



RIGHTS STUFF

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Chief Psychologist Loses ADA Lawsuit

Michael Stern began working for St. Anthony's Health Center as a clinical psychologist in 1998. In 1992, he was promoted to chief psychologist. He was responsible for supervisory, administrative and clinical duties. In March of 2009, he received 2.54 points on a 4-point job performance review, which came with a 2.5% merit raise.

Problems for Dr. Stern began four months later, when one of his subordinates resigned and made troubling comments about him during her exit interview. She said he had cognitive issues, was forgetting to follow procedures, exhibiting impulsive behavior and taking six to twelve months to do what was supposed to be done in two weeks. The health center began an investigation and found that other subordinates agreed. One said that other staff members had gradually begun taking over some of Dr. Stern's responsibilities. Another said that she had shown him how to forward e-mails three or four times, and each time "he acted like it was the first time."

The hospital sent Dr. Stern to a doctor for a fitness-for-duty evaluation. The evaluating doctor found Dr. Stern to have mild to moderately deficient learning, memory and word retrieval abilities. He performed at the fifth percentile of his peers when asked to read a story and immediately recall what the story said, meaning 95% of people taking the test would have done better than he.

The hospital discussed ways to accommodate Dr. Stern so he could continue to do his job. They talked about assigning him only "non-complex" patients, but rejected that idea because it is not always clear which patients are complex at the outset. They talked about reducing his case load, but they had no part-time positions. They talked about supervising him more closely, but did not want to have a supervisor present during his sessions with patients. So they terminated him, and he sued, alleging that the hospital had discriminated against him on the basis of his disability and/or failed to provide him with reasonable accommodations under the Americans with Disabilities Act. He lost.

He argued that he was able to do his job because he had received a strong evaluation a few months before he was terminated. The Court said that the question was not whether he was meeting job expectations at the time of the performance review, but whether he was meeting job expectations at the time of the termination. He argued that his evaluating doctor had said there was a possibility that accommodations could make it possible for him to do his job, but the Court said that was speculative at best. He argued that both his wife and his assistant said he could continue to do his job. But his wife's background is in art and she was not an expert witness. His assistant had no knowledge of whether he was doing well with his patients

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Is Sexual Orientation Discrimination a Form of Sex Discrimination?

Jacqueline Tote married Diana Smithson in 2004. Tote works for Walmart, and in 2008, she tried to enroll Smithson in Walmart's health insurance plan as an eligible spouse. According to GLAD, a gay and lesbian rights organization, Walmart repeatedly rejected Tote's application. At the time, Walmart's national policy said that same-sex spouses of employees were not eligible to receive its health insurance benefits. Opposite-sex spouses of employees were eligible.

Smithson has been battling cancer since 2012. Walmart's decision left her without any health insurance, and she and Tote have racked up more than \$150,000 of medical debt.

Tote filed a complaint with the Equal Employment Opportunity Commission, alleging that Walmart had discriminated against her on the basis of her sex. She said that if she had been married to a man, Walmart would have enrolled him in their plan, but denied the same opportunity to her and her spouse because her spouse is female.

The EEOC found probable cause to believe that Walmart had discriminated against Tote on the basis of her sex. Even though Walmart voluntarily changed its policy effective January 1, 2014, to provide insurance to same-sex spouses and domestic partners of employees, the EEOC said that Tote had been treated

differently and had been denied benefits because of her sex before 2014.

The parties thus far have been unable to settle, and GLAD, on behalf of Tote, is now seeking to pursue the matter in court as a class action. GLAD said it is seeking a court injunction prohibiting Walmart from denying such coverage in the future and damages for out-of-pocket medical expenses same-sex spouses incurred due to a lack of health coverage.

If you have questions about GLAD's actions, contact them at awright@glad.org.

Lawyer Loses ADA Suit Against Former Client

Brenda Sconiers hired Andrew U.D. Straw, an Indiana lawyer, to represent her in a sexual harassment complaint. Straw missed a filing deadline, so Sconiers found another lawyer to sue Straw for legal malpractice.

Straw's response: he has bipolar disorder, and to accommodate his disorder, he does not take cases to court. Therefore, he alleged, Sconiers' lawsuit against him was a violation of the Americans with Disabilities

Act (ADA). He argued that the ADA required that the Court dismiss the malpractice case because his disorder prevented him from being able to represent himself in court.

The Court did not agree. The ADA prohibits discrimination in employment, public accommodations, governmental services and telecommunications. A former client does not fall into any of those categories. And Straw provided no precedent that would lead the Court to conclude

that it had to dismiss the malpractice case because of his alleged disorder, particularly when he had an attorney representing him in the matter who presumably felt capable of handling courtroom appearances.

The case is [Straw v. Sconiers](#), 2014 WL 7404065 (N.D. IN 2014).



EEOC Files Suit Against Shipley's Do-Nuts

The Equal Employment Opportunity Commission (EEOC) recently filed a lawsuit against a Shipley's Do-Nuts franchise in Texas, alleging that the company discriminated against an employee on the basis of her pregnancy.

According to the lawsuit, the franchise owner heard rumors that one of his employees, Brooke Foley, was pregnant. He confronted Foley in front of witnesses, asking her intrusive personal questions about her status. She refused to answer the questions. He then took her off the schedule and told her she could not return to work until she provided a medical statement saying that her pregnancy was not high risk and that she was able to work.

That same day, according to the EEOC, Foley's mother contacted the owner and questioned the

legality of his actions in removing Foley from the schedule. The next day, a supervisor called Foley and said she was fired for not reporting to work, even though she had been removed from the schedule.

Foley filed a complaint with the EEOC, alleging that Shipley's had discriminated against her on the basis of her pregnancy and had retaliated against her because her mother questioned the legality of its actions. The EEOC tried to conciliate the complaint and when it was unable to come to a settlement, filed a lawsuit in federal court. The EEOC is seeking an injunction, back pay with interest, reinstatement, compensatory damages and punitive damages.

In announcing the lawsuit, Jim

Sacher, an attorney with the EEOC, said, "The Supreme Court has made clear that the employee alone is responsible for making decisions that affect her safety and that of her future offspring. An employer who forces leave on a pregnant employee violates federal law. The law also prohibits retaliation against an employee for opposing unlawful attempts to interfere with that decision-making."

The EEOC's press release gives only its side of the story. Shipley's will have a chance to give its side in court.

If you have questions about the fair employment laws and practices, please contact the BHRC.

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and could not evaluate whether his reports were competently done.

The Court said that the hospital had to be sure that its patients were being treated properly. "The ADA does not require an

employer to walk on a razor's edge - in jeopardy of violating the ADA if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and hurt someone." Coming up with reasonable accommodations for Dr. Stern's type of work would be much harder than for other

jobs because of the hospital's dual obligations to patients and to the hospital itself.

The case is Stern v. St. Anthony's Health Center, 788 F. 3d 276 (7th Cir. 2015). If you have questions about the ADA, please contact the BHRC.

Essay/Art Winners Announced in Annual BHRC Contest

The BHRC annually sponsors an essay/art contest for local students. The theme this year was "What Rights Every Human Being Should Have."

Mayor John Hamilton presented prizes to the winners at an awards ceremony on March 21 in the Council Chambers at Showers City Hall.

Judges for the twenty-fifth annual contest were Carolyn Calloway-Thomas, Beth Applegate, Pete Giordano and Drew Larabee.

The essay winners at the younger student level were first place, Caden McCoy, grade 4, Unionville; second place, Elijah Fischer, grade 3, Harmony; and third place, Aspen Siek, grade 3, Harmony. The essay winners at the older elementary level were first place, Caden Walden, grade 6, Harmony; second place, Isabel Watts, grade 6, Harmony; and third place, Maya Szakaly, grade 6, Harmony.

The art winners at the younger student level were first place,

Patience Denny, grade 4,

Templeton; second place, Harper Eakin, grade 2, Childs; and third place, Maya Sovann Siufanna, grade 4, Templeton. The older student art winners were first place, Izland Casey, grade 5, Harmony; second place, Josie Smith, grade 5, Harmony; and third place, Genevieve Murphy, Naomi Crocker, grade 6, and Elizabeth Bennett, grade 4, Templeton.

Childs fifth grade won Special Recognition for their class art project. Congratulations to all of these students.



Mayor John Hamilton poses with the winners of the BHRC's 2016 annual essay/art contest.