Two Guiding Trends in Contemporary Labor and Employment Law: Technology and Fairness

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There are two primary trends guiding contemporary labor and employment law. The first is the recognition and incorporation of technology into existing law. Labor law has led the way with the National Labor Relations Board (NLRB or Board)'s increased focus on social media firings. The second is increased fairness measures at the expense of legal certainty. Employment law has led the way here, with recent regulations interpreting the Genetic Information Non-Discrimination Act (GINA) as well as judicial expansion of Title VII to include discrimination based on sexual orientation.

I. Recognition and Incorporation of Technology

Perhaps the greatest challenge to unionized and non-unionized workplaces alike is how to best adapt to technological change. While employees have had access to the internet for a long time, employee use of social media is a relatively new phenomenon. The term "social media" encompasses a broad range of online communication programs. The two key social media programs are Facebook and Twitter. These programs allow employers and employees to instantly transform their thoughts into text that the whole world can read.

This development has its advantages and disadvantages. A large disadvantage for employers is that employees are more likely to air grievances online. Employees' candid comments, in turn, often lead to termination. Thus, the NLRB has recently had several opportunities to indicate how the National Labor Relations Act (NLRA) applies to online conduct. In short, online protected activity is treated largely the same as in-person protected activity. The Board has recognized that social media is a new, but no less legitimate, form of human communication.

Technology can also be used to expedite and aid in the enforcement of existing laws. The Department of Labor has found a unique way to do so. It recently introduced two mobile phone applications that will help workers prove the hours they have worked and the temperature on any given day. These applications are intended to aid the enforcement of wage and employment laws.

A. The NLRB

The NLRB has been extremely active as of late, proposing several new rules and rendering significant decisions. Some of this represents the push and pull of the political system: the current Democratic Board has reversed several policies initiated by the Republican Board. However, other changes reflect the Board's engagement with technological change. Specifically, the Board has issued several important decisions on online protected activity. These decisions: (1) confirm that the Board's protected activity inquiry is the same in person or online; and (2) indicate that employers must carefully draft their social media policies to avoid conflict with employees' right to organize.

Also, the Board has proposed new election rules that would allow for the electronic service of documents. This is a marked change from the approach the Board took to technology in its 2007 decision in *The Register Guard*[1] prohibiting employees from using employers' computers for union solicitation purposes.

B. Social Media and the NLRA

The Acting General Counsel of the NLRB released a report on August 18, 2011 summarizing the results of fourteen recent Board decisions involving employee use of social media.[2] The decisions primarily involved one of two legal issues: (1) whether online employee interaction constituted protected activity; and (2) whether employers' social networking policies infringed on employees' rights.

Under the NLRA, most employees in the private sector have a right to communicate with fellow employees about job-related concerns such as wages, hours, and workplace conditions. The theory behind this is that employee discussions about job conditions may germinate into unionization efforts.

1. Online Protected Activity

While the summarized decisions involved online and/or social media communications, the Board's protected activity inquiry proceeded as if the conversations took place in person. In order to be protected, employee activity must be concerted; that is, employees must act with or on the authority of other employees, and not solely by and on behalf of the employee him or herself. The summarized decisions held that online employee interaction constituted protected activity when employees expressed group concerns about wages, hours, and other work conditions. Therefore, comments, responses, and clicks of the "Like" button on Facebook all qualified as protected activity.

An illustrative case involved a sports bar's alleged mismanagement of its books. In early 2011, several employees of the bar discovered, much to their chagrin, that they owed a considerable amount of state taxes for 2010. The employees suspected it was due to employer error. The employer was informed of the employees' dissatisfaction, and one employee requested that the matter be discussed at an upcoming company meeting. Meanwhile, a former employee posted a comment on her Facebook Wall complaining about the issue. Another employee clicked "Like" underneath the comment. Then, another employee made a comment that she too owed state taxes and that one of the owners was "[s]uch an asshole." In response, the sports bar fired the employees. The employees then contacted the NLRB, which filed unfair labor practice charges against the bar.

In deciding this case, the Board found that the employees' activity was protected because it referred to group concerns

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about a work-related issue (the employer's administration of income tax records). The employer's firing of the employees based on the online discussion was deemed unlawful despite the fact that the employees made disparaging remarks about the owner. It is long-standing Board policy that an employee does not lose the protection of the NLRA by resorting to swearing, name-calling, and/or sarcasm. In a similar case, an employee's reference to her supervisor as a "scumbag" in the context of a Facebook discussion of supervisory action was protected. Important to the Board was the fact that the Facebook postings occurred outside the workplace and thus did not disrupt the work of any employee or undermine supervisory authority.

However, online individual gripes in the absence of concerted activity are not protected under the NLRA. The Board found that the firing of a bartender after he posted a message on Facebook complaining about his employer's tipping policy was lawful. Although the employee's Facebook posting involved the terms and conditions of his employment, it was not protected because there was no discussion about the posting with his co-workers. In addition, there had been no employee meeting or attempt to initiate group action regarding the tipping policy. Similarly, the firing of a customer service employee after he posted a profane message on Facebook complaining about the "tyranny" of store management was found to be lawful. Although several of the employee's co-workers responded to his post, the Board found that the employee expressed an individual gripe about an individual dispute rather than an intention to initiate group action.

2. Employers' Social Media Policies

The more novel legal issue discussed in the cases is the permissible scope of employers' online and social media policies. The Board found that employers' social networking policies infringe on employees' rights when they are broad in scope. Employers must walk a fine line, as broad policies that could be interpreted as discouraging employees from discussing work conditions will likely be found illegal.

An instructive case involved an ambulance company's blogging and internet posting policy. The Board found that language prohibiting "employees from making disparaging remarks when discussing the company or supervisors" violated the NLRA because it impliedly encompassed their right to concerted activity under the NLRA. In addition, the Board found that a prohibition on "depicting the company in any media" violated the NLRA because it would prohibit an employee from engaging in protected activity such as posting "a picture of employees carrying a picket sign depicting the company's name."

Similarly, a hospital's social media, blogging, and social networking policy, which banned employee use of "any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy and confidentiality of any person or entity," was struck down as overly broad. The Board found that the policy lacked limiting language and provided no definition or guidance of what was considered to be private or confidential. Other cases disapproved of similarly broad policies that lacked limiting language and specific examples of what was covered under the policy.

In contrast, the Board found that a provision in a supermarket chain's social media policy, which prevented "employees from pressuring their coworkers to connect or communicate with them via social media," was lawful. This part of the policy passed the Board's scrutiny because employees have the right to refrain from organizing under the NLRA. Thus, the policy "was narrowly drawn to restricted harassing conduct and could not reasonably be construed to interfere with protected activity."

Two important things can be taken away from these case summaries. First, the NLRB does not treat online employee interaction differently from personal interaction. Employees are allowed to discuss work-related grievances whether their communications are in person or via social media, and employers cannot punish them for doing so despite how disparaging their comments may be. Second, overly-broad online or social media policies are likely to be struck down.

C. Department of Labor Mobile Phone Apps

The Department of Labor has launched two applications ("apps") for mobile phones that will assist workers in proving wage discrimination and hazardous working conditions. The first is a "timesheet" app that allows workers to "independently track the hours they work and determine the wages they are owed."[3] It is currently available in both English and Spanish for iPhone and iPod Touch. This application is significant because worker-generated records will stand as definitive proof of an employee's hours if his or her employer does not have adequate records.

Also available for download is a Heat Index application that records outdoor temperature, calculates a heat index, and recommends "protective measures that should be taken . . . to protect workers from heat-related illness."[4] While this application will be relevant to a more specialized audience (outdoor workers), its import is broad. For example, suppose an employer refused to grant breaks or provide water to employees working in extremely hot weather. The application's record of the outside temperature—along with its unheeded recommendations—could support a civil or criminal suit against the employer.

While the Department of Labor's initial foray into the mobile application market may be modest, it illustrates a movement towards the use of technology as a tool to enforce existing laws.

II. Fairness Measures in Employment Law

Recent developments in employment law have emphasized fairness at the expense of legal certainty. A perennial dilemma for policy makers is whether they should adopt hard-line rules or a flexible balancing test. Hard-line rules have the advantage of legal certainty, while flexible balancing tests are better suited towards individuals' unique situations. Employment law as of late has favored fairness measures that entail individualized consideration. For example, the Equal Employment Opportunity Commission's (EEOC) regulations interpreting GINA confirm that it is difficult for an employer to easily prove the lawful acquisition of genetic information. Additionally, courts have expanded Title VII's prohibition on

gender discrimination to encompass discrimination based on sexual orientation as well as "sex plus discrimination."

A. GINA Regulations

GINA's application is quite broad: it prohibits employers from "requesting, requiring, or purchasing genetic information" as well as making any employment decisions based on an individual or his or her family member's genetic information. "Family member" includes "a person who is a dependent . . . as the result of marriage, birth, adoption, or placement for adoption" as well as relatives of the first, second, third, and fourth degree.[5] "Genetic information" is defined as an individual or his or her family member's genetic tests, "the manifestation of disease or disorder" in family members of the individual, and any request for, or participation in, genetic testing.[6] There are six statutory exceptions where an employer may legally acquire genetic information. Most relevant are exceptions for "inadvertent acquisition" and for acquisition in the course of processing an employee's Family Medical Leave Act request.[7]

GINA's prohibition on genetic-based employment discrimination is grounded in fairness: because employees cannot control their genetic information, treating employees differently because of their genetic information is unfair. Like many other employment laws, GINA attempts to force employers to treat employees equitably.

However, it will not always be clear when an employer violated GINA due to the subtle distinction between permissible and non-permissible acquisition of genetic information. For example, the regulations indicate that overhearing a conversation about genetic information does not violate GINA unless the employer "actively listen[s]." Similarly, "a casual question between colleagues . . . concerning the general well-being of a parent or child would not violate GINA," but a "follow [ ] up . . . question concerning a family member's general health with questions that are probing in nature" would. This situation could be especially tricky as co-workers engaged in conversation about medical issues are not likely to be considering the niceties of GINA.

An employer who has sufficient proof that its manager or managers acted with good intentions will eventually be able to refute a GINA claim. However, prior to that point, GINA's ambiguities will allow employees to bring claims and require employers to defend against these claims. Judicial disposition of GINA claims thus far shows that employees have had little luck stating, let alone proving, GINA claims.[8] Nevertheless, GINA's breadth and subtle distinctions will surely engender uncertainty and give rise to more claims in the future.

B. Title VII

Several recent decisions have expanded the literal language of Title VII to include discrimination that does not fit the familiar gender discrimination paradigm.[9] Two examples are: (1) discrimination based on sexual stereotypes; and (2) discrimination based on a particular subclass of men or women ("sex plus" discrimination).

1. Discrimination Based on Sexual Stereotypes

Courts have stretched the literal language of Title VII's prohibition on gender discrimination for some time. The most notable example is the U.S. Supreme Court's holding in *Price Waterhouse v. Hopkins* that sexual stereotypes could give rise to Title VII gender discrimination.[10] The plaintiff in *Hopkins* was a well-qualified manager who was repeatedly put down for her failure to adhere to feminine stereotypes. She was once referred to her by a colleague as "macho."[11] A second co-worker claimed she "overcompensated for being a woman," and a third recommended that she take "a course at charm school."[12] The Supreme Court held that this discrimination was actionable under Title VII.

The Third Circuit Court of Appeals considered a more tenuous claim of gender discrimination in the recent case of *Prowel v. Wise Business Forms, Inc.*[13] The plaintiff in *Prowel*, a gay male, was subjected to cruel and pervasive harassment. He was called "Princess" and referred to as a "fag."[14] Co-workers wrote graffiti in the men's bathroom "claiming Prowel had AIDS and engaged in sexual relations with male co-workers."[15] An unidentified co-worker left "a pink, light-up, feather tiara with a package of lubricant jelly" at his work station.[16]

As a result of this harassment, Prowel brought a Title VII action claiming that he was discriminated against because he did not fit his co-workers' definitions of a stereotypical male. The Third Circuit first admitted that the line between gender discrimination and sexual orientation discrimination "can be difficult to draw."[17] Nevertheless, it found sufficient evidence that Prowel was discriminated against based on gender stereotypes. The evidence established that Prowel, among other things "did not curse . . . was very well-groomed . . . [and] discussed things like art, music, interior design, and décor."[18] This distinguished Prowel from his male factory colleagues who liked to "hunt [ ] . . . fish [ ] . . . dr[i]nk beer .. .[and watch] football [and other] sports."[19]

Some would argue that the Third Circuit's holding impermissibly stretched the language of Title VII. Title VII prohibits "discriminat[ion] against any individual . . . because of such individual's . . . sex."[20] It is more accurate to say that Mr. Prowel was discriminated because of his sexual orientation and not because of his sex. This is an important distinction, as Congress has considered, and repeatedly rejected, proposals to add sexual orientation as a protected category under Title VII.[21] *Prowel* illustrates that many courts are not willing to wait for Congress. Therefore, employers must take immediate action to prevent workplace discrimination based on sexual orientation.[22]

2. "Sex Plus" Discrimination

Many courts have held that "sex plus" discrimination is illegal under Title VII. "Sex plus" discrimination refers to discrimination based on an employee's sex plus an additional characteristic. Thus, the alleged victims are a subclass within the larger categories of male and female.

The First Circuit recently considered a sex plus discrimination claim in *Chadwick v. WellPoint, Inc.*[23] The plaintiff was a well-respected employee of the defendant. In 2006, the plaintiff applied for a promotion at her supervisor's urging. The company named two finalists for this position: the plaintiff and another woman. The plaintiff was better-qualified, having received a superior performance review and possessing

greater work experience. Nevertheless, the plaintiff did not receive the promotion.[24]

The plaintiff's interviewers made several comments that suggested that the plaintiff's status as a mother cost her the promotion. For example, one interviewer sent the plaintiff an e-mail two months before the decision that said: "Oh my - I did not know you had triplets. Bless you!"[25] Also, in response to a hypothetical question about disciplining an associate, an interviewer asked the plaintiff: "[Y]ou are a mother[.] [W]ould you let your kids off the hook that easy if they made a mess in [their] room[?] [W]ould you clean it or hold them accountable?"[26] Finally, after being denied the position, an interviewer told the plaintiff: "It was nothing you did or didn't do. It was just that you're going to school, you have the kids and you just have a lot on your plate right now."[27]

The First Circuit held that the plaintiff alleged sufficient facts to survive a motion for summary judgment because "an employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities."[28] The district court granted summary judgment in favor of the defendant because "nothing in [the interviewer's] words showed that the decision was based on a stereotype about female caregivers, not about caregivers generally."[29] The First Circuit disagreed, explaining that plaintiffs may prove their case through circumstantial evidence, and there was sufficient evidence to show that the employer acted based on stereotypical notions about working women with children.[30]

In the strictest sense, *Chadwick* was a case about working-parent discrimination. However, the First Circuit peered beneath the surface and surmised that the case was really about discrimination based on sexual (female) stereotypes. *Chadwick*, like *Prowel*, illustrates that many courts take an expansive view of Title VII's protections.

III. Conclusion

In the labor and employment law universe, there are two things that we can be certain of. The first is that new technology will continue to impact the way that people work and interact. The second is that new technological and societal developments will necessitate laws (or interpretations of laws) designed to promote fairness. This article has outlined how agencies, courts, and Congress have reacted to recent technological developments and calls for fairness. These trends will surely continue into the future, and forward-looking employers can be ready for them.

Endnotes

1 The Guard Publ'g Co., 351 N.L.R.B. No. 70 (Dec. 16, 2007).

2 These decisions were rendered by lower NLRB tribunals, and not the official National Labor Relations Board. For simplicity's sake, the decision-makers are referred to as "the Board."

3 Press Release, U.S. Department of Labor, Wage and Hour Division, Keeping Track of Wages: The US Labor Department Has an App for That! (May 9, 2011), *available at* http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20110509_1.xml.

4 Android Market, OSHA Heat Safety Tool, https://market.android.com/details?id=com.erg.heatindex (last visited Oct. 23, 2011).

5 *See* 29 C.F.R. §1635.3 (2011). Fourth-degree relatives include one's "great-great-grandparents, great-great-grandchildren, and first cousins once-removed." 29 C.F.R. §1635.3(iv).

6 *See* 29 C.F.R. §1635.3(c).

7 § 1635.8(b).

8 *See, e.g.*, Dumas v. Hurley Medical Center, 2011 WL 3112882 (E.D. Mich. 2011) (The plaintiff failed to state a claim); Dodrill v. Alpharma, Inc., 2011 WL 3877076 (N.D.W. Va. 2011) (same); Bullock v. Spherion, 2011 WL 1869933 (W.D.N.C. 2011) (same). *But see* Tate v. Quad/Graphics Inc., 2011 WL 4352301, at *2 (E.D. Ark. 2011) ("[The plaintiff] alleges that defendants have requested medical information with respect to him or his family members . . . . It is unclear whether [the plaintiff] has a GINA claim . . . . [Therefore,] he is ordered to file a second amended complaint correcting the deficiencies in his GINA claim within 30 days of this order.").

9 For an excellent discussion of the topic, see Susan Fahey Desmond, *Employment Law: Why It Frequently Changes and What Has Happened Recently*, *in* Complying with Employment Regulations, Leading Lawyers on Analyzing Legislation and Adapting to the Changing State of Employment Law (Inside the Minds ed., 2011).

10 490 U.S. 228 (1989).

11 *Id.* at 235.

12 *Id.*

13 579 F.3d 285 (3d Cir. 2009).

14 *Id.* at 287.

15 *Id.*

16 *Id.*

17 *Id.* at 291.

18 *Id.*

19 *Id.* at 287.

20 42 U.S.C. 2000 e-2(a).

21 Desmond, *supra* note 9, at *8.

22 That is, if state law does not already prohibit it. *See, e.g.,* Mass. Gen. Law. c. 151b ("It shall be an unlawful practice . . . [f]or an employer . . . because of. . . sexual orientation . . . to refuse to hire or employ or to bar or to discharge from employment [an] individual or to discriminate against such individual . . . .").

23 561 F.3d 38 (1st Cir. 2009).

24 *Id.* at 41.

25 *Id.* at 42.

26 *Id.*

27 *Id.*

28 *Id.* at 45.

29 *Id.* at 46 (quoting Chadwick v. WellPoint, Inc., 550 F. Supp. 2d 140 (D. Me. 2008)).

30 *Id.* at 46-47.