



Employment

Law Briefing

Insights on Legal Issues in the Workplace

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**& Sandberg, Phoenix
von Gontard, P.C.**
Attorneys at Law

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Hostile work environment not limited to sexual harassment

Hostile work environments are most commonly associated with sexual harassment. But other types of harassment can also create a hostile work environment. In *Quiles-Quiles v. Henderson*, the First Circuit addressed the issue of whether U.S. Postal Service supervisors violated the Americans with Disabilities Act (ADA) by harassing a postal employee because of his mental disability.

Allegedly hostile conduct

After nine years, a U.S. Postal Service mail carrier was assigned to work as a window clerk. Soon after, his supervisor began to interfere with how he ran his window. His complaints to her manager were ignored. Two years later, his supervisor screamed at him for going to lunch without authorization. Immediately thereafter, the clerk suffered a panic attack and sought psychiatric help for anxiety and depression. He missed three days of work and returned



with a certificate from his psychiatrist stating that his absence was medically necessary.

After the clerk returned to work, his supervisor bothered him more frequently and once drove her truck at him while he crossed the street. His mental condition worsened, and his psychiatrist prescribed a week's leave of absence and recommended assigning him to other duties. When the clerk returned, he gave his supervisor a medical certificate. She read it and laughingly showed it to her manager, exclaiming, "He is crazy!"

From that point on, the supervisor and her manager daily called the clerk "crazy" and constantly joked in front of co-workers and customers about the clerk's seeing a psychiatrist and taking medication that they said affected his ability to have marital relations. The supervisor, her manager and the postal-station manager all remarked that the clerk shouldn't be working and was a risk to other employees because he was "crazy" and undergoing psychiatric treatment.

Harassment complaint filed

After three years, the clerk filed a harassment complaint with the Equal Opportunity Office of the Postal Service. Two weeks later, the station manager screamed at the clerk and threw him out of his office, told him he would "soon be without a job," challenged him to a fight, and called him a "punk" and a "coward" while grabbing his crotch.

The clerk's mental condition deteriorated, and his psychiatrist two years later diagnosed him as totally disabled as a result of severe depression and put him in a hospital for several days. He was off work for a year, but two years after returning, he suffered a relapse after his supervisor again called him "crazy." He was hospitalized again and never returned to work.

The clerk sued, and a jury awarded damages of \$950,000, later reduced by the court to the statutory cap of \$300,000. The Postal Service filed a posttrial motion for judgment as a matter of law. The trial court granted the motion on grounds

that the clerk had failed to prove he was disabled or that he was subject to a hostile work environment, and he appealed. The First Circuit reversed.

Proof of disability

The First Circuit noted that a person is disabled under the ADA if he or she:

1. Has a physical or mental impairment that substantially limits one or more major life activities,
2. Has a record of such impairment, or
3. Is regarded as having such an impairment.

The clerk argued that the Postal Service regarded him as disabled because his supervisors perceived his mental impairment as substantially limiting his ability to engage in the major life activity of working. The First Circuit cited evidence showing that his supervisor believed — without foundation — that the clerk’s mental impairment made him a potential risk to his co-workers.

The First Circuit held that the belief that the mentally ill are disproportionately dangerous was precisely the type of discriminatory myth that the ADA was intended to confront. The court noted that the act’s legislative history emphasized that the “determination” that a person with a mental disability “will pose a safety threat to others must be made” case-by-case

and “must not be based on generalizations, misperceptions, ignorances, irrational fears, patronizing attitudes, or pernicious mythologies.”

Proof of hostile environment

To establish a hostile work environment, the clerk had to show that his workplace was permeated with discriminatory intimidation, ridicule and insult sufficiently severe and pervasive to alter his employment conditions and create an abusive working environment.

The First Circuit found sufficient evidence that he had been subjected to a hostile work environment, citing the constant ridicule about his mental impairment that required his hospitalization and eventually caused him to withdraw from the work force. This evidence was sufficient for a reasonable jury to find that a hostile work environment existed.

Training is essential

This case is a reminder that the concept of a hostile work environment isn’t limited to sexual-harassment cases. A worker can be subject to a hostile work environment based on race, religion, national origin, age, sex or disability. Supervisors — such as these Postal Service supervisors — need sufficient training to learn what is appropriate conduct for them and their subordinates in the workplace. 🏠

Employer wins attorneys’ fees for unreasonable suit filed by EEOC

This case shows how an employer can recover some of the costs of defending an unfounded suit, even when a governmental agency filed it. In *EEOC v. Robert Reeves & Associates*, a California law firm not only won the suit against it, but also collected \$1.2 million for attorneys’ fees.

Frivolous, unreasonable or unfounded

The EEOC alleged that the firm discriminated against and harassed 12 female employees on the basis of sex in violation

of Title VII of the Civil Rights Act of 1964. The trial court ruled that the facts were undisputed and the firm was entitled to judgment as a matter of law on some of the EEOC’s claims. After a three-week trial of the remaining claims, the jury found in favor of the firm.

Under Title VII, a prevailing defendant is entitled to recover attorneys’ fees if the court finds that the plaintiff’s action was frivolous, unreasonable or unfounded — even though not brought in subjective bad faith. The EEOC can be held liable for costs and attorneys’ fees the same as a private person.

Another employer tool

Employers fighting governmental-agency misconduct can also use the Equal Access to Justice Act (EAJA). Under this act, prevailing employers can be awarded attorneys' fees and expenses from an administrative agency that conducts an adversary adjudication without substantial justification.

While the right to attorneys' fees under Title VII is available to all prevailing parties, the EAJA is limited to employers who have limited resources and is unavailable to larger companies. Attorneys' fees are usually limited to \$125 per hour.

For example, in *The Brandeis School*, the National Labor Relations Board granted attorneys' fees (limited to \$75 per hour) under the EAJA to an employer who prevailed. In that case, the NLRB's general counsel had continued to prosecute allegations on which she knew or should have known she could not prevail.

The firm requested \$1.2 million in attorneys' fees and costs, alleging that the EEOC:

1. Knew or unreasonably failed to learn that the action was begun as part of a scheme by two former law firm associates to destroy the firm,
2. Used increasingly vexatious and improper tactics,
3. Failed to engage in good-faith conciliation tactics,
4. Filed unreasonable or frivolous claims, and
5. Conducted an incomplete, inadequate, biased and faulty investigation.

Agreeing, the court held that the trial proved that the EEOC either knew it was being used as a primary weapon in the former associates' campaign to destroy the firm or it maintained "a studied and inexcusable ignorance of this fact."

EEOC investigation flawed

The court cited evidence showing that the EEOC investigator interviewed only three persons as part of its investigation: the two former law firm associates (who were already engaged in litigation against the firm in an unrelated matter) and one of the named "victims" in the complaint. The EEOC didn't interview any of the other 11 women.

Other evidence showed that the EEOC ignored the fact that one of the former associates had been the firm's in-house counsel and was romantically involved with the one interviewed "victim" and that both associates had engaged in unlawful conduct against the firm — both before and after leaving the firm. Based solely on the word of these "clearly biased" persons, the EEOC issued a "reasonable cause" finding of classwide discrimination and harassment. The court concluded that the EEOC basically sought "to parlay a few isolated jokes and comments into" exaggerated bad-faith allegations of a hostile work environment.

No credible evidence

The court also agreed with the firm's contention that the EEOC's improper discovery tactics showed it used the legal system improperly to prosecute what it knew — or should have known — were groundless claims.

Furthermore, the EEOC had sought to compel discovery of irrelevant and improper information — including Social Security numbers of uninvolved third parties. A magistrate judge issued a protective order barring the EEOC from seeking this private information. The EEOC had also refused to comply with the magistrate's orders to provide basic information regarding the supposed victims' claims.

In addition, the EEOC sought discovery directly from the firm's attorneys, flagrantly disregarding the attorney-client privilege. The magistrate found the EEOC's conduct in this regard bore "the hallmarks of harassment."

Holding that the EEOC had no credible evidence to support its claims and that its witnesses' testimony was exaggerated and distorted, the court concluded that the requested fees were reasonable and granted them in full.

Settlements are likely

While we might like to think that our governmental agencies act impartially and above board, this is not always the case. Moreover, not every defendant can spend more than \$1 million to defend itself. As a result, cases like this are often settled even though they lack merit. 🏠

Computer Fraud and Abuse Act helps protect employer interests

The Seventh Circuit had to decide whether an employee violated the Computer Fraud and Abuse Act (CFAA) when he deleted files from his company laptop computer. The court's decision, in *International Airport Centers v. Citrin*, hinged on what constitutes a transmission under the act.

The employee quits and deletes

A company engaged in the real estate business hired an employee to identify properties that it might want to acquire and provided him with a laptop to record his collected data on. He quit to go into business for himself — in breach of his employment contract.



Before returning the laptop, he deleted all the data in it — not only data he had collected but also data that would have revealed to the company that he had engaged in improper conduct before he quit. Deleting the files wouldn't have precluded the company from recovering them had he

not also loaded into the laptop a secure-erasure program to prevent the company from recovering the deletions. The company had no backup copies of the files he erased.

Transmission defined

The company alleged that deleting the files violated the CFAA. The company relied on the provision that bars



“knowingly” causing “the transmission of a program, information, code, or command” that “intentionally causes damage without authorization to a protected computer.” At trial, the ex-employee argued successfully that merely erasing a file from a computer doesn't constitute a “transmission” as defined in the act.

On appeal, the Seventh Circuit first noted that pressing a delete or erase key in fact transmits a command. But it felt that to consider any typing on a computer keyboard to be a form of “transmission” just because it transmits a command to the computer might stretch the statute too far — especially because it provides criminal as well as civil sanctions.

Designed to damage

Still, the Seventh Circuit found that the secure-erasure program here was also transmitted to the computer. The employer's complaint didn't specify whether the program had been downloaded from the Internet or copied from a CD. Either way, the court held that the program was designed to damage the laptop's files.

The CFAA provides that “damage” includes any “impairment to the integrity or availability of data, a program, a system, or information.” To the Seventh Circuit, it made no difference that someone would have had to manually insert a disk before the program on it was electronically transmitted to the computer.


Does considering any typing on a computer keyboard to be a “transmission” stretch the statute too far?

Transmission by disk would have required the wrongdoer to have physical access to the computer. Using the Internet, he could have erased the laptop’s files from afar by transmitting a virus, something that can be more difficult to detect, deter or punish than when made by someone with physical access. The inside attack — while easier to detect — may also be easier to accomplish.

The Seventh Circuit found that Congress was concerned with both types of attacks. The act bars “intentionally” accessing “a protected computer without authorization” and recklessly causing damage. Under these circumstances, that the destructive program comes on a physical medium such as a disk or CD makes no difference.

The Seventh Circuit concluded that the ex-employee’s authorization to access the laptop ended when he quit in violation of his employment contract. So he violated the act when he destroyed files that revealed his past misconduct and other files belonging to his employer.

A useful employer tool

To protect their interests when key employees leave, employers have long used restrictive covenants and trade secret and confidential data language in employment contracts. This case shows that the CFAA can be another tool for employers to use in protecting their interests. 

Is a person who draws disability benefits barred from suing for ADA violations?

That was one of two important questions before the Third Circuit in *Turner v. Hershey Chocolate USA*. The other question was related to what constitutes an essential job function.

Work restrictions initially accommodated

The worker in a candy factory underwent several surgeries for fused cervical discs, postlaminectomy pain syndrome, cervical radiculopathy, and thoracic outlet syndrome.

When she returned to work, the company accommodated her work restrictions by assigning her to a light-duty position as a line inspector sorting mint patties as they moved down a conveyor. Originally, she was assigned to the only line that required inspectors to stand and repeatedly bend and twist. When she complained of pain, she was moved to a line where she could sit down.

Rotation required

Later, to decrease the likelihood of repetitive-stress injuries to line inspectors’ wrists and arms, the company decided to rotate the workers daily among all lines. Rotation allowed them to change positions hourly and to alternate between sitting and standing and using left and right arms.

The worker objected to the rotation scheme and refused to work on a line requiring movements that caused her pain. She gave the company:

1. A letter from her lawyer asking the company to exempt her from rotating, and
2. A form from her doctor limiting her to activities that required no stretching, bending, twisting or turning of the neck or lower back or lifting more than 20 pounds.



The company decided the worker couldn't continue as an inspector because she wasn't able to rotate among all lines, which they viewed as necessary to prevent injuries to all inspectors. She applied for disability benefits, and the Social Security Administration (SSA) determined that she was disabled and awarded them.

Discrimination alleged

Two years later, the worker sued the company under the Americans with Disabilities Act (ADA), alleging that she was not totally disabled and could have performed her position if the company had accommodated her request to be exempted from rotating.

The trial court ruled for the company without a trial on two grounds. The first was that applying for disability benefits precluded her from arguing that she could now work. The Third Circuit disagreed, holding that the worker's SSA application didn't bar her ADA claim. The court relied on the Supreme Court's 1999 ruling, in *Cleveland v. Policy Management Systems*, that statements supporting an application for Social Security

disability benefits don't take into account the concept of reasonable accommodation under the ADA and, therefore, don't necessarily bar an ADA claim that someone is capable of performing the essential functions of a position with reasonable accommodation.

Essential function

The second reason given by the trial court was that the worker couldn't perform an essential function of the job: rotating among workstations. Again, the Third Circuit disagreed, holding that rotating workstations wasn't an essential job function. Whether a job duty is an "essential function" turns on whether it is "fundamental" to the employment position. A job function may be considered essential for any of several reasons, including:

- Because the reason the position exists is to perform that function,
- Because only a few workers are available to distribute that job function among, and/or
- Because the function may be highly specialized so that the worker was hired for his or her expertise or ability to perform the function.

Based on these criteria, the Third Circuit held that rotating wasn't necessarily an essential job function. The inspector position didn't exist so that inspectors could rotate. The rotation system didn't affect the number of workers required to operate the lines. And, finally, rotating was not a highly specialized function, and the worker wasn't hired for her rotating ability. Concluding that this was an issue a jury could resolve, the court reinstated the suit.

Whether a job duty is an "essential function" turns on whether it is "fundamental" to the employment position.

No easy answers

Here, the employer faced a difficult decision in resolving a conflict between all inspectors' health and one inspector's health. A jury may ultimately vindicate the company. Nonetheless, this case demonstrates that sometimes no clear answers exist, and any potential course of action can lead to exposure. ■



John S. Sandberg
314-446-4214
jsandberg@spvg.com



Anthony J. Soukenik
314-446-4279
asoukenik@spvg.com



Thomas E. Berry, Jr.
314-446-4324
tberry@spvg.com



Bryan P. Cavanaugh
314-446-4221
bcavanaugh@spvg.com

Final Military Leave Regulations Issued

The U.S. Department of Labor has issued its final regulations regarding reemployment rights and obligations under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). The final regulations are written in a fairly easy to use question-and-answer format. USERRA entitles veterans to continuing health and pension benefits, forbids discrimination based on military status or activities, and entitles most veterans to reemployment. Importantly, the final regulations generally create an exception to the at-will employment doctrine for a veteran returning to work: if the veteran served for more than 180 days, your company may terminate him or her only for just cause during his or her first year of reemployment.

USERRA can be tricky; it is a complicated scheme with harsh penalties for non-compliance. The final regulations can be found at <http://www.dol.gov/vets/regs/fedreg/final/2005023960.pdf>.

Improper Interview Questions

The Eighth Circuit Court of Appeals, which covers Missouri, recently exonerated an employer from an age discrimination lawsuit by an applicant who was asked "prohibited" questions during his interview. This case helps dispel the common misconception that an employer cannot lawfully ask questions related to age, race, pregnancy, etc. during a job interview. Logically, this is not illegal because there is no discrimination, i.e., there is no adverse action taken against an applicant simply by asking that applicant a question. The problem, however, is that asking such questions allows a rejected applicant to argue those questions are strong evidence that that characteristic was high in the interviewer's mind and, therefore, a motive for the rejection of an employment application. In this case, the court decided the questions about plaintiff's age and his intended time with the company were matters of a legitimate business interest, and did not clearly point to the presence of age discrimination.

Although the employer in this case was exonerated, management tips to take from this case are to limit interview questions to matters of legitimate business concerns, and to be careful about the questions you ask applicants during interviews. Although it is not illegal *per se* to ask questions regarding an applicant's protected characteristics, doing so can be used against you as strong evidence of unlawful discrimination.

SPvG News:

SPvG is pleased to announce that **Thomas E. Berry, Jr.** recently joined SPvG as a shareholder. Tom is part of the Business Law and Business Litigation Practice Groups and he focuses his practice in the areas of labor and employment law with regards to all aspects of employment litigation, employment counseling and immigration.

SPvG is pleased to announce that **Michael W. Forster** has rejoined the firm as a shareholder. Mike is a member of the Business Practice Group and concentrates on representing financial institutions, and in real estate, contract law, general corporate law and commercial law.

Specialized and Effective Service

Sandberg, Phoenix & von Gontard serves a diversity of clients, including Fortune 500 Companies, and represents them in state and federal courts. Our expertise helps our clients avoid problems as well as resolve issues when they arise. We are particularly effective in dealing with these areas of employment law:

- Claims of discrimination under federal, state and local statutes
- Claims of retaliation for exercising protected rights
- Wage and Hour/Fair Labor Standards Act claims
- Wrongful termination
- WARN Act notifications
- Work place security and violence

SPvG also advises employers routinely on:

- Employment agreements and contracts
- EPLI coverage
- Employee privacy issues, including such matters as drug testing
- Lie detectors, cameras and searches
- Discipline and termination of employees; accommodation of disabilities

In addition, we serve many clients in the areas of business law, health law, products liability, and business litigation.

The SPvG Employment Law Team represents employers exclusively.