SHAWE ROSENTHAL LLP

E-UPDATE

June 28, 2024

RECENT DEVELOPMENTS

Remember That Managers Can Be Individually Liable Under the FLSA!

A case from the U.S. Court of Appeals for the Eleventh Circuit provides a good reminder that individual owners and managers, even those at a middle level, can be held liable for violations of the Fair Labor Standards Act.

What the FLSA Says. The FLSA holds "employers" liable for minimum wage and overtime violations, and it defines that term very broadly to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." In making that determination, courts will look at the total circumstances of the relationship.

Background of the Case. In *Spears v. Patel*, the employee worked as a front desk clerk at hotels that were operated by a father and son. The father was based in another state, so the son was responsible for day-to-day operations for the hotels where the employee worked. The son scheduled and assigned work to the employee and, in consultation with his father, directed the employee to adjust room rates.

The employee eventually sued the hotels and the two individuals for wages and overtime pay. A federal magistrate judge ruled that both individuals were employers under the FLSA and individually liable for unpaid wages and overtime. The son appealed, arguing that he could not be an "employer" as he was a wage-earning employee and not an owner of the company that owned the hotels in question.

The Court's Decision. The Eleventh Circuit rejected the son's argument. It acknowledged that owners and corporate officers are "more susceptible to personal liability because they are more likely to exercise operation control." However, the definition is not limited to those groups, and under existing Eleventh Circuit caselaw, a supervisor who either is "involved in the day-to-day operation or [has] some direct responsibility for the supervision of the employee" may be an "employer" under the FLSA. Moreover, "[i]nvolvement in the day-to-day operations of a company can include regular visits to the company's facilities, the power to determine employee salaries, involvement in the business operations of the company, or control over the company's purse strings."

This definition, however, does not include low level supervisors or team leads, as, "[a] supervisor's control must be substantial and related to the company's obligations under the [FLSA]." But, according to the Eleventh Circuit, even mid-level managers may have the necessary authority to trigger individual liability.

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

And that is the case here. The Eleventh Circuit determined that the son was "undeniably involved in the day to day operations of the company." He supervised the employee, gave him tasks, and set his schedule. Although the son tried to argue a lack of financial control, in that his father set salaries and directed him to adjust room rates (which he passed along to the employee), the Eleventh Circuit noted that the son had control over the company's finances in ways that other employees did not. He was able to sign paychecks, and no other employees were involved in discussions about room rates. Moreover, he assumed responsibility for company business when his father was unavailable. According to the Eleventh Circuit, his involvement in both day-to-day operations and company operations – which were substantial and related to the Company's obligations under the FLSA – were separate reasons for finding him to be an FLSA "employer" and therefore individually liable.

Lessons for Employers. This case highlights the potential consequences for even middle managers arising from violations of the FLSA. Such violations are, unfortunately, all too common, and it behooves employers to pay particular attention to ensuring compliance – and to empower managers to speak up if they believe employees have not been paid appropriately.

Insubordinate Behavior May Be Protected Under the National Labor Relations Act

Although difficult to accept, employers may be required to tolerate insubordinate and unprofessional behavior from employees when such behavior is connected to protected conduct under the National Labor Relations Act – a point that the National Labor Relations Board made in a recent case.

Protected Concerted Activity and Misconduct Under the National Labor Relations Act. Section 7 of the NLRA protects the rights of employees, whether unionized or not, to engage in "concerted" (i.e. group) activity for their mutual aid or protection (referred to as "protected concerted activity"). Section 8 prohibits employers from interfering with those rights.

The issue of when employees may be disciplined for misconduct occurring during the course of protected concerted activity is one that has swung back and forth with the change between Republican and Democratic administrations. Previously, the Board applied "setting-specific" standards to determine whether an employee lost the NLRA's protection during the course of their protected conduct. More specifically, the Board applied a four-factor test (*Atlantic Steel*) when addressing employees' conduct towards management in the workplace, in which it reviewed four factors:

1. The place of the discussion;
2. The subject matter of discussion;
3. The nature of the employee's outburst; and
4. Whether the outburst was, in any way, provoked by an employer's unfair labor practice.

Then in 2020, in the *General Motors* case, the Board overruled the patchwork of setting-specific standards, replacing them with the well-known *Wright Line* standard to address all cases where employees are alleged to have engaged in abusive conduct in connection with protected activity. *Wright Line* utilizes a burden-shifting framework, under which the NLRB General Counsel (GC) must first establish that the employee's protected conduct was a substantial or motivating factor in the disciplinary decision. If the GC meets that burden, the employer must then prove that it would have taken the same action absent the employee's protected activity. Pursuant to *General Motors*,

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

the Board thereafter applied a single, consistent standard to assess employer decisions to discipline employees who engaged in misconduct while arguably engaged in protected activity.

But then in 2023, in *Lion Elastomers, LLC,* the Board announced a return to the pre-2020 "setting-specific" standard, as discussed in our May 5, 2023 E-Lert. Under this more lenient standard for misconduct, an employer will have violated the NLRA where the Board has determined that the conduct for which the employee was disciplined was "insufficiently serious" to lose the NLRA's protection.

The Board's Decision. In *Intertape Polymer Corp.,* both an employee and union steward became involved in a heated discussion with the supervisor over how the supervisor handled a malfunctioning machine. Both were suspended after the union steward refused the supervisor's directive to return to work. Applying the *Atlantic Steel* factors, the Board determined that neither the employee nor the union steward lost the protection of the Act.

As to the place of discussion, the heated discussion began on a loud shop floor and continued in the supervisor's office, so that no other employees heard the discussion or had their work disrupted. This argues in favor of protection.

As for the subject matter of the discussion, the employee requested the assistance of the union representative and they discussed a potential grievance over the supervisor's departure from past practice (in handling the malfunctioning machine) and a safety concern that potentially violated the collective bargaining agreement, followed by a discussion between the union steward and the supervisor regarding the employee's suspension. The Board asserted that "such discussions are especially important to the effectiveness of contractual grievance-arbitration mechanisms and are therefore protected as a critical aspect of collective bargaining under the Act, even when the technical procedures of the grievance arbitration mechanism are not followed."

With regard to the nature of the outburst, although disrespectful, the employee did not engage in violent or threatening behavior or use abusive language, and was therefore deemed not sufficiently "opprobrious or extreme" so as to lose protection. And although the union steward's conduct was more combative, he did not use physically threatening or intimidating statements and had no history of violent or threatening behavior, and the Board stated that "the Act clearly protects such conduct by an employee-representative in the course of dealing with the employer on behalf of employees."

And finally, as to whether the outburst was provoked by an unfair labor practice, the Board concluded that the employee's outburst was not, but the union steward's outburst – which was connected to the employee's suspension – clearly was. Thus, on balance, the factors favored a finding of protection for both the employee and union steward.

Lessons for Employers. It is important for employers to educate their supervisors and managers that they may not necessarily be able to discipline employees for insubordination, if it is connected to protected concerted activity. Supervisors and managers must be trained on how to recognize protected concerted activity (which can come in many forms and about many issues), and how to remain calm and disengaged in the face of such conduct. Unfortunately, a supervisor's or manager's normal and understandable reaction to insubordination (e.g. an angry response and/or discipline) may violate the law.

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

TAKE NOTE

Employers Must Take Reasonable Steps to Stop Harassment by Third Parties. A recent case from the U.S. Court of Appeals for the Second Circuit reminds employers that they must do more than the bare minimum to protect their employees from outside harassment.

In *Riggins v. Town of Berlin*, the Town Planner was subjected to years of harassment by a Town resident and local building contractor, who had sent various letters to the Town Manager, Mayor, other Town officials, and media outlets, accusing the Town Planner of substance abuse problems and inappropriate sexual conduct. In response, the Town officials (without consulting an employment attorney) took some steps, including having the police investigate to determine if there were any criminal violations (there were not), and instructing the contractor's then-attorney that the inappropriate communications must stop. Because the contractor continued, the Town Planner finally resigned and sued the Town for failing to protect her from sexual harassment. The federal district court dismissed her claims, finding that the Town had taken appropriate remedial action to protect her.

The Second Circuit, however, disagreed, stating that, "Although there is no dispute that the Town took *some* action in response to [the contractor's] conduct, … we find that there is evidence in the record from which a reasonable jury could conclude that those actions were not sufficient in light of the circumstances." For example, the Town never directly told the contractor to stop the communications, and it failed to determine if there were steps other than criminal prosecution (including civil litigation) that it could take to stop them. Also, the Town also did not consult an employment attorney about the situation for years, and it failed to investigate whether the contractor's actions constituted harassment in violation of Title VII or state law until after the Town Planner's resignation. And while the Town could not control the contractor, it did have control over its workplace, including the email system over which the contractor sent many of his communications. All in all, the Second Circuit found that a reasonable jury could find the Town's responses to the Town Planner's complaints were not appropriate.

There are several lessons for employers here. While certainly telling a third party to stop the harassing behavior is the usual first and necessary step, more may be required if the harassment continues. Employers should think broadly and creatively about ways to stop the harassment. And for goodness' sake, they should consult their employment attorney immediately!

Service Dog Might Not Be a Reasonable Accommodation. The U.S. Court of Appeals for the Eighth Circuit does not appear to be a fan of service animals in the workplace. Following last year's decision, in which it rejected a train conductor's accommodation request to bring his dog to work to mitigate his PTSD and migraines, as discussed in our March 2023 E- Update, the Eighth Circuit has doubled down on the principle that service dogs, who provide the same assistance whether at or away from work, are not a benefit or privilege of employment to which an employee is entitled under the Americans with Disabilities Act.

In *Howard v. City of Sedalia, Missouri,* a pharmacist with diabetes sought to bring a new service dog, who could detect an impending blood sugar drop, to the pharmacy for a six-month training period, after which she would not need to bring it to work. Her request was denied because of the risk of contamination, and she resigned. She refused to reconsider her resignation, even though her

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

employer offered to have a third party evaluate the risks of having a service animal in the pharmacy. She sued, and a jury awarded her over $100,000 in damages.

On appeal, however, the Eighth Circuit overturned the jury verdict. Under the ADA, absent an undue hardship, employers must provide reasonable accommodations not only to enable employees with disabilities to perform the essential functions of their job, but also to enjoy equal benefits and privileges of employment as non-disabled employees. In this case, the employee was capable of performing her essential job functions without the dog, so the only issue was whether the dog provided her access to equal benefits and privileges of employment. However, the only benefit the pharmacist identified was to improve her job performance – but the Eighth Circuit had held in the earlier case that the "benefits and privileges of employment" refers only to employer-provided services. Moreover, as the Eighth Circuit noted, the ADA regulations state that an employer is not required to provide as an accommodation a personal item that assists the employee both on and off the job, which is what the service dog does. (We caution, however, that the Eighth Circuit's position on the service as a personal item is one that may not be shared in other Circuits).

This case, like the earlier one, reminds employers that the reasonable accommodation obligation is not just limited to situations involving an employee's essential job functions. But it also highlights that the obligation is limited to employer-provided services and facilities and, further, that employers may not need to provide an accommodation if such accommodation assists the employee outside as well as at the workplace.

Improving Benefits May Violate the NLRA. No good deed goes unpunished, so the saying goes, and improving benefits for employees in the context of a union organizing campaign can land the employer in exceedingly hot water, as shown in a recent case from the National Labor Relations Board.

In *NP Red Rock LLC dba Red Rock Casino Resort Spa*, the employer won a union election but was then charged with multiple violations of the National Labor Relations Act, including coercive conduct intended to discourage employees from voting for the union. Among the charges was the contention that the employer made promises, announcements or grants of benefits during the organizing campaign.

The NLRA provides that the grant of benefits during an organizing campaign can be unlawful, depending on the motive. If the reason is to dissuade employees from joining the union, it is unlawful. The Board will infer improper motive when an employer grants benefits without showing a legitimate business reason. And "[t]o rebut this inference, the employer has the burden to show that it would have taken the same action, at the same time, even if there had been no union activity." And in this case, the Board determined that the company could not make that showing. The Board focused on the fact that the employer knew of the unionization efforts, and that union issues were central in the discussion of hiring someone to improve its human resources policies. Moreover, the employer was actively opposing the union campaign, while the benefits it ultimately offered were "unprecedented" and formulated following review of the union's contracts at other, unionized properties. There were also communications by and among leadership that documented the purpose of counteracting the union's campaign. Finally, the timing of the announcement – a mere week before the election, was problematic.

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

In this case, the punishment was severe – the Board ordered the employer to engage in bargaining with the union, even though the union had lost the election. This is known as a *Cemex* order, arising from a groundbreaking decision that we discussed in our August 28, 2023 E-lert. Thus, employers who are facing a union campaign must be extremely careful – and work with experienced labor counsel – about what benefits changes it will make during that period and the timing of any such announcement.

But Blaming a Delay in Raises on the Union Is Also Unlawful. As discussed elsewhere in this E-Update, an employer may violate the National Labor Relations Act by granting benefits under certain circumstances. But on the flip side, the employer may also violate the NLRA when it blames delays in benefits on the union.

In *Garten Trucking Lc*, the union lost an election but filed unfair labor practice charges alleging that the employer engaged in unlawful conduct that affected the election results. While those charges were being litigated before an Administrative Law Judge, the union distributed a flyer to the company's employees, asserting that the union would help achieve raises for all union members. The employer posted a response, accusing the union of lying and stating, "As a matter of fact if it wasn't for [the union organizers] trying to steal money out of your paychecks you would already have your raises."

The National Labor Relations Board found the employer's statement to be unlawful. Employers are prohibited from interfering with or coercing employees in the exercise of their rights under the NLRA, including their right to organize. The Board evaluates whether the employer's conduct has a "reasonable tendency" to interfere with, restrain or coerce such activities. In this case, the Board found a clear violation of the NLRA because the employer blamed the union for the lack of raises – in effect, the employer "told employees they were paying a price for their union activities."

Building upon the lesson from our other article, employers in the throes of a union campaign must be extremely careful about what they say and do about employment raises and benefits. The decision to grant or delay such raises and benefits must be for legitimate (and provable) business reasons unrelated to the union activity itself, and should be made in consultation with experienced labor counsel.

The FMLA Does Have Limits... In finding that an unmarried partner of a birth parent was not entitled to leave under the Family and Medical Leave Act prior to the child's birth, the U.S. Court of Appeals for the Eleventh Circuit stated, "We have little doubt that some people and families who would benefit from FMLA leave are denied its benefits because its reach and scope is limited."

In *Tanner v. Stryker Corp. of Michigan*, an employee was terminated for attendance violations after traveling to another state to be with his girlfriend in the weeks before she gave birth. He argued that his leave should have been protected under the FMLA, which provides up to 12 weeks of unpaid leave in a 12-month period for specific family and medical reasons, including "because of the birth of a son or daughter of the employee and in order to care for such son or daughter."

The Eleventh Circuit noted that the FMLA does provide protected leave before a child is born – but only where an expectant mother requires it for prenatal care or because of her pregnancy-related inability to work, or where the employee must care for their pregnant spouse. Similarly, the FMLA allows adoptive and foster parents to take pre-placement leave where required for the placement to

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

proceed, such as for mandatory counseling sessions, court appearances, meetings with attorneys, or adoption-related travel. What the FMLA does not provide, however, is pre-birth leave for a non-pregnant, unmarried individual to await their child's birth.

But employers should recall that, while the FMLA only covers leave to care for immediate family members – meaning spouse, parent, and child under the age of 18 (unless disabled and unable to care for themselves) – there may be applicable state and local laws, including sick leave and paid family and medical leave, that may provide additional protections to care for extended family members, including domestic partners and household members.

On-Call Time: Engaged to Wait or Waiting to Be Engaged? For employers with on-call employees, a recent case from the U.S. Court of Appeals for the Tenth Circuit offers a good reminder of the rules regarding the compensability of on-call time under the Fair Labor Standards Act.

In *Barnes v. Omnicell*, a medication device company's customer contracts required it to have a technical service engineer (TSE) make initial contact within an hour of a service request, with an on-site visit to follow within 6 hours for urgent issues, and up to several days later for non-urgent ones. The TSE here was paid for a 40-hour week, covering 5 8-hour days, plus overtime. When he was not working his regular workweek, he was on call, during which he was free to spend his time as he wished, as long as he could respond to calls within one hour. The TSE filed suit, seeking unpaid wages of more than $2 million, alleging that "he was on duty 24 hours per day, 7 days per week."

As the Tenth Circuit reminds us, whether waiting time is compensable time worked under the FLSA depends on the circumstances. The test for compensability – whether the employee is engaged to wait (compensable) or waiting to be engaged (non-compensable) – considers factors including the agreement between the employer and employee, the nature and extent of the restrictions, and the relationship between the services rendered and the on-call time. An employee is engaged to wait where waiting is an integral part of the job – such as when the employee must remain on the employer's premises or their time is so restricted that it interferes with their personal pursuits. On the other hand, an employee is waiting to be engaged where they are completely relieved from duty and the time is sufficient for them to use it effectively for their own purposes. Another way of looking at it is whether the on-call time is spent primarily for the benefit of the employer or the employee.

In this case, the Tenth Circuit found that the employee was not entitled to be paid for his on-call time – he could engage in personal activities, he was not required to remain on the premises, the frequency of calls was not unduly restrictive, and he was not typically required to conduct immediate on-site visits, but could do much of the work over the telephone. Although his time may have been somewhat restricted, those restrictions were not so significant to consider the time as being spent predominantly for the employer's benefit.

Employers with on-call employees should review the rules carefully – and consult with employment counsel – to ensure that they are properly compensating their employees.

Mid-Atlantic Employers – There Are Minimum Wage Increases in D.C. and Montgomery County (MD). Employers with employees in the District of Columbia and Montgomery County, Maryland should be aware that the minimum wage rate is increasing as of July 1, 2024. As discussed

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

in our December 2023 E-Update, increases in Maryland, Howard County, New Jersey, Delaware, and Virginia, as well as for federal contractors, took effect on January 1, 2024.

- **Montgomery County, Maryland**: $17.15 per hour for employers with more than 50 employees and $15.50 for those with 11-50 employees. The wage rate remains at $15.00 for the smallest employers. The tipped employee rate is still $4.00 per hour. Our November 30, 2017 E-Update provides more detail on this law. The required poster is available here.

- **District of Columbia**: $17.50 per hour, with a tipped wage rate of $10.00 per hour. The required poster is available here.

Federal Contractor Update – Audit List, Mega Construction Designees, VEVRAA Resources. The U.S. Department of Labor and its Office of Federal Contract Compliance Programs announced several matters of significance to federal contractors and subcontractors this month. These include the following:

- CSAL (Corporate Scheduling Announcement List). The OFCCP has posted its most recent list of upcoming audits of supply and service contractors on its Scheduling List Resources webpage. OFCCP audit Scheduling Letters are already being sent out, and once a contractor receives a letter, it will have 30 days in which to provide the requested information, which will be extensive. We recommend that those on the list take steps now to ensure that they are ready to submit the required information and that they have taken other appropriate actions to demonstrate compliance with the relevant requirements.

- New Mega Construction Designees. As discussed in our March 2023 E-Update, the OFCCP has launched a new initiative focused on construction. The agency has designated certain Bipartisan Infrastructure Law-funded contracts, valued at $35 million or more and lasting at least one year, as Megaprojects. Recently, it added more projects to its list, which may be found on its Scheduling List Resources webpage. These projects receive compliance assistance from the OFCCP with regard to recruitment, hiring, and employment practices and, of more concern, are subject to compliance reviews of the contractors' anti-discrimination and EEO practices.

- New Resources to Support Hiring and Retention of Veterans. As discussed in our March 2024 E-Update, earlier this year, the OFCCP created a new Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) webpage with resources to assist federal contractors and subcontractors to comply with their obligations under the law. This month, the OFCCP announced that it had added new resources to the page, including a sample Affirmative Action Program and information on how to use the hiring benchmark effectively to monitor veteran hiring and recruitment efforts.

NEWS AND EVENTS

Summer Associates – Shawe Rosenthal LLP is pleased to welcome our 2024 Summer Associates to the firm:

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

- **Emily Sedlak** is a Dean's Law Scholar at The University of Maryland Francis King Carey School of Law, where she is an Associate Editor for the Journal of Health Care Law & Policy, President of the Alternative Dispute Resolution Team, and President of the Carey Law Women's Bar Association. She is a magna cum laude graduate of Wake Forest University where she earned her BA in Political Science & International Affairs and Communication. Emily most recently worked as a Law Clerk for the National Labor Relations Board, and previously worked as a Law Clerk for the Maryland Office of the Attorney General, State Treasury Department.

- **William A. Shorter, Jr.** is a Thurgood Marshall Scholar at The George Washington University Law School, where he is on the Moot Court Board, and recently won 1st Place Team and Best Brief in the 2024 Rothwell Constitutional Law Moot Court Competition. He is a cum laude graduate and Helen P. Denit Honors Scholar of The University of Baltimore. Will also earned his Masters degree in Public Policy from The University of Maryland, College-Park. Will most recently worked as the Deputy Chief of Staff to Maryland General Assembly Office of House Judiciary Committee Chair Luke Clippinger, and previously worked as an Operations Analyst for Morgan Stanley.

Honor – Fiona Ong was named to the Daily Record's 2024 Employment Law Power List, which recognizes 25 of the most influential and respected employment attorneys in Maryland, as selected by the publication's editorial leadership team. (Subscription may be required for access).

Victory – Teresa Teare and Courtney Amelung won summary judgment for an insurance company on an employee's lawsuit alleging discrimination, constructive discharge, hostile work environment, and retaliation. The federal judge agreed that there had been no violation of any law, and that the employee's concerns were simply normal workplace grievances.

Webinar - On June 18, 2024, Mark Swerdlin and Teresa Teare presented a webinar, "2024 Final FLSA Overtime Regulations." Mark and Teresa helped employers understand their obligations under the law and these new regulations, and provided guidance and examples of how best to comply. The recording may be viewed here.

Webinar – On May 29, 2024, Teresa Teare and Jamie Salazar presented a webinar, "What to Expect from the EEOC's Pregnant Workers Fairness Act Regulations." Teresa and Jaime discussed employer obligations under these new regulations and provided guidance and examples on compliance. The recording may be viewed here.

TOP TIP: Lessons for Employers on Call-In Requirements From a Rather Troubling FMLA/ADA Decision

It is well-established that, under both the Family and Medical Leave Act and the Americans with Disabilities Act, employers may require employees to comply with normal call-in requirements, "absent unusual circumstances." Additionally, employees are required to respond to an employer's reasonable questions about a leave request and failure to do so may result in denial of FMLA leave. But a recent case from the U.S. Court of Appeals from the Sixth Circuit would apply a high standard for enforcing that requirement and offers other guidance for employers.

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

Background of the Case. In *Crispell v. FCA US, LLC*, the employee was approved for intermittent FMLA leave for mental health issues. Under employer policy, as negotiated with the union, failure to call in 30 minutes before their start time for any absence or tardiness would result in disciplinary action, unless the employee could provide an explanation for why they could not comply. Supervisors also had discretion to excuse the failure. Here, the employee received discipline for several incidents where she called in less than 30 minutes before her start. After each incident, she submitted a letter from her doctor that simply stated her "covered illness" was the reason she could not comply but, according to the employer, she refused to provide any further reason for why she failed to meet the call-in requirement. Following her termination for another tardiness event where she was 3 minutes late to work, she sued. The federal district court dismissed all of her claims.

The Court's Decision. The Sixth Circuit (with one of the three judges on the panel vehemently dissenting), however, reinstated her case, finding that there were circumstances that excused her failure to meet the call-in requirement, in that she submitted letters from her doctor that cited her illness as the reason for her non-compliance and that the employer already knew the details of her medical condition. Although the Sixth Circuit acknowledged that "additional details of [the employee's] symptoms" regarding the tardiness events in question "may have been helpful," it found that a jury could reasonably conclude that the doctor's letters were sufficient to constitute unusual circumstances that excused her failure to comply. In addition, because the employee disputed whether the employer requested additional information, this was an issue that should have been left for a jury to decide.

Lessons for Employers. Interestingly, the Sixth Circuit issued this as an "unpublished" opinion, meaning that it does not establish legal precedent for other employers and employees. Nonetheless, the Sixth Circuit's approach contains lessons for employers, including the following:

- Establish clear, written call-in procedures for when an employee will be late or absent, and state that these procedures apply when employees are calling out for FMLA or ADA reasons.

- Enforce the call-in requirements consistently. Allowing supervisors to exercise general discretion over when or how to enforce such requirements may result in findings that they are being enforced unfairly in FMLA or ADA situations. For example, here the employee was fired after being 3 minutes late, but another employee who was also 3 minutes late was not disciplined, which suggested that the employee was being treated less favorably.

- Excuse non-compliance where there are "unusual circumstances" that prevent the employee from calling-in timely. Under this case, however, the Sixth Circuit would find that providing a doctor's note vaguely explaining that the employee's condition is the reason for the inability to call in might be sufficient to constitute "unusual circumstances." It does not appear that other courts would necessarily agree, but risk-averse employers should perhaps err on the side of excusing the failure where there is at least some medical input.

- If additional information is needed to clarify whether the incident is FMLA- or ADA-covered, put the request in writing. Here, because the employer's request was only verbal, the employee could create a dispute of fact by arguing that it never happened.

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

RECENT BLOG POSTS

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

- So, A Union's Own Unionized Workers Go On Strike… by Evan Conder and Fiona Ong, June 19, 2024
- NLRB Injunctions Are Now More Difficult to Obtain, At Least in Some Jurisdictions by Evan Conder, June 13, 2024
- Three Overtime Rule Lawsuits, Three Judges – What Now? by Fiona Ong and Eric Hemmendinger, Jun 5, 2024
- Wait – the EEOC Is Really Serious About the EEO-1 Filing Requirement! by Fiona Ong, May 31, 2024

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