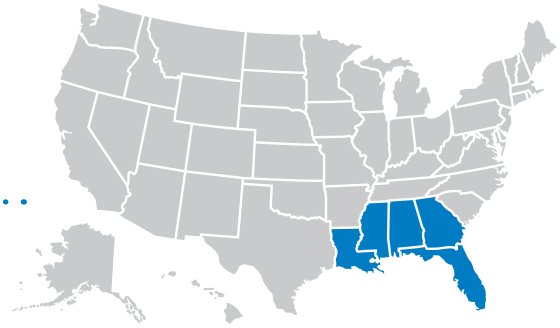
Southeast
Employment Law Letter
Focusing on Alabama, Georgia, Florida, Louisiana, and Mississippi

Vol. 1, No. 10 | October 2020



WORKPLACE DIVERSITY

Black Lives Matter apparel at work evokes legal, business, social concerns

AL | FL | GA | LA | MS

by Eric S. Roth, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

The Black Lives Matter (BLM) movement has sparked significant emotion in the past few months. Ever since the NBA season restarted, TV viewers are seeing the phrase emblazoned on the courts and on some players' jerseys. What you won't see on TV are the large employers that have faced significant backlash for attempting to prohibit employees from wearing BLM masks and other apparel. For example, several Whole Foods employees recently initiated a class action lawsuit claiming they've been subjected to race discrimination and retaliation for wearing BLM masks and other clothing, even after the company reversed its initial prohibition on the face coverings. Let's look at the legal, business, and social considerations in play here.

Constitutional and legal tug-of-war

Some employees assert their right to free speech should allow them to wear whatever they please to work, not realizing the First Amendment protects them only from unreasonable restrictions on speech by the government. Legally, private employers may restrict speech as long as their actions don't violate other laws. For example, if employees are engaged in concerted activity about the terms and conditions of their employment, the National Labor Relations Act (NLRA) may protect their conduct and speech.

Wearing a BLM mask could be permissible under the NLRA if employees were protesting workplace discrimination, but that's generally not what we've been seeing. Rather, employees want to express their support for the social movement embodied by the BLM slogan. Therefore, when considering restrictions on the employee dress code, as with many other issues, you must evaluate potential legal, social, and business concerns all at once.

Corporate commitment to diversity

Many companies feel the BLM movement aligns with their values and reinforces their commitment to diverse employees, management, customers, and partnerships. Therefore, they've decided to let employees express themselves with their apparel. Here are two examples:

- After initially banning any BLM apparel, Starbucks reversed its decision and decided to print 250,000 company-branded BLM shirts. They plan to make the shirts available to all employees, similar to how the company celebrates Pride month.
- Wawa changed its policy banning BLM apparel and now allows employees to wear pins to express support for the movement.

▼ What's Inside

▼ What's Online

Podcast
Workers' FFCRA lawsuits begin hitting the courts
https://bit.ly/3l8d5WX

Find Attorneys
To find employment attorneys in all 50 states, visit **www.employerscounsel.net**

BLR® a Simplify Compliance brand
HR hero by BLR®

▼ Employers Counsel Network (ECN) Member Attorneys

ALABAMA

- **Albert L. Vreeland,** Lehr Middlebrooks Vreeland & Thompson, P.C., Birmingham
- **David J. Middlebrooks,** Lehr Middlebrooks Vreeland & Thompson, P.C., Birmingham

FLORIDA

- **G. Thomas Harper,** The Law and Mediation Offices of G. Thomas Harper, LLC, Jacksonville
- **Lisa Berg,** Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami
- **Andrew Rodman,** Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami
- **Robert J. Sniffen,** Sniffen & Spellman, P.A., Tallahassee
- **Jeffrey D. Slanker,** Sniffen & Spellman, P.A., Tallahassee

GEORGIA

- **Raanon Gal,** Taylor English Duma LLP, Atlanta
- **Glianny Fagundo,** Taylor English Duma LLP, Atlanta
- **Destiny Washington,** FordHarrison LLP, Atlanta

LOUISIANA

- **H. Mark Adams,** Jones Walker LLP, New Orleans
- **Mary Margaret Spell,** Jones Walker LLP, New Orleans

MISSISSIPPI

- **Martin J. Regimbal,** The Kullman Firm, Columbus
- **Jennifer D. Sims,** The Kullman Firm, Columbus
- **Peyton S. Irby,** The Kullman Firm, Jackson

Other companies are struggling

Other companies have struggled with the issue. A Chicago-area Costco employee wore a BLM mask to work but, according to the worker, was told to take it off because it was "political," "controversial," and "disruptive." Eventually, the employee was given permission to wear a mask depicting a raised fist as long as it didn't include any words.

Some employers are concerned that allowing employees to wear BLM masks or shirts will prompt others to want to wear "Blue Lives Matter," "White Lives Matter," or other socially or politically charged apparel, thus inflaming the workplace environment and causing unnecessary and potentially dangerous disruptions. Additionally, companies are worried about alienating prospective customers who may have differing opinions, especially when businesses are struggling to draw traffic because of the pandemic. Employers that restrict what employees wear should do so in a nondiscriminatory, consistent, and fair manner.

Many employers have decided to impose (or have maintained) a neutral policy prohibiting social or political messaging of any type, mitigating the impact of any allegations they have discriminated against one group or favored another. While enforcing a neutral policy could appear to be an easy solution, it may prove difficult in practice because customers and the public are sensitive to aligning themselves with (or distancing from) brands based on the companies' social views.

Bottom line

As the economy (hopefully) continues to reopen, more employers will be faced with the issue and should weigh the risks of adverse publicity and employee spirits when deciding which approach to implement. Although there are clear legal implications, ultimately, you should view the issue from a business perspective and implement your policy in a thoughtful and consistent manner.

Eric S. Roth is a shareholder with Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., in Miami, Florida. You can reach him at eroth@stearnsweaver.com. ■

COMMUNICABLE DISEASES

What to do if employees 'can't wear mask because of medical condition'

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

by Richard I. Lehr, Lehr Middlebrooks Vreeland & Thompson, P.C.

Many employers are wondering what to do if employees say they can't wear a required mask at work because of a medical condition. Read on to learn more.

Steps for employers

Here are steps employers can take when workers claim they can't wear a mask at work.

Know the facts. First, you've probably seen a great deal of misinformation about masks. The Occupational Safety and Health Administration (OSHA) has released a helpful Q&A about the safety of medical and surgical masks (https://www.osha.gov/SLTC/covid-19/covid-19-faq.html).

Depending on your workforce, you may want to provide the mask information as a positive talking point during a preshift or other regular meeting. At the least, you could have the material readily available on an as-needed basis.

Require medical verification. Next, if employees articulate a specific medical reason for being unable to wear a mask, you have the right to require them to provide medical substantiation for the limitation. Specifically, you may require them to ask the healthcare provider to:

- Identify whether the issue is (1) *any* covering, (2) its density, or (3) the fabric; and
- State what accommodation, if any, you could make for the employee in lieu of a face covering.

Evaluate possible accommodations. Let's assume the employee simply cannot wear a face covering. If so, you would evaluate whether a form of accommodation is available that would allow your infection control prerogatives to remain in place. They might include:

- Two regular breaks during which the employee could go outside or to some other designated area and lower his mask;
- Temporary transfer to an open position for which a mask isn't required; or
- Telework.

Any transfer or physical reassignment of the place where work is done wouldn't have to be permanent. Notably, for a transfer, the new position may pay less.

What if no accommodation will work?

If you ultimately conclude no accommodation is possible, you aren't required to let the employee continue working without a face covering if doing so would negatively affect the health and safety of coworkers and/or consumers. In that situation, you may place the employee on a leave of absence without pay until either (1) the company revises its face covering policy or (2) the employee's limitations end or the need for an accommodation changes.

During the leave of absence, you may move forward with filling the employee's position. If he can return to work later with a different or no accommodation, he should notify you. At that point, you could evaluate your staffing needs.

You may issue a COBRA notice to the employee and either leave him alone indefinitely or provide a follow-up date months into the future. If you don't hear from the employee by that date, you may consider him to be separated from the organization.

Richard I. Lehr is an attorney with Lehr Middlebrooks Vreeland & Thompson, P.C., in Birmingham, Alabama. You can reach him at rlehr@lehrmiddlebrooks.com. ■

INDEPENDENT CONTRACTORS

Oompa-Loompa doompety doo, Willy Wonka's got an employment law issue for you

AL | FL | GA | LA | MS

by Destiny Smith Washington, FordHarrison LLP

In the 1971 movie Willy Wonka and the Chocolate Factory, the Oompa-Loompas were small humans whom predators in their homeland preyed upon before Wonka invited them to work at his factory. Among other things, they loved to play practical jokes and sing songs. According to Wikipedia, they were paid in their favorite food, cocoa beans. Which, of course, raises a larger question for us employment law enthusiasts: Were the Oompa-Loompas employees or independent contractors?

Traveling down memory lane

My husband and I recently watched the original *Willy Wonka* movie (starring Gene Wilder) with my son for the first time. The movie is one of my absolute favorites. I found myself singing along and laughing when Violet swelled into a blueberry and when Charlie and his grandfather drank soda, flew to the ceiling, and burped themselves down. I cringed when Wonka threw old shoes into a batch of candy.

But hands down, my absolute favorite parts were when the Oompa-Loompas graced the screen. As I listened to Wonka's explanation for how they came to live with him, though, I couldn't believe what I was hearing. Apparently, in exchange for their services, the Oompa-Loompas were allowed to:

- Live at the factory; and
- Eat all the chocolate they wanted.

Further, I don't ever recall seeing a non-Oompa-Loompa performing services for Wonka.

Weighing Oompa-Loompas' contractor status

In determining whether workers are independent contractors under the Fair Labor Standards Act (FLSA), different federal circuit courts apply different tests. Many circuits (including the U.S. 11th Circuit Court of Appeals, which covers Alabama, Florida, and Georgia, where I live) apply the "economic realities" test. That is, they zero in on the reality of the relationship between the employer and the worker and whether it demonstrates dependence. If so, more than likely the worker is an employee.

The economic realities test has six factors, and here is how they might apply to the Oompa-Loompas:

- **Nature and degree of the employer's control over the manner in which the work is to be performed.** Wonka was an artist who was very serious about his craft. Everything was just perfect—from the tasty plants (which I now know to be salad but back then thought it was candy) to the edible tea cups. It's very likely he controlled each and every aspect of the factory, and the Oompa-Loompas were simply executing the orders.
- **Workers' opportunity for profit or loss depending on their managerial skill.** Did the Oompa-Loompas profit? Not likely, unless their wealth was counted in chocolate.
- **Workers' investment in equipment or materials required for the task or their employment.** Did the Oompa-Loompas invest in the equipment? Nope, it's unlikely the tools of the trade came from Loompaland. And those overalls and boots were totally Wonka's style.

- **Whether the rendered service requires a special skill.** Maybe the Oompa-Loompas arrived with some skill. But are we talking about their work ethic, or did they actually know how to make candy? If the latter, you could argue the skill could push them toward independent contractor status.
- **Degree of permanency and duration of working relationship.** The Oompa-Loompas were likely staying with Wonka forever, especially since he saved (ahem, took) them from their home.
- **Extent to which the rendered service is an integral part of the employer's business.** The workers' rendered service was the sole reason Wonka was in business—to make the candy.

Tipping the scales toward employee status

The economic realities test's six factors weigh heavily, if not completely, in favor of the Oompa-Loompas' receiving employee status. Under the FLSA, employees must be paid at least the minimum wage of $7.25 per hour (which sometimes is higher in certain states and localities) for their work. Therefore, Wonka might be in trouble for paying his employees in candy.

In the words of our dear friends, "Oompa-Loompa doompety dee, Wonka needs employment counsel immediate-ly!"

Destiny Washington is an employment law attorney in the Atlanta offices of FordHarrison LLP and a regular contributor to the firm's "EntertainHR" column, where this article first appeared. She can be reached at dwashington@fordharrison.com. ■

DISCIPLINE

Pregnant employee terminated for her threatening behavior—not discrimination

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

by Jennifer Kogos, Jones Walker LLP

In a recent case decided by the federal district court in Shreveport, an employee's pregnancy didn't curb her own threatening behavior that led to her termination. The court had to decide if her termination was really due to her threatening behavior or whether other motivations were at play, such as her pregnancy or complaints about not being accommodated.

Two-timing boyfriend leads to problems in the meat department

Ebony Gilbert was employed by Kroger supermarket in the meat and seafood department. A problem developed with her two female coworkers, Veronica and Porkeshia. Gilbert's niece and Veronica were involved in a romantic relationship with the same man. Veronica and Prokeshia wanted Gilbert to interfere in her niece's relationship with Veronica's "boyfriend." Gilbert's refusal led to a hostile relationship between the three employees.

Gilbert claimed Veronica and Porkeshia threatened her with violence. In turn, Veronica and Porkeshia filed official complaints with Kroger alleging Gilbert was creating a hostile work environment. The store manager met with the women to hear their complaints and rectify the situation. When the efforts were unsuccessful, the District Human Resources Manager (DHRM) was called in to meet with the women, along with their union representative. The meeting was compared to an episode of the Jerry Springer show.

After warning the meat department employees to "squash the beef," the DHRM explained that progressive discipline would be next if the behavior continued. Gilbert, Veronica, and Porkeshia signed Kroger's workplace violence policy prohibiting all threatening or intimidating behavior and acknowledged that violating the policy could lead to progressive discipline up to and including termination. Gilbert testified she understood this would be her last warning and disciplinary action would be taken in the event of a future episode. Veronica and Porkeshia requested transfers to other stores, stating they couldn't work with Gilbert. Veronica was transferred, and Porkeshia was injured in a car accident before she could be transferred.

Pregnancy leads to request not to lift pans

A few months later, Gilbert learned she was pregnant. She claimed her pregnancy was high-risk and requested light-duty work. She asked the assistant store manager, the meat and seafood department manager, and the HR manager to excuse her from lifting silver pans for cleaning and to change her schedule.

The HR manager asked for a doctor's note. The first doctor's note was undated and stated, "Please allow patient to have light duty and no heavy lifting and don't allow the patient to close at night." Despite being undated, Gilbert stated that she provided the note to the HR manager and the store manager on August 10, 2017. She claimed that despite the note, she still had to lift the heavy silver pans and work the night shift.

About a month after she provided the doctor's note, Gilbert alleged she injured her back when she lifted a silver pan. She claimed the injury caused her to seek medical care and miss over a week of work.

Following her injury and return to work, Gilbert provided another doctor's note to management. The note restricted her from lifting anything over 15 pounds. After this note, her schedule was changed, and she no longer

had to close the store. A couple of weeks after her return to work, on October 10, she met with the store manager and the DHRM. They discussed her issue with lifting and cleaning the silver pans. The store manager testified he left the meeting because Gilbert continued to speak over him.

Drama continues in meat department

Gilbert allegedly was involved in two other altercations with coworkers in the week leading up to her October 10 meeting to discuss her accommodation request.

First, Gilbert had a "violent altercation" with her male coworker, Jacob. A female coworker who witnessed the event reported that "out of the blue," Gilbert asked the male employee "what the f*ck you looking at" and then called him a "racist" and a "dumbass autism mother*cker." Jacob provided a statement that Gilbert made fun of him for having Asperger's syndrome and called him a racist in front of customers. Gilbert claimed the altercation began because Jacob disparaged African Americans and Mexicans and called her "ghetto."

Kroger also offered evidence Gilbert made a violent gesture toward another employee, Jimmy. He reportedly encountered her at the computer and that "all of a sudden" she made a "double fist at me and lunge[d] at me while saying f*ck you." Gilbert admitted making the gesture but stated it happened a couple months earlier after he pushed a trashcan at her and hit her in the stomach with it. The date stamp on the video footage didn't support her claim about the timing of the incident. The store manager reviewed the video and called the DHRM, who recommended Gilbert be suspended.

The store manager met with Gilbert to inform her she was suspended because of gross misconduct/workplace violence pending an investigation. She was presented with a constructive advice record, which she refused to sign. She then left the room cursing at him, reportedly telling him to go "f*ck himself." She was sent a letter stating she was terminated for "just cause," effective the last day she worked at the store.

Gilbert takes her 'beef' with Kroger to court

Gilbert later filed suit, alleging Kroger refused her a reasonable accommodation in violation of the Pregnancy Discrimination Act (PDA) and Louisiana law prohibiting pregnancy discrimination. She claimed the company accommodated other nonpregnant employees. She also claimed she was terminated because of pregnancy discrimination and in retaliation for complaining to HR about the denial of her request for accommodation.

To begin the review of Gilbert's PDA claim, the court explained an employee alleging the denial of an accommodation in violation of the Act must show (1) she belongs to the protected class, (2) she sought accommodation, (3) the employer did not accommodate her, and (4) the employer accommodated others similar in their ability or inability to work.

The court determined Gilbert was unable to establish her failure-to-accommodate claim because she couldn't meet the fourth prong of the test. Specifically, she failed to identify a comparator with a similar ability or inability to work who received an accommodation when she did not. Therefore, the court dismissed her pregnancy discrimination claim based on a failure to accommodate.

Gilbert's termination claim

Next, Gilbert alleged Kroger discriminated against her based on her pregnancy when it terminated her. To establish an initial case of pregnancy discrimination, she had to show that (1) she belongs to the protected class, (2) she was qualified for her position, (3) she suffered an adverse employment action, and (4) other similarly situated employees were treated more favorably. She belonged to the protected class (pregnant), she was qualified for the position, and she was terminated. Thus, the only dispute was the fourth element. To attempt to meet that element, she offered the following individuals as comparators: Veronica, Porkeshia, Jacob, and Jimmy. Each of the employees worked in the same department with the same manager.

First, the court determined Veronica and Porkeshia weren't proper comparators. Their dispute with Gilbert came to a head two months before she informed Kroger she was pregnant. The three women were also treated the same, and all had to sign the workplace violence policy. Her termination came after she had additional confrontations with other coworkers. There's no evidence in the record that Veronica or Porkeshia had other disciplinary violations after the "beef" with Gilbert.

Next, the Court considered Gilbert's claim that Jimmy was treated better than she was. Gilbert alleged Jimmy pushed a trashcan at her that hit her stomach. She argued management watched the video footage but didn't terminate or reprimand Jimmy. To the contrary, she argued Kroger used her "double fist" gesture at Jimmy as one of the reasons for her termination. The court noted she provided no evidence of Jimmy's disciplinary record. Without his record, he couldn't serve as a similarly situated comparator. She signed the workplace violence policy and was told she was being given a last chance. There's no evidence Jimmy had prior warnings or had been told he was given a last chance before the trashcan incident.

Finally, the court considered Gilbert's claim she was treated less favorably than Jacob. She alleged she had "words back and forth" with Jacob during which she said he made a reference to her "picking cotton." Her coworkers reported she called him a "racist" and a "dumbass autism mother*cker." Again, the court noted she failed to provide the disciplinary history on Jacob.

Without the history, the court couldn't deem him to be a proper comparator to Gilbert, who previously had been given a last chance.

Because Gilbert failed to provide the court with proof that similarly situated employees were treated more favorably, it dismissed her pregnancy discrimination claim based on her termination.

Gilbert's retaliation claim

Gilbert claimed Kroger terminated her in retaliation for her complaints to HR regarding her request for an accommodation. To establish a retaliation claim, she had to establish (1) she engaged in protected activity, (2) the employer took an adverse action against her, and (3) a causal link existed between the protected activity and the adverse action.

Kroger disputed there was a causal link between her complaints and her termination. A termination close in time to protected activity may provide the causal connection required to make out an initial retaliation case. Because the timing was very close (three days) between the final meeting with the DHRM about the accommodation and her termination, the court found Gilbert established a *prima facie* (minimally sufficient) retaliation case.

Kroger then had an opportunity to establish a legitimate nondiscriminatory reason for her termination. The store manager testified Gilbert was terminated because she was a violent person and engaged in gross misconduct. He also pointed to the fact she engaged in violent, aggressive behavior after she signed Kroger's workplace violence policy, including the incidents with Jimmy and Jacob.

The burden then shifted back to Gilbert to establish Kroger's reasons were a pretext (excuse) and retaliation was the real reason for termination. To meet that burden, she had to show her termination wouldn't have occurred "but for" Kroger's retaliatory motive.

Gilbert again pointed to the fact her termination was only three days after her meeting with the DHRM to discuss her accommodation request. The court noted timing alone is insufficient to establish "but for" causation. She also alleged the fact that her altercations weren't discussed in the meeting with the DHRM about the accommodation established pretext. The court rejected the argument, noting the DHRM could have purposely separated the topics or the investigation into the other incidents hadn't yet concluded.

Gilbert also argued that alleged comments made by management established pretext. She claimed the HR manager said she used to be a good worker but she should quit and take care of her family so she wouldn't have to stress coming into work during a high-risk pregnancy. The court disregarded that comment because there was no evidence the HR manager participated in the termination decision.

Gilbert also pointed to the store manager asking her for a doctor's note specifying how much she could lift. The court noted a request for specifics on a lifting restriction isn't discriminatory. She complained that when she asked about pregnancy leave, the store manager told her she had to work to be paid. The court found no reason to believe that comment showed animus, especially since there was no evidence Kroger offered paid maternity leave.

Finally, the store manager also allegedly commented on Gilbert's pregnancy by asking her when she planned on quitting her job. Even though the store manager was the decision maker on her termination, the court found the comment wasn't enough to establish pretext. Even if the comment was based on an outdated notion of women's ability to work while raising a family, it wasn't enough to demonstrate a retaliatory motive.

After reviewing the evidence, the court determined Gilbert failed to establish she wouldn't have been terminated "but for" her protected activity. Her employment history included several altercations in the months leading to her termination. She didn't dispute that several of her coworkers reported to Kroger she created a hostile work environment. Therefore, the court also dismissed Gilbert's retaliation claim. *Gilbert v. The Kroger Co.*, No. 19-0049 (W.D. La., 05/19/20).

Written documentation shielded employer from liability

When an employee engages in conduct that amounts to workplace violence or the threat of violence, clear and concise warnings are key. Of course, if an employee gets physical or places her hands on another employee, automatic termination often occurs. If threatening behavior is verbal and doesn't warrant immediate termination, however, it's imperative to have the involved employees acknowledge the policy and their understanding that any future infractions will lead to discipline up to and including termination.

In this case, there was a signed acknowledgment of the workplace violence policy along with an understanding that future incidences would lead to discipline. This fact helped the employer justify termination after additional alleged acts of threatening behavior occurred.

The record in this case wasn't as clear on the accommodations process. As a reminder, pregnant employees may be entitled to accommodations under the PDA. If you accommodate other employees with similar limitations, you should also strive to accommodate the pregnant employee.

Finally, train your supervisors not to make negative comments about an employee's pregnancy or medical condition when discussing employment status. No pregnant employee should ever be asked when she will quit to stay home to take care of her family.

Jennifer Kogos is a partner in Jones Walker's labor and employment practice group in New Orleans. Jennifer can be reached at jkogos@joneswalker.com or 504-582-8263. ■

LEGISLATION

New Georgia law protects breastfeeding moms in workplace

AL	FL	**GA**	LA	MS

by Ilene W. Berman, Taylor English Duma LLP

Working mothers who return to the workplace after childbirth and wish to pump breast milk received enhanced legal protection on August 11, when Georgia Governor Brian Kemp signed legislation requiring employers to provide paid lactation breaks and private locations at the worksite. The new law, known as "Charlotte's Law," eliminates an employer's discretion about whether to allow or prohibit employees to take the time they need to pump breast milk at work.

How new state law works

Charlotte's Law was inspired by a Georgia public school teacher who wanted to pump breast milk during one of her planned breaks. A supervisor told her, however, she would have to either stop pumping during the break or stay late after school to make up the time. The difficult choice sparked the state legislature to take action to protect a woman's right to pump and express breast milk in the workplace.

Under the new state law, an employer with one or more employees must provide a reasonable break time each day so a working mom can express breast milk for a nursing child (24 months of age or younger). So she can express the milk in privacy, the employer must provide a room or other location that (1) isn't within a restroom and (2) is in close proximity to her work area.

The requirement to provide a reasonable break time to pump breast milk is in addition to an employee's unpaid break time. The breastfeeding breaks, however, may run concurrently with other breaks. In addition, employers may not deduct from or reduce an employee's pay for any breaks taken to pump breast milk.

Employers are likewise prohibited from discriminating or retaliating against an employee for pumping or asking to pump breast milk or reporting any violations of the law. Significantly, the law provides employees with private claims, including damages, attorneys' fees, filing fees, and reasonable costs, explicitly including expenses for discovery (pretrial fact-finding) and document reproduction, for violations of the law.

Broader protection than FLSA provides

Charlotte's Law provides broader protection for breastfeeding working mothers than the Fair Labor Standards Act (FLSA), which was amended by the Patient Protection and Affordable Care Act (ACA). The FLSA requires covered employers to provide reasonable, unpaid break time to an employee who needs to pump breast milk for a nursing baby up to only *one year* after the child's birth.

The FLSA, as amended, also requires employers to provide the employees with a place to pump breast milk that isn't a bathroom but is shielded from others' view and free from intrusion by coworkers and the public. The Act's breastfeeding protections apply only to nonexempt employees. In addition, employers with fewer than 50 employees aren't required to comply with the law if doing so would create an undue hardship.

Ilene W. Berman is an attorney with Taylor English Duma LLP in Atlanta. You can reach her at iberman@taylorenglish.com. ■

AGE DISCRIMINATION

When in (or not in) doubt, flesh it out!

AL	FL	GA	LA	**MS**

by Jennifer D. Sims, The Kullman Firm

We all know the drill. You interview multiple employees/applicants for a position, and one just stands out. Your gut tells you he's the right guy for the position, but on paper, he's less qualified than the other candidates. Oh, and the others are members of a protected class. How can you avoid landing in hot water if you hire Mr. Right Guy? A Mississippi school district recently learned this lesson the hard way.

Facts

Cora Cunningham began working for the East Tallahatchie School District (ETSD) as an inclusion teacher in the fall of 2017. She had more than 23 years of experience in the education field, including three years as an assistant principal in other school districts. She also had an administrator's license and a Doctor of Education degree in educational leadership.

In July 2018, Cunningham applied for the assistant principal position at Charleston High School. The school district's superintendent, Darron Edwards, delegated Mark Beechem, principal at the high school, to interview applicants for the position. Beechem, who had previously worked with Cunningham in the same school and had an opportunity to observe her, interviewed some of the applicants but chose not to meet with Cunningham because of her performance in a past interview.

Beechem selected Ranald Johnson for the position because "he brought some things to the table that would be beneficial" to the high school and "would be a good fit for the system" the principal was putting in place. Johnson held a specialist's degree in educational leadership, which is "above a master's degree" but short of a PhD.

At the time Johnson was selected for the assistant principal position, he was approximately 39 years old, and Cunningham was 57 years old.

Court's decision

Cunningham filed a lawsuit against the ETSD asserting the decision to select Johnson rather than her was in violation of the Age Discrimination in Employment Act (ADEA). The ETSD filed a request for summary judgment, seeking dismissal of the claim without a trial, arguing she couldn't prove her age was the "but-for" cause of her being denied the promotion.

To prove she wasn't promoted because of her age, Cunningham had to show (1) she belongs to the protected class, (2) she applied to and was qualified for a position for which applicants were being sought, (3) she was rejected, and (4) another applicant not belonging to the protected class was hired. The ETSD didn't dispute Cunningham could make that showing. Thus, the burden shifted to the employer to articulate a legitimate nondiscriminatory reason for its decision.

In an attempt to meet its burden, the ETSD claimed the decision not to promote Cunningham was based on Beechem's belief Johnson would be a better fit. Also, based on the principal's previous interactions with her, he believed she lacked the desired capabilities for the job.

The court acknowledged that "justifying an adverse employment decision by offering a content-less and nonspecific statement, such as that a candidate is not 'sufficiently suited' for the position, is not specific enough to meet a defendant employer's burden of production." An employer's "subjective reason for not selecting an applicant may serve as a legitimate reason, but the employer must 'articulate a clear and reasonably specific basis for its subjective assessment.'"

Although Beechem's subjective beliefs about Cunningham's fitness for the position may have been true, the court determined the ETSD didn't articulate a nondiscriminatory reason *with sufficient clarity* to afford the candidate a realistic opportunity to show the reason was pretextual (or a cover-up for discrimination). The U.S. District Court for the Northern District of Mississippi thus declined to grant summary judgment in the school district's favor. *Cunningham v. East Tallahatchie School District*, 2020 WL 4495472 (N.D. Miss., Aug. 4, 2020).

Takeaway

When deciding between two or more candidates, it's important to be able to articulate specific nondiscriminatory reasons for the selection you make. As much as possible, you should steer clear of vague, subjective reasons and instead point to concrete, objective bases for the decisions. And of course, contemporaneous preparation of documentation outlining your reasoning is a best practice. As we have said time and time again, document, document, document!

Jennifer D. Sims is of counsel with The Kullman Firm and can be reached at 662-244-8824 or jds@kullmanlaw.com. ■

UNEMPLOYMENT COMPENSATION

Employer's failure to do its homework leads to six-figure defamation award

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

by Christopher Mann, Jones Walker LLP

A Louisiana employer's allegations during a hearing about a former employee's unemployment benefits claim—that she had engaged in fraud—resulted in a $224,000 judgment in her favor for defamation of character. The case serves as a reminder to employers of the potential pitfalls of even a lowly unemployment claim proceeding and the risks of accusing an employee of fraud when they don't take steps to ensure the allegation is factually sound.

Setting the stage

Janice Williams worked as a cook for MMO Behavioral Health, a psychiatric hospital, for more than 14 years with no disciplinary history. In 2015, she took three weeks of approved Family and Medical Leave Act (FMLA) leave and, upon her return, asked MMO about short-term disability benefits.

Approximately one week later, Williams was written up for engaging in activities for which she had obtained permission (*e.g.*, bringing old food home to her dogs). Soon thereafter, MMO accused her of stealing time by claiming to have worked on a day when she did not. Despite her efforts to show the accusation was false, the employer fired her.

From lowly unemployment benefits to jury trial windfall

Williams applied for unemployment benefits, which MMO contested. At the hearing, the company's HR director claimed the former employee had falsified her time card and hours worked. The administrative law judge didn't buy the argument and awarded unemployment benefits to the cook.

Williams then sued MMO in Louisiana state court asserting, among other things, a claim for defamation of character under state law based on the company's statements accusing her of fraud at the unemployment hearing. The jury sided with the cook and awarded her $224,000 in damages.

Court of appeal weighs in

MMO appealed to the U.S. 5th Circuit Court of Appeals (whose rulings apply to all Louisiana and Mississippi employers), arguing its statements at the unemployment hearing were protected by a qualified privilege against liability since they were made in the context of a legal proceeding. In examining the evidence, however, the appellate court found no error in the jury's determination that MMO had abused the privilege. Therefore, its accusations against Williams weren't protected.

Even before the unemployment hearing, Williams had provided MMO with an explanation about why its accusation that she had falsified her time card was incorrect. According to the court, the employer should have investigated the claim more thoroughly, especially in light of her explanation. The evidence at trial clearly showed another employee, *not* Williams, had used her time card on the day at issue and that the hours shown on the card were different from Williams' normal schedule.

The fact MMO apparently didn't look into the time card discrepancies but rejected Williams' effort to defend herself out of hand, supported the jury's finding that the qualified privilege had been abused. Thus, the 5th Circuit concluded the company's statement about the timecard "was made with knowledge that it was false or with reckless disregard of whether it was false."

MMO also challenged the amount of damages awarded, arguing no evidence showed Williams had sustained any damages, much less the level awarded by the jury. The 5th Circuit disagreed, concluding the employer's published statement accusing the cook of fraudulent activity at the unemployment hearing was defamatory *per se,* which permitted the jury to presume the statement was false, made with malice, and resulted in injury to the individual. The appeals court further concluded the amount of damages was within the "realm of reason" and did not "shock the judicial conscience." *Williams v. MMO Behavioral Health Systems, LLC,* No, 19-30757 (5th Cir., July 9, 2020).

Takeaway for employers

So, what are the lessons for employers here? First and foremost, do your homework before accusing an employee of committing fraud. If a termination or another employment decision is based on alleged employee misconduct, including charges of fraudulent activity, make sure you have investigated the matter thoroughly.

Be sure to document not only the employee misconduct but also any explanation provided by the individual as well as your investigation. If a mistake was made, correct it. An indefensible position doesn't get stronger the more times it is repeated.

Finally, take even lowly unemployment claims proceedings seriously. If you have reason to contest a former employee's claim, be sure to do your homework and come prepared.

Christopher Mann is a partner in Jones Walker LLP's labor relations and employment practice group. You can reach him in New Orleans at cmann@joneswalker.com or 504-582-8332. ■

RETALIATION

Korean carmaker outpowers the opposition

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

by Chris Butler, Christopher Butler LLC

In a controversial, bitterly divided decision, the 11th Circuit (whose rulings apply to all Alabama, Florida, and Georgia employers) recently held a Georgia automaker's decision to fire an HR representative after it had suspected her of recruiting another employee to sue the company was lawful and nonretaliatory.

Facts

In 2010, Korean automobile manufacturer Kia Motors Manufacturing Georgia employed Andrea Gogel as team relations department manager at its West Point, Georgia, plant. As a key member of the HR team, her position was highly sensitive and critical to maintaining the company's employee relations. She was directly responsible for investigating and attempting to resolve workplace complaints internally and, where possible, avoid externalizing complaints and having them evolve into Equal Employment Opportunity Commission (EEOC) charges or lawsuits.

In her role, Gogel frequently expressed her personal dissatisfaction with Kia's employment practices, claiming management harbored antiquated views toward women. In turn, she reportedly exhibited a strong animus against the Korean management structure and "hated the Koreans."

After being passed over for promotion, Gogel lodged an EEOC charge against Kia on November 10, 2010, claiming gender and national origin discrimination. A week later, her colleague, HR manager Robert Tyler, filed a discrimination and retaliation charge. And merely three weeks later, another employee, Diana Ledbetter, filed a discrimination charge.

After receiving three EEOC charges in such close proximity, Kia discovered Gogel, Tyler, and Ledbetter were

represented by the same law firm. It also learned Gogel and Ledbetter frequently met behind closed doors for several hours several times per week. Based on those observations, among others, Kia became concerned Gogel and Tyler had recruited and encouraged Ledbetter to file a charge against the company, further believing Gogel was spearheading a campaign against it.

Kia determined Gogel's suspected actions created a conflict of interest that rendered her ineffective in her role. As a result, it terminated her in January 2011, two months after she filed her charge.

Legal analysis

Gogel eventually filed a federal lawsuit against Kia alleging discrimination and contending she was terminated in retaliation for filing a charge. The trial court dismissed the entirety of her claims, finding Kia had fired her for a legitimate reason—her solicitation of a subordinate to file an EEOC charge against the company in contravention of her job responsibilities. She appealed the decision to the 11th Circuit.

As a matter of law, an employer is prohibited from retaliating against an employee because she has *opposed* an unlawful employment practice. The principle is more commonly referred to as the "opposition clause." On appeal, the 11th Circuit was tasked with deciding whether, in light of her special role and responsibilities as team relations manager, her recruitment of a fellow employee to sue Kia constituted protected conduct under the opposition clause. And if her actions were deemed to be protected conduct under the opposition clause, the court had to opine whether her termination was retaliatory and thus unlawful.

In conducting its analysis, the appeals court observed that in the context of a retaliation claim, an employee's oppositional conduct is not protected if the means by which she has chosen to express her opposition interferes with the performance of her job to the point it renders her ineffective in her role. Here, the court concluded Kia had reasonably believed in good faith that Gogel had abandoned her responsibility to attempt resolution of an employee's internal complaint when she instead solicited and encouraged the employee to sue the company.

The court found Gogel's actions unreasonably conflicted with the core objectives of her sensitive and highly important position, thereby creating questions of loyalty and effectiveness and prompting Kia to conclude it could no longer trust her to do her job. Thus, her actions weren't protected under the opposition clause because they unreasonably interfered with her job duties. As a result, Kia didn't engage in unlawful retaliation when it terminated her for encouraging another employee to file legal action against the company.

Takeaway for employers

The majority of the 11th Circuit recognized employers have a legitimate expectation of effectiveness and loyalty from their HR professionals, particularly those charged with investigating and resolving workplace complaints. When an HR representative deviates from that role and undertakes unreasonable means—such as aiding and abetting other employees to sue the employer—she isn't protected from termination.

A number of dissenting judges were troubled, however, that Gogel had filed her own discrimination charge, opining that while her conduct may not have been protected under the opposition clause, by filing her own charge on her own behalf, she may have engaged in protected conduct under the "participation clause" (an alternative component to the opposition clause). This observation signals she may have been able to demonstrate retaliation by the fact she participated in filing a charge on her own behalf and was terminated soon thereafter.

Given the diametrically opposed viewpoints expressed in this 100+ page decision, future cases bearing similar facts and circumstances will be shrewdly analyzed, bringing close calls and uncertain outcomes. Your mileage may vary.

In less obvious scenarios, you should proceed with extreme caution and diligence when taking adverse action against managerial employees who raise internal complaints on their own behalf, while simultaneously championing the cause of other subordinates—because you

may face a retaliation claim filed under *both* the opposition and participation clauses.

Chris Butler is an employment lawyer with Christopher Butler LLC in Atlanta. You can reach him at 404-295-1985 or cbutlerlaw@outlook.com. ■

TERMINATION

Supervisor's retaliatory motive nearly tanks firing after fourth strike

AL	FL	GA	LA	MS

by Minia Bremenstul, Jones Walker LLP

A former Walmart employee who was fired for her inappropriate handling of a suspected shoplifter—her fourth disciplinary action—cannot continue with her retaliation claim under Title VII of the Civil Rights Act of 1964 despite her supervisor's retaliatory motive. She argued her supervisor harbored a retaliatory motive against her due to sexual harassment complaints she made against him less than two months earlier. The 5th Circuit found that although the supervisor played a role in the investigation, the employee didn't present evidence the investigator relied on the supervisor's statements when making the termination decision. Of note for employers is the court's warning that the outcome would have been very different for Walmart had the supervisor inappropriately influenced the investigation.

Employment and disciplinary history

In 2014, Lashawnda Brown began working as an assistant manager for a Walmart Neighborhood Market. Before July 2016, when Brown began reporting to store manager Aurelio Quinn, she had received three levels of coachings under Walmart's employee disciplinary policy: one for attendance and two for referencing associates using derogatory language. The most recent violation occurred a month before Quinn became her supervisor. Under Walmart's disciplinary policy, any further infractions occurring during the next 12 months would subject her to termination.

Sexual harassment complaints

In December 2016, Brown began hearing rumors that Quinn was sexually harassing female employees. One rumor involved Quinn's allegedly paying an employee for sex. Another involved claims he invited an employee to meet him at his hotel room.

Brown called Walmart's ethics hotline on March 28, 2017, to report that Quinn was soliciting sexual favors from employees in exchange for money or employment-related favors. A week later, she followed up with a new allegation after she was told Quinn had offered to keep an employee from facing an automatic termination for attendance in exchange for her performing oral sex on him.

On May 17, as part of Walmart's investigation into Brown's complaints, Quinn made a statement in which he denied all wrongdoing, expressed frustration with Brown, and indicated he was aware she was behind the allegations.

Suspected shoplifting incident

On May 9 (after Brown's complaints but before Quinn's statement), a customer service representative (CSR) advised Brown that a customer left the store with more groceries in her cart than the self-checkout register receipt reflected and that the CSR instructed a cashier to bring the customer back into the store. Brown explained to the CSR that following a customer into the parking lot violated company policy but that it was too late to correct the mistake. Brown went to the front of the store, compared the customer's receipt to the items, and determined the customer had paid for all items in the cart.

The disgruntled customer demanded to speak with Brown's manager. Quinn also was at the front of the store, and the customer gave him the receipt and showed him the contents of her shopping bags and the inside of her purse. After checking the receipt, Quinn apologized, escorted the customer outside, and spoke with her for a while. According to him, the customer insisted on making a report, so he reported the incident to the market manager, who immediately concluded it was "a bad stop." The incident was then reported to the market asset protection manager, who also concluded it was a bad stop after hearing Quinn's recap.

Investigation and termination

The market asset protection manager began an investigation and instructed Quinn to obtain witness statements, which was the normal practice. The CSR testified that when Quinn obtained her statement, he asked her to state that Brown directed her to stop the customer, which was untrue. Even though Quinn threatened the CSR's job, she refused.

After reviewing the witness statements and surveillance footage, the market asset protection manager concluded Brown didn't follow company policy because she questioned a customer without observing certain required elements and did so even though the customer had gone past the sidewalk when she should have allowed the customer to leave. He recommended Brown receive a coaching for violating the policy, which resulted in her discharge due to her previous coachings. He also recommended the CSR's employment be terminated, despite her not having any prior disciplinary history, and that the cashier receive a coaching. The decision maker testified Quinn didn't influence the disciplinary decisions.

Brown was fired on May 19. Three days later, Walmart closed the investigation into her complaints concerning Quinn as "unsubstantiated." He was later terminated for gross sexual misconduct based on the report of another Walmart employee.

Lawsuit

Brown filed a lawsuit against Walmart claiming she was fired in retaliation for reporting sexual harassment by Quinn in violation of Title VII. The lower court granted summary judgment (dismissal without a trial) in favor of Walmart, determining no reasonable jury could find in her favor on the retaliation claim.

Brown appealed the decision to the 5th Circuit, which confirmed the lower court's ruling was correct.

Close timing shows causal connection

One of the disputes during the appeal was whether Brown met her burden of proving the causation prong of her *prima facie* (minimally sufficient) retaliation case. There were approximately seven weeks between her first hotline report to Walmart and her termination. The 5th Circuit found that short gap alone was sufficient to suggest causation for her retaliation claim. But she had to present additional evidence to show pretext (a cover-up of the employer's true motives).

No impermissible influence in decision

Brown conceded Walmart offered a legitimate nonretaliatory reason for her termination, but she claimed she had presented enough evidence to suggest Quinn's retaliatory actions were the true cause of her termination. The 5th Circuit disagreed.

Brown argued the "cat's paw" theory, claiming Quinn impermissibly influenced the investigation by falsely reporting she instructed the CSR to stop the customer and attempting to influence the witness statements. Under the cat's paw theory, an employer may still be liable under Title VII even if a decision maker didn't directly act out of retaliatory animus if the decision maker was influenced by another supervisor with an unlawful motive.

The 5th Circuit recognized Quinn could have influenced the investigator's initial perception, but Brown failed to show the influence was the "but-for" reason for her termination. It was undisputed that the investigator also reviewed the witness statements and surveillance footage before recommending her termination. The court noted Quinn's attempt to threaten the CSR to falsify her witness statement was "deeply disturbing" but ultimately unsuccessful. Importantly, the recommendation for Brown's termination was based on the investigator's conclusion she shouldn't have approached the customer once she knew it was a bad stop and not based on Quinn's false accusation she had instructed the CSR to stop the customer.

The court also rejected Brown's arguments Quinn was similarly situated and treated more favorably, finding she knew before approaching the customer it was a bad stop, whereas Quinn did not. *Brown v. Wal-Mart Stores East, L.P.*, 19-60719, 5th Cir., Aug. 14, 2020.

Takeaway

The court made clear in this decision that a jury would likely be deciding Walmart's fate if Quinn had been successful in pressuring any witness to provide a false statement, as he tried to do. This decision sends a strong message to employers that if a supervisor with a retaliatory motive has a role in an investigation, it generally won't be found to be "independent."

To avoid any potential liability under the cat's paw theory, you should be sure to keep supervisors with any potential retaliatory animus away from investigations. If an employee makes a complaint about a supervisor's alleged unlawful actions, the supervisor shouldn't play a role in any investigation into the employee to the extent possible. For some employers, this is easier said than done depending on resources for investigations into misconduct, but as you can see, it matters. Be sure to consult with your employment counsel when needed.

Minia Bremenstul is an associate in Jones Walker's labor and employment practice group. She can be reached in New Orleans at mbremenstul@joneswalker.com or 504-582-8603. ■

BLR® a Simplify Compliance brand

HR hero by BLR®

SOUTHEAST EMPLOYMENT LAW LETTER (ISSN 2689-789X) is published monthly for $499 per year by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

Editorial inquiries should be directed to Content Manager Alan King, aking@blr.com.