



**Wimberly Lawson**  
Wright Daves & Jones, PLLC  
*Attorneys & Counselors at Law*

**Briefly**  
May 2013      Volume 13, Issue 5

## **WLWDJ OPENS CHATTANOOGA OFFICE**

WLWDJ is very pleased and excited to announce that, as of May 1, 2013, our firm has a Chattanooga Office. Our new office is in conjunction with our "Of Counsel" relationship with the law office of Bob E. Lype & Associates (BELA). WLWDJ and BELA will retain their independent status and will share space in the current office of BELA. WLWDJ will staff the office initially with a current paralegal of WLWDJ, Annette Burton, and Terri Bernal (Nashville office) will be our primary attorney assigned to the office. Terri is licensed to practice in Georgia as well as Tennessee. Other WLWDJ attorneys will spend time in the Chattanooga office frequently in the service of our current clients in the Chattanooga area and in developing an expanded presence for the Firm.

Bob Lype was formerly associated with WLWDJ as a labor and employment attorney in our Morristown office during the 1990's. We are very excited to have this opportunity to, once again, have Bob working with us, as Of Counsel, to provide enhanced capabilities of serving WLWDJ clients and for our Firm to have the opportunity to work with Bob in service to his Firm's clients. We are also excited about our new relationship with Mi Wu Belvin, who currently works full time with Bob and who has an excellent background of experience as an attorney in the same practice areas.

Bob and Mi are currently engaged in an active practice serving primarily Chattanooga-area employers in labor & employment, litigation, commercial and business law, insurance defense, contracts, business torts, and appeals. More details regarding Bob and Mi are provided on this page and may be found at BELA's website, [www.lypelaw.com](http://www.lypelaw.com). Wimberly Lawson Wright Daves & Jones' contact information in the Chattanooga office will be (423) 602-7300. The fax number will be (423) 602-7301. In addition to Bob's and Mi's current email and other contact information, they will have WLWDJ email addresses as follows: Bob Lype – [blype@wimberlylawson.com](mailto:blype@wimberlylawson.com) and Mi Belvin – [mbelvin@wimberlylawson.com](mailto:mbelvin@wimberlylawson.com).

We are confident that Bob and Mi will add greatly to our service capabilities and that you will find them to represent clients of both WLWDJ and BELA with the highest levels of integrity, zeal, and dedication that is currently the hallmark of both firms.

### **KNOW YOUR ATTORNEY**



**BOB E. LYPE** is Of Counsel in the Chattanooga, Tennessee office of the Firm, which he joined on May 1, 2013. Bob's primary areas of practice include labor and employment law, litigation, commercial and business law, contracts, business torts, and appeals. Bob received his B.S. degree, *magna cum laude*, from East Tennessee State University and his J.D. degree with high honors from the University of Tennessee College of Law in 1990. After graduating from East Tennessee State University, he taught American History, Sociology and Contemporary issues while coaching both the boys' and girls' tennis teams at Volunteer High School in Church Hill, Tennessee. Bob has practiced law with both large and mid-sized law firms, and he began his solo practice in Chattanooga in November 2003 as Bob E. Lype & Associates. Bob is a member of the Tennessee Bar Association and the Chattanooga Bar Association.



**MI WU BELVIN** is Of Counsel in the Chattanooga, Tennessee office of the Firm, which she joined on May 1, 2013. Mi's practice emphasis is primarily in litigation, including insurance defense, business litigation and employment law. Mi also handles general civil matters. Mi received her B.A. degree with a major in Psychology from Vanderbilt University. She received her J.D. degree from Cumberland School of Law at Samford University. After graduation from law school, Mi worked as an attorney at the Chattanooga office of a large law firm for more than three years handling primarily insurance defense matters. Mi is fluent in Mandarin Chinese and is licensed to practice law in Alabama and Tennessee.

*Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville, Chattanooga and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.*

## CRIMINAL BACKGROUND CHECKS: DARNED IF YOU DO AND DARNED IF YOU DON'T



**Mary Dee Allen** ....

**"If an employer elects to perform criminal background checks, accuracy as well as legal issues can arise."**

There are a great deal of regulatory guidelines, publicity, and confusion, about the need for criminal background checks of job applicants. A recent federal appeal's court case indicates that in at least some circumstances, an employer may be sued for a negligent hiring claim based on a company's failure to conduct a criminal background check. *Keen v. Miller Environmental Group, Inc.*, 702 F. 3d 239 (CA 5 2012). In the *Keen* case, an applicant failed to disclose his criminal history to the employer and stated he had no criminal history on his application. Although the applicant had consented to a background check as part of the hiring process, the employer did not perform one. Later, the employee raped a co-worker. The co-worker sued the employer for negligent hiring contending that a criminal background check should have been performed.

The court cited general law in the Restatement (Second) of Agency Section 213, that, "one can normally assume that another who offers to perform simple work is competent. If, however, the work is likely to subject third persons to serious risk of great harm, there is a special duty of investigation." In this particular case, the court found that there was nothing in the nature of the work, which involved removal of tar balls from the Gulf Coast, suggesting that the applicant was likely to subject his co-workers to the risk of assault. The court noted that, if a criminal background check was necessary to screen for the possibility that a manual laborer might assault a co-worker, it would be difficult to envision a fact pattern in which a background check would not be necessary.

If an employer elects to perform criminal background checks, accuracy as well as legal issues can arise. Accuracy issues relate to relying solely on "national" database information, which may result in receiving only partial information, as most state-level and municipal courts are not represented in such databases. Further, a national database is composed of material from many different sources, each updated at different times, making accuracy questionable.

The legal issues relate first to the requirements of the Fair Credit Reporting Act (FCRA), and second to the guidelines issued by the Equal Employment Opportunity Commission (EEOC). The use of a third party to conduct such criminal background checks, even using commercial data bases, requires compliance with the specific requirements of the FCRA, including consent, notice, and an opportunity to make corrections.

The EEOC guidelines are particularly concerned about the fact that the rates of conviction are much higher for African American and Hispanic persons than for Caucasians. Thus, employees/applicants allege that an employer's facially neutral policy or practice disproportionately screens out a Title VII - protected group, like African Americans or Hispanics, without any business justification. An employee/applicant may also allege that the employer rejected, for example, an African American applicant based on his criminal record, but hired a similarly situated white applicant with a comparable criminal record, giving rise to a discrimination claim.

The Labor Department's Office of Federal Contract Compliance Programs (OFCCP), has also issued a directive on similar issues. The agency recommends that government contractors engage in individualized assessments if they have policies and procedures that use criminal conduct as a screening tool for applicants and employees. "Such policies and procedures should be narrowly tailored to the essential job requirements and actual circumstances under which the jobs are performed, to the specific offenses that may demonstrate unfitness for performing such jobs, and to the appropriate duration of exclusions for criminal conduct, based on all available evidence." Although neither the OFCCP or the EEOC favors contractors including questions about applicants' criminal convictions on their employment applications, they do indicate that if a contractor makes such a request, the inquiry should be "limited to convictions for which the exclusion would be job-related for the position in question and consistent with business necessity."

In spite of these legal issues, a 2010 survey by the Society for Human Resource Management (SHRM) found that 73% of responding employers conduct criminal background checks on all of their job candidates and 9% conduct them on selected job candidates. Only 7% do not conduct them at all.

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## WORKING AWAY FROM WORK

Although it may be a boon to productivity, working away from “work” creates multiple issues. In addition to eliminating the line between employees’ personal and professional lives, there are other hazards. First, employers may be liable for accidents that happen to employees away from the office. Likewise, employers may be liable for accidents caused by employees away from the office. Finally, in some cases employers may need to consider telecommuting as a reasonable accommodation for disabled employees unable to work in the office.

### On-the-job injuries away from “work”

**T. Joseph Lynch...**

“Whether in a high-rise or a home basement, injured employees are covered by Tennessee’s Worker’s Compensation Act if the injury ‘arise[s] out of’ and occurs ‘in the course of’ employment.”

Whether in a high-rise or a home basement, injured employees are covered by Tennessee’s Worker’s Compensation Act if the injury “arise[s] out of” and occurs “in the course of” employment.<sup>1</sup> In 2007, the Tennessee Supreme Court addressed the interplay of telecommuting and worker’s compensation in *Wait v. Traveler’s Indemnity Co.*<sup>2</sup> In *Wait*, the plaintiff employee had worked from a home office for approximately four years. One workday while she was preparing lunch in her kitchen, she was brutally assaulted by an acquaintance.<sup>3</sup>

The Court held that the injuries did occur in the course of the plaintiff’s employment. Applying the general rule that injuries sustained during personal breaks on work premises during the workday are compensable, the Court concluded that the plaintiff was taking a break “at a place where her employer could reasonably expect her to be.”<sup>4</sup> However, the Court held that the injuries from the assault did not arise out of the plaintiff’s employment, because the assault was not connected in any way to the employment.<sup>5</sup>

Other courts have found injuries to employees in their home offices to be compensable where there was a clearer connection to work. For example, in *Verizon Pennsylvania, Inc. v. Worker’s Compensation Appeal Board*,<sup>6</sup> the employee had left her basement office to get a drink from her kitchen upstairs. Her boss phoned and as she spoke with him, she fell down the stairs. Like the Court in *Wait*, the Pennsylvania court found that the injury occurred in the course of the plaintiff’s employment, as she was on a short break during her workday. The court also held that the injury arose out of the employment, because she was furthering the employer’s business at the time she was injured.<sup>7</sup>

While hazards in the home office can result in a compensable worker’s compensation claim, note that the federal Occupational Safety and Health Administration (OSHA) does “not hold employers liable for employees’ home offices, and does not expect employers to inspect the home offices of their employees.”<sup>8</sup>

In sum, even though employers need not (and perhaps should not) inspect “home-based worksites,” employers should offer guidance and assistance to employees in eliminating hazards and setting up safe work spaces.

### Injuries caused by employees away from “work”

Of all the ways an employee away from the office can get an employer into trouble, one of the most chilling is by distracted driving. For example, in 2008 a truck driver admitted to looking away from the road to retrieve and answer his cell phone. In the time it took him to do so, he failed to see a line of stopped traffic ahead of him. The resulting collision killed three people and injured numerous others. Just one of the lawsuits resulted in an \$18m verdict against the employer.<sup>9</sup>

Of course, an employee does not have to be driving a tractor-trailer to cause serious damage. For example, back in 2000 an attorney with a prominent East Coast law firm struck and killed a 15-year old girl while talking to another attorney on her cell phone. The attorney and her firm were named as defendants; the law firm settled for an undisclosed amount, while a jury awarded \$2m against the attorney. The attorney also lost her law license and spent a year in jail.<sup>10</sup>

Employers should adopt policies strictly prohibiting texting while driving and should consider requiring hands-free use for cell phones, or even prohibiting use of cell phones while driving. Although a policy may not shield an employer from all liability in the event of an accident caused by an employee’s distracted driving, it will show that the employer has taken steps to reduce risks. A policy that is clearly communicated and enforced will also show employees that the employer takes the issue seriously, and hopefully result in safer behavior.



**Rebecca Brake Murray** ...

“During the plaintiff’s interview, the interviewer had to repeat questions several times because he was unable to understand the plaintiff’s response.”

## ISSUE OF APPLICANT REJECTED DUE TO HEAVY ACCENT

Obviously, many jobs require the ability to effectively communicate. Sometimes, however, there is tension between an employer’s legitimate need to require an ability to communicate and an applicant’s right to be free of discrimination based on national origin. In a recent case, a Jamaican born applicant was not hired because his accent was too heavy for interviewers to understand him. A federal judge ruled that the case could proceed to a jury trial, because the employer did not make the applicant aware that he could reapply in the future, and the employer did so for other applicants who were rejected. *EEOC v. West Customer Management Group, LLC*, 3:10-CV-378 (N.D. Fla. 2012).

The position required employees to provide telephone support service to clients for telephone repair and billing issues. One of the requirements for the job was to speak in a clear and understandable voice. During the plaintiff’s interview, the interviewer had to repeat questions several times because he was unable to understand the plaintiff’s responses. The interviewer also asked one of his colleagues to sit in the interview, who confirmed the difficulty in understanding the plaintiff. The plaintiff was not hired because he was “very difficult to understand” due to a “heavy accent.”

During the EEOC investigation, the EEOC admitted during conciliation that it had difficulty understanding the plaintiff. Characterizing the decision as a “close call,” the district court judge noted that, “An employee’s heavy accent or difficulty with spoken English can be a legitimate basis for adverse employment action where effective communication skills are reasonably related to job performance.” However, the court stated that the issue in this particular case was not whether the plaintiff was properly rejected due to his heavy accent, but the employer not applying its normal practice to the plaintiff of inviting him to reapply for other positions. The court noted that only two candidates during the relevant time period were not invited to reapply, and they were the plaintiff and an applicant from Puerto Rico, who was rejected for the same reason as the plaintiff.

### “CRIMINAL BACKGROUND CHECKS”

**continued from page 2**

So, what should an employer do in light of this dilemma? First, in the case of those employers that have questions about criminal records on job applications, disclaimers should be added to indicate that an affirmative answer does not constitute an automatic bar to a job but that the employer will take the information into account based on the nature, timing and job-relatedness as to the offense. The applicant could even be invited to share more information on a blank piece of paper if they want to provide an explanation. Next, employers need to apply a balancing test to review the criminal record, while reviewing various factors such as the nature of the job, the nature and gravity of the offense, and the time that has passed since the relevant events. The requirements of the FCRA must also be met. As a general rule, arrest records should not be considered since they are the hardest to justify as a business necessity. Occasionally, a particularly egregious and recent arrest might result in an investigation of the underlying facts, but the employer must rely on the over-all circumstances and not just the fact of the arrest.

### “WORKING AWAY FROM WORK”

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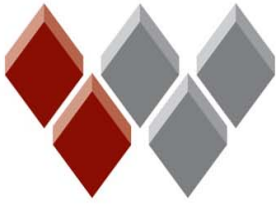
#### Working away from “work” as a reasonable accommodation

Finally, note that employers should consider whether telecommuting is a reasonable accommodation<sup>11</sup> under the Americans with Disabilities Act when a disabled employee is unable to come to the office but can otherwise perform the essential functions of her job. The EEOC takes the position that working from home may be a reasonable accommodation, as do some courts. For example, in *Bixby v. JP Morgan Chase Bank*,<sup>12</sup> the court denied the employer’s motion for summary judgment on the issue of whether working from home would be a reasonable accommodation for a disabled project manager. The court chastised the employer for failing to conduct a fact-specific inquiry, instead dismissing the employee’s request out of hand. Thus, as part of the interactive process to determine whether a disabled employee can be accommodated, employers should consider whether telecommuting is a viable option.

<sup>1</sup> Tenn. Code Ann. § 50-6-103.  
<sup>2</sup> 240 S.W.3d 220 (Tenn. 2007).  
<sup>3</sup> See id. at 223-24.  
<sup>4</sup> Id. at 226.  
<sup>5</sup> Id. at 227-28.  
<sup>6</sup> 900 A.2d 440 (Pa. Cmwlth 2006).

<sup>7</sup> See id. at 445-47  
<sup>8</sup> OSHA Directive No. CPL 2-0-125 (Feb. 25, 2000).  
<sup>9</sup> *Tiburzi v. Holmes Transp., Inc.*, 2009 WL 2009 WL 2592732 (E.D. Mo. 2009). The employee was a co-defendant; the court found the employee and employer jointly and severally liable.  
<sup>10</sup> Karin Bruilard, Family Wins \$2 Million in Hit-Run, Wash.

Post, Oct. 8, 2004, at B01.  
<sup>11</sup> See EEOC’s fact sheet, “Work At Home/Telework as a Reasonable Accommodation,” available at: <http://www.eeoc.gov/facts/telework.html> (last modified Oct. 27, 2005).  
<sup>12</sup> 2012 WL 832889 (N.D. Ill. Mar. 8, 2012).



# Wimberly Lawson

## Wright Daves & Jones, PLLC

*Attorneys & Counselors at Law*

### 34th Annual Labor & Employment Law Update Conference November 14–15, 2013



**Ronald G. Daves**  
Managing Member

Our Annual Fall Conference is truly the high point of the year for us — a time to gather with friends and discuss important, contemporary employment issues. This year the Conference will

offer insight to the employment and labor climate that follows the presidential election last November. *PLEASE PLAN NOW TO JOIN US.*

Our day and a half program covers important legal decisions and societal trends affecting employment.

Approximately thirty employment law attorneys will present more than thirty-five topics that have been carefully selected to address the concerns

of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail.

Join us in Knoxville on November 14th and 15th! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

*Ron Daves*

#### SPECIAL GUESTS - EEOC OFFICIALS

Multiple opportunities to participate in panel discussions entitled "How Does The EEOC's Strategic Enforcement Plan Affect Me?" with guest speakers Sarah L. Smith, Director and Sylvia Hall, Supervisory Enforcement Federal Investigator with the Nashville, Tennessee office of the EEOC.

#### A FEW COMMENTS FROM LAST YEAR

*"Hard to choose—so many great choices in breakouts"*

*"Very informative!"*

*"Great information that's affordable for small employers"*

*"A great refresher—keeps me up to date"*

#### HOTEL ACCOMMODATIONS

**Knoxville Marriott**  
500 Hill Avenue  
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**SPECIAL CONFERENCE  
RATES AVAILABLE**  
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Call 800-836-8031 and mention Wimberly Lawson Conference **or** reserve online at [www.marriott.com/TYSMC](http://www.marriott.com/TYSMC) (group code: WLWWLWA)

Approval of this program for recertification credit hours toward PHR, SPHR and GPHA through HRCI will be requested.

Accreditation of this program by TN, VA, FL and GA CLE for attorneys will be requested.

#### Topics Of Interest:

- PPACA/Healthcare Reform
- TN Workers' Comp Reform
- FMLA 20th Anniversary
- Mediation Strategies
- NLRB Update
- Workplace Violence
- Wage and Hour Initiatives



**TARGET  
OUT OF  
RANGE**



**Wimberly Lawson**

Wright Daves & Jones, PLLC

Attorneys & Counselors at Law



## TARGET OUT OF RANGE

### THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE Knoxville Marriott - Knoxville, Tennessee - November 14 – 15, 2013

**COST:** Early, Early Bird (registration AND payment received BY May 31, 2013)  
\$309 per person  
\$299 for each additional person from same company  
\$269 for eight or more from same company

Early Bird (registration AND payment received BY October 1, 2013)  
\$329 per person  
\$319 for each additional person from same company  
\$289 for eight or more from same company

Registration and payment received AFTER October 1, 2013  
\$369 per person  
\$359 for each additional person from same company  
\$329 for eight or more from same company







*The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.*

**REGISTRATION INCLUDES:**

Seminar (1½ days), materials, two continental breakfasts, lunch and evening reception on Thursday

*Attorneys and Paralegals: Application will be made for TN, GA, VA and FL Attorney CLE credit hours. Approval of continuing education credits through the National Association of Legal Assistants (NALA) will be requested.*

**REFUND POLICY:** 50% cancellation fee will be incurred for cancellations after October 10, 2013. Cancellations made after October 25, 2013 will forfeit registration fee (registrants will receive the conference materials post-seminar). Substitutions of attendees within the same company will be permitted through Thursday, November 14, 2013.

<p><b>FIVE WAYS TO REGISTER:</b></p> <p>1. <b>Mail to:</b> Bernice Houle Wimberly Lawson Wright Daves &amp; Jones, PLLC P.O. Box 2231 Knoxville, TN 37901-2231</p> <p>2. <b>Fax to:</b> 865-546-1001</p> <p>3. <b>Email to:</b> <a href="mailto:bhoule@wimberlylawson.com">bhoul@wimberlylawson.com</a></p> <p>4. <b>Via website:</b> <a href="http://www.wimberlylawson.com">www.wimberlylawson.com</a></p> <p>5. <b>Phone:</b> 865-546-1000</p>	<p>Name _____</p> <p>Company _____</p> <p>Address _____</p> <p>City _____ State _____ Zip _____</p> <p>Phone _____ - _____ - _____ Fax _____ - _____ - _____</p> <p>Email _____</p> <p>BPR and State for CLE (Attorneys): _____</p> <p><b>For Credit Card Payments:</b></p> <p><b>Cards Accepted</b>    </p> <p>CC No. _____ Exp. Date _____</p> <p>Credit Card Code (3-digit number) _____</p> <p>Name on Credit Card _____</p> <p>Billing Street Address _____</p> <p>City _____ State _____ Zip _____</p> <p>Signature Authorizing Charge _____</p> <p><i>Special Needs? If you should have any special needs, such as wheelchair access or special dietary requirements, please contact Bernice Houle at 865-546-1000 no later than 10 days before the event.</i></p>
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