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FLORIDA
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EMPLOYER LIABILITY

Court warns about self-serving testimony in FLSA retaliation claims

by Jeffrey Slanker and Jarrett Davis
Sniffen and Spellman, P.A.

The U.S. District Court for the Southern District of Florida recently released an order on a motion for partial dismissal of a retaliation claim under the Fair Labor Standards Act (FLSA) that provides an overview of whether an employee's self-serving testimony should be considered direct evidence in discrimination or retaliation cases. The case is a reminder that the FLSA, like many federal statutes, contains an antiretaliation provision, and such claims are increasingly being brought by employees.

Brief FLSA primer

The FLSA is a federal law that sets minimum wage, overtime, and minimum age requirements for employers and employees in the private sector and federal, state, and local governments. The FLSA also prohibits employers from retaliating against any employee who has filed a complaint or cooperated in an investigation into a violation of the Act. The FLSA's prohibition on retaliation provides broad protection to all employees, even those who perform jobs that are exempt from the Act's overtime and minimum wage requirements.

Case background

Denise Pineda, an employee of Pescatlantic Group, complained about the lack of overtime pay at the company and refused to continue working overtime without compensation. She claimed she was subsequently terminated for refusing to work overtime without pay.

Pescatlantic disputed Pineda's claim and provided different reasons for her termination, including her excessive cell phone use and refusal to follow her supervisors' instructions. The company asked the U.S. District Court for the Southern District of Florida to grant summary judgment and dismiss Pineda's retaliation claim without a trial.

Is self-serving testimony direct evidence?

The court held that if an employee has direct evidence to establish a key issue in her case, the claim will survive dismissal and go to a jury trial because she has provided adequate evidence to prove the employer's decision was more probably than not based on illegal discrimination. In this case, the sole evidence supporting Pineda's retaliatory discrimination claim was her self-serving testimony that her supervisor informed her on her final day of work that "if she was unwilling to work without overtime pay[,] she would be terminated." Pescatlantic argued Pineda's testimony shouldn't be considered direct evidence because it was false and urged the court to apply an alternative evidentiary

AGENCY ACTION

NLRB launches ADR pilot program. The National Labor Relations Board (NLRB) announced in July that it is launching a new pilot program to enhance the use of its alternative dispute resolution (ADR) program. The pilot program is intended to increase participation opportunities for parties in the ADR program and help facilitate mutually satisfactory settlements. Under the new program, the NLRB's Office of the Executive Secretary will proactively engage parties with cases pending before the Board to determine whether their cases are appropriate for inclusion in the ADR program. Parties also may contact the Office of the Executive Secretary and request that their case be placed in the ADR program. There are no fees or expenses for using the program.

Acosta praises action to create workforce advisory board. U.S. Secretary of Labor Alexander Acosta spoke in support of President Donald Trump's July 19 Executive Order establishing the National Council for the American Worker and the American Workforce Policy Advisory Board. "President Trump's Executive Order represents a national commitment to helping Americans upskill and reskill to embrace rapidly changing job demands," Acosta said. "A blend of traditional and workplace lifelong learning is required for a nimble workforce ready to succeed in overcoming any challenge." The council is made up of senior administration officials and is charged with developing a strategy for training and retraining workers needed for high-demand industries.

DOL cites court ruling in rescinding Persuader Rule. The U.S. Department of Labor (DOL) in July rescinded the 2016 Persuader Rule, which the department said exceeded the authority of the Labor-Management Reporting and Disclosure Act. The DOL said the rule impinged on attorney-client privilege by requiring confidential information to be part of disclosures. Also, the DOL noted that a federal court had decided the rule was incompatible with the law and client confidentiality.

DOL announces training grants to help homeless veterans reenter workforce. The DOL in July announced the award of 163 Homeless Veterans' Reintegration Program grants totaling $47.6 million. This funding will provide workforce reintegration services to more than 18,000 homeless veterans. Funds are awarded on a competitive basis to state and local workforce investment boards, local public agencies, nonprofit organizations, tribal governments, and faith-based and community organizations. Homeless veterans may receive occupational skills training, apprenticeship opportunities, and on-the-job training as well as job search and placement assistance. ✤

framework that would allow it to dismiss the case without a trial.

The court relied on the definition of direct evidence and its application to self-serving testimony set out in *Wright v. Southland* by the U.S. 11th Circuit Court of Appeals (whose rulings apply to all Florida employers). In *Wright*, the 11th Circuit used a "preponderance" definition that deems direct evidence a causal link between an adverse employment action and protected activity.

The district court ruled that the preponderance definition should apply in Pineda's case because a reasonable trier of fact could find, more probably than not, that there was a causal link between her refusal to work overtime without compensation and her subsequent termination. In addition, the court stated that it's up to a jury to decide the credibility of Pineda's claim. *Pineda v. Pescatlantic Group, LLC*, Case No. 16-25291, Dist. Court, S.D. Florida, July 12, 2018.

Takeaway for Florida employers

Because the FLSA broadly applies to all employers, it's critical to be familiar with its requirements for retaliatory termination claims. As this case illustrates, an employee's self-serving testimony can be considered direct evidence that isn't subject to the burden-shifting framework and is therefore sufficient to bypass summary judgment. The court's decision makes it much easier for employees' claims to survive summary judgment, so you should be wary of taking unwarranted adverse action against employees who have engaged in any conduct that could be deemed protected activity under the myriad federal statutes containing antiretaliation provisions.

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EVIDENCE

Orlando court reviews requirements for preserving videotapes and other evidence

by Tom Harper
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In today's digital age, most Florida businesses use, or have access to, video cameras that record everything that happens in certain areas inside and outside the premises. Often, images recorded on surveillance videos will support an employer's decision to reprimand or discharge an employee for misconduct. For example, an employee's theft of merchandise or equipment may be captured on video. Accidents involving employees, customers, or visitors to the premises may also be recorded. When something like that happens, is a Florida employer required to preserve videotapes and other evidence from the date of the incident? An August decision by a federal judge in Orlando reviews some of the requirements that apply in such cases.

Facts

The case involved a customer's slip and fall at a CVS Pharmacy in Central Florida. Peggy Noftz fell and broke her leg in front of a cooler in which the store displayed milk, Gatorade, and other refrigerated merchandise. Two employees immediately came to her assistance. Noftz claimed the floor in front of the cooler was wet, while the CVS employees asserted the floor was dry.

Sixteen days after the accident, Noftz's lawyer wrote a letter to CVS demanding that the store preserve all videotapes from the day of the accident (referred to by the courts as a "preservation letter"). The letter from Noftz's lawyer demanded that the store preserve:

> Any [videotape from] the date in question for *all* security cameras *inside the store* from the hours of 9:00 a.m. to 5:00 p.m. It is our intent to not only preserve evidence of the incident itself, but also of the area of the incident to determine how water near the milk shelving area came [to be] upon the floor as well as video subsequent to show cleanup of the water. Your destruction of this crucial evidence will be considered actionable spoliation [i.e., willful destruction of evidence]. [Emphasis in original.]

CVS claimed that it didn't receive the letter, but it had nevertheless saved a CCTV video from one of the store cameras that was recorded on the day of the accident. The video showed the accident, but the floor in front of the display case wasn't visible. Noftz's lawyer asked about other videos and learned that a camera at the photo center may have captured the accident. However, CVS didn't save the video from that camera since it didn't receive the preservation letter.

Noftz sued CVS in federal court in Orlando over her injuries. During the litigation, her lawyer filed a motion claiming that CVS was guilty of spoliation of evidence because it failed to keep the video from the photo center camera on the day of the accident. Noftz claimed the pharmacy's failure to keep the video "resulted in the loss of what would have been strong and persuasive evidence for the jury to consider regarding the nature of the [substance she] slipped [on], along with the cause of, and [CVS's] notice of, the [hazardous condition]." She asked the court to instruct the jury at trial that there was a presumption that the video contained evidence supporting her case.

Court's decision

The court defined "spoliation" as the intentional concealment, destruction, mutilation, or material alteration of evidence. In this case, there was no proof that CVS had ever received the lawyer's letter asking it to preserve the videos. Despite the lack of notice, the court looked to a federal court decision from Maryland to find that "once a party reasonably anticipates litigation, it is obligated to suspend its routine document retention/destruction policy and implement a 'litigation hold' to ensure the preservation of relevant documents."

The court's statement may become the standard Florida employers must look to when deciding whether to take steps to preserve evidence. Relevant evidence that must be preserved can include documents like cash register receipts, damaged merchandise or property, text messages, e-mails, and social media posts as well as other physical evidence like videos and photos. The court explained that in Florida, spoliation occurs when a party proves (1) the lost documents or evidence

existed at one time, (2) the other party had a duty to preserve the lost evidence, and (3) the evidence was crucial to her case or defense.

In deciding whether CVS was guilty of spoliation, the court found the company had control of all the video cameras in its store, and once it knew that Noftz had fallen and was injured, it should've reasonably anticipated litigation. The court found, however, that Noftz failed to establish element number three of her spoliation case. Mere speculation by her lawyer that the photo center camera would have captured the floor where she slipped wasn't enough for the court to find CVS guilty of spoliation. Establishing where the camera was pointed that day as well as its normal field of view may have been enough to convince the court, but she didn't conduct discovery (pretrial fact-finding) on any of those particulars.

The court found that although it wasn't "hold[ing Noftz] to a high standard of proof, more is required than her speculation, . . . about what the photo area camera may have glimpsed." Her motion for sanctions for spoliation of evidence was therefore denied. *Peggy Noftz v. Holiday CVS, LLC*, Case No. 6:17-cv-1638-Orl-31TBS (M.D. Fla., August 21, 2018).

Takeaway

The court made it clear that Florida employers must act reasonably by taking positive action to preserve evidence that's material in a lawsuit. Even though the case involved a customer's slip-and-fall injury, the court's decision will apply to evidence in labor relations and employment cases. Often, an employer will have videotapes (or documents) that capture employees' conduct or workplace incidents. Make sure your managers are trained on the rules and take steps to preserve any evidence that could be relevant in a lawsuit.

Contact Tom Harper at tom@employmentlawflorida.com. ✤

WORKPLACE ISSUES

Under the radar: Florida prohibits discrimination based on HIV and AIDS status

by Jeffrey Slanker
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Previously, we have highlighted some lesser-known Florida employment laws, including the law that requires employers to provide leave to individuals who are dealing with domestic violence. Another lesser-known law, Chapter 760.50, Florida Statutes, explicitly prohibits discrimination against employees based on their AIDS, AIDS-related complex, and HIV status. This article provides an overview of the law and Florida employers' obligations under it.

The law and what it prohibits

Broadly, the statute prohibits employment discrimination based on someone's AIDS, AIDS-related complex, or HIV status. It covers not only employees who have the disease but also employees who are *perceived* to have it, extending to them the protections available under the Florida Civil Rights Act of 1992, the state's analogue to Title VII of the Civil Rights Act of 1964.

The statute protects employees from discrimination in the terms of their employment, including from being discharged or otherwise adversely affected, because of their AIDS or HIV status. The law prohibits an employer from requiring someone to take an AIDS or HIV test as a condition of being hired, receiving a promotion, or remaining employed unless not having the disease is a bona fide occupational qualification (BFOQ) for the job in question. The statute also prohibits an employer from discriminating against an individual because he is a "licensed [healthcare] professional or [healthcare] worker who treats or provides patient care to persons infected with [HIV]."

When is someone unqualified for her job because of HIV/AIDS?

An employer has the burden of establishing that being AIDS- or HIV-free is a BFOQ for a particular job. The statute provides that an employer must satisfy two factors to show there is a BFOQ for HIV-related testing:

(1) The HIV-related test is necessary to ascertain whether an employee is currently able to perform her job duties in a reasonable manner or whether she will present a significant risk of transmitting HIV to others in the course of her normal work activities; and

(2) There is no reasonable accommodation short of requiring that the individual be HIV-free.

It's important to reiterate that *both* factors must be satisfied for the defense to be available.

Although an HIV-infected employee who isn't qualified to perform his job isn't entitled to the statute's protections, an employer must show there is no reasonable accommodation for a *qualified* individual with HIV that would prevent others from being exposed to a significant possibility of HIV infection. Note that this accommodation standard is different from the requirement to make a reasonable accommodation that allows employees with disabilities to perform the essential functions of their jobs.

Finally, the statute creates an important record-keeping obligation. Employers that administer health or life insurance plans for their employees must maintain the confidentiality of information related to an employee's HIV or AIDS status .

Consequences of failure to comply

The statute creates a civil cause of action for a person who claims to be a victim of discrimination based on her AIDS or HIV status. An individual who proves a violation may recover liquidated damages of $1,000 or actual damages, whichever is greater. An employer that commits an intentional or reckless violation may be liable for $5,000 in liquidated damages or actual damages, whichever is greater. The statute also provides for injunctive relief and attorneys' fees for an individual who prevails on her claim.

Employers, beware

Not every obligation Florida employers have to their employees is as well-known as the common prohibitions against employent discrimination or retaliation. Chapter 760.50 is one of those lesser-known obligations, but that doesn't make it any less important. You should take the time to consider the statute when you conduct your annual employment policy audits (always a good practice)

WORKPLACE TRENDS

Survey finds more than half of workers open to new job opportunities. Recruitment firms Accounting Principals and Ajilon released results of a new survey in July exploring job search trends among more than 1,000 U.S. full-time workers in sales, office, and management/professional occupations. The survey found that 25.7% of respondents are actively seeking new job opportunities and that 55.5% are passively open to new job opportunities. The survey found that salary is the most important factor respondents consider when deciding to accept a job offer. The survey also found that 43.2% of respondents would be enticed to leave their company if another one offered a better salary or pay. That rate is highest among respondents ages 18 to 25, while respondents age 55 and older are least likely to leave for better pay.

Research finds counteroffers often ineffective. Research from staffing firm Robert Half suggests that offering higher salaries to workers who announce they're planning to quit for a better job may not be effective in the effort to hold on to top talent. Instead, counteroffers may serve only as a stopgap retention strategy since employees who accept a counteroffer typically end up leaving the company in less than two years. The primary reasons leaders said they extend counteroffers are to prevent the loss of an employee's institutional knowledge and to avoid spending time or money hiring a replacement. "Counteroffers are typically a knee-jerk reaction to broader staffing issues," said Paul McDonald, senior executive director for Robert Half. "While they may seem like a quick fix for employers, the solution is often temporary."

Study finds organizations confident but unprepared for crises. Many organizations overestimate their ability to deal with a crisis despite their awareness of the increasing threat of emergencies, according to Deloitte Global's 2018 crisis management survey. The survey, "Stronger, fitter, better: Crisis management for the resilient enterprise," found that nearly 60% of respondents believe organizations face more crises today than they did 10 years ago, yet many overestimate their ability to respond. The study's researchers surveyed over 500 senior crisis management, business continuity, and risk executives about crisis management and preparedness. The research found that 80% of organizations worldwide have had to mobilize their crisis management teams at least once in the past two years. Cyber and safety incidents in particular have topped companies' crises (46% and 45%, respectively). The study says that being ready significantly reduces the negative impact of a crisis, particularly if senior management and board members have been involved in creating a crisis plan. ✤

UNION ACTIVITY

Farmworkers union supports petition for heat protection. The United Farm Workers union is supporting a petition drive calling on the Occupational Safety and Health Administration (OSHA) to issue a national heat protection standard. The union announced in July that the petition marks the launch of a national campaign to raise awareness around climate change's impact on the health and safety of workers and other vulnerable populations and advance standards to prevent injuries and deaths from outdoor and indoor heat stress. The union's statement says that heat is the leading weather-related killer in the United States and that climate change is resulting in more frequent days of extreme heat.

AFL-CIO voices support for Dodd-Frank. AFL-CIO President Richard Trumka issued a statement in July supporting the Dodd-Frank Wall Street Reform and Consumer Protection Act on the eve of the law's eighth anniversary. He warned against attacks on the law from corporate CEOs. "Attacks in the mission to undo protections for working people are coming from all directions," Trumka said. "At the center of attacks is the egregious effort to dismantle the Consumer Financial Protection Bureau, highlighted by the [U.S.] Supreme Court nomination of Judge Brett Kavanaugh, who has vehemently opposed it. This watchdog agency has protected working people from dangerous financial products and returned more than $12 billion to ripped-off consumers."

Unions speak against Kavanaugh nomination for Supreme Court. President Donald Trump's July nomination of Brett Kavanaugh for a seat on the U.S. Supreme Court sparked a wave of criticism from union interests. "Judge Kavanaugh routinely rules against working families, regularly rejects employees' right to receive employer-provided health care, too often sides with employers in denying employees relief from discrimination in the workplace and promotes overturning well-established U.S. Supreme Court precedent," said AFL-CIO President Trumka. Mary Kay Henry, president of the Service Employees International Union, also criticized the nomination: "With his nomination of Judge Kavanaugh, President Trump has doubled down on rhetoric and policies that tilt our country further towards billionaires and greedy corporate CEOs, and away from all working people, whether they are white, black or brown."

Education unions fight orders affecting bargaining. The National Education Association and the Federal Education Association joined a "national day of action" dubbed #RedforFeds in July that coincided with a federal court hearing to challenge the Trump administration's Executive Orders affecting bargaining rights of federal workers. A coalition of 13 unions representing 300,000 federal workers sued the Trump administration, claiming the orders violate government workers' rights. ✤

and make sure your policies, and your implementation of them, complies with all applicable laws—even those that are under the radar. Be sure to include a check of any county and municipal ordinances that may be applicable to your workplace.

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EMPLOYEE BENEFITS

Planning and education are key to successful HSA

Over the past decade, the percentage of employers offering a health savings account (HSA) to their employees has grown dramatically. HSAs are a form of "consumer-driven health plan," a category of employee benefit that strives to place more responsibility on employees to be better consumers of health care. In short, employees pay 100 percent of the deductible under a high-deductible health plan (HDHP). In return, they are given the opportunity to contribute to an HSA, which offers substantial tax benefits.

While most employers provide HSAs as a cheaper alternative to a traditional group health plan, a few offer it as the sole coverage option. Either way, when an employer first adopts an HSA, there's a very good chance it will experience a lot of pushback and confusion from employees. For anyone who hasn't had an HSA before, it's a pretty big adjustment. In addition, the complicated rules regarding who can and can't contribute to an HSA provide lots of ways for both the employer and its employees to make mistakes that could jeopardize the tax benefits HSAs are designed to provide. Let's take a look at those rules and how they can cause unforeseen problems for you and your employees.

Enrollment in HDHP

The first prerequisite for an individual to contribute to an HSA is that he must have health coverage under an HDHP. For individual coverage, that means the deductible has to be at least $1,350. For anything other than individual coverage, the deductible has to be at least $2,700.

There are also other technical requirements for an HDHP to be considered HSA-eligible. For example, the plan must require participants to pay *all* of their medical expenses until the deductible is met. So if the underlying health plan offers copays for office visits or prescriptions, employees won't be eligible to contribute to an HSA—no matter how high the deductible is.

Another important concept is that while an employee needs an HDHP to contribute to an HSA, the opposite is not true. It's possible, for example, for an employee to enroll in your HDHP but contribute nothing to the HSA. It's also possible, depending on how your plan is set up, for your company to contribute to an employee's HSA when the employee is enrolled in an HDHP other than your own.

No other 'first dollar' coverage

For the whole premise of an HSA to work, employees must be fully responsible for their health expenses up to the amount of the deductible. That means they can't have any other "coverage" that would pick up those costs.

In this context, other coverage is defined very broadly. Employees may not contribute to an HSA if they have any of the following:

- Other non-HDHP coverage (including coverage under a spouse's or parent's group health plan);
- Medicare, Medicaid, or Tricare coverage;
- A general-purpose health flexible spending arrangement (but they can have a limited-purpose flexible spending arrangement—which covers only dental or vision expenses—if you offer one); or
- Access to an on-site health clinic or telemedicine services that aren't HSA-compatible (i.e., if services are provided at a cost that is lower than the fair market value). Make sure to discuss their impact on HSA eligibility with your benefits attorney before implementing such services.

Finally, remember that because enrollment in the HDHP and HSA eligibility are separate issues, employees might still enroll in the HDHP even if they're ineligible to contribute to the HSA.

Final thoughts

Employees deciding whether to choose coverage under an HSA need to be educated on—and make their decision after careful consideration of—all the pros and cons. Some key considerations will be how high the deductible is (it can get pretty high), the age and health of individuals to be covered, and whether the employee can afford to put aside extra money each month.

And one final word of caution: It's a bit of a double-edged sword, but HSAs are designed to encourage people to be informed consumers of health care rather than simply agreeing to every test or treatment a doctor recommends without regard to cost. Unfortunately, that aspect can also cause people to delay seeking treatment out of concern over the cost, doing more harm than good in the long run. You can help by educating your employees about the free preventive services provided under your plan and making employer contributions to their HSAs. ✤

SUPREME COURT

The end of the Kennedy era

For the past 20 years, Anthony Kennedy has decided the most important issues in America. An early protégé of Justice Antonin Scalia, Kennedy was appointed by Ronald Reagan as a conservative choice for the U.S. Supreme Court. At first, he voted with the conservative bloc more than 90 percent of the time and remained solidly conservative on criminal justice issues throughout his judicial tenure.

But as often happens with Supreme Court justices, Kennedy became a centrist swing vote. He joined Justices Sandra Day O'Connor and David Souter in protecting abortion rights and taking a nuanced view of affirmative action. He wrote the opinion that solidified the right to same-sex marriage.

Kennedy retired July 31, 2018. Nominated to replace him is Judge Brett Kavanaugh. Though there will be a loud fight in the Senate, expect Kavanaugh to be confirmed. He is a Yale graduate who clerked for several judges, worked for the White House, served under the solicitor general, and has a long track record on the influential U.S. Court of Appeals for the District of Columbia Circuit. Absent some personal revelation yet to come, it's hard to see him getting derailed.

A peek at the Court's future

So how would a Justice Brett Kavanaugh change the employment law landscape of the Supreme Court? He is known to follow the originalist and literalist theory espoused by Justice Scalia, and his writings reflect a narrow and strict reading of the law. More than anything else, he shows a pragmatic bent that often defies political labeling.

Two discrimination cases show Kavanaugh's employee-friendly side. In the race discrimination case of *Ayissi-Etoh v. Fannie Mae,* the question was whether a single use of the "n" word could create a hostile work environment. He wrote a ringing concurring opinion, quoting case law, Equal Employment Opportunity Commission (EEOC) compliance manuals, and *To Kill a Mockingbird* to conclude that a single use of that word can create a hostile work environment.

In another discrimination case, *Ortiz-Diaz v. United States HUD,* Kavanaugh is credited with moving the

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appellate panel to find a violation of Title VII of the Civil Rights Act of 1964 when an employer refused to provide a "lateral transfer" because of race or gender. His concurring opinion was expansive on what constitutes an "adverse employment action," again taking a practical approach in finding for the employee.

In an analysis that makes it easier to present a claim of discrimination, Kavanaugh is critical of the classic *McDonnell Douglas* test, which requires an employee to first set forth a *prima facie* (minimally sufficient) case and then prove the employer's explanation for its actions is unworthy of credence. Kavanaugh would ignore the *prima facie* showing and go straight to the bottom line: Once an employer explains its conduct, the case goes straight to whether that was the actual reason or a cover-up for discrimination. However, that shouldn't be seen as a proemployee ruling, but more of a pragmatic view of what the *McDonnell Douglas* test is all about.

Kavanaugh used that same practical approach in vacating a National Labor Relations Board (NLRB) order that found it unlawful for a phone company to prevent employees from wearing prounion T-shirts saying "Inmates" and "Prisoner of AT$T" on the job. The opening sentence of his opinion reads, "Common sense sometimes matters in resolving legal disputes."

In another case, Kavanaugh dissented from the holding that people who are not legally permitted to work in the country could be "employees" under the National Labor Relations Act (NLRA): "An illegal immigrant worker is not an 'employee' under the NLRA for the simple reason that . . . an illegal immigrant worker is not a lawful 'employee' in the United States."

Bottom line

At age 53, Brett Kavanaugh is likely to influence our nation even longer than Justice Kennedy has. We can only begin to list the questions he will face. Is sexual orientation covered by Title VII? Do job applicants have rights under the Age Discrimination in Employment Act (ADEA)? Can an employer use past salary as a factor in making a job offer? Where will the line be drawn between an employee's right to privacy and an employer's right to protect and control its workplace? How far can casual labor agreements erode traditional employment rights and benefits?

In the great tradition of our Supreme Court, we maintain the hope and belief that Kavanaugh—or whoever is appointed—will rise to the task of making those important decisions. ✤

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