Bull in a China Shop: Animals in the Workplace

Cosponsored by the Animal Law Section

Friday, February 19, 2016
8:55 a.m.–Noon

3 General CLE credits
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SCHEDULE

8:30  Registration
8:55  Introduction

9:00  Whistleblowing Animal Abuses in the Workplace: Ag-Gag Legislation and Litigation
      Stefanie Wilson, Animal Legal Defense Fund, Cotati, CA

9:45  “Working Like a Dog”—Applying Labor and Wage and Hour Laws to Animals
      Stacy McKerlie, Leiman & Johnson LLC, Eugene, OR

10:15 Break

10:30 Service Animals in the Workplace
      Scott Aldworth, Kell Alterman & Runstein LLP, Portland, OR

11:00 Assumption of Risk: The Evolving Firefighter’s Rule as Applied to Veterinary Staff and Animal Control
      Adam Karp, Animal Law Offices of Adam P. Karp, Bellingham, WA

11:30 Vegetarian and Vegan Workplace Discrimination
      Adam Karp, Animal Law Offices of Adam P. Karp, Bellingham, WA

Noon Adjourn
FACULTY

Scott Aldworth, Kell Alterman & Runstein LLP, Portland, OR. Mr. Aldworth’s practice focuses on employment law, including claims involving wage and hour disputes, discrimination, harassment, and Americans with Disabilities Act (ADA) complaints, and civil rights law, including claims brought under the ADA and the Fair Housing Act. Mr. Aldworth is coauthor of “Let Them In: Rights of the Deaf and Hearing Impaired,” Spring 2015 OTLA Guardian, and author of “Supreme Court Allows Disparate-Impact Claims in Fair Housing,” July 2015 Oregon Civil Rights Newsletter.

Adam Karp, Animal Law Offices of Adam P. Karp, Bellingham, WA. Mr. Karp exclusively practices animal law throughout the states of Washington, Oregon, and Idaho. Mr. Karp founded and was the first chair of the Washington State Bar Association Animal Law Section, founded the Idaho State Bar Animal Law Practice Section and serves on its executive committee, is a member of the Oregon State Bar Animal Law Section, and is vice chair of the American Bar Association Animal Law Committee. Mr. Karp also serves on arbitration panels in several Washington counties and as a mediator to resolve animal-related disputes. He teaches animal law at the University of Washington School of Law and Seattle University School of Law and lectures on animal law at Edmonds Community College. Mr. Karp regularly writes and speaks on the topic of animal law. Mr. Karp is the 2012 recipient of the American Bar Association Tort Trial and Insurance Practice Section Animal Law Committee Excellence in the Advancement of Animal Law Award.

Stacy McKerlie, Leiman & Johnson LLC, Eugene, OR. Ms. McKerlie represents employees individually and in class actions against employers in claims for violations such as failure to pay overtime, misclassification, and employer retaliation. Ms. McKerlie is chair-elect of the Oregon State Bar Animal Law Section.

Stefanie Wilson, Animal Legal Defense Fund, Cotati, CA. Ms. Wilson assists the Animal Legal Defense Fund with its casework as a litigation fellow. In addition to her JD, she holds an MS in Animals and Public Policy from Cummings School of Veterinary Medicine at Tufts University.
Chapter 1
Whistleblowing and Ag-Gag: Legislation and Litigation

Stefanie Wilson
Animal Legal Defense Fund
Cotati, California

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Whistleblowing and Ag-gag: Legislation and Litigation

February 19, 2016
Stefanie Wilson
Litigation Fellow, ALDF

Overview

• What are ag-gag laws and why do we have ‘em?
• History of ag-gag statutes
• Litigating ag-gag
• Whistleblowing beyond ag-gag
• **3 basic forms:**
  - Criminalize misrepresenting who you are and then recording (e.g., Idaho)
  - Quick reporting (e.g., Missouri)
  - Civil liability (e.g., North Carolina)

• **Broad reach**
Investigations produce:

- Criminal prosecutions
- Civil lawsuits
- Facility closures
- Meat recalls
- Corporate shaming
- Greater (and more mainstream) media coverage

Ag-Gag Laws

- Kansas (1990)
- North Dakota (1991)
- Montana (1991)
- Iowa (2012)
- Utah (2012)
- Missouri (2012)
- South Carolina (2012)
- Arkansas (2013)
- Idaho (2014)
- North Carolina (2015)
The bright side...

- In 19 other states, ag gag legislation has failed.

Idaho Code § 18-7042

- Created new crime of “interference with agricultural production”
- Applies to “agricultural production facilities”
- Entering or getting a job at an APF by “misrepresentation”
- Making audio or video recording of the APF’s operations without facility owner’s consent or pursuant to judicial process or statutory authorization
Arguments against Ag-Gag

- First Amendment: Free Speech
- Supremacy Clause: Preemption
- Fourteenth Amendment: Due Process & Equal Protection

ALDF v. Otter, 2015 WL 4623943 (D. Id.)

- Idaho’s ag-gag statute is unconstitutional
- Grounds:
  - First Amendment
  - Equal protection
ALDF v. Otter, 2015 WL 4623943 (D. Id.)

Key findings:
- Criminalized protected speech based on its content and viewpoint
- State’s interest in protecting property and privacy of agricultural facilities did not justify the law
- No legitimate explanation why agricultural facilities deserve more protection than other places

Key findings cont’d:
- State’s intent was to silence activist and whistleblowers (animus!)
- Denies equal protection of the laws in plaintiffs’ exercise of their fundamental right to free speech
Chapter 1—Whistleblowing and Ag-Gag: Legislation and Litigation

New arenas

• “Ag-gag-esque” laws or policies in other contexts
  - Wyoming’s data censorship statutes
  - Wisconsin’s “right to hunt” law
  - Shelters (?)

Shelter-gag?

• Do animal shelter policies that limit what employees and/or volunteers can say run afoul of the First Amendment?

- I will not use social media, or any other public media, to disparage . . . or any other organization that has an existing or potential relationship with . . . or to vent opinions that are at cross-purposes with . . .’s mission, including, but not limited to, Facebook, Linked-In, Twitter, Instagram, radio, T.V. and newspaper.
- I will abide by . . .’s policy regarding photography, videotaping and promoting the animals.
Shelter-gag?

- **Nguyen v. County of Los Angeles** (Cal. Super. Ct. 2007)
  - Settlement: restored full volunteer status

- **Fancy Cats v. Baltimore County Animal Control** (D. Md. 2015)
  - $25k in damages plus attorneys’ fees

Fin

- **Further reading:**
  - *Blood, Sweat, and Fear*, a report by Human Rights Watch
  - *Unsafe at These Speeds*, a report by Southern Poverty Law Center
  - *Lives on the Line*, a report by Oxfam America

swilson@aldf.org
Document Links

- State of Wisconsin 2015 Senate Bill 338
  [http://tinyurl.com/AL16-1-SB338](http://tinyurl.com/AL16-1-SB338)

- Animal Legal Defense Fund, et al., v. C.L. Butch Otter, in his official capacity as Governor of Idaho; and Lawrence Wasdon, in his official capacity as State of Idaho, Case No. 1:14-cv-00104-BLW (D. Id.) Memorandum Decision and Order (8/3/15)
  [http://tinyurl.com/AL16-1-ALDF](http://tinyurl.com/AL16-1-ALDF)

- Cathy Nguyen, an individual, Rebecca Arvizu, an individual, on behalf of herself and other Los Angeles County Taxpayers; and No Kill Advocacy Center, a nonprofit charitable organization, v. County of Los Angeles; Los Angeles County Department of Animal Care and Control; Marcia Mayeda, in her official capacity as Director, Los Angeles County Department of Animal Care and Control; and Does 1 through 10, inclusive, Case No. BS 112581 (Los Angeles Superior Court, 2008)
  - Notice of Ruling on Plaintiff's Motion for Preliminary Injunction (3/11/08)
    [http://tinyurl.com/AL16-1-Nguyen-1](http://tinyurl.com/AL16-1-Nguyen-1)
  - Stipulated Order on Petition for Writ of Mandate and Complaint for Injunctive Relief (10/5/08)
    [http://tinyurl.com/AL16-1-Nguyen](http://tinyurl.com/AL16-1-Nguyen)

  [http://tinyurl.com/AL16-1-Fancy-Cats-2](http://tinyurl.com/AL16-1-Fancy-Cats-2)

- Fancy Cats Rescue Team, Inc., et al., v. Charlotte Crenson, et al., Civil No. J KB-14-1073 (D. Md.) Memorandum and Order (1/21/15)
  [http://tinyurl.com/AL16-1-Fancy-Cats](http://tinyurl.com/AL16-1-Fancy-Cats)

- People for the Ethical Treatment of Animals, Inc.; Center for Food Safety; Animal Legal Defense Fund; Farm Sanctuary; Food & Water Watch; and Government Accountability Project v. Roy Cooper, in his official capacity as Attorney General of North Carolina, and Carol Folt, in her official Capacity as Chancellor of the University of North Carolina-Chapel Hill, Case No. 16-cv-25 (MD NC), Complaint for Declaratory and Injunctive Relief Concerning the Constitutionality of a State Statute (1/13/16)
  [http://tinyurl.com/AL16-1-PETA](http://tinyurl.com/AL16-1-PETA)

- Western Watersheds Project; National Press Photographers Association; Natural Resources Defense Council, Inc., People for the Ethical Treatment of Animals, Inc.; and Center for Food Safety v. Peter K. Michael, in his official capacity as Attorney General of Wyoming; Todd Parfitt, in his official capacity as Director of the Wyoming Department of Environmental Quality; Patrick J. Lebrun, in his official capacity as
County Attorney of Fremont County, Wyoming; Joshua Smith, in his official capacity as County Attorney of Lincoln County, Wyoming; Clay Kainer, in his official capacity as County and Prosecuting Attorney of Sublette County, Wyoming; Matthew Mead, in his official capacity as Governor of Wyoming, Case No. 15-CV-0169-SWS (D. Wyo.) Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (12/28/15)

http://tinyurl.com/AL16-1-Western
Chapter 2

“Working Like a Dog”: Labor and Wage and Hour Laws as Applied to Animals

Stacy McKerlie
Leiman & Johnson LLC
Eugene, Oregon

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DEFINING WORK

• What is work?
  
  o Definition of “work” from Webster: “a job or activity that you do regularly especially in order to earn money”

  o “Work” as defined for humans in laws:
    ▪ Fair Labor Standards Act (FLSA) and Oregon Administrative Rules (OAR): “Employ” means to “to suffer or permit to work” (no definition for “work”). The workweek includes all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace. The workday means the period between the time on a day when employees start their “principal activity” and the time on that day when they cease such principal activity. Includes being on-call, working when not asked to, and being “engaged to wait” (i.e. fireman playing checkers while on duty).1

  o “Work” as defined for animals. This is hard to define. Is a dog in a puppy mill “working”? What about a service animal? Companion animal?

  o Examples of animals we would probably consider to be workers because they perform specific tasks:
    ▪ Circus animals
    ▪ Horse and dog racing
    ▪ Animal fighting
    ▪ Sea world- marine animal entertainment
    ▪ K9 police dogs
    ▪ Rodeos
    ▪ Service animals
    ▪ Animal actors/models in media
    ▪ Animals used for transportation (i.e. horses, donkeys, camels, elephants)
    ▪ Show animals (i.e. dogs, cats)

  o Not so clear whether employees or not...
    ▪ Zoos/ roadside zoos
    ▪ Research/ lab animals
    ▪ Factory farm animals
    ▪ Puppy mills/ breeding animals
    ▪ Therapy animals

Technically, captive animals that provide an economic service or good to a human are “working” 24 hours a day! Most are not permitted to leave to pursue other activities. Hence, they are always either actively working or “engaged to wait” (still considered working).

Who protects animal workers? Like us humans, they get sick when they work too hard, are at risk when they work in dirty or dangerous conditions, and get hurt in the course of working. We have BOLI, Oregon laws, Federal laws, and unions. What about them?

Examples of Animals Working In the News:

The Carriage Horse Industry: http://aldf.org/blog/5-things-you-didnt-know-about-the-carriage-horse-industry/


Donkeys/ Horses Injured while Carrying Tourists: http://www.dailymail.co.uk/travel/article-1178797/Horses-donkeys-abroad-suffering-result-tourist-trade.html


LAWS THAT PROTECT HUMAN EMPLOYEES

- What kinds of laws and agencies do we have in place to protect human employees’ rights and benefits?

  - Laws and Statutes
    - Workers compensation laws
    - Unions/ National Labor Relations Board
    - Oregon Revised Statutes (ORS)
      - Ch. 651 (Bureau of Labor and Industry (BOLI))
      - Ch. 652 (hours, records)
      - Ch. 653 (employment conditions, minors)
      - Ch. 654 (occupational safety and health)
    - The FLSA:
      - Child Labor:
        - Children who work must not engage in work that is detrimental to their health or well-being
        - Injuries that occur must be reported to government agencies in some instances
      - Violations of certain provisions can include $10K in penalties or 6 months imprisonment; employees also have the right to seek damages
Chapter 2—“Working Like a Dog”: Labor and Wage and Hour Laws as Applied to Animals

- Oregon Administrative Rules (OAR) Ch. 839:
  - Div. 4- protects workers’ opposition to health and safety hazards
  - Div. 5- protects employees from discrimination, sexual harassment
  - Div. 6- gives employees disability rights, accommodations
  - Div. 18- recordkeeping mandatory for employers
  - Div. 20- mandates minimum wages and paying overtime wage rates; requires certain working conditions, including 10 minute rest breaks and 30 minute meal breaks
  - Civil penalties for violations

  o Agencies that Enforce
     - Bureau of Labor Industries (BOLI-) state
     - Department of Labor (DOL) - federal

**LAWS THAT AIM TO PROTECT ALL ANIMALS**

- What kinds of laws/ agencies protect animal “employees”?  
  o Agencies and Organizations, such as:  
     - Film and Television Unit of the American Humane Association
     - Oregon Racing Commission
     - Oregon Police Canine Association
     - Dept of Agriculture
     - USDA

- Animal Welfare Act (7 USC 54 § 2131- 2159)²:
  - Outlines standard of care for certain animals
  - Does not protect mice, birds, rats, farm animals, and cold-blooded animals.
  - Standard of care (§2143):
    - Minimum requirements for feeding, watering, sanitation, shelter
    - Psychological well-being of primates
    - Different depending on the type of animal

- Oregon Revised Statutes:
  - Offenses Against Animals- Ch. 167³
    - Animal abuse: causing physical injury to an animal or cruelly causing the death of an animal.
      - Abuse in 1st degree = Class A misdemeanor
    - Animal neglect: failing to provide minimum care for an animal, which results in serious physical injury or death.
    - Animal defined as any nonhuman mammal, bird, reptile, amphibian or fish.

³ [http://www.oregonlaws.org/ors/167.305](http://www.oregonlaws.org/ors/167.305)
Chapter 2—“Working Like a Dog”: Labor and Wage and Hour Laws as Applied to Animals

What kinds of things do you think an animal’s “employer” must ensure for the benefit of animal “employees”? Are they also held to the same basic standard of treatment for any individual treating any animal in his/her possession?

CATEGORIES OF ANIMAL EMPLOYEES

- Rules usually grouped by type of animal employee
  - Most animals are covered under the Animal Welfare Act or state laws. Under the law, these covered animals have the right to be provided with minimum requirements of care. Occasionally, there are also state laws that require specific protections to certain animal workers. Additionally, any endangered animals are also covered under the Endangered Species Act (ESA), and are entitled to additional protection.
  - However, industry groups and internal regulatory agencies run the show. Even when the government uncovers cruelty, exemptions to anti-cruelty laws are often in favor of the “employer”; thus, the offender is often given a slap on the wrist and prosecutions are rare.

- Types of animal employees (by industry):
  - Horse and Dog Racing
    - Governed by industry standards and specific state laws
      - Oregon Racing Commission responsible for sanctions, investigating, designating enforcement agents
      - ORS Ch. 462: No direct mention of standard of care or violations
      - “Soring” (using chemicals, such as kerosene, or pressure, including nails, to cause extreme pain to a horse’s feet, used for the purpose of forcing unique stepping movements) has been prohibited under the Horse Protection Act (HPA)
        - HPA codified in 1970; originally enforced by inspections done through Animal and Plant Health Inspection Service (APHIS)
        - Amended in 1976 to allow horse industry groups to train and license their own inspectors
    - Dog racing illegal in most states (and also sometimes illegal to bet on the races)
      - Legal in Oregon
      - Annual Iditarod Trail Sled Dog Race
        - Iditarod Trail Committee monitor dogs’ health
      - Thousands of greyhounds that are no longer able to work are sentenced to death annually in the US.

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o Dog and Cock Fighting
  - Illegal in most, if not all, states
    - ORS Ch. 167
    - AWA

o K-9 Police Dogs
  - Typically when retired (for the day or at the end of career), lives with the family of human partner
  - But when video\(^6\) surfaced of North Carolina officer repeatedly kicking his K9 partner and was subsequently terminated, administrative judge reinstated him, saying no cruelty had occurred and that the officer was simply doing his job.

o Service Animals
  - Perform “active work” by guiding or completing tasks for individual with a disability (i.e. leading blind, open doors, retrieve items)
  - Constantly “on-call” for most owners; typically able to eat, sleep, nap, play like a regular pet does when not working.
  - When no longer able to serve, usually either adopted and kept by disabled individual’s family or adopted by others

o Companion Animals
  - Do they perform active work? Is affection and companionship an “active task”?

o Dog and Cat Shows
  - Regulated by internal rules of trade organizations, such as the American Kennel Club (AKC)
    - AKC has its own field inspectors to ensure proper care and conditions of dogs
    - Provides for penalty of 10-year suspension from membership, as well as a $2,000 fine, for anyone convicted of cruelty.

o Rodeos
  - Specific exemptions to anti-cruelty laws:
    - ORS §167.383- Equine Tipping
      - Class B misdemeanor to rope or lasso legs of an equine, causing them to trip or fall, for purposes of entertainment, sport, or exhibition.

Television and Film
- Many animal production companies “lend” out their animals for use in movies and shows:
  - Wild World of Animals
  - Paws for Effect
  - Birds & Animals Unlimited
- Screen Actors Guild clause in contract granting sole authority to the Film and TV Unit of the American Humane Society (AHS) to monitor treatment of animal actors. AHS has faced a lot of criticism for turning a blind eye to abuse, and for favoring the movie industry. For instance:
  - Casey v. HBO/American Humane Society - AHA employee sues after being fired for uncovering abuse on set of “Luck”, an HBO series.
  - "No Animals Were Harmed" - a program by the American Humane Society, which offers a database of movies and ratings of how well the animal actors were treated.
    - Gave no negative review to the movie “The Hobbit: An Unexpected Journey”, despite almost 30 animals dying on the set.
- “Crush” Videos
  - 18 USC §48: makes illegal electronic depictions of all animal cruelty

Transportation Animals
- Horse carriages
  - In New York City, administrative code Title 24, Chapter 4 requires that:
    - Housing conditions for the horses must be clean, free of fire hazards, at least 35° Fahrenheit
    - Horses be evaluated by veterinarian no less than once a year
    - Horses must not be driven at high speeds
    - No more than 10 continuous hours of work per day (24 hrs) for carriage horses; no more than 8 continuous hours for riding horses
    - Rest periods of 15 minutes for every riding hour (for riding horses), and 15 minutes for every two “pulling” hours (for carriage horses)
    - During the winter months, horses must have blankets while stationed outside waiting for passengers

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8 http://www.humanehollywood.org/index.php/movie-reviews
**Chapter 2—“Working Like a Dog”: Labor and Wage and Hour Laws as Applied to Animals**

- In Massachusetts, 520 CMR 13 requires:
  - No single fare shall exceed 30 minutes, and there must be at least a 5 minute break between fares
  - No work during adverse weather conditions (i.e. ice, heavy rain, extreme heat); shall not be worked in temps over $90^\circ$ F, and in temps below $18^\circ$ F

- **Mule rides**
  - In Grand Canyon, Xanterra South Rim, LLC (a private corporation with its own policies) requires that riders must not weigh more than 200 lbs, fully dressed, to ride mule, and provide rest breaks for mules after 35-45 minutes of riding.

- **Breeding Animals/ Puppy Mills**
  - Protected under the AWA:
    - Puppy Protection Act (2001): amends the AWA to prohibit unsanitary conditions, age limits, etc.

- **Aquariums**
  - Similar to zoos, but some animals here are seen more as employees because they perform “active work” (i.e. tricks and stunts for audiences)
  - AWA
  - Marine Mammal Protection Act
  - Orca Welfare and Safety Act

- **Circuses, Zoos and Exhibition Entertainment**
  - Protected under AWA
    - 7 USC §2132(g-h): “exhibition purposes”
    - 7 USC §2132(i-j): “transport of animals”
  - Some animals also given additional protection under the ESA (i.e. more oversight from the gov’t in complying with laws)
  - Circuses
    - Bullhooks no longer legal to use to train elephants
  - PETA v. Berosini
    - Berosini, an entertainer who used orangutans in his shows, was filmed abusing his orangutans before beginning his show
    - 27 Hastings Comm. & Ent. L.J. 405: law review article discussing how chimpanzees and other exotic animals are exploited for entertainment purposes

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12 https://www.animallaw.info/article/no-animals-were-harmed-protecting-chimpanzees-cruelty-behind-curtain
Chapter 2—“Working Like a Dog”: Labor and Wage and Hour Laws as Applied to Animals

- Zoos
  - Voluntary membership with the American Zoo and Aquarium Association
    - Self-policing; no legal authority
    - Provides internal accreditation
  - Inspected by USDA for AWA compliance
  - Trainers and professional animal caretakers rarely ever prosecuted for cruelty.\textsuperscript{13}
    - Rose-Tu, an elephant at Portland Oregon Zoo, was severely abused by handler in the form of 170+ puncture wounds, lacerations. Handler was charged with second-degree animal abuse
  - SB 230, ORS 167.310(9)

- What is the trend in treating animals like employees?
  - Current legislation/ pending cases
  - Other States:
    - Nebraska, New Hampshire, New Jersey, Rhode Island, South Carolina, Tennessee, Texas, Vermont: have laws specifically against “overworking” animals

- Call to Action (possible solutions):
  - Do not leave it to agencies to self-regulate (which can cause a conflict of interest); instead appoint government inspectors. It is probably more harmful to have agencies that are falsely claiming to protect the interests of animals, than having no formal agencies at all.
  - Create authority through BOLI to regulate animal workers differently, similar to child labor laws; have a complaint procedure (that can effect change) for others who notice animal cruelty or abuse occurring.
  - Make sure employee animals are held to the same standard of treatment as their non-working counterparts (i.e. no exemptions for cruelty and abuse, despite the industry and job)

Useful Sources

- Oregon Revised Statutes: [www.oregonlaws.org](http://www.oregonlaws.org)
Chapter 2—“Working Like a Dog”: Labor and Wage and Hour Laws as Applied to Animals

“Working Like a Dog”
Laws for Animal Employees

By Stacy McKerlie
February 19, 2016

What is work?

• General definition

• Technical definition for humans under the law

• For animals?
Which animals are working?

- Circus animals
- Service animals
- K9 Police Dogs
- Transportation animals

Which animals are not working?

- Therapy animals
- Zoo animals
- Factory farm animals
- Breeding animals
Who is looking out for animals that work?

Laws that protect human employees:

• Bureau of Labor and Industries
• Department of Labor
• The Fair Labor Standards Act
• Oregon Administrative Rules
  – Ch. 839
• Oregon Revised Statutes
  – Ch. 651, 652, 653, 654
Laws that intend to protect all animals, not just workers:

- Animal Welfare Act
- State law
- Endangered Species Act

Are working animals treated better than their non-working counterparts?
Types of Industries

- Racing
- Hunting
- Fighting
- Guard dogs
- Police Dogs
- Service
- Therapy
- Show animals
- Rodeos and Circuses
- Media
- Transportation animals
- Aquariums and Zoos

Racing Animals
Chapter 2—“Working Like a Dog”: Labor and Wage and Hour Laws as Applied to Animals

Fighting Animals

Law Enforcement Dogs
Service/ Therapy Animals

Show Animals
Rodeos

Animal Actors: Media
Chapter 2—“Working Like a Dog”: Labor and Wage and Hour Laws as Applied to Animals

Transportation Animals

Aquariums
Circuses, Zoos, other Exhibition Animals

Is there a trend in treating animals differently because they are employees?
Chapter 2—"Working Like a Dog": Labor and Wage and Hour Laws as Applied to Animals

Trends:

• Cases

• Legislation

• Other states/countries

Suggestions for change?

• Decrease the amount of self-regulation

• Minimize conflicts of interest

• More legislation regulating treatment of animal employees
Thank you!

Please feel free to email me with questions! samckerlie@gmail.com
Service Animals in the Workplace

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What Laws Apply?

- Section 504 of the Rehabilitation Act
- Americans with Disabilities Act
  - Title I – 15 or more employees
- ORS 659A.112

- Each of these laws:
  - (1) Prohibit discrimination on account of disability
  - (2) Require employers to make reasonable accommodations for employees with disabilities
What qualifies as a disability?

- Physical or mental impairment that substantially limits one or more major life activities
- ADA amended in 2008 – substantially broader definition

What can an employer ask?

- If disability or need for accommodation is not obvious, can request documentation that accommodation is needed
  - Not always from doctor
- Can only ask for enough information to determine that an accommodation is necessary
- With service animals, can also verify that animal is trained and can behave appropriately in work setting
What is a reasonable accommodation?

- Modifications or adjustments to manner in which position is usually performed that enable a disabled individual to perform the essential functions of his or her position
- Focus is on alteration to work environment, not alteration to manner in which the individual deals with his or her disability
- Employers have a duty to engage in interactive process to find an accommodation that works
  - But cannot substitute their judgment for that of the employee

What is a service animal?

- Narrow definition under Title II and Title III of ADA — “any dog that is trained to do work or perform tasks for the benefit of an individual with a disability”
- However, not defined under Title I of ADA
- Arguably, broader definition of “service animal,” as used in FHA and Section 503 applies
- Any animal that provides assistance or emotional support to a person with a disability
- Not settled
Employee’s Responsibilities

- Employee is responsible for taking care of service animal, making sure it is behaved, cleaning up after it
- Part of employer’s duty to accommodate can be giving employee flexibility to perform these tasks

When can an employer deny accommodation request?

- Undue hardship
  - “Action requiring significant difficulty or expense”
  - Varies by size, resources of employer
  - High standard to meet
- Direct threat
  - If animal threatens other employees, would not qualify
What if another employee is allergic?

- Cannot favor one employee’s disability over another’s disability
- Interactive process – find strategies that work for everybody

Other Employer Responsibilities

- Obligation is not limited to allowing animal
- Must makes accommodations necessary to ensure arrangement is workable
- Allow breaks, designated spaces to take care of animals’ needs
Legal Options if Accommodation Improperly Denied

- Administrative Complaint
  - ADA requires filing administrative complaint prior to filing lawsuit
- Civil Lawsuit
  - ORS 659A.112 – administrative complaint is optional, can go directly to court
- Advantages to Filing Administratively
  - Free investigation, power of state/feds behind case
- Advantages to Going Directly to Court
  - Quicker, don’t have to divide the pot

Time Limits

- EEOC – 300 days
- BOLI – 1 year
- Civil suit – 1 year
Resources

• Job Accommodation Network – askjan.org
  • Free service, works with employers on resolving accommodation issues

• Northwest ADA Center – nwadacenter.org
  • Resources, fact sheets
Chapter 4

Assumption of Risk: The Evolving Firefighter’s Rule as Applied to Veterinary Staff and Animal Control

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Assumption of Risk: The Evolving Firefighter’s Rule as Applied to Veterinary Staff and Animal Control

Traditionally, the firefighter’s rule exempted private landowners from premises liability. As professionals trained to manage dangerous emergencies, firefighters are held to assume the risks associated with the normal, foreseeable hazards of their work. If firefighters’ salaries are enhanced to compensate for increased risk, then the law arguably should not permit recovery of damages against a landowner when they suffer injury while encountering those very hazards they were hired to assume. The rule is generally regarded as an application of primary assumption of risk and operates as a complete bar to liability. Over time, the rule has been examined with respect to pleas for extension to veterinarians, kennel workers, and animal control officers. In Priebe v. Nelson, 39 Cal.4th 1112 (Cal.2006), the California Supreme Court invoked assumption of risk to bar a kennel worker’s strict statutory liability claim for a job-related dog bite. Interestingly, the Priebe court was careful to stress that the assumption of risk rationale would not apply to common law strict liability claims where the risks associated with an abnormally dangerous dog were not disclosed to the kennel worker. If the owner of an animal is aware of its unusually vicious tendencies and does not disclose them, the owner is subject to potential liability. A recent decision distinguishing Priebe is Harris v. Anderson Cy. Sheriff’s Office, 381 S.C. 357 (2009)(declining to follow Priebe in creating “kennel worker exception” to statutory strict liability).

The veterinarian’s rule is a variant of the firefighter’s rule and subject to the same analysis. The first court to announce it was Nelson v. Hall, 165 Cal.App.3d 709 (1985), stating that vets and their assistants assume the inherent risk that any dog, even if apparently docile, might bite in course of treatment. Id., at 715. “[T]he veterinarian determines the method of treatment and handling of the dog. He or she is the person in possession and control of the dog and is in the best position to take necessary precautions and protective measures.” Id. Thus, “the risk of being attacked or bitten in the course of veterinary treatment is an occupational hazard which veterinarians accept by undertaking their employment....” Cohen v. McIntyre, 16 Cal.App.4th 650, 655 (1993). Importantly, Nelson noted that the rule “does not mean dog owners could never be held liable for injuries to veterinarians or their assistants ... emphasize[ing] that
the defense of assumption of the risk extends only to the danger which the injured person has knowingly assumed; i.e., the danger the dog will bite while being treated.” Nelson, at 715 fn. 4.

Since 1992, California cases applying the veterinarian’s rule have focused on the relationship with the vet, and “defendant’s conduct in entrusting the animal to the professional care and control of the veterinarian,” not whether the vet subjectively agreed that dog bites were foreseeable hazards of the job. Adams v. Lewis, 2004 WL 2192336 (Cal.App.4 Dist.2004, unpbl.) (quoting Neighbarger v. Irwin Indus., Inc., 8 Cal.4th 532, 541 (1994)). The Adams case extended the veterinarian’s rule to an animal behaviorist. “[T]he veterinarian, like the firefighter, cannot recover for injuries arising out of the very conditions he or she was hired to confront.” Rosenbloom v. Hanour Corp., 66 Cal.App.4th 1477 (1998) (summary judgment affirmed for plaintiff sued for injuries sustained in moving shark into larger aquarium). Exceptions have been said to exist where the dog owner conceals knowledge of vicious propensity or where the “conduct was so reckless as to fall totally outside the range of behavior ordinarily expected of those who avail themselves of veterinary services.” Cohen, at 655; Lipson v. Superior Court, 31 Cal.3d 363, 266, 371 (1982) (firefighter’s rule does not apply where defendant misled plaintiff as to nature of risk presented by chemicals). Davis v. Gächler, 11 Cal.App.4th 1392 (1992) refused to extend the fireman’s rule to a dog handler not specially retained by the defendants to manage their dog but who, rather, rendered aid to their dog who had been hit by a car and was bitten in the process. Prays v. Perryman, 213 Cal.App.3d 1133 (1989) refused to extend the rule to a dog groomer who had not yet assumed control over a skittish dog when bitten.

In Cole v. Hubanks, 272 Wis.2d 539 (2004), LEO Julia Cole was on duty when she came upon the Hubankses’ dog wandering in the street, dragging a snapped chain. The Akita approached her. Without warning, the dog lunged, knocked her down, and bit her face and neck. She required 30 stitches to close her wounds. On summary judgment, the trial court dismissed her claim, invoking the firefighter’s rule (which the State adopted in 1970). On appeal, the Wisconsin Supreme Court reversed by refusing to extend the rule from firefighters to police officers. It reasoned:

¶ 18 There are many differences between firefighters and police officers. For example, firefighters know they are exposed to danger when they are called to fight a fire. As we noted in Häss, “[t]he call to duty is the warning of the hazard.” Häss, 48 Wis.2d at 325, 179 N.W.2d 885. By contrast, police officers usually are out on patrol from the start of their shift until its end. Their efforts are not directed to one hazard, but rather they are often required to address varied circumstances, the responses to which may not always be apparent simply from the fact that they are police officers. Furthermore, firefighters and EMTs receive specialized training in fighting fires and in moving injured people at the scene of an accident, on a regular basis. 12 While capturing stray dogs can fall within police officers' duties on occasion, they receive no specialized training to do so and it appears not to be a central focus of their day's activities. And finally, focusing too heavily on the plaintiff's occupation has the danger of permitting assumption of risk to be an absolute defense to a negligence claim, without expressly saying so. 12 Therefore, any limit on the right to sue may also
evaluate relevant public policy concerns in light of the particular claims made. As we have explained above, the public policy factors are the basis of the firefighters rule; therefore, they form the basis for our analysis here. We now turn to Cole’s claims.

Id., at 553. One justice dissented from the holding of the high court.

Oregon adopted the short-lived firefighter’s rule in 1970 in Spencer v. B.P. John Furniture Corp., 255 Or. 359, 362 (1970)(“...[A]n owner or occupier is not liable to a paid fireman for negligence with respect to creating a fire.”) In Spencer, a firefighter died in an explosion that was a risk naturally inherent in the fire. The original rationale for the rule was primary implied assumption of risk. In 1975, the Oregon legislature abolished both primary and secondary implied assumption of risk in ORS 18.475(2), stating that neither could serve as an absolute bar to recovery.\(^1\) The Spencer holding lived on for another fourteen years until that decision was overruled by Christensen v. Murphy, 296 Or. 610 (1984). In the interim, the firefighter’s rule was extended to police officers in Cullivan v. Leston, 43 Or.App. 361 (1979), rev.den., 288 Or. 527 (1980), at least as to on-premises injuries (i.e., limited to those harmed on premises owned or possessed by the defendant). Christensen’s rejection of Spencer arose from ORS 18.475(2) [now ORS 31.620(2)] and a systemic rejection of policy arguments favoring the Rule. See also Leonard v. Moran Foods, Inc., 269 Or.App. 112, 132 (2015) (modern decision affirming abolition of implied assumption of risk).


**Animal Control Officer Rule**

In Delaire v. Kaskel, 842 A.2d 1052 (R.I.2004), the Rhode Island Supreme Court was apparently the first in the nation to address whether the firefighter’s rule should be extended to animal control officers; it held that the rule should not be applied. Id., at 1056. DeLaire slipped and fell on the Kaskels’ property in response to a stray cat call. Kaskel argued that DeLaire’s injury resulted from a risk of his employment and invoked the Public Safety Officer Rule. Kaskel urged the court to treat ACOs as the equivalent of LEOs given that (a) DeLaire drove a vehicle with police license plates, (b) he carried a police-issued firearm, (c) he was a police constable, (d) he reported to a police sergeant, and (e) he used an office in the East Greenwich Police Department. DeLaire rebutted by noting that (1) ACOs do not enjoy state law benefits given to

\(^1\) Primary assumption of risk conceptually obliterates the existence of any duty of care owed to the plaintiff, and serves as a complete bar to any negligence claim; secondary assumption of risk is treated as contributory negligence. Blair v. Mt. Hood Meadows Development Corp., 291 Or. 293, 300 (1981) clearly stated that ORS 18.475(2) eliminated both specie. Express assumption of risk, however, remains viable.
LEOs and firefighters injured in the line of duty (such as full salary with medical and related expenses), (2) LEOs get police academy training, but DeLaire did not, (3) while the local chapter of the police union represented both ACOs and LEOs in East Greenwich, ACOs were non-police members of the union and had separate contracts, (4) LEOs had a significantly larger salary, pension, and benefit program, (5) LEOs were a statutorily protected class of employees in Rhode Island enjoying the Law Enforcement Officer’s Bill of Rights. Siding with DeLaire, the court found that ACOs were not bound by the constraints of the Public Safety Officer Rule.

In February 2006, the Tennessee Court of Appeals in Jamison v. Ulrich, 206 S.W.3d 419 (Tenn.Ct.App.2006), decided otherwise, holding that the firefighter’s rule should apply to ACOs. The animal control officer alleged that the dog owner failed to warn about the dog’s dangerous nature. He was bitten as a result. Id., at 420. Dismissing the lawsuit, the trial court reasoned that the rule barring police officers and firefighters from recovering for injury suffered in the line of duty should apply to animal control officers. Id., at 421. On appeal, the Jamison court stressed that animal control officers should expect to encounter aggressive dogs given the nature of their work. Id., at 424-25. The Jamison decision is in line with several others in which animal care personnel, such as commercial kennel workers, have tried unsuccessfully to overcome the assumption of risk rationale underlying the firefighter’s rule.

In Fetchko v. Edmunds, 2008 WL 2550751 (Ky.Ct.App.2008), Ronald Fetchko, a Louisville metro animal control officer, suffered extensive head wounds from Bandit, a pit bull terrier-type dog cared for by Ashley Edmunds and Jonathan Morgan. Fetchko responded to a call that Bandit had attacked Edmunds and Morgan’s infant child the night before, but he did not know any details beyond the fact that there was a dog bite and that he was to pick up the owner-released dog. When he arrived two blocks from the home, he was informed by dispatch that the dog owner’s mother (K. Morgan) would arrive to meet him shortly. He was then approached by Morgan’s mother, who was walking one dog on a leash and had another (Bandit) walking at her feet unrestrained. Not knowing that this was his contact, he engaged in a discussion with the mother, noting that both dogs “‘appeared to be calm and docile,’” but he intended to tell the mother it was unlawful to walk dogs unleashed. Id., at *1. As he climbed out of the truck, the mother told him “‘that the unleashed dog was the [one] [who] had bitten her grandchild the previous evening.’” At this moment, Bandit began circling and then took him to the ground, attempting to get at his neck. Bandit bit him on the face many times and grabbed his left arm before he could climb back into his truck.

Fetchko sued for negligence, negligence per se, and strict liability against Edmunds, Morgan, and K. Morgan. The trial court dismissed the case on summary judgment; although Morgan’s mother was an “owner” of the dog pursuant to statute, the court noted, Fetchko had assumed the risk of being injured by one of the animals he transports, so the court declined to extend the Firefighter’s Rule to animal control officers. Id., at *2. Fetchko appealed. In a 3-0 decision, the appellate court affirmed on the question of ownership, reversed on the question of assumption of risk, and concluded that the Firefighter’s Rule would not apply under these facts. Id., at *4. The case was accordingly remanded for trial. Although Edmunds and Morgan had traditionally understood “ownership” rights in Bandit, Kentucky’s strict liability statute states that an “owner” includes keepers and harborers, which she certainly became. Distinguishing the
matter from a case involving a groomer bitten in the face while carrying a dog, the court held that Fetchko never accepted custody of Bandit before being bitten and thus did not assume any risk of that injury. Id., at *3. After all, he was merely exiting his truck and had not attempted to assert any custody or control over Bandit before being attacked.

The Firefighter’s Rule bars public employees like police officers and firefighters from suing individuals when they call a public protection agency and the employee is harmed after arriving at a given location to engage a specific risk (e.g., a resident calls 911 asking for assistance with a house fire, and the firefighter comes to the residence and engages the fire, suffering injury). The court did not address the merits of whether the doctrine should extend to animal control officers but, for the sake of argument, reasoned that because Fetchko had not yet arrived at a “given location” to engage a known risk (he did not know at the time of exiting his vehicle that Bandit was the dog he was there to capture), it did not apply. Id., at *4.

Even where the Rule applies, exceptions do exist. In Gonzales v. Kissner, 24 So.3d 214 (La.App.2009), ACO Toni Gonzales was repeatedly attacked by a 100-pound GSD owned by the Kissners. She had visited their residence to investigate a bite complaint from the day prior. While talking to Mrs. Kissner by her truck, the dog escaped the house by forcing open the back door and mauled the officer on her head, face, and neck. The appellate court discussed the professional rescuer doctrine, which states that firefighters, police officers, and those whose professions protect life and property necessarily endanger their safety. However, they do not assume the risk of all injuries without recourse. The Gonzales court did not decide whether the duties of an ACO fall within the Rule, but noted that they are hired to protect the public from harmful animals and can reasonably expect to encounter such beasts, who may respond aggressively during apprehension, and inflict bites in the course of employment. Indeed, the risk of being bitten arises from a specific problem the ACO is hired to remedy. Assuming arguendo that the Rule applied to ACOs, the court found application of an exemption. Under Louisiana’s Rescuer Doctrine, the Rule does not apply if (1) the dependent risks encountered by the rescuer are so extraordinary that it cannot be said the parties intended the rescuer to assume them; or (2) the defendant’s conduct was so blameworthy that tort recovery should be imposed for punishment or deterrence. Despite known prior escapes and vicious propensities, the Kissners failed to secure their vicious dog. Gonzales had every reason to believe the dog would be restrained. Accordingly, the second exception would have saved Gonzales from the immunizing effect of the Rule.

No Washington case exists that addresses the firefighter’s rule with respect to veterinarians, animal control officers, or kennel workers. Hence, the matter is one of first impression. Of relevance, however, is the Supreme Court case of Beaupre v. Pierce Cy., 161 Wn.2d 568 (2007)(en banc), providing that the professional rescue doctrine holds that a professional rescuer cannot recover for injuries stemming from hazards inherently within ambit of dangers unique to and generally associated with particular rescue activity. See also Maltman v. Sauer, 84 Wn.2d 975 (1975)(noting that professional rescuer, however, does not assume all hazards that may be present in particular rescue operation). The rescuer doctrine would not, in all likelihood, apply to a contractual agreement for veterinary care, dog training, boarding, walking,
sitting, or behavioral assessment. However, it could apply on behalf of animal control and law enforcement, who could plausibly be regarded as professional rescuers.

Fiat justicia ruat coelum,

ANIMAL LAW OFFICES

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Chapter 5
Vegetarian and Vegan Workplace Discrimination

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Bull in a China Shop: Animals in the Workplace
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Vegetarian and Vegan Workplace Discrimination

The 2008 Vegetarian Times poll, collected by the Harris Interactive Service Bureau, surveying 5,050 respondents, found that 3.2 percent of the American population is vegetarian, of which 1 million are vegans. In 2011, the Vegetarian Resource Group commissioned Harris to perform another survey of 1,010 adults. In three short years, the percentages jumped to approximately 5.0 percent vegetarian and 2.5 percent vegan (or nearly eight million people).\(^1\) Dietary vegans abstain from the consumption of animal products. Ethical vegans extend their commitment beyond dietary choices to avoidance of cosmetics, clothing, and vaccines. Animal lawyer and named plaintiff in Friedman v. S. Cal. Permanente Med. Gp., 102 Cal.App.4\(^{th}\) 39 (2002) described Ethical Veganism this way:

Ethical Veganism extends beyond trivial dietary preferences. Diet is merely a small part of observing a non-exploitive relationship with the people and animals of this world. Ethical Veganism is a relational lens through which to view the world. Ethical Vegans are not “speciesist” and value the sanctity of all life, seeking to exclude from their life, as far as possible and practical, all forms of exploitation of, and cruelty to, animals for food, clothing or any other purpose. Consequently, Ethical Vegans do not eat meat, fish or poultry, and do not use other animal products and by-products including eggs, dairy products, honey, leather, fur, wool, soaps and toothpastes which contain lard, etc., and Ethical Vegans do not participate in the biomedical experimentation on animals and avoid activities or products which encourage it. As can be seen from this “list” of prohibited activities, being vegetarian is only one small part of being an Ethical Vegan. While being a Vegan or Ethical Vegan necessarily implies that one is a

\(^1\) In 2015, however, VRG used Harris again to poll 2017 adults 18 and over. The figure 3.4\% vegetarian again arose, though the two highest subcategories of vegetarians were 18-34 year olds (6\%) and households earning under $50,000 (7\%). Close to 15\% of the 3.4\% were vegans, or about half a percent of all Americans (i.e., 1.54 million). According to the 2015 poll, 55\% of vegetarians (including vegans) were female. A 2012 Gallup poll, however, surmised that 5\% of Americans were vegetarian.
vegetarian, the opposite is not true; being a vegetarian does not imply one is an Ethical Vegan, let alone a Vegan.... There is a common ethical principle shared by all Vegans which is a reverence for life and desire to live with, as opposed to depending upon, the other species of the planet.

Legal issues pertaining to vegans and vegetarians relate predominantly to accommodation – in employment, education, medical care, and institutionalized meals. Though adherents to particular faith systems may find support and even prescription for vegetarianism in religious canons, others embrace such multifaceted conscientious views from a secular, humanist, or other nonreligious perspective. Certainly, one may choose veganism without possessing religious bona fides or proper soul calibration. Yet it also finds refuge in Buddhism, Christianity, Hinduism, Judaism, Wicca, and Spiritual Veganism. Stanley M. Sapon, Is Veganism a Religion?, VegNews (Dec. 2002) and Vegan Ethics, at www.veganforlife.org/ethics.htm and International Vegetarian Union, Religion and Vegetarianism, www.ivu.org/religion. As discussed below, the primary veg*n workplace challenges arise under Title VII, the First Amendment, and state antidiscrimination laws.

A. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 renders unlawful the employment practice of discriminating against an employee or prospective employee on the basis of “such individual’s race, color, religion, sex, or national origin....” 42 U.S.C. § 2000e-2(a). Employers may not fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to such protected classifications. 42 U.S.C. § 2000e-2(a). Further, they must reasonably accommodate the employee’s “religious observance or practice” unless doing so would be an “undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j) (circularly defining “religion” as “all aspects of religious observance and practice, as well as belief”). The EEOC has established a more informative administrative definition that elucidates the situation where the issue of whether or not a practice of belief is “religious” exists. It provides:

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions. [FN 1 See CD 76-104 (1976),
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CCH ¶ 6500; CD 71-2620 (1971), CCH ¶ 6283; CD 71-779 (1970), CCH ¶ 6180.]
The fact that no religious group espouses such beliefs or the fact that the religious
group to which the individual professes to belong may not accept such belief will
not determine whether the belief is a religious belief of the employee or
prospective employee. The phrase “religious practice” as used in these Guidelines
includes both religious observances and practices, as stated in section 701(j), 42

29 CFR § 1605.1. Title VII and Rule 1605.1 only apply to employers with fifteen or more

Title VII religious accommodation claims abide a two-part burden shifting analysis. The
employee must establish a prima facie case by proving (1) an employment obligation interferes
with her religious practice; (2) she has informed the employer of same; (3) the employer
subjected her to an adverse employment action due to her inability to perform as required. Then
the burden shifts to the employer to rebut one or more elements of the prima facie case, show it
offered a reasonable accommodation, or that accommodation would constitute an undue
hardship. See EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de
Puerto Rico, 279 F.3d 49, 55 (1st Cir.2002).

Perhaps the earliest known Title VII case claiming vegan workplace discrimination
concerned Bruce Anderson of San Diego. Anderson drove buses for public transit. When his
strict vegan views compelled him to refuse to hand out Carl’s Jr. coupons to passengers so they
could claim free hamburgers, the OCTA fired Anderson for insubordination – even though he
offered to place the coupons in a basket so passengers could take them as they wished. David
Haldane, Vegetarian Bus Driver Settles Suit Against Agency for $50,000, Los Angeles Times
(Nov. 20, 1996), at A3. On Aug. 20, 1996, the EEOC held that Anderson’s vegan beliefs rose to
the level of a protected religion under Title VII. Anderson v. Orange Cy. Transit Auth., EEOC
Charge No. 345960598 (1996).

Claims under Title VII must be brought within 300 days of the unlawful employment
practice in jurisdictions that enforce a law prohibiting discrimination on the same basis.
Otherwise, the deadline is 180 days. Before initiating litigation, one must obtain a “Notice of
Right to Sue” letter from the EEOC. If the EEOC fails to complete its investigation within 180
days of the filing of the employee’s complaint, then one can immediately request a right to sue
letter at that time. Suits must be filed within 90 days of receiving the right to sue letter.

B. State Antidiscrimination Laws.

State antidiscrimination laws may also protect religiously-based dietary preferences in the
employment context. In 2014, the Washington Supreme Court decided Kumar v. Gate Gourmet,
Inc., 180 Wn.2d 481 (2014). It held that there existed a prima facie case for a religious
accommodation claim under the Washington Law Against Discrimination ("WLAD") where
airport employees’ sincerely held religious beliefs mandating a vegetarian diet conflicted with
the employer’s requirement that they all eat nonvegetarian, company-provided food (citing
security concerns). The plaintiffs informed the employer of the conflict, to which it responded by first deceiving the employees into dining on fare prohibited by their religions and then refusing to entertain any of the employees’ proposed accommodations, thereby compelling them to eat forbidden meals or work hungry. Specifically, and putting aside that turkeys are not vegetables, Gate Gourmet switched from beef-pork meatballs to turkey meatballs to ostensibly accommodate their vegetarian requirements but then switched back to beef-pork mixtures without telling them. Kumar reversed Short v. Battleground Sch. Dist., 169 Wash.App. 188 (2012), which held no duty existed for an employer to accommodate an employee’s religion under the WLAD.

Most state fair employment practices acts extend such protections to those working for employers with fewer than fifteen employees. **Ch. 659A ORS, Oregon’s Fair Employment Practices Act** (“FEPA”), guards against discrimination because of race, color, religion, sex, sexual orientation, national origin, marital status or age in various contexts – including (a) in refusing to hire or employ or to bar or discharge and (b) in disparate compensation or terms, conditions, or privileges of employment. Other sections of ORS 659A.030 apply to labor organizations and employment agencies.

ORS 659A.033, known as the **Oregon Workplace Religious Freedom Act**, came into effect in 2010. ORS 659A.033(1) states that an employer violates FEPA by failing to allow an employee to use vacation leave or other leave available for the employee to engage in religious observance or practices of the employee, provided that in so accommodating use of such leave, the employee will not impose an undue hardship on the operation of the business of the employer. ORS 659A.033(3) states that an employer violates FEPA by imposing an occupational requirement that restricts the ability of the employee to wear religious clothing in accordance with his or her sincerely held religious beliefs, to take time off for a holy day or to take time off to participate in religious observance or practice, provided that there is no undue hardship and the activities only have a temporary or tangential impact on the employee’s ability to perform the essential job functions.

ORS 659A.033(4-5) speak to reasonable accommodations and undue hardship. Undue hardship requires a showing of “significant difficulty or expense.” Of interest is subsection (5), addressing legal obligations of school districts, education service districts, and public charter schools and preventing them from “endorsing religion,” as well as advising them to “maintain religious neutrality in a school environment.” OAR 839-005-0140 and 839-005-0031(1) further describe when an employer must accommodate an employee’s religious practices. The undue hardship analysis differs from federal law in that it applies the same (and thus, higher) standard imposed in cases of disability discrimination. While no BOLI commissioner decisions or technical guidances could be found discussing whether vegetarianism and veganism unmoored from a traditional theism qualifies for protection under the OWRFA, my communication with Jeff Burgess, a Training and Development Specialist with BOLI, confirmed that “the standard [for what constitutes a sincerely held religious belief] is very broad [and applies the federal standard]: it need not necessarily be traditionally religious (so long as it provides moral or ethical determinations as to right or wrong and it is held with the strength of traditional religious beliefs). Such beliefs needn’t be widely held; and they needn’t be logical. Examples includes
vegetarianism, veganism, international church of body modification, wicca, druidry, Satanism, etc.” Email of Feb. 4, 2016.

Claims under Oregon’s FEPA must be brought within one year of the unlawful employment practice or 90 days after a determination is made by the BOLI (should a complaint have been timely filed with that agency). ORS 659A.875. Complaints must be lodged within one year. To be safe, if there is a claim against a governmental employer, I would file a notice of claim within 180 days per ORS 30.275.

C. Armon.

For an interesting twist on the theme of this talk, consider claims made against veg* n employers who proselytize nonvegetarian employees. Commissioner Mary Wendy Roberts decided In the Matter of Sapp’s Realty, Inc., 4 Boli 232 (Or Boli), 1985 WL 1134246 (1985), a case alleging that Gloria and Bob Sapp, Seventh Day Adventists, created an intimidating and offensive work environment by subjecting 19-year-old Caroline Armon to an “intolerable atmosphere of religious harassment and intimidation, causing her to refuse to continue working, and thus constructively discharged her.” Specifically, the Sapps allegedly made “unwelcome religious advances, proselytizing, and other verbal conduct of a religious nature or term or condition of Complainant’s employment.” The commissioner ordered the Sapps to pay $10,477.45 to Caroline Armon, representing $4477.45 in wage loss and $6000 in mental distress, to deliver a favorable reference for her, and to cease and desist from discriminating against any employee based on religion. The thrust of the charge had nothing to do with the vegetarian tenets of Seventh Day Adventism, but the commissioner did address one encounter in the kitchen:

Based upon all relevant evidence on the record, this forum concludes that Seventh Day Adventists believe in not consuming alcohol or coffee, and that many, but not all, Seventh Day Adventists are vegetarians. Respondents Sapp explained to Complainant during her employment at Respondent Sapp's what food one should eat and tried to influence her dietary habits. For example, once, when Complainant was preparing to eat a meat sandwich for lunch in the office's kitchen. Respondent B. Sapp told her that meat eaters had bad breath because they used their stomachs as graveyards for dead animals. (Even though Complainant understood Respondent B. Sapp's comments to be in jest on occasion, they seemed to her more in the nature of ridicule, as exemplified by the preceding comment)

Respondent G. Sapp maintained at hearing and, since there is no evidence to the contrary, this forum finds, that her vegetarianism was based primarily upon health, as opposed to religious, concerns and that her comments concerning vegetarianism were made strictly from a health standpoint As there was no specific first or even second-hand evidence that the comments of Respondent B. Sapp to Complainant about diet were based upon his religious beliefs or practices (rather than upon health considerations), this forum declines to find that they were.
ld., at 15. The concept of religious intimidation has been examined by the EEOC in EEOC Dec. 72-1114 (1972), which held that allowing a supervisor to occasionally discuss religious beliefs on the job with his co-workers (one of whom felt his job could be threatened by his reaction to those discussions, one of whom believed he was trying to be converted, and both of whom felt interfered with their job performance) created a working environment that was not free of religious intimidation. Note that OWRFA does permit bona fide churches or other religious institutions to make religious employment preferences. OAR 839-005-0031(1).

D. Friedman.

When Jerry Friedman, an ethical vegan of nearly ten years, refused to receive a mumps vaccination, a mandatory condition of permanent employment with Kaiser Permanente Medical Group, on the basis that it used a chicken embryo for culturing, Kaiser withdrew its offer of employment. Friedman then sued for religious creed discrimination under the California Fair Employment and Housing Act (“FEHA”), Govt. Code § 12940 and Regulation 7293.1, defining “religious creed” as “any traditionally recognized religion as well as beliefs, observations, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions.” Friedman v. So. Cal. Kaiser Permanente Gp., 125 Cal.Rptr.2d 663 (2002). He did not raise a Title VII claim.

Although California decisional law had not then formally construed “religious creed” under the FEHA or administrative regulations established by the Employment and Housing Commission for purposes of implementing the FEHA, its holdings in other contexts did “point away from a strictly theistic definition of religion. A belief in a Supreme Being is not required.” Id., at 49. United States Supreme Court decisions also broadened protections for those believing in a Judeo-Christian Creator and a system of after-death punishments and rewards to religions “which do not teach what would generally be considered a belief in the existence of God,” such as “Buddhism, Taoism, Ethical Culture, Secular Humanism and others.” Torcaso v. Watkins, 367 U.S. 488, 495 fn. 11 (1961).

After surveying California decisional authority, the hallmark United States Supreme Court cases of U.S. v. Seeger, 380 U.S. 163 (1965)(conscientious objection to military service); Welsh v. U.S., 398 U.S. 333 (1970)(conscientious objector status applies to “all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war”); and Wisconsin v. Yoder, 406 U.S. 205 (1972)(Amish families convicted for refusing to allow their children to attend public high school), federal Title VII employment discrimination law, and federal non-employment discrimination law, the Friedman court embraced Third Circuit Court of Appeals Judge Arlin M. Adams’s objective test for determining whether a belief “plays the role of a religion and functions as such in an individual’s life.” Originally articulated in Malnak v. Yogi, 592 F.2d 197 (3d Cir.1979), and later adopted in five other circuits, the test follows:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it
consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

Africa v. Com. of P.a., 662 F.2d 1025, 1032 (3rd Cir.1981). Before applying the three-prong test, the court admitted that the EEOC definition of religion was more expansive than Regulation 7293.1 and, perhaps, than the statutory interpretation in Seeger, which protects strictly moral or ethical beliefs held with the “strength of traditional religious views.” Reg. 7293.1 requires that said beliefs carry not only the import and weight of traditional religious views but must occupy in his or her life a place of importance parallel to that of traditionally recognized religions.

As applied, Friedman lost, the court determining that Friedman’s veganism did not address the “meaning of human existence; purpose of life; theories of humankind’s nature or its place in the universe.” Arguably, classical Darwinism would begin to speak to these issues. The court then found a lack of comprehensiveness in that there was no “apparent spiritual or otherworldly component” and that the veganism is “limited to the single subject of highly valuing animal life and ordering one’s life based on that perspective.”

But what of parallels to the Jewish doctrine of tikkun olam (without the overt messianic component which is, of course, critical to this prong) or similar “reverence of life” belief systems? Because the Malnak requires not just an “isolated teaching,” but a full “belief system,” metaphysically tethering philosophical and ethical doctrine to a supreme being or power is critical. On the last point, Friedman’s veganism did not possess sufficient indicia of religious formality and externality, having not found teachers, services, holidays, or other organizational structures. Does this suggest that no religions of one qualify under this statute? Possibly. Nonetheless, the court concluded that veganism inspired or required by a traditionally recognized religion or quasi-religion qualifying under Malnak may be protected as “religious belief” under 7293.1.

E. Chenzira

Since Friedman, another court examined veganism in an employment discrimination dispute. Sakile Chenzira, a hospital customer service representative working for Cincinnati Children’s Hospital for over a decade was discharged for refusing to receive a non-vegan flu vaccine. The Hospital refused to grant her a religious accommodation. Chenzira v. Cincinnati Children’s Hospital Medical Ctr., 2012 WL 6721098 (S.D.Ohio Dec. 27, 2012). She sued under Title VII of the Civil Rights Act of 1964, Ch. 4112 of the Ohio Revised Code, and tortious wrongful discharge in violation of public policy. At the motion to dismiss stage, the court rejected the hospital’s contention that veganism was “no more than a dietary preference or social philosophy” or that Chenzira’s essay response, “The Biblical Basis of Veganism,” was nothing more than “strategically cherry-picked Bible verses”:

The Court finds that in the context of a motion to dismiss, it merely needs to determine whether Plaintiff has alleged a plausible claim. The Court finds it plausible that Plaintiff could subscribe to veganism with a sincerity equating that of traditional religious views. The Sixth Circuit’s decision in Spies in no way bars
such conclusion. In Spies, the Court found that a Buddhist inmate's dietary request was adequately met by the provision of a vegetarian diet, as the inmate himself conceded that a more restrictive vegan diet was not a religious requirement of his faith. 173 F.3d 398, 407. The Court's conclusion is further bolstered by Plaintiff's citation to essays and Biblical excerpts. Although the Code makes it clear that it is not necessary that a religious group espouse a belief before it can qualify as religious, 29 C.F.R. 1605.1, the fact here that Plaintiff is not alone in articulating her view lends credence to her position. Accordingly, at this early stage of the litigation, the Court finds it inappropriate to dismiss Plaintiff's claims for religious discrimination based on her adherence to veganism.

Id., at *4. It should also be noted that the Hospital urged that her claim was time-barred as she lodged her charge with EEOC 309 (instead of within the required 300) days after her termination. The Hospital also moved to dismiss the public policy/wrongful discharge claim on the grounds that Title VII and O.R.C. Chapter 4112 adequately provided a remedy for religious discrimination. Relying on Federal Express Corp. v. Holowecki, 552 U.S. 389 (2008), the Court found the EEOC charge timely filed she completed a sufficiently detailed EEOC intake questionnaire within 300 days so as to be construed as a request for remedial action. It dismissed the wrongful discharge claim as barred because Title VII and Ch. 4112 gave ample remedy.

F. Catalanello.

Occasionally, the sexual politics of meat manifest not as discrimination based on vegetarianism or veganism, but because of gender. In Catalanello v. Kramer, 18 F.Supp.3d 504 (S.D.N.Y. 2014), managing director of Credit Agricole CIB Robert Catalanello sued Arizona State University Associate Dean and Professor of Law Zachary Kramer for defamation and related dignitary torts for statements made in the article Of Meat and Manhood, 89 Wash. U. L. Rev. 298 (2011) and the lecture “Of Meat and Manhood/The New Sex Discrimination” in which Kramer examined the lawsuit by Ryan Pacifico, a former junior foreign exchange trader at Credit Agricole, who sued Catalanello, his former supervisor, for creating a hostile work environment by harassing him for not eating meat and referring to him as “gay” or “homo” in front of coworkers. When Catalanello told the traders they were dining at a Brazilian steakhouse, someone asked what Pacifico could eat there, to which Catalanello responded, “Who the fuck cares? It’s his fault for being a vegetarian homo.” Three years after filing suit, Pacifico nonsuited his case with prejudice. While the case pended, Kramer submitted an article on the law’s refusal to treat gender stereotyping as a form of sex discrimination protected under title VII. He regarded Pacifico’s case as a “case study” to “highlight[,] the messiness of modern sex discrimination.” He concludes by stating that Pacifico’s case demonstrates how sex discrimination occasionally manifests in other forms, such as a “hybrid of vegetarian and sexual orientation discrimination.” In 2012, Kramer presented a lecture at Western New England University School of Law, arguing that Catalanello viewed Pacifico’s vegetarianism as a proxy for effeminacy and that male vegetarianism is, wrongly, an unprotected trait in federal employment discrimination law. The

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trial court dismissed the lawsuit, finding Kramer’s statements to be nonactionable opinions and fair accounts of an official proceeding.

**G. Grimsley.**

In Grimsley v. Charles River Laboratories, Inc., 564 Fed.Appx. 333 (9th Cir. 2014), Guy Grimsley was terminated as Director of Laboratory Sciences for making comments that several scientists found derogatory and based on gender stereotypes. He asserted employment discrimination based on “national origin,” pursuant to 42 U.S.C. § 2000e-2(a)(1), and the implementing regulations prohibiting discrimination on the basis of “cultural … characteristics of a national origin,” 29 C.F.R. § 1606.1. Specifically, he contended that his critical “views on the treatment of animals” at Charles River, a perspective purportedly seeped in his British heritage, furnished the true, discriminatory basis for ending his employment. The Ninth Circuit disagreed, finding no evidence to support such claim of pretextual discrimination. It did not determine whether, as a matter of law, a cultural objection to animal mistreatment would state a claim under Title VII of the Civil Rights Act.

**H. First Amendment.**

First Amendment retaliation jurisprudence also speaks to vegan workplace discrimination claims. Consider the case of Keith Allison of Ohio, a vegan second grade teacher fired in 2014 for posting a picture on his personal Facebook page depicting a local dairy farm with crates used to house babies separated from their mothers at birth. PETA attorney Gabriel Walters (along with other counsel at PETA and ACLU) sued the Board of Education of Green Local School District, and various officials on behalf of Allison in Allison v. Besançon, N.D.Ohio 5:15-cv-00416-DAP. On Apr. 14, 2015, a voluntary dismissal with settlement agreement was filed. [https://assets.documentcloud.org/documents/1873593/aclu-settlement.pdf](https://assets.documentcloud.org/documents/1873593/aclu-settlement.pdf). In addition to monetary settlement, Mr. Allison achieved reinstatement (at a middle school in the same district, rather than the elementary school at which he previously taught) and a written policy clarifying that district teachers have a right to engage in protected speech on matters of public concern in their role as private citizens. It should be noted that Allison was not engaging in vegan advocacy on class time and was using his personal computer. This case was styled not as a title VII accommodation claim, but First Amendment claim based on Pickering v. Board of Education, 391 U.S. 563 (1968).

3 The employee must prove (1) he spoke as a private citizen on a matter of public concern; (2) his First Amendment interests, combined with interest of the public, outweigh the government’s legitimate interest in the efficient performance of the workplace; and (3) even if the balance of interests favors the employee, he must still prove that protected speech was a substantial or motivating factor in the employer’s adverse employment action. The 9th Circuit has refined the three-step Pickering inquiry into five steps:

1. whether the plaintiff spoke on a matter of public concern;
2. whether the plaintiff spoke as a private citizen or public employee;
3. whether the plaintiff’s protected speech was a substantial or motivating factor in the adverse employment action;
4. whether the state had an adequate justification for treating the employee differently from other members of the general public; and
5. whether the state would have taken the adverse employment action even absent the protected speech.
Also consider the matter of Karen Coyne, a vegan high school English teacher for more than a decade at Newport-Mesa Unified School District. Coyne sued the District after being forced to take the 2013-14 year off. In early 2012, she informed teachers and the principal that requiring students to perform animal dissections broke state educational law. She collaborated with a campus group, Compassion in Action, to educate the staff and administrators about alternatives. The principal allegedly changed her schedule so she could not meet with the club, then changed it back. Students began acting out, some posing with dead animals on Facebook, another holding up a cat’s head and pretending to lick it, and yet another putting a dissected cat’s head in a student’s locker. To learn more, see: http://www.psmag.com/nature-and-technology/battle-high-school-animal-dissection-92391. Coyne’s attorney Cheryl Konell Ruggiero sued for a lost year of salary and benefits and unspecified general damages. The case is set for trial currently.

Fiat justicia ruat coelum,

ANIMAL LAW OFFICES

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Adam P. Karp, Esq.

Dahlia v. Rodriguez, 735 F.3d 1060, 1067 (9th Cir.2010)(quoting Eng v. Cooley, 552 F.3d 1062 (9th Cir.2009)).