SHAWE ROSENTHAL LLP

E-UPDATE

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RECENT DEVELOPMENTS

Universal Schedule Change Was Not Unlawful FMLA Interference

An employer's decision to implement a universal rotating shift schedule while an employee was out on Family and Medical Leave Act Leave did not constitute unlawful interference with the employee's FMLA rights, even though the employee was the one most impacted by the change, according to a Maryland federal court.

Facts of the Case: In *Quigley v. Meritus Health, Inc.*, the plaintiff was assigned to a permanent night shift schedule, while her co-workers rotated through day shifts, evening shifts and the night shifts that the plaintiff did not work. Following an incident in which the hospital was unable to secure night shift coverage when the plaintiff called out sick, the department manager announced the change to a universal rotating shift schedule to better ensure 24-hour coverage in case of last minute call-outs. Shortly thereafter, the plaintiff went on FMLA leave, and the change was implemented during her leave. Plaintiff objected to the change and never returned to work. She then sued the hospital for interference with her right under FMLA to be restored to the same or equivalent position and shift upon her return from leave.

The Court's Decision. The Maryland federal court held that the right to restoration is not absolute – that, under the FMLA regulations, the employee "has no greater right to reinstatement … than if the employee had been continuously employed during the FMLA leave period." In this case, the decision about the change to the schedule had been made prior to the employee's leave, and was made for legitimate business reasons unrelated to her leave. Thus, there was no violation of her FMLA rights.

Lessons Learned. This case highlights the fact that employers may continue to make legitimate business decisions regarding its operations, even if the decisions adversely affect an employee on FMLA leave. Of course, the decision may not be made for the purpose of targeting the employee on leave – that would be a violation of the FMLA.

Federal Contractors Required to Provide Privacy Training

A new final rule requires federal contractors and subcontractors with contracts involving personally identifiable information (PII) or any "system of records" (that allows for retrieval of information by an individual's name or other personally identifiable characteristic) to provide privacy training to employees who handle or have access to such information.

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PII means "information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information that is linked or linkable to a specific individual." The required training, which must be conducted prior to granting the employee access to such information and then annually, must include the following:

- The provisions of the Privacy Act of 1974 (5 U.S.C. 552a), including penalties for violations of the Act;
- The appropriate handling and safeguarding of PII;
- The authorized and official use of a system of records or any other PII;
- Restrictions on the use of unauthorized equipment to create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise access, or store PII;
- The prohibition against the unauthorized use of a system of records or unauthorized disclosure, access, handling, or use of PII or systems of records; and
- Procedures to be followed in the event of a potential or confirmed breach of a system of records or unauthorized disclosure, access, handling, or use of PII.

In addition, the training must be "role-based" (i.e. tailored to the particular employee's job duties) and must include both foundational and advanced training levels. In addition, the employee's knowledge level must be tested. Unless the contracting agency specifies that its own training must be used, the training may be developed by the (sub)contractor or the (sub)contractor may use training provided by another agency. (Sub)contractors must retain records of the training, and may be required to produce these to the contracting officer upon request.

TAKE NOTE

Unlawful Interrogations Under the National Labor Relations Act. A recent case reminds employers of the importance of complying with the strict requirements regarding employee interviews in the context of defending against an unfair labor practice (ULP) charge.

Under the National Labor Relations Act, an employee's right to engage in concerted activities regarding the terms and conditions of employment is protected, and a ULP charge may be filed when such rights have allegedly been violated. Under the well-established guidelines set forth in *Johnnie's Poultry Co.*, when interviewing an employee about protected activity in preparation for a ULP hearing before the National Labor Relations Board, "the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis."

In the present case, *Tschiggfrie Properties, Ltd.*, the employer interviewed an employee twice about a union campaign and his union-related conversation with another employee. In both interviews, the employer failed to provide the employee with assurances against reprisal, and it failed to inform him during the second interview that his participation was voluntary. Thus, the Board determined that the employer had violated the Act.

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Employee Requesting Religious Accommodation Must Still Follow Leave Policy. Employees eligible for leave as a religious accommodation are still required to comply with company policies governing leave requests, the U.S. Court of Appeals for the Fourth Circuit (which covers Md., Va., W.Va., N.C. and S.C.) recently held.

Under Title VII, employers must provide reasonable accommodation for an employee's religious needs, as long as such accommodation does not pose an undue hardship for the employer. Such reasonable accommodation can include leave. The employee, however, must comply with any policies regarding requesting leave, and may appropriately be disciplined for failing to comply with such policies. Thus, in *Abeles v. Metropolitan Washington Airports Authority*, the Court threw out the plaintiff's claim that the employer had failed to provide a reasonable accommodation because the plaintiff had clearly failed to follow the employer's long-established and neutral rules requiring her to request and receive approval for leave.

Individual Managers May Be Liable Under Section 1981. Individual managers should be aware that they may be held personally liable for race discrimination under Section 1981, as a recent case illustrates.

Only companies, and not individuals, can be held liable under most federal antidiscrimination statutes, like Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. Employees, however, can also bring claims of race discrimination under Section 1981, and a Pennsylvania federal court held that such claims can be asserted against individual managers. Therefore, in *Suero v. Motorworld Automotive Group, Inc.*, the court refused to throw out the employee's claim against the manager that he failed to take any action in response to the employee's complaints about racially harassment by co-workers, which created a hostile work environment.

Employer Avoided Liability by Prompt Response to Harassment Complaint. Although the U.S. Court of Appeals for the Seventh Circuit confirmed that racially offensive conduct by co-workers does not need to be targeted at a specific employee in order to create a hostile work environment under Title VII, the Court nonetheless found that the employer was not liable for such conduct where it responded promptly and effectively to the harassment complaints.

In *Cable v. FCA US LLC,* the employee complained about a co-worker's black voodoo doll and the letters "NIG" etched into one of her workstations, as well as some other drawings that she thought were racial in nature. The Court found that because the employer promptly investigated her complaints, painted over the letters and drawings, and conducted anti-harassment training for her team members, the employer should not be held liable under Title VII and Section 1981. This case emphasizes the importance of employers responding promptly and effectively to complaints of harassment.

Updated Disability Self-Identification Form for Federal Contractors. The Office of Management and Budget has released an updated version of the "Voluntary Self-Identification of Disability" form that federal contractors and sub-contractors are required to use for applicants and employees.

Federal (sub)contractors must invite applicants to self-identify as an individual with a disability both prior to making a job offer and after a job offer is made. In addition, current employees must also be

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asked at least every five years to self-identify voluntarily as an individual with a disability. In all cases, the government form must be used – employers may not alter the form in any way. The updated form should be used starting immediately.

EEOC Increases Posting Penalties. The penalty for violations of the notice posting requirements under Title VII, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act is again increasing – from $525 to $534.

As we previously reported in our June 2016 E-Update, Title VII, ADA and GINA each require employers to post a notice describing the protections provided by these laws. This can be accomplished by displaying the Equal Employer Opportunity Commission's "EEO is the Law" poster in a conspicuous location in the workplace where such notices for applicants and employees are customarily posted. Failure to post this required notice is subject to a monetary penalty.

Due to the passage of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, federal agencies must issue regulations annually to adjust for inflation the maximum civil penalties that they can impose. The EEOC's first adjustment, which took effect in July 2016, increased the posting penalty from $210 to $525. The new final rule regarding the current increase takes effect on March 2, 2017.

Shifting Explanations Support Discrimination Claim. A Maryland federal case emphasizes the need for employers to be thorough and honest in offering reasons for an employee's termination.

In *Saah v. Carroll L. Thumel et al.*, a veterinary assistant sued for pregnancy discrimination. The defendants asked the court to throw out the case, but the court found that there was sufficient evidence of discrimination and retaliation to send the case to trial. In particular, the court noted the shifting reasons for the termination – initially, the defendants said it was because the assistant had eavesdropped on a management conversation and told her co-workers that the office manager was talking sh** about them. In their response to the assistant's charge of discrimination, however, the defendants referenced additional issues, including her tardiness. Additional reasons were subsequently listed during the discovery process in the lawsuit, including poor performance (although the assistant had received 96/100 in her most recent performance review). The court found the shifting and "inconsistent" explanations to be "probative of pretext" for discrimination.

NEWS AND EVENTS

Webinar. The Employment Law Alliance, of which Shawe Rosenthal is the Maryland representative, is presenting a *free 60-minute webinar* **"*Social Media and the New Workplace: Is Your Brand and Reputation Protected?*"** on March 8th. Local times are listed here: 1:00pm – 3:00pm EST, 12:00pm – 1:00pm CST, 11:00am – 12:00pm MST, 10:00am – 11:00am PST, 8:00am – 9:00am HAST.

The world of social media is rapidly expanding in both scope and utilization. Employers may be surprised to learn what their employees may be posting about their managers, clients or the company in general. The new world of social media presents real challenges to employers who are seeking to protect their company brand and reputation. During this webinar, experienced legal counsel from the

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United States and Canada will provide practical insight on how companies can prepare for and respond to these challenges. To **To register, please click** here**.**

Victory. Elizabeth Torphy-Donzella won summary judgment in federal court on behalf of a bank against a manager who claimed that his termination was based on his race and sex. Liz was able to establish that the manager had been properly terminated for engaging in a verbal altercation with one of his subordinates in front of bank customers.

Victory. Darryl G. McCallum won summary judgment in federal court for a skilled nursing center in a case involving claims of national origin discrimination brought by several former employees. Reflecting the complex nature of this multi-plaintiff litigation, the grounds for the Court's dismissal of the claims were many and varied.

Article. Elizabeth Torphy-Donzella and Lindsey White authored an article, "Handling EEOC Systemic and Individual Discrimination Investigations and Litigation," for Lexis Practice Advisor, which provides practical labor and employment guidance from leading practitioners.

TOP TIP: Employer's Obligation to Seek More Information Regarding FMLA Request

Employers should be careful about automatically denying a request for leave to care for a family member under the Family and Medical Leave Act because the family member in question is apparently not a spouse, parent or child, as a recent case emphasizes.

The FMLA permits an employee to take leave in order to care for a "spouse, son, daughter or parent with a serious health condition." In *Coutard v. Municipal Credit Union*, the employee requested FMLA leave to care for his grandfather, and the employer denied the request on the grounds that the law does not apply to grandparents. The employee was then discharged for taking unprotected leave.

At issue was what notice the employee has to provide to the employer. The FMLA regulations provide that an employee must provide "sufficient information" for the employer to realize that "the FMLA may apply to the leave request." The FMLA regulations further provide that if an eligible employee provides such information and the employer needs additional information in order to determine if the request is covered by the FMLA, it is the employer's responsibility to seek such additional information.

The employee filed suit for violation of his FMLA rights, on the basis that he should have been informed by the employer that, under the FMLA, the definition of "parent" includes those who stand "*in loco parentis*," meaning that they acted as a parent to the employee regardless of the legal relationship. (The definitions also includes biological, adoptive, step and foster parents). He further argued that the employer should have recognized that, because the FMLA "may" have applied to his leave request, the employer was required, under the FMLA to request further information from him regarding the relationship with his grandfather. The employer, on the other hand, argued that it had no obligation to inform the employee of the "*in loco parentis"* definition or to inquire further as to the relationship.

The U.S. Court of Appeals for the Second Circuit observed that, in enacting the FMLA, Congress specifically stated that the broad definition of "parent" was intended to "reflect the reality that many children in the United States today do not live in traditional 'nuclear' families with their biological

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father and mother, and are increasingly raised by others including 'their grandparents.'" Thus, the employee's relationship with his grandfather was hardly "unique" and the employer had been given sufficient information to alert it to the fact that the FMLA "may" apply, which triggered its obligation to inquire further as to the relationship.

This case highlights the fact that the definition of "parent" and "child" under the FMLA is broader than the legal relationship. Thus, employers should not be too quick to decide that the FMLA does not apply to individuals who do not seem to fall within the parameters of a legal family relationship. Rather, the employer should ask further questions to establish whether an "*in loco parentis"* situation exists.

RECENT BLOG POSTS

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

Trump Administration Rescinds Transgender Student Guidance – What Does This Mean for Employers?

Rarely Performed Job Functions May Still Be "Essential" Under ADA

Are College Football Players Employees? The NLRB General Counsel Thinks So!

What is the Future of Sexual Orientation and Transgender Status Under the Trump Administration?

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