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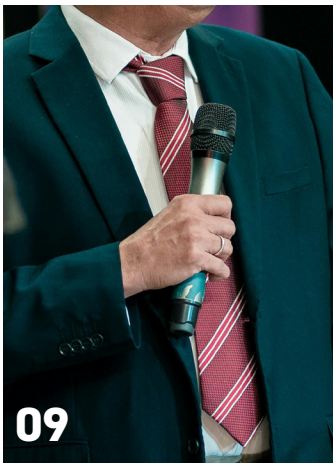

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AI IN THE WORKPLACE: CHALLENGES AND SOLUTIONS FOR HIRING PRACTICES

By Maria Alfaro, Miami

A January 2024 survey, encompassing 2366 organizations across diverse sectors in the United States, revealed that one in four companies employ artificial intelligence (AI) to bolster its human resources operations.[1] Approximately 64% of AI use is directed toward talent acquisition,[2] and the number of companies utilizing AI is expected to keep growing.[3] While the efficiency of AI in assessing numerous job candidates and offering impartial consideration at lower costs is appealing,[4] key stakeholders in the AI sector are raising concerns about the possibly biased decision-making processes of AI.[5] Accordingly, "several law firms throughout the country are preparing for lawsuits related to AI hiring discrimination," particularly for disparate impact claims.[6]

AI operates by being fed information from its creator.[7] In essence, AI (i) is assigned a task, (ii) is provided with instructions (algorithms) for execution, (iii) is taught how to analyze its performance, and (iv) refines its execution through experience.[8] The primary AI tools used in recruiting are personality tests, video interviewing, and resume screening.

AI personality tests evaluate an applicant's skills or characteristics using "disagree," "agree," "neutral," and similar answers.[9] The test's criteria "must be sufficiently related to an employer's legitimate interests in 'job-specific' ability."[10] However, the concern is that these tests are generally subjective and unrelated to job performance because they "assign numerical values to qualitative characteristics,"[11] which could have a "disparate impact on individuals who may be qualified for the job, but do not 'fit into' the preferred cultural characteristics an employer [or developer] has fed into [the] program."[12]

AI video interviewing assesses applicants' voice tone and non-verbal cues during video interviews.[13] An applicant's responses are evaluated against model answers from current successful employees.[14] However, concerns have been raised that some AI software factors in skin tone when using facial analysis and accented speech when using voice recognition, which could expose the employer to potential national origin-based or race-based discrimination allegations.[15]

AI resume screening examines resumes, suggesting the order in which candidates should be ranked for further consideration.[16] This ranking is based on the AI tool's determination of how closely applicants match the job qualifications.[17] However, an audit of one company's AI resume screening tool showed that two of the criteria indicative of strong job performance were applicants named "Jared" and playing "high school lacrosse."[18] "As for a business necessity defense, it would be difficult for an employer to argue that being named 'Jared' or playing 'high school lacrosse' are necessary for a successful business."[19]

In May of 2022 and 2023, the Equal Employment Opportunity Commission (EEOC or Commission) released technical assistance documents discussing how existing ADA and Title VII requirements may apply to AI use in employment decision-making, assessing AI recruiting tools' potential adverse impact risk, and offering best practices to help with compliance when utilizing AI employment decision mechanisms.[20] The EEOC warned that "without proper safeguards," AI may violate civil rights laws.[21]

The EEOC's ADA technical assistance document identified the following practices as the most common ways an employer's AI decision tools could violate the ADA: (i) failing to provide reasonable accommodations necessary for applicants to be fairly and accurately rated; (ii) relying on AI tools that intentionally or unintentionally "screen out" or underscore applicants with a disability who could perform the job with a reasonable accommodation; or (iii) adopting AI tools that

pose disability-related inquiries and seek medical examinations (asking about physical or mental impairments) before giving a conditional offer of employment.[22] For example, AI resume screening tools might reject applicants with a disability because of employment gaps caused by their disability; AI video interviewing software might reject or under score candidates who have speech impediments; and AI personality tests might discriminate against applicants with depression disorder if the tests include questions about optimism.[23]

The EEOC suggested the following practices to avoid ADA liability: (i) assess whether a disability might make a test more difficult or reduce its accuracy; (ii) clearly indicate and offer alternative testing formats or accommodations; (iii) disclose which traits the test measures and the disabilities that might lower such assessment; and (iv) ask AI vendors whether the test/tool was developed considering individuals with disabilities.[24] The EEOC emphasizes employing tools that assess only necessary job-relevant qualifications and avoiding tests that rate abilities by predicting or making inferences between applicants' personalities and the stereotypically successful candidate.[25]

The EEOC's Title VII/Adverse Impact technical assistance document focuses on tests that employ seemingly neutral selection procedures but disproportionately exclude applicants based on protected classes. This document indicates that the following measures could help employers avoid Title VII liability: (i) asking AI vendors about their assessment of whether their AI tools disproportionately screen out individuals based on Title VII-protected characteristics; (ii) conducting periodic self-assessments to learn whether employment practices unduly or disproportionally impact protected groups; and (iii) ensuring that the use of AI recruiting tools is job related and consistent with business necessity.[26]

In December 2023, EEOC Commissioner Keith Sonderling discussed the impact of AI on the EEOC's enforcement scope.[27] Before AI, the EEOC primarily oversaw employers, employees, unions, and staffing agencies.[28] After AI, its purview expanded to venture capitalists and investors interested in workplace AI investments, computer programmers and entrepreneurs developing these technologies, companies utilizing AI in employment decisions, and employees affected by such technology.[29] This approach aligns with the EEOC's current guidelines, in which the Commission has taken the position that employers could be liable for discriminatory AI recruiting practices even if the tool was developed by third-party vendors.[30] Moreover, employers may be accountable for the actions of their agents—including software vendors—if authorized to act on the employer's behalf.[31]

Against this backdrop, the EEOC has increased its AI enforcement efforts. In May 2023, the EEOC mandated training for all its staff members to be able to recognize and correct discrimination caused by AI systems in the workplace.[32] In August 2023, the EEOC settled its "first-ever"[33] AI age-based failure-to-hire lawsuit in the Eastern District of New York against iTutorGroup, Inc., a China-based online tutoring company.[34] iTutorGroup paid $365,000 to a class of more than 200 applicants over 55 years old who were allegedly rejected because of age.[35] In March 2024, employers in Alabama began receiving requests for production asking for the (i) dates and purpose of AI use; (ii) entities (employers or vendors) responsible for the AI system's maintenance; (iii) identities and role description of individuals involved in

the AI system's creation, supervision, maintenance, or management on the employer's behalf; (iv) service contracts with AI vendors; (v) identities of individuals responsible for AI tool oversight on behalf of the vendor; (vi) decisions made based on AI tools, specifying the dates and decision-makers; and (vii) all AI training materials developed by the employer or AI vendor. As implied by these requests, liability can extend beyond the employer. AI software developers could also face liability for the decisions of their AI tools, as demonstrated by a recent ruling in *Mobley v. Workday, Inc.* out of the Northern District of California.[36] *Mobley* involves a claim for employment discrimination based on race, age, and disability against an AI developer for allegedly "provid[ing] companies with algorithm-based applicant screening tools that discriminated against . . . similarly situated job applicants."[37] On January 19, 2024, the *Mobley* court granted the defendant's motion to dismiss the complaint but also granted the plaintiff leave to amend.[38] The court explained that the plaintiff had not alleged enough facts to "state a plausible claim that Workday is liable as an employment agency"; particularly, the plaintiff did not allege that the defendant *procured* employees for employers.[39] However, the plaintiff was granted leave to amend the complaint to fix deficiencies, plead additional facts, and add the legal theories of "indirect employer" and "agent" as additional bases for the defendant's liability.[40] While this case arose out of the Northern District of California, it warrants close observation by all practitioners as it could signify the onset of a broader trend nationwide.

Despite the risk of unconscious bias, it seems clear employers will continue adopting AI tools because of their efficacy in streamlining hiring practices. But as AI reliance increases, federal agencies and states are poised to heighten AI regulation. The EEOC's guidelines serve as a starting point for employers and AI vendors to comply with anti-discrimination laws. A key takeaway is the critical need to implement proactive and periodic audits—by vendors or by employers themselves—to ensure the technology is transparent and accountable and that deviations are promptly rectified. AI tools are not perfect, but echoing sentiments from scholars[41] and several AI stakeholders,[42] such as the CEO of AI vendor HiredScore, these shortcomings are preventable, and audits can ensure the development of properly designed AI tools, benefiting employers and applicants through a "fair and more equitable hiring process."[43]

Employers, as well as labor and employment practitioners, are urged to become familiar with AI mechanics, not solely to support vendors in crafting anti-discrimination-compliant AI tools, but also to require such compliance to reduce liability.

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Endnotes

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EMPLOYMENT SWATTING: NEW DIMENSIONS TO AN OLD EMPLOYMENT PROBLEM

By Aaron Tandy, Miami

In recent years, news accounts of "swatting"—making a false report to law enforcement to engender an emergency services response (often by a SWAT team) directed to a particular address or particular individual—have become commonplace.[1] While prank phone calls have always existed with the widespread use of the telephone, technological advances such as artificial intelligence (AI) have resulted in this practice becoming more sophisticated and more dangerous, leading to serious repercussions for the victims of the hoax, who often don't know they are being targeted.[2]

"Employment swatting" is also on the rise. Employment swatting can be defined as making false accusations against a co-worker or another person (sometimes at another company) for some type of employment-related malfeasance—harassment, theft, an undisclosed romantic relationship—usually to cause a workplace investigation or harm the reputation of that co-worker or another individual. Here again, technological advances have enabled this practice to become more sophisticated, including making it technologically possible to falsify e-mails, pictures, videos, or reports. In many cases, the false accusations are made to derail a person's promotion, influence an employer to terminate an employee for a policy infraction, or simply to exact some type of revenge against the target. And again, the targeted employee usually is blindsided by both the accusation and the resulting investigation.

While not a new phenomenon, employment swatting is now receiving more attention. Social media platforms make it easier to "swat" an employee, and employers, for their part, are required to undertake investigations to disprove a negative—that the alleged "conduct" never occurred or that the employee under investigation is being painted in a false light.

Take, for example, this scenario, which is based in part on a real experience. A purported hotel guest, using only an initial as identification, leaves a review on a social media site thanking a waitstaff member by name for providing superior service during a hotel stay and for allowing access to a private club on the property without paying the required cover charge. The review goes on to recommend that other guests seek out the same waitstaff member for similar beneficial treatment, which is a violation of hotel policy. The waitstaff member in question is one of several candidates up for a supervisor position. After the review is published online, the hotel conducts an investigation based upon the review but, be-

cause the review is anonymous and the social media platform refuses to cooperate in disclosing the identity of the reviewer, the only "evidence" of misconduct is the review itself. The waitstaff member in question denies engaging in the alleged conduct but, because there remains a concern, and no way to fully monitor his workplace conduct going forward, the waitstaff member is removed from the position and transferred elsewhere on the property, and someone else is promoted to the supervisor position. Months later, the hotel discovers that the anonymous reviewer was actually a cousin of another employee also seeking the promotion who wanted to help the relative's chances of gaining the position by swatting the perceived competition.

Other real-world experiences abound, and can sometimes lead to criminal charges against the perpetrator, as in the case of the widely reported swatting of Maryland high school Principal Eric Eiswert.[3] After recordings seemingly of Principal Eiswert making racist and discriminatory comments surfaced in January 2024, he was placed on administrative leave and received calls for his resignation and even death threats. He vehemently denied making any of the remarks attributed to him and denied that the recording was even of his real voice, asserting that it appeared to be AI generated. Almost four months passed before, in late April 2024, the high school's athletic director (AD), Dazhon Darien, was arrested on charges of theft, stalking, and disrupting the operations of a school in connection with the deepfake recording of Principal Eiswert—an act designed to divert and sabotage an investigation the Principal had been undertaking to review the AD's performance and unauthorized payments from the school budget, which could have led to his termination. However, even after the AD's arrest, the damage done to Principal Eiswert's reputation may be difficult to overcome, as it is unclear whether he will be allowed to regain his former administrative role. Even if reinstated, he will still have to deal with some colleagues who admitted to disseminating the recording because of their personal dislike of the principal.

And this trend is only likely to continue. As Linda Crockett, a workplace psychological safety expert, has noted in her article "Addressing Cases of Malicious Complaints in Professional Settings," accusations against driven leaders for bullying employees are on the rise, with negative repercussions for both the accused and the organizations themselves.[4] Further, one of Justice Clarence Thomas' new law clerks, Crystal Clanton, was allegedly targeted by a former colleague at Turning Point USA, who used fake text messages attributed to Clanton containing racist comments to force her departure from the organization.[5]

In fact, the Equal Employment Opportunity Commission (EEOC or Commission) has noted an increase in charges that contain exaggerations, mischaracterizations, or outright fraudulent statements in recent years, although the Commission's position appears to be that "an individual is protected against retaliation for participating in the charge process [ ] regardless of the validity or reasonableness of the original allegation of discrimination."[6] Professor Lawrence D. Rosenthal, Associate Dean for Academics and Professor of Legal Writing at Northern Kentucky University, noted in his 2021 law review article that there is a split among federal courts in addressing the protections afforded to employees who file false claims or provide false testimony during an EEOC investigation.[7] He advocates the view that public policy favors protecting employees in order to avoid a chill on the filing of legitimate claims.[8]

Several courts have cautioned that, while employers have the right to terminate employees for making false statements during an investigation, employers can avoid a retaliation claim by proceeding cautiously rather than simply dismissing the allegations out of hand; they should undertake the same thorough investigation that they would for legitimate claims in order to provide support and justification for whatever actions the employer ultimately decides to take. Unfortunately, many courts have also determined that employees who are dismissed based on false allegations rarely have an employment claim against their employer under Title VII or other employment statutes or interpreting regulations, although in certain egregious situations they may have a defamation claim depending on how broadly an allegation is distributed within or beyond the company.

Obviously, human resource (HR) departments, HR investigators, and in-house counsel must treat every allegation the same, proceeding methodically during the investigation process to dispel or validate the allegation and to take appropriate disciplinary measures. Nevertheless, given the rise of employment swatting, HR professionals need to keep in mind that the timing of certain types of claims may have more to do with derailing the accused employee's professional development or wasting company resources than with simply bringing alleged misconduct to light.

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Endnotes

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CHAIR'S MESSAGE

Florida Bar members will soon be making their annual decision on whether to renew their section memberships. As my year as Chair of the Labor and Employment Law Section comes to a close, I would reflect on our successes and why L&E Section members should continue to be a part of this great organization and encourage your colleagues to join.

As we are all aware, labor and employment are dynamic areas of the law. As Section members, we are privy to seminars, publications, and other communications that give us an edge as practitioners. This year, in particular, our field has seen a number of changes, ranging from the FTC's recent rule on non-compete agreements, to important decisions in the private sector at the federal level out of the National Labor Relations Board, as well as state legislation impacting the public sector. Section membership ensures that you will continue to have access to resources to help navigate these changes.

Since my last report, we held two successful programs that were particularly noteworthy. First, on March 1st, our Section, along with the Administrative Law Section, hosted a sold-out seminar entitled "Practicing in Front of State Labor and Employment Agencies." The seminar took place at The Florida Bar in Tallahassee and featured speakers from the Florida Commission on Human Relations, the Public Employees Relations Commission, the Reemployment Assistance Appeals Commission, the Division of Administrative Hearings, and the First District Court of Appeal. Moderating practitioners asked questions of agency attorneys and staff about the nuts and bolts of appearing in front of the state agencies and appellate courts. Thank you to seminar Co-Chairs Cristina Velez and Amanda Neff, as well as all our speakers, for putting together such a great event. If you did not have the opportunity to attend, the aftermarket download—and our catalog of other downloadable CLEs that are discounted for our members—are available on The Florida Bar's InReach page at this link. We also have a number of offerings available via DVD and CD on The Florida Bar's website at this link, as well.

Second, in April we held our 2024 Advanced Labor Topics (ALT) program in Asheville, North Carolina, at the historic Omni Grove Park Inn. In addition to hearing from excellent speakers on cutting-edge topics, attendees were able to enjoy scenic views, tours of the Biltmore, sightseeing in downtown Asheville, and a brewery tour. This issue of *The Checkoff* includes a few pictures from the event, and we are already looking forward to next year's ALT. Thank you to Co-Chairs Jim Craig and Alicia Kopeke for putting together such a great program and destination event!

Aside from these seminars, we also finalized changes to our Section bylaws, which are now going before The Florida Bar's Program Evaluation Committee for review and then to the Board of Governors for final approval. Some of the substantive changes were made to encourage greater participation by Section members in committees and leadership. If you are interested in getting more involved, please do not hesitate to reach out! We also have been working on updating our website and have been increasingly active on social media. If you are not currently plugged into the Section's Facebook, X, Instagram, and LinkedIn, check them out!

Finally, our outreach to young lawyers and law students continues to not only grow the Section, but also to provide opportunities for new attorneys to learn more about practicing labor and employment law. In February, L&E Section officers Yvette Everhart and Chelsie Flynn attended the Young Lawyers Division's (YLD) Affiliate Outreach Conference in Orlando to explain the value of Section membership. In March, past chair Zascha Abbott attended the University of Miami's Bar Association Fair to talk with law students about practicing in the area of labor and employment law and the benefits of affiliate membership in the Section. In April, L&E Executive Council member James Poindexter took part in YLD's Virtual Summit and gave a presentation on "Hot Topics in Employment Law: Cannabis and Non-Competes." Finally, we have also partnered with YLD again for a webinar this month that is part of their practice series. Thank you to YLD President Anisha Patel for giving our Section so many great opportunities to work with them this year!

I leave the Section in good hands and look forward to all the accomplishments and improvements they have in store!

Gregg Morton, *Chair*

FOSTERING MENTAL HEALTH IN THE WORKPLACE:

A Win-Win for Employees and Employers

By Suhaill Morales, Miami Lakes

In January 2024, Elmo—the famous red Muppet from *Sesame Street*—posted on X (formerly Twitter) and asked an innocuous question: "How is everybody doing?"[1] Elmo received thousands of responses which, collectively, reflected a general sentiment that people are not doing so well. Given the data, this should not be surprising. According to the National Institute of Mental Health, one in five Americans (57.8 million in 2021) is living with some type of mental health condition, ranging from mild to severe anxiety and depression.[2] That number has increased in recent years due to the COVID pandemic, turbulence in the workplace, global events, and other factors. There are many different types of mental health conditions, such as depression, anxiety, and post-traumatic stress disorder (PTSD),[3] with anxiety being the most frequently reported condition, affecting 42.5 million Americans.[4] Additionally, over half of American workers (57%) experience at least moderate levels of burnout, according to a recent research study by Aflac.[5] Employees increasingly take leave to care for their own mental health and, in fact, managing mental health was cited as the most common reason for taking leave from work.[6]

Legal claims related to mental health conditions are also on the rise. In 2022, more than one-third of all claims filed with the Equal Employment Opportunity Commission (EEOC) included disability-related claims, of which nearly 30% alleged discrimination based on mental health conditions.[7] Over a ten-year period, the percentage of EEOC claims involving a mental disability increased by nearly 20%. By way of example, in fiscal year 2010, the EEOC received 1335 charges that referenced an anxiety disorder, or 5.3% of all charges brought under the Americans with Disabilities Act (ADA).[8] In fiscal year 2022, that number increased to 3,086, or 12.3% of all ADA charges.[9] A similar increase was seen with respect to claims for ADA discrimination involving PTSD.[10]

Employees now prioritize their mental health and want their employers to do the same. The American Psychological Association's 2023 "Work in America" survey revealed that mental health and psychological well-being are now a prime concern for employees.[11] Ninety-two percent of the employees surveyed considered working for an organization that values their emotional and psychological well-being as important.[12] The same percentage said they valued working for an organization that proactively provides support for employee mental health.[13] When employees feel supported by their employer, they are less likely to experience mental health symptoms, and to underperform and miss work, and more likely to feel comfortable discussing their mental health at work, thereby benefiting the overall workplace culture.[14]

Given the complexities of mental health diagnoses, most human resources departments are not equipped to handle employees' mental health issues. Consider, for example, a male employee suffering from clinical depression who calls into work to request a day off. His supervisor is torn: she'd like to accommodate him, but the team project is on a tight deadline. Is the employee legally entitled to the time off? While it depends on the exact circumstances, this employee will likely be entitled to time off under either the ADA or the Family and Medical Leave Act (FMLA). The ADA protects employees from discrimination for depression, PTSD, and other mental health conditions.[15] The ADA also provides for reasonable accommodations for employees' mental health conditions.[16]

Employers and human resources professionals should make it a priority to familiarize themselves with the requirements of the ADA concerning mental health. As a reminder, the ADA applies even during the application and interview process—prospective employers may not discriminate against qualified candidates based on a mental health disability or illness.[17] As long as accommodating the candidate's mental health condition does not place an undue hardship on the organization, employers must accommodate his or her needs.[18] Eligible employees may also be entitled to leave under the FMLA, which allows up to twelve weeks of unpaid time off to deal with a mental health crisis.[19]

In our hypothetical about the male employee with depression, to be entitled to leave, he must notify his employer that he needs time off for a diagnosed mental health condition and needs an accommodation for his depression.[20] Under the law, employees are not required to divulge their mental health conditions except in four specific circumstances.[21] The first is if they have requested a reasonable accommodation. The second is where they are answering a question about mental health that all new hires

are required to answer, after an offer of employment is made but before they begin work. The third has to do with company-wide surveys on affirmative action: for example, if a company is tallying the number of employees with a disability, employees may choose to volunteer that information. The fourth is a situation where an employee discloses a mental health condition that makes it impossible to do his or her job, or would cause a safety risk. Employees may also need to discuss their mental health conditions to establish eligibility under certain laws, such as the FMLA.

In addition to complying with the law, it is incumbent upon employers—both because it's the right thing to do and leads to better employee performance—to proactively and actively engage employees around these topics. Employers should develop a mental health policy that does more than simply check off the box and ensure proper training for managers. It's a matter of reminding employees to utilize paid time off, avail themselves of company benefits, and take a day off if they or their children don't feel well. And employers should strive to make all of these offerings, tools, and programs understandable and accessible.

Of course, providing mental health support poses employment law questions about how mental health days will be allowed and counted. For example, should employers compensate workers for taking mental health days off? Are mental health days included with PTO, or is there a separate allotment? How many days should be afforded for mental health? Given these considerations, employers should make sure their policies are clear and their managers are trained on how to respond to, and communicate with, employees.

There is no question that mental health is going to continue to impact the workplace, and responding to requests for accommodation of mental health conditions is not only a legal obligation but also a strategic investment in employee well-being and organizational success. At a minimum, employers should have adequate policies in place and train their managers and human resources professionals on how to communicate with employees about mental health conditions. By fostering open communication, providing reasonable accommodations, and promoting awareness, employers can create a workplace where individuals feel supported, valued, and empowered to thrive. Embracing mental health accommodation not only benefits individuals but also contributes to a more inclusive and resilient workforce.

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AUTHOR SPOTLIGHT

Maria Alfaro

As an associate attorney at Allen Norton & Blue's Miami office, Maria represents public and private sector employers in various facets of employment and labor law.

Editor's Note: The Author Spotlight highlights exceptional contributions to* The Checkoff. *This issue we focus on a first-time contributor, Maria Alfaro, for her in-depth and timely article on the use of artificial intelligence in hiring.

Maria Alfaro is originally from Venezuela and lived in five Latin American countries before settling in Miami, which is now her home. Maria received her Juris Doctor, *cum laude*, from the University of Miami School of Law and her bachelor's degree in hospitality management and pre-law, *magna cum laude*, from Florida International University.

As an associate attorney at Allen Norton & Blue's Miami office, Maria represents public and private sector employers in various facets of employment and labor law. She has successfully advocated for clients in state, federal, and appellate courts, as well as in arbitration forums and before state and federal administrative agencies.

Before starting her legal career, Maria served as a human resources manager, overseeing a broad spectrum of employment matters including recruitment, performance management, compensation and benefits, EEOC, workers' compensation, and FMLA matters, among others.

Maria's commitment to social justice extends beyond the courtroom. She was part of the University of Miami Law School Human Rights Clinic and participated in the Pro Bono Challenge program, dealing with immigration asylum matters. Maria gained valuable practical experience through internships with the Honorable Judge Peter R. Lopez of the Eleventh Judicial Circuit of Florida, and with the State Attorney's Office for the Eleventh Judicial Circuit as a Certified Legal Intern.

In her community, Maria is an active volunteer, lending her support to organizations like Camillus House, Sisters of Charity, Clean this Beach Up, and Big Brothers Big Sisters. In her free time, Maria enjoys playing board games with a competitive spirit, and watching movies, particularly horror, mystery, and anything Marvel, as she considers herself a Marvel fan. Maria loves trying new restaurants, playing sports such as volleyball and tennis (yes, also pickleball), hiking, traveling, and spending time with friends and family.

Eager to connect and collaborate, Maria welcomes discussions on employment matters and co-authoring articles with fellow employment attorneys. Maria can be reached at malfaro@anblaw.com.

INSIGHTS FROM AN ARBITRATOR:

Advancing Your Client's (and the Arbitrator's) Interests at Final Hearing

By Leslie W. Langbein, Miami Lakes

Introduction

Most attorneys approach an employment arbitration hearing as if it was a bench trial. That mindset is quite helpful in *preparing* the case; however, *presenting* the case requires adjustments in strategy and style. This article explores why practitioners ought to reconsider how they present testimony and evidence at an arbitration hearing to best advance their clients' interests.

Advantages/Disadvantages of Arbitration

Arbitration is valued because of its privacy, the ability to select a neutral trier of fact with subject matter expertise, and the efficiency and finality of the process. Unlike litigation, the parties have significant input into how their case will be administered and tried. Of course, there are drawbacks as well. Arbitrators are granted enormous latitude in the manner in which they conduct hearings and decide discovery disputes. Review by courts is limited: an award will be upheld if it "draws its essence" from the contract and/or the law.[1] And, because the burden of meeting a statutory ground for vacatur is high, arbitration awards generally are deemed final and binding. Thus, a practitioner's primary goal during an arbitration proceeding should be to influence the arbitrator to exercise that broad discretion in the client's favor.

Arbitrator's Frame of Reference

Many aspects of an arbitrator's handling of an arbitration proceeding are influenced by the administering tribunal. For example, the mantra of every American Arbitration Association (AAA) arbitrator is "speed, efficiency and cost containment." The AAA periodically evaluates its arbitrators for their ability to achieve these goals. It therefore stands to reason that arbitrators expect parties who appear before them to cooperate in fulfilling these obligations to the process. Litigators who consciously employ delay and other obstructive tactics to undermine these objectives do little to help their client's case, and such tactics allow arbitrators the opportunity to draw adverse inferences. This is not to say that practitioners cannot and should not vigorously represent their clients' interests when there is a reasonable basis for doing so. Zealous practitioners who are guided by principles of fairness and professionalism generally fare well in arbitration.

Practitioners also should be mindful that most tribunals strive to create and maintain a "sterile" environment for arbitration. Tribunal rules and codes of ethics require arbitrators to fully disclose all actual or potential conflicts of interest with parties, their attorneys, and witnesses in a case. One of the worst "sins" an arbitrator can commit is to conceal or simply fail to disclose a prior relationship that may actually compromise neutrality or create the appearance of non-neutrality. Ex-parte communications between a party and an arbitrator are verboten. Therefore, attempts to curry favor with an arbitrator or to create an impression for the opposing party of a special relationship with the arbitrator are as much unappreciated as a lack of respect.

Preparation for Final Hearing

Keep in mind that arbitrators also function as the "courtroom deputy" at hearing. They must track exhibits, the identity and order of witnesses, evidentiary objections, the dates and times of each session, and their rulings, all while listening to testimony or considering evidence. This record-keeping function can easily divert an arbitrator's attention from the case-in-chief in complex cases, especially when reams of exhibits

are presented in bulky, hard-to-handle notebooks. To make sure an arbitrator has not missed important testimony, consider providing a court reporter to keep the official record of the hearing if the economics of the case permit.

An effective practitioner also will consider preparing and filing a pre-hearing exhibit catalog that contains columns where the arbitrator can simply check off an exhibit's admission into evidence, note the opposing party's objections, and record the arbitrator's ruling. (The same catalog enables the practitioner to keep track of whether exhibits have been introduced into evidence.) A similar list should be presented for witnesses. The date and time that has been arranged for each witness who will testify from a remote location should be designated on the practitioner's witness list.

For the arbitrator, the only thing worse than having one bulky exhibit notebook is having two. If the arbitrator has not directed counsel to confer regarding the possibility of marking joint exhibits, by all means take the initiative. This saves time, cost, and confusion at hearing—a benefit to both sides and the arbitrator. Remember to bring enough copies of all exhibits to furnish to the arbitrator, the witness, opposing counsel, and the court reporter. Also keep a list of contact numbers for all witnesses so that if one witness cannot (or does not) appear at an appointed time, another is available to fill the gap. Avoid "down time" at all costs.

Opening Statements

Unlike juries or judges with large dockets, arbitrators usually have a fairly good grasp of the factual and legal disputes they will decide before a hearing begins. Nevertheless, it is good practice to reinforce in opening statement what an arbitrator already may know.

Given that most pre-hearing interaction in arbitration is conducted via telephone or teleconference, an arbitrator may have no clue who the people are congregated in the hearing room. Opening statement should identify counsel, their clients, and any witnesses present in the room. A good tool to use in opening statement is an organizational chart that ties the identity of participants in the hearing to their role in the case. When called, each witness can be identified on the organizational chart to strengthen the arbitrator's association with the witness's testimony. This will prove valuable later should there be a delay between the hearing and the preparation of the opinion and award.

Also consider preparing a timeline for use as a demonstrative exhibit in opening statement that succinctly highlights the important events in a case and can be referred to by witnesses during their testimony. A timeline also reduces confusion when a practitioner must call some witnesses out of order. Scaled copies of the demonstrative exhibits should be provided to the arbitrator so that the arbitrator can refer to them in preparing the opinion and award.

While a practitioner may wish to use a PowerPoint presentation as a cost-efficient means to illustrate points in opening statement, consideration should be given to the "staying power" of such a presentation, as it is generally viewed only once. Tangible documents that an arbitrator can review during (and after) the hearing are better means of reinforcement. Of course, reliance on electronic devices during arbitration dictates that a practitioner ensure the availability of all necessary equipment prior to hearing.

Finally, opening statement should pinpoint the present claims and defenses that will be heard by the arbitrator, given that they may have been amended or eliminated during case administration. The goal of opening statement should be to provide the arbitrator with a legal basis and a good reason to rule in a party's favor. Dramatic opening statements with denigrating comments about the opposing party or its witnesses are inappropriate in arbitration.

Presentation of Evidence

While the rules of evidence do not govern the admissibility of evidence in arbitration, a practitioner may not simply ignore basics like the need to establish a foundation for documents that will be introduced at hearing. If a chart or summary will be used in your case, ensure the opposing party has an opportunity to review the underlying data pre-hearing. Arbitrators are not keen on losing valuable and costly hearing time to verify the accuracy or authenticity of documents.

Pursuant to Rule 28 of the AAA's Employment Arbitration Rules and Mediation Procedures (AAA Rules),[2] "[t]he parties shall bear the same burdens of proof and

burdens of producing evidence as would apply if their claims and counterclaims had been brought in court." Thus, while there is no change in a claimant's burden to prove a claim by a preponderance of evidence, the quality and forms of evidence that may be introduced before an arbitrator vary dramatically from the rigid standards used in a courtroom.

The standard used by AAA arbitrators in accepting or excluding evidence is described in Rule 30 of the AAA Rules:

> The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute. . . . The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. The arbitrator may in his or her discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any party is absent, in default, or has waived the right to be present.

Two principles generally influence an arbitrator's ruling to admit otherwise inadmissible or less reliable evidence. One is fairness, and the other is fear that the award will be vacated for "refus[al] to hear evidence pertinent and material."[3]Arbitrators balance these considerations by accepting less reliable evidence "for what it is worth." On the other hand, practitioners should not presume that an arbitrator's latitude in accepting less reliable evidence or testimony will overcome the client's burden of proof.

Use of Affidavits

Arbitrators prefer live testimony. It is difficult to judge the credibility of witnesses from transcripts of depositions. Likewise, arbitrators rarely accord much weight to affidavits of witnesses because they are not subject to cross-examination. This is the type of evidence that may be accepted by an arbitrator for "what it's worth." To the extent possible, affidavits should be limited to providing corroborative evidence.

One exception to this rule is the presentation of a party affidavit in place of direct examination, utilized in the following manner: Before the hearing, the practitioner prepares an affidavit that contains all the information to which the client would testify at the hearing to prove the case-in-chief. The affidavit is submitted into evidence at the hearing. The opposing party then may cross-examine the client or witness whose affidavit has been tendered. The advantages of using an affidavit in this fashion are twofold: It dramatically reduces the time needed for hearing, and the practitioner does not have to fear having overlooked an area of inquiry under the pressure of hearing. One cautionary note on the use of affidavits in lieu of live testimony: avoid canned statements or those that are tailored to match the testimony of other witnesses. Arbitrators give very little weight to obviously scripted testimony.

Weight of Evidence

The "weight" attributed to a particular piece of evidence or testimony does not increase in proportion to the number of times it is presented at hearing. One corroborating witness, not three,

ordinarily is all that is needed to establish that a particular event or conversation took place. Restraint also should be exercised in introducing every document that was created during and through the course of an event unless, of course, they all have some greater evidentiary value, such as proof of a sequence of events. The key to presentation of evidence in arbitration is quality, not quantity. If a practitioner hears an arbitrator say, "You've proven your point, now let's move on," consider excusing other witnesses who will merely repeat the same testimony.

Arbitrators accord greater weight to testimony that is focused and specific. Witnesses should be familiar with the documents that will be introduced through their testimony prior to hearing. A practitioner should also anticipate that a witness's recollection may need to be refreshed to obtain the specificity that increases credibility. The timeline used in opening statement is good for this purpose. Every practitioner should always have available a calendar from the year in which relevant events took place to encourage accuracy and detail in a witness's presentation.

Use and Treatment of Objections

Experienced arbitrators understand that certain forms of testimony and evidence are less reliable than others. Although a practitioner may feel the need to make an objection for the record, save hearsay objections for only the most rank forms, such as hearsay upon hearsay. Use standing objections to hearsay when appropriate. Likewise, procedural objections, such as testimony being "beyond the scope of direct" or "not the best evidence," are not favored. On the other hand, there is nothing wrong with posing objections to leading questions or a witness's competency to answer.

One evidentiary matter that is always taken seriously by an arbitrator is the sudden production and presentation of evidence at hearing that previously was not disclosed. Like courts, arbitrators have the power to sanction a party for such conduct by refusing to admit the evidence and may draw adverse inferences from the concealment. A wise practitioner will weigh the tactic of "surprise" against the risk of exclusion.

Evidence Not Available at Hearing

Occasions arise when parties or witnesses do not (or cannot) appear at the hearing or when essential subpoenaed documents have not been received. The practitioner should bring such matters to the attention of the arbitrator pre-hearing or as soon as known. Arbitrators are loathe to grant postponements on the day of hearing and may, indeed, refuse to grant a postponement on that basis. In Florida, the standard for review of an arbitrator's refusal to grant a continuance is whether the arbitrator abused his or her discretion.[4] To obtain such relief, the practitioner generally will be required to show that the circumstances that occasioned the need for a continuance were beyond the client's control.

If such circumstances arise, better practice is to move forward with the hearing but ask the arbitrator to adjourn and continue the hearing to allow for admission of the missing evidence or testimony. This may be done without the necessity of reconvening a hearing. The arbitrator may allow the parties a certain period post-hearing to tender any other relevant evidence and thereafter provide each party an opportunity to submit rebuttal evidence. Once the additional evidence is received, the evidentiary portion of the hearing is closed unless the arbitrator wishes to hear closing arguments or receive post-hearing briefs.

Direct and Cross-Examination Combined

Given that efficiency is a hallmark of arbitration, practitioners should expect that an arbitrator will require them to ask all questions of a witness while that person is on the stand. Recalling a witness is frowned upon unless for pure rebuttal purposes.

Rebuttal Presentations

Rebuttal presentations are not an opportunity for the claimant to restate previous testimony. The arbitrator may dispense with rebuttal presentations altogether unless a witness has something extremely important to add to the understanding of the case.

Closing Statement or Post-Hearing Brief?

A closing statement provides an opportunity for immediate reinforcement of a party's position. However, after a lengthy hearing, the parties and the arbitrator may be too tired to properly focus on the salient points. By contrast, though costly to prepare, post-hearing briefs allow for more cogent marshaling of the evidence and presentation of supporting case law, but they will prolong closing the hearing and issuing an award. An alternative to briefs is asking the arbitrator to schedule a telephonic conference for post-hearing summation.

Conclusion

First-time practitioners in arbitration may feel like they have fallen down a rabbit's hole: there are no hard and fast rules of procedure or evidence, and the arbitrator has the same degree of discretion as the Queen of Hearts.[5] Be assured the process is aimed at fairness and efficiency. The practitioner who understands these goals and assists the arbitrator in meeting them will increase the chances of a successful result.

Leslie Langbein *is a member of the AAA's national panels of labor, commercial, employment, and consumer arbitrators. For over thirty years, she has served as a sole arbitrator, chair, and panelist in cases involving labor and employment claims. She owns Langbein ADR Services in Miami Lakes, Florida.*

Endnotes

1 *See, e.g., Steelworkers v. American Mfg. Co.*, 363 U.S. 593, 597 (1960).
2 AAA's Rules are available online at www.adr.org.
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4 *See, e.g., Flavio Dev. Corp. v. Laguna East Club Condo. Ass'n, Inc.*, 756 So. 2d 186 (Fla. 3rd DCA 2000).
5 *See Alice's Adventures in Wonderland* (1865) by Lewis Carroll.

FEDERAL CASE NOTES

By Jessica P. Fico, Tampa

Eleventh Circuit reiterates *McDonnell Douglas* is an evidentiary framework, not a standard of liability, in employment discrimination cases.

Tynes v. Fla. Dep't of Juv. J., 88 F.4th 939 (11th Cir. 2023).

Lawanna Tynes, a former detention center superintendent, brought suit against her former employer, the Florida Department of Juvenile Justice (the Department), alleging, in part, that her termination was the result of sex and race discrimination under Title VII. Tynes, a sixteen-year employee of the Department with no documented performance issues, was terminated for "poor performance, negligence, inefficiency or inability to perform assigned duties, violation of law or agency rules, conduct unbecoming of a public employee, and misconduct," after an unusually high number of incidents at the detention center led to a review of staffing and personnel issues.

Tynes prevailed at the trial court level when the jury found that race and sex were motivating factors in her discharge. The Department filed a renewed motion for judgment as a matter of law, or alternatively, for a new trial. In its motion, the Department argued Tynes failed to present proper comparators who were "similarly situated in all material respects" and, therefore, failed to establish a prima facie case under *McDonnell Douglas*. The district court denied the Department's motion.

On appeal, the Eleventh Circuit affirmed the district court's ruling, holding that a plaintiff's failure to produce a comparator is not dispositive. The court noted that the *McDonnell Douglas* framework has been misunderstood as an independent standard of liability when in fact it is merely an "evidentiary tool that functions as a 'procedural device, designed only to establish an order of proof and production.'"

A plaintiff who fails to satisfy *McDonnell Douglas*, the Eleventh Circuit reminded, still has other avenues by which to prove her case, including proffering a "convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." The Eleventh Circuit explained that the "analysis turns on the substantive claims and evidence in the case, not the evidentiary framework," and ultimately the question is "whether there is a sufficient evidentiary basis for the jury to find that the defendant intentionally discriminated against the plaintiff." Here, the Eleventh Circuit held, the Department failed to demonstrate why the record evidence could not support the jury's verdict in favor of the plaintiff.

Eleventh Circuit affirms the but-for standard to retaliation claims under the Family and Medical Leave Act and Florida's Private Sector Whistleblower Act.

Lapham v. Walgreen Co., 88 F.4th 879 (11th Cir. 2023).

Doris Lapham was a longtime employee of Walgreen Company (Walgreens), working in various positions for over a decade. Between 2011 and 2016, Lapham took annual intermittent leaves under the Family and Medical Leave Act (FMLA) to care for her son with special needs. During that time, Lapham received ratings on her performance evaluations ranging from failing expectations to achieving expectations, with the latest evaluation being partially achieving expectations. In 2017, after she transferred to another Walgreens store, Lapham was placed on a PIP based on her 2016 performance. Subsequently, Lapham submitted another request for intermittent FMLA leave, but Walgreens did not immediately process it. There was then another delay due to Lapham initially not providing the leave start and end dates, and Walgreens' leave administrator sending the request for that information to Lapham's old address on file. Lapham complained to management that Walgreens delayed in processing her request for leave. In April 2017, Walgreens terminated Lapham for insubordination and dishonesty, due to her allegedly "actively disregarding instructions," lying to management, and "sabotaging the store."

Lapham sued Walgreens for retaliation and interference under the FMLA and retaliation under Florida's Private Sector Whistleblower Act (FWA). On summary judgment, the parties argued different causation standards for the retaliation claims: Walgreens argued Lapham could not prove that she would not have been terminated but for her FMLA leave request and complaints about delays in approving her leave request; Lapham argued she only had to show her leave requests and complaints were a motivating factor.

The lower court initially agreed with Lapham, denying summary judgment to Walgreens. Walgreens moved for reconsideration, requesting that the court apply the but-for standard of causation. The court granted Walgreens' motion and entered judgment in favor of Walgreens on Lapham's FMLA and FWA retaliation claims, finding that but-for was the proper causation standard in light of the U.S. Supreme Court's reasoning in *Nassar* establishing the but-for causation standard for Title VII retaliation claims.

On appeal, the Eleventh Circuit agreed with the lower court, finding that "the retaliation provisions of both the FMLA and the FWA are sufficiently similar to the retaliation provision of Title VII for *Nassar* to be especially instructive." "Critically," noted the court, "all three provisions use 'because [of]' language or an equivalent[,]. . . . [a]nd all three provisions were enacted against [the background of] the historic, default but-for causation standard." The court thus upheld the grant of summary judgment in favor of Walgreens.

This decision created a circuit split, as the Second, Third, and Seventh Circuits apply the motivating-factor test. The remaining circuits have yet to take up the issue.

Plaintiffs, who volunteered as golf attendants at a county-owned golf course, fell under the public-agency volunteer exemption of the FLSA and were not entitled to wages even though they received benefits, such as discounted rounds of golf.

Adams v. Palm Beach Cty., 94 F.4th 1334 (11th Cir. 2024).

Three golf attendants who had volunteered at the county-owned Osprey Point Golf Club (Osprey Point) brought suit against the county alleging that it failed to pay them minimum wage in violation of the Fair Labor Standards Act (FLSA), the Florida Minimum Wage Act (FMWA), and Section 24, Article X of the Florida Constitution.

The three plaintiffs sought to represent a class of bag-drop attendants, driving range attendants, and course rangers at four county-owned golf courses. The golf attendants had responded to advertisements by the Palm Beach County Parks and Recreation Department specifically seeking "volunteers" to perform services at Osprey Point in exchange for benefits, such as discounted golf rounds. The services included greeting customers, carrying golf clubs, cleaning equipment, and retrieving carts. The attendants could accept tips but were never promised wages. The volunteers argued that because the county offered discounted golf, which has a monetary value, in return for their services, they did not fall under the "public-agency volunteer" exemption to the FLSA and were therefore entitled to wages.

In a case of first impression for the Southern District of Florida, the court dismissed the case, finding that the position was advertised as "volunteer," and the plaintiffs accepted that status when they signed up to provide services. The plaintiffs appealed to the Eleventh Circuit.

The Eleventh Circuit upheld the lower court, finding that the discounted rounds of golf were "reasonable benefits" for the attendants' services, and the plaintiffs therefore fell within the FLSA's "public-agency volunteer" exemption. Further, the court noted that the discounted rounds of golf could not constitute "compensation" and were not "wages in another form" that would trigger the loss of volunteer status.

The Florida Bar Labor and Employment Law Section

The Checkoff

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STATE CASE NOTES

By Jessica Fico, Tampa

Certifying conflict with the Fourth DCA, the Second DCA finds that failing to specifically allege a violation of the FCRA when filing a charge of discrimination with the EEOC does not bar a plaintiff from raising the claim in a subsequent civil suit, where the EEOC complaint sufficiently put the defendant on notice regarding the nature of the claims.

Ramos v. Steak N Shake, Inc., 376 So. 3d 100 (Fla. 2d DCA 2023), *review granted*, No. SC2024-0099, 2024 WL 1550904 (Fla. Apr. 9, 2024).

In a split from a recent decision of the Fourth District Court of Appeal, the Second District Court of Appeal ruled that employees may bring discrimination claims under the Florida Civil Rights Act of 1992 (FCRA) even if they did not explicitly allege a violation of state law in their EEOC charges.

While employed by Steak N Shake as a grill operator, Wilfred Ramos was involved in a car accident and suffered a back injury. His work hours were then reduced from thirty hours per week to six, and he was also demoted from grill operator to janitor. Ramos filed a charge with the EEOC with a detailed description of the facts underlying the basis of his allegations, alleging that Steak N Shake violated the ADA. The charge did not specifically mention the FCRA. Shortly thereafter, Steak N Shake terminated Ramos.

The EEOC charge was dismissed, and Ramos subsequently filed suit, alleging discrimination and retaliation in violation of the FCRA, only. Steak N Shake moved for summary judgment, arguing Ramos failed to specify FCRA claims in his EEOC charge and therefore failed to exhaust his administrative remedies prior to filing the lawsuit. The trial court agreed and granted summary judgment in Steak N Shake's favor.

The Second District reversed, finding that Steak N Shake was "fully on notice as to the nature and substance of Ramos's claims," as he had included factual allegations in the EEOC complaint, checked the boxes for retaliation and disability discrimination, and claimed that the charge should be "'filed with both the EEOC and the State or local agency, if any.'" The Second District also noted that the FCRA asks only for "'a short and plain statement of facts'" and that there is no additional requirement that the aggrieved party specifically allege that claims are being brought under the FCRA. "[I]n finding that Ramos failed to exhaust his administrative remedies by failing to specifically allege in his charge of discrimination that his claims were under the FCRA, the trial court added a requirement that is not found anywhere within the statute and contravenes the legislature's clear intent that the statute be interpreted liberally."

The Second District certified conflict with the Fourth District's decision in *Belony v. N. Broward Hosp. Dist.*, 48 Fla. L. Weekly D2106, D2107 (Fla. 4th DCA 2023), and the Florida Supreme Court has granted review.

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