JONES WALKER

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U.S. SUPREME COURT KNOCKS OUT FMLA REGULATION

In a March 19, 2002 ruling, the U.S. Supreme Court invalidated a troublesome regulation issued by the U.S. Department of Labor (DOL) concerning the effect of an employer's failure to notify an employee of his rights under the Family and Medical Leave Act (FMLA).

The case involved an employee who was granted 30 weeks of medical leave by his employer. The employer did not notify the employee that any of his leave would be counted against his 12 weeks of FMLA leave. At the end of his leave, the employee demanded additional leave, which he claimed he was entitled to under the FMLA because his employer had not given him "proper notice" that his previous 30 weeks of medical leave were covered by the FMLA. The company refused and fired the employee when he failed to return to work.

The DOL took the position that when an employer fails to give "proper notice" to an employee on leave covered by the FMLA, the employer can't count the employee's leave as FMLA leave. Thus, said the DOL, none of the leave an employee takes before receiving his FMLA notice can be counted as FMLA leave. So according to the DOL, the employer in this case would have to give the employee 42 weeks of leave.

Hogwash, said the Supreme Court. In a 5-4 ruling, the Court said the DOL's rule is unlawful because it has the effect of requiring employers to give employees more than 12 weeks of FMLA leave, which is all the statute requires of them, when they fail to give employees notice that their leave is covered by the FMLA. In other words, the regulation was in conflict with the statute and, therefore, invalid.

Despite the Court's ruling, employers are still encouraged to follow the DOL's notice requirements to minimize confusion and make sure both you and your employees are clear about your respective rights and obligations. But if your notice is technically deficient, you can still count your employee's absences against his FMLA entitlement. *Ragsdale v. Wolverine World Wide, Inc.*, No. 00-6029 (U.S. March 19, 2002).

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PERSONAL SCREENSAVERS A PROBLEM FOR EMPLOYER

Addressing an issue of first impression, a three-member panel of the National Labor Relations Board held that an employer unlawfully discriminated against an employee when it prohibited her from displaying a union-related message on a computer screensaver at work and then reprimanded her because of the content of the message. Because the employer routinely permitted other employees to use a wide variety of personal, non-work-related screensaver messages, its actions against this employee would be unlawful discrimination.

The employee began using the screensaver a month into an organizing campaign. The screensaver said “Look for the U.” The supervisor interpreted “U” to mean union, called the employee into her office, and gave her a verbal warning. The supervisor said that the computer was hospital property and it was inappropriate for the employee to post prounion messages on hospital property.

The employer tried to argue that the same principle that governs the use of bulletin boards at work should also govern the use of screensavers. However, the Board found that the use of a screensaver was more similar to a union button than a bulletin board. Other employees use screensavers to promote their favorite sports teams or for personal messages, such as “have a nice day.”

The bottom line is, whether it is a bulletin board or a computer screensaver, if you allow employees to post personal, non-work-related messages, you cannot then discipline an employee because the content of his or her message is union-related. Thus, as with bulletin boards, personal screensavers should not be used; otherwise, you run the risk of what happened to this employer.

VERIFIED CHARGE NOT REQUIRED TO TOLL EEOC FILING REQUIREMENT

In another March 19, 2002 ruling, the U.S. Supreme Court upheld an EEOC regulation that permits an otherwise timely filer to verify a charge after the time for filing has expired.

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The case involved a college professor who was denied academic tenure and then faxed a letter to the EEOC accusing the college of gender-based, national origin, and religious discrimination. The letter included no oath or affirmation. The EEOC told the professor to file a charge within the applicable 300-day time limit and sent him the EEOC's standard form charge of discrimination, which he returned 313 days after he was denied tenure. When he later filed suit, the college asked the court to dismiss his case based on his failure to file a verified charge of discrimination with the EEOC within the applicable filing period. The professor argued his letter was a timely filed charge for purposes of tolling the filing deadline and the EEOC's rules allowed him to verify his charge at a later date even after the filing period expired. The district court agreed with the college and dismissed the case. The court of appeals affirmed, and the professor asked the Supreme Court to review the lower courts' decisions.

The only issue the Court agreed to decide was whether the EEOC's "relation back" rule was authorized by Title VII. The Court found there is nothing about the word "charge" as it appears in Title VII to require an oath at the time it is filed. Title VII doesn't even define "charge." It merely requires that a charge be filed within a given period, without indicating whether it must be verified when filed, and it requires that a charge be verified, without saying when. The time limitation, said the Court, is meant to encourage an employee to file a discrimination claim before it gets stale, while the verification requirement is intended to protect employers from the disruption and expense of responding to a claim unless the employee is serious enough to support it with an oath under penalty of perjury. The verification requirement, however, demands an oath only by the time the employer is obliged to respond to the charge, not at the time an employee files it with the EEOC.

On the bright side, the Court's decision does not reach the issue of whether a letter, as opposed to a completed EEOC charge form, can be considered a "charge" for purposes of tolling the charge-filing period. This issue is bound to be litigated in the lower courts following this decision. Of significance, said the Supreme Court, will be whether the EEOC treats a letter from an employee or her attorney as a "charge." The Court further indicated that whether the EEOC follows its own rule of providing notice to a charged employer within 10 days after the filing of a charge may be the determining factor. *Edelman v. Lynchburg College*, No. 00-1072 (U.S. March 19, 2002).

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SWAT – THE UNION

Shipyard Workers and Allied Trades Union (SWAT), a federation of construction and metal-working trades, appears to be on the move in the Gulf South. Hot off the heels of a representation case victory in Amelia, Louisiana by one of its affiliates, SWAT has begun a campaign focusing on Louisiana and Texas fabrication and shipyards. SWAT has affiliated itself with Offshore Mariners United (OMU) and apparently with a foreign union called Technip-Coflexip, which represents workers at fabrication and shipyards in France. The significance of the affiliation with the foreign union is that SWAT is utilizing the same model that OMU has used to wage a global campaign against offshore supply vessel companies in the oil industry.

In a recent propaganda release, SWAT and Technip outlined a comparison between union and nonunion retirement benefits, wages, vacation plans, injury experience, and layoffs in the United States. SWAT claims the United States does not have sufficient protections for its workers and the atmosphere in the United States is antiworker and antiunion. This is precisely the type of message that garnered the interest of the Norwegian Oil and Petrochemical Workers Union and International Transport Federation, two organizations that came to the aid of OMU in waging a worldwide campaign to boycott U.S. companies in the oil industry, as well as to interfere with present and potential contracts with customers.

OMU and its cohorts have been vigilant in their attempts to disrupt the operations of numerous companies in South Louisiana and Texas. If there is a lesson to be learned from OMU's global corporate campaign, it's that companies that may be targeted by SWAT should take precautions immediately to educate their managers and employees on union issues and to reinforce their positive employee relations programs. Companies in the offshore supply vessel industry have successfully thwarted attempts by OMU because of their proactive strategy of education and positive employee relations. The same strategy should be utilized by fabrication and shipyards that may be the target of a SWAT campaign. To view the most recent news release from SWAT go to www.cgttp.eu.org.

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ILLEGAL ALIENS CAN'T RECOVER BACK PAY

On March 27, 2002, the U.S. Supreme Court ruled that the National Labor Relations Board (NLRB) cannot award back pay to workers not legally authorized to work in the United States.

The case involved unfair labor practice charges by Jose Castro and several other employees who were laid off shortly after they supported a successful union organizing campaign. An administrative law judge (ALJ) of the NLRB initially ordered the employees reinstated with back pay, but he overturned his order when he later learned Castro was an illegal alien.

The NLRB agreed that Castro should not be reinstated but awarded him back pay for the period between his layoff and the date his employer discovered his illegal status. The Supreme Court said the NLRB couldn't do that.

According to the Court, federal immigration policy, specifically the Immigration Reform and Control Act, "foreclosed the Board from awarding back pay to an undocumented alien who has never been legally authorized to work in the United States." Awarding back pay to illegal aliens, said the Court, has the effect of condoning prior violations and encouraging future violations of U. S. immigration laws. *Hoffman Plastic Compounds, Inc. v. NLRB*, No. 00-1595 (U.S. March 27, 2002).

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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