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E-UPDATE

May 31, 2018

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RECENT DEVELOPMENTS

NLRB Releases More New Advice Memos

Following the release of a multitude of advice memoranda earlier this year, as we reported in our February 2018 and March 2018 E-Updates, the National Labor Relations Board's Office of the General Counsel (OGC) has now released additional memoranda. As before, some of these memos were originally prepared years ago, but they were not released to the public until this month. Of particular interest are the following:

- *Securitas Security Services USA, Inc.* (September 17, 2017). The union's representation petition named only Bechtel's subcontractor, Securitas, as the employer. Nevertheless, the OGC found that the union had not waived its right to bargain with Bechtel as a joint employer because the union had not been fully aware of the relationship between Bechtel and Securitas, and therefore its conduct "does not evidence a conscious and deliberate pursuit of a bargaining relationship limited solely to Securitas." In addition, the OGC found that Bechtel was not deprived of due process because it received timely notice of the alleged joint employer status.

- *Adams & Associates, Inc.* (November 20, 2014). Applying either the Board's then-current joint employer standard or the GC's proposed standard, the OGC found joint employer status to exist. Notably, the joint employer standard is an issue of considerable continuing controversy. In 2015, the Obama Board issued *Browning-Ferris Industries*, which essentially adopted the GC's proposed standard and vastly expanded the universe of who would be considered a joint employer. This decision was overturned by the Trump Board in December 2017 in *Hy-Brand Industrial Contractors, Ltd.*, which returned to the prior standard. As we reported in our February 2018 E-Update, however, the *Hy-Brand* decision was subsequently rescinded based upon a purported conflict of interest by one of the members of the Board. On May 9, 2018, the Board announced that it is considering rulemaking on this issue. We expect further developments in short order.

- *GE Appliances, Haier* (April 17, 2018). The OGC held that the employer's refusal to allow union representatives to record the employer's monthly team meetings and investigatory interviews was lawful. Long-standing Board policy disfavors verbatim recordings of employer-union meetings where questions arising under the collective bargaining agreement

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will be discussed. In addition, the OGC noted that the employer's denial targeted only union representatives, not employees.

- *Libra Services, Inc.* (April 23, 2018). The OGC found that the employer's discharge of an individual for questioning his status as an independent contractor did not violate the NLRA. The individual was not engaged in protected concerted activity, as the questions were asked only on behalf of himself (as the only individual designated as an independent contractor in the New York office) and not for the purpose of mutual aid or protection of other co-workers. Moreover, there was no indication that the individual would be seeking to engage in such activity in the future.

Federal Appellate Courts Provide Guidance on Essential Functions Under the ADA

Two U.S. Courts of Appeals have issued opinions on the essential functions of a job under the Americans with Disabilities Act, specifically the ability to work overtime and the ability to work rotating shifts.

Working Overtime Can Be an Essential Function. In *Faidley v. United Parcel Service of America, Inc.*, the U.S. Court of Appeals for the Eighth Circuit held that the essential functions of a delivery driver job include working overtime, and an employee who was restricted by his doctor to working eight-hour shifts was therefore unable to perform the essential functions of that job, rendering him unqualified for the position.

UPS explained that drivers' workloads could increase unpredictably, particularly during the holiday season. Drivers also dealt with unpredictable weather, which could affect delivery schedules. If a driver could not work overtime, other drivers would have to complete his deliveries or the packages would not be delivered timely – either result having a negative impact on the business. The court noted that the overtime requirement was set forth in the job description, and also had been collectively bargained with the union.

Working Rotating Shifts Can Be an Essential Function. The ability to work rotating shifts was found to be an essential function of an assistant restaurant manager position by the U.S. Court of Appeals for the First Circuit, in *Sepulveda-Vargas v. Caribbean Restaurants, LLC.* Following an attack at gunpoint, the employee was diagnosed with depression and PTSD, and he requested a permanent fixed schedule as an accommodation. Although he was initially granted the fixed schedule, the employer later informed him he would need to resume working the rotating schedule.

The employer established that the rotating schedule was necessary for equal work distribution among the managerial staff, and that permanently granting the employee a fixed schedule would require the other managers to work less desirable shifts. The court noted that the employer's judgment as to what was an essential job function was of significance. The essential nature of the requirement is evidenced by a job description containing the requirement. Other considerations include the consequences of not requiring the performance of the function, the work experience of past incumbents in the position, and the current work experience of those in similar jobs.

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The court also noted that granting the exemption from the requirement on a temporary basis did not render it non-essential. "To find otherwise would unacceptably punish employers from doing more than the ADA requires, and might discourage such an undertaking on the part of employers."

Lessons Learned: There are several lessons that can be drawn from these cases. First, employers should be thoughtful about what is an essential function of the job and how they can establish that the function is, in fact, essential. Demonstrating the negative impact if the function is not performed is helpful to that analysis. In addition, it is useful to list particularly important functions in a job description and, if applicable, to engage the union in discussions over those critical job functions – these also help establish the essential nature of those functions. Other helpful indicia are past and present performance of those functions by those in the position.

Employers should also be aware that exempting the performance of a job function temporarily does not necessarily mean that they will be required to provide that same accommodation on a permanent basis. Note, however, that the longer the exemption is provided, the weaker the argument that the function is actually essential will be.

Finally, situations may arise where an employee insists that he or she can perform functions that the doctor has restricted. However, as the Eighth Circuit stated, the ADA "does not require an employer to permit an employee to perform a job function that the employee's physician has forbidden." Thus, employers can rely on the limitations set forth by a doctor, even if the employee wishes to ignore them.

TAKE NOTE

ADEA Protects Applicants as Well as Employees from Disparate Impact. The U.S. Supreme Court had previously ruled that the Age Discrimination in Employment Act prohibits employment practices that disparately impact older employees, and the U.S. Court of Appeals for the Seventh Circuit has now expanded that ruling to include applicants.

The Seventh Circuit, in *Kleber v. CareFusion Corp.*, found that, although ADEA's disparate impact provision does not expressly reference applicants, the broad language of the statute could be read to cover such individuals. Limiting the language to current employees would "leave a wide array of discriminatory hiring practices untouched." Moreover, internal job applicants would have the ability to sue while outside applicants would not – an arbitrary result. The Seventh Circuit found that, in enacting ADEA, Congress was specifically concerned about the difficulty for older workers "to *find* jobs." Furthermore, the Seventh Circuit found parallels between the language of Title VII and the ADEA, and the Supreme Court has recognized disparate impact claims for applicants under Title VII.

Notably, this ruling sets up a split among the federal appellate courts, with the Ninth Circuit coming to the opposite conclusion in the 2016 case of *Villarreal v. R.J. Reynolds Tobacco Co*. Accordingly, this issue may ultimately need to be resolved by the U.S. Supreme Court.

Request for "a Few Weeks or a Few Months" of Leave Was Not Reasonable. A worker's request for "a few weeks or a few months" of leave was deemed to be a request for indefinite leave, which is

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not a reasonable accommodation as a matter of law under the Americans with Disabilities Act, according to the U.S. Court of Appeals for the Third Circuit.

In *Kieffer v. CPR Restoration and Cleaning Servs., LLC*, the worker sustained a shoulder injury that prevented him from performing his job. The worker asked for "a few weeks or a few months" of leave. The Third Circuit noted that, under the ADA, "a short period of definite leave [that] would enable an employee to perform his essential job functions in the near future" is a reasonable accommodation. In this case, however, "the request for leave here specified neither a leave for a definite period, nor a return in the near future." Accordingly, the Third Circuit deemed it to be a request for indefinite leave, which is not a reasonable accommodation under the ADA.

This ruling is interesting because, in our experience, the Equal Employment Opportunity Commission would likely consider the request as one for a definite amount of up to "a few months" of leave, rather than an open-ended (i.e. "indefinite") leave. Yet it appears that the Third Circuit would view even that amount as being beyond the "short period of definite leave" that would be reasonable. If so, the Third Circuit would join the Seventh Circuit, which recently held that two to three months of leave was not a reasonable accommodation, as we discussed in our September 2017 E-Update.

Harassment Claim May Be Based on Demand for Sexual Favors for a Third Party. The U.S. Court of Appeals for the Fifth Circuit held that a sexual harassment claim may be based on a demand that an employee date a potential client in order to receive a bonus.

Under the *quid pro quo* theory of sexual harassment, an employer is liable when a manager or supervisor makes sexually-based demands of an employee, and then takes action against the employee based on the employee's compliance or refusal of the demands. In the case of *Davenport v. Edward D. Jones & Co.*, the supervisor did not make demands for himself but rather for a third party – a client. The court rejected the employer's argument that a *quid pro quo* claim must involve a request to engage in sexual acts with the supervisor. Instead, the court found that, because the supervisor conditioned the receipt of a bonus on the subordinate's dating a client, the supervisor was the harasser, and it did not matter that a third party was the beneficiary of the harassment.

Interestingly, however, in this case, the court went on to find that the employee had failed to establish her claim because she did not offer sufficient evidence that she was actually eligible for a bonus and was denied it based on her refusal to date the client. Nonetheless, in this #MeToo era of heightened sensitivity to sexual harassment, this case warns employers that sexual harassment claims may be considered broadly and involve individuals outside of the company.

Philadelphia Wage Inquiry Ban Found Unconstitutional; Wage History Ban Upheld. Philadelphia's recently-enacted ordinance was found to be illegal to the extent it prohibits an employer from asking about an applicant's salary history (the "Inquiry Provision"), but legally prohibits employers from relying on wage history in establishing an employee's salary (the "Reliance Provision).

In *Chamber of Commerce of Greater Philadelphia v. City of Philadelphia et al.*, a federal district court in Pennsylvania found that the Inquiry Provision violated the First Amendment's free speech protections. A governmental action may limit free speech rights only where it can demonstrate a substantial governmental interest – in this case, reducing discriminatory wages and promoting wage

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equity. According to the court, the City failed to provide evidence such as studies or statistics that the law would, in fact, advance the governmental interest, and instead relied on unsubstantiated conclusions. Therefore, the court granted a preliminary injunction as to this provision.

The court declined, however, to enjoin the Reliance Provision. It found that this provision did not implicate the First Amendment because it targeted content (i.e. wage history, utilized to determine salary) rather than speech. The Chamber argued that the Reliance Provision was unconstitutionally vague by failing to clearly define when employers *could* rely upon voluntary disclosures of past salaries by prospective employees. The Court found that the ordinance did in fact adequately define a voluntary, "knowing and willing," disclosure of wage history in an interview setting. When such a "knowing and willing" disclosure by an applicant occurs, the Court held that the ordinance is clear in allowing employers to rely upon it.

Employer Illegally Withheld Benefits from Eligible Voters Granted to Non-Voting Employees. The National Labor Relations Board held that the employer violated the National Labor Relations Act when it implemented better health benefits for all employees except those eligible to vote in an upcoming union election.

In *Woodcrest Health Care Center*, the Board applied the analysis set forth by the U.S. Supreme Court in *NLRB v. Great Dane Trailers, Inc.*, which requires the Board to consider whether an employer's conduct has some adverse effect on employees' rights under Section 8(a)(3) of the NLRA to engage in concerted activity regarding their terms and conditions of employment. The Board found that withholding the improved health benefits had an adverse effect "to some extent" in that the denial of benefits discouraged them from engaging in organizational activity. Under *Great Dane*, the burden then shifted to the employer to provide evidence of "legitimate and substantial business justification for the conduct." The employer claimed that it was trying to preserve the status quo and avoid affecting the outcome of the election, but could offer no evidence in support of this supposed motive.

Nonetheless, that stated motive would still have been insufficient to support the denial of benefits, asserted the Board. The Board has consistently held that withholding benefits from eligible voters that are granted to other employees has a "coercive effect." Thus, an employer cannot treat voters differently than other employees.

Maryland Federal Court Recognizes Discrimination Claim Based on "Perceived" National Origin. The U.S. District Court for the District of Maryland held that a claim of perceived national origin is actionable under Title VII, rejecting the employer's argument that Title VII protects only actual national origin.

In *EEOC v. MVM, Inc.*, the EEOC claimed that the employer discriminated against employees that it believed to be African. The employer argued that only discrimination based on actual, not perceived, national origin is prohibited by Title VII. The court noted that, while the Fourth Circuit had not yet addressed this issue, other federal appellate courts had recognized claims of perceived national origin, based in part on EEOC guidance referencing both "real" and "perceived" national origin. The court likewise relied on the EEOC guidance to extend Title VII's protections to "perceived" national origin, stating that to find otherwise "would be to allow discrimination to go unchecked where the

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perpetrator is too ignorant to understand the difference between individuals from different countries or regions."

We believe it is likely that the U.S. Court of Appeals for the Fourth Circuit would agree with the District Court's rationale. Employers in this jurisdiction should be aware that a claim of perceived national origin is a viable claim.

OFCCP Extends Moratorium on TRICARE Enforcement. The Office of Federal Contract Compliance Programs announced that it was extending its five-year enforcement moratorium for TRICARE providers for another two years, and expanding the moratorium's coverage to Veterans Affairs Health Benefits Program providers.

TRICARE is the Department of Defense's healthcare program for military service members and their families. Directive 2014-01, issued in 2014, established a five-year moratorium on enforcement of the federal contractor affirmative action program and recordkeeping obligations with regard to healthcare providers solely on the basis of their subcontractor status in TRICARE contracts between DOD and prime managed-care contractors. This moratorium has been extended for two years, to 2021, under Directive 2018-02. The new Directive also provides that the moratorium will cover Veterans Affairs Health Benefits Program providers. The enforcement prohibition does not apply to the investigation of discrimination complaints under the laws enforced by OFCCP (Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act).

NEWS AND EVENTS

Honor – Firm and Attorneys Recognized by Chambers USA: America's Leading Lawyers for Business. Shawe Rosenthal has been ranked in the top tier of Maryland labor and employment firms for the fifteenth consecutive year by Chambers USA: America's Leading Lawyers for Business – one of only two firms to receive this ranking in Maryland. Seven Shawe Rosenthal partners received recognition as top individual labor and employment law practitioners: co-managing partners Gary L. Simpler and Stephen D. Shawe, as well as J. Michael McGuire, Elizabeth Torphy-Donzella, Mark J. Swerdlin, Fiona W. Ong, and Eric Hemmendinger. 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.

Honor – Gary Simpler Honored with the Daily Record's Leadership in Law Award. Gary L. Simpler was an honoree at The Daily Record's reception on May 17, 2018 recognizing its Leadership in Law Award recipients. Leadership in Law Awards recognize Maryland's legal professionals – lawyers and judges – whose dedication to their occupation and to their communities is outstanding. Gary was also featured in an article on the Daily Record website.

Victory – Teresa Teare and Parker Thoeni Win Dismissal of Case. An employee sued her former employer for various torts arising out of alleged sexual misconduct by her supervisor. The employee had previously settled the same claims against the employer's successor. Although the release contained in the settlement agreement did not specifically name the former employer, the employee's attempt to take a second bite of the apple was clearly in bad faith, and Teresa and Parker were able to convince the plaintiff and her counsel to dismiss her claims.

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TOP TIP: Employment Action May Still Be Adverse Even If Employee Does Not Mind

A recent case expands the definition of an adverse employment action on which a discrimination claim may be based. Typically, an "adverse" employment action is one to which the plaintiff objects; but in *Vinson v. Koch Foods of Alabama, LLC*, the U.S. Court of Appeals for the Eleventh Circuit found an adverse action existed despite the fact that the employee did not mind the change and even received a raise.

The plaintiff, who is Hispanic, and two of her HR colleagues, who are Caucasian, left the HR office unattended for several hours one day. All three were suspended. Following the suspension, the plaintiff was reassigned from the HR office to the production floor in a poultry processing plant, and given additional production line duties (including handling chicken carcasses and operating machinery). The two co-workers were not reassigned. After her position was eliminated, the plaintiff sued the employer, claiming, among other things, that she was subjected to discriminatory discipline.

In order to prove a discriminatory discipline claim, a plaintiff has to show that she was subjected to more severe discipline than someone outside her protected class who engaged in similar misconduct. A necessary part of the claim is that she suffered from an adverse employment action, which is defined as "a serious and material change in the terms, conditions or privileges of employment." The employer had argued that the plaintiff suffered no adverse action because she did not mind being on the production floor and eventually received a raise. But the Eleventh Circuit found that the plaintiff's "subjective view of the change is not controlling." Rather, it found that she had been relocated from an office to a refrigerated production floor and experienced a significant change in her duties with the addition of manual chicken processing tasks. These changes, which the court deemed to be "material," were not shared by the Caucasian employees.

The lesson for employers here is to be very careful about ensuring similar treatment for similarly situated employees. Even if the targeted employee does not object to a change, the difference in treatment can still ultimately support a discrimination claim. Any difference in treatment should be based on legitimate and articulable business reasons.

RECENT BLOG POSTS

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- No, You Can't Sleep On the Job, Especially When It's a Matter of Life and Death! by Shelby S. Skeabeck, May 11, 2018
- To Affinity and Beyond: A Look at Legal Risks and Recent Trends in Corporate Affinity Groups by Felix M. Digilov, May 4, 2018
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