Labor & Employment Law Update

JANUARY 2018

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Legislative And Administrative Actions

END OF YEAR DEVELOPMENTS

The Department of Labor, National Labor Relations Board and Congress have made end of year changes for employers.

DOL. The Department of Labor has limited enforcement on a number of FLSA regulations, including the Tipped Pool Rule and Joint Employment definition. DOL will not enforce these and is working to repeal them. However, until then, the rules can still be enforced by suit by individuals in Federal Court.

NLRB. The National Labor Relations Board announced eased standards in several areas, including those on Joint Employer; Micro Unit status; Duty to Bargain policy changes, and the effect of workplace policies. Details on these new standards can be found in the new HR Heads-Up at boardmanclark.com.

Tax Overhaul. Congress' new tax overhaul has many employment-related provisions affecting deductions, benefits and reporting. Some will require HR and payroll to make quick changes. The provisions are too detailed and complex to cover here. Consulting your payroll and accounting experts is advised. Of particular interest are provisions curtailing an employer's ability to consider sexual harassment settlements deductible, if there is a non-disclosure provision, and tax credits for employers paying for FMLA time.

Litigation

THEMES OF THE MONTH

Recent cases seem to include similar sorts of employees and similar situations, though under different laws. Angry behavior, dishonesty, pilots, men being sexually harassed, and the perils of family-owned businesses – where the checks and balances of a regular corporation seem to be lacking.

PERSONAL LIABILITY

Family Indicted for Failure to Pay Prevailing Wages. A family owned construction business had a contract with the City of New York to do facility repairs. The family owned a company, Vick Construction, that had been cited and debarred from public works due to non-payment of prevailing wages and falsification of pay records. However, the family then created another company, AVM Construction, which took on contract work with the same officers, same employees, and same practices, often on the same facilities, continuing substantial underpayment of workers, and falsification of records. The State Attorney General criminally indicted the husband, wife and their son, who owned both Vick and AVM. If successful, the prosecution could result in two to seven year prison terms. The individuals have pled not guilty.

CONTRACTS OF EMPLOYMENT

String Emails Create Contract of Employment. A clothing company fired a fashion manager. She demanded a significant severance under her employment contract. The company claimed employment at-will, and that there was no contract. In fact, there was no formal Employment Agreement. However, the Court ruled that a series of pre-hire emails between the CEO and employee had established clear terms and representations which had been relied upon in accepting the job, including a specific exchange on severance. The terminated employee was entitled to the severance. *Nusbaum v. E-Lo Sportswear* (S.D.N.Y., 2017). [For more information about the dangers of how emails and other communications can outweigh employment at-will, see the article Blundering Into Liability – Unwitting Creation of Employment Contracts, by Boardman & Clark LLP.]

DISCRIMINATION

AGE

Comments Without Adverse Action Are Not Enough For Case. A 57 year old security guard complained about a scheduling change for all second shift workers. He stated that it would interfere with his regular time with his grandchildren. The manager made several statements, such as "I'm tired of these old men complaining," and "If you don't like it old man, you can quit." The guard was offered an alternate schedule which would not interfere with his grandchildren time (and would have had a younger person work the schedule he had objected to). He rejected this because it would interfere with a part-time job he had for another employer. He sued, but the Court dismissed the age discrimination case. The schedule alteration was not enough to constitute an adverse action sufficient to support a case. The supervisor's negative age comments were also not severe and not pervasive to the degree necessary to constitute harassment. *Deshuk v. G4S Security Solutions, Inc.* (N.D. Ohio, 2017).

SEX

Fired For Rejecting Advances. A male drug and alcohol counselor at a correctional center can take his *quid pro quo* sexual harassment and malicious interference with employment case to a jury. The Court found sufficient evidence that the female Department Director had made a number of romantic advances, including complementing his looks, asking if he was single, asking him out for drinks, sending pictures of herself to his personal email account, and stating that he "looked like the kind of guy that knows his way around women" and she wanted to "see what kind of guy" he was. He rejected these advances, and suddenly the Director began formally criticizing his work, imposing extra training requirements and making recommendations which resulted in his discharge. *Moore v. Bolivar County Miss*. (N.D. Miss, 2017).

Pilot Harassed by CEO of Family Controlled Business. A male pilot was hired to fly a private corporate jet of a family controlled business. He alleged that the male CEO made ongoing verbal and physical advances, starting with "I am the man," "There can be only one alpha male," and then proceeded to grabbing, rubbing and groping his leg in a sexual manner, on 18 occurrences, as they both sat in the pilot and co-pilot seats. The pilot complained in writing to the other corporate management, the CEO's son, about this, and about the errors made when the CEO took control to fly the plane. The son's alleged response was that this was the CEO's "normal" behavior, and that's the way it would be if the pilot wished to stay employed. The CEO then demanded the pilot withdraw his complaint. Instead, the pilot had an attorney write a letter re-emphasizing the issue. The CEO then reduced the pilot's wages by a third and insisted the pilot sign a full release of all claims in order to get pay restored. The pilot refused and was fired. He sued for sexual harassment and retaliation. The Court found sufficient foundation for both gender-specific harassment and retaliation. It also denied the company's motion to seal the record during the litigation in order to prevent negative publicity harmful to the company and its stock value. Public policy favors a strong value in public access. The company did not show a compelling reason to overcome this principle. *Huenefeld v. Nat. Beverage Corp.* (S.D. Fla., 2017).

DISABILITY

Was Denial of Accommodation Reasonable, or Just Rigid Adherence to Traditional Practices? A bank business development officer (BDO) was disciplined for not meeting deadlines for filing business expenses for travel and corporate credit card use. He revealed that he had ADHD and this impaired his ability to organize and timely file the reports. (His work was acceptable in all other areas.) He asked that the expense report be assigned to his administrative assistant or support staff because the bank received electronic records of all of the credit card and travel bills. The Bank declined because its standard process required the actual paper receipts be turned in and attached to the reports. The BDO was then fired for being behind in the reports. He filed an ADA failure to accommodate and retaliation case. The Bank's defense was that all employees were required to submit actual paper verification, and timely, accurate expense reports were essential to the operation of a financial institution. The Court denied summary judgment, and ruled that there appeared to be full electronic information received by support staff necessary to complete the reports. There was a valid question for trial as to whether the paper receipts were required out of "necessity," or merely because it had always been the standard method. If the Bank refused the accommodation merely due to a rigid adherence to old traditional practices, then that would be a violation of the duty to accommodate. Accommodation, by its nature, requires reasonable alteration of traditional practices. *Henderson v. U.S. Bancorp. Fund Services* (S.D. Oh., 2017).

RACE

Applicant For Promotion Has Race Discrimination Case. Safeway required an advanced degree as a requirement for manager positions. An African American employee, who had earned a Bachelor's and an MBA, applied for promotion to Manager. He was rejected, not even receiving an interview. The White Director making the decision hired two White applicants – neither of whom had any advanced degree. He stated that they had "superior relevant work experience," so he waived the degree requirement (though the African American applicant had similar work experience with no negative evaluations). He also expressed concern about the rejected applicant's "interpersonal skills," though one of the White promotes had similar interpersonal issues. In the ensuing Title VII discrimination case, the Court found multiple suspicious "red flags" as to why the manager would not even interview an African American applicant who appeared to have superior qualifications over those who were hired. The Director's explanations appeared to be pretext. *Saturde v. Safeway, Inc.* (10th Cir., 2017).

UNIFORM SERVICES EMPLOYMENT AND RE-EMPLOYMENT RIGHTS ACT (USERRA)

Escalator Principle. Returning Employee Must Receive Full Bonus Awarded While on Active Duty. A Federal Express pilot was called to active Air Force duty, overseas, for two and a half years. He was restored to his position upon return, but did not receive the bonus granted to all pilots during that time because he was not there. The bonus was built into future pay. So, he returned at a lesser monthly level than those who did receive it. He won a USERRA case. There is an "escalator principle" under USERRA which entitles one returning from duty to not only be restored, but to be placed into a position where they would have been had they not left, including pay raises, benefit increases and promotions. The original bonus was only approximately $10,000, but due to the continuing pay effect and having to litigate the issue, the Court awarded $227,000 in damages, interest, and attorneys' fees. *Huhmann v. Fed. Ex. Corp.* (9th Cir., 2017). The escalator principle is a special USERRA provision. It does not apply to other leave of absence laws, such as FMLA or ADA. However, one should be careful when denying bonuses or other items for absence under those laws as well.

ANGRY BEHAVIOR

No Rule Against Taking Other Job While on Suspension. A teacher was placed on a paid suspension during investigation of angry outbursts toward her principal and supervisor. While on suspension, she took a temporary job at a private charter school. The School District sent notice that she was terminated for violating the suspension, and had "constructively resigned." An arbitrator reversed the discharge due to (1) lack of any due process prior to the action; and (2) there was no rule or condition which prohibited working elsewhere while on suspension. *In re Dayton Educational Assoc. and Dayton Sch. Dist.* (2017).

Glaring at Co-Worker at Cooler Not Reason for One Week Suspension. Two employees, male and female, simultaneously tried to get a soda out of the break room cooler. The female co-worker complained that she felt intimidated "by the look in his eye." He received a five day suspension. There had been a prior three day suspension for another reason, and the employer took the next step of progressive discipline. He grieved, and an arbitrator voided the suspension, finding it excessive. There was no evidence of an intent to intimidate; the incident should have been handled with an "excuse me" rather than formal discipline. *In re Pleasant Ridge Manor & AFSCME #1771* (2017).

But:

Shoving Co-Worker in Break Room Warranted Discharge. An employee got upset, grabbed a co-worker, and shoved him in the breakroom. He had prior discipline for angry outbursts toward others. An arbitrator upheld the discharge for overly aggressive behavior. *In re Teamsters Local 283 and Airgas USA LLC* (2017).