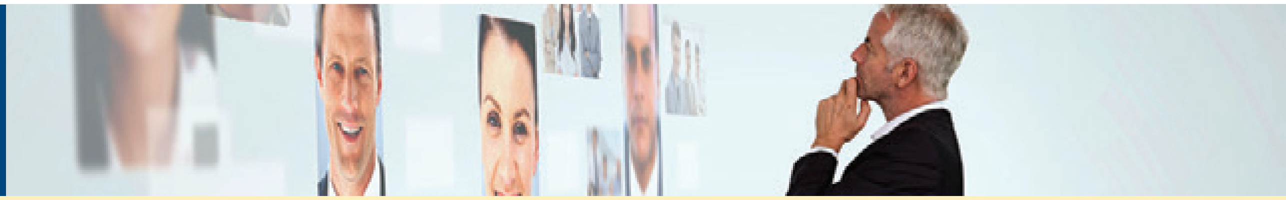

The Job Description

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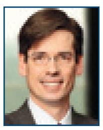

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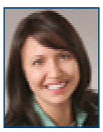

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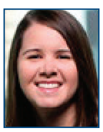

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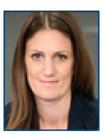

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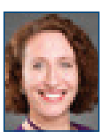

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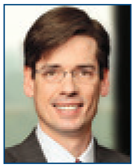
Leadership Note

From the Chair

By Stan Graham



I tend to have mixed emotions this time of year, but not for the reasons you're probably thinking. I love Thanksgiving and all of the opportunities for fellowship and wonderful food. I love the holiday season and all of the good cheer (and more great food!) it brings. And I love celebrating the New Year and all of the new hope and opportunities it brings with it.

January 2 is another story. It's then that I must process that college football is effectively over for another 8 months (sniff!), that the financial odometer has reset on the fiscal year (364 days to go!), and that winter will be hanging on for several more months (Brrrr!!).

But the joys are made all the more joyous and the winter doldrums quickly forgotten when I consider the embarrassment of riches we enjoy year-round within our Employment and Labor Committee. Whether it's the fellowship and wonderful CLE we enjoy at our annual employment seminar in May or the DRI annual meeting in October, the always entertaining and informative back and forth on our e-Community, the amazing written content contributed by our writers and editors, or any of the many other educational and relational opportunities our Committee offers, we have something for everyone literally every day of the year.

This latest edition of the *Job Description* is a great example of the many wonderful gifts we get to enjoy as a Committee. And this one easily ranks among the best yet, with timely and informative articles examining ADA accommodation in the real world, pay equity trends to watch, practical tips on the investigation of sexual harassment claims in the #MeToo era, an introduction to the Law Practice Management Committee, and much more. Please join me in giving thanks to our dedicated editors and authors for all of the hard work that went into this issue, and for bringing us timely information we can put to immediate use. I hope you enjoy reading it as much as I did.

Wishing everyone a Happy Holidays and Happy New Year!!

Stanley E. (Stan) Graham is a partner with the Nashville office of Waller. He is also the Vice-Chair of the DRI Employment and Labor Law Committee. He has extensive jury trial experience, including first-chair verdicts for Ford Motor Company, Dollar General, Logan's Roadhouse, and Federal-Mogul Corporation. Stan formerly served as Chair of the Tennessee Bar Association Employment Law Section. He is recognized in Chambers USA and was recently named 2017 Nashville Lawyer of the Year by Best Lawyers in the field of Labor Law-Management. He has represented clients in litigation and arbitration proceedings in 22 states and counting.

Feature Articles

"I Got the Juice": Sixth Circuit Affirms Verdict in Favor of Diabetic Employee Alleging ADA Discrimination

By Racquel B. Martin

Engaging in the ADA interactive process is likely the most significant aspect of managing employees with disabilities. Failing to do so can truly make or break an employer's ability to protect itself from disability discrimination claims. Employers must remember that one policy or practice does not fit all employees, especially ones with known disabilities. The Sixth Circuit's opinion in *Equal Employment Opportunity Commission v. Dolgencorp, LLC* illustrates the dangers of applying neutral employment policies to employees who request reasonable accommodations that may conflict with such policies.

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Background

Linda Atkins was a lead sales associate at Dollar General who suffered from type II diabetes and occasionally experienced low blood sugar. Because of her condition, Atkins had to monitor her blood sugar level daily to ensure that it was high enough. When Atkins had a low blood sugar episode, she would shake and have trouble seeing and thinking clearly. To avoid fainting or having a seizure, Atkins had to quickly consume 100 calories of glucose. She preferred to do so by drinking orange juice because it acted quickly and was easy to measure. As such, Atkins kept orange juice in a cooler in the break room in the event that she experienced a low blood sugar episode at work.

Because Atkins' position often required her to work alone, Atkins asked her store manager if she could keep orange juice at her register in case of an emergency. The manager told Atkins that Dollar General's policy prohibited having food at a register. In fact, the "Personal Appearance" policy stated that employees "should not chew gum or eat/drink, except during breaks (which should not be taken on the sales floor, at registers, etc.)."

In late 2011 and early 2012, Atkins suffered two hypoglycemic episodes while she was working alone. Because there were eight to ten customers in the store both times, Atkins could not go to the break room where she kept orange juice in a cooler. Instead, she took a bottle of orange juice from the store cooler and drank it. After each episode ended, Atkins paid $1.69 for the orange juice and told the store manager what happened. Nevertheless, when Dollar General's district manager and regional loss prevention manager conducted an audit and learned about what Atkins had done, they terminated her for violating the company's grazing policy, which forbid employees from consuming merchandise in the store before paying for it.

Atkins filed a disability discrimination charge with the EEOC and the EEOC filed a lawsuit against Dollar General alleging failure to provide a reasonable accommodation and discriminatory discharge under the ADA. After Atkins intervened in the lawsuit as a plaintiff, litigation proceeded to trial where a jury found in favor of Atkins on both claims, awarding her over $27,500 in back pay and $250,000 in compensatory damages. The district court awarded Atkins' lawyers over $445,000 in attorney's fees and almost $1,700 in expenses. Dollar General appealed.

Sixth Circuit Upholds Jury Verdict Regarding ADA Claims

On appeal, Dollar General first argued that it did not have a duty to accommodate Atkins because she could treat hypoglycemia in other ways, *e.g.*, glucose tablets, honey, candy, or peanut butter crackers. Siding with the jury, the Sixth Circuit stated that the jury could have found that Dollar General's "Personal Appearance" policy also prohibited employees from consuming Dollar General's suggested treatment alternatives. More importantly, the Sixth Circuit highlighted that the Personal Appearance policy included a disclaimer that permitted disability-related exceptions depending on the circumstances. Despite this disclaimer and Atkins' request for an exception because of her diabetic condition, her store manager "categorically denied Atkins' request, failed to explore any alternatives, and never relayed the matter to a superior." Such a response was not consistent with Dollar General's duty to explore the nature of Atkins' limitations, if and how those limitations affected her work, and what type of accommodations could be made. Consequently, the jury had a legally sufficient basis to conclude that Dollar General failed to provide Atkins reasonable alternatives to keeping orange juice at her register.

Regarding Atkins' discriminatory discharge claim, Dollar General argued that it had a legitimate, non-discriminatory reason for firing Atkins, its anti-grazing policy. The Sixth Circuit swiftly discounted this argument, stating that "a company may not illegitimately deny an employee a reasonable accommodation to a general policy and use that same policy as a neutral basis for firing [her]." Furthermore, the Sixth Circuit emphasized that a neutral policy was irrelevant because Atkins had presented direct evidence of discrimination, *i.e.*, failing to provide a reasonable accommodation.

The Sixth Circuit concluded its analysis by refuting Dollar General's final argument that Atkins did not present evidence of animus toward the disabled. The Court held that proving animus was not necessary and an employer violated the ADA whenever it terminated an employee on the basis of disability. Ultimately, the Sixth Circuit upheld the jury verdict regarding both of the ADA claims and Atkins prevailed.

Takeaways

This decision does not mean that you cannot apply neutral policies like personal appearance or anti-grazing to disabled employees. However, employers who apply policies without regard to an employee's disclosed disability do so at their own risk. Remember that you and your employee are a team that can only succeed when everyone can perform their jobs in a supportive and efficient environment. When faced with an employee who requests a reasonable accommodation, think about the following:

- Would the requested accommodation violate a policy? Don't ignore your policies that may prevent you from granting their request, but think about whether you need to make an exception to enable them to keep doing their job. If the employee's request violates a policy, think about alternatives that would not violate the policy.
- Solicit the employee's doctor's input when necessary. If you need a second opinion, get it, but be prepared to pay for it.
- Don't forget that if you cannot provide a reasonable accommodation in an employee's current position, you should determine if there are vacant positions for which the employee is qualified in which you could provide the accommodation.
- If you simply cannot grant a requested accommodation, consult with senior management, human resources, and your attorney to assess whether not providing the accommodation would be an undue hardship or whether you can otherwise defend this decision.
- Finally, document your discussion with the employee and be sure it is clear that you did all you could to make it work.

Courts and juries like employers who try to figure out ways for disabled employees to keep working. Make sure you fit that mold before you end up in court.

As an associate in the Nashville office of Bradley Arant Boult Cummings LLP, Racquel B. Martin represents public and private employers in employment-related litigation involving discrimination and retaliation, wage and hour, FMLA, and non-compete issues. She also assists employers with drafting, reviewing, and updating employment policies, employee handbooks, and a variety of employment agreements. Racquel has aided clients in conducting workplace investigations and routinely advises employers regarding new developments in employment law and compliance with state and federal employment statutes such as the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), Title VII, the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), the Tennessee Human Rights Act, the Tennessee Public Protection Act, and the Tennessee Workers' Compensation Act.

Three Pay Equity Trends to Watch

By Nakimuli Davis Primer

Closing the pay gap between men and women is not only a priority identified in the EEOC's most recent Strategic Enforcement Plan, it is also a priority for state legislators.

President John Kennedy signed the Equal Pay Act ("EPA") into law in 1963 explaining that the Act "prohibits arbitrary discrimination against women in the payment of wages."[1] Over fifty years later, the pay gap[2] persists and has become a public issue. In 2017, state legislators in upwards of 40 jurisdictions introduced approximately 100 bills that related to equal pay. While not all of the bills were passed or ultimately became law, there are a few notable trends.

First, states are prohibiting employers from relying on a candidate's prior salary when setting the candidate's salary, and some states prohibit salary inquiries. At least four states—California, Delaware, Maine, and Oregon—have banned an employer's ability to ask about or otherwise consider a candidate's pay history to set the candidate's salary.[3] Puerto Rico, New Orleans (for public employees), New York City, Philadelphia[4], Pittsburgh (for city employees), and San Francisco also have salary history bans. Similar laws are pending in more than ten other states. Although states are moving toward banning reliance on prior salary, some courts have held that prior salary is a

1 http://www.presidency.ucsb.edu/ws/?pid=9267.

2 According to the U.S. Census Bureau, in 2016 women were paid about 80% of men's earnings, i.e. a 20% pay gap.

3 Delaware's law was effective December 2017; California's law was effective January 1, 2018; Massachusetts' law was effective in July 2018; and Oregon's law is effective in January 2019.

4 There is a legal challenge to this law.

"factor other than sex" that an employer may rely on to support a pay differential. On November 30, 2017, the Seventh Circuit, in *Lauderdale v. Ill. Dep't of Human Servs.*, No. 16-3830, affirmed summary judgment in favor of an employer who relied on prior salary as long as the prior salary was not a product of bias. The Ninth Circuit had similarly held since 1982 in *Kouba v. Allstate Ins. Co.* that prior salary may be a factor other than sex; but, on April 9, 2018 in *Rizo v. Yovino*, No. 16-15372, the *en banc* court overruled *Kouba* holding that an employer may no longer rely on prior salary. The court concluded that "any other factor other than sex is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance."

Second, some states are more broadly defining the equal pay standard. The EPA requires that employers pay employees "equal pay for equal work." However, states have proposed legislation to require equal pay for "comparable work," Mass. Gen. Laws ch. 149 §105, "substantially similar work," Cal. Lab. Code §1197.5, and "work of a comparable character." Or. Rev. Stat. §652.220. States are also broadening the geographical scope of comparison. More specifically, the EPA requires that men and women who work in the *same establishment* be given equal pay for equal work. An establishment is generally a distinct physical location or office rather than the entire business, but states would allow an employee to compare his or her salary to employees who work in different locations. For example, New York permits comparison in the "same geographic region" and Maryland within "the same county."

Third, states are including pay transparency provisions that allow employees to openly discuss wages. Additionally, available defenses under recent legislation vary. For example, Oregon does not have the general any factor other than sex "catch-all" defense that is available under the EPA; California and New York require proof of a bona fide factor other than sex like education, training, or experience; and some states have expanded defenses for employers who self-audit.

Because of the differences in state and local law, it is critical that employers remain vigilant to ensure compliance not only with the federal law but also with applicable state and local laws. Employers should also consider pay audits, pay scales, and updating compensation policies where appropriate because states are continuing to introduce and pass pay equity legislation.

Nakimuli O. Davis-Primer, shareholder in the Jackson, Mississippi office of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, concentrates her practice in the areas of labor and employment and commercial litigation.

Responsibly and Respectfully Investigating Sexual Misconduct Allegations in Light of the Sensitivities and Lessons Raised by the #MeToo Movement

By Katherine Pappas

Just over six months ago, on October 5, 2017, Jodi Kantor and Megan Twohey of *The New York Times* published their initial article detailing allegations of sexual harassment and assault against producer Harvey Weinstein. Within days of the article's publication, Weinstein was fired as an employee from the company he helped found and, following additional accounts of sexual misconduct and Ronan Farrow's October 10, 2017 article in *The New Yorker*, Weinstein ultimately resigned from his company's board. In the wake of news reports and Weinstein's resignation, the #MeToo movement—a campaign originally started ten years earlier and aimed at connecting sexual assault survivors—quickly gained momentum, empowering victims to come forward with their accounts of sexual harassment and assault. At the same time, allegations against individuals in positions of power took center stage in the news. These allegations have cut across industries, from Hollywood to the news media to the halls of government.

Against this backdrop, legal think pieces addressing how employers can combat sexual harassment in the workplace have also proliferated, often focusing on crucial policy and training initiatives. But once you have revised your policies on harassment and discrimination in the work place, and you have implemented new training for employees, what do you when an employee comes forward to allege sexual harassment, including instances which occurred before the updated policies were implemented? What should you do (and not do) next?

A company's immediate reaction to sexual harassment allegations should include proactive steps, such as defining an investigation and communications strategy that takes into account the elevated risk profile of such claims. But a company must also exercise restraint and refrain from taking actions that could actually increase liability moving forward. Below, we discuss some of the keys to investigating such serious allegations responsibly and in a manner that is respectful to the potential victims while not prejudging the facts.

Develop a disciplined investigation strategy and, where necessary, retain experienced internal investigations counsel.

Although businesses have been handling harassment complaints for years, the risk profile has changed and these allegations now present not only employee relations and litigation concerns but compliance and reputational risks as well. The first responders to complaints must therefore be trained to know when to raise red flags. Whether the investigation is managed by in-house or outside counsel, a strategy must be developed that navigates the sensitivities of investigating serious allegations while responsibly maintaining confidentiality.

Neither corporate nor outside counsel would, of course, represent the accused wrongdoer. Therefore, part of the immediate investigation strategy must be to avoid reporting lines which might, even inadvertently, overlap with the alleged wrongdoer or employees who directly report to the wrongdoer. Defining communication lines is critical to maintaining the integrity and effectiveness of the investigation. Particularly where the allegation relates to events occurring before the new policies were in place, was previously investigated by the company, or where it implicates senior management, such as the cases which have dominated the news in recent months, outside counsel may be retained to bring full independence and neutrality to the investigation. In those cases, counsel will work with the company to take the crucial step of defining the client and the reporting lines between outside counsel and the company. Whether counsel represents the company or a board committee, along the lines of an independent audit committee which might be involved in cases dealing with financial fraud, correctly identifying the client and the lines of communication serves the dual purpose of maintaining the independence and authority of the law firm in connection with the investigation, and also protecting the attorney-client privilege by avoiding potential waivers.

Carefully craft communications regarding the allegations.

A communications strategy must be developed that aligns with the overall investigation plan and is implemented from the earliest interactions with the accuser. The recipient of the complaint may often be located outside of the legal department but, regardless of position, the first responder must be trained to respectfully and objectively communicate without creating liability. The company should be careful not to expose itself to potential liability by engaging in an aggressive communications campaign without knowing the full picture. The risk here is not that the communications violate the alleged wrongdoers' due process rights—as some supporters of individuals accused of wrongdoing in recent months have suggested. In fact, this notion was raised by the President in a February tweet: "People[']s lives are being shattered and destroyed by a mere allegation. Some are true and some are false. Some are old and some are new. There is no recovery for someone falsely accused—life and career are gone. Is there no such thing any longer as Due Process?" Of course, companies do not have a legal obligation to provide their employees with constitutional due process, rather, those rights impose obligations on government conduct. But these situations can carry serious personal and professional consequences for the accused. The same is true for the accuser. Companies should be careful to avoid making statements which could lead to civil liability, including defamation, or any statements which could be viewed as a violation of company processes regarding the investigation of complaints against employees.

The caution to carefully craft communications holds for both internal communications, between and among company employees, and outward facing communications, such as press releases. Nonetheless, particularly in the case of an allegation made in the public sphere, the company may feel that it is necessary to release a strong statement condemning the alleged conduct. Such communications present risk because the company may not be able to immediately assess the credibility of the allegations. Indeed, the purpose of the investigation will be to reach an understanding of the underlying facts in order to evaluate any potential exposure for the company and determine the appropriate response. Public comments may undermine that objective.

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Ultimately, where it appears that a communications campaign is a necessary step in the process of investigating and responding to sexual harassment allegations in today's environment of increased awareness and sensitivity to such claims, the company should consider engaging a communications firm. Ideally such a firm would be engaged through counsel, to allow for a free flow of information between the company, counsel, and the team crafting the messaging strategy, while not waiving the attorney-client privilege.

Thoughtfully negotiate the exit of any employees.

Companies may consider putting the accused wrongdoer on leave or separating the accused from the accuser during the investigation. But if it becomes clear that certain employees violated company policies or the law such that they should be exited from the company, the company should consider a number of factors, including the basic question of whether the employee is going to resign or whether the company is going to fire him or her. In the case of a resignation, how the resignation is structured should be evaluated in light of the seriousness of the misconduct. For example, a bonus or severance package may not be appropriate. The company should further keep in mind whether ongoing cooperation in the investigation should be a condition of any severance agreements, particularly where the company may be in the position of cooperating with enforcement authorities in the future. In the case of a decision to terminate an employee, the company and its counsel should carefully consider whether the employment contract requires a termination "for cause" and whether those requirements have been met.

Avoid reactionary policy changes that harm, rather than help, the company.

In the wake of misconduct allegations, particularly those that are made public, companies are understandably eager to implement policies which will reduce the potential for harassment in the workplace or during business-related activities outside of the office. But companies should avoid impulsively imposing new practices and policies which would impede and restrict productive workplace interactions between employees. Just days after *The New York Times* broke the Weinstein story, the paper published Claire Cain Miller's report on the "unintended consequences of sexual harassment scandals" which described anecdotal evidence across industries, from Silicon Valley to Wall Street, showing that men were avoiding and even declining to meet one-on-one or behind closed doors with women due to a fear of facing harassment allegations. And in January, Steve Hendrix, Ellie Silverman, and Marc Fisher of *The Washington Post* similarly detailed instances in which employers are prohibiting or discouraging business travel, one-on-one meetings, and even dinners between employees of different genders in the wake of the highly-publicized cases of sexual harassment and the #MeToo movement. Such practices impose needless and often impractical limits on business activities and smother the flow of information and ideas. Moreover, they generally stifle opportunities for women in the workplace and only further engrain existing inequities. And such policies demonstrate a lack of trust and respect for employees of any gender because they assume that employees cannot be trusted to behave professionally, responsibly, and lawfully in the workplace. For these reasons, any formal adoption of a policy which limits interactions between men and women, or even tacit approval of such practices, is problematic for the business. Crucially, these practices also risk exposing the company to claims of workplace discrimination or a hostile work environment. Any large-scale policy changes should be taken in consultation with employment law subject matter experts to avoid this risk of additional liability and to ensure that the policies are appropriate, fair, and conducive to the company's business objectives.

Conclusion

When a company learns of allegations of sexual harassment or assault by an employee, it must quickly move to investigate the allegations, potentially with the assistance of outside counsel, while also navigating the potential pitfalls in providing information both internally and publically, and avoiding impulsive and harmful policies which may undermine the business objectives and create additional legal liability for the company.

Katherine Pappas is counsel for Miller & Chevalier in Washington, D.C., where she focuses her practice on white collar and internal investigations, and complex civil litigation. She has conducted internal investigations on behalf of corporate clients stemming from allegations of fraud, anti-competitive practices, and violations of the Foreign Corrupt Practices Act. Ms. Pappas routinely conducts witness interviews and manages the review and analysis of large numbers of documents often associated with internal corporate investigations. In addition, she has represented individuals and corporations in connection with enforcement actions brought by the Department of Justice and the Securities and Exchange Commission. Ms. Pappas has also represented corporate clients in federal district and appellate courts in connection with complex civil litigation matters.

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New California Law Exposes Maritime Sector to Liability for Drayage Carriers Who Owe Drivers

By J. Michael Cavanaugh, Eric Lee, and Daniel Burkard

Under an amendment to California labor statutes that becomes effective in January 2019, beneficial cargo owners (BCOs), shippers and other "customers" engaging port drayage motor carriers (PDMCs) that default on obligations to pay employees will be jointly and severally liable for the sums the PDMCs fail to pay to or for the benefit of their drivers.

Highlights of the New Law

For purposes of the statute, a "customer" means any business entity, regardless of form, that engages or uses a PDMC to perform port drayage service on the customer's behalf. Importantly, this definition applies even where the customer indirectly engages or uses the drayage motor carriage through the use of an agent (*i.e.*, freight forwarder, broker, ocean carrier or other motor carrier). The statute defines "port drayage services" as the movement within California of cargo or intermodal equipment by a commercial motor vehicle whose point-to-point movement has either its origin or destination at a port—including any interchange of power units, chassis, or intermodal containers—or the switching of port drayage drivers that occurs during the movement of that freight. Port drayage services do not include intra-port and inter-port movements of cargo.

The recently enacted California Senate Bill (SB)-1402, introduced by state Sen. Ricardo Lara, requires the California Division of Labor Standards Enforcement (DLSE) to publish a "blacklist" (to be posted on its website) identifying PDMCs with any unsatisfied judgments. PDMC defaults may include failure to pay wages, imposing unlawful expenses, failure to remit payroll taxes, failure to provide workers' compensation insurance or misclassification of employees as independent contractors. Also, the law provides DLSE with the authority to adopt necessary regulations and rules to administer and enforce its provisions.

The new law will be implemented as California Labor Code Section 2810.4(b)(3). This statute states that a customer contracting with or using a drayage provider on the DLSE "blacklist" shall share all civil legal responsibility and civil liability owed to a driver for services obtained after the date the drayage trucking company appeared on the "blacklist." The joint and several feature of the law is especially problematic for customers of a blacklisted PDMC, because it permits the unpaid drivers to claim the entire amount owed from a single "deep pocket" source, who must pay the full damages amount, then seek contribution from any other entity that used the PDMC after it was blacklisted.

The law prohibits businesses and PDMCs from taking any adverse action against a commercial driver for providing notification of a violation, filing a claim or a civil action. The law also requires businesses and PDMCs to provide DLSE with information within their possession to verify compliance with applicable state laws. For any unsatisfied judgment, PDMCs would be provided with notification at least 15 business days before appearing on DLSE's website. PDMCs are required to notify contracting businesses of any unsatisfied judgments within 30 days, prior to providing services.

However, the law exempts certain businesses engaged with PDMCs. There are a few entities that are specifically exempted from liability under the statute, including state and local governments, businesses with less than 25 employees and marine terminal operators (MTOs). Also, the law does not impose joint and several liability on businesses involved with PDMCs whose employees are covered by a collective bargaining agreement, or to businesses who wish to terminate an existing contract. Where a logistics contract exists at the time the trucker is first added to the "blacklist," there is a 90-day grace period for joint and several liability.

Takeaways and Considerations

In response to this recently enacted statute, customers of PDMCs should diligently review the DSLE blacklist and refrain from engaging in business with blacklisted companies to avoid the incursion of joint and several liability. While the statute does not go into effect until January 2019, impacted entities should create protocols to ensure that they are prepared to vet drayage carriers. It is advisable that vetting protocol include, at a minimum, reviewing the California DLSE website every 45 to 60 days. If an engaged drayage carrier appears on the "blacklist," the customer should terminate its engagement with the

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drayage carrier to avoid incurring liability to the drayage carrier's truckers.

J. Michael Cavanaugh *co-chairs Holland & Knight's Energy Team. His practice includes representation of clients in project development transactions, principally in the areas of technology and infrastructure, including energy and utilities, transportation and communications. He represents both buyers and sellers in corporate and asset acquisitions and restructuring transactions. He also assists clients with international commercial transactions, including sales and distribution, joint ventures, trade regulation and establishing overseas branch operations.*

Eric Lee *is a supply chain, logistics, and transportation attorney in Washington, D.C. He has a practice that encompasses a broad range of complex international and domestic regulatory, commercial, and corporate matters, principally in the transportation, trade, and energy sectors, including the associated businesses for each sector and end-to-end across all nodes and modes (maritime, aviation, rail, and motor). Mr. Lee assists clients with direct, 3PL and 4PL transportation, logistics, distribution, and supply chain projects and transactions, including service contracts, operating agreements, corporate and asset acquisitions, asset reallocation and transfers, and related corporate and commercial transactions.*

Daniel L. Burkard *is a maritime, logistics and supply chain attorney in Holland & Knight's Washington, D.C., office. His practice covers a broad range of transactional and regulatory matters, primarily in the transportation, energy and trade sectors.*

When an Internal Business Dispute Has External Features

By Stephen Feldman

Food and drink are staples of the caselaw on unfair and deceptive trade practices. Roasted soybeans. Hot dogs. Poultry. Beef. Bourbon.

Today, wine.

In particular, a business called Wine & Design. It caters to those who desire to sip a traditional Gamay while living out their Andrew Wyeth-inspired dreams.

The business developed from two partners. But the partners had a falling out, and their fractured relationship fueled heated and ongoing litigation in the North Carolina Business Court.

The litigation includes a decision by Judge Gregory P. McGuire on the circumstances in which a fight between business owners can violate N.C. Gen. Stat. §75-1.1. This post concerns that decision.

Emily Preiss and Harriet Mills co-founded Wine & Design in 2011. The name of the business describes what it offers: a social experience where you can drink wine and paint. The business features a design studio in Raleigh and a limited-liability company organized to franchise the concept to other locations. Within three years, the franchise company acquired forty franchise locations along the East Coast.

The founders' personal relationship, however, didn't fare as well. Facing allegations that she struggled with drug addiction, Preiss enrolled—allegedly under pressure from Mills and others—at a treatment facility in Florida. But she left after four days of a thirty-day program.

When she came back to Raleigh, Preiss found herself locked out of the business and removed from the companies' bank accounts. An extended negotiating period followed, and it culminated in a restructuring that left Preiss with 100 percent of the membership interest in the Raleigh studio, and with Mills holding the majority of the interest in the franchise company. Mills also effectively controlled the franchise company's operations.

Unfortunately, the restructuring didn't stop things from devolving further. Preiss accused Mills of not making monthly distributions to Preiss from the franchise company, despite having adequate reserves. Preiss also accused Mills of self-dealing.

Preiss then sued Mills. Her complaint included an alleged violation of section 75-1.1.

On these facts, you might reasonably surmise that the 75-1.1 claim stood little chance of success: the lawsuit sounds like a classic internal business dispute, and an internal business dispute does not fall within the ambit of section 75-1.1.

But Judge McGuire's opinion shows that this doctrine's application can demand granular analysis.

In Wine & Design, some of the complaint's allegations concern actions internal to the franchise company before the restructuring. Section 75-1.1 doesn't apply to those actions.

It also doesn't apply to Preiss's allegations that Mills internally mismanaged the franchise company, even after the restructuring. That alleged mismanagement included the assertions about distributions. All of that alleged conduct is internal to a single business—the franchise company.

But the complaint described additional conduct that allegedly violates section 75-1.1. That additional conduct includes dealings between the Raleigh studio and the franchise company after the restructuring. According to the complaint, the restructuring cast the Raleigh studio and franchise company as two separate businesses. Judge McGuire concluded that—at the Rule 12(b)(6) stage—the conduct between the two companies after the restructuring was "arguably" within the bounds of section 75-1.1.

Preiss's lawyers, however, probably didn't pop the Prosecco too quickly. In rendering his decision, Judge McGuire observed that the allegations about dealings between the two companies—allegations that concerned a trademark agreement between the companies, as well as the company website—"are thin."

Where does this leave us?

For one, Wine & Design shows the attention that's demanded when drafting a complaint that alleges unfair and deceptive trade practices. If you're the type of drafter who thinks vague pleading is good pleading, you better be ready for your allegations to be parsed—even under North Carolina's notice-pleading standard—to see if they fall within the scope of section 75-1.1

Wine & Design also reiterates the Business Court's consistent admonition that 75-1.1 claims about disputes internal to a company will have a short shelf life.

Finally, *Wine & Design* suggests that, even if a complaint can point to conduct between two separate businesses, it might not be a wise tactical decision to raise the claim. To state the obvious, having a claim described as "thin" in connection with a Rule 12(b)(6) motion does not paint an optimistic forecast for the claim's merits at summary judgment.

A forecast, however, is just that—a guess about what might happen later. Preiss and her legal team ultimately have control over marshaling proof of a 75-1.1 violation, and the evidentiary canvas is not dry. But whether or not she marshals that proof, Preiss spent a non-trivial amount of time, resources, and credibility defending a 75-1.1 claim that mostly fell within a well-known exception.

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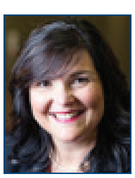
DRI News

Hello from the Law Practice Management Committee

By Stacy Linn Moon



People in general are fascinated by the law. They watch television series and love movies about lawsuits. They are fascinated by the medical malpractice cases they hear about; they ask their lawyer friends for explanations about what they hear or see on the news; and in general, they cannot seem to get enough. Litigators, too, love lawsuits. Above and beyond the fact that, if no one files a lawsuit, we, as defense counsel, are out of jobs, lawyers tend to enjoy learning about new areas of technology, matching wits with (hopefully) good opposing counsel, and sharing war stories. What most lawyers do NOT tend to enjoy, for whatever reason, is law practice management. If you want to watch another lawyer's eyes glaze over, tell them you are involved in the Law Practice Management committee. Frequently, the next comment is something along the lines of "Oh. I'm not the managing partner/shareholder. Thank God. I don't have to worry about that."

Au contraire, mes amis. From the most junior associate in a mega firm, to a semi-retired partner in a small firm, law practice management *is* your concern, and you do have to worry about it. How a firm is managed determines how an associate gets his or her first assignment; which lawyers that associate works with; how much out-of-office activities (deposition, hearings) that associate received and when; and whether that associate will ever get to try a case. Law practice management determines whether that semi-retired lawyer can, in fact, retire, or feels comfortable doing so. Everyone in between runs into those and other issues, as well. And, unfortunately, many lawyers do not have any business experience. So, what is a lawyer to do?

That, friends, is where the Law Practice Management Committee comes swooping in like a superhero to save the day. The mission of the LPM is to serve the needs of firms of all sizes. It provides resources and practice advice for improving the business side of the practice of law. It regularly offers webinars, conference calls, articles, and invites its members to ask questions and share their insights. The committee includes practice group leaders and prospective law firm managers who are interested in management issues, as well as young lawyers who are just starting out. Nor do you have to be a managing partner or shareholder to join the LPM (or even be involved in the leadership of LPM—as I am an example).

How, you ask, can LPM do all of that? Through dedicated volunteers who are facing issues in their practice, are willing to ask their questions, and willing to share their experiences. We also have several ways to provide information to our members, and we are looking for better, more efficient ways to do so.

Currently, we have two webinars in the works, one of which is the inaugural Law Firm 101 series we hope to create, involving understanding law firm financials. If there are topics for a webinar or that you think should be on the list for a Law Firm 101 series, please let Steve Embry and Bonnie Moss, our webinar chair and vice chair, know.

Our Dialed In calls (every quarter) provide a one-hour mini-resource. We update LPM activities and have a 20 minute presentation, with time for questions. Our next Dialed In after this publication is December 18, 2018. Keep an eye on the E-Community for more details. Thank you to Jay Courie and Melissa Thompson Richardson for their hard work this year.

The E-Community is a wealth of information. Have an issue that you think is unique? Ask the E-Community. The odds are good that someone has dealt with that issue or one similar. Whether they respond across the community or privately, generally someone has some helpful information.

If you are a new member to LPM, keep an eye out for newcomer calls. Also, if you are considering joining LPM, or if you know someone who is considering joining DRI and/or LPM, keep an eye out for future mixers and other opportunities to meet in cities.

As importantly as anything else, LPM is a great resource for referrals. You may need an attorney to assist with a case that involves a different practice area than yours. LPM members come to the rescue. Being involved in LPM helps you meet lawyers in those other areas (and, of course, different geographical regions) to assist with those cases. The attendees of the 2018 Managing Partner and Law Firm Leaders Seminar in September made several new contacts and renewed previous contacts. Many thanks to the members of the planning and marketing committees for the seminar.

Last, but certainly not least, our publications are also resources for information on issues facing law firms and lawyers. And they cannot be done without volunteers from the LPM Committee members. [Insert here a visual of Uncle Sam—We Need You!] Mario Delano, our publications chair, has worked diligently this year and has published several articles, with the help of the Publications team, Sandy Wunderlich and Stephen Acker, and the help of LPM members who took the time to write, in our newsletter, in *The Voice*, and now, in *For The Defense*. Never fear, though. He can ALWAYS use more articles—even if a deadline is not looming. [As one judge told the parties in a recent case, "Just because you CAN wait to the deadline, does not mean you HAVE to wait to the deadline."] Some of our best articles arise out of situations our members faced and resolved during the year. We look forward to receiving those articles.

In short, we invite you to become as involved as you care to be in LPM. If, as you read this invitation, you think to yourself that you are too busy to do anything but read the *For The Defense* edition and newsletters, we invite you to do just that, as well. But if you ever change your mind, LPM is here.

Stacy Moon, a shareholder of F&B Law Firm, P.C., in Huntsville, Alabama, is an experienced litigator who practices in the areas of employment law, commercial litigation, government liability, insurance defense, and construction law. She is admitted to practice law in Alabama state courts, all federal courts within the State of Alabama, and the United States Circuit Court of Appeals for the Eleventh Circuit. She has extensive trial experience, including cases involving employment discrimination, excessive force *claims, and personal injury. She has written and presented on issues involving accommodations and the effect of recent marijuana litigation on employers, trial practice and presentation, law practice management, and HIPAA compliance for law firms.*