Northwest Ohio Human Resource Association

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

LEGISLATIVE UPDATE

February 2019

NLRB Narrows Definition of Protected Concerted Activity

On January 11, 2019, in an important decision for employers, the National Labor Relations Board (NLRB) narrowed the definition of "protected concerted activity" in *Alstate Maintenance, LLC & Trevor Greenidge.* The NLRB found that a single statement made by an employee about the poor tipping habits of a soccer team a year prior was not protected concerted activity. The Alstate Maintenance decision reversed a 2011 Obama-era decision that held any employee complaint made to management in the presence of coworkers was sufficient to qualify as protected under the National Labor Relations Act (NLRA). Now, the NLRB has returned to the more stringent standard whereby only those complaints that seek to initiate group action will be considered protected concerted activity.

The facts of the case reveal Trevor Greenidge worked as a skycap at JFK International Airport. The bulk of a skycap's compensation comes from tips. After being notified of a flight arriving with a soccer team that needed assistance with equipment and luggage, Mr. Greenidge remarked in front of his supervisor and 3 other skycaps that "We did a similar job a year ago and we didn't receive a tip for it." A few minutes later when the van containing the soccer team's equipment arrived, the skycaps were waved over to assist. The skycaps walked away. The employer subsequently discharged the skycaps. The discharge letter stated that the basis for termination was "indifference to customers" but also referenced the comments made by Mr. Greenidge about "getting small tips" in front of the other skycaps.

Following his termination, Mr. Greenidge filed an unfair labor practice charge contending he was discharged for making his comments about poor tips. In its decision, the NLRB by a 3 to 1 majority explained, "Individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor". The majority observed the statement made by Mr. Greenidge did not demonstrate he was seeking to initiate or induce any sort of group activity among the other skycaps. Rather, his statement "was just a comment" and was not aimed at changing the employer's policies or practices involving the terms and conditions of employment. Therefore, the unfair labor practice charge was denied.

7th Cir. Follows 11th Circuit To Find Narrow View Of The ADEA

On Jan. 23, 2019, the U.S. Court of Appeals for the Seventh Circuit held that the federal Age Discrimination in Employment Act (ADEA) does not permit job applicants to bring disparate impact claims against prospective employers in *Kleber v. CareFusion Corp., No 1:15-CV-1994 (7th Cir. Jan. 23, 2019).* By way of background, disparate impact occurs when an employer's neutral policy or workplace rule result in a disproportionate effect on a protected classification. Kleber, a 58-year-old attorney, filed suit against CareFusion after being rejected for a senior in-house counsel position due to CareFusion's three-to-seven-year experience requirement. When making its ruling, the court majority examined the plain language of the ADEA, finding that section 4(a)(2) of the ADEA prohibits an employer from subjecting "employees" to discrimination based upon disparate impact. The court reasoned that the plain language of this section explicitly applies only to employees and therefore it does not afford the same protections to other individuals, such as job applicants. The court further explained that section 4(a)(2), when read in conjunction with the entire statute, provides further evidence that Congress did not intend for the ADEA to protect job applicants in disparate impact claims.

Workplace Gossip Can Support A Gender Discrimination Claim

The Fourth Circuit found in *Parker v. Reema Consulting Servs., No. 18-1206 (4th Cir. Feb.8, 2019),* that employers may be held liable for a hostile work environment under Title VII for failing to address and stop rumors and workplace gossip that are sexual in nature.

Parker, a female warehouse manager, received a half-dozen promotions within the year and a half that she worked at Reema Consulting. Shortly after her last promotion, Parker learned of false workplace rumors that she received her promotions by sleeping with her male boss. Parker alleged that due to the rumors, other male colleagues treated her with hostility and disrespect. Parker further claimed that a member of upper-management participated in the circulation of the rumors. Parker was also notified that she would not receive any further promotions because of the rumors. Parker later reported the hostile conduct and rumors to Human Resources. Shortly after reporting her complaints, she was terminated.

Following her termination, Parker asserted a sexual harassment and retaliation claim under Title VII. The Court stated that the sex-based nature of the rumors and its effects invoke a deeply rooted gender stereotype—"one that unfortunately still persist—that generally women, not men, use sex to achieve success." The court concluded that such a stereotype is enough to sustain a viable sex discrimination claim under Title VII. As part of its reasoning, the Court cited Price Waterhouse v. Hopkins, which found that claims based on gender stereotypes are actionable under Title VII.

DOL Increased Penalties for FLSA, FMLA, and OSH Act Violations

The Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 requires federal government agencies to adjust their penalties for inflation no later than January 15 of every year. However, due to a lapse in appropriations for certain federal agencies, the publication of the Department of Labor's (DOL) penalty increases was delayed. Effective January 23, 2019, the DOL issued the flowing maximum increase for 2019:

Fair Labor Standards Act. $1,964 to $2,014 for repeat or willful minimum wage or overtime requirements.

Family and Medical Leave Act. $169 to $173 for failing to comply with posting requirements.

Occupational Safety and Health Act. $129,336 to $132,598 for willful and repeat violations and $12,934 to $13,260 for posting, other-than-serious, serious, and failure-to-abate violations.

Mark S. Barnes
mbarnes@bugbeelawyers.com

Carl E. Habekost
chabekost@bugbeelawyers.com

Elizabeth L. Bolduc
ebolduc@bugbeelawyers.com

BUGBEE & CONKLE

www.bugbeelawyers.com