Labor & Employment Law Update

May 23, 2013 • Volume 22, Number 5 • Heidi A. Guttau-Fox, Editor

BAIRD HOLM LLP
ATTORNEYS AT LAW

NLRB Facing Constitutional Conundrum

The National Labor Relations Board (the "Board") has always been somewhat political. At full complement, the Board consists of five members, nominated by the President and appointed to the Board with the "advice and consent" of the Senate. When the Board is interpreting the National Labor Relations Act (the "NLRA"), or modifying Board procedures, its Members are roughly analogous to United States Supreme Court Justices. To a degree, they enjoy ultimate decision-making authority, although their decisions are subject to appeal in federal court, and they do not enjoy lifetime tenure.

Presidential appointments to the Board are typically stacked with a 3-2 Republican majority while a Republican occupies the White House. Conversely, Democratic appointments enjoy the same majority status while Democrats serve as President. This susceptibility to shifts in political power at times undermines the Board's credibility. When Board appointees use their authority to pursue political agendas, rather than objectively analyze and enforce the terms of the Act, controversial and inconsistent decisions emerge.

Board controversy, and departure from long standing precedent, is exactly what has occurred in recent years. New and expanded interpretations of the NLRA have substantially impaired employer rights and breached areas previously untouched by NLRA restrictions. The Board's procedural rules have also been dramatically modified in a manner that enhances the opportunity for successful union organizing, and undermines employer efforts to remain union free.

To better appreciate the controversial nature of recent Board decisions, consider the following developments, all of which occurred in the last few years:

1. Employer policies restricting publication of confidential and personnel information on social media websites have been deemed illegal, unless they narrowly

Also in this issue

3 Pennsylvania Court Holds Partial Deafness Not a Disability Under ADAAA

4 Federal Court Upholds That OFCCP Has Jurisdiction Over Hospital

5 Eighth Circuit Vacates Front Pay Award For FMLA Violation As Too Speculative

6 Other State Specific Developments

define the subject matter and illustrate how employees may exercise their NLRA rights.

2. The Board now considers some employment-at-will clauses to be illegal under the NLRA. Specifically, policies or handbooks that require employees to individually acknowledge that they "agree that the at-will employment relationship cannot be amended, modified or altered in any way" are now unlawful.

3. The current Board found illegal a long standing employer prohibition on employees conversing with coworkers about pending investigations. The Board concluded that such policies infringe on employees' rights, *unless the employer proves* that "witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up."

4. The Board is now approving what has come to be known as "micro" bargaining units. The term "micro" describes smaller segments of larger employee groups that are targeted for union representation. Micro units place employers at a disadvantage during union organizing drives because majority support for union representation is easier to achieve in smaller groups, and employers are exposed to a divide and conquer organizing tactic. Under the micro unit standard, contrary to the Board's longstanding historical approach to bargaining unit determinations, employers shoulder the burden of proving by "overwhelming" evidence that a larger bargaining unit is more appropriate.

5. Overruling precedent that has been in effect since 1962, the current Board announced that "an employer, following contract expiration, must continue to honor a dues-check off arrangement established in that contract until the parties have either reached agreement or a valid impasse permits unilateral action by the employer." In practical terms, that means that employers have now been denied a very significant means of pressuring unions to settle ongoing negotiations following contract expiration.

The Board's procedural rules have also been dramatically modified in a manner that enhances the opportunity for successful union organizing, and undermines employer efforts to remain union free.

6. Perhaps most controversial among recent Board initiatives are new "quickie election" rules that essentially cut in half the typical campaign period following a petition for a union representation election. History unequivocally demonstrates that the shorter the pre-election time period, the more likely it is that unions win the election. The quickie election rules were formally implemented by the Board in April 2012, only to be almost immediately stopped by a legal challenge, as further explained below.

The quickie election rules surfaced, without public hearing or advance notice, in the summer of 2011. At that time, Board Chairman Pearce (D) announced the rules were necessary to modernize the election process, and to overcome employer abuses that unreasonably slowed the election process. Pearce was appointed to the Board by the President during what the President alleged was a Senate recess, in spite of the Senate's refusal to "approve and consent" to his nomination. Board Member Hayes (R) immediately and very publicly objected, expressing his view that the new election rules were an obvious and politically motivated attempt to help organized labor win more elections.

When the new election rules were being publicly discussed, the Board was operating with only three of its five members. When the new rules were eventually approved in December 2011, they garnered supporting votes from only two Board members, shortly before the term of one of the supporters expired. Dissenting Board Member Hayes did not participate in the vote, setting the groundwork for a subsequent legal challenge to the validity of the new rules.

In essence, the challenge to the new election rules alleges that the Board lacked the three Board Member quorum required for approval. In May 2012, the D.C. Circuit found that that the Board in fact lacked the legally required quorum since Member Hayes did not support the rules, or even participate in the vote. The NLRB

then placed the new election rules "on hold" pending its appeal of the D.C. Circuit's decision.

Further complicating matters, within a matter of weeks of the invalid Board approval of the new election rules, President Obama appointed three new Board Members during what he alleged to be another Senate recess in January 2012. Those appointments were recently deemed unconstitutional by the Court of Appeals for the District of Columbia. Last week, the Third Circuit Court of Appeals held that the 2010 Obama recess appointment of another Board member was also unconstitutional. These decisions have far greater implications. Recall that Board Member Pearce, one of only two Board Members to support the new election rules, was also appointed by the President during an alleged Senate recess, under circumstances identical to the January 2012 recess appointments that have been deemed unconstitutional.

If Member Pearce's recess appointment is deemed unconstitutional like the other appointments, then the new elections rules are unequivocally invalid, as are any other Board decisions that lack the support of at least three validly appointed Members. The United States Supreme Court will likely further review this entire mess as early as later this year.

Stay tuned. We will keep you posted. ■

Mark McQueen

Pennsylvania Court Holds Partial Deafness Not a Disability Under ADAAA

A Pennsylvania federal court has held that deafness in one ear is not a disability under the ADA Amendments Act (ADAAA). In *Mengel v. Reading Eagle Co.* (E.D. Penn.), Christine Mengel, a copy editor and page designer at the Reading Eagle newspaper, filed a complaint alleging she was discriminated against on the basis of her disability and gender when she was laid off during a reduction in force.

Starting in November 2007, Mengel became totally deaf in one ear and had balance problems due to a surgery which removed a brain tumor. Mengel was nonetheless able to perform her job functions without accommodation and received satisfactory evaluations in 2008. In her deposition, Mengel testified that she was able to hear even though she was deaf in one ear. While she stated that she had difficulty hearing in noisy environments such as the newsroom in which she worked, she also testified that her hearing loss was not a distraction.

In January 2009, the employer decided to perform a reduction in force. The employer executed the reduction in force by rating its employees on a matrix and eliminating the lowest scoring employees. Mengel was the lowest scoring employee in her department and, as a result, was laid off from her position.

The court dismissed Mengel's ADA complaint, holding that her deafness in one ear was insufficient to establish she had a disability under the ADAAA. The court concluded that Mengel failed to establish that her hearing loss in one ear substantially limited her hearing. The court relied on her deposition testimony stating, "She testified that her deafness in her left ear was not a distraction," and she could not point to any specific instances where her hearing loss caused a problem other than she "didn't hear some things." While the court noted that Mengel presented evidence she might have been regarded as being disabled, she was unable to establish a causal link between her alleged disability, which arose in 2007, and her termination from employment, which occurred in 2009.

While recognizing that total deafness is a disability, the *Mengel* court did not merely assume that hearing loss in one ear constitutes a disability. Rather, the court relied on the record to determine if Mengel actually supported her allegations with testimony that demonstrated the hearing loss in one ear was substantially limiting. This decision demonstrates that the determination of whether an employee has an actual disability is still alive and well under the ADAAA. ■

Scott P. Moore

Federal Court Holds That OFCCP Has Jurisdiction Over Hospital

For years, we have been tracking the Department of Labor's Office of Federal Contract Compliance Programs' ("OFCCP") efforts to expand its jurisdiction to health care employers. Generally, the OFCCP enforces regulations that require employers with at least 50 employees, who hold a single contract or subcontract of at least $50,000 to provide services to the federal government, to comply with certain affirmative action obligations, including maintaining an affirmative action program ("AAP").

Health Care Institutions As Federal Contractors/ Subcontractors

Many health care organizations have a direct contract with the federal government, and therefore have affirmative action obligations by nature of that contract. For instance, a hospital may be a covered contractor as a result of a contract with the Department of Veterans' Affairs or the Department of Defense, requiring the provision of medical services to active or retired military personnel.

At the same time, a health care provider may have affirmative action obligations by nature of being a *subcontractor* to someone with a federal contract. In relevant part, a "subcontract" is any agreement between a contractor and any person for the purchase, sale, or use of non-personal services (1) that in whole or in part, are necessary to the performance of any contract, and/or (2) under which any portion of the contractor's obligation under any contract is performed, undertaken, or assumed.

Whether a health care provider's subcontracts bring it under the OFCCP's jurisdiction is a difficult inquiry, as it depends upon the nature of the underlying prime contract and the terms of the subcontract.

Brief Review of Prior Cases

In 1993, the OFCCP issued a directive concluding that Medicare or Medicaid reimbursement would not, absent other contracts, subject hospitals to its jurisdiction. The OFCCP concluded that Medicare and Medicaid were not contracts, but instead programs of federal financial assistance; therefore, the OFCCP had no jurisdiction over hospitals solely on the basis of Medicare/Medicaid reimbursement.

In a 2003 case entitled *OFCCP v. Bridgeport Hospital*, the DOL's Administrative Review Board ("Board") held that a hospital's contract with Blue Cross did not make it a subcontractor for affirmative action purposes. The Board held that because (1) the prime contract between Blue Cross and the agency was for medical insurance, and (2) the hospital was not in the business of providing insurance, the hospital was not a subcontractor because it did not perform work necessary to the performance of the prime contract to insure federal employees. Based on this decision, the consensus was that the OFCCP generally could not claim subcontractor coverage for hospitals, pharmacies, or other medical care providers based solely upon the existence of a contract with Blue Cross or other Federal Employee Health Benefits Program ("FEHBP") providers.

The OFCCP, however, did not give up its attempts to assert jurisdiction over health care providers, and it began focusing on health care providers that have contracts with health maintenance organizations (HMOs). In *OFCCP v. UPMC Braddock*, the Board held that a hospital was a subcontractor by nature of its contracts with an HMO. In that case, the Board made a distinction between an HMO and an insurance arrangement like the one at issue in *Bridgeport,* holding that, because the prime contract between the HMO and federal agency was to provide medical services to the federal employees, and the hospital provided *medical services*, the hospital was performing work necessary to the performance of the HMO's federal contract, which made it a subcontractor with affirmative action obligations.

The Board further held that the HMO's failure to notify the hospitals of any affirmative action obligations did not excuse the subcontractors' noncompliance. In other words, even if an organization does not know it is contracting with a federal contractor due to the absence of an Equal Employment Opportunity Clause in the contract, the organization may nevertheless be bound by the affirmative action regulations. This matter was appealed to federal court.

Recent Developments

On March 30, 2013, a federal court upheld the OFCCP's jurisdiction over the hospital in *Braddock*. The hospital unsuccessfully

attempted several arguments, including that it did not meet the definition of a "subcontractor" because the medical services it performed did not qualify as "nonpersonal services," and that the contract with the HMO was not a "subcontract" because the hospital did not provide services necessary to the HMO's performance of its contract with the government. The court rejected these arguments and held, that "because the hospitals provide a portion of the medical care that the [HMO] agreed to supply to federal employees under its OPM contract, the hospitals' agreements with the [HMO] are necessary to the performance of that contract."

Finally, the hospital argued that it never consented to be bound by the EEO clauses in the laws and the Executive Order due to their absence from the contract with the prime contractor. The court disagreed and held that "certain statutory or regulatory provisions may become part of a government contract even though the contract does not contain language to that effect." The court essentially stated that because the hospital indirectly benefited from doing business with the federal government, it was subject to the EEO clauses. In the end, the court determined that the hospital was a subcontractor and was subject to affirmative action requirements.

In light of the OFCCP's current aggressive stance, we advise health care providers to review their contracts and subcontracts and review their arrangements to assure that they do not fall under OFCCP jurisdiction.

Practical Effect of the Decision

In the end, this decision does not change what health care institutions already knew—that the OFCCP will continue its efforts to expand its jurisdiction over health care institutions. This case merely confirms the earlier findings of the Board, and solidifies the OFCCP's aggressive position on jurisdiction. This case does not change the TRICARE exclusion established in the December 2011 National Defense Authorization Act, which held that TRICARE contracts alone are not enough to establish OFCCP jurisdiction. In other words, if the only federal contract/subcontract in place is a TRICARE contract, the health care institution does not have affirmative action obligations.

In light of the OFCCP's current aggressive stance, we advise health care providers to review their contracts and subcontracts and review their arrangements to assure that they do not fall under OFCCP jurisdiction. Even health care providers who only have TRICARE network arrangements should take this opportunity to review their contract status to confirm that nothing has changed in the last eighteen months.

Employers uncertain about their contract status should seek legal counsel, or at the very least, should attempt to comply with affirmative action obligations voluntarily. In this way, if (or more likely, when) the OFCCP asserts jurisdiction on a different basis, health care employers will be better prepared to prove compliance. ■

Kelli P. Lieurance

Eighth Circuit Vacates Front Pay Award For FMLA Violation As Too Speculative

The Eighth Circuit recently held that an employer interfered with a sick employee's job protection rights under the Family Medical Leave Act ("FMLA") by failing to reinstate her to a position that she never actually performed. However, in the same decision, the court vacated a ten-year front pay award of $135,000 on the grounds that it was unduly speculative to assume that the employee would have lasted in a position that she never performed.

The Plaintiff, Christine Ann Dollar ("Dollar"), worked for Smithway Motor Express, Inc. ("Smithway"), an over-the-road trucking carrier. Dollar worked for Smithway for nine years until a battle with depression forced her to exhaust her sick leave and resign in 1998. She resumed employment with Smithway in 2006 as a driver manager. As a driver manager, she supervised and coordinated the activities of 35-40 truck drivers, which required substantial interaction with the drivers. By the spring of 2007, Dollar's depression resurfaced and caused her to miss several days of work. On

her performance evaluation, her supervisor noted that her attendance and resulting productivity were below expectations. He also noted that her attendance issues were a particular concern for the driver-manager position. Dollar's supervisor began looking for other positions that might be a better fit for Dollar in light of her attendance issues.

Dollar's depression took a substantial and sustained turn for the worse in early June of 2009. She presented Smithway with several doctor's notes excusing her from work and extending her sick leave through July 30, 2009. When Dollar's supervisor received the doctor's notes, he informed Dollar that she could no longer work as a driver manager and would be reassigned to a driver recruiter position. The recruiter position had essentially the same hours, pay, benefits and working conditions, but was less stressful and required less day-to-day interaction with other drivers. Dollar's supervisor informed her that he could not guarantee her the position if she did not return by July 9, 2009. When Dollar insisted that she could not return until July 30th, she was fired.

Dollar filed a lawsuit alleging unlawful interference under the FMLA. The District Court ruled in her favor, finding that she was entitled to FMLA leave and adequately asserted her FMLA rights. Notably, while even Dollar admitted that she could not perform the functions of the driver manager position, the District Court found that she had been transferred to the position of driver recruiter prior to her termination. Accordingly, the District Court reasoned that Smithway should have restored her to her "former" recruiter position, which Dollar claimed she was able to perform.

The District Court awarded Dollar $80,793 in back pay, liquidated damages in the same amount, and a ten-year front pay award of $134,526. Smithway appealed the front pay award to the Eighth Circuit on the grounds that ten years of front pay was unduly speculative. Smithway argued that Dollar was wholly untested in the driver-recruiter position and the only evidence of her ability to perform the job was her personal subjective belief and the company's vote of confidence as expressed in the transfer itself. Smithway also highlighted evidence showing that it ceased its business activities as part of a corporate restructuring and that its Iowa operations suffered a dramatic reduction in force. The Eighth Circuit found that the changes in operations created great uncertainty as to Dollar's future prospects with Smithway. However, it reasoned that, even in the absence of the corporate restructuring, changes in operations, or reductions in force, "substantial speculation is required to conclude that Dollar would have remained in the position of driver recruiter more than the three and one half years following her termination," which was essentially the length of time represented in her back pay award. The Eighth Circuit vacated the front pay award as unduly speculative, but affirmed the judgment of the District Court in all other respects. The Eighth Circuit, also noted, however, that her transfer to the recruiter position "was not necessarily required by the FMLA."

In light of *Dollar v. Smithway*, employers should carefully document all reductions in force and changes in business operations – such records may create uncertainty as to employment longevity and limit front pay claims by former employees. ■

Todd A. West

Other State Specific Developments:

Iowa: A Waterloo hospital is finalizing a $2 million settlement agreement for a race discrimination class action lawsuit. The class action complaint was filed on behalf of African American persons who applied for employment with the hospital but were not hired, who were passed over for promotional opportunities, or were terminated by the hospital. Under the settlement, the hospital will pay approximately $1 million to 35 applicants, $667,000 for attorney fees, approximately $10,000 for administrative expenses, and the remainder of the $2 million to nonprofit organizations which serve primarily African-Americans in Waterloo. Attorneys for both sides recently appeared at a hearing in district court to discuss the joint motion to finalize the settlement, and a judge will make the final decision on the terms.

Kansas: On March 7, 2013, the U.S. District Court for the District of Kansas entered a decision in an ADA discrimination suit *(Hardwick v. Amsted Railway Co., Inc.*, Case No. 12-2039-RDR, March 7, 2013) which reaffirms that transferring an

employee from one job to another, in and of itself, does not constitute an adverse employment action. The plaintiff in *Hardwick* contended that after he disclosed his physical restrictions to Amsted Railway, the company retaliated against him when it twice threatened to transfer him. In its analysis, the Kansas District Court relied upon the U.S. Supreme Court's holding that an adverse employment action includes conduct constituting "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998). The District Court also cited the Tenth Circuit Court of Appeals, which has jurisdiction over Kansas, and has taken a "case-by-case approach, examining the unique factors relevant to the situation at hand" to define what constitutes an adverse employment action. *Hillig v. Rumsfeld*, 381 F.3d 1028, 1031 (10th Cir. 2004). The Tenth Circuit has cautioned that more than "de minimus harm" or a "de minimus impact" upon an employee's job opportunities or job status must be shown and that "mere inconvenience or an alteration of job responsibilities" will not qualify as an adverse employment action. Unfortunately for the plaintiff in *Hardwick*, the only "evidence" he offered to support his contention that the transfer would have constituted an adverse employment action was his personal belief that the job to which he would have transferred was less desirable than the one he held. The District Court of Kansas dismissed the plaintiff's case because, standing alone, an "employee's negative views of transfer" are insufficient to render a transfer an adverse employment action. *See McCrary v. Aurora Pub. Schs.*, 57 Fed.Appx. 362, 368-69 (10th Cir. 2003).

Minnesota: Minnesota's Governor signed a new law, taking effect January 1, 2014, prohibiting most employers from inquiring about or taking into consideration a job applicant's criminal record until after the applicant is either selected for interview or given a conditional offer of employment. This "ban the box" law, referring to the box on most job applications which an applicant must "check off" if he or she has a criminal record, includes an exception for employers who have a statutory duty to conduct or consider criminal background checks in hiring. Since the start of the year, Minnesota's legislature, primarily led by members of the Democratic-Farmer-Labor party, has introduced several other bills supportive of employees which employers should be watching. If passed, these bills would increase Minnesota's minimum wage, prohibit discrimination based on unemployment status, guarantee pregnant women accommodations and leaves of absence, and prohibit employers from requiring employees or applicants to provide information regarding their social networking sites.

Missouri: In *Missouri Ins. Coalition v. Huff*, the U.S. District Court for the Eastern District of Missouri held that the Patient Protection and Affordable Care Act (PPACA) preempts a Missouri state law that requires insurers to offer employee health plans that exclude contraceptive coverage. Missouri state law requires health insurers that provide coverage for pharmaceuticals to provide coverage for contraceptives. The law, however, also includes an opt-out provision by which employers can request policies that exclude coverage for contraceptives if their use is contrary to the employer's "moral, ethical or religious beliefs or tenants." In *Huff*, the court held that the Missouri opt-out provision squarely conflicts with the PPACA's women's preventive services mandate, which generally requires health insurers to provide contraception coverage without cost in all plans issued to individuals and employers.

Montana: The Montana Supreme Court recently affirmed dismissal of a plaintiff's complaint and denial of a motion to amend, after the Plaintiff had accepted her former employer's arbitration demand on her Wrongful Discharge from Employment Act ("WDEA") claim. The Supreme Court reasoned that the district court lost jurisdiction over the case once the plaintiff had accepted the employer's offer to arbitrate. Of more interest was that the district court had addressed the plaintiff's argument that the arbitration provision in the WDEA was unconstitutional because it required her to pay the employer's attorney's fees if she had declined arbitration and lost the suit. Therefore, she argued the statute effectively compelled her to give up her constitutional right to a jury trial. While the district court reasoned that the arbitration provision

with its fee shifting mechanism was not unconstitutional, the Supreme Court held that it need not reach that issue because the district court had correctly determined that it had no jurisdiction and should never have decided that issue. Employers should anticipate seeing that argument at some point in another case.

North Dakota: The North Dakota Supreme Court recently held that employees locked out during a labor dispute were eligible to collect unemployment benefits. While the state statute bars the recovery of benefits for unemployment resulting from strikes, sympathy strikes and work stoppages "of any kind," the court reasoned that the statute only referred to work stoppages initiated by employees. In total, the employees may collect up to $4.1 million in benefits.

South Dakota: In *Heil v. Belle Starr Saloon & Casino, Inc.*, the plaintiff brought tort claims for assault and battery and intentional infliction of emotional distress against her employer based on the physical and sexual abuse she endured from her supervisor. The employer filed a motion for partial summary judgment, claiming that her tort claims were precluded by the exclusive remedy provision of South Dakota's worker's compensation laws. However, that exclusive remedy provision includes an exception for "rights and remedies arising from intentional tort." The South Dakota Supreme Court has held that to meet this exception, a plaintiff must allege facts that "plausibly demonstrate an actual intent by the employer to injure or a substantial certainty that injury will be the inevitable outcome of the employer's conduct." The federal district court in South Dakota denied the employer's motion for partial summary judgment, finding that "a jury could reasonably conclude [the employer] endorsed, condoned, and encouraged the physical and sexual abuse of their employees" because the employer was "not in the dark about" the supervisor's ongoing improper conduct yet took no affirmative action to control it. ■

Labor, Employment and Employee Benefits Law or Related Services

Allison D. Balus (6)
Kirk S. Blecha (1)
Jonathan R. Breuning (1)
Jeremy T. Christensen (1)
Gary N. Clatterbuck
Adam L. Cockerill (1)
Amy L. Erlbacher-Anderson
Heidi A. Guttau-Fox (1)
Christopher R. Hedican (5)
Thomas E. Johnson
David J. Kramer
Kelli P. Lieurance (1)
Lindsay K. Lundholm (1)
George E. Martin
Mark McQueen (7)
Scott P. Moore (4)
Scott S. Moore (3)
D. Ashley Robinson (1)
R.J. (Randy) Stevenson (1)
Anthony D. Todero (8)
Todd A. West (9)

All attorneys are admitted to practice in Nebraska unless otherwise noted. (1) Also admitted to practice in Iowa (2) Also admitted to practice in Missouri (3) Also admitted to practice in Iowa and Colorado (4) Also admitted to practice in Iowa and Missouri (5) Also admitted to practice in Iowa, Kansas, Missouri, Wyoming, Montana, North Dakota and South Dakota (6) Also admitted to practice in Iowa, Virginia, and the District of Columbia (7) Also admitted to practice in Texas and West Virginia. (8) Also admitted to practice in California and Minnesota. (9) Also admitted to practice in Iowa, Montana and North Dakota.

Labor & Employment Law Update is intended for distribution to our clients and to others who have asked to be on our distribution list. If you wish to be removed from the distribution list, please notify laborupdate@bairdholm.com.

USLAW NETWORK, INC®

Baird Holm

1700 Farnam St
Suite 1500
Omaha, NE 68102

402.344.0500
402.344.0588

www.bairdholm.com