STARNES DAVIS FLORIE LLP

LABOR & EMPLOYMENT BULLETIN

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KEEP YOUR HEAT UNDER THE SEAT – ALABAMA'S NEW GUN RIGHTS LAW

For twenty years, this lawyer has advised employers to prohibit their employees from bringing guns to work. I stuck to this advice despite the fact that I have held a hunting license longer than a law license. I believed, given my clients' duty to provide a safe workplace, that "no guns allowed" was the best policy. Next month, my advice will change – or at least will have to be refined.

In response to rising support for more gun control in the wake of the recent mass shootings, the Alabama legislature saw fit to pass a law to protect an individual's right to carry a gun, even on someone else's property.

What employers need to know is that the new law gives their employees the right to have a gun in their vehicle if:

1. The employee has a valid concealed weapon permit; or

2. The gun is legal for hunting (but it cannot be a hunting pistol), the employee has a hunting license, the gun is not loaded, it is hunting season, the employee has not been convicted of certain crimes, the employee has no documented prior workplace incidents involving actual or threatened physical injury, and the gun is kept out of observation in a locked vehicle or in a locked compartment inside or attached to the vehicle.

Importantly, the law does not give employees the right to bring a gun into the office or onto the worksite. They must keep it in their locked car and out of sight. If an employer fires an employee for exercising his right to have a gun in his car, the employee may sue the employer to recover for damages resulting from the termination.

As an aside, it is interesting to consider the classes of employees to whom our state has decided to grant special protection. Before the passage of this law, Alabama only protected older employees (age 40 and over) from discrimination. Now, our legislature has added hunters to the list. Federal law, on the other hand, protects against discrimination based on race, gender, disability, and age, among other classifications. I suppose this says we have the decency to respect our elders and the common sense to respect those with a gun – at least that's the best spin I can put on it.

The "good news" is that the law grants immunity to employers against any lawsuit based on an employee's use of a firearm. Therefore, if an employee gets his deer rifle from under the seat of his truck and goes on a shooting spree in the office, the employer, at least, is not responsible.

It may be necessary to revise your policy. It is too broad if it can be read to prohibit possession of a weapon in an employee's car parked in the company parking lot. This new law takes effect August 1.

This is my new advice. Employers should continue to prohibit guns at work. However, employers must now allow their employees to keep their "heat" under their (vehicle) seat – even in the company parking lot.

~Trip Umbach

THE SUPREME COURT'S ANSWER TO THE RECENT EXPLOSION OF RETALIATION CLAIMS: REQUIRING A HEIGHTENED STANDARD TO PROVE RETALIATION UNDER TITLE VII

On June 24, 2013, the United States Supreme Court issued an important opinion holding that Title VII retaliation claims must be proved according to the traditional principles of but-for causation, not the lessened motivating-factor test that governs Title VII discrimination claims. In other words, a plaintiff bringing a Title VII retaliation claim must demonstrate that he or she would not have suffered an adverse employment action but for his or her protected activity. Because the number of retaliation claims made against employers has been rapidly increasing, the Court's holding is a welcomed victory for employers. The heightened standard will likely help curtail some of the increasing costs and burdens associated with the explosion of retaliation claims in recent years. The "but for" standard of proof is more difficult for plaintiffs to establish and this heightened standard will assist employers in defending Title VII retaliation claims, especially at the summary judgment stage.

In *University of Texas Southwestern Medical Center v. Nassar*, the plaintiff, who was of Middle Eastern descent, was an assistant professor at the University of Texas Southwestern Medical Center (UTSW) and a staff physician at Parkland Hospital. Nassar accused his supervisor of harassment based on his religion and ethnicity. After his complaint, and because he no longer wanted to work under the harassing supervisor, Nassar negotiated with the hospital to continue working there and resigned from UTSW, citing harassment by his supervisor as his reason for leaving. Although the hospital verbally offered him a position, it eventually rescinded its offer when UTSW officials objected to Nassar being employed solely with the hospital because such action was inconsistent with an existing affiliation agreement between the hospital and the University.

Nassar filed suit alleging that UTSW constructively discharged him on account of race and religion and retaliated against him for his complaints of discrimination. The jury found in favor of Nassar on all claims. On appeal, the Fifth Circuit reversed the verdict on the constructive discharge claim and affirmed the retaliation verdict, finding that Nassar had demonstrated that retaliation was a "motivating factor" of the University's actions. UTSW then appealed to the United States Supreme Court asking the Court to decide the issue of whether Title VII's retaliation provision requires a plaintiff to prove "but-for" causation or instead, requires only proof that the employer had a mixed-motive (i.e., that retaliation was one of many reasons for the employment action).

In a 5-4 decision, the Supreme Court reversed the Fifth Circuit's decision and held that in order to prove retaliation under Title VII, a plaintiff must prove that his or her protected activity was a "but-for" cause of the adverse employment action, rather than simply a "motivating factor." In making this decision, the Court relied on the plain language of Title VII's retaliation provision, which requires a plaintiff to prove retaliation "because of" the plaintiff's protected activity. The Court also referenced its 2009 decision involving similar "because of language" in *Gross v. FBL Financial Services, Inc.*, in which the Court held that a plaintiff suing under the Age Discrimination in Employment Act must prove that age was the but-for cause of the adverse employment action. According to the Court, the "because of" language in the retaliation statute mandated the same result in *Nassar.*

The Court further recognized that although Congress chose to amend the anti-discrimination provision of Title VII in 1991 to allow for mixed-motive liability, it specifically chose not to amend the anti-retaliation provision. In addition, the Court acknowledged the ever-increasing frequency of retaliation claims and reasoned that this heightened causation standard struck the appropriate balance between protecting the rights of employees and protecting employers from frivolous claims.

Although this decision should strengthen an employer's defense of retaliation claims, it is worth noting that the decision only speaks to the standard of proof required in Title VII retaliation cases—the "motivating factor" standard is still applicable to Title VII claims based on race, color, religion, sex, and national origin. Additionally, because this is such a recent decision, the practical effects are still unknown; therefore, it is important that employers continue to be diligent in taking employee complaints seriously and not treating complaining employees any differently than non-complaining employees.

~Breanna H. Young

ELEVENTH CIRCUIT FINDS THAT REQUIRING AN EMPLOYEE TO SUBMIT TO A MENTAL EVALUATION DOES NOT VIOLATE THE ADA

The Eleventh Circuit recently ruled in the case of *Owusu-Ansah v. Coca-Cola Co*. that an employer had not violated the Americans with Disabilities Act by requiring an employee to submit to a mental evaluation that was deemed job related and consistent with a business necessity.

In *Owusu-Ansah v. Coca-Cola Co.*, an employee went to work for Coca-Cola in 1999. By 2005, he had received three promotions and was employed as a assurance specialist. In that position, he could work from home but had to attend certain meetings on-site. In December of 2007, the employee reported to an on-site meeting with his supervisor. During the meeting, the employee voiced complaints of numerous incidents of alleged mistreatment and discrimination. According to his supervisors, the employee became agitated during the meeting, banging his hands on the table and stating someone would "pay for this." The employee subsequently denied this behavior.

The employee's supervisors were notified of the incident and were concerned that a threat had been made against an employee (s) of the company. The employee was asked to meet with the employer's senior human-resources manager. The employee refused to discuss the concerns he voiced during the prior meeting but agreed to speak to an independent psychologist. The psychologist reported concerns with the employee's emotional and psychological condition, noting there was a "strong possibility" that the employee might be delusional. In January of 2008, the psychologist also recommended that the employee see a psychiatrist. The employee attended an initial appointment, but declined to discuss any workplace concerns or issues. One week later, the psychologist recommended that the employee submit to a psychiatric/psychological fitness-for-duty evaluation "to rule out the possibility of a mental condition that could interfere with his ability to successfully and safely carry out his job duties."

The employer wrote the employee the following week stating that, in order to continue his employment, he was required to complete an evaluation to identify any issues that could represent a risk to the safety of others in the workplace or face immediate termination. A portion of the evaluation included the Minnesota Multiphasic Personality Inventory. The employee failed to show up for the first MMPI appointment. Another letter was sent to the employee advising of his non-compliance. The employee eventually complied. The psychologist reviewed the test results and cleared the employee to return to work.

The employee filed suit alleging that the employer violated the ADA by requiring him to submit to a fitness-for-duty evaluation. Under Section 12112(d)(4)(A) of the ADA, an employer cannot require a mental examination unless the examination is "job related and consistent with business necessity." As a threshold matter, the Court determined that an employee does not have to be disabled to be protected by Section 12112(d)(4)(A).

The Court next examined whether the evaluation was job-related and consistent with business necessity. Whether an evaluation is job-related is based upon the questions or subject-matter contained in a test or the criteria used by an employer to make an employment decision. Whether there is a business necessity hinges on the existence of a business reason that necessitates use of a test or criteria. The Court determined that an employee's ability to handle reasonably necessary stress and work reasonably well with others is an essential function of any position and thus "job related." The Court also found that an employer can require a fitness-for-duty evaluation under the ADA if it has information suggesting an employee is unstable and may pose a danger to others, therefore the evaluation was "consistent with business necessity."

~Alexandra S. Terry

IMPACT OF NEW MENTAL HEALTH MANUAL ON EMPLOYERS

The American Psychiatric Association recently released a new edition of their Diagnostic and Statistical Manual for Mental Disorders, known as the "DSM-5." This manual is relied upon by psychiatrists and other mental health professionals to identify, classify, and diagnose mental disorders in patients. In addition, health and disability insurance providers use the DSM in deciding what conditions and treatments to cover, as do government agencies in determining eligibility for benefits and services. These factors make the DSM a particularly powerful document.

Of importance to employers, the latest version of the DSM creates several new mental disorders and broadens the definition of a number of existing ones. In so doing, the DSM-5 will likely result in more people qualifying for mental disorders, thereby expanding the number of employees who will qualify as disabled under the Americans with Disabilities Act (ADA) and be entitled to reasonable accommodations.

Several new diagnoses contained in the DSM-5 may be problematic for employers. One is "Mild Neurocognitive Disorder." This describes a modest decline in learning, attention, or memory not associated with another mental disorder that does not interfere with the

person's ability to live independently, but which may require "greater effort, compensatory strategies, or accommodation." Under the law, employers generally do not have a duty to accommodate the ordinary cognitive effects of aging in older workers. However, under the latest version of the DSM, an older worker might present a diagnosis of Mild Neurocognitive Disorder as the basis for his or her forgetfulness or difficulty learning new tasks, which could trigger accommodation obligations under the ADA.

Another potentially troublesome disorder is the newly added "Social (Pragmatic) Communication Disorder." This disorder applies to people who have significant problems communicating verbally and nonverbally in social situations, but who do not qualify for an autism diagnosis. Employees who were previously thought to merely be shy or socially awkward might now qualify for accommodations under this new diagnosis.

In addition to several new disorders, the DSM-5 also makes it easier for an individual to qualify for various existing diagnoses. For example, the DSM-5 now permits a Post Traumatic Stress Disorder (PTSD) diagnosis where the person merely "learns about" a traumatic event, rather than the previous requirement that the person actually witness or experience the event. The broadening of this condition is likely to increase the number of employees who will qualify for a PTSD diagnosis.

Another expansion is evidenced by the removal of the "bereavement exclusion" from the definition of Major Depressive Disorder. Under prior DSM editions, mental health professionals were instructed not to diagnose Major Depressive Disorder after the recent death of a loved one. Now, under the new DSM-5, a person with depressive symptoms for longer than two weeks may qualify for a diagnosis of Major Depressive Disorder, even if those symptoms are the result of bereavement. This change may result in employees seeking more lengthy bereavement leaves as an accommodation.

Unfortunately, because there is currently little or no regulatory or court precedent to assist in determining whether these newly designated or modified conditions constitute a disability, employers are at risk for unwittingly violating the ADA. If history is any indicator, the EEOC will likely embrace the DSM-5's expansive view of mental disorders and treat most of the newly-established conditions as disabilities for purposes of the ADA. Employers should be mindful that requests for time off or an accommodation may now require more scrutiny to determine if the DSM-5's new diagnostic criteria has created ADA protection for the employee.

~Allison J. Adams

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