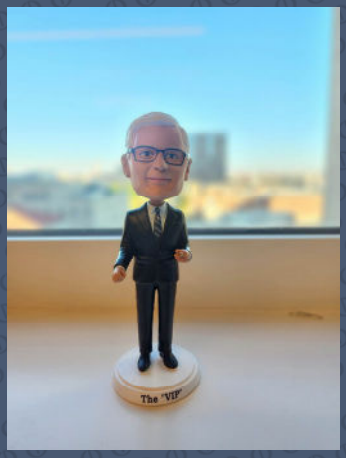
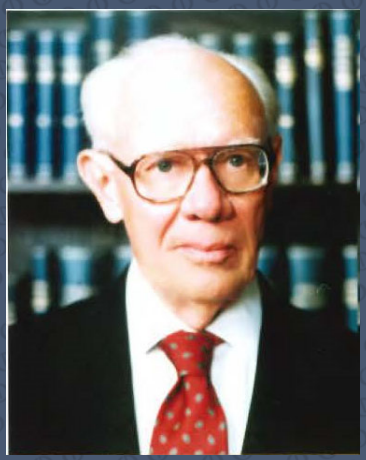
Adam W. Childers

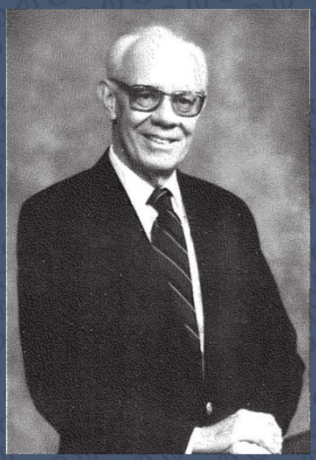
- President and CEO of Crowe & Dunlevy
- Chair of the Labor & Employment Practice Group
- Trial lawyer and litigator in the firm's Oklahoma City office
- *Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Adam W. Childers, or another licensed attorney.

TEAM: THE CROWES



TEAM: THE DUNLEVYS





Tales from the HR Crypt– "How to Work With Me"

Focus Periods

"I work best with structured schedules. I have certain periods during the day when I am most focused and productive—typically early mornings from 8am-11:30am. Please try to schedule meetings outside these focus periods if possible."

Case No. 1 - The Facts:

- Sergeant Muldrow, initially assigned to the Intelligence Division where she worked on various high-profile cases and was deputized by the FBI, was transferred to the Fifth District by Interim Police Commissioner Lawrence O'Toole's appointee, Captain Deeba.
- This change led to a different work schedule, responsibilities, and loss of special FBI-related privileges including a potential $17,500 in annual overtime pay.
- After her transfer, Sergeant Muldrow was asked to return FBI-issued equipment, which she did, and her Task Force Officer status was revoked.
- She filed a sex (gender) discrimination charge with the Missouri Commission on Human Rights against the City of St. Louis and Captain Deeba, later filing an action in Missouri state court alleging Title VII violations. A lower court tossed out the case, saying she didn't suffer any significant harm to be able to bring the suit.

Question for the Team Captains:

Is it enough harm to have your schedule changed and your job duties changed to bring a Title VII discrimination claim?

THE OUTCOME: Employees Don't Need to Show 'Significant' Harm for Title VII Claims

Muldrow v. City of St. Louis (U.S. Supreme Court, April 17, 2024)

- Justin Kagan and four other SCOTUS justices – "Nothing in Title VII's text requires a transferred employee to show that the harm they suffered was 'significant.' Rather, as long as the transfer left the employee worse off in some way with respect to their employment terms or conditions, and was made because of a protected characteristic like sex or race, it violates Title VII's prohibition on discrimination."
- "There is no basis for reading a heightened 'significant harm' standard into the statute. Title VII targets employment practices that treat a person worse because of a protected trait, without distinguishing between significant and less significant harms."
- "While concerns about frivolous lawsuits are valid, courts have other ways to dismiss meritless claims without imposing an extra-textual 'significant harm' requirement."

Tales from the HR Crypt– "How to Work with Me" Continued….

Learning

My learning style is unique and differs depending on the task. This often means a use of written, visual aides, and or recordings to assist. At times this may require a slower pace than usual depending on the complexity. It is preferred to not stand over or have someone too close to my personal space due to potential triggers and boundaries

Case No. 2 – The Facts:

- Eric Jones, a twenty-four year employee of the Georgia Ports Authority (GPA) and a U.S. Army veteran with PTSD, took leave under the FMLA.
- Jones requested the leave because he felt his immediate supervisor had created a stressful environment, exacerbating Jones' PTSD symptoms. After twice extending his leave, Jones sought to return to work and secure a transfer to a less stressful work area.
- The GPA policy required that an employee seeking to return from leave lasting longer than three days provide GPA with a signed doctor's note indicating that it was safe for the employee to return to work.
- The RTW Jones submitted stated that Jones "'report[ed]' he was able to return to work, and noted Jones needed to continue his psychiatric follow-up appointments and to attend individual or group therapy."

THE FACTS (cont'd):

- Although the letter was written on letterhead of the U.S. Department of Veterans Affairs and contained his doctor's contact information, Jones's doctor "did not sign the letter—electronically or otherwise."
- Additionally, before his RTW date, Jones was scheduled to meet with GPA's physician. Jones appeared for his scheduled appointment, but he was told that the physician had an unexpected emergency and could not see him that day. Jones' appointment was rescheduled for the following week, but it was also canceled
- After review, GPA deemed Jones' RTW letter deficient, citing a lack of signature and clarity regarding his readiness to return.
- GPA terminated Jones's employment citing the deficiency of his RTW letter. While GPA acknowledged that it "could have attempted to verify the RTW letter, such as by reaching out" to Jones' doctor, GPA "generally did not make attempts to verify letters that did not initially meet its policy requirements."

THE FACTS (cont'd):

- On the same day of Jones' discharge, GPA's executive director emailed Jones' supervisor "to ask what was 'wrong' with Jones, and [Jones' supervisor] responded that Jones suffered from '[a]n illness that only [Jones knew] about.'
- The employee alleges disability discrimination based on wrongful discharge and failure to fully accommodate.

Question for the Team Captains:

Is the employer in the clear based on the unsigned status of the RTW note, or has the employee substantially complied such that the discharge was unlawful?

THE OUTCOME: Consistent Paperwork and Documentation Wins the Day!

Jones v. Georgia Ports Authority (11th Cir., Feb. 7, 2024)

- The 11th Circuit focused not on whether Jones' termination of employment was "prudent or fair" but on whether unlawful discriminatory intent had influenced the decision.
- The court emphasized that employers may discharge employees "for a good or bad reason, or for no reason at all, so long as that reason was not rooted in discrimination." Notably, the court stated that "an employer's honest belief that an employee violated employer policy, even if such belief was wrong, may constitute a legitimate, nondiscriminatory reason for termination."
- In response to Jones' supervisor's email, which indicated that Jones was ill with a condition known only to Jones himself, and which Jones interpreted as evidence of his supervisor's "negative feelings" about his PTSD diagnosis, the court determined that even if his supervisor did harbor such feelings, there was no evidence implicating his supervisor in deciding to discharge Jones.

Tales from the HR Crypt – "How to Work With Me" Continued....

Environment

- Workspace Preferences: I work best in a quiet, organized environment. If possible, please avoid unnecessary disruptions. This includes random pop ins that can sometimes startle me. If needing to meet with me, please try to arrange a meeting.
- Sensory: Constant beeping and or beeping can be very distracting for me—as such notifications from sources outside of email can make it difficult for me at times. At times I may silence and or remove those distractions from my sight which may cause a delay in response. Please note the best way to reach me is through email.
- Safe Space: A predictable and safe workspace is important for my mental well-being. If I need to step away for a moment to manage anxiety, your understanding is greatly appreciated.

Case No. 3 – The Facts

- Within one day of being diagnosed with breast cancer, bakery employee Mary Ellen Yanick broke the news to her assistant store manager, who then relayed the diagnosis to the store manager.
- Following a series of meetings about Yanick's unsatisfactory job performance, Yanick began medical leave to undergo surgery. Almost four months later, Yanick returned to work without any restrictions.
- However, one week later, the store manager met with Yanick to again discuss her unsatisfactory job performance. At this time, Yanick stated that she "was struggling" and needed "some time to get back to normal," and that she had worked fifty-three hours the previous week, which was "hard for [her] physically." Yanick eventually stepped down from her position and ultimately ended up working in a position with lower pay and less authority.

Question for Team Captains

Are the words used by this employee enough to require an ADA dialogue?

THE OUTCOME: The Employee said Just Enough to Spark Legal Action by the Employer

Yanick v. The Kroger Co. (6th Cir., April 29, 2024)

- Yanick filed a lawsuit alleging claims under the ADA for disability discrimination, failure to accommodate, and retaliation. The district court held that none of Yanick's claims survived summary judgment, but the Sixth Circuit reversed on the claim for failure to accommodate.
- The Sixth Circuit found that although Yanick had returned to work without restrictions, once she explained she was struggling physically, and, due to the close temporal proximity to her return from medical leave, the employer had been sufficiently informed of lingering issues from her disability, putting it on notice that Yanick required modifications to her job.
- The Sixth Circuit noted that although Yanick's comments were "no model for how to make an accommodation request," given their "context," they "provide[d] just enough information … to raise a triable issue" for a jury that she had made a request. Further, if the employer believed Yanick's issues to be disingenuous, it could have asked Yanick for medical documentation, but it did not.

Tales from the HR Crypt– "How to Work With Me" Continued....

Meetings

- Preparation: I prefer to have an agenda in advance to prepare for meetings. This helps me contribute more effectively.
- Participation: I may take a moment to process information before responding. If I am quieter in meetings, it's not due to a lack of engagement—I'm simply processing the information.
- Follow-Up: A summary or action points after meetings is greatly appreciated to help me stay on track.

Case No. 4 – The Facts

- Employer, which maintained drug-free workplace policies, discharged Alyssa Bartolotta, a preschool teaching assistant with epilepsy following an investigation into her potential impairment on the job.
- Bartolotta, who has suffered from epilepsy her entire life, did not inform the facility of her condition when she was hired, nor did she disclose her medical marijuana card. Due to her condition, she has "on average, one 'bad' seizure a month," which the facility learned after she experienced her first seizure on the job.
- After an incident in which the teacher called a student by the wrong name and admitted to another employee that it was due to her still feeling the effects of her medical marijuana, the facility opened an investigation. During the investigation the teaching assistant informed the facility that she had a prescription for medical marijuana and presented her medical marijuana card.
- One employee stated that she had "observed the plaintiff 'to be forgetful, droopy, and unsteady on her feet,'" and another employee said that the teacher had confided in him that she used medical marijuana.

Question for Team Captains:

Do we have enough to terminate in Oklahoma? (even without telltale Cheeto stains?!?)

THE OUTCOME: The Termination Stands Under Connecticut Medical Marijuana Law

Bartolotta v. Human Resources Agency of New Britain, Inc. (Conn. App. Ct., March 19, 2024)

- The appellate court rejected arguments that the facility violated the Palliative Use of Marijuana Act, which prohibits employers from discharging or penalizing an employee "solely on the basis of such person's or employee's status as a qualifying" medical marijuana user (very similar to Oklahoma's law).
- The decision found that the reason provided to the teaching assistant for her discharge was her admitted impairment from medical marijuana use while on the job. Further, the appellate court pointed out that the facility never told the teaching assistant that she could not use medical marijuana, but had informed the plaintiff that she could not be impaired while at work due to safety concerns with the children.

THE OUTCOME: The Termination Stands Under Connecticut Medical Marijuana Law (Cont'd)

- Key to the appellate court's decision was the provision in the Palliative Use of Marijuana Act that states "[n]othing in [the law] shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours."
- "The plain import of that provision confirms that, while the palliative use of marijuana is authorized under Connecticut law, employers nonetheless may prohibit qualifying patients from being under its influence in the workplace," the decision stated.

THE OUTCOME: The Termination Stands Under Connecticut Medical Marijuana Law (Cont'd)

- Regarding an accommodation for medical marijuana use, the court found that the teaching assistant never made a clear request for such an accommodation, and even if she had, "it is unclear what—if any—accommodation the defendant could make with respect to the plaintiff's use of medical marijuana short of allowing her to appear impaired in the workplace."
- "To the extent that the plaintiff is suggesting that the defendant should permit her to disregard the directions on her medical marijuana prescription to allow her (1) to use it during the workday or (2) to appear at the facility in an impaired state, she has provided no legal authority that supports that bold proposition," the court said.

Tales from the HR Crypt– "How to Work With Me" Continued....

Social Interactions

I may prefer to limit casual small talk, especially when focused on tasks. However, I'm open to discussions when there's a specific topic to address.

Case No. 5 – The Facts

- In an ongoing case, a job applicant by the name of Derek Mobley has been burned down for more than 100 jobs that he applied for using the platform Workday.
- Mobley alleges that Workday's artificial intelligence-based hiring algorithms discriminated against him (and other applicants) because of his race (African American), his age (over 40) and his anxiety and depression.
- Mobley was turned down for every single job he applied for within hours of his application being made, despite meeting the minimum requirements for every position he applied for.
- Workday argues the company is comparable to a staffing agency, and that Workday designs products that can be configured by individual customers.

Question for the Team Captains:

Will the job-search sites be liable for discriminatory acts just like the employers for whom they are helping identify employees?

THE OUTCOME: Maybe???

Mobley v. Workday, Inc. (U.S.D.C. N.D. of CA, July, 2024)

- In July the court granted in part and denied in part Workday's motion to dismiss.
- Critically, the court found in favor of Mobley on the threshold issue of Workday's potential for liability for discrimination under Title VII, ADA and ADEA, as an agent of an employer.
- On the substantive claims, the court held that Mobley sufficiently alleged the elements of a disparate impact claim, but it dismissed the intentional race, age, and disability discrimination claims.

THE OUTCOME: Maybe??? (Cont'd)

- Takeaway - employers should ask vendors how their algorithms are created and what they are specifically doing in the background.
  - Ask if the vendor holds routine audits and what happens if there are discriminatory outcomes.
  - Employers may be on the hook (too) if proactive steps like these are not taken to ensure fairness.

Contact
Adam W. Childers
405.235.7741
adam.childers@crowedunlevy.com
crowedunlevy.com

Oklahoma City
Braniff Building
324 North Robinson Ave.
405.235.7700

Tulsa
222 N. Detroit Ave.
Suite 600
918.592.9800

Dallas
2525 McKinnon Street
Suite 425
214.420.2163

Houston
3663 N. Sam Houston
Parkway East, Suite 628

To sign up for Crowe & Dunlevy news, legal updates and seminars, please visit crowedunlevy.com/subscribe