Southeast Employment Law Letter

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

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DIVERSITY TRAINING

Trump order pulls back on race, sex stereotyping training

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

by Dawn Siler-Nixon, Nancy Van Der Veer Holt, and Cymoril M. White, FordHarrison LLP

President Donald Trump recently signed an Executive Order (EO 13950) that seeks to "combat offensive and anti-American race and sex stereotyping and scapegoating" and end so-called "divisive concepts" covered in certain workplace trainings. Proponents say the aim is to promote "unity in the Federal workforce" by prohibiting messages in trainings that imply "an individual, by virtue of their race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously."

Discussion of the EO by both proponents and detractors has been swift and thoughtful, particularly at a time when many American businesses have been increasing their focus on diversity, equity, and inclusion (DEI) and issuing public statements denouncing racism and injustice in the wake of events such as George Floyd's death. In that context, it's critical to understand what the EO does and does not require of government contractors and recognize its lasting impact and enforceability are currently uncertain, as the nation awaits the expected legal challenges to the order.

Who's covered

In general, the EO covers federal contractors, federal agencies, certain federal grant recipients, and the military. While certain aspects of the order were effective immediately, its workplace training restrictions are set for inclusion in federal contracts entered into after November 21, 2020, for contractors covered by EO 11246 and over whom the Office of Federal Contract Compliance Programs (OFCCP) has jurisdiction (i.e., government contractors). The training restrictions appear to apply to trainings for all employees of those contractors and their subcontractors, regardless of whether the workers support a federal contract.

Federal grant recipients also may be affected by the EO if the head of the agency issuing their grant programs identifies the recipient's program as one for which the agency will require recipients to make certifications as a condition of receiving the federal funds. The certifications will involve confirming the funds won't be used to promote the eight enumerated concepts involving race and sex stereotyping and scapegoating (listed below).

What's covered

The EO seeks to combat "division and inefficiency" in federal contracting by prohibiting contractors from providing employee training on "divisive concepts," which the order defines as ideas such as "race or sex stereotyping" or "race or sex scapegoating."

Race or sex stereotyping "means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex."

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Race or sex scapegoating "means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others."

The EO also lists the following prohibited training topics:

- One race or sex is inherently superior to another race or sex;
- An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- Members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- An individual's moral character is necessarily determined by his or her race or sex;
- An individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or
- Meritocracy or traits such as a hard work ethic are racist or sexist or were created by a particular race to oppress another race.

The topics mirror the eight certifications that may be required of certain grant recipients under the EO.

Notice requirements

Covered contractors must conspicuously post a notice (to be provided by the agency contracting officer) where it will be seen by employees and job applicants. They also must provide the notice to all labor unions or similar entities with which they have a collective bargaining agreement and must include specific language about prohibited training concepts, notice requirements, and noncompliance penalties in all subcontracts and purchase orders.

Enforcement plan

The OFCCP is tasked with investigating complaints and enforcing the EO. The agency has already established a hotline to field whistleblower complaints alleging a government contractor is using prohibited training programs in violation of the order.

The EO also requires the OFCCP to publish in the *Federal Register* (no later than October 22, 2020) a request for information (RFI) from government contractors and subcontractors as well as their employees. As part of the RFI, the agency will seek (1) copies of any training, workshop, or similar programing having to do with DEI and (2) information about the duration, frequency, and cost of the activities.

Possible penalties

Government contractors can potentially face rather steep penalties, including cancellation/termination or suspension, in whole or part, of their federal contracts, debarment, and/or monetary sanctions.

The Attorney General (AG) also will assess the extent to which workplace training that teaches the "divisive concepts" outlined in the EO may contribute to a hostile work environment under Title VII of the Civil Rights Act of 1964. The AG and the Equal Employment Opportunity Commission (EEOC) may issue future guidance "to assist employers in better promoting diversity and inclusive workplaces consistent with Title VII."

Potentially 'significant' impacts

Government contractors—many of which recently invested in DEI initiatives—may understandably be unsure about how to proceed in light of the EO. The order applies specifically to "training" and not policies or other documents they may publish as part of their DEI efforts.

If the EO is fully implemented, its terms could trigger significant modifications to current trainings, including how and whether to address concepts such as unconscious bias, privilege, sexual harassment, and meritocracy. Yet the order doesn't appear to prohibit training or

dialogues involving cultural competence, generational diversity, microaggressions, communications across differences, mindfulness, and trainings unrelated to race or gender, to name a few.

The EO's future is currently uncertain, given the presidential election and rumblings from many organizations about legal challenges:

- If a new administration takes over in January 2021, the EO most likely will be rescinded, even if implemented briefly in the interim.
- Likewise, if President Trump is reelected, legal challenges potentially lodged on various grounds, including policy concerns (failure to follow rulemaking procedures, obtain agency or congressional input, or be supported by data) and the First Amendment, also may affect the order's enforceability.

Employers that anticipate entering into new covered federal contracts as well as government contractors that will be renewing federal contracts after November 21, 2020, may want to evaluate their DEI training programs and determine whether any changes may be appropriate to avoid penalties under the EO. Before undertaking any major programming adjustments, however, many contractors will likely want to wait on further regulatory and legal developments.

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ECONOMIC OUTLOOK

Employers unsure about benefits for furloughed workers

AL | FL | GA | LA | MS

by Sharon Quinn Dixon, Stearns Weaver Miller Weissler Alhadeff and Sitterson, P.A.

Many struggling but optimistic employers have continued to offer medical, dental, and other benefits to employees on furlough during the COVID-19 pandemic. But with no immediate end in sight, they're wondering what to do next.

Employment relationship hasn't been severed yet

Most businesses in the United States (and the world, for that matter) remain hobbled because of the coronavirus crisis. (Amazon is an exception. Another notable exception is Peloton, the exercise bike maker, which is glowing in its 172% surge in total revenue, with gains in subscribers and demand for its fitness products.) But employees in several industries, including travel, hospitality, and entertainment, remain uncertain about their futures.

Before the pandemic, "furlough" was a concept more familiar in European countries where it's mandated by law. We've now settled on the concept that the employer hasn't severed the employment relationship of a furloughed employee, who is still active in the HR system. Instead, the individual isn't actively working or being paid *except for* the value of the benefits the employer continues to provide.

Employer options

Check your benefit plans and insurance policies. Determine how long you may extend eligibility even though furloughed employees aren't actively working. Many employers have clauses limiting the coverage to six months. Other plans or policies don't specifically address the duration, but carriers have allowed the coverage to remain in place so long as the employer pays the necessary premium. (Please get this in writing from your insurance carrier.)

As your benefits department begins delving into 2021 open enrollment, don't forget about the last quarter of 2020 and its special circumstances for any furloughed group.

Revisit your benefits plan's COBRA provisions. Normally, the reduction in the number of hours worked would constitute a COBRA-qualifying event, but not if the event doesn't also result in the loss of eligibility for coverage. For furloughed employees who still have health coverage, their COBRA event presumably won't occur until actual termination of employment, at which point presumably they will remain eligible for COBRA coverage for at least 18 more months, depending on plan terms, albeit without the employer subsidy.

With appropriate plan provisions, an employer with furloughed employees may now take action before termination to trigger COBRA earlier and thereby have at least some portion of the furlough period with the company's subsidy counting toward the 18 months of required COBRA coverage.

Rehiring employees before year's end

Some employers may have terminated employees but still hope to rehire them before the end of 2020. The laid-off workers likely withdrew their vested 401(k) plan account balances.

The IRS has provided helpful guidance on the "partial termination" issue affecting 401(k) plans and other tax-qualified retirement plans. Identifying the occurrence of a "partial termination," which generally occurs with an employer-initiated plan participant reduction of 20% or more, is important because affected individuals will become 100% vested in the employee contributions on

their behalf. As a result, the laid-off employees might be entitled to a greater vesting percentage of their account balances.

Significantly, the IRS announced employees who were laid off (not just furloughed) during 2020 won't count to determine if the 20% threshold was reached if they're rehired before the end of the year. Furloughed employees, who haven't actually severed their employment, presumably won't factor into the partial termination calculations.

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RACE DISCRIMINATION

Talk is (not) cheap! Racial remark leads to hefty judgment against MS firm

AL	FL	GA	LA	**MS**

by Jennifer D. Sims, The Kullman Firm

It's 2020, folks—a year that will always be associated with the COVID-19 pandemic. But for some, the year also represents a time of missed opportunity given the racial divide that's still present in our country. Employment lawyers hear the stories almost daily, and employers must be reminded that not everyone has moved beyond our nation's past. But if a business owner turns a "blind eye," what are the repercussions? A Mississippi employer recently found out.

Facts

Commercial Furniture Installation, Inc. (CFI), is an office furniture installation company in the Jackson area. Jackie Armagost and John Haselhorst were 50/50 partners in CFI.

Aisha T. Crump, an African-American woman, worked for CFI over the course of several different periods from December 2015 to September 2018. On April 18, 2018, Armagost called Crump and terminated her without explanation. While she was in her office packing up her things, she overheard Haselhorst tell Armagost that another CFI employee, Brenda Hollis, did not want Crump's "black ass working here."

Thereafter, Crump filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC). After Armagost learned of the filing, he asked Crump to drop the EEOC claim in return for reinstatement. She agreed and started back the following day but was relegated to a workstation in an isolated area at the bottom of a hot warehouse, which had no running water or bathroom.

When Crump tried to go to a higher floor to use the bathroom, Hollis wouldn't open the door to allow her to enter. She could only go to the bathroom down the street at the company's store.

The harassment continued, and at the end of July 2018, CFI stopped putting Crump on the schedule. It continued to pay her in cash, however, until September 2018.

Court's decision

Crump filed a lawsuit alleging race discrimination, racial harassment, and retaliation. CFI failed to respond to the lawsuit, and a default judgment was ultimately entered against the company. An evidentiary hearing was held on December 17, 2019, to determine the damages amount.

Back pay. The court first analyzed a proper award for back pay, to which entitlement is presumed once discrimination has been established. In general, back-pay liability in a wrongful termination case commences from the time the discriminatory conduct causes economic injury and ends upon the date of the judgment. On that basis, the court found Crump was entitled to $52,012.58.

Front pay. Crump also sought front pay, an equitable remedy employed to account for future lost earnings. While reinstatement is generally preferred over front pay, the court recognized it wouldn't be feasible to reinstate her into an environment where she experienced explicit race discrimination, retaliation, and hostility from the named partners. Thus, the court determined front pay was an appropriate alternative remedy.

Crump, age 37, had worked for CFI for around 27 months in total. She had been able to find subsequent employment, but it took her more than a year to do so, and it paid $2.05 less per hour. Thus, the court awarded front pay for two years at a rate of $2.05 an hour for 40 hours a week, which amounted to $8,528.

Additional damages. The court also awarded Crump:

- $140,000 for stress and emotional hardship and $585 for medical expenses associated with three visits to a mental health therapist, all of which she claimed to be related to the issues raised in the lawsuit;
- $200,000 in punitive damages for the malice and reckless indifference exhibited by CFI;
- $20,325 in attorneys' fees; and
- $566.65 in litigation costs.

Crump v. Commercial Furniture Installation, Inc., 19-461, 2020 WL 5869950 (S.D. Miss., Sept. 30, 2020).

Takeaway

The discriminatory remark and actions by CFI employees and principals led to a judgment in excess of $400,000 against the employer. In an already tumultuous time, such a judgment could have fatal consequences

for a business and undoubtedly harm the affected employee. To avoid setting your organization up for similar liability, you should be proactive:

- Have policies against discrimination, harassment, and retaliation, and require the reporting of those actions;
- Enforce and follow the policies;
- Discipline anyone who acts in a discriminatory or retaliatory manner; and
- Require employees to undergo equal employment opportunity training on a regular basis.

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LITIGATION

5th Circuit rejects discrimination, hostile work environment claims

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

by Jacob J. Pritt, Jones Walker

A former employee failed to establish she was subjected to a hostile work environment and discriminated and retaliated against by her former employer, the U.S. Court of Appeals for the 5th Circuit (which covers Texas, Louisiana, and Mississippi employers) recently ruled, affirming the district court's decision. The appellate court's opinion offers guidance on how you should respond to such allegations to avoid liability.

Former employee sues for bias, retaliation

Angie Scott-Benson worked as a health, safety, and environment (HSE) inspector for KBR, Inc., on a construction project in Waggaman, Louisiana, from 2013 to 2016. At some point during the stint, some coworkers reported her to the company's HR ethics hotline, alleging she was in a romantic relationship with her supervisor and receiving favorable treatment at work as a result.

KBR commenced an investigation and ultimately determined there wasn't enough evidence to substantiate the relationship, but it wrote up Scott-Benson and her supervisor and advised both to change their behavior in the workplace going forward.

After Scott-Benson was disciplined for the alleged workplace conduct, she filed a charge with the Equal Employment Opportunity Commission (EEOC) claiming:

- KBR and the coworkers had discriminated against her based on sex by accusing her of being romantically involved with the supervisor; and
- The company retaliated against her for informing the corporate office about a possible Health Insurance Portability and Accountability Act (HIPAA) violation related to some of her medical records.

In late 2016, after a construction project ended, KBR laid off Scott-Benson from her position as an HSE inspector. A different manager (not the supervisor with whom she allegedly had the relationship) tried to create a new HSE inspector position for her at another company project in La Porte, Texas. She applied for the position.

Ultimately, management decided KBR didn't need another HSE inspector on the La Porte project and that Scott-Benson wasn't qualified to fill such a job in any event. She countered that KBR hired a man for the position instead of her based on gender. The company replied that the male employee was hired for a separate, management-level position for which she hadn't applied.

After KBR declined to hire Scott-Benson for the La Porte project, she filed a lawsuit in federal court alleging she was discriminated against based on sex and the company failed to hire her in retaliation for filing the earlier EEOC charge.

Court rejects lawsuit because of insufficient evidence

Scott-Benson filed her gender discrimination lawsuit under Title VII of the Civil Rights Act of 1964. The statute holds employers liable under certain circumstances when an employee can show a hostile work environment, retaliation for reporting possible violations of the Act, or a wrongful termination or refusal to hire based on gender, race, or any other protected characteristic.

Hostile work environment. Before an employee can pursue a Title VII lawsuit, she must file a related charge with the EEOC. Although Scott-Benson filed multiple charges with the agency, none of them referenced a hostile work environment. Therefore, the court dismissed the claim.

Sex discrimination. To prove the failure-to-hire claim, Scott-Benson had to demonstrate she applied and was qualified for the job and the company hired someone of another gender instead. If she could make that showing, CBR had to articulate a legitimate nondiscriminatory reason for why she wasn't hired. The company established she wasn't qualified because of a lack of relevant experience and the position she sought was discontinued before her application.

Employer retaliation. The court likewise found no evidence KBR had retaliated against Scott-Benson for filing an EEOC charge or for any other reason. The company successfully showed (1) the Waggaman project had ended, which provided a legitimate reason for laying her off, and (2) she wasn't qualified for any positions that may have opened up in La Porte.

Takeaways for employers

KBR was able to defend itself against Scott-Benson's lawsuit in part because of adequate documentation of its hiring and termination practices and policies in place to prevent discrimination and retaliation. Be sure you have a method for employees to report perceived violations of company policy as well as actions that may constitute discrimination or create a hostile work environment. Complaints must be taken seriously and investigated promptly in compliance with the law.

Document the reasons behind your employment decisions, particularly adverse actions such as discipline, demotion, or termination. Proper documentation on the front end may help you avoid costly and extensive litigation if an employee or applicant accuses the company of violating Title VII.

Finally, always consult with an experienced employment attorney when it becomes clear an employee or applicant may be pursuing charges through the EEOC or preparing to file a lawsuit. It's never too early to retain legal counsel to help your company address and remedy the issues and develop policies to prevent the situations from happening in the first place.

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MINIMUM WAGE

Florida voters pass minimum wage increase to $15 by 2026

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

by Lisa K. Berg, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

On November 3, Florida voters approved Amendment 2 to the state constitution, gradually raising the state's minimum wage to $15 by 2026. The ballot measure needed 60 percent support to pass and narrowly cleared the threshold by winning approximately 60.8 percent of the votes cast. Florida becomes the first state in the South (and the eighth overall) to vote "yes" to the eventual $15 wage.

How quickly state's minimum wage will go up

Amendment 2 will boost Florida's minimum wage in phases from $8.56 in 2020 to the $15 mark in 2026. Here is when the new rates will take effect:

- $10 on September 30, 2021;
- $11 on September 30, 2022;
- $12 on September 30, 2023;
- $13 on September 30, 2024;

Q & A: Can we recoup benefit premiums owed by ex-employees? Short answer: not easily

by Martin J. Regimbal, The Kullman Firm

Q ***What is the general rule (or process) for recouping premiums owed by former employees? Typically, when an employee goes out on leave, we deduct the cost sharing from her paid time off (PTO). If she doesn't have any PTO left, we double-deduct her pay when she returns. Is there a way to recoup the funds if an employee resigns before we can deduct the amount from her pay?***

In most cases, the employer isn't able to recoup the full amount or, in some cases, any of the outstanding premiums. While you may seek to recoup health insurance and other benefit premiums owed by an employee upon her return from leave, you must do so in a manner that complies with the Family and Medical Leave Act (FMLA)—if the leave was FMLA-qualifying—and the Fair Labor Standards Act (FLSA).

Although the FMLA deems recoverable health and nonhealth benefit premiums to be debts owed by the employee to the employer and doesn't prohibit recouping them, it also doesn't provide a practical process for doing so when an employee's employment terminates before the full amount is recovered. The Act provides only that an employer may initiate legal action against the employee to recover the costs. In many circumstances, the cost of legal action may far outweigh the amount to be recouped, effectively eliminating the value of recovery.

While the FLSA also doesn't prohibit recouping such premiums, it places limits on the manner in which, and the amount, an employer may recover. For instance, if an employee returns to work and then shortly thereafter the employment terminates, the employer could seek to deduct the amounts from the final paycheck. If the employee is a nonexempt employee under the FLSA, however, the employer may not deduct certain premium amounts if it would drop the individual's wages below minimum wage for the pay period(s) in question. Like with the FMLA, this is likely to affect the employer's ability to recoup any or all of the premium amounts.

For the above reasons, you may consider arrangements whereby employees are required to make premium payments during leave even if they don't have paid time off (PTO) or other forms of paid leave. Under the FMLA, an employee who fails to make the premium payments during FMLA-qualifying leave can be subject to having insurance canceled. There are strict notice requirements on the employer and obligations to restore insurance coverage immediately upon the employee's return, but the risk of cancellation might encourage employees to stay current on the payments during leave periods and may reduce the risk of never recouping premium amounts in the scenario set forth in your inquiry.

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- $14 on September 30, 2025; and
- $15 on September 30, 2026.

Beginning on September 30, 2027, an annual adjustment to the state minimum wage will be based on increases to the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) or a successor index as calculated by the U.S. Department of Labor (DOL).

Where things stand now

Employers will in fact be subject to two minimum wage increases in 2021. Effective January 1, 2021, the state's minimum wage will rise from $8.56 to $8.65 per hour

For employers in the hospitality industry with tipped employees, a "tip credit" of up to $3.02 per hour may be taken for tips actually received by the workers. The employers must still pay employees a direct hourly wage of $5.63, which is the 2021 state minimum wage rate ($8.65) minus the federal tip credit ($3.02). Then, on September 30, 2021, the minimum wage will increase to $10 in accordance with Amendment 2.

Florida employers must post a notice of the state minimum wage requirement, in addition to posting the notice required by the federal Fair Labor Standards Act (FLSA). Both notices are available on the Florida Department of Economic Opportunity website (www.floridajobs.org).

How we got here

Florida voters approved minimum-wage changes back in 2004, when a ballot initiative implemented annual increases based on changes in consumer prices. This year, the Florida For a Fair Wage organization led the campaign in support of Amendment 2. Orlando attorney John Morgan chaired the group and helped finance the bid to get the measure on the ballot. The effort was backed by many unions and the Fight for $15, a global advocacy group focused on creating a living wage and increasing the federal minimum wage to $15.

Many Florida business groups strongly opposed Amendment 2, including the Florida Chamber of Commerce and the Florida Restaurant and Lodging Association. They argued increasing worker wages would lead to higher costs and job losses and devastate businesses, especially in the hospitality industry, which are already suffering from the COVID-19 pandemic and struggling to bounce back.

Will Amendment 2 have net positive effect?

Insufficient data exist to determine Amendment 2's true impact because few states have implemented a $15-per-hour minimum wage. In the interim, employers should review their budgets, update notices, and begin preparing for the inevitable.

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TERMINATION

Racist Facebook posts support employee termination, maybe

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

by Martin J. Regimbal, The Kullman Firm

Despite the proliferation of employer social media policies over the last decade and frequent cautionary tales in the news about employee social media mishaps resulting in serious consequences in the workplace, social media issues continue to arise. In a recent case from the Mississippi Court of Appeals, however, what seemed like a classic case of social media misconduct rightfully leading to termination wound up in a finding for the employee. Let's take a closer look.

Facts

In 2017, Cammie Rone's employment as a schoolteacher at Batesville Intermediate School was terminated by South Panola School District (SPSD) Superintendent Tim Wilder. The basis for her termination was a Facebook post attributed to Rone that stated:

> If blacks in this country are so offended [sic] no one is forcing them to stay here. Why don't they pack up and move back to Africa where they will have to work for a living. I am sure our government will pay for it! We pay for everything else.

In addition, another reason given for Rone's termination was a Facebook comment attributed to her stating "Amen" in response to a comment another individual had posted that stated, "Bet they won't protest them welfare checks." Screenshots of the post and comment were sent to the SPSD's public information director.

Rone appealed the decision through the school board's administrative process, asserting she wasn't responsible for the post or comment, but the board upheld the decision. She appealed to the chancery court, where her termination was overturned due to a finding that the decision to terminate wasn't supported by substantial evidence. The SPSD appealed to the court of appeals.

Court's decision

In upholding the chancery court's judgment, the appeals court agreed the SPSD hadn't met its burden of demonstrating the termination decision was based on substantial evidence. Private employers in an employment-at-will context can make a termination decision for a good reason, a mistaken reason, or no reason at all as long as it isn't otherwise prohibited (i.e., a discriminatory reason). Because Rone was a schoolteacher for a public employer, however, her termination decision could be overturned

if it wasn't supported by substantial evidence, was arbitrary or capricious, or was in violation of some statutory or constitutional right.

According to the appeals court, the SPSD's failure to satisfy its burden of providing substantial evidence in support of the termination decision arose from questions about whether Rone was in fact responsible for the Facebook post and comment. In particular, the court noted the employer hadn't taken any measures to authenticate the screenshots it received and never viewed the post and comment on her Facebook page. Citing previous Mississippi Supreme Court opinions, the appeals court found such failures supported the chancery court's decision that the SPSD lacked substantial evidence in support of its termination decision.

The appeals court noted current technology allows the "cloning" of an individual's Facebook page (essentially creating an account that appears to belong to another person), "hacking" someone else's account and posting comments from it, or otherwise generating a post that appears to be from a particular individual's account when in fact it is not. For those reasons, something more than a bald assertion that the post and comment were in fact Rone's was required. The "something more" included:

- The alleged sender admitting to authoring the posts;
- The alleged sender being viewed authoring the posts;
- A business record of an Internet provider or cell phone company showing the posts originated from the individual's personal computer or cell phone under circumstances in which it's reasonable to believe only the purported sender would have access to the devices;
- The communication containing information only the alleged sender would be expected to know;
- The alleged sender responding to an exchange in a way that indicates she was in fact the author of the communication; or
- Other circumstances peculiar to the particular case that might establish the post's authenticity.

Rone introduced no evidence her account had been cloned or hacked or the post and comment were generated by someone else, and the the appeals court agreed the post and comment warranted termination if they were hers. Nevertheless, it said the lack of any of the evidence listed above supported the chancery court's finding that the SPSD hadn't provided enough proof to support the firing decision. Accordingly, Rone was entitled to reinstatement and back pay for all the wages she would have earned had she not been discharged.

Takeaways

While the administrative process through which Rone appealed her firing wouldn't be available to an employee of a private employer in an at-will-employment relationship, the decision provides valuable lessons any employer should keep in mind going forward.

First, although you can be mistaken, you must have a good-faith belief in the reason for an adverse action. In that regard, Rone might have been able to argue the employer's lack of effort to prove the social media posts were actually attributable to her shows its lack of a good-faith belief in the termination decision.

Second, be sure to present evidence from the six points listed above. Otherwise, you may have trouble persuading a court to admit unauthenticated social media content.

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EMPLOYER RETALIATION

Can nonemployees sue under Title VII? 5th Circuit says 'no'

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

by Michael Foley, Jones Walker LLP

In a recent employer-friendly decision, the 5th Circuit concluded nonemployees can't sue under Title VII based on allegations they were the intentional target of an employer's retaliatory animus against an employee.

Facts

James Simmons worked for a third-party wholesaler of life insurance products to clients of UBS Financial Services, Inc., though he frequently worked out of UBS's offices. His daughter was a UBS employee who submitted an internal complaint of pregnancy discrimination and filed a charge with the Equal Employment Opportunity Commission (EEOC). She eventually resigned and settled her claim.

In the following months, Simmons' third-party relationship with UBS deteriorated. Allegedly in retaliation for his daughter's complaints, the company revoked his right of access to its offices and then eventually prohibited him from doing business with its clients. That effectively ended Simmons' job with his own employer.

Lawsuit and district court decision

Simmons sued UBS, among others, and alleged the company "retaliated against his daughter by taking adverse actions against him." Stated differently, he sued the company based on its employment relationship with his daughter, even though he wasn't UBS's employee. The company promptly asked the court to dismiss the

lawsuit, contending he couldn't sue under Title VII because he wasn't its employee.

A federal district judge in Texas agreed with UBS and dismissed Simmons' complaint because his nonemployee status foreclosed his legal standing to sue under Title VII. He then appealed to the 5th Circuit.

5th Circuit's decision

The 5th Circuit focused on whether Simmons' claim fell "within the zone of interests sought to be protected" under Title VII. The zone-of-interests inquiry requires courts to determine whether a legislatively conferred cause of action—like, in this case, a Title VII retaliation or discrimination lawsuit—encompasses a particular person's claim.

Simmons and UBS both relied on a U.S. Supreme Court decision—*Thompson v. N. Am. Stainless, LP*—to support their respective legal positions. In *Thompson*, the individual who filed suit (Eric Thompson) and his fiancée were employed by the same company. The fiancée filed a sex discrimination charge with the EEOC. Just three weeks later, the company fired Thompson, who sued, alleging the company fired him to retaliate against his fiancée for filing her charge.

The Supreme Court ruled reprisals against third parties can violate Title VII and concluded the decision to fire Thompson was unquestionably an unlawful act of retaliation against his fiancée. "The more difficult question," however, like the one before the 5th Circuit arising from Simmons' claim, was whether Thompson also could sue the company for retaliating against his fiancée.

Applying the zone-of-interests test, the Supreme Court concluded Thompson had the right to sue under Title VII for two reasons:

- Like his fiancée, Thompson was an employee of the company he sued; and
- His termination "was the employer's intended means of harming" his fiancée for exercising her Title VII rights.

After analyzing the *Thompson* decision, the 5th Circuit agreed with UBS and the lower court that a critical distinction between the case and Simmons' argument was that Simmons, unlike Thompson, wasn't an employee of the company he sued. The 5th Circuit reasoned:

> It would be a remarkable extension of [the Supreme Court's decision in] *Thompson*—and of Title VII generally—to rule that a nonemployee has the right to sue.

Instead, the 5th Circuit squarely ruled "the zone of interests that Title VII protects is limited to those in employment relationships with the [employer]." Accordingly, the appellate court upheld the dismissal of Simmons' Title VII claim against UBS. *Simmons v. UBS Financial Services, Inc.*, Aug. 24, 2020, Smith, J.

Takeaway for employers

Although Simmons' claim ultimately wasn't successful, the 5th Circuit's decision is a good reminder that you shouldn't take adverse employment actions against an employee based on a coworker's protected activity. Also, while nonemployee third parties like Simmons may not be entitled to sue under Title VII, they still could assert various state law tort (or wrongful personal injury) claims. Thus, your best approach is to avoid engaging in any action that could be perceived as retaliatory when an employee makes a good-faith complaint of unlawful conduct.

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PERSONNEL POLICIES

Twitter, Tiktok, and termination: navigating employees' social media usage

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

by Eric K. Gabrielle and Lynn Derenthal, Stearns Weaver Miller Weissler Alhadeff and Sitterson, P.A.

With approximately 3.6 billon people expressing themselves on social media platforms such as Facebook, Twitter, LinkedIn, YouTube, Instagram, and TikTok, employers have to ask themselves some important questions. For example, should you set boundaries for what you will or won't accept in employees' online posting activities? Can you legally fire them for posting something on their personal social media accounts?

'We are deeply troubled'

ViacomCBS came face-to-face with an employee social media hurdle in July when the company cut ties with Nick Cannon after he made what the company called "hate speech," including anti-Semitic theories, during a YouTube podcast not associated with the firm. Shortly after the podcast, the employer issued the following statement:

> ViacomCBS condemns bigotry of any kind and we categorically denounce all forms of anti-Semitism. We have spoken with Nick Cannon about . . . his podcast . . . which promoted hateful speech and spread anti-Semitic conspiracy theories. While we support ongoing education and dialogue in the fight against bigotry, we are deeply troubled that Nick has failed to acknowledge or apologize for perpetuating anti-Semitism, and we are terminating our relationship with him.

Deloitte, a Big Four accounting firm, recently faced a similar situation. The employer pulled a two-week summer internship offer made to Claira Janover, a Harvard graduate, after she posted an explicitly racist and threatening TikTok video, which went viral. The company stated:

> Deloitte unequivocally stands against the legacy of systemic bias, racism, and unequal treatment that continues to plague our communities. We encourage and support our colleagues to speak out on these issues of critical importance to society, but our policies strictly prohibit invoking or threatening violence.

You may recall the story of Justine Sacco, a 30-year-old senior director of corporate communications with IAC, who sent a racially offensive tweet before an international flight. When she turned on her phone after the flight, she found she was the number one worldwide trend on Twitter as people were outraged by her offensive comment. She was terminated shortly after she landed. The employer issued a statement during the time she was unreachable:

> This is an outrageous, offensive comment that does not reflect the views and values of IAC. Unfortunately, the employee in question is unreachable on an international flight, but this is a very serious matter and we are taking appropriate action.

Employers' options

Employees clearly have a right to online freedom of speech. In Florida, however, you can terminate an employee with or without cause, so long as the reason isn't discriminatory.

Generally, you shouldn't tolerate an employee's postings that are egregiously offensive, discriminatory, violent, illegal, deliberately false, or ridiculing of your company, products, or services. You also generally shouldn't tolerate their social media activities that compromise or threaten your legitimate business interests. You can and should assess an employee's social media activity as it relates to your set policies and the risk to your business and reputation.

Having a separate social media policy can be especially important. Your policy should advise employees they're responsible for their postings and that they also must:

- Use good judgment;
- Be professional;
- Stay accurate and honest;
- Be responsible and respectful;
- Refrain from engaging in inappropriate or unacceptable conduct, including obscene, harassing, discriminatory, bigoted, pornographic, and/or hateful behavior;
- Avoid divulging your confidential, financial, and trade secret information;
- Steer clear of representing themselves as a spokesperson for your organization; and
- Refrain from using social media at work.

Employees' rights

Employees have a right to engage in certain protected activities without an employer retaliating against them. The National Labor Relations Board (NLRB) says your social media policy shouldn't be so sweeping that it prohibits the kinds of activity protected by federal labor laws, such as employees' discussions about wages or working conditions.

In other words, employees are generally permitted to discuss work-related issues, criticize their employer, and share information about pay, benefits, and working conditions while communicating with coworkers on social media.

Bottom line

With so many employees using social media, now may be a good time to review or implement a company policy. Be sure the policy provides you with the protection needed to enforce your current rules, including antiharassment, antidiscrimination, antiviolence, and trade secret protections. Don't unlawfully prohibit employees, however, from engaging in protected activities and freedom of speech. A good policy should let employees know they'll be held accountable for posts falling outside the company's values and policies, up to and including termination.

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WORKPLACE CULTURE

What *The Addams Family* teaches us about diversity and inclusion

AL | FL | GA | LA | MS

by Destiny Smith Washington, FordHarrison LLP

Because of the COVID-19 crisis, there was no trick-or-treating or family party at my house for Halloween 2020. Instead, we opted for a movie night by the campfire, complete with s'mores. We searched for a spooky (but not scary) movie appropriate for an 8-year-old. We ultimately settled on the animated version of The Addams Family. I knew we were in for laughs and gore but had no idea I'd also be schooled on diversity and inclusion.

Assimilated into Assimilation

The story begins with the wedding of Gomez Addams (Oscar Isaac) and Morticia (Charlize Theron), who share an intricate grooming ritual, including using her parents' ashes as eye shadow. The ceremony ends abruptly, however, when they're interrupted by an angry, intolerant mob. Longing for a new place to call home, the newlyweds drive to New Jersey. They fall in love with a hilltop asylum, which is providing shelter for Lurch (Conrad Vernon) and a house spirit (also Conrad Vernon).

The story advances 13 years, and the Addams are settled into their home, having been joined by a teenage daughter, Wednesday (Chloe Grace Moretz) and a preteen Pugsley (Finn Wolfhard). Down the hill, HGTV-esque TV personality Margaux Needler (Allison Janney), who makes over homes, has made over an entire town literally named "Assimilation." During a welcome ceremony, residents perform a song containing the lyrics, "What's so great about being yourself, when you can be just like everyone else?"

Needler sets her sights on the Addams estate because it's scaring prospective residents away. When the Addams family refuses Needler's complimentary home makeover, she embarks on a campaign to defame the family on "Neighborhood Peeps" (clearly a parody of "Next Door").

The smear campaign culminates in the destruction of the Addams family's estate during Pugsley's Mazurka (a family rite of passage, in which Gomez doubts the youth's ability because he is just "too different" from the rest of the family), which ends in a standoff between the family and the Assimilation residents. During the confrontation, Wednesday outs some of the residents' strange habits. The residents ultimately embrace the family, who become citizens of Assimilation, changing the entire character of the community.

Lessons on diversity and inclusion

The Addams family's experiences can teach us about diversity and inclusion. The family longed to live in a place where their differences would be welcomed. Ultimately, Assimilation's residents realized that although the family's macabre habits and demeanor were unique, the citizens had "different" habits as well. The residents realized the Addams were just like them. The key to diversity and inclusion is accepting others as they are and embracing them despite their differences.

By hiring and retaining diverse individuals, your business can better understand the fluctuating consumer base in an increasingly diverse marketplace. A diverse and inclusive environment leads to more effective collaboration, resulting in a better working environment and more successful business plan.

Diversity comes in different shapes, sizes, hues, and predilections (ghoulish, perhaps?). The more you can embrace diversity and foster inclusion, the happier your employees, clients, and customers will be.

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MENTAL HEALTH

Combating isolation just one more priority for employers during COVID era

AL | FL | GA | LA | MS

Back in March, when a rapidly proliferating pandemic forced workers across the country out of their offices and into their homes, most thought the arrangement would be short-lived—a few weeks, maybe a month or so. As the year winds down, with many people still working from home—and coping with the kind of isolation they never expected—various surveys have shown that most workers miss the office. They may like the flexibility of working from home and hope to continue the arrangement in a limited way postpandemic, but they want the kind of interaction with colleagues they get in the office. This many months into the pandemic, workers are seeing that the isolation of working alone in their homes is taking a toll.

Distilling the dilemma

A survey released at the end of September from Boomi, a Dell Technologies business and provider of a cloud-based integration platform as a service, found that 58% of employees felt more isolated and disconnected from their work and their teams because they were working from home. The survey also found that

49% of workers wanted to see their employers improve remote collaboration tools and systems.

As a way of dealing with the challenges of isolation, the survey found that 41% of workers were increasing how often they use technology, and 38% reported adding new apps or technology processes to help them get their work done.

C-suite respondents to the Boomi survey noted that remote work was affecting their ability to innovate and be creative, with 60% pointing to a lack of in-person information sharing with colleagues. The survey also found that that CEOs are anxious to get back to the office, with 58% saying the idea of returning to the office tomorrow is exciting.

It's not just the higher-ups and the most outgoing workers that miss the connections that come with in-office work, according to the Boomi survey. Both introverts (48%) and extroverts (55%), especially Baby Boomers, miss connecting with their peers. That doesn't mean all those workers are ready to go back—85% reported some level of concern about returning.

Over the course of the COVID-19 pandemic, many employees and employers alike have predicted a mix of at-home and in-office work even after the pandemic subsides. But a July article from consulting firm McKinsey and Company's *McKinsey Quarterly* points out downsides to hybrid arrangements—workplaces where some workers are at home at least part of the time and others are in the office. The article speaks of a threat to the organizational norms "that help create a common culture, generate social cohesion, and build shared trust."

To lose sight of organizational norms during a significant shift to virtual working arrangements "is to risk an erosion over the long term of the very trust, cohesion and shared culture that often helps remote working and virtual collaboration to be effective in the short term," the article says.

A hybrid system also "risks letting two organizational cultures emerge, dominated by the in-person workers and managers who continue to benefit from the positive elements of co-location and in-person collaboration, while culture and social cohesion for the virtual workforce languish," according to the report. Such an arrangement can leave remote workers feeling isolated and without the sense of belonging and common purpose necessary to keep organizational performance from deteriorating.

Exploring solutions

Employers can take action to lessen the isolation at-home employees experience. A July report in *Harvard Business Review* notes that managers need to be realistic about the challenges employees face. A few tips from the article:

- If employees seem less productive at home, managers should encourage them to set achievable daily tasks and goals. As workers adjust, they may be able to gradually add more ambitious tasks.
- Make sure each team member is aware of others' projects, timelines, and goals.
- Encourage employees to set expectations with their family. That means agreeing on schedules, quiet spaces, homework time, and when it's OK to interrupt.
- Encourage employees to set reasonable boundaries so they don't feel they are "always on" when working from home. Breaks can avoid burnout.
- Since isolation is a common problem, managers may want to create and participate in regular chat threads or video calls so employees can catch up and connect with colleagues, even if it's just for a watercooler kind of chat at the end of the day. ■

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