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Sexual Harassment Allegation Leads to Employer Discrimination Against Accused

When greeted with allegations of sexual harassment, any employer is understandably concerned. When those allegations are against a man in a position of power, that concern tends to be elevated. Some hasty employers (but of course not our ELB readers) might even begin with a presumption that such archetypal sexual harassment allegations are likely true. Absent a contractual protection, an employee of a private employer is generally not due any measure of due process. And, an employee accused of harassment is generally unable to sue for retaliation or discrimination even if his or her termination was unjustified, even if it was the product of an overzealous zero tolerance policy or practice, and even if the employer's investigation was flawed. However, if an employer's flawed decision-making stemmed from its own presumptions about the protected class of the accused (*e.g.*, it assumed a male in position of authority would be guilty of sexual harassment), then the accused employee might just have something.

Such was the case in *Menaker v. Hofstra University* (2nd Cir. Aug. 15, 2019). Menaker was the men's and women's tennis coach at the University. Menaker did not honor his predecessor's commitment to increase the scholarship level for a women's tennis player. Thereafter, the student's father called the coach to tell him that he was heading for trouble if he did not increase his daughter's scholarship. Subsequently, she accused the coach of sexual harassment, alleging that he made sexual advances, posted improper comments on social media, and told her and other women to dress nicely and to shave their legs. She alleged that he responded to her refusal to submit to sexual advances by threatening her scholarship. The coach denied the allegations.

The University investigated the allegations and two months after they were made, terminated the coach. He sued, arguing that he was terminated because of his gender and, as evidence, he proved the employer failed to follow its protocols regarding allegations of sexual harassment. For example, he was told that he would receive a copy of the investigation report, but he did not. He provided witnesses for the University to speak to, but the University did not speak with them. The University had a written investigation procedure, but it did not follow that procedure. The coach's supervisor was aware of information which would discredit the accuser, but that was not considered.

The Court stated that Menaker properly asserted a case of sex discrimination. The employer took adverse action, the employer's investigation process was not followed, and the employer had recently been criticized under Title IX for failing to take seriously sexual assault complaints by female students against male students. Further, the employer had very clear procedures for investigations of complaints, from which it deviated substantially. The Court stated that "when [employers] distort and deviate from [their] policies, fearfully deferring to invidious stereotypes and crediting malicious accusations, they may violate the law."

It is essential from an internal cultural credibility perspective as well as risk management that employers conduct a thorough, objective investigation about harassment allegations. Do not approach a harassment allegation by deciding the outcome and then investigating to find facts that support that decision.

Major ADA Development: Concern About Future Medical Issues Does Not Violate ADA

May an employer consider potential future medical issues when deciding whether to hire or promote an employee? Yes, according to the Seventh Circuit Court of Appeals in *Shell v. Burlington Northern Santa Fe Railway Company* (Oct. 29, 2019). This is a significant development for employers who are concerned about potential job-related accidents, employee injuries, or incurring significant healthcare costs. Ronald Shell was employed for over 30 years at the Corwith Rail Yard in Chicago. Workers at this railyard load and unload 1,900 freight containers daily. For over 30 years, Shell worked in several safety-sensitive positions, such as crane-operator and grounds man. When Burlington Northern Santa Fe Railway Company took control of the yard, Shell and all other employees of the predecessor were invited to reapply with BNSF. The job involved climbing on railcars, operating cranes, and driving trucks. Those positions were considered safety-sensitive positions and all applicants were required to take a physical examination where their body mass index had to be 40 or lower. BNSF believed that a BMI over 40 could lead to future medical issues which could create a risk of harm at the job, higher medical costs, and sudden incapacitation.

Shell's BMI was 47.5, and so he was not hired to do the job which he had done for 30 years. BNSF did not hire him because of its concern that his obesity would create medical, operational, and cost issues in the future. The Court noted that obesity is not a disability unless it is caused by an underlying condition, whether physiological or psychological. Shell did not have nor did he assert any underlying reasons for his obesity. Shell argued that BNSF "regarded him as disabled, in violation of the ADA, because of its concern about future harm." However, the Court stated that for the "regarded as" prong of the definition of disability to apply, the employer must believe the employee "presently and continuously" has a disabling impairment. In Shell's situation, BNSF regarded him as currently healthy with a fear he would one day develop an impairment. Because the employee was currently healthy and because the employer regarded the employee as currently healthy, the employee could not claim that he was either a person with a disability or a person "regarded as" disabled, so he could not establish that he was a protected person under the ADA.

The impact of this decision could be profound. In essence, the Court's decision means that if an employee does not currently have a disability, the employer may consider the employee's risk of future disabilities in deciding whether to hire or promote the individual. The employer does not have to take the risk of whether an individual will have a job-related injury or illness nor does the employer have to wait to see what medical costs are incurred. A word of caution: Shell did not bring an ERISA claim, but BNSF's concern over healthcare costs might have given rise to a claim that Shell was discriminated against because of his potential healthcare costs.

Union Owes Employer $93 Million

The International Longshore and Warehouse Union (ILWU) may not be long for this world. They have assets of $8 million and, on November 4, were hit with a jury award of $93 million for an illegal secondary boycott against the former operator of the Port of Portland, Oregon.

There was a jurisdictional dispute about whether work at the port would be assigned to the ILWU or the IBEW. The NLRB decided the jurisdictional dispute by awarding the work to IBEW. The response of the ILWU and its Local was to engage in an illegal secondary boycott. This included encouraging other businesses not to do business with the terminal operator and engaging in slowdowns and other disruptive activities which forced shipping companies to seek other ports. The company lost its contracts at the terminal and claimed that it lost $11 million as a result of the union's illegal activity.

Unions are becoming more aggressive in the number of strikes, corporate campaigns, and on-the-job disruptive activities to pressure employers to agree to union demands. Generally, unions are more disruptive when unemployment is low, because employers cannot readily find replacements for those employees represented by the union. Unions may not exert pressure on "neutral" employers to cease doing business with the employer the union has it labor dispute. In this case, the union's failure to adhere to the NLRB's decision resulted in illegal pressure on third parties that likely will put the union out of business.

I Am Anxious; Am I Covered Under ADA?

Anxiety is commonly discussed and self-identified in the work environment and elsewhere. An individual may suffer from anxiety for any number of reasons, some of which are not medical in nature. The question that was considered by the Middle District of Tennessee in the case of *EEOC v. West Meade Place, LLP* is to what extent someone who has a self-diagnosed anxiety disorder is protected under the ADA. (Oct. 22, 2019).

The EEOC alleged that the employee suffered from an anxiety disorder and was terminated by her employer for that reason. The Court rejected the EEOC's arguments, concluding that the former employee could not prove that she was "disabled" as defined under the ADA.

There are three definitions of disability under the ADA - the first is whether the individual has a physical or mental impairment that substantially limits their ability to perform one or more major life activities. The second category is an individual who may not currently have a disability, but has a "record" of a disability. The third definition is "regarded as" disabled, where an individual has a current medical condition that results in the employer treating the individual as if he or she is disabled.

The Court concluded that the individual here was unable to prove that she had an actual disability under the ADA. While she did receive medication for anxiety from a prescribing physician, that physician testified that she wrote the prescription and came to the diagnosis of anxiety based on the employee's representations that a previous doctor had so diagnosed her. The doctor had undertaken no real independent analysis of the question, and opined in deposition that the employee did not have a disability. Because the only records of disability were the prescriptions and an FMLA certification by the doctor above, the Court found that these were not records of disability. Finally, the Court found that these records and the employee's own self-identification as having anxiety were not sufficient evidence to prove the employer regarded her as disabled (the employer having made no such designation or representation).

Anxiety, stress, and depression are terms which are often used conversationally, and not clinically, in the workplace. Sometimes these labels indicate true ADA disabilities. Other times, these labels are an expression of an emotional state. Employers should always avoid using diagnostic language or making unnecessary conclusions about an employee's disability status, and should be mindful that self-diagnoses and sham-diagnoses do not automatically mean an employee is disabled. Finally, while the *West Meade Place, LLP* decision represents good law for employers, employers should be loathe to bar potentially qualifying employees from the rights and privileges of the ADA (*i.e.,* reasonable accommodation) based on questions about the employee's disability status.

DOL Proposes Fixed Salary for Fluctuating Workweek Change

The fixed salary for fluctuating workweek pay system is a favored system for employees who work unpredictable hours above and below 40 on a recurring basis. The way this system works is that the employer pays the employee a fixed salary, and if the employee works over 40 hours, the employer averages the salary over all hours worked and pays one half of that average hourly rate as overtime. Rules for this program include that if the employee works at all during a week, the employee must receive the full salary for that workweek, even if the employee works fewer than forty hours in a week. Also, the weekly salary must always be high enough that the average hourly rate (before OT is added) is above the minimum wage. The payment system should be memorialized in writing and signed by the employee.

On November 4, 2019, the United States Department of Labor, Wage and Hour Division proposed a rule to give employers more flexibility in how bonus and premium payments would be handled under this pay system. According to the proposed rule, "bonuses, premium payments and other additional pay of any kind are compatible with the fixed salary for fluctuating workweek method of compensation." The key is to not give the bonuses or incentives based upon the number of hours worked, but based on performance, safety, or productivity. DOL's proposed changes will also include explanations of differences between how shift differentials should be included compared to incentive payments.

Some states have enacted laws or regulations more restrictive than the federal Fair Labor Standards Act, including with respect to fluctuating workweek arrangements. Consult with counsel to regularly review these arrangements and before implementing these arrangements.

"Big Mac" Terminated

Employers and their boards of directors are holding leadership and all levels of employees to a higher standard for personal behavior, regardless of whether the behavior is legal. Most recently, the CEO of McDonald's, Steve Easterbrook, resigned as a result of a consensual relationship with a direct report. There are no allegations of harassment, coercion, or any pressure related to that relationship. McDonald's' standards of business conduct policy prohibits the personal relationship of an employee who as a direct or indirect reporting relationship with another. The restaurant industry is one sector where sexual harassment is among the highest. In one report, 90% of women in the restaurant industry felt they were subjected to sexual harassment, whether by employees or customers. In another survey, 42% of women felt that they had to tolerate sexual abusive conduct and not say anything because they were afraid they would lose their job. Thus, even though Mr. Easterbrook's relationship with a direct report was consensual, it violated the company's standard of conduct policy and he was terminated. Note that he was widely acclaimed for helping to turn around McDonald's during his few years as CEO, but job performance was not enough when standards for personal behavior in the workplace were not followed.

Union Organizing Voter Initiative Rejected in California

One approach unions are pursuing to organize is through local initiatives, where the outcome will be more favorable to employers who become unionized. For example, voters in the community of Rancho Palos Verdes (south of Los Angeles) rejected a union-pushed proposal to increase the minimum wage for hotel and restaurant employees to $15 an hour. The proposal included annual raises of $1 an hour and annual increases of 2% per year thereafter. The proposal also limited the number of square feet a hotel housekeeper would be required to clean each day and required hotels to pay double pay if the square footage exceeded the statutory amount. If an employer had a collective bargaining agreement, then these regulatory provisions could be waived. In other words, become union and it will cost you less to do business in Rancho Palos Verdes than if your employees chose to remain union-free. Approximately 8,000 voted on this referendum and rejected it by 78.1% to 21.8%. However, the lesson here for employers is that union activism is expanding to influence local laws, where the "prize" for the employer would be to become unionized and not have the same financial burden as non-union employers.

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Out of 14,135 licensed attorneys in Alabama, SuperLawyers published its top 50 lawyers for 2020. We are proud to say that four of our lawyers were selected among the top 50, an unusually high number in general and especially so for a small firm. This selection is based on a peer rating system, so we are humbled and honored by these results. Congratulations to Richard Lehr, David Middlebrooks, Al Vreeland, and Mike Thompson.

Additionally, our firm was recently recognized by US News and World Report with a first-tier ranking. We know that regardless of rankings, we are "terminable at will" by our clients and relationship partners. Providing excellent and creative service motivates us, not awards.

Tipped Employees Under the Fair Labor Standards Act

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.

In October, the U.S. Department of Labor announced a proposed rule regarding the tip provisions of the Fair Labor Standards Act implementing provisions of the Consolidated Appropriations Act of 2018 (CAA). The proposal would also codify existing Wage and Hour Division guidance into a rule. The proposal allows for a 60-day comment period and invites comments from interested parties. As the comment period does not end until late in 2019 and then Wage Hour will have to review those comments it is not expected the revised regulations will become effective until sometime in 2020.

The CAA prohibits employers from keeping employees' tips. During the development of those provisions, the Department provided technical assistance to Members of Congress. DOL's proposed rule would allow employers who **do not** take a tip credit to establish a tip pool to be shared between workers who receive tips and are paid the full minimum wage, and employees that do not traditionally receive tips, such as dishwashers and cooks.

The proposed rule would not impact regulations providing that employers who take a tip credit may only have a tip pool among traditionally tipped employees. An employer may take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage (currently $2.13 per hour) and the federal minimum wage. Establishments utilizing a tip credit may only have a tip pool among traditionally tipped employees. Employers should be aware that several states do not allow the use of tip credit toward the minimum wage. If you operate in multiple states, you should consult with counsel to determine whether you may claim a tip credit in all locations.

Additionally, the proposed rule reflects the Department's guidance that an employer may take a tip credit for any amount of time an employee in a tipped occupation performs related non-tipped duties with tipped duties. For the employer to use the tip credit, the employee must perform non-tipped duties contemporaneous with, or within a reasonable time immediately before or after, performing the tipped duties. The proposed regulation also addresses which non-tipped duties are related to a tip-producing occupation.

With its Notice of Proposed Rulemaking (NPRM), the Department proposes to:

- Explicitly prohibit employers, managers, and supervisors from keeping tips received by employees.

- Remove regulatory language imposing restrictions on an employer's use of tips when the employer does not take a tip credit. This would allow employers that do not take an FLSA tip credit to include a broader group of workers, such as cooks or dishwashers, in a mandatory tip pool.

- Incorporate in the regulations, as provided under the CAA, new civil money penalties, currently not to exceed $1,100, that may be imposed when employers unlawfully keep tips.

- Amend the regulations to reflect recent guidance explaining that an employer may take a tip credit for any amount of time that an employee in a tipped occupation performs related non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

The Act defines tipped employees as those who customarily and regularly receive more than $30 per month in tips. Section 3(m) of the FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage of $2.13 and the minimum wage. Thus, the maximum tip credit that an employer can currently claim under the FLSA is $5.12 per hour (the minimum wage of $7.25 minus the minimum required cash wage of $2.13).

The current regulations, which became effective in April 2011, state that the employer must provide the following information to a tipped employee before using the tip credit:

1. The amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour.

2. The additional amount claimed by the employer as a tip credit;

3. That the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;

4. That all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and

5. That the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

The regulations state that the employer may provide **oral or written notice** to its tipped employees informing them of the items above. Further, they state that an employer must be able to show that he has provided such notice. They also state that an employer who fails to provide the required information cannot use the tip credit provisions and thus must pay the tipped employee at least $7.25 per hour in wages plus allow the tipped employee to keep all tips received. For an employer to be able to prove that the notice has been furnished the employees, I recommend that a written notice be provided signed by the employee.

Employers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips combined with the employer's direct (or cash) wages of at least $2.13 per hour do not equal the minimum hourly wage of $7.25 per hour, the employer must make up the difference.

Currently, the regulations also state that a tip is the **sole property** of the tipped employee regardless of whether the employer takes a tip credit and prohibit any arrangement between the employer and the tipped employee whereby any part of the tip received becomes the property of the employer. However, the proposed regulations will remove this prohibition as related to employers that do not claim tip credit against the minimum wage requirements.

Yet, the current regulations do allow for tip pooling among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, and service bartenders. Conversely, a valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors. A factor in who may be included in the tip pool concerns whether the employee has direct interaction with the customer. One positive change is the regulations no longer impose a maximum contribution amount or percentage on valid mandatory tip pools. The employer, however, must notify tipped employees of any required tip pool contribution amount, may only take a tip credit for the actual amount of tips each tipped employee ultimately receives.

Under the current regulations, when an employee is employed in both a tipped and a non-tipped occupation, the tip credit is available only for the hours spent by the employee in the tipped occupation. An employer may take the tip credit for time that the tipped employee spends in duties related to the tipped occupation, even though such duties may not produce tips. For example, a server who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses is considered to be engaged in a tipped occupation even though these duties are not tip producing. The October 2019 proposed regulations remove this section of the regulations relating to the amount of time a tipped employee may spend in non-tipped duties.

A compulsory charge for service, such as a charge that is placed on a ticket where the number of guests at a table exceeds a specified limit, is not a tip. The service charges cannot be counted as tips received but may be used to satisfy the employer's minimum wage and overtime obligations under the FLSA. If an employee receives tips in addition to the compulsory service charge, those tips may be considered in determining whether the employee is a tipped employee and in the application of the tip credit.

Where tips are charged on a credit card and the employer must pay the credit card company a fee, the employer may pay deduct the fee from the employee's tips. Further if an employee does not receive enough tips to make up the difference between the direct (or cash) wage payment (which must be at least $2.13 per hour) and the minimum wage, the employer must make up the difference. When an employee receives tips only and is paid no cash wage, the full minimum wage is owed.

Deductions from an employee's wages for walkouts, breakage, or cash register shortages that reduce the employee's wages below the minimum wage are illegal. If a tipped employee is paid $2.13 per hour in direct (or cash) wages and the employer claims the maximum tip credit of $5.12 per hour, no deductions can be made without reducing the employee below the minimum wage (even where the employee receives more than $5.12 per hour in tips).

The current regulations state that if a tipped employee is required to contribute to a tip pool that includes employees who do not customarily and regularly receive tips, the employee is owed all tips he or she contributed to the pool and the full $7.25 minimum wage.

Computing Overtime Compensation for Tipped Employees:

When an employer takes the tip credit, overtime is calculated on the full minimum wage, not the lower direct (or cash) wage payment. The employer may not take a larger tip credit for overtime hours than for a straight time hours. For example, if an employee works 45 hours during a workweek, the employee is due 40 hours X $2.13 straight time pay and 5 hours overtime at $5.76 per hour ($7.25 X 1.5 minus $5.12 in tip credit).

If you have questions regarding these rules or other Wage Hour issues, do not hesitate to give me a call.

**LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.**

Richard I. Lehr — 205.323.9260
rlehr@lehrmiddlebrooks.com

David J. Middlebrooks — 205.323.9262
dmiddlebrooks@lehrmiddlebrooks.com

Albert L. Vreeland, II — 205.323.9266
avreeland@lehrmiddlebrooks.com

Michael L. Thompson — 205.323.9278
mthompson@lehrmiddlebrooks.com

Whitney R. Brown — 205.323.9274
wbrown@lehrmiddlebrooks.com

Lance W. Parmer — 205.323.9279
lparmer@lehrmiddlebrooks.com

Lyndel L. Erwin (Wage and Hour and Government Contracts Consultant) — 205.323.9272
lerwin@lehrmiddlebrooks.com

Jerome C. Rose (EEO Consultant) — 205.323.9267
jrose@lehrmiddlebrooks.com

Frank F. Rox, Jr. (NLRB Consultant) — 404.312.4755
frox@lehrmiddlebrooks.com

JW Furman (Investigator, Mediator & Arbitrator) — 205.323.9275
jfurman@lehrmiddlebrooks.com