Ogletree Deakins

The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law | January/February 2016

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Suspicious Timing of Discharge Not Enough to Sue

Employer Had Legitimate, Nondiscriminatory Reason to Fire Pregnant Worker

A federal appellate court recently held that an employer did not violate Title VII of the Civil Rights Act when it discharged an employee shortly after she informed her manager that she was pregnant. According to the Fifth Circuit Court of Appeals, suspicious timing alone is not sufficient to prove that the employer's stated reason for her termination (repeated performance problems) was a pretext for unlawful discrimination. ***Fairchild v. All American Check Cashing, Inc.,*** *No. 15-60190, Fifth Circuit Court of Appeals (January 27, 2016).*

Factual Background

Ambrea Fairchild was employed by All American, a check-cashing company based in Mississippi. Her job duties included cashing checks, issuing loans, and making reminder and "past due" phone calls to assist with debt collection.

In March 2012, All American promoted Fairchild to manager. Her duties largely stayed the same, but she also became responsible for training other employees. During her time as manager, All American issued Fairchild several written complaints regarding her performance. In May 2012, she received a written complaint after a register drawer was missing $100. In July 2012, she received another complaint for failing to follow instructions after she kept the store open past the scheduled closing time. The next month, she received a written warning related to her "general inefficiency."

In the first half of September 2012, Fairchild received three more warnings. One cited her failure to train manager trainees and another indicated that she

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O Canada! Ogletree Opens Office in the True North

Expands the Firm's International Presence, Knowledge

Ogletree Deakins recently entered the Canadian market with a Toronto office led by a group of prominent lawyers from a large Canadian law firm. The Toronto office, which is Ogletree Deakins' 49th, expands the firm's international platform that now includes offices in the United States, Canada, Europe, and Mexico.

"Canada is an important market for our firm, as many of our clients have operations there and need representation and counsel on Canadian and cross-border labor and employment law matters," said Kim Ebert, former managing shareholder of Ogletree Deakins. "We know that we've chosen the right team of lawyers who share the firm's culture and values to establish our presence in the country. The opportunities for us to grow in Canada are substantial, and we expect others to join us in Toronto soon."

"The chance to service our Canadian clients' growing U.S. and international needs through the Ogletree Deakins platform is a remarkable opportunity. We are excited to be joining an acknowledged leader in our area of practice," said Hugh Christie.

Christie, who serves as the managing partner of the Toronto office, has practiced labor and employment law in Canada for more than three decades and was the chair of the national employment and labor practice group at his former firm. Christie has been recognized throughout his career, including listings in *The Legal 500 Canada*, *The Best Lawyers in Canada*©, *The Canadian Legal Lexpert Directory*, and *Chambers (International)*.

Joining Christie in the new Toronto office are partner Edward Majewski and associate Michael Comartin. ■

New EEOC Guidance Seeks to Further Stack the Deck Against Employers

by H. Bernard Tisdale and Parker R. Himes (Charlotte)

On January 21, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) released proposed changes to its guidance on workplace retaliation. These changes mark the first time the federal agency has modified its guidance in nearly 20 years. The proposed changes track the EEOC's recent efforts to broaden both conduct deemed retaliatory and the concept of causation.

Causation Standard

Perhaps most importantly, the new guidance attempts to expand what can constitute a causal connection between an adverse employment action and prior protected activity. In the EEOC's view, evidence of a causal connection can be proved by what one appellate court has called a "convincing mosaic" of circumstantial evidence that would support the inference of retaliatory intent.

The guidance provides a striking example of the "convincing mosaic" standard concerning a situation in which retaliatory animus was found where the protected activity occurred more than five years earlier. The EEOC explains that even though the protected activity occurred many years in the past, the opportunity for the adverse employment action did not present itself until the alleged retaliatory action occurred.

Protected Activity

The guidance also provides an expanded definition of "protected activity." At the outset, the guidance states "[a] retaliation claim, whether based on participation or opposition, is not defeated merely because the underlying challenged practice ultimately is found to be lawful." Conduct could, therefore, be considered protected activity when an employee subjectively believes the employer's conduct violates the equal employment opportunity laws. The employee's subjective belief must be based on reasonable good faith, but the guidance suggests protected activity will be found unless the complaint is "patently specious."

For hostile work environment claims, the guidance suggests a harassment complaint is protected activity even if a pervasive or severe hostile work environment does not exist. Protected activity exists "even if the harassment falls far short of 'severe or pervasive' harassment, since the entire hostile work environment liability standard is predicated on encouraging employees to report harassment and employers to act on early complaints, before the harassment becomes 'severe or pervasive.'" The guidance acknowledges this is contrary to many court rulings, but suggests that a finding of a hostile work environment could be tacked on to any claim of harassment, because "an employee might reasonably complain about even a single incident," as evidence of a hostile work environment.

Adverse Action

Concerning the definition of "adverse action," the guidance acknowledges what the EEOC has believed for years: The definition includes "any action that might well deter a reasonable person from engaging in protected activity." Even though courts generally refer to this element as an "adverse employment action," the guidance defines the element to include actions that are not work-related as a suitable basis for a protected complaint. The guidance states, "[a]n adverse action may also be an action that has no tangible effect on employment, or even an action that takes place exclusively outside work." Further, "[i]f the employer's action would be reasonably likely to deter protected activity, it can be challenged as retaliation regardless of the level of harm."

Retaliatory animus can also be found where the materially adverse action is taken against a third party "who is closely related to or associated with the complaining employee." This action could include threatening to fire an employee's fiancé, for example, since it might dissuade the employee from engaging in protected activity. Adverse action could also be found where an employer punishes an employee by canceling a vendor contract with the employee's husband, even though he was employed by a contractor, not the employer.

Conclusion

The guidance confirms that the EEOC will find protected activity and retaliatory animus in nearly all situations in which an employee subjectively believes the employer has retaliated against him or her. Circumstantial evidence forming a "convincing mosaic" also renders the employee's entire employment history, no matter how many years it spans, fair game for finding evidence of protected activity or retaliatory animus. In short, the new guidance confirms what many employers have always believed—the EEOC strains to find protected activity and retaliatory animus in nearly every complaint. ■

Ogletree Deakins

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Ogletree Deakins State Round-Up

California

California recently amended its pay equity law by passing the Fair Pay Act—designed to close the "gender pay gap." The amended statute drops the requirement that wage discrimination claims be based on a comparison of the wages of male and female employees "in the same establishment," making it more difficult for employers to defend pay differentials.

Florida

Hillsborough County and Pinellas County have both enacted wage theft ordinances. A violation of the ordinances occurs if an employer does not pay an employee for work performed within 14 days (unless the employer has established a regular pay period longer than 14 days) and the amount to be paid exceeds $60.

Louisiana

The Louisiana Third Circuit Court of Appeal recently held that an employer asserted a valid cause of action when it sought to enforce a liquidated damages provision in an employment agreement with its former employee. The court found that the provision for repayment of the $80,000 training cost was not a penal clause that restrained the plaintiff from "exercising a lawful profession, trade, or business of any kind." *ERA Helicopters, LLC v. Amegin,* No. 15-753 (December 9, 2015).

Massachusetts

The Massachusetts Superior Court recently found that a religious school could be held liable for discriminating against a man in a same-sex marriage. In doing so, the court struck down constitutional and statutory defenses typically available to employers affiliated with religious institutions facing claims under the state's antidiscrimination law. *Barrett v. Fontbonne Academy*, No. NOCV2014-751 (December 16, 2015).

Minnesota

On January 20, the Supreme Court of Minnesota held that some whistleblowers have up to six years to sue if they were retaliated against for reporting violations of the law or for reporting actions they genuinely thought were illegal. This limitations period is much longer than the applicable period for most other employment law claims. *Ford v. Minneapolis Public Schools*, No. A13-1072 (January 20, 2016).

New Jersey

On January 19, the New Jersey Small Business Retirement Marketplace Act was signed into law by Governor Chris Christie. The Act establishes a state-sponsored marketplace for small businesses to shop for retirement savings plans for their employees. Under the final law, employers are not required to offer retirement plans, but can choose among several options through the marketplace. The marketplace is limited to employers with fewer than 100 employees.

New York

As of December 31, employees working for fast food establishments must be paid a higher minimum wage rate. In New York City, the workers' minimum wage is now set at $10.50 per hour, and will increase by $1.50 each year through 2018. In the state of New York, the minimum wage rate is now $9.75 per hour and will rise annually until 2021.

North Carolina

For the first time in a decade, North Carolina employers will not be subject to a 20 percent state unemployment tax surcharge in 2016. This is because the state's unemployment trust fund threshold of $1 billion has been triggered. North Carolina businesses are expected to save $600 million or more.

Oregon

The Oregon Bureau of Labor and Industries has issued additional guidance on complying with the new Oregon statewide mandatory paid sick leave law, which took effect on January 1, 2016. The guidance includes the Final Administrative Rules, a model Sick Time Notification for employees, and a number of answers to frequently asked questions about the law.

Pennsylvania

On December 15, Mayor Michael Nutter signed a bill amending Philadelphia's "ban the box" law. With these amendments, the city's ordinance joins New York City's Fair Chance Act as being among the most expansive and restrictive "ban the box" laws in the country. The amendments will become effective on March 14, 2016.

Texas

The Fifth Circuit Court of Appeals recently found that the threat of a 50 percent pay cut did not constitute an adverse action sufficient to establish a prima facie case of retaliation under Title VII. According to the court, the threatened employee was in a supervisory position and should have known that the speaker had no final decision-making authority. *Brandon v. Sage Corp.*, No. 14-51320 (December 10, 2015).

Washington

Seattle Mayor Edward B. Murray recently signed a measure strengthening the city's ability to enforce minimum wage and other workplace standards. The Wage Theft Prevention and Labor Standards Harmonization Ordinance 2015 streamlines enforcement procedures, allows for a phased-in private cause of action, and provides key definitions of terms in the Minimum Wage, Administrative Wage Theft, Paid Sick Leave and Safe Time, and Job Assistance ordinances.

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

Are You on Candid Camera? NLRB Rules on Recording Devices at Work

*by John T. Merrell**

On December 24, 2015, the National Labor Relations Board (NLRB) issued a decision in *Whole Foods Market, Inc.*, 363 NLRB No. 87, finding for the first time that it is unlawful for an employer to adopt a work rule that prohibits employees from recording company meetings or conversations with coworkers without a valid legal or business justification. This decision is another in a long line of cases in which the NLRB has deemed employer handbook policies unlawful. Employers that maintain policies that do not pass muster under federal labor law risk having their union-election victories overturned—making it crucial for employers to understand the current state of the law with respect to such policies.

The Work Rules at Issue

The first work rule at issue in the case was a "Team Meetings" policy that prohibited employees from recording company meetings. The policy stated: "It is a violation of [company] policy to record conversations, phone calls, images or company meetings with any recording device (including but not limited to a cellular telephone, PDA, digital recording device, digital camera, etc.) unless prior approval is received from your Store/Facility Team Leader, Regional President, Global Vice President or a member of the Executive Team, or unless all parties to the conversation give their consent. Violation of this policy will result in corrective action, up to and including discharge."

The second rule prohibited employees from recording conversations with each other: "It is a violation of [company] policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership. The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded."

The General Counsel of the NLRB argued that recording conversations in the workplace is a protected right and that employees "would reasonably interpret the rules to prohibit their use of cameras or recording devices in the workplace for employees' mutual aid and protection, 'such as photographing picketing, or recording evidence to be presented in administrative or judicial forums in employment related matters.'"

The NLRB's Decision

The NLRB ruled that Whole Foods Market's policies were unlawful. According to the Board, photography and audio or video recording in the workplace, as well as the posting of photographs or recordings on social media, are protected by Section 7 of the National Labor Relations Act (NLRA), as long as "employees are acting in concert for their mutual aid and protection and no overriding employer interest is present."

The NLRB gave the following examples of protected activity: recording images of protected picketing; documenting unsafe workplace equipment or hazardous working conditions; documenting and publicizing discussions about terms and conditions of employment; documenting inconsistent application of employer rules; and recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions.

The NLRB acknowledged that some states, including many of the states where Whole Foods operates, have laws that make nonconsensual recording illegal. The NLRB's position was that Whole Foods Market's policy was still unlawful—even in those states—because it was not limited to stores in the states where nonconsensual recording is illegal. The NLRB stated, "the Respondent's rules do not refer to those laws and do not specify that the recording restrictions are limited to recording that does not comply with State law." It appears the NLRB's position is that an employer that operates in states where nonconsensual recording is illegal must refer to those recording laws and specify that its restrictions on nonconsensual recording are limited to those states.

The NLRB also acknowledged that some restrictions on recording may be valid depending on the type of business in which the employer is engaged. In this regard, the NLRB did not overrule its 2011 decision in *Flagstaff Medical Center, Inc.*, in which it held that patient privacy restrictions may justify a recording ban in hospitals. The NLRB also acknowledged that Whole Foods Market's business justifications for prohibiting recording in annual town hall meetings and termination-appeal peer panels were "not without merit," but found that these narrow circumstances could not justify a broad, unqualified restriction on recording.

"The Whole Foods ruling does not give employees an unfettered right to take photos or videos."

Key Takeaways for Employers

This decision is the most recent example of the Board's continued efforts to expand the definition of concerted activity protected by Section 7. Employers should review their existing policies and proceed with caution when disciplining an employee for engaging in photography or making recordings in the workplace. An employer may still be able to maintain a no-recording policy (1) in states where nonconsensual recording is illegal or (2) where a valid business justification exists.

Employers should be surgical in tailoring their policies, spelling out the explicit business reasons why workplace recording by employees is prohibited. If a recording restriction is necessary to protect the employer's confidential processes, recipes, or technology or to protect patient privacy, the employer should say as

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* John Merrell is a shareholder in the Greenville office of Ogletree Deakins, where he represents management in labor and employment-related matters.

NLRB Further Reduces Time to Educate Workers During Union Campaigns

by Seth D. Kaufman (New York City)

On January 29, 2016, the National Labor Relations Board (NLRB) issued a decision in *Guardsmark, LLC*, 363 NLRB No. 103, moving the deadline for employers to hold captive audience meetings in mail ballot elections to 24 hours before the regional office mails the ballots. In so doing, the NLRB overruled a near-60-year-old precedent set in *Oregon Washington Telephone Co.*, which held that employers could hold captive audience meetings until the time the regional office mailed the ballots.

Captive Audience Meetings

A "captive audience meeting" refers to a meeting held in the course of a union organizing campaign during working hours that employees are required to attend. These meetings can be an effective tool for employers to educate employees during a union organizing campaign.

However, as established in *Peerless Plywood Co.*, captive audience meetings cannot be held within 24 hours of a union election. The NLRB reasoned that "last-minute speeches by either employers or unions delivered to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect."

In *Oregon Washington Telephone*, the NLRB applied its *Peerless Plywood* reasoning to mail ballot elections and created the bright-line rule that captive audience meetings are forbidden from "the time and date on which the 'mail in' ballots are scheduled to be dispatched by the Regional Office until the terminal time and date prescribed for their return." In addition, the NLRB required regional offices to give the parties 24 hours' written notice of the mailing.

The NLRB Weighs In

The NLRB's *Guardsmark* decision simply replaced one bright-line rule with a different and—unsurprisingly—more union-friendly one. The NLRB focused on the fact that the *Oregon Washington Telephone* rule has, on occasion, been incorrectly applied by the NLRB, stating that the NLRB's overall goal in its *Guardsmark* decision was to "achieve the clarity, uniformity, and simplicity" that the *Oregon Washington Telephone* rule failed to provide. The NLRB first cited an 18-year-old decision in which the majority and dissent, as asides, stated that captive audience meetings are forbidden starting 24 hours before the ballots are mailed. The NLRB also invoked the section of the NLRB's Casehandling Manual that cites *Oregon Washington Telephone* to address captive audience meetings during mail ballot elections, and referred to this section as ambiguous as to when captive audience meetings are forbidden.

The NLRB then devoted a mere paragraph to explain why changing the *Oregon Washington Telephone* rule was a better approach than reaffirming the rule. The NLRB simply stated in conclusory fashion that the agency "believe[s] that it is appropriate to provide for a full 24-hour period before the ballot mailing that is free from speeches that tend to interfere with the 'sober and thoughtful choice which a free election is designed to reflect.'"

In dissent, Member Miscimarra rebuked the NLRB's reasoning. Member Miscimarra first pointed out that the *Oregon Washington Telephone* rule already provided the "clarity" and "simplicity" that the majority sought. He also questioned why tangential language from an 18-year-old Board decision and language from the NLRB's Casehandling Manual specifically citing to *Oregon Washington Telephone* could provide sufficient ambiguity to warrant overturning nearly 60 years of precedent.

Member Miscimarra next examined the policy considerations underlying *Peerless Plywood* and noted that the NLRB's new rule would cut off the time for captive audience meetings much earlier than *Peerless Plywood* intended and provide a double standard directly in opposition to the NLRB's stated goal in *Guardsmark* of "uniformity" in elections. Ballots mailed will not reach employees until, at the earliest, the day after they are mailed; thus, the NLRB's new rule for mail ballot elections cuts off captive audience meetings at least 48 hours before employees can cast their votes, double the time required for manual elections.

Practical Implications

The most basic employer takeaway is to follow the NLRB's new rule in any mail ballot election. This decision should also give pause to any employer considering a mail ballot election. Although in many instances the parties stipulate to when a regional office will mail the ballots, the fact that a regional office need only give 24 hours' notice of the mailing could result in an employer being precluded from giving a "25th hour" speech if the regional office were to give the minimum notice.

Nearly 60 years of precedent and a lack of reasoning did not deter the NLRB in *Guardsmark* from further limiting employer communications. Moreover, the NLRB clearly demonstrated its hostility to captive audience meetings, and with some advocating for the NLRB to require equal time for unions to hold such meetings, more significant changes in this area could soon come down the pike. ■

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much in the policy and make sure the policy is narrowly tailored to the times and physical locations where such confidentiality is necessary to protect the employer's legitimate business interests. In other words, even if an employer has a valid business reason to protect the confidentiality of its proprietary processes, the NLRB will not allow blanket restrictions on all photography or recording on the employer's property.

Finally, it is important to note that the *Whole Foods* ruling does not give employees an unfettered right to take photos or videos or make audio recordings. Rather, employers that wish to discipline an employee for taking photos or making recordings in the workplace must carefully evaluate whether the employee's actions constitute Section 7 activity under the NLRA. If the employee's actions do not constitute protected concerted activity under Section 7, the employee's actions are not protected by the NLRA.

Ogletree Deakins News

New Managing Shareholder. Effective February 1, 2016, C. Matthew Keen was elected Managing Shareholder of Ogletree Deakins during the firm's annual Shareholders Meeting. "I am privileged to follow in the steps of the firm's three outstanding Managing Shareholders who served before me. It is an honor to lead the firm forward on a path of continued growth and success, with the vision of being the premier labor and employment law firm," said Keen. "We will strive to achieve our goal by living each of the fundamental service principles outlined in our Client Pledge." Keen succeeds Kim Ebert, who had served in the role since 2010. Ebert will return to full-time practice in the firm's Indianapolis office.

Firm Managing Directors. Charles Baldwin and Joseph Beachboard have been elected to the position of Managing Director. The Managing Directors are members of the firm's Board of Directors who, along with Managing Shareholder C. Matthew Keen, make up the Executive Committee of the Board, and are responsible for the strategic direction and daily affairs of the firm. Baldwin, a shareholder in the firm's Indianapolis office and member of the firm's Board of Directors, has served in this role since 2014. Beachboard, a shareholder in Ogletree Deakins' Los Angeles and Torrance offices who also has served as the firm's Chief Strategy Officer, is elected to the role for the first time.

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needed to "slow down and pay attention" when processing transactions. The company also issued a "final warning" for "general inefficiency," which related to the accrual of "bad debt" at the store and her failure to issue a sufficient number of loans.

In late September 2012, All American demoted Fairchild to manager trainee. Daniel Fowler, an individual who was previously trained by Fairchild, became her manager. Fowler issued Fairchild several performance-related warnings, which included a December 2012 document informing Fairchild that the company had "zero tolerance" for "threatening phone calls" and "poor attitudes." Fowler also claimed that Fairchild caused low morale at the Hattiesburg store, which in turn led to problems with customer service and ultimately an increase in the number of customer complaints.

In October 2012, Fairchild learned that she was pregnant. She told her then-supervisor, Mandy Hearn, and her manager (Fowler) of her pregnancy in late November 2012. On January 23, 2013, All American terminated Fairchild's employment. Two days earlier, Mark Hendrix, who held another position at All American, became acting supervisor of the Hattiesburg store.

Fairchild sued her former employer, alleging that All American discharged her because of her pregnancy in violation of Title VII of the Civil Rights Act and failed to pay her overtime wages in violation of the Fair Labor Standards Act (FLSA). The trial judge granted All American's request to dismiss both claims and Fairchild appealed this decision to the Fifth Circuit Court of Appeals.

Legal Analysis

Under the FLSA, an employer must pay nonexempt employees overtime compensation that is "not less than one and one-half times [the employee's] regular rate" for all hours worked over 40 in a workweek. The Fifth Circuit noted, however, that an employee cannot prevail on an FLSA overtime claim if he or she "fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work."

Fairchild claimed that she was owed overtime wages under the FLSA. The Fifth Circuit agreed with the trial judge's decision to dismiss this claim, holding that Fairchild had no right to overtime pay for hours she allegedly worked off-the-clock but did not report to All American. According to the Fifth Circuit, "Fairchild cannot prevail on her FLSA claim for overtime compensation for hours that she worked at her own discretion and that she deliberately failed to report in violation of All American's policy." The court also noted that Fairchild was paid for all the overtime hours she reported through the company's timekeeping system.

The Fifth Circuit next turned to Fairchild's pregnancy-based sex discrimination claim under Title VII. Fairchild relied on the short proximity in time between when All American learned that she was pregnant and her discharge (January 2013) to show that the company's decision was discriminatory.

All American claimed that the period was two months—the time lapse between Fairchild informing Hearn and Fowler of her pregnancy in late November 2012 and her firing in late January 2013. Fairchild, on the other hand, alleges that the proximity was only two days—the time lapse between Hendrix becoming the acting supervisor of the Hattiesburg store and Hendrix instructing Fowler to fire her.

Even assuming that Fairchild could establish a prima facie case of pregnancy bias under Title VII, the Fifth Circuit held that she failed to rebut her employer's legitimate, nondiscriminatory reason for her discharge. According to the court, "suspicious timing" alone is not sufficient absent other evidence of discriminatory motive. Thus, the court concluded that "All American was entitled to judgment as a matter of law after it established legitimate, nondiscriminatory reasons for Fairchild's termination."

Practical Impact

According to Timothy Lindsay, a shareholder in the Jackson, Mississippi office of Ogletree Deakins, "This decision illustrates that even though a short period of time between an employer learning that an employee is pregnant and an adverse employment action may support a plaintiff's claim of pretext, this evidence without more is not sufficient to establish a viable claim of discrimination under Title VII. Thus, employers should ensure that all disciplinary actions are properly documented. Likewise, managers and supervisors should be educated on how to handle pregnant employees in the workplace." ■

Should Workers Get More Fun in the Sun? A Look at Unlimited Vacation Policies

by Keith A. Watts and Michael E. Olsen (Orange County)

The news reports that more and more companies are moving to offer unlimited vacation time. On its face, this policy change appears to be a generous offer by employers to boost employee morale and attract top talent, but there may be other factors at play. Here is an overview of such policies and some observations on their utility for employers.

1. ***What is an unlimited vacation policy?***

An unlimited vacation policy is one in which employees do not accrue vacation time; rather, they take vacation as business permits and are paid for any vacation days they take. Such policies are most common for highly skilled and/or executive level workers.

2. ***How common are unlimited vacation policies?***

An unlimited vacation policy is still the exception, rather than the norm, in corporate America, but there has been a trend in the last few years to adopt more flexible paid time-off policies for some categories of employees, such as certain exempt or white collar employees.

3. ***What factors are driving American businesses to adopt these policies?***

The rules governing vacation time may actually discourage its use. California law, for instance, defines vacation days as a form of wage earned by an employee. As a result, many employees simply accrue their vacation days, which must be paid out as wages if an employee does not take time off from work. An unlimited vacation policy would encourage employees to use their vacation time, rather than bank the time in lieu of a vacation.

4. ***What are the advantages of unlimited vacation policies?***

Employers are able to offer flexibility to their employees and attract highly qualified candidates who may require the flexibility of an unlimited vacation policy. Employers may also benefit from an unlimited vacation policy because employees will be encouraged to use vacation time instead of simply accruing time off, which may result in increased productivity. Employees who take time off—instead of simply accruing vacation time—may be more rested, relaxed, reenergized and, perhaps, more productive. Additionally, a policy that allows for unlimited time off may encourage more efficient use of work time.

5. ***What are the disadvantages of unlimited vacation policies?***

Some of the disadvantages include the fact that employees will have less guidance regarding how much time off is permissible. Moreover, such policies will not be suitable for every type of position. For instance, workers whose jobs require onsite presence, such as those in customer service positions, would not be able to take unlimited vacation and still perform the functions of their jobs.

Key Takeaways

Certain companies or industries may find an unlimited vacation policy beneficial for certain categories of workers. However, such a policy will not be standard in every industry, and some types of jobs will not be amenable to such a policy because of the nature of the job. In the end, the advantage of such a policy will depend on a demonstrated benefit for both employers and employees, such as increases in employee productivity and increased work-life balance for employees. ■

It's Time to Post the OSHA 300A Annual Summary

Notice Must Be Placed in a Conspicuous Location Until April 30

The Occupational Safety and Health Administration's (OSHA) Form 300A, which lists a summary of the total number of job-related injuries and illnesses that occurred during 2015 at each workplace, must be posted between February 1 and April 30, 2016. The summary must be placed in a conspicuous location where notices to employees are usually posted, and the posting cannot be altered, defaced, or covered by other material.

The summary must include the total number of job-related injuries and illnesses that occurred in 2015 and were logged on OSHA's Form 300, Log of Work-Related Injuries and Illnesses. To assist in calculating incidence rates, the form requires information about the annual average number of employees and total hours worked during the calendar year. If there were no recordable injuries or illnesses in 2015, employers may enter "zero" on the total line.

A company executive must sign and certify the form. The executive may be: (1) any officer of the corporation; (2) the highest-ranking company official working at the establishment; (3) the immediate supervisor of the highest-ranking company official working at the establishment; or (4) an owner of the company (permitted only if the company is a sole proprietorship or partnership).

Organizations with 10 or fewer employees and employers in certain industries are normally exempt from federal OSHA injury and illness recordkeeping and posting requirements, including the annual Form 300A posting. A list of exempt industries can be found on OSHA's website. The Bureau of Labor Statistics, however, may still select exempted employers to participate in an annual statistical survey. ■

New to the Firm

Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Erika Leonard (Atlanta); Ryan Correia and Robert Shea (Boston); Parker Himes (Charlotte); Gary Eisenstat (Dallas); Jamie Brod (Houston); John Drake (Indianapolis); Oscar Margain Vega (Mexico City); Bernard Bobber and David Froiland (Milwaukee); Hal Ungar (New Orleans); Patrick Collins, Christina Schmid, Carole Sobin, and Nicole Welch (New York City); Ian Robertson and Joseph Sbuttoni (Orange County); Jessica Bocchinfuso (Philadelphia); Karen Vossler (Richmond); Zachary Shine (San Francisco); Natalie McEwan and Jennifer Roeper (Tampa); and Hugh Christie, Michael Comartin, and Edward Majewski (Toronto). Ogletree Deakins has more than 750 attorneys in 49 offices across the United States and in Europe, Canada, and Mexico.

Transgender Worker May Proceed With Title VII Lawsuit

Court Finds Gender Bias May Have Been a "Motivating Factor" in Her Discharge

A federal appellate court recently reversed a lower court's grant of summary judgment in a sex discrimination case brought under Title VII of the Civil Rights Act. The Eleventh Circuit Court of Appeals found that although the employer had a legitimate reason for discharging the employee, circumstantial evidence demonstrated that there was a triable issue of fact as to whether the employee's transgender status was also a motivating factor in the discharge decision. ***Chavez v. Credit Nation Auto Sales, LLC,*** *No. 14-14596, Eleventh Circuit Court of Appeals (January 14, 2016).*

Factual Background

Jennifer Chavez began working as an auto mechanic for Credit Nation Auto Sales in 2008.

On October 28, 2009, she announced her intention to transition from male to female. Initially the company's president was supportive, but about one month later, his tune allegedly changed. The president became very nervous that Chavez's transition would "negatively impact his business." He acknowledged that she was "the best mechanic" at the company, but, according to Chavez, began to restrict her actions and look at her work with heightened scrutiny.

In the following weeks, Chavez was allegedly told that she should not discuss her transition in the workplace, use the unisex bathroom reserved for customers and office personnel, or wear dresses or anything "outlandish" traveling to or from work.

On January 11, 2010, Credit Nation discharged Chavez for sleeping on the job. Chavez sued her former employer, alleging discrimination and retaliation in violation of Title VII. The trial judge granted summary judgment in favor of Credit Nation and Chavez appealed to the Eleventh Circuit Court of Appeals.

Legal Analysis

Although sex discrimination claims under Title VII are traditionally analyzed under the *McDonnell Douglas* burden-shifting framework, an employee can also demonstrate discriminatory intent by providing direct or circumstantial evidence. Under the "mixed-motive" standard, the employee need only show that an improper motive was one of multiple reasons for the discriminatory employment action.

The Eleventh Circuit found that Chavez could demonstrate that discriminatory intent was a motivating factor in her discharge by providing circumstantial evidence. Reading the facts in the light most favorable to Chavez, the court found that Credit Nation's decision to seek legal advice to establish a nondiscriminatory basis for discharging Chavez, the company's heightened scrutiny towards her after she announced her transition, and its failure to follow the progressive disciplinary policy were sufficient to raise "a reasonable inference that the employer discriminated against the plaintiff" and to support a Title VII claim under the mixed-motive standard.

Credit Nation argued that it would have discharged Chavez for sleeping on the job even if she had not intended to transition from male-to-female. However, the same-decision defense is just a limitation, not a complete affirmative defense, to liability in Title VII sex discrimination cases. According to the court, discriminatory intent just needs to be one motivating factor—not the only motivating factor—in the employer's decision.

Because triable issues of fact existed as to whether the employer had discriminatory intent and whether gender bias was a motivating factor in her discharge, the Eleventh Circuit reinstated Chavez's Title VII suit.

Practical Impact

According to Nonnie Shivers, a shareholder in the Phoenix office of Ogletree Deakins, "With the proliferation of cities and counties with nondiscrimination ordinances that protect transgender employees, more employers may be facing gender identity issues in the near future. Thus, employers must take measures to educate their employees and management to prevent insensitive or intolerant behavior toward transgender employees that could give rise to legal liability."

Among other steps, employers should consider: using a transgender person's chosen name; choosing the correct terms to describe the person's gender identity; establishing an action plan for transitioning employees; updating policies to provide explicit protections against transgender discrimination and harassment; making dress code policies gender-neutral and applying them consistently; and familiarizing key company players with helpful transgender resources. ■

Workplace Strategies Heads to the Windy City

Ogletree Deakins' annual labor and employment law seminar, Workplace Strategies, will be held at the Chicago Marriott Downtown Magnificent Mile on May 5-6 (with special pre- and post-conference sessions on May 4 and 7). This year's program is the largest yet, featuring more than 75 "cutting-edge" topics and 200 speakers.

Enclosed with this issue is the full agenda for Workplace Strategies 2016—the premier advanced-level seminar designed specifically for in-house counsel and senior-level human resources professionals. Information on the program and how to register is also available at www.ogletreedeakins.com.

Some of the seminar highlights include a welcome luncheon featuring ESPN legal analyst Lester Munson, enhanced pre-conference "immersion sessions," a Chicago Supper Club Experience with proceeds benefiting Kids Off The Block, a special lunch presentation with former lawmakers Charlie Gonzalez and Ray LaHood, keynote presentations from NLRB Member Philip Miscimarra and presidential advisor Dr. Julia Nesheiwat, the popular "Lunch with the Lawyers," and "Interactive Saturday." You will find all of the details in the enclosed brochure.

Based on early responses (more than 500 clients are registered as this issue was going to press), we are expecting the program and the hotel to sell out—so please make your reservations as soon as possible. We look forward to hosting you in Chicago in May for Workplace Strategies 2016!