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The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law

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National Labor Relations Board Full Of Drama

Courts Strike Down Controversial Rules And One Member Resigns

In the last several months, two courts handed down employer-friendly decisions invalidating (or at least delaying) the implementation of new rules instituted by the National Labor Relations Board (NLRB). One decision involved the so called "quickie election" or "ambush election" rules. The other decision addressed the notice posting rule. A summary of these key decisions follows, in addition to discussions of Board Member Terence Flynn's resignation and the NLRB's recently released report on social media policies.

"Ambush Election" Rules

The impetus for the ambush election rules dates back to June 22, 2011, when the NLRB proposed changes to the procedures for holding representation elections. Specifically, the proposed rule amended the procedures for determining whether a majority of employees want to be represented by a labor organization for the purposes of collective bargaining. The NLRB ultimately adopted a final rule amending its election case procedures, which went into effect on April 30, 2012.

Two weeks later, in *Chamber of Commerce et al v. NLRB*, Judge James E. Boasberg of the U.S. District Court for the District of Columbia enjoined the NLRB representation case rules due to the lack of a quorum of three NLRB members acting on the final rule. Citing the U.S. Supreme Court's decision in *New Process Steel*, the court noted that: "At the end of the day, while the Court's

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"Start Spreading The News…"

Ogletree Deakins Opens Office In New York City

Ogletree Deakins opened its 41st office in April in the nation's largest city – New York, New York. Starting with eight of the Big Apple's best employment attorneys (three shareholders and five associates), the firm expects the office to grow quickly.

Edward Cerasia II, who previously practiced with Seyfarth Shaw, serves as Managing Shareholder of the New York City office. Joining Cerasia from Seyfarth is fellow shareholder Anjanette Cabrera, along with five associates. Cheryl Stanton, a shareholder in Ogletree Deakins' Morristown office, and Patrick DiDomenico, the firm's Director of Knowledge Management, also have relocated to the New York City office.

Kim Ebert, Ogletree Deakins' Managing Shareholder, expressed the sentiment of the firm: "A New York City office supports our strategic initiative to provide premier labor and employment law legal services to employers from coast to coast. It strengthens our commitment to clients in developing and growing our presence in major markets with talented lawyers."

Cerasia similarly expressed excitement about the opportunity: "We are thrilled to open the New York office with Ogletree Deakins, which is well known for its outstanding client service and deep bench strength in all areas of labor and employment law. Joining Ogletree Deakins gives our team an exciting opportunity to provide our clients with cost-effective representation throughout the country, as well as handle new matters for the firm's clients in New York." ■

BEWARE OF H-1B WAGE LAW VIOLATIONS

Company Ordered To Pay Over $300,000 In Back Pay And Penalties For H-1B/LCA Violations

A recent case before the Office of Administrative Law Judges (ALJ) is a compelling reminder that H-1B wage law infringements can result in significant financial penalties and fines. Moreover, violations in H-1B program rules also can lead to program debarment and even criminal investigations.

H-1B Wage Requirements

In this case, the ALJ found that the employer, a New Jersey-based consulting company, had violated several H-1B wage obligations as set out in the Immigration and Nationality Act (INA) and its implementing regulations.

H-1B visas are issued for "specialty occupations" and allow an employee to work temporarily for a U.S. employer in a qualifying position. The INA requires an employer to pay H-1B employees as much as it pays other employees with similar experience and qualifications (the "actual wage") or the prevailing local wage level for the H-1B worker's occupational classification, whichever is greater. Prior to submitting an H-1B petition to the U.S. Citizenship and Immigration Services (USCIS), the company must determine the prevailing wage rate for the occupational classification in the H-1B employee's area of intended employment and file a Labor Condition Application (LCA) with the U.S. Department of Labor (DOL).

H-1B employees must be paid the required wage listed on the original H-1B petition when they report for work, and these wages must continue to be paid even through periods of nonproductive status "due to a decision by the employer," such as a lack of assigned work or the absence of a permit or license.

The regulations also require an H-1B employer to provide notification to its workforce of the filing of an LCA by posting a *notice of filing* in two or more conspicuous locations. These notices must be placed at the employer's primary place of business and any other worksite where an H-1B employee may be placed, "whether the place of employment is owned or operated by the employer or by some other person or entity," such as an end-client site.

Back Pay And Penalties

Finding that numerous H-1B provisions had been violated, in a May 16, 2012 ruling, the ALJ awarded over $250,000 in back wages to former H-1B employees for its failure to pay the prevailing wage during times when they were "benched" without assigned projects. The H-1B employer also was ordered to pay more than $67,000 in civil money penalties for its willful failure to pay the prevailing wage and to post the required notice of LCA filing at the end-client work sites, among other violations.

"Piercing The Corporate Veil"

Significantly, the ALJ held not only the corporate entity responsible, but also held the company's sole shareholders and corporate officers personally liable for payment of assessed back wages and civil money penalties. Although a corporate entity is presumed to be separate and distinct from its shareholders, a court may "pierce the corporate veil" and hold corporate shareholders personally liable if they have abused the privilege of incorporating by ignoring corporate formalities and if the situation presents an element of "injustice" and fairness demands that the shareholders not have limited liability.

The court, in this instance, found that the evidence established a basis for disregarding the corporate form. The corporation served merely as the alter-ego of its shareholders: they observed no corporate formalities; they received loans and rents from the corporation but could produce no documentation memorializing these transactions; and they intermingled corporate and personal assets. As a result, the shareholders compromised the company's ability to comply with the H-1B wage laws. Consequently, the ALJ found that justice and fairness required that the shareholders be held personally liable for back wages and civil money penalties.

What Does This Mean?

The DOL continues to aggressively prosecute employers that violate the laws on wage payments to H-1B workers. If you employ H-1B workers, it is critical that you are aware of – and scrupulously follow – the special wage payment rules applicable to H-1B employees to avoid any potential liability. Until recently, this area of immigration compliance had gone largely unchecked. As part of our comprehensive immigration compliance services, Ogletree Deakins can audit H-1B/LCA records and assist employers in implementing proper procedures to avoid future liability. ■

Ogletree Deakins

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Ogletree Deakins State Round-Up

ARIZONA

On May 10, Governor Jan Brewer signed HB 2571 into law. The legislation makes sweeping changes to the state personnel system, including making all new hires "at will" employees. The new law, which "uncovers" workers from the state's merit system and gives supervisors more flexibility in hiring and firing, will take effect on September 29, 2012.

CALIFORNIA*

On May 21, the Ninth Circuit Court of Appeals held that because the use of medical marijuana remains illegal under federal law, the ADA does not protect against discrimination on the basis of medical marijuana use, even if that use is in accordance with a California law explicitly authorizing such use. *James v. City of Costa Mesa*, No. 10-55769 (May 21, 2012).

FLORIDA

The Eleventh Circuit Court of Appeals recently upheld a jury verdict in favor of two doctors at a Florida hospital who alleged that they were subjected to a hostile work environment in retaliation for complaining about discrimination. The Eleventh Circuit has now joined 10 other circuits in recognizing a retaliatory hostile work environment claim under Title VII of the Civil Rights Act. *Gowski v. Peake*, No. 09-16371 (June 4, 2012).

INDIANA*

On March 19, Governor Mitch Daniels signed into law a bill imposing statewide restrictions on smoking in public places. Indiana is the 38th state to enact such a statewide ban. This law goes into effect on July 1, 2012. Any public place where smoking is permitted must post conspicuous signs. Employers also must inform current and prospective employees of the smoking prohibitions that apply.

MICHIGAN

The Sixth Circuit Court of Appeals recently held that an employer was not required to accommodate a narcoleptic worker's request to adjust her schedule so she could avoid driving to and from work in heavier traffic. According to the federal appellate court, "the ADA does not require an employer to accommodate an employee's commute." *Regan v. Faurecia Auto. Seating Inc.*, No. 11-1356 (May 10, 2012).

MINNESOTA

The Minnesota Supreme Court held in a case where an employee had taken a leave of absence under the state's parenting leave law that no formal words or express reference to the statute was necessary to be entitled to its protections. The court found, however, that the worker (who was granted personal leave after her parenting leave expired) was not entitled to reinstatement. *Hansen v. Robert Half International, Inc.*, No. A10-1558 (May 30, 2012).

NEW JERSEY*

On June 4, a bill was introduced in the state Senate that would greatly expand employers' notice obligations under the state family leave insurance and temporary disability insurance laws. The new notice would not only contain additional content, but also would have to be distributed to all employees at least twice a year.

OHIO*

The Sixth Circuit Court of Appeals has adopted the "but for" causation standard for claims brought under the ADA. In this case, the court found that the plain language of the ADA does not provide that a plaintiff must prove that his or her disability was the "sole" cause of the adverse employment action. *Lewis v. Humboldt Acquisition Corp.*, No. 09-6381 (May 25, 2012).

OREGON*

The Ninth Circuit Court of Appeals upheld the dismissal of a suit brought by a nurse who requested a waiver from her employer's five-unplanned-absence limit. According to the court, the employer established that compliance with its attendance policy was an essential job function. *Samper v. Providence St. Vincent Med. Center*, No. 10-35811 (April 11, 2012).

SOUTH CAROLINA

On June 6, the state legislature approved a scaled back version of legislation that is aimed at discouraging union activity. H. 4652, which is expected to be signed by Governor Nikki Haley, would increase the monetary penalties that can be imposed against employers and labor groups that violate the state's right-to-work law. The bill also would allow employers to display a poster informing workers of their rights under state law.

TENNESSEE

Governor Bill Haslam recently signed into law a bill (S. 2625) clarifying that an employee's right to take a 30-minute meal or rest period includes the right to waive the meal period or break. The new law applies to employees who are principally employed in the service of food or beverages and who receive tips. The waiver must be made knowingly and voluntarily and both the employer and employee must consent.

TEXAS

The Fifth Circuit Court of Appeals recently upheld a jury verdict in favor of a doctor of Middle Eastern descent who claimed that his hiring by another hospital was blocked in retaliation for his bias complaints. The court found, however, that the doctor could not show that he was constructively discharged. *Nassar v. University of Texas Southwest Med. Center*, No. 11-10338 (March 8, 2012).

**For more information on these state-specific rulings or developments, visit www.ogletreedeakins.com.*

IS THE TIDE TURNING? THE DEFENSE OF MARRIAGE ACT AND EMPLOYEE BENEFITS

by Christina Broxterman (Atlanta), Mark E. Schmidtke (Chicago) and Laura S. McAlister (Atlanta)

The Defense of Marriage Act (DOMA), which provides that under federal law marriage is between one man and one woman, is no stranger to employers. DOMA is the reason that employer health benefits provided to same-sex spouses are taxable, and is the reason that tax-qualified plans are not required to provide survivor benefits to same-sex spouses.

DOMA also is shaping up to be no stranger to the news in 2012. This year, two federal courts – including the First Circuit Court of Appeals – have ruled the provision of DOMA that limits marriage to an opposite-sex union unconstitutional. Also, last month President Barack Obama announced his support of gay marriage – although he did not go as far as addressing whether there should be a federal right to gay marriage. While these types of developments are indeed newsworthy, they do not yet rise to the level of requiring (or allowing) employers to modify their plans to fully recognize same-sex marriages in all contexts.

Background On DOMA

DOMA, which was signed into law by President Bill Clinton in 1996, provides that states are not required to recognize a same-sex marriage that is treated as a marriage in any other state. DOMA also provides that, for purposes of federal law, only a marriage between a man and a woman is recognized. Because a person's marital status determines numerous benefits, rights and privileges under the United States Code, the provision of DOMA restricting marriage to opposite-sex unions has far-reaching implications, including implications with respect to the administration of employee benefit plans governed by the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code, both federal laws.

Effect Of DOMA On Employee Benefits

A person's marital status is determinative of many benefits offered under an employee benefit plan. If the employee benefit plan or provision provides a tax-preferred benefit under the Internal Revenue Code – then generally the benefit cannot be extended to a same-sex spouse without incurring tax implications. Likewise, there are certain spousal benefits that are mandated or allowed under ERISA or the Internal Revenue Code – and those benefits do not extend to same-sex spouses. For example:

- ***Survivor Annuities Under Certain Tax Qualified Plans.*** Under both ERISA and the Internal Revenue Code, certain tax qualified plans are required to provide survivor annuities – whereby upon the death of the participant the "spouse" has a right to survivor benefits unless previously waived by the participant and spouse. Because the survivor annuities are a creation of federal statutes, DOMA prevents a plan administrator from applying these rules to same-sex spouses. Rather, the rules would view a participant in a same-sex marriage as "unmarried." A plan may, however, allow optional forms of benefits whereby a same-sex spouse is the designated beneficiary.
- ***Hardship Distributions.*** Under the Internal Revenue Code, a cash or deferred arrangement or "Section 401(k) plan" can permit participants to receive a hardship withdrawal in the event of certain financial hardship. Prior to a 2006 change in the law, the financial hardship events were limited to those affecting the participant or a spouse, or a dependent of the participant. Unless a participant's same-sex spouse also qualified as a participant's tax dependent, a hardship distribution was unavailable in the event of a hardship faced by the participant's same-sex spouse.

A 2006 law attempted to address this result by expanding the list of hardship events to include hardship expenses (such as medical or funeral expenses) relating to a "primary beneficiary" under the plan (which can include a same-sex spouse). However, if a plan has not been amended for this permissive expanded hardship definition, a participant's hardship events remain restricted by DOMA and plan administrators can only look at the hardship expenses relating to the participant, an opposite-sex spouse and a tax dependant.

- ***Health Coverage.*** There is nothing in ERISA or the Internal Revenue Code that limits employer-provided health coverage to an employee, the employee's spouse (as defined under federal law) or the employee's dependent. An employer (other than the federal government) can design its group health plan to permit coverage of a same-sex spouse. However, because medical coverage received under an employer-provided health plan is excludable from income for the medical care of only the participant, the participant's spouse and the participant's tax dependent, the benefits provided under the group health plan (or alternatively, the employer contributions made to the group health plan) would be taxable in light of DOMA.

"Plan administrators will need to watch future decisions to determine whether they impact their . . . plans."

The Status Of DOMA

In a February 22, 2012 decision where DOMA was successfully challenged in a federal district court in San Francisco – *Golinski v. United States Office of Personnel Management* – a federal government employee attempted to enroll her same-sex spouse in the government's health plan. Coverage was denied because DOMA proscribed federal health coverage to same-sex spouses.

The participant challenged the interpretation, arguing that DOMA violated her rights to equal protection under the Due Process Clause of the Fifth Amendment, which limits the distinction the federal government may make between groups or categories of people by placing the burden on the government to

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WORKPLACE STRATEGIES SHINES IN VALLEY OF SUN

Program Returns To New Orleans In 2013

This year's Workplace Strategies program continued its tradition as the premier advanced-level annual labor and employment law seminar. The program featured more than 85 "cutting-edge" topics, over 150 speakers and more than 600 registered attendees.

Workplace Strategies 2012 was held on May 10-11 in Phoenix at the fabulous Arizona Biltmore. The program included enhanced pre-conference "immersion" sessions, a charity golf tournament at the acclaimed Troon North Golf Club, a reception featuring recording artist Jordin Sparks and benefiting Childhelp, a keynote presentation from Fox News commentator Joe Trippi, our annual review of the most bizarre employment law cases, a special Saturday breakfast session featuring U.S. Senator Jon Kyl (R-Arizona), helpful breakout and roundtable sessions, and much more.

During the Phoenix seminar, Workplace Strategies moderator Joe Beachboard announced that in 2013 the program will be held at the historic Roosevelt New Orleans on May 9-10 (with pre- and post-conference sessions on May 8 and 11). In response to this exciting news, more than 200 clients have already registered for next year's program.

According to Ogletree Deakins Managing Shareholder Kim Ebert, "We are extremely proud of Workplace Strategies and the fact that so many of our clients took time from their busy schedules to join us in Phoenix. We also are delighted that so many have already registered for New Orleans next year." ■

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justify its reasoning for the distinction. The district court agreed with the participant and found that her same-sex spouse was entitled to benefits under the health plan.

On May 31, 2012, in *Massachusetts v. United States Department of Health and Human Services,* the First Circuit Court of Appeals also held that DOMA did not withstand scrutiny based on equal protection and federalism concerns and was thus unconstitutional. This case was the companion case to *Gill v. Office of Personnel Management*, in which the surviving same-sex spouses of federal employees sought health benefits under a federal health plan. The First Circuit ruled on DOMA but stayed its applicability to any cases pending in the courts (including *Gill*) until the U.S. Supreme Court has had a chance to review the issue of DOMA's constitutionality.

Implications For Employee Benefits

Although the recent case law may be indicative of the tide turning against the constitutionality of DOMA, it is too early to tell. More litigation on the issue is expected. The district court decision in San Francisco is not binding on other courts, even courts in the same district. The First Circuit decision has been stayed, so it also is not binding on other courts, although lower courts in the First Circuit as well as in other federal circuit courts of appeal may find it persuasive.

What that means is that plan administrators will need to watch future decisions to determine whether they impact their respective plans. If a split develops in the federal circuit courts of appeal, administrators will have difficult decisions to make about whether or not DOMA is still applicable in their jurisdiction. If a benefit plan is applicable in more than one jurisdiction, plan administrators' jobs will be even more difficult because they may have to reconcile conflicting court decisions. Uniformity will not occur unless or until the constitutionality of DOMA is considered by the U.S. Supreme Court or the law is amended by Congress. In the meantime, plan administrators of both welfare and retirement plans will need to take into account DOMA's more limited definition of marriage when applying and drafting employee benefit plans. ■

Ogletree Deakins News

New to the firm. Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Eric Berezin, Patricia Luna and John Morrison (Atlanta); Richard Marcus and Shavaun Taylor (Chicago); Natalie Stevens (Cleveland); Daniel Verrett (Houston); Joshua Wille (Kansas City); Brian Bradford (Las Vegas); Aaron Cole and Ashley Decker (Los Angeles); Mark Kowal (Morristown); Andrew Burnside (New Orleans); Hema Chatlani, Maayan Deker, Allison Ianni, Caitlin Senff and Aaron Warshaw (New York City); Samuel Endicott (Orange County); Samantha Clancy (Pittsburgh); Jacqueline Barrett and Min Suh (Philadelphia); John Boylston (Portland); Stephen Huey and Allison Kranz (Raleigh); and David Rosner (Washington, D.C.).

Chambers USA rankings. Ogletree Deakins is pleased to announce that 74 of the firm's attorneys have been included in the 2012 edition of *Chambers USA*, an annual ranking of the nation's top law firms and lawyers. Additionally, the firm's offices in 17 states and the District of Columbia have been included in the 2012 edition. Chambers ranks firms and individual lawyers in bands, with Band 1 being the highest. The rankings are developed through research and interviews with clients and peers to assess their reputation and knowledge across the United States. In the 2012 edition, 15 attorneys and the firm's offices in seven states earned a Band 1 ranking. Ogletree Deakins' Managing Shareholder Kim Ebert noted: "We continue to pride ourselves on providing superior client service – in fact, we attribute much of our growth over recent years to this focus. Our ranking in the 2012 edition of *Chambers USA* demonstrates our commitment to providing our clients with the best service in the legal industry."

Compensation Growth Higher For Non-Union Workers

Wages for non-union workers increased more in the last year than their union counterparts, according to figures recently released by the Labor Department's Bureau of Labor Statistics. The average hourly wage for non-union workers rose 2.3 percent compared to a 0.7 percent hike in pay for union-represented workers. Employer costs for benefits, however, increased slightly more over the 12-month period for unionized workers (3.9 percent) than non-union workers (3.7 percent).

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decision may seem unduly technical, the quorum requirement, as the Supreme Court has made clear, is no trifle."

The court did not reach the Chamber of Commerce's challenge to the final rule on myriad grounds. Instead, the court reached only the first contention: that the rule was adopted without the statutorily required quorum.

Notice Posting Rule

On April 17, 2012, the D.C. Circuit Court of Appeals enjoined the NLRB from implementing the notice posting rule, which would have required private employers across the country to post a notice regarding the rights of employees to organize and join a union, until the D.C. Circuit had fully considered the issue on appeal. The appellate court cited the verdict obtained a few days earlier by the U.S. and South Carolina Chambers of Commerce in federal court in South Carolina.

Ogletree Deakins brought the lawsuit on behalf of the U.S. Chamber and the South Carolina Chamber. According to Gray Geddie, Ogletree Deakins' former chairman and the attorney who argued the case, the decision both vindicates the rights of employers and constrains the power of the NLRB. "In striking down the rule, the court preserved the role of the NLRB as a quasi-judicial arbiter of employee rights, rather than an advocate for unions and unionization," he said.

On April 27, the Office of General Counsel of the NLRB issued a letter clarifying its understanding of the D.C. Circuit Court of Appeals' decision enjoining the NLRB's implementation of the notice posting rule. According to the letter, which clarifies that the Board will comply with the District Court of South Carolina's judgment invalidating the notice posting rule, "the NLRB will honor the District Court of South Carolina's judgment and not implement the Rule against any person unless and until that judgment is reversed upon appeal by the Fourth Circuit Court of Appeals or the Supreme Court of the United States."

It is expected that the NLRB will appeal Judge David Norton's decision to the Fourth Circuit.

NLRB Member Flynn Resigns

The NLRB announced on May 27 that Member Terence F. Flynn had submitted his resignation to President Obama and NLRB Chairman Mark Gaston Pearce. Flynn also asked the President to withdraw his February 2011 nomination to the Board, which had never received Senate action.

In his resignation letter, Flynn stated that effective immediately he would recuse himself from "all NLRB activities." Flynn's resignation, dated May 25 and submitted May 26, will be effective on July 24, 2012.

Report On Social Media

On May 30, 2012, the NLRB issued a report on social media policies. The key issue that the report addressed was whether employers' restrictions on the use of social media "would reasonably be construed to chill the exercise of Section 7 rights" by employees under the National Labor Relations Act. In the report, the NLRB found a number of social media restrictions unlawful.

For example, a policy barring workers from disclosing "confidential guest, team member or company information" on social networking sites was unlawful because it could "reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves – activities that are clearly protected by Section 7." In addition, a policy instructing employees to ensure that their posts were "completely accurate and not misleading" would be "overbroad because it would reasonably be interpreted to apply to discussions about, or criticism of, the Employer's labor policies and its treatment of employees."

The NLRB also found policies cautioning employees to "think carefully" about "friending" colleagues and those prohibiting employees from commenting on any legal matters unlawful. The report included an example of an acceptable social media policy.

Conclusion

According to Harold P. Coxson, Jr., a shareholder in Ogletree Deakins' Washington, D.C. office: "The significance of these four, seemingly unrelated issues is that employers are successfully challenging the activist, pro-union NLRB's aggressive agenda, but there is much more still pending. For example, the Board's *Specialty Healthcare* decision, which privileges unions to organize in micro-small, single-job classification bargaining units, is on appeal to the Sixth Circuit. Similarly, the Board's *D.R. Horton* decision prohibiting employers from requiring employees to sign mandatory arbitration agreements that do not allow employees to bring class or collective claims, is on appeal to the Fifth Circuit."

Undoubtedly, however, the most important ruling will be the business community's challenge to the constitutionality of the President's three NLRB "recess" appointments when Congress was not in recess but continued to operate in pro forma sessions. If the courts, and ultimately the U.S. Supreme Court, rule that the appointments were unconstitutional, then every Board action or decision since the January 4 recess appointments will be invalid and recalled for lack of a quorum under the authority of the Supreme Court's *New Process Steel* decision. "That," according to Coxson, "would be a 'game changer' – truly a 'big deal'." ■

SEVENTH CIRCUIT REJECTS NATIONAL ORIGIN DISCRIMINATION CLAIM

Court Distinguishes Alien Status From Race

A federal appellate court recently rejected the national origin discrimination claim brought by a bank employee who assisted her husband, an undocumented alien, in opening a bank account. According to the Seventh Circuit Court of Appeals, any discrimination that led to the employee's firing was not based on her husband's race or national origin but instead on his status as an undocumented alien. ***Cortezano v. Salin Bank & Trust Company,*** *No. 11-1631, Seventh Circuit Court of Appeals (May 21, 2012).*

Factual Background

Kristi Cortezano was employed by Salin Bank & Trust Company as a sales manager. Her husband, Javier Cortezano, was a Mexican citizen living illegally in the United States. Javier did not have a social security number and, thus, was unable to open a banking account for his new business. After her husband obtained an individual tax identification number, Cortezano named him a joint owner on her account at Salin Bank and helped him open personal and business accounts.

In late 2007, Javier returned to Mexico to try to obtain U.S. citizenship. Cortezano requested vacation time to attend proceedings in Mexico to help Javier. In connection with this request, she revealed Javier's alien status to her supervisor, Stacy Novotny. In response, Novotny notified the bank's security officer, Mike Hubbs. Worried that the arrangement would violate bank fraud laws, Hubbs scheduled a meeting during which he expressed his concern to Cortezano that her husband must have used fraudulent documents to open his accounts.

Hubbs later emailed several Salin Bank supervisors to notify them that Javier used false identification to open his accounts. Hubbs prepared an internal Suspicious Activity Report, which "harped on the fact that Javier was an 'illegal alien'." In February, Cortezano refused to attend a meeting because Salin Bank would not allow her attorney to attend. That afternoon, the bank terminated her employment for refusing to participate in the meeting.

Cortezano filed suit against Salin Bank alleging employment discrimination under Title VII of the Civil Rights Act. The trial judge granted the bank's motion for summary judgment and Cortezano appealed this decision.

Legal Analysis

Cortezano alleges that Salin Bank discriminated against her because of her marriage to a Mexican citizen whose residence in the United States was unauthorized. The Seventh Circuit first noted that it had not decided whether discrimination based on the race or national origin of a person's spouse or partner falls within the protections of Title VII. Even assuming that it does, the court found, Cortezano's claim fails. According to the Seventh Circuit, the "claim falls short because it is based on Javier's alienage," which is not protected by Title VII.

The Seventh Circuit noted that Novotny first called Hubbs when she learned Javier was undocumented and that Hubbs' report stressed that fact. Moreover, the court found that the report barely noted that Javier was Mexican. The "*coup de grâce*," according to the court, was that Hubbs reported his findings to U.S. Immigration and Customs Enforcement after Cortezano was fired. The court concluded that "it is beyond dispute that Salin Bank's actions were motivated by the fact that Javier's presence in the United States was unauthorized."

The Seventh Circuit also noted several reasons the bank may have been concerned with Cortezano's assistance to Javier in opening accounts. The court found that Salin Bank might have wanted to avoid holding accounts for unauthorized aliens. "It would hardly advance the bank's business to be known as a resource for such aliens," the court noted. Finally the court observed that the U.S. Supreme Court has ruled that the term "national origin" includes "the country from which you or your forebears came" but not one's immigrant status. Thus, the Seventh Circuit affirmed the lower court's ruling, holding that "[a]ny discrimination suffered by [Cortezano] was not the result of her marriage to a Mexican, but rather the result of her marriage to an unauthorized alien."

Practical Impact

According to Danuta Panich, a shareholder in Ogletree Deakins' Indianapolis office: "While making employment decisions based on an individual's unauthorized presence in the United States is permissible, there is often a fine line between illegal immigration status and national origin. The employer in this case successfully walked that line because of precision in thinking and documentation. Employment actions based on a worker's documentation should focus on the narrow immigration issue presented and avoid references to the individual's country of origin or ancestry."

"There is often a fine line between illegal immigration status and national origin."

Panich added: "Employers should also recognize that 'alienage' really focuses on status as an undocumented worker. Foreign individuals who are present in the United States legally are also 'aliens,' but most courts have concluded they are protected against discrimination under Title VII's sister statute: 42 U.S.C. Section 1981. Thus, had Mr. Cortezano been legally admitted to the United States, the outcome might well have been different."

Finally, Panich noted, employers should not consider this decision as approving blanket discharges of employees whose spouses happen to be undocumented. The status of a spouse is usually irrelevant. Ordinarily, employment decisions should focus on the workplace conduct of the employee. In this case, there happened to be a connection between the spouse's status and the employee's job duties. ■

COURT REJECTS WORKER'S FMLA RETALIATION CLAIM

Upholds Employer's "Honest Belief" That Employee Committed Disability Fraud

A federal appellate court recently upheld the dismissal of a lawsuit brought by an employee who claimed that he was terminated in retaliation for his use of protected leave under the Family and Medical Leave Act (FMLA). According to the Sixth Circuit Court of Appeals, the employee's retaliation claim failed because the employer had an "honest belief" that the employee had committed disability fraud. ***Seeger v. Cincinnati Bell Telephone Co.,*** *No. 10-6148, Sixth Circuit Court of Appeals (May 8, 2012).*

Factual Background

Tom Seeger was employed as a network technician by Cincinnati Bell Telephone Company (CBT). In August 2007, Seeger began experiencing pain and numbness in his left leg. On September 5, 2007, a physician confirmed that Seeger had a herniated lumbar disc, and Seeger commenced an approved FMLA leave of absence the same day.

On September 19, Seeger was examined by Dr. Michael Grainger, his primary care physician. Dr. Grainger observed that it was difficult for Seeger to change positions, get in and out of a chair, and walk. The following day, Dr. Grainger's office left a message for CBT that Seeger was unable to perform any restricted work.

On September 23, Seeger attended an Oktoberfest festival in Cincinnati for approximately 90 minutes, during which time he admittedly walked a total of 10 blocks. While at the festival, Seeger encountered several co-workers. One co-worker observed that Seeger was able to walk, seemingly unimpaired, for approximately 50 to 75 feet through the crowd, and the co-worker reported his observations to CBT's HR Manager. On October 15, 2007, Seeger reported to Dr. Grainger that he had been asymptomatic for two days, and Dr. Grainger authorized his return to work. Seeger resumed his full-time position on October 16, 2007.

Meanwhile, CBT investigated the matter by obtaining sworn statements from Seeger's co-workers and by reviewing his medical records, disability file and employment history. Based on the inconsistency between Seeger's reported medical condition and his behavior at Oktoberfest, CBT decided to suspend Seeger's employment and scheduled a suspension meeting with him. At the meeting, Seeger defended his actions and denied committing disability fraud. CBT invited Seeger to submit any relevant information, and Seeger provided a letter from Dr. Grainger. The letter stated, in part, that "[w]alking for one and a half hours at one's own pace doesn't equal working for an eight hour day nor is it reasonable to assume that he could perform even limited duties for an eight hour day."

Ultimately, CBT concluded that Seeger had "over reported" his symptoms and terminated his employment. Seeger filed a lawsuit alleging that he was fired in retaliation for taking protected leave. The trial judge dismissed the suit and Seeger appealed.

> *"An employer's invocation of the honest belief rule does not automatically shield it from liability."*

Legal Analysis

While the Sixth Circuit determined that Seeger established a *prima facie* case of retaliatory discharge due to the short amount of time between his return from FMLA leave and his termination, it also concluded that CBT articulated a legitimate, nondiscriminatory reason for discharging Seeger. In the court's words, "Fraud and dishonesty constitute lawful, nonretaliatory bases for termination."

The court then considered whether Seeger produced adequate evidence demonstrating that CBT's professed reason was a pretext for discrimination. Essentially, Seeger attempted to show that there was no factual basis for CBT's proffered reason for discharging him because CBT had ignored medical evidence in its possession that Seeger was responding to treatment, and his pain had improved before Oktoberfest.

Under the "honest belief rule," the inference of pretext is not warranted where the employer can show an honest belief in the proffered reason. The court explained that an employer's professed reason is deemed honestly held where the employer can show that it made a reasonably informed and considered decision before taking the adverse action. The court cautioned that an employer's invocation of the honest belief rule does not automatically shield it from liability because the employee must be given a chance to produce evidence to the contrary.

The Sixth Circuit held that CBT demonstrated that it reasonably relied on specific facts in determining that Seeger had committed disability fraud, and Seeger failed to refute CBT's honest belief. The court emphasized that Seeger's argument and presentation of competing medical evidence were misdirected. "The determinative question [was] not whether Seeger actually committed fraud, but whether CBT reasonably and honestly believed that he did." Accordingly, the Sixth Circuit upheld the judgment in favor of CBT.

Practical Impact

According to Bruce Hearey, a shareholder in Ogletree Deakins' Cleveland office: "The significance of this decision is that employers can protect themselves from employees who are exaggerating or misrepresenting a medical condition to get off work. To substantiate a 'reasonably informed and considered' belief of FMLA fraud, employers should conduct a thorough investigation, including whether the off-work activity is actually inconsistent with the medical restrictions, and give the employee an opportunity to defend his or her actions. An employer cannot 'jump the gun' and act precipitously on a suspicion no matter how well founded. Here the quality of the employer's investigation, and affording the employee an opportunity to explain his actions, were instrumental in upholding the discharge decision." ■