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The Employment Law AUTHORITY

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May/June 2013

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"Facebook Firing" Ruling Favors Employer

Expression Of Personal Contempt Was Not Protected Activity

By now, employers are aware of a number of "Facebook firing" cases in which individuals who were terminated for posting content on Facebook have been reinstated after the National Labor Relations Board (NLRB) found the postings to have been "protected concerted activity" under the National Labor Relations Act (NLRA). An NLRB Associate Counsel recently took a different tack when he sent an Advice Memorandum to a Regional Director supporting the actions of a medical group that fired an employee who vented about her workplace in a private group message sent through Facebook. *Tasker Healthcare Group d/b/a Skinsmart Dermatology*, NLRB Div. of Advice, No. 4-CA-94222 (May 8, 2013).

In this case, an unnamed charging party was employed by Tasker Healthcare Group, where she performed various office duties with patients and office guests. The employee, along with nine other individuals (the majority of whom were Tasker Healthcare Group employees), participated in a private Facebook "group message" in which only the invited individuals were able to participate.

The conversation initially focused on a planned social event for the group. Later, however, the charging party,

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Workplace Strategies Hits New Highs

Viva Las Vegas In 2014!

What do you get when you combine nearly 100 cutting-edge workplace law sessions, 200 nationally acclaimed speakers, a second line parade through the French Quarter (ending at Pat O'Brien's), an authentic crawfish boil, and employers and lawyers working together to raise $40,000 for an outstanding local charity? The answer: Workplace Strategies, the nation's premier labor and employment law event.

This year's program was held on May 8-11 in New Orleans to the largest crowd in the history of the event. From the immersion sessions, to the policymaker presentations, to the panel discussions, to the breakout sessions, Workplace Strategies 2013 established a high bar for employment law seminars. And perhaps at the other end of the spectrum, few in attendance will forget the "Hollyweird Squares" game featuring Ogletree Deakins lawyers playing characters from the popular TV show.

During the program, moderator Joe Beachboard announced that the 2014 program would be held in Las Vegas on May 7-10 at the fabulous Bellagio Resort (see the enclosed Save the Date flyer). Noting that this year's program sold out almost a month before the event, Beachboard encouraged attendees to register early to guarantee their place at next year's program. And the audience responded, with almost 300 guests already registered for Las Vegas. Those who missed the program this year but plan to attend in 2014 should make their reservations as soon as possible by visiting www.ogletreedeakins.com.

According to Ogletree Deakins Managing Shareholder Kim Ebert, "This was an amazing event, and we are delighted that so many of our clients took time from their busy schedules to join us in New Orleans. I can't wait to see what our planning committee comes up with for next year. Don't miss it!" ■

EEOC ISSUES UPDATED GUIDANCE FOR SPECIFIC DISABILITIES

Focuses On Cancer, Diabetes, Epilepsy, And Intellectual Limitations

The Equal Employment Opportunity Commission (EEOC) recently updated its guidance for employers concerning employees with cancer, diabetes, epilepsy, and intellectual disabilities. The federal agency issued the updated guidance as part of its "Disability Discrimination, The Question and Answer Series" (to access online, visit http://www.eeoc.gov/laws/types/disability.cfm).

The expanded coverage of the Americans with Disabilities Act Amendments Act (ADAAA), which took effect on January 1, 2009, has raised more questions in the workplace. The updated guidance provides additional assistance for employers that are seeking answers regarding these specific disabilities.

The four revised publications now provide specific examples of permissible and impermissible inquiries. The publications address issues such as the circumstances in which employers may make medical inquiries and which types of reasonable accommodations employers should offer disabled employees. The documents also discuss confidential medical information, offer an analysis of concerns about safety, and provide reminders about harassment and retaliation.

While the information is not expansive, it is easily understood and offers sufficient detail to provide additional guidance to employers. The EEOC guidance applies to both applicants and current employees and spells out for the employer appropriate actions under specific circumstances.

Each publication offers a discussion of the particular condition and why it is likely to be considered a disability. The discussion of intellectual disabilities is particularly helpful because it defines an intellectual disability as being "characterized by significant limitation both in intellectual functioning and in adaptive behavior that may affect many everyday social and practical skills." This characterization by the EEOC may provide added detail that employers will find helpful.

According to Kathy Dudley Helms, a shareholder in Ogletree Deakins' Columbia office: "From a practical standpoint the updated guidance provides employers an excellent resource when issues arise with regard to these specific conditions—which have each presented more issues since the implementation of the ADAAA." ■

Ogletree Deakins

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GENETIC DISCRIMINATION SUIT SETTLES

Employer Allegedly Requested Applicant's Family Medical History

The Equal Employment Opportunity Commission (EEOC) recently agreed to settle its first lawsuit alleging discrimination under the Genetic Information Nondiscrimination Act (GINA). The company, which also faced allegations of disability discrimination under the Americans with Disabilities Act (ADA), agreed to pay $50,000 and to take other specified actions to prevent future bias.

The lawsuit was brought by the EEOC on the behalf of Rhonda Jones, a temporary worker at Fabricut, Inc. in Tulsa, Oklahoma. When her temporary assignment was coming to an end, Jones applied for a permanent position with the company. After making her a job offer, Fabricut sent Jones to its contract medical examiner for a pre-employment drug test and physical. She was required to complete a questionnaire, which among other inquiries asked about the existence of heart disease, hypertension, cancer, tuberculosis, diabetes, arthritis, and "mental disorders" in her family.

Following her physical, the examiner concluded that further evaluation was required to determine whether Jones suffered from carpal tunnel syndrome (CTS). At Fabricut's request, Jones was evaluated by her personal physician who concluded that she did not have CTS. Nonetheless, the company rescinded the job offer.

GINA, which was signed into law in 2008, prohibits employers from discriminating against employees or applicants because of genetic information (including family information). The federal law also restricts employers from requesting, requiring, or purchasing such information.

Fabricut denied any wrongdoing, noting that the family medical history was gathered by a third party and was not used in the employment decision. EEOC regional attorney Barbara Seely disagreed: "Although GINA has been law since 2009, many employers still do not understand that requesting family medical history, even through a contract (third-party) medical examiner, violates the law." ■

Ogletree Deakins State Round-Up

ARIZONA*

On April 29, Arizona Governor Jan Brewer signed legislation that bars Arizona cities from enacting their own ordinances governing "employee benefits." The law states that the regulation of employee benefits, including meal breaks, rest periods, and other areas of compensation, is "of statewide concern."

CALIFORNIA*

A California Court of Appeal recently held that a worker did not fall under the administrative employee exemption because he was not paid a guaranteed salary. The court explained that the administrative exemption requires payment of a predetermined amount to the employee that is not subject to reduction based on the amount of work performed. *Negri v. Koning & Associates*, No. H037804 (May 16, 2013).

COLORADO*

The state of Colorado recently passed a law regulating an employer's use of credit checks for applicants and employees. The new law, which goes into effect on July 1, 2013, is applicable to (1) employment positions in Colorado, and/or (2) applicants or employees who reside in the state. Employers may not use consumer credit information for employment purposes unless one of four stated exceptions applies.

CONNECTICUT

On May 29, the House of Representatives approved legislation (S.B. 387) to increase the state hourly minimum wage from $8.25 to $9.00 over a two-year period. The measure was approved by the state Senate on May 23 and the governor is expected to sign the bill. Despite the proposed increase in the overall minimum wage, employers' "tip credit" percentage will remain the same.

FLORIDA

On April 30, a federal jury in Florida awarded more than $20 million in damages to a group of female telemarketers who claimed that their former bosses subjected them to unwelcome groping and sexual propositions. The trial judge reduced the awards for the five employees represented by the EEOC to $200,000 each—in addition to back pay—based on Title VII's damages cap.

MASSACHUSETTS

The First Circuit Court of Appeals recently upheld the dismissal of an age bias claim brought by a 55-year-old worker whose position was eliminated. According to the court, the employee could not identify younger, similarly situated employees with low sales numbers who were retained by the employer. *Woodward v. Emulex Corp.*, No. 12-1612 (April 18, 2013).

MINNESOTA*

Minnesota recently passed "ban the box" legislation. The new law, which goes into effect on January 1, 2014, makes it unlawful for most private employers to inquire into or consider the criminal record of an applicant until (1) the applicant has been selected for an interview; or (2) if an interview is not conducted, a conditional offer of employment has been extended to the applicant.

MISSOURI

The Eighth Circuit Court of Appeals recently dismissed a lawsuit brought by a hospital employee in Missouri who was fired after having numerous epileptic seizures at work. The court found that the worker could not perform her essential job duties with or without an accommodation "during the indefinite periods in which she was incapacitated." *Olsen v. Capital Region Med. Ctr.*, No. 12-2113 (May 7, 2013).

NEW YORK

The New York City Council recently approved legislation that would require employers in New York City with 20 or more employees to provide five paid sick days beginning in April 2014. The employee threshold would later move to 15 employees. Mayor Michael Bloomberg has threatened to veto the measure; however, the City Council has the authority to override the veto.

PENNSYLVANIA

On May 9, Philadelphia Mayor Michael Nutter signed a measure making Philadelphia the first U.S. city to offer tax credits to businesses that make health benefits available to the partners of lesbian, gay, bisexual, and transgender employees. The bill also extends protections, rights, and benefits to life partners in matters of workplace fairness, medical decisionmaking, and public accommodations.

TENNESSEE*

On July 1, a new law goes into effect in Tennessee allowing individuals with handgun carry permits to carry firearms and ammunition in their personal vehicles. The state Attorney General recently issued an advisory opinion, however, clarifying that the new law does not preclude an employer from prohibiting employees from having guns on its property (provided the employer posts a notice to that effect).

TEXAS*

Recently, Texas enacted a state Uniform Trade Secrets Act that will apply to misappropriation of company trade secrets occurring after September 1, 2013. The Act will provide companies with greater protection for their trade secrets and will expand the available legal remedies to address actual and anticipated harm.

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

THIRD CIRCUIT SIDES WITH D.C. CIRCUIT'S RECESS APPOINTMENT RULING

*by Matthew J. Kelley and Kenneth B. Siepman**

In a 102-page decision, the Third Circuit Court of Appeals recently dealt the National Labor Relations Board (NLRB) a significant blow and gave employers another victory in their attempts to have President Obama's recess appointments to the NLRB invalidated. In *NLRB v. New Vista Nursing and Rehabilitation*, the court weighed in on the same issues discussed in the D.C. Circuit's recent decision in *Noel Canning v. NLRB*.

Specifically, the Third Circuit considered whether former Board Member Craig Becker's appointment was a valid exercise of the President's recess appointment power. Member Becker was appointed on March 27, 2010, during a true two-week intrasession break. This presented a cleaner question than the one the D.C. Circuit answered in *Noel Canning*, where the court also had to deal with whether the Senate's pro forma sessions of December 2011-January 2012 were actually Senate sessions.

Constitutional Question

Writing for a 2-1 majority, Judge D. Brooks Smith dismissed New Vista's non-constitutional arguments for overturning the Board's decision, clearing the way for a lengthy discussion of constitutional concepts. Judge Smith devoted 70 pages of the opinion to reviewing the history of the Recess Appointments Clause and its potential meanings. The clause itself provides that "[t]he President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

The court next considered three possible meanings of the word "recess," as advanced by the parties and various courts. As the D.C. Circuit found in *Noel Canning*, the word possibly meant that the President could use recess appointments only during intersession breaks. As the Eleventh Circuit found in a 2004 case, the word could include intersession breaks as well as intrasession breaks that lasted a non-neglible time period (historically, at least 10 days). As the NLRB advocates, the word "recess" could mean "when the Senate is not open to conduct business" and is thus unavailable to provide advice and consent on nominations. This definition would, according to the NLRB, cover situations like the pro forma sessions held in December 2011-January 2012 at issue in *Noel Canning*.

D.C. Circuit's Interpretation

The Third Circuit agreed that the D.C. Circuit's interpretation was the correct interpretation of the Recess Appointments Clause, though it reached this conclusion for different reasons. In *Noel Canning*, the D.C. Circuit found that the "the" in "the Recess" represented a definite article, and therefore it meant a specific recess, known in parliamentary language as an adjournment sine die, which is the procedural method by which the Senate ends a session. An intersession break is the period between an adjournment sine die and the start of the next session. As defined, "recess" appointments could only occur during the intersession break.

Additionally, the D.C. Circuit found that the Recess Appointments Clause was a supplemental power to the Appointments Clause, which provides that the President may appoint individuals who must be confirmed by the advice and consent of the Senate. Finally, the court also relied on the historical fact that no President prior to 1867 attempted an intrasession recess appointment and it was used very sparingly until the Reagan administration. The D.C. Circuit also reached another conclusion dealing with whether the vacancy being filled must "happen" during the recess. The Third Circuit chose not to reach that argument, because its determination that "recess" meant only intersession breaks was conclusive.

The Third Circuit was not persuaded by the D.C. Circuit's arguments concerning the use of the definite article "the" in the language of the U.S. Constitution. The court found that the literal meaning of the word "recess" was open to various interpretations. In reviewing the language of the Constitution, early-American state constitutions, historical precedent of state representatives using recess appointments, 18th century dictionaries, and English/early-American parliamentary procedure, the court could not conclusively define what type of "recess" the framers contemplated. After determining that the literal meaning of the word was of no help, the court turned to context.

> *"(T)he main purpose of the clause was . . . to preserve the Senate's advice and consent power."*

In reviewing the textual context of the clause, the court agreed with the D.C. Circuit and enunciated a key tenet of its decision. The Third Circuit held that the main purpose of the clause was not to "enable the President to fill vacancies to assure the proper functioning of our government" as the Eleventh Circuit had found, but to "preserve the Senate's advice and consent power by limiting the President's unilateral appointment power." Based on this central tenet, the Third Circuit, like the D.C. Circuit, found that the Recess Appointments Clause was subordinate to the Appointments Clause and limited the President's power to make appointments without the advice and consent of the Senate to situations where the Senate was truly unavailable, i.e., during intersession breaks.

Board's Interpretation

In reviewing the Board's proposed definition that "recess" meant "when the Senate is not open to conduct business," the court easily found it unworkable. According to the Third Circuit, as the Board defined "recess," any time the Senate was not open to conduct

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* Kenneth Siepman is a shareholder and Matthew Kelley is an associate in Ogletree Deakins' Indianapolis office. Both attorneys represent management in labor and employment related matters.

D.C. CIRCUIT INVALIDATES NLRB'S NOTICE POSTING RULE

Finds Remedies Were Beyond Authority Of Federal Labor Law

In yet another blow to the National Labor Relations Board (NLRB), in *National Association of Manufacturers v. NLRB*, the D.C. Circuit Court of Appeals reversed an earlier ruling of the U.S. District Court for the District of Columbia and held that the NLRB's notice posting rule is invalid. The trial judge had held that the Board could not extend the statute of limitations under the National Labor Relations Act (NLRA) or make a blanket advance determination that a failure to post will always constitute an unfair labor practice. But the court held that the Board did have the authority to require notice posting in the first place and to find that a refusal to post the notice could be considered evidence of improper motive, such as to support a finding of animus in an unrelated unfair labor practice (ULP) charge.

The D.C. Circuit found that all of the remedies provided for by the notice posting rule were beyond the authority of the NLRA. The court held that the ULP and animus remedies violated employers' Section 8(c) rights under the NLRA to express their views, arguments, and opinions on unionization without fear that such would be viewed as an unfair labor practice, so long as the communications contained no threat or promise. Analogizing to cases decided under the First Amendment to the U.S. Constitution, the D.C. Circuit held that "[t]he right to disseminate another's speech necessarily includes the right to decide not to disseminate it." Therefore, the court found that "the Board's rule violates §8(c) because it makes an employer's failure to post the Board's notice an unfair labor practice, and because it treats such a failure as evidence of anti-union animus."

The Board's third method of enforcing the notice posting rule was to toll the NLRA's limitations period for filing ULP charges. The D.C. Circuit found that there was no reason to believe that Congress had envisioned any application of equitable tolling when it passed the NLRA in 1947. Accordingly, the tolling remedy was directly contrary to the Act and could not stand. Having found that all three remedies for violation of the notice posting rule were invalid, the D.C. Circuit went on to find that the Board had specifically rejected a voluntary model for notice posting, so the posting requirement was not severable from the remedies provided. Since the remedies were invalid, the entire rule was necessarily invalid.

In a concurring opinion, Judge Karen LeCraft Henderson went one step further and found that the Board lacked the authority to promulgate any rule requiring notice posting, regardless of the remedies supplied to address violations of the rule. This finding is consistent with District Judge David C. Norton's decision in *Chamber of Commerce of the United States v. NLRB*, which is currently pending on appeal to the Fourth Circuit Court of Appeals.

According to Benjamin Glass, a shareholder in the Charleston office of Ogletree Deakins: "This is yet another development contributing to a rough year for the NLRB. In January, the D.C. Circuit issued its decision in *Noel Canning v. NLRB*, finding that the NLRB has been operating without a valid quorum since at least January 4, 2012, and that all of its actions since that time are void. [For a discussion of the *Noel Canning* case and a key decision that followed, see article on opposite page.] In the wake of *Noel Canning*, the NLRB indicated publicly that the decision of the D.C. Circuit was limited to the case before it and that the Board would continue 'business as usual.'"

Glass continued: "In the past, when the D.C. Circuit has invalidated an agency action, the agency has voluntarily given that judgment nationwide application. That appeared to be the approach that the Board was taking following the ruling of the U.S. District Court for the District of South Carolina invalidating the notice posting rule shortly after the district court in D.C. upheld it. Given the Board's recent actions, however, and its increasingly antagonistic posture towards the D.C. Circuit, it is hard to say with any certainty how it will react to the court's ruling." ■

"RECESS"

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business, such as a lunch break or long weekend, the President could appoint individuals to government positions without the advice and consent of the Senate. This was simply too open-ended for the court and gave the executive branch far more power than the U.S. Constitution contemplated.

Eleventh Circuit's Interpretation

In reviewing the Eleventh Circuit's interpretation that "recess" could include intersession and intrasession breaks, the court could not reconcile its own review of the historical facts and interpretation of the founders' intent with the Eleventh Circuit's interpretation and determination that intrasession appointments were valid. "Under an intrasession definition, the Clause would no longer have an auxiliary role. . . . [T]he appointment would continue even though the opportunity to undergo the ordinary, preferred process had come and gone. This shows that when the intrasession definition of recess is combined with the durational provision, a fundamentally different relationship between the clauses is created: the intrasession definition makes the Recess Appointments Clause an additional rather than auxiliary method of appointing officers."

A Final Note

The plot thickens as other courts, including the Fifth Circuit Court of Appeals, have asked for argument on these issues in pending cases. The U.S. Supreme Court will likely grant certiorari in *Noel Canning*. The Third Circuit's interpretation of the clause dovetails with the D.C. Circuit's, but they are not identical and the different reasoning found within each opinion only highlights the confusion that must be resolved by the Supreme Court in the coming months, lest the NLRB grind to a halt.

JUSTICES CLARIFY CLASS ACTION CERTIFICATION REQUIREMENTS

Plaintiffs Must Present Methodology For Assessing Damages

The U.S. Supreme Court recently issued a ruling in an antitrust case that could have far-reaching effects on employment litigation. In this case, the Court considered whether a district court and the Third Circuit Court of Appeals appropriately certified a class of over two million under Federal Rule of Civil Procedure 23(b)(3), which permits certification only if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." The Court found that the class was improperly certified, thereby reinforcing its prior cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim. ***Comcast Corp. v. Behrend*** *(March 27, 2013).*

Lower Court Certifies Class

In this case, the trial judge certified the class holding that to meet the Rule 23(b)(3) predominance requirement, the plaintiffs must show that: (1) the existence of individual injury resulting from the alleged violation, the "antitrust impact," was "capable of proof at trial through evidence that [was] common to the class rather than individual to its members"; and (2) the damages resulting from that injury were measurable "on a classwide basis" through use of a "common methodology."

The trial judge accepted one of the plaintiffs' theories of antitrust impact as capable of classwide proof and found that the resulting damages could be calculated on a classwide basis. The Third Circuit affirmed the ruling that the plaintiffs must "assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations."

Justices Weigh In

The U.S. Supreme Court agreed to review the case and reversed the Third Circuit's ruling. The Court recognized that to determine whether certification is proper will frequently entail overlap with the merits of the underlying claim. Thus, according to the Court, the Third Circuit ran afoul of Supreme Court precedent "[b]y refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination." The Court considered the expert testimony regarding the respondents' damages model and concluded that the damages model did not establish that damages were capable of measurement on a classwide basis. Thus that the plaintiffs could not show Rule 23(b)(3) predominance.

Practical Impact

According to Craig Cleland, a shareholder in Ogletree Deakins' Atlanta office: "*Behrend* essentially holds that in an antitrust case, plaintiffs must present a full-scale methodology for assessing damages at the class-certification stage (and the court must approve that methodology after challenges from defendants). In those cases, plaintiffs must prove that damages can be assessed on a classwide basis using various disputed methods of proving antitrust impact. That is the crux of an antitrust case and, once proved, may be used to establish not merely damages but also liability."

Cleland continued: "Granted, *Behrend* could well extend beyond the antitrust context and may require more formal damages models in certain cases. It is the first serious (b)(3) ruling from the Roberts court. But our cases are not antitrust cases, and the proof required there is different and unique."

Patrick Hulla, a shareholder in the firm's Kansas City office added: "Keep in mind that the plaintiffs' bar is going to great lengths, and to a significant degree succeeding, to limit the scope of Supreme Court decisions (witness the multiple district court cases limiting *Dukes* to employment discrimination claims, the class arbitration rulings, etc.)." ■

"FACEBOOK"

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while recounting an exchange with a current supervisor, stated that she had implied in so many words that the supervisor should "back the freak off." She followed that post with one in which she described the employer as "full of shit" and went on to state, "I don't bite my [tongue] anymore . . . FIRE ME . . . Make my day. . ." Other than the charging party, no other employee took part in that portion of the conversation until two hours later, when someone else stated that the workplace was "annoying as hell" and that "there's always some dumb shit going on." The conversation ended shortly afterward.

On the following day, one of the members of the group showed the message string to the employer, which then fired the charging party. In addition to saying that it was obvious that the charging party was not interested in continuing her employment, the employer also expressed concern about her working directly with patients given her feelings about the medical practice.

The charging party claimed that her firing constituted an unfair labor practice under the NLRA. Later, the NLRB Regional Director asked for input from the Division of Advice. The Division of Advice Associate Counsel acknowledged that the NLRA protects individual employees who engage in concerted activity and further acknowledged that such activity can be undertaken by a single employee who seeks to initiate group action or who brings group complaints to an employer. However, he pointed out that in this case, the charging party had "merely expressed an individual gripe" rather than engaging in a discussion of shared concerns. He went on to characterize the Facebook comments as "personal contempt" rather than discussion of the terms and conditions of employment. Based on that, the Associate Counsel concluded that "the Charging Party's discharge was not unlawful because her comments were not concerted and, instead, were merely boasting and griping."

HIGH COURT RULES EQUITABLE DEFENSES DON'T OVERRIDE ERISA PLAN TERMS

Finds Employer As A Fiduciary Was Entitled To Reimbursement

The U.S. Supreme Court recently addressed whether equitable defenses, such as the principle of unjust enrichment, can override the reimbursement provision of a health benefits plan established under the Employee Retirement Income Security Act (ERISA). Specifically at issue in the case was Section 502(a)(3) of ERISA, which authorizes health plan administrators to bring a civil action to obtain appropriate equitable relief to enforce the terms of a plan. The Court held that such equitable defenses cannot override the clear terms of a plan. *US Airways, Inc. v. McCutchen*, No. 11–1285, U.S. Supreme Court (April 16, 2013).

The case arose from a dispute over a health benefit plan provision that required participants to reimburse the plan for medical expenses paid by the plan where the expenses were incurred as a result of the fault of a third party and the participant was able to obtain a recovery for those expenses from the third party. After a participant suffered injuries in a car accident, the plan paid medical expenses in the amount of $66,866. The participant then sued the driver and recovered $110,000 ($40,000 of which went to attorneys' fees).

The employer, as a fiduciary of the health plan, sued the participant under Section 502(a)(3) seeking reimbursement from the recovery. In response, the employee asserted various equitable defenses to reduce the plan's recovery and also argued that the plan was required to share in the attorneys' fees and costs incurred.

The case eventually reached the Third Circuit Court of Appeals, which ruled that in a Section 502(a)(3) suit, regardless of the terms of an ERISA plan, a court must apply any "equitable doctrines and defenses" that traditionally limited the relief requested. The Third Circuit held that "the principle of unjust enrichment," for example, overrides a plan's reimbursement clause if and when they come into conflict. The court also held that the plan was required to share in the participant's attorneys' fees and costs under the common fund doctrine.

The U.S. Supreme Court held that equitable defenses cannot override the clear terms of an ERISA plan. According to the Court, attempting to enforce the employer's plan "means holding the parties to their mutual promises" and "declining to apply rules at odds with the parties' expressed commitments." Because the health plan effectively disclaimed the application of unjust enrichment or other equitable defenses, the Court ruled that the participant could not rely on equitable defenses to defeat "the plan's clear terms" and thereby reduce the plan's recovery.

However, the Court went on to find that the health plan was silent on the issue of whether it would share in the attorneys' fees and costs incurred in obtaining the tort recovery. As a result, the common fund doctrine would therefore provide the default rule, requiring the plan to reduce its reimbursement recovery by a pro rata share of the fees and costs.

According to Mark Schmidtke, a shareholder in the Chicago office of Ogletree Deakins: "The *McCutchen* decision reinforces the importance of ERISA plan documents and the fact that plan terms override otherwise applicable equitable principles. It provides important guidance not only for those who litigate these types of cases, but also for those who draft the plans in the first place." ■

VIRGINIA IS FOR OGLETREE DEAKINS

Firm Opens 44th Office In Richmond

In April, Ogletree Deakins announced the opening of its Richmond, Virginia office. "Richmond has long been an attractive market for Ogletree Deakins, as we have a number of clients with a significant presence in Virginia," said Kim Ebert, Ogletree Deakins' managing shareholder. "We are confident that we have found the right team of attorneys to guide our entry into the market."

Jimmy F. Robinson, Jr., who joined Ogletree Deakins from Troutman Sanders, serves as the office's managing shareholder. Elizabeth Ebanks, formerly a partner at LeClairRyan, joined as a shareholder, and Tevis Marshall, formerly a senior associate at Troutman Sanders, came on board as of counsel. As this issue was going to press, former LeClairRyan associate Nancy Lester also joined the firm, adding additional depth to the Richmond office.

Ogletree Deakins continues its dramatic growth in response to client demand. Richmond is the second office the firm has opened in 2013 and the fifth to open in the past year. The firm opened its San Diego office in January of this year and offices in Berlin, Germany, New York City, and Stamford, Connecticut in 2012.

"Ogletree Deakins has a wonderful reputation among employers in Virginia and throughout the mid-Atlantic," said Robinson. "I am excited to open the Richmond office with these accomplished and outstanding attorneys who will offer expanded value for the firm's clients that have a presence in Virginia." ■

New To The Firm

Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Lia Lesner (Charlotte); Ceridwen Koski (Denver); Sarah Rain (Detroit); Aimee Parsons (Houston); Martin Sullivan (Los Angeles); Christopher La Piano (Miami); Curtis Fox and Steven Luckner (Morristown); Lindsey Johnson (New Orleans); Stephanie Aranyos, William Birchfield, Ronald Kreismann, and Anurima Ray (New York); Justin Walley (Orange County); Caroline Guest and Ursula Kienbaum (Portland); Whitney Larson and Elaine Leung (Raleigh); Noam Glick (San Diego); Sean Nalty (San Francisco); Gretchen Lehman (Tampa); John Martin (Washington, D.C.).

ASSOCIATION BIAS CLAIM FAILS TO SURVIVE JUDICIAL SCRUTINY

Court Finds Supervisor's Comment Did Not Show Discriminatory Animus

A federal appellate court recently dismissed a lawsuit brought by a property accountant who claimed that she was not hired by a company because she had children with special needs. According to the court, the worker could not proceed with her discrimination claim under federal or state law because there was no direct evidence of association bias. ***Sarvak v. Urban Retail Properties, LLC,*** *No. 12-4217, Sixth Circuit Court of Appeals (April 29, 2013).*

Factual Background

Crystal Sarvak was employed by Developers Diversified Realty Corp. as a property accountant. Developers Diversified managed the Tri-County Mall in Cincinnati, Ohio. The mall's General Manager was Michael Lyons.

Sarvak, who had children with special needs, made several requests for schedule changes and leave. Lyons approved all of these requests.

On September 3, 2009, Sarvak requested to take a later lunch hour and to reduce her hours to part-time. Lyons claimed that after he checked with his supervisor, he denied her part-time schedule request because "the position required full-time duties." In early October, Lyons told Sarvak that the company "would help her with flex time," but that the position would remain full time. Sarvak claimed, however, that Lyons never gave her a substantive response. She further alleged that Lyons said, "I honestly don't see how you will be able to balance both, work and being a mom with special needs kids."

In late 2009, the owner of the Tri-County Mall informed Developers Diversified that Urban Retail Properties, LLC would be taking over the management of the mall. Bryan Alper, Urban's Senior Vice President of HR, contacted Lyons to discuss if there was anyone on the existing staff that would not fit into Urban's system. Lyons expressed concern about Sarvak being a good fit because the companies used different accounting systems and Sarvak's duties differed substantially from Urban's onsite accountant's responsibilities. Sarvak acknowledged that Urban used a different accounting program that she was not familiar with. Urban ultimately determined that Sarvak lacked the necessary experience and skills for its field-based accounting position and did not retain her.

Sarvak sued alleging discrimination on the basis of her association with her disabled children (among other claims). The trial judge dismissed the suit, and Sarvak appealed this decision to the Sixth Circuit Court of Appeals.

Legal Analysis

Sarvak argued that the trial judge erred in holding that she had not presented direct evidence of discrimination. In particular, Sarvak pointed to Lyons' comment that he did not see how she would be able to balance work and being a mom of kids with special needs.

The court found that there was no discriminatory animus on the part of Lyons. In support of this finding, the court wrote: "Sarvak claims that Lyons knew that at least one of her children had a disability prior to her request for a part-time schedule, yet Lyons never expressed a concern about Sarvak's ability to balance her responsibilities at work and at home previously. In fact, Lyons consistently gave her positive reviews and even promoted her."

The Sixth Circuit also held that Urban presented a legitimate, non-discriminatory reason for not hiring Sarvak for the position (which she failed to rebut). According to the court, the company simply believed that Sarvak did not have the necessary experience and skills for its accounting position. Thus, the Sixth Circuit upheld the dismissal of her suit.

Practical Impact

According to Ellen Toth, a shareholder in Ogletree Deakins' Cleveland office: "Adverse actions against employees and/or applicants should be handled on an individualized basis and evaluated without regard to their association with disabled relatives. Naturally, as evidenced in this case, the employer must ensure that it has a legitimate and non-discriminatory basis for any action(s) it takes." ■

Ogletree Deakins Joins Am Law 100

Ogletree Deakins continues to mark its place among the top labor and employment law firms in the United States and Europe. *The American Lawyer* recently released its annual list of the largest law firms and Ogletree Deakins jumped 11 spots to No. 97 on this year's list. The list ranks the nation's top law firms according to revenues.

"Ogletree Deakins is proud to be among the Am Law 100 for the first time since the firm was founded in 1977," said Kim Ebert, managing shareholder of Ogletree Deakins. "Our arrival on the Am Law 100 is a direct result of the tireless efforts by the talented individuals that make up our firm and the highly effective teamwork demonstrated across our network of 44 offices. This achievement validates our firm's growth strategy, which has focused on both entering new markets and attracting accomplished laterals. It also reflects our unwavering commitment to providing unparalleled service and value to our clients."

In other exciting news, Ogletree Deakins has once again fared well in a survey of the nation's best law firms. The rankings, prepared by *Chambers USA*, were based on extensive interviews conducted by the organization with clients and other lawyers over a span of several months.

More than 70 individual Ogletree Deakins attorneys have been named in the 2013 edition of *Chambers USA*. In addition, Ogletree Deakins' offices in 19 states and the District of Columbia were named among the top employment law practices in those markets. *Chambers USA* ranks firms and individual lawyers in bands, with Band 1 being the highest. The rankings are developed through research and interviews with clients and peers to assess their reputation and knowledge across the United States. Fourteen attorneys and the firm's offices in eight states earned a Band 1 ranking.