Labor & Employment Law Update

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Legislation & Administrative Actions

EEOC Report On 2017. The EEOC reports that it received 84,254 discrimination charges in 2017. Retaliation was the most frequently filed type of charge in FY 2017, followed by race and disability. The EEOC received 6,696 sexual harassment charges. Categories and numbers were:

- Retaliation: 41,097 (48.8 percent of all charges filed)
- Race: 28,528 (33.9 percent)
- Disability: 26,838 (31.9 percent)
- Sex: 25,605 (30.4 percent)
- Age: 18,376 (21.8 percent)
- National Origin: 8,299 (9.8 percent)
- Religion: 3,436 (4.1 percent)
- Color: 3,240 (3.8 percent)
- Equal Pay Act: 996 (1.2 percent)
- Genetic Information: 206 (.2 percent)

Because some charges allege multiple bases, these percentages add up to more than 100 percent.

New DOL Disability Claims Procedures – Apply April 1, 2018. Section 503 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), requires that every employee benefit plan establish and maintain reasonable procedures governing the filing of benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations. The Department of Labor (DOL) has issued new regulations regarding benefit claims procedures for ERISA plans. For more information, see the HR Heads-Up notice at boardmanclark.com.

Trends

"Placement Discrimination" – How To Have Double Liability In Hiring. How can an employer discriminate against a group and in favor of the same group at the same time? That is the issue in the growing EEOC and OFCCP focus on "Placement Discrimination." An employer has a "favored group" for lower paying jobs. Then it also has a different favored group for the higher jobs. For example, there have been cases in which the stereotype is that Hispanics work harder, and are therefore more highly recruited and preferred for low wage labor, yet White or Asian applicants are more recruited and preferred for technical and management positions. The result is that non-Hispanics do not get an equal opportunity for the lower, but more numerous positions. Hispanics do not get equal opportunity for the higher paying jobs. Dual discrimination, dual liability. This situation was long an issue in education and hospitals. It was difficult for a man to be considered for a nurse or grade school teacher. Yet administrative and management positions were overwhelmingly male. Discrimination against and in favor of the same sorts of people, at different levels in the same organization.

White Applicants Get $125,000. In re *GGNSC & Rehab* (OFCCP Settlement, 2018), a senior care facility paid $125,000 to settle OFCCP findings that White applicants were harmed due to a preference for hiring African-Americans for CNA positions.

Litigation

DISCRIMINATION

SEX/GENDER

Housing Discrimination In Employment. Pay and benefits are not the only employment discrimination issues. Some employers provide housing (oil rigs; agricultural operations; large seasonal resorts; fire houses; ships, etc.). The lodging becomes part of the compensation, and is a key issue in work environment, safety, and hireability. Inadequate housing has repeatedly been the focus of unsafe and sexual harassment-enabling environments for female employees. In re *Bird's Eye Inc.* (OFCCP Settlement, 2018), an agricultural company will pay $1 million to settle a charge that its barracks were largely for male, but not female, employees. This significantly limited employment opportunities for women. The company will also provide more equality in housing, which will be monitored by the OFCCP.

"Why Can't We Just Pay A Fine?" – General Manager "Didn't See A Problem" Until Sued. In *Bowen v. Manheim Remarketing Inc.* (11th Cir., 2018), the testimony of the company's HR Manager was convincing evidence of violation of the Equal Pay Act and Title VII. The HR Manager had investigated complaints of sex discrimination and submitted an analysis of pay disparities in which women "were paid thousands of dollars less than men for the same jobs." The company's General Manager routinely ignored these reports and ignored the HR Manager's advice to correct the pay disparities. He "didn't see a problem." In one instance in which he was advised that his employment action against a woman in favor of a man was illegal, the GM responded, "Why can't we just pay a fine?" and then do what we wish. The court stated that "management repeatedly exhibited an unwillingness to treat women equally in the workplace." It is now likely the company will be paying more than a "fine." A finding of intentional action or "intentional disregard" of disparities can carry double damages in addition to legal fees and other penalties. [The Equal Pay Act also allows suit of managers personally, so a cavalier attitude could come back in personal liability.]

Manager's Sexually Explicit Ring Tone Generates Case. *Arrindell v. Trane US Inc.* (WD Tenn., 2018) involves a supervisor's ring tone which "mimicked the sound of a woman having an orgasm." A female engineering employee said that she found this offensive. Instead of changing the ring tone, the supervisor allegedly began making sexual comments. She complained. The case claims that Human Resources did not investigate and did not tell the supervisor to change the ring tone. There were then a series of alleged retaliatory actions leading to discharge. The company denies many of the allegations. Though this Title VII harassment and retaliation case has not yet been tried, it illustrates the variety of things which can create a hostile environment, and how technology can create untold new issues.

RACE

$22.2 Million Award And 17 Years Of Litigation. Lawsuits may result in an award of damages, but may not solve "the problem." By the time the often slow process finally ends, "the problem" is now ancient history. *Brown v. Nucar Corp.* (D. SC., 2018) is the final phase in a racial discrimination class action filed by 114 African-American mill workers. A jury ruled in favor of the employees, but the company engaged in multiple appeals of both the viability of the class, and the award. The case worked its way up and down the appellate system, including a trip to the US Supreme Court in 2013. After further remands, appeals and re-remands, the case seems over. The final award is for $22 million damages and attorneys' fees, and the conditions leading to the suit will permanently be remedied for current and future employees.

RELIGION

Methodist Hospital Passes Over Methodist Minister To Hire A Rabbi And A Priest. In *Penn v. N.Y. Methodist Hospital* (2nd Cir., 2018), a Methodist minister was a part-time chaplain in the hospital's Pastoral Department. He was passed over for full-time positions, when the hospital hired a Jewish rabbi and then a Catholic priest for the positions. He sued. The hospital argued for dismissal of this case under the First Amendment's Ecclesiastic Exemption for religious organizations. The plaintiff argued that this did not apply because the hospital had a generally secular mission, and was not a religious organization. The hiring of other denominations showed the hospital was not a Methodist organization. The court disagreed, and dismissed without ever looking at the merits of the plaintiff's case. The First Amendment forbids government (courts) from interfering with religious decisions. Though the hospital was in general a secular operation, the same as any other hospital, the specific job was in the Pastoral Department. The mission of that department and the chaplain position was ecclesiastic/religious. The organization was not required to confine its ecclesiastic/faith-based comforting of patients to its own Methodist doctrine. As long as the job is ecclesiastic in nature, the courts will not interfere.

FAMILY AND MEDICAL LEAVE ACT

Supervisor's Repeated Questions About Lyme's Disease Creates Case. A Human Resource Specialist was diagnosed with Lyme's Disease. She submitted an FMLA request stating that she would need ongoing treatment and would have flare-ups requiring time off about twice a month. Her manager allegedly did more than express sympathy and concern. The manager repeatedly questioned her about the time off needed and how quickly the treatments would work. The employee was then abruptly fired when she took her first day of FMLA. The company claimed the discharge was for failure to complete assigned work and for a "poor attitude." The court found this suspicious, since the employee had received no prior documented critique for poor work, or attitude, and did not get the usual Performance Improvement Plan before discharge. The manager's repeated "quizzing" about the Lyme's Disease and time off were an indication that the discharge was due to concern about FMLA use, rather than performance. *Majocha v. Eversource Energy Services* (D.C. Conn., 2018). [This case is a good illustration of two cautions. First, even sincere expressions of concern can become issues if too frequent, too probing, and too focused on effects of time off or performance. Second, failure to document performance concerns until the last minute is guaranteed to generate liability. For more information, request the article We Have the Straw that Broke the Camel's Back, But Where is the Rest of the Camel? by Boardman & Clark.]

Falsification Of Leave. An employee requested FMLA to help his sick wife. However, that same week a company supervisor took a car into a repair shop. There was the employee, in a mechanic's uniform with grease on his hands, at his part-time moonlighting job. The employee had no explanation, and was fired. An arbitrator upheld the discharge for dishonesty. *Union Pacific RR and TCUI/AM* (2018). [This is a clear example of FMLA falsification. Be aware that one must have clear proof in order to defend such a discharge under the FMLA. The burden of proof is on the employer. So less than very clear evidence does not work.]

LABOR ARBITRATION

Officer Attempts To Arrest Delivery Driver, In Speedo. Exactly who was in the bathing suit? A police lieutenant and his family spent the day at the pool. At the end of the day, in the parking lot, the officer saw a delivery truck enter too fast and skid to a stop nearby. Still clad only in his bathing suit, he ran over to the delivery truck, began banging on the window, and then made physical contact with the driver [either shoving the driver or grabbing the driver's neck – causing minor injury]. Someone called 911, reporting an altercation between a delivery driver and a semi-nude man. At some point the officer recognized that he had no badge, and perhaps should not continue the arrest attempt. He got into the car with his family and left. He then received a suspension, and a two level permanent demotion, due to unreasonable use of force, unprofessional conduct, and leaving the scene of an accident (the injury to the driver). He grieved the discipline. An arbitrator upheld the discipline in general, due to improper conduct. However, the officer had a 20-year exemplary record, and the demotion seemed to be a "forever" penalty, preventing future advancement, regardless of all further good performance. So the discipline was modified to eliminate this result. In re *Waterloo, IA and AFSCME #1195* (2018).

Date Error Should Not Result In Next Stage Of Discipline. An employee had received two disciplinary actions for not logging in a notice of an absence at least an hour prior to work. She then did send a notice well over an hour prior, that she would "be absent today." However, she inadvertently hit the wrong key, and the system recorded it was for the next day. She was given a three-day suspension for her absence that day. The arbitrator voided the discipline. It was clearly a typing error. The message clearly stated "today," and the employer knew, or should have known, which day was intended. The employee did follow the rule and a typo did not warrant the next step of discipline. *Deer Lakes and PSEAN/NEA* (2018).