SHAWE ROSENTHAL LLP

E-UPDATE

September 30, 2019

RECENT DEVELOPMENTS

U.S. Supreme Court's Upcoming Employment Docket

The first Monday in October begins a new Supreme Court term each year. For those that follow labor and employment cases, the first Tuesday in October (specifically, October 8, 2019) will be the real "opening day" as the Court has devoted its docket to three cases that will require the Court to decide whether Title VII's prohibition on sex discrimination extends to sexual orientation and/or gender identity.

The Court granted certiorari to hear three cases dealing with the scope of sex discrimination under Title VII: *Altitude Express, Inc. v. Zarda*; *Bostock v. Clayton County., Ga.*; and *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.* In *Altitude Express* and *Bostock* the plaintiffs alleged that their discharges from employment were based on their status as gay males, which did not conform to their employer's expectations of male behavior in violation of Title VII. *R.G. & G.R. Harris Funeral Homes* involves a claim by a biological male who was discharged after informing the employer of an intent to transition to female and to dress consistent with that intention. Suing on the employee's behalf, the EEOC maintains that Title VII is violated by adverse actions based on an individual's transgender status and failure to conform to sex stereotypes. Although the Court has previously held that sex stereotyping violates Title VII, it has not yet decided whether discrimination "because of sex" extends beyond the traditional male/female gender divide. With the lower courts split on this issue, it appears that the Supreme Court will at last resolve what Congress intended.

Other employment-related issues to be decided by the Court this term are the following: whether a plaintiff bringing a race discrimination claim under Section 1981 must prove "but for" causation – that is, "but for" race, the plaintiff would not have suffered an adverse action – in contrast with race being a motivating (but perhaps not the sole) factor, as the U.S. Court of Appeals for the Ninth Circuit has concluded (*Comcast v. National Association of African-American Owned Media*, a non-employment case involving a civil rights statute often used for employment claims); whether the statute of limitations for a claim under the Employee Retirement Securities Act (ERISA) runs from the date the employee-plaintiff received all relevant disclosures from the plan administrator or, as the U.S. Court of Appeals for the Ninth Circuit held, from the date the plaintiff knew that the plan's actions could violate the law (*Intel Corp. Investment Policy Committee v. Sulyma*), and finally, what pleading standard applies under ERISA to claims alleging the fiduciaries of an employee stock ownership plan breached their fiduciary duty to participants when they continued to invest in the employer's own stock despite allegations that the employer had fraudulently concealed problems with a company unit that could adversely affect the stock price (*Retirement Plans Committee of IBM v. Jander*).

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Employer May Not Delay FMLA Designation Pursuant to Collective Bargaining Agreement

The Department of Labor (DOL) has released a new opinion letter under the Family and Medical Leave Act (FMLA), in which it states that an employer may not delay the designation of FMLA leave even where a collective bargaining agreement (CBA) provides for such delay.

Opinion letters respond to a specific wage-hour inquiry to the DOL from an employer or other entity and represent the DOL's official position on that particular issue. Other employers may then look to these opinion letters as general guidance.

In FMLA2019-3-A, the employer was party to a CBA under which employees may delay taking unpaid leave, including FMLA, until all CBA-protected accrued paid leave is exhausted. Paid leave is treated as continuous employment for purposes of seniority, while unpaid leave is not, and thus employees would prefer to postpone using unpaid FMLA until after they have used the paid leave. The employer expressed concern about the impact of the DOL's recent opinion letter, FMLA2019-1-A, in which the DOL stated that an employer may not delay designating FMLA leave that is qualifying, even at the request of the employee (which we discussed in our March 2019 E-Update). According to the employer, requiring employees to take unpaid FMLA before taking accrued paid leave may negatively impact their seniority status under the CBA.

The DOL reiterated the same principle it articulated in its recent opinion letter – that once the employer has sufficient information to determine that the leave qualifies as FMLA leave, it must be designated as such. This is the case even if the employer is obligated by a CBA to provide protections and benefits greater than those required by the FMLA. The DOL further stated that, "[i]f, pursuant to a CBA and other policies, [the] employer provides for the accrual of seniority when employees are utilizing accrued paid leave, it must permit employees to accrue seniority when the employee is substituting FMLA leave for paid leave." The failure to do so would constitute interference with the employee's FMLA rights. If the FMLA leave runs concurrently with the accrued paid leave under the CBA, the employee's seniority status would be the same as if the employee took only CBA-protected paid leave.

The DOL notes, in a footnote, that the FMLA statute specifically provides that an employee may, but is not entitled to, accrue seniority while on FMLA leave. However, it further notes that the statutory prohibition against discriminating against employees taking FMLA would require that an employer's established policy for providing benefits – in this case, the accrual of seniority – while on other forms of leave must be applied to FMLA leave.

NLRB Continues Expansion of Employer Private Property Rights. In *Kroger Limited Partnership*, the National Labor Relations Board issued its third major decision concerning employer private property rights. The Board established a new standard concerning when an employee may ban or prohibit access to its property by a nonemployee union agent to engage in protest or other organizational activity.

Background: In April 2015, a union representative accessed a parking lot adjoining a Kroger store in Portsmouth, Virginia. The union representative solicited store customers to sign a petition protesting the company's decision to close the store and transfer the union-represented employees to stores outside the area. Kroger contacted the police. After the police arrived, the union representative left the premises. The union filed an unfair labor practice charge against Kroger, alleging that its

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ejection of the union representative was discriminatory because Kroger permitted other third parties to engage in civic solicitations on its property, and such disparate treatment interfered with employees' Section 7 rights under the National Labor Relations Act (NLRA).

The Board's Ruling: The Board held that an employer may deny access to nonemployees, including union representatives, seeking to engage in protest activities on its property if the employer also bans comparable organizational/protest activities by groups other than unions, even if it permits nonemployee access for a wide range of charitable, civic, and commercial activities not similar in nature to protest activities. In short, to prove a violation of the National Labor Relations Act, the General Counsel must prove that an employer denied access to nonemployee union agents "while allowing access to other nonemployees for activities similar in nature to those which the union agents sought to engage." This holding overruled the Board's 1999 decision in *Sandusky Mall*, which held that an employer violates the NLRA when it prohibits nonemployee union agents access to its private property for any purpose if the employer permitted other third-party access for charitable, civic, or commercial purposes.

Applying this new standard, the Board held that Kroger did not violate the NLRA. The Board reasoned that Kroger had never permitted nonemployees to access its property to engage in protest activities comparable to the boycott solicitation at issue in this case.

Takeaway: As in *UPMC* (discussed here) and *Bexar County Performing Arts Center* (discussed here), the Board continues expanding employer private property rights. Employers may now prohibit nonemployee union agents from accessing its property for organizational purposes even if it permits other organizations to use its property for charitable, civic, and commercial activities, *provided* the employer does not permit other third parties to engage in organizational conduct similar to that which the nonemployee agent seeks to engage. In short, the Board will look at the activity's purpose when determining whether activities are "similar in nature."

NLRB Grounds Proposed Micro-Unit at Boeing Plant

In *Boeing Co.*, the National Labor Relations Board found a petitioned-for "micro unit" inappropriate, and clarified that its 2016 *PCC Structurals* decision contemplates a three-step process for determining whether a proposed bargaining unit is appropriate under the Board's community-of-interest test.

First, the Board will consider whether the petitioned-for group of employees shares an internal community of interest. A unit without an internal, shared community of interest is inappropriate and the Board's inquiry ends there. Second, if the unit does have an internal, shared community of interest, the Board will compare the included and excluded employees and determine whether the excluded employees have meaningfully distinct interests that outweigh similarities with the included employees. If the distinct interests do not outweigh the similarities, the unit is inappropriate. Finally, if the proposed unit has survived the first two steps, the Board will consider guidelines, if any, the Board has established for specific industries regarding appropriate unit configurations (e.g., public utilities).

Applying this test, the Board found that a proposed unit of 178 technicians and technician inspectors at Boeing's 2,700-employee facility in South Carolina was an inappropriate bargaining unit. The Board first concluded that the proposed unit did not share an internal community of interest. The

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Board reasoned that the two classifications were in different departments, did not share immediate supervision or any supervision below the level of CEO, and had completely different job functions. The inquiry could have ended there, but the Board also found that the interests of the excluded employees are not meaningfully distinct from and do not outweigh similarities with the interests of the petitioned-for employees. The Board noted that the two petitioned-for classifications are in the same departments as excluded classifications. Further, the included and excluded employees share most skills and training, and largely enjoy the same terms and conditions of employment. Thus, even if the analysis survived the first step of the Board's inquiry, the second step also required a finding that the proposed unit was inappropriate. Finally, the Board noted that there no industry-specific guidelines applicable to this case.

This decision clarifies the framework to be used by the Board in analyzing whether a proposed unit is an appropriate unit, and reinforces that any petitioned-for "micro unit" will have to share an internal community of interest, *and* the interests of the excluded employees must be sufficiently distinct to warrant their exclusion.

Another Month, Another (Unhelpful) NLRB Advice Memo on Social Media Rules

In the latest batch of Advice Memoranda from the National Labor Relations Board, the Office of General Counsel (OGC) offers further guidance to employers, both unionized and non-union. Advice Memoranda contain the recommendations of the OGC to the Board on specific issues. While several are years old and of limited interest, *Comprehensive Healthcare Management Services, LLC*, which was prepared in 2018, provides some rather confusing direction on social media rules.

As the Board set forth in the 2017 case, *The Boeing Company* (which we discussed in detail in a December 2017 E-lert), workplace rules are divided into three categories, depending on whether they (1) are lawful, (2) warrant individualized scrutiny, or (3) are unlawful. In the current memo, the OGC examined provisions contained in the Social Media Policy. Two provisions were found to have a disproportionately adverse impact on employees' rights under the National Labor Relations Act to communicate information regarding the terms and conditions of employment, while several others were found lawful.

What is particularly confusing is that the provisions at issue were taken verbatim from a social media policy that was found to be lawful in its entirety by the then-Acting General Counsel of the Board back in 2012, in a Division of Operations-Management Memo (OM 12-59). Unsurprisingly, the employer community has since adopted this social media policy as the model. Nonetheless, the current OGC found the following provisions to be unlawful under *Boeing*:

- A directive to "Make sure you are always honest and accurate when posting information or news." The OGC observed that "employees have the right to make a wide variety of statements in the context of a labor dispute, including inaccurate statements, as long as those statements do not constitute malicious defamation."
- A provision stating "Maintain the confidentiality of [employer] private or confidential information. Do not post internal reports, policies, procedures or other internal business related confidential communications." According to the OGC, this reference to "policies" and "procedures" would include information about terms and conditions of employment.

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Oddly, there appears to be no recognition or acknowledgement in the current advice memo of the existence of the prior Operations Memo or the fact that the current memo represents a shift in position on these provisions above. Consequently, it is unclear whether this memo, which has not actually been addressed by the Board itself, has any real impact on how social media policies should be assessed.

Federal Contractor Update – Minimum Wage Increase, Contractor Portal, Guidance for Educational Institutions

This past month, the Office of Federal Contract Compliance Programs continued with its flurry of activity. Among the actions it has taken are the announcement of the new minimum wage rate for certain covered workers, a new feature on its recently-created Contractor Assistance Portal, and guidance for educational institutions and other contractors with campus-like settings.

Minimum Wage Increase for Government Contractors. Executive Order 13658 established a minimum wage rate, increased annually, for all covered workers performing work on construction contracts covered by the Davis-Bacon Act (DBA); service contracts covered by the Service Contract Act (SCA); contracts to provide concessions (*g.* food, lodging, fuel, etc.) on federal property; and contracts to provide services (*e.g.* child care, dry cleaning, etc.) in federal buildings. The DOL has announced the applicable minimum wage increase effective January 1, 2020: $10.80 per hour, with a tipped wage rate of $7.55 per hour. In addition, covered contractors must update the required minimum wage poster as of that same date, which can be found on the DOL website (only the current poster is available now; check again on January 1, 2020 for the updated poster).

Update to Contractor Assistance Portal. As we discussed in our August 2019 E-Update, the OFCCP launched its new Contractor Assistance Portal, intended to improve compliance assistance and increase transparency. This past month, the OFCCP added a new Topics feature to the portal, which allows contractors to post questions for feedback from the contractor community.

Guidance for Educational Institutions. The OFCCP issued guidance that clarifies the affirmative action program requirements for educational institutions and other contractors with campus-like settings, as well as supporting the White House Initiative on Historically Black Colleges and Universities (HBCUs), as follows:

- **FAQs on AAPs for Campus-Like Settings**, providing guidance on whether one or multiple affirmative action programs (AAPs) should be maintained for a multi-building establishment.
- **The Student Worker Directive**, providing guidance on whether academic institutions need to include student workers in their AAPs and the support data submitted to OFCCP during a compliance evaluation.
- **The HBCU Webpage**, a one-stop shop helping to connect college students with internship, apprenticeship, and entry-level job opportunities as part of the White House Initiative on Historically Black Colleges and Universities.

TAKE NOTE

DOL Proposes Revisions to the FMLA Forms. The Department of Labor has proposed revisions to its model forms under the Family and Medical Leave Act, with the stated purpose of increasing

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compliance, improving customer service, and making the forms easier to use. According to the DOL, the revisions include the following:

- Fewer questions requiring written responses; replaced by statements that can be verified by simply checking a box
- Reorganization of medical certification forms to more quickly determine if a medical condition is a serious health condition as defined by the FMLA
- Clarifications to reduce the demand on health care providers for follow-up information
- More information on the notification forms to better communicate to employees specific information about leave conditions
- Changes to the qualifying exigency certification form to provide clarity to employees about what information is required
- Changes to the military caregiver leave forms to improve consistency and ease of use
- Layout and style changes to reduce blank space and improve readability.

While the proposed forms provide greater clarity and ease of completion, they will likely not eliminate all the concerns that employers have with regard to incomplete or insufficient certifications. Nonetheless, they appear to be a significant improvement over the current, rather confusing forms.

Comments to the proposed rule may be submitted here. Once the 60-day comment period has closed on October 4, 2019, the agency will review the comments and may revise the rules before issuing them in final form.

NLRB Poised to Exclude Student Workers from Employee Status. The National Labor Relations Board has issued a proposed rule that would exclude from coverage under the National Labor Relations Act college and university students performing services for compensation in connection with their studies.

This is a matter of some controversy, and the Board has changed its position on this issue several times, beginning in 1972, in the case of *Adelphi University*, when it first determined that graduate student assistants were primarily students and should be excluded from a faculty bargaining unit. In 2000, however, the Board asserted in *New York University* that certain graduate student assistants were statutory employees. Four years later, the Board reversed course again, holding in *Brown University* that graduate student assistants were primarily students and not employees. This changed again in 2016, when the Board issued *Columbia University*, finding student assistants to be employees.

Now, the Board is seeking to reverse position yet again, on the grounds that students have a predominantly educational relationship with their school, rather than economic, and therefore should not be considered statutory employees under the Act. This time, however, the Board is proposing to solidify this position through rulemaking, which will be more difficult to reverse in the future.

Comments to the proposed rule may be submitted here. Once the 60-day comment period has closed on November 22, 2019, the agency will review the comments and may revise the rules before issuing them in final form.

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NLRB Adopts New Unilateral Change Standard. In *MV Transportation*, the Board adopted the "contract coverage" analysis when determining whether a unionized employer's unilateral change to employee working conditions violates the National Labor Relations Action (NLRA). In doing so, the Board overturned the "clear and unmistakable waiver" standard that had been rejected by several courts of appeals, particularly the D.C. Circuit, which has plenary jurisdiction to review all Board decisions.

Under the "contract coverage" standard, an employer's unilateral change will not violate the NLRA if the change was "within the compass or scope" of the language in the agreement granting the employer the right to act unilaterally. If, however, the agreement does not cover the employer's disputed action, the employer will have violated the NLRA unless it establishes that the union waived its right to bargain over the change, or that the employer was privileged to act unilaterally for some other reason (e.g., economic exigency).

This decision likely makes it easier for employers to make lawful unilateral changes, provided that the changes appear to be within the scope of the language in the agreement.

The ADA Does Not Cover Potential Future Disabilities. In a case of first impression, the U.S. Court of Appeals for the Eleventh Circuit rejected the Equal Employment Opportunity Commission's argument that an employer regarded an employee as disabled when it terminated her employment based on its fear that she would contract Ebola during an upcoming trip to Africa.

The Americans with Disabilities Act has a broad definition of disability, covering not only those individual with actual disabilities, but also those who have a record of disability and those who are "regarded as" disabled by the employer. In *EEOC v. STME, LLC dba Massage Envy-South Tampa*, the court addressed the "regarded as" definition of disability, and it concluded that "the disability definition in the ADA does not cover this case where an employer perceives a person to be presently healthy with only a potential to become ill and disabled in the future …" In so ruling, the court noted that the EEOC's own interpretive guidance states that a predisposition to developing an illness or disease is not a physical impairment.

Employer Reasonably Believed that Golfing Employee Abused FMLA Leave. The U.S. Court of Appeals for the Sixth Circuit upheld the termination of an employee with a shoulder condition, finding that the employer's belief that he was abusing his leave under the Family and Medical Leave Act was reasonable, given that he took such leave next to PTO days or weekends and golfed during such leave.

In *LaBelle v. Cleveland-Cliffs, Inc.*, the employee developed a shoulder condition, and provided an FMLA certification from a doctor stating that he would need to miss work during flare-ups of his condition, which could occur once a month for a three-day period. Because the employee repeatedly took his FMLA days next to PTO days or weekends, the employer became suspicious and twice hired a private investigator to follow him. Each time, the PI recorded the employee playing golf without any indication of pain. At a disciplinary hearing, the employee contended that his shoulders hurt all the time and he took FMLA leave next to weekends to give him more time to rest from the work creating the pain. He also argued that he could golf because "80 percent of your swing is legs and core."

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The court found, however, that the employee's use of leave was not consistent with his FMLA certification for flare-ups, and if he had needed FMLA in order to rest over a long weekend, he should have requested leave for that purpose. Thus, the employer had "an honest belief" that the employee had abused his leave, and its decision to terminate him did not violate the FMLA.

While this case is a win for employers, they should be cautious when addressing issues of potential FMLA abuse or fraud based on an employee's activities during FMLA. It is necessary to be thoughtful regarding the limitations set forth in the employee's certification, and whether the employee's off-duty activities are truly in conflict with those stated limitations. Thus, other courts have found that an employer's termination of an employee for going to the beach or traveling during FMLA leave was unlawful, as those activities were not inconsistent with the employees' limitations in those specific situations.

Remember that the ADA Protects an Association with a Disabled Individual. A recent case is a good reminder that the Americans with Disabilities Act prohibits discrimination against non-disabled employees based on their association with a disabled individual.

In *Kelleher v. Fred A. Cook, Inc.*, an employee told his supervisor that his daughter had severe medical issues, and thereafter his employment relationship began to deteriorate, with less favorable assignments. In a meeting in which he was told that he could not leave work to care for his daughter immediately after his shift in case of emergencies on-site, he asked to work one week of shortened days. He was allegedly told to "leave his personal problems at home" and that he would not receive a raise. He missed the next workday because his daughter suffered a medical emergency, and was then demoted. Several weeks later, he was late for work and was subsequently terminated. He then sued under the ADA, and the company argued that he was terminated because he was unable to work the required hours and he had no right to an accommodation.

The court noted that, "[t]hough the ADA does not require an employer to provide a reasonable accommodation to the nondisabled associate of a disabled person, an employer's *reaction* to such a request for accommodation can support an inference that a subsequent adverse employment action was motivated by associational discrimination." (Emphasis in original). In this case, the negative employment actions in the context of the manager's comments about the employee's "problems at home were not the company's problems" were sufficient to raise an inference that the company's concern about the employee's daughter being a distraction was a determining factor in the termination decision.

Maryland Employers Must Consider Noncompetitive Reassignment as Reasonable Accommodation. Courts across the U.S. are split on whether an employer must grant a reassignment on a noncompetitive basis or must simply allow a disabled employee to compete for such reassignment as a reasonable accommodation. The Equal Employment Opportunity Commission and the Maryland Court of Appeals – and now the Maryland federal district court – have adopted the position that employees must be given the transfer, even if they are not the most qualified for the job, as long as they meet the basic qualifications.

In *EEOC v. Manufacturers and Traders Trust Co dba M&T Bank*, the EEOC argued that the bank failed to accommodate a former branch manager when she was required to compete for open positions upon returning to work after an extended absence following the birth of her child. The

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bank argued that reassignment was required only if the branch manager was the most qualified for the position. The court, however, found that the ADA requires only that the employee be qualified to be entitled to noncompetitive reassignment.

While employers in some other jurisdictions may continue to require disabled employees who are unable to perform the essential functions of their job to compete for an open position for which they are qualified, Maryland employers do not have that latitude. Instead, if there is an open position for which the disabled employee is qualified, they must be placed in the position, even if more qualified candidates exist.

Updated *Workplace Accommodation Toolkit* from the Job Accommodation Network . The Job Accommodation Network (JAN), which is an entity funded by the U.S. Department of Labor's Office of Disability Employment Policy, has updated its *Workplace Accommodation Toolkit*.

According to JAN, this is a free, comprehensive online resource for employers seeking to move beyond basic compliance with the Americans with Disabilities Act (ADA) in order to create more disability-inclusive workplaces. It includes guidance and resources for developing or updating accommodation policies and processes, as well as best practices for creating an inclusive workplace for those with disabilities.

NEWS AND EVENTS

Shawe Rosenthal Conference. We hope you will join us for our biennial conference, which will be held on Friday, October 4, 2019 at Oriole Park at Camden Yards. Our sessions will cover a variety of labor and employment issues relevant to your workplace, including:

* Exploring Wage and Hour Law at the Federal and State Level.
* Marijuana and Opioids at Work.
* #MeToo Developments: Pay Equity, Salary History Bans, Mentoring, and More.
* A Headache for Employers: Sick Leave, ADA and FMLA.
* Compliance with New State Laws in the Mid-Atlantic Region (including Non-Competes and Restrictive Covenants).
* The NLRB in the Trump Administration.

We will begin with breakfast starting at 8:00 a.m. Friday morning, October 4, with presentations from 8:30 a.m. to 4:20 p.m. After the sessions, please join us for a cocktail reception and a tour of Oriole Park at Camden Yards, followed by a raffle (prizes include sports tickets, aquarium tickets, and a handbook review up to $2,500 value).

Our conference has been approved for SHRM 6.00 (HR (General)) recertification credit hours. Shawe Rosenthal LLP is recognized by SHRM to offer Professional Development Credits (PDCs) for SHRM-CP or SHRM-SCP. In addition, this program has been submitted to the HR Certification Institute for review and we have also applied for CLE credit.

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The registration fee of $499 includes sessions, seminar materials, breakfast, lunch, the tour of Oriole Park, and cocktail reception (hotel room charges are not included). In addition, attendees will also receive a complimentary copy of the 2019 Maryland Human Resources Manual, published by the Maryland Chamber of Commerce and authored by our firm, a $260.00 value.

To register: contact us at conference@shawe.com.

Victory – Mark J. Swerdlin and Lindsey A. White were successful on behalf of a health care client in securing summary judgment on claims under the Maryland Wage Payment and Collection Act, the parties' employment agreement, and tortious interference.

Media – Eric Hemmendinger was quoted in a September 24, 2019 *Daily Record* article, "Trump administration expands overtime pay eligibility," by Christopher Rugaber (subscription required to access article). Eric noted that the rule would have little impact on employers except in certain sectors.

Media – Darryl G. McCallum was quoted in an article by C. Thea Pitzen, "Employers May Be Liable for Harassment by Nonemployees," which was published on September 9, 2019 in the American Bar Association's *Litigation News.*

Article - Elizabeth Torphy-Donzella authored an article,"Stability in Bargaining and Employee Free Choice: A Balancing of Policies that Divides the Board in Johnson Controls, Inc.," which was published in the May 2019 issue of *Bender's Labor and Employment Bulletin*, a monthly newsletter for labor and employment practitioners.

TOP TIP: Be Careful What You Put In Writing

A recent case provides a reminder to managers to be thoughtful about what they write in an email or text message. With the prevalence of email and text messages, many people tend to think of those means of communication as a casual equivalent to a conversation. This type of thinking, however, can come back to haunt the writer.

In *Gaddis v. Brandywine Senior Care. Inc. d/b/a Brandywine Senior Living at Haverford Estates*, a licensed practical nurse at an assisted living facility, who was experiencing health issues from diabetes, received several disciplinary warnings for errors in dispensing medications to residents. She then had a health incident at work, in which she was slurring and incomprehensible before losing consciousness while trying to buy candy from a vending machine; she was found with the coins in her mouth. She initially refused to go to the hospital, but ended up at the emergency room the following day. She was cleared to return to work but advised to follow up with other doctors.

The executive director of the facility emailed the nurse's supervisor, the operations manager, and the chief nursing officer, expressing his belief that the nurse could not properly manage residents' medication if her own health issues were not managed properly. The manager told the director and supervisor to inform the nurse that she had to receive clearance from multiple specialists related to her condition. The director then replied, by email, '[t]hat is what I was assuming, because we also have the age issue."

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Following yet another medication error, the nurse was fired. She then sued for disability and age discrimination. The court dismissed her disability discrimination claims because it was undisputed that she had committed multiple errors in administering medication to the residents, even after being fully cleared for work. Her age discrimination claim, however, was another matter. Although the employer argued that the comment about her age was only an acknowledgement that it should be cognizant of the Age Discrimination in Employment Act, the court found that it raised a fact issue as to whether the stated reason for termination was a pretext for age discrimination, as it was made by an actual decisionmaker who specifically referenced the nurse's age shortly before she was terminated.

The lesson from this case is that "casual" means of written communication, such as emails and texts, do not go away, are still discoverable in litigation and can be interpreted in several ways, including as an expression of bias – even if it was not intended that way. So, as a general matter, managers should be extremely careful about referencing employees' protected characteristics in writing.

RECENT BLOG POSTS

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

- Wait! What Does the NLRB Think About Social Media Policies?!!! by Fiona W. Ong, September 25, 2019 (featured on HRSimple.com).
- DOL Issues Final Overtime Rule, Increasing Required Salary Level for Exempt Employees by Eric Hemmendinger, September 24, 2019.
- Death During Sex on Business Trip Was "Workplace Accident"?!!! by Fiona W. Ong, September 19, 2019 (featured on HRSimple.com).
- The EEOC's Approach to Remedies for Discrimination by Fiona W. Ong, September 11, 2019.
- Laws That Aren't In the State Code? by Fiona W. Ong, September 4, 2019 (Selected as a "noteworthy" blog post by the *Employment Law Daily*).

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