Labor & Employment Law Update

NOVEMBER 2019

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

Legislation & Administrative Issues

DOL Fair Labor Standards Act – 2020 Leap Year Issue 2020 is a leap year. That one extra day may create an issue. Common pay days are Wednesday, Thursday or Friday. Thursday, February 29th, is Leap Day, and could create an extra pay day for some, with 27 pay dates in the year for those paying every other week on Thursdays. This is mainly an issue regarding exempt employees, paid a set amount on an annual salary basis. Adjustments might be needed to avoid overpayment. Employers who might be caught by the Thursday – Leap Day payday issue should check with their payroll processor to see if they will experience this effect and then assess options for addressing those issues.

Trends

Electronic Signatures

Electronic signatures are legally valid. They have become the standard way people do business, including signing off on job applications, employee handbooks, pay plans, new policies, etc. However, there are now growing challenges. There are more cases in which the validity of those signatures are difficult for the employer to prove, and employees may not be bound by their signatures. So it may be time to ensure an actual pen and ink signature for some of the crucial documents.

Clicking vs. Signing – Electronic Policy Signatures Can Be Challenged. A court refused to enforce a company's mandatory Arbitration Agreement, allowing the employee's case to proceed in Federal Court. The employee claimed that she had not actually read and signed the Arbitration Agreement. Instead, in the orientation/training, the store manager rushed, clicking through the policies and forms, just clicking through and telling her to just click her electronic signature on each of the items, without actually stopping to view them. She claimed the only items the manager stopped and really covered were the state rules on tobacco sales to youth, and the store opening/closing details. There was evidence that this was not an uncommon practice. However, an agreement requires understanding and a knowing assent to the terms. Absent this, the Arbitration Agreement was not binding. An actual written signature on a full copy of the agreement would have verified the employee actually did see the document and knowingly signed it. *Roberts-Banks v. Family Dollar of Tenn.* (E.D. TN, 2019). Similar arguments have been made in cases regarding whether employees actually read, understood and could be held to follow pay or commission arrangements, and work from home, right to inspect, harassment reporting policies, etc. The EEOC has criticized anti-harassment training in which an employee can just "click through," without any verification they actually watched a training video, read materials or did not have some manager click a pro forma sign-off. Electronic signatures can carry the same legal weight as a written signature; however, they can also be easier to challenge. So actual written signatures may be important on crucial agreements and acknowledgements.

HAIR STYLE

Another State Adopts Hair Style Discrimination Guidance New Jersey is the latest state to add hair style to the list of protected EEO categories. This is a growing trend, especially when focus on hair seems closely associated with ethnic, religious or racial practices or fashions. As more states and municipalities adopt hair style rules, the Federal EEOC may also begin to focus more on the "adverse impact" effects of employers' dress codes and hair rules. Appearance policies which prohibit "unusual" or "extreme" hairstyles should be reevaluated. What is an "unusual" hairstyle? Whose values set the standard and how old are those values/standards? Clothing, fashion, styles and norms of appearance change constantly, and greatly over time. [i.e., rules banning tattoos and piercings are now becoming very rare since they are no longer "unusual."] So look at your policies now because the laws are also moving to catch up with the times. For more insight on this issue and the laws, see the article Appearance Laws & Cases by Boardman Clark.

Litigation

JOINT EMPLOYMENT

McDonald's Ruled To Not Be A Joint Employer Of Local Franchise Workers. In a much watched case, a federal circuit court has ruled that McDonald's Corporation cannot be held liable for the wage payment violations or other employment infractions experienced by workers at separately incorporated and locally-owned McDonald's franchise stores. The court found that the national organization set requirements for and monitored product and quality control, and gave local franchises software systems to manage their operations. However, national exercised no control over hiring, firing, setting wages, payroll, or day-to-day supervision of employees. All of this was done by local franchise managers. The national corporation was not a joint employer and the local franchises were not "agents" of the national corporation for the purposes of employment issues. *Salazar v. McDonald's Corp.* (9th Cir., 2019).

DEFAMATION & PERSONAL LIABILITY

There seems to be an uptick in civil suits filed under state defamation laws. These are often due to harmful statements made about former employees. This Update has reported several of these in the past year. These cases illustrate that "it is not over" when a person leaves employment. Sometimes the really big liability is just starting. Many employment laws have "caps" on damage awards. These state civil suits usually do not have any limits. So, be aware of the obligations to maintain confidentiality, curb upset managers' tendency to vent, and "do not speak ill of the departed." All information regarding former employees should be routed through Human Resources and any negative references or other information should comply with the protections afforded by the Qualified Privilege Standards.

Post Employment Rumors Create Liability For Supervisors An employer's liability does not stop when an employee leaves. Managers can do things afterward which create new cases. A Medical Assistant reported her supervising surgeon for sexual harassment. She then left her employment to pursue an MBA degree. Though she was gone, the surgeon went to the university MBA department admissions office. He falsely reported that his former assistant had left her job, and a previous job, due to manipulating the company process to get money for false claims. He said he wanted to warn the MBA department that their new student might manipulate male faculty members to create liability. These statements were reported to the Dean and other faculty, created rumors and harmed the new student's reputation and ability to interact with faculty and effectively participate in the MBA program. She sued the surgeon personally for retaliation in defaming her for her harassment complaint. The surgeon argued that he could not be sued for employment-related retaliation since she was no longer an employee at the time of his visit to the MBA department. The court ruled that the false statements grew out of and were in retaliation for a protected harassment complaint made during employment, and were thus employment-related. The surgeon could be personally sued for defamatory employment-related retaliation under state law. *McLaughlin v. Wilson* (Or. S. Ct., 2019).

DISCRIMINATION

NATIONAL ORIGIN

Use Of Unwritten Policy Was Pretext To Fire Jamaican Nurse A discharged nurse of Jamaican origin showed sufficient evidence of bias for a Title VII national origin case. The nurse's new supervisor seemed to have a bias against Jamaican women. She made statements, including "Women from Jamaica all have big mouths!" Jamaican women "run down the money" (are gold diggers). The supervisor referred to the nurse as "an ugly Black woman from Jamaica." When the nurse accepted an additional shift in another department without going through the proper procedure, the supervisor suspended her, and then had her fired. The problem was that the "proper procedure" was not in writing. The procedure was interpreted differently over time. No one else had ever been fired for violating this unwritten policy. The selective enforcement of a vague "policy," and the prior statements about Jamaicans were sufficient to show pretext in the discharge. *Brown v. Montefiore Med. Center* (S.D. NY, 2019).

DISABILITY

Three Police Officers And A Huge Jury Award Regarding Interactive Process. This month police departments seem to be at issue in disability cases more than other organizations. Also, a jury issued a huge punitive damages award in another case.

Problematic Personality Is Not A Disability A police officer was directed to have a fitness for duty psychological evaluation following incidents of anger, threatening to shoot the dogs of his former wife, and sending threatening text messages to others. The evaluation concluded that he had narcissistic and other personality traits which resulted in lack of self-awareness, diminished self-monitoring ability, and created a risk for continuing loss of control and judgment errors which could put others at risk. Therefore, the officer was removed from his job. He sued under the ADA for disability and/or perceived disability discrimination. The court rejected the claim, ruling that ordering a psychological, or any other fitness evaluation does not, of itself, show one is perceived as disabled. Further, problematic personality traits are not sufficient to be a psychiatric disability under the ADA. *Donley v. Village of Yorkville* (N.D. NY, 2019).

Taser Training – City Looking For A Policy To Fit Its Desire To Terminate A police officer requested to be exempted from Taser Training, in which officers are shocked and immobilized to personally experience how the Taser works. She had a prior heart attack and the shock could be dangerous for her heart. She was then declared not fit for duty, and placed on administrative leave until she could provide a doctor's release to "full duty." She informed the Department that the doctor was out-of-town and her appointment would be after July 8th. However, on July 8th the Department terminated her for "failure to come to work." She filed ADA and sex discrimination cases. The court found that the Department perceived her to be disabled. Without any evidence that she could not perform duties, it suspended her simply for requesting not to do the Taser shock. There was evidence that other male officers had been exempted from the shock and were not required to carry Tasers. The Taser manufacturer did not require the shock test in order to certify officers for Taser use. The Department's placing her on leave, then accusing her of "just not showing up," seemed like an effort to manufacture a reason to discharge a fully functioning officer once it became aware of her heart condition – "looking for a policy to fit its desire to terminate." *Lewis v. City of Union City* (11th Cir., 2019).

Department Should Have Explored Accommodation Of No-Beard Policy A university police officer requested exemption from the Department's no-beard policy, due to being diagnosed with Pseudofolliculitis Barbae, a condition aggravated by shaving. The university simply made a flat denial without engaging in an exploration of the issue or apparently considering his medical information. The officer was further threatened with discipline if he pursued his no shaving medical restrictions. He quit, and filed suit. The court found evidence of a failure to engage in a good faith interactive process regarding the officer's medical request. Failure to engage in this essential process violates the ADA. *Lewis v. U. of Pennsylvania* (3rd Cir., 2019).

$5.2 Million Verdict Against Walmart . A developmentally-disabled and deaf cart pusher worked effectively for 16 years. He received the accommodation of assistance of a Job Coach from a public agency as needed, at no

cost to Walmart. A new Manager then promptly required the employee to resubmit medical certification to keep the accommodation, even though nothing had changed in 16 years. The new Manager suspended him pending the certification in spite of the fact he was still performing as usual. The employee submitted the new certification, but the store did not respond. It cut off communication and never brought the employee back to work. In the ADA case, a jury awarded $200,000 in compensatory damages and an additional $5 million in punitive damages. Walmart had no legitimate reason to demand a new certification for a well-established condition. It had no reason to suspend an employee who was performing the job, pending an unnecessary certification. It failed to engage in the interactive process, and just terminated the employment. *EEOC v. Walmart* (W.D. Wis., 2019).

LABOR ARBITRATION

If You Get Kicked Out Of A Bar Just Leave – Don't Threaten An off-duty state Liquor Control Agent was asked to leave a bar due to his behavior. He then threatened to void the bar's liquor license if he had to leave; they would never have a license again. The bar kicked him out, and reported him to the state. He was disciplined and then grieved the discipline. The arbitrator denied the grievance, ruling that the employee had failed to follow policies and "discredited the Department's mission." He deserved suspension and a pay loss of $36,000. In *Re Ohio Dept. of Commerce and Ohio Civil Service Employees Assoc.* (2019).