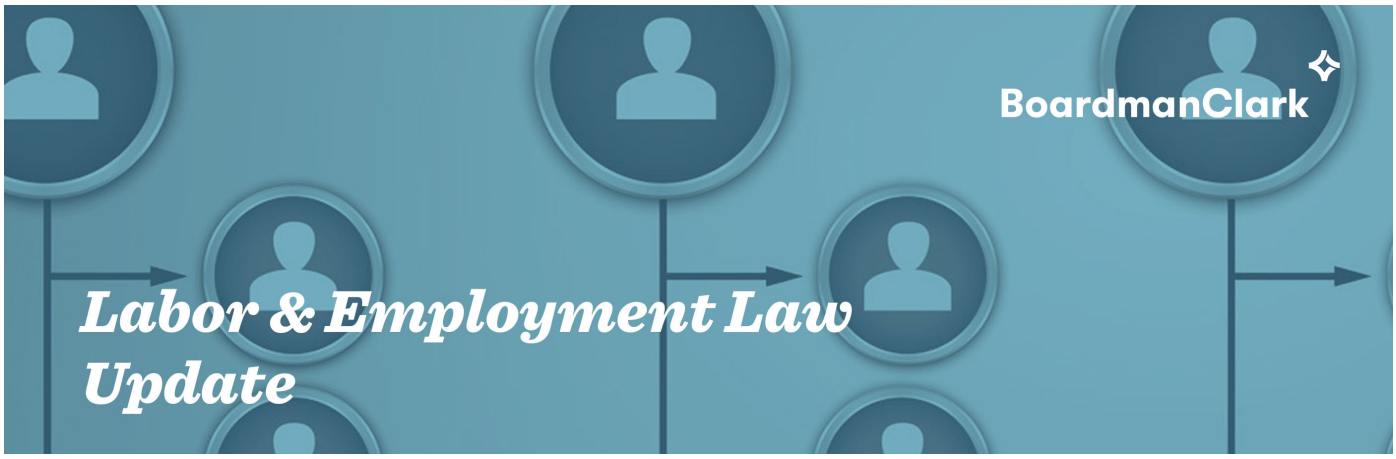

$30.5 Million to Settle Bag Search Procedure Case

ROBERT E. GREGG | 09.01.22

LITIGATION

Employer Constitutional Rights

Court Blocks States Content Restriction on Employers' Rights to Give Workplace Training. A federal court blocked Florida's new Individual Freedom Act law which prohibits employers from including various sorts of poorly defined content about sex, race, and ethnic discrimination in their workplace training. The judge opined that the law is a misnomer, restricts freedom, and violates the constitutional speech rights of employers, as well as conflicting with the state's own antidiscrimination law requirements. The judge stated that the law was not narrowly tailored, met no test of showing any compelling interest, and unduly restricted employer rights to conduct training as they see fit. The new "law is an unconstitutional effort to stifle speech with which those in power disagree… State lawmakers are trying to squelch viewpoints they don't like. It is fundamental in our democracy that government cannot punish speech that it dislikes." The judge went on to state, in our constitutional scheme the remedy for speech one does not like "is more speech, not enforced silence" *Honeyfund.com, Inc. v Ron DeSantis et al* (N. D. FL 2022) Though this case is about the Florida restrictions law there are several other states which have passed, or are in the process of trying to implement similar laws, so this case may have applicability to those situations as well.

Family Medical Leave Act

Failure to Give Required Notice On-Time is "interference" Under the FMLA. The FMLA requires an employer to promptly give three notices once there is a request for leave: 1. The Eligibility Notice; 2. The Rights and Responsibilities Notice; 3. The Designation Notice

– on leave approval or non-approval. The notices are to be given within five days of the request. In *Fairmont Tool, Inc v. Opyoke* (WV App., 2022), the employee took leave, but the employer failed to give the notices for several months. Then the employer notified him that the time he had been off had counted as FMLA and exhausted his FMLA allotment. Shortly thereafter, the employee was included in a layoff. Even though leave may be given, the technical violation of failure to give notice can still be a violation of the Act and interfere with FMLA rights. In this case the employer was found to have committed this technical violation. However, there was no showing of harm. The employee did get his requested leave and would have been included in the layoff regardless of that leave. Thus, there were no grounds for any tangible relief or damages to be granted. The court pointed out that this would have been a different result if there had been any sort of harm such as planning to take additional leave believing he still had FMLA; a cut of his benefits; non-reinstatement on return; or, termination while still on leave. Even if the leave exceeded 12 weeks, one risk of a no notice leave is that may allow the employee to have leave extended by the time it took to finally send the notices.

Personal Liability

Diversity Recruitment Fraud. A Human Resources Manager for a Honda race car design operation defrauded her company by submitting fake invoices for diversity recruitment efforts. She colluded with her father to set up a sham company, Engineering Talent Connect, which sent invoices for nonexistent recruiting services. The HR Manager, her father, and others involved then pocketed the resulting $1.7 million in payments; $1.1 million which she kept for herself. This resulted in criminal charges for wire fraud. The others involved were sentenced to six months in prison and up to $183,000 restitution. The HR Manager received a sentence of four and a half years in a federal prison, plus a $1.7 million restitution order. *USA v. Fernandez-Adelugba et al (C.D. CA, 2022)*

Wages & Hours

$30.5 Million to Settle Bag Search Procedure Case. Apple Inc. conducted security searches of employees' handbags, backpacks and other personal parcels when they left work. The search was conducted after the employees clocked out, but before they were allowed to exit the premises. This resulted in up to 90 minutes or more in unpaid time each week waiting in line, and having security do the searches. It was not a *de minimis* amount of time. An FLSA Class Action was filed claiming pay and overtime for the time spent in the bag search process. The company decided to settle the case and will provide a payment to affected employees. The court approved a $30.5 million total amount. (N.D. CA 2022) [There is very little room for unpaid time. Even very small increments can eventually add up to major amounts. For more information request the article "*De Minimis is No Small Matter*" by Boardman Clark LLP.]

DISCRIMINATION

Sex & Disability — Accommodation

Walmart Can Restrict Light Duty to Those with Workers Compensation Injuries. The Seventh Circuit Court of Appeals ruled that an employer can restrict light duty assignments to employees with work-related injuries and does not have to extend this practice to other workers. Walmart denied the request of an employee to have light duty during her pregnancy. She and the EEOC then sued under the Pregnancy Discrimination Act (PDA) which provides that the condition of pregnancy must be treated the same as other similar employees with inabilities. The court decided that she was not similarly situated to those with work injuries. All other employees with non-work-related inabilities or disabilities were not eligible for light duty; so, she was treated the same as all others who had no work injury. The court held that "offering temporary light duty to workers injured on the job pursuant to a state workers' compensation law is a legitimate nondiscriminatory justification for denying accommodation to everyone else." The light duty was intended to speed injured worker recovery and lower the company's workers' compensation exposure, a purpose which would not apply to the condition of pregnancy. *EEOC v. Walmart Stores East LP* (7th Cir. 2022)

Disability

Gender Dysphoria Can Be a Disability. The Fourth Circuit Court of Appeals has found that Gender Dysphoria, (a sense of unease or discomfort that a person may have because of a mismatch between the sex assigned at birth and their gender identity) is an ADA covered disability. The court found that Gender Dysphoria is different than a Gender Identity disorder, which was excluded from coverage when the ADA was passed. The American Psychiatric Association, some time ago, removed Gender Identity from its diagnostic manual, finding it was too narrow of a definition to qualify, focusing only on "identification". Gender Dysphoria is a more in-depth diagnosis with greater clinical symptoms and significant distress". This ruling may have broad effects for transgender people within the ADA's sections on employment, transportation, and public accommodation. *Williams v. Kincaid* (4th Cir, 2022) This is the first circuit court to address this issue, so other circuits may reach different conclusions.

National Origin

Manager Did Not Want "A Brown Man Running Around with a Gun" – Loose Comments Create Cases. A court found sufficient evidence to warrant a jury trial for a terminated Hispanic insurance agent. There was an incident in which a difficult, irate customer made repeated calls to the agent's office using profanity and threats toward the agent and his assistant – his wife. The customer then filed a complaint against the agent, which was

investigated by the District Manager. During this investigation, the agent's assistant/wife stated that she was offended, but that if the customer indeed tried to carry out a threat, she could have defended herself and shot him; she and her husband had legally authorized firearms. The conclusion of the investigation was that no action would be taken, though the agent was counseled to better handle such customers. Then, several months later, the company decided to cancel the agent's contract. In doing so, the District Manager stated that the company "didn't want a crazy brown man running around with a gun." The agent filed a race discrimination case under 42 U.S. Code Section 1981. The court found that the "brown man" comment could be direct evidence of discrimination and was sufficient for the case to proceed to trial. *Cruz v. Farmers Insurance Exchange et al* (10th Cir. 2022) This case is yet another example of how managers' loose comments can create cases. This situation goes beyond just the "brown man" statement into deeper stereotyping. White agents had guns and often openly comment on their protective properties and their right to carry. There is little concern voiced by the employer. Non-white agents who legally exercise the right to possess and carry can be viewed in a different light – as somehow creating a danger. Management comments and company decisions based on such stereotypes are discriminatory. For more information on how loose comments create cases, see the article It Was Just a Joke by Boardman Clark LLP.

Retaliation

Siracha Sauce Employee Wins $103 Million Retaliation Case Verdict – Sweating in the Hot Sauce. The Huy Fong siracha sauce producer has suffered a double hit this summer. First it announced that weather had seriously harmed the chili pepper crop and severely curtailed its production of siracha sauce this year. Now the company has lost a hotly contested employment case and suffered a $1 million jury award. A production plant employee raised concerns about unhealthy work conditions and food safety. He complained that due to worker shortage, meal breaks were not given, safety processes were shortcut, poor ventilation and excess heat created difficulties in breathing, and workers were sweating into the batches of chili pepper products. He claimed that he suffered asthma attacks and made requests for accommodation of this disability, asking the company to correct some of the safety and health conditions. Instead, he was discharged soon after raising the concerns. The company claimed he was discharged due to his own food safety violation in not properly cleaning a food conveyor. The food conveyor incident, though, had occurred over a month before the discharge, and a jury could conclude the company looked back to find something which could be used for a discharge, and the employee's raising of concerns was a significant factor in the termination. The jury did give credit for the company having addressed some of the employee's concerns, awarding only $1 million when the plaintiff's demand had been for $10 million in damages. *Bravo v. Huy Fong Foods, Inc.* (LA Co. Cal., 2022) This case is a good reminder what using stale issues to justify a current discharge. When it looks like

the employer was going back to "look for something it could use" to now fire the employee, then it may be seen as pretext for a retaliatory or discriminatory decision.

Hospital Services Director Fired for Failure to Accommodate and Lying. Title VII prohibits retaliation against a person who participates in an EEOC investigation of discrimination. However, it does not protect the perpetrator of the discrimination from being disciplined for other reasons, even though that person may become a "participant" in the investigation. A hospital employee filed complaints that her Services Director had refused to accommodate her religious needs as a Jehovah's Witness for Sundays off. The Services Director told HR that she had not denied the requests and would accommodate. However, the Services Director then did not inform the employee of this and told her, *"You can have all rights in the world; I'm not going to change your schedule*!" the employee filed a Title VII Complaint with the EEOC. The hospital defended, using the Director's representations that she had informed the employee that accommodation would be made. The Director participated in helping write the response. Then, the truth came out. The hospital fired the Services Director for failure to follow its religious accommodation policy and for providing false information to Human Resources. The Director then filed her own Title VII retaliation case for having "participated in the EEOC investigation." A court found the discharge was for valid cause and not retaliatory under Title VII. The false representation had also occurred during the internal HR process, prior to any EEOC investigation, and merely continued into that process. *Anderson v. Emery Healthcare, Inc.* (11th Cir. 2022)

IMMIGRATION LAW & COMPLIANCE

Penalties Can Be More Severe Than Simply Money – Only $1,300 Fine, But Full Year Ban on Recruiting Farm Laborers. A farm operation was found to have violated the H-2A regulations regarding guest workers. It then did not pay the resulting $1,300 fine for over two years, until the Dept. of Labor filed for an enforcement order and sanctions. The DOL Administrative Law Judge ordered payment plus an additional penalty of a full-year ban on the company being able to use guest workers. The monetary fine is miniscule. The inability to get workers could have very serious, if not dire, consequences for the farm's operations. *Dept. of Labor v. Wikstrum Cattle* (DOL Administrative Decision, 2022)

BENEFITS

Retirees Receive $5.7 Million in Promised Health Benefits. Retirees sued Cabell Huntington Hospital over promised, but unfulfilled, health insurance benefits. When union employees went on strike over a decade ago, the hospital's HR Dept. told nonunion nurses and professional employees that they would be rewarded with future benefits of being able to retire at age 62 and receive lifetime health benefits if they did not join the union. Some years later the hospital then acted to end the retirees' continuing insurance

benefit. The retirees filed an ERISA suit alleging they were induced into early retirement based on misrepresentations about their receipt of benefits. The case in now being settled at $5.7 million which will create a fund to cover a number of the lost benefits. *Blenko et al v. Cabell Huntington Hospital, Inc.* (S.D. WV, 2022) [This case presents an interesting commingling of labor law and ERISA. Though now far beyond the statute of limitations, the hospital's promises of special benefits could have been viewed by the striking union as an unfair labor practice at the time (as in the recent case of *In Re Starbucks Corp. and Workers United Labor Union*, (NLRB 2022)), as well as creating an ERISA issue. The Huntington Hospital case is of special interest to the author of this Update since it is the hospital where he was born and received treatment for a number of youthful mishaps.]

Author

Robert E. Gregg
(608) 283-1751