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DISABILITY DISCRIMINATION

Miami judge rules that Winn-Dixie's website violates ADA

by Tom Harper
The Law and Mediation Offices of G. Thomas Harper, LLC

After a bench trial in Miami, U.S. District Judge Robert N. Scola, Jr., entered an order on June 12, 2017, in which he found that Winn-Dixie's website violated the Americans with Disabilities Act (ADA) because it wasn't accessible to a vision-impaired customer. For years, disabled individuals have been visiting Florida retailers and filing lawsuits over ADA accessibility violations. In light of Judge Scola's recent ruling, this may be the next big line of attack against employers in Florida.

Facts

Juan Carlos Gil, a longtime Miami resident, attended the Florida School for the Deaf and Blind in St. Augustine, graduating in 2002. Gil, who has cerebral palsy and is legally blind, currently lives in southwest Miami near one of Winn-Dixie's stores.

While he was in school in St. Augustine, Gil visited a Winn-Dixie with a group of students taking part in a vending program to learn how to buy products for the vending business. Back in Miami, he began shopping at a nearby Winn-Dixie because of its low prices and convenience to his home. Since he shopped at Winn-Dixie for groceries and used its pharmacy, he signed up for the rewards program.

Gil learned from Winn-Dixie ads on TV that he could access coupons and fill prescriptions online. Friends in several organizations for the blind told him that Winn-Dixie's website was accessible to the visually impaired. Gil is able to use a computer but cannot read the screen. He can't use a mouse, but he can use a keyboard. His computer has special software designed to assist him in navigating websites, Job Access with Speech (JAWS).

Gil told Judge Scola that he uses the "Tab" key or the "Shift + Tab" keys to learn what he needs to type in to use a website. He claimed that when he accessed Winn-Dixie's website, hitting "Tab" sometimes worked, but 90 percent of the time, it did not. The court summarized his testimony as follows:

> Once you enter the website, you usually hit tab until you find a combo box[,] like a box announcing "store hours" or "pharmacy." When the website is interfacing properly with the JAWS [program], you would then press enter and that would take you into the specific [subcategory]. But, when [Gil] tabbed through the website[,] he could not access any of the [subcategories]. He spent about a half an hour on the website but was not able to access any information[,] including [the] store locator. On other websites, he has been able

> to access store locations. [When you press "Control + S,"] most websites take you to a search box in which you can type the specific information you are looking for. But this was not available on the Winn-Dixie website.

Gil was frustrated that the website didn't work with JAWS. He believed that he didn't have access to money-saving coupons and couldn't order his prescriptions online. He testified that when he went into the pharmacy area of the store and asked questions about his prescriptions, he was uneasy because he didn't know who was around, listening to his conversation.

Gil sued Winn-Dixie, claiming its website is a public accommodation and the company denied him goods and services based on his disability in violation of the ADA. After a nonjury trial with just three witnesses, all of whom were deemed credible and forthcoming, Judge Scola agreed with him.

Court's decision

In reaching his decision, Judge Scola acknowledged this issue hasn't been decided by the federal appeals court with jurisdiction over Florida. He also pointed out that there is currently no federal organization that "mandates [the] particulars of website accessibility." Instead, a consortium of private groups has contributed to the Web Content Accessibility Guidelines [WCAG] in at attempt to make websites accessible to everyone. The court noted that the WCAG "had virtually [if not officially] been adopted" by the federal government in January of this year when the United States Access Board refreshed its comments on Section 508 of the Rehabilitation Act.

Rodney Cornwell, vice president of IT, application, and delivery for Winn-Dixie, told Judge Scola that the company was building an ADA policy but didn't have one at the time of the trial. He admitted that he thought it was feasible for the website to be modified, and the company was taking steps to make it accessible to the disabled. He explained that the company had set aside $250,000 to make its website accessible to screen reader software. Chris Keroack, an expert on website accessibility, testified that he believed his firm could update and make Winn-Dixie's site accessible for $37,000.

Winn-Dixie operates 495 stores throughout the Southeast. There was no dispute in this case over the fact that Gil is disabled or that Winn-Dixie's physical store locations are places of public accommodation. Title III of the ADA prohibits a place of public accommodation from discriminating by denying a person with a disability the full enjoyment of its goods and services. The testimony revealed that Winn-Dixie doesn't sell products through its website, but a customer can access digital coupons and link them to his rewards card so he is automatically credited with the coupons' value when he purchases items at a store.

One issue before the court was whether Winn-Dixie's website is subject to the ADA as a service of a public accommodation or as a public accommodation itself. The court reasoned that because Winn-Dixie's website is "heavily integrated" with the physical store locations, it operates as a "gateway" to the stores. As a result, the website is a service of a public accommodation covered by the ADA.

Finally, the court found that the website modifications Gil requested were reasonable. The court noted that Winn-Dixie presented no evidence at trial to show that it would be unduly burdensome to make the website accessible to the visually impaired.

Having found that Winn-Dixie violated Title III of the ADA, the court turned to the remedy. Prevailing parties under Title III are not entitled to recover damages but may recover attorneys' fees, court costs, and injunctive relief. Judge Scola asked the parties to try to agree on an amount that Winn-Dixie should pay Gil's lawyers as a reasonable fee for prevailing on the lawsuit. He gave the parties time to propose language for an injunction. The injunction will set a date by which the company must modify its website to make it accessible to the visually impaired. *Juan Carlos Gil v. Winn-Dixie Stores, Inc.*, Case No. 16-23020-Civ-Scola (S.D. Fla., June 12, 2017).

Takeaway

This decision opens the door to the next big wave of lawsuits attacking businesses for not being accessible to disabled people. Florida businesses whose websites are connected with a physical store location should study the case to decide if their websites are covered by the ADA. (Send an e-mail to tom@employmentlawflorida.com for a copy.) If you decide the ADA is applicable, you should have your IT people make your website accessible.

You may contact the author at tom@employmentlawflorida.com. ✤

ASK ANDY

The interplay between FMLA leave and domestic violence leave

by Andy Rodman
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.

Q *A longtime employee needs time off to deal with a domestic violence issue. Should we count the domestic violence leave against her entitlement to 12 weeks of leave under the Family and Medical Leave Act (FMLA)?*

A It depends. Before I explain further, however, here's a quick recap of Florida's domestic violence leave law. Under Fla. Stat. § 741.313, employers with at least 50 employees must permit an eligible employee who has been employed for at least three months to take up to three days of leave in any 12-month period if the employee, or a family or household member of the employee, is the victim of domestic or sexual violence and if the leave is taken to:

- Seek an injunction;
- Obtain medical care or mental health counseling;
- Seek services from a victim services organization, such as a domestic violence shelter or a rape crisis center;
- Secure the employee's home or seek new housing to escape the perpetrator; or
- Seek legal help or prepare for and attend court-related proceedings.

Some local laws also address domestic violence leave. For example, under a Miami-Dade ordinance (§ 11A-60, *et seq.*), covered employers (those with 50 or more employees working in Miami-Dade during 20 or more calendar weeks in the current or preceding calendar year) must provide eligible employees (workers employed in the county for at least 90 days and for at least 308 hours during the previous 90 days) up to 30 days of unpaid leave during any 12-month period to:

- Obtain medical or dental treatment as a result of domestic violence (including treatment for dependent children);
- Obtain and receive legal assistance related to domestic violence;
- Attend court appearances related to domestic violence;
- Attend counseling or support services (including services for dependent children); or
- Make other arrangements to provide for their safety.

Given the circumstances under which domestic violence leave may be taken, it may sometimes run concurrently with FMLA leave (assuming, of course, that the employee is eligible for FMLA leave). For example, if the domestic violence results in an FMLA-qualifying "serious health condition" for the employee (or the employee's child) and the employee needs time off to obtain medical treatment, she may qualify for both domestic violence leave and FMLA leave, and the leaves may run concurrently. But if there is no FMLA-qualifying serious health condition (i.e., the employee doesn't need to seek medical or mental health treatment), then there is no FMLA issue, and the domestic violence leave may not be "charged" against any available FMLA leave.

Also, even if the domestic violence results in an FMLA-qualifying serious health condition, the domestic violence leave must be provided under Florida law even if the employee isn't eligible for FMLA leave or has exhausted all of her FMLA leave. The same holds true under the Miami-Dade ordinance.

Employers should have policies governing leave for domestic violence. Moreover, staff members responsible for addressing employee leave requests should be trained on the ins and outs of any federal, state, and local laws that are potentially triggered by incidents of domestic and sexual violence. (For more information on Florida's domestic violence leave law, see "Under the radar: Are you aware of your duties under FL's Domestic Violence Leave Act?" on pg. 4 of our February 2017 issue.)

Andy Rodman is a shareholder and director at the Miami office of Stearns Weaver Miller. If you have a question or issue that you would like Andy to address, e-mail arodman@stearnsweaver.com or call him at 305-789-3255.

Your identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

LEGISLATIVE UPDATE

Florida's 2017 legislative session closes with few changes to employment law

by Jeffrey D. Slanker
Sniffen & Spellman, P.A.

Florida's 2017 regular legislative session and the special session have come to a close in Tallahasse. Ultimately, out of the approximately 1,900 bills filed in the Florida House and Senate, only 234 bills were passed by both chambers. As usual, many of the bills that were being considered by lawmakers could have altered the labor and employment landscape in Florida, but very few of them passed.

Indeed, as in years past, one proposal would've expanded the protections under state antidiscrimination laws for individuals based on their sexual orientation and gender identity. Senate Bill (SB) 666/House Bill (HB) 623 would have made sexual orientation and gender identity a protected class under the Florida Civil Rights Act and would have prohibited discrimination on that basis in employment, housing, restaurants, or other public facilities. The bill did not pass.

Ultimately, very few employment-related bills passed. Some overarching moves, including tax changes for businesses, will have an impact on employers. This article highlights some of the legislation that Florida employers should be aware of.

Notable bills

Medical marijuana. The effect of medical marijuana in the workplace has been a hot topic since Florida voters approved a constitutional amendment to legalize it throughout the state. We have written about this topic numerous times in the past, but the legal and regulatory issues surrounding medical marijuana in the workplace continue to change.

The Florida Department of Health (FDH) was initially tasked with developing regulations to implement the constitutional amendment approving the use of medical marijuana in Florida. This spring, the FDH held question-and-answer sessions throughout the state seeking input on its proposed rules. Significantly for employers, the amendment itself provides that on-site medical marijuana use doesn't have to be accommodated by employers.

Ultimately, the house and senate failed to pass a bill addressing medical marijuana during the regular legislative session. However, **SB 8A,** passed during the special session and signed by the governor on June 14, implements the constitutional amendment permitting the use of medical marijuana by patients with certain debilitating conditions.

The bill defines who may use medical marijuana and under what circumstances, and sets out the requirements patients must satisfy to receive a prescription for medical marijuana. It also defines the training requirements for physicians and delineates when a physician can prescribe medical marijuana. On the business side, SB 8A sets forth the requirements for medical marijuana growers and cultivators. It gives the FDH the authority to issue licenses for such businesses and ties the licenses to the number of prescriptions issued.

From an employment perspective, not much has changed since the constitutional amendment was approved. Employers still need not accommodate medical marijuana use at work, but dealing with an employee who legally uses medical marijuana outside of work remains tricky. Restricting an employee's use of medical marijuana or making employment decisions based on such drug use isn't forbidden under federal law because marijuana use is still a federal crime. However, it's unclear how Florida courts will adjudicate that issue or address the intersection of employees' medical marijuana use and employers' mandatory drug-testing policies.

Nevertheless, medical marijuana is here to stay in Florida. You should be thinking about how to confront any issues in your workplace and work with your employment counsel to iron out your policies and procedures in light of this new reality.

Contractors hired by cities and counties. Under **SB 534/HB 599,** contractors on projects that receive at least 50 percent of their funding from the state cannot be required by a city or county to provide their employees benefits or wages that comply with wages and benefits mandated under local ordinances. HB 99 was signed by the governor on June 14.

What now?

Employers affected by any of these bills should consider whether to revise certain policies—or implement new policies—to comply with the changes to the law. You should also consider your unique circumstances and determine if any other bills passed this session will

affect the way you do business. Work with your employment counsel, insurance providers, and staff to make sure you're in the best position to continue operating in compliance with the law.

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SEX DISCRIMINATION

Landmark ruling boosts protection against sexual orientation discrimination

Federal law prohibits employers from discriminating against employees on the basis of their sexual orientation, a federal appeals court recently ruled for the first time. With this landmark ruling, the U.S. 7th Circuit Court of Appeals upended three decades of precedent and likely set the issue up for review by the U.S. Supreme Court. The decision applies only in Illinois, Indiana, and Wisconsin, but its effect reaches far beyond those three states. Some observers suggest the ruling, when combined with the position of the Equal Employment Opportunity Commission (EEOC) on the issue, means employers everywhere should ensure they don't discriminate based on sexual orientation.

Facts

In 2000, Kimberly Hively, who is openly lesbian, began teaching at Ivy Tech Community College as a part-time adjunct professor. She applied for six full-time positions from 2009 to 2014 without receiving an interview, and her part-time adjunct contract wasn't renewed in July 2014. She filed an EEOC charge and a lawsuit against Ivy Tech claiming she was "denied full[-] time employment and promotions based on sexual orientation" in violation of Title VII of the Civil Rights Act of 1964. The district court dismissed the complaint on grounds that Title VII didn't apply to sexual orientation discrimination claims. Hively appealed.

A three-judge panel of the 7th Circuit upheld the dismissal. In its decision, however, the panel engaged in a thorough analysis of the state of sexual orientation discrimination law. Although the panel affirmed the dismissal, it clearly signaled that it did so because it felt bound by the 7th Circuit's prior decisions. The panel called for additional guidance from the U.S. Supreme Court. Instead, the judges' 7th Circuit colleagues answered their call.

'Time has come to overrule our previous cases'

On April 4, 2017, the full court of appeals overturned the three-judge panel's 2016 decision, explaining: "Any discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner . . . is a reason purely and simply based on sex. That means that it falls within Title VII's prohibition against sex discrimination." The ruling comports with the EEOC's view. In 2015, the agency indicated for the first time that sexual orientation discrimination was included in Title VII's ban on sex discrimination.

While acknowledging that the Supreme Court has never expressly addressed the issue, the majority asserted that its conclusion is buttressed by two Court decisions interpreting Title VII:

- *Price Waterhouse v. Hopkins,* which held that gender stereotyping falls within the statutory ban on sex discrimination; and
- *Oncale v. Sundowner Offshore Services, Inc.*, which held that Title VII prohibits sexual harassment inflicted on a man by another man.

Extrapolating from those decisions, the majority concluded: "The logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade[s] us that the time has come to overrule our previous cases that have endeavored to find and observe that line."

Supreme Court showdown

In March, the 11th Circuit (covering Alabama, Florida, and Georgia) reached the opposite conclusion in a case alleging sexual orientation discrimination. Given the split in the federal circuits, it's almost certain that this issue will be addressed sooner rather than later by the Supreme Court. That could make the recent appointment and swearing in of Neil Gorsuch as the ninth justice on the Court all the more important in how the issue of sexual orientation discrimination under Title VII is ultimately decided. You will want to watch what happens with these cases.

How employers can avoid being 'test case'

With the EEOC already taking the position that Title VII prohibits sexual orientation discrimination, employers across the country will want to pay close attention to the developments. As a matter of fact, the 7th Circuit's expansion of Title VII won't require major changes to many employers' policies and practices. Both Illinois and Wisconsin already have state laws that prohibit employment discrimination on the basis of sexual orientation. And in Indiana, most major municipalities have already prohibited sexual orientation discrimination by local ordinance, which is becoming the norm for cities across the country. Nevertheless, the decision is a good reminder to check to see whether your policies and practices are working as well as they should.

Consider adding "sexual orientation" to your policies as an example of prohibited sex discrimination. Also, consider adding sexual orientation to your sexual harassment training materials. An ounce of prevention now could help your organization avoid being sued.

Learn what you should do in light of the 7th Circuit's ruling by listening to the webinar "New LGBT/Sexual Orientation Protections under Title VII: HR's Roadmap for Ensuring Compliant Policies and Practices." For more information, visit http://store.HRhero.com/lgbt-sexual-orientation-protection-050317-on-demand. ✤

EMPLOYEE BENEFITS

Trump's parental leave plan likely will leave employers footing bill

President Donald Trump's latest budget proposal calls for six weeks' paid leave for new parents. And while the employee wage replacement that comes with the leave would be paid out by states, experts say states will have to draw at least some of the funding from businesses.

The program likely would lead to a significant tax on employers in the form of increased unemployment insurance (UI) taxes, according to Lisa Horn, director of congressional affairs for the Society for Human Resource Management (SHRM).

Who gets leave?

An earlier Trump paid parental leave proposal made during his campaign appeared to exclude fathers, adoptive parents, and same-sex partners. The new proposal contains few details about eligibility, but it does say the leave would be available to new mothers and fathers, including adoptive parents. It goes on, however, to say that it would ensure "all families" can afford to take time to recover from childbirth and bond with a new child without worrying about paying their bills.

The proposal doesn't set out any other eligibility requirements, such as job tenure (like the Family and Medical Leave Act (FMLA) does), full-time employment status, or an income ceiling. It also doesn't say whether the law would include job protection for employees who seek parental leave or whether states would have to provide at least a certain percentage of income replacement. Those details may be left to Congress (because this plan would require new federal legislation) or individual states.

Several states already have programs with some similar features, but they were created through existing temporary disability insurance programs and were funded by employee payroll taxes. The programs generally offer between 55 percent and 66 percent of an employee's pay, subject to a cap.

And who pays?

According to Trump's proposal, the program would use the UI system as a base, and expenses would be offset by reforms to that system. Those changes include reducing improper payments, helping unemployed workers find jobs more quickly, and—most notably—encouraging states "to maintain reserves in their Unemployment Trust Fund accounts."

The problem with that third item is that according to the U.S. Department of Labor (DOL), many states depleted those trust funds during the recession. By the beginning of 2017, only 21 states had reached the "minimal level of adequate solvency," according to the DOL's *State Unemployment Insurance Trust Fund Solvency Report 2017.*

To resolve that issue, the administration would require states to increase their UI payroll taxes, according to the Committee for a Responsible Federal Budget. And in most states, those taxes are paid solely by employers.

Horn agreed with that assessment. "You can easily get to a scenario where this is going to lead to a significant tax increase on employers."

There are also concerns with intertwining parental leave and UI. "This is a serious departure from the original intent of and purpose of the UI system," whose purpose is to provide wage replacement to involuntarily unemployed workers, Horn said. Claimants must be able, available, and willing to work; with someone taking parental leave, that's not necessarily the case. Adding leave takers to the claimant pool jeopardizes benefits for the unemployed, she said.

Reactions

Trump's plan has received little praise from either side of the aisle. Democrats in Congress say it doesn't go far enough. Republican lawmakers say that while providing assistance to working parents is a "worthy endeavor," they're concerned with the costs and about adding more federal mandates for employers.

The National Partnership for Women & Families, responding to the proposal, voiced support for the Family and Medical Insurance Leave Act instead. That bill that would provide 12 weeks' paid leave for a variety of reasons. Wages would be replaced at 66 percent and would be funded through both employee and employer contributions.

And SHRM has its own proposal: a federal law that would allow employers to opt into a nationwide leave program and in turn receive permission to opt out of state and local requirements. If employers choose to opt into the federal program, SHRM says they would no longer be subject to state and local leave laws and could be exempt from emerging legislative initiatives like predictable scheduling. ✤

WORKPLACE ISSUES

With HR's help, employee network groups can improve retention

From the employer's perspective, employee network groups can boost engagement and retention—or they can create divisiveness. To ensure the former, employers need to be involved from the start.

By adopting a policy and welcoming network groups, businesses can encourage members to have positive effects in the workplace, according to Ray Friedman, a professor of management at Vanderbilt University's Owen Graduate School of Management. Friedman offered tips on policies and best practices during a recent presentation at the 2017 Employers Counsel Network (ECN) Conference in Nashville, Tennessee. The editors of Florida Employment Law Letter are members of ECN, a network of lawyers from all 50 states, Washington, D.C., and Canada who write BLR's state employment law newsletters.

One or many groups?

When adopting a network group policy, employers often wonder whether to sanction one all-encompassing "diversity group" or allow workers to create individual groups based on different identities.

The clear winner, according to Friedman's research, is smaller, individual groups. One of the things that determines a group's success—which he defines as helping employees to feel more comfortable and be more effective at work—is how strongly workers identify with the group. This applies regardless of whether a group is based on gender, religion, or ethnicity, for example. If an individual doesn't strongly identify with the group's identity, neither the employee nor the employer will reap the potential benefits.

Encouraging membership and leadership

Some employers assume that network groups form because employees are dissatisfied at work, and they fear the groups will become confrontational. But that's not what Friedman's research has shown. Membership is driven by social identity and a desire for career enhancement, he determined. Groups provide mentoring and help employees feel included. They improve retention, and employees who participate have better "career optimism."

But for that to happen, an employer must signal that it views participation and leadership in network groups in a positive light. It's especially important to encourage management-level employees to join, Friedman said. Reduced turnover is linked to groups that have management in leadership positions. And "career optimism" is found when employees receive mentoring from group leaders.

Conversely, when a business reacts negatively to a network group, ambitious employees don't join, and the employer's assumptions create a self-fulfilling prophecy. "So a bit of this is under your control," Friedman said.

Benefits for employers

In addition to improved engagement and reduced turnover, network groups have other benefits for employers.

First, they can help a business achieve its affirmative action or diversity goals. It's not enough to hire minorities, Friedman said. The key is moving them up in the organization, and network groups can make that very simple. They allow workers to make high-level contacts and help management identify potential candidates.

Network groups also can serve as a mechanism for management to find out about problems in the workplace. But the company must be ready to respond to any concerns that members raise. According to Friedman, "If they're going to bring up issues, you'd better be able and willing to address them."

Employers also may find that employees in network groups end up with new skills that can be applied at

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work. Members often develop leadership skills and learn how to run meetings and give presentations.

Adopting a policy

When adopting a policy on employee network groups, an employer has several decisions to make, Friedman said. For example:

- Will you police the types of groups that form? Will you allow religious groups?
- If you do allow religious groups, will you require that they have a business purpose, such as professional development? Will you require that they refrain from proselytizing? If so, how will you monitor that?
- Will you prohibit groups from participating in political, commercial, or religious activities or from opposing any of the other approved groups? And again, how will you police that?
- Will you maintain two separate group categories? (These could be "recognized organizations" that support diversity and receive company funding and "special interest organizations" for social, recreational, religious, or educational issues, which receive no funding.)

And don't be afraid to ask for more information when you receive a network group proposal, Friedman said. For example: Who are they? Why are they forming? What will they do? You may not be able to anticipate every request, but with a solid policy and some follow-up questions, you should be able to set your network groups up for success. ✤

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