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E-UPDATE

August 31, 2021

RECENT DEVELOPMENTS

What the FDA's Regular Approval of the COVID-19 Vaccine Means for Employers

On August 23, 2021, Pfizer-BioNTech COVID-19 vaccine received regular approval from the Food and Drug Administration. Moderna has submitted its application for regular approval, and it is expected that such approval is forthcoming shortly. With these developments, certain legal hesitation regarding vaccine mandates – including by employers – has fallen away.

Putting political and philosophical arguments to the side, vaccine mandates were initially subject to some concerns from a legal perspective. In particular, the fact that the vaccines were approved under Emergency Use Authorization (EUA) was an issue. The EUA statute specifically provides that individuals must be informed of their right to refuse the vaccine, which gave rise to an argument that any employee who was terminated because they exercised their right to refuse the vaccine could then assert a claim of wrongful or abusive discharge in violation of public policy, i.e. the policy articulated in the EUA statute.

Notably, this argument did not find much traction. In July 2021, the U.S. Department of Justice (DOJ) released an opinion definitively stating that the Emergency Use Authorization (EUA) statute, under which current COVID-19 vaccines were approved by the Food and Drug Administration (FDA), "does not prohibit entities from imposing vaccination requirements" including "to return to work or be hired into a new job." Additionally, the argument was also rejected by several federal courts, including *Bridges v. Houston Methodist Hospital*, in which a hospital's vaccine mandate for its employees was upheld. Yet, until this point, there existed the possibility that other courts might not agree with the DOJ or their fellow courts. However, with regular approval, the EUA issue has become moot.

Concerns about whether such mandates are permissible under other federal workplace laws have been previously addressed by the relevant federal agencies. From a workplace safety standpoint, the Occupational Safety and Health Administration expressly encourages employers to impose such mandates. In its recently revised Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace, OSHA pointedly suggests "that employers consider adopting policies that require employees to get vaccinated or to undergo regular COVID-19 testing – in addition to mask wearing and physical distancing – if they remain unvaccinated."

As for federal discrimination laws, the Equal Employment Opportunity Commission (EEOC) has updated its What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and

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Other EEO Laws resource to address the impact of federal non-discrimination laws on an employer's vaccine requirements, most recently on May 28, 2021. Notably, the guidance specifically asserts that employers may mandate vaccines under certain circumstances, but employees may be entitled to an exemption under the Americans with Disabilities Act due to a medical condition or under Title VII due to a religious belief, and pregnant employees should be extended the same accommodations provided to others. Additionally, in its 2009 Guidance, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, the EEOC recognized that an employer can impose a vaccine mandate in the context of a pandemic, subject to religious or disability accommodations.

However, many states have enacted or are considering restrictions on a company's right to require proof of vaccination (e.g. bans on so-called "vaccine passports"), which could prevent enforcement or imposition of a vaccine mandate. These bans come in many different forms. Some are limited to governmental or public entities. Others (including Alabama, Florida, North Dakota, and Texas) prohibit private entities from requiring vaccine passports in providing goods, services, or access to the public, but do not govern employers' ability to impose a vaccine mandate on their employees. Montana prohibits employers from requiring proof of vaccination, and many other states have similar legislation pending before their state legislatures.

Thus, although employers may freely impose vaccine mandates under federal law, it is critically important for them to stay on top of any changes in state law on this issue.

Title VII Does Not Prohibit Paramour Preferences

Although noting that, "[w]orkplace favoritism toward a supervisor's sexual or romantic partner is certainly unfair to similarly situated workers and more than likely harms morale," the U.S. Court of Appeals for the Ninth Circuit joined its sister circuits in holding that Title VII's prohibition on sex discrimination does not encompass preferential treatment toward a supervisor's sexual or romantic partner.

Background of the Case. In *Maner v. Dignity Health*, the head of a laboratory was involved in a long-term affair with one of his subordinates. He took her to conferences to which other employees were not invited and gave her greater opportunities for publications. After a complaint by another employee, she was technically reassigned to another supervisor but continued to work in the same lab. Subsequently, the position of a male employee, who had poor performance, was eliminated due to reduced funding for the lab. He sued, alleging sex discrimination based on a "paramour preference" theory, which posits that an employer violates Title VII "whenever a supervisor's relationship with a sexual or romantic partner results in an adverse employment action against another employee."

The Court's Opinion. The Ninth Circuit flatly rejected the paramour preference theory. Although Title VII prohibits discrimination based on an individual's sex, the Ninth Circuit quoted a leading case from the Second Circuit that "sex logically could only refer to membership in a class delineated by gender and that … [in a paramour preference case,] male plaintiffs faced exactly the same predicament as that faced by any woman applicant for the promotion: No one but [the paramour] could be considered for the appointment." This rationale has also been adopted by the Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits. Moreover, as the Ninth Circuit noted, the Equal Employment Opportunity Commission has issued guidance that "Title VII does not prohibit isolated

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instances of preferential treatment based upon consensual romantic relationships," since such treatment, although unfair, disadvantages both males and females equally.

The Ninth Circuit also relied upon the Supreme Court's decision in *Bostock v. Clayton County, Georgia* (discussed in our June 15, 2020 E-lert), which set forth what the Ninth Circuit described as an "all-purpose test for assessing whether an adverse employment decision violated Title VII" as follows:

> If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer— a statutory violation has occurred.

In a paramour preference context, changing the sex of the plaintiff would make no difference – "The motive behind the adverse employment action is the supervisor's special relationship with the paramour, not any protected characteristics of the disfavored employees."

The Ninth Circuit also rejected the male employee's argument that "sex" necessarily encompasses sexual activity. The plain meaning of the term as used in the statute is a characteristic that an individual "personally owns or possesses," and not an activity in which multiple individuals engage. Somewhat facetiously, the Ninth Circuit compared the term to Title VII's similar protections for "race," noting that the term refers to an individual's membership in a class, and not participation in an athletic event.

Lessons for Employers. Although this case is good news in that the court refused to expand the scope of sex discrimination claims, wise employers should not ignore workplace romances between a manager and their subordinate. While paramour preferences do not violate Title VII, they can create workplace morale issues, as the Ninth Circuit noted. Moreover, employers should always be sensitive to possible claims of sexual harassment by the subordinate paramour, who might later claim that they were pressured into a romantic or sexual relationship by their manager.

The Eleventh Circuit Provides Guidance to Successor Employers on Workforce Transitions Under the NLRA

In determining that the National Labor Relations Board's decision finding that the Employer violated the National Labor Relations Act was not supported by substantial evidence, the U.S. Court of Appeals for the Eleventh Circuit provided some guidance to employers on workforce transitions from another employer.

The case of *Ridgewood Health Care Center, Inc. v. NLRB* addressed three primary issues: whether a successor employer (1) coercively interrogated prospective employees, (2) engaged in a discriminatory hiring scheme to avoid an obligation to recognize and bargain with the union representing its predecessor employees, and (3) thereafter refused to bargain with the union on the basis that the employees previously represented by the union did not constitute a majority of the successor's workforce.

Background: Prior to 2013, Preferred Health Holdings leased and operated Ridgewood Health Care Center. In 2013, Preferred announced that it would terminate its lease. Following Preferred's termination of operations, Ridgewood Services (Ridgewood) would assume operations of the

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facility. Preferred Health employees were informed that their positions would be terminated at the same time as Preferred's operations ended, and they would have to reapply for positions with Ridgewood.

Sixty-five of 83 Preferred employees applied for employment with Ridgewood. Of those 65 employees, 53 were offered employment with Ridgewood Services. On the first day of Ridgewood Services' operations at the facility, 49 employees were previously employed by Preferred – and represented by the union – and 52 were not previously employed by Preferred. Accordingly, Ridgewood notified the union that it would not recognize and bargain with the union because a majority of its workforce was not comprised of Preferred employees who had been represented by the union.

The union alleged that Ridgewood Services committed numerous unfair labor practices. Ultimately, the Board held that Ridgewood Services coercively interrogated prospective employees regarding their union activities, engaged in a discriminatory scheme to avoid hiring a workforce comprised of a majority of the union-represented employees, and unlawfully refused to bargain with the Union.

Coercive Interrogation: The Eleventh Circuit found that Ridgewood did not coercively interrogate Preferred employees during interviews. It held that the Board failed to analyze the circumstances to determine whether Ridgewood's questioning crossed the line and became coercive. The Eleventh Circuit noted that the seven employees who were asked about union membership all answered truthfully and were hired by Ridgewood. Additionally, there did not appear to be a systemic effort to inquire about union status. Finally, not one of the employees asked about union membership testified that their interviews suggested any coercion. Accordingly, Ridgewood's questioning did not violate the NLRA.

Discriminatory Hiring: The Board found that Ridgewood undertook a discriminatory hiring scheme to avoid a bargaining obligation with the Union. The Board inferred union animus from the alleged coercive interrogations, Ridgewood's lead investor's statement that it was a "possibility" that Ridgewood may close the facility if employees unionized, and a threat of termination made to an employee seeking to organize a union months after Ridgewood commenced operations.

The Eleventh Circuit, however, rejected each prong of the Board's reasoning. First, as discussed above, the court held that Ridgewood did not engage in coercive interrogation. Second, the Eleventh Circuit held that the investor's statement was not coercive on its face but, even if it was coercive, was made several months after the hiring decisions and there was therefore no nexus between the statement and Ridgewood's hiring decisions. Third, the termination threat occurred well after Ridgewood's commencement of operations and, again, there was no evidence that hiring decisions made months earlier were impacted by union animus. Thus, the Eleventh Circuit held that the Board's conclusion that Ridgewood engaged in a discriminatory hiring scheme was not supported by substantial evidence.

Refusal to Bargain: Finally, the Eleventh Circuit agreed with Ridgewood that it did not unlawfully refuse to bargain with the union. On Ridgewood's first day of operations, a majority of its workforce was not comprised by a majority of Preferred employees who had been represented by the union. And because Ridgewood did not engage in a discriminatory hiring scheme, the Board incorrectly found that Ridgewood was obligated to bargain with the Union.

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Takeaway: While Ridgewood was ultimately successful before the appeals court, it takes substantial resources to process a case to that juncture. Employers who are taking over operations at a unionized facility are well-served to avoid broaching the subject of unionization or union membership during employee interviews. Finally, successor employers should not make hiring decisions based on an effort to avoid a bargaining obligation; if the successor's Day 1 workforce is not comprised of a majority of employees who were represented by the union, the employer should be prepared to present non-discriminatory reasons for its hiring decisions.

TAKE NOTE

EEOC Extends EEO-1 Filing Deadline. Citing the continuing challenges of the COVID-19 pandemic, the Equal Employment Opportunity Commission has announced an extension to the filing period - now ending on October 25, 2021- for the (typically) annual submission of EEO-1 workforce demographic information regarding employees' race, ethnicity and sex.

Because last year's submission was postponed due to the COVID-19 pandemic, those employers subject to the filing requirement will need to submit data for both 2019 and 2020. Employers who are required to file an EEO-1 form are those with 100 or more employees and federal contractors and first-tier subcontractors with 50 or more employees. Employers may file their EEO-1 data electronically, and obtain more information and assistance about the filing requirements, here.

OSHA Issues Revised Small Business Safety and Health Handbook. The federal Occupational Safety and Health Administration, in conjunction with the National Institute for Occupations Safety and Health, has revised its Small Business Safety and Health Handbook.

This handbook is intended to help small businesses make their workplaces safer and more healthful for their employees. According to OSHA's press release, the Handbook "highlights the benefits of implementing an effective safety and health program, provides self-inspection checklists for employers to identify workplace hazards and reviews important workplace safety and health resources for small businesses."

Occasional Contacts Are Permitted During an Employee's FMLA Leave. Although employees cannot be required to work while on Family and Medical Leave Act (FMLA) leave, occasional contact with those employees is not a violation of the law, as the U.S. Court of Appeals for the Sixth Circuit recently reiterated.

In *Blank v. Nationwide Corp.*, while the employee was on FMLA leave, he was contacted by telephone to inform him that he was being demoted due to incidents that occurred approximately a week and a half earlier, which the Company had investigated. He then filed a complaint with the Company's Office of Ethics that he believed the investigation was biased. A representative from the Office reached out to him to conduct an initial intake and discussion, and agreed not to contact him further until he returned from his FMLA leave. He subsequently sued his employer claiming, among other things, that contacting him while he was on FMLA leave interfered with his leave.

The Sixth Circuit however, rejected the employee's claim, stating that "an employer can engage in de minimis contact with the employee on leave without violating their FMLA rights." In this case, the call regarding his demotion had been set up prior to his FMLA leave, and the remaining contact

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was in response to the complaint that he had filed. The Sixth Circuit found these minimal contacts neither discouraged the employee from taking leave nor interfered with his ability to take leave under the FMLA.

While employees are on extended FMLA leaves, there may be occasions where the employer needs to contact them, such as for operations-critical information or to proceed with normal or significant disciplinary matters that should not wait until the conclusion of the leave. Employers can contact those employees without violating the FMLA – but should be careful to ensure that such contacts are kept to a minimum.

Title VII Prohibits "Associational Discrimination," Even for Distant Relationships. Under Title VII, employees are protected from discrimination and retaliation based on their association with persons of another race (i.e. "associational discrimination"), regardless of the closeness of the relationship, according to the U.S. Court of Appeals for the Third Circuit.

In *Kengerski v. Harper*, an employee made a written complaint that a colleague had called his bi-racial grand-niece a "monkey" and also sent offensive text messages with racial comments about his coworkers. Seven months later, he was fired. He sued, claiming retaliation for his complaint, but the federal district court rejected his claim on the basis that the employee, who is White, could not maintain a claim for Title VII retaliation.

The Third Circuit disagreed, joining its sister Circuits in holding that "Title VII protects all employees from retaliation when they reasonably believe that behavior at their work violates the statute and they make a good-faith complaint. As relevant here, harassment against an employee because he associates with a person of another race, such as a family member, may violate Title VII by creating a hostile work environment." The Third Circuit further observed that this theory of associational discrimination is not limited to "close or substantial" relationships, and that the protections of Title VII extend to even distant family relationships – such as a grand-niece.

This case reminds employers that employees are protected from discrimination not just on the basis of their own race, but that of those they choose to associate with – whether family, friends, or others.

Employees with Disabilities Can Be Held to Performance Standards. But documentation is key, as the U.S. Court of Appeals for the Eighth Circuit noted in a recent case.

In *Vinh v. Express Scripts Services Co.*, an employee had performance issues that were documented in his annual reviews and, when a new manager took over, in her notes of her weekly meetings with the employee. In the meantime, the employee began experiencing severe neck pain and was subsequently diagnosed with cervical dystonia, which required him to take intermittent leave. Because of his performance issues, he was told that he would be placed on a performance improvement plan (PIP), but he began an extended leave before that occurred. When he returned from leave, he was then placed on the PIP (after the manager confirmed that there would be no impact on his work restrictions) and was ultimately terminated when his performance did not improve sufficiently. He then sued, alleging, among other things, that he was discriminated against because of his disability.

The Eighth Circuit found that the employer had established a legitimate reason for the employee's termination: his history of deficient performance and failure to satisfactorily complete the PIP. There

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was substantial evidence of his poor performance predating his disability, including his annual reviews and his low rating compared to his peers. Moreover, the PIP had been discussed with him prior to his leave, and his manager had confirmed that the PIP did not conflict with his work restrictions. As the Eighth Circuit noted, "[f]ederal courts do not sit as a super-personnel department that reexamines an entity's business decisions…. Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior."

So, while employers must provide reasonable accommodations to enable employees with disabilities to perform their essential job functions, it can hold employees accountable for meeting the expected standard of performance for those functions. And if the employee cannot meet those standards, which should be documented, employers may follow their normal process for performance management – including PIPs and termination, as appropriate.

Whistleblowers Are Not Protected from the Consequences of Their Own Misconduct. Although employers may not take adverse action against an employee for whistleblowing activity, those employees are not protected from any and all adverse actions, as the U.S. Court of Appeals for the D.C. Circuit recently noted.

There are many laws at the federal and state level that provide protection to whistleblowers (i.e. employees who report illegal activity by the employer). In *Marcato v. U.S. Agency for Int'l Devt.*, the employee frequently alleged misconduct by high-ranking agency officials. However, the employee had also engaged in misconduct herself, as confirmed by an extensive investigation, which resulted in her termination. She appealed her termination, invoking the federal Whistleblower Protection Act, which protects federal employees from retaliation for reporting legal violations.

The WPA specifically provides that employers taking adverse actions against a whistleblower do not violate the law if they can show "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." Although not all statutes have the exact same language, the general principle applies – an employer may terminate an employee who engaged in whistleblowing activity, as long as the termination is justifiable and wholly unconnected to the activity (although the standard for making this showing may differ under the applicable law). Factors that are relevant under the WPA (and are likely relevant under other laws) include: the strength of the employer's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the company officials who were involved in the decision; and any evidence that the employer takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

In the present case, the D.C. found that the employer would have terminated the employee for her misconduct regardless of her protected disclosures. It also rejected her contention that the employer commenced the investigation against her because of her whistleblowing activity, noting that her misconduct itself justified the investigation and the individual making the decision to commence the investigation had no reason to engage in retaliation.

The lesson here for employers is that, while they need to proceed carefully when dealing with a whistleblower, they can still proceed with adverse employment actions as long as they can demonstrate that the actions are legitimate, that they would have been taken regardless of the

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protected activity, and that the employee is being treated consistently with how others engaging in the same type of misconduct have been treated.

Racist Slurs in a Foreign Language Is Still Harassment. The use of racial slurs in a foreign language, particularly in connection with other problematic conduct, can create a hostile work environment, as the U.S. Court of Appeals for the Fifth Circuit recently held.

In *Johnson v. PRIDE Indus., Inc.*, a Hispanic supervisor used "mayate," which is the Spanish equivalent of the N-word, to refer to a Black employee in that employee's presence, as well as on a regular basis with fellow Hispanic employees to refer to other Black employees. The Black employee also claimed that the Hispanic supervisor only called him "mijo" (son) or "manos" (hands) rather than by name. Additionally, the supervisor gave the Black employee less preferable assignments and hid his applications for promotion on several occasions, as well as hiding materials the Black employee needed to do his job. Although the employee repeatedly complained to his manager and HR, the company concluded no harassment had occurred (although it summarily stated that it "addressed as appropriate" each of the complaints), and the conduct continued. Eventually, the employee resigned.

The Fifth Circuit found that the employee had sufficiently alleged the existence of a hostile work environment. In order to establish a hostile work environment, there must be conduct targeted at an individual because of their protected characteristic that is sufficiently "severe or pervasive" to alter the conditions of employment. In this case, the Fifth Circuit characterized the N-word as "the most noxious racial epithet in the contemporary American lexicon." It recognized that some sister Circuits have found the limited or isolated use of the word is sufficiently severe to create a hostile environment. The Fifth Circuit did not need to decide whether it would follow those courts, however, because there was additional conduct that could support the severe or pervasive nature of the harassment. Thus, the use of the superficially inoffensive terms "mijo" and "manos" could have been offensive in the context of the situation. Moreover, the supervisor interfered with the Black employee's attempts to secure a promotion and assigned him less favorable work. The Fifth Circuit found that all of this conduct could reasonably be found by a jury to create a hostile work environment.

Of particular interest in this case is the fact that the racial slurs were made in a foreign language. The Black employee, although he only had limited knowledge of Spanish, was aware of how derogatory the term "mayate" was. But even if he had not been, the other Spanish-speaking employees in the workplace clearly were. To the extent that an employer is aware that inappropriate language is being used in the workplace – even in another language – it is important to take prompt action to stop it.

D.C.'s Controversial Non-Compete Law Delayed Until April 1, 2022. As we discussed in our January 2021 E-Update, the District of Columbia passed arguably one of the most sweeping non-compete bans in the country. The effective date of this law, however, has been delayed until April 1, 2022.

With a few limited exceptions, the Ban on Non-Compete Agreements Amendment Act of 2020 ("the Act") would prohibit the use of non-competition agreements across all income levels both during and after employment. Notably, however, D.C. Council members, including the Act's sponsor, have questioned the impact of this law, and are considering amendments, including adding an exception

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for "bona fide conflict of interest provisions" and clarifying that employees may be banned from using, as well as disclosing, the employer's confidential, proprietary or sensitive information (e.g. client or customer lists, trade secrets). Another proposal would permit certain targeted non-competes. Whether any of these amendments will pass is not yet known.

NEWS AND EVENTS

Honor – We are delighted to announce that all of our partners were listed in *The Best Lawyers in America*© 2022, an extremely rare accomplishment: Bruce S. Harrison, Eric Hemmendinger, Darryl G. McCallum, J. Michael McGuire, Fiona W. Ong, Stephen D. Shawe, Gary L. Simpler, Mark J. Swerdlin, Teresa D. Teare, Parker E. Thoeni, Elizabeth Torphy-Donzella and Lindsey A. White. Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* lists are compiled based on an exhaustive peer review evaluation.

Webinar – The Employment Law Alliance, of which Shawe Rosenthal is the Maryland member, is presenting a complimentary 90-minute webinar on September 15, 2021 at 10 a.m. Eastern: "Global Employer's Guide to Cross Border Work: The experts you need in employment, immigration, tax, and governance." This presentation will address some of the issues that come up when hiring or moving employees internationally. Our panel of professionals will tackle key topics including:

- Immigration/visa requirements & work permits
- Complying with local labor and employment laws
- Whether a formal employment contract is required (or advisable)
- How to handle employee benefit plan issues (e.g. medical coverage, insurance and retirement plans)
- Individual and corporate tax issues that affect the employer and the employee, data privacy, and export controls

You may register for this webinar here.

Victory – J. Michael McGuire won an arbitration for an energy company. The union alleged that the company had violated the collective bargaining agreement when it began pro-rating the annual incentive payment for employees who were not actively at work. The arbitrator found that the company's management rights clause had "extraordinarily strong prohibitions regarding the use of past practices," and the company was entitled to determine eligibility for the payment.

Victory – Chad M. Horton won an arbitration for an alcoholic beverage company. The arbitrator agreed that the Company discharged an employee for cause who lied during the Company's contact tracing investigation following his positive COVID test result.

Victory – Veronica Yu Welsh won a motion to dismiss for a private medical practice that was being sued for discrimination. The court agreed that the plaintiff had failed to state a claim.

Appointment – Parker E. Thoeni was named a co-leader for the Employment Law Alliance's Trade Secrets and Restrictive Covenants group. ELA is a global alliance of preeminent labor and employment firms, of which Shawe Rosenthal is the Maryland member.

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Webinar – Chad M. Horton was a speaker for the Employment Law Alliance's August 12, 2021 webinar, "Challenging Health and Safety Issues in a Unionized Environment." The presentation addressed what employers can do to keep pace with rapid changes in health and safety when bargaining and administering labor agreements in an organized workplace. The webinar recording may be accessed here.

Podcast – Chad M. Horton was a guest speaker for the Employment Law Alliance's podcast series, Episode 284: Safety Measures and Mandatory Vaccines in a Unionized Environment. The podcast can be accessed on the ELA website or on your favorite podcast streaming service.

TOP TIP: Timing Matters – Failure to Respond and Act Promptly Can Create Liability

A recent case emphasizes the importance of timing – both in terms of reacting to reports of employee misconduct and in imposing discipline (particularly termination). As the U.S. Court of Appeals for the Eighth Circuit recently found, terminating an employee, based on conduct that occurred months earlier, shortly after they complain of discrimination certainly seems suspect.

Where Things Went Wrong. In *Hairston v. Wormuth*, a female employee allegedly experienced some sexually harassing conduct from her male supervisor. In late August, she spoke to a colleague, who happened to be an EEO assistant, but did not file a formal complaint. He suggested that she talk to either her next level manager or the EEO manager. He also reported his conversation to the EEO manager, who then informed the employee's next level manager. The employee's manager then informed the supervisor, who denied the alleged conduct. In turn, he complained about inappropriate conduct by the employee, including reiterating an incident that he originally reported back in March. A month later, at the end of September, the manager also spoke with the employee, who confirmed her conversation with the EEO assistant but declined to file a formal complaint.

Approximately two months later, in late October, an investigation was conducted into all the allegations. The investigator issued his report a month later, on November 21, finding the employee's allegations to be "unfounded," while concluding that she had engaged in multiple incidents of inappropriate behavior. On December 2, the employee sought counseling from the EEO officer regarding her perceptions of retaliation and a hostile work environment, among other things. A week later, she filed a complaint about inappropriate comments that she overheard her manager making. A few days later, on December 12, the employee was terminated, based on the inappropriate conduct addressed in the investigator's report. She sued, alleging illegal retaliation, among other things.

The Court Weighs In. The Eighth Circuit found that the employee's retaliation claim had merit because the timing of her termination was problematic. Specifically, she was terminated for conduct that had been known by her manager for many months, but only days after she formally complained of discrimination. As the Eighth Circuit stated, "[w]here an employer tolerates an undesirable condition for an extended period of time, and then, shortly after the employee takes part in protected conduct, takes an adverse action in purported reliance on the long-standing undesirable condition, a reasonable jury can infer the adverse action is based on the protected conduct."

The Eighth Circuit also found troubling the fact that the manager had done a thorough investigation into the supervisor's allegations of misconduct by the employee, but no similar investigation into the

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employee's allegations of misconduct by the supervisor. This "lopsided" treatment was further support for the retaliation claim.

Lessons for Employers. There are several takeaways for employers here.

- First, it is important to respond promptly to reports of discrimination or harassment. In this case, months went by without much response from the employer – a formal investigation was not started for some months after the issues were first raised, and the investigation itself apparently took almost an entire month. It is difficult to maintain that the issues were significant, or that the employer was appropriately concerned, when there is no urgency exhibited in responding to reports of misconduct.
- Moreover, it is important to take remedial action promptly as well, as it is hard to argue that the employee's misconduct was so serious as to warrant termination if the employer tolerated the same conduct for an extended period.
- And finally, it is important to treat all complaints consistently, as "lopsided" investigations suggest that the employer is not taking some complaints seriously or has already prejudged the situation.

RECENT BLOG POSTS

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

- I'm Tired of Doctors Who Just Say Whatever the Employee Wants by Fiona W. Ong, August 25, 2021

- NLRB Hearing Officer Recommends Second Union Election at Amazon – But Will It Happen? by Chad M. Horton, August 18, 2021

- Again? What Employers Need to Know About OSHA's Latest Update to Its COVID-19 Workplace Guidance by Fiona W. Ong, August 16, 2021 (Selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)

- New NLRB General Counsel Signals Major Changes Ahead by Chad M. Horton, August 13, 2021

- Love Me, Love My Dog? Maybe Not At Work… by Fiona W. Ong, August 12, 2021 (Recognized as one of LexBlog's weekly Top 10 in Law Blogs and selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)

- Small/Mid-Sized Employers May Be Reimbursed for Paid Family Vaccination Leave! by Fiona W. Ong, August 6, 2021 (Recognized as one of LexBlog's weekly Top 10 in Law Blogs)

- Masks Redux? What Employers Need to Know About the Latest Guidance for Fully Vaccinated Individuals From the CDC by Fiona W. Ong, August 4, 2021 (Selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)

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