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Highlighting Recent Issues in Employment Law



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Employee First Amendment Rights Restrict Employer Discipline

It is late on a Friday afternoon and the phone rings: An important client—the head of a large public entity—is extremely upset. One of his administrators ignored his advice and decided to fire an employee. The now-former employee also happens to be an important member of several organizations that the public entity relies on for support. The client needs your advice, pronto: Can he immediately fire the administrator for failing to follow his clear direction? There is also concern that the public entity could face some backlash if members of the local organizations learn that one of their own was treated so poorly. Being an experienced employment lawyer, you know to ask a lot of questions to learn more about the key facts and circumstances surrounding this situation before evaluating the risks and potential claims and then advising your client on a course of action. Some legal research might be in order, too, because, as you know, employment jurisprudence is always changing. Of course, while you work with your client to learn as a much as possible about the relevant background, and if you represent a public employer, do not forget to explore the possibility that the employee in question participated in some sort of protected speech that might be motivating your client's desire to fire.

The Employment Law Section of the Ohio Attorney General's office has the challenge of representing a myriad of public sector employers - from state agencies, boards and commissions to state colleges and universities. The Section is frequently asked to assist clients with evaluating potential employment claims, including whistleblower-type claims arising from an employee's protected speech.

Recently, in *Lane v. Franks*, No. 13-483, ___ U.S. ___ (2014), the U.S. Supreme Court considered a federal employment case alleging retaliation against a public employee who was fired after testifying about corruption in a criminal trial and in a unanimous decision issued on June 19, 2014, determined that the testifying employee spoke as a concerned citizen and should not have been subjected to discipline.¹ The *Lane* decision is significant because it is the first U.S. Supreme Court ruling since 2006 to squarely address the limitations on a public employer from taking an adverse employment action against an employee because of that employee's speech.

¹ *Lane v. Franks* (No. 13-483).

Legal backdrop of First Amendment retaliation claims

In 1968, the U.S. Supreme Court held in *Pickering v. Board of Ed. of Township High School Dist.* that public employers cannot require employees to surrender their constitutional rights. Rather, the First Amendment protection of a public employee's speech hinges on the balance "between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."² Essentially, *Pickering*, which remains good law today, allows public employees the right to speak out on matters of public concern under the protections of the First Amendment, unless the employee's speech is too disruptive to the workplace.

In accordance with this balancing test, both public sector employers and the courts have been left to weigh these factors when determining if an employee's speech is protected from subsequent retaliation. Public sector employees are often uniquely positioned to observe or learn of something happening at work that might be a "matter of public concern." Thus, employment-related retaliation claims under the First Amendment, often in the form of whistleblower-type complaints, are nothing new to public sector employers.

In 2006, the U.S. Supreme Court offered some clarity to the scope of First Amendment protected speech afforded to public employees. In *Garcetti v. Ceballos*, the Court held that a public employee's speech is generally not protected where the statements or speech were made pursuant to the employee's official duties—even if the speech is on a matter of public concern.³ Basically, if the employee speaks pursuant to his official government job duties, then it is not free speech but rather duties speech. Still, *Garcetti* said little about speech that simply relates to public employment or concerns information learned in the course of public employment. So, the employee may well have protected speech on a matter of public concern that relates to their employer, but is outside of and not "part and parcel" of the employee's public sector work duties.

Lane v. Franks

Edward Lane was an administrator at an Alabama community college who learned that an employee of the college, Suzanne Schmitz, was getting paid by the college for a job that she never actually performed. After complaining to the college president, Steve Franks, Lane was basically told not to worry about Schmitz. Lane disagreed with that approach and instead terminated Schmitz's appointment with the college. Later, Lane was subpoenaed to testify before a federal grand jury and then in court during the criminal prosecution of Schmitz. Franks not being pleased with Lane ignoring his direction to leave Schmitz alone decided to terminate Lane under the guise of an employee layoff. Following his termination, Lane brought an action against Franks in federal court for violation of his First Amendment rights.

In a unanimous decision, authored by Justice Sonia Sotomayor, the Supreme Court held that a public employee who testifies truthfully at a trial, pursuant to a subpoena – here, Franks - is protected by the First

² *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

³ *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S.Ct. 1951, 164 L.Ed.2d 689.

Amendment from employer discipline or retaliation. However, the Court also considered the defense of qualified immunity, which precludes damages where it can be shown that the relevant constitutional law at issue was not clearly settled law in that Circuit at the time of the unconstitutional conduct, thereby failing to provide fair notice to the defendant that his or her conduct was unconstitutional. The Court then concluded that the law espoused in its decision was not well-settled at the time of Franks' conduct and therefore, Franks was entitled to qualified immunity.

The Court's analysis is rather straightforward. First, the Court looked to whether Lane's testimony at the criminal trial was "speech as a citizen on a matter of public concern." The Court quickly concluded that Lane's testimony was given as a citizen and regarding a matter of public concern—namely the misuse of public funds. Second, the Court examined whether the government as employer had an "adequate justification" under the *Pickering* balancing test to override the employee's First Amendment rights. The Court found that Franks and the college failed to advance any plausible governmental interest by terminating Lane that could outweigh Lane's First Amendment rights. Third, the Court considered *Garcetti's* holding to determine that Lane's speech was not made pursuant to his official job duties—in that it was not his job to testify in court, even if some of what he testified about concerned his duties or things he learned about while at work. Predictably, the Court commented that it is "every citizen's duty under subpoena to testify truthfully at trial." Consequently, the Court found that the First Amendment protected Lane's "speech" and made his removal subject to legal challenge. Finally, the Court granted qualified immunity to Franks, noting that qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions," and that to defeat qualified immunity the legal issue needed to be "beyond debate" when Franks terminated Lane.

Impact

The Court's holding clarifies the scope of First Amendment protection for public employees in the limited situation involving subpoenaed and truthful testimony by a public employee and affirmed its strong support for the qualified immunity defense to insulate unknowing government actors from acts that are not clearly unconstitutional. The decision does *not*, however, extend protection to government employees who must testify as part of their regular duties, such as police officers and lab analysts.⁴ But it leaves open the questions regarding: (1) protection for a public employee if the testimony was not compelled by subpoena or was not truthful and (2) how the First Amendment analysis would apply in the case of a public employee who testifies in litigation where the public institution is a party and the employee is a designated representative.⁵

Bottom line: *Lane v. Franks* declares that truthful testimony of a public employee on a matter of public concern, which is not given as part of his or her job duties, is indeed protected from a governmental employer's discipline or retaliation by the First Amendment. Indeed, all public employers are now on notice

⁴ See Fed. Rule Civ. Proc. 30(b)(6).

⁵ Some commentators have also noted that Lane failed to raise possible legal claims for retaliation beyond his First Amendment rights, such as protections under state or federal laws that prohibit interference or witness intimidation. For example, the federal Civil Rights Act of 1871, 42 U.S.C. §1985, or Section 2921.50 of the Ohio Revised Code.

that such protection is “clearly established law”—meaning the defense of qualified immunity is no longer applicable to future actions arising from similar operative facts.

By Sloan Spalding
Employment Law Section Chief

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Religious Accommodation and the Hiring Process: What Constitutes Sufficient Notice to the Employer?

Introduction and Relevant Facts

The United States Supreme Court recently granted certiorari in a case in which Ohio-based retailer Abercrombie & Fitch (“A&F”) declined to hire a young woman in 2008 because the headscarf she wore to the interview did not comply with the company’s “Look Policy.”⁶ Although not disclosed during the interview, the woman wore a headscarf (or “hijab”) because of her Muslim faith. A&F’s Look Policy requires, in part, that all employees wear the “classic East Coast collegiate style of clothing” it sells and prohibits employees from wearing black clothing or “caps,” a term the policy leaves undefined. The applicant, then seventeen-year-old Samantha Elauf, suspected that A&F may have had clothing restrictions before her interview but had learned from her friend, an A&F employee, that the company had previously made exceptions to its no-caps policy, so long as the headwear in question was not black.

With this information, Elauf arrived at her interview wearing a black headscarf. During the interview, neither Elauf nor the interviewer mentioned religion, the headscarf, or the reason for Elauf’s wearing a headscarf, and neither broached the subject of whether Elauf needed an accommodation to A&F’s Look Policy. However, the record reflects that the interviewer believed Elauf wore a headscarf for religious reasons and assumed she was a Muslim. Using A&F’s interview guide, the interviewer gave Elauf a score of “two” out of “three” in each of the categories the company considers when hiring floor sales associates: (1) appearance and sense of style; (2) whether the candidate is outgoing and promotes diversity; and (3) sophistication and aspiration. This gave Elauf six points—the minimum amount necessary to merit a recommendation for hire.

Before moving forward with her recommendation, however, the interviewer contacted her district manager about her concerns hiring an applicant whose attire violated A&F’s Look Policy. The record reflects conflicting testimony: the interviewer claims she informed the district manager that Elauf was Muslim and the district manager denied that she informed him of this. After learning that Elauf wore a headscarf to the interview, the district manager instructed the interviewer to change Elauf’s score in the “appearance and style” category from “two” to “one” because she wore a headscarf in violation of the Look Policy, stating

⁶ *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013), cert. granted 135 S.Ct. 44 (Oct. 2, 2014).

that they could not assume that Elauf wore the headscarf for religious reasons. This change gave Elauf five points and ensured that A&F would not hire her. Several days after the interview, Elauf learned from her friend that A&F had not hired her because she wore her headscarf to the interview. Elauf then filed a charge with the Equal Employment Opportunity Commission (“EEOC”). A&F countered that Elauf had failed to inform it that her religious practices conflicted with its Look Policy. The EEOC subsequently sued A&F on Elauf’s behalf in the Northern District of Oklahoma, alleging violations of Title VII of the Civil Rights Act of 1964 for religious discrimination.⁷

Title VII makes it unlawful for an employer to refuse to hire an applicant on the basis of his or her religious beliefs or practices unless the employer can show that accommodating the belief or practice would impose an undue hardship upon its business.⁸ Generally, in order to make a prima facie case for religious discrimination under Title VII for failure to hire, a plaintiff must establish that: (1) he or she holds a sincere religious belief that conflicts with an employment requirement; (2) he or she has informed the employer about the conflict; and (3) he or she was not hired for failing to comply with the conflicting employment requirement.⁹ The A&F case turns on what constitutes sufficient notice to the employer that the applicant sincerely holds an inflexible religious belief that is in conflict with one of the employer’s policies.

The parties filed cross motions for summary judgment. A&F argued that the EEOC failed to prove the “notice” element of its prima facie case because Elauf never told the interviewer about her need for a religious accommodation to A&F’s Look Policy. The EEOC contended that Elauf was not required to explicitly request an accommodation because the interviewer was aware (through visual observation) that a conflict existed between its Look Policy and Elauf’s practice of wearing a headscarf for what were, the interviewer assumed, religious reasons.

The District Court’s Decision

The District Court ruled in favor of the EEOC. In the absence of direct guidance from the Tenth Circuit Court of Appeals on the “notice” element, the Court looked to precedents from other Circuit Courts of Appeal and to the parallel structure of the Americans with Disabilities Act in holding that “the notice requirement is met when an employer has enough information to make it aware there exists a conflict between the individual’s religious practice or belief and a requirement for applying for or performing the job.”¹⁰ The District Court concluded that, if “faced with the issue of whether the employee must explicitly request an accommodation or whether it is enough that the employer has notice an accommodation is needed—the Tenth Circuit would likely opt for the latter choice.”¹¹

⁷ *EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1285 (N.D. Okla. 2011) *rev’d and remanded*, 731 F.3d 1106 (10th Cir. 2013)

⁸ *Tepper v. Potter*, 505 F.3d 508, 514 (6th Cir. 2007), (quoting *Virts v. Consol. Freightways Corp.*, 285 F.3d 508, 516 (6th Cir.2002)); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir.1994).

⁹ *Tepper v. Potter*, 505 F.3d 508 514 (6th Cir. 2007).

¹⁰ *Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d at 1285 (citing *Dixon v. Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir.2010); *Brown v. Polk County, Iowa*, 61 F.3d 650, 654 (8th Cir.1995); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir.1993); *Hellinger v. Eckerd Corp.*, 67 F.Supp.2d 1359, 1361 (S.D.Fla.1999)).

¹¹ *Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d at 1286.

The Tenth Circuit's Decision

The Tenth Circuit disagreed. Because the determination of whether an applicant's "practice is religious depends on [*his or her*] motivation," (which is invisible to all except the applicant), the Tenth Circuit reasoned that it is the applicant—and not the employer—who is in the best position to recognize the need for an accommodation.¹² In granting A&F's motion for summary judgment, the Court reasoned that, because the interviewer assumed, but did not know, what Elauf's motivations were for wearing a headscarf, A&F did not have the type of particularized knowledge necessary to implicate the "notice" element of a Title VII religious accommodations claim. The Court held that "in order to establish a prima facie case under Title VII's religion-accommodation theory, a plaintiff ordinarily must establish that he or she initially informed the employer that the plaintiff adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice, due to a conflict between the practice and the employer's neutral work rule."¹³

The Dissent

The dissent argued that the notice requirement adopted by the majority was too rigid a standard to fit the scenario presented by the EEOC. The dissent was careful to note that it agreed with the majority that, in *most* failure-to-accommodate cases, the burden of notice should be on the applicant, who must inform the employer of any religious belief that conflicts with employer policies once he or she is aware of them because the applicant is in the best position to know of his or her own religious beliefs (which, unlike policies, are invisible to all except the applicant). In this typical scenario, the employer has no obligation to engage in the interactive process of accommodation unless initiated by the applicant. However, the dissent found that this case did not present the usual failure-to-accommodate notice scenario because A&F had superior knowledge of the conflict between its Look Policy and Elauf's apparent religious practice.

The dissent argued for a more flexible notice standard and for applying a modified prima facie case for failure-to-accommodate religious practices cases, the likes of which had been adopted by the Eighth, Ninth, and Eleventh Circuits.¹⁴ Under the dissent's modified standard, where the employer knows of or should know of a conflict between its policies and religious practices, the plaintiff must show: (1) he or she had a bona fide religious belief that conflicted with the employer's policy; (2) he or she was not aware of the conflicting policy; (3) the employer had knowledge that the employee might hold a religious belief that manifested in a conflict with its policy; and (4) without informing the employee of the conflict, the employer takes an adverse employment action against the employee for violation of that policy.¹⁵ Under this modified prima facie standard, the issue of notice appears to shift over the last three elements: where the plaintiff provides evidence that she was not aware of the conflicting policy, the plaintiff must then show that the employer was aware, and did not inform the plaintiff, of the conflict. In this case, the dissent

¹² *Abercrombie & Fitch Stores, Inc.*, 731 F.3d at 1118.

¹³ *Id.* at 1122–23.

¹⁴ *Brown*, 61 F.3d at 654; *Heller*, 8 F.3d at 1439; *Dixon*, 627 F.3d at 856.

¹⁵ See *Abercrombie & Fitch Stores, Inc.*, 731 F.3d at 1147 (Ebel, J. dissenting).

determined that the EEOC presented evidence that Elauf was not aware that the Look Policy conflicted with wearing a headscarf because her friend, an A&F employee, had speculated that A&F made exceptions to its “no cap” policy and because no one from A&F told Elauf she could not wear her headscarf. The dissent found that the EEOC presented evidence that A&F had knowledge that Elauf might hold religious beliefs that manifested in a conflict with its Look Policy—she wore a headscarf to the interview and the interviewer assumed she was Muslim. Finally, the dissent noted that the EEOC showed that A&F never notified Elauf of the conflict before failing to hire her. In sum, the dissent argued that the rigid notice requirement applied by the majority was improper for the facts of this case, where A&F was in the better position to know of the potential conflict between its Look Policy and Elauf’s apparent religious practice.

Comparison & Analysis

The conflicting decisions of the District Court and the Tenth Circuit highlight a tension between whether the applicant or the employer is better suited to know when a conflict exists between the applicant’s religious beliefs and the employer’s policies. On the one hand, the employer may have no way of knowing (and is, in some instances, prohibited from asking) whether an applicant wears particular clothing or accessories *for religious reasons* during the interview process. On the other hand, it may be difficult for the employee, who presumably has not yet been introduced to the employer’s work rules, to know when his or her religious observance would conflict with a company policy. The Supreme Court will have the opportunity to consider this issue when it decides the A&F case this session. In the meantime, however, employers should be aware of such considerations and should take proactive steps to protect themselves from Title VII liability during the interview process.

Recommendation

Employers should avoid asking current or prospective employees about their religious affiliations or observances. To protect against situations like those in the A&F case, however, employers (especially those with rigid appearance requirements) should make those policies available to applicants before their interviews so that religiously observant applicants have an opportunity, and therefore the obligation, to note any conflicts that exist between their religious practices and the employer’s requirements. Being informed of the employer’s policies, applicants would have knowledge of both their religious observances *and* the employer’s requirements, placing the onus on the applicant to request a religious accommodation if he or she feels that one is necessary.

Knowledge of Proper E-discovery is Critical

In an opinion dated July 1, 2014, U.S. Magistrate Judge Terrence P. Kemp, of the Southern District of Ohio in Columbus, (“the Court”) blasted defense counsel for their lack of a basic understanding of their client’s electronically stored information (“ESI”), which resulted in repeat misrepresentations to the Court and a failure to preserve, review, and produce relevant ESI in discovery. *Brown v. Tellermate Holdings Ltd.*, No. 2:11-CV-1122, 2014 WL 2987051 (S.D. Ohio July 1, 2014). In doing so, the Court made it abundantly clear that all counsel must have an understanding of theory clients’ ESI and will be held to the same standards in discovery regardless of the format of the information requested.

Brown v. TellerMate Holdings Ltd.

Robert and Christine Brown were formerly employed by TellerMate Holdings, Ltd. in sales positions. TellerMate terminated their respective employment in August 2011 allegedly for not meeting sales targets. The Browns subsequently filed a federal action, alleging that they were really terminated based on their age and that TellerMate's proffered reason was a mere pretext for age discrimination. In discovery, the Browns sought documents relating to data maintained on salesforce.com (a cloud-based app used by TellerMate salespeople to track customers and sales activity) to demonstrate that younger salespeople had similar sales performance but were not terminated.¹⁶ After protracted discovery, involving formal and informal dispute resolution, TellerMate continued to resist producing any of the requested salesforce.com documents, alleging that TellerMate: (1) was contractually prohibited from providing the information; (2) could not provide the information even if was contractually permitted; and (3) could not access historical data on salesforce.com. Eventually, TellerMate determined it could provide the requested information to the Browns. However, by this time only the current status of the accounts was accessible.

The court ruled on a few preliminary discovery motions, but the discovery dispute between TellerMate and the Browns did not come to a head until the Browns filed a Fed. R. Civ. P. 37(b)(2)(vi) motion for judgment and sanctions. After a three-day evidentiary hearing, the Court determined that each of TellerMate's "reasons" for the resistance regarding producing the salesforce.com discovery were untrue and that even if TellerMate initially made these untrue representations to counsel, counsel made these representations to the Court without doing any independent investigation, resulting in the loss of viable and relevant information. Specifically, the Court determined that TellerMate's counsel (as it relates to the salesforce.com documents):

"- failed to uncover even the most basic information about an electronically-stored database of information (the "salesforce.com" database);

- as a direct result of that failure, took no steps to preserve the integrity of the information in that database;

....

- and, as a result of these failures, made statements to opposing counsel and in oral and written submissions to the Court which were false and misleading, and which had the effect of hampering the Browns' ability to pursue discovery in a timely and cost-efficient manner (as well as the Court's ability to resolve this case in the same way)."

In the opinion, the Court laid out the applicable discovery rules and standards applicable to parties and counsel. It also advised that the discussions regarding ESI in discovery should occur at the Fed. Civ. R. 26(f) planning meeting stage so that "each party is able to exert some measure of control over the e-

¹⁶ Additional discovery issues were addressed in the opinion (relating to a prior discrimination action and employee performance evaluations), however, the ESI portion of the opinion centered mostly on discovery related to salesforce.com.

discovery process, and, in turn, to have some measure of confidence in the results.” Then, quoting Milberg LLP and Hausfeld LLP, “E-Discovery Today: The Fault Lies Not in Our Rules . . .,” 4 Fed. Cts. L. Rev. 131, 163 (2011), he indicated that the parties should discuss each of the following at the 26(f) conference:

- The “sources of information to be preserved or searched;”
- the “number and identifies of custodians whose data will be preserved or collected;”
- the “topics for discovery;” and
- the “search terms and methodologies to be employed to identify responsive data.” (internal quotations omitted).

Although the Court placed a large portion of the blame for the discovery shortcomings on Tellermate for “not telling counsel what, collectively, it knew or should have known to be the truth about its inability to produce the salesforce.com information[,]” he stressed that counsel must certify the discovery responses accuracy based on “reasonable inquiry” and “cannot simply take a client’s representations about such matters at face value.” The Court reiterated that this duty of counsel has been the pronouncement of that court since at least 1995, when Judge Graham decided *Bratka v. Anheuser-Busch Co.* 164 F.R.D. 448, 461 (S.D. Ohio).

In *Bratka v. Anheuser-Busch Co.* 164 F.R.D. 448, 461 (S.D. Ohio) Judge Graham¹⁷ instructed counsel of record in his court formulate “a plan of action which will ensure full and fair compliance with the [discovery] request,” explaining:

Such a plan would include communicating with the client to identify the persons having responsibility for the matters which are the subject of the discovery request and all employees likely to have been the authors, recipients or custodians of documents falling within the request. The plan should ensure that all such individuals are contacted and interviewed regarding their knowledge of the existence of any documents covered by the discovery request, and should include steps to ensure that all documents within their knowledge are retrieved. All documents received from the client should be reviewed by counsel to see whether they indicate the existence of other documents not retrieved or the existence of other individuals who might have documents, and there should be appropriate follow up. Of course, the details of an appropriate document search will vary, depending upon the circumstances of the particular case, but in the abstract the Court believes these basic procedures should be employed by any careful and conscientious lawyer in every case.

The Court in *Tellermate* found that counsel failed to meet the standards set out in *Bratka* with respect to the salesforce.com request, noting that that counsel for Tellermate failed to identify the persons having responsibility for salesforce.com information, failed to take any steps to ensure that documents were retrieved and failed to perform any follow-up. The court also determined that the duty to preserve relevant evidence was also violated, stating:

¹⁷ Judge Graham is also the Judge assigned to the instant matter.

Like any litigation counsel, Tellermate's counsel had an obligation to do more than issue a general directive to their client to preserve documents which may be relevant to the case. Rather, counsel had an affirmative obligation to speak to the key players at Tellermate so that counsel and client together could identify, preserve, and search the sources of discoverable information.

Ultimately, the Court sanctioned both Tellermate and its counsel, concluding, in part, that “[a]t the end of the day, both Tellermate’s and its counsel’s actions were simply inexcusable, and the Court has no difficulty finding that they were either grossly negligent or willful acts, taken in objective bad faith.” Specifically, the Court precluded Tellermate from “using any evidence to show that the Browns were terminated for performance-related reasons,” noting “[t]his sanction is commensurate with the harm caused by Tellermate’s discovery failures, and is also warranted to determine other similarly-situated litigants from failing to make basic, reasonable inquiries into the truth of representations they make to the Court, and from failing to take precautions to prevent the spoliation of evidence.” The court also ordered Tellermate and its counsel to pay the Browns’ attorney fees and costs in connection with moving to compel discovery.

Analysis

In the end, the Court rendered a significant blow to Tellermate’s defense and in doing so made it clear that that counsel will be held to the same standards with respect to all discovery, regardless of its format or source, with no leniency given for a lack of technological understanding of a client’s record keeping systems. Importantly, despite a commonly-held belief that an attorney’s duty to make “reasonable inquiry” ends with soliciting and obtaining the client’s representation of the extent and accessibility of responsive documents, the Court also makes clear that attorneys must go a step further, employing a particularized knowledge of their client’s processes. But, it is helpful that the Court has provided a road map of what questions to ask and when to begin asking them to assist with this process. Because according to District Judge Michael Watson also of the Southern District, Magistrate Judge Kemp is the court’s “expert” on e-discovery, all counsel who practice in the Southern District of Ohio in Columbus should be cognizant of and apply the principles set forth in *Tellermate* in their federal litigation practice.

U.S. Supreme Court Remands *Young v. UPS* Back to Fourth Circuit

On March 25, 2015, the U.S. Supreme Court issued a much-anticipated decision in the *Young v. UPS* case, vacating the Fourth Circuit Court’s grant of summary judgment to UPS and remanding the case back for further consideration. At issue was UPS’s duty to accommodate Young, who had lifting restrictions due to her pregnancy, under the Pregnancy Discrimination Act.

The Pregnancy Discrimination Act was enacted to amend Title VII to include pregnancy discrimination and has two separate clauses. The first clause states that discrimination “because of sex” includes discrimination because of pregnancy. The second clause states that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other person not so affected but similar in their ability or inability to work.” 42 U.S.C. § 2000e(k). The

Court was tasked with defining who constitutes an “other person” and what it means to be “similar in their ability or inability to work.”

Here, UPS had policies that accommodated the following groups of individuals: (1) workers who were injured on the job; (2) workers who had a disability as defined under the Americans with Disabilities Act; and (3) workers who had lost their DOT certification. However, when Young requested an accommodation for her lifting restrictions imposed by her physician due to her pregnancy, UPS informed her that it could not accommodate her restrictions. Young argued that since UPS accommodated other employees who were unable to work, and thus were “similar in their ...inability to work,” that it must accommodate her as well. On the other hand, UPS argued that since Young did not fall into any of the categories of individuals for which it does provide accommodations, it did not discriminate against Young on the basis of her pregnancy; rather, it treated her the same as it treated all “other” relevant persons. Young’s interpretation of the second clause of the Pregnancy Discrimination Act would require a Court to find a violation of Title VII unless an employer always accommodates a pregnant worker’s restrictions if the employer accommodates other workers with disabling conditions, even if other non-pregnant workers do not receive accommodations. Under UPS’s view, a court would compare the accommodations provided to pregnant employees to the accommodations provided to other employees in a facially neutral category and then determine whether the employer violated Title VII. The District Court and Fourth Circuit Court of Appeals agreed with UPS.

The Supreme Court declined to adopt the interpretation of either party. The Court opined that Young’s interpretation granted pregnant workers an “unconditional most-favored-nation status” and doubted that Congress intended such a result. Further, the Court opined that UPS’s interpretation was incorrect because its position was that the second clause solely defined sex discrimination to include pregnancy discrimination. However, since the first clause defined the sex discrimination to include pregnancy discrimination, the second clause would then be superfluous. Instead, the Court held that a plaintiff can maintain a prima facie case of disparate treatment pregnancy discrimination under the second clause of the Act by demonstrating that: (1) she belongs to a protected class; (2) she sought an accommodation; and (3) her employer did not accommodate her, but accommodated others “similar in their ability or inability to work.” Then, the employer can justify its refusal to accommodate the plaintiff by proffering a legitimate, nondiscriminatory reason for refusing to accommodate her. However, the Court made clear that this reason cannot be because it is more expensive or less convenient to accommodate the employee. Finally, the plaintiff can then demonstrate that this reason is pretextual. The Court held that a plaintiff can reach a jury on the pretext issue if it demonstrates that the employer’s policies impose a significant burden on pregnant workers or that the legitimate nondiscriminatory reason is not sufficiently strong to justify this burden.

The Supreme Court remanded the case to the Fourth Circuit because it determined that Young raised a genuine issue of material fact as to whether UPS provided more favorable treatment to other employees whose situation “cannot reasonably be distinguished from Young’s.” Further, Young had introduced evidence that UPS accommodated three separate groups of employees, and the Fourth Circuit did not consider the combined effect of these policies or UPS’s justification for accommodating these employees, but not pregnant employees. Justice Breyer, who delivered the opinion of the Court, stated: “Why, when the employer accommodated so many, could it not accommodate pregnant women as well?”

The dissent opined that the majority's test would require courts to apply a disparate impact analysis to a disparate treatment case. However, the majority clarified that the plaintiff still has the burden to establish intentional discrimination as required in a disparate treatment analysis.

Employers should review their accommodation policies to ensure compliance with this decision and should analyze whether their policies "significantly burden" pregnant employees. If current policies do "significantly burden" pregnant employees, the employer must have a clear legitimate nondiscriminatory reason to justify the burden. Please feel free to contact the Employment Law Section should you have any questions regarding your policies and the impact it may have on pregnant employees.

The Court's full decision can be located here: http://www.supremecourt.gov/opinions/14pdf/12-1226_k5fl.pdf