Ogletree Deakins

The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law

July/August 2013

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Supreme Court Issues Two Key Title VII Rulings

Clarifies Supervisor Liability And Retaliation Causation Standards

On June 24, 2013, the Supreme Court of the United States issued two highly-anticipated decisions. In *Vance v. Ball State University*, the justices considered whether the "supervisor" liability rule established by Supreme Court precedent applies to harassment by employees whom the employer vests with the authority to direct and oversee a harassment victim's daily work or whether the rule is limited to those who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim. With Justice Alito writing for the majority in a 5-to-4 decision, the Supreme Court ruled that an employee is a "supervisor" for purposes of vicarious liability under Title VII of the Civil Rights Act of 1964 only if he or she is empowered by the employer to take tangible employment actions against the victim. *Vance v. Ball State University*, No. 11-556, Supreme Court of the United States (June 24, 2013).

In the second case, *University of Texas Southwestern Medical Center v. Nassar*, the Court considered whether the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-2(a), requires a plaintiff to prove but-for causation (i.e., that an employer would not have taken an adverse employment action but for an improper motive) or instead requires only proof that the employer had a mixed motive (i.e., that an improper motive was one of multiple reasons for the employment action). In *Nassar*, with Justice Kennedy writing the majority in another 5-to-4 decision, the Supreme Court ruled that Title VII retaliation claims must be proved

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Ogletree Deakins Launches New Fall Seminar

Program Specifically Designed For In-House Counsel

This fall, Ogletree Deakins will be holding the firm's first multi-day seminar designed specifically for in-house labor and employment counsel and focusing on the challenging issues they face. The *Corporate Labor and Employment Counsel Exclusive* will be held in Charleston, South Carolina on November 7-9 and will feature more than 75 experienced speakers from both Ogletree Deakins and a variety of companies across the country.

The combination of plenary and breakout sessions will focus on the key labor and employment law issues facing today's in-house counsel, from the Affordable Care Act to workplace investigations to trends in class and collective actions. Networking opportunities include a welcome reception on November 6, a group dinner on the evening of November 7, and round-table discussions on the morning of November 9. According to Ogletree Deakins Managing Shareholder Kim Ebert, "I am confident this will be a great program that will provide sophisticated analyses of key issues facing in-house counsel."

To maintain the interactive experience of this event, attendance is limited, so make your reservations soon. For more information or to register, visit www.ogletreedeakins.com/events/seminars/2013-11-07/corporate-labor-and-employment-counsel-exclusive. We hope that you will join us in Charleston this November for our inaugural *Corporate Labor and Employment Counsel Exclusive*. ■

ARE YOUR HIPAA PRIVACY POLICIES UP TO DATE?

by Stephanie A. Smithey, Ogletree Deakins (Indianapolis)

If you haven't focused on HIPAA lately, now is the time. On January 25, 2013, the Department of Health and Human Services issued final regulations implementing revisions to the Privacy and Security Rules under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). These arose as a result of the extensive revisions to HIPAA made by the Health Information Technology for Economic and Clinical Health (HITECH) Act in 2009. The new regulations, known simply as the "Omnibus Regulations," became effective March 23, 2013, and require all HIPAA-covered entities, including employer-sponsored group health plans, to update their HIPAA policies and procedures by September 23, 2013.

As described in our blog post entitled "New Final Regulations Strengthen HIPAA Privacy and Security Rules" (which can be found at blog.ogletreedeakins.com), these extensive Omnibus Regulations:

- expand the scope and impact of the Privacy and Security Rules on business associates;
- impose significant new restrictions on the use of protected health information (PHI);
- revise individual rights to reflect various HITECH Act requirements;
- implement new enforcement of the tiered penalty structure established by the HITECH Act;
- redesign the final HITECH Act breach notification rule; and
- include genetic information in the definition of PHI.

If an employer provides medical, dental, vision, wellness, or employee assistance benefits, or if it sponsors a health reimbursement arrangement or a health flexible spending account plan, the company's HIPAA privacy compliance is likely out of date and should be reviewed immediately in light of the Omnibus Regulations. In addition, on or before September 23, 2013, the plan should update and reissue its Notice of Privacy Practices. Updated training must also be provided for all employees who may come into contact with protected health information on behalf of a health plan.

Finally, all business associate agreements must be updated, but employers have an extra year (September 23, 2014) to update those agreements that were in place when the Omnibus Regulations were issued in January. Any new business associates will need to execute agreements with the health plan incorporating changes implemented by the new rules. ■

Ogletree Deakins

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OFCCP CLARIFIES DAMAGES FOR VICTIMS OF BIAS

Agency Publishes New Internal Directive

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) is charged with enforcing the affirmative action and non-discrimination obligations of federal contractors and subcontractors. Through compliance reviews and complaint investigations, OFCCP can allege and seek remedies for discrimination in hiring, compensation, and other employment scenarios.

In late July, OFCCP published its internal Directive 310 addressing the calculation of back pay awards for victims of discrimination. Two types of back pay relief are available to OFCCP when trying to calculate awards—"formula relief" and "individual relief." Formula relief—the preferred method of calculating damages that cannot be ascertained with specificity—is generally used for systemic cases of hiring discrimination. Individual relief is more appropriate for victim-specific situations, such as compensation discrimination claims. Mitigation options and prohibitions are also discussed in the Directive.

Most contractors will never need to parse Directive 310's nuances regarding the calculation and mitigation of damages in OFCCP discrimination claims. However, contractors faced with the possibility of settling or litigating OFCCP violations should note that despite Directive 310's mandates, OFCCP settlements can involve extensive negotiation over the amount and parameters of make-whole relief.

According to Leigh Nason, a shareholder in the Columbia, South Carolina office of Ogletree Deakins: "Our experience in this area with both systemic and individual discrimination claims reveals that the settlement of discrimination claims is not only a legal issue, but also a business decision. Properly evaluated, Directive 310's information can be used to positively affect a contractor's monetary obligations to resolve systemic or individual claims of discrimination. ■

Ogletree Deakins State Round-Up

CALIFORNIA*

A California Court of Appeal recently held that employees who are "on call" need to be compensated for those hours if the employer substantially restricts their ability to engage in non-work related activities. However, the court also held that employers may exclude eight hours of sleep time from 24-hour shifts, if an agreement provides for such deductions. *Mendiola v. CPS Security Solutions, Inc.*, No. B240519 (July 3, 2013).

ILLINOIS*

On July 9, Illinois lawmakers overrode Governor Pat Quinn's veto of the Firearm Concealed Carry Act (PA 098-0063). This new law permits private licensed citizens in Illinois to carry concealed firearms. The Act, which stands to directly impact employers, lists numerous types of "prohibited areas" and includes an expansive "parking lot exception."

INDIANA

The Indiana Court of Appeals has upheld a lower court's enforcement of an agreement that limited a print shop manager from competing with her former employer for five years. The court found that the agreement was reasonable given the manager's customer contacts during her employment and her freedom to compete outside a two-county area. *Mayne v. O'Bannon Publishing Co.*, No. 31A05-1301-CT-5 (July 17, 2013).

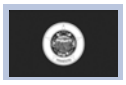
MASSACHUSETTS*

The Massachusetts Supreme Judicial Court recently held that an employer unlawfully discharged an employee based on his wife's disability. However, the court was careful to limit its recognition of associational claims to immediate family members based on the facts of this case. *Flagg v. AliMed, Inc.*, No. SJC 11182 (July 19, 2013).

MICHIGAN*

The Sixth Circuit Court of Appeals recently held that an employee who was unable to complete the functions of her job while on part-time duty could not subsequently claim that ongoing part-time work was a reasonable accommodation for her disability. The court noted that under the ADA, an employer is not obligated to create a new part-time position where none previously existed. *White v. Security First Associated Agency, Inc.*, No. 12-1287 (June 28, 2013).

MINNESOTA*



On August 1, a new sick leave law goes into effect in Minnesota for employers with 21 or more employees at one site. The statute requires employers to allow employees to use sick leave to care for their minor child, adult child, spouse, sibling, parent, grandparent, or stepparent on the same terms upon which the employees are able to use sick leave for their own illnesses.

NEW JERSEY*

On July 17, Governor Chris Christie signed into law the "New Jersey Security and Financial Empowerment Act," which becomes effective on October 1, 2013. This new law provides leave rights to victims of domestic violence and sexual assault and creates additional notice obligations for all New Jersey employers with 25 or more employees.

NEW YORK

The Second Circuit Court of Appeals recently held that a supermarket owner was personally liable for his companies' default on payment obligations under an overtime settlement agreement. The court found that he was an "employer" under the FLSA because he had functional control over the market and operational control over its employees. *Irizarry v. Catsimatidis*, No. 11-4035 (July 9, 2013).

NORTH CAROLINA

A DOL administrative law judge recently held that OFCCP may not proceed with its claim that a North Carolina employer discriminated against "non-Asian" job applicants. In granting summary judgment to the employer, the judge found that "non-Asian" is not a recognized race or ethnic group under Executive Order 11246. *OFCCP v. VF Jeanswear Ltd. Partnership,* No. 2011-OFC-00006 (August 5, 2013).

OREGON*

Governor John Kitzhaber recently signed into law H.B. 2654, which prohibits employers from requiring employees and applicants to provide access to their social media accounts. The law, which goes into effect on January 1, 2014, also prohibits employers from compelling applicants or employees to add the employer to their contact list.

TENNESSEE

On July 1, a new state law (S.B. 833) went into effect that imposes penalties on construction companies that misclassify employees to avoid paying workers' compensation premiums. Violations of the new law include misstating the company's payroll amount or the number of employees employed. Violations carry a maximum fine of $1,000 or 1.5 times the company's average yearly workers' compensation premium (whichever is larger).

TEXAS*

On June 14, Governor Rick Perry signed into law a measure that will preclude most causes of action for negligent hiring or negligent supervision against employers, general contractors, and premises owners. The new law, which goes into effect on September 1, 2013, contains several exceptions (e.g., allowing an individual to sue if the employer knew or should have known its employee was convicted of certain offenses).

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

THE OTHER LABOR CASE BEFORE THE HIGH COURT

*by Thomas A. Smock and Jennifer G. Betts**

Lost amidst the focus on the Supreme Court of the United States' decision to grant certiorari in *Noel Canning v. NLRB* is another case now before the Court, *Mulhall v. UNITE HERE Local 355*, that is equally worthy of attention. Through its decision in *Mulhall*, the Supreme Court has the opportunity to resolve a circuit split regarding the legality of employer agreements to remain neutral during union organizing campaigns.

Background Regarding Neutrality Agreements

Only six percent of the private workforce in the United States is unionized. Traditional organizing tactics—attempting to convince employees to sign enough authorization cards to obtain a National Labor Relations Board (NLRB) election—are combative, time-consuming, and only intermittently effective. Increasing unions' traditional organizing burden is employers' free speech rights under Section 8(c) of the National Labor Relations Act (NLRA), which guarantees employers the ability to express their views about the benefits of remaining union free. In response to the difficulty with this "bottom up" strategy of organizing, unions have increasingly turned to a "top down" approach to organizing—the corporate campaign.

AFL-CIO President Richard Trumka called corporate campaigns the "death of a thousand cuts," and for good reason. This campaign approach involves using legal, political, and public relations attacks to wear down a company's resistance to unionization. High-profile corporate campaigns have recently gained widespread media attention, including the United Auto Workers' efforts to organize automobile manufacturers such as Nissan, Volkswagen, and Toyota, and the Service Employees International Union's (SEIU) nearly decade-long campaign against Sodexo. Litigation spawned from the Sodexo campaign led to the public release of the SEIU's corporate campaign manual, which clarifies the mindset of unions involved in such campaigns: "If management officials feel that you are determined to provoke the maximum possible confrontation no matter what, then they may have no reason to negotiate seriously."

Indeed, the ultimate goal of a corporate campaign is for the employer to conclude that opposition to a union's organizing efforts is ill advised. The tangible evidence of such a capitulation is typically a neutrality agreement. Neutrality agreements usually involve some or all of these ingredients: (1) access for union representatives to non-public work areas; (2) provision of non-public employee information such as employee lists, job classifications, and departments to the union; (3) a promise of neutrality during the organizing campaign; and/or (4) abdication of the employer's right to insist on a secret ballet election in lieu of card-check. (Card-check involves a union's automatic recognition as the agent of a relevant employee unit if the union has collected cards from 50 percent plus one of the unit's workers.)

> *"If the Court finds that even some neutrality agreements are unlawful, unions will have lost the big prize."*

The *Mulhall* Decision and Conflicting Authority

In *Mulhall*, the Eleventh Circuit Court of Appeals addressed whether such neutrality agreements violate Section 302 of the Labor Management Relations Act (LMRA). Section 302 makes it unlawful for "any employer . . . to pay, lend, or deliver, any money or other thing of value, to any labor organization . . . which represents, seeks to represent, or would admit to membership, any of the employees of such employer."

The employer, Mardi Gras Gaming, entered into a neutrality agreement in which it agreed to, among other things, remain neutral to the unionization of employees and provide union representatives with access rights to non-public work areas during non-working hours. In exchange, the union, UNITE HERE Local 355, promised to lend financial support to a local ballot initiative regarding casino gaming. The union spent more than $100,000 on this initiative.

On appeal, Mardi Gras argued to the Eleventh Circuit that the neutrality agreement was a value or thing of benefit to the union, and thus violated Section 302. The Eleventh Circuit agreed. Based on a "common sense" reading of the term, and in the specific circumstances of the case, the court found that the organizing assistance provided by Mardi Gras to be a "payment" of a "thing of value" because its "performance fulfill[ed] an obligation"—i.e., the $100,000 the union spent on the ballot initiative.

In essence, the Eleventh Circuit found that the neutrality agreement could violate Section 302 because the employer and union entered into a "quid pro quo" arrangement—organizing assistance in return for support of a ballot initiative. This arrangement, according to the Eleventh Circuit, arguably ran afoul of the purpose underlying Section 302—"curbing bribery and extortion." As a result, the Eleventh Circuit found that the lower court's dismissal of the case was improper.

The Eleventh Circuit's decision departs from existing circuit court precedent. The Third and Fourth Circuit Courts of Appeal previously addressed challenges to neutrality agreements under Section 302 and both found that they were not a thing of value as a matter of law. In fact, the Third Circuit dismissed the employer's argument that a neutrality agreement was illegal

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* Tom Smock is a shareholder and Jennifer Betts is an associate in the Pittsburgh office of Ogletree Deakins. Both attorneys represent management in labor and employment related matters.

SENATE CONFIRMS NEW FIVE-MEMBER NLRB

What Union And Non-Union Employers Can Expect In The Near Future

The U.S. Senate recently confirmed all five pending nominations to the National Labor Relations Board (NLRB), giving the agency a fully operational complement of Board members for the first time in over a decade.

Meet the New Board Members

The new members and their terms are: Nancy Schiffer (D) for a term expiring on December 16, 2014; Harry I. Johnson, III (R) for a term expiring on August 27, 2015; Kent Hirozawa (D) for a term expiring on August 27, 2016; Philip A. Miscimarra (R) for a term expiring on December 16, 2017; and Chairman Mark Gaston Pearce (D) for a term expiring on August 27, 2018.

Schiffer is a former associate general counsel with the AFL-CIO and earlier was a staff lawyer with the United Auto Workers and the NLRB. Hirozawa was chief counsel to Board Chairman Pearce after spending most of his career as a union lawyer. Pearce was a longtime union lawyer in private practice in Buffalo, New York, while Miscimarra and Johnson both practiced with management-side labor law firms in Chicago and Los Angeles, respectively.

What Happened?

Among the group of Republican Senators who voted for the confirmation of Chairman Pearce were the Senators, led by John McCain, who negotiated a "deal" not to filibuster the Board nominations and to allow a simple majority vote for confirmation. The "deal" involved a majority vote for confirmation in exchange for: (1) an agreement by the White House to withdraw the nominations of recess appointees Richard Griffin (D) and Sharon Block (D); and (2) an agreement by Majority Leader Harry Reid to drop the threat of a "nuclear option" to advance presidential nominations.

The "nuclear option" would have eliminated filibusters on executive branch nominations and, Senate Republicans feared, in the future on judicial nominations and perhaps even on legislation. The threat to eliminate the filibuster was termed the "nuclear option" because Majority Leader Reid threatened to blow up the long-standing requirement for 67 votes to change Senate rules and instead allow rules to be changed by a simple majority vote.

What's Next at the NLRB?

So what's next? Business can count on Chairman Pearce revisiting the Board's representation election (or "ambush election") rule, which he promised to do when he was forced to drop some of the most objectionable provisions from the rule as originally proposed in order to issue the rule before then-Member Craig Becker's recess term expired (thus losing a quorum). Since then, the rule has been blocked by the U.S. District Court for the District of Columbia. Some predict that the new ambush election rule will be even more extreme, dramatically reducing the time employers have to fully inform employees regarding unionization before a union representation election is held.

Employers also should expect the issuance of several controversial decisions pending before the Board, including an expansion of *Specialty Healthcare* to rubber stamp a union's petitioned-for bargaining units of multiple small, single job classifications unless the employer can overcome the nearly impossible hurdle of proving that other employees have an "overwhelming" community of interest—which the Board describes as nearly a complete overlap of job duties and interests with the petitioned-for unit. By choosing their voters to the extent of their ability to organize, unions obviously will be able to win far more elections.

Non-union employers should also expect a continued expansion of the concept of "protected concerted activity," which the Board applies to union and non-union workplaces through policies, work rules, handbooks, employment arbitration agreements, and even at-will employment policies, which may "chill" employees' rights to engage in concerted activity.

Finally, there is the issue of the "persuader activity" rule, requiring public reporting and disclosure of confidential legal and labor relations "advice" from law firms and consultants during union organizing campaigns and collective bargaining under the Labor-Management Reporting and Disclosure Act of 1959. If, in November as forecast, the U.S. Department of Labor (DOL) issues a final "persuader activity" rule, employers can expect the NLRB to work hand-in-glove with the DOL in identifying violations of the public reporting and disclosure requirements for employers and outside parties. ■

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as a "remarkable assertion" since such agreements involve no payment, loan, or delivery of anything.

Current Status and Potential Impact

The Supreme Court granted certiorari for the *Mulhall* case on June 24. The Court framed the issue as follows: "Whether an employer and union may violate [Section] 302 by entering into an agreement under which the employer exercises its freedom of speech by promising to remain neutral to union organizing, its property rights by granting union representatives limited access to the employer's property and employees, and its freedom of contract by obtaining the union's promise to forego its rights to picket, boycott, or otherwise put pressure on the employer's business."

This case could be a very big deal. If the Court finds that even some neutrality agreements are unlawful, unions will have lost the big prize of a corporate campaign. It could lead to a reduction or perhaps even an elimination of these kinds of disruptive campaigns. However, if the Court agrees with the Third and Fourth Circuits and finds such agreements lawful, organized labor will likely be emboldened to continue (and perhaps intensify) this organizing tactic.

New To The Firm

Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Mark Johanson (Atlanta); Caroline Tang (Austin); Nicole Corvini, Rebecca Marks, and Andrew Silvia (Boston); Burton Reiter (Chicago); Todd Nierman (Indianapolis); Adam Pankratz (Kansas City); Robert Roginson (Los Angeles); W. Chris Harrison (Memphis); Evan Citron, Brian Gershengorn, Melissa Osipoff, and Eric Su (New York); Christopher Suffecool (Phoenix); Leo Little (Pittsburgh); Andrew Drozdowski (Raleigh); Nancy Lester and Amy Pocklington (Richmond); Jesse Ferrantella (San Diego); Timothy Reed (San Francisco); Daniel Begian and Julie Devine (St. Louis); Dee Anna Hays (Tampa).

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according to traditional principles of but-for causation. *University of Texas Southwestern Medical Center v. Nassar*, No. 12-484, Supreme Court of the United States (June 24, 2013).

Below is summary of each case and a brief discussion on how the Court's decision impacts employers.

Vance v. Ball State University

This case was brought by Maetta Vance, who alleged that she was the victim of a racially hostile work environment while employed at Ball State University. The Supreme Court decided to hear the case to clarify the "supervisor" liability rule that it had established in 1998 in two key rulings— *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*. According to those cases, an employer may be held vicariously (or "strictly") liable for harassment under Title VII if the harasser is the plaintiff's supervisor.

In *Vance*, the Court ruled that the *Ellerth/Faragher* framework presupposes a distinction between supervisors and workers in which the ability to make tangible employment decisions is the defining characteristic of supervisors. In so finding, the Court rejected the "expansive, nebulous, and vague" definition of "supervisor" found in an Equal Employment Opportunity Commission (EEOC) Enforcement Guidance and ruled that the "ability to direct another employee's tasks is simply not sufficient" to warrant employer liability. As Justice Alito commented several times in the majority opinion, under the EEOC's definition, "supervisor status would very often be murky" whereas the definition of supervisor adopted by the Court today can be "readily applied" and resolved before trial.

According to Michael Wade, Jr., of counsel, and James Spears, a shareholder in the Charlotte office, who filed an amicus brief on behalf of the National Retail Federation in *Vance* in support of the employer: "Rejecting the arguments for an almost unlimited and unworkable definition of 'supervisor' advanced by the EEOC and the employee, the Supreme Court emphasized the benefits of clarity for employers, courts, and juries in deciding when vicarious liability should or should not be applied in Title VII harassment cases.

"As a result of this decision, employers now have uniformity and clarity in deciding which of their employees are supervisors in Title VII hostile work environment claims. The Court's standard provides a good opportunity for employers to evaluate which of their employees have the authority to actually create vicarious liability on behalf of the employer, and thus, which particular employees should be targeted for special training and directions regarding not only their conduct, but also their responsibilities for prevention and appropriate action when harassment occurs."

Univ. of Texas Southwestern Medical Center v. Nassar

Dr. Naiel Nassar, who is of Middle Eastern descent, was a faculty member at the University of Texas Southwestern Medical Center (UTSW) and a clinician at UTSW-affiliated Parkland Hospital. Nassar filed a constructive discharge and retaliation suit against UTSW and a jury found in his favor. The Fifth Circuit Court of Appeals affirmed, finding that retaliation claims only require a showing that retaliation was a "motivating factor" for an adverse employment action. The Supreme Court disagreed.

According to the Court, an employee who alleges retaliation under Title VII must satisfy the "but-for" causation test. Thus, he or she must show that the causal link between the injury and the wrong is so close that the injury would not have occurred but for the act. The lesser causation standard—the so-called "mixed-motive" standard—would require a showing that retaliation was one of the employer's motives, even if the employer had other, lawful motives that contributed to the decision. This test is insufficient, the Court ruled, to establish liability for a Title VII retaliation claim.

In arriving at this conclusion, the Court found instructive its 2009 decision in *Gross v. FBL Financial Services, Inc.*, in which it applied the but-for causation standard to a disparate treatment claim brought under the Age Discrimination in Employment Act (ADEA). The Court held that "the lack of any meaningful textual difference between" Title VII's anti-retaliation provision and the ADEA necessitates the same conclusion in this case, namely that "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." Recognizing that "retaliation claims are being made with ever-increasing frequency," the Court noted that a lesser causation standard might "contribute to the filing of frivolous claims, which would siphon resources from efforts by employer[s], administrative agencies, and courts to combat workplace harassment."

According to John Martin, a shareholder in the Washington, D.C. office of Ogletree Deakins, "The immediate impact of *Nassar* is, of course, that Title VII retaliation claims just became a

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COURT REVIVES WORKER'S RELIGIOUS ACCOMMODATION CLAIM

Rejects Employer's Contention That Worker Failed To Give Sufficient Notice Of Need For Leave

A federal appellate court recently reinstated a lawsuit brought by an employee who was discharged after taking several weeks of unpaid leave to travel to Nigeria to bury his father. The Seventh Circuit Court of Appeals held that a jury should decide whether the company had sufficient notice of the religious nature of his request for leave. ***Adeyeye v. Heartland Sweeteners, LLC,*** *No. 12-3820, Seventh Circuit Court of Appeals (July 31, 2013).*

Factual Background

Sikiru Adeyeye was employed by Heartland Sweetners, LLC. Adeyeye is a native of Nigeria who moved to the United States in 2008.

Following his father's death, Adeyeye requested five weeks of leave to attend the funeral ceremony in Nigeria. In his first written request for leave dated July 19, 2010, Adeyeye stated that it was very important for him to be there "to participate in the funeral rite according to [his] custom and tradition." He also mentioned there are certain rites in which all of the children must participate.

After this request was denied, Adeyeye wrote a second request dated September 15, 2010. He reduced his request from five weeks of unpaid leave to one week of paid leave and three weeks of unpaid leave. He stated that the burial would take place in October and he "[had] to be there and involved totally in this burial ceremony being the first child and the only son of the family."

Heartland again denied the request, but Adeyeye traveled to Nigeria for the funeral anyway. As a result, his employment was terminated.

Adeyeye then sued his former employer for religious bias under Title VII of the Civil Rights Act. The trial judge dismissed the suit, finding that Adeyeye did not provide Heartland sufficient notice that he sought the unpaid leave for religious reasons. Adeyeye appealed this decision to the Seventh Circuit Court of Appeals.

Legal Analysis

To establish a Title VII claim for failure to accommodate an individual's religion, the employee must prove, among other factors, that he or she "called the religious observance or practice to [the] employer's attention." The Seventh Circuit disagreed with the trial judge's conclusion regarding the notice element.

The court first noted that an employee who seeks an accommodation for his or her religion under Title VII must give the employer fair notice of his or her need for an accommodation and the religious nature of the conflict. According to the court, "religion is not necessarily immediately apparent to others, and employers are not 'charged with detailed knowledge of the beliefs and observances associated with particular sects.'" On the other hand, the court observed that an "employer cannot shield itself from liability by . . . intentionally remaining in the dark."

In this case, the Seventh Circuit found that Adeyeye's two written requests provided Heartland with sufficient notice of the religious nature of his request for leave. The court noted that his first request specifically referred to a "funeral ceremony" and a "funeral rite." The second request was not as specific, but again referenced the burial ceremony and the importance of his attendance as the first child and only son.

Although the practices referred to in Adeyeye's requests may not be as familiar as those in modern American religions, the court wrote, "the protections of Title VII are not limited to familiar religions." Likewise, if Heartland was uncertain about the religious nature of Adeyeye's request, the court held that the law "leaves ample room for dialogue on these matters" and the company should have asked for additional information. Thus, the Seventh Circuit reinstated Adeyeye's Title VII claim.

Practical Impact

According to Brian McDermott, a shareholder in the Indianapolis office of Ogletree Deakins: "The case highlights the importance of closely scrutinizing an employee's leave request to determine whether it constitutes a request for a religious accommodation. In remanding the case for a jury trial, the Seventh Circuit explained that Title VII's notice requirement does not require the employee to adhere to a 'rigid script' and it concluded that a reasonable jury could find the employee's letters gave sufficient notice of the need for a religious accommodation. In light of the Seventh Circuit's decision, employer representatives that decide whether to grant or deny leaves of absence should be trained to identify when a leave request may be made as part of a sincerely-held religious belief." ■

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lot harder to prove. The Court expressed alarm at the rising number of retaliation claims—which Justice Ginsburg's dissent derided as a tone-deaf zeal to reduce claims without regard to the realities of the workplace."

"The decision also could affect retaliation claims beyond Title VII," Martin commented. "The government currently interprets several retaliation statutes as employing the mixed-motive standard, such as the Occupational Safety and Health Act (OSHA) and several environmental statutes. Those statutes contain similar 'because' or 'because of' wording used in the retaliation provision under Title VII. The *Nassar* decision followed the logic of its 2009 decision, *Gross*, and found that the 'because of' language in Title VII essentially provides a 'but for' causation standard for retaliation claims. After *Gross* was decided, the U.S. Department of Labor (DOL) declared that the decision did not apply to OSHA and environmental retaliation claims for several reasons, many of which the Court rejected in *Nassar*. It will be interesting to see how the DOL and other agencies respond to the *Nassar* decision." We will keep you apprised of any new developments.

OBJECTIONS TO MATCHMAKING DO NOT CONSTITUTE "PROTECTED ACTIVITY"

Court Rejects Worker's Sex Discrimination and Retaliation Claims

The Eleventh Circuit recently affirmed a trial judge's decision to dismiss a lawsuit brought by a worker who claimed that he was subjected to sex discrimination and retaliation in violation of Title VII of the Civil Rights Act. The court held that his complaints about a co-worker's attempts to make a love connection between him and a colleague were insufficient to form the basis of a retaliation claim. Likewise, the court found that the worker failed to show that he was not promoted based on his sex. ***Laincy v. Chatham County Board Of Assessors,*** *No. 12-15345, Eleventh Circuit Court of Appeals (May 28, 2013).*

Factual Background

Alix Laincy was hired as a clerical assistant by the Chatham County (Georgia) Board of Tax Assessors in May of 2008. The county terminated his employment on November 14, 2008, just five days before the end of his probationary period.

Laincy sued the county alleging sex discrimination and retaliation under Title VII of the Civil Rights Act. He argued that the county failed to promote him and later unlawfully terminated his employment. Specifically, he argued that the county promoted two female employees rather than promote him to appraiser.

Laincy also alleged that he was discharged in retaliation for complaining about a co-worker's "persistent" efforts to get him to date another colleague. When Laincy explained that he was not interested, the complaint alleged, co-worker Andrea Wilson continued her efforts. Wilson allegedly even suggested that their colleague's mother could help Laincy advance in his career. According to Laincy, he reported Wilson's "harassing" conduct to his supervisor in August to no avail.

The trial judge granted summary judgment in the county's favor and Laincy appealed this decision to the Eleventh Circuit Court of Appeals.

Legal Analysis

With regard to Laincy's claim that the county's failure to promote him was discriminatory, the Eleventh Circuit noted that the two female employees who had been promoted had taken appraisal classes whereas Laincy had not. According to the court, "Laincy has not shown that 'no reasonable person' could have selected two candidates who had already taken the courses over Laincy, who had not done so." The court further noted that even if Laincy had asked to take the appraisal classes and his request was denied, the county's decision not to promote him was not discriminatory because probationary employees are not eligible for promotion.

The Eleventh Circuit also rejected Laincy's retaliation claim, finding that he did not engage in "protected activity." The court found that Wilson had made three innocuous comments asking Laincy if he was dating anyone. These comments, the court wrote, "were not threatening, humiliating, and they did not interfere with Laincy's job performance." Thus, the court upheld the trial judge's decision to dismiss his suit.

Practical Impact

According to Patrick Clark, a shareholder in the firm's Atlanta office, "The decision in *Laincy* is consistent with Eleventh Circuit precedent rejecting retaliation claims that are premised upon workplace occurrences that fail to provide the claimant with a subjectively reasonable belief that the challenged conduct is unlawful." ■

OGLETREE DEAKINS ADDS DEPTH IN NORTHWEST

Firm Adds Three New Shareholders In Portland

Ogletree Deakins' growth in the Northwest has continued in recent weeks with the announcement that Howard Rubin, Larry Amburgey, and Patricia (Pat) Haim are joining the Portland office as shareholders. These highly regarded attorneys will be reunited with their colleagues Caroline Guest and Ursula Kienbaum, who joined Ogletree Deakins last June.

"We've made a strategic investment in Portland and the Northwest, which includes a commitment to attracting and retaining the best and brightest attorneys in the market," said Kim Ebert, managing shareholder of Ogletree Deakins. "This group is a real coup for our efforts in the region as their decades of experience and stellar reputation underscore the depth of service and value we provide our clients."

Before joining Ogletree Deakins, Rubin was the managing shareholder of Littler's Portland office. He has represented public and private sector employers in a full range of employment and labor law matters for over 25 years and handles some of the highest profile public sector employment matters in Oregon. Amburgey, who has more than 35 years of experience representing employers in the Portland market, handles union organizing campaigns, unfair labor practice matters, and labor negotiations and has arbitrated more than 500 cases. The two are joined by Haim, who brings almost 30 years of experience advising employers on a wide range of employment law issues and maintaining a business immigration practice. ■

Firm Advances On Diversity Scorecard

Ogletree Deakins has moved up 18 spots to No. 38 on *The American Lawyer's* 2013 Diversity Scorecard, an annual ranking of large U.S. law firms based on their percentage of minority attorneys and partners. "As our numbers continue to show, we are committed to diversity and inclusion," said Michelle Wimes, director of Ogletree Deakins' Professional Development & Inclusion group. "Our firm works tirelessly to recruit and retain first-class talent from varied backgrounds and to promote opportunities for diverse attorneys within the firm." The Diversity Scorecard surveys the country's 250 largest and highest-grossing firms as ranked by the *National Law Journal* and the Am Law 200 firms as ranked by *The American Lawyer*.