SCHWARTZ HANNUM PC
Labor and Employment Lawyers Guiding Management

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Deposition Errata Sheets Face Scrutiny Under Recent SJC Ruling

By David G. Abbott

The Massachusetts Supreme Judicial Court ("SJC") has established important new guidelines on the use of deposition "errata sheets," which witnesses use to make corrections to their deposition testimony. Most significantly, witnesses who make substantive changes to their deposition testimony may be required to justify those changes in a reopened deposition or at trial – and their lawyers may be subject to sanctions, including disqualification, depending on the nature and extent of the changes. As a result, it is critical that witnesses prepare thoroughly for their depositions with counsel.

Factual Background

In *Smaland Beach Association, Inc. v. Genova*, a number of witnesses who were deposed submitted errata sheets containing significant substantive changes, rather than the mere clerical corrections (*e.g.*, dates or spellings) that errata sheets typically include. In some instances, "yes" responses were changed to "no," and vice versa. In addition, substantive deposition answers were replaced entirely or supplemented with lengthy passages containing significant new information.

Many of the changes were so substantive, and so clearly reflected the involvement of the plaintiff's attorney, that the trial judge granted a motion to make this attorney a witness at trial and, on that basis, disqualified him from continuing to represent the plaintiff. After the Massachusetts Appeals Court affirmed the disqualification order, the plaintiff appealed to the SJC.

The SJC's New Guidelines

The SJC reversed the disqualification order and remanded the case to the trial court, on the basis that the judge had not thoroughly evaluated all of the relevant factors. In doing so, the SJC provided important new guidelines on the use of deposition errata sheets. Specifically, the SJC announced that:

- Errata sheets should be used "sparingly" to correct inadvertent errors or omissions, and not as a substitute for providing complete and accurate testimony during the deposition itself;
- Although witnesses may use errata sheets to correct, supplement or even contradict their deposition testimony, all such changes must be made "in good faith" and must include an adequate description of the reasons for the changes;
- Witnesses may be questioned at trial as to their reasons for amending their deposition testimony through errata sheets;
- If an errata sheet reflects "substantive changes as to significant matters," then the party that took the deposition may be permitted to reopen the deposition to inquire further into those matters;
- Attorneys representing deponents must (1) explain to their clients that any changes to their deposition transcripts must be made in good faith and not merely out of a desire to strengthen their case, and (2) ensure that the witnesses' written descriptions of their reasons for the changes "provide an adequate basis from which to assess their legitimacy"; and
- Attorneys who abuse the use of errata sheets in an effort to bolster their clients' cases may be subject to sanctions.

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Arbitration Class Action Waiver Ruled Unenforceable By Massachusetts Court

By William E. Hannum III [1]

The Massachusetts Superior Court has ruled that a mandatory arbitration agreement in a consumer sales contract is unenforceable because it contains a class action waiver. Feeney v. Dell, Inc. *is notable in that it deviates from the U.S. Supreme Court's April 2011 decision in* Concepcion v. AT&T Mobility LLC, *which, if construed broadly, holds that the Federal Arbitration Act ("FAA") preempts state laws that prohibit arbitration agreements containing class action waivers.*

Determining that *Concepcion* did not govern, Superior Court Judge Douglas A. Wilkins ruled that the class action waiver was unenforceable because it would not have been feasible for the consumer to pursue his claim on an individual basis. This ruling has implications for Massachusetts employers because it informs the analysis that would likely take place if a class action waiver in an employment agreement were challenged in the Commonwealth.

Background Of *Feeney*

The plaintiffs in *Feeney* sued Dell, Inc. ("Dell") in the Massachusetts Superior Court in 2003, claiming that Dell's collection of sales tax on optional service contracts violated the Massachusetts consumer protection law. Dell sought to compel arbitration pursuant to the FAA based on the respective consumer contracts the plaintiffs signed at the time of their purchases. These consumer contracts provided that claims against Dell were to be resolved "exclusively and finally" by arbitration, and that the arbitration would be "limited solely to the dispute or controversy between" the consumer and Dell.

The case reached the Massachusetts Supreme Judicial Court (the "SJC") in 2009. The SJC held that Dell's consumer contract – specifically the contract's mandatory arbitration provision and class action prohibition – was unenforceable because it violated Massachusetts public policy. The SJC remanded the case to the Superior Court, where it was pending when the U.S. Supreme Court decided *Concepcion*.

The U.S. Supreme Court's Decision In *Concepcion*

Concepcion involved a dispute that arose in California between cell phone customers and AT&T Mobility LLC ("AT&T") over AT&T's customer contract. This contract contained an arbitration provision requiring all claims against AT&T to be brought in the customer's individual capacity, and therefore not as a class action. The customer contract specified: (i) if the parties proceeded to arbitration, then AT&T would pay all of the costs for non-frivolous claims; (ii) either party could bring a claim in small claims court in lieu of arbitration; (iii) AT&T was prohibited from seeking reimbursement for attorneys' fees; and (iv) AT&T would pay a minimum recovery amount of $7,500 plus double the cost of attorneys' fees if the customer received an arbitration award greater than AT&T's last written offer.

Despite the arbitration provision of the customer contract, the plaintiff-customers sought to invalidate the class action waiver and pursue a lawsuit against AT&T for overcharged sales taxes. The case reached the U.S. Supreme Court, which ruled in favor of AT&T and upheld the arbitration agreement and class action waiver.

The Supreme Court explained that the primary purpose of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms" and that "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." Accordingly, the U.S. Supreme Court concluded that states cannot require a procedure that is inconsistent with the FAA, even if it may be desirable for unrelated reasons.

Feeney v. Dell, Inc. (2011 Superior Court Decision)

After the U.S. Supreme Court issued *Concepcion,* Dell sought to dismiss the *Feeney* case based on federal preemption. In sum, Dell argued that state courts must follow the U.S. Supreme Court's interpretation of the FAA and that *Concepcion* effectively overruled the SJC's decision in 2009 that the arbitration provision at issue was invalid.

Judge Wilkins disagreed. He determined that Dell's "arbitration agreement stands in stark contrast to the AT&T agreement in *Concepcion*, which had so many pro-consumer incentives that an individual consumer might be better off in arbitration than in class action." In contrast, explained Judge Wilkins, the "Dell Arbitration Clause provides no incentives and simply requires arbitration of all disputes, even those that could not possibly justify the expense in light of the amount in question." For these reasons, Judge Wilkins found that *Concepcion* was distinguishable and, as such, did not govern the outcome of this case.

Recommendations For Employers

The upshot of *Feeney* for Massachusetts employers is that employment agreements containing arbitration provisions with class action waivers will probably not be deemed invalid *per se*. Rather, it is likely that the courts will examine these provisions to

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1 *Will gratefully acknowledges the efforts of Todd A. Newman and Paul Dubois of Schwartz Hannum PC for their help in preparing this article. This article previously appeared in the November 2011 edition of* New England In-House (NEIH). *Will gratefully acknowledges* NEIH *for its support in publishing this article.*

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Massachusetts Enacts "Gender Identity" Law

By Frances S.P. Barbieri

On November 23, 2011, Massachusetts Governor Deval Patrick signed "An Act Relative To Gender Identity," which adds gender identity as a protected characteristic to various state anti-discrimination laws. Effective July 1, 2012, Massachusetts law will prohibit discrimination based on gender identity in employment, education, housing, credit, and other areas. The act, however, is silent as to whether gender identity should be recognized as a protected characteristic in the provision of public accommodations, such as hotel and restaurant services.

The act defines gender identity as "a person's gender-related identity, appearance or behavior, whether or not . . . different from that traditionally associated with the person's physiology or assigned sex at birth." Under the act, evidence of a person's gender identity may include "medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the person's gender-related identity is sincerely held, as part of the person's core identity."

The act also states that "gender-related identity shall not be asserted for any improper purpose," but does not explain this statement or provide examples to illuminate its meaning.

In passing the act, Massachusetts joins the District of Columbia and the following 14 states in rendering gender identity a protected characteristic: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

In order to comply with the act by its July 1 effective date, employers are encouraged to take the following measures:

- Revise equal employment opportunity policies, harassment policies, and corresponding managers' guides and employee handbooks to include gender identity as a protected characteristic;
- Roll out the new policies sufficiently in advance of July 1 to provide employees with adequate notice of this change, and consider doing so in conjunction with general training on diversity, sensitivity, and appreciation of differences;
- Train managers and supervisors to appropriately handle issues pertaining to gender identity in all aspects of human resources, including interviewing, hiring, evaluating performance, imposing discipline, and terminating the employment relationship; and
- Ensure that all individuals designated in your organization's discrimination and harassment policies understand how to respond appropriately to complaints of discrimination based on this new protected characteristic.

This new law will almost certainly result in a wave of cutting-edge employment litigation based on the assertion of gender identity in the workplace. Accordingly, employers that act now to understand and thoughtfully implement this new law over the next several months should have the greatest protection against liability when the law takes effect on July 1.

The new Massachusetts law is also a reminder to employers to exercise care when an employee undergoes a change in gender identity. Such circumstances can be challenging for not only the employee, but also co-workers and managers. Thus, special training and thoughtful advice from experienced counsel are critically important when a current employee is going through a change in gender identity. We have substantial experience guiding clients successfully through that process and are happy to assist as appropriate.

Please do not hesitate to contact us if you have questions about this new law or would like our assistance in achieving compliance with it.

Schwartz Hannum PC Honored As A **"Top 100" Woman-Led Business** For The Second Year In A Row

We are thrilled to announce that Schwartz Hannum PC has been ranked 75th on the Top 100 Women-Led Businesses in the region by the *Boston Business Journal* and *The Commonwealth Institute.* This select list was published in a recent issue of the *Boston Business Journal.*

We are grateful to the entire team at Schwartz Hannum PC, as well as to our clients and friends, for making this award possible.

To read more, go to this link:
http://www.bizjournals.com/boston/event/40711.

NLRB Adopts Significant Changes To Union Election Procedures In Final Rule To Take Effect On April 30, 2012

By Brian D. Carlson

On December 22, 2011, the National Labor Relations Board (the "Board" or "NLRB") issued a Final Rule substantially altering established union election procedures. The Final Rule will become effective on April 30, 2012.

The new election procedures will enable NLRB hearing officers and regional directors to put union elections on a *much* faster track. This will disadvantage employers by according them little time to respond to union propaganda and to present their positions on unionization and relevant workplace issues to their employees.

Advance planning will be the most effective, and perhaps the only, way for employers to prevail in union elections under the new procedures. Our planning recommendations are set forth below, following a summary of the new procedures and the circumstances leading to the Board's vote to adopt them.

The New Election Procedures

The Board's new election procedures will:

- Empower NLRB hearing officers to exclude from pre-election hearings challenges about whether employees are in the bargaining unit or eligible to vote;
- Empower NLRB hearing officers to decide whether the parties will be permitted to file briefs at the conclusion of pre-election hearings (currently, parties may file such briefs as a matter of right);
- Eliminate an employer's right to seek Board review of the regional director's pre-election rulings – and allow post-election review of only those issues "that have not been rendered moot by the election";
- Permit an employer to obtain "special permission" to appeal the regional director's pre-election rulings only upon a showing of "extraordinary circumstances";
- Allow elections to be scheduled within 25 days after a notice directing an election (by deleting language in the Board's current statement of procedure that currently prevents regional directors from scheduling balloting within 25 days of directing an election); and
- Make Board review *discretionary* with respect to certain post-election disputes, *e.g.*, disputes concerning alleged misconduct during the balloting.

Deferral Of More Controversial Changes

In the Final Rule, the Board adopts only a *portion* of a larger set of changes that it proposed in June. The remainder of the proposed changes are even more controversial – and have been deferred for possible later consideration. The deferred portion of the Board's proposed rules would, among other things:

- Permit election petitions to be filed electronically;
- Require a pre-election hearing to be scheduled no later than seven days after service of a notice of hearing;
- Reduce from seven days to two days the employer's time period for providing a list of eligible voters to the union after the election petition has been granted; and
- Require employees' phone numbers and e-mail addresses to be included in the voter lists.

These proposed changes to the election rules were deferred after Republican Board Member Brian Hayes threatened to resign as a way of depriving the Board of the three-member quorum needed to vote on *any* of the proposed rules. In this regard, the five-seat Board consisted of only Hayes and Democrats Craig Becker and Mark Gaston Pearce at the time.

Since the deferral of these controversial additional changes, Member Becker's recess appointment expired, and President Obama appointed (again, via recess appointment) three new Board members, bringing the Board to its full complement of five. As the Board now consists of three Democratic and two Republican members, it is anticipated that the controversial proposed changes will at some point be revived.

Recommendations For Employers

As the Final Rule will give unions a decided advantage in representation elections – and is slated to go into effect on April 30, 2012 – employers should act *now* to reduce the risk of successful union organizing campaigns. At a minimum, employers should:

The new election procedures will enable NLRB hearing officers and regional directors to put union elections on a much *faster track.*

- Adopt and enforce valid policies that limit when employees may solicit and distribute literature in the workplace and that prevent unauthorized visitors from gaining access to the premises. Such policies should always be reviewed by labor counsel, as the rules governing them are complex;
- Be sensitive to issues that are of concern to employees and attempt to remedy legitimate complaints. A proactive approach on such matters can help to alleviate the dissatisfaction among employees that often spawns union organizing campaigns;
- Train supervisors, managers, and human resources personnel in how to recognize and respond appropriately to possible union organizing activity; and

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NLRB Adopts Significant Changes To Union Election Procedures In Final Rule To Take Effect On April 30, 2012

- Develop a plan for communicating the employer's position on unionization and related issues both internally and externally.

Significantly, enacting some of these recommendations *after a union organizing campaign is under way* may be viewed as unlawful retaliation against union activity and, in turn, support an unfair labor practice charge against the employer. Accordingly, employers that wish to remain union-free should act *now* to implement these protections.

Please do not hesitate to contact us if you have questions about the NLRB's new election procedures, or if we can assist with any other labor-related matter.

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Arbitration Class Action Waiver Ruled Unenforceable By Massachusetts Court

determine if they provide employees with an adequate avenue for relief, as in *Concepcion*, or if they set forth a procedure that makes pursuit of relief impractical in light of such factors as the amount of damages being sought and the anticipated cost of pursuing a recovery, as in *Feeney*. When viewed in the employment context, *Feeney* is but one stitch in the patchwork of statutes, case law, and agency policies bearing on the enforceability of arbitration agreements. Accordingly, employers are advised to consult with experienced labor and employment counsel in formulating and drafting arbitration requirements for their applicants and employees.

After this article was published in NEIH, *the National Labor Relations Board ruled in an unrelated case that arbitration agreements prohibiting group claims may violate the National Labor Relations Act, even if the employer is not unionized. This creates further risk and uncertainty for employers and heightens the need to confer with counsel before drafting or seeking to enforce any such provision.*

Schwartz Hannum PC Is Pleased To Announce That David G. Abbott Has Joined The Firm As An Associate

David G. Abbott received his law degree from the University of California at Los Angeles School of Law. He received his undergraduate degree from Cornell University, where he majored in Natural Resources Economics.

Prior to joining the Firm, David worked with Curiale Hirschfeld Kraemer, LLP in Santa Monica, California, where he represented employers in state and federal cases and administrative actions involving wrongful termination, retaliation, employment discrimination, harassment, whistleblowing, and wage and hour violations. David is well versed in drafting and arguing dispositive motions, position statements, charge responses, drafting employee handbooks and conducting classification audits.

During law school, David externed with the California Court of Appeals (District 2 – Division 8), assisting the Justices with appellate opinions for civil, criminal, and juvenile cases. David was also involved in reviewing petitions for writ relief. David has also worked for the National Labor Relations Board in Oakland, California, where he investigated Unfair Labor Practice (ULP) charges against both Unions and Management. He has experience with labor elections, and he has facilitated stipulations between Management and Unions.

David is a member of the Bar of the State of California. He is also admitted to the United States District Court for the Central District of California.

Recent ADA Cases Underscore Heightened Accommodation Duties

By Frances S.P. Barbieri

Under the 2008 amendments to the Americans with Disabilities Act ("ADA"), employers' obligations to accommodate employees with disabilities were significantly expanded. This is now being reflected in court decisions, which are increasingly favoring employees whose requested accommodations were denied. As this trend has emerged, many employers have settled ADA claims originally believed to be defensible in order to avoid potential adverse judgments.

In light of this development, it is crucial that employers carefully review their policies and procedures regarding disability accommodations to ensure that they are in compliance with the amended ADA. And employers embroiled in disability discrimination cases in court should make the utmost of any and all accommodations offered to the plaintiff.

Background

The recent amendments to the ADA broadly expand the universe of physical and mental conditions that qualify as protected "disabilities." In particular:

- The employee's burden of proof in establishing that a physical or mental limitation "substantially limits" a major life activity has been significantly lessened, as this standard may now be met via a generalized, non-scientific comparison to *most people* in the general population;
- The definition of "major life activity" has been expanded to encompass "major bodily functions" (such as the immune, digestive, circulatory and reproductive systems);
- The determination of whether an impairment substantially limits a major life activity must now be made without regard to the potential use of outside measures, *e.g.*, medications or physical-assistance devices, that might mitigate the limitation (although the mitigating effects of ordinary eyeglasses and contact lenses may be considered);
- A condition that substantially limits a major life activity when active qualifies as a covered disability even if the condition is episodic, in remission or otherwise not active; and
- An employer may be held liable for taking adverse action based on its "regarding" an employee as having a physical or mental impairment, even if the employer does not perceive the putative impairment as substantially limiting a major life activity.

Recent Cases

Recent cases under the ADA illustrate the statute's broadened definition of a covered "disability." For instance, a federal court in Illinois recently held that an employee's HIV-positive status, by itself, was sufficient to trigger the protections of the ADA, even though the employee's performance of his job duties had not been affected by his condition. Likewise, a federal court in New York recently held that an employee's breast cancer could qualify as a disability under the ADA, even though the cancer was in remission.

Further, in keeping with the amended ADA's overall purpose of expanding protections for disabled employees, recent lawsuits by employees and the Equal Employment Opportunity Commission ("EEOC") have forced employers to be much more flexible in providing extended leaves of absence as an accommodation for employees with disabilities. For example, during 2011 alone, there were numerous substantial settlements with the EEOC on this issue.

Verizon Communications agreed to pay $20 million to settle a lawsuit alleging that its nationwide attendance policy unlawfully failed to provide flexibility for employees with disabilities requiring extended leaves of absence.

Denny's, Inc. agreed to pay $1.3 million to settle claims that its medical leave policy unlawfully provided for an absolute maximum of 26 weeks' leave, regardless of whether additional leave might constitute a reasonable accommodation under the ADA.

The Jewel-Osco chain of stores agreed to pay $3.2 million to settle a lawsuit brought by the EEOC, which alleged that Jewel-Osco had an unlawful policy of automatically terminating any employee who failed to return at the end of a medical leave without regard to whether the employee might reasonably be given extended leave as an accommodation for a disability.

A Michigan employer settled (for an undisclosed amount) an ADA claim by an employee with cancer, where the employer rejected the employee's request to work part-time for an additional five months while undergoing chemotherapy.

By having clear policies in place … an employer can help to ensure its compliance with the amended ADA.

Recommendations For Employers

In light of the expanded employee protections demonstrated in these recent cases under the amended ADA, employers should:

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U.S. Supreme Court Allows Discrimination By Religious Institutions

By Paul Dubois

In a unanimous decision, the U.S. Supreme Court recently affirmed that a "ministerial exception," grounded in the Establishment and Free Exercise Clauses of the First Amendment, bars religious ministers from bringing discrimination claims against their employers. The Court's decision, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission,* confirms that religious institutions have broad discretion in making employment decisions that affect their ministers.

Facts

Hosanna-Tabor, a Lutheran school in Michigan, categorizes its teachers as either "called" or "lay." Called teachers are regarded as having been called to their vocation by God through a congregation, and are required to complete significant theological studies. Once "called," a teacher receives the formal title "Minister of Religion, Commissioned." Lay teachers, in contrast, are not required to be "called," or even be Lutheran, and are hired by Hosanna-Tabor, for one-year terms, only when called teachers are unavailable.

As a called teacher, the plaintiff in the case, Cheryl Perich, taught math, language arts, science and music at Hosanna-Tabor from 2000 to 2004. She also taught a religion class four days a week, and led her students in daily prayer and occasional devotions.

In June 2004, Perich fell ill with narcolepsy, which resulted in her taking a disability leave of absence at the start of the 2004-2005 school year. In January 2005, Perich informed Hosanna-Tabor that she would be able to report to work the following month. Hosanna-Tabor told Perich that it had hired a lay teacher to fill her position, and that, as a result, there was no position to which Perich could return.

The Court's decision … confirms that religious institutions have broad discretion in making employment decisions that affect their ministers.

As an alternative to reinstating Perich, Hosanna-Tabor offered to pay a portion of her COBRA premiums in exchange for her voluntary resignation. Perich refused this offer and showed up for work on the day her doctor had cleared her to return. After being asked to leave and informed that she would likely be fired, Perich threatened to sue for disability discrimination. Hosanna-Tabor viewed Perich's actions as inconsistent with the teachings of the Lutheran Church, and subsequently terminated her employment for "insubordination and disruptive behavior." In response, Perich filed a claim of disability discrimination with the EEOC.

Procedural Background

The EEOC brought suit against Hosanna-Tabor on behalf of Perich, seeking, in part, Perich's reinstatement to her called-teacher position. Hosanna-Tabor moved for summary judgment on the basis that Perich was barred by the First Amendment's ministerial exception from challenging her termination. The District Court agreed and granted summary judgment in favor of Hosanna-Tabor.

On appeal, the Court of Appeals for the Sixth Circuit held that the ministerial exception did not apply, because, in the court's view, Perich did not qualify as a "minister." The Court of Appeals noted that Perich's job duties were largely the same as those of Hosanna-Tabor's lay teachers, and emphasized that Perich spent only 45 minutes each day performing purely religious duties.

Subsequently, the Supreme Court intervened in the case to clarify the legal standards governing the ministerial exception, which the lower federal courts had uniformly adopted but the Supreme Court itself had not previously recognized.

Supreme Court's Decision

Reversing the Sixth Circuit, the Supreme Court unanimously held that Perich qualified as a "minister," and that the First Amendment therefore required dismissal of her discrimination suit against Hosanna-Tabor. In reaching this conclusion, the Court declined to adopt any specific formula for deciding when an employee qualifies as a "minister." Rather, the Court indicated that this issue must be decided on a fact-specific basis.

In its analysis, the Supreme Court emphasized that both Hosanna-Tabor and Perich herself considered Perich to be a minister, and that Perich's job duties involved conveying the Lutheran Church's message and carrying out its mission. The Court also found it significant that Perich claimed a special housing allowance on her taxes reserved for employees earning compensation "in the exercise of the ministry." Moreover, the Court deemed it irrelevant that Perich spent the majority of her work time in secular duties, stating that whether an employee qualifies as a minister is not an issue "that can be resolved by a stopwatch."

In affirming the lower courts' adoption of the ministerial exception, the Court noted that "requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision," and that such

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Many of the changes were so substantive, and so clearly reflected the involvement of the plaintiff's attorney, that the trial judge granted a motion to make this attorney a witness at trial and, on that basis, disqualified him from continuing to represent the plaintiff. After the Massachusetts Appeals Court affirmed the disqualification order, the plaintiff appealed to the SJC.

Sara Schwartz Featured As Entrepreneur Success Story

Sara Goldsmith Schwartz was featured as an Entrepreneur Success Story on **Womenetics.com**, a website focusing on women who are business leaders and change agents in their respective fields.

To read this feature story, please visit www.womenetics.com or click here: *http://www.womenetics.com/Success-Stories/super-lawyer-sara-goldsmith-schwartz-grows-her-firm-and-her-family.*

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Recent ADA Cases Underscore Heightened Accommodation Duties

- Provide appropriate training to ensure that managers and HR personnel (i) recognize that a broader range of conditions may now qualify as disabilities under the ADA, and (ii) understand how to respond when an employee requests an accommodation for a disability;
- Revise their attendance and leave policies as necessary to allow for flexibility for employees with disabilities;
- Update their job descriptions to accurately reflect each position's qualifications and essential functions, so that there will be no ambiguity as to a job's requirements when an employee requests an accommodation; and
- Consider adopting an accommodation policy that sets forth (i) the steps that an employee should take to request an accommodation, and (ii) the process through which the employer will respond to such requests. The policy should make clear that medical documentation will be required and that decisions regarding accommodations will be made on a case-by-case basis.

By having clear policies in place and ensuring that managers and HR personnel understand how to identify and handle requests for accommodations, an employer can help to ensure its compliance with the amended ADA.

Finally, it is critical that an employer litigating a disability discrimination claim provide counsel with full and complete information about *all* accommodations that were offered to the plaintiff. Often, a variety of accommodations are offered to an employee in the course of both informal discussions and formal meetings, such as extended leaves of absence, flexible work hours, extended deadlines for completing assignments, or reassignment of some of the employee's job duties to other employees. By identifying, in as much detail as possible, the various accommodations that were offered, an employer can enhance its chances of defeating an employee's lawsuit alleging a failure to accommodate his or her disability. (Of course, employers should thoroughly document all such proposed accommodations at the time they are offered.)

If you have questions about these recent developments or would like guidance in achieving ADA compliance, please do not hesitate to contact us. We have created a training program specifically designed for HR professionals and managers who are responsible for receiving and responding to requests for accommodations, and we would be happy to tailor this training program to your particular needs.

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U.S. Supreme Court Allows Discrimination By Religious Institutions

restrictions would "interfere with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." In this regard, the Court emphasized that the ministerial exception is not limited to heads of congregations but applies to *all* ministers employed by religious organizations.

While Perich was fired for failing to comply with church doctrine, the Supreme Court held that the ministerial exception is not limited to instances in which an employment decision is motivated by religious tenets. Rather, the Court emphasized that "[t]he purpose of the [ministerial] exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful…is the church's alone."

Finally, the Court expressly limited its holding to employment discrimination claims, stating that it was expressing no view as to whether the ministerial exception might bar ministers from asserting other types of claims (such as contract or tort actions) against their employers.

Recommendations For Religious Employers

Because the *Hosanna-Tabor* decision makes clear that the determination of whether an employee qualifies as a "minister" must be made on a case-by-case basis, we recommend that religious organizations:

- Ensure that all offer letters, job descriptions, employee handbooks and other employment-related documents are consistent with their understanding as to which of their employees are "ministers";
- Before taking an adverse employment action that might result in an allegation of discrimination, consider (in consultation with counsel) whether the employee is likely to fall within the ministerial exception; and
- Keep in mind that non-ministerial employees remain free to assert claims of employment discrimination.

Please do not hesitate to contact us with any questions you may have about the Hosanna-Tabor *decision or how it may affect your organization.*

Sara Schwartz On National Public Radio

Sara Goldsmith Schwartz appeared as a legal expert on 90.9 WBUR, Boston's National Public Radio station, to discuss the termination of Conductor Benjamin Zander by the New England Conservatory for employing a sex offender to work with the youth orchestra. Sara also addressed the need for schools to conduct proper background checks. Below is a link to the interview, which took place on January 13, 2012.

http://www.wbur.org/media-player?source=radioboston&url=http://radioboston.wbur.org/2012/01/13/conductor-benjamin-zander-fired-for-employing-sex-offender-with-youth-orchestra/&title=Radio%20Boston%20-%202012-01-13&segment=&pubdate=2012-01-13

Suzanne W. King

Jessica L. Herbster

Schwartz Hannum PC

Is Thrilled To Announce That

Suzanne W. King & Jessica L. Herbster

Have Become Shareholders With The Firm

Effective January 1, 2012

Labor and Employment Lawyers Guiding Management

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Spring Seminar Schedule

April 10-11, 2012
Employment Law Boot Camp
(2-day seminar)
4/10: 8:30 a.m. to 4:30 p.m.
4/11: 8:30 a.m. to 5:00 p.m.

April 17, 2012
Annual Independent Schools Hot Topics
8:30 a.m. to 12:45 p.m.

May 1, 2012
Technology In The Workplace
11:30 a.m. to 1:30 p.m.

May 23, 2012
What Non-Union Employers Need To Know About Union Issues
8:30 a.m. to 10:00 a.m.

Schwartz Hannum PC Webinar Schedule

March 29, 2012
Facebook Terminations And Other Social Media Issues
12:00 to 1:30 p.m.

April 24, 2012
ADA/ADAAA: Road Map To Compliance
12:00 to 1:30 p.m.

May 15, 2012
The High Price of Misclassification: Are You Properly Classifying Independent Contractors, Temps, Interns And Volunteers?
12:00 to 1:30 p.m.

Lunchtime Webinar Series For Independent Schools

April 9, 2012
Technology And Acceptable Use Agreements: Where To Draw The Lines For Faculty, Staff And Students
12:00 to 1:30 p.m.

May 7, 2012
Applicants And Students With Disabilities: Is Your School Prepared To Lawfully Accommodate And To Know Where To Draw The Line?
12:00 to 1:30 p.m.

Please see the Firm's website at **www.shpclaw.com** or contact the Firm's Seminar Coordinator, **Kathie Duffy**, at **kduffy@shpclaw.com** or **(978) 623-0900** for more detailed information on these seminars and/or to register for one or more of these programs.

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