Ogletree Deakins

The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law — March/April 2015

In This Issue

Offices of Ogletree Deakins

Atlanta
Austin
Berlin
Birmingham
Boston
Charleston
Charlotte
Chicago
Cleveland
Columbia
Dallas
Denver
Detroit Metro
Greenville
Houston
Indianapolis
Jackson
Kansas City
Las Vegas
London
Los Angeles
Memphis
Mexico City
Miami
Milwaukee
Minneapolis
Morristown
Nashville
New Orleans
New York City
Orange County
Philadelphia
Phoenix
Pittsburgh
Portland
Raleigh
Richmond
San Antonio
San Diego
San Francisco
Stamford
St. Louis
St. Thomas
Tampa
Torrance
Tucson
Washington, D.C.

www.ogletreedeakins.com

Supreme Court Revives Pregnant UPS Worker's Suit

Finds Plaintiff May Show Disparate Treatment Through Indirect Evidence

On March 25, 2015, in a 6-3 decision, the Supreme Court of the United States settled a controversy surrounding an employer's policy that provided light-duty work for three specific groups of employees, but not pregnant workers. The case was brought by an employee who alleged that the policy discriminated against pregnant workers. The Court held that an individual pregnant worker may show disparate treatment via indirect evidence. According to the majority, the employee can establish pretext (or unlawful motive on the part of the employer) by showing that the policy placed a "significant burden" on female workers, and that the policy was "not sufficiently strong" to justify that burden. ***Young v. United Parcel Service, Inc.,*** *No. 12–1226, Supreme Court of the United States (March 25, 2015).*

Background

Peggy Young was a delivery truck driver for United Parcel Service (UPS) when she became pregnant. Young was instructed by her doctor that she should not lift more than 20 pounds for the first half of her pregnancy and that she should not lift more than 10 pounds thereafter. As a result, UPS informed Young that she was not permitted to continue working with her lifting restriction per company policy.

According to UPS's policy, the essential functions for all delivery drivers included the ability to lift packages weighing up to 70 pounds. Pursuant to a collective bargaining agreement (CBA) covering UPS drivers, the company offered alternative work to three groups of employees: (1) employees injured while on the job, to whom UPS offered light-duty work; (2) employees suffering from a permanent impairment cognizable under the Americans with

Please see "PREGNANCY" on page 6

Workplace Strategies Heads to the Alamo City

Annual Client Seminar Features 75+ Sessions Over Four Days

Ogletree Deakins' annual labor and employment law seminar, Workplace Strategies, will be held at the Grand Hyatt San Antonio on May 14-15, 2015 (with special pre- and post-conference sessions on May 13 and 16). This year's program features more than 75 "cutting-edge" topics and 200 speakers.

Enclosed with this issue of *The Employment Law Authority* is the full agenda for Workplace Strategies 2015—a premier advanced-level seminar designed specifically for in-house counsel and senior level human resources professionals. Information on the four-day program and how to register is also available at www.ogletreedeakins.com.

Some of the seminar highlights include a welcome luncheon on May 13, enhanced pre-conference "immersion sessions," a charity golf tournament and welcome reception (with proceeds benefiting Fisher House, Inc.), keynote presentations from National Labor Relations Board member Philip Miscimarra and syndicated columnist Kathleen Parker, the popular "Lunch with the Lawyers," and "Interactive Saturday." You will find all of the details in the enclosed brochure.

Based on early responses, we are expecting the program and the hotel to sell out quickly—so please make your reservations as soon as possible. We look forward to hosting you in San Antonio for Workplace Strategies 2015! ■

Spouses of H-1B Visa Holders Applying for Residency Eligible for Work Permits

by Maria Fernanda Gandarez (New York City) and Matthew Kolodziej (New York City)

On February 24, 2015, U.S. Citizenship and Immigration Services (USCIS) announced that beginning on May 26, 2015, it will start accepting applications for work authorization from certain spouses of H-1B visa holders who have begun the process of applying for lawful permanent residence (a Green Card). This regulatory change is part of the Immigration Accountability Executive Action that President Obama announced on November 20, 2014, in order to modernize and improve the U.S. immigration system after the failure of legislative reform efforts last year. Because the regulation allowing spouses of H-1B visa holders to obtain work authorization has gone through the normal rulemaking process, it is not affected by a federal court injunction issued on February 16, 2015, blocking other portions of President Obama's executive action involving the deferral of deportation for certain undocumented immigrants.

Who Is Eligible?

Spouses of H-1B visa holders generally receive H-4 visa status, which does not confer work authorization. On May 26, 2015, the spouse of an H-1B visa holder will be able to apply for work authorization if he or she is in H-4 visa status and his or her H-1B spouse is either the principal beneficiary of an approved employment-based immigrant visa petition (Form I-140) or has received an extension of H-1B status beyond the six-year limit, based on an immigrant visa petition or PERM/labor certification filed at least 365 days before the expiration of the sixth year. (A PERM/labor certification filing is the first step in obtaining permanent residence through employment.)

How to Apply

Spouses must file Form I-765, Application for Employment Authorization, with:

- A copy of the applicant's passport biographic page;
- Two passport photos;
- Evidence of the applicant's H-4 status;
- Evidence of the principal visa holder's H-1B status;
- Documentation of marriage;
- Documentation of the principal H-1B visa holder's approved I-140 or approved one-year H-1B extension beyond the six-year limit; and
- The required $380 fee.

Upon approval, the applicant will receive a Form I-766, Employment Authorization Document (EAD). The H-4 spouse may begin working in the United States for any employer once the application is approved and the physical EAD is received. The application may be filed concurrently with (1) the principal H-1B visa application, Form I-129, filed to extend the H-1B worker's status beyond the sixth year, along with the H-4 spouse's I-539 application to extend H-4 status, or (2) with an I-539 application to change status to H-4. The EAD will be valid for the period of authorized H-4 status (for up to three years) and may be extended indefinitely as long as the applicant maintains eligibility.

How Will This Change Help Employers, H-1B Employees, and the Economy?

Immigrant visas based on employment are limited to 140,000 per year, and no one country may use more than 7 percent of the cap. This limit results in enormous backlogs for obtaining immigrant visa numbers, and many H-1B visa holders and their spouses wait years—or even a decade or more—to obtain lawful permanent residence in the United States. Because the numbers for each country are capped, the wait is particularly long for nationals of China and India—countries that send a large proportion of highly-educated, skilled workers to the United States.

Employees sponsored for H-1B visas are often unable to change jobs, and their spouses are unable to work for long periods while they wait in line. This may prompt frustrated employees to leave the United States, thereby harming the business interests and derailing the projects of those companies that employed the H-1B visa holders in a way that could hinder the continued growth of our high-skilled, innovation economy.

Allowing H-4 spouses to work eases the financial burden on families of skilled H-1B workers, facilitates their integration into local communities, and promotes economic growth and job creation. Allowing these spouses to work will also bring the United States in line with other countries, such as Canada and Australia, which already grant work authorization to spouses of foreign workers and with which the United States competes for skilled workers. Starting in May, employers will have a further incentive to sponsor their skilled H-1B employees for permanent residence in order to allow their spouses to obtain work authorization and encourage them to remain in the United States. ■

Ogletree Deakins

© 2015

Publisher
Joseph L. Beachboard

Managing Editor
Stephanie A. Henry

Reproduction
This is a copyright publication. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without written permission.

Disclaimer
The articles contained in this publication have been abridged from laws, court decisions, and administrative rulings and should not be construed or relied upon as legal advice. If you have questions concerning particular situations and specific legal issues, please contact your Ogletree Deakins attorney. This publication may be considered advertising under applicable laws.

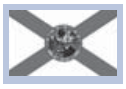
Additional Information
To request further information or to comment on an article, please call Stephanie Henry at (310) 217-0130. For additional copies or address changes, contact Marilu Oliver at (404) 870-1755.

Ogletree Deakins State Round-Up

California*

A California Court of Appeal recently upheld the denial of an employer's request to compel arbitration where the employer failed to prove the electronic signature on the agreement was that of the employee. According to the court, the introduction of conclusory evidence that the worker signed the agreement was insufficient to meet the employer's burden of proof. *Ruiz v. Moss Bros. Auto Group., Inc.*, No.E057529 (December 23, 2014).

Florida



The Eleventh Circuit Court of Appeals recently held that a Florida woman failed to establish an Equal Pay Act claim against her employer, even though she was paid less than three male employees (one of whom was her subordinate). The court ruled that she failed to show the male employees' jobs were substantially similar to hers. *Blackman v. Fla. Dep't of Bus. & Prof'l Regulation*, No. 13-14742 (February 19, 2015).

Illinois*

Two recent rulings have further blurred the "bright line" rule established by *Fifield v. Premier Dealer Services.* In *Fifield*, the court held that two years of continued employment after an employee enters a restrictive covenant is "substantial continued employment" that makes the agreement enforceable without any additional consideration.

Indiana

A federal jury in Indiana recently awarded nearly $2 million to a female parochial school teacher who was fired for undergoing in vitro fertilization procedures. The jury found that the diocese illegally discriminated against the teacher based on her sex and/or her efforts to become pregnant. *Herx v. Diocese of Fort Wayne-S. Bend, Inc.*, No. 12-122 (December 19, 2014).

Michigan

A federal judge recently declined to overturn a $1.2 million jury verdict awarded to a black Muslim man who claimed that Washtenaw County denied him a promotion because of his race, nationality, and religion. The judge found that the verdict was supported by the evidence. *Aboubaker v. County of Washtenaw*, No. 2:11-cv-13001 (March 18, 2015).

Missouri

The Missouri National Guard recently agreed to provide over 2,000 days of paid leave to 138 civilian employees on active duty with the U.S. Active Guard Reserve program. The agreement resolves charges brought by the U.S. Department of Justice alleging that the Guard violated the workers' employment rights under USERRA by requiring them to give up their civilian positions. *United States v. Missouri*, No. 2:14-cv-04036 (March 12, 2015).

New Jersey*

On February 25, the New Jersey Department of Labor and Workforce Development (NJDOL) published draft proposed regulations to implement the New Jersey Opportunity to Compete Act, otherwise known as the "ban the box" law. The Act, which restricts when in the hiring process an employer may obtain criminal history information from an applicant, went into effect on March 1, 2015.

New York*

On February 24, the Acting Commissioner of the New York State Department of Labor adopted the recommendations set forth by the three-member Wage Board affecting tipped employees in the hospitality industry. In pertinent part, the order increases the minimum hourly rate for tipped employees in New York to $7.50 per hour effective December 31, 2015.

Oregon

The U.S. Supreme Court declined to review a federal appeals court decision finding that an Oregon police officer's dismissal did not violate the ADA. The Ninth Circuit Court of Appeals held that the officer failed to show that his attention deficit hyperactivity disorder rendered him "disabled" under the ADA. *Weaving v. City of Hillsboro*, No. 14-766 (March 2, 2015).

Texas*

The Fifth Circuit Court of Appeals voted 11-4 against rehearing a lawsuit in which a three-judge panel adopted a more lenient standard for determining when an employment action is sufficiently "adverse" to support a discrimination claim. In dissent, four judges urged the court to "produce a clear standard" for assessing whether an employment action is indeed adverse, "so that all litigants get the same deal from this Court." *Thompson v. City of Waco*, No. 13-50718 (February 26, 2015).

Washington, D.C.*

Effective December 17, 2014, Washington, D.C. joined 13 states that have ban-the-box laws and passed the Fair Criminal Record Screening Amendment Act of 2014. The new law prohibits District of Columbia employers from unlawfully screening a prospective employee's criminal background.

Wisconsin*

The U.S. Department of Labor (DOL) recently announced that Wisconsin is the latest state to join the "Misclassification Initiative," which is designed to protect the rights of employees "by preventing their misclassification as independent contractors or other non-employee statuses." Wisconsin is the 19th state to sign a Memorandum of Understanding (MOU) with the DOL.

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

Turning Metrics Into Money: An Interview With Solange Charas, Ph.D.

by Jathan Janove*

Solange Charas, Ph.D. is chief executive officer (CEO) of Charas Consulting, Inc. In her career, she has served as a chief human resources officer (CHRO) and corporate board director, her research has been published in *Harvard Business Review* and *The Corporate Board* magazine, and she has appeared on Bloomberg Business.

JATHAN JANOVE: Senior human resources (HR) professionals often complain about not being treated as strategic business partners by organization leadership. Why is that?

SOLANGE CHARAS: Corporate executives and board members frequently view HR as too subjective, too "touchy-feely," which is not how they typically view other departments and positions.

JJ: What should HR do to overcome this problem with how they are perceived?

SC: Learn to use and apply employee metrics so that they can better demonstrate the economic impact HR has on operating results. Research shows that 55 to 85 percent of company revenues goes to employee costs. This expenditure creates a great opportunity for HR to demonstrate its value. HR can help the CEO and other top executives maximize the return on that huge human capital investment.

JJ: What metrics should HR measure?

SC: Fellow researchers and I developed an assessment tool that asks employees a series of questions on three fundamental areas: jobs and the people in them; organization structure (or how work gets done); and management effectiveness, both in leading the organization and facilitating work product. Some of the questions we ask include:

- Workflow: How is the work being done in the organization, and is it effective?
- Employee productivity: How well do employees function in relation to their jobs and teams?
- HR infrastructure: Do HR programs such as training and development, performance reviews, and compensation enhance employee productivity and engagement?
- Organizational and managerial justice: Do employees perceive that the organization and their direct supervisors treat them fairly?
- Managerial effectiveness: How well do the organization's leaders coach, mentor, and motivate employees to pursue a shared vision and goals?

JJ: What do you do with the data?

SC: Several things. There is a macro analysis and there is a micro analysis. We address questions such as:

- What drives the company's economic engine? Most companies say that people are their greatest asset, yet they don't know how to generate a number around this, and don't show concern that their "assets" come to work every day. A data-driven approach identifies the degree to which people drive economic value creation, and how.
- Management and employee alignment: Are we talking about one company or two? Do managers have a different view of the organization than employees? If so, what can be done to get everyone on the same page?
- Voluntary attrition: Are employees you want to keep leaving (and taking their knowledge base with them)? Voluntary attrition is probably the most powerful value detractor for an organization. Replacing these employees can cost anywhere between one to eight times their salaries before they are up to speed and productive. And the fastest way to get people to leave is to create a climate where employees feel they're not being treated fairly compared to their peers inside or outside the organization.
- Is the company's organizational structure impeding achievement of its own goals? One of the most important lessons I've learned is that employees inherently know how to make their teams more productive. Eliminating unproductive tasks and/or reorganizing the way work is done can have a huge impact on productivity.
- How strong is employees' sense of purpose? I believe that management has a fundamental duty to help employees understand the impact of their work. Instead of simply having a job, employees need to be able to connect with their work and how it supports the goals and vision of the organization, and have a sense of purpose and connectedness.

The process of HR analytics is like an hourglass. At the top end, you pour in the data and information. In the narrow middle or waist, you identify the real drivers, the key difference-makers, and where the greatest potential payoff is. Once you identify the key systemic problems and address them, the impact on the overall business is like the bottom of the hourglass—far-reaching in the business process.

JJ: Can you share an example?

SC: We worked with a pharmaceutical company that had 350 senior-level managers worldwide. This group had a high attrition rate compared to the industry—at the time 8.5 percent annually. Costs were high for this organization not only because of the loss of key talent, and their institutional memory, but because at this senior level, talent is harder to identify and more expensive to recruit.

After analyzing the data, we learned that a key attrition-driver was lack of succession planning, communication, and a demonstration that there were career opportunities in the company. Managers felt plateaued and many chose to leave. Once we identified the systemic problem, we developed interventions to address it, including career paths and career tracking programs, communications strategies for enhancing employees' ability to identify their desired career paths, and establishing a talent inventory with pre-identification of candidates for promotion from

Please see "METRICS" on page 5

> *"Until HR presents data that drives bottom-line results, it won't command attention and respect."*

* Jathan Janove is the firm's Director of Employee Engagement Solutions and a member of Ogletree Deakins Learning Solutions (ODLS). In that capacity, he provides clients customized training, coaching, and consulting solutions to meet their challenges and achieve their goals.

SEC Investigating Employment Contracts That Restrict Whistleblowing

by Margaret H. Campbell (Atlanta) and Jesse C. Ferrantella (San Diego)

The U.S. Securities and Exchange Commission (SEC) may soon be investigating the agreements companies enter into with their employees. According to a February 25, 2015 *Wall Street Journal* report, the SEC has sent requests to several companies asking for years of employment contracts, nondisclosure agreements, and other documents imposing confidentiality obligations on employees.

The inquiries are part of the heightened attention that the SEC is paying to the protection of whistleblowing acts and to the SEC's efforts to encourage the free exchange of information with regulatory agencies. In 2014, the SEC's Office of the Whistleblower Chief Sean McKessy said that his office would be on the lookout for contracts that attempt to discourage employees from bringing alleged wrongdoing to the SEC's attention. According to a 2014 article, McKessy warned "if we find that kind of language, not only are we going to go to the companies, we are going to go after the lawyers who drafted it."

In requesting these documents from companies, the SEC is stepping up its efforts by moving from analyzing these contractual provisions in matters before the agency to seeking out these contractual provisions in situations in which the SEC is not conducting an active investigation. According to the *Wall Street Journal* report, the SEC is specifically asking companies to submit nondisclosure, confidentiality, severance, and settlement agreements into which they have entered with employees, as well as training materials and other company documents about whistleblowing. These inquiries represent an expansion of the investigations conducted by the Office of the Whistleblower into a new arena of potential enforcement.

Based on McKessy's prior statements, the SEC is likely to focus not only on language that prohibits employees from reporting information to regulatory or enforcement agencies in exchange for benefits, but also on language that could have a chilling effect on employees' communications to agencies. SEC Rule 21F-17(a) generally states that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce a confidentiality agreement." The SEC has yet to issue any specific guidance regarding the type of language it views as unlawful or impermissible, however, and McKessy has said that there are no plans to provide specific language that will pass muster, as the Financial Industry Regulatory Authority (FINRA) has done.

In light of the SEC's initiative, companies should review their employment agreements to ensure they do not include language that impedes an employee's ability to report potential violations to the SEC or other regulatory agencies. Companies should also consider inspecting some of their more general confidentiality, nondisparagement, or nondisclosure provisions and consider if their effect could be to restrict interactions with regulatory agencies.

The SEC's Office of the Whistleblower has been increasingly active in pursuing whistleblower actions. The SEC made nine whistleblower awards in 2014, more than in all previous years combined. These actions included the SEC's largest bounty award to date of $30 million and the SEC's first enforcement action under the anti-retaliation provisions of the Dodd-Frank Act. The SEC also awarded over $300,000 to a whistleblower with auditing functions in August 2014, which is the first award the agency has made to an employee with compliance functions. The SEC recently issued an award of approximately half a million dollars to a former company officer who reported securities law violations. ■

"METRICS"

continued from page 4

the entry level up through the senior ranks.

JJ: What were the results?

SC: Retention improved. Plus, there were other benefits. Internal promotions increased, creating career path opportunities for those promoted into the senior positions as well as for those promoted into the positions vacated. Morale improved. Promoting existing employees meant shorter learning curves and reduced vacant job time, which increased efficiency and productivity. Moreover, this change greatly reduced the company's reliance on external headhunters. On this metric alone, the company achieved a 10:1 return. Within six months, a $250,000 project investment resulted in a $2.5 million reduction in headhunting costs.

JJ: What if I'm the head of HR at my company, but don't have the background or aptitude for metrics. Am I stuck?

SC: Not at all! Think of a sports team. Not everyone plays the same position. But a good coach meshes the various positions to build a successful team. You might hire a quantitative analyst or engage a consultant to support HR's diagnostic efforts and continually gather and analyze the data and what the data reveals about the relationship between human capital and bottom-line financial performance.

JJ: Earlier, you used the term "employee engagement." Isn't that one of those subjective, "touchy-feely" terms that makes executives' eyes roll?

SC: It shouldn't! The evidence is overwhelming that there's nothing soft about the impact of employee engagement. Research has shown that a change of one standard deviation in employee engagement correlates with up to a 40 percent increase in EBITDA (earnings before interest, taxes, depreciation, and amortization). Depending on the standard distribution of scores, that could be as little as moving from 2.9 to 3.2 on a 1-to-5 scale. With Gallup reporting that only 30 percent of U.S. employees are engaged, think of the enormous upside!

If HR wants to be a strategic business partner, it has the leverage to do so. But until HR presents data that drives bottom-line results, it won't command attention and respect as an equal business partner. So gather the data, analyze it from a macro and micro perspective, and create a narrative about the analytics that resonates with stockholders, board members, and the executive team.

New to the Firm

Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Joseph Magliolo (Dallas); Gregory Krause (Detroit Metro); Erica Kelly (Las Vegas); Kelly Pena (Miami); David McKinney and Stephanie Willing (Minneapolis); Thomas Whitworth (Nashville); Greg Guidry (New Orleans); Meaghan Kramer (Phoenix); Jeanne Floyd (Richmond); Daniel Kanter and Jaclyn Simi (San Diego).

"PREGNANCY"

continued from page 1

Disabilities Act (ADA), to whom UPS offered light-duty work; and (3) certain drivers who had lost their certification by the U.S. Department of Transportation, to whom UPS offered an "inside job" (which is typically not considered light-duty work).

Under both UPS policy and the CBA, a pregnant employee could continue working as long as she could perform the essential functions of her job. However, she was ineligible for light-duty work for any limitations arising solely as result of her pregnancy.

As a result of this policy, Young went on an extended leave of absence without pay or medical coverage. She later filed suit claiming that UPS had refused to accommodate her pregnancy-related lifting restriction. Young argued that UPS had accommodated other drivers who were "similar in their . . . inability to work." UPS countered that since Young did not fall under one of the three categories of employees to whom the company offered alternative work, it had treated Young as it had treated all other relevant persons.

The district court granted summary judgment in favor of UPS. On appeal, finding that UPS's policy was facially neutral and a legitimate business practice, the Fourth Circuit Court of Appeals affirmed. The court ruled that "where a policy treats pregnant workers and nonpregnant workers alike, the employer has complied with the [Pregnancy Discrimination Act]." The Supreme Court eventually agreed to hear the case.

The PDA and Its Second Clause Controversy

The Pregnancy Discrimination Act (PDA) added new language to the definitions subsection of Title VII of the Civil Rights Act of 1964. The first clause of the PDA includes pregnancy-related conditions within the definition of sex discrimination: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."

The second clause states that "women affected by pregnancy . . . shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."

The Court noted that this case required it "to consider the application of the second clause to a 'disparate-treatment' claim—a claim that an employer intentionally treated a complainant less favorably than employees with the 'complainant's qualifications' but outside the complainant's protected class."

Young argued that the UPS policy reserving light-duty work for certain employees, but not pregnant employees, violated the second clause of the PDA. UPS, as the Court put it, "takes an almost polar opposite view. It contends that the second clause does no more than define sex discrimination to include pregnancy discrimination."

The Supreme Court's Decision

The Court found that Young's interpretation of the PDA, according to which pregnant and nonpregnant workers must be treated the same, "proves too much." According to the majority, "It seems to say that the statute grants pregnant workers a 'most-favored-nation' status." The Court also rejected UPS's argument that the second clause merely clarifies the first clause, finding that "there is no need for the 'clarification.'"

Instead, the Court interpreted the PDA as follows: an individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework. Accordingly, a worker alleging that an employer's denial of an accommodation constitutes disparate treatment under the PDA's second clause may establish a prima facie case by showing that (1) she belongs to the protected class, (2) she sought accommodation, (3) the employer did not accommodate her, and (4) the employer did accommodate others "similar in their ability or inability to work."

"Significant Burden" Standard

The Court also created a new "significant burden" standard. According to the Court, if an employer presents a legitimate, nondiscriminatory reason for its actions, a worker may reach a jury on the issue of whether the reason is pretextual "by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination."

Moreover, the Court explained that a worker can "create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."

According to the Court, "there is a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young's." The Court thus vacated the Fourth Circuit's judgment in favor of UPS and remanded the case for further proceedings.

The Court declined to give "special, if not controlling, weight"—as urged by the Solicitor General—to the Equal Employment Opportunity Commission's (EEOC) pregnancy discrimination guidance (which was approved after the Court agreed to hear this case). Because the EEOC failed to explain the basis of the guidance, the Court found that "[w]ithout

Please see "PREGNANCY" on page 7

Single "Hitler" Comment Is Insufficient to Support Title VII Retaliation Claim

Court Holds Worker Failed to Show That His Actions Were Protected

A federal appellate court recently affirmed a judgment against an employee who claimed that he was demoted for reporting another employee's racially offensive comment made during a meeting. According to the Fifth Circuit Court of Appeals, the worker had not engaged in a protected activity by reporting the single, isolated remark. ***Satterwhite v. City of Houston,*** *No. 14-20240, Fifth Circuit Court of Appeals (March 3, 2015).*

Factual Background

Courtney Satterwhite and Harry Singh were both employed by the City of Houston. During a meeting, Singh made a comment referencing Hitler. After the meeting, Satterwhite informed Singh that another employee was offended by his comment, and Singh apologized to that employee. Satterwhite then reported the comment to the City's Deputy Director of Human Resources. The Director of Human Resources reported it to the Chief Deputy Controller, who verbally reprimanded Singh.

Several months later, Singh was promoted into a position in which he supervised Satterwhite. Singh disciplined and reprimanded Satterwhite on multiple occasions. Satterwhite told Singh that he believed that the reprimands were issued in retaliation for his complaints about the Hitler comment. Singh later recommended that Satterwhite be demoted, which ultimately resulted in his demotion and a decrease in his salary.

Satterwhite filed a complaint with the U.S. Equal Employment Opportunity Commission and received a right-to-sue notice. He then filed a lawsuit in the federal court alleging retaliation under Title VII of the Civil Rights Act of 1964. The trial judge granted summary judgment in favor of the City, and Satterwhite appealed this decision to the Fifth Circuit Court of Appeals.

Legal Analysis

Concluding that Satterwhite's activities were not protected under Title VII, the Fifth Circuit affirmed the lower court's judgment in favor of the City.

Satterwhite argued that he engaged in protected activities when he reported Singh's comment to human resources. He also claimed that he engaged in protected activities when he participated in an investigation into Singh's comments that the City Office of Inspector General had conducted.

According to the court, for these actions to qualify as protected activity, Satterwhite must have had a reasonable belief that Singh's comment created a hostile work environment under Title VII. In judging whether a work environment is hostile, the Fifth Circuit noted, courts examine the frequency of the discriminatory conduct, its severity, whether the conduct is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.

Given this framework, the Fifth Circuit found, "[n]o reasonable person would believe that the single 'Heil Hitler' incident is actionable under Title VII." Thus, the court ruled that Satterwhite failed to establish a prima facie case of retaliation.

Practical Impact

According to Carolyn A. Russell, a shareholder in the Houston office of Ogletree Deakins, "The Fifth Circuit found that a complaint about a one-time use of the phrase 'Heil Hitler' by a co-worker cannot form the basis of a Title VII retaliation claim because, among other things, a reasonable employee could not believe that a one-time use constituted an unlawful employment practice under Title VII. But, employers still should seek to eliminate the use of inflammatory and inappropriate language in the workplace. A complaint about the use of this phrase, or something similar, could form the basis of a harassment or retaliation complaint if it were linked to certain religious prejudices." ■

"PREGNANCY"

continued from page 6

further explanation, we cannot rely significantly on the EEOC's determination."

Justice Scalia authored a critical dissent, which was joined by Justice Kennedy and Justice Thomas, and which Justice Breyer frequently addressed in the majority opinion. Justice Scalia accused the Court of crafting a new law "that is splendidly unconnected with the text and even the legislative history of the Act." Critiquing the Court's new standard, he stated, "Where do the 'significant burden' and 'sufficiently strong justification' requirements come from? Inventiveness posing as scholarship—which gives us an interpretation that is as dubious in principle as it is senseless in practice."

Practical Impact

According to Brian L. McDermott, a shareholder in the Indianapolis office of Ogletree Deakins, "The *Young* decision will have a significant impact on employers that accommodate nonpregnant workers but not pregnant employees. If the employer's policies impose a 'significant burden' on pregnant workers, and the employer's legitimate, nondiscriminatory reasons do not justify that burden but instead give rise to an inference of discrimination, then a plaintiff likely will be able to reach a jury trial on her pregnancy claim. As the Supreme Court noted, a 'significant burden' can be shown by evidence that an employer 'accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.' *Young*, therefore, requires prudent employers to evaluate their current policies and practices to determine whether they significantly burden pregnant workers and, if they do, whether the non-discriminatory reasons for the policies or practices justify that burden."

Protections for pregnant workers is just one of many topics that will be covered at this year's Workplace Strategies program in San Antonio. For more information, see the enclosed brochure or visit www.ogletreedeakins.com.

Worker Fails to Show Age Was "But-For" Cause of His Discharge

Court Finds Firing Was Caused by Long History of Job Performance Issues

A federal appellate court recently affirmed an order of summary judgment in favor of an employer that discharged a 63-year-old driver because of his long history of job performance issues. The driver, who had filed a federal lawsuit claiming that his discharge violated the Age Discrimination in Employment Act (ADEA), was unable to demonstrate that his age was the "but for" cause of his discharge—even though his supervisor had once told him he was too old for the job and should "go ahead and hang it up." ***Arthur v. Pet Dairy,*** *No. 13-2530, Fourth Circuit Court of Appeals (February 9, 2015).*

Factual Background

Ralph Arthur was a milk delivery driver and salesman for Pet Dairy, located in Lynchburg, Virginia. Hired in January of 2003, when he was 57 years old, he was assigned to Pet Dairy's largest and most profitable sales route, which supplied a number of customers including the Lynchburg City School Division.

Arthur's direct supervisor was Mike Reynolds, who joined the company in 2005. According to Arthur, on Reynolds's first day as supervisor, he told Arthur, "[Y]ou are too old to be here and I'm going to get rid of you." Arthur further testified that in November of 2009, about three weeks before Arthur was fired, Reynolds told him that he "need[ed] to go ahead and hang it up because [he was] just too old to do [his] job."

The record, however, also reveals that during his employment, Arthur's work performance had come under scrutiny and criticism by his employer. In 2003, for example, Arthur was involved in an accident in which his truck struck an SUV. For this, Pet Dairy issued him a written warning. Later that year, Arthur was also given two formal, written reprimands for failing to supply customers with adequate quantities of milk.

In a memorandum dated December 4, 2009, the School Division's director of school nutrition, Meryl Smith, enumerated the School Division's complaints about Arthur's work performance and threatened to end Pet Dairy's account with the School Division's food service program.

Reynolds forwarded Smith's memorandum to Pet Dairy's HR department, stating, "Ralph Arthur needs to be terminated" because he "is an ongoing problem." Based on Reynolds's recommendation and the Smith memorandum, Arthur was fired.

In 2011, Arthur filed a lawsuit alleging that he been subjected to age discrimination in violation of the ADEA. He also claimed that he had performed his job duties adequately, that he had not been formally disciplined in writing for six years, and that the complaints about his work performance had been exaggerated or fabricated. The trial judge granted summary judgment to Pet Dairy, and Arthur appealed.

Legal Analysis

To establish a prima facie case of discrimination under the ADEA, an employee must establish, among other factors, that he was performing his job duties to his employer's legitimate expectations at the time of termination. Whether an employee has met his employer's legitimate expectations depends on the "perception of the decision maker…, not the self-assessment of the plaintiff."

The trial judge found that Arthur failed to meet this burden. The Fourth Circuit agreed, noting the "mountain of evidence demonstrating that [Arthur] had consistently failed to meet his employer's expectations." While Arthur pointed to the lack of an extensive, formal, written disciplinary record in his employment file with Pet Dairy, the court found this argument unpersuasive and lacking, as Arthur himself had admitted that most of the employment counseling and discipline he had received had been informal. Further, Arthur did not dispute the contents of the Smith memorandum. Ultimately, the Fourth Circuit concluded that Arthur's evidence was insufficient for a reasonable jury to find that he had met his employer's legitimate employment expectations.

The court also addressed the issue of the derogatory comments made by Reynolds. In general, there must be a clear nexus between an employer's derogatory comments and the employment decision in question. The Fourth Circuit found that although Reynolds had made derogatory, ageist comments ("too old to do the job" and "need to go ahead and hang it up") that closely preceded Arthur's firing, Arthur did not contest the ample record evidence demonstrating his long history of performance issues. Accordingly, the Fourth Circuit concluded that the comments had not been sufficiently related to the discharge, and that the employer had acted for other lawful reasons (namely, the threat of losing its contract with the School Division, were Arthur to remain on the job).

The court also found that Arthur had offered no evidence to show that the Smith memorandum, and his past work performance issues, had not independently led to Pet Dairy's decision to discharge him. "Indeed," the court found, "[Arthur] admitted that he had been criticized both verbally and in writing on numerous occasions over his seven-year tenure at Pet Dairy because of his substandard performance. Consequently, viewing the evidence in a light most favorable to Arthur, the evidence at best demonstrates that his 'age was simply a motivating factor' in [Pet Dairy's] decision, not 'the but-for cause' of [Arthur's] termination."

"This case demonstrates the importance of implementing manager training programs."

Practical Impact

According to Jimmy Robinson, Jr., managing shareholder of the Richmond office of Ogletree Deakins, "This case demonstrates the importance of implementing manager training programs aimed at avoiding the injection of protected classifications into evaluations, or even isolated comments. Although isolated remarks such as the ones in this case may not ultimately create liability, they have the tendency to impair employee morale and increase the possibility for costly litigation." ■