Labor & Employment Law Update

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Legislation & Administrative Actions

Paycheck Fairness Act Passed By House The PCFA has passed the House. It strengthens the Equal Pay Act by prohibiting pay secrecy (already prohibited by the NLRA); prohibiting arbitration agreements which ban class actions over pay (i.e., the *Epic* decision); strengthening remedies for pay discrimination; and eliminating caps on damages. The bill passed on party lines. It faces uncertain prospects in the Senate.

Be Heard Act In a seeming stretch to reach a good acronym, the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination (BEHEARD) Act has been introduced in Congress to strengthen sex discrimination protections. It would prohibit employers from imposing mandatory arbitration and non-disclosure agreements for sex discrimination cases, clearly include LGBT under Title VII, and allow Independent Contractors to bring sex discrimination cases. (Senate Bill 1082, House Bill 2148) (several states have adopted similar laws in the last two years.)

Wisconsin Payroll Classification Task Force – Use Of Independent Contractors Under Scrutiny
Wisconsin has established a "task force" to give enhanced scrutiny to employers' improper classification practices. This includes improper salaried exemptions, overtime practices and especially use of Independent Contractors/ Freelancers who do not meet the proper standards and should be employees – subject to the employer's payment of taxes and U.C. contributions. So this is the time to reassess your practices. Be aware that this is *not just a Wisconsin issue.* Other states are also looking for this source of increased tax assessment and revenue. Under state/federal compacts a state finding of improper classification also gets reported to other taxing/enforcement authorities like the IRS, DOL, OSHA, and more. Some of the federal laws carry personal liability for the managers and business owners involved. So, re-examine your practices now, especially your use of Independent Contractors [for more information on the IC standards, see the article Independent Contractors by Boardman & Clark].

Litigation

THEME OF THE MONTH – UNWISE STATEMENTS

Sometimes all would have been OK, except for an employee's dumb or indiscreet statement. Verbalizing our thoughts before we have actually thought about it is unwise, and can, as in the following cases, result in discharge. This is also the case with emails and texts in which people react and hit send without actually giving the issue time to pause in the brain.

Supervisor Had Reason To Drug Test Employee Who Blurted That He Had Partied And Might Not Pass A city employee had a traffic accident while transporting other workers in a van. Originally the supervisor was not going to do a drug test since the accident was minor. However, the employee voluntarily blurted out that he was glad to hear that, since he had *"partied over the weekend and might have a hot drop and might be dirty on a test."* So, the supervisor sent him for a test, and he was positive for cocaine and marijuana and was fired. He then filed a case for invasion of privacy/Fourth Amendment unwarranted search. The court ruled that the voluntary admission turned the minor accident into reasonable suspicion under the drug testing policy. This gave probable cause for the test, and there was no privacy or unreasonable search violation. *Rodriguez v. City of Chicago* (N.D. Ill., 2019).

Mortgage Brokers Should Not Curse About Customers In The Restroom Two lending employees were in the company's public restroom profanely, using the F-word, venting frustration about a particular customer. This was overheard and reported to management. The result was discharge. This resulted in an Unfair Labor Practice charge to the National Labor Relations Board, which also protects the rights of non-unionized employees to engage in "concerted activity," including complaining about wages, hours, terms and conditions of employment. The charge alleged that the restroom conversation was a "protected activity" of private conversation about a term of employment – difficult customers. The NLRB disagreed and ruled that this did not fit. The profane comments were in a public place where customers could be present and hear disparagement of themselves. A specific customer transaction does not rise to a "term or condition of employment," and does not involve a policy or practice of the employer as required by the NLRA. *In Re Quicken Loans Inc.* (NLRB, 2019).

Supreme Court

LGBT Cases The U.S. Supreme Court has agreed to take three cases in next Fall's term, to address whether Sexual Orientation and Gender Identity are, or are not, covered as Sex/Gender Discrimination under Title VII. One case, *R.G. and G. R. Harris Funeral Homes, Inc. v. EEOC*, involves Gender Identity. Two, *Bostic v. Clayton Co. Ga and Altitude Express, Inc. v. Zarda*, involve Sexual Orientation. Lower courts have issued conflicting decisions regarding LGBT coverage. The government is itself conflicted. The U.S. EEOC argues that these characteristics are covered under the standard Title VII sex discrimination provisions. The U.S. Dept. of Justice argues they are not; when Congress passed the 1964 Civil Rights Act it never considered, ever envisioned Sexual Orientation or Gender Identity, so they cannot be read into the "Congressional intent" for the sex discrimination part of that law. The Supreme Court will decide whether to include or exclude.

DISCRIMINATION

DISABILITY

Needle Phobic Pharmacist Has Case – Changing Standards Without Interactive Process Walmart announced that all new pharmacy employees would be required to be certified to administer immunizations – an increasingly significant part of its business. A long-term pharmacist requested an exemption due to his condition of trypanophobia (needle phobia). The exemption was granted, with the statement that it could be subject to future review based on changes in the job duties and description. Then three months later Walmart changed its mind abruptly and notified him that he was now required to administer immunization shots. There was no change in the position description, nor any advance discussion with the pharmacist regarding whether accommodation was possible. The pharmacist could not do the immunization, so he left and filed an ADA case for constructive discharge. The court found valid grounds for the claim. An employer may change the essential function of a job based on its business needs. However, when these impact a disability, there must first be the "interactive process," of considering accommodation. This requires communication, and an individualized assessment of the condition, and the specific store's operations and flexibility before simply sending a surprise notice. Since Walmart had not made any changes in the pharmacist position description to warrant changing the exemption, and had not engaged in any interactive effort, there was a sufficient case for the jury to decide. *Noel v. Walmart Stores East* (2nd Cir., 2019).

Deaf Employee Mocked By Others A deaf UPS employee was originally provided a sign language interpreter for training. He did not need this for performing his regular duties, but did require a signer for employee meetings and meetings with management. This was not provided, and he was excluded from over 100 meetings. Human Resources ignored his repeated requests to provide an interpreter, and to even have a meeting to address his concerns. Then co-workers, with management's knowledge, began to taunt the employee with mocking, and vulgar imitations of sign language. He finally obtained a transfer, then filed an ADA suit regarding failure to accommodate and harassment. The court found substantial evidence to warrant both claims, plus a retaliation claim for continuing to allow the bullying and delaying the transfer following his internal complaints. *Mehan v. UPS* (D. Md., 2019).

General Comments About Insurance Cost Savings Were Not Evidence Of Discrimination Toward Specific Employee An employee's position was eliminated when a new computer system automated a number of her key duties. The employee claimed that this was a pretext, the real reason was her MS and the ongoing medical expenses for treatment under the company's health insurance. She filed an ADA case over this discrimination. Her evidence was that company executives had made statements on cost cutting, including statements about the need to control the rising costs of health insurance. Another manager had stated that reducing the number of employees could save the company not just the salary, but the cost of benefits as well. The employee claimed that this was in reference to her personally, and the need to eliminate the higher cost associated with her disability. The court rejected this argument. The new system had indeed eliminated the need for several duties, so there was no evidence that this was not a legitimate, non-discriminatory basis for the layoff. Further, general statements regarding cost savings do not create a presumption of discrimination toward a specific person. There must be a "link" to the disability; some more direct reference to the person or the disability. The general rule is that one cannot build a case upon asking the court to go through extra steps of "interpretation" or "inference" to connect the dots and tie unrelated general statements together. To be valid evidence, the statements must have been in reference to the plaintiff's specific situation. *Akridge v. Alfa Mutual Ins. Co.* (M.D. Ala., 2019).

No Post-Termination Accommodation Required. A truck driver was sent to a random drug test. He did not provide a sufficient specimen. This counted as a failed test under the testing policy. The clinic had followed the standard "shy bladder" procedures and provided time and several bottles of water. The company advised the driver to consult with his physician, however, the physician found no reason for the failure to produce. So the employment was terminated. Then, the driver went to a urologist, who diagnosed a medical condition causing the problem. He submitted this to the company and requested the accommodation of reinstatement and retesting in a manner which accommodated the newly diagnosed condition. The company refused. The driver sued. The court ruled that the ADA does not require after-the-fact accommodation. The termination was made with no knowledge of disability. An employer is not required to engage in the interactive process post-termination. *Beller v. Walmart Transportion LLC* (S.D. OH, 2019).

SEX

Internal Transfer Justifies Pay Difference Under the Equal Pay Act, Federal courts and a number of states have ruled that setting starting pay based on prior salary is inherently discriminatory, because it creates higher pay for men doing the same work as female co-workers. In *Hubers v. Garrett Co.* (ND Ill., 2019), a female advertising employee challenged unequal pay of a new male co-worker, whose wage was set based on his salary prior to an internal transfer into the job. The court distinguished this from all the other cases which had involved external hires, and considered the prior pay received from some other employer. Internal transfers often involve guaranteeing no loss in pay, or "red lining" pay to prevent a loss of income. In this case the person moved into a lower pay range job, but was "red lined" at the old pay. Such a policy is not based on gender. It could affect the transfer of both women and men. Thus, it was "a factor other than sex," which is not a violation of the EPA.

RACE-SEX

Evidence Of A Manager's Bias Against White Women Creates Case A White female attorney contested her discharge from a state public safety agency. She alleged that the new African-American male Director had animus toward White women, and sought to rid the agency of them. The employer claimed the discharge was due to poor performance and unprofessional conduct – especially being barred from a court by a judge. The court found that this seemed pretextual. There was evidence the new Director had indicated a preference for hiring Black employees and treated White women harshly as compared to Black employees. In the first seven months he had fired seven White females. The Director's explanations seemed flawed. There was no record of any prior performance issues. The judge who supposedly banned her from his court stated that he had never had any problem with the attorney. Rather he had received a call from the agency management stating that the agency did not want her to appear in his court anymore – so he complied. Thus, it seemed there was an effort to discredit her rather than valid performance issues. *Boland v. Miss. Dept. of Public Safety* (S.D. Miss., 2019).