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FLORIDA
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PROTECTED ACTIVITY

Putting yourself in the best position to defend whistleblower claims

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

In addition to the myriad whistleblower provisions in federal statutes, Florida has enacted two whistleblower laws that cover private- and public-sector employers respectively. The whistleblower statutes prohibit employers from taking adverse action against employees for complaining about their alleged violations of the law. A recent decision from Florida's 4th District Court of Appeals (DCA) highlights some employer concerns about how to appropriately respond to what appear to be whistleblowing complaints when courts continue to interpret the law very broadly.

Facts

Jeffery Kogan, a law enforcement officer, sued Sheriff Scott Israel and the Broward Sheriff's Office (BSO) under Florida's public Whistle-blower's Act. His complaint was based on the allegation that he was demoted after he reported an incident involving the possible use of excessive force in Fort Lauderdale, but not by the BSO.

A jury found in favor of Kogan, and the BSO challenged the verdict through posttrial procedural motions. The BSO's challenge focused on whether Kogan could prove that he was retaliated against, despite the jury's findings. Although a new trial was granted based on juror misconduct, BSO's challenge to the sufficiency of the evidence supporting the jury's verdict was denied. On appeals, the 4th DCA affirmed that ruling.

Appellate court's opinion

In upholding the trial court's denial of the BSO's challenge to the jury verdict, the appellate court examined the factual circumstances in light of prevailing law. The public Whistle-blower's Act requires an employee to show that:

(1) He engaged in statutorily protected conduct.

(2) He suffered an adverse employment action.

(3) There is some causal connection between the two.

The BSO argued that Kogan didn't prove that he engaged in protected activity under the statute or that he was even a whistleblower at all.

Under the public Whistle-blower's Act, determining whether an employee's complaint is considered whistleblowing can be difficult. Indeed, the statute requires that an individual complain of a certain type of legal violation in a certain way in order to be protected. Some complaints must be made in writing, while others can be made orally but must be made in the right context and to the right people (e.g., in the context of an investigation). In this case, the appellate court held that Kogan proved at

trial that he disclosed his complaint in the context of an investigation.

At trial, Kogan established that he was asked to participate in an investigation conducted by the Florida Department of Law Enforcement (FDLE) and he made a protected disclosure in the course of the investigation. He claimed that during the FDLE investigation, he disclosed a suspected violation of excessive force policies by another law enforcement entity in Fort Lauderdale, not the BSO.

The BSO argued that because Kogan's complaint involved potentially illegal activity by another entity, it wasn't protected, an argument that has some foundation in the language of the statute itself. The appellate court disagreed, reading the statute broadly to encompass complaints like Kogan's. In so holding, the court found that "the public Whistle-blower's Act does not require that the disclosed information [involve the whistleblower's] employer."

Determining whether an employee's complaint is considered whistleblowing can be difficult.

The BSO also argued that Kogan didn't prove that his complaint to the FDLE was causally related to his demotion or that his demotion wasn't based on legitimate reasons. The appellate court rejected both arguments, holding there was enough evidence before the jury to allow it to reach the verdict in favor of Kogan. *Jeffrey Kogan v. Scott Israel, as Sheriff of Broward County, Florida,* Case No. 4D15-1848 (4th DCA Fla., 2017).

What does this mean for employers?

Courts continue to broadly interpret Florida's whistleblower laws. Consequently, if one of your employees complains, you must make sure you address the complaint appropriately. Follow your policies and guidelines for resolving complaints, and take steps to make sure the employee doesn't suffer any illegal retaliation for making the complaint.

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ELECTRONIC WORKPLACE

What can you do when an employee gains unauthorized access to coworkers' e-mail?

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

An employee's unauthorized access or "hacking" of another employee's electronic messages is a common concern in the workplace. Is such conduct illegal? Yes. Are there remedies for it? Yes. The U.S. 11th Circuit Court of Appeals (whose rulings apply to all Florida employers) recently affirmed a Miami court's finding that a senior manager's conduct in accessing his coworkers' e-mails violated federal law. Here's what happened.

Facts

In 2002, Christopher Carmicle began working for Brown Jordan International, a company engaged in the manufacture and sale of furniture for residential and commercial use. Carmicle received several promotions and rose through the ranks to become a senior official at the company. By 2005, he was in effect serving as the head of a separate Brown Jordan subsidiary, Brown Jordan Services. After a new CEO, Gene Moriarty, took control, Carmicle was asked to sign a written employment contract.

Moriarty and other senior officials at Brown Jordan's parent company began to have doubts about Carmicle around 2011. According to Moriarty, signs that Carmicle was incurring excessive entertainment expenses began to appear. In addition, he hired his wife and put her on the Brown Jordan payroll. Moriarty gave him a "stern warning" about his conduct and a second chance. Carmicle was also given greater responsibility for a second Brown Jordan subsidiary, Brown Jordan Company.

Moriarty claimed that after receiving a second chance, Carmicle again authorized excessive business expenses in 2013, and engaging in that conduct, after being warned for similar behavior, was enough to warrant termination. However, Moriarty decided not to fire Carmicle because the company's board of directors had decided to hire an investment bank to offer the parent company for sale. Moriarty believed it would be better for the sale if experienced managers were in place and

could go with the company to the new buyer. As a result, Brown Jordan held off on terminating Carmicle at that time.

While the company was listed for sale through an investment bank, three senior officials at the parent company—Moriarty, the general counsel, and the chief financial officer (CFO)—put together their own performance figures for the company and began considering their own buyout of part of the company. No suitors were found in 2013, and by early 2014, the performance numbers for the two companies Carmicle was responsible for were low. He began to be concerned that he was going to be fired over the performance of his companies.

Six months earlier, in 2013, Brown Jordan began transitioning from one e-mail service to another. As part of the transition, the chief information officer gave all employees a generic password—Password1—and asked each employee to test his new e-mail account with the password. Carmicle discovered that he could access the e-mail accounts of other employees, and he began to read his coworkers' e-mails without authorization.

Carmicle claimed he started reading other employees' e-mails after he became suspicious that one of his subordinates was communicating directly with Moriarty and that they were lying to him. That prompted him to use the generic password to access their accounts and

ASK ANDY

Calculating FMLA leave exhaustion for reduced-schedule leave

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

Q *An employee in my office works a reduced schedule because she has a qualifying health condition under the Family and Medical Leave Act (FMLA). Her normal work schedule varies between 30 and 45 hours each workweek, but she is limited to working 24 hours a week during her reduced-schedule FMLA leave. How do I determine when she has exhausted her 12 weeks of FMLA leave?*

A When an employee takes FMLA leave on an intermittent or reduced-leave schedule, her employer may count only the leave she actually takes toward her 12-week allotment (or the 26-week allotment for military caregiver leave). The calculation for leave exhaustion is done on a proportional or prorated basis. For example, if an employee who normally works 40 hours each week takes off 10 hours a week because of a serious health condition, she uses one quarter of a week of FMLA leave each workweek during the intermittent or reduced-leave schedule. Under that scenario, it would take her 48 weeks to exhaust 12 weeks of FMLA leave.

Your question adds a wrinkle to the equation because your employee works a variable schedule. In that situation, there really is no "normal" workweek from which to determine her prorated FMLA leave usage. When you can't determine with any certainty how many hours an employee would have worked had she not taken FMLA leave, you must look to the weekly average of hours scheduled over the 12-month period immediately preceding the beginning of her FMLA leave.

You state that the employee normally works between 30 and 45 hours each week. Unless you know how many hours she would have worked during the workweeks at issue if she hadn't taken FMLA leave, you should use the 12-month "look-back" method to determine her "baseline" average workweek. Once you have that baseline average, you can determine her prorated FMLA leave usage. For example, if the employee's 12-month average turns out to be 32 hours per week and she works a reduced-leave schedule of 24 hours each week, then every eight hours of leave would constitute one quarter of a week of FMLA leave.

One more point: If an employee normally is required to work overtime but can't work the overtime because of an FMLA-qualifying reason, then the hours she can't work (including the required overtime) may be counted against her FMLA leave allotment. So, if an employee normally is required to work 45 hours per week but works only 40 hours because of an FMLA-qualifying condition, the five overtime hours equate to one-ninth of a week of FMLA leave. Voluntary overtime hours the employee doesn't work for an FMLA-qualifying reason may not be counted against her FMLA leave entitlement.

Andy Rodman is a shareholder and director at the Miami office of Stearns Weaver Miller. If you have a question or issue that you would like Andy to address, e-mail arodman@stearnsweaver.com or call him at 305-789-3255. Your identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

AGENCY ACTION

EEOC announces $4.25 million settlement of sex discrimination suits. Two lawsuits against a group of affiliated coal mining companies accused of hiring practices that effectively excluded women from working in the underground mines and in other coal production positions have been settled. The settlement calls for the companies to pay $4.25 million to a group of female applicants who it was determined were denied jobs because of sex discrimination. The Equal Employment Opportunity Commission (EEOC) filed suit against Marion, Illinois-based Mach Mining, LLC, in 2011. In 2016, the agency filed a second lawsuit naming certain affiliates of Mach that, along with Mach, are part of St. Louis-based Foresight Energy. The cases were resolved by a single consent decree. In addition to the monetary settlement, the companies have agreed to hiring goals that are expected to result in at least 34 women being hired into coal production jobs in their mines that operate in Illinois.

OSHA issues recommended practices on anti-retaliation programs. The Occupational Safety and Health Administration (OSHA) has issued "Recommended Practices for Anti-Retaliation Programs." The recommendations are intended to apply to all public- and private-sector employers covered by the 22 whistleblower protection laws that OSHA enforces.

Veteran EEOC member takes top post. EEOC member Victoria A. Lipnic was announced as President Donald Trump's pick for acting chair of the agency in January. Lipnic has served as an EEOC commissioner since 2010, having been nominated to serve by President Barack Obama and confirmed by the Senate initially for a term ending on July 1, 2015. Obama nominated her to serve a second term ending July 1, 2020, and she was confirmed by the Senate on November 19, 2015. "I believe equal employment opportunity is critical to all Americans and to how we define ourselves as a nation," she said after the announcement.

Miscimarra takes helm of NLRB. President Trump announced in January that he had named National Labor Relations Board (NLRB) member Philip A. Miscimarra as acting chair of the NLRB. "I remain committed to the task that Congress has assigned to the Board, which is to foster stability and to apply the National Labor Relations Act [NLRA] in an even-handed manner that serves the interests of employees, employers, and unions throughout the country," Miscimarra said after the announcement. He also recognized former Chairman Mark Gaston Pearce for his service. Pearce will continue as a member of the Board in a term expiring August 27, 2018. The NLRB also currently includes Lauren McFerran, whose term expires on December 16, 2019. Two Board seats are vacant. ✤

read their e-mails. According to the court, "From there, Carmicle's behavior began to snowball" and he "repeatedly accessed the e-mail accounts of other employees, including his superiors, with the generic password and used his personal iPad to take screenshots of hundreds of e-mails over the next six months." That was how he learned of the buyout attempt by Moriarty, the CFO, and the general counsel.

Carmicle thought Moriarity's conduct was improper. He also learned that the CFO was monitoring his expense account. Sensing that the board would fire him, he took preemptive action, writing a letter to the board in which he accused Moriarty of improper conduct, including the preparation of a second financial model to the detriment of shareholder value in an attempt to secure the consumer business through a management buyout.

After receiving the letter, the board hired an outside consulting firm to investigate Carmicle's allegations. During the investigation, the consulting firm learned that Carmicle had gleaned much of his information by reading everyone's e-mails. The investigator also believed and reported to the board that Carmicle had incurred more than $100,000 in unauthorized entertainment expenses. As a result of those findings, the board decided to fire him for cause under his employment contract.

After he was fired, Carmicle went home and used his "Find My iPhone" app to remotely lock a laptop owned by the company, making the computer inaccessible. He later claimed that locking the company computer was an accident and he intended to lock his own personal laptop, which he left at the office when he was walked out. He also claimed to have lost his personal iPad, which he used to take screenshots of hundreds of e-mails.

Carmicle's firing wasn't enough, however. Within weeks, Brown Jordan sued him under the Computer Fraud and Abuse Act (CFAA) and the Stored Communications Act (SCA) in the U.S. District Court for the Southern District of Florida. Ten days later, Carmicle sued Brown Jordan in state court in Kentucky. The company was able to get the lawsuit in Kentucky transferred to federal court, and the two lawsuits were eventually consolidated into one case in Miami.

The Miami court held an 11-day bench trial (i.e., a trial before a judge rather than a jury). Among other claims, Brown Jordan alleged that by accessing company e-mails without authorization, Carmicle had violated the CFAA and the SCA. The court agreed, finding his conduct violated both laws. Carmicle appealed to the 11th Circuit.

11th Circuit's decision

CFAA claim. One issue before the appeals court was whether Brown Jordan was entitled to damages for Carmicle's CFAA violations. The CFAA provides, in part: "Whoever . . . intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer" violates the Act. In addition, the law states, "A civil action for a violation of this section may be brought *only if* the conduct involves [one] of the factors set forth in [S]ubclauses (I), (II), (III), (IV), or (V)" (emphasis added).

Subclause (I) permits a civil suit only if the plaintiff incurs a minimum "loss" of $5,000 as a result of the "interruption of service."

On appeal, the court considered whether Carmicle's actions caused a "loss" to Brown Jordan and whether the loss was due to the "interruption of service." Carmicle argued that his access of company e-mails caused no loss to his former employer, and if it did, the only loss was the cost it paid the outside consultants who investigated his conduct for the company. The appeals court decided that his conduct did violate the CFAA. And in ruling on the issue for the first time, the 11th Circuit held that a "loss" under the CFAA doesn't have to stem from an "interruption of service" to be compensable.

SCA claim. Next, the appeals court turned to the employer's claim that Carmicle's conduct violated the SCA. The district court in Miami had ruled that he violated the SCA when he accessed other employees' e-mails without authorization. Carmicle argued that he didn't violate the SCA because the e-mails he accessed weren't held in "electronic storage" as that term is defined in the Act. He also argued that his access was authorized.

The SCA provides, in part, that a person who "intentionally accesses without authorization a facility through which an electronic communication service is provided; or . . . intentionally exceeds an authorization to access that facility; and thereby obtains . . . access to a wire or electronic communication while it is in electronic storage in such system" is liable under the SCA. Carmicle argued that since the e-mails he accessed and read had already been "opened," they were not "stored" under the SCA. This issue also hasn't been decided by the 11th Circuit, but the court declined to decide it in this case because Carmicle hadn't properly raised the argument before the lower court.

Next, the court considered Carmicle's argument that his access to the e-mails had been authorized. In making that argument, he cited the company's e-mail policy, which states:

> [E]mployees at [Brown Jordan] should have no expectation of privacy while using company-owned or company-leased equipment. Information passing through or stored on [Brown Jordan] equipment can and will be monitored. Employees should also understand that [Brown Jordan] has the right to monitor and review Internet use and e-mail communications sent or received by employees. Access to another employee's e-mail and [I]nternet usage is controlled by senior management. No IT staff person is authorized to give out passwords to users other than the account holder without the permission of senior management. Managers and employees who need access for legitimate [Brown Jordan] purposes to another employee's e-mail must request such access from a member of corporate senior management.

Carmicle argued that as a member of "senior management," he didn't have to request access to other employees' e-mail from a member of corporate senior management. The appeals court didn't buy his argument.

The court of appeals agreed with the lower court, which concluded that even though Brown Jordan's computer and Internet policy uses the terms "employees," "managers," "senior management," and "corporate senior management" without definition, it was clear that Carmicle's use of the generic password wasn't authorized. The district court determined that it would be "unreasonable to interpret the [p]olicy as authorizing [Carmicle] to exploit a generic password—which by happenstance permitted [him] to access others' e[-]mail accounts without requesting such access through appropriate and otherwise necessary channels—solely on [his] suspicion of dishonesty [in] the content of communications between others, without any reason to suspect wrongful or illegal conduct prior to doing so."

The appeals court agreed with the district court that Carmicle's e-mail access wasn't authorized. It therefore upheld the lower court's findings on the employer's CFAA and SCA claims against its terminated senior manager. *Brown Jordan International, Inc., et al. v. Christopher Carmicle,* Case No. 16-11350 (11th Cir., January 25, 2017).

Takeaway

This case is a rare example of the options available to your company when employees hack into your e-mail systems. It was refreshing to see the court upholding the employer's electronic communications policy. Make sure your company has written policies addressing employees' computer and Internet access as well as their e-mail privacy.

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

MENTAL HEALTH

EEOC releases guidance on mental health conditions

The Equal Employment Opportunity Commission (EEOC) has released informal guidance to advise employees of their legal rights in the workplace with regard to depression, posttraumatic stress disorder (PTSD), and other mental health conditions. Although the guidance is geared toward employees, it provides insight for employers on the EEOC's position on employee protections under the Americans with Disabilities Act (ADA).

Guidance covers broad range of topics

The guidance is provided in a question-and-answer format and covers the following areas.

Discrimination. The EEOC advises that it's illegal for employers to discriminate against an individual because he has a mental health condition. The guidance explains the exceptions for individuals who pose a safety risk and for those who are unable to perform their job duties. The EEOC says you can't rely on myths or stereotypes about a mental health condition when making an employment decision but instead must base your decision on objective evidence.

Privacy/confidentiality. The guidance explains that employees and applicants are entitled to keep their condition private and that employers are permitted to ask medical questions in four situations only:

(1) When an individual asks for a reasonable accommodation;

(2) After a conditional job offer has been extended but before employment begins (as long as all applicants in the same job category are asked the same questions);

(3) For affirmative action purposes—and a response must be voluntary; or

(4) When there is objective evidence that an employee may be unable to do his job (or may pose a safety risk) because of a medical condition.

When medical information is disclosed, you must keep the information confidential—even from coworkers.

Job performance. Reasonable accommodation is the focus of the EEOC's guidance in this area. It describes a reasonable accommodation as a change in the way things are normally done at work and gives the following examples:

- Altered break and work schedules (e.g., scheduling work around therapy appointments);
- A quiet office space or devices that create a quiet work environment;
- Changes in supervisory methods (e.g., written instructions from a supervisor who doesn't usually provide them);
- Specific shift assignments; and
- Telecommuting.

"Substantially limiting" condition. The guidance points out that a condition doesn't need to be permanent or severe to be substantially limiting under the ADA. A condition that makes activities more difficult, uncomfortable, or time-consuming to perform (when compared to the general population) may be substantially limiting.

And even if symptoms come and go, the guidance notes that "what matters is how limiting they would be when the symptoms are present." It also notes that mental health conditions like major depression, PTSD, bipolar disorder, and obsessive compulsive disorder "should *easily* qualify." According to this section, you shouldn't conduct an extensive analysis of whether a condition qualifies as a disability. Instead you should focus on complying with the ADA's antidiscrimination and reasonable accommodation requirements.

Reasonable accommodation. The guidance advises employees that they may ask for a reasonable accommodation at any time but that it's generally better to ask before any workplace problems occur because employers aren't required to excuse poor job performance—even if it's caused by a medical condition or the side effects of medication.

The guidance notes you may ask an employee to put an accommodation request in writing and may ask her healthcare provider for documentation about the condition and the need for an accommodation. The EEOC suggests that employees bring to their medical appointment a copy of the EEOC publication "The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation" (available at www.eeoc.gov).

The guidance adds that an unpaid leave may be a reasonable accommodation if the leave will help the employee get to a point where she can perform a job's essential functions. And if the employee is permanently unable to do her regular job, the guidance explains that she can request reassignment to another job if one is available.

Harassment. The EEOC advises employees to tell their employer about any harassment if they want the employer to stop the problem. The guidance recommends that employees follow your reporting procedures and explains your legal obligation to take action to prevent future harassment.

Bottom line

Although the EEOC's guidance is directed specifically at employees and their healthcare providers, you may also benefit from it for several reasons. First, the

document makes clear that you must rely on objective evidence in making employment decisions and requesting medical information from employees—myths, stereotypes, and rumors are insufficient. In addition, given the document's focus on confidentiality, you should ensure you have in place a process guaranteeing the appropriate treatment of information regarding employees' mental health conditions.

Also, the guidance highlights the significance of healthcare provider documentation in accommodation requests. Indeed, documentation from a healthcare provider often serves as a catalyst for the interactive dialogue between you and the employee that is required by the ADA.

Finally, the guidance underscores the importance of training supervisors. Supervisors must be able to identify an accommodation request and understand your obligations once a request is received. They also must manage performance and conduct issues that may be caused by employees' mental health conditions—a difficult task that can be accomplished with proper education and guidance.

The EEOC guidance is available online at www.eeoc.gov/laws/types/disability.cfm. ✤

EMPLOYEE SCHEDULES

Predictive scheduling provides shift notice, income consistency

The needs of businesses—especially in the retail, food services, and hospitality industries—change from week to week. Therefore, it has benefited businesses to be able to schedule shifts and change those schedules without providing much notice to employees. Companies want their workers to be flexible and available when they're needed.

But that lack of notice is very difficult for workers and doesn't allow them to schedule their lives before or after work or maintain any type of consistency. In some cases, employees are simply on call and aren't even guaranteed work. Therefore, the incomes of these employees can fluctuate drastically, depending on whether they're called into work or not or whether their shifts are shortened or lengthened.

What is predictive scheduling?

The first predictive scheduling ordinance was passed in San Francisco in 2014, and since then, other localities have taken notice. Seattle recently enacted a similar secure scheduling ordinance, effective in July 2017. Areas across the country as well as the federal government are considering the issues and determining whether predictive scheduling laws should be implemented on a larger scale.

Predictive scheduling laws generally require a minimum amount of notice to be provided for an employee's scheduled shift or if changes are made to an employee's scheduled shift. Predictability pay may be required if shift reductions or changes are made after the initial notice of the shift is provided or if on-call employees aren't ultimately called in to work.

San Francisco: the pioneer of predictive scheduling

In San Francisco, employers covered by the law are required to provide new employees with a good-faith written estimate of the minimum number of scheduled shifts per month as well as the days and hours of those shifts. Employees must receive their schedules two weeks in advance. Schedules can be posted or provided electronically if employees are given access to the electronic schedules at work.

If an employer changes an employee's schedule with less than seven days' notice, the employer must pay the employee an additional one to four hours of pay based on the amount of notice provided and the length of the shift. If an employee is required to be on call but isn't called in to work, the employer must pay her an additional two to four hours of pay based on the amount of notice provided and the length of the shift.

There are several exceptions to the rules, such as:

- When operations can't begin or continue because of threats to employees or property, because public utilities fail, or when something beyond the control of the employer happens;
- When another employee previously scheduled to work a shift is unable to work and doesn't provide at least seven days' notice;
- When another employee fails to report to work or is sent home;
- When the employer requires the employee to work overtime; or
- When the employee switches shifts with another employee or requests a change in shifts.

Seattle: cutting edge of secure scheduling

In Seattle, employers must provide new employees with a good-faith estimate of the median hours they can expect to work, including on-call shifts. Employees may request a preferred schedule to meet their commitments outside working hours. Employers must post employees' work schedules 14 days in advance.

If an employer adds hours to an employee's schedule after the schedule is posted, it must pay the employee for one additional hour. If an employee is scheduled for a shift and then is sent home early, the employer must

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pay him for half of the hours not worked. Employees receive half-time pay for any shift on which they're on call and don't get called in to work.

There are exceptions to the rules in Seattle as well, such as:

- When an employee requests a change to his schedule;
- When an employee trades shifts with another employee;
- When an employer provides notice of additional hours through mass communication and an employee volunteers to cover those hours; and
- When an employer conducts an in-person group conversation with employees currently on a shift to cover new hours to fill customer needs and an employee agrees to work more hours.

Helping employees gain consistency

In the end, predictive scheduling makes life much easier for employees by allowing them to maintain a steady flow of income, schedule transportation to and from the workplace without continual last-minute changes, allow time for a second job if additional income is needed, organize child care, and even commit to attending educational classes during off hours to further their education. ✤

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