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Return To Work Issues Amidst the COVID-19 Pandemic: A Comparison of California and Federal Law

By Arthur F. Silbergeld and Kacey R. Riccomini

As the nation reels in the wake of the COVID-19 outbreak, California businesses and their employees are often left with more questions than answers. What steps should employers take to return employees to a safe and healthy working environment required under Cal-OSHA provisions? What procedures can an employer follow to ensure that returning employees are in good health and will not infect others? What obligations does an employer have to an employee who is offered work, but is turned away because of health risks? How can an employer protect the privacy of employees who are unable to return? What expenses should an employer expect for expenses incurred by teleworking employees? This article attempts to shed some light on some of the practical problems facing employers today.

Cal-OSHA Health and Safety Requirements and Guidelines

Approaches to employee safety during the current pandemic are still evolving, which requires that employers be aware of and check for updates to guidance from government entities. Cal-OSHA requires that all employers maintain a workplace that is safe and healthy, which includes creating and carrying out an Injury and Illness Prevention Program (IIPP), and provide washing facilities that have an adequate supply of suitable cleansing agents, water and single-use towels or blowers. Employers should take current and developing government guidance seriously because, although many workplace injuries and illnesses are subject to workers' compensation statutes, an employer who is grossly negligent, such as one who fails to implement basic COVID-19 safety protocols, may be subject to lawsuits from sick employees.

On March 16, 2020, Cal-OSHA issued general written guidance for employers.[1] Cal-OSHA also provided more specific guidance for various industries, including health care facilities, agriculture, child care, and grocery stores. Employers should also consider federal guidance on the corona virus response, available on the federal Centers for Disease Control (CDC), Occupational Safety and Health Administration (OSHA) and Mine Safety and Health Administration (MSHA) websites.

Under current Cal-OSHA guidance, employers covered by the Aerosol Transmissible Diseases (ATD) Standard, including but not limited to hospi-

[1] *See* https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html.

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ATTENTION READERS

Any reader interested in sharing information of interest to the labor and employment bar, including notices of upcoming seminars or newsworthy events, should direct this information to:

Laurie E. Leader
Clinical Professor
Chicago-Kent College of Law
565 W. Adams – Ste. 600
Chicago, IL 60661
E-mail: lleader@kentlaw.iit.edu

or

Mary Anne Lenihan
Legal Editor
Bender's Labor & Employment Bulletin
LexisNexis Matthew Bender
230 Park Avenue, 7th Floor
New York, NY 10169
E-mail: maryanne.lenihan@lexisnexis.com

If you are interested in writing for the BULLETIN, please contact Laurie E. Leader via e-mail at lleader@kentlaw.iit.edu or Mary Anne Lenihan via e-mail at maryanne.lenihan@lexisnexis.com.

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tals and other employers in the health and medical field, are required to comply with the ADT Standard, including developing and implementing an effective written ATD Exposure Control Plan.

The majority of employers, who are not covered by the ATD Standard, should develop a plan to respond to the COVID-19 pandemic, which should include, at a minimum: actively encouraging sick employees to stay home, sending employees with acute respiratory illness symptoms home immediately, providing information and training to employees on cough and sneeze etiquette, hand hygiene, avoiding close contact with sick persons, avoiding touching eyes, nose, and mouth with unwashed hands, avoiding sharing personal items with co-workers, providing tissues, no-touch disposal trash cans and hand sanitizer for use by employees, performing routine environmental cleaning of shared workplace equipment and furniture, and advising employees to check CDC's Traveler's Health Notices prior to travel. Additionally, employers should follow CDC guidelines to create an infectious disease outbreak response plan to be followed in the event of an outbreak, including: allowing flexible worksites, telecommuting and flexible work hours to increase physical distance among employees, using other methods of minimizing exposure between employees, and between employees and the public, and postponing or canceling large work-related meetings or events.

If the employer maintains a workplace where there is significant risk of exposure to COVID-19, the employer must: implement measures to prevent or reduce infection hazards, such as implementing the above-listed CDC recommended actions, and provide training to employees on their COVID-19 infection prevention methods. Additionally, the employer must provide properly fitting personal protective equipment (PPE) where necessary, and protect employees from inhalation exposure if there is an increased risk of infection in the workplace, which includes implementing engineering and administrative controls where feasible and practicable, or providing respiratory protection. Notably, surgical and other non-respirator face masks do not protect persons from airborne infectious disease and cannot be relied upon for novel pathogens because they do not prevent inhalation of virus particles, do not seal to the person's face and are not tested to the filtration efficiencies of respirators.[2]

Federal OSHA Requirements and Guidelines Related to COVID-19

Strict guidelines apply to high and very high exposure risk jobs, such as those in the healthcare field. However, the majority of jobs medium to low risk. Lower exposure jobs, those that do not require contact with persons known or suspected to be infected with the corona virus nor in frequent and close contact (within 6 feet) of the general public should follow steps applicable to all employers, including: developing an infectious disease preparedness and response plan that addresses the level of risk at each jobsite; taking into consideration where and how workers might be exposed such as through customers, the general public and coworkers, risk factors at home and in the community, workers' individual risk factors like older age and medical conditions; and adopting controls necessary to assess these risks. Employers must also implement basic infections prevention measures, like: promoting frequent handwashing; encouraging sick employees to stay home; encouraging individuals to cover coughs and sneezes; providing customers and the public with tissues and trash receptacles; considering flexible worksite, telecommuting, flexible work hours, and staggered shifts to increase physical distancing; discouraging the use of other employee's equipment; and maintaining regular housekeeping practices.

Medium exposure risk jobs include those that require frequent or close contact with persons who may have COVID-19. In areas where there is ongoing community transmission, workers in this category may have contact with the general public (e.g., schools, high-population-density work environments, some high-volume retail settings). For medium risk jobs, employers should create engineering controls such as installing physical barriers like plastic sneeze guards, applying administrative controls such as offering face masks to ill employees and customers, keeping customers informed about COVID-19 and asking them to minimize contact with workers, limiting customer and public access to the worksite if appropriate, minimizing fact to face contact, and communicating the availability of medical screening and other worker health resources. Workers with medium exposure risk may need to wear some combination of gloves, a gown, a face mask, and/or a face shield or goggles. PPE ensembles for workers in the medium exposure risk category will vary by work task, the

[2] *See* https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html.

results of the employer's hazard assessment, and the types of exposures workers have on the job.[3]

Additionally, employers must consider the relative risk of transmission in the communities in which they have jobsites. Where there is minimal to moderate transmission of COVID-19, employers should: encourage telework where possible, particularly for individuals with an increased risk of severe illness; implement social distancing measures like increasing space between workers, staggered work schedules and limiting in-person meetings and large work gatherings; and consider regular health checks like temperature and respiratory symptom screening of staff and visitors, if feasible. If transmission in the community is substantial, employers should additionally implement extended telework arrangements where feasible, ensure flexible leave policies, and cancel non-essential travel and work-sponsored conferences.[4]

Under current CDC guidance, employers must also separate sick employees. Employees who appear to have symptoms (i.e., fever, cough, or shortness of breath) upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors and sent home. If an employee is confirmed to have COVID-19 infection, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA) by, among other things, ensuring that they do not disclose the name or other information personally identifying the COVID-19 positive or exposed employee. Failure to notify employees of potential exposure could lead to a lawsuit by other employees who then develop COVID-19 symptoms. While difficult to prove, the litigation would be costly. At the same time, employers must be careful not to reveal medical information of particular employees, including a COVID-19 diagnosis, or face privacy lawsuits.[5]

EEOC Guidance on Screening Employees for COVID-19 Symptoms

On April 23, 2020, the United States Equal Employment Opportunity Commission (EEOC) released guidance on COVID-19, the ADA, the Rehabilitation Act and other equal employment opportunity laws. Specifically, the EEOC allows an employer to ask employees if they are experiencing symptoms of COVID-19, like fever, chills, cough, shortness of breath, sore throat or symptoms more recently identified by the CDC like loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

Although measuring an employee's body temperature is considered a medical examination, due to community spread of the coronavirus and the harm posed by it, employers may measure employees' body temperature. The employer may also require that an employee with symptoms of COVID-19 stay home and leave the workplace.[6]

Current EEOC guidance also allows employers to administer COVID-19 tests before permitting employees to enter the workplace as it is "job related and consistent with business necessity." However, the tests must be accurate and reliable under guidance from public health authorities like the U.S. Food and Drug Administration and the CDC.

As with any type of medical screening, testing or medical documentation, employers must ensure confidentiality. Thus, each screening should be done privately, where other employees cannot see or hear screenings of other employees, and where employees are not standing in line together. Additionally, medical information obtained through such screenings or testing, must be maintained as a confidential medical record in compliance with the ADA and stored separately from the employee's personnel file. Failure to properly maintain these confidential records may lead to lawsuits for privacy and other violations.

Although the EEOC allows employers to require a doctor's note certifying fitness for duty when employees return to work, as a practical matter, doctors and other medical professionals may be too busy addressing the pandemic to provide this documentation. Under EEOC guidance, it may be necessary to rely on local clinics to provide a form, a stamp, or an e-mail to certify that an employee does not or no longer has the pandemic virus.[7] In light of the current burdens on healthcare providers, the CDC warns that employers should not require a positive COVID-19 test result or a healthcare provider's note for employees who are sick to validate their illness, qualify for sick leave, or to return to work.[8]

As a practical matter, the employer may also wish to obtain a certification from employees, representing, for example, that within the last couple of weeks the employee has not experienced symptoms of COVID-19, had personal contact with anyone testing positive for COVID-19, or trav-

[3] *See* https://www.osha.gov/Publications/OSHA3990.pdf.

[4] *See* https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf.

[5] *See* https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

[6] *See* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

[7] *Id.*

[8] https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html.

elled to areas that are considered "hot spots" by the CDC. They may also wish to require that employees self-report any symptoms of COVID-19.

Payment for Reporting Time and Testing and Telework Expenses Under California Law

California's Department of Industrial Relations (DIR) has also released COVID-19 guidance for employers. Generally, if an employee reports for his or her regular shift but is sent home or works fewer hours, the employee must be paid at least two hours or no more than four hours of reporting time pay. However, if a state of emergency is declared, such as in response to the coronavirus, reporting time does not apply if the employer's "operations cannot commence or continue when recommended by civil authorities."[9] Thus, reporting time pay applies even under a state of emergency, "unless the state of emergency includes a recommendation to cease operations." Under current guidance, employers who are still operating in some fashion during the pandemic should pay employees reporting time even if they are sent home due to screening or testing for the corona virus. Even where a government authority recommends cessation of operations, the safest course is to pay employees for reporting time.

Although there is no current government guidance on the issue, the best practice in California is to pay employees for the time that they are screened or tested for COVID-19 or wait to do so. While dependent a variety of facts, as in *Frlekin v. Apple Inc.*[10], a court could find that while waiting for or being tested or screened, employees were subject to an employer's control and, thus, that their time is compensable. The safer course, to avoid the time and expense of litigation, is for employers to pay for the time that employees are tested or screened or waiting to do so.

Telework Expenses

Many employers have, in whole or in part, allowed employees to work from home. However, this practice raises a host of new issues, including reimbursement of employee expenses. Generally, under California Labor Code § 2802(a), "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer." In *Cochran v. Schwan's Home Service, Inc.*,[11] the court found that Labor Code § 2802 required that an employer reimburse employees for the use of employees' personal cell phone, even where the employee did not incur extra expense as a result because it would otherwise result in a windfall to the employer. "Thus, to be in compliance with section 2802, the employer must pay some reasonable percentage of the employee's cell phone bill. Because of the differences in cell phone plans and work-related scenarios, the calculation of reimbursement must be left to the trial court and parties in each particular case."[12]

Unfortunately, *Cochran* provides little guidance to employers who want to know what expenses and portion thereof they should pay employees who are teleworking. The amount the employer should pay for expenses like internet access, paper, ink or other supplies reasonably necessary for the employees to perform their duties depends on the employer's and individual employee's circumstances. Employers should consider what utilities and supplies employees are likely using to perform their work, any requests for reimbursement from employees, and documentation of employee expenses in determining what portion of those expenses to pay. For example, employers should pay all expenses that employees incur performing their job that would otherwise have been paid by the employer, such as providing office or other supplies, the employer should pay the entirety of that expense. By contrast, employers should pay a reasonable portion of expenses that an employee would normally use for personal reasons but is now using to perform work, such as internet service.

As a final point, federal, state and local governments, in their attempts to reign in the virus, have created a variety of restrictions, which rapidly change from day to day. In this uncertain time, employers should work with their counsel to ensure compliance with recent executive orders, local ordinances, guidance for government and health authorities, as well to develop appropriate policies and practices to prepare for and address incidents of COVID-19 in the workplace. This article does not detail every legal requirement that may apply to employers during this pandemic, and should not be construed as legal advice.

Arthur F. Silbergeld is an employment litigation partner with Thompson Coburn LLP in Los Angeles who has defended employers in hundreds of employment suits. Kacey R. Riccomini is a senior business litigation associate with Thompson Coburn LLP in Los Angeles.

[9] *See* https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm.

[10] 8 Cal.5th 1038 (2020).

[11] 228 Cal.App.4th 1137 (2014).

[12] *Id.* at 1144.

COVID-19 and Employer Best Practices Under the ADA

By Rauana Karabayeva

The coronavirus disease (COVID-19) pandemic has created an unprecedented world health crisis and, with it, a wide array of social and legal issues. Governmental restrictions primarily aimed at combating the spread of the virus and preventing disease, may limit individual civil rights and have a significant impact on employment and labor relations. This article focuses on employer best practices and obligations during the pandemic arising under, or as influenced by, the Americans With Disabilities Act (ADA).[1]

The United States Equal Employment Opportunity Commission (EEOC) is the agency responsible for administering and enforcing federal laws that prohibit employment discrimination, including the ADA.[2] At the time of the H1N1 outbreak in 2009, the EEOC issued guidance on "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (Guidance)." On March 21, 2020, in response to the COVID-19 outbreak, the EEOC amended its 2009 Guidance, excerpts of which are highlighted below.[3] Although the Guidance does not have the force of law, it provides a roadmap for ADA-covered employers to follow based on the current state of the law and scientific evidence to navigate the uncharted waters of the COVID-19 pandemic.

The ADA's Prohibitions as They Relate to COVID-19 and EEOC Guidance

The Americans With Disabilities Act of 1990 (ADA) prohibits discrimination against "qualified individuals with disabilities."[4] A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." [5]

The ADA defines "disability" as (a) a physical or mental impairment that substantially limits one or more major life activity of an individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment.[6] The ADA's "major life activities" include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.[7] The term "major life activity" also includes the operation of a major bodily function including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.[8]

An impairment qualifies as a disability under the ADA if it "substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity to be considered substantially limiting."[9] "The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . medication."[10]

Assuming that an individual qualifies as a person with a disability within the meaning of the ADA or as a person regarded as disabled or with a history of disability, the individual is entitled to all of the Act's protections. While the ADA prohibits an employer's disability-related inquiries and the pre-employment medical examination or testing of job applicants (whether or not the applicant qualifies as "disabled"),[11] the statutory duty to accommodate only extends to" qualified individuals with disabilities."

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[1] 42 U.S.C. §§ 12101 *et seq*.

[2] 42 U.S.C.S. § 2000e-4.

[3] U.S. EQUAL EMP'T OPPORTUNUTY COMM'N, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act." [hereinafter- EEOC Guidance], available at https://www.eeoc.gov/facts/pandemic_flu.html

[4] 42 U.S.C. § 12102(1).

[5] 42 U.S.C. § 12111(8); *see School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.17, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987)*; *Southeastern Community College v. Davis*, 442 U.S. 397, 406, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979). "Essential job functions" are those that "bear more than a marginal relationship to the job at issue." *See White v. York Int'l Corp.*, 45 F.3d 357, 361 (10th Cir. 1995); *see also Arline*, 480 U.S. at 287 n.17.

[6] 42 U.S.C. § 12102(1).

[7] 42 U.S.C. § 12102(2).

[8] 42 U.S.C. § 12102(2).

[9] 29 C.F.R. § 1630.2(j)(1)(ii).

[10] 42 U.S.C. § 12102(4)(E)(i)(I).

[11] 42 U.S.C. § 12112 (d).

Is COVID-19 a Disability Under the ADA?

In determining the extent to which the ADA protects individuals with COVID-19 or those exposed to it, the threshold question is whether COVID-19 qualifies as a disability under the ADA. A number of factors suggest that symptomatic COVID-19 qualifies as an actual disability under the ADA, including the facts that the disease occurs individually without identically identifiable symptoms and that it is extremely dangerous and life-threatening for a percentage of the population, including those aged 65 and over and those with ongoing chronic diseases. While conditions that are minor and transitory, such as a cold or flu, do not generally qualify as disabilities under the ADA,[12] a short-term illness or other impairment may qualify as an ADA disability if it is severe.[13] Thus, the fact that a person recovers from COVID-19 without a relapse or recurrence should not itself preclude the disease from qualifying as a disability under the ADA.

In cases where an employer challenges whether COVID-19 qualifies as a "disability" under the ADA, an employee with COVID-19 may have to prove either that the disease substantially limits one or more major life activities (e.g., breathing, eating) or that he or she is "regarded as" disabled by the employer. The more difficult question is whether individuals who test positive for COVID-19 but are asymptomatic are entitled to statutory protections. In the case of asymptomatic individuals who receive adverse treatment at work because of their test results, they may be able to argue that they are entitled to ADA protections, because they are "regarded as" disabled within the meaning of the Act.

The ADA provides protections for individuals who are "regarded as" having a disability, even if they are healthy.[14] "[A]n individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[15]

There is case law to the effect that the "regarded as" basis does not include the "fear of a potential future disability." Specifically, in *EEOC v. STME, LLC,*[16] the Eleventh Circuit rejected a "regarded as" claim where the employer allegedly terminated an employee who was about to travel to West Africa over fears that she would contract the Ebola virus and transmit it at work once she returned.[17] Under this authority, the "fear of a potential future disability" would not excuse employee absences and should not justify an employee's evasion of his or her job duties during the COVID-19 pandemic. Nor will it prevent an ADA-covered employer from inquiring as to the reason for an employee's absence from work.[18]

Rights and Obligations of Employers and Employees Under EEOC Guidance

It is recommended that employers follow the Guidance on Preparing Workplaces for COVID-19,[19] issued by the Center of Disease Control (CDC). The amended EEOC Guidance focuses on implementing requirements of the CDC and other public health authorities in a manner consistent with the ADA and "recognizes that guidance from public health authorities will change as the COVID-19 situation evolves."

EEOC Guidance underscores that the ADA:

> [I]s relevant to pandemic preparation in at least three major ways: First, it regulates employers' disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities; Second, it prohibits employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat"; Third, it requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.[20]

Disability-Related Inquiries and Medical Examinations

Generally, the ADA prohibits an employer from making disability-related inquiries and requiring the medical examinations of employees, except under limited circumstances,[21] as set forth in the ADA .[22]

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[12] 42 U.S.C. § 12102(3)(B). The ADA does not define a "minor" impairment, but it does define a "transitory" one. An impairment considered is transitory if its actual or expected duration is six months or less. *Id.*

[13] 29 C.F.R. Pt. 1630, App'x.

[14] 42 U.S.C. § 12102 (3)(A).

[15] 42 U.S.C. § 12102 (3)(A).

[16] EEOC v. STME, LLC, 938 F.3d 1305 (11th Cir. 2019).

[17] 938 F.3d at 1317.

[18] EEOC Guidance, (III) (A)/15.

[19] U.S. CENTERS FOF DESEASE CONTROL AND PREVENTION: Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19) [hereinafter-CDC Guidance], available at https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html.

[20] EEOC Guidance, III.

[21] 42 U.S.C. § 12112(d).

[22] EEOC Guidance, II.

An inquiry is "disability-related" if a question or series of questions is likely to elicit information about a disability.[23] For example, asking an individual if "s/he has (or ever had) a disability or how s/he became disabled or inquiring about the nature or severity of an employee's disability" is a disability-related inquiry.[24] In contrast, an inquiry is not disability-related if it is not likely to elicit information about a disability. By way of example, asking an employee who is sneezing or coughing whether s/he has a cold or allergies is not likely to elicit information about a disability.[25]

A "medical examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health. Whether a procedure constitutes a medical examination under the ADA is determined by considering factors such as: whether the test involves the use of medical equipment; whether it is invasive; whether it is designed to reveal the existence of a physical or mental impairment; and whether it is given or interpreted by a medical professional.[26]

The ADA regulates disability-related inquiries and medical examinations in the following ways:

(1) *Before a conditional offer of employment* -- The ADA prohibits employers from making disability-related inquiries and conducting medical examinations of applicants before a conditional offer of employment is made;[27]

(2) *After a conditional offer of employment, but before an individual begins working* -- The ADA permits employers to make disability-related inquiries and conduct medical examinations if all entering employees in the same job category are subject to the same inquiries and examinations;[28]

(3) *During employment* -- The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity.

As a general rule, a disability-related inquiry or medical examination is job-related and consistent with business necessity when an employer has a "reasonable belief" that the employee's ability to perform essential job functions will be impaired by a medical condition or the employee will pose a direct threat due to a medical condition. This reasonable belief "must be based on objective evidence obtained, or reasonably available to the employer, prior to making a disability-related inquiry or requiring a medical examination."[29]

Direct Threat

A direct threat is defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[30]

The EEOC's regulations identify four factors to consider when determining whether an employee poses a "direct threat" within the meaning of the ADA: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.[31]

According to EEOC Guidance, as of March 21, 2020, there is information available from the CDC and public health authorities that "manifestly support[s] a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time [due to the risk of contagion]. At such time as the CDC and public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists."[32]

Reasonable Accommodation

Generally, the ADA requires employers to provide reasonable accommodations, when requested, to allow applicants and employees with disabilities "to have an equal opportunity to apply for a job, perform a job's essential functions or enjoy equal benefits and privileges of employment."[33] Reasonable accommodations should be provided to covered employees and job applicants in the absence of "undue hardship."[34] An accommodation poses an "undue hardship" if it results in significant difficulty or expense for the employer, considering the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer's business.[35] In the event of

[23] EEOC Guidance, II.

[24] Equal Employment Opportunity Comm'n, No. 915.002, Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, § B of "General Principles" (Jul.27,2000) [hereinafter- Inquiries and Exams], available at https://www.eeoc.gov/policy/docs/guidance-inquiries.html#4.

[25] *Id.*

[26] EEOC Guidance, II.

[27] 42 U.S.C. § 12112(d)(2)(A).

[28] 16. 42 U.S.C. § 12112(d)(3)(A); *see also* 29 C.F.R. § 1630.14(b).

[29] *See* Inquiries and Exams, *supra* note 11, at § A.5 of "Job-Related and Consistent with Business Necessity."

[30] 29 C.F.R. § 1630.2(r).

[31] 29 C.F.R. § 1630.2(r).

[32] EEOC Guidance, II.

[33] 29 C.F.R. Pt. 1630, app. §1630.

[34] 42 U.S.C. § 12112(b)(5)(A).

[35] 42 U.S.C. § 12112(b)(5)(A).

undue hardship, the employer and employee should engage in an interactive process to identify whether alternative reasonable accommodations exist.

Telework may be a reasonable accommodation during the COVID-19 outbreak, depending on the nature of the employer's business and the nature of the employee's work. While telework is an effective infection-control strategy that may accommodate employees with disabilities that are at high risk for complications of influenza during a pandemic, it would not be a reasonable accommodation where the employee's essential job functions involve retail store sales. Where telework is a reasonable accommodation, the employer should ensure that employee being accommodated has the necessary technical equipment and access to perform remote work successfully.

EEOC Guidelines further recommend employer practices for pandemic preparedness in a question and answer format to help employers plan how to manage their workforce in an ADA-compliant manner during and after the pandemic.[36]

During the pandemic, in accordance with EEOC Guidance, an employer may send employees home if they display influenza-like symptoms,[37] or they can ask employees who report feeling ill at work, or who call in sick, questions about their symptoms as fever, chills, cough, shortness of breath, or sore throat, to determine if they have or may have COVID-19.[38] By contrast, an employer should not inquire whether the employee has other chronic diseases, the presence of which may put him at higher risk during a pandemic.

An employer may take the body temperature of employees during a pandemic.[39] Although a measure of body temperature is treated as a medical examination and the ADA prohibits employee medical examinations unless they are job-related and consistent with business necessity, exceptions apply when the employee medical examination is job-related and consistent with business necessity. Again, this exception applies when an employer has a reasonable belief, based on objective evidence, that:

- an employee's ability to perform essential job functions will be impaired by a medical condition, or

- an employee will pose a direct threat due to a medical condition.[40]

The employer may have enough objective information to reasonably conclude that employees will face a direct threat if they contract COVID-19. The best practice in taking employee temperatures should include: (1) training personnel on how to take temperatures; (2) using equipment that avoids direct contact in doing so; and (3) keeping social distance during the process.[41]

ADA-covered employers may not ask employees without influenza symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications.[42] In this case, employers should encourage employees who experience flu-like symptoms to stay at home.[43] This practice is justified by current public policy and CDC Guidance to prevent the spread of the virus. However, questions remain regarding whether during the medical leave period employees must be paid under federal and state or local law; if paid leave is not required, short-term paid leave may constitute a reasonable accommodation under the circumstances.

ADA-covered employers may, likewise, rely on the advice of public health authorities regarding available COVID-19 information in deciding whether to permit an employee's return to the workplace after visiting a specified location, whether for business or personal reasons.[44]

In addition, an employer may require that employees follow infection-control practices, such as regular hand washing, coughing and sneezing etiquette, proper tissue usage and disposal,[45] and requiring employees to wear certain personal protective equipment (e.g., facial masks, gloves and/or gowns).[46]

After the pandemic, when employees return to work, employers may require a physician note certifying an employee's fitness for duty.[47] Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza becomes truly severe, because they would be justified under the ADA's standards for disability-related inquiries of employees.[48]

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[36] EEOC Guidance, III.

[37] EEOC, III, B,5.

[38] EEOC Guidance, III, B.

[39] EEOC Guidance, III, 7.

[40] Inquiries and Exams, § B of "General Principles" (2000), note 11, at § A.5 of "Job-Related and Consistent with Business Necessity".

[41] *See* Best Practices When Implementing a Program for Taking Employee Temperatures During the COVID-19 Pandemic. By Daniel A. Kaplan Carrie Hoffman Ryan N. Parsons, available at https://www.foley.com/en/insights/publications/2020/04/best-practices-employee-temperatures-covid19.

[42] EEOC Guidance, III, B, 9.

[43] EEOC Guidance, III, B, 9.

[44] EEOC Guidance, III B, 8.

[45] EEOC Guidance, III B, 11.

[46] EEOC Guidance, III, B, 12.

[47] EEOC Guidance, III, C (20).

[48] EEOC Guidance, III, C (20).

In the hiring process, an employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, if it does so for all entering employees in the same type of job. This ADA rule allowing post-offer medical inquiries and examinations applies to all applicants, whether or not the applicant has a disability within the meaning of the ADA.[49]

An employer may delay the start date of an applicant who has COVID-19 or symptoms associated with it because, according to current CDC Guidance, an individual with COVID-19 or its symptoms should not be in the workplace.[50]

Employers must maintain all information regarding a person with a disability as a confidential medical record. The fact that an employee had COVID-19 symptoms would be subject to confidentiality requirements. If an employee without a disability-related inquiry voluntarily discloses that he or she has a specific medical condition or disability that puts him or her at increased risk of influenza complications, the employer must keep the information confidential, but may inquire as to whether particular assistance will be needed to enable the employee to work safely.[51]

Conclusion

To balance the employer's business interests and the employee rights and safety during the COVID-19 pandemic, employers should ensure that their best practices are consistent with the ADA's requirements and state and local law. The EEOC Guidance assists employers in achieving that balance. Employers should also develop best practices to assist in preventing the spread of the virus at work by looking to continued CDC Guidance and the guidance of other public health authorities.

Rauana Karabayeva, is an attorney in the Republic of Kazakhstan. She is currently enrolled in the LL.M Program in US, International and Transnational Law through Kazakh State Law Academy, Almaty, Republic of Kazakhstan, and Chicago-Kent College of Law, Chicago, IL, and is expected to receive a Master of Law degree from Chicago-Kent in May 2020.

[49] EEOC Guidance, III, B, 16.
[50] EEOC Guidance, III, B, 18.
[51] EEOC Guidance, II.

[51] EEOC Guidance, II.

Durham v. Rural/Metro Corp.: The Pregnancy Discrimination Act Five Years After *Young v. United Parcel Service*

By Elizabeth Torphy-Donzella

The Pregnancy Discrimination Act ("PDA") is an amendment to Title VII of the Civil Rights Act that expanded the definition of discrimination based on "sex" to include pregnancy, childbirth, and related medical conditions. By its terms, the PDA requires employers to treat those affected by pregnancy the same as "other persons not so affected but similar in their ability or inability to work[.]"[1] The amendment was a legislative response to the U.S. Supreme Court decision in *Gen. Elec. Co. v. Gilbert*,[2] which had held that Title VII's prohibition on sex discrimination was not violated by a disability benefits plan that did not afford benefits to employees absent due to pregnancy because men and women were treated equally as to benefits eligibility and "there was no risk from which men are protected and women are not."[3]

What proof must be proffered to establish that an employer has not met this "same treatment" mandate, particularly in cases in which there is no direct evidence of discrimination, has proved vexing, even after the U.S. Supreme Court's 2015 decision in *Young v. United Parcel Syst*.[4]

This article will examine the first U.S. Court of Appeals for the Eleventh Circuit case to interpret *Young* some five years after that decision, in *Durham v. Rural/Metro Corp.*[5] The article also will examine questions that remain about the fidelity of *Young* to the statutory requirements of the PDA.

Factual Background

Appellant Kimberly Durham was hired in early March 2015 as an emergency medical technician ("EMT") by Rural/Metro Corp ("Rural"), a privately operated ambulance service. Her work as an EMT required her to engage in heavy lifting on a daily basis, including moving medical equipment to and from ambulances, lifting stretchers weighing in excess of 100 pounds and moving patients to and from stretchers.[6]

Durham learned she was pregnant in August of 2015. After a visit with her doctor the following month in which she was advised not to lift more than 50 pounds, she informed the general manager for Rural, Mike Crowell, of her restriction and asked for a light duty or dispatcher position. Rural's light duty policy applied only to employees who sustained work-related injuries. Positions were created to accommodate such employees' work restrictions while they recovered. Dispatcher, by contrast, was an existing position. Although Durham testified in her deposition that she saw two dispatcher jobs "on the board" at the time she asked Crowell for the accommodations, when Crowell was asked by Rural's human resources representative if there were any open light duty or dispatcher jobs available, he said "no." Human Resources, accordingly, told Crowell that Durham's only option was unpaid leave.[7]

Under Rural's policy, unpaid leaves of absences were limited to 90 days, subject to a single 90-day extension. The policy also did not allow other employment while on leave or guarantee that a position would be available when the employee was ready to return. Crowell told Durham that unpaid leave was her only option given her ineligibility for light duty and the lack of any open dispatcher jobs. Needing an income, believing that she could not work or seek unemployment compensation on unpaid leave, and knowing that a single 90 day extension would not take her to the end of her pregnancy, Durham asked to continue in her EMT role. Rural, however, would not agree to this absent a note from Durham's doctor that she could safely perform the duties of the EMT job. Durham could not produce the note and was no longer scheduled for work.[8]

Procedural History

Durham filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination in violation of the PDA because non-pregnant employees with lifting restrictions had been accommodated with light duty or dispatcher jobs. She also alleged that offering her unpaid leave that made her unable to earn a living or have assurance she would be returned to work was tantamount to termination.

[1] 42 U.S.C. § 2000e(k).
[2] 425 U.S. 129 (1976).
[3] 425 U.S. at 138.
[4] 575 U.S. 206 (2015).
[5] 955 F.3d 1279 (2020).
[6] 955 F.3d at 1281-82.
[7] 955 F.3d at 1282
[8] 955 F.3d at 1283.

The record showed that Rural had previously provided light duty to four employees with work-related injuries who had lifting restrictions. Rural also had a policy that employees, regardless of the source of injury, might be accommodated on a case-by-case basis where they could not perform job functions due to a medical condition. This policy was implemented to comply with the Americans with Disabilities Act ("ADA"). Finally, the record also showed that after the EEOC charge was filed, Rural's human resources person pressed Crowell to confirm whether there were available dispatcher positions or open shifts that Durham could work. Crowell responded that open slots were normally filled by others but that he possibly could create a dispatch position from 2 to 10 pm. No offer was conveyed to Durham.[9]

Durham subsequently filed a lawsuit with a single count alleging that Rural's refusal to allow her to work violated the PDA. After discovery, the trial court granted summary judgment, concluding that Durham failed to establish a *prima facie* case because she had not produced evidence that she had been treated less favorably than others who were not pregnant but were similar to her in their ability or inability to work.[10] According to the Court of Appeals, "[t]o reach this conclusion, the district court mistakenly determined that Durham and the nonpregnant Rural EMTs who could not lift the required 100 pounds were not 'similar in their ability or inability to work.'"[11]

Durham appealed the grant of summary judgment against her.

The Eleventh Circuit's Decision

The Panel Decision

The U.S. Court of Appeals for the Eleventh Circuit reversed in what was for the court "a case of first impression as to how to implement *Young*."[12]. In *Young*, the Supreme Court established a modified standard for the *prima facie* case derived from *McDonnell Douglas v Green*[13] under which "a plaintiff must show only that (1) she is a member of the protected class; (2) she requested accommodation; (3) the employer refused her request; and (4) the employer nonetheless accommodated others "similar in their ability or inability to work."[14]

As is familiar under the *McDonnell Douglas* formulation, the employer must then proffer a legitimate, non-discriminatory reason for its actions. However, the Eleventh Circuit noted that "[n]ormally, … an employer cannot simply say that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates, since that reason alone would generally be [in] consistent with the Act's basic objective."[15]

Assuming that the employer presents a justification for its decision that is an "ostensible 'legitimate, non-discriminatory reason'"[16] then the plaintiff may survive summary judgment by presenting evidence suggesting pretext by the employer. Under *Young* "a plaintiff does enough to survive summary judgment if she shows both that 'the employer's policies impose a significant burden on pregnant workers' and that 'the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.'"[17]

In Durham's case (and as in many PDA cases) there was no dispute that she had evidence of the first three elements of her *prima facie* case: she was pregnant, she requested accommodations, and the requests were denied. Thus, the propriety of the lower court's grant of summary judgment turned on the fourth element: whether Rural accommodated others who were similar in their ability or inability to work but not Durham.

In analyzing this element, the court reviewed the operative facts in *Young*. UPS, like Rural, had refused to permit delivery driver Young to receive a temporary alternative assignment when her doctor imposed lifting restrictions due to her pregnancy. UPS advised Young that she did not qualify for temporary assignment. The evidence revealed that UPS provided such assignments to employees injured on the job, disabled on the job (including those with lifting restrictions) and those who lost their DOT licenses for a variety of reasons, including for driving under the influence. The Supreme Court held that because UPS accommodated at least some others who were similar in their ability or inability to do the job, Young satisfied the fourth element of the *prima facie* case.

[9] 955 F.3d at 1283-84.
[10] 955 F.3d at 1284.
[11] 955 F.3d at 1281.
[12] 955 F.3d at 1281.
[13] 411 U.S. 792 (1972).
[14] 955 F.3d at 1285.
[15] 955 F.3d at 1285 (citation and internal quotations omitted).
[16] 955 F.3d at 1285.
[17] 955 F.3d at 1285, *quoting Young*, 575 U.S. at 229.

Turning to the case at hand, the court in *Durham* first noted the Eleventh Circuit's *en banc* decision in *Lewis v. City of Union, Ga.*,[18] in which the court had clarified the contours of "similarly situated employees" for Title VII comparator purposes, and had contrasted this with comparators under the PDA after *Young*. The *en banc* court in *Lewis* remarked that the PDA at this stage looks at only one criterion: similarity in the ability or inability to do the job rather than the "similarity in all material respects" standard applicable to Title VII. Thus, the court in *Durham* found for *prima facie* case purposes that Durham should be compared with non-pregnant employees with lifting restrictions due to on-the-job and medical injuries because they were similar in their ability or inability to do the job. Because they were given accommodations and she was not, the court found that Durham met the fourth element of the *prima facie* case.[19]

Rural's non-discriminatory reasons now at issue, the court listed them: that light duty was reserved exclusively for those injured on the job and that there were no dispatcher positions open. One way Durham could establish pretext, the court noted, was by evidence that the policies imposed a significant burden on pregnant employees and that the reasons were not sufficiently strong to justify the burden. The lower court, however, had not reached this issue, because it had found that Durham did not make out a prima facie case. Therefore, the case was remanded to allow the lower court to undertake this review.

The Concurrence

Concurring in the decision, Circuit Judge Boggs wrote separately because he believed that the Supreme Court's decision in *Young* presented more complexity than the panel decision had acknowledged. Prior to *Young*, the fourth element of the *prima facie* case focused on whether the plaintiff was treated less favorably than other employees who suffered non-occupational disabilities. In the *Young* decision, because UPS had granted temporary work assignments in a great variety of circumstances, including to employees who lost their DOT licenses, it was unclear which categories of employees the Supreme Court had found to create a genuine issue of material fact vis-à-vis the pregnant plaintiff:[20]

Nonetheless the concurrence concluded that it was sensible to determine, as the court did in this case, that the Supreme Court did intend to change the rule and allow the plaintiff to meet her *prima facie* case by comparing herself to others with similar ability or inability to work, including individuals injured on-the-job. The concurrence cited three reasons.

First, the Court in *Young* specifically abrogated the Fourth Circuit ruling that had required the plaintiff to show that all coworkers injured on the job had been treated differently than she was.

Second, the Court in *Young* explicitly adopted many policy rationales that favored moving the arguments for the employer's purportedly legitimately reasons for treating pregnant employees differently than non-pregnant employees in some circumstances from the *prima facie* case to the legitimate/non-discriminatory reason and pretext stages.[21]

Finally, the Eleventh Circuit's *en banc* decision in *Lewis* had specifically cited *Young* as standing for the proposition that the comparator analysis in the PDA was to be treated differently than under Title VII. There, the Eleventh Circuit explained that comparators needed to be similar in all material respects because under Title VII, treating different cases differently is not discrimination.[22] "In the PDA context, by comparison, *either* available comparator—coworkers injured on the job or coworkers injured off the job—is going to be at once 'like' (because unable to work) or 'unlike' (because their inability to work came through injuries or ailments that are not pregnancy). The question is rather whether the company's policy choices reflect an intent to discriminate. And that is better evaluated in the *post-prima facie* stages."[23]

The concurrence concluded by noting that Rural may be able on remand to show that its actions do not give rise to a valid inference of discrimination because there were legitimate reasons for the differential treatment. "It remains an open question, both as a matter of law and as to whether this is in fact what happened here. Such questions are left to the district court to decide in the legitimate-reasons and pretextual inquiries of the *Young* test, not at the *prima facie* stage."[24]

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[18] 918 F.3d 1213 (11th Cir. 2019). For a discussion of the case, see Torphy-Donzella, E, *Cleaning Up the "Similarly Situated" Mess: Lewis v. Union City*, 19 Bender's Lab. & Empl. Bull. 123, 136 (May 2019).

[19] 955 F.3d at 1287.

[20] 955 F.3d at 1288.

[21] 955 F.3d at 1288, *comparing Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1309, 1319-13 (11th Cir. 1999), *with Young*, 575 U.S. at 229–30.

[22] 955 F.3d at 1288, *citing Lewis*, 918 F.3d at 1228 n.14.

[23] 955 F.3d at 1289.

[24] 955 F.3d at 1289.

Analysis

The PDA is unique in that it not only amended Title VII to add pregnancy to the scope of discrimination "because of sex" but because it further specified that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purpose … as other persons not so affected but similar in their ability or inability to work[.]"[25] Prior to *Young*, courts effectively read the "same treatment" clause as inextricably intertwined with whether someone was "the same" in the "ability or inability to work" as the pregnant plaintiff. As such, if an employer restricted light duty to employees who sustained work-related injuries only, the plaintiff could not get past her *prima facie* case burden. A pregnant employee, by virtue of her circumstance, was not the same as those who got the benefit; non-pregnant employees who did not have on-the-job-injuries were equally ineligible for the benefit.

Young refocused the consideration of the employer's justification to the later "why" stages; steps two and three, in which the employer's proffered reason is offered and then its *bona fides* challenged by the plaintiff to reveal whether a jury could find the reasons to be pretextual. In this case, it would seem that if the issue were solely whether Durham was denied the light duty benefit due to pregnancy, Rural should prevail on summary judgment on remand because only those injured at work were eligible and Durham would have been denied this consideration even if she were not pregnant.[26]

Yet, the problem with *Young* and how it analyzes the "why" stage is that the Court added a lawyer that sounds more like a "should" inquiry. Under *Young*, at the pretext stage, courts may assess whether the employer's policy distinction "imposed a significant burden on pregnant employees" and whether the reason for the policy is "not sufficiently strong to justify the burden." These questions take the matter beyond whether the employer intended to treat pregnant employees differently based on their pregnancy for a benefit such as light duty, to whether the denial of a benefit to pregnant employees is sufficiently justified (even if non-pregnant employees in the exact same circumstance – unable to do the job due to non-work reasons – are denied the benefit). And as the court in *Durham* opines, cost to the employer and operational convenience are likely insufficient justifications for any burden on pregnant employees; hence, in most cases, courts are invited to reject such justifications. This balancing of burden and justification invites judges (and ultimately, juries) to act as "super personnel departments" assessing the wisdom of the employer's choices, rather than whether they are choices that suggest an intent to discriminate based on pregnancy. Traditionally, courts and juries are prohibited from such second-guessing.[27]

Equally troubling is that although the Court in *Young* expressly did not decide whether the ADA might require employers to accommodate pregnancy-related disabilities,[28] the decision effectively engrafted a duty to accommodate pregnancy into the PDA. The Court did so by allowing employer policies adopted to comply with the ADA to be used to determine whether pregnant employees were being treated differently than others similar in their ability or inability to work. Before *Young*, the answer was "yes, because the employer legally must accommodate disabilities, and the ADA expressly excluded pregnancy in most cases from the definition of disability." Now, as the *Durham* case demonstrates, policies that provide for accommodations required under the ADA may be used to suggest that denial of a requested accommodation to a pregnant employee is evidence of pregnancy discrimination.[29]

Although five years after *Young* the Eleventh Circuit has now resolved how that case shall be applied in the Circuit, *Young* remains troubling precedent. It is troubling not because accommodating employees with pregnancy related limitations is "bad" or injurious to employers. Rather, it is troubling because it effectively expands the law to afford pregnant employees the same treatment as non-pregnant employees who are the same in their ability or inability to work but materially different otherwise.

Elizabeth Torphy-Donzella is a partner with Shawe Rosenthal, LLP, which exclusively represents management in labor and employment law matters. Among her practice areas are defense of employers before state and federal courts and agencies, advice and counsel to company human resources personnel, investigations of harassment and discrimination complaints, and employment law compliance and diversity training.

[25] 42 U.S.C. § 2000e(k).

[26] Denying the dispatcher position, by contrast, would seem to have been a classic issue for the jury given that there was evidence that positions were available, general manager Crowell told Durham that there were not, and subsequently when Crowell told the human resources manager that he would if required create a shift for Durham, she was not offered the opportunity.

[27] *Chapman v. AI Transp.*, 229 F.3d 1012, 1029 (11th Cir. 2000).

[28] 575 U.S. at 219 (noting that the ADA was amended after the time of Young's pregnancy and that the EEOC had interpreted the amendment as requiring pregnancy accommodations but declining to reach the issue).

[29] Of course, after the amendments to the ADA, employers may have a duty to accommodate employees with pregnancy related disabilities under that law. In addition, many State and local laws require employers to accommodate disabilities caused by pregnancy.

SUPREME COURT REVIEW

Under Plain Meaning of 29 U.S.C.S. § 633a(A), Age Has to Be A But-For Cause Of Differential Treatment, But Not Necessarily A But-For Cause Of A Personnel Action Itself

Babb v. Wilkie, 140 S. Ct. 1168 (2020)

Noris Babb ("Babb") a clinical pharmacist at a U. S. Department of Veterans Affairs Medical Center, sued the Secretary of Veterans Affairs ("VA") under the Age Discrimination in Employment Act [29 U.S.C. § 633a(a)]. The VA moved for summary judgment, offering nondiscriminatory reasons for the challenged actions. The United States District Court for the Middle District of Florida granted the VA's motion after finding that Babb had established a prima facie case, that the VA had proffered legitimate reasons for the challenged actions, and that no jury could reasonably conclude that those reasons were pretextual. On appeal, before the U.S. court of appeals for the Eleventh Circuit, Babb contended that the district court's requirement that age be a but-for cause of a personnel action was inappropriate under the federal-sector provision of the Age Discrimination in Employment Act of 1967 ("ADEA"). Because most federal-sector "personnel actions" affecting individuals aged 40 and older must be made "free from any discrimination based on age," 29 U.S.C. § 633a(a), Babb argued, such a personnel action is unlawful if age is a factor in the challenged decision. Thus, even if the VA's proffered reasons in her case were not pretextual, it would not necessarily follow that age discrimination played no part. The Eleventh Circuit found Babb's argument foreclosed by a Circuit precedent. The U.S. Supreme Court granted certiorari to resolve a Circuit split over the interpretation of § 633a(a). The Court reversed and remanded.

The Court stated that the plain meaning of § 633a(a) demands that personnel actions be untainted by any consideration of age. To obtain reinstatement, damages, or other relief related to the end result of an employment decision, a showing that a personnel action would have been different if age had not been taken into account is necessary, but if age discrimination played a lesser part in the decision, other remedies may be appropriate.

The Court stated that two matters of syntax were critical here. First, "based on age" is an adjectival phrase modifying the noun "discrimination," not the phrase "personnel actions." Thus, age must be a but-for cause of discrimination but not the personnel action itself. Second, "free from any discrimination" is an adverbial phrase that modifies the verb "made" and describes how a personnel action must be "made," namely, in a way that is not tainted by differential treatment based on age. Thus, the Court stated that the straightforward meaning of § 633a(a)'s terms is that the statute does not require proof that an employment decision would have turned out differently if age had not been taken into account. Instead, if age is a factor in an employment decision, the statute has been violated.

The Court stated that § 633a(a) requires proof of but-for causation, but the objection of that causation is "discrimination," not the personnel action. Further, the Court stated that it is not anomalous to hold the federal government to a stricter standard than private employers or state and local governments. When Congress expanded the ADEA's scope beyond private employers, it added state and local governments to the definition of employers in the private-sector provision.

But-for causation is nevertheless important in determining the appropriate remedy. The Court stated that to obtain reinstatement, damages, or other relief related to the end result of an employment decision, a showing that a personnel action would have been different if age had not been taken into account is necessary, but if age discrimination played a lesser part in the decision, other remedies may be appropriate.

RECENT DEVELOPMENTS

ADA

District Court Properly Granted Summary Judgment for Employer On Plaintiff's Discriminatory Discharge Claim And Failure To Accommodate Claim

Trahan v. Wayfair Me., LLC, 2020 U.S. App. LEXIS 12748 (1st Cir. Apr. 21, 2020)

This disability discrimination case required the court to hold steady and true the balance between the important workplace protections that Congress has put in place for disabled employees and the ancient right of employers to discipline (or even discharge) employees, whether or not disabled, for violations of clearly established, neutrally applied conduct rules. At a granular level, the case pitted Kirstie Trahan, a military veteran who suffered from post-traumatic stress disorder ("PTSD"), against her former employer, Wayfair Maine, LLC. The United States District Court for the District of Maine entered summary judgment in favor of Wayfair, and Trahan appealed. After careful consideration, the First Circuit affirmed.

The court while analysing whether Wayfair acted with discriminatory intent stated that the record revealed that Trahan's misconduct was patent. Trahan admitted that she called two of her co-workers (Ireland and McDonald) "bitches." To compound the matter, she repeated in her subsequent meeting with management that they were a "bunch of bitches." What is more, her other actions — such as rolling her eyes, throwing her headset, and slamming down her phone — were undisputed and plainly warranted Wayfair's determination that Trahan had acted unprofessionally. The court stated that it could not be gainsaid that acting unprofessionally and in a disrespectful manner transgressed the Conduct Rules. In short, Trahan committed fireable misconduct, and Wayfair had to prevail at the third stage of the McDonnell Douglas framework unless Trahan — who adduced no direct evidence that Wayfair acted with an intent to discriminate on the basis of her disability — could show that Wayfair's ostensible reliance on this misconduct as the predicate for her dismissal was a sham, that was, a pretext for discrimination. Further, the court stated that no reasonable factfinder could conclude that Wayfair's stated reason for discharging Trahan was pretextual. Consequently, the district court did not err in entering summary judgment against Trahan on her discriminatory discharge claim.

Trahan asseverated that any record deficiencies regarding the reasonableness of her proposed accommodations are "due to Wayfair's failure to engage in an interactive process." Refined to bare essence, she submits that Wayfair opted to fire her rather than engage in a discussion. The court agreed that a request for an accommodation could spark an employer's duty to engage in an interactive dialogue with a disabled employee. But the court stated that liability for failure to engage in an interactive process depends on a finding that the parties could have discovered and implemented a reasonable accommodation through good faith efforts. Here, however the court stated that the record contained no evidence sufficient to ground a reasonable inference that further dialogue between Trahan and Wayfair was likely to have led to such an outcome. Her attempt to invoke the interactive process was, therefore, futile. That ended this aspect of the matter. The court discerned no error in the district court's entry of summary judgment for Wayfair on Trahan's failure-to-accommodate claim.

Employee Was Not "Otherwise Qualified," And The Employer Was Not Obligated to Engage in The Interactive Process Where the Employee Did Not Satisfy The Prerequisites For The Technical Writer Position

Anthony v. Trax Int'l Corp., 2020 U.S. App. LEXIS 12299 (9th Cir. Apr. 17, 2020)

Sunny Anthony appealed the United States District Court for the District of Arizona's grant of summary judgment in favor of TRAX International Corporation (TRAX) in her action alleging disability discrimination under the Americans with Disabilities Act ("ADA"). The ADA prohibits discrimination against "a qualified individual on the basis of disability" [42 U.S.C. § 12112(a)]. Here, TRAX terminated Anthony from her position as a Technical Writer—a position that by virtue of a third-party contract required a bachelor's degree in English, journalism, or a related field—allegedly due to an inability or unwillingness to accommodate her disability. TRAX discovered during the course of this litigation that Anthony lacked the requisite degree. The Ninth Circuit had to decide under these circumstances whether such "after-acquired evidence" that an employee does not satisfy the prerequisites for the position, including educational background, renders the employee ineligible for relief under the ADA.

Contrary to her representation on her employment application, Anthony lacked the requisite bachelor's degree required of all technical writers under the TRAX's government contract. The court stated that because plaintiff did not satisfy one of the prerequisites for her position, she was not "otherwise qualified," and TRAX was not obligated to engage in the interactive process.

Under the two-step qualified individual test promulgated by the Equal Employment Opportunity Commission and embedded in the court's precedent, an individual who fails to satisfy the job prerequisites cannot be considered "qualified" under the ADA unless she shows that the prerequisite is itself discriminatory in effect. Disagreeing with the Seventh Circuit and agreeing with other circuits, the court held that a limitation on the use of after-acquired evidence, applicable under *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995) to an employer attempting to excuse its discriminatory conduct under the Age Discrimination in Employment Act, does not extend to evidence used to show that an ADA plaintiff is not a qualified individual, as required to establish a prima facie case of disability discrimination. Further, the court stated that TRAX had no obligation to engage in the interactive process to identify and implement reasonable accommodations.

ACCOMMODATION

District Court Mistakenly Determined that Employee, Emergency Medical Technician (EMT), and the Non-Pregnant EMTs Who Could Not Lift the Required 100 Pounds Were Not "Similar in Their Ability or Inability To Work"

Durham v. Rural/Metro Corp., 2020 U.S. App. LEXIS 12323 (11th Cir. Apr. 17, 2020)

The Pregnancy Discrimination Act commands that pregnant women "be treated the same ... as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e. Five years ago, in *Young v. United Parcel Service*, 575 U.S. 206, 135 S. Ct. 1338, 191 L. Ed. 2d 279 (2015), the Supreme Court addressed anew the doctrine courts are to use to assess indirect evidence of intentional discrimination in violation of the PDA. This case presents a question of first impression as to how to implement the *Young* test.

Kimberlie Durham's job as an emergency medical technician ("EMT") for Rural/Metro Corporation ("Rural") required her to lift 100 pounds regularly. So when Durham's physician advised her to refrain from lifting more than 50 pounds while she was pregnant, Durham asked Rural for a temporary light-duty or dispatcher assignment for the duration of her pregnancy. Rural had provided these same accommodations to other EMTs who had suffered injuries on the job and were restricted to lifting no more than 10 or 20 pounds as a result. On the other hand, Rural had a policy of not granting such accommodations to employees who had been injured off the job. Rural also had a policy that allowed it to accommodate those with disabilities on a case-by-case basis. Rural declined Durham's request for accommodation, and Durham filed suit, alleging discrimination under the PDA. Rural moved for summary judgment.

The United States District Court for the Northern District of Alabama granted Rural's motion after concluding that Durham had failed to establish a *prima facie* case of discrimination under the PDA. To reach this conclusion, the district court mistakenly determined that Durham and the non-pregnant Rural EMTs who could not lift the required 100 pounds were not "similar in their ability or inability to work." The court arrived at this determination because it erroneously factored into the "similar in their ability or inability to work" evaluation the distinct, post-*prima-facie*-case consideration of Rural's purported legitimate, non-discriminatory reasons for treating Durham and the non-pregnant employees differently.

The Eleventh Circuit therefore vacated the grant of summary judgment. The court stated that neither a non-pregnant EMT who is limited to lifting 10 or 20 pounds nor a pregnant EMT who is restricted to lifting 50 pounds or less can lift the required 100 pounds to serve as an EMT. Since neither can meet the lifting requirement, they are the same in their "inability to work" as an EMT. And that satisfied Durham's *prima facie* requirement to establish that she was "similar [to other employees] in their ability or inability to work."

But the court stated that because the district court determined that Durham did not make a *prima-facie*-case showing, it did not have occasion to separately evaluate Rural's purported legitimate, non-discriminatory reasons for denying Durham her requested accommodation. Nor did it consider whether Durham had pointed to sufficient evidence to raise a genuine issue of fact concerning whether Rural's stated reasons for treating Durham differently than other EMTs with lifting restrictions were pretextual. The court remanded to the district court to make these assessments in the first instance.

CLASS CERTIFICATION

District Court Properly Denied Class Certification on Basis Of A Lack Of Predominance And Superiority

Scott v. Chipotle Mexican Grill, Inc., 2020 U.S. App. LEXIS 10185 (2d Cir. Apr. 1, 2020)

Plaintiffs were seven named plaintiffs representing six putative classes under Fed. R. Civ. P. 23(b)(3) (the "class plaintiffs"). Plaintiffs also sued on behalf of themselves and 516 individuals who opted in to a conditionally certified collective action (the "collective plaintiffs") pursuant to the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. § 216(b). Class plaintiffs were current and former "Apprentices" of Chipotle Mexican Grill, Inc. and Chipotle Services, LLC (together, "Chipotle") who alleged that Chipotle misclassified them as exempt employees in violation of the labor laws in six states. Collective plaintiffs were current and former Chipotle apprentices who alleged that Chipotle misclassified them as exempt employees in violation of the FLSA. As a result of Chipotle's purported misclassification, plaintiffs contended that they were unlawfully denied overtime wages required under state and federal law. The United States District Court for the Southern District of New York denied class plaintiffs' class certification motion on the grounds that class plaintiffs failed to meet the predominance and superiority requirements of Rule 23(b)(3) [*Scott v. Chipotle Mexican Grill, Inc.*, No. 12-cv-8333, 2017 U.S. Dist. LEXIS 62902 (S.D.N.Y. Mar. 29, 2017)]. In the same decision, the district court granted Chipotle's motion to decertify the collective action on the grounds that collective plaintiffs failed to establish that opt-in plaintiffs were "similarly situated" to the named plaintiffs as required for collective treatment under the FLSA [2017 U.S. Dist. LEXIS 62902]. On appeal, class plaintiffs principally argued that the district court relied on erroneous law and clearly erroneous facts in determining that common questions of law or fact did not predominate. Collective plaintiffs contended that the district court erred in decertifying the collective action because it relied on an

erroneous view of the law -- namely, that the FLSA's "similarly situated" inquiry "mirrors" the Rule 23 analysis in rough proportion to the number plaintiffs who have chosen to opt-in. The Second Circuit affirmed the district court's order denying class certification, vacated the district court's order decertifying the collective action, and remanded for further proceedings.

Class plaintiffs argued that this conclusion rested on clearly erroneous factual findings. The court was not persuaded. The court stated that, although nominally an argument about clearly erroneous facts, this assertion boiled down to a disagreement with the district court's ultimate conclusion. The court noted that no clearly erroneous facts relied upon in the district court's analysis; it based its legal conclusion on a fair interpretation of the facts after thoroughly parsing the voluminous record in the case. While reasonable minds could disagree, on the record before the court, the court could not say that the district court's factual findings were clearly erroneous or that its conclusion was outside the range of permissible decisions.

Further, the court stated that the district court correctly cited the law of class certification and applied that law to the facts of the case. It concluded that predominance was not met only after weighing the individualized issues against the common ones and concluding that the individualized issues proved "fatal" to the balancing. The court stated that the district court's conclusion fell within the range of permissible decisions committed to its discretion. Accordingly, the court affirmed the district court's denial of class plaintiffs' motion to certify the proposed class actions.

Collective plaintiffs principally argue that the district court committed legal error by improperly analogizing the standard for maintaining a collective action under the FLSA to Rule 23 procedure, and relying on that improper analogy in concluding that named plaintiffs and opt-in plaintiffs are not "similarly situated." The court agreed. The court stated that if named plaintiffs and opt-in plaintiffs are similar in some respects material to the disposition of their claims, collective treatment may be to that extent appropriate, as it may to that extent facilitate the collective litigation of collective plaintiffs' claims.

COLLECTIVE BARGAINING

Employer Did Not Violate Its Duty to Bargain in Good Faith Because Employer Effectively Retracted its Claim of Inability to Pay Union's Wage and Benefits Proposals, Thereby Limiting Its Obligation to Produce Financial Documents to the Union

Int'l All. of Theatrical Stage Emples., Local 15 v. NLRB, 2020 U.S. App. LEXIS 13739 (9th Cir. Apr. 29, 2020)

At issue in this collective bargaining case is whether the employer, Audio Visual Services Group d/b/a PSAV Presentation Services ("PSAV"), effectively retracted its claim of inability to pay the union's wage and benefits proposals, thereby limiting its obligation to produce financial documents to the union, and whether PSAV failed to bargain in good faith. Petitioner International Alliance of Theatrical Stage Employees, Local 15 ("Local 15" or "Union") is the certified collective-bargaining representative for PSAV's employees. The National Labor Relations Board ("NLRB") found that PSAV did retract its inability-to-pay claim and that PSAV's conduct both at and away from the bargaining table did not establish that it acted in bad faith in violation of the National Labor Relations Act ("Act"), 29 U.S.C. §§ 151-169. Rather, the NLRB concluded that Local 15 "did not sufficiently test [PSAV]'s willingness to bargain prior to filing its bad-faith bargaining charge" [*Audio Visual Servs. Grp., Inc.*, 2019 NLRB LEXIS 173 (Mar. 12, 2019)]. Accordingly, the Ninth Circuit affirmed the NLRB's decision.

The court affirmed the NLRB's findings that: (a) the employer, Audio Visual Services Group d/b/a PSAV Presentation Services, effectively retracted its claim of inability to pay the union's wage and benefit proposals, thereby limiting its obligation to produce financial documents to the union; and (b) PSAV's conduct did not constitute bad faith bargaining in violation of the Act.

The court stated that the union was the certified collective-bargaining representative for PSAV's employees. At issue in this collective bargaining case was whether PSAV effectively retracted its claim of inability to pay the union's wage and benefits proposals, thereby limiting its obligation to produce financial documents to the union, and whether PSAV failed to bargain in good faith.

The court held that substantial evidence supported the NLRB's finding that the substance of PSAV's bargaining position was an unwillingness to pay, rather than an inability to pay, the union's demands. The panel concluded that substantial evidence supported the NLRB's finding that PSAV retracted its inability-to-pay claim, and PSAV's failure to produce documents responsive to the Union's first document request did not violate the Act.

The court rejected the union's arguments that PSAV bargained in bad faith. First, the court held that the fact that PSAV never changed its wage proposal did not itself establish that it acted in bad faith; and on this record, the court could not conclude that PSAV's position on benefits was evidence of bad faith either by itself or in conjunction with

its overall bargaining posture. Second, PSAV's employee discipline proposals did not evidence its bad faith. Third, PSAV's behavior away from the bargaining table did not demonstrate its bad faith. Fourth, PSAV's withholding of documents did not evidence PSAV's overall bad faith. Finally, PSAV's refusal to bargain before May 2016 did not evidence overall bad faith bargaining.

COLLECTIVE BARGAINING AGREEMENT

Unions' Action Was Time-Barred Since the Six-Month Statute of Limitations from NLRA § 10 Applied to Their Claim

United Gov't Sec. Officers v. Am. Eagle Protective Serv. Corp., 2020 U.S. App. LEXIS 12700 (10th Cir. Apr. 21, 2020)

United Government Security Officers of America International Union and its local, United Government Security Officers of America, Local 320 (collectively, the "unions") sued American Eagle Protective Services Corporation and Paragon Systems, Inc. (collectively, the "employers") under § 301 of the Labor Management Relations Act ("LMRA"), seeking declaratory relief under the Collective Bargaining Agreement ("CBA") and to compel arbitration of a terminated employee's grievance. The district court granted summary judgment to the Employers because it determined the six-month statute of limitations from the National Labor Relations Act ("NLRA") § 10(b) applied to the union's claim. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, the Tenth Circuit affirmed the judgment of the United States District Court for the District of Utah.

The court stated that not only is § 10(b) a closer analogy to an action to compel arbitration, federal policies underpinning labor law and the practicalities of litigation weigh in favor of applying § 10(b)'s limitations period in cases brought to compel arbitration of a grievance.

The court concluded that § 10(b) is a better fit for actions brought under § 301 than Utah's statute of limitations for breach of contract because § 10(b) is a closer analogy to an action to compel arbitration and more aligned with federal labor policy. A six-month statute of limitations sets "the proper balance between the national interests in stable bargaining relationships and finality of private settlements," and a party's right to seek a court's resolution. Thus, the court concluded that § 10(b)'s six-month statute of limitations applied.

Finally, the court stated that because § 10(b)'s six-month statute of limitations applies and the unions brought suit nearly two years after the employers' final refusal to arbitrate the grievance, this suit was time-barred.

QUALIFIED IMMUNITY

City Was Not Entitled To Qualified Immunity Under The Kentucky Claims Against Local Governments Act (CALGA) Since That Statute Only Covered Actions In Tort

Queen v. City of Bowling Green, 2020 U.S. App. LEXIS 12926 (6th Cir. Apr. 22, 2020)

Jeffrey Queen sued his former employer, the City of Bowling Green ("the City"), and a former supervisor, Dustin Rockrohr, asserting violations of the Kentucky Civil Rights Act ("KCRA;" city, Rockrohr and KCRA collectively "defendants") and the Family and Medical Leave Act ("FMLA"). The United States District Court for the Western District of Kentucky granted summary judgment to defendants on the claims for hostile work environment based on gender under the KCRA and the FMLA claims, and to Rockrohr on the claim for hostile work environment based on religion under the KCRA. The district court denied summary judgment to defendants on Queen's claim that he was constructively discharged and his retaliation claims, and also denied summary judgment to the city on Queen's claim for hostile work environment based on religion under the KCRA, and on the city's entitlement to an *Ellerth/Faragher* defense. Lastly, the district court also held that defendants were not entitled to qualified immunity for any of Queen's claims that were not otherwise dismissed at summary judgment. This appeal concerned whether the district court correctly denied summary judgment to the city and Rockrohr on certain KCRA claims, holding that they were not entitled to qualified immunity. The Sixth Circuit affirmed the district court's denial of qualified immunity to the city as to the claims for hostile work environment based on religion and for retaliation and affirmed the district court's denial of qualified immunity to Rockrohr for the retaliation claim.

Queen asserted that the court lacked jurisdiction to decide this appeal because defendants failed to concede the most favorable view of the facts to him and instead "rely exclusively on their version of the facts." The court stated that Queen was only partially correct. To be sure, defendants had relied on their disputed version of the facts to support certain arguments that the district court erred in denying qualified immunity. For example, defendants challenged the district court's conclusion that "Queen publicly acknowledged that he was an atheist," by asserting that "[i]t is undisputed," when it is in fact disputed, "that Queen never disclosed his atheism to anyone at the" fire station. Similarly, with respect to Queen's retaliation claim, defendants factually disputed whether Queen actually made a complaint about his work conditions that was sufficient to constitute a statutorily protected activity.

However, defendants presented two purely legal questions that the court could review. First, in response to Queen's claims of a hostile work environment based on his religion and employment retaliation, the city argued that it was entitled to immunity under Kentucky's Claims Against Local Governments Act ("CALGA"). Second, in response to Queen's retaliation claim, Rockrohr argues that under Morris v. Oldham County Fiscal Court, 201 F.3d 784 (6th Cir. 2000), he was entitled to qualified immunity, as recognized by Kentucky common law. The court stated that under its controlling precedent, these challenges presented "neat abstract issues of law" that the court had jurisdiction to review.

The court held that Queen's claims for hostile work environment based on religion and for retaliation were not within the scope of CALGA, as they did not meet the definition of "action in tort" set forth in KRS § 65.200(1), given that they were statutory, not tort, claims. The court stated that as such the city was not entitled to immunity under CALGA on those claims. The judgment of the district court denying such immunity was therefore affirmed. The claims against the city for hostile work environment based on religion and for retaliation could therefore proceed on remand.

The court agreed with the district court that Queen provided sufficient evidence to deny Rockrohr summary judgment on his qualified immunity defense. A reasonable jury could conclude that Rockrohr's subsequent conduct after receiving Queen's complaint about the harassment he faced at the Bowling Green Fire Department, which conduct included Rockrohr's suggestion that Queen "should get employment elsewhere" because "things [were] not working out," went far enough to amount to a materially adverse action.

REST BREAK

Former Employees Were Entitled to Summary Judgment in a Class Action Against Their Bank Employer, Because Bank's Commission-Based Compensation Plan for Their Mortgage Sales Violated Lab. Code § 226.7 By Not Separately Compensating Them For Time Spent On Rest Breaks

Ibarra v. Wells Fargo Bank, N.A., 2020 U.S. App. LEXIS 11891 (9th Cir. Apr. 15, 2020)

Jacqueline Ibarra ("plaintiff"), a mortgage broker for Wells Fargo Bank, N.A. ("Wells Fargo"), brought a putative class action alleging that Wells Fargo's commission-based compensation plan violated California Lab. Code § 226.7 by not separately compensating her for time spent on rest breaks. The United States District Court for the Central District of California certified a class of Wells Fargo employees who sold mortgages ("plaintiffs"). Based on a set of facts stipulated to by the parties, the district court granted summary judgment for plaintiffs and awarded damages of $97,284,817.91. Accordingly, the Ninth Circuit affirmed in part the district court's judgment and remanded in part.

The court stated that under *Vaquero v. Stoneledge Furniture LLC*, 9 Cal. App. 5th 98 (Ct. App. 2017), *review denied* (June 21, 2017), plaintiffs were correct that Wells Fargo's compensation method violated California's rest break requirements. The court stated that *Vaquero's* reasoning drew from other California law precedents that the California Supreme Court has declined to disturb and the California Supreme Court denied review in *Vaquero* itself. The court thus had no reason to think the California Supreme Court would decide *Vaquero* any differently than the court of appeal did. The court stated that although Wells Fargo attempted to draw distinctions, its commission-based compensation plan was virtually identical to the compensation plan that *Vaquero* held violated Lab. Code § 226.7. Because the commission-based approach here was mathematically equivalent to that in *Vaquero*, it yielded the same violation of state law that occurred in *Vaquero*.

The court rejected Wells Fargo's argument that damages should be reduced to account for the 961 class members who Wells Fargo asserted earned only hourly pay. The court stated that even if Wells Fargo was not liable to any class members who earned only hourly pay, it had not met its burden of establishing the number of such class members—a figure that could likely only be discovered from Wells Fargo's own records.

Further, the court stated that although some judicial economy might be lost by remanding to the district court, the fact that the parties have stipulated to alternative damages amounts—leaving only the question of which legal approach to calculating damages is correct—significantly narrows the scope of what remains to be resolved in any further proceedings.

RETALIATION

Former Employee's False Claims Act Claim Failed Because He Failed to Make Sufficient Showing on Essential Element of His Case With Respect To Which he had Burden of Proof

Sherman v. Berkadia Commer. Mortg. LLC, 2020 U.S. App. LEXIS 11713 (8th Cir. Apr. 14, 2020)

Richard Sherman alleged he was terminated from his employment by Berkadia Commercial Mortgage LLC ("Berkadia") in retaliation for actions protected by the False Claims Act ("FCA") and Missouri law. The United States District Court for the Eastern District of Missouri granted Berkadia summary judgment on all claims. Sherman appealed. The Eighth Circuit affirmed the district court's judgment.

The court stated that Sherman failed to establish a direct evidence of retaliation. While Sherman had produced evidence that Berkadia management did not implement, and were at times critical of, some of his suggestions regarding compliance with the United States Department of Housing and Urban Development ("HUD") regulations, there was also evidence that Sherman's supervisors disapproved of other parts of his job performance. The record demonstrated, for example, that Berkadia was concerned about Sherman's inability to work with the production team manager and his history of accommodating underwriters who continually produced work product at a much slower rate than the industry average. Taken in the light most favorable to Sherman, this evidence would not allow a reasonable jury to find that Berkadia fired Sherman solely for protected activity. In other words, Sherman "has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof."

Further the court stated that even assuming his wrongful-discharge claim was not waived, none of the HUD compliance issues Sherman raised internally during his tenure amounted to "*serious* misconduct" on the part of Berkadia or its employees. The evidence showed that Sherman made it his mission to align the company's conduct with his interpretation of HUD regulations. Sherman's efforts in this regard were mostly well-taken by his supervisors. The court stated that at no point had Sherman shown how Berkadia's activity violated "*clearly mandated* public policy." The record therefore did not present a genuine issue of material fact as to whether Sherman fit Missouri's "very narrow" exception to at-will employment. Therefore, the court stated that summary judgment was appropriate on Sherman's wrongful-termination claim.

WRONGFUL TERMINATION

Former Public High School Teacher Could Not Show That His Termination For Teaching Anti-Semitic Views Was A Pretext for Discrimination

Ali v. Woodbridge Twp. Sch. Dist., 2020 U.S. App. LEXIS 12906 (3d Cir. Apr. 22, 2020)

Jason Mostafa Ali is of Egyptian descent and identified as a non-practicing Muslim. Ali was employed as a non-tenured history teacher at Woodbridge High School from September 2015 to September 2016. His History department supervisor received complaints about Ali's instruction on the Holocaust. One English teacher reported that her students were questioning historical accounts of the Holocaust, opining that Hitler didn't hate the Jews and that the death counts were exaggerated. Students' written assignments confirmed those accounts. Around the same time, Ali had prepared and presented a lesson on the terrorist attacks that occurred on September 11, 2001. The lesson plan required students to read online articles translated by the Middle Eastern Media Research Institute ("MEMRI"). Ali posted links to the articles on a school-sponsored website: "U.S. Planned, Carried Out 9/11 Attacks—But Blames Others" and "U.S. Planning 9/11 Style Attack Using ISIS in Early 2015." The MEMRI articles also contained links to other articles, such as "The Jews are Like a Cancer, Woe to the World if they Become Strong." A television reporter questioned Principal Lottman and Superintendent Zega. Lottman directed Ali to remove the MEMRI links from the school's website. The following morning, Ali met with Zega and Lottman; his employment was terminated. He alleged he was wrongfully terminated from his high school teaching position on the basis of his race, ethnicity, and religion. Although Ali's deposition testimony stated that his supervisor made some disparaging remarks about Ali's race, Ali was not able to show that his teaching anti-Semitic views to his students was a pretext for discrimination that led to his termination. The Third Circuit affirmed the United States District Court for the District of New Jersey's grant of summary judgment in favor of Woodbridge Township Board of Education, Woodbridge Township School District, Zega, and Lottman (collectively "defendants").

The court stated that defendants presented at least two legitimate reasons for Ali's termination. Since Ali has not presented a genuine dispute of material fact that two of Defendants' rationales were a pretext for discrimination, we will affirm the District Court's grant of summary judgment on both the NJLAD and 42 U.S.C. § 1981 discrimination claims.

Ali alleged that Lottman had greeted Ali on two occasions with "Hey Arabia Nights" and "Hey, Big Egypt," made a comment to Ali regarding computers in Egypt, and referred to him as "Mufasa" or "Mufasa Ali" based on Ali's middle name, Mostafa, and in reference to a character from the Lion King. The court stated that although these remarks were offensive, none of them rose to the level of severity that would alter working conditions. There was no evidence that Lottman made these comments in the presence of other employees with "an attitude of prejudice that injects hostility and abuse into the working environment" or that any of them were as severe as the use of an unambiguous racial epithet. In addition, these were isolated incidents; Ali cannot show that Lottman's remarks were so pervasive that they altered the working environment.

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2020

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Oct. 29-30	NELI: Employment Law Conference	New York, NY
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