Ogletree Deakins

The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law

March/April 2014

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And Much More

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Depressed Worker Does Not Qualify For Leave

Court Finds FMLA Requires A Period Of Incapacity

A federal appellate court recently overturned a $1 million award to an employee who claimed that he was discharged in violation of the Family and Medical Leave Act (FMLA). The Eleventh Circuit Court of Appeals held that "the FMLA does not extend its potent protection to any leave that is medically beneficial leave simply because the employee has a chronic health condition." The worker must still show a period of incapacity or treatment for such incapacity. ***Hurley v. Kent of Naples, Inc.****, No. 13-10298, Eleventh Circuit Court of Appeals (March 20, 2014).*

Factual Background

Patrick Hurley was hired as the chief executive officer of Kent of Naples, Inc. in 2001. Gil Neuman was the chief executive officer of the parent company, Kent Security Services, Inc., at the time.

Hurley sent an email to Neuman with the subject line "Vacation Schedule." In the email, Hurley wrote, "attached is my vacation schedule going forward. The dates are subject to change." The attachment listed eleven weeks of vacation over the next two years.

Neuman denied the request and asked to meet with Hurley to discuss the matter further. Hurley replied that the "email below, which regards my upcoming vacation schedule, was not a request it was a schedule." He further stated that his "medical/health

Please see "FMLA" on page 6

Homer Deakins Testifies Before NLRB

Discusses Controversial Changes To Representation Election Rules

The National Labor Relations Board (NLRB) recently held a public hearing on proposed amendments to its representation election rules. Homer Deakins, Jr., one of the founding shareholders of Ogletree Deakins, testified on four separate panels before the Board. He provided comments on behalf of the Council on Labor Law Equality (COLLE).

Many members of the business community have expressed their disagreement with the Board's proposed rule. As explained by Deakins during the hearings, "One of the most notable things in the proposed new rule was the total silence by the Board on a central issue in fair elections—the right of employees to make an informed choice on whether they wish to be represented by a union. The standard should be a date which safeguards 'against rushing employees into an election where they are unfamiliar with the issues.' Senator John F. Kennedy said that would require a minimum of 30 days. In 2010, the average time from petition to election was 31 days, and in 2013, 94 percent of elections were within 56 days. These ranges satisfy the correct standard for setting election dates. There has never been and should never be an absolute, arbitrary rule on the timing of elections." A detailed discussion of the proposed amendments can be found at pages 4 and 5 of this issue of *The Employment Law Authority*.

It is expected that the Board will issue a final rule before the December expiration of Board Member Nancy Schiffer's term (when the Board would become deadlocked at 2-2). *The Employment Law Authority* will provide updates on any new developments. ■

PRESIDENT OBAMA TAKES ACTION ON PAY EQUALITY FOR CONTRACTORS

by Leigh M. Nason, Ogletree Deakins (Columbia)

On April 8, 2014, President Obama directed U.S. Secretary of Labor Thomas E. Perez to propose a rule requiring that federal contractors submit summary compensation data to the U.S. Department of Labor (DOL) and issued an executive order prohibiting retaliation against employees and applicants who discuss compensation information. The executive order and presidential memorandum are designed to further the Obama administration's emphasis on pay equity and wage transparency.

The executive order, entitled "Non-Retaliation for Disclosure of Compensation Information," amends Executive Order 11246 by prohibiting federal contractors and subcontractors from retaliating against any employee or applicant "for inquiring about, discussing, or disclosing the compensation of" the employee, the applicant, or any other employee or applicant. The National Labor Relations Board already prohibits both union and nonunion employers from retaliating against employees for discussing wages, hours, and working conditions. The executive order instructs the DOL to propose implementing regulations—likely to be enforced by the Office of Federal Contract Compliance Programs (OFCCP)—by September 15.

President Obama also issued a memorandum regarding "Advancing Pay Equality Through Compensation Data Collection." This memorandum states that federal law advancing equal pay "is impeded by a lack of sufficiently robust and reliable data on employee compensation, including data by sex and race." Citing OFCCP's August 2011 Advanced Notice of Proposed Rulemaking (in which OFCCP received comments about the design and implementation of such a tool for federal contractors), President Obama's memorandum directs the DOL to propose a rule by August 6 requiring that summary compensation data be provided by federal contractors to the DOL. It should be noted that current federal contractors must already provide summary and detailed pay information to OFCCP during compliance reviews, yet OFCCP has found very few instances of pay discrimination.

Interestingly, President Obama has directed the Secretary of Labor to, among other things, "consider independent studies regarding the collection of compensation data," perhaps referring to a report issued in August 2012 by the National Research Council. This study found that no regulatory agency had a comprehensive plan for using compensation data if it was required to be collected, that there was no basis to determine the cost and benefits of such a data collection, and that there were security concerns in collecting such highly sensitive information.

Clearly, the Obama administration has been frustrated by Congress's failure to pass the Paycheck Fairness Act and implement other recommendations by the president's task force on pay equity. The issuance of another executive order on pay and a directive to the DOL to require submission of compensation data from federal contractors could be perceived as a last-ditch effort to move the pay equity discussion forward. ■

Ogletree Deakins

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OBAMA ADMINISTRATION PROPOSES CHANGES TO OVERTIME RULES

On March 13, 2014, President Obama signed a presidential memorandum instructing the U.S. Secretary of Labor to update regulations regarding overtime requirements. Specifically, the change would amend employers' wage and hour obligations under the Fair Labor Standards Act to make overtime compensation available to a wider group of employees who are currently considered "exempt" from the federal law's overtime requirements.

The new rule is expected to extend the availability of overtime compensation for working over 40 hours in a workweek to fast-food restaurants managers, loan officers, computer technicians, and other workers who are currently classified as "executive or professional exempt employees." The change, if implemented, could affect millions of workers and eliminate the flexibility in the current "primary duty" test, reinstating the inflexible percentage-based test used prior to the 2004 amendments and in states like California.

In the memorandum, President Obama also asked the Secretary of Labor to "address the changing nature of the workplace and simplify the regulations to make them easier for both workers and businesses to understand and apply." ■

Ogletree Deakins State Round-Up

ARIZONA*

On February 27, the Tempe City Council approved a proposal to expand the Tempe City Code's anti-discrimination ordinance to prohibit discrimination in housing, employment, and public accommodation on the basis of sexual orientation and gender identity. Religious organizations are exempt from the new provision. Businesses and employers that violate the ordinance face a civil fine of $1,500 to $2,500.

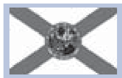
CALIFORNIA*

A California Court of Appeals recently affirmed an award of $100,000 in attorneys' fees to a prevailing employer after finding that a former employee brought a frivolous and unsubstantiated claim of discrimination under state law. The employee alleged that his firing stemmed from discrimination based on his Native American ancestry, but provided no supporting evidence. *Robert v. Stanford University,* H037514 (February 25, 2014).

CONNECTICUT*

On March 27, 2014, Connecticut became the first state in the country to pass legislation mandating an increase in the state minimum wage to $10.10 per hour by 2017—the same rate to which President Obama is seeking to raise the federal minimum wage.

FLORIDA*



A state District Court of Appeal recently held that a worker's comments to his daughter regarding a settlement with his former employer and his daughter's subsequent comment on Facebook about the settlement violated the agreement's confidentiality provision. As a result, the court approved the disgorgement of a portion of the settlement payments. *Gulliver Schools, Inc. v. Snay,* No. 3d13-1952 (February 26, 2014).

MASSACHUSETTS

A Massachusetts cleaning contractor was recently ordered to pay more than $1 million in back pay and liquidated damages to 149 workers. The DOL's Wage and Hour Division alleged that the company failed to pay overtime to employees who worked more than 40 hours in a workweek and concealed its illegal behavior by altering timecards. *Perez v. Ward's Cleaning Service, Inc.*, No. 1:13-13287 (February 20, 2014).

MISSOURI*

The Eighth Circuit Court of Appeals upheld one of the first excessive fee rulings in favor of retirement plan participants. The court upheld the $13.4 million judgment for excessive fees, finding that ABB had failed to properly monitor the fees paid to the third-party administrator from the plan investments. *Tussey v. ABB, Inc.*, No. 12-2060 (March 19, 2014).

NEW JERSEY*

Newark Mayor Luis A. Quintana recently signed into law a sick leave ordinance that provides most private sector employees working in Newark with mandatory paid sick leave. The new law is expected to go into effect on May 29, 2014. Newark will become the second New Jersey municipality to require paid sick leave for employees, following Jersey City's lead.

NEW YORK*

On March 20, New York City Mayor Bill de Blasio signed amendments to the New York City Earned Sick Time Act. The Act, including the recent amendments, went into effect on April 1, 2014. The recent amendments expand the definition of "family members"; omit an exemption for employers in the manufacturing industry; and increase the time period for employers to maintain records of their compliance with the Act to three years.

OHIO

The Ohio Court of Appeals recently held that a former resident at a local college who claimed that an instructor discriminated against her after learning she is a lesbian failed to establish a viable claim under state law. The court wrote, "we cannot conclude that the term 'sex' under R.C.4112.02(A) encompasses sexual orientation." *Burns v. Ohio State University College of Veterinary Medicine*, No. 13AP-633 (March 25, 2014).

OREGON*

A federal court in Oregon recently ruled that employment agreements may impose a reasonable limitation on the time period in which an employee may bring statutory and common law claims, even when that time period is shorter than the statute of limitations. According to the court, "Oregon law does not prohibit enforcement of the contractual limitation." *Felix v. Guardsmark, LLC*, 3:13-CV-00447-BR (February 19, 2014).

TENNESSEE

Tennessee Attorney General Robert E. Cooper, Jr. recently issued an opinion stating that legislation pending before the Tennessee legislature that would impose criminal penalties on mass picketing is unconstitutional. According to Cooper, the bills (H.B. 1688/S.B. 1661) are "clearly directed at mass picketing activities by individuals or organizations in the context of the labor dispute."

TEXAS

A Texas jury recently awarded $567,000 to a former deputy county constable who claimed that he was subjected to his female boss's repeated sexual suggestions, advances and touching. The alleged harassment included "motorboating," which involved holding his head under her shirt while moving back and forth. *Gist v. Galveston County*, No. 12-cv-1159 (verdict March 21, 2014).

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

NLRB REISSUES PROPOSAL FOR AMBUSH ELECTIONS: ARE YOU PREPARED?

by Eric C. Stuart and Christopher R. Coxson*

On February 6, 2014, the National Labor Relations Board (NLRB) reissued a Notice of Proposed Rulemaking (NPRM) for what has become known as the "ambush election" rules. The proposed rules radically alter well established union representation election procedures that have worked in a highly efficient fashion for decades. While these rules contemplate many technical changes, the core result is that employers will have virtually no time to prepare a considered response to a representation petition or to help employees gather the information they need to make an informed decision.

As detailed below, the Board's proposed rules would: 1) substantially reduce employers' ability to have meaningful input regarding the size and scope of the bargaining unit; 2) delay the resolution of most disputes about voter eligibility until *after* the election; 3) impose upon employers new onerous filing requirements; and 4) effectively shorten the time between th e filing of the petition and the actual election. The net effect of the proposed rules is a significant reduction in the pre-election due process typically afforded employers in representation cases and the creation of an environment in which employees will be required to vote without being fully informed of the critical facts.

The main vehicle for most of this change is the pre-election hearing, which has historically been used to resolve legal disputes related to the union's petition. Under the proposed rules, pre-election hearings would *only* be conducted to determine the narrow issue of whether a question concerning representation exists. NLRB hearing officers will have authority to enforce that mandate by limiting the evidence employers can submit at the hearing. Accordingly, many issues of individual voter eligibility will be deferred to post-election procedures rather than determined prior to the vote. Thus, employers are well advised to implement a plan of action in advance of a petition being filed.

This article identifies a few of the most significant changes in the NLRB's proposed rules and examines measures employers should consider to prepare for expedited union elections.

Proposed Change No. 1: Position Statements

Under the NLRB's proposal, if a pre-election hearing is needed it will be held within just seven calendar days after the petition is filed. During that short time frame, employers would be required to file a written position statement addressing: 1) the Board's jurisdiction to process the petition; 2) the appropriateness of the petitioned-for unit; 3) any proposed exclusions from the unit as identified by the union; 4) the existence of any legally recognized bar to the election; 5) the type of election (manual or mail ballot); 6) the proposed date, time, and location of the election; and 7) any other issues the employer seeks to raise at the pre-election hearing. Critically, any issue the employer fails to identify in this filing will be waived (i.e., not something the employer can litigate).

Currently, the rules do not specify any set number of days within which the pre-election hearing must be held (although they are currently held promptly). Likewise, the current rules do not require employers to present a written statement of position articulating all potential issues, and thus current rules do not penalize an employer's failure to raise any and all issues prior to the pre-election hearing.

Employer Action

Employers must recognize that NLRB regional directors and hearing officers will have greater discretion to limit the issues litigated at pre-election hearings, including what evidence is received in the record and whether briefing will be permitted. It appears clear that fewer pre-election hearings will be conducted and, when they are required, they will be shorter in duration with fewer post-hearing briefs likely to be allowed.

As a consequence, employers should conduct an analysis of the potential issues to be resolved during a hearing and then draft model position statements to preserve all potential issues. This exercise will allow an employer to respond quickly, but in a thoughtful manner should a petition actually be filed. Among the issues to evaluate are the following: 1) showing of interest including authentication of cards, timeliness of petition, etc.; 2) NLRB jurisdiction; 3) labor organization status; 4) legal bars to the election; 5) multi-facility and multi-employer issues; 6) expanding and contracting unit issues; and 7) appropriateness of the potential petitioned-for bargaining units.

In drafting position statements on unit issues, employers need to bear in mind the Board's new "appropriate unit" analysis. In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (Aug. 26, 2011), the Board overturned 20 years of precedent and arguably changed the standard for determining an "appropriate bargaining unit." *Specialty Healthcare* encourages small, fragmented units of employees ("micro" units) that are much more likely to be deemed appropriate unless the employer can prove that the employees excluded by the petition share an "overwhelming" community of interest. In combination, the proposed rules and this new NLRB case precedent make it more difficult for employers to challenge the petitioned-for unit.

"Employers will have virtually no time to prepare a considered response to a representation petition."

* Eric Stuart is a shareholder and Christopher Coxson is of counsel in the Morristown office of Ogletree Deakins, where they represent management in labor and employment law related matters.

Proposed Change No. 2: Offers of Proof

Under the proposed rules, employers will also be required to make an offer of proof at the start of the hearing concerning all issues raised in the position statement. The NLRB's hearing officer will have the authority to refuse to accept any evidence at the hearing to support a particular issue if it is determined that the offer of proof is insufficient to create a genuine issue of material fact.

Currently, the rules do not require employers to make an offer of proof before submitting testimony and evidence at a pre-election hearing. It is unclear how hearing officers will determine whether an issue of material fact has been created.

Employer Action

In response to this proposed change, employers should consider the following steps: 1) prepare outlines of relevant testimony to use in response to requests for offers of proof; and 2) prepare a list of exhibits supporting the issues identified in the offer of proof. To contest the eligibility of individuals in a proposed unit, the employer must identify them by name and job classification and provide a basis for the proposed exclusion/inclusion.

Proposed Change No. 3: 20% Rule

The proposed rules defer until after the election issues concerning voter eligibility if the hearing officer concludes the issues affect less than 20 percent of all potential voters. Currently, the rules do not provide a bright-line rule and most voter eligibility issues are resolved before the election.

Employer Action

Employers should analyze the optimal bargaining unit(s) and confirm that the available facts support the position they plan to take with respect to the appropriate bargaining unit, which would be appropriate under NLRB case law. The proposed rules and new NLRB precedent make it more difficult for employers to challenge the eligibility of voters.

In addition, employers should identify statutory supervisors and, where necessary, clarify job duties and job descriptions to support supervisory status. Supervisors are not eligible to vote in union elections, are agents of the employer, and their conduct is legally binding on an employer.

Proposed Change No. 4: 25-Day Rule Eliminated

The proposed rules eliminate current requirements that a vote cannot be held sooner than 25 days after the Board's Regional Director issues a decision and direction of election. Because of this change, regional directors will almost certainly schedule elections to be held sooner after the direction of election than was previously the case. Expedited elections deprive employees of the opportunity to receive information about unions and unionization prior to voting.

Employer Action

The proposed elimination of the 25-day rule will require employers to take certain steps to educate their employees. Specifically, employers should:

- Develop the company's position on unionization and communicate it to employees with appropriate frequency;
- Be prepared to further communicate with employees as soon as management becomes aware of a union campaign;
- Create a "rapid response" team to develop a campaign philosophy and an internal management communication structure;
- Train "rapid response" team members and line supervisors regarding the NLRB's new rules and how to legally, but effectively communicate with employees during a union organizing campaign to avoid unfair labor practices; and
- Prepare campaign materials in advance of any petition being filed.

There will be little time under the new rules to develop information about the petitioning union and to properly vet materials to educate employees on the company's position.

Proposed Change No. 5: Multiple Eligibility Lists

Finally, for almost half a century the Board's decision in *Excelsior Underwear*, 156 NLRB 1236 (1966) has required employers to submit, within seven days of either a stipulated election agreement or a Regional Director's decision and direction of election, a list of the employees considered eligible to vote. Under the current rule, only employees' names and home addresses are required to be disclosed.

The proposed rules establish new intrusive mandates that expand the information unions must be provided. Assuming an employer believes that a pre-election hearing should be held, it must provide the Board and the union with two separate lists at the time of a pre-election hearing: 1) a list of employees in the challenged, petitioned-for unit, and 2) a list of all employees in a unit the employer contends is appropriate. The lists must include employee names, work locations, shifts, and classifications.

Within two days after either the Regional Director issues a decision and direction of election *or* the parties enter into a stipulated agreement, employers must serve electronically on the Region and the union an eligibility list that not only includes employee names and home addresses, but also telephone numbers, email addresses, work locations, shifts, and classifications.

Employer Action

Employers should prepare voter eligibility lists and inform employees that the company is legally required to disclose information to the union to prepare them for likely contacts by union organizers.

Conclusion

The foregoing is an overview of only the most significant proposed changes and the action items employers should consider in anticipation that the proposed election rules will become final in whole or in part. Each step is subject to a much more comprehensive discussion and analysis depending on the facts, circumstances, and specific employer objectives.

The proposed election rules and other developments for both union and nonunion employers will be covered in detail at the *Not Your Father's NLRB* program on June 5-6 in Washington, D.C. For more information on this important program, see page 7. ■

Ogletree Deakins News

New to the firm. Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Eric Berg and Jonathan Mraunac (Chicago); Russell Rendall (Cleveland); Michelle Muhleisen (Denver); Amy Adolay and Brian Burbrink (Indianapolis); Jacquelyn Meirick (Kansas City); Rachel Silverstein (Las Vegas); Audrey Calkins (Memphis); Anne Breaux (New Orleans); Michael Marra (New York); Jacob Cherry and Jamie Dietz (Raleigh); Jordon Ferguson and Seth Ort (Orange County); and Joseph Appel and Victoria Tallman (San Francisco).

Client Choice awards. Three Ogletree Deakins shareholders have been awarded the International Law Office's 2014 Client Choice award. Ron Chapman, Jr., a member of the firm's Board of Directors and shareholder in the firm's Dallas office, was the exclusive winner of the Employment & Labor category for Texas and the overall winner of the Employment & Labor category for the United States. Meg Campbell, a shareholder in the firm's Atlanta office, was the exclusive winner of the Employment & Labor category for Georgia. Sean Nalty, a shareholder in the firm's San Francisco office, was the exclusive winner of the Healthcare/Life Sciences category for California. The Client Choice awards recognize law firms and attorneys that stand apart for the excellent client service they provide and the quality of their work. The 2014 award recipients were selected based on feedback provided by more than 2,000 in-house counsel.

"FMLA"

continued from page 1

professionals" had advised him that taking vacation time was a "necessity" going forward. However, Hurley did not mention that he was suffering from depression and anxiety.

Neuman contacted Hurley the next day to discuss the email. During this conversation, Hurley claimed, he explained to Neuman his medical condition and his need for leave. Neuman, on the other hand, denied that Hurley mentioned his medical condition. Hurley was ultimately discharged for "insubordinate behavior and poor performance."

A week later, and with knowledge of Hurley's termination, Hurley's doctor completed an FMLA form, stating that Hurley suffered from depression. His doctor also noted that he could not determine the frequency or duration of any incapacity.

Hurley filed a lawsuit in federal court alleging violations of the FMLA. Specifically, he claimed that his former employer "interfered with the exercise of [his] right to unpaid leave, because [the company] terminated [his] employment as a result of exercising his right to FMLA leave." The lawsuit did not include any specific allegation that Hurley was unable to work or had been incapacitated. The employer contended that Hurley's vacation request did not qualify for FMLA protection, and that he had not been discharged because of the request.

Both parties sought summary judgment, but the trial judge denied the motions. The case then proceeded to trial, where Hurley testified that he had requested leave for medical reasons, but acknowledged that his wife had chosen the vacation/leave days without input from a health care professional.

The jury found that Hurley's leave request was not the reason for his termination, but nevertheless awarded Hurley $200,000 in damages. Hurley was also awarded $200,000 in liquidated damages, $354,000 in front pay, and $244,000 in attorneys' fees, along with court costs.

After the verdict, the company asked the judge to dismiss the case because Hurley's leave request did not qualify for protection under the FMLA. The trial judge denied both this request and the employer's motion for a new trial. The case was then appealed to the Eleventh Circuit Court of Appeals.

Legal Analysis

On appeal, the employer again asserted that Hurley was not qualified for FMLA leave, and argued that the jury verdict was inconsistent with its damages award. In response, Hurley contended that he could bring a claim under the FMLA without actually qualifying for leave because he had provided sufficient notice and needed only to "potentially qualify" for FMLA leave.

The Eleventh Circuit disagreed with Hurley, holding that an employee must actually—not potentially—qualify for FMLA leave to assert an interference or retaliation claim. The court also found that the trial judge had erred by denying the employer's motion for judgment as a matter of law because Hurley's vacation request did not qualify for leave under the FMLA.

It was undisputed that Hurley suffered from a chronic serious health condition within the meaning of the FMLA. However, Hurley failed to establish the required period of incapacity to trigger the protections of the Act. The regulations state that the FMLA only protects leave for "[a]ny period of incapacity or treatment of such incapacity due to a chronic serious health condition." The regulations define "incapacity" as the "inability to work, attend school or perform regular daily activities due to the serious health condition."

Because Hurley admitted that his leave had not been for a period of incapacity, the court held, he failed to meet the burden of proving that his vacation/leave request qualified for protection under the FMLA. Therefore, he was not entitled to damages under that statute.

Practical Impact

According to Maria Greco Danaher, a shareholder in the Pittsburgh office of Ogletree Deakins: "This decision would likely have been different had Hurley provided, with his vacation request, some evidence or information that he would be treated for his depression and anxiety during his absence. Without that specific connection between the leave and either treatment or a period of illness, Hurley was unable to prove that his request had been related to his serious health condition." ■

Workplace Investigations: "Don't Tell Anyone About Our Conversation"

by Timothy A. Garnett, Ogletree Deakins (St. Louis)

Does this sound familiar? You are meeting with an employee, who is telling you about a workplace complaint. At the end of the meeting, you tell the employee that you will investigate the complaint and that he or she should not talk about the matter with coworkers while the investigation is ongoing. Guess what? According to the National Labor Relations Board, your confidentiality request violates the National Labor Relations Act.

In *Banner Health System*, 358 NLRB No. 93 (July 30, 2012), a hospital employee went to HR to express concern about an instruction given by his supervisor that he believed was not in line with established hospital procedure. The Board asserted that HR instructed the employee not to discuss the investigation of his complaint and concluded that the instruction violated the Act because it prohibited employees from engaging in protected concerted activity—i.e., discussing their workplace concerns, even if those concerns are the subject of an ongoing investigation.

Many HR professionals ask employees to maintain confidentiality to protect the integrity of their investigations. They want to avoid employees discussing what they will say before HR has a chance to talk with them. Preventing the "rumor mill" and other workplace distractions may also be a concern.

But, according to the Board in *Banner Health*, generalized concerns like these do not justify asking an employee to remain tight-lipped during a complaint investigation. Instead, employers must show why the confidentiality request is necessary in each individual investigation. How do you do that? By documenting specific reasons why confidentiality is necessary in a particular investigation *before the investigation begins*. Reasons the Board articulated in *Banner Health* are the danger of fabricated testimony, the risk of evidence being destroyed, and the need to protect certain witnesses. Another potential reason could be protecting the attorney-client privilege.

One effective way to document the reasons why you are asking employees not to discuss an internal investigation is by giving employees an acknowledgment form, similar to a "*Johnnie's Poultry* warning." In *Johnnie's Poultry*, 146 NLRB 770 (1964), the Board articulated specific "warning" requirements that apply when employers are investigating union grievances and unfair labor practice charges. The purpose behind the warning is to prevent employees from being coerced into answering an employer's questions.

Similarly, in *Banner Health*, the Board was concerned about employees being coerced into staying tight-lipped during an investigation for no legitimate reason. A "*Banner* acknowledgment" form, given to employees ahead of time, addresses this concern by explaining the purpose of the investigation, promising that the employee will not be retaliated against for complying, and explaining the reason for keeping the investigation confidential. It is a good idea to have the employee sign the acknowledgment form or incorporate the acknowledgment into the written statement you ask the employee to sign.

The *Banner Health* rule does not apply to supervisors since they are not protected under the Act. Therefore, supervisors can legitimately be told to keep investigations confidential. ■

NLRB Regional Director Rules College Football Players Can Unionize

On March 26, 2014, a regional director for the National Labor Relations Board (NLRB) issued a decision and direction of election in a union representation petition filed by the College Athletes Players Association (CAPA) seeking to represent Northwestern University's football players. CAPA petitioned the Board for a ruling that Northwestern football players who receive grant-in-aid scholarships are university employees and therefore eligible to form a union and engage in collective bargaining under the National Labor Relations Act. The university opposed the petition, arguing that scholarship athletes are not employees, but similar to graduate teaching assistants who receive stipends and whom the Board has historically held are not employees because their primary purpose and relationship to their schools is educational, not economic.

If this decision is upheld, grant-in-aid scholarship football players who have not exhausted their eligibility at Northwestern may be eligible to vote to decide whether they will be represented by CAPA for collective bargaining purposes. The regional director excluded walk-on players, concluding that they are not employees and thus ineligible to vote in any election or join the union. Northwestern issued a statement confirming its intent to appeal to the full Board. The National Collegiate Athletic Association (NCAA) also issued a statement, noting, "While not a party to the proceeding, the NCAA is disappointed that the NLRB Region 13 determined the Northwestern football team may vote to be considered university employees. We strongly disagree with the notion that student-athletes are employees." ■

Not Your Father's NLRB

The recent aggressive actions taken by the National Labor Relations Board and the U.S. Department of Labor are game-changers, and employers need to be prepared. Over the last several years, Ogletree Deakins has been pleased to participate in the *Not Your Father's* seminar series—to rave reviews from attendees. The latest (and completely new) version of *Not Your Father's NLRB* will be held on June 5-6 in Washington, D.C. at the Mandarin Oriental. The cost of the two-day program is just $895. However, Help Center Seminars is offering a $100 discount for clients and friends of Ogletree Deakins. For more information or to register for *Not Your Father's NLRB*, see the enclosed brochure or visit www.helpcenterseminars.com.

SLEEPING WITH THE ENEMY? FIRED EMPLOYEE'S RACE BIAS CLAIM FAILS

Court Upholds Employer's Decision To Discharge Worker Who Accused Boyfriend Of Infidelity

A federal appellate court recently held that an employer did not violate federal or state law when it fired an employee because she made harassing, disparaging, and inappropriate accusations against her coworkers. According to the First Circuit Court of Appeals, the employee, who accused her coworkers of sleeping with her boyfriend, failed to establish that her termination was motivated by race discrimination. The court also found that the employee was unable to show that the company's decision not to rehire her was connected to the employee's earlier discrimination complaint. ***Pina v. The Children's Place,*** *No. 13-1609, First Circuit Court of Appeals (January 27, 2014).*

Factual Background

Jamilya Pina, who is African-American, was employed as a sales associate by The Children's Place (TCP). She worked in the company's South Shore Plaza store in Braintree, Massachusetts.

In mid-2007, TCP offered Pina an assistant store manager position at the company's Cambridgeside Galleria location. Jean Raymond, a white male district manager for TCP, interviewed and hired Pina for the position. Pina accepted the job and thereafter reported to Cambridgeside Manager Ingrid Trench, an African-American female.

During this period, Pina was dating Michael Williams, who was also African-American and worked at TCP's South Shore Plaza store. Pina suspected that Williams was being unfaithful, and she accused several TCP employees of sleeping with him.

Pina made a telephone complaint to the company, alleging that two of the employees whom she suspected of sleeping with Williams had falsified his time cards. Pina believed that her report entitled her to a loss-prevention monetary reward. The company investigated the claims but found no evidence of time card falsification.

Two days after her time card falsification allegation, Pina accused her store manager of having an affair with Williams. Pina later ran into her manager's partner at a donut shop, where she told him (within earshot of her manager's young daughter) that her manager was sleeping with Williams.

Pina's manager reported these statements to the district manager, who immediately questioned Pina about the incident. Pina admitted to making the public accusation, but defended her actions by claiming that the incident occurred outside of working hours and was not a concern to the company.

The district manager suspended Pina pending further investigation. The investigation ultimately revealed that Pina had left harassing and threatening messages (which were also related to her suspicions regarding Williams) on another employee's voice mail. The company determined that Pina had engaged in harassing, disorderly, and inappropriate conduct and terminated her employment.

Pina filed a charge of discrimination with the Massachusetts Commission Against Discrimination (MCAD), alleging that she had been fired on the basis of her race because TCP did not want to compensate her for reporting the time card fraud. MCAD dismissed her charge.

Three months later, Pina applied for an assistant store manager position at another TCP store, which did not have any openings at the time. A position later opened at that store, but TCP selected an internal candidate who had previous experience as an assistant store manager. Pina then sued her former employer alleging, among other things, race discrimination and retaliation. The trial judge dismissed Pina's claims on summary judgment and she appealed to the First Circuit Court of Appeals.

Legal Analysis

Pina's discrimination claim was based on a novel theory accusing her former employer of discriminatory feelings regarding interracial relationships. Specifically, Pina claimed that TCP fired her for reporting misconduct—the falsification of Williams' time cards—that, if investigated, would have revealed an interracial relationship between store employees, which, according to Pina, TCP did not want to acknowledge. The First Circuit rejected this argument because Pina was unable to show that TCP knew of any romantic relationships among its employees. Further, the court found that the company had investigated Pina's purported loss prevention claim and that there was no evidence that the company's investigation had been influenced by its view of interracial relationships.

The First Circuit also rejected Pina's claim that TCP retaliated against her by not hiring her for the assistant store manager position she applied for after being fired. According to the court, there were no openings when she applied, TCP did not consider any external candidates when a position eventually became available, and Pina failed to establish that she was qualified for the position (because she was not available the necessary hours). In addition, the court found that there was no evidence of a causal connection between the store's failure to hire Pina and her initial discrimination complaint. Thus, the court upheld the decision to dismiss her suit.

> *"An employer is not required to ... respond to complaints in the precise manner desired by the ... employee."*

Practical Impact

According to Rachel Reingold Mandel, a shareholder in the Boston office of Ogletree Deakins: "The court held that an employer is permitted to discharge an employee who engages in harassing and potentially threatening conduct towards other employees. In addition, under circumstances such as those in this case, an employer is not required to investigate and respond to complaints in the precise manner desired by the complaining employee." ■