Ogletree Deakins

The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law | November/December 2015

In This Issue

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Detroit (Metro)	Richmond
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Indianapolis	San Francisco
Jackson	Seattle
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Las Vegas	St. Thomas
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Los Angeles	Tampa
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Paramedic's GINA Claims Are Flatlined by Court

Employer Did Not Seek Genetic Information As Part of Wellness Program

A federal appellate court recently dismissed a lawsuit brought by a paramedic who claimed that his employer unlawfully placed him on alternative duty after he refused to participate in a wellness program. According to the Fifth Circuit Court of Appeals, the information sought by the employer as part of its wellness program did not meet the definition of "genetic information" under the Genetic Information Nondiscrimination Act (GINA). ***Ortiz v. City of San Antonio Fire Department,*** *No. 15-50341, Fifth Circuit Court of Appeals (November 18, 2015).*

Factual Background

Alfred Ortiz, III was employed by the City of San Antonio Fire Department (SAFD). He began working for the department more than 30 years ago, first as a firefighter and later as a paramedic.

In December 2010, SAFD announced that all uniformed employees must participate in a mandatory "wellness program." The program was "designed to provide early detection of serious medical conditions and encourage better health, thereby allowing . . . employees to do their job more safely and effectively."

Under the program, employees were provided with a free and comprehensive "job-related medical evaluation." The medical examination could be conducted by an employee's personal physician (at his or her own expense). The evaluation included a medical history, a "complete physical examination," blood and urine tests, and tests for vision, hearing, and lung capacity. SAFD also required employees to undergo a chest X-ray every

Please see "GINA" on page 6

Ogletree Deakins Named "Law Firm of the Year"

Marks Fifth Consecutive Year Receiving This Prestigious Designation

Ogletree Deakins recently was named a "Law Firm of the Year" for the fifth consecutive year by *U.S. News – Best Lawyers*. Only one law firm in each practice area receives the "Law Firm of the Year" designation. In the 2016 edition of the *U.S. News – Best Lawyers* "Best Law Firms" list, Ogletree Deakins is named the "Law Firm of the Year" in the Employment Law - Management category.

The firm also maintained its national "First Tier" 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-one of the firm's offices earned a metropolitan "First Tier" ranking.

"Outstanding client service is a top priority for us as a firm and as individual lawyers," said Kim Ebert, managing shareholder of Ogletree Deakins. "We are pleased to be selected as a *U.S. News – Best Lawyers* 'Law Firm of the Year' for the fifth consecutive year, as this honor emphasizes the principles we adhere to in our Client Pledge."

The Ogletree Deakins Client Pledge focuses on the firm's goal to offer premier client service. As part of the pledge, our attorneys agree to: (1) understand the client's business and objectives; (2) focus on and anticipate the client's needs; (3) collaborate to develop creative business solutions; (4) harness technology and innovation to better serve the client's interests; (5) communicate in a timely and effective manner; and (6) provide quality representation with exceptional value. ■

DOL's Fall 2015 Agenda: Does It Shed Light on Timing of Final Overtime Rule?

by Alfred B. Robinson, Jr. (Washington, D.C.)

Approximately three months after the comment period closed on the proposal from the Obama administration and U.S. Department of Labor (DOL) to revise the Part 541 overtime regulations, the DOL issued its Fall 2015 Semiannual Regulatory Agenda that includes a statement on the timing for a final overtime rule. According to the regulatory agenda, the DOL expects to issue the final rule in July of 2016.

The regulatory proposal, which was published in the Federal Register on July 6, 2015, provided for a 60-day comment period, which closed on September 4, 2015, with some 290,723 comments received. The proposal's comment results page indicates that commenters voiced their concerns about both the overtime rule's compensation requirement and the duties test.

Timeline to the Final Rule

The DOL must now review all the comments and prepare a preamble and final rule to address them. It must then submit its preamble and final rule to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) for review and possible revision.

The regulatory agenda's prediction of July 2016, for publication of a final rule really does not give us greater insight into the timing of a final rule than we already had. In fact, the predicted date of a final rule in the regulatory agenda may not be realistic at all. Recall that earlier versions of the DOL's regulatory agenda predicted the proposed rule would be published initially in November 2014, then February 2015, and finally, June 2015, before its actual publication was accomplished in July of 2015.

If anything, the regulatory agenda's estimate of when the DOL will publish a final rule fuels more speculation and predictions. Perhaps more telling is a recent statement by the Solicitor of Labor, M. Patricia Smith, at an American Bar Association conference where she stated that a final rule was not likely before "late" next year. While the Solicitor did not elaborate on what "late" 2016 means, a more realistic prediction for publication of a final rule would be during the late third quarter, or even the fourth quarter of 2016.

Given the tremendous number of comments that must be analyzed and read, this will be a Herculean task that will strain the DOL's resources. Also, as reflected in the regulatory agenda, the DOL has some 96 other regulatory initiatives at various stages in the rulemaking process.

Regulatory Agenda Description of the Overtime Rulemaking

The regulatory agenda's section on "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees" includes a "statement of need," which describes the DOL's effort to "modernize and simplify" the overtime regulations "while ensuring that the FLSA's intended overtime protections are fully implemented" as "[c]onsistent with the President's goal of ensuring workers are paid a fair day's pay for a fair day's work."

The agenda lists the key provisions of the proposed rule to include: (1) setting the standard salary level required for exemption at the 40th percentile of weekly earnings for full-time salaried workers (projected to be $970 per week, or $50,440 annually, in 2016); (2) increasing the total annual compensation requirement needed to exempt highly compensated employees to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers ($122,148 annually); and (3) establishing a mechanism for automatically updating the salary and compensation levels going forward to ensure that they will continue to provide a useful and effective test for exemption.

At the time of the proposal, the DOL had not made any substantive proposals for the duties tests. Instead, it requested comments on whether the tests adequately determine whether an employee qualifies as exempt or nonexempt and whether the current tests permit exempt employees to perform a disproportionate amount of nonexempt work. While the Fall 2015 Semiannual Regulatory Agenda does not mention the duties test, the prospect that the DOL will revise the duties tests and significantly increase the salary amount is a grave concern for businesses.

Conclusion

Employers should start planning now so they can be prepared for big changes in the overtime regulations late next year. For example, employers should evaluate strategies for exempt employees who earn less than approximately $50,000 of increasing salaries to exceed the new salary threshold, modifying their job responsibilities, or reclassifying them as nonexempt. Also, the final rule will impact employers' budgets so employers should consider the possibility of substantially increased compensation or overtime costs for employees who remain exempt at a higher salary level or are reclassified as non-exempt. ■

Ogletree Deakins

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Ogletree Deakins State Round-Up

California

A California Court of Appeal recently ruled that an employee who reported a suspected theft of personal property in the workplace was protected against retaliation. The court found that reporting illegal activity is protected even if it involves a matter of personal interest, and that the report need not relate directly to the employment enterprise. *Cardenas v. M. Fanaian, D.D.S., Inc.*, No. F069305 (October 1, 2015).

Colorado

The Colorado Department of Labor and Employment recently issued guidance to clarify its position on "use-it-or-lose-it" vacation pay policies in light of the Colorado Wage Claim Act. The department took a hard stance against these policies, clarifying that an employer cannot deprive an employee of his or her right to earned wages, and that vacation pay is an earned wage.

District of Columbia

Employers with 20 or more employees working in the District of Columbia must comply with a new law that requires them to offer commuter benefits to employees by January 1, 2016. Employers can offer the commuter benefits program through an employer-paid pretax benefit program or employer-provided transportation provided at no cost to employees.

Florida

The commissioners of Pinellas County recently adopted a wage theft ordinance that goes into effect on January 1, 2016. The ordinance provides that if any employer fails to pay wages of at least $60 due to an employee 14 days or more from the date the work was performed, the failure to pay will be deemed "wage theft." However, if the employer has established a regular pay period longer than 14 days, the wages may be paid according to that schedule.

Illinois

The Illinois Appellate Court recently affirmed a circuit court's holding that an employer's restrictive covenants were overbroad and unreasonable. Furthermore, the court refused to judicially modify the restrictive covenants, despite the parties' agreement authorizing judicial modification, thus demonstrating its strong stance against overly broad restrictive covenants. *AssuredPartners, Inc. v. Schmitt*, No. 13 CH 19264 (October 26, 2015).

Louisiana

The Louisiana Workforce Commission (LWC) is on track for a second consecutive record-setting year in identifying workers misclassified as independent contractors. In 2014, Louisiana led the nation with the LWC finding an average of 11 misclassified workers per audit and identifying 12,782 misclassified workers. The LWC is on pace to exceed that number by the end of 2015.

Missouri

A Missouri Court of Appeals recently affirmed the dismissal of an employee's claim of discrimination based on sexual orientation under the Missouri Human Rights Act. The majority held that Missouri law does not prohibit discrimination based on sexual orientation, but the court left open the possibility that future claims may be brought by plaintiffs who specifically allege discrimination based on gender stereotyping. *Pittman v. Cook Paper Recycling Corp.*, WD 77973 (October 27, 2015).

New Jersey

The New Jersey Department of Labor and Workforce Development published its long-awaited, final "ban-the-box" regulations on December 7, 2015. The final regulations, which took effect immediately, clarify issues regarding New Jersey's Opportunity to Compete Act.

New York

On November 5, the New York City Commission on Human Rights issued guidance on the local Fair Chance Act. The guidance interprets the law's language broadly, expanding the scope of "applicants" to include current employees, and creates a new framework for background checks. The Commission also issued a new version of its Fair Chance Notice form.

Oregon

On November 25, the Portland City Council passed an ordinance restricting an employer's ability to inquire about a job applicant's criminal history. As of July 1, 2016, Portland employers with six or more employees will be prohibited from soliciting information regarding an applicant's criminal background at any time prior to making a conditional offer of employment.

Pennsylvania

The Commonwealth's Supreme Court recently reaffirmed the claim that Pennsylvania's decades-old Uniform Written Obligations Act does not change the long-standing common law rule. According to the court, covenants not to compete entered into after the commencement of employment must be accompanied by new and valuable consideration. *Socko v. Mid-Atlantic Systems of CPA, Inc.*, No. J-40-2014 (November 18, 2015).

Washington

The City of Tacoma recently voted to forgo a ballot measure that would have quickly increased the minimum wage to $15 per hour, and instead voted in favor of a gradual increase to a $12 per hour minimum wage. The city's minimum wage will increase to $10.35 per hour in February of 2016, $11.15 per hour in January of 2017, and finally $12 per hour in January of 2018.

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

"Click Here to Organize"—NLRB Accepts E-Signatures on Authorization Cards

*by Timothy C. Kamin**

The National Labor Relations Board (NLRB) has made union organizing by email and social media a reality. The NLRB's General Counsel issued Memorandum 15-08 on September 1, 2015, stating that, "[e]ffective immediately, parties may submit electronic signatures in support of a showing of interest."

On October 26, 2015, the General Counsel issued Revised Memorandum 15-08 providing more detail and examples of how the new process will work. Employers should expect unions to take advantage of this groundbreaking development by using email and social media to expedite and expand the organizing process.

The History of Actual Signatures on Authorization Cards

The NLRB has long required that a union election petition be supported by a "showing of interest" demonstrating that at least 30 percent of the employees involved support the union. For decades, the showing of interest has taken the form of employee-signed "authorization cards," pocket-sized cards stating that employees wish to be represented by a union for purposes of collective bargaining. Under the General Counsel's new rule, there is now no need for union organizers to solicit actual signatures from employees.

Part of the Larger Picture

This move to electronic signatures is an outgrowth of the NLRB's new "ambush" election rules, which took effect in April 2015. Under those rules, the speed of the organizing process has increased significantly and, for the first time, electronic filing and service of petitions is permitted by the NLRB. As part of that rulemaking process, the Board directed the General Counsel to issue guidance on whether electronic signatures should be accepted to support a showing of interest, and Memorandum 15-08 was issued in response to that directive.

* Timothy Kamin is a shareholder in the Milwaukee office of Ogletree Deakins, where he represents management in labor and employment-related matters.

What Types of Electronic Signatures Are Acceptable?

Multiple forms of "electronic signature" will be accepted by the NLRB, including "email exchanges or internet/intranet sign-up methods." Options include a website that employees could access to complete an online "authorization form" or a form email message. An authorization supported by electronic signature must include the signer's name, email address or social media account, telephone number, the actual "authorization" language to which the employee assents, the date of the submission, and the name of the employer.

The submitting union also must provide a declaration identifying the technology used and explaining the identification controls within the system. Rather than signing an authorization card with a pen, employees will be offered the opportunity to affirm their desire for union representation by clicking a box.

Concerns About Authenticity

In accepting "electronic signatures," it is not clear whether, how, or what actions the NLRB will take to verify authenticity. The NLRB has long presumed conventional signatures to be valid absent significant evidence to the contrary, and the acceptance of cards has been at the NLRB's discretion with extremely limited opportunity for legal challenge.

Under the procedures detailed in the Revised Memorandum, electronic signatures verified by an independent third party through public key infrastructure (PKI) technology will be accepted without further action. If the union gathering the electronic signatures does not use a PKI-based system, it will be required to send a "confirmation transmission" to each electronic signer confirming the information to which the signer assented, and inviting the signer to respond if anything is incorrect. The submitting union will be obligated to provide any responses to the "confirmation transmission" to the NLRB along with the electronically signed authorizations. Sample forms for these submissions are provided as attachments to the Revised Memorandum.

In the General Counsel's view, "the contact information (email address, phone number or other social media account) is easy to obtain electronically from the signer and will enable the NLRB to promptly investigate forgery or fraud, where appropriate." While the process of verifying the authenticity of the showing of interest always has been murky from the viewpoint of employers, the potential for fraud and abuse of electronic processes is significant.

"The potential for fraud and abuse of electronic processes is significant."

"E-Signatures" Reduce the Employer's Ability to Respond

It remains to be seen how unions will capitalize on this development, but the opportunity is tremendous. Many unions have existing websites, social media pages, and Twitter accounts that provide a ready-made platform for soliciting employees by offering a hyperlink to the "electronic authorization form" for employees to complete.

Likewise, a hyperlink easily could be included in a mass email to employees—a prospect that was enhanced greatly by the NLRB's recent decision in *Purple Communications*. In that case, the NLRB held that employees who have been granted access to company email systems must be permitted to use those systems for union organizing activity when on non-working time. If a union provides the hyperlink to one sympathetic employee, that employee could extend the invitation to all employees in a matter of seconds.

In addition to electronic solicitations, more traditional means still may be used to direct employees to a union's "e-authorization" website, such as handbills

Please see "NLRB" on page 5

Receipt of Letter Doesn't Place Employer on Notice of Wage Garnishment

Court Upholds Dismissal of Worker's Wrongful Termination Suit

A federal appellate court recently rejected a lawsuit brought by an employee who claimed that his employer discharged him to avoid obligations associated with a wage garnishment for his student loans. According to the Ninth Circuit Court of Appeals, no one involved in the employee's termination had actual knowledge of the potential wage garnishment, and the mere receipt of correspondence from the employee's loan servicer by the office where the HR director worked did not put the director on constructive notice of the potential garnishment activity. ***Sutherland v. Red Bull Distrib. Co.,*** *No. 13-16724, Ninth Circuit Court of Appeals (November 23, 2015).*

Factual Background

Red Bull Distribution Company (RBDC) hired Valgene Sutherland in 2008 to deliver Red Bull refrigerators to customers from a Las Vegas distribution center. RBDC's payroll was handled by Red Bull North America (RBNA) in Santa Monica, California.

On March 23, 2011, RBNA received a letter from Sutherland's student loan servicer, Texas Guaranteed Student Loan Corporation (TG), which sought to locate Sutherland and verify his employment with RBDC. Prior to TG sending the letter, RBDC had informed TG that wage garnishment requests should be sent to the Santa Monica office. However, the March 23 letter did not mention any potential wage garnishment.

Following some earlier "timekeeping issues," Sutherland was caught clocking in on a day he had not actually worked. Although he claimed that he had clocked in mistakenly, he allegedly made no effort to correct the error. Sutherland's direct supervisor, Steve Crudo, sought to terminate Sutherland for falsifying time records.

Crudo consulted with Roberta Hernandez, RBDC's HR director who worked in the Santa Monica office. Hernandez approved the decision and, on June 21, 2011, RBDC discharged Sutherland.

Sutherland subsequently filed a wrongful termination lawsuit alleging that RBDC had terminated him because of the "potential garnishment activity."

Legal Analysis

Under Nevada law, a plaintiff cannot prevail on a wrongful discharge claim unless he can "demonstrate that his protected conduct was the proximate cause of the discharge." Moreover, under 20 U.S. Code section 1095(a)(8), an employer may not discharge an employee "by reason of the fact that the individual's wages have been subject to garnishment." Thus, to prevail on any of his claims, Sutherland had to demonstrate "a causal link between his termination and the garnishment activity."

The district court noted that both Hernandez and Crudo—as well as another supervisor who had been involved with Sutherland's previous timekeeping issues, Bryce Ondell—testified that they did not know about the letter from TG nor "of the potential future garnishment" at the time they terminated Sutherland. Hernandez in particular testified that as Red Bull's HR director, with more than 1,200 employees to deal with, she did not handle or know about employee garnishment issues and didn't become aware of Sutherland's student loan until after he had been terminated.

Since Crudo, Ondell, and Hernandez were the only people involved in the decision to terminate Sutherland, and their testimony that they did not know about the potential garnishment issue was undisputed, Sutherland could not prove a direct link between the potential garnishment and their decision to terminate him.

Nevertheless, Sutherland proceeded on the theory that Hernandez and Red Bull had "constructive notice" of the potential garnishment because the Santa Monica office had received the initial letter from TG.

The district court rejected this argument as well. "The fact that someone at the Santa Monica office uninvolved with the decision to terminate Sutherland knew about a potential future wage garnishment is insufficient," the court held, to prove that the garnishment activity was causally connected to his termination.

On appeal, the Ninth Circuit affirmed without oral argument. The court held that no reasonable jury could find a causal link between the potential garnishment and Sutherland's firing based on a mere allegation of constructive notice. "For the potential wage garnishment to have motivated Sutherland's managers and the human resources department to terminate his employment they must have known about it," the court held. "Because it is undisputed that the decision-makers had no actual knowledge of the proposed garnishment, the district court properly granted summary judgment."

Practical Impact

According to Tony Martin, a shareholder in the Las Vegas office of Ogletree Deakins, "This decision highlights that in the Ninth Circuit, the mere receipt of correspondence in an office that houses HR functions does not necessarily put the HR director on notice of the contents of that correspondence. Nonetheless, employers are reminded by this decision that they should refrain from taking adverse action against employees who have engaged in protected activity." ■

"NLRB"

continued from page 4

and mailers. One union has already placed an advertisement in a local newspaper, inviting employees of a particular employer to visit a union website for the purpose of signing an electronic authorization card.

The General Counsel's decision to allow unions to organize electronically creates an alternative to traditional authorization card signing drives that is exponentially faster, very low in cost, and more "under the radar" than ever before. A union can now effectively solicit all of an employer's employees before the employer has any opportunity to respond, or perhaps even without the employer becoming aware that it has happened. A proactive approach to positive employee relations, including advising employees in advance of the ramifications of signing an authorization card and properly training supervisors, is now more important than ever.

Ogletree Deakins News

New to the firm. Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Rachel Kelly (Dallas); Steven Reid (Denver); Michael Riccobono (Morristown); Alysia Harris (Portland); and Jonathan Liu (San Diego). Ogletree Deakins has 750 attorneys in 48 offices across the United States, in Europe, and in Mexico.

Diversity award. Ogletree Deakins has been selected as the recipient of the Minority Corporate Counsel Association's (MCAA) Thomas L. Sager Award for the Midwest region. The Thomas L. Sager Award is given to law firms that have demonstrated sustained commitment to improve the hiring, retention, and promotion of minority attorneys. Every year, MCCA selects one law firm in each of five regions—Mid-Atlantic, Midwest, Northeast, South, and West—for its outstanding contribution to the promotion of diversity in the corporate legal community.

"GINA"

continued from page 1

five years, as well as a stress test and "Prostate-Specific Antigen" testing for those over the age of 40.

Failure to complete the wellness program resulted in an employee being placed on "alternate duty." However, SAFD committed to working "closely with the employee and the Wellness Physician to expedite a return to full duty status."

On June 23, 2011, Ortiz received an email regarding upcoming physicals for all Emergency Medical Services personnel. Approximately one month later, Ortiz wrote a letter to the fire chief stating that he did not want to participate in the wellness program and did not wish "to allow release of [his] Personal Protected Information to any entity without [his] consent." In a second letter, he requested "additional time to meet with [his] lawyer . . . before subjecting [himself] to the physical and lab work."

In February 2012, Ortiz was placed on alternative duty for failing to comply with the wellness program. One week later, Ortiz submitted documentation from his personal physician and he was immediately returned to regular duty.

On April 13, 2012, SAFD learned that Ortiz had not taken a stress test and refused to submit to one. As a result, he was again placed on alternate duty. After nine months of alternate duty, Ortiz submitted the results of a stress test and was returned to regular duty.

Ortiz filed a lawsuit against SAFD alleging that the department violated the Genetic Information Nondiscrimination Act (GINA) by mandating that he participate in the wellness program and by placing him on alternate duty when he refused. The district court adopted a magistrate judge's recommendation to dismiss the suit, and Ortiz appealed this decision to the Fifth Circuit Court of Appeals.

Legal Analysis

GINA prohibits an employer from discriminating or taking adverse action against an employee "because of genetic information with respect to the employee." Under the Act, it is unlawful "for an employer to request, require, or purchase genetic information with respect to an employee or a family member of the employee."

There are some exceptions to this provision, however. As noted by the Fifth Circuit, "an employer that offers medical services 'as part of a wellness program' may request genetic information if the 'employee provides prior, knowing, voluntary, and written authorization' and certain confidentiality requirements are met."

The court also noted that under the Act, "genetic information" encompasses information about "genetic tests" of an employee or his or her family members, and information about "the manifestation of a disease or disorder in family members of such individual."

In this case, the Fifth Circuit held that the district court properly dismissed Ortiz's discrimination claim because there was no evidence that SAFD had requested, required, or purchased his genetic information, or discriminated against him on the basis of genetic information. According to the court, Ortiz "appears to misread the statute as forbidding *any* mandatory wellness program, regardless of whether it involves a request for or the acquisition of genetic information."

Practical Impact

According to Stephanie Smithey, a shareholder in the Indianapolis office of Ogletree Deakins, "Even though the employer prevailed in this case, the landscape for workplace wellness programs continues to get more rocky. The facts of this case are different from those in which the Equal Employment Opportunity Commission (EEOC) has initiated litigation against employers relating to their wellness programs. Here, the plaintiff alleged violations of GINA, even though the employer's wellness plan did not request or collect any genetic information from the plaintiff. The medical exam was clearly job-related, and the record contained no indication that he was ever asked to provide his family medical history, which constitutes genetic information under GINA."

"By contrast," Smithey continued, "the EEOC recently raised GINA issues when it sought a temporary restraining order against an employer wellness plan where the employer offered a contribution to the employee's health savings account based in part upon collection of family medical history from the employee's spouse."

Employers should be cognizant when structuring their wellness programs that the collection of any family medical history can raise GINA concerns which should be considered at the front end.

"In addition to GINA concerns, workplace wellness programs continue to trigger potential exposure for employers under the Americans with Disabilities Act (ADA), the Affordable Care Act (ACA), and the Health Insurance Portability and Accountability Act (HIPAA). While the EEOC has targeted wellness programs that compel participation in medical tests unrelated to the job and that impose significant penalties for non-participation, even voluntary wellness programs can run afoul of one or more of these laws, particularly when they include penalties or incentives linked to medical status." ■

Eliminate Relationship Breakdown in the Workplace: Listen With Your "EAR"

by Jathan Janove, Janove Organization Solutions

Many years ago, I learned the "EAR" listening method. It's simple and effective, and it has since served my clients and me well.

E stands for "Explore."

A stands for "Acknowledge."

R stands for "Respond."

How Does It Work?

The EAR method comprises three steps that should generally be carried out in sequence. Start by *exploring* the other person's position by asking open-ended questions, such as "What do you think?" "How do you see it?" and "Can you share examples with me?"

Next, move to *acknowledgment*. Confirm your understanding of what they think is important: "So if I understand you . . . Is that accurate?" "So your main concern is . . . Is that right?"

After the person confirms that you understand what matters to him or her, *respond*.

Why Is It So Effective?

The EAR method improves the quality of your response. It will give you the information and the time to craft a nuanced, intelligent response.

At the psychological level, the *E* and the *A*—exploring and acknowledging—combine to create a receptive environment for communication. Think about how you've felt when someone took the time to hear your point of view and showed they'd paid attention and understood. You felt pretty good, didn't you?

The EAR method eliminates perhaps the number one culprit in relationship breakdown: the erroneous assumption. Far too often, we jump to the response, basing it on what we assume about the other person. We shouldn't be surprised that our response elicits a negative reaction—its inaccuracy offends the other person, who feels misunderstood.

Common Applications

Although the EAR method is useful in essentially all exchanges, it's especially so in the following:

- *Building relationships.* If you have a boss, a coworker, or someone else with whom it's in your interest to create a positive relationship, find a subject of interest to them and apply the EAR method. Explore the subject, including why it matters to him or her. Acknowledge what you've learned by confirming your understanding. Then respond with what that subject means to you.
- *Corrective action.* Too often, when employees behave in ways we don't like, we assume it's their fault and move to disciplinary action. A better approach is to suspend judgment and explore the employee's perspective—what he or she thinks happened, including the causes, reasons, and results. Acknowledge or confirm your understanding, and then respond. You may avoid an unnecessary and counterproductive disciplinary response by learning information that gives you a more nuanced view. Even if your response is ultimately disciplinary, it will be tailored to the circumstances and the employee will more likely accept it as fair.
- *Conflict resolution.* In my view, most conflicts rest on a foundation that's less substance than style. It's not a matter of irreconcilable positions; rather, it's interaction breakdown. When you explore the other person's position, including the underlying bases and causes, you'll often discover common ground. Even if the conflict is rooted in substance, taking an EAR approach creates an opportunity to manage it going forward.
- *Meeting protocol.* When was the last time you attended an unproductive meeting? You probably witnessed a lot of talking and not much listening. The extroverts competed with their *R*s or responses while the introverts kept their ideas and insights to themselves. Make the EAR part of your meeting protocol and observe how extroverts become more collaborative and introverts become more engaged.

Common Missteps

In years of coaching people, I've observed the following missteps:

- *Spending insufficient time in the E or exploring step.* Before you move to the acknowledge step, make sure the other person has shared everything he or she thinks is meaningful. Use questions such as "What else?" or "Anything else?"
- *Skipping the acknowledgment.* Some people have a tendency to jump from exploring to responding. As a result, they rely on assumptions in their *R*s. Don't neglect the *A* for acknowledgment.
- *Succumbing to a hard-wired R habit.* Some people have Pavlovian *R*s: When a topic arises, they automatically respond. No questions. They may think they're listening when in reality they're focused on their own responses. To combat this tendency, it's helpful to mentally prepare yourself before the conversation begins. It can be useful to keep a small sticky note in the palm of your hand with the EAR steps spelled out, especially when you are about to engage in a challenging conversation.

> "The EAR method comprises three steps that should generally be carried out in sequence."

Variations on the EAR Method

Although it's useful to follow the method consciously until it becomes natural, don't hesitate to customize it to fit your communication style.

Sometimes I start with the *A*. I find this useful in emotionally tense situations when I already have a good idea of why the other person is upset: "The first thing I'd like to do is make sure I understand your position. Tell me if this is accurate…"

Another variation involves providing an *R* before completing the *EA*. At the outset or in the course of the discussion, I'll sometimes provide responses to help organize or provide structure to the discussion: "As you know, my position is . . . However, what I'd like to do now is explore your view of the matter." "I think it would be helpful if we focused on . . . What do you think?"

The EAR process isn't a rigid, mechanical tool. Rather, it's an approach to keep you other-focused, as opposed to self-focused, and maximize the likelihood that you will have a constructive conversation. ■

Court Expands Definition of "Adverse Employment Action" Under Title VII

Finds Employer's Failure to Accept Worker's Rescission of Resignation May Constitute Adverse Action

A federal appellate court recently reinstated a lawsuit brought by an employee who claimed that her former employer retaliated against her by not allowing her to rescind her resignation. The Fifth Circuit Court of Appeals found that refusing to accept the employee's rescission of her resignation amounted to an adverse employment action and that summary judgment was improper. ***Porter v. Houma Terrebonne Housing Authority Board of Commissioners,*** *No. 14-31090, Fifth Circuit Court of Appeals (November 17, 2015).*

Factual Background

Tyrikia Porter was employed as a Housing Manager II by the Houma Terrebonne Housing Authority (HTHA). In April 2006, HTHA hired Wayne Thibodeaux as executive director.

Shortly thereafter, Porter claimed that Thibodeaux began engaging in behavior that made her uncomfortable. Thibodeaux asked her to lunch and to accompany him on overnight business trips, made comments on her physical appearance, told her she had a "sexy voice," prevented her from leaving his office, and stared at her continuously.

On June 6, 2012, Porter tendered her resignation with an effective date of August 1, 2012. A few days before the effective date, Porter requested that her resignation be delayed for one month. Thibodeaux approved the request, extending her resignation to September 1, 2012.

On June 25, 2012, Porter testified about Thibodeaux's inappropriate behavior at a grievance hearing for a coworker. Before the hearing, the Chairman of the HTHA Board of Commissioners personally asked Porter to rescind her resignation. And following the hearing, in late August, her direct supervisor asked Porter to stay with the company.

On September 4, 2012, three days after her resignation had taken effect, Porter notified HTHA that she would like to rescind her resignation. Her direct supervisor fully supported this decision and passed the information on to Thibodeaux.

Thibodeaux unilaterally denied Porter's request to rescind her resignation, alleging that Porter was not happy in her position. No one had been separated from HTHA before without supervisor approval and four other employees had rescinded their resignations in the past.

Porter filed a lawsuit against HTHA alleging retaliation under Title VII of the Civil Rights Act. The trial court granted summary judgment in favor of HTHA and Porter appealed this decision to the Fifth Circuit Court of Appeals.

Legal Analysis

To establish a prima facie case of retaliation under Title VII, an employee must show that (1) he or she was engaged in protected activity, (2) he or she was subjected to an adverse employment action, and (3) there was a causal connection between the protected activity and the adverse employment action.

The issue in this case revolves around whether a refusal to accept a rescission of resignation constitutes an adverse employment action. The Fifth Circuit's decision relied on precedent from the U.S. Supreme Court's 2006 decision in *Burlington Northern*. That case held that an adverse employment action is any action that would be "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination."

Given that Porter was allowed to stay on an extra month and was asked to reconsider her resignation twice, the Fifth Circuit found that it was reasonable for her to believe that she would be able to rescind her resignation. Thus, refusing to accept her rescission of resignation amounted to an adverse employment action.

The Fifth Circuit then considered whether HTHA would not have taken the action "but for" Porter's protected activity. In this case, Thibodeaux alleges that he rejected her rescission because she was not happy in her position, not due to her testimony. Since HTHA produced a legitimate reason for their action, Porter must now demonstrate that there is "a conflict in substantial evidence." In other words, she must show that there is a possibility that Thibodeaux's stated reason is actually a pretext. The fact that no one else was fired against their supervisor's desires, four other employees were allowed to rescind their resignations, and there was temporal proximity between the events created a "conflict in substantial evidence." Thus, the Fifth Circuit reversed the grant of summary judgment in favor of HTHA.

Practical Impact

According to Greg Guidry, a shareholder in the Lafayette and New Orleans, Louisiana offices of Ogletree Deakins, "This decision, coming from a generally conservative court on employment matters, reaffirms the very broad realm of actions that will qualify as actionable retaliation under Title VII. The Supreme Court in *Burlington Northern* and other decisions has greatly expanded the playing field for employees to allege retaliation against their employers, and this decision adds rejecting an employee's attempted withdrawal of a prior resignation to the list of 'adverse employment actions,' if the circumstances and context support it."

"This decision reaffirms the very broad realm of actions that will qualify as actionable retaliation under Title VII."

Guidry adds: "Since retaliation claims have been the leading basis for EEOC charges for the past few years and are a very common basis for lawsuits, employers should train their supervisors to avoid taking any actions against employees who have engaged in any protected activity, even if seemingly insignificant or clearly appropriate, without consulting with human resources or upper management. This is particularly important when the timing of the potentially adverse action would be close-in-time to the employee's protected activity. The employer in this case will still have the opportunity to win this case at trial, but the bad facts and timing that were highlighted by the Fifth Circuit might make that difficult." ■