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E-UPDATE

August 31, 2022

RECENT DEVELOPMENTS

Gender Dysphoria Constitutes a Disability Under the ADA, According to the Fourth Circuit

The U.S. Court of Appeals for the Fourth Circuit has ruled that gender dysphoria, a medical condition defined in the DSM-5 as "clinically significant distress or impairment related to gender incongruence, which may include desire to change primary and/or secondary sex characteristics[,]" can constitute a disability under the Americans with Disabilities Act ("ADA"). The decision substantially alters the legal landscape under the ADA, as "gender identity disorders" are expressly excluded from the definition of disability under the ADA.

Background. The extent of workplace protections for transgender workers has evolved rapidly over the past decade. Gender identity, a protected characteristic under many states' laws, was in a state of limbo under Title VII until the Supreme Court confirmed in 2020 in *Bostock v. Clayton County* that Title VII's prohibition on sex discrimination extends to discrimination based on sexual orientation and gender identity. The Equal Employment Opportunity Commission and the Occupational Safety and Health Commission have opined on employers' obligations when it comes to restroom usage by transgender employees. The Department of Justice has filed statements of interest in cases involving transgender employees' workplace rights. In several cases, transgender employees have asserted claims of disability discrimination and rights to reasonable accommodations, but the focus had largely been on anti-discrimination statutes prohibiting sex discrimination.

In *Williams v. Kincaid*, the plaintiff had been incarcerated in a Fairfax, Virginia detention center. She was born male but identified as female, and had been taking hormone therapy medication for fifteen years prior to her incarceration. Upon her incarceration, she was initially assigned to the women's side of the prison, but when the prison discovered that she "retained the genitalia with which she was born[,]" she was reassigned to the male side of the prison pursuant to prison policy. She was allegedly subjected to harassment and denial of medication and various requested accommodations during her incarceration, which became the subject of the lawsuit. Williams sued the prison and several other defendants for violations of the ADA, among other claims.

The Court's Ruling. The Fourth Circuit began its discussion with the ADA, which defines "disability" very broadly, noting that it includes a carveout excluding from the definition of disability "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, *gender identity disorders not resulting from physical impairments*, [and] other sexual behavior disorders," as well as "compulsive gambling, kleptomania, . . . pyromania; or . . . psychoactive substance use disorders resulting from current illegal use of drugs." (emphasis added).

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Whether the exclusion barred the claim for discrimination based on gender dysphoria was resolved in the negative for three reasons.

The Fourth Circuit focused first on the question of whether gender dysphoria is a "gender identity disorder" as that term is used in the ADA. It looked first to the meaning of the exclusion at the time it was enacted: 1990. The Fourth Circuit noted that the version of the Diagnostic and Statistical Manual of Mental Disorders ("DSM") in effect at the time of enactment did not include a diagnosis of "gender dysphoria;" rather, it included a diagnosis of "gender identity disorder," which the Fourth Circuit found "marked being transgender as a mental illness." "Gender identity disorder" has since been removed from the DSM, and "gender dysphoria," a different diagnosis, has been added. The distinction the Fourth Circuit found between the prior version and the current version is that while the prior version defined being transgender as a disability, the current version is limited to a subset of transgender individuals who suffer from clinically significant distress resulting from incongruence between gender identity and assigned sex. The Fourth Circuit put it succinctly, quoting the Harvard Journal on Law and Gender, "being trans alone cannot sustain a diagnosis of gender dysphoria under the DSM-[5], as it could for a diagnosis of gender identity disorder under [earlier versions of the DSM]." Because the current DSM diagnosis focuses on distress rather than transgender identity, the Fourth Circuit found that it falls outside the scope of the exclusion, and therefore within the scope of the definition of disability under the ADA.

Next, the Fourth Circuit focused on whether Williams' gender dysphoria, if it were a gender identity disorder, resulted from physical impairments. The Fourth Circuit found that, although the allegations in the complaint were unclear on the point, gender dysphoria could be shown to result from physical impairments because scholars have pointed to evolving science suggesting that gender dysphoria may be driven by physical, namely hormonal and genetic, causes. The Fourth Circuit focused on Williams' need for hormone therapy, which suggested a physical component, and it refused to permit dismissal of the complaint at an early stage before evidence could be developed on this point.

Finally, seemingly turning its prior analysis on its head, the Fourth Circuit found that because many transgender individuals likely suffer from some form of gender dysphoria, excluding gender dysphoria from the definition of disability under the ADA would exclude the class of transgender individuals and likely violate the equal protection clause of the Fourteenth Amendment, supporting the Fourth Circuit's statutory construction that avoided this constitutional infirmity.

The opinion was not unanimous. Being careful to note that the dissenting opinion did not constitute a value judgment or policy preference in this area rife with political discord, the dissenting judge expressed that the distinction between the prior DSM diagnosis of gender identity disorder and gender dysphoria was minimal, both requiring some discomfort or distress. The dissent found the allegations in the complaint to fit within the definition of gender identity disorder as that term was defined in the prior version of the DSM in effect at the time of enactment of the ADA. As a result, the dissent stated, "linguistic drift cannot alter the meaning of words in the ADA when it was enacted. And at that time, the meaning of gender identity disorders included gender dysphoria as alleged by Williams." Among other reasons, the dissent also found the language of the exclusion, which refers to gender identity disorders in the plural, indicates an intent to construe the exclusion more broadly rather than limiting it to a single diagnosis in the DSM.

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Practical Considerations. As an area that already required careful consideration from employers, additional caution is now necessary. First, employers must recognize that transgender employees may be, but are not necessarily, disabled under the ADA. Accordingly, employers should be open to cues that transgender employees may be suffering from gender dysphoria and in need of some workplace accommodation(s). However, employers must avoid assuming all transgender employees are disabled, lest they expose themselves to a claim of discrimination based on perceived disability. Indeed, in the not-too-distant past, some took the position that transgender employees should focus their legal arguments on Title VII rather than the ADA to avoid the potential stigma resulting from characterizing non-binary gender identity with disability. (The dissenting opinion even notes the change to the DSM was driven in part by the desire to avoid the stigma associated with the use of the term disorder in the diagnosis.) Perhaps one of the most straightforward ways employers can address this legal tightrope is to simply respond to issues raised by transgender employees by asking if there is anything the employer can do to assist the employee, thus initiating a conversation that could constitute an interactive process without assuming the employee is disabled.

Second, employers confronting an employee who establishes that they suffer from gender dysphoria should be prepared to offer reasonable accommodations. While there has been debate surrounding restroom usage and pronouns, it is difficult to envision an undue hardship that would overwhelm an employee's request to use the restroom that conforms to their gender identity and use of their preferred pronouns as a reasonable accommodation.

Third, this case offers important insights into the central role the DSM plays in courts' analyses of health conditions under employment statutes. The DSM evolves, and related medical publications are not always in sync with the DSM. Careful employers and practitioners will consult the DSM and related publications in analyzing employee requests for accommodations or leaves of absence under health- and disability-related employment statutes.

The fourth practical consideration is one of state law: despite the fact that many states' antidiscrimination laws are typically interpreted consistently with the ADA, there is reason to believe that the dispute between the majority and the dissent about the scope of the exception to the ADA's protection may be immaterial to coverage under state law, at least for those states within the Fourth Circuit (i.e. Maryland, Virginia, West Virginia, North and South Carolina). State statutes may lack the carveout set forth in the ADA, meaning that employers may need to consider gender dysphoria a disability under the state statute regardless of the status of federal law (*i.e.*, a successful appeal of the Fourth Circuit's decision would not likely alter employers' legal obligations under state law).

Offensive Language May Be Protected Concerted Activity

The U.S. Court of Appeals for the D.C. Circuit ruled that the National Labor Relations Board sufficiently addressed the conflict between an employer's obligations under federal antidiscrimination laws and employee's rights under the National Labor Relations Act in finding unlawful an employee's termination for writing "whore board" at the top of two overtime sign-up sheets. The result turned on what the employer had previously tolerated in the workplace – a warning to employers to be careful of what behavior they permit.

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Legal Framework. Federal antidiscrimination laws require employers to maintain a harassment-free workplace. The NLRA protects employees' rights to engage in concerted activity for their mutual benefit regarding their terms and conditions of employment. Both are implicated when employees engage in abusive and potentially illegal conduct in connection with protected concerted activity, and the Board applies the *Wright Line* analysis to determine whether employers have unlawfully disciplined employees in this situation.

Under *Wright Line*, the Board's General Counsel must show that the employee engaged in protected activity, the employer knew of it, and the employer had animus against such activity, as proven with evidence that establishes a causal relationship between the discipline and the protected activity. Then the employer has the opportunity to demonstrate that it would have taken the same action even in the absence of the protected activity.

Factual Background. In *Constellium Rolled Products Ravenswood, LLC v. NLRB*, some of the company's unionized workers protested the employer's unilateral change in the overtime scheduling system. The union filed an unfair labor practice charge and 50 employees filed grievances, while some employees boycotted the new procedure. The term "whore board" was commonly used to describe the new overtime sign-up sheet. Six months after the change, an employee wrote "whore board" at the top of two sign up sheets. He was suspended and ultimately terminated, ostensibly for violation of the company's harassment policy.

The Board initially found that the company disciplined the employee for the protected content of his writing, rather than his misconduct. On the first appeal, the D.C. Circuit sent the matter back to the Board to address the potential conflict between the NLRA and the employer's anti-harassment obligations. The Board then applied the *Wright Line* analysis to find that the employee's offensive actions were part of a continuing course of protected activity in protest of the overtime procedures, that the employer knew of the activity, and that there was animus against such activity, as evidenced by the fact that the use of the term was commonplace and the company had tolerated "extensive profanity, vulgarity, and graffiti in the workplace" before disciplining the employee. The Board's decision was again appealed by the company.

The Court's Decision. On this round, the D.C. Circuit affirmed the Board's finding. It agreed that the employee's writing was protected activity, and that the employer knew of the activity. The D.C. Circuit also agreed that there was evidence of animus, given the disparate treatment of the employee, as the company had otherwise tolerated graffiti and the common use of vulgarities – including the use of "whore board" by even supervisors – without imposing discipline.

With regard to the second part of the *Wright Line* analysis – whether the company showed that it would have disciplined the employee in the absence of the protected activity – the D.C. Circuit also agreed with the Board that the company failed to make this showing. Although the company asserted that the employee was disciplined for "insulting and harassing conduct" in violation of its rules of conduct and anti-harassment policy, there was evidence that profane, vulgar and even harassing language was routinely heard and written at the company without consequence. Thus, the company's "failure to enforce its code of conduct or anti-harassment policy dooms its assertion that it would have fired [the employee] for use of the phrase or for an offensive writing."

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Lessons for Employers. As the D.C. Circuit noted, the company could have avoided liability under the NLRA "by showing that it had a history of enforcing laws and policies against discrimination and harassment in a consistent manner, or by showing it was turning over a new leaf in that regard when it disciplined [the employee], but it showed neither." This lack of enforcement was determinative in this case. Thus, this case emphasizes the need for employers to be consistent in enforcing conduct and harassment policies – both as a general matter, but also to avoid NLRA liability where there is, in fact, a legitimate reason for disciplining an employee's conduct, even in the context of protected activity.

Federal Contractor Update – Revised Compensation Analysis Directive, Objections to Disclosure of EEO-1 Reports, and New Construction Contract Portal

The Office of Federal Contract Compliance Programs had a busy month, issuing several documents and resources of interest to federal contractors and subcontractors. These include the following:

- **Compensation Analysis.** The OFCCP has issued a revised Directive, "Advancing Pay Equity Through Compensation Analysis." When originally issued in March, the Directive controversially appeared to require the disclosure of attorney-client privileged communications and attorney work product. The Directive now clarifies that it does not require production of such protected information. The Directive further:
    - Identifies the documentation that OFCCP requires from a contractor to determine that the contractor has satisfied its obligation to perform a compensation analysis:
        - when the compensation analysis was completed;
        - the number of employees the compensation analysis included and the number and categories of employees the compensation analysis excluded;
        - which forms of compensation were analyzed and, where applicable, how the different forms of compensation were separated or combined for analysis (e.g., base pay alone, base pay combined with bonuses, etc.);
        - that compensation was analyzed by gender, race, and ethnicity; and
        - the method of analysis employed by the contractor (e.g., multiple regression analysis, cohort analysis, etc.).
    - Explains the documentation required from a contractor when its compensation analysis identifies problem areas to demonstrate that it has implemented action-oriented programs:
        - the nature and extent of any pay disparities found, including the categories of jobs for which disparities were found, the degree of the disparities, and the groups adversely affected;
        - whether the contractor investigated the reasons for any pay disparities found;
        - that the contractor has instituted action-oriented programs designed to correct any problem areas identified;
        - the nature and scope of these programs, including the job(s) for which the programs apply and any changes (e.g., pay increases, amendments to compensation policies and procedures) the contractor made to the compensation system; and
        - how the contractor intends to measure the impact of these programs on employment opportunities and identified barriers.

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- **Objections to the Release of EEO-1 Reports.** The OFCCP has issued a Notice that gives multi-establishment contractors the opportunity to provide written objections to having demographic data from their EEO-1 Reports from 2016-2020 disclosed in response to a specific Freedom of Information Act request (Component 2 pay data has not been sought), on the basis that such information constitutes "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." There are FAQs for contractors wishing to object to the release of their EEO-1 data, as well as a portal for submission of objections. The OFCCP also details the information that contractors should submit in support of their objection.

- **Notification of Construction Contract Award Portal**. Construction contractors and subcontractors are required to submit notice to the agency within 10 working days of the award of a federal or federally assisted contract or subcontract exceeding $10,000. Typically, this is done by mail or email. However, the OFCCP has announced a new online portal by which notice should now be submitted, along with FAQs on the portal.

TAKE NOTE

Reasonable Accommodations Must Be Required, Not Just Desired. Under the Americans with Disabilities Act, an employer is obliged to provide only those reasonable accommodations that are necessary to enable an employee to perform their essential job functions (or enjoy the privileges and benefits of employment), and not those that would arguably maximize an employee's productivity.

In *Edwards v. WellStar Medical Group, LLC*, after an employee's accommodation request of being transferred to a new supervisor (which courts have found to be not reasonable as a matter of law) was rejected, she submitted a list of 18 other requested accommodations (including leave, equipment, breaks, part-time work, removal of distractions, removal of non-essential job functions, assistance, additional training, weekly meetings, etc.) that she copied from "the ADA website." She wanted her employer to pick those that would not be a hardship. The employer asked for clarification, and the employee stated that she was requesting accommodations "to maximize her productivity." The employer ultimately denied the requests as "unduly burdensome, impractical, [and] disruptive," and terminated her employment. She sued for failure to accommodate.

The U.S. Court of Appeals for the Eleventh Circuit threw out her claims, finding that she did not show that an accommodation was necessary in order to enable her to do her job. The employee admitted she could perform her essential job functions without accommodation, but only sought to increase her productivity. But, as the Eleventh Circuit asserted, "[i]f an employee does not require an accommodation to perform her essential job functions, then the employer is under no obligation to make an accommodation, even if the employee requests an accommodation that is reasonable and could be easily provided."

This case reminds employers that a necessary predicate to any reasonable accommodation request is that the employee does, in fact, require an accommodation to perform their essential job functions or to enjoy the privileges and benefits of employment. The language of any doctor's note may be critical (e.g. "it may be helpful" v. "it is necessary").

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Establish and Enforce Clear FMLA Reporting Mechanisms. This was the lesson from a recent case from the U.S. Court of Appeals for the Fourth Circuit, in a case under the Family and Medical Leave Act where the employer allowed communications beyond what was specified in its written policy.

In *Roberts v. Gestamp West Virginia, LLC*, the employer had written attendance and leave policies that required employees to notify their group leader of absences or late arrivals via a call-in line at least 30 minutes before their shift begins. Failure to do so for three consecutive shifts was considered job abandonment. In the current case, the employee's group leader had communicated with him about an absence for medical reasons by Facebook messenger. The employee and his group leader then engaged in multiple communications over the app about the employee's appendectomy and resulting complications, for which he received FMLA leave. Following his return to work, the employee experienced additional complications that resulted in his missing additional time from work. He sent multiple messages to his group leader by Facebook messenger regarding his status. However, he was terminated for job abandonment, since he failed to comply with the written call-in procedure.

Under the FMLA, "[a]n employer is expressly allowed to require employees to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." The FMLA regulations provide examples of requiring employees to call a specific number or contact a specific individual, and leave may be delayed or denied for an employee's failure to comply.

But what is "usual and customary"? The Fourth Circuit found that it was not limited to an employer's written policy, but could also encompass "methods of providing absentee notice that an employer has accepted as 'a pattern or course of conduct to date' or 'by custom.'" Because the employee had previously communicated with his group leader about absences for which FMLA was granted by Facebook messenger, the Fourth Circuit found that it was possible for a jury to find that this type of informal notice was also "usual and customary."

So, a best practice for employers is to establish clear, written policies that set forth specific reporting procedures for absences and other missed time, including FMLA-covered situations. But it is equally important to ensure that managers and supervisors are trained to use and enforce those written procedures.

Be Careful Not to Cut Off the Interactive Process Too Quickly. "Just as an employee may not terminate the interactive process quickly to create liability, so too an employer may not cut off the interactive process so early that the parties cannot find a position to reasonably accommodate the employee," stated the U.S. Court of Appeals for the Tenth Circuit in a recent case involving the Americans with Disabilities Act.

In *Dansie v. Union Pacific Railroad Co.*, the employee requested an accommodation for his medical condition. When completing the reasonable accommodations forms, the employee and his physician requested clarification about certain definitions so that the physician could provide more specific estimates of the employee's need for intermittent leave, but no clarification was provided. After discussions with the Director of Disability Management, the employee submitted a new form, but again, the physician noted that the unclear requirements prevented him from providing an estimate

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with certainty. The employee believed his accommodations request had been granted, and suggested no further accommodations. The company's documents, however, show that it would not accommodate the requested intermittent leave. When the employee told his supervisor he thought his request had been granted, the supervisor shrugged and walked away. The employee asked the Director to explain ADA accommodations to his supervisors, but that did not happen. Instead, the employee was charged with attendance policy violations and subsequently terminated.

Under the ADA, once an employee provides notice of his need for accommodation, the employee and employer must engage in an interactive process. As noted by the Tenth Circuit, "once an employee triggers the interactive process, both the employee and the employer have an obligation to proceed in a reasonably interactive manner to determine the employee's limitations and consider whether the accommodations he requests—or perhaps others that might surface during the interactive process—would enable the employee to return to work."

In the current case, the Tenth Circuit found that a jury could conclude that the company failed to sufficiently engage in the interactive process, as it made no effort to discover the employee's actual limitations or explore any other accommodations. The company also failed to clarify definitions, as requested. His supervisor refused to discuss the employee's medical issues or the employee's belief that his request for accommodation had been granted.

The lesson here for employers is to ensure that both managers and HR/admin personnel are trained to respond promptly and effectively throughout the interactive process. It may be that the process will not result in an accommodation, but employer representatives may not shortcut the discussion.

Can Non-Employers Be Sued for Interference with an Employee's ADA Rights? Addressing this "novel" question, the U.S. Court of Appeals for the Sixth Circuit answered: No. However – be careful – companies may be held liable under a joint employer theory.

In *Post v. Trinity Health-Michigan*, a nurse was employed by a physician group that provided services to a hospital. Several months after suffering an accident that caused long-term effects, she was terminated. Because the physician group declared bankruptcy, she could not sue them. Instead, she sued the hospital for, among other things, interfering with her right to a reasonable accommodation under the Americans with Disabilities Act.

Under the ADA's interference provision, it is illegal to interfere with an individual's ADA rights. The Sixth Circuit acknowledged that the language of the interference provision does not identify the party that is prohibited from interference. However, the Sixth Circuit noted that the ADA adopts Title VII's remedial framework, and Title VII permits suit only against employers – thus the ADA likewise permits suit only against employers. The Sixth Circuit further noted that this ruling was consistent with its previous ruling that only employers could be sued under the ADA's provision prohibiting retaliation for making a complaint of discrimination.

It is worth noting that, in this case, the parties agreed that the hospital was not the nurse's employer. However, in many similar situations, including the use of personnel employed by a temporary staffing agency, individuals have successfully argued that host entities are, in fact, joint employers with the named employer – and subject to coverage under the ADA (and/or other federal non-discrimination laws).

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Training and Reporting Obligations for DC Employers of Tipped Workers Take Effect. The "Tipped Wage Workers Fairness Amendment Act of 2018" was enacted by the District of Columbia Council back in 2018, but certain provisions are taking effect only now – including mandatory sexual harassment training and reporting of sexual harassment complaints. D.C. has created a new website setting forth the required obligations, for which employers must certify compliance by December 31, 2022 through an online portal. (A printed copy of the portal form may be found here.) To reiterate, these obligations include:

- Conduct mandatory sexual harassment training by December 31, 2022, either through a course developed by the Office of Human Rights or from an OHR-certified provider.
    - New employees must receive in person or online training within 90 days after hire, unless they have received such training within the past two years.
    - Current employees must receive in person or online training within two years.
    - Owners and operators must receive in person or online training every two years.
    - Managers must receive in person training (online is not permitted) every two years.

- Implement a sexual harassment policy that outlines how to report sexual harassment to management and to the OHR. The employer must distribute its sexual harassment policy to all employees and post the policy in conspicuous locations.
    - In the portal, the employer will need to state: how long the policy has been in effect; where it has been published; that all employees received the policy in 2020 and, separately, in 2021; the average number of employees and management in 2020 and in 2021; and the number of employees who received a copy of the policy in 2020 and in 2021. The policy itself must be uploaded and, if the employer keeps a signed list of staff receiving the policy, the list should be uploaded as well.

- Post a mandatory OHR-prepared notice in a visible location where all employees have access, such as a breakroom.

- Report annually the sexual harassment complaints to management. The portal requires the employer to report the number of complaints by specific categories of alleged harassers (i.e. owner, operator, manager, co-worker, customer or other) separately for 2020 and for 2021.

501(c)(3) Status May Trigger Title IX Obligations for Private Schools. In a case of first impression, the United States District Court for the District of Maryland concluded that independent schools receiving a 501(c)(3) tax exemption is the substantial equivalent of receiving a cash grant from the government in the amount of tax otherwise owed, which subjects them to the requirements of Title IX.

In *Buettner-Hartsoe et al. v. Baltimore Lutheran High School Association*, the federal judge held that the 501(c)(3) tax-exempt status of a private school, Concordia Preparatory School (CPS), qualifies the institution as a recipient of federal financial assistance for the purposes of Title IX of the Education Amendments Act of 1972 ("Title IX") coverage. Until this ruling, Title IX was generally construed to exclude tax-exempt private schools if they did not receive affirmative federal funding. More recently, accepting federal COVID-19 relief funding, such as PPP loans, conferred Title IX obligations on private schools.

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Title IX – perhaps best known for creating equal access for female athletes in schools – prohibits discrimination and harassment on the basis of sex (including sexual orientation and gender identity) of students and employees in educational settings receiving federal funding. Covered educational institutions are required to undertake several, specific obligations, including adopting written policies and training, and designating a Title IX coordinator.

In denying CPS' motion to dismiss the lawsuit, the federal judge held that entities that receive federal assistance, either directly or indirectly are recipients of federal financial assistance within the meaning of Title IX. Adding that the "Supreme Court has held that tax exempt institutions must demonstrably serve and be in harmony with the public interest," the judge reasoned that "CPS cannot avail itself of federal tax exemption but not adhere to the mandates of Title IX."

Shortly after this decision, the federal court for the Central District of California issued a similar ruling in *E.H. v. Valley Christian Acad.*, declaring tax exemption as a form of federal financial assistance for the purposes of Title IX. Although we anticipate that both rulings will be appealed, private schools with 501(c)(3) tax exempt status should follow these developments carefully.

NEWS AND EVENTS

Honor – We are delighted to announce that Teresa D. Teare has been named the Litigation – Labor and Employment "Lawyer of the Year" in the Baltimore area by *The Best Lawyers in America*© 2023. In addition, 11 other attorneys were also recognized by *Best Lawyers*: Bruce S. Harrison, Eric Hemmendinger, Darryl G. McCallum, J. Michael McGuire, Fiona W. Ong, Stephen D. Shawe, Gary L. Simpler, Mark J. Swerdlin, 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.

Victory – Teresa D. Teare, Veronica Yu Welsh and Bruce S. Harrison won summary judgment for a healthcare employer. The federal judge found that the former employee failed to establish discrimination claims based on her national origin and race and that she had no evidence to rebut the employer's legitimate, non-discriminatory, non-retaliatory decision to terminate her and deny her internal appeal.

Victory – Darryl G. McCallum won summary judgment for an elevator repair company on a former sales employee's claims that he was owed commissions under the Maryland Wage Payment and Collection Law and that he was wrongfully terminated in violation of public policy for complaining about the commissions he was owed.

TOP TIP: May Light Duty Be Limited to Occupational Injuries?

Many employers would like to have a policy that provides light duty only to those workers who suffer on-the-job injuries, but not others, like pregnant employees. The Equal Employment Opportunity Commission, however, took the position that the Supreme Court's 2015 ruling in *Young v. UPS* necessarily required employers with occupational light duty policies to extend light duty to pregnant employees. But, according to the U.S. Court of Appeals for the Seventh Circuit, *Young* is

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not so categorical and an employer may be able to establish an occupational light-duty policy – under the right circumstances and with caveats.

Factual Background. In *EEOC v. Wal-Mart Stores East, L.P.*, the company had a policy under which it offered light duty only to workers who were injured on the job. The EEOC sued, arguing that this policy violated Title VII, as amended by the Pregnancy Discrimination Act (PDA), which mandates that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work."

The Court's Opinion. The U.S. Court of Appeals for the Seventh Circuit turned to the Supreme Court's ruling in *Young*, in which the Supreme Court applied the burden-shifting framework of *McDonnell Douglas* to the PDA. Under this framework, a plaintiff makes out a *prima facie* case of pregnancy discrimination by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work." The burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for its denial of the accommodation. The burden then shifts back to the plaintiff to show the employer's policies impose a significant burden on pregnant workers, and that the employer's reasons are insufficient to justify the burden, giving rise to an inference of discrimination. As the Supreme Court noted, this showing may be made where there is evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers.

Under *McDonnell Douglas,* the Seventh Circuit first found that the EEOC had made a *prima facie* case. It then found that the employer had articulated a legitimate, non-discriminatory reason for its occupational light-duty policy: to implement a worker's compensation program that benefits the company's employees while limiting the company's legal exposure (by enabling employees to receive full wages rather than the reduced wages under the workers' compensation system) and costs of hiring people to replace injured workers. The Seventh Circuit then reviewed whether the EEOC had offered sufficient evidence of pretext, and found that that it had not. In the *Young* case, there was evidence that the employer provided light duty under various policies to employees beyond just those injured at work, but not to pregnant employees. Thus, pregnant employees in that case were not being treated like those who were similar in their (in)ability to work. In contrast, here the employer limited light duty only to those suffering occupational injuries, meaning that pregnant employees were being treated the same as all other employees incurring non-occupational injuries.

Lessons for Employers. This case provides some guidance for employers who may wish to implement occupational light-duty policies that do not include accommodations for pregnancy. But such policies must be carefully considered and applied in order to avoid violating the PDA. Among the considerations include:

- The policy must be based on a legitimate non discriminatory reason, such as minimizing liability for lost wages under a state workers' compensation system.
- The policy must be strictly limited to occupational injuries and illnesses. If the employer provides light duty for other non-occupational medical needs, it will not be able to exclude pregnancy-related light duty.

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- Moreover, it may be necessary to limit light duty (including reduced schedules) for other non-occupational reasons as well. The Seventh Circuit noted a possible argument (forfeited by the EEOC) that if a reduced schedule was provided to other employees who were neither pregnant nor injured on the job (such as to attend school), that may be evidence of a significant burden on pregnant workers and could undermine the stated nondiscriminatory reason.
- In addition, this decision is effective only in those states covered by the Seventh Circuit (i.e. Illinois, Indiana and Wisconsin), although it may be persuasive authority in other jurisdictions that have not yet addressed this issue.
- Moreover, employers should understand that the EEOC has taken the position that employers cannot limit light duty to occupational injuries only, because that discriminates against individuals with non-work-related disabilities in violation of the ADA – a position with which courts have not always agreed. Regardless of any policy, moreover, employers must keep in mind their obligation to provide reasonable accommodations to employees with disabilities.

Employers should consult with counsel before implementing such policies to ensure that any state-specific considerations are taken into account.

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