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Albert W. Palewicz, *Editor*

FROM THE CHAIR

By Darryl G. McCallum

As I write this short "Chair" column just after the new year, it occurs to me that employment law practitioners will be grappling with new laws in the new year that affect their practice. For instance, one recent development in employment law is the flurry of new laws regarding conducting criminal history inquiries on job applicants. Effective January 2015, subject to certain exemptions, employers that do business in Prince George's and Montgomery County Maryland are now barred by County law from asking about the criminal history of applicants on employment applications (*i.e.* the "box" is "banned") or before the first interview is concluded. Thus, questions about criminal history are banned from the employment application and prohibited otherwise before the first interview concludes. Under the Prince George's County law, employers that are considering disqualifying an applicant based on criminal history must make an individualized assessment of the job relatedness of the conviction, including the nature of the offense, the time that has elapsed since the conviction, and any information bearing on its potential inaccuracy. The Montgomery County law imposes no such requirements (although the EEOC's Guidance on the Use of Arrest and Conviction Records in Employment Decisions counsels that these factors be used to assess an applicant's criminal history). In contrast with the Prince George's County law, the Montgomery County law applies not just to outside applicants but also to employees applying for new positions with the employer. It is also likely that a new "shielding bill" will be introduced in this year's legislative session in Annapolis. If passed, such a law could allow individuals to petition a court to shield certain nonviolent misdemeanor convictions after a certain length of time so that they would not be seen by employers looking into the individual's criminal record. It should make for an interesting legislative session as we continue to see new developments in the area of employment law.

A brief note of thanks to the Maryland Employment Lawyers Association and the Metropolitan Washington Employment Lawyers Association for partnering with our Section in presenting a program this past October on the 50th Anniversary of Title VII, entitled "Working for Equality: A Celebration of the 50th Anniversary of Title VII of the Civil Rights Act of 1964." The program was very informative and well received. Stay tuned for information in upcoming newsletters about our Annual Meeting Program in Ocean City this June.

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EDITOR'S CORNER

By Albert Palewicz

HAPPY NEW YEAR!
With this issue, we begin a new year, and a new volume of this newsletter. I hope the new year is good for everyone who sees this newsletter. However, I do not need to hope this newsletter issue will be good. It is an amazing issue. The articles cover many topics of strong interest, and they are all well written. I do not usually do an "index" of articles in the newsletter, but I want to make sure everyone sees the topics covered here. They are:

1. Three Decades of *Adler* and Lingering Mysteries of the Abusive Discharge Tort
2. The Impact of ACA Final Regulations on Adjunct Faculty, Part-Time Faculty, and Student Employees
3. Mental Health Impairments Pose a Growing Challenge for Employers Under the ADA
4. Arbitrator's broad authority ends at public policy exception
P.G. County ex rel. P.G. County Police Dep't v. P.G. County Police Civilian Employees Ass'n, 219 Md. App. 108, 98 A.3d 1094 (2014) (herein "*;PCEA*")
5. Analyzing Decision to Reinstate Ray Rice to the NFL: Did Commissioner Goodell Act Arbitrarily?
6. Are You My Employer? (The NLRB's recent joint er issues.)
7. **Challenges in 2015 for the Federal Contractor Community**
these new regulations raise the minimum wage for workers on federal contracts, increase the employer's obligations to veterans and individuals with a disability and expand the coverage of the OFCCP to include protections for LGBT employees
8. EEOC Issues New Guidelines to Address Workplace Pregnancy Discrimination Ahead of Supreme Court Decision
9. Handling Complex Whistleblower Cases: Dealing with Ambiguities and High Stakes Claims

As you can see, these articles cover many topics of significant interest to labor and employment law practitioners. They were written by attorneys at the Baltimore firm of Miles & Stockbridge, with Marc Sloane acting as coordinator. Thanks to all the authors.

The next issue will be coordinated by Jim Hammerschmidt of Paley Rothman in Bethesda.

I extend the continuing thanks of all the Section members to the firms and the attorneys, who have continued to help insure all of us stay current with the law in this exciting arena.

ARTICLES

Three Decades of *Adler* and Lingering Mysteries of the Abusive Discharge Tort

By Anthony W. Kraus, Miles & Stockbridge P.C.

It has been over thirty years since the Court of Appeals of Maryland first recognized the claim of abusive discharge in *Adler v. American Standard Corporation*, 291 Md. 31 (1981). Answering a certified question from Maryland's federal district court, the Court of Appeals decided that employees who are fired for reasons "in contravention of a clear mandate of public policy" are entitled to relief in tort. The newly-announced claim, in derogation of employers' traditional power to terminate at will, was based upon a delicate balancing of the interests of employees, employers, and society in general.

While thorough in its weighing of such concerns, the *Adler* decision left many thorny issues still to be resolved in the application of its new rule. Determining what constitutes "a *clear* mandate of public policy" has been the primary puzzle facing judges in adjudicating abusive discharge claims. Decisions applying the *Adler* rule have been largely devoted to discussing that issue, as has the related critical commentary. Generally, Maryland courts have found a "clear mandate of public policy" only where an employee has been discharged for (1) refusing to violate the law, (2) attempting to exercise a statutory duty, right, or privilege, or (3) performing an important public function. *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 610 (1989). Even with these guidelines, the *Adler* rule has remained obscure and the subject of controversy. *See*, *e.g.*, Haley, "*Porterfield v. Mascari II Inc.*: A 'Clear Mandate of Public Policy' Remains Unclear in Maryland's Wrongful Discharge Jurisprudence," 63 Md. Law Rev. 605 (2012).

Equally perplexing as how to rate the "clarity" of public policy mandates, however, are three other questions that arose but were undecided in *Adler*, and have persisted as sources of additional uncertainty in such claims. In *Adler*, the plaintiff had alleged that he had been discharged for "whistleblowing" internally to management in Maryland about illegalities that were principally defined by federal law and that had been committed out of state by company personnel in New Jersey and Mexico. This complicated scenario raised questions of (1) whether intra-company complaints, rather than reports to external public authorities, were sufficient to trigger abusive discharge relief in a whistle-blowing context, (2) whether federal law is incorporated as a source of "Maryland" public policy that can serve as a foundation for the claim, and (3) whether the relevant public policy should be confined to intra-state interests rather than more broadly encompassing interstate or international interests.

These three secondary *Adler* issues, which have been largely overlooked in the extensive commentary on the case, are the focus of this article. While these questions are yet to be decided by Maryland's Court of Appeals, they have been addressed, at least preliminarily, by judges in Maryland and elsewhere, and have been the subject of sharp difference of opinion. To track where things currently stand and where they may be heading in Maryland, the relevant decisions are discussed below.

A. "Whistleblowing" Sufficient to Trigger Abusive Discharge Protection.

The ultimate resolution of the abusive discharge claim in *Adler* occurred in the United States Court of Appeals for the Fourth Circuit, following the trial of the case in federal district court. The Fourth Circuit reversed a jury verdict for the plaintiff, and held that the motivation for his discharge, which allegedly was retaliation for complaining internally to his immediate supervisors about commercial bribery, did not contravene a sufficiently clear mandate of public policy. In the view of the panel majority, an abusive discharge tort claim for whistleblowing arises only when an employee is fired for reporting employer wrongdoing to law enforcement agencies or other public authorities *outside* the company, which had not occurred. *Adler v. American Standard Corporation*, 830 F.2d 1303, 1306 (4th Cir. 1987).

The question of whether external communication to governmental authorities was necessary to trigger protection under the *Adler* doctrine was revisited in *Lee v. Denro, Inc.*, 91 Md. App. 822 (1992), in which a trial court had dismissed a complaint for lack of such alleged public reporting. The Court of Special Appeals affirmed on another ground, but the opinion by Judge Diana Motz noted in dicta that "[t]he existence of public policy would not seem to depend on whether an employee articulates her grievances to government authorities." *Id*. at 835, n. 5.

The Maryland Court of Appeals further considered the matter in *Wholey v. Sears, Roebuck & Co.*, 370 Md. 38 (2002), which involved an alleged retaliatory firing for internal investigation and reporting of criminal conduct. Contrary to the dicta in *Lee v. Denro*, the court concluded that '"[t]o qualify for the public policy exception to at-will employment, the employee must report the suspected criminal activity to an the appropriate law enforcement or judicial official, [and] not merely investigate suspected wrongdoing and discuss that investigation with co-employees or supervisors," as the plaintiff allegedly had done. *Id*. at 62 Under Section 762 of Article 27 of the Maryland Code, it is a crime to retaliate against a person who reports suspected criminal behavior to law enforcement authorities; and consistent with that statute, the Court held that an abusive discharge claim could be brought by an employee fired for reporting crimes to public officials, but not for simply reporting crimes internally. In so ruling, the court confirmed the Fourth Circuit's conclusion in *Adler* that mere inves-

tigation or internal reporting of suspected criminal activity was not enough. While two judges did not join in *Wholey* opinion, and just concurred in the result, their expressed reservations did not relate to the external reporting requirement. Rather, because the plaintiff had failed to meet the requirements of § 762, they concluded that the issue of whether or not an abusive discharge claim could be based on that statute's public policy was moot and need not have been addressed.

In *Lark v. Montgomery Hospice, Inc.*, 414 Md. 215 (2010), the Court of Appeals subsequently considered whether such external reporting was required as an element for a direct, statutory whistleblowing claim under Maryland's Healthcare Workers Whistleblower Protection Act, Md. Code Ann., Health Occ.§§ 1-501 - 1-506. In contrast to its more conservative decision in *Wholey* under the common law, the court interpreted the statute liberally to provide job protection for employees who merely complained internally about noncompliance with laws, rules or regulations; and it did not require the reporting of such wrongdoing to "an external board." The court noted that the statute specifically included protection for those who "threatened to report" as well as who reported, which clearly contemplated that no actual external report was necessary for relief. The court also cited out-of-state abusive discharge cases that had extended common law protection to internal whistleblowers.

In the most recent abusive discharge case raising the internal/external reporting distinction -- *Parks v. Alpharma, Inc.*, 421 Md. 59 (2011) -- the Court of Appeals side-stepped further assessment of the issue. In *Parks*, the plaintiff claimed to have been fired for making internal complaints about her employer's unlawful practices in development of pharmaceuticals. Among other things, she contended that its practices had violated the Maryland Consumer Protection Act, the Federal Trade Commission Act, and labeling regulations of the Federal Drug Administration. Consistent with *Wholey*, the trial court had dismissed her claim because she had not reported the alleged wrongdoing externally; but the Court of Appeals affirmed on the alternative ground that various public policies invoked in her complaint were insufficiently specific and focused to support a claim. While approving the result, Judge Adkins stated in a concurring opinion that the Court should specifically have disavowed the "external" reporting requirement relied upon by the trial court. She believed any such requirement had been effectively rejected in *Lark*, even though that opinion had involved a statutory rather than a common law claim. *Parks*, 421 Md. at 87-88

Consequently thirty years after *Adler*, it is still an open and much-debated question about whether the Fourth Circuit properly required "external" reporting for an abusive discharge claim based on whistleblowing, or whether, as Judge Adkins and Judge Motz both have proposed in the meantime, internal reporting should be sufficient.

B. Reliance upon Federal Public Policy.

In a later phase of the *Adler* litigation in 1982, after the theory of abusive discharge had been recognized preliminarily through the certified question procedure, the defendants had moved for dismissal of Adler's claims insofar as they were based upon alleged contravention of federal law and public policy. Federal District Judge Harvey, before whom the case was then pending, flatly rejected the argument that federal law should not be considered part of the "public policy of Maryland" for purposes of stating such a claim:

> If plaintiff recovers, there would be no binding determination of a violation of a federal statute, nor any enforcement of same. It is in no way offensive to state sovereignty to engraft federal public policy within the civil law. If defendant's arguments were to be adopted, this Court would accept the proposition that the State of Maryland, as a matter of public policy of its own, should not be concerned with serious violations of federal law resulting from acts of bribery. Federal and state officials regularly cooperate in the enforcement of the laws of the other sovereignty. This Court cannot agree that the State of Maryland should close its eyes and, as a matter of policy, not be concerned with violations of federal law.

Adler v. American Standard Corporation, 538 F. Supp. 572, 578-79 (D. Md. 1982).

Although the Fourth Circuit did not reach the issue in the appeal of *Adler*, it did address the point in a subsequent case -- *Szaller v. The Am. Nat'l Red Cross*, 293 F.3d 148 (4th Cir. 2002) – where its view diverged sharply from Judge Harvey's. The Fourth Circuit concluded that predicating abusive discharge relief on federal public policy, at least as derived from the welter of federal administrative regulations, would unduly burden Maryland employers and blur the boundaries of the claim:

> Szaller argues that the Red Cross violated a clear mandate of public policy by discharging him for reporting allegedly improper blood handling procedures to a Red Cross hotline. . . He relies solely on FDA regulations and a consent decree between the FDA and the Red Cross to support his wrongful discharge claim. Maryland courts, however, have given no indication that federal regulations or consent decrees constitute Maryland public policy. . . . [F]ederal policy is enforced by the means Congress specifies, not through state-law wrongful discharge actions.
>
> In an attempt to address the overwhelming burden his position would place on Maryland employers, Szaller contended at oral argument that only federal regulations dealing with situations of "extreme importance" should be included in the state's public policy. . .
> But all federal regulations address areas of public concern, and a litigant could argue that all federal policies protect cogent and compelling interests. If the Maryland courts or legislature wish to define which federal regulations also qualify as clear mandates of state public policy, they are free to do so. But federal courts cannot draw the line for Maryland.

Szaller, 293 F.3d at 151.

Prior to *Szaller*, federal law had been utilized in a few Maryland abusive discharge claims as a source of applicable public policy *See*, *e.g.*, *Magee v. DanSources Technical Services*, 137 Md. App. 527 (2001) (holding a claim could be based upon discharge for refusing to violate a federal statute outlawing health care benefit fraud); *Kessler v. Equity Management*, 82 Md. App. 577 (1990) (finding that the discharge of a rental property manager for allegedly for refusing to enter apartments and "snoop" through their contents contravened not only state law policies against trespass and invasion of privacy but also the 4th Amendment's policy against unreasonable searches); and *DeBleeker*

v. Montgomery County Maryland, 292 Md. 498 (1982) (upholding a potential § 1983 discharge claim by a public employee alleging retaliation for exercising 1st Amendment rights, and obliquely citing *Adler* in support of its ruling.).

The question arose again in *Parks v. Alpharma*, *ante,* which involved alleged violation of Federal Drug Administration regulations, among other things; but the Court of Appeals skirted the issue of reliance on federal law, and affirmed for other reasons. Again, however, in dicta in a concurring opinion, Judge Adkins expressly endorsed permitting state abusive discharge claims based on contravention of federal public policies, and stated her concern that the majority's references to the *Szaller* opinion might be construed as tacit approval of the Fourth Circuit's conclusion to the contrary. With a vehemence reminiscent of Judge Harvey's in *Adler*, she rejected what she characterized as the "Fourth Circuit's tirade against reliance on federal regulation in abusive discharge cases" and remarked that "it was by no means beyond the ken of this Court to assess the relative importance of one Federal regulation over another in terms of wrongful discharge law." *Parks*, 421 Md. at 89-91. Although not mentioned in her concurrence, she had personal experience in applying federal law in an abusive discharge setting, having authored the Court of Special Appeals' decision in *McGee*, which had relied upon an anti-fraud provision in federal health care benefit law.

Whether the failure of other judges to join Judge Adkins' concurrence in *Parks* reflects their support for the Fourth Circuit's position, or simple reluctance to consider an issue they may have viewed as unnecessary to address, remains to be seen when the question again arises before the court in a future case.

C. Extra-Territorial Contravention of Relevant Public Policy.
An additional unresolved question raised in *Adler* was whether a retaliatory firing in Maryland for whistleblowing about wrongdoing occurring outside of the state contravened *Maryland's* public policy sufficiently to support an abusive discharge claim. Judge Harvey's opinion in *Adler* had given short shrift to any potential constitutional and practical problems related to the out-of-state location of the reported misconduct, which primarily had been commercial bribery in New Jersey and Mexico. *Adler*, 538 F. Supp. at 578 ("The civil law remedy in Maryland for an abusive discharge does not . . . have extraterritorial effect"). One Fourth Circuit panel member had raised concerns about it in oral argument in the *Adler* appeal, but the court's eventual decision did not address it.

In the wake of Judge Harvey's original ruling, the courts of Maryland appear not yet to have had occasion to reconsider the issue, but there is a split of authority that has emerged in the out-of-state decisions, illustrated by decisions from Illinois and New Jersey.

In *Pratt v. Caterpillar Tractor Co.*, 500 N.E.2d 1001, 1002 (Ill. App. Ct. 1986), an Illinois appeals court rejected an abusive discharge claim brought by an employee who alleged that his employer's Swiss subsidiary had paid bribes in violation of the Foreign Corrupt Practices Act ("FCPA") and who reportedly was terminated for refusing to certify to the contrary on company documents. The court concluded that Congress's efforts to regulate American international corporations in their dealings with foreign states did not implicate the public policy of Illinois. In *Osikowiz v. Northwest Airlines, Inc.*, 1994 WL 23153 (N.D. Ill. Jan 27, 1994), another Illinois court concluded that there is no local public policy basis under Illinois law "favoring the reporting of extraterritorial crimes."

In contrast, two decisions from New Jersey's Supreme Court have taken the opposite view. In *D'Agostino v. Johnson & Johnson*, 133 N.J. 516 (1993), the court addressed an abusive discharge claim by a Swiss resident working for the Swiss subsidiary of a New Jersey-based corporation, who claimed to have been fired in Switzerland for objecting to payments there in alleged violation of the FCPA. The court concluded that foreign bribery in Switzerland had a potential effect on New Jersey and upon the health and welfare of its citizens, and that because the FCPA was intended to have an extraterritorial effect, incorporation of the FCPA's policies into New Jersey employment law was a permissible extraterritorial effect. It also sought to characterize the result as "not exporting New Jersey employment law so much as applying New Jersey domestic policy, drawn from federal sources, to a domestic company." Id. at 539.

Subsequently, that court sustained a similar internationally oriented claim brought under the New Jersey Conscientious Employees Protection Act, which codifies the state's abusive discharge law. In *Mehlman v. Mobil Oil Company*, 153 N.J. 163 (1998), the state supreme court concluded that the defendant company's director of toxicology, who alleged that he was fired for advising a company manager that gasoline sold by the company in Japan contained unsafe benzene levels in excess of 5%, had a viable claim. Such benzene levels exceeded those prescribed by the Japanese Petroleum Association, which represented the oil industry in its relations with the Japanese government, and whose guidelines were found by the court to authoritatively state the public policy of Japan. The court concluded that retaliation for whistleblowing about violation of such foreign public policy, even if the employee had been unaware of the policy's specific legal underpinning in the law of Japan, was properly actionable under the statute.

It is unclear whether Maryland will go so far in extending the reach of its law of abusive discharge, although doing so would appear to be at odds with the Court of Appeals' cautionary comments about the intended "limited nature" of the claim. *See*, *e.g.*, *Makovi v. Sherwin-Williams*, Co. 316 Md. 603, 609 (1989). But whatever the eventual outcome, the persistence of these basic questions, among others, is a reminder of the complexity of what the Court of Appeals began in *Adler*. In initiating relief for discharged employees that seeks to vindicate the vague, general concept of "public policy," and also is to evolve through the halting, case-by-case procedure of the common law, the court created what, to borrow Churchill's phrase, seems to be an abiding riddle, wrapped in a mystery inside an enigma, at least in comparison to the more familiar forms of employment regulation found in focused, comprehensive statutes.

The Impact of ACA Final Regulations on Adjunct Faculty, Part-Time Faculty, and Student Employees

By Thomas J. St. Ville & Cristopher D. Jones, Miles & Stockbridge, P.C.

Starting in 2015, the Patient Protection and Affordable Care Act (ACA) imposes "shared responsibility" tax penalties on "Applicable Large Employers" (ALEs) who fail to offer their full-time employees health care that meets the ACA requirements for coverage and affordability. ALEs are employers with at least fifty full-time and full-time equivalent (FTE) employees (for 2015, this number is increased to 100), and shared responsibility tax penalties are imposed on ALEs in relation to the number of their full-time employees (but not their FTEs). It is important, therefore, that ALEs correctly determine exactly which of their employees are full-time for purposes of the ACA so they can anticipate—and avoid—shared responsibility tax penalties.

Educational ALEs often find it challenging to decide whether a particular adjunct faculty member or student employee is full-time because they work on an academic calendar and have special duties. Nevertheless, determination of full-time employee status for purposes of the ACA is made using actual hours of service. This means ALEs must generally count both the hours an employee is paid for the performance of services and the hours an employee is paid due to vacation, holiday, illness, incapacity or disability, layoff, jury duty, military duty, or leave of absence.

For hourly employees, ALEs count actual hours of service to determine whether they are full-time. For salaried and other non-hourly employees, employers may either count actual hours of service, or they may use a days-worked or weeks-worked equivalency. Under the days-worked equivalency, employees are credited with eight hours of service for each day in which they must be credited with at least one hour of service. Under the weeks-worked equivalency, employees are credited with forty hours of service for each week in which they must be credited with at least one hour of service. Because of the difficulties in counting their actual hours of service, the final ACA regulations include special rules for dealing with certain types of employees.

Counting Hours for Adjunct Faculty and Students

Determining hours of service in educational settings raises special issues, especially concerning student and adjunct faculty employees. For student employees, the ACA final regulations provide that hours worked under a federal or state work–study program do not count as "hours of service" for purposes of the ACA. Similarly, hours worked in an uncompensated internship or externship do not count as "hours of service," whether the internship or externship is performed at the school or at a private employer's workplace. For all other purposes, hours for which an educational institution compensates students as employees are "hours of service" for purposes of the ACA, and failure to offer health benefits to students employed full-time may result in shared responsibility tax penalties.

Measuring hours for adjunct faculty can be difficult because adjuncts may not have set office hours or other defined service requirements. The final regulations provide that educational institutions may either count actual hours worked (as they may do for any employee), or they may use a reasonable method for crediting hours of service. Employers have great latitude in designing their method for counting service hours, but the regulations are clear that no method is reasonable if, based on the facts and circumstances, it has the effect of characterizing as part-time those employees whose positions traditionally involve at least thirty hours of service per week.

The ACA shared responsibility regulations provide an optional formula that the IRS deems a reasonable method for calculating adjunct faculty members' hours of service. Under this method, adjunct faculty are credited with 2.25 hours of service for each hour spent teaching in a classroom. For example, if an adjunct faculty member spends three hours per week teaching classes, he or she would be credited with 6.75 hours of service: 3 x 2.25 = 6.75. In addition to this teaching and preparation credit, the method requires crediting adjunct faculty with an hour of service for each hour spent performing other duties for the school. Thus, if an adjunct faculty member must attend meetings, hold office hours, respond to student questions, or perform other duties, that employee must be credited with one hour of service for each hour spent performing those duties. Adding to our example, if the faculty member must attend an hour-long faculty meeting and spend three hours answering student questions via email each week, she or he would need to be credited with an additional four hours of service, for a total of 10.75 hours of service per week.

Measurement Periods

How must an educational employer go about identifying its full-time employees? In general, employees' status is measured monthly, and an ALE is subject to a tax penalty if it fails to offer health coverage to its full time employees within three months of their hire. Therefore, if a new employee is expected to work at least an average of thirty hours per week (or 130 hours per month), the employee is a full-time employee and must be offered health coverage within three months of his or her hire.

For variable-hour and seasonal employees, using the default monthly measurement method for determining whether an employee is expected to be full-time can be difficult, and the results can vary wildly from month to month. (Note that educational institutions may not count as seasonal employees those employees whose work schedules are interrupted by school breaks, such as summer and winter breaks.) To provide some predictability as to which of their variable-hour employees are full-time, the final regulations provide that employers may use an optional "look-back measurement method" for determining their status.

The look-back measurement method is used only for purposes of calculating whether the employee is full-time for purposes of the tax penalty, not for purposes of determining whether the employer is an ALE. Under this method, the employer looks to a prior period, the "measurement period," to determine whether the employee is full-time (i.e., worked an average of at least thirty hours per week (or 130 hours

per month)), and if she or he is determined to have worked full-time in the measurement period, he or she is deemed to be a full-time employee during a subsequent "stability period," regardless whether she or he works less than full-time during the stability period. The measurement period must be at least three months, but no longer than twelve months, and the stability period must be at least six months, but no shorter than the measurement period. (The employer may also use an "administrative period" of up to ninety days, akin to an open enrollment period, which runs consecutively to the end of the measurement period and concurrently with the end of the prior stability period. The administrative period allows time to notify and transition variable-hour employees into and out of health coverage, as applicable, at the start of the upcoming stability period.)

Imposing Limits on Hours: Legal Considerations

Some educational employers have contemplated ways to ensure their part-time faculty, adjunct faculty, and student employees do not become full-time faculty for purposes of the ACA's health care coverage requirements. In addition to employee relations and morale issues, such limitations raise legal issues that should be considered before making any decision to impose limits on the number of hours that those employees can work. These issues, for which government agencies have declined to provide guidance, include:

- ACA Whistleblower Protections: Section 1558 of the ACA prohibits employers from "discharging or in any manner discriminating against any employee with respect to his or her compensation, terms, conditions or other privileges of employment" for reporting or objecting to a violation of the Act.

- ERISA § 510 Claims: Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA) protects benefit plan participants from adverse employment action, and employers may not interfere "with the attainment of any right to which such participant may become entitled under the plan."

Closing Thoughts

The ACA shared responsibility regulations are complex, and compliance failures can be expensive. If an ALE does not offer an ACA-compliant health plan to substantially all of its full-time employees (at least 70% in 2015, and at least 95% thereafter), the ALE can be penalized $250 per month, per full-time employee. And if an ALE offers an ACA-compliant health plan but somehow fails to offer that plan to a full-time employee who then receives an ACA tax subsidy to purchase health insurance on an exchange, the ALE can be penalized $166.67 per month, per full-time employee who received the subsidy. So it behooves employers to plan carefully for ACA compliance.

For educational ALEs, the key to compliance is determining which of their student employees and adjunct faculty are full-time for purposes of the ACA. It can be especially difficult to capture adjunct faculty service in distance-learning and online classroom settings. But with careful planning, use of the look-back measurement method, and reliance on the 2.25-hour safe harbor for adjunct faculty, educational employers can ensure their compliance with the final ACA shared responsibility regulations.

This is for general information and is not intended to be and should not be taken as legal advice for any particular matter. It is not intended to and does not create any attorney-client relationship. The opinions expressed and any legal positions asserted in the article are those of the author and do not necessarily reflect the opinions or positions of Miles & Stockbridge P.C., its other lawyers, or the Maryland State Bar Association.

Mental Health Impairments Pose a Growing Challenge for Employers Under the ADA

By Kristy M. Eriksson, Miles & Stockbridge P.C.

According to the National Alliance on Mental Illness, one in four adults - nearly 60 million people - will experience a mental health disorder this year. Will some of those people be your employees? The answer is probably "yes." Are you ready? The answer is probably "no." The question of how to accommodate employees with mental health impairments is a growing challenge for employers, and most are not prepared to meet that challenge. Not only are requests for accommodations increasingly being made to employers for mental health disabilities, but employees are taking action to enforce their legal rights more and more frequently. More than ever before, EEOC Charges and lawsuits are being filed under the Americans with Disabilities Act (ADA) involving mental disabilities. This article briefly reviews the current state of the law and offers some suggestions to employers to comply with their legal obligations.

There is no question that mental disabilities are covered by the ADA to the same extent as physical disabilities. A physical or mental impairment will constitute a disability under the ADA if it "substantially impairs one or more major life activities," which are broadly defined to include activities such as learning, reading, concentrating, thinking and communicating. ADA regulations define "mental impairment" to include "[a]ny mental or psychological disorder, such as . . . emotional or mental illness." The EEOC has issued guidance providing examples of mental illnesses, such as major depression, bipolar disorder, anxiety disorders, schizophrenia and personality disorders. It therefore appears that a broad range of mental impairments may qualify as disabilities. In addition, because many mental health conditions are episodic in nature, it is important for employers to understand that an impairment that is episodic or even in remission is still considered a disability if it would substantially limit a major life activity when active. Finally, employers must consider whether an employee has a disability without regard to mitigating measures, such as a hearing aid. Even if an employee takes medication or uses some assistive technology to function normally, the employee is nevertheless disabled under the law.

Now that we know what might constitute a mental disability, what is an employer's legal obligation to an employee with a mental disability? As with other protected categories such as race and sex, an employer cannot discriminate against an employee with a disability in the terms and conditions of employment. However, the ADA imposes an additional, affirmative obligation on employers to provide a "reasonable accommodation" to employees with a known disability

if the accommodation would not impose an undue hardship on the employer. There are several components to this obligation, each of which can have its own pitfalls.

First is the requirement that a disability be "known." Unlike physical disabilities, which may be obvious, it can be very difficult for an employer to recognize the existence of a mental disability. The initial burden is on the employee to make known the disability and request an accommodation. However, employers should understand that the employee does not need to use any "magic" words – such as "disability" or "accommodation." It is enough that the employee put the employer on notice that he or she requires an adjustment to the workplace because of a physical or mental limitation. What constitutes sufficient notice is still unclear and subject to interpretation by the courts. As an example, EEOC has issued guidance that an employee provides sufficient notice by stating that he or she is "stressed and depressed." Courts have, however, rejected this guidance and required more specific notice of both the disability and the impact on the employee's ability to perform the job. Another area that may be subject to testing in the courts is the question of when a disability is "known" based on performance problems. For example, although the EEOC recognizes in its enforcement guidance that traits or behaviors such as irritability, chronic lateness and poor judgment do not themselves constitute disabilities, it goes on to note that they are often linked to mental health impairments. Thus, employers may find themselves subject to a claim that they "knew" of a mental health disability by virtue of performance problems, especially if such performance problems come along with employee comments about being "stressed," "depressed," or even being under a doctor's care.

While an employer has the right to, and should, get medical documentation of the existence of the disability, employers generally should not spend much time to determine whether the employee's medical condition qualifies as a "disability" under the law. Amendments to the ADA in 2008 intentionally and substantially lowered the bar, to the extent that many employment lawyers joke that "everyone is disabled." Unless a medical condition is very short term and not severe, prudent employers will assume the employee is disabled and focus on the accommodations process.

Once a request is made, the employer must engage in the "interactive process" – a dialogue with the employee about the accommodation – to determine whether the accommodation is reasonable and whether it will cause undue hardship to the employer. This process generally requires the employer to analyze job functions to separate out essential functions from nonessential functions, to identify the barriers to performance by learning the employee's limitations, and to explore the accommodations that would be most effective. The purpose of this exchange of information and ideas is to determine what the employee needs and what the employer can offer that will allow the employee to perform his or her job without significant disruption to the employer's operations.

How does the employer determine what accommodations are "reasonable"? This is a difficult question, and one that will likely be refined as cases work their way through the court system. The question of reasonableness is often more difficult for mental impairments than it is for physical impairments. While many physical impairments can be accommodated with special equipment (chairs, computer screens, etc.) the accommodations necessary for individuals with mental disabilities may require changes to scheduling, attendance, or the manner in which work assignments are provided. Employee requests to work at home or to take leave are also common. These accommodations may seem incompatible with today's workplaces that are often fast-paced and high-stress.

One bright spot for employers is that they are not required to provide the exact accommodation required by the employee, but must provide an accommodation that is reasonably expected to allow the employee to perform his or her function. For example, an employee may request a private office to minimize distractions from nearby co-workers. If noise-cancelling headphones could effectively reduce these distractions, the employer may refuse to provide the office and instead choose to provide the headphones.

Once one or more reasonable accommodations have been identified, an employer must provide an accommodation unless the accommodation would create an "undue hardship." An undue hardship includes any action that is unduly costly, disruptive, or fundamentally alters the nature and operation of the business. In many cases, it will be easier for a smaller employer to claim undue hardship than large employers because courts will consider the overall financial resources of the employer and the number of employees. An accommodation that requires other employees to work harder or longer is generally not reasonable, and an employer is not required to reduce production standards or excuse compliance with legitimate, business-related conduct rules.

In light of the uncertainty involving requests for accommodations of mental disabilities, there are some steps that employers can take to protect themselves. First, every employer should have a policy that informs employees of the process for making an accommodation. It goes without saying that employers need to follow that process. Employers who fail to engage in the interactive process (and to document that process) face very high hurdles in court and before the EEOC and other agencies. Second, a point of contact for such requests should be identified - preferably in Human Resources or some other individual outside of an employee's supervisory chain. Third, all requests, no matter how minor, should be made via the same process. While a formal, written process is not an absolute requirement, employers should have a uniform process for addressing requests to ensure consistency and proper documentation. Fourth, medical information requested by the employer must be kept confidential and in a locked cabinet separate and apart from any personnel files. Fifth, employers should document the steps taken to evaluate the request and be prepared to explain the reason for any denial and the hardship that would be caused. If a requested accommodation is denied, employers should be prepared to offer alternatives, or at a minimum invite the employee to continue the dialogue by making further requests for accommodation. Sixth, employers should also review and revise job descriptions, which are critical for determining an employee's essential functions. Job descriptions should clearly address essential functions relating to attendance, work location, or teamwork to the extent those are identifiable. Finally, and often most importantly, employers should train their managers and supervisors to ensure compliance with employer policies and legal requirements.

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not be taken as legal advice for any particular matter. It is not intended to and does not create any attorney-client relationship. The opinions expressed and any legal positions asserted in the article are those of the author and do not necessarily reflect the opinions or positions of Miles & Stockbridge P.C., its other lawyers, or the Maryland State Bar Association.

Arbitrator's Broad Authority Ends at Public Policy Exception

By Warren E. Hedges, Miles & Stockbridge P.C.

In what appears to be a first for a Maryland appellate court, in September the Court of Special Appeals vacated a labor arbitration decision on the grounds that it violated public policy. The court held that the arbitrator's decision that a civilian police employee had a right to union representation during a criminal investigation, encroached on the ability to detect and investigate crimes and therefore violated the public policy of effective law enforcement. In the same ruling, the court also wrestled with the level of authority an arbitrator has to review employment decisions under a public-sector collective bargaining agreement and held that unless parties bargain for constraints, an arbitrator has broad authority to evaluate evidence and law and to fashion a remedy.

Background

The case, *P.G. County ex rel. P.G. County Police Dep't v. P.G. County Police Civilian Employees Ass'n*, 219 Md. App. 108, 98 A.3d 1094 (2014) (herein "*PCEA*"), stems from the termination of a civilian police employee, Marlon Ford ("Ford"), by the Prince George's County Police Department. Several employees, including Ford, were questioned by detectives during a criminal investigation into a missing firearm. Ford was interrogated for fourteen hours by at least a dozen detectives. During this questioning, Ford was read his *Miranda* rights but was never advised that he had a right to union representation.

Ultimately, the investigation did not link Ford to the missing firearm, but detectives did learn that Ford, without authorization, had used department equipment while driving an unmarked police vehicle, including siren and radio, and had possibly responded to calls and made unsanctioned traffic stops. The department referred the case to its Internal Affairs Division and placed Ford on leave.

Over two months later, the Internal Affairs Division recommended filing disciplinary charges against Ford for impersonating an officer. At the same time, he was notified for the first time of his right, under the collective bargaining agreement ("CBA") to have union representation during disciplinary proceedings. Based on the findings in the internal affairs report, the department terminated Ford. Ford, through his union, opposed the discharge and eventually filed a formal grievance which, under the terms of the CBA, was heard by an arbitrator.

The arbitrator found that the evidence presented at the arbitration did not provide just cause for Ford's termination. In the opinion of the arbitrator, the case was riddled with conflicting evidence, including irreconcilable differences in documents and testimony. In addition, the arbitrator found the employer had violated terms of the CBA by failing to tell Ford that he had a right to union representation during his initial interrogation. Still, the arbitrator concluded that Ford's conduct showed "bad judgment" and was "deserving of discipline." The arbitrator therefore ordered that Ford be reinstated and receive back-pay except for a 30-day suspension.

The Circuit Court for Prince George's County upheld the arbitrator's decision. The department appealed to the Court of Special Appeals. The appellate court addressed two main challenges to the arbitration award: first, whether the arbitrator had authority to determine whether or not just cause existed to terminate Ford; and second, whether the department was required to inform Ford of a right to union representation during its criminal investigation. While the Court of Special Appeals held the arbitrator had broad authority to adjudicate the grievance, the court also rejected the arbitrator's reduction of the discipline because he had relied, in part, on a finding that the employee should have been notified of his right to union representation during his interrogation.

Arbitrator's scope of authority

The first question addressed by the Court of Special Appeals was whether the arbitrator even had authority to render his decision. The department argued that the role and authority of the arbitrator was limited by the terms of the CBA, which failed explicitly to give the arbitrator the power to make his own findings of fact. Without such a direct grant of authority from the CBA, the department argued that the arbitrator could only apply an "objectively reasonable" standard to determine if the department's own factual findings showed that there was "just cause" for Ford's termination. In essence, the employer was arguing that the arbitrator should be prohibited from serving as a "super personnel" officer, just as courts are so limited in judicial employment discrimination and contract claims. *See, e.g.*, *Towson Univ. v. Conte*, 384 Md. 68, 87 (2004).

The Court of Special Appeals rejected the department's argument and in fact found that the terms of the CBA had the opposite effect, giving the arbitrator broad authority to make a decision based upon his interpretation of the CBA. The CBA framed procedures for filing a grievance, including for grieving employee discipline. At the end of a multi-step grievance process, the CBA allowed the parties to submit their dispute to an arbitrator, who was authorized to "hear and decide any grievance dispute." The CBA further directed that any arbitration would be governed by the rules of the American Arbitration Association and that the "decision of the [a]rbitrator shall be final and binding on both parties." *PCEA*, 219 Md. App. at 122. The department contended that this language limited the arbitrator's authority to, in effect, a "quasi-appellate" function where the arbitrator cannot make his/her own subjective findings of fact.

Rejecting this claim, the appellate court emphasized the plain reading of the CBA and that the bargaining unit and employer had specifically agreed to have an arbitrator "hear and decide" a dispute and render "final and binding" decisions. The court also noted that the rules of the American Arbitration Association gave broad authority to arbitrators to adjudicate the admissibility, relevance, and materiality of evidence. The court found that the only legal support cited by the department,

which either affirmed an arbitrator's role as a fact-finder or dealt with an employment contract of a single employee with no arbitration provisions, was neither relevant nor controlling.

The court noted that Maryland courts have previously held that similar language in CBAs authorized arbitrators to render their own findings of fact and independently adjudicate disputes. For example, in *Amalgamated Transit Union, Div. 1300 v. Mass Transit Admin.*, the Court of Appeals addressed a CBA that similarly provided that an arbitrator's decision would be "final and binding" and found that the arbitrator had "broad discretion" to render a decision that was "appropriate to the facts as found by the arbitrator." *Amalgamated*, 305 Md. 380, 385, 390 (1986). Likewise, appellate courts have commonly held that they will not question the findings of fact made by an arbitrator. *See, e.g.*, *Roberts Bros. v. Consumers' Can Co.*, 102 Md. 362 (1905) (explaining that a court "will not look into the merits of the matter and review the findings of law or fact made by the arbitrators, nor substitute its opinion or judgment for theirs, but will require the parties to submit to the judgment of the tribunal of their own selection, and abide by the award"); *Bd. of Educ. v. P.G. Co. Educators' Ass'n.*, 309 Md. 85, 99 (1987) (same). For management to limit the ability of an arbitrator to review employee discipline, such as by preserving management's right to terminate an employee for certain violations of company policies or other misconduct, it must bargain for such language in the terms of the CBA. *Amalgamated*, 309 Md. at 388.

Public policy exception to arbitration awards

Despite concluding that the arbitrator had not exceeded his authority, the Court of Special Appeals nonetheless vacated the arbitrator's decision as violative of public policy. The court relied on the doctrine, articulated by the Supreme Court in *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983) and *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), that an arbitration award must not contradict public policy. This doctrine rests on the principle that no court can enforce a contract that is contrary to public policy. Since *W.R. Grace*, several Maryland appellate courts have considered whether a decision from a labor arbitration is contrary to public policy, but the decision in *PCEA* appears to be the first reported decision to vacate an award on these grounds.

An initial challenge to establishing a public policy exception is that courts require an "explicit" statement of public policy. *W.R. Grace & Co.*, 461 U.S. at 766. Courts have set a high bar, requiring that the public policy statement "must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of public interests." *PCEA*, 219 Md. App. at 128 (quoting *W.R. Grace & Co.*, 461 U.S. at 766).

Pointing to this high bar for establishing a public policy, and also to the need for factual support to show an obvious contradiction, most Maryland courts have declined to use this exception to vacate an arbitrator's award. In *Amalgamated*, the employer sought to terminate a bus driver who was observed at work with alcohol on his breath. 309 Md. at 383. The arbitrator found that, although the employee likely did have alcohol on his breath, there was insufficient evidence that the employee had been intoxicated. As a result, the arbitrator ordered that the employee be reinstated. Refusing to comply with the award, the employer argued that reinstatement would be contrary to the state's public policy against drunk driving. On appeal, the Court of Appeals examined the arbitrator's specific factual findings in the context of Maryland's statutes against drunk driving. While the state had a public policy against drunk driving, this policy was "not so extreme" as to punish a driver who has just an odor of alcohol. *Id.* at 390. And since the arbitrator specifically found the driver was not intoxicated, the Court of Appeals held there was no basis to show a violation of the public policy. *Id. See also, Int'l Ass'n of Firefighters, Local 1619 v. Prince George's Cnty.*, 74 Md. App. 438 (1988) (finding no violation of public policy in reinstatement of firefighter who had been arrested for drunk driving and possession of marijuana while on vacation).

In federal decisions, most public policy exception cases have debated the legitimacy of reinstating an employee who tested positive for drugs or alcohol. While the Court of Appeals suggested in *Amalgamated* that the proper factual findings could lead to a public policy exception in cases of driving while intoxicated, the Supreme Court has since undercut this analysis. In *E. Associated Coal Co. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57 (2000), the Court upheld the reinstatement of a truck driver who tested positive for drugs on two separate occasions. There the Court reasoned that the public policy against use of illegal drugs by an employee in a safety-sensitive position did not extend to a public policy against the *reinstatement* of employees who had used illegal drugs in the past. As a result, the arbitrator's decision to reinstate the employee did not controvert public policy. *Id.* at 66.

In *PCEA*, the arbitrator concluded that the police department had failed to notify Ford that he had a right to union representation during his initial interrogation. 219 Md. App. at 118. Ford had a right to such a notification, the arbitrator determined, based on the terms of the CBA and the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), which requires that union employees be provided with procedural protections during investigations or questioning that may result in discipline. To the Court of Special Appeals, this pillar of the arbitrator's decision directly infringed on the police department's mission of effective law enforcement. The court found it immaterial that the ultimate charges for Ford's discipline – impersonating a police officer – were different than the gun investigation that led to the interrogation; both were investigations of criminal behavior and not mere workplace rules. *PCEA*, 219 Md. App. at 132-33 (noting that, although the investigation addressed behavior as an employee, the same conduct implicated criminal behavior as codified by Maryland's statute criminalizing impersonation of a police officer). Ruling that investigation of either crime must not be impeded by an employee's *Weingarten* rights or terms of a CBA, the court vacated the arbitrator's decision. *Id.* at 134, 136.

Looking forward

One takeaway from the decision by the Court of Special Appeals is that unless a CBA provides specific limitations, the arbitrator has broad authority to make factual and legal determinations and to mold the terms of an arbitration award. For any party questioning an arbitrator's authority, the *PCEA* decision provides valuable framework to analyze what powers have been delegated by a CBA.

The *PCEA* decision also serves as a warning that arbitrators can overstep their bounds by issuing a decision that is contrary to public policy. However, the decision provides only one illustration of a sufficiently

well-defined public policy exception, and parties may have difficulty identifying other possible public policy exceptions. It is also unclear what other "express" statements of public policy would support this exception. Though *PCEA* did not make such a comparison, courts have recognized public policy mandates in considering common law wrongful discharge claims. *Cf. Parks v. Alpharma, Inc.*, 421 Md. 59, 84 (2011) (requiring public policy mandate necessary for wrongful discharge claims to be rooted in "clear and articulable principles of law"). There is not a perfect fit between the two doctrines, however; wrongful discharge claims consider whether a *termination* violated a mandate of public policy, while *PCEA* considered whether the arbitrator's *decision* violated public policy.

The Court of Special Appeals also emphasized that the conduct targeted by the underlying investigation was criminalized by Maryland statutes and that the employer had a public duty of law enforcement. Between these unique facts and the Supreme Court's limited application of the public policy exception, it remains to be seen what impact *PCEA* may have in the future.

Endnotes

[1] In an even more recent decision supporting arbitration, the Court of Special Appeals has held that a teachers union and county had lawfully bargained to allow a non-professional employee to grieve her termination through arbitration. *See Howard Cnty. Educ. Assoc.-ESP, Inc. v. Bd. of Educ. of Howard Cnty.*, --- Md. App. ---, No. 009, Sept. Term 2013 (Dec. 1, 2014).

Analyzing Decision to Reinstate Ray Rice to the NFL: Did Commissioner Goodell Act Arbitrarily?

By Rebecca M. Hielke, Miles & Stockbridge P.C.

On November 28, 2014, Ray Rice, former running back for the Baltimore Ravens in the National Football League, won his appeal of his indefinite suspension from the NFL and was reinstated to the NFL by former United States District Court judge, Barbara Jones, who heard Rice's appeal and wrote the opinion in the case. Rice had been indefinitely suspended by NFL Commissioner, Roger Goodell, following the release of a video showing Rice hitting his then-fiancée (now wife), Janay Palmer, in an elevator at an Atlantic City, New Jersey casino.

Rice, like all players in the NFL, is a member of the National Football League Players Association ("NFLPA"), which is a union for professional football players. The NFL entered into a collective bargaining agreement ("CBA") with the NFLPA which governs the terms and conditions of the players' employment. The current CBA went into effect in August 2011 and does not expire until 2020. Article 46 of the CBA provides the Commissioner with the authority to discipline a player for "conduct detrimental to the integrity of, or public confidence in, the game of professional football." Additionally, the professional football players are subject to a Personal Conduct Policy, instituted by the NFL, which grants disciplinary authority to the Commissioner for a player's conduct that violates the "standards of conduct" outlined in the Policy. A player, like Rice, challenging the imposition of discipline by the Commissioner under the CBA or the Personal Conduct Policy must follow the procedures outlined in Article 46 of the CBA. These procedures provide for an appeal of the discipline and a hearing on the appeal held by the Commissioner or his designee.

There is no dispute that Commissioner Goodell had the authority to impose discipline on Rice for the incident in Atlantic City. Rather, the relevant issue is whether Commissioner Goodell had the authority to increase the discipline he originally imposed against Rice from a two-game suspension to an indefinite suspension following the release of the video of the incident in Atlantic City.

It is important to understand how and when the events unfolded since February of this year in determining whether Commissioner Goodell's actions were appropriate. The incident took place on February 15, 2014, when the media reported that Rice and Palmer were arrested on simple assault charges, charged and released from jail. The reports indicated that Rice and Palmer had gotten into a fight at a casino in Atlantic City, New Jersey, but there were no additional details at the time. On February 19, 2014, a video of a scene outside an elevator was released by media outlet TMZ.com. The video showed Ray Rice dragging his unconscious fiancée by her shoulders from an elevator. Police later indicated that there was a video depicting Rice knocking Palmer unconscious, but the footage of that video was not released at that time.

In March through May 2014, the legal case against Rice proceeded. Rice was indicted on aggravated assault charges (and the simple assault charges against Palmer were dropped). Rice rejected a plea deal that offered probation and anger management in exchange for no jail time. Instead, he applied for and was accepted into a pretrial intervention program for first-time offenders. Typically, this program is available for nonviolent crimes.

In June 2014, Rice appeared for a disciplinary hearing in front of Commissioner Goodell. Present at the June meeting were Rice; Commissioner Goodell; Jeff Pash, NFL General Counsel; Adolpho Birch, NFL Senior Vice President of Labor Policy and Government Affairs; Kevin Manara, NFL Senior Labor Relations Counsel; Janay Palmer; Dick Cass, President of the Baltimore Ravens; Ozzie Newsome, the Ravens' General Manager; Heather McPhee, Associate General Counsel of the NFLPA; and Ben Rinzin, Rice's agent and childhood friend. Rice provided an account of the February incident to all of those present at this meeting. The information conveyed during this meeting was the central focus of Judge Jones' opinion.

Following the June hearing and with all of the information the NFL gathered during that meeting, on July 23, the NFL announced that Rice would be suspended for two games. Even though the suspension was in line with what other first-time offenders had received in the past, many in the public reacted very negatively to the punishment, feeling it was too light. The Baltimore Ravens did not impose any additional punishment on Rice.

In late August 2014, the NFL announced a new policy for domestic violence offenders in the NFL. First-time offenders would receive a six-game suspension with no pay and second-time offenders would be subject to a lifetime ban. At this time, the NFL did not revisit its punishment of Rice. In fact, Commissioner Goodell has since indicated that he called Rice and told him that the new Personal Conduct Policy would not apply to Rice; it was only to be applied on a prospective basis.

However, within two weeks of the NFL's announcement of its new policy, TMZ.com leaked a second video of Rice and Palmer that showed the altercation in the elevator, depicting Rice punching Palmer, Palmer hitting her head on the railing in the elevator as she fell, and Palmer ending up unconscious on the floor of the elevator. Within hours of the video's release, the Ravens cut Rice and, following that announcement, the NFL indefinitely suspended him. Pursuant to Article 46 of the CBA, Rice appealed the NFL's decision to indefinitely suspend him. Judge Jones presided over Rice's appeal, which was heard on November 5 and 6, 2014.

There was some speculation that the decision in Rice's appeal would turn on Section 4 of Article 46 of the CBA, which provides that "The Commissioner and a Club will not both discipline a player for the same act or conduct. The Commissioner's disciplinary action will preclude or supersede disciplinary action by any Club for the same act or conduct." The clause is called the "One Penalty" clause and some commentators have interpreted it to mean that the Commissioner is prohibited from punishing a player twice for the same act or conduct. However, the One Penalty clause, as drafted, does not necessarily limit Commissioner Goodell from imposing a second punishment; it merely indicates that Commissioner Goodell and the player's team cannot both punish a player for the same incident.

Because the One Penalty clause is not entirely clear, the decision in the Rice case might have been a good opportunity for an arbitrator to provide guidance on how that language should be applied. Unfortunately, Barbara Jones' opinion does not tackle the interpretation of that language. Judge Jones determined that it was not necessary to rely on Section 4 of Article 46 to decide Rice's appeal, but, instead, applied an "abuse of discretion" standard to Commissioner's Goodell's actions and reviewed Rice's punishment to determine if it was applied in an "arbitrary or capricious" manner. In order to do that, Jones needed to examine Commissioner Goodell's imposition of discipline because, "where the imposition of discipline is not fair or consistent, an abuse of discretion has occurred."

Jones succinctly stated in the opinion that "the legal standards are not outcome determinative in this case, which turns on the facts." The facts that Jones focused on were whether Rice presented a "starkly different sequence of events" to Commissioner Goodell in June than what was captured on the video released in September. During the appeal hearing, Commissioner Goodell disputed that Rice used the term "hit" when describing the incident at the June meeting, claiming that Rice merely stated he "slapped at" Palmer. Additionally, Commissioner Goodell disputed that Rice acknowledged that his blow to Palmer knocked her unconscious, claiming that Palmer's falling and hitting the railing in the elevator knocked her unconscious. Commissioner Goodell's testimony was contradicted by the testimony and notes of Ms. McPhee, both of which indicated that Rice used the term "hit" and that he acknowledged that his striking her could have resulted in knocking her unconscious. Since Jones found that Rice did not mislead the NFL through his description of the February events at the June meeting, Jones determined that "the imposition of a second suspension based upon the same incident, and the same known facts about that incident, was arbitrary." Jones upheld the initial punishment imposed on Rice of a two-game suspension.

Particularly noteworthy is that Jones did not render an opinion on the severity of the punishment itself. In fact, Jones specifically indicated that "if this were a matter where the first discipline imposed was an indefinite suspension, an arbitrator would be hard pressed to find that the Commissioner had abused his discretion." This statement acknowledges Commissioner Goodell's significant authority under the CBA and the Personal Conduct Policy to impose discipline on players for "conduct detrimental," but also recognizes there are limits to Commissioner Goodell's power.

Judge Jones' opinion was not intended to, and did not, address the Baltimore Ravens decision to release Rice, and that decision currently stands. With Rice reinstated to the NFL but still released from the Ravens, it remains to be seen whether he will be picked up by another team. Additionally, the NFL has indicated it will take a stronger stance against domestic violence incidents that arise and the imposition of its new Personal Conduct Policy seems to reflect that position. Because it is also important for an employer to document a thorough investigation to support any decision it ultimately makes concerning an affected employee, the NFL will likely be more cautious before imposing discipline going forward in order to avoid a repeat of the Rice incident.

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Are You My Employer?

By Marc K. Sloane and Lee Crofton Douthitt, Miles & Stockbridge P.C.

Since the decisions in *TLI, Inc.*, 271 NLRB 798 (N.L.R.B. 1984) *enforcement granted sub nom. Gen. Teamsters Local Union No. 326, Int'l Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. N.L.R.B.*, 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (N.L.R.B. 1984), the National Labor Relations Board (hereinafter, the "NLRB" or the "Board") has determined the existence of a joint employer relationship based on whether the alleged joint employers share the ability to control or co-determine essential terms and conditions of employment. The essential terms and conditions of employment include those involving such matters as hiring, firing, discipline, supervision, and direction of employees. *TLI, Inc.*, 271 NLRB at 798. Under this test, a joint employer's control over these employment matters must be direct and immediate. As such, under the current joint employer standard, a contractor, for example, which leaves decisions concerning wages, hiring and firing, or other terms and conditions of employment to its subcontractor, would not be considered a joint employer with the subcontractor because the contractor would not be seen as exercising the necessary direct and immediate control.

Two recent policy decisions by the Board could result in a change to this 30-year old standard. In cases involving franchisor/franchisee and contractor/subcontractor relationships, the Board has shown a willingness to redefine the joint employer standard in such a way that could result in franchisors, contractors, leasing firms and other entities with similar business models (hereinafter sometimes referred to as "once-removed companies" or as a "once-removed company") being held liable for the unfair labor practices of the employees' direct employer. This change could also result in these once-removed companies being required to bargain with unions over the direct employers' employees' terms and conditions of employment. Outside of the labor setting, an expanded joint employer definition could also impact the liabilities of these once-removed companies with respect to Title VII, FLSA, FMLA, and other similar statutes.

In July 2014, the Board's General Counsel (hereinafter the "General Counsel") announced his intention to charge McDonald's USA, LLC, as a joint employer with its franchisees in a number of unfair labor practice cases (the "*McDonald's* cases"). Each of the charges involves franchisees alleged to have committed unfair labor practices in response to protests to increase wages in the fast-food industry, all of which were organized and funded by the Service Employees International Union. This announcement by the General Counsel comes on the heels of the Board's May 2014 invitation to parties and interested *amici* to file briefs in a case (hereinafter the "*BFI* case") requiring the application of the joint employer standard to an election petition filed by the International Brotherhood of Teamsters naming both a waste services company, Browning Ferris Industries of California Inc. ("BFI"), and a staffing agency, Leadpoint Business Services Inc. ("Leadpoint"), as joint employers, further indicating the Board's willingness to revise the joint employer standard. In that case, the Board granted review of a regional director's decision and direction of election which held that BFI and Leadpoint were not joint employers with respect to workers Leadpoint provided to a BFI-owed recycling facility. Specifically, the Board invited briefs addressing the following questions:

1. Under the Board's current joint-employer standard, as articulated in *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984), is Leadpoint Business Services the sole employer of the petitioned-for employees?

2. Should the Board adhere to its existing joint-employer standard or adopt a new standard? What considerations should influence the Board's decision in this regard?

3. If the Board adopts a new standard for determining joint-employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard?

It is unlikely that the Board invited input on these questions because it is inclined to narrow the current standard. In response to the invitation, the General Counsel filed an *amicus* brief arguing that the Board should return to the joint employer standard as it existed prior to 1984, which would have the effect of expanding the Board's current definition of a joint employer.

Arguments for and against change

The General Counsel asserts that the existing test does not appropriately account for the current business relationships between direct employers and once-removed companies. For example, the General Counsel argues in his brief that technological changes have allowed franchisors to dictate virtually all employment conditions between the franchisee and its employees without exerting direct control over the employees. The General Counsel proposed a new joint employer standard in its *amicus* brief in the *BFI* case that would take into account the "totality of the circumstances, including how the putative joint employers structured their commercial dealings with each other." Under the General Counsel's test, joint employer status would be found by establishing evidence of any of the following:

- Direct Control (including instances where a once-removed company exerts control over any one term or condition of employment such as: wages; hiring, discipline, and discharge; employee personnel issues, including grievances; the number of employees needed to perform a job or task; establishing employee work hours, schedules, work length, and shift hours; authorizing overtime; safety rules and standards; production standards; break and/or lunch periods; assignment of job duties; training; and, vacation and holiday leave and pay);
- Indirect Control (including instances where a once-removed company exerts some control over wages paid by the direct employer because, for example, evidence establishes that the direct employer only raises wages when it receives raises from the once-removed company, or, evidence establishes that increased wages were absorbed by the direct employer alone unless they were presented to and accepted by the once-removed company);
- Potential for Control Because of Granted Authority (including instances where a once-removed company has the potential to control some of the direct employer's employees' employment conditions discussed above through authority granted in contracts, licenses, leases, or other commercial agreements); and

- Potential for Control Because of Industrial Realities (including instances where a once-removed company has significant control over the terms and conditions of employment of the direct employer's employees based on the nature of the commercial relationship between the once-removed company and the direct employer even though no contract, license, lease, or other commercial agreement grants the once-removed company the right to control terms and conditions of employment).

Thus, under the General Counsel's new proposed standard, a once-removed company could be deemed to be a joint employer with the direct employer if it had indirect influence over workplace issues such as wages, dress codes, schedules, rent, or discipline, or even if it has the potential to have such influence indirectly.

In the General Counsel's view, his multifactor standard, though less predictable than the existing standard, attempts to account for the evolution of the relationships between once-removed companies and direct employers in recent years. For example, labor efficiency software programs that franchisors provide to their franchisees, in theory, may determine the number of employees that a franchisee should hire and how the franchisee should schedule those employees. Indeed, such software may go so far as to instruct managers when to take employees on and off the clock in a given day. Where use (and adherence to the resulting recommendations) of such programs is mandated by the franchisor, the franchisor may be viewed as exerting control over the franchisee's employees' terms and conditions of employment. Minimum price structures and the required square footage and layout of retail space are other, more traditional ways in which a franchisor could indirectly control the wages a franchisee is able to pay its employees for which the current joint employer standard may not account.

While franchisors have pointed out that the control exercised is simply to protect their product or brand by ensuring consistency in production and operation, the General Counsel argues that the franchisors' control surpasses that necessary merely to protect the franchisors' products or brands. According to the General Counsel, this type of control is enough to support a claim of joint employer status because it indirectly affects the amount of money franchisees can allocate to wages, for example, even though the control is not exercised on a day-to-day basis.

Once-removed companies and their associated industries do not believe that the Board should alter the current joint employer standard. As discussed above, the current standard allows for a finding of joint employer status only when direct control is exercised over the terms and conditions of employment. Direct control over the terms and conditions of employment has been interpreted to mean control over issues such as wages, hours, scheduling, hiring, and discipline. This current standard's focus on whether an alleged joint employer exercises meaningful control over the employees' terms and conditions of employment is a clear and fact-specific approach that is easy to administer and predictable in application. By contrast, the General Counsel's proposed standard's focus on the totality of the circumstances, they fear, would result in a vague and ambiguous standard that lacks clarity and does not provide adequate guidance to either courts or employers. Furthermore, the proposed standard is so broad that it could allow for a finding of joint employer status in circumstances where the once-removed company has no true or meaningful control over the employees of the direct employer.

McDonald's points out that it lacks the control over its franchisees that the General Counsel claims it has. Specifically, McDonald's maintains that it does not determine or help determine decisions on hiring, wages, or other employment matters. Moreover, according to the International Franchise Association, franchisors like McDonald's do not instruct franchisees regarding how to run their stores on a day-to-day basis; rather, they provide franchisees with a framework to maintain the consistency and credibility of the franchisor's brand. To this end, franchisors, specifically, provide the guidance on how to make or build a product and may provide support in purchasing the supplies necessary to do so, without necessarily exercising day-to-day operational control over their franchisees.

With respect to collective bargaining, for example, proponents of the current standard believe that only the parties who have direct control over an employee's terms and conditions of employment are in an adequate position to negotiate those terms and conditions. Specifically, in its *amicus* brief to the Board in the *BFI* case, Leadpoint, an independent contractor to BFI, argues that the proposed standard would "create a practical impediment to effective bargaining" because it would force "one of the alleged joint employers [that] previously had no prior role in determining the employees' terms and conditions of employment" to the bargaining table. Moreover, because such alleged joint employers would "bring different interests to the bargaining table," their "disparate motivations and desires can stand in the way of the parties reaching a collective bargaining agreement." Where parties "actually share or codetermine those matters governing the essential terms and conditions of the employees at issue," Leadpoint suggests, it makes sense to find them to be joint employers because "their interests at the bargaining table are far more likely to be aligned." The parties involved in the negotiations, thus, would be more likely to effectively bargain over the employees' terms and conditions of employment.

Impact

A new joint employer standard likely would change the way once-removed companies are treated under the law, both in traditional labor and other settings. The proposed standard would broaden the current joint employer standard, resulting in more joint employer findings by the Board in franchisee, subcontractor, temporary employee, and outsourcing employment relationships. A broader standard could subject more businesses to unfair labor practice claims, and provide unions with a new avenue for organizing because obtaining support among workers employed by a franchisee, subcontractor, or staffing agency could bring the once-removed company to the bargaining table. Once there, the union may be able to obtain an agreement that the once-removed company will recognize the union on a company wide basis to avoid possible labor unrest.

Because the current joint employer standard has been in effect for 30 years, adopting a new standard will create a great deal of uncertainty for once-removed companies outside of traditional labor law. Should the Board expand its definition of joint employer, the courts could follow suit and find that franchisors and contractors, for example, can be subject to employment-related Title VII claims such as harassment and statutory wage and hour claims based on the conduct of their franchisees and subcontractors. In a decision consistent with the position

taken by the General Counsel, in September, a district court in the Southern District of West Virginia denied a motion to dismiss filed by a fast food franchisor against a negligence claim filed by employees of the franchisor's franchisee, not accepting the franchisor's argument that it did not control the daily operations of the franchisee. This uncertainty may cause once-removed companies to become hesitant to enter into new economic relationships because they will not know how the application of a new joint employer standard will impact them in a variety of legal contexts, especially given the unlikelihood that the uncertainty will be resolved in the near future.

Conclusion

Though this issue has become heated in the past six months, it may not be determined with finality for some time. While the Board may issue a ruling in the *BFI* case sooner rather than later, that decision will certainly be appealed if the Board determines to adopt the General Counsel's joint employer standard. It may take years for the case to work its way through the appellate process. The *McDonald's* cases are even less-developed. Accordingly, it could take years before there is some certainty around the joint employer standard and the extent of liability that will be imposed on once-removed companies with respect to employees of the direct employers.

In the meantime, this uncertainty could have varying impacts. Franchisors, for example, may re-evaluate their business models in new ways. On the one hand, they could choose not to expand at the rate they have in the past, so as not to expose themselves to additional potential liability. On the other hand, they could choose to exert additional control over franchisees, reasoning that if the Board is going to implement a new joint employer standard through which they may be liable for the unfair labor practices, and, possibly, the torts, of franchisees, such additional control could limit the likelihood of the occurrence of events giving rise to such cases in the future. This increased control could make the franchise business unattractive to potential franchisees looking to start their own small businesses. Since franchise-related job creation and new business formation have grown faster than non-franchise growth over the last five years, this uncertainty could have significant economic consequences in addition to legal ones.

Moreover, regardless of the ultimate outcome in the *BFI* case and *McDonald's* cases, once-removed companies may see claims of joint employer status in other areas of the law. Plaintiffs could use the arguments developed in the labor-context to bring Title VII or wage and hour claims against franchisors and contractors based on the actions of franchisees and subcontractors. Employees of smaller franchisees or subcontractors could make claims under FMLA or the Affordable Care Act based on the theory that their employer is subject to those regulations based on the size of the franchisor or contractor, rather than the franchisee or subcontractor employing the claimant.

Thus, even though a decision from the Board may take years to go into effect, the process of trying to change the standard will have its own impact.

Endnotes

[1] *The Board developed its proposed criteria for determining the existence of a joint employer relationship from a range of Board decisions interpreting the Board's pre-TLI and Laerco Transportation joint employer standard dating back to the early 1960s.*

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Challenges in 2015 for the Federal Contractor Community

By Suzzanne W. Decker, Miles & Stockbridge P.C.

For the last eighteen months the Department of Labor (DOL), Office of Federal Contract Compliance Programs (OFCCP) and the White House have been busy putting into place regulations that will require a complete revamping of most federal contractor's affirmative action programs (AAP). Along with more mundane form and scheduling letter changes, these new regulations raise the minimum wage for workers on federal contracts, increase the employer's obligations to veterans and individuals with a disability and expand the coverage of the OFCCP to include protections for LGBT employees. Employers who work on federal contracts need to update their programs quickly to be in compliance for 2015.

Increased Minimum Wage

Earlier this year President Obama issued an Executive Order increasing the minimum wage for federal contractors. This was in line with other efforts within the DOL to increase income for low wage earners. For all new covered federal contracts after January 1, 2015, employers will be required to pay certain employees at least $10.10 per hour. Federal contractors should understand that amendments/modifications to contracts may render them "new" contracts for the purposes of this regulation.

Only certain types of federal contracts and subcontracts are covered. These include: (1) procurement construction contracts already covered by Davis Bacon; (2) contracts for services subject to the Service Contract Act; (3) contracts for concessions; and (4) contracts issued in connection federal property or related to offering services for federal employees, their families and the general public. Grants are expressly excluded from coverage. The burden is on the contracting Agency to alert the contractor and include language regarding this wage rate in the contract.

The good news is that not all employees are covered. The minimum wage must be paid to those workers who perform services directly on a covered contract. For employees who provide support services in connection with a covered contract, the OFCCP regulations will exclude those spending less than 20 percent of their total hours worked on a covered contract.

Contractors will be required to maintain adequate records to show appropriate payments and to be able to perform the 20 percent calculation. In addition, there will be a new poster issued by the DOL

which must be posted.

Self-Identification of Veterans and Individuals with Disabilities (IWD)
Federal contractors will need to begin collecting applicant information for veteran and disabled status. The OFCCP has provided samples of applicant and employee information forms for veterans and a mandatory from for IWD.

The self-identification veteran categories will be modified to include recently separated veterans, disabled veterans, Armed Forces service medal veterans, and active wartime or campaign badge veterans. The invitation for applicants to self-identify must also include a question regarding the "existence of disability." Questions will not be permitted regarding the nature or the severity of the disability. To minimize risk, the contractor should make certain that decision-makers at all stages of the hiring process are not privy to the information on the form.

Annual reporting for veterans will now be on a form VETS-4212. The biggest change is that reporting will be done in the aggregate by EEO category instead of by veteran category. The federal government believes that this will provide a more accurate date and will foster more confidentiality as it will be harder to determine the identity of a veteran in a small EEO category.

New Veterans and IWD Plan and Other Requirements
The OFCCP rolled out new regulations in September 2013 but for most covered employers the changes were not required until the AAP for plan year 2015. Historically, the Veteran/IWD plan was a narrative document that had no numeric calculations or job groups. That approach has dramatically changed and the new plans will have many of the same requirements as the gender/minority AAP.

For veterans there will be an annual hiring benchmark. Contractors can use either a national number of 8% or create their own benchmark based on factors provided by the regulations. Federal contractors desiring to create their own benchmark must make that calculation by dividing the number of protected veterans it seeks to hire in the following year by the total number of hires anticipated for the following year. To determine the number of protected veterans the federal contractor seeks to hire it must consider: (1) the percentage of veterans in the local civilian workforce; (2) the number of veterans who participate in the state's employment system delivery service; (3) the referral, applicant, and hiring ratios; (4) the contractor's recent assessments of outreach; and (5) any other factors that would likely affect the number of qualified protected veterans in the applicant pool. The problem with such a benchmark is the lack of reliable data regarding the number of qualified veterans in the workforce. Another difficulty will be that contractors who successfully increase veteran applicants may be held to a higher threshold than those contractors who make less of an effort. It is anticipated that the OFCCP we will see the 8% national number as the lowest benchmark and therefore, contractors generally should avoid the difficult calculation and use that option.

For IWD, the employer must perform a utilization analysis just like for gender and minorities. There is a 7% utilization goal across the board. For employers with less than 100 employees, then the analysis would be for the entire workforce and not by job group.

OFCCP is very focused on recruitment. No longer can employers make assertions of good faith efforts. Rather, they must show action focused on veteran and IWD applicants. There are a number of job fairs for veterans and people with disabilities around the country. The following is just a brief list of various on line information services: www.MOAA.org; www.recruitmilitary.com; www.veteranscareerfair.com; www.disabled-world.com; and www.eop.com. Your local employment services office may also be able to suggest recruiting sources. It is critical that the contractors be able to produce to the name, dates, and location of the job fair and the contact person with a phone number. Contractors should use such recruiting sources but also must assess whether the individual sources are effective.

With respect to accommodation of IWD and disabled veterans most employers would do well to improve documentation of those who self-identify as disabled, requests to engage in the interactive process, and the final accommodation decision in order to avoid and defend against claims brought under the ADA. In many organizations, the implementation of a disability accommodation policy is done at the department level. Some contractor's decisions are made ad hoc without proper understanding of the ADA's obligations, but creating a central repository for requests and complaints will be key. Another important prep tool should be training for managers on the interactive process, appropriate documentation, and the need for confidentiality. Those same improvements will help tremendously with the OFCCP's Rehab Act focus.

LGBT Rules
On July 21, 2014, President Obama through Executive Order extended the obligation for federal contractors to protect against discrimination based on sexual orientation and gender identity. In early December the OFCCP issued its final rules which will be effective April 4, 2015. There is not an obligation to solicit LGBT status and there are no recordkeeping obligations.

Contractors need to review policies and the content of their AAPs to make certain that the list of protected categories of individuals includes sexual orientation and gender identity. For Maryland employers, those categories are already protected and should appear in policies. Employers should be sure to include these categories in any annual training that it provides to employees.

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EEOC Issues New Guidelines to Address Workplace Pregnancy Discrimination Ahead of Supreme Court Decision

By Tony W. Torain, Miles & Stockbridge P.C.

For the first time in more than 30 years, the Equal Employment Opportunity Commission (the "EEOC") issued enforcement guidelines to clarify its view of existing laws prohibiting discrimination in the workplace based on pregnancy. The guidelines, released on July 14, 2014 after a narrow 3 to 2 vote by EEOC commissioners, are intended to enhance protections for pregnant women in the workplace. The agency last issued comprehensive guidance regarding pregnancy discrimination in its 1983 Compliance Manual chapter dedicated to the subject. The Commission issued the guidelines in advance of a case currently before the Supreme Court, *Young v. United Postal Service, Inc.*, U.S., No. 12-1226, *cert. granted* 7/1/14, which involves the scope of non-discrimination laws related to pregnancies.

In *Young*, the plaintiff worked as a part-time driver for UPS, handling air delivery packages. In 2006, she became pregnant, and her doctors placed her on a 20-pound lifting restriction. Although the plaintiff was placed on the lifting restriction, she desired to continue working, either in her regular position or in a light duty position. UPS would not permit her to work with the 20-pound restriction and would not provide light duty. Instead, UPS placed Young on unpaid leave for the rest of her pregnancy without health benefits.

After she gave birth, Young sued UPS, contending that the company violated the Pregnancy Discrimination Act (the "PDA") by failing to accommodate her lifting restrictions while accommodating the restrictions of other employees who were not pregnant, but similarly situated in their abilities to work. Congress passed the PDA in 1978 to amend Title VII of the Civil Rights Act of 1964 by prohibiting sex discrimination on the basis of pregnancy. After it analyzed the merits of the case, the U.S. District Court for the District of Maryland granted summary judgment in favor of UPS, concluding that UPS's decision to refuse to provide an accommodation for Young was gender-neutral. UPS's policy only provided light duty positions to drivers who were injured on the job, had a disability recognized by the Americans with Disabilities Act (the "ADA"), or had lost their Department of Transportation certification. Although some conditions related to complications stemming from pregnancy may be recognized as disabilities under the ADA, pregnancy alone is not considered a disability under the ADA.

On appeal, the Fourth Circuit affirmed and concluded that UPS did not violate the PDA. The court reasoned that the "shall be treated the same" language in the statute did not provide a right of action separate from the PDA's general prohibition against pregnancy discrimination. According to the Fourth Circuit, such an interpretation of the statute would provide preferential treatment for pregnant employees, which Congress did not intend. Furthermore, the court concluded that a pregnant worker with a temporary lifting restriction is not similar to drivers who were injured on the job, had a disability recognized by the ADA, or had lost their Department of Transportation certification to drive.

The Supreme Court granted certiorari on July 1, 2014 to decide whether, and in what circumstances, the PDA requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are similarly situated in their ability or inability to work. The Court heard oral arguments on December 3, 2014. By deciding this issue, the Supreme Court will resolve a circuit split on the interpretation of the PDA. The Sixth Circuit concluded in *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996), that the PDA provides additional protection to women affected by pregnancy and related conditions by requiring employers to treat them the same as non-pregnant employees who are similar in their ability or inability to work. The Tenth Circuit follows the reasoning of the Sixth Circuit, while the Fifth, Seventh and Eleventh Circuits adopt the approach the Fourth Circuit has taken.

After the Supreme Court granted certiorari, the EEOC issued enforcement guidelines regarding pregnancy discrimination. In support of the guidelines, the EEOC stated, "Consistent with the language of the law, the EEOC's position is that the PDA requires only that an employer treat pregnant workers the same as it treats workers who are not pregnant but are similar in their ability or inability to work." The agency further noted that "an employer may offer light duty to pregnant employees on the same terms that it offers light duty to other workers similar in their ability or inability to work." This is consistent with the Sixth and Tenth Circuits' interpretation of the PDA.

By implementing the enforcement guidelines, the EEOC sought to bring cohesion to the various interpretations of the PDA at a time when pregnancy discrimination complaints are on the rise. From 1997 to 2011, pregnancy discrimination complaints increased 46%, according to the EEOC. In 2013, 5,342 pregnancy discrimination charges were filed. The rise of pregnancy discrimination cases can present significant financial liabilities. In November 2014, a federal jury in California awarded a single plaintiff $185 million against AutoZone for pregnancy discrimination.

Under the new EEOC guidelines, medical conditions related to pregnancy that substantially limit major life activities are considered disabilities under the ADA, without regard to the duration of the medical condition. Accordingly, the guidelines require employers to make reasonable accommodations for employees with pregnancy-related conditions, including the provision of light duty positions during pregnancy. For example, the EEOC suggests that lactation falls under the array of medical conditions that may require employers to provide reasonable accommodation under the ADA. In addition to addressing the rights of pregnant women, the guidelines also address discrimination based on a woman's potential to become pregnant and reinforce the mandates under the PDA. Although the EEOC has issued the enforcement guidelines, the Supreme Court's decision in *Young* will have the force of law with respect to the interpretation of the PDA.

The guidelines also require employers to provide contraceptives to employees. However, the effectiveness of this provision is questionable

in light of the Supreme Court's recent decision in *Burwell v. Hobby Lobby*, where the Court concluded that closely held corporations may be exempt from a law they religiously object to if there is a less restrictive means of achieving the purpose of the law. In that case, the Court specifically struck down a contraceptive mandate adopted under the Affordable Care Act (the "ACA"). According to the EEOC, "the enforcement guidance explains Title VII's prohibition on pregnancy discrimination; it does not address whether certain employers might be exempt from Title VII's requirements under the [Religious Freedom Restoration Act] or the Constitution's First Amendment."

The guidelines also call for equality in the provision of parental leave for mothers and fathers. Both mothers and fathers are currently entitled to unpaid leave under the Family Medical Leave Act (the "FMLA"). However, the parental leave contemplated by the guidelines is different from the FMLA leave and medical leave provided for women during and after childbirth. Parental leave under the guidelines is provided for the purposes of bonding with a child, while FMLA leave is provided for medical recuperation after childbirth.

In its guidance, the EEOC provided a list of best practices for hiring, promotion, and other employment decisions, for leave and fringe benefits, for the terms and conditions of employment, and for reasonable accommodation situations to minimize the risk of pregnancy discrimination charges. The best practices include the establishment of a strong policy against pregnancy discrimination that conforms to the requirements of the ADA and the PDA. The EEOC also suggests that employers train their managers and employees about the rights of pregnant women under the ADA and the PDA. In the event a violation of the statutes, regulations or guidelines occurs, the EEOC recommends that employers provide employees multiple avenues for complaint and the support of a robust anti-retaliation policy.

With respect to hiring and promotion, the EEOC proposes that employers focus only on the applicant's qualifications for the position and avoid questions and inquiries regarding the pregnancy status of an applicant. To comply with the guidelines, leave policies related to childbirth should include fathers and mothers. The EEOC is also calling for employers to evaluate compensation practices and performance appraisal trends for possible discrimination based on pregnancy, childbirth, or related medical conditions and to make available light duty positions for pregnant women. In dealing with requests for accommodation, the agency suggests that employers develop a system for considering the reasonable accommodation requests of employees affected by pregnancy, childbirth, or related medical conditions and include in any written policy regarding reasonable accommodation a provision acknowledging that reasonable accommodations are available to those employees.

Notably, UPS changed its policy regarding pregnant employees after the EEOC issued its guidance. Effective January 1, 2015, light duty work will be provided for pregnant employees with physical restrictions. According to UPS, the change in policy was a direct response to the EEOC's issuance of the guidelines.

Maryland and other states have recently passed laws requiring light duty accommodations for pregnant employees and leave for both parents. In 2014, Maryland passed the Parental Leave Act, which requires employers with 15 to 49 employees to provide 6 work weeks of unpaid leave in a 12-month period for the birth or adoption of a child. In addition, Illinois passed legislation banning pregnancy discrimination and requiring employers to provide accommodations, including light duty assistance for manual labor and more frequent bathroom breaks. The Supreme Court, however, in *Young* still has to resolve whether federal law imposes similar requirements.

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Handling Complex Whistleblower Cases: Dealing with Ambiguities and High Stakes Claims

By Kathleen Pontone, Miles & Stockbridge P.C.

There has been a lot of media attention paid to claims by whistleblowers, including a recent op-ed by two Maryland attorneys urging the General Assembly to pass stronger whistleblower legislation.[1] Whether this happens or not, there are currently more than twenty-two state or federal statutes protecting whistleblowers, so as a Maryland employment law lawyer, you certainly may encounter at least one of these claims in the coming year. The bulk of the claims are coming from the financial services industry or from the ranks of government contractors, with healthcare related claims increasing as a major source of activity. A few of these cases have resulted in spectacular recoveries for the whistleblower.

The Supreme Court recently ruled that even contractors and subcontractors of public companies are covered by the Sarbanes-Oxley Act whistleblower protections. *Lawson v. FMR LLC*, 134 S.Ct. 1158 (2014). Nevertheless, experienced practitioners report that the majority of cases seem to be resolved without much fanfare and amount to little more than a request for enhanced severance. Rather than addressing "run-of–the-mill" whistleblower cases, I want to concentrate on whistleblower cases in which the substantive allegation is of grave concern, whether or not the alleged whistleblower is regarded as a concerned citizen or merely a disgruntled employee looking for an angle to avoid the consequences of his or her misconduct. These are the kinds of cases that come to the attention of Boards of Directors and key executives.

On the most basic level, handling this kind of investigation requires close management of your own client's expectations. Most labor

practitioners understand that even if the substantive issue raised turns out to be unworthy of concern, the protection accorded the alleged whistleblower can still be the subject of a whistleblower claim. There is little question, however, that when the substantive issue is serious, the lawyer who is faced with the claim must always attempt to disassociate the substantive issue from the issue of what, if anything, will happen to the whistleblower. Potential retaliation after the complaint is made, and during the investigation, has to be controlled at every step. While many people loathe committing anything to writing at a very early stage when the "complaint" first comes to the attention of upper management, taking the time to document the initiation of the investigation can be critical. Generally an "intake letter" setting out the issue as it has been articulated in the complaint, asking for further clarification and documentation and stating that the matter will be investigated may be the single most important document that is generated during the investigation. This document also sets out a non-retaliation policy and invites the complainant to immediately complain if they believe that they are subject to retaliation. That document should provide a single point of contact for matters relating to the claim. This should not be one of the employee's supervisors, but rather a senior human resources manager or lead officer.

While it is subject to second guessing and sometimes negative reaction by the complainant, a paid leave of absence during an investigation can be the safest course, especially when the whistleblower alleges retaliation at the start. A leave of absence has the advantage of protecting the whistleblower from the day to day activity within the workplace and clears the field for the investigation. Naturally, this leave has to be paid in all but the most obvious misconduct cases. The employee may or may not need to be actively involved in the investigation, but having their availability guaranteed is only one benefit of this option. If the employee is not placed on immediate leave, the company must guarantee that neither management nor anyone else takes any action against the whistleblower, real or perceived, without thorough legal review. The difficulty of this proposition is the reason for strongly recommending paid leave.

The next question is whether the investigation should be split up at this point to separate the substance of the business issue from the employment issue with respect to the employee. When the issue is critical or sensitive, separate investigative teams should review the financial/regulatory substance of the complaint and the employment issues raised. Allowing these two issues to become wrapped up together is a common trap and source of inevitable delay, particularly if one group is handling the whole matter and the substantive issue is complex.

In addition, there is always a question as to whether the client's regular outside counsel should be involved. Mary Jo White, the current Chair of the SEC, has gone on record as saying that she cares more about whether the investigation is fair and complete than whether the investigator is a member of the firm's regular outside counsel. That said, you may avoid one more argument if you use an investigator who is perceived as "neutral" on the substance of the claim. Moreover, with respect to the substantive issue, you may be far more likely to prevail in keeping the details of the alleged wrongdoing out of the public eye if you separate out the two very different investigative tasks. On the human resources side, the issue of privilege is much more difficult if you intend to use the fact that you conducted an investigation into the employee's retaliation claim as a shield. You still may have some chance of keeping at least some of the substantive investigative material protected in a later employment suit if you bifurcate the investigation. (Bear in mind of course that the employment investigation will be discoverable in the employment case, and the financial investigation may

very well be discoverable in the financial case, should one develop.) You should assume that anything you write, including your notes may be the subject of a disclosure request. The situation is even worse for in-house counsel, who may have little protection at all in some courts. *See, e.g.*, *U.S. ex rel Barko v. Haliburton Co.*, No. 1:05-CV-1276, 2014 WL 6657103, at *3 (D.D.C. Nov. 20, 2014) (providing no protection to a) documents where in-house counsel was an "incidental" recipient, b) documentation that employees met or intended to meet with in-house counsel, or c) litigation hold notices).

One issue which sometimes comes up in a whistleblower case is the misappropriation of documents by the whistleblower to support his or her charges. Ethical plaintiff's attorneys warn their clients not to engage in this behavior. For example, see David Marshall's excellent article on this topic.[2] Sometimes it is appropriate for defense counsel to warn claimants not to engage in this behavior but it should be done very carefully. You also might explore ways to have IT monitor for large scale copying of documents and to alert counsel if this occurs.

Recent court cases support a company's right to demand that its documents not be misused this way and that purloined documents be returned subject to later production in discovery. In the recent case of *U.S. ex rel. Cori Rigsby et al. v. State Farm Fire & Casualty Co*., Case No. 14-60160 (5th Cir. 2014), the U.S. Chamber of Commerce filed an amicus brief regarding an interesting twist on this issue. In this case, the complaining insurance adjusters were attempting to discover broad ranging evidence about all of State Farm's Katrina claims in a False Claims Act case because they have presented evidence of one alleged false insurance claim to the government's flood insurance program. The case contains counterclaims by State Farm that the adjusters downloaded 15,000 pages of documents during the course of the litigation. No doubt State Farm had already received notice of the substantive issue, but nonetheless, it is important to be able to understand how the claims work to defend against that kind of broad ranging discovery request.

However, as a corollary to refusing to produce or disclose confidential documents, employers should develop robust and effective litigation holds the moment this kind of a charge comes to light. Forensically sound images of hard drives used by employees who are important to the issue should be obtained, so that there can be no doubt that the key documents are not destroyed or altered. Metadata is always an important part of these investigations, so inexperienced in-house staff, who may not be up to speed on preservation are, often times, not well-suited to gather documents. We usually recommend that full-blown litigation hold letters be issued both to the company as a whole and to key individuals so that it is clear that the company took steps to preserve the necessary documents from the inception of the investigation. While this does not make counsel popular with the company, the executives should be advised these litigation hold letters are coming and their purpose. The receipt of an unexpected litigation hold letter almost always throws the case into turmoil, because most executives do not understand that the letters are for their protection—which they most certainly are. Going back to client expectations, you should map out a timeline and explain the investigation plan so that key executives have some idea of the scope of what the company is facing and what their team needs to expect in the coming weeks.

The final issue that deserves special consideration in difficult investigations is the presentation of the findings. Many practitioners prefer verbal reports but experience has shown that in most cases some written product is extremely helpful in documenting conclusions. We often do recommend that these reports be divided into two, with a general short report that is provided to the Board of Directors and can be provided in discovery in cases in which the detail of what has been concluded is not necessary or relevant. A more detailed counsel memo can also be created for the general counsel or outside counsel in deciding what, if any, corrective action is to be taken as a result of the substantive findings. While it is not true in every case, you may be able to preserve some attorney client privilege for that document depending on the subject matter of the litigation or investigation where discovery of the findings are sought. While in general the drafters should anticipate that the entire contents of the investigation may be subject to discovery, it is sometimes worth trying to preserve the confidentiality of these documents by proper labeling, limiting distribution, and maintaining an "eyes only" storage indefinitely.

Similarly, the substance of the claim – financial, fraud, healthcare or employment practice – should absolutely be the subject of a separate report. The retaliation and employment issues are most often litigated, as wise employers attempt to correct any alleged business misconduct before the whistleblower allegation reaches a public forum. Because the employer will no doubt acknowledge any real problems which emerge from the investigation, it would probably rather not have the extent of the underlying business problems subject to discovery in open court. Having those issues discussed in a separate document, which may be drafted by separate counsel, may in fact insulate the facts and details of these items from disclosure as simply irrelevant and possibly prejudicial. This is usually true when the employer chooses to admit that there were some problems but fixed them as soon as it became aware of them. In some cases, the trier of fact may be satisfied by an in camera review of that document, to assure itself that it is irrelevant to the issues raised by the whistleblower.

There is no doubt that these cases will increase in number over the next few years and that employment counsel will play a critical role in sorting the cases out. Managing client expectations, careful planning of investigations and a willingness to work on complex matters with teams with other lawyers and accounting and computer professionals, will be important in providing successful outcomes to clients. So while the kind and number of claims are growing fast, most labor lawyers are well equipped to "bring it" as we enter this exciting new area.

Endnotes

[1] Sally Dworak-Fisher and Rena Steinzor, *Maryland's Whistleblower Laws Need Teeth*, Baltimore Sun, Dec. 4, 2014.

[2] D. Marshall and A. Cook-Mack, *Purloined Documents, Confidential Employer Data, and Counterclaims in Whistleblower Retaliation Cases* (2013 NELA Winter Seminar, Oct. 19, 2013).

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