

Labor & Employment Law Update

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Legislative and Administrative Actions

EEOC Launches Training Focus On Harassment, Respectful Workplace. The EEOC is devoting additional resources to employment training and advice. The programs focus on providing in-house presentations. There have been critiques by the EEOC and others about non-personal, online harassment training, since it may be short, and without controls to assure the person actually watched or paid attention to the program, and no assurance the viewer did not receive “canned answers” in advance of the “test questions.” The EEOC in-house training is designed to effectively deliver the message.

Preemptive Paid Sick Leave Bill Introduced. Congressional Republicans have introduced HR4219 which would allow employers to ignore state paid sick/family leave laws if they provide between 12 and 20 days a year of paid annual leave (depending on size of company), which can include up to six paid regular holidays and leave for vacation, or any other personal purpose (not just sickness). The purpose of the bill is to benefit workers and relieve employers from the requirements of the multiple and confusing various state paid sick leave laws. The bill would only be applicable in those states which do require paid sick leave, it does not require paid sick leave in general. Opposition groups state that this is a “thinly disguised attempt to take away guaranteed sick leave,” and can significantly reduce the amount of paid time off employees currently have in the affected states, some of which require a set aside of paid leave specifically for sick/family leave use, in addition to regular holiday and vacation leave.

Salaried-Exempt Rules Not Dead Yet! The Obama Administration’s minimum salary increase is starting to be referred to as the “Zombie Rule,” since it continues to go forward even after Federal courts struck it down and the President declared it dead – more than once. The Trump Administration’s Dept. of Labor (DOL) has appealed the court’s decision against the rule, in an apparent effort to protect the agency’s authority to set rules generally. So it is less about trying to uphold the \$47,476 minimum salary level, and more about keeping the courts from preventing DOL from establishing future rules more to the Trump Administration’s liking. It is expected that DOL will still adopt a new, but much less expensive salary increase, if its authority is eventually upheld.

Litigation

JURISDICTION

Contracts – International Assignments. Pay Disputes For Work Done Overseas Must Be Decided Under U.S. “State Of Contract” Law. In *Rose v. Computer Sciences Corp.* (E.D. La., 2017), several employees of a U.S. company disputed pay received while they were assigned to work in Asian countries and Kuwait. The suit was filed in a Louisiana Federal Court. The company defended, arguing that the cases should be decided under the wage laws of each of the foreign countries where the work was done (often very weak laws). The court, however, ruled that the most important factor was where the contracts of employment were entered into, and using a single legal standard would also “produce a more orderly result” than using multiple standards from multiple countries. Since the contracts were issued from the corporate headquarters in Virginia, that state’s contract law was found to be the appropriate standard.

Cannot Sue Employer’s Defense Attorney For Defending The Case. A former employee filed ADA and FMLA claims. The company hired legal counsel to defend, and both cases were decided against the employee. He then sued the defense attorneys, claiming they had presented inaccurate representations and “defamed” him in the DOL investigation, resulting in the dismissals of his cases. He claimed the attorneys were “acting as the employer” in their advice to the company. The court dismissed the matter. Attorneys representing a party are not “employers,” and attorneys have “an absolute privilege not only to communicate to the courts, but also to administrative bodies.” The attorneys’ representations were entitled to immunity from suit. *Carter v. Spirit Aerosystems, Inc., et al.* (D. Kan., 2017).

PRIVACY

Health Systems Employee Accused Of Using Her Position To Reveal Information On Ex And His Family. The former husband of a health system billing assistant, plus 15 of his family members and a friend, have sued the system and the employee personally for invasion of privacy. They allege that the billing assistant improperly accessed thousands of their medical records over several years and disclosed information to an outside party. The employee was fired after the former husband and family discovered and reported the improper access and disclosure. The case alleges invasion of privacy, and negligent supervision by the health system. The defendant health system claims it provides more than adequate training and audits regarding privacy, and took prompt corrective action once informed of the issue. *Buckeridge, et al. v. U.W. Hospitals and Clinic Authority, et al.* (Dane Co. Wis. Cir. Ct., 2017).

FAIR CREDIT REPORTING ACT

False Positive Warrants FCRA Suit. Usually a plaintiff complains about incorrect “negative” information being reported in an employment background search. In *Robins v. Spokeo, Inc.* (9th Cir., 2017), the plaintiff complained that the Consumer Reporting Agency falsely reported that he had better education, better credit, more professional credentials, and a better employment history than he actually did (it also included a picture of the wrong, and younger, person in the report). The FCRA allows suits over incorrect information which causes harm. The court found that the “false positive” can indeed be harmful. The report was inconsistent with the employment application and representations, which caused [or could cause] the employer to question his honesty. It also could lead to a rejection because he was “overqualified” for the job he applied for.

DISCRIMINATION

RETALIATION

Suit By Married Couple Seems To Be “Community Property.” A company lost its attempt to force discrimination and retaliation claims by a married couple to be tried as two separate cases, before two juries. The court ruled against this sort of “divorce.” The couple worked in the same mix/bake breakfast cereal facility. They complained that the wife was sexually harassed by a male co-worker. Both were suspended after reporting the harassment, and the harassment was not effectively addressed. When the harassment of the wife continued, the husband had an altercation with the offending co-worker, and was fired. The wife then was denied a request to transfer to a unit away from the harasser. She quit, claiming constructive discharge and both then sued the company. The company sought to have separate trials, claiming that the two claims together would “confuse the jury.” The court found the cases were “properly joined” and had sufficient commonality of facts to warrant the efficiency of a joint trial. Juries are intelligent enough to not be confused in this situation. *Roman v. Kellogg Co.* ((D. Kan., 2017).

RACE

Panda Hung In Sicilian-African American Officer’s Area. A sheriff’s deputy of Sicilian-African American parentage was racially harassed. He received multiple hostile comments about being “half Black, half White.” A stuffed panda was hung by a noose in his work area. Numerous racial jokes and the “N-word” were directed at him. There was evidence that the department had a longstanding “commonplace practice” of racial jokes by officers. His complaints were met by inaction. When he filed suit the department claimed that all of the hostile behaviors were just “isolated instances” or “stray remarks.” The court, however, found them to be “blatantly racially motivated” and both severe and pervasive, occurring frequently. *Sears v. County of Butte* (E.D. Cal., 2017).

SEX

Men Get Clothing Allowance, Women Don’t. A male clothing store company was sued because it gave substantial clothing allowances (\$12,000) to male Sales Associates to enable them to wear the store’s products while on the job. Since the store did not sell a women’s line, female Sales Associates got nothing. This was a substantial economic benefit denied to women (it was not a “uniform” that men wore only on the job. The men got a large personal economic benefit from the clothing). The women sued, as a class action, under the Equal Pay Act. The company challenged the action, claiming it does not fit as an Equal Pay Act violation, since the women were not required to purchase and wear the company clothes. They could wear their “usual garb.” The company also challenged the class. The court disagreed. It found the claims could be a viable Equal Pay Act case, and that all women who did not receive the \$12,000 allowance had a commonality of interest. *Knox, et al. v. John Varvates Designer Mens Fashion Ent.* (S.D. N.Y., 2017).

Noogies By Doctor Are Enough To Create Retaliation Case. A new female clinic manager found that the head doctor in charge ignored company policies, was abusive, profane and micro-managed. He then made several sexual comments to her, including about his sexual ability and how he could “rock her world.” When she complained about these behaviors to the corporate level, the doctor began to grab her and give her “noogies,” (hard rubbing or knocks) on her head, telling her she would be fired if she did not back off on her complaints. The clinic manager took medical leave due to the stress caused by this treatment and filed a harassment and retaliation case (the doctor’s contract was subsequently not renewed). The court dismissed the harassment claims, finding that the comments were not “severe” and were too few to be “pervasive” under the law. However, the overt physical intimidation and threats to discharge were certainly sufficient to support a retaliation case. *Howell v. Baptist Health System* (N.D. Ala., 2017).

“White Trash” And “Filipino Women.” A court found ample evidence of sexual harassment to go to a jury. A hotel General Manager/owner appeared to single out female service staff for sexual harassment based on their race or national origin. The GM, of Indian national origin, propositioned them and made comments that “white trash” were “lazy” and “stupid garbage” and should be grateful to provide sex to Indian men. He told another worker that Filipino women provided sex to Indian men and she had to do so or he would get her deported to the Philippines. Both women were told they would be fired if they did not comply. Both were intimidated until they happened to talk to each other. Then they felt they could, together, stand up and refuse the advances. They were then fired, and filed an EEOC complaint. The company defended by claiming the employees did not first file an internal complaint as required by the Faragher/Ellerth Standard. The court quickly rejected this argument. “It is bedrock law that the Faragher/Ellerth defense does not apply when the supervisor’s harassment results in a tangible employment action” and when the harasser is an executive or owner. *Charest v. Sunny-Aakash LLC* (M.D. Fla., 2017).

FAMILY AND MEDICAL LEAVE ACT

Altering FMLA Form Warranted Discharge. An employee had used intermittent FMLA for several years due to severe migraine headaches. His supervisor had proactively informed him of FMLA rights and encouraged him to use it. He was later fired, and filed a retaliation case, claiming the supervisor and employer had animosity and discharged him due to his ongoing FMLA use. However, the court found otherwise; the employee had falsified his leave papers. This started when the new annual FMLA certification (stating a need for one or two days a month) did not have the proper signature by the medical provider. The employee was requested to get the correction. He then submitted the form with signature, and certifying a need for six days a month of leave. The company contacted the provider regarding the sudden increase in leave need. The medical provider stated that she had just signed the form but had not made any other changes, and had not increased the amount of predicted leave. The employee had altered the form to increase his opportunities to take time off from work. The falsification warranted discharge. *Lavorgna v. Norfolk Southern Corp.* (W.D. Pa., 2017).

FAIR LABOR STANDARDS ACT

Sprint To The Restroom. In *DOL v. American Future Systems, Inc.* (3rd Cir., 2017), the court ruled that a “flex time break policy” violated the FLSA. Usually breaks shorter than a full meal period must be paid. However, breaks are not required by the law. The “flex policy” allowed employees to log off their computers anytime they wished “for their own convenience.” Log off of 90 seconds or more was unpaid time. The company argued that since the employees had discretion, “for their own benefit and convenience” the time should not be included as “hours worked.” The court found this ran contrary to the intent of the law. One cannot “disguise” standard break time used for standard human needs and safe operations as “flex time.” Employees would not get to even use the bathroom “unless they could sprint from desk to bathroom and back in less than 90 seconds” – an impossibility. It is clearly in the company’s interest for employees to be able to continue focusing on work and not have accidents at their desks.

Sales Peoples’ Draws Against Commission Cannot Be Recovered From Final Pay. A company may pay retail sales people by commission, but must pay at least time and a half minimum wage for hours worked. It may give a regular standard “advance” or “draw” against commissions, and then pay any extra at the end of the month, or take any shortfalls (below the required minimum wages) and deduct (recover) these from future commissions which exceed the draw while the sales person continues to be employed. On termination, though, requiring repayment of any still outstanding shortfalls violates the FLSA. *Stein v. HH Gregg, Inc.* (6th Cir., 2017). [This is similar to the prohibition against recovering advanced use of vacation or paid time off from final pay of a salaried-exempt employee.]