

DATE: **2008 September 7**
PODCAST: **The Undercover Lawyer**
TITLE: **Episode 5: Listener Interview; Disability Discrimination**

Hello! Welcome to the "Hostile Work Place" podcast episode five. Welcome back to the "Hostile Work Place" podcast, I am your host, the Undercover Lawyer. This is the biweekly podcast where you can learn how to take back your workplace life. Fight back against a bully boss and end harassing treatment at work. If you listen to this podcast regularly, you will become the most knowledgeable person on employment law at your work and legal knowledge truly is power.

In episode number five, we have two great features for you today. The first is a listener interview with Vicki who has gone through quite a lot in her career. Specifically with disability discrimination, filing with the EEOC and going through a mediation. You will be entertained and learn a lot from listening to Vicki's story.

Second, for our Quick Tip, we have an update on male-to-male sexual harassment in the workplace. Has anybody ever heard of a little restaurant called the Cheesecake Factory?

But first, the announcements. We now have a listener comment line where you can call in, tell us whether or not you are finding the information helpful, what you would like to hear on the show. Tell us your story or leave comments about some of the stories that you hear on the show. The comment line number is (360) 450-5750 and I will put the number for the comment line in the show notes also.

Also, on the UndercoverLawyer.com website, we will be adding transcripts of the first four podcast shows. So if there is something mentioned that you would like to read about, you can find the full transcripts there. They are free, no cost at all.

Then finally, for our announcements, we are going to be adding three DVD courses soon to our line up. The first will be on how to file a winning unemployment benefits claim. The second will be how to file a winning EEOC complaint and third a tutorial on the legal rights of job seekers. We all know that discrimination and illegal treatment occurs frequently at work but do you think it occurs before some one is even hired, during the application process? You bet! There are lots of products out there on how to get jobs, how to interview, how to create a resume. There is nothing on how to

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protect yourself and assert your rights as someone who is looking for a job. That is what I hope this DVD will teach people and fill that void. So be watching for that in the next week or two.

So now, for our first segment, the Quick Tip about the case EEOC versus Cheesecake Factory and male-to-male sexual harassment. The case was recently filed in Arizona and alleges that since November of 2004, Cheesecake Factory employees have been subjected to sexual harassment by male co-workers. The EEOC alleges that male employees have been held down while other male employees simulated sex acts against them by rubbing their genitals against the employees' genitals who were pinned down.

In addition, male employees bump into male co-workers from behind in a sexual way. Grab their co-workers crotches and the EEOC further claims that the Cheesecake Factory either knew or should have known that this was going on and the company failed to take steps to correct it.

If this sounds a lot like the case we discussed in podcast episode three, you are right. It relied on that quite a bit. That case was Oncale versus Sundowner, the offshore oil well rig workers. In an interview in the Los Angeles Times, one of the employees from this Arizona Cheesecake Factory by the name of Albert Miller did an interview. He said how difficult it was to come forward as a man and make allegations of sexual harassment. Feeling that he would either be stereotyped as gay or as someone who could not handle horse play and "boys will be boys" and he should be tough.

However, the tide is changing on that attitude. The EEOC now reports that 16% of its sexual harassment charges involve male victims. That is very different than how things were just a decade ago.

Now, for our feature segment, our interview with listener Vicki. Vicki has been a frequent poster in the Undercover Lawyer forums and is someone who bought the Work Laws Exposed book early on when it was offered. She also finished third in our forum-posting contest and won the iTunes gift card. I am pleased to bring you this

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interview with her and hope that in the future I can feature interviews with other listeners of the show. We join the conversation between myself and Vicki where she is describing how her bosses reacted to her filing for FMLA leave due to her disability.

(Start of Interview)

Vicki: I am glad you did not give me any warning because now I will be relaxed and I do not have time to worry all ahead of time.

Undercover Lawyer: Well, good. So do you go back to work tomorrow?

Vicki: Well, I will see my doctor tomorrow and I go back to work Thursday.

Undercover Lawyer: Okay. I did not know how you would feel about putting the bipolar...

Vicki: [00:05:36 Audio Gap] we are supposed to not be prejudicial about stuff like that.

Undercover Lawyer: Well, that is true and they do have a right to know what the problem is and how it gets in the way of you doing your job. So I tried to just say it outright so that they cannot argue with it or nitpick it.

Vicki: Good. Now, what if they say, I hate to play the "what-if" but what if they say, "Well, we will not do the work accommodation and so since we will not do it then she cannot come back to work." Because you know, they are not following the law. I mean, I guess they still do not. They fired two people since we have talked last, these FMLA people. Can you believe that?

Undercover Lawyer: It surprises me although from everything you have said, I get less and less surprised all the time.

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Vicki: It is. It is just totally unbelievable but yes. Two of my friends, it is like we are averaging one a week now.

Undercover Lawyer: How do you keep up with them all?

Vicki: Well, you mean my friends?

Undercover Lawyer: Yes.

Vicki: My co-workers? We are a very close-knit group. We have to be to protect each other. We had a grapevine that is like almost too reliable. You know, everybody tells everybody's business and passes it through the grapevine. When you know somebody is having problems and you are having the same problem then you hear it through the grapevine and you call each other.

So those two, they are registered nurses and they are like, "I am not fighting them." They said they would testify for me. They said, "We are registered nurses. We can get a job anywhere, to hell with them!"

Undercover Lawyer: So when they said, "to hell with them" did they get fired or that they quit?

Vicki: They were borderline to get fired and instead they signed - they did not get fired because they were allowed to sign the - you know what I mean.

Undercover Lawyer: It was a resign or be fired situation?

Vicki: Yes and they signed the resign.

Undercover Lawyer: Yes.

Vicki: You know I would not do that. I would tell them, "Go ahead and fire me" but I am so different than everybody.

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Undercover Lawyer: Like willing to fight?

Vicki: Yes, like willing to fight.

Undercover Lawyer: Yes. Well, I do not think that there is anything wrong with that, obviously.

Vicki: I like that about you and I like you supporting me being that way.

Undercover Lawyer: So what caused the decision to return to work after you being out on FMLA?

Vicki: Well, because of my diagnosis, I qualify for disability and I thought that was sort of unfair to the Americans, to our society because I am very capable of work. I did find out I could earn the same amount of money on disability that I can bring home now. I decided that that was not fair because I am very capable of work.

So then, I checked into retirement because I have been with the state many, many years I think. Anyway, my aid plus years of service have to total 80, with 100% max retirement. In order for that to do that, I need to work two more years and three months. I decided that was what I was going to opt for and then if they fire me in the end - I am not going to resign. I am not going to let them give me an ultimatum of resign or get fired. I will just make them fire me and then I will sue them again.

Undercover Lawyer: You were all set to sit back and collect the same amount of money every month as you would get from working but decided to go back to work because basically, you are an honest person.

Vicki: That is correct.

Undercover Lawyer: Yes. Well, I commend you for that.

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Vicki: Well, somebody has got to do it. We have got too many people on disability and the bipolar diagnosis really, right now, [00:09:03 Audio Gap]. So that will get you disability and there are millions of people out there that are bipolar and half of them are able to work. So I think our society does not quite understand yet.

Undercover Lawyer: Bipolar can do some jobs?

Vicki: Yes. I would say probably half or more than half, so rather than just handing out disability to each person that carries that diagnosis, society needs to be understanding. For example, I have been off work for a month and I offered to tutor a little boy who has autism because I know a lot about it. I am interested in it and I thought that was something I could do to occupy my time while I am off work on disability or temporary disability, while I am deciding whether to go back to work or not. When I told her, she wanted to know why I was off work. When I told her, she did not want me to do it.

Undercover Lawyer: I think a lot of people have misconceptions about what that means.

Vicki: Right, yes. She thinks I am going to flip out, murder her child or something like that.

Undercover Lawyer: Well, the misconceptions about what it means, does that concern you at all in going back to work because people are going to regard you as being disabled in ways that you are not? The same way that this mother did?

Vicki: I would hope not because we are nurses and I would hope that that would make the difference. There is like probably 40 to 60 people in my department, we are all registered nurses and we deal with these people everyday. We are supposed to know a lot about the different diagnoses and so they should have that information. In fact, there are other people that work in my department that do have that diagnosis. They too would like to turn in FMLA papers for this but they are afraid to because of what happened to me.

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Undercover Lawyer: You know from the view of those people who are afraid that they are going to be retaliated against like you, what did they see happen with you from their perspective?

Vicki: Really, they only know what I tell them but they did notice that all of a sudden HR and management were having regular meetings with me. It seemed like every two weeks I was being called into their office. So that part they noticed for themselves and then of course, I would tell them what happened behind closed doors. They said, "This is unbelievable! You turn in your FMLA papers and now all of a sudden, you are constantly being called into management's office."

Undercover Lawyer: Yes. I would not like that if I watched it happen to you.

Vicki: Right and the other managers that were not my immediate supervisors started treating me different. For instance, I was coming back from xeroxing some things and one of the other managers said, "You are wanted down in your boss' office." They charged in there and they said it in a really mean-spirited, demanding kind of way. I even stopped and said, "What did you say?" I was surely misunderstood because I have never done anything to that person, and then she said again. She said it like she was coming down on me and I always thought she and I got along fine.

So the hostility is spreading from one manager person to other management people that are not even really - should not be affiliated with me.

Undercover Lawyer: Right, other managers of other departments.

Vicki: Yes.

Undercover Lawyer: So when did you first notice that things started to go wrong?

Vicki: For starters, everything was going right December of 2007, which was when we all got our annual evaluation. My evaluation was good. They had nothing negative to

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say. They put on the evaluation that they noticed that I had been working outside of my regular work hours to keep my work caught up, which I considered that kind of a plus that I was willing to work on my own time to keep my current. That was in my evaluation and they said, "Exceeds standards" so I did not think anything of it.

Then, three months later, March, I was called in and they said, "We need to talk to you about your absentee. You are missing three half days per month and you only have 92 hours of leave time in the bank and that is not very much for being a state employee. So we are questioning why you are gone so much." I told them it is for disability. They said, "Well, we are going to have to have you bring a doctor's statement every single time that you are out." That is going to cost me \$25 a pop. They said, "Well, I am sorry but that is what you are going to have to do. Is bring us a doctor's note each time you are sick." So then I said, "I can get you FMLA papers." They said, "What is an FMLA paper?" She said, "It does not matter what it is because even if you get that for me, I still need a doctor's note every single time you are sick."

Undercover Lawyer: She was wrong, was she not?

Vicki: Yes. So I said, "Maybe since you do not know what FMLA papers are, let me tell you because I used to be an occupational health nurse for one of our countries Fortune 500 companies. FMLA papers mean..." and then I went into it. She had trouble believing that my information was correct. She said she still needed a doctor's statement from me each time I was sick.

So at that point, I went over her head and I went to the director of our division, which is my boss' boss. I said, "I have a disability and my disability is bipolar. That is why I had never rocked the boat when I am absent three half days a month. It has been that way for four years and nobody has ever said anything about it until now. Then, the reason why I had not rocked the boat on that is I did not want to have to step forward and tell management that I was bipolar but I am. I can get the papers." She said, "I do not think you are going to qualify for FMLA papers for that." I told her, "Well, I am going to try" because I knew I could. From my work experience I knew that I would

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get qualified but she was trying to get me to think that I did not qualify and then hopefully to not pursue it.

Undercover Lawyer: You know when someone discourages employees from applying for FMLA that in itself is illegal. She obviously did not know that since she did not know what FMLA was.

Vicki: Right.

Undercover Lawyer: So what did you do next?

Vicki: She was so nice and she said, "Do not worry about a thing. FMLA would be fine." She said, "It is our goal to make everybody succeed in this environment. Anything we can do to help you succeed at your job we will do. If you can get your FMLA papers then that will not be a problem at all." I said, "Okay, thank you. I appreciate that." I mean, I was really impressed with her story about how she was supporting me and would do anything she could do to make me succeed at my job.

So two days later, I gave them to my immediate supervisor and my immediate supervisor look at them and turned as white as a sheet. I particularly noticed that. Then she said, "I am going to take this down to HR and I will be right back." She was gone maybe an hour. She came back and she said, "Have you told anyone in the department about you being on FMLA?" I said, "Yes." She said, "Well, do not tell another soul." She said, "Who else have you told?" I named a few people and I said, "I am not ashamed of it. In fact, I have worked here for four years with a bipolar condition and I have always had good evaluations for four years. Nothing negative that has ever been said. So I would think that that would be a plug for the bipolar people. They are capable of working and doing a good job."

Undercover Lawyer: So what do you think her concern was? That other people were going to use FMLA?

Vicki: Yes. That was my take on it.

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Undercover Lawyer: So did she go rushing down to HR?

Vicki: Yes.

Undercover Lawyer: What did they tell you after that?

Vicki: So I told them that I had already told people. It was a little late not to tell people because I already had. That infuriated her. So then, my co-workers were telling me, "I did not know about this FMLA thing and I qualify for it. I do not have bipolar but I have like an autoimmune disorder or severe asthma when I am out four days every quarter and I am going to get some FMLA papers too."

So HR was getting a lot of phone calls from the nurses saying that they wanted to inquire about FMLA and it enraged HR. They immediately held a meeting and it was a staff meeting for all employees in my two departments, which consists of like 60 people. The HR director said, "We are having this topic on FMLA or this meeting on FMLA because now it is in high demand." He said it in that tone of voice like it was frowned upon. He said, "I have a slide show presentation to show everybody." He went by real fast and he said, "This slide tells you who are qualified" - click - "and this slide tells you how long you get off each year for FMLA" - click. You did not even have time to read the slides and you did not get your questions asked.

Undercover Lawyer: Yes. That is just amazing.

Vicki: Yes. Then, it was pretty obvious that he definitely got it across that FMLA was frowned upon. At the end, he said, "Are there any questions?" Nobody had any questions. You could have heard a pin drop.

Undercover Lawyer: Yes, they were probably afraid to ask any questions.

Vicki: Right. Then he did not say, "You can refer to your handbook. It is mentioned in the handbook or you can really find it online." Nothing like that. He did not have

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handouts. He just abruptly stopped right there, "Are there any questions?" When there was not, he said, "Thank you very much" and he left. The whole presentation lasted 15 minutes.

Undercover Lawyer: Now you filed EEOC complaint. When in the process did you do that?

Vicki: Right after that meeting where HR gave the FMLA presentation, I mean it was 10 minutes after that meeting I was called down to management's office again. They said, "You have been observed working outside your regular work hours and you will no longer be able to do that. You would have to complete your work between the hours of 8:00 and 5:00. If you cannot then your productivity will be judged and you will be terminated.

Undercover Lawyer: So they came right out and let you know that that is where they were headed, termination.

Vicki: Yes and they typed it up and put it in a memo and sent it to me via e-mail.

Undercover Lawyer: Okay. Then it was after that that you filed the EEOC complaint?

Vicki: I think we had a couple more meetings where management was always calling me in the office, asking me different things and telling me things, which I considered hostile. At this point, I did not know what to do. I have the background working with FMLA but I did not know what you would do when they reject your FMLA. I had never encountered that problem.

So now, I was in water that I was unfamiliar with and a friend said, "File an EEOC complaint" which I did "and very important, you get that filed before they right up anything negative and put it in your file because right now, you have a clean personnel slate. So you need to get down there as quick as you can." I took an annual day the very next day and went to EEOC and filed that. Then, I was called into management's office again, and they had heard that I had filed an EEOC complaint. They said, "Now,

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we understand that you might have be having a problem and is there anything we can do to help? We want to help you if we can." I said, "I assume you have heard that I filed an EEOC complaint and I did." They said, "Why would you think that we are being hostile and discriminatory?" I said, "I have your e-mails. I kept them." So they were really freaked out then. They had not even thought of that.

So they said, "At this point, we need to call in a third party so that we can get you to dismiss the EEOC complaint. We are going to get and internal person to help you with these problems. I am sorry that you misconstrued our e-mails to you. We did not mean them the way that you took it." I said, "I still have them and the people that have read them took it the same way I took it." They said, "We are sorry if it came across that way. That is not how we meant it at all and we are going to call..." I do not know what they call it. Some civil rights lady, in-house. "We are going to call her and bring her in." I said, "No. I do not trust anybody in management. I am going to stick with EEOC."

Undercover Lawyer: Yes, so they just announced that would you dismiss your EEOC complaint?

Vicki: Yes.

Undercover Lawyer: Yes. Well, they obviously cannot do that either. At what point did you run into the Undercover Lawyer website and material?

Vicki: I was looking for some sort of book or something that I could buy to tell me what was legal and what was not legal. I did not know what to do and I needed to know what to do next.

So I bought the book on the site. I bought that book and boy that just really filled me. I got all kinds of information from it and read the book like three or four times just to make sure I got it right. I immediately started a journal. That was in there; to be sure you keep a journal of everything. So I started doing that and it is a good thing I

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did because now, looking back, it is just amazing what all happened. There is no way I could have remembered it all.

Undercover Lawyer: Right.

Vicki: So the book gave me information like anybody that was on side that was standing up for me. If they got retaliated against that they would be in the protected class II. Of course, that was good information. It was just very helpful all the way around.

[00:22:52 Audio Gap] We are going to start with your side of the story. Then I told the story just like how I told it to you. The director of my department, he said, "We have had a problem with this employee's productivity since day one and both of them said they were having problems with her productivity." So then, the mediator said, "Do you have anything to say about that?" I said, "Yes. Here is a copy of my evaluation and the evaluation said that my productivity was perfect. That I had been observed working outside the work hours because of my absences to keep my productivity current." So I passed everybody out a copy of my evaluation. Undercover Lawyer recommended this which I did.

Then I passed out another sheet that explained how there was a new president in the spring where if an employee is out on FMLA that the employer would have to provide coverage to get their work done. They were just shocked about that. Nobody, not even the senior investigator was aware of that and he is an HR director himself. So they all admitted they did not know anything about it and they would have to check into it.

Undercover Lawyer: Nice one. You know more about the law than they do.

Vicki: Yes. He did, at that point, the mediator stopped and looked at me straight in the eyes and said, "You are a very knowledgeable young woman." Then he looked at the other two and he looked at them like, "I hope you heard what I just said." He was trying to give them a heads up I think.

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Undercover Lawyer: Yes, that is great.

Vicki: Yes.

Undercover Lawyer: Where do you think you would be with your job now if you had not bought the Work Laws Exposed book?

Vicki: Oh, my God, I would have been fired. I would not have kept a journal. That journal has come in so handy. When both the EEOC was doing their investigation and when the mediator was asking me questions during his investigation. The advice saying to get the journal going has been priceless. So that little, one piece of information alone was immensely valuable.

Besides that, there were just all kinds of little Labor Law pieces that were relevant. You know which things would put people in a protected class and how that worked, and what an at-will employee was. I did not even know that. So now, I understand at-will employment. How you can put yourself on the other side of the fence and be in the protected class so that you are not an at-will employee in essence or at least you have protections that the other people do not have. I never understood that before and just every little piece of it in the book it either applied to me or it applied to people that I knew. So boy, I thought it was just unbelievable. I thank the good Lord for putting it in my hand.

Undercover Lawyer: Well, that is real nice. That is real nice.

(End of Interview)

That the conclusion of our interview with Vicki for this episode. There was much more on the call where Vicki told us all about her mediation with the EEOC and a mediator and her manager and HR director. That will all be available in our DVD that specialized on teaching you how to file a winning EEOC complaint.

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That is all for the Undercover Lawyer "Hostile Work Place" podcast episode five. Tune in two weeks for the next episode.

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