Bender's Labor & Employment Bulletin

December 2020
VOLUME 20 • ISSUE NO. 12

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Remote Work as An Increasingly Reasonable Accommodation in the Age of COVID-19: *Peeples v. Clinical Support Options* (D. Mass. 2020)

By Peter J. Moser

I. Introduction

Prior to the COVID-19 pandemic, there was a small but growing number of judicial decisions analyzing remote work[1] as a reasonable accommodation under the Americans with Disabilities Act (ADA). For the most part, courts sided with employers who argued that attendance requirements and the need for face-to-face interaction, and perhaps the availability of alternative accommodations, precluded remote work as a viable long-term accommodation option. The Equal Employment Opportunity Commission (EEOC) urged that remote work could be a reasonable accommodation, but courts seemed hesitant to reach that conclusion in most cases before them.[2]

Then came the COVID-19 pandemic. The pandemic ushered in a newfound and widespread comfort level with remote work across many industries, born of necessity and made possible by improved technology. Employers that previously prohibited remote work have found ways to take advantage of it, or at least survive it, making it more difficult to persuasively argue the necessity of in-person attendance. Moreover, there is a heightened emphasis on employee health and safety, with both employers and judges erring on the side of caution. There is also greater recognition and sympathy for employee conditions that increase COVID-19 vulnerability, including conditions previously considered relatively minor, such as moderate asthma.

All of these factors came together recently in *Peeples v. Clinical Support Options,*[3] a noteworthy decision by a U.S. Magistrate Judge in the District

[1] Remote work is often referred to as "telework", "telecommuting", or "work-at-home."

[2] According to one analysis of reported decisions conducted in early 2019, "Employers won 70 percent of the rulings over the past two years on whether they could reject workers' bids for telework as an accommodation for a disability . . ." Work at Home Gets Skeptical Eye From Courts as Disability Issue https://news.bloomberglaw.com/daily-labor-report/work-at-home-gets-skeptical-eye-from-courts-as-disability-issue.

[3] 2020 U.S. Dist. LEXIS 169167 (D. Mass. Sept. 16, 2020).

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A NOTE ON CITATION

The correct citation form for this publication is:
20 Bender's Lab. & Empl. Bull. 299 (December 2020)

ISBN 978-0-8205-5039-8, EBOOK ISBN 978-1-4224-8015-1

(Pub. 1239)

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of Massachusetts. On September 16, 2020, U.S. Magistrate Judge Katherine Robertson took the highly unusual step of ordering the defendant-employer via preliminary injunction to allow the plaintiff-employee to work remotely as a COVID-related accommodation.

The *Peeples* injunction is a first-of-its-kind, and it remains to be seen whether the case is anything more than a function of its unique facts and timing. Regardless, even after the pandemic subsides, it seems reasonable to assume that there will continue to be widespread utilization of remote work and an increasing acceptance of it as a reasonable accommodation option.

II. Remote Work and the ADA: A Brief History

a. *The ADA and EEOC*

The ADA, enacted in 1990, makes no express mention of remote work. The law does, however, provide a non-exhaustive list of reasonable accommodation examples which includes "job restructuring", "modified work schedules", and "appropriately adjusting or modifying . . . policies."[4]

In 1999, the EEOC, which enforces Title I of the ADA[5], published an enforcement guidance addressing reasonable accommodation.[6] In one of the guidance's forty-six questions and answers, the agency addressed remote work, declaring that in some situations it could be a form of reasonable accommodation:

> Does an employer have to allow an employee with a disability to work at home as a reasonable accommodation?
>
> An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship. Whether this accommodation is effective will depend on whether the essential functions of the position can be performed at home. There are certain jobs in which the essential functions can only be performed at the work site -- e.g., food server, cashier in a store. For such jobs, allowing an employee to work at home is not effective because it does not enable an employee to perform his/her essential functions. Certain considerations may be critical in determining whether a job can be effectively performed at home, including (but not limited to) the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment or tools that cannot be replicated at home. In contrast, employees may be able to perform the essential functions of certain types of jobs at home (e.g., telemarketer, proofreader). For these types of jobs, an employer may deny a request to work at home if it can show that another accommodation would be effective or if working at home will cause undue hardship.[7]

The agency acknowledged judicial resistance In a footnote, explaining that "Courts have differed regarding whether 'work-at-home' can be a reasonable accommodation."[8] The footnote elaborated further that: "Courts that have rejected working at home as a reasonable accommodation focus on evidence that personal contact, interaction, and coordination are needed for a specific position."[9]

In 2003, the EEOC published a guidance exclusively devoted to remote work.[10] The guidance consisted of a series of seven questions and answers. In it, the EEOC noted the increased prevalence of remote work, facilitated by technological advances. The agency both affirmed and expanded upon the key principles it had previously articulated, and offered a structured approach for employers

[4] 42 USC 12111(9)(B) https://www.law.cornell.edu/uscode/text/42/12111.

[5] Title I pertains to employment, prohibiting discrimination on the basis of disability and requiring reasonable accommodation to help a disabled individual perform essential job functions. 42 U.S.C. § 12101, *et seq.*

[6] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (revised 10/17/02) https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.

[7] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (revised 10/17/02), question and answer #34.

[8] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (revised 10/17/02), fn. 101.

[9] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (revised 10/17/02), fn. 101.

[10] Work at Home / Telework as a Reasonable Accommodation. https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation.

to determine whether a particular job could be performed remotely.[11]

In 2020, the EEOC once again addressed remote work, this time in the context of the COVID-19 pandemic. The agency posted a Technical Assistance Publication entitled "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," which has been periodically updated throughout the year.[12] An update on September 8, 2020, addressed remote work.

In one of the update question and answer segments related to remote work, the EEOC noted that an employer re-opening its business after a temporary period of remote work, due to the pandemic, is not obligated to grant all future requests for remote work. However, the EEOC clarified that if an employee's pre-pandemic request to work remotely was denied, but the employee was nonetheless allowed to work from home during the pandemic, this temporary arrangement "could be relevant" as a sort of "trial period" to be considered in connection with a renewed post-pandemic remote work request by the employee:

> Assuming all the requirements for such a reasonable accommodation are satisfied, the temporary telework experience could be relevant to considering the renewed request. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process going forward if this issue does arise.[13]

b. *Key Recent Decisions*

Despite the EEOC's pronouncements, a majority of judicial decisions have favored the employer.[14] Several illustrative cases are briefly summarized below.

[11] Work at Home / Telework as a Reasonable Accommodation. https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation (see question 4).

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

[13] What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (question D.16).

[14] *See* fn 2, *supra.*

EEOC v. Ford Motor Co. (6th Cir. 2015)

Perhaps the most well-known court decision involving remote work as a potential ADA accommodation is the 2015 Sixth Circuit decision in *EEOC v. Ford Motor Co.*[15] In *Ford*, the employer denied a resale steel buyer's request to work remotely as an accommodation for her irritable bowel syndrome. The employee had requested to work remotely up to four days per week, the days being at the employee's choosing, but her request was denied in large part because her position required face-to-face interaction and because of her exceedingly poor performance and attendance. She filed a charge with the EEOC, and was eventually discharged for ongoing poor performance. The EEOC eventually brought suit, alleging, *inter alia,* that Ford failed to reasonably accommodate the employee by denying her remote work request.

The trial court awarded summary judgment for the employer, but on appeal the Sixth Circuit reversed, a decision which garnered much media attention at the time. Yet the EEOC's appellate victory was short-lived; a year later the Sixth Circuit *en banc* affirmed the trial court's dismissal after all. In a divided opinion, the majority explained:

> Regular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones. That's the same rule that case law from around the country, the statute's language, its regulations, and the EEOC's guidance all point toward. And it's the controlling one here.[16]

The Court was confident at the time that it was following a majority, common sense viewpoint:

> We do not write on a clean slate. Much ink has been spilled establishing a general rule that, with few exceptions, "an employee who does not come to work cannot perform any of his job functions, essential or otherwise." *EEOC v. Yellow Freight Sys., Inc.,* 253 F.3d 943, 948 (7th Cir. 2001) (en banc) (quoting *Tyndall v. Nat'l Educ. Ctrs.,* 31 F.3d 209, 213 (4th Cir. 1994) (internal quotation marks omitted)). We will save the reader a skim by omitting a long stringcite of opinions that agree, but they do. *E.g., Samper v. Providence St. Vincent Med. Ctr.,* 675 F.3d 1233, 1237-38 (9th Cir. 2012) (collecting cases); *Mason v. Avaya Commc'ns, Inc.,* 357 F.3d 1114, 1122-24 (10th Cir. 2004) (same). Our Circuit has not bucked the trend. *E.g.,Ameritech,* 129 F.3d at 867. And for good reason: "most jobs require the kind of teamwork, personal interaction, and

[15] 782 F.3d 753 (6th Cir. 2015).

[16] 782 F.3d at 762-63.

supervision that simply cannot be had in a home office situation." *Rauen v. U.S.Tobacco Mfg. L.P.,* 319 F.3d 891, 896 (7th Cir. 2003).

Mosby-Meachem v. Memphis Light Gas & Water Div. (6th Cir. 2018)

Three years after deciding *Ford,* the Sixth Circuit issued another well-publicized decision involving remote work, but this time the Court upheld a jury verdict in favor of an employee who had been denied a remote work accommodation.

In *Mosby-Meachem v. Memphis Light Gas & Water Div,*[17] the plaintiff-employee, an in-house attorney, requested a remote work accommodation while she was on bedrest due to pregnancy complications. Her request was denied notwithstanding that she had worked remotely for several weeks in the past and even though her pregnancy-related request was of limited duration (ten weeks). Following a jury verdict in the employee's favor, the employer filed a motion for judgment as a matter of law, or in the alternative for a new trial, arguing that the employee could not be a qualified individual with a disability while on bedrest because in-person attendance was an essential function of her job. The motion was denied.

On appeal, the Sixth Circuit upheld the jury verdict by distinguishing the facts of the case from prior decisions which had stressed the importance of regular in-person attendance. The Court also noted, in affording deference to the jury's verdict, that several of the employee's co-workers testified that they felt the employee could perform all essential job functions from home during the 10-week period.[18] Further, the Court observed that the employer's evidence of an in-person work requirement stemmed largely from a 20-year old job description that was undermined by the employee's own actual work experiences (e.g., she never tried cases in court or took witness depositions), as well as technological advances brought by the passage of time.[19]

Morris-Huse v. GEICO (11th Cir. 2018)

In *Morris-Huse,*[20] the Eleventh Circuit Court of Appeals affirmed summary judgment for the employer, dismissing the claims of a former employee who alleged that she was unlawfully denied the ability to work from home as an accommodation for symptoms related to Meniere's disease. The Court noted that the employee's disease resulted in only two work limitations, an inability to reliably drive long distances and an inability to climb stairs, and that the employer had provided alternative accommodations to address both limitations; the employer was not "required to provide [the employee] with the accommodations of her choosing."[21] The Court also supported the lower court's finding that physical presence was an essential job function "because the job required [the employee] to interact with, coach, and lead a team of associates on a daily basis."[22] Moreover, it did not matter that the employee had been allowed to work remotely in the past, because "at the time [employee] sought the accommodation" the employer no longer permitted remote work based on a need for employees to use monitoring software installed on office computers.[23]

III. *Peeples v. Clinical Support Options*

On September 16, 2020, a U.S. Magistrate Judge for the federal District Court in Massachusetts issued a surprising and noteworthy decision addressing remote work as a COVID-related accommodation in *Peeples v. Clinical Support Options.*[24] The judge issued a preliminary injunction prohibiting a defendant-employer from discharging an employee who claimed an inability to work in the office due to increased vulnerability to COVID-19, and ordering that the employee be allowed to work remotely for at least 60 days. The facts and distinguishing features of *Peeples* are summarized below.

The plaintiff-employee began working for the defendant-employer as an assistant manager in March 2020, eight days before the Governor of the Commonwealth declared a state of emergency due to the developing pandemic. The Plaintiff's doctors advised them[25] to work remotely in order to avoid exposure to the virus. Plaintiff, who suffers from moderate asthma, worked remotely for approximately two months until the employer required all managers to return to the office in May 2020. Plaintiff presented a medical note indicating a continued need to work from home for the next four weeks, and they were granted this accommodation. Upon the expiration of the 4-week period, however, the Plaintiff requested to further continue the remote work accommodation and this request was denied. The

17 883 F.3d 595 (6th Cir. 2018).

18 883 F.3d at 604.

19 883 F.3d at 604.

20 748 Fed. Appx. 264 (11th Cir. 2018) (unpublished).

21 748 Fed. Appx. at 267.

22 748 Fed. Appx. at 267.

23 748 Fed. Appx. at 267.

24 2020 U.S. Dist. LEXIS 169167 (D. Mass. Sept. 16, 2020).

25 The Court referred to the Plaintiff as "they", "them" and "their." These pronouns are also used throughout this analysis.

employer explained that "'that they are not approving work from home for managers since [they] need managers in the building and supporting operations.'"[26]

After utilizing available accrued leave time, the Plaintiff reluctantly returned to the office in July 2020. However, the Plaintiff claimed that not all of the protective items they had requested were provided (e.g., PPE, masks, sanitizer, wipes). The Plaintiff made further requests to resume working remotely, supported by medical documentation, and also provided a letter from their direct supervisor in support of the request which stated that the Plaintiff could perform all their essential duties from home. However, the Plaintiff's request was denied because the employer "expect[ed] all managers to work from the office."[27]

Plaintiff tendered a conditional resignation on August 2020 to take effect approximately one month later. The resignation letter indicated that it would be rescinded if Plaintiff was permitted to work remotely. Prior to the resignation date, the employer began allowing managers with children to request remote work for up to two days each week, and the Plaintiff's supervisor also submitted a letter to senior management in support of Plaintiff's request to work from home. Based on these developments, Plaintiff rescinded their resignation notice and renewed their request to work remotely. The request was again denied.

Plaintiff then sent an email to the employer declaring that they would work in the office for one week and afterwards resume working remotely. The employer responded, through counsel, that it would "enforce its applicable policies'" if the Plaintiff tried to resume remote work without approval. Plaintiff took this to mean that their employment would be terminated.

Plaintiff thereafter filed a civil complaint alleging that they were the victim of disability discrimination, as well as a hostile work environment, and that the employer had failed to provide reasonable accommodation, all in violation of the ADA and the Massachusetts Fair Employment Practices Act. Plaintiff further requested that the court issue a preliminary injunction requiring Defendant to permit Plaintiff to telework "for the duration of the [COVID-19] pandemic" and otherwise "to discontinue its discriminatory practices."[28]

In the end, the Court granted an injunction, applying traditional preliminary injunction standards.

> Plaintiff is entitled to telework as a reasonable accommodation pursuant to the ADA and [state law] for sixty (60) days or until further order of the court. During this period of time, [employer] is entitled to seek further medical documentation concerning Plaintiff's alleged disability. The parties are strongly encouraged to discuss a mutually acceptable resolution of their dispute. A status conference has been scheduled on October 8, 2020 at 10:00 A.M. . . .[29]

The issuance of an injunction forcing an employer to accept an unwanted remote work arrangement is certainly extraordinary. However, *Peeples* involves a number of mitigating or unique factors which could limit its persuasiveness in future cases:

- *COVID-19 Pandemic.* The Court acknowledged that normally it would be "very hesitant to intrude into the employment relationship" via preliminary injunction, but, citing pandemic related concerns, determined that "[t]his is not a normal situation."[30]
- *The Plaintiff was Permitted to Work Remotely for a Lengthy Period.* All told, the Plaintiff was allowed to work remotely for over three months, a majority of the Plaintiff's tenure with the defendant-employer, with apparent success.
- *Support from Management.* The Plaintiff's direct supervisor supported the request for remote work, expressly writing that the employee was able to perform all essential job functions remotely.
- *Other Employees Were Permitted to Work Remotely.* Other managers were allowed to continue working remotely, for example managers with children.
- *Lack of Individualized Assessment / Accommodation*. The employer relied on a blanket prohibition against remote work for managers, rather than an individualized assessment. Similarly, the alternative accommodations provided were universal safety measures.
- *Settlement*. The order's 60-day duration was rather transparently an attempt by the judge to encourage settlement.

[26] 2020 U.S. Dist. LEXIS 169167, *3.
[27] 2020 U.S. Dist. LEXIS 169167, *4-5.
[28] 2020 U.S. Dist. LEXIS 169167, *6.
[29] 2020 U.S. Dist. LEXIS 169167, *18-19.
[30] 2020 U.S. Dist. LEXIS 169167, *15.

IV. Conclusion

For more than 20 years, the EEOC has stated that, depending upon the facts, remote work can be a reasonable accommodation under the ADA. Now, with evolving technology and business practices, and fueled by a pandemic, courts may be more inclined to agree in the cases before them. The preliminary injunction issued in *Peeples* is a striking new chapter in the story, but even if *Peeples* proves to be more anomaly than bellwether, it seems likely that remote work will remain commonplace even after the pandemic and that it will achieve greater judicial acceptance as a reasonable ADA accommodation.

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USDOL's New Guidance on the Fluctuating Workweek Method To Calculate Overtime

By Laurie E. Leader

On May 20, 2020, the United States Department of Labor (USDOL) announced a final rule clarifying the fluctuating workweek method for calculating overtime compensation. Under the new rule, employers can pay bonuses and other incentive pay to salaried nonexempt employees whose hours vary weekly, without sacrificing the ability to calculate their overtime under the fluctuating workweek model; however, such incentive payments generally must be included in calculation of the employee's regular rate.[1] The new rule also provides examples to illustrate how to calculate overtime under various scenarios using the fluctuating workweek method. The final rule became effective on August 7, 2020.

Further guidance on the fluctuating workweek method followed with a Wage-Hour Opinion Letter, issued on August 31, 2020, articulating the requirements that an employer needs to satisfy before using the fluctuating workweek method.[2] While this guidance is helpful in understanding when an employer can take advantage of the fluctuating workweek method, certain questions remain unanswered, including the degree to which an employee's hours need to fluctuate in order for the fluctuating workweek method to apply. This article analyzes the recent guidance and regulations against the backdrop of existing case law to provide a roadmap for employer compliance with the fluctuating workweek method.

Overtime Compensation and the Fluctuating Workweek Method

Section 7(a) of the Fair Labor Standards Act (FLSA) requires employers to pay their nonexempt employees overtime pay at a minimum of "one and one-half times the regular rate at which [the employee] is employed" for all hours worked in excess of forty (40) in a workweek.[3] Where an employee receives a fixed salary for fluctuating hours, an employer may use the "fluctuating workweek method" to compute overtime compensation owed, if certain conditions are met.[4] Under the fluctuating workweek method, the employer need only pay an additional one-half times the regular rate for all overtime hours worked – a substantial savings for employers who qualify.

To illustrate by way of example, an employee who receives a weekly salary of $1000 and who works fifty (50) hours in a week would be paid $100 in overtime compensation under the fluctuating workweek method. Specifically, overtime would be calculated by first computing the regular rate by dividing the weekly salary ($1000) by the total number of hours worked (50). The employee's regular rate of $20 per hour is then multiplied by half that amount or $10 per hour for each hour of overtime worked ($10 per hour times 10 hours in the example) to arrive at overtime compensation in the amount of $100 for the workweek.

By contrast, under the usual method for calculating overtime at 1.5 times the employee's regular rate, the employee would receive $375 in overtime compensation or $275 more in overtime for the workweek than the amount owed under the fluctuating workweek method. The employee's regular rate of $25 per hour would first be computed by dividing the total weekly salary ($1000) by 40. The regular rate is then multiplied by 1.5 to arrive at an hourly overtime rate of $37.50 per hour; the overtime compensation owed is the product of the hourly overtime rate and the number of overtime hours worked or $375.

To reap the benefits of the fluctuating workweek method, employers must satisfy certain criteria set forth in the USDOL regulations, specifically, the employee must: (1) work fluctuating hours from week to week; (2) receive a fixed salary that does not vary with the number of hours worked and (3) that satisfies the minimum wage; (4) be paid pursuant to a clear and mutual understanding with the employer; and (5) receive any overtime compensation calculated pursuant to the fluctuating workweek method.[5]

[1] *See* https://www.federalregister.gov/documents/2020/06/08/2020-10872/fluctuating-workweek-method-of-computing-overtime. An exception applies if the incentive pay is excluded under 29 U.S.C. § 207(e)(1)-(8).

[2] *See* WHD Op. Letter FLSA 2020-14, *reprinted at* www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_08_31_14_FLSA.pdf. Wage-hour opinion letters respond to specific inquiries and are based exclusively on the facts presented in the query. The letters issued by USDOL's Wage Hour Division are available on the agency's website.

[3] 29 U.S.C. § 207(a). The FLSA generally requires that overtime be calculated weekly regardless of the employee's pay period.

[4] 29 CFR 778.114.

[5] 29 CFR 778.114(a).

In such cases, because the salary is designed "compensate the employee at straight time rates for whatever hours are worked in the workweek," the regular rate "is determined by dividing the number of hours worked in the workweek into the amount of the salary."[6] An employer satisfies the FLSA's overtime pay requirement under the fluctuating workweek method if it compensates the employee by paying, in addition to the fixed salary, overtime compensation at a rate of at least one-half times the regular rate of pay for the overtime hours worked.[7] Because the employee's hours of work fluctuate from week to week, the regular rate must be determined separately each week based on the number of hours actually worked in the workweek.

Backdrop for the Final Fluctuating Workweek Rule

Until 2011, the USDOL did not prohibit use of the fluctuating workweek method where salaried nonexempt employees were paid bonuses and other incentive pay. In 2011, the Department issued a final rule on the fluctuating workweek method. In the preamble to that rule – but not in the rule itself -- the USDOL stated that bonus and premium payments "are incompatible with the fluctuating workweek method of computing overtime under section 778.114." [8]

Several courts declined to give weight to the 2011 preamble and allowed for application of the fluctuating workweek method notwithstanding any incentive payments made.[9] Other courts held that bonuses and other premium pay were incompatible with the fluctuating workweek method.[10] These divergent views emerged as an impetus for the USDOL's May 2020 final rule which, again, clarifies that bonuses and other supplemental pay will not prevent application of the fluctuating workweek method of calculating overtime.

Fluctuating Workweek Requirements and Shades of Gray

As noted above, for the fluctuating workweek method to apply, an employee's hours must fluctuate from week to week. The USDOL has long-held the position that "there is no requirement that the employee's hours of work must fluctuate below forty hours per week," and that the "fluctuating workweek method remains appropriate even when it is only the number of overtime hours that fluctuate."[11] Both the final rule and the recent Wage-Hour Opinion Letter clarify that the employee's hours need not fluctuate below forty (40) hours per week for the fluctuating workweek method to apply, as long as the employee's hours vary from week to week.[12] Several court decisions previously reached the same conclusion.[13] However, recent USDOL guidance and the final rule fail to identify the amount of fluctuation in hours necessary to qualify under the fluctuating workweek method.

The requirement that the employee be paid a fixed salary regardless of the hours worked prohibits an employer utilizing the fluctuating workweek method from making deductions from an employee's salary for "absences occasioned by the employee."[14] By contrast, the USDOL has previously advised that an employer adopting the fluctuating workweek method "may take a disciplinary deduction from an employee's salary for *willful* absences or tardiness or for infractions of major work rules, provided that the deductions do not cut into the required minimum wage and overtime compensation."[15] This prior guidance has been added to the USDOL's final rule.[16]

The requirement that the employee be paid a fixed salary sufficient to compensate the employee for all hours worked at a rate not less than the applicable minimum wage is fairly straightforward. Notwithstanding this requirement, the fluctuating workweek method is not invalidated

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6 29 CFR 778.114(a).

7 29 CFR 778.114(a).

8 75 F.R. 18832, 18850 (May 5, 2011).

9 *See, e.g., Smith v. Frac Tech Servs., LLC,* 2011 U.S. Dist. LEXIS 64079, at *7 (E.D. Ark. June 15, 2011).

10 *See O'Brien v. Town of Agawam,* 350 F.3d 279, 288 (1st Cir. 2003).

11 *See* https://www.federalregister.gov/documents/2020/06/08/2020-10872/fluctuating-workweek-method-of-computing-overtime at 11, citing WHD Op. Letter FLSA (Oct. 27, 1967), and WHD Op. Letter FLSA 2009-3 (Jan. 14, 2009).

12 *See* https://www.federalregister.gov/documents/2020/06/08/2020-10872/fluctuating-workweek-method-of-computing-overtime at 12; WHD Op. Letter FLSA 2020-14, *reprinted at* www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_08_31_14_FLSA.pdf.

13 *See, e.g., Condo v. Sysco Corp.,* 1 F.3d 599, 602 (7th Cir. 1993); *Ramos v. Telegian Corp.,* 176 F. Supp.3d 181, 195 (E.D.N.Y. 2016).

14 *See* https://www.federalregister.gov/documents/2020/06/08/2020-10872/fluctuating-workweek-method-of-computing-overtime at 12, citing WHD Op. Letter FLSA 2006-15 (May 12, 2006).

15 *See* https://www.federalregister.gov/documents/2020/06/08/2020-10872/fluctuating-workweek-method-of-computing-overtime at 13, quoting WHD Op. Letter FLSA 2006-15 (May 12, 2006).

16 29 C.F.R. §778.114(d).

by occasional and unforeseeable workweeks in which the employee's fixed salary provides compensation at less than the minimum wage.[17]

Perhaps, the least defined requirement of the fluctuating workweek method is the requirement of a "clear and mutual understanding" between employer and employee that "the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than working 40 hours of some other fixed weekly work period."[18] Courts have held that the employee need not understand the precise payroll method by which overtime is calculated in order to satisfy this requirement.[19] Less clear are the precise contours of what is needed for an understanding to qualify as "clear and mutual" within the meaning of the fluctuating workweek method. Neither the final rule nor the recent wage-hour opinion letter clarify this requirement.

The final rule does provide guidance on how to calculate overtime pay under the fluctuating workweek method as well as the fact that bonuses, commissions, hazard pay and other incentive pay may be paid to employees consistent with the fluctuating workweek method, as long as such supplemental payments are included in calculating the employee's regular rate.[20]

Conclusion

Although the USDOL's final rule and recent guidance help to clarify when employers can use the fluctuating workweek method to calculate overtime compensation and how to actually calculate such overtime, where appropriate, unanswered questions remain as to the parameters of fluctuation and the "clear and mutual understanding" necessary to satisfy the fluctuating workweek's threshold requirements. While the clear and mutual understanding need not be in writing, best practices mandate that the understanding be memorialized. Given the uncertainties in application, employers seeking to avail themselves of the fluctuating workweek method should proceed cautiously.

Moreover, employers should consult with state law to determine whether the use of the fluctuating workweek method is prohibited within a particular state. California, Pennsylvania and New Mexico are among the states prohibiting reliance on the fluctuating workweek method to calculate overtime.

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[17] *See* https://www.federalregister.gov/documents/2020/06/08/2020-10872/fluctuating-workweek-method-of-computing-overtime at 15.

[18] *See* https://www.federalregister.gov/documents/2020/06/08/2020-10872/fluctuating-workweek-method-of-computing-overtime at 16, quoting 29 C.F.R. §778.114(a).

[19] *See Garcia v. Yachting Promotions, Inc.,* 662 F. App'x. 795, 797 (11th Cir. 2016) (per curiam); *Clements v. Serco, Inc.,* 530 F.3d 1224, 1230-31 (10th Cir. 2008); *Valerio v. Putnam Assocs., Inc.,* 173 F.3d 35, 40 (1st Cir. 1999).

[20] 29 C.F.R. §778.114(a)-(b); *see generally See* https://www.federalregister.gov/documents/2020/06/08/2020-10872/fluctuating-workweek-method-of-computing-overtime at 19-21.

California Employers Must Provide Notice to Employees Of COVID-19 Exposure and Benefits, Take Safety Measures to Prevent COVID-19's Spread

By Kacey Riccomini

Effective January 1, 2021, California employers will have new notice, record keeping and safety obligations related to COVID-19. Through Assembly Bill 685, the California legislature and Governor Gavin Newsom mandate that employers provide written notice and health benefit information to employees who were potentially exposed to COVID-19 at work. Failure to comply with this new bill may result in citations, civil penalties and even operational shutdowns. Thus, employers should be proactive and work with their counsel to ensure that they will be compliant with AB 685 by the new year.

Employers Will Have One Business Day to Provide Notice To Employees of COVID-19 Exposure, Health Benefits, and The Employer's Disinfection And Safety Plan

When an employer receives a notice of potential exposure to COVID-19, the employer will be required to provide, within one business day, notice to employees, employee representatives (i.e., union representatives and attorneys), and employers of subcontracted employees present at the same worksite as the infected person within the infections period. "Notice of potential exposure" includes notice that the employee has a laboratory-confirmed case of COVID-19, a positive diagnosis from a licensed health care provider, an order to isolate from a public health official, or that the employee died from COVID-19. An employer may learn of potential exposure from an employee, employee's emergency contact, employer's testing protocol, subcontractor, a public health official, or licensed medical provider. However, employers may not require employees to disclose medical information that is not required by law. Of course, employers may not retaliate against employees who disclose their COVID-19 positive status. Doing so may result in a complaint to the Division of Labor Standards Enforcement.

The notice of potential COVID-19 exposure to employees must be provided in English and the language understood by the majority of employees, and in the manner that the employer normally uses to communicate employment information, including, but not limited to, written notice by personal service, email, or text messages. Although not determinative of whether an illness is work-related, notices to employees should contain the same information required in an incident report in a Cal/OSHA Form 300 injury and illness log. Employers must maintain records of these written notices for three years.

The employer must also provide all potentially exposed employees and their representatives with information about COVID-19-related benefits to which employees may be entitled under federal, state or local laws. Such benefits may include workers' compensation, COVID-19 leave, company sick leave, state-mandated leave, supplemental sick leave, negotiated leave provisions, and anti-retaliation and antidiscrimination protections.

Additionally and within one business day, the employer must provide employees, their representatives, and employers of subcontracted employees with notice of the disinfection and safety plan that the employer plans to implement and complete in accordance with guidelines from the Centers for Disease Control and Prevention.

To avoid claims or liability for privacy violations, health information and personal identifying information about infected employees should remain confidential and not be disclosed to other employees. Notices need only state that employees at the affected worksite may have been exposed to COVID-19, and provide appropriate information regarding benefits, leave, and disinfection and safety plans.

Employers Will Have 48 Hours to Report to the State Department of Public Health

Under the California Department of Public Health's September 11 guidance, if an employer or its representative receives three "notices of exposure" within two weeks involving individuals from different homes (an "outbreak"), the employer has 48 hours to notify the local public health agency in the jurisdiction of the effected worksite. The employer must provide the following information to the appropriate public health agency: the names, number, occupation, and worksite of infected employees, the employer's business address, and NAICS code of the worksite where infected employees work. The employer must update the local public health agency when it learns of any subsequent confirmed cases of COVID-19 at the worksite.

Notably, the definition of an "outbreak" may evolve depending upon the California Department of Public Health's guidance, which is posted to its website.

Employers Must Develop Safety Plans and Training, or Face Citations and Shutdowns

AB 685 revises Cal/OSHA rules to provide that there is a "rebuttable presumption" of a "serious violation" if "there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." According to the bill, "serious physical harm" explicitly includes respiratory illnesses, inpatient hospitalization, loss of any member of the body, serious permanent disfigurement, or impairment that causes a part of the body or function of an organ to be "permanently and significantly reduced in efficiency." Violations may also include a "serious exposure exceeding an established permissible exposure limit," or "unsafe or unhealthful" practices. Given the potentially severe health consequences of COVID-19, Cal/OSHA may determine that any exposure or having unsafe practices related to COVID-19 is a "serious violation."

Additionally, Cal/OSHA is authorized to issue orders prohibiting use (stop work orders) if a workplace poses an "imminent hazard" of COVID-19 exposure. Such orders require employers to post conspicuous notices of COVID-affected areas and operations, and prohibit entry into those areas except to eliminate the dangerous condition. Safety notices may not be removed until the threat is remediated and appropriate safeguards are in place. However, these orders may not affect critical governmental functions, or delivery of power or water.

Thus, employers should have a safety plan and sanitation protocols consistent with the CDC's guidance in place, implement these protocols when they receive any notice of potential exposure, and train employees how to respond to and prevent exposure to COVID-19. Failure to do so may result in citations or even operational shutdowns.

With Appropriate Safety Procedures, Employers May Be Able to Convince Cal/OSHA Not to Issue a Citation

Fifteen days before issuing a citation, Cal/OSHA may send the employer a letter detailing alleged violations and request information. In determining whether to issue a citation, Cal/OSHA considers, among other things: training that the employer provides to employees and their supervisors to prevent exposure to COVID-19, the employer's procedures for discovering exposure, whether the employer controlled access to the hazard, whether the employer corrected the hazard, supervision of exposed and potentially exposed employees, the employer's procedures for communicating its health and safety rules and programs to employees, and any other information that the employer wishes to provide.

In response to Cal/OSHA's letter, the employer may explain the circumstances of the alleged violation, why it does not believe a violation to exist or be "serious," and why its response to the alleged violation was reasonable. Additionally, the employer may rebut any presumption of a serious violation by showing that the employer did not know, and could not know through reasonable diligence, of the existence of the violation. To establish "reasonable diligence," the employer provide evidence that it took all steps that a reasonable employer would take before an alleged violation occurred, considering the severity and likelihood of the expected harm, and that it acted to eliminate employee exposure to any hazard as soon as the employer discovered it.

Notably, employers are not barred from presenting information at a later hearing even if the employer does not provide information in response to Cal/OSHA's letter. However, if the employer provides different information from the letter at the hearing, the trier of fact may draw a negative inference against the employer based on any inconsistencies.

Conclusion

To avoid civil citations, penalties and a disruption in operations, employers should work with their counsel to develop compliant notices of COVID-19 exposure, health benefits and safety plans to send to employees and employee representatives before the Act's effective date of January 1, 2021. Employers should also be prepared to provide notices of exposure to subcontractors and local health agencies, and to develop a disinfection and safety plan and ensure that employees and their supervisors are appropriately trained to prevent the spread of COVID-19.

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RECENT DEVELOPMENTS

ADA

Employee Failed to Show That the Employer Had Taken an Adverse Action Against Her Where the Employee Voluntarily Agreed—As Part of Her Settlement—to Laterally Transfer to the Police Department As a Reasonable Accommodation

Laird v. Fairfax Cty., 2020 U.S. App. LEXIS 33516 (4th Cir. Oct. 23, 2020)

This suit involved allegations of discrimination and retaliation in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* Viola Laird, an employee of Fairfax County, suffers from multiple sclerosis. In 2017, Laird sued the County, claiming that she faced unlawful discrimination based on her disability when the County laterally transferred her to another department, and that the transfer came in retaliation for filing a complaint with the Equal Employment Opportunity Commission. The United States District Court for the Eastern District of Virginia granted summary judgment for the County, and the Fourth Circuit affirmed.

Laird had worked for the County for more than twenty-five years. In 2012, she sought an accommodation for her multiple sclerosis through "unscheduled telework," subject to her manager's approval. When that arrangement became "untenable" for her manager and management's revised schedule did not satisfy Laird, Laird filed a charge with the EEOC. The parties reached a settlement in May 2017, in which "the County agree[d] to provide, and Laird agree[d] to accept, a lateral transfer within the County to the Fairfax County Police Department (FCPD) to the position of Buyer I, where she [would] maintain her pay grade, position within the salary band, and opportunity for future promotion." J.A. 751. Laird was also given up to sixteen (16) hours of flexible telework each week as an accommodation and the lump sum of $30,000.

After Laird accepted the settlement, she was to FCPD's Quartermaster Section where she was responsible for "uniforming and equipping about 2,000 members of the agency and also some non-members." J.A. 43. Laird's new position, thus, drew from her previous procurement experience in the County's Department of Procurement & Material Management. Her new position was titled as a "Management Analyst I" with the same pay grade as Laird's previous job.

Approximately one month after her transfer, Laird complained that the duties she was performing were not consistent with those set forth in her job description. After discussing the issue with Laird, the FCPD agreed to create a new position and job description position of Buyer I. Because Laird formally refused to accept the reclassified position, her job technically remained in the Department of Procurement & Material Management, although the duties she performed were within the FCPD. Laird complained that her new position was "boring" without "opportunity for future promotion," she remained in the position without other complaints. Laird subsequently filed her lawsuit in December 2017 for unlawful discrimination and retaliation.

In affirming the grant of summary judgment in the County's favor, the Fourth Circuit focused on the fact that Laird voluntarily agreed—as part of her settlement—to laterally transfer into the Police Department as a "reasonable accommodation." J.A. 751. The court further noted that the County agreed to create a new position for Laird, and went beyond what the ADA requires, in changing the title of that position notwithstanding the internal confusion this change would potentially create. *See generally* 42 U.S.C. § 12111(9)(B) (listing as a "reasonable accommodation" the "reassignment to a *vacant* position" (emphasis added)). As a result of her FCPD transfer, Laird is able to telework each week and holds a job with the same salary and similar responsibilities as before. Thus, she could no longer argue on appeal that intolerable conditions in her previous job compelled her to accept the settlement. Under the circumstances, in the court's view, because the transfer reached by agreement could not qualify as an adverse action, it trumped Laird's claims of discrimination and retaliation. To the extent that Laird claimed that the County breached their agreement by failing to transfer her to the precise position Laird wanted, the Fourth Circuit noted that was not before the court, since Laird failed to file a breach of contract claim.

In sum, the court stated that Laird's transfer was not an adverse action, since it was voluntarily requested and the matter of agreement. Because Laird failed to demonstrate an adverse action, the district court held -- and the Fourth Circuit agreed – that Laird failed to establish a prima facie case of discrimination and retaliation.

ADVERSE EMPLOYMENT ACTION

An Adverse Employment Action Is Not a Requisite Element of a Failure to Accommodate Claim. Once Plaintiffs Have Established Their Employers' Failure to Reasonably Accommodate Their Disability, They Need Not Go Further and Establish That They Have Suffered an Adverse Employment Action

Exby-Stolley v. Bd. of Cty. Comm'rs, 2020 U.S. App. LEXIS 33962 (10th Cir. Oct. 28, 2020)

This en banc appeal centred on a pure issue of law: whether an adverse employment action is a requisite element of an ADA failure-to-accommodate claim under Title I of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12111-12117. The United States District Court for the District of Colorado concluded that the answer was "no," reaching this determination through a comprehensive analysis, including consideration of the following: the ADA's text; the Circuit's failure-to-accommodate precedent; the failure-to-accommodate decisions of sister circuits; the views of the Equal Employment Opportunity Commission (the "EEOC"), the federal regulatory agency charged with administering the ADA; and the ADA's general remedial purposes. The district court in this case had instructed the jury that, in order to prevail on her ADA failure-to-accommodate claim, Laurie Exby-Stolley was required to establish that she had suffered an adverse employment action. Over a dissenting opinion, a panel of the Tenth Circuit agreed and affirmed the district court's judgment. *See Exby-Stolley v. Bd. of Cty. Comm'rs,* 906 F.3d 900 (10th Cir. 2018). Thereafter, the Tenth Circuit granted rehearing en banc. In the court's words: "In accordance with our local rule, the judgment was vacated, the mandate stayed, and the case was restored as a pending appeal." *United States v. Nacchio*, 555 F.3d 1234, 1236 (10th Cir. 2009) (en banc).

On en banc rehearing and following oral argument, the Tenth Circuit held that the district court erred, that an adverse employment action is not a requisite element of an ADA failure-to-accommodate claim. Accordingly, the court reversed the district court's judgment and remanded for a new trial. Because the court remanded for a new trial and the original decision turned on trial-related issues, the court vacated the decision in its entirety.

In rejecting the view that an adverse employment action is a requisite element of an ADA failure-to-accommodate claim, the Tenth Circuit noted that the term "adverse employment action" not appear in the plain text of the relevant statutory provisions. The court further stated that incorporating this element into an ADA failure-to-accommodate claim would be contrary to: the court's controlling precedent; the inherent nature of a failure-to-accommodate claim, as contrasted with a disparate-treatment claim; the general remedial purposes of the ADA; the EEOC's understanding of the elements of an ADA failure-to-accommodate claim; and the regularly followed practices of all of the court's sister circuits. The Tenth Circuit, thus, concluded that the district court erred as a matter of law in incorporating an adverse-employment-action requirement into its instructions to the jury concerning Exby-Stolley's ADA failure-to-accommodate claim.

ARBITRATION

The District Court Did Not Err by Confirming the Arbitral Award in Favor of the Dealership Because Plaintiff Had No Right to Appeal to an Arbitration Panel As the Contract Made No Such Provision

Salinas v. McDavid Houston-Niss, L.L.C., 2020 U.S. App. LEXIS 32842 (5th Cir. Oct. 13, 2020)

On September 29, 2017, Angela C. Salinas purchased a 2015 Mercedes-Benz E350 from a dealership, McDavid Nissan, for the purchase price of $31,944.06. Salinas put $10,000 down and applied for a loan in the amount of $22,326 from Ally Financial ("Ally") to finance the balance of the purchase price. The contract for sale, which Salinas signed, required her to keep the car insured against property damage in the amount that she still owed on the car. Three days after purchasing the car, Salinas collided with another vehicle, which totaled the Mercedes-Benz. Salinas had not then insured the vehicle against property damage, claiming that McDavid represented to her that it would insure her vehicle. McDavid contended that the contract required Salinas to maintain insurance on the car and that she represented to the dealership that she would insure the vehicle. Asserting claims for breach of contract and violations of the Texas Deceptive Trade Practices Act ("DTPA"), Salinas sought recoupment from McDavid of her $10,000 down payment under an arbitration provision in the sales contract. She also sought $15,000 in vehicle replacement fees, attorney's fees, arbitration costs, interest, and punitive damages.

Before arbitrating her claims, Salinas moved to amend her complaint to join Asbury and Ally as parties to the arbitration. After the arbitrator denied her request to join Asbury and Ally, Salinas sued them in federal court for violations of the DTPA, the Sarbanes-Oxley Act, the Consumer Credit Protection Act, and the Equal Credit Opportunity Act. While the federal suit was pending, Salinas proceeded to arbitrate against McDavid. After conducting an evidentiary hearing, the arbitrator ruled in favor of McDavid on October 18, 2019. Specifically, she awarded McDavid $14,569.06, which equated to the purchase price of the Mercedes-Benz less Salinas's down payment and $7,375 that McDavid received for the car in salvage value. The arbitrator also awarded McDavid $20,728.50 in attorney's fees and costs, along with pre-judgment and post-judgment interest. Later that day, McDavid moved to intervene in Salinas's lawsuit against Asbury and Ally to confirm the arbitral award. In response, Salinas moved to vacate the award. The United States District Court for the Southern District of Texas granted McDavid's motion to intervene and confirmed the arbitral award. Salinas appealed, and the Fifth Circuit affirmed.

The court stated that Salinas had "forfeited" her argument that the arbitrator exceeded her authority by failing to join Asbury and Ally in the arbitration, since Salinas did not raise that issue in her opening brief. The court also rejected Salinas's argument that the arbitrator exceeded her authority in awarding McDavid attorney's fees. That argument was based on a misreading of the contract. Salinas argued, in particular, that the sales contract entitled McDavid to attorney's fees only if the arbitrator found that any of Salinas's claims to be frivolous. The arbitration provision stated otherwise, specifically that: "Each party shall be responsible for its own attorneys' ... fees, unless awarded by the arbitrator under applicable law." The arbitrator awarded McDavid attorneys' fees pursuant to the Texas Civil Practice and Remedies Code, which allows the prevailing party to recover reasonable attorneys' fees for claims asserted in contract.

Finally, Salinas asserted that the arbitrator ignored testimony that McDavid did not follow the contract provisions regarding recovery of the vehicle. The court rejected this argument, too, since Salinas failed to identify what that testimony entailed, which clause(s) of the sales contract were breached, or how the arbitrator's decision to disregard the purported testimony amounted to an abuse of the arbitrator's authority. The court thus affirmed the district court decision confirming the arbitral award.

COLLECTIVE BARGAINING

First Amendment Does Not Guarantee a General Right of Access to Government-Controlled Information

Boardman v. Inslee, 2020 U.S. App. LEXIS 33319 (9th Cir. Oct. 22, 2020)

Bradley Boardman, Deborah Thurber, Shannon Benn and Freedom Foundation (collectively "Plaintiffs") were a nonprofit organization and individual in-home providers who were required by Washington law to participate in statewide collective bargaining. Although the individual plaintiffs were members of their collective bargaining units, they were not members of their respective unions and did not pay agency or "fair share" fees—fees paid to a union by nonmembers to support activities that were germane to a union's duties as a collective-bargaining representative. Plaintiffs sought to inform other individual in-home providers of their right to opt out of paying agency fees to their unions. After the passage of Initiative 1501 by Washington voters, however, Plaintiffs were unable to obtain the contact information of other in-home providers.

Initiative 1501 prohibits public access to certain government-controlled information, including the personal information of in-home care providers, but permits that information to be disclosed to the providers' exclusive bargaining representatives. Plaintiffs challenged their denial of access to the providers' contact information under the guise of Initiative 1501 pursuant to the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The United States District Court for the Western District of Washington rejected Plaintiffs' claims on summary judgment. The Ninth Circuit affirmed.

The court stated that although the decision whether to disclose government-controlled information is generally a "task which the Constitution has left to the political processes," *Houchins v. KQED, Inc.*, 438 U.S. 1, 15, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978), the First Amendment forbids a state from discriminating invidiously among viewpoints in the provision of information within its control. However, a state does not engage in viewpoint discrimination by simply disclosing the personal information of public or quasi-public employees to the employees' exclusive collective bargaining representative, while denying equal access to the public. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).

FEHA

District Court Properly Denied a Remand to State Court Because 28 U.S.C. §1332 Diversity Was Complete Upon Dismissal of an Employee's Harassment Claims Against the Only Non-Diverse Defendant

Pineda v. Abbott Labs. Inc., 2020 U.S. App. LEXIS 33044 (9th Cir. Oct. 20, 2020)

Ronald Pineda ("Pineda") appealed the district court's denial of his motion to remand to state court and dismissal on summary judgment of his claims that Abbott Laboratories ("Abbott") failed to accommodate his disabilities, discriminated against him on the basis of age and disability, and engaged in retaliation. The Ninth Circuit affirmed the district court's denial of remand and grant of summary judgment on the reasonable accommodation, disability discrimination, and retaliation claims under the California's Fair Employment and Housing Act and reversed summary judgment on the age discrimination claim.

The court affirmed the district court finding that Abbott met its burden of showing that Pineda did not sufficiently plead harassment and intentional infliction of emotional distress ("IIED") claims against Alex Mazzenga, the only non-diverse defendant. Thus, the court stated that district court properly denied the motion to remand to state court because diversity was complete. 28 U.S.C. § 1332. The court stated that Pineda failed to allege facts in his complaint sufficient to plead a harassment claim. Mazzenga's alleged conduct arose "out of the performance of necessary personnel management duties," *Janken v. GM Hughes Elecs.*, 46 Cal. App. 4th 55, 53 Cal. Rptr. 2d 741 (1996) and did not rise to the level of the pervasive hostility recognized by the California Supreme Court in *Roby v. McKesson Corp*., 47 Cal. 4th 686, 709, 101 Cal. Rptr. 3d 773, 219 P.3d 749 (2009), *as modified* (Feb. 10, 2010). Additionally, the court stated that Pineda did not allege facts sufficient to plead the outrageous conduct required for a claim of IIED.

The court further stated that the district court properly granted summary judgment for Abbott on Pineda's reasonable accommodation claim. It was undisputed that, following Pineda's traumatic brain injury, Abbott provided Pineda with eleven out of twelve accommodations requested during the interactive process. Pineda argued that Abbott failed to provide the twelfth requested accommodation, four-hour work days for a period of six weeks. The record, however, made clear that Abbott accommodated a four-hour work day for an initial two-week period, after which Pineda's doctor cleared him to return to full-time work. The record, therefore, established that Pineda did not need the full requested accommodation of six weeks of part-time work, and thus that Abbott did not unreasonably deny it. The court, thus, affirmed the district court's grant of summary judgment for Abbott on the reasonable accommodation claim.

The court similarly stated that the district court properly granted summary judgment in Abbott's favor on Pineda's disability discrimination claim. Pineda made a sufficient showing that he suffered from a disability and was otherwise qualified for his position, but he failed to present a genuine issue of material fact as to whether he was subjected to adverse employment action because of his disability.

Additionally, the court held that the district court properly granted summary judgment for Abbott on Pineda's retaliation claims, since there was no genuine issue of material fact as to whether Pineda could make a showing of pretext. Even assuming arguendo that Pineda established a prima facie case of retaliation, he failed to raise a triable issue of fact as to whether Abbott's proffered non-retaliatory motive, poor performance, was a pretext for retaliation.

By contrast, the court found error in the grant of summary judgment for Abbott on Pineda's age discrimination claim. Not only did Pineda made a prima facie showing as to age discrimination, but there were genuine disputes of material fact as to pretext on that claim. According to the Ninth Circuit, conflicting declarations regarding "me too" evidence and evidence of biased policies, coupled with the subjective nature of the performance evaluation at issues, created a genuine issue of material fact as to pretext for discriminatory animus, such that summary judgment on the age discrimination claim was improper.

RETALIATION

Mere Misuse or Bad Practice Is Not Enough to Ground a False Claims Act Claim

Brown v. Morehouse Coll., 2020 U.S. App. LEXIS 33444 (11th Cir. Oct. 23, 2020)

James Brown was employed by Morehouse College for about eleven and a half years, between November 1996 and June 2015. Beginning in November 2004, Brown worked as the Director in the Office of Research Careers, a position that was completely funded by grants. He was also the Principal Investigator for the National Science Foundation's Renaissance Scholarship program, which meant that he "was responsible for ensuring compliance with the reporting obligations established by the NSF."

Six years into the last role he held with the College, Brown submitted an internal complaint with the College's

Ethics Point hotline. The complaint concerned the FACES grant, which according to Brown was a National Science Foundation sub-contract with Georgia Tech. In his complaint, Brown reported what he saw as errors with the College's handling of the FACES grant. In particular, he stated that the College failed to comply with its cost-sharing obligations, and that the College was wrongfully expensing the grant for more people than were on budget. A report of a subsequent meeting between Chief Ethics and Compliance Officer Doris Coleman and Brown revealed that, according to Brown, "all of the errors have to do with billing issues. His major concern is that expenditures do not conform to the grant provisions." Seven months later, the College sent Brown a letter to formally respond to the complaint. In the letter, the College declined to remove one of the contested persons from the grant and stated that it considered "this report closed." Two years later, Brown sent a memorandum to Campbell, the College's provost. In it, Brown raised three concerns. *First*, he said that the College should have been recovering more funds from Georgia Tech under the FACES grant. *Second*, he said that the College had excessively charged another grant for fringe benefits. *Third*, he claimed that the budget analysts refused to provide feedback on their rejections of spending requests.

It was around the time of that letter to Campbell that Brown's troubles started. They began with a lapse in salary disbursement that lasted from September 2013 until sometime in early 2014. And they concluded on June 1, 2015, when Brown was provided with a notice of contract non-renewal—which terminated his employment with the College. Brown filed suit against the College, claiming that the College's actions were in retaliation for protected conduct under the federal False Claims Act (FCA), 31 U.S.C. § 3730(h). In his complaint, he claimed that the College "acted by and through its agent's servants and employees to intentionally discriminate and punish" Brown "for reporting prior misuse of Federal funds spending."

The United States District Court for the Northern District of Georgia granted summary judgment in favor of the College. Noting that "Brown's EthicsPoint complaint alerted Morehouse that, at most, it was misusing and abusing federal funds" and that Brown's 2013 memo did not suggest "that Morehouse was somehow defrauding the United States," the district court found that Brown did not engage in protected activity. More specifically, the district court found that "the evidence in the record does not show that Brown's EthicsPoint complaint or letter to Campbell made Morehouse aware of the possibility of an FCA action." Brown appealed, and the Eleventh Circuit affirmed.

Brown consistently described his reports as raising "mismanagement of funds," abridging "operational guidelines," "financial irregularities," "misuse of funds," and "abuse of funds." But the court stated that it is well-established that mere misuse or bad practice is not enough to ground an FCA claim. Rather, FCA liability "arises from the submission of a fraudulent claim to the government, not the disregard of government regulations or failure to maintain proper internal policies." *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1045 (11th Cir. 2015) (quoting *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1012 (11th Cir. 2005)). Nothing Brown raised on appeal raised the possibility that the College was submitting anything to the government. Without a governmental submission, there can be no FCA violation or claim.

The court stated that even if the letter raised the "distinct possibility" of FCA litigation, the distinct possibility standard requires that such possibility be in existence "at the time the" protected activity occurred. This letter, of course, came after anything Brown did as an employee of the College. It could not reach back in time to make his activity protected under the FCA. The court stated that if Brown failed to engage in protected conduct, then it did not matter whether the College retaliated against him. Under all of the circumstances, Brown's appeal failed on the merits.

TITLE VII

There Was Insufficient Evidence to Support Piercing the Corporate Veil of the Dealership Network and Aggregating the Number of Employees For Purposes of 42 U.S.C. § 2000e

Prince v. Appleton Auto, LLC, 2020 U.S. App. LEXIS 33227 (7th Cir. Oct. 21, 2020)

Applecars, LLC was a member of a network of affiliated but corporately distinct used-car dealerships located in Wisconsin. Shannon Prince worked at Applecars for several months in 2018 before he was fired. Prince claims his firing was retaliatory, and sued Applecars and its affiliates for racial discrimination under Title VII of the Civil Rights Act of 1964. The United States District Court for the Eastern District of Wisconsin granted summary judgment to the defendants, noting that Applecars had fewer than fifteen employees and, therefore, was not subject to Title VII. The Seventh Circuit stated that -- because there was insufficient evidence to support Prince's theory that the court should pierce the corporate veil of the dealership network and thereby aggregate the number of employees such that Title VII would apply – the entry of summary judgment court was proper.

Congress exempted small businesses from the strictures of Title VII. The statute only applies to an "employer," which it defines as "a person engaged in an industry affecting commerce who has fifteen or more employees

for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). The parties agreed that Applecars alone never met the fifteen-employee threshold during the relevant time period; they also agreed that if all related dealerships were aggregated, there would be more than fifteen employees altogether. The dispute therefore rested solely on the question of whether the court ought to pierce the dealerships' corporate veils and aggregate the dealerships' employees to render them subject to Title VII.

The court noted that the dealerships shared a web address, where they were advertised and counted together as Wisconsin's largest independent used car dealership, perhaps weighing in favor of piercing the veil, but that alone was not enough.

The court stated that none of the Wisconsin courts' bases for veil-piercing applied. There was no evidence that respecting the dealerships' corporate forms would allow them to "accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim." Prince tried to argue that failing to aggregate the dealerships would defeat his strong equitable Title VII claim, but this was insufficient to pierce the corporate veils. As Defendants pointed out, under Prince's logic, any Title VII plaintiff could pierce the corporate veil with no evidence whatsoever to support doing so beyond his or her own allegations. The court clearly rejected such self-serving argument.

Employee's Acceptance of Remittitur on Her Title VII Claims Did Not Foreclose Her Appeal of The Judgment on Her 42 U.S.C. § 1983 Claim

Legg v. Ulster Cty., 2020 U.S. App. LEXIS 34095 (2d Cir. Oct. 29, 2020)

This case arose from hostile work environment claims brought by four female employees of the Ulster County Jail, including plaintiff Patricia Watson. After trial in the U.S. District Court for the Northern District of New York, a jury awarded Watson a total of $400,000 on her claims against Defendants Ulster County and Paul J. VanBlarcum (collectively, "the County") under Title VII of the Civil Rights Act, and 42 U.S.C. § 1983. In reliance on the district court's invitation to file its post-trial motions two weeks after receiving trial transcripts, the County filed motions for judgment as a matter of law or, alternatively, for a new trial, under Fed. R. Civ. P. 50(b) and 59. The district court then *sua sponte* denied the motions based on the restrictions established by Fed. R. Civ. P. 6(b)(2) on extending the time for filing such motions.

On appeal, the Second Circuit vacated the denial order and remanded, holding that Rules 6(b)(2), 50(b), and 59(b), establish claim-processing, not jurisdictional, rules, and therefore that the court had jurisdiction to consider them on the merits if it determined that any objection to untimeliness was waived or forfeited, or if an equitable exception applied. *See Legg v. Ulster Cty*., 820 F.3d 67, 79 (2d Cir. 2016). On remand, the district court found that Watson "constructively waived" her objection to the untimeliness of the County's motions by not objecting when the motions were filed and before the district court *sua sponte* denied them two days later. It then entered an order reducing Watson's Title VII award to $75,000 and overturning the jury verdict in her favor on her § 1983 claim for want of evidence of an unlawful municipal custom or practice as required by *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

Both Watson and the County appealed. Watson assailed the district court's determination that she "constructively waived" her objection to the motions' untimeliness, and further challenged the court's rejection of the jury's verdict on her § 1983 claim. On cross-appeal the County argued that the district court erred by rejecting its motion for judgment as a matter of law on Watson's Title VII claim. It further submitted that Watson's acceptance of remittitur on her Title VII claim foreclosed entirely her appeal of the judgment.

As to Watson's procedural challenge, the Second Circuit decided that Watson forfeited her right to object to the untimeliness of the County's post-trial motions by failing to raise the issue contemporaneously with the district court's grant of the extension. The court further rejected the County's position that Watson's acceptance of remittitur on her Title VII claims foreclosed her appeal of the judgment insofar as it related to her § 1983 claim.

As to the merits, the court affirmed the judgment in Watson's favor on her Title VII claim and rejected the County's cross-appeal seeking judgment in its favor on that claim as a matter of law. With regard to Watson's § 1983 claim against the County, the court concluded that the district court erred in entering judgment as a matter of law for the County; the jury had a reasonable basis for its finding of sufficient municipal involvement to support its award to Watson. Accordingly, the Second Circuit affirmed the court's entry of judgment in Watson's favor on her Title VII claim, vacated the court's entry of judgment for the County on Watson's § 1983 claim, and remanded the case with directions to reinstate the jury's verdict accordingly and, on motion of the parties, to consider the appropriateness of remittitur on Watson's § 1983 damages award.

Allegations Supporting Plaintiffs's Hostile Work Environment Claims Were Insufficient to Establish That the Former Employer Was On Notice of the Alleged Harassment, Such That There Was a Basis For Holding the Employer Liable.

Little v. CSRA, Inc., 2020 U.S. App. LEXIS 34267 (11th Cir. Oct. 30, 2020)

Sybil Little, proceeding pro se, appealed the dismissal of her complaint. Over the preceding five years, Little filed three employment discrimination lawsuits against CSRA, Inc., her former employer. The court considered the two earlier cases, because they had a bearing on the outcome of this third action. In September 2015, Little filed suit against CSRA, alleging that she was not promoted because of her sex. The United States District Court for the Middle District of Alabama granted summary judgment to CSRA in June 2017. The court called that case "*Little I*." In March 2017, while *Little I* was pending, Little filed a second lawsuit against CSRA and two of its employees, asserting a Title VII hostile work environment claim and related state law claims ("*Little II*"). Little alleged that one CSRA employee, Jason Patrick, propositioned her for "oral and missionary sex," and that another employee, Ricky Norris, sexually harassed her, commenting among other things that Little should "wear dresses so he could stand at the bottom of the ladder and look up her dress." *Little v. CRSA*, 744 Fed. Appx. 679, 680 (11th Cir. 2018). The district court dismissed Little's complaint in *Little II* for failure to state a claim, reasoning that it could consider her allegations only as to Norris because Little did not mention Patrick in her EEOC charge, and that she failed to allege facts that CSRA was on notice of Norris' alleged harassment. The Eleventh Circuit affirmed that dismissal. In November 2018 Little laid the foundation for this case, *Little III*, by filing another EEOC charge against CSRA.

The EEOC dismissed Little's third charge. Then, on February 26, 2019, Little filed this lawsuit against CSRA and its parent company, General Dynamics Information Technology. *Little III* largely rehashes allegations from *Little II*. An important difference for present purposes is that the *Little III* lawsuit alleges that Little was laid off on December 31, 2018 without severance pay and without being permitted to transfer to another position for which she was qualified. Specifically, that complaint asserted four Title VII claims and two state law claims. Count One alleged that CSRA employees sexually harassed Little and created a hostile work environment. Count Two repeated much of Count One but added that the harassment culminated with Little being laid off. Count Three alleged sex discrimination, asserting that sex was the impetus behind CSRA's decision to lay off Little. Count Four alleged that CSRA employees retaliated against Little for filing *Little II* by harassing her, terminating her employment, and denying her severance pay. Counts Five and Six alleged state law claims for the negligent and wanton hiring, training, or supervision of Patrick and Norris.

CSRA moved to dismiss Little's complaint for failure to state a claim. The district court granted that motion, adopting in full a magistrate judge's report that recommended: dismissing Little's claims related to her being laid off because she did not exhaust them before the EEOC; dismissing the hostile work environment claim because the conduct Little alleged was not sufficiently severe or pervasive and because Little failed to establish that CSRA's management knew about that conduct; dismissing the retaliation claim because Little did not plausibly allege retaliatory animus; and declining to exercise supplemental jurisdiction over the state law claims. The district court also denied Little's request for discovery.

Addressing Little's hostile work environment claims, the court stated that to state a claim for a hostile work environment based on sex, a plaintiff must plausibly allege, among other things, that: she was "subject[ed] to unwelcome sexual harassment," the "harassment was sufficiently severe or pervasive to alter the terms and conditions of [her] employment," and there is "a basis for holding the employer liable." Little presented many of the same allegations to support her claims in *Little II*, which also alleged a hostile work environment based on sex. To the extent Little's hostile work environment claims were presented in *Little II*, they are barred by in *Little III* by the doctrine of res judicata.

The court stated that Little's remaining allegations related to her hostile work environment claims — e.g., that her coworkers subjected her to "verbal attacks," that she found a screw in her tire, and that she found detritus on her desk — were insufficient to establish that CSRA was on notice of the alleged harassment, such that there was a basis for holding the employer liable. The court further stated that because Little did not object to the magistrate judge's finding that she failed to sufficiently allege that CSRA management knew or should have known about the alleged harassment, she was barred from challenging that determination on appeal.

Summary Judgment For the Employer Was Proper on Title VII Discrimination And Retaliation Claims, Because Reprimands, Administrative Matters, and Poor Evaluations Were Not Adverse Employment Actions, and There Was No Evidence That the Incidents Were Causally Connected to the Plaintiff's Engagement In Protected Activities

Price v. Wheeler, 2020 U.S. App. LEXIS 34297 (5th Cir. Oct. 30, 2020)

Kimeka Price, an African-American female, was employed by the United States Environmental Protection Agency ("EPA" or "Agency") in 1996. She became an Enforcement Officer in the Hazardous Waste Enforcement Branch, Compliance Enforcement Section, Region 6. In March 2018, Price filed suit against then-EPA Administrator Scott Pruitt, asserting claims of discrimination and harassment on the basis of race and gender, and retaliation under Title VII of the Civil Rights Acts of 1964. Price's complaint involved factual allegations made in prior complaints filed with the Equal Employment Opportunity Commission ("EEOC") in 2010 and 2012.

The subsequent lawsuit and underlying administrative complaints were premised on allegations of more than twenty instances of discrimination, harassment, and retaliation that Price allegedly suffered while employed by the EPA. Of the myriad allegations, two specific, related instances formed the crux of her claims and warranted more detailed discussion: denying sick leave on May 9, 2011, and a subsequent 14-day suspension. Price appealed a district court order granting summary judgment in the EPA's favor. Specifically, the United States District Court for the Northern District of Texas concluded that Price had failed to establish a prima facie claim of discrimination or retaliation because: (1) none of the alleged instances—save for the aforementioned 14-day suspension—constituted adverse employment actions, and (2) Price had failed to establish that she was treated differently than any similarly situated employee outside of her protected group. The district court assumed that Price had established a prima facie case of discrimination and retaliation with respect to the 14-day suspension but concluded that Price had failed to rebut the EPA's stated legitimate, non-discriminatory, and non-retaliatory reason for imposing the suspension—namely, Price's failure "to comply with an [ALJ's] order to attend a colleague's EEOC hearing"—or to demonstrate that the proffered reason was pretextual. The district court also dismissed Price's harassment claims, concluding that none of the alleged acts were "sufficiently pervasive," threatening, or humiliating to constitute alleged harassment. The district court also commented that there was no evidence that the agency knew or should have known about any harassment. The Fifth Circuit affirmed the judgment.

The Fifth Circuit agreed with the district court's conclusion that -- except for the 14-day suspension -- dismissal was appropriate on the basis that none of the other alleged instances of discrimination constituted an adverse employment action. An adverse employment action is "a judicially-coined term referring to an employment decision that affects the terms and conditions of employment."

Keeping in mind that an adverse employment action must be an "ultimate employment decision," the court also rejected Price's contention that the decision to ask a less-experienced white male colleague to give a particular presentation was discriminatory. This was especially so in light of evidence that the presentation was organized by a different branch of the agency and that Price could have, and had in the past, given similar presentations. Price also contended that her supervisor's decision to rate her "Fully Successful" rather than "Outstanding," was discriminatory. The court stated it was not so. Receiving a low performance evaluation does not alone constitute an adverse employment action.

The court stated that in any event, even if Price had demonstrated that she was harassed at work, her hostile work environment claim would fail, because there was no evidence that any of the incidents were motivated by her race or sex. The agency had provided reasonable explanations for each individual incident collectively suggesting that Price's grievances were caused by professional disputes, disagreements, and misunderstandings rather than by her membership in a protected group. In the absence of such evidence, summary judgment was appropriate.

WAGE-AND-HOUR CLASS ACTION

Employee's Time Spent on Employer's Premises Waiting For, and Undergoing, Required Exit Searches of Packages, Bags, or Personal Technology Devices, Such as iphones, Brought to Work Purely for Personal Convenience, Is Compensable as "Hours Worked" Within the Meaning of California's Wage Order 7

Frlekin v. Apple, Inc., 2020 U.S. App. LEXIS 34205 (9th Cir. Oct. 29, 2020)

Amanda Frlekin, Taylor Kalin, Aaron Gregoroff, Seth Dowling, and Debra Speicher (collectively "Plaintiffs")

brought this wage-and-hour class action on behalf of current and former non-exempt employees who worked in Defendant Apple, Inc.'s retail stores in California since July 25, 2009. Plaintiffs sought compensation for time spent waiting for and undergoing exit searches pursuant to Apple's "Employee Package and Bag Searches" policy (the "policy"). Employees estimated that the time spent waiting for and undergoing an exit search pursuant to the policy typically ranged from five to twenty minutes, depending on the manager or security guard's availability. Some employees reported waiting up to forty-five minutes to undergo an exit search. Employees received no compensation for the time spent waiting for and undergoing exit searches, because they had to clock out before undergoing a search pursuant to the policy.

On July 16, 2015, the United States District Court for the Northern District of California certified a class defined as "all Apple California non-exempt employees who were subject to the bag-search policy from July 25, 2009, to the present." Because of concerns that individual issues regarding the different reasons why employees brought bags to work, "ranging from personal convenience to necessity," would predominate in a class-wide adjudication, the district court (with Plaintiffs' consent) made clear in its certification order that "bag searches" would "be adjudicated as compensable or not based on the most common scenario, that is, an employee who voluntarily brought a bag to work purely for personal convenience." Therefore, the certified class did not include employees who were required to bring a bag or iPhone to work because of special needs, such as medication or a disability accommodation.

The parties filed cross-motions for summary judgment on the issue of liability. On November 7, 2015, the district court granted Apple's motion and denied Plaintiffs' motion. The district court ruled that time spent by class members waiting for and undergoing exit searches pursuant to the policy is not compensable as "hours worked" under California law, because such time was neither "subject to the control" of the employer nor time during which class members were "suffered or permitted to work." Plaintiffs appealed. The Ninth Circuit certified to the California Supreme Court a question of state law which the Supreme Court reformulated as following: Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees compensable as "hours worked" within the meaning of Wage Order 7?

The California Supreme Court answered the certified question, as reformulated, in the affirmative. The Supreme Court stated that time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees was compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order 7. Following the Supreme Court's decision, the parties filed supplemental briefs addressing whether there are factual disputes that would preclude summary judgment for Plaintiffs on remand.

The Ninth Circuit reversed the district court's grant of Apple's motion for summary judgment and remanded with instructions to grant Plaintiffs' motion for summary judgment on the issue of whether time spent by class members waiting for and undergoing exit searches pursuant to Apple's "Employee Package and Bag Searches" policy is compensable as "hours worked" under California law, and to determine the remedy to be afforded to individual class members.

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