EMPLOYMENT FLASH

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INSIDE

EEOC Issues Final Rule Addressing Disparate Impact Claims Under ADEA

On March 30, 2012, the Equal Employment Opportunity Commission (EEOC) issued a final rule amending the Age Discrimination in Employment Act (ADEA) regulations concerning disparate impact claims and the reasonable factors other than age (RFOA) defense. The rule became effective on April 30, 2012. The EEOC issued the rule to address two U.S. Supreme Court holdings.

In *Smith v. City of Jackson,* 544 U.S. 228 (2005), the Supreme Court held that disparate impact claims are cognizable under the ADEA, but that an employer has a defense to such a claim if the adverse employment action was based on a "reasonable factor other than age." The Court in *Smith* explained that "the scope of disparate-impact liability under ADEA is narrower than under Title VII[,]" which requires that an employer meet a business necessity test to establish a defense. *Smith*, 544 U.S. at 240. Consistent with the holding in *Smith*, the new ADEA rule confirms that, while the RFOA defense requires more than a showing that the policy or practice has a rational basis, it is intended to be a less demanding standard than the business necessity defense. The new rule is also consistent with the decision in *Meacham v. Knolls Atomic Power Lab.,* 554 U.S. 84 (2008), in which the Supreme Court clarified that RFOA is an affirmative defense and, therefore, the employer bears both the burden of production and the burden of persuasion of proving such defense.

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NLRB Finds That Employee Was Unlawfully Harassed on Facebook

In a decision dated April 20, 2012, a National Labor Relations Board (NLRB) Administrative Law Judge (ALJ) held, in part, that a restaurant manager's posting on an anti-union Facebook page during an organizing campaign violated Section 8(a)(1) of the National Labor Relations Act (NLRA). *Miklin Enterprises, Inc. and Industrial Workers of the World,* NLRB Case Nos. 18-CA-19707, 18-CA-19727, 18-CA-19760. The restaurant manager's posting provided a pro-union employee's telephone number and suggested that Facebook members text the employee to "let him know how they feel." The ALJ found that the restaurant manager's posting violated the NLRA because it constituted harassment that would reasonably interfere with employees' rights to engage in protected and concerted activities under Section 7 of the NLRA.

As set forth by the ALJ, an employer generally violates the NLRA if it engages in disparagement that conveys explicit or implicit threats, suggests the employees' union activities were futile, or constitutes harassment that would reasonably interfere with employees' Section 7 rights. However, "[w]ords of disparagement alone concerning a union, its officials or supporters are insufficient for finding a violation of Section 8(a)(1)." Here,

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Seventh Circuit Holds That Cat's Paw Theory Supports Imposing Individual Liability Under § 1981

On May 24, 2012, the Seventh Circuit held that an employee may be individually liable under 42 U.S.C. § 1981 through the cat's paw theory for causing his or her employer to retaliate against another employee. *Smith v. Bray,* No. 11-1935, 2012 WL 1871855 (7th Cir. May 24, 2012). In *Smith v. Bray*, Darrel Smith sued his former human resources manager, Denise Bray, claiming that Bray conspired with his former supervisor to retaliate against him in violation of § 1981, which prohibits race discrimination in contractual relationships. In particular, Smith claimed that Bray ignored his complaints of racial harassment by his immediate supervisor and persuaded her bosses to terminate him in retaliation for such complaints. (Smith voluntarily dismissed his claim against the company and its parent because they had filed for bankruptcy, and reached a settlement with his immediate supervisor.) Although Bray did not have the authority to terminate Smith, Smith claimed that Bray should nevertheless be held individually liable for his alleged discriminatory discharge under the cat's paw theory, which imposes liability where an employer's adverse action is influenced by a biased employee. The district court granted summary judgment in favor of Bray, holding that there was insufficient evidence that Bray had contributed to causing Smith's termination, and that there was no evidence that she did so because Smith had complained about discrimination.

Though the Seventh Circuit ultimately concluded that the facts of the case did not warrant reversal, the court ruled, as a matter of first impression, that a subordinate employee with a retaliatory motive may be individually liable under § 1981 for causing the employer to retaliate against another employee. In so holding, the appeals court acknowledged that it has "long recognized that a final decision-maker's reliance on an improperly motivated recommendation from a subordinate may render the corporate employer liable because the subordinate acts as the firm's agent." The court also noted that the U.S. Supreme Court has endorsed the cat's paw theory of employer liability in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191 (2011), and that several circuits have held or assumed that this "theory will support holding the *employer* vicariously liable under both § 1981 and 42 U.S.C. § 1983." Additionally, the court emphasized the fact that at least five circuits have indicated that a cat's paw theory would support imposing individual liability on the unlawfully motivated subordinate under § 1983. As the court reasoned, given that the same substantive standards generally govern intentional discrimination claims under Title VII, § 1981 and § 1983, it "logically follows that an individual can be liable under § 1981 for retaliatory conduct that would expose her employer to liability under Title VII or § 1981." The court also made clear that its holding makes sense as a matter of basic fairness.

EEOC Rules That Title VII Protects Transgender Employees

On April 20, 2012, the Equal Employment Opportunity Commission (EEOC) held that discrimination based on an individual's transgender status or gender identity constitutes discrimination based on sex and is therefore cognizable under Title VII. *Macy v. Holder,* Appeal No. 0120120821, Agency No. ATF-2011-00751 (EEOC Apr. 20, 2012).

Complainant Mia Macy, a transgender woman, applied for a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives (Agency), for which she was qualified. Macy had interviewed for the job when she was a man and was allegedly informed that she would be hired if she passed the standard background check. As alleged by Macy, during this process, she informed the Agency that she was in the process of transitioning from male to female. Macy further alleged that, although she was told soon thereafter that the position was no longer available because of budget reductions, the Agency in fact hired another individual for the job. Macy filed a complaint with the Agency, claiming discrimination on the basis of "'sex, gender identity … [and] sex stereotyping.'" The Agency accepted her sex discrimination claim for investigation, but indicated that her claim for discrimination on the basis of gender identity stereotyping fell outside the scope of Title VII's sex discrimination protections and, therefore, had to be adjudicated through a separate process.

In reversing the Agency and holding that the EEOC had jurisdiction over Macy's entire claim, the EEOC emphasized that sex discrimination encompasses both biological and gender differences. As the EEOC stated, Title VII's "protections sweep far broader than [discrimination on the basis of biological sex], in part because the term 'gender' encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity." In doing so, the EEOC relied on the Supreme Court's decision in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), as well as federal circuit and district court decisions holding that discrimination based on gender stereotypes constitutes sex discrimination. The EEOC also cited a "steady stream" of cases that have applied the gender stereotype theory specifically to discrimination against transgender people. For example, in *Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011), the Eleventh Circuit noted that transgender discrimination is frequently based on the transgender person's noncompliance with traditional gender stereotypes.

The EEOC made clear that "evidence of gender stereotyping is simply one means of proving sex discrimination" and thus is not itself an independent cause of action. As the EEOC noted, evidence of sex discrimination can also include actions that are "motivated by hostility, by a desire to protect

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people of a certain gender, by assumptions that disadvantage men … or by the desire to accommodate other people's prejudices or discomfort." In other words, while stereotyped remarks can provide evidence that gender played a role in an adverse employment action, the key question is always whether the "'employer actually relied on [the employee's] gender in making its decision.'"

The EEOC addressed only the jurisdictional issue of whether Title VII applied and did not offer a position as to whether unlawful discrimination had occurred against Macy. The EEOC also noted that its holding "expressly overturn[s]" any contrary EEOC decisions.

New Jersey Court Holds That State Bias Law Protects Individuals Perceived to Belong to a Protected Class

A New Jersey appellate court held that it is the perception of an employee's membership in a protected class that triggers standing to bring a claim under the New Jersey Law Against Discrimination (LAD) in *Cowher v. Carson & Roberts Site Constr. & Eng'g, Inc.,* No. A-4014-10T1, slip op. (N.J. Super. Ct. App. Div. Apr. 18, 2012). In particular, the court held that anti-Semitic workplace comments directed toward an individual because of a mistaken belief that he is Jewish are actionable under the LAD.

The plaintiff, Myron Cowher, was employed as a truck driver for Carson & Roberts. Cowher alleged that, although he was not Jewish, his two direct supervisors wrongly perceived him to be Jewish and repeatedly directed anti-Semitic slurs towards him during the majority of his employment with the company, thereby creating a hostile work environment in violation of LAD. The defendant successfully argued before the trial court that Cowher could not satisfy the test for establishing a *prima facie* case of discrimination under the LAD, as articulated in *Lehman v. Toys 'R' Us, Inc.,* 132 N.J. 587, 603-04 (1993). Under such test, a plaintiff alleging an anti-Semitic hostile work environment must show: (1) that the defendant's conduct would not have occurred but for the plaintiff's religion; (2) that the conduct was severe or pervasive; and (3) that the severe and pervasive nature of the conduct was enough to make a reasonable person believe that the conditions of employment were altered and the working environment was hostile and abusive. As the trial court held, Cowher could not get past the first prong because he was not Jewish and because, in its view, New Jersey law does not recognize a cause of action premised on perceived membership in a protected group other than disabled persons.

The appeals court, relying on precedent recognizing that a plaintiff's perceived disability triggered standing to bring an LAD claim, rejected the trial court's position and held that if Cowher could demonstrate that the discrimination would not have occurred but for the perception that he was Jewish, his claim would be covered under LAD. Though the defendants disputed that perception, the court concluded that "[i]n a case such as this involving facially discriminatory conduct, we find it reasonable at this point to infer that the conduct was spurred by plaintiff's perceived status. Otherwise, legitimate claims could be too easily defeated by self-serving denials on the part of otherwise culpable persons." In turning to the issue of whether Cowher had established proof of a hostile work environment, the court held that although Cowher was not Jewish, the proper question in evaluating whether a *prima facie* case is met is what effect would defendants' derogatory comments have on a reasonable person of the perceived religion.

The employer was unsuccessful in asserting the existence of an effective anti-harassment workplace policy as a bar to vicarious liability. In the court's view, although a defendant is entitled to assert the existence of such an affirmative defense to vicarious liability, material issues of disputed fact — as existed in this case — can deny a defendant summary dismissal based on that defense. As such, the court held that liability must be resolved at trial.

California Supreme Court Clarifies Meal and Rest Break Requirements

On April 12, 2012, the California Supreme Court issued its opinion in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, No. S166360, 2012 WL 1216356 (Cal. Apr. 12, 2012), settling questions regarding the timing and substance of the requirement to provide nonexempt employees with meal and rest periods, and clarifying trial courts' responsibilities at the class certification stage.

Brinker involves a putative wage and hour class action. Defendants own and operate restaurants throughout California, including Chili's Grill & Bar and Maggiano's Little Italy. Named plaintiffs, hourly nonexempt employees at one or more of defendants' restaurants, sought to represent defendants' cooks, stewards, buspersons, wait staff, host staff and other hourly employees, and alleged that defendants: (1) failed to provide those employees with rest breaks due under law; (2) failed to provide those employees with duty-free meal periods due under law; and (3) required those employees to work off-the-clock and engaged in time shaving.

The trial court granted class certification. The Court of Appeal then reversed as to three subclasses — a Rest Period Subclass, a Meal Period Subclass and an Off-the-Clock Subclass — because, among other reasons, the trial court

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California Supreme Court Clarifies Meal and Rest Break Requirements *(continued from page 3)*

failed to resolve the parties' disputes over the elements of those claims, which the Court of Appeal believed was a necessary threshold inquiry. In reversing the Court of Appeal, the California Supreme Court agreed that trial courts must resolve the disputes that are necessary to the determination of whether class certification is proper, but ultimately held that such courts need not resolve all disputes prior to certification. The court then addressed the merits of the parties' threshold substantive disputes, noting, however, that it was only doing so at the parties' request.

Rest Periods

Regarding rest periods, the court held that under the California Industrial Wage Commission's Wage Order No. 5, employees are entitled to 10 minutes rest for each 4 hours "or major fraction thereof" worked — meaning that employers must provide 10 minutes rest for shifts from 3.5 to 6 hours in length, 20 minutes for shifts of more than 6 hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on. The court further held that employers are not required to provide a rest period before an employee's meal period. Instead, employers need only make a good faith effort to authorize and permit rest periods in the middle of each work period. The court nonetheless held that because plaintiff had pleaded and presented substantial evidence of a uniform rest break policy that violated the law, the trial court properly certified the Rest Period Subclass. The court also held that the question of whether individual employees had waived the rest period did not prevent certification of the Rest Period Subclass because employers must first authorize a rest period before employees can waive it.

Meal Periods

As to meal periods, the court held that an employer satisfies its substantive obligations if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, without impeding or discouraging them from doing so. The employer is not required to police meal breaks or ensure that no work is performed during such periods. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not create liability for premium pay.

Meal Period Timing

As to meal period timing, the court held that Wage Order No. 5 and California Labor Code § 512 require only that employers provide a first meal period no later than the end of an employee's fifth hour of work and a second meal period no later than the end of an employee's tenth hour of work. There is no requirement that the second meal period start at most five hours after the end of the first meal period.

California Labor Commissioner Issues Updated Wage Notice Form

The Wage Theft Protection Act of 2011 (WTPA), which became effective January 1, 2012, requires California employers to provide all new non-exempt hires with written notice of specific employment-related information, including details about rates of pay and the company's workers' compensation policy (see the October 20, 2011 Special Edition of *Employment Flash*, "California Governor Signs New Laws Affecting Employers"). The law requires California's Labor Commissioner to publish a template that complies with the requirements of the notice. On April 12, 2012, the Labor Commissioner issued a revised wage notice template as well as updated responses to "frequently asked questions" by employers. Accordingly, employers should utilize the new form on a going forward basis.

Employers are not required to issue the new form to employees who already received a prior version of the notice before the new notice posting date unless and until there is a substantive change to the provided information. The revised form was issued in response to employer concerns regarding the broad scope as well as the practical implementation of the prior version. One notable change is that the new notice eliminates the requirement of a separate Acknowledgment of Receipt. As the updated guidance makes clear, signatures by the employer or employee may provide assurance and confirmation that the notice was, in fact, provided by the employer and received by the employee. Also, the form no longer includes a question about whether the employment agreement is written or oral. Instead, employers need only specify whether a written agreement exists that provides the rate(s) of pay.

Connecticut Supreme Court Holds That State Bias Law Protects Employees From Harassment Based on Sexual Orientation

On May 15, 2012, the Supreme Court of Connecticut held that Connecticut law "imposes liability on employers for failing to take reasonable steps to prevent their employees from being subjected to hostile work environments based on their sexual orientation." *Patino v. Birken Mfg. Co.,* No. 18441, 2012 WL 1570857, at *1 (Conn. May 15, 2012).

The plaintiff, Luis Patino, worked as a machinist for Birken Manufacturing Company from 1977 until his termination in 2004. Patino alleged that, beginning in 1991, he was repeatedly subjected to co-workers' derogatory name-calling and

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slurs regarding homosexuals. He allegedly complained about such behavior to his supervisor and Birken's general counsel for several years. While the company transferred one of the employees to another facility and held a seminar on workplace harassment, the offensive behavior allegedly did not stop.

Patino filed suit with the Connecticut Superior Court, alleging that Birken violated § 46a–81c(1) of Connecticut's general antidiscrimination statute, which protects employees from discrimination with respect to terms and conditions of employment based on sexual orientation. Specifically, Patino alleged that the "defendant had violated § 46a-81c (1) 'by creating a hostile work environment because of the plaintiff's sexual orientation, [and] failing to take adequate measures to alleviate the harassment or to remedy the hostile work environment. …" Following a trial, a jury found for Patino and awarded him $94,500 in non-economic damages.

In Birken's appeal of the trial court's denial of its motion to set aside the verdict, it argued that § 46a-81c does not create a cause of action for hostile work environment claims. The court rejected Birken's argument, agreeing with Patino that the language "terms and conditions" has taken on a specific meaning in antidiscrimination law and creates a cause of action where the employer fails to take steps to prevent the creation of a hostile workplace. In doing so, the court relied on both federal and Connecticut interpretations of "terms, conditions, or privileges of employment" to conclude that this language, which is also contained in Title VII, creates a hostile work environment cause of action. In particular, the court addressed *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), in which the U.S. Supreme Court interpreted this language to mean that Title VII prohibits "'discrimination based on sex [that] create[s] a hostile or abusive working environment.'" Additionally, the court focused on § 46(a)60(a)(1) of Connecticut's general antidiscrimination statute, which also refers to "terms, conditions, or privileges of employment" in prohibiting discrimination based on race, religion and sex, among other characteristics. As the court noted, the Connecticut legislature's "use of the same phrase in § 46a-81c(1) evinces a similar intent with respect to sexual orientation discrimination." Further, the court emphasized the long line of Connecticut cases that have interpreted § 46(a)60(a)(1) to provide a cause of action for hostile work environment claims.

In reaching its decision, the court rejected Birken's assertion that the legislature intended less protection for homosexuals. While the court noted that some parts of Connecticut antidiscrimination law "provide more limited protection than any other antidiscrimination statutes," it concluded that the employment discrimination section has no indication that it should be narrowly construed. Moreover, although Birken also argued that a Connecticut statute prohibiting sexual harassment contains the language "hostile or offensive working environment," and, therefore, a hostile work environment claim is limited to sexual harassment, the court disagreed, reiterating its reasoning about the common meaning of "terms and conditions."

New York Court of Appeals Clarifies Exception to State's At-Will Doctrine

On May 8, 2012, the New York Court of Appeals, in a 5-2 decision, held that the judicially-created exception to the State's strong at-will employment doctrine did not extend to a wrongful discharge claim brought by Joseph Sullivan, a former hedge fund compliance officer who alleged that he was fired in retaliation for complaining internally about alleged improper stock trades by the company's president. *Sullivan v. Harnisch*, 2012 N.Y. Slip. Op. 03574, 2012 WL 1580602. Sullivan alleged that his claim fell within an exception to the employment at-will doctrine that the court recognized in a prior case involving an attorney who had been fired after reporting a fellow associate's unethical conduct. *Wieder v. Scala*, 80 NY.2d 628 (1992).

The Court of Appeals explained that its recognition of an exception to the employment at-will doctrine in *Wieder* was motivated by the "unique ethical obligations of members of the bar and the importance of those obligations to the employment relationship between a lawyer and a law firm." Though Sullivan argued that compliance with securities laws was central to his relationship with his employer in the same way that ethical behavior as a lawyer was central in *Wieder* to the plaintiff's employment at a law firm, the Court of Appeals rejected this analogy. In so holding, the court stated that "important as regulatory compliance is, it cannot be said of Sullivan, as we said of the plaintiff in *Wieder*, that his regulatory and ethical obligations and his duties as an employee 'were so closely linked as to be incapable of separation.'" As the court further explained, Sullivan was not associated with other compliance officers in a firm where all were subject to self-regulation as members of a common profession. The court also noted that regulatory compliance was not at the core of Sullivan's job in that he was not a full-time compliance officer, but had four other titles at the company and was allegedly a 15 percent partner in the business.

The court further reasoned that, despite the fact that compliance with federal regulations by compliance officers is an integral part of the securities business, the existence of such regulation furnishes no reason to make state common law governing the employer-employee relationship more intrusive. Accordingly, the court stated that Congress can regulate that relationship itself to the extent it thinks the objectives of federal law require it, citing the Dodd-Frank Wall Street Reform and Consumer Protection Act as an example.

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The dissent highlighted the devastation caused by the recent fraudulent financial scandals and the negative message that it contends the majority decision conveys to members of the financial services industry. In the dissent's view, "the common law should protect compliance officers from retaliatory termination from the inception of their investigations into suspected wrongdoing, even before they make any reports to the government without the need for recourse to federal statutes or, for that matter, to state statutes."

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Additionally, the new rule defines a RFOA as "a non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances." In particular, the rule confirms that, to establish the RFOA defense, an employer must show that the employment practice was (1) reasonably designed to further or achieve a legitimate business purpose and (2) administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.

By looking to a prudent employer under like circumstances, the rule refers to tort law to determine whether a factor is reasonable. As the EEOC highlighted, employment discrimination law, like tort law, focuses on the avoidance of harm. The new rule also provides a non-exclusive list of "considerations that are relevant" to whether a practice is based on a RFOA, including: (1) the relationship between the factor and the stated business purpose; (2) the fairness and accuracy of the definition of the factor, including the guidance and training provided to managers and supervisors; (3) the limitation on "discretion to assess employees subjectively"; (4) the assessment of adverse impact of the practice on older employees; and (5) the degree of harm imposed on protected employees and steps the employer took to reduce the harm. The EEOC emphasized that these factors are "considerations" rather than "required elements or duties."

While the AARP applauded the new rule as "helpful guidance" that will "preven[t] discrimination before it happens," some employers have expressed concern that the rule places new burdens on them and goes beyond *Smith* and *Meacham* by actually conflating the RFOA standard with a business necessity standard. In maintaining that the rule does not impose the business necessity standard of Title VII, the EEOC explained that employers need not validate a practice or use the least discriminatory alternative, each of which is a requirement associated with the business necessity standard. Rather, as the EEOC reiterated, determining whether the employment practice causing the disparate impact was based on a RFOA depends on all of the surrounding facts and circumstances.

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by encouraging employees and managers to text a pro-union employee without specifying what they should communicate, the manager was deemed to be "encouraging other employees and managers to harass [the pro-union employee] for activities that were protected, as well as some that were arguably unprotected" by the NLRA. In contrast, the ALJ found that postings by members of management containing derogatory comments and engaging in offensive name calling did not violate the NLRA.

Employment Flash **provides information on recent developments in the law affecting the corporate workspace and employees. If you have any questions regarding the matters discussed in this newsletter, please call one of the following attorneys or your regular Skadden, Arps contact:**

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