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DISABILITY DISCRIMINATION

Texas federal appeals court defines 'fundamental' in ADA

by Michael P. Maslanka, UNT-Dallas College of Law

Recently, the U.S. 5th Circuit Court of Appeals (the federal appeals court covering Texas) applied a commonsense definition of "fundamental"—a key word in the Americans with Disabilities Act (ADA).

Visually impaired woman applies for job

Suzonne Kakoolaki suffers from cone dystrophy, which limits her vision to making out silhouettes but little else. By way of example, she is unable to identify faces or facial expressions. Her visual acuity is limited to reading screen text that is extremely magnified.

Kakoolaki had three virtual interviews with the Galveston Independent School District (GISD) to teach 6th grade social studies. She received a contingent job offer after the first interview. To her credit, she emailed the district after receiving the offer, telling it about her visual impairment. Specifically, she stated that her disability "has no effect at all on her ability to perform the essential duties of the job." And she welcomed the chance to answer "any questions at all about how [her visual impairment] will impact [her] ability to" teach at GISD.

Applicant rejected

The GISD job description for the 6th grade social studies teacher position lists "Classroom Management and Organization" as a major responsibility, which includes "managing student behavior" and "taking all necessary and reasonable precautions to protect students, equipment, materials, and facilities."

Concluding that Kakoolaki's disability was inconsistent with performing these duties, the GISD decided to offer the job to another applicant. It also concluded that the proposed accommodations of a full-time aide in the classroom and/or assistance from other teachers to alert her to students' nonaudible behavioral violations were unworkable.

Kakoolaki sued under the ADA, and the courts dismissed her lawsuit.

Reasons for dismissal

The key is that the applicant needs to be able to perform the essential job functions with or without a reasonable accommodation.

Can she perform the essential job duties? The law defines an essential duty as one that is "fundamental" to a job such that if the duty were stripped away, then there would be no reason for the job in the first place. Well, direct supervision of middle school students is just such a duty. Kakoolaki's severely limited ability to see would frustrate her ability to perform this duty.

Is there a possible reasonable accommodation so she can perform the fundamental duties? Sadly, there was not. According to the appeals court, "To grant

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either [requested accommodation] would amount to a reassignment of a teacher's primary responsibility to monitor student behavior. As a matter of law, those requests are unreasonable." It then went on to quote a relevant 1999 ruling from the same court: "The ADA does not require an employer to relieve an employee of any essential functions of his or her job, modify those duties, reassign existing employees to perform those jobs, or hire new employees to do so." Case dismissed. *Kakoolaki v. Galveston Independent School District (*5th Cir., April 2, 2025).

Bottom line

Some readers might be thinking this case is a no-brainer. A word of caution: Never assume that visual impairments always preclude the performance of a job's fundamental duties. The analysis must always be performed on a case-by-case basis. And never assume a reasonable accommodation is just too hard to implement. If you ever find yourself saying, "Of course. Isn't it obvious?"—then stop and think, like the GISD did in this case. The ADA is meant for us to try our best to integrate workers with disabilities into the mainstream.

Michael P. Maslanka is a professor at the UNT-Dallas College of Law. You can reach him at michael.maslanka@untdallas.edu. ■

LITIGATION

Settlement language matters in Texas

by Michael P. Maslanka, UNT-Dallas College of Law

A deal is a deal—that's a Texas value. This principle was reaffirmed in a recent case out of Austin that went to the U.S. 5th Circuit Court of Appeals, the federal court of appeals covering Texas.

Go broad or go home!

Before we get to the facts, let's look at the language used to settle this employment case that was filed against the University of Texas (UT) at Austin:

> The Parties mutually release each other from all Claims and Damages arising from [the employee's] employment with UT Austin or any actions or inactions by UT existing at the time of the Effective Date [of this release]. This includes but is not limited to [the employee] releasing UT and its employees from all Claims and Damages that have been, may be, or could be alleged or asserted now by [the employee] against UT. . . . The Parties intend this release to be full and final mutual releases of Claims and Damages for matters accrued through the Effective Date.

Wait, there's more with "claims" defined as follows:

> All theories of liability or recovery of whatever nature, whether known or unknown, that were or could have been the subject of any complaint or charge filed or proceeding initiated with any court or other governmental agency or body of the United States of America or any other country, or any state or local jurisdiction within the United States of America or any other country, or of any lawsuit or similar proceeding and which relate to or arise from [the employee's] employment with UT Austin or any actions or inactions by UT Austin, as of the Effective Date [of the agreement], whether known or unknown to [the employee] at the time of the execution of this Agreement.

Notice the settlement language and its use of the disjunctive "or," which expands its scope. Note, too, the key language—as we will soon discuss—of "known or unknown."

'Unknown' doesn't matter

Jack Stamps was a professor at UT Austin. After reporting the alleged misconduct of university administrators, he was told his employment contract would not be renewed. Put differently, "You are fired, Jack."

Believing there was a connection between the two, Stamps filed a wrongful termination lawsuit. The suit was later settled when Stamps signed the settlement agreement quoted in part above.

So, what's the problem?

After settling, Stamps filed an open records request with the university. It complied and turned over documents relating to his employment. Among the documents was a report from UT Austin's Behavioral Risk Assessment Committee (BRAC).

Stamps claimed that several university administrators had made defamatory statements about him during the BRAC investigation. He then filed a defamation lawsuit based on these statements, asserting that he "certainly would not have signed the Release Agreement" had he known about the BRAC investigation. UT asked the court to dismiss the defamation suit based on the release agreement.

UT wins

A settlement agreement is a contract. And like any other contract, it can be set aside if one party lied to induce agreement. Here, there was no evidence of, for instance, Stamps asking UT before he signed the agreement, "Is there any internal BRAC report on me?" and UT lying with "No, not at all."

So, the agreement would not be set aside, and the only question is whether the language in the agreement was broad enough to cover the defamation claim Stamps was making. It sure did:

- "All theories of liability or recovery";
- "Whether known or unknown"; and
- "Any actions or inactions."

Lawsuit dismissed. *Stamps v. University of Texas System et al.* (5th Cir., 2025).

Bottom line

Words matter, and they matter a lot. So, if you are paying money to settle, you are entitled to get the language you want.

Now, there are exceptions. By way of example, you cannot get a release for any possible claim arising after the settlement is signed off on. This is why UT included language in this agreement saying, "at the time of execution of this agreement." Also, you cannot prevent the employee's lawyer from suing you over another matter in the future, and your lawyer cannot ask. Lawyers must adhere to ethics rules, and this is one of them. The idea is that the public should be able to pick the lawyers best suited for them, and this type of proposed restriction makes that more difficult.

Michael P. Maslanka is a professor at the UNT-Dallas College of Law. You can reach him at michael.maslanka@untdallas.edu. ■

TRADE SECRETS

5th Circuit wants to know: 'Where's the trade secret?'

by Michael P. Maslanka, UNT-Dallas College of Law

Remember the fast-food commercial from the 1980s? The tag line criticized a competitor with an irate customer looking at their puny burger and asking, "Where's the beef?" I thought about this ad after reading a new case from the U.S. 5th Circuit Court of Appeals, our federal court of appeals in Texas.

Exec leaves for competitor

Justin Pethick worked for DeWolff, Boberg & Associates (DB&A), a consulting company in Dallas. He jumped ship to go to work for a competing consulting company, the Randall Powers Company. DB&A was none too pleased and sued him and his new employer for misappropriation of trade secrets.

Here, DB&A claimed the trade secrets consisted of information it had collected from three of its clients on their needs and

Cutting-Edge HR

Survey finds hiring for promise more effective than hiring for skills. A survey from research and advisory firm Gartner finds that hiring for promise is more effective than requiring people to show proficiency in all skill requirements before moving into critical roles. The survey, conducted in October 2024 and released in March 2025, found that 48% of the 190 surveyed HR leaders agreed that the demand for new skills is evolving faster than existing talent structures and processes can support. The approach taken by many employers—of requiring proficiency in all skills before transitioning into new roles—delays performance and hinders growth, the survey found. HR leaders instead should shift from building proficiency to building on promise, which Gartner defines as "a willingness and ability to learn new skills from a minimum foundation."

Study finds lack of trust in HR to address toxic workplace behaviors. Just 25% of employees trust HR to address toxic behaviors in the workplace, according to a survey from employment platform iHire. The survey also found that approximately 65% of workers who reported harmful behaviors or incidents to HR, managers, or supervisors said their organization did nothing to address the issues. Some of the behaviors that respondents said they experienced or witnessed are favoritism; gossip; dishonesty; bullying or harassment; discrimination, such as ageism, sexism, or racism; and unethical or illegal activities. Of those who experienced or witnessed toxic behaviors, 53% reported them to a manager, a supervisor, or HR.

Report finds workforce burdened by surging stress. The American workforce is suffering from increasing levels of stress and low mood, according to a report from workplace mental health platform Modern Health. The report notes that more workers are seeking workplace mental health benefits. The report comes from a survey of 1,000 full-time U.S. employees commissioned to understand the state of mental health across America's workforce at the start of 2025. The survey was conducted from February 21 to 25. Seventy-five percent reported experiencing some form of low mood, largely driven by politics and current events. The survey found half of employed Americans were pessimistic about the country's direction, rising to 59% among female employees and 56% among Gen Z. Current events topped the list of negative mental health drivers, even outpacing crime and finances. Seventy-one percent of employees said they believe political tensions are making it harder to foster a positive workplace culture, and 74% said political uncertainty can lead to more burnout at work. ■

Federal Watch

Agencies stepping up efforts against DEI. The Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Justice (DOJ) in March released two technical assistance documents focusing on what the agencies consider unlawful discrimination related to diversity, equity, and inclusion (DEI) in the workplace. The announcement says DEI initiatives, policies, programs, or practices may be unlawful if they involve employment actions an employer or other covered entity took that were motivated—in whole or in part—by an employee's or applicant's race, sex, or other characteristic protected by Title VII of the Civil Rights Act of 1964. To explain the issue, the EEOC and the DOJ released a technical assistance document titled "What To Do If You Experience Discrimination Related to DEI at Work." The EEOC also released a question-and-answer technical assistance document titled "What You Should Know About DEI-Related Discrimination at Work."

EEOC chair speaks out against antisemitism in campus workplaces. Andrea Lucas, acting chair of the EEOC, in March claimed there's antisemitism plaguing workers at some universities and colleges, and she said she would hold the institutions accountable. One of her stated priorities for compliance, investigations, and litigation is protecting workers from religious bias and harassment. "Under the guise of promoting free speech, many universities have actually become a haven for antisemitic conduct, often in violation of the universities' own time, place, and manner policies, as well as civil rights law," Lucas said. Harassment violates Title VII when it's so frequent or severe that it creates a hostile or an offensive work environment.

EEOC takes aim at "anti-American bias" in hiring. The EEOC in February announced it's putting employers and other covered entities on notice: "If you are part of the pipeline contributing to our immigration crisis or abusing our legal immigration system via illegal preferences against American workers, you must stop." The announcement from Acting Chair Andrea Lucas said the EEOC will increase enforcement of employment antidiscrimination laws against employers that illegally prefer non-American workers, as well as against staffing agencies and other agents that unlawfully comply with client companies' illegal preferences against American workers. One of Lucas's stated priorities is protecting American workers from anti-American national origin discrimination, which she claims is a large-scale problem in multiple industries nationwide. ■

preferences. And this is, in fact, confidential information because it isn't something that is generally known to the public and gives a competitive advantage to DB&A.

So what, now what?

The trial court tossed the case on summary judgment (pretrial dismissal), and the 5th Circuit upheld the ruling. Here's why.

First, DB&A never identified to the court the actual documents it considered confidential. Yes, it identified the types of information it considered confidential, but it didn't label the actual documents reflecting this information for the court. Here's a peeved court:

> [Pethick and his new employer] are correct that DB&A's labeling large swathes of database information trade secrets is "vastly overbroad," and that DB&A failed to distinguish between the public information in it is Salesforce Database and the non-public information. More importantly, DB&A has not identified what specific information within its database constitutes a trade secret.

The court went on to say it had "no obligation to 'sift through the record in search of evidence.'" In short, an undifferentiated data dump on a court will only lead to a cry of "Where's the evidence?"

Second, to prove misappropriation, there must be some proof that the company you are suing either "used" or "disclosed" the trade secrets. Here "use" means commercial use, by which an entity seeks to profit. Yes, Pethick took three DB&A clients with him to the competitor, but that, standing alone, was insufficient evidence to show that the information was "used." *DeWolff, Boberg & Associates Inc. v. Justin Pethick et al.* (5th Cir., April 3, 2025).

Bottom line

After a big loss for the Packers, its legendary coach, Vince Lombardi, went into the team's locker room, held aloft a football, exclaimed, "Gentlemen, this is a football. Let's remember that next Sunday," and walked out. As with football, so too with trade secrets litigation.

Look, when a key employee leaves with your stuff, it can be a shock. You will likely sue at once and seek relief from a court to stop him for going to the competitor. The fog of litigation, like the fog of war, creeps in. Understandable, but don't lose sight of the basics. You can submit the confidential documents to the court under seal so that no one but the judge sees them. When you sue, you can ask the court for what is called expedited discovery so you can take the depositions of the exec who left and their new employer as soon as possible. You can find out what they are doing or planning to do with your stuff. Finally, make a forensic image of the hard drive of the departing employee, but in Texas, make sure that person who does so has a private detective license (an odd feature of Texas law).

Michael P. Maslanka is a professor at the UNT-Dallas College of Law. You can reach him at michael.maslanka@untdallas.edu. ■

REASONABLE ACCOMMODATIONS

Texas federal appeals court: Be anxious about ADA anxiety claims

by Michael P. Maslanka, UNT-Dallas College of Law

A very recent case from the U.S. 5th Circuit Court of Appeals (the federal appeals court over Texas) explains how a seemingly common condition in a stressed-out world is deserving of Americans with Disabilities Act (ADA) protection.

Lawyer sues under ADA

Jamilah Way was a lawyer for the city of Missouri City, Texas, from August 2018 until her termination in January 2021. She sued for two separate violations of the Americans with Disabilities Act (ADA): failure to reasonably accommodate her disability and retaliation for seeking such an accommodation.

Let's take accommodation first. There are three questions that must be asked.

Questions for accommodation

Question No. 1: Is her anxiety a covered ADA disability? Recall that the ADA defines a disability as a physical or mental impairment that limits a major life activity such as caring for oneself, sleeping, and thinking. Here, there was evidence that, in August 2019, Way told her boss—the city attorney—that her anxiety caused her heart to beat more quickly; to physically tremble; to be short of breath; and for her thoughts to race. All of this made it a lot more difficult to perform activities most of us take for granted, such as falling asleep and eating. So now onto Question No. 2.

Question No. 2: Did the city know of her disability and the limitations flowing from it? Emails played a role in the answer.

Way to her boss, City Attorney E. Joyce Iyamu: "I am developing anxiety. (I have a doctors appoint [sic] scheduled for August 20, 2019, to address this.)"

Iyamu back to Way: "It is partly because you seem overwhelmed, as exhibited in the meeting earlier this week when you laid your head on the conference table and the state of the [work assignment you were given] on what was supposed to be the due date, that I feel like I have to step in. I don't want you or any member of the team to feel like you are in an ocean without a life raft."

And the following day, Way cried in front of Iyamu.

The 5th Circuit answered Question 2 this way:

> Both the email and the tearful interaction could have communicated to Iyamu that Way was suffering from anxiety. Way "need not utter any magic words" to inform her employer of her disability. . . . Instead, she need only point to enough evidence in the record to allow a jury "to infer [the City's] knowledge of the 'limitations experienced by the employee as a result of [her] disability.'" . . . A reasonable jury considering Way's evidence could make that inference.

Question No. 3: Did the city engage in a back and forth on a reasonable accommodation to her disability? Once limitations are established, then the next stage is to discuss a reasonable accommodation for those limitations. The failure of an employer to do so can be a violation of the ADA.

Here, Way asked Iyamu for clearly set work expectations, timelines for completion of tasks, and for these communications to be in writing. According to Way, the response was crickets. So, a jury will need to decide whether the city violated the reasonable accommodation portion of the ADA.

Questions for retaliation

Not so with the retaliation claim. There, there are three questions to be asked:

Question No. 1: Did Way participate in a protected activity under the ADA? You bet. Asking for a reasonable accommodation to a disability is the essence of a protected activity.

Question No. 2: Did she suffer an adverse employment action? Yes on Question 2 as well. Getting fired is the ultimate adverse employment action.

Question No. 3: Does a causal connection exist between the protected activity and the adverse employment action? Here, a swing and a miss. Way asked for the reasonable accommodations in November 2019 but wasn't fired until January 2021, a full 14 months later. That length of time negates a connection between the first and the second. *Way v. City of Missouri City et al.* (5th Cir., April 9, 2025).

Bottom line

Note that while Way was specific in the description of her condition, other ADA cases were dismissed when the employee vaguely stated that "the past 11 months had been very difficult" or that, at a previous job, the employee was "sensitive to noise." Note too that there might be a temptation to be dismissive of certain conditions, as Way claimed to be the case here. A word of advice: Resist this temptation. We never really know what other people are going through or how a condition affects them. Empathy is a good strategy when it comes to ADA claims.

Michael P. Maslanka is a professor at the UNT-Dallas College of Law. You can reach him at michael.maslanka@untdallas.edu. ■

DAMAGES

When harassment complaints go to trial: Lessons from a recent federal court ruling

by Jacob M. Monty, Monty & Ramirez, LLP

A recent decision from the U.S. 10th Circuit Court of Appeals serves as a powerful reminder to employers: How you respond to harassment complaints can have long-lasting consequences, even if a jury initially rules in your favor.

What happened?

Two female restaurant servers sued their former employer, Remington of Montrose Golf Club, claiming they were sexually harassed by an assistant manager. They also said they were retaliated against after speaking up.

Initially, the company did take some action. It suspended and demoted the manager after the complaints. However, once the manager was allowed to return to work, he continued to harass the two servers by cutting one's hours until she quit and shoving the other and refusing to help her during shifts that he shared with her.

Only one of the waitresses' cases made it to trial. There, the jury did something odd—it said the employer did not harass or retaliate against her but then awarded her $125,000 in damages anyway.

That contradiction was a legal problem. Under the law, damages can only be awarded if the jury finds the employer did something wrong. So, the judge threw out the damages, and the case seemed to be over.

But on appeal, the 10th Circuit stepped in and said, essentially, this doesn't make sense, and it awarded her a new trial.

Why it matters

Here's why this is important for employers and managers, especially in industries such as hospitality where team members often work long hours in close quarters and the lines between professional and personal can get blurry.

The appeals court made the following points clear:

- Employers must take complaints seriously.
- If you act, make sure it's enough and consistent.
- Poor handling of complaints can come back to bite you later, even if you "win" in court.

In this case, the company did take action (imposing a five-day suspension), but the employees felt the punishment didn't fit the seriousness of the situation. That perception matters, not just for morale, but for legal risk.

What should employers do differently?

Don't stop at the bare minimum. If you find one of your employees has harassed a coworker, a short suspension may not be enough, especially if it forces the victim to keep working with them afterward. Ask yourself: *Are we protecting our team, or just checking a box?*

Document everything clearly. When you respond to a complaint, keep detailed records of what was said, what actions you took, and why. If a case goes to court, those records become your first line of defense.

Train your managers. This includes training on how to spot harassment, how to handle complaints, and how to avoid retaliation—whether direct or indirect.

Understand retaliation can be subtle. Cutting hours, ignoring concerns, or forcing someone to work with a harasser can all be seen as punishment—even if that wasn't the intent.

Use legal resources early. Had the employer or court caught the jury's confusing verdict earlier, the case might have been resolved without a retrial. Knowing what rights judges have (like sending a jury back to reconsider) can make a difference.

Bottom line

This case shows that when it comes to harassment complaints, the way you respond matters just as much—if not more—than what actually happened. Courts are looking closely at whether employers are acting reasonably and fairly. Even a win at trial can be overturned if something seems off.

Being proactive, transparent, and thorough in your policies and practices is the best way to protect your team and your business.

Jacob M. Monty is a partner at Monty & Ramirez, LLP, in Houston, Texas, and can be reached at jmonty@montyramirezlaw.com. ■

WORKPLACE CULTURE

Learn the secret morale booster for your workplace: Check-in, tap-in

by Michael P. Maslanka, UNT-Dallas College of Law

Employers spend a lot of time thinking about how to boost employee morale. The solutions range from bonuses to better benefits to recognition awards. But there's a simpler and more effective way—namely, conducting a regular "check-in" with your employees or colleagues and "tap-in" to what they are doing.

Check-in, tap-in solution

In her article "The Surprising Power of Simply Asking Coworkers How They're Doing" published February 28, 2019, in the *Harvard Business Review*, consultant Karyn Twaronite writes about the check-in as an effective and easily implemented tool.

But a solution to what exactly? Employees can sometimes feel isolated at work. That's not good. Studies repeatedly show that employees are not feeling included at work. One study found that more than 40% of those surveyed are feeling physically and emotionally isolated in the workplace. And while employees look first to their homes for a sense of belonging (62%), the workplace is a runner up (34%). And 39% of employes feel the greatest sense of belonging when colleagues check in with them.

Three ways

Latch onto small opportunities to connect. Connection need not be—and should not be—a major undertaking. Twaronite's advice is to "be present, curious, and seize small daily opportunities to connect authentically." Just ask, "How are you doing today?" or "How can I support you in your work or goals?"

Several years ago, I read about a version of this check-in if you believe your colleague is troubled by something. Ask: "What's on your mind today?" or "What are you thinking about?" You might need to use this more direct approach several times, but sooner or later, the colleague will tell you.

HR Technology

AI literacy tops LinkedIn list of skills on the rise. Data from LinkedIn shows that by 2030, 70% of the skills used in most jobs will change. LinkedIn's Skills on the Rise list ranks the fastest-growing skills that professionals should be investing in. Artificial intelligence (AI) literacy ranked No. 1 on the list, followed by conflict mitigation, with adaptability coming in third. Here's the rest of the list (in order): process optimization, innovative thinking, public speaking, solution-based selling, customer engagement and support, stakeholder management, large language model development and application, budget and resource management, go-to-market strategy, regulatory compliance, growth strategy, and risk assessment. In releasing the list, LinkedIn said employers need to embrace skills-based hiring practices, and professionals need to learn new, in-demand skills or deepen existing areas of expertise.

Research finds most executives see AI transforming their industries. Research from Accenture released in March found that 97% of the executives polled believe generative artificial intelligence (gen AI) will fundamentally transform their companies and industries. Also, 93% of the executives say their gen AI investments are outperforming investments in other strategic areas, and 65% say they lack the expertise to lead gen AI transformation, underscoring an urgent need to develop new skills. "But the challenge isn't just about upskilling," a summary of the research says. "It's about redesigning how people and machines work together—holistically and at speed." The research also found that 82% of workers believe they already understand gen AI technology, and 94% are confident they can develop the skills needed. Yet 63% of employers still cite skills gaps as a major hurdle.

Analysis of large companies finds skills gap amid rise of tech priorities. Many of the largest companies in the United Kingdom and the United States are underprioritizing skills development in relation to technology, according to Multiverse, a company that identifies and tries to close skills gaps. Around seven in 10 companies in the United Kingdom and United States mention a strategic priority relating to technology in their latest reports. Yet only 7% (United Kingdom) and 8% (United States) describe skills and training as a strategic priority. Multiverse says that proportion hasn't improved since 2013, while technology has shot up in importance, suggesting that boardrooms are not yet recognizing its sweeping impact on workforce skills requirements. With Goldman Sachs predicting artificial intelligence (AI) investment will reach $200 billion this year, companies that don't act are putting record levels of investment at risk, the Multiverse announcement said. ■

Assume positive intent. Start any conversation with your colleagues believing that they mean well in their statements or their actions. After all, not all check-ins will be peaches-and-cream conversations. By assuming positive intent, you stop from judging and criticizing and start understanding and inquiring. You start saying, "I am pausing because I just want to make sure I understand your point" or "I am pausing because I want to learn more." To be inclusive, you must first be accepting.

True recognition. Always recognize the achievements of others and do so sincerely. (This point is mine.) I know what some might be thinking: "I can't send an email to everyone every time Malik or Gabby or Joe gets a new contract or brings in a new client. Emails are clogged enough already."

Why not always recognize others? People aren't that busy. Either coworkers are truly your colleagues, or they are not. Act like they are colleagues. Learn to experience "empathetic joy" for others, which is a feeling of joy or happiness that arises from witnessing the success and well-being of others, rather than envy or resentment. Ask how they achieved their accomplishment. They will be glad to tell you, and you may well learn something benefiting you.

Bottom line

The culture of your workplace is up to you. Make it a good one.

Michael P. Maslanka is a professor at the UNT-Dallas College of Law. You can reach him at michael.maslanka@untdallas.edu. ■

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Editorial inquiries should be directed to Content Manager Sean Richardson, srichardson@blr.com.