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Legislation & Administrative Actions

OFCCP Proposes Religious Exemption Regulation On August 15th the Office of Federal Contract Compliance Program (OFCCP), which regulates government contractors, issued proposed regulations which "ensure that conscience and religious freedom are given the broadest protection permitted by law." The religious "exemption" allows faith-based organizations to receive Federal contracts and be exempted from some of the usual rules and employment requirements which may conflict with a religious practice or doctrine. The new rules allow these organizations to insist employees adhere to their religious doctrines and be exempt from benefit requirements, etc., which are in contrast to the beliefs of the religion. Opponents argue that the new rules may allow employment discrimination against LGBT status, race or interracial relationships, and a variety of other things which some religions believe are not in accord with their tenets.

Litigation

PERSONAL LIABILITY/CONVICTIONS

A number of employment laws can impose personal liability, with individual managers, HR staff, CEO and board members, being named in cases and damages collected from their personal assets. Some also have criminal sanctions. The following two cases are about conviction and jail time under some of these laws.

Five Years And $327,000 Fine For FLSA And H-2A Violation The owner of a lawn care company was convicted of violating the immigration laws and failing to pay wages. He was sentenced to five years, to be served on probation, plus a $327,000 fine. He made false statements on a H-2A visa application, representing that Tri-State Lawn Care LLC's workers would be involved in agriculture, when the work was actually residential and related lawn care. He also improperly charged for housing and transportation to daily job locations, and failed to pay overtime. *U.S. v. Wheeler* (E.D. Ky., 2019).

Wine, Women, Cigars – And A Prison Term For UAW Official A former Vice President of the International United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) was convicted for taking approximately $100,000 of bribes from executives at Fiat Chrysler Automobile US. This was during the exact time he was supposed to be bargaining a contract for his UAW members with Fiat Chrysler. He used the money for extravagant personal travel and enjoyment and for lavish entertainment of other UAW officials. He spent $7,000 in bribe money on one blow-out dinner at a Detroit restaurant for UAW officials. He spent $25,000 each for two parties where he hosted UAW Executive Board members to ultra-premium liquor, personalized bottles of expensive wine, 20 boxes of imported cigars and women assigned to attend to each guest and light their cigars. The VP was convicted and will spend 15 months in prison, plus other penalties. He is the eighth person to be convicted for his part in the much larger bribery conspiracy, including Fiat Chrysler executives – one of which will spend six years in prison and pay approximately $1 million in restitution. *US Dept. of Justice v. Jewel* (E.D. Mich., 2019).

CONTRACTS

Handbook Policy Creates Contract Claim A discharged Whole Foods Manager lost her discrimination case but maintained an Unfair Discharge case due to the company's failure to follow its own progressive discipline policy in the Employee Handbook. The employee received a Final Warning regarding management style. She was then discharged for "bad decisions." She had never received the written warning or suspension described in the Policy prior to the Final Warning and discharge. The Manager sued for National Origin discrimination and breach of contract. The court dismissed the discrimination complaint, finding no evidence that Hispanic origin played any role in the Manager's employment. However, the state law Contract case was valid. Once an employer makes policy guarantees, those particular policies can become enforceable contracts which the employer is obligated to follow. Skipping steps can result in liability. *Sanchez v. Whole Foods Market Group* (D. Md., 2019). Even when a Handbook disclaimer contains Employment at Will statements, some states and Federal courts have ruled that certain individual policies within the Handbook can still create enforceable contracts giving employees greater rights. [See the article Blundering Into Liability – Unwitting Creation of Employment Contracts by Boardman & Clark.]

DISCRIMINATION

STANDARD OF PROOF

"Vague And Slippery Explanations." The standard burden of proof requirements for discrimination cases requires the plaintiff to first establish a prima facie statement of a case. Then the employer must articulate a non-discriminatory reason for its actions. This meets the employer's burden. Unless the plaintiff can show a "pretext," the employer wins. This is called the McDonnell Douglas standard. However, as pointed out in *Figueroa v. Pompeo* (D.C. Cir., 2019), a Puerto Rican national origin case, the employer must do more than simply "articulate" a non-discriminatory sounding defense. The employer must provide some specific evidence which seems credible; a "reasonably specific explanation." In the *Figueroa* case the U.S. Foreign Service defended its non-promotion of Mr. Figueroa by presenting an eight page chart outlining "core precepts and skills," many purely subjective. It claimed that top managers viewed Mr. Figueroa as only "adequate" under these standards. However, it provided no specifics as to which precepts or skills were seen as problems, and no specifics as to why he was rated as only "adequate." Instead, it gave only a generic opinion. The court found this did not meet the employer's burden of proof. There must be information as to how the employer actually applied the standards to the particular employee. "No reasonable jury would accept such a vague and slippery explanation."

AGE

Be Careful What You Ask For – Employer's Demand For Retrial Results In Twice As Much Liability A former journalist sued the LA Times for Age and Disability discrimination under Federal and California law. A jury awarded $7.1 million. The company appealed the verdict as "excessive" and demanded and then was granted a retrial on the issue of the damages. The retrial resulted in a jury award of $15.4 million. *Simers v. Tribune Co.* (Supreme Ct. LA County, CA 2019).

RACE AND DISABILITY

Harassment vs. Accommodation – Dueling EEO Categories An African-American employee sued over an ongoing racially hostile environment. Another employee with Tourette syndrome continually yelled profane and racial slurs at her. When she complained, Management's view was this was due to the other employee's disability – which had to be accommodated. Also, the other person yelled the same things when only White people were there or when no one was present. So, the comments "did not seem racially motivated," nor "intentional." They were "involuntary," so she "shouldn't take it personally." Management tried to create more separation between her and the other employee. However, the behaviors continued, including yelling of the "n-word" on an almost daily basis. On one occasion the other employee yelled that word at her 16 times in six minutes. Faced with the ongoing situation, the employee quit and filed a racial harassment case. The employer's defense included the conflicting obligation to accommodate the disabled employee under the ADA and the "involuntary" "non-intentional" nature of the Tourette behavior. The court did not agree. Regardless of the "intent," the behavior was racial and created a severe and pervasive racially hostile work environment. "Intent" is not the operational factor in hostile environment cases. The employer has a duty to deal with offensive behaviors. Though an employer must make reasonable accommodations for a disabled employee, "it need not tolerate misconduct that it would not have tolerated in a non-disabled employee." The company had a duty to effectively respond and eliminate the ongoing harassment. *Evans v. Orthopedic Associates LLC* (E.D. Mo., 2019).

SEX

"After 55 Years" Auto Dealership Should Have Known Better Fifty-five years after passage of Title VII, an auto dealership and its General Manager should have known better than to make or allow the GM's daily sexual and misogynistic commentary about female employees, the court ruled in *Rorke v. Aubrey Alexander Toyota* (M.D. Pa., 2019). A new General Manager for one of the company's dealerships was abusive in general, but especially to female staff, making overt sexual comments, gender stereotypes, trying to discuss their sex lives, and using offensive gender slurs in reference to women. A female salesperson quit and filed a Title VII harassment suit claiming hostile environment and bullying. Though she had never complained to corporate headquarters about the GM, the court found a valid claim. The general "Ellerth-Faragher Standard" for first making an internal complaint does not apply when key Managers are the harassers. Their acts can automatically bind the company to liability. [See the article The Undefendable by Boardman & Clark.] Further, there was evidence that the "patriarch" of the family-owned dealership group, some family members and HR knew of some of the GM's abusive behavior, and failed to take reasonable care to look into it, and prevent and correct the harassment.

Rush To Judgment – Irregular Investigation Process A court found plausible evidence that a university may have rushed to discharge a coach accused of harassment in order to please public sentiment rather than conduct a fair investigation. A new coach informed a tennis player that he could not provide her with the scholarship increase the former coach had promised. Then her father allegedly called to threaten the coach with "trouble" if he did not provide the scholarship. The coach did not do so, and then the student filed a claim that the coach had sexually harassed her. The ensuing investigation resulted in the coach's discharge. He filed a Title VII charge, claiming discrimination by investigation on the basis of his gender. The court found evidence to support this claim. There was evidence that the university was under pressure to react more forcefully with less evidence to allegations of male harassment toward females. The "investigation" was conducted under a directive to adopt a lower burden of proof for sexual harassment claims than others. The investigator did not interview critical witnesses, including other tennis players and an administrator who had concrete evidence that at least one of the harassment allegations was false and a ploy to retaliate for not receiving the scholarship. The investigation did not follow the university's own procedures, or provide the coach an opportunity to present a reasonable defense. There was no written investigative report with specific findings; he was simply told he was being terminated based on the "totality" of the allegations. *Menaker v. Hofstra Univ.* (2nd Cir., 2019).

Action Against Both Participants For Argument In Front Of Customers Voids Any Discrimination Claim An Auto Zone Store Manager got into an ugly confrontation with an employee on the sales floor. The employee had been unhappy over receiving a less than desired pay raise. One day the Manager was telling a customer that she was a Christian. The employee overheard and retorted "She's a fake Christian!" The Manager replied that the employee's mother had slept around and "at least I know who my father is!" This led to a loud and lengthy tirade with the employee calling the Manager profane names and slurs, and the Manager continuing to cast aspersions about his mother's character and morality. The Manager reported the incident and both were suspended. The employee was then fired. The Manager was demoted and sent to another store as a non-management employee. The Manager filed a Title VII case of sex discrimination and retaliation. She claimed that since she had reported the employee's hostile comments about her the demotion was "retaliation" for her using the company's harassment reporting process. The court disagreed and dismissed the case. There was no sex discrimination. Both the male and female participants were disciplined. In fact, she less than he, even though she, as a Manager, had greater responsibility to maintain a proper environment. Reporting an improper situation does not immunize a person from discipline when they were a full participant in the wrongful behaviors. Her own problem behaviors, not the report, were ample grounds for the demotion. *Carter v. Auto Zone, LLC* (D. Conn., 2019).

POLYGRAPH PROTECTION ACT (PPA)

Company Will Pay Penalty For Improper Lie Detector Tests The Dept. of Labor has assessed a $15,000 penalty against an employer for having five employees submit to polygraph testing after it discovered ongoing cash shortages and discrepancies. It had a general suspicion that someone in that group might be at fault. However, the PPA allows testing only when there is reasonable suspicion that the particular employee is involved in serious financial misconduct. In this case no individual had been identified as suspicious. The employer simply rounded up a group without any evidence as to which, if any, of them might be at fault. This violated the law. In re *West Valley ENT Clinic* (DOL Enforcement Action, 2019).