Bryce Downey & Lenkov LLC

Labor & Employment Newsletter
May 2018

In the wake of the tragedy in Parkland, What Can Corporate America Do to Reduce Violence in the Workplace?

Seventeen years ago I graduated from Marjory Stoneman Douglas High School in Parkland, Florida. I walked the halls of MSD daily without a care in the world other than that of a typical high-school student — did I study enough for the test next period? Does the boy I like notice me? I never felt unsafe in my school or in my community.

Seventeen years later, in the same halls I walked, 17 innocent individuals were gunned down and killed.

We have tragically become a society in which we grow complacent over reoccurring senseless acts of violence. They get filtered through the media cycle and we eventually move on. People send their thoughts and prayers, change their profile pictures, and after a week or two, we turn our attention to the next crisis or scandal. I admittedly have fallen victim to this numbness until February 14, 2018 when my outlook on acts of violence changed forever.

Marjory Stoneman Douglas High School alumna, Jessica Jackler, addresses in detail what Corporate America can do to reduce violence in the workplace. Click here for full article.

Seventh Circuit: Age Discrimination Act Protects Prospective Employees Under Disparate Impact Theory

In a case of first impression, the Seventh Circuit ruled that the disparate impact provision of the ADEA (Age Discrimination in Employment Act) applies not only to existing employees but to prospective hires as well. *Kleber v. Carefusion Corporation*, 17-1206 (7th Cir. 4/26/18).

The plaintiff in Kleber was a 58 year old attorney who had been practicing for over 25 years. He applied for a position as senior counsel for Carefusion. The job posting sought an attorney applicant who had "3-7 years (no more than 7 years) of relevant legal experience." Carefusion declined to interview Kleber and hired a 29 year old attorney applicant. In defending the matter Carefusion argued that its job posting involved "'objective criteria based on the concern that an individual with many more years of experience would not be satisfied with less complex duties… which could lead to issues with retention.'"

The Seventh Circuit noted that in the U.S. Supreme Court in *Griggs v. Duke Power*, 401 U.S. 424 (U.S. S. Ct. 1971) previously held in Title VII cases (race, gender, disability, etc.) that a cause of action premised on disparate impact protects prospective employees and not just existing employees. The Court in Kleber similarly interpreted the ADEA disparate impact theory in age cases to also protect prospective employees. Disparate impact is defined under ADEA, §623(a)(2) as limiting segregating or classifying "employees in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee because of such individual's age".

The Court overturned the trial court's dismissal of the disparate impact claim and remanded the case to the district court level for further proceedings.

Practice Tip:

Any job posting or add seeking applications with a maximum number of years of experience runs the risk of being interpreted as running afoul of the ADEA. One is better suited to limit such job hiring criteria to education, types and extent of minimum experience (if applicable) and other non-age factor criteria.

Second Circuit Joins Seventh Circuit in Protection Against Sexual Orientation Discrimination

The Second Circuit Court of Appeals has joined the Seventh Circuit in holding that Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination on the basis of sexual orientation. *See Zarda v. Altitude Sys., Inc.,* No. 15-3775 (2d Cir. 2018). In the *en banc* decision, the Second Circuit overruled its own precedents.

The case originated in September 2010, after Zarda, a skydiver, filed a lawsuit against his former employer alleging that the company violated Title VII by discriminating against him because of his sexual orientation.
The U.S. District Court for the Eastern District of New York rejected his claim, finding that Title VII does not protect his claims of discrimination based on his sexual orientation.

Although Zarda tragically died in a base jumping accident in October 2014, his estate pursued his claims on appeal. In 2017, the estate asked the Second Circuit to revisit its precedent and hold that sexual orientation discrimination is a form of sex discrimination and is protected under Title VII. The three-judge panel denied Zarda's claim in April 2017, but held that Zarda would be entitled to a new trial if the entire Second Circuit court agreed with his arguments about Title VII. In May, the Second Circuit granted en banc review.

On appeal, the court considered whether an employee's sex is a motivating factor in discrimination based on sexual orientation. In answering this question in the affirmative, the court explained that because sexual orientation discrimination is motivated at least in part by sex, it is a subset of sex discrimination. "Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted. Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected." Id. at 22.

Other circuits still take the contrary position and have held that discrimination based on sexual orientation is not protected under Title VII. The Supreme Court further has declined to review an Eleventh Circuit ruling affirming dismissal of a lesbian security guard's allegations that a Georgia hospital violated Title VII by firing her because of her sexuality. The high court's ruling leaves in place a circuit split over whether federal law bars discrimination against gay workers.

Practice Tip:

If your company does business within the purviews of the Second or Seventh Circuits, it is important to understand that you are precluded from discriminating against employees on the basis of their sexual orientation. Furthermore, the EEOC has taken the position that discriminating against employees based on their sexual orientation violates the law.

Title VII: Religious Accommodations To Prospective Employees

The EEOC continues to play an active role in either seeking to force settlements of religious discrimination claims on behalf of individual employees or directly filing such lawsuits against the employers of such individuals. In 2017, we saw almost 3,500 religious discrimination claims filed with the EEOC.

Two such similar cases in 2018 spotlight the EEOC's ongoing focus in this area of employment law. In one such case, the EEOC helped facilitate a settlement of almost $100,000 on behalf of a dispatcher/customer service representative against his prospective logistics company employer. The individual was hired but later turned down for his position when the employer declined to allow him to move back his initial start date one day after he sought to celebrate the Jewish holiday Rosh Hashanah the previous day. The EEOC brought suit alleging the employer engaged in religious discrimination by failing to accommodate the religious schedule of the hired worker.

Following on the heels of the religious discrimination suit filed in 2016 by the EEOC against Mission Hospital in North Carolina (reported in our September 2017 newsletter), the EEOC has filed a similar suit this year in Michigan federal court against another healthcare provider after it rescinded a job offer to an applicant who declined to receive an influenza shot or spray because of her religious beliefs. *EEOC v. Memorial Healthcare*, 2:18-CV-10523 (ED Mich 2/13/18). The company revoked its job offer to the hired employee despite her willingness to wear mask which was an approved policy for employees who declined to be vaccinated.

Practice Tip:

Employers should be wary of turning down job applicants or revoking job offers to such individuals where their requested religious accommodation in scheduling or a job required activity would not be deemed an unreasonable request nor undue hardship upon for the employer to accommodate.

Defending Mental Health Disability Employment Claims

We are seeing a significant increase in mental and developmental disability claims brought before both the EEOC and Illinois Department of Human Rights. An escalating number of employees with alleged depression, bipolar disorder, autism, schizophrenia, post-traumatic stress disorders and anxiety disorders among other mental health conditions, are asserting discrimination, ADA and retaliation claims against their employers alleging that they were treated unfairly and/or fired because of their protected mental health condition.

While one certainly can be sympathetic to an individual with such a condition, as with any physical or medical condition which constitutes a disability under Title VII or state law, an employer can successfully defend a mental health disability Title VII claim by establishing that the subject claimant employee could not perform the essential functions of his/her position with or without a reasonable accommodation or accommodate the employee without undue hardship. Similarly, if the employer can establish it was unaware of the alleged mental health condition/disability of the employee and proceeds to terminate the employee, it should not be held liable for some form of disability discrimination or retaliation.

Such was the situation in a case Storrs Downey recently handled before the Illinois Department of Human Rights ("IDHR"). In successfully convincing the IDHR to dismiss an employee's claim against the firm's client, Storrs established that the employer had no knowledge the employee was on the autism spectrum, it sought to accommodate and help the employee despite being unaware of the employee's condition and solely terminated the employee because she consistently could not perform the key functions of her job.

By contrast, in a recently resolved court action the employer, The Salvation Army, paid $55,000 to settle a claim of disability discrimination filed by the EEOC on behalf of a prospective donation attendant employee who was not fired. EEOC v. Salvation Army, 3-16-CV-00240 (Dist. Ct. Alaska). The employer allegedly chose not to hire him because of its concern about his ability to interact with the public in his pending job. The EEOC commented that the employer stereotyped the plaintiff regarding this disability and perceived limitations.

The employer had well-documented the employee's job performance and had well-written job duties which the IDHR relied upon in part in reaching its decision.

Practice Tip:

In addition to treating employees with mental health conditions with dignity and respect employers should reasonably accommodate such employees' related disabilities, if any.

If they can establish that they reasonably engaged in the interactive process to attempt to accommodate the employee but ultimately could not do so without undue hardship such employers have a viable defense to a claim of disability discrimination or retaliation.

Sometimes the ADA Bites Back

In recent months there have been several headlines focusing on different entities denying access to animals. These headlines often invite several questions regarding what the law requires in these situations. At the outset of any discussion it is important to address two issues:

1. The difference between "service animals" and "support animals;" and

2. Under what legal provision or basis is a possible claim or suit is being pursued

In order to qualify as a service animal, the ADA requires that the animal be a dog. The ADA specifically states that, "other species of animals, whether wild or domestic, trained or untrained, are not service animals." The ADA definition of service animal also states in part that, "the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks." 28 C.F.R. § 35.104.

In order to assert a claim pursuant to the ADA, a Plaintiff needs to show, among other things, that his or her animal qualifies as a service animal.

In *Sykes v. Cook County*, the 7th Circuit held that in situations where it is not obvious if a dog is a service animal, employees of a public entity are permitted to ask if the dog is a service animal required because of a disability, and what work or task the dog has been trained to perform. 837 F.3d 736 (7th Cir. 2016). They are not permitted to request documentation for the dog, require the dog to demonstrate a task, or inquire about the nature of the person's disability.

In *Riley v. Board of Commissioners*, the Northern District of Indiana specifically addressed the issue of a Plaintiff alleging that he his dog was barred from a courthouse despite being a support animal. 2017 U.S. Dist. LEXIS 153737 (N.D. Ind. Sep. 21, 2017). The Circuit Court held that Plaintiff failed to prove that his dog was a service dog and that it had any effect other than calming Plaintiff down.

Surprisingly, While there are no reported case in the last two decades years addressing ADA compliance by employers under Title I. However, one would expect the same analysis and guidance to be applied with service dogs at the worksite.

Sixth Circuit: Religious Beliefs Not a Shield to Transgender Bias Lawsuit

The U.S. Court of Appeals for the Sixth Circuit issued a groundbreaking decision on March 7, 2018 in which it ruled that discrimination based on transgender status is prohibited under Title VII of the Civil Rights Act of 1964 ("Title VII"). *See Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424, 2018 WL 1177669 (6th Cir. Mar. 7, 2018).

Aimee Stephens, formerly known as Anthony Stephens, was a funeral director at R.G. and G.R. Harris Funeral Homes in the Detroit-area and was fired after she informed her boss that she was a transgender woman and wanted his support to start dressing in appropriate women's attire at work. She was terminated two weeks later.

Ms. Stephens filed a charge of discrimination with the Equal Employment Opportunity Commission, and thereafter, the EEOC sued the funeral home for sex discrimination in the District Court for the Eastern District of Michigan in September 2014.

In August 2016, the District Court dismissed the claim, finding that the EEOC had proven sex discrimination but the Religious Freedom Restoration Act provided the funeral home an exemption from Title VII because the business operated "as a ministry". In October 2016, the EEOC appealed the decision to the Sixth Circuit Court of Appeals.

On appeal, the funeral home's owner, a devout Christian, argued that he could not be liable for discrimination under the Religious Freedom Restoration Act, which prohibits the government from burdening an individual's religious practice. He claimed that his work was tantamount to a religious service and that employing a transgender woman would distract customers. The Sixth Circuit Court disagreed, and in reaching its decision, held that the religious beliefs of the funeral home's owner did not insulate him from a discrimination lawsuit. The decision reversed the 2016 federal district court ruling.

Practice Tip:

This decision not only adds to the growing number of federal courts that are expanding the scope of "sex discrimination" under Title VII, but also explicitly limits an employer's ability to defend EEOC claims against it based on alleged exercise of religious freedom. The Seventh Circuit Court of Appeals has previously ruled that Title VII protections apply to sexual orientation, and as such, employers in this Circuit are prohibited from discriminating against LGBTQ employees (See our April 4, 2017 Labor & Employment Blog post for discussion for this case). Time will tell if the U.S. Supreme Court will address this issue and once and for all settle this dispute among the nation's courts and provide clarity as to whether LGBTQ employees can claim protection from sex discrimination under Title VII. In the interim, this ruling affirms that transgender individuals are protected by federal sex discrimination laws (at least in the Sixth and Seventh Circuits), and that religious beliefs do not protect employers from discrimination lawsuits. If you have any questions related to policies in your workplace which may impact your LGBTQ employees, please contact us.

SCOTUS: Service Advisors are Exempt Employees

In early April, the Supreme Court held that service advisers at car dealerships are exempt from federal overtime pay requirements under the Fair Labor Standards Act (FLSA).

Service advisors are generally responsible for the intake of customers in the service area of a car dealership. This process may include the service advisor's evaluation of the customer's complaints, determining the service needs of the vehicle, and selling supplemental auto services.

In a 5-4 decision, the court held that service advisers are exempt under the FLSA's overtime provisions because they are salesmen primarily engaged in servicing automobiles. Justice Clarence Thomas, writing for the majority, stated "[a] service advisor is obviously a 'salesman,'… The ordinary meaning of 'salesman' is someone who sells goods or services, and service advisors 'sell customers services for their vehicles.'" Chief Justice John Roberts and Justices Anthony Kennedy, Samuel Alito and Neil Gorsuch joined Thomas in the majority.

Justice Ginsburg issued a dissenting opinion, in which she said service advisors "neither sell automobiles nor service vehicles" and should be covered by the FLSA.

This was the second time this case came before the Supreme Court. First, in 2016, the court did not render a decision on the merits and remanded the case to the 9th Circuit Court of Appeals. Now, the Supreme Court's decision confirms that service advisors employed at car dealerships throughout the United States are exempt from under the FLSA.

Practice Tip:

If your company employs service advisors in the same capacity as this case, it is now safe to classify them as exempt employees without risk of violating the FLSA. This ruling is also a good reminder to audit your pay procedures to avoid any misclassification issues in the future. If you are in need of assistance in an internal audit, or any other wage and hour issue, please contact us.

Pranks in the Workplace are a Good Idea Said No One Ever

April 1st is famously known as April Fools' Day, a day filled with fun practical jokes. Or are they?

In the current corporate climate, companies should be mindful of those who may take jokes to an unprofessional level in the workplace. When they cross that proverbial line, it could open the floodgates for potential liability exposure.

Practical jokes and pranks have little place in a healthy company culture. There is almost always a victim of the joke or prank, who may find the behavior offensive, and perhaps even rising to the level of actionable harassment. If the employer condones such behavior, it could be exposed to liability.

Aside from litigation exposure, pranks and jokes may impede productivity at work. We all have time-sensitive tasks, and the thought of frustrating that process even further with a gag is uneconomical to say the least.

Pranks also have the common effect of embarrassment and singling out of an individual, which could lead to a complaint. Offensive pictures and jokes may also implicate certain harassing or discriminatory behavior. To avoid potential harassment or discrimination complaints, it is a best practice to leave the pranks and jokes at home.

Practice Tip:

Although it is not necessary to implement a separate April Fools' policy in your workplace, it is a good reminder to review your current harassment and standard conduct policies to ensure they comply with the law.

Spring: The Season for Rebirth of Pregnancy-Related Policies

By: Jessica Jackler

Some say spring is the time of rebirth, which seems like a good starting point to discuss pregnancy in the workplace. As the presence of women in Corporate America continues to grow, so should your knowledge base regarding associated legal rights of your female workforce. As a new mother, I am fortunate enough to be employed by an organization which respects my home life and the personal decisions I have made to balance my work and family. Pregnancy, however, remains a stigma in the workplace. Many employers still view pregnancy as an interruption to their operations. They believe that women who become pregnant will not want to return to work, or will not be focused enough on work if they return. This outdated mindset unfortunately remains a visible deterrent to many women in the workplace. It also is a contributing factor as to why women may not be promoted as often as their male counterparts. After I gave birth to my son last year, I intended return to work, but I also had a goal to breastfeed for the first year of his life. I am an experienced employment lawyer, and as such, I knew my rights associated with these decisions. But, many employers and employees do not understand their obligations and/or rights. Denying certain rights to pregnant employees (or women who intend to become pregnant) could also expose your company to liability. This article focuses on a few key legal issues of which your company should be aware to avoid possible liability.

Pregnancy Discrimination Act

The Pregnancy Discrimination Act (PDA) is an amendment to Title VII of the Civil Rights Act of 1964. Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII, which applies to employers with 15 or more employees. In sum, the PDA mandates that women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees who are similar in their ability or inability to work. An employer cannot refuse to hire a woman because she is pregnant or because of a pregnancy-related condition as long as the applicant is able to perform the major functions of the job. The PDA also prohibits discrimination based on pregnancy when it comes to any other aspect of employment, including pay, job assignments, promotions, layoffs, training, fringe benefits, firing, and any other term or condition of employment. It is similarly prohibited to refuse to hire an applicant, or base any employment-related decision, because of a woman is pregnant or intends to become pregnant. Pregnant employees must be permitted to work as long as they are able to perform their jobs. This means that an employer may not require that an employee take a leave of absence because of a pregnancy-related condition unless it is requested. If an employee is

temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee (i.e. by providing light duty, modified job tasks, alternate assignments, or leave). The PDA also requires that pregnant employees have equal access to health insurance and benefits. An employer's health insurance plan must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions. While insurance coverage for expenses arising from abortion is not required under the Act, there is an exception where the life of the mother is endangered or medical complications arise from an abortion. If an employer provides any benefits to employees while on medical leave, the employer must similarly provide the same benefits for those on medical leave for pregnancy-related conditions.

FMLA/Maternity Leave

Under federal law, there is no mandatory paid leave available to pregnant workers. The Family and Medical Leave Act (FMLA) of 1993, provides 12 weeks of unpaid leave to be used for the birth of a new child, including prenatal care and incapacity related to pregnancy, and for the mother's own serious health condition following the birth of a child. A father can use FMLA leave for the birth of a child and to care for his spouse who is incapacitated (due to pregnancy or child birth). The FMLA applies to private employers that have employed at least 50 employees during 20 or more calendar weeks during the current or preceding calendar year. When an employee returns from FMLA leave, she must be restored to the same job or to an "equivalent job". The employee is not guaranteed the actual job held prior to the leave. An equivalent job means a job that is virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions. For those employers not covered by the FMLA, you may want to consider providing similar leave to your pregnant employees. It is important to remember that there are great physical consequences to giving birth. Many women who return to work before they are physically (and emotionally) ready may experience harmful effects. Even for those who return after 12 weeks, their bodies may not yet have fully recovered, nor do they sleep through the night. Employers may want to consider these factors before taking a hardline approach to maternity leave.

Breastfeeding/Lactation under Federal Law

Since 2010 under the Affordable Care Act (ACA), federal law has required certain employers to provide break time and a place for employees to express breast milk at work (pumping). The federal law provides that employees who work for employers covered by the Fair Labor Standards Act (FLSA) and are not exempt from section 7, which sets forth the FLSA's overtime pay requirements, are entitled to pumping breaks. While employers are not required under the FLSA to provide breaks to nursing mothers who are exempt from the requirements of section 7, they may be obligated to provide such breaks under State laws. The Department of Labor, however, encourages employers to provide breaks to all nursing mothers regardless of their status under the FLSA. The law states that employers must provide a "reasonable" amount of time and that they must provide a private space other than a bathroom. They are required to provide this until the employee's baby turns one year old. The designated space must be completely private so that no one can see inside the space and no one is able to enter the space while it is being used. It also must be "functional [useable] as a space for expressing breast milk." Some considerations may be whether there are working electrical outlets for pumps, a table on which to place the pumping equipment, a chair, etc. Employers are not required to create a permanent dedicated space for breastfeeding employees. For many employees who have a private office, such a space is ideal for pumping. For employees who do not have their own private office or dedicated pumping room, providing access to a conference room or manager's office are alternatives. Under the ACA, an employer shall not be required to compensate an employee receiving reasonable break time for pumping. However, if the employer offers paid breaks and an employee uses that time to pump, the time should be paid in the usual way. Any extra time required to pump need not be paid. Although it is not specifically mentioned in the ACA, storage of pumped breastmilk is a big concern for breastfeeding mothers. It is important to remember that expressed human milk is food. This "liquid gold" can be stored in a company refrigerator. The Centers for Disease Control and Prevention (CDC) and Occupational Safety and Health Administration (OSHA) do not classify human milk as a biohazard and as such, there are no health concerns associated with storage in a communal space. Under certain work conditions (e.g. in a restaurant setting), or because of an employee's personal preference, she might instead choose to store her milk in a personal cooler with ice packs or keep a personal refrigerator in her private office.

Illinois Pregnancy Accommodation Law

On January 1, 2015, the Illinois Pregnancy Accommodation Law became effective. The law applies to every employer in the state with one or more employees and covers workers (full-time, part-time and those on probation) and applicants who are pregnant or who become pregnant. The law requires employers to make reasonable accommodations for a pregnant employee even if her impairment does not meet the official test to be determined a "disability." Some examples of accommodations under this state law include:

- More frequent or longer bathroom breaks;
- Breaks for increased water intake;
- Breaks for periodic rests;
- Private non-bathroom space for expressing breast milk and breastfeeding;
- Seating;
- Assistance with manual labor;
- Light duty;

- Temporary transfer to a less strenuous or hazardous position;
- The provision of an accessible worksite;
- Acquisition or modification of equipment;
- Job restructuring;
- A part-time or modified work schedule;
- Appropriate adjustment or modifications of examinations, training materials, or policies;
- Reassignment to a vacant position;
- Time off to recover from pregnancy; and
- Leave necessitated by pregnancy.

An employer additionally cannot force an accommodation on a pregnant employee who has not requested one. For example, an employer is prohibited from forcing a pregnant employee to take leave before she is ready. After an employee does take leave, the law requires employers to reinstate the employee to her original job or to an equivalent position, unless the employer can demonstrate that doing so would impose an undue hardship. ADA

Pregnancy alone is not considered a disability for purposes of the Americans with Disabilities Act (ADA). Some health conditions resulting from pregnancy, however, may be considered disabilities under the ADA. An employer therefore may be legally required to provide a reasonable accommodation for a disability related to pregnancy under the same standard as it would for any other disabled employee. Remember, disabilities related to pregnancy are not limited to those which are physically manifested. For example, many women experience postpartum depression after giving birth, which has been considered a disability under the ADA according to case law.

Flex-Time Schedules

Although not required by law, the implementation of flex-time schedules, especially for new mothers, has been a popular alternative to the traditional 9-5 schedule. Flex schedules may allow workers to adjust their start and finish times, work remotely, or work on a part-time basis. The FMLA is the only current federal law which provides leave to mothers (and does not even apply to employers with less than 50 employees). Under the FMLA, new mothers are required to return to work after a mere 12 weeks of (unpaid) leave. For many women, this concept is difficult to accept when facing the prospect of returning to work full-time shortly after childbirth. Flex schedules are becoming increasingly attractive for many reasons, including softening the physical and emotional tolls associated with childbirth. Employers who are open to this concept may find that employees who are on flex schedules are just as productive, if not more productive, than employees working traditional schedules. Flex schedules, based on my own experience, also can increase morale. Knowing that I have a couple days a week to be home with my son has greatly impacted my positivity while in the office. It also makes me appreciate my employer that much more for affording me with the opportunity to work a flex schedule. These factors are important to consider when employers seek to retain a strong female workforce.

Practice Tip:

Compliance with pregnancy-related state and federal laws is the floor, not the ceiling, when it comes to retaining your female workforce. Companies are in no way restricted from providing additional (and paid) leave to its pregnant employees, as well as other benefits. If your organization needs assistance in reviewing your current policies to ensure compliance with the laws referenced above, or any other related laws and regulations, please contact us.

Employer Gets "Cat's Pawed" For $350,000

On March 28, 2018, the Sixth Circuit U.S. Court of Appeals, whose jurisdiction includes Tennessee, upheld a jury's $350,000 award under Title VII to a Michigan State Police sergeant who claimed she was retaliated against for making internal sexual harassment complaints. The sergeant, who had made two sexual harassment complaints against her supervisor (both found by the Department to be without merit), alleged that the Department retaliated against her by transferring her from her longtime post to a post 180 miles away. In *Mys v. Michigan Department of State Police*, No. 17-1445 (6th Cir. 2018), the court of appeals of appeals held that the Department was liable for unlawful retaliation even though the Department's Transfer Review Board made the transfer decision, rather than the supervisor who was the subject of the harassment complaints. The key to the court's decision was that, even though the accused supervisor was not involved in the Board's decision, he initiated the process that culminated in the decision.

The supervisor's unlawful intent was made clear by his own words when he told both his superior and the Human Resources Department that the sergeant's harassment complaints had created a "hostile work environment" at the sergeant's current post that undermined both "the continued effective operation" and the complaining sergeant's "credibility". Applying what is known as the "cat's paw" theory of liability (which the court explained to be "a reference to one of *Aesop's Fables* in which a monkey tricks a cat into pulling a chestnut out of a fire for him"), the court held that the Department was liable because the supervisor's retaliatory animus was the proximate cause of the transfer decision.

Practice Tip:

To ensure that decisions negatively affecting employees are free of discriminatory intent, employers must look not only at the records of the decision makers but also of everyone who initiated, recommended or otherwise may have caused the decisions to be made. An example would be a false incident report written by a discriminatory supervisor which results in an innocent manager's decision to discipline or discharge an employee.

The court of appeals reminded employers that when an employee's supervisor retaliates against an employee, the employer is automatically liable for the supervisor's unlawful action. And, "supervisors" are not just people whose titles are "supervisor" or "manager". As the court explained, a supervisor for these purposes is anyone who "is empowered by the employer to take tangible employment actions against the victim." An example would be an hourly lead person who can effectively recommend hiring, firing, or disciplining employees. That is why comprehensive employment law training for all managers, supervisors and employees who might be considered "supervisors" legally is an absolute must for employers.

EEOC Appoints New Memphis District Director

On April 2, 2018, the federal Equal Opportunity in Employment Commission announced that Delner Franklin-Thomas will become the new District Director of the EEOC's Memphis, Tennessee district office. The Memphis district includes all of Tennessee and Arkansas as well as northern Mississippi. Ms. Franklin-Thomas has been District Director of the EEOC's Birmingham, Alabama district since 2006 and will continue as Acting District Director of that office.

Franklin-Thomas, who grew up near Memphis, has been with the EEOC for 28 years, holding the positions of trial attorney and Regional Attorney before becoming the Birmingham District Director. Throughout her career at the EEOC, Franklin-Thomas has aggressively pursued litigation against employers under the various federal employment discrimination statutes. Cary Schwimmer, who oversees Bryce Downey & Lenkov LLC's Memphis office, expects to see Franklin-Thomas continue her vigorous approach to enforcement of the anti-discrimination laws in her new role as the EEOC's Memphis District Director.

Cary Schwimmer has successfully represented employers in litigation and other employment matters throughout Tennessee, the rest of the Southeast, including Arkansas, Alabama, Mississippi, Kentucky, Florida, Louisiana, Georgia, North Carolina, and South Carolina, and in Tennessee's neighboring state of Missouri.

Senate Confirms Last NLRB Vacancy

On April 11, 2018, the U.S. Senate confirmed John Ring, of Morgan Lewis & Bockius LLP, to fill the agency's last vacant seat and restoring it to a full five-member board. Ring will join other new Republican members, William Emanuel, a former shareholder at Littler Mendelson, and Marvin Kaplan, a former Occupational Safety and Health Review Commission lawyer (OSHA).

Since the recent appointments by President Trump, the board is now majority Republican and is expected to continue its pro-business agenda. As we have mentioned in a prior article (See Labor & Employment Newsletter September 2017), it is likely that this new board will reverse a number of controversial pro-labor positions taken by the NLRB under the Obama administration. For example, under the Obama administration, the NLRB ruled in favor of employees in many cases involving Section 7 rights–that is, employees' rights to engage in protected, concerted activity—significantly expanding what constitutes protected activity and limiting employers' right to control employee speech and activity. We would expect that we will begin to see a shift in these types of decisions over time.

Contributors to the May 2018 Labor & Employment Newsletter

The Bryce Downey & Lenkov attorneys who contributed to this newsletter were Storrs Downey, Jessica Jackler, Timothy Furman and Cary Schwimmer.

Firm News

Storrs Downey obtained from the Illinois Department of Human Rights a finding of a lack of substantial evidence to support a claim of alleged harassment and disability (mental) discrimination arising out of an underperforming employee's termination.

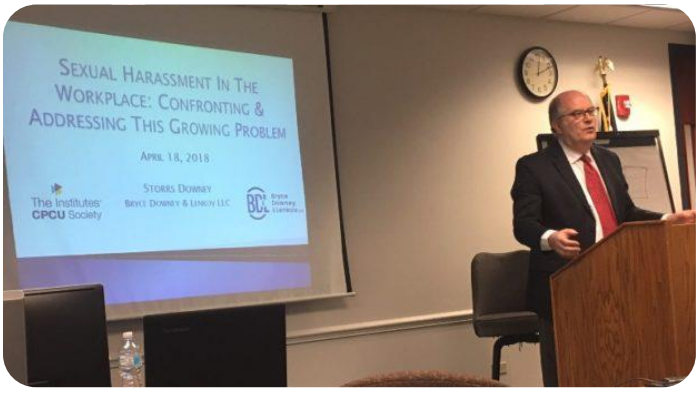
After a grueling eight hour mediation. Storrs was successful in settling an age and gender discrimination claim before the EEOC for less than 5% of the initial six figure demand.

IMA Small Manufacturers Council Meeting

On 2/2/18, Storrs Downey presented **"Sexual Harassment in the Workplace"** at the Illinois Manufacturers' Association Small Manufacturers Council Meeting in Oak Brook, IL. Presentation covered: Identifying sexual harassment, investigating sexual harassment and workforce training on company policy.

Storrs Downey Presents to The Institutes CPCU Society

On 4/18/18, Storrs Downey presented **"Sexual Harassment in The Workplace: Confronting & Addressing This Growing Problem"** at The Institutes CPCU Society monthly member meeting. Presentation covered: Identifying sexual harassment, investigating sexual harassment and workforce training on company policy.



Upcoming Seminars

- On **5/23/18**, Rich Lenkov will participate in "Navigating Mild Traumatic Brain Injury Cases In The Workers' Compensation Environment" at the 2018 CLM & Business Insurance Workers' Compensation Conference. For more information or to register, click here.

- On **5/23/18**, Tricia Bellich will participate in "Premium--It's Not Just About Price!" at the 2018 CLM & Business Insurance Workers' Compensation Conference. For more information or to register, click here.

- On **8/9/18**, Storrs Downey will present "Ethical Issues in Employment Law" at the National Business Institute's *Indiana Emlpoyment Seminar*. For more information or to register, click here.

Cutting Edge Legal Education

If you would like us to come in for a free seminar, click here or email Storrs Downey at sdowney@bdlfirm.com

Our attorneys regularly provide free seminars on a wide range of labor and employment law topics. We speak to a few people or dozens, to companies of all sizes and large national organizations. Among the national conference at which we've presented:

- 12th Annual Employment Practices Liability Insurance ExecuSummit
- National Association of Security Companies (NASCO)
- American Conference Institute (ACI)
- 12th Annual Employment Practices Liability Insurance ExecuSummit
- National Association of Security Companies (NASCO)
- American Conference Institute (ACI)
- Claims and Litigation Management Alliance Annual Conference
- CLM Retail, Restaurant & Hospitality Committee Mini-conference
- National Workers' Compensation and Disability Conference® & Expo
- SEAK Annual National Workers' Compensation and Occupational Medicine Conference
- RIMS Annual Conference

Some of our previous seminars include:

- Religious & Disability Discrimination & Accomodations.
- Recent DOL & NLRB Developments.
- Approaching LGBT Issues In Today's Workplace.
- Hiring Do's And Don'ts (With Video Examples).
- Is your Independent Contractor Actually An Employee?

- 10 Tricky Employment Termination Questions Answered.
- Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace.
- Employment Law Issues Every Workers' Compensation Professional Needs To Know About.

Other Newsletters

Bryce Downey & Lenkov regularly issues several practice area newsletters. If you would like a copy of any of the below articles from other BDL newsletters, please contact us.

General Liability

- Indiana Court Of Appeals Holds Children's Claims Are Not Time Barred As Derivative Claims In A Medical Malpractice Action
- Illinois Supreme Court Holds Six Person Jury Limitation Unconstitutional

Corporate & Construction

- Will Interest Rates Rise? Economic Slow Down? Time To Talk To Your Banker
- Parties May Be Entitled To A Lien Even If The Project Never Proceeds

Workers' Compensation

- Wage Differential May Not Necessarily Require Wage Loss
- Accident Date Trumps Hearing Date In Wage-Diff Award
- Collateral Source Rule Does Not Apply To Workers' Compensation Cases

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