Labor & Employment Law Update

DECEMBER 2019

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

Legislation & Administrative Issues

Fair Leave Act A New Senate Bill On FMLA A new bill proposes changing the FMLA to eliminate the "marriage penalty" which gives spouses working for the same employer only half the Family, New Child, Leave (combination of only 12 weeks, between them) they would receive if they worked for different employers (12 weeks each). This is a bi-partisan proposal sponsored by Sen. Joni Ernst (R. Iowa) and Kyrsten Sinema (D. Ark.). A companion bill is expected to be introduced in the House.

Litigation

POLITICAL IMMUNITY – MIXED RESULTS

NLRB Declines To Exercise Jurisdiction Over Political Campaigns Employees of both the Bernie Sanders campaign and Elizabeth Warren campaign filed Unfair Labor Practice charges with the National Labor Relations Board (NLRB) over alleged failure to bargain with employees, allegedly failing to consistently implement benefits and pay practices, and allegedly firing workers who attempted to advocate for collective rights. The NLRB declined to exercise jurisdiction and dismissed the charges against both campaign organizations, stating that it has never exercised authority over presidential campaigns. "The prosecution of a presidential election committee, which is so entwined with political speech protected by the Constitution, could raise serious First Amendment considerations." *In Re: Warren for President* (2019) and *In Re: Bernie Sanders for President* (2019).

State Dem Party Chair's Behaviors Are Not Protected Speech – Can Be Sexual Harassment A court has rejected the political speech defense of the former head of the California Democratic Party. An employee filed suit alleging that the Chair engaged in ongoing verbal and physical sexual harassment and assault toward him and other employees, making improper advances toward men and hostile, demeaning treatment of female employees. The former Chair's defense was that all alleged statements and behaviors were to a political organization's employees in the course of political activity and thus "protected political speech and activity" – Constitutionally immune from court intervention. The court rejected this argument, finding the alleged behavior was for personal reasons, not related to the political mission of the organization. So he, and the organization, could be liable under the sexual harassment laws, just like any other employer. *Floyd v. The Cal. Democratic Party, et al.* (Superior Ct. of LA County, 2019).

WHISTLEBLOWER PROTECTIONS

Court Refuses Company's Effort To "Out" Whistleblowers The Third Circuit decried a Johnson & Johnson subsidiary's moves to publicly expose the names of two anonymous employees who accused the pharmaceutical giant of trying to illegally expand its market share for HIV drugs. There was no legal need to have a public exposure of the names, except perhaps retaliation. Publication of the names would expose the individuals to "notoriety,"

potential threats from third parties, and could make them "virtually unemployable" in the pharmaceutical industry for the future. Courts across the US have recognized that there are substantial harms and dangers suffered by those who stand up and engage in whistleblowing regarding ethical and legal issues, as well as harms and threats to their families. There was ample opportunity in the litigation process for the company to get all the information needed for the case, without any need to make the names public. *Jane Doe et al. v. Jansen Therapeutics et al.* (3rd Cir., 2019).

DISCRIMINATION

DISABILITY

Do The Job And Don't Be Sick All The Time A Dollar General employee asked her Manager how she could apply for a leave of absence for her worsening migraine, gastritis and anxiety conditions. The Manager's response was "There is no leave of absence!" He stated that she could only remain employed as long as she could "do the job and not be sick all the time." That was the end of any discussion. The next week the employee was taken to the emergency room due to the gastritis and needed three days off. The Manager again informed her she could not have any leave. She said she could not come in and quit due to the medical need. She filed an ADA case for constructive discharge. The court found that Dollar General violated its duty by failing to even try to engage in an interactive process, and that it could have readily made an accommodation, had it met its duty to consider the employee's disability request. *Garrison v. Dolgen Corp. LLC* (8th Cir., 2019).

RACE

$6 Million To Settle Criminal Records Check Case Dollar General will pay $6 million to settle a charge that it invalidly used criminal record checks to withdraw job offers. The EEOC charged that the record checks had an adverse impact, disproportionately targeting African-American men for rejection. The company considered any sort of conviction, regardless of whether or not it had a relationship to the job duties. In order to pass muster with the EEOC such a record check must be "job-related and consistent with business necessity." The rejection must be based on a conviction which "is substantially related" to the work; on a case-by-case basis rather than a general ban for any sort of conviction. *EEOC v. Dolgen Corp. LLC* (Dollar General) N.D. Ill., 2019). Be aware that over half the states and numerous localities also have specific laws prohibiting Arrest or Conviction Discrimination, and restricting employers' practices in record/background checks.

SEX

U.S. Women's Soccer Team Can Proceed With Class Action For Equal Pay. A Federal court has certified a class action against the U.S. Soccer Federation for equal pay. The plaintiffs allege that they have a better winning record than the male teams, including World Championships, larger attendance and often bring in more revenue, yet receive drastically less in pay. The case can now proceed toward trial as a class, rather than forcing each player to try to challenge discrimination on their own. *Morgan, Rapinoe, et al. v. U.S. Soccer Federation* (C.D. Cal., 2019).

Non-Fraternization Policy Must Be Enforced Equally – Not Just Against Women A female HR Manager was fired after she married a Plant Manager. The company policy forbade Managers from engaging in intimate relationships. The male Plant Manager was not discharged. Further, another male Manager had also violated the policy, and continued to be employed. The HR Manager sued under Title VII. The different treatment of men for the same violations creates a prima facie discrimination case. *Collins v. Koch Foods, Inc.* (N.D. Ala., 2019).

Faulty Reporting Policy Results In Half Million Dollar Verdict An auto mechanic was sexually harassed, verbally and physically, by her supervisor. The company process required her to go through her location Manager for complaints, and the Manager would decide if a complaint should be forwarded to a higher level, or not. When she reported this to the Manager, instead of solving the problem, he too began to harass her as well. So she had to keep meeting with the Manager/harasser to no avail. She eventually filed a police report over the physical groping and threats of retaliation she experienced. She then left employment, and filed a Title VII case. The jury found that she had been constructively discharged, and the company had failed to set up an effective process to protect employees from harassment. *Harris v. Auto Systems Centers, Inc.* (W.D., Pa., 2019). Requiring an employee to go through the harasser to raise a concern is designed to allow and cover up harassment rather than prevent it. An effective policy must have alternative ways to report; at least one local and one in central HR, with no chain of command requirement, and the employee free to choose which route to use.

STRANGEST DEFENSE OF THE MONTH

I Don't Discriminate, I Have Good Relations With Women And My Many Ex-wives, May Not Be The Best Defense In Harassment Case The billionaire owner of media company Hologram USA, Alki David, is defending his fourth sexual harassment-assault case this year by female former employees. In *Kahn v. Hologram USA, et al.* (Cal. Superior Ct., LA County, 2019), the company is being sued and he is being sued personally for overt harassment, including allegations of sexual touching, groping and exposing himself at work. David adamantly denies all allegations and has made strong statements regarding the motivation of plaintiffs. In this case he personally delivered a long "bombastic" statement to the jury, with his major defense being that he could not be a discriminator or harasser because he is a *"family man with children,"* he *"deeply respects women,"* and had always had positive relationships with women, including *"my many ex-wives."* The judge cautioned Mr. David several time for his demeanor, and the court has imposed $24,000 of sanctions against him due to his disruptive courtroom behaviors. He has already lost a $2 million verdict in one of the other cases. This sort of "defense" is not unusual; but it is rarely effective in discrimination cases. Business owners and Managers accused of discrimination often claim I can't be discriminatory, I am not prejudiced, *"Some of my best friends are (fill in the EEO category), I've invited them to my house." "We get along great."* This usually backfires. It really shows the individual has little or no understanding of the dynamics of discrimination nor of the legal standards. It remains to be seen whether the "many ex-wives defense" will convince the jury of Mr. David's innocence and good intentions.

FAIR LABOR STANDARDS ACT

Open Door Policy Doesn't Work For FLSA A care worker in a group home for the developmentally disabled had a continuous shift of 56 hours, but was supposed to have sleep time and only work 40 hours. In order to meet the requirements for unpaid time an employer must provide private sleeping quarters and uninterrupted sleep time. The employee successfully maintained a case for pay plus overtime for the full 56 hours each week. The employer's policy requiring the sleep quarters door to be kept unlocked and open at all hours to be accessible for residents' needs did not meet the "private" quarters and "uninterrupted" time requirements. *Bagoue v. Developmental Pathways, Inc.* (D. Col., 2019).

Paying Only Billable Hours Results In $1.2 Million Verdict – Multiple Excuses Did Not Work Nineteen tree trimmer crew chiefs were paid only for hours which were billable to the company's customers. Though their overall duties (including meetings, filling out paperwork, travel between jobs, etc.) averaged 10 hours a day, they were only paid on billable hours – which were usually less than 40 per week. The company tried to pull out all the stops in excuse making. It claimed the crew chiefs just left the time off their sheets; the time was de minimis; and, the company had no actual knowledge of the unreported work. None of these excuses worked. It was noted that the company had an extensive history of FLSA violations, having paid up to $95 million for prior violations. The court awarded between $55,000 and $63,000 to each of the plaintiffs. *Belloso v. Asplundh Tree Experts Co.* (M.D. Fla., 2019).

OSHA

Hemp Processor Fined $825,000 For Overt Safety Violations An Oregon hemp processor was cited for endangering employees in both its processing plant and its on-site living facilities. A county fire marshal did a routine inspection, finding fire hazards, and more. The county inspector reported the other glaring dangers to OSHA. The OSHA inspectors found "open and obvious structural defects that could have killed the employees." The workers were exposed to buildings in danger of collapse, rodents and pests, and the building doors were locked from the outside preventing workers from escape in case of fire, collapse or any other emergency. The fine was in addition to orders to repair before work continued. The operators are also subject to additional legal action due to being unlicensed. In *Re: Safe and Simple LLS, and New Eighteen Hope LLC* (2019). The Oregon hemp industry has grown so fast, from 13 producers in 2015 to 1,900 in 2019, that "fast and loose" operators appear to be in a rush to open with little time for developing adequate facilities, and more concern for "getting growing" than concern for employee safety or conditions.