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Court Rules Random Alcohol Testing Permitted Under ADA

In the first ruling of its kind, a United States Federal District Court ruled that a collective bargaining agreement providing for random alcohol testing for probationary employees did not violate the Americans with Disabilities Act. *EEOC v. United States Steel Corp.* (W.D. Pa. Feb. 20, 2013). Under the ADA, a "medical exam" for a current employee may not occur unless job-related and consistent with business necessity. Alcohol testing has consistently been viewed as a "medical exam," meaning alcohol screens are considered out of bounds under the ADA except where job-related and consistent with business necessity; for instance, where an employer has a reasonable suspicion of intoxication, and in certain types of jobs where testing may be required by a federal agency. (In contrast, testing for current illegal drug use is not considered a medical examination under the ADA so employers may drug test employees under a variety of circumstances—including randomly—though state or local law may impose additional limitations).

In the *U.S. Steel* case, the employees' union and company agreed at the bargaining table that probationary employees would be tested on a random basis for alcohol. This was part of contractual language regarding a safety and health program negotiated by the parties. The judge noted that the business necessity exemption had been applied to permit the continuation of random alcohol testing of private security officers, bus drivers, flight attendants, and nuclear plant operators, in accordance with federal regulations that predated the ADA. Acknowledging that if intoxicated individuals performed these positions poorly they would endanger the general public, the Court concluded that it had "no reason to deem the lives of those in the general public less worthy of protecting than the lives of one's co-workers. . . . The life of a person is no less valuable simply because he or she decided to work in a factory rather than take a walk through the park."

The Court found that the application of the policy to new, probationary employees only did not undermine the Company's business necessity argument. The Court ruled that a business could grow to trust its regular employees and that new employees would be less cognizant of safety concerns and would be more likely to report to work impaired.

It was important to the court that random alcohol testing was an outcome of a collective bargaining process. The court stated that, "The fact that there was a negotiated agreement between U.S. Steel and the union is not lost on the court, as it further highlights the consensus by all parties involved that such testing was consistent with maintaining workplace safety."

Also important to the Court was the dangerous nature of the job (working in a coke and chemical plant) and the difficulty of detecting potential impairment where employees wore "heavy protective gear that obscure[d] their faces and muffle[d] their speech."

Although we are encouraged by this decision, we are also cautious in assessing its implications. As described above, the inherently dangerous nature of the job and the presence of a union were factors in the decision. The EEOC stated it will appeal this case to the United States Court of Appeals for the Third Circuit. If employers want to pursue random alcohol testing as part of the "business necessity" exception under the Americans with Disabilities Act, consult with us so that we can approach that process as narrowly as needed, thus maximizing the possibility of avoiding a claim or successfully defending one.

The U.S. Labor Movement – Where Does It Go From Here?

In last month's Employment Law Bulletin, we highlighted the remarkable and continued decline of union membership, down now to 6.6% of all private sector employees, the lowest since 1935. Rich Trumka, President of the AFL-CIO, stated on March 7 that, "To be blunt, our basic system of workplace representation is failing – failing miserably – to meet the needs of America's workers by every critical measure." He said that, "Our unions will experiment. We will adapt to this new age. We will change . . ."

This of course is a theme that we have heard consistently for so many years. Trumka says that, "The time for excuses is over. We must effectively mobilize then act." What does this mean? The following are examples of how we think Labor will try to reverse this ever-declining trend of lower membership:

- Push for the enactment of a Bill of Rights for what Labor characterizes as the vulnerable workforce – home care and child care workers.
- Focus on enacting state and local legislation that would revoke business licenses for those employers who violate wage and hour law – what the Labor Movement refers to as "wage theft."
- Focus on the "vulnerable" workforce – lower wage employees, single parent/head of household employees, and first generation immigrants.
- Strengthen alliances with various public interest groups, including LGBT, the green movement, the faith community and the Hispanic community.
- "Take to the streets" more often – raise the level of public protest over workplace issues and financial condition of the vulnerable workforce.

Frankly, we do not expect Labor's initiatives to be successful. Those interest groups Labor partners with will appreciate Labor's support, but that doesn't mean individuals in those groups will want a union at their workplace. Labor will continue to be a "player" on the national scene, as it has over 15% membership in seven states that total 170 electoral votes (California, Washington, Michigan, Illinois, Pennsylvania, Ohio and New York). In our view, the essential flaw in Labor's agenda is the lack of recognition that employees today are not interested in compensation based upon seniority, but rather want an opportunity for individual achievement – "How do I increase my value to the organization?" Unless Labor gets creative as a problem solver at the bargaining table, it will only continue to hang on, with a high level of political influence but continued reduced membership.

Same Sex Harassment Unrelated to Sexual Orientation

The case of *Barrows v. Seneca Foods Corp.* (2d Cir., Feb. 25, 2013) is instructive for employers to understand how same sex harassment is actionable, even if it is not based on sex.

This case involved a male supervisor who had hit the genitals of other men, asked other men for a "blowjob," referred to other men as "faggots," and made other similar sexually vulgar comments. The employee sued, claiming that he was subjected to sexual harassment. The court stated that there was no evidence that the harassing supervisor was gay or that any of the other employees were gay, but reviewed why same sex harassment is actionable regardless of sexual orientation.

The court explained that there are three scenarios of evidence that may show actionable same sex harassment:

1. The first is where the harassment is related to sexual orientation. That is, the harasser and the harasser's behavior are motivated by a sexual interest.

2. Where the harasser's behavior is due to a hostility because of the presence in the workplace of the other employee of the same sex.

3. Where the harasser treats individuals of different sexes differently – there is discriminatory behavior toward one sex compared to the other.

In this case, the court concluded that a jury may decide that the difference in treatment was based upon the supervisor's behavior toward other men, and thus a form of same sex harassment. There was no evidence that the supervisor directed any vulgar comments to women; his vulgarity was directed to men, only. Therefore, the court concluded that, "A reasonable jury could find that direct comparative evidence shows that [the supervisor] treated women better than men."

Comments of a sexual nature that are not based upon sexual desire occur at times in certain industries that historically are male-dominated, such as construction and transportation, but may also occur within organizations where a particular department is dominated by one sex. We have found that often sexual comments or "cutting up" at the workplace is known by various levels of the leadership team or reported, but minimized, because there is not a request for sexual favors or involvement. An employer's failure to act on what is reported or what it otherwise becomes aware of increases the risk of a dispute, and a dispute the employer may lose.

Cannot Accommodate Restrictions – Cannot Remain An Employee

The case of *Wulff v. Sentara Healthcare Inc.* (4th Cir., Mar. 4, 2013) addresses an employer's right to terminate an employee whose disability cannot be accommodated at the workplace.

The employee was an emergency room nurse. She provided a doctor's statement to the employer that she could not lift more than 10 pounds with her left arm. The employer accommodated this restriction. Six months later, the employer requested that the employee's physician complete a form regarding various job-related functions and whether the employee was restricted from performing them. The restrictions were even more significant than the initial 10 pound lifting limitation. Now the employee could not push or pull, lift or carry up to 20 pounds, and could not raise her arms above her shoulders. The employer concluded that it could not accommodate these restrictions and the employee was terminated.

The employee sued, claiming that the employer failed to accommodate her restrictions under the Americans with Disabilities Act. In granting summary judgment for the employer, the court noted that under the ADA, the employee must show that she can perform all the essential job functions with reasonable accommodation. The employee acknowledged that she was restricted from performing essential job functions and she did not suggest any accommodations to enable her to perform those functions. Therefore, the employer was not required to retain her in a reduced capacity. Note: The fact that the employer accommodated her initial restrictions influenced the court – this was an employer aware of its rights and responsibilities under the ADA and successfully accommodated prior restrictions.

"Disparate Impact" Unavailable for Age Discrimination Hiring Claims

The EEOC believes that there is widespread discrimination in hiring based upon age, but knows that such claims are difficult to prove because an applicant often does not know the age of the individual ultimately selected. In the case of *Villarreal v. R.J. Reynolds Tobacco Co.* (N.D. Ga., Mar. 6, 2013), a court dismissed a "discriminatory impact" age discrimination claim that was filed against R.J. Reynolds Tobacco Co.

The attempt at this class action was on behalf of individuals older than age 40 who were not hired nationally for territory manager positions. The territory manager job involved working with local retailers to enhance the sale of the employer's tobacco products. Villarreal claimed that out of the 1,024 territory managers hired between September 1, 2007 and July 10, 2010, only 19 were older than age 40. Villarreal alleged that RJR and its outsourced hiring firms used hiring criteria to disqualify applicants older than 40.

The company used Kelly Services, Inc. to screen applicants according to criteria established by RJR. This included a statement that the ideal candidate was just 2-3 years out of college and adjusted easily to change. The guidelines also requested that Kelly "stay away" from applicants with extensive sales experience.

In dismissing the discriminatory impact theory of liability, the court stated that under the Age Discrimination in Employment Act, discriminatory impact applies only to "terms and conditions of employment." Thus, a claim of discriminatory impact based upon age may be made on behalf of current employees, but not job applicants.

Although a discriminatory impact theory is unavailable to applicants, of course there remains the "discriminatory treatment" theory to pursue. The evidence supporting disparate impact may be available to help persuade a court that there was in fact discriminatory treatment. In Villarreal's situation, the court also concluded that he waited too long to bring many of his claims, thus, they were time-barred.

With four applicants for every job opening in the United States, employers in many industries enjoy great "leverage" in the hiring process. That said, the frustration of rejected applicants we expect will lead to more claims of discrimination in hiring. Thus, be sure those are engaged in the hiring process know the ground rules for effective and compliant hiring procedures, such that a failure to hire claim based upon age, disability, or any other protected status, is either avoided or disposed of promptly.

NLRB Tips: *Noel Canning* and Sequestration – Impact Being Felt on NLRB Operations

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In the aftermath of *Noel Canning's* finding that two of three seated board members were improperly appointed by the Obama administration, the NLRB signaled its intention to operate normally, virtually ignoring the court's ruling. The Agency tune has since changed. The constant challenges to the simplest Board rulings, coupled with the anticipated cuts in the budget because of the sequestration, have strained Board resources to the limit.

One pundit claims that the Board faces a "major existential crisis" that is casting a cloud over the future of the agency. While an overstatement, there is no doubt that a confluence of events has put never-before-seen pressure on the enforcement function of the NLRB.

***Noel Canning*:**

At an American Bar Association meeting in late February of 2013, Acting General Counsel Lafe Solomon told attendees that the D.C. Circuit Court of Appeals ruling on recess appointments has had an effect on agency operations. The GC characterized the impact as "profound, enormous, significant – take your pick."

Solomon stated that litigants across the country are citing the *Noel Canning* ruling in challenging decisions of the Board, Administrative Law Judges and even Regional Directors. These challenges (noted in the February 2013 ELB) have the effect of slowing the movement of cases through the pipeline as Agency lawyers must respond to the challenges in order to enforce Agency actions. This development, coupled with the coming budgetary constraints, will have an ongoing impact on the NLRB and are overwhelming its efforts to keep up. As GC Solomon stated in his address, addressing questions on the Agency's authority on a daily basis "takes time" and consumes agency resources which must be diverted from enforcement of the Act.

- Chairman Mark Pearce recently admitted that *Noel Canning* "has a sweeping potential."

- GC Lafe Solomon claimed that the "train is continuing to run," but that a significant slowdown in case processing may be expected in the near future.

Approximately six-hundred decisions have been issued the NLRB since the January 2012 recess appointments of Block, Griffin and Flynn. All of those decisions are subject to question, as an aggrieved party has unlimited time to file a petition for review by a federal appellate court.

Since the January appointments, at least eighty-seven employers and three unions have cited *Noel Canning* in cases at varying stages within the agency, including cases the Board has not yet decided. Many employers are asserting that the Agency's actions against them should be voided or blocked since the Board or its appointed regional officers made decisions while the NLRB lacked authority to act. Dozens of other companies are citing the illegality of the recess appointments in appeals they have filed against the agency in federal appellate courts.

In the D.C. Circuit alone, thirty-three cases have been held in abeyance due to *Noel Canning.* Twenty-nine cases in which the April 2010 recess appointment of former Member Craig Becker are also on hold under the *Noel Canning* reasoning. The recess appointment issue has been raised in NLRB enforcement proceedings in every federal circuit court except the Tenth, while Becker's appointment is at issue in the Third, Fourth, Fifth, Ninth and Tenth circuits.

In the regional offices, *Noel Canning* has been raised in nine representation cases and fifty-eight unfair labor practice charges. The NLRB anticipates an additional ten challenges to actions by Regional Directors (mainly in the investigative subpoena area) appointed since 2010 with the approval of board members whose recess appointment are disputed.

Finally, the U.S. Justice Department has decided **not** to petition the D.C. Circuit for re-hearing on the *Noel Canning* decision. Rather the administration and the agency will petition the U.S. Supreme Court for *certiorari*. The petition for *certiorari* must be filed by April 25, 2013. Even if the Supreme Court accepts the petition for review, ruling on the merits of the legal dispute might not occur until 2014.

Sequestration:

In addition to the adverse court decision in *Noel Canning*, the Agency is facing significant funding issues due to the sequestration. Eighty percent of the NLRB budget goes to employees' salaries and benefits, while another ten percent goes to office rental and security expenses. In light of this harsh reality, it appears that the Agency does have much choice in meeting the sequestration of funds other than a furlough or reduction in force of agency personnel.

Regional office employees have received notice of possible furloughs (not to exceed a total of twenty-two days) and the NLRB is currently in negotiations with the two NLRB unions on the impact of potential furloughs. Solomon has stated that he and Chairman Pearce agree that "the pain will be spread among employees equally" and that the Agency intends to stop all discretionary expenditures that do not "cripple [the Agency's] mission."

One topic in negotiations between the NLRBU and the Board include the Agency's planned move of headquarter offices. Cancellation of the move could reportedly save as much as $10 million dollars. No announcements have been made as to whether the move will occur as scheduled, and it is apparently unclear if the General Services Administration (GSA) will foot the bill of the

relocation. Expect a significant amount of complaining from field employees should they be furloughed while managers in D.C. expend monies in a move to new space.

GC Solomon has acknowledged that the pressure of the sequestration and talk of furloughs has affected employee morale. In any event, employee furloughs could save the NLRB approximately $800,000 a day.

Recent Legislative Action:

On March 13, 2013, a dozen Republicans on the House Education and the Workforce Committee joined the Health, Employment, Labor, and Pensions Subcommittee Chairman Phil Roe (R-Tenn.) in sponsoring H.R. 1120. The bill limits the Board from taking action that requires a three-member quorum. H.R. 1120 states:

> The Board shall not implement, administer, or enforce any decision, rule, vote, or other action decided, undertaken, adopted, issued, or finalized on or after January 4, 2012, that requires a quorum of the members of the Board.

The bill's prohibition on Board action would end upon the Agency achieving a Senate-confirmed quorum or when the Supreme Court issues a decision on the validity of the disputed recess appointments.

A spokesman for the democrats on the House subcommittee panel stated that the bill is a "ridiculous waste of time", as the bill does not stand a chance of passing a full congressional vote.

Nevertheless, the bill was referred to the House Committee of Education and the Workforce. On March 20, 2013, the committee approved the legislation by a 23 – 15 vote along party lines. Pundits observed that Senate action is unlikely on H. R. 1120 even if it passes the House.

Did You Know?

In 2012, union membership declined nationwide to 11.3%, down from 11.8% in 2011. The data on union membership were collected as part of the Current Population Survey (CPS), a monthly sample survey of approximately 60,000 U.S. households.

Highlights from the 2012 data include:

- Public sector worker had a union membership rate more than five times higher than private sector employee (35.9% v. 6.6%).
- Workers in education, training, library occupations, and protective services had the highest unionization rates, at around 35%.
- Black workers were more likely to be union members than were white, Asian, or Hispanic workers.
- Among states, New York continued to have the highest union membership rate (23.2%), and North Carolina again had the lowest membership rate (2.9%). Membership in Alabama fell to 9.2% from 10% in 2011, its lowest membership rate since 2006 (at 8.8%).

EEO Tips: The Retaliation Problem – Don't Get Mad, Get Even

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When an employer receives that dreaded notice that a charge of employment discrimination has been filed against it, normally the first reaction is to get made and seek retribution against the "ungrateful employee" who filed it. While that instinct is at least understandable (and may be justified), it could be the worst thing an employer could do. Getting mad may be a way to vent the employer's frustrations, but what is more important is "getting even" by getting all of the facts and handling the initial charge in a way that eliminates the probability of a

retaliation charge in addition to the first charge. The reason for "keeping one's cool" is that, when all of the facts are known, the initial charge itself may be baseless, but, if the employer takes some adverse action in the heat of the moment, a retaliation charge may prove to be far more devastating.

The following table showing the increasing number of retaliation charges filed over the last five years would seem to indicate that far too many employers are not getting the message.

Comparative Retaliation Charge Processing Results
Fiscal Years 2008 through 2012

	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Total Charges – All Statutes	95,402	93,277	99,922	99,947	99,412
Total Retaliation Charges	32,690	33,613	36,258	37,334	37,838
Total Resolutions	25,999	30,571	37,970	41,743	42,025
No Reasonable Cause	14,905 57.3%	17,468 57.1%	22,803 60.1%	26,161 62.7%	27,077 64.4%
Reasonable Cause	1,330 5.1%	1,519 5.0%	2,278 6.0%	1,707 4.1%	1,800 4.3%
Merit Resolutions	5,780 22.2%	6,216 20.3%	7,589 20.0%	7,467 17.9%	7,422 17.7%
Monetary Benefits (in Millions)	$110.7	$133.8	$150.8	$147.3	$177.4
Average Obtained Per Merit Resolution	$19,152	$21,525	$19,871	$19,727	$23,902

Perhaps one redeeming statistic which the table shows is that, although the number of retaliation charges has steadily increased over the last five years, so has the number of "no reasonable cause" determinations. On the other hand, it is worth noting that the monetary benefits attributable to the resolution of retaliation charges was $177.4 million in FY 2012, the highest amount obtained from this source within the last 10 years. Thus, in FY 2012, it cost employers an average of $23,902 for each merit resolution of a retaliation charge.

The steady growth in the number of retaliation charges is due to the fact that charging parties frequently add retaliation as a secondary allegation when employers, unwittingly, take some form of additional adverse employment action to the action which underlies the basic charge.

EEO TIP: In addition to Title VII, the ADA, the ADEA, and the FMLA, there are approximately 15 other federal statutes which contain anti-retaliation provisions that employers should be aware of. All of them have similar provisions as to the specific persons (employees) who are protected thereunder, limitations as to the kind of acts protected, and remedies or damages available to a complainant. Of course, a comprehensive review of these statutes here would be beyond the scope of this article. But please feel free to call this office for legal counsel if you would like to learn more about them.

As with most complicated matters, there probably is no single reason for the increase. In recent years, however, one could point to several notable Supreme Court cases where the perimeters of retaliation in the context of employment have been widened. In *Burlington Northern and Santa Fe Ry. Co. v. White*, the court held that the scope of retaliation under Title VII goes beyond activity which affects the terms and conditions of employment and includes actions which "could well dissuade a reasonable worker from making or supporting a charge of discrimination." In *CBOCS West, Inc. v. Humphries*, the court extended the issue of retaliation to cases filed under Section 1981, and, in the case of *Crawford v. Metropolitan Government of Nashville and Davidson County*, the court widened the "opposition clause" under Title VII by holding that the clause extends protection to an employee who speaks out about discrimination when asked during the course of an internal investigation, even though that employee may not have otherwise openly opposed the discrimination in question. Thus, it could be said that these holdings made it easier for an employee to allege and sustain a charge of retaliation.

However, on January 18, 2013, the Supreme Court granted *certiorari* in the case of *University of Texas Southwestern Medical Center v. Nassar*, U.S. 12-484, to resolve the issue of whether a Title VII plaintiff is required to prove "but-for causation" as to an allegation of retaliation in light of the court's holding in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 168 (2009), or whether the statute only requires that a plaintiff prove that an improper motive was one of several reasons for an employer's personnel decision. In *Gross*, which hitherto

only applied to the ADEA, the Supreme Court found that, in order to prove age discrimination, the plaintiff must show that the discrimination was **"because of"** a plaintiff's age, or in effect "but-for" the plaintiff's age the discrimination would not have happened.

In this case, the plaintiff alleged that he had been discriminated against and harassed because of his national origin, religion, race, and constructively discharged. He also alleged that he was rejected for a position in a related medical facility in retaliation for his complaints. The defendant, UTSWMC, is appealing the decision to the Fifth Circuit to uphold a jury finding of retaliation and for remanding the case to reconsider the trial court's award of damages and attorneys' fees. In making these findings, the Fifth Circuit in effect took the position that *Gross* should be construed more narrowly and that a mixed motive theory can be used to prove an allegation of retaliation.

In substance, the argument of UTSWMC for review by the Supreme Court is that Title VII's anti-retaliation provisions contained in 42 U.S.C. Section 2000e-3(a) were unchanged by the minor revisions made to Title VII in the Civil Rights Act of 1991, and contain almost identical statutory language as the ADEA by prohibiting adverse action against an employee **"because"** the employee has filed a charge or opposed an unlawful employment practice. Accordingly, UTSWMC contends that Title VII's retaliation statute should also be interpreted to require proof of but-for causation.

If the Supreme Court rules in favor of UTSWMC, the pendulum will have swung back in favor of employers. The burden of proof in retaliation cases will require a higher standard for a court's finding that the employer has retaliated, namely that the employer's actions were intentional and that "but for" those intentions there would be no retaliation.

In the meantime, there are at least four basic questions that an employer should ask in responding to almost all retaliation claims:

1. Does the employee meet the procedural prerequisites which would qualify him or her for coverage under the statute in question (e.g., was the alleged retaliation against an applicant or employee as defined in the underlying statute)?

2. Did the employee engage in "protected activity" under the statute in question (e.g., was the employee's conduct protected by the "participation" or "protest" clause under Title VII, or some similar clause in the other acts)?

3. Was the employee subjected to any "adverse employment action" (e.g., did the alleged retaliation result in a termination, demotion, refusal to hire, loss of wages, or denial of a promotion)?

4. Is there a causal connection between the employee's protected action and the adverse employment action (e.g., does the evidence tend to show that the adverse employment action was, more or less, a direct result of the employee's protected activity)?

A clear answer to each of the foregoing questions can be blurred by the circumstances in any given case. Here are a few brief examples of why there may not be a simple answer:

Question No. 1 – Was the employee covered? The obvious answer would be that only an applicant or current employee would qualify for protection under Title VII. However, in the case of *Robinson v. Shell Oil*, the U.S. Supreme Court held otherwise. In that case. Robinson (a former employee who had been discharged by Shell Oil Co.) filed a charge with the EEOC alleging that he had been discharged because of his race. He apparently applied for a job with another employer and, in response to the prospective employer's inquiry, Shell Oil Co. gave a negative reference about Robinson, at least in part, because of Robinson's charge with the EEOC. The Supreme Court held that in filing his charge Robinson had engaged in protected activity, and that his protection "encompassed individuals other than current employees." Thus, former employees, such as Robinson, may qualify under Title VII as being covered by the anti-retaliation provisions of the Act.

Question No. 2 – What is protected activity? In general under Title VII, employees and/or witnesses are

engaged in protected activity if they "oppose" an unlawful practice or "participate" in the filing of a charge, testify as a witness, or assist in an investigation or hearing of a charge under the Act.

An employer in Georgia faced the question of whether an employee's false statements during the course of an internal sexual harassment investigation, before an actual charge had been filed with the EEOC, constituted "protected activity." The employee was fired for making the false statements during the preliminary investigation and later filed a charge with the EEOC alleging retaliation for her participation in the investigation. This was the case of *EEOC v. Total Systems Services, Inc.* (11th Cir. 2000). The Court held that her false testimony before a charge had been filed was not protected activity and upheld her termination by the employer. This case suggests that protected activity under Title VII with respect to the "participation clause" only commences after a charge has been filed.

Question No. 3 – What is an adverse employment action? Obviously, a discharge, demotion, reduction in pay, or denial of a promotion can be easily identified as adverse employment actions. However, there are some subtle actions such as a reduction of privileges or benefits as happened in the case of *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002) which also may constitute an adverse employment action. While the term "adverse employment action" may sometimes be hard to define in any given case, most courts agree that it must involve a" significant change in employment status" which is detrimental to the employee. For example, a temporary change of shifts with no loss of benefits may or may not constitute an adverse employment action depending upon the circumstances. That is why it is so important to get all of the facts when responding to a retaliation claim.

Question No. 4 – What constitutes a causal connection? The matter of causation is one of the most basic elements that must be proved in a retaliation case under virtually all of the retaliation statutes, whether state or federal. Under Title VII, a plaintiff must prove that there is a "causal connection" between the protected activity and the adverse employment action that followed. In many cases, this can be proven just by time, that is, the closeness in proximity between the protected activity and the adverse employment action (e.g., as in *Tinsley v. First Union National Bank,* 4th Cir. 1998). In other cases, plaintiffs may attempt to prove it by a preponderance of the evidence (as in *Simmons v. Camden County Board of Education,* 11th Cir. 1985), where the Court held that the plaintiff merely had to establish that the protected activity and the adverse action "were not wholly unrelated." Obviously, in the Eleventh Circuit, employers must be extra careful to avoid taking any action after a charge has been filed which could be construed to be an "adverse employment action."

Thus, as stated above, don't get mad when a charge is filed against your company, get even by objectively gathering all of the facts pertaining to the charge with the view toward undermining each and every allegation, thus guiding the EEOC to return a "no reasonable cause determination" which it apparently has done in over 57% of the charges (both regular and retaliation) filed over the last five fiscal years.

If you need help in responding to any type of charge, especially if retaliation has been alleged in the charge, please feel free to call this office for legal counsel at 205.323.9267.

OSHA Tips: Employer Safety Rules and OSHA

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at 205.226.7129.

One affirmative defense that an employer may raise in contesting an OSHA citation is to show that an alleged violation was due to employee misconduct. However, the burden of proof to establish that the violation of an OSHA rule was due to "unpreventable employee misconduct rests with the employer. It must be shown that the cited violation was unknown to the employer and was in violation of an adequate employer work rule that had been "effectively communicated" and "uniformly enforced."

An example might be where an OSHA inspection finds a guard missing from a machine but facts may exist that cause OSHA to refrain from issuing a citation or being able to sustain one if issued. Important to the employer would be the ability to show that there was a rule that equipment was not to be operated without all guards attached, perhaps with signs in proximity to the machines emphasizing this and evidence that the rule is enforced. Also, it should be shown that the guard had not been removed for a significant period of time. If the guard can't be located or if it's on the floor covered with an inch or so of dust, the employer may have difficulty prevailing on a misconduct claim.

Failure of employees to wear required personal protective equipment has often led to employer claims of employee misconduct. For instance, OSHA's observing employees not wearing head protection on a multistory building site might lead to the claim of misconduct. The site superintendent could note that safety helmets are required and provided, and also point to posted signs saying they must be worn. A misconduct claim will again be hard to sell if a number of workers on the site aren't wearing safety helmets while working within full view of the superintendent.

While most misconduct claims arise from circumstances such as the above, others may involve horseplay or indulging in such activities as taking a forklift truck for a joy ride. Another side of this emerges when an employee takes it upon himself/herself to help out in an area or on a job that is unassigned and not part of his or her duties. This occasionally ends in a tragic accident when this volunteer task includes hazards for which the employee is untrained.

Regardless of exposure to hazards, absence of assigned duty or training, OSHA will not issue a citation where an employee engages in efforts to rescue a fellow employee. The agency issued an interpretive rule in 1994 saying, "It is not OSHA's policy to regulate every decision by a worker to place himself at risk to save another individual."

The OSHA act places the duty upon employees to comply with OSHA rules and the employer's rules. An employer should have in place rules which they need to fulfill their duty to provide a safe worksite. It is unreasonable to expect an employer to anticipate everything an employee might do apart from assigned duties, but one rule should insist that they not engage in activities that require training they have not had. Remember that as an employer, you should also be able to demonstrate that your safety rules are enforced.

Wage and Hour Tips: Proposed Changes Regarding Home Care Employees

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at 205.323.9272. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.

On December 15, 2011, President Obama and Secretary of Labor Solis announced that Wage and Hour was going to publish some proposed changes to the regulations dealing with Home Care employees. The proposal, published on December 27, 2011, provides for substantial changes in the exemptions available for persons working in private homes that are placed there by third parties such as Home Healthcare Agencies. The comment period regarding these changes has long since expired, and I understand that the revised regulations could be released at any time.

Below is information gleaned from a Fact Sheet that Wage and Hour issued outlining the proposed changes:

- The Department states their proposal expects to accomplish two purposes. First, the Department seeks to more clearly define the tasks that may be performed by an exempt companion. Second, the proposed regulations would limit the companionship exemption to companions employed only by the family or household using the services. Third party employers, such as health care staffing agencies, could not claim the exemption, even if the employee is jointly employed by the third party and the family or household.

- The proposed revised regulations will limit a companion's duties to fellowship and protection. Examples of activities that fall within fellowship and protection may include playing cards, watching television together, visiting with friends and neighbors, taking walks, or engaging in hobbies. The proposed regulations provide some allowance for certain incidental intimate personal care services, such as occasional dressing, grooming, and driving to appointments, if this work is performed in conjunction with the fellowship and protection of the individual, and does not exceed twenty percent (20%) of the total hours worked by the companion in the workweek.

- The proposal also makes clear that employees performing services that do not fall within the revised definition of companionship services are not considered exempt from the minimum wage and overtime requirements.

- It would clarify that "companionship services" do not include the performance of medically-related tasks for which training is typically a prerequisite. The current regulations specifically identify trained personnel, such as nurses, as outside the scope of the exemption, and this clarification more clearly identifies what constituted medically-related services.

- Any work benefiting other members of the household, such as preparing meals or performing housekeeping or laundry for other members of the household, does not fall within the allowable incidental duties of an exempt companion.

- The Department proposed to revise the third party regulation to apply the companionship and live-in domestic worker exemptions only to workers employed by the individual, family or household using the worker's services. Thus, the minimum wage and overtime exemptions would not be available to third party employers, such as home health care agencies, even if the household itself may claim the exemption (such as in a joint employment relationship).

- The new regulations would also revise the recordkeeping requirements for live-in domestic workers. Under the proposal, employers would be required to maintain an accurate record of hours worked by such workers, just as other covered employees must keep such records.

In a case dealing with household employees, in January 2013, a U.S. District Court in Illinois held in *Arenas v. Truself Endeavor Corp. d/b/a Garret/Juarez Cleaning* that cleaning and janitorial workers employed by a cleaning company, rather than the homeowners, were protected by the Fair Labor Standards Act and were therefore entitled to minimum wage and overtime. The company had argued that the employees were not covered because the firm lacked the amount of gross revenue required for enterprise coverage under the Act. However, the Court found that the employee's work in private residences was sufficient to provide the employees protection under the "domestic service" provisions of the FLSA.

Recently, I saw an article that indicated that Wage and Hour is still concentrating its efforts in certain key industries. Those listed include agriculture, day care, restaurants, garment manufacturing, guard services, health care, hotels and motels, and janitorial and temporary help firms. According to the article, Wage and Hour collected more than $97 million in back wages for more than 124,000 employees during fiscal year 2012. If you operate in one of the listed industries, there is probably a greater than normal chance you will be investigated. Consequently, I suggest that you look very carefully at your pay practices to make sure that you are in compliance with the FLSA.

If you have additional questions, do not hesitate to give me a call.

2013 Upcoming Events

EFFECTIVE SUPERVISOR®

Huntsville – April 10, 2013
U.S. Space & Rocket Center

Montgomery – April 25, 2013
Hampton Inns & Suites, EastChase

Birmingham – September 25, 2013
Rosewood Hall

Huntsville – October 9, 2013
U.S. Space & Rocket Center

Upcoming Webinars:

FMLA Update: New Regulations and Tools to Curb Abuse
April 11, 2013, 2:00 p.m. – 3:30 p.m. CDT
Presented by Donna Eich Brooks and Whitney R. Brown

Final HIPAA HITECH Act Regulations are Here; What You Need to Know Now?
May 2, 2013, 9:30 a.m. – 11:00 a.m. CDT
Presented by Donna Eich Brooks

For more information about Lehr Middlebrooks & Vreeland, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com.

Or you may contact Marilyn Cagle at 205.323.9263 or mcagle@lehrmiddlebrooks.com, or Diana Ferrell at 205.226.7132 or dferrell@lehrmiddlebrooks.com.

Did You Know…

…that legislation was introduced in the House of Representatives on March 5 to prohibit "union security" language in collective bargaining agreements? The bill, entitled the "National Right-to-Work Bill" is similar to the bill that was introduced in the Senate on February 1, 2013. The bill has 61 co-sponsors (all Republicans) and was referred to the House Committee on Education and the Workforce. We expect the bill has no chance of even getting to the floor for a vote in the Senate. However, the bill is one of many efforts by several in the Senate and House to challenge the direction of the National Labor Relations Board and pro-labor proposals to amend the National Labor Relations Act.

…that the NLRB "ambush election" rules litigation has been tabled by the court? The Court of Appeals for the District of Columbia Circuit stated that it will "hold in abeyance" the case of *Chamber of Commerce v. NLRB*, which challenges the NLRB's December 2011 "ambush election" rules. The lower court hearing the case ruled that the NLRB did not have a proper quorum to issue its rules and therefore enjoined their enforcement. One of the three board members then in place at the time of the *Chamber of Commerce* decision, Craig Becker, was appointed through a recess process which was recently considered unconstitutional in the case of *Noel Canning v. NLRB*, also decided by the Circuit Court of Appeals for the District of Columbia. Therefore, the appellate court issued a decision removing the *Chamber of Commerce* case from its calendar and instead holding that case "in abeyance pending further order of the court." Thus, unless and until the Supreme Court rules on *Noel Canning*, the Court of Appeals will not even consider the appeal of the "ambush election" decision. This is good news for employers.

…that fitness center employees "lifted" $17.5 million from their employer in back pay? *Beauperthuy v. 24 Hour Fitness* (N.D. Cal., Feb. 21, 2013). The case involved 862 trainers and managers working at 24 Hour Fitness facilities in 18 states. They alleged that they were required to work off the clock when they provided individual training sessions and were not paid overtime for hours worked in excess of 40. The $17.5 million figure is a settlement. $5.5 million of the $17.5 million will be set aside to pay attorney fees.

…that the EEOC on February 27 was sanctioned by a court for "dilatory" and "cavalier" behavior in responding to employer discovery requests during litigation? *EEOC v. Original Honeybaked Ham Co. of Ga. Inc.* (D. Colo., Feb. 27, 2013). The issue arose after the company became aware of social media communications regarding the company and the EEOC's efforts in the lawsuit. These communications were via e-mails, texts and blogging. Multiple times the employer requested the EEOC to disclose this information. In sanctioning the EEOC, the court said that in response to employer requests and to

those of the court, “EEOC counsel has prematurely made promises about agreed-upon discovery methodology and procedure where they apparently had no authority to do so, or else had authority only to be overturned by someone in a higher pay grade . . . after the Defendant and I relied on those promises and engaged in efforts to implement the commitments previously made.” The court added that, “In several material respects, the EEOC has made this endeavor time consuming, laborious, and adversarial than it should have been.” The court stated that the EEOC did not act in bad faith, but its conduct was deserving of sanctions because the EEOC’s “flip-flopping harm[ed] the Defendant in a tangible way that is violative of the spirit of the Federal Rules of Civil Procedure.” The irony is that the EEOC’s national litigation initiatives are at a record low. One would think that with such a light case load, the EEOC could manage all aspects of the litigation properly and according to the Federal Rules of Civil Procedure.

…that President Obama has nominated a new Secretary of Labor? The nominee, Thomas Perez, the current head of the Civil Rights Division of the Department of Justice, has been criticized for his Division’s challenging voter identification laws and bringing a number of discrimination and brutality suits against police and sheriffs, while dropping a case of voter intimidation against the New Black Panthers and while his Division was found to suffer from antagonism and in-fighting between its liberal and conservative factions. Under Perez’s command, the voting section was involved in the most new litigation in its history in the last fiscal year. Perez has been praised by Richard Trumka, president of the AFL-CIO as a leader “to champion the cause of ordinary working people” against the political power of corporations and the “very wealthy.” James P. Hoffa, president of the Teamsters, said that “workers need a fighter at the Labor Department who will stand up for them, and they are getting just that with Thomas Perez.”

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