Ogletree Deakins
The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law — November/December 2013

This Issue

And Much More

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"You Say ADA, I Say FMLA"

Worker's Failure To Return From Leave Justified Her Discharge

The Fifth Circuit Court of Appeals recently upheld a federal judge's decision to grant summary judgment in favor of an employer on a claim brought under the Americans with Disabilities Act (ADA). The interesting—and somewhat unexpected—basis for the decision was that the employer fired the employee because she had failed to return in a timely manner from a medical leave that she had taken under the Family and Medical Leave Act (FMLA). The decision illustrates the often difficult task faced by employers that must tackle the overlap between the ADA and FMLA. ***Owens v. Calhoun County School District,*** *No. 12-60897, Fifth Circuit Court of Appeals (October 8, 2013).*

Factual Background

Karen Darlene Mann Owens was a teacher at Bruce Upper Elementary School, which is part of the Calhoun County, Mississippi School District. For a number of years, Owens had suffered from back and neck pain. On October 19, 2009, Owens underwent surgery and took a leave of absence under the FMLA.

On January 20, 2010, the school principal, Paula Monaghan, asked Owens when she would be returning to work. Owens replied that she had a doctor's appointment on February 12, 2010 and would have more information at that time.

After that discussion, Calhoun County's superintendent, Mike Moore, sent a letter to Owens, warning her that her FMLA leave would soon expire and requesting that Owens provide a

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Ogletree Deakins Named "Law Firm Of The Year"

Also Garners Most "Mentions" In Corporate Counsel Survey

For the third consecutive year, Ogletree Deakins has been named a "Law Firm of the Year" by *U.S. News - Best Lawyers.* The firm received this distinguished honor in the 2014 edition of the *U.S. News - Best Lawyers* "Best Law Firms" list in two categories: Employment Law - Management; and Labor Law - Management. Only one law firm in each practice area receives the "Law Firm of the Year" honor.

Ogletree Deakins also earned "First-Tier" national practice area rankings in six categories: Employee Benefits (ERISA) Law; Employment Law - Management; Immigration Law; Labor Law - Management; Litigation - Labor & Employment; and Construction Law. Thirty-four of the firm's offices earned a metropolitan "First-Tier" ranking.

According to Ogletree Deakins managing shareholder Kim Ebert: "We are very excited to have received 'Law Firm of the Year' designations again this year. We will continue our focus on providing outstanding service and value to our clients."

Ogletree Deakins also received the most "mentions" of any law firm in *Corporate Counsel* magazine's annual "Who Represents America's Biggest Companies" survey. The survey reports on the law firms representing Fortune 500 companies and is based on public records. Ebert commented, "The results of the *Corporate Counsel* survey serve as a strong validation of the business relationships that we have developed with our clients and our commitment to provide premier client service." ■

EXECUTIVES AND HARASSMENT—IS TRAINING EVEN AN ISSUE?

by Dennis A. Davis, Ph.D., Director of Client Training, Ogletree Deakins

Recently, after the mayor of a major U.S. city was forced to resign amid allegations of sexual harassment, I was asked by several people if I believed that the problem was a lack of training. "After all," one person reasoned, "the mayor did say that he missed the anti-harassment training and was unaware that what he did could be considered harassment." My answer was, "It depends" (a popular lawyer response). Whether or not training would have made a difference depends on several factors, including: where the emphasis would have been placed in the training; and his openness to the message of the training.

In my experience, the most important variable in helping executives understand harassment is program emphasis. Many executive training programs (those geared toward C-suite occupants) misplace the focus. While it is important to address the types of harassment such as quid pro quo (tangible job harassment) and hostile work environment, two issues continue to trip up many at the head of their organizations: (1) the extension of the workplace; and (2) the relationship between power and feelings.

Many executives seem to forget that just about every time they step out of their personal residence they are representing their organization. Make sure that your training program instructs executives that everything counts: while at work on the company dime/time; while attending company functions; while representing the company; and while interacting with those with whom there is an employment relationship. At a certain level (whether politician, CEO, or pro athlete), one is always on. It comes with the territory.

The next most important issue for executives to realize is that there is an important relationship between power and feelings. Generally, the more powerful the position one holds, the easier it is to elicit emotion, especially in subordinates. In many of the recent incidents of alleged harassment, the person coming forward to complain reported feelings of humiliation because of the nature of the relationship with the perpetrator. A playful, maybe even flirtatious, remark is received differently when it is made by a peer versus when it is made by a superior, or one in a "power-up" position. Executives need to know that employees often report feelings of powerlessness when they are spoken to in a flirtatious manner by executives.

Finally, assess your executive's willingness to be trained. Often, executives are not open to being instructed in a public setting. Sometimes, a far more productive use of the executive's time is in one-on-one coaching. In this setting they often will allow themselves to be vulnerable, ask questions, and not have to be the "answer guy." ■

Ogletree Deakins

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ICE CHANGES ITS POSITION ON FORM I-9, AGAIN

Finds Pre-Population Of Data May Be Allowed

An important issue for many employers that use electronic I-9 systems is the pre-population of employee information in Section 1 of the I-9 form. Electronic I-9 systems are often integrated with other HR systems and streamline the hiring process by pre-populating employee information in Section 1 from information in the employer's onboarding intake program.

In April 2013, the American Immigration Lawyers Association (AILA), after meeting with officials representing the U.S. Immigration and Customs Enforcement (ICE), announced that pre-population of Section 1 is not permissible. ICE officials also stated that this is the case irrespective of whether the preparer/translator section is completed and regardless of whether the individual employee provided the original information that is pre-populated. Based on ICE's statements, AILA warned that employers should be aware that an electronic I-9 program that involves pre-population of employee information in Section 1 "carries significant legal risk."

However, ICE recently announced that the agency now takes no position on pre-population of Section 1 of Form I-9 by electronic I-9 programs. This appears to modify ICE's earlier statement to the effect that pre-population of Section 1 by electronic I-9 programs is always prohibited. Ogletree Deakins is monitoring developments and will provide updates and further clarification as more information regarding ICE's recent statements and the impact on employers and electronic I-9 programs becomes available. ■

Ogletree Deakins State Round-Up

CALIFORNIA*

Governor Jerry Brown recently signed into law AB 556, which adds "military and veteran status," to the list of categories protected from employment discrimination under the California Fair Employment and Housing Act. Under the new law, employers are permitted to make inquiries regarding military or veteran status for the purpose of awarding a veteran's preference.

FLORIDA

Effective January 1, 2014, the Florida minimum wage will be increased to $7.93 per hour, with a minimum wage of $4.91 per hour for tipped employees. The increase is in accordance with state law, which requires the Florida Department of Economic Opportunity to revise the minimum wage annually based on the CPI index.

GEORGIA

On November 21, the Eleventh Circuit Court of Appeals heard oral argument in a legal challenge to Georgia's controversial "prompt pay" law. Under the statute, insurers must pay electronic claims within 15 days or incur a 12 percent penalty. In 2011, Georgia expanded the law to apply to self-funded plans (which were previously allowed 45 days to process such claims). The law was challenged in court and a trial judge issued a preliminary injunction to block the amendment from being enforced.

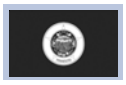
ILLINOIS*

Recently, the Illinois Supreme Court refused to review *Fifield v. Premier Dealer Services, Inc*. The decision requires two years of continued employment for an employer to enforce a post-employment restrictive covenant. *Fifield* is now binding precedent in a large part of the state and may be adopted by the other appellate districts in Illinois as well.

MASSACHUSETTS*

On October 9, the First Circuit Court of Appeals held that an employee was not eligible to take FMLA leave because he had not worked 1,250 hours in the previous year. The court further held that the employee could not establish that his employer's handling of his leave caused him any harm, and that he was not fired for requesting FMLA leave but for his indefinite absence. *McArdle v. Town of Dracut*, No. 13-1044 (October 9, 2013).

MINNESOTA



Effective January 1, 2014, most employers will not be permitted to perform a criminal background check prior to selecting an applicant for an interview. The law does not apply to job applicants who are required by state or federal law to be pre-screened. In cases where there is no interview, a criminal background check can only be completed after a conditional job offer has been extended.

NEW JERSEY*

On October 21, an ordinance was enacted mandating that all Jersey City businesses provide their employees sick leave—either paid or unpaid (depending upon the employer's size). The ordinance will take effect on January 24, 2014, or upon the expiration of current collective bargaining agreements for employees represented by a union.

NEW YORK*

New York's highest court recently affirmed the dismissal of a lawsuit brought by a bank executive who alleged that he was discriminated against on the basis of his disability. The court held that an indefinite leave requested by the employee is not a reasonable accommodation under state law. *Romanello v. Intesa Sanpaolo, S.p.A., et al.*, 2013 WL 5566332 (October 10, 2013).

OHIO

The Ohio Court of Appeals recently held that the parent of an underage girl can proceed with a sexual harassment claim against the owner of a theme park where she worked. The issue now turns to whether the owner created a hostile work environment based on a single, 10-minute conversation in which he allegedly propositioned the 16-year-old for sex. *Ward v. Oakley*, No. CA2013-03-031, (October 28, 2013).

PENNSYLVANIA

The state supreme court recently held that a police trooper who hit and killed a woman who ran in front of his patrol car is entitled to workers' compensation benefits. The court found that his mental injury resulted from "abnormal working conditions." *Payes v. Workers' Comp. Appeal Bd.*, No. J-42-2012 (October 30, 2013).

TENNESSEE

The Sixth Circuit Court of Appeals has rejected a retaliation lawsuit brought by a county worker who claimed that he was demoted because of his race. The court found that the county offered a reasonable explanation for paying him less than other supervisors following his reinstatement and he recouped any other losses when the demotion was later overturned. *Ellis v. Shelby Cnty. Land Bank Dep't*, No. 12-6312 (October 31, 2013).

TEXAS*

The Fifth Circuit Court of Appeals has rejected a Texas federal district court's methodology for calculating damages in a misclassification case. The court found that the overtime award should have been calculated using the FLSA's standard one and one-half times the regular rate of pay for hours exceeding 40 in one week rather than the fluctuating workweek method. *Black v. SettlePou, P.C.*, No. 12-10972 (October 11, 2013).

**For more information on these state-specific rulings or developments, visit www.ogletreedeakins.com.*

REGULATIONS REDEFINING "PERSUADER ACTIVITY" ANTICIPATED IN THE NEW YEAR

*by Harold P. Coxson and M. Baker Wyche III**

It is widely expected that the U.S. Department of Labor's (DOL) recently-installed Secretary Thomas Perez will issue one of the most damaging new labor regulations in decades by changing the definition of a "persuader" under the Labor-Management Reporting and Disclosure Act (LMRDA). The LMRDA, enacted in 1959, includes provisions that require employers to disclose agreements or arrangements between employers and labor relations consultants under which the consultant undertakes activities that have the object of persuading employees to exercise, or refrain from exercising, their right to organize or seek union representation.

As the statute has been interpreted for 50 years since its passage, any company could seek legal advice and guidance on acts covered by the National Labor Relations Act (NLRA) under the "advice" exemption without the need to report that advice to the federal government. The revisions proposed by the DOL would eviscerate the current "advice" exemption and would require reporting of an employer's confidences with its attorneys regarding union organizing, collective bargaining, and other concerted activities in the same manner as a conversation with any non-lawyer.

If the proposed regulations are issued, employers and outside counsel would be required to report any time the lawyer renders advice by:

- Disclosing attorney-client confidences regarding services performed during union organizing campaigns, collective bargaining, or other concerted activity, including the identity of the firm, fee arrangements, and details of services rendered;
- Unjustifiably requiring the lawyer/law firm to report the identity and fee arrangements not only for the single client for whom persuader services are performed, but also for ALL of the lawyer's clients and ALL "labor relations services" (undefined), even those services that have nothing to do with "persuader activity."

* Harold Coxson is a principal with Ogletree Governmental Affairs, Inc., and a shareholder in the law firm of Ogletree Deakins in its Washington, D.C. office. Baker Wyche is a shareholder in the firm's Greenville, South Carolina office.

Questions Have Been Raised

The public commentary about the proposed change has raised many questions, including "What public interest is served by such disclosure?" and "Who is the beneficiary of information classified as 'persuader activity'?" Unsurprisingly, the answer is: organized labor.

One would expect the public disclosure of confidential information (including attorney-client relationships, fee arrangements, and the details of legal services rendered to employers during union organizing and collective bargaining) to be an extremely useful tool for labor organizations during a campaign or bargaining with an employer. An expected result of the proposed regulations might be that unions win more representation elections, especially against uncounseled employers that have been intimidated by the disclosure requirement, thus reversing the decades' long decline in union density. Also, the proposed regulation will interfere with attorney-client relationships by making it more difficult for employers most in need of legal advice to retain counsel.

Uncounseled employers also increases the chances of unfair labor practices which, if sufficiently serious, could cause the National Labor Relations Board (NLRB) to issue *Gissel*-type bargaining orders forcing employers to recognize and bargain with the union based solely on recognition cards rather than a secret ballot election.

Background

The proposed regulations go far beyond original congressional intent and impose new requirements never contemplated when Congress passed the LMRDA. The original intent following the McClellan labor-management corruption investigations in 1959 was to prevent the nefarious practice of an employer's hiring "middlemen" to pose deceptively as fellow employees, befriend workers, and infiltrate their meetings with union organizers, while preaching against unionization, and then reporting back to the employer.

To end this practice that was intended to deceive employees, Congress imposed a "persuader activity" reporting requirement. "Persuaders" and employers that hire them are required to report and publicly disclose whenever the "persuaders" are hired to meet *directly with employees* in an effort to persuade them regarding their rights to organize and bargain.

Congress was careful, however, not to interfere with legal advice. Section 204 of the LMRDA provides: "Nothing contained in this Act shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this Act *any information* which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship."

The LMRDA also does not require reporting of activities that constitute "giving or agreeing to give advice." For over 50 years, this "advice" exception has been read to exempt attorneys from the disclosure requirement.

In enforcing LMRDA's "persuader activity" regulations, the DOL has consistently interpreted the "advice" exemption to apply to a consultant (or, for the purposes of this article, an attorney) who has "no direct contact with employees" and whose services include providing or working on "advice or materials for use in persuading employees which the employer has the right to accept or reject." Thus, where an attorney was providing "advice," the attorney was under no obligation to report to the DOL the services provided, what advice was given, and what fees were paid.

For over 50 years, the law has provided an easily enforced bright-line test that direct communications with employees by "persuaders" concerning unionization trigger a reporting and disclosure requirement. However,

"advice" to an employer concerning the employer's communications with employees on organizing and bargaining has been exempt from reporting and disclosure.

Proposed Revisions

The new proposed persuader activity regulations go well beyond requiring reporting of direct contacts with employees. The regulations provide: "The duty to report can be triggered even without direct contact between a lawyer or other consultant and employees, if persuading employees is an object, direct or indirect, of the person's activity pursuant to an agreement or an arrangement with an employer."

The open-ended scope of the proposed regulations might require reporting not only in typical union organizing campaigns or collective bargaining, but also for advice from lawyers, labor relations consultants, and even public relations firms retained to counsel employers during "corporate campaigns," which attack the company's reputation or corporate brand. Reporting obligations might also exist any time an "indirect" object is to persuade employees to remain non-union.

Certainly, reporting would be required for advice regarding policy reviews to detect areas that might interfere with employees' "protected concerted activities" as that phrase has been expanded recently by the NLRB to include social media and email policies, and class action waivers in employment arbitration agreements.

The effect of the new regulations would be especially devastating for small businesses, which typically do not have in-house legal and labor relations expertise, but must rely on outside counsel.

Congressional Intent

The proposed regulations far supersede congressional intent. The DOL attempts to justify disclosure of the confidential information as merely correcting under-reporting and providing "transparency" that would benefit workers. In fact, the proposed revisions are a dramatic departure from original Congressional intent. The law provides both a reporting and disclosure requirement for true "persuaders" and employers that hire them, and a broad exemption from reporting and disclosure for legal advice.

The proposed regulations would obliterate the advice exemption and stretch the reporting obligations far beyond the original intent of Congress. The original intent was narrowly focused: to eliminate "deceptive" persuader activity practices. When an employer retains a lawyer for legal advice, employees are not deceived. If anything, employees benefit when a well-counseled employer operates within the law and communicates within the parameters of Section 8(c) of the NLRA. Section 8(c) provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

The revised persuader activity regulations undermine an employer's free speech rights granted by Section 8(c).

"The revised persuader activity regulations undermine an employer's free speech rights."

Hobson's Choice for Lawyers

The revisions also place lawyers in an ethical dilemma. Disclosure of attorney-client confidences is an ethical violation for lawyers under Rule 1.6 of the Model Rules of Professional Responsibility. Violations lead to discipline, suspension, and even disbarment from the practice of law. However, a lawyer's failure to report such confidences as required by the LMRDA could lead to civil and criminal fines and imprisonment. Clearly, the proposed regulations create a conflict where there is no good answer.

It was for that reason the American Bar Association (ABA) filed public comments demanding that the proposed rule be withdrawn. The ABA comment stated: "These reports, in turn, would require lawyers (and their employer clients) to disclose a substantial amount of confidential client information, including the existence of the client-lawyer relationship and the identity of the client, the general nature of the legal representation, and a description of the legal tasks performed. The lawyers also would be required to report detailed information regarding the legal fees paid by all of the lawyers' employer clients, and disbursements made by the lawyers, on account of 'labor relations advice or services' provided to any employer client, not just those clients who were involved in persuader activities."

Status of the Regulations

Before the rule is finalized, the revised persuader activity regulations must be reviewed and approved by the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB). OIRA checks to see, for example, whether a proposed rule has met all of the requirements before being finalized.

In the case of the proposed regulations, the DOL has failed to conduct an analysis under the Regulatory Flexibility Act to determine the cost of the persuader activity regulations and to consider less costly alternatives. Instead, the DOL estimated the cost would only be $826,000. If true, this would mean that the new revisions would not constitute a "significant rule" and would be under the threshold to trigger a full economic analysis.

The understated cost estimate has been severely criticized by outside economists, including former DOL economist Diana Furchtgott-Roth of the Manhattan Institute. Her economic study indicates: "The proposed rule could cost the economy between $7.5 billion and $10.6 billion during the first year of implementation, and between $4.3 billion and $6.5 billion per year thereafter. The total cost over a ten-year period could be approximately $60 billion. This does not include the indirect economic effects of raising the cost of

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THE RISE OF "WORKER CENTERS": BIG LABOR'S TROJAN HORSE

by Mark M. Stubley (Greenville) and Andrew D. Frederick (Greenville)

Fast food workers made national headlines earlier this year when several hundred walked off the job, demanding $15 per hour. The strikes were organized by allegedly grass roots organizations such as "Fight for 15," "Jobs with Justice," and "Raise Up MKE," among others. Hundreds of these organizations have sprung up over the last several years. While they attempt to project a spontaneous, grassroots image, they are nothing of the sort. Most "worker centers" are organized, bankrolled, and run by Big Labor. But, a sign of worker centers' success in concealing their true organizers is the fact that many centers have secured government grants and commonly have operations tied to community colleges.

Membership in traditional labor unions continues to decline and Big Labor has serious image problems in the wake of Detroit's collapse and the continued exodus of manufacturing jobs. But unions are striking back. Worker centers target low-wage workers in industries and jobs that cannot be moved overseas—retail, fast food, and agricultural workers to name a few. While these industries have been largely immune to traditional union campaigns due to high turnover, the goal of worker centers is not a secret ballot election. Their weapon is the corporate campaign and soliciting members and participants with social justice appeals.

Take the Retail Action Project (RAP) for example. They solicit employee grievances and sow discontent among the ranks—telling employees that their employers have been "stealing" their wages by cutting their hours or failing to pay overtime. Next, they present the employer with a "bill" for the back pay allegedly owed—payable to the worker center of course. After that, employers have two choices: (1) give in to the worker center's demands; or (2) suffer pickets, boycotts, walkouts, and demonstrations. Using these tactics, RAP claims to have "negotiated" several seven-figure settlements with New York City retailers such as Shoe Mania, Scoop NYC, and Mystique Boutique.

Worker centers are active in most major metropolitan areas—particularly historically dense union territories. This is no coincidence as these worker centers are anything but "grassroots." For example, RAP is a wholly owned subsidiary of the Retail, Wholesale, and Department Store Union (RWDSU), itself an arm of the United Food and Commercial Workers (UFCW). Most of the groups behind the fast food strikes mentioned above are no more than false flag operations financed and operated by the UFCW and the Service Employees International Union (SEIU).

Aside from projecting the appearance of grassroots support, another reason that traditional unions are using these front groups is to evade the accountability and reporting requirements imposed on unions. Because worker centers do not consider themselves "labor organizations" under the National Labor Relations Act and the Labor-Management Reporting and Disclosure Act, they do not submit financial reports to the government, they do not have any duty to fairly represent their members, and they are free to engage in tactics that regular unions are prohibited from using (e.g., secondary boycotts, indefinite recognitional picketing, etc.).

What do worker centers mean for your business? Bankrolled by the still formidable war chests of traditional unions, and unrestrained by financial disclosures and prohibitions on unfair labor practices, worker centers are a powerful weapon for Big Labor. ■

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doing business in the United States."

To resolve this, OIRA may send the proposed regulation back to the DOL to complete a full economic analysis under the Regulatory Flexibility Act, delaying its issuance for several months. Assuming, however, that the regulations are issued before the end of 2013 or in early 2014, it will set an *effective date* that presumably will be 60 to 90 days thereafter. With a regulation this controversial, legal challenges are virtually assured.

What's Wrong With This Picture?

Earlier this year, a unanimous three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit ruled that White House visitor logs for the President and his staff are confidential, not subject to disclosure under the Freedom of Information Act. The decision found that construing the term "agency records" to extend to White House visitor logs could substantially affect the ability of the President and his staff to meet confidentially with foreign leaders, agency staff, and members of the public and could seriously undermine the conduct of daily operations.

What's wrong with this picture? The President and his staff do not have to disclose the identity of individuals on confidential visitor logs, but employers and their attorneys would be required to disclose the identity of their clients and, even beyond that, reveal attorney-client confidences such as fees and services rendered.

What if, in the interest of transparency, laws required Members of Congress to disclose confidential advice coming from their staff, or if trial lawyers were required to disclose confidences coming from their clients, or if the media were forced to disclose their confidential sources? Certainly all that would create transparency, but at what cost?

The DOL's proposed regulations will have far-reaching implications for employers and their legal counsel. The new regulations will create practical challenges for all employers and a true ethical dilemma for lawyers nationwide. Employers and lawyers should begin preparing now for the implementation of the regulations by discussing and developing their action plan.

OGLETREE DEAKINS OPENS LONDON OFFICE

Firm Drives International Expansion

Ogletree Deakins recently expanded its international platform by opening an office in London, England. The London office joins Ogletree Deakins' network of more than 700 lawyers in 45 offices throughout the United States and in Europe. The London office represents the next phase in the firm's international strategy, which began with the opening of its Berlin office in December 2012.

"We are excited to expand into London as we continue to seek to provide assistance to our clients wherever the need arises," said Ogletree Deakins' managing shareholder, Kim Ebert. "Our expansion into London is our next phase of offering clients increased global reach, excellent value, and superior client service."

The London office is managed by partner Richard Linskell, who is joined by associates Ruhul Ayazi and Justin Tarka. Linskell joined Ogletree Deakins from Speechly Bircham LLP, where he was a partner in the employment team. He advises employers on all aspects of the employment relationship from recruitment to termination (and post-termination issues), as well as in relation to the law of limited liability partnerships and partnerships. "Changes in the UK legal market and the evolution of client demands have encouraged the international expansion of law firms as well as an acceleration in the growth of boutique firms, particularly in the employment field," said Linskell. "What makes the Ogletree Deakins proposition stand out is the offering to clients of boutique employment law services on an international scale." ■

New Employer Resource on Garnishments

Ogletree Deakins recently introduced a new subscription-based resource to its *O-D Comply* lineup, which already included background checks, employment applications, e-signatures, state leave laws, and state wage and hour issues. *O-D Comply: Garnishments* focuses on the most common wage attachments for all 50 states: (1) creditor wage garnishments; (2) federal student loan wage garnishments; (3) federal tax levies; and (4) voluntary wage assignments. This subscription will keep employers safe from the inherent risks of garnishments (including becoming liable for the worker's entire debt). For more details, visit www.O-DComply.com or contact James Doss at (864) 240-8264.

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return-to-work date. Owens did not provide a date, but again stated that she had a doctor's appointment on or around February 12, 2010.

On February 9, 2010, Moore sent a letter to Owens terminating her employment for failing to return to work before her FMLA leave expired on February 1, and for failing to provide a return to work date. Owens unsuccessfully appealed her discharge to the Calhoun County school board. She then filed a lawsuit alleging violations of the FMLA, which she ultimately withdrew, and the ADA (among other claims). The trial judge dismissed her lawsuit, finding that Owens failed to present sufficient evidence to support her disability bias claim. Owens appealed this decision to the Fifth Circuit.

Legal Analysis

Owens argued that the trial judge improperly granted summary judgment on her ADA claim because there were genuine issues of material fact—mainly whether she could return to work. The school district maintained that Owens was not capable of returning to work when her employment was terminated. Moreover, the school district argued that Owens was effectively seeking an indefinite leave, which is not a reasonable accommodation under the ADA.

Even assuming Owens was able to establish a prima facie case of discrimination under the ADA, the Fifth Circuit held, she failed to prove that the school district's reason for firing her (failing to provide a return-to-work date after her FMLA leave) was a pretext for disability discrimination. To the contrary, the court found that the record was "replete with evidence that Owens was fired for reasons other than her disability." Specifically, Owens admitted that she had failed to return to work at the expiration of her FMLA leave and, more importantly, had failed to provide a date on which she would return to work, or any documentation from her doctor stating that she was cleared to return to work at any point. Thus, the court upheld the dismissal of her suit.

Practical Impact

According to Maria Danaher, a shareholder in Ogletree Deakins' Pittsburgh office: "Many employers are hesitant to tackle the overlap between the ADA and FMLA, because of the two statutes' different legal standards. To support a valid FMLA claim, a plaintiff typically must show a serious health condition. For an ADA claim, on the other hand, the plaintiff typically must show a disability that substantially limits a major life activity. The challenging situation for employers involves employees who are on FMLA leave with a serious health condition that is also an impairment significant enough to constitute a disability for purposes of the ADA. In those cases, the employer must carefully review and document its reasons for any decision related to the employee's return from leave—including termination of employment—before any need for accommodation is discussed."

Danaher added, "Ultimately, Owens was unable to present any evidence that the school district's reason for her discharge was a pretext for disability discrimination. The school district's documentation of its communications to Owens informing her of the expiration of her FMLA leave, and its attempts to obtain her return-to-work date, led to their success in this matter. This decision shows that the importance of clear, contemporaneous, and objective documentation cannot be overstated." ■

SUPREME COURT TACKLES KEY LABOR AND EMPLOYMENT ISSUES IN NEW TERM

Wage And Hour and Traditional Labor Cases To Be Heard By Justices

The 2013-2014 term at the Supreme Court of the United States is underway. While the hot issues last year were the Defense of Marriage Act, Title VII of the Civil Rights Act, and class actions, the most high-profile cases of this term are in the wage and hour and traditional labor arenas. Below is a brief summary of the key cases that will impact employers.

Sandifer v. United States Steel Corp.

Does the Fair Labor Standards Act (FLSA) require employers to compensate employees for the time they spend putting on and taking off their work clothes in a locker room at the plant? The case was brought on behalf of 800 former and current steelworkers in Gary, Indiana. And the "alleged clothes," as the Seventh Circuit Court of Appeals puts it, include flame-retardant pants and jackets, work gloves, steel-enforced work boots, hard hats, safety glasses, ear plugs, and a hood that covers the top of the head, chin, and neck. The Seventh Circuit ruled that the changing time was not compensable. The specific question the Court has agreed to hear is what constitutes "changing clothes" within the meaning of Section 203(o) of the FLSA. The Supreme Court heard arguments in the case on November 4.

NLRB v. Noel Canning

This case concerns the constitutionality of President Barack Obama's recess appointments of Sharon Block, Terence Flynn, and Richard Griffin to the National Labor Relations Board (NLRB) on January 4, 2012. The President appointed these three NLRB members pursuant to Article II, Section 2, Clause 3 of the U.S. Constitution—the "Recess Appointments Clause." The D.C. Circuit Court of Appeals found that the recess appointments were unconstitutional. The Court granted review to evaluate the President's recess appointment power and the validity of President Obama's three appointments. In addition, the Court will decide whether the recess appointment power may be exercised during a recess that occurs within a session of the Senate or is instead limited to recesses that occur between enumerated sessions of the Senate. Oral arguments in the case have not yet been scheduled.

UNITE HERE Local 355 v. Mulhall

This case centers around the meaning of the phrase "thing of value" under section 302 of the Labor-Management Relations Act (LMRA)—often known as the Taft-Hartley Act—which makes it unlawful for an employer to give, or for a union to receive, any "thing of value" (subject to limited exceptions). In the case, the employer and union entered into an agreement according to which the employer promised: (1) to provide union representatives access to non-public work premises to organize employees during non-work hours; (2) to provide the union a list of employees, their job classifications, departments, and addresses; and (3) to remain neutral with respect to the unionization of employees. In return, the union promised to lend financial support to a ballot initiative regarding casino gaming. The Eleventh Circuit Court of Appeals held that organizing assistance can be a thing of value that, if demanded or given as payment, could violate section 302. The Court agreed to hear the case to decide whether the employer and union violated section 302 by entering into their agreement.

United States v. Quality Stores, Inc.

The Supreme Court recently agreed to consider the taxability of severance payments. The case is on appeal from the Sixth Circuit Court of Appeals, which considered a bankruptcy court's ruling ordering refunds of tax payments collected under the Federal Insurance Contributions Act (FICA). The specific issue to be settled by the Court is whether severance payments are taxable under FICA when made to employees whose employment is involuntarily terminated.

Heimeshoff v. Hartford Life & Accident Insurance Co.

The Employee Retirement Income Security Act (ERISA) does not contain a specific limitations period within which individuals must bring a challenge to a denial of benefits. Instead, according to the Second Circuit Court of Appeals, the controlling limitations period on such claims comes from the "most nearly analogous state limitations statute." The Supreme Court is expected to settle the issue of the statute of limitations for judicial review of adverse disability benefit determinations under ERISA. The Court heard oral arguments on October 15.

Madigan v. Levin

The Supreme Court heard oral arguments in *Madigan* on the first day of its term, and it was the first case it decided. The Court dismissed the writ of certiorari in this age discrimination case as improvidently granted in a one-line order. The issue in the case, which came out of the Seventh Circuit, was whether the Age Discrimination in Employment Act (ADEA) is the exclusive remedy for age discrimination claims brought by a former state assistant attorney general. Justice Stephen Breyer suggested that review should not have been granted.

Ogletree Deakins will keep you apprised of any developments from the Supreme Court. Stay tuned! ■

New To The Firm

Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Ashley Scott (Atlanta); Earlisha Williams (Birmingham); Piper Byzet (Charleston); Katherine Manuel and Grace Ristuccia (Chicago); Amanda Quan (Cleveland); Christopher Thomas (Columbia); Colin LeCroy, Gavin Martinson, and Vicki Tall (Dallas); Carly Osadetz and Iveory Perkins (Detroit Metro); Camden Navarro (Greenville); Jessica Knapp (Houston); J. Patrick Allen, Erin Brinkman, Kathleen Choi, Monica Dean, Ki'Jhana Friday, and Patricia Jeng (Los Angeles); Robin Koshy (Morristown); P. Kramer Rice (New York); Sasha Meschkow (Phoenix); Jennifer Nelson, Kelly Riggs, Kathryn Roberts, and Amanda Van Wieren (Portland); J. Clay Rollins (Richmond); Kathryn Gray and Tracy Warren (San Diego); Adam Aholt and Andrew Metcalf (St. Louis); Vanessa Patel (Tampa); and Kesia Brown (Washington, D.C.).