October 27, 2023

RECENT DEVELOPMENTS

Cemex Alert! Employer Ordered to Bargain Despite Winning Its Union Election

In our August 28, 2023 E-lert, we warned employers that the National Labor Relations Board's decision in *Cemex Construction Materials Pacific* would be game-changing. One of the key points of that decision is that if the employer files a petition for election in response to a request for recognition but commits an unfair labor practice, the petition may be dismissed and the employer ordered to recognize and bargain with the union. And now that has happened.

The Cemex Decision. The NLRB held that if a union requests voluntary recognition, an employer has two weeks from the demand for recognition to either (1) voluntarily recognize the union as the bargaining representative in the unit sought by the union, or (2) file an RM petition (employer-filed petition) with the NLRB. If the employer does not file, the NLRB will hold that it has waived its right to demand an election and will order the employer to bargain with the union.

Additionally, the NLRB also held that if an unfair labor practice is committed following the demand for recognition, the NLRB will impose on the employer an order to bargain with the union – even if the employees have voted against unionization in the secret-ballot election – unless the unfair labor practice is "so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results."

Background of the Case. In *I.N.S.A. Inc.*, the employer received a letter signed by the majority of employees demanding union recognition and bargaining. The union then petitioned for an election, which it eventually lost. But in the interim, the employer engaged in unlawful/objectionable conduct, including:

- soliciting employee grievances, and promising employees increased benefits and improved terms and conditions of employment if they refrained from supporting the Union;
- restricting employees from talking about unions while allowing employees to discuss other, non-work-related topics;
- discriminatorily enforcing work rules and policies, disciplining and discharging employees because they engaged in union activities.

The ALJ's Decision. An Administrative Law Judge of the NLRB found that the employer had violated the National Labor Relations Act as described above. It determined that the employer's conduct meant that there was only a slight possibility that a rerun election would be fair, and given that a majority of employees had signed on to the demand letter, a bargaining order was warranted.

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It is worth noting that the union also charged the employer with other allegedly improper conduct, including holding mandatory meetings to discourage union support, having high-level officials visit the location to create an impression of surveillance, threatening adverse consequences if the union won the election, informing employees that they would not receive performance evaluations and wage increases until after the election, and implementing wage increases after the election. The ALJ found that either the conduct was not, in fact, a violation of the Act or that it did not actually occur as alleged.

Lessons for Employers. This case poses as a stark reminder to employers that the rules around unionization have changed dramatically in favor of the unions. Much of the conduct alleged by the union may seem to be a reasonable or understandable reaction by an employer to a demand for recognition – but may actually cross the line to constitute an unfair labor practice, with severe consequences. And even if the conduct is not actually illegal, it seems that unions are willing to try to characterize it as such. This is particularly concerning because the NLRB is aggressively revamping its standards such that conduct that was previously deemed legal may be found illegal in the future. It is therefore critically important for employers who face a demand for recognition, or even suspect that union organizing may be occurring prior to such a demand, to consult with experienced labor counsel before taking any action in response.

An Employee Who Refuses the COVID Vaccine Is Not Protected by the ADA

An employee who refused to be vaccinated against COVID-19 argued that his employer violated the Americans with Disabilities Act (ADA) by regarding him as having a disability. His claim, however, was rejected by the U.S. Court of Appeals for the Fifth Circuit.

What the ADA Requires. The ADA prohibits discrimination against a qualified individuals with a disability (meaning a mental or physical impairment that substantially limits a major life activity) and requires employers, absent an undue hardship, to provide reasonable accommodations to enable such individuals to perform their essential job functions and enjoy equal privileges and benefits of employment. The definition of disability includes not only those with current disabilities, but also those who have a record of one, or who are regarded as having one.

Background of the Case. In *Chancey v. BASF*, the employer implemented COVID protocols in compliance with federal guidance, including inquiries about vaccine status, masking requirements, social distancing, handwashing, and temperature checks. The employee refused to comply although he wanted to continue to work onsite. While the employer investigated his concerns about the protocols, he was separated from other employees. Following the investigation, the employer required the unvaccinated employee to remain segregated in a part of the workspace and undergo weekly COVID testing at his own expense, among other things. He then sued the employer, alleging that it regarded him as having impaired immune and respiratory systems in violation of the ADA.

The Fifth Circuit's Decision. The Fifth Circuit held, however, that "merely being at risk of developing a condition is insufficient to state a disability-discrimination claim under the ADA." It noted that at least three of its sister Circuits – the Sixth, Seventh and Eleventh – had come to the same conclusion. We further note that, also this month, the U.S. District Court for Maryland similarly rejected this "regarded as" argument in *Foshee v. AstraZeneca Pharmaceuticals, LP*,

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finding that the employees did not show that they were regarded as having any physical or mental impairment that limits a major life activity. The Maryland federal court further observed that any limitations on the activities of unvaccinated individuals "are caused by societal rules, not by the vaccination status of those subject to those rules."

Lessons for Employers. As many COVID-19 accommodations lawsuits are now being litigated, this case provides some comfort to employers that employees who simply choose to remain unvaccinated are not protected by the ADA. Of course, if the employee is unable to be vaccinated due to some underlying medical condition, that condition may constitute a disability that requires accommodation.

TAKE NOTE

Does a "Factor Other Than Sex" Need to Be Job-Related to Justify a Pay Differential? In seeking to simplify the analysis of a "factor other than sex" under the Equal Pay Act (EPA), the U.S. Court of Appeals for the Second Circuit has complicated the matter by breaking from its sister Circuits.

The EPA prohibits pay discrimination on the basis of sex for equal work on jobs requiring equal skill, effort and responsibility performed under similar working conditions. However, pay disparities are permitted when they arise from: (1) a seniority system; (2) a merit system; (3) an earnings system based on quantity or quality of production; and (4) a differential based on "any other factor other than sex."

Until now, the federal Circuit Courts have generally required this last factor to be job-related. And that is what the employee argued in *Eisenhauer v. Culinary Institute of America*, in claiming that the pay disparity between her and a male colleague violated the EPA. The Second Circuit, however, rejected this interpretation, asserting that "[t]he term has sowed needless uncertainty and confusion among our sister circuits," and that, "[i]ts meaning, we think, is about as simple as it sounds." Thus, according to the Second Circuit, nothing in the text of the statute or its legislative history requires "a factor other than sex" to be job-related, and it was intended to be a broad, general exclusion.

In so holding, the Second Circuit has diverged from the position taken by other Circuits, meaning that different standards will apply depending on where an employer is located. But this case also reminds employers that state law may provide different or additional protections to employees than federal law as well – here, the Second Circuit noted that the New York Labor Law's equal pay provision contains similar exclusions, but that the last factor, "a bona fide factor other than sex," is required under law to be job-related to the position in question. Thus, although the employee's federal EPA claim failed, her state law claim was remanded to the trial court and may yet survive.

A Reprimand Does Not Constitute a Material Adverse Employment Action. Although we have recently discussed the federal appellate courts' expansion of Title VII liability to cover actions short of "ultimate employment decisions," it is important to note that the challenged actions must still have some material impact, as the U.S. Court of Appeals for the Seventh Circuit recently reiterated.

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In *Fuller v. McDonough*, the employee claimed that she was reprimanded in retaliation for her sexual harassment complaint in violation of Title VII. In order to establish a retaliation claim, employees must show: (1) that they engaged in some protected activity (like filing a harassment complaint or participating in a harassment investigation), (2) that they suffered some adverse action, and (3) a causal link between the protected activity and the adverse action. An adverse action, however, must be material – "meaning more than a mere inconvenience or an alteration of job responsibilities," as the Seventh Circuit noted in another case that it referenced here. However, as the Seventh Circuit stated, "a documented reprimand alone is not an adverse action absent some tangible job consequence" such as "ineligibility for job benefits like promotion, transfer to a favorable location, or an advantageous increase in responsibilities."

In fact, turning the employee's argument on its head, the Seventh Circuit asserted that, "job-related criticism can prompt an employee to improve her performance and thus lead to a new and more constructive employment relationship." Thus, rather than an adverse action, a reprimand is arguably a positive opportunity.

Employers Can Define the Essential Functions of the Job, But Must Be Able to Back It Up. And employees must be qualified to perform those essential functions, as the U.S. Court of Appeals for the Eleventh Circuit recently held.

In *Lewis v. Union Home Mortgage Corp.*, a loan officer suffered a stroke. Following his recovery, he worked as a loan officer for one company, CMS, then applied for a position with Union Home. He was not hired due to his inability to self-source business. He sued, alleging that the stated reason was a pretext for disability discrimination. Union Home argued that he was not qualified for the job because it requires loan officers to close three loans per month, while he had closed only two loans in the six months with CMS. In addition, after he was rejected by Union Home, he worked for another company where he closed only three loans in six months.

In order to establish an ADA claim of disability discrimination, individuals must show that they (1) are disabled, (2) are qualified, and (3) were discriminated against because of their disability. In order to be qualified, the individual must be able to perform the essential functions – or fundamental duties – of the job, with or without reasonable accommodation.

Whether a function is essential is determined on a case-by-case basis, and factors in that analysis include: (1) the employer's judgment regarding which functions are essential; (2) the posted job descriptions; (3) the time spent on the job performing the function; (4) the consequences of not performing the function; (5) the terms of a collective bargaining agreement; (6) the work experience of past employees; and (7) the current work experience of employees in similar jobs. Moreover, as the Eleventh Circuit noted, "No matter how mistaken an employer may be, this court's inquiry is limited to whether an employer gave an honest explanation of its behavior."

Here, the Eleventh Circuit found that Union Home established, through the qualifications and output of their workforce, that self-sourcing is a key qualification. And it was clear that the loan officer was unable to meet that essential job function.

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This case is useful in supporting the proposition that the employer does, in fact, have the ability to decide what job functions are essential – but that the decision must be a legitimate, good faith one that should be able to be demonstrated through the factors identified above.

No Cat's Paw Here – An Independent Review of a Proposed Termination May Be A Good Idea. In a case in which an employee accused the higher-level manager who terminated him of being a "cat's paw" for his allegedly racist first line supervisor, the manager's independent review of the circumstances to support his decision wholly undercut the employee's claim.

"Cat's paw" is an idiom meaning someone who is used by another to carry out wrongdoing. For those of you who are wondering, it comes from a Jean de La Fontaine fable, "The Monkey and the Cat," in which the monkey tricks the cat into pulling hot chestnuts from the fire, which the monkey eats, leaving the cat only with burned paws. This principle has been applied in the employment law context to hold employers liable for unlawful discrimination where the unbiased decisionmaker was influenced by another employee with a discriminatory motive.

In *Chea v. IHC Health Services, Inc.*, the employee was accused of various incidents of inappropriate behavior towards his co-workers. He was suspended by his supervisor, and the matter was investigated by his higher-level manager, who ultimately decided to terminate him. He appealed his termination through three levels of internal review. All three reviewers, who did not supervise the employee and were not involved in the termination decision, upheld the termination. The employee then sued, arguing that his supervisor was biased against him and started the chain of events leading to his termination by the manager.

The U.S. Court of Appeals for the Tenth Circuit rejected the employee's argument. The Tenth Circuit stated, "One way an employer can break the causal chain between the subordinate's biased behavior and the adverse employment action is for another person or committee higher up in the decision-making process to independently investigate the grounds for dismissal." And that is what occurred here, where the manager conducted his own investigation, including interviews of witnesses and meeting with the employee himself.

The Tenth Circuit further stated that, "An employer can also break the causal chain through a post-termination, independent review." That also occurred here, with the three levels of internal review by independent reviewers.

So a suggestion for a best practice, particularly in larger companies, is to have a higher-level manager do an independent investigation before making a termination decision. It may also be useful to set up an internal grievance process to allow for another independent review of the decision.

Maryland Employers – Here's the Contribution Rate for Paid Family and Medical Leave! As employers with Maryland employees seek to assess the economic impact of the forthcoming paid family and medical leave mandate, one question has been – what is the contribution rate? And the Maryland Department of Labor has now announced that it will be .90% of an employee's covered wages, equally divided between employees and employers with 15+ employees.

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As most Maryland employers know, the State will be implementing a paid family and medical leave benefits program (known as FAMLI), will provide most Maryland employees with 12 weeks of paid family and medical leave, with the possibility of an additional 12 weeks of paid parental leave. Contributions will begin in October 2024 and benefits will begin on January 1, 2026. And while employers with fewer than 15 employees need not make their portion of the contributions, their employees will be required to do so and will be entitled to FAMLI benefits. As noted above, the contribution is based on covered wages, not total wages. Under the law, covered wages means up to and including the social security wage base, which limits the amount of earnings subject to taxation for a given year; for 2024, this wage base is $168,600.

The MDOL is currently working on regulations to interpret and implement the Act by January 1, 2024, and we have summarized those efforts thus far in our August and September 2023 E-Updates. But at this time, employers now have sufficient information to calculate the economic impact of the contribution – with their share being .45% of each employee's wages up to $168,600, at least until it goes up to $174,900 in 2025.

NEWS AND EVENTS

Victory. Gary Simpler successfully defended a chemical manufacturer against a grievance in which the union challenged an employee's termination. The arbitrator found that the company had just cause to terminate the employee for engaging in conduct that he had been specifically informed was prohibited and for stealing time.

Victory. J. Michael McGuire and Maya Foster won an arbitration on behalf of a company on the issue of whether the company could count only hours actually worked towards overtime. The union had filed a grievance contending that all hours paid, including PTO, should be counted, but the arbitrator found that the law, past practice, and the actual contract language all supported the employer's position.

Media. Darryl McCallum was quoted in a October 9, 2023 National Law Journal article by Avalon Zoppo, "'Gray Area': Courts Grapple with Justices' Religious Accommodation Rule." (Subscription required for access). Darryl offered comments on the issue of co-worker impact, as well as denied accommodations for vaccine mandates.

TOP TIP: So, the Destruction of Evidence Is Not a Good Idea…

Employers holding a problematic piece of evidence may be tempted to dispose of it, in the hopes that once it is gone, so too will any legal claims disappear. But such actions can result in much bigger problems for the employer, as the U.S. Court of Appeals for the Fifth Circuit recently highlighted.

In *Calsep v. Dabral*. an executive of Calsep left to join another company, IPSS, that was owned by his friend, Dabral, which then surprisingly developed a product that was "functionally identical" to the first company's product. Calsep discovered that the executive had copied hundreds of files prior to his departure, including the software source code for the product. Calsep then sued the executive, IPSS, and Dabral for the theft of trade secrets.

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In discovery (when parties request and must produce relevant information and documents to each other), Calsep requested all information related to the development of the product, including the complete source code control system, which contains the development history of the product. This would reveal whether Calsep's data was used in IPSS's product development. After an extended dispute, with an incomplete source code control system disclosed, a magistrate judge ordered Dabral to comply with his discovery obligations. Dabral claimed that he had produced the entire source code control system with the exception of files deleted in the regular course of business prior to suit. However, Calsep claimed that Dabral deliberately made multiple deletions from the source code control system during the litigation, including after the judge's compliance order. Additionally, hundred of thousands of records had been deleted before his earlier discovery productions.

At an evidentiary hearing, the magistrate judge found that Dabral had filed false affidavits about his actions with the court, intentionally delayed discovery, manipulated data, and deleted electronic evidence from the source code control system. Based on the judge's findings and recommendations, the trial court entered a default judgment against Dabral and awarded damages plus fees to Calsep. Dabral then appealed.

The Fifth Circuit had no sympathy for Dabral, explaining that courts have the power to sanction parties for failing to comply with a court order, and that it has "broad discretion" with regard to the sanction – up to dismissal or default judgment. The Fifth Circuit further noted that parties have an obligation to preserve electronic evidence, and the failure to do so is likewise sanctionable by dismissal or default judgment. But before entering a "litigation-ending sanction," the Fifth Circuit noted that a court must make four findings: (1) the discovery violation was committed willfully or in bad faith; (2) the client, rather than counsel, is responsible for the violation; (3) the violation substantially prejudiced the opposing party; and (4) a lesser sanction would not substantially achieve the desired deterrent effect.

Here, the Fifth Circuit found that all those factors were met. Dabral's actions were deliberate and he was responsible for them. It also found that, without the information, Calsep would not be able to perform the analyses that were required to prove its misappropriation claims. And here, where Dabral destroyed crucial evidence and disregarded multiple court orders, lesser sanctions were insufficient.

So the lesson for employers here is rather simple: Don't destroy evidence. Even bad evidence. Almost all documentation now has an electronic trail – whether in its creation, transmission or retention – and those savvy tech experts can find those trails. Just remember that the coverup is often worse that the original wrongdoing!

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