SHAWE ROSENTHAL LLP

E-UPDATE

January 31, 2024

RECENT DEVELOPMENTS

Very Helpful Guidance on the ADA from the Fourth Circuit!

The U.S. Court of Appeals for the 4th Circuit issued an opinion that provided much useful guidance on an employer's obligations under the Americans with Disabilities Act, including reasonable accommodations, discrimination, and retaliation.

What the ADA Requires: The ADA prohibits employers from discriminating against qualified individuals based on their disability, which includes the failure to provide a reasonable accommodation that would enable the individual to perform their essential job functions. The law also prohibits employers from retaliating against any individual for exercising rights under the law, opposing any acts illegal under the ADA, or because of any complaint of an ADA violation.

In order to sustain a claim for failure to accommodate, an employee must show that (1) they are disabled, (2) the employer had notice of the disability, (3) they could perform the essential functions of their job with a reasonable accommodation, and (4) the employer refused to make such accommodation.

As for a discriminatory discharge claim, an employee must show that (1) they are a qualified individual with a disability, (2) they were discharged, (3) they were meeting their employer's legitimate expectations at the time of the discharge, and (4) the circumstances of the discharge raise a reasonable inference of unlawful discrimination.

With regard to a retaliation claim, the employee must show that (1) they engaged in a protected activity under the ADA, (2) they subsequently suffered an adverse employment action, and (3) there is a causal link between the two. In many cases, a temporal link – meaning a short period of time between the protected action and the alleged retaliatory action – can be sufficient to establish a causal link.

As to all of these claims, once the employee makes the required showing, the burden then shifts to the employer to establish a legitimate, non-discriminatory reason for its actions. And if so, then the burden shifts back to the employee to demonstrate that the asserted reason is just a pretext for the illegal discrimination or retaliation.

Background of the Case: In *Tartaro-McGowan v. Inova Home Health, LLC*, the employee spent 17 years as a field nurse for an Inova home health agency, providing direct care to patients. After the employee developed chronic arthritis in her knees that limited her ability to perform tasks requiring

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squatting, kneeling, bending or other stress on her knees, she requested and was transitioned to a supervisory clinical manager position, which she continued to hold after her employer entered into a joint venture with another company, creating a new entity. In that role, she supervised the performance of direct care by others on "very infrequent" field visits.

Then the COVID-19 pandemic occurred, and there was a well-known critical shortage of healthcare staff. The employer informed all clinical employees, including clinical managers, that they would be required to perform direct patient care field visits until the company could hire additional staff. The employee requested an accommodation to excuse her from any direct patient care field visits, supported by a doctor's letter. The employer stated that it could not accommodate that request, but would allow her to screen patients/visits so she could select field visits that would avoid the need to bend her knees, as well as to avoid back-to-back visits.

The employee then submitted another doctor's letter, stating that the proposed accommodation was not reasonable because a patient's needs could not truly be determined until she arrived at the home. The employer reiterated its proposed accommodation, noting that the employee's extensive field experience would allow her to identify patients (such as those who are mobile) that would suit her limitations, and asked what other accommodation she was requesting. The employee responded that she was concerned about the layout of the patient's home and any unexpected treatment reactions. The employer again repeated its proposed accommodation, and the employee again refused. She was then terminated after she failed to make any field visits. Of note, another clinical staff member was also terminated for refusing to conduct any direct patient care field visits.

Unsurprisingly, the employee sued. The federal district court rejected all her claims as a matter of law, based on the undisputed facts. She then appealed to the 4th Circuit.

The Court's Decision. The 4th Circuit affirmed the federal district court's decision on all claims. As to the failure to accommodate claim, the 4th Circuit found that no reasonable jury could find that the employer denied the employee a reasonable accommodation. Under the specific circumstances of the case, which included the COVID-related staffing shortages, and the fact that, where there are different reasonable accommodation options, employers may choose the accommodation, the 4th Circuit found that the denial of the employee's request was not unreasonable. Moreover, the accommodation offered by the employer was reasonable, as the employee was able to research the layout of any patient's home beforehand, as well as request additional insight from other clinicians, and therefore select only appropriate assignments, which could be spaced out to avoid potential stress to her knees. Any argument that there could be an unexpected event was only hypothetical and would apply to even fully-able nurses.

As to the discrimination claim, the 4th Circuit held that there was no dispute that the employee was not fulfilling the employer's legitimate expectations. Nor were there circumstances raising an inference of unlawful discrimination, since the employer offered a reasonable accommodation that she refused. Moreover, she was treated similarly to the other employee who was also terminated for refusing field visits.

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And for the retaliation claim, despite the relatively short time period between the employee's request for accommodation and her termination, the causal link was broken by the employer's legitimate non-discriminatory reason – "her failure to perform any direct patient care field visits, even with a reasonable accommodation, despite multiple warnings." The employee offered no evidence that the reason was pretext for retaliation.

Guidance for Employers. In arriving at these conclusions, the 4th Circuit made a number of very interesting and helpful statements related to an employer's obligations under the ADA, including the following:

- What is a reasonable accommodation is not a theoretical question, but one depending on the particular circumstances of the case.
- There may be "many possible solutions" for what constitutes a reasonable accommodation in a particular case. If so, "the employer, exercising sound judgment, possesses the ultimate discretion over these alternatives." The employer's choice must only be reasonable, "not perfect" – and "not even a well-intentioned court may substitute its own judgment for the employer's choice."
- A reasonable accommodation *may* – but does not *necessarily* – require the elimination of a non-essential, marginal function. It depends on the circumstances.
- "An accommodation is not ineffective simply because it is available to other employees regardless of disability status." In other words, an accommodation need not be specially created for the employee, if there are existing mechanisms that would allow them to perform their essential job functions.
- "While [an employee]'s doctor's opinion regarding an accommodation should be considered by the employer, the ADA doesn't bind the employer to that opinion if the proposed accommodation is otherwise reasonable under the circumstances." Thus, the doctor's opinion is not the final word.
- "The ADA requires reasonableness, not perfection. Reasonableness does not demand that an accommodation have an airtight solution to every contingency conceivable. Its dictates are tethered to the practical realities of each case, not boundless hypotheticals."
- An employee should give the employer's proposed reasonable accommodation a chance, rather than simply rejecting it. Then if in practice the accommodation proves to be "impracticable," the employee may seek an alternative accommodation at that time. Without doing so, any argument that the proffered accommodation is unreasonable is "only vague conjecture," which is not sufficient under the ADA to support a violation.

Employers, Be Careful With Those Employee Groups!

Some employers, particularly larger ones, may have or may be interested in the creation of employee groups to identify workplace issues and propose solutions. Unfortunately, unless carefully handled, such groups could constitute "labor organizations" under the National Labor Relations Act, and an employer's authority over such groups could constitute unlawful interference with employees' rights under the Act, as T-Mobile recently learned in a case before the U.S. Court of Appeals for the D.C. Circuit.

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What the Law Provides: It is an unfair labor practice under Section 8(a)(2) of the Act for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." The Act defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Thus, under National Labor Relations Board law, to find labor organization status, there must be a finding that (1) the organization submitted group proposals, (2) on statutory subjects (regarding the terms and conditions of employment), (3) the proposals received real or apparent management consideration, and (4) there is a pattern or practice of such bilateral dealing.

Background of the Case: In *T-Mobile USA, Inc. v. NLRB*, the company created an internal organization called T-Voice, consisting of call center employee representatives selected by management. Other employees were told to use those representatives to raise issues regarding frontline and customer problems and complaints (i.e. "pain points"). The frontline problems often involved terms and conditions of employment. The T-Voice representatives submitted their own as well as the pain points from others into a database that was reviewed by managers, who provided a response that was then transmitted by the T-Voice representative to the appropriate employee. There were also a variety of meetings between the T-Voice representatives and managers to discuss both the pain point process and particular pain points. T-Mobile occasionally announced to employees that it had implemented T-Voice proposals, expressly crediting T-Voice.

The Communications Workers of America (CWA) has been trying to unionize T-Mobile for many years. It filed an unfair labor practice charge with the National Labor Relations Board, and the Board's General Counsel then filed a complaint alleging that T-Voice was a labor organization (i.e., like a union) under the Act, and that T-Mobile unlawfully dominated the labor organization. T-Mobile argued that T-Voice was not a statutory labor organization. The Trump Board agreed, but on appeal by the CWA, the D.C. Circuit sent the case back for further consideration – and this time, the Biden Board held that T-Voice was a labor organization. This time T-Mobile appealed to the D.C. Circuit.

The Court's Ruling: The D.C. Circuit agreed with the Biden Board that T-Voice was a labor organization under the Act, under which the term is defined broadly and incorporates even informal entities. Applying the four-factor analysis above, it found (1) that T-Voice, as an employee group, was "dealing with" the Company "where the group's individual members make proposals to management while acting in a representative capacity, even if there is no additional indication that the full group endorses the individual member's proposal." It is not required for the group to adopt the proposals as a group to meet this definition. (2) The D.C. Circuit also found that T-Voice dealt with the Company on terms and conditions of employment such as performance metrics, training and equipment (covered by the Act), in addition to customer issues (not covered by the Act). The fact that there were far more customer issues than work issues was not relevant to the analysis. (3) Proposals were clearly considered and addressed by T-Mobile, who responded or reacted to many of them. And (4) because T-Mobile itself described T-Voice as a representative organization for raising concerns about work conditions, and repeatedly acknowledged T-Voice in that context, there was an established pattern and practice of bilateral dealing.

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Lessons for Employers: It is critically important that if an employer creates an employee group to address workplace issues, that it is aware of the fact that such group may very well be considered a labor organization subject to the protections of the Act and the jurisdiction of the Board. Any employee groups must be carefully constructed to avoid the triggers of coverage, and employers should consult with counsel regarding those parameters as applied to their individual circumstances.

TAKE NOTE

A Disparate Impact on a Protected Group Is Not Always Illegal. One form of discrimination is where a policy or job requirement has a disparate (i.e. negative) impact on a protected group. However, that impact is not necessarily illegal under Title VII where there is a legitimate need for the policy or requirement, as the U.S. Court of Appeals for the 7th Circuit recently reiterated.

In *Erdman v. City of Madison*, a female firefighter could not pass the City's physical abilities test, and she sued, alleging that the City's test had a disparate impact on women in violation of Title VII, and that the City could have used an alternate test with less of a disparate impact. The 7th Circuit found, however, that the City was able to demonstrate that the alternative test did not serve its unique legitimate needs.

As the 7th Circuit explained, in order to serve an employer's legitimate needs, any alternative hiring practice must be "substantially equally valid," meaning that it "would lead to a workforce that is substantially equally qualified." However, factors such as cost or other burdens imposed by the alternative may also be taken into account in determining if the alternative is "substantially as efficient as the challenged practice in serving the employer's legitimate business goals." In this case, the City argued that its test measured elements that were specifically designed to replicate tasks that its firefighters would be expected to perform with the City's equipment and in light of specific safety concerns. The City also showed that its test screened out applicants that were likely to wash out later in the training process, as it had a higher rate of hiring and retaining female applicants than other fire departments. Based on these showings, the 7th Circuit agreed that the City's test was not illegal.

This case reminds employers that not all job requirements that have a disparate impact are prohibited by Title VII. However, it is critically important that they consider whether there are alternative criteria that could accomplish essentially the same legitimate purpose with less adverse impact on the protected group – and if not, they need to be prepared to articulate why not with objective, factual support.

Employees Must Tie "Accommodation Requests" to a Disability. As the U.S. Court of Appeals for the 4th Circuit explained, for purposes of the Americans with Disabilities Act, "[m]erely labeling a list of suggestions an 'accommodation request' is not enough to inform the employer that the employee is requesting workplace changes to address his disabilities, rather than other unrelated issues."

In *Kelly v. Town of Abingdon*, the Town Manager suffered from anxiety, depression and high blood pressure, which he attributed in part to political infighting and unprofessional behavior by the Mayor and Town Council. Subsequent to the filing of charges with the Equal Employment Opportunity Commission, attorneys for the Town Manager and two of his colleagues sent a letter to Town authorities seeking changes to "the daily office environment." Although the letter was entitled "Accommodations Requests" and referenced the ADA, the stated "overall aim" was "to foster a

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well-running office." The list of 12 requests included things such as compliance with the Code of Ethics, adherence to defined roles, ending the threats of termination, courteous communications, equal treatment, improved gender diversity, teamwork, and the development of written conduct policies. The letter did not mention the Town Manager's medical conditions, nor how the requests would alleviate them. The Town Manager subsequently resigned and sued under the ADA for retaliation and interference with his rights to reasonable accommodation, among other things.

The 4th Circuit rejected these claims, noting that while the ADA requires employers to provide disabled employees with reasonable accommodations that enable them to perform their essential job functions, employers need only accommodate those disabilities that are known, and the employee must make an adequate request for accommodation. The 4th Circuit noted that, "It is not difficult to request an accommodation. To trigger an employer's duty to accommodate, a disabled employee need only communicate[] [his] disability and desire for an accommodation." The employee is not required to identify his precise limitations or identify a specific accommodation; it is the employer's responsibility to seek clarification through the requisite interactive process.

As the 4th Circuit noted in this case, "not every work-related request by a disabled employee constitutes a request for accommodation under the ADA." For example, an employee may seek changes for unrelated reasons, such as "the kind of personality conflict that pervades many a workplace." Although there are no magic words required for the request, it is necessary that the request makes clear that the employee wants assistance for their disability. In other words, "there must be a logical bridge connected the employee's disability to the workplace changes he requests." And, as the 4th Circuit notes, "The substance of the employee's communication, not its title, determines whether the ADA applies." In this case, the 4th Circuit found the "logical bridge" to be absent, given that the list of requests had "no connection to anyone's disabilities."

This case is helpful for employers by requiring employees to articulate at least enough information for the employer to understand that a request for assistance is connected to their disability in order to trigger the ADA. But employers should keep in mind that there are no required "magic words" and be thoughtful in addressing any requests for workplace changes.

Employers Need Not Engage in "Optimal" Decision-Making, "so long as an employer honestly and reasonably believed the nondiscriminatory reason for its action," according to the U.S. Court of Appeals for the 6th Circuit.

In *Noumoff v. Checkers Drive-In Restaurants, Inc.*, the general manager of a restaurant complained of sex discrimination by her supervising District Manager to his direct manager, who was also the Employee Relations Manager. The ER Manager opened an investigation, but because the GM did not provide concrete instances of discriminatory treatment, the investigation was closed. Subsequently, several restaurant employees complained of missing wages. The ER Manager conducted an investigation by reviewing the electronic time records for the relevant days, cross-referencing the records against separate "punch card" modifications by the GM, and reviewing video footage that showed the employees working during the time in question. Based on this evidence, the ER Manager determined that the GM had manipulated the employees' time in violation of company policy and the GM was terminated. She sued, claiming that her termination was in retaliation for her complaint of sex discrimination, and that the ER Manager's determination was "uninformed"

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because she did not speak with the GM or the employees to determine if the GM's time adjustment was intentional, rather than just a mistake.

The 6th Circuit rejected the employee's claims, noting that where an employer demonstrates an honest belief in the reason for the termination decision, the argument that this reason is pretext for illegal retaliation fails. According to the 6th Circuit, in order to show an honest belief, the employer must provide evidence that it "made a reasonably informed and considered decision based on reasonable reliance on particularized facts" – and the employer did so here, through its review of the records, written modifications and videos. Although the employer could have conducted the additional interviews, the 6th Circuit held that "so long as an employer honestly and reasonably believed the nondiscriminatory reason for its action, the employer need not use an optimal decision-making process that leaves no stone unturned."

Although many employers are cautious about taking disciplinary action against employees who have alleged discrimination or harassment for fear of a retaliation claim, this case demonstrates that such employees are not insulated from adverse employment decisions. Such decisions, however, must be based on legitimate business reasons, reasonably investigated and supported by concrete evidence, and consistent with how other (non-complaining) employees have been treated.

Really, It's Not Discrimination When the Employee Is Not Doing Their Job. An employee who did not dispute the reasons for her termination nonetheless claimed that it was race and sex discrimination, but the U.S. Court of Appeals for the 8th Circuit disagreed.

In *Ingram v. Arkansas Dept. of Correction*, the employee was responsible for the hobby craft area, including the keys to the office and the cash used for supplies. After an inmate stole the keys and broke into the office, stealing the cash, the employee was terminated for a number of reasons including violation of employer policies, unsatisfactory work performance resulting in property damage, and false statements. She claimed, however, that white, male employees were not punished for similar misconduct.

To bring a claim of discrimination under Title VII, an employee must establish four factors: (1) that they belong to a protected group; (2) that they met their employer's legitimate performance expectations; (3) that they suffered an adverse employment decision; and (4) that circumstances give rise to an inference of discrimination (such as by similarly-situated co-workers of a different group receiving better treatment). Here, the 8th Circuit found that the employee couldn't meet the second and fourth factors – she was responsible for the keys and funds that were stolen, and she did not show that any other white, male employees were treated better than she. As the 8th Circuit noted, the other employees had to be "similarly situated in all respects," which include things such as having the same supervisor, as well as engaging in the same type and degree of misconduct.

This case reiterates the common-sense principle that employees can be held accountable for failing to meet legitimate performance expectations, but we remind employers to be consistent in holding employees accountable. There would have been a very different result if the employee here were able to show that a white male who engaged in similar misconduct had not received the same discipline.

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New Pay Transparency Requirements Coming to D.C. The D.C. Wage Transparency Omnibus Amendment Act of 2023 will impose requirements for salary range and healthcare benefit disclosures, as well as prohibitions on the request for or use of wage history, on employers with at least one employee in the District of Columbia, starting at the end of June 2024.

Once it takes effect, the Act will require employers to post the minimum and maximum projected salary or hourly pay in all advertised job listings and position descriptions. The minimum to maximum range consists of the lowest to highest salary or hourly pay that the employer believes in good faith it would pay for the position in question. Employers must also disclose available healthcare benefits to candidates before the first interview. The Act further prohibits employers from screening applicants based on their wage history or even asking about their wage history during the application and selection process. Nor may employers ask an applicant's previous employer for their wage history. Employers must also post a notice of rights under the Act.

The Mayor signed the Act on January 12, 2024 and, following a period of Congressional Review and publication in the D.C. Register, the new requirements will take effect on June 30, 2024.

Revisions to D.C. Minimum Wage Law Apply to Those Working 2 Hours a Week in D.C. A revision to the District of Columbia's minimum wage law expands the application of the law to include those working two or more hours a week in D.C. starting in March 2024.

The D.C. minimum wage law requires employers to pay employees "employed" in D.C. at least $17.00 per hour, with a tipped wage rate of $8.00 (The tipped wage rate for tipped employees, together with any tip credit, must meet the minimum wage, with employers making up any shortfall.) These are scheduled to increase to $17.50 and $10.00 respectively on July 1, 2024. An employee is considered to be "employed" in D.C. if they regularly spend more than 50% of their working time in D.C. or the employee's employment is based in the District of Columbia and they regularly spend a substantial amount of their working time in the District of Columbia and not more than 50% of their working time in any particular state. The revision adds the requirement to pay the D.C. minimum wage to those working two or more hours in a workweek in D.C. – but only as to those hours worked in D.C.

The Mayor signed the law on January 10, 2024, and it will take effect following a period of Congressional review and publication in the D.C. Register, anticipated to be March 7, 2024. This law vastly expands the number of employees who are entitled to D.C.'s elevated minimum wage (the federal rate is currently $7.25), and complicates employers' time tracking and payment obligations for those who work this minimal amount of time in the District.

Maryland Appellate Court Confirms Trade Secret Protections for Customer Lists. Maryland's second-highest court, the Maryland Appellate Court, has reiterated that confidential customer lists, vendor pricing, profit margins and other pricing information may constitute trade secrets under the Maryland Uniform Trade Secrets Act (MUTSA).

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In *Ingram v. Cantwell-Cleary Co.*, a group of key employees left their employer to form a competing company, taking many clients with them. Their former employer sued for theft of trade secrets under MUTSA, among other things. In order to constitute a trade secret under MUTSA, the information must (1) Derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) Be the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In this case, the Court held that the customer lists and other pricing information in question met the definition under the specific circumstances of the case. The information included account-specific pricing information that was adjusted for each customer by the sales people, which established a pattern on how to price the account. Such information would be valuable to competitors, if they understood how the pricing was determined, so that they could undercut the pricing in each circumstance. This information was developed over time and was not generally known to competitors in a highly-competitive industry.

Moreover, the employer took several reasonable steps to protect the information on its internal database, by restricting access, assigning numeric levels of access clearance, and requiring salespeople to have a high clearance level, which still required managerial approval to print off account-specific information. The company also had policies that prohibited the removal of confidential information that included pricing, sales and customer information, and required its return upon termination. In addition, all sales people were required to sign a non-compete agreement that acknowledged their duty to keep the company's customer, vendor and pricing information confidential.

This case provides a good reminder to employers that, particularly in a competitive industry, specialized and individualized customer lists and pricing information can constitute a trade secret – but it is important, if so, that the employer take clear and effective steps to protect that information.

NEWS AND EVENTS

New Partner – We are delighted to announce that Courtney B. Amelung has been made a Partner at our Firm. Courtney represents employers in a wide range of employment-related matters in federal and state court, as well as before administrative agencies. Courtney graduated *magna cum laude* from the University of Richmond and *cum laude* from the University of Maryland Carey School of Law, where she was an editor for the Maryland Law Review. Courtney also served as a judicial law clerk for Magistrate Judge Beth P. Gesner in the U.S. District Court for the District of Maryland. Courtney has been recognized as a *Super Lawyers* Rising Star for the past several years and by *The Best Lawyers in America: Ones to Watch*© 2024.

Webinar – Fiona Ong and Chad Horton will be presenting a webinar at 1:00 p.m. Eastern on February 8, 2024 for HR Simple on the ever-popular topic of "2024 Handbook Updates." The cost is $60, or free for hr/webinar MAX subscribers, and attendees will receive 1 SHRM and HRCI credit. You may register for this webinar here.

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Complimentary Webinar – On January 10, 2024, Parker E. Thoeni moderated an Employment Law Alliance webinar, "US Employment Law Year in Review." This free webinar reviewed the most impactful labor and employment changes of 2023 and anticipated developments in 2024. You may view the webinar here. The Employment Law Alliance is a comprehensive global network of local labor, employment and immigration attorneys, of which Shawe Rosenthal is the Maryland member.

Honor – Fiona Ong has once again been recognized by Lexology as its "Legal Influencer" for U.S. – Employment, most recently for Q4 2023. Lexology publishes in excess of 450 legal articles daily from more than 1,100 leading law firms and service providers worldwide. Lexology instituted its quarterly "Lexology Content Marketing Awards" in 2018 to recognize one individual within each practice area in each region of the world for consistently providing useful, insightful legal analysis. This is the 19th consecutive quarter and 20th time overall that Fiona has received this honor.

Victory – Chad Horton won an arbitration for a hospital. The arbitrator found that the hospital had just cause to terminate an RN who was shown to have spent several hours off her unit, sought pay for time not worked, and was untruthful during the Hospital's investigation.

Public Comment – Paul Burgin submitted comments to the Maryland Department of Labor's proposed regulations on the Maryland Economic Stabilization Act, which is the law mandating written notice for certain mass layoffs and reductions in force. Paul noted concerns from the employer perspective with the proposed regulations. Notably, Paul was instrumental in the successful efforts of the Maryland Chamber of Commerce and other employer organizations in seeking modifications to the law several years ago to better conform the state law with the federal Worker Adjustment and Retraining Notification Act.

Webinar – Michael McGuire was a panelist for a Maryland State Bar Association's Section of Labor and Employment webinar, "NLRB Update," on January 23, 2024. Mike and his fellow panelists discussed the National Labor Relations Board's decision in *Cemex Construction Materials Pacific, LLC*, in which the Board announced a new framework for situations when a union requests recognition from an employer, as well as the Board's revised "quickie election" rules, both of which facilitate unionization.

TOP TIP: Does the Employer or Employee Own Those Social Media Accounts? Part II.

This question has been subject to litigation in a years-long case that we previously discussed in our January 2022 E-Update. At that time, the U.S. Court of Appeals for the 2nd Circuit affirmed in part and vacated in part a preliminary injunction that gave the employer sole control of the social media accounts, sending it back to the federal district court for further proceedings. And now the 2nd Circuit has clarified that the ownership question is subject to traditional property law principles.

In *JLM Couture, Inc. v. Gutman*, the company and the designer had an employment contract that governed much of their relationship, but not social media accounts. When the relationship ended, the company claimed ownership of the designer's Instagram, TikTok and Pinterest accounts, arguing that she created them in her capacity as an employee. She, on the other hand, argued that she created them in her personal capacity, and she did not cede ownership by agreeing to use the accounts to market the company's products.

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In this go-round, the federal district court gave the company exclusive control over the social media account, using a six-factor test that it developed specifically for social media ownership disputes. The 2nd Circuit, however, rejected the new test, holding that traditional property law principles apply. More specifically, the 2nd Circuit noted that if the designer created the accounts using her personal information and for her personal use, then she is the owner of the accounts. But the designer could have transferred ownership to the company by contract. However, the 2nd Circuit noted that transferring rights to content posted on the account is not the same as transferring ownership. Also, permitting others to assist in managing the account or who holds themself out as the owner does not bear on the question of actual ownership.

The 2nd Circuit also addressed the argument that ownership was transferred through a contract provision providing that all "designs, drawings, notes, patterns, sketches, prototypes, samples, improvements to existing works, and any other works conceived of or developed by [the designer] in connection with her employment with the Company involving bridal clothing, bridal accessories and related bridal or wedding items," are works for hire and the exclusive property of the company. The 2nd Circuit rejected the argument that the social media account were "other works," under the general principle of contract interpretation that "the ordinary meaning of general terms at the end of a list must be interpreted to embrace only objects similar in nature to those objects enumerated by the preceding specific words." In this case, the other items in the list are closely related in that they are steps in the process of fashion design and might be sold to the public – unlike the accounts. The 2nd Circuit then remanded the issue back to the federal district court to re-evaluate the ownership question under these general contract principles.

This case reinforces the lesson we previously articulated: it is critically important to establish – clearly and in writing – who owns a social media account, if an employee is engaged in social media activities for the employer, particularly if there is a mixing of business and personal activity on the account.

RECENT BLOG POSTS

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

- Maryland's "Draft" FAMLI Regulations – What Do They Say? by Fiona W. Ong, January 30, 2024
- Employers, "When you assume, you make an ass out of u and me." – Oscar Wilde (or not?*) by Fiona W. Ong, January 25, 2024
- When One of Your Employees Fails to Report to Work… by Fiona W. Ong, January 21, 2024
- The Maryland Department of Labor Issues Proposed Maryland Economic Stabilization Act Regulations by Paul D. Burgin and Fiona W. Ong, January 21, 2024

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