Ogletree Deakins

The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law — July/August 2016

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Persuader Rule Put on Hold Pending Adjudication

Judge Finds Plaintiffs Showed Likely Success on Merits and Irreparable Harm

On June 27, 2016, in *National Federation of Independent Business et al. v. Perez, et al.*, the U.S. District Court for the Northern District of Texas (Lubbock Division) granted Plaintiffs' Motion for a Preliminary Injunction, thereby enjoining the U.S. Department of Labor (DOL) from implementing and enforcing its revised persuader rule on a national basis. The Court found that Plaintiffs' challenge to the new rule, which was set to become effective July 1, 2016, has a substantial likelihood of success on the merits and that Plaintiffs have shown that they would be irreparably harmed if the rule was not enjoined.

This lawsuit was filed on March 31, 2016, by Plaintiffs the National Federation of Independent Business, the Lubbock Chamber of Commerce, the Texas Association of Business, the National Association of Home Builders, and the Texas Association of Builders. Ogletree Deakins represents the Plaintiffs in this case. The State of Texas along with nine other states intervened in support of Plaintiffs' position.

The DOL's new rule significantly revised and expanded the reporting and disclosure requirements imposed on employers and advisors (including consultants and lawyers) under the Labor-Management Reporting and Disclosure Act (LMRDA). If implemented, the DOL's new rule would require employers and consultants to report and disclose direct or indirect communications that have an object to persuade employees with regard to union organizing.

This is a change to a long-standing rule that has been in place for nearly

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Ogletree Deakins Scores Nearly 200 "Best Lawyers"

Thirteen Attorneys Also Receive "Lawyer of the Year" Nod

The Best Lawyers in America © recently named 195 of the firm's attorneys to its 2017 edition. One attorney was also listed in the 2017 edition of *The Best Lawyers in Canada*. The attorneys on the 2017 lists were selected based on an exhaustive peer-review survey that examines the professional abilities, current practice, and experience of each lawyer.

Ogletree Deakins' attorneys received recognition in several categories. Of the 195 attorneys named to the 2017 list, 151 were named under the Employment Law—Management category; 102 were named under the Labor Law—Management category; and 115 were named under the Litigation—Labor and Employment category. Ogletree Deakins attorneys were also recognized in the Immigration Law, Qui Tam Law, and Employee Benefits categories, among others.

In addition, 13 Ogletree Deakins attorneys were named as a *Best Lawyers*® 2017 "Lawyer of the Year." The publication awards this honor to a single lawyer in each practice area and designated metropolitan area.

According to Matt Keen, managing shareholder of Ogletree Deakins and recipient of the 2017 "Lawyer of the Year" designation for Labor Law—Management in Raleigh, "Our continued strong presence on *The Best Lawyers in America*© list is a testament to the strength of our lawyers and our steadfast commitment to excellent client service and value." Ogletree Deakins has more than 750 attorneys located in 49 offices across the United States and in Europe, Canada, and Mexico. ■

A Modern Makeover for the PERM Program

by Ann Louise Brown (Greenville)

The U.S. Department of Labor's (DOL) electronic permanent labor certification system (PERM) as we know it has been in existence for the past 10 years. This year, the Office of Foreign Labor Certification (OFLC) is expected to publish new regulations aiming to modernize the current PERM program to better meet the needs and practices of employers. The OFLC has expressed a desire to see the final regulation published before the end of President Barack Obama's term. Although the OFLC has not issued the proposed regulations for public comment yet, the listening session conducted by the OFLC with stakeholders in 2015 gives us insight into possible changes.

As background for those unfamiliar with the PERM program, if an employer wants to sponsor an employee for permanent residency in the United States, the DOL must first certify a labor application. PERM is the electronic system for completing the permanent labor certification process with the DOL. When an employer files a PERM application using Form 9089, the employer attests that there are no minimally qualified U.S. workers to fill the position. To prove this, the employer must recruit for the position prior to filing the application.

Social Media Recruiting

One of the modernizations to the PERM program that is most obviously needed is to expand the list of acceptable forms of recruitment to include social media. Under the current PERM regulations, there are two forms of mandatory recruitment: (1) placement of a job order with the applicable state workforce agency for 30 days, and (2) the publication of two Sunday newspaper ads. The employer must also conduct three other forms of recruitment from the following options: job fairs, the employer's website, external job search websites, on-campus recruiting, trade or professional organizations, private employment firms, employee referral programs with incentives, campus placement offices, local and ethnic newspapers, and radio and television ads.

But technologies tend to change far more rapidly than federal statutes, and the PERM regulations' mandatory recruitment methods are outdated. The upcoming changes to the regulations should allow the PERM process to adapt with advancements in technology by allowing new forms of recruitment without requiring employers to wait for the regulations to be rewritten.

Occupational Requirements

We also anticipate that the OFLC will change how it evaluates "normal" occupational requirements. Currently, the DOL assigns an education and experience requirement for each job based on information from the Occupational Information Network (O*NET). O*NET data is updated through ongoing surveys of the occupation's worker population and occupation experts. These are then interpreted as the "normal" requirements of the job. However, employers have voiced concern that these determinations are inaccurate in the real world.

Where an employer requires more education or experience than the level deemed "normal" by the DOL, the employer must justify the business necessity of these requirements. In addition to posing an extra documentary burden on employers, the step of justifying the business necessity of additional education or experience requirements subjects employers to the risk that the DOL may find that the requirements are not "normal" for the position and tailored to the alien, which could result in denial of the case. The new changes could give the DOL more flexibility in interpreting what "normal" requirements are and when a business necessity justification must be provided.

Form 9089 Corrections

Another expected change deals with corrections to the actual Form 9089 after filing. The current regulations do not permit any changes to the PERM application once it is submitted. This has been interpreted strictly to prevent changes even in the case of a "harmless error," such as a typographical or date error. This draconian bright-line rule has been one of the most common complaints about the PERM program. Expect to see a change allowing for corrections of these errors after filing.

Processing Fees

Finally, the OFLC is seeking the statutory authority to charge a fee for processing PERM applications. This would not be part of the regulations and is instead included in a budget proposal. The OFLC is currently funded by congressional appropriations. Although the number of PERM application filings has increased, the OFLC has not received any increased funding. The proposed fee would offset this imbalance, permitting the DOL to maintain current processing times. If granted fee authority, the OFLC could implement an option for expedited processing at an added cost. ■

Ogletree Deakins

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Ogletree Deakins State Round-Up

California

On June 28, California Secretary of State Alex Padilla confirmed that a measure titled "Control, Regulate and Tax Adult Use of Marijuana Act" is eligible for the November 8, 2016, general election ballot. The measure, Proposition 64, proposes to legalize recreational marijuana for individuals over the age of 21.

Colorado

On June 8, Colorado Governor John Hickenlooper signed House Bill 16-1114, which repeals the state attestation law requiring employers to complete an extra affirmation document for I-9 purposes and retain copies of verification documentation. (Federal law does not require employers to retain copies of the underlying verification documentation.) The new law went into effect on August 10, 2016.

Connecticut

Public Act No. 16-95, which was recently signed into law by Governor Dannel P. Malloy, prohibits noncompete agreements that restrict physicians from competing for a period longer than 1 year or provide for a geographical restriction of more than 15 miles from the primary site where the physician practices. However, the noncompete agreements will be enforceable only when a physician resigns or is discharged for cause.

District of Columbia

D.C. councilmembers recently approved the "Fair Shot Minimum Wage Amendment Act of 2016." Once enacted, the law will increase the minimum wage to $12.50 per hour in July of 2017 and then raise it each year thereafter until it reaches $15.00 per hour in July of 2020. After 2020, the minimum wage will be increased annually to match the area's Consumer Price Index as set by the Bureau of Labor Statistics.

Louisiana

The New Orleans City Council recently adopted an ordinance making it unlawful for city contractors to seek or use the consumer credit history of a current or prospective employee for any decision regarding hiring or compensation or in the terms, conditions, or privileges of his or her employment. The ordinance was approved by Mayor Mitch Landrieu on July 1, 2016.

Massachusetts

Governor Charlie Baker recently signed the Act to Establish Pay Equity, a significant law that will affect all employers with employees in the state. The final version of the law will go into effect on July 1, 2018, giving employers ample breathing room to analyze and assess their compliance and consider conducting pay equity self-evaluations as outlined in the law.

Minnesota

The Minnesota Court of Appeals recently held that an employee who is discharged for refusing to obey an employer's directive that violates the Minnesota Fair Labor Standards Act can sue for "damages normally associated with a wrongful-discharge cause of action" and not merely lost wages. *Burt v. Rackner, Inc. d/b/a/ Bunny's Bar & Grill*, No. 12-CV-15-11477 (June 27, 2016).

New Jersey

The New Jersey Supreme Court has broadly interpreted the prohibition against marital status discrimination in the Law Against Discrimination to protect a person who has separated from his or her spouse and is in the process of getting a divorce. According to the court, the employer's fear of the employee's "ugly divorce" was sufficient to form the basis of a marital status bias claim. *Smith v. Millville Rescue Squad*, A-19-14 (June 21, 2016).

Oregon

The city of Portland's new ban-the-box law went into effect on July 1, 2016. The ordinance prohibits most Portland employers from asking about an applicant's criminal history or conducting a background check on an applicant until after a conditional offer of employment has been made. In June, the Portland City Attorney's Office published administrative rules and documents related to the ban-the-box ordinance.

Pennsylvania

A new Philadelphia ordinance amending the city's Fair Practices Act went into effect on July 7, 2016. The amendment severely limits an employer's ability to procure and use credit information on most applicants and employees and also limits references to credit checks on an employer's background check disclosure and authorization forms.

Tennessee

Governor Bill Haslam recently signed Public Chapter No. 638. This amendment to Tennessee Code Annotated §39-17-1359(b) changes how employers and other owners and operators of properties and buildings must provide notice that weapons are prohibited on their properties or in their buildings. Notices must now have both the appropriate wording and a red circle with a slash symbol over a weapon.

Texas

The Fifth Circuit Court of Appeals recently held that the state of Texas may challenge the EEOC's guidance on criminal background checks. The Fifth Circuit reversed and remanded the case, noting that the district court had erred in its ruling that Texas did not have constitutional standing to challenge the guidance under the Administrative Procedures Act. *State of Texas v. EEOC*, No. 14-10949 (June 27, 2016).

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

Zika Virus Hits the United States: What Should Employers Do Next?

*by Charles E. Engeman (St. Thomas)**

Public health officials recently confirmed that Florida is the first state in the nation to have local mosquito transmission of Zika virus—a fact that has prompted renewed concerns and operational issues for employers. Zika's arrival in the United States raises employee apprehension and poses unique challenges for some employers.

This article will answer basic questions about the Zika virus and address specific legal issues for employers in the United States dealing with employees concerned about the Zika virus.

Causes and Symptoms

According to the World Health Organization (WHO), Zika virus usually is caused by being bitten by an infected mosquito. Zika virus can also be transmitted through sex and has been detected in semen, blood, urine, and other bodily fluids. Most people with Zika will get a slight fever and a rash. Others may also get conjunctivitis, experience muscle and joint pain, and feel tired. The symptoms usually abate in two to seven days.

The WHO has also stated that there is scientific consensus that Zika virus is a cause of microcephaly and Guillain-Barré syndrome. Microcephaly is a condition where a baby's head is smaller than those of other babies of the same age and sex. Guillain-Barré syndrome is a condition in which a person's immune system attacks his or her nerves. Most people recover fully from even the most severe cases of Guillain-Barré syndrome. Severe cases of Guillain-Barré syndrome are rare, but can result in paralysis.

Recent case reports also suggest there may be a link between Zika and other neurological abnormalities, such as inflammation of the spinal cord.

Refusal to Work or Travel

The spread of Zika virus implicates a number of federal laws, including the Family and Medical Leave Act (FMLA), the Occupational Safety and Health Act (OSH Act), and the National Labor Relations Act (NLRA).

Under the FMLA, eligible employees incapacitated by a serious health condition (which may or may not be the case with an individual with the Zika virus), or who are needed to care for covered family members incapacitated by a serious health condition, are entitled to up to 12 weeks of leave. Thus, any leave taken by an employee to avoid exposure to Zika virus would not be protected under the FMLA.

Under the federal OSH Act regulations, if an employee has no "reasonable alternative" and "refuses in good faith to expose himself to a dangerous condition," then the employer is prohibited from discriminating against the employee. The dangerous condition must be one that would cause "a reasonable person, under the circumstances then confronting the employee, [to] conclude that there is a real danger of death or serious injury."

The OSH Act's General Duty Clause requires employers to maintain a workplace that is "free from recognized hazards" that may cause serious injury or death. An employer's obligations under the General Duty Clause depend upon, and change with, the circumstances. A person who is not pregnant and who refuses to work or travel because of fear of exposure to Zika virus would not be protected by the OSH Act, although a pregnant woman may arguably be protected under the Act.

The NLRA may provide the most legal protection for an employee refusing to work because of fear of exposure to the Zika virus. To be protected under the NLRA, an employee's refusal to work based on concerns about safety and health (i.e., a "strike" under the NLRA) must be "concerted protected activity." There is a fairly low threshold to satisfy the NLRA's "concerted" requirement for safety and health concerns. The strike also must be "protected."

The NLRA includes a reasonableness "option," though not a requirement. Unlike the OSH Act, the NLRA does not require an individual to have a "reasonable" belief that a situation is unsafe to refuse to work—i.e., there is no mandatory "reasonableness" requirement for a strike based on safety issues or concerns. However, if the employee's belief is reasonable, the NLRA places additional restrictions on the employer: An employer may not replace strikers who satisfy this "reasonable belief" element.

Recent Guidance

The Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH) are monitoring the Zika virus outbreak and have provided the following recommended employer actions for *outdoor workers* in their "Interim Guidance for Protecting Workers from Occupational Exposure to Zika Virus" fact sheet:

- Inform workers about their risks of exposure to Zika virus through mosquito bites and train them how to protect themselves.
- Provide insect repellents and encourage their use in accordance with their directions.
- Provide workers with, and encourage them to wear, clothing that covers their hands, arms, legs, and exposed skin. Consider providing workers with hats with mosquito netting to protect the face and neck.
- If requested by a worker, consider reassigning anyone who indicates she is or may become pregnant, or who is male and has a sexual partner who is or may become pregnant, to indoor tasks to reduce their risk of mosquito bites.

Conclusion

Given the significant media attention surrounding the spread of the Zika virus, employers should take action to educate, counsel, and maintain flexibility with employees. Employers should consider: making travel voluntary to affected areas; using employee acknowledgments for company sponsored travel; and granting reasonable accommodations (especially for pregnant women).

Further information is available on OSHA's website (www.osha.gov/zika). Additionally, employers should continue to monitor the latest news from the Centers for Disease Control and Prevention (www.cdc.gov/zika/index.html). ■

* Charles Engeman is a shareholder in the St. Thomas office of Ogletree Deakins, where he represents management in labor and employment-related matters.

Is Your Conference Room a PokéStop? Employer Hacks for When Apps Attack

by Hera S. Arsen, Ph.D. (Torrance)

A recent CareerBuilder survey found that 24 percent of employees are using their smartphones for gaming while at work. This number is sure to be on the rise with the release of the Pokémon Go game.

According to recent reports, Pokémon Go has broken all sorts of downloading records and is currently topping the charts of the most downloaded apps. It stands to reason that a good number of the users are playing the game at work. In fact, a Forbes poll recently reported that 69 percent of Pokémon Go users are playing the game during working hours, with one-third of the 66,159 respondents saying that they spent more than one hour playing Pokémon Go at work.

In case you are one of the few who don't know, Pokémon Go is a free "augmented reality" game that displays various characters, called "Pokémon," in a player's current location (and/or his or her immediate surroundings, which the game maps out). As players encounter different characters while going about their daily activities, they can "catch" the characters—with an ultimate goal of capturing the original 151 Pokémon.

The Good and the Bad

So what's an employer to do when employees are catching Pokémon at work? If you are hoping to put a stop to the craze at work, first consider two possible benefits of the game. The Forbes poll found that workers are bonding with colleagues, bosses, and clients while ridding your office of Pokémon monsters. In addition, 80 percent of those who responded to the poll said that they have been exercising more due to using the app—thereby creating a healthier and more productive workplace. Employers could potentially use their employees' interest in the app for team-building or group exercise breaks to channel the game's popularity into a morale booster.

Still, the drawbacks of employees' gaming at work are obvious: lower productivity; increased distraction; and maybe even workplace injuries caused by players who aren't paying attention to their surroundings. Here are a few issues for employers to consider as they navigate the new landscape of popular gaming apps.

What Does Your Handbook Say About Internet Use?

Employers may want to use this time to revisit their Internet policies. Perhaps your workplace has a robust policy on Internet use, but nothing in that policy specifically addresses gaming at work. If your employee handbook was written at a time when solitaire was the biggest "gaming" threat to employee productivity, you may want to consider refreshing some provisions to take into account the most current technologies being used in (and in the case of Pokémon Go, interacting with) the workplace.

Employers may also want to consider blocking certain websites or expanding the number of website categories that are prohibited from being accessed from within the workplace (or even from home if employees are accessing shared drives through a virtual private network). Internet filtering can be used to stop employees from accessing inappropriate content, such as pornographic websites, or distractions like online games.

Do You Have a Smartphone Policy in Place?

It's one thing to stop gaming on the Internet using work computers. It's another thing to stop gaming on employees' mobile devices. Since employees are using smartphones to play Pokémon Go, employers may want to consider implementing or revising their smartphone policies.

Regardless of whether an employer is providing employees with smartphones for work-related purposes or permitting employees to use their own phones for work, employers will want to institute policies governing how employees may use those devices. In the case of employer-issued devices, the employer must also consider the risks involved when employees use their company-provided devices before or after working hours and outside the workplace. Employers with bring-your-own-device (BYOD) programs face other challenges, for example, attempting to balance their desire to monitor the contents of an employee's device with the employee's privacy rights and rights under Section 7 of the National Labor Relations Act.

Is It Time for a Reminder?

Employers may want to take the time now to educate employees on company smartphone and Internet policies. Whether a policy allows employees a moderate amount of personal or non-work-related Internet or smartphone use during work hours—or none at all—employers should ensure that employees have access to and are aware of the policies.

"Employers with bring-your-own-device (BYOD) programs face other challenges."

Are your Internet and smartphone policies posted on your intranet, in break or lunch rooms, on community message boards, or all of the above? If you monitor employees' Internet use, are the employees aware that they're being monitored? If some Internet and smartphone use is prohibited, have the parameters of that use been made explicit in the policies?

Though not essential, it may also help if employees are aware of the business justifications for regulating and monitoring their use of technology in the workplace. Even if all employees acknowledge their receipt of these policies when they are hired, employers may want to periodically remind employees of the policies via emails or during weekly meetings.

Whether employers use Pokémon Go to promote employee bonding or view all gaming in the workplace as a distraction to be prohibited, employers should acknowledge that their employees are playing—with one report stating that the game had approximately 25 million U.S. users. Careful planning could prevent the unwary employer from getting "knocked out" in a Pokémon battle. ■

EEOC Announces New Process for 2016 EEO-1 Data

Employers Can Now Test and Upload Their Own Data Files

The 2016 filing period for the Employer Information Report EEO-1 (also known as the EEO-1 Report) is fast approaching. Once the 2016 Survey opens, companies will have until September 30, 2016 to complete their annual filing requirements.

On July 25, 2016, the EEO-1 Joint Reporting Committee (JRC) notified companies that all reporting for the EEO-1 reports will now be done electronically. In previous years, companies that did not manually upload data on the EEO-1 site had to email the data file to a member of the JRC and wait for confirmation that the data file had been uploaded. Now, companies can upload data files directly to the production database according to the specifications to the JRC's database and be informed immediately of acceptance or errors regarding the data submission.

With the new process, the JRC aims to improve the experience with data file submission, reduce the burden of filing EEO-1 reports as well as the wait times, and make the filing process more transparent so that issues with the data file can be revealed in "real time."

As a reminder, a company's 2015 EEO-1 password will not work for the 2016 EEO-1 filing. Companies should receive a password notification from the JRC concerning 2016 passwords. It should also be noted that employers must still certify the data. According to the Equal Employment Opportunity Commission, "This means that once you have uploaded your data, additional action is needed. You must complete all incomplete records and certify the survey." For more information, visit www.eeoc.gov/employers/eeo1survey/. ■

"PERSUADER"

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50 years. Until the DOL's new rule, neither employers nor lawyers were required to report such engagements, provided that the lawyers communicated only with management. This is what has been known traditionally as the "advice exception" to the reporting rules.

Plaintiffs contend that the DOL's new persuader rule violates the LMRDA, the First and Fifth Amendments to the U.S. Constitution, and the Regulatory Flexibility Act.

Since the DOL promulgated its new rule, three separate legal challenges have been filed in federal district courts in Little Rock, Arkansas, Minneapolis, Minnesota, and Lubbock, Texas. The U.S. District Court for the District of Minnesota issued the first decision arising out of three separate lawsuits on June 22, 2016. In that case, the judge declined to issue a preliminary injunction. In the Arkansas case, Plaintiffs withdrew their request for a preliminary injunction.

Lead counsel representing Plaintiffs in the *Lubbock* case is Jeffrey C. Londa, a shareholder in Ogletree Deakins' Houston office. He made the following comments following receipt of the Court's Order: "We are gratified by the judge's decision. The DOL's new rule is not only confusing, vague, and unwarranted. It constitutes a blatant overreach by the Administration designed to assist unions by making it more difficult for employers to obtain professional, including legal, assistance when exercising their constitutional right to oppose unionization."

The DOL has given notice of its intent to appeal the granting of a preliminary injunction by the district court. The underlying case continues. In granting the preliminary injunction, the district court found Plaintiffs likely to succeed on the merits and the DOL's new persuader rule "defective to its core." The DOL has 14 days to file the record with the Fifth Circuit Court of Appeals and 40 days to file its brief. Ogletree Deakins has filed a motion for summary judgment with the district court asking for a final judgment striking down the DOL's rule and granting a permanent national injunction. The motion for summary judgment and the case at the district court will likely be ruled on and the case concluded before the DOL's interlocutors appeal is decided by the Fifth Circuit. ■

Ogletree Deakins News

New to the firm. Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Josh Harrison (Birmingham); D. Michael Henthorne (Columbia); Jeremy Hays, Andrew Magid, and Ellen Perlioni (Dallas); Mark Nasr (Detroit (Metro)); Samantha Seaton (Houston); Katherine Erdel, Patrick Mastrian, and Courtney White (Indianapolis); Daniel Johnson (Kansas City); Amy Howard and Marcus Smith (Las Vegas); Sarah Platt (Milwaukee); Jason Isom (Morristown); Eugene McMenamin (Orange County); Kara Kelly and Malou Mararang (Raleigh); Raven Applebaum (San Antonio); and Lisa Bowman and Roshni Chaudhari (San Francisco).

Best law firm for women. Ogletree Deakins has been named among the 2016 *Working Mother* and Flex-Time Lawyers Best Law Firms for Women. This recognition acknowledges firms that lead the industry in creating and using best practices in retaining and promoting women lawyers. Ogletree Deakins is one of 50 firms on the 2016 list. *Working Mother* and Flex-Time Lawyers co-founded the Best Law Firms for Women initiative in 2007 to recognize firms that lead the industry in initiatives for women's business development and career advancement, plus offer flexible work arrangements and generous paid parental leave.

BTI Clientopia 24. Ogletree Deakins ranked No. 10 on The 2016 BTI Clientopia 24—an exclusive group of 24 law firms that clients recognize for superior client relationships. The BTI Clientopia 24 was released as part of the 2016 *BTI Power Rankings: The Law Firms with the Best Client Relationships* report. The *BTI Power Rankings* report is the only law firm client relationship ranking based solely on objective feedback. In addition to its inclusion on the Clientopia 24, Ogletree Deakins was recognized as a core law firm in eight categories, including Powerhouse rankings in Manufacturing and Wholesale Trade.

Keys to Harassment Prevention: An Interview With an EEOC Commissioner

by Jathan Janove, Principal, Janove Organization Solutions

Chai Feldblum is a Commissioner of the U.S. Equal Employment Opportunity Commission (EEOC). She co-chaired the EEOC Select Task Force on the Study of Harassment in the Workplace, and produced a report in June of 2016, together with Commissioner Victoria Lipnic.

JATHAN JANOVE: What prompted your agency to create a task force?

CHAI FELDBLUM: After I joined the commission in 2010, I was astonished to learn how prevalent harassment still was in the U.S. workplace—not only sexual harassment, but also harassment based on race, religion, and other protected characteristics. Commissioner Lipnic had the same reaction. Commission Chair Jenny Yang asked us to co-chair a task force and conduct an in-depth study of the problem.

JANOVE: Describe the makeup of your task force.

FELDBLUM: Its 16 members were highly diverse. We had employee-side attorneys, management attorneys, employer association representatives, and academics who've researched the issue.

JANOVE: What are your salient findings?

FELDBLUM: There are three: Despite more than 30 years of anti-harassment training, policies, and procedures, workplace harassment remains a persistent problem. One-third of the charges we receive at the EEOC allege harassment, amounting to 163,000 charges over the past 5 years.

Despite the plethora of claims, most harassment doesn't get reported. Our research indicates that at least 85 percent of harassment cases never result in a claim being filed. Even more disturbing, 70 percent don't even result in internal action. The overwhelming majority of situations remain unknown to the employer. Due to fear of retaliation or other reasons, employees don't take action other than avoidance, tolerance, or complaining to family and friends. Regarding just sexual harassment, conservative estimates are that 25 percent of working women say they have been sexually harassed, 40 percent have experienced unwelcome sexual conduct, and 60 percent have experienced either unwelcome sexual conduct or sexist conduct.

There's a compelling business case for stopping workplace harassment. There's the direct economic cost. Over the past 5 years, the EEOC has collected over $700 million for complainants in just the pre-litigation stage. Last year, we collected $140 million pre-litigation and $40 million in litigation. And this is just our agency. But there's also the indirect financial costs, which are even higher—negative impact on retention, productivity, morale, and physical and psychological harm not only to the targets of harassment but also coworkers who witness or learn about the harassing behavior.

JANOVE: What prevention steps does the task force recommend?

FELDBLUM: It starts at the top. Company leaders have to demonstrate, in both their communications and personal actions, that a healthy, harassment-free workplace is a core value for the organization. Employees must believe their leaders are authentic in that commitment, which requires that company leaders hold employees accountable to that goal.

"Company leaders have to demonstrate . . . that a healthy, harassment-free workplace is a core value."

In enforcement, instead of "zero-tolerance," in which all conduct gets the same remedy, focus on swift, effective, and proportionate remedial action. Be consistent—don't look the other way when it's the "Superstar Harasser." Hold supervisors and managers accountable for how they respond to complaints or observations of harassment.

Do a climate survey. In an anonymous, confidential, and secure manner, ask employees if they've experienced conduct that's made them uncomfortable. Don't ask, "Have you been harassed?" Ask if they've experienced unwelcome conduct such as off-color jokes, racial stereotypes, religious put-downs, etc. Also, ask questions regarding how comfortable they feel reporting problems to management or Human Resources.

JANOVE: What about training? Your report got a lot of press for supposedly saying anti-harassment training has been ineffective.

FELDBLUM: We found very limited empirical evidence that anti-harassment training has been effective. However, the solution is NOT to eliminate training. Rather, it's that training shouldn't be done in a vacuum. It should augment leadership commitment and accountability. Also, its purpose shouldn't be to create a defense against a legal claim. It should be to create a workplace where employees feel safe, secure, and respected.

JANOVE: What should such training cover?

FELDBLUM: The basic type of training is what we call "compliance training." But this training is not just about compliance with the law. It's about teaching employees to comply with rules regarding unacceptable behavior in the workplace, regardless of whether that behavior would legally constitute "harassment." This training also doesn't focus on changing employees' beliefs; it focuses on changing their behavior. Once behavior changes, culture can change as well.

We also identified two other types of training that might be helpful in changing workplace culture. The first is designed to create a culture rooted in civility. It trains employees on the kinds of behavior that foster a civil, respectful, and dignified workplace, without regard to any protected characteristic under the law. The second type is bystander intervention training. This would teach employees what they can do to prevent or help correct offensive behavior, even if they are not in management or Human Resources and do not have a responsibility to intervene.

JANOVE: What do you recommend as employers' next steps?

FELDBLUM: If you don't have time to read all 95 pages of the report, I recommend that you read the executive summary. Print out, laminate, and apply the four checklists in Appendix B. Conduct a risk assessment using the 12 factors listed in Appendix C. Finally, do a confidential climate survey to get a real sense of how your workplace is doing. ■

Denial of Lateral Transfer Does Not Amount to "Adverse Action" Under Title VII

Court Rejects Worker's Claim That Transfer Would Have Increased His Promotion Opportunities

A federal appellate court recently held that an employee could not proceed with his discrimination lawsuit under Title VII of the Civil Rights Act. According to the U.S. Court of Appeals for the District of Columbia Circuit, the employee failed to show that his lateral transfer requests were denied because he is Hispanic. Specifically, the court ruled that there was no evidence to support a finding that the worker was subjected to an adverse action based on his race or national origin. ***Ortiz-Diaz v. U.S. Department of Housing & Urban Development****, No. 15-5008, U.S. Court of Appeals for the District of Columbia Circuit (August 2, 2016).*

Factual Background

Samuel Ortiz-Diaz was employed as a criminal investigator in the Office of the Inspector General at the U.S. Department of Housing and Urban Development (HUD) in Washington, D.C.

Under HUD's voluntary transfer program, investigators could "request voluntary transfers to duty stations of their choice for reasons other than the specific staffing needs of the Agency." However, the employee was required to cover the cost of the relocation. The program also did not guarantee that the request would be approved; rather, the employee would be considered for a transfer if a vacancy arose.

In October 2010, Ortiz-Diaz requested a voluntary transfer to an investigative position in Albany, New York or Hartford, Connecticut. He wanted to be closer to his wife, who worked in Albany. Ortiz-Diaz's supervisor denied the request, noting that the agency did not have an investigative office in Albany. He also noted that there were no vacant positions in Hartford.

Shortly thereafter, Ortiz-Diaz filed a lawsuit under Title VII of the Civil Rights Act against HUD, alleging that his request was denied because he is Hispanic. He argued that the decision not to grant his transfer affected his career opportunities because his supervisor in Washington, D.C. allegedly discriminated against Hispanics. In addition to being able to work for a Hispanic supervisor in Albany, Ortiz-Diaz maintained that the opportunity to perform "high-profile work" in Albany or Hartford would also improve his ability to be promoted.

The trial judge granted HUD's request to dismiss the suit, finding that "'[a]bsent extraordinary circumstances not present here, a purely lateral transfer does not amount to an adverse employment action' cognizable under Title VII." The trial judge also noted that a transfer from the D.C. headquarters would have been a downgrade to a GS-13 level position, "which itself may have constituted an 'adverse employment action.'" Ortiz-Diaz appealed this decision to the Court of Appeals for the D.C. Circuit.

Legal Analysis

Under Title VII, an employer may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . or national origin." To support a discrimination claim under Title VII, however, the employee must show that the action complained of was "materially adverse."

In a 2-1 decision, the D.C. Circuit upheld the trial judge's decision to dismiss Ortiz-Diaz's suit. The court first rejected Ortiz-Diaz's argument that working under one supervisor instead of another could constitute a "materially adverse action." The desire to work for the Hispanic supervisor in Albany, or even to "escape" his current supervisor in D.C., is "irrelevant" to the adverse action inquiry, the court held.

The D.C. Circuit also found that Ortiz-Diaz's argument that the transfer would enhance his promotion prospects was without merit. Ortiz-Diaz merely stated that there was "high profile" work in Hartford and Albany. According to the court, he did not provide evidence to support this assertion.

Because Ortiz-Diaz was not subjected to an adverse action, the D.C. Circuit affirmed the trial judge's decision.

Practical Impact

According to John Flood, a shareholder in the Washington, D.C. office of Ogletree Deakins, "This is a positive development for employers in that the court held that an action must be 'materially adverse' to proceed with a discrimination suit under Title VII. Moreover, the majority found that an employer's denial of a transfer with no change in salary, benefits, or other terms and conditions of employment does not generally amount to an adverse action." ■

Ogletree Deakins Receives 2016 InnovAction Award

The College of Law Practice Management (COLPM) recently announced that it has selected Ogletree Deakins as a 2016 InnovAction Award recipient for the firm's Ogletree Deakins Advantage™ portfolio engagement service delivery model. Award recipients were judged on criteria that included the originality of the approach, beneficial disruption of legal services, value for clients and/or the legal industry, and the effectiveness or measurable benefits of the entry.

Ogletree Deakins Advantage™ is an innovative service delivery model that leverages technology to streamline the handling of day-to-day legal issues. This goal is achieved by examining employment-related processes, including analysis of a client's past litigation and claims, to identify problematic areas. Ogletree Deakins then implements a corrective plan that includes using tools to improve these processes. Introduction of these improvements can result in increased predictability and control of legal costs, consistent application of employment policies, faster resolution of legal issues, and an overall reduction in the number of claims.

"OD Advantage™ is built on a foundation of legal project management, knowledge management, and technology that offers clients the benefits of predictability, efficiency, and cost-effectiveness," said Charles Baldwin, Ogletree Deakins' managing director. "We are thrilled to be recognized for this platform, which truly redefines what it means to marry innovation with law practice management."