Wimberly Lawson
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Briefly

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"May an employee bring suit … if the sexual harassment did not occur at work and did not occur during work hours?"

WILD AFTER-HOURS HALLOWEEN WORKPLACE EVENT LEADS TO SPOOK-TACKULAR CASE OF FIRST IMPRESSION IN TENNESSEE COURT OF APPEALS

Like Title VII to the Civil Rights Act of 1964, the Tennessee Human Rights Act ("THRA") forbids workplace harassment and other forms of discrimination on the basis of sex. Recently, the Tennessee Court of Appeals considered the following issue: May an employee bring suit under the THRA if the sexual harassment did not occur at work and did not occur during work hours?

The short answer to the above-stated question is "yes." The facts of *Phelps v. State of Tennessee* are relatively straightforward. The Plaintiff, Phelps, worked as a server for a restaurant operated by the State of Tennessee at Paris Landing State Park. In 2017, the restaurant hosted a Halloween party open to the public. The Court noted the party was adults-only because the restaurant's bar was open, and alcohol was served in abundance.

Once the party ended, a park employee invited Phelps and other co-workers to an after-party at his residence on park property. Phelps claimed at the after-party, an assistant park manager, Walsh, who was second in command of the park, was intoxicated and sexually assaulted her. Phelps also claimed after she reported the incident, the Defendant, among other retaliatory actions, allowed Walsh to continue working around her at the park and to continued harassing and threatening her.

The trial court found that there were genuine issues of material fact as to whether Walsh was Plaintiff's supervisor; whether he "sexually harassed women at Paris Landing State Park prior to the Halloween party" and Defendant was aware of it; and whether "a reasonable factfinder could conclude that Walsh's action in grabbing [Plaintiff] by the neck and thrusting his body against her in a sexual manner was 'extremely serious' and sufficient to impose liability on the Defendant." However, the trial court granted summary judgment to the Defendants because it found that the sexual assault did not occur "in the workplace." Regarding the retaliation claim, the trial court held that Plaintiff did not establish that Defendant took a "materially adverse action" against her after she reported the assault.

The Appeals Court vacated the decision and remanded the case back to the trial court. In it's holding, the Court noted that harassment outside of the traditional workplace, "can and often does spill over and affect the victim's workplace experiences," and that the following factors should be considered when analyzing such a case:

1. The proximity in time and space to the "traditional workplace;"
2. The relationship of the event to the employees' work duties;
3. The extent to which the employer planned, promoted, or sponsored the event;
4. The degree to which employees were pressured or encouraged to attend the event and the number of employees in attendance;
5. The employer's knowledge of any pattern of similar harassment by the offending employee under prior similar circumstances;
6. The extent to which the off-premises harassment impacted the victim's workplace experience after it was reported to the employer, including whether the victim was forced to continue working with the harasser; and
7. Any other circumstances pertinent to the inquiry.

It is pertinent to note that prior to analyzing the above-stated factors, the Court found that it would be inappropriate

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Greetings to all,

All of us at Wimberly Lawson look forward to our Labor and Employment Law Update Conference in the fall. As many of you know, out of an abundance of caution, we cancelled last year's Fall Conference due to the pandemic.

In light of continued warnings expressed by the CDC and concerns about the close proximity of attendees, it is with heavy heart that we once again have decided to cancel the Fall Conference for this year. This cancellation comes with a great deal of handwringing, but please know that taking care of you has always been our primary concern. In the interests of everyone's safety, we simply feel that it would be best to wait one more year.

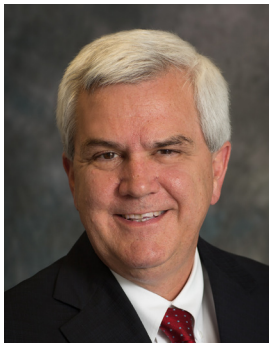
Meanwhile, we are planning a webinar in lieu of the Conference with updates regarding Labor and Employment Law. This will be similar to the one that we had last year, which was well received. When more details become available, we will post them on our website at www.wimberlylawson.com. We hope that you will join us this year for our Fall Webinar.

We definitely anticipate being able to come together in 2022! We have already booked the Sevierville Convention Center and the Wilderness Hotel for our 2022 Fall Conference. The dates for 2022 will be November 17 and 18. We hope to see you there.

Sincerely,

Jeffrey G. Jones
Attorney at Law
Firm Managing Member

AN *ADA* CAUTIONARY TALE



Howard B. Jackson

"The case illustrates some very important ADA principles that it seems employers tend to forget or ignore – much to their detriment."

In June of this year the jury awarded a former employee $450,000 based on the employer's violations of the Americans With Disabilities Act ("ADA") in the case of *Crystal Lamb v. Clayton County School District*. The case illustrates some very important ADA principles that it seems employers tend to forget or ignore – much to their detriment. Let's take a look.

Fact Summary. Ms. Lamb was a special education teacher. In 2016 she was diagnosed with myotonia disorder, a form of muscular dystrophy that can cause persons to fall. The Clayton County, Georgia School District ("District") hired her in its Georgia Network of Education and Therapeutic Support ("GNETS") program to teach special education in the 2017 to 2018 school year.

The applicable job description provided that teachers had to be able to stand and walk approximately seven and a half hours per day. Teachers must also be trained for "restraints and de-escalation." The job description further noted that most days would involve sitting at a desk or table much of the time with intermittent standing or stooping.

GNETS teachers receive training in a two-step de-escalation technique called "MindSet" which is followed when a student has a behavioral issue. The first step is verbal de-escalation to calm a student. If that does not work then physical restraint is used. Ms. Lamb testified that not all teachers can perform the physical restraint and that she told her trainer she would not be able to perform physical restraint because of her myotonia. The trainer allowed her to participate in the training on a modified basis.

In October of 2017 Ms. Lamb fell and injured herself while chasing a student. She injured her knee and ankle and missed work for two days. She then attempted to return to work with a physician's note saying she needed to sit seventy percent of the time and could not squat or kneel. She was told by the District that she had to leave and could not return with less than a one hundred percent release from her health care provider. She was placed on medical leave pending her receipt of such a release.

During the leave Ms. Lamb kept the District informed. She received lesser restrictions from her physician but was denied the ability to return to work.

In March of 2019, the District sent Ms. Lamb a letter that said she had three options: (1) return on March 16 with a full duty release; (2) retire; or (3) resign. She did none of the above and was discharged. Her legal claim followed.

Yes, Virginia, It Is A Disability. When the case went to court, the District's attorneys moved for summary judgment, arguing, among other things, that Ms. Lamb's condition did not render her disabled within the meaning of the ADA. Of course they did. They were in court at that point. This author would do the same if there were any chance of succeeding on that argument in litigation. Nevertheless, as is obvious since the case went to trial, the judge did not accept the District's "she's not disabled" argument. Neither did the jury.

The wise human resources practitioner will not look to make such arguments, however. The ADA definition of disability is very broad. *Unless the condition in question is clearly very minor and very temporary the smart thing to do is assume you are dealing with an ADA disability and genuinely work to reasonably accommodate.*

Is It Really Essential? In Ms. Lamb's case, the job description said she needed to be able to stand seven and a half hours a day. In addition, GNETS teachers had to employ the "MindSet" technique, which required restraining students exhibiting behavior problems.

On the other hand, the job description also stated that the majority of the time the teacher would intermittently sit or stand. In other words, the teachers were not truly required to stand seven and a half hours a day.

Ms. Lamb testified that she told the "MindSet" trainer during the training that she could not perform restraint due to her myotonia. The trainer modified the training program in Ms. Lamb's case. Further. Ms. Lamb testified that several other teachers could not perform restraint on their own and called for help as needed. This was the classroom reality.

A statement on a job description is not magic. It will not save the employer from making an attempt to accommodate nor excuse the failure to attempt accommodation. Relying on a job description in that manner is a recipe for trouble, to include exposure to a valid ADA claim.

Having a well done, and accurate, job description is a good thing. It is helpful in a variety of ways, including when the employer and employee are both genuinely engaging in an effort to find a reasonable accommodation

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to create a "bright-line principle" that "would disallow a court from considering harassing conduct that occurs away from the physical premises owned or controlled by an employer, or after traditional work hours." In other words, there is no clear-cut rule to how these cases will be handled in the future. The above-stated factors simply put forth the types of things the Court will consider in future cases such as this one.

To read the full opinion, visit *c36da17e-38ff-43cb-bf24-9115a5e3ee86.pdf (tncourts.gov)*.

While it may be tempting to nix outside work functions all together, holiday and after-hours events are great ways to show employees what they mean to the company and build camaraderie amongst co-workers in a non-office setting. There are ways to prevent your company from becoming the next *Phelps* decision. The following are a few tips keep such events under wraps.

Do you have a work-related social event policy in your handbook? It is important to remember that your duty of care as an employer may extend to work-related functions. Consult with your employment attorney to ensure your handbook is updated to include a clear and concise policy about events outside the office.

One of the best ways to prevent workplace harassment, whether on the job or at after-hours or a corporate-sponsored event, is to review the policy with employees regularly and before the event in question. Mandatory anti-harassment training about the company's specific policy is one way to protect your employees and everyone in your workplace from harassment. Keep in mind the training should be required for all employees at *all levels* of your organization. When the C-suite team, managers, and supervisors are visibly present during training, employees are less likely to dismiss the training's significance. Further, the presence of upper management solidifies and constructs a workplace culture about what behavior will not be accepted in the workplace.

In conjunction with proper training, it is key to regularly enforce, abide, and encourage reporting for violations of the policy to maintain the culture employers have created. Poor culture can lead to high turnover and ultimately poor business performance. Prior to the event in question, inform all employees that any complaints from the event will be taken seriously, documented, and investigated to conclusion. Again, if employees understand that harassment or inappropriate behavior will not be tolerated, they will be less likely to act in a method contrary to the policy.

Consult with employment counsel to establish the proper safeguards against sexual harassment claims. Not only will it protect employees, but it will also protect the best interests of the company. After all, the thought of a company with no policies or procedures against events like the one in *Phelps* is a haunting prospect.

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for an employee who has a limiting condition. It is not the "be all and end all" of the discussion, however.

You Must Try And Work It Out. One of my favorite NBA basketball announcers is Hubie Brown. He's a hundred and fifty years old (just kidding, but he's been around for decades, not years) and still going strong! One of his favorite descriptions is to begin the sentence with, "And the big thing is, you must" (fill in the blank with something like: "keep Jones off the offensive glass!")

In the ADA context, you must try and work out a reasonable solution. Telling an employee that he or she must be "one hundred percent healed or else" does not qualify. That is tantamount to saying: We're not going to even consider an accommodation for you.

As a side note, it has been very clear for years that a "one hundred percent healed" requirement is absolutely an ADA violation. Yet, we continue to see employers impose that requirement. Dear reader, please do not be one of them. ....

More generally, it is simply very important to understand that when an employee brings forward a limiting condition it is incumbent on the employer to seek a reasonable solution that allows the employee to perform their job. Certainly, it is incumbent on the employee to participate in the process in good faith as well. In the case of Ms. Lamb, she clearly did so. She obtained notes from her physician, offered ideas for accommodation, and kept the District informed. And the District responded by imposing a "one hundred percent healed" requirement. In the end, the District paid dearly for it.

Conclusion. To borrow from my friend and colleague in the law, attorney Suzanne Roten, complying with the ADA is an art, not a science. An employer needs to have appropriate policies in place of course. But when handling employees and their circumstances the ADA requires individualized analysis and individualized approaches to solutions. Relying on hard-line rules and taking an inflexible approach can not only result in the loss of a good employee, it can also get you in legal hot water.