
Parker Poe
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ACC
Association of Corporate Counsel
EMPLOYMENT LAW UPDATE
Keith M. Weddington
Tory I. Summey
June 6, 2024
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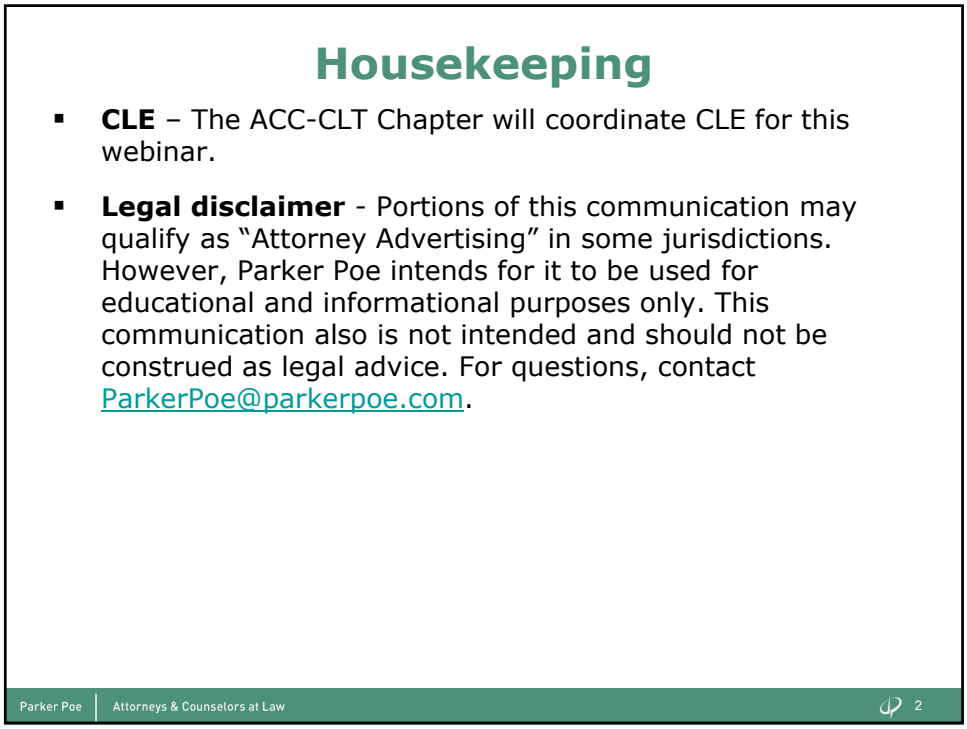
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Today's Presenters

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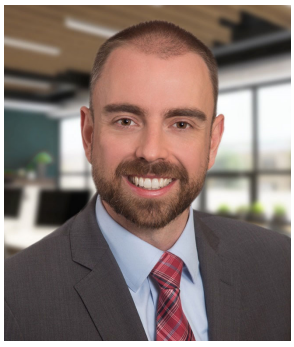

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AGENDA

I. Judicial Decisions

- **U.S. Supreme Court**
- **4th Circuit**
- **North Carolina**

II. Regulatory/Agency Update

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SUPREME COURT DECISIONS

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APPEAL OF ARBITRABILITY

Coinbase, Inc. v. Bielski

(Decided June 23, 2023)

- Held: District Court proceedings are automatically stayed during the pendency of an appeal of the court's denial of a motion to compel arbitration.
- District Courts may not maintain control over parts of the case "involved in the appeal."
- An appeal of a denial to compel arbitration means that the entire case was "essentially 'involved in the appeal.'"
- Significant protection and leverage to employers!

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ARBITRATION

Smith v. Spizzirri

(Decided April 17, 2024)

- Stay vs. dismissal after compelling arbitration?
- Plain statutory text of Section 3 of FAA requires a court to stay the proceeding.
  - "*shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement…"
- Insulates party prevailing on a motion to compel from an appeal.
  - Dismissal is a final decision that could be appealed
  - Per Section 16 of FAA, an interlocutory order compelling arbitration is not appealable.

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RELIGIOUS ACCOMMODATION

Groff v. DeJoy

(Decided June 29, 2023)

- Employers must provide religious accommodation unless doing so creates an undue hardship.
- Court rejected the prior "more than a *de minimis* cost" standard.
- Held: Undue hardship only occurs when "the burden of granting [the] accommodation would result in *substantial* increased costs in relation to the conduct of its particular business."
- No bright line rule. Requires case by case, fact specific analysis.

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RELIGIOUS ACCOMMODATION

Groff v. DeJoy

(Decided June 29, 2023)

- Look at all relevant factors, including the particular accommodations at issue and the practical impact in light of the nature, size and operating cost of employer.
- Undue hardship cannot be "attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice."
- Cannot deny accommodation merely because it inconveniences or displeases the employee's coworkers.
- Seniority-based bidding systems are still okay.

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RELIGIOUS ACCOMMODATION

Groff v. DeJoy

(Decided June 29, 2023)

- Examples of accommodations
  - Schedule or shift changes
  - Exceptions to dress and grooming standards
  - Job reassignment
  - Remote work
  - Time off—paid or unpaid
  - Prayer breaks
- Most risk averse strategy: use same interactive process and standard as ADA undue hardship analysis.
- DOCUMENT, DOCUMENT, DOCUMENT!

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TITLE VII—ADVERSE ACTION

Muldrow v. City of St. Louis

(Decided April 17, 2024)

- Elements of a prima facie case under Title VII:
  1. Plaintiff is a member of a protected class.
  2. Was qualified for her position/meeting employer's expectations
  3. Experienced an adverse employment action
  4. Similarly situated individuals outside of Plaintiff's protected class were treated more favorably.
- What level of harm, if any, must a plaintiff show to establish an adverse employment action?

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TITLE VII—ADVERSE ACTION

Muldrow v. City of St. Louis

(Decided April 17, 2024)

- A plaintiff need only show that their transfer brought about "some" harm with respect to a term of condition of employment.
- Rejected the standard used by several circuits that required "significant" or "material" harm.
- The bar has been lowered.

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TITLE VII—ADVERSE ACTION

Muldrow v. City of St. Louis

(Decided April 17, 2024)

- A plaintiff should easily be able to show some harm—whether in money, time, satisfaction, schedule, convenience, commuting costs or time, prestige, status, career prospects, interest level, perks, professional relationships, networking opportunities, effects on family obligations, etc.
- Key to defending any claim of discrimination is still to show that the actions were taken for legitimate, nondiscriminatory reasons.
- DOCUMENT, DOCUMENT, DOCUMENT!

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CHEVRON DOCTRINE

Loper Bright Enterprises v. Raimondo

(Pending)

- The Chevron Doctrine is an administrative law principle that compels federal courts to defer to a federal agency's interpretation of an ambiguous or unclear statute that Congress delegated to the agency to administer.
- **Issue:** Should the Court overrule *Chevron v. Natural Resources Defense Council* or at least clarify whether statutory silence on controversial powers creates an ambiguity requiring deference to the agency?

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FOURTH CIRCUIT DECISIONS

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REASONABLE ACCOMMODATION

Hannah v. UPS

(Decided July 10, 2023)

- Employee's request to restructure his job functions went beyond employer's accommodation obligations.
- ADA does not require employers to redefine jobs to allow a disabled employee to return to work.
- Requested accommodation must be reasonable—i.e., it must allow the employee to perform the essential functions of the job.

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FLSA STANDARD OF PROOF

Carrera v. EMD Sales, Inc.
(Decided July 27, 2023)

- Circuit split: "preponderance of the evidence" vs. "clear and convincing proof"
- Bound by prior 4th Cir. precedent, the court held that employers must prove exemption by "clear and convincing evidence."
- Panel noted that 2018 SCOTUS decision in *Encino Motorcars v. Navarro* rejected interpreting FLSA exemptions narrowly and instead adopted a "fair reading standard."
- Panel suggested that further review (petition for en banc rehearing) might be in order.

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FLSA STANDARD OF PROOF

Carrera v. EMD Sales, Inc.
(Decided July 27, 2023)

- Petition for en banc rehearing was denied.
- Employers in the 4th Cir. must be mindful of the fact that they will face the "clear and convincing" standard to prove that an exemption applies.
- The higher standard of proof should give employers pause in being overly aggressive about classifying employees as exempt.

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SUFFICIENCY OF ACCOMMODATION REQUEST

Kelly v. Town of Abingdon
(Decided January 2, 2024)

- Plaintiff's letter titled "Accommodation Request" made no mention of health conditions and asked for changes such as mutual respect, hiring more women and fostering a well-running office.
- Request for ADA accommodation need not use the magic words "reasonable accommodation"
- Not every work-related request by a disabled employee constitutes a request for accommodation under the ADA.

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SUFFICIENCY OF ACCOMMODATION REQUEST

Kelly v. Town of Abingdon
(Decided January 2, 2024)

- Merely using the magic words "reasonable accommodation" are not, alone, sufficient to trigger the employer's duty to engage in the "interactive process."
- Substance of the request must permit the employer to infer that the request relates to the employee's disability.
- Employer's knowledge of employee's disability did not create a "logical bridge" between his health issues and the accommodation request.

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REASONABLE ACCOMMODATION

Tartaro-McGowan v. Inova Home Health
(Decided January 17, 2024)

- ADA requires an individualized assessment of the particular circumstances.
- A reasonable accommodation may – but does not necessarily – require the elimination of a non-essential, marginal function. It depends on the circumstances.
- "The ADA requires reasonableness, not perfection. Reasonableness does not demand that an accommodation have an airtight solution to every contingency conceivable."

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REASONABLE ACCOMMODATION

Tartaro-McGowan v. Inova Home Health
(Decided January 17, 2024)

- Where there are multiple ways to provide a reasonable accommodation, the employer has the final word.
- While a doctor's opinion should be considered, the ADA does not bind the employer to it if the employer's proposed accommodation is otherwise reasonable.
- Engaging in the interactive process allows an employer to build its defense.
- Give the employee a chance to be unreasonable.

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MINISTERIAL EXCEPTION

Billard v. Charlotte Catholic High School
(Decided May 8, 2024)

- Prior SCOTUS cases
  - *Hosana-Tabor (2012)*: held that a faith institution's "ministers" are exempt from federal civil rights laws.
  - *Our Lady of Guadalupe School (2020)*: expanded the ministerial exception to include any employee that advances a religious institution's mission.
- Despite the fact that CCHS waived the ministerial exception defense, 4th Cir. *sua sponte* raised it because it was tied to "structural concerns regarding separation of powers."

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MINISTERIAL EXCEPTION

Billard v. Charlotte Catholic High School
(Decided May 8, 2024)

- Ministerial exception is highly fact intensive.
- No bright line test—facts and circumstances.
- Focus is on the function of the position and its importance to the institution's spiritual and pastoral mission.

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NORTH CAROLINA

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ATTORNEYS' FEES UNDER N.C. WAGE AND HOUR ACT

Brown v. Caruso Homes Inc.
(Decided May 21, 2024)

- Unlike the FLSA, an award of attorneys' fees to a prevailing plaintiff is not mandated.
- Trial court has sole discretion to deny fees and need not make findings of fact to support denial.
- Court left plaintiff's counsel with her one third contingency fee agreement, rather than her claim for inflated hours and fees.
- There is room to fight excessive fee demands!
- Seek discovery of plaintiff's fee agreement.

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UNILATERAL ADDITION OF ARBITRATION CLAUSE

Canteen v. Charlotte Metro Credit Union

(Decided May 23, 2024)

- Agreement provided that credit union could unilaterally change account agreement on notice to the account holder
- Credit union unilaterally amended contract to add arbitration provision and class action waiver and sent notice that provisions would be effective unless account holder opted out.
- Enforceable or a breach of the covenant of good faith and fair dealing?

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UNILATERAL ADDITION OF ARBITRATION CLAUSE

Canteen v. Charlotte Metro Credit Union

(Decided May 23, 2024)

- "Change-of-terms provisions permit unilateral amendments to a contract so long as the changes reasonably relate back to the universe of terms discussed and anticipated in the original contract."
- BUT—would a different result occur if this was an agreement with an employee as opposed to a mass consumer contract?
- Best to include arbitration clauses in original agreements to avoid disputes re: enforceability.

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Federal Agency Update

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FTC: Non-Compete Ban

- Issued 4/23/24; Effective 9/4/24
- Prohibits future and requires employers to rescind existing non-competes
  - Applies to "workers" (including contractors)
  - Functional view of non-competes may include broad non-disclosure agreements
- Exceptions:
  - Existing agreements for Senior Executives ($151,164 and work in "policy-making position")
  - Agreement ancillary to "bona fide sale."

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FTC: Non-Compete Ban

- Legal challenge: *Ryan, LLC v. FTC (N.D. Tex)*
  - Exceeds authority under FTC Act
  - Unconstitutional delegation of legislative power and insulation from removal by President.
- Decision deadline: July 3, 2024.

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EEOC: PWFA Regulations

- Issued 4/19/24; Effective 6/27/24
- Covered Conditions:
  - Known limitations related to physical/mental conditions arising out of pregnancy (past, current, potential)
  - Including lactation, miscarriage, stillbirth, abortion
- Supporting Documentation
  - Cannot require proof of pregnancy
  - Only when "reasonable under the circumstances"
  - Cannot require use of ADA or FMLA form
  - Cannot require exam by physician chosen by employer
  - Information subject to ADA confidentiality rule

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EEOC: PWFA Regulations

- Reasonable Accommodation
  - Unnecessary delay responding, engaging in interactive process, or providing accommodation actionable
  - Cannot require leave if another reasonable accommodation can be provided
  - Temporary suspension of essential functions if could perform functions "in the near future" (i.e. 40 weeks)
- Undue hardship
  - Same as ADA
  - "significant difficulty or expense" considering nature of accommodation and resources of employer
  - "Cumulative burden" can cut both ways
  - No "direct threat" defense

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EEOC: Harassment Guidance

- Replaces longstanding guidance
- Expansion of the "Workplace"
  - Outside the regular workplace (parties or training)
  - Within the virtual work environment (email, text, etc.)
- Gender identity and sexual orientation
  - Slurs and intrusive questions prohibited
  - "Repeated and intentional" misgendering or denial of bathroom access consistent with gender identity can create hostile work environment

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EEOC: Harassment Guidance

- Code words
  - Facially neutral code words can contribute to a hostile work environment ("you people")
  - Social context can establish causation
- Religion
  - Includes belief or lack of belief, practices, and dress
  - Discussion of religion in workplace not prohibited
  - Unwelcome proselytizing can lead to HWE

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DOL: FLSA Salary Requirements

- Minimum salaries for EAP:
  - 7/1/24: $844 weekly ($43,888 annual)
  - 1/1/24: $1,128 weekly ($58,656 annual)
- Minimum for highly compensated:
  - 7/1/24: $132,964 annual
  - 1/1/24: $151,164 annual

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DOL: Independent Contractors

- Effective 3/11/24
- Economic reality test. Factors:
  - Opportunity for profit/loss depending on managerial skill
  - Investments by the worker and the potential employer
  - Degree of permanence of the work relationship
  - Nature and degree of control
  - Extent to which the work performed is an integral part of the potential employer's business
  - Skill and initiative
- No factor determinative

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DOL: AI and the FLSA

- Issued 4/29/24
- Tracking work time
  - Must pay regardless of productivity
  - AI not determinative of hours worked
  - Location not determinative
- Monitoring break time
  - Beware of systems that predict breaks

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NLRB: Unlawful Work Rules

- *Stericycle*, issued August 2, 2023
- Prohibits rules that have a reasonable tendency to chill employees' exercise of Section 7 rights
- Employer defense if rule advances a legitimate and substantial business interest and unable to advance with more narrowly tailored rule

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OSHA

- Inspections
  - Outside union or other representatives may join investigations
- Heat stress enforcement
  - NIOSH heat exposure standard

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Contact Us With Questions

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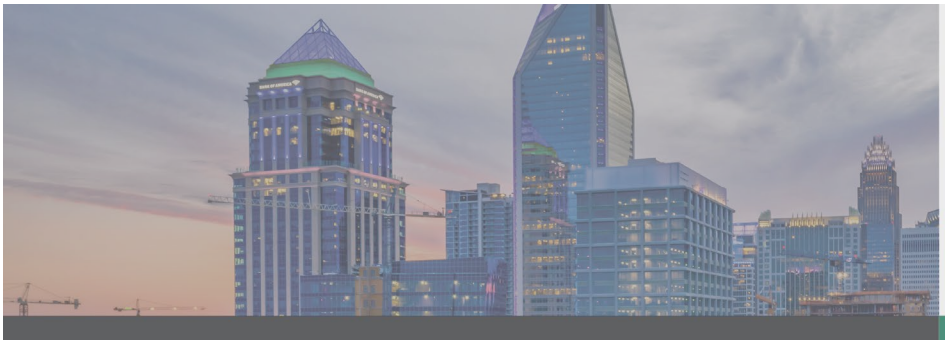

Parker Poe

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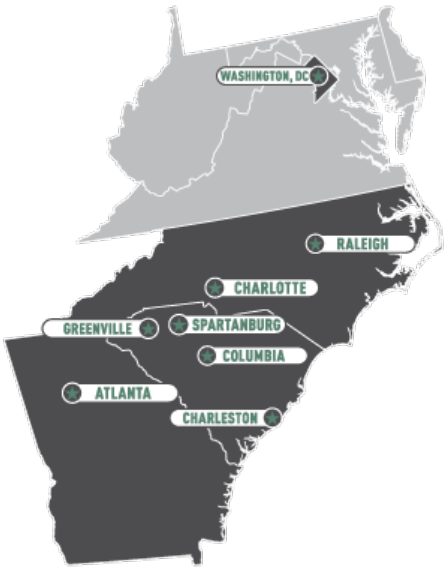
For more than a century, Parker Poe has represented many of the Southeast's largest companies and local governments in transactions, regulatory issues, and complex litigation. Our attorneys have extensive experience representing clients in the education, energy, financial services, government, health care, life sciences, manufacturing, real estate, sports and entertainment, and technology industries. Parker Poe has more than 275 attorneys serving clients from eight offices:



Lawyers in each of our offices are rated among the highest quality attorneys across their respective states, recognized for effective and efficient service. *The Best Lawyers in America* lists over 100 of our attorneys in its rankings, and we are also well-recognized by *U.S. News & World Report, Chambers USA,* and other ratings publications.

Quality Service

Service satisfaction research by Altman Weil and BTI identifies Parker Poe among the leaders in client satisfaction and loyalty. For 2023, Parker Poe was named to the BTI Client Service A-Team, which is the gold standard used by law firms and corporate counsel to measure client service. Parker Poe has received that recognition 14 of the past 15 years.

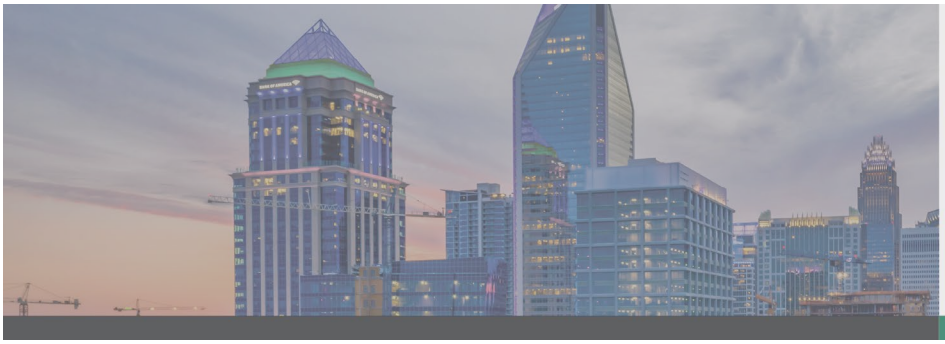
Ongoing, independent surveys of the largest clients of Parker Poe find service satisfaction scores average higher than 9.0 on a 10-point scale. These surveys of nearly 20 top clients have found that every study participant values Parker Poe's service and attorneys, would recommend Parker Poe, and would consider our firm for service in additional legal areas.

Civic Engagement

Community service is ingrained in our culture at Parker Poe. Our lawyers have served as mayors, city attorneys, state legislators, and Supreme Court justices. They have served on boards of universities and K-12 schools. They have been elected as presidents of the state bar and state and local bar associations. Members of our firm – lawyers and business professionals – have also been deeply involved in charitable and arts organizations. These commitments are part of how we seek a better future for our clients, our community, and each other.

Diversity, Equity & Inclusion

Parker Poe is building on initiatives to advance diversity, equity, and inclusion (DEI) among our personnel, developing a pipeline for minority students interested in the legal profession, and collaborating with clients and local organizations who share our commitment to giving everyone a voice at the table. Here are some of the concrete ways we are promoting DEI within our firm and our communities in the Southeast:

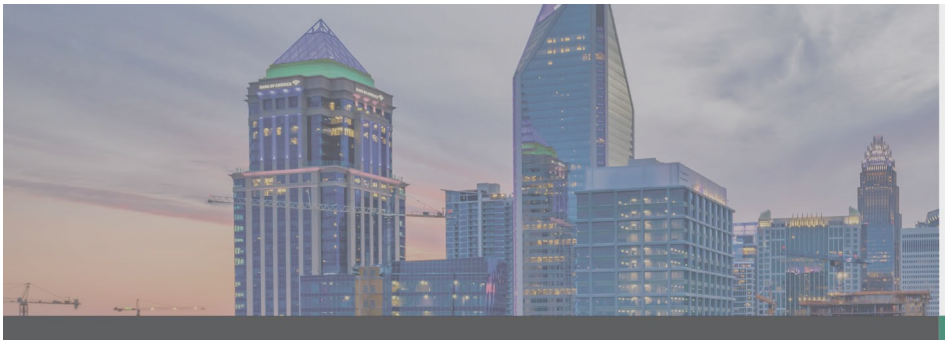


- We achieved nationally recognized Mansfield Certification from Diversity Lab. The certification process gave us tools to measure steps we were already taking to advance DEI, and it identified additional steps we could incorporate to increase and sustain DEI at every level of the firm.
- We are a founding member of the Carolinas Social Impact Initiative, a coalition of 24 law firms working to reduce systemic barriers to social and economic mobility in the Carolinas.
- We fund a Parker Poe Scholars Program at Johnson C. Smith University (JCSU), a historically Black university in Charlotte, North Carolina. We cover the cost of tuition, fees, and room and board for one student per academic year and mentor that student as well.
- We have hosted the THRIVE program since 2007, which helps minority students navigate law school, make a successful transition into the practice of law after graduation, and thrive as they pursue the different paths a legal career may take. More than 800 students have attended since the program's inception.

International Scope

Forty years ago, Parker Poe was the first Carolinas-based firm with a dedicated international practice group. The practice was an outgrowth of our firm's service to companies based in Germany. Today, our international practice represents clients based across Europe and Asia, as well as in Africa, Australia, and Latin America. Parker Poe is also a member of two leading international legal networks: TerraLex and the Employment Law Alliance. TerraLex and the ELA have chosen Parker Poe to help guide clients through the challenges of global business.

For more information, please visit ParkerPoe.com.



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Keith Weddington has been representing employers for more than 30 years and has defended Fortune 500 and middle-market companies in a broad array of disputes with employees and former employees. Named a *Best Lawyers* "Lawyer of the Year" in Charlotte four times for employment law or litigation, he is a go-to attorney for clients' most sensitive and potentially high-profile employment disputes. Whether the case requires resolute and intensive litigation or delicate negotiations to achieve a favorable resolution, Keith provides results-oriented solutions to achieve clients' objectives.

"My experience with him has been fantastic," one of his clients told *Chambers USA*, which develops rankings using in-depth interviews and objective research. "He is incredibly responsive and provides very practical advice."

In addition to defending U.S. and international employers in discrimination, harassment, retaliation, wrongful discharge, wage and hour, FMLA/ADA, and ERISA matters, he brings his more than 30 years of experience to bear in advising employers on strategic employment practices, human resources policies, and the continuum of employment compliance issues.

Tory I. Summey

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Tory Summey focuses on employment counseling and litigation. On the counseling front, he helps employers navigate complex and ever-changing federal and state laws and regulations that govern the modern employment relationship. Tory assists clients with day-to-day issues such as recruiting and hiring, accommodation requests, discipline and corrective action, and terminations. He helps clients to implement practical policies that comply with applicable law and to find creative solutions to challenging situations in the workplace. Tory regularly represents employers in various industries, including higher education, manufacturing, local government, and health care.

On the litigation front, Tory helps clients understand the risks and benefits of litigation while aggressively pursuing each client's best interests. He has experience at the trial and appellate levels of state and federal courts, including the North Carolina Business Court, the N.C. Court of Appeals, the N.C. Supreme Court, and the U.S. Court of Appeals for the Fourth Circuit. Tory has defended numerous clients from lawsuits relating to alleged discrimination and retaliation and also pursued relief for his clients on various complex issues such as misappropriation of trade secrets or unfair and deceptive trade practices. Tory also represents clients in proceedings before the Equal Employment Opportunity Commission (EEOC) and the N.C. Department of Labor.