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The Employment Law
AUTHORITY

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Race-Based Comment Found Not To Be "Hostile"

Court Rejects Harassment Claim, Noting Worker's Inaction

A federal appellate court recently held that an employee who claimed he was subjected to 14 months of racially-motivated comments cannot succeed on his Title VII racial harassment claim. According to the Seventh Circuit Court of Appeals, the case must be dismissed because the alleged behavior was not "severe and pervasive" and the employee failed to adequately pursue his complaint with his supervisors. ***Ford v. Minteq Shapes and Services, Inc.,*** *No. 09-2140, Seventh Circuit Court of Appeals (November 24, 2009).*

Factual Background

Dennis Ford was employed by Minteq Shapes and Services, Inc. (MSS) at its Portage, Indiana facility. Ford, who had worked at MSS as a forklift operator for 13 years, was the only African-American employee on site.

Ford claimed that over a 14-month period a co-worker, Joseph Wampler, often referred to him as "black African-American" or "black man." The behavior stopped when his supervisor, Steve Smith, and co-worker Miguel Altieri overheard Wampler's comments and reprimanded him.

Ford claimed that he reported Wampler's comments and several other concerns to Laura Beemsterboer, the Manager of Human Resources. Specifically, Ford alleged: that his supervisor,

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Ogletree Deakins "Grows" West

New Offices Open In Las Vegas And Denver

Increasing coverage in the West has long been a goal of Ogletree Deakins – a goal which is much closer to being realized after new offices were opened in the first few weeks of 2010 in Las Vegas and Denver. "We are very excited about both the location of these new offices and the outstanding attorneys we have recruited," said Kim Ebert, new managing shareholder of Ogletree Deakins. Ebert assumed the reins for the firm from long-time managing shareholder Gray Geddie on February 1.

Las Vegas opened first, on January 19, with four shareholders (Tony Martin, Jeff Winchester, Suzanne Martin and Jill Garcia) and two associates (Christian Zinn and Christopher Pastore). In the first few days the office was open, two additional lawyers were added to meet client demand – Of Counsel Shaun Haley and associate Christina Mallatt. Las Vegas managing shareholder Tony Martin said the decision to join Ogletree Deakins was easy given the firm's "well-known commitment to client service and bench strength."

In Denver, the firm opened with two lawyers – shareholder Steve Moore (who will lead the new office) and associate Roger Trim. Moore not only brings the ability to handle Colorado matters but is a nationally recognized expert on class action cases. The office is expecting to add lawyers almost immediately.

According to Ebert, "the two new offices will quickly develop synergies with the firm's extremely successful offices in California and Arizona." With these additions, the firm has 37 offices and more than 450 lawyers – making Ogletree Deakins the third-largest labor and employment law firm in the country. ■

NEW PENALTY FOR FAILING TO REPORT PAYMENTS TO MEDICARE BENEFICIARIES

Pitfall Can Prove Costly For Employers

Effective January 1, 2010, employers may be subject to a penalty of $1,000 per day if they do not report certain settlement and severance payments made to Medicare-eligible employees to resolve discrimination or other workplace-related claims.

Background

Medicare is a government-funded health insurance program primarily for individuals age 65 or older. However, Medicare is not intended to be the primary insurance coverage for such individuals where there are other funds available to pay for medical treatment (*i.e.*, Medicare is a "secondary payer").

In response to increasing costs and funding concerns for Medicare, the "Medicare, Medicaid and SCHIP Extension Act of 2007" (MMSEA) was signed into law. The Act's purpose is to enable Medicare to determine when its beneficiaries have received payment or reimbursement for medical expenses that Medicare could recoup.

What Is Required?

Section 1395y(b)(7) of the Act requires a "Responsible Reporting Entity" (RRE) to register with the Centers for Medicare and Medicaid Services (CMS) Coordination of Benefits Contractor (COBC) and electronically file certain information on third-party claims that involve payments to Medicare-eligible claimants. This information includes identifying data about the individual and the amount paid to the individual to resolve all or part of a claim for medical expenses. The payment is referred to as the Total Payment Obligation to Claimant (TPOC).

An RRE can be any entity that is self-insured for all or part of a particular claim involving medical expenses. Where the claimant is a Medicare beneficiary and either (i) the claimant has made a claim for medical expenses or (ii) the claim results in a settlement, judgment, award or other payment to the Medicare beneficiary that resolves claims for medical expenses, the RRE must report the payment to the COBC.

Why Is This Important?

Any employer that is self-insured for all or part of any claim for medical expenses (*i.e.*, personal injury claims, which can include claims for discrimination or harassment) can be an RRE and thus subject to the reporting requirement. Effective January 1, 2010, an RRE that fails to properly report to the COBC a covered payment to a Medicare-eligible claimant will be subject to a civil penalty of $1,000 for each day it fails to report the payment.

On and after January 1, 2010, where an employer is fully or partially (*e.g.*, a deductible) self-insured for tort or employment claims potentially involving personal injuries to a Medicare-eligible claimant, payments by the employer to such a claimant must be reported to the COBC.

What Should Employers Do?

1. Employers should consult with their insurance carriers and the attorneys handling their insured liability claims to ensure that preparations have been made to report information on TPOC payments made on or after January 1, 2010.

2. Employers should examine their claims history and determine if any claims or demands could be made against their company for personal injury, including claims for harassment or discrimination, for which the company would be self-insured for all or part of a claim. This includes deductibles on Employment Practices Liability Insurance (EPLI) policies.

   a. If "yes," the employer should register with the COBC to begin the process of filing claim information.

   b. If "no," the employer should stay on alert for such claims, and consider registering with the COBC in case it is obligated to report a covered payment in the future.

3. For claims pending against a company for which the company may be required to make a payment to the claimant, the company should determine if the individual making a claim is a Medicare beneficiary. (Note: as an individual's Medicare status can change, such inquiries should be made at the beginning of the litigation and at the time of a final payment to the claimant, at a minimum.) Inquiries about a claimant's Medicare status can be made (i) to the claimant, and (ii) through the COBC by entities registered to report TPOC payments.

4. When a Medicare-eligible claimant has made a claim for personal injury/medical expenses at any time during a dispute, or when a payment is made to such a claimant settling a claim for medicals or any personal injury, the payment should be reported promptly to the COBC. ■

Ogletree Deakins

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Ogletree Deakins State Office Round-Up

CALIFORNIA

The California Supreme Court has held that a state civil procedure law, which denies attorneys' fees in low-recovery cases, applies to discrimination cases brought under the Fair Employment and Housing Act (FEHA). According to the court, the statute "gives a trial court discretion to deny attorney fees to a plaintiff who prevails on a FEHA claim but recovers an amount that could have been recovered in a limited civil case." *Chavez v. City of Los Angeles*, No. S162313 (January 14, 2010).

FLORIDA

The Eleventh Circuit Court of Appeals recently held that a trial judge properly awarded $610,470 in compensatory and punitive damages in a battery case that stemmed from alleged harassment. According to the court, "[d]ecades of Florida case law" establish "that a finding of battery is sufficient to trigger punitive damages." *Myers v. Central Florida Investments Inc.*, No. 08-16291 (January 6, 2010).

ILLINOIS*

The Illinois Right to Privacy in the Workplace Act places statutory obligations on employers that use E-Verify. Effective January 1, 2010, employers must complete an attestation at the time of E-Verify enrollment (or by January 30, 2010, if already enrolled) confirming that responsible employees have completed the Department of Homeland Security E-Verify tutorial.

INDIANA

The Indiana General Assembly is considering legislation that would prohibit employers from enforcing a policy or rule that has the effect of prohibiting a person from bringing a gun on their property. If passed, workers would be allowed to keep guns in their cars while at work so long as the guns are locked in their vehicles.

MASSACHUSETTS

The Massachusetts Supreme Judicial Court recently held that a high school teacher was entitled to workers' compensation benefits for an injury she suffered while serving as a chaperone at a school-sponsored ski event. According to the court, the teacher was acting in the course of her employment and was not engaged in "recreational" activity. *Sikorski v. City of Peabody*, No. SJC-10481 (December 11, 2009).

MICHIGAN

Governor Jennifer Granholm recently signed into law a measure that prohibits smoking in most workplaces, including bars and restaurants. The new law, which takes effect on May 1, does not apply to gaming floors of the three Detroit casinos, establishments that are designated for smoking cigars purchased on or off premises, and stores that primarily sell tobacco products.

NEW JERSEY*

On January 14, a bill (S2773) aimed at combating employers that pay workers off the books was signed into law. The measure allows for the suspension and revocation of employer licenses for repeat violations of state wage, benefits and tax laws. The new law, which takes effect in July, also requires employers to post notification in their workplaces.

OHIO

The Ohio Court of Appeals has held that a firefighter was improperly terminated for watching violent videos on a fire station computer. According to the court, the fire department's computer usage policy was too vague to justify his discharge. Moreover, the court found that due process requires that individuals be on notice of prohibited conduct, and no such notice was provided. *Bowman v. Butler Township Board of Trustees*, No. 23240 (November 20, 2009).

PENNSYLVANIA

The Third Circuit Court of Appeals has held that a hospital "took prompt and adequate remedial actions" to address harassment complaints raised by female occupational therapists. According to the court, it was undisputed that after each complaint, the supervisor disciplined the alleged harasser through oral warnings, written warnings, a suspension, and ultimately termination. *Young v. Temple University Hospital*, No. 08-4375 (December 31, 2009).

TENNESSEE

The Tennessee Court of Appeals has held that a fired worker's admitted drug use does not make him ineligible for unemployment benefits. The court stated that the worker's conduct may have justified discharge, but it "does not warrant denying him unemployment compensation." *Dura Automotive Systems Inc. v. Neeley*, No. M2009-908 (January 21, 2010).

TEXAS

The Texas Court of Appeals has held that an employer properly withheld a former salesperson's final commissions check after he gave its competitor confidential information during a job interview. The court found that forfeiture of commissions is appropriate when an employee breaches his fiduciary duty to his employer. *Central Texas Orthopedic Products v. Espinoza*, No. 04-09-00148 (December 9, 2009).

WASHINGTON, D.C.

The D.C. Circuit Court of Appeals has held that a female executive's lateral transfer did not constitute an "adverse action" under Title VII. According to the court, she retained her pay grade and her senior executive status, and there was evidence that her new position "in fact proved vital, visible, and prestigious." *Czekalski v. Hood*, No. 08-5431 (December 29, 2009).

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

VULNERABILITY ASSESSMENTS – TO BE FOREWARNED IS TO BE FOREARMED

*by Bruce A. Petesch**

With the heightened concern regarding increased federal and state government requirements expanding employer risks and liabilities, as well as employee expectations, many proactive clients are asking what they can do to enhance their positive employee relations programs – and where to start. While there are many elements to be considered in building a successful positive employee relations program – supervisory training, effective communications, continued review and improvement of policies and procedures, dispute resolution processes and more – none is more important than having a program for obtaining regular assessments of employee concerns and job satisfaction.

Why Audit?

Employers have several obvious reasons to conduct employee opinion surveys and positive employee relations assessments. A proactive employer wants to know what employees are thinking, determine whether the company's employee relations programs are effective, and assess the organization's "progress" in key areas of employee relations.

But there may be more important reasons to conduct employee relations assessments. A key benefit is opening a dialogue regarding problems and issues. In this context, less-than-desired scores can give management a reason to talk with employees about identified problems and to seek employee involvement. Involving employees in developing solutions to issues is a very effective way to build a strong positive employee relations program because this builds management credibility and opens communication channels.

Another reason beyond just scoring and issue identification is management development. It is said that adults learn through their failures. Vulnerability assessments can be a valuable tool not only to identify potential problem areas, but to force management to grade their organization on what may not be working in their employee relations program. Also, vulnerability assessments are a proactive way for leaders to keep an organization focused on employee issues and problematic operations and facilities. As with all self-evaluations, absolute honesty and candor may be difficult to achieve, but are crucial to the value of these assessments, and their benefits can be great.

* Bruce Petesch is a shareholder in Ogletree Deakins' Raleigh, North Carolina office, where he represents management in labor and employment-related matters.

Types of Assessments/Audits

There are a number of different types of surveys and assessments. Determining which is best is largely dependent on the purpose of the survey in any given situation. For example, the paper and pencil employee opinion or "attitude" survey can be a valuable tool in getting direct input on how employees evaluate various aspects of their employment experience. However, employee opinion surveys normally require time to administer and evaluate, and often it is difficult to effectively give employees timely feedback.

"As with all self-evaluations, absolute honesty and candor . . . are crucial to the value of these assessments."

Another way to conduct an assessment is to interview a facility's managers and supervisors following a format intended to reveal not only employee attitudes and satisfaction or dissatisfaction, but to identify issues among the managers and supervisors themselves. While these interviews can be handled internally, they are often more effective if done on a confidential basis by outside counsel or a consultant. Supervisors and managers are sometimes more candid with an outsider about their concerns than with internal interviewers, and, again, candor is absolutely critical to the value of the assessment.

There are a number of advantages with the supervisor interview vulnerability assessment: 1) the assessment and the results can usually be done more quickly than an employee opinion survey; 2) as issues are uncovered, there is an opportunity to "dig down" and gain a better understanding of the problem; and 3) there is an opportunity to evaluate the strengths and weaknesses of the managers and supervisors themselves.

Ogletree Deakins has developed another tool for making timely and cost effective assessments. Called "Trip-Wire" assessments, they are web-based surveys which audit the organization's potential problem areas at one or more facilities without the intrusiveness of either conducting an employee attitude survey or the supervisor interview vulnerability assessment. Aside from the cost advantage, the web-based tool provides a quick, non-intrusive way to take the pulse of single or multiple sites and obtain almost instant results. The company can determine exactly who will take the survey and who will receive the results. If the company elects, the results can be simultaneously viewed and evaluated by experienced labor counsel. The Trip-Wire surveys are focused on several areas, including:

- The external environment in which the facility exists;
- The facility's working conditions;
- Compensation and benefits;
- Employee understanding of the business;
- Business performance of the facility;
- Issue resolution at the facility;
- Communications effectiveness;
- Employee development;
- Performance management and/or recognition;
- Leadership and employer-employee relationships;
- Facility culture; and
- Composition of the workforce.

While no survey or assessment can predict whether a union campaign or significant employment-based litigation will occur at a facility, the Trip-Wire tools can quickly identify potential areas of concern which deserve a

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Union Membership Declines In 2009

The union membership statistics for 2009 suggest that organized labor has lost ground over the past year. According to the Bureau of Labor Statistics' report on annual union membership, private sector unions lost 834,000 members in 2009, bringing membership down to 7.2 percent of the private sector workforce (compared to 7.6 percent in 2008). Overall union membership, however, held steady at 12.3 percent in 2009. This was largely due to public sector union membership, which rose slightly from 36.8 percent in 2008 to 37.4 percent last year.

The total number of union members declined in 2009 by 771,000 members to a total of 15.3 million across the country (51.5 percent of which were employed by the government). The unionization rate dropped in several industries including manufacturing (from 12.3 percent in 2008 to 11.9 percent in 2009), construction (from 16.2 percent to 15 percent), and the information sector (from 13.7 percent to 11.2 percent). Unionization in the transportation and utility industries remained unchanged from 2008 to 2009 at 23.4 percent, which represents the highest rate of any broad industry sector.

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closer look. In that way, they can be a great aid in prioritizing where the responsible management team needs to apply its greatest effort and resources.

There are two types of "Trip-Wire" assessments. "Trip-Wire 1" is specifically designed for employers that have multiple small facilities, typically over a large geographic area, which may only have one or two local managers and are managed by a regional operations manager and human resources manager. Good examples of the type of operations that could use the Trip-Wire 1 web-based tool would be banks with a large number of small branch operations, food chains with multiple stores, and trucking companies with operations or terminals in several states.

The second Trip-Wire assessment is a more in-depth survey intended for employers with facilities with larger employee populations, or larger facilities with multiple departments and operations. Identified as "Trip-Wire 2," this web-based tool is intended for input by 5 to 12 participants, including first-line supervisors or department managers, and the facility leader and human resources manager. In appropriate circumstances, Trip-Wire 2 may be used as a follow-up tool at facilities that have been identified as vulnerable by the Trip-Wire 1 assessment, but its principal use would be in larger manufacturing plants, hospitals or other large institutions with multiple departments.

Responding to Raised Expectations

Conducting an employee opinion or attitude survey creates an immediate expectation in the workforce that issues will be addressed. Some employers make the mistake of allowing too much time to pass from the time the survey is taken to the announcement of the results. A worse mistake is failing to take immediate action to address problem areas and failing to use those problems to engage employees in the solution process. It may be as simple as informing employees of the areas that appeared to be viewed positively, but also highlighting the areas of disappointment and the company's commitment to address them quickly and, in appropriate subjects, with employee involvement. Some companies will set up a "scorecard" so employees can monitor what is being done. Whatever the tool, involving employees shows commitment and respect for their opinions, and builds management credibility with the workforce.

While employee opinion surveys clearly give employees an expectation of a management response, other forms of assessment may lessen that effect. Third-party interviews of managers and supervisors may cause less expectation in the workforce. But, there certainly will be an anticipation and expectation among the supervisors and managers interviewed regarding the conclusions reached and the actions to be taken. Trip-Wire assessments probably fly the lowest under the radar of the workforce and depending on the tool used and those management personnel who are involved, they increase the chance that confidentiality will be maintained. That can be a distinct advantage of using the Trip-Wire tool.

Surveys and Audits When There Is Organizing Activity

Experienced labor relations professionals know that "timing is everything" in the area of labor relations – and that timing can make what would otherwise be legal, illegal. Context and communications has a lot to do with it as well. As a general rule though, if an employer has a history of regularly using certain tools to manage its workforce, it can employ those tools even during a union organizing drive.

Using good management techniques not only will pay dividends in better employee relations, but also will give management more flexibility even in the context of a union organizing drive. Of course, proactive employers that effectively use assessment tools and respond to the results stand a better chance of avoiding the employee discord and unrest that lead to organizing drives and costly litigation cases, because they will have had early recognition of, and an opportunity to address, the issues before they fester.

Conclusion

Knowledge of employee concerns, issues and satisfaction, as well as an honest and candid evaluation of the work environment and processes, interaction with management, and supervisory strengths and weaknesses, etc., is critical to effectively designing a positive employee relations program. As the old proverb states: To be forearmed is to be forewarned. Smart employers use a variety of tools to stay on top of issues and attitudes and then respond in ways that involve their employees in the process. ■

DOES YOUR HEALTH PLAN VIOLATE THE NEW MENTAL HEALTH PARITY RULES?

New regulations are giving employers their first glimpse of the mental health and substance abuse benefit changes that may be needed by 2011 to ensure that their health plans do not violate the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 ("New Mental Health Parity Act").

Published in the February 2 *Federal Register* and jointly issued by the IRS, the Department of Labor and the Department of Health and Human Services, the interim final regulations will require employers to consider issues such as:

- Separate deductibles for mental health/substance abuse and standard medical/surgical benefits.
- Medical management standards, prescription drug formulary design and other "nonquantitative" treatment limitations that plans set for mental health and substance abuse benefits.
- Operational differences between how mental health and substance abuse benefits are administered and how medical benefits are administered.
- How the general parity rule applies to a multi-tiered prescription drug program.
- Specialist co-pays that could apply to nearly all mental health or substance use claims, but only a fraction of medical claims.

Though these regulations withdraw prior rules that date to 1997, they do not answer all employer questions about the New Mental Health Parity Act – such as with respect to the exemption from the requirements for plans that experience certain cost increases from compliance. For more information on the regulations, visit www.ogletreedeakins.com. ■

High Court Rules In Political Spending Case

The U.S. Supreme Court recently struck down limits on corporate political spending in a 5-4 decision. *Citizens United v. Federal Election Commission* overturned a 20-year-old ruling that prohibited corporations from spending general treasury funds to pay for campaign advertisements. The ruling also invalidated a central provision of the 2002 McCain-Feingold Act prohibiting unions and corporations from funding issue advertisements at the close of campaign elections. The Court held that the limits on corporate spending violate the First Amendment by impermissibly restricting free speech. The case addressed whether a 2008 movie critical of presidential candidate Hillary Clinton was subject to Federal Election Commission regulations.

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Ronald Humphreys, once told him that he didn't have to worry about his job because MSS "wanted to appear integrated"; that another supervisor, Lee Nuzzo, once called him a "gorilla"; and that MSS barred Ford but not others from bringing their grandchildren to the company's Christmas parties.

On May 5, 2007, Ford filed suit alleging that MSS had racially harassed him, paid him a discriminatory wage, and retaliated against him in violation of Title VII of the Civil Rights Act. The trial judge granted summary judgment to MSS and Ford appealed.

Legal Analysis

The Seventh Circuit first noted that to succeed on his racial harassment claim, Ford must show that his employer's conduct was "severe or pervasive enough to create an objectively hostile or abusive work environment." The court considered each incident and found that Wampler's comments were not severe enough to alter Ford's working conditions and constitute racial harassment.

In reaching this conclusion, the Seventh Circuit found it relevant that although Ford reported Wampler's comments to Beemsterboer, he did so only once in 14 months. Moreover, the court found that during this conversation with Beemsterboer, Ford's main concerns seemed to be the raise he was seeking and his treatment at the Christmas party (not Wampler's comments). According to the court, even when no apparent action was taken on his complaint, Ford did not follow up with Beemsterboer or with his supervisor.

Because Ford did not take reasonable steps to inform MSS of Wampler's comments, the court rejected his claim that the comments created a hostile work environment or rose to the level of illegal harassment.

The Seventh Circuit also concluded that neither Humphreys' affirmative action comment nor the gorilla remark constituted harassment. According to the court, both incidents occurred only once, "did not impair Ford's job performance, and were insufficiently severe to rise to the level of a hostile work environment."

Finally, the Seventh Circuit concluded that Ford's treatment at the Christmas party did not constitute racial harassment because it did not impair Ford's job performance, happened only occasionally and occurred outside the normal workday. The court also noted that Ford had not presented any evidence that his treatment at the party was because of his race. Thus, the Seventh Circuit ruled that without regard to whether Ford's claims were considered separately or in the aggregate, they did not support a legal claim for harassment.

Practical Impact

According to Charles Baldwin, a shareholder in Ogletree Deakins' Indianapolis office: "This case highlights the importance of adopting and promulgating effective harassment policies and complaint procedures. A thorough and easily-understood policy, coupled with a simple complaint procedure, is critical in defending against claims of unlawful harassment. This case reinforces these strategies by rejecting the employee's case on the basis of his own inaction. It is also noteworthy that while the Seventh Circuit found the comments at issue to be 'rude and offensive,' it refused to treat Title VII as a 'general civility code'." ■

CONGRESS' "NEW" LEGISLATIVE AGENDA

Brown Victory Alters Political Landscape In The Senate

In a special election held on January 19, Republican Scott Brown defeated Democrat Martha Coakley by a margin of almost five percentage points, and will fill the seat held by the late Senator Edward Kennedy for the past 47 years. Brown is the first Republican elected to national office in Massachusetts since 1972.

Brown's election means that Democrats no longer have 60 seats in the Senate. Instead, the Democrats have 59 seats (57 Democrats and two Independents). As a result, Democrats no longer have the votes necessary to end a filibuster and bring legislation to the floor. Brown made the elimination of the Democrats' 60-seat majority a cornerstone of his campaign, and he also pledged to oppose the current health care reform measures negotiated among House and Senate Democrats.

Brown's victory will likely have a dramatic impact on Congress' agenda. The most immediate issue is health care reform. Without 60 votes, Democrats in the Senate almost certainly will not be able to pass any final health care legislation negotiated between the House and Senate, except through controversial "budget reconciliation" (which only requires 51 votes but all non-budgetary provisions must be eliminated). Likewise, the shifting voting demographic is probably the end of the Employee Free Choice Act (EFCA) as introduced. Organized labor may seek a scaled down version of the legislation, however. The Democratic agenda now is likely to depend more heavily on the work of federal agencies and to include continued emphasis on strong enforcement, new regulations, and test cases intended to overturn Bush-era judicial and agency decisions.

Brown's victory may rekindle bipartisanship since the Senate is no longer filibuster-proof and his term ends in 2012. So, a wide array of bills such as OSHA reform, anti-discrimination measures, increased employee leave entitlements and retirement benefit protections may be considered before the November elections. In other words, Brown's election may actually force both Democrats and Republicans to seek areas of agreement and compromise so they can salvage the 111th Congress and prevent it from being dubbed as yet another "Do-Nothing Congress." ■

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2010 H-1BS GONE: TIME TO PLAN FOR 2011

New Filing Period Begins April 1

United States Citizenship and Immigration Services (USCIS) announced that the 65,000 H-1B cap for the 2010 fiscal year (FY 2010) was reached on December 21 of last year. The annual limit for new H-1Bs is 65,000 (less up to 6,800 set aside for citizens/nationals of Chile or Singapore, plus any of the unused 6,800 from the prior fiscal year). An additional 20,000 H-1Bs are available to individuals who possess a Master's or higher degree from a U.S. academic institution (the "Master's cap"). For FY 2010, the 20,000 Master's cap was reached as of September 25, 2009. "New" H-1Bs are thus unavailable until the start of FY 2011 on October 1, 2010.

Employers can continue to file petitions for workers not subject to the H-1B cap, which includes petitions filed to extend or amend H-1B employment for foreign workers already in H-1B status and petitions filed on behalf of new workers to be employed by institutions of higher education or related nonprofit entities, nonprofit research organizations, or governmental research organizations.

Employers must now turn their attention to the FY 2011 cap. The filing period for "new" H-1B petitions to be counted against the annual H-1B cap begins on April 1, 2010. Employers are encouraged to begin identifying current and future employees who will need H-1B visa status to be legally employed. Individuals currently employed as F-1 students or J-1 trainees and individuals outside of the United States commonly require new, cap-subject H-1Bs. April 1 is the initial filing date for petitions seeking H-1B status with an effective date of October 1, 2010. Although the hiring of H-1B workers has not recovered to the levels seen in 2007 and 2008, employers are encouraged to file at the first possible opportunity to maximize access to limited H-1Bs. ■

Ogletree Deakins News

New to the firm. Several new lawyers have recently joined the firm. This growth, combined with the recent opening of the Las Vegas and Denver offices (see page 1), brings the firm to more than 450 attorneys in 37 offices. The new attorneys are: Jon Gumbel (Atlanta); Ruth Cramer, D. Finn Pressly and Jeremy Moritz (Chicago); Jason Rothman (Cleveland); Sunita Shirodkar (Houston); Grace Skertich (Jackson); Christopher Wike (Miami); Thomas Arn and Alexis Pheiffer (Phoenix); Shera Stewart (Raleigh); Amanda Ballard and Edmund McKenna (Tampa); and Crystal Barnes (Washington, D.C.).

New shareholders. At the annual meeting held in Atlanta, Ogletree Deakins' existing shareholders elected new shareholders. They include: Frank Davis (Austin); Michelle Arendt (Cleveland); Kyle Dillard (Greenville); John Henning and Robert Seidler (Indianapolis); Chris Pace (Kansas City); David Fishman (Los Angeles); Thomas Rattay and Evan Shenkman (Morristown); Leah Freed (Phoenix); Bernhard Mueller (Raleigh); Dawn Knepper (San Antonio); Danielle Ochs-Tillotson (San Francisco); Iggy Garcia (Tampa); and Melissa Bailey (Washington, D.C.).

Congratulations to . . . Thomas McInerney (San Francisco) who recently was elected to a seat on the San Anselmo Town Council; Bruce Hearey (Cleveland) who received the Rudolph H. Garfield Circle of Caring Award; J. Howard Daniel (Greenville) who was named one of the 50 Most Influential People of 2009 by *Greenville Business Magazine*; Thomas Barnard (Cleveland) who was named as "Cleveland's *Best Lawyers* Labor and Employment Lawyer of the Year" for 2010; Bernard Tisdale (Charlotte) who was named a Mover & Shaker by *Business Leader* magazine; and Columbia shareholders Charles T. Speth II and Kathy Dudley Helms who were inducted as Fellows in the Litigation Counsel of America.

COURT REVIVES HOTEL WORKER'S GENDER STEREOTYPING CLAIM

Finds Manager's Requirement That Workers Be "Pretty" May Be Discriminatory

A federal appellate court recently reinstated a gender stereotyping case brought by a hotel front desk employee who claimed she was fired for not having the "Midwestern girl look." According to the Eighth Circuit Court of Appeals, "[c]ompanies may not base employment decisions for jobs . . . on sex stereotypes." ***Lewis v. Heartland Inns of America, L.L.C.,*** *No. 08-3860, Eighth Circuit Court of Appeals (January 21, 2010).*

Factual Background

Brenna Lewis started working for Heartland Inns of America, which operates a group of hotels, in 2005. In 2006, she was assigned to part-time front desk shifts at two locations. Lori Stifel, who was Lewis' manager at one hotel, received permission from Heartland's Director of Operations, Barbara Cullinan, to offer Lewis a full-time "A shift" position. Lewis accepted the offer and took over the job in December of 2006.

After Cullinan saw Lewis working the front desk, Cullinan told Stifel that she was not sure Lewis was a "good fit" for the front desk. Cullinan stated that Lewis, who wore loose-fitting clothes, avoided makeup and had short hair, lacked the "Midwestern girl look." Although the front desk job description in Heartland's personnel manual did not mention appearance, Cullinan ordered Stifel to move Lewis back to the night shift. Stifel refused, citing the "phenomenal job" Lewis had been doing.

The following week, Cullinan insisted that Stifel resign. At the same time, Heartland informed its general managers that hiring for front desk positions would require a second interview.

Cullinan then notified Lewis that she would need a second interview to "confirm/endorse" her current position. Lewis protested, noting that other Heartland staff members had not been required to have a second interview. Three days later, Lewis was fired. In its termination letter, Heartland asserted that Lewis had "thwart[ed] the proposed interview procedure" and exhibited "host[ility] toward Heartland's most recent policies."

Lewis filed a lawsuit in federal court against Heartland, its Human Resources Director and Cullinan, alleging sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964. The trial judge granted summary judgment in favor of Heartland and Lewis appealed this decision to the Eighth Circuit Court of Appeals.

Legal Analysis

Lewis argued that Heartland fired her "because her appearance did not comport with its preferred feminine stereotype" and not because of her job performance or qualifications. The Eighth Circuit noted that the relevant issue was whether Cullinan's requirements that Lewis be "pretty" and have the "Midwestern girl look" were because she is a woman. In considering this issue, the court found it relevant that Cullinan was a primary decisionmaker with authority to hire and fire and that the other individuals who took part in the decision to fire Lewis relied on Cullinan's description of her conversation with Lewis.

The Eighth Circuit also noted that Cullinan had indicated that Heartland staff should be "pretty," especially women working the front desk, and that she criticized Lewis' "look" in the same conversation in which she ordered Stifel to move Lewis to the night shift. In addition, the court pointed out that Lewis had a history of good performance at Heartland. Based on these findings, the court concluded that one could infer that Heartland had a discriminatory motive to fire Lewis. As a result, the Eighth Circuit ruled that Lewis had presented sufficient evidence to proceed with her sex discrimination claim.

Practical Impact

According to Donald Prophete, a shareholder in Ogletree Deakins' Kansas City office: "While courts, as a general rule, continue to uphold employer-adopted appearance standards, it is clear that such policies are subject to attack unless care is taken in both drafting the policies and the manner in which they are applied and enforced. This decision makes clear that appearance policies should be carefully drafted to avoid a claim that they go beyond an employer's legitimate interest in maintaining a particular image for business purposes and, instead, enforce a sexual stereotype. It is one thing to require both males and females to maintain a 'professional' image or appearance and another to specify the particular male or female 'image' that the employer believes to be 'professional'." ■

2010 Workplace Strategies To Tackle Key Legal Issues

Ogletree Deakins is gearing up for Workplace Strategies 2010 – which will be held in Las Vegas on May 6 and 7 at the fabulous Bellagio Hotel. This unique two-day seminar will feature nearly 50 cutting-edge topics and more than 100 top quality presenters. No matter what your areas of interest in the employment law arena, this program will address them. Also, we have prepared a special track for in-house attorneys, designated by the scales in the agenda.

The Workplace Strategies 2010 brochure, with all the details about the program, the agenda, and making your reservations, will be sent to you shortly, and can also be found on the firm's website at www.ogletreedeakins.com. Both capacity at the seminar and our hotel block is limited – so please register for the program and make your hotel reservations as soon as possible.

Back by popular demand will be the pre-conference session on Wednesday, May 5. This year will feature two four-hour sessions on cutting-edge topics, which are offered at no additional charge. This will undoubtedly be a very informative – and entertaining – event. We hope you can join us in Las Vegas this May!