Southeast Idaho SHRM Employment Law Conference

OCTOBER 19, 2023 | HOLIDAY INN & SUITES | IDAHO FALLS

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Presentations:

Employment Law Update Part I
8 – 9 a.m.

Employment Law Update Part II
9:15 – 10:15 a.m.

How Managers Who Are Sure They're Right Still Get it Wrong: Case Studies in Lessons Learned Too Late
10:30– 11:30 a.m.

A *Different* LEGAL PERSPECTIVE

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Southeast Idaho Chapter of SHRM

The premier Human Resources Professional Organization in SE Idaho

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A Professional Law Corporation

2023 Employment Law Update Southeast Idaho SHRM

October 19, 2023

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Semi-Monthly Employment Law Update

Oct. 27, 2022

Content

- Halloween Edition—What Really Scares Employers?
- Employers are Spooked by Unexpected/Unknown Changes in the Rules
- Employers Fear Unexpected Liability
- Employers Worry About Sexual Harassment at Work
- Employers are Terrified at the Disruption and Expense of Employment Law Non-Compliance

Halloween Edition—What Really Scares Employers?

Happy All Hallows Eve! Our annual Halloween edition of the Parsons Behle & Latimer employment law update is full of scary

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Michael O'Brien is a seasoned employment attorney who provides daily counsel to clients as well as representing clients in matters of civil rights, harassment, discrimination, litigation and compliance with federal employment

Dec. 13, 2022

Content

- Unionization Trending
- New Tenth Circuit Law Dismissing a Discrimination Case
- Proposed Law Regarding Caregiving
- Question Corner

Unionization Trending

You have undoubtedly heard more and more about employees forming unions. In Utah, the big news has been Starbucks employees unionizing, beginning with the Cottonwood Heights Starbucks. After that, a barista who helped lead the union effort claims he was terminated in retaliation for leading the effort. Then a group of Starbucks employees joined a nationwide, one-day strike. The strike was on Red Cup Day (when Starbucks gives out free red cups).

Before you choke on your latte (single shot, half sweet, 2% milk for me please), there are things you can do. First, the number one step an employer can take to avoid unionization is to listen to employees and improve working conditions. Second, talk to a lawyer about what you can do legally to prevent unionization. Third, if there are

Employment & Labor Team Spotlight

Christina M. Jepson
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Christina M. Jepson is Parsons' Diversity, Equity & Inclusion director and past Employment & Labor practice team chairperson. She regularly speaks in client and community forums on DE&I as well as helps clients build their DE&I plans. A shareholder at

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(newest generation)

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Legal Disclaimer

This presentation is based on available information as of October 19, 2023, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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Agenda

8 - 9 AM: Employment Law Update Part I

9 - 9:15 AM: Break

9:15 - 10:15 AM: Employment Law Update Part II

10:15 - 10:30 AM: Break

10:30 - 11:30 AM: How Managers Who Are Sure They're Right Still Get it Wrong: Case Studies in Lessons Learned Too Late

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Remote and Flexible Work
ADA Accommodations in the wake of COVID-19

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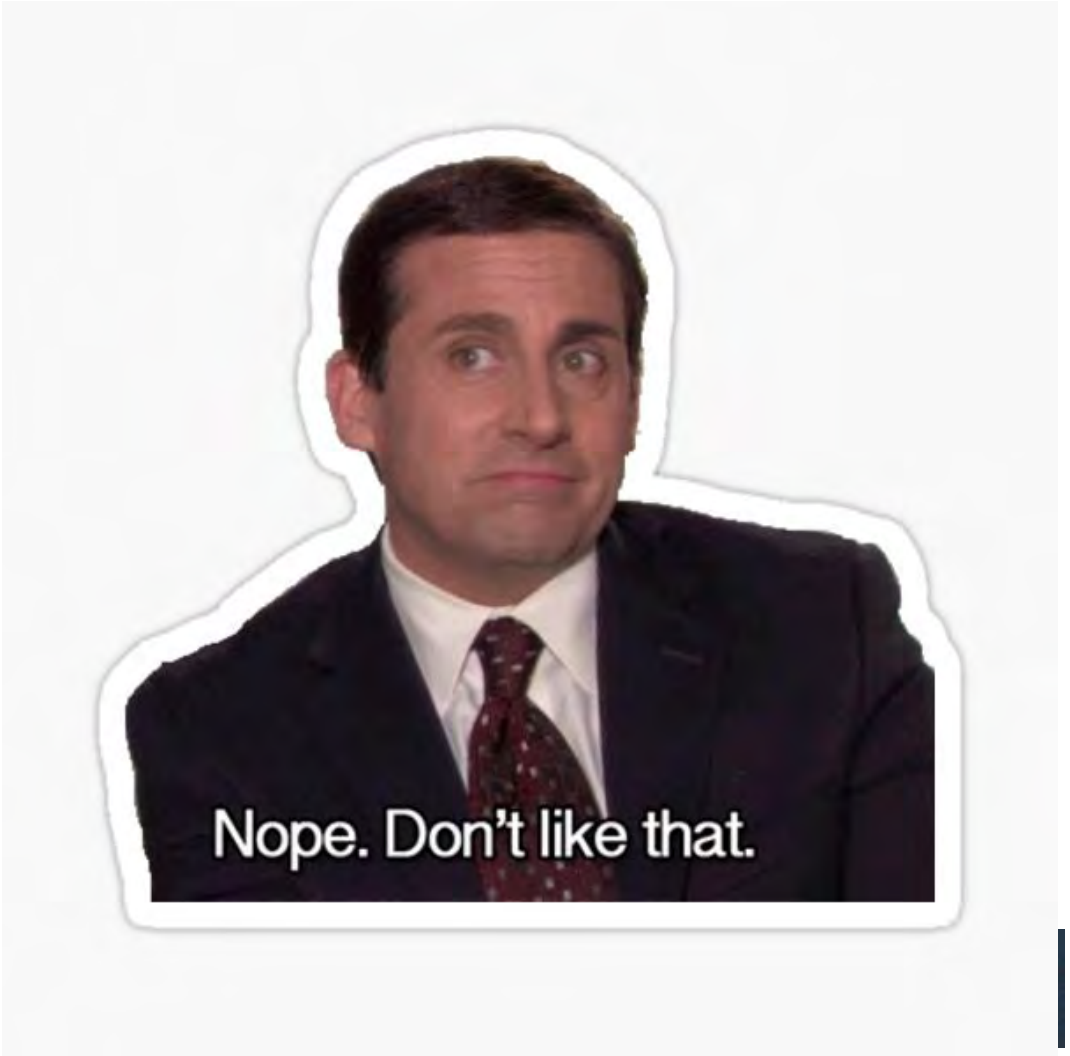
Mark D. Tolman

What if your company doesn’t like remote or flexible work arrangements?

- If an employee simply prefers remote or flexible work, you may simply tell them no.
- But if an employee cannot work onsite for health reasons—physical (e.g., immunocompromised conditions) or mental (e.g., anxiety or depression)—the employee may be eligible for leave under the **Family & Medical Leave Act (FMLA)** or an accommodation under the **Americans with Disabilities Act (ADA)** and related state law.



Employees Who Resist Onsite Work

- Recall that under the ADA, you do not need to excuse an essential job function as an accommodation.
- As a result, if onsite work is essential, you do not need to excuse it for an employee who cannot return to onsite work because of a disability (although you may need to provide other accommodations).
- Anticipate that employees may claim that onsite work is non-essential and head those arguments off with clear communication.

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Flexible Work Case Study

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Lamm v. DeVaughn James, LLC

Lamm v. DeVaughn James, LLC, 2022 WL 353500 (10th Cir. Feb. 7 2022)

The *Lamm* case provides insight on two important issues:

The distinction between remote work and leave accommodations.

Whether employers need to excuse “regular and predictable” attendance requirements under the ADA.

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Lamm v. DeVaughn James, LLC

What happened in 2016?

Allison Lamm worked for DJ as a litigation case manager.

She was diagnosed with Generalized Anxiety Disorder ("GAD") and panic attacks in May 2016.

She asked to be permitted to work half-days "on the days that [she] experience[s] intense anxiety" as an accommodation under the ADA. She could not predict when such flareups would occur.

The Firm denied that request. After additional absences, it terminated Allison's employment.

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Lamm v. DeVaughn James, LLC

A trial court dismissed Lamm's case and she appealed.

On appeal, the firm argued that Lamm was not qualified to perform an essential function of her job—***regular and predictable attendance***.

Lamm contended that her physical presence in the office was not an essential function.

Lamm v. DeVaughn James, LLC

"Lamm's focus on physical presence in the office is a red herring because she did not ask to work remotely, but to simply *not work* for half the day when she was feeling overwhelmed by her anxiety on a unilateral as-needed basis and with no advance notice to her employer."

The Court held that Lamm's request for "indefinite" flexibility to work half-days whenever she was experiencing anxiety was "unreasonable."

"The accommodation Lamm proposed—not working for half days—would do nothing to enable her to fulfill the essential functions of her job," i.e., to regularly and predictably work full days.

Because Lamm could not perform the essential functions of her job, and no reasonable accommodation was available, she was not a "qualified individual" under the ADA.

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Lamm v. DeVaughn James, LLC

Key Takeaways

Indefinite attendance flexibility likely is not required for most jobs.

Regular and predictable work likely is essential for most jobs.

But note the distinction between the ADA and the FMLA—your ability to deny unpredictable flare up leave is limited under the FMLA.

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Remote Work Case Study

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Case Study: Remote Work as an Accommodation Mobley v. St. Luke Health—8th Cir. 2022

Mobley v. St. Luke Health System, Inc., 53 F.4th 452 (8th Cir. 2022)

- Joseph Mobley worked as a Patient Access Supervisor for the St. Luke's Hospital system in Kansas City, MO.
- He supervised a team of customer service employees who assisted patients with insurance questions via telephone.
- Like all other supervisors, Joseph worked a hybrid schedule—three days onsite and two days remote.
- The Hospital expected Joseph to work three days onsite to supervise.

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Case Study: Remote Work as an Accommodation Mobley v. St. Luke Health—8th Cir. 2022

- Mobley suffers from Multiple Sclerosis.
- He asked for an accommodation of additional time at home during MS flareups.
- The Hospital denied Mobley's request on the ground that onsite work was essential for Mobley to effectively supervise his team.
- But the Hospital offered an alternative accommodation—leave when needed for flareups.

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Case Study: Remote Work as an Accommodation Mobley v. St. Luke Health—8th Cir.

Mobley resigned and sued his employer, alleging that it had failed to accommodate his disability as required by the ADA.

The hospital's argument. The Hospital asked the court to enter summary judgment dismissing Mobley's claims instead of moving forward with a jury trial, on the grounds that: (a) onsite work was essential, and (b) it provided an alternative leave accommodation.

The trial court's decision. The district court sided with the Hospital, ruling that it saw no "continuous pattern of discriminatory conduct or a change in job responsibilities." Mobley appealed.

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Case Study: Remote Work as an Accommodation Mobley v. St. Luke Health—8th Cir.

A mixed ruling on appeal. The 8th Circuit rejected the Hospital's argument that onsite work was essential.

The Court noted that the Hospital offered only its own conclusory opinion that onsite work was essential and failed to provide evidence that Joseph could not effectively perform all essential functions remotely.

> By allowing Mobley to consistently work remotely aside from his medical condition, St. Luke's implicitly demonstrated a belief that he could perform his essential job functions without being in the office all the time. Moreover, while working remotely, Mobley continued to receive positive performance reviews, reflecting that he was able to effectively supervise his employees despite not being on site.

However, the Court still found in favor of the Hospital because it agreed that the Hospital provided an alternative leave accommodation.

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Case Study: Remote Work as an Accommodation Mobley v. St. Luke Health—8th Cir.

Takeaways

If you provide a hybrid schedule of telework and onsite work, you may face steeper challenges to deny an ADA accommodation for additional telework.

If you deny a telework accommodation request because you deem onsite work essential, document the specific ways that onsite work is essential.

Better yet, plan ahead by documenting the essential nature of onsite work in your **job descriptions.**

If you provide a provisional telework accommodation, document that you are temporarily excusing some essential job functions and provide that context in your performance reviews.

Always analyze alternative accommodations, including leave and reassignment to a vacant position, before closing out your accommodation analysis.

Congressional Update

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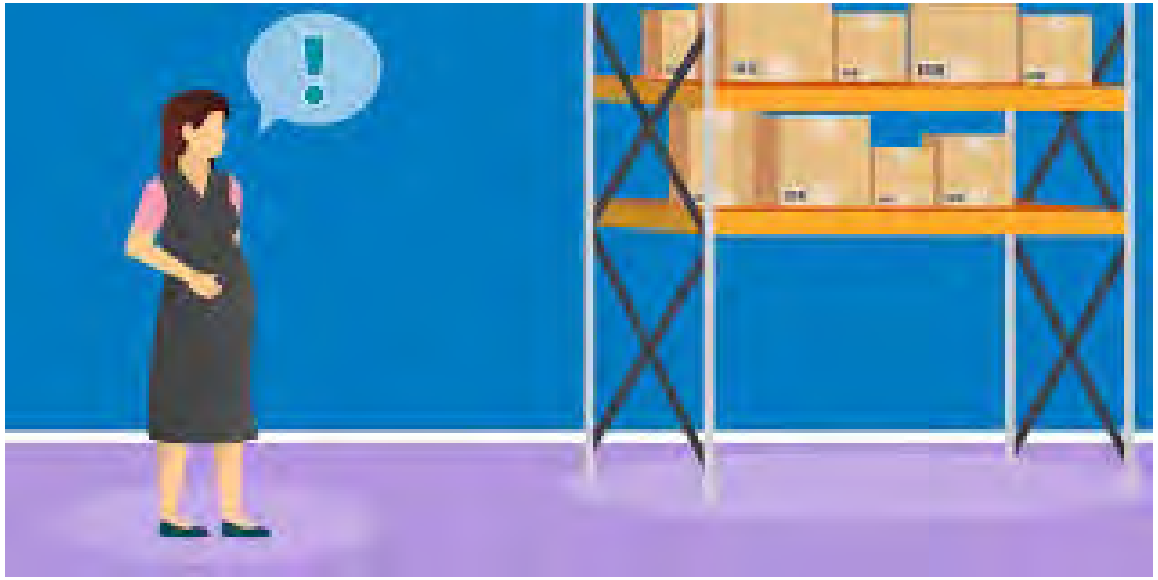
Pregnant Workers Fairness Act & PUMP Act



On December 22, 2022, Congress passed two significant equal opportunity laws that give pregnancy and childbirth issues disability-like protection:

***Pregnant Workers Fairness Act (PWFA)**

***Providing Urgent Maternal Protections for Nursing Mothers Act (the "PUMP Act")**

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Pregnant Workers Fairness Act

- The PWFA requires that employers with at least 15 employees must provide reasonable accommodations for pregnant applicants and employees that are needed for pregnancy, childbirth and related medical conditions.

    - For example, accommodations might include light duty work, a water bottle, a stool/chair, and additional restroom breaks.

- The PWFA is effective June 27, 2023.

Pregnant Workers Fairness Act

- The EEOC recently issued proposed regulations to implement the Pregnant Workers Fairness Act.
- The Act requires employers to make reasonable accommodation and adjustments in the workplace if necessary to enable pregnant employees do their job.
- The public had 60 days, through October 10, 2023, to comment on the proposed rules.

Pregnant Workers Fairness Act

- The proposed rules identify four accommodations that should be granted in almost every circumstance: allowing covered employees (1) to have extra time for bathroom breaks; (2) to have food and drink breaks; (3) to drink water on the job; and (4) to sit or stand as necessary.

Pregnant Workers Fairness Act

- The proposed rule contains a “non-exhaustive list” of conditions covered by the Act which includes current pregnancy, past pregnancy, potential pregnancy, lactation (breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth and “having or choosing not to have an abortion.” The proposed rule also states that the Act covers postpartum anxiety and depression.
- The EEOC began accepting charges claiming violations of the Act on June 27, 2023.

PUMP Act

- The PUMP Act amends the Fair Labor Standards Act, with an effective date of December 29, 2022.

    - This law requires employers provide new mothers with reasonable breaktime to express breast milk for the employee's nursing child for one year after childbirth.

    - Employers also must provide a private place (other than a bathroom) to express breastmilk.

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PUMP Act

Is breaktime under the PUMP Act paid or unpaid?

- For non-exempt (hourly) employees, breaktime is unpaid (unless pay is required by another law, e.g., FLSA breaks and meal periods regs, state laws, etc.).
- For exempt (salaried) employees, breaktime is paid, i.e., you cannot dock salary for these breaks.

Small Employer Exception: an employer with fewer than 50 employees is exempt from the PUMP Act if compliance would cause an undue hardship (significant difficulty or expense).

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Equal Employment Opportunity Commission Enforcement Update

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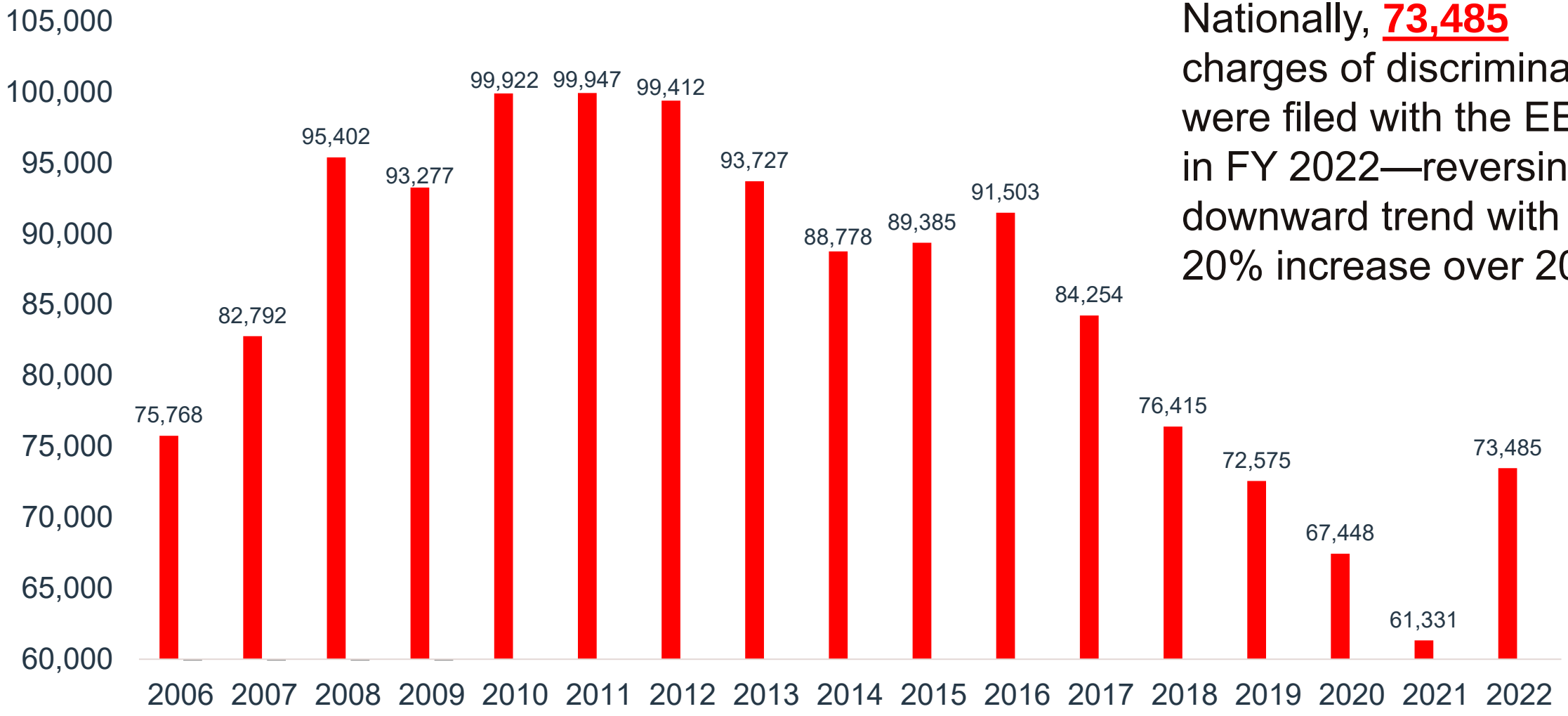
Looking Back: EEOC Charge Data (Updated March 2023)



Nationally, **73,485** charges of discrimination were filed with the EEOC in FY 2022—reversing a downward trend with a 20% increase over 2021.

Looking Back: EEOC/UALD Charge Statistics

www.eeoc.gov/statistics/enforcement-and-litigation-statistics

In 2022, the top 5 charges of discrimination **nationally** were:

Retaliation (52%)

Disability (34%)

Race (28%)

Sex (27%)

Age (16%)

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Looking Back: IHRC 2021 Charge Statistics

The EEOC only received 76 charges directly from Idaho employees last year.

Employees in Idaho also may file discrimination charges with the Idaho Human Rights Commission.

231 Idaho employees filed with IHRC in 2021 (the last reported year by IHRC).

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Looking Back: IHRC 2021 Charge Statistics

Although IHRC charges are concurrently filed with the EEOC, IHRC tracks the data.

In 2021, the top 5 most commonly-filed charges with IHCR were:

- **Disability (37%)**
- **Sex (36%)**
- **Retaliation (27%)**
- **Age (17%)**
- **National Origin (11%)**

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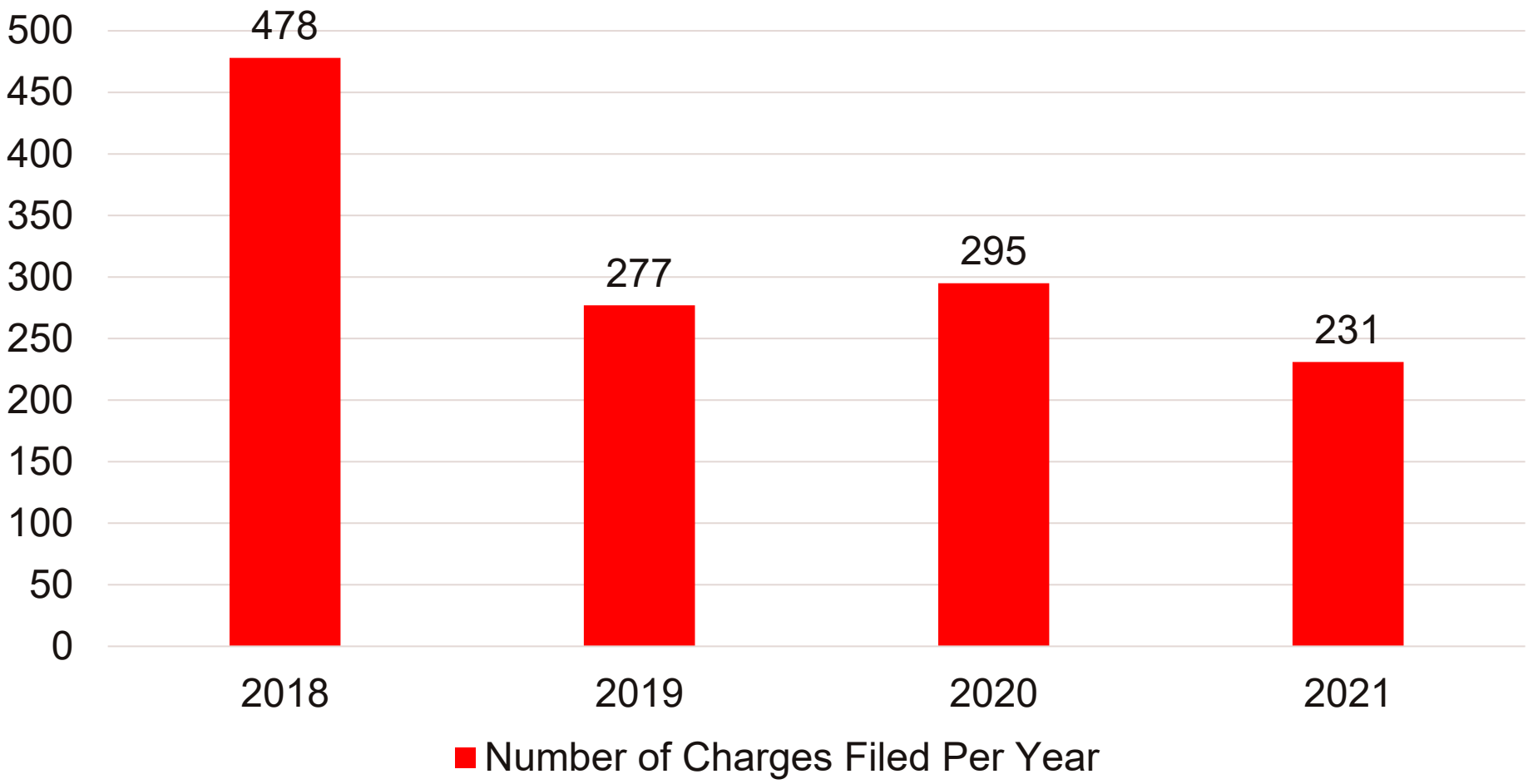
Looking Back: Charges Filed at the IHRC



https://humanrights.idaho.gov/wp-content/uploads/2022/03/FY2021_Statistic_Measures.pdf

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Back to the EEOC: EEOC weighs in on AI Applicant Screening Tools

- Some AI software claims to have eliminated bias as to race, gender, and other classes protected under Title VII
- The EEOC has concerns about those claims and has issued a strong warning about AI screening, with an emphasis on avoiding disability discrimination.

EEOC Warning on AI Screening

Employers now have a wide variety of computer-based tools available to assist them in hiring workers . . . . Employers may utilize these tools in an attempt to save time and effort, increase objectivity, or decrease bias. ***However, the use of these tools may disadvantage job applicants and employees with disabilities****. When this occurs, employers may risk violating federal [EEO] laws that protect individuals with disabilities.*

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New Screening Tool: AI Software

- Here are some examples from the EEOC:
  - Administering a knowledge test that requires the use of a keyboard, trackpad, or other manual input devices—especially if the responses are timed.
  - A chatbot designed to engage in communications online and through texts and emails that is programmed to reject all applicants who have a gap in employment history, without checking to see if the gap was caused by a disability.
  - Video interview software that analyzes applicants' speech patterns in order to reach conclusions about their ability to solve problems, which might not score an applicant fairly if the applicant has a speech impediment that causes significant differences in speech patterns.
  - Gamified tests to measure abilities and personality traits, which require a 90% score, might be unfair for blind applicants.

New Screening Tool: AI Software

- What are the key takeaways from the EEOC's guidance?
  - Inform applicants ahead of time what steps an evaluation process will include.
  - Provide a clear way for applicants to request a reasonable accommodation, e.g., providing an alternative test.
- Employer might be liable for AI software vendor's actions…
  - If applicant asks for a reasonable accommodation and doesn't receive it, employer might be held liable
  - Even if it was the software vendor that rejects
  - Even if the employer was unaware that the applicant reported a problem to the vendor

Under the FLSA, Salary Means Salary: Highly Compensated Employees Entitled to Overtime

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Salaried Employees

- Most common misconception we run across
- I pay Employee X a salary, they are not entitled to overtime, right? Right?
- Exemptions – salary (of at least $684 per week) plus duties
  - Executive
  - Administrative
  - IT
  - Professional
- Outside sales

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Salaried Employees and the FLSA

- Salary means Salary
- *Helix Energy Solutions Group v. Hewitt*
- Facts
  - The employee, Michael Hewitt, a “tool pusher” working for Helix Energy Solutions Group on an offshore oil rig
  - Hewitt reported to the rig’s captain and oversaw 12-14 workers
  - He typically worked 84 hours per week, seven days a week for a 28-day “hitch,” after which he had 28 days off

Salaried Employees and the FLSA

- *Helix Energy v. Hewitt* Facts (cont.)
  - Hewitt was compensated on a daily-rate basis with no overtime
  - The daily rate ranged from $963 (the minimum) to $1,341
  - Under this compensation scheme, he earned more than $200,000 annually
- The Company argued, and two Justices agreed, that if he was paid a minimum of $963 a day, then he obviously was paid a guaranteed amount of $684 per week, so he is exempt (executive)
- Six Justices said No – the regulations measure the salary per week and he was paid on a daily, not weekly, basis

Salaried Employees and the FLSA

- The Act defines “salary” as a “predetermined amount,” which must be paid “without regard to the number of days or hours worked”
- The Court found that “by definition,” a daily-rate worker is “paid for each day he works and no others,” rendering him non-exempt under the Act
- The Court found that Helix could come into compliance by adding a weekly guaranteed rate or paying Hewitt a weekly salary, but that the company’s current structure (though generous) violated FLSA

What's New from the Federal Trade Commission?

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Federal Trade Commission (FTC) Proposes Rule to Ban Noncompete Agreements

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The Biden Administration Wants to "Curtail" Noncompete Agreements

July 2021—Pres. Biden signed an Executive Order calling on the FTC to "**curtail the unfair use of non-compete clauses** and other clauses or agreements that may unfairly limit worker mobility."

The Executive Order did not actually change the law on non-competes

We've been waiting on the FTC to engage in rulemaking.

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FTC Proposes Rule to Ban Noncompete Clauses

On January 5, 2023, the FTC published its Notice of Proposed Rulemaking (NPRM) to ban noncompete clauses.

- A company may NOT enter into or attempt to enter into a noncompete with a worker (both employees and independent contractors) >> so no **new** noncompetes
- A company may NOT maintain a noncompete with a worker >> so no **old** noncompetes
- A company may NOT represent to a worker that the worker is subject to a noncompete >> so no **pretending**

Must rescind existing noncompetes and actively inform workers that they are no longer in effect

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How Does FTC Define a Noncompete?

"Non-compete clause means a contractual term between an employer and a worker that prevents the worker from **seeking or accepting employment** with a person, or **operating a business**, after the conclusion of the worker's employment with the employer."

- Also, contractual clauses that have the **effect** of prohibiting the worker from seeking/accepting employment/operating a business
- In other words… no ***de facto*** noncompetes

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Examples of *De Facto* Noncompetes

- Non-disclosure agreements
  - Written so broadly that they effectively preclude the worker from working in the same field
- Payback clauses:
  - A contractual term that requires the worker to pay the employer or a third-party entity for training costs
  - The required payment is not reasonably related to the costs the employer incurred for training the worker

What about non-solicit clauses?

Are there any exceptions? ***Yes, when an owner/partner sells a business…but that's pretty much it, for now…***

Federal Trade Commission (FTC) to Propose New Regulation Governing Online Marketing

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FTC to Propose Rule to Combat Deceptive Reviews and Endorsement

The Federal Trade Commission announced in October that it is:

"[E]xploring a potential rule to combat deceptive or unfair review and endorsement practices…."

"Companies should know by now that fake reviews are illegal, but this scourge persists….We're exploring whether a rule that would trigger stiff civil penalties for violators would make the market fairer for consumers and honest businesses."

Categories of Deceptive/Unfair Practices FTC Wants to Target

- **Fake reviews**
- **Review-reuse fraud**
- **Paid reviews**
- **Review suppression**
- **Buying followers**
- **Insider reviews:** Reviews written by a company's executives or solicited from its employees **that don't mention their connections** to the company.

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Some Examples in the Employment Context

Q: *Can employees mention and review company products online?*

A: Yes, if the employee discloses the relationship. (No, listing the employer in profile isn't enough.)

Q: *Can employers ask employees to spread the buzz about company products?*

A: Yes, but…(1) don't ask employees to say anything that isn't true; and (2) instruct employees to disclose relationship.

Q: *What instruction should we give to employees? How much disclosure is required? Is "#employee" good enough?*

A: Consumers may be confused by "#employee." Better: "#[Company Name]_Employee." Best: Use the words "my company" or "employer's" in the body of the message.

Q: *Can employees use their personal social networks to "like" or "share" company posts without relationship disclosure?*

A: Maybe. If the post is akin to an ad, then relationship-disclosure is required. That's easy with a "share." It's hard with a "like."

"We realize that some platforms – like Facebook's "like" buttons – don't allow you to make a disclosure. [Companies] **shouldn't encourage** endorsements using features that don't allow for clear and conspicuous disclosures. Whether the [FTC] may take action would depend on the overall impression, including whether consumers take 'likes' to be material in their decision to patronize a business or buy a product."

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How Do You Stay out of Trouble with the FTC?

- **DISCLOSURE!**
- Tell your employees to be as clear as possible about their affiliation with the company

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Apple Airpods
(newest generation)

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The Supreme Court for Employers: Changes and Cautions from the 22-23 Term

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Religious Accommodation – Raising the Bar

Title VII of the Civil Rights Act of 1964 requires employers provide reasonable accommodations for their employees' religious beliefs and practices.

In late June 2023, the United States Supreme Court issued a decision in *Groff v. DeJoy*—a case that reset the standard for the burden an employer must meet in demonstrating that it is not required to grant an employee's request for a religious accommodation.

What *is* an "undue hardship"?

Religious Accommodation – Raising the Bar

An employee may seek an exception to a dress standard to allow for religious garb, or ask for a Saturday or Sunday off for worship, etc.

Courts have long maintained that employers must provide such religious accommodations unless the request imposes an "undue hardship," defined as "more than a de minimis cost."

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Religious Accommodation – Raising the Bar

Similarly, the Americans with Disabilities Act (ADA) requires employers provide disability accommodations unless an employee's request imposes an "undue hardship."

However, the standard for "undue hardship" under the ADA is far more stringent, requiring a showing of "significant difficulty or expense."

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Religious Accommodation – Raising the Bar

- The plaintiff, Gerald Groff worked for the U.S. Postal Service (USPS) and asked for Sundays off, asserting that his religion as an Evangelical Christian forbad Sunday work.
- USPS asked Goff's coworkers to voluntarily trade shifts with him, but that did not work.
- Ultimately, USPS denied Groff's request and then disciplined him when he missed work on Sundays. Groff resigned and filed suit.

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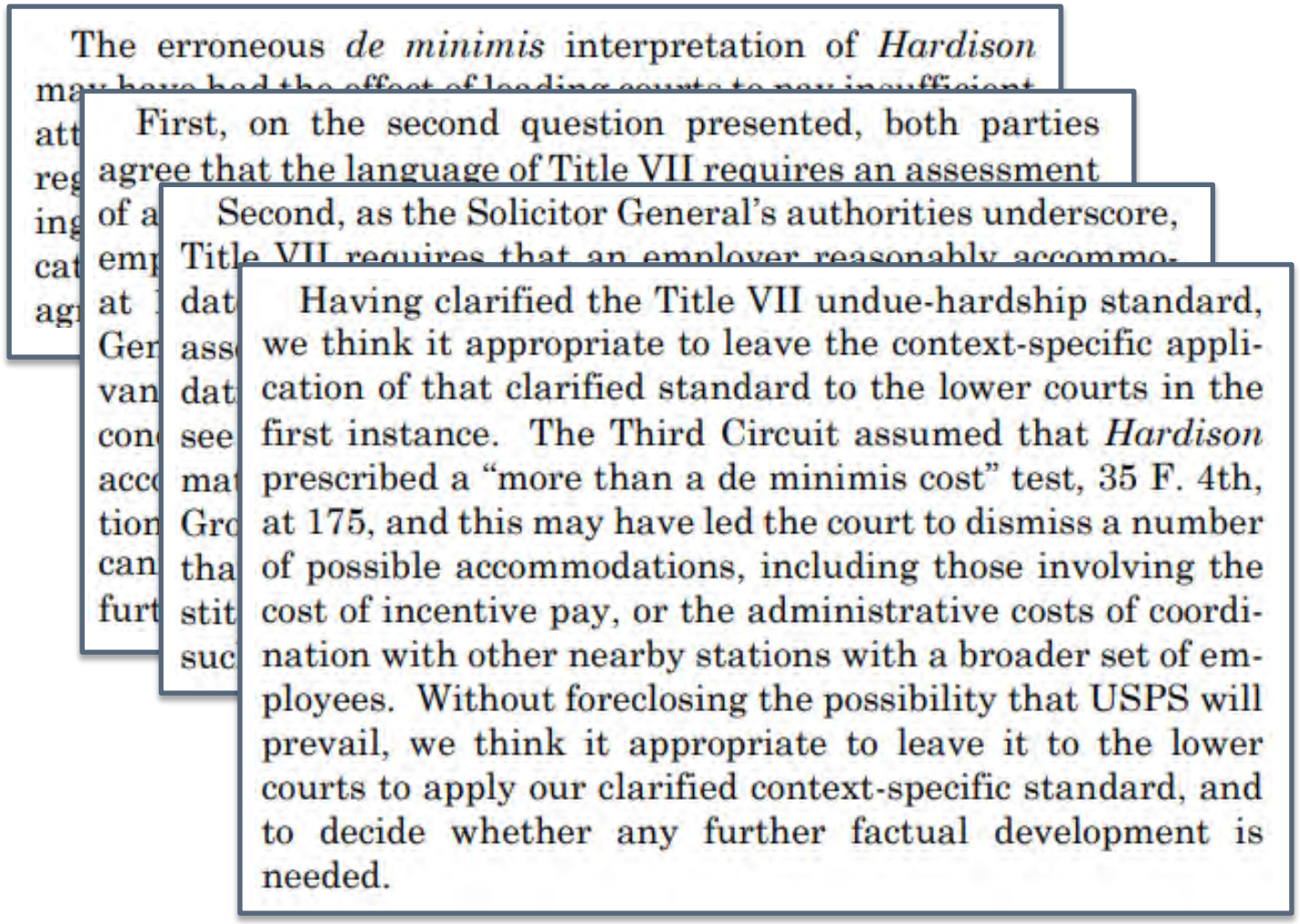
Religious Accommodation – Raising the Bar

A federal district court and appellate court found in favor of USPS because Groff's request for Sundays off imposed "more than a de minimis cost" because the request "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale."

But the Supreme Court reversed.

Religious Accommodation – Raising the Bar



The erroneous *de minimis* interpretation of *Hardison*

First, on the second question presented, both parties agree that the language of Title VII requires an assessment

Second, as the Solicitor General's authorities underscore,

Having clarified the Title VII undue-hardship standard, we think it appropriate to leave the context-specific application of that clarified standard to the lower courts in the first instance. The Third Circuit assumed that *Hardison* prescribed a "more than a de minimis cost" test, 35 F. 4th, at 175, and this may have led the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees. Without foreclosing the possibility that USPS will prevail, we think it appropriate to leave it to the lower courts to apply our clarified context-specific standard, and to decide whether any further factual development is needed.

Takeaways

The *de minimus* standard is out, but the work of making "context-specific" determinations of how to apply the undue-hardship standard has been left to the lower courts.

Be careful about "coworker impacts," and keep an eye on "reasonably accommodating *the practice*," not simply thinking about whether certain workplace changes are reasonable.

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What's Next for DEI Initiatives?

Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

That's Title VI, not Title VII.

But: Section 1981 of the Civil Rights Act of 1886 "offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship . . . ."

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What's Next for DEI Initiatives?

In *Students for Fair Admissions v. Harvard/UNC*, a nonprofit sued Harvard and UNC, "arguing that their race-based admissions programs violate Title VI and the Equal Protection Clause of the Fourteenth Amendments.

Lower courts found both admissions programs "permissible under the Equal Protection Clause and [the Supreme Court's] precedents."

PARSONS BEHLE & LATIMER

What's Next for DEI Initiatives?

After assessin pplicant's als along these lines, the reader es an bout whether the student should b d then "writes a comment defending nded decision." *Id.*, at 598 (internal quota ted). In making that decision, readers may o a "plus" based on their race, which "may be si individual case." *Id.*, at 601 issions decisio , "pro-visiona v. *Uni-versity* MDNC, Nov. 9,

The final stage of Harvard's process is called the "lop," during which the tentativel ted students is winnowed further at th ss. Any applicants that Harva rs this stage are placed on a "lop lis nly four pieces of information: legacy d athlete status, financial aid eligibility, 0 F. 3d, at 170. The full com to lop. 397 F. S e committee ce the lop pro is set. *Ibid.* I determinativ mitted African 78.

PARSONS BEHLE & LATIMER

What's Next for DEI Initiatives?

Although Title VI and Title VII have similar language, **affirmative action in the employment context is distinct from the education context** and governed by different rules and case law.

With very few exceptions, discussed below, an employer **cannot consider race or other protected characteristics when making decisions**.

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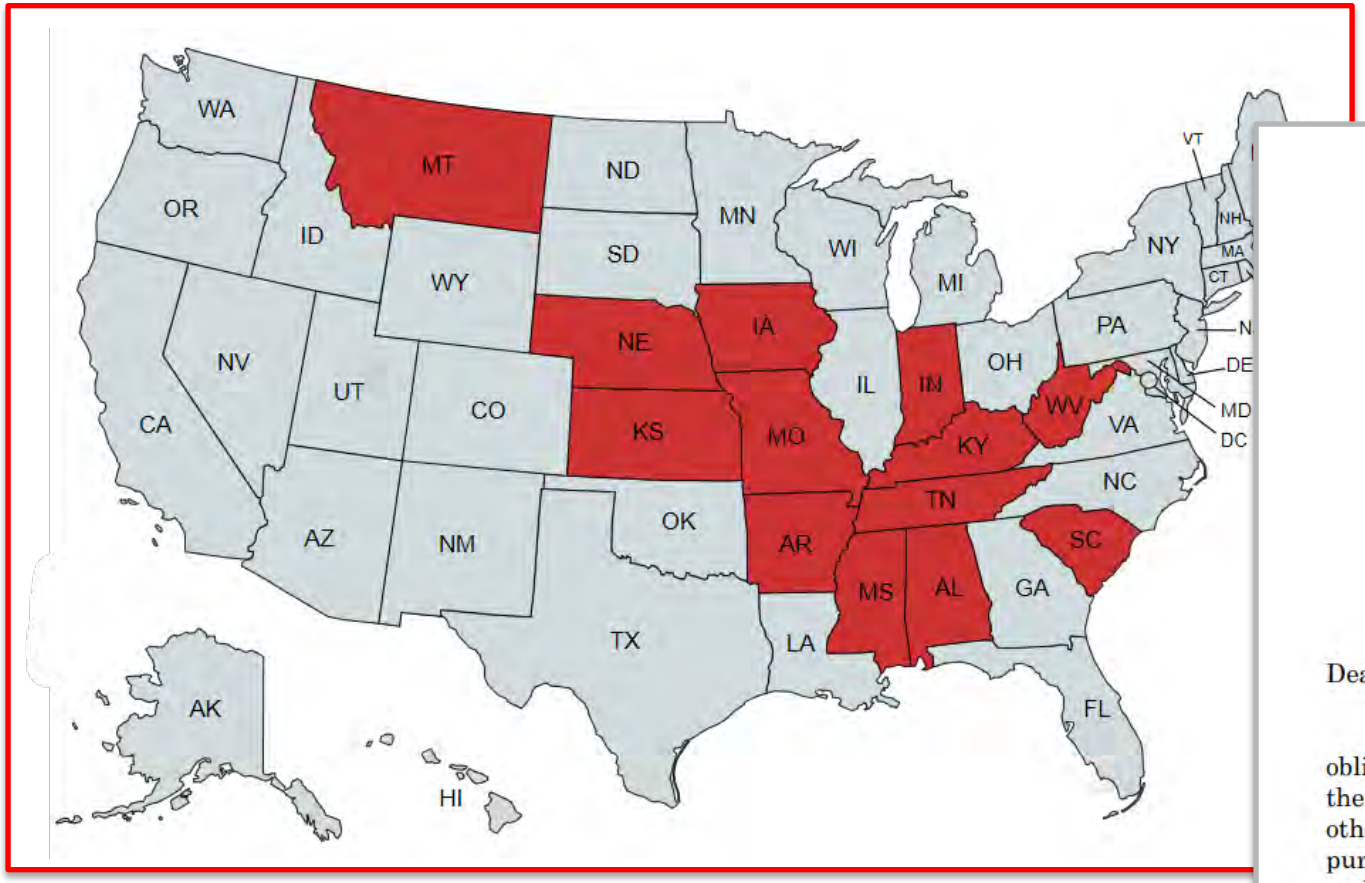
What's Next for DEI Initiatives?



July 13, 2023

Dear Fortune 100 CEOs:

We, the undersigned Attorneys General of 13 States, write to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of "diversity, equity, and inclusion" or otherwise. Treating people differently because of the color of their skin, even for benign purposes, is unlawful and wrong. Companies that engage in racial discrimination should and will face serious legal consequences.

PARSONS BEHLE & LATIMER

What's Next for DEI Initiatives?

AARON D. FORD
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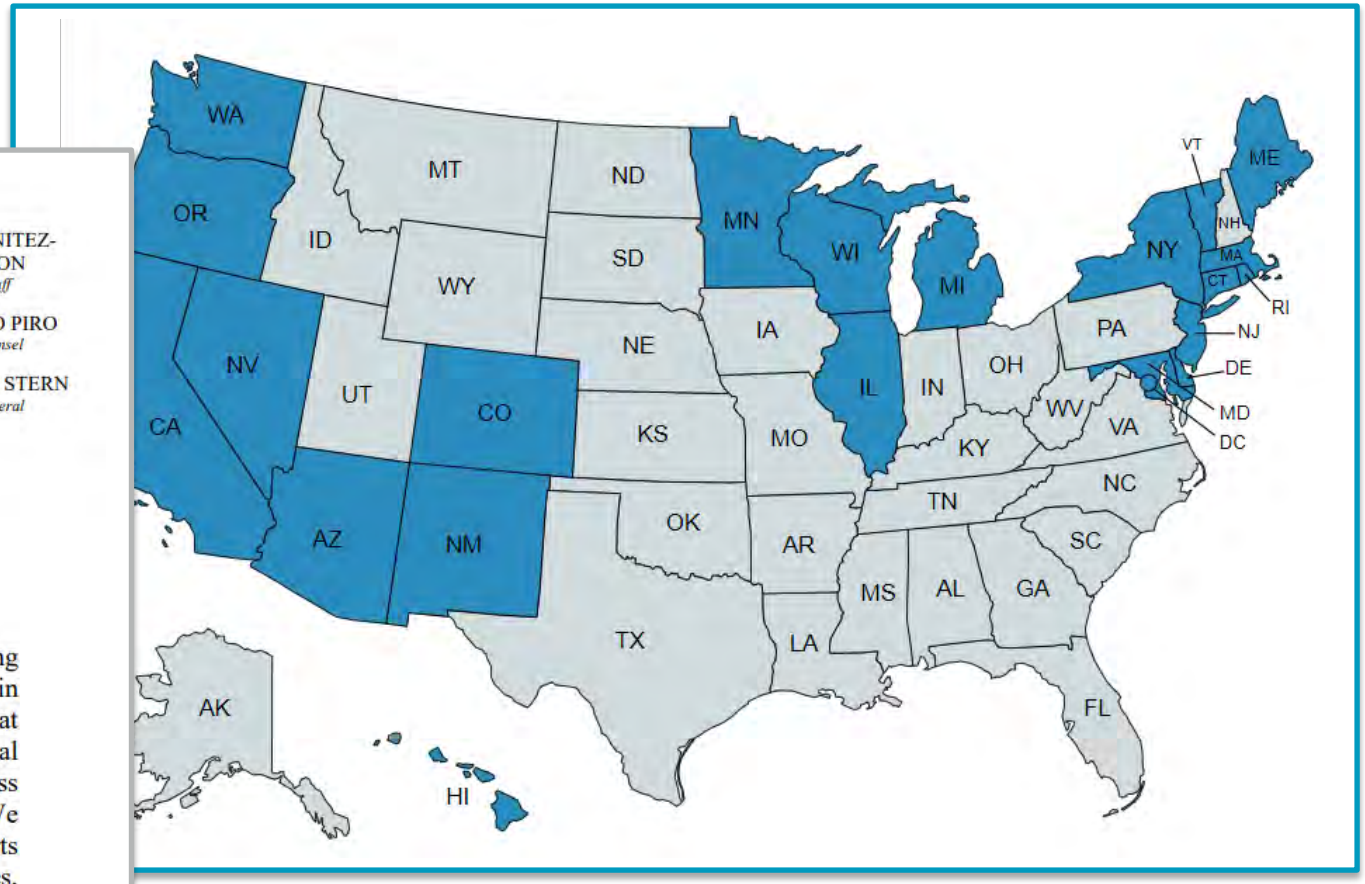
HEIDI PARRY STERN
Solicitor General

July 19, 2023

Dear Fortune 100 CEOs,

We recently reviewed a letter sent to you by 13 state attorneys general, purporting to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race. While we agree with our colleagues that "companies that engage in racial discrimination should and will face serious legal consequences," we are focused on actual unlawful discrimination, not the baseless assertion that any attempts to address racial disparity are by their very nature unlawful. We condemn the letter's tone of intimidation, which purposefully seeks to undermine efforts to reduce racial inequities in corporate America. As the chief legal officers of our states, we recognize the many benefits of a diverse population, business community, and workforce, and share a commitment to expanding opportunity for all.



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What's Next for DEI Initiatives?

"The first thing we do, let's [get] all the lawyers."
--*Henry VI, Pt. 2*, Act IV, Scene 2

BIGLAW

Two Biglaw Firms Sued Over Diversity Initiatives

Affirmative action in college was only the first target.

By KATHRYN RUBINO on August 22, 2023 at 2:29 PM

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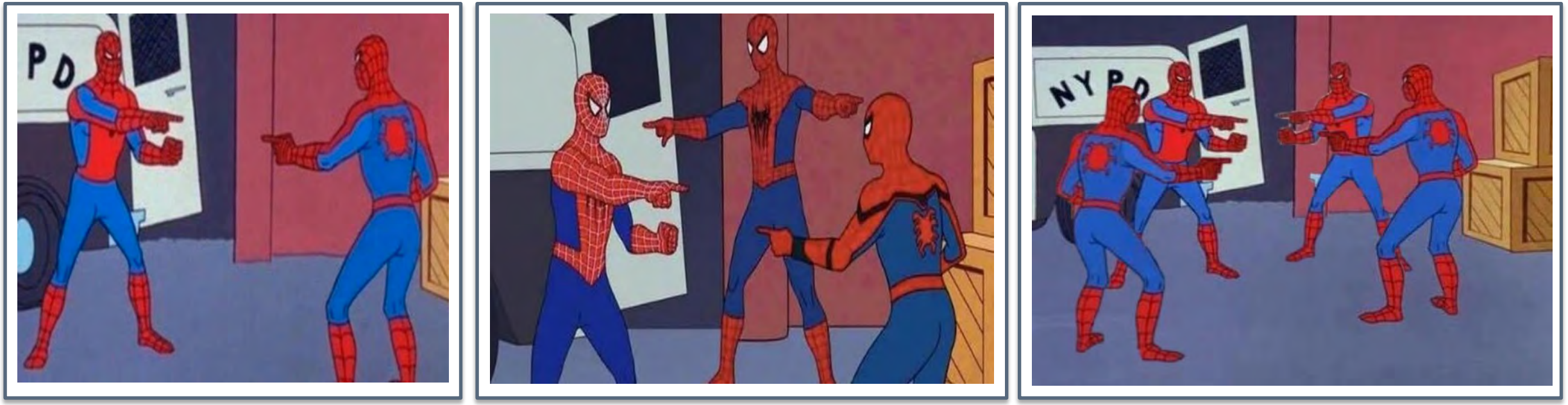
What's Next for DEI Initiatives?



Lawyers suing ***lawyers*** . . .

about hiring ***certain lawyers*** . . .

instead of ***other lawyers***.

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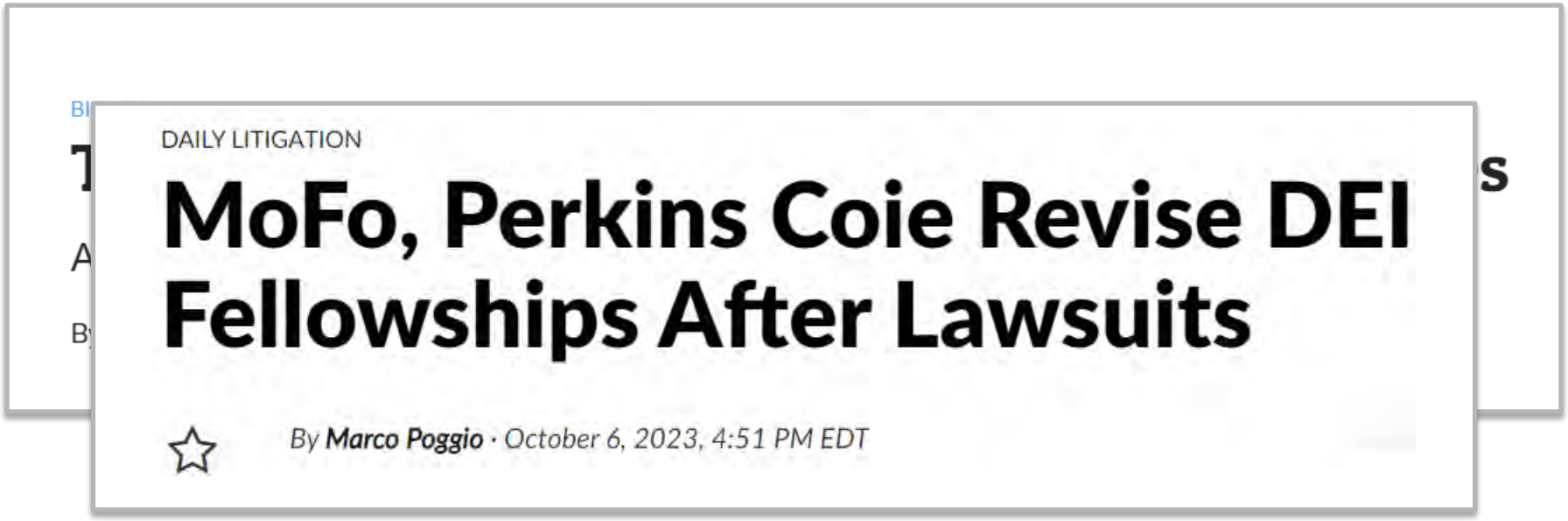
What's Next for DEI Initiatives?



What made these programs targets?

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What's Next for DEI Initiatives?

Takeaways

The decision in *SFFA v. Harvard/UNC* has no direct current legal impact on employers. The framework (Title VI/Equal Protection Clause) does not apply to private employers, and in the context of employment, the use of race in employment decisions was **already** (nearly always) prohibited.

Employers may still: promote diversity in the workplace, have DEI training (generally), implement DE&I programs and policies, improve hiring pipelines, etc.

But DE&I programs will likely be subject to increased scrutiny and more frequent legal challenges. We recommend you work with legal counsel to assess the benefits and costs of any current program and to ensure compliance with existing law.

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DOL Proposes New Independent Contractor Guidelines

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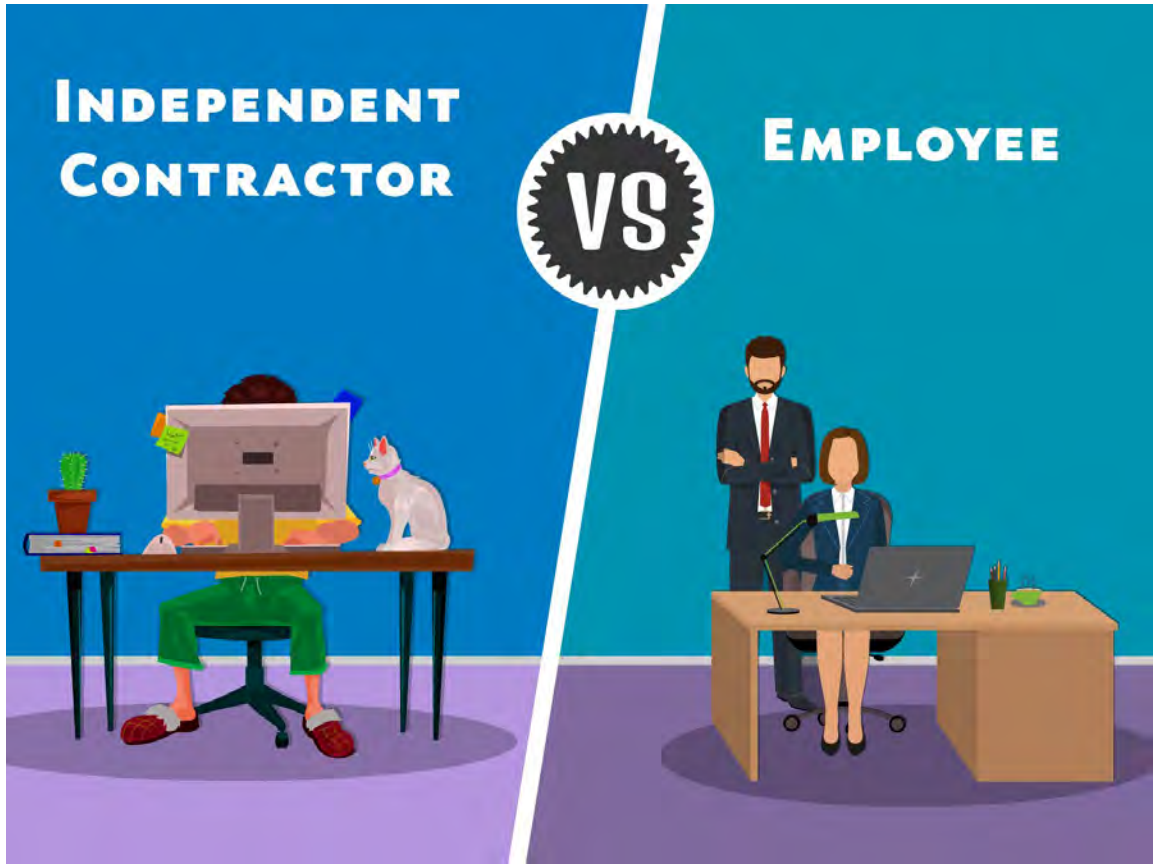
DOL: Independent Contractor Guidelines

On October 11, 2022, the United States Department of Labor (DOL)—and the Biden Administration—proposed new independent contractor classification guidelines that are viewed as more favorable to the worker.

In other words, these guidelines would make it more difficult to maintain the contractor classification.



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Background on DOL's Interest in Contractor v. Employee Classifications

DOL enforces the Fair Labor Standards Act (FLSA), the federal law that requires minimum wage and overtime for non-exempt employees

As a result, DOL has taken an interest in independent contractor misclassifications and has provided various tests over the years for the employee/contractor analysis

The current test, implemented during the Trump administration and viewed as favorable to employers, emphasizes two factors:
(1) degree of control and (2) opportunity for profit of loss

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DOL: Independent Contractor Guidelines

The 2022 proposed rule clarifies that the ultimate inquiry in deciding whether a worker is properly classified as a contractor is "**economic independence**"

The focus of the proposed rule is whether the worker is in business for themselves rather than the amount the worker earns

According to the DOL, "an employee is someone who, as a matter of economic reality, is economically dependent on an employer for work—not for income"

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DOL: Independent Contractor Guidelines

Other factors traditionally relied on by DOL will still be considered, e.g., degree of control, skills required, permanence of the working relationship, whether the work is integral to the company's business, and the opportunity for profit or loss

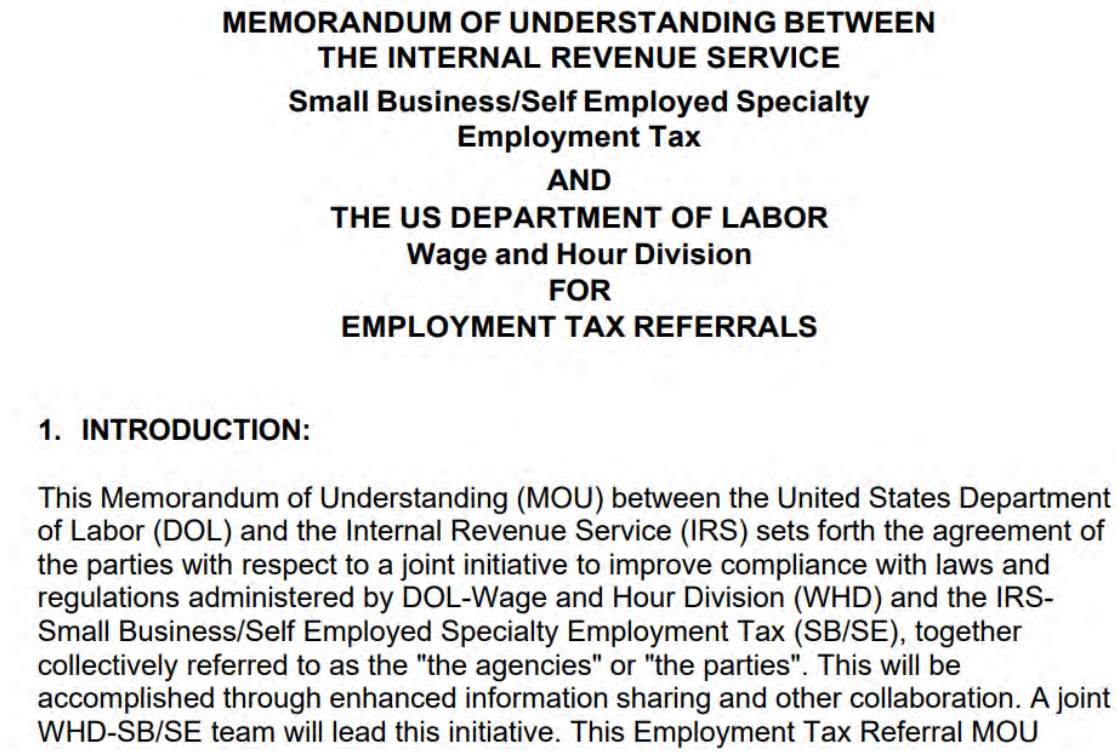
But economic independence will be the primary analysis under the Proposed Rule

The comment period for the Proposed Rule closed on December 13, 2022

The final rule is expected any day! (Still waiting)

DOL & IRS Combine Forces

On December 14, 2022, DOL and IRS signed and published a Memorandum of Understanding for Employment Tax Referrals—joining forces to combat contractor misclassifications.



MEMORANDUM OF UNDERSTANDING BETWEEN
THE INTERNAL REVENUE SERVICE
Small Business/Self Employed Specialty
Employment Tax
AND
THE US DEPARTMENT OF LABOR
Wage and Hour Division
FOR
EMPLOYMENT TAX REFERRALS

1. INTRODUCTION:

This Memorandum of Understanding (MOU) between the United States Department of Labor (DOL) and the Internal Revenue Service (IRS) sets forth the agreement of the parties with respect to a joint initiative to improve compliance with laws and regulations administered by DOL-Wage and Hour Division (WHD) and the IRS-Small Business/Self Employed Specialty Employment Tax (SB/SE), together collectively referred to as the "the agencies" or "the parties". This will be accomplished through enhanced information sharing and other collaboration. A joint WHD-SB/SE team will lead this initiative. This Employment Tax Referral MOU

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NLRB: the new Sheriff in Town?

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NLRB tackles confidentiality and non-disparagement clauses in severance agreements

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NLRB: Severance Agreements

On February 21, 2023, the National Labor Relations Board (NLRB) issued a major decision (*McLaren Macomb*) that impacts severance agreements for non-management employees in both union and nonunion workplaces.

Recall: the NLRB enforces Section 7 of the National Labor Relations Act.

Section 7 gives (non-management) employees the right to engage in "concerted activity," i.e., the right to band together to discuss and complain about the terms and conditions of employment.

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NLRB: Severance Agreements

The McLaren Macomb Hospital in Michigan had “permanently furloughed” 11 employees and offered each of them severance.

The Hospital included two standard provisions in its severance agreements: **confidentiality** and **non-disparagement**.

The NLRB concluded that the Hospital committed an unfair labor practice by even offering a severance agreement that included such provisions.

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Provisions at Issue in McLaren Macomb

The confidentiality provision prohibited the employee from disclosing the terms of the agreement to anyone other than a spouse or a professional adviser (e.g., tax or legal).

The non-disparagement provision prohibited the employee from making statements that could disparage or harm the employer or affiliated persons and entities.

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Why Was the Agreement in *McLaren Macomb* Unlawful?

In a press release, the Board said its decision "explains that ***simply offering employees a severance agreement that requires them to broadly give up their rights under Section 7 of the Act violates Section 8(a)(1) of the Act.*** The Board observed that the employer's offer is itself an attempt to deter employees from exercising their statutory rights, at a time when employees may feel they must give up their rights in order to get the benefits provided in the agreement."

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NLRB General Counsel Issues Follow Up Guidance

In a March 22, 2023 Memorandum, the Board's General Counsel responded to questions arising from *McLaren Macomb.* She took the following positions:

- **Severance agreements are lawful absent "overly broad provisions** that affect the rights of employees to engage with one another to improve their lot as employees. This includes the rights of employees to extend those efforts to channels outside the immediate employee-employer relationship," such as the NLRB, a union, the media, legal forums, etc.
- *McLaren Macomb* **applies retroactively**, making an attempt to enforce a previously-entered severance agreement with broad confidentiality or non-disparagement provisions a potential unfair labor practice.
- A "**savings clause or disclaimer language may be useful** to resolve ambiguity over vague terms," but should not be relied upon to "cure overly broad provisions."

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General Counsel Follow Up Guidance

- **Confidentiality clauses** in severance agreements may be lawful if they are narrowly tailored to protect proprietary or trade secret information, based on legitimate business justifications.
- **Non-disparagement provisions** may be lawful if they are limited to statements "that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity."
- Other common provisions the General Counsel views as problematic include **non-compete & non-solicitation clauses, no poaching clauses, cooperation requirements** for current or future investigations, and overly broad **liability releases**.

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General Counsel Follow Up Guidance

- The principles in *McLaren Macomb* apply to other employer communications.
- Although supervisors generally do not have Section 7 rights, the General Counsel asserts that there may be unique circumstances where an employer violates the Act by offering an overbroad agreement to a supervisor.
- Former employees have Section 7 rights, which "are not limited to discussions with coworkers." Former employees can provide evidence to the NLRB and "otherwise share information about working conditions they experienced."

NLRB: Severance Agreements

- What are your options?
- **Do nothing** and take your chances with an unfair labor practice (the standard may swing back under the next Republican administration).
- **Delete** entirely the confidentiality and non-disparagement clauses in your standard severance agreements for non-management employees.
- **Middle Ground:** narrowly tailor any confidentiality and non-disparagement clauses to make clear that the provisions:
- Do not prevent an employee from participating in Section 7 activity;
- Do not prevent an employee from filing an unfair labor practice charge or assisting others in doing so;
- Do not prevent an employee from cooperating with an NLRB investigation.

Key Takeaways

- Severance agreements should be carefully scrutinized to ensure they do not restrict Section 7 rights.
- Remember that the Board will likely apply the *McLaren Macomb* principles to other employer communications.
- Approach the enforcement of previously-entered non-disparagement and confidentiality provisions with caution.
- Consider seeking the advice of employment counsel on these matters.

Stericycle®

We protect what matters.

NLRB issues *Stericycle* decision, changing the standard for employer conduct rules

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Have you checked your handbook lately?

On August 2, 2023, the NLRB issued along-anticipated opinion in a case called *Stericycle* that analyzes whether employer conduct rules are lawful.

Your policies likely address conduct standards, such as rules requiring professionalism and civility.

These rules need to be balanced against an employees' Section 7 rights to engage in concerted activity, i.e., to discuss together, or complain about, the terms and conditions of employment.

Prior to *Stericycle*, we applied an employer-friendly balancing test to weigh the conduct rule against the Section 7 rights.

Facially neutral rules about professionalism and civility were presumptively valid.

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The pendulum has swung back in favor of employees

Stericycle reversed that precent, adopting a new case-by-base balancing approach to determine is a conduct rule has "a reasonable tendency to chill employees from exercising their Section 7 rights."

The Board will read conduct rules from the perspective of a "reasonable employee."

If a "reasonable employee" could interpret the rule in a way that limits Section 7 rights, the rule will be presumptively invalid.

The employer's intent in making the rule is irrelevant.

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Confidentiality Instructions Changed Too

For internal investigations, many employers instruct all witnesses to maintain the confidentiality of the investigation—during and after the investigation.

- For supervisors, there's no change. Recall that supervisors don't have Section 7 rights. Feel free to tell them to keep it secret.
- But what about non-supervisors?

Confidentiality Instructions to Non-Supervisors

- In 2019, the NLRB ruled that employer rules requiring employee confidentiality during open investigations are lawful. But you needed to apply "individualized scrutiny" in each case to maintain confidentiality post-investigation, e.g., to protect the integrity of the investigation, or to protect the complainant against mistreatment or retaliation.
- In *Stericycle*, the NLRB overruled their 2019 decision with respect to confidentiality instructions during the pendency of the investigation. Now, you need a specific reason—during and after the investigation—to maintain confidentiality.

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Wither the EEOC?

State that you will protect the confidentiality of employees who report harassment or participate in a harassment investigation, to the greatest possible extent.

NLRB Enters the Non-Compete Fray

- On May 30, 2023, NLRB General Counsel (GC) Jennifer Abruzzo issued a memorandum declaring that overbroad non-compete agreements are unlawful because they chill employees from exercising their rights under Section 7 of the National Labor Relations Act (NLRA).
- Abruzzo asserts that non-competes interfere with Section 7 rights by making workers believe they'll have a harder time replacing lost income if they're discharged for exercising their Section 7 rights. Abruzzo's memorandum is not an official statement or ruling by the NLRB. But, as the NLRB's GC, Abruzzo sets the direction for regional offices and instructs them on the types of complaints to file against companies.

PDF Handbook Download and Prize Drawing

Scan the QR code to download the PDF handbook

Apple Airpods
(newest generation)

*Make sure to fill out and turn in an entry slip to be eligible for the prize drawing later today.

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Southeast Idaho Chapter of SHRM

The premier Human Resources Professional Organization in SE Idaho

A Different LEGAL PERSPECTIVE

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A Professional Law Corporation

How Managers Who Are *Sure* They're Right Still Get It Wrong: Case Studies in Lessons Learned Too Late

Managers should be trained on EEO essentials and empowered to consult with HR or Legal on employment matters.

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Jersey Mikes Makes Headlines

- In August 2018, Kameisha Denton was hired to work at Jersey Mikes in Marysville, Ohio.
- Having experienced discrimination in the past, Kameisha didn't volunteer the fact that she was pregnant. Instead, after being hired, she wrote to her manager:

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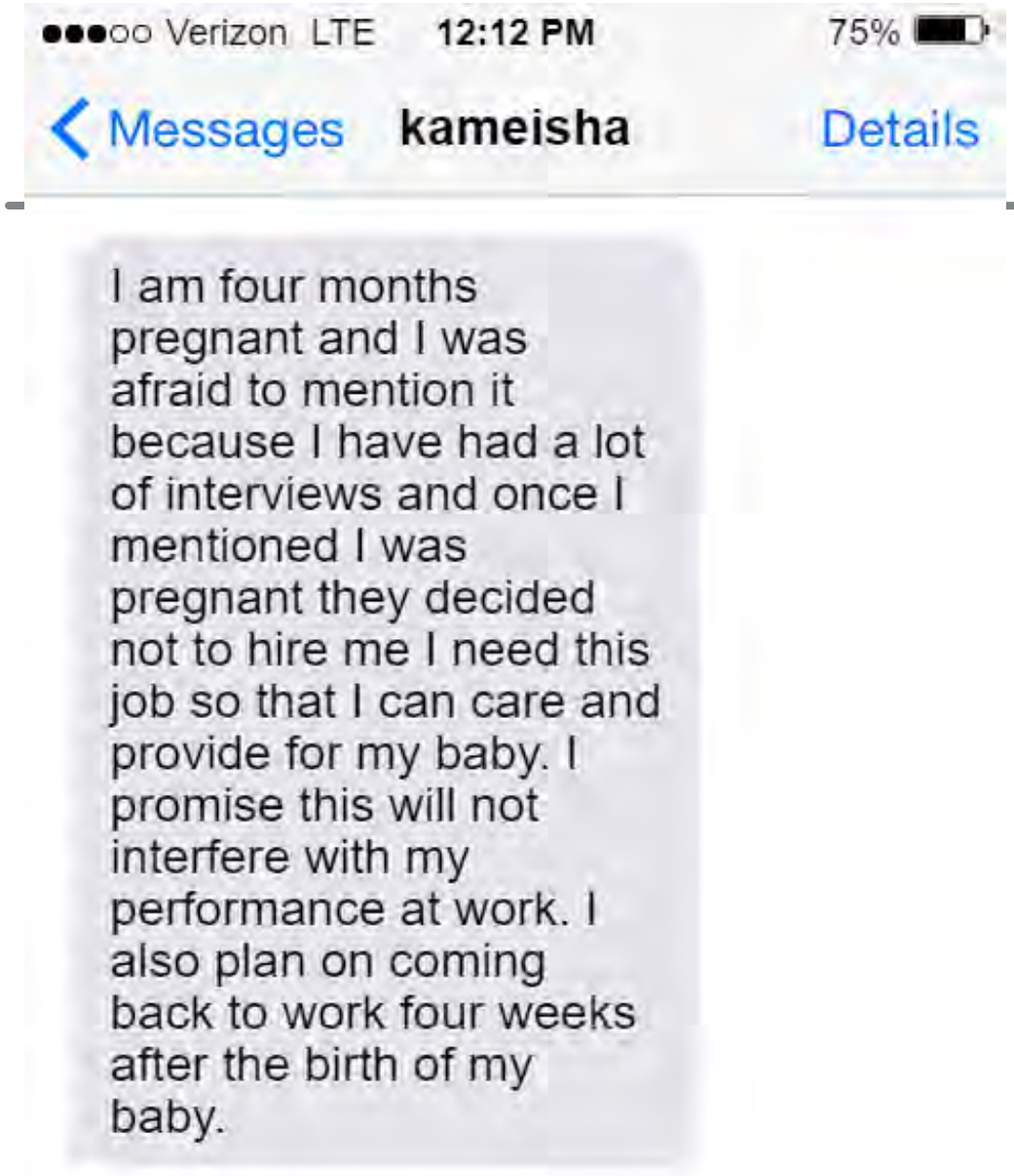

After no response, Kameisha followed up to get her schedule.

Here's how her manager replied…

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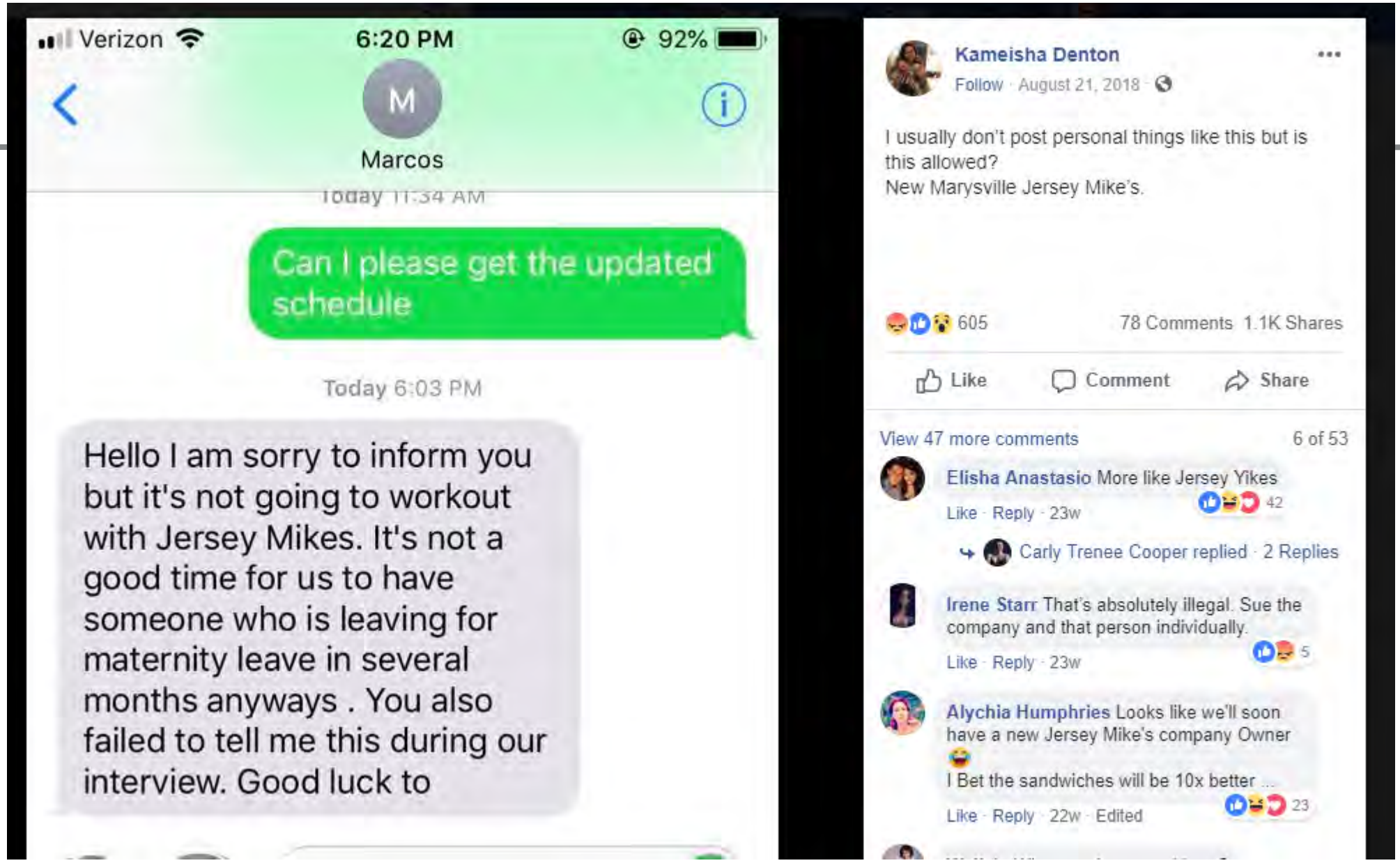

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Franchise owner, Jim Traub found out, fired the manager, and offered Kameisha the job back.

She declined and it went viral…

She commented to ABC that she was “considering legal action.”

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Case Study 1: Consult with HR and Legal Before Acting! Lowe v. Atlas Logistics Grp. Retail Servs. (N.D. Ga.)

Have your managers ever heard of the Genetic Information Nondisclosure Act of GINA?

GINA does two things:

- Prohibits discrimination against employees and applicants on the basis of genetic information.
- Prohibits employers from collecting the genetic information of their employees.

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Case Study 1: Consult with HR and Legal Before Acting! Lowe v. Atlas Logistics Grp. Retail Servs. (N.D. Ga.)

It appears that Atlas's managers had not heard about GINA.

This case has come to be known as the case of the devious defecator.

From the actual opinion:

"Beginning in 2012, an unknown number of Atlas employees began defecating in Atlas's Bouldercrest Warehouse. [This]occurred numerous times and necessitated the destruction of grocery products on at least one occasion."

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Case Study 1: Consult with HR and Legal Before Acting! Lowe v. Atlas Logistics Grp. Retail Servs. (N.D. Ga.)

Atlas collected DNA information from the "***evidence***" in the warehouse and tested it against DNA samples from two suspected employees.

It required the two suspected employees to submit to a cheek swab.

These two employees were exonerated, and the actual culprit was never found.

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Case Study 1: Consult with HR and Legal Before Acting! Lowe v. Atlas Logistics Grp. Retail Servs. (N.D. Ga.)

Two tested employees, **Jack Lowe** and **Dennis Reynolds** reported to the NY Times that they were humiliated and embarrassed. They became the target of jokes from their coworkers.

Although they were both exonerated by the DNA tests, they sued alleging that the tests violated GINA.

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Case Study 1: Consult with HR and Legal Before Acting! Lowe v. Atlas Logistics Grp. Retail Servs. (N.D. Ga.)

U.S. NEWS JUNE 23, 2015 / 9:56 AM / UPDATED 8 YEARS AGO

Georgia workers win $2.2 million in 'devious defecator' case

By Daniel Wiessner 2 MIN READ

(Reuters) - A federal jury in Georgia has awarded $2.2 million to two workers whose DNA was illegally tested after they were suspected of defecating in their company's warehouse.

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Case Study 1: Consult with HR and Legal Before Acting! Lowe v. Atlas Logistics Grp. Retail Servs. (N.D. Ga.)

Takeaways

All levels of management should receive regular employment law training.

Before taking action that adversely affects employees, managers should be empowered to consult first with HR and/or Legal.

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Retaliation: watch what you say in emails!

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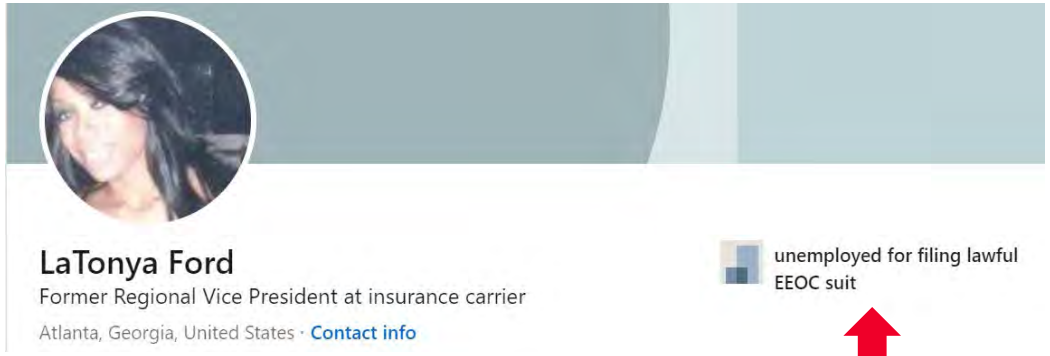
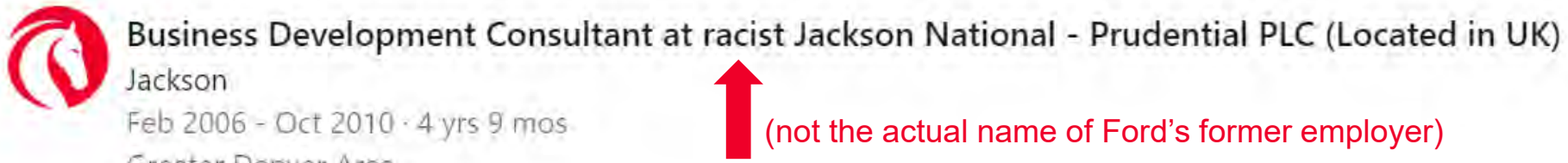
Case Study 2: Perils of Retaliation
Ford v. Jackson Nat'l Life Insurance—10th Cir.

Ford v. Jackson Nat'l Life Ins., 45 F.4th 1202 (10th Cir. 2022)



Employee background. La'Tonya Ford spent four unhappy years at Jackson National where, according to Ford's account, her coworkers were crude, misogynistic and racist.

(LinkedIn post not a judicially binding conclusion)



(not the actual name of Ford's former employer)

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Case Study 2: Perils of Retaliation
Ford v. Jackson Nat'l Life Insurance—10th Cir.

Employee complaint. Ford eventually complained to management. After that complaint, Ford applied for a new, better position—which she'd done unsuccessfully several times in the past. She didn't get it.

A month later, La'Tonya resigned. She (and the EEOC) sued Jackson for alleged discrimination and retaliation.

Trial court decision. A Colorado federal district court granted summary judgment to the employer on all claims, and appeal to the Tenth Circuit was taken.

. . . the wrinkle. You'd better believe that La'Tonya's lawyers got all the employer's internal emails…

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Case Study 2: Perils of Retaliation
Ford v. Jackson Nat'l Life Insurance—10th Cir.

Jackson National VP James Bossert, meet Gary Stone at HR.

"She has posted for the vacant desk director position in RBD East. I firmly believe that she would attempt to leverage that position into an opportunity to work against the company's interests by furthering her complaint."

"You should not express in e-mails sentiments like the one you expressed."

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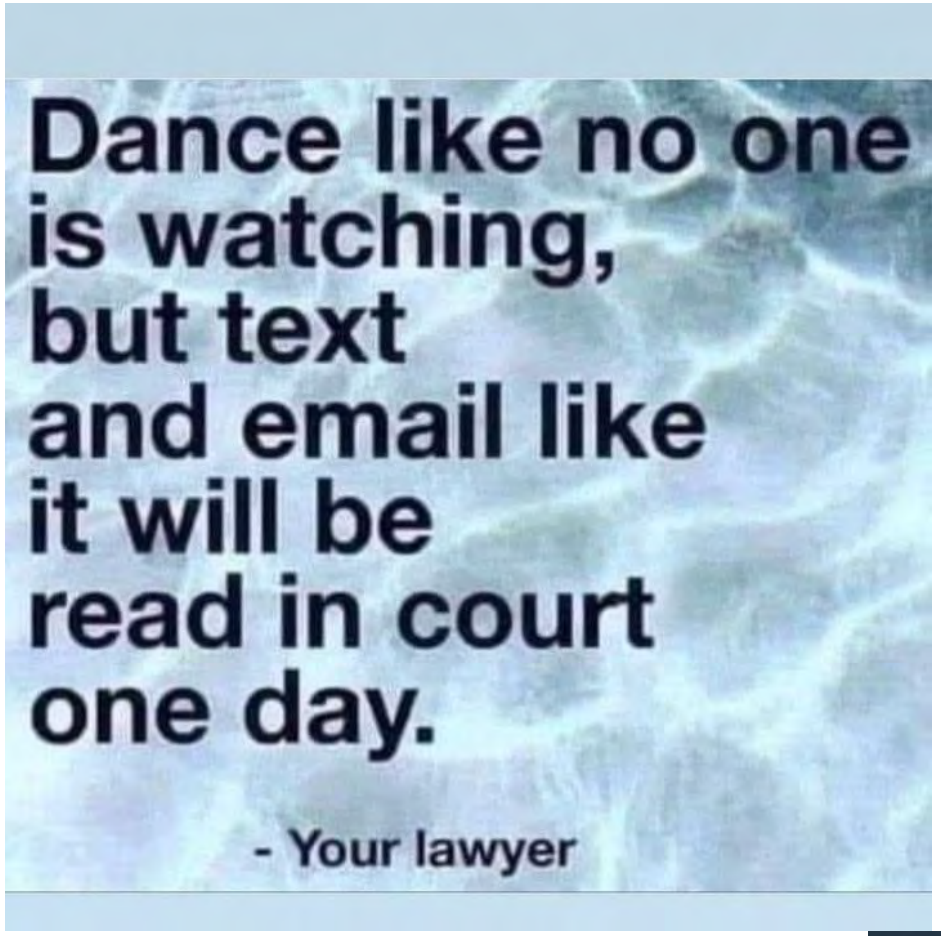
Case Study 2: Perils of Retaliation
Ford v. Jackson Nat'l Life Insurance—10th Cir.

The result on appeal. Ford lost on her discrimination claim. But the Tenth Circuit allowed her *retaliation* claim to go forward to a jury trial, calling the VP's email a "key piece of evidence."

Takeaways

When a manager lashes out at an employee for complaining about discrimination, even "behind closed doors," the situation goes from bad to worse.

Unless you are speaking with legal counsel, all the things you've said and written about an employee will be "discoverable" in the event of a lawsuit.



Managing Workplace Conflict

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Case Study 3: Managing Workplace Conflict
Carter v. Transport Workers Union—N.D. Texas

Carter v. Transport Workers Union of Am., 602 F. Supp. 3d 956 (N.D. Tex. 2022)

What do I do when my employees fight online?

37 Title VII makes it unlawful for an employer "to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion." 42 U.S.C. § 2000e-2(a)(1). "The term *577 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate ... an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j). Thus, "[a]n employer has the statutory obligation to make reasonable accommodations for the religious observances of its employees, but it is not required to incur undue hardship." *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 273 (5th Cir. 2000).

What does Title VII require?

- Title VII prohibits employers from discriminating against employees based on their religion.
- Employers must accommodate employees' religious practice unless doing so would cause an "undue hardship."

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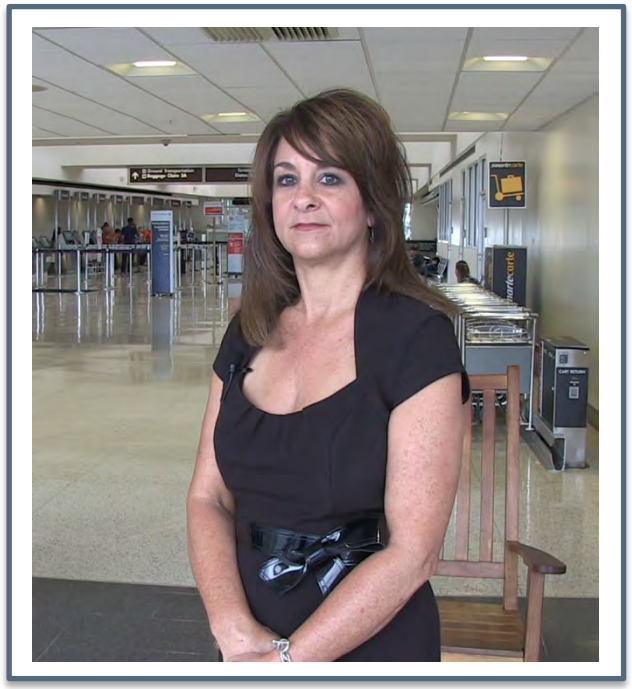
Case Study 3: Managing Workplace Conflict
Carter v. Transport Workers Union—N.D. Texas

- What might this look like in practice?
- Audrey Stone (left) was the president of a flight attendants' union.
- That union represented Charlene Carter (right), who was a Southwest Airlines flight attendant from 1996 to 2017.
- Carter had a long-running dispute with the union, which stretched back to at least 2012.



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Case Study 3: Managing Workplace Conflict
Carter v. Transport Workers Union—N.D. Texas

- In January 2017, some union members, including Stone, participated in the "Women's March on Washington, D.C."
- Union members posted pictures from the Women's March on social media and their attendance was profiled in the union newsletter.
- Carter says that Southwest provided support for those attendees.

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Case Study 3: Managing Workplace Conflict
Carter v. Transport Workers Union—N.D. Texas

First off I do not want your Propaganda coming to my inbox...that being said I Support the RIGHT TO WORK Organization 100% ABOVE what I have to pay you all in DUES! YOU and TWU-AFL-CIO do not Speak For Me or over half of our work group...We have a RECALL right now that we want adhered to with over the 50+ 1% and growing. WE WANT YOU all GONE!!!!!

....

P.S. Just sent The RIGHT TO WORK more money to fight this.... YOU all DISGUST ME!!!!! OH and by the WAY I and so many other of our FAs VOTED FOR TRUMP....so shove that in your Propaganda MACHINE! [sic]

- In February 2017, Carter sent a series of angry Facebook messages to Stone.
- Stone complained to management, who brought Carter in for a "fact-finding meeting."
  - Carter says that at that meeting, Southwest told her that she "cannot post ideological views on a personal Facebook page with a connection to the workplace."
- Southwest fired Carter a week later.

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Case Study 3: Managing Workplace Conflict
Carter v. Transport Workers Union—N.D. Texas

- Carter sued Southwest, arguing that her religious beliefs "require her to share with others" her views on religious issues, including abortion, and that Southwest fired her "for engaging in the religious practice of sharing religious beliefs" on her personal Facebook page.
- Finding that Carter had shown "more than a sheer possibility that her religious beliefs and practice were a factor" in her firing, the Texas court allowed her claims to go forward to trial.
- At a July 2022 trial, a jury sided with Carter, and awarded her $5.1 million in damages.

What could Southwest have done differently?

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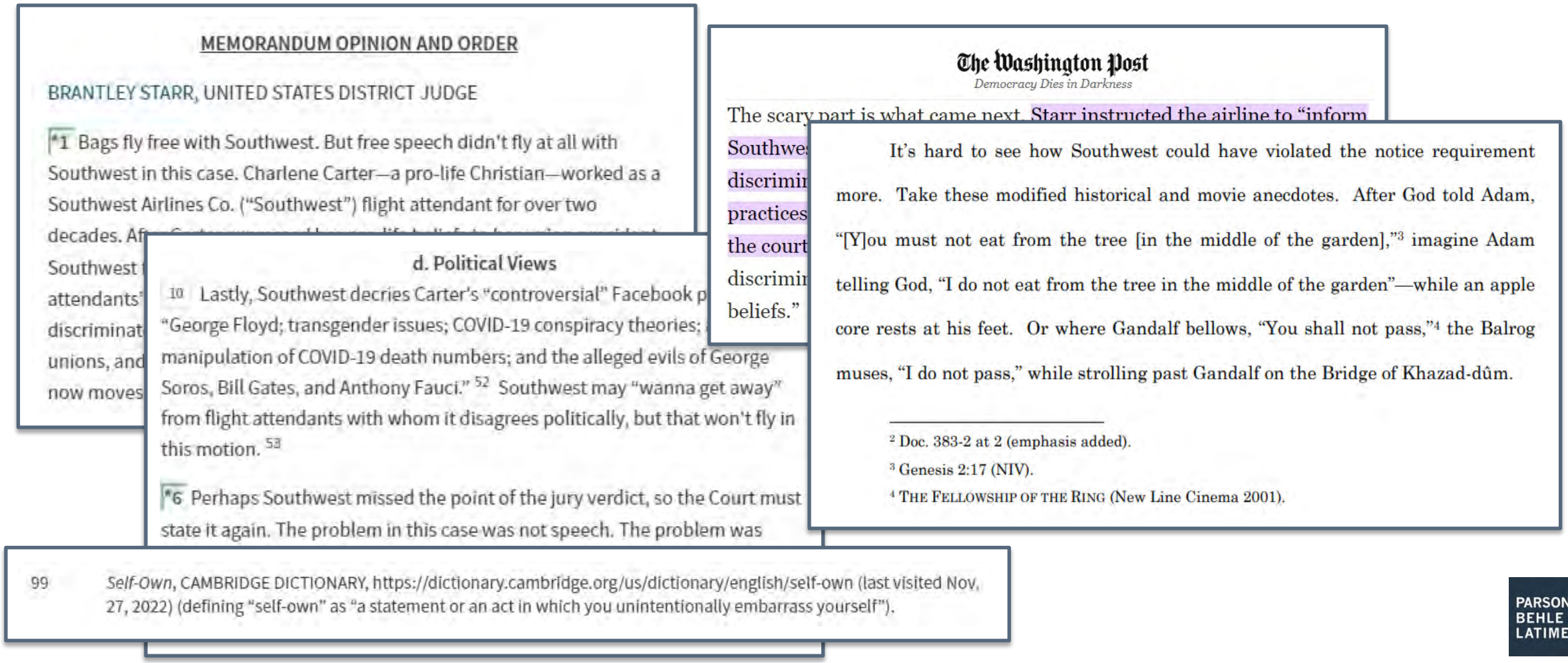
Case Study 3: Managing Workplace Conflict
Carter v. Transport Workers Union—N.D. Texas

Coda: Judge Brantley Starr and More Trouble for Southwest



MEMORANDUM OPINION AND ORDER

BRANTLEY STARR, UNITED STATES DISTRICT JUDGE

*1 Bags fly free with Southwest. But free speech didn't fly at all with Southwest in this case. Charlene Carter—a pro-life Christian—worked as a Southwest Airlines Co. ("Southwest") flight attendant for over two decades. Af
Southwest
attendants'
discriminat
unions, and
now moves

d. Political Views

10 Lastly, Southwest decries Carter's "controversial" Facebook p
"George Floyd; transgender issues; COVID-19 conspiracy theories;
manipulation of COVID-19 death numbers; and the alleged evils of George Soros, Bill Gates, and Anthony Fauci." [52] Southwest may "wanna get away" from flight attendants with whom it disagrees politically, but that won't fly in this motion. [53]

*6 Perhaps Southwest missed the point of the jury verdict, so the Court must state it again. The problem in this case was not speech. The problem was

The Washington Post
Democracy Dies in Darkness

The scary part is what came next. Starr instructed the airline to "inform
Southwe
discrimi
practices
the court
discrimi
beliefs."

It's hard to see how Southwest could have violated the notice requirement more. Take these modified historical and movie anecdotes. After God told Adam, "[Y]ou must not eat from the tree [in the middle of the garden],"[3] imagine Adam telling God, "I do not eat from the tree in the middle of the garden"—while an apple core rests at his feet. Or where Gandalf bellows, "You shall not pass,"[4] the Balrog muses, "I do not pass," while strolling past Gandalf on the Bridge of Khazad-dûm.

[2] Doc. 383-2 at 2 (emphasis added).

[3] Genesis 2:17 (NIV).

[4] THE FELLOWSHIP OF THE RING (New Line Cinema 2001).

99 *Self-Own*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/self-own (last visited Nov. 27, 2022) (defining "self-own" as "a statement or an act in which you unintentionally embarrass yourself").

PARSONS BEHLE & LATIMER

Case Study 3: Managing Workplace Conflict
Carter v. Transport Workers Union—N.D. Texas

Takeaways

If you have a company policy regarding e-mail and social media usage—that, for example, prohibits conduct that disrupts the workplace—make sure to *apply those policies in an even-handed way.*

Keep an eye on the difference between on-duty and off-duty political expression, including attendance at political rallies or voiced support for political beliefs.

As the *Carter* case reflects, be careful to consider the content of the speech or expression at issue, to ensure that you're not missing an angle.

These situations can be tricky—when in doubt, consult with counsel.

Ignoring complaints of harassment when the alleged harasser is not an employee

PARSONS BEHLE & LATIMER

Case Study 4: Ignoring Harassment
Fried v. Wynn Las Vegas—9th Cir.

Title VII:

Whose actions can create a hostile work environment for the purposes of a sexual harassment complaint?

PARSONS BEHLE & LATIMER

Case Study 3: Ignoring Harassment
Fried v. Wynn Las Vegas—9th Cir.

Title VII:

Whose actions can create a hostile work environment for the purposes of a sexual harassment complaint?

PARSONS BEHLE & LATIMER

Case Study 4: Ignoring Harassment
Fried v. Wynn Las Vegas—9th Cir.

- Fried was a manicurist at the hotel.
- Fried was assigned to provide a pedicure to a male customer. The customer asked Fried to give him a massage. Fried responded the salon did not offer that kind of service, and the customer made an explicit sexual proposition. Fried immediately reported the conduct to his manager.
- In response, Fried's supervisor ***directed him to finish the pedicure and "get it over with."***
- Fried attempted to speak with the supervisor about the incident on two occasions afterward, but she told him she would talk to him "when she got a chance."

PARSONS BEHLE & LATIMER

Case Study 4: Ignoring Harassment
Fried v. Wynn Las Vegas—9th Cir.

- Fried then brought suit against Wynn. Among other claims, Fried asserted a claim for hostile work environment in violation of Title VII of the Civil Rights Act of 1964.
- The district court granted Wynn's motion for summary judgment. Fried appealed.

PARSONS BEHLE & LATIMER

Case Study 3: Ignoring Harassment
Fried v. Wynn Las Vegas—9th Cir.

The Ninth Circuit Reversed the District Court…

- The Court said: the supervisor's response to the customer's unwelcome sexual advances could create a hostile work environment, because the supervisor not only failed to take immediate corrective action, but also directed Fried to return to the customer and complete the service.

- The supervisor's direction not only discounted and condoned the customer's sexual harassment but also conveyed that Fried was expected to tolerate it as part of his job.

Case Study 4: Ignoring Harassment
Fried v. Wynn Las Vegas—9th Cir.

Takeaways

- State and federal anti-discrimination laws protect employees from harassment in all their interactions as an employee. As a result, an alleged harasser could be an employee, a customer, or a vendor—anyone an employee interacts with in connection with their job.
- Supervisors and managers must take concerns about possible harassment seriously, even when the alleged perpetrator is not an employee.
- Supervisors should be trained to intervene when they learn about possible harassment, whether they've personally observed it or had the matter reported to them.
- When needed, supervisors should separate an employee from their alleged harasser. And then get the matter in the hands of HR right away.

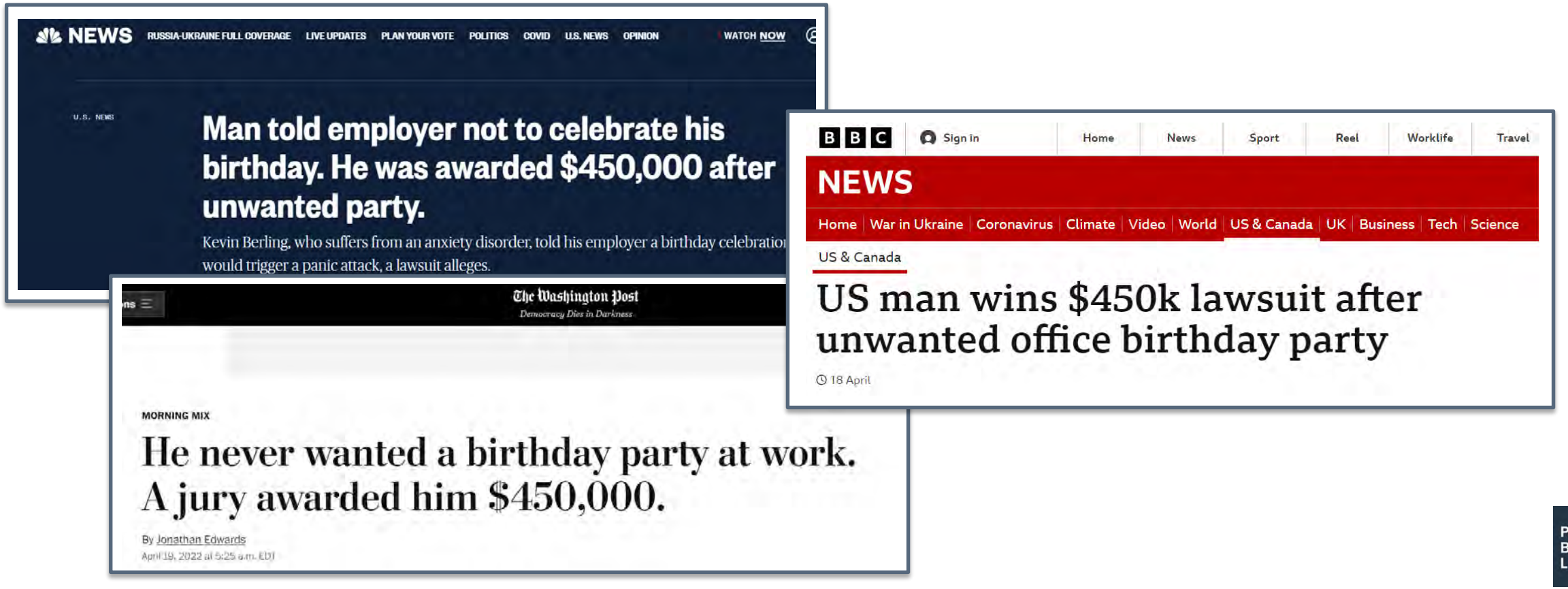
PARSONS BEHLE & LATIMER

Lurking ADA Issues: be on the lookout for a quick, simple easy fix!

PARSONS BEHLE & LATIMER

Case Study 5: Lurking ADA Issues
Berling v. Gravity Diag.—Kenton Ky. Circuit Court

Berling v. Gravity Diag., No. 19-CI-1631, 2022 WL 4127641 (Ky. Cir. Ct. June 17, 2022)



PARSONS BEHLE & LATIMER

Case Study 5: Lurking ADA Issues
Berling v. Gravity Diag.—Kenton Ky. Circuit Court

- The “real” Kevin Berling worked at Gravity for 10 months as a lab accessioner.
- Berling had anxiety disorder, and he experienced panic attacks related to his birthday because his parents announced their divorce to him on his birthday when he was a kid.
- Gravity typically celebrated employee birthdays by placing the date on a breakroom calendar and purchasing a dessert or cake. Coworkers would sign a card and often sing “Happy Birthday.”

PARSONS BEHLE & LATIMER

Case Study 5: Lurking ADA Issues
Berling v. Gravity Diag.—Kenton Ky. Circuit Court

- On the Friday before his birthday, Berling asked Gravity's chief of staff, Allison Wimmers to make sure the company did not celebrate his birthday.
- But… it was the weekend and Wimmers forgot to relay the message to Lauren Finn who coordinated b-days.
- Berling's coworkers wished him a happy birthday and put up a banner in the breakroom. Berling grabbed his lunch, went to his car and had a panic attack.

PARSONS BEHLE & LATIMER

Case Study 5: Lurking ADA Issues
Berling v. Gravity Diag.—Kenton Ky. Circuit Court

- Berling complained to Wimmers, who was out of town, so he met with Wimmers' supervisor, Amy Blackburn along with senior director Ted Knauf.
- The meeting was not smooth: Berling became "very red," closed his eyes, clenched his fists, and (when Blackburn asked if he was okay) "commanded silence." Blackburn testified that she was worried Berling would strike her.
- Blackburn and Knauf told the CEO they felt unsafe, so the company decided to terminate Berling's employment.
- Berling sued, claiming he was denied a reasonable accommodation and discriminated against based on a disability.

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PARSONS BEHLE & LATIMER

Case Study 5: Lurking ADA Issues
Berling v. Gravity Diag.—Kenton Ky. Circuit Court

- Gravity argued that management did not know he was disabled.
- And that it had a legitimate and non-discriminatory reason for termination—that its employees felt unsafe.
- Ultimately, the judge disagreed and sent the matter to the jury.

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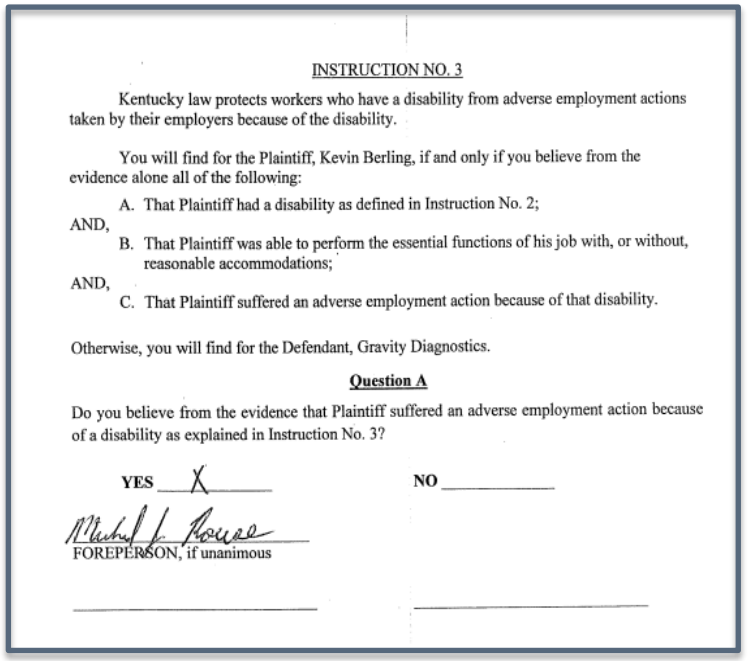
PARSONS BEHLE & LATIMER

Case Study 5: Lurking ADA Issues
Berling v. Gravity Diag.—Kenton Ky. Circuit Court



INSTRUCTION NO. 3

Kentucky law protects workers who have a disability from adverse employment actions taken by their employers because of the disability.

You will find for the Plaintiff, Kevin Berling, if and only if you believe from the evidence alone all of the following:

A. That Plaintiff had a disability as defined in Instruction No. 2;

AND,

B. That Plaintiff was able to perform the essential functions of his job with, or without, reasonable accommodations;

AND,

C. That Plaintiff suffered an adverse employment action because of that disability.

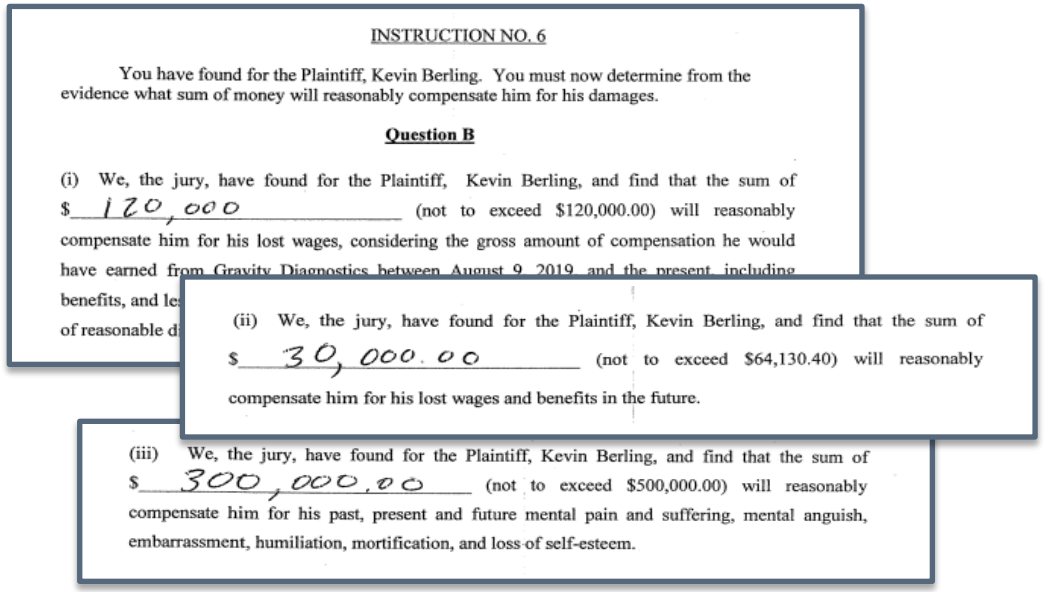
Otherwise, you will find for the Defendant, Gravity Diagnostics.

Question A

Do you believe from the evidence that Plaintiff suffered an adverse employment action because of a disability as explained in Instruction No. 3?

YES X NO _____

FOREPERSON, if unanimous



INSTRUCTION NO. 6

You have found for the Plaintiff, Kevin Berling. You must now determine from the evidence what sum of money will reasonably compensate him for his damages.

Question B

(i) We, the jury, have found for the Plaintiff, Kevin Berling, and find that the sum of $ 120,000 (not to exceed $120,000.00) will reasonably compensate him for his lost wages, considering the gross amount of compensation he would have earned from Gravity Diagnostics between August 9, 2019 and the present, including benefits, and les
of reasonable di

(ii) We, the jury, have found for the Plaintiff, Kevin Berling, and find that the sum of $ 30,000.00 (not to exceed $64,130.40) will reasonably compensate him for his lost wages and benefits in the future.

(iii) We, the jury, have found for the Plaintiff, Kevin Berling, and find that the sum of $ 300,000.00 (not to exceed $500,000.00) will reasonably compensate him for his past, present and future mental pain and suffering, mental anguish, embarrassment, humiliation, mortification, and loss of self-esteem.

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PARSONS BEHLE & LATIMER

Case Study 5: Lurking ADA Issues
Berling v. Gravity Diag.—Kenton Ky. Circuit Court

Takeaways

Good communication is critical in the accommodation process.

If a quick, simple easy fix is available, just do it and document that you did it.

Thank you for attending!

Mark D. Tolman
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Kaleigh C. Boyer
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Sean A. Monson
smonson@parsonsbehle.com

Garrett M. Kitamura
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Michael Judd
mjudd@parsonsbehle.com

PARSONS BEHLE & LATIMER

Attorney Profiles

PARSONS
BEHLE &
LATIMER

Kaleigh is a member of the firm's corporate and litigation practice teams. With more than 10 years of legal experience in both the private and public sectors, Kaleigh offers a unique and pragmatic approach to resolving client matters.

Kaleigh C. Boyer

Associate | Idaho Falls

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Capabilities

Business & Commercial Litigation

Business Bankruptcy & Restructuring

Trusts, Wills & Estates

Corporate

Employment & Labor

Licensed/Admitted

Delaware

Idaho

U.S. Dist. Court, Dist. of Idaho

U.S. Bankruptcy Court, Dist. of Idaho

District of Columbia

Biography

Kaleigh Boyer is an associate attorney in the Idaho Falls office of Parsons Behle & Latimer. Her practice is focused on business and commercial litigation and related corporate matters. Kaleigh also represents clients in the resolution of probate and trust-related litigation, including guardianship and conservatorship proceedings.

Prior to joining Parsons, Kaleigh served as a judicial law clerk to the Honorable Paul R. Wallace of the Superior Court of Delaware, where she handled a wide array of matters on the court's civil, criminal and complex commercial litigation dockets. She significantly contributed to the court's opinion addressing the valuation of cryptocurrency tokens in a breach of contract action–a matter of first impression in Delaware. Kaleigh is licensed in Delaware, the District of Columbia and Idaho.

Accomplishments

Professional

Judicial Law Clerk to the Honorable Paul R. Wallace, Superior Court of the State of Delaware (September 2021 – August 2022)

Judicial Extern to the Honorable Henry W. Van Eck, Chief Bankruptcy Judge, United States Bankruptcy Court, Middle District of Pennsylvania (January 2021 – May 2021)

Judicial Extern to the Honorable Martin C. Carlson, Magistrate Judge, United States District Court, Middle District of Pennsylvania (January 2020 – May 2020)

Legal Extern, The Governor's Office of General Counsel, Pennsylvania Commission on Crime & Delinquency (August 2019 – December 2019; May 2020 – August 2020)

As a research assistant to one of her law school professors, Kaleigh assisted extensively with editing *Voting Rights and Election Law* (3d ed. 2021) and the corresponding teacher's manual.

Academic

Pennsylvania State University, B.S., Finance

Pennsylvania State University, Master of Public Administration

Widener University Commonwealth Law School, Juris Doctorate, *magna cum laude*

- CALI Excellence Awards: Civil Procedure, Legal Methods, Property, & Business Organizations

Associations

Professional

Delaware State Bar Association (2022-present)

Idaho State Bar Association (2022-present)

District of Columbia Bar (2022 - present)

Eagle Rock Inn of Court, Executive Board Member (2022-present)

Richard S. Rodney Inn of Court, Member (2021-2022)

Community

Idaho Volunteer Lawyers Program (2022-present)

Volunteer attorney for the Court Appointed Special Advocates (CASA) of Idaho Falls (2022-present)

Presentations

"Common Mistakes Employers Make," Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar, Oct. 5, 2022 (co-presented with Kelsie A. Kirkham)

**To view additional insights and related news items, visit parsonsbehle.com/people/kaleigh-c-boyer#insights*

Michael Judd's practice centers on competition and information. He guides clients through complex litigation in varied industries, including disputes related to employee mobility, antitrust and trade secrets. He also maintains a vigorous First Amendment practice in which he represents media organizations in their news-gathering efforts.

Michael Judd

Shareholder | Reno

Contact information

801.536.6648
mjudd@parsonsbehle.com

Capabilities

Antitrust & Competition
Appeals
Business & Commercial Litigation
Employment & Labor
Employment Litigation
Trade Secret Litigation

Licensed/Admitted

Utah

Biography

Michael is a commercial litigator focused on competitive issues. His work includes employment litigation where he represents employers in cases related to employee movement, compensation and compliance with state and federal law, including the ADA, FLSA, and FMLA.

Michael's practice also includes complex business and intellectual-property matters, including trade-secret disputes, enforcement of restrictive covenants and anti-competitive business practices.

In his First Amendment practice, Michael also represents clients, including news media organizations, in matters that enable reporting and public oversight through access to government records, defense of defamation claims and similar legal issues.

Experience

Defended Client in Competitive Misconduct with Antitrust Issues
Defended a pharmacy services client in allegations of competitive misconduct with antitrust issues.

Nondisclosure, Nonsolicitation, Noncompetition Defense of Solar Sales Company
Defending a solar sales company in several lawsuits in Utah state and federal courts and Texas state court for competitive claims including nonsolicitation, nondisclosure and noncompetition claims.

Public Records Access Motion for Summary Judgment
Parsons' client The Salt Lake Tribune asked for copies of officer interviews from the City of West Jordan, as part of a project assembling a database of Utah police involved shootings. The city refused to release the records, and The Tribune challenged that access denial in an appeal to the district court. The court issued a ruling granting the Tribune's Motion for Summary Judgment and ordered West Jordan to turn over those records, with minimal redactions.

Accomplishments

Professional
"Utah Legal Elite," *Utah Business Magazine,* Civil Litigation 2022

Mountain States Super Lawyers, Rising Stars, 2019–2023

Academic
University of Iowa, J.D.

- Editor in Chief of the Iowa Law Review
- Captained the Jessup Moot Court team
- Received the Dean's Award for Constitutional Law
- Earned a joint MBA at Iowa's Tippie College of Business

Princeton University & Brigham Young University, B.A, English, Economics

Associations

Professional
Advisory Committee, Utah Rules of Appellate Procedure, Recording Secretary, 2019–present

Board Member, Utah Chapter, Federal Bar Association, 2020–present

Community
President, Alumni Association, The Waterford School, 2013 – present

Articles

"Federal Court Sides with Whole Foods in Dress-Code Dispute Over Black Lives Matter Masks," *Employment Law Update* (Jan. 30, 2023)

Presentations

"Every Case Really is a Story: Four State and Federal Caselaw Stories and Lessons," Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar (Oct. 5, 2022)

Garrett M. Kitamura is a member of Parsons Behle & Latimer's litigation practice group. His sophisticated litigation practice focuses on representation of industry leaders in the corporate and agricultural sectors.

Garrett M. Kitamura

Associate | Boise

Contact information

208.562.4893
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Capabilities

Agriculture
Antitrust & Competition
Business & Commercial Litigation
Employment Litigation
Water Rights, Quality & Infrastructure
Government Relations & Lobbying
Employment & Labor

Licensed/Admitted

Idaho
U.S. Dist. Court, Dist. of Idaho
U.S. Court of Appeals, 9th Circuit
Oregon
U.S. Dist. Court, Dist. of Oregon
Washington
U.S. Dist. Court, Eastern. Dist. Of Wash.
U.S. Dist. Court, Western. Dist. of Wash.
U.S. Court of Federal Claims

Biography

Garrett M. Kitamura is a member of the litigation and employment law practice groups at Parsons Behle & Latimer. He previously worked alongside Parsons' attorneys in the firm's Summer Associate Internship program.

Garrett received his Juris Doctor from the University of Virginia School of Law. While in law school, he participated in the Child Advocacy Clinic, where he argued on behalf of juvenile clients in review hearings before the state circuit courts of Virginia. He served as Articles Editor for the Virginia Environmental Law Journal and as President of Street Law, a program where law students facilitate legal workshops for local high school students. Between his semesters in law school, Garrett performed pro bono services for Immigrant Justice Idaho.

Prior to law school, Garrett graduated from Oregon State University, where he was elected to Phi Beta Kappa and earned dual bachelor's degrees in Education and English. During his undergraduate studies, Garrett was a member of the Honors College and served as a legislative intern in the Oregon House of Representatives.

Garrett previously served as a state officer for the Oregon Future Farmers of America (FFA) Association and continues to be involved with the FFA in Idaho.

Accomplishments

Professional
Idaho State Bar

Oregon State Bar

Washington State Bar

American Bar Association

Academic
University of Virginia School of Law (J.D., 2021)

- Virginia Environmental Law Journal, Junior Managing Board
- Recipient of the Pro Bono Challenge award

Oregon State University (B.A., Summa Cum Laude, 2018)

- Phi Beta Kappa
- Romeo and Juliet: Textbook Edition, Undergraduate Editor
- Honors Thesis: The Auteur Perspective of David Fincher

Associations

Community
Friends of Public Television, board of directors (2023-present)

Foundation for Idaho History, board member (2022 - present)

Nampa FFA Alumni Association, vice president (2021 - present)

Articles

"Responding to a Complaint: Idaho," Practical Law, September 6, 2023

Case Study: Non-Compete Agreements Remain Subject to Judicial Review for Reasonableness, November 17, 2022

Idaho Employers May Be Liable for Harm Stemming from Workplace Injuries Aggravated by Employee Conduct, July 28, 2022

Presentations

The Major Questions Doctrine – The Supreme Court Decision West Virginia v. EPA, January 19, 2023
Idaho Water Users Association

Sean Monson is the chairperson of the firm's Employment, Labor & Immigration Law practice teams. He defends employers against discrimination and wrongful termination claims, represents clients in non-compete cases and advises clients regarding best practices to avoid litigation in the future.

Sean A. Monson

Employment & Labor Practice Area Co-Chairperson | Shareholder | Salt Lake City | Lehi

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Capabilities

Business & Commercial Litigation
Banking & Financial Services
Employment & Labor
Employment Litigation
Real Estate
Real Estate Litigation

Licensed/Admitted

Utah

Biography

Sean A. Monson focuses his practice in employment counseling and litigation and real estate litigation and transactions. He has represented several large and small Utah businesses in litigation matters involving claims for wrongful termination, discrimination, covenants not to compete, WARN Act disputes, OSHA infractions, and labor disputes. He has represented title companies, businesses and individuals in real property transactions and litigation matters involving boundary, ownership, title insurance and priority of interest lawsuits. He has also represented companies in multimillion dollar real estate purchase and sale transactions as wells as lending, development and leasing agreements. He has appeared before planning commissions and city councils on behalf of real estate developers regarding entitlement and zoning disputes throughout the Wasatch Front. He is the current chair of the Bountiful City planning commission.

Experience

Representing Software Company in Collective Action
Representing a dental software company in a collective action brought by independent contractors.

Defending Client in FLSA Claims
Defending call center client against claims of violation of the Fair Labor Standards Act, Utah Wage Payment Act and Montana Wage Payment Act.

Representing Dental Client in Collective Action
Representing a dental software company in a collective action brought by independent contractors.

Accomplishments

Professional
Recognized as member of Utah's Legal Elite by *Utah Business* magazine for multiple years in both employment and real estate.

Academic
University of Michigan Law School (J.D., 1995)

Brigham Young University (B.A., summa cum laude, 1992)

Associations

Professional
Chair, Real Estate Section of the Utah State Bar

Member, Executive Committee, Litigation Section of the Utah State Bar

On the Board of the Northern Utah Human Resource Association

Community
Member of Board of Directors, Davis County Citizens Committee Against Violence

Volunteer, Davis County Attorney's Office Protective Order Project

Articles

Employment Law Update, March 16, 2023

Black Lives Matter, My Body My Choice, Make America Great Again: The Thorny Path of Navigating Political Speech at Work September 6, 2022
Utah Business Magazine

Employment Law Update May 2022, May 19, 2022

Is COVID-19 a Disability Under the ADA? It Depends, February 8, 2022

U.S. Court of Appeals for the Sixth Circuit Lifts Stay of Vaccine Mandate; OSHA Extends Compliance Deadline, December 20, 2021

Utah Responds to the Federal Vaccine Mandate: The New State Rule, November 12, 2021

New Federal Mandates Regarding COVID-19 Vaccination and Testing Are Coming, September 10, 2021

See the Latest EEOC Guidance For Employee Covid-19 Vaccinations In A "Utah Business Magazine" Article by Labor And Employment Department Chair Sean Monson, July 29, 2021

EEOC Issues Updated Guidance Regarding COVID-19 Vaccinations and the Workplace, May 28, 2021

Vaccines: Mandatory or Voluntary for Employees?, February 4, 2021

New COVID Relief Statute: Second Round of PPP Loans, Extension of FFCRA Leave Rights, and Tax Code Changes, December 23, 2020

Dealing With "Remote" Teleworking Employees: Best Practices for Teleworking, September 15, 2020

Treasury Department Clarifies Payroll Tax Deferral Executive Order, September 9, 2020

A Portion of Payroll Taxes May Be Deferred for the Vast Majority of Workers Beginning Sept. 1, 2020, and Continuing Through Dec. 31, 2020, August 29, 2020

Supreme Court Limits Protections for Employees Working for Religious Schools, July 14, 2020

Salt Lake County Extends Face Covering Order to Aug. 20, 2020, July 7, 2020

Salt Lake County and Summit County Require Individuals to Wear Face Coverings, July 1, 2020

Looking Forward: How to Manage Your Workforce In 2020 and Beyond, June 30, 2020

Title VII Covers LGBQT Employees, June 30, 2020

PPP Loan Program Modified – More Time to Spend, Fewer Restrictions on Spending, June 5, 2020

Strategies on acing the SBA's new PPP Loan Forgiveness Application, May 18, 2020

What to Do with Employees at High Risk for Serious COVID 19 Illness: The ADA and Return to Work, May 12, 2020

Liabilities When Re-Opening: Steps to Minimizing the Risks, April 28, 2020

Re-opening for Business: Employers Should Begin Planning, Now April 14, 2020

You've Had a Chance to Catch Your Breath, Now What? Five Things Employers Should be Thinking About Right Now, April 9, 2020

CARES Act PPP Loans Interim Final Rule Released, April 3, 2020

Additional Guidance from the Department of Labor Including the Frequently Asked Question: "What is the 'small business exemption' under the Families First Coronavirus Response Act?, March 30, 2020

Response Act Poster, Leave Policies and Shelter in Place Notices, March 30, 2020

Emerging Questions For Employers Under The Families First Coronavirus Response Act And Other Coronavirus Employment Issues, March 24, 2020

Presentations

Parsons Attorneys Present at SHRM Annual Employment Update, February 14, 2023

Remote Work in the Post-Pandemic Era, December 9, 2022
American Bar Association Event

New Sharks in the Water: FLSA Collective Actions, October 5, 2022
Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar

Everything You Want to Ask Your Lawyer But Are Afraid to Ask, October 5, 2022
Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar

Common Mistakes and Horror Stories, August 31, 2022
WECon Utah SHRM Conference

Everything You Want to Ask Your Lawyer But Are Afraid to Ask, June 16, 2022
34th Annual Parsons Behle & Latimer Employment Law Seminar

Employment Arbitration Agreements: What Are The Good For?, June 16, 2022
34th Annual Parsons Behle & Latimer Employment Law Seminar

Webinar -- New Vaccination Rule: What Does it Mean for Employers with More Than 100 Employees? A Lot!, November 10, 2021

Hot Employment Topics Session #2, October 28, 2021
33rd Annual Parsons Behle & Latimer Employment Law Seminar

Hot Employment Topics Session #1, October 28, 2021
33rd Annual Parsons Behle & Latimer Employment Law Seminar

Hot Employment Topics Session #2, September 22, 2021
Parsons Behle & Latimer Ninth Annual Boise Employment Law Seminar

Hot Employment Topics Session #1, September 22, 2021
Parsons Behle & Latimer Ninth Annual Boise Employment Law Seminar

Hot Employment Topics, August 25, 2021
Parsons Behle & Latimer Utah County Employment Law Seminar

The Coronavirus "Response Act" – COVID-19 Relief and Tax Benefit Opportunities in 2021, January 14, 2021
Parsons Behle & Latimer Virtual CLE

Independent Contractor vs. Employee: The Devil's Bargain, November 10, 2020
32nd Annual Parsons Behle & Latimer Employment Law Seminar

Trends in Employment Law Cases Related to COVID-19, November 10, 2020
32nd Annual Parsons Behle & Latimer Employment Law Seminar

PPP Loans: The CARES Act & Flexibility Act - What we Know to Date About Loan Forgiveness, July 14, 2020

Strategies on Acing the SBA's New PPP Loan Forgiveness Application, May 20, 2020

COVID-19: Returning to Work, May 13, 2020

Back in Business: Information Every Idaho Employer Should Know, May 13, 2020
Human Resource Association of Treasure Valley

What Every Employer Should Know Before Resuming Business in Utah, May 12, 2020
Visit Salt Lake

Back in Business: Information Every Idaho Employer Should Know, May 11, 2020
Idaho Technology Council

Reopening Utah's Restaurants: What Owners Need to Know, May 7, 2020
Salt Lake Area Restaurant Association

Employer Considerations To Successfully Reopen A Business, May 5, 2020
South Valley Chamber

Reopening Your Business: Meeting Opportunities and Challenges To Come Back Stronger, April 28, 2020

Families First Coronavirus Response Act: What It Does and How To Respond, March 23, 2020

News

Breaking: Vaccine and Testing Emergency Temporary Standard (ETS) is Stayed by the Supreme Court, January 13, 2022

COVID-19 Response Resource: New Relief Statute - Important Information Concerning the Supplemental Response Act, December 22, 2020

A Portion Of Payroll Taxes May Be Deferred For The Vast Majority Of Workers Currently Through Dec. 31, 2020, August 28, 2020

Supreme Court Limits Protections For Employees Working For Religious Schools, July 14, 2020

View Parsons Behle & Latimer's Family First Coronavirus Response Act Webinar Recording. Learn More About How This Act May Affect Your Business, March 23, 2020

Mark is co-chairperson of the firm's Employment and Labor practice team. Mark helps his employer clients avoid disputes through preventative practices, policies and training, and advocates for them in litigation when disputes cannot be avoided.

Mark D. Tolman

Employment & Labor Practice Area Co-chairperson | Shareholder | Salt Lake City

Contact information

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Capabilities

Appeals
Healthcare
Employment & Labor
Trade Secret Litigation
Employment Litigation

Licensed/Admitted

Utah
Idaho
Wyoming

Biography

Mark practices employment law and commercial litigation in matters before state and federal courts, the Utah Labor Commission and Equal Employment Opportunity Commission. He was recognized by the Utah State Bar as the 2018 Labor & Employment Attorney of the Year. Mark litigates cases involving complex factual and legal matters, including employment discrimination, harassment and retaliation, breach of fiduciary duty, covenants not to compete, solicit, or disclose confidential information, interference with contract, trade secrets and defamation. Mark has tried cases before state and federal courts and before the Adjudication Division of the Utah Labor Commission. He has also argued cases to the Utah Supreme Court, the Utah Court of Appeals and to the United States Tenth Circuit Court of Appeals. Most importantly, Mark helps his clients avoid litigation by daily counseling on employment law problems, developing preventative practices and policies and providing regular inhouse training.

Mark also volunteers as the Director of Legal Affairs for the Utah SHRM State Council and as Co-Director of Legal Affairs for Salt Lake SHRM. Mark is a regular presenter at SHRM events and provides a monthly *Ask a Lawyer* webinar for members of Salt Lake SHRM.

Experience

Utah's Workplace Violence Protective Order Law

Mark lobbied on behalf of Salt Lake SHRM and Utah SHRM for passage of House Bill 324, Workplace Violence Protective Order Amendments. This bill allows an employer to seek a protective order against individuals who harm, or threaten to harm, its employees or property. The bill passed and took effect July 1, 2023. For additional information on how to obtain a Workplace Violence Protective Order, please contact Mark or visit the Utah Court's website here: Protective Orders (utcourts.gov)

Independent Investigation of Sexual Harassment

Conducted an independent investigation of sexual harassment claims against Senator Gene Davis by a legislative intern.

ADA Discrimination Defense

Represented a Utah city regarding discrimination charges under the ADA and in retaliation for filing worker's compensation claims.

FMLA and ADA Discrimination Defense

Represented a large Intermountain region bank in two discrimination claims in U.S. District Court concerning FMLA and ADA.

Nondisclosure, Nonsolicitation, Noncompetition Defense of Solar Sales Company

Defending a solar sales company in several lawsuits in Utah state and federal courts and Texas state court for competitive claims including nonsolicitation, nondisclosure and noncompetition claims.

Accomplishments

Professional

Utah Business Magazine's Legal Elite, Labor and Employment

Recognized in *Chambers USA*, Labor & Employment – Utah

Mountain States Super Lawyers (Employment & Labor)

Academic

University of North Carolina at Chapel Hill (J.D., with honors, 2004)

Weber State University (B.S., *summa cum laude*, Economics, 2001)

Associations

Professional

Member, Society for Human Resource Management (SHRM)

Director of Legal Affairs, Utah State SHRM Council

Co-Director of Legal Affairs, Salt Lake Chapter of the Society for Human Resource Management (SHRM)

Community

Weber State University Business Advisory Council

Articles

"Congress Passes the Speak Out Act, Outlawing the Use of NDAs to Silence Victims of Sexual Harassment and Assault," (November 30, 2022)

"*Employment Law Update*," (June 29, 2022)

Presentations

"Parsons Attorneys to Present at SHRM Annual Employment Update," (February 14, 2023)
Salt Lake SHRM

"Everything You Want to Ask Your Lawyer But Are Afraid to Ask," (October 5, 2022)
Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar

"Common Mistakes and Horror Stories," (August 31, 2022)
WECon Utah SHRM Conference

"2022 Legislative and Regulatory Update," (June 16, 2022)
34th Annual Parsons Behle & Latimer Employment Law Seminar

"Key Employment Laws Every New HR Professional Must Know," (August 30, 2022)
WECon Utah SHRM Conference

"Everything You Want to Ask Your Lawyer But Are Afraid to Ask," (June 16, 2022)
34th Annual Parsons Behle & Latimer Employment Law Seminar

"The ADA, FMLA and Other Leave Essentials," (June 16, 2022)
34th Annual Parsons Behle & Latimer Employment Law Seminar

"Emerging Employment Law Issues and Trends for Municipal Employers," (June 3, 2022)
Utah Municipal Attorneys Association