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HIGHLIGHTS

EEOC Updates Guidance on Employers' Use of Criminal Histories

The Equal Employment Opportunity Commission approves updated enforcement guidance on potential discrimination resulting from employers' use of individuals' arrest and conviction records to make hiring and other employment decisions. The guidance states that although Title VII of the 1964 Civil Rights Act does not bar use of criminal background checks, employers may violate Title VII if they intentionally discriminate among individuals with similar criminal histories or if their policies have a disproportionate adverse impact based on race, national origin, or other protected category, and employers cannot demonstrate ''business necessity.'' Management attorney Pamela Q. Devata tells BNA that ''employers would be wise to at least be knowledgeable about the guidance and evaluate their policies and processes regarding the use of criminal history.'' **Page 453**

Solomon Issues Guidance on Representation Case Rule Changes

National Labor Relations Board Acting General Counsel Lafe E. Solomon issues a guidance memorandum describing procedures regional offices will use to implement changes in NLRB representation case regulations. The guidance memorandum addresses an issue of timing that was frequently cited by opponents of the rulemaking proposal who contended that changes in board procedures would deprive employers and employees of reasonable time needed to respond to union representation petitions. **Page 456**

EEOC: Title VII Protects Transgender Employees From Sex Discrimination

The Equal Employment Opportunity Commission decides that Title VII of the 1964 Civil Rights Act prohibits discrimination against an employee because of transgender status. It finds that the term ''sex'' under Title VII encompasses both biological sex and gender stereotypes. **Page 459**

Justices Hear Arguments Over Arizona's Controversial Immigration Law

In an oral argument before the U.S. Supreme Court, a lawyer for the state of Arizona argues that the state's controversial immigration statute represents a legitimate effort to supplement inadequate federal law enforcement efforts, but the solicitor general of the United States responds that Arizona improperly is attempting to develop its own immigration policy without regard to the authority and priorities of the federal government. **Page 456**

Retaliation Cases: A Growing and Important Field of Employment Law

Record-high numbers of retaliation charges filed with the Equal Employment Opportunity Commission—combined with the U.S. Supreme Court's demonstrated receptiveness to such claims—indicate that employers should take note of developments in this significant area of employment law, former National Labor Relations Board chief counsel Harold J. Datz says in the latest BNA Insights article. **Page 473**

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Lead Report

Background Checks

EEOC Updates Enforcement Guidance On Employers' Use of Criminal Histories

The Equal Employment Opportunity Commission April 25 approved updated enforcement guidance on potential discrimination resulting from employers' use of individuals' arrest and conviction records to make hiring and other employment decisions.

By a 4-1 vote, EEOC cleared a document stating that although Title VII of the 1964 Civil Rights Act does not bar use of criminal background checks, employers may violate Title VII if they intentionally discriminate among individuals with similar criminal histories or if their policies have a disproportionate adverse impact based on race, national origin, or other protected category, and employers cannot demonstrate ''business necessity.''

''[E]mployers would be wise to at least be knowledgeable about the guidance and evaluate their policies and processes regarding the use of criminal history,'' management attorney Pamela Q. Devata told BNA.

The new guidance updates and consolidates existing EEOC documents on the subject, which had not been revised since 1990. During the past few years, EEOC held two public meetings examining the potential hiring barriers, mainly for black and Hispanic men, resulting from employers' exclusion of those with criminal records (26 HRR 1313, 12/1/08; 29 HRR 821, 8/1/11).

Management attorneys contacted by BNA said that employers will need to re-examine their background screening practices in light of the new guidance.

''It's not binding guidance, however, employers would be wise to at least be knowledgeable about the guidance and evaluate their policies and processes regarding the use of criminal history,'' Pamela Q. Devata, a partner in the Chicago office of Seyfarth Shaw and a member of the firm's Labor and Employment practice group, told BNA April 26. ''It's clear the EEOC guidance is going to inform EEOC investigators and may give rise to a larger number of investigations based on the use of criminal history.''

San Francisco-based attorney Rod M. Fliegel, a Littler Mendelson shareholder and co-chair of the firm's Hiring and Background Checks practice group, told BNA April 26, ''If an employer uses criminal records in the screening process for applicants or during employment it will at least want to consider how its policies and procedures align with [the new guidance].''

Concern Over Individualized Assessment. Devata said EEOC's view that a criminal background screen that does not include individualized assessment is more likely to violate Title VII could prove problematic for employers.

The biggest concern for employers, Devata said, is that conducting an individualized assessment is ''tremendously burdensome and logistically difficult.''

It essentially means ''talking to the applicant and giving the applicant or employee the opportunity to provide additional evidence and/or do their own investigation,'' she said.

Devata also noted that employers must now limit the amount of information they seek about arrest and conviction records.

''That is an absolute sea change from what most people do right now,'' she said. ''Current practice for many employers is to request any and all criminal history they can legally obtain and do an analysis of that information.

''What the EEOC guidance seems to say is employers should only request information that is job-related, so they are getting less information in the first place,'' Devata said. ''Practically speaking, that is going to be challenging to do on a position-by-position basis.''

Based on the updated guidance, Fliegel recommended that human resources practitioners ''find the subject matter expert on the company's background check program and review with the expert how the program compares to the specifics of the EEOC's guidance.''

Employers may want to look at ''how the screening program is configured,'' Fliegel said. For example, he said, employers could defer consideration of criminal records until other records, like employment history or driving records, are examined.

Barker Casts Sole Dissent. EEOC Chair Jacqueline Berrien (D) said at the April 25 public meeting to vote on the guidance, ''The new guidance clarifies and updates the EEOC's long-standing policy concerning the use of arrest and conviction records in employment, which will assist job seekers, employees, employers, and many other agency stakeholders.''

EEOC Commissioner Constance Barker (R), who cast the sole vote against the guidance, objected to ''the utter and blatant lack of transparency'' in EEOC's process for approving a draft guidance without making its proposal available for public comment or Office of Management and Budget review.

Barker also contended the new guidance ''obviously exceeds our authority as an enforcement agency'' because it places obligations on employers not required by Title VII. ''I'm afraid the only real impact the guidance will have will be to scare business owners from ever conducting criminal background checks,'' she

said. ''Thus, the unintended consequence will be that even those business owners who we all agree should conduct criminal background checks simply will not.''

As it became clear this year that EEOC was poised to issue revised guidance, some employer representatives and at least one Republican senator objected to what they called EEOC's ''closed-door'' process and expressed concern EEOC could unduly restrict employers' ability to conduct necessary background checks, particularly for jobs affecting public safety (30 HRR 371, 4/9/12).

No 'Huge Changes' in EEOC Stance, Backers Say. But EEOC Commissioner Stuart Ishimaru (D) said the new guidance contains ''nothing new'' in terms of EEOC's policy regarding employers' use of arrest and conviction records but rather fleshes out the commission's views given technological changes in hiring and employment, employers' increasing use of background checks, and statutory and case law developments.

In its 2007 decision in *El v. SEPTA* (479 F.3d 232, 100 FEP Cases 195 (2007)), the U.S. Court of Appeals for the Third Circuit faulted EEOC's prior guidance for ''insufficient legal analysis'' and factual background to guide employers on how to use criminal background information, Commissioner Chai Feldblum (D) said.

The updated guidance fills in the blanks regarding EEOC's legal analysis and factual support while not making ''any huge changes'' in EEOC's view of how Title VII impacts employers' use of arrest and conviction records, Feldblum said.

Responding to Barker, Feldblum defended EEOC's process in developing the updated guidance, saying that after a draft was circulated Feldblum and EEOC Commissioner Victoria Lipnic (R) jointly met with stakeholders that requested meetings on the topic. ''I do not believe at all that the public was shut out'' from EEOC's deliberations, Feldblum said.

Commissioners voting for the guidance emphasized research indicates that if current incarceration rates persist, one in six Hispanic men and one in three black men will spend some time in prison during their lives, compared with one in 17 white men.

Berrien said EEOC took into account more than 300 comments it received after its July 2011 meeting on use of arrest and conviction records and that the proposed guidance built upon ''long-standing'' court decisions and EEOC's 1987 and 1990 documents on the subject.

The revised guidance, which does not ban criminal background checks but rather advises employers that their use of such information may violate Title VII under particular circumstances, ''is not a departure, either in law or in fact,'' Berrien said.

Chair Berrien and Commissioners Ishimaru, Feldblum, and Lipnic voted to approve the guidance. EEOC also issued a question-and-answer sheet regarding Title VII and employers' use of arrest and conviction records.

ADA Item Removed From Agenda. EEOC's original April 25 meeting agenda included a potential vote on a proposal to update its Americans with Disabilities Act guidance regarding reasonable accommodation and undue hardship. In particular, EEOC recently has been considering the issue of leave as a reasonable accommodation, which is not specifically addressed in its existing guidance (29 HRR 623, 6/13/11).

But the final agenda released April 25 included only the guidance on employers' use of arrest and conviction records. Feldblum said at the meeting that updated ADA guidance remains ''critical'' and that additional time will allow EEOC to answer questions and develop ''the most effective and workable guidance'' possible.

Stakeholders' Reaction to Guidance. Employer representatives April 25 said the approved EEOC guidance was an improvement over earlier versions but they were still troubled about certain aspects, including EEOC's view that employers must conduct ''individualized assessments'' and that employers' compliance with state or local law is not necessarily a defense to Title VII liability.

The National Retail Federation is ''pleased [EEOC] took time to listen to the retail industry'' but ''still very much concerned that the guidelines recommend 'banning the box' on job applications and restrict employ-

Employer Best Practices

EEOC suggested in the ''Employer Best Practices'' section of the updated guidance that organizations:

- Eliminate policies or practices that exclude individuals from being hired based on any criminal record.
- Train managers, hiring officials, and other decisionmakers about Title VII and its prohibition against employment discrimination.
- Create a narrowly tailored written policy and procedure for screening job applicants and employees for criminal conduct.
- Identify essential job requirements and the actual circumstances under which work duties are performed.
- Determine the specific offenses that might demonstrate unfitness for performing such jobs.
- Identify the criminal offenses based on all available evidence.
- Determine the duration of exclusions for criminal conduct based on all available evidence.
- Record the justification for the policy and procedures.
- Note and keep a record of consultations and research considered in crafting the policy and procedures.
- When asking questions about criminal records, limit inquiries to records for which exclusion would be job-related for the position in question and consistent with business necessity.
- Keep information about applicants' and employees' criminal records confidential, and only use it for the purpose for which it was intended.

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ers' ability to ensure the safety of their workers and customers,'' said David French, NRF's senior vice president for government relations. ''NRF will continue to hold conversations with [EEOC], stakeholders, and other business organizations on the importance of background checks.''

French's ''banning the box'' comment refers to some advocates' suggestion that employers should remove the standard question about prior criminal convictions or arrests from employment applications.

The retail federation noted that although EEOC's guidance does not ''call for a complete ban'' on criminal background screening, it does recommend employers not ask applicants about criminal convictions on their job applications.

Garen Dodge, a management lawyer for Jackson Lewis in Reston, Va., told BNA that on balance, EEOC's final product was better than earlier drafts.

Dodge added, however, the guidance imposes a new obligation on employers to engage in ''individualized assessments'' regarding applicants with criminal convictions, even though that is not required by Title VII and makes little sense in some contexts. ''Is it good public policy to demand that a day care center sit down with a convicted child molester who has applied for a job and allow him to explain the circumstances of the conviction?'' he asked.

Dodge said it is problematic that EEOC takes the position its guidance would preempt state or local laws that ''conflict'' with the guidance. An employer that follows a state or local law requiring it to not hire an applicant with a felony conviction for a particular job therefore may still run afoul of Title VII in EEOC's view, he said.

Meanwhile, a spokesman for the Fortune Society, a New York-based nonprofit advocacy group for ex-offenders, hailed EEOC's action as a welcome step forward. The labor market is ''a totally different place'' in terms of technology and employer access to personal background information than in 1990, when EEOC last issued guidance, said Glenn Martin, the organization's vice president of public policy.

As more small and medium-sized employers obtain criminal background information, they need guidance on how to ''make the right decision'' on using that information, Martin told BNA. EEOC's updated guidance not only helps build ''a level playing field'' for ex-offenders seeking employment but also will expand the labor pool of qualified workers for employers that follow the guidance, Martin said.

BY KEVIN P. MCGOWAN AND RHONDA SMITH

Text of EEOC's enforcement guidance is available at http://op.bna.com/dlrcases.nsf/r?Open=kmgn-8tpnv9. EEOC's question and answer sheet is available at http://op.bna.com/dlrcases.nsf/r?Open=kmgn-8tppup.

News

Union Organizing

Solomon Issues Guidance Memorandum On NLRB's Representation Case Rule Changes

National Labor Relations Board Acting General Counsel Lafe E. Solomon issued a guidance memorandum (Memorandum GC-04) April 26 describing procedures regional offices will use to implement changes in NLRB representation case regulations that are set to take effect April 30.

Stating that adoption of the procedures ''will enhance our efficiency and provide more field-wide uniformity and predictability in the processing of representation cases,'' the acting general counsel expressed hope that the rule changes adopted by the board in December 2011 ''will save time and resources for both Agency staff and the parties who appear before the Board.''

NLRB supplemented Solomon's memorandum by posting on its website answers to frequently asked questions about the new rule provisions.

Rule Changes Survived Congressional Challenge. After holding a two-day public meeting in July 2011 (29 HRR 791, 7/25/11) and receiving more than 65,000 comments on a rulemaking proposal, NLRB members voted 2-1 to approve representation case rule changes, which were published in the *Federal Register* Dec. 21, 2011 (76 Fed. Reg. 80,138; 29 HRR 1379, 12/26/11).

Senate and House Republicans introduced resolutions under the Congressional Review Act, disapproving the NLRB regulatory action and attempting to block it from taking effect, but the effort was defeated April 24 when the Senate voted 54-45 not to proceed to final action on the resolution.

Enzi Attacks Amendments. Sen. Mike Enzi (R-Wyo.), who introduced the resolution in February, repeatedly attacked NLRB's regulatory amendments as an ''ambush election rule'' during the April 24 Senate debate.

Enzi said the NLRB rule change was a rushed attempt to ''stack the odds'' in favor of organized labor by adopting rule changes he said were ''not a response to a real problem.''

NLRB recently reported conducting representation elections in a median time of 38 days, Enzi said. He argued there was ''simply no justification'' for rule changes that he claimed were intended to move petitions for representation elections to a vote in ''as little as 10 days.''

Statistics show that unions recently have won more than 70 percent of the elections in which they participated, Enzi said. He argued that the board's existing regulations did not need to be revised.

A federal court in Washington, D.C., meanwhile, is still considering a challenge to the rule filed by the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace (*Chamber of Commerce v. NLRB*, D.D.C., No. 11-cv-2262), but the court has not indicated when it may rule in the lawsuit.

Changes in Amended Regulations. The amended NLRB regulations will make the following changes, which will be applied to representation case petitions filed with the agency on or after April 30:

- amend board regulations to state that the purpose of pre-election hearings described in Section 9(c) of the National Labor Relations Act is to determine whether a question concerning union representation exists that should be resolved in a secret ballot election;
- give NLRB hearing officers authority to limit hearings to genuine issues of fact material to the existence of a question concerning representation;
- provide for post-hearing briefs only if permitted by a hearing officer;
- amend the board's rules to eliminate parties' right to seek board review of regional directors' pre-election rulings while allowing parties to seek post-election review;
- eliminate language in NLRB's current statement of procedure that recommends a regional director not schedule balloting within 25 days of directing an election;
- amend the board's rules to provide that requests for special permission to appeal a regional director's pre-election ruling will be granted only in extraordinary circumstances; and
- amend board rules to make NLRB review of post-election disputes discretionary.

BY LAWRENCE E. DUBÉ

Text of the memorandum is available at http://op.bna.com/dlrcases.nsf/r?Open=ldue-8tqpty. The board's FAQ page is available at http://www.nlrb.gov/faq/election-procedures.

Immigration

Arizona, Federal Government Argue Cases, As Justices Consider State's Immigration Law

In an oral argument before the U.S. Supreme Court April 25, a lawyer for the state of Arizona argued that the state's controversial immigration statute represents a legitimate effort to supplement inadequate federal law enforcement efforts, but the solicitor general of the United States responded that Arizona improperly is attempting to develop its own immigration policy without regard to the authority and priorities of the federal government (*Arizona v. United States*, U.S., No. 11-182, *oral argument* 4/25/12).

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The state's lawyer, Paul D. Clement of Bancroft PLLC in Washington, D.C., defended a provision in Arizona's S.B. 1070 that makes it a crime for an unauthorized immigrant to perform work or even apply for work. Clement acknowledged that the state law allows sanctioning workers for conduct that is not prohibited by the Immigration Reform and Control Act, but he stressed the Arizona statute applies only to individuals who lack authorization under federal law to hold employment.

Solicitor General Donald B. Verrilli, who faced sharp questioning by several justices on nonemployment provisions of S.B. 1070, argued that IRCA ''fundamentally changed the landscape'' of federal immigration law. Congress rejected the idea of punishing immigrants for seeking work, Verrilli said, and he told the court it was ''incomprehensible'' that Congress intended to leave the states free to adopt their own prohibitions on such conduct.

Injunction of Provisions Upheld. The federal government filed a lawsuit challenging the Arizona measure soon after its enactment, and the U.S. District Court for the District of Arizona issued a preliminary injunction that blocked enforcement of four of the act's provisions (703 F. Supp. 2d 980, 30 IER Cases 1633, 2010 BL 175456 (D. Ariz. 2010); 28 HRR 819, 8/2/10).

The U.S. Court of Appeals for the Ninth Circuit, in a 2-1 decision, upheld the lower court injunction (641 F.3d 339, 2011 BL 98328 (9th Cir. 2011); 29 HRR 398, 4/18/11), and the Supreme Court granted the state's petition for review on Dec. 12, 2011 (29 HRR 1351, 12/19/11).

Employment and Other Provisions at Issue. The four provisions covered by the preliminary injunction and now at issue before the high court include two provisions concerning questioning and arrests by law enforcement authorities, as well as one provision that makes it a criminal offense under state law for an individual to fail to register as an alien and carry registration documents required by federal law.

The Arizona act also contains an employment provision, Section 5(C), now codified at Ariz. Rev. Stat. § 13-2928(C). Section 5(C) makes it a misdemeanor for ''a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.''

The Arizona provision defines an ''unauthorized alien'' to mean an alien ''who does not have the legal right or authorization under federal law to work in the United States'' as described in a provision of the Immigration and Nationality Act.

Arizona Brief Defends Right of State Action. Clement and a team of lawyers wrote in a brief submitted to the justices before the oral argument that ''S.B. 1070 is fully consistent with Congress' policies and it is simply an attempt by the State . . . to add its own resources to federal ones in enforcing the precise legal rules, and using many of the procedures, prescribed by Congress.''

Addressing Section 5(C) in particular, the brief argued that the federal Immigration Reform and Control Act made it unlawful for American employers to employ unauthorized immigrants, ''but IRCA conspicuously did not impose federal penalties, or preempt any state penalties, on aliens who work without authorization.''

Arizona contended in the brief that the Ninth Circuit misread IRCA as indicating that Congress intended to prohibit states from criminalizing work in the United States by unauthorized aliens. ''That conclusion,'' the state wrote, ''attributes to Congress a remarkably counterintuitive intent—namely, not only to focus its resources on employers who make illegal hires, but to leave those who unlawfully seek employment entirely immune.''

The state acknowledged that the text and legislative history of IRCA show that Congress made a choice not

Information Technology

Long Hours, Meager Support Can Overload Circuits of IT Workers

Almost 70 percent of IT administrators consider their jobs stressful and about the same number (67 percent) occasionally think about a career change due to job stress, according to a survey released April 19 by GFI Software.

Lack of management support was the biggest stress-causing factor (cited by 28 percent), followed by tight deadlines (20 percent). The third most stressful thing about the IT department's job, unfortunately, is the rest of us, mainly due to non-IT employees' basic knowledge. For example, some workers repeatedly download the same malware, opening the door to system viruses, according to GFI. Computers are also frequently impaired when workers inadvertently spill beverages on them, the survey said. Other times, an employee complains that a computer has no power—and the responding IT specialist discovers that the machine is not plugged in.

The excessive demands and limited resources also mean that nearly one-third of IT administrators (30 percent) work the equivalent of 10 weeks of overtime annually, according to GFI.

Phil Bousfield, general manager of GFI Software's Infrastructure Business Unit, told BNA April 24 that in spite of the fact that IT is a critical component of a company's success, many do not always provide their IT administrators with the resources they need to work at peak efficiency. ''Organizations need to equip these teams with the right tools to help automate IT processes and make their jobs easier,'' he said.

The survey, which polled 204 IT administrators, was released between National Stress Awareness month in April and the American Psychological Association's National Mental Health Month in May. Stress Awareness Month is sponsored by the Health Resource Network, a nonprofit health education organization. The American Psychological Association sponsors National Mental Health Month.

to impose sanctions on unauthorized alien workers. But the state said ''IRCA certainly cannot be read to reflect a congressional policy that no consequences should follow from unauthorized work by aliens,'' adding that there was no showing Congress denied state governments the ability to sanction unauthorized work.

Government Calls Federal, State Policies at Odds. But the federal government argued that the Immigration and Nationality Act established a ''comprehensive federal statutory regime for the regulation of immigration and naturalization'' with detailed provisions describing the authority of federal officials and agencies.

The solicitor general asserted in its brief that ''Arizona has adopted its own immigration policy, which focuses solely on maximum enforcement and pays no heed to the multifaceted judgments that the INA provides for the Executive Branch to make.''

Addressing the employment provision of S.B. 1070, the federal government said the state legislation criminalizes an alien's seeking, soliciting, or performing work. ''That provision is incompatible with the comprehensive federal scheme governing the employment of aliens,'' the solicitor general argued.

IRCA, ''[t]he product of a carefully negotiated compromise hammered out over several years,'' did not include penalties for unauthorized workers, and the brief argued that was ''a deliberate decision.''

''Even if IRCA left room for supplemental state measures,'' the United States argued, ''Section 5 cannot be justified under a rule of 'dual criminalization,' because it criminalizes conduct that Congress affirmatively concluded, after extensive study, *not* to make criminal.''

Arguing that Arizona's rigid scheme of penalties for employees who merely apply for or solicit work is inconsistent with the balanced immigration law principles approved by Congress, the federal government's brief argued that Section 5, along with the other challenged provisions of S.B. 1070, is preempted by federal law and was properly enjoined by the district court.

Arizona Lawyer Backs Provisions. Clement was first to address the court, with eight justices participating. Justice Elena Kagan, who served as solicitor general before her appointment to the court, was recused.

Chief Justice John G. Roberts was the first to press Clement on the issue of whether Section 5(C) is preempted by federal law.

''Now,'' Roberts said, ''that does seem to expand beyond the federal government's determination about the types of sanctions that should govern the employment relationship.''

Clement said, ''I take the premise that 5(C) does something that there is no direct analog in federal law. But that's not enough to get you to preemption, obviously.''

Clement argued that the federal immigration law contains express preemption language, but he argued ''it only addresses the employer's side of the ledger.'' The preemptive effect of federal law does not apply to employee sanctions, he argued.

But Justice Sonia Sotomayor responded, ''Well, for those of us for whom legislative history has some importance, there seems to be quite a bit of legislative history that the idea of punishing employees was raised, discussed and explicitly rejected.''

Clement argued that ''there's a big difference between Congress deciding not as a matter of federal law to address employees with an additional criminal prohibition, and saying that decision itself has a preemptive effect.''

Justice Ruth Bader Ginsburg resisted the argument that the ''supply side'' of the employment relationship—the activity of unauthorized workers—is not regulated by federal law, and therefore not preemptive of a provision like S.B. 1070's Section 5(C).

''[T]here is regulation,'' Ginsburg said, citing federal law that makes it a crime for an individual to use false documents to procure employment. ''The question is whether anything beyond that is inconsistent with federal law,'' the justice said

Clement offered two responses. First, he said, the employee conduct sanctioned under federal law are ''things that actually assist in regulating the employer's side.'' Making the use of fraudulent documents a crime reflects a concern that they may be used to trick an employer into giving work to an unauthorized individual.

Second, Clement said, ''the more that you view IRCA as actually regulating part of the employee's side, then I think the more persuasive it is that the express preemption provision doesn't reach the employee's side of the equation.''

Solicitor General Cites National Interest. Solicitor General Verrilli argued the framers of the Constitution placed authority over immigration with the federal government ''because they understood that the way this nation treats citizens of other countries is a vital aspect of our foreign relations.''

Several justices questioned the solicitor general's contention that S.B. 1070 is preempted by federal law. Justice Antonin Scalia said there are other situations in which states can constitutionally enforce federal laws.

Roberts added that he did not see how the statute ''says anything'' about the authority of the Attorney General to enforce federal law.

Verrilli argued there are ''strong indicators'' in the federal immigration legislation that Congress made a judgment about how to enforce the law.

''Congress tackled the problem of employment and made a decision, a comprehensive decision, about the sanctions it thought were appropriate to govern,'' the solicitor general said.

''It seems quite incongruous to think that Congress, having made that judgment and imposed those restrictions on the employer's side, would have left states free to impose criminal liability on employees merely for seeking work, for doing what you, I think, would expect most otherwise law-abiding people to do, which is to find a job so they can feed their families.''

Arguing that S.B. 1070 could allow Arizona to engage in ''mass incarceration'' of individuals who had not been considered a priority by federal authorities, Verrilli warned that the impact on U.S. relations with other countries could be negative.

''It would be an extraordinary thing to put someone in jail merely for seeking work,'' Verrilli said, contending ''that's what Arizona proposes to do under section 5 of its law.''

A decision in the case is expected by the end of the court's term, in late June.

BY LAWRENCE E. DUBÉ

Text of the oral argument transcript is available at http://op.bna.com/dlrcases.nsf/r?Open=ldue-8tpnpm.

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Sex Discrimination

Title VII Protects Transgender Employees From Sex Discrimination, EEOC Decides

The Equal Employment Opportunity Commission decided April 20 that Title VII of the 1964 Civil Rights Act prohibits discrimination against an employee because of transgender status (*Macy v. Holder*, EEOC, No. 0120120821, 4/20/12).

Finding that the term ''sex'' under Title VII encompasses both biological sex and gender stereotypes, EEOC concluded that transgender police detective Mia Macy's multiple allegations against the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) amount to a claim of discrimination based on sex. EEOC remanded Macy's complaint to ATF for further processing.

Denied Job During Sex Change. Macy, a police detective with ATF in Phoenix, sought to relocate in 2010. During this time, Macy was still known as a male and presented himself as a man. The Walnut Creek, Calif., director assured Macy that he could have the position assuming no problems arose during his background check.

However, after Macy informed Aspen of DC, the contractor responsible for filling the position, that he was in the process of transitioning from male to female, Aspen inform Macy that the Walnut Creek position was no longer available due to federal budget reductions.

On June 13, 2011, Macy filed a formal EEO complaint with ATF. The bureau responded that Macy's claim of discrimination ''on the basis of gender identity stereotyping'' could not be adjudicated before EEOC because it was not recognizable under Title VII.

Title VII Prohibits 'Sex Stereotyping.' EEOC said that courts have consistently interpreted Title VII's prohibition of discrimination on the basis of ''sex'' as proscribing gender discrimination. It found that this inclusion is important because ''gender'' encompasses not only a person's biological sex but also the ''cultural and social aspects associated with masculinity and femininity.''

The U.S. Supreme Court concluded in *Price Waterhouse v. Hopkins* (490 U.S. 228, 49 FEP Cases 954 (1989)) that discrimination based on ''sex stereotyping''—failing to conform with gender-based expectations—violated Title VII. In that case, the justices found that a female senior manager presented a cognizable claim for sex discrimination when her employer refused to make her a partner at least in part because she did not fulfill stereotypes for how male partners felt a woman should act.

Since *Price Waterhouse*, EEOC said, courts have applied the stereotyping theory in cases involving employees who act or appear in gender-nonconforming ways and in cases involving transgender individuals.

EEOC found that any ''gender-based evaluation'' violates the Supreme Court's admonition in *Price Waterhouse* against taking gender into account in making employment decisions.

Since a person is defined as transgender because his or her behavior is perceived to transgress gender stereotypes, EEOC said, discriminating against a transgender individual amounts to discrimination on the basis of stereotypical gender-based behavioral norms. As previous decisions have suggested, ''consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual,'' EEOC said.

Accordingly, EEOC concluded that discrimination against a transgender person because of his or her gender nonconformity is sex discrimination, whether it is described as being on the basis of sex or gender.

EEOC found that Macy's complaint of discrimination based on gender identity, change of sex, and/or transgender status presented a cognizable claim of sex discrimination under Title VII and remanded the complaint to ATF.

BY ANNE A. MARCHESSAULT

Text of the decision is available at http://op.bna.com/gr.nsf/r?Open=amat-8tnu6m.

Labor Law

Justices Deny Hospitals' Bid to Review Ruling on Workers' State Law Wage Claims

The U.S. Supreme Court April 23 declined to review a federal appeals court decision that potentially allows two named plaintiffs to pursue a class action on behalf of 12,000 employees of a hospital network alleging the employer violates Massachusetts law by not paying employees for work performed during meal breaks, before and after scheduled shifts, and during employee training sessions (*Caritas Christi v. Pruell*, U.S., No. 11-690, *cert. denied* 4/23/12

Caritas Christi, which operates six hospitals in southeastern Massachusetts, sought review of a U.S. Court of Appeals for the First Circuit decision that the state law wage and hour suit may not be preempted by the Labor-Management Relations Act.

A federal district court held the named plaintiffs' claims preempted by LMRA Section 301 because at least some of the putative class members are union-represented employees whose wage rates and working conditions are set by collective bargaining agreements subject to federal labor law.

The First Circuit, however, said that in granting Caritas's petition for removal of the case from state court to federal court and its motion to dismiss based on preemption, the district court improperly bypassed the issue of whether it had subject-matter jurisdiction. Since it was unclear whether either of the two named plaintiffs is a union-represented employee, the district court must decide that issue first and remand the plaintiffs' suit to state court if neither is union-represented because Section 301 then would not provide a basis for federal jurisdiction and preemption, the First Circuit ruled (645 F.3d 81, 191 LRRM 2027 (1st Cir. 2011)).

Petitions for, Against Review. In its petition for review, Caritas said the First Circuit decided a matter of first impression without the benefit of briefing or oral argument by the parties, namely whether a federal court lacks jurisdiction under Section 301 if named plaintiffs in a putative class action are not union-represented even though members of the proposed class are indisputably union-represented

In a brief opposing review, the named plaintiffs defended the First Circuit's ''interlocutory'' decision as a

''narrow, reasonable'' ruling that does not conflict with any decision of another circuit and presents no legal question of recurring importance.

BY KEVIN P. MCGOWAN

Safety & Health

Workplace Fatality Rate Increased in 2010; First Gain in Five Years, BLS Figures Show

The on-the-job fatality rate increased during 2010 for the first time in five years, figures released April 25 by the Bureau of Labor Statistics confirmed.

The 2010 fatality rate was 3.6 deaths for every 100,000 workers, up from 2009's record low rate of 3.5, according to the final results of the 2010 Census of Fatal Occupational Injuries. Overall, 4,690 workers lost their lives in 2010, while 4,551 died the previous year.

The highest rates recorded since BLS began the calculation in 1992 was 5, reported for each of the years 1992 through 1995.

The preliminary survey of 2011 fatalities is expected to be issued in August.

Increase Predicted. The 2010 increase was expected. When the BLS released its preliminary fatality data in August, the agency predicted the final report would show a higher rate (29 HRR 970, 9/12/11).

Since the preliminary report was published, BLS has confirmed another 143 deaths.

Assaults and violent acts were responsible for 24 newly added deaths; falls were the cause of 11 deaths.

More than half the newly listed deaths, 76 cases, resulted from highway traffic accidents, and another 15 fatalities were attributed to other transportation incidents. Overall in 2010, highway accidents took the lives of 1,044 workers, 6 percent more than in 2009, but still the second-lowest total reported by the census, BLS said. The additional deaths pushed the fatality rate for workers in transportation and material moving occupations to 14.8 per 100,000, up from 2009's 13.6.

While the construction industry experienced fewer deaths—774 in 2010 versus 834 in 2009—the fatality rate decrease was small, down by 0.1 to 9.8 for 2010, reflecting fewer jobs in the building trades.

The industry group with the highest fatality rate once again was agriculture, forestry, fishing, and hunting with a rate of 27.9 per 100,000, up from 27.2 the prior year.

BY BRUCE ROLFSEN

Text of the 2010 fatality census is available at http://www.bls.gov/iif/oshcfoi1.htm#2010.

OFCCP

OFCCP Rescinds Medical Providers Directive, Places Certain Reviews on Hold, Officials Say

The Labor Department's Office of Federal Contract Compliance Programs has rescinded a December 2010 enforcement directive that had provided guidance for determining whether a health care provider or insurer falls within OFCCP's jurisdiction as a federal contractor or subcontractor, a DOL attorney said April 25 during an OFCCP webinar.

Directive 293 provided principles and procedures addressing OFCCP's jurisdictional coverage based on a health care provider or insurer's relationship with federal health programs, or participants of such programs (29 HRR 95, 1/31/11). The rescission is effective April 25, said Consuela Pinto, an attorney in DOL's Office of the Solicitor.

Several DOL administrative decisions provided the basis of the analysis framework in Directive 293, including *OFCCP v. Florida Hospital of Orlando*. In that case, a DOL administrative law judge ruled that OFCCP has jurisdiction over a Florida hospital that provides medical services for a federal contractor that administers a network for TRICARE, the Defense Department's health care program for active and retired military members (DOL OALJ, No. 2009-OFC-0002, 10/18/10).

That case still is pending before DOL's Administrative Review Board (Case No. 11-011). Pinto said the hospital has filed a motion to dismiss in light of the Dec. 31, 2011, enactment of the National Defense Authorization Act, which states that a ''TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services or supplies'' for the purpose of determining ''whether network providers are subcontractors for purposes of the Federal Acquisition Regulation or any other law.''

Last December, OFCCP Director Patricia Shiu told BNA that the agency planned to assess how the NDAA might affect its policies and the *Florida Hospital* proceedings.

Pinto said OFCCP has filed a response to Florida Hospital's motion, and both parties have filed replies. Amicus briefs are currently being filed with ARB, she said.

Given the NDAA's enactment and the pending *Florida Hospital* case, Pinto said OFCCP determined that rescission of Directive 293 was ''warranted.''

Additionally, Pinto said OFCCP will ''put on hold'' scheduled compliance evaluations of entities over which the agency's only basis for establishing jurisdiction is their participation in TRICARE.

BY JAY-ANNE B. CASUGA

EEOC

House Committee Advances EEOC Funding Bill With Amendment Blocking ADEA Rule

The House Appropriations Committee April 26 approved, by voice vote, legislation that would fund the Equal Employment Opportunity Commission at $366.6 million for fiscal year 2013, but would block funding for implementation of a new EEOC regulation involving the Age Discrimination in Employment Act.

As part of the Commerce, Justice, Science, and Related Agencies Appropriations Act, the EEOC funding level would be $6.56 million above the FY 2012 level and $7.1 million below the president's request.

The committee approved, by voice vote, an amendment that would prohibit funding for EEOC to imple-

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ment, administer, or enforce a final rule amending its existing ADEA regulations to conform with two U.S. Supreme Court decisions that recognized ADEA disparate impact claims and put the burden on employers to prove the act's ''reasonable factors other than age'' (RFOA) defense (77 Fed. Reg. 19,080; 30 HRR 343, 4/2/12).

A spokesman for Rep. Jack Kingston (R-Ga.), who offered the amendment, said April 26 that the rule would require employers ''to take age into account when making employment decisions by considering the impact business actions may have on older employees.'' He added, ''Our concern with the new rule is that it could preclude employers from using education attainment, technical skills and health for making hiring, promoting, salary adjusting, or firing decisions.''

When EEOC issued the final rule, AARP described it as ''helpful guidance'' that will aid both workers and employers in dealing with potential age bias. EEOC's new guidelines offer a ''better chance of preventing discrimination before it happens,'' said Nancy LeaMond, AARP executive vice president in Washington, D.C., in a March 29 statement. ''But if it does, older workers will have a meaningful chance to get their day in court and prove their case.''

BY DERRICK CAIN

Text of Kingston's amendment is available at http://op.bna.com/dlrcases.nsf/r?Open=dcan-8tqrnf.

In Brief

Senate Committee Approves Whistleblower Bill

The Senate Homeland Security and Governmental Affairs Committee April 25 approved, by voice vote, legislation (S. 241) that aims to protect nonfederal employees from employer retaliation for disclosing ''gross mismanagement or waste'' of federal funds.

With little discussion, the committee advanced the Non-Federal Employee Whistleblower Protection Act to the full Senate. The bill was introduced, with two cosponsors, Jan. 31, 2011, by Sen. Claire McCaskill (D-Mo.). It would prohibit employers from discharging, demoting, or otherwise discriminating against nonfederal employees for participating in any disclosure of misuse of federal funds. The legislation would consider misuse to include gross mismanagement of an agency contract, a gross waste of federal funds, a danger to public safety caused by the use of federal funds, an abuse of authority related to federal funds, or a violation of law related to a federal contract.

McCaskill's bill joins legislation (S. 743) that would enhance such protections for federal employees. Text of S. 241 is available at http://op.bna.com/dlrcases.nsf/r?Open=dcan-8tpquq.

Court OKs $45M Settlement of Cash Balance Case

The U.S. District Court for the Eastern District of Wisconsin April 20 gave final approval to a $45 million settlement that will resolve claims that a cash balance plan failed to calculate pre-retirement-age plan participants' lump-sum benefits in accordance with the Employee Retirement Income Security Act's minimum distribution requirements (*Downes v. Wisconsin Energy Corp. Ret. Account Plan,* E.D. Wis., No. 2:09-cv-00637, 4/20/12).

The settlement brings to an end a lawsuit alleging Wisconsin Energy Corp. violated ERISA by failing to use a ''whipsaw'' calculation in computing lump-sum distributions of employees who left the company before reaching normal retirement age.

Prior to the passage of the Pension Protection Act of 2006, cash balance plans were required to use a whipsaw calculation when determining lump-sum distributions of employees who retired prior to normal retirement age. A whipsaw calculation occurs when the interest rate used to project a current account balance to normal retirement date or convert it to an annuity is higher than the interest rate used to discount the annuity back to present-day value.

Text of the court's order is available at http://op.bna.com/pen.nsf/r?Open=mmaa-8tmklu and the settlement agreement at http://op.bna.com/pen.nsf/r?Open=mmaa-8tmkpu.

New UI Claims Inch Down for First Time Since March

Workers filed 388,000 new claims for unemployment insurance in the week ended April 21, a slight 1,000 claim drop from the prior week's adjusted total claims and the first decline in four weeks, according to seasonally adjusted figures released April 26 by the Labor Department's Employment and Training Administration.

The decline followed an increase of 3,000 claims in the week ended April 14, as revised upward to 389,000.

Despite the slight decrease in the most recent figures, the four-week average for new claims rose to 381,750 for the week ending April 21 from 375,500 per week for the four weeks ended April 14, marking a continued climb from the nearly four-year low of 364,250 reached on March 31.

UBS Securities economist Maury Harris called the figures ''a disappointment,'' but said he was skeptical that they reflect a weakening job market. ''If anything, other labor market indicators so far in [the second quarter] have strengthened,'' he said.

Text of the UI claims report is available at http://workforcesecurity.doleta.gov/press/2012/042612.asp.

Compensation&Benefits

Pensions

Cash Balance, Pension Equity Plan Rules Altered From Proposal, Treasury Official Says

The Treasury Department soon will release final rules on cash balance and pension equity plans that will be significantly different from the proposed rules, a senior Treasury official said April 23 at a U.S. Chamber of Commerce briefing.

The anticipated final hybrid plan rules ''can be expected to be meaningfully different from the proposed regulation issued some time ago,'' said J. Mark Iwry, senior adviser to Treasury Secretary Timothy F. Geithner and deputy assistant treasury secretary for retirement and health policy.

In October 2010, the Internal Revenue Service issued proposed and final rules amending provisions for hybrid defined benefit pension plans under Sections 411(a)(13) and 411(b)(5) of the tax code (28 HRR 1131, 10/25/10).

Chamber's Retirement Benefits Goals. Clarifying the Treasury and IRS hybrid plan rules was among more than a dozen detailed recommendations that the U.S. Chamber of Commerce highlighted at a briefing on private retirement benefits accompanying the April 23 release of a position paper, *Private Retirement Benefits in the 21st Century: A Path Forward*.

Iwry and other officials were invited to comment on the paper, which included broad recommendations for policymakers to:

- encourage employers to create and maintain retirement plans;
- encourage increased individual savings; and
- encourage strategies to make retirement income last.

Iwry said the Obama administration is open to creating hybrid plans that mix characteristics and features of defined benefit plans and defined contribution plans in innovative ways. For example, he said, collective investments and professional investment management could be used in plans that have characteristics of defined contribution plans.

Similarly, defined contribution plan investing could be done with institutional shares, not retail shares, Iwry said.

There also could be greater sharing and allocating of ''longevity, investment, counter-party, and inflation risks,'' Iwry said. ''The employer does not need to bear all of them but also does not need to transfer all of them to the individual,'' he said.

Modifying current Treasury and Internal Revenue Service rules on required minimum distributions is an achievable goal, Iwry said.

Under an Obama administration proposal introduced by Rep. Richard E. Neal (D-Mass.), seniors who have aggregate balances of less than $100,000 in individual account plans at age 70.5 would be exempt for life from the required minimum distribution rules, Iwry said. ''Only in unusual situations where they might accrue additional benefits would they be subject to those rules,'' he said.

The administration's $100,000 aggregation proposal has a nearly zero cost in terms of lost tax revenue, compared with a more expensive approach that would increase the minimum age for taking RMDs from age 70.5 to age 75, Iwry said.

Phased Retirement. Commenting on the chamber's proposal to eliminate barriers to phased retirement, an executive from Boeing Co. said that private employers need flexibility to experiment with and implement phased retirement programs that would keep valuable members of the baby boom generation in the workforce.

''We would like the flexibility to offer to a subset of critical employees, in a nondiscriminatory way, a bona fide phased retirement program,'' Stacey Dion, vice president of corporate public policy at Boeing, said at the chamber briefing. ''We would also like to see in-service distributions allowed, irrespective of whether there is a reduction in hours,'' she said.

Karen Friedman, executive vice president and policy director at the Pension Rights Center, said that, despite policy differences that often exist between the Pension Rights Center and the Chamber of Commerce, the discussion paper contained fundamental points on which both organizations agree.

''We need to find ways to build on today's voluntary system, although we at the Pension Rights Center also believe we need to work toward a system that is universal, secure and adequate on top of Social Security,'' Friedman said.

Accounting Standards. Referring to a pending crisis in the private defined benefit retirement system, a congressional staff member said at the briefing that U.S. accounting rules need to be evaluated. ''Our Financial Accounting Standards Board is considering European rules that would be applied in a much different fashion to American companies,'' said Gregory Dean, Republican staff chief counsel on the Senate Health, Education, Labor, and Pensions Committee. ''If that happens, I do believe our defined benefit system would completely come to a halt for all publicly traded companies,'' he said.

BY FLORENCE OLSEN

Text of the Chamber of Commerce position paper is available at http://op.bna.com/dlrcases.nsf/r?Open=scrm-8tnrll.

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Economic Trends

Employment

New York, California Among 29 States Posting Job Gains in March, BLS Says

The number of payroll jobs increased in 29 states and the District of Columbia in March, while 20 states lost jobs and employment held steady in Alabama, according to seasonally adjusted figures released April 20 by the Labor Department's Bureau of Labor Statistics.

Meanwhile, the unemployment rate declined in 30 states last month, rose in eight states, and held steady in 12 states and the district.

March's labor market trends among the states reflected a nationwide increase of 120,000 nonfarm payroll jobs and a dip in the unemployment rate to 8.2 percent (30 HRR 371, 4/9/12).

The state with the largest job gain in March was New York (19,100), followed by California (18,200) and Arizona (13,500). Smaller states with significant increases for their population size included Massachusetts (8,700) and Nebraska (4,600).

The heaviest job losses during March occurred in New Jersey (8,600) and Wisconsin (4,500).

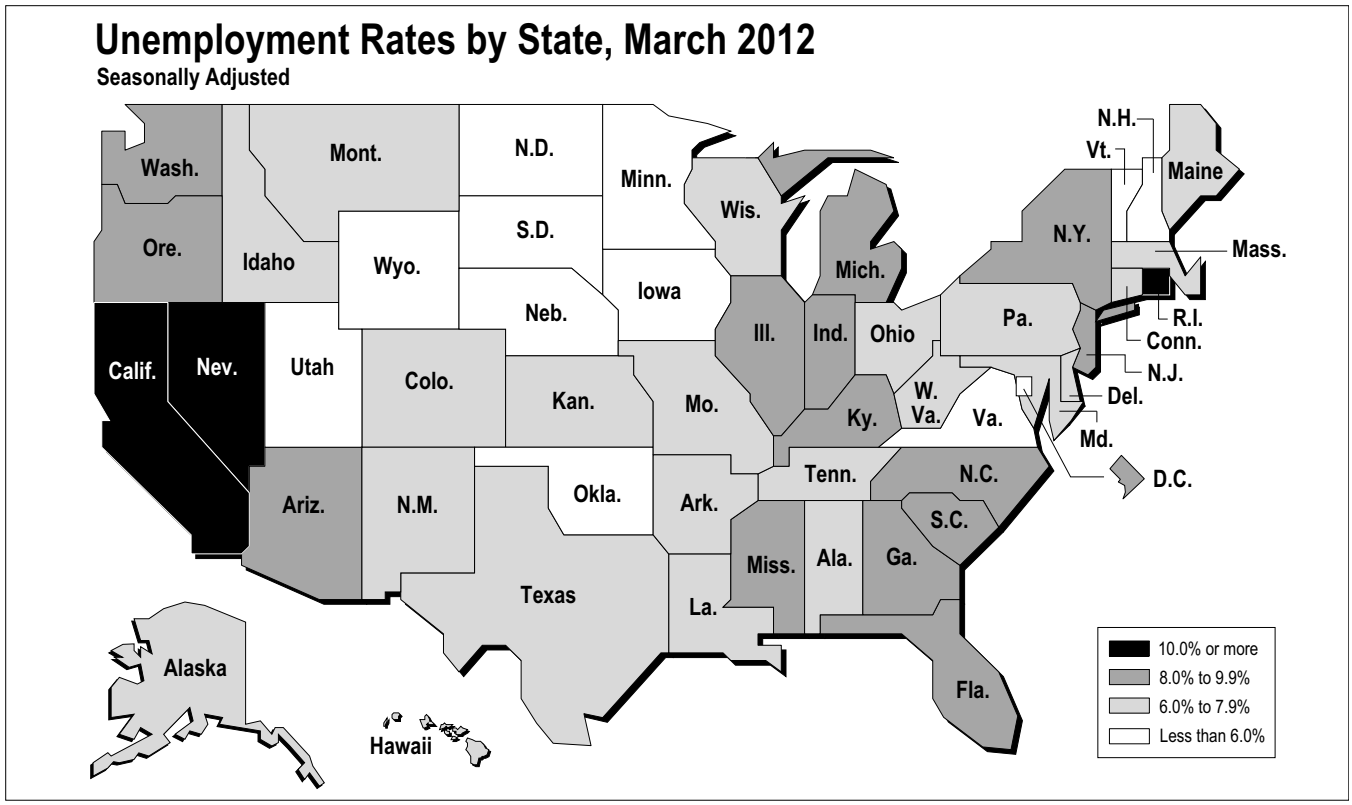
As in previous months, Nevada posted the highest jobless rate in March (12 percent), which was four times as high as the rate in North Dakota (3 percent), the nation's lowest.

Mississippi and Oklahoma recorded the biggest decline in their unemployment rates (0.6 percentage point each).

By region, the jobless rate fell last month in five of the nine Census areas—none by more than 0.2 percentage point—while the rate held steady in four regions.

The West North Central region, which includes North Dakota, Minnesota, and Iowa, continued to have the lowest regional unemployment rate (5.9 percent), while the Pacific region, which includes California, Oregon, and Washington, had the highest rate (10.2 percent).

The Bureau of Labor Statistics' state and regional employment report is available online at http://op.bna.com/dlrcases.nsf/r?Open=lswr-8tjlpp. The accompanying BNA graphic reflects the latest data.



Source: Bureau of Labor Statistics

A BNA Graphic/dy2077g1

EEO/Diversity

Age Discrimination

Former TV Reporter Lacks Age Bias, Retaliation Claims, Split Sixth Circuit Affirms

A terminated 62-year-old television reporter lacks age discrimination or retaliation claims because a reasonable jury could only find that he voluntarily resigned, a divided U.S. Court of Appeals for the Sixth Circuit ruled April 18 (*Sander v. Gray Television Grp. Inc.*, 6th Cir., No. 10-6120, *unpublished opinion* 4/18/12).

Jerry Sander, who had worked for WKYT-TV in Lexington, Ky., for 27 years before his departure in February 2008, argued Gray Television Group, the station's corporate owner, violated the Age Discrimination in Employment Act and Kentucky Civil Rights Act by effectively forcing him out because of his age and prior discrimination complaints.

In the 2-1 majority opinion, written by Judge John M. Rogers, the Sixth Circuit affirmed a ruling for the employer on the grounds that Sander voluntarily quit. Moreover, the court said, he cannot show Gray Television's legitimate, nondiscriminatory reasons for not reinstating him were a pretext for age bias or retaliation.

In dissent, Judge Gilbert S. Merritt said a jury should rule on the defendant's actual motivation in refusing to reinstate Sander, who was the station's highest-paid reporter and arguably was replaced by a 26-year-old employee.

''In light of the evidence in this case, it is clear to me that there is a material dispute of fact about whether Sander voluntarily resigned or was discharged,'' Merritt wrote.

Reporter Made Stormy Exit. Sander joined WKYT in 1981 and became a Gray Television Group employee in 1994 when the Atlanta-based company bought the station. In 2004, Sander was promoted to senior reporter and signed an eight-year agreement under which his pay would steadily rise from $77,510 in 2005 to $96,510 in 2012. That made him the station's highest-paid reporter, the court related.

Sander's fortunes changed, however, after Robert Thomas became the station's vice president of news in 2006, the court said. Thomas removed the ''senior reporter'' designation from Sander's job title. Sander also alleged Thomas ''no longer used'' Sander's expertise on health and medical news and instead assigned health stories through the general assignment desk, bypassing Sander.

Thomas in 2007 shifted Sander without explanation from the day shift, on which Sander had worked for 26 years, to the morning shift, meaning Sander had to arrive at 4 a.m. Less than two months later, again without explanation, Thomas moved Sander back to the day shift. Thomas repeatedly asked Sander about his retirement plans and referred to Sander as ''old'' and ''old-school,'' Sander alleged.

Sander talked with General Manager Wayne Martin about Sander's perception that Thomas was ''out to get him,'' but Martin assured Sander that was not true, the court recounted.

Matters came to a head Feb. 21, 2008. As a winter storm approached, Sander anticipated being part of a ''a big story,'' but Thomas instead told Sander he would be ''web producer of the day.''

Later that morning, the station's executive producer said Sander should manage ''SnoGo,'' the station's automated system for reporting weather-related closings. That suggestion set Sander off. At a group meeting, he refused the assignment. Thomas ''yelled'' in response that Sander should never ''tell me what you will do or will not do,'' the plaintiff alleged. Sander claimed that Thomas then suspended him, which Thomas denied.

Sander left the station, telling at least two co-workers and Deanna Wolfe, the general manager's assistant, he was going to quit. On his arrival home, Sander had his wife call the station managers to explain Sander was upset but was not quitting. Later Feb. 21, General Manager Martin told Sander to return for a Feb. 25 meeting between Martin, Thomas, and Sander. During that meeting, Sander discussed his belief that Thomas was trying to force him out because of his age and salary. At the meeting's conclusion, Martin said the company accepted Sander's resignation, even though Sander had said he wanted to return.

Sander sued under the ADEA and Kentucky law, but the U.S. District Court for the Eastern District of Kentucky ruled in favor of Gray Television. Sander appealed.

Reporter's Own Words, Actions Doom Claim. Sander's own words and actions, including his statements to coworkers he was quitting, indicate Sander ''explicitly expressed the intent'' to resign, the appeals court said.

Sander argued that because on Feb. 21 he told no one in a position of authority that he was quitting, he did not officially resign. But the court pointed out that Thomas believed Sander had quit when he left the station in the middle of the workday. Sander also told Wolfe, Martin's assistant, he was going to quit and ''it would be unreasonable'' for Wolfe not to relay that message to Martin, the court said.

That Thomas arguably had suspended Sander and that Sander also reasonably believed Thomas intended to fire him also ''do not change the implications of Sander's own words and actions,'' the court said.

Sander also cannot prove he was replaced by a substantially younger employee, the court said. Sander argued a 26-year-old reporter hired in May 2008 was his replacement, but the court pointed out two other reporters had left during the same four-month period and it is ''mere conjecture'' that the new reporter replaced Sander rather than one of the others. Sander failed to identify any similarly situated reporter who ''engaged

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in a similar level of misconduct'' but was allowed to continue working, the court said.

The court said if Sander could ''credibly prove'' that Thomas called him ''old'' and ''old school'' in a context relevant to his discrimination claim, he might have a triable issue of age-based animus. But Sander has ''not provided any other pretextual evidence'' and could not remember the circumstances under which Thomas made the alleged remarks, the court pointed out.

Sander's ADEA retaliation claim fails both because his voluntary quit means there was no adverse action and because he failed to show any link between any protected activity and his alleged discharge, the court said.

BY KEVIN P. MCGOWAN

Text of the opinion is available at http://op.bna.com/dlrcases.nsf/r?Open=kmgn-8tjjxq.

Age Discrimination

Sixth Circuit Concludes Age Discrimination May Have Prompted Post-Accident Firing

A former landscaping foreman offered enough evidence to show that his employer's claim that he was discharged for failing to conduct a safety meeting at a job site was a pretext for firing him because of his age, a federal appeals court ruled April 17 (*Brooks v. Davey Tree Expert Co.*, 6th Cir., No. 11-5102, *unpublished opinion* 4/17/12).

The decision by the U.S. Court of Appeals for the Sixth Circuit overturned a district court ruling for the employer on Johnnie Brooks's Age Discrimination in Employment Act claims.

Brooks worked as a foreman for Davey Tree Expert Co. in the Clarksville, Tenn., area. At the time of the incident that led to his firing, Brooks was in his mid-50s. He was the foreman of one of two crews that were assigned to cut down trees at a job site on Feb. 21, 2008. Shortly after completing paperwork that morning, he received a call telling him that the foreman of the other crew had been struck by a tree.

Brooks reported the incident to his immediate supervisor, James Barker. That same day, Barker issued Brooks a safety practice violation notice, listing among other violations, ''No Job Briefing Conducted,'' which was Davey Tree's term for a safety meeting. Three days later, Brooks's area manager told him to either resign or be fired. He declined to resign, so the manager terminated him.

Brooks sued Davey Tree in the U.S. District Court for the Middle District of Tennessee, alleging that he was wrongfully dismissed because of his age, in violation of the Age Discrimination in Employment Act. The court ruled in favor of Davey Tree, and Brooks appealed to the Sixth Circuit.

Davey Tree argued that Brooks was fired for three reasons: the company safety department determined that the accident might not have happened if Brooks had been at the site when it occurred; Brooks had failed to conduct a safety meeting at the site; and Brooks asked his crew after the accident to sign a form acknowledging that they had a safety meeting.

District Court Reversed. The Sixth Circuit noted that as Brooks pointed out, the victim of the accident was not under his supervision.

''A reasonable juror could conclude that Davey Tree blamed the accident on Brooks without factual basis, as pretext for firing him,'' the appeals court said.

As to Davey Tree's claim that Brooks had failed to conduct a safety meeting at the work site, the Sixth Circuit found that there was enough evidence to show both that Brooks did conduct such a meeting and that an on-site safety meeting was not actually required by Davey Tree's rules.

Similarly, Davey Tree did not offer any evidence that Brooks's requests that his crew sign forms acknowledging their attendance at such meetings after the fact were requests that they lie or that he coerced them to sign.

Meanwhile, there was evidence that Brooks's immediate supervisor, Barker, had told an employee to sign a statement saying no safety meeting had occurred after that employee told him that one had occurred. The employee testified that he did feel that his job was at stake if he refused to sign.

Finally, Brooks offered evidence of Barker's frequent age-related comments. While Barker himself did not have the power to terminate Brooks, the court noted, Davey Tree said that the manager who did fire him did so on Barker's recommendation.

BY DAVID SCHWARTZ

The text of the decision is available at http://op.bna.com/env.nsf/r?Open=sbra-8tgm3k.

Disabilities

Relapsed Alcoholic Fired After Not Taking Drug Test Lacks ADA Claims, Court Decides

A manager for a modular construction provider who relapsed into alcoholism and was fired for refusing to submit to an alcohol and drug test in violation of a return-to-work agreement has no triable discrimination claim under the Americans with Disabilities Act, a federal district court in Texas ruled April 18 (*Sechler v. Modular Space Corp.*, S.D. Tex., No. 10-05177, 4/18/12).

However, Judge Keith P. Ellison of the U.S. District Court for the Southern District of Texas said that George Sechler's interference claim under the Family and Medical Leave Act survives because ModSpace Corp. may have failed to comply with its obligation to notify Sechler of his rights under the statute, and this failure may have prejudiced Sechler's ability to obtain more leave for further treatment.

Manager Relapsed After Years of Sobriety. According to the court, Sechler had a history of receiving treatment for alcohol dependence prior to joining GE Capital Modular Space in August 1998 as a fleet manager. Resun Leasing Inc. subsequently bought the company and later formed ModSpace.

The company had an employee handbook that included a multi-step disciplinary process, but also had a drug-free workplace policy that allowed immediate termination for an employee who refused to participate in a drug and alcohol test.

Between 1998 and 2008, Sechler remained sober, received promotions and pay raises, and eventually became the district general manager of ModSpace's south Texas district.

In October 2008, Sechler began drinking alcohol again for various reasons, including the death of his wife and stresses involved with new work responsibilities as well as a new marriage. He allegedly drank ''a pint and a half of vodka up to four days a week,'' and his job performance and work attendance declined, the court recounted.

In May 2009, Sechler requested, and ModSpace officials approved, leave to receive alcoholism treatment. Sechler received outpatient treatment at a local hospital from May 7 to June 17, and returned to work June 22. Neither Sechler nor ModSpace officials mentioned the FMLA.

The hospital recommended that Sechler enroll in an aftercare program, but Sechler declined to participate allegedly because he did not think he could take more leave.

Sechler signed a return-to-work agreement, which required him to attend weekly Alcoholics Anonymous meetings and submit to at-will drug and alcohol tests. The company allegedly denied Sechler's request to use leave to attend AA meetings.

He also accepted a negative performance review for October 2007 to December 2008 that allegedly had been completed prior to his leave. The evaluation noted Sechler's previous absences.

In August, Sechler's co-workers reported on two days to company officials that Sechler was behaving unusually and appeared intoxicated. The company on August 18 required Sechler to submit to drug and alcohol screening, but he refused to go to a testing location unless he drove himself.

Sechler continued to refuse ModSpace repeated demands that he allow someone else to drive him to take the test, and the company fired him the same day.

Sechler in December 2010 brought ADA bias and failure-to-accommodate claims against ModSpace, as well as FMLA interference and retaliation claims.

No Showing of ADA Bias. The court rejected Sechler's argument that the temporal proximity between his alcoholism treatment and his discharge pointed to pretext. With respect to timing, the court pointed out that Sechler was fired the same day he refused to submit to drug and alcohol testing in violation of the return-to-work agreement.

Sechler next maintained that the agreement itself was evidence of pretext, but the court observed that such agreements are recognized as valid employment requirements and their existence alone does not show pretext.

The court rejected Sechler's argument that pretext can be found based on the fact that he made an attempt to comply with the drug and alcohol test, but that ModSpace refused to let him drive himself to the testing facility.

''That Sechler agreed to take the test with a limitation—only if he could drive himself—is insufficient to show compliance,'' the court said. ''Such a conclusion would require ModSpace to have sent an apparently intoxicated employee to drive himself to a drug and alcohol screen, putting both that employee and the public at risk.''

BY JAY-ANNE B. CASUGA

Text of the opinion is available at http://op.bna.com/dlrcases.nsf/r?Open=jaca-8tjrch.

Disabilities

EEOC Failed to Explain Conflict Between ADA Claim, Disability Benefits, Fourth Circuit Says

The Equal Employment Opportunity Commission did not offer a satisfactory explanation for the conflict between its claim under the Americans with Disabilities Act that an employee could work with or without accommodation and contrary statements made by the employee for Social Security disability insurance benefits purposes, a divided U.S. Court of Appeals for the Fourth Circuit ruled April 17 (*EEOC v. Greater Baltimore Med. Ctr. Inc.*, 4th Cir., No. 11-1593, *unpublished opinion* 4/17/12).

The two-judge majority affirmed the U.S. District Court for the District of Maryland's ruling in favor of Greater Baltimore Medical Center Inc. (29 HRR 183, 2/21/11) in EEOC's enforcement action under the ADA on behalf of Michael Turner, a fired GBMC secretary.

Turner experienced serious medical conditions in 2005. He was hospitalized for five months with necrotizing fasciitis, a life-threatening condition, and later had a stroke, requiring further hospitalization.

Under *Cleveland v. Policy Management System Corp.* (526 U.S. 795, 9 AD Cases 491 (1999)), the appeals court majority said, an employee may seek SSDI benefits and simultaneously assert that he is a qualified individual under the ADA if it can be established that there is no genuine conflict between the two seemingly conflicting positions.

The conflict between Turner's disability application and receipt of SSDI benefits and his claim to be a qualified individual under the ADA, however, was ''genuine,'' the court said. At the same time that he was receiving disability benefits from SSDI based on prior representations of total or near-total disability, Turner was providing multiple work releases from his doctor to GBMC, the court found.

Moreover, Turner never informed the Social Security Administration that his condition had improved, the court said. It was not reasonable for Turner to have believed that he did not have an obligation to notify SSA of his changed status, the court added.

Judge Roger L. Gregory dissented, arguing that EEOC was not a proxy for Turner, but instead was serving the public's interest. An EEOC lawsuit under the ADA, he urged, may not be barred by a charging party's representations of disability to the SSA.

BY HELEN IRVIN

Text of the opinion is available at http://op.bna.com/eg.nsf/r?Open=hirn-8tmmjg.

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Health&Safety News

OSHA

Emphasis Program on Recordkeeping Ends; OSHA Found Few Willful, Repeat Violations

While recordkeeping problems were found during two-thirds of the federal inspections carried out as part of the Recordkeeping National Emphasis Program conducted by the Labor Department's Occupational Safety and Health Administration, nearly all of the violations were ''other than serious,'' according to data released to BNA April 23.

The inspection effort, which lasted nearly two and a half years, officially ended Feb. 19.

The emphasis program resulted in only 10 willful or repeat violations and no serious violations of recordkeeping regulations (29 C.F.R. § 1904). Of the 731 violations cited by OSHA, 99 percent (721) were ''other-than-serious'' violations.

The emphasis program, intended to gauge the accuracy of employers' OSHA Form 300 injury and illness logs, involved 351 inspections by federal compliance officers. They found alleged violations of recordkeeping rules during 233 (66 percent) of the checks, according to OSHA.

Compliance officers from state workplace safety agencies conducted at least 175 additional inspections, a number that could increase as more state reports are filed, OSHA said in a statement. Figures were not available from OSHA on how many state inspections found suspected violations.

OSHA did not respond to a BNA request for comment on the results.

Inspection Results. The federal inspections found 731 violations, with proposed penalties totaling $882,915. A breakdown by violation category showed the following results:

- willful violations—seven for $410,000 in penalties;
- repeat violations—three for $94,000 in penalties;
- serious violations—none; and
- other-than-serious violations—721 for $378,915 in penalties.

Industry attorney David Sarvadi, of Keller and Heckman, who criticized the emphasis program when it began, said that before OSHA and employers can reach conclusions on what the results show, there needs to be a ''transparent discussion,'' with OSHA releasing all its data from the emphasis program, including the selection process for which cases were investigated.

BY BRUCE ROLFSEN

Congress

Senate Committee Hearing Explores Ways to Speed Up Pace of OSHA Rulemaking

Senators at an April 19 committee hearing examined the procedural requirements imposed on the Labor Department's Occupational Safety and Health Administration when it writes new rules, seeking ways to speed up the process.

At various points during the hearing, members of the Senate Health, Education, Labor, and Pensions Committee expressed surprise at how the OSHA process works.

For example, Sen. Tom Harkin (D-Iowa), chairman of the committee, said he ''was not fully aware'' of what several witnesses described as overly lengthy and duplicative reviews by the White House Office of Information and Regulatory Affairs. Harkin said those steps ''should be an area that maybe we ought to look at, and see if there's some way of streamlining that.''

Similarly, on the issue of stakeholder input, Harkin said, ''The question is, why does it take so long after the stakeholder input? After they do that, then they sit on it for years and years after that.''

GAO Describes Challenges. The Government Accountability Office also released a report April 19, requested by congressional Democrats, that describes the steps OSHA must follow as it puts out a rule. The report's author, Revae Moran, director of GAO's Education, Workforce, and Income Security Issues department, appeared before the committee to describe the various risk assessments, peer reviews, technological feasibility analyses, economic analyses, and small business reviews involved.

Most of those requirements cannot be bypassed because they were established either by Congress or executive order, Moran said.

''The administrative burdens and costs associated with [OSHA] standards must be carefully considered, but once the need for a new standard has been established, it is important for OSHA to be able to move forward as quickly and efficiently as possible in order to protect workers,'' Moran said.

More Collaboration Between OSHA and NIOSH. Sen. Al Franken (D-Minn.) noted that the GAO report offered only one recommendation: to instruct OSHA and the National Institute for Occupational Safety and Health to ''develop a more formal means of collaboration'' between the two agencies that would allow OSHA to ''better leverage NIOSH's capacity as a primary research institution when building the scientific record required for standard setting.''

Franken asked Moran to evaluate four further ideas: legislation that would let OSHA more easily adopt voluntary consensus standards, legislation directing OSHA

to work on regulating certain hazards, the use of surveys instead of on-site studies to determine rule feasibility, and reducing or eliminating the Office of Information and Regulatory Affairs' economic analysis, ''since OSHA already conducts its own analyses.''

Moran said she had not heard, while researching her report, that OIRA analysis poses a major impediment to rulemaking, because the agency generally meets its 90-day deadline to complete its reviews.

She said OSHA is already required to consider voluntary consensus standards, but the standards that come from bodies such as the American National Standards Institute and National Fire Protection Association are often not a suitable proxy for OSHA's own standards because they are not subject to the same scientific rigor.

Enzi Urges 'All of the Above' Strategy. By contrast, Sen. Mike Enzi (R-Wyo.), the panel's ranking Republican and the only Republican present at the hearing, urged OSHA to adopt an ''all-of-the above strategy'' that would ''pursue multiple methods, rather than focusing only on new regulations and stronger enforcement.''

In particular, OSHA's voluntary protection programs (VPP) ''have been shown to make workplaces considerably safer and save money,'' Enzi said. ''Yet under the current administration, VPP has been threatened and undermined. Instead, we should be talking about expanding VPP to smaller employers and making it even more effective. . . . What should matter most is the result—keeping workplaces safe. OSHA must use its broad authority appropriately when establishing new standards.''

Enzi said he will ''closely scrutinize proposals to 'shortcut' '' any of the steps currently involved in rulemaking.

Witnesses Offer Policy Ideas. Harkin asked the witnesses to identify the one thing they would do to speed up the rulemaking process. Michael Silverstein, clinical professor of environmental and occupational health at the University of Washington, said he would direct OSHA to engage in expedited rulemaking to bring its permissible exposure limits up to date, and also to adopt a general rule that would require injury and illness prevention programs.

Silverstein's testimony included a range of policy prescriptions, including a closer relationship between OSHA and NIOSH and the Environmental Protection Agency on risk assessments and feasibility analyses, an acknowledgement by OIRA that it need not scrutinize OSHA rules as closely as it does because OSHA's public hearing process is already robust, and more willingness by Congress to intervene when the rulemaking process drags on too long.

Randy Rabinowitz, director of regulatory policy at watchdog group OMB Watch, said Congress should enforce deadlines on OSHA, thereby shortening the ''hand-wringing'' process during which OSHA considers, ''Should we do this, should we do that? If we could just force them to decide, on the record, then we could move on to the next priority.''

She said OIRA ''should not be permitted to second-guess OSHA's scientific judgments or to demand scientific certainty before OSHA moves to protect workers,'' and that ''regulatory review should not become a graveyard for burying rules.''

Chamber Lawyer Calls for Negotiated Rulemaking. David Sarvadi, an attorney with Keller Heckman who testified on behalf of the U.S. Chamber of Commerce, agreed with Rabinowitz that OSHA should be spurred to act more quickly. ''It's about getting managers to stick to the deadlines that they set,'' Sarvadi said.

He called for ''a continuous dialogue among trade associations, who are often involved as standard-setting organizations, other professional associations, and members of industry,'' as well as increased reliance on established science and ''real-world observations, rather than seeking out that information which confirms the agency's preconceived hypothesis.''

Sarvadi said OSHA ''has not been willing to do a good job, and come back later should it decide more needs to be done or after experience has shown the need for refinements.''

The agency should also be more willing to accept the results of negotiated rulemaking, Sarvadi said, and should ''stop spending time on pet projects and take into account the evidence presented.''

Shifting Priorities Also a Factor. While the bulk of the responsibility for OSHA's slow rulemaking pace is due to procedural requirements, some of the blame must also fall to the government officials who set the agency's agenda, witnesses told the committee.

''The problem with OSHA rulemaking is that they just don't stick to their priorities,'' Sarvadi said. ''The agency simply gets bogged down in its own processes.''

Similarly, citing ''agency officials and experts,'' the GAO report found that ''OSHA's priorities may change as a result of changes within OSHA, [the Department of] Labor, Congress, or the presidential administration.''

In particular, OSHA assistant secretaries typically serve for three years, and new appointees ''tend to change the agency's priorities,'' GAO said.

''Procedure alone cannot explain why OSHA has issued so few rules recently,'' Harkin said, pointing to the fact that OSHA put out 47 new safety rules in the 1980s and 1990s, but only 11 since then.

BY STEPHEN LEE

Text of the GAO report is available at http://op.bna.com/dlrcases.nsf/r?Open=smgk-8tjtvb.

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Legal News

FMLA

Employee Can Combine Health Conditions To Qualify for FMLA Leave, Court Decides

A fired administrative assistant for an insurance telemarketer can combine her medical conditions, which include genital herpes and a bladder condition, to show she had a ''serious health condition'' that entitled her to leave under the Family and Medical Leave Act, a federal district court in Minnesota ruled April 23 (*Fries v. TRI Mktg. Corp.*, D. Minn., No. 11-01052, 4/23/12).

Judge Joan N. Ericksen of the U.S. District Court for the District of Minnesota acknowledged that each of Angela Fries's conditions alone may not have incapacitated her for more than three consecutive days, as required by the statute's implementing regulations.

However, the court relied on circuit precedent in observing that the conditions can be considered together because they were temporally linked and affected the same organ system.

The court also found triable FMLA interference issues related to whether Fries adequately and timely notified TRI Marketing Corp. of her need for FMLA leave, whether the company denied her statutory benefits, and whether it would have terminated Fries even absent her exercise of FMLA rights.

Employee Had Multiple Medical Conditions. According to the court, Fries had both herpes and a bladder condition called interstitial cystitis when she joined TRI in July 2006.

''Flare-ups'' associated with the latter condition caused Fries to experience pain and urgent and frequent urination, and required her to repeatedly visit medical providers multiple times each month. This allegedly resulted in absences, tardiness, and frequent restroom breaks during the work day.

On Friday, July 9, 2010, Fries did not report to work because of alleged pain and frequent urination. The next day, she began to have difficulty urinating and could not urinate at all by the evening. On Sunday, Fries went to the ER, where a doctor attributed her urinary retention issue more to herpes than to interstitial cystitis. He installed a catheter in Fries, prescribed medications, and instructed her to take off Monday, July 12, and return to work July 13.

While at the ER, Fries texted her immediate supervisor, Tara Koch, and informed her that she had a doctor's note to miss work Monday. In response, Koch allegedly threatened to fire Fries if she was absent. Nonetheless, Fries did not go to work that Monday. She returned Tuesday with her catheter in place and her drainage bag visible, and worked through her pain.

The following day, Fries met with Koch and TRI's owner, Pat Leger. During the meeting, Fries alleged that Leger told her she was being suspended because of her Monday absence. Fries claimed that she expressed her belief that it was illegal to suspend an employee because of a medical absence, and threatened to sue TRI.

In contrast, TRI alleged that it suspended Fries because of other performance issues, including tardiness and absenteeism, and that Fries actually threatened litigation related to unemployment benefits and not leave rights.

Leger and Koch later would testify that Fries's discharge was based ''a little bit'' on her litigation threat. Additionally, a written termination statement that TRI provided to Fries noted that the company originally had intended only to suspend Fries, but that ''[i]t was then decided that termination was the best option'' after she threatened to sue.

Fries in April 2011 brought FMLA interference and retaliation claims against TRI.

Court Combines Medical Ailments. The court said under precedent from its federal circuit, the U.S. Court of Appeals for the Eighth Circuit, and the Seventh Circuit, two diseases that alone do not constitute a serious health condition can nonetheless together rise to that level where they are ''temporally linked'' and affect ''the same organ system.''

The court observed that the circuit courts have noted that it is an individual, and not his or her disease, that receives leave from work, and that medical conditions can have cumulative effects on a person over time and have a ''serious impact.''

Here, the court ruled that it is reasonable for a jury to consider whether both Fries's interstitial cystitis and herpes caused her to be incapacitated for more than three days.

The court rejected TRI's argument that Fries's testimony alone is insufficient to show she was incapacitated Friday and Saturday. The court said Fries not only produced her own testimony, but also subsequent medical records from her ER visit to prove incapacity, the court said.

In addition, a triable FMLA interference claim requires a showing that Fries gave TRI adequate and timely notice that she may need FMLA leave, and that the company denied her leave request, the court said.

The court found that a reasonable jury could find that Fries satisfied the FMLA notice requirement because she offered evidence that she texted Koch while at the ER, and informed her of her condition and her planned one-day absence.

It added that a jury also could conclude that TRI denied her leave or discouraged her from taking leave given evidence that Koch allegedly threatened to fire Fries if she was absent that Monday, and that the company actually terminated Fries two days after she returned.

Finally, the court said, ''If the jury believes Fries's testimony that her threatened lawsuit was related to the illegality of her suspension, rather than recovering unemployment compensation, then Leger's testimony, the

termination letter, and Koch's statement are direct evidence of retaliation.''

BY JAY-ANNE B. CASUGA

Text of the opinion is available athttp://op.bna.com/dlrcases.nsf/r?Open=jaca-8tnnsq.

Employment Contracts

Workers May Pursue Antitrust Claims Against High-Tech Employers, Court Rules

Seven large technology employers must defend accusations in a class action that they unlawfully conspired to fix employee compensation through the use of bilateral agreements, the U.S. District Court for the Northern District of California ruled April 18, declining to dismiss employees' claims under Sherman Act Section 1 (*In re High-Tech Emp. Antitrust Litig.*, N.D. Cal., No. 5:11-cv-02509, 4/18/12).

Following a Justice Department investigation and civil suit involving the same conduct, a group of software engineers employed by certain technology companies in California initiated a class action challenging the companies' use of agreements not to ''cold call'' each others' employees for recruitment purposes.

DOJ concluded that the defendants—Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., Lucasfilm Ltd., and Pixar—had reached ''facially anticompetitive'' agreements that eliminated a form of competition and were ''naked restraints of trade that were *per se* unlawful under the antitrust laws.''

The agreements were bilateral and involved the active participation of a company under the control of the late Steven P. Jobs and/or a company whose board shared at least one member of Apple's board of directors. The agreements allegedly were negotiated, executed, monitored, and policed by senior executives for each company, who also actively concealed each agreement.

Agreements Not to Recruit Employees. From 2005 to 2007, the employees alleged, each pair of companies entered into nearly identical ''Do Not Cold Call'' agreements, whereby they agreed not to actively recruit employees of the other company. In several cases, when one company suspected violations of the agreement by another, the breaching company responded by changing its conduct to conform to the agreement.

Jobs also allegedly proposed an identical agreement between Apple and Palm Inc. to Palm's Chief Executive Officer Edward T. Colligan, who responded that such an agreement ''is not only wrong, it is likely illegal.''

This conduct, the employees alleged, violated Section 1 of the Sherman Act; California's Cartwright Act (Cal. Bus. & Prof. Code § 16720); California Business & Professional Code Section 16600; and California's Unfair Competition Law. They sought damages, restitution, costs, attorneys' fees, and pre-judgment and post-judgment interest.

Employees Established 'Overarching Conspiracy.' Judge Lucy H. Koh addressed the companies' argument that the employees failed to allege sufficient acts to establish an ''overarching conspiracy.'' In particular, they contended that the employees failed to plead either the ''who, what, where, and when'' of the conspiracy or the requisite knowledge and intent.

Disagreeing, Koh cited the identical nature of the agreements as support for the inference that senior executives played a significant role in shaping the agreements, especially since the agreements purportedly were reached in secret. Also supporting such an inference, Koh said, is the evidence of Jobs's alleged attempt to negotiate a similar, if not identical, agreement with Palm's CEO.

Additionally, Koh observed that ''the bilateral agreements were not limited by geography, job function, product group, or time period, and were not related to a collaboration between the defendants . . . to infer that such significant wide-ranging, company-wide and worldwide policies would have been approved at the highest levels.''

BY TIFFANY FRIESEN MILONE

Text of the opinion is available at http://op.bna.com/atr.nsf/r?Open=tmie-8thldu.

Background Checks

Court Says Sales Rep Was Independent Contractor, May Not Sue Firm Under FCRA

A call center sales representative cannot assert claims against his employer for violating the Fair Credit Reporting Act, the U.S. District Court for the Eastern District of Wisconsin ruled April 12, finding that the law does not protect independent contractors (*Lamson v. EMS Energy Mktg. Serv. Inc.*, E.D. Wis., No. 2:11-cv-00663, 4/12/12).

Ruling in favor of EMS Energy Marketing Service Inc., Magistrate Judge William E. Callahan found that Philip Lamson was not an employee protected under the FCRA.

According to the court, Lamson took a job as a sales representative for EMS, selling a telephone service to a list of leads in a call center. Lamson was fired roughly a month after he started when EMS obtained his background check and credit check information.

Although EMS did not follow FCRA (15 U.S.C. §§ 1681), when it obtained and used Lamson's credit report, the employer claimed that the law did not apply to Lamson as an independent contractor. EMS also noted that Lamson signed a sweeping waiver of EMS's liability for obtaining the report.

Lamson acknowledged that he signed an independent contracting agreement and the waiver, but he argued that, under any definition, he really was an employee and that the FCRA should apply.

Using the common law test for ''employment,'' however, Callahan wrote, ''I am persuaded that Lamson was an independent contractor, not an employee.'' The FCRA only protects employees, he held, not independent contractors.

Text of the opinion is available at http://op.bna.com/atr.nsf/r?Open=etyr-8temqv.

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Trends&Views

Employment

Survey Finds Improved Job Outlook Among Businesses, Plus Rising Wages

The share of businesses expecting to add jobs in the coming six months has risen since earlier this year, while those reporting they have raised workers' wages also increased, according to survey results released April 23 by the National Association for Business Economics.

About 39 percent of NABE members said their company likely will increase employment over the next six months, up from 27 percent in January, while the proportion expecting a decrease in jobs rose to 13 percent from 8 percent, NABE said.

The remaining 48 percent of survey participants said employment was likely to hold steady, down from 64 percent at the start of the year.

''The current labor market for NABE panelists continues to reflect stability, with only 28 percent reporting rising employment'' over the last three months, about the same as in January, said Nayantara Hensel, a professor of industry and business at National Defense University who helped analyze the results for the nonprofit professional group.

Another 59 percent of respondents said employment held steady in the first quarter, down from 62 percent in January, while the share reporting job losses climbed to 13 percent from 10 percent.

The latest quarterly survey was conducted from late March through April 9 among 55 economists and other NABE members employed by private sector firms and industry trade groups. The results reflect business conditions in the first quarter of 2012 and the outlook for the coming six months.

More Employers Boost Pay. ''A significantly higher share of panelists (44 percent) reported that wages and salaries are rising in the April 2012 survey, relative to the previous four surveys,'' NABE said.

That was an increase from 26 percent in January who said their firms boosted pay over the last three months and from 35 percent in the first quarter of 2010.

About half of respondents (48 percent) said wages and salaries were unchanged in the most recent period, down from almost three-fourths (71 percent) in January, while the share reporting pay cuts rose to 8 percent from 3 percent.

The most common shortage experienced by businesses in the first quarter was skilled labor, cited by 25 percent of survey participants, up from 21 percent in the previous survey, while 70 percent reported no shortages of labor, materials, or capital goods.

About nine out of 10 respondents (89 percent) expect non-labor input prices will either remain unchanged or rise by 5 percent or less in the coming six months.

Optimism Over Economy. The latest survey also found NABE panelists are more optimistic about the outlook for the economy in 2012.

''The survey results suggest an improvement in economic conditions through higher sales and rising profit margins, continued optimism concerning real GDP growth, and continued price stability, although there are some indications of rising price pressures in wages,'' Hensel said.

Almost two-thirds of respondents (63 percent) believe the nation's real gross domestic product will grow between 2.1 percent and 3.0 percent this year, up from 60 percent in the January survey.

Meanwhile, the share anticipating growth of 2.0 percent or less declined to 23 percent from 35 percent, while those predicting growth of 3.1 percent or more increased to 15 percent from 5 percent.

Sales improved noticeably in the first quarter, while more firms also reported rising profits.

Some 60 percent of survey respondents said sales of products and services increased in the past three months, up from 41 percent in January, while the share reporting falling sales declined to 10 percent from 19 percent. The remainder said sales held steady.

Meanwhile, 40 percent reported increased profits in the first three months of 2012, compared with 30 percent in the fourth quarter of last year, while those experiencing falling profits rose slightly, to 18 percent from 15 percent.

Text of the NABE industry survey is available at http://op.bna.com/dlrcases.nsf/r?Open=lswr-8tmmvd.

Politics

Presidential Candidates Should Focus On Jobs, Say Two-Thirds in Online Survey

The top priority of the presidential candidates this fall should be to focus on getting people back to work, according to two-thirds of respondents to an online poll on job-related issues released April 23 by Glassdoor, an online jobs and career firm.

The survey was conducted March 16-18 by North American market research company Ipsos Media. It surveyed a nationally representative group of 2,013 adults, including 555 Democrats, 570 Republicans, 479 Independents, and 180 individuals not registered to vote. The poll's margin of error is plus or minus 2.18 percentage points.

Asked to select from a list of job-related issues, the largest share of respondents (67 percent) said the presidential candidates should focus on ''reducing unemployment and getting Americans back to work,'' the survey results showed.

''Now that the race is heating up, presidential candidates may want to consider focusing their message

more on job creation,'' Glassdoor said in announcing the results.

The next-highest priorities for those polled and the percentage of respondents supporting them include:

- providing incentives for large corporations to hire Americans and keep jobs in the United States (46 percent);
- creating jobs in the private sector (45 percent); and
- providing incentives for small businesses and entrepreneurs (45 percent).

Other options drawing support from more than a quarter of those polled include creating public sector jobs (38 percent); providing new skills training for the unemployed (38 percent); and reducing work visas for noncitizens (30 percent).

The job creation effort also would benefit from a presidential change, according to 39 percent of respondents. Asked whether they felt ''a change in the White House/Administration will signal a positive or negative effect on job creation,'' 39 percent said they felt the election of a new president replacing President Obama would positively impact job creation. Another 15 percent of respondents said a presidential change would adversely affect the job market, and 32 percent said a presidential change would yield no impact at all. The remaining respondents (14 percent) said they were unsure.

Responses varied strongly by party affiliation, as more than two-thirds (68 percent) of Republicans said they believed that President Obama's ouster would enhance job creation, while just 21 percent of Democrats agreed. Independents were divided on the question, with 37 percent stating that new blood in the White House would bolster the job market, 35 percent responding that it would have no effect, 14 percent saying a change would have a negative impact, and another 14 percent saying they were unsure.

BY CHRIS OPFER

Youth Employment

68 Percent of 2011 High School Graduates Entered College, Slightly Under Record High

The share of 2011 high school graduates who entered college rose slightly to 68.3 percent from 68.1 percent the prior year, remaining close to the record high of 70.1 percent set in 2009, according to figures released April 19 by the Department of Labor.

Of last year's 3,081,000 high school graduates, 2,103,000 were attending either a two-year or a four-year college in October 2011, the Bureau of Labor Statistics said in an annual report.

During the 2010-2011 school year, another 369,000 high school students dropped out, more than the 340,000 dropouts in 2009-2010.

About 54 percent of dropouts were men, while 46 percent were women. By race or ethnic group, the largest share of dropouts were whites (72 percent), followed by Hispanics (36 percent), while smaller shares were blacks (20 percent) and Asians (3 percent).

Young women were more likely to enroll in college than young men (72.3 percent versus 64.6 percent). Since fewer women than men graduated high school in 2011, however, the women outnumbered men only slightly among new college students (1,065,000 versus 1,038,000).

By race or ethnic group, Asians had the highest college enrollment rate (86.7 percent), followed by whites (67.7 percent), blacks (67.5 percent), and Hispanics (66.6 percent).

92 Percent Attend College Full-Time. Of the 2011 high school graduates who entered college, more than three-fifths (62 percent) were attending four-year institutions, while the rest (38 percent) attended two-year institutions.

Nine out of 10 new college students took classes full-time (92 percent) and were less likely to participate in the labor force than part-time college students (35 percent versus 80 percent).

Among all college students participating in the labor force, the unemployment rate was 21.1 percent, down from 22.8 percent in 2010.

33.6 Percent of Nonstudents Unemployed. Among last year's 979,000 high school graduates who did not enter college in the fall, more than two-thirds (68.7 percent) were in the labor force, either working or unemployed and actively seeking jobs, and their unemployment rate was 33.6 percent, about the same as in 2010.

Among those not enrolled in college, young men were more likely to be in the labor force than young women (76 percent versus 59 percent), and their jobless rate was higher (35 percent versus 30 percent). Conversely, women were more likely than men not to be participating in the labor force (41 percent versus 24 percent).

By comparison, the national unemployment rate in October 2011 was 8.9 percent, down from 9.5 percent a year earlier, reflecting an improved labor market in the second year of recovery following the 2007-2009 recession.

The figures were derived from the monthly current population survey of 60,000 households and an October 2011 supplement to the survey.

58.5 Percent of All Youth Attend School. Of the 38.3 million youth ages 16 to 24, nearly three out of five (58.5 percent) were enrolled in school in 2011, either high school (25.1 percent) or college (33.4 percent).

Among the 41.5 percent who were not in school last year, or 15.9 million youth, nearly four out of five were in the labor force (79.6 percent), either working or unemployed and actively seeking work, and their unemployment rate was 17.5 percent, down from 18.7 percent in 2010.

More young men than young women were not attending school (8,352,000 versus 7,521,000), they were more likely than women their age to participate in the labor force (85 percent versus 74 percent) and to have a higher jobless rate (18.2 percent versus 16.6 percent).

BY LARRY SWISHER

Text of the report on 2011 high school graduates is available at http://op.bna.com/dlrcases.nsf/r?Open=lswr-8thkzx.

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BNA Insights

RETALIATION

Record-high numbers of retaliation charges filed with the Equal Employment Opportunity Commission—combined with the U.S. Supreme Court's demonstrated receptiveness to such claims—indicate that employers should take note of developments in this significant area of employment law, Harold J. Datz says in this BNA Insights article. The former NLRB chief counsel, now teaching employment and labor law at several law schools in Washington, D.C., addresses the key statutory provisions and case law on this issue.

Retaliation Cases—A Growing and Important Field of Employment Law

BY HAROLD J. DATZ

The Equal Employment Opportunity Commission recently reported that retaliation charges accounted for the highest percentage of private sector discrimination charges filed with the commission last year. (The total number of private sector EEOC charges for that year was 99,947—a record high.)

The number of retaliation charges is not surprising. Many people believe that retaliation protections are the most important part of all employee protection statutes. Unless employees feel free to complain about alleged violations, these laws are not worth the proverbial paper they are printed on. A statute that is not invoked because of fear of reprisal does not have any real impact on the workplace and on the people who work there.

In recent years, the U.S. Supreme Court has seemingly recognized this important fact. Although the court has been ''business friendly'' in many respects, it has been markedly receptive to employee claims of retaliation. Other courts also have been receptive to these claims. This article explains these important rulings.

The law of retaliation breaks down into various areas:

- Is an oral complaint protected?
- Are internal employee complaints protected? Internal complaints are those made to company officials rather than to a government agency or a court.
- What kinds of retaliatory treatment will be deemed unlawful?
- How clearly must the employee complaint be voiced in order for it to be protected?
- Who is protected from retaliation?
- If the statute in question prohibits discrimination but does not have an explicit anti-retaliation provision, can such a provision nonetheless be inferred?

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Oral complaints. The Fair Labor Standards Act's anti-retaliation provision at 29 U.S.C. § 215(a)(3) provides that an employer cannot discriminate against an employee who ''has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the FLSA].''

Notwithstanding a strong argument that the word ''filed'' refers to a written document, the Supreme Court ruled last year in *Kasten v. St. Gobain Performance Plastics Corp.* (131 S. Ct. 1325, 17 WH Cases 2d 577 (2011); 29 HRR 313, 3/28/11) that an oral complaint to management was protected. The court relied on the use of the broad term ''any'' and the public policy of protecting those who complain about alleged violations of the FLSA. Absent the protections against retaliation, the court explained, employees would be reluctant to invoke the substantive protections of that statute.

Internal complaints. In *Minor v. Bostwick Laboratories* (669 F.3d 428, 18 WH Cases2d 1248 (4th Cir. 2012); 30 HRR 133, 2/6/12), the U.S. Court of Appeals for the Fourth Circuit ruled that the anti-retaliatory provision of the FLSA is broad enough to cover an internal complaint, such as one made to a company official, that employees were not receiving appropriate overtime pay. Again, although the language of the provision would suggest a requirement of a formal case before the Department of Labor or a court, the Fourth Circuit held that internal complaints are protected.

The court relied on the public policy of protecting employee complaints about alleged violations of the

FLSA. In addition, the court noted, there is an interest in protecting such activity so that complaints can possibly be settled internally without the need for formal litigation.

In so ruling, the Fourth Circuit joined eight other circuits that had previously ruled the same way. There are no circuit court rulings the other way, and thus Supreme Court review is unlikely. The ruling will likely stand as the law.

What kinds of retaliatory treatment are unlawful? In *Burlington Northern v. White* (548 U.S. 53, 98 FEP Cases 385 (2006); 24 HRR 677, 6/26/06), the Supreme Court dealt with the anti-retaliation provision of Title VII of the 1964 Civil Rights Act. The provision forbids an employer from ''discriminating against'' an employee or job applicant because that individual has opposed any practice made unlawful under Title VII or made a charge, testified, assisted, or participated in a Title VII proceeding or investigation.

The employer argued that the only kinds of retaliatory conduct that would be forbidden would be conduct that affects the terms and conditions of employment of an employee. The Supreme Court held that the concept of retaliatory conduct has a broader scope. The court held:

> '' . . . the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.''

The court relied on the public policies discussed above. The court also noted that the basic anti-discrimination parts of Title VII (no discrimination based on race, etc.) refer to discrimination in ''hiring, discharge, compensation, and other terms and conditions of employment.'' By contrast, Title VII's anti-retaliation provision contains no such limiting language.

Although the court's protection was broad, it nonetheless was careful to emphasize that not every retaliatory response would be unlawful. In its ruling the court said, ''An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.''

In the same vein, the court added that ''normally petty slights, minor annoyances and simple lack of good manners will not create such deterrence.''

How clearly must the employee complaint be voiced in order for it to be protected? In *Crawford v. Metropolitan Government of Nashville* (129 S. Ct. 846, 105 FEP Cases 353 (2009); 27 HRR 94, 2/2/09), the Supreme Court dealt with the ''opposition'' part of Title VII's anti-retaliation provision (noted above). As discussed, that provision covers internal complaints. The plaintiff in that case was called into the employer's office to give information concerning another employee's internal complaint about alleged sexual harassment.

In its investigation, the employer called in the plaintiff as a possible witness. She described sexual conduct by the same supervisor in front of her. She did not explicitly voice any objection to such conduct. The circuit court ruled that she was not protected. In its view, the ''opposition'' clause ''demands active consistent opposition.''

The Supreme Court gave a broader definition. The court quoted approvingly the EEOC guideline that: ''When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication'' virtually always ''constitutes the employee's opposition to the activity.''

The court's decision assures employees that they can cooperate in an employer's investigation, and this helps the employer in its quest for the truth of the underlying complaint.

Who is protected from retaliation? In *Robinson v. Shell Oil* (519 U.S. 337, 72 FEP Cases 1856 (1997)), an employee sued Shell under Title VII. The employee thereon applied for a new job with another employer, and Shell gave the employee a negative recommendation because of the suit he had brought against Shell. The Supreme Court ruled in that case that Title VII protects former employees and thus the retaliatory bad reference was unlawful.

In explaining its result, the court said a contrary rule would allow ''the threat of post-employment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims.''

By contrast, *Dellinger v. SAIC* (649 F.3d 226, 17 WH Cases2d 1833 (4th Cir. 2011); 29 HRR 914, 8/22/11) dealt with an employee who had sued her prior employer for wage-hour violations under the FLSA. She alleged in the instant case that she thereafter applied for a job with another employer, and that the new potential employer would not hire her because of her complaint against the prior employer.

The Fourth Circuit dismissed the ''refusal to hire'' allegation, and the Supreme Court denied certiorari (U.S., No. 11-598, Feb. 21, 2012; 30 HRR 201, 2/27/12). Although Section 215(a)(3) forbids retaliation by any person, the victim of the retaliation must be an employee. The FLSA requires an existing employment relationship, and Dellinger did not have such a relationship with the defendant employer.

Although the result in Dellinger is understandable, it is unfortunate. An employee who has a wage dispute with an employer may want to sue her employer, but may also have lingering resentments against her employer. She therefore may look for another job. She will encounter difficulty in finding another job if potential employers are aware of the prior lawsuit and may not want to hire someone perceived to be troublesome. In light of this, the Dellinger result may deter her from filing a suit against the first employer.

In any event, it would appear that the Fourth Circuit's decision is confined to the FLSA. That statute requires an extant employment relationship. Thus, if, for example, the employee had been hired by the new employer and then retaliated against by that employer because of the earlier suit against the prior employer, she would have been protected.

Statutory silence on retaliation. Section 623(d) of the Age Discrimination in Employment Act forbids age discrimination in the private sector. In addition, the law contains an anti-retaliation provision for private sector

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employees. Section 623(a) proscribes age discrimination for federal sector employees. However, there is no anti-retaliation provision with respect to federal employees. Against the argument that the difference was critical, the Supreme Court held that the absence of an explicit anti-retaliation provision in the federal sector does not preclude a claim of retaliation. See *Gomez-Perez v. Potter* (553 U.S. 474, 103 FEP Cases 494 (2008); 26 HRR 596, 6/2/08).

Similarly, the Civil Rights Act of 1866 (42 U.S.C. § 1981) provides that all persons, regardless of color, have an equal right to make and enforce contracts. The statute contains no provision protecting persons who complain about discrimination in the making and enforcing of contracts. Notwithstanding such silence, the court held that retaliatory conduct would be unlawful. See *CBOCS West v. Humphries* (553 U.S. 442, 103 FEP Cases 481 (2008); 26 HRR 595, 6/2/08).

These cases suggest that where Congress prohibits discrimination, it impliedly prohibits retaliation against those who invoke the prohibitions of the statute.

Conclusion. As these cases demonstrate, the Supreme Court and other courts will, with few exceptions, give a broad protection to employees who complain about alleged violations of employee-protection statutes. These statutes cover the broad spectrum of employment law. And, as noted at the outset, employees are ready, willing, and able to claim retaliation for making such complaints. The EEOC retaliation-related caseload reflects this fact.

The upside of this is that employees will not be fearful about making complaints. Further, however the complaint comes out, the matter at least will see the light of investigative day.

The downside is that some employers will unnecessarily treat a complaining employee with kid gloves, even if the employee engages in poor performance or other misconduct. The answer may be that employers should simply make sure of their facts before acting, and make sure that any adverse action against the complainant is consistent with action against noncomplaining employees.

As usual in a paper of this character, and in deference to my fellow lawyers, I sound the customary warning to employers and employees: when in doubt, call your lawyer.

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CONFERENCE CALENDAR

May

21-23—Total Rewards 2012 Conference & Exhibition; location: Orlando, Fla.; sponsor: WorldatWork; fee: $2,210 ($1,595 for members); telephone: 877-951-9191; web: http://www.worldatwork.org/waw/orlando2012/attendee/registration.jsp

21-24—Portfolio Concepts and Management; location: Philadelphia; sponsor: International Foundation; fee: $4,695 ($4,395 for members); telephone: 888-334-3327, option 2; web: http://www.ifebp.org/education/certificateprograms/wharton/portfolioconcepts/default.htm

22-23—Leading with Focus and Intention; location: New York City; sponsor: Cornell University; fee: $1,495; telephone: 866-470-1922; web: http://www.ilr.cornell.edu/hcd/catalog/md303.html

JUNE

1—401(k) Plan Workshop; location: Nashville, Tenn.; sponsor: Sungard/Relius; fee $410; telephone: 800-326-7235; web: http://www.relius.net/events/seminardetail.aspx?eid=26016&sid=114&sel

4-5—Expanding Your Influence: Understanding the Psychology of Persuasion; location: San Francisco; sponsor: American Management Association; fee: $2,095 ($1,895 for members); telephone: 877-566-9441; web: http://www.amanet.org/training/seminars/expanding-your-influence-understanding-the-psychology-of-persuasion.aspx

4-8—13th Annual Call Center Week; location: Las Vegas; sponsor: International Quality & Productivity Center (IQPC); fee: $2,799; telephone: 800-882-8684; web: http://www.callcenterweek.com

5-6—Executive Compensation Conference; location: New York City; sponsor: Conference Board; fee: $2,795; telephone: (212) 339-0345; Web: http://www.conference-board.org/conferences/conferencedetail.cfm?conferenceid=2380

5-6—Metrics and Measures for Effective Leadership; location: Chicago; sponsor: Linkage Inc.; fee: $1,395; telephone: (781) 402-5555; web: http://www.linkageinc.com/offerings/training/pages/metricsandmeasuresforeffectiveleadership.aspx

5-7—The Coaching Leaders Certification Program; location: Boston; sponsor: Linkage Inc.; fee: $3,995; telephone: (781) 402-5555; web: http://www.linkageinc.com/offerings/training/pages/coaching_leaders_Certificate_Program.aspx

THIS WEEK'S ISSUE

Listed below are the headlines and page numbers of selected articles in this issue followed by websites providing related information. The links provided by Bloomberg BNA are to external websites maintained by federal or state organizations in the United States, foreign or international governing bodies, or nongovernmental organizations of interest to our subscribers. Bloomberg BNA has no control over their content, timeliness, or availability.

Solomon Issues Guidance Memorandum On NLRB's Representation Case Rule Changes (p. 456)
http://www.nlrb.gov/faq/election-procedures

Workplace Fatality Rate Increased in 2010; First Gain in Five Years, BLS Figures Show (p. 460)
http://www.bls.gov/iif/oshcfoi1.htm#2010

New UI Claims Inch Down for First Time Since March (p. 461)
http://workforcesecurity.doleta.gov/press/2012/042612.asp

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http://www.bna.com/products/ens/oshr.htm

Privacy & Security Law Report
http://www.bna.com/products/corplaw/pvln.htm

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