Labor & Employment Law Update

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Legislation & Administrative Action

FLSA Amendment – Farm Workers Overtime Bill Introduced. A bill has been introduced in Congress to require payment of overtime for agricultural workers. The sponsors are Sen. Kamala Harris (D-Cal.) and Rep. Raul Grijalva (D-Ariz.). The FLSA currently does not require overtime pay for many sorts of agricultural employees, no matter how many hours a week they work. The bill has an uphill climb in the current Congress.

Trends

#METOO Focus Is Resulting In More Executive Departures. Movie and TV celebrities are not the only ones to have careers ended due to sexual harassment. Since the start of #METOO, over 325 top corporate executives and board members have been fired, resigned, or suspended indefinitely due to alleged inappropriate workplace sexual conduct. All but seven have been male. This is not a certain number. It was determined via a study of available corporate and news announcements by Tenin & Co. consultants, and reported in Bloomberg Law reports. The actual number is certainly higher and growing. Corporations are now closely scrutinizing the current and past behaviors of their top ranks. What was once overlooked and tolerated is now a career ender. Perhaps MBA programs should begin including more EEO and human relations courses for those who hope to become executives.

Litigation

U.S. SUPREME COURT

Janus v. AFSCME On June 27th the Supreme Court decided that "fair share" provisions requiring non-members to pay union dues was unenforceable because it violated their First Amendment rights. Non-members receive all benefits, pay and protections bargained by the union, so the unions argue the fair share provision is to prevent "freeloading" on the benefits without contributing to the effort. A public employee who opted out of membership challenged this involuntary contribution. The Court ruled that the union could not require a fair share payment from nonconsenting employees and the employer could not make the automatic deductions.

JOINT EMPLPYMENT

Liability – Subsidiary & Affiliates, Separate Entities Or Joint Entity? A growing area of litigation involves whether an employer is a separate corporate entity or whether its parent company or affiliated companies can be aggregated in order to create greater liability and "deeper pockets." National franchise operations, such as McDonald's, have been defending claims that they are responsible for the actions and wage practices of individual

franchise stores, even though each franchise is a separate corporation in its own right. In *Herring v. SCI Tenn. Funeral Services LLC* (E.D. Tenn., 2018), the court ruled that a local, separately incorporated funeral home was sufficiently tied-in to the parent company to be one entity, so as to increase the jury award in a sexual harassment case by an additional $100,000 (Title VII sets different damages "caps" according to the company's number of employees). The court found that the local company and the parent did not operate sufficiently as separate entities. There was an integration of handbook policies. The central HR department was intimately involved with the local human resource issues. Employees were readily transferred between the various local subsidiaries, and they did not become "new hires" of the local corporation when moving from one to another. There was too much integration of operations to maintain a claim that the parent and the subsidiaries were somehow separate entities.

Arbitration

Requiring Employees To Agree To Mandatory Arbitration After Filing With EEOC Was Not Enforceable. The U.S. Supreme Court's *Epic Systems* decision confirmed enforceability of mandatory arbitration agreements, signed upon employment, which preclude employees from suing in court, or from bringing class actions. However, in *Bayer v. Neiman Marcus Group, Inc.* (N.D. Cal., 2018), the court voided a mandatory arbitration agreement, which had a bit different foundation. After the employee filed an ADA action with the EEOC, Neiman Marcus attempted to force him to sign the arbitration agreement prohibiting pursuing any claims with courts or government agencies. The agreement was under threat of discharge if he did not sign and agree to arbitration of the claim. The court found this was coercive and a retaliatory interference with ADA rights.

Discrimination

AGE

Rejected Due To Too Much Experience. LA company's recruitment ads for corporate legal counsel positions specified "3 to no more than 7 years" of experience. An older applicant with extensive legal experience was rejected. He sued, claiming that the criteria had an "adverse impact" upon older people, most of whom had far more than 7 years of work history. The criteria did not match any business necessity, and constituted age discrimination against him and all older applicants. The 7th Circuit Court of Appeals agreed. *Klever v. Care Fusion Corp.* (7th Cir., 2018). The significance of this case is that other federal courts have ruled that adverse impact cases cannot be brought by external applicants. They may only be brought by those who have been hired and are already employees (such as internal promotion applicants). So, this case shows a split of opinion which will create confusion until resolved. But those in Wisconsin, Illinois and Indiana (the 7th Circuit) should be aware of this case – as the current law there.

RACE

White Manager Fired For Posting Critical Of Black Lives Matter, Yet African-American Employees Allowed Freely To Make Black Lives Matter Posts Critical of Police. In *Kane v. Finance of America Reverse LLC* (S.D. IN., 2018), a court found evidence of racial discrimination. A White bank manager with exemplary performance, posted one Facebook message on "All Lives Matter" and critical of people blaming police "for their plight." Several African-American employees learned of the post and complained to management. The bank suspended and then fired him. He was told the action was because the bank "needed to satisfy African-American employees who were upset by his post." In the Title VII suit the court found that a number of the bank's African-American employees had made numerous Facebook posts railing on their support of Black Lives Matter and accusing White police of intentionally targeting Black people to shoot. There were no consequences. Whereas a White manager was discharged, the African-American employees were allowed to post similar or more critical messages on the same topic, with impunity. This appeared to be racially discriminatory.

Dreadlocks Not Protected By Title VII An African-American applicant was not hired because of her dreadlocks hair style. She sued claiming racial discrimination. The court rejected the claim. Title VII prohibits discrimination due to "immutable characteristics." Race is immutable – one cannot change one's race. A hair style may be "culturally associated" with a particular race; however, it is not an immutable characteristic. One can change hairstyles at any time, and there are a wide variety of hairstyles among African-Americans; so this one style was not a special designation of race. *EEOC v. Catastrophe Management Solutions* (11th Cir., Cert. Denied U.S. S. Ct., 2018). If the hairstyle was a religious expression, then it would have qualified as protected under Title VII, and required reasonable accommodation. (For more information, see the article Appearance Laws and Cases by Boardman & Clark.)

SEX

Requirement To Date Customer Was Quid Pro Quo Harassment. Usually quid pro quo sexual harassment involves a manager's attempt to have a personal sexual relationship with a subordinate. In this case the manager wanted no relationship. Instead, the company was luring a big customer. The customer expressed an attraction for an office employee. So the company urged her to date the customer, and promised "big bonuses" if she did so. She then allegedly was denied any bonus when she refused. The court found that even though the supervisor did not seek a personal relationship, he was nonetheless the sexual harasser, because he pressured the employee on behalf of a third party. But, the court granted summary judgment against the employee on other grounds, because she failed to properly include key elements in her EEOC filing and thus failed to meet the administrative requirements. *Davenport v. Edward D. Jones & Co.* (5th Cir., 2018).

LABOR RELATIONS & ARBITRATION

Presentation Of Picture ID Requirement Violates Rights. In *Local 58 IBEW v. NLRB* (D.C. DC, 2018), the circuit court upheld an NLRB ruling against a union. The union violated its members' rights by requiring anyone who wished to opt out of paying dues to personally appear at the union hall with a photo ID and present their written request. The NLRB ruled that this impaired and restricted member rights. It was both an unnecessary burden on members who live or work far from the union headquarters, and was intimidating. The court also ruled that requiring anyone who did not have a photo ID to have to get one just to engage in this right was unreasonable.

"Upset" Is Not A Mental Condition, And Resignation Could Not Be Withdrawn. A police officer was placed on leave for investigation after a domestic dispute with his girlfriend. Following this, he went to her house again and got into an argument. Police were called and asked him to leave. Later that evening he called the Police Chief and told her that he was resigning. She urged him to think about it, calm down, and come in the next day to talk. He did, and despite the chief's efforts to have him take time to consider, he met with the HR Director and filled out a resignation form. The day after filling out the resignation form the officer calmed down and texted a retraction of his resignation blaming his "mental condition" for his rash action. The Chief was willing to accept the retraction, but the City Council did not. It voted to accept the resignation, and did not accept the retraction. The officer grieved the "termination." The arbitrator upheld the resignation. Temporary situational "upset" is not a mental condition which would create a sufficient mitigating circumstance. The city had the right to accept the resignation, and no duty to allow the rescission. In *Re Hibbing Police Federation & City of Hibbing* (2018).

Cell Phone While Driving Warrants Discharge. Cemstone Products received a complaint called in by a truck driver from another company. The complaint stated that a Cemstone driver almost hit him because of cell phone use while driving. This resulted in discharge. The Cemstone driver denied using the cell phone, or of any unsafe driving and grieved the discharge. The arbitrator ruled for the company. There was a direct report by another truck driver. The cell phone records showed the Cemstone driver was using his phone at the time the other driver alleged. This was sufficient evidence of a major safety violation. *Cemstone Products Co. & Teamsters Local 20* (2018). This case illustrates the growing trend to view cell phone/texting while driving as a major offense, which can result in discharge on the first instance.

Old Tattoos Get To Stay. A company implemented a no tattoo policy, then fired 20 employees who already had tattoos. An arbitrator ruled for the employees and ordered reinstatement. The employer had earlier indicated it would grandfather pre-existing body adornments. Then it unilaterally implemented the no grandfathering policy without any consultation with the union. The discharged employees had no fair warning under the contract's just cause policy, since they could not possibly have received notice of the rule and an opportunity to comply prior to getting their tattoos. In *Re Hennepin County NM & Hennepin Sheriff's Deputies Assoc.* (2018).