Labor & Employment Law Update

JULY 2019

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Legislation & Administrative Actions

Longest Time Without Minimum Wage Increase The federal minimum wage law was enacted over 80 years ago. There have been regular increases. The last increase was in 2009. June, 2019 marked the longest period in the law's history without an increase. Opponents of an increase claim it would be bad for business and result in a decrease in jobs. Proponents claim that the current $7.25 is a 31% decrease in purchasing power since 2009, resulting in loss to retail and consumer manufacturing business and a decrease in jobs serving consumers. The current U.S. Senate is unlikely to approve any increases in the minimum wage. A growing number of states and municipalities have passed their own minimum wage or living wage laws exceeding the Federal $7.25.

Litigation

EVIDENCE

Destruction Of Personnel File Sinks Case A company suffered a catastrophic consequence in an ADA case. It claimed to have fired an employee with MS for poor performance. However, her personnel records were destroyed just a few days after the discharge. The court rejected the argument that the jury should "just trust" its verbal representations about the performance. Under the ADA (and Title VII), employers are supposed to keep employee records for at least one year following employment terminations, and several laws require three or more year retentions. The court believed the company destroyed the records in order to hide the truth. It sanctioned the company by ruling that the jury could infer that the employee's performance had been satisfactory and the employer's defense was a pretext for discrimination. *Webster v. Psychiatric Medical Care LLC* (D. Mont., 2019).

Courts reached similar decisions in two other "evidence spoliation" cases. *EEOC v. JP Morgan Chase* (S.D. OH, 2019) – destruction of 10 months of data regarding assignments of female mortgage consultants. *EEOC v. Ventura Corp.* (D. PR, 2019). Loss of critical emails and job applications due to a "software migration" and due to shredding. In both cases the sanctions were the court's exclusion of the testimony of defense witnesses and allowing an inference by the jury that the destroyed or lost information was to hide a cover-up of evidence of discrimination. These cases should be a powerful reminder of the importance of having a good record keeping and retention system for all records (paper, electronic, telephonic, video, and more).

Retaining Video Of Bartender Drinking On The Job Wins Case A bartender's Pregnancy Discrimination Act discharge case was dismissed. Rather than pregnancy, there was clear evidence of rule violations. A security video showed her pouring drinks for herself while working, and giving free drinks to a friend. It also showed her boyfriend engaging in the same behavior when he was bartending on a different shift. Both were fired. This was solid evidence of a non-discriminatory basis for the discharge. *Ducharme v. Crescent City Déjà vu* (E.D. La., 2019).

Keeping the record was the key. [The result was very different in a similar situation in which a bartender was videoed drinking and giving out freebies, and fired. However, the security video taped over itself every few days. Failure to preserve it resulted in the fired employee winning her case, and a lot of money.]

LABOR LAW – NLRB

Scabby The Rat – Restricting The Rodent Scabby, a giant inflatable 30-foot tall rat, has been a frequent participant in strikes, union organizing drives and other union events throughout the U.S. It draws a lot of attention. It also can be intimidating to others, subcontractors and customers. The courts have upheld the First Amendment and NLRA rights of unions to draw attention to labor issues. However, a "secondary boycott" to motivate customers or consumers of a secondary employer – subcontractor, supplier, retailer of goods – is an unfair labor practice. Courts or municipalities have also deflated Scabby when it poses a dangerous vision blockage or distraction for highway drivers. Now the NLRB itself may be trying to exterminate the rat. A NLRB Regional Director has filed for an injunction prohibiting Scabby the Rat and a giant inflatable cockroach in a labor dispute with a supermarket, claiming that the mere display size is intimidating to non-dispute-related parties and constitutes a secondary boycott. This appears to be a test case for the current administration's NLRB to trim union activities. *NLRB v. Construction & General Building Laborers #79* (E.D. NY, 2019).

DISCRIMINATION

DISABILITY

You Need To Take Care Of Yourself An employee suffered panic attacks, anxiety and depression, which caused her to go to the ER and miss several days of work. She then had a subsequent panic attack, informed her supervisor, and had to leave work. On return she was discharged. In the ensuing ADA case the employer claimed it did not have specific knowledge that the condition actually constituted a "disability" under the ADA, and the employee had attendance and performance issues. However, in the termination meeting the supervisor said *"It is not working out due to your health problems, and you need to take care of yourself."* This clearly seemed to show the employer knew of a disability or perceived the employee was disabled. *EEOC v. Crain Automotive Holdings LLC* (E.D. Ark., 2019). It is generally never a good idea to try to "soften the blow" by telling an employee the discharge is for their own good. It tends to backfire and magnify the hurt, and increase the damages.

SEX

Paid Parental Leave Policies Must Treat Fathers Equally - $5 Million Payments In an EEOC settlement, JP Morgan Chase has agreed to pay $5 million to male employees who were denied the opportunity to have the same paid parental leave as women. "Maternity" leave for caring for a new child is a thing of the past. Parents, regardless of gender, deserve equal policies to care for their new children. The JP Morgan policy for paid leave presumed mothers were the primary caregivers and gave them 16 weeks of paid parental leave. Fathers, though, were eligible for only two weeks of paid parental leave. The EEOC charge was filed by a new father as a class action on behalf of all men subject to the unequal policy. In addition to the payment, the company has changed the policy. *Rotondo v. JP Morgan Chase* (EEOC settlement, 2019).

HARASSMENT

Supervisor's Behaviors Bind Company To Liability - $425,000 A company will pay $425,000 to settle a racial harassment case alleging that warehouse supervisors used frequent overt slurs toward African-American employees, assigned them more difficult tasks, and assigned them the longest delivery routes. When non-management co-workers engage in harassment, an employer generally escapes liability if it promptly addresses and corrects once it is aware of the issue. There is a different standard regarding behavior by supervisors. Their behaviors are automatically imputed to the company and "are the acts of the employer," even if HR or top management had no knowledge. There is automatic liability and the employer may find itself literally "undefendable." Supervisors have a duty of care to be models of non-discriminatory behavior, not to be the harassers. In addition to paying the damages, the company will provide extra training to all employees, and undergo EEOC monitoring. *EEOC v. Aarons Furniture, Inc.* (E.D. NY, 2019).

Sex Or Gender –It's Still Harassment – Bullying By Ex-Brother-In-Law A school cafeteria worker's former brother-in-law was a custodian, with frequent presence in the food service area. He began a pattern of intimidating behaviors toward her and toward other female cafeteria workers. He would leer, snarl, make verbal threats, intentionally bump carts into the women, and used a leaf blower to blow dirt and gravel onto their cars in the parking lot. The employee and others complained that he was bullying women in the cafeteria and was "frightening." Management's alleged response was "boys will be boys," "he's harmless," and "that's just how he is." The employee and another woman quit. She filed a Title VII Constructive Discharge – harassment case. The District defended by claiming this could not be sexual harassment because the custodian made no overt sexual comments, did not ask for sexual favors or indicate he was motivated by sexual desire. The court recognized this, but found the conduct was directed against only female employees, and appeared to be based on their gender. Though sexuality sexual harassment seems to get the most attention, Title VII covers all forms of gender-based discrimination, so this situation fit hostile environment harassment based on gender. *Atkins v. Smyth County School Bd.* (W.D. Va., 2019).

Court Upholds Conviction Of Employee Who Assaulted Gay Co-Worker Harassment has consequences beyond discharge. It can also result in criminal conviction. An Amazon warehouse employee expressed his hatred for homosexuals by coming up behind a gay co-worker and then punching him in the head and face numerous times. The attacker was fired, and then convicted and sentenced to prison for assault and battery, with an enhanced sentence under the Federal Hate Crimes Act. He appealed, claiming that the Federal law only applies to those engaged in interstate commerce, and as a local warehouse worker he was not subject to the law. The court disagreed, finding that preparing packages for shipment across state lines is interstate commerce, which the defendant was doing the day of the attack, is well within the coverage of the law. This is in line with interpretations of interstate commerce under other laws, such as the FLSA. *United States v. Hill* (4th Cir., 2019).

RELIGION

Holy Days – Who's Matter? A Jehovah's Witness repeatedly requested a day off from his delivery truck driving job in March for the day his faith recognized as Christ's death. He was denied, and he alleged the supervisors did not seem to understand or care about his explanation of the religious importance. However, in December the same supervisor asked him to work an extra day on December 24th to accommodate the ability of other drivers to take off on the company's officially recognized Christmas Eve and Christmas Day. He filed a Title VII religious discrimination case and the court found sufficient adverse action for a plausible case. *James v. Get Fresh Produce* (N.D. Ill., 2019).

JOINT LIABILITY – OSHA

Staffing Agency As Well As Manufacturing Company Liable For Exposing Employees To Hazards At Automotive Plant A company is certainly responsible for the safety of its own employees. OSHA also holds companies responsible for safety issues and injuries to Leased Employees. Under the growing Joint Employment concept, the placement/leasing agency can also be liable – even if it did not control the work site nor create the unsafe equipment or conditions. The agency is still responsible for its placed employees, and has a duty to be aware of the conditions into which they are placed, and to act to protect them or remove them from unsafe conditions. *In Re Dongee Alabama LCC & JC Enterprises LLC* (OSHA, 2019), both the manufacturer of auto gas tanks and the placement agency were fined $145,438 due to "caught in/crushed by hazards," for requiring workers to operate machines without functioning safety warning equipment.