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A legal update from Dechert's Labor and Employment Group

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The "But She Didn't See the Porn" Defense to Hostile Work Environment Claims

The U.S. Court of Appeals for the Second Circuit recently issued a decision that should alert employers to the consequences of ignoring what employees do in the confines of their offices, particularly when the employee's conduct involves pornography. In *Patane v. Clark*, No. 06-3446, 2007 WL 4179838 (2d Cir. Nov. 28, 2007), the circuit court found that the plaintiff, whose complaint described her supervisor's habit of watching pornographic videos in his office, had sufficiently plead claims for hostile work environment. The plaintiff, Eleanora M. Patane ("Patane"), an executive secretary at Fordham University, reported to a number of supervisors, including John Richard Clark, a Classics professor. Plaintiff alleged that Clark regularly viewed "hard core pornographic videotapes on a TV-VCR in his office" for one to two hours a day. Patane also alleged that she discovered pornographic web sites on her computer and believed that Clark was using her computer to view these web sites on weekends. She also claimed that she was exposed to pornographic material directly because Clark regularly received them in his office mail, which Patane was responsible for opening and delivering to his mailbox. Patane claimed that she reported Clark's behavior to the director of the Equity and Equal Opportunity Department and later to the associate vice-president of Academic Affairs. Fordham took no action as a result of these complaints and, instead, the plaintiff alleged that she suffered disciplinary and other adverse actions in retaliation for her complaints.

The district court had concluded the claims did not rise to the level of a hostile work environment because Patane "never saw the videos, witnessed Clark watch the videos, or witnessed Clark performing sexual acts." The Second Circuit flatly rejected this conclusion, reiterating that the Circuit has repeatedly cautioned against "setting the bar too high" in the sexual harassment context. The court instead noted that the mere presence of pornography in an office is a relevant factor in determining whether a hostile work environment has been created. Moreover, the combination of Patane being forced to handle the pornographic material, the pornographic web sites found on her computer, an additional allegation that Clark had previously harassed a female professor, and the university's failure to take any action in response to Patane's complaint could lead a reasonable jury to conclude that Patane had been subject to an objectively hostile work environment. The court clarified that offensive conduct need not be aimed directly at the plaintiff in order to create a hostile work environment and reiterated its position that sexually charged conduct in the workplace may create a hostile environment for women even if it is also experienced by men.

The circuit court also concluded that Patane's complaints to university officials created general corporate knowledge, which satisfied the knowledge requirement of a retaliation claim and held that the plaintiff adequately alleged a causal connection by claiming that she overheard Clark and another professor conspiring to not give her work so that she would leave her job. In addition, the court found that Patane's claim that Clark had stripped her of nearly all of her secretarial duties came within the traditional definition of an adverse employment action. It also noted that under the U.S. Supreme Court's recent decision in *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2409 (2006), the conduct alleged by Patane certainly qualified as action that could "dissuade a reasonable worker from making or supporting a charge of discrimination" and thus constituted retaliation. Notwithstanding these conclusions, the circuit court agreed with the trial court's dismissal of Patane's Title VII sex discrimination claim because her complaint did not allege that she was subject to any gender-based adverse employment actions.

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In sum, *Patane* should remind employers that they can be liable for employees' "private" actions when those actions begin to impact the surrounding workplace. This is particularly true when the offending employee has a supervisory role and when the offensive conduct involves pornographic materials. An employer is not free to allow its employee to view pornography in the workplace.■

Recent Developments Under the FMLA

Department of Labor Regulations Requiring Prompt Individual Notice by Employer of FMLA-Designated Leave Are Upheld

In *Downey v. Strain*, 2007 WL 4328487 (5th Cir. Dec. 12, 2007), the U.S. Court of Appeals for the Fifth Circuit held that the FMLA regulations requiring employers to provide individualized notice that a leave of absence will be designated as FMLA leave were valid as enforced below where the plaintiff demonstrated that she was prejudiced by her employer's noncompliance.

Susan Downey ("Downey") was employed by the St. Tammany Parish Sheriff's Office in the crime lab. After suffering injuries to her knee and shoulder, Downey took a leave of absence from November 2002 through March 2003 and was charged with 424 hours of FMLA leave. In June 2003, Downey again injured her knee, which resulted in her need to use additional hours of FMLA time, leaving her with only forty-four remaining FMLA hours for the applicable 12-month period. On July 30, 2003, Downey had surgery on her knee and took a leave of absence through the beginning of October 2003. Downey's supervisor charged this two-month leave to her annual FMLA entitlement, but did not inform her that he was doing so. Accordingly, Downey's protected FMLA leave was exhausted in the middle of her absence. Upon her return to work in October 2003, Downey was reassigned to the corrections division where she received fewer fringe benefits.

Downey sued Rodney Strain ("Strain"), the Sheriff, in his official capacity, contending that he had interfered with her rights under the FMLA by failing to provide her with individualized written notice that her leave for her second knee surgery would be designated as FMLA leave. She contended that, had she known that the second leave would be counted, she would have postponed her surgery to a time when it would not have caused her to exceed her FMLA entitlement. The jury found in favor of Downey, and Strain appealed.

Affirming the jury verdict, the Fifth Circuit rejected Strain's argument that the FMLA regulations requiring employers to provide prompt individualized notice that leave will be designated as FMLA leave are invalid. *See* 29 C.F.R. §§ 825.208(a), 825.208(b)(1). Citing the U.S. Supreme Court's decision in *Ragsdale* and several other recent opinions, the court concluded that the FMLA regulations at issue are not arbitrary, capricious, or manifestly contrary to the FMLA "as long as they are enforced in a manner that is consistent with the FMLA's remedial scheme, which requires an employee to prove prejudice as a result of an employer's non-compliance." According to the court, the individualized notice regulations were valid as applied to this case because Downey sufficiently demonstrated that she was prejudiced by Strain's non-compliance.

Employee Entitled to FMLA Protections Even With Minimal Notice of Intent to Take Leave

In *Sarnowski v. Air Brooke Limousine, Inc.,* 2007 WL 4323259 (3d Cir. Dec. 12, 2007), the U.S. Court of Appeals for the Third Circuit held that the plaintiff had provided sufficient notice of his intent to take FMLA leave to bar the company from interfering with his FMLA rights where he notified the company that he needed to wear a heart monitoring device and that he might require surgery in the future.

James Sarnowski ("Sarnowski") was hired by Air Brook Limousine, Inc. ("Air Brook") as a service manager responsible for vehicle maintenance in July 2001. Initially, he received positive performance reviews and a pay raise in June 2002. In October 2002, Sarnowski underwent quintuple coronary artery bypass surgery and was out of work for 6 weeks. Upon his return, Air Brook gave Sarnowski a written warning, stating that his performance had fallen to unacceptable levels in the weeks that preceded his leave and since his return. After suffering heart palpitations in the spring of 2003, Sarnowski informed his immediate supervisor that he had four additional blocked arteries, would have to wear a heart monitor for 30 days, and might need to undergo another operation resulting in an additional 6 weeks of leave. Eight days later, Air Brook terminated Sarnowski's employment, citing poor performance.

The district court granted summary judgment for Air Brook on Sarnowski's FMLA claim, concluding that Sarnowski "never officially placed a request to take leave from work." Rather, he had simply mentioned to his supervisor that he *might* have to take time off in the future. The Third Circuit reversed, concluding that "Air Brook had sufficient notice of Sarnowski's intent to

take leave to bar Air Brook from interfering with Sarnowski's rights under the FMLA." The court reasoned, "the regulations are clear that employees may provide FMLA qualifying notice before knowing the exact dates or duration of the leave they will take." While Sarnowski was not certain that he would need surgery, he had conveyed what information he had and made it clear that his health problems were continuing.

FMLA Expansion for Service Members on Hold

In other news under the FMLA, on December 28, 2007, President George W. Bush vetoed legislation that would have expanded the FMLA to afford protected leave to workers who care for wounded soldiers and to the family members of those called to activity duty. The FMLA provision was part of a larger defense bill known as the National Defense Authorization Act. Specifically, the bill's FMLA provisions would have required employers to provide up to 12 weeks of unpaid leave to family members of soldiers because of any "qualifying exigency" arising out the service member's active duty or impending call to active duty. It would have also required employers to give up to 26 weeks of leave to family members, including "next of kin," to care for a service member wounded while on active duty. According to the White House, President Bush pocket vetoed the bill for reasons unrelated to the FMLA provisions. The move came as a big surprise to leaders in Congress who fully expected the president to approve the legislation. While the proposed expansion of the act has been stalled, it may only be a matter of time before the legislation is passed.■

NLRB Recognizes Employer Property Right in E-mail System Even During Non-Work Time

In its highly anticipated decision in *The Guard Publishing Company*, 351 NLRB No. 70 (Dec. 16, 2007), the National Labor Relations Board (the Board) ruled that the National Labor Relations Act does not entitle employees to use an employer's e-mail system for union communications prohibited by the employer's nondiscriminatory policy. The case arose when The Register Guard (the "Guard"), a newspaper in Eugene, Oregon, put in place a "no solicitation" policy that prohibited employee use of its email system "to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." After the Guard disciplined employee Suzi Prozanski for sending three union-related e-mails, Local 37194 of the Communications Workers of America challenged the Guard's policy, claiming that while an employer may impose non-discriminatory restrictions on the use of its e-mail system during working time, it generally cannot prohibit use of the system during non-work time. The general counsel sided with the union, arguing that the Board should adopt the rule that broad prohibitions on non-business use of employer e-mail systems should be "presumptively unlawful, absent a particularized showing of special circumstances."

A majority of the Board (consisting of Republicans Chairman Battista and Members Schaumber and Kirsanow) disagreed, holding that an employer possesses a "basic property right" in its e-mail system and that that property right need only yield to employees' § 7 rights where employees would be "entirely deprived" of the ability to engage in protected activity if not given access to the employer's property. Accordingly, the Board held that an employer "may lawfully bar employees' non-work-related use of its e-mail system, unless the [employer] acts in a manner that discriminates against Section 7 activity."

The Board then went on to significantly revise its standard for determining what constitutes "discrimination" against protected union activity. Under previously controlling precedent, an employer that permitted any non-work use of its e-mail system could not prohibit use of the system for § 7 purposes. The *Guard Publishing* Board, however, concluded that this rule was too broad and that only where the employer discriminates "along § 7 lines" (i.e., prohibits protected communications but permits similar, non-protected ones) does it commit an unfair labor practice. Under this standard, an employer may lawfully permit use of its e-mail system for personal, non-political communications, while at the same time prohibiting "solicitations" on political or union-related topics. Applying the standard to the facts of the case, the Board held that the Guard validly disciplined Prozanski for her union "calls to action" even though it had previously permitted personal communications by other employees.

Democratic members Liebman and Walsh dissented from the majority's decision, stating that "today's decision confirms that the NLRB has become the Rip Van Winkle of administrative agencies." The dissenters stated that because of the central role that e-mail has come to play in daily life, they would hold that where an employer permits "regular, routine" e-mail usage by employees, a policy "banning all non-work-related so-

licitations is presumptively unlawful absent special circumstances."

In conclusion, the Board's decision in *The Guard Publishing Company* should be a relief for employers in that it recognizes employers' basic right to impose reasonable restrictions on employee use of workplace e-mail systems. However, employers must remain careful that their e-mail policies do not distinguish among employee communications in a way that discriminates "along Section 7 lines." Moreover, the Board is a "political animal" and a change in presidential administration from Republican to Democratic would make reliance on this decision risky.■

OFCCP Issues FAQs Concerning the Review of Contractor Compensation Practices

In December 2007, the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) released new Frequently Asked Questions (FAQs) with responses concerning its Interpretative Standards for Systemic Compensation Discrimination ("Standards") (i.e., formal standards for the agency's investigation of systemic pay discrimination under Executive Order 11246) and Voluntary Guidelines for Self-Evaluation of Compensation Practices ("Guidelines") (i.e., procedures a contractor may use to evaluate its own compliance with the Executive Order). The FAQs, which can be found at http://www.dol.gov/esa/regs/compliance/ofccp/faqs/comstrds.htm, are a basic but helpful starting point for those unfamiliar with OFCCP review standards and procedures. A contractor planning to conduct a self-audit of compensation or preparing for an OFCCP audit should also review the actual Guidelines and Standards.

The FAQs confirm that in nearly all compliance evaluations, OFCCP uses a tiered process, commencing with a desk audit. The agency moves to successively detailed stages of scrutiny (i.e., requests additional data, investigates on-site, interviews witnesses, etc.) when it believes it has discovered indicators of potential discrimination. Initially, OFCCP sends a contractor a Scheduling Letter requiring submission of affirmative action plans, personnel transaction data, and "annualized compensation data (wages, salaries, commissions, and bonuses) by salary range, grade, or level showing total number of employees by race and gender and total compensation by race and gender." Using what is submitted, OFCCP then performs a simple comparison of the mean compensation of males versus females and minorities versus non-minorities by salary grade/level or similar grouping. Based on the results, OFCCP may move to stage two of investigation, at which it requests and analyzes individual employee data, as listed in the FAQs. The FAQs explain that if the analysis of this data continues to reveal an indication of potential discrimination, OFCCP will perform a full review of the contractor's compensation systems.

OFCCP practitioners will recognize the first two stages mentioned in the FAQs respectively as OFCCP's tipping point analysis and mini (or cluster) regression analysis. The stage three full investigation is the level at which OFCCP focuses significant resources on trying to build full multiple regressions that statistically support findings of systemic pay discrimination for potential use in litigation, and to gather anecdotal evidence of discrimination. The FAQs neither clearly identify the stages of review nor describe the actual method of analysis OFCCP uses at each stage, but are useful in other regards.

For example, they hint at the extent to which the agency may be willing to consider a contractor's timeliness arguments when it is attempting to limit the scope of OFCCP's investigation during an audit or to defend against findings of alleged compensation discrimination. In *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007), the U.S. Supreme Court ruled that an employee must challenge an allegedly discriminatory pay decision within 180 (or 300) days for the claim to be timely under Title VII. Despite the agency's historical reliance on Title VII precedent in enforcing Executive Order 11246, after *Ledbetter* OFCCP repeatedly contended that the decision had no relevance to its prosecution of pay discrimination cases. Taking a less emphatic position in the FAQs, OFCCP states that it does not believe *Ledbetter* invalidates its Standards or permits a contractor to refuse to provide the agency with requested pay data during a review, but does admit that it is examining the impact of *Ledbetter* on specific cases.

Several of the FAQs address what, if any, new actions the Standards and/or Guidelines require that a contractor undertake. The FAQs note that while OFCCP regulations require that a contractor review its pay practices annually, in so doing the contractor need not follow either the procedures OFCCP has established for itself under the Standards or those described in the Voluntary Guidelines. According to OFCCP, a contractor is not obligated to conduct a grand scale review of its own employment records or to create a database for OFCCP use during a compliance evaluation. Nor is it

obligated to engage statisticians or economists to conduct the self-evaluation. (Of course, a contractor ignores the Guidelines and Standards at its own risk, as OFCCP will be guided by them during an audit, and the contractor will need to defend the audit on that basis.) To the extent a contractor already has available in electronic format employee data that OFCCP requests and considers relevant to its analysis of compensation, the agency believes its regulations require production of that data.

According to OFCCP, a contractor's decision to implement a self-evaluation program that does not conform to the Guidelines will neither be taken into account nor held against the contractor when OFCCP itself assesses whether the contractor's pay system is discriminatory. In essence, the contractor's analyses will be ignored. Note, however, that a contractor's failure to adopt any sort of self-evaluation method will result in a finding of a violation for failure to self-audit.

Under the Standards and Guidelines, pay must be analyzed for groups of employees who are similarly situated considering job content, skills/qualifications, and responsibility level (referred to under the Guidelines as Similarly Situated Employee Groups or "SSEGs.") As the FAQs note and contractors are advised, regression analyses are the preferred method of analysis, provided the SSEG is sufficiently large – that is, it has at least 30 total members, including at least five persons per comparison group (i.e., males and females; minorities and non-minorities.) Contractors are advised to use non-statistical methods to review compensation for an SSEG that does not satisfy the 30/5 rule.

Compensation and other personnel information provided to OFCCP during an audit will be treated by OFCCP as confidential to the maximum extent it is exempt from disclosure under the federal Freedom of Information Act. Contractors should make efforts to label the material they submit to OFCCP accordingly.■

OSHA Tells Employers to Pay for Employees' Personal Protective Equipment

After years in the making, the Occupational Safety and Health Administration ("OSHA") has issued a new rule requiring employers to pay for the personal protective equipment necessary to protect employees from processing, mechanical, environmental, chemical, and radiological hazards presented in the workplace.

Under existing OSHA regulations, employers are required to assess the workplace and identify hazards necessitating the use of employee personal protective equipment. The employer must also ensure that all affected employees receive training on the need for and proper use of any personal protective equipment. OSHA's new rule now requires that the employer provide all required protective equipment "at no cost to employees."

Certain items, however, are excluded from this general rule. Employers are not required to pay for:

- non-specialty safety-toe protective footwear (such as steel-toed shoes or boots) or non-specialty prescription safety eyewear, if the employer allows employees to wear the items off the job site;
- shoes or boots with built-in metatarsal protection that the employee requests to use in lieu of employer-provided metatarsal guards;
- logging boots required for the logging industry;
- everyday clothing, such as long-sleeve shirts, long pants, street shoes, and normal work boots;
- ordinary clothing, skin creams, or other items used solely for protection from the weather, including winter coats, gloves, raincoats, ordinary sunglasses, and sunscreen;
- personal protective equipment needed to replace personal protective equipment lost or intentionally damaged by an employee;
- adequate protective equipment that the employee owns and the employer allows the employee to use; and
- protective equipment that other specific OSHA rules deem to be the financial responsibility of a party other than the employer.

Given the change imposed by this new rule, OSHA has determined that the rule will not become effective until February 13, 2008, and employers will be given until May 15, 2008, to comply with the new payment requirements. While this new rule may be challenged,

employers should assume that the rule will go into effect as scheduled and thus plan their strategies accordingly. Employers would be well advised to reassess the risks presented by the worksite, determine what types of personal protective equipment are needed to guard employees against such risks, and identify the most cost-effective way to provide employees with the required protective equipment, making sure to consider whether personal protective equipment not required to be paid for by the employer under OSHA's rule, such as ordinary and everyday clothing, is sufficient to meet the employer's responsibility and adequately protect workers from worksite hazards.■

Labor Law Developments in the UK for 2008

Charles Wynn-Evans and Georgina Rowley from Dechert's London employment team summarize the principal changes to legislation which will affect UK employers during the first half of 2008. Dechert's employment team in Europe includes representatives in London, Paris, Brussels, and Munich.

- *Increases to compensation limits:* from February 1, 2008, the maximum compensatory award payable in successful unfair dismissal cases rises from £60,600 to £63,000, and the cap on the value of one week's pay for the purposes of calculation of statutory redundancy payments rises from £310 to £330.

- *Immigration:* the Immigration, Asylum and Nationality Act 2006 (IANA) comes into force on February 29, 2008. IANA creates a new criminal offense of knowingly employing an individual who is not entitled to work in the UK. IANA preserves the existing statutory defense available to an employer where it has checked and recorded specific identification and immigration documents relating to the employee in question. However, an employer will not be able to rely on the statutory defense if at any stage it is aware that an employee is working illegally. Any person found guilty of knowingly employing illegally may be subject to an unlimited fine or two years imprisonment.

- *Corporate Manslaughter:* the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCH) comes into force on April 6, 2008. CMCH will create a new offense of corporate manslaughter if the way an organization's activities are managed or organized causes a person's death and amounts to a gross breach of a duty of care owed to the deceased. Accordingly, from April 6, 2008, employers may be prosecuted for management failures that lead to deaths of employees. There is no upper limit on the fines or remedial or improvement notices that may be imposed on employers. A convicted organization may also be ordered to publicize details of the offense.

- *Worker Consultation:* the scope of the Information and Consultation of Employees Regulations 2004 (the ICE Regulations) extends with effect from April 6, 2008. The ICE Regulations, which implement the European Information and Consultation Directive, will cover organizations with 50 or more employees (they previously applied to organizations with 100 or more employees). In brief, the ICE Regulations provide a mechanism by which UK workforces may establish a representative forum with which the employer is obliged to consult in relation to proposed business developments.

- *Pension plans:* the Occupational and Personal Pensions Scheme (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (the Pensions Regulations), which establish the requirements for employers to consult with employees over proposed changes to pension plans, will extend in scope on the same basis on the same date. From April 6, 2008, the Pensions Regulations (which currently apply to employers with 100 or more employees) will apply to organizations employing 50 or more employees.■

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