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LAW FIRM

LABOR & EMPLOYMENT UPDATE

Bob Gregg | Employment Attorney | 608.283.1751 | *Sign up to receive the update by emailing Bob: rgregg@boardmanclark.com.*

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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

EEOC Act Digital. The EEOC has initiated its new electronic intake system. It receives over 200,000 mail inquiries a year, of which half result in charges of discrimination. It is now streamlining the intake system, to improve service and reduce paper. The process has started in five regions, Charlotte, Chicago, New Orleans, Phoenix and Seattle, and will expand during the year.

Parental Bereavement Leave Bill Proposed. A bi-partisan sponsored bill has been introduced in Congress to include leave following the death of a child as an FMLA covered event (S.B. 528). Similar legislation has been proposed in past years, but has not proceeded beyond committee consideration.

THEME OF THE MONTH

Joint Employer Status

The Department of Labor, EEOC, IRS and the courts have been increasing scrutiny and liability for "joint employment." There are compacts between these federal agencies and states in which a red flag noticed by one will be forwarded to the others and bring about audits by several agencies. Joint employment allows suits of and liability assessed against all the entities involved. Often the governmental agency or plaintiffs can elect to collect from whichever one they wish, usually the one with the deepest pockets. Joint employment can exist when there are leased workers, subcontractors, independent contractors, and when a larger organization (major retailer or production facility) leases part of its space or operation to another company (i.e., franchise food operation; cafeteria, branch of a bank, coffee shop, garden center, etc.) which operates on its premises. The following two cases show the standards and the dangers.

Court Expands Joint Employer Scope. In *Salinas v. Commercial Interiors, Inc.* (4th Cir., 2017), the court held that joint employment should be broadly interpreted (in this case, under the Fair Labor Standards Act) to hold two entities jointly liable. The case involved drywall installers employed by subcontractor J. J. General Contractors, whose work was done almost exclusively on projects of a developer, Commercial Interiors. The court found both companies shared and co-determined the terms and conditions of the installer's work, and could be jointly liable for pay and overtime claims. The court assessed factors, including the involvement of either party in the direction of the employee's duties or behavior; ability to recommend discharges; control of the physical site or environment; integration of the operations, including the regularity and degree of interaction with employees or customers of the other entity. [Not all factors must be met. Only one may be enough for a joint employment finding in some situations.]

Employee's Estate Can Sue Home Depot And Grand Services As Joint Employer. Home Depot does not operate its Garden Centers. It leases the space to another company, Grand Services, LLC (Grand Flower Growers), which staffs and supervises the seasonal garden operation in the Home Depot stores. In *Estate of Anicich v. Home Depot, et al.* (7th Cir., 2017), the court decided that Home Depot is a joint employer and can be held liable for the murder/sexual assault of a Grand Services garden center employee and her unborn daughter by a Grand Services manager. The case is about both Grand Services and Home Depot's knowledge of and failure to act to correct the manager's abusive behavior. Both Grand Services and the Home Depot store in which he was located had received complaints about the manager's behaviors, sexually harassing, verbally abusive, screaming threats and obscenities in the Home Depot store and parking lot, and deliberately frightening behavior toward female employees. More senior managers of both Grand Services and Home Depot had directly observed these behaviors over time. The manager engaged in overt quid pro quo job actions and threats to reduce or terminate employment of female subordinates who did not acquiesce to his advances, especially young, teenage employees. He used his authority to intimidate through the threat of job loss, one 18 year old to accompany him from Illinois to Wisconsin where the murder/sexual assault occurred. The employee's estate, through her mother, brought suit. The court first affirmed that the murder grew directly out of and as a consequence of the workplace quid pro quo abuse of the manager's authority. Though the employer(s) may not have foreseen the specific crime, they could and should have easily foreseen that the manager's particular unfitness and history of abuse would eventually lead to some egregious harmful act. Therefore, there was liability for whatever that act might be. Home Depot could be jointly responsible because the garden center was a long-term arrangement and integrated into Home Depot's premises and operations, and was to a degree under its overall control. Home Depot allowed the known dangerous manager to continue to be present on its premises and in its integrated operation. This case involved a complex analysis and application of Federal Title VII, Illinois tort law, and workers compensation standards.

OTHER LITIGATION

Interpretation

A Comma Makes The Difference. Dairy truck drivers were ruled to be entitled to potentially thousands in overtime pay due to the placement of a comma in Maine's Labor Standards Law. A lower court had found the drivers were exempt from OT. However, the 1st Circuit Court of Appeals found that absence of a comma in the relevant line of the statute created an ambiguity. Ambiguities are generally construed in favor of expanding rights rather than limiting them. So the appeals court reversed, finding in favor of the driver's interpretation. *O'Connor v. Oakhurst Dairy* (1st Cir., 2017).

Discrimination

Disability

Shifting And Contradictory Reasons For Discharge Lose Case – Company Blames Employee For Its Own Acts. A TV station video editor used crutches since childhood. The station's technology changed to more electronic digital recording (EDR). Managers stated a concern that the employee would not be mobile enough to work in the tighter EDR room, and could fall or injure himself. So they severely limited his time in EDR work and training, for his own safety. Nonetheless, the employee devoted his spare time to learning the EDR system, and had no apparent difficulty in the EDR room. Just after returning from a surgery he and another editor were terminated due to lack of proficiency in EDR. He sued under the ADA and FMLA. The company's defense then kept changing and evolving. First, it claimed that the employee had "refused to work in EDR" and was "a slacker." After evidence surfaced of management denying the employee EDR training and duties, the company shifted to the excuse that "he did not take initiative to try to learn EDR." The facts showed the employee had indeed used his own time to do exactly that. The company shifted to "he just wasn't as proficient as the rest of the editors" and "we terminated another non-disabled editor as well." Unfortunately for the company, the evidence showed that the non-disabled editor had received prior warnings and an EDR performance improvement plan, and ample opportunity and extra training to improve EDR proficiency, while the disabled editor received no warnings, no plan, and had been prevented by management from gaining EDR proficiency. Finally, the company's story changed to the termination "had nothing to do at all with work ethic," the company just picked two people for layoff. The court found ample evidence of overt discrimination and pretext. The employer's reason not only kept shifting; the employer overtly set up a denial of training to the editor, then tried to blame the employee for the results. *Caldwell v. KHOU-TV* (5th Cir., 2017).

Needle-Phobic Pharmacist Was Not A Qualified Person With A Disability. Many pharmacies provide immunizations and pharmacists give a great number of shots. A pharmacy decided to enter into the immunization business and revised its pharmacist job descriptions to require an immunization certification and that they administer injections. The stores were staffed by one pharmacist on each shift. A long-term pharmacist revealed that he had Trypanophobia, fear of needles, and could not administer the shots; he would faint and be a serious safety risk to himself and the customers. The company informed him that he must complete the certification and be prepared to administer shots. When he did not do so, he was terminated. A jury then found in the pharmacist's favor and awarded $2.5 million. The appeals court reversed, overturning the verdict. An employer is entitled to change essential duties and job descriptions at any time. Employees must then learn and perform the new essential duties. One who cannot is then not a "qualified person" with a disability. An employer must reasonably accommodate to help an employee perform the essential duties. However, the employee must generally then do the duty. The pharmacist had not proposed an accommodation which was reasonable. There was no other pharmacist on duty to do the immunization. It is not reasonable to tell customers to rearrange their lives and come back on a different shift, when another pharmacist is there (customers are not required to accommodate disabled employees). The argument that a nurse should have been hired to give the shots was rejected, because an employer should not have to hire two people in order to do the duties of one position. Finally, the pharmacist had claimed the company should have directed him into desensitivity

therapy. This too was found not reasonable, since no employer is required to fund medical treatment or psychological therapy as an accommodation (it can be an ADA violation to push people into treatment) and there was no evidence he proposed this accommodation or would have gone to such treatment prior to the termination. *Stevens v. Rite Aid Corp.* (2nd Cir., 2017).

Religion

"An Adequate Amount Of Hate" Leads To Half Million Settlement – Company President Prohibited From Employment Involvement. The owner and president of an aerospace technology company engaged in repeated hostile comments and emails regarding Muslims. Complaints were filed with the Washington State Civil Rights Agency regarding refusal to hire Muslims and creating a hostile environment. The company characterized the comments as just "jokes" placed on the company's system and listserve. The "jokes" included comments referring to Iraqi job applicants as "They will be sleepy, because they are up all night making bombs." Another post was "I can tell you that most Chinese hate Muslims, not as much as me, but an adequate amount of hate." The owner closely scrutinized applicants to try to avoid Muslims. When a non-Muslim employee objected to the ongoing comments, the owner told her that it was his company, and if she did not like his views she "had to leave." In addition to paying a half million dollars, the company has revised its hiring processes. The settlement terms also remove the owner/president from being involved in hiring or any other Human Resources or employment-related processes in his own company. *Washington v. Electroimpact, Inc.* (Wash. Superior Ct., 2017) [Any individual is entitled to personal political, social and religious opinions. Companies in business, however, may not infect employment decisions or the work environment with these individual beliefs. The laws require practices in which all people are not subject to discrimination. For more information on the legal effects of "joking," see the article "It Was Just a Joke" or the seminar "Is It Humor or Harassment?" by Boardman & Clark.]

Retaliation

Hitting Supervisor With Vehicle Warranted Suspension – Was Not Retaliatory. A postal carrier hit his supervisor with the mail truck. He also had no valid driver's license. He was suspended. The carrier then claimed the suspension was done in retaliation for having made earlier complaints of age, ethnic and race discrimination. The court dismissed the case. The employer seemed to have valid grounds for the suspension and the only evidence of retaliation was the employee's own speculative conclusions. Further, the suspension was not long enough to constitute an "adverse employment action" under the circumstances. *Cabral v. Brennan* (U.S.P.S.) (5th Cir., 2017).

Sex-Sexual Orientation

7th Circuit Rules That Sexual Orientation Is Included As Sex Discrimination Under Title VII – Sets Up Supreme Court Case. In *Hively v. Ivy Tech Community College (2017),* the 7th Circuit Court of Appeals reversed its own previous 2016 panel decision, and found that discrimination based on sexual orientation is simply a form of sex discrimination, without having to go to extra lengths of showing "sexual stereotyping" or other such theories. This decision is at odds with other circuits. In *Christianson v. Omicom Group* (2nd Cir., 2017) and *Evans v. Georgia Regional Hosp.* (11th Cir., 2017), the 2nd and 11th Circuit Courts refused to find that sexual orientation itself was a sex discrimination category; Congress had not intended to cover sexual orientation when it crafted Title VII (this is what the previous 7th Circuit panel had ruled). However, both did allow gay employees to pursue cases based on sexual stereotyping (non-conformance to gender stereotypes). Opposite rulings by different Federal Courts of Appeals generally result in the U.S. Supreme Court taking the issue for a final determination.