Downey & Lenkov LLC

Labor & Employment Newsletter

July 2023

SCOTUS Clarifies Standard for Religious Accommodation Requests

On June 29, 2023, the Supreme Court issued its decision in *Groff v. DeJoy*, No. 22-174 (June 29, 2023) in which it clarified and changed the standard for religious accommodations under Title VII. The new standard provides that "'under hardship' is shown when a burden is substantial in the overall context of an employer's business." For almost 50 years, the prior established standard required an employer "to bear more than a de minimis cost in order to give [an employee] Saturdays off is an undue hardship."

In its unanimous 9-0 opinion, the Supreme Court agreed to change the standard and declined to implement the undue hardship test under the Americans With Disabilities Act, which requires significant difficulty and expense. The Court further declined to provide guidance as to what a substantial burden constitutes for businesses, leaving a lot of questions open for employers.

Practice Tip:

This new heightened standard requires employers to assess requests for religious accommodation and to deny such requests only if there is evidence that providing the accommodation would result in "substantial increased costs in relation to the conduct of [an employer's] particular business." This standard requires a case-by-case factual analysis as the Court did not provide clear guidance on how to apply its new standard. Employers will therefore need to carefully consider each accommodation request going forward.

Indiana Federal Court Rules on Constructive Discharge Based on Age Discrimination

In a recent Indiana federal court case tried in South Bend, Indiana a jury returned a verdict for the defendant employer in a case involving alleged constructive discharge based on age discrimination. *Stamey v. Forest River*, 3.19: 250 (ND Ind., 5/4/23).

Plaintiff, who was a production worker in the company's auto parts plant, alleged he was forced to retire at age 62.5 because of chronic intolerable verbal bullying and harassment

(over 1,000 insults) directed towards him by fellow employees. However, only weeks before he retired, he first complained of such alleged harassment to his employer and shortly thereafter he filed a claim with the EEOC.

The employer denied this claim and asserted that plaintiff had not met the standard for constructive discharge and had resigned solely because he was eligible to begin collecting social security benefits. He had previously told co-employees he would be retiring soon so as to secure such benefits.

The court also pointed out that plaintiff never claimed nor suffered any physical bullying. After a three-day trial the jury found plaintiff had not proven constructive discharge and a judgment for the employer was entered.

Practice Tip:

While the Plaintiff's allegations, if proven, might have been deemed to demonstrate pervasive harassment, the fact Plaintiff told co-workers he had planned to retire at age 62.5 in order to begin collecting social security benefits, this was likely a very factor in the jury's demand of his claim.

Reminder: Federal Pregnancy and Nursing Legislation Now Effective

In our last newsletter, we reported on two new laws protecting pregnant and nursing employees: the Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protections (or PUMP) for Nursing Mothers Act. The PUMP Act became effective immediately and the PWFA became effective on June 27, 2023. Below are overviews and reminders of the new laws.

THE PWFA

The PWFA requires employers with 15 or more employees to engage in an interactive process to determine temporary reasonable workplace accommodations for pregnant applicants and employees with conditions related to pregnancy and/or childbirth, and to provide such accommodations without imposing an undue hardship. Many of the definitions included in the PWFA are borrowed from Title VII and the ADA such as "covered entities," "reasonable accommodation," "undue hardship," and "qualified individual."

The PWFA makes it an unlawful employment practice to:

- Fail to make reasonable accommodations to known limitations related to pregnancy, childbirth, or related medical conditions of a qualified employee, absent undue hardship;
- Require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation not arrived at through an interactive process;
- Require a qualified employee to take a paid or unpaid leave of absence if another reasonable accommodation can be provided; and
- Take any adverse employment action, including denial of employment or employment opportunities, because an employee requests or uses a reasonable accommodation provided under the PWFA.

Retalliation Prohibited: The PWFA also prohibits retaliation against employees who oppose unlawful conduct or who file a charge, testify, assist, or participate in any manner in an investigation, proceeding or hearing regarding a PWFA violation. It also prohibits coercion, intimidation, threats, or interference directed toward individuals who exercise their rights under the PWFA or who aid or encourage others in the exercise of such rights.

Remedies:
Available remedies under the PWFA are the same as those provided under Title VII, including reinstatement, back pay, front pay, compensatory damages, punitive damages, and recovery of attorneys' fees and costs.

EEOC Enforcement: The PWFA requires the EEOC to issue regulations within one year of the law's enactment and directs that the regulations include examples of reasonable accommodations.

THE PUMP ACT

The PUMP Act amends the Fair Labor Standards Act (FLSA) by requiring employers to provide all employees (exempt and non-exempt) with reasonable break time and a private location other than a restroom in which to express breast milk. It became immediately effective upon signing.

Previously, under the 2010 amendment to the FLSA, these protections were only available to non-exempt employees and exempted employers with fewer than 50 employees if the employer was able to prove that doing so would present an undue hardship in terms of expense or other difficulties because of the employer's size, resources, nature, or business structure. This exemption remains available under the PUMP Act as well as additional exemptions for air carrier crew members, rail carrier crew members, and motor coach operators.

Remedies for non-compliance are the same as those available under the FLSA, including payment of unpaid wages, reinstatement, back pay, front pay, and liquidated damages.

Practice Tip:

Employers should review their current policies and procedures to ensure they are in compliance with these new laws. Employers in Illinois are already subject to an existing pregnancy accommodation law so may already be compliant with the PWFA.

NLRB Revises Standard for Independent Contractor Test

The National Labor Relations Board (NLRB) recently revised the standard it will use to determine whether a worker is an employee or independent contractor under the National Labor Relations Act (NLRA). In its decision in *Atlanta Opera,* Case 10– RC–276292 (June 13, 2023), the NLRB overruled a 2019 decision in which the framework to evaluate a worker's independence focused on entrepreneurial opportunity. The revised standard returns to a traditional common law test, which contemplates several factors to be weighed equally.

The common law factors include the extent of control

exercised by the employer, the opportunity for profit or loss, the investment in equipment or materials, the skill required, the permanence of the working relationship, and the degree of integration into the employer's business. Additionally, the Board will consider whether the employer has effectively imposed constraints on a worker's ability to render services as part of an independent business (such as by limiting the worker's ability to work for other companies and restricting his or her control over important business decisions).

Practice Tip:
The NLRB's revised standard to determine whether a worker is an employee or an independent contractor may ultimately result in more workers being considered employees under the NRLA. Employers should review their classification practices and evaluate the nature of their working relationships in light of this new decision

SCOTUS Rules Businesses May Deny Services Based on Free Speech Rights

On June 30, 2023, the Supreme Court issued its decision in *303 Creative, LLC v. Elenis* (No. 21-436) (6/30/2023) in which it held that the First Amendment precludes the State of Colorado from requiring a business owner who creates websites to create websites that convey messages about marriage with which she disagrees.

Several years ago, the owner of 303 Creative, a website design company, brought a lawsuit to challenge the Colorado Anti-Discrimination Act (CADA), which prohibits discrimination by a place of public accommodation. She claimed that enforcing the law against her company in the context of creating wedding websites for anything other than a marriage between one man and one woman would violate her First Amendment rights to free speech and free exercise of religion. CADA prohibits places of public accommodation from refusing services to a person based on their sexual orientation. Both the trial court and the Tenth Circuit Court of Appeals denied her claim.

The Supreme Court granted review only on the question of whether the enforcement of CADA violated the free speech clause of the First Amendment.

In a 6-3 decision, the Supreme Court reversed the Tenth Circuit, holding the First Amendment prohibits Colorado from forcing the owner to create expressive designs that would violate her free speech rights. It found that CADA compelled speech in that it forced the owner to express herself in a manner inconsistent with her religious beliefs in that it would have required the business owner to express her support of same-sex marriage by creating a wedding website for same-sex couples.

Practice Tip:
This decision does not change or undermine an employer's obligations to prohibit discrimination and harassment against employees. Nor does this decision change the fact that the First Amendment does not apply to employees of private employers. But, private employers are legally obligated to provide religious accommodations under certain circumstances. We anticipate that there may be an uptick in cases against places of public accommodations for the denial of goods and services based on protected characteristics and/or for religious discrimination against private employers based on this decision and what employees may interpret as their rights in the workplace.

EEOC Honors Pride Month

June is Pride Month, a celebration to honor the contributions of LGBTQI+ persons. This month also marks the third anniversary of the Supreme Court's landmark decision in Bostock v. Clayton County, which affirmed that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sexual orientation or gender identity.

The EEOC issued a statement in honor of Pride Month in which it confirmed its commitment to education and outreach about the Bostock decision and using its enforcement authorities to remedy unlawful discrimination in any aspect of employment. The EEOC noted it recovered approximately $8.7 million during the 2022 fiscal year in cases involving an allegation of sexual orientation or gender identity discrimination.

More recently, in the first half of 2023, the EEOC filed four new lawsuits seeking relief for individuals who were discriminated against because of their sexual orientation or gender identity. It is clear discrimination based on sexual orientation and gender identity will continue to be a high priority on the EEOC's agenda going forward.

Practice Tip:
Both federal and many state laws, including Illinois, prohibit discrimination on the basis of sexual orientation and gender identity. Employers should review their policies and practices to strictly prohibit discriminatory practices against workers who identify as part of the LGBTQI+ community.

Illinois Appellate Court Rules Pre-Judgment Interest Amendment is Constitutional

The Cook County Illinois Circuit Court ruled that the 2021 statutory amendment allowing for pre-judgment interest to be applied in personal injury lawsuits was unconstitutional. On June 9, 2023, the Illinois Appellate Court First District weighed

in and reversed the trial court and ruled that the statute is, in fact, constitutional. See *Cotton v. Coccaro*, 122-0788 (June 9, 2023), (IL. 1st District). The court rejected all arguments raised by the defendants and held that the amendment was not unconstitutional. The court made the following determinations regarding the six arguments raised by the defendants.

The amendment to 735 ILCS 5/2-1303(c) directs trial courts to award plaintiff's pre-judgment interest at a rate of 6% per annum dating back to the date the lawsuit was filed under certain circumstances. Notably, pre-judgment interest is awarded on the amount that the verdict exceeds the highest settlement offer made by a defendant or defendants within one year of the lawsuit being filed.

1. Right to Jury Trial.

Initially, defendants argued that the imposition of pre-judgment interest violated defendants' right to a jury trial. The appellate court held that while juries are charged with the function of determining liability and damages, pre-judgment interest is not a component of tort damages. In fact, pre-judgment interest has no relationship to the injury at all. The concept of awarding interest is to compensate for the delay in a plaintiff being able to recover compensation for those injuries.

2. Due Process.

The defendants also argued that the imposition of pre-judgment interest amounted to a double recovery for a single injury because under the Illinois Pattern Jury Instructions, juries already assess time value for a plaintiff's injuries because they consider the nature, duration, and extent of the injury.

In response, the appellate court held that the pre-judgment interest statute does not impinge on the fundamental right to trial by jury. It is constitutional and not violative of the due process clause because the purpose for the statute is rationally related to promoting legitimate state interests. Interestingly, the court acknowledged that pre-judgment interest applies to future damages and that juries already adjust their awards for future damages to present cash value. To this end, the court held that the application of pre-judgment interest to future damages is illogical. However, the court held that it is up to the General Assembly, and not the courts, to refine that illogical application of the statute.

3. Special Legislation.

Defendants further argued that by focusing on the award of pre-judgment interest solely to personal injury lawsuits the statute amounted to special legislation. Again, in response, the appellate court held as long as there is a rational basis for the statute that tethers it to a legitimate governmental interest, it is not unconstitutional. In this regard, the court held that the statute promotes settlement and, in turn, eases the burden on court dockets. Both are legitimate state goals. Because personal injury lawsuits make up a large portion of court dockets, it was entirely reasonable for the General Assembly to focus its reform on just personal injury lawsuits.

4. Separation of Powers.

Defendants argued that the statute amounted to the legislature stepping into the factual question of damages, a role clearly belonging to the judiciary. The appellate court wasted no time in pointing out that the General Assembly always has the authority to determine when or how interest is applied in judicial proceedings. Again, there is a notable difference in the determination of damages and the application of interest to any judgment for those damages.

5. Three Readings Requirement.

Under Illinois law, all bills must be read into the record on three different days in each house of the General Assembly. The Defendants pointed out that this had not been done on this case.

Certainly, the procedural deficiency raises legitimate concerns. However, the appellate court noted that once a bill is passed, compliance with procedural requirements of passage are presumed and certification of a bill is not subject to judicial review. In short, the appellate court essentially ruled that once a bill is passed, there is no remedy for violation of the three readings requirement.

6. Retroactive Application.

Defendants argued that, by applying pre-judgment interest to pending lawsuits, the General Assembly was retroactively modifying the rights of defendants.

Here again, the court relied on the fact that protection against pre-judgment interest is not a vested right and held that the General Assembly may apply any law retroactively as long as it does not unconstitutionally interfere with a vested right. The court also noted that the amendment had a built-in window for existing claims under which defendants would have one year from the effective date of the amendment in which to make the predicate settlement offer which would be the benchmark for application of pre-judgment interest.

Practice Tip:

This statute applies to actions brought to recover damages for personal injury or wrongful death resulting from or occasioned by the conduct of any other person or entity, whether by negligence, willful and wanton misconduct, intentional conduct, or strict liability of the other person or entity. Though the statute would not apply to claims (in either state court or federal court) for wages, discrimination, retaliatory discharge, or other traditional labor and employment claims, the statute would apply to sexual assault and intentional infliction of emotional distress claims arising out of employment setting.

Given the tremendous impact that the pre-judgment interest statute will have on pending and future tort claims, there should be no doubt that Illinois Supreme Court will accept the case for further review. However, readers should be cognizant of the fact that in the last general election, two new justices who were financially backed by Democratic Governor Pritzker obtained seats on the high court. The addition of these two liberal jurists will make success in any further challenge to the statute very difficult.

Firm **News**

Jessica Jackler Secures Lack of Substantial Evidence Finding Before IDHR

Jessica Jackler successfully secured a "lack of substantial evidence" finding before the IDHR against a tenant who filed a housing discrimination claim alleging disability discrimination, failure to accommodate and retaliation against a place of public accommodation. The IDHR found insufficient evidence to support the claims and dismissed the charge after Jessica submitted a detailed position statement outlining the employer's legitimate, non-discriminatory defenses to the charge as well as her successful defense provided to the defendant during the IDHR's thorough investigation process including witness interviews and record production.

ACS Selects NIU Chapter President Felix L. Mitchell As 2023 class of Next Generation Leaders (NGL)

We are pleased to announce that our law clerk Felix L. Mitchell has been selected by the American Constitution Society (ACS) as its 2023 class of Next Generation Leaders(NGL).

NGLs are recent and forthcoming law school graduates who have demonstrated special leadership in their work with ACS's student chapters, and who have the interest, skills, and ability to remain vital members of the ACS community for years to come. As an ACS NGL, Felix plans to spearhead the development of the BIPOC law student pipeline, voter rights initiatives, and reproductive rights protections.

Felix graduated from Northern Illinois University College of Law this past May.

Margery Newman & Samuel Levine To Be Recognized At ISBA Awards Recognition Reception

We are proud to announce that Income Member Margery Newman and Of Counsel Samuel Levine will be recognized at the Illinois State Bar Association Member Appreciation and Recognition Reception!

Income Member Margery Newman will receive the 2021-2022 ISBA Newsletter Editor Service Award for five years of service as Editor of the Construction Law newsletter.

Samuel will receive the 2021-2022 ISBA CLE Distinguished Service Award. Congratulations on your well-deserved recognition!

Management & Professional Liability Alliance™

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We are a proud co-originating firm of the Management & Professional Liability Alliance (MPLA) which consists of independent law firms which share a commitment to excellence, affordable representation, and integrity in the representation of management and professionals.

The independent law firms of MPLA have extensive experience in handling all types of defense litigation including employment and all professional lines. MPLA firms practice in multiple states including Illinois, Indiana, and Wisconsin amongst several others.

They offer complimentary webinars and actively participate in regional and national conferences. For more information, please contact Storrs Downey and visit the website at https://www.mplalliance.org/.

Cutting Edge Continuing Legal Education

If you would like us to come to you for a free seminar, Click here or email Storrs Downey.

Our attorneys provide free seminars on a wide range of general liability topics regularly. We speak to individuals and companies of all sizes. Some national conferences that we've presented at are:

- American Conference Institute's National Conference on Employment Practices Liability Insurance
- Claims and Litigation Management Alliance Annual Conference
- CLM Retail, Restaurant & Hospitality Committee Mini-Conference
- Employment Practices Liability Insurance ExecuSummit
- National Workers' Compensation and Disability Conference & Expo
- National Workers' Compensation & Disability Conference
- RIMS Annual Conference

If you would like a copy of our other prior webinars, please Email us at mkt@dl-firm.com.

Newsletter Contributors

Storrs Downey, Jessica Jackler and Ryan Danahey contributed to this newsletter.

View more information on our **Labor & Employment practice.**

Our other practices Include:

- Appellate Law
- Business Law
- Condominium Law
- Construction Law
- Entertainment Law
- General Liability
- Healthcare Law
- Insurance Law
- Intellectual Property
- Products Liability
- Professional Liability
- Real Estate
- Transportation Law
- Workers' Compensation

Upcoming **Events**

Ryan A. Danahey will present "Defending a Failure to Procure Claim - The Best Offense," at the Professional Liability Defense Federation (PLDF) Annual Meeting in Denver, Co.
For more information or to register, **click here**.

Who We Are

Downey & Lenkov LLC is a full-service law firm with offices in Illinois and Indiana. Our expertise spans across several practice areas, providing transactional, regulatory and business solutions for clients across the nation. The firm's continued growth is a result of an aggressive, results-oriented approach. Unlike larger law firms however, we do not face massive overhead and are able to charge more reasonable rates that both small and larger employers can more readily afford.

We evolve with our clients, representing Fortune 500 and small companies alike in all types of disputes. Downey & Lenkov is a team of experienced, proactive and conscientious attorneys that have been named Leading Lawyers, Super Lawyers, Rising Stars and AV Preeminent

Offices located in:

- **Chicago, IL**
- **Crown Point, IN**
- **Indianapolis, IN**
- **Milwaukee, WL**

Downey & Lenkov LLC