SHAWE ROSENTHAL LLP

E-UPDATE

September 30, 2022

RECENT DEVELOPMENTS

An Employer Must Not Retaliate Against an Employee for Others' Activity

In several recent cases, the National Labor Relations Board reminds employers that illegal retaliation against a worker can occur even if they were not directly involved in the protected actions of others – whether co-workers or unions.

Protected Concerted Activity. The National Labor Relations Act gives employees, whether unionized or not, the right to engage in concerted activities for their mutual aid or protection (i.e. protected concerted activity or PCA), which includes both informal activity as well as activity by a union on behalf of the represented employees. The Act further prohibits employers from interfering with that right – including by engaging in retaliation that is intended to deter others from engaging in PCA.

Co-Worker Activity. In the first case, *Morgan Corp.*, an employee was discharged for disclosing his raise to other employees, who then complained as a group regarding their own wages. Wages are clearly a term of employment that is covered by the NLRA, and employees may not be prohibited from discussing them – an issue that arises particularly with older companies that have legacy policies that restrict such discussions. Here, the Board found that the employee's discharge "was inextricably linked" to the other employees' PCA, and that "by discharging [the employee], [the employer] intended to suppress protected concerted activity among his co-workers."

Union Grievance. In the second case, *New York Paving, Inc.*, the union filed a grievance alleging that the employer was utilizing smaller work crews than required under the collective bargaining agreement. An arbitrator agreed, and the employer then told the union that because of the ruling, there would be changes to the operations and layoffs. Although the Act provides that expressing views, arguments or opinions do not amount to an unfair labor practice as long as such expressions do not contain a "threat of reprisal or force or promise of benefit," the Board found that the employer's notice crossed over from "merely predicting economic consequences of unionization to threats of reprisal" (e.g. permanent layoffs). Moreover, the employer made no showing that the layoffs were for legitimate, nondiscriminatory reasons – it did not establish that they were required by seasonal slowdowns (the same ones it experienced in years prior) or economic reasons arising from the arbitration ruling.

Lessons for Employers. Employers should keep in mind that even those employees not directly engaged in PCA are protected from retaliation. It is important to ensure that any adverse action has an objective basis and is consistent with how the employer has handled similar situations in the past.

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Can Employee's Own Testimony Support Their Disability?

According to the U.S. Court of Appeals for the Eleventh Circuit, the answer is "Yes." But that answer comes with caveats.

The ADA. The Americans with Disabilities Act protects employees with disabilities; however, not every impairment constitutes a disability. Employers are entitled to evidence to support the disability. Most often, when the disability is not obvious, employers request medical evidence from the employee's doctor to identify the employee's limitations and possible accommodations. And that evidence must be sufficiently specific – conclusory statements, even by medical professionals, are insufficient to establish a disability under the ADA. Rather, they must provide specific facts to support their medical conclusions.

Background of the Case. In *Sugg v. City of Sunrise*, the employee had a heart attack. Following his return to work, he was demoted and eventually terminated. He sued for disability discrimination under the ADA. The employee's doctors provided declarations: one that he "would have issues" with several major life activities and the other that he would have "substantial limitations" in those activities without explaining how or the degree to which he was substantially limited in them. The employer argued that the employee failed to produce sufficient evidence that he was disabled, in that his doctors' declarations were too conclusory and the employee's own testimony about his limitations could not be used to support a finding of disability.

The Court's Opinion. While the Eleventh Circuit agreed that the doctors' notes here were so conclusory that they did not support a finding of disability, it further noted that, because the ADA regulations "do not require medical evidence to establish disability, we conclude that a plaintiff's own testimony is sufficient where it would allow a jury to reasonably determine that the plaintiff was disabled under the ADA." The Eleventh Circuit asserted that the employee's own testimony could not be conclusory. Here, however, it found the employee's testimony sufficiently specific – that he could not lift "anything" and could only "go like 15 minutes spurts" before having to stop to catch his breath – such that a jury could find his heart disease substantially limited the major life activities of lifting and walking.

Lessons for Employers. Does this case mean that an employee can always ignore a request for information from their doctor? Of course not – but the employer should be mindful of when and how much information to request. It would not be appropriate to request information if the disability is obvious. But otherwise, as the Job Accommodation Network (part of the U.S. Department of Labor) states, in its Interactive Process resource, "Under the ADA, when an employee requests an accommodation and the disability and need for accommodation are not obvious, then the employer can request medical documentation to help determine whether the employee has a disability and needs the requested accommodation and information to help process the accommodation request." But what the employer should keep in mind is that it should not wholly ignore the employee's own testimony in favor of medical evidence. It is one thing if the employee's own doctor offers medical evidence that contradicts the employee's self-serving testimony; it is another if the employee's testimony augments or clarifies general information from the doctor.

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Federal Contractor Update – Extended Objections to Disclosure of EEO-1 Reports, Revised Directive on Functional Affirmative Action Programs, and New Disclosure Requirements

It was another active month for government contractors and subcontractors. The U.S. Department of Labor and its Office of Federal Contract Compliance Programs (OFCCP) have taken the following actions:

- **Extended Deadline for Objections to the Release of EEO-1 Reports.** As we discussed in our August 2022 E-Update, the OFCCP 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." Originally, the deadline for the submissions of objections was September 19, 2022; this has now been extended until **October 19, 2022**.

  In addition, rather than requiring contractors to figure out by themselves whether they are covered by the FOIA request, the OFCCP has now announced that it will be emailing those contractors it believes to be covered.

  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.

- **Revised Directive on Functional Affirmative Action Programs.** Many federal supply and service contractors are required to prepare annual affirmative action programs (AAPs). Typically, AAPs are prepared for each contractor establishment; however, the OFCCP allows contractors to organize their AAPs to reflect how they operate functionally, across establishments, if appropriate. Contractors must request an agreement from the OFCCP in order to use a functional AAP (FAAP) arrangement. The OFCCP has announced a revision to its earlier-proposed policies and procedures for requesting, modifying and renewing FAAP agreements – these revisions ease some of the proposed requirements. More information on FAAPs is available from the OFCCP's FAAP webpage.

- **Expanded Disclosure Requirement for Persuader Forms.** Under the Labor-Management Reporting and Disclosure Act of 1959, employers must file a Form LM-10 (i.e. "persuader reports") with the Department of Labor's Office of Labor-Management Standards (OLMS) that discloses, among other things, agreements with (typically anti-union) consultants related to persuading employees regarding their organizing and collective bargaining rights. OLMS has issued a proposed rule seeking to amend LM-10 to include a checkbox for employers to indicate whether they are federal contractors or subcontractors, along with their Unique Entity Identifier and the contracting agency(ies) with whom the employer has (sub)contracts.

  The ostensible reason for this revision is to permit employees of federal contractors to know whether they, as taxpayers, are indirectly financing persuader activity regarding their unionization rights. Realistically, this is likely intended to discourage contractors from

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engaging in persuader activity – part of the current administration's focus on promoting unionization.

Interested parties will have until October 13, 2022 to comment on the proposed rule, which may be submitted here, and OLMS must consider such comments prior to issuing a final rule. We will keep you updated concerning any developments.

TAKE NOTE

An Independent Review Can Help Insulate Termination Decisions. This is particularly true when an employee has engaged in some form of protected conduct – such as taking leave under the Family and Medical Leave Act, as shown in a recent case from the U.S. Court of Appeals for the Tenth Circuit.

In *Parker v. United Airlines, Inc.*, the employee fielded customer calls to book flight reservations. A number of months after she took FMLA leave, her supervisor claimed that she was avoiding customer calls by placing them on hold while chatting with co-workers. Following an investigation, including a meeting with the employee and her union representative, the supervisor recommended termination. Under the employer's standard termination process, before termination could occur, a manager was selected to hold a meeting in which the supervisor, employee and the union representative could present arguments and evidence. The manager would then make a decision about termination. A terminated employee could then file a grievance to appeal the termination, and another manager would conduct a conference call in which the employee and union representative could present further arguments and evidence. The second manager would then decide whether to uphold or overturn the termination decision. Following this process, the first manager decided to terminate the employee, and her termination was upheld by the second manager. She then sued, alleging that she was actually terminated in retaliation for her use of FMLA leave, and that the manager(s) acted as the supervisor's "cat's paw" – i.e. that the supervisor's illegal motive improperly influenced the decisionmaker(s).

The Tenth Circuit, however, rejected her claim, stating that "Retaliation entails a causal link between an employee's use of FMLA leave and the firing. That causal link is broken when an independent decisionmaker conducts her own investigation and decides to fire the employee." Thus, by having a higher-level manager independently investigate the grounds for dismissal, the employer prevented the supervisor's alleged bias from being connected to the termination decision.

Thus, for employers who are considering termination of an employee who has engaged in some form of protected activity – whether taking protected leave or perhaps complaining of discrimination or harassment – this case provides the useful suggestion that a full and independent review of the grounds for termination by a higher-level manager can provide a strong defense against a retaliation claim.

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Employers – You May Not Dig Up Reasons for Termination. The U.S. Court of Appeals for the Third Circuit made this quite clear in a recent case involving an employee's cell phone messages soliciting prostitutes while at work. While this behavior was quite clearly improper, unfortunately the employer's search of the cell phone was also improper, according to the Third Circuit. It refused to endorse a rule that "would not only immunize employers who retaliate against employees only after they stumble upon something that would justify their termination; it would also incentivize such retaliatory forays."

In *Canada v. Samuel Grossi & Sons, Inc.*, an employee filed an EEOC charge, followed a month later by a lawsuit alleging violations of Title VII, §1981, the Americans with Disabilities Act, and the Family and Medical Leave Act. Two months later, while he was on vacation, the company decided to move lockers on the shop floor. In the course of doing so, they cut off a personal lock that the employee had on his locker and removed the items inside. One of those items was a cell phone, and the HR manager stated that she thought it could have been a company phone. She guessed the password and searched the phone, supposedly to determine if it was a company phone (it actually was not). She found text messages from a year prior, soliciting prostitutes during work hours. The employee was then fired for violations of company policies.

Under anti-discrimination laws, an employer may not retaliate against an employee for engaging in protected conduct, such as complaining about discrimination or harassment. An employer may offer a legitimate reason for taking an adverse action, but then the employee can offer evidence that the stated reason is a pretext for discrimination or retaliation – such as antagonism from the employer, differential treatment, or inconsistencies in the explanation.

The Third Circuit held that the employer's motivation for investigating an employee can be relevant to whether its stated reason for termination is a pretext for discrimination or retaliation. In the current case, the Third Circuit found the company's reasons for searching the phone to be "weak, implausible, contradictory, incoherent, and more likely motivated by retaliation." It questioned why the locker had to be opened in order to move it and why the cell phone had to be searched in order to determine if it was a company phone – there were easier ways to make that determination, such as checking against the company's list of those who had cell phones and the serial numbers of the phones. Text messages would likely not establish whether the phone was owned by the company – let alone a year's worth of messages. The Third Circuit found the company's actions supportive of a finding that it was attempting "to dig up dirt" on the employee, which could be in retaliation for his protected actions.

This case warns employers that, if an employee engages in some type of protected activity – like complaining of discrimination or harassment, or taking protected leave – they cannot go searching for reasons to terminate the employee. If, in the normal course of business, they discover information of terminable misconduct, they can fire the employee – but they need to demonstrate that the discovery was reasonable, wholly unrelated to the protected activity and consistent with how they have treated such misconduct previously.

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Employer Unlawfully Implemented Punch-in Policy, Says NLRB. In *Troy Grove*, the National Labor Relations Board held that the unionized employer violated the National Labor Relations Act by implementing a rule regulating how early employees could clock in prior to their shift. Employees frequently punched in well before the start of their morning shift. In response, the Company implemented a rule requiring that employees clock in no more than five minutes prior to their schedule shift. When implemented, the employer did not maintain a rule or policy regarding punching in early. The employer implemented the rule without first notifying and bargaining with the employees' union. Thus, the Board held that the company unlawfully unilaterally implemented the clocking-in policy.

While unsurprising, the Board's holding in the case serves as a good reminder to employers seeking to implement rules or policies related to work hours – even commonsense and reasonable rules like the one in this case – or other mandatory subjects of bargaining that, in the absence of contractual authority permitting them to act unilaterally or a previous waiver of the union's right to bargain, the employer must first notify and bargain with the union prior to implementing the rule.

Non-Employees May Create a Hostile Work Environment. A recent case from the U.S. Court of Appeals for the Fourth Circuit reminds employers that they are responsible for ensuring that employees are not subjected to harassment by non-employees – including six-year old children.

Under Title VII, in order to create a hostile work environment, the complained-of conduct must be (1) unwelcome, (2) based on the plaintiff's protected characteristic, (3) sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive work environment, and (4) imputable to the employer. In *Chapman v. Oakland Living Center, Inc.*, an employee sued her employer, alleging that a hostile work environment was created by the owners' six-year old grandson, who repeatedly called her the n-word, including the statement, "My daddy called you a lazy ass black n*****, because you didn't come to work." The employer argued that the repeated use of the n-word by a six-year old was not sufficiently severe to impose liability.

The Fourth Circuit, however, found that the child's slurs could create a hostile environment. It was not just any child, but the grandson of the owners and the son of a supervisor being groomed to take over the family business. A reasonable person in the employee's position could "fear that the child had his family's ear and could make life difficult for her." Moreover, one of the slurs was directly attributed to the child's father, "My daddy called you…" And that slur was "the most egregious of all racial insults." The Fourth Circuit distinguished between an insult from a customer's son and the "powerful statement form a supervisor's son." The Fourth Circuit also noted that it did not matter if the child was too young to understand the impact of his words or did not intend to harm the employee, as it is the effect of the language that is actionable under Title VII.

This case reminds employers that they are responsible for protecting their employees from harassment by third parties – even from children. While the Fourth Circuit drew a distinction between a customer's child and a supervisor's child here, we note that employers who know of and ignore abusive language by any outsider could still find themselves facing liability under Title VII.

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More Federal Protections for Gig Workers? The Federal Trade Commission, which is not typically involved in employment matters, has decided to throw its weight behind protecting the interests of gig workers from "unfair, deceptive and anticompetitive practices." The FTC has issued a policy statement that identifies its concerns and the actions that it intends to take.

Gig workers earn income from on-demand work, often through online gig platforms like apps. They are typically categorized as independent contractors, but federal and state agencies have challenged this categorization where the companies for whom they work "tightly prescribe and control their workers' tasks in ways that run counter to the promise of independence." The misclassification of gig workers as independent contractors, by which employers avoid certain employment rights, has become an issue of great interest.

The FTC has identified certain enforcement priorities with regard to gig workers to include:

- Holding gig companies accountable for their claims and conduct concerning gig work's costs and benefits, such as deceptive or unfair pay practices and undisclosed costs or terms of work.
- Combating unlawful practices and unlawful constraints imposed on gig workers, such as the use of improper/unfair algorithmic tools and unfair contractual terms and restrictions on mobility.
- Policing unfair methods of competition that harm gig workers, like wage fixing and coordination between companies, and market consolidation and monopolization.

The FTC states that it will partner with other agencies, including the Department of Justice and the National Labor Relations Board (as we discussed in our July 2022 E-Update) on its initiatives and enforcement efforts.

Well, If You're An Employer Who Really Wants Your Employees to Unionize, There's a Federal Agency Toolkit for You. Perhaps in an excess of optimism, multiple federal agencies – the Department of Labor, the Small Business Administration, the National Labor Relations Board, and the Federal Mediation and Conciliation Services – have partnered to create an online toolkit "for employers seeking guidance on supporting and responding to their employees interested in exercising their right to form or join a union." They characterize this initiative as "empowering" employers, including small business.

Characterization aside, the toolkit collects resources from the various agencies that educate employers on employee and employer rights and obligations with regard to unionization and collective bargaining issues.

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Expansion of OSHA's Severe Violator Enforcement Program. The U.S. Department of Labor announced that it was expanding the criteria for placement in the Occupational Safety and Health Administration's Severe Violator Enforcement Program. This action is intended to increase compliance with workplace safety standards and reduce worker injuries and illnesses.

According to the DOL, the updated criteria include the following:

- Program placement for employers with citations for at least two willful or repeated violations or who receive failure-to-abate notices based on the presence of high-gravity (as opposed to medium or low) serious violations. (Previously, the criteria also included exposure to specific high emphasis hazards or to hazards related to the potential release of a highly hazardous chemical)
- Follow-up or referral inspections made one year – but not longer than two years – after the final order.
- Potential removal from the Severe Violator Enforcement Program three years after the date of receiving verification that the employer has abated all program-related hazards. (Previously, removal could occur three years after the final order date.)
- Employers' ability to reduce time spent in the program to two years, if they consent to an enhanced settlement agreement that includes use of a safety and health management system with seven basic elements in OSHA's Recommended Practices for Safety and Health Programs.

NEWS AND EVENTS

New Associate – We welcome Maya R. Foster, our former law clerk, as our newest associate. Maya is a recent graduate of the University of Maryland Francis King Carey School of Law. During her time at Maryland, Maya served as associate editor of the Maryland Journal of Healthcare Law & Policy and competed with the Alternative Dispute Resolution Team, winning the Tulane University Professional Football Negotiation Competition in 2021. Maya received Cali Awards (given to the highest scoring student in the class) for her work in the Consumer Protection Clinic with the Office of the Attorney General in Maryland and classwork in the Consumer Protection course. She also served as the Student Bar Association (SBA) Executive President for two terms.

Publication – We are pleased to announce that Chambers' Employment 2022 Global Practice Guide, for which Shawe Rosenthal authored the USA Trends and Developments chapter, has been released. Chambers & Partners is a prominent London-based research and publishing organization that ranks law firms and lawyers based upon their reputation among peers and clients. It also publishes global practice guides providing clients with expert legal commentary on the main practice areas in key jurisdictions around the world. You may click here to view our chapter, as well as to access other chapters.

Victory – Lindsey White and Paul Burgin obtained a temporary restraining order against a non-profit organization's former Executive Director who retained improper access to the Organization's confidential and trade secret information and changed passwords and access credentials to the Organization's systems and accounts, preventing employees from accessing documents and files necessary to perform their work.

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Presentation – Fiona Ong and Parker Thoeni presented a session on Maryland's new employment laws at the LifeSpan 2022 Annual Conference on September 27, 2022.

Presentation – On September 6, 2022, Parker Thoeni spoke at an Associated Builders and Contractors of Metro Washington event on wage theft laws in the Mid-Atlantic region.

Presentation – Parker Thoeni was a guest speaker for the Maryland Manufacturing Extension Partnership's Human Resources Peer Group on August 31, 2022. Parker offered the group insights into upcoming changes to Maryland law, as well as developments and challenges faced by manufacturers.

TOP TIP: Applicants and Prescription Drugs – What Employers Can and Should Do

Many employers require applicants to take a post-offer/pre-employment drug test. In and of itself, a drug test is not considered a medical examination under the Americans with Disabilities Act – but it can reveal the use of prescription drugs, which will then trigger the ADA. Several recent cases illustrate what employers can do, and what they should not do, if an applicant tests positive for prescription drugs.

The Right Way. In *EEOC v. Rogers Behavioral Health*, the employer utilized a third-party provider to conduct drug screens of its applicants. The drug screen tests for illegal drugs, including prescription drugs taken without a valid prescription. The results are reviewed and verified by an independent Medical Review Officer (MRO). If the individual tests positive, the MRO contacts them to determine the reason for the positive test. If the individual has a valid prescription that explains the positive result, the result is changed to negative before it is provided to the employer.

The applicant here tested positive for Xanax, for which she said she had a prescription. Despite being informed multiple times that she needed to contact the MRO, the applicant failed to do so. Almost two weeks later, the employer rescinded the job offer. The EEOC sued, arguing that the employer erroneously and illegally regarded the applicant as engaging in the illegal use of drugs. The court, however, rejected the EEOC's argument, finding that the employer only regarded her as someone who tested positive and who would not or could not provide proof (and not just her say-so) of a valid prescription – thus failing to comply with the employer's pre-employment process. The court further noted that the current use of illegal drugs is not a covered disability under the ADA in any case.

The Wrong Way. Another case brought by the EEOC this month provides a stark contrast to the *Rogers Behavioral Health* case. As announced by the EEOC, it has brought suit against another employer under the ADA in a case also involving pre-employment drug testing. The applicant here is a veteran who suffers from post-traumatic stress disorder for which she takes a legally-prescribed drug. She informed her interviewer that she takes prescription medication that would cause her drug test to fail. After taking the test, she again told the employer that her prescription medications would cause a positive result. Apparently, the employer did not follow up on the prescription and instead revoked her job offer.

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In a separate lawsuit announced by the EEOC, the EEOC is charging another employer with a different violation of the ADA related to a pre-employment medical exam. In that case, the EEOC alleges that the employer withdrew an offer of employment after the applicant revealed that he was taking prescription medication to treat his ADHD. The EEOC asserts that the employer failed to make any individual assessment of the applicant's medication use or whether it would affect his ability to safety perform the job in question.

Lessons for Employers. The cases described above offer some tips for employers who engage in pre-employment drug testing. These include the following:

- Establish a protocol for handling pre-employment drug testing results. Use of an MRO can be useful in establishing a boundary between the employer and confidential medical information, and to ensure consistency and impartiality.
- If an applicant tests positive for a substance contained in prescription medication, the employer should determine whether the applicant has a valid prescription.
- If an applicant says that they have a prescription for medication that will cause a positive result, it is important to verify that they do, in fact, have such a prescription.
- If the employee has a valid prescription, their positive test must not automatically be used to disqualify them from employment. Rather, the use of a legally-prescribed drug is disqualifying only if it will interfere with the individual's ability to safely and effectively perform the essential functions of the job for which they are being hired, or such use is prohibited by law, regulation (e.g. Department of Transportation regulations) or federal contract.
- If an applicant cannot or will not provide proof of a valid prescription, the employer may then disqualify the applicant from employment – not because of illegal drug use, but because they did not comply with the pre-employment protocol.

RECENT BLOG POSTS

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

- Retaliation Claims Can Drive You Nuts! by Fiona W. Ong, September 21, 2022
- Wait – But the Disability Law Doesn't Actually Say That! by Fiona W. Ong, September 15, 2022
- NLRB Proposes Return to a More Expansive Joint Employer Standard by Chad M. Horton, September 7, 2022
- Employers – Be Prepared for More Union Apparel in the Workplace by Evan Conder, September 1, 2022

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