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LAW FIRM

LABOR & EMPLOYMENT UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

EEOC Harassment Rules Comment Time Extended To March 21st. The EEOC is considering new revised guidance on workplace harassment. There has been so much commentary and interest that the agency has extended the deadline for comments.

Mixed Results on LGBT

President Trump Keeps Obama Executive Order On LGBT. President trump has stated that he intends to keep in place President Obama's Executive Order prohibiting LGBT discrimination in Federal employment and for employers with government contracts. Government contracts cover one-fifth of the U.S. workforce.

Dept. of Education Abandons Transgender Restroom Protection For Schools. The Dept. of Education has announced that it is voiding the former guidance it issued allowing transgender students to use the school restrooms/locker rooms of their gender orientation. The administration strongly believes that state and local governments should determine these EEO and civil rights matters. This is not per-se an employment rule, but it may portend the new DOL & EEOC approach to LGBT issues under Title VII.

Courts Continue To Divide On Whether LGBT Categories Are "Protected Status." More courts are shutting down the DOL and EEOC rules prohibiting LGBT discrimination. The courts have either enjoined enforcement (*Franciscan Alliance v. Burwell* (N.D. Tex.)), or decided the EEOC's interpretation of LGBT as sex discrimination is outside the congressionally authorized scope of Title VII.

Newest Ban The Box. Asking for prior salary history in the hiring process is the newest prohibited activity under state and local EEO laws. Since the court in *Woodard v. Medseek* (N.D. Ala., 2016) determined that use of prior salary or wage setting was an adverse impact discretionary practice, states and localities have been prohibiting the prior pay question in applications or anywhere in the selection process. Philadelphia has become the latest place to forbid asking applicants or inquiring about prior pay history. However, Pennsylvania's Legislature has introduced bills, in reaction, which would prohibit local governments from having rules or making determinations regarding EEO or civil rights matters which extend beyond the letter of state law. This would void the Philadelphia rule. [This is an interesting paradox, since there is an opposite trend regarding some other sorts of discrimination, in which the administration is deciding that it is local governments which should have the right to make decisions about EEO and civil rights issues on discrimination regarding LGBT issues – [see above "restroom" item.]

LITIGATION

Theme of the Month – Fired Over Food

Soups On! – Double Coupon Abuse. Two supermarket cashiers and the floral dept. manager were fired for double coupon abuse for soup. The store allowed employees a double value on original clipped coupons, no photocopies allowed, and a four item limit. There was a half-off coupon on a $1.69 can of soup. With the double coupon value-employee benefit the soup was free! Rather than stay with the four can limit, the three employees made photocopies of the coupons, and were each taking 30 cans a day. The manager used her management code to override the system to allow the photocopied coupons. The cashiers broke the "sales" down into multiple separate transactions, in order to look like the per item limit had not been exceeded. When caught and fired, they grieved the discharge, claiming it was excessive, it was only cans of soup. One was an employee with a 31-year exemplary record. The arbitrator upheld all three discharges. The arbitrator did not view dishonesty and theft as only cans of soup, regardless of one's length of service. *In Re United Food & Commercial Workers #1 and Tops Market, LLC* (2017).

Eating Stale Cake Was Insufficient For Discharge. A freight crew supervisor for a supermarket company determined that a cake was too stale to ship. She then opened it and shared it with her work crew. She was fired for gross misconduct, theft and dishonesty. She was replaced by a new male employee who had no supervisory experience. She sued under Title VII and Idaho EEO law for sex discrimination. The court found that there was direct evidence that the discharge might be a cover-up for sex discrimination. There were prior overt comments by her manager about how a "man would be better" in supervisory jobs, and did not like that a "girl" was supervising the freight crew. Further, many, many employees had been allowed to take and eat stale cake and other products, and it was a common and accepted practice. The discharge appeared to be a pretext. In addition, the court allowed the fired supervisor to also pursue causes of action under the FLSA for denial of unpaid wages and COBRA for health insurance medical expenses. *Mayers v. Win Co. Holdings, Inc.* (9th Cir., 2017). [General Warning. COBRA allows denial of health insurance continuation if an employee is discharged for gross misconduct, such as theft. Employers are often indignant and angry about a "bad actor" and may be too eager to label behavior as "gross misconduct," and then deny COBRA continuation. The former employee then may have very great uncovered medical bills. If a court later finds that the misconduct was not "gross," or worse, finds the employer was at fault for discrimination or other employment law violations, the employer can be in a lot of trouble. The employer may get stuck paying for all the multi-thousands of uncovered medical bills. The employer's employment practices liability insurance will generally not cover a COBRA issue. So be careful in any decision to deny COBRA continuation due to "gross misconduct."]

Electronic Privacy

Computer Fraud – Accessing Other Employees' E-Mails – Company Policy Excuse Fails. A company was concerned about a manager's expense accounts. The company gave him a strong warning about improper expenses. Then it became suspicious of more expense items. During this period the manager was hacking into the e-mails of other employees, including the CEO. He used his personal ipad to take hundreds of screen shots. The manager learned that he was under suspicion for the expenses. He decided to mount a preemptive strike to deflect the attention, so he filed an internal complaint accusing the CEO of fraudulent activities. The company hired an independent investigator, who found the complaint was without merit, but also uncovered the manager's unauthorized e-mail hacks and $100,000 of unauthorized entertainment on the manager's expense account. The manager was fired. The company then sued the manager under the Computer Fraud and Abuse Act, the Stored Communications Act, and for the expense monies. The manager counter-sued for wrongful discharge. The company won on all counts. The manager argued that he did not use unauthorized access to other e-mail accounts. He cited the company handbook policy which stated that "management" has the right to access and inspect all content of the company systems. Since he was a "manager" that gave him the right. The court disagreed. The generic "management" in the policy did not mean each and every manager. It meant "the company" and its IT or other designated management, using proper channels. *Brown Jordan Int. v. Carmicle* (11th Cir., 2017).

Discrimination

Liability and Damages

Consulting With Attorney Is A Good Defense To Punitive Damages. In *EEOC v. Flambeau, Inc.* (E.D. Wisc., 2017), the EEOC sued, alleging a company's Wellness Plan violated the ADA. It sought extra punitive damages, charging "reckless indifference" to the requirements of the law. The court denied the punitive damages. The company had consulted its legal counsel regarding its wellness plan. The court ruled that a legal consultation and consideration before acting is inconsistent with any recklessness or indifference; it shows the opposite. The court also ruled against the EEOC on the remainder of the case as well.

Sex

Mooing. A city's first firefighter to become pregnant took leave for birth of her child. On return, she exercised her rights for reasonable time and private space to express milk or nurse her baby in the workplace. Male co-workers harassed her. They intentionally entered the private room while she was expressing milk. They stood outside the door and made loud "mooing" sounds. There were a number of other negative statements by co-workers and higher managers regarding "I would never let my wife work while pregnant" and about expressing milk at work and about her breasts. When she complained, she was told that the fire department was a "frat house" environment and the guys were "only kidding." She received a negative performance evaluation after the complaint. The court found strong evidence of sex discrimination which was difficult for the city to rebut. *Hinton v. City of Olathe* (D. Kan., 2017).

Lexis Nexis Pays $1.2 Million For Unequal Pay. Lexis Nexis Risk Solutions has agreed to pay over $1.2 million to female employees to settle an OFCCP charge that it paid 26 women far less than men for the same management work. Lexis Nexis has denied any discrimination in settling the case. OFCCP states that the significant pay differences were not explained by legitimate sex-neutral factors (OFCCP Settlement, 2017).

Disability

Transfer To Job Slated For Elimination Was Not A Valid Reinstatement Nor Accommodation. A fire system inspector had a mild stroke. She was on medical leave for almost three months, then certified to return without limitations. She was told that there was not enough work at her former location to use her, and was reinstated to a different office. A short time later she was laid off due to an "unexpected downturn in business at that office." The inspector filed an ADA case. The evidence indicated the employer's stated reason was a pretext for discrimination. While on LOA the inspector's supervisor made several negative statements regarding the stroke and doubt about her abilities if she returned. The "unexpected downturn" had occurred months earlier, layoffs had been in progress for several months, and the company knew it was closing the office soon. The original office she should have been restated to was experiencing an increased work load, and was calling in additional help. None of the company's stated reasons appeared to be valid. *Palermo v. Grunau Company* (MD Fla., 2017).

Obsessive Stalking Is Not A Disability When Manager Violates Work Directive. A male manager and female employee had a consensual extra-marital affair. She broke it off, but the manager persisted in contacting her to resume the relationship. He not only repeatedly contacted her, he obtained information from her bank account, he showed up at her house, pounding on her door and shouting, he repeatedly texted after being told to stop, and after the police ordered him to cease contact. Finally, she informed the company that she needed a police escort to her car in the company parking lot due to her fear of the stalking. The company investigated and the manager admitted the behavior. He signed an agreement to cease contact and get counseling for his obsessive stalking. He then violated the agreement and was fired. The manager then sued under the ADA and California Fair Employment law, claiming he was fired due to the disability of obsessive compulsive stalking. The court dismissed the case, finding that the employer had not concluded or perceived the stalking was a disability. Even if it were a function of OCD, active violation of rules and harassing others does not show an employee was "qualified" to meet work expectations as protected by the ADA. *Wyant v. Intel Corp.* (Cal. Ct. App., 2017).

Doctor's Estimate Of Return To Work Is Not The Same As A Return To Work Date. A leave of absence for a "reasonable duration" is a form of accommodation. It allows treatment, recovery and return to the duties of the job. On the other hand, leave for "indefinite duration" is not reasonable. The employer is not required to hold a job vacant on an indeterminate basis. A reasonably certain date for return gives the employer the ability to determine whether it can hold the job open that long without causing an undue hardship. Doctors at times respond to a request for "date of return" by providing a "date of next evaluation." This does not mean a return, since "next evaluations" can continue indefinitely. (The employer should send a second request specifying the need for reasonable predicted date of actual return.) In *Williams v. AT&T Mobility Services* (6th Cir., 2017), the employee's doctor could only give a date when the employee "might be able" to return to work, but could not state that she would be able to return. The court found that was an "indefinite" prognosis, and the employer's decision to no longer hold the job open was reasonable under the ADA. [Caution: An employer should not use the first doctor's note about "next evaluation" to consider this an "indefinite" situation and fill the position. That would violate the "interactive process" requirements. Any leave may have some period before return can be specified. Send a further communication to the employee and doctor, explaining the need for a reasonably specific date of actual return and asking the doctor to give that approximate date, or to verify that the leave is of indeterminate duration.]

Family and Medical Leave Act

OWI Arrest Indicates Day Off Was Not Used For FMLA. An employee taking a day of FMLA was arrested for drunken driving. The employer fired him for abusing FMLA. The employee sued, claiming that getting intoxicated and driving were not an indication that he did not actually have a serious medical condition, and need to be off work. The court dismissed the case, finding that the employee's behavior was inconsistent with a need to take FMLA, and the employer had an honest belief that there was abuse of leave, and the discharge was for a leave abuse rule violation, not a punishment for exercising FMLA rights. *Capps v. Mondalez Global LLC* (3rd Cir., 2017).