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Legislation & Administrative Actions

EEOC Case Digest The EEOC has issued a new edition of the Digest of Equal Opportunity Law. It features summaries, recent decisions regarding Federal Employee cases. Though it focuses on government employment, it can be a useful source to stay abreast of developments in EEO and related law and practice, since the decisions are often similar to those made in non-government cases as well. It is available at the EEOC website – eeoc.gov.

Litigation

WAGES & HOURS – FAIR LABOR STANDARDS ACT

Taco Bell Employees Can't Get Overtime Pay For Cheap Lunch. Taco Bell offered employees a substantially reduced price lunch, but they had to eat it inside the restaurant. This was to prevent them taking it out, and reselling to others on the street at a profit. Some employees filed a class action wage suit, claiming that this violated the requirement that for a non-paid meal period the employee must be "completely free of control and free to leave the premises." Thus, the company owed them overtime pay for all the cheap lunches they ate, without being able to leave the building. The court rejected the argument and dismissed the case. The employees were free to leave, and eat lunch anywhere else. It was their choice to take advantage of the cheap lunch, knowing the condition of staying inside until eaten. Eat quick, then there is still ample opportunity to go elsewhere. The court would not allow turning a money saving benefit into a money making situation. *Rodriguez v. Taco Bell Corp.* (9th Cir., 2018).

Cosmetology Students – Paying Tuition? OR Employees Entitled To Pay? A cosmetology school has received a split decision under the FLSA. It has been required to pay its students for multiple hours spent in required non-curriculum activities. The state-regulated educational curriculum included classroom training, and hands-on practice of cosmetology services to customers of the school. However, students were also required to put in multiple hours of facility cleaning, laundry and other non-curriculum duties. The one day a week the school was closed to customers, students often cleaned for the full day. The court found that the school took unfair advantage by requiring the students to pay tuition in order to do work that was not related to the curriculum and should have instead been paid, as that work was for the primary benefit of the school, not for the students. *Eberline v. Douglas J. Holdings.*

Immigration Detainees May Be Entitled To Minimum Wage Some prisons and Federal detention facilities are run by private companies under contract with the government. They house not only convicted prisoners, but also

people who have not been convicted of crimes but are on immigration holds. These can be those apprehended due to alleged illegal status, or new entrants awaiting determination of their application for asylum or other legal entry status. *GEO Group v. Menocal* (10th Cir., 2018) involved a detention facility which had its immigration detainees do cleaning and other work, and paid as little as $1 per day. A 60,000 person class action was filed under the Trafficking and Violence Protection Acts (TVPA) prohibition of forced labor: "Obtaining services by threat of physical restraint." This law is part of the enforcement of the 13th Amendment which prohibits forced labor/slavery and indentured servitude. The TVPA has also often been used to challenge abusive conditions for migrant labor in agriculture.

CONTRACTS OF EMPLOYMENT

Pay/Bonus Agreement Did Not Modify At Will Employment A Manager was promoted to Executive VP with a resulting new compensation plan. The written pay agreement included a bonus provision upon the company achieving sales of $150 million, and stated that this new salary "stays in place until $150 million is reached." The company later terminated the VP. He sued, claiming that the provision had altered his status from At Will to a guaranteed contract of employment for a defined duration. He was guaranteed to stay employed at least until $150 million was reached. The lower court agreed. However, on appeal a different decision was reached, and judgment was granted to the employer. The Appellate Court found that the agreement covered only compensation, not the terms of employment in general. "It was not a multi-year contract for either party," and was not for a defined term of years. According to the former VP's interpretation, the agreement meant that if the $150 million mark was somehow never reached, then he had a "forever" contract for guaranteed employment – "which made little sense." *Ayalu v. Cyberpower Systems, Inc.* (8th Cir., 2018). Be aware and Beware – this case had success in the lower court, and was a tight decision on appeal. It illustrates the dangers of generically or loosely worded compensation plans, commission agreements, or even job offer and hiring documents. Courts have often found in favor of plaintiffs due to vague or over general terminology. Even a series of letters or e-mails in the hiring or compensation process can create an unintended contract – [See the article Blundering Into Liability - Unwitting Creation of Employment Contracts by Boardman & Clark].

FALSE CLAIMS ACT

$625 Million In Cancer Drug Case – Whistleblowers Collect $93 Million The False Claims Act (FLA) covers fraud by companies doing business with and billing government agencies, including billing for Medicare, Medicaid and other health care programs. The FCA also awards a percentage of damages to whistleblowers who report the falsifications. In this case, AmerisourceBergen Corp. (ABC), a major wholesale drug provider, and its subsidiaries, were reported by employees or former employees and charged with violations. The company was charged with altering the dosage of a cancer treatment drug. It took the FDA-approved vials, opened and then repackaged them to essentially create short-fills, creating more vials from the "excess" to re-sell. Thus, being able to bill for the short-filled vials rather than the full dosage, making an extra substantial profit from repackaging the original amount of medication. This also meant highly vulnerable cancer patients did not receive the full FDA approval amount of medication. In addition, the repackaging appeared to have occurred in ABC's subsidiary facilities which were not FDA approved, were alleged to be in non-sterile conditions, with bacterial contamination and without required quality and purity protocols. The company settled for $625 million to be paid to the Federal government and to state Medicaid programs. The whistleblowers were a pharmacist, pharmacy tech and a former Chief Operating Officer of the company, who was terminated after raising internal concerns about the practice. They received $93 million of the payment amount. *United States ex rel Michael Mullen v. AmerisourceBergen Corp. et al.* (ED NY, 2018).

DISCRIMINATION

Failure To Ban Stalking Customer From Store A female Costco store clerk reported that a male customer was coming to the store frequently and observing her and asking personal questions. She reported to her supervisor this was creepy and she felt threatened. A department supervisor told the man to "avoid" the employee. This did not keep him out of the department, and he began watching her from a little further away, often hiding behind clothing racks, and videoing her with his cell phone. She complained, and the Assistant Store Manager yelled

at her because salespeople were supposed to be "friendly and welcoming" to customers. The customer had not made any overtly sexual comments or sexual advances, so the manager felt that this didn't seem to be "sexual harassment." This customer then again began approaching the employee, asking for her phone number, address and asked other workers where she lived, and on several occasions "bumped" into her. She eventually had to go and get her own restraining order from a court because the company was not taking action. The man then confronted her in Costco and yelled profanities. She went on leave due to the stress and trauma. Only then did Costco ban the man, revoking his membership. The employee and EEOC sued for sexual harassment. The court found in her favor, due to management's failure to protect her. It rejected the company's argument that this was not "severe" or "pervasive" enough because the man never used actual sexual terms or overtly sexual comments. The court found this behavior was due to a romantic-sexual attraction, and created a hostile workplace, severe enough to constitute "terrorizing the victim due to her sex." The company had a duty to effectively ban the customer at a much earlier stage. *EEOC v. Costco Wholesale Corp.* (7th Cir., 2018).

Joint Employment – Double Liability For Harassment A franchise Holiday Inn operator owned several hotels. It hired an independent management company to manage the hotel operation. Though the workers were employees of and paid by the Holiday Inn franchise, hiring, firing and daily operational supervision were done by the management company's on-site managers. The CEO of the management company sexually harassed one of the housekeeping employees with ongoing comments and trying to get her into a hotel room with him. She complained to her direct supervisor. The CEO "laughed off the complaints." She then went to the franchise owner, who did not act. The management company then fired her. She sued both the Holiday Inn franchise and the management company for harassment and retaliation. The court found both liable. Her employer, the Holiday Inn franchise, obviously had a duty to its employees to monitor the work environment and correct harassment by its workers, or its agents. Then the court applied the "economic realities test" to find the management company was also her employer and could be separately sued and liable for the harassment, since it had day-to-day control and it, by its CEO, committed the unwelcome attention. *Frey v. Hotel Coleman* (7th Cir., 2018).

RELIGION

Ecclesiastic Immunity Does Not Cover Everything – ADA Suit Allowed Religious organizations have a certain amount of immunity from employment laws in regard to faith-based or doctrine-based decisions regarding employees in ministerial or "ecclesiastic" positions (those with a religious function). The First Amendment prohibits government (the courts) intrusion into religion and religiously-based decisions. A parish music director is an ecclesiastic position. He was discharged. He filed Title VII and ADA cases alleging he was fired in violation of Title VII after having a same sex marriage, and the ADA for discrimination due to his diabetes and metabolic syndrome disabilities. The church claimed that the gay marriage "was against the teachings of the church." Therefore, without further examination the court dismissed the Title VII case. However, there were no church "teachings" or beliefs of doctrine defenses alleged regarding diabetes or metabolic syndrome. The courts were not prohibited from examining non faith-based discrimination. So, the ADA case was allowed to proceed. *Demkovich v. St. Andrew the Apostle Parish* (N.D., Ill.).

DISABILITY

Cannot Require Applicants To Pay For Their Own Pre-Employment Medical Evaluations The ADA prohibits use of medical information or medical inquiry during the hiring process, except a job-related medical evaluation may be required after a "conditional offer of employment." In this case, *EEOC v. BASF Railway* (9th Cir., 2018), the company did require such a post-offer evaluation. The initial evaluation raised concerns about a back issue. So the company requested an additional MRI – at the applicant's expense. The applicant could not afford the $2,500 cost. The job offer was rescinded for failure to provide the MRI information. The court found an ADA violation. The ADA authorizes post-offer testing. "It does not impose a burden on the prospective employee as to the costs of testing." [Many states have laws which specifically require an employer to pay the costs of any required medical inquiry or testing, and often, if the person is already employed, wages for the time the employee spends in that process.]

Must Wear Steel Toed Shoes A utility lineman suffered an electric shock while working. This resulted in amputation

of three toes and reconstruction of his left foot. The surgeon stated that he was medically restricted from wearing steel toed boots. These were required federally certified safety equipment for line work. He requested an accommodation exception, and was denied and not allowed to work as a lineman. His employment was terminated, and he filed an ADA failure to accommodate case. Interactive process and alternative accommodations. The court ruled for the company. It found the utility had fully engaged in the required interactive process. It had explored boot reconstruction and orthotics which might enable the lineman to wear a certified steel toed boot – without being able to achieve a medically ok exemption. Non-compliance with significant safety rules is not a "reasonable" accommodation. It had also offered to assist him in procuring other jobs in the company, which he did not follow through with. So the company had amply met its ADA obligations. *Sharbono v. Northern States Power Co.* (8th Cir., 2018).

NATIONAL ORIGIN

COBRA Notices In Spanish A court has certified a class action suit under COBRA/ERISA against a hotel chain due to failure to provide COBRA notices in Spanish. The company employs a large percentage of Spanish speaking employees who are not effectively literate in English. Thus, its English only notices are not an effective "notice," and allegedly deny continuation rights to this large segment of employees. Vasquez v. Marriott International, Inc. (D.C. Fl., 2018). Similar cases have been filed and won over employers' failure to provide anti-harassment policies; pay policies; arbitration agreements and more in the language understood by a segment of the workforce.

LABOR ARBITRATION

Police Officers Held To Higher Standards For Off-Work Social Media. A police officer's off-the-job Facebook posts were disparaging of Black Lives Matter and other legal protests. He used terms such as "asshats," "morons," "ghetto rats" and seemed to advocate violent reactions against those engaged in legally protected protesting. He identified himself as a police officer in these posts. When this came to the department's attention, he was fired. He grieved, claiming that 1) the department policy on social media was vague; 2) he was posting as a private citizen, protected by the First Amendment; and 3) the postings were merely an expression of protected political views. He lost on all counts. Police officers have a higher duty in both their on and off-the-job behaviors. ("I only flaunted the law and Constitution off-the-job: is not a defense.) The policy was not vague, it prohibited racially biased statements and advocacy of violence. "Ghetto rats" was "unequivocally" a racial disparagement – especially when coupled with the Black Lives Matter comments. The officer was not "debating" a political view – he was attacking and advocating violence against the people he was sworn to protect. The posts brought discredit to the department and the city, and seemed to endanger other officers by an implication that, if this was allowed for one officer, the public could not trust the police in general to equally protect them. An interesting factor was that after the officer threatened violence to violate the First Amendment rights of protestors he did not like – he then contradictorily attempted to use the same First Amendment to assert that he should not be criticized at all for his postings. In Re *Grievant and the City of Austin* (2018).