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Newsletters

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NLRB Expands Definition of "Protected Activity"

Margaret Elias, a cashier at the grocery store chain, sought to file an internal sexual harassment complaint after a note she wrote on a whiteboard in the employee breakroom was altered with some offensive comments and illustrations. Elias told her manager and two of her coworkers she was planning on filing a complaint and obtained their signatures on a copy of the note (as witnesses). The HR representative directed Elias to not obtain any further employee statements related to the incident. The National Labor Relations Board (Board) considered whether Elias's conduct constituted protected activity under Section 7 of the National Labor Relations Act (NLRA) and whether the employer violated Section 8(a)(1) of the Act by questioning Elias about why she obtained the witness statements and telling her to refrain from gathering statements from other employees regarding the incident. To be protected under Section 7 of the NLRA, employee conduct must be both "concerted" and for the purpose of "mutual aid or protection." The Board concluded that Elias's conduct was concerted activity even if she did not intend to file a complaint on behalf of others because concertedness is not dependent on a shared objective or on the agreement of one's coworkers with what is proposed, and because

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concerted activity includes situations "where individual employees seek to initiate or to induce or to prepare for group action," and thus includes preliminary individual discussions, as long as it is not solely by and on behalf of the employee himself. Elias's conduct was "for the purpose of mutual aid or protection," because Elias was confronting misconduct that affected the terms and conditions of all employees' employment. Therefore, even if only one employee is immediately benefitted by the action, by soliciting assistance from coworkers to raise issues to management, an employee is requesting that his coworkers exercise vigilance against the employer's perceived unjust practices, and thus benefits all employees by creating solidarity among employees. Even though Elias's conduct was protected, the Board concluded that it was not unlawful for the HR representative to question Elias about her solicitation of statements from other employees or to direct her to stop soliciting additional witness statements. This decision reiterates that a broad range of individual employee conduct can still be protected under the NLRA as long as it could, broadly speaking, seek to improve the terms and conditions of employment generally. Also, employers must be very careful if they seek to constrain employee discussions regarding an on-going investigation, but limitations may be permissible if they are narrowly tailored and necessary to ensure an impartial investigation.

Fresh & Easy Neighborhood Market, Inc. and Margaret Elias, No. 28–CA–064411 (N.L.R.B. August 11, 2014)

Dodd-Frank Act's Whistleblower Protections Do Not Extend to Foreign Tipsters

Liu Meng-Lin, a citizen and resident of Taiwan, was employed as a compliance officer for the healthcare division of Siemens China, Ltd., a Chinese corporation that is a wholly owned subsidiary of Siemens AG (Siemens). Liu discovered that fellow employees were making improper payments to officials in North Korea and China in connection with the sale of medical equipment in those countries. Liu reported this conduct, which he believed to violate anti-corruption measures. Liu claimed that Siemens progressively restricted his authority as a compliance officer, demoted him, and ultimately fired him because of his complaints. After his termination, Liu sued Siemens alleging that Siemens retaliated against him in response to his disclosures of alleged corrupt conduct, and that Siemens thereby violated the whistleblower anti-retaliation provision of the Dodd-Frank Act. In interpreting the anti-retaliation provision of the Dodd-Frank Act, the U.S. Court of Appeals for the Second Circuit concluded there was no legislative evidence to suggest that the provision in question was intended to have extraterritorial reach. As such, the court found that because Liu's complaint alleged that he was a non-citizen employed abroad by a foreign company, and that all events allegedly giving rise to liability occurred outside of the U.S., applying the anti-retaliation provision at question to the facts as alleged by Liu would constitute an unintended extraterritorial application of the statute. Though this decision provides defenses for employers under this particular statute, employers must nevertheless be careful about taking adverse employment action against an employee who has lodged complaints since such situations create a foundation for retaliation claims.

Liu v. Siemens AG, No. 13-4385 (2d Cir. August 14, 2014)

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Employee's Claim for FMLA Retaliation, Interference Permitted to Proceed in Light of Questionable Notice

Lisa Lupyan, an instructor at the defendant college, showed signs of depression, and her employer encouraged her to take a leave. Lupyan met with supervisor Sherri Hixson who told her to submit paperwork indicating that she was requesting "Family Medical Leave." Hixson set Lupyan's projected return to work date based on Lupyan's Certification of Health Provider. Lupyan's FMLA rights were not discussed during this meeting although the college contends that it mailed a letter to her later that day advising her that she was on FMLA leave. Lupyan denies that she received this letter and denies that she had any knowledge that she was on FMLA leave. Lupyan ultimately sought to return to work, but the college informed her that she was discharged due to low attendance and that she had not returned to work following the end of her 12 weeks of FMLA leave. Lupyan asserts that this was the first time she had learned that her leave was considered FMLA leave. She sued the college for FMLA interference and retaliation. The district court granted summary judgment in favor of the employer and the employee appealed. The U.S. Court of Appeals for the Third Circuit agreed that written notice to an employee that she was on FMLA was required, and that the failure to provide notice could constitute interference. In this case, Lupyan claimed that, had she known her leave was considered FMLA-protected, she would have acted differently with regard to her return to work. The employer argued that she had notice because its employee handbook described her FMLA benefits and that it had also sent her a letter designating her leave as FMLA. The court

rejected this argument, finding that the handbook issued to all employees was not sufficient written notice to an employee concerning their actual FMLA leave. The court determined, however, that there was a question as to whether Lupyan actually received the letter regarding FMLA, and that there was a question as to why Lupyan was not reinstated, and thus, summary judgment should not have been granted. Given the proximity in time to Lupyan's end of leave and questionable rational for her discharge, a jury could conclude that the employer's stated reasons were pretextual and that Lupyan was retaliated against for taking leave. Employers should implement and follow practical FMLA policies that provide employees with prompt notice of their rights under the FMLA and clear designation of their FMLA leave and dates.

Lupyan v. Corinthian Colleges Inc., No. 13-1843 (3rd Cir. August 5, 2014)

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Jury to Decide Whether Employer Properly Demanded Psychological Examination of Employee

The emergency medical technician had had an affair with her married coworker. Her supervisor described the conduct as "immoral" and demanded that the employee receive psychological counseling. The employer discharged the employee upon her refusal to receive such counseling. The employee sued under the Americans with Disabilities Act (ADA) based upon the contention that the demanded examination did not satisfy the condition of being "job-related and consistent with business necessity." Earlier in the same course of litigation, the U.S. Court of Appeals for the Sixth Circuit previously held that the employer ordered psychological exam constituted a "medical examination." On this second appeal, the appellate court focused on whether the employer could show: (1) the employee requested an accommodation; or (2) the employee's ability to perform the essential functions of the job is impaired; or (3) the employee poses a direct threat to herself or others. The court found that the one safety violation the employee committed, along with the limited evidence of her emotional outbursts at work, were few enough in number to create a jury issue over whether the supervisor and employer had enough objective knowledge to decide that the plaintiff's job performance was impaired by her supposed psychological state. Similarly, the employer could only identify two isolated events where the employee's conduct could have harmed another person. As a result, a jury must decide whether the employer properly decided that the employee was impaired or that her conduct posed a significant risk to others based upon "reasonable medical judgment." The holding provides a reminder to employers not to hastily terminate employees who exhibit strange or unusual behaviors without first assembling and compiling supporting objective evidence from medical professionals.

Kroll v. White Lake Ambulance Authority, No. 13-1774 (6th Cir. August 19, 2014)

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Clinic Owner Personally Liable for Back Wages after Failing to Pay H-1B Non-Immigrant Required Salary

Dr. Mohan Kutty, through a corporate entity, owned and operated a group of five medical clinics in rural Florida and Tennessee. With respect to staff, Kutty hired 17 newly graduated foreign medical students who were in the United States on J-1 student status. This particular status allows foreign medical graduates to study medicine in the United States, but generally requires them to return abroad for at least two years before seeking work in the country. An exception to the two-year foreign residency requirement exists, however, allowing foreign medical graduates who have a qualifying job offer for employment in a medically underserved area to waive the requirement and immediately enter H-1B nonimmigrant status. Kutty's clinics were in such underserved areas, and so he was able to obtain waiver of the graduates' two-year J-1 foreign residency requirement and petition for their H-1B status. Kutty (on behalf of the corporations) agreed to regularly pay the physicians the prevailing wage for their work. Thereafter, Kutty suspected that some physicians were lying about how many hours they were working, and he began to withhold their salaries, releasing each physician's wages only when he or she increased the number of patients treated. A group of physicians complained, and Kutty stopped paying them entirely. Ten physicians ultimately filed a complaint with the Department of Labor. Following an investigation, the DOL determined that the corporations violated the Immigration and Nationality Act (INA) by failing to pay the required wages and by retaliating against the physicians for engaging in activity protected by the INA. The DOL also concluded that Kutty should be held personally liable for the corporate violations because his actions were willful and because the corporations were, in effect, his alter egos. He was ordered to personally pay $1.14 million in fines and back wages. Kutty petitioned for review

and the U.S. Court of Appeals for the Sixth Circuit affirmed. "The INA is clear," the court concluded, "that Kutty was not permitted to withhold funds from the physicians except in limited circumstances, none of which were present here." This case presents a cautionary tale for any employers utilizing non-immigrant workers. The Department of Labor takes the prevailing wage requirements associated with the H-1B status very seriously, including the requirement that the costs of H-1B petitions not be deducted from the employee's wage if such deductions would bring the wage below the minimum required amount.

Kutty v. U.S. Department of Labor, No. 11-6120 (6th Cir. August 20, 2014)

Contact for more information: Brett A. Strand

Employee Failure to Show Employer's Knowledge of Her Religious Beliefs Proves Fatal to Her Discrimination Claim

Nursing home aide Kelsey Nobach was discharged by employer Woodland Village Nursing Center because she refused to pray the Rosary with a patient because it was against her religion. Nobach was previously written up for other incidents in the past. Nobach filed a charge against the employer with the U.S. Equal Employment Opportunity Commission alleging religious discrimination, and suit was subsequently filed. The jury at the district court level found that the employer discriminated against Nobach by unlawfully discharging her for exercising her religious beliefs. The employer unsuccessfully moved for judgment as a matter of law, and subsequently appealed. The U.S. Court of Appeals for the Fifth Circuit reversed, finding that the motion for judgment as a matter of law should have been granted because Nobach failed to produce evidence of the employer's actual knowledge of her religious beliefs before it fired her. There was no evidence that Nobach ever advised anyone involved in her discharge that praying a Rosary was against her religion. Nobach offered no evidence that Woodland knew of her religious beliefs until after she was actually discharged. Here, the employer prevailed because the employee could not show that the employer was aware of her beliefs prior to the time of termination. Employers should nevertheless exercise caution in terminating an employee where religious beliefs are involved.

Nobach v. Woodland Vill. Nursing Ctr., Inc.,No. 13-60378 (5th Cir. August 7, 2014)

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Ninth Circuit Holds Involuntary Transfers and Rescission of Vacation Were Not "Trivial" Actions in the Context of Retaliation Claims

Thomas was a Communications Supervisor for the Riverside Sheriff's Department and was very active in the union, including serving as negotiator for her union, giving public speeches, and speaking with the media about union issues. Following over 30 actions she viewed as adverse, Thomas filed a lawsuit against the County of Riverside alleging she was retaliated against for exercising her First Amendment rights. The district court granted the county's motion for summary judgment and held that a reasonable jury could not find Thomas's alleged 30-plus adverse actions would be "reasonably likely to deter" First Amendment speech. The U.S. Court of Appeals for the Ninth Circuit reversed in part. The court held that the district court erred in dismissing the prior adverse actions as "trivial" as a matter of law. Although the court acknowledged a few of the alleged adverse actions were, in fact, "trivial," actions such as removing Thomas from a community college teaching position paying $9,000 per year, prohibiting her from using break time to travel between worksites, rescinding a previously approved vacation, and removing Thomas from an unpaid committee position, could be viewed by a reasonable juror, even in isolation, as deterring protected speech. Therefore, the court concluded that Thomas's claim survived summary judgment, and the action was remanded for further proceedings. Public employers should take caution to ensure that any adverse actions taken against employees do not appear to be retaliatory for the employee engaging in protected speech.

Thomas v. County of Riverside, No. 12-55470 (9th Cir. August 18, 2014)

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Appeals Court Holds Reassignment Upon Return from Maternity Leave Constitutes FMLA Interference

A payroll and insurance manager for a book retailer requested leave under the Family and Medical Leave Act (FMLA) in order to give birth to and care for her newborn. The employer initially approved the leave but then told her she would still have to continue working due to a new payroll system implementation. The employee subsequently worked from home immediately after birth but when she returned she was informed the employer was unhappy with her performance and she was reassigned to a newly created, inferior position. Plaintiff resigned because she did not want to change careers. She filed suit, alleging, among other things, FMLA interference. The district court granted summary judgment in favor of the employer, concluding that she suffered no prejudice because she was paid her salary until she resigned and the reassignment did not constitute prejudice. The employee appealed. The U.S. Court of Appeals for the Eleventh Circuit reversed, finding that a jury could conclude reassignment to an inferior position immediately following return from leave prejudiced her. The court also held the trial court must still consider a claim for injunctive relief (here reinstatement) even if no monetary damages exist. Based upon this decision, employers should remain cognizant that any personnel decision made immediately upon an employee's return from leave could later be seen as violating the FMLA.

Evans v. Books-a-Million, No. 13-10054 (11th Cir. August 8, 2014)

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Court Declines to Uphold Choice of Law Clause in Employment Agreement

Maine resident Michael Dinan worked as a salesman for California-based Alpha Networks from 2005 until 2010 when he quit because of a dispute about unpaid commissions. In 2005, Dinan signed a letter agreement with Alpha Networks that included a standard choice of law clause designating California law applicable to disputes under the agreement. In 2008, Alpha sent an email to Dinan that contained a new compensation plan, which Dinan thought promised him less in commissions than the 2005 letter agreement. Despite his disappointment, Dinan remained at Alpha Networks selling computer hardware. Dinan claims he was promised a new compensation plan in 2009 but that never materialized. Dinan left in March 2010 having been paid almost no commissions for his sales in 2009 and 2010. Dinan filed a lawsuit against Alpha Networks asserting contract and "quasi-contract" claims. The case went to trial and a federal court jury concluded that although Dinan had not established his right to commissions for 2009 and 2010 under the 2005 letter agreement, he was nevertheless entitled to "quasi-contract" damages for services rendered in an amount equal to his unpaid commissions. In determining damages, the parties disagreed about whether Maine or California law applied to augment the jury's award since the difference was substantial based on which state's law governed. The district court found that California law applied per the terms of the agreement thereby adding only liquidated damages to the unpaid commissions award not the treble damages and attorneys' fees provided under Maine's wage payment law. The U.S. Court of Appeals for the First Circuit disagreed. The court concluded that the 2005 letter agreement's choice of law clause designating California was inapplicable because it applied only to disputes resolved under that agreement and since the jury awarded damages applying a "quasi-contract" theory outside of the 2005 letter agreement then the clause did not apply. The court then applied Maine law regarding choice of law issues to determine which state's law applied. Specifically, the court stated that it would apply the law of the state where most of the employment services were performed unless another state has a "more significant relationship" with the employee then that state's law would apply. Here, the court concluded that since Dinan's work was mostly performed from his home in Maine then Maine's wage law should apply to govern enforcement of the quasi-contractual relationship he had with Alpha Networks in 2009 and 2010. Accordingly, the damages awarded Dinan was far greater than anticipated by Alpha Networks. Employers should take note that the choice of law clause in their employment agreements may not be sufficiently broad to cover all disputes involving compensation or any other terms or conditions of employment.

Dinan v. Alpha Networks, Inc. No 13-1976 (1st Cir. August 20, 2014)

Employee's Religious Discrimination Claim Withstands Employer Challenge

Lois Davis was hired by Fort Bend as a Desktop Support Supervisor. After she complained of sexual harassment against the IT Director, he resigned. She and the rest of the IT department began to install new computers at a county facility, and all employees were scheduled to work over a weekend. Davis advised that she could not work on Sunday due to a

religious commitment, and had arranged a replacement during her absence. Her supervisor Kenneth Ford told her it was not an excuse and she would be written up or terminated if she missed the installation. Davis attended her church event, and was terminated for not showing up for work. Davis subsequently filed suit against her employer, claiming retaliation and religious discrimination under Title VII of the Civil Rights Act of 1964 (as amended), among other things. The employer successfully sought summary judgment and Davis appealed. The U.S. Court of Appeals for the Fifth Circuit affirmed in part and reversed in part. At the outset, in reviewing the religious discrimination claim, the court found that Davis's testimony about her own sincere belief regarding her religious need to attend a special service at church sufficiently evidenced a genuine dispute of material fact as to whether she held a bona fide religious belief. The employer and district court incorrectly focused on the nature of the activity (e.g., special service, feeding the community) instead of whether the belief was sincere. Further, the court found there existed a genuine issue of material fact as to whether the employer would have truly suffered an undue hardship in accommodating Davis's request. On the retaliation claim, however, the court affirmed, finding that Davis failed to meet her burden of showing that she was subjected to "materially adverse" actions, and similarly was unable to produce evidence demonstrating that Fort Bend's legitimate, non-retaliatory reason for terminating her (because she failed to appear for work) was pretext for retaliation. Employers must take caution in making employment decisions that affect or call into question a person's sincerely held religious beliefs.

Davis v. Fort Bend County, No. 13-20610 (5th Cir. August 26, 2014)

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New Pregnancy Accommodation Rules Coming to Illinois in January 2015

On August 26, 2014, Governor Pat Quinn of Illinois signed the "Pregnancy Fairness bill" into law, creating broad new protections for pregnant workers in Illinois. The legislation, which comes on the heels of the U.S. Equal Employment Opportunity Commission's (EEOC) recent federal pregnancy discrimination rules, amends the Illinois Human Rights Act and creates substantial new rules for employers interacting with pregnant employees and job applicants. Under the new law, any pregnant employee or job applicant (including those with "common conditions related to pregnancy or childbirth") will have to be accommodated in the same way that disabled employees currently are accommodated under the Americans with Disabilities Act. Thus, it will be unlawful for an employer to refuse a pregnant employee's request for a reasonable accommodation unless the accommodation would create an undue hardship. Specific accommodations that may be appropriate and necessary, according to the law, include longer bathroom breaks, assistance with manual labor, temporary transfer to less strenuous positions, equipment purchase, modified work schedules, and time to off to recover from pregnancy-related conditions. In determining whether one of these accommodations creates an "undue hardship," Illinois courts will ask whether the action is overly expensive or disruptive given the nature and cost of the accommodation compared to the operations and financial resources of the company. Employers will also be permitted to request medical certification of a pregnant employee's need for accommodation, including the "medical justification" for the accommodation and details regarding the nature and duration of the proposed accommodation. Lastly, after the law takes effect on January 1, 2015, employers will have to post a notice of pregnant employee's rights under the law, which the state will make available on its website. The new Illinois law sets forth many of the same rules that the recently enacted EEOC guidance identified. Illinois, however, has set forth legally binding and far more specific rules for pregnancy accommodation. Additionally, smaller employers who are exempt from the federal requirements are not similarly exempt from the new Illinois rules. Prior to January 2015, all Illinois employers should take note of the new requirements and train their staff accordingly.

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