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The Employment Law AUTHORITY

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Court Reinstates Worker's FMLA/ADA Claims

Rejects Coverage And Eligibility Arguments Posed By Employer

A federal appellate court recently held that an employee with congestive heart failure could sue his former employer under both the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). This case reminds employers not to rush to judgment when evaluating whether an employee can return to work following a leave of absence. ***Demyanovich v. Cadon Plating & Coatings, LLC,*** *No. 13-1015, Sixth Circuit Court of Appeals (March 28, 2014).*

Factual Background

Alan Demyanovich was employed by Cadon Plating & Coatings, LLC as a machine operator since 1989. He was diagnosed with dilated cardiomyopathy and congestive heart failure in 1998. He was placed on FMLA leave for approximately 11 weeks in early 1999. His doctor cleared him to return to work, but restricted him from lifting more than 50 pounds and working more than 40 hours per week.

Demyanovich continued to work for Cadon over the next 10 years, taking several FMLA leaves to cope with his health issues. His heart condition worsened in November 2009 and Demyanovich was placed on FMLA leave. He was released to return to work three weeks later with the same restrictions.

Demyanovich began experiencing

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Chambers USA Rankings Recognize Firm

Names Ogletree Deakins Attorneys And Offices

Ogletree Deakins is pleased to announce that 79 of the firm's attorneys have been included in the 2014 edition of *Chambers USA*, an annual ranking of U.S.-based law firms and lawyers. The firm's offices in 20 states and the District of Columbia have also been included in the 2014 edition. *Chambers USA* ranks firms and individual lawyers in bands, with Band 1 being the highest, and the rankings are developed based on research that includes thousands of in-depth interviews with clients and peers.

In the 2014 edition, 10 Ogletree Deakins attorneys and the firm's offices in eight states earned Band 1 rankings. The attorneys include: Thomas Barnard, Thomas Farr, Michael Fox, L. Gray Geddie, C. Matthew Keen, Jeffrey Londa, Elizabeth Partlow, David Powell, Jr., Charles Speth II, and Fred Suggs, Jr. Offices in the following states received a Band 1 designation: Arizona, Georgia, Indiana, Missouri, New Jersey, North Carolina, South Carolina, and Texas.

Firm managing shareholder Kim Ebert and Phoenix shareholder Joseph Clees received the distinction of Eminent Practitioner. This is the first year that *Chambers USA* has included this category in its annual ranking of lawyers.

The *Chambers USA* research team determines rankings based on select criteria including technical legal ability, professional conduct, client service, commercial astuteness, diligence, commitment, and other qualities most valued by clients.

Ebert noted, "Our ranking in the 2014 edition of *Chambers USA* demonstrates our ongoing commitment to provide clients with the best service in the legal industry." ■

DHS PROPOSAL AIMED AT ATTRACTING HIGHLY-SKILLED IMMIGRANTS

Would Extend Employment Authorization To Spouses Of Certain H-1B Workers

On May 6, 2014, the U.S. Department of Homeland Security (DHS) announced the publication of two proposed rules that reflect the Obama Administration's "continuing commitment to attract and retain highly skilled immigrants." The first regulation would extend employment authorization to spouses of certain H-1B workers. The second rule would ease restrictions on employment authorization for certain groups of highly-skilled immigrant workers and expand visa eligibility criteria for others.

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DHS proposed similar initiatives in January 2012 as part of its continuing effort to retain highly-skilled foreign nationals and attract new business investment to the United States. Additionally, last year, a Notice of Proposed Rulemaking (NPRM) was issued by DHS indicating its intention to pursue a comparable regulation to expand work authorization to certain categories of H-4 dependent spouses.

DHS Deputy Secretary Alejandro Mayorkas and Commerce Secretary Penny Pritzker stated that the proposed rules will further economic growth and assist the United States in remaining competitive by attracting and retaining highly-skilled, world-class talent to support U.S. businesses. Such actions were described as necessary to "ensure we do not cede the upper hand to other countries competing for the same talent."

Work Authorization for Spouses of H-1B Holders

This proposed rule would amend existing regulations to allow H-4 dependent spouses of certain principal H-1B workers to request employment authorization. Under current law, employment authorization is not extended to an H-4 spouse unless he or she is the derivative beneficiary of a pending adjustment of status application (the final step in the permanent residence process).

The proposed change would allow H-4 dependent spouses to request employment authorization at an earlier stage, provided the principal H-1B holder has started the process of seeking lawful permanent residence through employment. More specifically, the H-4 spouse would be eligible for work authorization if the H-1B worker has an approved Form I-140, Immigrant Petition for Alien Worker (the second stage in the permanent residence process following PERM approval) or has been granted an extension of his or her authorized period of stay under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), as amended. AC21 allows H-1B holders seeking lawful permanent residence to work and remain in the United States beyond the six-year limit.

Enhanced Opportunities for Certain Groups

The second proposed change would enhance opportunities for certain groups of highly-skilled foreign nationals "by removing obstacles to their remaining in the United States." The proposed rule would: (a) incorporate highly-skilled professionals from Chile and Singapore (H-1B1) and from Australia (E-3) within the classes of foreign nationals authorized for employment on the basis of their status with a specific employer; (b) allow H-1B1 and principal E-3 nonimmigrants to work without filing a separate application for employment authorization; and (c) make the "240-day rule" available to those with E-3, H-1B1, and CW-1 status.

The "240-day rule" allows foreign nationals in certain nonimmigrant categories, who have timely-filed extension of status requests, to continue working for the same employer for up to 240 days from the expiration of their authorized period of stay. Under current law, a petition to extend the status of E-3, H-1B1, or CW-1 workers must generally be filed well before the expiration of the initial authorized period of stay.

This proposed change would also reform the employment-based first preference (EB-1) "outstanding professor/researcher" category to allow DHS to accept a broader scope of evidence to establish that the beneficiary is internationally recognized as outstanding in a particular academic field. Under current regulations, petitioning employers are limited to six specific categories of acceptable evidence. Proposed changes would allow for "comparable evidence" beyond the specifically-articulated regulatory list.

Both NPRMs will soon be published in the *Federal Register* and the public may comment on the regulatory proposals. DHS will consider this feedback and make appropriate changes. The agency will then publish final rules in the *Federal Register* with the specific dates upon which the rules become effective. ■

Ogletree Deakins State Round-Up

ARIZONA

The NLRB recently held that a Yuma car salesman did not lose the protection of the National Labor Relations Act by launching into an obscene outburst at the business owner. As a result, the Board found that the employer unlawfully discharged him for engaging in protected concerted activity. *Plaza Auto Ctr., Inc.*, 360 NLRB No. 117 (May 28, 2014).

CALIFORNIA*

On July 1, 2014, the minimum wage in California will increase by one dollar to $9 per hour. The minimum wage will get another bump in January 2016, when it goes up to $10 per hour. Aside from complying with the minimum wage, employers must examine whether the increase will take them out of compliance in other areas of wage and hour law that are dependent upon the minimum wage.

CONNECTICUT*

The Connecticut Supreme Court found that a plumbing foreman was not entitled to compensation for the time he spent commuting to and from job sites and his home at the beginning and end of his workday, even though he used a company vehicle and carried his employer's tools. The court rejected the four-part test developed by a state agency for determining the compensability of travel time and instead applied the federal test. *Sarrazin v. Coastal, Inc.*, No. SC 18877 (April 29, 2014).

ILLINOIS*

The Illinois Supreme Court recently issued two opinions that together invalidated Illinois' eavesdropping statute. This grants employees nearly free reign over recording and distributing workplace conversations. Employers should examine and perhaps rethink their existing policies regarding unconsented workplace conversation recordings.

MINNESOTA*

On Mother's Day, Governor Mark Dayton signed into law the Women's Economic Security Act, which amends a number of Minnesota laws concerning pregnancy, nursing, parenting leave, and familial status. These laws will significantly impact employers and will require employers to revise their policies and alter their practices. Many of the provisions went into effect immediately, while others have later effective dates.

MISSOURI*

The Missouri Supreme Court recently expanded rights for injured workers by virtue of its ruling in *Templemire v. W&M Welding, Inc*. Under the court's new standard, a discharged employee alleging retaliation for filing a workers' compensation claim need only prove that the claim was a contributing factor, rather than the exclusive reason, for the discharge. *Templemire v. W&M Welding, Inc.*, No. SC 93132 (April 15, 2014).

NEW JERSEY*

The New Jersey Senate recently passed the Unfair Wage Recovery Act (S783). The bill would amend the New Jersey Law Against Discrimination to provide that an unlawful employment practice occurs each time an individual is affected by a past discriminatory compensation decision. The act brings New Jersey in conformity with the federal Lilly Ledbetter Fair Pay Act.

NEW YORK*

On April 15, New York City Mayor Bill de Blasio expanded protection under the New York City Human Rights Law to include unpaid interns. This amendment effectively overturns a prior decision holding that unpaid interns do not qualify as employees, and cannot file discrimination or harassment claims.

NORTH CAROLINA*

On May 12, the Fourth Circuit Court of Appeals rejected a SOX retaliation claim brought by a former executive against a North Carolina surveillance equipment manufacturer. The court held that the employee failed to show that his complaints about potentially illegal exports and insider trading to a federal agency contributed to his termination. *Feldman v. Law Enforcement Associates Corp.*, No. 13-1849 (May 12, 2014).

PENNSYLVANIA

The Superior Court of Pennsylvania held that a an employer could not enforce a noncompete agreement against a salesman who signed the document after beginning his employment. The court found that such agreements are generally unenforceable unless the employee has received new consideration. *Socko v. Mid-Atl. Sys. of CPA, Inc.*, No. 1223 MDA 2013 (May 13, 2014).

TENNESSEE

Governor Bill Haslem recently signed a highly significant employment litigation reform bill that will benefit employers. The bill places caps on the availability of non-monetary damages (pain, suffering, humiliation, embarrassment, etc.) that employees can seek under the Tennessee Human Rights Act, the Tennessee Disability Act, and the Tennessee Public Protection Act. The new law applies to all causes of action starting July 1, 2014.

TEXAS

On May 28, the Houston City Council approved an ordinance prohibiting employment discrimination in both private and public sectors on the basis of sexual orientation and gender identity. The measure was introduced by Mayor Annise Parker, and the city council passed it in an 11-6 vote. The new law is scheduled to take effect 30 days after the vote.

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

THE NLRB RULES AGAINST "NEGATIVES" AND "POSITIVES" IN HANDBOOK RULES

*by J. Hamilton Stewart, III and Matthew J. Kelley**

When was the last time you looked at your handbook policies and critically thought about whether they might violate the National Labor Relations Act (NLRA)? If you have not done so recently, now may be the time. Over the past several years, the National Labor Relations Board (NLRB) has cast a critical eye on any employer policy or rule that could be viewed as an overbroad attempt to "chill" an employee's Section 7 rights.

Section 7 of the NLRA allows employees, including non-union employees, to form or join a union or engage in other protected concerted activities. Section 7 also prohibits employers from interfering with, restraining, or coercing employees in the exercise of those rights, which include the right to discuss wages, hours, and conditions of employment. One recent case exemplifies the NLRB's extreme position in this area.

The Case

The April 1, 2014, NLRB ruling in *Hills and Dales General Hospital*, 360 NLRB No. 70, represents the Board's latest intrusion into the right to manage through employers' published rules and policies. The rules in question were a part of the hospital's Values and Standards of Behavior Policy, which was developed with employee input in response to poor employee morale, lack of cooperation between departments, and a culture of "back biting and back stabbing." The policy addressed a wide range of issues (e.g., customer service, respect, teamwork, attitude, and continuous improvement). The policy was *not* developed in response to any union activity.

The specific portions of the policy under Board scrutiny were:

Teamwork

11. We will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other.

16. We will represent Hills and Dales in the community in a positive and professional manner in every opportunity.

Attitude

21. We will not engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating.

As used at Hills and Dales, "team member" refers to anyone who worked at the hospital, from the CEO to entry level employees. The NLRB General Counsel attacked these rules as being overbroad restrictions on employees' Section 7 rights, in particular the right to engage in concerted activities for mutual aid and protection. Employers that infringe upon an employee's Section 7 rights, as outlined above, violate Section 8(a)(1) of the NLRA. Section 8(a)(1) makes it illegal for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

> *"Employee involvement, endorsement, consent, or acquiescence cannot validate an unlawful rule."*

The Board's Analysis

The NLRB's general tests and standards for evaluating whether an employer's acts or conduct violate Section 8(a)(1) are clearly stated in the opinion, but they allow for broad discretion and interpretation:

- Does the statement or conduct have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7?
- The employer's subjective motive for the action is irrelevant.

The Board added similar, but more specific standards for evaluating work rules: "If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if: (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights."

The rules at issue in this case were evaluated under the first prong of the Board's standard, whether "employees would *reasonably construe*" them to restrict Section 7 rights. Applying this standard, the Board found:

- Prohibitions against "negative comments" and "negativity" in paragraphs 11 and 21 were unlawful because these terms were overbroad and ambiguous.

The prohibition against negative comments about "team members" could, according to the Board, be reasonably interpreted as prohibiting complaints about managers or supervisors who were considered to be team members. The prohibition against "negativity" could be interpreted as prohibiting discussions or disagreements between employees related to protected Section 7 activities.

- The requirement that employees represent the hospital in a "positive and professional" manner in the community was likewise unlawful because it was overbroad and ambiguous.

The Board found this language could discourage employees from engaging in public protests of unfair labor practices or terms and conditions of employment. The Board distinguished "positive and professional" from "positive and ethical," a phrase relied upon by the administrative law judge to find the policy lawful and that the Board approved in the context of a conflicts of interest policy in *Tradesman International*, 338 NLRB 460 (2002).

Please see "HANDBOOK," on page 5

* J. Hamilton Stewart is a founding shareholder and Matthew Kelley is an associate in the Indianapolis office of Ogletree Deakins. Both attorneys represent management in labor and employment law related matters.

FIRM RECEIVES HIGH HONOR IN TEXAS

Named Litigation Department Of Year In Labor And Employment

Ogletree Deakins has been named the Litigation Department of the Year in the Labor and Employment category by *Texas Lawyer*. The firm will be honored for this award at an event in October.

In determining the winners in various categories, *Texas Lawyer* examined the biggest victories and notable cases that occurred in 2013. The award was open to any law firm in Texas or litigation group led by Texas attorneys. *Texas Lawyer* analyzed work that was handled in Texas, throughout the United States, or abroad.

One major result with a national impact recognized by *Texas Lawyer* is the *D.R. Horton v. NLRB* case, led by Ron Chapman, Jr., a shareholder in Ogletree Deakins' Dallas office and member of the firm's Board of Directors. Additionally, Jeff Londa, the managing shareholder of the firm's Houston office, is the co-chief negotiator representing the City of San Antonio in high profile collective bargaining with its police and firefighter unions.

Ogletree Deakins is the only labor and employment law firm with four offices in Texas: Austin, Dallas, Houston, and San Antonio. Since opening its first Texas office in 1996, Ogletree Deakins has built its Texas presence, in part, by acquiring established labor and employment lawyers who have previously practiced at some of the most prominent firms in Texas and the United States. ■

"HANDBOOK"

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This is a narrow distinction probably beyond most employees who read the rule.

The NLRB also rejected the company's argument that the evidence of employee involvement in developing the rules removed any impermissible ambiguity as to the meaning and the purpose of these paragraphs. Even though employees had significant roles in crafting these rules, the NLRB found "that employee involvement is no guarantee that work rules will not infringe on Section 7 rights." *Hills and Dales* essentially added another "standard" for future reviews. "Employee involvement, endorsement, consent, or acquiescence cannot validate an unlawful rule."

Lessons Learned

This case places employers on notice that the NLRB and its General Counsel will go to great lengths to invalidate any employer rule or policy that could conceivably restrict or discourage concerted protected activity. From an employer's perspective, a better way to evaluate whether its rules will stand is not whether "an employee would reasonably view" the rule as restrictive on protected activity, but rather, "whether an aggressive General Counsel can parse the language in a manner to conceivably be interpreted as restricting" the right to protest for mutual protection.

This aggressive stance, coupled with the General Counsel's pronouncement in other forums that general disclaimers providing "the policy will be administered in compliance with Section 7 of the NLRA" are not sufficient to cure ambiguities found in unlawful provisions, reminds employers that handbook language will be a growing source of Board charges and litigation. *Hills and Dales*, other recent decisions, and the announced intentions of the General Counsel create difficult legal rules for employers to understand and follow, while attempting to maintain control over workplace behavior.

A careful review of existing rules by an experienced labor lawyer familiar with the NLRB's expanded handbook challenges in recent years can help to avoid unintended violations in the event an unfair labor practice charge is filed. It is noteworthy that the initial unfair labor practice charge may not involve the handbook at all. Nonetheless, the Board will demand a copy and will add any potentially problematic rules or policies to the charge. In some cases, this could result in a "no cause" determination on the charge originally filed, but an unfair labor practice complaint issued on the allegedly unlawful rule or policy. ■

Ogletree Deakins News

New to the firm. Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Rebecca Bennett (Cleveland); Anthony Salvador (Dallas); Nancy Monts (Greenville); Merritt Chastain, III (Houston); Berna Rhodes-Ford (Las Vegas); Simon McMenemy (London); Paul De Boe (Miami); Seth Kaufman (New York); Thomas Song and Serafin Tagarao (Orange County); Lauren Crawford (Phoenix); Andrea Davis (Raleigh); and Kristen Silverman (San Diego).

AmLaw 100. Ogletree Deakins has jumped nine spots to No. 88 on the 2014 Am Law 100, *The American Lawyer* magazine's annual list of the top-grossing law firms. Ogletree Deakins first broke into the Am Law 100 in 2013, when it ranked No. 97 on the list. "Ogletree Deakins' continued advancement on the Am Law 100 year after year reflects the success of our firm's model and validates our strategy," said Kim Ebert, Ogletree Deakins' managing shareholder. "Our growth is a testament to the resolute commitment of our attorneys and staff to providing excellent service and unparalleled value to our clients."

A best law firm for female partners. Ogletree Deakins was recently named one of the best law firms for female partners by prominent legal news publication *Law360*. *Law360*'s 2014 class of Ceiling Smashers includes the 25 U.S.-based law firms with the highest percentage of female partners. The results were based on a survey of nearly 400 U.S.-based law firms with 50 or more attorneys. Women comprise nearly 30 percent of Ogletree Deakins shareholders and nearly 60 percent of associates. In addition, Ogletree Deakins has demonstrated a commitment to elevating women to key leadership positions in the firm, including its board of directors and local office management. In fact, 20 percent of the firm's 45 local offices are managed by women attorneys.

Some Surprises in DOL's Latest Regulatory Agenda

The White House, through its executive branch and other federal agencies, recently issued the Spring 2014 edition of the Semiannual Regulatory Agenda. The agencies' regulatory agendas provide an outlook on regulatory activity and highlight which proposed and final rules are imminent. For example, the Spring 2014 Regulatory Agenda announced that implementing regulations are expected later this year to "define and delimit" the FLSA overtime exemptions for "white collar" employees. For more on the Regulatory Agenda, visit our blog at http://blog.ogletreedeakins.com.

"FMLA/ADA"

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difficulty performing parts of his job. He requested a light duty assignment such as "sorting," which could be performed while sitting, or another position that did not require him to move as quickly. The company denied his request and allegedly continued to schedule him to work overtime.

On February 23, 2010, Demyanovich's doctor advised him to quit his job and apply for Social Security benefits. At that point, Demyanovich asked his supervisor, Al Ensign, about taking FMLA leave. Ensign denied the request, stating Cadon did not have enough employees for the company to be covered by the FMLA. Further, according to Demyanovich, Ensign told him that he could not have any more time off under Cadon's attendance policy and that he was a "liability." His employment was terminated shortly thereafter.

Demyanovich later sued alleging that Cadon interfered with his rights under the FMLA and discriminated against him based on his disability (among other claims). The trial judge dismissed the suit, and Demyanovich appealed this decision.

Legal Analysis

The Sixth Circuit Court of Appeals first addressed his FMLA interference claim. The company argued that it is not a covered employer under the FMLA and that Demyanovich was not denied any benefits to which he was entitled.

To be covered by the FMLA, a company must employ 50 or more employees "during each of 20 or more calendar workweeks in the current or proceeding calendar year." To support its claim, Cadon provided documentation that it employed, at most, 47 employees at any given time during the applicable time period.

The Sixth Circuit found, however, that Cadon may have been an "integrated employer" with MNP, an affiliated company with more than 500 employees. In determining whether two entities are integrated employers, a court must consider: 1) common management; 2) interrelation between operations; 3) centralized control of labor relations; and 4) degree of common ownership/financial control. Here, the companies had several common managers, their operations were interrelated, Cadon's employees regularly consulted with MNP's HR officer on labor and employment issues, and the same group of employer investors had owned both companies since 2004.

The court also rejected the employer's assertion that Demyanovich was not entitled to FMLA benefits because he would not have been able to return to work at the end of the 12-week leave period. "Although there is ample evidence that Demyanovich might have had difficulty returning to work within [12] weeks of his February 23 request for FMLA leave," the Sixth Circuit wrote, "it is not undisputable that he would have been unable to do so."

As to his FMLA retaliation claim, the court noted that when Demyanovich brought up the topic of taking an FMLA leave, he was engaged in protected activity. The timing of his firing minutes after he discussed taking a leave and his supervisor's reference to him as a "liability" created a prima facie case of retaliation, the court held.

Under the ADA, Demyanovich was required to show that: 1) he was disabled; 2) he was otherwise qualified to perform the essential functions of the machine operator position, with or without accommodations; and 3) he suffered an adverse employment action because of his disability. His disability must have been a "but for" cause of the adverse employment action. The court noted that in showing his heart condition was the "but for" cause of his discharge, Demyanovich could show that he would not have been fired "had he not asked about taking leave to treat his medical conditions."

With regard to the disputed issue of whether Demyanovich was a "qualified individual" under the ADA, the Sixth Circuit examined the essential functions of the machine operator position. The court found that despite the supervisor's testimony that Demyanovich's position required several physically demanding activities, "the written job description [did] not specifically identify a lifting requirement or any other physical fitness requirement." Thus, the Sixth Circuit allowed Demyanovich to proceed with his claims.

Practical Impact

According to Michelle LeBeau, a shareholder in the Detroit Metro office of Ogletree Deakins: "Where a company has fewer than 50 employees but is a part of a larger affiliate of companies, it is important to keep in mind that the employer can be found to be an 'integrated employer' under the FMLA. It also bears repeating that many FMLA-related claims can be avoided by having designated HR personnel who are well trained to handle these requests.

It is important not to prejudge an employee's future ability to perform certain work, or to return to work, at the end of a leave of absence. Let the situation play itself out rather than usurping the role of medical professionals in making this determination.

Finally, maximum leave policies that have no flexibility should be carefully evaluated when making employment-related decisions for employees on medical leaves of absence. In this respect, considerations under the ADA should include an analysis of whether additional leave time is a reasonable accommodation." ■

CAN WE FIRE HIM NOW? FROM COMPLIANCE COP TO COMPLIANCE COACH

*by Jathan Janove**

Ever had a conversation with a manager like the following?

Tom, the head of the IT Department, walked into the HR director's office. "Sarah," he said, "Jerry has to go."

Tom explained that Jerry had been with the company for many years and had never been a good employee. Tom had tried using different supervisors, but no sustained positive change had occurred.

Tom pointed out that as the CEO had said, industry upheaval meant the company had to be leaner and more efficient than ever.

"We can't afford to keep carrying him," Tom said. "Besides Jerry's poor performance, nobody wants to work with him and competitors have been raiding our talent. We recently lost two good IT people. I think part of the attraction was getting away from Jerry. We've just got to get him out of here. Today would be great!"

Sarah immediately replied, "Where are the documents?"

Press the Rewind Button

The documents didn't come close to supporting summarily discharging a long-time employee well past age 40, which put Sarah in a bind. Tom had a great sense of urgency to get rid of a bad employee before he caused more damage. Yet because Jerry had not been properly managed, firing him now could be highly problematic.

How does Sarah navigate these treacherous waters? How does she fulfill her compliance responsibilities without turning Tom into a card-carrying member of the "I hate HR" club?

Capture the Business Case First

HR professionals can dramatically improve relations with management by using their E-A-R. First, *explore* their needs and challenges with open-ended questions. Next, *acknowledge* by confirming with them that you understand their position. Last, *respond.*

It's understandable that as an HR professional, Sarah first addressed documentation, a topic she rightly suspected would not be Tom's strong suit. Instead, address that topic later.

First, explore the manager's business problem and summarize and confirm your understanding. Have Tom describe the long, frustrating years of dealing with Jerry, the failed attempts at improvement, the heightened sense of urgency due to industry challenges, and the crisis created by a competitor's talent raids.

Once Tom has confirmed that you grasp the picture he's painted, it's time to put on your compliance/claim prevention hat.

Risk Management Checklist

In circumstances like these, I use a four-part checklist:

- Substantive fairness—Does Jerry deserve to lose his job based on substantial and irremediable performance or behavior problems?
- Procedural fairness—To what degree will firing Jerry be a surprise to him?
- Consistency—How consistent would termination be with: (a) past communications with Jerry; (b) relevant documents such as performance reviews, disciplinary documents, or company policies; and (c) disciplinary practices in other cases?
- Legal issues—Are there any claim risk factors of note (e.g., Jerry's age)?

Explain that the purpose of the checklist goes beyond simply protecting the company against a lawsuit. It goes to the company's core values. What kind of organization are we? What do we stand for? How do we treat people? The primary goal is not to stay out of court. It's to create a culture built on trust, respect, and fairness.

Costs, Benefits, Risk Options

Often, I find it helpful to identify options and analyze the costs, benefits, and risks of each. I use the equation V=LM. "Value" of a contemplated action compared to "likelihood" times "magnitude" of outcome.

The three options include:

- Risk averse—What's the safest possible course of action we can take?
- Risk preferrer—I'm feeling lucky. Let's roll the dice.
- Risk neutral—What action makes the most sense in light of the potential consequences?

Regarding the likelihood that Jerry would file a claim, risk averse would be take no action. That brings likelihood times magnitude down nearly to zero. However, there's a high business cost to continuing his employment.

Conversely, the risk preferrer option of firing Jerry now would seem foolhardy. It eliminates one problem but creates new ones such as the likelihood of a claim (high) and magnitude (very expensive). Other employees also might draw a negative inference about how the company operates.

The Outcome

The Tom-Sarah-Jerry story is based on a true situation I coached.

Later, the real HR director told me the outcome. "The department head and I agreed to meet the next morning after I had time to review the file and each of us could consider the options.

"We created 'the mother of all performance improvement plans.' We sat down and walked Jerry through his employment history, pointing out each problem and each failed attempt to make things work. We told him we were at a crossroads. It seemed the best thing would be for Jerry to find other employment. We offered him a narrow window in which he could elect severance.

"Jerry went home, came back the next morning, took the severance offer, signed a release, and quietly and cooperatively left the company."

"That's great!" I said.

"Yes," the HR director replied. "But you know what the best thing is? It's how I've interacted with Tom since. It's no longer a negotiation between HR and management. Instead, we *collaborate* on solutions. The approach we took with Jerry has carried over to how we interact on other matters." ■

* Jathan Janove is Ogletree Deakins' Director of Employee Engagement Solutions. He will be speaking at the SHRM Annual Conference on performance review best practices and tools for tough conversations.

SPORADIC LEWD GLANCES NOT SUFFICIENT TO CREATE HOSTILE ENVIRONMENT

Court Also Rejects Worker's Retaliatory Discharge Claim

A federal appellate court recently held that an employee who was discharged after alleging that his supervisor made sexual advances toward him could not prevail on his hostile work environment claim. Likewise, the court found that the worker failed to establish a causal connection between his harassment complaint and his termination. ***Lewis v. City of Norwalk,*** *No. 13-2485, Second Circuit Court of Appeals (April 14, 2014).*

Factual Background

In September of 2006, the City of Norwalk, Connecticut hired Oswald Lewis as its director of management and budgets. He worked under Thomas Hamilton, the city's director of finance. According to Lewis, from the start of his employment with the city, Hamilton made sexual advances towards him, including leering at him and licking his lips. Lewis also claimed that Hamilton complimented his clothes, and invited him to join his gym and go out for drinks.

On May 6, 2010, Hamilton and James Haselkamp, the city's director of personnel and labor relations, met with Lewis to discuss his poor performance evaluations that had been documented since 2006. They gave Lewis the option of resigning or undergoing a formal removal process, with three days to decide.

After allowing the deadline to pass, but before the formal removal process was initiated, Lewis notified Haselkamp of Hamilton's alleged harassment. Following an investigation, the city concluded that Lewis's claims could not be corroborated. On the basis of that finding, Hamilton proceeded with the termination process. Lewis did not challenge the decision internally, but instead filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission.

After receiving a right-to-sue letter, Lewis filed a lawsuit against the city claiming that he had been subjected to a hostile work environment and unlawful retaliation. The trial judge dismissed the case, and Lewis appealed.

Legal Analysis

On appeal, the Second Circuit Court of Appeals found that the alleged sporadic leering and lewd glances were not sufficiently severe or pervasive to create a hostile work environment. The Second Circuit further held that the other facially sex-neutral comments and incidents which Lewis had alleged (the invitation to join Hamilton's gym, for example) did not create an environment that a reasonable person would find abusive (though it might have been subjectively uncomfortable).

The Second Circuit also upheld the dismissal of Lewis's retaliation claim. The court agreed with the trial judge that Lewis had failed to establish a causal connection between the protected activity—his filing of the sexual harassment complaint—and his termination, which was set in motion before the filing of the complaint.

The court concluded that Lewis had initiated his sexual harassment allegations *in response to* being informed by Hamilton and Haselkamp that he was in danger of being fired, and that ample evidence existed for the discharge—namely, Lewis's documented poor performance reviews. The court also found no evidence that his poor performance reviews had been related to the alleged harassment.

Practical Impact

According to John Stretton, a shareholder in the Stamford office of Ogletree Deakins: "The Second Circuit reinforced the generally accepted principles that 'facially sex-neutral incidents' should not be relied upon when attempting to establish a hostile work environment, and a termination will rarely be deemed retaliatory when the termination process is already underway by the time the employee complains of the discriminatory treatment. In addition, the Second Circuit's opinion reinforced the importance of documenting an employee's performance and maintaining a harassment policy with clear reporting procedures." ■

At Workplace Strategies, What Happens in Vegas Doesn't Stay in Vegas

Ogletree Deakins' annual labor and employment law seminar, Workplace Strategies, was held in Las Vegas over four days in May and provided attendees with a remarkable amount of information to take back to their offices. This year's "sold out" program was the largest yet, with nearly 1,000 guests and speakers in attendance.

There were many highlights at the program, including: "Policymaker Perspective" presentations by EEOC Commissioner Victoria A. Lipnic and NLRB Member Philip Miscimarra; an inspirational keynote presentation on disabled veterans by Dr. Richard Pimentel; insights into the politics of Washington, D.C. by popular pundit Charlie Cook; and the return of the popular "Wacky World of Employment Law." Most memorable for many will be the presentation of the Homer Deakins Award for Service to Sergeant First Class Cory Remsburg, who was injured in Afghanistan and recognized by President Obama during his recent State of the Union speech.

Workplace Strategies also has a history of giving back to the local community. This year, attendees and Ogletree Deakins raised more than $37,000 for Autism Community Trust and Families for Effective Autism Treatment through a charity golf tournament and a special reception with food prepared by celebrity chef Charlie Palmer.

Workplace Strategies moderator Joe Beachboard announced that the 2015 program will be held in San Antonio from May 13-16. He predicted that for the third consecutive year the program will sell out. To guarantee your spot at the program, visit www.ogletreedeakins.com.