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Religion at Work: A Tightrope Walk for Employers

By Seth Ford, Christina Lucio, and William Andersen

Most employers recognize that they cannot ignore the religious needs of their employees. They realize that it is necessary to work with their employees to try to accommodate their religious beliefs not only to avoid liability but to maintain a harmonious work environment. But, imagine discovering that several of your employees decided to rub olive oil on the doorway of another employee's cubicle and then proceeded to chant vociferously, commanding "demons to leave… you vicious evil dogs [to] get the hell out" of their co-worker. As a private employer, your reaction most likely would be to consider whether these acts disrupted the work environment and then to determine if and to what extent the acts deserve reprimand. What you probably would not consider is that these actions might constitute expressions of your employees' religious beliefs that are protected by law. Think again. As a Texas federal court explained when recently faced with these very facts, employers must always be mindful that employment decisions involving employee religious beliefs or observances be handled with care. While this case may be a far cry from the more common religious-based workplace issues (like requests for time off for religious observances or requested exceptions to grooming and dress standards), it is important for employers to remember that religious issues may arise in the workplace in a wide variety of situations, each of which presents its own unique set of considerations and difficulties.

When religion meets the workplace, employers face many challenges and potential liabilities. Title VII of the Civil Rights Act of 1964 (Title VII) not only prohibits employment discrimination based on religion, but it also requires employers to take steps to reasonably accommodate the religious beliefs or observances of their employees. Courts have determined that the definition of "religion" is broad and includes "all aspects of religious observance and practice, as well as belief." Additionally, religious beliefs held by an employee need not be part of a recognized religion or religious group in order to be protected; such beliefs only need to be "sincerely held" by the employee. Given this mandate, employers should educate themselves about the various areas where liability can arise in order to avoid costly litigation.

Disparate Treatment: Employers are prohibited from considering the religion of an employee or job applicant when making employment decisions. In other words, an employer may not treat employees or applicants more or less favorably because of their religious beliefs or practices. If an employer takes an adverse employment action against an employee or job applicant and that action is motivated by the individual's religion, the individual may bring a "disparate treatment" claim against the employer.

In the case described above, a federal court in Texas recently ruled that two employees bringing a disparate treatment claim against the University of Texas at Arlington (UTA) were entitled to have their claims heard by a jury. In that case, three UTA employees performed an after-work prayer in the office involving loud chanting and the use of olive oil near the entryway of an absent co-worker's cubicle in an effort to rid the absent co-worker of her "demons." Two of the employees

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were terminated; the one who reported the incident was not. UTA argued that its decision to fire the two employees was justified because their actions constituted harassment of the absent employee, "behavior unbecoming of a UTA staff member" and a blatant disregard for university property. It also argued that it was justified in not firing the third employee because he was a "whistleblower" who reported the improper work conduct. The judge did not find the argument compelling and pointed out that all three employees were involved in the prayer session in some manner, yet the consequences of their actions ended with different disciplinary results. Thus, the judge found that the fired employees could pursue their disparate treatment religious discrimination claim against the University.

It is important to note that Title VII prohibits discrimination based upon an individual's own religious beliefs and not those of his or her employer. To illustrate, a federal appeals court upheld a decision finding that an employer did not violate Title VII when it discharged employees for having an extra-marital affair, where the employer viewed the affair as inconsistent with its own religious beliefs and having an affair had no religious significance to the discharged employees. But, where an activity has sincerely-held religious significance to an employee, an employer may not make an employment decision based on that activity. To do so would leave the employer susceptible to a religious discrimination lawsuit.

Failure to Accommodate: Charges of religious discrimination often are based on an employee's claim that the employer refused to accommodate the employee's religion, typically by refusing to grant time off for religious observances. Employers are usually not required to abolish otherwise neutral and generally applicable policies that happen to disparately impact employees with certain religious beliefs. However, an employer is required to "reasonably accommodate" an employee's religious belief or practice unless doing so would impose an undue hardship on the employer.

An employee or job applicant seeking an accommodation must provide the employer with express notice of the conflict between the employment requirement and his or her religion or religious beliefs. The Seventh Circuit recently confirmed this requirement in Xodus v. Wackenhut Corporation. In Xodus, an applicant was rejected for employment because his dreadlocked hairstyle failed to conform to the employer's grooming policy. The rejected applicant sued, arguing that he wore dreadlocks as an adherence to his religion, Rastafarianism, and that he was denied a job because of his refusal to cut his dreadlocks, which would contravene a tenet of his religion. The applicant never explicitly informed the employer of his religious belief. Instead, when the employer told the applicant that he would not be hired until he cut his hair, the applicant responded, "[t]hat's why I am suing…. It's against my belief." The Court found it significant that the applicant failed to expressly bring his religious beliefs to the attention of the employer and concluded that, since the employer did not equate the applicant's reference to "belief" with religion, the employer did not discriminate against the applicant based on his religious beliefs.

Religious Harassment: Religious harassment claims generally fall under one of two theories. The first theory involves a situation in which an employee claims that the employer demanded that the employee abandon, alter, or adopt a religious practice as a condition of his or her employment. The second theory involves a set of circumstances in which an employer creates a religious "hostile work environment" that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. Both types of claims can expose employers to great liability, and both types of claims may be brought in a single case. Consider, for example, a case in which a federal court in Colorado held that an employer's religious views "saturated the workplace." In that case, the CEO/President of the company sent employees audiotapes of prayers and religious scripture, gave a religious-themed speech at a company award dinner, and presented a "corporate prayer," which all employees were required to sign. Consequently, the Court awarded $750,000 in punitive damages to an employee who sued for religious harassment. Such liability can be avoided when the employer diligently maintains a harassment-free work environment.

Practical Advice for Employers

Treat Everyone Equally: The advice found in this playground adage still rings true today, especially for employers. Employers must treat employees equally regardless of their religious beliefs and practices. In the UTA case, the university terminated two employees for conducting a prayer vigil in the workplace but failed to terminate a third who was also involved. Employers should always ask themselves whether they are treating similarly-situated employees differently than others, and if so, whether the reasons for doing so are legitimate and legally permissible. Moreover, employers must be mindful that they cannot consider an applicant or employee's religion or religious beliefs when making employment decisions.

Make Reasonable Accommodations and Remain Consistent With Your Own Internal Policies: Typically, reasonable accommodation issues arise in situations where an employee is required to work on a religious holiday or to conform to certain dress codes and/or grooming guidelines that conflict with his or her religious beliefs. To that end, the Equal Employment Opportunity Commission (EEOC) recommends that employers implement policies that allow voluntary substitutes or shift swaps, flexible scheduling, changes in job assignments, or lateral transfers. But these suggestions do not provide guidance for certain other delicate issues of accommodation, such as prayer at work. If an employee's religious beliefs require time for prayer during the workday, the employer should try to find an appropriately private and separate area to allow for such prayers, maybe an office or conference room.

In all cases, employers must carefully strike a balance between accommodating employees' religious beliefs and other workplace goals and policies. Such workplace policies and goals should be clearly communicated to employees. Importantly, an employer is not required to accommodate if such accommodation

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infringes on the rights of fellow employees. In the case against UTA, however, the judge determined that no employee rights were infringed because the object of the prayer was unaware of its occurrence and the university's own harassment policy expressly allowed prayer. Further, the judge referred to the fact that the fired employees' department supervisor stated that the university's duty to accommodate depended "on the type of prayer" and whether it was "offensive." The judge determined that this reason was not only inconsistent with the university's harassment policy, but it did not conform to the law. Remember, an employer cannot consider the substance of an employee's belief when making employment decisions or when determining whether accommodation would result in undue hardship.

Don't Play the Guessing Game: Religious affiliation, beliefs, and practices are not always apparent, nor are they easily determined. A job applicant or employee has a duty to expressly notify the employer of a conflict between his or her religious beliefs and an employment policy or practice. This provides employers with a certain amount of protection against having to guess the religious convictions of applicants or employees. However, employers should still be sensitive to the fact that many employees do, in fact, hold strong religious beliefs. Being consistently mindful of this should help avert costly litigation.

An Employer's First Line of Defense: The Importance of Good Documentation

By Chad C. Almy

A lot has been made of employer documentation in the last several years. Most of the discussion, however, has focused on document retention policies. While such policies are necessary for every employer, they could be irrelevant if the employer isn't documenting correctly in the first place. Effective documentation is essential in employment litigation. Without it, an employer is open to serious challenges from plaintiffs regarding whether the actions occurred as the employer maintains, and if so, whether the actions were taken for the reasons articulated by the employer. Alternatively, an employer that produces and retains effective documentation may insulate itself from many forms of employment liability. When faced with documentation, a plaintiff's ability to poke holes in the employer's story is greatly reduced. Further, good documentation allows the employer to streamline its legal defense, laying out the facts clearly and authoritatively, and cutting legal costs in the process. This article will explore what employers should be documenting and how they should do it.

What Should be Documented?

As a general rule, the more documentation an employer is able to provide regarding the communications with, and actions taken toward, its employees, the better. Anything that defines an employee's duties or responsibilities, details an action taken by an employer, explains the decision-maker's rationale in taking the action, or evidences communications between supervisors and their subordinates can prove helpful. When things are documented, they are less likely to be disputed by a current or former employee, and when they are challenged, they are much easier to defend. Specifically, employers would be wise to document the following:

- **Initial employment records:** Documentation should include records obtained from the employee at the outset of employment: the application, any authorizations obtained from the employee (i.e., background check or drug testing), the employee's W-4 and I-9 forms, and any benefit election/waiver forms.

- **Signed acknowledgment:** A critical piece of documentation that should be obtained at the inception of the employment relationship is a signed acknowledgment from the employee stating that she received the employer's important policies and/or employee handbook. It is critical that certain policies such as the company's equal employment opportunity and harassment policy, the at-will employment policy and the Family and Medical Leave Act (FMLA) policy be communicated to employees at the inception of employment. Proof that employees received certain policies is essential in some kinds of employment cases and is helpful in virtually every employment case.

- **Updated acknowledgments:** When policies or handbooks are updated and distributed, acknowledgments of receipt should be obtained from existing employees and kept in the employee's personnel file.

- **Training documentation**: Proof of attendance at key training events can be important in employment litigation. Employers should document employees' attendance at harassment training, safety training and training on other important aspects of an employee's job.

- **Attendance**: Attendance records should be accurate, current and maintained consistently for all employees who are subject to a company's attendance policy. Unexcused absences should be documented as such. Excused absences such as FMLA-related

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absences should be documented to ensure that they are not considered in connection with discipline arising out of attendance issues.

- **Performance evaluations:** Make certain that managers consistently and timely perform employee evaluations at the scheduled intervals and that those evaluations are maintained in the employee's file.

- **Misconduct:** Regardless of whether you think an employee's isolated actions will lead to discipline, all misconduct must be recorded. Documentation that is created contemporaneously with the event is more reliable than documentation created after the fact.

- **Discipline/counseling records:** All oral and written discipline or counseling should be documented in the employee's file. Employers should document performance and discipline problems carefully, contemporaneously, consistently and thoroughly. It is important to make certain that performance-related documentation in the employee's personnel file appears consistent with that of other, similarly-situated employees.

- **Employee change forms:** Include records showing changes in title, responsibilities, pay, transfers and other terms and conditions of employment in the employee's file.

- **Investigations and complaints:** Document investigations and complaints relating to or raised by the employee. Employers should retain documents that reflect the nature of the complaint, what action the company took in response, who the witnesses are, and the ultimate disposition of the complaint or investigation. For minor issues, maintaining related documents in the personnel file is acceptable. For more serious or sensitive complaints or investigations (i.e., harassment or discrimination complaints by or against the employee), the employer should maintain a separate file.

- **Records relating to medical or disability issues:** It is important to maintain records containing medical information, but they should be maintained separately from the personnel file and treated as confidential. Examples include records relating to worker's compensation claims, an employee's disability or request for accommodation under the Americans with Disabilities Act, and certification forms and supporting documents under the FMLA.

- **Post-termination records:** The employer should maintain a copy of the employee's DOL Separation Notice (required in Georgia), a copy of any correspondence or documentation relating to the return of company property, and a copy of the COBRA notice that went to the employee in the employee's file. Records (including any transcripts) of any unemployment compensation proceedings should also be maintained by the employer.

Important Tips for Supervisors when Documenting

After going through litigation involving a current or former employee, a supervisor is often more diligent with documentation. Throughout the litigation, that supervisor sees how helpful having certain documentation was (or could have been) in defending the company. In addition to better understanding what must be documented, these supervisors also learn how to enhance and improve their existing documentation. The following is a list of insider tips that can help supervisors avoid the mistakes and omissions they will regret if litigation occurs:

- **Document in the Moment:** When something noteworthy happens, document it. In the instance of employee misconduct, document it as soon as you have the opportunity. Don't wait until you've decided whether to issue formal discipline to document the underlying conduct. Even if you don't plan on issuing discipline for isolated conduct, document it – you never know when isolated conduct will repeat itself and become a pattern of behavior. Contemporaneous documentation can be powerful evidence, as it is not only more accurate than testimony regarding the incident months and years later, but it reflects the true rationale of the decision-maker when the decision was made.

- **Document Diligently:** Err on the side of over-documenting. If you aren't certain whether there needs to be a record, document it. Documenting is time intensive and tedious, but you must be persistent – every issue has the potential to turn into litigation.

- **Document Professionally:** Remember, a primary purpose of documenting is to provide evidence during litigation. Document as though everything you write will one day appear in front of a judge and jury. Use appropriate language, write clearly and succinctly, and be thorough. Make certain that what you write makes sense without having to explain things that aren't written.

- **Document Correctly:** Make sure you follow all company procedures without exception. If a document requires an employee's signature, get it. Often times if procedures are not followed, the documentation can be disregarded for evidentiary purposes. For example, if a notice of discipline requires an employee's signature acknowledging his review and you give it to the employee without obtaining his signature, the employee may be able to successfully assert that he never received the notice at all.

Leave Me Alone: Avoiding ADA Retaliation Claims Based on Reasonable Accommodation Requests

By Jana L. Korhonen

As a prudent employer, you know that an employee who complains of discrimination cannot be retaliated against. You have policies that prohibit retaliation against individuals who complain of discrimination or harassment. You train your managers on these policies and you enforce them consistently. So, you may be thinking to yourself that, when it comes to avoiding retaliation claims, we've got it covered.

But, did you know that retaliation claims can arise absent complaints about discrimination or harassment? The federal and state statutes that prohibit retaliation generally state that an employee cannot be retaliated against for having engaged in protected activity. Of course, protected activity includes activities such as complaining of discrimination or harassment and filing a charge of discrimination with the Equal Employment Opportunity Commission (to name a few). But, protected activity can also arise when an employee requests a reasonable accommodation under the Americans With Disabilities Act (ADA). That means there's at least a potential risk to employers whenever it becomes necessary to discipline, terminate, or otherwise take an adverse job action against an employee who has requested a reasonable accommodation. The risk is that this employee may have a viable ADA retaliation claim.

Real World Examples of Viable ADA Retaliation Claims Based On an Employee's Request for an Accommodation

Employers are not always successful in avoiding the risk of an ADA retaliation claim where the employee's allegedly protected activity is a request for a reasonable accommodation. Below are some real world examples to illustrate this point:

An Employee with Depression Requests Accommodations and Her Position is Later Eliminated: In a recent case pending before a federal court in Minnesota, an employee took a leave of absence for depression. Toward the end of the leave, the employee called her boss to discuss a reduced work schedule upon her return. The employee's boss indicated that he would look into her question. A few days later, however, the employee's boss informed her that her position had been eliminated. Several months later, the employer, having recently received additional funds, decided to hire a replacement. The employee applied for her former position, but delayed in submitting her work history, and was not selected for this position.

The employee sued her employer claiming, among other things, that she had been discriminated against on the basis of her disability and retaliated against. The court concluded that the employee could not show she was disabled (because she was not substantially limited in a major life activity). Nonetheless, the court concluded that a non-disabled employee could pursue an ADA retaliation claim, as long as she had a good faith belief that the requested accommodation was appropriate (which this employee did because no evidence showed her request was made in bad faith). The court also reasoned that the employee's request for a reduced-work schedule was a request for a reasonable accommodation, which constituted protected activity under the ADA. Further, the employee's termination appeared to be causally connected to her request because these events were closely related in time. The employer claimed that the employee's termination was justified due to a decreased workload. The court, however, found contrary evidence in the record, plus evidence that the employer had ignored her application for the new position. Accordingly, the court permitted the employee to proceed to a jury trial on her ADA retaliation claim.

An Employee with ADD Requests a Leave of Absence and is Later Terminated for Insubordination: In a case arising in Massachusetts, an employee who suffered from Attention Deficient Disorder (ADD), stress, and anxiety requested several accommodations, including a short leave of absence, which was granted. Shortly after the employee returned from leave, the employee's manager gave him some work-related instructions, which the employee attempted to follow, but was unsuccessful in doing so. The manager then fired the employee for insubordination. The employee sued in federal court claiming retaliation under the ADA. Ultimately, the court concluded that the employee's request for a reasonable accommodation was protected activity, which appeared causally connected to his termination because these events were close in time. The court determined that the record did not (in its view) paint a picture of insubordination by the employee and, therefore, the court determined a triable issue of fact remained as to whether the employee was fired in retaliation for his request for a reasonable accommodation.

An Employee Requests Possible Accommodations for Hypersensitivity to Chemicals and Is Later Terminated: In a case arising in Pennsylvania, an employee suffered from hypersensitivity to common chemicals (e.g., scented hand creams, deodorants, White-out, furniture polish). The employee met with her supervisor to discuss possible accommodations, including the possibility of adopting a perfume-free workplace policy or installing a special air filtration device in

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her workspace. The meeting, however, went awry. The employee became confrontational. Accusations were made. Later, the employee was terminated. The employee then sued claiming that the employer terminated her in violation of the ADA because she requested an accommodation. The court agreed that the employee had a viable ADA retaliation claim, even though the employee never established that she was disabled.

What Should Employers Do?

In light of the cases discussed above, employers would be wise to take the following steps to minimize the risk of a retaliation claim based on requests for accommodations:

Check for Protected Activity (Including a Request for a Reasonable Accommodation) Before Approving a Discipline or Termination Decision: To minimize the risk of a retaliation claim, you should always check to confirm that the employee has not recently engaged in protected activity. Employers should recognize requests for accommodation as protected activity to evaluate the risk of a retaliation claim based on this activity.

Be Sensitive to Appearances and Timing: As with any retaliation claim, employers are well-advised to consider the timing between an employee's request for an accommodation and any discipline or termination that's being proposed. Where discipline or termination follows on the heels of an employee's accommodation request, an ADA retaliation claim could follow.

Train Your Managers: Employers must train their managers to understand that requests for reasonable accommodations can constitute protected activity (regardless of whether they are granted or denied). Managers work on your organization's front-lines daily. These managers need to understand that requests for reasonable accommodations can constitute protected activity so they know to call the Company's Human Resources Department and/or the Legal Department if discipline, termination, or other adverse actions are necessary.

Understand That Even Non-Disabled Employees Can Pursue ADA Retaliation Claims: Do not confuse the requirements to establish an ADA discrimination claim with a retaliation claim. It matters for an ADA discrimination claim whether the employee can establish that he or she has a disability or is perceived as having a disability as defined under the ADA. Whether an employee has an ADA disability generally does not matter with respect to his or her retaliation claim (provided the accommodation request is made in good faith). So, do not assume that an employee's ADA retaliation claim will fail if his or her impairment does not rise to the level of a disability. As the cases discussed above indicate, even non-disabled employees can sometimes prevail on ADA retaliation claims.

Costly Commutes: An Overview Of When Employers Must Pay For Employee Travel Time

By Matthew R. Almand and Daniel Gunning

The general rule for when employers are required to pay employees for time spent traveling seems easy enough: commute time to and from work is not compensable, while travel time during the workday is compensable. Unfortunately for employers, the rule only seems easy to apply. No longer is a workday simply based on when an employee punches in and out. As technology changes, so too does the average workday. More employees are working from home or doing work on the road before and after the normal workday takes place. As the typical workday changes, employers must come to understand how these changes affect whether employees must be compensated for their travel time.

Under the Fair Labor Standards Act (FLSA), employers are not required to compensate employees for time spent commuting from home to work or for any activities that are "preliminary to or postliminary to" their principal activities at work. The U.S. Department of Labor (DOL) has clarified that "normal travel from home to work [whether at a fixed location or at different job sites] is not work time" because it is an "incident of employment," and is therefore not compensable. The term "normal travel," as used in the regulation, does not represent an objective standard of how far most workers commute or how far they may be reasonably expected to commute, but rather represents a subjective standard that is defined by a particular employment relationship.

Where courts are currently struggling, however, is with the issue of what activities trigger the start of the workday because once the workday begins, all time spent traveling will almost always be considered compensable travel time and no longer part of the employee's non-compensable "commute". In addition, employees must be compensated for any work performed during the commute that is integral and indispensable to a principal activity of their employment. This article addresses the various circumstances that can take place before, during, or after the commute and whether the courts and the DOL have found that such activities transform non-compensable commute time into compensable time.

Circumstances That DO NOT USUALLY Make Commute Time Compensable

The good news for employers is that commute time is generally not compensable. And courts and the DOL tend to agree that this rule

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remains true even when the following factors (without more) are present:

Company Vehicle: Otherwise non-compensable commute time is not compensable merely because an employee commutes in a company-provided vehicle, provided that (1) the work sites are within the normal commuting area of the employer's establishment and (2) the use of the vehicle is subject to an agreement or mutual understanding between the employer and the employee. Employer restrictions, such as prohibiting the vehicle to be used for personal pursuits or transporting passengers or requiring employees to have their cell phone on them at all times while driving a company vehicle, do not make otherwise non-compensable commute time compensable.

Job Assignments: The mere receipt of a job assignment or other instruction before or during a commute does not require commute time to be compensable.

Carrying Equipment: Transporting ordinary parts, tools and equipment needed to perform a job does not make commute time compensable.

Loading Equipment: Loading personal equipment (such as gloves, uniforms, safety equipment) is preliminary in nature and does not trigger the start of a workday requiring commute time to be compensable.

Other *De Minimis* Activities: *De minimis* activities are activities that are conducted infrequently, take a minimal amount of time to perform, and are administratively impractical to record. *De minimis* activities, even if performed during the commute, do not make commute time compensable.

Circumstances That MAY MAKE Commute Time Compensable

In contrast, if an employee's activities at home trigger the start or end of the workday, then the employee's drive from home to work or work to home occurs within the workday and at least part of that time must be compensated. This is known as the "continuous workday doctrine." While courts have been wrestling with what activities trigger the start or end of the workday for years, there are certain facts that typically are viewed as starting the workday.

Remote Reporting Site: Where employees are required to report to a remote site to pick up equipment, receive instruction, or drop off personal vehicles, the travel time from the remote site to the work site is compensable.

Transporting Special Equipment: Where transporting specialized or heavy equipment is a principal activity and a regular part of the employee's daily travel, such time may be compensable. The DOL has stated that special equipment does not include typical or usual work or repair tools such as laptops, manuals, briefcases, gloves, wrenches, etc.

Special Assignment: Where an employee regularly works at a fixed location, but is given a special assignment in another city, such travel is not ordinary home-to-work travel because it is performed for the employer's benefit to meet the needs of a particular and unusual assignment. Notably, all of the time spent traveling to the special assignment is not necessarily compensable – the amount of time it would have taken the employee to commute from his home to the fixed location may be subtracted, as it remains non-compensable.

After Hours/Emergency Work: While the DOL recognizes that there may be instances where an employee is called back into work to perform emergency work after completing his shift, the DOL has expressly refused to take a position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.

Work During Commute: If the employee performs principal activities during the commute, which are not merely *de minimis* in nature, such time is compensable.

While the above-discussed rules provide some guidance for employers in determining whether commute time is compensable, each employment relationship is fact specific and requires some analysis before determining whether an employee's commute time is compensable. The following cases illustrate how courts have handled some of the more difficult fact patterns that have surfaced in recent years.

For example, in Dooley v. Liberty Mutual Insurance Co., a federal court in Massachusetts held that an insurance appraiser who, in the morning and still while at home, received phone calls, checked email, responded to messages, reviewed the day's assignments, and mapped out her route for the day was required to be compensated for commute time. It typically took the insurance appraiser about 30 minutes to complete these tasks. The court found that the employee's activities performed at home were principal activities that commenced the workday, and the employee's commute from home to the first appraisal site was therefore compensable.

In Hiner v. Penn-Harris-Madison School Corp., a federal court in Indiana held that a bus driver who kept his bus at home and was required to perform extensive inspections before leaving for his first stop was required to be compensated for his travel time between his home and first stop.

In both the Dooley and Hiner cases, the courts found that the employee's activities were more than *de minimis* because they were frequent activities (in these cases, they occurred daily) conducted at the behest of the employer, easy to record, and usually took a significant amount of time (in both cases, more than a half hour). In addition, the courts noted that travel was integral to the employee's job duties (i.e., insurance appraisers and bus drivers). Accordingly, travel to the first work site was not treated as traditional commute time.

By comparison, in Rutti v. Lojack Corp., Inc., the Ninth Circuit Court of Appeals recently denied a technician who installed car alarms compensation for his commute time under the FLSA. There, the technician argued that his workday started at home by receiving, mapping, and prioritizing jobs and routes for assignment and ended at home by sending a Personal Digital Assistant (PDA) transmission to his employer concerning all the jobs he performed during the day. With respect to the start of his workday, the court held that mapping his route was related to his commute,

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took no more than a few minutes each morning, and was therefore *de minimis* and non-compensable. The court also refused to require compensation for the employee's drive home, because the employer only required the PDA transmission to be sent sometime between 7 p.m. and 7 a.m. The court held that, while the employee was required to be compensated for the actual time it took to send the transmission (typically about 10 minutes), his commute home was not compensable because the employer provided enough time to enable him to use the time effectively for his own purpose. In other words, the workday ended after the last assignment, since the employee was free to do as he chose with his night, so long as the transmission was sent by 7 a.m. the next day. As a cautionary note to California employers, however, the court in Lojack did find the employee's commute time compensable under California law, which is broader than the FLSA.

Similarly, the Federal Circuit Court of Appeals in Bobo v. United States rejected a claim for commute time by a group of border patrol agent dog handlers for the time spent transporting their dogs from home to the border patrol office. The handlers argued that during the drive, they were required to monitor their radios, wear their uniforms, report mileage, lookout for suspicious activity, and occasionally make stops to allow the dogs to exercise or relieve themselves. The court found that the activities were *de minimis* and non-compensable, as the activities were performed infrequently, of little duration, and were administratively impracticable to measure.

In both the Rutti and Bobo decisions, the courts found that the employees were minimally restricted by the employer during the commute, the activities performed were *de minimis* in nature, and the activities performed did not materially alter the employees' commutes.

Is Information On Facebook Subject to Discovery Requests? It Depends On Whom You Ask

By Brandon Dhande and Steve Riddell

One of the most important aspects of any civil lawsuit is the discovery phase, in which the parties request documents, ask questions, and take depositions of witnesses to establish the facts in the case before trial. In employment law cases, it is common for employees to request a wide range of information from their former employers. But because employees do not produce as much data and keep the same type of records as the companies they work for, the scope of discovery requests sent to employees is traditionally fairly limited.

With over 500 million active users, the popularity of Facebook and other online social networks has created a wealth of potentially discoverable information for employers. It is not unusual for employees to update their Facebook status once a day or more, use Facebook to communicate with coworkers, and post pictures to Facebook taken with friends from work. Over time, this type of daily use may result in a significant amount of discoverable information.

When an employee who is an active user of Facebook decides to sue his or her employer for allegedly violating a workplace law, information on a Facebook profile may be essential to the outcome of the case. For example, if an employee filed an Americans with Disabilities Act (ADA) claim alleging that she is disabled because of a back injury and that her employer failed to accommodate her condition, imagine the impact on the case if the employee's Facebook page reveals that she works the night shift at a strenuous second job without accommodation. The Facebook information could sink her ADA claim.

Many employees are already wise to the privacy pitfalls of Facebook, so they have locked their accounts away from public view. Some supervisors may choose to friend employees on Facebook, thus gaining access to their profiles and raising a host of monitoring concerns (which exceed the scope of this article and are worthy of their own discussion). Once an employee initiates a lawsuit, the discovery process is the easiest way to obtain information from private Facebook accounts.

Despite the fact that Facebook has been popular for years, there are only a few court rulings that address the permissible scope of discovery requests involving Facebook and other online social networks. The following cases show how parties have succeeded and failed to obtain information posted on Facebook through the discovery process.

Facebook Users May Be Compelled to Respond to Discovery Requests

A recent court order in the case of EEOC v. Simply Storage Management, LLC provides an interesting look at how employers can use focused discovery requests to access the private Facebook profiles of their employees during litigation. In that case, the EEOC sued Simply Storage for sexual harassment on behalf of two employees. As part of the claim for damages, the EEOC alleged that the employees had suffered from depression and stress disorders because of the harassment. During discovery, Simply Storage sought a number of communications and updates from the plaintiff's Facebook and MySpace accounts, including self-evaluations entitled "How well do you know me" and the "Naughty Application."

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Information on Facebook *Continued*

The EEOC objected to these requests on the grounds that the production of material from the Facebook and MySpace accounts would not be relevant to the case and would violate the plaintiff's privacy. The Court disagreed and made two important findings. First, it held that content on Facebook and MySpace is not shielded from discovery simply because it is locked or private. Second, the Court held that social media content should be produced during discovery if it is relevant to a claim or defense. Based on these findings, the Court in Simply Storage ordered the production of any content from Facebook or MySpace that could reasonably relate to the plaintiff's mental or emotional state.

Requests Sent Directly To Facebook May Be Blocked By Federal Privacy Law

In 1986, Congress passed the Stored Communications Act, a law that prevents certain private electronic communications from being disclosed without authorization. Because the Stored Communications Act was enacted before the widespread adoption of the Internet, it can be difficult to predict whether the law applies to new technologies until a court rules on the issue. Until recently, no court had addressed whether the Stored Communications Act protects private information sent through online social networks.

Earlier this year, a federal court in California issued an important ruling that applied the Stored Communications Act to discovery requests for information on Facebook and MySpace. In Crispin v. Christian Audigier Inc., the plaintiff, an artist, sought information from the defendant's Facebook and MySpace accounts to prove that artwork was used without permission. However, unlike in Simply Storage, the plaintiff in Crispin issued discovery requests directly to Facebook and MySpace. The Court denied these requests, holding that the Stored Communications Act prohibits Facebook and MySpace from disclosing private electronic communications, even in response to a civil subpoena. Because the defendants had communicated on these social networks using private accounts, federal law protected the messages. The ruling in Crispin is significant because it held that the Stored Communications Act applies to online social media networks like Facebook and MySpace when they receive discovery requests. We expect other courts to follow this rule in the future.

Proper Discovery Requests Pay Dividends

The lesson learned from Simply Storage and Crispin is that discovery requests for information contained on a Facebook or MySpace profile should be directed to the social network user, not Facebook or MySpace. The Stored Communications Act protects Facebook and other social media networks from most civil discovery requests. This rule makes sense because thousands of Facebook users could be engaged in litigation nationwide. If those Facebook users' profiles are discoverable from Facebook, Facebook would need to devote significant time and resources to respond to such requests. In contrast, the burden on a party during discovery to produce his or her own Facebook or MySpace records is minimal. We expect to see more decisions like Simply Storage, in which courts require parties to produce their own Facebook or MySpace profiles during discovery.

What Should Employers Do?

Employers typically distribute "litigation hold" or "document retention" advisories to key employees when a charge of discrimination or lawsuit is filed, which instruct those employees to preserve relevant documents and electronic records. However, employers should consider also sending their own document retention advisories to plaintiffs and their counsel whenever the employer believes that helpful, discoverable information may have been posted on a Facebook or MySpace page. Such letters can greatly assist a spoliation-of-evidence argument if the plaintiff's prior postings on Facebook or MySpace are allegedly gone or unavailable later. The Labor & Employment Practice Group at Troutman Sanders will continue to monitor developments in this important area of the law.

Employment Law on the Back Burner? Uncertainty after Midterm Elections

By Rebecca E. Ivey

There has been much activity in Congress since our last update, but the vast majority of that activity has not directly impacted employment law. Before the late summer recess we saw the confirmation of Elena Kagan to the United States Supreme Court and the appointment of Carte Goodwin to the Senate seat vacated by late Democratic Senator Robert C. Byrd of West Virginia. In the abbreviated pre-election session, very little of note occurred. Of course, the big news is the outcome of the November mid-term elections, after which Republicans gained control of the House, and Democrats held their majority in the Senate, but barely. One interesting fact is that Republican Mark Kirk will take over for Democratic Senator Roland Burris from Illinois.

Since Congress has been back in session, Charlie Rangel's ethics trial has occupied the spotlight. There is some doubt as to whether significant legislative progress can be made during the current post-election lame duck session, and it is unlikely that legislation affecting employers will be front and center, with Congressional members focusing their attention on extensions of the Bush tax cuts and unemployment benefits. This continues the theme of 2010, where most employment-related initiatives have played

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second fiddle to healthcare, economic reform, and unemployment benefits. To set the stage for the lame duck session and the upcoming 112th Congress, below is an update of the progress of bills we have previously discussed, as well as new employment legislation.

HIRE Now Tax Cut Extension Act of 2010 (H.R. 6105, S. 3623)

Current Status of Law: The HIRE Act of 2009 provides two tax incentives for private employers who hire unemployed workers, including an exemption from paying FICA (social security) taxes on the wages of those workers and a business tax credit for retaining the workers for at least 52 consecutive weeks. These incentives only apply to individuals hired before January 1, 2011, and the FICA tax "holiday" only applies to employment through December 31, 2010. For more information on the HIRE Act in its current form, read the article entitled "Are You Taking Advantage of the HIRE Act?" in the Summer 2010 edition of the Troutman Sanders *Employment & The Law* newsletter, available online at http://www.troutmansanders.com/lesummer2010-09/.

What Would Change: Simple. The HIRE Now Tax Cut Extension Act of 2010 (the "Extension Act") extends these incentives into 2011. First, the Extension Act amends the applicable hire date of the previously unemployed worker to extend through July 1, 2011. Second, the Extension Act extends the FICA tax holiday through June 30, 2011, but only for workers hired after July 22, 2010.

Why You Care: You can give a little less to the IRS. If you have already taken advantage of the HIRE Act, you may be entitled to additional incentives if you hired an eligible worker after July 22, 2010. If you haven't taken advantage of the HIRE Act because you haven't been able to justify hiring an eligible worker, this legislation would give you some extra time.

Likelihood of Becoming a Law: Introduced in the House in August, this bill has a long way to go before it becomes law. In the bill's favor, however, is that it is a mere timing extension of the HIRE Act, which garnered bipartisan support, possibly because it took the form of a tax credit rather than a spending initiative. However, the clock is ticking – this legislation does not appear to be on anyone's radar. Another possible fate for this extension is that it may be enacted in slightly different form if the Americans Want to Work Act (discussed below) garners more bipartisan support, though that is unlikely.

The Americans Want to Work Act (S. 3706)

Current Status of Law: This law would affect both unemployment insurance and the HIRE Act tax incentives discussed above. Normally, unemployment benefits last for 26 weeks and are primarily paid by the states. In periods of high unemployment, the federal government has traditionally stepped in with emergency measures to provide extra weeks of benefits. The Emergency Unemployment Compensation program, created in June 2008, currently structures these efforts with up to four new "tiers" of benefits. In July, legislation that provided an extension of these extended unemployment benefits through November was signed by the President. The extension restored unemployment benefits to the 2.3 million unemployed Americans who had run out of basic unemployment benefits, but did not include a Tier 5 unemployment extension that would provide additional weeks of unemployment benefits for those unemployed workers who have exhausted all basic and extended unemployment benefits.

What Would Change: This bill goes much further than the Extension Act. It amends the applicable hire date of the previously unemployed worker to extend through January 1, 2012 (six months longer than the Extension Act). Second, the Act extends the FICA tax holiday through December 31, 2011, but only for workers hired after August 4, 2010 (again, six extra months). The bill also doubles the tax credit from $1,000 to $2,000 if businesses hire workers who have totally exhausted their unemployment benefits. With respect to unemployment benefits, this bill would also provide extra weeks of benefits to people who have reached the end of their unemployment insurance lifelines (also known as Tier 5) in states with over 7.5% unemployment. The measure would provide 20 extra weeks of unemployment benefits.

Why You Care: You can give even less to the IRS. This legislation would give employers even more time to take advantage of the available incentives. The increase in the tax credit for those who have exhausted their unemployment benefits is yet another potential boon for any employer looking to hire. And you don't have to pay more in unemployment taxes.

Likelihood of Becoming a Law: Introduced August 4, 2010, this bill is trying to do an awful lot. The problem is that the advantageous tax initiatives for employers are tied to yet another unemployment benefits extension. This bill has a hefty price tag that could be unappealing to many in Congress. While it is possible this bill will be revisited in the lame duck session, it is unlikely.

Direct Care Workforce Empowerment Act (S. 3696, H.R. 5902)

Current Status of Law: Workers employed "on a casual basis in domestic service," such as babysitters, companions, and in-home caregivers are currently exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA). A 2007 Supreme Court ruling clarified that this FLSA exemption also applies to direct care workers employed in clients' homes by third parties, such as employment agencies, in accordance with a corresponding Department of Labor (DOL) regulation.

What Would Change: This bill would revise the FLSA to redefine "casual basis." The definition would specify that "employment is not on a casual basis, whether performed for one or more family or household employers, if such employment for all such employers exceeds twenty hours per week in the aggregate." Consequently, many casual domestic workers would become entitled to minimum wage, which is currently $7.25 nationally, and overtime pay for hours worked in excess of forty per week. This bill would also direct the Department of Health and Human Services (HHS) to establish a direct care workforce monitoring program to facilitate data collection about the direct care workforce, and would allocate $25 million to the HHS Secretary to provide grants to states to expand their direct care worker training programs, create or improve systems for monitoring and collecting data about the direct care workforce, and establish or expand recruitment and retention programs.

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Why You Care: This is not about your daughter's babysitting gig. This bill will affect many direct care occupations, including employees working as nurses' aides, home health aides, personal care aides, and home care aides. If you are in the healthcare industry or direct care industry, or if your business places individuals for work in these industries, this may affect you.

Likelihood of Becoming a Law: Eventually, highly likely. This bill was just introduced, so it has a long way to go, and so far its current vocal supporters are exclusively members of the Democratic Party. Nonetheless, the House bill's sponsor, Representative Linda Sanchez from California, is pursuing a parallel means of changing the FLSA by taking the issue up with the DOL. The DOL is scheduled to release a notice of proposed rulemaking by the end of October 2011.

Miner Safety and Health Act of 2010 (H.R. 5663) (update)

Current Status of Law: Both mining safety law and general workplace safety law are implicated. The Occupational Safety and Heath Act (OSH Act) mandates safe and healthful working conditions by authorizing enforcement of workplace standards developed under the OSH Act. The Mine Safety and Health Act (MSHA) regulates and enforces safety specifically within the mining industry. Both legislative schemes provide for oversight and enforcement and have a schedule of penalties for violations.

What Would Change: This legislation's proposed changes to the OSH Act are relevant to most employers. Akin to the Protecting America's Workers Act discussed in last edition's Legislative Update (H.R. 2067, S. 1580), this bill revises the OSH Act to increase whistleblower protections and augment criminal and civil penalties on employers and managerial employees. The legislation would also require employers to fix serious hazards during the contest period, instead of waiting until the employer's appeal is exhausted. Employees and their family members would have greater rights during investigations and enforcement actions. The Occupational Safety and Heath Administration (OSHA) would be able to assert concurrent enforcement jurisdiction in states with the OSH Act state plans if the state is failing to maintain protections on par with the OSH Act. The bill raises employer penalties from $7,000 to $12,000 for serious violations and from $70,000 to $120,000 for willful and repeat violations. The Congressional Budget Office estimates that the OSH Act portion of this bill could bring in an additional $80 million in fines over the next 10 years.

Why You Care: This legislation could upend decades of policies and practices upon which employers and employees have come to rely. The increased penalties and liability for managerial employees are costly for business operations, and the augmented whistleblower protections could cause costly litigation in an already challenging economic environment.

Likelihood of Becoming a Law: It is possible, but not probable. This bill has reported out of committee and could be brought to vote on the House floor later this year. However, there is significant opposition to this legislation from Republicans and industry groups. Passage in the House and Senate would have to be prioritized during the lame duck session, which is unlikely, and when the starkly different 112th Congress is seated, the outlook for the bill becomes increasingly grim.

Paycheck Fairness Act (S. 3772, H.R. 12, S. 182) (update)

Current Status of Law: The Equal Pay Act (EPA), enacted in 1963, prohibits discrimination on account of sex in the payment of wages by employers. Class members must affirmatively give written consent to opt in to any action. Employers have an affirmative defense to an EPA action if a discrepancy in pay is due to "any factor other than sex."

What Would Change: The Paycheck Fairness Act would amend the EPA by narrowing the employer's affirmative defense from discrepancies due to "any factor other than sex" to discrepancies that are "not based upon or derived from a sex-based differential in compensation," are "job-related with respect to the position in question," and are "consistent with business necessity." The bill would also allow for previously unattainable compensatory and punitive damages, as well as opt-out (rather than opt-in) class actions.

Why You Care: If passed, the Paycheck Fairness Act would make gender-based pay discrimination claims more prevalent, more difficult to defend, and more costly.

Likelihood of Becoming a Law: Zilch. The Paycheck Fairness Act breezed through the House alongside the Lilly Ledbetter Fair Pay Act (which became law in January 2009), but stagnated in the Senate as Senate Bill 182. Senate Majority Leader Harry Reid re-introduced the bill as Senate Bill 3772 in mid-September, but was unable to bring it to a vote before mid-term elections. On November 17, 2010, the bill failed a cloture motion in the Senate by roll call vote, receiving only 58 of the 60 votes necessary, preventing consideration of the bill.

Work-Life Balance Award Act (H.R. 4855) (update)

Current Status of Law: There are currently no laws governing this area.

What Would Change: Nothing. The bill would simply reward companies for being particularly innovative or proficient in developing policies that foster a work-life balance for their employees. The Work-Life Balance Award Act would establish an award within the DOL to recognize companies that help employees balance the demands of their professional and personal lives.

Why You Care: What employer wouldn't want to be on the good side of the DOL?

Likelihood of Becoming a Law: Nil. While we thought passage was fairly likely (thinking that few would oppose the bill), on June 15, 2010, it failed to pass the House by roll call vote. The vote was held under a suspension of the rules to cut debate short, which would have allowed the bill to pass with a two-thirds majority, which happens often enough for uncontroversial legislation. But this bill wasn't uncontroversial enough, it seems. Still, you may see the bill again next Congress. In the meantime, don't expect a plaque from the DOL.

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