Ogletree Deakins

The Employment Law
AUTHORITY

Today's Hot Topics in Labor & Employment Law | September/October 2010

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And Much More

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Supreme Court Spotlights Retaliation, Privacy

Justices Also Set To Consider Hiring Unauthorized Aliens

Can the federal government require contract employees to disclose their use of illegal drugs? Can states sanction employers that knowingly hire unauthorized aliens? Can employers be held liable for the discriminatory actions of managers who don't make ultimate employment decisions? The U.S. Supreme Court will decide these and other issues in its new term, which began on October 3.

During the 2010-2011 term, the high court has agreed to hear seven cases that involve employment and labor related issues, or are likely to impact employers. The cases scheduled to be addressed by the Court include the following.

On October 5, the justices heard oral argument in *National Aeronautics and Space Administration v. Nelson*. This case was brought by 28 scientists working for the California Institute of Technology, which runs the Jet Propulsion Lab under a contract with NASA.

The issue before the Court is whether the government violates these federal contract employees' constitutional right to informational privacy by:

- Asking, during the course of a background investigation, whether they have received counseling or treatment for illegal drug use within the past year; and
- Asking the employees' references for any information that may have bearing on their suitability for employment at a federal facility (when the responses are used only for employment purposes and any information obtained

Please see "SUPREME COURT" on page 7

Ogletree Deakins Tops *U.S. News* Survey

Also Scores Most "Best Lawyers" In Employment Law

In September, *U.S. News & World Report* and *Best Lawyers* issued their first annual "Best Law Firms Rankings." Ogletree Deakins received a National Tier 1 ranking in both labor and employment law. Additionally, 30 of the firm's offices were recognized by the publications for providing high quality legal representation in their market, with 19 offices earning a Metropolitan Tier 1 ranking, signaling a unique combination of excellence and breadth of experience. These inaugural rankings showcase 8,782 different law firms ranked in one or more of 81 major practice areas. The reputational survey responses were combined with more than 3.1 million evaluations of individual lawyers in ranked firms in the most recent *Best Lawyers* survey of leading lawyers.

One month earlier, *The Best Lawyers in America* named 121 of the firm's attorneys to the 2011 edition of the peer-review publication. Of these 121 lawyers, 110 were named to the list under Labor and Employment Law giving Ogletree Deakins the distinction of having more *Best Lawyers* in the field of labor and employment law than any other law firm in the United States.

Ogletree Deakins' Managing Shareholder Kim Ebert said, "We are very proud of this achievement. It underscores our commitment to delivering first-class client service, is a reflection of the firm's culture, and illustrates our deep bench strength in labor and employment law." Ebert added, "We will continue to excel in meeting our clients' needs and fostering a spirit of partnership that we believe is part of the reason for this achievement." ■

OFCCP RESCINDS COMPENSATION GUIDELINES, REVIVES EO SURVEY

by Leigh M. Nason (Columbia)

Office of Federal Contract Compliance Programs (OFCCP) Director Patricia Shiu recently announced that OFCCP's Interpretive Standards for Systemic Compensation Discrimination will be rescinded. This action was taken pursuant to a July 2010 recommendation by the National Equal Pay Enforcement Task Force.

A Brief History

OFCCP's Standards, issued in 2006 under the Bush Administration, establish that OFCCP will focus solely on systemic pay discrimination and describe the methodology OFCCP uses in deciding to file an agency lawsuit against a contractor for pay discrimination. Four years later, OFCCP has moved from statistical analyses of compensation to conducting cohort analyses by job title or job group.

Unlike systemic compensation claims, OFCCP has been somewhat successful in litigating or conciliating individual pay claims, and individual pay discrimination – as opposed to systemic discrimination claims promoted by the Standards – appears to be the agency focus now. Consequently, the agency intends to rescind its current compensation discrimination "bible" in favor of a new tool to collect personnel and wage data and provide information to OFCCP on alleged "bad actor" contractors. Unfortunately, this leaves contractors with little guidance from OFCCP on how to identify and correct "problems" with pay.

EO Survey

OFCCP has announced that it will soon seek input from the contracting community on what Director Shiu calls a "new wage data collection instrument" – most likely, some form of the now-defunct EO Survey. OFCCP utilized the EO Survey from 2000-2005 to collect information on personnel data (*e.g.*, applicants, promotions, hires, terminations, current employment), and compensation by EEO-1 category. The hope was that the EO Survey would identify non-compliant federal contractors and assist OFCCP in identifying contractors for further evaluation. The EO Survey was discontinued in 2006 after an independent consulting group found that it was not a valid tool and did not predict systemic discrimination.

The proposed Paycheck Fairness Act would require the reinstatement of the EO Survey and its completion by one half of approximately 200,000 federal contractors each year. Even if the Paycheck Fairness Act does not pass, however, we can anticipate OFCCP issuing an Advanced Notice of Proposed Rulemaking (ANPR) to solicit input from the federal contracting community on this issue.

Director Shiu recently said on Federal Radio that she is anticipating a new data collection tool that is "effective and strategic." An effective data collection instrument could assist OFCCP in selecting contractors for compliance reviews, or persuade OFCCP that an audit is unnecessary. We also anticipate that one purpose of the new data collection instrument will be to identify contractors for corporate-wide and industry-wide compliance reviews, as the Department of Labor is already moving in the direction of corporate-wide remedies to site-specific discrimination.

Steps To Take

To prepare for these anticipated changes, federal contractors should:

- Be proactive. Compensation equity is not just an OFCCP issue; challenges can come from the Equal Employment Opportunity Commission, wage and hour, and private litigants in individual lawsuits or class actions.
- Establish consistent and well-documented pay policies and update or discard old policies.
- Review pay systems for both OFCCP compliance and Ledbetter Fair Pay Act decisional analysis. A compensation self-audit conducted under the scope of attorney-client privilege and using reliable statistical methodology can be a great tool to assess OFCCP and Title VII compliance risks. Consult with your legal advisor about the merits and demerits of making pay adjustments if you detect unexplained differences in pay.
- Don't limit your focus to only systemic discrimination. Individual pay claims can be brought by private litigants under the Equal Pay Act or by federal agencies under Title VII.

By establishing a well-documented and consistent pay system, reviewing it periodically, and training managers involved in pay decisions on what the law requires, employers stand a much better chance of defending a claim of pay discrimination brought by OFCCP or any other litigant. ■

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Additional Information
To request further information or to comment on an article, please call Stephanie Henry at (310) 217-0130. For additional copies or address changes, contact Marilu Oliver at (404) 870-1755.

Ogletree Deakins State Office Round-Up

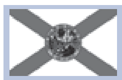
ARIZONA

The Ninth Circuit Court of Appeals recently dismissed a sex discrimination lawsuit brought by three male pilots who worked for a charter jet company in Arizona. The court found that the pilots, who were fired after a harassment investigation, could not establish that similarly situated female employees were treated more favorably. *Hawn v. Executive Jet Management Inc.*, No. 08-15901 (August 16, 2010).

CALIFORNIA

Governor Schwarzenegger recently vetoed a bill (AB 482) that would have prohibited employers from using consumer credit reports when performing background checks. The bill would have barred most California employers from using a consumer credit report unless the information obtained is "substantially job-related" for employees or applicants who have access to the employer's money, assets, trade secrets, or other confidential information.

FLORIDA



The Eleventh Circuit Court of Appeals recently held that an insurance adjuster failed to show he was fired based on his age. According to the court, "neither assigning [the worker] to the Fort Lauderdale area nor increasing his workload was an adverse employment action." *Diaz v. AIG Marketing Inc.*, No. 10-10440 (September 22, 2010).

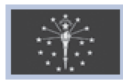
GEORGIA

In awarding relief to an ex-Georgia state worker, a federal court recently recognized the viability of a sex stereotyping claim. "While transsexuals are not members of a protected class based on sex," U.S. District Court Judge Richard W. Story wrote, "those who do not conform to gender stereotypes are members of a protected class based on sex." *Glenn v. Brumby*, No. 1:08-cv-02360 (August 9, 2010).

ILLINOIS

Governor Pat Quinn recently signed the Employee Credit Privacy Act. The new law, which goes into effect on January 1, 2011, generally prevents employers from inquiring about most employees' or applicants' credit history or obtaining their credit report from a consumer reporting agency. The Act has multiple exceptions, including exempting employers in industries dealing with banking, insurance, trade secrets, or state and national security.

INDIANA*



A federal judge in Indiana recently held that an employee with cancer is considered to be "disabled" under the Americans with Disabilities Act even if his condition is in remission at the time the alleged adverse action was taken against him by his employer. *Hoffman v. Carefirst of Fort Wayne Inc.*, No. 1:09-cv-00251 (August 31, 2010).

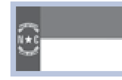
MASSACHUSETTS*

Massachusetts Governor Deval Patrick recently signed a bill that changes employers' legal obligations with regard to personnel records. The law requires employers to notify employees, within 10 days, when any information is added to their "personnel record" that is being used, has been used or may be used to negatively affect the employee's qualification for employment, promotion, transfer, additional pay, or may subject the employee to disciplinary action.

NEW YORK*

On September 7, a final version of the New York State WARN Act regulations was adopted into law. The NY WARN Act differs from the federal WARN Act in many key respects, such as requiring 90 rather than 60 days' notice, covering employers with 50 rather than 100 employees, and setting forth additional items to be included in the notices.

NORTH CAROLINA



The North Carolina Court of Appeals recently dismissed a wrongful death lawsuit brought on behalf of a 17-year-old worker who was killed on the job. In reaching this decision, the court refused to recognize a limited exception to the ban on tort claims under the state's workers' compensation law. *Valenzuela v. Pallet Express Inc.*, No. 10-87 (October 5, 2010).

PENNSYLVANIA

A Pennsylvania road construction company has agreed to pay $200,000 to settle a lawsuit brought by the Equal Employment Opportunity Commission. The suit claimed that the employer violated the Americans with Disabilities Act by rescinding a job offer after it learned that the prospective employee has diabetes. *EEOC v. Glenn O. Hawbaker Inc.*, No. 4:09-CV-1261 (October 4, 2010).

TENNESSEE

The Tennessee Supreme Court recently ruled that the *McDonnell Douglas* burden-shifting framework should not be used to decide summary judgment motions because it is "incompatible with Tennessee summary judgment jurisprudence." While the framework's factual inquiry is "particularly appropriate at trial," the court held, it is "ill-suited" for determining whether there is a genuine issue of material fact. *Gossett v. Tractor Supply Co.*, No. M2007-02530-SC-R11-CV (September 20, 2010).

TEXAS

The Fifth Circuit Court of Appeals recently held that a city planner failed to show that he was laid off and not rehired by the city of Houston based on his national origin. According to the court, the city presented a legitimate, nondiscriminatory reason for the reorganization, which the worker failed to rebut. *Okpala v. Houston*, No. 10-20175 (October 4, 2010).

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

THE USE OF SOCIAL MEDIA IN HIRING – RISKS AND TIPS

by Nicholas J. Walker*

With the current economy as it is, more than ever businesses are trying to make sure that they make wise hiring decisions. Companies want to find a person who fits with the corporate culture, who projects an appropriate image and who can succeed. Historically, employers have researched potential hires through their applications, questionnaires, interviews, references (both personal and business), background checks, credit checks, and drug tests.

With the advent of social media, more and more employers are using the Internet to check on potential employees. Many employers find the information on these sites to be particularly helpful because they perceive that this information reflects a more accurate representation of the applicant. Users of these sites are allowed to post a variety of information including photographs, videos, personal interests, and current activities (among other items). This influx of information regarding applicants would seem to be a great way to vet their ability to "fit in" with a company.

In fact, according to a study conducted by ExecuNet, an executive job-search agency, "75 percent of recruiters already use Web searching as part of the applicant screening process," and "more than a quarter of these same recruiters say they have eliminated candidates based on information they found online." An NBC News report showed that "over 77 percent of employers uncover information about candidates online, and 35 percent of them have eliminated candidates based on the information they have uncovered."

Thus, it is clear that businesses are, in fact, utilizing this resource. But, there are many potential pitfalls and risks (both practical and legal) in conducting this type of research, as discussed in more detail below.

* Nicholas Walker is an attorney in Ogletree Deakins' Kansas City, Missouri office, where he represents management in labor and employment related matters.

Potential Legal Risks

Invasion of Privacy

Invasion of privacy is one of the issues most commonly cited by applicants who feel that employers should not be looking at their social networking profiles when making employment decisions. This is likely due to the fact that many social networkers believe that what they do and post on social networking sites is "private."

Under the law, a claim of invasion of privacy is almost exclusively based on whether an employee has "a reasonable expectation of privacy in the information viewed." While there are no specific cases that have decided this issue yet, applicants who allow their profiles to be viewed by the general public would have a hard time demonstrating that they had a reasonable expectation of privacy in this information. On the other hand, if an employer hacked into a potential employee's account or posed as someone else in order to "friend" the potential applicant and gain access to this information, the employer could certainly be setting itself up for a lawsuit.

TIP: If you have made the decision to utilize social networking information to vet potential applicants, use information that is generally available to the public rather than attempting to gain access through covert means.

Discrimination

Federal and state statutes generally prohibit discriminatory hiring decisions based on protected categories such as race, color, religion, sex, national origin, religion, age, disability, genetic information and military status. Some state and local statutes prohibit discrimination based on sexual preference, marital status, and other protected classes. The danger of conducting background checks of applicants using social media is that you may become aware that the applicant belongs to a protected category – something that through the general application process you otherwise would be unaware.

Once the employer views the individual's social networking page, there is no going back. Both Facebook and MySpace provide user profile pictures that could automatically provide the employer with information concerning race, gender and age. Because users of these sites typically provide additional information about themselves, including their interests, there is a danger that you could become aware they are disabled, work in the military, have a family, etc. While the availability of this information does not inherently lead to discrimination, employers that make adverse employment decisions and have viewed an applicant's social networking profile – whether or not they factored in any information – may find themselves subject to a discrimination claim.

In fact, most companies would not dream of asking an applicant in an interview or on an application form about his race, age, religious beliefs, etc. so that there is no potential for bias in the application process. This type of information, however, may be readily available on an applicant's social networking profile. Thus, employers that make hiring decisions and have viewed an applicant's social networking profile may find it difficult to defend against a claim of discrimination, because they are deemed to have known of and relied on this information.

Another particular risk for employers exists in the form of disparate impact claims if it was found that applicants who had a certain protected characteristic (*i.e.*, race) in common were being systematically refused employment. Even if there is no disparate impact based on actual viewing of the profiles, there may be a disparate impact if the company tended to hire those who had social networking profiles rather than those who did not. This could occur because (while this is a generalization) social networks are comprised of younger, more affluent (*i.e.*, those sophisticated with the use of the Internet) users.

TIP: If you find it necessary to use social networking profiles in your hiring process, it would be wise to insulate the decision maker from actually

Please see "SOCIAL MEDIA," on page 5

NLRB ISSUES CONTROVERSIAL DECISIONS

Seminar In Las Vegas Will Address These Rulings And More

After a slow start due to the Senate confirmation fight over National Labor Relations Board (NLRB) Member Craig Becker (eventually given a recess appointment by President Barack Obama) and the need to reconsider scores of decisions from the former two-Member Board (as a result of the U.S. Supreme Court's *New Process Steel* decision), the NLRB has now begun to issue significant decisions. The rulings of the new three-Member majority of former union lawyers who currently sit on the Board are starting to make dramatic changes to national labor law policies and have recently expanded the law in ways that substantially favor unions.

For example, on August 27, the current NLRB majority, consisting of Chairman Wilma Liebman and Board Members Mark Pearce and Craig Becker, issued over 30 major decisions, in many cases over the dissents of former Member Peter Schaumber (whose term expired that day) and current Member Brian Hayes. How these decisions will impact employers is the subject of an important new seminar entitled "Not Your Father's NLRB," which will be held on December 9 and 10 at the Bellagio in Las Vegas (for more information, see the enclosed separate brochure). Several Ogletree Deakins attorneys, along with former Board Member Peter Schaumber, will be featured speakers at the program. ■

New To The Firm

Several lawyers recently have joined the firm. They include: Brittni Pitts, Deepa Subramanian and Lauren Zeldin (Atlanta); John Brown (Dallas); Jocelyn Campanaro, John Combs, Angelica Ochoa and Christopher Thomas (Denver); William Warihay (Greensboro); Alyson Carstens (Kansas City); Jonathan Longino and Emmet O'Hanlon (Los Angeles); Shira Krieger and Jocelyn Merced (Morristown); Mike Johnson (Nashville); Carolyn Sieve (Orange County); Amanda Bolliger and Nadine Gartner (Portland); Amy Dalal and Kristin Meister (Raleigh); Jean Kosela (San Francisco); Talib Ellison (St. Thomas); and Tressi Cordaro (D.C.).

"SOCIAL MEDIA"

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viewing the profiles. This can be accomplished by having another individual look at the sites and gather limited and particularized information regarding each applicant (*i.e.*, whether or not the applicant has posted inappropriate photos, whether or not the applicant has or is working for a competitor).

The list of information collected also can be tailored to the specific company at issue. For instance if you are a large oil conglomerate, you might want to know if the applicant is involved in any groups that purport to be against "big oil."

Fair Credit Reporting Act

While the Fair Credit Reporting Act may not come to mind when discussing searches of applicant profiles, it governs "employment background checks for the purposes of hiring" and applies if "an employer uses a third-party screening company to prepare the check." Thus, if an employer is using an outside resource to view social networking sites and provide information, the applicant must be informed of the investigation, given an opportunity to consent, and notified if the report is used to make an adverse decision.

TIP: If you decide to use social networking information in your hiring decision, consider having these checks done within the business and not a third party to avoid claims under the Act.

Practical Risks

Backlash from Potential Employees

Most employees would like to think that what they do outside of work is off limits to employers and that their employer is going to allow them a private life. When a candidate with great potential is deciding which employer he or she would rather work for, there is a good chance that the candidate will pick the one who refrained from searching his or her social networking profile to look at what he or she considers personal. Although in today's economy it is hard for applicants to be too picky, there will be a day when employees have more choices and likely will not choose the employer that is acting like "Big Brother."

Identity, Authenticity and Accuracy of Posted Information

Perhaps the most serious problem with employers using social networking profiles as tools to investigate applicants is that the profiles they find are not always trustworthy or authentic. Although this may seem obvious, it can be overlooked. As an initial matter, employers cannot be sure that the information they find on a social networking site is actually about the applicant they are researching and not someone else with the same name. Also, because anyone can create a profile (even a fraudulent profile for someone else), one cannot be sure that the information provided is actually accurate. Perhaps the most tragic and well-known occurrence of this phenomenon occurred in Missouri where a mother posed as a child on MySpace. Her deception allegedly led to the suicide of a local youth. While mishaps in the employment context are not so grotesque, one could certainly envision unfortunate issues that could arise.

In fact, there is some evidence that applicants (knowing that the job market is very competitive and that businesses are utilizing social networking sites to make hiring decisions) have been creating fake profiles of other potential applicants and people they view as competition for jobs. Moreover, the problem with the use of these sites becomes compounded because employers are not required (unless they use a third party) to tell an applicant that information from the site was used to make the hiring decision or give the applicant an opportunity to correct any misinformation which was provided.

Conclusion

Although companies may find social networking sites useful, they should be wary of the potential risks associated with such use. These risks include potential litigation as well as employee backlash. ■

WORKER CAN'T SELL COURT ON EMPLOYEE STATUS

Ninth Circuit Rejects Sex Discrimination Suit

A federal appellate court recently dismissed a lawsuit brought by an insurance agent who sued for sex discrimination in violation of Title VII of the Civil Rights Act. According to the Ninth Circuit Court of Appeals, the insurance agent was an independent contractor and not an "employee" entitled to the protections of Title VII because she controlled the manner and means by which she sold financial products. ***Murray v. Principal Financial Group, Inc.,*** *No. 09-16664, Ninth Circuit Court of Appeals (July 27, 2010).*

Factual Background

Patricia Murray was a "career agent" for Principal Financial Group, Inc., Principal Life Insurance Company and Princor Financial Services Corporation (Principal), selling financial products and services. Murray filed a lawsuit in federal court against Principal alleging sex discrimination in violation of Title VII. The trial judge granted summary judgment in Principal's favor, holding that Murray was not an employee of the company. Murray appealed, arguing that she qualified as an employee because Principal exercised sufficient "control" over her work.

Legal Analysis

The issue before the Ninth Circuit was whether Murray was an independent contractor or an "employee" under Title VII. The court found that the U.S. Supreme Court intended its common law test, pronounced in *Nationwide Mutual Insurance Company v. Darden*, to control whenever an employment statute defines "employee" in the same way it is defined in the Employee Retirement Income Security Act (ERISA). Since both ERISA and Title VII, the Ninth Circuit noted, define "employee" as "an individual employed by an employer," the court ruled that the *Darden* test applies to this case.

Under *Darden*, to determine whether a worker is an independent contractor or an employee for Title VII purposes courts should evaluate "the hiring party's right to control the manner and means by which the product is accomplished." The relevant factors in making this determination are:

- The skill required;
- The source of the instrumentalities and tools;
- The location of the work;
- The duration of the relationship between the parties;
- Whether the hiring party has the right to assign additional projects to the hired party;
- The extent of the hired party's discretion over when and how long to work;
- The method of payment;
- The hired party's role in hiring and paying assistants;
- Whether the work is part of the regular business of the hiring party;
- Whether the hiring party is in business;
- The provision of employee benefits; and
- The tax treatment of the hired party.

The Ninth Circuit found that several of these factors "strongly favor classifying Murray as an independent contractor." According to the court, Murray was free to operate her business without intrusions. Murray decided when and where to work (including maintaining her own office), she scheduled her own time off and was not entitled to vacation or sick days, Murray was paid on commission, she reported herself as self-employed to the IRS, and Murray sold other products.

The court also found that several factors support Murray's argument that she was an employee. For example, Murray received some benefits, had a long-term relationship with Principal, possessed an at-will contract, and was subject to minimum standards imposed by the hiring party. However, the court concluded that these factors are not sufficient "to overcome the strong indications that Murray is an independent contractor." Because Principal did not control the manner and means by which Murray sold their products, the court held, the "overall picture presented by Murray's relationship with Principal" is one of an independent contractor. As a result, her case was dismissed.

Practical Impact

According to Keith Watts, a shareholder in Ogletree Deakins' Orange County, California office: "Employers now have a clearer understanding of the appropriate standard for independent contractors. Of course, whether someone is an independent contractor has dire consequences if an employer gets it wrong. Misclassification impacts a whole host of employment laws, not just whether someone is covered by Title VII, as in this case. In California, for example, liability for the misclassified can easily mushroom into overtime, meal and rest period, check stub reporting and withholdings violations, as well as impacting unemployment insurance and workers' compensation."

"Whether someone is an independent contractor has dire consequences if an employer gets it wrong."

Watts continued: "The practical effect is that employers must do their due diligence to determine whether an individual really is an independent contractor. Despite this case, courts are increasingly hostile to the independent contractor arrangement, even where the individual and the company desire such a relationship. Employers should immediately evaluate any independent contractor relationships they have and whether and to what extent they control the manner by which an individual performs the work, provides tools and equipment, requires a set work schedule, or has the individual performing the same work employees perform.

"Getting your house in order goes a long way towards avoiding future liability. Think of it this way – no one is suing you now – at least not yet. Be proactive and get out in front of what might become a much bigger problem later." ■

ICE INITIATES HUNDREDS OF NEW I-9 AUDITS

◣ *Employers Should Review Policies And Consider Self-Audits*

The pattern of increased worksite enforcement by the Department of Homeland Security's Immigration and Customs Enforcement (ICE) shows no sign of slowing down. The latest in a series of audit "blitzes" was commenced on September 15. More than 500 employers from across the country were targeted to receive Form I-9 Notices of Inspection (NOIs), the letter that marks the start of an ICE I-9 audit.

The increase in I-9 audits should come as little surprise to employers. In a 2009 press release, ICE made it clear that the agency's new enforcement strategy would be to focus its resources on auditing and investigating employers suspected of cultivating illegal workplaces by knowingly employing illegal workers. After that announcement, there have been three major rounds of audits, including the issuance of more than 1,000 NOIs in November 2009.

In light of the substantial increase in the number of I-9 audits, a summary of the audit process is instructive.

- *Who gets audited?* Any business can be the subject of an I-9 audit.
- *How is an audit started?* Employers will receive a Notice of Inspection (NOI) subpoena requesting certain documents and possibly a personal appearance by a company representative. ICE must provide employers with at least three days to provide the documentation (unless a warrant or court order is obtained, typically as a part of a criminal investigation, that requires document production in less time).
- *What should an employer do if it receives an NOI?* Contact counsel, assemble documents and make corrections as time permits.
- *What is the potential liability?* Most audits are likely to result in employer fines of $110 to $1,100 per I-9 for improper completion of I-9 forms (*e.g.*, failure to timely complete Sections 1 or 2, failure of the employer to sign Section 2, or employer acceptance of improper documents).
- *What about criminal sanctions?* The U.S. Attorney's Office may become involved to initiate criminal proceedings (*e.g.*, for harboring illegal aliens, for assisting with securing fraudulent documents, or for other violations).

Employers that have not yet been audited have time to take some simple steps to reduce potential liability and the bad press that can result from an I-9 audit. Reviewing I-9 policies, training persons responsible for I-9 completion, and conducting a self-audit of I-9 records are but a few of the steps an employer should consider. Completing these steps is likely to reduce potential fines and the chances of other sanctions being imposed should your company be the subject of an ICE I-9 audit. ■

"SUPREME COURT"

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is protected under the Privacy Act).

On October 13, the justices heard oral argument in *Kasten v. Saint-Gobain Performance Plastics Corp.* to decide what constitutes "protected activity" under the retaliation provisions of the Fair Labor Standards Act (FLSA). The Court will consider whether the FLSA protects employees from retaliation for verbally complaining about violations or whether such complaints must be submitted in writing.

On November 2, the Court will hear oral argument in a case that examines the "cat's paw" theory of employment liability. *Staub v. Proctor Hospital* was brought by an Army Reservist who claimed that he was fired in violation of the Uniformed Services Employment and Reemployment Rights Act. The Court will decide whether an employer can be held liable for the discriminatory acts of supervisors who do not themselves make employment-related decisions, but may influence the decision-makers.

On November 8, the justices will hear oral argument in a case involving Social Security taxes for student employees. Currently, colleges and universities are not required to pay social security taxes for students they employ. The issue in *Mayo Foundation for Medical Education and Research v. United States* is whether this exemption applies to medical students working as residents in a university hospital.

On November 30, the Court will hear oral argument in a case concerning the notice requirements of the Employee Retirement Income Security Act (ERISA). In *CIGNA Corp. v. Amara*, the Court will decide whether a showing of "likely harm" is sufficient to entitle participants in, or beneficiaries of, an ERISA plan to recover benefits based on an alleged inconsistency between the explanation of benefits in the Summary Plan Description (or similar disclosure) and the terms of the plan itself.

The Court will hear oral argument in a second retaliation case on December 7. Unlike *Kasten*, however, *Thompson v. North American Stainless* concerns retaliation against workers who have not engaged in protected activity but are "associated with" someone who has. The case was brought by Eric Thompson, who claims that North American Stainless fired him after learning that his fiancée/co-worker had filed a discrimination charge with the Equal Employment Opportunity Commission. The Court will decide whether Thompson is protected under the anti-retaliation provision of Title VII based on his association with a co-worker who has engaged in protected activity.

Finally, on December 8, the Court will hear oral argument in a case challenging the Legal Arizona Workers Act, which imposes sanctions on employers that hire unauthorized aliens. The issue in *Chamber of Commerce of the United States v. Whiting* is whether the statute is valid under the federal Immigration Reform and Control Act, which arguably preempts state or local laws imposing civil or criminal sanctions on those who employ unauthorized aliens. The Court also will decide whether the Arizona law, which requires all employers to participate in E-Verify, is preempted by the federal Illegal Immigration Reform and Immigrant Responsibility Act (which specifically desginates that system as voluntary). ■

HOSTILE WORK ENVIRONMENT CAN BE BASED ON A SINGLE BAD ACT

Court Finds Jury Must Weigh The Evidence To Determine If Company Is Liable

A federal appellate court recently held that a jury must determine whether a single act is sufficient to support a worker's hostile work environment claim. According to the court, "a single act can create a hostile environment if it is severe enough . . ., and instances of uninvited physical contact with intimate parts of the body are among the most severe types of sexual harassment." ***Berry v. Chicago Transit Authority,*** *No. 07-2288, Seventh Circuit Court of Appeals (August 23, 2010).*

Factual Background

Cynthia Berry was hired by the Chicago Transit Authority (CTA) in 2002 as a carpenter. In January 2006, Berry was one of only two female employees among about 50 individuals working in Area 315 at the CTA's South Shops facility, and the only female carpenter.

Employees in Area 315 often played cards at an outside picnic table. During her morning break, Berry sat down at the table with mechanic Earl Marshall and two other male employees. Philip Carmichael, an electrician, followed Berry into the break area. Marshall wanted to play cards with Carmichael as his partner. He ordered Berry to get up from the table, but she refused. Carmichael then sat down and straddled the bench with his back toward Berry.

According to Berry, Carmichael began rubbing his back against her shoulder. She jumped up, told him to stop, and moved to the other end of the table. Although Marshall again told Berry to get up from the table, she remained seated. Berry alleged that Carmichael then lifted her up from the bench, grabbing her breasts in the process. While holding her up in the air, Carmichael allegedly rubbed her buttocks against the front of his body three times before bringing her down to the ground. Berry claimed that he then pushed her into a fence.

On the following day, Berry reported the incident to Michael Gorman, her supervisor. According to Berry, Gorman told her that she was a "pain in the butt" and that she could lose her job if she filed charges against Carmichael. Berry alleged that Gorman also said that he was "going to do whatever it takes to protect CTA." Nonetheless, Gorman reported the incident to a CTA equal employment opportunity investigator, and collected statements from Berry and the other witnesses.

In the meantime, Berry called the police, reporting that she had been attacked at work. The police spoke to Berry, Carmichael and Gorman, and determined, based on that investigation, that Berry actually had been the aggressor. The CTA investigation ultimately reached a similar conclusion. The investigator found no substantial evidence that Berry had been sexually harassed. Instead, she determined that Berry had been the aggressor and sat between Carmichael's legs. According to Carmichael, he picked her up by the waist to move her out of the way.

Berry accused Gorman of sabotaging the investigation to prevent the alleged harassers from being punished. She then filed a lawsuit alleging hostile work environment sexual harassment (among other claims).

Legal Analysis

The trial judge granted summary judgment in CTA's favor. The judge found that the hostile environment claim could not go forward because CTA took prompt and reasonable steps to investigate and rectify the alleged misconduct.

To survive summary judgment on this claim, Berry had to show that she was subjected to unwelcome conduct because of her sex, that the conduct was so severe or pervasive that it created a hostile environment, and that CTA should be held liable. Berry argued that she experienced a hostile environment when Carmichael rubbed his body with hers and that Gorman's dismissive comments to her about her complaints formed the basis for CTA's liability. The trial judge had discounted Berry's uncorroborated testimony on those issues when it found in CTA's favor.

The Seventh Circuit Court of Appeals first noted that personal knowledge or firsthand experience of a plaintiff can create a "disputed fact" that can only be resolved by a jury. According to the Seventh Circuit, the trial judge improperly discounted Berry's testimony, which was based on her personal encounters with both Carmichael and Gorman. Such testimony, the court ruled, could create issues of material fact sufficient to preclude summary judgment.

The Seventh Circuit further held that a single act can create a hostile environment if it is severe enough. Carmichael's actions, as alleged by Berry, qualify as such an act. Notably, the court also determined – based solely on Berry's uncorroborated testimony as to Gorman's remarks – that a reasonable factfinder could reach the conclusion that CTA, through its manager, had "maliciously thwarted any legitimate investigation, and that CTA was therefore negligent or worse in responding to [Berry's] report of harassment." Thus, the court reinstated Berry's hostile work environment claim.

> *"(A) single act can create a hostile environment if it is severe enough."*

Practical Impact

According to Carol Poplawski, a shareholder in Ogletree Deakins' Chicago office: "Although this decision is noteworthy for its holding that a single severe act of harassment can create a hostile environment, the real lesson lies in the alleged failure of the employee's first line supervisor to properly respond to her complaint. An employer can have a thorough policy against harassment, backed up by HR professionals who know how to recognize and respond to workplace harassment, but unless the supervisors are properly trained as well, that policy is rendered ineffective. An employer must conduct periodic training for its managers to avoid the result in this case." ■