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**Liability Online: Section 230 of the Communications Decency Act**

By: Christopher Keleher – Chicago, Illinois

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**Green Construction: Proceed With Caution**

By: Ari Scharg – Chicago, Illinois

Now is the time to build green. The Daley administration has ramped up their effort to turn Chicago into the “greenest city in the country” by awarding valuable incentives to “green” construction. While the new opportunities are exciting and promising, new legal issues may arise that could devastate any potential success. Chicago office associate Ari Scharg explains.

**Municipal Law Update: Failure To Show Actual Knowledge Of Political Affiliation Defeats Employment Discrimination Claim**

By: Stacey McGlynn Atkins – Chicago, Illinois

Chicago associate Stacey Atkins writes on the February 9, 2009 decision in *Zerante v. DeLuca and Proft*, No. 08-1381, where the Seventh Circuit Court held that in the absence of proof that political affiliation was a motivating factor behind a termination, the plaintiff’s claims failed.

**Employment Law Update: Seventh Circuit Rejects Title VII Claim**

By: Matthew Byrne – Chicago, Illinois

Chicago office associate Matthew Byrne discusses an interesting Title VII gender discrimination case where judgment was entered in the defendant’s favor. The decision is interesting both for the court’s acceptance of improper motives of the municipal manager as a defense to the plaintiff’s claim, as well as the court’s entry of judgment before plaintiff completed her case-in-chief at trial.

**Q&H Wins Again Before Illinois Supreme Court**

**Q&H Supports Cook County Sheriff Thomas J. Dart’s Efforts in Craigslist Suit**

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## Liability Online: Section 230 of the Communications Decency Act

By: Christopher Keleher – Chicago office

We live in a digital age. Computers have become indispensable in virtually every facet of business, education, and entertainment. This rapid shift has razed industries while building others. A major beneficiary of the proliferation of the Internet has been online businesses. But even those businesses for whom the Internet is not their *raison d'être* have utilized the web to market their services. Setting up shop on the web is not a panacea, however. Websites must be cognizant of liability issues. This article examines the following question: when is a website liable for the content of its site?

There are two answers to this question. First, a website will be responsible for any content it creates. This is not surprising. Creating a hazardous, libelous, or illegal condition denotes liability in the real world. Cyberspace is no different. The second answer is less clear. When content on the site is created by third party site users, and not the site itself, a federal statute, the Communications Decency Act, 47 U.S.C. 230, is triggered.

Congress created Section 230 of the Communications Decency Act to immunize websites for content created by site users. Section 230(c)(1) provides that:

[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Thus, a website cannot be held liable for information provided by site users.

Section 230 immunity effectuates Congress' policy choice not to deter online speech by imposing liability on companies that serve as intermediaries for the messages of others. The law was created in response to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y.

Sup. Ct. 1995). Prodigy was sued for defamation due to a post which claimed that the plaintiff had committed fraudulent acts. The *Stratton* Court held that Prodigy was liable as the publisher of the content created by its users because the website exercised editorial control over the messages.

Congress disagreed with *Stratton* and that displeasure was manifested by Section 230. Post *Stratton*, websites sued because of content posted by others invoke Section 230 and invariably prevail. Cases finding Section 230 immunity usually involve specific postings deemed defamatory, or in one Seventh Circuit case, discriminatory.

The Seventh Circuit's decision in *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, No. 07-1101 (7th Cir. 2008), is instructive. In the case, a nonprofit entity concerned with affordable housing found examples of discriminatory language posted by site users in the housing section of Craigslist. The district court found Craigslist to be an "interactive computer service" and not a publisher of the discriminatory posts. Therefore, the site could not be held liable for the content of its users. The Seventh Circuit agreed. It reasoned that Craigslist does not induce anyone "to post any particular listing or express a preference for discrimination." Under Section 230, the plaintiff "cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination."

The Ninth Circuit reached a different outcome in *Fair Housing Council Of San Fernando Valley v. Roommates.Com*, 521 F.3d 1157 (9th Cir. 2008). In that case, the Fair Housing Council sued Roommates.com ("Roommate") alleging the site allowed users to discriminate in violation of the Fair Housing Act. The district court dismissed the suit finding Roommate was a computer service provider and thus protected by

Section 230. The Ninth Circuit, en banc, disagreed.

By an 8-3 vote, the Ninth Circuit found the website did not deserve Section 230 immunity because it created much of the illegal content. The site requires users to identify themselves by gender and sexual preference, and then uses that information to send e-mails to its customers with compatible preferences. This troubled the court: “Not only does Roommate ask these questions, Roommate makes answering the discriminatory questions a condition of doing business.” By requiring site users to provide the information as a condition of using the site, Roommate became a creator, in part, of that content. Thus, Section 230 did not apply.

At first glance, the decisions of the Seventh and Ninth Circuits appear incompatible. A closer inspection reveals they can be reconciled. While the outcomes clearly differ, the divergent facts were the catalyst. Craigslist’s housing section is more free flowing than its counterpart at Roommate. While Craigslist provides the housing section, it does little else. Craigslist users are on their own to specify the roommate they seek. In sharp contrast, Roommate has a more regimented arrangement necessitating users to identify themselves by gender and sexual preference. Such content was created by the website. Thus, the differing outcomes between the Seventh and Ninth Circuits can be traced to this factual distinction, and not varying interpretations of Section 230.

In sum, when a website’s own content, and not an individual post, is the target of a lawsuit, the

stakes change. The question becomes intricate where, as in *Roommate*, the impermissible content is created by users, but the interface is created by the website. Per the Ninth Circuit, simply creating an interface which enables illegal conduct is enough to eviscerate Section 230 immunity. The Seventh Circuit has not yet spoken on this precise question.

Courts have upheld Section 230 immunity in a variety of factual contexts and on numerous legal theories. However, it must be remembered that Section 230 immunity only applies when the information that forms the basis of the claim has been provided by “another information content provider.” Section 230 was not intended to give websites a free pass on liability. But as the above case law demonstrates, what constitutes website content will depend on the facts.

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*Christopher Keleher, an associate with Querrey & Harrow’s Chicago office, concentrates his practice in appellate litigation. He also has experience in commercial litigation and insurance coverage. Beyond the appellate realm, Mr. Keleher assists the trial attorneys in writing motions for summary judgment and motions to dismiss.*

*Chris, along with Dan Gallagher and Paul O’Grady, is representing Cook County Sheriff Tom Dart on a pro bono basis in Sheriff Dart’s suit against Craigslist, by which Sheriff Dart is seeking to force Craigslist to close its “Erotic Services” section of its website, which Sheriff Dart believes is necessary to protect the public from prostitution, juvenile prostitution, human trafficking, and child endangerment.*

## **Querrey & Harrow Supports Sheriff Thomas J. Dart’s Efforts in Craigslist Suit**

Querrey & Harrow provided, *pro bono*, the legal services necessary to prepare the Complaint filed by Cook County Sheriff Thomas J. Dart on March 5, 2009 against Craigslist. Sheriff Dart, calling the website the “single largest source of prostitution in the nation,” requests swift action to disable the site in order to protect the public from prostitution, juvenile prostitution, human trafficking, and child endangerment.

In November, Craigslist entered into an agreement with 40 state attorney generals to help control the sex-related postings being run through the site, but failed to follow through on its agreements.

A copy of the Complaint filed can be obtained here: <http://www.querrey.com/news-86.html>.

## Q&H Wins Again Before Illinois Supreme Court



In its second win for a government entity before the Illinois Supreme Court in the past month, Querrey & Harrow struck a huge blow for municipal police and correctional agencies throughout Illinois in *Adames v. Sheahan et al.*, Case Nos. 105789 and 105851 cons. (decided March 19, 2009). Chicago office shareholders **Dan Gallagher** and **Terrence Guolee** obtained the decision from the Illinois Supreme Court, which overturns the First District Appellate Court's reversal of the trial court's summary judgment order in favor of former Cook County Sheriff Sheahan.

In the case, a 13-year-old boy, the son of a correctional lieutenant, was home alone when he found his father's duty handgun in an unlocked gun case in a closet. Not knowing that a bullet remained in the chamber of the gun after the magazine was removed, the child accidentally and tragically shot and killed a young friend. Suit was filed against gun manufacturer Beretta and the Sheriff, in his capacity as the father's employer. The boy was later adjudicated delinquent for involuntary manslaughter and reckless discharge of a firearm. The father served a suspension from his employment as a correctional officer.

Plaintiffs claimed the father was negligent and the Sheriff, as his employer, was responsible for the death. The trial court granted summary judgment on all counts, holding that the Sheriff owed no duty to protect the deceased minor from the criminal acts of the lieutenant's son. While plaintiffs also sued the father, plaintiffs dismissed these claims following the entry of summary judgment. The First District Appellate Court, however, found the storage of the gun was within the course and scope of the lieutenant's employment and the Sheriff could be held liable pursuant to the doctrine of *respondeat superior*.

Querrey & Harrow's petition for leave to appeal was accepted by the supreme court and the case was argued on November 18, 2008. In the March 19, 2009 decision, the court held that the father did not act within the scope of his employment when he stored the gun, and, thus, the Sheriff was not liable under *respondeat superior*. In particular, the court noted the well-developed record of the Sheriff's extensive gun training, general orders and instructions mandating that weapons stored at an officer's home be made inaccessible. The supreme court also found the lieutenant did not store the gun in the manner selected in order to perform his job duties as outlined by the Sheriff, thus accepting the main defense theme presented by Querrey & Harrow since the case's inception.

As to Beretta, among other findings, the Illinois Supreme Court found that dismissal was proper as the Federal Protection of Lawful Commerce in Arms Act (PLCAA), which provides certain protections to weapons manufacturers, was applicable because the juvenile shooter committed a criminal act. This decision is the first state supreme court decision in the nation addressing the PLCAA.

Dan Gallagher and Terrence Guolee were assisted with the briefing by **Jennifer Medenwald**. Jennifer was also involved in Q&H's other win before the Illinois Supreme Court this month, *Lacey v. Village of Palatine, et al.*, detailed at <http://www.querrey.com/news-87.html>. A full copy of the *Adames* decision is available via the Illinois Supreme Court's website at <http://www.state.il.us/court/OPINIONS/SupremeCourt/2009/March/105789.pdf>. Video of the arguments in the case can be accessed via [http://www.state.il.us/court/Media/On\\_Demand.asp](http://www.state.il.us/court/Media/On_Demand.asp).

*Querrey & Harrow's municipal practice group attorneys regularly represent governmental bodies, including the State of Illinois, the Illinois State Treasurer, various state's attorneys, several counties, municipalities, townships, schools and park districts, in litigation involving Section 1983 civil rights, reapportionment, employment, eminent domain, premises liability claims and other matters. Information regarding our municipal law practice can be found at <http://www.querrey.com>. Questions regarding the decision about may be addressed to Dan Gallagher via [dgallagher@querrey.com](mailto:dgallagher@querrey.com) or 312-540-7674 or Terrence Guolee via [tguolee@querrey.com](mailto:tguolee@querrey.com) or 312-540-7544.*

# Green Construction: Proceed With Caution

By: Ari Scharg – Chicago office

Now is the time to build green. The Daley Administration has ramped up their effort to turn Chicago into the “greenest city in the country” by awarding valuable incentives to promote sustainable and environmental construction. Not surprisingly, builders and developers who have shied away from the green arena in the past are now organizing new construction teams to navigate Chicago’s green construction code. While the new opportunities are exciting and promising, new legal issues may arise that could devastate any potential success. It is, therefore, imperative that all parties involved in the construction process understand the Chicago green construction standards and incentives in order to plan for every step of their venture.

## **Chicago’s Green Construction Standards**

Chicago’s green construction standards are principally based upon the U.S. Green Building Council’s Leadership in Energy and Environmental Design (LEED) rating system. The LEED rating system provides nationally accepted benchmarks for the design, construction and operation of green buildings.

Presently, LEED offers four levels of certification: “Certified,” “Silver,” “Gold,” and “Platinum.” The standards comprising these different levels are considered to promote a healthy environment, provide long term cost benefits through efficient use of energy, optimize building performance and create healthier workplaces for employees. A project can earn points in each of these areas and the number of earned points determines which of the four levels the project will attain.

LEED standards are being used to promote green building in both the public and private sectors. For instance, Chicago requires all new public buildings to achieve at least LEED “Silver” status. Moreover, substantial tax credits may be awarded to LEED certified

buildings. Even private projects that receive city assistance must pursue LEED certification.

## **Legal Implications**

While the LEED construction standard is a success story to the public, it has the potential to wreak havoc on the construction industry. Unfortunately, in the world of construction, the LEED standards are relatively new and there is little legal analysis regarding green building disputes. As cities all over the country continue to implement LEED, developers, builders, owners, architects and engineers must understand the new risks and be prepared to deal with unique legal implications by planning ahead.

At the outset, all parties need to be wary of the unique risks posed by the LEED certification process. The Green Building Council provides an online submittal process for projects seeking LEED certification that requires extensive documentation of design and construction activities. Therefore, contracts must be drafted to clearly reflect each project stakeholder’s role in obtaining the certification. These contracts must clarify which parties will be responsible for tracking, collecting, assembling and submitting support documentation and which parties will be responsible if a project fails to meet a desired sustainability rating. Of course, a thorough contract will not solve all problems, but it is a critical starting point.

The LEED certification process also poses significant timing issues. Often times, the inspection process associated with certification can be arduous. Consequently, budgeting extra time for completion becomes essential. In addition, the timing of the receipt of certification can have major implications for green building tax credits. An owner may expect certification to be awarded during a certain tax year and a delay may have disastrous consequences.

For example, last summer, in the first reported instance of LEED litigation, a general contractor in Maryland filed a lawsuit to foreclose a \$54,000 mechanic's lien. The owner counterclaimed for \$1.3 million, based in part upon the failure of the project to qualify for state tax credits that were based upon LEED silver certification. The owner's LEED claims were settled outside of court, leaving them untested. However, the litigation illustrates the vital role and importance of the timing of the receipt of LEED certification.

Developers must also consider the possibility that LEED certification may be denied when the project is complete. Failure to obtain the certification could have catastrophic consequences. Consider the situation where a new condominium complex is advertised during construction as LEED compliant but fails to obtain certification. In addition to breach of contract claims, buyers who purchased condominium units in reliance on the LEED representations may also have claims for consumer fraud, resulting in exposure to liability not contractually assumed.

The issues discussed above are by no means an exhaustive list of legal implications and are, instead, meant to provide examples of issues that may arise in the course of a green construction project.

### **The Bottom Line**

While green construction standards have the potential to create legal smog, construction companies will quickly realize that the incentives are too valuable to ignore. In Chicago, there are government contracts, tax credits, expedited permitting and various other financial enticements to build green. Not to mention the fact that more and more consumers

are seeking out green buildings because of decreased operating expenses.

The key is preparation. Experienced legal counsel should be engaged from the very beginning of any green project to ensure that all available green building incentives are realized and that all legal hurdles are minimized. Developers and builders must be proactive and address potential issues before they arise. With the proper planning, the green construction industry will thrive and green buildings will continue to sprout up all over Chicago.

\* \* \*



*Ari Scharg, an associate in our Chicago office, concentrates his practice in general litigation. Although recently admitted to practice, Ari has worked with Querrey & Harrow since 2006. His experience also includes serving as a judicial extern to The Honorable Judge Bruce W. Black of the US Bankruptcy Court for the Northern District of Illinois.*

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*Our construction attorneys have extensive experience in project development, zoning and construction contracting. We counsel clients on insurance issues, construction contracts, professional service agreements, and corporate questions. Querrey & Harrow is on the leading edge of "green" construction issues.*

*Our experience includes joint ventures, contract interference and delay damage claims, construction/design deficiency disputes, mechanic's lien and surety claim matters, insurance coverage questions and bidding problems.*

*If you have questions regarding Querrey & Harrow's construction practice, please contact group Co-Chair David Flynn at 312-540-7662, or via [dflynn@querrey.com](mailto:dflynn@querrey.com).*

## **Q&H Shareholders Win Elections**



Querrey & Harrow salutes shareholders **Paul O'Grady** (left) and **Mike Stillman** (right) on their landslide victories in the Orland Township Supervisor and Worth Township Trustee races! A great day for Q&H!

## Failure To Show Actual Knowledge Of Political Affiliation Defeats Employment Discrimination Claim

By: Stacey McGlynn Atkins – Chicago office.

Often in the governmental employment sector, when one administration is replaced with another, employees may find themselves on the receiving end of downsizing. As a result, the new administration often becomes subject to Section 1983 retaliatory discharge claims. Recently, the Seventh Circuit Court of Appeals discharged claims by a former employee who asserted she was fired because she elected to remain politically neutral in a local mayoral campaign. On February 9, 2009, in *Zerante v. DeLuca and Proft*, No. 08-1381, the court held that in the absence of proof her neutral position was a motivating factor behind her termination, the plaintiff's claims failed. The court affirmed the lower court's decision to grant summary judgment in favor of the defendants.

Maria Zerante was an employee with the City of Chicago Heights for approximately eight years, during which she served as a Purchasing Agent for the city's Purchasing Department. Ms. Zerante's service was entirely under one administration. When that mayor decided not to run for re-election, several candidates threw their hats in to the campaign ring.

During the campaign, the city was facing major budget shortfalls. As a result, solving the city's financial problems was an important campaign issue. The platform on which the successful mayoral candidate had campaigned was one of cutting waste and running the city like a private business. After his successful campaign, the new mayor hired his Chief of Staff, who took the helm on the promised financial reform. The Chief of Staff identified several "duplicative" jobs, which were ultimately eliminated. Additionally, plaintiff's department was identified as underperforming and, as a result, Ms. Zerante was terminated and her position refilled by a campaign worker of the new mayor.

Ms. Zerante filed a Section 1983 action claiming she had been fired because of her political

activities and associations. In order to succeed in her retaliatory discharge claim, Ms. Zerante needed to demonstrate two things: 1) that her conduct was constitutionally protected; and 2) that the protected conduct was a substantial or motivating factor in the complained-of employment decision.

It was undisputed that Ms. Zerante's decision to remain politically neutral in the general election was entitled the same protection as would be her choice to support a political opponent of the new mayoral administration. Therefore, the first prong of her *prima facie* case was satisfied. However, in order to satisfy the second prong, Ms. Zerante needed to offer proof that that her apolitical stance was a motivating factor behind her firing. Specifically, Ms. Zerante needed show that the defendants were actually aware of her political activities and terminated her because of these activities.

Ms. Zerante's own deposition testimony defeated her claims and the Seventh Circuit took note. She testified that she had no personal knowledge that the defendants were aware of her campaign activities and failed to provide any proof, circumstantial or otherwise, which could allow a trier of fact to draw an inference to the contrary. Also damaging to her claim was the fact that Ms. Zerante actually voted for the new mayor and was a registered member of his political party. The court held that Ms. Zerante "simply failed" in proving her decision to abstain from political involvement was a substantial or motivating factor in her termination.

This decision is important to governmental entities, especially in this ever-changing political and economic climate. In defense of Section 1983 retaliatory discharge claims it is important for the defendant to closely examine the reasoning behind the termination of employees, paying specific attention to the genesis of such

decisions, and ensuring that the motivating factor of termination is not one based upon the employee's political affiliation or activities, be they neutral bystander or rabid supporter.

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*Stacey Atkins, an associate in our Chicago office, concentrates her practice in municipal liability litigation. Prior to joining Querrey & Harrow, she worked with a local litigation firm concentrating her efforts in litigation of municipal employment and labor matters, personal injury and professional negligence litigation.*

*Stacey has extensive experience in motion practice, discovery practice, arbitrations and mediations. She has tried five matters to verdict, which include contract disputes, quantum meruit claims, and vehicle accidents. She also has represented governmental employees in actions involving employment matters before the Police Board and civil rights matters in Federal Court.*

*Stacey has actively practiced in the Circuit Court of Cook County, the United States District Court for the Northern District of Illinois, the Nineteenth Judicial Circuit, Cook County Criminal Court and Domestic Relations, the Police Board, the Illinois Department of Human Rights and Illinois Human Rights Commission. If you have any questions regarding this article, please contact Stacey via 312-540-7656 or [satkins@querrey.com](mailto:satkins@querrey.com).*

## COMMUNITY INVOLVEMENT

### Join Querrey & Harrow's Attorneys and Staff on April 24, 2009 As We Shake Our Cans For Misericordia Candy Days!



On April 24, 2009, over 60 of Querrey & Harrow attorneys, staff and friends of the firm will "shake their cans" for Misericordia's Candy Days. Look for us in our white and red smocks on corners throughout the Loop.

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Those who would like to join us can sign up by calling Julie Heinzl at 312-540-7103.

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Chicago associate **Ari Scharg** served as a Judge to the John Marshall Law School 1L Mock Trial Competition on March 27, 2009.

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Chicago office shareholder **Ellen Gibson** will be speaking at the Illinois Nursing Home Administrators Association's June Conference in Peoria. Ellen's topic will be: "How to prepare your nursing home employees for their depositions."

## Employment Law Update: Seventh Circuit Rejects Title VII Claim

By: Matthew Byrne – Chicago Office

The Seventh Circuit Court of Appeals recently affirmed a district court's order granting defendant's Rule 50 motion for judgment as a matter of law regarding a Title VII gender discrimination claim in *Greene v. Potter*, 2009 U.S. App. LEXIS 5035 (7th Cir. 2009). Judgment as a matter of law was entered prior to the completion of plaintiff's case-in-chief. The plaintiff appealed claiming the District Court had acted prematurely and incorrectly in entering judgment as a matter of law without allowing plaintiff to finish her case-in-chief.

Plaintiff was a mail processing clerk for a post office in Carbondale, Illinois. Postal employees were scheduled to work five days a week and were allowed to volunteer for overtime on the days that they were not scheduled to work. Plaintiff preferred to work overtime on her Sunday off-days, however, this request was rarely granted by her supervisor. After completing the required EEOC procedures, plaintiff filed suit against her employer for gender discrimination claiming that she was denied Sunday overtime shifts because she was a woman. Plaintiff further claimed that her supervisor favored male employees when scheduling the Sunday overtime shift.

At trial, plaintiff and one witness testified. Plaintiff intended to call three additional witnesses during her case-in-chief to testify regarding their employment with the post office. However, this action was precluded when the district court granted the defendant's Rule 50 motion for judgment as a matter of law.

Plaintiff appealed the district court's granting of the defendant's motion for judgment as a matter of law as well as its denial of Plaintiff's motion to reconsider the judgment and grant a new trial. The court of appeals reviewed the district court's order granting judgment in favor of the defendant *de novo* and its denial of plaintiff's motion for a new trial for abuse of discretion.

With regards to the distinct court's granting of judgment as a matter of law, the court of appeals first analyzed the terms and provisions of Rule 50. Fed. R. Civ. P. 50(a)(1). The court found that Rule 50 allows for entry of judgment as a matter of law as soon as it becomes apparent that a plaintiff cannot establish an essential element of her claim. Further, Rule 50 provides that "a motion for judgment as a matter of law may be made at any time before the case is submitted to the jury." Accordingly, judgment can be entered prior to the completion of a plaintiff's case-in-chief. Therefore, the underlying question with regards to plaintiff's appeal was whether it was apparent that plaintiff would not be able to prove her claim when the district court granted the defendant's motion for judgment as a matter of law.

The court of appeals then turned to an analysis of the elements of a Title VII claim under the Civil Rights Act of 1964. Under Title VII, a plaintiff can prove illegal discrimination either directly or indirectly. The court found that, in the present case, the plaintiff relied on the indirect burden shifting method of proof which requires plaintiff to prove that: 1) she is a member of a protected class; 2) she was performing her job satisfactorily; 3) she suffered an adverse employment action; and 4) similar situated employees outside of her protected class were treated more favorably. Once a plaintiff establishes these elements, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse employment action. If such a reason is established the plaintiff then must prove that the stated reason is merely pretext for unlawful discrimination.

For the purposes of its review, the court of appeals assumed that plaintiff could have presented sufficient evidence to establish the four requirements for a gender discrimination claim. The court then analyzed defendant's stated reason for the adverse employment action

(the failure to grant plaintiff Sunday overtime) and whether this reason was simply pretext for discrimination. The defendant stated that the Sunday overtime request list was significantly longer than the weekday overtime request lists. Therefore, for business reasons, plaintiff was not scheduled for Sunday overtime despite her requests.

Plaintiff disputed this contention as a mere pretext for gender discrimination. The court held that the precise question when examining a defendant's justification for an adverse action is whether it is a pretext for the sort of discrimination prohibited by Title VII. Therefore, a plaintiff must prove that an employer's stated justification for an adverse employment action is not only false, but that the true reason for the adverse employment action is illegal discrimination. Therefore, in the present case, the plaintiff needed to establish that the motive for defendant's failure to assign her to Sunday overtime was gender discrimination.

Plaintiff testified at trial that she believed her supervisor passed her over for Sunday overtime in favor of two male employees. Plaintiff further testified that her supervisor manipulated the schedule in favor of two male employees which were his personal friends. One of plaintiff's male co-workers testified and concurred with her testimony regarding their supervisor's manipulation of the Sunday overtime schedule. Plaintiff argued that this testimony established that her supervisor violated the overtime scheduling policy and that she suffered an adverse employment action due to gender discrimination.

The district court stated that even if they agreed that plaintiff's supervisor had manipulated the overtime procedures in order to benefit a few of his friends, this did not establish that the plaintiff had suffered gender discrimination. The court found that the testimony presented suggested that plaintiff's supervisor violated the overtime procedures to the detriment of both male and female employees. Moreover, plaintiff's supervisor was motivated by a desire to provide benefits to his personal friends, not by a desire to discriminate against female employees.

Therefore, plaintiff had disproved her intentional discrimination claim because her own evidence conclusively revealed some other non-discriminatory reason for defendant's decision.

Accordingly, the court of appeals found that the district court had properly granted judgment as a matter of law because plaintiff had presented testimony which established that she would not be able to prove her claim for gender discrimination. The court of appeals held that the district court had properly granted judgment as a matter of law despite the fact that the plaintiff had not completed her case-in-chief. For that reason, the court of appeals affirmed the district court's grant of judgment as a matter of law and the denial for plaintiff's motion for a new trial.

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*Matthew Byrne, an associate in our Chicago office, concentrates his practice in liability litigation and often defends municipalities in Title VII claims. Matt served as a law clerk at Querrey & Harrow during his second and third years of law school, which has prepared him well to assume his role as an associate with the firm. While attending law school, Mr. Byrne was a member of The John Marshall Law Review and was a member of the Family Law Society and the Health Law Society.*

*If you have any questions regarding this article, please contact Matt via [mbyrne@querrey.com](mailto:mbyrne@querrey.com) or via 312-540-7644.*

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