SHAWE ROSENTHAL LLP

E-UPDATE

April 28, 2017

By: Fiona W. Ong

2017 Maryland General Assembly Employment Legislation Update

During the Maryland General Assembly session that ended in April 2017, Shawe Rosenthal lawyers again worked with the Maryland Chamber of Commerce to oppose or moderate legislation that would adversely affect employers. Several employment-related bills were passed by the General Assembly.

Maryland Healthy Working Families Act (i.e. Paid Sick Leave)

As noted in our recent E-lert, "Maryland's General Assembly Just Passed Paid Sick Leave – Now What?", the General Assembly passed HB1, which requires employers with 15 or more employees to provide up to 5 days of paid sick leave and smaller employers to provide unpaid sick leave. Although Governor Hogan had earlier promised to veto the bill, he has not yet done so. If he vetoes the bill, the Maryland General Assembly would have to override the veto either during a special session, if one is called, or at the beginning of the next regular session in January 2018. If he chooses not to veto the bill and it becomes law, it will take effect January 1, 2018. We will know in early May whether or not the Governor has vetoed the bill, and will keep you posted on its status.

Maryland Personal Information Protection Act - Revisions

The General Assembly passed HB 974, which revises currently existing law protecting the disposal of employee personal information and providing for notification of the breach of electronically-maintained personal information.

The revisions modify the definition of "personal information" under the law to add, among other things, individual taxpayer ID numbers, passport numbers, or other government-issued ID numbers; a state identification card number; health insurance policy, certificate or subscriber numbers; biometric data; and user name or e-mail address in combination with a password or security question and answer.

The law previously provided that, when destroying the personal information of a customer, a business must take reasonable steps to protect against unauthorized access or use of that information, and the revisions add "employees and former employees" to the protected group.

The revisions also modify the notice of breach provisions contained in the law, among other things, by imposing a 45-day deadline for the notification.

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The revisions add a new section to the law regarding a breach involving information that permits access to an individual's e-mail account, setting forth specific notice requirements directing the individual to change their e-mail password or security question/answer or take other unspecified steps to protect the account. Notice of the breach may not be e-mailed to the breached e-mail account, except when the individual is connected to the account from an internet protocol (IP) address or online location from which the business knows the individual customarily accesses the account.

Finally, the revisions provide that a business that is subject to the Health Insurance Portability and Accountability Act (HIPAA) and is in compliance with its HIPAA obligations will be deemed to be in compliance with the Personal Information Protection Act.

Once this becomes law, it will take effect on January 1, 2018.

More Jobs for Marylanders Act of 2017

This bill, SB 317, was a centerpiece of Governor Hogan's Maryland Jobs Initiative. He signed it into law on April 11, and it will take effect on June 1, 2017. The law provides tax incentives to both new and existing manufacturers for job creation. It also provides funding for scholarships to job training programs, encourages high-school vocational training, and promotes state agency registered apprenticeship programs.

Two More Federal Appellate Decisions on Sexual Orientation Discrimination Under Title VII, With Opposite Results

Following last month's decisions by two different federal appellate courts that sexual orientation discrimination is not sex discrimination under Title VII, as discussed in our March 2017 E-Update, two other federal courts have now addressed this issue – one for the first time finding coverage under Title VII and the other reiterating a finding of no coverage.

The Seventh Circuit's Opinion

Following a three-judge panel ruling that sexual orientation was not covered by Title VII and a request for rehearing *en banc* (meaning by all the members of the court), the full U.S. Court of Appeals for the Seventh Circuit has now issued its groundbreaking majority opinion in *Hively v. Ivy Tech Community College*, concluding that "discrimination on the basis of sexual orientation is a form of sex discrimination" under Title VII. In so holding, the Seventh Circuit overturned its prior rulings to the contrary. The Seventh Circuit applied two different approaches to reach this conclusion.

First, the Seventh Circuit utilized the comparative method of proof – would the employee have been treated the same way if only her sex were different? Hively alleged that she would not have been subjected to the adverse employment actions at issue if she were a man, which the majority found "describes paradigmatic sex discrimination." Applying the comparator method in the context of gender non-conformity cases (a recognized form of sex discrimination), the Seventh Circuit found that Hively "represents the ultimate case of failure to conform to the female stereotype" in that she is not heterosexual. It further noted that its panel decision "described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does

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not exist at all." The Seventh Circuit went on to state: "Any discomfort, disapproval, or job decision based on the fact that the complainant – woman or man – dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex," and thus falls within the ambit of Title VII.

The second approach utilized by the Seventh Circuit was sex discrimination under the associational theory: that a person is discriminated against because of the protected characteristic of one with whom she associates. This also necessarily means that the person "is actually being disadvantaged because of her own traits." The associational theory was first articulated in the Supreme Court case of *Loving v. Virginia*, in which the Supreme Court rejected state law prohibiting interracial marriage as race discrimination in violation of the Equal Protection Clause. It was subsequently applied in race discrimination cases under Title VII, and, as the Seventh Circuit explained, to the extent that Title VII prohibits associational discrimination on the basis of race, it must also prohibit associational discrimination based on other characteristics, including sex.

In addition to these two approaches, the Seventh Circuit looked to Supreme Court cases addressing sexual orientation beyond the employment context, such as *United States v. Windsor* (striking down Section 3 of the Defense of Marriage Act) and *Obergefell v. Hodges* (establishing right to same sex marriage). The Seventh Circuit observed that, "It would require considerable calisthenics to remove the 'sex' from 'sexual orientation'" and attempts to do so have "led to confusing and contradictory results." Rather, the Seventh Circuit stated that it must "consider what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what someone thought it meant one, ten or twenty years ago." And ultimately, the Seventh Circuit relied on the Supreme Court's decisions and "the common sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex" to find Title VII coverage.

The Second Circuit's Opinion

In *Zarda v. Altitude Express dba Skydive Long Island*, a three-judge panel of the U.S. Court of Appeals for the Second Circuit refused to expand Title VII coverage to sexual orientation. The Second Circuit had previously held, in *Simonton v. Runyon*, that sexual orientation discrimination was not discrimination based on sex under Title VII. The *Zarda* panel noted that, just last month, another Second Circuit panel, in *Christiansen v. Omnicom Group*, had stated that *Simonton* can only be overturned by the entire Second Circuit sitting *en banc*. The *Zarda* panel agreed with the *Christiansen* panel's statement, further noting that the Seventh Circuit's recent groundbreaking decision in *Hively v. Ivy Tech Community College*, discussed above, which overturned prior Seventh Circuit precedent, was issued by the Seventh Circuit sitting *en banc*.

What This Means for Employers: The Seventh Circuit's opinion is the first federal appellate court decision to find Title VII coverage of sexual orientation discrimination – and sets up a Circuit split with all other federal appeals courts thus far finding no such coverage. The Second Circuit's opinions in *Christiansen* and *Zarda*, however, essentially invite the plaintiffs to request *en banc* review, which sets up the possibility that this, and other federal appellate courts, may revisit their position. Nonetheless, given the currently existing Circuit split, it is likely that this issue is headed for the Supreme Court. Until then, employers should recognize that the approach to this issue will vary by jurisdiction – and may even change in those jurisdictions if other federal appellate courts join the Seventh Circuit in rejecting their prior position.

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Profanity-Laced Facebook Message Is Protected Activity

Because an employee's profane and vulgar Facebook message occurred in the context of union organizing activity, the U.S. Court of Appeals for the Second Circuit found that it was protected by the National Labor Relations Act, although it sat at the "outer-bounds" of such protected conduct.

Background. The National Labor Relations Act prohibits employers from terminating employees based on union-related conduct. However, employees may lose the protection of the Act if their conduct is "opprobrious."

In *NLRB v. Pier Sixty, LLC*, there was a "tense" organizing campaign. Two days before the election, while working an event, a server was upset by his supervisor's attitude, which he viewed as part of management's continuing disrespect for employees. During a break, he posted a message on his Facebook page, where a number of his co-workers were "friends" and which was publicly accessible:

> Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!"

He was terminated, according to the employer, for his public use of profanity. The National Labor Relations Board, however, determined that the employer had violated the Act by terminating the employee in retaliation for his protected activity.

The Second Circuit's Opinion. The Second Circuit agreed with the NLRB that the termination was illegal. According to the Court, the message constituted protected conduct under the Act in that it concerned workplace issues – management's continuing disrespect for employees and the upcoming union election. The Court found that the conduct, despite its vulgar and profane nature, was not so opprobrious as to lose protection, based on the circumstances. These included the facts that the employer regularly tolerated similar language in the workplace, and that while the Facebook post may have been publicly available, it did not occur in the immediate presence of customers or disrupt the event at which the employee had been working – and thus was not the equivalent of a "public outburst" in the presence of customers that has been found to lose protection. The Second Circuit cautioned, however, that these statements bordered on unprotected conduct.

What This Means for Employers. What seems like clearly unacceptable conduct – conduct for which an employer should be able to discipline an employee – must be carefully reviewed before disciplinary action is taken. If the conduct implicates the terms and conditions of employment, it will be protected unless it is so egregious that it loses such protection – but this is a difficult standard to meet, as is evident from this case. And it appears that the NLRB and the Second Circuit view online activity, even if publicly accessible, as being quite different from in-person activity in front of customers.

NLRB's Revised Successor Bar Doctrine Upheld by Federal Appellate Court

The U.S. Court of Appeals for the First Circuit upheld the National Labor Relations Board's 2011 revision to its successor bar doctrine, under which a successor employer is required to recognize the union's bargaining relationship with the prior employer for some reasonable period of time.

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Background on the Successor Bar Doctrine: The issue of the relationship between the union and a successor employer has been subject to inconsistent treatment by the NLRB over the years. Under the 1975 case of *Southern Moldings, Inc.*, at the time the successor assumed control of the business, there existed a rebuttable presumption of union support, meaning that the successor employer would be obligated to bargain with the union unless it could show that the union did not have support from the majority of the bargaining unit. In 1999, however, the NLRB issued *St. Elizabeth Manor, Inc.*, which created the successor bar doctrine by stating that "the union is entitled to a reasonable period of time without challenge to its majority status." Only three years later, however, in 2002 under the Bush administration, the NLRB issued *MV Transportation*, which returned to the rebuttable presumption. The NLRB again changed course in 2011, in the case of *UGL-UNICCO Service Co.*, which re-established the successor bar with some variations: (1) defining the previously undefined "reasonable period" to be between six months and a year, depending on the circumstances, and (2) in successorship situations involving the execution of a collective bargaining agreement, the bar would last only two years rather than three.

The First Circuit's Decision: In the current case of *NLRB v. Lily Transportation Corp.*, the employer urged the First Circuit to reject the NLRB's reinstatement of the successor bar, but the Court refused, finding that the NLRB had offered a "reasoned explanation" for its change in position. Specifically, the NLRB had cited a sharp increase in mergers and acquisitions, with statistics, which increased the number of successor situations, thereby increasing "the potential volatility in union-management relationships across the national labor market," and resulting in a greater likelihood of litigation challenging union support during the unsettled period immediately following successorship, which would place a greater burden on the administrative law machinery including the NLRB itself. In addition, the First Circuit found that the NLRB, by implementing the above-mentioned variations to the successor bar doctrine, imposed reasonable limits to the doctrine, providing for "a shorter period of union protection and a correspondingly earlier opportunity to challenge the ensconced union, whether by employees … or by the successor or a competing union."

Thus, the First Circuit determined that this revised approach to the successor bar provides "a reasonable balance between the Section 7 right of employee choice and the need for some period of stability to give the new relationships a chance to settle down." For employers, however, this approach gives them less flexibility in their dealings with the union, even where, as in this case, a clear majority of the employees had expressed the desire to no longer be represented by the union.

TAKE NOTE

Supreme Court Establishes Standard for Appellate Review of A District Court's Enforcement of EEOC Subpoena. A federal district court's decision either to enforce or to quash a subpoena issued by the Equal Employment Opportunity Commission is reviewed by an appellate court under an abuse of discretion standard, according to the U.S. Supreme Court.

In *McLane Co., Inc. v. EEOC*, the Supreme Court noted that the subpoena authority granted the EEOC by Title VII is the same authority granted the National Labor Relations Board by the National Labor Relations Act. Appellate courts have consistently held that their review of a district court's decision regarding the enforceability of an NLRB subpoena is subject to an abuse of discretion standard – in other words, the district court's decision should be given deference unless the district court has committed a clear error of judgment based on the facts and circumstances – rather than a

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de novo standard, in which the appellate court can make its own decision based on the facts and circumstances. The Supreme Court found that this same abuse of discretion standard should apply to EEOC subpoenas.

This decision makes it harder for employers to have a district court order enforcing an EEOC subpoena overturned on appellate review.

Federal Court Holds Poor Economy Does Not Justify Pay Disparity. The U.S. Court of Appeals for the Eighth Circuit held that the trial court properly instructed a jury that the employer could not rely on poor economic conditions as a justification for pay discrepancies between female and male employees.

Under the Equal Pay Act, an employer may establish an affirmative defense to a claim of sex-based wage discrimination by showing that the pay difference is "based on any other factor other than sex." In *Dindinger v. Allsteel, Inc.*, the employer defended itself from claims that the female plaintiffs were paid less than their male colleagues by arguing that it was because of negative economic conditions arising from the economic recession that began in 2008, which resulted in multiple rounds of lay-offs, restructuring of job responsibilities, and the freezing of merit-based pay increases. The Eighth Circuit held, however, that this did not justify the pay differential – that these circumstances "did not cause the plaintiffs to be paid less than their male comparators, but merely held pre-existing wage differentials in place."

Thus, if sex-based wage discrepancies are discovered, employers should be aware that poor economic conditions will not serve as a justification for the original discrepancy, and likely will not be a viable reason for failing to address the continuing discrepancy.

Cat's Paw Theory of Liability Applies In FMLA Cases. The U.S. Court of Appeals for the Sixth Circuit held that an employer may be held liable for Family and Medical Leave Act violations based on the cat's paw theory of liability, meaning that the illegal animus of a non-decisionmaker influences the actual, non-biased decisionmaker.

The U.S. Supreme Court recognized this theory of liability in *Staub v. Proctor Hospital*, which was a case involving claims under the Uniformed Services Employment and Reremployment Rights Act. Federal courts then expanded this theory to apply to discrimination claims under federal antidiscrimination laws, including Title VII and the Age Discrimination in Employment Act. In *Marshall v. Rawlings Co.*, the Sixth Circuit applied the theory to FMLA claims, joining several other sister circuits in so holding.

As in other contexts, employers can protect themselves from cat's paw allegations in FMLA situations by ensuring that the actual decisionmaker does not blindly rely on the recommendations of or information from subordinates. Rather, he should conduct his own thoughtful and independent investigation and/or analysis of relevant information before making a decision that adversely affects an employee who intends to take or has taken FMLA leave, in order to ensure that the decision itself is unrelated to the employee's rights under FMLA.

President Trump Nullifies Amendments to OSHA's Recordkeeping Rule. President Trump signed a Congressional resolution of disapproval that nullifies the recent amendments issued by the Occupational Safety and Health Administration to its recordkeeping rule.

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In December 2016, OSHA issued a final rule clarifying the requirement for employers to make records of workplace injuries and maintain such records for five years following the injury, and establishing that recordkeeping violations are a continuing violation that may be challenged for up to six months following the five-year recordkeeping period. OSHA had issued this "clarification" because a 2012 federal case, *AKM LLC v. Secretary of Labor*, had held that the Occupational Safety and Health Act does not permit a continuing violations theory.

Maryland Court of Appeals Addresses "Public Policy" Underlying Wrongful Discharge Claim. The Maryland Court of Appeals (our highest State court) refused to recognize federal regulations prohibiting research misconduct as setting forth public policy that supports a wrongful termination claim.

Under Maryland law, employment is at-will, meaning that either the employer or the employee may terminate the employment relationship at any time, with or without cause or notice. An exception to this at-will rule is where the termination "contravenes some clear mandate of public policy. Public policy may be found in statutes (that otherwise do not provide a legal remedy to the employee) or certain regulations, or prior court opinions. Importantly, the public policy must be "reasonably discernable from prescribed constitutional or statutory mandates."

In *Yuan v. Johns Hopkins University*, a former employee pointed to federal regulations prohibiting research misconduct as the basis of the public policy. The Court noted, however, that the identified regulations "lack specificity as to what constitutes a violation" of the prohibition on research misconduct, particularly as the regulations impose the authority to determine if such misconduct has occurred on the research institution (i.e. Hopkins). The Court noted that Hopkins, and not the Court, is therefore in the best position to make this determination. As a result, the Court found that the identified regulations "do not provide a clear public policy to support a tort claim for wrongful termination of employment."

Maryland Federal Court Addresses Parameters of Employee Defamation Claims. The U.S. District Court for Maryland issued an opinion in *Doe v. Johns Hopkins Health Syst. Corp.* that reviewed the scope of defamation claims based on intra-company communications. In order to bring a defamation claim under Maryland law, (1) there must be a defamatory statement made to a third person (i.e. publication), (2) the statement must be false, (3) the defendant must be legally at fault in making the statement, and (4) the plaintiff must suffer harm. In this case, the Court rejected the employer's argument that intra-company statements made in the normal course of business between employees of that company are not publications. The Court noted that Maryland has not adopted such a rule and, in fact, has recognized defamation claims based on intra-company statements.

The Court acknowledged that Maryland law does recognize a qualified privilege for communications arising out of the employer-employee relationship, such as where the information is shared with those who are entitled to receive the information. But this privilege may be lost if the defendant makes the statement with malice – meaning that the defendant knew the statement is false and intended to deceive another person in making the statement.

Revised Veterans' Hiring Benchmark for Government Contractors. The Office of Federal Contract Compliance Programs has announced an updated hiring benchmark for veterans of 6.7%, based on recently-released data from the Bureau of Labor Statistics.

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Under revised Vietnam Era Veterans' Readjustment Assistance Act regulations effective in March 2014, covered government (sub)contractors must set a veterans hiring benchmark for each of their establishments, either by using the OFCCP's benchmark as set forth in its VEVRAA Benchmark Database, or by developing their own individualized benchmarks. The current 6.7% figure represents a slight decrease from the previous year's 6.9% benchmark. The annual benchmark will be updated again in Spring 2018.

NEWS AND EVENTS

Webinar – "Essential Job Functions, Reasonable Accommodations & the ADA: Ensuring Compliance, Mitigating Risk." On May 19, 2017, Fiona W. Ong and Lindsey White will be presenting a webinar on behalf of the Center for Competitive Management (C4CM), which provides consulting and training services to businesses, including in the human resources area. The Americans with Disabilities Act requires employers to provide disabled employees with reasonable accommodations to perform the essential functions of their job. Fiona and Lindsey will be discussing the legal issues and offering practical advice on:

- Factors used to determine the essential functions of a job
- Steps employers should take to clearly define and communicate that a function is essential now, before facing an accommodation request or Charge of Discrimination
- Whether essential job functions can change over time
- How to assess whether employees are qualified to perform the essential functions of a job, including the interactive process that should occur between the employer and employee or applicant
- How to explore and provide reasonable accommodations to enable employees or applicants to perform essential job functions

This 75-minute webinar begins at 2:00 p.m. Eastern. Attendees will also receive C4CM's bestselling practice guide, "Crafting Legally Compliant Job Descriptions," a $349 value. You may see the full invitation and registration information for this webinar by clicking on this link.

Article – "Handling EEOC Systemic and Individual Discrimination Investigations and Litigation."[*] Elizabeth Torphy-Donzella and Lindsey A. White authored an article addressing how to represent effectively an employer in both individual and systemic investigations and litigations by the Equal Employment Opportunity Commission. The article was published in the daily legal newsletter, Law360, and had previously been published by LexisNexis Practice Advisor, a digital legal publisher.

Article – "Discrimination based on sexual orientation: Not the "principal evil" but protected by Title VII nonetheless?"

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In the wake of the groundbreaking Seventh Circuit opinion, which was the first appellate court to recognize Title VII's prohibition on discrimination based on sex includes sexual orientation Lindsey A. White, Parker E. Thoeni, and Fiona W. Ong co-authored an article titled: Discrimination based on sex: Not the "principal evil" but protected by Title VII nonetheless?, which Employment Law Daily, a daily labor and employment publication issued by Wolters Kluwer, featured as its top story.

Honor – ELA Ranked as "Elite" by Chambers & Partners. The Employment Law Alliance, a global alliance of firms practicing employment and labor law of which Shawe Rosenthal is the Maryland member, has been named to Chambers and Partners'" Employment: the Elite – Global-wide" list. The ELA is one of only two law firm networks in the world to receive this "Band 1" distinction. For many years, Shawe Rosenthal has also been named as a top "Band 1" firm for Maryland in Chambers USA. Chambers & Partners is a prominent London-based research and publishing organization that ranks law firms and lawyers based upon their reputation among peers and clients.

TOP TIP: Investigatory Suspensions

When confronted with a situation involving possible employee misconduct, many employers place the employee in question on a suspension while it conducts an investigation. Employees sometimes challenge the suspension as being an adverse employment action on which they can base a claim of discrimination or retaliation under federal employment laws, and it may be helpful for employers to establish up front that it is not.

The recent case of *Bellagio, LLC v. NLRB* offers some guidance on this topic. In that case, the employee was accused of misconduct by a customer. He was summoned to a meeting with management, and invoked his right as a union member to have union representation at the meeting. When a union representative could not be found, the employee was placed on suspension pending investigation (SPI). He then filed an unfair labor practice charge with the National Labor Relations Board, claiming that his placement on suspension was unlawful retaliation for invoking his right to union representation.

The U.S. Court of Appeals for the D.C. Circuit found, however, that the suspension was not an adverse employment action. In so finding, the Court pointed to the employer's SPI form that had been given to the employee, which states in relevant part:

> You are being placed on Suspension Pending Investigation effective [date]. *This is not a disciplinary action*; it is a process that [the Company] utilizes to remove you from the work place in order to investigate a serious situation or policy infraction in which you may have been involved.
>
> Upon the completion of the investigation process, one of the following things will occur:
>
> 1. You will be returned to work without disciplinary action and compensated for the scheduled shifts missed resulting from the suspension pending investigation . . . ; or
>
> 2. You will be returned to work with disciplinary action if warranted based on the outcome of the investigation and possibly no compensation; or

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3. You will be separated from the Company if warranted based on the outcome of the investigation.

[Emphasis added by the Court].

Thus, employers using an investigatory suspension may wish to utilize a similar form – particularly the notice that the action is not disciplinary. Other information that could be incorporated into such a form would include logistical information, such as:

- The need for the employee to be available for future interviews and, if the employer is unionized, the right of the employee to have union representation at such interviews. If the employee chooses not to attend such interviews, the Company will make a decision based on the available information.
- Prohibiting the employee from coming to the work premises or accessing Company systems.
- Prohibiting the employee from performing any work.
- Requiring the employee to turn over keys or access cards, or other employer property in his/her possession.

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- Justice Gorsuch and the ADA? (Selected as a "noteworthy" blog post by the Employment Law Daily)
- Judge Davis' Paean to G.G. and Other Brave Souls Who Opposed Discrimination (Selected as a "noteworthy" blog post by the Employment Law Daily)
- Maryland's General Assembly Just Passed Paid Sick Leave – Now What?
- A Battle for the Soul of the NLRB? (Selected as a "noteworthy" blog post by the Employment Law Daily)

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