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Today's Hot Topics in Labor & Employment Law
January/February 2013

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Email Request Does Not Constitute "Complaint"

Court Finds Employee's Firing Was Not Retaliatory

A federal appellate court has upheld the dismissal of a lawsuit brought under the Fair Labor Standards Act (FLSA) by an employee who claimed she was fired for complaining about needing a place to express breast milk while at work. According to the Eleventh Circuit Court of Appeals, the employee's email requesting a time and place to express milk cannot reasonably be considered a complaint. ***Miller v. Roche Surety and Cas. Co.,*** *No. 12-10259, Eleventh Circuit Court of Appeals (December 26, 2012).*

Factual Background

Danielle Miller was employed by Roche Surety and Casualty Company, a Florida bail bond surety company. Miller needed to express milk while at work. Roche did not limit her breaks by frequency or by time and never criticized her for taking breaks. She was also provided a one-hour lunch period.

Miller had access to vacant offices to express milk but she chose to use her own office, where she taped folders to the windows for privacy. She did this without informing anyone at Roche that she would be expressing milk in her office and did not ask for a different location.

On one occasion, Miller sent an email to her supervisor, stating, "Shannon, I'm scheduled tomorrow all day

Please see "RETALIATION" on page 7

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Former NLRB Member Joins Ogletree Deakins

Brian Hayes Brings Insight To Traditional Labor Law Arena

During his tenure on the National Labor Relations Board (NLRB), Brian Hayes often dissented to the Board's game-changing rulings, and his opinions were a voice of reason to many in the employer community. When Hayes's term expired in December, employers were left without a voice on the NLRB.

Ogletree Deakins clients can still benefit from Hayes's insights, as he has chosen to join the firm over the many other options available to him. Hayes, who started with the firm on January 6, will serve as co-chair of the firm's Traditional Labor Relations Practice Group and be based in the Washington, D.C. office. According to Kim Ebert, Ogletree Deakins' managing shareholder, "It is a unique and special opportunity for us to welcome Brian Hayes to our firm, and we are delighted that he felt our model and platform were the right fit for him."

Hayes participated in an active Board that reversed long-standing precedents in many areas of labor law. During his tenure, employers lauded Hayes for his dissents in several landmark cases. He articulated pro-management positions on key issues, including social media in the workplace, notice posting, narrow bargaining units and "micro-unions," and post contract deduction of union dues. Many employers hope that Hayes's legal analyses will be a roadmap for the courts in evaluating NLRB rulings.

"I am very excited to join Ogletree Deakins," said Brian Hayes. "This is a very dynamic time in the traditional labor law arena. The NLRB's rulings have created many challenges for employers in recent years. While I will miss my days as a policymaker, I look forward to returning to the practice of law and helping employers manage these risks—and those that are likely to come from the NLRB in the future." ■

FOR EMPLOYERS, PAY-OR-PLAY PROPOSALS COULD BE WORSE, MUCH WORSE

by Timothy J. Stanton (Chicago)

Could employee benefits regulatory activity under the Patient Protection and Affordable Care Act be taking a turn toward common sense?

Based on the new proposed rules on the "pay-or-play" provision under the Act—only those on the federal payroll still say "shared responsibility"—the answer may be a qualified "yes." The "pay-or-play" mandate refers to an employer's option under the Act to provide the required coverage to all full-time employees (play) or pay a penalty for not offering coverage (pay).

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Published in the *Federal Register* on January 2, the proposals represent the latest attempt by the Internal Revenue Service (IRS) to put into effect the requirements of Internal Revenue Code section 4980H. Code section 4980H was added by the Act and requires large employers to offer minimum essential coverage to "full-time employees" and their "dependents." Failure to offer such coverage would trigger a penalty if any full-time employee is not offered such coverage, applies for coverage through one of the public insurance exchanges, and qualifies for federal financial aid for that coverage. Those penalties differ depending on whether an employer failed to offer any minimum essential coverage or whether it failed to offer coverage that was "affordable" and provided "minimum value" under federal standards.

Key Provisions

Below is a recap of some of the highlights of the proposed rules:

- "Pay-or-play" penalties would be applied separately to each member of a controlled group, rather than on a controlled group-wide basis. This represents good news, for example, where some subsidiaries of a parent company may want to "play" (i.e., provide coverage), while others "pay" the penalty. Note that these proposed rules would not affect other legal rules that may hinder employer plans to provide benefits for only certain subsidiaries.
- For purposes of the pay-or-play requirements, "dependents" would be children as defined in Code section 152(f)(1). This definition includes stepchildren and foster children, but it does not include other dependents such as spouses or domestic partners. The proposed rules also contain a transition rule for employers that do not currently offer dependent coverage.
- The "affordability" standards under Code section 4980H may in several ways be easier to meet than might have been expected. Consistent with prior IRS guidance, the proposed rules appear to allow employers to evaluate affordability on the basis of self-only coverage, even in cases where an employee covered his or her family. The proposed rules also contain three design-based safe harbors that would enable employers to meet the affordability standard by setting employee costs for self-only coverage based on W-2 wages, the federal poverty level, or an employee's rate of pay.
- Under the statute, if even one full-time employee of a large employer was not offered coverage, applied for coverage through a new insurance exchange, and qualified for federal aid for that coverage, an employer would face a penalty of $2,000 per full-time employee in its workforce (minus the first 30). This would be true even if every other full-time employee had properly been offered coverage. Under a de minimis standard in the proposed rules, no penalty would apply where an employer had properly offered coverage to at least 95 percent of its full-time employees. Again, this standard typically would apply separately to each member of a controlled group, rather than on a controlled group-wide basis.
- The safe harbor that the IRS has gradually developed for employers to evaluate full-time status across a workforce features "measurement" periods to gauge how many hours an employee works and then "stability" periods during which the employee would be characterized as full-time or not full-time. This approach is clearly ill-suited to educational institutions, and the new proposed rules contain special provisions designed to adapt the safe harbor to that industry.

A Final Word

All this is not to say that the proposed rules are ideal. The rules to evaluate which employees are full-time remain frustratingly complex. And the rules governing which employers are "large" employers will put a burden on small employers that often lack compliance resources.

This topic will be covered at Ogletree Deakins' special Legislative and Regulatory program on February 21-22 in Washington, DC. For the full agenda, see the enclosed brochure or visit www.ogletreedeakins.com. ■

Ogletree Deakins State Round-Up

CALIFORNIA*

The California Supreme Court recently held that although a supermarket's privately owned entrance area is not a public forum where a union could assert free speech rights under the state Constitution, there is statutory protection for picketing activities under California Code of Civil Procedure section 527.3 (the Moscone Act) and California Labor Code section 1138.1. *Ralphs Grocery Company v. UFCW Local 8*, S185544 (December 27, 2012).

FLORIDA*

The Florida Supreme Court recently upheld the constitutionality of a 2011 law that requires Florida's public sector employees to contribute three percent of their pay to the Florida Retirement System. This decision also affirmed the elimination of the cost of living adjustment for service after July 1, 2011. *Scott v. Williams*, No. SC12-520 (January 17, 2013).

GEORGIA

The Eleventh Circuit Court of Appeals has rejected a lawsuit brought by a Georgia city employee who claimed that she was discriminated against based on her disability. The court found that even though her supervisor allegedly called her a "cripple," the employee was unable to prove that she had a qualifying disability or that she was "regarded as disabled." *Gilliard v. Georgia Department of Corrections*, No. 12-11751 (December 7, 2012).

INDIANA*

Indiana's right-to-work statute recently survived its first challenge by a union. On January 17, a federal judge in Indianapolis dismissed federal claims brought by the International Union of Operating Engineers after finding that the state legislature was within its rights to pass the law. *Sweeney v. Daniels*, No. 2:12cv81 (January 17, 2013).

ILLINOIS

On January 17, the Chicago City Council approved an ordinance that authorizes the city to suspend or revoke the business licenses of employers that violate the Illinois Wage Payment and Collection Act and similar state and federal laws. A report released two years ago found that "labor laws are regularly and systematically violated" within the city's low-wage and immigrant labor forces.

MICHIGAN*

On December 27, 2012, Governor Rick Snyder signed into law the Internet Privacy Protection Act. The new law, which applies to both public and private sector employers, prohibits an employer from requesting or requiring an employee or applicant to grant the employer access to the individual's personal Internet account.

NEW JERSEY*

The New Jersey Department of Labor and Workforce Development has issued proposed rules on the state's new pay equality notice law, and they clarify that the law applies to New Jersey employers with 50 or more employees *whether in or out of New Jersey*. The posting and distribution requirements will not take effect until the proposed notice is adopted.

NEW YORK*

A New York court has held that an extended leave of absence may be a reasonable accommodation under the New York City Human Rights Law. According to the court, the employer did not engage in the interactive process and failed to establish that it would have suffered an undue hardship by granting the employee a three-month leave of absence. *LaCourt v. Shenanigans Knits, Ltd.*, No. 102391/11 (November 14, 2012).

NORTH CAROLINA

A North Carolina printing company recently agreed to pay $334,000 to settle a lawsuit brought by the EEOC alleging bias against non-Hispanic workers. The agency claimed that the company violated federal law by not placing non-Hispanic workers in its "core group" of regular temporary workers and giving more hours to Hispanic workers. *EEOC v. PBM Graphics Inc.*, No. 11-805 (December 10, 2012).

OHIO

The Ohio Court of Claims recently awarded more than $500,000 to a former contract engineer who claimed that he was refused a job because of his age. The court found that the plaintiff was invited to interview for the position and scored the highest among the applicants, but the job was awarded to an individual who was 15 years younger. *Warden v. Ohio Department of Natural Resources*, No. 2011-01232 (January 15, 2013).

TEXAS

The U.S. Supreme Court recently agreed to review a case brought by an employee who sued his former employer for race discrimination and retaliation under Title VII. The justices will decide whether a plaintiff must prove that the employer would not have taken an adverse action *but for* an improper motive or that an improper motive was one of several reasons for the employer's action. *University of Texas Southwestern Medical Center v. Nassar,* No. 12-484 (cert. granted January 18, 2013).

WASHINGTON, D.C.

The D.C. Circuit has held that a security company was not liable for providing a gun to a mentally unstable worker who used it to commit suicide. The court found that the suicide was an intervening act that precludes finding the employer liable. *Rollins v. Wackenhut Servs. Inc.*, No. 11-7094 (December 28, 2012).

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

THE NLRB IN 2013: MORE CONTROVERSY AHEAD

*by Harold P. Coxson, Ruthie L. Goodboe and Sarah J. Murphy**

The National Labor Relations Board (NLRB) begins 2013 amid continuing controversy. Most notably, on January 25, the D.C. Circuit Court of Appeals issued a ruling concerning the Board's authority to make decisions due to legal challenges to its current composition of "recess" appointments. Ultimately, the court held that the recess appointments were invalid.

Adding to the controversy is pending litigation stalling the NLRB's two major rulemakings and a host of appeals from its precedent-setting pro-union decisions. Yet, in the final weeks before the expiration of the term of its lone Republican Board Member Brian Hayes (see "Former NLRB Member Joins Ogletree Deakins" article on page 1 of this issue), the Board majority moved ahead in spite of the controversy with a series of new decisions issued over his strong dissents.

Based on the D.C. Circuit Court's recent ruling, however, these and all of the Board's decisions dating back to January 4, 2012 (when the recess appointments were made by President Obama) may lack quorum and therefore, under the U.S. Supreme Court's decision in *New Process Steel*, may be invalidated. Only time will tell what the future holds for the NLRB.

The Board's Decision-Making Authority

Noel Canning v. NLRB involved an unfair labor practice charge brought by a Teamsters local against a bottler and distributor in the state of Washington. The administrative law judge (ALJ) assigned to the case ruled that Noel Canning violated the National Labor Relations Act by refusing to reduce to writing and execute a collective bargaining agreement reached with the union. The ALJ then ordered Noel Canning to sign the agreement. The company appealed this decision to the NLRB, and the Board affirmed. The case ultimately reached the D.C. Circuit Court of Appeals.

On appeal, Noel Canning argued that the Board erred in determining that the parties actually reached a final agreement following negotiations. The company also challenged the authority of the Board to issue an order on two constitutional grounds. First, Noel Canning claimed that the NLRB lacked a quorum because three members of the five-member Board were appointed when the Senate was not in recess. Second, the vacancies filled by these three members did not "happen during the Recess of the Senate" as required by the U.S. Constitution.

After finding that the Board's decision was valid on statutory grounds, the three-member panel of the D.C. Circuit Court of Appeals turned to the constitutional arguments. Under Article II, Section 2, Clause 3 of the U.S. Constitution (also referred to as the Recess Appointments Clause), "[t]he President shall have power to fill up all vacancies that may *happen* during the *recess* of the Senate, by granting commissions which shall expire at the end of their next session."

Pursuant to this provision, President Obama on January 4, 2012 appointed three members to the NLRB. The first of these three members, Sharon Block, filled a seat that became vacant on January 3, 2012, when Board member Craig Becker's recess appointment expired. The second seat, which was vacated by Peter Schaumber on August 27, 2010, was filled by Terence F. Flynn. Richard F. Griffin was appointed to the third seat, which became vacant on August 27, 2011 at the conclusion of Wilma B. Liebman's term.

Noel Canning contended that the President's appointments were invalid because they were not appointed during the "recess" of the Senate. Specifically, the company argued that the term "recess" refers to the intersession recess of the Senate (or the period between sessions) when the Senate is not available to act upon nominations from the President. The D.C. Circuit agreed with the company, after carefully considering the plain text, history, and structure of the U.S. Constitution. "To adopt the Board's proffered intrasession interpretation of 'the Recess,'" the court held, "would wholly defeat the purpose of the [f]ramers in the careful separation of powers structure reflected in the Appointments Clause [of the U.S. Constitution]." Thus, because the Board lacked a quorum of three members when it issued the ruling in this case, the court vacated the Board's decision.

Even though Noel Canning prevailed on its first constitutional argument, the D.C. Circuit continued its analysis of whether the vacancy must arise during the recess of the Senate for the recess appointment to be valid. "Consistent with the structure of the Appointments Clause and the Recess Appointments Clause exception to it," the court wrote, "the filling up of a vacancy that happens during a recess must be done during the same recess in which the vacancy arose." The court continued, "There is no reason the [f]ramers would have permitted the President to wait until some future intersession recess to make a recess appointment, for the Senate would have been sitting in session during the intervening period and available to consider nominations."

This ruling can be considered a "game changer" for the NLRB and the parties subject to its jurisdiction. Under the controlling authority of the U.S. Supreme Court's *New Process Steel* precedent, this decision will likely mean that the Board's decisions issued since the invalid recess appointments were made—January 4, 2012—lacked a quorum and will have to be recalled and redecided by the Board, just as happened following *New Process Steel*. The ruling may also impact those decisions and rules involving recess appointee Craig Becker, since his appointment was not during an intersession recess of Congress. Thus, perhaps any cases where he was one of three members on a decision or issuance of a rule

* Hal Coxson is a principal with Ogletree Governmental Affairs, Inc., and a shareholder in the law firm of Ogletree Deakins in the Washington, D.C. office. Ruthie Goodboe is a shareholder in the firm's Detroit Metro office and Sarah Murphy is an associate in the New Orleans office.

may be subject to challenge as well, since the Board may have lost its quorum when former Chair Liebman left the Board on August 27, 2011.

It is expected that the Board will seek an *en banc* review of the panel's decision by the full D.C. Circuit, and then perhaps by the U.S. Supreme Court, but it is unclear what the Board and the Obama Administration will do in the interim.

In any event, the Board will face a challenge to its authority with the expiration of Chairman Mark Pearce's term on August 27, 2013, reducing the Board to only two Members—Members Griffin and Block—without a legal quorum to act and whose recess appointments, even if validly made, will expire when Congress adjourns at the end of 2013.

"The emphasis of the General Counsel in 2013 will continue to expand the NLRB's reach even further."

Notice Posting and Election Rules Challenged

Legal challenges to the Obama Board's final rulemakings are pending before the federal circuit courts of appeals. Decisions are expected early in 2013, with likely review before the U.S. Supreme Court.

First, the so-called Notice Posting Rule would require over six million private sector employers subject to the National Labor Relations Act to post workplace notices informing employees of how to form or join unions, bargain collectively, and strike or engage in other concerted activity. Employer groups challenging the Notice Posting Rule argue that the Board lacks statutory authority to mandate employer posting, and that the notice prepared by the Board is incomplete and improperly skewed in favor of encouraging unionization. The challenges are pending before the D.C. and Fourth Circuit Courts of Appeal, with briefing and arguments completed in the D.C. Circuit (which is likely to rule soon).

Second, the Election Rule—often referred to as the "quickie" or "ambush" election rule—would significantly reduce the time between a union petition and the date of election for union representation by eliminating most preliminary hearings to determine the appropriate bargaining unit. Employer groups argue that elections within as little as two weeks from the date of the union petition would deprive employees of being fully informed on the issues and also would prevent them from knowing the scope and composition of the future bargaining unit prior to voting.

The legal challenge to the final rule is pending before the D.C. Circuit and a decision should be issued early in 2013. Nevertheless, NLRB Chairman Pearce has announced his intention to expand the rule to include additional provisions—among the most controversial ones—which were dropped from the rule as originally proposed.

Troublesome General Counsel Memoranda Continue In 2013

"Acting" General Counsel Lafe Solomon, who was appointed by President Obama under the Federal Vacancies Act but never confirmed by the Senate, has issued a number of controversial GC Memoranda during his term. GC Memoranda are binding on the NLRB's regional offices throughout the country. The most controversial of these memoranda include mandates on the imposition of extraordinary remedies, default language in settlement agreements, non-deferral to arbitration, and a series of memoranda on the handling of social media cases.

Recently, the General Counsel announced his intention to require employers to provide unions petitioning for a representation election with employees' personal information, including email addresses, home phone numbers, and work shifts, together with the current requirement of providing a list of their full names and current home addresses.

The emphasis of the General Counsel in 2013 will continue to expand the NLRB's reach even further into company polices and employee handbooks, which in the General Counsel's view might be read to "chill" employees' rights to engage in "protected concerted activity." The Board has found violations even with regard to policies that have never been applied and company rules that have never been enforced. Of course, this applies to both union and union free workplaces since even unrepresented employees are protected under the National Labor Relations Act.

Employers should review their current policies and handbooks to determine areas that might interfere with an employee's right to engage in protected concerted activity. This is harder than ever, since the NLRB and General Counsel keep raising the bar.

Controversial Decisions Challenged

Among the most controversial Board decisions currently pending on appeal before the federal circuit courts are *Specialty Healthcare* (appropriate bargaining units), *D.R. Horton* (class action waivers in mandatory arbitration agreements), and *Banner Health* (confidentiality of investigations of workplace misconduct). Likewise, at the end of 2012, the Board was very active in issuing decisions that reversed longstanding precedent over the dissenting opinions of Board Member Hayes shortly before the expiration of his term on December 17, 2012. (Summaries of these decisions can be found on the firm's Traditional Labor Law blog at http://blog.ogletreedeakins.com/).

What's Next In 2013? More Of The Same?

Clearly, 2013 promises to be a momentous year for the NLRB and a challenging one for employers. The D.C. Circuit's recent decision stands to have broad ramifications as it calls into question the validity of the Board's decisions dating back to January 4, 2012. Even so, with the union's labor law reform agenda blocked in Congress, there is little doubt that the NLRB will continue to be the source of the unions' regulatory labor law reform agenda over the next four years. ■

POST-ELECTION IMMIGRATION REFORM—WHAT'S AT ISSUE?

by Nicole Brooks (Raleigh), Justin S. Coffey (Atlanta), and Andrew W. Merrills (Raleigh)

The prospect of comprehensive immigration reform appears to be gaining momentum. On January 28, a bipartisan group of eight senators announced a broad proposal for immigration reform. Meanwhile, a similar bipartisan effort is underway in the House and, as this issue was going to press, it was expected that President Obama would announce his proposal for comprehensive immigration reform.

The Senate Proposal

The Senate proposal has four basic elements: (1) a path to legalization for illegal immigrants; (2) increased border security; (3) increased employer verification requirements; and (4) increased employment-based immigration. Illegal immigrants would pay monetary penalties to legalize but would not be eligible for permanent resident status until other enforcement-related measures are in place (such as increased border security).

The proposal would also increase certain types of employment-based immigration and allow individuals who have an advanced degree in science, technology, engineering, or mathematics from a U.S. university to obtain permanent resident status. The proposal includes increased fines and criminal penalties for employers that knowingly employ unauthorized workers.

Highlights of the proposal include:

- Increased border security (additional unmanned drones, surveillance equipment, and border agents);
- Entry-exit system to monitor visa overstays;
- A commission to provide a recommendation as to whether increased border security measures have been completed;
- A government registry for illegal immigrants who must pass background checks, pay fines, and back taxes in order to obtain temporary legal status (when increased border security measures are completed they can apply for permanent resident status behind others who have already applied);
- A quicker path to legalization for foreign nationals that were brought to the United States as children;
- A reduction in the immigrant visa backlogs for both family-based and employment-based immigration;
- Permanent resident status for individuals who have an advanced degree in science, technology, engineering, or mathematics from U.S. universities;
- Electronic verification of employment authorization and identity for new hires;
- Increased fines and criminal penalties for employers that knowingly employ unauthorized workers;
- Increased employment-based immigration where it can be demonstrated that employment of a foreign national would not displace U.S. workers;
- Creation of an agricultural worker program;
- Increased or decreased immigration for lower-skilled workers as needed depending on economic conditions; and
- Permanent resident status for long-term employees who have contributed to the community and to the workplace.

Reaction From White House

Initial reaction from the White House to the Senate's proposal has been positive; and with a similar bipartisan effort underway in the House, the prospect of comprehensive immigration reform seems a possibility. President Obama has made comprehensive immigration reform a priority, referencing the idea in recent speeches including his inaugural address.

With approximately 70 percent of Latinos voting for Obama in the past election, Republicans appear to have become more receptive to a comprehensive overhaul of immigration laws. Latinos accounted for approximately 11 percent of the electorate in 2012 (up from eight percent in 2008) and this community has been especially important in key swing states, such as Florida, Colorado, Nevada, and New Mexico. More than two-thirds of exit polls were in favor of comprehensive immigration reform.

The perception is that Republicans have alienated the Latino community, the fastest-growing demographic group in the country, on the immigration issue. Immigration policy, largely overlooked during President Obama's first term, has now re-emerged as a key issue as Republicans scurry to rebound from their election performance, motivated by the need to repair the electoral damage through comprehensive immigration reform.

The fact that Latinos cast significantly fewer votes for Mitt Romney than they had for previous Republican presidential candidates has led to an ostensible shift in the GOP's position on immigration, forcing Republicans to reconsider their opposition to reform. In fact, following the election, many Republican Congressional Leaders (including House Speaker John Boehner), well aware of the election results, the polls, and demographic trends, have stepped forward to show support for comprehensive immigration reform.

"Immigration reform is a highly divisive issue and could face significant opposition in Congress."

However, immigration reform is a highly divisive issue and could face significant opposition in Congress as did the last attempt in 2007, which failed.

Stay Tuned

Ogletree Deakins is monitoring developments with respect to comprehensive immigration reform and will provide updates as more information becomes available. Immigration reform and the various proposals from Congress will be addressed in detail at Ogletree Deakins' special Legislative and Regulatory program. The conference will take place on February 21 and 22 at the Renaissance Washington, DC Downtown Hotel. For the full agenda or to register, see the enclosed brochure or visit www.ogletreedeakins.com. ■

OGLETREE DEAKINS ANCHORS DOWN IN SAN DIEGO

Strengthens Presence In California

Expanding its presence in Southern California, Ogletree Deakins recently opened its newest office in San Diego. Spencer Skeen, who joins Ogletree Deakins from Fisher & Phillips, will serve as the founding and managing shareholder. The San Diego office is the firm's fifth in California and part of the network of offices throughout the state that includes Los Angeles, Orange County, San Francisco, and Torrance. The firm now has 43 offices and more than 650 attorneys across the United States and internationally.

"We continue to make strategic investments in California to the benefit of our clients," said Kim Ebert, Ogletree Deakins' Managing Shareholder. "San Diego has long been a target for our firm's growth, and we have been patient to open until we found the right person to lead our expansion in the market. Spencer is a superior collaborator with extensive community involvement, and he embodies the culture and client service mentality that our firm is known for."

"Ogletree Deakins has an outstanding reputation for providing superior client service," said Skeen. "The firm's expanded platform creates an opportunity to provide additional value and offer enhanced services to my clients." Joining Skeen in the new San Diego office is associate Tim Johnson. ■

New To The Firm

Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Jeremiah Rogers (Birmingham); Jenna Leake (Chicago); Lucas Asper and Stephen Giles (Greenville); Michelle Maslowski (Indianapolis); Christian Keeney and John Migliarini (Orange County); Alexander Nemiroff (Philadelphia); David Janklow and J. Allen Thomas (Raleigh); Danielle Hinton (San Francisco); Kelly Cardin (Stamford); Nathan Harris, William Lawson, Charles Morgan, Stanley Schroeder, and Robert Stewart (St. Louis); and Amanda Pickens (Washington, DC).

"RETALIATION"

continued from page 1

at the bail office, so therefore, I need to know where I can use my breast pump at and who will cover the office while I am doing it. I'll need to be able to do it at least twice while there. Please let me know. Thanks." Sometime later, Miller was fired.

Miller subsequently sued her former employer for failing to provide a reasonable break time and a place to express breast milk in violation of the FLSA and retaliating against her because of the email she sent to her supervisor. The trial judge granted Roche's motion for judgment as a matter of law, ruling that no reasonable jury could find that Roche violated the FLSA. Miller appealed the decision to the Eleventh Circuit Court of Appeals.

Legal Analysis

Section 207(r)(1) of the FLSA requires that an employer provide "a reasonable break time" and a private "place, other than a bathroom," for an employee to express breast milk. "Because Miller testified that she was given the necessary breaks for this purpose and she had access to a private place to do so," the Eleventh Circuit held, "the [trial judge] correctly concluded that the evidence was insufficient for a reasonable jury to find that Roche violated [Section] 207(r)(1)."

The court next turned to Miller's retaliation claim. Section 215(a)(3) of the FLSA provides in relevant part that "it shall be unlawful for any person . . . to discharge or in any manner discriminate against any employee because such employee has filed any complaint." To establish a *prima facie* case of retaliation under the FLSA, an employee must demonstrate that: (1) he or she engaged in statutorily protected activity; (2) he or she suffered an adverse action; and (3) the adverse action occurred as a consequence of the protected activity.

The Eleventh Circuit found that while filing a complaint is statutorily protected activity, Miller's email to her supervisor did not constitute the filing of a complaint under Section 215(a)(3). According to the court, "Miller's email would not have appraised a reasonable employer that a complaint had been filed." The court noted that the complaint must be "sufficiently clear and detailed so that a reasonable employer, considering the context and content, can understand that an employee is asserting rights provided by the FLSA and calling for the protection of those rights."

Prior to sending the email, Miller had never asked for, or been denied, a time or place to express milk. As noted by the court, she was given breaks as needed and chose to express milk in her office without notifying her supervisor.

The Eleventh Circuit also rejected Miller's argument that because Roche monitored her email communications, the company was aware of her discontent. Specifically, Miller referred to an email that she sent to a friend entitled "Federal Law," which referenced Section 207(r)(1). The court found that this email did not constitute sufficient notice to her employer because Miller never showed the email to anyone at Roche and she never told a company representative that she believed the law was violated. Thus, the trial judge's decision to dismiss her FLSA suit in its entirety was upheld.

Practical Impact

According to Karen Morinelli, a shareholder in Ogletree Deakins' Tampa office: "This is a good example of how timely training and awareness of legislative changes in workplace requirements pays off. Employers that make their supervisors and managers aware of changes as soon as they are legislated will have important defenses to creative, yet baseless plaintiffs' allegations. Obviously the manager here did not question the employee's right to express breast milk under the new Department of Labor regulations. The employee was permitted to take her breaks when she needed them, and they did not interfere when she selected her own office for this purpose." ■

BE CAREFUL WHO YOU CLASSIFY AS A "TEMPORARY" EMPLOYEE

Court Decides Worker's Age Discrimination Claim Should Go To Jury

A federal appellate court recently rejected disability discrimination and employee benefits claims brought by an accountant whose employment was terminated after 10 months. However, the Sixth Circuit Court of Appeals reinstated the 62-year-old plaintiff's age discrimination claim, determining that there were material questions regarding the employer's reasons for firing the plaintiff. ***Gaglioti v. Levin Group, Inc.,*** *No. 11-3744, Sixth Circuit Court of Appeals (December 13, 2012).*

Factual Background

In 2008, Joseph Gaglioti was hired by the Levin Group, Inc. to work as a staff accountant. Gaglioti, who was 62 years old and had over 40 years of accounting experience, was hired with full benefits. As part of his initial paperwork, Gaglioti completed a medical insurance form, on which he disclosed that his wife suffered from significant medical problems.

In July 2009, Gaglioti and all other Levin Group employees completed a new medical history form in connection with the renewal of the company's medical insurance plan. Again, Gaglioti disclosed information regarding his wife's medical conditions.

In August 2009, Gaglioti was informed that his employment would be terminated at the end of that month. The comptroller of Levin Group informed Gaglioti that he had always been a temporary employee and that his dismissal was due to lack of work. Two younger accountants were retained at the time of Gaglioti's discharge.

Gaglioti filed a lawsuit against his former employer in Ohio state court, which was later removed to the United States District Court for the Northern District of Ohio. Gaglioti raised claims of age bias, discrimination based on association with a disabled person, and interference with employee benefits guaranteed by the Employee Retirement Income Security Act (ERISA) against Levin Group. The trial judge rejected all of Gaglioti's claims, and he appealed this decision to the Sixth Circuit Court of Appeals.

Legal Analysis

The Sixth Circuit first addressed Gaglioti's age discrimination claim, which he brought under Ohio law. The court noted that Gaglioti had demonstrated that: (1) he was a member of a protected class (because he was 63 years old at the time of termination); (2) he was discharged; (3) he was qualified for the position; and (4) his discharge permitted the retention of younger workers. Levin Group argued that Gaglioti was not fired on account of his age, but rather because he was a temporary employee (among other reasons).

The Sixth Circuit noted that Levin Group's own employee manual defined a "temporary employee" as one who received no benefits, and it was undisputed that Gaglioti received health insurance benefits as part of his employment. Accordingly, the court held that a reasonable juror could conclude that Levin Group's "temporary employee" justification was a pretext for age bias, and reinstated the claim.

The court then turned to the disability discrimination claim. While Gaglioti had shown that he was qualified for the position, subject to an adverse employment action, and known to be associated with a disabled individual (his wife), the court held that he failed to show a reasonable inference that his wife's disability was a determining factor in his discharge. The insurance form that Gaglioti filled out at the time of his initial hire contained the same information about his wife's disabilities as the form he submitted in July 2009, one month before his discharge. Because the latter form contained no new information, it could not demonstrate an inference of discrimination.

Finally, the Sixth Circuit examined Gaglioti's ERISA interference claim. The court determined that Gaglioti failed to point out any specific evidence that showed Levin Group's desire to reduce medical costs had motivated the termination of his employment. Accordingly, the court rejected Gaglioti's ERISA interference and disability discrimination claims, but held that a jury should decide whether he had been fired on account of his age.

Practical Impact

According to John Gerak, a shareholder in Ogletree Deakins' Cleveland, Ohio office: "The Sixth Circuit's decision underscores the need to follow consistent and well-documented procedures when implementing workforce reductions. The decision also highlights the need for employers to periodically update their employment manuals and to train supervisors regarding long-standing policies, procedures, and rules. Here, the court could not accept the company's argument that there was no pretext for age discrimination when it fired the plaintiff because he was a 'temporary employee.' The company's own manual belied that argument, thus creating a triable issue for the jury." ■

Ogletree Deakins Hosts Legislative And Regulatory Program

To provide employers with a better understanding of what to expect in terms of policy changes over the next four years, Ogletree Deakins and the First Tuesday Group, which consists of approximately 35 national trade associations, are presenting a Legislative and Regulatory Conference in Washington, D.C. on February 21 and 22. The program will include high-level discussions about the labor and employment policies that employers are likely to face.

The conference will feature representatives from both sides of the aisle, including: Congressman Rob Andrews (D-NJ); Whit Ayres (leading Republican political consultant); EEOC Commissioners Victoria Lipnic and Chai Feldblum; Bill Samuel (the AFL-CIO's chief lobbyist); Randy Johnson (Senior VP of the U.S. Chamber); former NLRB members Craig Becker and Brian Hayes; and FMCS official Scot Beckenbaugh. The full agenda for this program is enclosed with this issue or can be found at www.ogletreedeakins.com.