SHAWE ROSENTHAL LLP

E-UPDATE

September 29, 2017

RECENT DEVELOPMENTS

To Celebrate Our 70th Anniversary, Shawe Rosenthal Has a New Look

In connection with our 70th anniversary, our website, social media presence (LinkedIn, Facebook and Twitter pages), and e-communications have a bold, new look. We hope you enjoy it.

We also plan to celebrate our 70th anniversary with a social media campaign showcasing our impressive history. The campaign will feature historic photos accompanying the firm's many "firsts," such as our recognition as one of the first labor law and employment firms in the U.S., our handling of the first unfair labor practice charge brought against a union, and "first" positions held by some of our attorneys.

Our 70th anniversary celebration will culminate in a gala dinner held on October 26 at the Loews Annapolis, in conjunction with our bi-annual client conference. More information about the conference and dinner can be found here.

Court Finds Long Term Leave Is Not a Reasonable Accommodation

According to the U.S. Court of Appeals for the Seventh Circuit, "A multimonth leave of absence is beyond the scope of a reasonable accommodation under the [Americans with Disabilities Act]," a position that is directly contrary to that of the Equal Employment Opportunity Commission.

Facts of the Case: In *Severson v. Heartland Woodcraft, Inc.*, the employee exhausted his 12 weeks of Family and Medical Leave Act leave and requested an additional 2-3 months of leave to recuperate from back surgery. The employer denied his request, terminated his employment, and invited him to reapply when he was medically cleared to return to work. Instead, the employee sued, alleging, among other things, that the employer had failed to provide a reasonable accommodation of 3 months of additional leave. The district court found in favor of the employer, and the employee appealed to the Seventh Circuit.

The Court's Ruling: In affirming judgment for the employer, the Seventh Circuit flatly asserted, "The ADA is an antidiscrimination statute, not a medical-leave entitlement." The Seventh Circuit further stated that the ADA only protects qualified individuals with a disability, and that in order to be qualified, the individual must be able to perform the essential functions of the job with or without a reasonable accommodation. However, "An employee who needs long-term medical leave cannot work and thus is not a "qualified individual" under the ADA." Although the Seventh Circuit acknowledged that a brief period of leave could be a reasonable accommodation in some

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circumstances, enabling the employee to perform the essential functions of the job, it specifically stated that a long-term leave does not permit an employee to do the job.

In addition, the Seventh Circuit pointedly noted that "Long-term medical leave is the domain of the FMLA, … recognizing that employees will sometimes be unable to perform their job duties due to a serious health condition. In contrast, the ADA applies only to those who can do the job."

The Seventh Circuit specifically rejected the EEOC's argument that a long-term medical leave of absence should qualify as a reasonable accommodation when the leave is (1) of a definite, time-limited duration; (2) requested in advance; and (3) likely to enable the employee to perform the essential job functions when he returns. The Seventh Circuit observed that, under the EEOC's position, "the ADA is transformed into a medical-leave statute—in effect, an open-ended extension of the FMLA." This interpretation, held the Seventh Circuit, was untenable.

Lessons Learned: Employers frequently struggle with requests for extended leave. Although employers in the Seventh Circuit can rely on this ruling to deny requests of more than 2-3 months as a matter of course, employers elsewhere must recognize that the EEOC generally considers such leaves to be a reasonable accommodation and will require an employer to demonstrate that such leave constitutes an undue hardship before denying the request.

Breastfeeding Is Covered by the Pregnancy Discrimination Act

The U.S. Court of Appeals for the Eleventh Circuit held that breastfeeding mothers are protected by the Pregnancy Discrimination Act (PDA).

Facts of the Case: In *Hicks v. City of Tuscaloosa, Alabama*, a police officer returning from maternity leave was assigned to patrol duty that required her to wear a ballistic vest. She requested an accommodation of alternative desk duty, because her doctor stated that the vest was restrictive and could cause infections that would limit her ability to breastfeed. She was denied the alternative duty, which was available to employees with other medical conditions, and told that she could either not wear a vest or wear a "specially fitted" vest. The "specially fitted" vest, however, had large gaps. The officer felt that these options were too dangerous and she had no choice but to resign. She sued the police department, and a jury found in her favor. The police department then appealed to the Eleventh Circuit.

The Court's Ruling: Following the lead of the Fifth Circuit, the Eleventh Circuit observed that the PDA expressly states that it covers discrimination "because of" or "on the basis of sex" and is "not limited to [discrimination] because of or on the basis of pregnancy, childbirth, or related medical conditions." The Eleventh Circuit therefore arrived at the "common-sense conclusion" that "breastfeeding is a sufficiently similar gender-specific condition covered by the broad catchall phrase included in the PDA," as only women can breastfeed. Citing to the Congressional record, the Eleventh Circuit stated that the PDA was intended to clarify that Title VII's protections extend "to include the[] physiological occurrences peculiar to women" as part of the childbearing process, and that such physiological occurrences includes breastfeeding.

The Eleventh Circuit observed, however, that, "Taking adverse actions based on woman's breastfeeding is prohibited by the PDA but employers are not required to give special

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accommodations [under the PDA or Title VII] to breastfeeding mothers." On the other hand, if an employer refuses to provide accommodations that are offered to other employees, that could constitute discrimination under the PDA. The Eleventh Circuit found that the police department's unwillingness to provide accommodations to the breastfeeding employee resulted in her constructive discharge (i.e. forced resignation) in violation of the PDA.

Lessons Learned: Employers should keep in mind that the PDA may be interpreted to encompass more than the condition of pregnancy itself, and, according to several federal appellate courts, does include the post-pregnancy condition of breastfeeding. Thus, breastfeeding employees should be treated in the same manner – and provided the same types of accommodations – available to other employees with other types of medical conditions. And employers should also remember that, although the PDA and Title VII do not require employers to provide breastfeeding accommodations per se, the Fair Labor Standards Act does require employers to provide reasonable break times and a private location to non-exempt employees needing to express breast milk.

TAKE NOTE

New E-Verify Participation Poster. A new version of the E-Verify Participation poster has been released, and must be displayed by employers participating in the E-Verify program. E-Verify is an online system that compares information from an employee's Form I-9 to records from the U.S. Department of Homeland Security and Social Security Administration to confirm employment eligibility. Under Executive Order 13465, contractors with qualifying federal contracts are required to use E-Verify. Certain states have mandated the use of E-Verify. In addition, employers not subject to those requirements may choose to use E-Verify to verify that newly-hired employees are legally authorized to work in the United States.

Increased Minimum Wage for Government Contractors. The Department of Labor has announced the minimum wage increase for government contractors and subcontractors effective January 1, 2018. The new minimum wage applicable to workers performing work on or in connection with federal contracts covered by Executive Order 13658 will be $10.35 per hour, and the tipped wage rate will be $7.25 per hour.

Employer's Posting of Side Letter Next to NLRB Notice Was Improper. An employer's posting of a side letter next to an official National Labor Relations Board Notice was found to minimize inappropriately the effect of the Notice.

In *Outokumpu Stainless USA, LLC fka Thyssenkrupp Stainless USA, LLC*, the employer entered into a settlement agreement with the union over several unfair labor practice charges. As part of the settlement, the employer agreed to post an official NLRB Notice identifying the employer's unlawful activities. Next to the Notice, however, the employer posted a side letter, denying that it had violated any laws and blaming the union for certain issues. The Board found that this letter attempted "minimize the effect of the Board's notice" and "suggests to employees that the Board's notice is posted as a mere formality, and that the employer's true sentiments are to found in its own notice, not the Board's." Accordingly, the Board found that the letter constituted non-compliance with the settlement agreement, and that default judgment on the underlying unfair labor practice charges against the employer was warranted.

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The employer's desire to explain its side of the story is certainly understandable; however, the Board will not permit such actions where it finds the communication to undercut the effectiveness of the Board's own Notice. Thus, employers must be very careful and should consult with experience labor counsel before taking any such step.

Firing for Refusal to Sign an Unlawful Confidentiality Agreement Violates the NLRA. Terminating an employee who refused to sign a confidentiality agreement that unlawfully prohibited the employee from engaging in protected activities under the National Labor Relations Act was illegal, according to the U.S. Court of Appeals for the Second Circuit.

In *NLRB v. Long Island Association for AIDS Care, Inc.*, the employer required its employees to sign a confidentiality agreement that prohibited them from discussing their salaries and banned them from talking to the media about their employment and working conditions, among other things. Section 7 of the NLRA protects an employee's ability to engage in concerted activity regarding the terms and conditions of employment. The Second Circuit agreed with the Board that the confidentiality agreement ran afoul of Section 7's protections, as it would deter employees from their protected right to engage in concerted activity, such as a discussion of their wages and other terms and conditions of employment. Therefore, terminating the employee for refusing to sign the unlawful agreement violated the NLRA.

Ability to Assign Hours May Be Sufficient to Establish Supervisory Status. According to the U.S. Court of Appeals for the Third Circuit, a foreman's ability to assign hours of work may be sufficient authority to render him a supervisor for purposes of Title VII liability.

Under Title VII, an employer is liable for a supervisor's illegal harassment of a subordinate. In *Vance v. Ball State University*, the U.S. Supreme Court stated that a supervisor is one who is "empowered by the employer to take tangible employment actions," and it further clarified that a "tangible employment action" is a "significant change in employment status." In *Moody v. Atlantic City Board of Education*, the supervisor in question could assign the employee hours, for which she would be paid, and this constituted a tangible employment action.

Thus, employers should keep in mind that, for purposes of Title VII liability, even low-level foremen or leadmen may have sufficient authority to affect compensation in some manner that will render them a supervisor, for whose actions the employer may be liable.

Court Rejects DOL's Dual Jobs Regulation Interpretation. The U.S. Court of Appeals for the Ninth Circuit rejected the Department of Labor's revised interpretation of the dual jobs regulation, which addresses the Fair Labor Standards Act's tip credit provision in the situation where an employee works two different jobs for the employer – one tipped and one not.

Under the dual jobs regulation, an employer may not take a tip credit for work performed in a non-tipped job. The DOL's Field Operations Manual contains an interpretation of the regulation, providing that where tipped employees spend more than 20% of their time in preparation work, no tip credit may be taken for that preparation work. The Ninth Circuit, however, rejected this interpretation in *Marsh v. J. Alexander's, LLC*, finding it inconsistent with the language of the regulation, which speaks to being "engaged in an occupation." The Ninth Circuit found the reference to "occupation" to mean employed in a "job," not simply performing an activity. Thus, the regulation

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applies when an employee works two distinct jobs for the employer, and not when an employee performs different tasks within a job. The DOL's interpretation, the Ninth Circuit found, was an inappropriate attempt to create a new regulation, apparently without going through the required regulatory approval process.

NEWS AND EVENTS

Shawe Rosenthal Labor & Employment Conference – October 26-27, 2017. We invite you to attend our client conference at the beautiful Loews Annapolis Hotel, and to join us in celebrating our 70th anniversary at a gala dinner. Our sessions will cover a variety of labor and employment issues relevant to your workplace, including:

- State Law Trends and Update.
- Workplace Violence: Best Practices for Prevention and Response.
- The New Trump NLRB: Is There Hope for a Light At the End of This Long Dark Tunnel?
- The Potential Risks and Rewards of Cutting Edge Tech in the Workplace.
- What's in a Name? Misclassifcation Issues and How to Avoid Them.
- The "Who, What, When, Where, Why and How" of Leave under the ADA and FMLA.
- Exploring Wage and Hour Law in 2017.

We will also hold interactive small group discussions in**:**

- Best Practices for LGBT Employees in the Workplace.
- Restrictive Covenants: The Key to Protecting Valuable Business Assets.
- Internal Investigations: The Do's and Don't's of Workplace Investigations.

Our conference has been approved for 7.00 (HR (General)) recertification credit hours. We can also arrange for CLE credit.

Attendees will also receive a complimentary copy of the 2017 Maryland Human Resources Manual, published by the Maryland Chamber of Commerce and edited by our firm, a $260.00 value.

To register or for more information, please contact Liam Preis at preis@shawe.com.

Shawe Rosenthal Welcomes New Associate. We are delighted to announce that Paul Burgin has joined us as an associate. During his third year of law school, Paul was a law clerk for our firm. After graduating, he served a one-year judicial clerkship with Judge Kevin Arthur of the Maryland Court of Special Appeals.

Liz Torphy-Donzella at the Maryland Chamber of Commerce Conference. Elizabeth Torphy-Donzella participated on several panels at the Maryland Chamber of Commerce's annual Business Policy & Competitiveness Conference, which took place on September 28-29, 2017. On one panel, Liz spoke about Maryland's anti-discrimination laws. She also moderated a panel on HB1 – the paid sick leave bill.

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TOP TIP: Can Employers Control Speech in the Workplace?

Our President is not shy about staking out controversial positions, and this is carrying over into the public discourse. And these conversations can and do occur in the workplace. So what can a private employer do about controversial discussions – tied to race, politics, gender, etc – in the workplace?

Title VII prohibits discrimination based on race, sex and religion, among other things. Not every conversation involving these topics is necessarily discriminatory, but they can very easily cross the line or be perceived as discriminatory. And of course, the employer has the obligation to ensure that its employees are not subjected to a hostile work environment created by discriminatory comments by co-workers or managers.

There are no federal laws applicable to private employers that protect employees on the basis of their political affiliation. (Public employers, however, may be subject to such laws). As far as state laws, only a few - such as California, Louisiana, and the District of Columbia - have enacted laws that prohibit discrimination by private employers against an employee based on political affiliation. Some cities and counties may have local ordinances that also provide such protections. In those jurisdictions, employers cannot take any adverse employment action against an employee simply because he supports a particular political party.

Regardless of whether political affiliation protections exist, however, a private employer can prohibit political discussions in the workplace. And certainly it can prohibit speech that is discriminatory or harassing. "But what about the First Amendment right to free speech?" some may ask. The First Amendment and similar state laws prohibit government actors from limiting citizens' free speech rights - but they do not apply to private employers. So employees do not have a right to free speech in a private workplace, and the employer can choose to restrict speech on any topic - including politics, race, religion, and gender.

Of course, there are caveats. At least two states - South Carolina and Connecticut - protect freedom of expression. But even there, and certainly in all other states, employers can prohibit speech if it is disruptive.

In addition, the National Labor Relations Act, which applies to both unionized and non-unionized workplaces, protects employees' rights to engage in discussions about the terms and conditions of employment. So if the discussion involves, for example, which political candidate may be better with regard to wages or benefits, for example, that specific discussion may be protected under the NLRA, even if the speech is disruptive (e.g. the employee uses a raised voice or profanity).

And realistically, should an employer ban all discussions of politically or racially sensitive topics in the workplace? That seems rather extreme, even if it is permissible. Certainly the employer can and should ban any speech that is discriminatory or harassing. And the employer can ban speech that is disruptive (subject to the NLRB caveat above), whether in content or expression. But the employer should ensure that any such prohibitions are being applied consistently.

RECENT BLOG POSTS

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

- Fired for Kneeling During the Anthem? Maybe Not So Fast… by Mark J. Swerdlin, September 28, 2017 (Selected as a "noteworthy" blog post by Employment Law Daily)
- The Value of Labor Goes Beyond Wages by Elizabeth Torphy-Donzella, September 21, 2017
- What, Did the Judge Draft Ezekiel Elliott for His Fantasy Football Team? by Mark J. Swerdlin, September 14, 2017 (Selected as a "noteworthy" blog post by Employment Law Daily)
- Do Employers Have to Provide Accommodations for Medical Marijuana Use? by Shelby Skeabeck and Lindsey White, September 7, 2017
- DOL Overtime Rule Struck Down by Fiona W. Ong, August 31, 2017 (Selected as a "noteworthy" blog post by Employment Law Daily)

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