Southeast Employment Law Letter

Focusing on Alabama, Georgia, Florida, Louisiana, and Mississippi

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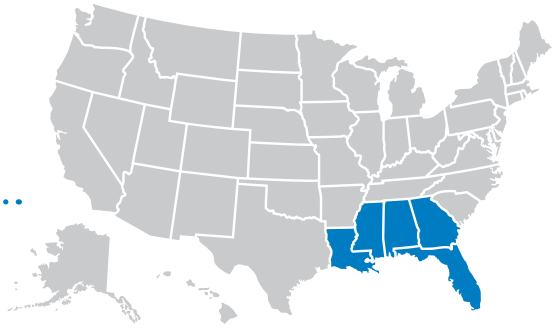

LITIGATION

Online job portals and the risk of website accessibility lawsuits under the ADA

AL | **GA** | **FL** | **LA** | **MS**

by Elmer C. Ignacio, Sniffen & Spellman, P.A.

Your HR office likely uses a Web-based career portal. Applicants rely on the portal to search and view job opportunities as well as submit applications for employment. In recent years, however, an explosion of website accessibility lawsuits filed under the Americans with Disabilities Act (ADA) should make you consider reviewing not only your online job portal but also your organization's website as a whole.

Lawsuit tests

Many of the lawsuits are driven by plaintiffs' attorneys who often represent the same client. The clients, known as ADA "testers," file suit against businesses and governmental entities, claiming their websites don't comply with the ADA. At Sniffen & Spellman, we defended the city of Pensacola against one such ADA tester who had filed close to 100 lawsuits in Florida alone.

A substantial portion of website accessibility lawsuits are filed by visually impaired individuals. They use screen-reader software allowing them to comprehend (read) information and documents on websites. They claim the entities they sue violate the ADA by failing to maintain information on their websites in such a manner that a visually impaired individual could use the screen-reader software to access the information on the websites.

Virtual barriers to access in private sector

Website accessibility lawsuits filed against private entities come under Title III of the ADA, which prohibits discrimination based on a disability in "any place of public accommodation." Federal courts have been split over whether places of public accommodation are limited only to physical spaces or whether websites also count. The U.S. 11th Circuit Court of Appeals, whose rulings apply to all Alabama, Georgia, and Florida employers, has taken the view that the ADA prohibits "virtual" barriers to the extent they deprive a disabled individual of the right to access or enjoy a physical location.

As an example, in the 2018 case *Haynes v. Dunkin' Donuts LLC*, a visually impaired individual sued Dunkin' Donuts, claiming he wasn't able to access the company's website. Dunkin' argued the case should be dismissed because any alleged virtual barriers on its website lacked a connection to an inability to access goods and services at its physical locations. The 11th Circuit disagreed. The website maintained by Dunkin' allowed users to locate physical locations and purchase gift cards. Therefore, the

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court concluded the alleged inaccessibility of the website to visually impaired users also denied them access to the services available at its physical locations.

Public spaces of a public entity

Website accessibility suits against public entities are filed under Title II of the ADA, which states no person with a qualified disability will "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." In the 2019 case *Gil v. City of Pensacola, Florida*, Sniffen & Spellman successfully defended the city in a website accessibility lawsuit filed by Juan Carlos Gil.

Gil lived in Miami, which was more than 650 miles away from Pensacola. He claimed he was unable to access information and documents on Pensacola's website with his screen-reader software. In dismissing the case, the court concluded he couldn't demonstrate that his inability to access information or documents on the city's website posed any real and immediate threat of future injury to him.

Specifically, the court found it significant that Gil couldn't establish any meaningful connection to Pensacola. He had alleged he considered Pensacola as a "viable living" option. The court was unconvinced, especially in light of his other lawsuits against different cities and counties in which he also made the same contention.

Bottom line

If employers operate the online job portal, a website accessibility lawsuit would be filed under Title I of the ADA, which prohibits them from discriminating against qualified individuals with a disability. The best way to minimize risk is to retain an attorney or consultant to assess and review your online job portal. Because of the recent spate of website accessibility lawsuits, law firms and consultants specializing in ADA compliance and litigation have become more common.

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WAGE AND HOUR LAW

Merely an intern? Netflix series provides insights on primary beneficiary test

AL | **GA** | **FL** | **LA** | **MS**

by Destiny S. Washington, FordHarrison LLP

It's not often that "dark and twisted gems" like Netflix's Black Mirror educate us on the Fair Labor Standards Act (FLSA). An episode of the sci-fi anthology series released in the summer of 2019, called "Smithereens," didn't contain the gore, futuristic technology, or deep psychological intrigue of past episodes (cue "Crocodile," "The Entire History of You," and "White Bear"). It was even more haunting, however, because it could happen today. Had the plot been set in the United States, the company Smithereen could have been subject to the FLSA.

Is the hostage an intern?

"Smithereens" is set in present-day London and follows a rideshare driver, Chris (Andrew Scott), who abducts his passenger, Jaden (Damson Idris), an employee of the social media company Smithereen, at gunpoint. The rationale behind the kidnapping—to hold a Smithereen employee hostage in order to speak with its CEO, Billy Bauer (Topher Grace)—falls to pieces when Jaden discloses to Chris that he is *merely an intern.*

Chris is obviously disturbed by Jaden's revelation and assumed he was more than an intern, partially because he was wearing a business suit. Jaden responds that it was his first week. After a tense standoff, Chris decides Jaden is "important enough" to get Bauer on the phone, although the CEO is only six days into a 10-day silent retreat.

"Smithereens" got the worth part right. Interns are valuable assets to companies—from both the interns' and the companies' perspectives. The intern gets work experience, and, depending on the outcome of the "primary beneficiary test," the company can reap the benefit of the worker's performance without paying him.

Primary beneficiary test

The FLSA requires for-profit employers to pay employees for their work. The U.S. Supreme Court hasn't yet addressed whether interns are employees under the Act. But the U.S. Department of Labor (DOL) has endorsed the primary beneficiary test, which was established by the 2nd U.S. Circuit Court of Appeals in *Glatt v. Fox Searchlight Pictures, Inc.*, and is followed by the 9th Circuit and the 11th Circuit. The nonexhaustive seven-factor test measures the extent to which:

- The intern and the employer clearly understand there is no expectation of compensation. Any promise of pay, express or implied, suggests the intern is an employee—and vice versa.
- The internship provides training similar to that which would be given in an educational environment, including the clinical and other hands-on training offered by those institutions.
- The internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- The internship accommodates the intern's academic commitments by corresponding to the school calendar.
- The internship's duration is limited to the period in which it provides the intern with beneficial learning.
- The intern's work complements—rather than displaces—the work of paid employees while providing significant educational benefits to the intern.
- The intern and the employer understand the internship is conducted without entitlement to a paid job at its conclusion.

The test focuses on what the intern receives in exchange for his work, and it gives courts the flexibility to examine the economic realities between him and the employer.

Was Jaden truly an intern?

In "Smithereens," at a stylist's direction, Jaden was on his way to deliver outfits to an executive at the airport. If he had interned in the United States and mostly ran errands, picked up dry cleaning, and fetched coffee, the tasks—resembling those of a paid personal assistant—wouldn't appear to be tied to an educational benefit. Therefore, he likely would be deemed an employee.

Conversely, maybe Jaden was a fashion major or graduate and helped the stylist select the executive's outfits. Perhaps the intern was headed to the airport to deliver the outfits, help the executive select which one to wear, and then add the proper jewelry. In that case, Jaden's services would have carried an educational benefit, and he would be considered an intern.

In 2017, the 2nd Circuit explored the intern-versus-employee factors in a multiplaintiff FLSA case from the Southern District of New York. The defending parties were various fashion publications of the Hearst Corporation.

One litigant was a *Seventeen Magazine* intern who delivered and retrieved clothing samples, folded outfits, and transported samples. The court found a reasonable jury could conclude the tasks had little educational value and displaced the work of paid

Cutting-Edge HR

Report identifies most important skills for recruiters. LinkedIn's new Future of Recruiting report identifies the number one priority for recruiting organizations during the next five years will be keeping pace with rapidly changing hiring needs. The report finds that talent analytics roles have grown by 111% since 2014. The data also show that the three skills that will become more important over the next five years are the ability to engage passive candidates, the ability to analyze talent data to drive decisions, and the ability to advise business leaders and hiring managers. Among the other findings, the report notes that demand for recruiting professionals is at an all-time high, the career path to becoming a recruiter is evolving, and deeper investments in technology will be required to find quality candidates.

Employee experience found key to growth, profitability. A study by Willis Towers Watson claims there is what the firm calls a compelling and predictive link between employee experience and an employer's superior financial performance. The study found companies demonstrating a strong employee experience consistently beat their sector on average by a clear margin of 2% to 4% across key performance metrics, including return on assets and equity, one-year change in profitability, and three-year changes in revenue and profitability. Companies delivering a less effective employee experience consistently underperformed their peers by 1% to 10%. The study included a survey of more than 500 companies, close to 50 years of research, and a total database approaching 250 million employees.

Many employers hit pause on shifting health benefit costs to employees. As the cost of health benefits continues to rise, concerned employers are looking at how to keep from shifting more costs onto low-paid employees, according to Mercer's National Survey of Employer-Sponsored Health Plans 2019. The average total health benefit cost per employee grew 3% to reach $13,046 in 2019. When asked about their priorities for the next five years, 42% of large and midsize employers identified "addressing healthcare affordability for low-paid employees" as an important or very important strategy. In fact, the survey found that in 2019, most large and midsize employers hit pause on requiring members to pay more out of pocket for health services as a way to hold down premium costs. The average individual deductible in a preferred provider organization (PPO), the most common type of medical plan, rose just $10 in 2019 to $992. The average deductible rose by more than $250 among small employers. ■

Federal Watch

NLRB releases 2019 case-processing data. The National Labor Relations Board (NLRB) has announced progress in case processing in three of its divisions for fiscal year (FY) 2019. The Office of Appeals, which reviews appeals by employers, unions, and individuals who believe their unfair labor practice allegations have been wrongly dismissed by an NLRB regional office, reduced its backlog of cases from 294 in FY 2018 to 98 in FY 2019. The Division of Advice, which provides guidance to the regional offices on difficult and novel issues arising in the processing of unfair labor practice charges, reduced the average age of closed cases for FY 2019 to 38.6 days, a 9.8% reduction from FY 2018. The Board's Freedom of Information Act (FOIA) Branch processes all FOIA requests made to the agency. In FY 2019, the branch reported that it responded within 20 working days to 67.5% of FOIA requests and 90% of FOIA appeals.

NLRB adopts mandatory e-filing policy. The NLRB's General Counsel has announced that all affidavits, correspondence, position statements, documentary, or other evidence in connection with unfair labor practice or representation cases processed in NLRB regional offices must be submitted through the agency's electronic filing system. The Board says the system will ensure accuracy and reduce the time and effort expended by regional office workers in scanning or otherwise ensuring that documents are properly placed in the appropriate electronic case file. The new requirements don't apply to the filing of unfair labor practice charges or petitions in representation proceedings. Parties in such cases are encouraged to use the e-filing system to file charges and petitions, but they may continue to use regular mail, personal delivery, and/or facsimile to file and serve the documents.

New EEO law digest released. The Equal Employment Opportunity Commission (EEOC) has made the newest edition of the federal-sector "Digest of Equal Employment Opportunity Law available at www.eeoc.gov/federal/digest/vol_4fy19.cfm. The digest, a quarterly publication prepared by the EEOC's Office of Federal Operations, features a variety of recent EEOC decisions and federal court cases of interest. It also includes hyperlinks so stakeholders can access the full decisions that have been summarized. The new edition contains summaries of noteworthy decisions issued by the EEOC, including cases involving attorneys' fees, class certification, compensatory damages, and complaint procession. It also includes cases discussing dismissals, findings on the merits, remedies, sanctions, settlement agreements, stating a claim, summary judgment, and timeliness. ■

personnel. On the other hand, she also organized and created clothing inventories, assisted stylists, and drew up weekly fashion invoice spreadsheets.

Although the "internships involved varying amounts of rote work and could have been more ideally structured to maximize their educational potential," the 2nd Circuit granted summary judgment (dismissal without a trial) to Hearst. Given the totality of the circumstances, the court said no reasonable juror could conclude the interns were employees. *Xuedan Wang v. Hearst Corp.*

Bottom line

If you use the services of unpaid interns, be sure to prescribe the parameters of their role to ensure the maximum educational experience. Whether they perform tasks that are primarily educational and provide beneficial learning—not whether they don coats and ties and other business apparel—will ultimately determine if they are employees for FLSA purposes.

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WAGE AND HOUR LAW

DOL fluctuates on fluctuating workweek rules

AL | GA | FL | LA | MS

by Martin J. Regimbal, The Kullman Firm

The U.S. Department of Labor (DOL) recently issued a proposed rule that would make it simpler for some employers to implement a fluctuating workweek (FWW) method of calculating overtime pay for certain employees.

What's the problem?

As costly litigation continues to proliferate under the Fair Labor Standards Act (FLSA), employers have been struggling with how to compensate nonexempt employees in accordance with the FLSA's overtime requirements. The concept of paying overtime is easy: Nonexempt employees get 1.5 times their regular hourly rate for each hour worked over 40 in a workweek. Translating the concept into practice, however, can be anything but easy. Employers must account for labor costs, remote work environments, and jobs with widely varying week-to-week schedules.

Over the years, in balancing those considerations against the FLSA's requirements, some employers have taken advantage of the Act's FWW method of calculating overtime. But, as expected, litigation has still arisen over whether employers are properly paying employees. Complicating the matter, the DOL's guidance on which pay schemes comply with the FWW regulations has varied drastically over the years and at times defied a commonsense understanding of their plain language.

All of that may be about to change. If the DOL's recently proposed rule goes into effect, some employers will have a simpler time implementing the FWW method for certain employees. Let's take a closer look.

How FWW works

Under the FWW method, a nonexempt employee gets a fixed salary for all hours worked in a given workweek, regardless of how few or many. If the employee happens to work overtime during the workweek, she must still receive the premium for each such hour. Instead of receiving 1.5 times the regular rate, however, she would be entitled to only 0.5 times the regular rate for each hour. Essentially, under the regulations, the salary is treated as satisfying the regular rate portion of the 1.5 overtime rate for all hours worked over 40.

In certain work environments, the FWW method can benefit both parties. For the employer, it can be a way to reduce labor costs versus paying employees on a regular straight time and overtime hourly basis. For employees, they receive the same fixed pay (the salary) even if they work fewer than 40 hours in a week. The consistent income that a fixed salary provides for nonexempt employees with fluctuating hours is frequently cited as a more manageable way for them to plan for and meet monthly expenses.

Basis for litigation

The FWW method seems simple enough, but litigation arose when employers provided additional compensation—above and beyond the fixed salary (e.g., incentive pay, bonuses)—to employees paid under the method. Some courts found that paying an employee more than the fixed salary was contrary to the regulations that required him to receive a *fixed* salary. Employers that made such payments found themselves in costly litigation for the simple fact they paid employees more than just the fixed salary.

In 2008, the DOL under the Bush administration issued proposed regulations specifically addressing the issue that would have allowed employees to receive the additional incentive payments and bonuses. Despite the proposal, the regulations weren't finalized until 2011, after President Barack Obama took office, and the final rules didn't include the language allowing the additional pay. In addition, the language from the Obama DOL stated that any additional compensation paid to an employee (e.g, shift premiums, production bonuses) was incompatible with the fixed-salary requirement.

Proposed regulations

In a move that hopefully will bring more certainty for employers and logical interpretation of the FWW method, the DOL under the Trump administration has proposed regulations explicitly allowing the additional pay. Under the proposal, any additional pay would be factored back into the regular rate for overtime purposes—the same structure for calculating overtime for nonexempt employees paid under the traditional straight time and overtime hourly pay scheme. Because employees could receive additional incentive pay, bonuses, and other compensation beyond their fixed salary, a greater number of employers might find the compensation scheme useful for complying with the FLSA and simultaneously providing flexibility and consistent income to employees with varying weekly schedules.

Takeaway

The DOL is accepting comments on the proposed regulation through December 5, 2019, and could issue a final rule later in 2020, possibly before the November election. It's important to remember, however, that the proposed regulation is just that, proposed. Until it's finalized, those of you who are providing additional pay will continue to face potential liability as the current rules are interpreted.

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EMPLOYER LIABILITY

Pregnant patrolman's PDA claim proceeds to trial

AL	GA	FL	**LA**	MS

by Jennifer Kogos, Jones Walker LLP

In a recent case before the federal district court in Baton Rouge, an employer's failure to consider a pregnant employee's request for an accommodation, along with a decision maker's statement that she should "not stay pregnant" if she wanted to keep her job, created potential liability for the employer. Let's take a look at what happened and why the case is headed to trial.

BPD ends up on wrong side of the law

Kasey Townsend was employed as a patrolman in the Brusly Police Department (BPD). About 16 months into her employment, she informed the police chief and the assistant chief that she was pregnant. She mentioned that while she was employed by another police force, she had worked in a light-duty position until her delivery. The police chief asked her to provide documentation from her physician confirming her pregnancy and stating which patrolman duties she couldn't perform while she was pregnant.

Townsend hadn't yet seen her doctor, but she told the police chief that she had been restricted from carrying her firearm during her last pregnancy. She also said she felt capable of performing her job duties at that time. Five days after the chief's request for documentation, she

submitted a letter from her doctor requesting that she be assigned a light-duty position during her pregnancy.

Townsend subsequently received a letter from the police chief stating that she was soon scheduled to work the night shift, and if she wasn't able to see a doctor or be taken off light duty by then, she would need to request leave. In response, she asked the chief to provide her with her sick leave and comp time balance, a copy of the letter from her doctor requesting light duty, dates of council meetings at which her employment/leave status would be discussed, and the names of the decision makers with authority over her employment.

About a week later, Townsend received a letter from the town clerk that outlined her available leave time and provided information about the council meetings at which her employment would be discussed. Two days later, she received a letter from the police chief stating that because she had refused to sign a release allowing the town to speak to her doctor, the BPD couldn't consider possible accommodations for her pregnancy.

Townsend's counsel then got involved, clarifying that she wasn't refusing to provide information, but her first doctor's appointment wasn't for another week. The police chief responded with another letter stating that Townsend's sick leave and regular leave time would soon run out and her unpaid administrative leave would start. The letter also informed her that the BPD had no light-duty positions available at that time.

Mayor provides 'smoking gun'

A couple of weeks later, a meeting attended by Townsend, her counsel, the assistant police chief, and the former mayor of Brusly took place. During the meeting, Townsend's lawyer proposed reassignments/light-duty assignments that would accommodate her pregnancy, but the town representatives rejected all of the proposals. Townsend's attorney said they also refused to discuss any available jobs in town government. Further, they seemed uninterested in speaking with Townsend's doctor to arrive at a reasonable accommodation.

The most problematic aspect of the meeting was a comment allegedly made by the mayor that if Townsend wanted to keep her job, she "should not stay pregnant." The meeting ended at that point, and Townsend remained off work. A month later, her Peace Officer Standards and Training (POST) certification lapsed, and five months after that, a male officer was hired to fill her position.

About two months after the male officer was hired, Townsend's attorney contacted the town's representatives to report that Townsend was able to return to full duty. At a meeting to discuss her employment, the town's attorney reportedly stated that if Townsend dropped the charge she had filed with the Equal Employment Opportunity Commission (EEOC), the town would consider reinstating her.

Townsend declined to comply with the request and was formally terminated. According to the BPD, she was no longer qualified to be a patrolman because her POST certification had lapsed.

Patrolman takes town to court

Townsend filed a lawsuit in federal court in Baton Rouge claiming she was subjected to gender discrimination in violation of Title VII of the Civil Rights Act of 1964, pregnancy discrimination in violation of the Pregnancy Discrimination Act (PDA), and failure to accommodate in violation of the Americans with Disabilities Act (ADA). The town asked the court to dismiss her claims.

At the outset of its review of the case, the court explained that an employee alleging the denial of an accommodation in violation of the PDA must show that:

- She belongs to the protected class.
- She sought an accommodation.
- The employer didn't accommodate her.
- The employer did accommodate other employees who had a similar ability or inability to work.

If the employee makes that showing, the burden shifts to the employer to provide a legitimate nondiscriminatory reason for not offering the accommodation. Under the PDA, however, the employer's sole justification cannot be that it's more expensive or less convenient to add pregnant women to the category of employees it accommodates. If the employer offers a legitimate nondiscriminatory reason, the burden shifts back to the employee to show that its reason was pretextual, or an excuse for discrimination.

Direct evidence of discrimination

Another way for an employee to prove a pregnancy discrimination case would be to offer "direct evidence" of discrimination. If she can provide direct evidence, the burden of proof shifts to the employer to establish that it would have made the same decision regardless of her pregnancy. Direct evidence is evidence that, if believed by the judge or jury, allows an employee to prove her employer engaged in discriminatory conduct without relying on inference or presumption.

When evaluating a workplace comment to decide if it constitutes direct evidence of discrimination as opposed to a "stray remark," a court must consider whether the comment was:

- Related to the employee's protected characteristic;
- Made around the time of the challenged employment decision;
- Made by an individual with authority to enact the challenged employment decision; and
- Related to the challenged decision.

Townsend offered the former mayor's comment that if she wanted to keep her job, "she should not stay

pregnant" as direct evidence of discrimination. She also contended that when her attorney asked about the possibility of her handling bookings at the jail, the town representatives stated that "no female officers can perform those duties." The police chief further admitted that the BPD never considered allowing Townsend to work part-time because she would need to be able to carry a firearm to perform any part-time position.

Noting the town didn't dispute those statements, the court concluded they were direct evidence of discrimination based on Townsend's pregnancy and gender. The town officials' statements ticked all the boxes for the evidentiary standard: They were related to Townsend's pregnancy/gender, were made around the time of the challenged employment decision, were made by individuals with authority over the decision, and were related to the challenged decision.

Indirect evidence of discrimination

The court also determined that even if she didn't have direct evidence of discrimination, Townsend met the initial test for proving discrimination with indirect evidence. There was no dispute about the first three elements of the test because Townsend belonged to the protected class, she sought an accommodation, and the BPD didn't accommodate her. The only element in dispute was the fourth one: Did the town accommodate other employees who were similar in their ability or inability to work?

The town focused on Townsend's attempt to compare her situation to that of the former interim chief of police, who had been assigned light-duty tasks following eye surgeries that temporarily restricted his ability to perform his job duties. Instead of comparing their similarity in their ability or inability to work, however, the town focused on Townsend's professional experience compared to the interim chief's. The town argued they weren't proper comparators because the interim police chief had more experience than Townsend. But that wasn't the correct comparison.

The court explained that the issue under the PDA isn't a comparator's difference in professional experience, disciplinary record, or available leave time. The sole basis for comparison is the similarity in the employees' physical restrictions and their need for similar accommodations. The court found Townsend had offered enough evidence that the town accommodated other employees who were similar in their ability or inability to work to create an issue of fact.

The town then attempted to offer a legitimate nondiscriminatory reason for Townsend's termination by claiming that she was no longer qualified to be a patrolman because of her restrictions, her POST certification had lapsed, and there was no longer an available position because her job had been filled. However, the court found ample evidence that the town's reasons were pretextual. Specifically, it focused on the town attorney's statement that Townsend could be reinstated if she dropped her pending EEOC charge, noting she was terminated after she refused. In light of that evidence, the court denied the town's request to dismiss the claims and allowed the case to proceed to trial. *Townsend v. Town of Brusly, et al.*, No. 18-00554 (E.D. La., 11/08/19).

HR Technology

AI ready to make impact on HR? As artificial intelligence (AI) continues to make an impact on business, HR may be poised to feel the impact soon. In December 2018, tech marketplace firm G2 looked ahead to HR trends set to emerge in 2019 and beyond. One prediction: AI-driven HR technology innovations will see a significant increase. The G2 research found companies increasingly leveraging AI technology to help identify data opportunities, improve internal workflows, and increase productivity. AI-embedded HR technologies also were predicted to improve the employee experience, which begins with the candidate experience. AI also was predicted to enhance the employee lifecycle from recruiting through offboarding since the technology can help businesses treat their candidates and employees like loyal customers.

Digitization seen creating new roles not yet imagined. Research from Deloitte reported early in 2019 in the *Harvard Business Review* finds that digitization will fundamentally change how humans and machines work together. The upcoming change is seen as creating new roles for workers not yet imagined. The Deloitte researchers say HR leaders must reimagine work across an enterprise with digitization and automation in mind. The researchers say the ability to continuously innovate is critical to mastering a new mindset for the future of HR. Also, as AI, robotics, and cognitive solutions grow in sophistication, work will continue to change, and organizations must reconsider how they design jobs, organize work, and plan for future growth. Also, proactive efforts in employee engagement and satisfaction will remain important, but success in the future will require expanding engagement and satisfaction of an enterprise's full workforce in a world where nontraditional employment is exploding.

Survey shows many businesses not using data security software. A survey from HR technology provider Paychex, Inc., shows that despite the growing risk of cyberattacks, 27% of the business owners surveyed weren't using any type of data security software. Of the 73% that did use data security software, they were using the following solutions: 48% used on-premise software, 11% used cloud-based software, and 14% used both. The survey of 500 business owners with one to 500 employees also found that 81% of respondents felt confident their company and customer data was as secure as possible, and 84% said they would be able to recover from a data breach or cyberattack. The survey also asked business owners about their data security policies. Seventy percent said their company has a clear data security policy, and 60% said their company trains all employees on data security. ■

Interactive process always saves the day

Whether an employee is pregnant, has suffered a job-related injury, or has a serious medical condition, engaging in the interactive process to discuss a possible accommodation is always the way to go. Hear the employee out, and take notes on what she's requesting to be able to do her job. But make sure you take notes only on what was said during the meeting and on your follow-up work to consider the accommodation. Refrain from including personal opinions about the veracity of the employee's condition.

As this case reminds us, pregnant employees may be entitled to accommodations under the PDA. That means an employee who is pregnant is entitled to the same interactive process and analysis of whether she has a similar ability or inability to work as another employee who isn't pregnant. If you determine that you would accommodate other employees with similar limitations, you should also strive to accommodate pregnant employees.

Finally, train your supervisors not to make negative comments about an employee's pregnancy or medical condition when discussing her employment status. As you can see from what happened here, those are the comments that will come back to haunt you.

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DISABILITY DISCRIMINATION

Performing duties promptly and without overtime: essential job function or not?

AL **GA** **FL** **LA** **MS**

by Jennifer D. Sims, The Kullman Firm

It wasn't the devil going down to Georgia. Instead, it was an employee going out to Yellowstone. What could possibly go wrong? Oh, just a snowmobiling accident followed by some accommodation requests and the employee's inability to promptly perform her essential job functions. A Texas federal court recently tackled the case and provided guidance that could assist employers in Mississippi and elsewhere.

Facts

After working as a temp for R2Sonic, Celina Cruz was promoted to operations coordinator II in April 2016. In January 2017, she participated in a voluntary trip to Yellowstone the company had organized for its employees. While on the trip, she injured herself in a snowmobile wreck and was diagnosed with a concussion. Doctors recommended she stay home from work for a week.

Cruz returned to work full-time on February 13, 2017, with restrictions against working overtime or lifting more than 30 pounds. The limits remained in place until she was fired in April. R2Sonic blamed the termination on "inefficient performance" throughout her employment.

Cruz filed suit against R2Sonic, alleging, among other things, that it violated the Americans with Disabilities Act (ADA) by discriminating against her on the basis of a disability. The company requested summary judgment (dismissal in its favor without a trial).

Court's decision

Because Cruz relied on circumstantial evidence for her disability discrimination claim, to meet her initial burden of establishing a *prima facie* (or minimally sufficient) case, she had to show, among other things, that she was qualified for the job and was fired "on account of" her disability. Under the ADA, a "qualified individual" is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that [she] holds or desires." "Essential functions" include those that are the "fundamental job duties of the employment position," and an employer's judgment and its written job descriptions are relevant evidence of whether a function is essential.

R2Sonic didn't argue that Cruz was *unable* to perform any particular job function after her injury, either with or without an accommodation. Rather, it claimed she couldn't do her job *quickly enough*: She couldn't perform all of the job functions without regularly taking overtime.

R2Sonic had conceded there was nothing in Cruz's job description that imposed a time requirement on the performance of her job functions, and the former employee testified she had been given "a green light" to take overtime to finish her work "as often as necessary" before the injury.

Moreover, before the injury, Cruz was promoted and given a raise, suggesting that her pace and the overtime weren't serious concerns, and she was never put on a performance improvement plan or issued any written discipline. As the court stated, "all of this evidence is relevant to whether a job function is essential."

The court opined a "reasonable jury could conclude that doing her tasks in only 40 hours per week was not an essential part of Cruz's job: Overtime was routinely approved, there were no metrics or training for working faster, late shipments never caused a problem with a customer, and Cruz was never formally reprimanded for needing to take overtime before her injury."

If it wasn't essential that Cruz perform the essential tasks listed in her job description without taking more

than "occasional" overtime, then she was qualified to do the essential functions of her position with or without a reasonable accommodation. Accordingly, the court found summary judgment wasn't proper because factual questions remained about whether it was truly essential that Cruz be able to perform everything in her job description without needing more than occasional overtime. *Cruz v. R2Sonic, LLC,* 2019 WL 4739301 (W.D. Tex., Sept. 26, 2019).

Takeaway

In preparing new job descriptions or updating existing ones, you should analyze whether it's essential for the person fulfilling the specified duties to be able to perform them without needing more than occasional overtime. If that is the case, you should consider adding a time requirement for their performance to the job description.

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EMPLOYER LIABILITY

Parish secretary's Title VII claims dismissed for lack of evidence

AL | GA | FL | **LA** | MS

by Jacob Pritt, Jones Walker

The federal district court in New Orleans recently determined that a former employee didn't present enough evidence to continue with a lawsuit in which she claimed that St. Bernard Parish's decision to terminate her was retaliatory and that she was subjected to a hostile work environment. Title VII of the Civil Rights Act of 1964 prohibits employers from terminating employees for reporting coworkers' wrongful conduct. It also prohibits pervasive harassment in the workplace. Let's take a look at how St. Bernard Parish successfully defended the lawsuit and what it did correctly and incorrectly in the months leading up to the litigation.

Legal secretary terminated after reporting alleged sexual assault

Sharon Schaefer worked as a legal secretary for St. Bernard Parish from 2007 until she was fired on April 2, 2014. Over time, Schaefer began a relationship with David Peralta, who eventually became the parish president and her ultimate supervisor. They were married in March 2012, a mere two months after he was sworn in as parish president.

After her marriage to Peralta, Schaefer's employment relationship with the parish continued unaffected until the next year, when she reported a coworker for gambling in the workplace in September 2013. By that time, the honeymoon was apparently over. In response to her report, Peralta suspended her without pay for three days.

Shortly after that incident, Schaefer filed a police report alleging that Peralta had raped her in their home. She also alleged that when she attempted to go to work to request leave the next day, Peralta and his attorney accosted her and demanded that she drop the charges or she would lose her job. She dropped the charges two days after filing the police report, but she didn't withdraw her workplace complaint. Importantly for its defense of her subsequent lawsuit, the parish took no adverse employment actions against her at this time.

Over the next couple of months, Schaefer's employment relationship with the parish, like her relationship with Peralta, deteriorated. She allegedly asked a coworker where she could acquire a gun and told several coworkers that she was having family trouble. Eventually, her direct supervisor placed her on paid leave.

As her paid leave was about to expire, Schaefer notified her supervisor that she had been diagnosed with posttraumatic stress disorder and requested leave under the Family and Medical Leave Act (FMLA). Her supervisor e-mailed her a request to return any parish files she was still in possession of, but she wasn't formally terminated at that time. When she failed to return from FMLA leave, however, she was fired.

Schaefer filed a lawsuit against the parish and several individuals, including Peralta, alleging they violated Title VII by creating a hostile work environment and by firing her in retaliation for reporting the alleged sexual assault. Among other things, Title VII prohibits an employer from terminating an employee for reporting misconduct by her coworkers. Likewise, it allows an employee to sue her employer when she is subjected to a hostile work environment based on sex.

Employer argues termination was for failure to return from leave

In response to Schaefer's argument that she was fired for reporting the alleged assault, the parish had to present evidence that it fired her for a nonretaliatory reason. The parish argued that she was fired solely because she didn't return to work after her 12 weeks of FMLA leave expired. The court followed the lead of many other courts in deciding that firing someone for not returning from leave is a legitimate nondiscriminatory reason for the termination.

After the parish presented its nonretaliatory reason for terminating her, Schaefer had to prove that she was instead fired for reporting the alleged assault by Peralta. She argued that the e-mail from her supervisor demanding that she return any possessions belonging to the parish was evidence that she was actually terminated

before her FMLA leave ended. She claimed her termination had nothing to do with her FMLA leave and her failure to return to work, instead suggesting that her termination was related to her police report.

The court wasn't satisfied with the evidence Schaefer presented, and the judge ruled that none of her evidence demonstrated that she had been terminated when her supervisor sent the e-mail. Rather, her employment relationship with the parish didn't end until she received actual notice of her termination when her FMLA leave ran out and she failed to return to work.

Failure to report harassment dooms claim

Title VII makes it illegal to discriminate against an employee on the basis of her race, color, religion, sex, or national origin. Part of the protection from this kind of discrimination is freedom from a "hostile work environment" based on one of those factors. For a long time now, courts have found that pervasive sexual harassment in the workplace is a form of gender-based discrimination. To win a lawsuit under a hostile environment theory, an employee must show that her employer knew or should have known about the harassment but failed to promptly address it.

The parish was ultimately saved from legal liability for a hostile work environment by its sexual harassment reporting policy. The policy requires victims of workplace harassment to report the misconduct immediately. Because she didn't report her allegations of harassment in accordance with its guidelines, Schaefer didn't give the parish the chance to correct and prevent the alleged misconduct.

Although the court allowed Schaefer to continue her lawsuit against Peralta's estate (he died after the lawsuit was filed) and the other individual defendants, it dismissed St. Bernard Parish from the lawsuit because she didn't show that she was fired illegally and because she failed to report the alleged harassment in accordance with the employer's guidelines. *Schaefer v. Peralta,* Case No. 16-17784 (E.D. La., Oct. 15, 2019).

Lessons learned

Some things that St. Bernard Parish did incorrectly led to this litigation, but other actions it took throughout the course of Schaefer's employment shielded it from liability.

First, it's important to have policies that address romantic relationships in the workplace. Under no circumstances should a supervisor be romantically involved with a subordinate without some neutral decision-making process in place to address any disputes that may occur.

You should also implement strong antiharassment and antidiscrimination policies, inform your employees of those policies, and follow them at all times. Make your policies clear, and ensure that employees feel comfortable with the process for reporting any issues they encounter. Document all communications you receive under your harassment-reporting process, and preserve your documentation in case you face litigation in the future.

If you have to part ways with an employee, ensure on the front end that the termination is legally justified. If you anticipate a legal challenge, document the specific reasons you're considering termination as they occur. Take note of any discussions about the termination or any exit interviews with the employee. It can be helpful to have structured disciplinary procedures that precede your termination decisions so employees know exactly what type of conduct is punishable by termination.

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WORKPLACE ISSUES

Handling office romance in #MeToo era: Know your options

AL | GA | FL | LA | MS

As Valentine's Day nears, love is in the air—and oftentimes in the workplace. Although workplace romance is common, it can make HR professionals fret about all the what-ifs. What if a relationship is between a supervisor and a direct report? What if rumors of favoritism poison the workplace environment? What if one or both participants is married to someone else? What if a couple's public displays of affection make coworkers uncomfortable? What if a relationship goes sour and the breakup affects morale? And perhaps the most important question to consider: What if a relationship is one-sided and is more accurately described as sexual harassment instead of consensual?

The problems are daunting, but HR isn't powerless in overcoming at least some of the downsides.

#MeToo implications

The #MeToo movement has heightened awareness of a long-standing but often overlooked problem in the workplace—sexual harassment. And one of the worries associated with office romance stems from the possibility that a relationship can cross the line and turn into sexual harassment.

One of the lessons learned since #MeToo went viral is that sexual harassment isn't limited to Hollywood celebrities. It's in all industries at all levels. The #MeToo movement also has put antiharassment training in the spotlight. Training programs—in some states required

by law—aim to ensure employees understand what constitutes harassment and what protections are available.

The #MeToo movement also is a reminder to employers to make sure any policies related to romantic relationships fit with policies prohibiting sexual harassment and retaliation.

Policies on coworker dating

Not all relationships between coworkers present a harassment risk, but they still can be problematic, so employers often try to ward off complications with a policy.

Having a workplace relationship policy helps employers communicate why relationships are concerning—namely, that they can harm productivity and morale and lead to sexual harassment claims. But there are downsides to having formal policies since some employees may think the employer is inappropriately intruding in their personal lives, and others may get around the rules by keeping their relationship secret.

Policies take several forms. Some employers adopt zero-tolerance antifraternization policies for all employees. Others prohibit relationships between supervisors and their direct reports. Others require employees to disclose their relationship to HR. And others take a hands-off approach, with no rules on relationships.

No dating allowed. Such a policy can be tempting but is flawed in that it encourages employees to be secretive, creating an environment ripe for gossip. Also, it might encourage some workers to choose the relationship over the job, leading to the loss of one or both employees.

Supervisor-subordinate ban. Many employers that have workplace dating policies choose to ban relationships between workers and their bosses. Such a policy attempts to head off allegations of favoritism while a relationship is going on or harassment if it ends badly. This kind of policy also can prevent a boss from pursuing a subordinate who isn't interested in a relationship.

Disclosure requirements. Some policies require employees to report when they are in a relationship with a coworker. Requiring disclosure gives the employer a chance to document that the relationship is consensual and both parties understand its sexual harassment policy and reporting procedure. Also, requiring disclosure gives the employer a way to document that both parties agree they won't allow the relationship or the end of the relationship to affect how they do their jobs.

Prevalence of workplace relationships

Regardless of how far an employer goes to police workplace relationships, they remain common. Vault.com's 2019 office romance survey (released in February) found just 37% of the more than 700 survey participants said they had intentionally avoided an office romance. Less than half (42%) said they had never engaged in an office romance.

The survey also found that 64% of people who participated in an office romance chose to keep the relationship at least somewhat secret, with 38% not telling anyone and 26% telling just a few people.

The survey also asked respondents their feelings about various kinds of workplace relationships. Thirty-four percent disapproved of relationships between coworkers at different levels, and 26% disapproved of relationships between coworkers on projects together. Just 6% disapproved of all office relationships, and 28% said all office romances are fair game. ■

WAGE AND HOUR LAW

Alabama minimum wage law preemption upheld (for now)

AL	GA	FL	LA	MS

by Al L. Vreeland, Lehr Middlebrooks & Vreeland, P.C.

The dismissal of a lawsuit challenging the Alabama Uniform Minimum Wage Law was recently upheld by the full U.S. 11th Circuit Court of Appeals (which covers Alabama). In 2016, the state legislature enacted the statute to preempt any attempts by local governments to set higher minimum wage rates at the city or county level.

The Alabama law was passed in response to Birmingham's adoption of its own minimum wage ordinance raising the minimum wage in the city to $10.10 per hour. Several low-wage workers and the NAACP sued the Alabama attorney general to challenge the state preemption law, arguing it was racially discriminatory.

After several years of legal wrangling, the 11th Circuit decided to dismiss the lawsuit because the plaintiffs weren't permitted to sue the attorney general over the preemption law.

The upshot is that the Alabama Uniform Minimum Wage Law remains in effect—preempting any local attempts to raise the minimum wage. The ruling leaves open the possibility, however, that Birmingham low-wage workers could challenge the law again as racially discriminatory by suing their employer for failing to comply with the city's minimum wage ordinance. We'll keep you updated.

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THE LAST WORD

European countries take steps to confront #MeToo issues

by Juliette Duval, Visiting Fellow, Fortney & Scott, LLC

As the #MeToo movement enters its third year, it's important to note the United States isn't the only country where the awareness of discriminatory and harassing conduct in the workplace has increased dramatically. Governments in Europe and elsewhere also have responded to the urgent need to combat the persistent and unwelcome behavior.

Vicarious liability in United Kingdom

In the UK, employers have no explicit statutory duty to take proactive steps to prevent sexual harassment. They can be held vicariously liable, however, for acts committed by their employees. In practice, that means UK employers will be held responsible if unwelcome behavior occurs in their workplace and they can't show they took all reasonable steps to prevent it. They are free to decide which reasonable steps to take, including implementing antiharassment policies, conducting appropriate training, and instituting appropriate procedures for reporting harassment and taking action to end it.

Some observers consider the existing statutory requirements to be insufficient. That's why, on July 11, 2019, the Government Equalities Office (GEO) launched a "public consultation" on workplace sexual harassment, allowing anyone who has experienced the behavior at work to share their views on how the existing law can be improved. For its part, the #ThisIsNotWorking campaign has petitioned the government to introduce a law placing a legal duty on employers to take proactive actions to prevent workplace harassment.

Tougher restrictions in France

In contrast with the UK, France has passed legislation specifically stating that employers have an obligation to prevent sexually harassing behavior. The law requires them to provide information and training to employees to improve and ensure their security and protect their physical and mental health, but it doesn't go into detail about the content of the information or the training.

France's law simply indicates that employers must ensure their training remains effective over time. That implies employees and managers should be trained on a regular basis.

Sexual harassment officer's duties

The #MeToo movement exposed the need to intensify the fight against sexual harassment and sexist attitudes. That's why a French statute passed on September 5, 2018, "for the freedom to choose one's professional future" required companies with more than 250 employees to designate a sexual harassment officer among their employees. The law also created an obligation for smaller companies with more than 11 employees that have a social and economic committee to designate one of its members as the sexual harassment officer.

The officer's role is to direct, inform, and support employees in the fight against sexual harassment and sexist behavior. That means the officer will be the primary contact person for workers dealing with sexual harassment or sexist behavior. Among other things, a sexual harassment officer could:

- Organize awareness-raising activities and training for managers and employees;
- When necessary, direct employees to competent authorities (e.g., a labor inspector, an occupational doctor, or a human rights defender);
- Implement internal procedures to encourage the reporting and processing of complaints about sexual harassment or sexist behavior; and
- Conduct an internal investigation after sexual harassment or sexist attitudes are reported.

Bottom line

The actions undertaken by the UK and France show they understand the necessity of strengthening their antiharassment measures and providing employees with greater protection and support.

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