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The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law

July/August 2014

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Favoritism-Based Claim Rejected by Court

Preferential Treatment for Alleged Paramour Does Not Constitute Sex Bias

A federal appellate court recently affirmed a ruling in favor of an employer in a discrimination case brought by a fired employee who claimed that his supervisor favored female employees. According to the Tenth Circuit Court of Appeals, the discharged worker failed to show that his supervisor, who had allegedly had a "voluntary romantic affiliation" with a female subordinate, favored the subordinate because of gender discrimination and not simply because "the two of them had (or behaved as though they had) some kind of special friendship, affinity, or relationship." ***Clark v. Cache Valley Electric Company,*** *No. 13-4119, Tenth Circuit Court of Appeals (July 25, 2014).*

Factual Background

Kenyon Brady Clark and Melissa Silver, both project managers for Cache Valley Electric Company, were supervised by Myron Perschon. Clark alleged that Perschon and Silver were or had been involved in a relationship of a romantic and sexual nature, and that because of their relationship, Perschon favored Silver with respect to job assignments, bonuses, and other working conditions. He also alleged that Perschon favored females in general.

Clark complained about the alleged favoritism on a number of occasions and eventually met with human resources and Cache Valley's legal counsel to discuss his allegations. Cache Valley later terminated Clark's employment. Clark filed suit against the company claiming discrimination and retaliation in violation of Title VII of the Civil Rights Act.

The trial judge granted summary judgment in favor of Cache Valley. The court

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Eight Firm Attorneys Join Prestigious College

Ogletree Deakins Ranks Among Top Law Firms With 43 Fellows

Ogletree Deakins is pleased to announce that eight of the firm's attorneys have been elected as Fellows in the 2014 class of the College of Labor and Employment Lawyers. The attorneys include Thomas Cattel (Detroit Metro); Joseph Clees (Phoenix); A. Craig Cleland (Atlanta); Dan Dargene (Dallas); Douglas Farmer (San Francisco); Jim Goh (Denver); Brian McDermott (Indianapolis); and Richard Samson (Chicago). Ogletree Deakins now has 43 attorneys in the College. According to Ogletree Deakins Managing Shareholder Kim Ebert, "This is a very prestigious organization and it is an honor for these eight individuals, as well as the firm."

By being elected, the Ogletree Deakins attorneys have met the College's criteria, including: the highest professional qualifications and ethical standards based on the College's acclaimed Principles of Civility and Professionalism; the highest level of character, integrity, professional expertise, and leadership; a commitment to fostering and furthering the objectives of the College; sustained, exceptionally high-quality services to clients, the bar, bench, and public; and significant evidence of scholarship, teaching, lecturing, and/or published writings on labor and employment law. Membership is by nomination only and limited to those who have met the College's criteria for a period of at least 20 years.

The class will be formally inducted during a ceremony in Los Angeles on November 8. ■

Justice Department Settles Immigration-Related Discrimination Claim

Company Allegedly Required Workers to Produce Specific Documentation Verifying Employment Eligibility

The U.S. Department of Justice (DOJ), through its Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), recently settled a claim alleging discrimination, based on unfair documentary practices during the employment verification process, against employment-authorized non-U.S. workers by their employer. The anti-discrimination provision of the Immigration and Nationality Act prohibits employers from requesting more or different documents than are required to verify employment eligibility, rejecting reasonably genuine-looking documents, or specifying certain documents over others with the purpose of discriminating on the basis of citizenship status or national origin.

Through its investigation, the DOJ confirmed that a Denver-based company committed document abuse when it required work-authorized non-U.S. citizens to produce specific documentation issued by the Department of Homeland Security for the purpose of verifying employment eligibility. However, the company allowed U.S. citizens to present their choice of documentation.

Under the settlement, the company agreed to pay $53,500 in civil penalties and create a $25,000 back pay fund to compensate those who may have lost wages as a result of the employer's discriminatory document practices. The company is also required to have its employment eligibility verification practices monitored for one year. Acting Assistant Attorney General for the Civil Rights Division Jocelyn Samuels stated that discrimination against employment-authorized workers because they are not citizens "violates federal law and the Justice Department is committed to enforcing this law."

OSC vigorously investigates and prosecutes claims of discrimination and, as this case illustrates, employers found to be engaging in discriminatory activity may be required to pay civil penalties and back pay to affected parties. When reviewing or assessing compliance programs, it is critical that companies examine their hiring policies and practices to avoid discrimination and proactively discuss compliance with experienced legal counsel. ■

Ogletree Deakins

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The Arbitration Restrictions Imposed by the Fair Pay and Safe Workplaces Executive Order

On July 30, 2014, President Barack Obama issued the Fair Pay and Safe Workplaces Executive Order. Under this order, federal contractors will be required to disclose labor law violations and comply with additional obligations regarding pay information that must be disclosed to workers. The executive order also includes a prohibition against pre-dispute mandatory arbitration agreements for some employers with large federal contracts. Accordingly, when and if the executive order goes into effect, some contractors and subcontractors' agreements to arbitrate certain claims will be required to be made with the voluntary post-dispute consent of their employees or independent contractors.

These requirements apply to "claims arising under Title VII of the Civil Rights Act of 1964" and "any tort related to or arising out of sexual assault or harassment." Significantly, the executive order "grandfathers" all arbitration agreements entered into prior to the implementation of the order, but only if the employer does not retain the ability in the agreement to rescind or modify it. Additionally, the new arbitration limitation applies only to contracts where the estimated value of the supplies acquired and services required exceeds $1 million, and it also requires contractors to incorporate the requirement into subcontracts in the same value range. This obligation does not apply to contracts or subcontracts for the acquisition of commercial items or commercially available off-the-shelf items.

The executive order, if implemented, will impose another restriction on employers' ability to enter into arbitration agreements. The order comes in the wake of a number of recent rulings on the permissible contents of arbitration programs. In *D.R. Horton, Inc. v. NLRB*, which was argued by Ogletree Deakins, the Fifth Circuit upheld the employer's argument that class action waivers in mandatory employment arbitration agreements are permissible. The National Labor Relations Board had ruled such waivers violated employees' rights to engage in protected concerted activity. In denying enforcement of the Board's order, the Fifth Circuit held that under the Federal Arbitration Act (FAA) and several decisions by the Supreme Court, employers could insist on class action waivers in arbitration agreements, thereby providing employers with a powerful weapon against class, collective, and multi-plaintiff actions. The executive order is expected to face multiple legal challenges based on the FAA and other grounds. ■

Ogletree Deakins State Round-Up

Alabama*

The Alabama legislature recently approved a measure that permits the expungement of the criminal records of persons charged—but not convicted—of misdemeanors or nonviolent felonies. Individuals can now clear their names from charges of having committed misdemeanor criminal offenses, traffic violations, or municipal ordinance violations.

California*

On July 7, 2014, Governor Jerry Brown signed legislation that will give small business owners additional time to comply with the Affordable Care Act (ACA). For many employers, this legislation will offer additional time to secure ACA-compliant coverage and make needed adjustments to health plans.

District of Columbia

The D.C. Circuit Court of Appeals recently held that a hospital's captive insurer owes $3 million to Interstate Fire & Casualty Co. for a medical malpractice settlement. The court found that a temporary nurse qualified as an "employee" and thus triggered the captive insurer's policy. *Interstate Fire & Casualty Company v. Washington Hospital Center Corp.*, No. 13-7024 (July 18, 2014).

Florida*

On June 20, 2014, Florida Governor Rick Scott signed the Florida Information Protection Act of 2014 (FIPA) into law. FIPA imposes stringent new security and notice requirements on businesses and employers that maintain personal information regarding individuals, employees, and customers. For example, covered entities now have only 30 days after a determination of a breach to provide the required notifications to affected individuals.

Illinois*

Governor Pat Quinn signed HB5622 into law, amending the Illinois Wage Payment and Collection Act (IWPCA) to permit employers to pay employees using payroll cards. The IWPCA permitted employers to pay their employees by only cash, check, or direct deposit. As of January 1, 2015, employers will be able to pay their employees' wages, commissions, bonuses, and compensation for earned holidays and vacation time using payroll cards.

Indiana

The Seventh Circuit Court of Appeals recently held that an Indiana prison employee may proceed with her sex discrimination and hostile work environment claims. According to the court, the worker—who had an inter-office affair—was disciplined more harshly than her male companion and was subjected to "a constant barrage of sexually charged comments." *Orton-Bell v. Indiana*, No. 13-1235 (July 21, 2014).

Minnesota*

In April, the Minnesota legislature passed a measure establishing incremental increases to the state minimum wage over the next three years. The first increase went into effect on August 1, 2014. The new minimum wage impacts the wages of large and small employers, youths, trainees, and employees covered by nonimmigrant visas.

New Jersey*

On August 11, 2014, Governor Chris Christie signed into law "The Opportunity to Compete Act"—also referred to as the "ban the box" law—adding New Jersey to the growing list of states where employers are prohibited from asking criminal conviction questions on initial employment applications. This law is much more limited than prior similar bills introduced in New Jersey.

New York*

The New York State legislature has approved a bill that will eliminate the onerous requirement of providing annual wage notices to all employees. The existing New York Wage Theft Prevention Act requires that wage notices be provided to new employees at the time of hiring and to all existing employees on a yearly basis.

Tennessee

In a case of first impression, the Tennessee Court of Appeals recently held that undocumented workers may sue their employers for firing them in retaliation for pursuing workers' compensation claims. The court found that the legal right that the plaintiff was asserting wasn't the right to work, but rather the right to file a workers' compensation claim. *Torres v. Precision Industries, P.I. Inc.*, No. W2014-00032-COA-R3-CV (August 5, 2014).

Texas*

A Texas Court of Appeals has held that a car dealership was not responsible for an assault of a customer by one of its salesmen. According to the court, the alleged assault was not in furtherance of the business of the company or for the accomplishment of the object for which he was employed. *Ogunbanjo v. Don McGill of West Houston, Ltd.*, No. 01-13-00406-CV (2014).

Washington*

Seattle has become the first city to pass a $15.00 per hour minimum wage. The initial impact of the city ordinance will be felt by Seattle employers beginning on April 1, 2015, with additional increases in the minimum wage phased in over several years. The new ordinance, Seattle Municipal Code §14.19 et seq., applies to all employees in Seattle for each hour worked within the geographic boundaries of the city.

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

NLRB Decisions on "Micro Units" Provide Guidance for Employers

by Eric C. Stuart*

In two recent decisions, the National Labor Relations Board (NLRB) reached different conclusions on whether unions can organize small groups of employees in a workplace. While the NLRB's decisions in *Macy's, Inc.* and *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman*, both deal with retail employers, the principles articulated are applicable to employers in all industries. The decisions constitute a roadmap for unions seeking to gain representation rights over workers in single departments or within single job classifications. Employers concerned about union organizing need to understand the new paradigm that the NLRB created with these cases and take proactive steps to counter the expected surge in union organizing.

Moreover, employers must take these steps now. Employers do not have the luxury to delay thoughtful, advanced planning as the NLRB is likely to issue the ambush election rules shortly. The net effect of the proposed rules is: a significant reduction in the pre-election due process typically afforded employers in representation cases; a substantial reduction in employers' ability to have meaningful input regarding the size and scope of the bargaining unit; and the creation of an environment in which employees will be required to vote without being fully informed of the critical facts.

The new rules effectively limit the opportunities for employers to educate employees about unions and unionization prior to voting.

Macy's

In *Macy's*, the United Food and Commercial Workers International Union unsuccessfully attempted in 2011 to organize all full-time and regular part-time employees at the company's Saugus, Massachusetts store. In 2012, believing it would be more successful if a vote was conducted in a different bargaining unit, the union filed a petition seeking to represent a much smaller group of employees at the same store including both the employees working on the first floor in cosmetics and women's fragrances and those employed on the second floor selling men's fragrances. This group constituted about 41 of 150 total Macy's employees at the Saugus store.

The employer contended that the appropriate bargaining unit needed to include all 150 employees in the 11 departments of the store or, alternatively, all selling employees at the store. It was undisputed that all store employees shared almost identical terms and conditions of employment; they were issued the same handbook, had the same fringe benefits, worked under a single dispute resolution procedure, were evaluated according to the same performance evaluation process, used the same time clock system and the same break room. Despite that strong evidence of common interest among all store employees, the employees in the petitioned-for micro unit were separately supervised and there were apparently few documented instances of interchange of employees among the 11 departments.

The NLRB agreed with the union and concluded that a bargaining unit of only employees in the first floor cosmetics and fragrance department and those on the second floor selling men's fragrances was appropriate for collective bargaining. Applying its landmark decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, the NLRB found that Macy's did not meet its affirmative burden of proof to demonstrate that all store employees shared an "overwhelming community of interest" with the much smaller group of employees the union sought to represent. The NLRB focused on the fact that employees did not work in multiple departments and did not share common front-line supervision. The NLRB rejected the employer's arguments that the bargaining unit should be composed of all store employees because the retail industry historically has been organized in wall-to-wall units and because the union represented significantly larger and more comprehensive bargaining units at other company stores.

Bergdorf Goodman

The Board reached the opposite conclusion in *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman*, perhaps setting the outer limits of the NLRB's willingness to allow unions to organize "micro units" of workers. In *Bergdorf*, the union sought to organize employees working in the second floor "Salon Shoe Department" of the company's multi-floor, Manhattan store as well as the "Contemporary Footwear" employees working on the fifth floor who themselves were a subset of the larger "Contemporary Sportswear Department."

All employees at the store enjoyed identical working conditions; they were issued the same handbook, were offered the same health care plan, had the same holidays and vacations, and worked the same number of hours. Employees selling shoes on the second and fifth floors had separate direct supervisors who reported to different floor managers. Employees were not interchanged between the Salon Shoe and Contemporary Footwear departments.

The NLRB ruled that the two groups of employees did not share a community of interest and, therefore, did not constitute an appropriate bargaining unit. The Board observed that the unit the union sought to represent did not follow "any administrative or operational lines drawn by the employer," had little contact, were separately supervised, and otherwise did not share sufficient interests in working conditions to be grouped together for collective bargaining.

"Employers that desire to remain union-free need to consider the impact of the NLRB's decisions."

Understanding the NLRB's *Specialty Healthcare* Decision

The *Macy's* and *Bergdorf* decisions purport to apply the Board's 2011 decision in *Specialty Healthcare*, which permits unions to organize small groups

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* Eric Stuart is a shareholder in the Morristown, New Jersey office of Ogletree Deakins, where he represents management in labor and employment related matters.

Supreme Court Holds NLRB Member Recess Appointments Unconstitutional

The Supreme Court of the United States recently held that the recess appointments of former National Labor Relations Board (NLRB) members Sharon Block, Terence F. Flynn, and Richard F. Griffin, Jr. made on January 4, 2012, were unconstitutional. As a result, every decision issued by the Board between January 4, 2012, and July 30, 2013, is void. *NLRB v. Noel Canning*, No. 12–1281, Supreme Court of the United States (June 26, 2014).

In an opinion by Justice Breyer, the Court affirmed the decision of the D.C. Circuit Court of Appeals invalidating the recess appointments in question based upon a different legal theory. The Supreme Court held that the U.S. Constitution's Recess Appointments Clause empowers the president to fill any existing vacancy during any recess (intra-session or inter-session) of sufficient length. Yet, the Court held that the appointments being challenged were invalid because they occurred during only a three-day recess, which is insufficient time to trigger the Recess Appointments Clause, while the Senate was in "pro forma" sessions.

According to Harold P. Coxson, a principal with Ogletree Governmental Affairs, Inc. and a shareholder in the Washington, D.C. office of Ogletree Deakins, "Following the Supreme Court's June 2010 decision in *New Process Steel*, which held that the Board needs a three-member quorum to act, the Board was forced to reconsider more than 600 decisions issued during the period in which the Board lacked a quorum. Unlike the cases implicated as a result of the Court's *Noel Canning* holding, the decisions invalidated by *New Process Steel* were relatively simple, non-controversial cases where the two voting members—pro-employer Republican Peter C. Schaumber and pro-union Democrat Wilma B. Liebman—could agree. The issues in the current crop of *Noel Canning*-invalidated decisions, many of which have been held in abeyance by the D.C. Circuit pending the Supreme Court's decision, are far more controversial and significant."

"MICRO UNITS"

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of employees such as single departments or single job classifications of workers within an employer's overall operation. After the union has established that the unit they have requested is appropriate, that decision places the burden of proof on the employer to establish that any employees sought to be added to the unit share an "overwhelming community of interest" with the group the union seeks to represent. Naturally, *Specialty Healthcare* makes it far easier for unions to collect authorization cards and get to elections due to their ability to organize the smallest possible unit. In *Macy's*, for instance, the union only needed to secure cards from 30 percent of the 41 employees in the unit (13 cards) rather than 45 cards from among the 150 total employees at the store.

The danger of unions' use of micro units is not limited to the ease with which they may be organized. Consider, for example: (1) the time, expense, and disruption caused by multiple union organizing campaigns; (2) the possibility of negotiating multiple labor contracts; (3) circumstances in which different unions may seek to represent various departments or job classifications within a single operation; (4) competitive bargaining among the various micro units; and (5) the danger of unstable bargaining relationships.

As *Macy's* demonstrates, under the *Specialty Healthcare* analysis it is extremely difficult for employers to defeat a micro unit by simply arguing that the appropriate bargaining unit should also include other groups of workers, even when those employees work in the same establishment under almost identical terms and conditions of employment. However, there are limits. A careful reading of *Bergdorf* and *Macy's* provides employers key guidance on proactive steps to take to change the dynamic.

Proactive Steps for Employers

Employers that desire to remain union-free need to consider the impact of the NLRB's decisions paving the way for unions to organize small bargaining units. Employers have the ability to make changes now that help defeat attempts to organize micro units. According to the Board, the manner in which employers chose to structure their operations, including the manner in which the skills and training of employees are utilized throughout the operation and supervision of employees "is an important consideration in any unit determination."

The *Macy's* and *Bergdorf* decisions establish that the critical factors in the NLRB's bargaining unit analysis are whether separate groups of employees have common supervision and have common or overlapping job duties as well as the degree of interchange between departments or job classifications. Depending upon the particular operation or industry, employers can consider combining job classifications, cross-training employees in multiple job duties and rotating employees among classifications or jobs. Employers should make an individualized risk assessment and consider operational and structural changes based upon practical considerations unique to their businesses.

To meet the heightened burden of proof imposed by the NLRB, employers should document the degree of interchange between departments and across job classifications. As well, supervisor responsibilities should be structured so that oversight of multiple departments is shared among several individuals. Employees must also share common terms and conditions of employment such as wages, benefits, and training requirements. To be sure, these steps may not make sense for every business, but are worthy of consideration, particularly in light of the NLRB's ambush election rules.

In conjunction with developing the optimal bargaining unit—which will be an asset in the event of a union campaign—employers should also implement strategies that make unions unnecessary. This includes insuring fair and equitable treatment of workers, establishing appropriate complaint procedures, workplace issue identification and resolution, instituting adequate supervisory training, and offering competitive wages and benefits. The NLRB's obsession with micro units and ambush elections are reminders that the most successful campaign is the one employers never have to face. ■

EEOC Issues Enforcement Guidance on Pregnancy Discrimination

Discusses Best Practices Employers May Adopt to Reduce Chance of PDA and ADA Violations

On July 14, 2014, the U.S. Equal Employment Opportunity Commission (EEOC) approved a new guidance on the Pregnancy Discrimination Act (PDA). The first comprehensive update on the subject of discrimination against pregnant employees in over 30 years, the "Enforcement Guidance on Pregnancy Discrimination and Related Issues" supersedes the EEOC's 1983 Compliance Manual chapter and provides the public with information regarding the rights and obligations of all parties under the PDA. In addition, the guidance discusses the application of the Americans with Disabilities Act (ADA) to pregnancy-related disabilities. The federal agency also issued the "Fact Sheet for Small Businesses: Pregnancy Discrimination," a document of questions and answers explaining the guidance and providing direction for small businesses.

The PDA

Under the PDA, an employer cannot fire, refuse to hire, demote, or take any other adverse action against a woman if pregnancy, childbirth, or a related medical condition is a motivating factor in the adverse employment action. Therefore, pregnant women who are able to work must be permitted to do so subject to the same terms and conditions as other employees; when unable to work, they must be accorded the same rights, leave privileges, and benefits as other similarly-situated employees.

The recent guidance reinforces the PDA's treatment of discrimination based on pregnancy, childbirth, or a related medical condition as a form of sex discrimination. The guidance reviews the obligations that the PDA imposes on employers with regard to discrimination, harassment, medical leave, parental leave, benefits, health insurance, light duty requests, and other accommodations.

The ADA

Title I of the ADA forbids discrimination on the basis of a disability in any aspect of employment. The ADA likewise requires employers to provide reasonable accommodations to qualified individuals with disabilities if doing so would not impose an undue hardship on the operation of the employer's business.

While pregnancy is not an impairment that qualifies as a disability within the meaning of the ADA as amended in 2008, the guidance states that, "in some circumstances," workers with pregnancy-related impairments are covered under the ADA's definition of "disability." Accordingly, some pregnant workers may have impairments related to their pregnancies that amount to ADA-qualifying disabilities. The guidance reviews a number of examples of pregnancy-related medical conditions that would qualify as a disability and thus give rise to an employer's duty to accommodate. In addition, the guidance provides examples of reasonable accommodations that employers may be required to implement for disabilities caused by pregnancy-related impairments.

"The guidance announces significant changes that must be brought to an employer's attention."

Best Practices

The guidance concludes with a series of "suggestions for best practices that employers may adopt to reduce the chance of pregnancy-related PDA and ADA violations and to remove barriers to equal employment opportunity." In light of the new guidance, the EEOC suggests that employers take a number of actions. The recommended actions involve the development and review of policies affecting leaves, light duty requests, reasonable accommodations, and pregnancy and disability discrimination.

Problems, Predictions, and Future Concerns

As delineated in two dissenting opinions, the guidance announces significant changes that must be brought to an employer's attention. According to EEOC Commissioners Constance S. Barker and Victoria A. Lipnic, the guidance offers an interpretation of the PDA for which there is no apparent legal basis. Both commissioners have distributed public statements detailing their reasons for voting against the newly-issued draft and citing fatal flaws to the now-approved guidance. Both have deplored the failure of the EEOC to provide an opportunity for public comment on the draft guidance.

In the section on "Persons Similar in Their Ability or Inability to Work," Commissioner Barker stated that the EEOC introduced an entirely new legal interpretation of the PDA, which is unsupported by congressional intent and current case law. According to Commissioner Barker, despite the lack of legal authority, the guidance suggests that the PDA requires employers to give reasonable accommodations to all employees who have work restrictions because of their pregnancy. This gives even those women who do not have a disability as defined by the ADA a right to reasonable accommodations that is similar to the right of individuals with disabilities. In effect, the guidance permits all pregnant employees who are restricted in their ability to work to bypass the ADA's requirements for protection—namely, that the employee be disabled and qualified for the position with or without a reasonable accommodation. The EEOC thus pioneered a new interpretation of the PDA, analyzing the act not only as a nondiscrimination law, but as a reasonable accommodation law.

Moreover, in the section on "Light Duty Work Assignments," Commissioner Barker noted that the guidance wrongly interprets the PDA to require employers with policies limiting light duty work to those who have been injured on the job, to also offer light duty work to pregnant employees (who have not been injured on the job). The Supreme Court of the United States will consider similar issues next term when it reviews a case on appeal from the Fourth Circuit Court of Appeals. The case concerns whether and to what extent the PDA requires employers to provide accommodations to pregnant employees. *The Employment Law Authority* will keep you abreast of any new developments in this area. ■

Ogletree Deakins Ranked Among Top 25 Law Firms for Diversity

Ogletree Deakins has earned a ranking on career intelligence website Vault.com's 2015 list of the Top 25 Law Firms for Diversity. The 2015 list was compiled based on anonymous feedback from more than 17,000 attorneys from around the world.

"Ogletree Deakins is elated to be included on Vault's list of the Top 25 Law Firms for Diversity for the first time in our firm history," said Michelle Wimes, Ogletree Deakins' director of professional development and inclusion. "We continue to implement programs and initiatives that promote diversity and inclusion within the firm and its leadership, and we are proud that our hard work has been recognized on this prestigious list."

The diversity section of the *Vault Guide to the Top 100 Law Firms* includes separate categories for diversity as it relates to minorities, women, gays and lesbians, individuals with disabilities, and veterans. To determine the Top 25 Law Firms for Diversity, Vault used a formula that weighed the categories evenly for an overall diversity ranking.

Ogletree Deakins' ranking on this Vault list underscores the firm's commitment to diversity and inclusion. The firm recently launched the Ogletree Women's Network, which is dedicated to the development and advancement of women attorneys at the firm, and more than half of the 2014 class of Ogletree Deakins shareholders are women. In addition, Ogletree Deakins was included in *Law360's* 2014 class of Ceiling Smashers, which comprises the 25 U.S.-based law firms with the highest percentage of female partners, and was named the top firm for African-American attorneys on *The American Lawyer's* 2014 Diversity Scorecard. ■

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"FAVORITISM"

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reasoned that Clark's discrimination claim was based solely on Perschon's alleged voluntary romantic affiliation with Silver and therefore failed to state a claim for relief under Title VII. In addition, the court found that Clark failed to demonstrate that Cache Valley's stated nondiscriminatory reasons for terminating his employment were pretextual. Clark appealed this decision.

Legal Analysis

The Tenth Circuit Court of Appeals held that Clark did not present any evidence that Cache Valley treated women more favorably than men, or any circumstances giving rise to an inference of discrimination. Rather, Clark only showed that Perschon treated one female employee more favorably. Finding that "[f]avoritism of a paramour is not gender discrimination," the court ruled that the trial judge properly granted summary judgment on Clark's discrimination claim.

Clark also argued that Perschon retaliated against him when he complained about Perschon's alleged favoritism by trying to get a competitor to hire him, refusing to communicate with him, and distancing himself from Clark. Clark further alleged that when he complained to Cache Valley about Perschon's actions, the company fired him. The Tenth Circuit rejected this claim as well, finding that "nothing in those complaints illustrated a reasonable, good faith belief that Cache Valley was engaged in gender discrimination." According to the court, "though he complained about retaliation, he did not complain about retaliation that constituted an 'unlawful employment practice,' and was not retaliated against for making such a complaint."

Practical Impact

According to Jathan Janove, a shareholder in the Portland office of Ogletree Deakins, "This case illustrates that simply complaining about 'favoritism' in the workplace will not support a worker's discrimination claim under Title VII. As noted by the Tenth Circuit, 'other motives such as friendship, nepotism, or personal fondness or intimacy, rather than an actual sexual relationship, also suffice to remove the case from Title VII's anti-discrimination provisions.'" ■

Ogletree Deakins News

New to the firm. Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Norma Manjarrez (Chicago); Ashley Kerr (Columbia); Karen Hunter Courrèges (Houston); Jia Li (Indianapolis); Jennifer Oldvader (Kansas City); Z. Kathryn Branson (Las Vegas); Colton Long (Minneapolis); Alison Lungstrum (New Orleans); Natalie Alameddine (Orange County); Richard Diaz and Donald Gamburg (Philadelphia); Christopher Olmsted (San Diego); and Ashley Totorica (Stamford).

"Most Powerful" list. Kim Ebert, Ogletree Deakins' managing shareholder, and Joseph Clees, a shareholder in the firm's Phoenix office, have been named to *Human Resource Executive* magazine's 2014 list of the "Nation's Most Powerful Employment Attorneys." This is the sixth consecutive year that Clees has been selected for inclusion on the list. Ebert is named to the list for the second time. To make the list, attorneys must receive recommendations from corporate counsel who have benefitted from their services and would hire them again.

Attorney accolades. Cleveland shareholder Bruce Hearey was recently named the 2014-15 president of the Cleveland Metropolitan Bar Association (CMBA). The CMBA has nearly 6,000 members and serves the largest legal community in Ohio. Elizabeth Ebanks, a shareholder in Ogletree Deakins' Richmond office, has been chosen to represent the firm as a member of the Leadership Council on Legal Diversity (LCLD) 2014 Fellows. The LCLD Fellows program was created to empower a new generation of lawyers and increase diver-sity at the leadership levels of the nation's law firms. Mark Schmidtke, a shareholder in the firm's Chicago office, has been named to the Secretary of Labor's 2014 Advisory Council on Employee Welfare and Pension Benefit Plans. Schmidtke will serve a three-year term as a representative for the insurance field.

Employee's Failure to Apply for Position Dooms Discriminatory Hiring Claim

Court Finds No Evidence of Sex Discrimination on the Part of the Employer

The Eighth Circuit Court of Appeals recently held that the failure to apply for a particular position, in the absence of evidence of "gross and pervasive discrimination" that would deter applicants from applying for the job, and without "every reasonable attempt to convey" interest in that job, removes the matter from the protections of Title VII of the Civil Rights Act. ***EEOC v. Audrain Health Care, Inc.,*** *No. 13-1720, Eighth Circuit Court of Appeals (June 30, 2014).*

Factual Background

David Lunceford is a registered nurse with experience in both the Critical Care Unit (CCU) and Post Anesthesia Care Unit (PACU) of Audrain Medical Center (AMC) in Missouri.

AMC allowed nurses to transfer between nursing units in the various departments and posted vacancy notices to allow current employees to apply for transfer. To apply for transfer, an employee must complete a Request to Transfer form, after which the HR department reviews the applicant's file to ensure that the employee meets the qualifications for the position.

If HR approves the transfer, the application is routed to the relevant department director and executive administration for approval. After departmental/administrative approval, the transfer is deemed effective, although it could take up to 30 days for the formal transfer to occur. Once the employee obtains administrative approval for the transfer, he or she is not eligible to transfer to another position except as provided by hospital policy.

In March 2010, Lunceford completed a Request for Transfer from his position in the PACU to an open position in the CCU. On that same day, HR preliminarily approved the request.

On March 26, Linda Brooks, clinical coordinator for both the CCU and the operating room (OR), approved the request. Lunceford was scheduled to start in the CCU on April 22, 2010.

On April 26, 2010, Lunceford—who had no prior OR experience—asked Brooks if she would consider him or train him for an open OR position, which required specialized, specific job knowledge. Brooks responded that she wanted to fill the open OR position with a female nurse, in order to have a "right mix of patients to staff based on gender." (AMC has a policy that gives patients the right to have a health care provider of the same gender in the room during treatment.)

Lunceford never completed a Request for Transfer form for the OR position, nor did he follow up regarding the position.

Shortly thereafter, the U.S. Equal Employment Opportunity Commission (EEOC) filed a lawsuit on Lunceford's behalf, alleging that by refusing to consider Lunceford for a vacant OR position, the medical center violated Title VII. The trial judge dismissed the suit, and the EEOC appealed this decision to the Eighth Circuit Court of Appeals.

Legal Analysis

Title VII makes it unlawful for an employer to discriminate against any individual with respect to the terms and conditions of employment because of certain protected characteristics, including gender. To support a discriminatory failure to hire claim under Title VII, an individual must point to an "adverse employment action" that was taken again him or her because of the protected characteristic.

After review, the Eighth Circuit upheld the lower court's decision. Because Lunceford never applied for the OR position, the court held, the EEOC was unable to show that he suffered an "adverse employment action." In fact, the court found that although the OR vacancy was the first of the two open positions to be posted, Lunceford did not express interest in the position until nearly a month after he requested (and was approved for) the transfer to the PACU.

The Eighth Circuit also rejected the EEOC's argument that Lunceford's failure to apply for a transfer should be excused because Brooks' comment made it clear that applying for the position would be futile. The court found that there was no evidence that AMC fostered an atmosphere of "gross and pervasive disciminination" that would deter him from applying for a job.

Practical Impact

According to Maria Danaher, a shareholder in the Pittsburgh office of Ogletree Deakins, "While this case comes to a commonsense conclusion—one cannot complain not to have been hired for a position for which one never actually applied—it also reminds employers that there are exceptions to that premise, and that individuals who are able to make a showing of a discriminatory atmosphere that is severe enough to dissuade hiring, transfer, or promotion, may be able to support a claim of discrimination based upon a position for which there was no formal application." ■

Ogletree Deakins' In-House Counsel Exclusive Is Fast Approaching

Ogletree Deakins will be hosting its second annual Corporate Labor and Employment Counsel Exclusive on September 18-20, 2014, at the beautiful St. Regis Monarch Beach in Dana Point, California. This multi-day seminar is designed specifically for in-house labor and employment counsel and will feature more than 70 experienced speakers from both Ogletree Deakins and a variety of companies across the country.

The combination of plenary and breakout sessions will focus on the key labor and employment law issues facing today's in-house counsel, from the Affordable Care Act to workplace investigations to managing complex leaves of absence, and more. Networking opportunities include a welcome reception, a group dinner on Thursday evening, a reception at the Botanical Gardens on Friday evening, and roundtable discussions on Saturday morning. According to Ogletree Deakins Managing Shareholder Kim Ebert, "I am confident this will be a great program that will provide sophisticated analyses of key issues facing in-house counsel."

To maintain the interactive experience of this event, attendance is limited, so make your reservations soon. For more information or to register, see the enclosed brochure or visit www.ogletreedeakins.com.