

Wimberly Lawson Seale Wright & Daves, PLLC

Attorneys & Counselors At Law

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FIRING NON-UNION WORKER WHO ASKS FOR WITNESS MAY VIOLATE LABOR ACT

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Locations

Knoxville Office

Bank of America Building, Suite 900
550 Main Avenue
P. O. Box 2231
Knoxville, Tennessee 37901-2231
Phone: 865-546-1000/Fax: 865-546-1001

Morristown Office

929 West First North Street
P.O. Box 1066
Morristown, Tennessee 37816-1066
Phone: 423-587-6870/Fax: 423-587-1479

Cookeville Office

1420 Neal Street - Suite 201
P.O. Box 655
Cookeville, Tennessee 38503-0655
Phone: 931-372-9123/Fax: 931-372-9181

Nashville Office

200 Fourth Avenue South
Suite 900
Nashville, Tennessee 37219
Phone: 615-727-1000/Fax: 615-727-1001

Website: www.wlswd.com

Affiliated Offices

Wimberly, Lawson, Steckel, Nelson & Schneider, PC
Atlanta, Georgia

Wimberly Lawson Daniels & Brandon
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LLC
Tampa, Florida

Of Counsel

Holifield & Associates, P.C.
Knoxville, Tennessee

During 2004, the Bush Administration NLRB overruled an earlier Clinton Board ruling, and held that an employee not represented by a union does not have a statutory right to the presence of a co-worker at an investigatory interview which the employee reasonably believes could lead to discipline. In Wal-Mart Stores, Inc., 343 NLRB No. 127 (2004) the Board addresses the separate but related issue whether the employer when it refused the non-union worker's request for a witness during an investigatory interview, violated the Labor Act by discharging him for making the request. The Board notes that while an employer at a non-union workplace need not grant its employees' request for the presence of a co-

worker, the Board recognizes that such employees retain the right under Section 7 of the Labor Act to seek such representation, and cannot be disciplined for making such a request.

Editor's Note - Under NLRB rulings, an employer can require an employee to participate in an investigation, and consider a refusal to cooperate in an investigation cause for disciplinary action. Further, an employee has no right to an outside representative or co-worker as a witness in such an investigation. However, as the Wal-Mart case demonstrates, an employee cannot be disciplined simply for making requests for such a co-worker as a witness. Thus, an employee has no legal right to refuse to attend a meeting with the employer without a witness, or to refuse to supply a statement, but may not be

disciplined simply for asking for another employee as a witness. Similar issues come up when an employee asks for an outside attorney, family member, or pastor, etc. While an employee does not have the right to have the presence of such a person, it is not a good idea to discipline employees simply for making such a request. Also, in some situations, for strategic reasons, the employer may actually want to grant such an employee request for an outside representative. Consider the following fact pattern, for example. An employee complains of sex harassment, and when the employer requests a meeting to discuss the matter, the complaining employee insists that her attorney be present. While the complaining employee may not have a right to have her attorney present, advice of counsel should be sought as to the best response the employer can make.

EMPLOYEE'S ATTORNEY AND VOCATIONAL EXPERT NOT NECESSARY FOR ADA ACCOMMODATION PROCESS

A particular example of the right of an employee to outside representation dealing with his or her employer arose during May in Ammons v. Aramark, (C.A. 7, 2004). In this case, the employee met with the plant manager to discuss possible accommodations and indicated he could perform a portion

of his maintenance duties. Subsequently, he was terminated for being absent due to injury for more than 18 months, and sued contending he was terminated in violation of the ADA. The court found that Aramark did not violate the requirements of the ADA when it excluded the employee's attorney and vocational rehabilitation counselor from efforts to find a reasonable

accommodation for his medical condition. The employee had injured his right knee and surgery was performed, and the vocational rehabilitation counselor had assisted the employee in connection with the workers' compensation claim. "The duty to engage in an interactive process does not mandate a meeting with an employee's attorney and vocational

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counselor,” the court said. The employer, the court said, met face-to-face with the employee to discuss possible accommodations and told him to keep it informed if he thought of other possibilities. “This satisfied Aramark’s responsibility with respect to an interactive process,” the court found. Further, the court found that the main question was whether the employee could perform the essential functions of the job with or without reasonable accommodations, and the

employee’s suggested accommodations would amount to a significant change in the essential functions of the job, and the only other accommodation the employee offered would essentially amount to creating a new position the employer previously did not maintain and had no plans on creating.

Editors Note - As previously discussed, the Aramark case is another example of a court indicating employers are not obligated to deal with outside employer

representatives in handling work assignments, disciplinary matters, and the like. However, there is an old and often true statement that “hard facts make bad law.” Sometimes when an employer’s refusal to allow such representation makes the employer look “bad” or uncooperative in the minds of a judge or jury. Therefore, there may be circumstances in which an employer should allow such outside participation, in spite of no obligation to do so.

BENEFIT PLAN NOT EFFECTIVE UNTIL FORMALLY ADOPTED ACCORDING TO PLAN PROCEDURES

A recent case involved a fact pattern where an employee sued when his employer reduced his benefits according to a plan amendment, by adopting a “re-hire rule” providing that employees re-hired after the date of transition would no longer participate in a traditional defined benefit plan, but instead would participate in a less favorable cash balance plan. While the plan amendments were to be effective January 1, 1998, the plan was not formally amended until December 1998 when the CEO executed a written adoption in accordance with plan procedure. The court noted that while employers are generally free to adopt, modify or terminate employee welfare plans, ERISA does require that all employee benefit plans be established and maintained pursuant to a written instrument. Further, the plan must identify the person who has the authority to amend the plan and

amendments must be made according to formal procedures.

The plaintiff argued that the employer’s CEO did not have authority to amend the plan. He also argued that even if the CEO was authorized, he failed to comply with the plan’s written amendment procedures so that the amendment was not effective until December 1998. The employer argued the CEO did have authority and though the plan was not formally amended until December 21, 1998, the plan was retroactively effective January 1, 1998.

The court held that the plan gave the CEO authority to amend the plan. However, the court further held that the CEO did not exercise his authority to amend the plan until December 21, 1998, the date the written amendment was executed and formally adopted. Thus, the court found that the effective date of the amendment was not until December 21, 1998.

The court then looked as to whether the amendment could be applied retroactively. The court stated although a validly accomplished ratification may be given retroactive effect, such ratification is prohibited where the amendment retroactively reduces the intervening rights of third parties, such as plan participants. The court found that the ratification in this case would effect the retroactive reduction of the plaintiff’s accrued benefits, and thus was ineffective. Depenborck v. Cigna Corp. 389 F.3d 78 (C.A. 3, 2004).

Editor’s Note - As indicated by the Cigna case and the Bergt case, the federal ERISA pension and benefit plan law is very technical and requires plan documents to be properly drafted and formally adopted or amended. One way to look at the ERISA plan rules is to consider a benefit plan as sort of a “super contract,” in which the “contract” must be technically correct and formally executed.

SAFETY A HIGHER PRIORITY FOR EMPLOYEES

The number of employees who say feeling safe at work is a priority to their job satisfaction has jumped 28% in the last two years, according to a new survey from the Society for Human Resource Management (SHRM). The survey reports that 62% of employees reported feeling safe at work is “very important” compared with 36% in 2002. Most commentators relate increased safety concerns to the increased prospect of terrorism in the U.S. Women (71%)

place more importance on feeling safe in the workplace than did men (52%).

When asked which components are “very important” to overall job satisfaction, employees reported the following five components the highest: benefits, compensation, feeling safe in the work environment, job security, and flexibility to balance work/life issues. The vast majority of employees continue to report being satisfied with their jobs, and

77% reported overall job satisfaction, an increase of 5% from the prior survey. More information is available at www.shrm.org.

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HOWARD B. JACKSON

KNOW YOUR ATTORNEY

Howard is a Senior Associate in the Knoxville, Tennessee office of Wimberly Lawson Seale Wright & Daves, PLLC. His practice includes substantial experience with labor law, employment litigation, including both discrimination cases of all kinds and employee restrictive agreements, and frequent training and counseling of employers on a wide variety of employment law issues. Howard graduated from Georgia Tech in 1983, with a B.S. in Industrial Management, from Duke University in 1987, with a Masters of Divinity,

and from Georgia State University in 1994, with a Juris Doctor. He graduated *summa cum laude* from Georgia State University, where he was Lead Articles Editor of the Law Review. He is a member of the bar in Georgia and Tennessee. Howard and his family live in Maryville, where he is active in the Blount Chamber Partnership. He enjoys running, and along with his wife, serves as Co-Director of the Townsend 10K, a road race benefiting Second Harvest Food Bank.

IS A "NASTY" EMPLOYEE PROTECTED UNDER THE ADA?

A recent subject of court decisions, as well as commentaries, is whether legal issues are created in coping with "nasty" employees who have problems interacting with others. This is no small issue, as Ninth Circuit Judge Trotter asked in a recent dissenting opinion, does the law mean "that a person's foul temperament may no longer be a reason to deny that person a job?" Unfortunately, like so many other legal issues, the courts are in some conflict as to how to analyze and apply the questions arising under the Americans with Disabilities Act (ADA).

In the most recent circuit court ruling, the plaintiff's working relationship with the plant manager and her immediate supervisor became poisonous. The supervisor "was no longer really able to effectively do her job" because she felt obligated "to tip-toe around [the plaintiff] and not say something wrong to get [the plaintiff] upset and cause a whole scene." The plant manager concluded that the plaintiff's presence at the factory had become counter-productive, and the plaintiff was informed that she was terminated based on her "numerous conflicts with supervisors and ... co-workers." *Jacques v. DiMarzio, Inc.*, 386 F.3d 192 (CA 2, 2004).

The Second Circuit Court of

Appeals, in the most recent ruling on the issue, rejected the rationale of both the First and Ninth Circuit's approach, and set out a new method of addressing the issue of whether "interacting with others" constitutes a major life activity under the ADA. Focusing on a distinction between "getting along with others," which it termed a "normative or evaluative concept," and "interacting with others," which it termed "essentially mechanical," the court held that "a plaintiff is substantially limited in interacting with others when the mental or physical impairment severely limits the fundamental ability to communicate with others. This standard is satisfied when the impairment severely limits the plaintiff's ability to connect with others, i.e., to initiate contact with other people and respond to them, or to go among other people - at the most basic level of these activities. The standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited but whose

communication is inappropriate, ineffective, or unsuccessful. A plaintiff who otherwise can perform the functions of a job with (or without) reasonable accommodation could satisfy this standard by demonstrating isolation resulting from any of a number of severe conditions, including acute or profound cases of: autism, agoraphobia, depression or other conditions that we need not try to anticipate today."

The National Institute of Mental Health estimates that one in five people will experience mental illness in their lifetime. EEOC data shows that more than 20% of all disability discrimination charges involve mental impairment. Anxiety disorders are cited most frequently, followed by depression. In 2003, the World Health Organization estimated

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that mental health problems in the U.S. account for 35% to 45% of absenteeism.

What is an employer to do? In the face of the importance of the issue, and the lack of clarity on this subject by the courts, employers should nevertheless take comfort in certain basic principles. First, to have any sort of protection under the ADA, the disruptive employee must inform the employer of his or her mental impairment, and also ask for an accommodation. In the absence of informing their employer of a mental condition, and requesting an accommodation, the employer may apply normal disciplinary procedures in dealing with the employee as it would have done with anyone. In other words, the employer must be put on notice by the employee of the possibility of having to accommodate the disability.

Further, employers are within their rights to request a medical report from employees who assert

that their medical condition is a disability protected by the ADA. The employer is entitled to objective psychological or medical evidence upon which to evaluate the claim. Based on such documentation, the employer can evaluate whether the employee has a psychiatric condition that can be documented to interfere

with the ability to interact as opposed to “get along with” others. However, the employer should avoid going out and asking an employee if they have a mental or personality disorder, as medically related questions are generally prohibited at least in the absence of some type of clear psychotic behavior.

EMPLOYERS USING CORPORATE CHAPLAINS

Many employers are hiring a part-time chaplain to provide emotional support and guidance to workers.



Corporate chaplains often work on-site, so that it is easier for employees to build relationships with them and seek help in times of need. Demand for such chaplains has created a new industry that supplies corporate chaplains, including firms such as Marketplace Ministries and Corporate Chaplains of America. They charge from \$250 to \$100,000 a month, depending on the number of workers. Among the firms using corporate chaplains are poultry giants Tyson Foods and Pilgrim’s Pride, and Old Dominion Freight Line.

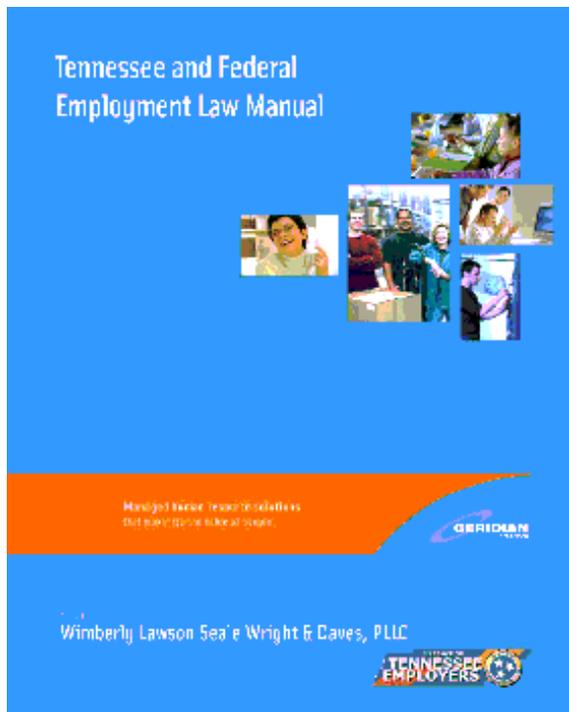
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