Ogletree Deakins

# The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law | March/April 2016

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## "Sleeping on the Job" Bars ADA Lawsuit

***Employee's Own Behavior, Not Disability, Led to Discharge***

*A federal appellate court recently held that an employer did not violate the Americans with Disabilities Act (ADA) when it discharged an employee who had been sleeping at work and falling short of the employer's performance expectations. The Sixth Circuit Court of Appeals affirmed a district court's grant of summary judgment to the employer, ruling that the employee had failed to show that he was disabled or had engaged in "protected activity" as defined by the ADA, and that his sleeping difficulties had been caused by his own "horrible sleep hygiene," rather than a medical condition.* ***Neely v. Benchmark Family Services,*** *No. 15-3350, Sixth Circuit Court of Appeals (January 26, 2016).*

### Factual Background

David Neely was hired by Benchmark Family Services as a support specialist in December of 2011. Within two weeks, he was promoted to support administrator.

Prior to joining Benchmark, Neely had sought treatment from family physicians Dr. Shah and Dr. Froelich for sleeping problems. Neither doctor diagnosed Neely with sleep apnea or a related sleeping disorder, but in 2010, Dr. Froelich referred him to Dr. Burton, a specialist who treats patients with sleeping issues.

Dr. Burton's "preliminary impressions" (which were not a diagnosis) were that Neely had "poor sleep hygiene, insufficient sleep syndrome, and probable obstructive sleep apnea." Dr. Burton recommended various follow-up tests, but Neely did not go through with them, preventing, according to the court, "'preliminary impressions' from maturing into a diagnosis."

After Neely joined Benchmark, he

*Please see "ADA SUIT" on page 6*

## Don't Miss Workplace Strategies 2016 in Chicago!

***Firm's Annual Seminar to Feature Over 70 Sessions and 175 Speakers***

Ogletree Deakins' 2016 Workplace Strategies seminar will be held May 4-7, 2016 at the Chicago Marriott Downtown Magnificent Mile and will feature dynamic speakers and presentations on a full range of labor and employment law topics. This annual seminar—the premier event of its kind for sophisticated human resources professionals, in-house counsel, and other business professionals—will likely sell out soon.

If you haven't yet made your plans to join us, here are five reasons to make your reservation now: 1) cutting-edge topics, including "ambush" elections, the revised rules for "persuader" activity, pay equity laws, the new proposed overtime rules, and the latest guidance on joint employment status; 2) world-class guest speakers, including U.S. State Department Presidential Deputy Envoy Julia Nesheiwat, Ph.D., ESPN Senior Writer and Legal Analyst Lester Munson, and former Secretary of Transportation and U.S. Congressman Ray LaHood; 3) "TED"-style talks with engaging speakers who will offer their perspectives on current workplace developments; 4) giving back by joining your colleagues at a special event on Wednesday evening benefiting Kids Off The Block, a local nonprofit dedicated to helping at-risk youth; and 5) networking at our Friday special wrap reception in "Sweet Home Chicago."

The seminar has a hard cap on attendance of 800 guests, so register soon. For more details, see the enclosed flyer or visit www.ogletreedeakins.com. ■

# Justice Scalia's Death Could Have Profound Reverberations for Employers

*by Harold P. Coxson (Washington, D.C.)*

The sudden death of Associate Justice Antonin Scalia of the Supreme Court of the United States, who served on the Court for over 30 years, has touched off a heated political debate over the appointment and consideration of his successor, which will perhaps shift the philosophical balance on the Court. Justice Scalia was the leader of the Court's "conservative faction" and was admired by his supporters—including his colleagues on the Court, some with whom he frequently disagreed—as a legal scholar, the principal and often tiebreaking conservative voice on the Court, and a social friend off the bench.

Beyond the broader political and social issues, Justice Scalia's death will have an immediate impact for employers on several labor and employment cases currently pending before the Court, as well as on the future of earlier decisions in which his vote would have been a tiebreaker.

## Key Labor and Employment Cases

Of immediate concern, for example, is the Court's decision in *Friedrichs v. California Teachers Association* (No. 14-915), which was decided as this issue was going to press. The issue in *Friedrichs* was the constitutionality of the compelled payment of "fair share" union dues for non-member public-sector employees.

The Court's decision was widely expected to be 5-to-4, with Justice Scalia casting the deciding vote against a requirement that non-members who are included as part of a collective bargaining unit pay union dues. With Justice Scalia's death, the result was a 4-to-4 tie, and the decision by the Ninth Circuit Court of Appeals upholding the right of public-sector unions to demand the "fair share" payment of union dues by nonmembers was affirmed. As a result, the tie decision lacks precedential value and merely becomes the law of that circuit. (For a detailed discussion of this case, see page 5 of this issue of *The Employment Law Authority*.)

An important pending case is *United States v. Texas* (No. 15-674), which challenges President Obama's deferred action immigration policy. If the death of Justice Scalia results in a 4-to-4 tie vote, the Court will uphold the decision of the Fifth Circuit Court of Appeals affirming the district court's preliminary injunction preventing implementation of the president's executive action granting deferred immigration status to certain undocumented immigrants.

Other pending employment law cases before the Court are:

- *CRST Van Expedited, Inc. v. EEOC* (No. 14-1375) involves a challenge to the largest fee sanction award—$4.7 million—ever issued against the U.S. Equal Employment Opportunity Commission. The fee award was for the federal agency's failure to meet its investigatory obligations in prosecuting a systemic lawsuit.
- *Spokeo, Inc. v. Robins* (No. 13-1339) concerns whether individuals can bring class action lawsuits for technical violations of the Fair Credit Reporting Act without actual injury.
- In *Green v. Brennan* (No. 14-613), the issue is whether the filing period for a constructive discharge claim brought under Title VII of the Civil Rights Act begins to run from the date when the employee resigned or when the employer commits the last alleged discriminatory act leading to resignation.

## Class Actions and Mandatory Arbitration Also at Risk

Beyond currently pending cases, Justice Scalia's death threatens the future viability of the Court's 5-to-4 majority decisions. Examples of two such decisions authored by Justice Scalia include *Wal-Mart Stores, Inc. v. Dukes* (2011) and *Comcast v. Behrend* (2013), employer-friendly decisions that dramatically changed the rules as to when and how class action lawsuits may proceed.

Another important case is the 5-to-4 decision in *AT&T Mobility LLC v. Concepcion* (2011) in which the Court upheld the right of employers to mandate employment arbitration agreements that provide individual treatment of employment law disputes rather than as class or collective actions.

## Conclusion

The next Court—without the presence of Justice Scalia—will likely be called upon to consider or reconsider crucial labor and employment law issues. As former Associate Justice Robert H. Jackson once wrote about the Supreme Court: "We are not final because we are infallible, but we are infallible because we are final." In effect, the Supreme Court is the final "firewall" from actions by the White House, Congress, and regulatory agencies. The Court's ultimate composition, thus, will have a significant and lasting impact on the shape and tenor of many of our nation's most pivotal issues for years to come. ■

Ogletree Deakins



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## Ogletree Deakins State Round-Up

### California

On April 4, Governor Jerry Brown signed a measure to increase the statewide minimum wage to $15.00 per hour. The new law will increase the minimum wage to $10.50 per hour on January 1, 2017, and to $11.00 on January 1, 2018. Thereafter, the minimum wage would increase $1.00 per year for four years.

### Connecticut

In a case that will have significant implications for employers, the Connecticut Supreme Court clarified the "ABC Test," finding that an employer is not required to pay unemployment taxes for workers who contractually install heating and security systems in residences because they are independent contractors, not employees. *Standard Oil of Connecticut, Inc. v. Administrator, Unemployment Compensation Act*, No. SC 19493 (March 15, 2016).

### Florida

On April 16, the Florida Supreme Court will hear another in a long line of cases brought by plaintiffs' lawyers trying to turn the clock back on Florida's Workers' Compensation Law. *Stahl v. Hialeah Hospital* has been making its way through the courts, questioning whether Florida's workers' compensation system has been an adequate alternative for injured workers since its major overhaul in 2003.

### Massachusetts

On March 2, Massachusetts House Speaker Robert A. DeLeo announced that he supported legislative restrictions on employee noncompetition agreements. Speaker DeLeo's statements, made in a speech to the Greater Boston Chamber of Commerce, may be a turning point in the long-running debate in Massachusetts over whether noncompetes should be banned or restricted through legislation.

### New Jersey

On January 19, Governor Chris Christie signed into law S3129, which requires the New Jersey Department of Labor and Workforce Development to create and maintain a webpage containing information regarding state and federal family leave rights and benefits. The new law requires that the webpage include information concerning the various New Jersey and federal leave and benefit laws.

### New York

On February 16, the New York City Commission on Human Rights issued proposed rules related to the city's ban the box legislation, the Fair Chance Act. The proposed clarifications and additions include an early resolution option for per se violations of the Act, a prohibition on employers' use of disclosure and authorization forms authorizing background checks before conditional offers of employment are made, and a definition of "business day."

### North Carolina

On March 23, Governor Pat McCrory signed into law House Bill 2, commonly known as the Public Facilities Privacy and Security Act. The law expressly clarifies that a wrongful termination claim cannot be based on the state's Equal Employment Practices Act.

### Oregon


Governor Kate Brown signed a bill to increase Oregon's minimum wage. The new law divides the state into three regions. In metropolitan areas, the hourly rate will increase to $9.75 on July 1, 2016, and will rise to $14.75 per hour by 2022. In nonurban counties, the hourly rate will increase to $9.50 on July 1, 2016, and will reach $12.50 per hour by 2022. For the rest of the state, on July 1, 2016, the minimum wage will rise to $9.75 per hour, and it will increase to $13.50 per hour by 2022.

### Pennsylvania

The Philadelphia Commission on Human Relations has released the poster employers are required to display under the new amendments to Philadelphia's "ban the box" law. Effective March 14, 2016, the poster must be displayed "in a conspicuous place on the employer's website and premises, where applicants and employees will be most likely to notice and read it."

### Utah

On March 22, Governor Gary Herbert signed into law the Post-Employment Restrictions Act (H.B. 251), which limits the duration of post-employment noncompete agreements between employers and employees to a maximum of one year from the employee's date of separation. Under the new law, any such agreement containing a noncompete restriction exceeding the Act's one-year limitation will be deemed void.

### Vermont

On March 9, Governor Peter Shumlin signed into law a measure that will make Vermont the fifth state to require employers to provide paid sick leave. Vermont's new sick leave law bears similarities to some other states' paid sick leave laws, but has its own unique features, including an elective waiting period and extended deadlines for small employers and new businesses.

### Washington

The Spokane City Council recently overturned the mayor's veto and passed Ordinance C-35300, which provides paid sick and safe leave to employees performing more than 240 hours of work in the city of Spokane in a calendar year. The ordinance requires employers to provide employees with 1 hour of paid sick and safe leave for every 30 hours worked starting on January 1, 2017.

*For more information on these state-specific rulings or developments, visit www.ogletreedeakins.com/our-insights.*

# The Final Persuader Rule: What Employers Need to Know

*by John T. Merrell and Ruthie L. Goodboe**

On March 24, 2016, the U.S. Department of Labor (DOL) published new regulations expanding the obligations of employers and lawyers to report certain information to the DOL under the Labor Management Reporting and Disclosure Act (LMRDA).

Lawyers (or labor relations consultants) will now have to report any engagement whose object is to directly or indirectly persuade employees concerning their rights to organize a union or bargain collectively. This is a change to a long-standing rule that has been in place for nearly 50 years. Until now, neither employers nor lawyers were required to report such engagements, provided that the lawyers communicated only with management. This is what has been known traditionally as the "advice exception" to the reporting rules.

The DOL is now abandoning its long-held bright-line rule. Under this new interpretation, a lawyer's services will be reportable activity even if there is no direct contact between the lawyer and employees of the employer, if the object of the services is to directly or indirectly "persuade" employees. While pure legal advice will continue to be exempt from the DOL's reporting requirements, legal advice that is combined with persuader activity will be reportable under the new interpretation. This fine distinction may swallow the advice exception.

## Reporting Requirements

In such a case, both the law firm and the employer will have to file reports with the DOL. Lawyers will be required to file a report with the DOL within 30 days after being engaged by the client to provide "persuader" services. The report is known as the LM-20 Agreement and Activities Report, and it must identify (among other things) the name of the client, the terms of the engagement, the scope of services to be provided, and the group of employees and union involved (if any). The law firm will also be required to file an annual report at the end of its fiscal year, supplying data on its receipts and disbursements related to providing "labor relations advice or services."

The employer will also have to file its own report. The employer's report must be filed on Form LM-10 within 90 days of the end of the employer's fiscal year. This report must disclose:

- The date of each reportable arrangement and the date and amount of each transaction made pursuant to that arrangement;
- The name, address, and position of the person with whom the agreement or transaction was made; and
- "A full explanation of the circumstances of all payments made, including the terms of any agreement or understanding pursuant to which they were made." This includes attaching a copy of any written agreement between the employer and the persuader.

The LM-10 must be signed by the president and treasurer (or corresponding principal officers) of the employer.

## Next Steps for Employers

The new regulations are scheduled to take effect on April 25, 2016, and will apply to arrangements, agreements, and payments made on or after July 1, 2016. On March 31, 2016, Ogletree Deakins filed suit on behalf of the National Federation of Independent Business and other business groups in federal court in Lubbock, Texas, challenging the enforceability of these new regulations. It is possible that a stay could be enacted in one or more of these lawsuits that will delay the implementation of the regulations.

Nonetheless, employers should be prepared should the regulations take effect as planned. Below are some key pointers that employers should know.

First, the revised persuader rule applies to virtually all employers and to projects that, on their face, may not appear to be union-related. While pure legal guidance from your attorneys still will not be reportable, "indirect persuasion" is now reportable and includes such things as providing campaign materials, conducting certain seminars for supervisors, and even developing personnel policies if the purpose is to persuade employees to exercise their Section 7 rights in a particular way.

So, to the extent employers have employee relations type projects in the works, such as handbooks, engagement surveys, websites, campaign readiness materials, or labor relations training, and employers have sought or plan to seek outside assistance that could be considered "persuasion" under the new rules, those projects should be completed (and paid for) before July 1, 2016, so there is clearly no reporting obligation.

If you do not have a reporting mechanism in place or a system to determine what should be reported, start working on a protocol immediately, including how you will coordinate with outside counsel and other vendors. It is important for various levels of management, not just human resources and legal, to understand that what once was considered merely human resource advice and counsel could now be reportable persuader activity if obtained from an outside source. Notably, a plan is only as good as its communication and implementation, so be sure to have your plan in place with enough time to train all necessary constituents prior to July 1.

Next, remember it won't be just the union watching. Employers will need to determine if and how they will respond to inquiries about the information contained in the reports. Since the reports will be posted on the DOL's website and become public information, sometimes within just a few weeks, anyone with curiosity and Internet access can learn how much an employer is paying its outside consultants and, to a certain extent, for what reasons those consultants have been retained. Expect and be prepared for questions from employees, shareholders, customers/clients, and community groups as well as unions.

Finally, be informed. Stay up to date with all that's going on relative to the revised rule, including legal challenges, potential guidance, interpretation, and compliance issues. ■

* John Merrell is a shareholder in the Greenville office of Ogletree Deakins. Ruthie Goodboe is a shareholder in the firm's Detroit (Metro) and Pittsburgh offices. Both attorneys represent management in labor and employment-related matters.

# Supreme Court Issues Long-Awaited Decision on Public Union Fees

***Justices Hold Agency Shop Arrangements Are Still Valid But Provide No Further Guidance***

*On March 29, 2016, the Supreme Court of the United States issued a per curiam opinion in a case on the validity of public-sector "agency shop" arrangements, which permit unions to charge a fee (in order to pay for select costs) to public employees who do not join a union. During oral argument, the Court had seemed likely to invalidate the fee and overrule the Court's primary precedent. However, the recent death of Associate Justice Antonin Scalia, having shifted the Court's conservative-liberal balance, likely changed the outcome of this case. An equally divided Court affirmed the decision of the Ninth Circuit Court of Appeals upholding the agency fee on the basis of decades-old Supreme Court precedent.* ***Friedrichs v. California Teachers Association,*** *No. 14-915 (March 29, 2016).*

## "Agency Shop" Arrangements

Under an agency shop arrangement, all workers in a unit covered by a union contract must pay union fees, regardless of whether they belong to the union. According to Supreme Court precedent, unions may require public-sector workers to pay an amount to support union activities related to collective bargaining—but *not* for union political activity (to which some workers would presumably object).

In 1977, in *Abood v. Detroit Education Association*, the Supreme Court extended this rule to the public-sector workforce. The Court ruled that unions may impose these fees on nonunion government workers for the following nonpolitical expenses: collective bargaining; administration of union contracts; and internal grievance procedures. The *Abood* Court acknowledged that public-sector unions engage in political activity but ruled that non-union public workers are not required to pay those costs.

## The *Friedrichs* Case

A group of California public school teachers filed suit challenging the agency fee that their union required them to pay. In short, the teachers argued that all of a public-sector union's activities attempt to influence government policy making, and thus that nonmembers of the union should not be required to pay any union fees if they do not support those political activities. The teachers also expressly challenged the holding in *Abood*. The Ninth Circuit affirmed a trial court decision upholding the agency fee as required by *Abood*.

The case eventually reached the Supreme Court, which agreed to hear it to decide two issues:

- Whether *Abood* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment to the U.S. Constitution; and
- Whether requiring public employees to affirmatively object to subsidizing nonchargeable speech by public-sector unions—rather than requiring that employees affirmatively consent to subsidizing such speech—violates the First Amendment.

## The Supreme Court's Decision

At oral argument in January of 2016, the line of questioning—and especially the liberal justices' focus on the doctrine of stare decisis, dictating that *Abood* be upheld—seemed to indicate that the justices would rule, 5-to-4, against agency fees. Instead, with Justice Scalia's passing, the justices split, 4-to-4, and issued a one-sentence decision: "The judgment is affirmed by an equally divided Court." By affirming the Ninth Circuit's decision, which followed *Abood*, the Supreme Court leaves the current agency shop system for public employees in place.

## Practical Impact

The Supreme Court's decision did not set any precedent on the constitutionality of agency shop arrangements and did not foreclose the possibility of similar cases reaching the Court in the future—when a full bench will likely make all the difference.

According to Harold P. Coxson, a shareholder in the Washington, D.C. office of Ogletree Deakins, "This is one of the first decisions to be altered by the death of Justice Scalia and the resulting vacancy on the Supreme Court. It will not be the last. The Court had the option of setting the case for re-argument when a new justice is confirmed, but chose not to wait. For public-sector employees, the decision means continued payment of union dues, often against their will, for causes they may not support. Unfortunately, the one-page decision affirming the Ninth Circuit provides no guidance for public-sector employers." ■

## DOL Delivers Final Overtime Regulation Revisions to OIRA Ahead of Schedule

The U.S. Department of Labor's (DOL) Wage and Hour Division recently delivered its proposed final revisions to the Fair Labor Standards Act's (FLSA) Part 541 overtime regulations to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget. OIRA review of this proposed final rule is required under Executive Order 12866 since the Department's proposal is "economically significant" in that its annual impact on the economy would be $100 million or more. OIRA review generally takes 30 days, but that time can be extended.

Based on the DOL's regulatory proposal, the final regulations likely will more than double the minimum salary requirement that is needed to qualify for the executive, administrative, and professional exemptions to the FLSA's overtime and minimum wage requirements. Annual indexing of the salary threshold also is anticipated. The larger unknown question is whether the DOL will modify the duties test, given that the department asked several questions about the adequacy of the current duties test and its position that many exempt employees perform too much nonexempt work.

Previously, the DOL had stated that its final revisions to these regulations would be published in July of this year. However, the delivery of the proposed final revisions to OIRA now means that publication could occur sooner, possibly in April or May of 2016. The final regulations will have an effective date of at least 60 days after publication.

## New to the Firm

Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Anja Becher and Saskia Hildebrand (Berlin); Rebecca Bryant (Chicago); Jim Berchtold (Las Vegas); Hector G. Sada Miramontes and Stefano Sandoval Malori (Mexico City); Natalie Wyatt-Brown (Minneapolis); Christopher Archibald (Orange County); Adam Boyd and D. Trey Lynn (Phoenix); Dan Webb Howard and Amy Knapp (Portland); and Brian Berry and Shivani Nanda (San Francisco).

## *"ADA SUIT"*

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continued having sleep problems, which he apparently attempted to treat "by taking undisclosed supplements" and "drinking lots of coffee daily." Following his promotion to support administrator, Neely began to have trouble performing his job. Benchmark also complained that Neely was underperforming in his assigned tasks, playing on his phone and doing non-work activities, and "almost daily falling asleep at work."

Neely told his supervisors that he had a "sleeping disorder which caused [him] to suffer fatigue and experience micro sleeps," and explained that he was trying to treat his sleeping problems himself. Over the next several months, Neely's supervisors discussed his performance and sleeping issues with him numerous times, but "Neely never sought medical treatment for his sleep problems during his entire employment with Benchmark" or requested an accommodation.

On May 25, 2012, Benchmark verbally reprimanded Neely, citing various shortcomings in his work performance, including his continual sleeping during the "workday, trainings, and meetings." The reprimand also informed Neely that he was being demoted to his former support specialist position.

On June 1, 2012, Benchmark terminated Neely's employment. Neely later filed a suit, asserting state and federal claims of disability discrimination and retaliation, and state law claims for wrongful discharge and intentional infliction of emotional distress. The district court concluded that Neely was not disabled within the meaning of the ADA and had failed to establish a case for retaliation. As a result, the court granted Benchmark's motion for summary judgment and dismissed the case. Neely appealed this decision to the Sixth Circuit Court of Appeals.

### Legal Analysis

Under the ADA, a plaintiff must show that he or she is disabled and that the impairment "substantially limits one or more major life activities."

In this case, Neely was unable to produce evidence to support his contentions related to either of the statute's basic requirements. First, Neely was unable to show that he suffered from a physical or mental impairment that had caused his sleeping problems. Neely claimed to have been suffering from the effects of obstructive sleep apnea, but never obtained a formal medical diagnosis or pursued medical treatment to directly address the issue. Although Dr. Burton had noted his "initial impressions" and speculated that Neely was experiencing "probable sleep apnea," he did not make a formal diagnosis based on tests.

Because Neely had not sought testing and treatment for his sleeping issues, the court wrote, Neely's showing was insufficient to support a finding that he had suffered from a "mental or physical impairment."

Second, Neely failed to show that his sleep problems substantially limited a major life activity. In his case before the district court, Neely had never asserted which major life activity had been limited by his sleep problems. Furthermore, as the court of appeals observed, the Sixth Circuit has consistently held that "sleeping problems like Neely's—'getting only 2 to 3 hours of restful sleep per night, falling into micro sleeps during the day . . . snoring, and extreme difficulty breathing while sleeping,'—fail to constitute a substantial limitation on a major life activity."

Finally, the Sixth Circuit held that Neely's self-described sleep problems, absent "corroborating medical evidence or any diagnosis," were insufficient to constitute a substantial limitation under the ADA Amendments Act of 2008.

Neely also claimed that he was disabled under a third prong of the ADA—that he was "regarded as having [] an impairment" by his employer. The court noted that the 2008 amendments "liberalized the standard, redefining 'regarded as having an impairment' only to require that a defendant took a prohibited action based on a perceived impairment, regardless of whether the employer thought the impairment was substantially limiting." The court, however, emphasized that it is not enough that an employer is aware of a plaintiff's symptoms; rather, the court wrote, "the plaintiff must show that the employer regarded the individual as 'impaired' within the meaning of the ADA."

The Sixth Circuit found that Neely's proffered evidence painted an inconsistent picture of his alleged disability. The report of Dr. Burton, which Neely had submitted as evidence of his disability, also stated that Neely was "often [] sleepy during the day but it does not interfere with his work." Neely's complaint before the district court acknowledged that his "sleeping disorder did not prevent him from doing his job in a competent, professional manner." The court also found that Neely had inconsistently argued that Benchmark had been dismissive of his alleged disability, yet had also "regarded him as disabled."

The Sixth Circuit wrote, "The facts construed in a light most favorable to Neely—that Benchmark suggested he take supplements 'so [his sleeping problems are] not an issue,' telling Neely to 'hurry up' with his self-medication for his sleep problems, and a supervisor 'rolling [his] eyes when Mr. Neely tried to explain his sleep disorder,'—indicate that Benchmark was aware of Neely's self-described sleep problems, but do not suggest that Benchmark regarded him as physiologically 'impaired' within the meaning of the ADA."

The court also upheld the dismissal of Neely's disability-related retaliation claim, finding that Neely's mere complaint about the "unfairness" of using his "sleeping disorder against him," in the absence of a failure to request an accommodation or file a formal charge against his supervisor, was insufficient to establish that he had engaged in statutorily protected activity.

*Please see "ADA SUIT" on page 7*

# The New California Regulations: Harassment and Abusive Conduct Training

*by Patti C. Perez (San Diego) and Andrea L. Fellion (San Francisco)*

The California Office of Administrative Law recently approved regulations drafted by the California Fair Employment and Housing Council. These new regulations, covering the entire gamut of employment law topics within the Fair Employment and Housing Act (FEHA), went into effect on April 1, 2016.

One of these new regulations concerns an employer's obligation to train its staff to avoid conduct prohibited by FEHA. This regulation and its requirements are discussed in detail below.

## Additional Training Requirements

Employers with 50 or more employees are obligated to provide two hours of sexual harassment training to their supervisory staff every two years. The goal of this training is to change or modify behavior that contributes to sexual harassment, assist supervisors in preventing and responding to sexual harassment, and implement mechanisms to promptly address and correct wrongful behavior.

The training must define unlawful sexual harassment as well as discuss the conduct that constitutes sexual harassment, remedies for sexual harassment, and strategies to prevent sexual harassment in the workplace. While this training was always intended to be interactive, the new regulations include guidance to meet this requirement, such as using pre- or post-training quizzes, small group discussions, or hypothetical fact scenarios.

## Abusive Conduct and the Obligation to Report

While previous regulations only addressed sexual harassment training, recent changes have expanded these requirements. As of 2015, employers are now required to train supervisors on "abusive" conduct, which FEHA defines as malicious workplace conduct that a "reasonable person would find hostile, offensive, and unrelated to the employer's legitimate business interests." The most recent amendments to the regulations also require employers to inform supervisors that they are obligated to report any harassment, discrimination, and retaliation of which they become aware.

## Expanded Recordkeeping Requirements

Before the new regulations, employers were required to maintain copies of certain materials in order to track compliance with this training requirement. For all trainings, employers were previously required to maintain a list of the names of all trainees, the date of each training, the type of training, and the name of the training provider.

The new regulations require employers to keep even more training documentation for a specified period. Now, employers are required to keep sign-in sheets and certificates of attendance or completion. Employers that use computer-based training must maintain copies of all questions submitted by employees in writing, as well as the responses.

Employers that train employees via webinars must maintain a copy of the webinar, all written materials used by the trainer, and all written questions that employees submit during the webinar. Employers must also document all written responses or guidance trainers provide during the webinar.

Employers must now keep all of this documentation for a period of two years.

## Compliance Tips

California employers have been providing mandatory sexual harassment training for 10 years, but the new regulations impose additional requirements that companies should fully understand. To ensure your training is compliant, design and execute your program with the following in mind:

- Train supervisors to prevent wrongful conduct. The new regulations require employers to cover mandatory substantive topics, including sexual harassment and abusive conduct, but proactive employers should take the opportunity to address ways to prevent and correct other types of wrongful workplace behavior.
- Interact with the audience. Keep in mind the specific issues that your employees face and customize the training for your specific work environment.
- Keep required records. Make sure not only to track attendance and compliance, but also to keep copies of the training materials, written questions, and responses.

The authors have also covered other key aspects of the regulations, including preventing and correcting wrongful behavior and guidance related to transgender employees. For more, visit www.ogletreedeakins.com/our-insights under the "State Developments" category. ■

### *"ADA SUIT"*

*continued from page 6*

For all of these reasons, the Sixth Circuit affirmed the district court's dismissal of Neely's claims under the ADA.

#### Practical Impact

According to Natalie Stevens, a shareholder in the Cleveland office of Ogletree Deakins, "This decision illustrates that despite the relaxed standards of the ADA Amendments Act, an employee is still required to establish that he or she has a physical or mental impairment that substantially limits one or more major life activities, that there is a record of such an impairment, or that he or she is regarded as having such an impairment by the employer to establish a viable claim of disability discrimination. Self-described symptoms, without any corroborating medical evidence or diagnosis, are not enough. Where an employee, who has provided no evidence that he or she is disabled and has not requested an accommodation, fails to meet the legitimate expectations for his or her position, he or she should be counseled and/or disciplined consistent with company policy. Although the employee in this instance did not request an accommodation, employers should train their managers to recognize when an employee may be requesting an accommodation to ensure that it is conveyed to the appropriate contact within the organization for evaluation."

# Corporate Harem Does Not Give Rise to Hostile Work Environment Claim

***Courts Finds Sexual Favors Being the "Common Currency" Had No Effect on Terms and Conditions of Employment***

*A federal appellate court recently affirmed summary judgment on a lawsuit brought by an employee who claimed that she was subjected to a hostile work environment. The Fifth Circuit Court of Appeals held that allegations of a sexually-charged work environment—without an assertion that such an environment negatively impacted the terms, conditions, or provisions of her employment—was not sufficient to proceed with a hostile work environment claim under Title VII of the Civil Rights Act.* ***Smith v. Touro Infirmary,*** *No. 15-30851, Fifth Circuit Court of Appeals (March 18, 2016).*

## Factual Background

Amy Smith was employed as a respiratory therapist by Touro Infirmary in New Orleans, Louisiana. Larry Anderson was Smith's direct supervisor.

Smith alleged that, throughout her employment with Touro, Anderson sexually harassed her and created a sexually-charged work environment in which sexual favors were the "common currency." According to Smith, Anderson favored female respiratory therapists who participated in his "sexually driven workplace economy" over those who were not part of his "harem." For example, Anderson allegedly allowed women who condoned his actions to show up late to work.

Both male and female coworkers reportedly complained about Anderson's favoritism. Smith claimed, however, that only the women who complained were subjected to heightened scrutiny, degrading comments, and public humiliation. On one occasion, Anderson allegedly disciplined Smith for being late and displayed the disciplinary documentation in a public area for all employees to see. He also used a chauvinistic tone and vulgar language with her, according to Smith.

On May 21, 2014, Smith took leave under the Family and Medical Leave Act (FMLA). She returned to work on June 25, but went on leave again one month later.

On August 25, 2014, Smith contacted Touro to update documentation in support of her need for FMLA leave. On September 22, 2014, Touro terminated Smith's employment. While it is disputed how much protected leave remained as of August 25 when Smith contacted Touro, the court later determined that Smith was not discharged while on FMLA leave.

Smith sued her former employer, alleging that she was subjected to a hostile work environment in violation of Title VII (among other claims). The trial judge dismissed the case on summary judgment and Smith appealed this decision to the Fifth Circuit Court of Appeals, which affirmed.

## Legal Analysis

To make a prima facie claim for hostile work environment under Title VII, an employee must show that (1) he or she belongs to a protected class; (2) he or she was subjected to unwelcome sexual harassment; (3) the harassment was based on sex; and (4) the harassment affected a term, condition, or privilege of employment.

Even assuming that Smith could satisfy the other elements of her prima facie case, the Fifth Circuit held that she could not demonstrate that the harassment affected a term, condition, or privilege of her employment. During her six years of employment, Smith's work schedule remained consistent, she was granted every overtime request, she worked as "therapist-in-charge," and she was not denied any promotions or raises. Thus, even if a hostile work environment existed, the court held, it was not the type that altered a term, condition, or privilege of her employment.

As a result, the Fifth Circuit upheld the lower court's decision to grant summary judgment in favor of Touro on Smith's hostile work environment claim.

## Practical Impact

According to Drew Burnside, a shareholder in the firm's New Orleans office, "The employer in this case dodged a bullet. To successfully make a claim of an unlawful hostile environment based on sex under Title VII, an employee has to offer evidence that he or she was affected by the alleged harassment. In this case, the employee alleged that she was subjected to a workplace highly charged with sexual activity and sexual favoritism driven by a rogue supervisor who treated her differently as a nonparticipant. According to Smith, the supervisor belittled her because she did not participate in his 'harem' of coworkers who engaged in sexual activity with him."

Burnside continued, "Here, the plaintiff defeated her own case by testifying that her job and performance were unaffected by the hostile environment she asserted: she got the overtime she wanted, her schedule was unaffected, and she was not denied pay raises or promotions. To the Fifth Circuit, what mattered was that Smith's job was objectively unaffected by the supervisor's behavior and that the degrading comments and humiliation inflicted by the supervisor did not alter the terms, conditions, or privileges of her employment." ■

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The firm is also pleased to announce that shareholders Charles T. Speth II, Gregg M. Lemley, and William L. Duda have been named to the *BTI Client Service All-Stars 2016* list. The *BTI Client Service All-Stars* is a listing—developed solely through client feedback—of lawyers delivering the highest levels of client service. Those named to the *BTI Client Service All-Stars* list have earned recognition from leading general counsel and legal decision-makers for client service.