SHAWE ROSENTHAL LLP

E-UPDATE

February 28, 2019

RECENT DEVELOPMENTS

EEO-1 Filing Deadline Extended, and Other Impacts of the Government Shutdown on EEOC Timelines

The Equal Employment Opportunity Commission issued questions and answers related to the impact of the government shutdown on EEOC timelines, including the annual filing of the EEO-1 form. Of particular interest are the following:

- The period for filing the EEO-1 form, which normally ends on March 31 of each year, will open in early March and close on May 31, 2019. Employers subject to this filing requirement are (1) those subject to Title VII with 100 or more employees; and (2) federal contractors and first-tier subcontractors subject to Executive Order 11246 with 50 or more employees and a contract, subcontract, or purchase order amounting to $50,000 or more.
- The EEOC is rescheduling intake appointments, mediations, and witness interviews that were supposed to have taken place during the shutdown.
- The EEOC is now processing charges that were filed during the shutdown. It does not indicate whether the 180 day/300 day time period for filing charges was tolled during the shutdown, but we would expect them to take that position.
- The shutdown did not affect the 90-day deadline for charging parties to file suit following receipt of a Notice of Right to Sue, even where a request for reconsideration was filed during the shutdown.
- Responses to Freedom of Information Act (FOIA) requests will likely be delayed, as no requests were processed during the shutdown.

DOL Issues Guidance on Tipped Employees

Following its November 8, 2018 opinion letter on the same topic, the Department of Labor's Wage and Hour Division has now published guidance stating that it "will no longer prohibit an employer from taking a tip credit based on the amount of time an employee spends performing duties related to a tip-producing occupation that are performed contemporaneously with direct customer-service duties for a reasonable time immediately before or after performing such direct-service duties."

As we discussed in our November 2018 E-Update, under the Fair Labor Standards Act, employers of tipped employees may pay a tipped wage of $2.13 and take a tip credit for the difference between the tipped wage and the minimum wage, currently $7.75. (Maryland and many other states and local jurisdictions have a higher minimum wage for both tipped and non-tipped employees). The FLSA recognizes that tipped employees may work dual jobs – one tipped and one non-tipped, and the tip

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

credit may be applied only to the tipped job. It also recognizes that a tipped job may involve both tipped and related non-tipped tasks (such as maintenance and preparatory or closing activities).

Prior to the November 8, 2018 opinion letter, the DOL had taken the position that employers could not take the tip credit for time spent on non-tipped tasks if the tasks exceeded 20% of the employee's work time (i.e. 20% or 80/20 rule). In the opinion letter and now in its new Field Assistance Bulletin, explaining the recent change to its Field Operations Handbook 30d00(f), however, the DOL has rescinded the 20% rule.

The DOL states that it will now apply the following principles in evaluating whether non-tipped duties are related to the tipped occupation:

- Duties listed as core or supplemental for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network (O*NET) http://online.onetcenter.org or 29 C.F.R. § 531.56(e) are related duties.
- Employers may take a tip credit for any amount of time an employee spends performing related tasks contemporaneously with tipped duties or for a reasonable time immediately before or after performing tipped duties, whether or not those related tasks involve direct customer service.
- If the task is not listed in O*NET or 29 C.F.R. § 531.56(e), the employer may not take a tip credit for time spent performing that unrelated task – although such task may be deemed non-compensable under the *de minimis* rule (meaning that such little time is spent on the task that it need not be paid).

EEOC Issues Proposed Rule Update on Digital Charges and a Little More

The Equal Employment Opportunity Commission issued a proposed rule revising its procedural regulations to account for its increasing reliance on digital charge technology and communications. It also took the opportunity to make some slightly more substantive changes as well.

The revisions related to digital communications consist mostly of technical changes to the language (e.g. "contact information" in place of "address and phone number"). Of somewhat more interest, the EEOC also:

- Clarifies that a "jurisdiction having a [fair employment practices] agency without jurisdiction over the statutory basis [of discrimination] alleged in the charge (e.g. an agency that does not have enforcement authority over sex discrimination) is equivalent to a jurisdiction having no FEP agency." Under such circumstances, the time period for filing a charge would be 180 days, rather than the normal 300 days applicable where the FEP agency has such statutory basis jurisdiction.
- Specifically states that a "no cause" determination "does not mean the claims in the charge have no merit."
- Adds language to the Age Discrimination in Employment Act regulation to recognize that charges may be filed on behalf of another individual, and the charge need not identify by name the person on whose behalf it is made, although that name and contact information must be provided to the Commission. This language conforms the ADEA regulation with

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

already-existing language in the Title VII/Americans with Disabilities Act/Genetic Information Nondiscrimination Act regulation.

The proposed rule is open for public comment for a 60-day period, ending April 23, 2019. Comments may be submitted by clicking on the "Submit a Formal Comment" button on the Federal Register webpage for the proposed rule. Once it has considered the comments, the EEOC will issue a final rule.

OFCCP Issues Directive Establishing Voluntary Program for "High-Performing" Contractors

The Office of Federal Contract Compliance Programs has issued a new directive creating a Voluntary Enterprise-wide Review Program (VERP) as an alternative to the typical establishment-based compliance review process. Those participating in the program would be excused from further reviews for either five or three years, depending on whether they are top-tier (i.e. top-performing contractors with corporate-wide model diversity and inclusion programs) or second-tier (i.e. OFCCP compliant contractors that will receive individualized compliance assistance to become top performers).

Applying to the program. Beginning in fiscal year 2020, contractors may apply to participate in VERP. The OFCCP will conduct a compliance review of the contractor's headquarters and a sample of other establishments as part of the application process. In addition, contractors must demonstrate not only basic compliance with OFCCP's requirements, but commitment to and application of successful corporate-wide equal employment opportunity programs.

Participation in the program. Upon acceptance into the program, OFCCP will enter an agreement removing the contractor from the neutral scheduling process for the duration of the agreement. The agreement lasts five years for top tier contractors and three years for second tier contractors. Contractors must provide periodic reports and information to OFCCP to confirm that they remain free from discrimination. At the end of the five-year period, top tier contractors may be re-evaluated to stay in the program.

Those who do not qualify for VERP are not automatically scheduled for a compliance evaluation, but would remain in the pool for neutrally scheduled evaluations. In addition, if OFCCP determines that a VERP participant fails to maintain the requirements of the program, it may terminate the agreement and return the contractor to the same pool.

Fourth Circuit Offers Useful Guidance on ADA/Rehab Act and FMLA

In a wide-ranging case, the U.S. Court of Appeals for the Fourth Circuit offered employers guidance on a number of interesting and significant issues under the Rehabilitation Act (and by extension the Americans with Disabilities Act, which is subject to the same analysis as the Rehab Act), as well as the Family and Medical Leave Act.

Background of the Case: In *Hanna P. v. Coats*, an employee who had previously informed her managers of her depression but did not request accommodations began experiencing attendance issues – extreme tardiness and numerous absences without communication. She and her managers developed a plan to address the attendance and communication issues. She failed to comply with the plan, however, and her managers then revised the plan without her input. Because she continued to

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

experience attendance issues, her managers directed her to meet with an EAP counselor. She told them that her psychiatrist was recommending four weeks of leave, but they told her that she had to talk to the counselor before leave would be considered. Following her appointment, her leave request was approved but she withdrew it without explanation. After several more weeks with continued attendance issues, she renewed her request for leave, which was granted two weeks later. Just before she began the leave, she applied and was recommended for another position; however, the chief management officer rejected her application because of her recent performance issues. She then sued, alleging violations of the FMLA and Rehab Act.

The Court's Ruling:

Failure to Accommodate. The employee alleged multiple violations of the Rehab Act, starting with a failure to provide reasonable accommodation for her disability. She claimed that the employer failed to engage in the interactive process when it unilaterally rescinded the attendance plan and directed her to consult with EAP. The Fourth Circuit disagreed, noting that the employer had, in fact, collaborated with the employee in developing the attendance plan, and only chose a different accommodation when that plan did not work. Moreover, the Fourth Circuit stated that, while employers must engage in the interactive process, it "has the ultimate discretion to choose between effective accommodations." Moreover, the employer need not provide the accommodation the employee requests, as long as the accommodation is effective.

Medical Examination. The employee also argued that the referral to EAP was an improper medical exam under the Rehab Act. Even assuming that the EAP evaluation constitutes a medical exam, which is not necessarily the case, the Fourth Circuit found that the referral was both job-related and consistent with medical necessity, which is the standard for requiring medical exams under both the Rehab Act and the ADA. In this case, the employer had a reasonable belief that the employee's ability to perform the essential functions of her job were impacted by her attendance and timely reporting issues. Of particular interest, the essential job function identified by the Fourth Circuit is "a regular and reliable level of attendance [which] is a necessary element of most jobs."

Confidential Medical Information. The employee claimed that her supervisor's inquiries about her attendance were designed to improperly solicit confidential medical information about her depression. The Fourth Circuit rejected this premise, noting that the supervisor was entitled to ask about her poor work behavior. As it has previously held, "[T]he ADA does not require an employer to simply ignore an employee's blatant and persistent misconduct, even where that behavior is potentially tied to a medical condition."

Discriminatory Failure to Hire. The Fourth Circuit found that the employee's attendance issues were a legitimate reason for her non-selection. Although her attendance issues were caused by her medical condition, the employer was nonetheless able to take those performance issues into account in making its hiring decision. The Fourth Circuit also noted that its role is not to determine if the employer made the right decision, but only to determine if it made an illegal one, because it does not "sit as a kind of super-personnel department weighing the prudence of employment decisions."

FMLA Interference. With regard to the FMLA claim, the employee fared better. The Fourth Circuit found that the employee's disclosure of her depression along with her initial request for leave as recommended by her psychiatrist triggered the employer's obligation to inquire as to whether she

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

needed FMLA leave, which it failed to do. Moreover, the failure to notify her of her FMLA leave rights negatively impacted her use of leave.

Lessons for Employers. There are many instructive points that can be drawn from this case:

- Reasonable Accommodations – employers must engage in the interactive process, but ultimately employers have the ability to choose between effective accommodations. They need not select the best accommodation or the one desired by the employee, as long as the alternative is effective in enabling the employee to perform her essential job functions or to enjoy the privileges and benefits of employment.
- Medical Examinations – employers may request such examinations where they are job-related and consistent with business necessity. But see the Top Tip in this newsletter for cautionary guidance on how to make that determination. Of some comfort to employers, the Fourth Circuit confirmed that regular attendance is an essential function of most jobs.
- Medical Information – employers may ask questions about work performance, even where it knows or suspects that the performance issues are tied to a medical condition.
- Employment Actions – employers may make employment decisions based on an employee's work performance, even where there are performance issues tied to a medical condition.
- FMLA – Managers should be particularly vigilant when employees mention medical issues, and should immediately inform HR of any such communications, even if the employee is not seeking an accommodation. Because a manager represents the company, the individual knowledge of the manager is deemed the company's knowledge, even if the manager has not shared that information with anyone else. And if an employee with a known – or even suspected - medical condition is requesting leave, it is critical for the employer to meet its obligation to inquire whether FMLA leave is needed.

TAKE NOTE

Supreme Court Strictly Limits Appeal of Rule 23 Class Certification Orders. The U.S. Supreme Court ruled that the right to seek permission to appeal an order certifying or decertifying a class under Rule 23 of the Federal Rules of Civil Procedure is subject to a mandatory 14 day limitations period following the court's order.

Rule 23 governs class actions, and provides that a request for permission to appeal a class certification or decertification order must be filed within 14 days. In *Nutraceutical Corp. v. Lambert*, the plaintiff first asked the federal district court to reconsider its decertification order, and then sought permission to appeal 14 days after reconsideration was denied. The Supreme Court held that the request for reconsideration did not equitably toll the 14-day period for requesting permission to appeal the order. Thus, the plaintiff should have requested permission within 14 days of the original order, not the denial of reconsideration. Although the ruling was issued in a consumer class action, it has general applicability to all Rule 23 class actions, including those involving employment claims.

Court Finds Implied Right of Private Action in Arizona's Medical Marijuana Law. Although Arizona's medical marijuana law does not contain language that expressly provides medical marijuana users the right to sue employers, the federal district court in Arizona has found that such an implied right exists.

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

In *Whitmire v. Wal-Mart Stores, Inc*., an employee was subjected to a drug test following a workplace injury. She tested positive for marijuana use and was terminated, despite informing the employer that she was a registered user of medical marijuana. She then sued, and the employer argued that the medical marijuana law does not provide a private right of action. Looking to cases in Connecticut and Delaware, where such a private right of action was implied in the antidiscrimination provisions of their medical marijuana laws, the court similarly found an implied private right of action.

The court then turned to the interaction of the medical marijuana law with the state's drug testing law. The drug testing law prohibits suit against an employer that has established a drug testing policy and program for actions taken based on the employer's good faith belief that the employee was impaired on the employer's premises or during working hours. In this case, the court found that the test results alone were not sufficient to support a good faith belief that she was impaired at work. Rather, proving impairment based on such results is a scientific matter requiring expert testimony, which had not been offered.

This case highlights the difficulty that employers have in navigating the medical marijuana laws. The parameters of such laws are subject to interpretation by courts. Judges have been increasingly willing to find protections for employees. Moreover, as the court's reference to expert testimony suggests, unlike an alcohol test, a drug test for marijuana does not actually measure impairment. Thus, impairment must be established through other means.

Ninth Circuit Adopts Common-Law Agency Test for Joint Employment Under Title VII. The U.S. Court of Appeals for the Ninth Circuit determined that common-law agency principles should be utilized in determining whether joint employer relationship exists under Title VII.

In *EEOC v. Global Horizons, Inc.*, the issue was whether fruit growers were joint employers with a recruiter of orchard workers for purposes of liability for discriminatory treatment under Title VII. The Ninth Circuit rejected an economic realities test, which focuses on the worker's economic dependence on the alleged joint employer, and chose to adopt a common law agency test set forth by the Supreme Court, under which the "principal guidepost" is the extent of control exercised by the secondary employer over the details of the work performed. (In so doing, the Ninth Circuit acknowledged that there may be little functional difference between the two tests and a third hybrid version, as all are fact-intensive and would likely produce the same outcome).

In analyzing whether a requisite level of control exists under the common-law agency test, the Supreme Court has identified a non-exhaustive list of factors: the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. In the present case, the Ninth Circuit found the growers had the power to control housing, meals, transportation and wages, even though they delegated such control to the recruiter, and this power was sufficient to establish joint employer status.

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

The Ninth Circuit went on to acknowledge that, even in a joint employer situation, one employer is not automatically liable for the actions of the other. Rather, "[l]iability may be imposed for a co-employer's discriminatory conduct only if the defendant employer knew or should have known about the other employer's conduct and failed to undertake prompt corrective measures within its control." (Internal quotation omitted). In this case, the EEOC sufficiently alleged such knowledge and failure to take action on the part of the growers.

Fifth Circuit Affirms That Title VII Does Not Prohibit Discrimination on Basis of Transgender Status. Citing to longstanding circuit precedent, the U.S. Court of Appeals for the Fifth Circuit stated that Title VII's prohibitions on sex discrimination do not encompass discrimination based on sexual orientation or transgender status.

In addition to making this pronouncement in *Wittmer v. Phillips 66 Co.*, the Fifth Circuit went on to find that the plaintiff had failed to establish a prima facie case of discriminatory failure to hire because she failed to show that any non-transgender applicants were treated better than she. Moreover the employer offered a legitimate non-discriminatory reason for the no-hire decision – certain misrepresentations the plaintiff made about her current employment status – and the plaintiff could not demonstrate that this was a pretext for discrimination.

This case highlights the split between federal Circuit Courts of Appeals on the question of whether Title VII coverage extends to sexual orientation and transgender discrimination, and stands in opposition to the Equal Employment Opportunity Commission's position on this matter but in concordance with that of the Department of Justice. The issue has been appealed to the Supreme Court in three separate cases, but as of yet, the Supreme Court has not decided to hear the cases.

Spreading False Rumors May Create Hostile Work Environment. The U.S. Court of Appeals for the Fourth Circuit found that spreading a false rumor that a female employee slept with the boss in order to get promoted could create a sexually hostile work environment in violation of Title VII.

In *Parker v. Reema Consulting Servs., Inc.*, a female employee was promoted rapidly to an assistant warehouse manager position. A jealous co-worker started a false rumor that she slept with a higher-ranking manager to get the job, and the rumor was spread by the warehouse manager and others. Although the employee complained to human resources and her supervisor, nothing was done to address the issue. She was subsequently terminated, allegedly for insubordination and because of a complaint against her by the jealous co-worker.

The Fourth Circuit held that the rumors were sex-based in nature, and subject to a "deeply rooted perception – one that unfortunately still persists – that generally women, not men, use sex to achieve success." The Fourth Circuit considered the claim to be based on sex stereotyping. It found the harassment to be severe and pervasive, as the employee alleged that it was frequent, humiliating, malicious, and permeated the workplace which caused "open resentment and disrespect."

While gossip and rumors are typically part of any workplace, this case instructs employers to be particularly sensitive to rumors that implicate a protected characteristic and that can undermine working relationships in the workplace. It is important to address such rumors directly and decisively in order to avoid potential liability in the future.

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

Employers Must Protect Employees from Third Party Harassment – and Context Matters! The U.S. Court of Appeals for the Fifth Circuit found that an employer could be liable to a certified nursing assistant for a hostile work environment created by a patient who had engaged in years of sexual comments, groping, and assault.

In the reissued opinion of *Gardner v. CLC of Pascagoula*, a CNA was trained to deal with "physically combative and sexually aggressive patients." The CNA complained of lewd comments and groping by a patient with cognitive issues. Patient was known to engage in such conduct with respect to female employees. Her supervisor told her to "put [her] big girl panties on and go back to work." The CNA was also refused reassignment. She was terminated after an incident in which the patient punched her three times, and she reportedly swung back at him. She also refused to care for him, and reportedly made a racist statement about a white caregiver being able to calm him down. She then sued for a hostile work environment in violation of Title VII.

The Fifth Circuit acknowledged that the particular work environment must be taken into account. In two other cases, the Fifth Circuit had found no actionable sex or racial harassment based on comments by patients because "they were not "physically threatening or humiliating" and did not "pervade the work experience of a reasonable nursing home employee, especially considering their source." But the Fifth Circuit further stated that there is no "bright-line rule that employees who care for disabled, elderly patients can never succeed on a Title VII claim." In particular, Title VII comes into play where there has been a physical touching, as in this case.

Be Careful In Conveying Information About Benefits Available to Union v. Non-Union Employees. In *Woodbridge Winery and Cannery*, the National Labor Relations Board affirmed an administrative law judge's (ALJ) decision that an employer's handbook provision regarding its incentive plan violated employees' rights to participate in a union under Section 8(a)(1) of the National Labor Relations Act.

The handbook provision stated that "[a]ll non-union full-time and regular part-time employees…are eligible for the incentive plan." The Board found that the provision was unlawful because it conveyed the message that employees choosing union representation are automatically ineligible for the plan. As a result, unionized employees would be disadvantaged because of their unionized status. In a footnote, the Board contrasted the provision with lawful benefit-eligibility language that indicates that coverage for union-represented employees is subject to collective bargaining.

Things Have Gotten Hairy! NYC Prohibits Hair Discrimination. Following a well-publicized incident where an athlete was required to cut his dreadlocks before being allowed to compete, the New York City Commission on Human Rights has issued a Legal Enforcement Guidance on Race Discrimination on the Basis of Hair.

The Guidance states that the City's anti-discrimination law "protects the rights of New Yorkers to maintain natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities." It goes on to identify such hairstyles for Black people, including locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state.

According to the Guidance, employers:

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

- May not enact grooming or appearance policies that ban or require alteration of such hairstyles.
- May not enforce facially neutral grooming policies in a discriminatory fashion.
- May not harass, impose unfair conditions, or otherwise discriminate against employees based on aspects of their appearance associated with their race.
- May not ban, limit or otherwise restrict natural hair or hairstyles associated with Black communities to promote a certain corporate image, because of customer preference, or under the guise of speculative health or safety concerns.
- Where there are legitimate health or safety concerns, consider alternatives for addressing the concerns that do not ban or restrict such hairstyles.

Fourth Circuit Finds Blended Rate of Non-Overtime and Overtime Hours to Violate FLSA. The U.S. Court of Appeals for the Fourth Circuit found that an employer violated the Fair Labor Standards Act by using a blended rate for all hours worked to calculate overtime, rather than the actual hourly rate for all hours worked.

In *U.S. Dept. of Labor v. Fire & Safety Investigation Consulting Servs., LLC*, the employer's consultant employees were scheduled to work a "hitch," meaning 12-hour days for 14 consecutive days and then 14 days off, totaling 168 hours. They did not always work a full "hitch." Employees working a full "hitch" received a fixed payment for the hours worked that allegedly incorporated a regular rate for the first 40 hours in the workweek and an overtime rate at time and a half for the next 44 hours in that same workweek. However, if the employee worked less than 168 hours, he was paid by dividing the fixed payment by 168 and then multiplying that sum by the actual number of hours worked.

The Fourth Circuit first turned to Supreme Court precedent. The Supreme Court has held that, in determining an employee's regular hourly rate, courts should examine whether the blended rate applies across all hours worked. This is particularly telling where the blended rate is paid even when no overtime is worked, and supports the determination that the so-called blended rate is actually the regular hourly rate.

In addition, the FLSA regulations permit fixed sum payments for overtime, but only where employees work a fixed number of overtime and non-overtime hours. It does not apply where the overtime hours fluctuate, as in this case. The methodology of payment in this case resulted in employees receiving a blended rate of overtime at $29.76, rather than the actual rate of $35.37, which violated the FLSA.

OFCCP to Announce Compliance Evaluation Scheduling List Only Through Electronic Posting. Up until now, the Office of Federal Contract Compliance Programs has typically mailed notifications that an establishment is on a list for a compliance evaluation in the near future. It has announced, however, that it will no longer do so, but will instead post the Corporate Scheduling Announcement List (CSAL) in its FOIA Library only.

The first posting will occur sometime in mid-to-late March 2019. This list will include compliance reviews as well as focused reviews and compliance checks, the implementation of which we discussed in our August 2018 E-Update. The OFCCP encourages contractors to subscribe to its

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

Email Updates through its website in order to receive notifications of the CSAL posting and other compliance resources.

NEWS AND EVENTS

New Associate - It is our pleasure to announce that Chad Horton has joined our firm. Chad was previously a Field Attorney with the National Labor Relations Board, Region 5. Chad is a graduate of Tulane University Law School, where he received the Outstanding Service Award from the Tulane Law Pro Bono Service Program and served as the Senior Editor on *The Sports Lawyer*, a monthly electronic newsletter for sports law practitioners.

Complimentary Webinar – Transgender Issues in the Workplace. On Wednesday, March 28, 2019 at 12:00 p.m. Eastern, Parker E. Thoeni will present this complimentary webinar on behalf of hrsimple.com, the publisher of the Maryland Human Resources Manual and similar publications in other states. Parker will discuss the new developments in the area of transgender rights, including restroom access and non-discrimination requirements, as well as best practices for employers to handle the transition process. You may register here.

Victory – Gary L. Simpler won an arbitration for a Hospital. The case involved the termination of a surgical technician. The arbitrator found the Hospital had properly applied progressive discipline and its decision to terminate her employment was supported by just cause, rejecting the Union's arguments that management was inconsistent in issuing discipline and that it failed to follow its own disciplinary processes.

Honor – Gary L. Simpler is a participant in the Cambridge Forum on Employment Law, being held in New Orleans from February 27-March 1, 2019. This invitation-only Forum brings together forty of the country's top practitioners in labor and employment law to discuss cutting edge topics in our field.

Article - Courtney B. Amelung authored an article, "Biometric Data Collection And What Employers Need To Know About It," which was published in the January 2019 issue of *Bender's Labor and Employment Bulletin*, a monthly newsletter for labor and employment practitioners.

Article – Blog posts by Fiona W. Ong ("RIFS are not the easy solution for problem employees") and Elizabeth Torphy-Donzella ("Now that you know that a RIF is not a 'magic bullet': Performance management advice for managers in five easy pieces") were featured as articles in the February 2019 edition of the Illinois State Bar Association Newsletter.

TOP TIP: Be Thoughtful When Requiring Fitness For Duty Examinations

A recent case from the U.S. Court of Appeals for the Fourth Circuit highlights the need for employers to be extremely careful in requiring employees to undergo fitness for duty examinations, even when such requirements may appear to be logical.

Background of the Case. In *EEOC v. McLeod Health, Inc.*, the employee worked as the editor of the company newsletter involved traveling to five company sites over a 100-mile area to interview other employees. She had congenital bone issues that impacted her mobility and stability, but did not affect her ability to perform her job for almost 30 years.

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

Then, within a four-month period, the employee fell three times, once at work. Although the employee had fallen multiple times over the years without reaction from the employer, the employee's manager reported the most recent falls to the Occupational Health department. Based on the report of falls, the employee's job description and its own records of the employee's health issues, Occupational Health ordered a fitness for duty examination in order to ensure that the employee could safely travel between locations. As a result of the exam and a follow-up functional-capacity exam (in which a physician evaluates whether the employee is physically capable of performing her job), the physician recommended that the employee be restricted to traveling no more than 10 miles from her main office, use an assistive device such as an electric scooter, and be given a parking space without a curb. Although the employee did not believe she needed any accommodations, she thought she was required to submit an accommodations form and requested the same parking space, help with selecting an assistive device, a new desk chair, and limitations on walking and standing "as much as possible."

Based on the physician's conclusions and the employee's request, the employer determined that the employee could not perform her essential job function of traveling between locations. Accordingly, she was placed on leave and then subsequently terminated. The EEOC sued the employer, claiming among other things that the medical exam was unlawful under the Americans with Disabilities Act as there was a lack of objective evidence that it was necessary.

The Court's Ruling. The Fourth Circuit agreed with the EEOC. Under the ADA, a medical exam must be job-related and consistent with business necessity. The Fourth Circuit explained that, to meet this requirement, the employer must reasonably believe, based on objective evidence that either the employee is impaired in performing an essential job function or that the employee will pose a "direct threat" to the safety of herself or others. Although the employer argued that the employee posed a direct threat to herself in navigating between and within locations, the Fourth Circuit questioned whether this navigation was actually an essential job function. It was not mentioned in the employee's job description, and there was evidence that the employee could conduct interviews and collect other information by phone.

The Fourth Circuit also found a question as to whether the employer had a reasonable belief that the employee actually posed a direct threat to her own safety, given that she had performed the job for 28 years, with limited mobility and occasional falls. Moreover, the only fall she had at work in recent months caused almost no injury.

Lessons for Employers. Given the employee's falls both in and out of the workplace, many employers might assume that a fitness for duty exam would be a logical requirement. But this case contains the following lessons for employers to think about before requiring a fitness for duty exam:

- Thoughtfully consider the essential job functions of the employee's position. Analyze the job function in question to assess whether it is accurate and whether it is truly essential. In this case, for example, the employer asserted that navigating between and within locations was an essential function – but the real function may have been the gathering of information.
- Consider whether changing technologies and needs may affect the essential job function. Perhaps at one time for this employee, traveling between locations may have been the only

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

real way to gather the information needed to prepare the newsletter. However, given developments in communication technologies, that may no longer be the case.
- Ensure that there is support for the assessment that the job function is essential. We discussed some of the ways to make this showing in our May 2018 E-Update.
- Determine if there has been an evident change in the employee's physical or mental health. In this case, the employee had been performing the job for decades with the same limitations and occasional falls. There did not appear to be any real change in her condition that would warrant new concern.

RECENT BLOG POSTS

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

- "…federal judges are appointed for life, not for eternity." by Fiona W. Ong, February 25, 2019.
- Yes, Unions Discriminate Against Workers Too! by Chad Horton, February 21, 2019.
- Extraordinary Employee Misconduct: Saving Nude Pictures to Work Computer! by Fiona W. Ong, February 13, 2019.
- Another State Finds No Federal Preemption of Its Medical Marijuana Law by Lindsey A. White, February 7, 2019.
- One! Two! Three! Four! What Do You Say We're Fighting For? Arbitration! by Elizabeth Torphy-Donzella, January 31, 2019 (Selected as "noteworthy" by the Employment Law Daily).

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