Labor & Employment Law Update

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BOB GREGG | LABOR & EMPLOYMENT GROUP | (608) 283 1751 | SIGN UP: RGREGG@BOARDMANCLARK.COM

Legislation & Administrative Action

ADEA Finally Old Enough For AARP Card The Age Discrimination In Employment Act (ADEA) went into effect 50 years ago. It has been a major factor in enabling employees to continue to work and enabling employers to benefit from the talents of mature and experienced people. The EEOC has issued a report on the State of Older Workers and Age Discrimination – 50 Years After the ADEA. The report provides insight and statistics on the current legal, economic and trend issues on age and employment. Eligibility for AARP membership and its many benefits starts at age 50. So the ADEA is now eligible.

DOL Opinion Letters The Dept. of Labor has issued its first opinion letters in nine years. Opinion letters provide guidance in answers to employers' questions on unclear issues. The letters include: *Short Rest Breaks For FMLA Condition Can Be Unpaid – Opinion Letter FMLA 2018-19.* The general rule is that short rest breaks under 20 minutes (30 minutes under Wis. and some other state laws) should be paid time. However, the question involved an employee whose serious medical condition required a 15-minute break every hour, as opposed to the standard one break every half day. This resulted in an extra hour and a half per day of breaks. The Opinion stated that if the break is for the benefit of the employee, they can be uncompensated. (The regular breaks are considered for the employer's benefit, since they promote work safety and productivity.)

EEOC Cautions Against Zero Tolerance Harassment Policies. In light of the current surge of attention to sexual harassment, many organizations are examining and upgrading their Harassment Policies. They wish to provide more prompt and effective responses to complaints, with more serious consequences. On July 11, 2018, EEOC Commissioner Chai Feldblumer cautioned that overly zealous and rigid Zero Tolerance policies may actually impede the ability to combat harassment. Zero tolerance resulting in discharges for minor instances seems unfair and may cause people to refrain from reporting; because they just want behavior to stop – not to have co-workers fired. Overly rigid and overly zealous policies can result in discharge for minor harassment, while people with much more egregious behavior of other sorts simply get warnings or lesser discipline. This can result in discrimination cases by those discharged, while others with much worse behavior are not fired. In 2016 the EEOC issued similar advice. For more information on these and other points in designing an Anti-Harassment Policy, see the article Harassment Policy and Procedure by Boardman & Clark.

Litigation

CASE OF THE MONTH - JOINT EMPLOYMENT

Dept. of Labor Rejects McDonald's Settlement. Leaves Open Joint Employer Claims An Administrative Law Judge for the National Labor Relations Board has rejected a proposed settlement of a case which claims that

McDonald's national corporation is a Joint Employer with local McDonald's franchised restaurants in the country, and therefore the national corporation can be liable when any of the local separately-incorporated restaurants violate federal labor laws. Each franchise is supposed to be an independent corporation owned by a local business, which operates on its own, under a franchise agreement. Often a local operation will have separate agreements with competing national brands, and operate several different sorts of restaurants; it has its own employees, management and practices. Joint employment may be found when two separate corporations are so "entwined" that it is difficult to tell them apart, or when a larger one exercises too much direction and control over the policies, practices and decisions of the other, decreasing the "independent business" status. That is the claim in this case.

Rejection of the settlement means the case will go forward, to determine whether there is Joint Employer status. Such a finding would not only affect McDonald's, it could have major impact on all franchise operations: restaurants, auto dealerships, farm equipment dealers, motorcycle dealers, hardware stores, gas/convenience stores; the list goes on and on. Franchise operations are a huge part of American business, and a large part of local small business ownership and opportunity. A great number of local jobs depend on small businesses which have franchised operations. A Joint Employment ruling could have the effect of the national corporation exercising much more scrutiny and control over franchises, or even deciding to eliminate franchising and directly owning local establishments, or closing the stores altogether, and putting some locally-owned businesses out of business, especially in small markets, small towns and low income sections of cities. The separate entity status of local franchise owners has also been an important protection for locally-owned businesses against unfair treatment by large national corporations under other federal laws and state Fair Dealership laws. So, a joint employer ruling could provide more opportunity for employees to organize and to file larger actions, but could also have serious impacts on local business ownership and jobs.

Discrimination

RETALIATION

HR Director Did Not Plot To Kill Employee An employee's retaliation case was dismissed. The employee, a county probation officer, had won a prior discrimination case, appealed by the county. While the appeal was pending, another employee said they overheard the HR Director say to a Deputy Chief Sheriff, "Figure out how to get her alone." The Deputy Chief replied, "I'm going to do it." The employee believed this was a reference to her, and indicated a plot to do her bodily harm or kill her in retaliation for winning her discrimination case. Then the Deputy Chief called in the probation officer at night to question a person who had been brought in for probation violations. At the end of the session the Deputy Chief had another officer escort her out by the back entrance. She alleged she thought he said, "Do it to her when she gets out the door," placing her in fear. However, nothing happened. The officer escorted her to the parking lot and she went home. The probation officer, believing she had been threatened, filed a retaliation case over this situation. The court found insufficient evidence. The direct witness could not say the overheard comments were actually about the probation officer. There was no actual threat or tangible description of harm in the vague statements, and it required a stretch to interpret a threat of bodily harm. The night time incident resulted in nothing more than a safety officer escorting an employee out the back exit at night. The evidence was too oblique to create a case of real threat. *Flanagan v. Office of the Chief Judge of Cook County* (7th Cir., 2018). The HR Director was not without fault. It was established that after the probation officer filed her retaliation case, he did angrily yell (not in the presence of the employee), "There she goes again with a new f...ing charge! I'm so sick of these f...ing lawsuits!" However, the court found this occurred after the case was filed, and though improper, resulted in no tangible negative actions toward the employee.

DISABILITY

Invalid Carpal Tunnel Evaluation Costs $4.4 Million A manufacturing company has settled a case by agreeing to pay $4.4 million in back pay and compensatory damages to 40 applicants who were rejected by a "nerve conduction test" for carpal tunnel syndrome. The evaluation did not meet the ADA standards for individualized assessments as to whether the person could or could not do the job and "had little or no value in predicting the

likelihood of future injury." *EEOC v. Amstead Railco* (S.D. Ill., 2018).

Transgender Is Not A Disability Under The ADA, But Is Covered As Title VII Sex Discrimination A transgender truck driver sued for harassment, and restroom discrimination – not allowing use of the female restrooms during the medical transition from male to female. She took the unusual approach of suing under the ADA for failure to accommodate the restroom issue based on the disability of Gender Disphoria Disorder. This is unusual because LGBT advocates have consistently argued that gender orientation and identity are not disabilities or "disorders." They are not to be viewed as medical or psychological conditions subject to treatment or corrective therapy. In the ADA, Congress excluded some such conditions from coverage. The court dismissed the ADA claim. However, the court ruled that transgender and transitioning status can be protected under Title VII's sex discrimination provisions. So, the harassment and discrimination claims could proceed. *Parker v. Strawser Construction Inc.* (S.D. Oh., 2018).

Sleeping Under Desk A railroad clerk could not establish that sleeping on the job was due to disability. The clerk job required her to pull extra shifts as needed, at all hours. She was found sleeping under her desk. She claimed exhaustion due to the number of consecutive days on extra shifts she had to work. The supervisor referred her to the EAP if she was having difficulty doing the job, and might need an accommodation or modification recommendation. She did not go. Then she called in stating she could no longer work on-call. The supervisor told her she could not unilaterally decide what hours she would or would not work, and reminded her that the EAP was available to assess any need for accommodations. She did not go. Then she was again found sleeping under her desk. She was told that she could go to the EAP or provide medical evidence to excuse the violation. She did not do so, and was terminated for the sleeping on the job violation. The court dismissed the ensuing ADA case. It found the employee could not meet the essential function of being attentive at all times, and she had failed to provide evidence that "exhaustion" was a disability – an ongoing medical condition. She had failed to take advantage of the repeated advice to use the EAP or medical evaluation to establish any proposed accommodation. *Kaye v. BNSF RR*. (N.P. Tx., 2018).

Employee Got Upset And Stopped Interactive Process. An employee with Cerebal Palsy had a part-time hospital registrar job with walking restrictions and time limitations. She then applied for another job in the hospital which would be full-time. She was requested to provide medical information as to whether the new job and hours would be within her restrictions and that she would be able to work full-time and walk the required distances. The resulting doctor's note was unclear. So the supervisor called the doctor to get clarification. The employee was upset that the supervisor did not ask her first before calling the doctor, so she ordered her doctor not to release any information. She was not given the new position. She sued. The court dismissed the case finding that the employee failed to hold up her end of the interactive process. She unilaterally held up the hiring process and refused to provide job-related information which was within her control. The employer had a valid reason to go ahead and fill the position with someone else. *Rose v. Franciscan Alliance Inc*. (S.P. Ind., 2018).

Employer Could Not Show "Standard Schedule" Was Essential Function For Manager A supermarket assistant meat department manager with Lyme Disease asked for an accommodation of leaving each day at 2:30 pm due to the adverse effects of medication he had to take in the afternoon. The store denied this, claiming that keeping a "regular schedule" until 5 pm and staying through one evening shift per week was essential. The assistant manager filed an ADA complaint for failure to accommodate. The court found validity to the complaint. There was nothing in the position description regarding the schedule being essential. More important, the assistant manager had rarely been scheduled to work past 3:30 pm for the previous two years by the former manager in the department's regular operation. The accommodation was similar to the schedule the store had already used for two years, so the new manager's claim about the essential "regular schedule" did not seem to be valid. *Marion v. Hannifond Bros. Co.* (D. Me., 2018).

FAIR CREDIT REPORTING ACT

Inaccuracy Of "Details" Not Sufficient For Case. A job applicant was rejected due to the report of an unpaid debt in the background search. The applicant filed an FCRA action claiming that the credit report was inaccurate in that

it reflected a greater amount of unpaid debt than was actual, and he was not sufficiently allowed to challenge or correct that information. The court found the complaint to be insufficient in this situation, and dismissed the case. The applicant was rejected because he had unpaid debt, not because of the amount. A correction to show a lesser amount of unpaid debt would not have changed the fact that there were still unpaid obligations. An inaccuracy which does not cause tangible harm, or does not change the overall result is not a violation of the FCRA. *Duta v. State Farm Mutual Auto Ins. Co.* (9th Cir., 2008).