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The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law — December 2014

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Justices Issue Pro-Employer Ruling in FLSA Case

Find Workers Need Not Be Paid for Time Waiting in Security Screenings

*On December 9, the Supreme Court of the United States ruled that the time workers spend undergoing security screenings is not compensable under the Fair Labor Standards Act (FLSA). According to Justice Thomas, writing for a unanimous Court, the security screenings at issue were not the principal activities the employees were employed to perform and were not "integral and indispensable" to those activities. Thus, the screenings were "noncompensable postliminary activities." In arriving at this conclusion, the Court provided some much-needed clarification on the "integral and indispensable" test, holding "that an activity is integral and indispensable to the principal activities that an employee is employed to perform—and thus compensable under the FLSA—if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." **Integrity Staffing Solutions, Inc. v. Busk,** No. 13-433, Supreme Court of the United States (December 9, 2014).*

Factual Background

Integrity Staffing Solutions, Inc., which provides staff and warehouse space to companies, required its workers to undergo an anti-theft search at the end of each shift. As part of the search, which required employees to wait up to 25 minutes, employees were asked to remove their wallets, keys, and belts and pass through metal detectors.

Two warehouse employees of Integrity Staffing filed suit against the company on behalf of themselves and other workers claiming federal and state law

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Ogletree Deakins Named A "Law Firm of the Year"

Also Garners "Powerhouse" Rankings in BTI Litigation Outlook Report

Ogletree Deakins has been named "Law Firm of the Year" in the Labor Law - Management category in the 2015 edition of the *U.S. News – Best Lawyers* "Best Law Firms" list. This is the fourth consecutive year that Ogletree Deakins has been named a "Law Firm of the Year" and the second consecutive year that the firm has been named "Law Firm of the Year" in the Labor Law - Management category. Only one law firm in each practice area receives the "Law Firm of the Year" designation.

Ogletree Deakins also earned "First Tier" national practice area rankings in six categories: Employee Benefits (ERISA) Law; Employment Law - Management; Immigration Law; Labor Law - Management; Litigation - Labor & Employment; and Construction Law. Thirty-three of the firm's offices earned a metropolitan "First Tier" ranking.

"We are honored to be named a *U.S. News – Best Lawyers* 'Law Firm of the Year' for the fourth consecutive year," said Kim Ebert, managing shareholder of Ogletree Deakins. "Our continued selection for this honor underscores the firm's steadfast commitment to providing our clients with outstanding service and value."

Ogletree Deakins also received "Powerhouse" rankings in the areas of complex employment litigation and routine employment litigation in the *BTI Litigation Outlook 2015* report, a national survey of more than 300 senior in-house attorneys. This is the third consecutive year that Ogletree Deakins has earned a "Powerhouse" distinction in that study. ■

California Mandates Anti-Bullying Training for Supervisors

by Timothy A. Garnett, Ogletree Deakins Learning Solutions

According to a recent study published in the *Harvard Business Review*, 98 percent of employees have faced some form of bullying in their workplace, ranging from verbal abuse to physical threats or assault. Bullying is a problem for employers too. Bullied employees are often less productive and innovative, and also more likely to leave their jobs. In addition, a hostile work culture may affect external relationships when abusive employees are likewise rude to customers or clients. In response to these concerns, California became the first state to mandate training on workplace bullying.

In the early 2000s, an initiative to pass a "Healthy Workplace Bill" spread across the country. The model legislation would have allowed workers to sue employers for harassment even when the harassment is not based on a "protected category." On September 9, 2014, California Governor Jerry Brown signed into law the first step toward increased regulation of workplace civility.

California employers with more than 50 employees must now provide training to all supervisors on bullying. Where the statute previously required two-hour sexual harassment training for supervisors, it now requires that "abusive conduct" also be covered in the training.

"Abusive conduct" is defined as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." This conduct may include "verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance."

The statute notes that a single act is not sufficient to constitute "abusive conduct," unless especially severe and egregious. The law does not specify how much of the two-hour training must be dedicated to abusive conduct, nor does it explain exactly what content should be covered. Any training on abusive conduct will count toward the two-hour harassment training requirement currently in place.

California employers should revise their training programs in anticipation of this new requirement, which takes effect on January 1, 2015. Employers in other states are strongly encouraged to consider including bullying in their training programs as well for the benefit of their employees and workplace productivity. ■

Ogletree Deakins

Publisher
Joseph L. Beachboard

Managing Editor
Stephanie A. Henry

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.

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OFCCP Issues Final Rule Barring Discrimination by Federal Contractors

The Office of Federal Contract Compliance Programs (OFCCP) has announced a Final Rule implementing changes made to the affirmative action requirements by Executive Order 13672, which prohibits discrimination based on sexual orientation and gender identity. The Final Rule requires contractors to ensure that applicants and employees are treated without regard to their sexual orientation or gender identity and replaces the words "sex, or national origin" with the words "sex, sexual orientation, gender identity, or national origin" wherever they appear in the current regulations.

The Final Rule modifies current regulations and obligations of federal contractors in several ways:

- Contractors must amend the Equal Opportunity Clause in subcontracts or purchase orders for new or modified contracts, but the modification may be incorporated by reference (e.g., "To the extent not exempt, this contractor complies with Executive Order 11246, as amended, and the applicable regulations contained in 41 C.F.R. Parts 60-1 through 60-60").
- Contractors must state in solicitations for employees that qualified applicants will receive consideration for employment without regard to protected characteristics, including sexual orientation and gender identity. This can be accomplished by stating that the contractor is an "equal opportunity employer." (Note, however, that contractors covered by disability and veterans laws should expand this tagline to include those categories, such as "Equal Opportunity Employer/Disabled/Veterans.")
- A new supplement to the "EEO Is the Law" poster must be posted as soon as it is available on OFCCP's website or provided by a contracting officer.

The Final Rule is effective 120 days from publication and applies to all covered contracts entered into or modified after the effective date. ■

Ogletree Deakins State Round-Up

California*

A California Court of Appeal recently overturned a jury verdict against an employer. The court held that the jury should have been instructed to decide whether the worker's race was a *substantial* motivating factor in the decision to discharge him, as opposed to a motivating factor. However, the court upheld a judgment against the worker's supervisor. *Norton v. San Bernardino City Unified School District*, No. G049496 (October 9, 2014).

Florida

The Eleventh Circuit Court of Appeals recently upheld the dismissal of a national origin bias suit brought by a Florida high school math teacher of Chinese descent. The court found that the principal's comments that she had a "very strong accent" was not direct evidence of discrimination. *Fong v. School Board of Palm Beach County*, No. 13-10393 (November 4, 2014).

Georgia

A Georgia state court judge recently upheld revisions to the city of Atlanta's pension plan. In doing so, the court rejected claims by city employees who claimed in a class action that the changes were unconstitutional. According to the court, the city's enrollment provisions "clearly authorize the city to amend its pensions plans." *Borders v. City of Atlanta*, No. 2013CV239021 (November 10, 2014).

Illinois*

The Supreme Court of the United States recently refused to consider a challenge to the Illinois Employee Classification Act, which defines workers in the construction industry as "employees" unless they can meet the detailed requirements of the statute for "independent contractor" status. As a result, the decision by the Illinois Supreme Court upholding the Act will stand.

Indiana*

The Indiana Supreme Court recently reversed a lower court ruling that held Indiana's right-to-work statute unconstitutional. The court ruled that the law does not constitute a demand by the state of Indiana that a union provide its services free to workers who do not pay dues, and therefore is constitutional. *Zoeller v. Sweeney*, No. 45S00-1309-PL-596 (November 6, 2014).

Massachusetts*

On November 4, 2014, Massachusetts voters approved a measure requiring employers to provide sick leave to all employees in the state, with limited exceptions. The new law, which takes effect on July 1, 2015, requires employers with 11 or more employees to provide *paid* sick leave.

Michigan*

The Michigan Court of Appeals recently ruled that employees discharged for failing a drug test because of medical marijuana use are not disqualified from receiving unemployment benefits. The three-judge panel held that the denial of unemployment benefits constituted a prohibited "penalty" and there was no evidence that the workers were under the influence while on the job. *Braska v. Challenge Manufacturing Company*, No. 313932 (October 23, 2014).

New Jersey*

Following Newark and Jersey City's lead, the cities of Passaic, East Orange, Paterson, and Irvington recently passed ordinances that will provide the majority of private employees working in those cities with paid sick leave. On Election Day, voters in Montclair and Trenton approved similar measures. When these laws take effect, it will bring the total number of New Jersey cities with paid sick leave ordinances to eight.

Oregon*

Oregon voters recently approved a measure to legalize recreational marijuana use beginning July 1, 2015. The new law allows individuals who are 21 years of age and older to possess up to eight ounces of marijuana in their home. The new law, however, specifically provides that it "may not be construed to amend or affect in any way any state or federal law pertaining to employment matters."

Rhode Island*

A graduate student has filed suit with the help of the Rhode Island chapter of the ACLU against a textile manufacturer that allegedly rescinded an offer for a paid internship because the student is a registered cardholder in the state's medical marijuana program. The suit is the first to invoke the anti-discrimination provisions of Rhode Island's medical marijuana law.

Tennessee

The Tennessee Supreme Court has reinstated a jury verdict against a local university that was sued for retaliation. The court found that there was sufficient evidence to prove that a supervisor was aware of a maintenance worker's protected activity when she assigned him duties that were outside his medical restrictions. *Ferguson v. Middle Tennessee State University*, No. M2012-00890-SC-R11-CV (October 29, 2014).

Texas*

A federal judge in Texas recently enforced a five-year noncompete provision contained in a purchase agreement. According to the judge, state courts "are more amenable to long non-competes in the purchase agreement context than the employer-employee context." *Henson Patriot Ltd. Co. v. Medina*, No. 5:14-cv-534 (September 11, 2014).

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

President Obama Takes Executive Action on Immigration, But Lawsuit Follows

*by Charles Gillman and Andrew W. Merrills**

On November 20, 2014, President Obama officially announced his plan for a series of executive actions on immigration. In addition to shielding several million undocumented immigrants from deportation, the president's plan impacts the business community by changing certain aspects of employment-based legal immigration programs.

Following the president's announcement, however, the attorneys general and governors of 20 states filed a complaint for declaratory and injunctive relief in federal court in Texas challenging portions of the president's executive action. Below is a summary of the key issues addressed by the president's plan and the challenges raised by the federal lawsuit.

Key Provisions

U.S. employers will experience the impact of the executive action in several ways:

Undocumented Workers Will Receive Employment Authorization Documents

Four to five million people will become eligible to apply for employment authorization to lawfully work in the United States. U.S. employers that employ these workers will need to ensure compliance with Form I-9 employment verification requirements.

The Benefit of Adjustment of Status to Employment-Based Immigrants Will Advance

Beneficiaries of approved employment-based immigrant visa petitions (and their eligible family members) may become eligible to file for adjustment of status to permanent residence sooner and obtain interim benefits, such as employment authorization and travel documents. Long-awaited guidance on job changes that occur during the pendency of the green card process is also expected. Additionally, employment authorization for certain H-4 spouses of H-1B employees who have reached certain green card processing milestones is also likely to be provided.

Foreign Entrepreneurs Will Have Increased Immigration Options and the National Interest Waiver Category Will Expand

The U.S. Department of Homeland Security (DHS) will expand immigration options for foreign entrepreneurs who meet certain criteria for creating jobs, attracting investment, and generating revenue in the United States. The proposal would include expanding national interest waiver petitions to entrepreneurs, researchers, inventors, and founders. The U.S. Citizenship and Immigration Services (USCIS) will also propose a program that will permit the granting of advance parole travel documents to inventors, researchers, and founders of start-up companies who have not yet qualified for a national interest waiver.

The STEM-based Optional Practical Training Program Will Expand

DHS will propose changes that will expand and extend the use of the existing Optional Practical Training (OPT) program. These changes will benefit foreign students studying science, technology, engineering, and mathematics (STEM) at U.S. universities. These changes should allow employers to employ highly skilled workers beyond the current maximum of 29 months in the OPT program.

Guidance on L-1B Intra-Company Transferee Petitions Will Be Clarified

DHS is expected to clarify its guidance on temporary L-1B specialized knowledge visas for foreign workers who transfer from a company's foreign office to its U.S. office. It is hoped that the forthcoming guidance will result in more predictable adjudications by the government.

The PERM Labor Certification Process Will Be Modernized

The U.S. Department of Labor (DOL) plans to take regulatory action to modernize the PERM labor market test that is required of many employers that sponsor foreign workers for immigrant visas. Specifically, the DOL will seek input on the following:

- Options for identifying labor force occupational shortages and surpluses and methods for aligning domestic worker recruitment;
- Methods and practices designed to modernize U.S. worker recruitment requirements;
- Processes to clarify employer obligations to ensure PERM positions are fully open to U.S. workers;
- The possibility for premium processing of applications; and
- The introduction of a process for efficiently addressing nonmaterial errors.

"This suit will delay or possibly prevent the implementation of . . . portions of the President's executive action."

The Immigrant Visa System Will Be Reformed

Finally, the administration will direct federal agencies to look at modernizing the visa system in order to make more efficient use of the current allotment of immigrant visas. More immigrant visas may become available based upon decisions on issues such as whether dependent visa beneficiaries should be counted and whether past unused visa numbers can be recaptured.

Federal Lawsuit

The lawsuit, which was filed on December 3, 2014, does not address the business-related portions of the executive action. The suit will impact the four to five million individuals who would become eligible to obtain employment authorization in the United States as a result of the president's executive action. This will also indirectly affect U.S. employers since these workers may be delayed or prevented from obtaining employment authorization.

The states seek the following relief:

- A declaratory judgment and injunction that the defendants' [the president's] deferred action program violates the U.S.

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* Charles Gillman is of counsel and Andrew Merrills is a shareholder in the Raleigh office of Ogletree Deakins. Both attorneys concentrate their practice in the areas of U.S. and worldwide business visas and employment-based immigration for multinational corporations.

Lauren McFerran Confirmed to National Labor Relations Board

Union-Friendly Agenda Likely to Continue

On December 8, 2014, the U.S. Senate voted along party lines to confirm President Obama nominee Lauren McFerran to the National Labor Relations Board (NLRB). McFerran, currently the chief labor counsel for the Senate Committee on Health, Education, Labor and Pensions (HELP Committee) will replace former union attorney Nancy J. Schiffer on the five-member Board.

McFerran was not the president's first choice to replace Schiffer. The administration pulled the nomination of recess appointee Sharon Block following opposition by Republicans and others. Block's recess appointment was ruled unconstitutional by the Supreme Court of the United States in its *Noel Canning* decision.

McFerran did not get all of the Democrat votes on the cloture vote—Senator Joe Manchin (D-WV) voted "nay" on cloture. There has been some speculation in Washington that Manchin may switch party affiliations in the next congress. On the other hand, McFerran's nomination was pushed through in record time. With judicial confirmations averaging 180 to 210 days, her confirmation by the lame duck Senate took little more than a month.

McFerran's primary experience is with the federal government. After graduating from Yale Law School, McFerran worked for a short time at a union-side law firm based in Washington, D.C. She also clerked for Judge Carolyn Dineen King on the Fifth Circuit Court of Appeals. McFerran became a Senior Labor Counsel to Senator Ted Kennedy on the Senate HELP Committee staff. Both she and Sharon Block were on Kennedy's HELP staff and shared responsibility for the labor agenda. She was also on Senator Tom Harkin's (D- IA) staff when Harkin became Chairman of the HELP Committee.

During Senate confirmation hearings, McFerran did not answer questions regarding her views concerning a number of high profile issues pending before the Board. The outcome of these cases will dramatically impact the future of labor-management relations. Significant pending issues include the criteria for determining joint employer status and the standard for deferral to labor arbitration awards.

Despite her unwillingness to commit to a position on these issues, observers of the NLRB expect that McFerran will vote in lock step with her fellow Democratic Board members, Chairman Mark Gaston Pearce and Kent Hirozawa. Accordingly, employers should likely continue to expect a steady stream of union-friendly rulings from the NLRB. ■

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Constitution's "Take Care Clause." The Take Care Clause limits the president's power and ensures that he will faithfully execute Congress's laws—not rewrite them under the guise of executive "discretion."

- A declaratory judgment that the defendants' deferred action program is *procedurally* unlawful under the Administrative Procedures Act (APA). The APA requires courts to hold unlawful and set aside any agency action taken "without observance of procedure required by law."
- A declaratory judgment that the defendants' deferred action program is *substantively* unlawful under the APA.
- All other relief to which the plaintiffs [the states] may show themselves to be entitled.

Commentary

The federal courts will determine the limits of prosecutorial justification underlying President Obama's executive action. Commentators in the *New York Times'* op-ed pages have expressed a range of opinions on the executive action.

One commentator, speaking against the executive action, stated: "There's no logical stopping point to the prosecutorial justification underlying President Obama's immigration policies. Presidents could simply decide not to enforce entire section of the Clean Air Act, tax code, or labor laws, or exempt entire categories of people—defined unilaterally by the president—on the assertion that those laws are 'unfair' and there aren't enough resources to go around. The president would have power to grant a 'privilege' or exemption from any federal law, defying the plain language [of] those laws and the will of the people's Congress."

Another commentator, also speaking against the executive action, stated: "But just because the president can't deport everyone, doesn't mean he can choose to protect millions. Executive discretion cannot be unfettered, and along the continuum from complete enforcement to non-enforcement, the presumption of unconstitutionality increases. As non-enforcement of the law leans toward thwarting Congress's statutes, rather than merely conserving resources, prosecutorial discretion turns into an abuse of power."

In favor of the executive action, one commentator noted: "Critics of the plan the president is reported to be considering argue that the Constitution obliges him to 'take care that the laws be faithfully executed,' an obligation that seems to give the lawmaker, Congress, the primary authority to set policy. They say that refusing to enforce immigration law against millions of illegal immigrants violates that constitutional duty.

"Yet the Constitution also gives the president 'executive power' which has always been understood to include the discretionary power to allocate resources among enforcement efforts…The only difference between the president and his predecessors is that the president has openly declared the de facto policy of his predecessors. We might disagree about whether this move is wise, but it's not a constitutional violation."

It is difficult to predict how the district court will rule, but it appears likely that at the very least this suit will delay or possibly prevent the implementation of the portions of the president's plan that pertain to deferred action for several million undocumented immigrants.

Ogletree Deakins and *The Employment Law Authority* will keep you apprised of any new developments on this topic. Stay tuned! ■

New to the Firm

Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. Ted Meyer joins the Houston office as a shareholder. In addition to representing employers in labor and employment matters for over 20 years, Meyer has extensive experience managing an office of a national law firm as well as leadership in particular practice groups. Jennifer Santa Maria is a new shareholder in the firm's San Diego office. Her practice focuses on employment litigation, which includes defending corporations, organizations, and individuals in a variety of legal claims including wrongful termination, harassment, discrimination, retaliation, wage and hour claims, breach of contract, and employee classification issues. Other new attorneys include: James Paul Rinnan (Houston); Dana Krulewitz (Las Vegas); and Carmine J. Pearl, II (Orange County).

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wage and hour violations. The workers claimed that their employer violated the FLSA and state labor laws by failing to pay them for the time they spent in security screenings that the company used to prevent theft. The district court granted Integrity Staffing's motion to dismiss the workers' complaint, holding that the time they spent passing through the security clearance was not compensable.

The case was appealed to the Ninth Circuit Court of Appeals. The appellate court noted that the FLSA does not require employers to compensate employees for activities that are "preliminary" or "postliminary" to employees' "principal activity or activities." But, preliminary and postliminary activities are compensable if they are "integral and indispensable" to an employee's principal activities. According to prior case law, to be "integral and indispensable," an activity must be "necessary to the principal work performed" and "done for the benefit of the employer."

The Ninth Circuit found that the security clearances were necessary to the employees' primary work, which involved access to merchandise, and were done for the benefit of the employer (as the security screenings were intended to prevent theft by employees). Thus, the court ruled that the warehouse workers had stated a valid claim for relief under the FLSA.

Circuit Court Decisions

In arriving at its pro-worker conclusion, the Ninth Circuit distinguished cases from other circuit courts (namely, the Second Circuit and the Eleventh Circuit) holding that time spent clearing security is not compensable. The security screenings at issue in *Integrity Staffing*, the court found, were implemented due to the nature of the employees' work and because of employees' access to merchandise. In other decisions, the security screenings had been unrelated to employees' primary work and had not been implemented for the employer's benefit. Noting that there was no blanket rule that time spent going through a security screening is noncompensable, the appellate court stated that the "integral and indispensable" test should have been applied to analyze the warehouse workers' claims.

The Supreme Court's Decision

The Supreme Court agreed to hear the case to decide whether time spent in security screenings is compensable under the FLSA. The Court reversed the Ninth Circuit's decision and held that the time spent passing through the security clearance is not compensable.

The Court started its analysis with the law's exemption for "activities which are preliminary to or postliminary to said principal activity or activities," and noted that the Court has interpreted the exemption to include "all activities which are an 'integral and indispensable part of the principal activities.'"

The Court defined the phrase "integral and indispensable" as follows: "An activity is therefore integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."

Finding that Integrity Staffing did not employ its workers to undergo security screenings but to retrieve and package warehouse products, the Court ruled that the security screenings were noncompensable postliminary activities. In addition, the Court found that the screenings also were not "integral and indispensable" to the employees' duties as warehouse workers in that they were not "an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment." The Court also noted that the employer "could have eliminated the screenings altogether without impairing the employees' ability to complete their work."

Providing further clarification on the "integral and indispensable" test, the Court found that the test "is tied to the productive work that the employee is employed to perform" and not whether the employer required the particular activity. The Court also rejected the workers' claim that they should have been compensated for the time they spent waiting to undergo the screenings because the employer could have reduced that time to a de minimis amount. The fact that the employer could have reduced the time, the Court found, "does not change the nature of the activity or its relationship to the principal activities that an employee is employed to perform."

Practical Impact

According to Alfred B. Robinson, Jr., a shareholder in the Washington, D.C. office of Ogletree Deakins who co-chairs the firm's Wage and Hour Practice Group (and who previously served as the acting Administrator of the Wage and Hour Division of the U.S. Department of Labor): "Employers should be encouraged by this unanimous decision of the Supreme Court. In finding that the security screening time was noncompensable, the Court validates practices by companies to safeguard their inventory and minimize theft. Further, and perhaps more importantly, the clarification by the Court of which activities are integral and indispensable to an employee's principal activities is helpful guidance for employers when evaluating which activities are an intrinsic part of the work activities that employees cannot avoid or neglect when performing their principal activities and for which

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Court Upholds Employer's Decision to Discharge Potentially Violent Employee

Finds Worker Failed to Show That He Was Fired Because of His Hearing Impairment

A federal appellate court recently affirmed a judgment against a worker who claimed that he was fired because of his hearing impairment in violation of the Americans with Disabilities Act (ADA). The Ninth Circuit Court of Appeals found that the employee could not show that the reasons for his discharge—including intimidation of his coworkers by threats of violence and conducting personal business during work hours—were pretextual. The court also rejected the worker's argument that his employer's tolerance of his "bad behavior" for years before he made an accommodation request confirmed that his discharge was retaliatory. ***Curley v. City of North Las Vegas,*** *No. 12-16228, Ninth Circuit Court of Appeals (December 2, 2014).*

Factual Background

During his employment with the City of North Las Vegas, Michael Curley received numerous oral and written reprimands. In 2008, Curley filed a discrimination charge with the U.S. Equal Employment Opportunity Commission (EEOC) claiming that the city denied his request for an accommodation for his hearing impairment. He also alleged that the city retaliated against him for previously filing a discrimination and retaliation charge.

In 2009, Curley made a second accommodation request for his hearing impairment. He asked to be relieved from duties requiring him to be near one of the trucks he operated. The city rejected his request because those trucks were essential to his position and recommended that Curley use hearing protection. Shortly thereafter, Curley was involved in a heated verbal exchange with a coworker. As a result, the city placed Curley on administrative leave and initiated an investigation into his behavior.

The investigation revealed that Curley had repeatedly threatened his coworkers and their families with physical violence. In addition, multiple coworkers claimed that Curley conducted personal business while at work, and it was revealed that Curley was operating an ADA consulting business during work hours. At the conclusion of the investigation, the City fired Curley for (1) failing to perform duties due to excessive personal phone calls, (2) intimidating his coworkers by threats of violence, (3) conducting and soliciting personal business on work time, and (4) making disparaging remarks about his supervisors and the city.

Curley filed suit under the ADA alleging that the city unlawfully terminated his employment because of his hearing impairment and retaliated against him for filing an EEOC complaint and requesting an accommodation. A federal judge granted the city's motion for summary judgment, and Curley appealed this decision to the Ninth Circuit Court of Appeals.

Legal Analysis

The Ninth Circuit first found that Curley failed to offer any basis for believing that any of the four reasons that the city had provided for his discharge were a pretext for discrimination. Curley argued that the results of a fit-for-duty evaluation, which showed that he was fit for duty and not a danger to himself or others, called into doubt the city's credibility regarding its reasons for firing him. The Ninth Circuit rejected this argument finding that the city fired Curley "because of the threats he had made in the past, not the danger of future violence." Moreover, even if the evaluation had undermined the city's credibility with regard to its concerns about Curley's intimidating behavior, it did not refute the city's three other reasons for his termination.

With regard to his retaliation claim, Curley argued that because the city tolerated his behavior in the past, his discharge must have been retaliation for the fact that he filed an EEOC claim and made an accommodation request. The Ninth Circuit rejected this argument as well, finding that "Curley wrongly assumes that the [c]ity was aware of the severity and scope of his misconduct during the years in which it refrained from terminating him." According to the court, the city's failure to fire Curley sooner is not evidence that its reasons for firing him were pretextual.

Finally, the court rejected Curley's claim that the close temporal proximity between his discharge and his protected activity is evidence of pretext. According to the court, because of the information revealed about Curley during the city's investigation, the timing "does nothing to refute the [c]ity's legitimate explanations for the adverse employment action." Thus, the court affirmed the trial judge's decision in the city's favor.

Practical Impact

According to Berna Rhodes-Ford, of counsel in the Las Vegas office of Ogletree Deakins, "Employers should promptly investigate employee threats and take action consistent with the findings. Often, employers are hesitant to discipline employees who have engaged in protected activity, whether it is a complaint of discrimination or harassment, or a request for accommodation. Regardless of protected activity, employers must protect their employees by removing threats of violence and those who otherwise do not perform up to the employer's expectations." ■

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employees must be paid under the FLSA."

According to Eric C. Stuart, a shareholder in the Morristown, New Jersey office of Ogletree Deakins and a member of the firm's Traditional Labor Practice Group Steering Committee: "Although time spent clearing security is not compensable under federal wage and hour laws, employers with a unionized workforce may be faced with new contract demands by unions seeking to negotiate additional compensation for employees who are required to undergo such screenings. Justice Thomas specifically stated that these claims 'are properly presented to the employer at the bargaining table . . . not to a court in an FLSA claim.' Union demands of this nature are likely mandatory subjects of bargaining under the National Labor Relations Act."

NLRB Establishes New Right for Employees to Use Company Email

by Eric C. Stuart, Ogletree Deakins (Morristown)

A sharply divided National Labor Relations Board (NLRB) ruled in a 3-to-2 decision that employees with access to employer email systems "in the course of their work" must, in most cases, be allowed to use that email to communicate with one another about any and all workplace issues during nonworking time. ***Purple Communications, Inc.,*** *361 NLRB No. 126 (December 11, 2014).*

Factual Background

Purple Communications employs video relay interpreters to provide two-way interpretations of telephone communications between deaf or hard-of-hearing individuals and hearing individuals. The interpreters at issue worked at 16 call centers, which operated on a 24/7 basis.

Purple Communications established a policy prohibiting employees from using its email system except for "business purposes." During an organizing campaign, the union filed an unfair labor practice charge with the NLRB challenging the policy. The union did not claim that the company disciplined or discharged any employee in connection with the policy. Rather, the basis of the charge was that the policy was unlawful on its face.

Legal Analysis

A three-member panel of the NLRB concluded that Purple Communications's email policy violated Section 8(a)(1) of the National Labor Relations Act. Based upon its conclusion that employee use of employer email is dramatically increasing and that email is the electronic equivalent of a "natural gathering place," the Board created a new analytical framework for workplace email use by employees. The starting point in the Board's framework is a presumption "that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time." The Board's analysis yielded the following conclusions:

First, any employee who has been granted access to an employer's email system "in the course of their work" cannot normally be restricted from using that email to communicate with coworkers regarding workplace concerns during nonworking time.

Second, employers can justify a blanket ban on nonwork time use of email only by demonstrating that "special circumstances make the ban necessary to maintain production or discipline." The Board majority observed that it would "be the rare case where special circumstances justify a total ban on nonwork email use by employees." To make use of this concededly narrow exception, employers must "demonstrate the connection between the interest it asserts and the restriction."

Third, absent legally sufficient justification for a total ban on nonwork time email use, the Board's decision permits employers to apply uniform and consistently enforced controls over its email system "to the extent such controls are necessary to maintain production and discipline." However, the Board provides no guidance clarifying this issue.

Fourth, the *Purple Communications* decision recognizes that employers that do not permit nonwork related email use by employees during work time "will have concerns about the extent to which they may monitor employees' email use to enforce that restriction." According to the Board, allegations of unlawful employer surveillance of email will be assessed using the same standards as nonemail surveillance. That is, employers may monitor email use provided such monitoring is in place before a union campaign and does not specifically target union or employee protected activity.

Finally, the decision does not purport to address email access by nonemployees such as union organizers or other third parties and it does not resolve these issues related to any other type of electronic communications system other than employer email.

Practical Impact

On its face, this decision is a major development in labor-management relations and creates a host of potential liabilities for employers. Regardless of whether the decision stands under appellate review, employers that have adopted a business-use-only policy for their email systems must consider rescinding or modifying that rule. It is expected that unions will likely file a wave of new unfair labor practice charges challenging employers' existing email policies. Likewise, employers that provide employees with email access at work but that do not permit employee email use during a representation campaign can expect to have the results of the election challenged by the union and possibly overturned by the Board.

The many unanswered questions will no doubt fuel litigation over, for example, the "special circumstances" required to prohibit nonwork time email use, employer monitoring of email content, and discipline of employees for improper email use, among other issues. The Board has now opened the door to mass solicitation of union authorization cards through a single email to employees at a worksite. These and other issues will no doubt have employers up nights considering ways to navigate the NLRB's email minefield. ■

Ogletree Deakins Hosts Program Focusing on California Law

To provide employers with a better understanding of the myriad of employment laws in the Golden State, Ogletree Deakins is presenting "Navigating California Employment Law"—a strategic program for multi-state employers. The program will be held at the beautiful Silverado Resort and Spa in Napa, California on February 26-28 (with a special pre-conference session on February 25).

The program will feature several guest speakers including the Honorable Patrick J. Mahoney, the Honorable James Ware, and Michael Belote, a lobbyist who has represented employers before the California legislature and state regulators for more than 30 years. On Friday evening, attendees will be transported to Louis M. Martini Winery for a wine tasting and dinner. This event is offered to attendees at no additional charge. For more information or to register for this informative program, see the enclosed brochure, contact Kim Beam at kim.beam@ogletreedeakins.com, or visit our website at www.ogletreedeakins.com.