Ogletree Deakins

The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law

November/December 2010

This Issue

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Facebook Posts May Be "Concerted Activity"

NLRB Issues Unfair Labor Practice Complaint Against Employer

Section 7 of the National Labor Relations Act (NLRA) bars employers from interfering with employees' efforts to work together to improve the terms and conditions of their workplace. The National Labor Relations Board (NLRB) regularly has held that an employer violates Section 7 if its actions would "reasonably tend to chill employees" in the exercise of their rights under the NLRA.

Recently, the NLRB announced its plans to prosecute a complaint issued by its Hartford, Connecticut regional office regarding the termination of an employee who posted negative remarks about her supervisor on her personal Facebook page. The complaint alleges that the company, American Medical Response of Connecticut, Inc. (an ambulance service), also denied union representation to the employee during the investigation of the incident.

The dispute began when Dawnmarie Souza was asked to prepare a report related to a customer's complaint about her work. Souza requested representation by Teamsters Local 443 regarding the complaint. According to Souza, she was denied representation and was threatened with discipline because of her request.

After leaving work, Souza posted a negative comment about her supervisor on her Facebook page from her home computer. The comment elicited supportive responses from co-workers, and led to additional negative comments from Souza. When the company

Please see "FACEBOOK" on page 7

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Ogletree Deakins Is Leading The Way

Recent Publications Tout Firm's Growth And Lawyers' Skill

Ogletree Deakins continues to excel in the labor and employment law field according to surveys conducted by *The National Law Journal* and *Best Lawyers in America.* Ogletree Deakins has once again been named to *The National Law Journal's* annual list of the 250 largest U.S. law firms. In the latest survey, Ogletree Deakins has advanced 10 spots to land at number 90. As the firm has strengthened in size during the last year, it has also increased its visibility on the *NLJ 250* and across the United States. The firm now has more than 500 attorneys in 40 offices nationwide.

"We are pleased Ogletree Deakins continues to advance on the *NLJ 250* list," said Kim Ebert, managing shareholder of the firm. "Although the firm has grown in size during the past year, growth for growth's sake is not our goal. Rather, this progress reflects the success of the firm and the incredible talent we continue to attract."

Separately, *Best Lawyers* is recognizing five Ogletree Deakins attorneys as 2011 Lawyers of the Year. *Best Lawyers* has selected only a single lawyer in high-profile practice areas in large legal communities as a "Lawyer of the Year."

Founding shareholders Homer Deakins and J. Hamilton Stewart received the honor as Atlanta's and Greenville's Labor and Employment Lawyer of the Year, respectively. Kim Ebert was honored as the Indianapolis Labor and Employment Lawyer of the Year. Joel Daniel earned the honor of Greenville Employee Benefits Lawyer of the Year and Fred Lewis was honored as the Memphis Labor and Employment Lawyer of the Year. ■

OFCCP TO AGAIN ISSUE CORPORATE SCHEDULING ANNOUNCEMENT LETTERS

Early Notice Allows Federal Contractors To Take Advantage Of Agency's Resources

The Chair of the National Industry Liaison Group for Affirmative Action Planning recently reported that he has been notified by the Office of Federal Contract Compliance Programs (OFCCP) that the federal agency plans to issue Corporate Scheduling Announcement Letters (CSAL) in the next two months. A CSAL is a courtesy notification to a federal contractor that two or more of its establishments are on the list to undergo a compliance evaluation during the current scheduling cycle (*i.e.*, OFCCP's fiscal year of October 1 to September 30).

One of the stated purposes of the advance notification is to encourage contractors to take advantage of the OFCCP's compliance assistance resources and activities. CSALs are not the same as scheduling letters, which actually start the evaluation process and request submission of the contractor's affirmative action plan (AAP) and supporting data within 30 days of receipt.

Just because a contractor does not receive a CSAL does not mean that one or more of its establishments will not be selected for a compliance review during the current scheduling cycle. CSALs are generated from the OFCCP's Federal Contractor Selection System (which identifies contractor establishments for audits by predicting the likelihood of a finding of systemic discrimination based on information from EEO-1 Reports), but contractors also may be selected for audits based on a contract award, a directed review, a complaint, or as part of the OFCCP's Corporate Management Compliance Evaluation or Functional AAP initiatives. Likewise, our experience reveals that not all establishments included in a CSAL will actually be audited during the current scheduling cycle.

Since CSALs will be mailed to corporations' CEOs, federal contractors should notify their CEOs to be on the lookout for these letters and remind them, upon receipt of a CSAL, to immediately notify the individuals responsible for affirmative action compliance for the establishments identified. Establishments selected for evaluation should begin to compile and review the information they must submit in response to a desk audit letter and ensure compliance with federal contractors' numerous other requirements. A copy of the OFCCP's standard scheduling letter and itemized listing of requested information is available on the OFCCP's website. ■

Ogletree Deakins

Publisher
Joseph L. Beachboard

Managing Editor
Stephanie A. Henry

Additional Information
To request further information or to comment on an article, please call Stephanie Henry at (310) 217-0130. For additional copies or address changes, contact Marilu Oliver at (404) 870-1755.

OFCCP JURISDICTION EXTENDS TO HOSPITALS

Ruling Focuses On Employer's Participation In TRICARE

The Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) has won another major battle in its war to establish jurisdiction over hospitals and other health care providers. An administrative law judge (ALJ) decided, without a hearing, that the Florida Hospital of Orlando (FHO) is subject to federal affirmative action laws by virtue of its agreement to provide health care services to eligible TRICARE beneficiaries. *OFCCP v. Fla. Hosp. of Orlando*, DOL OALJ No. 2009-OFC-00002 (October 18, 2010).

This ruling is significant because many hospitals and health care providers have been operating under the assumption that they are not covered by the federal affirmative action laws and, therefore, have not been complying with federal contractor requirements. Consequently, these hospitals are generally unprepared should the OFCCP select them for an affirmative action compliance evaluation.

This case was recently appealed to the DOL's Administrative Review Board. Until a decision is reached, however, health care entities should closely analyze their relationship with federal government agencies through HMOs, provider networks, and the like, and consult with counsel to determine whether they must comply with federal contractors' affirmative action obligations, including: 1) developing written affirmative action plans (AAPs) for minorities and women, and for covered veterans and the disabled; 2) preparing adverse impact analyses of hires, promotions and terminations; 3) analyzing compensation practices for discrimination; 4) filing EEO-1 and Vets 100(A) Reports; 5) posting required notices and invitations to self identify; 6) notifying state employment service delivery system agencies of job openings; and 7) complying with detailed recordkeeping requirements.

For a more detailed discussion of the *Florida Hospital* case and its ramifications, visit the firm's website at www.ogletreedeakins.com. ■

Ogletree Deakins State Office Round-Up

ARIZONA*

Voters recently approved Proposition 203, which makes Arizona the 15th state to pass legislation legalizing the use of marijuana for medical purposes. The new law specifically provides that employers may not discriminate in hiring, termination, or terms of employment, or in any other way penalize an individual for being registered to obtain and use marijuana for medical purposes (with limited exceptions).

CALIFORNIA

The California Court of Appeal has held that an employer may proceed with its defamation suit against a community activist and a group of former employees who accused the company of "racist firings." According to the court, "the assertions about the company were allegations of fact that [it] was entitled to challenge through its lawsuit." *Overhill Farms, Inc. v. Lopez*, No. G042984 (November 15, 2010).

FLORIDA

The Eleventh Circuit Court of Appeals has dismissed a lawsuit brought by a pharmacist who claimed that he was fired in violation of the Florida Whistleblower Act for reporting his perceived violations of pharmacy rules. The court found that the employer had presented legitimate reasons for terminating the worker, including customer complaints. *McIntyre v. Delhaize America, Inc.*, No. 09-12675 (November 22, 2010).

GEORGIA*

On November 2, voters decided to amend the Georgia Constitution, which allowed for the previously passed House Bill 173 to become law. This new statute revises state law with respect to employee non-compete, customer non-solicitation, confidential information and similar contractual provisions – to the benefit of Georgia employers.

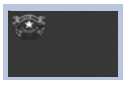
ILLINOIS

The Seventh Circuit Court of Appeals recently rejected an ADA suit brought by an employee who claimed that he was unlawfully subjected to a preemployment medical test. The court found that the worker was still an employee and not an applicant when he was told that he must complete a medical test before transferring to another position. *Denton v. Chicago Transit Authority*, No. 10-2318 (November 5, 2010).

MISSOURI

A Missouri Court of Appeals recently held that an employee could proceed with a lawsuit alleging that his co-worker's negligence caused his workplace injury. In reaching this decision, the court rejected the co-worker's argument that the state's Workers' Compensation Act provided her immunity from liability for the injury. *Robinson v. Hooker*, No. WD 71207 (August 3, 2010).

NEVADA



The Nevada Supreme Court recently held that a company that hired an independent contractor is not vicariously liable for injuries to the contractor's employees. The court found that neither company held any ownership interests in the other and the contractor was paid on a per-job basis. *San Juan v. PSC Industrial Outsourcing, Inc.*, No. 50033 (October 7, 2010).

NEW JERSEY*

On October 27, Governor Chris Christie signed a bill into law (P.L. 2010, c.82), which revises the unemployment insurance (UI) claims procedures to address certain abuses occurring in the UI system. The legislature attributed the problems to third-party agents that were hired to represent corporations in unemployment claims, which in turn often resulted in the improper delay or denial of UI benefits to laid off workers.

NEW YORK*

On October 4, the New York Department of Labor issued a proposed new wage order for restaurant and hospitality industry employees which, if enacted, would combine the wage orders for the restaurant and hotel industries into a single new Minimum Wage Order for the Hospitality Industry.

PENNSYLVANIA

In a case of first impression, the Third Circuit Court of Appeals ruled that a failure to promote does not, in itself, constitute discrimination in compensation. Thus, the Lilly Ledbetter Fair Pay Act of 2009 does not toll the statute of limitations for such a claim. *Noel v. The Boeing Co.*, No. 08-3877 (October 1, 2010).

SOUTH CAROLINA

On November 2, South Carolina voters approved a constitutional amendment that guarantees the right of individuals to vote by secret ballot when deciding whether to be represented by a labor union. The amendment has been widely viewed as a preemptive strike against the Employee Free Choice Act, the union-friendly legislation that would allow workers to choose a union based on signed authorization cards.

TEXAS

The Texas Supreme Court recently ruled that a lower court erred by refusing to compel arbitration in a discrimination case. According to the state's highest court, an employee manual reserving the company's right to unilaterally alter its personnel policies did not affect the validity of the arbitration agreement. Because the arbitration agreement did not specifically incorporate the employee policy manual, the court found, it was not illusory. *In re 24R, Inc. d/b/a Boot Jack*, No. 09-1025 (October 22, 2010).

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

EEOC ISSUES LONG-AWAITED FINAL GINA TITLE II REGULATIONS

*by Brian L. McDermott**

On November 9, 2010, the Equal Employment Opportunity Commission (EEOC) published its final regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). The final regulations are scheduled to take effect on January 10, 2011.

Background

President George W. Bush signed GINA into law on May 21, 2008. GINA was founded on the concern that advancements in the field of genetics and the decoding of the human genome could lead to the misuse of genetic information to discriminate against individuals in health insurance and employment.

To this end, Title I of GINA generally prohibits discrimination in group premiums and places limits on the use of genetic testing and collection of genetic information in group health plan coverage. Title II of GINA, in contrast, prohibits the acquisition and use of genetic information in the employment context.

The EEOC issued proposed GINA Title II regulations on March 2, 2009 and sought public comments. After receiving and considering input by 43 individuals, groups and organizations, and coordinating with other agencies, the EEOC unanimously approved the final GINA Title II regulations on October 29, 2010.

The new regulations contain several key changes to the proposed regulations and clarify the circumstances in which employers may be liable for acquiring "genetic information." Genetic information broadly includes information about an individual or his or her family member's genetic tests, "family medical history," requests for or receipt of genetic services, or the genetic information of a fetus or embryo of an individual or the individual's family member.

* Brian McDermott is a shareholder in Ogletree Deakins' Indianapolis office, where he represents management in labor and employment related matters.

Key Exceptions

GINA prohibits employers from requesting, requiring or purchasing the genetic information of an individual or an individual's family member. The final regulations outline six exceptions to the general prohibition, some of the more important of which include:

Requests for Medical Information

Under the final regulations, employers that inadvertently acquire genetic information pursuant to lawful requests for medical information will not violate Title II if they direct the health care provider not to provide genetic information. To assist employers in meeting this exception, the final regulations offer specific language for employers to use to demonstrate that the acquisition of genetic information was inadvertent:

"The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic Information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

An employer's failure to use this "safe harbor" language will not automatically prevent an employer from establishing that the receipt of genetic information was inadvertent (for example, when an employer's request for medical information was specifically tailored but the health care provider's response was overly broad).

The "Water Cooler" Problem

The final regulations also outline the "water cooler exception." In enacting GINA, Congress was concerned that casual conversation between co-workers regarding health could unnecessarily lead to federal litigation.

To this end, the final regulations confirm that an employer will not violate Title II where a manager or supervisor overhears a conversation about genetic information between the individual and others. Likewise, if a manager or supervisor learns of genetic information in casual conversation directly with the individual or a third party, the employer will not violate Title II. The final regulations warn, however, that if the manager probes further and asks the individual questions likely to result in the acquisition of genetic information, the inadvertent acquisition exception will no longer apply.

GINA and Social Media

With the social media explosion, many commentators were concerned about GINA liability based on managers learning of genetic information about individuals from social networking sites, such as where a manager and employee are "friends" on Facebook. The final regulations confirm that an employer will not be liable under Title II where a manager or supervisor inadvertently learns of genetic information from a social media platform to which he or she was given access by the creator of the profile at issue (typically the employee).

Voluntary Wellness Programs

Many employers offer employees wellness programs designed to enhance the health of employees. The acquisition of genetic information pursuant to a voluntary wellness program will not violate Title II if: (a) genetic information is provided voluntarily by the individual; (b) the individual provides prior knowing, voluntary and written authorization; and (c) individually identifiable genetic information is provided only to the individual or qualified health personnel, as applicable, and not to the employer. Furthermore, although an employer may not offer a financial inducement to employees to

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REQUESTING TOO MANY DOCUMENTS CAN BE COSTLY

Federal Government Is Cracking Down On I-9 Process

The Office of Special Counsel (OSC) for Immigration-Related Unfair Employment Practices, a division of the Department of Justice (DOJ), enforces the anti-discrimination provisions of Section 274B of the Immigration and Nationality Act. This statute prohibits discrimination in hiring, firing or recruitment or referral for a fee that is based on an individual's national origin or citizenship status. The statute also prohibits unfair documentary practices during the employment eligibility verification (Form I-9) process, and retaliation or intimidation.

What can happen to employers that request too many documents during the I-9 process or reverify employees with expired permanent residence cards (green cards)? Two employers have recently learned that civil fines and back pay penalties may result from such violations. In October, an OSC investigation determined that a major health care company had required non-U.S. citizens and naturalized U.S. citizens to present more work authorization documents than required by the I-9 process, but allowed native born U.S. citizens to select the documents they provided. Under the settlement agreement, the health care provider will pay $257,000 in civil penalties plus $1,000 in back wages to the charging party. The company also agreed to review its I-9 procedures, train recruitment personnel on I-9 procedures, and provide specific reports to the OSC for three years.

On November 10, the DOJ announced that it reached a settlement agreement with vacuum manufacturer Hoover Inc. in a similar situation. An OSC investigation found that Hoover had required employees who had presented a permanent resident card (green card) for I-9 purposes to produce a new green card when theirs expired. Hoover agreed to a civil penalty of $10,200, to conduct I-9 training, and to provide reports to the OSC for a period of one year.

Employers are encouraged to revisit their I-9 processes to ensure compliance not only with basic I-9 completion requirements but also to be sure they are not violating the I-9 discrimination and document abuse rules. ■

"GINA REGS"

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provide genetic information, it may offer such inducements for health risk assessments that include questions about family medical history so long as the employer makes clear that the inducement is available irrespective of whether the questions about family medical history are answered.

Medical Exams Relating to Employment

One of the key pronouncements in the final regulations relates to employer requests for medical examinations. The final rules make clear that the prohibition against acquiring family medical history applies to medical examinations related to employment. Thus, employers are *required* to specifically advise health care providers *not* to collect genetic information, including family medical history, as part of a medical examination intended to determine the individual's ability to perform a job. As a result, employer forms used in requesting medical information should expressly advise health care providers that genetic information is not requested by the employer.

Practical Implications for Employers

Violations of Title II may be costly. Remedies available for GINA violations include compensatory and punitive damages, reasonable attorneys' (and expert) fees, and injunctive relief (*e.g.*, reinstatement, hiring and back pay). As a result, employers should take proactive steps to avoid GINA liability. Recommended steps include reviewing and revising policies and procedures to ensure compliance with GINA, revising medical request forms to include the Title II "safe harbor" language for requests for medical information, and training managers and supervisors on the vast scope of GINA and the dangers of violating this federal law. ■

Ogletree Deakins News

New to the firm. Several lawyers recently have joined the firm. The new attorneys are: Damon Hart (Boston); Heidi Hartmann (Dallas); Ebony Reid (Indianapolis); Katherine Paulus and Kerri Reisdorff (Kansas City); John Zenor (Las Vegas); Daphne Bishop, Evan Moses and Alex Santana (Los Angeles); Donald Choi and James Conley (Orange County); Elizabeth Falcone (Portland); Julie Donahue (Philadelphia); Lara Peppard (Tampa); Dinah Choi and Gwendolyn Nightengale (Washington, D.C.).

Congratulations to . . . Mark Schmidtke (Chicago), who was recently elected to a three-year term as National Director for the Defense Research Institute; T. Scott Kelly (Birmingham), who has been appointed by the American Bar Association's Section of Labor and Employment Law to a one-year term as Employer Co-Chair of the Section's Leadership Development Program; Vince Verde (Orange County), who recently received the "Entrepreneur of the Year" award from the Filipino-American Chamber of Commerce of Orange County; and Jill Garcia (Las Vegas), who has been selected to be in the 2010 Legal Elite by *Nevada Business Magazine*.

Save the date. Ogletree Deakins is gearing up for Workplace Strategies 2011, which will be held on May 12 and 13 at the fabulous Fairmont Millennium Park in Chicago. This unique two-day seminar will feature 50 cutting-edge topics and more than 100 top quality presenters. No matter what your areas of interest in the employment law arena, this program will address them. Both capacity at the seminar and our hotel block is limited – so please reserve your spot at the program and make your hotel reservations as soon as possible. For more information on the seminar or to register, contact Kim Beam at (800) 277-1410 or kim.beam@ogletreedeakins.com.

MEDICARE REPORTING REQUIREMENT POSTPONED – WHAT YOU NEED TO KNOW

by H. Bernard Tisdale III (Charlotte) and Dorothy D. Parson (Indianapolis)

The Centers for Medicare and Medicaid Services (CMS) recently postponed until next year its requirement that certain employers (who are at least partially self-insured) and liability insurers report to CMS any one-time or lump sum payments to persons entitled to Medicare benefits in connection with settlements, judgments or awards involving the release of potential liability for medical expenses. Previously, such payments occurring on or after October 1, 2010 were to be reported in the first quarter of 2011. The new deadline requires that payments occurring on or after October 1, 2011 must be reported in the first quarter of 2012.

This extension does not apply to payments made to Medicare beneficiaries pursuant to no-fault insurance or workers' compensation claims. Any such payments occurring on or after October 1, 2010 still must be reported in the first quarter of 2011. Further, CMS has not revised the reporting dates for entities that assume an ongoing responsibility for medical payments.

Background

Medicare is a government-funded health insurance program primarily – but not exclusively – for individuals age 65 or older. However, Medicare is not intended to be the primary insurance coverage for such individuals where there are other funds available to pay for medical treatment (*i.e.*, Medicare is a "secondary payor"). In response to funding concerns for Medicare, Congress passed the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA), which former President George W. Bush signed into law on December 29, 2007.

The purpose of the MMSEA is to enable Medicare to recover money from beneficiaries who have received payments for medical expenses from third parties. To that end, the law requires an entity that makes such a payment to a beneficiary to report the payment to Medicare.

Who Reports Under the Act?

An entity that is either fully or partially self-insured may be a "Responsible Reporting Entity" (RRE) required to report payments made to a Medicare beneficiary when the payments are for medical benefits *or are in exchange for a release that has the effect of waiving claims for medical benefits*. For instance, an employer that is not insured, or that has to pay a deductible and/or co-pay on a liability insurance policy, or that pays a portion of a settlement or judgment, may be deemed a "self-insured plan" that must report the payment to CMS. (However, if payment to a beneficiary is partially paid by the RRE as part of its deductible, and partially paid by the insurer in the amount exceeding the deductible, then the insurer must report both the deductible and any excess paid beyond the deductible, rather than the RRE.)

What Must Be Reported?

Where the RRE is an employer who is at least partially self insured or is a liability insurer carrier, and it makes a one-time or lump sum payment to resolve all or part of a claim to a person entitled to Medicare benefits, which the CMS refers to as a Total Payment Obligation to Claimant (TPOC), such payments occurring on or after October 1, 2011, must be reported within the first quarter of 2012. This obligation will include circumstances where a settlement or other agreement between an employer and a Medicare-eligible person includes a full release of all claims by the individual.

In those cases, any payment occurring on or after October 1, 2011 in exchange for that release must be reported. This will be true even if the individual never asserted any claim for medical benefits, as long as the release would have the effect of releasing any such claim. Over the next few years, CMS has further limited the obligation to report in cases where the payment is below certain monetary thresholds.

Why Is This Important for Employers?

Once the reporting obligation commences, an RRE that fails to report covered payments will be subject to a civil penalty of $1,000 per day per violation. Thus, this additional delay for liability insurers (including self-insured employers) to begin reporting TPOC payments will provide additional time to review the Section 111 regulations and begin the process of registration with CMS if appropriate.

Registering with CMS is highly technical and CMS cautions that RREs must begin the registration process a full calendar quarter before the obligation to submit reports arises. This period allows for testing of the technical elements of the reporting process. However, CMS also has announced a "small reporter" option, which bypasses the testing period for those entities that will submit 500 or fewer claim reports per calendar year.

"(Failure) to report covered payments will be subject to a civil penalty of $1,000 per day per violation."

What Should Employers Do?

1. Employers should consult with their insurance carriers and the attorneys handling their insured liability claims to ensure that preparations have been made to determine whether a claimant is a Medicare beneficiary and report information on covered payments in a timely manner.

2. Employers should examine their claims history and determine the likelihood of claims or demands generally made against them for medical expenses. Employers also should consider whether there are other claims for which they would require a full release of all claims in exchange for a settlement payment.

3. Employers should consult counsel concerning what steps, if any, may be necessary to determine whether a plaintiff or claimant is eligible for Medicare benefits. ■

NLRB EXAMINES THE ELECTRONIC WORKPLACE

Ruling Finds Employer Must Distribute Remedial Notices Electronically

The National Labor Relations Board (NLRB) recently issued a decision finding that an employer must distribute remedial notices electronically when that is a customary means of communication with its employees. As a result, the NLRB modified its standard notice posting provision – which requires posting of remedial notices in all places where notices to employees are customarily posted – to expressly include electronic communications. ***J&R Flooring, Inc.,*** *356 NLRB No. 9 (October 22, 2010).*

Factual Background

Section 10(c) of the National Labor Relations Act authorizes the NLRB to issue an order requiring an employer that has engaged in an unfair labor practice to "take such affirmative action . . . as will effectuate the policies of th[e] Act." As a result, employers (and unions) that have been found to have violated the Act must post a notice informing employees of their rights under the Act, the violations found by the NLRB, the employer's promise to avoid such unlawful conduct in the future, and the actions to be taken by the employer to correct the violations.

The Board's standard notice posting provision requires employers to post a remedial notice for a period of 60 days "in conspicuous places including all places where notices to employees are customarily posted." Traditionally, this requires employers to post paper copies of the notice at fixed locations (*i.e.*, on bulletin boards and at time clocks and entrances).

The primary issue before the NLRB in this case was whether Board-ordered remedial notices should be posted electronically. Given the increasing reliance on electronic communication in the workplace, the General Counsel argued that the Board should amend its standard. The employer, on the other hand, argued that electronic posting of remedial notices should be required only in cases involving egregious unfair labor practices or repeat offenders.

Legal Analysis

In a 3-1 decision, the NLRB held that employers which have engaged in unfair labor practices may be required to distribute remedial notices electronically. In reaching this decision, the Board noted that the "ubiquity of paper notices and wall mounted bulletin boards . . . has gone the way of the telephone message pad and the interoffice envelope." Although these traditional forms of communication still exist, the Board found, email, postings on internal and external websites, and other electronic communication tools have now become an employer's primary means of communicating a uniform message to its employees.

The one caveat is that electronic distribution is only required where an employer customarily uses email or any other electronic means to communicate with employees.

As result of its holding, the NLRB modified its standard provision to include the following: "In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means."

Practical Impact

According to Tom Davis, a shareholder in the firm's Nashville office, "The Board's decision to require electronic posting of notices illustrates the new direction of the NLRB towards more union-friendly decisions. This ruling may even be a precursor to how the Board will decide another case involving electronic communication. In the *Register-Guard* case, the Board upheld an employer's policy prohibiting the use of the company's intranet and email systems for non-business purposes, including union solicitation. If this decision is reversed, the Board is likely to establish a broader right of access to a company's electronic equipment for employees seeking to campaign for (or against) a union. Employers should stay tuned and be prepared to amend their policies accordingly." ■

"FACEBOOK"

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learned of the comments it fired Souza, stating that the postings violated the company's Internet policies.

The NLRB investigated the situation and determined that the Facebook postings constituted "protected concerted activity" and that the employer's Internet policy was overly restrictive to the extent that it precluded employees from making disparaging remarks when discussing the company or its supervisors. A complaint was filed, alleging both that the company's actions violated Section 7 and that its Internet policy was unlawful.

Both union and non-union employers should pay attention to further developments in this area, particularly because the NLRB's allegation regarding the company's Internet policy is one that could be brought against virtually any employer on the basis of a written policy, and even in the absence of a specific factual instance of violation of such policy. Under the NLRA, employees have the right to engage in protected concerted activity, which can include discussions, meetings, or even conduct by a single employee who is attempting to initiate group action. While employees do not have unlimited discretion in choosing their method of activity – they cannot, for example, be "unduly and disproportionately disruptive" – employment policies should be drafted to avoid precluding employees' ability to act in concert, or to act to effect positive change in the terms and conditions of the workplace. According to the NLRB, protected activity might even include an online discussion about the personal character of a particular supervisor.

Employers will want to closely watch for the ruling following the January 25, 2011 hearing on this matter. *The Employment Law Authority* will you keep you up-to-date on any new developments.

EMPLOYER'S "EXTRAORDINARY" EFFORTS TO RESOLVE COMPLAINT PAYS OFF

Court Rejects Worker's Discrimination and Retaliation Claims

A federal appellate court recently upheld a trial judge's decision to dismiss an employee's claims of discrimination, hostile work environment harassment, and retaliation. The Third Circuit Court of Appeals reached this conclusion based primarily upon the "extraordinary lengths" to which the employer went to investigate the employee's complaints. ***Wood v. University of Pittsburgh,*** *No. 09-4469, Third Circuit Court of Appeals (September 23, 2010).*

Factual Background

Deborah Wood was employed as a systems analyst by the University of Pittsburgh and assigned to a project in the school's Biostatistical Center. Wood received a retention letter that informed her that the continuation of her position was contingent on the renewal of non-university grants that funded the project.

In 2007, approximately 90 percent of the project's funding was provided by grants from the National Institute of Health (NIH). In the spring of that year, the NIH announced that it would reduce funding of the project by over two million dollars. As a result, Wood was informed that she was one of 17 individuals selected for discharge as a part of a reduction in force.

On the day of her discharge, Wood served the University with a complaint alleging gender and race discrimination. Her claims were based upon incidents about which she had complained during the years preceding the reduction in force.

In 2005, Wood had become convinced that someone was tampering with her office computer, and reported her belief that the computer had been remotely accessed by an unknown user. She also claimed that someone was entering her office when she was not present. Her supervisor responded to these concerns by installing a lock on the office door, by installing software to monitor her computer, and by asking the University's computer services department to review activity related to the computer. After months of investigation, including over 150 hours spent by the supervisor himself, no evidence of improper tampering was found.

Despite these efforts, Wood contacted the University's HR department to express her dissatisfaction. The HR department then initiated its own investigation through the summer of 2006, providing a new computer to Wood, reformatting her hard drive, and reviewing additional event logs.

In November 2006, Wood alleged that someone had broken into her locked office. This led to an investigation by campus police, along with additional forensic work by the computer department. Again no evidence of inappropriate or unlawful activity was found. Wood again considered these efforts to be "inadequate," and filed a charge of gender discrimination with the Equal Employment Opportunity Commission (EEOC) in December 2006.

In 2007, after learning of the NIH decrease in funding and the impending layoffs, the project director offered Wood an opportunity to interview for a new position in another section of the same project group. Wood declined the offer and later was discharged.

Legal Analysis

The trial judge dismissed Wood's race bias claim prior to discovery because Wood had failed to assert that specific claim in her EEOC charge. After a period of discovery, the court also granted summary judgment in favor of the University on the remaining claims, and Wood appealed that decision.

The Third Circuit Court of Appeals upheld the dismissal of Wood's gender discrimination claim based on her failure to demonstrate that the University had retained similarly situated male employees (which would have raised an inference of discriminatory animus).

The court also dismissed her retaliation claim after finding that the University proffered evidence of a legitimate non-discriminatory reason for Wood's discharge – undisputed evidence that the project's budget was reduced when NIH funding was withdrawn, thereby necessitating layoffs.

Most interesting was the court's response to Wood's hostile environment claim, in which she argued that she suffered persistent harassment which "must have been" the result of gender bias. Upholding the dismissal of the claim, the court noted that the University "went to extraordinary lengths" to investigate Wood's allegations. In fact, the court found no evidence to suggest that any aspect of the investigation was influenced by gender bias.

Practical Impact

According to Maria Greco Danaher, a shareholder in the firm's Pittsburgh office: "The fact that the court was able to review and remark upon that evidence in such detail indicates that the University thoroughly investigated the incidents reported by Wood and fully documented its efforts. Employers must recognize that proper investigations and documentation are the cornerstones of an effective defense against claims of unlawful discrimination and hostile environment." ■

Paycheck Fairness Act Stalls In Congress

By a narrow margin, the Paycheck Fairness Act was stopped from reaching the 60 votes needed to invoke cloture and advance the bill to the Senate floor for debate. As written, the bill would impose unlimited punitive and compensatory damages for Equal Pay Act violations, make it easier to institute class action lawsuits, and eliminate critical employer affirmative defenses.

Conservative Democratic Sen. Ben Nelson (D-Neb.) joined 40 Republicans to vote against proceeding with the bill, while 56 Democratic Senators and two Independent Senators voted to consider the measure. Thus, the bill fell two votes short. Sen. Lisa Murkowski (R-Alaska), who was considered a "swing vote" on the bill, ended up not voting.

This means that unless the bill is modified to attract additional votes before the lame duck session concludes, the bill will not become law.