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# FLORIDA
## EMPLOYMENT LAW LETTER

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*RACE DISCRIMINATION*

# Holding supervisors to higher standard

by Al Vreeland, guest editor
Lehr Middlebrooks Vreeland & Thompson, P.C., Birmingham, AL

*One of the keystones of most progressive discipline systems is that context matters. The overarching goal of a successful system is consistency and fairness in meting out the discipline: Like offenses should be treated alike. But the system also provides leeway to recognize that not all violations of the same rule are equal. Some insubordination may be minor back talk because the employee is having a bad day; other insubordination can be flagrant and even pose a safety risk. The offending employee's role also can make a difference. Supervisors are paid for their good judgment and therefore can be held to a higher standard. Read on as our federal court of appeals approves how a Jacksonville-based employer considered context in determining the appropriate level of discipline.*

## *Following the leader*

John Jones began working for CSX Transportation (CSXT), a railroad based in Jacksonville, in 1997. At the time of his termination in May 2015, Jones served as a track foreman in a department responsible for installing new railroad track and preserving existing track. A track foreman directs the work of an assigned crew and ensures it follows CSXT operating rules.

On April 7, 2015, Jones led a three-man crew as track foreman and designated "employee-in-charge"—i.e., the roadway worker who is responsible for all movements and on-track safety for the crew. While performing their maintenance duties, Jones and his crew needed to cross a "diamond" where CSXT's railroad track intersects with track owned by another company. CSXT has established rules for how to do so safely: If the indicator light on a signal box near the diamond isn't lit, the track foreman is supposed to wait 12 minutes, press the signal button, wait another six minutes, and then direct his crew to cross the diamond.

Jones insists he followed the instructions, waiting the full 18 minutes before directing his crew to cross the diamond. But CSXT's investigation into the matter showed the crew waited only four minutes and 50 seconds before crossing the diamond. According to the railroad, Jones' crew narrowly avoided colliding with another train traversing the same stretch of track.

## *Same incident, different discipline*

CSXT disciplined Jones and the two other crew members for their conduct. The railroad charged Jones with failing to comply with safety rules or follow operating procedures and concealing facts under investigation. His charges were labeled "major offenses," and CSXT initiated a formal investigation, which ultimately resulted in his termination.

## AGENCY ACTION

***NLRB names new solicitor.*** The National Labor Relations Board (NLRB) in December announced the appointment of Fred B. Jacob as its new solicitor. The solicitor is the chief legal adviser and consultant to the Board on all questions of law regarding its general operations and on major questions of law and policy concerning the adjudication of NLRB cases in the courts of appeals and the U.S. Supreme Court. The solicitor also serves as the Board's legal representative and liaison to the General Counsel and other offices of the agency. Jacob has spent more than two decades practicing labor law and advising federal agencies on ethics, administrative law, and government operations.

***USCIS reaches H-2B cap for first half of fiscal year 2019.*** U.S. Citizenship and Immigration Services (USCIS) reached the congressionally mandated H-2B cap for the first half of fiscal year 2019 on December 6, meaning no more cap-subject petitions for H-2B workers wishing to start work before April 19 were accepted after December 6. The H-2B program allows U.S. businesses to employ foreign workers for temporary nonagricultural jobs. The cap is 66,000 per fiscal year, with 33,000 for workers who begin employment in the first half of the fiscal year (October 1 through March 31) and 33,000 for workers who begin employment in the second half of the fiscal year (April 1 through September 30).

***NLRB issues strategic plan.*** The NLRB in December issued its strategic plan for fiscal years 2019 through 2022. The Board's announcement said the plan contains four goals to support the vision of NLRB Chairman John Ring and General Counsel Peter Robb: (1) achieving a collective 20 percent increase (five percent over each of four years) in timeliness in case processing of unfair labor practice charges, (2) achieving resolution of a greater number of representation cases within 100 days of the filing of an election petition, (3) achieving organizational excellence and productivity, and (4) managing agency resources efficiently and in a manner that instills public trust.

***OFCCP launches new directives.*** The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) has announced three new directives aimed at establishing an opinion letter process and enhancing its help desk, establishing a process to resolve compliance evaluations at the earliest stage possible, and clarifying the agency's compliance review procedures. The OFCCP enforces federal laws that prohibit federal contractors and subcontractors from discriminating based on race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. ✤

The other two members of Jones' crew—both white men—were charged with violating the same operating rules, but their violations were called "minor offenses." CSXT issued "time outs" (the equivalent of a suspension) and agreed to waive any formal investigation into their conduct, allowing them to avoid serious discipline.

### *What's the difference?*

Jones sued CSXT, alleging he was subjected to harsher punishment than his fellow crew members because of his race. Seems pretty straightforward, right? Three guys were involved in the same incident, but only the black guy gets fired. CSXT argued, however, that Jones' fellow crew members—both of whom worked under his supervision and crossed the diamond at his direction—were not appropriate comparators. The railroad also explained that Jones deserved harsher discipline because he alone served as the crew's designated employee-in-charge.

Jones admitted he alone was the crew's designated employee-in-charge during the incident. Nonetheless, he claimed CSXT's reason for disciplining him differently than the other crew members was pretext (or an excuse for discrimination), contending *all* crew members—not just the track foreman and employee-in-charge—are responsible for following the railroad's safety and operating procedures. He also argued all three crew members were charged with violating the same operating rules, and CSXT has no company policy imposing harsher discipline on an employee-in-charge.

Our federal court of appeals, however, saw it differently. In the court's view, Jones could not prove race discrimination by merely quarreling with the wisdom of CSXT's decision to discipline an employee-in-charge differently than other crew members. That was a rational distinction in the disciplinary process, which ultimately derailed Jones' case. *Jones v. CSXT Transportation, Inc.* (11th Cir., 2018).

*continued on page 4*

# ASK ANDY

## Brackets, buzzer-beaters and . . . criminal liability?

by Andy Rodman and Thomas Raine (Law Clerk, Univ. of Miami), Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Super Bowl LIII has passed, but March Madness is right around the corner. You know what that means—betting, brackets, office pools, . . . and potential civil and criminal liability. So sorry to spoil the fun.

Each year, Americans bet billions on sporting events, and money wagered through office pools (such as March Madness brackets) surely contributes to that total. With sports betting occurring in plain view in the workplace, what, if anything, should Florida employers do? Organize and participate in the pools? Look the other way as it occurs? Adopt policies that ban all workplace gambling (and put an end to all the fun)?

### *Legal concerns*

Office pools are widespread, but believe it or not, they are illegal in many states (including Florida) when money changes hands. In fact, in Florida, it's a second-degree misdemeanor. Yes, a crime (though rarely prosecuted).

In May 2018, the U.S. Supreme Court—in *Murphy v. NCAA*—struck down the Professional and Amateur Sports Protection Act (PASPA), which had prohibited state-authorized sports gambling with a few exceptions (including, of course, a carve-out for Nevada). Declaring the PASPA unconstitutional, the Supreme Court held that the regulation of sports gambling falls within the purview of the states, not the federal government.

Since *Murphy*, many states have legalized sports gambling in some capacity. Florida has not taken any legislative action, so at least for now, the office pool remains illegal here in the Sunshine State.

Employers also run the risk of civil liability arising out of a workplace sports pool. Because the pool is illegal, an employee who suffers an adverse employment action (such as a demotion or termination) after voicing opposition to employer organization or sponsorship of the workplace pool could, theoretically, attempt to assert a whistleblower claim. Of course, he ultimately would bear the burden of proving the causal connection between the "blowing of the whistle" and the challenged adverse action.

### *Practical concerns*

Increasingly, employers are viewing office pools as a cybersecurity threat. Click-happy employees attempting to upload or update a bracket, or trying to catch the last few minutes of a game, inadvertently may subject the employer's computer system to a cyberattack that could expose highly sensitive information belonging to the employer, its employees, and even its customers.

There's also a drain on workplace productivity. With many March Madness games televised during work hours, the productivity loss is easy to understand.

On a positive note, many believe that office pools increase workplace camaraderie and morale. In many workplaces, the office pool is viewed as a "legitimate" excuse to socialize, build relationships, and of course, circulate company-wide e-mails announcing the pool or bracket rules. Many employees find themselves socializing with coworkers with whom they interact very little during the rest of the year.

### *Are office pools worth the risk?*

As long as office pools remain illegal in Florida, you should refrain from actively organizing, sponsoring, and promoting sports betting in the workplace. In an effort to distance the company from any legal problems, you may even want to consider expressly prohibiting management-level employees from participating in office pools. Then, weigh the pros and cons and decide whether to implement policies that reduce exposure (such as regulating computer and Internet usage) while, perhaps, safeguarding a little fun.

*Andy Rodman is a shareholder and director at the Miami office of Stearns Weaver Miller. If you have a question or issue that you would like Andy to address, e-mail arodman@stearnsweaver.com or call Andy at 305-789-3255. Your identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquires are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions.* ✤

*continued from page 2*

## *Considering context*

In defending disciplinary decisions, particularly against discrimination claims, consistency is key. But the rule of consistency need not (and should not) be applied blindly. You can consider context. But also keep in mind that the more exceptions you make and the more special cases you recognize, the harder it becomes to defend the original rule. In situations like the one facing CSXT, however, we think it's always appropriate to hold supervisors to a higher standard. That's why they're supervisors.

*You may contact Al Vreeland via e-mail at avreeland@lehrmiddlebrooks.com.* ✤

*MEDIATION*

# Florida courts requiring personal attendance at mediation

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

*If you or your company is involved in a lawsuit in Florida, at some point you will be required to mediate it. Increasingly, Florida courts are requiring that this conference be attended in-person by representatives who have authority to resolve all the issues in the case. A recent order by a Tampa federal magistrate judge in a case involving wage and hour law claims continues this trend. In the order, the court denied a joint request by the parties to conduct a settlement conference by telephone.*

## *Hibachi chef earned $6.25 per hour*

Henry Lopez worked as a hibachi chef at Yummy Cuisine, a Tampa restaurant. He claimed he was paid a straight salary of $1,800/month but regularly worked from Tuesday through Sunday, 12 hours per day. He also alleged that as hibachi chef, he wasn't exempt from receiving minimum wage or overtime. He claimed that he worked 72 hours a week and that his salary meant he was paid only $6.25 per hour in violation of the minimum wage and overtime laws.

Lopez's lawyer wrote a letter to the restaurant owner, who declined to resolve the claims. After the suit was filed, the federal court issued a special scheduling order used in Fair Labor Standards Act (FLSA) cases filed in the Middle District (which covers Ft. Meyers, Tampa, Orlando, Daytona, and Jacksonville). The procedure with FSLA cases is to suspend discovery (exchange of evidence) and require the employee and employer to provide all evidence in their possession of hours worked and pay. Then, they are ordered to conduct a settlement conference to see if the case can be resolved. This procedure was initiated, in part, to avoid attorneys' fees being racked up by lawyers representing employees who have smaller but valid claims.

## *Save money where you can*

Lopez's lawyer was in Coral Gables, and the Yummy House hired a lawyer in Port Richey. Since they were hours apart, both sides jointly asked the court if they could hold their settlement conference by telephone to save time and travel. The request, however, was *denied* by Magistrate Judge Amanda Arnold Sansone, who issued an order requiring that the lawyers meet *in person* to attempt to resolve the case (with their clients or with full authority from their clients).

Although the court rules encourage the use of telephone conferences when the parties and counsel are distant, here the judge noted there was a *strong preference* in FLSA cases for the parties to conduct settlement conferences *in person* and before discovery begins. In her decision, she noted the FLSA scheduling order required that they "meet and confer *in person* in a good faith effort to settle all pending issues, including attorneys' fees and costs."

Further, the scheduling order required that the lawyers must "set aside sufficient time for a thorough, detailed, and meaningful conference that is calculated to fully resolve the case by agreement." Judge Sansone cited several other instances in which courts in the Middle District required settlement conferences in person and ruled here that the scheduling order was best served by requiring that they and their lawyers actually meet in person. *Lopez v. Yummy House Chinese Cuisine, Inc.*, Case No. 8:18-cv-2018-002460-T-36AAS (January 14, 2019).

## *Takeaway*

Although this case involved the special court procedures followed in FSLA cases in the Middle District, the decision reinforces a "trend" to require in-person

attendance at mediations and required settlement conferences in Florida.

Florida law and the Florida Rules of Civil Procedure now provide that for mediations, each party *must personally attend* and must come with full authority to resolve all disputes at issue. Rule 1.720 of the Florida Rules of Civil Procedure now requires that the following persons be *physically present* at a mediation conference:

(1) The party or party representative having full authority to settle without further consultation;

(2) The party's counsel of record; and

(3) A representative of the insurance carrier for any insured party who isn't the carrier's outside counsel and who has full authority to settle in an amount up to the amount of the last demand or policy limits, whichever is less, without further consultation.

*You can reach Tom Harper at tom@employmentlawflorida.com.* ✤

*MARIJUANA USE*

# Now's the time to consider marijuana policy

*State laws legalizing the use of marijuana—whether for medical or recreational use—have been a fast-moving target over the last several years. Currently, there are only 16 states in which marijuana is still illegal for both medical and recreational purposes. And out of those 16, most allow products that contain small amounts of THC, the active ingredient in marijuana.*

*The point is that nearly every employer in the country may soon be faced with the question of how to discipline an employee who used marijuana or consumed marijuana-related products in a state where it's legal to do so.*

## *Background: federal law*

Under federal law, marijuana is still illegal and is considered a Schedule I drug, which is defined as a drug for which there is



## WORKPLACE TRENDS

***Survey finds lack of understanding of when workers will retire.*** U.S. employers are rethinking their approach to managing the retirement patterns of their workforces, according to a study from Willis Towers Watson. The 2018 Longer Working Careers Survey found that 83% of employers have a significant number of employees at or nearing retirement, but just 53% expressed having a good understanding of when their employees will retire. Additionally, while 81% say managing the timing of their employees' retirements is an important business issue, just 25% do that effectively. The survey found that 80% of respondents view older employees as crucial to their success.

***Urgent hiring needs expected in tech sector.*** New research shows many technology teams will be growing in the first half of 2019, but staffing challenges exist. Robert Half Technology's State of U.S. Tech Hiring research shows that 63% of IT hiring decision makers polled plan to expand the size of their teams by adding full-time employees. However, 87% of those surveyed said it's challenging for their company to find skilled IT professionals. Almost all respondents (95%) said they will bring on project professionals to support their teams in the first six months of the year. In addition, 90% of IT leaders said they are upskilling or training current employees on in-demand technology skills.

***Investment in talent development on the rise.*** A new report from the Association for Talent Development shows that organizations are continuing to make healthy investments in employee learning. The study was sponsored by LinkedIn Learning and the American Management Association. Organizations spent $1,296 per employee in 2017, up 1.7% from 2016, according to the research. This is the sixth consecutive year that per-employee spending on learning has increased. The report says the use of technology to deliver training continues to increase, but more than half of all learning is delivered in a traditional classroom. The 2018 State of the Industry report is based on a survey of nearly 400 organizations of various sizes, industries, and locations.

***Indeed studies weird, wacky job titles trend.*** Online career platform Indeed has taken a look at what it calls "the state of weird and wacky job titles in 2018" and noted some trends. The research found that in 2018, seven terms performed particularly well: genius, guru, hero, ninja, superhero, rockstar, and wizard. "Ninja" was dubbed the comeback kid of 2018 since there was a 90% increase in ninja job titles between October 2017 and October 2018. The 2017 winner, "rockstar," slipped in 2018. There was a slight uptick in "genius" jobs, but "heroes" and "wizards" were on the decline. ✤

## UNION ACTIVITY

***UAW lodges objection to GM announcement.*** The United Auto Workers (UAW) in December lodged a formal objection to General Motors' (GM) plan to close four American auto plants in 2019. The complaint objected to what the union called GM's unilateral decision on the future of those facilities. The UAW said the decision was made without the union's agreement, which it says is required by the 2015 National Agreement. "We have been clear that the UAW will leave no stone unturned and use any and all resources available to us regarding the future of these plants," UAW President Gary Jones said. He added that UAW members across the country "are committed to using every means available to us on behalf of our brothers and sisters" at the plants in Lordstown, Ohio; Hamtramck, Michigan; Baltimore, Maryland; and Warren, Michigan.

***AFL-CIO leader calls for stronger health, safety protections.*** The AFL-CIO's safety and health director in December spoke out about new figures from the U.S. Bureau of Labor Statistics (BLS) showing the number of injuries and fatalities at workplaces. "The BLS report shows that too many workers are being killed on the job," Peg Seminario said. "While in 2017, there was a small decline in the number and rate of job deaths, 5,147 workers lost their lives on the job. That is an average of 14 workers dying each and every day." Those figures don't include deaths from occupational diseases like black lung and silicosis, which are on the rise, Seminario said. "Instead of increasing life-saving measures aimed at protecting working people at their workplaces, the Trump administration is rolling back existing safety and health rules and has failed to move forward on any new safety and health protections."

***NEA speaks out against school safety recommendations.*** The National Education Association (NEA) is criticizing the Federal Commission on School Safety's recommendations released in December. "Instead of the Federal Commission on School Safety taking its charge seriously—addressing gun laws in this country and putting supports in place for students after the horrors of Parkland, Marshall County, Santa Fe, and the countless other school shootings that have occurred this year—[U.S. Education Secretary] Betsy DeVos and the commission are doing the exact opposite," NEA President Lily Eskelsen Garcia said. "The recommendations do little to make students safer in our nation's public schools." Garcia also spoke out against DeVos' plan to rescind federal guidance meant to address racial disparities in school discipline. In addition, Garcia said DeVos is using the commission to pursue her agenda to dismantle students' civil rights protections. ✤

a high potential for abuse and no currently accepted medical use. In short, in the eyes of the federal government, marijuana is in the same category as heroin and LSD.

That classification creates all sorts of legal and practical implications for employers in states in which marijuana and/or THC can be used legally. Can or should those employers prohibit employees from using marijuana? If so, to what extent? What is their obligation to make exceptions for medically prescribed marijuana?

While there are no one-size-fits-all solutions to those questions, there are some steps you can take to determine what you are *required* to do and what you are *allowed* to do.

### *Determine if you're subject to Drug-Free Workplace Act*

This federal law requires all federal contractors and federal grant recipients to adopt a zero-tolerance policy for employee use of illegal drugs (which may include unauthorized use of otherwise legal drugs), certify to the federal government that their workplaces are drug-free, and satisfy a variety of other requirements. The law applies to any organization that:

- Receives a federal contract of $100,000 or more; or
- Receives a federal grant of any size.

If you are subject to this law, you need to comply with it regardless of what your state law says regarding the legality of marijuana.

### *Closely examine, track state laws*

Most states that have legalized marijuana don't directly address the rights or obligations of employers with regard to employees who legally use it. And interestingly, some of the states that have legalized marijuana aren't necessarily the ones you would expect. For example, medical marijuana is still illegal in Virginia—a relatively moderate state—but is allowed in the very red states of Arkansas, Louisiana, and Oklahoma, among others.

So don't make any assumptions. Very few states still prohibit all use of marijuana or THC for any purposes whatsoever, and many of those that do have reduced the penalties to misdemeanor status.

### *Develop or modify drug policy*

Because marijuana is still illegal under federal law, employers would technically be allowed to prohibit employees from using marijuana completely, the same as any other illegal drug. However, depending on the nature of your business, a policy that does one or more of the following may be more equitable:

- Completely prohibits the use of marijuana during work hours and/or at the workplace, although it's possible employers could be required to allow employees to take breaks to use medical marijuana as an accommodation of a disability under the Americans with Disabilities Act (ADA);

- Prohibits employees from using marijuana or any other illegal drug at any time (unless they can show a valid prescription for it);
- Imposes discipline on employees who test positive for marijuana use (unless they have a prescription); or
- Bars employees who use medical marijuana from certain safety-sensitive positions if there is reasonable concern that they would pose a risk of harm to themselves or others (or, possibly, a risk of substantial harm to company property).

**How to assess "impairment."** Because of the wide variation in cannabis products, their strength, and the differences in how individuals metabolize THC, it's practically impossible to tell through drug testing alone whether a person who has smoked or consumed marijuana is actually impaired. While at this point there isn't a standard similar to blood alcohol levels for determining impairment under DUI laws, at least two states use a threshold of five nanograms of THC per milliliter of blood. Regulations under the Drug-Free Workplace Act provide similar thresholds for the presence of THC in urine.

Because there is no uniform standard, you have two choices. The simplest would be to enact a zero-tolerance policy for marijuana use, but that may not always have an equitable outcome. If you're not comfortable with that option, you could adopt one of the thresholds mentioned above or, preferably, work with your attorney to select a standard that is reasonable and works for you.

### *Final thoughts*

Because of the extremely complicated nature of these issues, it's imperative that you work with a qualified employment attorney to develop a drug use and testing policy that takes into account the specific state laws that apply to you. That's especially true if you have employees in multiple states. We expect more states to enact marijuana legislation in the coming months, so definitely stay tuned! ✤



*WORKPLACE ISSUES*

## Do you have a ghost of a chance against ghosting?

*If you're like us (and Seth Meyers), you might have a hard time keeping up with all the latest slang terms having to do with new technologies and trends in social interactions and other aspects of modern life. One such term is "ghosting," which is when a person just stops responding to text messages, usually from someone they recently started dating. The term has slowly spread to other situations in which one person suddenly disappears from another person's life, including—you guessed it—when an employee or job applicant is a no-show with no communication or explanation to the employer.*

*Ghosting an employer usually happens early on, such as during the recruiting, interview, or job offer stages or the anticipated first day of employment. However, employers are increasingly experiencing it even with longer-term employees. It tends to be most common among lower-paid hourly positions, for which there is currently a lot of competition in a tight labor market, and among the younger generations, who frequently hold those positions in many industries. But it can happen at any age and any salary range.*

*While there's no surefire way to prevent ghosting, employers may want to consider a number of possible modifications to their policies and processes that may help minimize it. Here they are, in an order we consider to be (roughly) most to least important. Note that most of these suggestions are geared toward preventing or reducing the damage from ghosting by job applicants and new employees.*

### *Tips to minimize ghosting*

1. **Make sure you pay hourly workers a competitive rate.** It's important to consider the hourly rate offered not just by your direct competitors but also by other employers in your area that are generally competing for the same type of employees. For example, retail and fast-food establishments typically compete for the same pool of potential employees. Depending on the nature of your workforce, it may even be worth engaging a compensation analyst to help you develop a sound and nondiscriminatory pay scale and structure.

2. **Streamline/shorten your hiring process.** The longer you string out the hiring process—for example, by subjecting applicants to several interviews when one will do—the more likely applicants are to find work at a company that pays more or is better equipped to snatch them up quickly.

3. **Consider a referral bonus program.** Applicants and employees are far less likely to burn their bridges by ghosting you if a friend who works for you recommended them for the job.

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4. **Cultivate a deep pipeline of prospects.** Don't discard applications or résumés from strong applicants just because a job has been filled. Try to identify backups during the hiring process so you can replace a "ghost" employee quickly if necessary.

5. **Foster a positive work environment, and modernize if necessary!** It's surprising how lacking in modern conveniences many employers still are. Make employees' schedules available online or in an app. Provide an easy way for them to contact their supervisors in the event of an unexpected absence, such as by text. Don't place unnecessary burdens or unrealistic expectations on employees who need to miss work—for example, by expecting them to find their own replacement. Those are just some of the negative working conditions that may make it tempting for employees—particularly younger ones just starting out in the workforce—to ghost you.

6. **Consider offering a mentoring program or apprenticeship opportunities and a clear career path.** The younger generation tends to expect swift advancement and pay increases. Without it, they are likely to move on if they get a better offer or after they have gotten what they need out of the position.

7. **Consider disclosing ghosting to employers that request references.** We all know the reasons not to say anything negative about former employees when a potential employer calls asking for a reference. And while it may be unlikely that you will receive many reference requests on employees who have ghosted you, it's possible. Having a policy that you will disclose ghosting (not using that term) could provide a disincentive in the right circumstances. Make sure you discuss the pros and cons with your employment attorney before adopting such a policy.

8. **If you're really desperate, consider over-hiring.** It's been reported that in China, where ghosting by newly hired employees is rampant, many employers hire two employees for every job opening in the hopes that one of them will show. We probably aren't to that point yet, but it may be something to keep in your arsenal for the future. ✤

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