Labor & Employment Law Update

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Legislative And Admininistrative Actions

EEOC Hiring More Employees The EEOC has initiated an effort to hire 450 more employees. This will enable the agency to clear a backlog, address complaints faster, and devote more attention to investigating and filing cases on systemic discrimination.

JUDICIARY

Equal Justice? "State Supreme Courts exhibit a stunning lack of racial diversity" according to a survey by the Brennan Center For Justice. Twenty-two states have all-White supreme courts, and all other states' high courts are overwhelmingly White. A number of states have a non-White Justice, but not of a race which represents its largest minority populations. Twenty-eight states have no Black Justices; 40 states have no Hispanic Justices, in spite of populations with significant percentages of these groups. Only 17% of state Supreme Court Judges are Black, Hispanic, Asian or Native American. As expressed by the Brennan Center, *"A diverse bench is vital to achieve a fair system of justice and promoting public trust in the courts. Across the country, state supreme courts fail to reflect an increasingly diverse population."* Though still not at parity, there is more gender diversity on the same courts. All states' supreme courts have female justices and some, such as Wisconsin, have a majority of women on the high courts. As more women joined courts, there has seemed to be an increase in serious attention to cases about sexual harassment, discrimination and gender equity. Diversity does appear to make a difference.

Litigation

WAGES AND CRIMINAL PROSECUTION

Employment laws and criminal law can intersect. Sometimes depriving people of wages or opportunities can also result in prosecution.

Prison and $1,160 Million FLSA Award For Slave Labor A White restaurant owner kept a cognitively disabled Black man enslaved for five years, forcing him to work over 100 hours a week, with no pay and no days off. He kept the man, Bill, who has a less than a 70 IQ level, isolated in a bedroom attached to the restaurant and used ongoing psychological and physical abuse to maintain compliance and silence. The true nature of the situation was eventually discovered and reported by another employee. The restaurant owner

was convicted and sentenced to 10 years in prison under the Trafficking Victims Protection Act. Then, the Dept. of Justice filed an FLSA case on behalf of Bill for back wages and overtime he should have been paid, plus double damages for the intentional violation. This resulted in a $1.16 million award on Bill's behalf. *U.S. v. Bobby Edwards/J&J Cafeteria* (4th Cir 2021) (The criminal case was *U.S. v. Edwards*).

Employee's Trade Secrets Theft Results in $3 Million Verdict and RICO Conviction An employee of an oil industry services website left employment, illegally taking trade secrets, and set up a competing website. He was sued civilly for theft of trade secrets, and criminally prosecuted for violating the Racketeer Influenced And Corrupt Organizations Act (RICO) since his actions fit the definition of racketeering activities. In the criminal action, he was convicted and sentenced to one year in prison. Then, the civil case resulted in a $3 million award to the former company. *DHI Group v. Kent* (S.D. TX, 2021).

Staffing Company Charged With Colluding to Suppress Wages The Dept. of Justice is increasing its new initiative to prosecute employers for labor market collusion designed to restrict competition and artificially fix wages under the Anti-Trust Act. In *U.S. v. Hee et al.* (D.C. NV, 2021), an indictment was issued against staffing agencies supplying nurses to schools for the care of disabled and special needs students. The case alleges two agencies agreed to not hire nurses away from each other and to coordinate in order to keep nurses' wages depressed.

WAGES AND HOURS

Pre and post shift time for required COVID temperature scans and logging in or out of security checks, etc., are increasingly the topics of FLSA and state wage claims. Many employers have not paid this time, stating that it is not actual work and is "de minimis" – too short to require including in wage and overtime calculations. However, there are now more rulings that the de minimis rule is eroding and "little bits every day add up" to significant amounts over time and can therefore require payment of overtime wages.

Nike Will Pay $8.2 Million to Cover End of Shift Security Check Time. Nike retail stores required staff to wait in line and go through an unpaid security check of their purses, bags, backpacks, etc., before leaving the premises. The employees filed a class action suit, claiming this was a significant extension of their shift and should be paid. The court rejected Nike's claim that this was a "de minimis" amount of time, a "trivial burden" on staff. Nike then settled that case for $8.25 million to be paid in back wages. *Rodriguez v. Nike Retail Services et al* (N.D. Cal, 2021). Often these cases are filed under both the FLSA and state laws. A number of states do not recognize the federal de minimis rule at all. [For more information see the article De Minimis Is No Small Matter by Boardman Clark.

FAMILY AND MEDICAL LEAVE ACT

Do Not Confuse Workers Comp and FMLA – They Can Both Operate in Unison. Many employers seem unaware that though Workers Compensation and FMLA are different laws, both work together to frequently cover the same serious medical conditions. Some employers forget that WC injuries can also be FMLA conditions and do not think to count time off for WC toward FMLA leave entitlement. In this case, a hospital staffing service discharged an injured housekeeper for inability to do work, without providing FMLA for additional healing. The housekeeper injured her knee at work. She took time off under WC and was certified to return with restrictions. However, she could not do several job functions, so was discharged for not being fit for work. However, the employer did not offer additional time under FMLA for further treatment and recovery. It did not bother to inform her that she had any FMLA rights. The employer's defense was that it

complied with WC regulations and could end the employment if the employee could not do the work upon return from treatment. The court ruled that the employer had an obligation to inform the housekeeper of her additional rights for more time off to achieve more functionality, which could have enabled her to return and fully perform the job duties. Complying with just WC was not enough; compliance with the FMLA is also required. *Ramiji v. Hospital Housekeeping Systems LLC* (11th Cir. 2021).

DISCRIMINATION

DISABILITY

Supervisor's Insults and Changing Excuses Support ADA Claim. A court found that a supervisor's history of insults and shifting explanations for discharge support a former employee's ADA case. The evidence showed the supervisor repeatedly insulted the employee's congenital right arm disability, called him "a cripple," stated how he could not be "the right-hand man," and made other derogatory comments. Though the company claimed a non-discriminatory reason for the discharge, the supervisor had given different stories to different people when pushing for the discharge. These changing reasons, coupled with the ongoing insulting disability comments, were evidence that the company's defense reasons were pretextual. *Beck v. Brookville Behavioral Health Inc.* (W.D. PA, 2021).

RETALIATION

Former Manager Wins $11 Million in Retaliation Case. A White IBM Sales Manager reported concerns about the company's discriminatory treatment of his Black subordinates; especially in payment of sales commissions. He reported concerns that there were substantial commission reductions and caps, whereas White salesmen had no reductions and received full commissions without any caps for the same performance. He raised his concerns to several levels of the organization. He was then soon fired, without a reason being given. A jury decided the company's after-the-fact stated reasons for the discharge were not valid, and awarded $11 million in back pay, lost commissions, front pay, and emotional harm. *Kingston v. IBM* (W.D. WA, 2021) (The company had previously settled claims by the affected salesmen over discrimination in the commission payments.)

RACE

Scapegoated Basketball Coach Wins $2.5 Million. In *Harris v. Falcon School Dist. et al.*, a jury awarded $2.5 million in punitive and economic damages against a school district and the Colorado High School Activities Association (CHSAA) for having scapegoated a Black coach in order to cover up the violations by his White supervisors. The case was brought under 42 U.S. Code Sec. 1981, which has no cap on damage awards. Mr. Harris was an Assistant Coach. He made objections to the school for allowing an ineligible transfer student to practice and play. He was overruled by the Head Coach and Athletic Director, who are White. Then parents and others complained to the CHSAA about the ineligible player. The Association's investigator glossed over the involvement of the Athletic Director and Head Coach even though the evidence showed their roles and easily should have shown that they permitted the violation over Mr. Harris' objections. Instead, the Association allowed the supervisors to scapegoat Mr. Harris and let him be "thrown under the bus" to take the blame for the violations by his White superiors. This resulted in Mr. Harris being fired and the resulting negative publicity harmed his ability to coach elsewhere.

STOCKHOLDER SUITS FOR DISCRIMINATORY PRACTICES

Another Stockholders' Fund Sues Company For Failing to Have and Enforce Internal Anti-Discrimination Policies. It is not just employees who file cases over a company's ineffective employment practices. Recently, companies have suffered loss of business, loss of stock value, and suits by large stockholders or pension funds due to lost dividends or stock value. These large stockholders can sue for far more in damages than any employee could ever claim; multi-millions plus demands for removal of executives and board members. Implementing ethical, fair, and effective employment practices is not just a Human Resources concern. The latest of these cases is *Teamsters v. Enrique Hernandez et al.* (Del. Ct of Chancery, 2021) in which a stockholding pension fund sued the McDonalds Corp. Board of Directors. The claim is that McDonalds failed to have and enforce effective sexual harassment policies. It allowed its executives and corporate managers to engage in violations of the company's harassment/anti-discrimination policies with relative impunity. When it did act, it paid to resolve complaints and then actually seemed to reward the wrongdoers by giving lavish exit packages, such as the $53 million to its CEO who departed due to a sexual relationship. That is a lot of money which could have gone to paying stockholder dividends. Now, belatedly, McDonalds is suing the former CEO to recover the severance because it found several additional instances of his violation of the sexual harassment discrimination policies. The Teamsters Pension Fund suit alleges that all of this actually was available information at the time the Board gave the lavish severance, and the company simply "turned a blind eye" to the violation of its top managers. Now, even more millions will be spent to try to get the severance money back; thus even more money siphoned off from the stockholders. The suit is against the company and individual Board Members for "the Board's own indifference to executive misconduct and its own role in failing to stop misconduct," and in failing to assure fair and effective employment practices. This may be an opportunity for Human Resources to achieve more strategic value by being able to advise their organizations on how to prevent these situations through good policies and practices.