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Halloween Can Be a Scary Time for Employers

Article by John P. McLafferty

Halloween conjures images of trick-or-treaters, toilet-papered houses and stomachaches from partaking too liberally of the leftover candy you intended to take into the office. For employers, a specter that often rises from the remains of the annual Halloween party is the allegation of workplace misconduct. Inappropriate conduct can arise anytime of the year, but Halloween tends to bring out a special breed of poor judgment and boorish (or worse) behavior. Following are some examples of the traps that can ensnare the unwary employer, along with tips on how to avoid the labyrinth of litigation.

Sexual Harassment. Many Halloween-related lawsuits arise from inappropriate comments about employees' costumes, such as the supervisor who commented suggestively about the "tail" on a female employee's cat costume[1][1] or the manager who pointed to his groin and told a female employee dressed as a doctor, "It hurts here."[2][2] Comments such as these are often made in response to particularly risqu? costumes. Provocative costumes, however, are not an invitation to harass. As always, managers should respond promptly to all allegations of harassment and take appropriate action to remedy the situation and prevent future harassment or retaliation. Employers permitting costumes at work or work-related functions can and should establish appropriate costume guidelines and may discipline employees whose attire is inappropriate. Only in rare cases might inappropriate attire be used as a defense to a harassment claim. See, e.g., Dahms v. Cognex Corp., 455 Mass. 190, 200 (2009) (photos of plaintiff wearing "see-through Empire State Building" costume admissible at trial as evidence that plaintiff was not subjectively offended by the workplace environment).

Other Forms of Discrimination. Costumes also figure prominently in other harassment and discrimination claims. For example, the U.S. Court of Appeals for the Eighth Circuit upheld discipline against a white police officer who offended his co-workers by attending a Halloween party dressed in blackface, wearing a black curly wig and carrying a watermelon.[3][3] Similarly, the Sixth Circuit held that a co-worker's comment in the days following the September 11, 2001, terrorist attacks to a Pakistani employee that he should dress as Osama bin Laden for Halloween constituted evidence of a hostile work environment on the basis of national origin.[4][4] And the 11th Circuit recently affirmed judgment in favor of a transgender female employee who wore a dress to the office on Halloween while she was transitioning from male to female, leading a manager to fire her after telling her that her "costume" was "unnatural."[5][5]

Religious Accommodations. Today's celebration of Halloween is far removed from its historical roots as a religious holiday. So many employers are often unprepared for Halloween-related requests for religious accommodations. Under federal and Massachusetts law, employers are required to reasonably accommodate an employee whose sincerely held religious belief, practice or observance conflicts with a work requirement, unless providing the accommodation would create an undue

hardship. Thus, an employer might need to accommodate an employee's request for time off on October 31 to attend the Samhain Sabbat, the New Year's observance for practitioners of Wicca.[6][6] Or it may need to permit a practicing Jehovah's Witness to abstain from attending mandatory company-sponsored Halloween events due to the employee's sincerely held religious belief preventing her from attending holiday celebrations.[7][7] Employers need not accommodate "personal preferences" that do not constitute religious beliefs, but an employer should challenge an employee's belief only if there is an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice.

Safety Issues. Halloween can also create some unique workplace hazards, some more predictable than others. For example, the safety concerns of permitting employees to wear costumes near dangerous machinery are readily apparent. Less foreseeable might be the unpredictable conduct of some employees, such as the off-duty?police officer at a Halloween party who accidentally set off a hand grenade that was part of his costume.[8][8] Employers generally will be held liable for all injuries sustained by their employees that arise out of and in the course of the worker's employment. An Arkansas employer learned that lesson the hard way when it was held responsible for workers' compensation benefits to an injured employee who fell off a stool after being scared by a co-worker wearing a Halloween mask.[9][9] Whatever festivities might be planned, managers need to ensure company-related Halloween celebrations do not put employees at increased risk of harm.

Tips for Employers. Employers often walk a fine line between encouraging activities that build camaraderie and teamwork and ensuring appropriate workplace behavior. Halloween is no exception, and the best practices that (should) govern throughout the year continue to apply:

- Establish and communicate clear guidelines on appropriate workplace conduct;
- Ensure managers understand the company's nondiscrimination and harassment policies and model appropriate behavior; and
- Apply company policies consistently and fairly, and deal with inappropriate behavior swiftly and effectively.

Keeping these principles in mind will help you avoid some of the scariest Halloween horror stories. Keeping you away from the candy bowl is beyond the scope of this article.

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[1] Taylor v. Renfro Corp., 84 F. Supp. 2d 1248, 1250 (N.D. Ala. 2000).

[2] Devane v. Sears Home Improvement Products Inc., 2003 Minn. App. LEXIS 1514 (Minn. Dec. 23, 2003).

[3] Tindle v. Caudell, 56 F.3d 966, 968 (8th Cir. 1995).

[4] Hussain v. Highgate Hotels Inc., 126 Fed. Appx. 256, 268 (6th Cir. 2005).

[5] Glenn v. Brumby, 663 F.3d 1312, 1314 (11th Cir. 2011).

[6] EEOC Compliance Manual, Section 12: Religious Discrimination http://www.eeoc.gov/policy/docs/religion.html (July 22, 2008).

[7] Morales v. PNC Bank N.A., 2011 U.S. Dist. Lexis 86918 (E.D. Pa. August 4, 2011).

[8] Henry v. City of Tallahassee, 261 F. Supp. 2d 1299, 1317 n. 28 (N. D. Fla. 2002).

[9] Travis v. Robbins-Sykes Hardwood Flooring, 1993 Ark. App. LEXIS 617 (November 17, 1993).

Unpaid Interns: Is Your Organization Vulnerable to a Lawsuit?

Article by Claudia T. Centomini

It is fall in New England, and the students have returned to school. College and high school students who are looking to gain a career advantage are submitting applications for unpaid internships for the school year and the summer of 2013. Companies tempted to use unpaid interns to gain an edge against their competitors by reducing their labor costs could find themselves in a costly legal battle.?

The U.S. Department of Labor and the Massachusetts Office of the Attorney General have stepped up enforcement efforts against for-profit companies that run afoul of the legal requirements for unpaid interns. Interns have also filed suits against companies that have violated the law?by depriving them of their wages. Some interns have sought to file a class action suit against their employers for failing to pay them for their internships. Most notably, former interns of Fox Searchlight Inc., the Hearst Corp. and *Charlie Rose* on PBS have filed class actions against these media and entertainment companies for misclassification, alleging the companies should have classified them as employees and paid wages to them for the hours that they worked as interns. If found liable, each of these companies could be ordered to pay more than $1 million in damages to their former interns. The U.S. Department of Labor and the Massachusetts Office of the Attorney General are also able to levy significant fines against employers for violating these laws.?

Federal law requires that a company classify its interns as employees and pay them at least minimum wage for their time unless the company has an internship program that meets the U.S. Department of Labor's six criteria for unpaid internships:?

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern and, on occasion, its operations may actually be impeded by the intern;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.?

Massachusetts has adopted the same criteria for determining whether an individual participating in an internship program is exempt from coverage by the Massachusetts minimum wage laws. The Massachusetts Attorney General will scrutinize the nature of the intern's tasks and the purpose of the company's internship program. Does the employer's program prepare the intern for the workplace? Alternatively, does the program require the intern to perform the same or similar tasks as the employees who work for the company that is sponsoring the program??

Accordingly, companies would be wise to examine their programs and the tasks they require the interns to perform before they offer an internship to any students. Although the students are eager to accept unpaid internships to gain valuable work experience, their viewpoint might change quickly when they learn that their employers were legally required to classify them as employees and pay them for their time.

Putting Together the Renewable Energy Puzzle

Article by Eric K. Runge

Including more renewable energy as part of our electric energy supply mix is a public policy goal most people would agree with in principle. It makes sense in at least two key ways: First, renewable energy (such as wind and solar power) tends to be clean energy, thus promoting a cleaner environment, and second, more reliance on renewable energy means less reliance on oil-producing foreign nations, thus improving our national security. While the public policy goal seems like a good one that has broad support, making it a reality is challenging and requires putting together many pieces of a puzzle. Two of the big pieces of that puzzle are (1) how to get the energy from remotely located resources (such as wind farms in Northern Maine) to load centers (such as Boston) where the electricity is consumed, and (2) how to secure financing for new renewable energy project development.

In New England generally and in Massachusetts in particular, renewable energy is becoming more of a reality each year as new federal and state rules affecting electric transmission and wholesale markets take effect. Below are two examples of such developments?-- one at the national level and one in Massachusetts?-- that will help shape our renewable energy future.

At the national level, the Federal Energy Regulatory Commission (FERC), the agency that oversees interstate sales and transmission of electricity, last year issued a landmark order ("Order 1000") governing how the transmission of energy gets planned and paid for on a regional basis. Prior to Order 1000, transmission providers generally planned the system only to reliably meet the needs of customers?-- to keep the lights on. Now they must also consider public policy requirements that drive transmission needs and evaluate potential solutions in the form of new transmission. For example, most of the states in New England have requirements that a certain percentage of the electricity supplied to retail customers come from qualified renewable energy resources. Wind power is the primary renewable resource being developed. Most of the major wind power production is being developed in Northern New England, especially Northern Maine, because of the favorable wind conditions, relatively low land costs and lack of population to be concerned with the presence of wind turbines. Getting that wind power in Northern New England to population centers such as Boston requires major transmission upgrades to the existing regional transmission network. Order 1000 has now opened a way to get that transmission capacity built.

At the state level, in response to Order 1000, the New England states put together a proposal (filed with the FERC on October 25, 2012) that would not only allow for the consideration of transmission needed to meet public policy requirements but also get that transmission built and paid for. Under the proposal, the New England states would work collectively to identify public policy requirements that drive transmission needs, work with the independent system operator of the regional electricity system to identify potential scenarios to meet those needs, and then conduct a competitive solicitation process for qualified transmission developers to propose and build specific transmission projects to meet those needs, with the costs of such projects being allocated according to an agreement among the participating states. The kinds of projects that are envisioned here are generally major transmission projects (costing in the range of hundreds of millions to billions of dollars) that could bring substantial amounts of renewable energy into participating states. These transmission projects would likely be coupled with long-term (10-to-20-year) power purchase agreements between the states?-- or the utilities subject to state jurisdiction?-- and the renewable energy suppliers.

Such long-term energy supply contracts are another piece of the renewable energy puzzle that must be put in place to make the goal a reality. In Massachusetts, Governor Patrick recently signed legislation that will allow for, among other things, distribution utilities in Massachusetts to enter into additional long-term renewable energy contracts. The new legislation provides that between January 1, 2013, and December 31, 2016, all distribution companies are required twice to solicit proposals from renewable energy developers through a competitive bidding process and enter into long-term contracts under certain conditions. The purpose of such legislation and earlier similar legislation in Massachusetts is to spur renewable energy development by ensuring a revenue stream, in the form of long-term power purchase agreements, to project developers.

Massachusetts regulators and other state officials are becoming increasingly involved in wholesale power markets and transmission, which are under federal jurisdiction, as they seek to carry out the public policy goal of including more renewable energy in our energy supply mix. By developing rules for getting transmission planned and paid for to deliver remote renewable energy and for the financing of renewable energy projects, they are helping put the pieces of the renewable energy puzzle together in a way that works.[1][10]

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[1] Day Pitney lawyers have been extensively involved in the Order 1000 compliance efforts, New England transmission matters, wholesale electricity markets and renewable energy project development.

An Interview with the Managing Partner of the Boston Office:

Getting to Know Leiha Macauley

What is your life philosophy?

"We make a living by what we get, we make a life by what we give." A great quote by Winston Churchill, taped to my desk at work.

What is your greatest extravagance?

Boston taxis -- to make it home for dinner on time.

What was your favorite journey?

I hiked and camped in India, through the Ladakh and Zanskar, for six weeks after taking the bar exam and before beginning work. It was the most rested I have ever been.

Any hobbies?

I grow bonsai, though in all honesty, not very well.

What is your favorite and least favorite part of the day?

My favorite part of the day is talking to clients. My least favorite part of the day is entering my time.

What is on your nightstand?

"It's a Boy: Women Writers on Raising Sons" by Andrea Buchanan. The latest issue of Vanity Fair. My BlackBerry. Earrings. Ear plugs.

If you weren't a trusts and estates lawyer, what would you be?

I'd love to be a writer for a travel magazine or guide book. Actually, I'd like to be the traveler but have a ghost writer.

Which pro bono matter are you most proud of?

The Boston office's Child Health Advocacy Partnership, or CHAP, in which Day Pitney "adopted" the East Boston Neighborhood Health Center. For six years, firm attorneys staffed a weekly two-hour legal clinic on-site in East Boston. The firm provided legal information and advocacy to families who encountered legal obstacles in accessing basic needs such as food, housing, education, health care and safety. Operating this program in a neighborhood health center results in increased access to legal assistance for low-income, disabled, and immigrant families who often feel safer and more able to trust in the clinic setting than in a law office.

What is your favorite cookie?

Keebler Fudge Stripes.

What is your favorite movie?

Top Gun. I must have watched it 50 times in high school. The opening scene with the Top Gun "anthem" is just awesome -- jets taking off down the runway, "Maverick" on his motorcycle. Give it a listen on Monday morning and you'll be fired up for the week.

Day Pitney Attorneys Help Others

Day Pitney Helps Low-Income Families

Leiha Macauley recently helped a family obtain Supplemental Security Income (SSI) for its three-year-old daughter who suffers from a rare genetic disorder. Leiha first met the mother in April 2011 while staffing a legal clinic at the East Boston Neighborhood Health Center (EBNHC) through the firm's Child Health Advocacy Partnership (CHAP), a cooperative venture between Day Pitney, EBNHC, and the Medical-Legal Partnership Boston that brings doctors and lawyers together in partnership to serve low-income families that reside in inner-city neighborhoods. At that initial meeting, Leiha learned the child's application for Social Security benefits had been pending for nearly two years, with little communication to the family on its status. Following a hearing on the matter, the Social Security Administration agreed that the child was eligible for SSI benefits and awarded her retroactive payments of more than $12,000, as well as payments going forward.

Leiha also learned the family was having difficulty securing permanent housing through the Boston Housing Authority because it had failed to pay a prior Housing Court judgment related to the family's residence at a former property. Day Pitney negotiated with the former landlord, convincing him to accept a reduced payment in fulfillment of the judgment, and prepared documents to request that the Social Security Administration allow the mother to use a portion of the child's retroactive SSI payments to pay this settlement.

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Sara Colb and Jillian Hirsch recently achieved a favorable result for a mother seeking special education services for her four-year-old autistic son. The mother was referred to Day Pitney through CHAP. When Sara and Jillian became involved in the case, Boston Public Schools had acknowledged the child's autism and placed him on an Individualized Education Plan (IEP). However, the particular services Boston Public Schools agreed to provide were woefully inadequate to meet the child's needs. For example, the child was not receiving any speech and language therapy, which is a crucial service for any autistic child, particularly one who is not yet verbal. After reviewing the testing performed on the child, as well as his current IEP and progress notes from his teachers, Sara and Jillian contacted the school to request a meeting with the IEP team. Ultimately, Sara and Jillian?got the team to meet with them and the mother to discuss the child's progress and ongoing needs. As a result of this meeting, the school agreed to all the additional services they requested and amended the child's IEP to reflect the same. Our client is very pleased with the result and reports her son is now making good progress.?

Day Pitney Helps Bring Clean Water to Africa

Jeff Clopeck is the clerk of, and provides pro bono legal services to, Community Water Solutions Inc. (CWS), a 501(c)(3) nonprofit corporation that brings clean drinking water to rural villages in West Africa. CWS brings students and young

professionals from around the world, as CWS "fellows," to launch sustainable water businesses in the villages and empower local women to run them. These businesses provide safe drinking water to the entire community, use local products and generate income for the women entrepreneurs who run them. To date, CWS has launched water businesses in 38 villages in Ghana that provide clean drinking water to more than 20,000 people. Jeff's daughter Katherine is a co-founder and the executive director of CWS. Visit the CWS website at www.communitywatersolutions.org for further information about their amazing work.

Day Pitney Helps Put Smiles on the Faces of Children in Boston Area Hospitals

Jeff Clopeck?is also a director and the clerk of, and provides pro bono legal services to, Hearts and Noses Hospital Clown Troupe Inc., a 501(c)(3) nonprofit corporation that sends volunteer hospital clowns to visit sick children in Boston area hospitals. The hospital clowns are specially trained to invite children into Clown World, providing relief for sick children and their families through improvisation-based, child-centered clowning. The central goals of the troupe's clowns are to engage, empower and give choices to the children. This is an enormous gift to children, who seldom are given choices about their care in the hospital. The clowns invite the child to make choices, to supply the magic word or to do a magic trick, or to direct a "clown symphony." Visit the Clown Troupe's website at www.heartsandnoses.org for more information about this unique organization.