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Legislative and Administrative Actions

Save Business Act May Address Joint Employment – Sort Of. The Save Business Act has been introduced in Congress with the purpose of redefining and narrowing the scope of "Joint Employment." There has been an escalation of cases and agency enforcement actions holding that placement agencies and the company which leases the employees are jointly liable for violation of various employment laws, especially in the areas of discrimination, the National Labor Relations Act, and wages and hour laws. The proposal would limit the ability of leased employees to sue the companies where they are placed. The bill only specifically addresses the scope of Joint Employment under the FLSA and the National Labor Relations Act. It does not seem to cover the many discrimination laws enforced by the EEOC, the Equal Pay Act, the tax laws under the IRS, unemployment compensation laws, OSHA and workers compensation. So, some of the major sources of liability may still continue.

Litigation

THEME OF THE MONTH

WHAT IS "PROTECTED ACTIVITY?" MANAGERS GO TOO FAR IN TRYING TO DEFEND AGAINST COMPLAINTS

No one likes to be the subject of complaints. Some managers want to take action, which can at times backfire. A good lesson for the named managers is to back off, decrease defensiveness and resist the urge to "act." Let HR and legal counsel take the lead.

Overzealous Manager Fired For Trying To Help Employer Defend A Case. Two employees filed complaints, including EEOC charges, against a university's Parking Manager. The legal counsel informed him that he should preserve any evidence and would be expected to cooperate in the defense of the complaints. He decided that this meant he should launch his own private investigation to dig up negative evidence against those who had complained about him – to help the university's defense. So he gained unauthorized computer access to records, emails and other files of the two employees and a number of their co-workers. This was discovered and the manager was fired for violating the organization's computer security policies and invading the privacy of other employees. He sued, claiming that he was engaged in a "protected activity" of assisting in the investigation of the complaints. The court ruled against him. It found that even if his participation in defense of a case was a protected activity, he exceeded any scope of protection when he unilaterally violated privacy and computer security policies to access the records. *Knight v. Slippery Rock Univ.* (W.D. PA, 2017).

Blanket Gag Order Violated K-9 Officers' Protected Free Speech Rights. A Highway Patrol Major issued an order that troopers in the K-9 drug investigations unit were "not allowed to contact or speak about the K-9 program to any entity or person outside the department, on penalty of discipline." This order was given after some officers raised concerns about the management and budgeting of the department's K-9 operation, and the Major had received inquiries and critiques from citizen interest groups. Several officers sued, claiming the order violated their Constitutional right to speak, even off duty, as citizens, about matters of public concern, such as effective management of a government department and misuse of taxpayers' money. The court agreed and granted judgment in favor of the officers. The Court of Appeals affirmed. The order went beyond the scope of official duties and the security of police operations. It gagged the ability to talk about anything to anyone, including all of the matters which are Constitutionally protected. In fact, the evidence was clear that the order was actually intended to shut down whistleblowing and valid critique of management – rather than protect any police security issues at all. The Major testified that he issued the order because he was irritated with citizen interest groups, especially "Friends of K-9," criticizing and "meddling" with the department. He "had issues" after he received questions from state legislators and the Governor's office regarding these criticisms of his management. The court found the policy to be an overbroad "prior restraint of protected speech." The order prohibited speech to the media, community groups, legislators, public officials, and even friends and family. In fact, the stated purpose of the edict was to cut off contact between the troopers and the community group that had apparently vexed the Major. The court went on to state: "Although it could be true that police departments would operate more efficiently absent inquiry into their practices by the public and the legislature, efficiency grounded in the avoidance of accountability is not, in a democracy, a supervening value," . . . "Avoiding accountability by reason of persuasive speech to other governmental officials and the public is not an interest that can justify curtailing officers' speech as citizens on matters of public concern." *Moonin v. Tice* (9th Cir., 2017).

SECURITY WINS OUT IN CONFLICT OF LAWS

Sometimes laws seem to be in conflict. Courts allow some to take precedence over others. At times a decision made under one set of regulations can eliminate a person's ability to file at all under other laws. An easy example is a truck driver whose license has been revoked by the state due to medical issues cannot then sue his employer under the ADA for having fired him, even though he claims he could still do the driving duties – without the license. National security is one such area. Security outweighs most other laws and some national security decisions are not challengeable at all in court.

Paranoid Nuclear Security Guard Should Not Carry Gun – National Security Preempts ADA. An armed security guard at a nuclear facility was exhibiting increasingly unusual behaviors. These were reported by his co-workers, wife, the school system and police. He made statements that he believed his child's toy cars were "bugged" and spying on him; that he was going to kill whoever was following him; and the school reported that he was going to come to his child's school intoxicated and "possibly armed." The police put the school on lock down for two hours (however, he never did come to the school). His wife took the children and left the residence. When these incidents were reported to the facility, the guard was placed on suspension and directed to take a psychological evaluation. The NRC regulations require all armed guards to be subject to routine behavior monitoring, and evaluated if there are any questions of reliability. The evaluation ruled that the guard was not fit for duty. The facility removed his NSA security clearance and he was discharged. He filed an ADA case, claiming that the ADA should allow him to challenge the NSA security rules. The court dismissed the case. National security regulations generally take precedence over the ADA. His claim that this would leave security personnel without an adequate remedy under the ADA was rejected; the court ruled that this is an "essential feature" of the nuclear regulatory process. The fact that "the ADA applies differently to professions that implicate the public welfare is essential." *McNelis v. Penn Power and Light Co.* (3rd Cir., 2017).

In *Sanchez v. US Dept. of Energy* (10th Cir., 2017), the court made a similar ruling under the Rehabilitation Act. An Emergency Operations Specialist for the U.S. Nuclear Administration lost his certification, and thus his job, due to a reading disorder. He sued, claiming a lack of accommodation. The court ruled that the NSA and nuclear security regulations preempted the Rehabilitation Act and the certification removal decision was not challengeable.

DISCRIMINATION

DISABILITY

"The Less Said The Better" And Inconsistant Use Of Return To Work Certifications. This case illustrates the importance of consistency in enforcement of policies; selective use creates problems. In *McMillan v. Valley Rubber & Gasket Co.* (E.D. Cal., 2017), a machine operator with Crohn's disease worked successfully for years. Then he had an at-work hand injury. He returned after two weeks, with restrictions, without any doctor's fitness certification. He wore a cast and received some assistance in lifting heaving items. Then the employee experienced off-the-job emotional problems, was committed to a psychiatric unit for a few days for observation, and released without restrictions. However, the employer refused to let him return to work until he produced a doctor's certification of fitness, including fitness to do lifting due to the hand injury. The company fired him when he did not promptly produce the certificate that he could do heavy lifting. In the ensuing disability suit the company defended by claiming the employee was not a "qualified person" due to no certification of his hand injury-ability to lift heavy objects. However, evidence surfaced of company emails expressing concern about the employee's recent commitment and the Crohn's disease – with the warning to supervisors *"the less said about this the better."* The court found this to be evidence of pretext, and a perceived mental disability, rather than a real concern about lifting. The employer had only imposed a return to work fitness certification requirement after the psychiatric commitment. It had no problem previously allowing him to return to work and get lifting assistance without any certification at all.

Must Communicate Need For Accommodation In Hiring Process To Have A Case. A visually impaired job applicant filed an ADA case claiming that hiring process tests had discriminatorily eliminated her from being interviewed. The court found the plaintiff had not engaged in a good faith communication. The employer had clearly asked applicants to identify needs for accommodation. The applicant had requested a reader, and was provided one and given extra time. During the test she felt the reader was not as good an accommodation as she needed. However, she said nothing then or later. On a second test she claimed that she really needed more time between test one and this test. Again, she never contacted anyone to say so. She just sued after not being hired. The court ruled that an employer cannot be liable for failing to provide accommodation, or correcting any insufficient accommodation it was never made aware of. *McFarland v. City & County of Denver* (D. Col, 2017).

LGBT STATUS

Multi-Ring Circus – City Of Houston Makes Another Request To Supreme Court. Previous Updates have described the multiple and contradictory positions regarding whether LGBT is covered by Title VII, and other Federal laws. Federal agencies are at odds, the EEOC filing cases claiming LGBT is covered; DOJ claiming it is not. Texas has challenged LGBT coverage under both Title VII, the FMLA, and seems to still wish to deny that the Supreme Court has clearly validated the legality of same sex marriage. Now the City of Houston has entered the field requesting that the Supreme Court review the Texas Supreme Court's decision to deny benefits to same sex spouses of public employees. In *Pidgeon v. Turner*, the Texas court tried to distinguish the U.S. S. Ct. *Obergefell* ruling by stating that the Supreme Court had validated same sex marriage and tax treatment, but had not specifically mentioned benefits for public employees in Texas.

HARASSMENT

HR Manager Fired For Secret Romance. Employees complained that the company HR manager was exercising favoritism toward a new employee and believed she had hired the man she was living with. The company questioned her about whether there was a relationship and a conflict of interest in hiring a romantic partner. The HR manager adamantly denied any relationship. She also stated that being questioned about this was "borderline sexual harassment" of her. It then turned out that she and the new hire were indeed a couple and lived together. She had lied about not having a relationship. She was fired. She sued, claiming that the discharge was retaliation due to her having made the "sexual harassment" allegation. She also claimed that other managers, mostly male, had romantic relationships with employees and were not fired. The court ruled against the HR manager. Her harassment complaint was not the cause of discharge – her untruthful denials were a valid reason for discharge. All of the other managers had made advance disclosure of any relationships with employees and facilitated a transfer in the few instances the employee was under their supervision. None had attempted a deception and lied openly in answering any company inquiries regarding their relationship. *Owens v. Old Wisc. Sausage Co.* (7th Cir., 2017).

Police Officer Retaliation After Reporting Pattern Of Excessive Force And Discrimination – Settles For $1 Million. The city's first female police officer raised concerns about patterns of excessive force and racial bias in enforcement. Suddenly she became the subject of investigation by her supervisors, and recommendations for discharge. The department settled the ensuing case for $1 million, and the officer's agreement to "retire." *Umpierre v. City of Rochester* (Minn. Human Rights Dept., 2017).

$10 Million For Harassment. Ford Motor Company will pay $10.1 million to settle harassment claims growing out of its Chicago Stamping and Assembly Plants. Women and African-American employees were subjected to ongoing sexual and racial harassment, and retaliation when they complained. In addition, Ford will implement more robust anti-harassment policies and training, have special compliance monitoring, and inform the EEOC of each and every internal discrimination complaint it receives at the facilities. *EEOC v. Ford Motor Co.* (EEOC Conciliation Agreement, 2017).

LABOR ARBITRATION – ANGRY REACTIONS

Aiming Truck – Trying To Run Over Co-Worker Justified Discharge. Two employees got into a heated argument (after a couple of weeks of bickering with each other). One got in a company truck and backed it rapidly directly toward the other, who had to dodge out of the way. The driver showed no apology or regret. He was fired. The arbitrator concluded that this was an intentional act intended to harm the other worker. Also, the employee's record showed several other warnings for altercations with co-workers over a six-year period. Thus, the discharge was warranted. In *Re Teamsters 264 and Try-It Distributing Co.* (2017).

Fear Firing – Profanity Warranted Suspension, But Only A "Fear" Of A Weapon Did Not Justify Discharge. An employee with 18 years of service was fired for "threatening his supervisor with physical harm." He became angry and unleashed a stream of profane comments. Since it was known that he had a handgun in his car, the company concluded that he now posed a threat to physical safety and fired him. An arbitrator overruled the discharge. There was no evidence that the employee ever mentioned the gun during the outburst and he had no access to it. He made no overt threat. He had never carried the gun into the facility. State law gave employees a right to have weapons in a car in a parking lot. Virtually 90% of all other employees in fact had hand guns or hunting rifles in the parking lot. So the employee's gun in the car was unremarkable. The employer had jumped to an unsustainable fearful conclusion. The profane outburst did warrant a 30-day suspension. In *Re Ameren Illinois Co. and Local 51, IBEW* (2017).