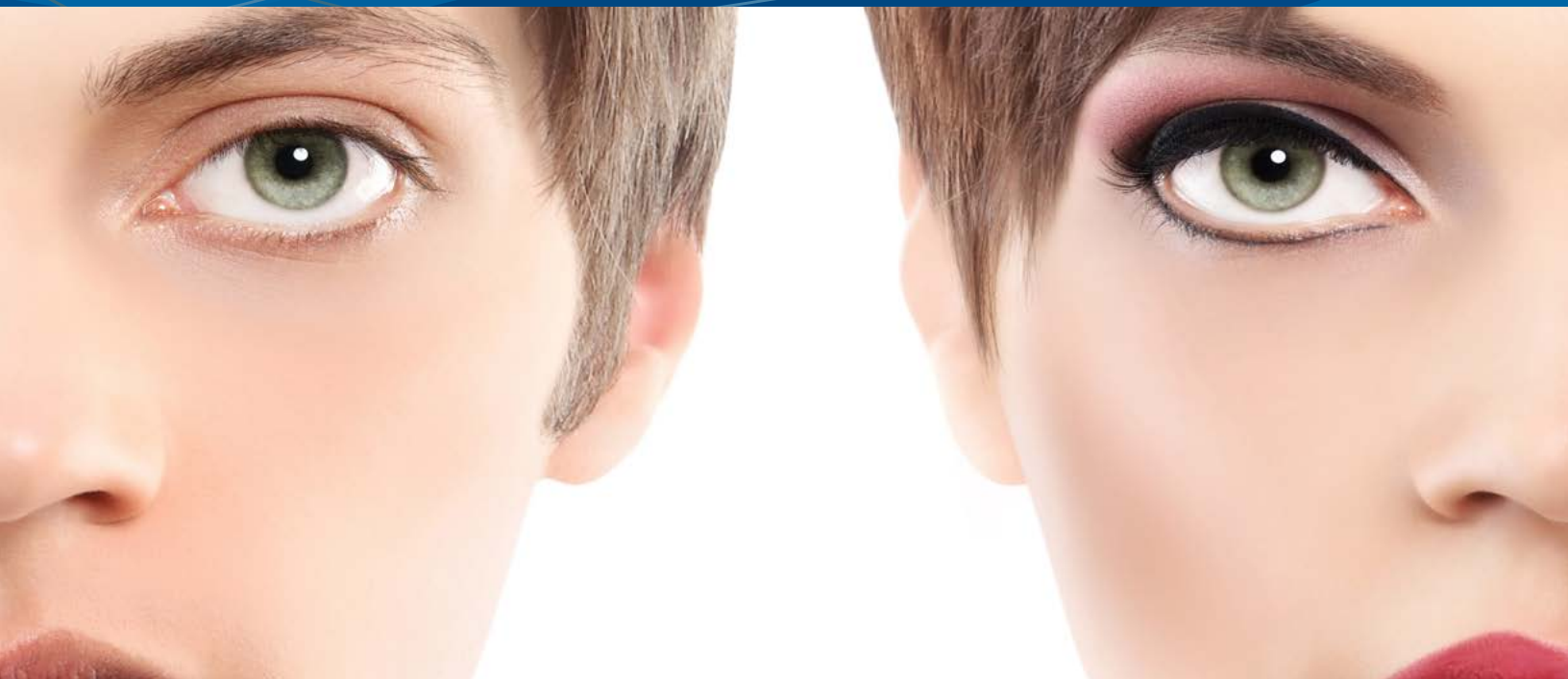


# At Issue

A RISK MANAGEMENT NEWSLETTER FOR  
ELEMENTARY AND SECONDARY SCHOOLS



## Title VII Warrants Attention

By: **Jennifer Hein**, Claims Counsel, Wright Public Entity

Whether the federal law commonly known as "Title VII" provides protection against sexual orientation discrimination is a question that likely has recently come across your desk, or soon will. Title VII of the Civil Rights Act of 1964 is a federal law that prohibits public and private employers, public and private schools, employment agencies, and labor organizations from discriminating in any aspect of employment on the basis of sex, race, color, national origin, and religion.

The Equal Employment Opportunity Commission (EEOC), tasked with interpreting and enforcing Title VII, has affirmatively stated that it interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity and sexual orientation. According to its webpage, the EEOC "has taken the position that existing sex discrimination provisions in Title VII protect lesbian, gay, bisexual, and transgender (LGBT) applicants and employees against employment

bias." The U.S. Department of Justice webpage also specifies that Title VII protections against sex discrimination include discrimination based on gender identity.

A 1989 U.S. Supreme Court case established that this protection covers discrimination based upon gender stereotyping, finding that a woman who was told to act more feminine in order to receive a promotion was discriminated against on the basis of her sex. In 1998, President Clinton amended an executive order that includes "sexual orientation" as a protected class in the federal government's equal opportunity employment policy.

Several federal courts, however, have declined to extend this language to include discrimination on the basis of sexual orientation. Some prominent recent federal court decisions across the country have split on the issue. In March 2017, the federal Court of Appeals for the Eleventh Circuit (covering Alabama, Florida and Georgia) ruled that Title VII does not protect against sexual orientation

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discrimination. Plaintiff, who is gay and identifies with the male gender, sued her employer claiming she had been discriminated against in violation of Title VII. The trial court dismissed her case on the basis that Title VII was not intended to cover discrimination against homosexuals. Plaintiff appealed and the Court of Appeals affirmed the dismissal, citing a 1979 Fifth Circuit employment discrimination decision that held "discharge for homosexuality is not prohibited by Title VII." The Court did, however, reverse the dismissal of plaintiff's gender nonconformity claim. It is unclear if plaintiff will pursue that claim and what the court will determine.

In somewhat of a contrast, also in March 2017, the Second Circuit Court of Appeals (which covers New York, Connecticut, and Vermont) ruled that Title VII does include protections for claims of gender stereotyping as a form of prohibited sex discrimination, but did not go so far as to reverse its earlier 2000 decision finding that sexual orientation was not covered by Title VII. The Chief Justice of that Court wrote a concurring opinion arguing strenuously that the Second Circuit should revisit its 2000 decision and overrule it, finding instead that, like gender stereotyping, sexual orientation discrimination is prohibited under Title VII.

In more stark contrast, a few days later on April 4, 2017, the Seventh Circuit (covering Illinois, Indiana, and Wisconsin) became the first federal appeals court in the country to extend Title VII protections to discrimination on the basis of sexual orientation. The Court concluded that Title VII does prohibit sexual orientation discrimination because it is a "common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."

Despite the EEOC and Department of Justice guidance on the matter and the several federal courts' apparent split on the issue, there are about 20 states and D.C. as well as 200 cities and counties across the country which have local laws prohibiting sexual orientation discrimination in the workplace. Accordingly, best practices dictate that an employer's anti-discrimination policies take into account sexual orientation as a protected class and counsel its administration, employees, students, and guests that discrimination, retaliation, and harassment based on sex, gender stereotype, or sexual orientation are impermissible. Policymakers with questions regarding such claims, and administrators in receipt of such complaints, should always seek guidance from your attorney.



## Safely Enjoying the Prom Experience

By: **Scott Wells**, Sr. Risk Control Specialist, ACLM, CPP, Wright Specialty Insurance

For many high school students, homecoming and the prom are the two social highlights of the school year. The purpose of this article is to provide school officials with some of the best practices regarding prom safety, with a goal of no one getting hurt during prom-related activities.

### DRUGS AND ALCOHOL

The Centers for Disease Control and Prevention (CDC) report that alcohol factors into the deaths of approximately 4,500 young people each year. This figure highlights the need for concern and vigilance — many people don't realize that alcohol is a depressant and can have a profound effect on the central nervous system. School administrators should adopt a zero tolerance policy relative to drugs and alcohol, to include communicating the policy to parents and students via the several methods available, such as the school website, social media (Facebook), and prom planning meetings. The policy should be clear that unlawful drugs and alcohol are not allowed on school property or locations where the school is hosting prom activities. The policy should also be clear that students who appear to be under the influence of unlawful drugs or alcohol will not be allowed to participate in



activities. The same code of conduct (including discipline) that applies throughout the school year should also be applicable for prom activities. If students do appear to be under the influence of alcohol or drugs, their parent or guardian should be called to pick them up and take them home. The policy must be enforced carefully and fairly — uniformly and in compliance with the policy terms and conditions. Some jurisdictions may require such a policy. Providing each prom participant

with a copy (in hardcopy or through the school website) of the rules and requiring them to acknowledge its receipt is a good idea.

### PLANNING

The planning process should begin early and ideally will include school administrators, parents and students. The emphasis should be on safety. Factors to consider include: activities for during and after prom, and include the location of the activities; action plans to deal with emergencies; communications; and security. Most schools prohibit smoking on school property — the same should be true for prom night. Licenses or permits may be required.

### ACTIVITIES

After-prom activities should be at a location that does not require a lot of driving; some schools hold after-prom activities at their school. Others go to venues such as bowling alleys. Activities can range from card games to human foosball and many others. Select activities that have a low risk of injury. Take into consideration that as the night wears on, fatigue becomes a factor.

### EMERGENCIES

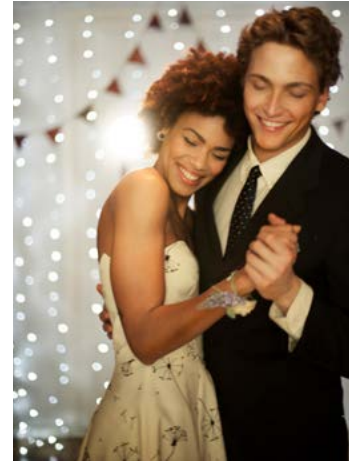
Have an action plan that includes sufficient staff with first aid and CPR training. If the dance is held at a location other than the school, ensure that all staff and volunteers are familiar with routes of emergency egress and the location of portable fire extinguishers. Prior to prom night, conduct “what if” scenarios; this can be a part of the planning process.

### COMMUNICATIONS

Schools having two-way portable radios should employ them on prom night — these should be the primary source of communication for those that have them. Every staff member and volunteer should have a fully-charged cell phone for use.

### SECURITY

Consider hiring off duty law enforcement officers for prom and after prom. Schools utilizing sworn law enforcement officers (SROs) might want to ask for their assistance; SROs are a familiar face to most students and staff.



## Preventing Slip, Trip and Fall Claims

### BEST RETURN ON RESOURCES



Slip, trip and fall accidents on and off premises are the leading cause of general liability claims for Wright Specialty insureds, accounting for 30% of reported claims and 25% of all incurred losses (amounts paid and reserved as a result of a claim or lawsuit).

Physical conditions, such as uneven or defective surfaces or stairs, increase the likelihood of an accident. However, human behavior also factors into the equation. Overall, walking is an unconscious activity; we don't plan each step

and stride. When walking, there is more or less an expectation that the surface will remain the same. Any change in the walking environment — height differences in stairs or between sidewalk flags, broken sidewalks or walkways, missing handrails — can cause a fall since we are not anticipating the change and the need to make an adjustment. Multitasking — such as using a smartphone, texting, listening to music when walking — is a contributing factor to slip, trip and fall accidents.

At this time of year, facility and operations managers are planning summer repair and renovation projects. Some have safety implications; they are designed to repair walking surfaces, stairs and stairwells — places where slip, trip and fall accidents occur. With limited resources, it's difficult to prioritize which projects get approved and which are deferred. If you want the biggest loss prevention return on resources (staff doing repairs or the cost of contractors), look into the following:

1. **Locations where accidents have occurred.** In all likelihood, there is a condition that needs to be corrected. Besides physical defects, missing signage or poor lighting can be contributing factors.
2. **Areas with high pedestrian traffic.** The more pedestrian traffic, the greater the chance of an accident. The negative effect of even minor defects is exponentially increased when the hazard is in a high traffic area.
3. **Steps or stairwells in older buildings.** From age and wear and tear or settling, there can be changes in the height of the risers as well as damaged or missing handrails, stair treads or stair nosing.
4. **High-use steps without painted edges or handrails.** This condition can often be found on buildings with wide exterior steps.
5. **Walkways that accumulate water or ice-up during the winter.** Usually due to poor drainage or improperly directed leaders or drain pipes. Sidewalk frost lift or heaving occurs when soil below the sidewalk freezes and lifts the flags.
6. **Walkways which are adjacent to trees.** Curbside tree roots can lift and cause extensive damage to sidewalk slabs and other surfaces.

## LEGAL LIABILITY FOR SLIP, TRIP AND FALL ACCIDENTS

Absent protection afforded by governmental immunity, educational institutions can be held accountable for slip, trip and fall accidents that occur on their premises or premises in which they control and maintain. Generally, to recover damages for bodily injury, a claimant needs to prove that the defendant's action or inaction caused a dangerous condition; it knew or should have known about the condition; the defendant is the party responsible for the property (not someone else, such as the landowner if the property is leased) and repairs were not done correctly or within a reasonable period of time. As one would expect, states have different laws concerning negligence for slip, trip and fall accidents.

In most jurisdictions, a claimant's recovery is reduced if their actions contributed to the accident. Examples would be if someone was wearing inappropriate footwear (such as high heels) while walking on a snow covered pathway, or if they were distracted while talking on a smartphone. In these cases, a percentage of liability will be assigned to the claimant, and the claimant's recovery will be reduced by that amount.

Slip, trip and fall accidents can never be completely eliminated. However, with careful planning, the number and severity of accidents can be controlled. Check the six areas listed previously and see if the risk of an accident exists in these locations.



# Equal Employment Opportunity Commission 2016 Charge Statistics

By: **Robert Bambino**, CPCU, ARM, Wright Specialty Insurance

Earlier this year, the Equal Employment Opportunity Commission (EEOC) released its 2016 charge statistics. The EEOC is the federal agency responsible for enforcing various federal laws prohibiting discrimination in the workplace (including job applicants). Protected classifications include race, color, religion, sex, national origin, age (40 or older), disability or genetic information. Enforcement includes investigating and resolving (when warranted) complaints of discrimination against an employer.

In 2016, the EEOC received 91,503 charges, as compared to 89,385 in 2015, a 2% increase. Charges to the EEOC have been increasing since 2014. The leading charges by type are similar to prior years. As a percentage of all charges they are:

Retaliation –	49%
Race –	35.3%
Disability –	30.7%
Sex (including pregnancy and gender identity) –	29.4%
Age (persons over 40) –	22.8%

The percentages add up to more than 100% because a charge can allege more than one type of discrimination.

## WHAT THIS MEANS FOR WRIGHT SPECIALTY INSURED

The EEOC's charge information is worth studying as it identifies the leading causes of employment liability on a national level. Wright Specialty's leading loss causes for our education clients are similar to the EEOC's.

**A note about retaliation.** Retaliation is an adverse action taken against an employee or job applicant for engaging in protected activity — either opposing a prohibited practice identified by one of the employment discrimination statutes or participating (such as in the role of a witness) in an investigation, proceeding, or hearing under an applicable statute. What can schools do to prevent retaliation? Make sure that your school or district has a policy prohibiting retaliation that applies to employment discrimination. Monitor the workplace when a complaint is made involving discrimination or harassment — checking in with the complainant and the complainant's witnesses.

Retaliation should also be addressed for other forms of discrimination or harassment — such



as actions between students. Title IX prohibits retaliation against any person for opposing an unlawful educational practice or policy, or any person who has made charges, testified, or participated in any complaint action under Title IX.

## ADVICE FROM DEFENSE COUNSEL

We asked several attorneys who defend Wright Specialty insureds a question concerning EPL litigation. Where do they see our education clients falling short of best practices when dealing with or responding to employment-related matters? Specifically, when looking at the cases they defend, are there any actions or practices that may result in the need to settle an EPL case or perhaps result in an unfavorable ruling? The answers are worth noting:

- Not properly evaluating staff with accurate, objective and when needed, critical performance evaluations, particularly with problematic employees. If the employee's shortcomings are not documented, disciplinary actions at some later date can be seen as discriminatory or in violation of a policy.
- Failure to enforce employment-related policies that call for specific actions when certain events or incidences occur.
- Not conducting prompt, fair and comprehensive investigations when a complaint is made by an employee.
- Ignoring complaints of harassment or discrimination and not following policy or procedure.
- Failing to keep up training for staff on EPL issues (harassment, discrimination, retaliation), especially for compliance officers who receive complaints and are responsible for implementing policies.

# News&Views

## Concussions and Girls' Soccer.

A study conducted at Northwestern University and reported in USA Today, is the first to report that concussions now account for a higher proportion of injuries in girls' soccer than boys' football.

USA Today High School Sports, March 22, 2017

## Calmer Hurricane Season?

According to Phil Klotzbach, a scientist at Colorado State University's Tropical Meteorology Project, the Atlantic Basin can expect slightly below-average hurricane activity this year, a noted longtime hurricane forecaster predicts.

The Charlotte Observer, April 13, 2017



## Going to the Dogs.

The Insurance Information Institute reported that 18,123 dog bite claims were made against homeowner policies in 2016. The state with the largest number of claims? It's California with 1,934.

## Sitting the New Smoking?

According to the World Health Organization, worldwide obesity has more than doubled since 1980. In 2014, 40% of adults aged 18 years and over were overweight, and 13% were obese. Some employers are encouraging activity during the day by allowing employees to use active workstations that include sit-stand desks.

Business Insurance, April 2017

# ResourceCenter

**Training or information about today's risk management-related subjects can be found in the Wright Specialty E-Learning or Title IX Learning Centers online.**

Wright Specialty is host to a number of online risk management resources. Take advantage of the free safety education courses available on Wright's 24/7 web-based training center. Visit our Title IX Resource Center to keep up with changing developments or browse our seasonal Risk Alerts to stay up-to-date on school-based risk management and safety issues. With years of experience insuring school risks, Wright Specialty Insurance provides valuable guidance for school administrators to help reduce injuries to students, staff and visitors, and to prevent damage to property. You can access our national Employment Liability Hotline for help with every day employment-related issues. The Hotline is available Monday - Friday from 8:30 a.m. to 6:00 p.m. eastern time. Call 866-758-6874.

**For easy registration for our e-Training Center and for access to the Resource Center, contact Erica Gotay, your Wright Specialty representative, to receive your access code at: 516-750-3902 or [EGOTAY@wrightinsurance.com](mailto:EGOTAY@wrightinsurance.com)**



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