EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

EEOC Will Take Gender Identity Claims As A Category Of Sex Discrimination. The Dept. of Justice has announced that the EEOC will change its practice of requiring Gender Identity cases to fit a "sexual stereotyping" framework, and will simply consider these complaints as a straightforward form of sex discrimination. This will allow more types of Gender Identity claims. One should expect challenges to this decision on the grounds that the EEOC is exceeding its authority beyond the wording and Congressional intent of Title VII sex discrimination provisions.

New Michigan Law Protects Employers From Liability For Hiring Ex-Offenders. Michigan's Department of Corrections will begin providing certain parolees with "Certificates of Employability," which describes completed educational programs, conduct history and work history. The law also states that a record of incarceration may not be used to show "lack of moral character" in a licensing process. A companion Act protects employers from lawsuits by others based on having hired a Certified ex-offender. [In 2013 the EEOC and OFCCP issued guidelines discouraging use of conviction records in the hiring process and many states have passed "ban the box" laws. This new law takes the process in a more proactive direction.]

Illinois Takes Independent Contractor Examination A Step Further. States and the U.S. Dept. of Labor are closely scrutinizing abuse/misclassification of Independent Contractor usage when a questionable practice is discovered. Now Illinois has taken a much more aggressive stand under Public Acts 98, 105 & 106. It will not wait until an issue presents itself. Construction companies will now annually report the names, addresses, and amounts paid for work done by all those who are not employees to the State Dept. of Labor.

LITIGATION

U.S. Supreme Court

Court Takes Same Sex Marriage Case. *DeBoer v. Snyder*. In 2014 the Court declined to accept appeals of various decisions which ruled that states could not prohibit same sex marriages. Then a circuit court ruled the opposite, holding that states can do so. The Supreme Court has now decided to take the appeal of that case, since there is now a conflict in the decisions. In the employment context this is an important case because it will determine whether there will be nationwide consistency in FMLA, benefit coverage, tax deductions, etc., or will a multi-state employer have to manage a variety of conflicting laws and requirements state by state.

Employee Handbooks

Overly Generous Policy Can Create Extra Causes Of Action. In *Marini v. Costco Wholesale Corp.* (D. Conn., 2014), the company policy specifically stated that "corrective action will be taken regardless of whether the inappropriate conduct rises to the level of any violation of law" and that the policy definition of harassment was broader than "as defined by law." A former employee filed a claim with the EEOC and state EEO agency alleging disability harassment, but filed over 300 days after the acts. The EEO cases were dismissed as being beyond the statute of limitations. However, the court ruled that the company's "progressive policy" exceeded the scope of EEO law, and created an enforceable **contract.** Under state law the contract statute of limitations was six years. So, the employee could pursue the harassment case. The court also found that the company policy had no disclaimer such as" "This policy does not create legally enforceable protections beyond the protection of the background laws" (state or Federal EEO laws). That sort of disclaimer would have prevented the policy from becoming an enforceable contract. [One other important issue is that state and Federal EEO laws often "cap" damages, but state contract law may have limitless liability. So, a contract action can be much more expensive.]

Discrimination

Race

Racially Demeaning Comments Over PA System. A food wholesaler has agreed to pay $735,000 to settle racial harassment charges by 30 African-American warehouse workers. The case alleged that supervisors routinely used racial slurs to demean Black workers, and upper management failed to take action when complaints were made. The chief offender was an African-American supervisor. In one incident he gave a public lecture over the warehouse PA system telling all Black employees that they were forbidden from

asking for leave for the Martin Luther King, Jr. holiday and warning them not to call in sick on that day. The EEOC stated "We want to demonstrate that this type of repetitive, aggressive, demeaning language is unacceptable in the workplace, regardless of the race of the speaker." You don't get a "pass" simply because you are the same race or gender or origin as the people you abuse. *EEOC v. Battalglion Distributing Corp.* (N.D. Ill., 2014).

Sex

"It's Your Fault For Getting Pregnant." A warehouse day shift worker had five years of excellent performance. She then became pregnant, and the doctor imposed a 30 lb. lifting restriction. Management told her that 40 lb. was the minimum restriction allowable, and placed her on involuntary leave under the Collective Bargaining Agreements provision for pregnancy leave of absence. She then filed a Title VII pregnancy discrimination complaint. The CBA provided for a right to return to the same job at the end of the leave. However, on return she was placed on night shift, with different duties and less pay. She and her union representative met with Human Resources regarding the restoration. However, the HR director replied to the union rep. that it was "her fault for getting pregnant in the first place" and having to leave the original job. He refused to place her back in the original job. She then filed a Title VII retaliation claim (in addition to any grievance process under the CBA). The court found that the HR director's statement was sufficient direct evidence of improper motive and retaliation. *Kaiser v. Trace, Inc.* (D. Id., 2014).

Sexual Harassment Case Survives But Firing Was Valid For Assaulting The Harasser. An employee suffered a lengthy "drumbeat of overtly sexually offensive remarks," and her supervisor took no action to stop the offender. She and her boyfriend (also an employee) confronted the harasser in a breakroom. She physically assaulted him while the boyfriend stood behind her with a raised hammer. Both she and the boyfriend were fired. The court allowed her to pursue a case for sexual harassment, but dismissed her claim of retaliatory discharge. Regardless of the verbal behavior a physical response is not justified. The reaction to management non-action should be filing with the EEOC, and the legal process rather than self-help fights and threats. *Walter v. Mod-U-Kraf Homes LLC* (4th Cir., 2014). [Even though the plaintiff will be ineligible for back pay, due to discharge, she may still seek substantial damages for the harassment. For example, in *Aguilar v. ASARCO* (9th Cir., 2014), a harassed employee was awarded only $1 in actual pay damages, yet $300,000 in punitive damages.]

Disability

Four-Inch Nail In Head – Perceived As Disabled. A city water service worker was able to proceed with a "perceived as disabled" ADA case. In an off-the-job nail gun accident he put a four-inch nail into his head. After operation and recuperation his neurologist cleared him for return to work. However, he had performance problems, some regarding memory. He was placed on leave, pending an independent medical evaluation. The doctor found some cognitive impairment which affected job performance. The city terminated the employment in a letter stating that it was "not due to discipline, but to disability," and performance of "essential functions." In the ADA suit the court found that the letter clearly established that the city's action was based on disability or perceived disability. Further, the city had not engaged in an interactive process to see if accommodations were possible prior to the termination. *Strajapede v. City of Evanston* (N.D. Ill, 2014).

Tardy In Reporting To Work At Home. Often people have difficulty getting to work on schedule. Weather, traffic, etc. create delays. When the employee works from home, it is more difficult to see how they cannot get to the office on time. A Contract Specialist with MS had difficulty getting to work. She requested, and was granted, the ability to work from home, and had an office setup there. She was told that she must still keep the regular predictable business hours. Nonetheless, she continued to be "tardy," logging in late over 29 times, sometimes over an hour late. After several warnings she was fired. She sued under the ADA, but the court found that punctuality was a legitimate expectation. She had not shown how her disability made it difficult for her to report on time from her own home. The court dismissed the case. *Taylor-Novotny v. Health Alliance Medical Plans, Inc.* (7th Cir., 2014).

Angry Supervisor's Behavior Catches Up With Company – Equal Treatment Required. An employee whose depression and adjustment disorders caused "anger issues" and angry outbursts toward others was fired. Normally a company does not have to accommodate overt disruptive behaviors, regardless of causation by a disability. However, in this case the evidence showed that a manager also had a history of angry outbursts, with numerous employee complaints about verbally abusive behavior, yet the company did nothing. The court found sufficient evidence to allow a case for disability discrimination based on the unequal treatment for the same sorts of behavior. Having allowed the manager to freely vent at others, the company may now be stuck with an inability to fire anyone else who engages in outbursts. *Assaturian v. Hertz Corp.* (D. Haw., 2014).

On the other hand

In *Curley v. City of N. Las Vegas* (9th Cir., 2014), the court found the city validly fired a worker who made angry and threatening statements to others, even though they were symptoms of his disability. The city was not required to accommodate these behaviors. There was no evidence of anyone else not fired for similar behavior.

Uniformed Service Employment & Reemployment Rights Act

"Indefinite Period" Works Under ADA, But Not For USERRA. A reasonable leave of absence for treatment or recuperation is a form of accommodation under the ADA. However, an undetermined leave is not reasonable. When the employee is unable to provide a reasonably predictable date of return, the employer is not required to hold the job for an "indefinite period" and can terminate the employment. USERRA is a very different law, and provides more rights to service members. An Army Reservist returning from active duty suffered PTSD and was unable to report back to her civilian bank job. USERRA provided a two-year right to reinstatement for those convalescing from service-related conditions. At the two-year mark the leave was still "undetermined in duration," so the bank terminated the employment. The employee then got better and asked for rehire and was denied. The court found no ADA case, but did find grounds for a USERRA case. The language of the two-year convalescence provision also includes the term "the two-year period shall be extended by the time required to accommodate circumstances beyond such personal control…." The PTSD condition could be such a circumstance, and extend the right to reinstatement indefinitely. *Lamar v. Wells Fargo Bank* (11th Cir., 2014).