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**Ebola: Emerging Concerns for Employers**  
*Recent Outbreak Impacts Healthcare and Other Industries*

Recent months have been filled with news reports about the Ebola virus outbreak. On August 8, 2014, the World Health Organization (WHO) stated that the spread of the Ebola virus in West Africa had become an “international health emergency,” and the Centers for Disease Control and Prevention (CDC) declared the outbreak the “first Ebola epidemic the world has ever known.”

News hit closer to home in August when it was reported that two American citizens were flown from Africa to Atlanta, Georgia for treatment of the Ebola virus at Emory University Hospital. A few weeks later, a third Ebola patient was sent to Emory for treatment. Shortly thereafter, the CDC confirmed the first case of Ebola to have been diagnosed in the United States. The patient

began experiencing symptoms approximately five days after arriving in Dallas, Texas from West Africa. Since then, two nurses who came into contact with the Dallas patient in the United States were diagnosed with the virus.

With this news, employers—particularly in the healthcare industry—have raised questions about how to safeguard employees and prepare for the potential impact of an Ebola virus outbreak in the United States. Employers should educate themselves about the Ebola virus, including its methods of transmission and the signs and symptoms of infection. Employers should also be prepared to address employee questions and concerns regarding workplace safety. But employers should

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**Ogletree Deakins Opens Mexico City Office**

*Firm Expands Presence Outside United States to Meet Growing Demand*

Ogletree Deakins recently expanded its international platform by opening an office in Mexico City. The firm has previously opened offices in Berlin, Germany and London, England to meet the growing demand for international legal services. The Mexico City office allows the firm to provide local labor and employment law support for clients with operations in Mexico.

The new office is led by Pietro Straulino-Rodriguez, who joined Ogletree Deakins from the law firm of Sánchez Devanny, where he served as the co-head of the Labor, Social Security and Immigration practice group. Straulino-Rodriguez has been joined by Rodrigo de la Concha Alvarez, Ana Paula Delsol Espada, Rodolfo Giles Salgado, and Jaime Rodriguez Eguarte.

Previously, Straulino-Rodriguez worked in the legal and government relations

department of a global automobile manufacturer. His practice is comprised of servicing international clients with litigation, counseling, and union matters in Mexico. He has advised several national and international companies on compliance with Mexican laws related to a myriad of matters, including individual work contracts, collective bargaining agreements, global policies, employment manuals, and codes of ethics and conduct.

“We are very pleased to expand our ability to service employers’ international needs, and Mexico City was the logical next step for us after Berlin and London,” said Kim Ebert, managing shareholder of Ogletree Deakins. “Pietro is a highly regarded lawyer who embodies our client service culture, and we are very excited to have him and his team of talented legal professionals join our firm.” ■

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## IRS Reminds Employers “Free” Parking May Be Taxable Fringe Benefit

by Vicki M. Nielsen, Ogletree Deakins (Washington, D.C.)

A recent Information Letter issued by the Internal Revenue Service (IRS) on the taxation of employer-provided parking serves as a useful reminder that “free” parking for employees may result in tax obligations for both the employee and the employer. IRS Information Letter 2014-0017 explains that if an employer provides a free benefit to employees for qualified parking, the value of which exceeds the maximum amount that may be excluded from an employee’s income per month, the amount by which the benefit exceeds the exclusion limit must be included in

the employee’s wages for income and employment tax purposes.

### Transportation Benefits

Employers may provide certain transportation fringe benefits to employees without including their fair market value in their income. These include qualified parking, transit passes, vouchers, fare cards or reimbursements for fare cards by the employer, or transportation between home and work in an employer-provided commuter vehicle. Up to \$130 per month (for 2014) is excluded from income for employer-provided transit passes and transportation in a commuter highway vehicle.

Up to \$250 per month (for 2014) is excluded from income for qualified parking. Note that this amount is not reduced if combined with other qualified transportation fringe benefits.

### Qualified Parking Expenses

“Qualified parking” is parking provided to an employee by an employer on or near the employer’s business premises or at a location from which the employee commutes to work using mass transit (such as a park-and-ride lot). Parking is “provided” to an employee if the employer pays for the parking (either to the operator or by reimbursing the employee), or the employer provides the parking on premises that it owns or leases.

Qualified parking does not include parking at or near the employee’s home. Also, qualified parking does not include parking on or near a work location where the employee works for the employer, if (1) the value of parking provided by the employer or reimbursement for the employee’s parking expenses is otherwise excluded from income as a working condition fringe benefit, or (2) the value of parking provided by the employer or reimbursement for the employee’s parking expenses is an employee business expense reimbursed under an accountable plan.

### Value of Qualified Parking

Under the general rule for fringe benefits, transportation benefits are generally valued at fair market value (FMV). The FMV of parking provided by an employer to an employee is based on the cost an individual would have to pay for parking

at the same time and site in an arm’s length transaction (or, if the employer cannot ascertain this information, in the same or a comparable lot in the general location under the same or similar circumstances).

Valuation issues often arise when employers provide their own parking lots. Whatever the employer charges for parking to the general public is generally the amount the employee would have to pay in an arm’s length transaction. If the employer does not offer parking to the general public, the employer must consider the amount surrounding parking facilities charge when determining FMV.

### Excess Amounts

While the FMV of employer parking often is less than the exclusion amount (\$250 per month in 2014), monthly parking costs in major cities may exceed this amount. Generally, an employee is taxed on the amount by which the FMV of the benefit exceeds the monthly exclusion amount plus any amount paid by the employee with after-tax dollars for the benefit. This amount is subject to federal income tax withholding as well as Federal Insurance Contribution Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes. Thus, if an employer provides a qualified parking benefit with a value exceeding \$250 per month, and the employee pays nothing for it, the value of the benefit over the limit must be included in the employee’s wages for income and employment tax purposes.

### No Double-Dipping

In Revenue Ruling 2004-98, the IRS issued guidance forbidding “double dip” parking arrangements. A “double dip” arrangement is one in which an employer: (1) reduces its employees’ pre-tax wages in return for parking provided by the employer; (2) “reimburses” the employees for that cost so that the employees’ net pay is the same as before the reduction in wages; and (3) excludes the reimbursement from the employee’s income. The ruling provides that the employer cannot exclude the same amount from income twice and concludes that the “reimbursements” are taxable income to the employees. This ruling also applies to other benefit arrangements in which pre-tax payments are reimbursed by an employer. ■

# Ogletree Deakins

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#### Additional Information

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## Ogletree Deakins State Round-Up\*

## ALABAMA



The Alabama Department of Labor and the U.S. Department of Labor entered into a formal Memorandum of Understanding to share information regarding independent contractor misclassification by employers. This agreement is expected to result in various initiatives, including enhanced audit and employer education programs.

## ARIZONA



On October 16, the Industrial Commission of Arizona (ICA) announced an increase to Arizona's minimum wage. Effective January 1, 2015, Arizona's minimum wage will increase to \$8.05 per hour. Tipped employees must be paid at least \$5.05 per hour in direct wages. Employers should remember to post the revised Arizona minimum wage poster with the 2015 rate.

## CALIFORNIA



Governor Jerry Brown recently signed Assembly Bill 1897, which extends liability for wage, Cal/OSHA, and workers' compensation violations to companies using workers from staffing agencies and other labor contractors. The bill aims to address the increasing use of long-term temporary workers in place of regular employees by creating joint liability for the labor contractor and the company using the temporary labor.

## FLORIDA



Beginning January 1, 2015, Florida's minimum wage will be \$8.05 per hour, which is a 1.54 percent (or \$0.12) increase from the current year. The new minimum wage for tipped employees will become \$5.03 per hour. The U.S. Department of Labor defines tipped employees as "any employee engaged in an occupation in which he or she customarily and regularly receives more than \$30 a month in tips."

## ILLINOIS



The Illinois Department of Labor recently relaxed the requirements imposed on employers when making deductions from employee wages. Under the new law, Illinois employers may enter into written agreements with employees in advance of making deductions, which allows a recurring series of deductions to be made over time without obtaining the employee's written consent prior to each deduction.

## LOUISIANA



Governor Bobby Jindal recently signed into law several bills that affect employers. The bills' effects include (1) expansion of the Louisiana Human Rights Act to include claims for retaliation; (2) creation of a state law analogue to the federal Equal Pay Act; (3) creation of the Personal Online Account Privacy Protection Act; and (4) limited liability for employers faced with negligent hiring claims.

## MASSACHUSETTS



Governor Deval Patrick recently signed sweeping domestic violence legislation. Under the new law, employers with 50 or more employees must provide employees up to 15 days of unpaid leave in any 12-month period if the employee or a covered family member of the employee is a victim of abusive behavior. The new law is effective immediately.

## MISSOURI



The Missouri Supreme Court recently issued a decision that will affect arbitration agreements relied on by employers across the state. In a 4-to-3 decision, the justices rejected the employer's request to compel arbitration, holding that sufficient consideration had not been provided by the company to form a binding contract. *Baker v. Bristol Care, Inc.* No. SC93451 (2014).

## NEW YORK



On September 30, 2014, New York City Mayor Bill de Blasio signed Executive Order No. 7, which raises the "living wage" for certain employers that contract with the city or that receive government subsidies. The executive order was enacted pursuant to the Fair Wages for New Yorkers Act.

## RHODE ISLAND



Rhode Island recently enacted legislation protecting job applicants' and employees' social media accounts and related information. The new law prohibits employers from requiring these individuals to disclose their social media passwords and to access their accounts while in their employer's presence.

## TENNESSEE



The Tennessee Court of Appeals at Nashville became the first Tennessee appellate court to address whether Tennessee's Uniform Trade Secret Act (TUTSA) preempts common law claims related to unfair competition and misuse of confidential information. The court's decision confirmed that most non-TUTSA claims in unfair competition cases will no longer be viable if the employer claims that the employee, as part of his or her alleged wrongdoing, misused confidential information. *Ram Tool & Supply Co., Inc. v. HD Supply Construction Supply, Ltd.*, No. M2013-02264-COA-R3-CV (2014).

## TEXAS



Governor Rick Perry recently signed a new law that limits negligent hiring and supervision claims. The new law prohibits most causes of action "against an employer, general contractor, premises owner, or other third party solely for negligently hiring or failing to adequately supervise an employee, based on evidence that the employee has been convicted of an offense."

\*For more information on these state-specific rulings or developments, visit [www.ogletreedeakins.com](http://www.ogletreedeakins.com).

## Bullying, Harassment, and Violence: What's Atmosphere Got to Do With It?

by Dennis A. Davis, Ph.D.\*

Most organizations have anti-harassment policies. Additionally, many employers have also expressed their desire to maintain bullying-free and violence-free workplace policies. These policies are designed to explicitly establish the company's stance on bullying, harassment, and workplace violence, establish a line between acceptable and unacceptable behavior, and provide an avenue for relief to employees who have been subjected to inappropriate behavior.

That organizations recognize the significant impact that violence and harassment can have on the work environment is good news. The less-than-good news is that too often these unacceptable behaviors are seen as completely unrelated. There are even instances in which the professionals who are responsible for maintaining an environment free of violence are completely cut off from those responsible for the anti-harassment program. The next step in the discussion of violence is the integration with other topics of concern in the workplace and the recognition that atmospheric changes affect all maladaptive behaviors.

Research suggests that certain atmospheric conditions allow bullying, harassment, and even violence to take hold in the workplace. What's more . . . when we look at the definitions of these behaviors side by side, it is clear that they are interrelated. Consider the following definitions:

- **Bullying:** the repeated infliction of intentional, malicious, and abusive conduct that interferes with a person's ability to do his or her work and is substantial enough to cause physical and/or psychological harm and that a reasonable person would find hostile or offensive.

- **Harassment:** the existence of an environment that is threatening, intimidating, hostile, and/or offensive based upon one's membership in a protected class, or an environment that is "charged" in some

manner (racially, sexually, etc.).

- **Workplace violence:** any act or threat of aggression that implicates the safety, security, or well-being of an individual who is at work or on duty.

While the definitions may differ, most commonly used definitions of these terms contain very similar language. These definitions refer to "atmosphere" and "environment." So the natural question to ask is, "What is the atmosphere that allows bullying, harassment, and even violence to take hold?"

The following six atmospheric conditions open the doors to objectification, devaluation, and dehumanization. They are almost always present when there is a complaint of hostile environment or bullying, and they provide the rationale

for his thoughtfulness and encourage the team to grab a bagel?

If you allow Chad to come in and take over the meeting, you have encouraged several unintended consequences. First, you send Chad the message that it is acceptable to be late to the meeting as long as he brings snacks. The message to him is that the standard rules only apply to others. Next, you send the message to Lucy that she is not valued as highly as others (such as Chad) in the organization. The message to others in attendance is that the rules of the workplace are inconsistently applied.

### Short-Term Goals Are the Only Focus

As humans, it is much easier for us to

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*"Violence often evolves from the objectification and devaluation of others."*

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or excuse (for those who are so inclined) for such behavior.

### Making the Numbers

A business cannot stay viable unless it makes money or hits the right numbers. But businesses are made up of people. And people sometimes hit bumps in the road or run into circumstances that take away from their ability to be productive (e.g., a lack of sleep because of a new baby at home, anxiety surrounding an impending medical test, etc.). Does your organization offer assistance to the employee or toss him or her overboard?

### Rewarding Strong Personality and Aggressiveness

Imagine this scenario. It is 9:15 a.m. and you are 15 minutes into your mandatory weekly staff meeting. Lucy is expressing her excitement from a recent meeting with a new potential client. She is mid-sentence when Chad walks in with fresh bagels and cream cheese for everyone. He loudly announces, "Come and get them while they are hot!" Let's say you can choose only one response. Do you tell Chad that he interrupted Lucy and you would like to hear what she was saying? Or, do you thank Chad

be appropriate today when we believe that there is a tomorrow. It is important for employees to be in the here-and-now as well as be future-oriented. A sign that our employees have achieved that balance is when we are goal-oriented. These goals might be short, mid, or long-term. One way to evaluate your atmosphere is to listen to the language that is used in your workplace. Do you hear a lot of "by any means necessary," and "we will worry about tomorrow when we get there"? If so, your atmosphere may be one where bridges (and relationships) are often burned.

### Personal Friendships Placed Above Business Decisions

Whenever personal relationships trump business decisions, the development of an "in group" is inevitable. "In groups" are cliques that enjoy special status in the social structure of the workplace. That special status can take many forms, but is most dangerous when it involves raises, promotions, and other work-related benefits. Wherever "in groups" exist, "out groups" exist as well. These are individuals who are perceived as unpopular and less valuable to the organization. Employers can combat this

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\* Dennis A. Davis, Ph.D. is the firm's Director of Client Training, and a member of Ogletree Deakins Learning Solutions (ODLS). In that capacity, he implements training programs, which are designed to minimize the risks associated with inappropriate employee behavior.

## OSHA Issues Final Rule on Reporting Requirements Represents a Major Change for Employers

On September 11, 2014, the federal Occupational Safety and Health Administration (OSHA) announced a final rule that significantly changes an employer's duties to report workplace injuries to the agency. The revised rule, which goes into effect on January 1, 2015, requires employers to report in-patient hospitalization of one or more employees as a result of a work-related incident to OSHA within 24 hours. The current rule requires reporting hospitalization of three or more employees within eight hours. The revised rule also adds a requirement that employers report amputations and the loss of an eye as a result of a work-related incident to OSHA within 24 hours.

The only provision under the current rule that is not changing is an employer's obligation to report workplace fatalities to OSHA within eight hours. OSHA is, however, amending the rule to take into account those situations in which the employer does not immediately learn of the fatality.

According to John Martin, a shareholder in the Washington, D.C. office of Ogletree Deakins: "The purpose of the new reporting requirements is obvious: OSHA intends to increase inspections of employee hospitalizations, amputations, and eye loss. Any employer required to submit a report of an accident to OSHA should expect an OSHA inspection, or at least some contact from OSHA. Even for instances that may not be work-related (such as when an employee suffers a heart attack at work), employers can anticipate that OSHA will check the veracity of the employer's report, which may entail the now-standard agency request for the employer's OSHA 300 and 300A logs for the past three to five years." ■

### "BULLYING"

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by making sure that everyone in the organization realizes that their role is important and vital to its success.

### Fear Is A Dominant Emotion

I once overheard a very high-ranking organizational official remark, "I would rather be feared than respected. People who fear you do what you say." What this professional failed to realize is that people who fear you don't tell you what you need to know; they don't share their thoughts and feelings with you; and often, they want to see you fail. This is classic passive-aggressive behavior. It can be subtle (and sometimes not so subtle) treachery and encourages an everyone-for-themselves mentality. In this environment, there is no sense of community, no interest in cheering on the team, and a belief that someone has to win and someone has to lose.

### Fun at the Expense of Others

Workplace fun is defined as the experience of joy and fulfillment while completing one's professional responsibilities. Fun at work is important. Research suggests that when employees perceive their

workplace as fun, they are more likely to go the extra mile, recommend their workplace to others, and remain loyal through difficult times. Unfortunately, sometimes fun can be cruel and inappropriate. Teasing and taunting might be fun for some, but the recipient rarely experiences joy while these behaviors are occurring. The signs that the fun in your workplace has taken an inappropriate turn include:

- **Non-reciprocity.** Employees are taking shots at another employee, but he or she is not participating in the "fun." The workplace fun is only one way.
- **Targeted.** Inappropriate behavior is often targeted toward one individual (or group of individuals). The inappropriate behavior can be recognized as one individual or group picking on another.
- **Personal.** The teasing is of a personal nature. Acceptable one-upmanship might include joking about one's favorite sports team beating another worker's favorite team. Unacceptable teasing often includes something personal about the targeted employee (his or her body type or hairstyle, for example).

### A Final Thought

How can you use this information to

### Ogletree Deakins Scores More Than 180 "Best Lawyers"

*The Best Lawyers in America* recently named 184 of the firm's attorneys to its 2015 edition. The list was compiled based on an exhaustive peer-review survey that included more than 5.5 million detailed evaluations of lawyers by other attorneys. Of the 184 Ogletree Deakins attorneys named to the 2015 list, many earned recognition in multiple categories—144 were named under the Employment Law - Management category; 104 were named under the Labor Law - Management category; and 105 were named under the Litigation - Labor and Employment category. In addition, *Best Lawyers* named 13 of the firm's attorneys as a 2015 "Lawyer of the Year." The publication awards this honor to a single lawyer in each practice area and designated metropolitan area.

make your workplace safer and more productive? First, it is important to remember that respect and dignity are essential to an effective workplace. Respect is the act of showing high regard for others. Dignity is the treatment of others in a formal and reserved manner. This is the complete opposite of the overly-familiar, boundary-free environment that exists in many workplaces today. Establishing boundaries between the personal and the professional aspects of the job will help employees with self-regulation.

Next, recognize the relationship between verbal aggression (such as harassment and bullying) and actual physical violence. Remember that violence often evolves from the objectification and devaluation of others. Many believe that bullying is the "younger sibling" to violence. Harassment (sexual, racial, religious, etc.) should be seen not as completely separate from violence, but rather as part of an environmental ailment that weakens the organizational immune system and allows violence in.

Finally, encourage your employees to see one another as part of the same team, working toward one goal, and cheering for each other's success. ■

### New to the Firm

Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Taylor Bracewell (Atlanta); Jean Kim (Charleston); Raul Chacon, Jr. and David Zwisler (Denver); Madi Ann Bakker, David Harris, Jr., and Emily O'Brian (Greenville); Alice Liu (Houston); Mira Kasliwal and Tae Kim (Los Angeles); Matthew McCluer (New Orleans); Dino Bovell (New York); Marissa Thielen (Phoenix); Patrick Lawler and Emily Rojas (Raleigh); Julia Reardon (St. Louis); Justin Scott (San Francisco); Warren Astbury and Karen Morinelli (Tampa); and Christina Crockett, Ashley Hurst, and Jenna Mennona (Washington, D.C.). Ogletree Deakins now has more than 700 attorneys in 46 offices across the United States, in Europe, and in Mexico.

### “EBOLA”

*continued from page 1*

act cautiously, as companies risk liability under the Americans with Disabilities Act (ADA) if they go too far by directing inappropriate health-related inquiries to employees or taking action against employees they suspect have come into contact with Ebola.

#### About Ebola

Ebola virus disease, formerly known as Ebola hemorrhagic fever, is a severe and often fatal disease caused by an Ebola virus infection. According to the CDC, there are several symptoms associated with the disease, including fever (greater than 101.5 degrees), severe headaches, muscle pain, vomiting, diarrhea, stomach pain, and unexplained bleeding or bruising. On average, symptoms appear between 8 and 10 days following exposure to the virus, though symptoms could appear anywhere from 2 to 21 days after exposure.

The CDC reports that people who become infected with Ebola are not contagious until they are symptomatic. The virus is not transmitted through food, water, or air. Rather, the virus is typically transmitted by direct contact with blood or the bodily fluids of an infected person, or with contaminated objects, such as needles and syringes. Therefore, healthcare workers are most at risk in the United States, in addition to those who travel to the high-risk parts of West Africa. The CDC notes that during Ebola virus outbreaks, “the disease can spread quickly within healthcare settings, such as clinics or hospitals.”

The CDC recently launched a new program through which federal and state health authorities will monitor—for a period of 21 days—all travelers returning from the West African countries affected by Ebola. The CDC will provide travelers whose travel originates in Liberia, Sierra Leone, or Guinea with a

kit upon arrival to the United States that contains a thermometer, education materials, a symptom log, and health authority contact information. If a traveler begins to show symptoms, “public health officials will implement an isolation and evaluation plan following appropriate protocols to limit exposure, and direct the individual to a local hospital that has been trained to receive potential Ebola patients.”

There is currently no vaccine for Ebola, though clinical trials for two experimental vaccines have begun in the United States and the United Kingdom.

#### Addressing Concerns at Work

The possibility that the Ebola virus will spread in the United States raises several concerns and issues for employers. As an initial matter, employers should note that the risk of transmitting Ebola is low at the time of this writing, and employers should be careful not to overreact. Nevertheless, prudent employers should take the opportunity to review their policies, prepare to address employee concerns, and understand when an employer may lawfully inquire into the medical condition of its employees.

Employers should first understand that the ADA impacts how a company engages its employees about the Ebola virus in two major ways. First, the ADA regulates when an employer may make medical inquiries or require medical examinations of applicants and employees. Second, the ADA prohibits employers from excluding employees from the workplace for health or safety reasons unless they pose a “direct threat.”

Therefore, employers should not ask employees about medical symptoms or conditions, or require medical exams of employees, unless such inquiries are job-related and consistent with business necessity, or the employer has some reasonable basis to believe the employee pos-

es a direct threat to others. For example, employers should not require an employee to undergo a medical examination simply because the employee recently traveled to West Africa. However, employers may require employees to report to the company any diagnosis of a contagious illness without requiring the employee to specifically identify the diagnosis or illness. To determine if and when certain medical inquiries may become appropriate, employers should monitor any pertinent guidance issued from the U.S. Equal Employment Opportunity Commission (EEOC) and the CDC, and consult with their employment counsel.

#### Pre-Pandemic Planning

Though the CDC estimates that it is unlikely that the Ebola virus will become a pandemic (i.e., a global epidemic), there are certain pre-pandemic planning steps that concerned employers may lawfully take. Employers may wish to review the EEOC’s 2009 guidance on pandemic planning, which the agency issued during the H1N1 influenza pandemic. While there are significant differences between the 2009 H1N1 global pandemic and the present Ebola epidemic in West Africa, and there is little reason to anticipate any widespread transmission of Ebola in the United States, the EEOC guidance discusses some relevant steps that employers (especially in the healthcare industry) may wish to consider, such as planning for unexpected absences or other work contingencies. Employers should also be prepared to cooperate with health authorities as they work to identify and isolate persons who may have been exposed.

#### Healthcare Workers

With healthcare workers at the greatest risk of infection, employers in that industry should review the latest CDC

*Please see “EBOLA” on page 7*

## High Court to Hear Key Labor and Employment Cases in New Term

### *Wage and Hour and Religious Discrimination Cases to Be Decided by Justices*

The Supreme Court of the United States recently commenced its 2014-15 term with several key cases on the docket that stand to affect employers. Below is a summary of several of these cases.

#### ***Integrity Staffing Solutions v. Busk***

In this case, the Supreme Court will decide whether time spent by employees in security screenings before and after their shifts is compensable under the Fair Labor Standards Act. In the wake of the Ninth Circuit Court of Appeals' decision on this issue in favor of employees, numerous class action lawsuits have been filed against employers seeking back pay for time spent undergoing security screenings. The Court heard oral arguments on October 7.

#### ***Young v. United Parcel Service***

The issue in this case is whether em-

ployers that provide work accommodations to non-pregnant employees with work limitations are required to provide accommodations to pregnant employees who are "similar in their ability or inability to work." This case will require the Supreme Court to determine congressional intent in enacting the Pregnancy Discrimination Act of 1978. More than 100 members of Congress have urged the Supreme Court to overturn the Fourth Circuit Court of Appeals' decision finding against the pregnant employee on this issue. Oral arguments are scheduled for December 3.

#### ***Mach Mining LLC v. EEOC***

In this case, the Supreme Court will decide whether and to what extent courts may enforce the U.S. Equal Employment Opportunity Commission's (EEOC) duty to conciliate a case prior to bringing a

lawsuit. Mach Mining raised the EEOC's failure to conciliate as an affirmative defense. The Seventh Circuit Court of Appeals held that the EEOC's conciliation efforts were not reviewable. This ruling stands in sharp contrast to contrary holdings on the same issue by courts in other circuits. Oral arguments in this case have not yet been scheduled.

#### ***EEOC v. Abercrombie & Fitch Stores, Inc.***

In this case, the Supreme Court will decide whether an employer can be held liable under Title VII of the Civil Rights Act of 1964 for refusing to hire an applicant based on a "religious observance and practice," where the employer had no notice that a religious accommodation was required and there was no request for accommodation made by the applicant. A Muslim woman who was not hired by the retailer had applied for a position wearing a hijab, along with Abercrombie clothes. However, the applicant did not inform the retailer that she was Muslim, that she wore the headscarf for religious reasons, or that she would need a religious accommodation, if hired, due to a conflict between her religious practices and the company's dress policy (which prohibited employees from wearing black clothing and "caps"). The Tenth Circuit Court of Appeals ruled in favor of the employer. Oral arguments in this case have not yet been scheduled.

#### ***Dart Cherokee Basin Operating Company, LLC v. Owens***

At issue in this case is how much evidence an employer seeking removal to federal court pursuant to the Class Action Fairness Act of 2005 is required to include in its notice of removal—whether it is enough to provide only a "short and plain statement of the grounds for removal" or whether more specific evidence of federal jurisdiction is required. The Tenth Circuit Court of Appeals previously affirmed a district judge's ruling, holding that the employer must establish the amount in controversy by a preponderance of evidence. The Court heard oral arguments on October 7.

Ogletree Deakins will keep you apprised of any developments from the Supreme Court. Stay tuned! ■

## **"EBOLA"**

*continued from page 6*

guidance, such as the "Infection Prevention and Control Recommendations for Hospitalized Patients with Known or Suspected Ebola Hemorrhagic Fever in U.S. Hospitals." Healthcare employers should educate employees on the signs and symptoms of Ebola, and clinical employees working in emergency departments should be educated on CDC screening guidelines. The CDC has developed a screening poster that healthcare facilities can post in their emergency departments. Healthcare employees should be reminded of proper procedures for the use of personal protective equipment (PPE) and the handling and disposal of contaminated medical waste. Hospitals and other healthcare facilities may also wish to consult the CDC's preparedness checklist.

## **Communication and Education in the Workplace**

Employers in other industries should be prepared to respond to employee questions and concerns regarding workplace safety, such as by educating employees on the means and low risk of transmission in the United States. Employers should also be prepared to cooperate with healthcare authorities in the event an employee is identified by the authorities to have been exposed to the Ebola virus. Finally, some employers may wish to educate their employees on the signs and symptoms of Ebola virus disease and to encourage employees who believe themselves to be symptomatic to stay home, seek appropriate medical treatment, and request medical or other leave as may be appropriate. However, given the low risk of transmission in the United States, employers outside of the healthcare industry may wish to temper and carefully consider their communications with employees so as to avoid violating the ADA or creating unnecessary panic and concern in the workplace.

For more information on the Ebola virus, employers should consult the CDC's Ebola resources on their website.

*\*This article was authored by Michael Eckard and Jean Kim and was first published on the Ogletree Deakins blog (blog.ogletreedeakins.com). Eckard is a shareholder in the Atlanta office of Ogletree Deakins, and a member of the firm's Ebola Rapid Response Team. Kim is a 2014 graduate of the Charleston School of Law and is currently awaiting admission to the state bar of South Carolina. ■*

## NLRB Finally Finds Facebook Activity That It Doesn't "Like"

*Holds Posts by Two Employees Were Not Protected Conduct Under Federal Law*

*The National Labor Relations Board (NLRB) recently found a Facebook conversation it couldn't bring itself to "Like." The NLRB held that a Facebook conversation between two employees was so egregious that it was not entitled to concerted activity protection afforded by the National Labor Relations Act (NLRA). This case illustrates that there are some employee activities that fall within the realm of unacceptable conduct not protected by the NLRA. **Richmond District Neighborhood Center, Case 20-CA-091748 (October 28, 2014).***

### Factual Background

Under Section 7 of the NLRA, employees may engage in joint (or "concerted") activity to raise complaints and attempt to obtain a remedy. In recent years, the Board and its General Counsel have applied these principles to protect Facebook-related conduct, including "liking" the comments of a former employee who posted that the supervisor was "such an asshole" (*Three D, LLC d/b/a Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (August 22, 2014)) and publicly criticized coworkers in violation of the company's anti-harassment and anti-bullying policies (*Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (December 14, 2012)). But in *Richmond District*, the NLRB found that the employee's Facebook discussion

had simply gone too far to deserve the NLRA's protection.

A teen center that provides after-school activities for students at a San Francisco high school asked employees to participate in a year-end meeting to discuss the "pros" and "cons" of working at the center. Two employees felt that supervisors reacted negatively to the comments shared, the majority of which were cons. That night, the two employees engaged in an exchange on Facebook, complaining about their supervisors and planning what the Board later characterized as "insubordinate acts." One of the employees suggested throwing parties for the kids without regard to the financial ramifications:

"Let them do the numbers, and we'll take advantage, play music loud, get artists to come in and teach the kids how to graffiti up the walls and make it look cool, get some good food. I don't feel like being their bitch and making it all happy-friendly-middle school campy. Let's do some cool shit, and let them figure out the money. No more [former supervisor]. Let's f\_\_\_ it up. . . ."

"That's why this year all I wanna do is shit on my own. Have parties all year and not get the office people involved. Just do it and pretend they [sic] are not there. . . . Well make the beacon pop this year with no ones help.

"F\_\_\_ em. Field trips all the time to

wherever the f\_\_\_ we want!"

Another post by one of the workers suggested a complete lack of concern for the welfare of the children: "let them figure it out and they start loosn' kids i aint help'n HAHA."

The next day, another employee sent screenshots of the conversation to management. The employer then rescinded the workers' rehiring letters.

### Legal Analysis

The NLRB found that the employees' comments were concerted activities. They complained about working conditions, lack of appreciation from supervisors, the failure to respond to employee concerns, and the demotion of one of the two employees involved in the Facebook exchange. All of those topics are ordinarily entitled to the NLRA's protection. The Board found, however, that the overwhelming thrust of the conversation encouraged insubordination so severe that it could not be protected by federal law.

In dismissing the complaint, the Board stated, "We find the pervasive advocacy of insubordination in the Facebook posts, comprised of numerous detailed descriptions of specific insubordinate acts, constituted conduct objectively so egregious as to lose the Act's protection and render [the two employees] unfit for further service."

### Practical Impact

According to James Pennington, a shareholder in the Birmingham office of Ogletree Deakins: "This case suggests that there are some employee activities that are beyond the pale of acceptable conduct and that employers may still expect employees to comply with reasonable operating rules. But it takes an extreme level of serious misconduct to justify the discharge of an employee based on social media expressions. Employers should consider all online discussions of working conditions involving multiple employees as presumptively protected by the NLRA. Discipline for such conduct should be reserved for situations where employee communications advocate egregious conduct such as violence, sabotage, or insubordination." ■

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