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FLORIDA
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OCCUPATIONAL SAFETY

Taking the sting out of Zika: what Florida employers need to know

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Florida recently confirmed the first known local transmission of the Zika virus through infected mosquitoes in the continental United States. On July 29, 2016, the state of Florida informed the U.S. Centers for Disease Control and Prevention (CDC) that it is highly likely that four residents contracted the Zika virus from local mosquitoes. None of the four patients had traveled to Zika-infected areas, but all had been to the Wynwood neighborhood of Miami, a small, one-square-mile area just north of downtown and a popular tourist destination.

To date, more than 1,650 people have been diagnosed with Zika in the United States. Most of the cases have been attributed to travel to Zika-infected regions, and a small number of people have contracted the virus through sexual transmission.

Because of the media frenzy and your obligation to maintain a safe workplace, you are well-advised to educate employees concerning the transmission of Zika and how they can protect themselves. Below are some frequently asked questions and answers to help employers better understand the disease and how to handle issues that are likely to arise in the workplace.

Q *What is Zika?*

A Zika is caused by the Zika virus, which is spread to people primarily through the bite of infected mosquitoes of the *Aedes aegypti* and *Aedes albopictus* varieties.

Q *What are the symptoms?*

A Symptoms are generally mild and include fever, rashes, joint pain, muscle pain, headaches, and conjunctivitis (pink eye). Some people have no symptoms. Zika infection during pregnancy, however, can cause a serious birth defect called microcephaly (characterized by an abnormally small head) and other severe issues. Although rare, there have been cases of Guillain-Barré syndrome, an uncommon condition of the nervous system that causes temporary paralysis. No vaccines or treatments are currently available to treat or prevent Zika infections.

Q *How do people become infected with Zika?*

A Zika is spread primarily through the bite of an infected mosquito from the *Aedes* species. A pregnant woman can pass Zika to her fetus during pregnancy or birth. In addition, a person who is infected with Zika can pass it to sexual partners via bodily fluids. That implies that Zika may be transmitted through contact with blood or other potentially infectious materials. However, the evidence is not clear at this time.

Q *What is the best way for employers to protect their employees from being bitten by mosquitoes while on the job?*

A The Occupational Safety and Health Administration (OSHA), together with the CDC, has published a fact sheet (www.osha.gov/Publications/OSHA3855.pdf) on protecting workers from workplace exposure to the Zika virus. The fact sheet is not a standard or regulation and creates no new legal obligations. Rather, it offers recommendations to assist employers in providing a safe and healthful workplace. The fact sheet provides interim guidance on protecting outdoor workers, healthcare and laboratory workers, mosquito control workers, and business travelers from occupational exposure to the virus. The Florida Department of Health has launched a Zika virus information hotline (1-855-622-6735).

Q *What steps do the CDC and OSHA recommend employers take to prevent infection?*

A The CDC and OSHA recommend employers take the following precautions:

- Increase on-site pest control measures.
- Drain standing water.
- Eliminate areas where mosquitoes breed at the worksite.
- Educate employees on Zika prevention. For example, the following instructions may help protect employees:
  - Avoid areas of standing water where mosquitoes may breed.
  - Use screens on windows and doors.
  - Use insect repellant that contains DEET, picaridin, or another active ingredient registered with the Environmental Protection Agency (EPA) on skin that is not covered by clothing. Always follow label precautions.
  - Wear clothing that covers all skin, including socks that cover the ankles and lower legs and hats with mosquito netting to protect the face and neck. Treat clothing with products containing permethrin (spray permethrin on clothing and gear only—not directly on the skin).
  - Discard sources of standing water (e.g., tires, buckets, cans, bottles, and barrels) whenever possible to reduce or eliminate mosquito breeding areas.

Q *Can an employer quarantine employees who have been to Wynwood or traveled abroad to areas with high rates of the Zika virus (e.g., Brazil)?*

A Public health officials have not quarantined any person returning from Zika-infected regions, and Zika is not known to be transmitted during casual contact. Therefore, employers risk liability under discrimination and medical privacy laws if they attempt to isolate or quarantine employees.

Q *Can an employer require an employee who is suspected to have been to Wynwood or a Zika-infected region to undergo a medical examination before returning to work?*

A Under the Americans with Disabilities Act (ADA), an employer can require a medical examination if it is job-related and consistent with business necessity. So unless an employer has a reasonable belief, based on objective evidence, that an employee will pose a direct threat to herself or others because of a medical condition, it is not advisable to require a medical examination. Moreover, because Zika is not known to be transmitted through casual contact, an employer may have a hard time meeting that burden.

Q *Can an employer fire an employee who refuses to perform her job or travel to a Zika-infected region because of fear of contracting the virus?*

A Under the Occupational Safety and Health Act's (OSH Act) General Duty Clause, employers are required to maintain a workplace that is "free from recognized hazards" that may cause "serious injury or death." An employer's obligations under the General Duty Clause change with the circumstances. Under the OSH Act's regulations, if an employee has "no reasonable alternative" and "refuses in good faith to expose [her]self to a dangerous condition," then the employer is prohibited from discriminating against her. The dangerous condition must be one that would cause "a reasonable person, under the circumstances then confronting the employee, [to] conclude that there is a real danger of death or serious injury," and the employee must have sought and been unable to obtain correction of the dangerous situation from the employer.

In addition, Paragraph 11(c) of the OSH Act prohibits employers from retaliating against workers for raising safety and health concerns. Unless the employee is disabled, pregnant, seeking to become pregnant, or seeking to impregnate a woman, the Zika virus likely does not rise to that level. Note that a pregnant employee's request not to be sent to affected areas or countries may be deemed a request for a reasonable accommodation. Employers should consult with legal counsel because those issues are extremely complex and fact-specific.

Q *Can an employer ban a pregnant employee from traveling abroad for fear of harming her fetus?*

A No. That would likely be deemed a form of gender or pregnancy discrimination. In its enforcement guidance on pregnancy discrimination, the Equal Employment Opportunity Commission (EEOC) emphasizes that "an employer's concerns about risks to the employee or her fetus will rarely, if ever, justify sex-specific job restrictions for a woman with childbearing capacity." Instead, employers are encouraged to educate *all* employees on the risks of Zika.

Employer takeaway

Florida employers should not overreact to the Zika outbreak. Although local transmission of the virus in Florida has garnered international media attention, most cases of Zika are mild. The virus appears to pose the greatest risk when it infects pregnant women. Therefore, employers should follow developments from the CDC, OSHA, the World Health Organization, local public health departments, and other reliable medical sources and consult with legal counsel before taking any action in the workplace concerning Zika.

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REASONABLE ACCOMMODATIONS

4 leave and accommodation policies that could land you on the EEOC's radar

by Lisa Berg
Stearns Weaver Miller Weissler
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On July 22, 2016, the Equal Employment Opportunity Commission (EEOC) held its Miami Technical Assistance Program Seminar. During the seminar, Miami District Regional Attorney Robert Weisberg discussed some of the EEOC's "hot button" issues and developing areas of the law. One troubling trend, according to Weisberg, is employer policies that deny or unlawfully restrict the use of leave as a reasonable accommodation.

Weisberg mentioned that employers are generally familiar with their responsibility to provide disabled employees reasonable accommodations under the Americans with Disabilities Act (ADA) absent an undue hardship. However, in practice, employers' policies may not comply with their legal obligations. On May 9 the EEOC issued "Employer-Provided Leave and the Americans with Disabilities Act," a new resource document that addresses the rights of disabled employees who seek leave as an accommodation under the ADA.

According to Weisberg, the EEOC is examining employers' leave policies to ensure they are not so inflexible as to foreclose the possibility of a leave of absence being a reasonable accommodation. He indicated the EEOC receives complaints regarding four recurring policy violations under the ADA.

1. '100 percent healed' policies

Some employers have policies that require an employee with a disability to have no medical restrictions (i.e., be 100 percent healed) before returning to work from medical or disability leave. According to the EEOC, in requiring employees to be 100 percent healed as a condition of returning to work, employers are not making an individualized determination about whether employees can perform the essential functions of their job with or without a reasonable accommodation and thus regard the employees as being disabled. (For more information on this topic, see "It's unwise to block employee on work restrictions from returning to work" on pg. 2 of our June 2016 newsletter.)

2. Maximum medical leave policies

Many employers have "maximum leave" policies under which employees are automatically terminated after they have been on leave for a certain period of time. Generally, employers develop the policies as a way to predict and control the impact of employee leave. The policies are intended to be nondiscriminatory because all employees are afforded the same amount of leave.

The EEOC maintains that maximum medical leave policies that automatically deny workers additional leave beyond a predetermined amount violate the ADA because the employer does not satisfy its obligation to engage in the interactive process and provide reasonable accommodations to employees who need more leave. In 2009, Sears entered into a $6.3 million consent decree with the EEOC after it was sued for having a maximum leave policy that stated that employees who did not return to work at the end of one year would be automatically terminated. In 2011, nationwide restaurant chain Denny's paid $1.3 million to settle a disability discrimination suit filed by the EEOC. Denny's entered into a consent decree in which it agreed to, among other things, provide additional medical leave to reasonably accommodate disabled employees and change its corporate policy, which set a maximum amount of leave for employees.

3. 'No fault' time and attendance policies

According to the EEOC, no-fault attendance policies violate the ADA because employees are assessed points for absences, resulting in discipline or discharge even when absences are due to ADA-covered disabilities. The agency's position is that an employer should provide, as a reasonable accommodation, an exception to its no-fault point system for absences related to ADA-covered conditions. One of the EEOC's largest settlements to date has been with Verizon, which agreed to pay $20 million in 2011 to settle a nationwide class action disability discrimination lawsuit that challenged its no-fault attendance policy.

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GUEST COLUMN

Life, death, and work: 4 tough questions for employers after Dallas

by Michael P. Maslanka
FisherBroyles, LLP

Dallas has been my home for 32 years. Currently, I live and work downtown. The murders of the five Dallas police officers took place just a few blocks from my home. Neighbors in my building heard the firefight as it unfolded. I am a law professor, and three of my students are police officers. I have thought of them a lot lately.

The public-policy issues on race, guns, and violence are being debated and discussed everywhere from the dinner table to the classroom to legislative arenas. Those issues permeate our workplaces as well. Like the Venn diagrams we learned in high school, which use overlapping circles to show relationships between different items, the issues overlap—not by a little, but by a lot. Here are some questions HR, company leaders, and anyone else who is grappling with these issues should ask.

Does discrimination exist in the workplace?

Yes, it does. Sometimes it's explicit. Good ol' boys' clubs exclude anyone not already in their network. Companies recruit only at schools with nonminority demographics. Sometimes it's even more overt. To cite just a few of many examples:

- In Pennsylvania, three employees were fired after they modified their uniforms to look like Ku Klux Klan members.
- In New York, employees routinely used anti-Semitic comments and offensive and derogatory remarks about Judaism to mock the religious beliefs of a coworker's spouse.
- In Illinois, after returning to work from serving in the Army, a Lebanon-born employee's new supervisor mistakenly thought he was an "Arab," forced him to take segregated smoke breaks, asked if his relatives were involved in the 9/11 attacks, and physically assaulted him.

Sometimes discrimination is implicit. While a company might say that it believes in equal rights, it can nevertheless have hiring managers who harbor an implicit belief that black employees don't measure up or that a woman's place is at the center of the family. Check out Harvard University's Project Implicit. There is a test on its website to determine your level of implicit bias (https://implicit.harvard.edu/implicit/takeatest.html).

The results may surprise you. They surprised me. I point the finger at my profession. Lawyers are overwhelmingly white. Just this year, the Texas Bar obtained 20 percent total minority membership. That 20 percent includes all minorities, including African Americans, Hispanics, Asians, and Native Americans.

The first step to wisdom is to understand that none of us is as good as we think we are. Trust me. Every morning, I look in the mirror and see someone who is skinnier than he really is, has more hair on his head than is really there, and is better looking than reality allows. A little self-awareness goes a long way to understanding.

First comes awareness, but what comes next?

In the first days after the bloodshed, there was a vigil in our city. Later, by happenstance, I ran into a Dallas police officer and a friend of hers at a bar. We talked over a beer, and she made an interesting observation (echoed by one of my students): Training at the Dallas Police Academy lasts eight months and continues after the rookie goes into the field. We saw that on display that terrible Thursday night as officers followed training protocol in helping their fallen comrades, professionally located and interviewed possible suspects, and gave updates to the press and public.

That's the value of training. It's the same in your workplace. You can't change people, but you can help them understand the value of diversity, give them the tools to be fair and equitable at work, and teach them how to give appropriate criticism and praise proper conduct.

Are we powerless against violence?

Yes, we are powerless to the extent that we can't stop or eradicate violence. But we aren't powerless to manage it when it happens. To address that issue, I'll go back to my encounter with the police officer over a beer (as well as my experience representing police

departments in employment lawsuits). In large metro areas, police officers are trained in the art of defusing volatile situations, moving them away from confrontation and toward resolution. The officer I met after the vigil mentioned that she receives five or so person-with-a-gun calls a week—calls that are resolved without violence.

To resolve conflicts in the workplace without violence, I suggest using supportive separations. I learned that method from working with consultants who helped me guide clients through workplace situations that were potentially violent. Here's a story to illustrate my point: An employee who was recently divorced and had a chronic illness didn't receive a promotion at work. He told a coworker that he was going to shoot his supervisor. The facts checked out, and we told him, "Joe, we cannot tolerate violence in the workplace. But we do care about you and your situation. We want to help design a way for you to receive health benefits and a severance, but those benefits come with the condition that you can't come back to the facility."

People resort to violence when they lose all hope. The supportive separation method is designed to preclude that feeling. It works.

Am I my brother's keeper?

In the Bible, Cain killed his brother Abel, a shepherd, over an imagined slight. The Lord said to Cain, "Where is Able thy brother?" Cain said, "I know not. Am I my brother's keeper?" I contend that yes, we are. We must be in order to have a civil and orderly society and workplace.

In a case in Kansas, an in-house attorney started acting oddly and took food from the company cafeteria without paying for it. The company installed cameras to catch him in the act, and once he was caught, it required him to report himself to the Kansas Bar Association. The lawyer was publicly reprimanded. To what end? After going through the expense and effort of earning a law degree and passing the bar exam, the attorney has a black mark over his whole career for what would seem like a minor infraction.

But what if the company had taken a different approach, digging a little deeper to find the cause of the problem instead of jumping to persecute the attorney? Instead of asking someone the vague, open-ended "How's it going?" and settling for a rote "OK," ask the person, "What's on your mind?" Cognitive researchers point to that question as one that truly invites an honest response.

Bottom line

Try to be a role model for others. In a commencement speech several years ago, U.S. Supreme Court Justice Clarence Thomas spoke of the grandparents who raised him and explained how they were his heroes. He said the greatest gift we can give our heroes is to be a hero to someone else.

That is close to the idea of being a role model—not a paragon of virtue, but someone whom a younger, less experienced person can model himself after. I am acutely aware of that whenever I stand in front of a class of first-year law students. No matter our age, we all need someone to show us the way and demonstrate that we are "our brother's keeper."

One of my law school colleagues participated in the Black Lives Matter march that preceded the violence. Television stations were filming the march as the firefight erupted. I saw my colleague and others running from the shooting. As I watched, a person fell. My colleague turned around, ran back toward the woman, and helped her get up, being a hero to someone else in a terrible moment.

It is hard to make sense of the senseless and find meaning in what seems like a meaningless enterprise. But I have found myself trying to do just that since the attack. More than anything, this tragedy has been a reminder of our shared humanity.

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4. Requiring competition for vacant positions

An unresolved issue in the U.S. 11th Circuit Court of Appeals (whose rulings apply to all employers in Florida, Georgia, and Alabama) is whether an employer that cannot reasonably accommodate a disabled employee in her current position must reassign her to another position without regard to its nondiscriminatory competitive selection process. On June 10 oral argument was held in *EEOC v. St. Joseph's Hospital* (Case No: 8:13-cv-02723-JSM-TGW (M.D. Fla.)), Appeal No: 15:14551-V, before the 11th Circuit. Specifically, the issue is whether the employer violated the ADA when it failed to reassign a disabled employee to a vacant position for which she was qualified as an accommodation and instead required her to compete with "all" eligible applicants and employees. We are following the case closely and will provide an update when the 11th Circuit issues a decision.

AGENCY ACTION

Task force urges "reboot" of harassment prevention. A task force headed by two commissioners of the Equal Employment Opportunity Commission (EEOC) is calling for a "reboot" of workplace harassment prevention efforts after 14 months of studying workplace harassment. In reviewing the findings for their fellow commissioners, EEOC commissioners Chai R. Feldblum and Victoria A. Lipnic said that too much of the effort to prevent workplace harassment has been ineffective and focused on simply avoiding legal liability. It also says almost one-third of the roughly 90,000 charges filed with the EEOC in fiscal year 2015 included an allegation of harassment. The report urges employers to explore new types of training to prevent harassment, including workplace civility and bystander intervention training. The report also includes a chart of risk factors that may permit harassment to occur, effective policies and procedures to reduce and eliminate harassment, recommendations for future research and funding, and targeted outreach. It also offers a toolkit of compliance assistance measures for employers and other stakeholders.

EEOC offers sample notice on wellness programs. The EEOC has posted a sample notice to help employers that have wellness programs comply with their obligations under a recently issued Americans with Disabilities Act (ADA) rule. The notice is available at www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm. The rule says that employer wellness programs that ask employees about their medical conditions or that ask employees to take medical examinations (such as tests to detect high blood pressure, high cholesterol, or diabetes) must ensure that the programs are reasonably designed to promote health and prevent disease, that they are voluntary, and that employee medical information is kept confidential. A question-and-answer document describing the notice requirement and how to use the sample notice is available at www.eeoc.gov/laws/regulations/qanda-ada-wellness-notice.cfm.

DOL, Virginia sign agreement on misclassification. The U.S. Department of Labor (DOL) announced in June that it has signed an agreement with the Virginia Employment Commission aimed at preventing misclassification of workers as independent contractors or other nonemployee statuses. The three-year memorandum of understanding says that the two agencies will provide outreach to employers and employees, share resources, and enhance enforcement by conducting coordinated investigations and sharing information. The DOL and the IRS are working with Virginia and 30 states as part of an initiative to combat employee misclassification. ✤

Employer takeaway

When dealing with accommodation issues, employers should engage in the interactive process with employees and analyze requests on a case-by-case basis. Also, train supervisors to notify the HR department or other appropriate company officials of all leave or time-off requests to ensure your organization promptly engages in an individualized interactive process with all disabled employees, even if they are not eligible for or have exhausted Family and Medical Leave Act (FMLA) and company-provided leave. In addition, consider removing any language from attendance and leave-of-absence policies that suggests employees will be terminated if they do not return within a specific period of time or requires employees to be able to return to work without any medical restrictions.

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DISCRIMINATION

Pizza discrimination?! Customer sues Florida Domino's for employees' alleged bias

by G. Thomas Harper
The Law and Mediation Offices of G. Thomas Harper, LLC

A pregnant Moroccan Muslim woman has sued a Domino's Pizza franchisee in Davenport over the quality of pizza and treatment she received from employees of the restaurant. The customer brought suit in state court in Polk County against the franchisee, Michael P. Jarvis, both as an individual and as the owner of Michael J.'s Pizzeria, Inc., d/b/a Domino's Pizza, Store Number 3267. Here is what the customer claimed happened.

Pizza blows up!

In July 2012 Hakima Benaddi, who was pregnant at the time, took her 23-month-old daughter to the Domino's store. Benaddi was wearing a hijab, a traditional head scarf worn by Muslim women. She ordered a vegetarian pizza and went home after receiving her pizza. After opening the pizza box, she discovered that the pizza was "grossly inadequate." She described her pizza as "missing crust and sauce in some places, the shape of the pizza was deformed, and many of the vegetables [that she was told would be on the pizza] were missing." The only toppings on the pizza were mushrooms, tomatoes, and onions, all of which were improperly distributed, according to Benaddi. A Domino's employee later said that the store was busy at the time and that employees had forgotten to put black olives on the pizza.

Benaddi called the store and complained, but according to her, no solution was offered. She went back to the store with her pizza to complain. At the store, she claims she was ignored at first but eventually met with three employees, including the

store manager. They told her there was nothing wrong with her pizza and the pizza she had ordered did not come with the toppings she claimed were missing. She claimed one of the employees laughed at her and the employees refused to give her a refund or honor Domino's satisfaction guarantee.

Whitney Green, the employee who took Benaddi's order, claimed Benaddi yelled at her and said, "It's because you're an American and I am Muslim. I am gonna come back with a bomb. I will blow you all up, especially you with the glasses [referring to Green]." Benaddi then left the pizza on the floor and went home.

A Domino's employee claimed Benaddi called the store after returning home and told him she was going to blow up the place. Domino's called police, who went to the store and investigated. Police then went to interview Benaddi at her home around midnight. Benaddi admitted that she had complained about the pizza but denied making statements about a bomb. Still, the sheriff's office arrested her.

Benaddi filed suit against the store, claiming that employees fabricated the statements she allegedly made and that the statements were typical of hate speech directed at and stereotypes of Arabs and Muslims. She claimed she was discriminated against because of her race, religion, and national origin. Jarvis had the case moved to federal court in Tampa based on the federal laws that Benaddi claimed were violated by his business.

Claims under employment laws

Benaddi sued based on Title II of the Civil Rights Act of 1964, the public accommodations provision. The provision states: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." Benaddi claimed Domino's discriminatory treatment of her because of the pizza sale violated Title II. Jarvis asked the court to dismiss her claim.

On Benaddi's claim based on the public accommodation provision of Title II, the court noted that she is a "Muslim woman of Arab and Moroccan descent." Also, the court found that she adequately showed that Michael J's Pizzeria is a place of public accommodation and that she attempted to contract for services when she ordered a pizza at the restaurant.

However, Benaddi failed to establish that she was denied the *right to contract* for service or that she was denied benefits or enjoyment. The court found that since she successfully ordered, paid for, and received her pizza, she could not show that she was denied the right to contract for the food. The court noted that the fact "that she was personally displeased with the pizza that she obtained is of no consequence." Thus, she failed to establish a required element of her public accommodation claim—i.e., that she was denied the right to contract. The court also found that Benaddi failed to show that she was treated differently as a Muslim woman since she did not present any evidence that non-Muslims were treated differently. Thus, her claim for a violation of the public accommodations provision was dismissed by the court.

In a second federal claim against the pizzeria, Benaddi asserted that the store violated one of the civil rights laws passed after the Civil War. The law grants minorities the same rights to make and enforce contracts as those enjoyed by white citizens. The court noted: "The term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." However, after analyzing the evidence presented by Benaddi regarding the actions of the Domino's employees, the court found it was not enough to establish that the actions of Jarvis and the pizzeria were intentionally and purposefully done because of her race and ancestry. Instead, the court said her claims were nothing more than "threadbare recitals" and were supported only by conclusory statements that were not enough to show intentional discrimination based on her race under the law.

Benaddi also asserted claims against the pizzeria for denial of public accommodations under Florida's discrimination law, the Florida Civil Rights Act of 1992 (FLCRA). She further claimed that she suffered intentional infliction of emotional distress under Florida law. In addition, she sued for malicious prosecution and defamation of her character and reputation. All those claims were based on Florida law, not federal law. As a result, the federal court declined to rule on her state-law claims and sent those claims back to the state court in Polk County. *Hakima Benaddi v. Michael P. Jarvis,*

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9-14 Website Accessibility: Strategies for Meeting Digital Accessibility Standards Amid Increased Regulatory Oversight ✤

Individually, and Michael J's Pizzeria, Inc., d/b/a Domino's Pizza, a Florida Corporation, Case No. 8:15-cv-2143-T-33TGW (M.D. Fla., July 6, 2016).

Takeaway

Benaddi's arrest for making threatening statements was dropped by the state's attorney because of inconsistent statements by witnesses, and the record of her arrest was ordered expunged from court records. This case shows that customers can use employment laws to claim discrimination and the denial of rights. Employee training is key to prevention. Employers typically discuss the 32 protected classes of individuals in Florida with supervisors, but if your employees work with the public, general training on Florida's discrimination laws is needed so they will be sensitive when dealing with all persons.

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