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The Employment Law
AUTHORITY

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November/December 2011

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HR Director's Alleged Comments Prove Costly

Court Reinstates Worker's Discrimination And Retaliation Claims

A federal appellate court recently held that remarks allegedly made by a law firm's human resources director could be "direct evidence" of pregnancy discrimination and a violation of the Family and Medical Leave Act (FMLA). According to the Seventh Circuit Court of Appeals, such evidence falls outside of the "hearsay" objection that might otherwise keep it from being presented to a jury. ***Makowski v. SmithAmundsen LLC,*** *No. 10-3330, Seventh Circuit Court of Appeals (November 9, 2011).*

Factual Background

Lisa Makowski was hired as a marketing director by Chicago-based law firm SmithAmundsen LLC in January 2005. She reported to Glen Amundsen, chair of the firm's executive committee and Michael DeLargey, chief operating officer. During her employment, Makowski received annual salary increases and discretionary bonuses based on her performance.

In the summer of 2007, Makowski informed the firm's management that she was pregnant. She requested, and was granted, leave under the FMLA. Between November 5 and November 25, Makowski worked from home with the firm's permission, as she had been placed on bed rest by her obstetrician. She began her FMLA leave on November 26, and gave birth on December 2.

In January 2008, the firm's Executive Committee conducted its annual retreat, at which time it assessed the overall structure of the firm to determine

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Ogletree Deakins Named "Law Firm of the Year"

U.S. News Recognizes Firm For Labor & Employment Litigation

Ogletree Deakins has been named the first "Law Firm of the Year" in Litigation – Labor & Employment in the 2011-2012 *U.S. News – Best Lawyers* rankings. Only one law firm in each of the nationally ranked legal practice areas received this recognition.

Under the specific categories Employment Law – Management, Labor Law – Management, and Litigation – Labor & Employment, Ogletree Deakins earned the most first-tier rankings in the United States and a national first-tier ranking. Ogletree Deakins received these distinctions based on a combination of high performance on surveys of clients about the firm's work, the high regard that lawyers in other firms in the same practice areas have for the firm, and survey information provided by the firm to U.S. News and Best Lawyers.

"I would like to thank our clients for recognizing us in this way," said Kim Ebert, Managing Shareholder of Ogletree Deakins. "It has been an exceptionally good year for the firm. Our model of providing excellent value and premier client service continues to be attractive not only to clients, but also to laterals who have contributed to the significant growth we have experienced across our national platform."

In addition, 141 Ogletree Deakins attorneys across 32 of the firm's offices have been named as "Best Lawyers." Impressively, 16 of these Ogletree Deakins lawyers have been named Best Lawyers' 2012 "Lawyers of the Year" in their market or practice area. ■

HIGH SCHOOL DIPLOMA REQUIREMENT MAY VIOLATE THE ADA

EEOC Informal Discussion Letter Reminds Employers To Review Qualification Standards

On December 2, 2011, the Equal Employment Opportunity Commission (EEOC) posted an important "informal discussion letter" on its website. The letter was in response to an issue involving individuals who are unable to earn a high school diploma because of certain learning disabilities and who therefore are ineligible for jobs that require a high school education. According to the EEOC, a qualification standard – including a high school diploma requirement – that screens out individuals on the basis of a disability must be job related and consistent with business necessity, or the standard may violate the Americans with Disabilities Act (ADA).

A qualification standard is "job related and consistent with business necessity" if it accurately measures an applicant's ability to perform the fundamental responsibilities of the job in question. However, that measurement is simply the first of two steps. Once it is determined that the qualification standard being used to screen out applicants is job-related and consistent with business necessity, the employer also must show that an individual who does not meet that standard is unable to perform the essential functions of the job, even with an accommodation.

According to Liz Washko, a shareholder in Ogletree Deakins' Nashville office: "Employers may use a high school diploma or college degree as a screening requirement to ensure a certain caliber of applicant, even where those achievements may not be critical or even related to the job at issue. The EEOC's 'informal discussion letter' on the topic of high school diplomas does not do much more than reiterate the ADA's requirements for qualification standards and apply that to the high school diploma criteria."

Washko continued: "The letter does, however, highlight how that ADA criteria may apply in the 'real' world and as to a criteria that many take for granted is an acceptable minimum level of achievement. It is difficult for an employer to determine whether an applicant has failed to obtain a high school diploma due to a learning or other disability or due to other factors, such as lack of initiative, failure to persevere, aversion to hard work, etc. This letter serves as a reminder to employers to periodically review their job descriptions, postings and criteria to make sure they are: (1) accurately and completely defining the essential functions of their various jobs; (2) properly identifying the minimum and desired qualifications and criteria; and (3) ensuring that the qualifications and criteria are, in fact, related to the essential functions of the job." ■

Ogletree Deakins

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EEOC APPROVES NEW AGE BIAS REGULATION

Federal Agency Also Experiences Record-Breaking Year

The U.S. Equal Employment Opportunity Commission (EEOC) recently approved a draft final regulation that clarifies the Age Discrimination in Employment Act's (ADEA) "reasonable factors other than age" test. The new standard will make it easier for workers to establish disparate impact claims and will put a heavier burden on employers in defending such claims.

The new regulation eliminates the "business necessity test," which was formerly used to determine the "reasonable factors other than age" (RFOA) standard. The federal agency voted 3 to 2 to eliminate the old test to bring the ADEA rules in line with two recent U.S. Supreme Court decisions, *Smith v. City of Jackson* (2005) and *Meacham v. Knolls Atomic Power Laboratory* (2008).

In *Smith*, the Supreme Court held that the ADEA permits older workers to bring disparate impact claims but failed to explain what the RFOA test requires. In *Meacham*, the justices held that the business necessity test does not apply to an RFOA determination. Commissioner Constance S. Barker, who voted against the rule, commented that "the regulations fabricate a new standard for the RFOA defense without foundation in the ADEA."

In a separate development, the EEOC recently released its annual performance and accountability report. According to the report, the EEOC experienced a record-breaking year, with $365 million in recoveries and a new high of 99,947 private sector discrimination charges. The federal agency also achieved a 10 percent reduction in its backlog. In addition, the EEOC's private sector mediation program obtained over $170 million in benefits for discrimination claimants during fiscal year 2011. ■

Ogletree Deakins State Office Round-Up

ARIZONA

The U.S. Supreme Court recently agreed to review Arizona's restrictive immigration law that has prompted similar legislation in other states. The justices will decide whether federal law precludes Arizona's efforts at "cooperative law enforcement" and impliedly preempts four provisions of SB 1070. The ruling is expected next summer. *Arizona v. United States*, No. 11-182 (cert. granted December 12, 2011).

CALIFORNIA*

Employers that willfully misclassify workers as independent contractors instead of employees may face steep fines under a new law that takes effect on January 1, 2012. SB 459, which was signed into law by Governor Jerry Brown on October 9, provides for civil penalties of $5,000 to $25,000 per violation.

COLORADO

On November 1, Denver voters rejected a measure to mandate employer-provided sick leave. The measure would have required employers to provide one hour of paid sick leave for every 30 hours worked by an employee – with a cap of 72 hours in a calendar year. A coalition of small businesses, restaurant owners and employer groups worked together to defeat the measure.

FLORIDA*

The Eleventh Circuit Court of Appeals recently held that a transgendered government employee was entitled to protection under the Equal Protection Clause of the U.S. Constitution. The court held that the worker could not be fired because of his or her gender non-conformity unless the employer could demonstrate a "sufficiently important governmental purpose." *Glenn v. Brumby*, Nos. 10-14833 and 10-15015 (December 6, 2011).

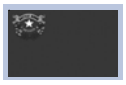
ILLINOIS*

The Illinois Supreme Court recently ruled that courts cannot use rigid, structured tests to determine whether restrictive covenants are enforceable. Specifically, the justices held that while courts must continue to evaluate whether an employer has a legitimate business interest that justifies the use of a restrictive covenant, courts should not use isolated, inflexible factors in making this assessment. *Reliable Fire Equipment Company v. Arredondo*, No. 111871 (December 1, 2011).

MASSACHUSETTS*

Governor Deval Patrick recently signed a transgender anti-discrimination bill making "gender identity" a protected category under Massachusetts non-discrimination statutes. The new law also will add gender identity as a protected category to several laws intended to protect people from hate crimes and harassment.

NEVADA*



A federal judge in Nevada recently held that a black security officer may proceed with a lawsuit against his former employer for race discrimination. The judge held that the plaintiff was similarly situated to a white security officer who allegedly was not terminated for similar conduct. *Johnson v. Western Hotel & Casino*, No. 10-cv-01590 (October 19, 2011).

NEW JERSEY*

The New Jersey Department of Labor and Workforce Development has issued a new six-page notice/poster that employers must: 1) distribute to all employees; and 2) post conspicuously in accessible locations. The new notice/poster is in accordance with the requirements of a 2009 statute, P.L. 2009, c. 194, relating to the maintenance and reporting of employment records.

OHIO*

Effective January 1, 2012, Ohio's minimum wage rate will increase by 30 cents per hour, from $7.40 to $7.70. Tipped employees, who are paid one-half the minimum wage, will see an increase from $3.70 to $3.85 per hour, excluding tips. Ohio employers with annual gross receipts exceeding $283,000 in 2011 must pay the Ohio minimum wage.

OREGON*

Effective January 1, 2012, employers that issue dishonored checks for the payment of wages will be subject to statutory damages and reasonable attorneys' fees. HR 2039 empowers the state Bureau of Labor and Industries to seek the same civil penalties available in a private lawsuit, with the recovered money payable directly to the wronged employee.

SOUTH CAROLINA*

Employers are reminded of several key changes to the South Carolina Illegal Immigration and Reform Act (SCIIRA), which will take effect on January 1, 2012. These changes include a state-wide mandate that all employers use E-Verify to confirm the employment eligibility of all newly-hired employees, as well as a significant revision to the penalty scheme for non-compliance with SCIIRA.

TEXAS

The Fifth Circuit Court of Appeals has rejected race bias claims brought by a district attorney's office employee who is black and speaks with a British accent. The worker was fired for sending an email in violation of the chain of command policy and for her angry outburst when confronted with the email. The court reasoned that the worker had not shown that discrimination was a plausible reason for her termination. *Dixon v. Comal County*, No. 11-50259 (November 1, 2011).

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

NLRB VOTES TO CHANGE REPRESENTATION ELECTION PROCEEDINGS

*by Bernard P. Jeweler and Harold P. Coxson, Jr.**

On November 30, 2011, the National Labor Relations Board (NLRB) voted 2-1 in favor of revising representation election proceedings by adopting a number of the changes included in its proposed rule, which was published in the June 22nd issue of the *Federal Register*. The adopted rule revises the process for union representation elections, shortening the time from the filing of the election petition until the actual vote is held and thereby making it easier for unions to win elections and more difficult for employers to communicate with employees prior to the vote.

These changes follow submissions to the Board of over 65,000 written comments on the proposed rule and public input gathered at a two-day hearing in July. The Board currently has three members, Chairman Mark Gaston Pearce (D) and Members Brian Hayes (R) and Craig Becker (D), who is serving on a recess appointment that will end on December 31. According to an explanation posted on the agency's website, the Board was spurred to vote on the proposed rule now "in light of the possibility that the Board will lose a quorum at the end of the current congressional session."

The vote was on a "scaled back" final rule, not the entire rule published in the *Federal Register*, which "will remain under consideration by the Board for possible future action." Chairman Pearce and Member Becker voted in favor of the new rule, Member Hayes voted against its adoption.

What's "In" For Now

As a result of the vote, the NLRB resolved to prepare a final rule to be published in the *Federal Register* that makes the following key changes:

- Elimination of current procedures providing for pre-election appeals to the Board from the actions of the Regional Director on the election petition and providing instead only for a single, discretionary appeal of pre-election and post-election issues after the votes are cast. An appeal to the Board prior to the election is expressly limited to issues that would otherwise escape Board review entirely if not raised at that time.
- Elimination of current requirements that a vote cannot be held sooner than 25 days after the Board's Regional Director issues a Direction of Election. As a practical matter, this means that elections will be held sooner after the Direction of Election than was previously the case, although the precise length of time may vary in each case.
- Clarification that a pre-election hearing is to determine only whether a question concerning representation exists and that the hearing officer has authority to limit evidence taken at the hearing that does not have relevance to a genuine issue of fact material to that issue. This means that many issues of individual voter eligibility (as opposed to voting unit composition) may be deferred to the post-election procedures rather than litigated prior to the vote. The right of parties to file a post-hearing brief to the Regional Director, previously guaranteed under the Board's rules, is now made discretionary with the hearing officer.

What's "Out" For Now

Some of the most onerous and unfair provisions of the original proposed rule, which produced a hail of criticism from the business community, are tabled for now. These include:

- The requirement that a hearing be held within seven days of the filing of a union's representation petition.
- The requirement that the union's petition be filed electronically rather than by hand or regular mail.
- The requirement that the employer prepare and file a comprehensive "statement of position" on the union's election petition no later than the date of the hearing, together with the requirement that any issues omitted by the employer from its statement are waived by the employer and may not be raised later.
- The requirement that unions be given employees' email addresses and telephone numbers prior to the election. Currently, the union receives a list of eligible voters from the employer prior to the election containing the employees' full name and residence address but not their email address and telephone number.
- The requirement that the voter eligibility list be given to the union within two work days of the Direction of Election instead of the current rule allowing seven work days.

Member Hayes's Position

Member Hayes, in voting against the rule, charged that the Board's Democratic majority improperly rushed to issue a final rule before Member Becker's recess appointment expires and without adequate consideration or discussion of the over 65,000 written comments that the Board had received. Member Hayes repeated his view expressed in July that the rule was an unnecessary change to the Board's current procedures and allowed too little time between the filing of an election petition and the holding of the vote to permit adequate discussion of the issues of unionization between management and the affected employees.

Member Hayes also complained that by deferring voter eligibility issues to post-election procedures rather than resolving them in the pre-election hearing the Board was introducing too much uncertainty into the election process regarding who could vote and who might be considered ineligible, including persons whose supervisory status is unclear. Member Hayes also expressed the view that the Board should not vote to change existing procedures without an affirmative vote of at least three Board members and since he was voting against the rule the result was that the statutorily created five-member Board was changing key procedures affecting its operations with just two votes in favor of passage.

What Does This Mean?

Even though the Board has adopted a rule that is less onerous to employers

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* Bernard Jeweler and Hal Coxson are shareholders in Ogletree Deakins' Washington, D.C. office, where they represent management in labor and employment related matters.

OGLETREE DEAKINS NAMES NEW DIVERSITY HEAD

Michelle Wimes To Focus On Professional Development As Well

Ogletree Deakins welcomes Michelle Wimes as Director of Professional Development and Inclusion. In this role, Wimes will focus on and lead the recruitment, orientation, retention and advancement of a diverse group of attorneys across the firm's national platform of 40 offices, as well as provide diversity and compliance consulting to the firm's clients. Wimes also will lead the training of the firm's attorneys and staff with regard to performance management practices and professional competencies. Additionally, she will maintain and expand relationships with national, local and specialized diversity organizations, bar associations, and law school affinity groups. Wimes, who will be based in Ogletree Deakins' Kansas City office, joins the firm from Shook, Hardy & Bacon, L.L.P. where she was the Director of Strategic Diversity Initiatives.

"Diversity is a core value of the firm and we have a long and proud tradition among our lawyers and staff," said Kim Ebert, Ogletree Deakins' Managing Shareholder. "In fact, earlier this year Ogletree Deakins was named a Top 100 Law Firm for Diversity by *MultiCultural Law* magazine. Michelle will drive professional development and inclusion by ensuring we are providing best-in-class service and knowledge to our clients while also growing the leaders of tomorrow." ■

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than its original proposal, which would have reduced the time from filing of the election petition to the holding of the vote to as little as 10-21 days, the new rule, by eliminating pre-election appeals of Regional Director rulings, still substantially shortens the period from filing of the petition to the date of election from the current Board target of 42 days. Elections will be held quicker than before, the precise period being determined by the circumstances in each case.

By not adopting for the moment the absolute requirement that pre-election hearings be held within seven days of the petition and that the employer file a statement of position on or before that date in which it must raise all issues or waive them, the Board has avoided some of the most scathing criticism leveled by the business community at the original rule. However, this respite may be only temporary. There is no guarantee that the Board will not adopt these portions of its proposed rule in the months to come, depending on the number and political composition of Board members at that time.

What's Next

Following the vote, the NLRB will proceed to draft a final rule limited to those proposals, to be issued prior to the expiration of Member Becker's recess appointment, and will "defer the remainder of the proposed rule for further consideration." This is, in effect, a "strategic retreat" from the most onerous provisions of the original proposal, but is by no means a "final surrender." In fact, whenever the Board restores its quorum, the majority likely will reinstitute its earlier provisions.

In the meantime, business groups will continue to attempt to block enactment of the rule by, among other strategies, supporting passage of the Workforce Democracy and Fairness Act (H.R. 3094). That legislation, which passed the House, is designed to negate the original provisions of the NLRB's proposed rule revising the process for representation elections and to overturn the "mini-union" bargaining unit rules from the Board's *Specialty Healthcare* decision. The business community also may ask Congress to deny funding to enforce both rules and challenge the representation election rules in court.

Ogletree Deakins will be sponsoring a webinar on January 17, 2012 to discuss what we can expect from the Board next year. For more information or to register for this informative webinar, visit www.ogletreedeakins.com or contact Moira Cue at (310) 217-8191 (ext. 221). ■

Ogletree Deakins News

New to the firm. Several lawyers recently have joined the firm. They include: James Brennan, Janelle Jenkins and Janne McKamey (Atlanta); Diana Nehro (Boston); Matthew Cooper, Heidi Doescher and Elisa Chen (Denver); Shannon Metz (Greenville); Brendan Joy (Los Angeles); Ashlee Bekish, Bruce Douglas and Chris Heffelbower (Minneapolis); Ryan Warden (Morristown); Louis Evan Van Gorder (Philadelphia); Mark Kisicki and Thomas Stanek (Phoenix); Daniel Boyer (Portland); David Schenberg, Kirsten Staples and Kalin Walker (St. Louis); Becki Graham and Nyoki Sacramento (San Francisco).

Congratulations to . . . Brian McDermott (Indianapolis), who was named the 2011 Samuel C. Schlosser Indiana Chamber Volunteer of the Year; Ron Chapman, Jr. (Dallas), who was named Appellate Lawyer of the Week by *Texas Lawyer*; Jessica Patrick (Nashville), who was selected as a member of the Nashville Emerging Leaders' Class of 2012; Stephen Benjamin (Columbia), who was chosen to receive an honorary doctorate degree from Francis Marion University; and Mark Schmidtke (Chicago), who serves on the Board of Directors for the Voice of the Defense Bar.

Firm takes pro-business stance. Ogletree Deakins has taken the lead in defending the interests of employers by challenging the NLRB's rule requiring employers to post a controversial notice for employees. The lawsuit has been brought on the behalf of the U.S. Chamber of Commerce and the South Carolina Chamber of Commerce. The posting rule was scheduled to take effect on November 14, 2011; however, the Board announced on October 5 that the effective date would be pushed back to January 31, 2012. For a detailed article on the new posting requirement, see the last issue of *The Employment Law Authority* or visit the firm's website at www.ogletreedeakins.com.

H-1B Cap Reached

The U.S. Citizenship and Immigration Services (USCIS) announced on November 22, 2011 that it had received enough H-1B cap-subject petitions to reach the annual 65,000 "regular cap" limit and that it would reject petitions filed thereafter. USCIS exhausted the 20,000 H-1Bs reserved for foreign nationals with U.S.-earned advanced degrees on October 19. The H-1B1 category is still available for nationals of Chile and Singapore and the numerical limit on the E-3 specialty occupation category for citizens of the Commonwealth of Australia has not yet been depleted.

USCIS will continue to process certain H-1B petitions already counted towards the cap, including requests to extend current H-1B validity and change an H-1B worker's employer or terms of employment. Otherwise, USCIS will accept cap-subject H-1B petitions for FY 2013 on April 2, 2012 for employment with a start date of October 1, 2012 or later. Employers with petitions that were not accepted should explore alternative options with their Ogletree Deakins attorney.

"PREGNANCY BIAS"

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whether staffing changes were necessary. During the retreat, the Executive Committee decided to terminate Makowski and to move another individual into the leadership position within the marketing department. After that meeting, the Committee informed the firm's human resources director, Molly O'Gara, that Makowski did not "fit into our culture," and asked O'Gara to consult with outside counsel to discuss the implementation of Makowski's termination.

On February 4, 2008, while Makowski was still on maternity leave, Amundsen and DeLargy terminated her employment over the telephone. In that conversation, Makowski was told that her position was being eliminated as part of an organizational restructuring.

Later that day, Makowski came into the office to pick up her personal belongings. According to Makowski, as she was leaving the office she was met by O'Gara, who told her that she "was let go because of the fact that [Makowski] was pregnant and . . . took medical leave." O'Gara also allegedly stated that the same thing had happened to several other women employees in the past and that Makowski should speak to a lawyer about a possible class action lawsuit against the firm.

Makowski filed a lawsuit on December 2, 2008, alleging violations of both the Pregnancy Discrimination Act and the FMLA, and cited O'Gara's alleged remarks as direct evidence of discrimination. The firm moved for summary judgment, which was granted based on the finding that because O'Gara had not been directly involved in the decision to terminate Makowski her statements concerning the termination were inadmissible hearsay. Without those statements, the judge held, Makowski lacked evidence of the connection between her termination and any discriminatory acts by the firm. Makowski asked the Seventh Circuit Court of Appeals to reinstate her case.

Legal Analysis

The Seventh Circuit reversed the judge's decision. The court found that because O'Gara's statements concerned a matter within the scope of her duties as HR director, they fell within an exception to the hearsay rule. Essentially, under that exception, an "agent" acting within the scope of his or her employment with the company speaks on behalf of the company and, therefore, his or her statement is actually a party admission that can be used to support a claimant's case.

In this case, O'Gara's alleged comments to Makowski fit within the scope of her duties as an HR director who was involved in the firm's hirings and firings. Furthermore, the court pointed out that O'Gara's discussions with outside counsel at the request of the Executive Committee could actually support an argument that O'Gara was directly involved in the final decision to fire Makowski, since the Committee waited for the counsel's response before implementing the termination.

Assuming O'Gara's alleged statements may be used at trial, the Seventh Circuit held, a reasonable jury could find that they provide direct evidence that pregnancy was a motivating factor in Makowski's discharge. Likewise, the court found that O'Gara's comments provide the "necessary causal connection" between Makowski's protected activity (taking FMLA leave) and her termination. As a result, the Seventh Circuit reinstated Makowski's lawsuit.

Practical Impact

According to Richard Samson, a shareholder in Ogletree Deakins' Chicago office: "At first glance one might be tempted to conclude that this case can be narrowly viewed as a company falling victim to a 'rogue' HR director. However, the reality is quite different. The court acknowledged the key role of HR representatives in typical personnel decisions such as hiring and firing so that comments that might seem benign can still be binding on an employer. But as this case demonstrates, employers are best served presuming that even the most errant of statements from their HR department may be used against them. This case underscores the strategic need for training for managers, supervisors and HR personnel, especially with respect to having the difficult conversations needed for disciplinary and termination meetings."

Arthur Smith, also a shareholder in the firm's Chicago office, added: "The ruling directing that the statements made by the HR director be admitted into evidence is not an aberration; other courts facing similar circumstances have reached the same result. Although the case was remanded to the trial court, if the HR director admits to having made the critical statements the likely outcome will be a settlement to avoid trial. The importance of the use of 'talking points' for disciplinary and termination meetings cannot be overstressed. Any remarks outside of pre-established, pre-rehearsed talking points could be used – as in this case – to argue to the jury that the 'official' reason given for the adverse action was a pretext for discrimination." ■

WORKERS' EXPLICIT EMAILS, NOT AGE, LED TO DISCHARGE

Court Holds Stray Remarks Are Not Sufficient To Reinstate Case

A federal appellate court recently dismissed a lawsuit brought by a group of four workers over 50 who claimed that they were terminated in violation of the Age Discrimination in Employment Act (ADEA). The Third Circuit Court of Appeals held that the workers failed to rebut their employer's legitimate, non-discriminatory reason for their termination – sending sexually explicit emails in violation of company policy. ***Hodczak v. Latrobe Specialty Steel Company,*** *No. 11-1085, Third Circuit Court of Appeals (November 17, 2011).*

Factual Background

Douglas Hodczak, James Crossan, Thomas Magdic and Joseph Litvik were all hired by Latrobe Steel Company between 1969 and 1979. In 2006, Watermill Group and Hicks Holdings acquired the Pennsylvania company, and renamed it Latrobe Specialty Steel (LSS). All four men initially chose to retire but later accepted offers to work for LSS.

In October 2007, LSS discovered that Hodczak, Crossan, Magdic and Litvik, as well as two other employees, regularly exchanged emails containing sexually explicit photographs. The emails were found during the course of an investigation into a sexual harassment complaint brought against Magdic. The company's electronic communications policy expressly prohibits employees from sending such materials.

To determine the appropriate level of discipline for each employee, LSS considered the nature and volume of the emails exchanged, whether they were sent to individuals inside or outside the company, and whether they were sent to customers or vendors. During this process, all six employees were suspended.

Approximately one week after the suspensions took effect, LSS terminated Hodczak, Crossan, Magdic and Litvik. The two other employees were not discharged. At the time they were fired, all four men were in their late fifties or early sixties.

Hodczak, Crossan, Magdic and Litvik sued their former employer under the ADEA, alleging that they were discriminated against because of their age. The trial judge granted summary judgment in favor of the company. The judge held that the workers failed to prove that "but for" their age, LSS would not have terminated their employment. The workers appealed this ruling to the Third Circuit Court of Appeals.

Legal Analysis

To establish a *prima facie* case of discrimination under the ADEA the workers must prove that: 1) they are members of a protected class; 2) they suffered an adverse employment action; 3) they were qualified to hold the positions; and 4) they were replaced by significantly younger employees.

Even assuming that the workers established a *prima facie* case of discrimination, the Third Circuit held, they could not rebut the employer's legitimate, non-discriminatory reason for terminating their employment (*i.e.*, violating the electronic communications policy). The workers alleged that there was a "corporate culture of age bias." Specifically, they referenced discriminatory remarks by the company's chief executive officer, such as comments that Magdic looked like he was "ready to retire" because he had "gray hair and [was] fat." The court found, however, that the alleged comments were far removed from the decision to discharge the four workers and completely unrelated to the investigation regarding their violation of company policy.

Likewise, the Third Circuit rejected the workers' argument that LSS treated younger, similarly situated employees more leniently for the same offense. According to the court, the three younger employees who were identified as comparators were not supervisors and there was no evidence that they had sent sexually explicit emails using work computers.

Finally, the court ruled that the mere fact that the electronic communications policy was not in effect when some of the offending emails were sent is irrelevant. The court wrote: "[The workers] cannot seriously contend that they thought it was acceptable to send sexually explicit emails simply because there was no policy expressly prohibiting it."

Thus, the Third Circuit upheld the trial judge's decision to dismiss the workers' ADEA suit.

Practical Impact

According to Jay Glunt, a shareholder in Ogletree Deakins' Pittsburgh office: "The Third Circuit's opinion in this case serves as a reminder about two things that good employers do well. The first is to vigilantly police your workforce and facilities, particularly at the supervisor level, to minimize the use of potentially inflammatory language in written and spoken communication. Although a court may find that ageist or sexist workplace language is properly categorized as stray remarks – as was the case in this opinion – the use of such language might be the triggering event giving rise to an expensive lawsuit."

Glunt added: "The second reminder for employers is to uniformly discipline employees for violation of computer use policies, as this company did. We see this in every imaginable workplace adversarial setting, from labor arbitrations to unemployment compensation hearings to federal court lawsuits. If shopping online, sending sexually explicit emails, or using an online chat service to make romantic overtures is unacceptable conduct, then it should be unacceptable across the board, with no exceptions. Treating any portion of your workforce more favorably than another on this issue will cause significant problems in litigation." ■

"The second reminder ... is to uniformly discipline employees for violation of computer use policies."