Ogletree Deakins

The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law | September/October 2015

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Proper Employer Response Bars Harassment Suit

Despite Court's Finding Conduct May Have Created Hostile Environment

A federal appellate court recently dismissed a lawsuit brought by two workers who claimed that they were forced to resign due to a hostile work environment. According to the Fifth Circuit Court of Appeals, a reasonable jury could find that even if the alleged harassment by male coworkers was severe or hostile, the employer took prompt remedial action once it became aware of the misconduct. ***Matherne v. Ruba Management,*** *No. 30864, Fifth Circuit Court of Appeals (September 3, 2015).*

Factual Background

Kelly Matherne and Sharetha Tart worked at an International House of Pancakes franchise operated by Ruba Management in Boutte, Louisiana. Approximately one month after they were hired, Matherne and Tart resigned.

The company handbook includes a sexual harassment policy and provides protocol for reporting complaints of sexual harassment. Matherne received a copy of the handbook as part of the new hire orientation. Tart claimed that she did not receive a copy of the handbook but that she was aware of the sexual harassment policy and the complaint procedure.

During her employment, Matherne claimed that she was sexually harassed by four members of the restaurant staff.

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Ogletree Deakins Opens Office in Seattle

Firm Expands Presence and Capabilities in Pacific Northwest

On September 1, 2015, Ogletree Deakins opened an office in Seattle, Washington, significantly expanding its capabilities in the Pacific Northwest. The office opened with shareholder Anthony Byergo, who cofounded the firm's Kansas City office in 2005, and attorney Sarah Evans, who has practiced at Ogletree Deakins since 2012. The Seattle office is expected to experience significant growth in the near future and will collaborate with the firm's Portland, Oregon office, where many of the lawyers are licensed to practice law in Washington.

"We are very excited to open in Seattle, which comes in direct response to client demand," said Kim Ebert, managing shareholder of Ogletree Deakins. "We represent a number of clients with substantial operations in Washington and the greater Pacific Northwest and combining this new office with our very successful Portland team will allow us to better serve those employers."

Byergo is chair of Ogletree Deakins' collective bargaining practice subgroup and has 25 years of experience representing and advising management in labor and employment matters. He is a recognized authority in traditional labor relations matters and union avoidance, including collective bargaining, representation campaigns, strike preparation, corporate campaigns, labor arbitration, and unfair labor practice proceedings.

Evans focuses her practice on employment litigation and preventative counseling. She regularly defends employers in matters involving charges of discrimination, harassment, and retaliation, investigations involving health and safety violations, and arbitrations of unfair labor practices.

Joining Byergo and Evans is shareholder Russell Buhite, who has more than 20 years of experience in the areas of employee benefits and employment litigation. ■

DHS Proposes New STEM OPT Extension Rules

by Miguel A. Manna (Raleigh) and Caroline Tang (Austin)

On October 16, 2015, the U.S. Department of Homeland Security (DHS) released a notice of proposed rulemaking (NPRM) concerning new rules for extending the Optional Practical Training (OPT) program for international students with degrees in science, technology, engineering, and mathematics (STEM). The notice was published in the *Federal Register* on October 19, 2015, and will be subject to a 30-day comment period.

This much-anticipated notification comes at a critical time for thousands of international students and their employers. An August 12, 2015 decision by the U.S. District Court for the District of Columbia in *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security* vacated the previous set of STEM OPT regulations, making the future of the STEM OPT program uncertain for international students in the United States who hold an F-1 visa. The NPRM is consistent with direction from the district court that a new rule be promulgated before February 12, 2016, in order to continue the program.

New Student Benefits

The proposed rule provides the following benefits to STEM-eligible international students:

- Increases the OPT extension period from 17 to 24 months for a total of 36 months of OPT employment status;
- Allows students to be eligible for an additional 24-month STEM OPT extension through enrollment in a subsequent STEM degree program;
- Offers a clearer definition of and possible additions to STEM-eligible fields of study; and
- Revises the number of days an F-1 student may be unemployed (i.e., a grace period) by an additional 60 days if the student receives a STEM OPT extension.

New Employer Requirements

These additional benefits also come with significant compliance obligations for employers. While E-Verify and reporting requirements remain largely unchanged, employers will be required to make the following attestations:

- The employer has sufficient resources and trained personnel available to provide appropriate mentoring and training in connection with the specified field of study.
- The employer will not discharge, lay off, or furlough any full-time or part-time, temporary or permanent U.S. workers as a result of providing the STEM OPT to the student.
- The opportunity promotes the student's training objectives.

DHS will also require the employer to provide compensation comparable to that of similarly situated U.S. workers. Although this compensation attestation requires only good faith belief, employers may need to submit objective evidence explaining how the workers' compensation level is calculated.

Perhaps most critical to employers, the rule proposes that Immigration and Customs Enforcement may, at its discretion, conduct on-site inspections to ensure employers abide by the attestations and program requirements.

Next Steps

The notice-and-comment process enables anyone to submit a comment to any part of the proposed rule. DHS will take comments and feedback into consideration in publishing the final rule. ■

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New Rules Now in Effect for Home Health Care

U.S. Supreme Court Refuses to Issue Emergency Stay

On October 6, 2015, Chief Justice John Roberts of the Supreme Court of the United States denied the emergency stay application filed by the association plaintiffs in *Home Care Association of America v. Weil*. As a result, the new U.S. Department of Labor's regulations extending the federal minimum wage and overtime requirements for home health care workers employed by third-party employers went into effect on October 13, 2015.

The final rule extends the Fair Labor Standard Act's (FLSA) minimum wage and overtime protections to an estimated two million home health care workers. Specifically, the new rule removes the ability of third-party employers (such as home health care agencies) to avail themselves of the FLSA's "companionship" exemption. For example, direct care workers who perform medically-related services for which training typically is a prerequisite are not considered companionship workers and therefore are entitled to the minimum wage and overtime pay. For more information on the new rule, visit our blog at www.ogletreedeakins.com/our-insights. ■

Ogletree Deakins State Round-Up

California*

On October 6, Governor Jerry Brown signed Senate Bill 358, an amendment to the California Fair Pay Act. The measure makes several changes to the law, including clarifying that it is the employer's burden to demonstrate that a wage disparity has a legitimate justification other than sex, and prohibiting employers from interfering with employees' discussions about their wages.

Florida*

Florida law requires a new minimum wage calculation on September 30 of each year, based on the Consumer Price Index (CPI). According to documentation listed on the Florida Department of Economic Opportunity website, in 2016 the Florida minimum wage will remain at $8.05 per hour ($5.03 per hour for tipped employees) based on the current CPI.

Indiana*

A new Indiana law gives employers the option to adopt voluntary veterans' preference policies. These policies allow employers to give preference to veterans in hiring, promotion, and retention decisions. Such a policy must be in writing, applied uniformly to employment decisions of hiring, promotion, or retention during a reduction in force, and cannot conflict with or change an employer's obligations under a preexisting collective bargaining agreement.

Louisiana*

Governor Bobby Jindal recently approved Act 74, which clarifies that hair tests are an acceptable method for employers to drug test potential hires. Hair testing detects drug use that might have occurred up to 90 days before the day the test is given. Meanwhile, urine and blood tests can only detect drug use up to a few days before the test is administered.

Maine*

Maine has become the latest state to restrict employers' ability to access social media accounts of employees and applicants. A new Maine statute, which went into effect on October 15, 2015, prohibits a broad range of employer conduct. Among other prohibitions, an employer may not require or request that an employee or applicant disclose the password for accessing his or her personal social media account.

Missouri*

Hours before a St. Louis ordinance increasing the city's minimum wage was set to take effect, St. Louis Circuit Court Judge Steven Ohmer struck down the ordinance. The ordinance, which was passed on August 28 with an effective date of October 15, would have increased the city's minimum wage to $8.25 per hour. The new minimum wage rate was scheduled to increase each January 1, eventually reaching $11.00 per hour in 2018.

New Jersey*

The New Jersey Division on Civil Rights (DCR) has issued another round of updated mandatory posters (with a revision date of 5/8/2015). The revised posters (English and Spanish versions of the agency's Discrimination in Employment, Public Accommodation, Family Leave Act, and Housing posters) contain new contact information reflecting that the DCR is now divided into four regional offices.

New York*

On September 3, the New York City Commission on Human Rights issued official guidance on the Stop Credit Discrimination in Employment Act. The guidance makes it clear that improperly requesting credit history for employment purposes is unlawful even if it does not lead to an adverse employment action.

Ohio

On September 30, the Cincinnati City Council approved an ordinance that will allow city workers—male or female—to take six weeks of paid leave after the birth or adoption of a child. This greatly expands the amount of parental leave available to fathers and makes Cincinnati the second city in the state to offer such a generous policy.

Rhode Island*

Governor Gina Raimondo recently signed legislation that requires employers to reasonably accommodate an employee or prospective employee's condition "related to pregnancy, childbirth, or related medical conditions." The law also prohibits an employer from requiring that an employee take a leave of absence if a reasonable accommodation can be given.

Tennessee

The Tennessee Court of Appeals has ruled that a former employee was entitled to severance pay for termination without cause under his employment agreement. The court rejected the employer's argument that the agreement was unenforceable. The agreement was clear, definite, and easy to understand. Furthermore, the court found that an employee of 35 years continuing to work for the company was sufficient consideration. *Hensley v. Cocke Farmer's Coop.*, No. E2014-01775-COA-R3-CV (August 31, 2015).

Virginia*

Virginia's new social media privacy law is officially in effect. Under the new law, an employer is prohibited from requiring that current or prospective employees share their social media usernames and passwords. It also prohibits employers from requiring that current or prospective employees add supervisors, administrators, or other employees to their "friends" list.

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

A Tale of Two Employers: The NLRB's New Joint-Employer Standard

*by Wade M. Fricke and Matthew J. Kelley**

"It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair…"

It's not often that labor lawyers can quote Charles Dickens in context, but given the past several months at the National Labor Relations Board (NLRB), it is wholly appropriate. Many of the fears labor lawyers and employers have harbored about the current NLRB have come to fruition recently, leaving the law in a state of flux in several key areas for employers.

The most publicized decision over the past few months has far-reaching consequences for the growing number of employers that use subcontractors, staffing agencies, and franchisees. The most recent statistics show that U.S. staffing companies employed 3.24 million workers at the end of the second quarter of 2015. Staffing company employees have tripled in the last 25 years and have become an important part of many employers' flex-staffing strategies.

On August 27, 2015, the NLRB returned to a pre-Reagan era standard on the determination of joint-employer status. In *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186, temporary workers hired by the "supplier" company to work at the "user" company attempted to unionize. The union claimed that the companies were joint employers of the workers attempting to unionize and the NLRB agreed with the union.

In a 3-2 decision, the NLRB ruled in favor of a broader standard to establish whether a company is a joint employer with a supplier company, and therefore must answer to organizing efforts directed at its subcontractors or staffing agencies. The vote split along partisan lines, with the Board Democrats voting for the broader standard and the Board Republicans voting against it.

* Wade Fricke is a shareholder in the Cleveland office of Ogletree Deakins. Matthew Kelley is an associate in the firm's Indianapolis office. Both attorneys represent management in labor and employment-related matters.

The Facts

BFI Newby Island Recyclery (BFI) owned and operated a recyclery and had subcontracted a portion of the recycling operation, called the "sorting line," to Leadpoint Business Services. Leadpoint hired, disciplined, and fired its own workers, had a large staff of supervisors and human resources personnel on-site, and paid its workers directly. Because the sorting line was only part of BFI's recyclery operation, BFI determined the hours Leadpoint needed to staff the line, the speed at which the line moved, and the physical environment at the recyclery. It also gave general tasks to the Leadpoint supervisors.

However, the large staff of Leadpoint supervisors independently set the standards for picking material out of the recycling stream, trained its workers, and monitored each shift using Leadpoint productivity forms. In comparison, BFI supervisors spent most of their time uninvolved in sorting line activities in areas away from the Leadpoint workers. The contract between BFI and Leadpoint reserved a variety of rights to BFI, but BFI did not exercise them.

The NLRB's Decision

As the NLRB stated in the introduction to its decision, this case rejected decades-old principles for determining joint-employer status under the National Labor Relations Act (NLRA). The Board majority concluded the current standard requiring "direct and immediate" control of the employees of the supplier company by the host company was inconsistent with the realities of today's workplace and harmful to the NLRA's purpose of fostering collective bargaining. According to the majority, "the right to control is probative of an employment relationship—whether or not that right is exercised." Furthermore, the majority held that the right to control "may be very attenuated" or indirect.

Under the NLRB's new joint-employer standard, the Board may conclude that two or more entities are joint employers if those entities meet the common law meaning of "employer" and if they share or codetermine the essential terms and conditions of employment. The Board will also consider whether the employer has exercised control over the terms and conditions of employment indirectly or through an intermediary, or whether it has the potential to do so.

The more demands that a third-party company can make of the staffing agency, in terms of scheduling, discipline, work rules, and other terms and conditions of employment, the more likely the parties will be found to be joint employers. For example, if the company demands that the staffing agency discipline or terminate someone and the staffing agency rubberstamps the termination, while the company may not have the right to fire that employee, it would be exercising significant indirect influence. The Board would consider that kind of influence as an indicator of joint-employer status.

> *"The right to control is probative of an employment relationship—whether or not that right is exercised."*

The NLRB's holding on the facts of this case demonstrates that joint-employer status can be based on the rights a party reserves under a contract, the indirect control it exercises over a third party's workers due to the nature of the services it contracted to the third party, or the standards and limitations it imposed on those services. Moreover, by claiming that it was applying the common law test for determining whether an employment relationship exists, the Board created precedent for other governmental agencies—state and federal alike—to rewrite historical understandings of the employment relationship and apply them far beyond the Board's reach under the NLRA.

Further complicating the situation, the

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Ogletree Deakins Launches Innovations Center

New Web Resource Offers Clients Technology and Compliance Tools

Ogletree Deakins recently launched the Innovations Center on its website, which will serve in-house counsels' and HR professionals' needs for technology and tools related to compliance with federal and state laws, litigation, legal project management, and workplace training.

"We've built the Innovations Center with a focus on making our clients' lives easier," said Patrick DiDomenico, director of knowledge management at Ogletree Deakins. "The tools in the center allow clients to collaborate with our attorneys to develop creative business solutions that ensure quality, consistency, and efficiency and can translate to real savings."

The tools include:

- *Clientlink:* An extranet platform that includes secure, custom-built collaboration sites that provide web-based access to all documents, data, and reporting needed to effectively track the progress of a matter.
- *IntelliCase*™: A proprietary web-based tool that enables employers to track their agency discrimination charges and manage the risk of escalation to litigation, providing real-time individual charge management data and aggregate actionable intelligence while limiting legal spend.
- *Ogletree Deakins Advantage*™: An innovative legal service delivery model that fulfills all of an employer's labor and employment needs and provides client education programs, as well as other value-added services, at a predictable price.
- *Ogletree Deakins Blueprint*™: A legal project management service that provides realistic budgets and plans to better manage matters to an employer's desired resolution, through support from dedicated legal project managers and a legal project management software tool.
- *Ogletree Deakins campaign app*: An app that is customized to each client's needs during pre-petition or post-petition organizing. It also allows employers to communicate with employees as part of a positive employee relations program.
- *O-D Comply*®: A user-friendly subscription-based solution to help keep employers in compliance on the most common multistate issues. O-D Comply provides employers what they need to meet today's requirements, as well as automatic updates on the latest legal developments.
- *Ogletree Deakins Learning Solutions*™: The firm's official training platform, which delivers customized programs on a full range of labor and employment law topics and in a variety of formats. ■

"NLRB"

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Board did not create a bright-line rule that employers can follow. The ruling does not create new absolute liability for every company that operates through subcontractors, independent contractors, or franchisees. NLRB administrative law judges will apply the new joint-employer definition on a case-by-case basis.

Practical Impact

The NLRA requires any employer of employees who have selected union representation to bargain over the "terms and conditions" of employment. These terms generally include wages, benefits, work rules, disciplinary procedures, and other essential terms of employment. The practical effect in this case is very simple: If both parties are now deemed to be joint employers, then both parties would have to bargain with the union, and both parties would be responsible for the outcome of such negotiations.

Additionally, in any situation where staffing agency employees attempt to exercise any protected rights under Section 7 of the NLRA (which extend beyond attempting to unionize to other, more general acts of protected concerted activity such as collective complaining about terms and conditions of employment), both the company and the staffing agency could be liable for unfair labor practices. For example, if a company demanded that the staffing agency replace one of its employees because of his chronic complaining about treatment and rabble-rousing, both the company and the staffing agency could be liable for violations of the NLRA.

Further, and potentially related to the Board's decision in *Browning-Ferris Industries*, another significant case for the staffing industry is pending (*Miller & Anderson, Inc.*). In that case, the Sheet Metal Workers union attempted to organize a collective bargaining unit comprised of both Miller & Anderson employees and temporary employees supplied by a staffing firm. An NLRB Regional Director dismissed the union's petition to represent the employees in a single unit, relying on the Board's 2004 ruling in *H.S. Care LLC d/b/a Oakwood Care Center*, which held that temporary employees cannot join a client's existing bargaining unit absent the consent of both the client and staffing firm.

The Sheet Metal Workers appealed, arguing that the Board should reinstate *M.B. Sturgis*, a Clinton-era decision in which the Board held that the NLRA permitted a combined bargaining unit of temporary employees and a staffing client's internal employees without both staffing firm and client consent. If the NLRB rules in favor of the Sheet Metal Workers in *Miller & Anderson*, it will create significant risks for employers that rely upon temporary workers, and in addition to the *Browning-Ferris Industries* decision, create increased risks for staffing companies and employers that utilize temporary employees.

Conclusion

The immediate impact of *Browning-Ferris Industries* is still to be determined. The company can refuse to bargain with the union and appeal the Board's decision in federal court, possibly ending in a decision by the Supreme Court of the United States, which could take years. However, the current NLRB will likely continue to make significant changes to the landscape of labor law generally, and the law as it relates to staffing agencies and temporary employees specifically. For employers, the outcome of the upcoming presidential election will weigh heavily upon whether these changes will continue for the next four years or whether the NLRB could potentially be reined in. ■

New to the Firm

Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Francesco DeLuca (Boston); Heather Huffman (Cleveland); Kiosha Dickey (Columbia); Britney Dieng (Dallas); Benjamin Anchill and Nicholas Saleh (Detroit (Metro)); Kevin Burch and Cherry Malichi (Indianapolis); AnnRene Braun and Kaitlin Gallen (Kansas City); Jasmine Simmons (Los Angeles); David Sawyer (Miami); Kelsey Schmidt (Milwaukee); Hanna Raanan (Orange County); Daniel Fassio (Pittsburgh); Stuart Matthews (Raleigh); Juan Hernandez (San Antonio); Cara Barrick and Rina Wang (San Francisco); Russell Buhite (Seattle/Tampa); Joseph Charron (St. Louis); Ina Crawford (Tampa); and D.A. Duggar, James Murphy and Matthew Thorne (Washington, D.C.). Ogletree Deakins has 750 attorneys in 48 offices across the United States, in Europe, and in Mexico.

"HARASSMENT"

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According to Matherne, she was physically and verbally harassed by three cooks at the restaurant. She further alleged that the weekend manager, Bob McCormick, made several harassing comments that were sexual in nature. Matherne did not report McCormick's comments to anyone, but told other members of the management team about the cooks' actions.

Tart claimed that she was physically and verbally harassed by one of the cooks and verbally harassed by another worker. She reported these incidents to management as well. Both Matherne and Tart also allegedly witnessed physical harassment and heard verbal harassment directed at other female workers in the restaurant.

Charlotte Owen, the weekday manager, made a record of Matherne's complaints and reviewed video footage from the restaurant's surveillance cameras. However, the tapes did not reveal any actionable conduct. Melvin, who was one of the cooks, was given a formal warning for "disrespectful communication towards [a] co-employee."

On April 6, 2012, the general store manager received a report from the manager on duty that Matherne had complained that another cook, Rafael, had tried to kiss her. The general store manager came to the Boutte location and reviewed surveillance video (which did not reveal any actionable conduct). She also interviewed Matherne and Rafael separately to obtain their versions of the incident. Following the investigation, the company "reduced Rafael's work schedule and transferred him to a different shift so that he and Matherne would not work together."

At about the same time, the general store manager became aware of Tart's complaints of sexual harassment. She again reviewed surveillance video and interviewed the relevant parties and other employees. Tart, at her own request, was subsequently moved to a different shift. The general store manager also conducted a full-staff meeting to review the company's harassment policy and required all employees to watch a video about workplace sexual harassment.

Shortly thereafter, Matherne and Tart resigned from their positions and filed suit against Ruba Management alleging sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1964. The trial judge dismissed the suit and the women appealed this ruling to the Fifth Circuit Court of Appeals.

Legal Analysis

To establish a claim of hostile work environment under Title VII, an employee must prove: (1) she belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action. To be actionable, the harassment "must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment."

Matherne and Tart argued that it was disputed whether Ruba Management took prompt and remedial action once it knew, or should have known, about the alleged harassment. The Fifth Circuit disagreed, noting that a reasonable jury would not find in the workers' favor on this element.

First, the court noted that in many instances, Matherne and Tart did not report the alleged misconduct to management. For example, Matherne did not report the comments made by McCormick to anyone. According to the court, "[s]he therefore cannot show that Ruba knew or should have known of the alleged harassment by McCormick in the first place, much less whether Ruba failed to adequately respond."

The Fifth Circuit also found that when Matherne and Tart did report the misconduct, the company responded promptly. Not only did management review surveillance video, but the general store manager made an in-person visit to the restaurant immediately upon learning of the incident. She also conducted interviews and took steps to ensure that the workers and alleged perpetrators were assigned to different shifts. Finally, the company conducted a sexual harassment training program to educate its employees on workplace harassment.

Because the company took prompt and remedial action once it knew about the alleged harassment, the Fifth Circuit held that the workers' claims were properly dismissed by the trial judge.

Practical Impact

According to Patti Perez, a shareholder in the San Diego office of Ogletree Deakins, "This decision illustrates the importance of conducting effective workplace investigations. As demonstrated by this case, prompt action may reduce the chances of subsequent litigation and, should litigation ensue, increase the company's prospects for success. Employers should remember the key elements of a successful workplace investigation: planning and preparing for the investigation; gathering information through effective interviews; analyzing the evidence collected; reaching reasonable conclusions; taking remedial measures; and closing out the investigation and getting back on track." ■

Is the Six-Factor Test Still Good? Eleventh Circuit Endorses Modified Intern Test

by Kristy G. Offitt (Atlanta) and Alfred B. Robinson, Jr. (Washington, D.C.)

A recent decision by the Eleventh Circuit Court of Appeals appears to reject the U.S. Department of Labor's (DOL) oft-recited six-factor test, which is used to determine whether interns are actually functioning as employees. In *Schumann v. Collier Anesthesia, P.A., et al*, No. 14-13169 (September 11, 2015), instead of the six-factor test, the court endorsed a primary beneficiary test designed to account for the economic realities of modern-day internships for academic credit and professional certification.

Background

Twenty-five former student registered nurse anesthetists (SRNAs) who had enrolled in a master's degree program at Wolford College to become certified registered nurse anesthetists (CRNAs) initiated the action. Each SRNA participated in a clinical curriculum at Collier Anesthesia, a Florida corporation that provides anesthesia services. The clinical curriculum required SRNAs to participate in a minimum of 550 clinical cases.

The SRNAs filed suit against Wolford College and Collier Anesthesia, alleging that they were "employees" and not interns, and that they were therefore entitled to recover unpaid wages and overtime under the Fair Labor Standards Act (FLSA). The SRNAs alleged that Collier benefited financially by using their services in place of CRNAs. The defendants responded by noting that the SRNAs were more often a burden than a benefit—in part because "the learning process impedes the actual delivery of anesthesia." The trial judge granted summary judgment to the defendants and the SRNAs appealed.

The Eleventh Circuit's Decision

The Eleventh Circuit Court of Appeals observed that the DOL's six factors did little more than reduce the very specific facts of the U.S. Supreme Court's decision in *Walling v. Portland Terminal Co.* to a rigid test. The court also noted that trying to apply the facts of the nearly 70 year-old *Portland Terminal* case to the facts at issue was "like trying to use a fork to eat soup."

Nonetheless, the Eleventh Circuit adopted "an application of *Portland Terminal's* 'primary beneficiary' test tailored" for the specific internship program at issue. In determining whether the employer or unpaid intern is the primary beneficiary of the program, the appellate court endorsed a seven-factor "non-exhaustive set of considerations," first articulated by the Second Circuit Court of Appeals in *Glatt v. Fox Searchlight Pictures, Inc.* Under the *Glatt* test, no one factor is determinative and every factor need not point in the same direction to conclude that a student is not an employee.

Instead, courts must weigh and balance all of the circumstances, which may include considerations outside of the seven *Glatt* articulated factors:

- The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
- The extent to which the internship provides training similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the end of the internship.

Perhaps the most important distinction between the *Glatt* test and the DOL's test is the "primary beneficiary" analysis. The fourth factor of the DOL's test is that the employer providing the training may not derive any immediate advantage from the students' or trainees' activity. As the Eleventh Circuit noted, however, such an expectation is no longer feasible. According to the court, "we find it difficult to conceive that anesthesiology practices would be willing to take on the risks, costs, and detriments of teaching students in a clinical environment for extended periods (four semesters, for example) without receiving some benefit for their troubles." "[T]he mere fact that an employer obtains a benefit," the court continued, "does not mean that the employer is the 'primary beneficiary,' of the relationship" and cannot render student interns "employees" for purposes of the FLSA.

"The court endorsed a . . . test designed to account for the economic realities of modern-day internships."

Recognizing that some employers may be inclined to maximize their own benefit at the unfair expense of students or trainees, the court suggested a balancing test: Focus on the benefit to the student, but consider whether the manner in which the program is implemented takes unfair advantage of or is otherwise abusive toward the student.

The court did not take a position on whether the SRNAs at issue were "employees," but instead directed the lower court to reassess the facts using the balancing test articulated in its opinion. The Eleventh Circuit's opinion, and the balancing test it articulated, will be well-received by employers with academic or clinical internship programs, many of whom may have found it difficult, if not impossible, to establish that they derived no immediate advantage from such programs. The opinion is a welcome signal that the courts are beginning to recognize the need to more carefully balance the inherent complexities of long-term internship programs with the requirements of the FLSA. ■

Traveling Salesman May Bring Retaliation Claim Under ADA

Court Finds Worker Engaged in Protected Activity and Was Subjected to Adverse Employment Action

A federal appellate court recently held that a trial judge erred in dismissing an employee's retaliation claim under the Americans with Disabilities Act (ADA). According to the Sixth Circuit Court of Appeals, an employee who is not adjudged to be a "qualified individual with a disability" may still pursue an ADA retaliation claim, if that person engaged in activity "protected" by the ADA and then suffered an adverse employment action. ***Hurtt v. International Services, Inc.,*** *No. 14-1824, Sixth Circuit Court of Appeals (September 14, 2015).*

Factual Background

Robert Hurtt was employed as a business analyst by International Services, Inc. (ISI) from 2007 to 2010. In this position, Hurtt was required to travel to sell the company's management and tax consulting services. In 2010, Hurtt resigned due in part to the quality of his assignments and the low commissions generated from these assignments.

In 2011, ISI recruited Hurtt to return to the company as a senior business analyst. Under his new compensation package, Hurtt would receive a $70,000 yearly "draw," a 12 percent commission on sales, pre-paid work-related flights, hotels and car rentals, and $40 per diem for food expenses.

Hurtt returned to ISI in September 2011. According to Hurtt, he soon began traveling extensively with little time for sleep. He also began to experience anxiety and other health problems. Hurtt claimed that he repeatedly asked for a change in his schedule because of these issues, but ISI denied his request.

On September 1, 2012, Hurtt's physician sent the company a letter stating that Hurtt suffered from acute anxiety and depression. She recommended that Hurtt be placed on leave through September 4, 2012, and stated that he might require additional time off.

On September 4, 2012, Hurtt submitted a request for leave under the Family and Medical Leave Act (FMLA) when his anxiety and depression flared up. The following day, ISI terminated Hurtt's draw and pre-paid travel expenses, and placed Hurtt on a "commission-only" pay scale. As a result of the company's action, Hurtt became immediately indebted to ISI for more than $22,000 in "advanced, unearned commissions." According to Hurtt, the new compensation package made it "difficult for [him] to afford" to work.

Hurtt did not return to work after September 4. His attorney sent a letter dated September 18 stating that Hurtt would not be returning to ISI. He subsequently filed a lawsuit alleging retaliation under the ADA (among other claims).

ISI asked the trial judge to dismiss the suit, arguing in part that Hurtt had not shown that he was subjected to an "adverse action" because of his disability and accommodation requests. The trial judge granted ISI's request, and Hurtt appealed this decision.

Legal Analysis

To establish a prima facie case of retaliation under the ADA, Hurtt must show that ISI took an adverse action against him because he engaged in protected activity. The Sixth Circuit Court of Appeals noted that "the pertinent inquiry here is not whether Hurtt proved he had a disability under the ADA, or whether ISI had specific knowledge of Hurtt's alleged disability, but rather, whether Hurtt showed a good-faith request for reasonable accommodations." The court found that Hurtt made a good-faith request when he sought sleep accommodations during his travel; thus, he engaged in protected activity as required by the ADA's retaliation provision.

The Sixth Circuit also held that Hurtt established that he suffered an adverse action when he was constructively discharged by the company. Specifically, the court pointed to the termination of his draw and pre-paid travel expenses and placement on commission-only pay as actions that would dissuade a reasonable person from engaging in protected activity. Thus, his suit was reinstated.

Practical Impact

According to Maria Danaher, a shareholder in Ogletree Deakins' Pittsburgh office: "This decision illustrates two critical points for employers that are dealing with accommodation requests: (1) an individual who is adjudged not to be a "qualified individual with a disability" may still pursue a retaliation claim under the ADA; and (2) requests for accommodation are protected acts, sufficient to support a claim of retaliation. While neither of these points is completely intuitive, there is case law in multiple jurisdictions to support them." ■

Not Your Father's NLRB Returns in December

Ogletree Deakins will be hosting the latest installment of its popular "Not Your Father's NLRB" program on December 10-11, 2015, at The Venetian in Las Vegas. This two-day seminar is designed specifically for both union and non-union employers and will feature an outstanding group of experienced speakers who will explain the latest developments and provide practical tips to help protect your organization.

While the ambush election rules are incredibly significant, they are just the icing on the cake for unions. Over the last seven years, the NLRB has given labor a proverbial wish list of new, favorable rules regulating both union organizing and collective bargaining. From micro-unit concepts that give unions power to define who gets to vote, to rules allowing certain employees to use employer email to organize at work, the playing field has been tilted in labor's favor. More recently, the NLRB has completely redefined the joint-employer definition and stands ready to rule that a union can force jointly-employed workers into the same voting unit with an employer's regular employees (the *M.B. Sturgis* rule). Plus, unions can now use "electronic signatures" on virtual union authorization cards. These are just a few of the changes that will be covered at this timely and informative two-day program.

To maintain the interactive experience of this event, attendance is limited—so make your reservations soon. For more information or to register, see the enclosed brochure or visit www.ogletreedeakins.com/our-programs.