



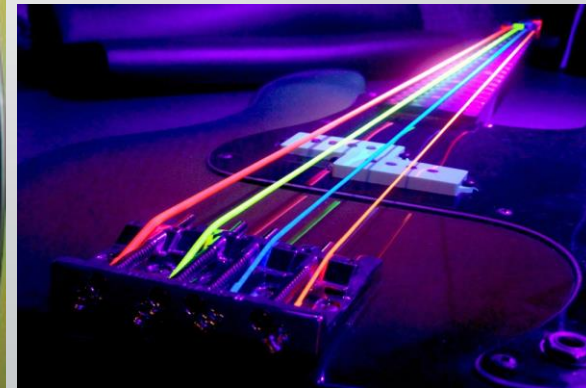
# **SUPERVISOR MISTAKES**

## That Get You In Trouble!

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Pierce Coleman PLLC

# Rock Your HR Training!





**YEAH, IF YOU COULD COOL IT WITH THE SEXUAL  
HARASSMENT**



**THAT'D BE GREAT**



# *Zetwick v. County of Yolo* (9<sup>th</sup> Cir. November 2016)

- A correctional officer alleged that the sheriff hugged her more than 100 times over the course of eight years and kissed her once on the cheek.
- The district court awarded summary judgment for the sheriff and the county. It found that hugs and kisses on the cheek do not go beyond what is considered acceptable workplace behavior.
- The Ninth Circuit reversed. A jury must determine whether the hugs were so severe or pervasive as to create a hostile working environment.
- **January 2018 settlement conference. Case settled. So we'll never know....**



# SUPERVISOR MISTAKE



- Brushing off conduct that would otherwise be acceptable in other settings/failing to recognize conduct that can lead to a harassment claim.

# Case in Point: Lawsuit filed in August 2018

- For approximately 6 months, employee's (sales associate at car dealership) general manager, a Caucasian male, called him a "good boy," and called other African American males "boy" on multiple occasions.
- **January 20, 2017** – Employee told his manager that his African American employees were uncomfortable with his use of the word "boy" to describe them. The manager asked for the names of the other employees, but the employee refused. Later that day, the general manager called the employee into his office and told him if anyone thinks his use of the word "boy" is racist, then "F— them all."
- The next day, at a sales meeting, the manager stated that he had been using the word "boy" all his life and would not change: "This is probably not the right job" for employees who had a problem with it. Another manager at the meeting then said that those employees should quit, and that "we don't want you here. You should leave right now... Do me a favor and get the f— out of here now, please." The complaining employee told the group he had researched the word, and the consensus was it was a derogatory way of speaking to African Americans.
- Two days later the employee was handed a document entitled "Exit Interview" advising him that he was being terminated for his "attitude."



# Chipotle Harassment Case



- Sixteen year-old Chipotle restaurant worker was groomed and encouraged to participate in unprotected sex while at the business and other places. The teen quit her job because of the sexual abuse, a representative of the teen said.
- The jury agreed with the plaintiff that Chipotle and its supervisors had knowledge of the sexual assaults occurring and did nothing about it.
- Jury awarded over \$8 million in compensatory and punitive damages, and attorneys' fees.
- Plaintiff's Lawyer: "If you're gonna hire 16-year-olds, you damn sure better have good policy enforcement to make sure they're protected."

# Another Chipotle Case Filed in March 2018

Julie Parkhurst v. Chipotle Mexican Grill Inc., a Delaware corporation; Does 3/15/2018 CV2018- 090561	Employment and assault. Plaintiff reported to defendant that her supervisor provided her with alcohol while she was underage, and had sexual contact with her resulting in a pregnancy. Plaintiff was later fired because there was "a lot of drama occurring in the restaurant."	Michael Pruitt Jackson White
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Aspen Chryst; Nicholas G. Chryst; Kristy L. Chryst; Tiana Schultz  
v.  
DEFENDANT (to protect the potentially innocent....)

**Sexual assault and employment.**  
**Plaintiffs Aspen Chryst and Tiana Schultz were sexually assaulted by defendants' manager, James Bonett, who used his power to coerce the minor employees to engage in sexual acts with him or face consequences at work. Defendants did not protect the minors from Bonett, who "hired attractive high school students who needed to earn money so that he could use his power as a manager to coerce them into sexual acts."**

Eric Zard  
Bonnett Fairbourn

# SUPERVISOR MISTAKE

- Realizing that sex with underage workers is frowned upon....
- But really: Paying attention to vulnerable employees to insure added protection against bullying, threats, etc.



# Quick Hypothetical

- Employee comes to you and says, “Hey, did you see my co-worker Emily’s twitter feed?”
- You say, “no, because I don’t follow employee twitter feeds.”
- Employee says, “She posted #MeToo with no other information.”



# SUPERVISOR MISTAKE



- Being oblivious to warning signs



# Can't Make This Stuff Up

- In late 2017 Gene Simmons showed up at a national news network to do a book-plugging interview, but instead went into a staff meeting uninvited.
- “Hey chicks, sue me!” he shouted, and then pulled open his red velvet shirt to reveal his chest and belly, starting telling Michael Jackson pedophilia jokes, and then bopped two employees on the head with his book, making derisive comments about their comparative intelligence according to the sound their heads made when struck.
- A person present reported, “It was pretty severe.”
- Simmons banned for life from the network.



# Hypothetical

- Employee comes to HR to complain that he has been communicating with a female co-worker for many months via text with no issues. Recently, though, she has been signing off with emojis that the male employee feels are inappropriate (like the one on this slide) → Can this rise to the level of sexual harassment?



Yeah, it's a thing



- You find out that employees are sending, or signing off with, avatars of themselves.
- Avatar policy?

# This is what I'm talking about

- Edited down from a "PG-13" image to a "PG" image – you're welcome.





# SUPERVISOR MISTAKE (Yes, this is a copy of Slide #7)



- Brushing off conduct that would otherwise be acceptable in other settings/failing to recognize conduct that can lead to a harassment claim.

# Pregnancy Discrimination

- Former police officer had great reviews for years until she left for maternity leave in 2012 for the birth of her first child. When she returned three months later, she had to pump breast milk in the locker room of the police station.
- Law requires employers to provide women with a break to pump and “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public.” Department didn’t do that.
- She got calls on the radio from coworkers telling her to “wrap those boobs up” and get back to work.
- Written up for minor issues and demoted. She also had to wear a bulletproof vest that hurt her milk production and made it tough to pump, but department didn’t accommodate.

# Pregnancy Discrimination

- After her requests for a transfer to a desk job were denied, she quit just two months after returning from leave.
- She filed suit in 2013, and a federal jury ruled in her favor last year, agreeing that the department violated the Pregnancy Discrimination Act. The city appealed the ruling, but the 11th U.S. Circuit Court of Appeals upheld the verdict in September 2017.

# SUPERVISOR MISTAKE

- Failing to treat pregnancy appropriately as a protected category under the law.







# Hively v. Ivy Tech Community College

- Kimberly Hively began working as a part-time adjunct professor for Ivy Tech in South Bend, Indiana in 2000. Her part-time employment contract was not renewed in 2014. During her 14 years with Ivy Tech, she applied for six full-time positions but claims never to have been offered an interview. Hively filed a federal lawsuit alleging sexual orientation discrimination under Title VII.
- The trial court dismissed her case. She appealed to the 7th Circuit.
- On April 4, 2017, the court ruled that “discrimination on the basis of sexual orientation is a form of discrimination.”

# Gay Sky Dive Instructor



- Seven years ago sky-diving instructor told a woman he was gay when she seemed uncomfortable with the close physical contact. Her boyfriend was watching and a friend had been teasing her about being strapped in so tightly to another man.
- After the woman's boyfriend called the sky-diving school to complain about the encounter, instructor was fired.
- Litigation for 7 years resulting most recently in 2<sup>nd</sup> Circuit oral argument on appeal where the federal government was on both sides (no pun intended) of the issue.
- The rest of the story: Plaintiff died in 2014 on a wingsuit BASE jumping trip in Europe. The lawsuit is being pushed forward by his sister and Bill Moore, a close friend and former partner.

# Circuit Split Continues

- 2<sup>nd</sup> Circuit decides that sexual orientation is protected under Title VII. 10-3 en banc decision.
- U.S. Supreme Court review?





# SUPERVISOR MISTAKE

- More generally, making or allowing disparaging comments to be made regarding any protected class.
  - Age jokes
  - LGBTQ
  - Too pregnant to do a job
  - What if the member of the protected class is doing it about their own protected class?

I look forward to making more disparaging comments than normal about your favorite NFL team this offseason.



your eCards  
someecards.com

# Fido Comes to Work



- In March 2017 the EEOC filed a lawsuit against a freight company on behalf of a truck driver trainee who is a veteran. According to the EEOC, the employer violated the ADA by refusing to hire the trainee because he uses an emotional support dog to manage post-traumatic stress disorder.
- Last December the EEOC issued a publication titled “Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights”, which brought more attention to accommodating mental health issues in the workplace.
- Treat an employee’s request to use a service animal just like any other accommodation request under the ADA.
- As of August 2018, case remains in litigation in Iowa (summary judgment pending).

# SUPERVISOR MISTAKE

- Treating service animal accommodation requests differently than any other request for accommodation, i.e., thinking a special certification is required.



# Leave as Reasonable Accommodation



# Failure to Accommodate

- A California jury, finding that her former employer had violated the ADA, awarded a former drug addiction counselor more than \$4.5 million in damages. *Hill v. Asian American Drug Abuse Program, Inc.*, No. BC582516 (Cal. Sup. Ct. Jan. 19, 2018). Della Hill, while out on protected medical leave after breaking her arm, was diagnosed with major depressive disorder. Her medical leave was set to expire on March 23, 2015, but prior to its expiration, she submitted additional medical information to her employer on her diagnosis and requested additional leave. Instead of granting the request, her employer, the Asian American Drug Abuse Program (AADAP), terminated her on March 31, 2015, for failing to return from medical leave.
- After determining that AADAP had failed to reasonably accommodate her disability, the jury awarded Hill \$1.9 million in damages (approximately \$550,000 in economic damages, and \$1,350,000 in non-economic damages). The jury also determined that AADAP had acted with malice, oppression, and/or fraud, which allowed the jury to award another \$2.6 million in punitive damages.
- No evidence in the record that AADAP did a thing to try and accommodate. No interactive process.



# Test – Find the Errors

Proposed letter to employee who's FMLA just expired (this is a **real** letter):

Dear [employee]:

As you are aware you have been on medical leave since [date]. Under the Family Medical Leave Act ("FMLA"), we have been able to accommodate your time off of work since your FMLA leave expired last week. Unfortunately, we cannot hold your position any longer. Therefore, we will begin initiating procedures to fill your position.

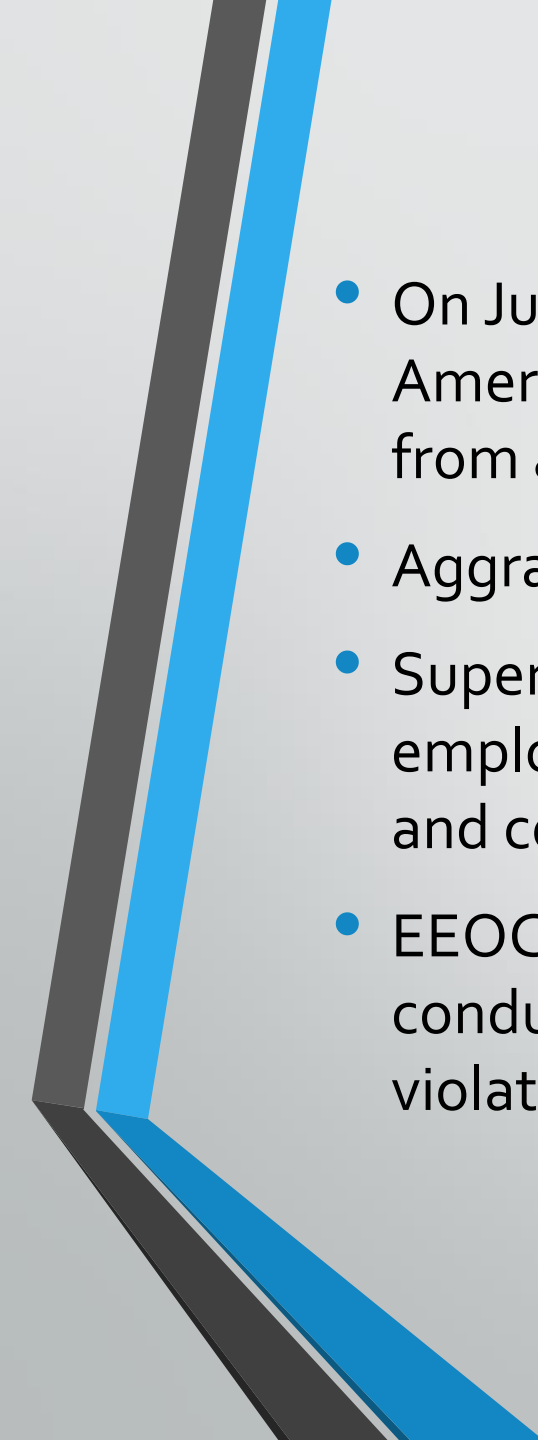
Should your condition improve and you are given a full work duty release, without restrictions, you are welcome to apply for an available position, which you are qualified for, with us.

Your final check will be available to you after 4:00 p.m. on [date] at [where]. You are required to turn in any [employer] issued equipment and/or uniforms to [employer] as soon as possible. Once all items have been received, your final check may be released.

# SUPERVISOR MISTAKE



- Believing that once the FMLA period expires the employee must come back to work.
- Telling an employee they need to be at "100%" or "without restrictions" before coming back to work.
- Asking for doctor's note after 1 or 2 days absence.

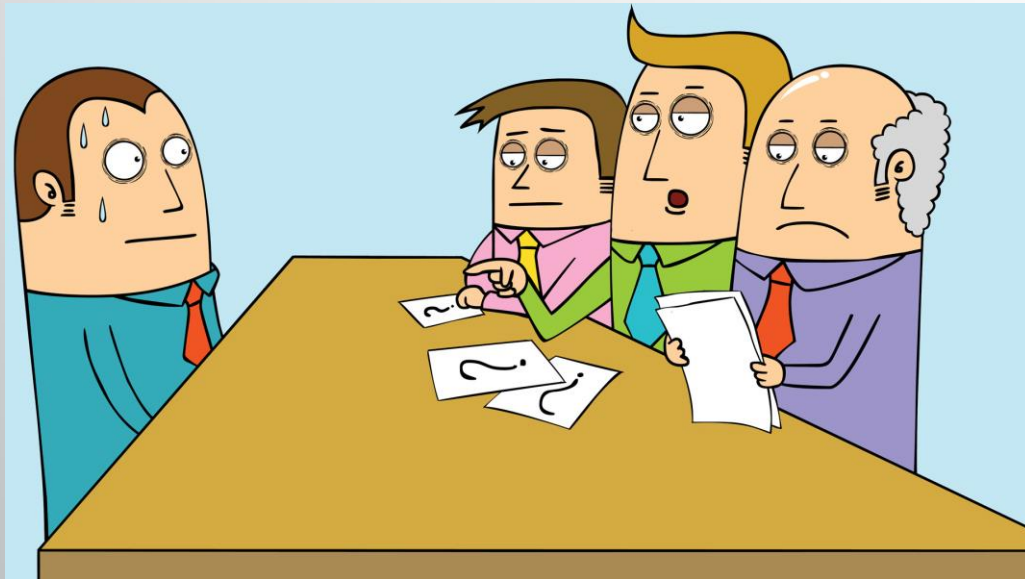
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- On July 12, 2017, the EEOC filed suit alleging that an employer violated the Americans with Disabilities Act (ADA) by refusing a request to telecommute from an employee with a sensitivity to workplace smells.
  - Aggravated her asthma and COPD.
  - Supervisor allegedly ignored the requests to telecommute, even though the employee worked as a case manager for patients requiring home services and could have performed her essential duties from home.
  - EEOC asserts that the rejection of the request to telecommute, without first conducting an individualized assessment of the requested accommodation, violated the ADA.

# SUPERVISOR MISTAKE

- Dismissing potential accommodations out of hand.



# SUPERVISOR MISTAKES



- The pre-hire/interview process
  - “Do you have kids?”



# Pre-Offer Medical Questions

- EEOC Lawsuit:
- Phoenix staffing agency forced applicants to fill out an invasive medical questionnaire and answer medical questions before job offers and denied job opportunities to applicants based on their answers.
- Questionnaire inquired into, among other things, the applicant's use of medications, history of illnesses, and whether the applicant has or had any current or previous injuries to various parts of the body.
- Settled for \$30,000.

# Final Hypothetical

- For efficiency, supervisor has her subordinates (6 people) on a group text so that when issues arise she can send one text to the group instead of individually. She uses this group text for things as simple as a missing key that one of the subordinates may have accidentally taken, or last minute scheduling issues, or even for quick reports from everyone on their last shift.

# SUPERVISOR MISTAKE

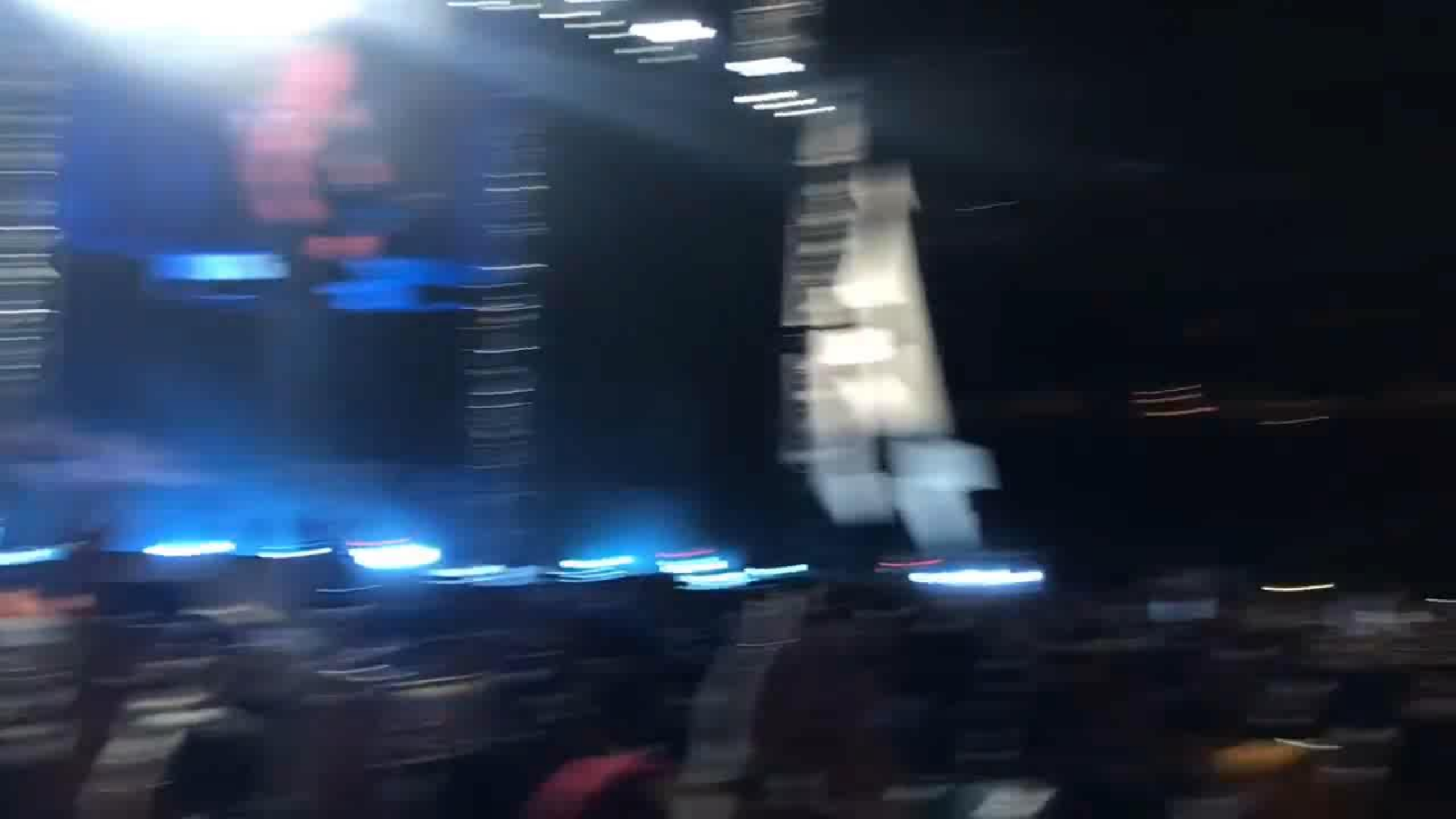
- Even quick communications, with enough frequency, can go beyond “de minimis” and implicate FLSA overtime issues.
- 2017 Deloitte study: 77% of people surveyed checked their email within an hour of going to bed.
- 86% of respondents checked their email within an hour of getting up.











# “You Got a Cool Dad”

- James Hetfield of Metallica to Gavin Pierce on August 4, 2017.



CLASS DISMISSED!

