SHAWE ROSENTHAL LLP

E-UPDATE

February 29, 2024

RECENT DEVELOPMENTS

Supreme Court Clarifies and Expands Statutory Whistleblower Protections

In a case under the Sarbanes-Oxley Act but applicable to certain other federal whistleblower laws, the U.S. Supreme Court held that, in order to establish a retaliation claim, a whistleblower must prove that their protected whistleblowing activity was a contributing factor in the employer's decision to take an adverse employment action, but they need not prove that the employer acted with "retaliatory intent."

Background of the Case. The Sarbanes-Oxley (SOX) Act was passed in the wake of the Enron and WorldCom corporate and accounting scandals to impose greater accountability in financial recordkeeping and reporting for public companies. It also prohibits retaliation against employees "because of" protected whistleblowing activity. Such claims are subject to a burden-shifting framework, in which the whistleblower must first show that the protected activity "was a contributing factor in the unfavorable personnel action." If the whistleblower makes that showing, then the burden shifts to the employer to show "by clear and convincing evidence" that it would have taken the same action absent the protected activity.

In *Murray v. UBS Securities, LLC*, a research strategist was required by certain Securities and Exchange Commission regulations to certify that his reports to UBS customers were produced independently and accurately reflected his own views. The research strategist was terminated shortly after reporting to his supervisor that two UBS trading desk leaders pressured him to skew his reports, which he believed to be unethical and illegal. He subsequently filed suit, alleging violations of the whistleblower provisions of SOX.

The Court's Decision. The Supreme Court addressed the issue of what a whistleblower-employee must prove in order to sustain a retaliation claim under the SOX Act's antiretaliatory provision. It held that the employee must establish that the protected activity was a contributing factor in the unfavorable employment decision but need not prove retaliatory intent on the part of the employer. The Supreme Court noted that the statutory language of the retaliation provision does not include a "retaliatory intent" requirement. Moreover, imposing a retaliatory intent requirement would ignore the burden-shifting framework by imposing a heavier burden on the employee.

The Supreme Court rejected the employer's argument that, "without a retaliatory intent requirement, innocent employers will face liability for legitimate, nonretaliatory personnel decisions." It noted that the burden-shifting framework ensures that an employer will not be held liable where it can demonstrate that it would have taken the same action absent the protected activity.

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

Lessons Learned. Although employers likely would have preferred that the Supreme Court impose the heightened "retaliatory intent" standard in whistleblowing cases under SOX, which would have made it more difficult for whistleblowing plaintiffs to prove, the silver lining is that we now have a definitive ruling that the "contributing factor" standard should apply. Moreover, because the statutory language at issue in SOX's retaliatory provision is mirrored in a number of other federal whistleblowing statutes applicable to private employers (e.g. the Motor Vehicle and Highway Safety Improvement Act, the FDA Food Safety Modernization Act, and the Consumer Product Safety Improvement Act, among others), we also now have clarity around the applicable standard for whistleblowers under those laws as well.

Don't Automatically Dismiss the Ever-Complaining Employee

Employers can become frustrated with employees who constantly complain about every little thing (often in a rude manner) and end up brushing off the complaints. They may even terminate the employee for their "inappropriate" communications. But a recent case from the U.S. Court of Appeals for the Sixth Circuit highlights the risks of doing so without careful consideration.

Background of the Case. In *Caudle v. Hard Drive Express, Inc.*, a truck driver complained about various company policies throughout his employment, including lack of reimbursement for repairs and payment for the repair time, which he asserted was illegal. The driver threatened to report the company to government authorities on various occasions. He was eventually terminated after a series of "argumentative" text messages with the company owner mainly concerning vacation pay, but also referencing payment for repairs and a threatened complaint to the "labor board." (Of note, the owner referenced the fact that the driver was an at-will employee who could be terminated for no reason – but see our blog post, At-Will Employment is a Fairy Tale…). He sued, and the trial court threw out his lawsuit on the grounds that the text messages only concerned vacation pay, which is not required or protected by state law or the Fair Labor Standards Act.

The Court's Decision. On appeal, however, the Sixth Circuit reversed the trial court's ruling, finding sufficient grounds to support a retaliation claim under the FLSA. In order to bring an FLSA retaliation claim, an employee must show that: (1) they engaged in a protected activity under the FLSA, such as complaining about unpaid wages; (2) the employer knew of the activity; (3) the employer took adverse employment action against the employee; and (4) there was a causal connection between the protected activity and the adverse employment action. Here, contrary to the trial court, the Sixth Circuit found that there was protected activity – it was unclear whether some of the text messages from the driver referred to (unprotected) vacation pay or (protected) reimbursement for repair costs, but certainly could be interpreted to include the latter. Moreover, there were other specific references to the repair cost issue, even though the owner initiated that topic, including the threat to report the company to the "labor board."

But even beyond the text message exchange, the Sixth Circuit found that the driver's prior complaints about reimbursement served as an additional basis for his FLSA retaliation claim. Although the trial court found these to be "mere grumblings" that did not put the employer on notice of the protected activity, the Sixth Circuit found that there was sufficient evidence that the company clearly knew the driver had complained about the lack of reimbursement and threatened to report them to government authorities.

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

Lessons Learned. So, when dealing with a constantly-complaining employee, it is important for employers to carefully consider what the employee is complaining about – a valid issue may be buried in a plethora of noise. Failure to address those valid complaints appropriately can create risk of liability. And complaints cannot necessarily be considered in isolation – prior complaints may be connected to current ones in ways that trigger possible protections for employees.

In terms of the manner of complaint, employers can require employees to communicate in a professional and respectful manner about individual concerns, and discipline them for failing to do so. (Although if the complaints themselves involve valid issues, the employer would be wise to tread carefully and consult with counsel before taking disciplinary action). But if the employee's complaints are about group concerns (like a policy of failing to provide reimbursement impacting multiple employees), then their communication, even if unprofessional or disrespectful, may be protected under the National Labor Relations Act – even for non-union employees.

TAKE NOTE

Delay in Effective Date of the NLRB's Joint Employer Rule. As we reported in our October 26, 2023 E-lert, the National Labor Relations Board has issued a final rule that rescinds and replaces the Trump Administration's 2020 rule for determining whether two entities are joint employers. A controversial topic, the new rule was subjected to immediate legal challenge, and the NLRB postponed the original effective date from December 26, 2023 until February 26, 2024. A federal district judge has further stayed that until March 11, 2024.

Under the new rule, two companies will be joint employers of workers if they "possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment." The old rule, in contrast, required actual and direct control. A joint employer must bargain collectively with employees' representative with respect to any term or condition of employment that it possess the authority to control or exercises the power to control – and according to the new rule, even for non-essential terms or conditions of employment.

The new standard will be applied only prospectively, meaning that the old standard will continue to apply to cases filed before March 11, 2024. As we warned previously, however, any arrangements that rely on the old standard may fall afoul of the new standard – and be subject to an unfair labor practice charge – once it takes effect.

Reasonable Accommodation Is Not Required to Go Beyond Essential Job Functions. Because the request to waive an educational requirement for a pay increase would not enable the employee to do his essential job functions, the U.S. Court of Appeals for the Seventh Circuit found that the employer was not obligated to provide a reasonable accommodation.

Under the Americans with Disabilities Act, absent an undue hardship, employers must provide reasonable accommodations to employees with disabilities in order to enable them to perform their essential job functions or to enjoy equal privileges and benefits of employment as non-disabled employees.

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

In *Bruno v. Wells-Armstrong*, the employee was selected for a deputy fire chief position that required a bachelor's degree, although he lacked one and was unable to complete college courses due to a heart condition. When he was required to enroll in college courses to keep his position, he requested, and the employer agreed, to waive the requirement with a doctor's note. Subsequently, the employer conditioned additional compensation on the employee's enrollment in college courses. The employee asked the employer to waive this requirement as a reasonable accommodation. His request was denied, and he resigned. He then sued, alleging a failure to accommodate, among other things.

The Seventh Circuit held that the request to waive the educational requirement would not enable him to do his essential job functions, and therefore was not a request for reasonable accommodation. According to the Seventh Circuit, he was not entitled to the increase just because he performed his essential job functions. Rather, "he would have needed to go beyond his duties to obtain the pay bump." And the employer did not need to provide an accommodation to enable him to go beyond his essential job functions.

Interestingly, the Seventh Circuit did not address whether a pay increase conditioned on an educational requirement would be a privilege or benefit of employment enjoyed by non-disabled employees. In this case, it was likely not raised by the parties, presumably because the employee had an individual employment contract and was in the unusual situation of holding a position for which the educational requirement had already been waived for him – and thus, this particular conditional pay increase was likely not an option for other employees. If it had been a standard requirement, however, the ADA would have obligated the employer to consider waiving the requirement as a reasonable accommodation, absent undue hardship.

Yes, You May Fire an Alcoholic Employee for Shooting Himself While Drunk on the Job. That is even if his disability was the reason for the conduct, according to the U.S. Court of Appeals for the Eleventh Circuit. Although unpublished (meaning it shouldn't be cited as binding precedent), this ruling reinforces the principle that employers may hold employees with disabilities accountable for performance and conduct standards.

In *Harrison v. Sheriff, Holmes County Florida*, a lieutenant with a sheriff's department suffered from mental health issues and alcoholism, which were known to his employer. One day, while working on call, the employee called a colleague (with whom he had an inappropriate sexual relationship) while drunk, crying and incomprehensible. She rushed to his location and saw him shoot and wound himself. During his subsequent leave for recovery from the gunshot wound, the lieutenant's manager told him that if he didn't resign, he would be investigated for both the shooting and his inappropriate sexual relationship. He resigned, and eventually sued his employer under the Rehabilitation Act (the analog to the Americans with Disabilities Act for public employees).

The Eleventh Circuit rejected the lieutenant's argument that he was subjected to disability discrimination because his misconduct of shooting himself was directly tied to his disability of alcoholism and depression. The Eleventh Circuit noted that the misconduct constituted a "fireable offense irrespective of whether his disability involved depression and alcoholism." As the Eleventh Circuit stated, the law does not require an employer "to countenance dangerous misconduct just because it was caused by a disability." Here, the lieutenant was drunk while on call behind the wheel of his patrol car and discharged his firearm in the presence of others – putting himself, other officers and members of the community in danger.

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The Eleventh Circuit's ruling is consistent with the Equal Employment Opportunity Commission's position, set forth in its Guidance, "Applying Performance and Conduct Standards to Employees with Disabilities." The EEOC states, "The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability." Of course, employers must provide reasonable accommodations for known disabilities to enable employees to meet the conduct standards, if the employee makes known that they need an accommodation. But ultimately, they can be held accountable for meeting those standards.

Do Not Unilaterally Stop Dues Checkoff When the Union Contract Expires. On an issue that has gone back and forth with changes in Presidential administrations, the U.S. Court of Appeals for the Ninth Circuit has recently upheld the National Labor Relations Board's current position that employers must continue dues checkoff after expiration of a collective bargaining agreement.

Under the National Labor Relations Act, an employee may authorize the employer to deduct and remit their union dues to the union, as long as the authorization is contained in a written dues checkoff assignment and the employee has the opportunity to revoke the assignment at least once a year and upon expiration of the applicable collective bargaining agreement (CBA). The Board had previously held that employers may unilaterally cease union dues checkoff after the expiration of a CBA - but no longer.

In a pair of cases, *NLRB v. Valley Health System, LLC* and *Valley Hospital Medical Center, Inc. v. NLRB*, the Ninth Circuit noted that the Board has again "changed its mind" and readopted a prior rule that prohibits employers from unilaterally ceasing dues checkoff upon expiration of a CBA. The Ninth Circuit found that the Board had the discretion to adopt its preferred rule and that it applied a permissible interpretation of the NLRA.

This is just another example of the changing tide on labor-management relations under the current Biden Board, which is notoriously and admittedly pro-labor. And employers who are approaching the end of CBAs should be careful not to stop dues checkoff unless the assignment specifically states that it should stop at the end of the contract. At least for now.

Government Contractor Update – Proposed Pay Transparency Rule, New Compensation FAQs, Construction Contractor Audits. There were several developments of interest to government contractors and subcontractors this past month, including the following:

- **Pay Transparency.** The Federal Acquisition Regulation (FAR) Council issued a proposed rule on "Pay Equity and Transparency in Federal Contracting." The rule would prohibit contractors and their subs from requesting or considering an applicant's compensation history for certain positions, and would require them to disclose the expected salary range in job advertisements. Interested parties may submit comments on the proposed rule through April 1, 2024 through the Federal Register website. The FAR Council will consider the comments and may make changes to the proposed rule before issuing a final rule.
- **Compensation FAQs.** The Office of Federal Contract Compliance Programs added a new "Compensation History" section to its FAQs. Of particular interest, the OFCCP notes that an employer's reliance on prior salary in making hiring and compensation decisions, although not expressly prohibited by law, may result in unlawful pay discrimination based on race and

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sex in violation of Executive Order 11246, which prohibits discrimination and requires affirmative action for women and minorities, among other groups.

- **Construction Contractor Audits.** The OFCCP has announced two initiatives that will revamp its audit selection process and audit procedures for construction contractors.
    - First, the OFCCP proposes to reinstate the long-abandoned Monthly Employment Utilization Report (CC-257), a monthly report of employee work hours and employee count by race/ethnicity, gender and trade in a covered area, which it will use to select contractors for audit. Comments may be submitted here through April 23, 2024.
    - Second, the OFCCP proposes to make substantial revisions to its information collection requirements, including the construction compliance review scheduling letter and itemized listing, which set forth the items and information that construction contractors must provide during an audit. The proposed changes will make the audit process more burdensome for construction contractors. Comments may be submitted here through April 26, 2024.

Maryland Paid Family and Medical Leave Insurance Program FAQs. The Maryland Department of Labor's Division of Family and Medical Leave Insurance (FAMLI) has released a Frequently Asked Questions document for employers about the forthcoming program. Starting in January 2026, the program 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, as we have previously detailed in our E-lerts from April 12 , 2023 and April 12, 2022.

As the FAMLI Division notes, however, there is pending legislation to further modify the FAMLI law, including a possible additional delay in the effective date (which has already been pushed off by a year). Moreover, the FAMLI Division is working on regulations to implement the FAMLI program, which we detailed in our January 30, 2024 E-lert. Thus, the FAMLI Division warns that there may be changes to the FAQs in the future.

We further note that most of the FAQs cover basic information, albeit in a readily accessible and understandable format. It does not address many of the more sophisticated questions that we have repeatedly raised in our writings and to the FAMLI Division – including how to report employee fraud (particularly if it is discovered after the employee already begins receiving paid leave benefits) and what the consequences are for such fraud, what to do about remote employees, and how to actually set up a private equivalent plan (which will be addressed in the regulations, although as we already pointed out, the draft regulations propose an incredibly challenging process).

NEWS AND EVENTS

New Associate – We are delighted to announce that Jordan Dunham has joined us as an associate. Jordan is an experienced trial attorney who has represented business clients before courts, administrative agencies, and arbitrators throughout the United States in employment, labor and commercial litigation disputes. Prior to becoming a lawyer, Jordan was a Human Resources professional with a major medical system, during which he attended the University of Baltimore School of Law as a night student. Jordan graduated from New Mexico State University with a B.A. in History and was elected to the Royal Graham Shannonhouse III Honor Society while in law school.

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Webinar - Shawe Rosenthal LLP and the Maryland Chamber of Commerce will present a 2024 Handbook Update webinar on March 6, 2024 at 12 noon, Eastern. This complimentary webinar will cover the latest employment law changes and how they will impact your handbooks, including:

- The National Labor Relations Board's changing rules on handbook policies, which impact all employers, whether unionized or not.
- Legislative updates at the federal and state level, such as lactation accommodations, pregnancy protections, limits on marijuana testing, and changes to leave laws.
- Major workplace developments, including the impact of the Supreme Court's affirmative action decisions on corporate DEIA initiatives and the use of generative AI like ChatGPT.

Attendees may receive 1 SHRM credit. You may register here.

Victory – Parker E. Thoeni and Veronica Yu Welsh won a motion to dismiss in federal district court on behalf of a healthcare employer. The judge found that the plaintiff had failed to allege facts that established a plausible claim for hostile work environment or unlawful retaliation.

Victory – Veronica Yu Welsh, Lindsey A. White and Jamie L. Salazer obtained significant sanctions against a plaintiff and her attorney in a case in the D.C. Superior Court. They discovered that the plaintiff had fabricated evidence to support her wage claim, but the plaintiff and her counsel (in the words of the court) "tripled down" on the supposed authenticity of the evidence, then tried to use the fraudulent evidence to barter a deal with the company. Although the plaintiff eventually dismissed the wage claim, the court found this to be fraud and awarded sanctions against the plaintiff.

Victory – Mark J. Swerdlin assisted a major food manufacturer to win an initial union election that was then challenged before the National Labor Relations Board. The parties eventually agreed to re-run the election. The union, however, withdrew from the election on the eve of the vote, meaning that the facility will remain non-union.

Presentation – J. Michael McGuire and Lindsey A. White spoke to the Baltimore chapter of the Association of Corporate Counsel on February 27, 2024. They discussed recent developments from the National Labor Relations Board, the U.S. Department of Labor and the Equal Employment Opportunity Commission of significance to employers.

Presentation – Jordan Dunn was a speaker for a Maryland State Bar Association Section of Labor & Employment Law webinar, "Independent Contractor Misclassification," on February 26, 2024. Jordan discussed the issue from the employer's perspective, reviewing the differing standards for independent contractor v. employee status under various statutes, the U.S. Department of Labor's new independent contractor rule, and remedies for violations.

Appointment – Parker E. Thoeni was appointed to a three-year term to serve as the attorney member of a Hearing Committee for the District of Columbia Board on Professional Responsibility. The Hearing Committee reviews and decides disciplinary cases brought by the D.C. Bar Association against attorneys.

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TOP TIP: Employers – Be Careful with Physical Assessment Requirements

A recent announcement from the Equal Employment Opportunity Commission warns employers to be thoughtful about any routine use of physical examinations. The EEOC found that a company provider of housekeeping, food and facilities support violated the Americans with Disabilities Act (ADA) in its use of a so-called Essential Functions Test (EFT) for its employees.

The ADA governs employers' ability to require examinations of applicants and employees that may reveal a disability – these are considered to be medical examinations. Physical assessments fall within the scope of this definition, since an individual's inability to pass the assessment may be due to a disability or a disability may be revealed in the course of the assessment.

With regard to applicants, employers cannot require them to undergo a medical examination. However, they may require a physical agility test (meaning one in which an applicant demonstrates the ability to perform actual or simulated job tasks), as long as it is given to all similarly-situated applicants regardless of disability and no measurement of a physiological response is taken (like checking blood pressure or heart rate).

After a job offer is made, an employer may require a medical examination and it need not be job related, as long as it is required of all individuals entering the same job category. But if the employer then chooses not to hire the individual because of the results of the examination, the reason must be either (1) job-related and consistent with business necessity or (2) involve avoiding a direct threat to the health or safety of the individual or other employees.

As to employees, any required medical exam must be job-related and consistent with business necessity. This is limited to when an employer has a reasonable belief, based on objective evidence that either (1) the employee's ability to perform their essential job functions is impaired by a medical condition, or (2) the employee will pose a direct threat due to the medical condition.

In addition, with regard to both applicants and employees, employers must explore whether there is any reasonable accommodation that would have enabled the individual to perform the essential functions of the job in question or reduce the threat to an acceptable level.

In this situation, the company required its employees to take the EFT upon hire, annually, and upon returning from a medical leave of absence. Those who failed any portion of the EFT were either not hired or were fired. The problem, according to the EEOC, is that not all portions of the test were job-related, and employees were fired despite being able to perform the essential functions of their job. In addition, the company did not offer any reasonable accommodations during the EFT.

So, there are several lessons to be learned here:

- Physical assessments should be carefully tailored to the actual requirements of the job in question – no more.
- Although employers may utilize physical agility tests in the hiring process, it is important to ensure that such tests for applicants do not measure any physiological response.

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

- Also, even though employers have a wide latitude as to post-offer/pre-employment medical examinations, they need to ensure that any decision to revoke the offer based on the examination results is, in fact, job-related and consistent with business necessity.
- As to current employees, any physical assessment must be job-related and consistent with business necessity.
- At all stages of the employment process – applicant, post-offer/pre-employment, and current employees – employers must make reasonable accommodations for any known disabilities, not only to enable the individual to perform essential job functions and/or reduce any direct threat, but as to undergo the testing procedures themselves.
- Calling a test an "essential functions test" does not make it so. If it tests for things beyond the actual essential functions of the job, it will be a violation of the ADA.

RECENT BLOG POSTS

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

- Display of BLM Insignia = Protected Concerted Activity by Fiona W. Ong, and J. Michael McGuire, February 23, 2024

- Is the NLRB Overstepping? Proposed Remedy Would Give Unions Hiring Control by Chad M. Horton, February 16, 2024

- March Madness in February? Unionization Heats Up College Sports Landscape by Evan Conder, February 9, 2024

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(410) 752-1040 www.shawe.com