SHAWE ROSENTHAL LLP

E-UPDATE

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RECENT DEVELOPMENTS

Shawe Rosenthal "Runs Point" on Comments on the EEOC's Proposed Harassment Guidance

Shawe Rosenthal, in conjunction with four other law firms, led the effort on behalf of the Employment Law Alliance (of which we are a member) to submit written comments on the Equal Employment Opportunity Commission's Proposed Enforcement Guidance on Unlawful Harassment.

In 2016, the EEOC issued a report on workplace harassment. Following that report, the EEOC then proposed to issue an Enforcement Guidance that set forth the Commission's interpretation of harassment law and suggested prevention strategies. The EEOC invited the public to submit comments on the proposed Guidance, which will be reviewed and potentially incorporated into the final Guidance.

In addition to generally objecting that the EEOC's Guidance is not binding law, the ELA's comments addressed several aspects of the Guidance that are problematic for employers, including:

- The Guidance would broadly consider conduct occurring in a non-work related context as part of a hostile work environment. The ELA comments urge the Commission to limit incidents comprising a hostile work environment to those occurring in the physical workplace and/or at work-related event, and, consistent with relevant case law, only consider outside-of-work conduct when it is carried out by an employee with direct supervisory authority, occurs at a work-related event, or occurs between co-workers who constantly work with and see each other inside the workplace.

- The Guidance states that harassing conduct may include conduct that is not directed at the complaining party and/or occurs outside his or her presence. The ELA comments point out that this position relies on hand-picked case law and ignores precedent to the contrary. This position also fails to clarify that the courts that do permit "second-hand" harassment grant far less weight to those incidents.

- The ELA requested clarification on the Guidance relating to postings on social media accounts. Specifically, the ELA asked the Commission to acknowledge an employer's limitations in evaluating and remedying social media postings. The ELA also urges that

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social postings should only be considered as part of a hostile work environment claim when there is clear evidence that the post was actually discussed inside the workplace, and when the employer has been made aware of such discussions.

- The ELA objected to the Commission's impermissible trespassing into legislative rulemaking by including gender identity, transgender status, intent to transition, and sexual orientation within the prohibition of sex-based harassment under Title VII.

The ELA's comments were cited in the lead article of Law360's March 27, 2017 edition of its daily newsletter (registration required for access), discussing concerns about the proposed guidance.

Lindsey White, formerly an EEOC Trial Attorney and now a senior associate with Shawe Rosenthal, co-chaired the ELA workgroup and was heavily involved in drafting the comments submitted by ELA.

Supreme Court Finds Lafe Solomon Improperly Served as NLRB General Counsel

The U.S. Supreme Court found that the National Labor Relations Board's Acting General Counsel, Lafe Solomon, improperly served in that capacity from 2011-2013, while awaiting Senate confirmation.

Case Background: Under the Federal Vacancies Reform Act (FVRA), an individual who has been nominated to fill a position requiring Presidential appointment and Senate confirmation may not perform the duties of that position in an acting capacity. Solomon had been appointed by President Obama as Acting General Counsel, and was subsequently nominated to fill the role permanently. His nomination, however, languished before the Senate for almost two years until it was finally withdrawn, and Solomon continued in his Acting role during this time.

In the meantime, the NLRB found that an employer had committed unfair labor practices (ULPs), and the employer appealed the NLRB's ruling to the U.S. Court of Appeals for the D.C. Circuit. Among other things, the employer argued that, because Solomon was improperly serving as Acting General Counsel, the ULP complaint issued by one of his Regional Directors on his behalf was invalid. The D.C. Circuit agreed, and the NLRB appealed to the Supreme Court.

The Court's Ruling: In *NLRB v. Southwest General, Inc. dba Southwest Ambulance*, the Supreme Court found the statutory language of the FVRA to be clear, and affirmed the Circuit Court's ruling that Solomon was not legally acting as General Counsel once he had been nominated to fill the position permanently.

What This Means for Employers: The Supreme Court did not opine on the impact of this ruling in other cases. The D.C. Circuit however held that the actions of Solomon (and those acting on his behalf) were voidable, but not automatically void. Employers who raised a similar FVRA objection in cases that are still pending will likely benefit from this ruling. In other pending cases where this objection was not raised, it may still be worthwhile to raise it now – although such objections may be deemed to have been waived by not being argued previously.

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Two Appellate Courts Find Sexual Orientation Discrimination Is Not Covered by Title VII

This month, two separate U.S. Circuit Courts of Appeals, the 2nd and the 11th, each held that Title VII's prohibition on sex discrimination does not include sexual orientation discrimination – a holding directly at odds with the Equal Employment Opportunity Commission's position.

Background: In *Christiansen v. Omnicom Group, Inc.*, a gay male employee alleged that his supervisor described him as "effeminate" to others and depicted him as a "submissive sissy," among other things. In *Evans v. Georgia Regional Hospital*, a lesbian employee alleged that, because she presented herself in a masculine manner through her dress and grooming, she was denied equal pay and promotion, harassed, assaulted and forced to resign. Each of them sued their employer, claiming sexual orientation discrimination under Title VII.

The Courts' Rulings: In the *Christiansen* case, the 2nd Circuit clearly expressed reservations about the current state of the law, noting that "in the context of an appropriate case, our Court should consider reexamining the holding that sexual orientation claims are not cognizable under Title VII. Other federal courts are grappling with this question, and it well may be that the Supreme Court will ultimately address it." Nonetheless, the Court found that it was bound by its earlier decisions and rejected the employee's sexual orientation discrimination claim. The 11th Circuit simply noted that it was also bound by earlier precedent in dismissing the employee's sexual orientation claim in the *Evans* case.

Both courts, however, recognized that the employees could assert a sex-stereotyping claim under Title VII – in other words that they were subject to discrimination because they did not conform to typical male or female sexual stereotypes.

What This Means for Employers: The battle over whether sexual orientation discrimination falls within the parameters of sex discrimination under Title VII continues. Despite the change in administration, the EEOC aggressively continues to push its position that sexual orientation (and gender identity) discrimination necessarily is sex discrimination under Title VII. Meanwhile, federal appellate courts thus far have rejected such an expansion of Title VII, while lower federal district courts have been inconsistent in their treatment. A final resolution of this issue will need to come from the Supreme Court or from Congress.

Maryland Jury Duty Law Clarified by Federal Court

The U.S. District Court for the District of Maryland recently offered some clarification as to the provisions of Maryland's jury duty law.

Background: Maryland law requires an employer to provide employees time off for jury duty, and prohibits the employer from terminating or otherwise retaliating against an employee for this reason. A 2012 amendment to the law further provides that, "An employer may not require an individual who is summoned and appears for jury service for 4 or more hours, including traveling time, to work an employment shift that begins (1) On or before 5 p.m. on the day of the individual's appearance for jury service; or (2) Before 3 a.m. on the day following the individual's appearance for jury service."

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In *Martin v. Douglas Development Corp.*, the employer provided paid jury duty leave, but required employees to return to work if dismissed from jury duty before the end of their normally scheduled shift. In this case, the employee did not appear for his 5:30 a.m. to 2:00 p.m. shift, but reported for jury duty at 8:00 a.m.. After being dismissed from jury duty at 12:00 p.m., he went home. He claimed 8 hours of paid jury duty time on his timesheet. He was subsequently terminated for failing to return to work after jury duty for the remainder of his shift. He then sued the employer for wrongful discharge in violation of public policy, contending that he was terminated for his jury duty.

The Court's Ruling: The Court acknowledged that a wrongful discharge claim may be based on the statutorily protected right to perform jury duty. The Court, however, found that the employee was terminated for his failure to report to work after jury duty, as required by the employer's policy, and not for the jury duty itself.

The Court rejected the employee's argument that, under the law, he could not be called back into work "before 3 a.m." following his 12 p.m. dismissal. The Court noted that such a reading would make the first part of the section superfluous – that the employee could not be required to work on or before 5 p.m. on the day of appearance. Rather, the Court found that the two provisions of the section worked together to cover a 10 hour period lasting from 5 p.m. one day until 3 a.m. the next morning.

The Court acknowledged that travel to and from jury duty is encompassed by the protections of the law, and the time spent in such travel is also considered part of the jury duty. In this case, however, even with the travel time added, the employee could have returned to work before the end of the shift – even if it was only 45 minutes before.

What This Means for Employers: Employers can implement jury duty leave policies that require an employee to return to work for the remainder of his shift if dismissed early from jury duty, and the enforcement of such policies is entirely legal. Those employers with employees working an evening or night shift, however, must keep in mind the additional scheduling restrictions of the law.

TAKE NOTE

No More Blacklisting Rule for Government Contractors. On March 27, 2017, President Trump signed a congressional resolution blocking implementation of the controversial "blacklisting rule" applicable to government contractors.

In 2014, President Obama issued Executive Order 13673, entitled "Fair Pay and Safe Workplaces" but known as the "blacklisting rule," which required prospective contractors to disclose a wide range of so-called "labor law violations," comply with certain notice requirements about employee pay, and refrain from utilizing mandatory pre-dispute arbitration provisions as to sexual assault and civil rights claims. The Department of Labor issued regulations implementing the EO in 2016; however, the disclosure and arbitration provisions of the rule were enjoined by a federal court shortly thereafter. We previously discussed the rule and the injunction.

With this resolution, the entire rule has now been nullified. Also on March 27, as an added precautionary step, President Trump signed an Executive Order revoking EO 13673.

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NLRB Reiterates that Email May Be Used for NLRA Protected Communications. Despite a request to reconsider its decision, the National Labor Relations Board has reaffirmed its position that employees have a presumptive right to use an employer's email system to engage in union-related and certain other protected communications under the National Labor Relations Act.

The NLRA protects employees' rights to communicate about terms and conditions of employment, including in connection with union organization and other union-related matters. In the 2014 case of *Purple Communications, Inc. (Purple Communications I)*, which we previously discussed in an E-Lert, the NLRB ruled that employee use of email for statutorily protected communications during nonworking time must "presumptively" be permitted by employers that have chosen to give employees access to their email systems. In so holding, the Board overruled its 2007 *Register Guard* decision, which had stated that employers can prohibit all non-business use of their email systems, including for communications protected by the National Labor Relations Act.

The employer subsequently asked the Board to reconsider its *Purple Communications I* decision. In a decision issued on March 24, 2017, *Purple Communications, Inc.*, however, the Board again rejected the employer's position based on its reasoning in *Purple Communications I*. This new decision reinforces the need for employers to be thoughtful in implementing email policies and monitoring employee email use.

Maryland Federal Court Emphasizes Obligation to Reassign Disabled Employee. The U.S. District Court for the District of Maryland recently reiterated the broad extent of the employer's obligation to reassign a disabled employee as a reasonable accommodation under the American with Disabilities Act and the state antidiscrimination law.

As we have previously noted, under Maryland law, if a disabled employee is unable to perform the essential functions of his original position with or without a reasonable accommodation, an employer is required to reassign a disabled employee to any open position that the employee is qualified to perform, with or without a reasonable accommodation. The EEOC also takes this position with regard to the ADA.

In *Wehner v. Best Buy Stores*, the employee was unable to perform his original position, and applied for an open position. He was rejected because the hiring manager said the position required an associate's degree. The Maryland federal court questioned whether the employer conducted an individualized assessment of the employee's limitations and possible accommodations, as required under the state and federal disability laws, and whether the associate's degree requirement was actually essential, given the employee's many years of experience.

This case emphasizes the need for Maryland employers to review open positions to determine what may be available for a disabled employee who can no longer perform the essential functions of his original position, and to ensure that in that review of open positions, the qualifications for the position, if they would eliminate the employee from consideration for the position, are truly essential to the position.

Federal Circuit Split on Whether Dodd-Frank Protects Internal Whistleblowers. Deepening a U.S. Circuit Court split on the issue, the U.S. Court of Appeals for the 9th Circuit found that the anti-retaliation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act apply to

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whistleblowers making internal complaints, and not just those who report directly to the Securities and Exchange Commission.

In *Somers v. Digital Realty Trust Inc.*, the 9th Circuit joined the 2nd Circuit in finding that Congress intended broadly to protect internal whistleblowers. Although Dodd-Frank defines "whistleblower" specifically to mean one providing information to the SEC, another part of the Act prohibits retaliation against a whistleblower for additional activities, including "making disclosures that are required or protected under Sarbanes Oxley," which includes internal reporting. The 5th Circuit, on the other hand, abides by the strict definition.

Given the Circuit split, it is likely that the Supreme Court will be called upon to resolve this issue at some point in the future.

Applying Tip Credit to Non-Tipped Work May Violate Minimum Wage Requirement. The U.S. Court of Appeals for the 10th Circuit held that an employer may not take a tip credit for the time an employee spends performing non-tipped work, if such work exceeds 20% of the employee's regular workweek.

Under the Fair Labor Standards Act, an employer may take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage (at least $2.13) and the federal minimum wage ($7.25). In *Romero v. Top Tier of Colorado LLC*, the 10th Circuit noted that the DOL has "recognize[d] that an employee may hold more than one job for the same employer, one which generates tips and one which does not, and that the employee is entitled to the full minimum wage rate while performing the job that does not generate tips." It further noted that the DOL's position is that "if a tipped employee spends a substantial amount of time (defined as more than 20 percent) performing related but nontipped work…then the employer may not take the tip credit for the amount of time the employee spends performing those duties." In the present case, a restaurant server also performed "non-tipped" tasks, such as brewing coffee or tea, rolling silverware, setting and wiping down tables, cutting and stocking fruit, stocking ice, taking out trash and sweeping floors. To the extent that those tasks exceeded 20% of her regular workweek, the employer could not take the tip credit towards those hours, but was responsible for the full minimum wage.

The tasks identified by the tipped worker in this case are very typical of the types of tasks that many (if not most) tipped workers perform in the course of their work. Thus, employers with tipped employees should be very careful to ensure that those employees' nontipped duties does not exceed 20% of their time.

NEWS AND EVENTS

Conference – Federal Mediation & Conciliation Service Arbitration Symposium. On May 5, 2017, Gary L. Simpler will be a panelist for a presentation on "Ethics for Arbitrators and Advocates – Disclosure" at this annual conference, taking place in Atlantic City, New Jersey.

Victory. Mark J. Swerdlin and Parker E. Thoeni won a motion to dismiss on behalf of a credit union in a case in which an unsuccessful applicant alleged negligent hiring, supervision and retention by the employer of the hiring manager. The Circuit Court for Baltimore City found that the applicant's

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claim was untimely filed, and therefore barred by the statute of limitations (i.e. the time period in which claims must be filed).

Victory. Teresa D. Teare and Lindsey A. White won summary judgment for a technology company in a federal disability discrimination case. The federal court found that the worker was not an employee of the technology company, but rather an independent contractor who was not entitled to the employment protections of the Americans with Disabilities Act. It further found that the company had legitimate non-discriminatory reasons for ending the business relationship.

Recognition. Teresa D. Teare was featured in the Maryland Chamber of Commerce's digital highlights communication, *The Leading Voice*. During the month of March 2017, the Chamber has recognized successful and up-and-coming women leaders.

TOP TIP: Requiring Disclosure of Legally Prescribed Medications May Violate the ADA

As the U.S. Court of Appeals for the 10th Circuit recently reminded us, an employer's general requirement that employees disclose their use of legally prescribed medications could violate the Americans with Disabilities Act.

The Americans with Disabilities Act limits an employer's ability to make medical inquiries to those that are job-related and consistent with business necessity. In its Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, the Equal Employment Opportunity Commission specifically addresses inquiries about prescription drug use and states that:

> Disability-related inquiries may include the following:… asking an employee whether s/he currently is taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications;…

The EEOC goes on to provide the following question and answer:

> May an employer ask **all employees what prescription medications** they are taking?
>
> Generally, no. Asking all employees about their use of prescription medications is not job-related and consistent with business necessity.

The EEOC further states as follows

> In limited circumstances, however, certain employers may be able to demonstrate that it *is* job-related and consistent with business necessity to require employees in positions affecting public safety to report when they are taking medication that may affect their ability to perform essential functions. **Under these limited circumstances, an employer must be able to demonstrate that an employee's inability or impaired ability to perform essential functions will result in a direct threat.**

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Although this language suggests that the EEOC would limit prescription medication disclosures to public safety employers only, both the EEOC Guidance and the ADA are silent on the specific issue of when and if private employers may make prescription medication inquiries.

In accordance with its Guidance, the EEOC has consistently challenged employer policies that generally require employees to disclose all prescription medication use. Courts have similarly found such general policies to violate the ADA – like the 10th Circuit in the recent case of *Williams v. FedEx Corporate Services* – in that they are not job-related and consistent with business necessity. After all, many people take prescription medications that do not impact their ability to perform the essential functions of their job.

But if the prescription medication affects the employee's ability to perform the essential functions safely or in an acceptable manner, then requiring the employee to disclose the use of such medication would likely be both job-related and consistent with business necessity.

If such a disclosure is made, the employer must react in a thoughtful way in order to avoid other violations of the ADA. The employer should not automatically bar the employee from performing the job based simply on the employee's use of the medication. Rather, it may be wise or even necessary to obtain further medical information about the actual impact of the medication on the employee's ability to perform the essential functions of the job and/or whether there are reasonable accommodations that may be provided to enable him to do so. And the employer must be careful to tailor the request for information to these issues – it could be a violation of the ADA to seek information about the underlying condition for which the employee is taking the medication, since that information may not be relevant as to whether the employee is capable of performing the essential functions of the job, with or without reasonable accommodation.

RECENT BLOG POSTS

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- Thoughts on the Fight for Fifteen from a Management Lawyer
- Supreme Court Kicks Transgender Case Back – What Does This Mean for Employers?
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