EMPLOYMENT LAW UPDATE

December, 2014

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LEGISLATIVE AND ADMINISTRATIVE ACTION

What You Should Know About Protections For LGBT Workers is the title of the new EEOC fact sheet regarding its recent reinterpretation of Title VII to cover LGBT as protected statuses. This follows last summer's Executive Order barring LGBT discrimination in government contracts. Now EEOC is expanding this rule to all employment. LGBT status is not specifically covered by Title VII and the EEOC has had to reverse its prior interpretations and carefully weave theories of LGBT coverage into the sex discrimination law. Employers can also "skirt" the Title VII LGBT issue by carefully avoiding gender connotations. This is giving rise to very legalistic and stretched interpretations of specific employment situations to argue for Title VII inclusion or exclusion. Perhaps, for the benefit of employees and employers, Congress should act to make the issue clear and stop the stretched interpretations and gamesmanship.

TRENDS

Sending Notices Is Not Enough – Proof Of Receipt May Be Required. *Lupyan v. Corinthian Colleges, Inc.* (3rd Cir., 2014) was decided against the employer because although it could prove it sent FMLA notices to the employee on leave, it could NOT prove they were actually received. The employee claimed never getting the required FMLA notices and information. So, first class mail – even with an affidavit of mailing – was not sufficient. This is not just an FMLA issue. There are many other notice issues, under the ADA, COBRA, ERISA, FCRA, termination and return of property, notice to cease violation of non-competes, and multiple other issues. Notice is often required before any "right" can be denied or any further action for problem activity can be pursued. For instance, one of the fastest growing liability issues is suit by rejected job applicants who claim they did not receive the two required FCRA notices when a background check

resulted in an adverse decision. [For more information on what might be sufficient proof of receipt, see the accompanying article at Boardman & Clark.com Reading Room.]

Theme of the Month

Rush to Judgment

Two cases illustrate the dangers of letting allegations of misconduct take on a life and lead to discharge without first carefully considering the evidence, or even finding evidence. The accusations may sound serious, but also can be overblown, magnified, or even false. Those accused of wrongdoing often end up winning aftermath litigation due to inadequate investigation and a rush to judgment. [For more information, request the article Investigative Malpractice by Boardman & Clark LLP].

Rush To Judgment Violated Mayor's Assistant's Constitutional Rights. Political appointees serve "at the pleasure" of their boss, and have virtually NO employment law rights. However, there is an exception for violation of one's Constitutional Liberty interest, which protects one's reputation against serious defamation. In *McDonald v. Wise* (10th Cir., 2014), the mayor's assistant had a relationship with a police officer. At some point she accused the mayor's assistant of hostile environment sexual harassment, and she provided snippets of two secretly taped conversations between them. The assistant was summarily fired. He requested a name clearing hearing, but was denied. Then the mayor's office publicly announced that the assistant had been dismissed for "serious misconduct." This poisoned the assistant's ability to get any further employment, as well as poisoned his public reputation. Following the discharge, evidence surfaced that the harassment charges were false. In fact, following the two taped conversation snippets the police officer continued the relationship, made over 30 other calls to the assistant, and accompanied him to social events, including going to meet his parents and family. She then waited another six months to make her complaint and provide only parts of two of the dozens of calls. The evidence was the exact opposite of a "hostile environment" or an "unwelcome" relationship. The court found that the denial of a due process name clearing hearing before discharge violated the assistant's Constitutional rights. Further, the court allowed personal suit of both the mayor for intentional, knowing denial of rights, and personal suit of the police officer for "false representation and reckless disregard" under state tort liability.

Court Finds For White Employee Fired For Non-Hostile Use of N-Word, While Black Employees Could Use The Term Without Sanctions. A White newsroom employee at a Fox Network station said the full N-word in a discussion about a story. Others reported it, and he was fired. He sued and the court found evidence of racial discrimination. Everyone avoids saying the actual N-word (including in this Update) though everyone knows exactly what the acronym means. This was a newsroom discussion on a story about an African-American church's "Funeral for the N-word" event, in which the full word was said over 100 times. The White employee said "does this mean we can now actually say N……? It might add more impact and credibility to the newscast." It was a standard discussion of how to best present a broadcast story. One of the others present said "I can't believe you said that." The use of the word was reported to management. Soon the rumor mill had expanded it to a story that the White employee had engaged in a "bizarre" lecture or tirade repeatedly using the N-word. A campaign was launched to fire him, with some African-American employees stating that they could no longer work with him. He was specifically told that White people could not use that word, while Black people could. He was fired. He sued. The court found ample evidence of Title VII racial discrimination. The N-word use by him was not hostile, not pejorative, not directed negatively about a race. It did not violate the Harassment Policy. It was part of a discussion similar to other newsroom talks about presentation of controversial issues. African-American employees used the term, non-pejoratively, even in jest, without any consequences. This rush to judgment created a prima facie case of race discrimination. *Burlington v. News Corp* (E.D. Pa. 2014). This case may be a counterbalance to the situation a couple of years ago when the Fox Network took a snippet of an African-American government official's comments about Whites out of context and turned a non-hostile, positive comment into a "case of racism" and broadcast this negative spin, resulting in her termination. The real picture emerged later, but it was too late. A wrong done to a White employee, however, does not balance out a similar wrong to an African-American person or vice versa.

Genetic Information-Non-Discrimination Act

Employment Physicals Violated Law. Three interrelated agricultural companies have settled a case, agreeing to pay $187,000 to several rejected applicants, and revise pre-employment medical exam policy. The evaluations violated both GINA's prohibition on asking for family medical history, and the ADA's prohibition of exploring medical information about conditions which are beyond the scope of relatedness. *EEOC v. All Star Seed et al.* (S.D. Cal., 2014). [Be aware that an employer does not have to directly be involved in this sort of

violation. Doctors often routinely ask about family medical background. They do not understand the different rules which apply to an Employment Exam versus personal treatment. The employer, however, is responsible for the acts of its "agents," so the company must *educate* the doctors it uses for pre-employment, worker's comp, fitness for duty, or any other medical evaluation.]

Discrimination

Disability

Drug Test Went Too Far. A manufacturing company drug tested for both illegal drugs and chemical compounds contained in prescription medicines which it believed could create safety concerns when operating machinery. It discharged those who tested positive for either illegal drugs or the prescription compounds, if they did not cease taking the prescriptions. A court decided that this turned the drug test into a medical examination under the ADA. Then it determined that it was an overbroad, impermissible medical exam. It did not engage in a job-related "individualized assessment" to determine whether a medication actually did pose a safety concern for a particular employee, nor did it engage in any interactive process for reasonable accommodation. *Bates v. Dura Auto Systems, Inc.* (6th Cir., 2014).

Sex

Women File Suit To Get More Male Jail Guards. Female sheriff's deputies/jail guards filed a Title VII sex discrimination suit claiming that the city-county policy prohibiting male guards in the women's jail created a staffing shortage. This shortage created an unreasonable work burden and safety issues for the female guards. The city-county argued that its policy was to protect female inmates from sexual misconduct or harassment. However, the court concluded that there was no valid evidence that "all or nearly all" male deputies were perpetrators proven to engage in sexual misconduct, nor unable to resist the sexual manipulations of female inmates. The employer could engage in individualized assessments to weed out problem individuals. Most states have had mixed gender jail and prison guards since the 1980's without significant issues, and many of the abuse cases which did occur were same-sex improprieties. So a blanket ban on one gender was not justified. *Anderson v. City & County of San Francisco* (9th Cir., 2014).

Uniformed Services Employment & Re-employment Rights Act

Anticipatory Demotion Violates Law. USERRA requires restoring a person to their position on return from active duty military service. In *Dept. of Justice v. Key Safety Systems, Inc.* (MD. Fla., 2014), the company was alleged to have demoted a National Guard member upon learning he was going to be called to a year of active duty, but prior to the time he left. On return, he was restored to that lesser job, and filed a complaint. The company claimed it met its restoration obligation to place him in the job he had at the time he left. DOJ alleged that anticipatory demotion due to military service is no different than failure to restore at the end; the effect on the service member is the same, punishment for service. The company settled the case and paid back pay, legal fees and reinstated the Guardsman to the original position.

Family And Medical Leave Act

Employee's Contribution To Illness Is Not A Defense To FMLA Case. An employee was fired when the company denied his FMLA request, and he went on leave anyway. He sued. The company defended by claiming he was not qualified for FMLA because his illness was his own fault and under his own control – he was not properly taking all of the medications his doctor prescribed. In *Cuff v. Trans States Holdings, Inc.* (7th Cir., 2014), the court flatly rejected this defense as having no foundation in the law. "The only question under FMLA is whether the employee has a medical need for leave, not whether he could have managed his life better to avoid needing time off." The court also assessed $325,000 in legal fees against the employer, for only a $50,000 back pay award. This was due to the employer's invalid defenses, and its having mounted a series of obstructions in the case without valid reason, which unreasonably drove up the costs. [Perhaps we all should be grateful that the court rejected this defense. Otherwise, it may have started routine FMLA litigation inquiry into all of our personal habits, diets and how many pizzas, hamburgers and fries we ate as teenagers, to show it was our fault that FMLA or an ADA accommodation was requested.]

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