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Court of Appeals Rules: Sexual Orientation Discrimination Unprotected Under Title VII

In the case of *Evans v. Georgia Regional Hospital* (11th Cir. Mar. 10, 2017), the Eleventh Circuit refuted the EEOC's arguments—raised in *amicus* briefing—that sexual orientation discrimination was synonymous with sex discrimination and thus prohibited by Title VII. Other similar cases are pending before the Court of Appeals for the Seventh Circuit and the Second Circuit. In a 2-1 decision, the Eleventh Circuit stated that although sexual stereotyping violates Title VII, sexual stereotyping is based upon whether a person's behavior is consistent with gender norms, whereas discrimination based upon sexual orientation relates to an individual's "status" as heterosexual or LGBTQ.

Jameka A. Evans, a lesbian security guard, alleged that she was discriminated against based upon her sexual orientation. In ruling that discrimination based upon sex does not include sexual orientation, the Court of Appeals remanded the case for Evans to amend her lawsuit to claim that she was discriminated against based upon gender stereotyping: that she did not meet the gender norms of a female. In dissent, Judge Robin S. Rosenbaum called it "utter fiction" to claim that gender stereotyping was not a form of discrimination based upon LGBTQ status. According to Judge Rosenbaum: "Any lesbian worker who alleges an employer discriminated because of her sexual orientation essentially is claiming the employer discriminated because she is attracted to women and therefore doesn't conform to gender stereotypes."

We still recommend that employer equal employment opportunity policies and related policies prohibiting discrimination, harassment, and retaliation include sexual orientation, gender stereotyping, and gender identity as protected classes. Until either Congress amends Title VII or litigation ultimately results in the conclusion that discrimination based upon sex includes sexual orientation, gender stereotyping will continue as the preferred approach to actually claim a form of sexual orientation discrimination.

Wage and Hour Retaliation Theory Expanded

"Retaliation" does not mean the same thing under all employment statutes. For example, under the Fair Labor Standards Act, a Human Resources Representative who reports a wage and hour violation cannot claim retaliation, because reporting it was part of the individual's job duties. This reasoning does not make much sense to us, but that's the law.

In the case of *Starnes v. Wallace* (5th Cir. Feb. 24, 2017), the Court of Appeals concluded that retaliation protects a manager for reporting a possible wage and hour violation when reporting such a violation was not part of the manager's job responsibilities. In this case, Starnes was a Risk Manager whose responsibilities included handling workers' compensation claims, medical benefits, and employment discrimination charges. Starnes reported to the company president in December 2010 that she thought an employee was not paid overtime which was owed. In January 2012, Starnes was terminated, which she claimed was in retaliation for reporting a possible wage and hour violation 13 months earlier. The employer contended that Starnes was terminated due to budgetary reasons. In permitting the case to proceed, the Court stated that Starnes and one other employee who was also terminated for budgetary reasons both raised concerns about wage and hour compliance. Furthermore, the Court stated that reporting to the president about a possible wage and hour violation was outside the boundaries of Starnes's normal job responsibilities, and, therefore, she was protected from retaliation.

There are two "lessons learned" for employers from this decision. First, the timing of the adverse action in relation to the alleged protected activity is the critical "first impression" of whether retaliation may have occurred. Retaliation cases are among the easier ones to bring, because the allegation simply is protected activity and adverse action. One way for an employer to evaluate a potential retaliation risk is whether any positive actions toward the complaining employee occurred between the protected complaint and the adverse action. For example, we defended a claim where an employee said that he was terminated for having raised discrimination issues two years earlier. However, during the interim the employee received a raise and a bonus, both of with undermined the claim for retaliation.

The second "lesson learned" is do not rely on the nuance of whether an employee's question or expression of concern about compliance qualifies as protected activity. What is considered protected has only expanded in the workplace, so from a risk management standpoint, consider those concerns protected when evaluating whether to make an adverse decision about the employee. An employee who raises a concern is only protected from retaliation, not from the consequences of attitude, attendance, performance or behavior. Just be sure that if push comes to shove, the employer can show that the adverse action would have occurred regardless of the protected activity.

President Trump's "Skinny" DOL Budget

The White House, on March 16th, released its proposed budget for the Department of Labor for Fiscal Year 2018 (Sept. 30). The budget proposes a reduction of 21%, from $12.2 billion dollars to $9.6 billion dollars. The proposed budget has been referred to as a "skinny budget," because it is thin on details. Generally, the Administration proposes to eliminate the Bureau of International Labor Affairs' funding, close some Job Corps centers, reduce jobless benefits costs, and terminate other programs or initiatives which are considered duplicative. The White House has not yet released its proposed budget for the EEOC and NLRB.

One impact of a reduced budget would be a change in the DOL's Office of Federal Contract Compliance Programs enforcement initiatives. For the past several years, the OFCCP budget has been approximately $105 million. If that is reduced substantially, such as by 21%, expect fewer comprehensive compliance audits. In essence, OFCCP would have fewer on-site investigations and pursue fewer leads regarding potential investigations. This would not necessarily result in a reduction in the amount recovered, but rather a different OFCCP strategy for determining compliance and when to conduct an on-site audit.

House Vote on the ACA Replacement Bill Delayed – The AHCA Remains "Just a Bill"

I'm just a bill
Yes, I'm only a bill
And I'm sitting here on Capitol Hill
Well, it's a long, long journey
To the capitol city
It's a long, long wait
While I'm sitting in committee
But I know I'll be a law someday
At least I hope and pray that I will
But today I am still just a bill

Most of us remember well these lyrics from "Schoolhouse Rock" which first aired in 1975, and last week, over 40 years later, the tune still rings true. After years of promises to repeal and replace Obamacare, and after passing several bills attempting to do just that (all vetoed by former President Obama), last week the House failed to secure enough votes to ensure passage of the American Health Care Act (AHCA). On March 24, 2017, President Trump and House Speaker Paul Ryan decided to postpone the vote on AHCA once it was clear that there would not be enough votes to support it. This decision was made only after hours and hours of negotiation as well as the addition of several changes called for by the House's Freedom Caucus, including allowing states to define "essential health benefits," keeping the ACA's 9% Medicare surcharge on wealthy consumers for six more years, and adding $15 billion to the Bill's $100 billion Patient and State Stability Fund for mental and substance abuse services. The Freedom Caucus wanted, among other things, full repeal of the ACA's essential health benefits provisions imposed on individuals and small group insurance plans. However, House GOP leadership argued that repeal of the essential health benefits, as well as ending payments to states that accepted Medicaid expansion, could jeopardize the legislation's chances in the Senate and make a Democratic filibuster all but certain.

If passed, the AHCA would have halted the ACA's tax penalties against individuals who did not buy coverage and would have shrunk the federal-state Medicaid program for low earners, which was expanded by the ACA. The AHCA would have provided tax credits for medical bills, albeit less than that provided by the ACA, and would have allowed insurers to charge older Americans more.

So what now? Well, the ACA remains the law of the land, with all of its requirements, including 1095 reporting. (***Reminder - Deadline to electronically file ACA reporting forms is Friday March 31, 2017!)*** The new Administration is not giving up completely, however. Modest changes may be effected through regulatory adjustments and targeted legislative actions. For instance, repeal of the so-called "Cadillac Tax" has enjoyed bipartisan support for some time, and thus we could see action on this provision in the near future. Since many details related to the implementation of the ACA were delegated to regulatory agencies, such as the Departments of Labor, the Treasury, and Health and Human Services, it is also foreseeable that these agencies will alter the course of health care in the near future. But for now, the ACA is here to stay.

NLRB Tips: NLRB News and Updates – The Swing to the Right Continues

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 205.323.8217.

Sixth Circuit Affirms Earlier Decision on Kentucky Right-to-Work Law

On March 6, 2017, the Sixth Circuit Court of Appeals declined to reconsider its full court decision finding that a Kentucky county's right-to-work law ordinance is allowed by the National Labor Relations Act. Unions had argued that local governments were prohibited from passing right-to-work laws and were preempted by the NLRA, and that the legislative intent of Congress was to NOT allow local right-to-work ordinances.

Kentucky has since passed a statewide right-to-work law that moots the current issue, but the law stands and potentially opens the door for local governments to pass such ordinances. *UAW v. Hardin County, KY et al*., (6th Cir. 2017).

It should be noted that this issue is not currently dead, as district courts in some jurisdictions in the country have ruled that such ordinances are invalid.

D.C. Circuit Refuses to Enforce Finding by Board that FedEx Drivers are Employees

On March 3, 2017, the D.C. Circuit refused to accept the NLRB arguments that the court could ignore its own precedent on admittedly identical facts finding that FedEx. drivers are independent contractors, not employees entitled to union representation. In front of the court, the Board argued that the first FedEx decision, issued in 2010, did not fairly weigh all factors for finding employee status, and that Court precedent required the Court to apply the recent Board decision if it had to make "a choice between two fairly conflicting views." The D.C. panel said the NLRB decision was not due any deference to its decision as "independent contractor" status is a common law issue and stated:

> It is clear as clear can be that the same issue 'presented' in a later case in the same court should lead to the same result. Doubly so when the parties are the same . . . Having chosen not to seek Supreme Court review in FedEx1, the Board cannot effectively nullify this court's decision in FedEx1 by asking a second panel of this court to apply the same law to the same material facts but give a different answer.

The D.C. Circuit called the NLRB decision the "poster child" for the doctrine that one panel of the court cannot overrule another panel on the same issues without an intervening change of law.

The Bottom Line

In my opinion, it seems apparent that the pendulum has begun to swing back toward a more neutral approach by the Agency. In addition, the U.S. courts will be less likely to enforce precedent-changing NLRB decisions unless the Board crosses their *t*'s and dots every *i*. Look for the NLRB to reconsider certain issues under a Trump Administration that were instituted under President Obama's tenure. Some of those issues likely to be reconsidered would be:

- Quickie or Ambush Election Rules
- NLRB Approval of Micro-Units under *Specialty Healthcare*
- The Board's Joint Employer finding under *Browning-Ferris*
- Unfettered Union Use of Employer E-mail for Organizing Under *Register-Guard and Purple Communications*

In order for the Trump administration to have a meaningful impact upon the NLRB, it is important for it to fill the empty seats to restore the Board to its full, five member capacity as soon as possible. As demonstrated below, the Agency intends to continue to pursue it pro-union agenda as long as it can, despite President Trump's election.

General Counsel OM Memorandum 17-14

On February 14, 2017, the Division of Operations Management of the NLRB issued OM Memo 17-14, iterating that discretionary discipline is a mandatory subject of bargaining, and therefore employers must bargain with union election winners over certain types of discipline before a contract is reached. The OM Memo gives guidance for Regions processing cases under *Total Security Management,* 364 NLRB No. 106 (2016).

Where, after a preliminary yet complete investigation, the Region determines that there was a failure to bargain and intends to issue complaint, it needs to submit its findings to the Agency's Compliance unit.

The downside of the Memo is that reinstatement plus back pay may be imposed if a violation is shown, but may be

precluded if the employer shows that the discipline was justified. The burden is on the employer to demonstrate that the discipline was justified.

NLRB Hearing Officer Validates Columbia University Election Results

Finding that the University's objections to the election only reached some voters, the Hearing Officer (HO) found that the employer "has failed to demonstrate that any alleged objectionable conduct occurred which could have affected the results of this election, in which the petitioner prevailed by more than 900 votes."

Because of the margin of the win, the HO recommendations may not be appealed. The better basis for appeal would be the Board's disregard of precedent finding that the university's graduate teaching assistants are employees under the Act.

NLRB Administrative Law Judge (ALJ) Adheres to *D. R. Horton* Analysis

An ALJ has found that Domino's pizza franchisees in the Southeast U.S. violated the Act and ordered the franchisees to remove the class action waivers from their employees' mandatory arbitration agreements.

The ALJ stated that "although the board's ruling on the issues set forth in *Murphy Oil* and *D.R. Horton* have received mixed reception in the federal courts of appeals, as an [ALJ] I am bound to apply established Board precedent that has not been modified or reversed by the U.S. Supreme Court."

As noted in last month's ELB, look for the Supreme Court to decide this issue in late fall 2017 or early spring 2018.

EEO Tips: Why Does EEOC Offer Mediation for Some Charges But Not Others?

This article was prepared by JW Furman, EEO Consultant Investigator, Mediator and Arbitrator for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Ms. Furman was a Mediator and Investigator for 17 years with the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). Ms. Furman has also served as an Arbitrator and Hearing Officer in labor and employment matters. Ms. Furman can be reached at 205.323.9275.

When an Employer receives notice that a charge has been filed with the EEOC, an invitation to participate in mediation is usually included. But not always. Even for those who rarely or never attempt resolution of charges through mediation, understanding why the invitation is or is not extended can be helpful.

Before sending notice of a charge to the Employer, EEOC performs a preliminary evaluation of information provided by the Charging Party and determines whether the charge will be investigated. EEOC is required to accept all charges that meet minimum criteria; it is not required to investigate all charges it accepts. When EEOC does not have jurisdiction (i.e., no claim is stated under a law EEOC enforces, company does not have requisite number of employees) or the charge is self-defeating, the charge is not investigated and mediation rarely is offered.

The greatest majority of charges are assessed to possibly have merit and require additional information to determine whether a cause finding is likely. All of these charges will be investigated and, unless linked to a charge already slated for a cause finding or litigation, will be offered for mediation.

When initial information from the Charging Party appears to show that unlawful discrimination likely occurred, EEOC may not offer mediation to the parties. The rules regarding mediation for these charges vary somewhat by district. However, the absence of an invitation does not preclude parties from requesting it. Joint requests from both parties do receive more consideration than those from only one and all requests for mediation should be

sent in writing to both the Enforcement and ADR divisions.

On occasion, during the investigation (sometimes well into the investigation) of a charge that initially was eligible for mediation the parties will receive a notice that states, "Upon further review, this charge is deemed ineligible for mediation …" This does not mean that EEOC denied a request for mediation from one of the parties. Most times this notice indicates that the classification of the charge has changed from possibly having merit to discrimination likely occurred.

It is important for parties to EEOC charges who would like to resolve their disputes to remember that they have options. If EEOC's mediation program is vetoed (by parties or agency), a private mediator with experience in employment matters might be the answer; the parties themselves can negotiate a settlement if the relationship permits; or the investigator can facilitate negotiations as long as confidentiality is not a concern for either party.

OSHA Tips: OSHA and Fall Protection

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, 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.

A major issue with OSHA has been that of fall hazards. In November of 2016, the agency issued a final rule updating its walking-working surfaces standards and establishing personal fall protection systems requirements. On its release, the agency stated that it was issuing a final rule updating its general industry walking-working surfaces standards related to slip, trip, and fall hazards. The release noted that the rule includes a new section under the general industry person protective equipment standards. This set employer requirements for using personal fall protection systems.

The final rule increases workplace protection especially from fall hazards which are a leading cause of worker deaths and injuries. The Assistant Secretary for OSHA stated the he believes advances in technology and greater flexibility will reduce worker deaths and injuries from falls. The final rule also increases consistency between general and construction industries which will help employers that work in both industries.

OSHA estimated that the new standard will prevent 29 fatalities and more than 5,842 injuries annually. The rule was set to become effective on January 17, 2017. The projection was that it would affect approximately 112 million workers at 7 million worksites.

OSHA noted the final rule which was most significant, was allowing employers to select the fall protection that works best for them. This rule notes that OSHA allowed construction workers to use personal fall protection systems since 1994 and this rule would allow similar requirements for general industry. The rule adds a requirement that employers ensure workers who use personal fall protection and work in other specialized high hazard situations are trained and retrained as necessary about fall and equipment hazards including fall protection systems. When there is a change in workplace operations or equipment or the employer believes that a worker would benefit from additional training based on a lack of knowledge or skill, then the worker must be retrained.

Wage and Hour Tips: Current Wage and Hour Highlights – Family & Medical Leave

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, 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. Mr. Erwin can be reached at 205.323.9272.

The Family and Medical Act (FMLA) which is more than twenty years old still commands a substantial amount of attention due to its impact on employers. In looking at some recent statistics published by Wage and Hour it appears the number of FMLA complaints they receive

continues to get smaller. For example, they only received about 1,250 complaints in FY2016 (year ending September 30, 2016) as compared to more than 1,400 the previous year. The level of employers found in violation of the FMLA requirements remains at less than 50% of those investigated and resulted in employers being required to pay more than $1.8 million in back wages to more than 700 employees. The largest number of violations resulted from improper termination of employees requesting FMLA leave with discrimination being the second-most prevalent area of violations. Refusal to grant FMLA leave and refusal to restore an employee to an equivalent position were two other areas where there were substantial numbers of complaints filed.

However, there also continues to be a substantial number of FMLA cases filed in the courts. According to statistics published by the U.S. Court systems there were almost 125 cases filed during the year ending June 30, 2016, which was a slight increase over the previous year.

One area that continues to be a problem for employers is the requirement that employees be allowed to use intermittent leave for certain types of treatments. While the requirements of the FMLA state that the employer must allow the use of intermittent leave when it is determined to be medically necessary, there are certain limitations that may be imposed by employers. For instance, the employee can be required to attempt to schedule the treatments outside of his normal working hours so as not to interfere with his job requirements. If you have employees that are seeking to use intermittent leave it is very important that you seek guidance from your counsel to insure that you are properly applying the regulations.

Also there were some amendments to the FMLA that became effective in 2015 regarding the use of leave relating to military duty. If your employee handbook has not been updated recently you may not have the proper information included. I have seen a couple of occasions recently where employers were charged with violations because their employee handbook did not contain information regarding those 2015 changes. Also, there is a revised FMLA poster dated April 2016 that should be posted.

Of course, the number one Wage and Hour issue relates to the proposed changes to the regulations that define the executive, administrative, professional, and outside sales exemptions. As I reported last month, the implementation of the new regulations is on hold pending further court action and decision by the current DOL officials regarding whether to pursue the pending appeals.

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

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Did You Know . . . ?

. . . that unions are winning a higher percent of fewer elections? Unions won 72% (991) representation elections during 2016, with a win rate of 74% in units involving 1-49 employees. This is the highest percentage win rate in several years. However, the number of elections declined substantially in 2016, to 1,381 compared to 1,626 in 2015. Thus, the NLRB "Ambush Election" Rule may have marginally helped unions win elections, but has had no impact on the total number of elections. In fact, 57,800 employees voted for unions in 2016, the lowest number in four years. The Teamsters continue to have the highest number of elections—290 in 2016. They won 182 (62.8%).

. . . that due to the decline in union membership, the AFL-CIO has started to lay off staff members? The AFL-CIO is comprised of 55 unions which represent 12.5 million employees. Unions lost a net total of 240,000 members in 2016, thus the AFL-CIO is trimming its expenses by laying off approximately two dozen employees. Unions are facing the same economic reality. For example, the Service Employees International Union, with approximately 2 million members, will lay off 30% of its total workforce by the end of this year.

. . . that rejected job applicants may claim "disparate impact" age discrimination? *Rabin v. PricewaterhouseCoopers, LLP,* (N.D. Cal. Feb. 17, 2017). Disparate impact is a theory of discrimination that a facially-neutral policy or practice has a discriminatory result. Some courts, including the Eleventh Circuit Court of Appeals (which covers federal district courts in Alabama, Georgia, and Florida) have found that the disparate impact theory isn't viable for age discrimination claims by applicants. *Villarreal v. R.J. Reynolds Tobacco Co.* (11th Cir. 2016). The California court's decision in *Rabin* supports the EEOC's position that a disparate impact claim is available under the Age Discrimination in Employment Act. Plaintiffs in the *Rabin* case claim that an example of disparate impact age discrimination is recruiting efforts limited to those who are currently in college. The plaintiffs assert that requirement inherently causes a discriminatory impact based upon age. Without the ability to sustain a disparate impact claim, it remains exceedingly difficult for individuals to prove age discrimination in hiring, in contrast to termination or promotion decisions. Often plaintiffs do not who is hired or the qualifications of those who were hired.

. . . that a jurisdiction grab by the NLRB was smacked down by the Tenth Circuit? *ABM Onsite Services – West, Inc. v. NLRB,* No. 15-1299 (D.C. Cir. Mar. 7, 2017). In early March of 2017, a panel of the Tenth Circuit, in a unanimous decision, denied enforcement of a determination by the NLRB that the Board had jurisdiction over baggage handlers in Portland, OR, finding instead that the National Mediation Board (NMB) under the Railway Labor Act (RLA) should have conducted the election. The court stated that:

> The NLRB has violated the cardinal rule here by applying a new test to determine whether the RLA applies, without explaining its reasons for doing so. Because [the Agency's] unexplained departure from precedent is arbitrary and capricious, [the court] must vacate the board's order.

The case was remanded, providing the NLRB an opportunity to change its reasoning and again assert jurisdiction. It will be interesting to see if the Board does so under the Trump Administration.

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