Labor & Employment Law Update

JUNE 2020

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

Administrative and Legislative Actions

DOL Expands Commissioned Retail Sales Exemption from Overtime under FLSA There are several Fair Labor Standards Act exemptions from overtime pay for hourly employees. One is the retail sales exemption. It only applies to retail or service establishments and employees who make over one-half of their pay through commissions. Historically, DOL has narrowly defined what it will consider to be a "retail or service" operation and had a long list of 90 types of businesses which it would not consider for the exemption. Now the Department has eliminated that list. Business operations have changed, so now DOL will assess how the business is conducted, rather than just looking at the type of business. So, many more businesses such as dry cleaners, roofing contractors, travel agencies and more may qualify to implement commissioned pay plans for hourly sales employees. The standards remain the same, requiring at least time and a half minimum wage for all hours worked, a valid commission system, and most important, a written understanding between employer and employee.

COVID Immunity From Liability vs. Safety. Senate Republicans are pushing for a fast-tracked Federal law which will make businesses immune from lawsuits if employees, customers or the public claim they got COVID-19 due to the business practices or environment. Majority Leader, Mitch McConnell, states this is a top Republican priority to enable businesses to reopen without fear of litigation. However, a bipartisan group of Democrat and Republican senators are slowing the process by insisting that enforceable safety standards must first be in place to protect workers and the public from businesses which may choose to ignore safety if there is no consequence of liability. The current CDC and OSHA COVID Safety "standards" are "recommendations" which have no legal enforceability. Enforceable standards could provide a basis for then limiting any liability to shield businesses which are in compliance.

Litigation

FAIR LABOR STANDARDS ACT

$8.3 Million Settlement is a Lot of Dough for Wonderbread Workers Flowers Foods/Franklin Bakery, the makers of Wonderbread and Tastykake will pay $8.3 million to settle a class action FLSA suit over misclassifying those who distribute the products as independent contractors. The plaintiffs alleged they were employees, due overtime wages and certain benefits. The settlement grants employee status, back wages and a variety of benefits and employment rights to the distributors. Rosinbaum et al v. Flowers Foods Inc. et al. (E.D. NC 2020). The company has previously paid $13.25 million to settle similar suits in other parts of the country. .

DEFAMATION

Fabricated Evidence Results in Defamation Suit An employee left XPO Logistics and went to work for a competitor. The former company sued him and his new employer for breach of his Confidentiality Agreement and demanded the

new employer end the employment. Then XPO presented allegedly forged, falsified emails which seemed to show the employee had indeed breached the Confidentiality agreement. So the new employer fired him in order to get itself out of the case. When the falsification then became apparent, the employee sued XPO for defamation. The court rejected the defense that there is a "liability shield" for statements made by parties in court cases. The court ruled that the shield does not protect "lying litigants" who engage in fraud or bad faith. Thus, the suit was allowed to proceed. Peterson v. XPO Logistics Inc. (10th Cir., 2020)

DISCRIMINATION

DISABILITY

Profane Outbursts and Throwing Things at Co-Workers The dismissal of an Army veteran's ADA case was upheld. The Vet was fired from a call center job after incidents of outbursts in which she cursed and threw objects at co-workers. She claimed that these incidents were due to her service-related PTSD disability, and that other employees had engaged in inappropriate behavior, yet not been discharged. The court ruled that an employer can require all employees to follow rules of civil and safe conduct; a disability does not excuse one from these basic standards. Further, the company had fired other non-disabled employees for similar behaviors. The individuals the plaintiff cited as "comparators" were not similarly situated, they had engaged in milder, purely verbal incidents of snarky emails or curt, irritated "snapping" at others, which were significantly less severe in comparison. Trehan v. Wayfair Maine LLC (1st Cir., 2020)

RACE

Effective Correction Does Not Require Meeting Employee's Demand to Fire Co-Worker . In case of harassment among coworkers, an employer is required to take prompt action "reasonably calculated" to stop the offensive situation. A White employee directed an overly offensive racist joke at a Black co-worker. The recipient complained and demanded the harasser be fired. The company promptly acted, skipped over the first three steps of its disciplinary policy and gave a final warning and suspension. This did not satisfy the recipient, who sued under Title VII, claiming that though the behavior stopped she still had to see the harasser in the workplace which created an on-going hostile environment; thus the company had not met its legal obligation to eliminate the intimidating environment. The court disagreed. It ruled that the legal standard requires action "reasonably calculated to stop the behavior," not pleasing the complainant nor acquiescing to the complainant's demands. The company met this standard. Bazemore v. Best Buy (4th Cir., 2020) This was a racial harassment case. The same Title VII standards also apply to cases of religion, national origin and sexual harassment. This case involved co-workers. The ruling may well have been different if the harasser had been a supervisor. Managers are held to a higher standard and employers are generally expected to take stronger action.

RELIGION

No Academic Freedom to Teach Prejudice . A public-school teacher was fired after posting links to anti-Semitic articles on the school website, teaching Holocaust denial lessons in the classroom, and espousing conspiracy theory Hitler-apologist views to students. The teacher then claimed he was fired due to his national origin - Egyptian descent and religion - "Non-practicing Muslim." The court dismissed the case on summary judgment finding that neither the national origin nor Muslim faith require anti-Semitic prejudice. There is no evidence the school district considered either factor in the discharge. The court also found there is no First Amendment academic freedom right to teach prejudice and patently false narratives. Ali v. Woodbridge Township School Dist. (3rd Cir., 2020)

No Immunity For Harassment of Atheist Firefighter Government managers can often claim immunity from liability when sued for their official actions. However, in Queen v. City of Bowling Green, et al. (6th Cir., 2020) the court denied that immunity in a religious harassment case. A firefighter suffered harassment due to his being an atheist. Other firefighters repeatedly called him "Pagan," said he "Should be burned" and other offensive comments. When he complained to his manager, the response was that he should just leave and look for employment elsewhere, he was no longer welcome in the Department. Nothing was done to end the harassment. The firefighter quit, claiming constructive discharge. The court rejected the city's immunity defense, ruling that the manager could be held liable because his actions were not a good faith exercise of his public authority. Instead, the manager engaged in an intentional violation of a well-established legal standard for non-discrimination.

LABOR RELATIONS

Bang the Gong Softly A state court issued an injunction against striking hospital workers who were loudly and repeatedly banging two large metal gongs outside the hospital to draw attention to their dispute. The gongs started at dawn and carried on throughout the day, for days on end, at a decibel level between 80 and 105 decibels. A 105 decibel level is "the equivalent of a loud rock concert," which can cause hearing damage within as little as five minutes. The constant gonging drew complaints from patients, their families, other hospital employees, and neighboring businesses and residents. The hospital filed for and was granted an injunction to stop the gong show since the noise was disturbing to the patients and their health. Marin General Hospital v. Int. Union of Operating Engineers Local 39 (Ct. App. Cal., 2020)

Strangest Case of the Month

TRIAL PROCEDURES

A Trial Is Not a Baseball Game - No Signals Allowed A company is appealing a $1.4 million judgment in a disability case after the trial judge cited one of the defense team for contempt and banned the company's chief representative from testifying and from being in the courtroom. The company representative was on the witness stand being cross examined. When a key document came up, a paralegal on the company defense team began signaling for her not to answer questions on that issue. The judge saw this and stopped the testimony. Then the company representative was seen talking to a juror in the hallway. The judge cited both the paralegal and company representative for contempt and informed the jury of the expulsion of the company's representative. The company then lost the case. The Appeal claims the judge was excessive in banning a key witness from testifying and for prejudicing the jury by openly informing it of the contempt for the signaling allegations. Hayes v. Sky West Airlines, Inc. (10th Cir., 2020) (The 10th circuit has already upheld the contempt citation for the paralegal on a previous appeal.) A trial is not like a baseball game in which the catcher can signal the pitcher. This was like banging on the trash can from the dugout or kicking your bridge partner under the card table.