SHAWE ROSENTHAL LLP

E-UPDATE

February 28, 2018

RECENT DEVELOPMENTS

Supreme Court Update

The Supreme Court issued several employment-related decisions this month: (1) it narrowly defined "whistleblowers" who are entitled to protection under the Dodd-Frank Act; (2) it reiterated that retirees' right to "lifetime" health benefits expires at the end of a collective bargaining agreement, unless the CBA specifically provides otherwise; and (3) it declined to clarify if sexual orientation discrimination is prohibited by Title VII.

- **Dodd-Frank Does Not Protect Internal Whistleblowers.** The Dodd-Frank Act protects whistleblowers from employment discrimination. Federal circuit courts were split on whether the whistleblower protections applied only to reports of financial wrongdoing to the U.S. Securities and Exchange Commission, or whether it applied also to internal complaints. The SEC also adopted this latter, broader approach in its regulatory guidance.

  The Supreme Court, however, found in *Digital Realty Trust, Inc. v. Somers* that the definition of a whistleblower was clearly set forth in the Dodd-Frank Act: an individual who provides "information relating to a violation of the securities laws to the Commission." Thus, employees who report internally are not protected by the anti-discrimination provisions of Dodd-Frank. This holding vastly narrows the group of employees protected by Dodd-Frank. However, it likely will increase the number of SEC complaints filed against publicly traded companies.

- **No Right To Lifetime Health Benefits After Expiration of CBA.** The Supreme Court in *CNH Industrial N.V. v. Reese*, found that the U.S. Court of Appeals for the Sixth Circuit incorrectly relied on invalid legal precedent in ruling that retirees had a right to lifetime health benefits after the applicable collective bargaining agreement (CBA) had expired. The Sixth Circuit failed to apply the Supreme Court's 2015 decision, *M&G Polymers USA LLC v. Tackett*, in which the Supreme Court stated that ordinary principles of contract law govern the interpretation of CBAs, specifically including provisions regarding retiree health benefits. Thus, under *Tackett*, the CBA must specifically provide for lifetime benefits beyond the term of the CBA, or else such benefits end with the expiration of the CBA.

  The *Tackett* case overturned an earlier case, *UAW v. Yard Man, Inc*, that had provided for an inference of lifetime benefits where the CBA is silent on the duration of such benefits. The Supreme Court found that the Sixth Circuit had, in essence and inappropriately, relied on

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

Yard Man in finding lifetime health benefits for retirees absent such clear cut direction in the CBA.

- **No Decision on Title VII Coverage of Sexual Orientation Discrimination.** The Supreme Court declined to review a case that would have resolved a federal circuit court split on whether discrimination based on sexual orientation constitutes sex discrimination under Title VII. As we have previously reported, the U.S. Court of Appeals for the Eleventh Circuit and, at that time, the Second Circuit, found that it does not (the Eleventh Circuit decision, *Evans v. Georgia Regional Hospital*, was the case on appeal to the Supreme Court). Until February 26, 2018, the Second Circuit agreed with the Eleventh Circuit, but has now joined the Seventh Circuit in reaching the opposite conclusion (the Second Circuit decision is discussed in the Take Note section of this E-Update). Meanwhile at the federal agency level, the Equal Employment Opportunity Commission strongly asserts that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII, and recently won its first filed sexual orientation discrimination case in federal district court. The Department of Justice, which under President Obama had shared the EEOC's position, has more recently under the Trump administration rejected that position.

  Employers were hoping that the Supreme Court would resolve the issue. With the Supreme Court's rejection of the appeal, whether sexual orientation discrimination is prohibited by Title VII will depend on the jurisdiction, and likely will be subject to shifting positions from the courts.

NLRB Releases Multitude of Advice Memos

The National Labor Relations Board's Office of the General Counsel (OGC) released 44 advice memos during a five-day period, from February 11-16, 2018. Some of these memos were originally issued as far back as 2009, but they were not released to the public until this month. The positions asserted in some of the memos were subsequently addressed in Board opinions, while others are very specific to the individual situation. There are a number of them, however, that offer some insight into matters of general interest. It is worth noting that the vast majority of these memos were issued during the pro-union Obama administration, and that the current General Counsel has already expressed interest in revisiting some of these issues.

- *Market 450 LLC d/b/a The Food Market* (July 28, 2017). An employee's intercession on behalf of a co-worker regarding a tip constituted protected concerted activity regarding the terms and conditions of employment under Section 7 of the National Labor Relations Act, and therefore terminating the employee for "sticking [the employee's] nose in other people's business" was a violation of the NLRA.

- *North Shore Ambulance and Oxygen Service, Inc.* (June 26, 2017). Under *Total Security Management*, the Board held that an employer must bargain with the union before imposing discretionary discipline when the union has been certified or recognized but has not yet entered into a collective bargaining agreement. If the employer unlawfully imposes discipline, the Board will grant reinstatement and backpay, unless the employer establishes

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

that the employee is terminated for cause. However, according to the OGC, once the employer makes that showing, the Board's Regional Director may show that there are mitigating circumstances or that the employer has not imposed similar discipline on other employees for similar misconduct. Then the employer would be required to show that it would have imposed the discipline nonetheless. If the employer cannot make this showing, reinstatement and backpay may be awarded.

- *JBS USA, LLC* (May 25, 2017). The employer violated Section 8(a)(1) when it terminated an employee who insisted on recording investigatory meetings with a manager in violation of the company cell phone policy. According to the OGC, although the recording activity itself was not protected concerted activity, it implicated Section 7 concerns. The employer's cell phone policy was overbroad, as it banned all recording without carving out exceptions for Section 7 activity (including recording images of protected picketing; documenting unsafe workplace equipment, hazardous working conditions, or inconsistent application of employer rules; documenting and publicizing discussions about terms and conditions of employment; or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions).

- *Continental Carbon Co.*, (April 26, 2017). The OGC stated that the Board should decline to defer resolution of a discharge case to the parties' grievance-arbitration process and assert jurisdiction because "the employer engaged in a pattern of hostility toward [the employee] for grievance activities and demonstrated a lack of respect for the grievance-arbitration machinery such that the parties' alternative process cannot be relied upon to fairly resolve this dispute."

- *Williams-Sonoma Direct, Inc.* (April 17, 2017). Under *Atlantic Steel*, an employee's otherwise protected Section 7 activity becomes unprotected if it is sufficiently egregious or offensive. The Board applies the following factors to make this determination: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. Under this analysis, an employee's statement during a workplace safety meeting that the employee might as well hit fellow employees if a near-miss would be treated the same as a collision and another employee's statement that "dead men can't talk" were found not to be objective threats of physical harm to fellow employees and that the *Atlantic Steel* factors weighed in favor of protection.

- *Toyota Motor Manufacturing, Kentucky Inc.* (April 7, 2017). Employees have a Section 7 right to display union insignia at work, including the wearing of pro-union clothing. An employer may restrict this right if "special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety." The OGC found that the employer did not establish legitimate safety concerns that would have established such special circumstances, even though the worker worked in a dangerous work area that required the wearing of high-visibility clothing. The OGC rejected the employer's argument that the union lettering on the clothing was distracting, diminished the high-visibility nature of the shirt, and was confusing because managers' high-visibility shirts also have large lettering.

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

- *Team Fishel* (March 23, 2017). The OGC urged the Board to extend the holding in *Purple Communications*, which allows employees to use the employer's e-mail system for Section 7 protected communications, to permit employees' use of a company-provided internet system for social media activity on company equipment. The OGC's position in this memo has more recently been called into question, given the current General Counsel's intention to revisit *Purple Communications*, as set forth in his December 1, 2017 memorandum, GC 18-02 "Mandatory Submissions to Advice."

- *Diversified Restaurant Holdings, Inc. d.b.a. Bagger Dave's Burger Tavern* (February 13, 2017). An employee was inadvertently given access to employee wage information in the course of his duties, which he then photographed and shared with his co-workers. The OGC found that his termination for violating the confidential information policy violated the NLRA, since Section 7 protects employees' ability to share wage information.

- *DFW Security Protective Force* (February 6, 2017). A company is a "perfectly clear" successor that is bound to the predecessor's bargaining obligation if it hires the predecessor's employees and actively or tacitly misleads employees or their union into believing that the employees will be retained by the successor under the same terms and conditions, or at least fails to clearly announce its intent to establish new terms and conditions prior to or simultaneous with its invitation to accept employment. The OGC found the employer here to be a perfectly clear successor, despite the fact that the offer letter contained a general statement that employees' work duties, locations, shifts, and post assignments were subject to change, because the OGC found this was not sufficiently specific to constitute a "clear announcement."

- *Southern California Gas* (November 8, 2016). The OGC found an agreement between the employer and union to give priority to union members in filling internal job postings to be unlawful because it interfered with employees' Section 7 rights to refrain from union membership.

- *St. Joseph Hospital* (April 9, 2015). The OGC encouraged the Board to extend *Purple Communications* to permit employees to use the employer's internet and intranet systems for protected Section 7 communications. As noted previously, this position is now questionable, given the current General Counsel's questioning of *Purple Communications*.

- *Milveen Environmental Services* (October 28, 2013). The OGC found that a company was a successor employer, despite the fact that there was an intervening non-union employer for six months, and therefore it was bound to the collective bargaining obligations of the predecessor employer. The company was deemed a successor under the Supreme Court case of *Burns International Security Services v. NLRB*, "because a majority of its employees were bargaining unit employees of the predecessor employer and there was substantial continuity between the enterprises, notwithstanding the hiatus caused by the intervening non-union employer." The NLRB adopted the Administrative Law Judge's same finding on this issue, and the NLRB's order was enforced by the U.S. Court of Appeals for the Third Circuit.

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

TAKE NOTE

***En Banc* Second Circuit Rules Sexual Orientation Discrimination Violates Title VII.** As noted in our Supreme Court update this month, the U.S. Court of Appeals for the Second Circuit, sitting *en banc*, recently held that sexual orientation discrimination is covered by Title VII.

In *Zarda v. Altitude Express*, a federal district had found, based on Second Circuit precedent, that an employee's Title VII claim could not proceed because his claim – that he was terminated based on his failure to conform to "straight male stereotypes" (i.e. his sexual orientation) – was not cognizable under Title VII (despite the EEOC's contrary position). Likewise, the panel of the Second Circuit that heard the appeal concluded that it, too, was bound by controlling Circuit precedent and upheld the district court's decision. A court of appeals, sitting *en banc*, may change Circuit precedent, and that is what the Second Circuit did in *Zarda*, ruling that discrimination based on sexual orientation is "because of sex" and therefore covered by Title VII. The majority based its conclusion on three premises.

First, under a "comparative test" the court asks whether a man and a woman would be treated differently for the same behavior. "In the context of sexual orientation, a woman who is subject to an adverse action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. We therefore can conclude that sexual orientation is a function of sex and, by extension, sexual orientation is a subset of sex discrimination."

Second, the majority found "gender stereotyping," which is a recognized theory of sex discrimination (that men and women who do not adhere to traditional masculine and feminine behaviors may challenge their treatment under Title VII), applied equally to sexual orientation discrimination. Said the majority, "an employer who discriminates against employees based on assumptions about the gender to which the employees can or should be attracted has engaged in sex-discrimination irrespective of whether the employer uses a double-edged sword that cuts both men and women."

Third, the majority found the recognized theory of "associational discrimination" under Title VII also supported its conclusion that sexual orientation discrimination is covered by that law. Just as courts have found it unlawful for employers to take adverse action against employees because they associate with individuals of another race, so too the majority found "if a male employee married to a man is terminated because his employer disapproves of same-sex marriage, the employee has suffered associational discrimination based on his own sex because 'the fact that an employee is a man instead of a woman motivated the employer's discrimination against him.'"

Three judges wrote separately to concur in the judgment, but not in all of the majority's rationales. There also were three separate dissenting opinions. The tenor of the dissents is encapsulated by the opening line of the opinion of Judge Lynch: "Speaking solely as a citizen, I would be delighted to awake one morning and learn that Congress just passed legislation adding sexual orientation to the list of grounds of employment discrimination prohibited by Title VII of the Civil Rights Act. . . . [But] we all know that Congress did no such thing." Finding that Congress did not intend Title VII

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

to cover sexual orientation discrimination when the law was enacted, the dissenting judges deemed themselves constrained to apply the law as passed.

NLRB's Updated Joint Employer Standard Rescinded – For the Moment. In a decision published February 26, 2018, the National Labor Relations Board vacated a Trump-era decision (*Hy-Brand Industrial*) concerning joint employer liability.

As we explained previously, in *Hy-Brand Industrial*, the NLRB reversed an Obama-era decision (*Browning-Ferris*) that made it easier to prove that multiple entities are joint employers. The *Hy-Brand* decision was vacated because a Trump-appointed Board member was alleged to have a conflict of interest based on the fact that his former law firm represented a company in the *Browning-Ferris* case. The conflict of interest charge was supported by a report from the Board's Inspector General, who described the conflict as a "serious and flagrant problem." Reading between the lines, it appears that the current Board majority thought it best to "wipe the slate clean" rather than continue to deal with the controversy. It is, however, fair to assume that when the issue comes up again, the Board will again reject the Obama-era standard, which was itself a departure from longstanding Board law.

NLRB Solicits Input on Misclassification Issue. The National Labor Relations Board has invited the public to submit briefs on the issue of whether the act of misclassifying an employee as an independent contractor is a violation of the National Labor Relations Act

In *Velox Express, Inc. and Edge*, an administrative law judge asserted that the act of misclassification, without more, violates the Act. This decision was quite controversial, and General Counsel Peter Robb has indicated an interest in reviewing this issue, as set forth in his December 1, 2017 memorandum, GC 18-02 "Mandatory Submissions to Advice."

Employer May Not Use Commercial Cost of Housing for FLSA Purposes. A bed and breakfast that sought to take a credit for housing against an employee's wages under the Fair Labor Standards Act may not use the cost it charged guests as the value of the housing.

Under the FLSA, an employee's "wages" may include "the reasonable cost... to the employer of furnishing [the] employee with board, lodging, or other facilities" in addition to cash. In *Balbed v. Eden Park Guest House*, the court noted that the FLSA "regulations provide only two ways to calculate the value of in-kind compensation — reasonable cost or fair value — and an employer must use whichever is less." In addition, "the employer may only use the fair value of housing as the amount credited toward wages if the fair value is *equal to or lower* than the amount the employer actually pays for the housing." In the current case, the use of the amount that the bed and breakfast charged guests improperly included the employer's profit.

Company Became Successor Employer on Date It Assumed Predecessor's Operations. In *Ride Right, LLC*, the National Labor Relations Board deemed the company to be a successor employer for purposes of the National Labor Relations Act on the date that it assumed the predecessor employer's operations, and the successor was therefore obligated to recognize and bargain with the union representing the predecessor's employees at that point.

Under the Supreme Court's decision, *Fall River Dyeing & Finishing Corp. v. NLRB*, a company is a successor employer when (1) there is a substantial continuity of operations, (2) the union makes a

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

timely demand to bargain for an appropriate unit, and (3) the employer has hired a "substantial and representative complement" of employees, the majority of whom were represented by the union under the predecessor. As the Board stated, a "substantial and representative complement" is achieved when "an employer's job classifications are substantially filled, its operations are in substantially normal production, and it does not reasonably expect to increase the number of unit employees."

The employer argued that it had not reached a substantial and representative complement until five months after it assumed operations, when it finally achieved its "ultimate work force totals." However, as the Board noted, under *Fall River,* the employer does not need to finish hiring to reach a "substantial and representative complement." Although the employer eventually did expand its workforce, there was no plan to do so at the time that it assumed business operations and hired the majority of the predecessor's employees, providing normal paratransit services. Thus, the bargaining obligation was triggered on the date that the employer assumed business operations.

Manager's Explanation of Employee's Inclusion in RIF Was "Plus Factor" That Undercut Age Claim. The U.S. Court of Appeals for the Eleventh Circuit found that a manager's explanation as to why an employee was included in a company reduction in force was a "plus factor" that supported the company's decision to terminate the employee.

In *Vira v. Crowley Liner Servs., Inc.*, the employee was included in a RIF of about 100 employees, and he sued for age discrimination and retaliation for taking leave under the Family and Medical Leave Act. The employee argued that an employer could not simply rely on the economic benefits of a RIF without explaining why the particular individual was selected for the RIF – i.e. a "plus factor." The court acknowledged that it had previously looked at plus factors to determine whether a termination decision was nondiscriminatory, but declined to decide whether such a plus factor was always required since in this case, the manager's statement, which explained the reasons for the employee's selection, was a plus factor.

This case emphasizes the wisdom of identifying what legitimate, nondiscriminatory reasons underlie each individual selection for a RIF.

Period of Telework Was Reasonable Accommodation. A jury's verdict that an attorney had been denied reasonable accommodation under the ADA when the company refused to allow her to telework for a 10-week period of bedrest was upheld by the U.S. Court of Appeals for the Eleventh Circuit, despite the company's argument that in-person attendance was an essential function of the job.

In *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, in support of its argument that in-person attendance was an essential function of the attorney's job that would prohibit telework, the company offered a job description and testimony of former attorneys. The court observed, however, that the job description was based on a 20-year old questionnaire that did not take into account technological advancements that had changed the job. In addition, the period of time for which the attorney sought to telework was limited, and she had successfully worked remotely in that position on previous occasions.

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

The lessons for employers here is to ensure that job descriptions are up-to-date and accurate, and to consider whether there are technological options that could enable the performance of the job on a remote basis.

OTHER NEWS AND EVENTS

On February 27, 2018, the radio station WAMU aired a piece examining the problems employers are experiencing in trying to comply with the Maryland Healthy Working Families Act. Fiona Ong was interviewed by the reporter. You may listen to the recording here.

On February 13, 2018, Fiona W. Ong testified before the Economic Matters Committee of the Maryland House of Delegates in favor of a proposed extension of the effective date for the Maryland Healthy Working Families Act, which requires employers to provide earned sick and safe leave. To read Fiona's testimony, click here. To view a recording of the testimony, click here. Fiona's testimony starts 26 minutes and 30 seconds into the recording.

Teresa D. Teare spoke about marijuana in the workplace at a City of Baltimore Human Resources conference on January 31, 2018.

TOP TIP: Maryland DLLR Issues FAQs on Earned Sick and Safe Leave Law

On February 16, 2018, the Maryland Department of Licensing and Labor Regulation (DLLR) released Frequently Asked Questions (FAQs) on the Maryland Healthy Working Families Act, which requires employers to provide earned sick and safe leave to eligible Maryland employees. The following are points of particular interest from the 10-page document, available on the DLLR's paid leave webpage:

- Only Maryland employees are counted towards the 15-employee threshold for purposes of determining whether the leave must be paid or unpaid. (p. 3)
- The law applies to the Maryland employees of out-of-state employers. (p. 3)
- The law does not apply to out-of-state employees of Maryland employers. (p. 3)
- If an entity has multiple businesses, the DLLR will consider whether each business is a separate employer for SSL by taking into account whether it is considered a separate employer for other legal purposes, including taxes, UI, and WC, as well as the relationship between the entities. (p. 3-4) Thus, it appears that the DLLR will apply some form of joint employer analysis.
- The employer can front load leave for full-time employees and accrue it for part-time employees. (p. 5)
- The DLLR acknowledges that the law does not define what it means to "regularly" work less than 12 hours a week, and suggests that it means "normal or customary." (p. 6) Unfortunately, the DLLR does not further elaborate on what "normal or customary" means.
- If an employee whose primary work location is Maryland works outside the state, all hours worked, including the out-of-state hours, count for purposes of accrual. (p. 7)

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

- The DLLR states that, "After an employee has exhausted all of the leave that he or she is entitled to use under the earned sick and safe leave law, then an employer could apply its normal attendance policies to any absences taken after the leave has been exhausted." (p. 9) In other words, leave taken for sick and safe leave purposes beyond the statutory entitlement is not protected by the law.

- Commission-based employee are not paid or tracked on an hourly basis, which is an issue because the law is premised on an hourly basis. The DLLR notes that, for such employees, there are several options. The employer can simply ensure that the employee does not incur a reduction in pay for sick and safe leave absences – if that is the case, no hours need to be tracked. Alternatively, the employer "could impute an average hourly wage to each employee based on commissions earned during a fixed period of time (for example the previous six months) and pay the employee at that rate for absences due to sick and safe leave use." (p. 10)

RECENT BLOG POSTS

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

- NLRB GC Is Woke (in more ways than one…), by Elizabeth Torphy-Donzella, February 23, 2018.
- Another Anonymous Employee Posting App? Watch Out!, by Shelby S. Skeabeck, February 15, 2018.
- No Enforcement of the EEOC's Background Check Guidance?, by Fiona W. Ong, February 8, 2018.
- Employers, Don't Let Your Emojis Get the Best of You, by Felix M. Digilov, February 1, 2018.

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com