WHAT THE HECK HAPPENED ... IN THE LAST TEN YEARS? EMPLOYMENT LAW UPDATE

by

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CHANGES IN OHIO LAW

I. EMPLOYMENT LAW UNIFORMITY ACT

On January 12, 2021, Governor Mike DeWine signed into law House Bill 352, the Employment Law Uniformity Act (ELUA). The law became effective on April 15, 2021 and made significant changes to Ohio's civil rights law, Ohio Revised Code Chapter 4112.

A. Elimination of Personal Liability for Supervisors and Managers

The first major change ELUA made is that it eliminated personal liability for supervisors and managers in most situations. In Genaro v. Central Transport, Inc., 84 Ohio St.3d 293 (1999), the Ohio Supreme Court ruled that a prior version of the statute allowed for individual liability against managers and supervisors. ELUA amended Ohio Revised Code Section 4112 to specifically exclude individual liability, unless:

1. The supervisor, manager or other employee **is** the employer, such as in the case of a sole proprietorship (ORC Section 4112.08 (A)), or

2. The employee has a claim for retaliation against any person who engaged in such conduct (ORC Section 4112.02(I)) or against anyone who aids, abets, incites, compels, or coerces an act of unlawful discrimination or retaliation or anyone who obstruct or prevent any person from complying with ORC Section 4112. (ORC Section 4112.02(J))

B. Requirement that Claimants Exhaust Administrative Remedies

The second major change is that claimants must now exhaust their administrative remedies that seek damages through the Ohio Civil Rights Commission before filing a lawsuit. Therefore, ELUA does allow employees to avoid the requirement

to file a charge with the OCRC if they file an employment discrimination lawsuit solely to seek injunctive relief.

Previously, an individual had a choice between filing a charge of discrimination with the Ohio Civil Rights Commission or filing a lawsuit directly in court. However, claimants are no longer allowed to seek damages in court without first going through the Ohio Civil Rights Commission.

Under the new law, individuals who wish to pursue discrimination claims against their current or former employer must first file a charge of discrimination with the Ohio Civil Rights Commission within **two years of the offense**. After 60 days, the employee can request a right to sue letter. Only after they receive their right to sue letter, or **45 days** after they request a right to sue letter and still haven't received one, can the employee bring a lawsuit in the court of common pleas.

If the claimant decides to keep their case in front of the Ohio Civil Rights Commission, the case will then proceed through eight basic stages:

1. The filing of the harassment and/or discrimination charge,

2. Initial alternative dispute resolution, such as mediation,

3. The investigation,

4. The determination of whether there is probable cause to believe a violation has occurred,

5. Informal conciliation if probable cause is found,

6. If informal conciliation is unsuccessful, the filing of an administrative complaint,

7. An administrative hearing and

8. Issuing an order following the hearing.

The law also provides that if an employee gets a right to sue letter and pursues a claim in court, the Ohio Civil Rights Commission can intervene as a party if it is a matter of great public importance.

C. Statute of Limitations

The third major change involves how long an employee has to pursue a claim of discrimination. Prior to ELUA, the statute of limitations for bring a lawsuit was six years and the time limit for filing a charge of discrimination was six months. The new law reduces the statute of limitations for filing a lawsuit to **two years**, and extends the deadline for filing a charge of discrimination to **two years**.

D. Simplification of Age Discrimination Lawsuits

The last major change deals with age discrimination claims. Previously, there were multiple statutes addressing age discrimination. Each one had its own separate remedies, procedures and statute of limitations. The new law eliminates those multiple claims and provides that age discrimination claims will be handled in the same way as all of the other discrimination claims. This change greatly simplifies the law associated with age discrimination claims.

E. Affirmative Defense for Hostile Workplace Harassment Claims

ELUA also adopted the affirmative defense for employers in hostile environment harassment claims established by the United States Supreme Court in two landmark decisions, Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998). ELUA codifies this affirmative defense under Ohio law as well and makes it clear that it is applicable to harassment claims brought pursuant to Ohio's statutory framework.

In providing employers with this defense, the General Assembly stated that it intended to encourage employers "to implement meaningful antidiscrimination policies and foster a work environment that is fair and tolerant."

Under this defense, employers won't be held liable for employment hostile work environment claims if all of the following are true:

- The employer exercised reasonable care to prevent or promptly correct any sexually harassing behavior, which means the employer had robust antidiscrimination policies and it has trained its employees on appropriate workplace behavior and its reporting procedures, all of which should be documented,
- The employee failed to take advantage of the employer's complaint procedures or other opportunities to prevent or correct the alleged harassment.

NOTE: Don't forget the 2016 EEOC's New Guidelines For Harassment Training.

However, the defense won't apply if the employee can show it would have been futile to invoke the employer's policies and procedures or that preventive or corrective action was unavailable.

ELUA also clarifies that this affirmative defense is not available if the supervisor's harassment resulted in a **tangible employment action, or quid pro quo**, such as termination, demotion or reassignment to a significantly worse position. The codification of this affirmative defense reinforces the importance of having a clear and effective sexual harassment policy, and assuring that managers are trained on how to promptly and effectively respond to complaints of harassment.

F. Limits on Non-Economic and Punitive Damages

ELUA redefines tort (wrongful act) claims to include employment discrimination claims brought under Sections 4112.052 and 4112.14 of the Ohio Revised Code. Several years ago, Ohio adopted tort reform, which included limitations on non-economic compensatory damages and punitive damages. ELUA amends the definition of "tort action" to make it clear that these limitations are applicable to discrimination claims brought pursuant to Ohio Revised Code Chapter 4112.

While there are no limits on compensatory damages for a plaintiff's economic loss, such as lost wages and benefits, compensatory damages for a plaintiff's non-economic losses, such as for emotional distress, cannot exceed the greater of either:

1. $250,000.00 or

2. Three times the plaintiff's economic loss to a maximum of $350,000.00 for each plaintiff or a maximum of $500,000.00 for each occurrence forming a basis for the claim.

With respect to punitive damages, unless a defendant committed the tort purposefully or knowingly, punitive damages are capped at **two times the amount of compensatory damages or 10% of a small employer's net worth, to a maximum of $350,000.00.**

A small employer is defined as one with less than 100 employees.

G. Exclusive Remedy

Finally, ELUA provides that the procedures and remedies for unlawful discriminatory practices relating to employment contained in Ohio Revised Code Chapter 4112 are the exclusive remedy for discrimination in the employment context. Common law claims, such as wrongful discharge in violation of public policy, are no longer available for employees if the underlying conduct would be covered by Ohio Revised Code Chapter 4112.

WHAT DOES THIS MEAN TO HR?

HR must ensure that the organization is complying with all the preventative measures given by Ohio's General Assembly and the 2016 accepted EEOC guidelines in order to protect it from liability. This means HR should make sure that the company's policy and reporting procedures are up to date and that proper training has also taken place for all the company's employee's and supervisors.

Supervisors must also be aware of how critically important it is to contact HR as soon as possible whenever such issues arise.

II. OHIO ENFORCES A STATE CHOICE OF LAW PROVISION

In Down-Lite Int'l, Inc. v. Altbaier, No 20-3354 (6th Cir., 2020), Down-Lite International, Inc. designs, makes, and sells feather-filled products. It employed Chad Altbaier, a California resident, in a variety of capacities for nearly two decades.

In 2019, Altbaier resigned from Down-Lite, intending to partner with the company to sell its down insulation as an independent sales representative. Soon after his resignation, however, the relationship soured.

In July 2019, Down-Lite filed a lawsuit in Ohio seeking to enforce a noncompete covenant contained in a 2013 shareholder agreement and prevent Altbaier from soliciting the company's customers and employees for two years. The agreement's choice-of-law provision indicated it "shall be governed and construed in accordance with Section 1701.591 of the Ohio General Corporation law and all other laws of the State of Ohio."

Despite the agreement's choice of Ohio law, Altbaier argued California law should apply. Notably, California courts have held that enforcing covenants not to compete is against the state's public policy. Therefore, California law prohibits noncompetes in most circumstances and would probably bar any enforcement of the covenants in Down-Lite's shareholder agreement.

Because Down-Lite filed the case in Ohio, the court applied the conflict-of-law rules typically followed by Ohio courts. They generally enforce contractual choice-of-law provisions unless

1. Doing so would violate the public policy of another state with a greater material interest in the dispute and

2. The other state would be the state with the applicable law absent the choice-of-law provision.

The 6th Circuit had to determine whether California had a greater material interest in Down-Lite's dispute than did Ohio and whether California law would control absent the Ohio choice-of-law provision in the shareholder agreement. Generally, the law of the state with "the most significant relationship to the transaction and the parties."

Complicating matters further was that Down-Lite's basic customer lists, supply chain information, and pricing details weren't protectable interests. Nevertheless, the company was able to establish a protectable interest in the customer relationships Altbaier developed with its outdoor apparel customers. The shareholder agreement's language was instructive:

> The covenants set forth in this Section shall be construed as agreements independent of any other provisions of this Agreement, and the existence of any claim or cause of action by any Shareholder against the Corporation, whether based upon this Agreement or otherwise, shall not constitute a defense to the enforcement of such covenants.

Because of the survival clause's plain language, the 6th Circuit concluded the restrictive covenant was enforceable independently of the agreement's other provisions. Furthermore, the court noted Ohio law provides "the public interest is always served in the enforcement of valid restrictive covenants contained in lawful contracts."

The 6th Circuit concluded Down-Lite would suffer irreparable injury if Altbaier was permitted to immediately solicit its existing outdoor apparel customers.

WHAT DOES THIS MEAN TO HR?

When considering the ramifications of Down-Lite's case, employers should ask themselves: When is it appropriate to ask an employee to agree to restrictive covenants? What locations should be considered in drafting the agreement? Which state laws may be considered in determining a restrictive covenant's enforceability?

Generally, you should consider using both express choice-of-law and choice-of-forum provisions in your restrictive covenant agreements. Doing so will provide you with

1. A standard agreement to use with employees regardless of where they reside and

2. Predictability in how the covenants will be enforced. Building in those planks can be especially valuable since remote work has expanded dramatically and is likely to continue, even after the COVID-19 pandemic is a thing of the past.

III. RECOVERY OF ATTORNEY FEES AND COSTS

Should the Employee breach or threaten to breach any section of this Agreement, or should Employee make any false or misleading representation under this Agreement, (Collectively known from hereon as a "breach.") the Employee agrees to indemnify the Company so that the Company is entitled to recover as damages from the Employee any and all loss, damage, and/or expenses, including, but not limited to, paying all the Company's costs associated with enforcing this Agreement, including all reasonable attorney's fees and other costs deemed necessary by the Company to enforce any part of this Agreement, as well as all of the costs associated with recovering these sums from the Employee.

IV. OHIO SUPREME COURT RE-ENFORCES "VOLUNTARY ABANDONMENT" POLICY

In State ex rel. Robinson v. Indus. Comm., (2014) 97 Ohio St.3d 423, Parma Care Nursing and Rehabilitation hired Shelby Robinson in 1995. Parma Care gave Robinson a written job description that set out her job duties and responsibilities. Parma Care also gave her a copy of an employee handbook detailing its policies and procedures.

Over the years, Robinson was disciplined for violating various work rules.

In a written warning given to her on February 29, 2008, she acknowledged that she had been warned that any future violations would result in her termination from employment.

On April 10, 2008, Robinson was injured at work and subsequently filed a Workers' Compensation claim. She was granted benefits for multiple low back conditions and returned to work in a light-duty capacity.

However, on April 15, a state surveyor reported to Parma Care that Robinson had violated state rules. Based on that infraction, Parma Care terminated her employment.

Robinson's physician subsequently certified that she was temporarily and totally disabled from all employment beginning on the date of her injury.

However, the Industrial Commission determined that her termination amounted to a **voluntary abandonment** of her employment and she was ineligible for benefits. Robinson appealed, but the court of appeals declined to reverse the commission's finding.

Robinson appealed to the Ohio Supreme Court, which affirmed the decision. The court held that she voluntarily abandoned her employment as a result of her termination for violating a written work rule and therefore wasn't entitled to receive TTD compensation.

Ohio Supreme Court's decision

In Ohio, when an employee is injured at work and unable to return to her job, she is entitled to receive TTD compensation. However, when the ***employee's own actions***, rather than the work injury, take her out of the workforce, ***she isn't entitled to compensation.*** A voluntary abandonment of the workforce precludes payment of TTD benefits.

Although being fired is usually considered an involuntary separation from employment, when the discharge arises from conduct the ***employee knows will result in termination***, the termination may be considered a voluntary abandonment of employment and bar any receipt of compensation.

Under State ex rel. Louisiana-Pacific Corp. v. Indus. Comm., 72 Ohio St.3d 401 (1995), a discharge from employment is considered voluntary abandonment **only** when the discharge arises from a violation of a written work rule that:

(1) Clearly defined the prohibited conduct,

(2) Identified the misconduct as a dischargeable offense, and

(3) Was known or should have been known to the employee.

In this case, Robinson argued that Parma Care didn't meet all the parts of the test because it didn't identify a written work rule that ***clearly defined the prohibited conduct for which she was terminated***.

Both the Ohio Supreme Court and the Industrial Commission found that Robinson knew her actions violated Parma Care's standard of conduct and could result in her termination.

The Industrial Commission also noted that she had received an **employee handbook** that contained her employer's **policies, rules, and disciplinary processes**.

Further, her job responsibilities were articulated in her job description.

Therefore, the Ohio Supreme Court found that Robinson was on notice that her actions in failing to abide by state rules could result in termination of her employment.

Robinson argued that because she had been released to work in a light-duty capacity and was unable to return to her former position at the time of her termination, her discharge couldn't be deemed a voluntary abandonment of employment.

The Ohio Supreme Court rejected that argument based on the fact that because she was working at the time of the infraction, she was capable of voluntarily abandoning her position. The court held that her discharge from employment for a violation of written work rules constituted a voluntary abandonment of employment precluding any receipt of TTD compensation.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

This decision highlights the importance of conveying to employees their exact responsibilities and the consequences for failing to abide by your rules, policies, and procedures. The employer's detailed job description and handbook protected it from liability in this case.

SAMPLE POLICY

Failure to abide by this policy may result in immediate termination. Employees understand if they are terminated under this policy that they will have voluntarily abandoned their positions and will therefore be ineligible for claiming certain Workers' Compensation benefits under applicable law, such as any form of compensation under their Workers' Compensation coverage.

Job descriptions and handbooks containing policies, procedures, rules, and disciplinary processes should be reviewed and updated as necessary.

V. POSITIVE TEST FOR DRUGS ***MAY NOT*** PRECLUDE WORKERS' COMPENSATION AWARD

In Cordell v. Pallet Companies, Inc., et al. 149 Ohio St.3d 483 (Ohio Supreme Court 12/29/2016) James F. Cordell, was terminated from his employment with appellant Pallet Companies, Inc. ("Pallet") after he failed a routine drug test administered soon after he was injured in a workplace accident. Pallet agreed that that Cordell's drug use ***did not cause the accident***.

Initially, Cordell's Workers' Compensation claim for temporary-total-disability (TTD) benefits was allowed, but the Industrial Commission reversed this decision. The Industrial Commission found that Cordell was ***not*** eligible for TTD compensation because he ***voluntarily abandoned*** his employment by using marijuana prior to the accident.

The Ohio Court of Appeals reversed the Industrial Commission's decision and granted Cordell TTD compensation.

Pallet appealed to the Ohio Supreme Court. However, the Ohio Supreme Court found for the employee.

On appeal, the Ohio Supreme Court considered whether an employee's conduct that occurs ***prior*** to a workplace injury can sustain an employer's defense of voluntary abandonment of employment and preclude temporary-total disability ("TTD") benefits.

The majority held when an employee is terminated after a workplace injury for conduct ***prior to and unrelated to the workplace injury***, his termination does not amount to a voluntary abandonment of employment for purposes of temporary-total-disability compensation when:

(1) The dischargeable offense was discovered because of the injury and

(2) At the time of the termination, the employee was medically incapable of returning to work as a result of the workplace injury.

However, the dissents argued that Cordell's use of illegal drugs in violation of the company's written drug-free-workplace policy, severed the causal connection between the injury and the wage loss, precluding temporary-total-disability (TTD) compensation.

WHAT DOES THIS MEAN FOR HR?

Even though the "Voluntary Abandonment" is still alive in Ohio, it has been greatly limited when it comes to terminating employees for substance abuse. According to this case, the days of terminating an employee for violating your substance abuse policy and relying on the "voluntary abandonment" doctrine to prevent the employee from collecting lost wages under Workers' Compensation are gone. Instead, the Ohio Supreme Court is now looking to see if there is an element of "Reasonable Suspicion" present in the facts.

Therefore, whenever there is a workplace accident and a subsequent substance abuse test is imminent, supervisors must be trained in how to spot "suspicious" behavior or facts. Of course, this also means DOCUMENTING whatever suspicious behavior the supervisor observes.

The Ohio Industrial Commission's "REASONABLE SUSPICIOUS CHECKLIST" form is an excellent resource for Ohio employers.

VI. WORKERS' COMPENSATION & INTENTIONAL TORTS

In order for employees to prevail in a lawsuit against their employer for an injury they incur in the course of their employment, which is commonly referred to as an Intentional Tort, they must have a cause of action under R.C. 2745.01.

In short, R.C. 2745.01 spells out what is required for an injured employee to prevail in an Intentional Tort lawsuit:

Subsection (A) states that an employer shall not be liable for an intentional tort unless plaintiff proves that the employer committed the tortious act with the **intent to injure** another or with the **belief that the injury was substantially certain to occur**.

Subsection (B) defines substantial certainty to mean "**that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.**"

or

Subsection (C) creates a rebuttable presumption of intent to injure by the employer in the event of a **deliberate removal by an employer of an equipment safety guard**.

Therefore, when the employer "deliberately" removes "an equipment safety guard," that employer can be held liable for "intentionally" harming the employee.

In Downard v Rumpke of Ohio, Inc., No. CA2012-11-218 (OH Ct. App., Dist. 12, Oct. 28, 2013), Scott Johnson worked as a temporary employee at Rumpke's tire shredding facility loading tires onto a tire shredder's inclined conveyor belt. Once the tires were loaded onto the conveyor belt, the tires would then be dropped into a cutter box that housed the feeder gears and cutting knives that cut the tires into two-by-two inch pieces. It is undisputed that as originally manufactured, the tire shredder had an observation platform, a jib crane, as well as a hinged hood and an interlock switch. All of these safety devices were removed, bypassed, or somehow modified by Rumpke.

On the afternoon of April 26, 2007, the overload beacon light on the tire shredder illuminated indicating a possible blockage of the drum discharge chute. Noticing the overload beacon light, Craig Stidham, the foreman at the Rumpke tire shredding facility, stopped what he was doing and approached the tire shredder. Although there is some dispute about what transpired next, all parties agree that Johnson then climbed onto the observation platform where he peered into the cutter box and confirmed that there was a tire blocking the discharge chute.

Upon shutting down the machine, Stidham then turned and began talking with Joseph Retherford, another temporary employee assigned to work at Rumpke's tire shredding facility. While speaking with Stidham, Retherford noticed that Johnson was no longer on the observation platform. Thinking Johnson may have fallen off the side of the machine, Retherford went around to the side of the tire shredder, but was unable to locate Johnson. Sensing something was amiss, Stidham then climbed onto the inclined conveyor belt up to the edge of the cutter box where he found Johnson entangled within the tire shredder's feeder gears and cutting knives.

Johnson had somehow fallen into the cutting machine.

Emergency crews were immediately dispatched to the scene to remove Johnson from the tire shredder, a process which took approximately 50 minutes to complete. During that time, Johnson remained conscious and proclaimed that he had fallen into the cutter box when he tried to unjam a tire from the machine. Johnson later reiterated the same to medical personnel as he was being transported to the hospital. After spending 52 days in the hospital, Johnson succumbed to his devastating injuries that had effectively removed the entire left side of his body. As a result of this incident, Johnson's estate received Workers' Compensation benefits totaling $387,761.29.

On November 23, 2010, Racheal Downard, Johnson's niece and Administratrix of Johnson's estate, filed suit against Rumpke asserting a claim of employer intentional tort under R.C. 2745.01, Ohio's Employer Intentional Tort statute. As part of her complaint, Downard argued Rumpke had violated R.C. 2745.01 by directing Johnson to operate the tire shredder after it had deliberately removed, bypassed, and modified the machine's safety devices and safety guards.

The trial court found for Rumpke.

Downard appealed to the Ohio 12th District Court of Appeals.

The Ohio Court of Appeals reversed in part and affirmed in part.

The court found that the trial court erred in finding that the interlock switch on the tire shredding machine was not an equipment safety guard. The court also held that an affidavit from the employer's manufacturing engineer that said that there was no intent to injure employee is **insufficient** to rebut the presumption found in R.C. 2745.01(C).

In other words, the Ohio Court of Appeals held that the trial court erred by finding the employer could successfully prevail as a matter of law by establishing that Rumpke had no intent to injure Johnson. No "**intent to injure**" requirement exists when "equipment safety guards" are at issue.

However, the court found no error in the trial court's decision for the employer by finding that the jib crane and platform ***were not*** "equipment safety guards" under R.C. 2745.01(C).

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Employers must understand that there are really two different ways they can be liable under the Intentional Tort Statute (R.C. 2745.01)

1. The deliberately intends to "**cause an employee to suffer an injury, a disease, a condition, or death,**" which is an extremely high standard for the employee to meet

   or

2. That the employer deliberately removed "**an equipment safety guard**."

   Clearly, employers have much more liability when they remove or fail to provide "safety guards" under the Intentional Tort Statute. Employers must therefore make sure all of its "equipment safety guards" are intact and fully functional.

VII. INTENTIONAL TORT: NOT REPLACING HANDGUARD

In Thompson v. Oberlander's Tree & Landscape, LTD., 2016-Ohio-1147, on October 6, 2011, Bret Thompson injured his left hand while working for Oberlander's Tree & Landscape.

Thompson was injured when he was cutting a tree using a chainsaw where the handguard had been removed. The handguard is supposed to protect against "kickbacks," which happens when the tip of a chainsaw blade hits an obstruction, which causes the blade to "kick back."

When a chainsaw has the handguard attached, then the chainsaw's brake will trigger if anything makes contact with the handguard during a kickback. Both federal and state regulations require that these handguards remain in place on chainsaws, and they are recommended by all manufacturers in their user manuals.

Thompson claimed that his injury occurred because the required handguard was not on the chainsaw he was using. Thompson's Workers' Compensation claim was granted.

Thompson filed a lawsuit against Oberlander's claiming intentional tort and sought punitive damages. He alleged that Oberlander's intended to injure him by requiring him to use a chainsaw without a handguard.

Oberlander's filed a motion to dismiss the case without a trial (Summary Judgment). Oberlander's argued that Thompson failed to present any evidence of how it intended to injure him or how it deliberately removed a safety guard.

Thompson, on the other hand, argued that by deciding not to replace or repair the handguard, Oberlander's deliberately removed it.

The trial court ruled that Thompson failed to present any evidence that Oberlander's committed any a deliberate act by removing the handguard. Consequently, the court found that there were no genuine issues of material fact, so it dismissed the case.

Thompson appealed to the Third Appellate District Court.

In reviewing the case, the Third Appellate District Court said that Ohio's intentional tort law has been limited many times over the years by the Ohio Supreme Court. An employer may be liable only if an employee proves that the employer acted with the intent to injure him or with the belief that injury was substantially certain to occur. "Substantially certain" has been defined to mean that an employer acts with a "deliberate intent to cause an employee to suffer an injury."

However, the deliberate removal of an equipment safety guard creates a rebuttable presumption that the employer acted with the intent to injure the employee.

In recent years, the Ohio Supreme Court has shed light on the exact standard for what an employee must establish in order to succeed on an intentional tort claim. The Ohio Supreme Court has defined "equipment safety guard" as a device that is designed to shield the operator from injury. Further, the court has found that an employer deliberately removes a safety guard when it lifts, pushes aside, takes off, or otherwise eliminates a guard from a machine.

Therefore, "deliberate removal" includes not only taking a guard off a machine but also **failing to attach a guard provided by the manufacturer**.

In this case, Thompson argued his employer knew perfectly well that the chainsaw he was using did not have a handguard. He submitted affidavits from his coworkers stating they had informed supervisors of the fact that the chainsaw did not have a safety guard. Oberlander's supervisors simply told their employees to continue using the chainsaw or they would be fired.

Thompson argued that Oberlander's decision to not replace the handguard, which was provided by the manufacturer and was required by federal and state law, equated to the deliberate removal of a safety guard.

On the other hand, Oberlander's argued that even if it was aware of a dangerous situation, that did not mean it deliberately removed the guard or intended to injure Thompson.

In short, the Third Appellate District Court held that Oberlander's did in fact intend to injure Thompson.

In reaching that conclusion, the court found that for a deliberate removal of a safety guard to occur, the safety guard must first be required by the manufacturer of the equipment, laws, or regulations. In this case, the handguard was provided by the manufacturer, and both state and federal regulations require chainsaws to have a front handguard.

Further, Oberlander's knew that the handguard was missing and could have replaced it. Thompson submitted evidence that Oberlander's had previously sent the chainsaw in for repairs, so it could have easily replaced the handguard at that time. Based on that evidence, the court found that Thompson had presented sufficient evidence to establish a presumption that Oberlander's intended to injure him.

The court then evaluated whether Oberlander's presented sufficient evidence to rebut the presumption. The only evidence the employer submitted in opposition were affidavits from management. The court rejected the affidavits as being "self-congratulatory" and insufficient to rebut the presumption. The court found that Thompson established that Oberlander's intended to injure him.

WHAT DOES THIS MEAN TO HR?

While it is true that Ohio's intentional tort laws have been greatly limited over the last few years, when it comes to "deliberately removing safety protections from equipment," employers still have tremendous liability. Training supervisors to make sure that all safety guards remain intact and in good working order is critically important to not only maintaining a safe environment, but also to avoiding intentional tort claims.

VIII. LACK OF PROPER RELEASE COSTS EMPLOYER IN NEGATIVE REFERENCE

In Kienow v. Cincinnati Children's Hospital Medical Center, 2015-Ohio-4396 (1st Dist. Hamilton, Oct. 23, 2015), while Gloria Kienow was an employee at Cincinnati Children's Hospital, she discovered that her supervisor had placed, according to her, "false, negative, and misleading information" into her personnel file. Although Human Resources agreed to remove the information from her file, it was never removed.

Kienow resigned in July 2011.

About six months after her resignation, Kienow received an oral offer of employment from Dayton Children's Hospital. The offer was rescinded just a week later.

A year after that, Kienow learned the job offer had been withdrawn because her former manager at Cincinnati Children's had provided "negative, misleading, and false statements" about her to the Dayton hospital.

Kienow sued Cincinnati Children's in Hamilton County Common Pleas Court, claiming defamation, negligent supervision, and tortious interference with business relations due to the statements provided to Dayton Children's Hospital by her former manager.

The court dismissed all three of Kienow's claims on grounds that her claims had passed the statute of limitations.

Kienow appealed to the First District Court of Appeals.

The appeals court agreed that the trial court had properly dismissed Kienow's defamation and negligent supervision claims because they were filed too late under their respective statutes of limitations.

Under R.C. 2305.11, a defamation claim must be filed within one year of the publication of the false information. In other words, Kienow had to file her lawsuit within one year of the day her manager shared the allegedly false information with Dayton Children's. Because she failed to do that, her defamation claim was properly dismissed.

Her claim for negligent supervision was also dismissed as untimely because it was based on events that occurred after the applicable four-year statute of limitations had expired.

However, the appellate court found that Kienow's tortious interference claim should not have been dismissed.

First, the court held that a four-year statute of limitations applied to the tortious interference claim, distinguishing it from a "disguised defamation" claim for which a one-year statute of limitations would apply. The court found that Kienow's tortious interference claim went beyond mere damage to her reputation, stating the claim "does not hinge simply on [the supervisor's] disseminating information but on her hindering a prospective and known business relationship -- Kienow's pending employment with Dayton Children's."

As a result, the court held that Kienow's claim for tortious interference was filed timely and was allowed to proceed.

However, even more important, the court found that Kienow was not required to present facts in her complaint to overcome Ohio's statutory privilege that generally allows employers to provide negative employment references without risk of liability.

Under R.C. 4113.71(B), "an employer who is requested by . . . a prospective employer of an employee to disclose . . . job performance" is not liable for damages unless that information was disclosed **maliciously with an intent to mislead or as an unlawful discriminatory practice.**

Cincinnati Children's argued that Kienow's tortious interference claim should be dismissed because her complaint did not contain sufficient facts to overcome the statutory privilege.

However, the court disagreed. The court held that Kienow was not required to plead those facts specific facts. As a result, the tortious interference claim should not have been dismissed, and the case was sent back to the trial court for litigation.

REFERENCE RELEASE AGREEMENT

I, _____, (Print Candidate's name) understand that I am voluntarily and knowingly entering into a legal and binding contract with _____ (from here on referred to as the "Company") for the sole purpose of securing reference information on me. I understand and agree that considering me as a candidate for employment or my continued employment if I am already an employee is sufficient consideration to legally bind this Agreement.

I understand and agree that this contract in no way guarantees that I will be hired by the Company or that my employment is guaranteed for any period of time should I be hired by the Company.

I therefore authorize the Company, and anyone it deems appropriate to act on its behalf, to investigate my background, qualifications and/or any other information on me as it deems appropriate.

I also authorize anyone the Company contacts as part of its investigation to release any information they have regarding me or my employment to the Company or its representatives as these parties deem appropriate.

Further, I authorize the Company to release the results of any background checks conducted on me and any other information related to me or my employment as it deems appropriate.

I also release all parties, including the Company and anyone supplying information on me, from all liability for any damage that may result from collecting, releasing or furnishing any such information.

I further agree that any party providing information to the Company will be treated as a third party beneficiary to this Agreement and are protected from any form of retribution from me our my representatives, legal or otherwise.

I also agree that I will indemnify the Company and/or any other parties for any attorneys' fees, administrative costs and any other costs by any party that it incurs should I breach this Agreement and pursue any action against them based upon the information they provided or collected as a part of my background check.

I agree that all lawsuits, actions, and other proceedings arising from any background investigation conducted on me will be brought in the appropriate court in ___ County, Ohio. This Agreement shall be governed by and construed under the laws of the United States and the State of ___.

I understand that I have had the opportunity to secure legal counsel before signing this Agreement.

I agree that I am therefore voluntarily and knowingly entering into this Agreement.

_____ _____

SIGNATURE Date

WHAT DOES THIS MEAN FOR HR?

Ohio's statutory privilege for employers is not "blanket" protection for employers allowing them to say whatever they want, even if they feel the information they provide is true.

However, employers are often put into a "catch-22" when it comes to giving and receiving references. In many instances, if an employer does not give references to potential employers, then they cannot expect to get any in return later. This is especially true in specific industries, such as in the world of health care.

As a result, employers often fail to "give or get" reference information on their candidates, so they make "bad" hiring decisions, which can easily cost an employer more than any lawsuit.

Also, many states have "Negligent Hiring" and "Negligent Retention" laws, such as Ohio. These laws require employers to be diligent and at least try and secure references or perform some sort of background check.

The facts of this case will be very damaging for the employer because it was placed on notice that the information in Kienow's file was "false, negative, and misleading information." As a result, HR agreed to remove the information from her file. However, it was never removed.

As a result, Kienow had every reason to believe that this "erroneous" information had been removed. This was a major error by the employer.

If HR tells an employee that certain damaging information has been removed from an employee's file, then it had better be removed immediately.

Also, clearly, supervisors and managers had not been developed here. Employees are typically promoted into supervision because they were very good technicians. This is especially true in hospitals.

If an organization does give out reference information, all references should go through a Human Resource professional. A real HR professional will know what can and cannot be said. A real HR professional will also make sure that a proper release is acquired before any reference information is provided.

A proper release for providing reference information will contain at least the following protections:

1. **Permission** to release information and

2. A **full release of liability** for releasing reference information.

A proper release for providing reference information would look something like this:

> Candidate authorizes the Company to investigate Candidate's background, qualifications and/or any other information on Candidate as it deems appropriate.

> Candidate also authorizes anyone the Company contacts as part of its investigation to release any information they have regarding Candidate or Candidate's employment to the Company or its representatives. Candidate also authorizes the Company to release the results of any background checks conducted on Candidate and any other information related to Candidate or Candidate's employment as it deems appropriate. Candidate also releases all parties, including the Company, from all liability for any damage that may result from either releasing or furnishing any such information.

Whenever an employer receives a request for a reference and the employer intends to respond, employers should make sure they get a full release from the former employee before they provide any information to the potential employer.

In an effort to secure such a release, the former employer can email one over to the requesting employer to have the employee sign. The former employer can make it clear that it will only provide reference information once this release is endorsed by the former employee. (Yes, scanned electronic signatures are valid.)

Employers can also have all exiting employees either sign this release … or they can refuse to sign it. The employer can then let any inquiring employers know if the exiting employee gave his/her permission to release information or not.

I often advise my clients to secure such a release from their own job candidates as part of the interview process.

First, such a release does not expire. It is enforceable even after the employee exits the organization.

Second, such a release can go a long way in getting a former employer to provide reference information. When a former employer sees that it will have protection under this release, they might be more willing to provide information and save a potential employer the disaster of making a bad hiring decision.

Securing such a release as part of the hiring process also helps to protect the employer in case a rogue supervisor decides to give a bad reference on a former employee without the direction of a real HR professional.

IX. "SILENCE" CAN SUPPORT A PROMISSORY ESTOPPEL CLAIM

In Trehar v. Brightway Center, Inc., 2015-Ohio-4144, Jennifer Trehar was employed at Brightway Center, a Christian non-profit, since 2010. In June 2012, she informed Brightway on **two different occasions** that she planned to move in with her boyfriend. She claimed that on the first occasion, **she was congratulated by her boss on the move**.

On the second occasion, she was **granted permission to miss a work function** in order to make arrangements for her boyfriend to move.

In July 2012, Trehar again informed Brightway of her move. However, this time Brightway responded by sending Trehar a letter suspending her for the month of July and providing her one month to determine if she wished to get married, stop living with her boyfriend, or be terminated. The letter cited the organization's religious ideals as the basis for the decision. Trehar did not change her living situation and was terminated.

Trehar sued, alleging **promissory estoppel**, claiming that Brightway knew about her living arrangement in advance of her formally moving in with her boyfriend, approved of it on two different occasions and assured her that she would remain employed. She claimed that she relied on those promises of continued employment and moved.

Brightway claimed in response that it was aware Trehar was moving and that her boyfriend was also moving, but was unaware she would be living with her boyfriend and his children until just prior to sending the suspension letter.

While Ohio is an at-will employment state, promissory estoppel is an exception to that doctrine. The elements necessary for a promissory estoppel claim are "(1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) injury by the reliance by the party claiming estoppel."

In this case, Brightway filed a motion for summary judgment on the basis that there was **no specific and explicit promise of continued employment**.

The trial court agreed and dismissed the case.

Trehar appealed the trial court's decision to the Seventh District Court of Appeals.

Trehar argued on appeal that an explicit promise of continued employment was not required and that **silence could be interpreted as a promise capable of reliance**.

The court found that the promises allegedly made were different from "praise with respect to job performance, discussion of future career development, or promises of future opportunities," which are insufficient to support a claim of promissory estoppel.

In Trehar's case, **by remaining silent** while Trehar discussed her move plans, Brightway and its CEO "**silently assented** to Trehar moving in with her boyfriend and [Brightway's CEO's] **silence can be construed as a promise that no adverse employment action would come as a result of her move**."

The Seventh District Court of Appeals noted that the Ohio Supreme Court has stated that promissory estoppel claims can result from **silence** where there is an obligation to speak. Accordingly, the Seventh District Court of Appeals remanded Trehar's case to the trial court and instructed that her promissory estoppel claim be presented to a jury.

The court also reviewed a handbook provision that disclaimed any contractual arrangement and reaffirmed at-will employment but held that promissory estoppel could still serve as an exception to at-will employment where the specific promise applied. The court interpreted these policies as meaning that Brightway could fire Trehar for any reason **except** for her moving in with her boyfriend.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Supervisors who remain silent when employees discuss taking a particular action (where one would normally be expected to speak) could lead to promissory estoppel liability after the employee takes action in reliance. Employers should keep this in mind as promissory estoppel claims can exist even in the ***absence*** of actual intent.

Therefore, a promissory estoppel claim can be created **even without an explicit promise.** ("Remaining silent where an ordinary person would speak up or take action.")

Also, it simply does not matter if an employee is employed at will. Employment at will is not a defense to a promissory estoppel claim.

X. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS *CAN* NOW BE BASED SOLEY ON TESTIMONY OF EMPLOYEE

In Kassay v. Niederst Mgmt., Ltd., No. 106016 (8th Dist., May 24, 2018), John Kassay was employed by Niederst Management, Ltd., as a pest control technician. Niederst is a property management company that owns a number of apartment buildings and Kassay worked with other technicians to exterminate bedbugs in its buildings.

Technicians are required to lift heavy equipment, including power cords weighing 75 pounds and, along with a technician, furnaces weighing 240 pounds.

After working for Niederst for over a year, Kassay reported to work wearing a wrist brace, which he wore occasionally because of a disabling injury he had suffered while working for a previous employer. One of his coworkers alerted Lisa Weth, their supervisor, about the brace. Weth told Kassay that she would have to speak to the HR department about his brace because she was concerned that his injury could put him or others in danger. She consulted with Denise Pacak, Niederst's HR director, who instructed Weth that Kassay would need to complete **Family and Medical Leave Act** (FMLA) paperwork to be able to work without any limitations, even though he had not requested any time off.

Kassay repeatedly expressed frustration about these instructions to Weth, who told him to speak to Pacak. He made multiple attempts to speak to Pacak but received no response. Five days after he first reported to work wearing the brace, Weth told him that he was being taken off the schedule and prohibited from working until he returned completed FMLA paperwork and received a "return-to-work note" from his doctor.

The next day, Kassay met with Pacak, who reiterated Weth's directive and, consistent with Niederst's policy that employees must be able to work full-time, full duty, with no restrictions, told him his medical documentation must indicate he could work with no restrictions.

Kassay testified at trial that he was unable to get an immediate appointment with his doctor, who was out of the country. During that time, he regularly attempted to contact someone at Niederst every day or every other day but did not get a response. When he finally got in to see his doctor, the doctor refused to complete the FMLA paperwork because he did not need any time off work and the doctor did not want to commit fraud.

After being off work for approximately a week, Kassay contacted Weth to tell her that he had met with his doctor. Weth told him that his employment had already been terminated because he failed to report to work or to report his absence for two straight days in violation of Niederst's attendance policy.

Kassay filed suit against Niederst, Weth, and Pacak, alleging that he had been unlawfully discriminated and retaliated against on the basis of his disability and that Niederst failed to provide him with a reasonable accommodation for his disability.

The jury found in his favor against all three defendants and awarded him a total of almost $800,000, which was made up of approximately $32,000 in economic damages for back pay, $250,000 in noneconomic damages for emotional distress, $250,000 in punitive damages, $200,000 in attorneys' fees, one year of front pay, and prejudgment interest.

Niederst appealed.

On appeal, Niederst didn't argue that the jury's decision finding in Kassay's favor was incorrect, but instead that there was insufficient evidence supporting the awards for noneconomic and punitive damages. The jury's award of $250,000 in noneconomic damages for emotional distress was based **entirely on Kassay's testimony about how the loss of his job affected him**. He testified at trial that the loss of his job made him feel like "less of a man," made him feel like he was letting down his family, caused him to have trouble sleeping and led to arguments with his family because of the financial problems it caused.

Kassay presented no expert testimony about his emotional distress and admitted that he never had any medical treatment for it, nor did he consult any doctor about it. This lack of medical evidence corroborating his testimony, Niederst argued, prevented him from proving the existence of emotional distress that would justify such a substantial noneconomic damages award.

The court disagreed.

Evidence of medical treatment, it reasoned, is not required to prove the existence of emotional distress. Because the assessment of damages is determined solely by the jury, and because Kassay's testimony provided some credible evidence of emotional distress, there was a sufficient basis for the jury's noneconomic damages award.

Niederst's argument that the jury's award of punitive damages wasn't supported by the evidence also failed. According to the company, Kassay failed to prove that the defendants acted with actual malice, proof of which is required to support a punitive damages award.

The court disagreed, identifying plenty of evidence of malice.

For example, the testimony of Weth and Pacak was, at times, contradictory. Neither admitted that she made the decision to require completed FMLA paperwork, and neither admitted being involved in the decision to terminate Kassay's employment. Weth testified that she believed the FMLA did not apply to Kassay but told him to complete the paperwork anyway. Both Weth and Pacak admitted disregarding his attempts to reach them, joking about his termination, and doing nothing when they realized their mistakes.

Kassay testified that his doctor believed he was being asked to commit fraud when Kassay gave him the FMLA paperwork and that Niederst's owner seemed to be more

concerned about being sued than about the impact the employment termination had on him.

All of this testimony, according to the court, amounted to clear and convincing evidence that allowed the jury to infer the existence of **actual malice**. Most notable, however, was the court's approval of an instruction given by the lower court to the jury. The instruction allowed the jury to find malice based only on the existence of retaliation. In other words, according to the instruction, a finding that Niederst unlawfully retaliated against Kassay was sufficient support, without any additional evidence, for a finding that **Niederst had acted with ill will, hatred, and a conscious disregard for Kassay's rights.**

WHAT DOES THIS MEAN FOR HR?

While this case reminds employers that a "100 percent healed" policy is unlawful, that employment decisions must have a reasonable basis and that the way employees are treated matters, its most important lesson relates to the damages that may be awarded in employment litigation. If a jury finds the existence of unlawful discrimination or retaliation, **very little, if any, additional evidence will be required to support an award compensating the employee for his emotional distress and an award of punitive damages**.

This potential for substantial damages must be considered by employers and their counsel when they make adverse employment decisions, evaluate risk, and determine the settlement value of ongoing litigation.

XI. OHIO'S MEDICAL MARIJUANA LAW

Ohio's new medical marijuana law (HB 523) became effective on September 6, 2016.

This law makes Ohio the 25th state to pass a medical marijuana law. The new law will have far-reaching effects on the business community but it is silent on many issues that concern employers.

A. Who can legally use medical marijuana?

Only people with the following medical conditions can legally use medical marijuana:

1. HIV/AIDS
2. ALS (Amyotrophic Lateral Sclerosis)
3. Alzheimer's Disease
4. Cancer
5. CTE (Chronic Traumatic Encephalopathy)
6. Crohn's Disease
7. Epilepsy or other seizure disorders

8. Fibromyalgia

9. Glaucoma

10. Hepatitis C

11. Inflammatory Bowel Disease

12. Multiple Sclerosis

13. **Pain (Chronic, and severe or intractable (This can be a vague criteria.)**

14. Parkinson's Disease

15. PTSD (Post-Traumatic Stress Disorder)

16. Sickle Cell Anemia

17. Spinal Cord Disease or injury

18. Tourette's Syndrome

19. Traumatic Brain Injury

20. Ulcerative Colitis

B. How will this law affect employers?

The new law expressly addresses employment issues, resolving each of these issues clearly in favor of employers. Specifically:

- Employers are not required to permit or accommodate an employee's use, possession, or distribution of medical marijuana;
- Employers are permitted to terminate or discipline an employee or refuse to hire an applicant based on the use, possession, or distribution of medical marijuana;
- Employers are permitted to establish and enforce a drug testing policy, a drug-free workplace policy, or zero-tolerance drug policy;
- Employers may still obtain Workers' Compensation premium discounts or rebates for participating in the drug-free workplace program established by the Ohio Bureau of Workers' Compensation;
- Employers have "just cause," for purposes of unemployment compensation, to terminate an employee for use of medical marijuana in violation of the employer's drug-free workplace policy, zero-tolerance policy, or other applicable policy; and
- An employee is not entitled to receive Workers' Compensation benefits if the employee was under the influence of marijuana at the time of injury and the use of marijuana was the proximate cause of that injury.

In addition, the law offers protection to Ohio employers from a broad range of potential lawsuits that might otherwise be filed by employees who use medical marijuana under the new law and then suffer adverse employment actions as a result. The law states that it does not permit a person to sue an employer for refusing to hire, terminating, disciplining, discriminating, retaliating, "or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment related to medical marijuana."

In short, Ohio employers are not required to make any changes as a result of the new law. Employers operating in the state may continue to require testing as required by their policies and may discipline or discharge for policy violations, even where an employee uses medical marijuana pursuant to the law. Employers may not, however, make employment decisions or take actions against an employee or applicant based on the individual's underlying medical condition.

However, just as before, actions based on the underlying medical condition may violate the Americans with Disabilities Act or corresponding state law.

C. How and where do patients get medical marijuana?

Patients will need a **recommendation** from a doctor to receive a medical marijuana prescription. They must have an ongoing relationship with the doctor. However, the law does not say where patients will get medical marijuana. Patients will have to receive the marijuana from approved dispensaries.

XII. STATE MEDICAL MARIJUANA LAWS DO NOT TRUMP EMPLOYER POLICIES

In Casias v Wal-Mart Stores, Inc., No. 11-1227 (6th Cir. 2012), Joseph Casias was an employee of Wal-Mart for the previous 5 years and was named "associate of the year" in 2008. Casias, who suffered from sinus cancer and an inoperable brain tumor, was required to take a drug after injuring himself at work. As expected, due to his status as a medical marijuana patient, Casias failed the drug test and his employment was terminated. Mr. Casias sued Wal-Mart in state court for wrongful discharge, claiming that Wal-Mart's application of its drug use policy to him violated the Michigan Medical Marijuana Act ("MMMA"). Wal-Mart had the case transferred to federal court and moved to dismiss the case for failure to state a claim.

The Federal District Court found that the MMMA does not regulate private employment and granted Wal-Mart's motion to dismiss. Casias appealed to the 6th Circuit Court of Appeals. The Sixth Circuit found for Wal-Mart.

The Sixth Circuit Court found that the MMMA merely provides a defense to criminal prosecution or other adverse actions by the state:

> **All the MMMA does is give some people limited protection from prosecution by the state, or from other adverse state action in carefully limited medical marijuana situations.**

The court further explained that adopting Casias' argument would create an entirely new protected employee class in Michigan and "mark a radical departure from the general rule of at-will employment in Michigan."

Casias argued Section 4′s use of the term "business" expands the MMMA protections to private employment. Section 4, in relevant part, states:

> **A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act . . .**

The Court disagreed, finding that the word "business" is not meant to stand alone, but instead, modifies the phrase "occupational or professional licensing board or bureau." Thus, the statute was intended to protect against disciplinary actions by state board or bureaus, not regulate all private employers.

XIII. OBSERVED URINE COLLECTION PERMISSIBLE

In Lunsford v. Sterilite of Ohio, LLC., 2020-Ohio-4193(Aug. 26, 2020), under Sterilite's substance abuse policy, it was allowed itself to test employees for drugs in connection with workplace accident investigations, based on reasonable suspicion, or randomly. The policy also said that it would use a urinalysis test, but the policy did not address how these samples would be collected.

In October and November 2016, Peter Griffiths, Donna Lunsford, and Laura Williamson were selected for random drug testing. Adam Keim was chosen for a reasonable-suspicion test at about the same time. All four had signed consent forms before being tested, but the forms never mentioned that these tests would be observed while being collected.

The four employees claimed that Sterilite then began using the direct-observation sample collection method. In other words, a same-sex monitor would accompany the employee to the restroom and watch the individual produce the urine specimen.

Lunsford and Griffiths were both able to produce valid urine samples. Keim and Williamson, despite their alleged "good-faith efforts," were unable to provide samples within the two-and-a-half-hour period allotted to them under Sterilite's policy. Keim's and Williamson's employment was terminated under the drug testing policy.

In December 2016, Griffiths, Keim, Lunsford, and Williamson filed a complaint in the Stark County Court of Common Pleas alleging eight separate claims, including invasion of privacy. The employees claimed that Ohio law recognizes an individual's right to privacy and freedom from an "unreasonable invasion." It further alleged the direct-observation method is "so highly offensive to a person of ordinary sensibilities" that Ohio courts should balance the level of intrusiveness against the employer's business interests in collecting samples this way. If the intrusion outweighs the business interests, the employer should be liable for invasion of privacy.

The trial court ultimately dismissed the invasion of privacy claim, noting the individuals were employed at will and had agreed to be tested as a condition of employment.

The four former employees appealed to the Ohio Court of Appeals for the Fifth District, which determined they had a "reasonable expectation of privacy with regard to the exposure of their genitals" and reversed the trial court.

Sterilite appealed the decision to the Ohio Supreme Court.

In the 4 to 3 ruling, the Ohio Supreme Court overruled the court of appeals. The Ohio Supreme Court said that the four former employees all signed consent forms and therefore had waived their claims for invasion of privacy. Also, the court noted that these employees did not object when they were told their urine collections would be directly observed, they therefore consented to the testing a second time. The majority relied heavily on the fact that the four employees worked "at will" for Sterilite and could therefore be terminated at any time and for any reason, including failure to submit to a urine test.

The three dissenting justices stated that just because employees are employed at will doesn't mean they can't have claims for invasion of privacy. The judges reasoned further that employees have a legitimate expectation of privacy when urinating and that direct observation by a stranger is highly intrusive. According to the dissent, whether Sterilite had a legitimate reason to use the direct-observation method for sample collection was an issue of fact to be decided by a jury.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Even though the direct-observation method of urine sample collection for drug testing isn't widely used, it is sometimes an option to further ensure that a sample is not tampered with by the employee. However, in order to ensure that employees have been put on notice that such collection is possible. That way, if an employee is going to object, the employee should do so when they sign their acknowledgment of the company handbook.

XIV. OHIO'S NEW VEHICLE CONCEALED CARRY LAW

As of March 20, 2017, Ohio's Vehicle Concealed Carry Law took effect. As a result, employees and visitors to your facility who possess their "Concealed and Carry Permits" will be allowed to bring their guns to your property and leave these weapons in their cars.

Specifically, the new law says:

> Sec. 2923.1210. (A) A business entity, property owner, or public or private employer may not establish, maintain, or enforce a policy or rule that prohibits or has the effect of prohibiting a person who has been issued a valid concealed handgun license from transporting or storing a firearm or ammunition when both of the following conditions are met:
>
> (1) Each firearm and all of the ammunition remains inside the person's privately owned motor vehicle while the person is physically present inside the motor vehicle, or each firearm and all of the ammunition is locked within the trunk, glove box, or other enclosed compartment or container within or on the person's privately owned motor vehicle;
>
> (2) The vehicle is in a location where it is otherwise permitted to be.

Therefore, as long as an employee keeps his firearm and ammunition in a locked compartment of his vehicle while he is away from the vehicle, an employer may not take any action against him for bringing the firearm or ammunition onto its property.

WHAT DOES THIS MEAN FOR HR?

Review your workplace violence and firearm policies. If your policies currently prohibit firearms in employees' locked personal vehicles, they must be modified to make them consistent with the new law before March 19. You are still free to prohibit employees who do not possess valid concealed carry licenses (or who are otherwise excluded from the licensing requirement) from keeping firearms in their vehicles, even if they are otherwise in compliance with the law. In addition, you may still prohibit employees from carrying firearms inside company premises or taking them out of privately owned vehicles while on company premises.

Many business interest groups opposed the legislation because it makes access and proximity to firearms in the workplace easier. Now that the bill has passed, you are well-advised to revisit your workplace violence policies to make sure they state clearly the prohibitions on violence and threats of violence.

CHANGES IN FEDERAL LAW

I. U.S. SUPREME COURT GRANTS PROTECTED CLASS COVERAGE TO SEXUAL ORIENTATION AND GENDER IDENTITY

On October 8, 2019, the United States Supreme Court heard arguments on all three of the following cases:

- Altitude Express, Inc. v. Zarda, 590 U.S. ___ (2020)
- Bostock v. Clayton County, 590 U.S. ___ (2020)
- R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, 590 U.S. ___ (2020)

Although the facts in each case differ, the primary legal issues did not. All of these cases dealt with question as to whether Title VII protects sexual orientation and gender identity.

On June 15, 2020, the Court ruled in a 6-3 decision under Bostock, but its decision covered all three of these cases, that Title VII protection does extend to sexual orientation and gender identity.

Facts: Bostock v. Clayton County

In Bostock v. Clayton County, 590 U.S. ___ (2020), Gerald Bostock worked for Clayton County, which is located in the Atlanta, Georgia metropolitan area, as a child welfare advocate. Under his leadership, the county won national awards for its work and all of his performance records were good.

In early 2013, Bostock joined a gay softball league and promoted the league at work to try and get volunteers. Not long after that, influential members of the community

allegedly made disparaging comments about Mr. Bostock's sexual orientation and his participation in the league. Soon after that, he was fired for conduct "unbecoming" a county employee. Georgia did not have any state laws that protected LGBTQ people from employment discrimination.

Bostock filed in 2016 in the U.S. District Court for the Northern District of Georgia. The county filed a request to dismiss Bostock's claim on the basis that the Eleventh Circuit Court of Appeals ruled in 2017 in Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017) that the Civil Rights Act's Title VII does not include protection against discrimination towards sexual orientation.

The district court agreed with the county and dismissed Bostock's claim.

Bostock then appealed to the Eleventh Circuit Court of Appeals, where the three-judge panel affirmed the district court's dismissal.

Bostock then appealed to the United States Supreme Court to determine if sexual orientation is covered by Title VII of the Civil Rights Act. The Supreme Court agreed to hear Bostock's case in April 2019.

Facts: Altitude Express, Inc. v. Zarda

Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, he was fired.

Facts
R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission

In R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, Aimee Stephens was a funeral home employee who had presented herself as male up until 2013. However, Stephens considered herself a to be a transgender woman for most of her adult life. She had always presented herself as a male, which she claimed caused her constant emotional stress. In 2013, she decided to "come out" to family and friends. She then decided to undergo reassignment within the next year.

At that time, Stephens had been employed by R.G. &. G.R. Harris Funeral Homes for six years and had an excellent work record. In 2014, she wrote to her supervisor and explained that considered herself to be female and what she was planning to do about it. She also explained that she planned on taking vacation time from work to have the surgery, and as part of her transition, she would return to work dressed in attire appropriate for female employees, as was outlined in the employee handbook.

Two weeks later, Stephens was notified by mail that she had been terminated by the funeral home's owner, Thomas Rost.

Stephens filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming that she had been discriminated against because she was transgender.

EEOC agreed and found for Stephens. The EEOC then took the case against the Rost's funeral homes to the United States District Court for the Eastern District of Michigan.

The District Court ruled for the Harris Funeral Homes group, stating Title VII did not cover transgender people and that as a religious organization under the Religious Freedom Restoration Act, the company had a right to dismiss Stephens for non-conformity.

However, the Sixth Circuit Court of Appeals reversed the District Court's decision and held that Title VII did cover transgender people. The court also ruled that requiring the funeral home to honor Stephens rights did not deny Rost from exercising his religious beliefs.

NOTE: During the course of the proceedings in these long-running disputes, both Mr. Zarda and Ms. Stephens have passed away. But their estates continue to press their causes for the benefit of their heirs. The Court agreed to hear these cases to resolve once and for all the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons.

OPINION

Justice Neil Gorsuch wrote the majority opinion for the Court. It was released to the public on June 15, 2020. In a 6-3 decision, the Court held that protections of Title VII do include sexual orientation and gender identity.

In reaching this decision, Gorsuch wrote:

> "An employer who fired an individual for being homosexual or transgender fires that person for traits or actions **it would not have questioned in members of a different** sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids. Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. But the limits of the drafters' imagination supply no reason to ignore the law's demands. Only the written word is the law, and all persons are entitled to its benefit."

Gorsuch then stated that there was one word primarily at issue in all three of these cases: "sex."

All of the employers in these cases say that the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." The employees disagreed, claiming that even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation.

Gorsuch then reasoned that it was key to the Court's decision to determine what Congress meant by using the word "sex" in 1964 when Title VII was passed.

Gorsuch also posed the question: What did "discriminate" mean in 1964?

As it turns out, it meant then roughly what it means today:

> **To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated.**

In so-called "disparate treatment" cases like today's, Gorsuch reasoned that this Court has also held that the difference in treatment based on sex must be intentional.

So, taken together, an employer who intentionally treats a person worse because of sex, such as by firing the person for actions or attributes **it would tolerate in an individual of another sex**, discriminates against that person in violation of Title VII.

Gorsuch noted that Title VII clearly states three times, including immediately after the words "discriminate against," that the Court's focus should be on "individuals," not "groups":

> Employers may not "fail or refuse to hire or . . . discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." §2000e–2(a)(1) (emphasis added).

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges:

> An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision. And it doesn't matter if the employer treated **women as a group** the same when compared to **men as a group**. If the employer intentionally relies **in part** on an individual employee's sex when deciding to discharge the employee, or put differently, **if changing the employee's sex would have yielded a different choice by the employer**, a statutory violation has occurred.

The Court then held that an individual's homosexuality or transgender status is not relevant to employment decisions. That is because it is impossible to discriminate against a person for being homosexual or transgender without also discriminating against that individual based on the basis of that person's sex.

For example, consider an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, **except that one is a man and the other a woman**. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions **it tolerates in his female colleague**.

Put differently, the employer intentionally singled out an employee to fire based in part on the employee's sex. Consequently, the terminated employee's sex is a but-for cause of his discharge.

Gorsuch also cites to an example where an employer fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or **actions that it tolerates in an employee identified as female at birth.**

Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Gorsuch's decision also alluded to concerns that the judgment may set a sweeping precedent that would force gender equality on traditional practices. However, Gorsuch wrote:

> "They say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today but none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today."

WHAT DOES THIS MEAN TO HR?

The impact of this case is obvious:

Sexual Orientation and Gender Identity are now protected classes under Title VII.

In other words, using sexual oriented or gender identity slurs are as illegal as using racial slurs, religious slurs, gender slurs and so on. .

Likewise, basing employment decisions on either of these sexual oriented or gender identity factors is as illegal as basing such decisions on someone's race, religion and so on.

Clearly, employers need to re-write their policies to include these new protected classes. Further, and perhaps more importantly, employers must be training their employees that sexual orientation and gender identity are indeed protected classes and any harassment or discrimination based on either of these **two classifications will not be tolerated in any way. Unfortunately, this will indeed be a huge cultural shift for many employers.**

IMPORTANT NOTE:
Religious Freedom Restoration Act (RFRA)

It is also important to note that Rost was a devout Christian who does not accept that anyone can change their gender. So, he ran his funeral homes according to his religious beliefs, the Religious Freedom Restoration Act (RFRA) gave him the ability to fire Stephens if she would not conform to these beliefs. In other words, since Stephens' decision to surgically alter his gender violated Rost's Christian beliefs, Rost claimed he could terminate Stephens regardless of whether Stephens actions were protected by Title VII or not. The district court agreed with Rost.

The EEOC appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit therefore had to consider if Rost and his funeral homes had shown that retaining Stephens as an employee under Title VII would have burdened Rost from expressing his religious freedom. The court decided that he did not, so he was required to comply with Title VII.

Judge Moore reasoned for the RFRA to serve as a shield that allows for illegal for discriminatory conduct, RFRA requires a showing that there has been a "**substantial burden**" on "**religious exercise**," that is not "**in furtherance of a compelling**

government interest" and/or "**the least restrictive means of furthering**" that interest. In this case, the funeral home claimed that the presence of a transgender employee would

(1) "often create distractions for the deceased's loved ones" and

(2) force Rost to leave the industry, because working with a transgender person was an infringement on his religious beliefs.

Judge Moore concluded that neither of these constituted substantial burdens on Rost or the funeral home. Regarding the first claimed burden, Judge Moore stated that employers cannot escape the requirements of Title VII simply by assuming the "**presumed biases**" of their customers.

With regard to the second claimed burden, Judge Moore wrote that:

"But we hold that, as a matter of law, tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it."

Judge Moore asserted that Stephens did not ask Rost in any way to endorse or to aid her transition. Instead, she only sought to remain on staff at the funeral home. According to Judge Moore, allowing her to remain employed does not "**substantially burden his religious practice**."

In conclusion, Judge Moore asserted that even if Title VII was to impose a "substantial burden" on Rost's religious beliefs in this case, it would still survive scrutiny under the RFRA because eliminating or preventing employment discrimination because of sex is clearly a "compelling interest," and no less "restrictive means" of preventing such discrimination exists. Otherwise, according to Judge Moore, all modern civil rights law would be called into question.

Since Rost did not appeal this part of the Sixth Circuit's decision to the United States Supreme Court, the Court did not need to rule on it.

II. OSHA's NEW ACCIDENT REPORTING RULES

A. Overview of New Rule

Thousands of employers implement post-accident drug and alcohol testing policies to promote workplace safety. However, the legal landscape shifted on May 12, 2016, when the Occupational Safety and Health Administration published its **final rule** on electronic reporting of workplace injuries and illnesses.

Specifically, effective 90 days after publication of the rule, on August 10, 2016, employers must establish "**a reasonable procedure**" for employees to report work-related injuries and illnesses promptly and accurately. The rule prohibits this procedure from **deterring or discouraging a reasonable employee from accurately reporting a workplace injury or illness.**

The rule also prohibits any retaliation for reporting an injury or illness.

This new rule became effective one **DECEMBER 1, 2016.**

The National Association of Manufacturers (NAM), along with other organizations, filed the challenge against OSHA's electronic record-keeping rule. The coalition has asked the court to declare that the rule is unlawful because it prohibits or otherwise limits incident-based employer safety incentive programs and/or routine mandatory post-accident drug testing programs.

More specifically, OSHA's new a final rule that amended 29 C.F.R. 1904.35 to add two new provisions:

- Section 1904.35(b)(1)(i) makes explicit the longstanding requirement for employers to have a ***reasonable procedure*** for employees to report work-related injuries and illnesses, and

- Section 1904.35 (b)(1)(iv) incorporates explicitly into Part 1904 the existing prohibition on retaliating against employees for reporting work-related injuries or illnesses under section 11(c) of the OSH Act, 29 U.S.C. § 660(c).

B. Reporting Injuries, Illnesses and Accidents As Soon As "PRACTICAL" … *Not Immediate*

To establish a violation of section 1904.35(b)(1)(i), OSHA must show that the employer either ***lacked a procedure for reporting work-related injuries or illnesses***, or that the employer had a procedure that was ***unreasonable***. The employer must establish a ***reasonable procedure*** for employees to report work-related injuries and illnesses. An employer's reporting procedure is reasonable if it is not unduly burdensome and would not deter a reasonable employee from reporting.

For example, OSHA explained that it would be reasonable to require employees to report a work-related injury or illness ***as soon as practicable*** after realizing they have the kind of injury or illness they are required to report to the employer, such ***as the same or next business day*** when possible.

However, it would not be reasonable to discipline employees for failing to report an injury ***before they realize they have a work-related injury*** they are required to report or for failing to report "immediately" when they are incapacitated because of the injury or illness. A rigid prompt-reporting requirement that results in employee discipline for late reporting even when the employee could not reasonably have reported the injury or illness earlier would violate section 1904.35(b)(1)(iv).

It would also be reasonable to require employees to report to a supervisor through reasonable means, such as by phone, email, or in person. However, it would not be reasonable to require ill or injured employees to report in person if they are unable to do so. Likewise, it would not be reasonable to require employees to take unnecessarily cumbersome steps or an excessive number of steps to report.

For a reporting procedure to be reasonable, and not unduly burdensome, it must allow for reporting of work-related injuries and illnesses ***within a reasonable***

timeframe after the employee has realized that he or she has suffered a recordable work-related injury or illness and in a reasonable manner.

WHAT DOES THIS MEAN TO HR?

First, all employers must have a process for employees to follow in reporting accidents, injuries and illnesses.

Next, the days of requiring employees to report all accident and injuries "**IMMEDIATELY**" are gone. Instead, policies should now say something like:

> In the case of accidents, injuries or illnesses, employees must promptly notify their supervisor or some company official **as soon as practical**.
>
> Incident Report Forms are provided for this purpose and may be obtained from _____. The supervisor will then complete a "_____ Form." These reports should be sent to _____. Failure to report an injury or illness as required by organization policy could result in loss of compensation benefits and possibly lead to disciplinary action, up to and including termination.

C. Safety Incentives

OSHA says Section 1904.35(b)(1)(iv) does not prohibit safety incentive programs.

Instead, according to OSHA, it ***does*** prohibit taking any adverse action against employees simply because they report work-related injuries or illness. Withholding a benefit, such as a cash prize drawing or any other substantial award, simply because an employee reported an injury or illness would likely violate section 1904.35(b)(1)(iv) regardless of whether such an adverse action is taken pursuant to an incentive program.

Penalizing an employee simply because the employee reported a work-related injury or illness ***without*** considering the circumstances surrounding the injury or illness ***is not objectively reasonable*** and therefore not a legitimate business reason for taking adverse action against the employee.

OSHA then gave the example of where an employer promises to raffle off a $500.00 gift card at the end of each month if no employee sustains an injury that requires the employee to miss work. If the employer cancels the raffle in a particular month simply because an employee reported a lost-time injury without also considering the circumstances of the injury, such as the cause of the accident, this would likely violate section 1904.35(b)(1)(iv) because it would constitute adverse action against an employee for reporting a work-related injury ... ***not*** for violating a safety rule.

However, OSHA says if an employer conditions the raffle on complying with legitimate safety rules or participating in safety-related activities for that month, that ***would not*** violate section 1904.35(b)(1)(iv).

In this previous example, suppose an employer raffles off a $500.00 gift card each month **if** all of the employees have universally complied with legitimate workplace safety rules, such as using required hard hats, fall protection and following lockout-tagout procedures, would not violate the rule.

Likewise, rewarding employees for participating in safety training or identifying unsafe working conditions would not violate the rule.

On the other hand, OSHA encourages employers to find creative ways to incentivize safe work practices and accident-prevention measures that do not disproportionately penalize workers who report work-related injuries or illnesses. If OSHA determines that an employer withheld a benefit from an employee simply because the employee reported a work-related injury or illness without also considering the circumstances surrounding the injury or illness, OSHA may issue a citation under section 1904.35(b)(1)(iv).

WHAT DOES THIS MEAN TO HR?

Penalizing employees for not following safety rules or for not attending safety training or events is permissible under OSHA. However, penalizing employees for having an accident or for missing work due to an accident will most likely be an OSHA violation.

D. Post-Accident Drug and Alcohol Testing

Section 1904.35(b)(1)(iv) does not prohibit employers from drug testing employees who report work-related injuries or illnesses so long as they have an ***objectively reasonable basis for testing***, and the rule does not apply to drug testing employees for reasons ***other*** than injury-reporting.

Further, OSHA will not issue citations under section 1904.35(b)(1)(iv) for drug testing conducted under a state workers' compensation law or other state or federal law, such as under DOT regulations.

In order to issue a violation against an employer under 1904.35(b)(1)(iv), OSHA will need to establish the three elements of retaliation:

- A Protected Report of an Injury or Illness;
- Adverse Action and
- Causation.

When evaluating whether an employer had a reasonable basis for drug testing an employee who reported a work-related injury or illness, the **central inquiry** will be whether the employer had a reasonable basis for believing that drug use by the reporting employee ***could have contributed to the injury or illness*.**

If so, it would be objectively reasonable to subject the employee to a drug test. When OSHA evaluates the reasonableness of drug testing a particular employee who has reported a work-related injury or illness, it will consider the following factors:

- Whether the employer had a reasonable basis for concluding that drug use could have contributed to the injury or illness (and therefore the result of the drug test could provide insight into why the injury or illness occurred),

- **Whether other employees involved in the incident that caused the injury or illness were also tested or whether the employer only tested the employee who reported the injury or illness**, and

- Whether the employer has a heightened interest in determining if drug use could have contributed to the injury or illness due the hazardousness of the work being performed when the injury or illness occurred.

OSHA will only consider whether the **drug test is capable of measuring impairment at the time the injury or illness occurred where such a test is available**. **Therefore, at this time, OSHA will consider this factor for tests that measure alcohol use, but not for tests that measure the use of any other drugs**.

The general principle here is that drug testing may not be used by the employer as a form of discipline against employees who report an injury or illness, but may be used as a tool to evaluate the root causes of workplace injuries and illness in **appropriate circumstances**.

OSHA then cites to the example of a crane accident that injures several employees working nearby but not the operator. The employer does not know what caused the accident, but there is a reasonable possibility that it could have been caused by operator error or by mistakes made by other employees responsible for ensuring that the crane was in safe working condition. In this scenario, OSHA says it would be reasonable to require all employees whose conduct ***could have*** contributed to the accident to take a drug test, whether or not they reported an injury or illness. Testing would be appropriate in these circumstances because there is a reasonable possibility that the results of drug testing could provide the employer insight on the root causes of the incident. **However, if the employer only tested the injured employees but did not test the operator and other employees whose conduct could have contributed to the incident, such disproportionate testing of reporting employees would likely violate section 1904.35(b)(1)(iv).**

Furthermore, OSHA cites that drug testing an employee whose injury ***could not possibly*** have been caused by drug use would likely violate section 1904.35(b)(1)(iv).

For example, OSHA cites where drug testing an employee for reporting a repetitive strain injury would likely ***not*** be objectively reasonable because drug use could not have contributed to the injury. Also, OSHA cites that Section 1904.35(b)(1)(iv) prohibits employers from administering a drug test in an unnecessarily punitive manner regardless of whether the employer had a reasonable basis for requiring the test.

WHAT DOES THIS MEAN TO HR?

According to OSHA, the real key here for employers lies in bullet #2:

> **Is the employer testing EVERYONE potentially involved in the accident … or just the person who reported it?**

Therefore, employers should consider using wording similar to the following:

Post-accident testing will be conducted whenever an accident occurs and **management believes that drugs and/or alcohol may have played a role**, as defined below:

1. **Anyone involved** in a workplace accident that results in a fatality,

2. **Anyone involved** in a vehicular accident causing damage in apparent excess of $750, as determined by the Company, (You may decide on this amount) or

3. **Anyone involved** in a non-vehicular accident causing damage in apparent excess of $500, as determined by the Company, (You may decide on this amount) or

4. **Anyone involved** in reportable work-related accident wherein someone is injured and management believes off-site medical attention is required.

When any such accidents occur, any employee the Company believes may have contributed to the accident will be tested for drugs and/or alcohol use if the Company believes such substances may have been involved.

III. OSHA's NEW PENALTY SCHEDULE

In November 2015, Congress enacted legislation requiring federal agencies to adjust their civil penalties to account for inflation. The Department of Labor has adjusted penalties for its agencies, including the Occupational Safety and Health Administration (OSHA).

The new penalties took effect August 2, 2016. Any citations issued by OSHA on or after this date will be subject to the new penalties if the related violations occurred after November 2, 2015.

Type of Violation	Previous Maximum Penalty	Current Maximum Penalty
Serious Other-Than-Serious Posting Requirements	$7,000/violation	$12,471/violation
Failure to Abate	$7,000/day beyond abatement day	$12,471/day beyond the abatement day
Willful or Repeated	$70,000 per violation	$124,709 per violation

IV. RELIGIOUS EXEMPTION FROM VACCINES

A. EEOC And Religious Exemption

For first-hand EEOC guidance, please hit this hotlink: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

Employers are required to accommodate an employee's "sincerely held" religious belief, observance, or practice.

No major religions have expressed anything but support for the vaccine.

There are fairly broad standards about what constitutes a religious belief or practice. It's not necessary for beliefs to be part of an organized religion, and the beliefs can be new, uncommon, or seem illogical or unreasonable to others.

Generally, under Title VII, an employer should assume that a request for religious accommodation is based on sincerely held religious beliefs. However, if an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, the employer would be justified in making a limited factual inquiry and seeking additional supporting information. An employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation.

Organizations must ensure that requests for religious exemptions are documented and evaluated in accordance with applicable federal law and as a part of that organization's policies and procedures.

B. Sincerity of Religious Belief Questioned

Bob, who had been a dues-paying member of the CDF union for fourteen years, had a work-related dispute with a union official and one week later asserted that union activities were contrary to his religion and that he could no longer pay union dues. The union doubted whether Bob's request was based on a sincerely held religious belief, given that it appeared to be precipitated by an unrelated dispute with the union, and he had not sought this accommodation in his prior fourteen years of employment. In this situation, the union can require him to provide additional information to support his assertion that he sincerely holds a religious conviction that precludes him from belonging to – or financially supporting – a union.

When an employer requests additional information, **employees should provide information that addresses the employer's reasonable doubts**. That information need not, however, take any specific form.

For example, written materials or the employee's own first-hand explanation may be sufficient to alleviate the employer's doubts about the sincerity or religious nature of the employee's professed belief such that third-party verification is unnecessary.

Further, since idiosyncratic beliefs can be sincerely held and religious, even when third-party verification is requested. **The third-party request does not have to be made of a member of the clergy or fellow congregant, but rather could be provided by others who are aware of the employee's religious practice or belief**.

An employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation. By the same token, employers who unreasonably request unnecessary or excessive corroborating evidence risk being held liable for denying a reasonable accommodation request, and having their actions challenged as retaliatory or as part of a pattern of harassment. https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_790763467358216107498601 35

C. What IS A Sincerely Held Religious Belief?

The definition of "religion" under Title VII protects nontraditional religious beliefs that may be unfamiliar to employers. While the employer should not assume that a request is invalid simply because it is based on unfamiliar religious beliefs, employees may be asked to explain the religious nature of their belief and should not assume that the employer already knows or understands it.

By contrast, Title VII does not protect social, political, or economic views, or personal preferences.

Thus, objections to COVID-19 vaccination that are based on social, political, or personal preferences, or on nonreligious concerns about the possible effects of the vaccine, do not qualify as "religious beliefs" under Title VII.

Factors that, either alone or in combination – might undermine an employee's credibility include:

- Whether the employee has acted in a manner inconsistent with the professed belief (although employees need not be scrupulous in their observance),
- Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for nonreligious reasons,
- Whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons) and
- Whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

The employer may ask for an explanation of how the employee's religious belief conflicts with the employer's COVID-19 vaccination requirement.

Although prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs, or degree of adherence, may change over time and, therefore, an employee's newly adopted or inconsistently observed practices may nevertheless be sincerely held.

An employer should not assume that an employee is insincere simply because some of the employee's practices deviate from the commonly followed tenets of the employee's religion, or because the employee adheres to some common practices but not others. No one factor or consideration is determinative, and employers should evaluate religious objections on an individual basis.

When an employee's objection to a COVID-19 vaccination requirement is not religious in nature, or is not sincerely held, Title VII does not require the employer to provide an exception to the vaccination requirement as a religious accommodation. https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_790763467358216107498601 35

D. Reasonable Accommodation

An employer is not required to accommodate an employee's religious beliefs if doing so would impose an undue hardship on the employer's legitimate business interests.

According to the EEOC, potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

Factors to consider in denying an accommodation:

- The accommodation is too costly
- The accommodation would decrease workplace efficiency
- The accommodation infringes on the rights of other employees
- The accommodation requires other employees to do more than their share of hazardous or burdensome work
- The proposed accommodation conflicts with another law or regulation
- The accommodation compromises workplace safety.

Employers should have a clear policy about how to handle accommodation requests related to their vaccine mandate.

V. FIRST AMENDMENT FREE SPEECH: USING PROPER PRONOUNS

In Meriwether v. Hartop, No. 20-3289 (3/26/2021), Nicholas Meriwether was a "devout Christian" and philosophy professor at Shawnee State University, a small public institution in Ohio. The university adopted a policy requiring faculty members to "refer to students by their 'preferred pronoun[s],'" regardless of their "convictions or views on the subject."

In January 2018, Meriwether referred to a student as "sir," upon which the student told Meriwether that she identifies as a woman and requested that he use "feminine titles and pronouns" when referring to her. The professor "wasn't sure" whether he could "comply" with the request, so he asked university officials to implement some alternatives to the pronoun policy.

Meriwether proposed he would use either

1. No pronouns when interacting with the student or
2. The requested pronouns, but only after placing a "disclaimer" in his syllabus "noting that he was doing so under compulsion and setting forth his personal and religious beliefs about gender identity."

Shawnee State did not agree with either "accommodation" and eventually presented the professor with two options:

- Eliminate all sex-based pronouns when interacting with students or
- Use the pronouns requested by the student.

Shawnee State then conducted an investigation, concluding Meriwether's "disparate treatment" had "created a hostile work environment" that called for a written reprimand. The written warning was placed in his file, directing him to comply with the university's pronoun policy and advising that future violations will result in "further corrective actions." His grievance of the discipline was denied.

Meriwether then filed suit, alleging Shawnee State had violated his rights under

1. The First Amendment's Free Speech and Free Exercise Clauses,
2. The Fourteenth Amendment's Due Process and Equal Protection Clauses,
3. The Ohio Constitution, and
4. His employment contract.

The magistrate judge at the district court level dismissed the federal claims and declined to exercise supplemental jurisdiction over the state claims.

Meriwether appealed to the 6th Circuit Court of Appeals.

The 6th Circuit held for Meriwether and found that that First Amendment's Free Speech Clause applies to public universities and their professors. The court also found that the government "may not compel affirmance of a belief with which the speaker disagrees."

However, in Garcetti v. Ceballos, the U.S. Supreme Court concluded public employees who make statements "pursuant to their official duties" aren't "speaking as citizens for First Amendment purposes." The question for the 6th Circuit was whether the Garcetti decision barred Meriwether's claim.

In Garcetti, the Supreme Court "expressly declined to address whether its analysis would apply 'to a case involving speech related to scholarship or teaching.'" And in previous opinions, the Court "long recognized" the significance of "expansive freedoms of speech" in university settings, occupying a "**special niche in our constitutional tradition**."

The 6th Circuit determined professors at public institutions "retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship," guarding speech that is both "germane to the contents of the lecture" and "not."

The 6th Circuit next applied the Pickering-Connick framework to evaluate whether Meriwether's specific speech was protected:

- Was the professor speaking on "a matter of public concern"?
- Was his interest in doing so greater than the university's interest in "promoting the efficiency of the public services it performs through" him?

Because Meriwether's refusal to use "gender-identity-based pronouns" relates to a "matter of political, social, or other concern to the community," it is a matter of public concern.

In determining which party's interest is greater, Meriwether highlighted the significance of his **academic freedom**, and Shawnee State cited its "**compelling interest in stopping discrimination against transgender students**." The 6th Circuit concluded the university had "flouted" the core principle of the First Amendment and violated the professor's free-speech rights because, in part, it **refused what the court considered to be his reasonable accommodation requests**.

Regarding Meriwether's claim under the Free Exercise Clause, the 6th Circuit analyzed whether the pronoun policy burdened the professor's **religious exercise**. Such a policy is "**presumptively unconstitutional unless [it is] both neutral and generally applicable**." Because

1. The university "**exhibited hostility**" to his religious beliefs and
2. There were "irregularities" in its "adjudication and investigation processes," the court concluded his rights under the Free Exercise Clause were violated upon issuance of the written warning.

The 6th Circuit affirmed the district court's dismissal of only the Due Process Clause claim because the pronoun policy wasn't "unconstitutionally vague." Meriwether was "on notice that the policy prohibited his conduct."

WHAT DOES THIS MEAN TO HR?

Even though this opinion is specifically tailored to public employers in the academia, it is an important reminder that all employers have obligations to:

1. Accommodate employees' religious beliefs and

2. To be diligent in creating a working environment that is tolerant of others beliefs and is free from discrimination and harassment based on protected characteristics, including gender identity.

Employers often comes dangerously close to violating employees' religious beliefs when they are told to be "accepting" of other's differences.

"Tolerance" means that the organization is not going to allow anyone to persecute or bully anyone because they are different, which includes how they think. That is the Diversity of Ideas. This means employers are going to control how its employees behave, both on and off the job.

Requiring employees to be "accepting" of other's differences can create legal issues for an employer because it tells employees how to believe. Such requirements can violate Title VII.

Such instances of controlling employees' religious beliefs should be avoided. Employers have every right, and a legal obligation, to control employee behavior … but not beliefs.

VI. RACIAL SLURS AND FIRST AMENDMENT FREE SPEECH

In Bennett v. Metropolitan Government of Nashville & Davidson County, Tennessee, 977 F.3d 530 (6th Circuit Court of Appeals), on the evening of November 8, 2016, election day, Nashville Fire Department dispatcher Danyelle Bennett anxiously awaited the results of the Presidential election, hoping for a win by the candidate she supported, Donald Trump. She stayed up watching the results until about 3:00 a.m. on November 9, when the electoral votes for Trump reached 270.

She then made a post on her public Facebook page of an image of the electoral map revealing Trump as the winner.

Shortly thereafter, before Bennett went to bed, she received a notification that Mohamed Aboulmaouahib, a man she did not know, writing that "Redneck states vote[d] for Trump, niggaz and latinos states vot[ed] for hillary."

Bennett then replied: "Thank god we have more America loving rednecks. Red spread across all America. Even niggaz and latinos voted for trump too!"

The following morning, Bennett was off-duty when she received a notification that her friend and former colleague had commented on her post, asking "Was the niggaz statement a joke? I don't offend easily, I'm just really shocked to see that from you."

Following an outcry from her colleagues and members of the public, Bennett was placed on administrative leave and subsequently terminated. She sued alleging that her posting was protected speech, and her termination violated the First Amendment.

At trial, the judge concluded as a matter of law that the Pickering Balancing test "weighed in Bennett's favor", and left the outcome to a jury, who awarded Bennett $6,500.00 in back pay and $18,750.00 for humiliation and embarrassment. Nashville filed an appeal to the Sixth Circuit.

The Sixth Circuit reversed and found for Metro.

In reversing the trial court's Pickering ruling, the Sixth Circuit concluded that public employee speech falls into two categories for First Amendment purposes:

1. Speech that calls for the "highest rung" of protection based on "the level of importance the speech has in the community" and

2. Speech that lacks "special insight."

The Sixth Circuit held that applying the Pickering Balancing Test is a matter of law for the court to decide. However, before it can apply the balancing test, it must first determine the degree of protection the speech warrants, i.e., the level of importance the speech has in the community.

Because "the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression," the court reasoned that it must also consider the context of the speech that resulted in Bennett being fired.

On appeal, Metro does not challenge the district court's finding that the statement in question was political in nature. But Metro did argue that it "was not purely political" and, thus, was not entitled to the heightened level of protection the district court had granted to it.

Bennett, on the other hand, argued that Metro's decision to terminate her "was based on the entirety of her post-election, political comment as a whole."

Bennett based her argument that she was fired for political speech on the jury's interrogatory response indicating that Metro terminated her "for using the term 'niggaz' when expressing her views regarding the outcome of a national election on Facebook."

However, the Sixth Circuit concluded that the part of the speech at issue was the racial slur and not Bennet's statements where she expressed her views on the election.

So, even though Bennett's speech was protected, it was not in the "highest rung" of protected speech as the district court erroneously found.

Since Bennett's speech did not garner the high level of protection that the district court assigned to it, the Pickering Balancing Test requires less of a showing that the speech was disruptive.

In other words, if the speech was shown to be of a greater public concern, then Metro would have to show that the speech caused a higher degree of disruption in the workplace.

When the court applied the balancing test, it took into consideration whether Bennett's the statement:

- Impaired discipline by superiors or harmony among co-workers,
- Had a detrimental impact on personal loyalty and confidence in close working relationships,
- Impeded the performance of the speaker's duties or interfered in the regular operation of the enterprise or
- Undermined the mission of the employer.

The court determined that Bennett's speech disruption to Metro's workplace was substantial. Bennett's post prompted a "nonstop conversation" in the office that lasted for days, and for as much as three weeks to a month after Bennett's comment, there was a need for a counselor to address the office. At Bennett's disciplinary hearing and during trial, she did not exhibit concern for her colleagues' feelings, called them hypocrites, and indicated that she would not apologize because someone else took something the wrong way-indeed, she believed her colleagues should instead apologize to her.

Such facts indicate that if she had returned to work at ECC, her presence would have continued or exacerbated the disharmony.

Therefore, the court ruled it had to grant Metro's leadership discretion in maintaining an effective workplace with employee harmony that serves the public efficiently. This concern by Metro outweighs Bennett's interest in using racially offensive language in a Facebook comment.

WHAT DOES THIS MEAN TO HR?

Yes, public sector employees do have a Frist Amendment Right To Free Speech, but it is not an absolute right. Whenever a public sector employee engages in Free Speech outside of their functions as an employee and a matter of public concern is involved, this case shows that using such offensive language is not protected, even though the message itself might be protected.

XV. OFFENSIVE POLITICAL SPEECH BY PUBLIC SECTOR EMPLOYEES MAY BE PROTECTED

In Marquardt v. Carlton, No. 19-4223 (Sixth Cir., Aug. 19, 2020), Jamie Marquardt, a Cleveland EMS captain, posted on his personal Facebook page his opinions regarding the shooting death of 12-year-old Tamir Rice. Marquardt did not identify himself as being a city employee. He also made these posts on his own time, not while he was on the job.

Marquardt posts said,

> Let me be the first on record to have the balls to say Tamir Rice should have been shot and I am glad he is dead. I wish I was in the park that day as he terrorized innocent patrons by pointing a gun at them walking around acting bad. I am upset I did not get the chance to kill the criminal f*&ker."

Marquardt also referred to Rice as a "ghetto rat."

Several EMS employees raised concerns about the posts. Marquardt's employer, the city of Cleveland, eventually fired him, explaining his speech didn't relate to a matter of "public concern."

Marquardt sued Cleveland, claiming he was unlawfully terminated in retaliation for his protected speech in violation of the First and Fourteenth Amendments. The district court dismissed the case, holding the posts amounted to a private interest, not a public concern.

Marquardt appealed to the Sixth Circuit.

The Sixth Circuit reversed the district court on the sole issue of whether Marquardt's Facebook posts were a matter of public concern. To assess whether a public employer impermissibly retaliated against an employee because of his speech, the court said the threshold question of whether he engaged in protected speech must be addressed.

The Sixth Circuit relied on the following two-part test:

- The court must determine whether the speech was about a "matter of public concern" (if and
- If the speech relates to a matter of public concern, the court must then balance the competing interests to determine if the employee's free-speech rights "outweigh the efficiency interests of the government as an employer."

The Sixth Circuit focused on the first part of the inquiry and determined the posts on Marquardt's Facebook page were a matter of public concern. Of course, if that is the case, the public employees are entitled to protection under the First Amendment.

The court explained that speech involves a matter of public concern when it's "fairly considered as relating to any matter of political, social, or other concern to the community." Applying the standard to the fired EMS captain's Facebook posts, the court pointed to the widespread local and national scrutiny surrounding Tamir Rice's death. The court held the shooting's high-profile nature made it a matter of public concern.

The shocking or inappropriate nature of the speech doesn't affect the inquiry. The court acknowledged Marquardt's posts, which reflected "the author's desire to kill a twelve-year-old boy" and "joy that [Rice] is already dead," might not seem public in nature. However, the court reasoned that the fact that the author wrote this post in the first-person did not change this topic of public concern into a "personal grievance." The court explained: "The First Amendment is not so fragile that its guarantees rise or fall with the pronouns a speaker selects."

The fact that Marquardt's speech was communicated only to his Facebook friends and it was hidden from the general public didn't affect the Sixth Circuit's decision. The court said speech doesn't have to be communicated to the general public to be a matter of

public concern. The court noted Facebook itself is a platform for sharing messages with a wide audience. Accordingly, posts made on social media, regardless of whether it was visible to the public or just to the author's friends, can still be classified as matters of public concern.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Public employers must be careful how they respond to employees' off-the-job comments.

Racially charged situations like this one will undoubtedly elicit strong emotional reactions from both sides. While the personal or offensive nature of an employee's speech may seem reprehensible, the threshold inquiry is whether the communication relates to "a matter of public concern." Before reprimanding or firing employees, public employers should consult with counsel to determine if the speech under scrutiny passes the threshold inquiry.

VII. HOSTILE ENVIRONMENT: BODY SHAMING

Nathan v. Great Lakes Water Authority, No. 20-1761 (6th Cir. 2021), Nicole Massey began working as a security guard for the Detroit Water and Sewerage Department (DWSD) in 2004.

Massey claimed that her supervisors and co-workers commented on "her weight, the size of her breasts, her looks and body [odor]." She also claims they referred to her as the "Queen of FMLA."

In 2015, Great Lakes became Massey's employer. Supervisors told Massey that she looked "sloppy," and that her breasts were "drooping" and that she needed a more supportive bra. Massey went to human resources, but claims that the harassment continued.

In total, Massey experienced five separate harassing incidents over a 15 month period of time.

On October 29, 2017, Massey was driving a Great Lakes van when the van incurred damage. Massey claimed that she was not aware that she had been in an accident. Massey claims that she was approved for FMLA leave for breast reduction surgery through November 17, 2017. However, there is no record that anyone at Great Lakes knew about her FMLA leave for her surgery. On November 15, 2017, Massey was told that it had been determined that she falsified her incident report. Great Lakes terminated her employment on December 16, 2017.

Massey, through her Chapter 7 bankruptcy trustee, alleged unlawful retaliation and a hostile work environment in violation of Title VII and the Michigan Elliot-Larsen Civil Rights Act.

The trial court granted Great Lakes summary judgment. Massey appealed to the 6th Circuit Court of Appeals.

The 6th Circuit focused on two major components of an employee's burden to substantiate a hostile work environment claim:

(1) Whether the harassment was based on sex and

(2) Whether it was severe and pervasive enough to create an abusive working climate.

Based On Sex

First, in order to determine if Massey's harassment was based on "sex" turned on one simple question:

Would a reasonable jury consider derogatory comments about a female's breasts to be based on sex?

The simple answer to the question was "yes."

The court further reasoned that hostile environment harassment is occurs when an employee is subjected to disadvantageous terms or conditions of employment to which members of the other sex aren't exposed. It typically occurs through either

(1) harassment based on sexual desire or

(2) nonsexual conduct that shows antifemale animus. Any unequal treatment of an employee that wouldn't occur, however, but for the employee's sex constitutes harassment based on sex.

The 6th Circuit found that a jury could easily infer that Massey's alleged harassers wouldn't have made similar comments to a man because they chose to specifically target her breasts. Moreover, the court stated it's entirely possible a jury could similarly find harassment of a man who was ridiculed because of the size of his breasts was based on sex. However, simply because a man and a woman can be subject to similar comments doesn't mean harassment based on sex cannot occur.

Severe or Pervasive

However, the court then looked at whether this harassment was "severe or pervasive."

Even though the court found that the harassment was based on sex, Massey's hostile work environment claim was dismissed on summary judgment (without a trial) because the conduct wasn't considered sufficiently severe or pervasive. Although she testified the harassment made it difficult to sleep and motivated her to get breast reduction surgery, the court didn't consider the work environment abusive.

The 6th Circuit said "pervasive harassment" needs to be commonplace, ongoing, and continual. Evidence of only five instances of sex-based harassment over roughly a 15-month period didn't meet the standard.

Next, the 6th Circuit didn't find the harassment Massey suffered to be objectively hostile or severe. No one at GLWS ever physically threatened Massey or placed their hands on her. Additionally, most of the comments were made in the context of conveying work-related information about her uniform, rendering them less severe than comments with no conceivable work purpose.

Therefore, the 6th Circuit also refused to hold the GLWS responsible for harassment that occurred before it took control of the workplace.

WHAT DOES THIS MEAN TO HR?

In short, any comments directed at an employee relating to their bodily features or appearances are typically considered "based on sex" for purposes of a hostile work environment claim.

Also, the fact that these incidents were not addressed after the first one or two incidents in a major error. Such incidents need to be addressed immediately by HR.

This case exemplifies the great need for proper training of employees and supervisors. This means organizations must have updated antidiscrimination policies and it has trained its employees on its reporting procedures and appropriate workplace behavior in accordance with the EEOC's 2016 Guidelines For Harassment Training, all of which should be documented.

The fact that these five incidents occurred before they were swiftly addressed in a big mistake.

However, the legal test for hostile environment is very high, which is as follows:

Would the

REASONABLE PERSON in the COMMUNITY

be so offended that they

COULDN'T FUNCTION IN THEIR JOB

and

TWO, THREE or FOUR
ISOLATED INCIDENTS ARE NOT ENOUGH

VIII. EMPLOYERS ARE LIABLE FOR OFF THE JOB CUSTOMER HARASSMENT

In EEOC v. Costco, No. 17-2432 (7th Cir 09/10/2018), Dawn Suppo, an employee of Costco Wholesale Corporation, was stalked by Thad Thompson, a customer of Costco, for over a year.

At Costco, Suppo, had the job of "doing 'go-backs,'" which refers to re-shelving items that members decided not to purchase. Go-backs required Suppo to circulate around the large warehouse with a shopping cart, returning items to the sections where they belonged."

In mid-2010, Suppo was approached by a customer named Thompson, who asked her invasive questions, such as where she lived. She put him off, and, a couple of months after the encounters started, she reported it to her direct manager, Don Currier. He told her to report any future encounters. When Thompson returned once again, he was escorted off the floor and told by Currier and a security officer not to go near Suppo again. As a precaution, Suppo also called the police.

Despite the warning, Thompson continued to appear at the store to follow and talk to Suppo. Though there was a dispute about how often these encounters occurred, the jury could have found that Thompson entered the store far more than the 20 times even though he had made only one purchase over 13 months before. He asked Suppo intimate questions, such as whether she had a boyfriend, he tried to offer her his phone number and card, he talked about her looks, he video recorded her at least once and occasionally made physical contact.

Attempts to involve store management did not end the unwanted contacts. Over a year later, Suppo won a court order on her own to keep Thompson away from her, and then went on medical leave of absence. The company investigated Suppo's complaints.

"On November 23rd, the General Manager of the Glenview store sent an investigation closure letter to Suppo, informing her that although the company could not confirm a violation of its harassment policy, it had instructed Thompson not to shop at the Glenview warehouse." Suppo did not return to work from her leave and was fired "because her unpaid medical leave of absence had extended beyond twelve months."

The EEOC prevailed at trial, obtaining a $250,000 compensatory damages verdict. The district court upheld the verdict over post-trial motions, but did not award Suppo back pay.

The EEOC appealed to the Seventh Circuit, which affirmed the verdict and remands for the award of back pay.

Costco argued that Suppo's encounters with Thompson were too mild, as a matter of law, to constitute severe or pervasive harassment. "Costco insists that they were 'tepid' compared to those that we have held insufficiently severe or pervasive to create a hostile work environment."

Yet the Seventh Circuit, while agreeing that the comments and physical contact were not excessively "vulgar" in isolation, held that harassment need not be "overtly sexual to be actionable under Title VII" (i.e., "consist of pressure for sex, intimate touching, or a barrage of deeply offensive sexual comments").

What pushed the conduct into the extreme range was the stalking. The court then reaonsed:

> "A reasonable juror could conclude that being hounded for over a year by a customer despite intervention by management, involvement of the police, and knowledge that he was scaring her would be pervasively intimidating or frightening to a person 'of average steadfastness.'"

While Costco attempted to paint Suppo as unreasonably sensitive to Thompson's conduct, the jury could have found that the conduct was severe enough to support a state-court order, issued on the ground that Suppo legitimately feared for her safety. And the jury could also have held that Costco's investigation and corrective measures were "unreasonably weak."

On the EEOC's cross-appeal, the court upheld the denial of back pay for the post-employment period. The EEOC tried arguing that Suppo was constructively discharged

when Costco failed to protect her at work, but the court that this argument fails conceptually:

> Suppo was fired (for being absent) rather than forced to resign, so no claim for constructive discharge could lie.

On the other hand, the court did hold that Suppo may be entitled to compensation for the period when she was on unpaid medical leave before her termination. "If a reasonable person in Suppo's shoes would have felt forced by unbearable working conditions to take an unpaid medical leave in September of 2011, then Suppo is entitled to recover backpay for some period of time following the involuntary leave."

WHAT DOES THIS MEAN FOR HR?

This case reminds employers that Title VII requires that employers exercise due care to prevent sexual harassment of their employees by customers.

IX. 2016 EEOC HARASSMENT/BULLYING TRAINING GUIDELINES

In 2016, the EEOC came out with its guidelines for conducting illegal harassment training. The EEOC's focus was on preventing harassment from occurring in the first place. The entire theme of this training promoted by the EEOC centers more on "workplace civility," which focuses on promoting workplace respect, rather than just training employees on illegal harassment.

The EEOC found that most of the training that employers have conducted over that last 30 over has failed to prevent harassment because its focus has been on **avoiding liability … NOT on prevention.**

The Key? PREVENTION!

The law is a **REMEDY** … and that is it. It does not prevent anything.

In other words, the EEOC concluded that …

Lawyers Do More Harm Than Good.

The EEOC took specific notice of the personal harm victims suffer from the harassment they experience, which includes …

diagnosable depression, anxiety and posttraumatic stress disorder (PTSD) …

just as our soldiers experience from being subjected to combat.

These conditions often result in …

eating disorders, emotional exhaustion, abuse of drugs and alcohol, sleep problems, gastric problems and respiratory, musculoskeletal and cardiovascular issues …

to mention just a few.

This suggests the mental damage inflicted on harassment/bullying victims should also be addressed.

Astonishingly, one researcher, Professor Lila Cortina at the University of Michigan, concluded that the most "reasonable" course of action for a victim of harassment to take in many organizations is to ***not report the harassment***.

Trainers must not only know the law, but they must also be able to address and train in the areas of workplace civility, which includes such topics as trust, tolerance and conflict resolution all of which focus on how to handle such situations in a more positive manner, rather than from an attacking or punitive standpoint.

Specifically, these Guidelines state that the following topics need to be covered in your Harassment Training Program:

TOLERANCE

CONFLICT RESOLUTION

DEFINE "BULLYING"

BYSTANDER INTERVENTION

SOCIAL MEDIA

Interestingly, this study cites the need for "tolerance" **13 times and never requires "acceptance." Instead, the study refers to building acceptance by building familiarity in endnote 201.**

One of the key areas for the EEOC was "Bystander Intervention."

The idea of Bystander Intervention training actually started as a way to combat sexual violence on school campuses. However, the idea of empowering co-workers to speak up and giving them the tools to intervene when they witness harassing behavior translates very well to the workplace for bullying and harassment prevention.

The EEOC reasoned that harassment in the workplace will not just stop on its own. Instead, employers must make their employees understand that it is everyone's job to stop workplace harassment. Employers cannot have complacent bystanders and expect that their workplace cultures will magically just change themselves.

The primary idea here is that co-workers, supervisors, clients, and customers all have roles to play in stopping such harassment.

In fact, the single most effective measure an employer can adopt to prevent harassment/bullying is Bystander Intervention.

Harassment/bullying stops 57% of the time within 10 seconds when a bystander intervenes.

To read this full report, just hit this hotlink: https://www.eeoc.gov/select-task-force-study-harassment-workplace

X. EMPLOYEE'S TESTIMONY IN OVERTIME DISPUTE IS GIVEN GREATEST WEIGHT

In Moran v. Al Basit LLC., 14-2335 (6th Cir., 2015), Jeffrey Moran was employed as a mechanic at Al Basit auto repair shop from summer 2011 to spring 2013. He was paid $300 a week plus an additional as a bonus occasionally, but he was never paid any overtime.

Moran claimed he worked **65 to 68 hours** a week. **His testimony wasn't based on any written records of his hours worked.** Rather, **it was based on his imprecise recollections of the number of hours he generally worked each week**.

Moran's former employer defended against the claim by pointing to **time sheets that were created by one of the owners**, who **watched security camera footage each day to determine employees' arrival and departure times**.

Although Moran worked a different schedule each week, the time sheets recorded by the owners almost always reflected **30 hours of work every week**.

Additionally, the manager who worked with Moran testified that he never worked more than 30 hours a week.

The court posed the question before it very succinctly:

When an employee has presented no other evidence, is his testimony alone sufficient to defeat his former employer's motion for summary judgment?

The court held that it is.

The court found that **Moran's testimony by itself was sufficient to create a genuine issue of material fact that must be resolved at trial by a jury**. **He didn't need to recall his hours worked with specificity, and his testimony was sufficient to contradict evidence offered by his former employer**.

WHAT DOES THIS MEAN FOR HUMAN RESOURCES?

This case is very disturbing. The court has basically held that any nonexempt employee who claims that he has worked more hours than his employer recorded only has to say that the employer's records are incorrect and that employee can avoid summary judgment. This means such cases will cost employers tens of thousands of dollars.

Of course, the way the employer recorded the employee's hours of the employees was very odd. This cases actually reinforces the critical importance of requiring all nonexempt employees to complete their own time sheets and certify that these time records are accurate. Such records can be certified by the employee in hard copy form or electronically. Such evidence will do much to overcome the lies employees might tell to recover damages.

XI. MATERNITY POLICIES ILLEGAL

The EEOC's case against Estée Lauder arose when a male employee, who was working as a stock person in an Estée Lauder store in Maryland, wanted parental leave benefits after his child was born. He requested, and was denied, the six weeks of paid child-bonding leave that biological mothers automatically receive. The employee, however, was only allowed to take two weeks of paid leave to bond with his newborn child. According to the EEOC, such policies violate Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, which prohibit discrimination in pay or benefits based on sex.

According to the suit, in 2013 Estée Lauder adopted a new parental leave program to provide employees with paid leave for purposes of bonding with a new child, as well as flexible return-to-work benefits when the child bonding leave expired. Under its parental leave program, in addition to paid leave already provided to new mothers to recover from childbirth, Estée Lauder also provides eligible new mothers an additional six weeks of paid parental leave for child bonding. Estée Lauder only offers new fathers whose partners have given birth two weeks of paid leave for child bonding. The suit also alleged that new mothers are provided with flexible return-to-work benefits upon expiration of child bonding leave that are not similarly provided to new fathers.

The EEOC sought back pay and compensatory and punitive damages on behalf of the aggrieved class members, as well as injunctive relief.

The EEOC alleged that Estée Lauder discriminated against a class of 210 male employees. The suit claims Estée Lauder provided them, as new fathers, less paid leave to bond with a newborn, or with a newly adopted or fostered child, than it provided new mothers. The parental leave at issue was separate from medical leave received by mothers for childbirth and related issues.

The EEOC also alleged that the company unlawfully denied new fathers return-to-work benefits provided to new mothers, such as temporary modified work schedules, to ease the transition to work after the arrival of a new child and exhaustion of paid parental leave.

The EEOC filed suit in U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 2:17-cv-03897-JP on Aug. 30, 2017.

On July 17, 2018, the court entered a consent decree resolving the case.

Under the decree, Estée Lauder agreed to pay a total of $1,100,000 to the class of male employees who, under Estée Lauder's parental leave policy, received only two weeks of paid parental leave as compared to the six weeks of paid leave for child-bonding, which was the same amount of paid time off allotted to the new mothers after their medical leave ended.

In the end, the EEOC prevailed on its view that parental leave policies that are unrelated to a medical disability due to pregnancy or childbirth must be gender-neutral.

WHAT DOES THIS MEAN FOR HR?

Employers should review their parental leave policies to ensure they don't discriminate against employees on the basis of sex.

"Maternity," "pregnancy," or "childbirth" leave should be covered as part of a short-term disability policy or a medical leave policy and limited to the period of a medical inability to work preceding or following childbirth.

Parental or child-bonding leave should be gender-neutral. Ideally, it should be offered to all employees, regardless of their parental role.

XII. DE MINIMUS CONTACT WHILE ON FMLA LEAVE

In Blank v. Nationwide Corp., No. 20-3969 (6th Cir. Aug. 6, 2021), Billy, a team leader, overheard Guia and Paul, two team members, discussing Paul's upcoming jury duty. Paul and Guia alleged that Billy told them that the best way to get out of jury duty was to say something along the lines of "let's get the ropes." The "uncomfortable conversation" ended shortly thereafter. Later that day, Guia told Billy that he thought his comment was inappropriate. Billy apologized.

The apology didn't stop Paul from reporting the comment to company. An investigation was launched, but because of Billy's good record, he was coached with no other action.

After the coaching, Guia and Peter noticed that Billy treated them more harshly in performance reviews as well as daily work. After days of this, they reported this subsequent behavior.

This recent behavior raised concerns that Billy was retaliating against Guia and Peter for their involvement in the complaint. Company leaders decided to put Billy on paid administrative leave to allow for further investigation. The investigation resulted in the belief that Guia and Peter were treated differently by Billy after the complaint and investigation. They decided to demote Billy.

A conference call was scheduled for later that day to inform Billy of the demotion, but not before he told his boss about the need for leave. During the call, he told the other leaders that he was on FMLA leave for 12 weeks for a chronic condition.

Billy's FMLA leave was approved. While on leave, he was informed that his new position was going to be eliminated as part of a reduction in force. He did, however, return to work in that new role until the position was eliminated.

He filed suit alleging that the employer interfered with his FMLA leave by contacting him regarding the demotion while on FMLA leave.

In siding with the employer, the court determined that Billy's could not show that the phone call to him to discuss the demotion, which occurred on the day his request for FMLA leave was approved, interfered with his ability to exercise his FMLA rights.

In other words, the court held:

> "[A]n employer can engage in *de minimis* contact with the employee on leave without violating their FMLA rights."

WHAT DOES THIS MEAN TO HR?

Employers may engage in de minimis contact with employees on leave without violating their FMLA rights. However, any contact with employees should not discourage them from, or otherwise interfere with, taking FMLA leave.

XIII. NOT INFORMING EMPLOYEE OF CONSEQUENCES COST EMPLOYER FMLA CASE

In Wallace v. FedEx Corp., Nos. 11–5500, 11–5577 (6th Cir. 2014), Ms. Wallace worked at Fedex for approximately twenty-one years, ultimately reaching the position of senior paralegal in the summer of 2007. In addition to being, by all accounts, a dedicated employee, Ms. Wallace also suffered from a history and variety of health problems.

Throughout the summer of 2007, and despite numerous explicit warnings from her supervisor, Ms. Wallace found it increasingly difficult to arrive by her appointed 9:00 am start time due to her health problems. By August 2007, Ms. Wallace found herself needing extended time off from work. After visiting her doctor and obtaining letters from that doctor explaining the need for Ms. Wallace to take several weeks off of work, Ms. Wallace met with her supervisor and attorneys from FedEx's Labor and Employment Group.

During this meeting, Ms. Wallace's supervisor presented Ms. Wallace with FMLA forms, including a request for medical certification. The jury ultimately found that at no time during this meeting did Ms. Wallace's supervisor or the FedEx attorney inform Ms. Wallace of the importance of this certification form:

If she did not get it filled out by her doctor and return it to FedEx within 15 days, FedEx could deny her FMLA request.

Ms. Wallace, as the jury concluded, not knowing of the extreme importance of this documentation failed to submit it to FedEx even though she had her doctor complete the forms. After days of Ms. Wallace being out of work and not contacting her supervisor, FedEx made the decision to terminate her for failure to comply with FedEx's attendance and leave policies.

The turning point for this case rested on whether FedEx made it clear to Ms. Wallace that if she failed to return these forms she would lose her rights under the FMLA.

Both the FMLA and its regulations clearly state that while an employee need not use "magic words," such as "I need to take FMLA leave," it is the *employee's* duty to provide the employer with sufficient information from which the employer can determine that FMLA leave is needed. An employer's liability for FMLA violations only attaches if and when the employer knows that the employee is seeking FMLA qualified leave.

FedEx argued that it did not interfere with Ms. Wallace's FMLA rights because Ms. Wallace never returned the health certification form as required, and so FedEx did not

know the duration of the leave that she required. It argued that because Ms. Wallace failed to return the forms, it did not know that she intended to take FMLA leave.

However, the Sixth Circuit reasoned,

"[s]pecifically, FedEx focuses upon Wallace's failure to return the medical-certification form or to indicate that she desired leave beyond August 29 [2007]."

The court rejected FedEx's argument. Instead, the court explained that:

"[b]y focusing on whether Wallace provided enough documentation for continued leave, FedEx largely misses the point of this notice element. The relevant question is whether Wallace provided FedEx with notice that she ***needed*** FMLA leave, ***not*** whether she provided notice that she needed a ***certain amount*** of FMLA leave."

To support its claim, FedEx cited the FMLA regulation that gives employers the option to request its employees provide a medical certification. The health certifications of the type FedEx relied upon provide employers with vital information regarding the reason for the leave, the type of leave (intermittent or for a block of time), and when (if known) the leave is supposed to end.

If the employee fails to return the completed certification to the employer within 15 days, the employer ***may*** delay or completely deny the employee's FMLA request. An employer ***must*** give notice of a requirement for certification each time that it desires one, and such notice must be in writing.

Because of the incredibly detrimental effect of failing to complete and return the FMLA form within the required time period, the regulations require that "[a]t the time the employer requests certification, ***the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification***."

The court noted, "[t]here was no mention of the need for medical certification or the consequences of failing to produce it. Given this evidence, a reasonably jury could find that FedEx failed to comply with the FMLA regulations and, thus, that terminating Wallace's employment interfered with her ongoing FMLA leave."

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The Sixth Circuit was very clear in this case:

Employers MUST put employees on clear notice of the consequences if they do not return required FMLA documents.

Therefore, you need to check your FMLA paperwork to make sure it includes such vial notices.

XIV. DOL OPINION LETTER ALLOWS EMPLOYER TO UNILATERALLY DESIGNATE FMLA LEAVE

There has always been a question as to whether an employer could unilaterally designate a leave of absence as being covered by the FMLA. Before 2014, the answer seemed to be a clear "yes." The DOL had issued a few opinion letters that stated it was the employer's right to designate absences as FMLA leave, regardless of whether the employee wanted it.

However, starting in 2014, a few courts held employees could decline FMLA protection for specific absences and "save" the leave for future use. That was contrary to the existing FMLA regulations and opinion letters and caused confusion for employers nationwide.

In 2019, the DOL came out with a new opinion letter that unequivocally reaffirms that an employer may designate an employee's absences as FMLA leave even if she doesn't want it to.

The DOL's rationale is complicated, but in short, it concludes:

1. Once an employer confirms that an absence qualifies as FMLA leave, it is absolutely obligated to designate the absence as such; and

2. Failure to do so will constitute unlawful interference with the employee's FMLA rights.

The issues addressed in the opinion letter commonly arise when an employee has more than one reason for FMLA leave. Employees may resist using their FMLA entitlement for an earlier absence because they want to save leave for later ones. The best and most common example is a pregnant employee who takes time off for a different FMLA-qualifying reason, such as to care for another child or a sick parent. Similarly, the employer may prefer not to force the employee to take FMLA leave for every little absence that might qualify.

In that situation, not only can the employer require the employee to use their FMLA leave until it is exhausted for all these absences, but the employer is required to do so. For employees who have paid leave available, you may allow them to choose between using it concurrently with FMLA leave or save it for after their protected leave is exhausted, but you may not allow them to use it first and save their FMLA leave for later.

WHAT DOES THIS MEAN FOR HR?

Opinion letters can be very helpful in clearing such confusing issues as this with the FMLA. Just because the DOL interprets a law a certain way does not mean the courts have to agree with it. However, these opinion letters are not law, but they are very persuasive to a court.

XV. ADA AND REASONABLE ACCOMMODATIONS

Under the ADA, an individual must request an accommodation. The EEOC has stated that, "it is the responsibility of the individual with a disability to inform the employer than an accommodation is needed." Appendix to 29 C.F.R. § 1630.9; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at "General Principles" and Question 40.

A. What EXACTLY Must An Employee Say To Request A Reasonable Accommodation?

What ***exactly*** does an employee have to say to his/her supervisor in order to qualify as asking for an accommodation?

In the past, the EEOC stated that, "if an employee requests time off for a reason related or possibly related to a disability (e.g., **"**I need six weeks off to get treatment for a back problem**"**), the employer should consider this **to be a** request for ADA reasonable accommodation as well as FMLA leave." See EEOC Fact Sheet: "The FMLA, the ADA, and Title VII of the Civil Rights Act of 1964" at p. 8 (question 16). (www.eeoc.gov)

However, more recently, the EEOC has stated that when an individual informs an employer that an **adjustment or change** is needed at work simply **because of "a medical condition,"** that is enough to qualify as a reasonable accommodation request. (EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, No. 915.002 (10/17/02) at Question 1.)

In Mirta v. DeJoy (USPS), 2021 EEOPUB LEXIS 229 (EEOC 2021), the EEOC reiterated this standard and held that a Postal Clerk adequately requested accommodation when she told her manager that she could not work prior to sunrise because of her seizures and her need to maintain a specific sleep schedule.

In Bruce v. Wolf (DHS), 2020 EEOPUB LEXIS 1234 (EEOC 2020), the EEOC reiterated that the employee triggers the interactive process by requesting "a modification or change at work because of a medical condition." In this case, the employee effectively asked for an accommodation by stating that he could not travel for work because he had medical restrictions resulting from PTSD.

In Bertram v. Chao (DOT), 2020 EEOPUB LEXIS 1808 (EEOC 2020), the EEOC held that when the employee told his manager that "he could not communicate by telephone due to the increased intensity of the ringing sensation caused by tinnitus," he triggered the interactive process.

Although an employee need not be terribly precise, s/he must be somewhat clear in indicating the need for accommodation because of a medical condition. For example, in Fisher v. Nissan North America, Inc., 951 F.3d 409 (6th Cir. 2020), the court held that the production line worker who was unable to continue in his job because of his severe kidney disease, triggered the interactive process when he said he would like to be transferred to an easier position.

In McCray v. Wilkie, 966 F.3d 616 (7th Cir. 2020), the court noted that the reasonable accommodation process was triggered when the employee "informed his supervisor that the van he was driving was causing him pain when he was driving."

In Hazelett v. Wal-Mart Stores, 2020 U.S. App. LEXIS 31678 (9th Cir. 2020)(unpublished), the court held that asking for FMLA leave for her workplace injury was also a reasonable accommodation request.

B. What Is NOT Reasonable Accommodation Request?

In Tielle v. Nutrition Group, 2020 U.S. App. LEXIS 14562 (3d Cir. 2020)(unpublished), the court held that where a food service worker was allowed to use her cane in the workplace, she did not also request the ability to push a food cart as an accommodation by simply telling her supervisor that, "sometimes it is just quicker to use the cart instead of the cane."

Likewise, in Miller v. Saul, 2020 U.S. App. LEXIS 14878 (7th Cir. 2020)(unpublished), the court held that the employee's simply informing his supervisor that he was "undergoing counseling" was not enough to trigger the accommodation process. The court also appeared to have been swayed by the fact that the supervisor had asked the employee to let her know how she could support the employee in performing his job.

C. No "Magic Words" Required

The courts do not require the employee to use any "magic" language, or even use the term "reasonable accommodation" in making their requests.

For example, in Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir. 2016), the court noted that an employee is not required to use "the magic words 'reasonable accommodation'" for a statement to be considered a request for accommodation.

In EEOC v. Chevron, 570 F.3d 606 (5th Cir. 2009), the court held that where a disability, the limitations and the necessary accommodations are not "open, obvious, and apparent to the employer," an "employee who needs an accommodation because of a disability has the responsibility of informing her employer, the employee does not need to mention the ADA "or use the phrase 'reasonable accommodation.'" The court noted that "plain English will suffice," and the employee must simply "**explain that the adjustment in working conditions or duties she is seeking is for a medical condition-related reason.**"

D. Request For FMLA Leave Could Likely Qualify As A Request For A Reasonable Accommodation Under The ADA?

In Complainant v. Donahoe (USPS), 2014 EEOPUB LEXIS 2159 (EEOC 2014), the EEOC suggested that the employee triggered the accommodation process by requesting FMLA leave for her medical condition.

In Arana v. Temple University Health System, 2019 U.S. App. LEXIS 16960 (3d Cir. 2019)(unpublished), the court stated that "an FMLA leave request can sometimes count as an ADA accommodation." The court also noted, however, that

"an employer ordinarily satisfies its duties under the ADA by granting the FMLA request."

E. A "Reasonable Accommodation" MUST Be Medically Necessary

An employer can also argue that a reasonable accommodation must be medically necessary. For example, in Brunckhorst v. City of Oak Park Heights, 914 F.3d 1177 (8th Cir. 2019), the court held that the employee was not entitled to work from home where his medical restrictions did not state that he "must" work from home. Although the employee testified that it would be "easier" to work from home because of his flesh- eating bacteria, the court stated that an employer "**is not required to accommodate an employee based on the employee's preference**."

Along these lines, in Atkinson v. SG Americas Securities Sec., LLC, 2017 U.S. App. LEXIS 8213 (7th Cir. 2017)(unpublished), the court held that where the employee asked for a reasonable accommodation because of his hearing loss and brain injury, the employer could obtain information to determine what accommodations were "**medically necessary**."

F. Employer's Duty to Engage in Interactive Process

It has become an affirmative duty on the part of employers to sit down with employees covered by the Americans With Disabilities Act and engage in the "Interactive Process" in order to determine which, if any, reasonable accommodations may be necessary.

The Circuits Courts have supported the use of the Interactive Process in recent years. As an example, the 6th Circuit Court of Appeals has been very clear on what it requires under the "Interactive Process."

First, the duty to engage in this process is ***mandatory***.

> "The duty to engage in the interactive process with a disabled employee is mandatory…" Keith v. County of Oakland, 703 F.3d 918, 929 (6th Cir. 2013); Kleiber v. Honda of Am. Mfg., 485 F.3d 862, 871 (6th Cir.2007); see also 29 C.F.R. § 1630.2(o)(3).

The 6th Circuit then specifically held that the law:

> " … requires communication and ***good-faith exploration of possible accommodations.***" Keith, 703 F.3d at 929 (6th Cir. 2013); Kleiber, 485 F.3d at 871 (6th Cir.2007); see also 29 C.F.R. § 1630.2(o)(3). "

The 6th Circuit has also held:

> "The purpose of this process is to ' ***identify the precise limitations resulting from the disability and potential reasonable accommodations*** that could overcome those

limitations.' " Keith, 703 F.3d at 929; Kleiber, 485 F.3d at 871 (quoting 29 C.F.R. § 1630.2(o)(3)).

Where the employee requests a reasonable accommodation from the employer, the ADA mandates that the employer engage in an ***individualized inquiry into that employee's specific condition and needs***. Failing to do so is failing to engage in the interactive process. Keith, 703 F.3d at 930

"More pointedly, ADA regulations anticipate that an employee may not be in the position to know what a reasonable accommodation to his condition is; they require that the employee and the employer engage in an interactive process with the end of jointly determining what accommodations are ***possible and adequate***. Jakubowski v. The Christ Hospital, Inc. 627 F.3d 195, 205 (6th Cir. 2010); Kleiber, 485 F.3d at 871 (quoting 29 C.F.R. § 1630.2(o) (3)). Holding otherwise would undermine the force of this mandatory interactive process by incentivizing employers to withhold potential accommodations in the hopes that the employee will be held to his initial and legally inadequate accommodation in subsequent litigation. Jakubowski, 627 F.3d at 205

The 6th Circuit absolutely requires that all of these elements be included in the interactive process ... or the interaction fails to qualify as being a real interactive process under the law. Otherwise, the court reasoned that it would be "incentivizing employers to withhold potential accommodations." Jakubowski, 627 F.3d at 205

In short, employers are required to engage in a "***good-faith exploration of possible accommodations***" that are "***possible and adequate***" by making an "***individualized inquiry***" into the employee's "***specific condition and needs.***"

In Thompson v. Microsoft Corp., 2021 U.S. App. LEXIS 18614 (5th Cir. 2021), the court held that the employer "appropriately engaged" in a good faith interactive process by meeting with the employee over several months, explaining why his requests were not reasonable, inviting further accommodation ideas, offering to consult directly with his doctors, and assigning a dedicated employee to help find a reassignment.

In Petti v. Ocean County Board of Health, 2020 U.S. App. LEXIS 38326 (3d Cir. 2020)(unpublished), the court held that the employer properly engaged in the interactive process after the employee complained about air quality by conducting testing, moving the employee to another location while investigating her work space safety, providing requested leave, and attempting to meet further with the employee

On the other hand, in Fisher v. Nissan North America, Inc., 951 F.3d 409 (6th Cir. 2020), the court held that the employer did not effectively engage in the interactive process when the supervisor, responding to the production line worker's request for reassignment, told him, "I feel for you, but my hands are tied," and stated that the employee's request for part-time work was "not an option." The court also stated that the employer has a "continuing mandatory duty of good-faith participation in the interactive process" which does not end simply because the employer has provided accommodations in the past, such as leave.

In Aubrey v. Koppes, 975 F.3d 995 (10th Cir. 2020), the court held that the "obligation to participate in this interactive process is inherent" in the statute, and "includes good-faith communications between the employer and employee." In this case, the court found that the employer did not properly engage in the process where it did not give the employee a chance to obtain updated medical records and did not "explore whether there was any accommodation that could enable" her to return to work. The court noted that "there may not always be a workable accommodation, but the ADA mandates that the employer work with the employee to try to find one."

Likewise, in McCray v. Wilkie, 966 F.3d 616 (7th Cir. 2020), the court held that the employer's failure to have a "dialogue" with the employee about what "could be done" and "on what timeline" to accommodate the pain he felt while driving, "could be understood to violate the VA's duty to engage in an interactive process with its employee in an effort to arrive at an appropriate accommodation."

In Garrison v. Dolgencorp, LLC, 939 F.3d 937 (8th Cir. 2019), the employer failed in its duty when the employee asked for a leave of absence because of her medical condition and the supervisor simply told her to "read the employee handbook." The court noted that once the interactive process was triggered, the employer had an obligation to "take some initiative and identify a reasonable accommodation."

G. What Is The Interactive Process?

In Mosby-Meachem v. Memphis Light, Gas & Water Division, 883 F.3d 595 (6th Cir. 2018), the court held that the company may have violated its duty to interact where it simply stood "**firm**" on its policy that employees could not telecommute regardless of circumstances. In this case, the court found that allowing an attorney to telecommute for 10 weeks could have been a reasonable accommodation.

In Sheng v. M&T Bank Corp., 848 F.3d 78 (2d Cir. 2017), the court noted that an "offer of an accommodation conditioned upon the dropping of monetary claims does not fulfill the requirements of the ADA as to an interactive process. The Act clearly imposes a duty to provide an accommodation in job requirements, if feasible."

In Cox v. Wal-Mart Stores, Inc., 2011 U.S. App. LEXIS 13829 (9th Cir. 2011)(unpublished), the court held that the employer may *not* have engaged in the interactive process in good faith where it refused to allow the employee to submit paperwork to support her reasonable accommodation request because she had missed the company's five-day deadline for such paperwork.

H. Employee Declines An Accommodation

The EEOC has also written that if the individual "states that s/he does not need a reasonable accommodation, the employer will have fulfilled its obligation." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 40.

For example, in Jackson v. Blue Mountain Production Co., 2019 U.S. App. LEXIS 5152 (5th Cir. 2019)(unpublished), the court held that where the

employee, a chemical operator with respiratory problems, voluntarily retired before returning from FMLA leave, he "terminate[d] the interactive process" and could not claim that the employer failed to provide a reasonable accommodation, which in this case was being reassigned.

In Complainant v. Vilsack (Agriculture), 2015 EEO PUB LEXIS 1230 (EEOC 2015), the EEOC found that the employer did not fail to provide a reasonable accommodation where the employee, who had a mood disorder, "cancelled her request for accommodations." Courts seem to agree with the position that the employer need not engage in the interactive process if the employee implicitly or explicitly withdraws the request.

In Arndt v. Ford Motor Co., 2017 U.S. App. LEXIS 25155 (6th Cir. 2017)(unpublished), the court held that the employer had not refused the manufacturing employee's request to bring in a service dog because of his PTSD when his first request was "expressly withdrawn" after he returned from medical leave and "no conclusion had been reached" on the second request at the time the employee resigned.

In Garcia v.Salvation Army, 918 F.3d 997 (9th Cir. 2019), the court stated that where the employee provided "a doctor's release to work without restrictions" and **she failed to provide requested medical information to support her claim for an accommodation**, the employer "was not required to continue an interactive process."

Similarly, in Hudson v. Tyson Farms, 2019 U.S. App. LEXIS 12753 (11th Cir. 2019)(unpublished), the court held that the employer did not fail to provide a reasonable accommodation, where, among other things, the employee's doctor "**had returned her to work with no restrictions**."

In Calderone v. TARC, 2016 U.S. App. LEXIS 3394 (5th Cir. 2016), where **the employee repeatedly denied having a disability** and **her doctor returned her to work without restrictions**, she could not later claim that the employer failed to accommodate with a modified schedule.

Likewise, in Aldini v. Kroger Co. of Michigan, 2015 U.S. App. LEXIS 17748 (6th Cir. 2015)(unpublished), the court stated that when the **employee brought in a doctor's note clearing him to work without restrictions**, after earlier bringing in a note with lifting restrictions, he "retracted" his request for accommodation.

I. Employee Is Unable To Request An Accommodation

Similarly, the EEOC has stated that although an individual generally must request an accommodation, the situation could be different if, "because of the disability, the employee is unable to request the accommodation."

For example, the EEOC has written that "an employer should initiate the reasonable accommodation interactive process without being asked if the employer:

- Knows that the employee has a disability,

- Knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and

- Knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation."

In one federal court case, EEOC's Amicus Curiae Brief in Taylor v. Food World, Inc., No. 97-6017 (Brief Filed with Eleventh Circuit, 4/30/97), the EEOC took the position that where a food store knew that its grocery bagger had autism, which affected his communication skills and ability to interact with others, it should have, on its own, considered providing reasonable accommodation when the employee made loud and possibly inappropriate comments to customers. Specifically, the EEOC wrote that the employer "was required to consider accommodation, even though [the employee] did not expressly request one, because the company was aware of [his] disability and the need for accommodation was clear, but the very nature of his disability prevented [him] from recognizing that need."

In Keenan v. Cox, 2010 U.S. App. LEXIS 19101 (9th Cir. 2010)(unpublished), the court held that where the employer knew that the employee had "a diminished intellectual and emotional capacity" because he was "'childlike' and not functioning at an adult level," and where the supervisor knew that the employee "should not interact with customers," there may have been an obligation to provide reasonable accommodation.

J. Searching For A Job Reassignment As A Reasonable Accommodation

The EEOC and courts tend to require employers to be proactive in searching for reassignment.

For example, in Felton v. Wolf (DHS), 2020 EEOPUB LEXIS 1195 (EEOC 2020), the EEOC rejected the employer's contention that the employee has the "burden to identify a vacant and funded position for which he is qualified." Instead, the EEOC said that the employer "is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time and it is obligated to inform an employee about vacant positions for which a complainant may be eligible as a reassignment."

In Georgeann v. DeJoy (USPS), 2020 EEOPUB LEXIS 3818 (EEOC 2020), the EEOC held that an employer "is obligated to inform an employee about vacant positions for which the employee may be eligible as a reassignment."

Along these lines, in Fisher v. Nissan North America, Inc., 951 F.3d 409 (6th Cir. 2020), the court held that where the production line employee put the employer on notice that he needed reassignment, the employer was "obliged" to identify positions for which the employee was qualified and consider the employee for those positions.

Likewise, in Ford v. Marion County Sheriff's Office, 942 F.3d 839 (7th Cir. 2019), the court stated that the ADA required the employer "to canvass available positions" and if a vacant job existed.

K. Having Disabled Employees Compete For A Job Reassignment As A Reasonable Accommodate

Most courts that have held that job reassignment is a required reasonable accommodation have expressly held that reassignment does not mean simply allowing the employee to compete for an open position.

For example, in Exby-Stolley v. Board of County Commissioners, Weld County, 979 F.3d 784 (10th Cir. 2020), the court stated that it rejects "the contention that the ADA's reassignment duty merely creates a right for employees to be considered for reasonable reassignments rather than creating a right to actually receive such reassignments."

Similarly, in Duvall v. Georgia- Pacific Consumer Products, L.P., 2010 U.S. App. LEXIS 11791 (10th Cir. 2010), the court noted that "the statutory duty upon employers to reassign disabled employees to vacant positions is mandatory. If a disabled employee can be accommodated by reassignment to a vacant position, the employer must do more than consider the disabled employee alongside other applicants; the employer must offer the employee the vacant position."

In Sanchez v. Vilsack, 695 F.3d 1174 (10th Cir. 2012), the court stated that requiring an employee "to be the best qualified employee for the vacant position" is "unwarranted" by the statute.

L. Reasonable Accommodation ONLY Applies To Employee

The EEOC and courts agree that an employer is only required to provide an accommodation that is for the individual's disability.

For example, in Complainant v. Castro (HUD), 2015 EEOPUB LEXIS 417 (EEOC 2015), the EEOC denied the employee's claim that the employer should have reasonably accommodated him by restricting his travel so that he could care for his **wife and child with disabilities**. The EEOC noted that an employer "is not required to provide a reasonable accommodation to a person without a disability due to that person's association with someone with a disability."

Similarly, in Erdman v. Nationwide Insurance Co., 582 F.3d 500 (3d Cir. 2009), the court held that "the association provision does not obligate employers to accommodate the work schedule of an employee with a **disabled relative**" because "the plain language of the ADA indicates that the accommodation requirement does not extend to relatives of the disabled." The court stated that "there is a material distinction between firing an employee because of a relative's disability and firing an employee because of the need to take time off to care for the relative." Supporting this, the court noted that the "statute clearly refers to adverse employment actions motivated by "the known disability of an individual" with whom an employee associates, as opposed to actions occasioned by the association."

WHAT DOES THIS MEAN FOR HR?

The claims made under the ADA today are overwhelming. Almost every employer will deal with employees who have disabilities or will need time off throughout the year due to a disability or serious injury. Therefore, knowing when the ADA applies and how to apply it is critical for every employer.

XVI. "REASONABLE ACCOMMODATION" MUST BE TIMELY and EMPLOYERS CANNOT FORCE EMPLOYEES TO TAKE A LEAVE OF ABSENCE WHEN ANOTHER ACCOMMODATION IS AVAILABLE

In Denese G. v. Dep't. of the Treasury, EEOC Appeal No. 0120141118 (Dec. 29, 2016), Denese G. worked as a Revenue Officer at the U.S. Department of Treasury. Denese G. had Type 1 Diabetes and used an indwelling insulin pump that required her to frequently check her glucose levels and make adjustments, which would likely include eating.

Denese G. told her supervisor (S1) that she had diabetes when she joined her Group in 2006.

Denese G. also told her employer that she must be able to adjust her pump and eat when necessary in order to avoid high and low blood sugar. The form she submitted to her employer had a section that was to be completed by Denese G.'s physician (Dr). Denese's Dr stated that she must be able to "indefinitely" check her blood sugar, adjust her insulin pump settings and consume food because of her diabetes.

On December 6, 2011, S1 gave Denese G. a written warning for "discourtesy and unprofessional behavior" during a November 17, 2011 group meeting regarding her text messaging. However, Denese G. was not texting anyone, but was instead programming her insulin pump. This was an unfounded accusation that forced her to disclose her medical condition to everyone in the room.

After Denese G. received this written warning, she requested that she be transferred out of Collection Group 1300, but her second-level supervisor (S2) denied her request.

On February 29, 2012, Denese G. again asked the Treasury if she could to excuse herself "from meetings . . . to adjust pump, check my blood sugar, eat if necessary to avoid a hypo or hyperglycemic reaction."

On April 17, 2012, management denied Denese G.'s February 29, 2012 reasonable accommodation request to excuse herself during meetings to adjust her insulin pump.

When her reasonable accommodation request was denied, Denese G. applied to take a leave of absence under the FMLA. On March 20, 2012, S1 approved her sick and annual leave requests and asked her to provide medical justification for her FMLA request.

On or about July 27, 2012, Denese G. contacted an EEO Counselor.

Denese G.'s reiterated that she needed to use private area and time to check her blood sugar levels as needed, along with the ability to leave meetings, discussions, conferences, events in order to do the same; time to adjust her insulin pump or inject insulin as needed as well as the ability to leave meetings and events to do the same; and the ability to eat as necessary

during meetings, discussions, conferences, events so that she could avoid hypoglycemic or hyperglycemic reactions.

On August 27, 2012, Denses G's attorney again requested these accommodation for her in a letter he sent to the Treasury.

On September 4, 2012, S2, an EEO counselor, responded to Denese G.'s requests for a private room to use for medical purposes and approval to eat during group meetings.

S2 stated that there are various places in the office for Denese G. to use for medical purposes such as the ladies' lavatory, which has a couch, and the nurse's station, which has a room used for nursing mothers.

S3 further stated that there was no prohibition on eating during meetings, and food was brought to almost all meetings.

S1 stated that "all employees" are given breaks and lunchtime as part of a normal tour of duty and during group meetings; a place to rest if needed; a break room equipped with refrigerators, ovens, and microwaves; modified work schedules; large screen computer monitors or other assistive devices; and a private area to administer medication upon request. S1 concluded that by clarifying the current accommodations available to Denese G., she expected her to overcome any misunderstanding about her position about Denese G.'s medical condition.

On September 14, 2012, Denese G. filed an EEO complaint in which she alleged that the Treasury harassed and discriminated against her on the bases of disability.

The initial EEOC decision concluded that Denese G. failed to prove that she was denied a reasonable accommodation for her disability.

Denese G. appealed this decision internally through the EEOC's appeal process.

On appeal, Denese G. reiterated her allegation that the Treasury denied her requests for reasonable accommodations by delaying the provision of the accommodations. Denese G. maintained that instead of immediately providing her with effective accommodations, the Treasury failed to engage in the interactive process in good faith, which deprived her of a reasonable accommodation that would have allowed her to perform the essential functions of her job.

Upon review, the Commission noted that providing employees with private areas to test blood sugar areas or to administer insulin injections and granting them breaks to eat, drink, or test blood sugar levels as types of accommodations employees with diabetes often need. Equal Employment Opportunity Commission, Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (ADA), Question 10 (Oct. 29, 2003).

The EEOC held that Denese G.'s requests were consistent with these types of accommodations. The Treasury had not provided any evidence that the requested accommodations constituted an undue burden on the Treasury. Consequently, the EEOC found that the requested accommodation did not constitute an undue burden on the Treasury's operations.

The Treasury claimed that it accommodated these requests when S1 assured Denese G. on April 17, 2012 when it told her that she could take breaks and lunch during her normal work hours and that the Treasury would provide a private location for her to administer medication. However, the Commission reasoned that when it reviewed S1's April 17, 2012 correspondence with Denese G., which was S1's response to Denese G.'s requests, the Commission found that the Treasury denied Denese G. a reasonable accommodation because its response took well over a month and a half to deliver. By then, she was forced to take a leave of absence in order to manage her condition.

In reaching this conclusion, the EEOC noted that Denese G.'s February 2012 medical documentation indicated that failure to provide the accommodations could result in Denese G. experiencing severe medical consequences, including hypoglycemic or hyperglycemic reactions. As such, Denese G.'s request revealed that she needed the requested accommodations immediately and without significant delay.

In fact, the necessity of immediately responding to these requests for reasonable accommodations is underscored by the fact that the Treasury's inaction or delay had a negative impact on Denese G., which forced her to take a leave of absence.

Also, the EEOC found that S1's assurances given to Denese G. on April 17, 2012 did not provide her with an effective reasonable accommodation because S1 was merely allowing Denese G. to use accommodations that were already provided to all employees, such as breaks and lunch, a resting place, a break room with refrigerators, ovens, and microwaves, modified work schedules, and a private area to administer medication.

Further, S1's response did not address the specific needs of Denese G. that were revealed in her request for reasonable accommodation. S1's generic assurance that all employees can take a break and lunch during work hours and meetings does not address the distinct need for Denese G. to regularly monitor and control her blood sugar during meetings and other work events, or to excuse herself from meetings and work events for medical care. Specifically, S1 did not provide any assurance that Denese G. could leave meetings as needed to monitor and regulate her blood sugar.

In fact, in Denese G.'s midyear 2012 evaluation, S1 stated that "the group meeting's agenda provides the anticipated time for breaks and lunch," which reflects that Denese G. would only be allowed to take breaks that were scheduled for all employees during meetings, not as she needed them.

Denese G. had specific medical needs that the Treasury should have addressed with individualized accommodations, instead of generic responses about amenities provided to all employees. Consequently, the Commission found that S1's response did not provide Denese G. with an effective reasonable accommodation.

The Treasury also claimed that it accommodated Denese G. by allowing her to take an approved leave through the FMLA.

However, the Commission has held that failure to respond to a request for accommodation in a timely manner may result in a finding of discrimination. See Shealy v. EEOC, EEOC Appeal No. 0120070356 (April 18, 2011); Villanueva v. Department of Homeland Security, EEOC Appeal No. 01A34968 (August 10, 2006).

In this case, the Commission held that the Treasury's inaction and delay drove Denese G.

out of the workplace for a significant period of time. After all, she had not received the requested reasonable accommodations from the Treasury, and the Treasury's inaction was negatively impacting her health. Faced with negative impacts on her health, Denese G. had no recourse but to ask for leave.

Further, the Treasury had an opportunity to mitigate this negative impact on Denese G. through its own Reasonable Accommodation Coordinator, but instead, used Denese G.'s leave status as an excuse to halt the interactive process that could have provided her with reasonable accommodations at work.

The Commission therefore held that Denese G.'s need to take a leave of absence was a foreseeable consequence of the Treasury's failure to expeditiously provide her with a reasonable accommodation. As such, the Treasury cannot credit itself for providing her with leave that Denese G. likely would not have needed if it had promptly and appropriately responded to her reasonable accommodation request.

Additionally, the Commission also held that, absent undue hardship, the Treasury needed to provide reasonable accommodations that allowed the employee to keep working rather than choosing to put the employee on leave. In so finding, the Commission noted that 29 C.F.R. § 1630.1 provides that the primary purpose of Title I of the ADA, as amended by the ADAA, is to provide equal employment opportunities for individuals with disabilities. To the contrary, leave removes an employee from the workplace and therefore denies the employee the opportunity to keep working with reasonable accommodation.

Next, the Commission noted that a reasonable accommodation must be effective. If a reasonable accommodation, such as breaks to test blood sugar levels and address any fluctuations, permits an employee to perform the essential functions of her position, then that accommodation is effective. Leave is not effective in permitting immediate performance of essential functions of a position.

While an employer may choose between effective accommodations, forcing an employee to take leave when another accommodation would permit an employee to continue working is not an effective accommodation. See Mamola v. Group Mfg. Services, Inc., 2010 WL 1433491 (D. Ariz. April 9, 2010) (unpaid leave may not be a reasonable accommodation when an employee specifically requests another accommodation that would allow him or her to perform the essential functions of the position without missing work); Woodson v. Int'l Bus. Machines, Inc., 2007 WL 4170560, at 5 (N.D. Cal. Nov. 19, 2007) (leave is sufficient as a reasonable accommodation only if other accommodations in a job would be ineffective).

Therefore, in this case, the Treasury failed to provide Denese G. with requested accommodations that would have allowed her to continue working. Consequently, Denese G. was forced to take leave, much of it unpaid.

XVII. DISABILITY: ANNOUNCING DISABILITY DOES NOT FORGIVE PAST SINS

In Salzbrun v. Warren County Community Services, Inc., Case No. 1:16-cv-402 (S.D. Ohio, 2017), Thomas Salzbrun was employed as Warren County Community Services, Inc.'s (WCCS), executive director from March 2011 to October 20, 2014. As the chief executive, he reported directly to WCCS's board of trustees, which consisted of 16 members and had a subset of five members known as the executive committee. The

executive committee had special supervisory authority over the executive director that included conducting an annual performance review. However, the full board appointed the executive director and was the only entity with the ability to remove him.

Salzbrun was diagnosed with Parkinson's disease around 2000. He claimed his symptoms worsened significantly in 2013 and 2014 and limited his ability to sleep, concentrate, engage in social interaction, and use his hands. He disclosed his diagnosis only to two WCCS employees, namely, the executive secretary and the IT director/HR manager. He disclosed the diagnosis to the IT director/HR manager to obtain a left-handed mouse and voice recognition software.

Salzbrun had a generally positive relationship with WCCS until late 2013, when the long-serving president of the board died and was replaced by Dr. Don Jusczyck. Upon becoming board president, Jusczyck sought to expand the sparse and formalistic performance evaluations of the executive director.

In April 2014, based on input from the executive committee, Jusczyck and another executive committee member met with Salzbrun and gave him several new goals from the board to improve his overall performance. During the summer of 2014, the executive committee solicited written evaluations of Salzbrun's performance from both the full board and WCCS's senior staff. Several comments expressed the opinion that Salzbrun should no longer serve as WCCS's executive director.

On September 24, 2014, the executive committee met with Salzbrun to give him a formal performance review based on the feedback. The committee informed him that the evaluations from the board and staff were largely negative and noted that he had failed to improve in numerous areas previously identified as needing improvement.

After all present executive committee members expressed negative opinions of his job performance, Salzbrun informed the committee of his Parkinson's diagnosis for the first time. He told committee members that although his condition was not life-threatening, he "was going to need some accommodations." When asked what kind of accommodations he needed, he mentioned a left-handed mouse, push-to-talk software, and "understanding." About an hour after the meeting ended, Jusczyck informed Salzbrun that the executive committee was going to recommend to the full board that his employment be terminated.

The full board met on October 20, 2014, and voted to terminate Salzbrun 11-1 (not all board members attended). He was eventually replaced by someone who was three years younger than he was. Salzbrun filed a lawsuit in the U.S. District Court for the Southern District of Ohio claiming age and disability discrimination under federal and Ohio law.

WCCS filed a motion seeking judgment in its favor on all of Salzbrun's claims without a trial. The court dismissed Salzbrun's age discrimination claim because although his replacement was younger than he was, the replacement was not "substantially younger." Salzbrun was born in 1956, and his replacement was born in 1959. The court cited case law that an age difference of less than six years cannot support an age discrimination claim absent direct evidence that the employer considered age in its decision to terminate an employee.

The court ruled that Salzbrun's federal and state disability discrimination claims failed as a result of his untimely disclosure of his disability. The court agreed with WCCS's argument that even if Salzbrun is disabled and made a request for reasonable accommodations, he didn't have a viable disability discrimination claim because WCCS presented evidence that clearly established that the executive committee was going to recommend that his employment be terminated before it learned about his Parkinson's diagnosis. According to the court: "The writing was on the wall long before [Salzbrun] had divulged his diagnosis, and [WCCS] was not required to reverse the process already in motion solely because [he] mentioned that he had a disability."

WHAT DOES THIS MEAN FOR HR?

If an employee does not reveal his disability to decision makers until his termination is "imminent," the employer is not necessarily required to reverse course and take a different path. However, if you are confronted with this situation, proceed cautiously. In this case, there was strong evidence from a number of witnesses and documents that Salzbrun's termination was in fact imminent.

XVIII. LISTING ESSENTIAL FUNCTIONS ON JOB DESCRIPTIONS IS ***CRITICAL***

In Henschel v. Clare County Road Comm'n., 737 F.3d 1017 (6th Cir. 2013), Wayne Henschel was employed by the Clare County (Michigan) Road Commission (CCRC) as an excavator operator. His duties included running an excavator, which digs ditches and trenches. Henshel was part of the union.

Henshel's machine was delivered to his worksites on a trailer that was pulled by a semitruck. Henschel hauled the excavator to his worksites approximately 70% of the time. The rest of the time, a driver or another qualified CCRC employee drove the truck. 90% of the time, the excavator stayed at a work site until the job was completed.

A few years after Henschel was hired, he was involved in a motorcycle accident that resulted in his left leg being amputated above the knee. He was fitted with a prosthetic leg. However, even with his prosthetic leg, Henshel was unable to operate a manual transmission. This affected his ability to haul the excavator to worksites because the CCRC's semitrucks had manual transmissions. Although the CCRC determined that hauling this equipment to and from the worksites was an essential function, it was not included in Henschel's written job description, although it was part of the written job description for semitruck drivers.

Consequently, the CCRC refused to restore Henschel to his excavator operator position because he was not able to haul the excavator around with a semitruck. The employer did not explore other ways of delivering the excavator, including asking a driver or another qualified employee to deliver it 100% of the time.

The CCRC tried to provide Henshel with a reasonable accommodation by reassigning him to another position driving a blade truck with an automatic transmission. However, there were no vacancies of this position at the time.

So, the CCRC asked for a volunteer who was willing to give up his position. The plan was initially approved by the union.

However, without advising the union or the volunteers, the CCRC said if someone agreed to give up his job for Henshel, then that person would be demoted to a laborer position, which was a violation of the CBA. Upon learning that a CBA violation might occur, the union withdrew its support, and the two employees who had volunteered changed their minds.

Henschel's employment was therefore terminated because he was unable to haul the excavator with a semitruck and the CCRC was unable to assign him to a blade truck driver position.

Henschel filed suit for ADA discrimination. The court granted summary judgment for the employer. The court relied on the employer's judgment that hauling of the excavating equipment was an essential job function.

Henschel appealed to the 6th Circuit.

The 6th Circuit focused on whether the hauling function was truly essential to the excavator operator position by considering the seven factors in the Americans with Disabilities Act's (ADA) regulations. Those factors include:

1. The employer's judgment on which functions are essential;

2. Written job descriptions that were prepared ***before*** advertising the job or interviewing applicants;

3. The amount of time spent performing the function;

4. The consequences of not requiring the employee to perform the function;

5. The terms of the CBA;

6. The experience of past incumbents in the job; and

7. The work experience of employees currently in similar jobs.

The court stressed that the CCRC's opinion that hauling the excavator was an essential function "carries weight but is only one factor to be considered." However, weighing against the CCRC's opinion was the fact that the excavator operator's job description failed to mention "hauling duties" at all. In addition, the court noted that the job description for semitruck drivers included the hauling duties the CCRC claimed were essential for excavator operators.

The excavator operator job description included a catch-all provision of "anything from any other [job] categories." However, the court noted, "Not every other duty under every other job category is an essential function of the excavator operator position. To reach that conclusion would make . . . job descriptions meaningless."

The 6th Circuit found that other factors weighed against the CCRC's opinion as well. The amount of time Henschel spent hauling the excavator appeared to be limited, there was evidence that asking other employees to haul the excavator would have had a minimal impact on the CCRC's operations, and other employees testified that they would have been willing to haul the excavator and had done so frequently in the past.

As a result, the 6th Circuit reversed the lower court's dismissal of Henschel's claims, finding there were factual issues about whether the hauling duty was essential. However, the court noted that the CCRC's attempt to accommodate Henschel's disability by creating a position and potentially violating the CBA was not required by the ADA.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Written job descriptions that accurately reflect essential job functions are critical to managing the reasonable accommodation process and defending against disability discrimination or failure-to-accommodate claims. Inconsistencies between job descriptions and the duties performed on a daily basis can undermine an employer's assertion that a function is essential.

Furthermore, "catch-all" provisions will not remedy an otherwise deficient job description. Job descriptions should be regularly reviewed by supervisors and employees to ensure accuracy and avoid battles about which functions are truly essential.

XIX. REPEATED REQUESTS FOR EXTENDED LEAVES OF ABSENCE UNDER THE ADA

The courts tend to view repeated extensions of leave requests as an indefinite leave, which are not permitted under the ADA.

For example, in Whitaker v. Wisconsin Department of Health Services, 849 F.3d 681 (7th Cir. 2017), the court stated that although unpaid leave could be a reasonable accommodation, the employee must be able to show that s/he "likely would have been able to return to work on a regular basis." In this case, the employee could not make this showing where she "repeatedly requested additional medical leave when her leave was about to expire," and she did not explain how additional "treatment" would be effective at enabling "her to return to work regularly."

In Williams v. AT&T Mobility Services, LLC, 847 F.3d 384 (6th Cir. 2017), the court noted that although additional leave is an accommodation, it is "unreasonable" to require an employer to keep a job open indefinitely. In this case, the customer service representative's history of repeatedly needing extensive periods of leave, and in some cases, many months, and often failing to return to work on the dates estimated by her health care providers, demonstrated that future leave requests were indefinite.

Similarly, in Gardner v. School District of Philadelphia, 2015 U.S. App. LEXIS 21941 (3d Cir. 2015) (unpublished), the court held that even though granting a leave of absence from work is a reasonable accommodation, the plaintiff was not "qualified" where, after extensive FMLA and other absences, he wanted to continue extending his leave by using his "sick leave and wage continuation benefits." In this case, the court held that although "the School District has authorized in abundance" sick leave benefits, **there was no evidence that the employee would be able to perform his job functions "in the near future**."

The court stated that an employer "is under no obligation to maintain the employment of a plaintiff whose proposed accommodation for a disability is 'clearly ineffective.'"

In Brannon v. Luco Mop Co., 521 F.3d 843 (8th Cir. 2008), the court held that an employee's third request for additional leave was not a request for "reasonable accommodation that would permit her to perform the essential function of regular work attendance," where each request "further postponed her return-to-work date." The court noted that although leave is a possible accommodation, an employer is not required to provide "an unlimited absentee policy."

In Tubbs v. Formica Corp., 2004 U.S. App. LEXIS 16467 (6th Cir. 2004) (unpublished), the court noted that reasonable accommodation does not include indefinite leave. The court held that the employee's "repeated medical leaves of absence are not reasonable" in light of the fact that she had taken 14 medical leaves in her 23 years of employment, and had worked no longer than seven months before needing another leave.

The EEOC seems to generally agree with this approach.

For example, in a "Fact Sheet" on "Conduct" issues, the EEOC has noted that when an employee has sought a second six- week extension of leave, after being granted an initial 12-week leave), the employer may ask the doctor about **"why the doctor's earlier predictions on return turned out to be wrong,"** and for **"a clear description of the employee's current condition"** and **the basis for the doctor's conclusion that only another six weeks of leave are required."** (EEOC Fact Sheet "Applying Performance and Conduct Standards to Employees with Disabilities" (2008) at Example 39.)

The EEOC stated that if the doctor "states that the employee's current condition does not permit a clear answer as to when he will be able to return to work," then this **"supports a conclusion that the employee's request has become one for indefinite leave."**

Importantly, the EEOC concluded that "this poses an undue hardship and therefore the employer may deny the request."

In the Commission's Employer-Provided Leave and the Americans with Disabilities Act (EEOC 2016 "Resource Document"), the EEOC stated that, "employers are allowed to have leave policies that establish the maximum amount of leave an employer will provide or permit," ***but*** "they may have to grant leave beyond this amount as a reasonable accommodation."

Importantly, the EEOC did not say that the policy itself must explicitly state that exceptions will be provided as a reasonable accommodation. In fact, the EEOC stated only that employers who use "form letters" to "instruct an employee to return to work by a certain date or face termination may want to modify them to let employees know that if an employee needs additional unpaid leave as a reasonable accommodation for a disability, the employee should ask for it as soon as possible so that the employer may consider whether it can grant an extension without causing undue hardship."

XVI. WHEN IS WALKING OFF THE JOB PROTECTED BY THE ADA?

In Morrissey v. Laurel Health Care Co., No. 18-1704, (Sixth Cir. 2019), Rita Morrissey worked as a licensed practical nurse (LPN) for The Laurels of Coldwater, a skilled nursing and rehabilitation center. In 2012, Morrissey reported she had a medical restriction that limited her from working more than 12 hours per shift, which was supported by a physician's note. At about the same time, the center informed staff it

would not accommodate medical conditions that weren't the result of a work-related injury.

Between 2012 and January 30, 2016, Morrissey worked shifts longer than 12 hours on eight occasions. There was no evidence, however, that Coldwater mandated the longer shifts. Rather, Morrissey's time records indicated she clocked out no more than 15 minutes after the end of the scheduled 12-hour shifts.

However, Morrissey's need for an accommodation became an issue on January 31, 2016, when Coldwater mandated her to work a 13.5-hour shift. The LPN testified she reminded her manager that she had a medical 12-hour work restriction, but the manager responded she had "no control" over the situation.

Five days later, Coldwater again ordered Morrissey to work more than 12 hours on a single shift, scheduling her to work a 16-hour shift to cover for a nurse who had called off from work. Morrissey testified it wasn't her turn to work the double shift, so she walked off the job during the shift and didn't return.

Morrissey filed a lawsuit in federal court alleging Coldwater had failed to accommodate her disability and engaged in constructive discharge and retaliation in violation of the Americans with Disabilities Act (ADA). The trial court granted the employer's request for summary judgment. The court dismissed the case without a trial, holding that the facts of this case didn't establish a violation under the ADA.

Morrissey filed an appeal with the Sixth Circuit Court of Appeals, which overturned the lower court's decision.

The Sixth Circuit found that Morrissey presented enough evidence to show there was a disputed issue of material fact on all her claims, which were outlined as follows:

1. **Failure to accommodate.** Even though the trial court ruled that Morrissey wasn't disabled, the Sixth Circuit held that the lower court had relied on outdated case law that didn't consider the **2008 amendments to the ADA**, which greatly broadened the definition of "disability." The LPN's proof was sufficient because she alleged (and the medical records showed) she was disabled in her ability to walk, bend, and lift repetitively because of her medical conditions.

   Further, the Sixth Circuit found enough evidence that Coldwater had failed to accommodate Morrissey for the case to proceed to trial. She showed the center had a blanket policy denying accommodations for nonwork-related disabilities. It was aware of her restriction and the requested accommodation but forced her to work beyond her medical limits on January 31 and February 4, 2016.

   Coldwater argued that between 2012 and Morrissey's resignation in 2016, it forced her to work more than 12 hours on only one occasion, and all other overages were *de minimis* (or so small that they should be considered "negligible"). But the Sixth Circuit said the center's argument ignored the fact that it forced her to work beyond her physician-imposed medical restriction on January 31, 2016, and attempted to do so again on February 4, 2016. The LPN presented enough evidence that she requested an accommodation for her disability, and the center didn't accommodate her.

2. **Constructive discharge.** Relying on past case law, the Sixth Circuit noted Morrissey had informed Coldwater numerous times about her restriction, but the center repeatedly failed to grant the requested accommodation. Therefore, her constructive discharge claim (i.e., that she was forced to resign) could proceed to a trial.

3. **Employer retaliation.** Finally, the Sixth Circuit permitted Morrissey's retaliation claim to go forward. She asked for an accommodation, and Coldwater was aware of her requests. The LPN was ordered to work when it was another nurse's turn, and she was constructively discharged. Thus, there was a material fact issue to be resolved at trial.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Morrissey's case shows that forcing an employee to work outside her restrictions may be enough to prove an ADA violation. Since the 2008 regulations, the ADA's definition of "disability" is very broad. It may cover conditions that aren't work-related, and you may be obligated to accommodate them unless you can present an undue hardship.

XX. STUPID COMMENTS DEFEAT HONEST BELIEF RULE

In Stewart v. Kettering Health Network, 576 Fed. Appx. 518 (6th Cir., Aug. 13, 2014), 59-year-old Doug Stewart was the oldest security officer working at Grandview Hospital.

On February 22, 2011, Grandview Hospital had a patient in a padded room that was becoming very upset and was cursing loudly. Dr. Robert Hunter asked Stewart and another officer, Officer Mardy White, to undress the patient and put him into a hospital gown. After blows were exchanged, Stewart was forced to use his stun gun to subdue the patient.

The patient appeared unaffected by the Taser, but shortly afterwards Stewart and White were able to tackle the patient to the floor and handcuff him with his hands in front of his body.

The door to the exam room was open during the incident. Stewart did not see anyone in the hall but medical staff came rushing in all of a sudden. Stewart recalls Dr. Hunter and Sergeant Jones ("Jones"), among others, coming into the room.

At this point, what happened to the patient is disputed.

Jones, Dr. Hunter and Dr. Fish testified that Stewart kicked the restrained patient in the head. Jones described the event in his report to Miller. Officer D. Stewart then took what appeared to be his right foot and moved it to the patients face in a quick motion. It appeared that his foot had struck the patient in the area of his forehead and nose...."

Jones also reported that Doctors Hunter and Fish confirmed that they saw Stewart kick the patient's head.

Stewart testifies to a different story. According to Stewart, the patient was spitting blood on everybody and everything. Dr. Hunter, in an effort to redirect the patient's head to avoid possible disease from the patient's blood, pushed his foot on the patient's head.

Stewart told Dr. Hunter that "we" had the situation under control and he needed to remove his foot from the patient's head.

Dr. Hunter refused.

Stewart then placed his foot on the patient's head but he says he had no pressure on the patient's head.

When the patient calmed down, Stewart removed his foot and Stewart also removed Dr. Hunter's foot.

During the follow-up investigation, Stewart denied kicking the patient.

White's incident report mentions nothing of Stewart kicking the patient's head.

Dr. Fish's handwritten statement made shortly after the incident says nothing about Stewart kicking the patient's head.

Dr. Hunter's handwritten statement made shortly after the incident says nothing about Stewart kicking the patient's head.

During an interview following the incident, the patient said nothing about Stewart kicking him.

Finally, according to Stewart, the only injury that the patient had was a bloody nose and the bloody nose was from being punched by White, the other security officer.

Following an investigation headed by its chief of security, David Miller, Grandview fired him for using excessive force.

Stewart sued Grandview for age discrimination.

In support of his claims, he pointed to a number of incidents in which Miller allegedly made remarks about his age. Grandview didn't dispute that Miller had remarked that he generally wanted to hire younger officers.

According to Stewart, Miller told him he wanted "young bulls" instead of "old guys."

Further, another officer testified that Miller had asked him to "keep an eye on" Stewart and that he felt Stewart's "days were numbered."

The trial court dismissed Stewart's lawsuit, finding that he failed to present sufficient evidence to refute Grandview's position that it appropriately terminated him based on its "honest belief" of the truthfulness of the witnesses' accounts of the patient altercation.

Stewart appealed that decision to the Sixth Circuit.

The Sixth Circuit reversed the trial court's ruling and found that Stewart came forward with enough evidence to warrant a trial. The heart of the issue was the honest belief rule.

Under that rule, an employer's termination or other disciplinary decision isn't unlawful if it was based on its "honest belief" of the facts, even if the employer makes a mistake about the facts.

According to the court, the "employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." Therefore, Grandview argued, even if Stewart did not actually kick the patient in the head, it was reasonable for it to determine that he did based on the doctors' statements.

However, the Sixth Circuit found that in this case, a jury, rather than a judge, should have the opportunity to determine whether Grandview could rely on the honest belief rule.

The court was particularly bothered by three things in this case.

First, Stewart was able to point to several comments by his supervisor that suggested a prejudice against his age.

Second, "the fact that neither doctor present at the time of the incident giving rise to [the] termination saw fit to mention [the alleged misconduct] in his contemporaneous notes undercuts the credibility" of their subsequent testimony.

Third, Miller, who was the primary person heading up the investigation, was the same person who allegedly made comments that suggested he was prejudice against older employees.

Taking all of that into consideration, the court found that there were plenty of reasons that reasonable minds could differ on the employer's true motives. Therefore, Stewart should be allowed to present his claims to a jury.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Under the Sixth Circuit's interpretation of the honest belief rule, an employer is not required to show that its decision-making process was "optimal or that it left no stone unturned."

However, the courts will not "blindly assume that an employer's description of its reasons [for an adverse action] is honest." The decision must be based on "particularized facts" rather than on "ignorance and mythology."

Grandview should have made sure that its physicians did a better job of documenting this incident. When their notes and their statements did not match, much doubt was cast on the truthfulness of their testimony.

Also, Miller's previous discriminatory comments are simply absurd. His credibility was destroyed.

As a result, the credibility of this entire process was tainted.

In the end, a lack of supervisor and physician training cost the employer.

XXI. CAT'S PAW THEORY

In Marshall v. The Rawlings Co. LLC., 854 F.3d 368, 377 (6th Cir. 2017), Gloria Marshall took an unexpected FMLA leave in February and March 2012 to receive treatment for her depression, anxiety and PTSD. Upon her return, she had a backlog of work waiting for her. There was conflicting evidence on whether she received any assistance catching up

on her work and when she did catch up, her supervisor became worried that a new backlog was forming.

In September 2012, Marshall was demoted after one of her supervisors recommended that she be demoted to the division president. The president confirmed that she was the final decisionmaker and the decision was based solely on Marshall's performance.

In March 2013, the Marshall took a second FMLA leave and also took periods of intermittent leave from April through August. In September, her supervisor noticed that Marshall and a coworker were not at their desks for much of the day. When he confronted Marshall, she claimed her other supervisor had harassed her on two occasions. The supervisor reported the alleged harassment to the president who, after meeting with Marshall, believed she "was someone who was not doing her job, had been called on the carpet by her supervisor, and in order to deflect it," brought up the harassment allegations. The president then met with the owner, who decided to terminate the employee for making false allegations of harassment.

Marshall then sued, asserting claims under the FMLA, ADA, and state law and the district court granted summary judgment to the employer.

Marshall appealed to the Sixth Circuit Court of Appeals.

The court first found that the rationale for the cat's paw theory applies equally to FMLA retaliation claims as to other types of employment discrimination and retaliation claims. Further, all of the justifications for applying the cat's paw theory apply when there are multiple layers of decisionmakers. The court found that there was no reason to prohibit plaintiffs from pursuing a cat's paw theory when a lower-level supervisor carried out a scheme to discriminate and in turn influenced multiple layers of higher-level supervisors in making their decisions.

The court also found that plaintiffs alleging FMLA retaliation based on a cat's paw theory of liability include proving that the ultimate decisionmaker was the cat's paw of a biased subordinate.

Finally, in considering the use of the honest-belief rule in cat's paw cases, the court reasoned that in a cat's paw case, Marshall's allegation is that a biased subordinate intentionally manipulated the decisionmaker. Under these circumstances, the decisionmaker's intent does not matter and consequently, the honesty of the decisionmaker's belief does not matter.

The court then looked at Marshall's FMLA retaliation claim, the court noted that there was conflicting evidence regarding her performance both before and after her demotion that showed she was performing well in some areas and poorly in others. However, there was no evidence regarding the relative importance of these different areas or how her overall performance compared with that of her coworkers.

Further, when her supervisor asked Marshall as to whether she planned on taking more leave, and then directed her in the same meeting to clear her backlog, this raised the inference that he was displeased with Marshall exercising her FMLA rights.

The Sixth Circuit then noted that there was conflicting evidence as to why the owner fired Marshall. As a result, the court found that on this record, a reasonable jury could

find a causal connection between Marshall's use of FMLA leave and the subsequent adverse actions.

Also, there was not any evidence that the president conducted an independent investigation apart from the information she was given by the lower level supervisor. However, there was evidence suggesting the supervisor had a significant influence on her decision as she appeared to have made the decision shortly after receiving his recommendation.

The court noted that when the president met with the owner, one of the supervisors was also present. There was also evidence suggesting that the owner's only source of information regarding the false harassment claim came this same supervisor, and then a brief meeting with the employee where he fired her.

There was also no indication that the president or the owner ever asked the alleged harassing supervisor about his behavior toward the employee.

Therefore, a reasonable jury could find the president and owner "did not conduct an adequate independent investigation, that they had no interest in doing so. Instead, they merely acted as a conduit for their subordinates' retaliatory intent."

Therefore, the court found for Ms. Marshall on her FMLA retaliation claim.

Also, since Marshall made the same arguments to support her ADA discrimination claim as her FMLA retaliation claim, the court found that the same fact issues existed here as with the FMLA retaliation claim and again found for Marshall.

XVII. NLRB LIMITS SECTION 7 PROFANE SPEECH BY EMPLOYEES

The National Labor Relations Board (NLRB) recently modified its standard for dealing with the abusive conduct and language used by employees. For the last several years, the NLRB allowed employees to use some of the most profane, harassing, and racist statements so long as those statements were made while discussing Section 7 activities, which relate to the wages, hours, or other terms and conditions of employment.

Previously, the NLRB applied three different standards for dealing with this type of employee conduct, which only added to tremendous confusion.

For outbursts made against management in the workplace, the Board used the four-factor Atlantic Steel test which considered:

(1) the place of the discussion;

(2) the subject matter of the discussion;

(3) the nature of the employee's outburst; and

(4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

For social media posts and most cases involving conversations among employees in the workplace, the NLRB examined the "totality of the circumstances."

Finally, **for picket line conduct**, it applied the Clear Pine Mouldings standard, which asks whether, under all of the circumstances, nonstrikers reasonably would have been coerced or intimidated by the abusive conduct.

However, the NLRB recently cleared up all of this confusion in General Motors LLC, 369 NLRB No. 127 (2020). In this case, the Board held that cases dealing with offensive or abusive conduct, language, or outbursts will be analyzed under the agency's Wright Line standard.

Under the Wright Line standard, in order to excuse the employee's conduct, the NLRB General Counsel must make an initial showing that:

(1) the employee engaged in Section 7 activity;

(2) the employer knew of that activity; and

(3) the employer had animus against the Section 7 activity.

If the General Counsel has made his initial case, the burden of persuasion shifts to the employer to prove it would have taken the ***same action*** even in the absence of the Section 7 activity. Under this standard, **employers must show that they would discipline an employee for abusive conduct or language even if the employee had not been engaged in protected activity such as union-related activity or workplace activism**.

The NLRB noted that the previous standards placed employers at odds with federal, state, and local antidiscrimination laws. Specifically, the previous "standards for analyzing abusive conduct … have been wholly indifferent to employers' legal obligations to prevent hostile work environments on the basis of protected traits."

The antidiscrimination laws require employers to take prompt action against the offending employee, and this proved difficult under the Board's previous standards.

Chairman John Ring stated that "this is a long-overdue change in the NLRB's approach to profanity-laced tirades and other abusive conduct in the workplace. Ring further noted that for too long "the Board has protected employees who engage in obscene, racist, and sexually harassing speech not tolerated in almost any workplace today."

Employers can now take comfort in enforcing their policies prohibiting profane outbursts and other abusive conduct regardless of whether the employee was engaged in Section 7 activity. So long as the employer would have disciplined the employee even in the absence of activity protected under the National Labor Relations Act, there should be no violation of the Act.

XXII. NLRB CHANGES HANDBOOK RULES … ***FOR THE BETTER*!**

In The Boeing Company, 365 NLRB No. 154 (Dec. 14, 2017), the NLRB overruled its previous decision in Lutheran Heritage Village, 343 NLRB 646 (2004), which had held that a work rule that does not explicitly restrict rights protected by the Act may nevertheless run afoul of § 8(a)(1) if:

- Employees would reasonably interpret the language of the rule as prohibiting § 7 rights; or
- The rule was promulgated in response to union activity; or
- The rule has been applied in a manner that restricts § 7 rights.

Under the new standard established in Boeing, if the rule is **not explicitly unlawful**, the Board will evaluate two things:

- The rule's potential impact on protected concerted activity; and
- The employer's legitimate business justification for maintaining the rule.

Boeing held that if the justifications for the rule outweigh the potential impact on employees' rights, the rule is lawful.

Conversely, if the potential impact on employees' rights outweighs the justifications for the rule, it is unlawful.

Following up on the NLRB's decision in The Boeing Company, 365 NLRB No. 154 (Dec. 14, 2017), on June 6, 2018 NLRB General Counsel Peter Robb issued a new Guidance Memorandum (18-04) detailing how NLRB Regional Offices receiving claims of improper employment policies are to interpret employer workplace rules.

In Boeing, the Board established a new, and much more employer-friendly, standard for the lawfulness of employee work rules. This Memo gives examples of specific policies that are to be found lawful and directs Regional Offices to no longer interpret ambiguous rules against the drafter or generalized provisions as banning all activity that **could** conceivably be included within the rule. Therefore, the Regional Offices will now look to whether a rule **would** be interpreted as prohibiting Section 7 activity, as opposed to whether it **could** conceivably be so interpreted.

In Boeing, the Board reassessed its standard for when the mere maintenance of a work rule violates Section 8(a)(1) of the NLRA. The Board established a new standard that focused on the balance between the rule's negative impact on employees' abilities to exercise their NLRA Section 7 rights, and the rule's connection to an employer's right to maintain discipline and productivity in the workplace.

Going forward, work rules are to be categorized in three categories:

(1) rules that are generally **lawful** to maintain,

(2) rules warranting **individualized scrutiny** and

(3) rules that are plainly **unlawful** to maintain.

The General Counsel's Memo places a number of commonly found workplace policies into these three groupings.

Category 1 Rules are generally lawful either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights guaranteed by the NLRA, or because the potential adverse impact on protected rights is outweighed by the business justifications associated with the rule.

The examples provided in the Memo of the types of rules that fall into this category include:

- Civility rules (such as "disparaging, or offensive language is prohibited");
- No-photography rules and no-recording rules;
- Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations;
- Disruptive behavior rules (such as "creating a disturbance on company premises or creating discord with clients or fellow employees is prohibited");
- Rules protecting confidential, proprietary and customer information or documents;
- Rules against defamation or misrepresentation;
- Rules against using employer logos or intellectual property;
- Rules requiring authorization to speak for the company; and
- Rules banning disloyalty, nepotism, or self-enrichment.

Category 2 Rules are not obviously lawful or unlawful and must be evaluated on a case-by-case basis to determine whether the rule would interfere with rights guaranteed by the NLRA, and if so, whether any adverse impact on those rights is outweighed by legitimate justifications.

General Counsel Robb identified the following examples of types of Category 2 Rules:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in, or voting for, a union,
- Confidentiality rules broadly encompassing "**employer business**" or "**employee information,**" as opposed to confidentiality rules regarding **customer or proprietary information**, or confidentiality rules more specifically directed at **employee wages, terms of employment, or working conditions**,

- Rules regarding disparagement or criticism of the **employer,** as opposed to **civility rules regarding disparagement of employees**,

- Rules regulating use of the **employer's name**, as opposed to rules regulating use of the **employer's logo/trademark**,

- Rules generally restricting **speaking to the media or third parties**, as opposed to rules restricting speaking to the media **on the employer's behalf,**

- Rules banning off-duty conduct that might harm the employer, as opposed to rules banning insubordinate or disruptive conduct at work, or rules specifically banning participation in outside organizations and

- Rules against making **false or inaccurate statements**, as opposed to rules against making **defamatory statements**.

Category 3 Rules are generally unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact on the rights guaranteed by the NLRA outweighs any justifications associated with the rule. The examples provided in the Memo of the types of rules that fall into this category include:

- Confidentiality rules specifically regarding wages, benefits, or working conditions; and

- Rules against joining outside organizations or voting on matters concerning the employer.

WHAT DOES THIS MEAN FOR HR?

Before Boeing, employers had to be very careful whenever they prohibited pretty much any employee conduct when they were drafting their handbooks since the NLRB rules at the time said that employee handbooks had to be viewed from the perspective of whether or not its rules could be construed as **possibly** infringing on employees' Section 7 rights. NLRB GC Robb's Guidance Memorandum provides helpful clarity, with a detailed analysis and specific examples, as to how certain types of workplace rules would fall within the three-category analysis espoused by the Board in Boeing. The Memorandum is particularly enlightening to employers as it foreshadows the manner in which a NLRB Regional Office would prosecute a potential unfair labor practice charge brought by an employee or union. Significantly, GC Robb expressly stated that Regions **will not** interpret ambiguities in rules against the drafter, which clearly benefits employers in any proceeding. We expect this guidance to lead to fewer charges brought against employers in this arena, but only if employers heed the GC's advice when drafting their employee handbooks.

XXIII. NLRB FINDS "NO DISCUSSION OF INVESTIGATION" RULE TO BE AN ULP

In Banner Health System, 358 N.L.R.B. No. 93 (July 30, 2012), the employer, Banner Health System, provided its human resources employees with an "Interview of Complainant Form" to use when interviewing employees as part of an internal investigation. While the form was titled "Interview of Complainant Form," it apparently was also used for interviews of the subjects of complaints. One of the bullet points under "Introduction for all interviews" noted that employees should be told not to discuss ongoing investigations. Although the form was never provided to employees, one human resources manager testified that she frequently, but not always, instructed employees not to discuss the investigation.

Members Richard Griffin and Sharon Block concluded that such an instruction violated Section 8(a)(1) of the Act because the statement, "viewed in context, had a reasonable tendency to coerce employees, and so constituted an unlawful restraint on Section 7 rights." The Board held that "to justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights."

In its ruling, the Board sustained objections to the administrative law judge's determination that the prohibition on discussing ongoing investigations was justified by the employer's concern in protecting the integrity of the investigations. The Board rejected such a "blanket approach" justification. Instead, the Board noted that the employer had the burden "to first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up." The Board found that the general assertion of protecting the integrity of an investigation "clearly failed to meet" that burden.

The majority rejected Member Hayes' conclusion that the instruction was only a suggestion because it appeared as part of the introduction "for all interviews" and was given in most interviews. On the basis of those facts, the Board concluded that the instruction or rule had the tendency to coerce employees against exercising their Section 7 rights. Further, the majority noted that a supervisor's instructions carry sufficient weight to make a statement unlawfully coercive even without actual discipline or the threat of discipline.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The Board's Banner Health decision applies equally to unionized and nonunion settings. The decision, however, is not a total prohibition on asking employees for confidentiality during an internal investigation. However, employers who do ask for confidentiality should be prepared to establish that confidentiality is necessary to protect a witness, prevent the destruction of evidence, preserve testimony, prevent a coverup, or further another legitimate business interest.

In light of the Board's Banner Health decision, employers should consider reviewing their internal investigation policies, appropriately revising forms that may be used, and discussing the decision with their human resources professionals in order to avoid potential violations of the NLRA.

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.

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Scott combines the areas of law and human resources to help organizations in "Solving Employee Problems ***BEFORE*** They Start." Scott's goal is ***NOT*** to win lawsuits. Instead, Scott's goal is to ***PREVENT THEM*** while improving ***EMPLOYEE MORALE***.

Scott's first book, ***Solve Employee Problems Before They Start: Resolving Conflict in the Real World***, is a #1 Best Seller for Business and Conflict Resolution. It was also named by EGLOBALIS as one of the best global Customer and Employee books for 2020-2021. Scott's next book, ***Living The Five Skills of Tolerance***, is also a #1 Best Seller in 13 categories on Amazon. His most recent book, ***Healing The Human Brain***, is an International Best Seller in 14 categories with sales in over a dozen countries worldwide.

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Scott is also a seven-time SHRM National Diversity Conference presenter. In 2023, he presented his ground-breaking "**TOLERANCE & BRAIN HEALTH**" program.

Scott's ***MASTER HR TOOL KIT SUBSCRIPTION*** is a favorite for anyone wanting to learn Employment Law and run an HR Department.

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Scott was named one of Business First's 20 People To Know In HR by CEO Magazine' and a Human Resources "Superstar" in 2008. Scott also received the Linda Kerns Award for Outstanding Creativity in HR and the Ohio State Human Resource Council's David Prize for Creativity in HR Management.

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