John R. LaBar

From: tba-bounces@tba2.org on behalf of tba@tba2.org
Sent: Friday, September 30, 2011 1:38 PM
To: tba@tba2.org
Subject: [TBA] Labor & Employment Section Newsletter (September 2011)

September 2011

Letter from the Editor

The latest newsletter from the TBA Labor and Employment Section, is larger than usual and covers a number of important issues for labor and employment lawyers - the Supreme Court's *Wal-Mart* decision, the new ADAAA and its final regulations, changes in Tennessee law on E-Verify and summary judgment, the NLRB and social media cases and the NLRB'S *Boeing* litigation. I want to thank this issue's authors, three of whom are repeat contributors – Wes Sullenger, Mark Travis, and John LaBar, as well as Mary Leigh Pirtle. If you have an article or idea, please e-mail me (bbuchanan@kingballow.com) or call (615-726-5484).

Bruce Buchanan

IN THIS ISSUE

Analysis of Tennessee Lawful Employment Act

By Bruce Buchanan *

Governor Bill Haslam signed into law, the "Tennessee Lawful Employment Act", which is a non-mandatory state E-Verify law. Under the new law, an employer is not required to enroll in E-Verify. Instead, an employer may accept, copy and maintain a state-issued driver's license or identification, unexpired U.S. passport, permanent resident card, work authorization, birth certificate, certificate of naturalization, or a few other forms of identification. The "in lieu of" clause in the Tennessee Lawful Employment Act does not mean an employer has the option to decide to use E-Verify on an employee-by-employee basis. Rather, under the law, if an employer signs up for E-Verify, it must use it for all newly-hired employees.

If you think the documents above are redundant of documentation needed for I-9 verification, you are correct. The only real difference is the requirement to maintain a copy of the identification document. Under the federal Immigrant Reform and Control Act (IRCA), an employer is not required to maintain a copy of the presented documents from List A or Lists B and C.

A second provision in the law involves the use of a "non-employee providing labor or services" to an employer. A "non-employee" is defined as "any individual, other than an employee, paid directly by the employer in exchange for the individual's services." If an employer contracts with an individual/non-employee, it must request and maintain a copy of one of the specified documents, such as state-issued driver's license or identification. However, a subcontractor, who is not an individual, is not covered by this provision by definition.

An employer violates the law by failing to receive E-Verify confirmation or to request and maintain a copy of one of the specified identification documents. An employer has a "safe harbor" and cannot be found to have violated the law by employing an employee without work authorization if the employer utilized E-Verify and received a confirmation or the employee appealed the tentative non-confirmation and the appeal has not been resolved. This "safe harbor" is not available for employers who copy and maintain an employee's driver's license or identification if the employee is found to be without employment authorization.

The Tennessee Lawful Employment Act will be phased in. Employers with 500 or more employees and governmental entities must comply by January 1, 2012; employers with 200 to 499 employees by July 1, 2012; and employers with six to 199 employees by January 1, 2013. Employers with five or fewer employees are exempt from the law.

Any "lawful resident" of Tennessee, or federal agency employee, may file a complaint with the Tennessee Department of Labor and Workforce Development (DOLWD), which will investigate complaints providing "satisfactory evidence" of a violation. This provision is an extension of the current law which only allows state or local officials to file a complaint alleging an employer's employment of an unauthorized worker.

The penalties for the new law are: First offense - $500 penalty + $500 per employee or non-employee not verified or copy of documentation maintained; Second offense - $1,000 penalty + $1,000 per employee or non-employee not verified or copy of documentation maintained; and Third offense - $2,500 penalty + $2,500 per employee or non-employee not verified or copy of documentation maintained.

An employer, under existing Tennessee law, may have a business license revoked or suspended based on a finding by the DOLWD that it employed an unauthorized worker. For the first offense, the employer's business license is suspended until it provides a sworn statement that it no longer employs illegal workers. An employer, who violates the law two or more times within a three-year period, shall have its business license suspended for at least one year.

One of the interesting political aspects of the law is it is non-mandatory. As immigration attorneys are aware, other southern states, such as Alabama, Georgia, and North Carolina, have passed mandatory E-Verify laws in 2011. What makes Tennessee different? One difference appears to be the strength of the Chamber of Commerce in Tennessee, which has opposed most state legislation related to immigration.

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* Bruce E. Buchanan is the partner-in-charge of Immigration Practice at King & Ballow, Nashville, Tennessee. Mr. Buchanan represents employers in immigration, labor, and employment law, as well as individuals in immigration law. He graduated from Vanderbilt University School of Law in 1982. Mr. Buchanan authors a blog, at www.kbimmigration.com/webline, which covers immigration compliance issues. He is the Chair of TBA's Immigration Law Section as well as editor of *Immigration Law Section Newsletter*, TBA's *Labor and Employment Law Newsletter* and *Employment Law Comment*. He may be reached at bbuchanan@kingballow.com or 615-

- **Tennessee's New Summary Judgment Standard for Employment Discrimination**
- **NLRB's General Counsel Issues Report on Social Media cases**
- **NLRB Issues Complaint Against Boeing for Transferring Work to Non-Union Facility**

726-5484.

Too Big To Sue? Supreme Court Finds Diverse Workforce Lacks Commonality

By Wes Sullenger *

The Supreme Court, in *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (June 20, 2011), rejected the certification of a company-wide class action brought on behalf of female employees of Wal-Mart. The Court held the plaintiffs could not show such a large workforce suffered common discriminatory acts where local managers had some discretion in making promotion decisions.

Three female employees sued the company for discrimination against women in opportunities for promotion to management and pay. The plaintiffs claimed Wal-Mart gave its local managers significant discretion over pay and promotions. Thus, while Wal-Mart had no express corporate policy against advancing women, the plaintiffs claimed the local managers used their discretion disproportionately in favor of promoting men, amounting to disparate impact sex discrimination against women. Further, the plaintiffs claimed, because Wal-Mart was aware of that sex discrimination but failed to curb the local managers' discretion, Wal-Mart engaged in disparate treatment discrimination of female employees.

The women claimed this sex-based discrimination applied to all of Wal-Mart's female employees. According to the majority: "The basic theory of their case is that a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decision-making of each one of Wal–Mart's thousands of managers – thereby making every woman at the company the victim of one common discriminatory practice."

The women, thus, sought certification of a class action including every female who worked at any Wal-Mart since December 26, 1998. The district court and Ninth Circuit Court of Appeals approved a class of 1.5 million women. The appeals court held the plaintiffs' statistical evidence of pay disparities between women and men raised a common question of whether Wal-Mart subjected women to a single set of corporate policies, rather than a series of individual discriminatory acts, that constituted unlawful discrimination.

Class action litigation imposes four requirements – numerosity, commonality, typicality, and adequate representation – to ensure the named plaintiffs are appropriate representatives of the class they purport to represent. Plaintiffs in a class action must show that "there are questions of law or fact common to the class." This means the plaintiffs must show the class members "have suffered the same injury," in the sense that "[t]heir claims must depend upon a common contention," such as a claim of discriminatory bias by the same supervisor. The claims must also be such that resolution of that common question will resolve a substantial legal issue as to each class member's claim.

Here, the Supreme Court found the class failed the commonality requirement. Looking to precedent, the Court stated that company-wide classes could only meet the commonality requirement if the plaintiffs could prove (1) the employer used a biased testing procedure to evaluate every employee, or (2) the employer operated under a general policy of discrimination that applied to all employees.

The plaintiffs failed in that effort, however. The plaintiffs offered

sociological evidence that Wal-Mart's strong corporate culture made it "vulnerable" to gender bias. Yet their expert could not determine with any specificity the percentage of corporate decisions that had been influenced by gender bias.

Rejecting the expert proof, the Court stated the only common policy the plaintiffs identified was Wal-Mart's policy of allowing discretion by local managers in employment matters. Such a policy, the Court stated, was the "opposite of a uniform employment practice that would provide the commonality needed for a class action" because it meant no uniform set of standards had been applied to the class members. While assigning discretion to low-level managers could allow widespread discrimination in some cases, the Court said such a result was unlikely in a company with a corporate ban on sex discrimination. The Court found it "quite unbelievable" that all managers would exercise their discretion in an impermissible way without corporate guidance to do so.

Moreover, the Court also rejected the plaintiffs' statistical evidence, which found Wal-Mart promoted a smaller percentage of women than its competitors or than one would expect based on the available labor pool in the absence of gender discrimination. The Court held that, even accepting the validity of the evidence, one could not extrapolate labor disparities across all employees – the fact some stores may have engaged in discrimination did not mean the claims of employees from those stores were typical of claims from employees of other stores.

Thus, Wal-Mart, it seems, is too big to be sued on a class basis. Because it has so many stores in so many states with so many managers and employees, it apparently cannot be held to have engaged in any common plan. The fact it has an explicit anti-discrimination policy prevails, with the Supreme Court majority presuming that few managers would be willing to violate such a policy.

The Court paid no heed to the possibility that the nearly all male managerial force might prefer to promote more of their own or act on the belief that women are less able to comply with Wal-Mart's requirement that managers be willing to re-locate because of their marital or childcare duties. The Court also, in discounting the plaintiffs' statistical evidence, ignored the undisputed evidence that women in every store region earned less than men and that the pay gap between men and women hired together increased with over time. Finally, the evidence showed that, while local managers had some discretion in promotions, they were also required to attend frequent meetings at which Wal-Mart emphasized the common way of thinking within the company and that the company regularly transferred managers to ensure uniformity across its stores.

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* D. Wes Sullenger is the founder of the Sullenger Law Office in Paducah, Kentucky. His practice focuses representing individuals who have been discriminated against in discrimination as well as Fair Labor Standards Act collective actions. Wes is licensed in Tennessee and Kentucky. He may be contacted at wes@sullengerfirm.com.

A Snapshot of ADA Amendments Act and Its Effect on Future Cases

Mark C. Travis *

This article is intended to provide the practitioner with a summary of how the law has changed, and provide some tools on how to effectively utilize these changes in future mediation of claims arising under the

Americans with Disabilities Act ("ADA").

The ADA was signed into law in 1990 with the stated purpose to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[1] The law prohibited discrimination by, among other things, failing to make reasonable accommodations to the known physical or mental limitations of applicants and employees. However, in the years following the ADA's enactment, the Supreme Court began to erode the class of individuals that qualified as having a disability under the ADA to the point that it became increasingly difficult for many individuals to meet a prima facie case for a "disability" necessary to bring a claim under the ADA. Accordingly, discrimination cases focused on the threshold question of whether the claimant could prove the existence of a disability, often resulting in summary disposition before an analysis of reasonable accommodation was ever addressed.[2]

The ADA Amendments Act ("ADAAA") became effective on January 1, 2009 and the Equal Employment Opportunity Commission's ("EEOC") Final Regulations became effective on May 24, 2011. The primary purpose of the ADAAA is to "make it easier" for people with disabilities to obtain protection under the law, and the regulations provide that the primary focus should be on whether discrimination has occurred, and not whether the individual meets the definition of a disability, which should not demand "extensive analysis."[3] This is not only viewed as a potential sea change but the new filings substantiate it. In the fiscal year September 30, 2010, the EEOC's statistics show charges for disability discrimination increased by over 3,700.[4]

Background

The ADA defines an individual with a "disability" as "(A) a physical or mental impairment that substantially limits on or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[5] In *Sutton v. United Air Lines, Inc.*,[6] the Court held that where the individual alleges discrimination under the "regarded as" definition, the individual must show that the employer actually believed that the individual had an impairment that was substantially limiting. In *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams*,[7] the Court held the determination of whether an impairment rises to the level of a disability is not limited to activities in the workplace, but includes an analysis of whether the individual is limited in the performance of daily activities that are central to the person's daily life. Additionally, the Court construed the phrase "substantially limits" to mean that the condition "prevents or severely restricts" the performance of the activity and the ADA's definition of disability must be "interpreted strictly to create a demanding standard for qualifying as disabled."[8]

Changes

Congress stated both *Sutton* and *Toyota* had narrowed the scope of protection Congress had originally intended and the intent of the ADAAA was to reject the standards enunciated in both cases.[9] The following is a summary of the statutory and regulatory changes:

"Major Life Activities" - The ADAAA now provides two major categories of "major life activities". The first deal with social or vocational activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The new second category of activities focuses on medical factors, or major bodily functions, such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The regulations specifically provide that the term "major" is not to be determined by

reference to whether it is of "central importance to daily life."[10]

"Substantially Limits" - The regulations state that an impairment is considered to be a disability if it substantially limits the ability of the individual to perform the major life activity "as compared to most people in the general population", and an impairment does not have to prevent, or even significantly or severely restrict the individual from performing a major life activity in order to be substantially limiting. The regulations contemplate that this determination will generally be made without reference to scientific, medical, or statistical analysis. Rather, the regulations suggest that this determination will include an analysis of the difficulty the individual encounters in performing the activity; the effort required; the pain experienced; how long the activity can be performed and its effect on the operation of a major bodily function; as well as the negative side effects of medication intended to address the condition. The regulations also state that an impairment that is episodic or in remission is still considered a disability if it would substantially limit a major life activity when active and that the effects of an impairment lasting fewer than six months can nevertheless be substantially limiting.[11] The regulations state: "The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity."[12]

"Regarded as" - Under the ADAAA and regulations, an individual meets "regarded as" if he or she has been subjected to discrimination because of an actual or perceived impairment, regardless of whether or not the impairment limits or is perceived to limit a major life activity, and the term "substantially limits" is not relevant under this prong of the disability definition. Prohibited actions include such things as refusal to hire, demotion, placement on involuntary leave, termination, or exclusion from a position for failure to meet a qualification standard. The only real limitation on this definition of disability is that it cannot be utilized if the impairment is transitory and minor with an expected duration of six months or less, but the employer must objectively demonstrate that the impairment is both transitory and minor.[13]

Corrective Measures - In response to the holding in *Sutton* dealing with corrective devices and measures, the ADAAA provides that the determination of whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative effects of mitigating measures. Examples of mitigating measures include medication, equipment, low vision devices (other than ordinary eyeglasses and contact lenses), prosthetics, hearing aids and cochlear implants, mobility devices, oxygen therapy equipment, assistive technology, auxiliary aids, as well as learned behavioral or adaptive neurological modifications and psychotherapy. Conversely, the corrective effect of ordinary eyeglasses or contact lenses which fully correct vision is to be considered in determining whether an impairment limits a major life activity.[14]

Impact on Litigation of Future ADA Claims

Judicial inquiry will now focus more on the act of discrimination itself, which will most often arise in the context of whether the employer made a reasonable accommodation for a "qualified individual" with a disability. Consequently, the practitioner should be prepared to adequately address this element of the claim.

A "qualified individual" is defined as "an individual who, with or without *reasonable accommodation*, can perform the *essential functions* of the employment position that such individual holds or desires."[15] The ADAAA provides the employer's judgment as to what functions are essential, if stated in a written job description, may be considered as evidence of which functions are essential. The regulations also provide guidance as to what constitutes an essential job function, including whether the position exists

to perform the function, the number of employees among whom the function can be distributed, whether the function is highly specialized or the employee was hired to perform that function, the consequences of not performing the function, the amount of time spent performing the function, and the terms of any collective bargaining agreement.[16]

Reasonable accommodation, in turn, includes job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, and adjustment or modifications of examinations, among other things. The duty to reasonably accommodate an individual's disability also encompasses the duty of both the employer and employee to engage in an interactive process to determine the appropriate reasonable accommodation for an individual with a disability. Specifically, the obligation requires the employer to initiate an informal, interactive process with the qualified individual in need of accommodation, in order to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[17] The requirement has been held to be mandatory in order to satisfy the reasonable accommodation standard.[18] As with the consideration of essential job functions, counsel must be prepared to address whether a proposed accommodation is reasonable.

Under the ADAAA, it can be expected that once the element of "disability" is now more readily satisfied, there will be increased contention over what job functions are essential, whether an accommodation is indeed reasonable, the depth to which the parties engaged in the interactive process, and to what extent the defenses of undue hardship and direct threat are applicable. The 21st century employment law practitioner must be prepared to address the importance of these issues in the litigation and resolution of claims under the ADAAA.

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* Mark C. Travis is a member of the Labor and Employment Law, and Dispute Resolution Sections of the Tennessee and American Bar Associations. He serves as the Director of the Tennessee Labor-Management Center and is a contract mediator for the Equal Employment Opportunity Commission and the American Arbitration Association. He can be reached at mtravis@travisadr.com.

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[1]42 U.S.C. §12102(b)(1)-(2).
[2]Amy L. Albright, 2006 *Employment Decisions Under the ADA Title I – Survey Update*, 31 MENTAL AND PHYSICAL DISABILTY L. REP. 328, 329 (2007)(finding that out of 272 ADA claims in 2006, employers prevailed in 97.2% of the cases).
[3]42 U.S.C §12102(4)(A); 29 C.F.R. §1630.1(a)(4).
[4]http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.
[5]42 U.S.C. §12102(1).
[6]527 U.S. 471 (1999).
[7]534 U.S. 184 (2002).
[8]*Id.* at 197-198.
[9]42 U.S.C. §12101(a),(b).
[10]42 U.S.C. §12102(2)(A); 42 U.S.C. §12102(2)(B); 29 C.F.R. §1630.2(i)(1)(ii); 29 C.F.R. §1630.2(i)(2).
[11]29 C.F.R. §1630.2(j)(1)(i),(ii),(v); 29 C.F.R. §1630.2(j)(4); 29 C.F.R. §1630.2(j)(1)(viii)(ix); 42 U.S.C.§12102(4)(D).
[12]29 C.F.R. §1630.2(j)(1)(iii).
[13]42 U.S.C. §12102(3)(A);29 C.F.R. §1630.2(g)(3),(j)(2); 29 C.F.R. §1630.2(l)(1); 42 U.S.C. §12102(3); 29 C.F.R. §1630.2(j)(1)(ix);29 C.F.R. §1630.15(f).
[14]42 U.S.C. §12102(4)(E)(i); 29 C.F.R. §1630.2(j)(1)(vi);(j)(5); 42 U.S.C. §12102(4)(E)(ii)(iii); 29 C.F.R. §1630.2(j)(6).
[15]42 U.S.C. §12111(8).

[16]42 U.S.C. §12111(8); 29 C.F.R. §1630.2(n).
[17]42 U.S.C. §12111(9); 29 C.F.R. §1630.2(o); 29 C.F.R. §1630.2(o)(3).
[18]*Kleiber v. Honda of America Mfg., Inc.*, 485 F.3d 862 (6th Cir. 2007).

Tennessee's New Summary Judgment Standard for Employment Discrimination

By: Mary Leigh Pirtle *

Effective June 10, 2011, Tennessee has adopted a new summary judgment standard in employment discrimination matters. Since the 1973 U. S. Supreme Court decision in *McDonnell Douglas Corp. v. Green*, a defendant could shift the burden of proof by articulating a legitimate, nondiscriminatory reason for an adverse employment action. The plaintiff would then be required to demonstrate the proffered reason was not the real reason for the action; instead, it was a pretext for illegal discrimination.

However, in *Gossett v. Tractor Supply Co., Inc*, the Tennessee Supreme Court held the *McDonnell Douglas* "burden shifting" was inapplicable at the summary judgment stage in Tennessee employment discrimination and retaliatory discharge cases. After the decision in *Gossett*, Tennessee became only one of four states not following the *McDonnell Douglas* framework. Because the *Gossett* decision produced inconsistent standards for certain legs of the legal proceeding, the legislature sought action. In HB 1641, Tennessee has rejected the *Gossett* decision by expressly enacting the *McDonnell Douglas* framework, a framework that is consistent across all stages of the legal proceeding, including motions for summary judgment. This legislative change will apply prospectively to actions filed after the effective date.

In adopting this legislation, an employer's odds of prevailing on a summary judgment motion in Tennessee were undoubtedly increased.

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* Mary Leigh Pirtle is an associate at King & Ballow in Nashville, Tennessee. Prior to joining King & Ballow, she worked as an Assistant Attorney General for the State of Tennessee in the Consumer Advocate and Protection Division. She received her Law Degree and Master's Degree in Business Administration from Stetson University and her undergraduate degree from Middle Tennessee State University, where she graduated *cum laude* with a major in accounting. She may be reached at mpirtle@kingballow.com.

NLRB's General Counsel Issues Report on Social Media cases

By Bruce Buchanan *

It appears the National Labor Relations Board has found a way to become relevant again in the employment law arena – social media cases. In August 2011, the Board's General Counsel issued a report discussing a number of social media charges, where the primary issue was whether a company's employment decision violated an employee's right to engage in protected concerted activities (social media activities) under the National Labor Relations Act. It is important to note the Board has not issued decisions in any of these cases, though two Administrative Law Judges have just issued decisions.

Facebook and Protected Concerted Activities

In *Hispanics United of Buffalo*, a non-profit social services provider an employee received criticism from one of her co-workers – an advocate for domestic violence victims. This advocate said she was planning to take the matter to the non-profit's Executive Director. Before the meeting, the employee posted on Facebook that the advocate felt many employees did not help the clients enough. Four co-workers responded to the post. The advocate reported the Facebook posts to the Executive Director and said she considered the posts to be "cyber-bullying." The non-profit provider discharged the initial employee who posted the message as well as the four co-workers who responded.

The General Counsel concluded the postings were concerted activity under *Meyers Industries (Meyers, II)*, 281 NLRB 882 (1986), because the Facebook discussion was initiated in an appeal to co-workers for assistance on issues of job performance. The employee statements relating to employee staffing levels were protected because it involved working conditions.

Finally, the General Counsel found the postings did not lose the protection of the NLRA. Even though the postings included swearing and sarcasm, the postings were "objectively quite innocuous" and did not rise to the level of "opprobrious" under *Atlantic Steel Co.*, 245 NLRB 814 (1979), where one loses the protection of the NLRA. Thus, the General Counsel alleged the discharges violated Section 8(a)(1) of the NLRA.

This case went to trial and an Administrative Law Judge found the discharges were unlawful. It is expected that the non-profit provider will file an appeal.

In *American Medical Response*, an ambulance driver got on Facebook to post derogatory comments about her employer, specifically referring to her supervisor as a "scumbag," and compared management to psychiatric patients. The driver's co-workers, whom she had "friended" on Facebook, responded with their own posts on the driver's page offering words of encouragement and additional comments about management. The ambulance company learned about the posts and terminated the driver in accordance with its policy prohibiting employees from disparaging the company or depicting the company in any way without permission. The NLRB alleged the policy was overbroad and potentially infringed on an employee's right to discuss working conditions in violation of the NLRA. In particular, the NLRB claimed the driver's comments on Facebook should be considered protected concerted activity as she was complaining about the general terms and conditions of her employment. Since the name-calling was not accompanied by verbal or physical threats, the General Counsel found *Atlantic Steel* strongly favored the postings protected nature, especially since the supervisor provoked the comments by his unlawful refusal to provide a union representative and unlawful threat of discipline. The case ultimately settled before going to hearing.

Knauz BMW involved a car dealership. After someone drove a vehicle at a car dealership into a pond, an employee at a nearby dealership, owned by the same company, took some photographs of the situation. Later that same week, the car dealership had an event, to introduce a new car model, where the sales manager informed his salesmen that the dealership would be serving hot dogs, chips, cookies and water. The salesmen met afterwards and expressed their concern that the cheap food and drink would send the wrong message to their clients and negatively affect their sales and commissions.

After the event, an employee posted photographs of the event as well as the vehicle in the pond with an introduction sarcastically stating the car dealership had gone all out for the car launch. The employer saw the

photographs on Facebook and ordered the employee discharged.

The General Counsel found the employee engaged in concerted activity because posting the photographs was an outgrowth of the previous discussion of these issues with the co-workers. An Administrative Law Judge found the discharge was not unlawful because it was caused by the posting of the accident photographs, which do not involve working conditions.

In case #4, employees at a sports bar discovered they owed state income taxes due to the sports bar not withholding sufficient money for taxes. One employee requested the employer place it on the agenda for an upcoming meeting between management and the employees. Another employee posted on her Facebook page displeasure with the fact that she owed taxes and emphasized it with an expletive. Several employees responded to the posting as well as two customers. One employee referred to one of the owners as "an asshole."

The initial posting employee and the employee who referred to an owner as "an asshole" were immediately fired. The General Counsel found the topic of conversation – withholding of taxes – was a term and condition of employment. Furthermore, it was concerted because it not only embodied "truly group complaints" but also contemplated future group activity. The employer's assertion that the one employee's comments lost the protection of the NLRA through the use of "asshole" was discounted.

Without Protected Concerted Activity, There is no Violation

In case #5, the General Counsel upheld the employer's discipline of an employee for posting offensive tweets on Twitter. A newspaper in Tucson, Arizona began encouraging its reporters to use social media sites like Twitter to interact with the public. The public safety reporter for the newspaper posted a tweet criticizing a headline in the newspaper's sports section, prompting the human resources director to encourage him to discuss his concerns internally rather than on Twitter, and the managing editor prohibited him from airing grievances in a public forum. Several months later, the reporter posted a series of tweets commenting on the homicide rate in Tucson ("What?!?! No overnight homicide? WTF? You're slacking Tucson."), criticizing a tweet posted by an area television news station for misspelling a word ("Stupid TV people."), and making a reference to masturbation ("My discovery of the Red Zone channel is like an adolescent boy's discovery of h…let's just hope I don't end up going blind.").

The managing editor told him the tweets were inappropriate and prohibited him from tweeting at all, noting the reporter's Twitter screen name and biography referenced his employment with the newspaper. The reporter was fired. The General Counsel found that although the newspaper may have made an unlawful rule when it prohibited the employee from making any derogatory comments about the newspaper in any social media forums, the employee's conduct was inappropriate and unprofessional; thus, it was not protected under the NLRA.

In case #6, another restaurant and bar case, an employer's discharge of an employee who posted a message on his Facebook page in response to a customer's question was not unlawful even thought it referred to the employer's tipping policy – a term and condition of employment. The policy concerned waitresses not sharing tips with the bartenders. This employee discussed the policy with another bartender who agreed it was a bad policy, but neither of them took up the issue with management.

Several months later, the employee corresponded on Facebook with a relative (non-employee) and complained about not getting any tips from the waitresses, referred to the customers as "rednecks," and said he had hoped

the customers choked on glass as they drove home drunk. Shortly thereafter, management discovered the posting and fired the employee. The General Counsel found the discharge did not violate the NLRA because it was not concerted – the employee did not address co-workers in his posting.

In case #7, an employee posted messages on the wall of a U.S. Senator's Facebook page. The messages were complaints about relationships that her employer had with various fire departments concerning their emergency services. None of the complaints used offensive language, but they were disparaging. The employee did not discuss her comments with any employees.

The employer discovered the postings and fired her for the disparaging remarks about the employer. Since the employee did not discuss her comments with her co-workers, the postings were not concerted activities. Thus, her discharge did not violate Section 8(a)(1) of the Act.

In a final case, an employee of a retail store posted a Facebook comment after a conversation with the new assistant manager. In the posting, the employee complained of "tyranny" at the store and suggested a lot of employees were about to quit. Several co-workers responded with emotional support although they inquired what the problem was. The employee responded by stating the assistant manager was a "super mega puta." Again, a couple of employees responded with "hang in there" remarks.

A co-worker provided a printout of the postings to the store manager who disciplined the employee with a one-day paid suspension and lost promotional opportunities. The General Counsel said the employee's postings were individual gripes, not concerted activity. Thus, the employer's discipline of the employee did not violate the NLRA.

Conclusion

Some legal commentators have asserted that the General Counsel is backing off social media cases because the last two charges have been dismissed. However, I disagree; instead, a careful review of those charges shows they simply did not involve protected concerted activities.

Furthermore, if you have created a social media policy, or if you are taking actions against employees because of comments on social media, you should consult with an experienced labor law attorney to discuss the legalities of such a policy.

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* Bruce E. Buchanan is the partner-in-charge of Immigration Practice at King & Ballow, Nashville, Tennessee. Mr. Buchanan represents employers in immigration, labor, and employment law, as well as individuals in immigration law. He graduated from Vanderbilt University School of Law in 1982. Mr. Buchanan authors a blog, at www.kbimmigration.com/webline, which covers immigration compliance issues. He is the Chair of TBA's Immigration Law Section as well as editor of *Immigration Law Section Newsletter*, TBA's *Labor and Employment Law Newsletter* and *Employment Law Comment*. He may be reached at bbuchanan@kingballow.com or 615-726-5484.

The author would like to thank Patrick Ogilvy, an associate of King & Ballow, for his contributions to the article.

NLRB Issues Complaint Against Boeing for Transferring Work to Non-Union Facility

By John R. LaBar *

On April 20, 2011, NLRB Acting General Counsel Lafe Solomon issued a complaint against the Boeing Company alleging that it violated federal labor law. Specifically, the Complaint alleges Boeing violated the National Labor Relations Act (NLRA) by deciding to transfer a second production line to a non-union facility in South Carolina for discriminatory reasons.

In 2007, Boeing announced it planned to assemble seven 787 Dreamliner airplanes per month in the Puget Sound area of the State of Washington, where its employees have long been represented by the International Association of Machinists and Aerospace Workers, District Lodge 751.[1] Boeing later said that it would create a second production line to assemble an additional three 787 Dreamliner airplanes a month to address a growing backlog of orders. In October 2009, Boeing announced it would locate that second line at a non-union facility located in South Carolina.

In March 2010, the Machinists Union filed a charge with the NLRB, charging the decision to transfer the second production line was made to retaliate against union employees for participating in past strikes and to chill future strike activity, which is protected under the NLRA. The union also charged that Boeing violated the NLRA by failing to negotiate over the decision to transfer the production line. After an investigation, a complaint[2] was issued by Acting General Counsel Solomon alleging violations of the NLRA by making coercive statements and threats to employees for engaging in statutorily protected activities, and by deciding to place the second line at a non-union facility, and establish a parts supply program nearby, in retaliation for past strike activity and to chill future strike activity by its union employees.

The NLRB also claimed its investigation found that Boeing officials communicated the unlawful motivation in moving the second production line in multiple statements to employees and the media. For example, the NLRB cited a senior Boeing official's quote in a videotaped interview with the *Seattle Times* newspaper: "The overriding factor (in transferring the line) was not the business climate. And it was not the wages we're paying today. It was that we cannot afford to have a work stoppage, you know, every three years."

To remedy the alleged unfair labor practices, the NLRB seeks an order that would require Boeing to maintain the second production line in the State of Washington. The complaint does not seek the closing of the South Carolina facility, nor does it prohibit Boeing from assembling planes there.

It is important to note that the Complaint states allegations by the Acting General Counsel that the employer has committed unfair labor practices and is not a finding by the Board that Boeing has committed the stated unfair labor practices.

The next step in the process is a hearing before an NLRB administrative law judge, which started on June 14 at the NLRB's Seattle office. To date, no testimony has been taken in the case as all parties have been locked in negotiations and motions to quash subpoenas from the NLRB Acting General Counsel and the International Association of Machinists. During the hearing process, both sides will have an opportunity to present evidence and argue in favor of their position. The decision of the administrative law judge may be appealed to the Board in Washington. The Board's decision could further be appealed to a federal court of appeals and then to the U. S. Supreme Court.[3]

As a follow-up to the initial hearing before the administrative law judge, on June 17, 2011, NLRB Acting General Counsel Lafe Solomon appeared before the House Committee on Oversight and Government Reform at a

field hearing in South Carolina regarding his decision to issue a complaint against Boeing. And, on August 9, 2011, the House Oversight Committee issued a broad subpoena compelling production of all NLRB documents related to the Boeing case, following three months of correspondence between the Committee and the NLRB Office of General Counsel. In response to this subpoena, Acting General Counsel Lafe Solomon said, "To the best of my knowledge, this is the first time since 1940 that the National Labor Relations Board has been the subject of a Congressional subpoena."

Besides the subpoena of documents, the House of Representatives has passed a bill to stop the litigation of this case. The U.S. Senate is not expected to pass this legislation.

The Boeing case likely will continue into the foreseeable future. Given the current high national unemployment rate and the future of a billion dollar factory at stake, this case is seen by some as an attack on job creation by the current administration. This case will continue to be a lightning rod for the larger national debate between support of union rights and those who believe that companies should be able to freely choose the location of their factories.

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*John R. LaBar is a named member at Henry, McCord, Bean, Miller, Gabriel & LaBar, P.L.L.C. in Tullahoma, Tennessee and is a member of the Labor & Employment Law Section of the TBA. Mr. LaBar also currently serves a TBA House of Delegates Member for the 14th Judicial District and has served as an Adjunct Professor at the University of Tennessee College of Law and as a frequent speaker on employment law topics. Mr. LaBar represents employers and business owners in many areas of labor, employment, business and corporate matters. He can be reached at jlabar@henry-mccord.com.

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[1]The Machinists Union has represented Boeing employees in the Puget Sound area of Washington since 1936.
[2]Case Number 19-CA-32421. Additional information regarding this case may be found at: http://www.nlrb.gov/category/case-number/19-ca-032431.
[3]For a flow chart of the NLRB hearing process, go to: http://www.nlrb.gov/nlrb-process.