Ogletree Deakins
The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law — January/February 2014

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And Much More

Family Trip Held Protected By FMLA

Court Finds Worker Continued To Care For Her Ill Mother

A federal appellate court recently held that an employee may sue her former employer for violations of the Family and Medical Leave Act (FMLA). According to the Seventh Circuit Court of Appeals, the worker was entitled to take protected leave to care for her terminally ill mother—even if such care occurred during a family trip to Las Vegas. The court found that the statute and corresponding regulations do not place restrictions on where the care takes place. ***Ballard v. Chicago Park District,*** *No. 13-1445, Seventh Circuit Court of Appeals (January 28, 2014).*

Factual Background

Beverly Ballard was employed by the Chicago Park District. In April 2006, Ballard's mother was diagnosed with end-stage congestive heart failure and began receiving hospice support. Ballard lived with her mother and acted as her primary caregiver. She engaged in various activities to assist her mother, including cooking meals, administering insulin and other medication, draining fluids from her heart, bathing and dressing her, and preparing her for bed.

In 2007, Ballard met with a hospice social worker to discuss her mother's end-of-life goals. Her mother expressed an interest in taking a family trip to Las Vegas. The social worker was able to secure funding for the trip through a

Please see "FMLA" on page 6

Welcome To Fabulous Las Vegas!

Workplace Strategies 2014 Heading Toward A Sellout

Ogletree Deakins is gearing up for Workplace Strategies 2014—which will be held at the beautiful Bellagio Las Vegas on May 8-9 (with special pre- and post-conference sessions on May 7 and 10). This year's program will feature "cutting-edge" topics designed specifically for in-house counsel and senior level human resources professionals.

Workplace Strategies 2014 will feature a number of special guest speakers. Richard Pimentel, a nationally recognized expert on employment issues associated with veterans and disabled individuals, will be serving as our Thursday lunch presenter. As a member of both categories, he brings a unique perspective to the program. Mr. Pimentel's life story was the subject of a motion picture produced by MGM ("Music Within") that won a number of awards.

Joining Mr. Pimentel as a keynote speaker is popular political commentator Charlie Cook. Mr. Cook, who will be featured during our Friday lunch, is editor and publisher of the Cook Political Report and a political analyst for *National Journal* magazine. He is considered one of the nation's leading authorities on American politics and U.S. elections and has been a featured guest on numerous television news shows. With the mid-term elections later this year, Mr. Cook will undoubtedly have some very interesting comments.

Our host hotel—the Bellagio—is one of the most beautiful properties in Las Vegas, and we have negotiated a special rate of $199/night. Please note that based on early responses (nearly 500 attendees are registered as of January 15), we are expecting the program and the hotel to sell out—so please make your reservations as soon as possible. We look forward to seeing you in Las Vegas in May! ■

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FEDERAL MINIMUM WAGE STAGNANT DESPITE RENEWED EFFORTS BY DOL

But 15 States And The District of Columbia Raise Their Minimum Wages

In 2013, the U.S. Department of Labor (DOL) made raising the federal minimum wage one of its priorities. The federal agency sought to create a discussion about the minimum wage through social media and town hall meetings across the country. In addition, Secretary of Labor Thomas E. Perez regularly blogged about his trips and conversations with workers throughout the country and the impact that raising the minimum wage would have on average households. Despite these efforts, Congress did not raise the federal minimum wage in 2013. As a result, the federal minimum wage remains $7.25 per hour in 2014.

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Joseph L. Beachboard

Managing Editor
Stephanie A. Henry

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Additional Information
To request further information or to comment on an article, please call Stephanie Henry at (310) 217-0130. For additional copies or address changes, contact Marilu Oliver at (404) 870-1755.

State Minimum Wage

Fifteen states did raise their minimum wage rates, however. Effective January 1, 2014, the new state minimum wages are as follows:

- Arizona: $7.90 per hour
- Colorado: $8.00 per hour
- Connecticut: $8.70 per hour
- Florida: $7.93 per hour
- Missouri: $7.50 per hour
- Montana: $7.90 per hour
- New Jersey: $8.25 per hour
- New York: $8.00 per hour
- Ohio: $7.95 per hour
- Oregon: $9.10 per hour
- Rhode Island: $8.00 per hour
- Vermont: $8.73 per hour
- Washington: $9.32 per hour

California's minimum wage will increase to $9.00 per hour beginning July 1, 2014.

The District of Columbia and the state of Delaware joined in on the action after the new year. On January 15, Mayor Vincent Gray, signed legislation that would increase the D.C. minimum wage over a three-year period. The initial increase takes effect on July 1, 2014, when the D.C. minimum wage increases to $9.50 per hour from the current rate of $8.25.

Delaware Governor Jack Markell signed into law Senate Bill 6 on January 30. Delaware's minimum wage will increase to $7.75 on June 1, 2014, and to $8.25 on June 1, 2015. The bill included an annual cost of living adjustment, but the final version did not.

Federal Minimum Wage

On the federal level, a number of measures to increase the federal minimum wage have been introduced during the 113th Congress, including the Fair Minimum Wage Act of 2013 (S. 460, H.R. 1010, and H.R. 3746) and the Minimum Wage Fairness Act (S.1737). Each bill would increase the federal minimum wage to $10.10 per hour over a two-year period. In addition, each proposal would index future increases in the federal minimum wage to the Consumer Price Index.

In his State of the Union address on January 28, President Obama noted the length of time that has passed since the last federal minimum wage increase and pledged to raise the minimum to $9.00 per hour. He also announced an executive order that guarantees workers who are employed through new federal contracts will receive at least $10.10 per hour.

The Broader Issues

"Income inequality" and "economic mobility" are attracting greater attention and study. Among the statistics that President Obama cited in a recent speech on this topic was that the top 10 percent of the most affluent households received 50 percent of the pre-tax household income. He also noted that the average CEO today makes more than 273 times the income of the average worker, whereas in the past, he or she earned 20 to 30 times the average worker's income.

On the topic of economic mobility, President Obama stated that a child born in the top 20 percent has approximately a 2-in-3 chance of staying in or near the top 20 percent, while a child born in the bottom 20 percent has less than a 1-in-20 chance of making it to the top 20 percent.

Income inequality has been studied by government agencies, economists, academics, think tanks, and public policy groups, among others, so there is no shortage of information on this topic. In an effort to connect the fight to increase the federal minimum wage with the challenges created by income inequality in the United States, the Economic Policy Institute (EPI), a nonpartisan think tank, recently held a briefing in support of raising the federal minimum wage. EPI estimates that an increase in the minimum wage would create some 85,000 jobs and provide millions of employees with roughly an additional $35 billion in income.

Thus, as this election year progresses, we can expect to hear more about these topics as well as the political struggle to increase the minimum wage. ■

Ogletree Deakins State Round-Up

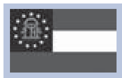
California

A California Court of Appeal recently held that an employee may proceed with his claim that his employer constructively discharged him in violation of public policy by allegedly failing to reimburse work-related expenses. The employee argued that without the reimbursements his pay was effectively reduced to below minimum wage. *Vasquez v. Franklin Management Real Estate Fund, Inc.*, No. B245735 (December 31, 2013).

Connecticut*

The Connecticut Supreme Court held that a "global release" between an employer and its former employee to pay him over $70,000 in exchange for his release of all claims—including a workers' compensation claim—was non-binding on the employee because it was not approved by the workers' compensation commissioner. *Leonetti v. MacDermid, Inc.*, No. SC 19085 (October 1, 2013).

Georgia



An NLRB administrative law judge recently held that a technical school in Atlanta violated the NLRA by maintaining and enforcing an overly broad "no gossip" policy. The judge found that terminations based on the unlawful policy violated federal law as well. *Laurus Technical Institute,* NLRB ALJ, No. 10-CA-093934 (December 11, 2013).

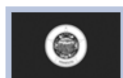
Illinois

Recently, a federal judge in Illinois held that an HR director may proceed with her suit alleging unlawful retaliation under the FLSA and state law. The HR director was allegedly fired one week after she told her supervisor that some employees were probably misclassified under the FLSA. *Kavanagh v. C.D.S. Office Sys. Inc.*, No. 12-3346 (January 7, 2014).

Massachusetts*

The First Circuit Court of Appeals recently allowed a worker's retaliation claim to proceed even though there was no direct evidence of retaliatory animus on the part of the decision maker. The court found that causation could reasonably be inferred from the CEO's remarks about "get[ting] rid of the worker." *Travers v. Flight Services & Systems, Inc.*, No. 13-1438 (December 12, 2013).

Minnesota*



The state's highest court recently refused to expand the scope of the public policy exception to the employment-at-will rule to include a termination resulting from an employee's application for unemployment benefits. According to the court, this exception has been limited to workers who refuse to participate in an activity they believe violates federal or state law or regulation. *Dukowitz v. Hannon Security Services*, No. A11-1481 (January 2, 2014).

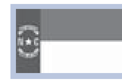
New Jersey*

On January 6, the New Jersey Department of Labor made available the gender equity notice that must be posted and distributed to New Jersey employees pursuant to P.L. 2012, c. 57. Employers must clearly display the notice as well as provide each employee with a written copy.

New York*

On January 10, Governor Andrew Cuomo signed into law the New York State Commercial Goods Transportation Industry Fair Play Act, which becomes effective on March 11, 2014. The Act creates a presumption of employee status for any person who performs commercial goods transportation services for certain contractors, unless the worker meets specific criteria to be considered an independent contractor or separate business entity.

North Carolina



The Fourth Circuit Court of Appeals recently overturned a $1.6 million verdict in favor of a contractor trainee who claimed that she was subjected to a racially hostile work environment. The court found that the worker failed to link her two supervisors to an incident in which her car was vandalized. *Bennett v. CSX Transp., Inc.,* No. 12-2477 (January 21, 2014).

Oregon*

Effective January 1, employers subject to the Oregon Family Leave Act must allow eligible employees to take up to two weeks of unpaid leave (or use accrued sick leave or vacation) to deal with the death of a family member. Eligible employees may take protected leave to attend a funeral (or alternative ceremony), to make arrangements necessitated by the death of a family member, or simply to grieve the death of a family member.

Tennessee*

Tennessee employers face uncertainty about whether they can discharge an employee for having a weapon in his or her vehicle while parked on the employer's property, based on a legal opinion recently released by the Office of Legal Services. It will now take a court challenge to clarify the law as the legislature appears unlikely to amend the statute to address the issue.

Texas

The Fifth Circuit Court of Appeals recently held that a Texas pharmaceutical company was not required to provide benefits to a former employee under its supplemental executive retirement plan. The court deferred to the plan administrator's conclusion that the employee violated the plan's non-compete clause when he went to work for a "competitor." *Wall v. Alcon Labs. Inc.*, No. 13-10117 (January 10, 2014).

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

SOCIAL MEDIA CONTINUES TO RAISE CONCERNS ABOUT EMPLOYEE DISPARAGEMENT

by Frank Birchfield*

An administrative law judge's (ALJ) recent ruling in favor of a San Francisco employer over disparaging employee comments on a website will provide another opportunity for the National Labor Relations Board (NLRB) to clarify the limits of protected employee expression on social media platforms, such as Facebook and Twitter.

The Case

In *Richmond District Neighborhood Center*, No. 20-CA-091748 (Nov. 5, 2013), the ALJ found that two employees of a nonprofit youth center rendered themselves unfit for continued employment when they engaged in a Facebook conversation threatening to act out in various ways during the coming program year. The judge found that the employees, both of whom worked with community teens during field trips and other activities, had engaged in "concerted activity" protected by federal labor law by criticizing their employer on a popular social messaging website, but went on to rule that some of the accompanying comments were "of such character as to render them unfit for service."

The employees' conversation, which was seen by other Facebook users with connections to the community center, was harshly and profanely critical of managers whom the employees perceived as unappreciative and stingy. The Facebook entries were also disparaging toward the center's focus on office administration as opposed to fun youth programs.

The judge indicated that these critiques, even if "impulsive" and "not the language of polite society," fell within the sphere of protected employee discussion of shared concerns relating to the workplace. However, according to the judge, the employees lost the protection of federal labor law in making threats to lead their teenaged clients in activities inconsistent with the mission of the center (e.g., planning disruptive activities and "crazy events" without the permission of center management, "teaching kids how to graffiti up the walls," and "having parties all year" without the involvement of the administrative staff).

When screenshots of the Facebook conversation were forwarded to management, the community center terminated its relationship with the two employees, expressing concerns "that the employees would not follow directions of their manager and could endanger the youth." The judge agreed, citing the center's reliance on government grants and other funding from external donors who could view the Facebook comments as displaying a reckless attitude toward the safety of the teens in the program. The judge's primary concern appeared to be the strong tenor of their conversation, which evinced an attitude of irresponsibility and rebellion—in the words of one employee, to "raise hell"—given that the program is designed to achieve the opposite goal, i.e., channeling community teenagers into constructive activities.

The Appeal

The deadline for an appeal was January 14, 2014; Region 20 met the expectations of most and appealed the decision. Region 20 in the San Francisco Bay Area is one of the most (if not *the* most) restrictive NLRB regions toward employers. Region 20's appeal raises the question of what employers can glean from the judge's decision in this case.

Employer Takeaways

Regardless of whether the *Richmond District* case is overturned, employers would be wise not to take the decision as a license to police employees' social media activities. Read in conjunction with the NLRB's recent decisions on social media and the NLRB General Counsel's analytical memoranda in this area, it is clear that the instances in which employers may take adverse action in response to employee comments on social media sites are tightly circumscribed under the best of situations.

Where an employer becomes aware that one or more employees have made disparaging or critical remarks about the company, the employer must examine carefully whether the remarks relate to the protected subject matter of shared concerns about the workplace—a concept interpreted very broadly by the NLRB (potentially including even stinging, obscene comments about individual managers). If the comments do relate to an employee critique of the workplace, the employer may take adverse action only where the employee expression is (1) "egregious" in some way, such as constituting a real threat of physical violence, or (2) of a nature demonstrating the employee cannot adequately perform his or her job—for example, serious threats to behave in the workplace in a manner contrary to the employee's job duties.

"The employer must examine carefully whether the remarks relate to the protected subject matter."

Employers have far more leeway, of course, where an employee's comments do not relate to a concerted discussion of the terms and conditions of employment. The employer still must be cognizant of other factors, however, such as some jurisdictions' legal protections for lawful, off-duty conduct by employees. Further, some states have constitutional protections for employee speech that may have limited applicability even to private employers.

Before terminating an employee based on social media activity, employers should carefully consider whether any legal protections apply to the employee's expression, even when the speech is inappropriate. ■

* Frank Birchfield is a shareholder in the New York City office of Ogletree Deakins, where he represents management in labor and employment law related matters.

NLRB Drops Notice Posting Rule

◣ *Employers Can Breathe A Sigh Of Relief . . . For Now*

The controversial notice posting rule proposed by the National Labor Relations Board (NLRB) recently died—not with a bang, but with a whimper. The NLRB's proposed rule was earlier struck down by both the Fourth Circuit Court of Appeals and the U.S. Court of Appeals for the District of Columbia Circuit. After twice requesting extensions of time within which to file petitions for a writ of certiorari with the Supreme Court of the United States, the Board let the final deadline of January 2, 2014, pass without filing anything. Lawyers for the NLRB have now confirmed that the Board will not seek further review of the decisions.

The final rule would have required most employers to post notices: advising employees of their rights to unionize; identifying specific types of protected concerted activity; and detailing several unfair labor practices that can be filed against employers. The posting requirement would have applied to both unionized and nonunion employers.

According to Benjamin Glass, the managing shareholder of the Charleston office of Ogletree Deakins, "This brings to a close the Board's attempt to recast itself and its mission after 65 years of enforcing the National Labor Relations Act. The Fourth Circuit's decision, in which it found that the Board exceeded its authority in promulgating the notice posting rule, is now binding precedent. Ogletree Deakins was pleased to partner with the U.S. Chamber of Commerce and the South Carolina Chamber of Commerce to achieve this result. While we are hopeful that the Fourth Circuit's decision will slow down the Board's more aggressive attempts to expand its powers, there is no question that the NLRB, along with the Occupational Safety and Health Administration, the U.S. Department of Labor, and other federal administrative agencies will continue to press their pro-labor agenda in 2014." ■

Justices Hear Oral Argument In *Noel Canning*

◣ *Will Determine Whether NLRB Recess Appointments Were Invalid*

The Supreme Court of the United States recently heard 90 minutes of oral argument in a landmark case regarding the constitutionality of President Obama's January 4, 2012 "recess appointments" to the National Labor Relations Board (NLRB). If the Court adopts the decision of the U.S. Court of Appeals for the District of Columbia Circuit in this case, as urged by the U.S. Chamber of Commerce and by Ogletree Deakins in an amicus brief filed on behalf of the Council on Labor Law Equality (COLLE), it will invalidate most of the decisions that the NLRB, without a quorum of Board members, issued since that date. *NLRB v. Noel Canning*, No. 12-1281 (oral argument heard on January 13, 2014).

Early reports from those in attendance at the oral argument indicate that the Court seemed highly skeptical of the administration's recess appointments, which may exceed the president's powers under the U.S. Constitution. A majority of the justices—including those from both sides of the ideological divide—asked questions concerning the legitimacy of the recess appointments, with Justice Kagan expressing doubts similar to those expressed by Chief Justice Roberts and Justice Scalia. Justice Kagan commented that "it's really the Senate's job" to decide when it is in recess, not the president's. A majority of the justices appear prepared to find the recess appointments unconstitutional because they were made when the Senate was in pro forma session, and thus, not in "recess."

If the Court rejects the president's recess appointments to the Board, all decisions made by the NLRB since January 4, 2012—and perhaps even earlier—will be invalid, and those cases must then be reconsidered. The Court's decision has even broader implications for future recess appointments and therefore has attracted the attention of those outside of the labor-management community. A decision is expected by June, and we will keep you apprised of any new developments in the case. ■

Ogletree Deakins News

Firm accolades. Ogletree Deakins' Employment Law Practice Group was recently named a 2013 Practice Group of the Year by the prominent legal news publication *Law360*. The publication selected firms that "excelled at getting the job done for clients in litigation and deals in 2013." "Our Employment Law Practice Group has experienced remarkable success in 2013, and we are very pleased with this recognition by *Law360*," said Kim Ebert, managing shareholder of Ogletree Deakins. "We look forward to continuing to provide client-service focused representation in 2014."

New to the firm. Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Todd Duffield (Atlanta); Irene Menzel (Berlin); Violet Borowski (Chicago); Stephen Quezada (Houston); Imad Abdullah (Memphis); Claudia Brea (Miami); Maria Fernanda Gandarez and Rajula Sati (New York); Elizabeth James and Albert Nicholson (Orange County); Katherine MacIlwaine and Vanessa Olivar (Raleigh); Andrea Jones (San Diego); and John Ferrer and Brooke Purcell (San Francisco).

New shareholders. At the annual meeting held in Atlanta, Ogletree Deakins elected new shareholders to the firm. They include: Justin Coffey, Michael Eckard, John Morrison, Thornell Williams, Jr., and Lauren Zeldin (Atlanta); Rachel Mandel and Katherine Rigby (Boston); John Hayes (Chicago); Eva Turner (Dallas); Gillian Yee (Detroit Metro); Sara Anthony, Stacy Bunck, and Justin Dean (Kansas City); Marrian Chang (Los Angeles); Christopher Capone (Morristown); Lara de Leon (Orange County); Jacqueline Barrett (Philadelphia); Elizabeth Townsend (Phoenix); Philip Kontul (Pittsburgh); James Barrett and Jennifer Nelson (Portland); Amy Dalal (Raleigh); and Dinah Choi (Washington).

OSHA Extends Comment Deadline on Proposed Recordkeeping Publication Rule

The Occupational Safety and Health Administration (OSHA) recently announced that it would extend the deadline for the public to submit comments on proposed revisions to its recordkeeping regulations. The new deadline to submit comments is March 8, 2014. The proposed rule has two major components: (1) it requires employers with 250 or more employees or certain employers with 20 or more employees to electronically submit their OSHA 300 and 300A logs, either quarterly or annually; and (2) it confirms OSHA's intent to publish all employers' logs online. The second component ignited controversy among the regulated community. Oklahoma Labor Commissioner Mark Costello surprised many by opposing the rule. Costello argues that the proposal seems to be more about politics than public safety and that publication of employers' recordkeeping logs could be used by unions and trial lawyers to distort company safety records.

"FMLA"

continued from page 1

nonprofit organization that specializes in providing such opportunities for terminally ill adults.

Ballard requested an unpaid leave of absence so that she could accompany her mother on the six-day trip to Las Vegas in January 2008. The Park District denied her request, although Ballard claimed that she was not informed of this decision until her return.

During the trip, Ballard and her mother visited several tourist attractions. Ballard continued to serve as her mother's caretaker while they were in Las Vegas, including driving her to a hospital to get medicine when a fire prevented them from getting to their hotel room.

Several months later, the Park District terminated Ballard's employment for unauthorized absences related to her Las Vegas trip. Ballard sued her former employer under the FMLA. The Park District asked the court to dismiss the case, arguing that Ballard "did not 'care for' her mother in Las Vegas because she was already providing [her mother] with care at home and because the trip was not related to a continuing course of medical treatment." The trial judge refused to dismiss the case, finding that "[s]o long as the employee provides 'care' to the family member, where the care takes place has no bearing on whether the employee receives FMLA protections." The Park District appealed this decision.

Legal Analysis

Under the FMLA, an eligible employee is entitled to a total of 12 workweeks of leave during any 12-month period "[i]n order to care for" a family member with "a serious health condition." The Park District did not dispute that Ballard's mother suffered from a serious health condition. Instead, it argued that Ballard did not "care for" her mother in Las Vegas.

The Seventh Circuit Court of Appeals rejected this argument, noting that "[i]t would have us read the FMLA as limiting 'care,' at least in the context of an away-from-home trip, only to services provided in connection with ongoing medical treatment." The plain text of the statute does not limit care to a particular place, the court noted. "The only limitation it places on care," the court continued, "is that the family member must have a serious health condition. We are reluctant, without good reason, to read in another limitation that Congress has not provided."

Because the FMLA does not define "care," the Seventh Circuit turned to the Department of Labor's (DOL) regulations for clarification. There are no regulations specifically interpreting this provision of the FMLA. However, the court found regulations that interpret a similar provision concerning health care provider certification. Those regulations define "care for" to include "situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor." Likewise, the term includes "providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care."

The Seventh Circuit held that even this regulation defines "care" broadly to include both "physical and psychological care" without any geographical limitation. While the *psychological care* language appears restrictive (limiting care to a family member "who is receiving inpatient or home care"), the court noted that this example is not exclusive. Moreover, the court found that the "examples of what constitutes *physical care* use no location-specific language whatsoever."

According to the court, Ballard continued to attend to her mother's basic medical, hygienic, and nutritional needs while they were in Las Vegas. Thus, the court concluded Ballard's case should not be dismissed because "at the very least, [she] requested leave in order to provide physical care" for her mother.

Practical Impact

According to Brian McDermott, a shareholder in the Indianapolis office of Ogletree Deakins: "In holding that the FMLA's 'care for' requirement includes psychological and physical care for a parent while the parent is traveling away from home, the *Ballard* court grounded its reasoning in the FMLA's text and regulations. According to the court, '[T]he FMLA's text does not restrict care to a particular place or geographic location.'"

McDermott added: "Following *Ballard*, therefore, employers in the Seventh Circuit should not deny an employee's leave request merely because the employee is traveling with the seriously-ill family member away from the family member's home. Rather, the focus should be whether the employee is caring for the family member by attending to the family member's basic medical, hygienic, or nutritional needs. As the *Ballard* court noted, however, its decision creates a split among the federal circuits, which may need to be resolved by the Supreme Court." ■

FROM EMPLOYMENT LITIGATION TO EMPLOYEE ENGAGEMENT

by Jathan Janove, Director of Employee Engagement Solutions, Ogletree Deakins

This article offers a few suggestions for leaders who would prefer to replace "terminal employment relationships" with ones characterized by high performance, accountability, and engagement.

The Problem

For 25 years, I litigated workplace disputes. I began as a plaintiff's attorney, suing employers. Later, I saw the light . . . or was drawn to the dark side —depending on your point of view. Same disputes—other side of the table.

Although my business card read "Attorney at Law," I often felt more like a "coroner" conducting "autopsies" of "terminal employment relationships." These relationships typically started out healthy, filled with high hopes and long-term expectations. But they got sick. Treatment protocols were ignored, and later wrongly administered. Past the point of recovery, the relationships ended in humiliation, bitterness, and a desire for revenge—thereby propelling them into the U.S. legal system.

Over time, I noticed recurring behavior patterns—how relationships intended to be win-win became lose-lose for no sensible, objective reason. I compared my "autopsy" observations with what I learned from my father, a university professor who taught organizational leadership and development, He taught me how to build trust, teamwork, collaboration, and a shared sense of mission throughout organizations. Somehow those best practices had been lost in corporate culture.

The Solution—Creating Engagement Employment

In my view, there's a spectrum of employment relationships. At one end is "transactional," in which the parties exchange time for money. At the other end is "engagement," in which the employee and the employer pursue a shared endeavor to create a whole greater than the sum of its parts.

In a transactional relationship, the employee says, "I put in my time; you pay me." The boss says, "You do what I tell you; I pay you." Transactional employment is "I-centric"—What do I have to do to get what I want? It can function well so long as each party feels he or she is getting a fair deal.

The problem with this model lies in the gap between how we perceive ourselves and how we are perceived. It's all too easy to think that you're not getting a fair deal and the other side is to blame. Negative perceptions reinforce each other and the downward spiral begins.

As you might suppose, employment litigation is rooted in I-centric transactional thinking.

In an engagement relationship, the focus is other-centric. The employee asks, "What needs to be accomplished, and how can I best help?" The boss asks, "What can I do to help you succeed?"

> *"As you might suppose, employment litigation is rooted in I-centric transactional thinking."*

When asked, managers and executives say they prefer engagement to transactional employees. Yet, I have observed many of them unwittingly behave in ways that promote transactional relationships. Invariably, they run afoul of one or more of three key ingredients necessary to accomplish employee engagement: (1) having a sense of purpose; (2) making a difference; and (3) feeling you matter as a human being.

If you want to avoid this trap, take these steps:

Focus on Why

Unfortunately, the "Command & Control" style of management still persists. The boss gives the employee the "what" and the "how" and expects obedience. Ugh!

You can ask, "Are they obeying my orders?" Or you can ask a much better question: "What is my 'What:Why' ratio?" Every time you tell an employee *what* to do, how often do you explain *why*? How often do you connect your employee's task or responsibility to a big picture purpose?

Why-centered communications tend to: (1) create a shared sense of mission; (2) engage the employee's full talent, ability, and energy—thereby producing better "whats" and "hows" to accomplish the "why"; and (3) replace the still prevalent command style of management with collaboration. Employees become liberated to grow, develop, and relate to their jobs in much deeper ways than as a means to a paycheck.

Therefore, to create a fully engaged workforce, strive to make your "What:Why" ratio 1:1.

Give Front Windshield Feedback

If you're on a highway going 70 miles per hour, do you use your rear-view mirror? Assuming you say "yes," do you keep your focus there or on the front windshield? (I'm hoping for all of our sakes that you say the latter.)

Do the same thing with performance feedback. Glance in the mirror and describe what you see. Then quickly shift your attention to the front windshield: "Here's what happened and why it matters. Now let's focus on what we can learn, build on, and improve."

Use this approach with both positive and negative feedback. Instead of obsessing over the past, connect with your employee in the present to create a better future. Keep your eyes forward.

Get to Know Your Employees

Perhaps it's lawyers' risk aversion, but I came late to the understanding that if you truly want to maximize employee contributions, you should listen to them and get to know them as human beings. What *do* you know about your employees? What *do* you know about their workplace needs, challenges, and desires for growth? What *do* you know about their families, outside interests, and core values? Tapping into that relationship gold mine simply requires asking a few questions that show you're genuinely curious about and interested in the answers. ■

"NO ACCOMMODATION POLICY" LANDS EMPLOYER IN COURT

Court Reinstates Worker's Pregnancy Discrimination Claim

A federal appellate court recently sided with an employee in a pregnancy discrimination case. The Sixth Circuit Court of Appeals reversed the lower court's dismissal of the claim, finding that the employer's "no accommodation for non-work-related injuries" policy raised a triable issue of discrimination for a jury's determination. ***Latowski v. Northwoods Nursing Center,*** *No. 12-2408, Sixth Circuit Court of Appeals (December 23, 2013).*

Factual Background

In July 2007, Jennifer Latowski was hired as a certified nursing assistant by North Woods Nursing Center in Farwell, Michigan. In that role, she assisted nursing home residents in their daily activities, which included showering, dressing, eating, and ambulating. On four occasions during her employment at North Woods, Latowski passed "essential functions" tests and was viewed as a competent employee.

On September 26, 2008, North Woods became aware that Latowski was pregnant and asked Latowski to obtain a doctor's note stating that she had no employment restrictions. The request was made pursuant to a North Woods policy, according to which the company only would accommodate restrictions resulting from work-related incidents. Latowski's doctor provided a note to North Woods, restricting Latowski from lifting over 50 pounds.

After receiving the note, North Woods informed Latowski that she had "resigned" and she was escorted from the facility. Commenting on Latowski's pregnancy and the accompanying restrictions placed on her work, the North Woods management allegedly stated that Latowski's "belly would be in the way" of her work, and that the company did not want to be liable for any harm that might come to Latowski's unborn child if she continued to work.

Latowski filed a charge with the U.S. Equal Employment Opportunity Commission (EEOC) and, ultimately, a federal lawsuit, alleging that North Woods had violated the Pregnancy Discrimination Act (PDA), the Americans with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA). The trial judge granted summary judgment in favor of North Woods on all claims, reasoning that the company's policy was "pregnancy blind" and that there was no evidence that it "harbored discriminatory animus towards [Latowski's] pregnancy." Latowski appealed this decision to the Sixth Circuit Court of Appeals.

Legal Analysis

On appeal, Latowski conceded that North Woods's accommodation policy was facially nondiscriminatory. However, she argued that its application of the policy to her condition was discriminatory—even though her pregnancy did not negatively affect her ability to pass the essential functions test required to do her job. The Sixth Circuit agreed, reversing the dismissal of the pregnancy discrimination claim. (The court did, however, uphold the lower court's dismissal of her ADA and FMLA claims for other reasons.)

According to the Sixth Circuit, there was a genuine issue of fact regarding whether the comments made by management played a role in the decision to terminate Latowski's employment. In addition, in a footnote, the court differentiated between the analysis of typical Title VII claims and the analysis of a claim under the PDA, pointing out that "[w]hile Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated in all respects, the PDA requires only that the employee be similar in his or her ability or inability to work."

Based on that analysis, Latowski was able to show that North Woods treated non-pregnant certified nursing assistants with similar lifting restrictions (and therefore, with abilities and inabilities to work that were similar to Latowski's) more favorably by allowing them to work light duty jobs, while precluding her from doing so. Thus, her pregnancy discrimination suit was reinstated.

Practical Impact

According to Maria Danaher, a shareholder in the Pittsburgh office of Ogletree Deakins: "This analysis raises a critical point for employers that make their light duty policies available only to employees with work-related injuries. It does not change the fact that an employer can adopt a light duty policy that restricts individuals with non-work-related injuries from light duty accommodations. However, what it does do, in essence, is instruct employers that pregnancy-related restrictions cannot be viewed as a non-work-related injury if, in fact, the pregnant employee is similarly restricted from working as a non-pregnant employee who has a work-related injury." ■

Ogletree Deakins Hosts Program Focusing on California Law

To provide employers with a better understanding of the myriad of employment laws in the Golden State, Ogletree Deakins is presenting "Navigating California Employment Law"—a strategic program for multi-state employers. The program will be held at the beautiful Silverado Resort and Spa in Napa, California on March 27-29 (with a special pre-conference session on March 26).

The program will feature several guest speakers including Christine Baker, who is the first female director of the California Department of Industrial Relations, and Cliff Palefsky, a partner with McGuinn, Hillsman & Palefsky, who is also known as one of the best plaintiffs' employment attorneys in the state. They will serve as our luncheon keynote speakers on Thursday and Friday. On Friday evening, attendees will be transported to Grgich Hills Estate for a wine tasting and dinner. This event is offered to attendees at no additional charge.

For more information or to register for this informative program, visit our website at www.ogletreedeakins.com, or contact Kim Beam at (800) 277-1410 or kim.beam@ogletreedeakins.com.