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The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law

March/April 2013

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Title VII Does Not Shield Inappropriate Behavior

Court Finds Employee's Schedule Change Was Not Retaliatory

A federal appellate court has upheld the dismissal of a lawsuit brought by an employee who claimed that he was subjected to retaliation for prior bias claims that he brought against his employer. According to the Seventh Circuit Court of Appeals, the employee "cannot use his prior EEO activity as a shield against the consequences of his inappropriate workplace conduct." ***Vaughn v. Vilsack,*** *No. 11-3673, Seventh Circuit Court of Appeals (March 8, 2013).*

Factual Background

Gary Vaughn was employed by the U.S. Forest Service, which is an agency of the U.S. Department of Agriculture (USDA), since 1974. He filed numerous complaints with the agency's Equal Employment Opportunity (EEO) representative. He filed these in 1997, 2004, 2005, and 2006 alleging race and age discrimination and retaliation for filing the complaints. On September 11, 2007, he settled all of the complaints, including one that had progressed to court.

During this same time period, Vaughn was involved in a romantic relationship with a co-worker, Lynn Towery. A few months after the relationship ended in 2005, Towery complained to Vaughn's supervisor that she was being sexually harassed by Vaughn. The supervisor had a meeting with Vaughn and Towery and both agreed to limit all contact to work-related issues. Less than a month later, Vaughn was placed on administrative leave for not honoring the agreement.

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Workplace Strategies Heads To "The Big Easy"

Annual Client Seminar Features 75+ Sessions Over Four Days

Ogletree Deakins' annual labor and employment law seminar, Workplace Strategies, will be held at The Roosevelt New Orleans on May 9-10 (with special pre- and post-conference sessions on May 8 and 11). This year's program is the largest yet, featuring more than 75 "cutting-edge" topics and 200 speakers.

Enclosed with this issue of *The Employment Law Authority* is the full agenda for Workplace Strategies 2013—a premier advanced-level seminar designed specifically for in-house counsel and senior level human resources professionals. Information on the program and how to register is also available at www.ogletreedeakins.com.

Some of the seminar highlights include a welcome luncheon on May 8, enhanced pre-conference "immersion sessions," a charity reception showcasing a tasting menu of several of New Orleans's outstanding restaurants, keynote presentations from corporate leaders and top representatives of several federal agencies, the popular "Lunch with the Lawyers," and "Interactive Saturday." You will find all of the details about the program in the enclosed brochure.

Please note that based on early responses (nearly 500 clients are registered as this issue was going to press), we are expecting the program and the hotel to sell out—so please make your reservations as soon as possible. We look forward to hosting you in New Orleans in May for Workplace Strategies 2013! ■

IMMIGRATION REFORM—HOW WILL PROPOSED LEGISLATION IMPACT EMPLOYERS?

by Nicole Brooks (Raleigh), Lee Depret-Bixio (Columbia), and Andrew W. Merrills (Raleigh)

President Obama has made comprehensive immigration reform a priority. In January, both the President and a bipartisan group of eight senators laid out their respective proposals for immigration reform.

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. Work on the bill continues and it is now expected that the legislation may seek to double the current 65,000 H-1B cap, or set it in the low 100,000-range. The bill may also call for increased fees for large H-1B users. This would include a graduated fee structure that sets higher H-1B fees once IT service providers hit certain thresholds.

President Obama expressed his support for the principles underlying the Senate proposal, but pledged to send his own reform bill to Congress if members fail to act quickly. The White House's own framework is based on similar principles, namely: (1) strengthening border security by focusing enforcement resources on preventing those intent on harming the United States from entering the country; (2) streamlining legal immigration, including eliminating annual country caps on immigrant visas, creating new visa programs for foreign investors and entrepreneurs, and "stapling" green cards to the diplomas of foreign nationals who earn a U.S. advanced degree in a science, technology, engineering, or mathematics (STEM) field; (3) creating a path to earned citizenship for undocumented immigrants, including registering and undergoing national security and criminal background checks, paying taxes, and learning English; and (4) cracking down on employers that hire undocumented workers.

Numerous new stand-alone bills have also recently been announced.

Immigration Innovation Act of 2013 (I-Squared Act)

This bill increases the current number of available H-1B visas for highly-skilled workers and makes that number adjustable based on market demand. The current quota of 65,000 for new H-1Bs per fiscal year would be raised to 115,000, and could be adjusted up to 300,000 per year depending on the demand in a given year. The bill also eliminates the cap on the existing exemption for holders of U.S. advanced degrees and provides for spouses of H-1B visa holders to be "employment authorized."

Employment-Based Green Cards

The proposed legislation also revises the current process for the allocation of employment-based green cards. The bill allows for the recapture of unused green cards that were approved by Congress but, due to delays, were lost. Under the bill, any unused employment-based green cards would roll over to the next fiscal year. Annual per-country limits for employment-based green cards would be eliminated and per-country limits for family-based green cards would be adjusted, depending on demand, allowing additional access to permanent residence.

In addition, certain groups would be exempt from the green card numerical limitations, namely: students who have earned a U.S. master's or higher degree in a field on the Department of Homeland Security (DHS)-approved STEM list; dependents of principal employment-based immigrant visa recipients; individuals of extraordinary ability; and outstanding professors and researchers. Students would no longer be required to maintain "nonimmigrant intent," i.e., they would not have to maintain a residence abroad that they have no intention of abandoning.

H-1B and L-1 Visa Reform Act of 2013

Among other provisions, this bill requires employers to post available job openings on the Department of Labor (DOL) website for 30 days prior to petitioning for an H-1B worker, prohibits companies from outsourcing visa holders to other companies, modifies the formula for determining the prevailing wage that must be paid to H-1B visa employees, permits the DOL to conduct random audits and investigations of H-1B visa employers, and requires an employer that employs 50 or more U.S. workers to attest that less than 50 percent of its workforce are H-1B and L-1 visa holders.

The fines for companies that violate H-1B and L-1 visa programs would increase and the ability of these companies to participate in future recruiting would be restricted. The bill obliges an L-1 visa holder to prove that a legitimate business is being established and requires a report on the blanket petition application process. ■

Ogletree Deakins

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Ogletree Deakins State Round-Up

ARIZONA*

On February 26, the Phoenix City Council amended the Phoenix City Code to add the terms "sexual orientation" and "gender identity or expression" to the code section currently prohibiting discrimination in employment, public accommodations, housing, and certain contracts with the city of Phoenix.

CALIFORNIA*

A California Court of Appeal has held that an employer may have to offer additional leave under the Fair Employment and Housing Act as a reasonable accommodation for a pregnancy-related disability even after the employer has provided four months of leave under the Pregnancy Disability Leave Law *and* allowed the employee to use California Family Rights Act leave for a difficult pregnancy. *Sanchez v. Swissport, Inc.*, No. B237761 (February 21, 2013).

FLORIDA

The Eleventh Circuit Court of Appeals recently held that two employees who were denied overtime pay may recover under the FLSA even though both failed to report their earnings to the IRS and one was an undocumented worker. *Lamonica v. Safe Hurricane Shutters, Inc.*, No. 11-15743 (March 6, 2013).

GEORGIA

The Eleventh Circuit Court of Appeals has held that a male county worker who was paid less for performing similar duties as female colleagues has a viable claim under the Equal Pay Act. Under the Act, positions will be considered substantially similar when employees have similar responsibilities, even if the job titles or descriptions are different. *Edwards v. Fulton County,* No. 11-14751 (February 15, 2013).

ILLINOIS*

Employers often assign light duty to employees who are returning to work from illness or injury. The Seventh Circuit Court of Appeals has held, however, that neither the FMLA nor the ADA creates an *obligation* for an employer to provide light duty work to an employee who is unable—with or without accommodation—to return to the essential functions of his job. *James v. Hyatt Regency Chicago*, No. 1:09-cv-07873 (February 13, 2013).

INDIANA*

The Indiana Supreme Court recently held that a day laborer who received job assignments on a day-to-day basis was not "separated from the payroll" and can bring an action under the Indiana Wage Claim Act, which has fewer filing requirements than the Indiana Wage Payment Act. *Walczak v. Labor Works—Fort Wayne LLC*, No. 02S04-1208-PL-497 (March 13, 2013).

MASSACHUSETTS*

The Massachusetts Supreme Judicial Court recently held that for an employee to release claims under the Massachusetts Wage Act, the release must be plainly worded in "clear and unmistakable" terms, "understandable to the average individual," and must specifically refer to the rights and claims provided by the Wage Act. *Crocker v. Townsend Oil Co. Inc.*, No. SJC-11059 (December 17, 2012).

MICHIGAN

The Sixth Circuit Court of Appeals has rejected a suit brought by a female high school basketball coach who sued the school district for retaliation after winning a prior discrimination case. The court found that the coach did not demonstrate a causal link between the court judgment in her favor and her removal as the girls varsity coach two years later. *Fuhr v. Hazel Park Sch. Dist.*, No. 11-2288 (March 19, 2013).

NEW JERSEY*

On March 21, a broadly-worded social media privacy bill (A2878) received final legislative approval, and now awaits action by the Governor. The bill would, among other things, bar an employer from requiring or requesting that any current or prospective employee disclose his or her username or password to a personal social media account or provide access to his or her personal account.

NEW YORK*

The New York City Council recently passed Bill No. 814-A that will modify the New York City Human Rights Law and create a private right of action prohibiting discrimination based on unemployment status. Despite Mayor Bloomberg's strong objections and veto, on March 13, 2013, the City Council overwhelmingly voted 43-4 in favor of overriding his veto. As a result, the bill goes into effect 90 days after final passage.

OHIO

An Ohio Court of Appeals has held that a state law banning sex discrimination by employers does not protect workers from harassment based on sexual orientation. The court explained that the law, which prohibits discrimination based on race, sex, religion, age, and other forms of discrimination, provides a cause of action for same-sex harassment, but not for harassment based solely on sexual orientation. *Inskeep v. Western Reserve Transit Auth.,* No. 12 MA 72 (March 8, 2013).

OREGON*

On March 13, the city of Portland passed a paid sick leave ordinance. Under the new ordinance, businesses with six or more employees must provide up to 40 hours of paid sick leave a year; smaller businesses must allow employees to take up to 40 hours of *unpaid* sick time. The law goes into effect on January 1, 2014.

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

STATE LEGISLATURES TAKE UP RENEWED CALL FOR RIGHT-TO-WORK LAWS

*by Wade M. Fricke and Matthew J. Kelley**

While the National Labor Relations Board (NLRB) has been embroiled in controversy—overturning or modifying decades of precedent and having its appointments challenged in federal court—state legislatures have been busy drafting and passing right-to-work (RTW) and other pro-business legislation. RTW legislation prohibits employers and unions from agreeing to union security clauses during collective bargaining, thus leaving employees with a personal choice as to whether they will pay union dues for union representation. While experts disagree on the economic impact that RTW legislation has on state economies, it is clear that states are reexamining RTW as a way to become more attractive to business investment.

In 1947, a Republican Congress passed the Taft-Hartley Act, amending the National Labor Relations Act (NLRA), over President Truman's veto. Among many changes to the Act, Taft-Hartley created Section 14(b) of the NLRA. This new section specified that nothing within the NLRA prohibited states from passing laws making forced membership in a labor organization illegal. This legislation largely was a response to an extensive post-war, concerted union organizing drive in many southern states, code-named Operation Dixie. Operation Dixie failed, leaving direct competitors for northern union jobs in nearby southern states.

At the same time post-war unions were attempting to push into the southern states, Section 14(b) of the NLRA led to intense debate during the 1950s. Almost every state considered RTW legislation. Today, there are 24 states with RTW laws, but after Oklahoma passed its legislation in 2002, nearly a decade passed without another state taking the plunge. Continued competition from non-union southern manufacturing facilities, strong overseas competition, and the recent economic downturn have left the former union stronghold "rust belt" states vulnerable to RTW legislation. In 2012, RTW appeared for the first time in a traditional "rust belt" state—Indiana.

* Wade Fricke is a shareholder in the Cleveland office of Ogletree Deakins and Matthew Kelley is an associate in the firm's Indianapolis office. Both attorneys represent management in labor and employment related matters.

Indiana

Indiana Governor Mitch Daniels supported RTW legislation in 2012 after refusing to make it an issue in 2011. Governor Daniels pressed for RTW legislation after meeting with the leaders of several major companies, all of whom expressed that they would not bring jobs to Indiana without it. After debate and several protests at the state capitol, Governor Daniels signed the legislation on February 1, 2012. Union advocates loudly protested the new law during Indianapolis' hosting of the Super Bowl that year.

The Indiana legislation followed the heated debate over collective bargaining rights in Wisconsin. In March of 2011, Wisconsin had passed laws banning most collective bargaining in public sector employment. Despite a heavy push from union supporters in Wisconsin, Governor Scott Walker convincingly won a 2012 recall election that was essentially a referendum on his support for the collective bargaining law.

While the benefits of RTW legislation continue to be debated, states in the Northeast and Central Midwest—historically areas of strong union support—are now seriously considering RTW bills. Many argue that with Indiana becoming the first "rust belt" state with a RTW bill, other states must now consider the issue to remain competitive in luring businesses and jobs.

Michigan

Most recently Michigan—the very epicenter and symbol of U.S. union support, stunningly became the latest state to enact RTW legislation. The path RTW legislation took in the Wolverine state, though, was indeed filled with twists and turns. In the past, Governor Rick Snyder had publicly expressed that RTW was too divisive an issue given Michigan's other pressing problems. That stance changed when labor unions sought to enshrine collective bargaining rights in the Michigan constitution with a referendum vote.

The ballot initiative was defeated by a margin of 58 percent to 42 percent in November 2012. In response, Governor Snyder expressed his support for RTW legislation following the November election and two bills were quickly proposed in the House and Senate. Despite raucous protests by union supporters around the state house, Michigan became the 24th state to pass a RTW law on December 12, 2012.

Since then, union supporters have been dealt two fresh blows in federal court cases challenging two anti-union pieces of legislation. First, on January 17, 2013, an Indiana federal district court dismissed the International Union of Operating Engineers' challenge to the Indiana RTW law. Second, on January 18, 2013, the Seventh Circuit Court of Appeals (covering Wisconsin, Indiana, and Illinois) overturned a Wisconsin district court's ruling that parts of the Wisconsin collective bargaining law were unconstitutional.

Pending Legislation

What is the future of further RTW efforts? Pennsylvania has introduced its own package of six bills aimed at giving workers the power to determine whether or not to join unions, with Republican lawmakers hoping to gain more support than during previous attempts at passing such legislation.

While Pennsylvania's legislation faces a tough uphill battle from union supporters around the state, specifically from the southeastern part of the state, Republicans do control the governor's office and both houses of the legislature. Currently, Pennsylvania is one of only four states having a Republican governor and a Republican-controlled legislature that does not have a RTW law.

Pennsylvania is not alone in revisiting this issue. Ohio is also a key participant in the RTW debate, but its Republican leadership has failed in the past to

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NEW FINAL REGULATIONS STRENGTHEN HIPAA PRIVACY AND SECURITY RULES

by Stephen A. Riga (Indianapolis)

Four years ago, the Health Information Technology for Economic and Clinical Health Act (HITECH Act) introduced major revisions to the Privacy and Security Rules under the Health Insurance Portability and Accountability Act (HIPAA). The U.S. Department of Health and Human Services has now published final regulations implementing these changes, as well as changes required under the Genetic Information Nondiscrimination Act (GINA).

The extensive regulations:

- Expand the scope and impact of the Privacy and Security Rules on business associates. Anyone providing services to a health plan, health care clearinghouse, or health care providers who receives or generates protected health information (PHI) may be subject to these expanded provisions. Previously, most business associates were subject to the Privacy and Security Rules only through a business associate agreement with the covered entity. The HITECH Act extended the application of HIPAA's enforcement provisions to business associates directly, and it established an independent requirement that business associates implement many of the Security Rule's administrative safeguards.
- Impose significant new restrictions on the use of PHI, including new rules governing the use of PHI for marketing and fundraising purposes and prohibiting the sale of PHI without authorization.
- Enhance individual rights to reflect various HITECH Act requirements, such as the right to request electronic copies of an individual's PHI and to restrict disclosures to a plan regarding treatment when the individual has paid in full for the service or product.
- Implement new enforcement of the tiered penalty structure established by the HITECH Act. Depending on the degree of knowledge that the covered entity had (or should have had) regarding the violation, penalties for each violation range from $100 to $50,000, with a maximum penalty for a given year of $1.5 million for any violations of the same requirement or prohibition.
- Redesign the final HITECH Act breach notification rule. A covered entity must engage in a risk assessment and examine (1) the nature and extent of the PHI involved, (2) any unauthorized person who used or received the PHI, (3) whether the PHI was actually acquired or viewed, and (4) whether the risk to the PHI has been reduced or resolved.
- Include genetic information in the definition of PHI. The regulations also finalize rules against the use of genetic information for health plan underwriting. The regulations make clear that any health plan covered by the Privacy Rule is subject to this requirement, not just health plans and insurers defined by GINA. Long-term care insurers are excluded by the regulations from this prohibition, but they remain subject to the Privacy Rule.

The final rule took effect on March 26, 2013, but provides a 180-day grace period on operational compliance. For existing business associate agreements, the new rule gives most covered entities and business associates an additional year to modify their current contracts to reflect the new regulations. ■

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support the measure. With Michigan's passage of RTW legislation, Ohio, a direct competitor with Michigan for many manufacturing jobs, has been rumored to be a target of renewed RTW efforts.

In the central Midwest, Missouri House Speaker Tim Jones found Michigan's decision on RTW a catalyst for his own push to support RTW legislation. Jones recently endorsed both a ballot referendum and a general law concerning RTW. Republicans in Missouri hold a veto-proof majority in the state legislature and can pass any measure over Missouri's Democratic Governor, Jay Nixon. While several previous bills on the issue have languished in the Missouri legislature without much action, Speaker Jones' endorsement will provide for a more robust debate on the issue in the coming months.

In New England, the New Hampshire legislature passed RTW legislation for the second straight year. But, also for the second straight year, Governor John Lynch vetoed it in 2012 and his successor, Governor Maggie Hassan is likely to veto any future legislation. New Hampshire Republicans do not have enough votes to overcome the veto. Elsewhere in New England, Maine has been identified as another potential state where RTW legislation could be introduced.

Even states such as Virginia, which already has a RTW law, are seeking more stringent protection. On January 28, 2013, additional RTW legislation was narrowly defeated on a 20-20 tie vote in the Virginia Senate. That legislation sought to amend the Virginia state constitution with RTW provisions. Many other states, such as Alaska, Colorado, Maryland, and Montana have introduced failed bills in the past two years.

Both sides of the RTW debate have spent millions of dollars and many years researching the value of RTW legislation to state economies. Given the complexity of state economies and the lure of other incentives such as tax subsidies, personal and business income tax laws, and other economic and social incentives, it is impossible to gauge the true impact of RTW legislation. But, it is clear that states with RTW laws see a decrease in union membership over time.

A Final Note

While RTW's economic benefits are still debated, it is clear the economic issues facing states today as they compete for jobs and business opportunities have made RTW legislation more and more popular. As federal agencies, especially the NLRB, become more pro-union, state legislatures are taking up the banner for RTW legislation as a way to make their states more competitive in the future. It looks like Indiana and Michigan may be just the beginning of a new wave of RTW states. As many proponents of RTW have said, if RTW legislation can happen in Michigan, it can happen anywhere! ■

New To The Firm

Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Karen Shriver (Atlanta); Jamey Ayers and Jacquelyn Maroney (Austin); Amanda Williams (Dallas); Glenn Spitler, III (Greenville); Jamie Zimmerman (Las Vegas); Benjamin Ikuta, David Raizman, and Amber Roller (Los Angeles); Christopher Elko (Morristown); Patrick Fazzini (Pittsburgh); Frank Tobin (San Diego); Steven Cuff (Stamford); and William Cantrell, Jennifer Moore, and Caren Skversky (Tampa).

"RETALIATION"

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Towery also obtained a protective order from a state court. In one of two meetings with a psychotherapist who was tasked with determining Vaughn's fitness to return to work, Vaughn acknowledged that Towery received the court order because of his "obsessive/compulsive contacts and phone calls with her and difficulty accepting the end of the relationship."

Vaughn later returned to work in a different role with no contact with Towery, but after one of his EEO complaints was mediated, he was reassigned to his old job. A few months later, Towery complained of continued harassment, alleging that Vaughn was seen in the parking lot following Towery's car, pulling in front of her, and slowing down.

Towery filed a complaint with the Equal Employment Opportunity Commission claiming that management had failed to stop Vaughn's harassing behavior. Towery and the USDA eventually reached a settlement, which provided monetary compensation to Towery and prohibited Vaughn from being at the worksite at the same time as Towery. As a result, Vaughn's schedule was changed from the day to the night shift.

Vaughn filed a lawsuit in federal court against the USDA claiming retaliation for his prior EEO activity, leading to his changed work schedule and lost overtime opportunities. The USDA asked the court to dismiss the case, arguing that Vaughn's schedule change was necessary to comply with the terms of the settlement with Towery. In dismissing the case, the trial judge determined that Vaughn did not provide sufficient evidence to establish a viable claim of retaliation under Title VII of the Civil Rights Act because "he could not have been meeting his employer's legitimate expectations while harassing a co-worker." Vaughn appealed the trial judge's decision to dismiss his case to the Seventh Circuit Court of Appeals.

Legal Analysis

The Seventh Circuit held that to establish a *prima facie* case of retaliation, Vaughn must present either direct proof of retaliation *or* indirect proof showing that: (1) he engaged in a statutorily protected activity; (2) he met his employer's legitimate expectations; (3) he suffered a materially adverse action; and (4) he was treated less favorably than a similarly situated employee who did not engage in the statutorily protected activity. If he established all four elements, the employer then has the burden to show there were nondiscriminatory reasons for the adverse action. The burden then shifts back to Vaughn to show that the employer's reasons were pretextal.

In focusing on the second element, the court noted that "[a]n employee who sexually harasses a co-worker cannot be considered to be meeting his employer's legitimate expectations 'by any stretch of the imagination.'" The court noted that employees cannot use prior EEO activity to "shield" themselves against the repercussions of inappropriate behavior at work.

Even though the issue of pretext would not have to be addressed because Vaughn failed to establish that retaliation had occurred, the Seventh Circuit pointed out that the analysis for determining whether an employee met the employer's "legitimate expectations" is very much connected to the issue of pretext. Here too, the Seventh Circuit found that each of Vaughn's allegations of pretext did not rebut the employer's legitimate reasons for the actions it took. Thus, the court upheld the dismissal of his retaliation suit.

Practical Impact

According to Robert Casey, a shareholder in Ogletree Deakins' Chicago office: "The court's decision in *Vaughn* is a welcome application of commonsense principles affirming an employer's right to hold employee's accountable for their workplace misconduct.

"If one reads the opinion carefully, there are clearly excerpts that will prove useful in other settings or litigation, e.g., 'even if [Vaughn's] unwanted contacts [with Towery] did not rise to the level of actionable harassment *on account of [her] sex* . . . he cannot contend seriously that he was performing his job in a manner that the Forest Service, or any other employer, would find acceptable'; and '[t]here is no validity to [Vaughn's] suggestion that an employer must tolerate harassment of a co-worker, no matter how offensive or disruptive to the workplace, so long as the harasser does not cross the threshold that will subject the employer to liability for ignoring the harassment.'

"Thus, the court rightly concluded that Vaughn could neither establish his *prima facie* case of retaliation, nor establish that the reasons for the employer's actions were a 'pretext' for retaliation. This case will be a useful precedent for employers that are faced with similar circumstances—and is a reason why all claims of harassment must be investigated fully and addressed appropriately in the workplace.

"Nonetheless, the facts in *Vaughn* are relatively unique. The employer had a documented history of years of complaints of harassment that coincided with the years of Vaughn's own engagement in his (separate) protected activities and had a settlement that required the changes in scheduling and overtime opportunities about which Vaughn subsequently complained.

"Just as importantly, Vaughn was

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LACK OF AN ADVERSE ACTION DOOMS POSTAL WORKER'S CASE

Court Finds Alleged Incidents Did Not "Materially" Change Her Working Conditions

A federal appellate court recently upheld the dismissal of a lawsuit brought by an African American postal employee who claimed that she was discriminated against based on her race and gender. The Sixth Circuit Court of Appeals found that her discrimination claims failed because there was no "adverse action." The court also rejected the worker's hostile environment claim because she did not show that her supervisor's actions were sufficiently "severe or pervasive." ***Brown v. Potter,*** *No. 12-1895, Sixth Circuit Court of Appeals (March 5, 2013).*

Factual Background

Alicia Brown worked as a customer service manager at the Wayne Post Office in Westland, Michigan from 2006 until 2010. Brown alleged that for a year and a half her supervisor, Kevin Brandon, singled her out for disparate treatment and unlawful discrimination.

Beginning in May 2007, Brandon openly criticized Brown's work in a meeting attended by other senior post office managers. Later that month, he denied her request for training. In June 2007, Brandon began dictating which shift Brown would be required to work, contrary to the practice of other managers who were free to select their own shifts and hours.

In January 2008, Brandon denied Brown's request to take mandatory rural mail count training, though he had approved the same training for Westland employees and other postal employees in the area. He also allegedly tried to make Brown work longer hours, called her a liar, and began requiring his secretary to maintain a file of his correspondence with Brown.

On November 4, 2008, Brown voluntarily transferred to the Dearborn, Michigan facility, with the same title and pay, but at a lower grade level. The next day, Brandon sent two emails to a manager at Dearborn, Cheryl Skotak, calling Brown a "peach," saying she was "stupid," and asking Skotak to "make sure [Brown] fails miserably." That same day, Brown filed a charge with the Equal Employment Opportunity Commission and, not long after, a lawsuit against the Postal Service in federal court.

Brown's complaint raised several theories of relief, including disparate treatment bias based on race and gender and hostile work environment. The trial judge rejected all of her claims and Brown appealed this decision.

Legal Analysis

The Sixth Circuit first addressed Brown's disparate treatment claim, which was based on three incidents: Brandon's attempt to require Brown to work a 12-hour shift on Mondays; Brown's decision to take an assignment at Dearborn on November 4; and the November 5 "peach" emails.

The Sixth Circuit found that none of the incidents in question rose to the level of an "adverse action" that would cause a "materially adverse change" in Brown's employment conditions. She had transferred to Dearborn voluntarily, her position was substantially the same as her old one (differing only in grade level), the proposed change to her Monday hours had never materialized, and Brandon's email to Skotak had no effect on "the terms or conditions of [her] employment." According to the court, "[i]n the absence of an adverse action, Brown has no threshold case."

The Sixth Circuit next addressed Brown's hostile work environment claim. Even though Brown and Brandon "did not get along" and Brandon was not an "ideal boss," the Sixth Circuit noted that Title VII does not create a workplace "civility code." Moreover, the court found that Brandon's comments and Brown's complaints about training and staffing were not "severe or pervasive enough to create an environment that both she and a reasonable employee would find hostile or abusive." Thus, the court upheld the dismissal of both her discrimination and hostile work environment claims.

Practical Impact

According to Michelle LeBeau, a shareholder in the Detroit Metro office of Ogletree Deakins: "This case highlights the importance of satisfying the evidentiary burden in disparate treatment cases. The court found no evidence of an 'adverse action'; thus, the worker's claim was dismissed. To prevent conflicts from escalating to the level of a Title VII violation, however, employers should immediately intervene when they become aware of objectively abusive or discriminatory conduct, even absent a complaint. In addition, supervisors should be trained to identify unacceptable conduct and respond appropriately." ■

"RETALIATION"

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apparently unable to produce performance evaluations that rated him as 'satisfactory' while Towery was complaining about him. Employers have often been caught in such conflicts between 'satisfactory' ratings on performance evaluations and claims of actionable misconduct. Had there been such evidence here, Vaughn may have satisfied his *prima facie* burden (although he likely still would not have been able to show pretext). This conclusion reinforces the standard advice that supervisors must provide accurate written reviews of subordinates.

"One last note on this ruling is appropriate—Vaughn complained that the employer had never interviewed him when investigating Towery's complaints of harassment. That is not a recommended practice, but in this case there was sufficient other evidence in the record (including an order of protection issued by a state court and Vaughn's admission to a psychotherapist of his 'obsessive/compulsive contacts' with Towery) that the court found that failure to interview Vaughn to get his side of the story was 'not fatal.' The employer had a good-faith belief based on the evidence available to support its actions."

"REASONABLE ACCOMMODATION" MAY INCLUDE SCHEDULE ADJUSTMENTS

Court Allows Worker To Proceed With ADA Suit

A federal appellate court recently reinstated a lawsuit brought by a case manager with schizophrenia who claimed that his discipline for tardiness violated the Americans with Disabilities Act (ADA). According to the court, "whether [the employee's] late and varied arrival times substantially interfered with his ability to fulfill his [job] responsibilities is a subject of reasonable dispute" and summary judgment should not have been granted to the employer. ***McMillan v. City of New York,*** *No. 11-3932, Second Circuit Court of Appeals (March 4, 2013).*

Factual Background

Rodney McMillan has schizophrenia and, with calibrated medication, has been employed by the City of New York, first for 10 years as a case manager with the City's Human Resources Administration (HRA) and then, since 1997, as a case manager for the HRA Community Alternative Systems Agency. In that job, McMillan conducts home visits, processes social assessments, and meets with clients on a daily basis in the agency's office.

The agency has a flex-time policy that allows employees to arrive at work between 9:00 and 10:00 a.m., and leave between 5:00 and 6:00 p.m., so long as they work 35 hours each week, excluding a one-hour break for lunch. Tardiness can be "approved" or "disapproved" by a supervisor. When a tardy is approved, the employee may use sick leave or other "banked" time to cover the time missed in order to be paid for a full week of work. However, an employee who has no time banked, or does not wish to use banked time, simply is not paid for the missed time. Tardiness that is disapproved can lead to disciplinary action.

McMillan's medication makes him drowsy and sluggish in the morning, which often makes him late for work. There is no dispute that McMillan's inability to get to work on time is a function of the treatment for his condition. For a period of at least 10 years prior to 2008, McMillan's tardiness was either explicitly or tacitly approved. However, in 2008, his supervisor (Loshun Thornton), at the direction of her supervisor (Jeanne Belthrop), refused to approve McMillan's late arrivals. McMillan then made a request for a later start time to avoid discipline for tardiness, but was told that a later start time was not possible because McMillan would then have to work past 6:00 p.m., after which no supervisors were present. McMillan also stated that he would be willing to work through his lunch hour and "bank" that time to make up for his late start. That suggestion was also rejected.

In May 2009, McMillan was fined eight days' pay for late arrivals. In December, Belthrop recommended additional discipline based on McMillan's "long history of tardiness," and the City subsequently recommended that his employment be terminated. Ultimately, the City reduced the recommended sanction from termination to a 30-day suspension without pay.

McMillan sued the City alleging violations of the ADA. In support of his claims, McMillan argued that his requested accommodations were reasonable, as he often worked past 7:00 p.m. Thus, he could arrive late and still work the required 35 hours a week.

The trial judge dismissed all of McMillan's claims, holding that the court was "required to give considerable deference to the employer's judgment" as to whether timely arrival at work was an essential function of a particular job. McMillan appealed this decision.

Legal Analysis

The Second Circuit Court of Appeals reversed the trial judge's decision, finding that while a "timely arrival is normally an essential function," the lower court did not conduct a fact-specific inquiry into McMillan's situation. Instead, the lower court "appears to have simply assumed that McMillan's job required at least seven hours of work each day and that the work could not be successfully performed by banking time on some days to cover tardiness on others."

The Second Circuit pointed out a number of circumstances, however, that called that conclusion into question, including the facts that McMillan's lateness had been allowed for years without discipline, and that the City allows flex-time hours and regularly permits employees to "bank" time to cover certain late arrivals. These facts, the court held, undermine the City's assertion that it would have been an undue hardship to grant McMillan's request for modified work hours. As a result, the Second Circuit returned the case to the lower court for additional factual analysis of whether an individual whose medication kept him from coming to work on time could be disciplined for attendance violations based on that lateness.

> *"This decision underscores the need for employers to . . . engage in the interactive process."*

Practical Impact

According to Edward Cerasia II, a shareholder in the firm's New York City office: "This decision underscores the need for employers to conduct fact-specific inquiries and engage in the interactive process with disabled employees to determine whether a reasonable accommodation is available and warranted. In this case, the Second Circuit held that arriving to work on time may not have been an 'essential' requirement of the plaintiff's job, given that he had arrived late for some 10 years without being disciplined and because of his employer's flex-time policy. The court also concluded that there should be additional analysis with respect to the City's 'undue hardship' defense. In reversing, the court emphasized that '[t]his case highlights the importance of a penetrating factual analysis' in disability discrimination and reasonable accommodation cases." ■