Labor & Employment Law Update

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Legislation & Administrative Actions

Expansion Of Employment Retirement Plans In another bipartisan display, the House of Representatives voted almost unanimously (417 for, and only 3 against) to allow changes in employee retirement plans and benefits (Bill HR 1994). The bill would remove contribution limits on 401(k)-type plans, raise the mandatory minimum distribution age to 72, allow more penalty-free early distributions, require employers to include more part-time employees in their plans, and encourage employers to have automatic enrollment in retirement savings plans rather than an employee opt-in. Given the bipartisan support in the House, the bill has a good chance of passage in the Senate.

Litigation

TORT ACTIONS

Torts are civil suits outside the standard employment laws. They are filed under state laws which recognize a variety of wrongful acts in addition to the Federal employment statutes. Each state is a bit different, but most recognize a common set of torts, such as invasion of privacy, defamation, interference with contracts, false imprisonment/restraint, etc. There generally is no "cap" on damages in these cases. They are often added to a standard employment law case as another cause of action, and a way to maximize the liability.

Do Not Speak Ill Of The Departed – They Can Sue For Defamation An Administrative Assistant told six employees that there were some surplused printers and they could take them home. So they did. The Administrative Assistant had no such authority, the printers were not surplus. The Administrative Assistant was fired. Then all six employees were fired for unauthorized taking of company equipment, in spite of their protest and the company's knowledge that they had been told it was ok. They should have been more cautious, double checked with a Manager to get written authorization. As employees at will, they had no recourse; they stayed fired. Then, however, a company HR Manager was giving an employee training program on integrity, and showed a power point emphasizing wrongful acts which had resulted in discharges. The power point had a section which included descriptions and slides of drug dealing on company property, several embezzlement incidents, "Printer Gate" and other seemingly criminal activities. Though no names were mentioned, virtually everyone present was aware of the printer issue and knew exactly what "Printer Gate" referred to and exactly who the six people were. The six former employees sued for defamation, claiming that the company had falsely represented that that their action was an intentionally criminal activity, theft. Witnesses present in the training testified that they understood the slides in that section were examples of criminal activities and they believed the six people were being described as committing a crime. This was not at all the true story. The court first ruled

that the HR Manager's false representations were *defamation per se* and did not even require a showing of actual damages. Then a jury awarded each person $350,000 compensatory damages and $1 million dollars in punitive damages. The court found this to be excessive and reduced it to $350,000 per person ($2,100,000 in all), still a very large amount to pay for a single power point slide and a few minutes discussion of "Printer Gate." *Desai v. Charter Communications* (W.D. Ky., 2019). The old saying is "do not speak ill of the dear departed." Perhaps do not speak ill of the less than "dear" either. Also, be aware that civil suits, such as defamation, false imprisonment, invasion of privacy, etc. can be filed against the Manager, HR staff, supervisors, or company executives in their personal capacities, and damages collected from their personal assets. [See the article Are You in the Crosshairs (Your Personal Liability in Employment Cases) by Boardman & Clark.]

Cornered in Parking Garage – False Imprisonment False imprisonment is a tort action civil suit, for unwarranted "willful detention" of a person without their consent or any lawful reason. An employee was fired and told to leave. However, when she got to the company parking garage she was confronted by three armed company security guards who cornered her and prevented her from going to her car. They allegedly cursed at her when she demanded to leave and continued to block her. She managed to finally get away from the guards but could not get access to her car and walked home. The company defended the case by claiming there had been no touching or actual physical restraint. However, the court found that this was not required. There had been sufficient presence, blocking and intimidation by the guards to constitute a real restraint and detention. *Garcia v. Randolph-Brooks Credit* (W.D. Tx., 2019).

COMPUTER FRAUD AND ABUSE ACT AND DEFEND TRADE SECRETS ACT

Taking Company Information Not Prohibited By CFAA But Could Be A Trade Secrets Violation Two major Federal laws protect a company's important information from being pilfered, the Computer Fraud and Abuse Act and the Defend Trade Secrets Act. They are each a bit different. The CFAA provides broad protection against any unauthorized access, use, transfer, removal of almost any company information, even non-"confidential" information. The DTSA covers only the improper use, transfer, or removal of information which fits the much narrower legal definition of a Trade Secret. Catalinbread LLC is a premier guitar pedal designer and manufacturer. Several key employees sought to purchase the company after its founder died. When they were unsuccessful, they decided to start up a competing company, and while still employed, used their management access to all Catalinbread information to secretly copy and transfer proprietary information, engineering, development, costs, planning, product schematics and much more to their new venture. They also deleted a good deal of important information from the company's system. Then they quit and pursued their new opportunity. Catalinbread sued the individuals under both the CFAA and DTSA. The court dismissed the CFAA claim, due to authorized use. The CFAA prohibits only "unauthorized" access, use, etc. All of the individuals were fully authorized to access all the company information. The CFAA does not prohibit misuse, nor dishonest use, nor unethical use, etc., only "unauthorized" access and use. So, as wrong as it may seem, there was no violation. If one wishes to prevent misuse or unacceptable use by authorized employees, then one should have a binding, signed, "Confidentiality and Non-Disclosure Agreement" with each person which can be enforced under standard contract law [not just a policy statement in an Employee Handbook – such as Catalinbread had – which is generally not a contract, and not legally enforceable]. On the other hand, the DTSA is a different law, with different protection. It does not depend upon "authorized" access. It simply prohibits the transfer and use of Trade Secrets. Since much of the transferred information did fall within the definition of Trade Secrets, the company could maintain a DTSA case against the former employees *Catalinbread v. Gee, et al.* (D. Ore., 2019).

DISCRIMINATION

DISABILITY

Overreach In Medical Evaluation The ADA and its requirement that any employment medical exam or medical inquiry must be narrowly tailored, very limited, has been in effect for decades. Yet for some reason employers and their medical providers, who should know better, are still engaging in overbroad and illegal practices. In *EEOC v. Pulmonary Specialists & Sleep Health* (ED TX., 2019), a medical company required employees to complete a medical

questionnaire. The medical questionnaire allegedly asked if employees had any of more than 20 listed medical conditions, whether the employee had an impairment or disability, and whether the employee had any previous disability rating. One employee answered all of the questions truthfully, stating that she had been injured on-the-job in 1996 and had back surgery, and as a result, was given a permanent partial disability rating. However, this back surgery and resulting disability allegedly did not impact her ability to perform the work of Billing/Collections Specialist. Within a week after completing the medical questionnaire, the employee was terminated, according to the EEOC. The company settled the case agreeing to pay the employee $30,000 plus cease using the questionnaire and implement new policies and training to prevent future discrimination.

Independent Contractor Can Sue Under Rehab Act – Prime Contractors Cannot Blame Client For Discharge The Rehabilitation Act is similar to the ADA, but not quite the same. It is older, and applies to those receiving government contracts, rather than to employers in general. A government contractor's employees may file both ADA and Rehab Act cases over the same situation. A company had a contract to provide health care services for an Air Force Base. It subcontracted with doctors as Independent Contractors (ICs) for some of that work. One IC doctor was having difficulty interacting with both the Contractor's employees and the patients. She then informed the Contractor of a recent Asperger Syndrome diagnosis. She requested accommodations. Two weeks later the Air Force liaison officer requested that she be removed from the clinic. She then requested reinstatement with accommodations to address any issues. The Air Force declined, so the Contractor ended her Independent Contract – she filed a Rehab Act disability discrimination case. The Contractor defended by claiming (1) she was not an employee, and had no rights to sue; (2) the Air Force, not the Contactor, asked for her removal, so it had no choice but to end the work, since it could not force the Air Force to allow her back on the Base. The court rejected both of these arguments. Unlike the ADA, the Rehab Act is not limited to employment situations. Section 504 of the Act covers "all of the operations of the Contractor entity, not just those related to employment." So, Independent Contractors, Sub-Contractors, etc. can file under the Act. Also, following the client's request did not shield the Contractor. A Contractor or staffing agency can be liable even when it complies with a client's request to discharge or remove a person. The Contractor could be liable for following the Air Force's request if the termination amounted to disability discrimination. "As a recipient of Federal funds, the company had an independent obligation to comply with the Rehabilitation Act" and following a client's discriminatory directive would violate the Act. *Flynn v. Distinctive Home Care, Inc*. (W.D. Tx., 2019).

SEX

We're Girls, So It's OK A 50-year old male Deputy complained about ageist comments and being repeatedly called old man. Rather than address the comments, the Sheriff's Department transferred him to the Radio Room, which had a female staff and supervisor. The women engaged in daily overt sexual comments, jokes, graphic conversations about and descriptions of their sex lives or wishes, and tried to get him to join in and describe his own activities. When he asked the women to stop the sexual comments, they replied, *"If a man talked like this to a woman it would be sexual harassment, but since you're a guy and we're girls, we can do it. It's ok."* When the Deputy complained, management asked why he did not just participate and try to fit in with the group. The Deputy was fired two days later and sued for age discrimination, sex discrimination, and retaliation. The court found an appearance that the Radio Room seemed like a Girls Gone Wild episode, and there was sufficient evidence to support the age and sexual harassment and retaliation claims. *Richard v. St. Tammary Parish Sheriff's Dept.* (E.D. La., 2019).

Settlement Requires Company To Fire Supervisor A construction company allowed an environment more like a gross middle school locker room than an adult workplace. Several male workers said a supervisor encouraged inappropriate sexual comments and behavior as part of his management style, which included sexual harassment of the male employees he supervised. The alleged harassment included egregious sexual name calling, sexual comments, innuendos, and at least one incident of groping a male employee's genitals. The company did nothing when several men complained, except to fire one of the complainers. The company settled the case and will pay $195,000 to seven affected workers, and the company is required to fire the supervisor and provide comprehensive anti-harassment training. In announcing the settlement, the EEOC stated: By allowing one of its supervisors

to adopt a management style incorporating sexual jokes or sexual conduct and encouraging harassment of male workers who did not want to participate, Atlas could only expect a charge would be made...." "The days of construction work sites being filled with sexual harassment because management adopts a 'boys-will-be-boys' excuse for harassment are over." *EEOC v. Atlas Electrical Construction, Inc.* (D.N. Mex., 2019).

RACE

Were Stereotypes Humor Or Discrimination? The new White supervisor of a Chinese-American Sales Manager began making frequent stereotypical comments about him. For instance, she rejected the ideas of a staff lunch at a restaurant he suggested because "your people eat dog!" and the place "could serve dog for all I know." She made comments about Asians being better at math, so he should get all the numbers work, and "It would be easier if you just take all the Asian customers." When the Sales Manager complained, the HR representative told him that he was being too sensitive, this was all joking; the supervisor's comments were humor which he was taking the wrong way. So the "humor" did not stop. After only five weeks, the new supervisor fired him for performance issues. He filed a Title VII racial harassment and discrimination case. The court found that the stereotypical comments were frequent enough to be pervasive under the harassment standards. They also were evidence of a discriminatory approach by the new supervisor. Finally, this termination could be seen as a pretext for discrimination, since his very recent performance evaluation by the prior supervisor rated the Sales Manager highly with comments such as "Alan's team has over-delivered on sales growth objectives and expectations." *Kwang v. Royal Canin USA, Inc.* (W.D. Wash., 2019).

FAMILY AND MEDICAL LEAVE ACT

Employees Must Follow The Company Policy Regarding Reporting Absence And FMLA Leave – But Which One? A Sales Consultant was fired for unexcused absences. She did not follow the employer's customary process for properly reporting or requesting any need for FMLA, as required by the company and by the FMLA. However, the court found that there was a problem. It, and perhaps the employee, could not determine exactly what the customary process was. There were at least two. The employer cited one which required calling a centralized third party FMLA administrator and the employee did not do so. However, the employee followed the FMLA absence reporting policy printed in the company's Employee Handbook. She did comply with that policy. The company has an obligation to be clear in its requirements and not give confusing or contradictory directives. *Archey v. AT&T Mobility Services LLC* (E.D. Ky., 2019).

LABOR ARBITRATION

Angry "I Quit" Is Enough An employee left work without proper notice. She loudly "gave notice" by announcing she was leaving – to an empty room, where no one was likely to hear her. This resulted in being called in for a pre-disciplinary meeting for the unauthorized absence. Instead of going into the meeting, she got angry and said "I'm leaving." When asked to stay and attend the meeting, she got louder and said "No. I quit. You can have this F____ job!" She then left. Later that day she calmed down and she and the Union attempted to rescind and walk back, the "I quit." The employer declined and sent a letter accepting the resignation and ended the employment. The employee grieved. The arbitrator denied the grievance, ruling that "I quit" means "I quit," even if said in a moment of temper. The statement was clear. The statement was voluntary, rather than coerced in any way. The employer could accept the resignation. In Re *Laborers International of N. America and Klamath County* (2019).

CONSTITUTIONAL RIGHTS

Discharged For Risque´ Photo He Did Not Post A high school head football coach was fired for "immoral conduct" after a nude picture of him appeared on his social media profile. The problem is that he did not post it. He claimed his ex-wife and her current boyfriend used old pictures in her possession and created the post to look like it was by him. He filed and ultimately received a settlement in his suit of both of them. However, the school district would

not listen to his claim and would not even grant him a hearing to present his evidence of the false posts. The district first delayed then cancelled the hearing. The court ruled that he was entitled to a pre-termination hearing under his Constitutional Property Interest in the job and his reputation. *Wallace v. DeSoto County Sch. Dist.* (5th Cir., 2019).