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DISABILITY DISCRIMINATION

Disability bias verdict provides 4.5M reasons to check your policies

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

A recent case from Central Florida highlights the importance of maintaining and properly implementing updated and compliant equal employment opportunity and antidiscrimination policies. The case involved disability discrimination claims, and a jury ultimately found in favor of the employee and rendered a $4.5 million verdict. The case is a reminder of the importance of complying with employment discrimination laws and the need to take extra caution when determining whether a termination is justified.

Facts

Fields Motorcars of Florida is an auto dealer in Central Florida. Michael Axel worked for Fields for about 10 years. During his employment, he was never disciplined. In fact, he was commended and received awards for his performance.

During his tenure at Fields, Axel was diagnosed with kidney cancer. He received treatment, including having a kidney removed, and he eventually returned to work. Upon his return, he was able to perform all his duties, including his essential responsibilities. He claimed he was very productive after his return to work, but he was passed over for promotions. Ultimately, Fields demoted and then discharged Axel for failing to follow company policy.

Fields terminated Axel after a vice president and general manager alleged he forged a document when he first started working for the company. However, Fields did not perform an independent investigation or speak with Axel prior to terminating him. Axel claimed that the letter was not forged, management authorized him to execute the document, and he did nothing wrong.

Ultimately, Axel sued the employer, alleging his termination was motivated by discriminatory animus. Specifically, he claimed Fields terminated him because of his age. He was older than 40 at the time of his termination, and thus, he was protected under age discrimination laws. Axel also alleged that he was terminated because he suffered from kidney cancer and had to take time off to undergo treatment. He contended that the reason provided by Fields for his termination was not the true reason but rather an excuse to engage in discrimination. A jury agreed.

The verdict

The jury did not believe that Axel was discriminated against because of his age, but it did believe that he was discriminated against because of his disability—i.e., kidney cancer. He filed his disability discrimination claim under the Florida Civil Rights Act, the state law prohibiting discrimination in

employment. The Act provides a host of damages to employees who have been discriminated against.

The jury ultimately awarded Axel $4.5 million: $680,000 in lost wages and damages, $600,000 for emotional pain and suffering, and $3,220,220 in punitive damages (i.e., damages designed to punish an employer for wrongdoing). Attorneys' fees and costs, which are typically awarded to prevailing employees, were not included in the verdict. *Axel v. Fields Motorcars of Florida, Inc.*, No. 8:15-cv-893-17JSS (M.D. Fla., Feb. 22, 2017).

The reason for taking action against an employee should be well documented.

How do you avoid this outcome and account for risk?

Disability discrimination occurs when an employee who has a qualifying disability and is qualified to perform his job is treated differently by the employer in some way, shape, or form and suffers harm. Obviously, terminations, suspensions, and demotions are types of actionable conduct employees can seek redress for if the actions are taken because of discrimination against a protected class. Employers always have the ability to respond to discrimination claims by putting forth a legitimate reason for the challenged action. However, the reason must be solid and nondiscriminatory.

There are many ways to ensure your reason is sufficient. The reason for taking action against an employee (e.g., a reason for terminating him) should be well documented. The reason should merit termination (or whatever action is taken). It should be a reason that led you to issue discipline to or take action against other employees in the past. At the very least, take extra caution if other employees committed the same or similar offenses but were not disciplined in the same manner. Finally, investigate and determine whether allegations of misconduct or performance deficiencies are true and accurate. Doing those things can go a long way toward putting your company in the best position to defend against discrimination claims.

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COMPENSATION

Don't get tripped up: Learn rules of the road on compensability of travel time

by Lisa Berg
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The law on whether the time nonexempt employees spend traveling is compensable is confusing and often trips up employers. This article is designed to explain the rules and provide guidance on how to pay for a nonexempt employee's travel time under federal law.

Background

The Fair Labor Standards Act (FLSA) is the federal statute that regulates wage and hour law. The Act requires employers to compensate nonexempt employees by paying the federal minimum wage for all hours worked and paying overtime at 1½ times their regular hourly rate for all hours worked over 40 in a workweek.

Employees must be paid for all hours worked in a workday, from the first principal activity to the last principal activity. A "principal activity" includes any activity that is an integral and indispensable part of an employee's work.

Commuting time

The most basic type of travel time is home-to-work travel and work-to-home travel, generally known as "commuting time." Under the FLSA, as amended by the Portal-to-Portal Act of 1947, the time employees spend commuting is not compensable. Similarly, the time employees spend commuting in an employer-provided vehicle generally is not considered hours worked as long as:

- The vehicle is a type of vehicle that is normally used for commuting.
- The employee is able to use her normal route for the commute.
- The employee does not incur additional costs by using the company vehicle.

- The home-to-work and work-to-home travel is in the company's normal commuting area.
- The use of the vehicle is subject to an agreement between the company and the employee.

In addition, time spent commuting from home to an alternate work location that is within reasonable proximity to the employer's office is not considered hours worked. However, if the alternate work location is not within reasonable proximity to the employee's home and the travel requires additional time, effort, or cost, the time may be considered hours worked.

Caution: What if you have a nonexempt employee who telecommutes and begins her workday by responding to e-mails for an hour and then is required to report to the office for a monthly meeting? In that scenario, the time spent traveling to and from the office likely would be compensable.

Overnight travel

Travel that keeps an employee away from home overnight is considered "travel away from home" and is compensable only if it "cuts across" (i.e., falls within or overlaps with) her normal work schedule. For overnight travel, the employee is deemed to be simply substituting travel for her other duties. In that situation, travel time is not only hours worked on regular workdays during normal work hours but also time spent traveling during corresponding hours on nonwork days (e.g., during the weekend). Travel time also includes any time an employee spends making phone calls, sending e-mails, navigating, or completing work while she is a passenger, even if it is outside normal work hours.

For example, if an employee who regularly works from 9:00 a.m. to 5:00 p.m. Monday through Friday is required to travel on Saturday between those hours, the travel hours are considered hours worked. The following situations are not considered compensable time: travel as a passenger outside of regular work hours, travel to and from an airport, travel to and from a train or bus station, regular meal times, and off-duty time (including sleeping in employer-furnished facilities).

There is a caveat for transportation choices. If an employee is not offered the option of using public transportation and is required to drive himself to a distant location, the entire time spent driving is compensable. However, if the employee is offered the option of using public transportation and chooses to drive himself to a distant location, the employer can count the actual time spent driving or the hours that overlap with his regular work hours as compensable work time.

One-day travel

If an employee who regularly works at a fixed location in one city is given a special one-day assignment in another city that requires him to travel to another city outside the normal commuting area and he returns home the same day, all of the time is considered hours worked, even travel that is outside his normal work hours. The employee is traveling for the employer's benefit at the employer's request. Thus, he must be paid for his time.

For example, Bob works in Miami, and his regular work hours are 9:00 a.m. to 5:00 p.m. He is given a special assignment in Orlando (three hours away). He leaves Miami at 7:00 a.m., works until 4:00 p.m., and returns to Miami at 8:00 p.m. Bob's actual work hours are 11:00 a.m. to 4:00 p.m., but his compensable work hours are 7:00 a.m. to 8:00 p.m.

However, an employer may deduct the time an employee would have spent on her normal commute to work and regular meal breaks from her paid travel time. For example, an employee who regularly spends 30 minutes commuting, takes a three-hour train ride for a one-day trip to another city during her regular work hours, and performs no work on the train must be compensated for the 2½ hours that are not part of her regular commute.

Other types of travel

One exception to the general rule that ordinary home-to-work travel is not compensable is an emergency call-back situation. Under the "Emergency Home to Work" rule, if an employee who has gone home after completing his day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for a customer, all time spent on such travel is working time.

Time employees spend traveling as part of their principal activities must be counted as hours worked and is compensable. For example, time spent traveling between jobsites or traveling from a central reporting site (e.g., to pick up equipment, supplies, coworkers, or instructions) to a first jobsite and working while traveling (even as a passenger) must be paid.

If an employee performs work while traveling, the time is compensable, regardless of when the travel occurs. Thus, an employee who performs research on her laptop while on an airplane outside her regular work hours must be compensated for the time.

Employer takeaway

The federal rules regarding travel time are confusing, and the outcome depends on when the travel occurs, the purpose of the travel, and whether employees perform any work-related activities while in transit. Even the most experienced HR professionals can be tripped up by the rules, so it's advisable to consult with an experienced employment law attorney to ensure your travel time policy is compliant with federal and state law.

Finally, note that the travel time rules apply only to nonexempt employees. Exempt employees are paid a salary regardless of how many hours they work, so calculating travel time is unnecessary.

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LITIGATION

Court announces new burden of proof in Title VII, FL Civil Rights Act retaliation claims

by Tom Harper
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The Florida 4th District Court of Appeals (4th DCA) has recently changed the burden of proof in retaliation cases litigated in state court in Florida. The 4th DCA adopted the federal standard set by the U.S. Supreme Court in 2013 for retaliation claims under Title VII of the Civil Rights Act of 1964.

History

In the 2004 case *Guess v. City of Miramar,* the Florida 4th DCA described the burden of proof in retaliation claims filed under Title VII:

> To establish a *prima facie* [minimally sufficient] claim for retaliation under Title VII, a plaintiff must demonstrate: (1) he engaged in statutorily protected activity; (2) he suffered an adverse employment action; and (3) there is a causal relation between the two events.

The court went on to state that the causal link requirement must be construed broadly: "A plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." Once a *prima facie* case is established, the employer must offer a legitimate nonretaliatory reason for the adverse employment action. The employee bears the ultimate burden of proving, by a preponderance of the evidence, that the reason provided by the employer is a pretext (excuse) for prohibited retaliatory conduct.

New standard

In 2013, the U.S. Supreme Court changed the causation standard for Title VII retaliation claims in *University of Texas Southwestern Medical Center v. Nassar.* In that case, the Court held, "The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim . . . must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." The Court continued, "Title VII retaliation claims must be proved according to traditional principles of but-for causation, not [a] lessened causation test."

On April 5, 2017, the 4th DCA announced it will now follow the test set by the Supreme Court in *Nassar.* In reviewing the jury instructions in a whistleblower retaliation case from Palm Beach County, the court said that since Florida courts follow federal case law when examining retaliation claims under the Florida Civil Rights Act, the *Nassar* decision required changing the causation standard in Florida Civil Rights Act retaliation claims. *Palm Beach County School Board v. Wright,* No. 4D16-112 (Fla. 4th DCA, April 5, 2017).

Bottom line

In the 4th DCA, retaliation claims filed under Title VII and the Florida Civil Rights Act will use the "but-for" causation standard going forward. That standard means employees must now show that but for the complained-of conduct, the adverse employment action would not have happened.

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

EMPLOYEE TRAINING

Wage and hour tips: paying employees for attending training meetings

Sometimes employees attend training or continuing education courses for their own personal enrichment. Sometimes they do it to impress their boss or get ahead in the company. Sometimes it's required for their job. So when do you have to pay them for it?

Criteria for determining compensability of training time

The wage and hour regulations state that an employee's attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if the following four criteria are met:

(1) Attendance is outside the employee's regular working hours.

(2) Attendance is in fact voluntary.

(3) The course, lecture, or meeting is not directly related to the employee's job.

(4) The employee does not perform any productive work during the training.

If a nonexempt employee fails to meet any of those criteria, then the employee must be compensated for his training hours. Of course, an employer doesn't have to provide additional compensation for any time exempt employees spend attending training meetings.

Outside the employee's regular working hours. An unpaid training meeting must be held during hours or days that don't fall within the employee's regularly scheduled work hours. For example, an employee scheduled to work from 8:00 a.m. to 5:00 p.m. Monday through Friday wouldn't have to be paid for training that's on Saturday or Sunday, or after 5:00 p.m. or before 8:00 a.m. Monday through Friday.

Attendance must be voluntary. If an employer (or someone acting on its behalf) either directly or indirectly indicates that an employee should attend training, her attendance is not considered voluntary. For example, if a vendor tells an employer that he will host a dinner for employees at which they will discuss a new product or a proposed marketing method and the employer encourages employees to attend, their time spent at the dinner would be considered work time.

However, if a state statute requires individuals to complete certain training as a condition of employment, their attendance at the training would be considered voluntary. An example would be a childcare worker who must complete a 40-hour class before he can work in the childcare industry. Conversely, if the state requires an employer to provide training as a condition of maintaining a license, employees' attendance at the training wouldn't be considered voluntary, and the employer would have to pay them for the training time.

Training must not be directly related to the employee's job. Training that is designed to make an employee more efficient at his job would be considered work time, while training for another job or a new or additional skill wouldn't be work time. Training at an independent educational institution (e.g., a trade school or college) that's obtained by the student on his own initiative wouldn't be considered work time, even if it's job-related. Also, training that's established by the employer for the benefit of its employees and corresponds to courses offered by independent educational institutions need not be counted as work time. An example would be a course in conversational English an employer makes available to employees at his facility.

The employee performs no productive work during the training course. Training that's conducted away from the employer's facility usually doesn't pose a problem, but training conducted at the employer's business can be problematic. Many times, an employee will receive such training using the employer's equipment, which could have some benefit to the employer and therefore makes the time compensable.

Before a nonexempt employee attends a training course, you should make sure that it meets each of the four criteria listed above. If not, you should be prepared to compensate the employee for the time he spends attending the training. Also remember that when training hours are considered work time, the time spent training must be added to the employee's regular work hours for overtime purposes.

New employee orientation, completion of employment-related documents

In today's electronic workplace, many employers now have their new employees complete new-hire documents online before they actually report to work. Also, some employers have their new employees view online videos as a part of their orientation process. Once an employee is hired, any time he spends on such activities is considered work time, and he must be paid for performing it at a rate not less than the current hourly minimum wage of $7.25.

You should track new employees' onboarding and orientation time and record it in your payroll records. If the time spent in those activities added to the employee's hours in her initial workweek causes her to work more than 40 hours, you should pay her time and a half for any hours over 40.

Bottom line

Training time should be compensated if any of the following four conditions are met: the training is required by the employer; the training takes place during an employee's typical work time; the training relates to an employee's existing job; or the training results in some production or work completed for the employer's benefit. ✤

WAGE AND HOUR LAW

Disney agrees to pay $3.8 million to comply with wage and hour laws

by Tom Harper
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G. Thomas Harper, LLC

In March 2017, the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) announced that two subsidiaries of The Walt Disney Co. agreed to pay $3.8 million in back wages to ensure compliance with the Fair Labor Standards Act (FLSA).

Pay up!

According to the DOL's website, 16,339 Florida employees of the Disney Vacation Club Management Corp. and Walt Disney Parks and Resorts U.S. Inc. will be paid back wages. The WHD found violations of the FLSA's minimum wage, overtime, and record-keeping provisions.

The WHD concluded that Disney deducted a uniform or "costume" expense from certain employees' pay. In some cases, the deduction resulted in employees' hourly rate falling below the federal minimum wage of $7.25 per hour. Under the FLSA, employers can require employees to bear the cost of uniforms as long as it doesn't push employees' wages below the minimum wage. Since Florida has a state minimum wage (currently $8.10 per hour), deductions cannot cause employees' wages to fall below the hourly minimum.

DOL Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA) provides:

> If an employee who is subject to the statutory minimum wage of $7.25 per hour . . . is paid an hourly wage of $7.25, the employer may not make any deduction from the employee's wages for the cost of the uniform[,] nor may the employer require the employee to purchase the uniform on his/her own. However, if the employee were paid $7.75 per hour and worked 30 hours in the workweek, the maximum amount the employer could legally deduct from the employee's wages would be $15.00 ($.50 X 30 hours).

However, employers may prorate the cost of uniforms over several pay periods, the DOL says. Finally, the fact sheet notes that employers may not take certain actions, including (1) furnishing or requiring elaborate uniforms and requiring workers to have them cleaned and (2) requiring employees to reimburse them for uniforms in cash to avoid the FLSA's minimum wage and overtime requirements.

According to the DOL, the Disney resorts did not compensate employees for performing duties during pre- and postshift periods. Additionally, the resorts failed to maintain required time and payroll records. In defending the companies' practices, Disney leadership released a statement saying:

> The [DOL] has identified a group of cast members who may have performed work outside of their scheduled shift, and we will be providing a one-time payment to resolve this. We are adjusting our procedures to avoid this in the future.

Key things to check

Understand that you cannot make payroll deductions that cause workers' pay to fall below the state minimum wage or deny them required overtime pay. That's what happened at Disney, along with a failure to keep required payroll records and a requirement that employees perform uncompensated pre- and postshift work. Review your practices to see whether employees are spending time performing prework activities (e.g., getting dressed) or postwork duties (e.g., cleaning up after a shift). If they are, check with your wage and hour counsel to see whether that time is compensable.

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

GUEST COLUMN

What will Trump's EEOC look like?

by JW Furman
Lehr Middlebrooks Vreeland & Thompson, P.C.

During my years with the U.S. Department of Justice (DOJ) and the Equal Employment Opportunity Commission (EEOC), I saw several changes in presidential administrations and power shifts between the major parties in Congress. Following major political upheavals, changes in the priorities of those agencies and even in the day-to-day tasks of their employees certainly occurred, but those changes usually came slowly. After the 2016 election results, I believe that changes for many agencies, including the EEOC, will occur much more quickly than we have previously seen. President Donald Trump and the Republican Party have vowed to erase many of the previous administration's programs, and they want to demonstrate their commitment to change immediately.

The groundwork for changing the direction of the EEOC has already been laid. The current chair's term will end in July. As soon as her replacement is named, the EEOC's leader and majority will be Republican. The current agency leaders are expecting the new commission to be much more involved in reviewing cases and deciding which ones will be filed in court. In the outgoing administration, those decisions were made by the general counsel in conjunction with the district directors.

The EEOC's general counsel, who has wielded much power since 2010, left in December. His position can be filled immediately. The former general counsel used class actions and systemic investigations to influence and enforce discrimination laws. He was criticized by some Republicans for focusing on systemic cases in which no charge was filed by an aggrieved party. Those large high-profile and high-expense lawsuits likely will not be supported or funded by the new leadership. Even under the Obama administration, the EEOC's budget was stagnant, and there's no reason to believe that it will fare better now.

Shift away from regulation, toward mediation

President Trump has been clear that he wants less regulation on business. Many in the Republican-majority Congress agree with him. I have been told that the new EEO-1 surveys requiring employers to report employee pay information are expected to be rescinded, possibly even before they go into effect next year.

It's also expected that reducing the backlog of administrative cases will be emphasized by shortening the process—shorter deadlines for the parties to provide information and produce evidence, more mediation, and probably fewer unsubstantiated demands for large settlements by the EEOC. If the issue is pressed, I believe the EEOC's hard line against binding arbitration agreements between employers and employees also will soften. These philosophical changes will likely reduce the number of investigators and increase the number of mediators (either in-house or contractors) in time.

Mediation has accounted for most of the money and benefits secured by the EEOC for its charging parties in recent years. The agency's mediation pilot program was born during a Republican administration (Bush I) and later expanded to include conciliation (i.e., settlement after a cause finding) under Bush II. My expectation is that the EEOC will fund and expand the mediation program because it has such an impact and allows employers more flexibility in resolving employee disputes. Mediation may become available for all charges filed with the agency.

What we can expect

Because of the party change in the executive branch, I would expect to see President Barack Obama's emphasis on LGBT and gender identity issues and equal pay to decline by the time the new EEOC chair is appointed. President Trump has said very little on those issues, so they seemingly aren't priorities for him. Vice President Mike Pence opposes equal pay legislation.

We don't know who will be appointed to leadership positions in the EEOC; however, we should expect viewpoints similar to those of withdrawn nominee for secretary of labor Andrew Puzder, who is against more regulation on employers (he opposes raising the minimum wage and requiring paid sick leave). We should expect the EEOC to become less focused on investigation and enforcement and more focused on compliance assistance and charge resolution.

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WAGE AND HOUR LAW

Jury to decide whether Ft. Myers student interns are owed overtime, minimum wage

by Tom Harper
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A federal court in Ft. Myers recently ruled that 25 former student registered nurse anesthetists have the right to a jury trial on whether they were "employees" of Collier Anesthesia, P.A.

Court's decision

The students enrolled in Wolford College's 28-month nurse anesthesia master's program to become certified registered nurse anesthetists. While at Wolford, the students were interns in a clinical training program supervised and subsidized by Collier. The students knew that the internship was unpaid and that completing it was required for graduation. Even so, in 2012, the students sued Collier and Wolford, claiming they were actually employees during their time at Collier and that they were entitled to minimum wage and overtime under the Fair Labor Standards Act (FLSA).

In 2014, the court decided to dismiss the interns' claims, finding they were not employees. The interns appealed, and the federal court of appeals that covers Florida disagreed with the analysis used by the trial court. The appeals court followed an analysis known as the "primary beneficiary" test, in which the court tries to identify the primary beneficiary of the internship for academic credit and professional certification purposes. The appeals court sent the case back to the lower court and told it to use this analysis to collect more facts and issue a decision.

On April 3, 2017, the Ft. Myers court found that deciding the issue was a mixed question of law and fact and that a jury should make the decision. That means the interns will get a trial. *Schumann v. Collier Anesthesia, P.A.*, No. 2-12-cv-347-FtM-29CM (April 3, 2017).

Takeaway

If your company uses student interns, the particular facts will determine whether they are employees entitled to pay. Have labor counsel look at the appeals court's decision and apply the analysis to your internship program.

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

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