

IN BRIEF

The newsletter of
Feldman, Franden,
Woodard Farris & Boudreaux
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KILLING THE NEWS SO YOU DON'T HAVE TO

BEING A BULLY AT WORK CAN BE SEX DISCRIMINATION

The Ninth Circuit Court of Appeals recently held that offensive conduct in the workplace, including shouting in a loud and hostile manner and using profanity may be considered sex discrimination under Title VII if one sex finds the behavior subjectively more intimidating than the other. *E.E.O.C. v. National Education Association*, 422 F. 3d 840 (9th Cir. 2005). The Court reversed the district court's ruling, which found that even though the employee was "rude, overbearing, obnoxious, loud, vulgar and generally unpleasant," there was no sex discrimination because there was no evidence that his conduct was motivated by lust or sexual animus toward women as women.

The Court stated that while sex or gender specific content is one way to show sex discrimination, it was not the only way. "Title VII is aimed at the consequences or effects of the employment practice and not at the...motivation of co-workers or employers." It invoked the reasonable woman standard, which focused on the effect of the behavior, both subjectively and

objectively, on a reasonable woman. Using this standard, the Court stated that the effects of the bully's conduct were extremely different on men and women. The reactions in women included crying, feeling panicked and physically threatened and avoiding contact with the bully for fear of making him angry. However, there was no evidence that the male employees had manifested such severe reactions to the bully's conduct. The Court held that this evidence was sufficient to send the issue to the jury.

This decision provides employers with more incentive to encourage their employees to be civil and send those who aren't to anger management.

—Belinda Aguilar

INSIDE THIS ISSUE...

Cold Wave Linked to Temperatures

Something Went Wrong in Jet Crash, Experts Say

Autos Killing 110 A Day, Let's Resolve to Do Better

We are proud of...

... our lawyers for their recent accomplishments ...

Paula Quillin won a difficult appeal to the Oklahoma Department of Labor, that denied all benefits to the claimant.

Jason Goodnight won dismissal of a lawsuit against a national trucking company.

Paula Quillin and **Joe Farris** won the dismissal of a legal malpractice suit.

John Woodard successfully argued a motion to dismiss on jurisdictional grounds resulting in the plaintiff not only losing his claim against our client but causing him to dismiss as against six other defendants as well.

Jason Goodnight and **Belinda Aguilar** won the dismissal of an Oklahoma Consumer Protection Act claim.

Jasen Corns prevailed on a contested motion for costs in federal court.

Paula Quillin won two motions to disqualify plaintiff's counsel in a legal malpractice case.

Curtis Roberts won a motion to transfer.

Victor Wandres won a disputed application for costs in federal court. Through the efforts of **Belinda Aguilar**, the victory was affirmed on appeal.



Paula Quillin and **Jason Goodnight** won a motion to dismiss a claim arising from an allegedly inaccurate corporate drug test.

Ray Feldman and **Victor Wandres** closed deals on millions of dollars worth of downtown Tulsa real estate.

Jason Goodnight and **Belinda Aguilar** prevailed on a motion to dismiss a personal injury case against a trucking company.

EMPLOYMENT LAW ROUNDUP

RACE DISCRIMINATION CASE DISMISSED BECAUSE MANAGEMENT WAS UNAWARE

Seventeen black postal workers who worked in a metal enclosure while workers threw bananas and made racist comments could not prevail because they did not show that management knew and failed to take corrective action. (Allen v. Potter, 5th Cir.)

MANDATORY ARBITRATION AGREEMENT MODIFIED TO BE ENFORCEABLE

Sections regarding available remedies and cost shifting were unenforceable. The court severed these provisions and found the agreement enforceable to resolve an ADEA case. (Scovill v. WSYX/ABC, 6th Cir.)

EMPLOYEE MUST SIGN MEDICAL RELEASE TO PRESERVE FMLA RIGHTS

A 39-year employee with diabetes must allow the company doctor to question his doctor to clarify his need for intermittent leave. The employee may not simply resubmit new forms to request a leave. (Rutschke v. Northwest Airlines, D. Minn.)

ZOO SUED FOR ADA VIOLATIONS

A proposed federal class-action lawsuit filed in San Diego is aimed at stopping the Zoo from requiring people in motorized wheelchairs and scooters to get out of line and fill out waivers before they are admitted. The lawsuit alleges violations of the Americans With Disabilities Act and California civil rights laws and asks that a judge order a change of policy and declare the waivers unenforceable.

PROSELYTIZING NOT A TITLE VII VIOLATION

A salesman's supervisor imposed religious pressure on a fellow-Christian. The claim of religious harassment was dismissed because the harassment was not severe enough to be actionable. (Sprague v. Adventures Inc., 10th Cir.)

FAILURE TO POST NOTICES JUSTIFIES EQUITABLE TOLLING

The First and Third Circuits hold that failure to post mandatory Title VII and ADEA notices justifies otherwise untimely EEOC filings. (Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino, 1st Cir., Hammer v. Cardio Med. Prods., Inc., 3d Cir.)

MORBIDLY OBESE MAN BRINGS ADA CLAIM

A 350 pound man was the most qualified candidate. Nonetheless, he was not hired by L.A. Weight Loss Centers Inc. because the company is "image conscious." The Court found that the applicant was not protected by the ADA because he was not regarded as unable to perform a wide range of tasks. (Goodman v. L.A. Weight Loss Centers, E.D. Pa.)

ALCOHOLIC MANAGER LAW- FULLY FIRED FOR ABSENTEEISM

The Court held that a bank manager's firing for erratic attendance did not violate the ADA. (Roig v. Miami Fed Credit Union, S.D. Fla)

72 YEAR OLD APPLICANT BRINGS ADEA CLAIM

A 72-year old applicant alleged that he was not hired because of his age. After he filed an EEOC charge, he was offered the job. He turned it down. The Eleventh Circuit found that by turning down the job, plaintiff lost any claim for damages and equitable relief. (EEOC v. Massey Yardley Chrysler Plymouth Inc., 11th Cir.)

SICK LEAVE POLICY

Requiring a medical diagnosis before approving sick leave should apply only to employees with chronic absentee problems or safety-sensitive jobs. (Transport Workers Union v. NYC Transit Authority S.D.N.Y.)

LOSS OF TITLE VII CASE AT ARBITRATION DOES NOT MEAN EMPLOYEE IS PRECLUDED IN FEDERAL COURT

However, an adverse decision by a neutral is highly probative. The employee

must present new evidence or challenge the neutrality of the arbitrator. (Morel v. American Bldg. Co. 2d Circuit)

ARBITRATION PROVISION

An arbitration provision required that a female life insurance manager arbitrate her sexual harassment claims. However, the arbitration provision could not stop the EEOC from suing. (EEOC v. Woodmen of the World Life Ins. Soc'y, D. Neb.)

ONLY US CITIZENS WORKING ABROAD ARE COVERED BY TITLE VII

A permanent resident of the U.S. fired in the Republic of Georgia may not sue for national origin discrimination under Title VII. (Skekoyan v. Sibley Int'l Corp., D.C. Cir.)

SEXUAL HARASSMENT NEED NOT BE SEXUAL

The 9th Circuit has held that conduct can be sexual harassment within the meaning of Title VII even though there is nothing "sexual" about the conduct. (Christopher v. National Education Assoc (9th Cir 09/02/2005).

RANDOM THOUGHTS

The holidays are the only time of the year when you get to sit in front of a dead tree and eat candy out of your socks.

Why do you press harder on a remote control when you know the battery is dead?

Why does Goofy stand erect while Pluto remains on all fours? They're both dogs!

Why do we say the alarm went off when, in fact, it went on?

Why don't you ever see baby pigeons?

Have you ever known anyone who would search the entire house for the remote control, and yet is too lazy to change the channel on the television set manually?

If you try to fail and succeed, which have you done?



Victor Wandres is organizing the firm bowling team. In practice sessions they are using pro se litigants as pins.

Bob Franden has gone south for the winter and we think he might be picking up some roofing work on the side in the wake of the last hurricane.

Top 10 Signs You're Not Getting A Bonus This Year

10. Co-workers refer to you as "the ghost of unemployment future"
9. The last time you saw your boss was when he testified against you at the embezzlement trial.
8. Your name is Harriet, and you were out of the office most of October when you could have been racking up billable hours.
7. What you call "my new office," everybody else calls "the supply closet"
6. You're pretty sure the greeting card from the boss was a sales sample, because it was signed "Your Name Here"
5. You keep getting memos reminding you that employees are required to wear pants
4. After getting a hefty price for the network server on eBay, you find out the high bidder was your boss.
3. Office Manager not amused by your paperclip sculpture of Radio City Music Hall
2. You write for IN BRIEF.
1. Your job was to find the weapons of mass destruction.

DRUG TESTING FOR TRUCK COMPANY MECHANICS

By Paula J. Quillin

The question recently arose as to whether mechanics employed by DOT-regulated trucking companies should be drug tested. The answer is in the Department of Transportation Federal Motor Carrier Safety Act Regulatory Overview, published by the DOT. The regulatory overview states that "drivers" must be tested and no other employees may be included. Nevertheless, the document goes on to state that a "driver" means anyone who operates a vehicle even on a casual, intermittent, or occasional basis and who performs "safety-sensitive functions." The document states that:

other employees who may not have the title of driver, but who sometimes operate a CMV, also must be included in your program. These may include maintenance workers, supervisors, clerks, and possibly even the President of your company.

Safety sensitive functions include time inspecting equipment and time repairing servicing or conditioning any CMV. Given this broad definition of safety sensitive functions, and given the assumption that mechanics will need to "intermittently" operate the vehicles even if simply to perform maintenance upon them, it appears that these employees can be drug-tested under the DOT regulations.

QUOTABLES

Anything is good and useful if it's made of chocolate.

Some people are slinkies — basically worthless, but they can still bring a smile to your face when you push them down the stairs.

Doesn't expecting the unexpected make the unexpected become the expected?

If at first you don't succeed, skydiving is not for you.

A FEW SHORT JOKES

A young man, hired by a supermarket, reported for his first day of work. The manager greeted him with a warm handshake and a smile, gave him a broom and said, "your first job will be to sweep out the store."

"But I'm a college graduate," the young man replied indignantly.

"Oh, I'm sorry. I didn't know that," said the manager. "Here, give me the broom, I'll show you how."

The classified ad said, "Wanted: a very experienced lumberjack." A man answered the ad and was asked to describe his experience.

"I've worked at the Sahara Forest."

"You mean the Sahara Desert," said the interviewer.

The man laughed and answered, "Oh sure, that's what they call it now!"

A young stockbroker decided to take a day off and visit some of his professors in his old school. When he made his way into the entrance he noticed a dog was attacking a small child. He quickly grabbed the dog and throttled it with his two hands.

The next day the local newspaper reported the story with the headline, "Valiant student saves boy from ferocious dog."

The stockbroker called the editor and strongly suggested that a correction be issued and that the newspaper inform its readers that he was a successful Wall Street stockbroker and not a student.

The next day the newspaper issued a correction and the headline read, "Pompous stockbroker kills school mascot."

AN INTERVIEW WITH OUR NEW LAWYER HARRY PARRISH

IN BRIEF: Harry Parrish, it's a pleasure to meet you.

HARRY: Oh, you're from IN BRIEF. I was warned about you.

IN BRIEF: That we're not afraid of the truth??!! We'll get to the bottom of that rumor!

HARRY: Actually, what I was told is not to talk to you because you will distort everything I say into a twisted, macabre version of your own brand of humor, which I understand appeals to about 7 people worldwide.

IN BRIEF: Funny . . . That's what we heard about *you*.

HARRY: See, that's exactly what I was told. That you try to "project" your mental defects onto others.

IN BRIEF: That's insane!

HARRY: Out!!

IN BRIEF: Thanks for the interview, Harry.

HARRY: Interview??? You call that an interview?!!

IN BRIEF: You were warned about us, Harry. Assumption of the risk.

Editor's Note: When we got this article, we knew it wouldn't do. We sent the staff back to Harry's office, but he had wisely closed his door. So, we went to the website and picked up our own intelligence.



Harry joined the firm in 2005, bringing with him a considerable amount of experience in tort and insurance law, insurance coverage, uninsured motorist law, insurance bad faith, and general commercial litigation.

He is the partner with primary responsibility for the Legal Research/Writing/Appellate Section of the firm.

He attended the University of Kansas where he received a B.A. in 1973. He obtained a J.D. in 1985 from the University of Tulsa. His admission to the Oklahoma Bar was in 1985.

Harry is a member of the Oklahoma Bar Association and the Tulsa County Bar Association.

He is also a member of the Chartered Property and Casualty Underwriters Society.

MORE LAWSUITS FILED OVER BANK CREDIT CARD CHARGES

A round of lawsuits against banks escalated in November when two more retail groups launched class action lawsuits against Visa USA, MasterCard Inc. , and several other large banking institutions. Plaintiffs quarrel with the fees banks are charging for processing credit card transactions. The latest cases were filed by the American Booksellers Association and the National Grocers Association and several of its members, including Affiliated Foods Midwest, Coborn's Inc., D'Agostino's Supermarkets and the Minnesota Grocers Association.

The cases involve interchange fees, which are paid by the merchants each time a customer uses a debit or credit card to pay for a purchase. Like all other credit card costs, the fees ultimately are passed on to consumers by way of higher prices.

A similar suit was filed earlier this year by four large merchant associations, including the National Association of Convenience Stores, the National Association of Chain Drug Stores, the National Community Pharmacists Association and the National Cooperative Grocers Association, which collectively represent thousands of merchants. Plaintiffs claim that Visa, MasterCard Inc. and the card associations member banks engage in collusive practices in setting their interchange fees. Both Visa and MasterCard have argued that the fees are fair.

A suit against several of the nation's largest banks and automatic teller machine (ATM) network companies is based on allegations that the banks conspired to double-charge ATM customers when they withdraw funds from ATMs not owned by the users' bank. Plaintiffs claim that the banks engaged in price fixing to create revenue from foreign ATM fees based on unnecessary interchange fees.

ANSWER TO TOY PUZZLE p 5:

Darth Tater; Sea Monkey, AOL Disks

SCALES OF JUSTICE ?

A Southern California attorney sued GTE California (now Verizon) for being listed in its GTE Yellow Pages directory under the heading of "Reptiles."

The suit seeks damages in excess of \$100,000.00. The Complaint alleges that the attorney became the target of jokes, rude telephone calls, people making hissing sounds in jest, and suffered other forms of ridicule and embarrassment.

It appears as though GTE inadvertently listed the attorney under the heading of "Reptiles" in its December 1999 Yellow Pages due to the fact that the attorney's telephone number was previously issued to a recently defunct business named the "Reptile Show." From the allegations, it appears that GTE forgot to update its records.



HOLIDAY TOY CATALOG & GAME PAGE

Which of these toys are REAL? (Answer on page 4)



\$36.50

Junior Supreme Court Nominee Archery Set

\$6.99

Mr. Potato Head Darth Tater

\$1.99

Candy Asbestos

\$0.00

AOL Trial Disk Hors d'Oeuvre Plates

\$24.95

My Little Taxidermy Kit With Starter Squirrel

\$9.99

Dashboard Sea Monkey

\$39.99

A Remote Controlled Remote Control (Try to guess which is which!)

\$1,243,018.22

OFFICIAL HURRICANE LOOTER'S KIT WITH FULL SIZE WAL-MART

In Brief



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