Oklahoma State Legislature clarifies definition of “misconduct” for OESC unemployment proceedings

Background

- Employee is not entitled to unemployment benefits if the Oklahoma Employment Security Commission finds that the employee was terminated for “misconduct”
What is misconduct?

- Oklahoma legislature recently amended Okla. Stat. tit. 40 § 2-406 to expand and clarify the definition of misconduct

- Oklahoma State Legislature clarifies definition of “misconduct”

What is misconduct?

- The statutory definition of misconduct includes, but is not limited to:
  1. Unexplained absenteeism or tardiness
  2. Willful or wanton indifference to or neglect of the duties required
  3. Willful or wanton breach of any duty required by the employer
  4. The mismanagement of a position of employment by action or inaction
  5. Actions or omissions that place in jeopardy the health, life, or property of self or others
  6. Dishonesty
  7. Wrongdoing
  8. Violation of a law, or
  9. A violation of a policy or rule adopted to ensure orderly work or the safety of self or others

- New definition went into effect November 1, 2013

- Oklahoma State Legislature clarifies definition of “misconduct”
Previous definition of misconduct

- Before amendment, there was no statutory definition of misconduct
- Courts applied a very liberal and ambiguous standard
- Previously, misconduct must have been an act or course of conduct detrimental to the employer’s best interest that contained the element of willfulness or culpable negligence

Oklahoma State Legislature clarifies definition of “misconduct”

Previous definition of misconduct

- Not “misconduct” within previous interpretation of statute
  - Mere inefficiency
  - Unsatisfactory conduct
  - Failure in good performance as the result of inability or incapacity
  - Inadvertencies or ordinary negligence in isolated instances
  - Good faith errors in judgment or discretion

Oklahoma State Legislature clarifies definition of “misconduct”

Difference between old and new standard

- New statutory definition has a non-exhaustive list of what constitutes misconduct
- Significant difference is that “mismanagement of a position of employment by action or inaction” is now misconduct
  - Strong argument that this definition overrides the previous requirement that mere negligence, inefficiency, and unsatisfactory conduct were not misconduct
Proving misconduct

- Employer still has initial burden of proof
- New statute states that a signed affidavit of the employer detailing the misconduct is sufficient evidence to meet this initial burden
- Burden now shifts to the discharged employee
  - To prove that the facts in the affidavit are inaccurate
  - Or that the facts as stated do not constitute misconduct as defined by the statute

The Takeaway

- Document, document, document
- Signed affidavits will become more common in unemployment hearings to make it easier to prove misconduct
- Try documenting reasons of misconduct so you can include them in an affidavit

Thank you for not smoking:

Revised state law allows businesses to offer employees incentives to cut the habit
Oklahoma prohibits discrimination based on tobacco use

- Since 1991, it has been illegal for an employer to discriminate against applicants or employees who smoke or use tobacco during nonworking hours.
- The law was ambiguous: were employers allowed to reward employees for participation in wellness programs, including smoking cessation?
  - One school of thought was that a reward for completing a smoking cessation amounted to discrimination against smokers.

The revised statute provides an answer

- Effective on November 1, 2013, an employer may offer incentives to employees to participate in wellness programs, including smoking cessation programs.
- But, the benefit must be in conjunction with providing the employee health insurance coverage.
- Beware, if your company’s benefit plan is governed by ERISA, federal law may preempt the newly revised state statute.
  - Make sure to check your plan before you act!

Tobacco Prohibited in the Workplace

- With few exceptions, smoking is prohibited in the workplace.
  - The workplace includes work areas, employee lounges, restrooms, conference rooms, classrooms, cafeterias, and hallways.
- Smoking rooms are allowed
  - Work is prohibited in smoking rooms.
  - The smoking room must be fully enclosed, exhausted to the outside, and have negative pressure so smoke does not escape.
Tobacco Prohibited in the Workplace

- Inform employees and the public!
  - The law requires owners or managers of public property to post "No Smoking" signs.
  - Inform violators of the no-smoking policy.
  - Failure to inform can lead to a misdemeanor and fine.

"But for" burden of proof:
Supreme Court applies strict "but for" causation to Title VII retaliation cases

Background

- Title VII of the Civil Rights Act of 1964
- Prohibits discrimination and retaliation on the basis of protected classes
  - Race
  - Color
  - Sex
  - Religion
  - Nationality
Discrimination based on a protected class

- Cannot take an adverse employment action against an employee based on a protected class
  - Example: Daycare may not refuse to hire a qualified male simply because of his gender

Retaliation

- Employer may not retaliate against an employee for complaining of, reporting, or participating in an investigation of any discrimination
  - Example: May not retaliate against white male employee because he testified on behalf of a black female who was claiming discrimination

Supreme Court Clarification
The burden of proof at trial

- University of Texas Southwestern Medical Center v. Nassar
- In June, the U.S. Supreme Court clarified what a Plaintiff must prove at trial

The facts

- Naiel Nassar was a physician at UT Southwestern Medical Center.
  - Claimed that the medical center constructively discharged him because of his Middle Eastern descent and religion in both a discrimination and retaliation claim
- Jury found for Nassar on both claims
  - Awarded him $400,000 in back pay and $3 million in compensatory damages, which was reduced to $300,000

The facts

- Fifth Circuit Court of Appeals found that Nassar had insufficient evidence for his discrimination claim
  - Fifth Circuit affirmed jury’s verdict on the retaliation claim
- Fifth Circuit held that Nassar’s complaints of discrimination only needed to be a motivating factor in the hospital’s decision
The Supreme Court’s opinion

- Reversed
- Court held that the lower courts applied an incorrect lesser burden of proof on Nassar's retaliation claim
- Interpreted “because of” to mean “but for”

“But for” vs. motivating factor

- Motivating factor
  - Consideration of the plaintiff's protected class needs to only be a factor in the defendant's decision
  - Defendant can consider other factors such as the plaintiff's discipline record but still be liable if the plaintiff's protected class was also considered

“But for” vs. motivating factor

- But for
  - The protected class must be the reason for the defendant's decision.
  - If the defendant relies on other factors, then there is no but for causation.
"But for" vs. motivating factor

- Bottom line
  - But for is easier for the employer to win

What does this mean for me?

- *Nassar* gives you another good reason to document, document, document!
- If an employee complains of discrimination or participates in an investigation, be vigilant in documenting any employment actions for that employee.
  - It can literally save you and your employer millions!

Who's my supervisor?

*Supreme Court’s new narrow definition of “supervisor” in Title VII harassment cases*
Background

- Title VII also prohibits workplace harassment based on a protected class
- Generally workplace harassment involves sexual harassment, but it is also illegal to harass an employee because of race, religion, national origin, and color

Two types of harassment

- Quid pro quo
  - Latin for “this for that”
- Hostile work environment
  - Severe or pervasive working conditions based on a plaintiff’s sex, race, color, religion, or national origin
  - More common than quid pro quo
  - Examples
    - Comments “joking” about employee’s religion
    - Showing inappropriate adult pictures to employee

The role of the supervisor

- Whether the person harassing the plaintiff is a supervisor has major legal implications
  - If harasser is a supervisor
    - Employer is strictly liable – end of analysis
    - Start talking about how much the company owes
  - If harasser is not a supervisor
    - Issue becomes whether employee reported harassment and whether employer was negligent in implementing and following workplace harassment policies
**Vance v. Ball State University**
- Clarified the legal definition of “supervisor” for Title VII harassment cases
- Provides more of a bright line approach that is favorable to employers

**The facts**
- Maetta Vance was an African-American woman that worked in the catering office for Ball State University
  - Claimed that Saundra Davis, a white woman, created a racially hostile work environment
- Davis allegedly gave Vance dirty looks, blocked elevators and doors, banged pots and pans near Vance, and otherwise intimidated Vance

**The facts**
- Parties agreed that Davis did not have the authority to hire, fire, demote, transfer, or discipline Vance
  - Davis did have significant control over Vance’s day-to-day duties
  - Parties disagreed whether Davis was Vance’s “supervisor”
- Trial court granted the university’s motion for summary judgment
  - Davis was not Vance’s “supervisor”
  - On appeal, Seventh Circuit affirmed
Supreme Court opinion

- Court took an employer-friendly approach and found that a supervisor is a person that has the authority to make tangible employment decisions
  - A supervisor must be able to hire, fire, demote, transfer, or discipline an employee
- Court found that the Equal Employment Opportunity Commission’s guidance was incorrect
  - EEOC had a vague standard where a “supervisor” must wield authority “of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment”
  - EEOC’s approach was fact-intensive, looked at multiple factors

Who’s my supervisor? New Title VII definition of supervisor

- The law appears settled
  - A “supervisor” must be able to make tangible employment decisions including the authority to hire, fire, demote, transfer, or discipline an employee

What’s this mean for Employers?

- Have clear job descriptions!
  - Make sure employees actually follow the job descriptions
- Review your company’s organizational structure
  - Clarify which employees have the ability to make tangible employment decisions
- New narrow definition should make many lawsuits easier
  - Court expressly stated that the issue of whether a certain employee is a supervisor can “very often” be resolved at summary judgment
Before you get carried away...

- With the new definition, it might be tempting to vest the authority to make tangible employment decisions with a small number of employees to limit exposure to liability.
- Court warned against this:
  - Stated that an employer will still be liable when its negligence leads to the creation or continuation of a hostile work environment.
  - Even if an employer concentrates all decision-making authority in a few individuals, it likely will not isolate itself from heightened liability.
  - Purposefully and unnecessarily creating a system where only a few individuals are supervisors could be negligence in itself.

Before you get carried away...

- If employer attempts to confine decision-making power to a small number of individuals, those individuals will have a limited ability to exercise independent discretion when making decisions and will likely rely on other workers who actually interact with the affected employee.
  - Employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies.
- The bottom line:
  - Very important to know who can make tangible employment decisions.
  - Those individuals must exercise their own discretion in making decisions.

The Future after Nassar and Vance

- These two decisions are very employer friendly; enjoy them while they last.
- Justice Ginsburg’s dissent in Nassar explicitly called on Congress to change the law.
- Ginsburg previously did this in Ledbetter v. Goodyear, which led Congress to passing the Lilly Ledbetter Fair Pay Act.
- The Civil Rights Act of 1991 corrected the burden of proof for Title VII discrimination cases.
- Congress passed the Pregnancy Discrimination Act to correct Supreme Court holdings.
- In the current political climate Congress will not likely change the law anytime soon.
Failure to Cooperate with Employer Requests under Family and Medical Leave Act

Tenth Circuit Upholds Termination of Employee for Being Slow to Provide FMLA Documentation and Respond to Exam Requests

Dalpiaz v. Carbon County

- Bridget Dalpiaz, who had served for 15 years as the Benefits Administrator for Carbon County, Utah, filed suit, alleging that the county violated the FMLA by terminating her which interfered with her FMLA Rights.

The District Court Ruling

- The trial court entered summary judgment in favor of the defendants on all of plaintiff’s claims.
The Tenth Circuit Ruling

- The Tenth Circuit upheld the district court's ruling and ratified the county's decision to discharge Dalpiaz because she "acted insubordinately by choosing to submit her FMLA forms at almost the literal last minute, more than seven weeks after the county made its first request for these forms to be submitted as soon as possible and after several reminders that the county was still waiting."

The Tenth Circuit Ruling

- The court further found that the county was justified in terminating Dalpiaz who "[a]ll[ed] to make more than a belated, half-hearted effort to comply with a direct and legitimate order" to attend an appointment with an independent physician to obtain a second opinion regarding her condition.

The Tenth Circuit Ruling

- The Tenth Circuit concluded that Dalpiaz was not discharged for exercising her rights under the FMLA, but rather because she was obstinate in the face of the county's directions and requests.
The Tenth Circuit Ruling

- The court explained that, 

"Like any other county employee, [Dalpiaz] was required to comply with legitimate directions given by her supervisors, and her request for FMLA leave did not shelter her from this obligation, even when her supervisors’ instructions were related in some way to her use of FMLA leave."

The Tenth Circuit Ruling

- According to the court, the key question was “whether the county terminated [Dalpiaz] because it sincerely, even if mistakenly, believed she had abused her sick leave and demonstrated significant evidence of untruthfulness.”

Requests for Religious Accommodations

Tenth Circuit puts onus on employee or applicant to inform employer about the need for a religious accommodation
Background

• Title VII prohibits employers from discriminating against an individual because of that individual's religion.
• Employees have a cause of action if an employer fails to accommodate their religious beliefs.
• Accommodations occur when an employer adjusts a neutral work rule which infringes on an employee's (or prospective employee's) ability to practice her religion.
• Making an accommodation is only required when there is actual conflict between the ability to practice religion and the work rule.
• The term "religion" is defined broadly - the ultimate ideas of life, purpose, and death.

Requests for Religious Accommodations


• Abercrombie & Fitch requires its employees to dress consistently with the clothes offered in its stores. They were not allowed to wear black clothes or caps.
• Plaintiff applied for a job with the store and attended an interview wearing a hijab, or headscarf.
• Plaintiff did not inform Abercrombie that she was Muslim. The subject of her headscarf did not come up in the interview.
• Abercrombie did not hire her because her headscarf would violate the employee dress code.

Employees must inform employers regarding 
the need for an accommodation

• The court ruled that in order to prevail in an "accommodation" lawsuit, the employee must inform the employer of both:
  – She adheres to a practice based upon a religious belief, and
  – The need for an accommodation for that practice.
• Because the Plaintiff did not inform Abercrombie that she wore her headscarf for religious purposes or that she needed an accommodation, she lost her claim.
Employees must inform employers regarding the need for an accommodation

- The court determined that mere “notice” of the need for an accommodation is not enough – the request must come from the employee.
  - This determination is based upon the principle that religion is a “uniquely personal and individual matter.”
  - Even wearing a generalized symbol – such as a Star of David – does not advise the employer of the individual’s particular beliefs and observances.
- Even an assumption that an employee needs an accommodation is not enough.
  - Employers cannot know if a practice is even related to a religious belief without being told.
  - Employers cannot know if an accommodation is needed without being told.

Requests for Religious Accommodations

Employees must inform employers regarding the need for an accommodation

- It is not the employer’s duty to inquire about religious beliefs
  - In fact, such inquiries are discouraged.
- BUT, don’t wait for the magic words. Employees can use plain language to inform an employer that they need an accommodation.

The takeaway

1. Document, document, document!
   - When making an employment decision make sure you and all other managers document the reasons for the decision. This can save you money and time down the road for unemployment hearings and Title VII retaliation cases.
2. Review job descriptions and company organizational charts
   - In light of Vance, focus on who has the power to hire, fire, demote, transfer, discipline, and make other major employment decisions.
3. Think about having employees sign arbitration agreements with class action waivers
   - Waivers are now clearly enforceable and arbitration is usually less expensive and quicker than a normal lawsuit.
4. Don’t make assumptions!
   - There is no need to accommodate a religious belief without first being informed by an employee.