

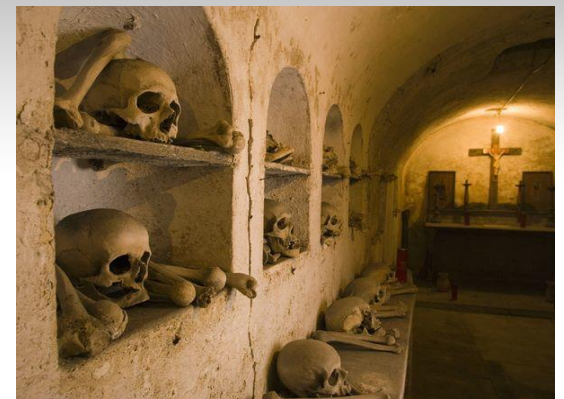
# TALES FROM THE CRYPT:

A Series of Unfortunate Events and the Human Resource Lessons We Can Learn from Them.

2016 South Carolina SHRM Conference

Myrtle Beach

September 22, 2016



This information is not to be construed as legal advice or as pertaining to specific factual situations. Any result the law firm and/or its attorneys may have achieved on behalf of clients in other matters does not necessarily indicate similar results can be obtained for other clients.

# Haynsworth Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW



## Scenario 1

- Small, close knit company
- Employee has worked well for Employer for years
- President of company knows his family
- Employee is beginning to be unreliable at work (unplanned absences and poor performance when there) but no documentation in personnel file
- Employee's mother calls President to tell him that her son is abusing alcohol, not treating his family right, being mean to his mother, and that he has had problems like this in the past, and that alcoholism runs in the family

## Scenario 1



- President meets with Employee, his supervisor, and several other members of management who don't have any direct dealings with Employee and puts him on a PIP with these conditions:
  - **Employee must go to EAP for treatment and comply**
  - **Employee must allow President to communicate with the treatment provider weekly to find out how he is doing**
  - **Employee must apologize to his mother and start doing right at home (seriously, this happened)**
  - **Even though other people in this specific department are not kept to strict work schedules, Employee cannot be late to work, miss any work, and must perform at top level if he wants to keep his job**

## Scenario 1

- Employee admits he is having trouble and is willing to comply with all of the requests
- Afterwards, President calls mother and says he will keep her up to speed on Employee's progress, and agrees to call her weekly to report what is learned from the treatment provider
- Additional facts
  - Company permits employees to use PTO as they see fit and does not require excuses for being absent as long as Employee calls in per policy
  - Employee has unused, accrued PTO time

## Scenario 1

- What if treatment provider recommends inpatient treatment?
  - *Americans with Disabilities Act (ADA)*
  - *Family Medical Leave Act (FMLA)*
- Or medication that will make Employee sleepy initially until he gets used to it?
- What about:
  - Talking directly to provider
  - Finding out anything more than compliance
  - Sharing with other employees who don't need to know
  - Reporting back to Mom

*Health Insurance Portability and Accountability Act (HIPAA)*



## Scenario 1

- What about:
  - Prohibiting Employee from being late to work, or
  - Prohibiting him from missing any work (taking PTO)?
  - Providing excuses for being absent when no one else is required to?
  - What if Employee wants to take vacation with family and President denies PTO request because he is not released from treatment?

*ADA and*

*Title VII of the Civil Rights Act  
(Title VII)*



- A covered entity-

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the **same** qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.



## Scenario 2



- Employer is self-insured and the accounting office receives and pays all invoices for any employee's health treatment
- Employee in accounting office notices from medical record received with invoice that Employee on a particular construction project is going to undergo surgery in a couple of weeks when the project is heating up, so she calls supervisor to advise that the Employee is scheduled for surgery and how long he'll be out
- Employee hadn't advised supervisor or Employer at that time
- Company has not trained its Employees in the accounting department regarding private health information and has no Privacy and Security Policy

***Health Insurance Portability and Accountability Act (HIPAA)***

***Health Information Technology for Economic and Clinical Health Act (HITECH)***

## Scenario 3

- Employer requires all employees to undergo post-offer physical examinations before beginning employment
- The examinations are general physicals and are not targeted to the specific positions or job duties
- While some of the jobs require great strength to perform, most of them have physical requirements such as being able to lift, push and pull 20 pounds frequently, and bend over, squat, and twist for 8 hours a day



## Scenario 3

- Company revoked accepted employment offer for employee who had high blood pressure and another who had asthma
- Supervisors review results of medical examinations which are in employees' personnel files and ask Human Resources if they can terminate employees after they have already been hired because employees are complaining to supervisors about their work conditions and how they effect them medically

## ADA

- Employment entrance examination. - A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if-
  - (A) all entering employees are subjected to such an examination regardless of disability;
  - ...
  - (C) the results of such examination are used only in accordance with this subchapter.

## ADA (continued)

- Examination and inquiry -

Prohibited examinations and inquiries. - A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity



## ADA on physical exams pre-offer, post-offer, and during employment

- Prior to an offer of employment, the ADA prohibits all disability-related inquiries and medical examinations even if they are related to a job
- After an employer extends a conditional job offer, but before an individual begins work, an employer may ask disability-related questions or require medical examinations as long as it does so for all entering employees in the same job category
- After employment begins, an employer may make disability-related inquiries and require medical examinations if they are job-related and consistent with business necessity
- *Only* disability-related inquiries and medical examinations, however, are subject to these restrictions

## ADA - physical agility testing

- Physical agility tests generally are not considered "medical" examinations
- Must be performed at pre-offer stage
- An employer who uses such tests to screen out an individual on the basis of disability must be able to show that its reason for doing so is job-related and consistent with business necessity
- An employer would need to demonstrate that the applicant or employee cannot perform the essential functions of the position in question or that he would pose a direct threat to himself or others that cannot be reduced or eliminated through reasonable accommodation
- Don't recommend periodic testing



## ADA - confidentiality

- Information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that-
  - supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations if they need to know

**Supervisors should not have access to the confidential medical employee file!**

**From EEOC: Employers may not give supervisors and managers unlimited access to the medical files. However, employers may give supervisors and managers information concerning necessary work restrictions and accommodations.**

## Scenario 4

- Employee has exhausted FMLA leave and has advised that she doesn't know when she can return but that she has an appointment with the doctor in three weeks
- Employer accommodates her with additional leave under the ADA until she can report back about her status
- Employee reports back that she wasn't released, but that her doctor said she might be in a couple of weeks
- (this goes on and on for several rounds with Employee either not providing note or just providing work excuse from provider)
- Employer terminates employee after 6 weeks of being unable to return
- Employee files ADA Charge and says she could've returned one week later (which Employer still doesn't know if this is true)

## Scenario 4

- Will the EEOC side with the Employee?
- What should Employer have done differently?
  - Asked for update before termination
  - Ask for more specific information from provider/employee
  - Analyze undue hardship
- What could the Employer have done to have more control over the uncertainty?
  - HIPAA Release
    - But not during FMLA...
  - Job Description
  - Written inquiry regarding ability to perform duties, limitations, and expected return to work to treatment provider



# ADA - undue hardship

- May 2016 Guidelines

- amount or frequency of leave requested;
- whether there is any flexibility with respect to what days the leave is taken;
- whether the days of leave are predictable or unpredictable;
- the impact of the employee's absence on coworkers;
- whether the employee's absence has an effect on specific job duties being performed in an appropriate and timely manner;
- the impact on the employer's operations and its ability to serve customers and clients appropriately and in a timely manner, taking into account the size of the employer;
- Employee's failure to assist employer in obtaining medical information in a timely manner



## Scenario 5

- Employee lost company over 1 million due to negligence
- Employer terminated employee
- Employer did not pay employee his wages through end date or unused, accrued PTO, but advised he'd address it when he returned from an overseas business trip
- Employer took business trip for a month
- Upon return, contacted legal counsel for opinion as to what could be withheld from final paycheck

***Fair Labor Standards Act/South Carolina Payment of Wages Act***

## Scenario 6

- Employee considered exempt employee under FLSA
- Employee keeps records of all hours worked for three years, showing a great deal of overtime
- Employer terminates employee
- Employee brings suit under FLSA contending he was misclassified as exempt and is entitled to overtime
- Employer did not require employee to keep official time records because he was considered exempt, so has nothing to refute his records
- Evaluation determines employee did not meet exempt test

***Fair Labor Standards Act/South Carolina Payment of Wages Act***

## Scenario 7



- Employer loans employees money to buy cell phones, car stereos, purchase extra uniforms and shorts from catalogue containing employer-required uniforms
- Employer deducts these loan amounts from employees' paychecks
- Deductions are not itemized by specific reason on paycheck
- Employer has no written loan "agreements" with employees
- Employer is investigated by DOL who determines Employer engaged in improper deductions from exempt employees' paychecks
- Employer loses exemption for entire class of managers (over 7 restaurants) who tell DOL investigator they worked 55-60 hours on average a week

***Fair Labor Standards Act/South Carolina Payment of Wages Act***



## Scenario 8



- Employee is a sales manager who travels in the southeast region three days a week usually
- Employee required to have outpatient knee surgery and advises supervisor but tells supervisor that she doesn't want to take FMLA leave and she can work from home for two weeks performing administrative tasks until she recovers
- Supervisor agrees to allow her to do this and doesn't alert Human Resources
- Two weeks later, Employee returns to full duties
- Four weeks' later, Employee is hospitalized due to new condition which is complication from surgery

## Scenario 8

- Supervisor and Employee are two people in their regional sales department who oversee sales personnel in 32 locations in the South East region
- They are under tremendous pressure to increase sales due to poor market conditions
- Supervisor goes to see Employee in hospital and asks her when she thinks she'll be released
- Employee reports to Human Resources that she is being pressured by Supervisor and complains she should have been put on FMLA leave when she went out for surgery
- Human Resources places Employee on FMLA leave

## Scenario 8

- Employee returns to work with restrictions and she is also prohibited from traveling initially
- Employee is released to travel but then schedules her physical therapy on her usual travel days. She uses remaining intermittent FMLA leave for physical therapy and other leave needs
- Employee's travel interferes with requirement that she elevate feet at certain times of day
- Employee's performance is slipping during a two month period after returning, so she is placed on a PIP which includes being more physically present and on site for the sales teams in her region

## Scenario 8

- Employee is terminated for poor performance about a month after she has used all of her intermittent FMLA leave
- Only performance issue in file is PIP
- Intermittent Leave
  - She was allowed to self report weekly to supervisor
  - Intermittent leave based on 40 hour work weeks
  - Employee worked 60 hour work weeks on average but exempt employee so no actual records to refute
- Employee brings suit for FMLA interference and retaliation against Employer and names supervisor

## Scenario 8

- What would you have done differently?
  - Intermittent leave - 12 weeks (or remaining weeks) broken down on weekly basis multiplied by **average number of hours worked**
  - Reduced schedule? Alternative position?
  - Accommodation for no travel? Creative means to support teams on-site? (Face-time; “Go to” meetings)
  - Train supervisors that FMLA carries personal liability
  - Intermittent leave should have been reported to Human Resources and not supervisor
  - Could company have removed direct report
  - What else could she have alleged? (ADA; Title VII)

## Anecdotes from “Courthouse News”



# Haynsworth Sinkler Boyd, P.A.

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Jennifer Ashworth v. A1 China  
Super Buffet; Ming & Xin LLC  
8/8/2016 2:16 cv 2754

Civil rights/jobs. Defendant fired plaintiff because of her race, calling her and telling her not to come to work because "they hired a Chinese girl." [Download](#)

Joshua Howle Wigger  
Law Firm



USDC South Carolina Rock Hill

Rock Hill

Jamie Moore fka James Moore  
v. ATS Carolina Inc.; Applied  
Technical Services Inc.; ATS  
Automation Tooling System  
Inc.; A.T.S. Inc.; Patriot  
Technical Consulting-Ptc;  
Entegee Inc. dba Patriot  
Technical Consulting-Ptc  
8/5/2016 0:16 cv 2748 Joseph  
Anderson (Rock Hill)

Employment discrimination -gender. Defendants  
wrongfully terminated plaintiff, who was born a  
male but is transitioning to female, by telling her on  
her first day of work "they were not expecting a  
woman" and that plaintiff "did not fit the company's  
culture." [Download](#)

Joshua Howle Wigger

# THANK YOU!!

Chris Gantt-Sorenson  
Haynsworth Sinkler Boyd Law Firm  
One N. Main St., 2<sup>nd</sup> Fl., Greenville  
[csorenson@hsblawfirm.com](mailto:csorenson@hsblawfirm.com)  
864.240.3282

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