Ogletree Deakins

The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law | November/December 2016

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Court Upholds Employer's Dreadlock Ban

Finds Grooming Policy Did Not Violate Title VII of the Civil Rights Act

A federal appellate court recently held that an employer's policy banning dreadlocks did not constitute racial discrimination under Title VII of the Civil Rights Act of 1964. In doing so, the Eleventh Circuit Court of Appeals rejected the Equal Employment Opportunity Commission's (EEOC) argument that hairstyle can be a determinant of racial identity for purposes of Title VII. The court reasoned that Title VII protection extends to immutable characteristics but not cultural practices and that hairstyles are not immutable characteristics. ***EEOC v. Catastrophe Management Solutions,*** *No. 14-13482, Eleventh Circuit Court of Appeals (September 15, 2016).*

Factual Background

Chastity Jones applied for a customer service representative position at Catastrophe Management Solutions (CMS), a claims processing company in Mobile, Alabama. The company was seeking candidates with basic computer knowledge and professional phone skills. Customer service representatives worked in a large call center and did not have contact with the public.

Jones, who is African American, completed an online employment application and was selected for an in-person interview. She arrived at the interview wearing a business suit and her hair in short dreadlocks.

After the interview, Jeannie Wilson, the company's HR manager, met with a group of applicants (including Jones) and told them that they were all being offered jobs, pending completion of paperwork and lab tests. Following the

Please see "DREADLOCKS" on page 6

Eight Firm Lawyers Join Prestigious College

Ogletree Deakins Leads All Law Firms With 51 Fellows

On November 12, 2016, eight Ogletree Deakins attorneys will be formally inducted as Fellows of the College of Labor and Employment Lawyers Class of 2016. With the newly-elected Fellows, Ogletree Deakins now has 51 attorneys in the College. According to Ogletree Deakins' managing shareholder Matt Keen, "This is a very prestigious organization and it is an honor for these individuals as well as the firm."

The new inductees include:

- Paul Lancaster Adams (Philadelphia)
- Theresa Egler (Morristown)
- Tom Farr (Raleigh)
- Brian Hayes (Washington, D.C.)
- Mark Kisicki (Phoenix)
- Bryant McFall (Dallas)
- Tom McInerney (San Francisco)
- Neil McKittrick (Boston)

The College of Labor and Employment Lawyers is a non-profit professional association honoring the leading lawyers nationwide in the practice of labor and employment law. Fellows are recognized as members of the labor and employment community who promote achievement, advancement, and excellence in the practice by setting standards of professionalism and civility, sharing their experience and knowledge, and acting as a resource for academia, the government, the judiciary, and the community at large.

These individuals are elected based on a rigorous vetting process where nominees are evaluated based on their character, integrity, and professional experience throughout their career. All Fellows have practiced labor and employment law for at least 20 years. ■

New EEO-1 Form Approved—Pay Data Collection Starts March 2018

by Dara L. DeHaven (Atlanta)

On September 29, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) officially announced that starting in March of 2018, the federal agency will collect summary employee pay data and total hours worked information from employers with 100 or more employees. The new data will be collected on the annual Employer Information Report (EEO-1) that is jointly coordinated by the EEOC and the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

Ogletree Deakins

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New Elements

The revised EEO-1 report has two new elements:

1. Summary pay data: Employers will be required to report the total number of full- and part-time employees in 12 pay bands for each of the 10 EEO-1 job categories and 14 gender, race, and ethnicity categories on the current EEO-1 form. In selecting the appropriate pay band for employees in each job category, employers will report the income provided in Box 1 of the employee's W-2 form.

2. Aggregate hours worked data: Employers will be required to tally and report the total hours worked by all the employees accounted for in each pay band. For exempt employees, employers may report a proxy of 40 hours per week for a full-time employee (or 20 hours for a part-time employee) or the actual number of hours worked by the exempt employee.

New Filing Deadline for 2017 Report Is March 31, 2018

The new EEO-1 filing deadline will be March 31 of the year that follows the reporting year. The "workforce snapshot" period for preparing the report can be any pay period between October 1 and December 31 of the reporting year, starting with the EEO-1 report for 2017. EEO-1 reports for 2017 data will be due on March 31, 2018. Although the filing deadline for 2017 EEO-1 reports is less than 18 months away, employers may want to have systems in place to capture the required data by December 31, 2016.

Significant Development

This is a significant development and marks the first time pay information will be reported on the EEO-1 filing. There is no doubt that this controversial new data collection tool reinforces the agency's focus on combatting pay disparities based on gender, race, and ethnicity. In announcing the new report, the EEOC said that "the new data will improve investigations of possible pay discrimination." According to EEOC Chair Jenny Yang, "Collecting pay data is a significant step forward in addressing discriminatory pay practices. This information will assist employers in evaluating their pay practices to prevent pay discrimination and strengthen enforcement of our federal antidiscrimination laws."

Employer advocates are concerned that the new data collection obligations are burdensome but provide little useful data in analyzing pay disparities because the EEO-1 job categories and the new salary bands are too broad; W-2 income may be misleading; and hours worked data for exempt employees, which presumes they work 40-hour workweeks, may be simply incorrect. Nonetheless, the EEOC is moving forward with collecting this new data and is sending a strong signal that the agency will increase its enforcement efforts.

Prepare Now

Employers may want to take the following steps now to get ready for filing the new report and to prepare for defending their pay decisions:

- Assess existing human resources information systems and payroll systems to ensure that they can generate the necessary data to prepare the reports.
- Meet with outside vendors to make sure they understand the new EEO-1 filing requirements.
- Identify or develop policies that explain how employees earn overtime, bonuses, commissions, and other components of W-2 Box 1 wages.
- Put systems in place to readily retrieve data regarding benefits choices employees make, since these choices can significantly affect W-2 income.
- Identify job titles in each of the 10 EE0-1 job categories and analyze job descriptions to ensure they are accurate and will support pay decisions that reflect different job responsibilities.
- Identify any existing pay bands that your company uses and map them to the new pay bands on the EEO-1 form.
- Determine how to report hours worked for exempt employees.

The EEOC website, www.eeoc.gov/employers/eeo1survey, provides additional information, including answers to frequently asked questions, a fact sheet, and a copy of the new form. ■

Ogletree Deakins State Round-Up

Alabama

Alabama's new restrictive covenant statute became effective on January 1, 2016. Recently published committee comments clarified certain provisions of the law. For example, the final comments reinforce the statute's message that an agreement based solely on specialized training will receive extra judicial scrutiny.

Arizona

An Arizona judge recently granted a temporary reprieve to more than 1,100 Arizona businesses that have been beleaguered by lawsuits alleging that their parking lots lack sufficient accessible parking spaces for the disabled, or that spaces are not marked with adequate signage. The judge entered an order consolidating and temporarily staying all of the cases that remain pending out of more than 1,500 cases.

California

On September 14, 2016, Governor Jerry Brown signed into law AB 2337. The bill amends California Labor Code Section 230.1 relating to protections of employees who are victims of domestic violence, sexual assault, and/or stalking. The amended law requires employers to provide specific information in writing to new employees upon hire and to other employees upon request.

District of Columbia

The District of Columbia may soon join Massachusetts in prohibiting employers from asking job candidates about their prior salary histories. On September 20, legislation known as the "Fair Wage Amendment Act of 2016" (FWAA) was introduced. As proposed, the FWAA would amend current law to prohibit a prospective employer (a) from screening a prospective employee based on his or her wage history and (b) from seeking a prospective employee's wage history from his or her current or former employers.

Florida

In 2004, Florida voters approved a constitutional amendment that established a statewide minimum wage. The Florida minimum wage law requires a new minimum wage calculation each year on September 30. Florida's current minimum wage is $8.05 per hour, effective January 1, 2015. The minimum wage did not increase in 2016, but will increase in 2017. Beginning January 1, 2017, Florida's minimum wage will be $8.10 per hour.

Illinois

Three recently enacted laws expanding sick leave benefits within the state of Illinois will soon impact employers with operations in Illinois: the Illinois Employee Sick Leave Act (effective in January of 2017); the Chicago Paid Sick Leave Ordinance (effective in July of 2017); and the Cook County Earned Paid Sick Leave Ordinance (effective in July of 2017).

Massachusetts

The Massachusetts legislature recently amended the General Laws of Massachusetts, Chapter 272, to prohibit discrimination in places of public accommodation based on an individual's gender identity. The Massachusetts Attorney General's Office and the Massachusetts Commission Against Discrimination both issued guidance on the amendments, which went into effect on October 1, 2016.

Minnesota

A 63-year-old employee was told that her position had been eliminated. She sued and claimed that her employer was obliged to find her a different position with the company. Affirming summary judgment for the employer, the Eighth Circuit held that no such duty existed under the Minnesota Human Rights Act. *Haggenmiller v. ABM Parking Services, Inc.*, No. 15-3107 (September 14, 2016).

New Jersey

Senate Bill 2160, which recently passed both houses, permits the payment of unemployment insurance benefits during labor disputes under certain specified conditions. Under the bill, unemployment benefits would be immediately available where the claimant's unemployment is caused by a lockout or a labor dispute that was caused by the employer's noncompliance with an agreement or contract between the employer and the claimant.

Pennsylvania

The Pennsylvania Department of Labor and Industry recently signed a three-year memorandum of understanding (MOU) with the U.S. Department of Labor's (DOL) Wage and Hour Division designed to prevent employees from being misclassified as independent contractors and other wage and hour violations. Pennsylvania is the 32nd state to enter into an MOU with the DOL.

Texas

A hearing has been scheduled for November 16, 2016 in a Texas federal court to decide whether an injunction will be issued to block the substantially increased salary threshold to qualify as exempt under the new overtime rule, which is anticipated to take effect on December 1, 2016. The hearing was requested by groups challenging the soon-to-be effective new overtime rule.

Washington

The Seattle City Council unanimously passed a bill on September 19, enacting secure scheduling regulations for large employers in the retail and fast food industries. Seattle is the second city, after San Francisco, to adopt such regulations. Mayor Ed Murray signed the ordinance on September 29. The Seattle Secure Scheduling Ordinance will take effect on July 1, 2017.

For more information on these state-specific rulings or developments, visit www.ogletreedeakins.com/our-insights.

SAVE THE DATE: **DECEMBER 8-9, 2016**

NOT YOUR FATHER'S LABOR ENVIRONMENT: THE NEW REALITY

In the last year, well-established labor relations rules have undergone complete transformation (or obliteration). Everything seems new, and regardless of who will be sworn in as our next President in January, nothing is likely to change in the immediate future.

TOPICS WILL INCLUDE:

- Joint employer and temporary employee issues
- Increased union access to employer property
- Creative new virtual organizing tactics
- Restricted management rights under labor agreements
- Continued expansion of protected concerted activity rights
- Even further diminished response times under ambush election rules
- Predicted future of the persuader rule

Join us for this important program on the new reality for employers. Learn how to survive—and thrive—in the new environment.

DATE
Thursday and Friday
December 8-9, 2016

LOCATION
Mandarin Oriental, Las Vegas
3752 Las Vegas Boulevard South
Las Vegas, NV 89158
(702) 590-8888

COST
Seminar:
$895 per person (clients)
$1,295 per person (non-clients)

Room Rate:
$169 per night (plus resort fee)

REGISTER NOW
Online by clicking here or email odvents@ogletreedeakins.com

To view the full program agenda, click here.

Misclassification of Independent Contractors In Itself May Be Violation of NLRA

*by Harold P. Coxson**

The National Labor Relations Board's (NLRB) Division of Advice recently released an advice memorandum from December of 2015 in which it found a Section 8(a)(1) violation for an employer's misclassification of independent contractor status. *Pacific 9 Transportation, Inc.* (No. 21-CA-150875, December 18, 2015).

The advice memorandum, which is binding on the NLRB's regional offices, authorizes the issuance of a complaint where an employer misclassifies employees as independent contractors. The advice memorandum acknowledges that the Board has never found misclassification of independent contractor status, in itself, to constitute a violation of Section 8(a)(1) of the National Labor Relations Act (NLRA) but noted that "there are several lines of Board Decisions that support such a finding."

In *Pacific 9 Transportation*, the company continued to insist that its drivers were independent contractors even after an earlier ruling by an NLRB regional office that the drivers in question were statutory employees. Pacific 9 Transportation, Inc. (Pac9) argued that its drivers were owner operators (or independent contractors) and thus ineligible to form a union under the NLRA.

The advice memorandum makes the future issuance of complaints for misclassification of independent contractor status a threat to employers across the United States, with the possibility of union representation election losses being overturned and rerun elections mandated. The issuance of a complaint also would trigger the misclassification being reported as an "administrative merits determination," which a contracting agency's labor compliance officer would be likely to classify as a "serious" violation for purposes of determining the contract bidder's eligibility for the award of federal contracts under regulations implementing Fair Pay and Safe Workplaces, Executive Order 13673 (also known as the "government contractor blacklisting" regulations).

Further, the advice memorandum signals that in the future, the NLRB will be an even more active player in the government-wide assault on independent contractor status.

Facts and Findings

Pac9 is a drayage company that operates a fleet of approximately 160 trucks with approximately 180 drivers who transport shipping containers in and around the ports of Los Angeles and Long Beach. The company has been the target of a bitter union "corporate campaign" to organize its drivers.

As part of that campaign, the union filed an unfair labor practice charge with the NLRB alleging that the company threatened employees by informing them that operations would shut down if the drivers voted for a union. The company defended the charge by alleging that the drivers were independent contractors, not employees, and therefore the NLRB lacked jurisdiction. The regional office disagreed and ruled that the drivers were statutory employees, at which point the case was settled.

Pac9 had entered into independent contractor agreements with a number of its drivers, which granted them a fair amount of autonomy, but the company failed to abide by the terms of the agreement and instead, among other things, directed the manner of performance of work by the drivers. Following the regional office's decision that the drivers were employees, the company sent a memorandum to its drivers informing them that only employees—and not owner operators or independent contractors—had the right to form a union, and implying that adverse consequences would result if the drivers voted for a union. The memorandum abrogated the company's settlement agreement approved by the Board. Yet, the company continued to insist that its drivers were independent contractors. The advice memorandum determined that the company's memorandum to employees was equivalent to telling statutory employees that if they sought to form or join a union, their jobs would be at risk or there would be other adverse consequences.

When the union filed a new charge alleging that Pac9's misclassification of employees as independent contractors was, in itself, a Section 8(a)(1) violation, the regional office sent the case to the Board's Division of Advice. As stated above, the advice memorandum concluded that the employer's misclassification of employees as independent contractors operates to interfere with and restrain statutory employees in their exercise of their Section 7 rights to engage in protected concerted activity so as to constitute an independent Section 8(a)(1) violation.

Legal Authority

First, applying the familiar multifactor analysis of Section 220 of the Restatement (Second) of Agency, the Division of Advice agreed with the regional office that the Pac9 drivers were not independent contractors. The advice memorandum concedes that the issue of whether misclassification of independent contractor status in itself constitutes a Section 8(a)(1) violation is a matter of first impression. However, it identifies three lines of cases to support its findings.

First, the Board has held that employer actions that tend to "chill or curtail" the future exercise of protected concerted activity violates Section 8(a)(1).

Second, the Board previously found that an employer violates Section 8(a)(1) by informing employees that engaging in Section 7 activity would be futile.

Third, the Board has held that it is a Section 8(a)(1) violation for an employer to misstate the law to reasonably insinuate that engaging in Section 7 activity would have adverse consequences.

On the basis of these three lines of cases cited as authority, the Division of Advice—for the first time—authorized the issuance of a complaint for a violation of Section 8(a)(1) solely for the misclassification of independent contractor status.

Key Takeaways

Although the advice memorandum merely authorizes the issuance of a complaint, which has yet to be considered by the full Board, it has ominous implications for employers. Ultimately, the threat of a Section 8(a)(1) violation makes proper classification of independent contractor status even more important. ■

* Harold Coxson is a principal with Ogletree Governmental Affairs, Inc., and a shareholder in the Washington, D.C. office of Ogletree Deakins.

OSHA Clarifies Limits on Post-Accident Drug Testing/Safety Incentive Programs

by Melissa A. Bailey (Washington, D.C.)

The Occupational Safety and Health Administration (OSHA) recently released a memorandum explaining "in more detail" two provisions added to the recordkeeping regulation: Section 1904.35(b)(1)(i) requiring "employers to have a reasonable procedure for employees to report work-related injuries and illnesses"; and Section 1904.35(b)(1)(iv) prohibiting retaliation for reporting work-related injuries and illnesses.

"Reasonable" Reporting

Section 1904.35(b)(1)(i) requires employers to implement a "reasonable" system for employees to use in reporting work-related injuries and illnesses. The guidance adds little to the explanation included when OSHA issued the original amendments to the recordkeeping regulation. OSHA reiterates that employers must give employees a "reasonable timeframe after the employee has realized that he or she has suffered a recordable work-related injury or illness and in a reasonable manner." A procedure requiring employees to report "as soon as practicable after realizing" they are injured is "reasonable," but it would not be "reasonable" to discipline employees for "failing to report before they realize they have a work-related injury" or "for failing to report 'immediately' when they are incapacitated because of the injury or illness."

Anti-Retaliation

When it issued the final amendments to the regulation, OSHA identified three policies that "can be used to retaliate against workers for reporting work-related injuries or illnesses and therefore discourage or deter accurate recordkeeping: disciplinary policies, post-accident drug testing policies, and employee incentive programs." Section 1904.35(b)(1)(iv) is not "prohibiting these kinds of policies categorically" and "does not impose any new obligations or restrictions on employers." Instead, the provision simply "gives OSHA another mechanism to address conduct that has always been unlawful" under Section 11(c) (the whistleblower provision) of the Occupational Safety and Health Act.

To prove a violation, OSHA must show: (1) "[t]he employee reported a work-related injury or illness"; (2) "[t]he employer took adverse action"— "action that would deter a reasonable employee from accurately reporting a work-related injury or illness"; and (3) "[t]he employer took the adverse action because the employee reported a work-related injury or illness."

Post-Accident Drug Testing

Post-accident drug and alcohol testing is not prohibited. Rather, Section 1904.35(b)(1)(iv) prohibits post-accident testing only when the employee reports an injury and a test is conducted "without an objectively reasonable basis." The "central inquiry will be whether the employer had a reasonable basis for believing that drug use by the reporting employee could have contributed." The factors OSHA will consider include whether "other [non-injured] employees involved in the incident" are tested and whether the employer "has a heightened interest in determining if drug use could have contributed to the injury or illness due [to] the hazardousness of the work being performed."

OSHA provides an example: A crane accident injures several employees working nearby but not the operator. Given the facts, "there is a reasonable possibility that it could have been caused by operator error or by mistakes made by other employees responsible for ensuring that the crane was in safe working condition." Testing all of the involved employees is "appropriate," while testing only the injured employees "would likely violate section 1904.35(b)(1)(iv)."

Finally, OSHA clarifies a troubling issue regarding the type and timing of the test. OSHA originally stated that the test must measure impairment at the time of the injury. OSHA now says it "will only consider whether the drug test is capable of measuring impairment at the time the injury or illness occurred where such a test is available." "OSHA will consider this factor for tests that measure alcohol use, but not for tests that measure the use of any other drugs." In light of this language, employers can discipline employees based on positive drug tests for marijuana and other drugs where the test is not capable of measuring the level of impairment at the time of the injury.

Safety Incentive Programs

Safety incentive programs only violate this provision if a benefit—"such as a cash prize drawing or other substantial award"—is taken away because an employee reported an injury or illness.

OSHA offers this example: A raffle for a $500 gift card at the end of "each month in which no employee sustains an injury that requires the employee to miss work." If the raffle is cancelled "simply because an employee reported a lost-time injury without regard to the circumstances of the injury, such a cancellation would likely violate section 1904.35(b)(1)(iv) because it would constitute adverse action against an employee simply for reporting a work-related injury."

"Mere existence of a program is not enough to violate the regulation even though it may deter employees."

Final Thoughts

The guidance offers several key takeaways for employers. Although OSHA does not say it specifically, the guidance seems to confirm that safety incentive programs and post-accident drug testing policies potentially violate the anti-retaliation provision and not the "reasonable" reporting provision. This means that the mere existence of a program is not enough to violate the regulation even though it may deter employees from reporting. Instead, OSHA must show a specific instance of retaliation against an employee.

Second, OSHA did not specifically address the types of safety incentive programs described in the 2014 memorandum concerning companies in the Voluntary Protection Program. The memo describes "blended" programs that include a component based on meeting injury and illness rate goals. Given that OSHA did not address these types of programs, the assumption is that they do not violate the anti-retaliation provisions.

For additional takeaways, visit www.ogletreedeakins.com/our-insights. ■

EEOC Issues Updated Strategic Enforcement Plan

by Harry J. Secaras (Chicago)

On October 17, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) approved a Strategic Enforcement Plan (SEP) for Fiscal Years 2017–2021. This recently approved SEP updates the EEOC's first SEP which spanned Fiscal Years 2013–2016.

In the updated SEP, the EEOC has identified six substantive area priorities:

- ***Eliminating Barriers in Recruiting and Hiring.*** In reaffirming a commitment to eliminating discrimination in recruiting and hiring, the updated SEP advocates a focus on "class based recruitment and hiring practices that discriminate" based on protected class status.
- ***Protecting Vulnerable Workers.*** The EEOC will continue to focus on immigrant and migrant workers and underserved communities where workers often are not aware of their rights and their "work status, language, financial circumstances, or lack of work experience make them particularly vulnerable to discriminatory practices or policies."
- ***Addressing Selected Emerging and Developing Issues.*** The issues that the EEOC will be targeting are: (1) qualification standards and inflexible leave policies that adversely affect individuals with disabilities; and (2) accommodations for pregnant employees under the Americans with Disabilities Act Amendments Act and the Pregnancy Discrimination Act.
- ***Equal Pay Protection for All Workers.*** The EEOC intends to continue its focus on pay practices and systems that are discriminatory under the Equal Pay Act and Title VII. In addition, the EEOC will expand this review to encompass compensation systems that "discriminate based on any protected basis."
- ***Preserving Access to the Legal System.*** The EEOC will continue to challenge policies and procedures that preclude individuals from seeking the protections afforded by the EEOC or impede access to the EEOC and state and local EEO agencies. For example, the EEOC will continue to scrutinize overly broad waivers and mandatory arbitration provisions.
- ***Preventing Systemic Harassment.*** The EEOC will continue to look to effectively eliminate harassment, particularly where evidence shows a pattern and practice of harassment. The agency also will encourage training and outreach.

For employer takeaways, visit www.ogletreedeakins.com/our-insights. ■

"DREADLOCKS"

continued from page 1

group meeting, Wilson met with Jones individually to discuss a scheduling conflict with her lab test date. As the meeting concluded, Wilson asked Jones whether she had her hair in dreadlocks. Jones responded yes and Wilson replied that CMS could not hire her "with the dreadlocks."

CMS had a race-neutral grooming policy requiring personnel to be "dressed and groomed in a manner that projects a professional and business-like image." The policy also stated, "[H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable[.]" Jones told Wilson that she would not cut her hair and the job offer was rescinded.

The EEOC filed suit on behalf of Jones, claiming that CMS's refusal to hire her amounted to intentional race discrimination under the disparate treatment theory. The trial judge dismissed the suit on the basis that it "did not plausibly allege intentional racial discrimination by CMS against Ms. Jones." The EEOC appealed this ruling to the Eleventh Circuit Court of Appeals.

Legal Analysis

The EEOC argued that race was a social construct with no biological definition and that race was not defined solely by immutable physical characteristics. Dreadlocks, according the EEOC, were a racial characteristic of black individuals and were "suitable for black hair texture." The EEOC also argued that hair was a substantial determiner of race. The agency offered evidence that dreadlocks were "'culturally associated' with black persons" and reflected aspects of the slave trade, thus having historical significance for African Americans.

The EEOC also cited its Compliance Manual, which stated that the "concept of race encompasses cultural characteristics related to race or ethnicity." The Eleventh Circuit was not persuaded that the Compliance Manual was determinative because the guidance offered in the manual conflicted with legal precedent and with a 2008 EEOC administrative ruling that a grooming policy prohibiting dreadlocks was outside the scope of Title VII.

The Eleventh Circuit held that Title VII protection only extends to immutable traits of race, and that dreadlocks were not an immutable trait of black individuals. The court said that mutable or changeable characteristics (such as hairstyle and facial hair)—even if associated culturally with a protected class—were not protected characteristics.

The Eleventh Circuit acknowledged that there was some support for interpreting "race" as used in Title VII to include cultural characteristics, but it refused to adopt that interpretation noting that it might lead to difficult issues of interpretation. Finally, the court expressed that, given the complexity of the issue and the role that race plays in society, a broader interpretation of race might be best left to Congress. Thus, the trial judge's decision to dismiss the EEOC's suit was upheld.

Practical Impact

According to Samantha Smith, of counsel in the Birmingham office of Ogletree Deakins, "This decision is noteworthy because of the detailed analysis the court undertook in differentiating race and cultural associations and the protections afforded to each under Title VII. The decision underscores the need for employers to examine policies on dress and grooming to ensure they are neutral toward any protected characteristic. It also reinforces that employers still have freedom (within the scope of Title VII's prohibitions) to determine what constitutes appropriate appearance and attire according to the business needs of their particular workplace." ■

U.S. Supreme Court Begins New Term

Few Labor and Employment Cases on the Docket

In early October, the Supreme Court of the United States began hearing oral arguments in the 2016-2017 term. There are only a few cases on the docket that involve employment and labor related issues or are likely to impact these areas. The justices, however, will also consider several petitions that seek review of lower court rulings that deal with various federal employment law statutes.

The cases scheduled to be addressed by the Court include:

NLRB Appointment. On November 7, the justices will hear oral argument in *National Labor Relations Board v. SW General Inc.* (No. 15-1251). This case concerns President Obama's appointment of Lafe Solomon, the former National Labor Relations Board (NLRB) "acting" general counsel. At issue before the high court is whether Solomon lost his authority to serve as the agency's acting general counsel (including issuing unfair labor practices) once President Obama nominated him in January 2011 for a full term as the Board's general counsel. The U.S. Court of Appeals for the District of Columbia Circuit held that Solomon was not validly appointed as acting general counsel pursuant to the Federal Vacancies Reform Act.

EEOC Subpoenas. The issue in *McLane Co. v. Equal Employment Opportunity Commission* (No. 15-1248) is the level of deference owed to federal district courts' handling of investigative subpoenas issued by the federal Equal Employment Opportunity Commission (EEOC). The Ninth Circuit Court of Appeals reviewed the district court's decision "de novo" (or with no deference), but the employer argued that the appellate court should have used a more deferential standard of review (which is consistent with Supreme Court precedent). This case has not yet been scheduled for oral argument.

The Employment Law Authority will keep you apprised of any new developments in these cases or the petitions seeking review. ■

Federal Judge Enjoins Contractor Blacklisting Rule

Regulations Were Set to Take Effect October 25

On October 24, 2016, a Texas federal judge issued a preliminary injunction in a case challenging the so-called contractor blacklisting rules, which were scheduled to take effect on October 25, 2016. The final regulations, which the U.S. Department of Labor issued to implement Executive Order 13673, Fair Pay and Safe Workplaces, would require companies bidding on certain federal contracts to report past and pending determinations by courts, arbitrators, and federal enforcement agencies regarding violations of 14 federal labor laws, including two other executive orders. The lawsuit was filed by Texas and national trade associations.

The final regulations created a scheme of "serious, willful, repeated, and pervasive" violations that would threaten contractors' eligibility for federal contracts, even if those "violations" consist of no more than preliminary determinations made unilaterally by agency enforcement staff. Starting October 25, 2016, these requirements were set to apply to bids on solicitations valued at $50 million or more and, starting April 25, 2017, to solicitations valued at or above $500,000.

In a 32-page order, Judge Marcia A. Crone, a federal judge for the U.S. District Court for the Eastern District of Texas, concluded that the business groups challenging the regulations "properly demonstrated immediate and ongoing injury to their members if the rule is allowed to take effect." Judge Crone stated: "The Order and Rule appear to conflict directly with every one of the labor laws they purport to invoke by permitting disqualification based solely upon 'administrative merits determinations' that are nothing more than allegations of fault asserted by agency employees and do not constitute final agency findings of any violation at all."

Judge Crone's ruling enjoins the final regulations' prohibition on certain pre-dispute arbitration agreements, but does not affect the final regulations' pay transparency provisions, which are scheduled to take effect on January 1, 2017. ■

Ogletree Deakins News

New to the firm. Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Fauzia Amlani, Rene Cousins, Luke Donohue, and Harry Rowland (Atlanta); Federico Munoz and Corey Tanner (Austin); Karla Turner Anderson (Charlotte); John Dickman (Chicago); James Garilas and Sara McCreary (Columbia); Robyn Funk (Dallas); McKinley Haskin (Greenville); Johnathon Bramble (Houston); Courtney Beasley and Amy Bergstraesser (Indianapolis); Marissa Franco and Lacey Rainwater (Los Angeles); M. Kimberly Hodges (Memphis); David Feldman and Shabri Sharma (New York City); Nardo Juan Catahan and Jennifer Yanni (Orange County); Phillip Combs (Philadelphia); Melina Villalobos (Raleigh); Reilley Moore (Richmond); Adam Christian (St. Thomas); and Kang He and Arthur Sapper (Washington, D.C.).

BTI Litigation Outlook. Ogletree Deakins recently earned a "Powerhouse" ranking in the Employment Litigation category in the *BTI Litigation Outlook 2017: Changes, Trends and Opportunities for Law Firms* report. The firm was also recognized as a "Standout" in the Class Actions and Commercial Litigation categories. This is the fifth consecutive year that the firm has earned top distinctions in the *BTI Litigation Outlook* report.

The Legal 500 Latin America. Ogletree Deakins' Mexico City office and the office's managing partner, Pietro Straulino-Rodriguez, have been recommended in *The Legal 500 Latin America 2016*. Both Ogletree Deakins and Straulino-Rodriguez were recommended in the Labour and Employment category. *The Legal 500 Latin America* is an authoritative guide to Latin America's leading law firms and individuals who are selected solely on merit. The annual referral guide provides a detailed qualitative review of more than 600 commercial law firms across 18 key jurisdictions in the region across all relevant practice areas.

Court Rules Game Over for Worker's Harassment and Retaliation Claims

Affirms Trial Judge's Decision That Comments Were Not Directed at Worker "Because of" His Sex

A federal appellate court recently upheld the dismissal of a lawsuit brought by an employee who claimed that he was sexually harassed by male coworkers and then fired for complaining about the alleged harassment. The Seventh Circuit Court of Appeals held that the worker failed to prove that he was harassed "because of" his sex. The court also found that he did not rebut the employer's explanation for his discharge. ***Lord v. High Voltage Software, Inc.,*** *No. 13-3788, Seventh Circuit Court of Appeals (October 5, 2016).*

Factual Background

Ryan Lord joined High Voltage Software, Inc. as an associate producer in September of 2006. Lord was initially assigned to the Omni team, which was named after a video game under development at the time.

Lord claimed that in January of 2007, his male coworkers began teasing him about his alleged interest in a female audio engineer. They would comment that he had "the audio bug" and would ask if he had "[taken] care of the audio bug" when the female engineer was in the area.

On June 5, 2007, Lord sent an email formally complaining about the audio bug joke to Maggie Bohlen, the company's HR director. Following an investigation, Bohlen met with Lord and explained to him that the audio bug joke did not amount to sexual harassment. She then directed Lord to report any further incidents of alleged harassment to HR "immediately."

After this meeting, the company's president reassigned Lord to the Responder team to avoid further "team dynamic issues." Lord also met with management for his regular performance review. During this meeting, Lord's recent complaints about harassment were discussed and he again was told to report any behavior that "crosse[s] the line."

As part of the Responder team, Lord shared an office with Nick Reimer, another associate producer. Between July 18 and July 27, Lord claimed that Reimer made unwanted physical contact with him on four separate occasions. One incident involved Reimer allegedly grabbing Lord between the legs while Lord was writing on a white board. On another occasion, Reimer slapped him on the buttocks while he was talking to a coworker. Lord did not report these incidents at the time, but he did ask Reimer to stop.

On July 30, Lord went to the office on his day off to discuss Reimer's behavior with HR. The next day, the company's executive producer, Chad Kent, issued a disciplinary "write up" to Reimer and Lord after a DVD malfunctioned during his presentation. Lord immediately responded to Kent by email, accusing the company of retaliation. After speaking with Lord and investigating the DVD malfunction, Kent withdrew the disciplinary action and apologized for "misunderstanding [Lord's] level of involvement with this issue."

On August 1, 2007, the company fired both Reimer and Lord. Reimer's employment was terminated based on his harassment of Lord. According to the company, Lord was discharged for "(1) failing to immediately report incidents of harassment to Bohlen as instructed; (2) failing to report incidents of harassment to Kent, again as specifically instructed; (3) obsessively 'tracking' the 'performance, timeliness, and conduct' of his coworkers; and (4) insubordination."

Shortly thereafter, Lord sued High Voltage alleging same-sex harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964. The trial judge dismissed the lawsuit, and Lord appealed this decision.

Legal Analysis

Lord relied on the audio bug comments and Reimer's unwanted physical conduct to support his harassment claim. However, the Seventh Circuit in a 2-1 decision held that Lord failed to show that his coworkers harassed him "because of" his sex.

To state an actionable same-sex harassment claim under Title VII, the Seventh Circuit Court of Appeals noted, there must be some evidence that the harasser was homosexual. According to the court, "Nothing suggests that Reimer was homosexual, and Reimer's behavior was not so explicit or patently indicative of sexual arousal that a trier of fact could reasonably draw that conclusion." The court also found that neither the audio bug comments nor Reimer's conduct "reflect a general hostility to the presence of men in the workplace." Absent evidence of sex discrimination, and not just horseplay, the court upheld the decision to dismiss his harassment claim.

The Seventh Circuit also rejected Lord's retaliation claim. The court agreed with the trial judge that "Lord's complaints about his coworkers did not amount to protected activity because they did not concern the type of conduct that Title VII prohibits." The court also found that Lord failed to show a causal connection between his complaints and firing. Even with the close timing between the two (in this case, two days), the court held that there was "no evidence from which a reasonable jury could infer that High Voltage's reasons for firing Lord were pretextual."

"Absent evidence of sex discrimination, and not just horseplay, the court upheld the decision."

Practical Impact

According to Carol Poplawski, a shareholder in the firm's Chicago office, "this decision is important for two reasons. First, it reaffirms that mere workplace banter may not support a claim for harassment under Title VII. It is also noteworthy that the company took action immediately after receiving both complaints from the plaintiff. Second, even though the outcome was positive in this case, employers must be mindful of taking action against workers after they have filed a complaint. Such decisions must be well-documented and you must be ready to prove that the worker would have been fired even absent his or her complaint." ■

November 2016

Nov. 8	**Webinar**	Minimize Exposure in the True North: Commonplace Mistakes with Canadian Compensation Damages
Nov. 8	Philadelphia, PA	Employment Law Briefing
Nov. 9	North Bethesda, MD	Employment Law Briefing
Nov. 9	Costa Mesa, CA	Managing a Workforce in 2017
Nov. 10	**Webinar**	Paid Sick Leave for Federal Contractors: What are the New Requirements and How Can You Ensure Compliance?
Nov. 14	Carterville, IL	FMLA and ADA Workshop
Nov. 15	**Webinar**	The Consequences of the 2016 Elections for Labor and Employment Policy
Nov. 15	Atlanta, GA	Power Breakfast: Time is Money
Nov. 17	Cleveland, OH	"Reel" Ethics
Nov. 17	Rosemont, IL	Avoiding Risks Associated with Construction Contracting, Project Communications, and Safety Matters
Nov. 17	**Webinar**	Telecommuting Arrangements—Pros and Cons for New Jersey Employers
Nov. 22	Cranberry, PA	Employment Law Briefing

December 2016

Dec. 6	Indianapolis, IN	"Reel Ethics"
Dec. 6	St. Louis, MO	Employment Law Briefing
Dec. 7	Santa Monica, CA	Employment Law Briefing for Start-Up and Technology Companies: Part 3
Dec. 8-9	Las Vegas, NV	Not Your Father's Labor Environment: The New Reality
Dec. 15	**Webinar**	Hiring, Monitoring, and Separating Employees with Confidential Business Information in New Jersey