EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

EEOC Proposes No Change In EEO-1 Report. The Equal Employment Opportunity Commission is proposing that the EEO-1 Report requirements for federal contractors and employers of 100 or more be kept the same for the next three years. Thus, employers will have no new rules or provisions to adjust to. The proposal must be approved by the Federal Office of Management and Budget.

President Adds Sexual Orientation And Gender Identity To Executive Order 11246. Federal contractors are required to comply with the anti-discrimination/Affirmative Action requirements of Executive Order 11246. The Order covers the categories of sex, race, national origin, disability and veterans. On July 22, 2014, the President amended the Order to include sexual orientation and gender identity.

Illinois Referendum On Contraception Coverage. Illinois Gov. Quinn, in reaction to the U.S. Supreme Court's *Hobby Lobby* decision, has placed a referendum on the state's November ballot; "should prescription insurance programs be required to include birth control?" The Governor states this is for the purpose of protecting women and families' ability to make their own medication and medical decisions, rather than allowing employers to choose their employees' medical and family decisions. It is unlikely that any state's vote would alter the situation. Any state law would likely be overruled under the same standard as in the *Hobby Lobby* case. [Over the years the majority of voters have approved many things the courts have then found unconstitutional (racial segregation, denial of the vote to women, same sex marriage, etc.).]

LITIGATION

Constitution – Due Process

Civility Code Was Not Void For Vagueness. A university professor's contract was non-renewed due to not complying with the school's "civility" policy requiring faculty to "treat one another with respect," and act in "cooperation." He sued, claiming the policy was "unconstitutionally vague" and did not establish sufficiently specific standards to be enforceable. The 14th Amendment's Due Process clause requires that a policy or rule must not be so "broad" or "vague" that a person would have no fair knowledge as to what conduct was prohibited. The professor had engaged in angry confrontations and openly, angrily emailed that a colleague was a "lying, backstabbing sneak." The court ruled for the university, stating that "as long as ordinary persons using ordinary common sense would know that certain conduct would be disrespectful, the policy was not void for vagueness" under the Due Process standards. The professor's comments were well within the scope of an ordinary common sense understanding of lack of civility. *Keating v. University of South Dakota* (8th Cir., 2014).

Public Policy Discharge

What Do You Think?

Pharmacist Saves His Own Life – Gets Fired. A Walgreens pharmacist had a valid "conceal carry" permit under Michigan law to have a firearm. One evening several armed robbers invaded the store pointing guns and threatening to shoot customers and staff. One jumped over the counter and pointed a gun at the pharmacist. The pharmacist pulled his gun and started shooting. He shot multiple times and the robbers all fled! The pharmacist was fired. He then was sued for wrongful discharge. Walgreens had a policy against employees bringing weapons onto the premises. The pharmacist had been informed of this policy (it was also posted) and ignored it. The court dismissed the case. The law (public policy) allows people to carry concealed weapons. It also allows employers to set rules about, and prevent weapons on their own premises. There was nothing "wrongful" about firing the pharmacist for violating the company policy. He saved his life, but stayed fired. *Hoven v. Walgreen Co.* (6th Cir., 2014).

Discrimination

Sexual Harassment

State Assembly Head's Inaction Creates Case For "Culture Of Sex Discrimination" - Personally Named In Case. A state legislator had a well known history of sexually harassing female legislative employees. The Legislature's Speaker was responsible for overview of legislative ethical behavior, legislative staff employment policies, staff pay allotments and appropriately referring complaints by staff for proper investigation and

action. The Speaker did not take action on the repeated complaints about the legislator harassing staff. Staff filed state harassment claims and a 42 US Code §1983 case against both the legislator and against the Speaker in his personal capacity. The court found that the Speaker's lack of effective action had created a tolerance of sexual harassment and a "culture" of indifference and sex discrimination within the state assembly. The Speaker was not entitled to a defense of a qualified immunity from personal suit. He concealed incidents; he "hushed" staff reassignments; he repeatedly failed to report the harassment. "No reasonable official could have believed that turning a blind eye to misconduct was consistent with clearly established law," or his duties to the public as Speaker. *Burhans v. Lopez* (S.D. NY, 2014). [The Wisconsin Legislature recently dealt with the issue of a harassing legislator. Its leadership paid attention, and engaged in bi-partisan action to address the issue promptly and effectively.]

Daily Comments About Sexuality And Denial Of Training Create Quid Pro Quo Case. A male employee was the object of daily sexual comments about his body, and seductive behavior from his female supervisor. He rebuffed the advances. He was then denied training opportunities, which could have led to enhanced performance and advances within the company, "sabotaging his career." The court found sufficient evidence for a quit pro quo case of sexual harassment. *Cruz v. N.Y. State Dept. of Corrections & Community Supervision* (S.D. NY, 2014).

Age

We Thought He Would Not Want To Transfer And Take A Pay Cut Is A Non-Defense To Age Discrimination In Layoff. A university counselor with 27 years' employment was the only person without a job at the end of a reorganization. The university's explanation that he would not want to suffer a pay decrease or transfer to another location were seen as pretext. The counselor had written that he "preferred not to transfer – but will go where needed." He also had said he understood that everyone was getting pay cuts, and did not state any refusal. The university told him his position in his department was eliminated and he could apply for other openings – none of which materialized. However, all younger counselors were simply transferred, and none had to "apply." The older counselor's duties remained, were transferred to another unit, and were then filled by a younger employee. The court found ample evidence of age discrimination. *Maxfield v. Brigham Young Univ.-Idaho* (D. Id., 2014).

***Keeping Less Senior, Younger, More Versatile Performers Is Not Discrimionaton*.** The oldest, most senior (26 years) and only African-American production worker was laid off in a reduction in force layoff of 12 of the 23 workers. He filed age and race discrimination actions. The employer prevailed. The court found that the workers who were laid off had fewer skills. Those kept had more qualifications and could do a broader range of work. There was a business decline and not all production areas were active at all times. The company had a legitimate need to shift people to where the work actually was week-to-week. The plaintiff had one certification as a "burner." He was not also

qualified as a welder or maintenance operator. He could not be moved as the available work shifted. Those who were retained had two or three different job qualifications. *Young v. Builders Steel Co.* (8th Cir., 2014).

Disability

Facebook Posting By Workers Comp Processor Violates Privacy And ADA. An employee injured his shoulder at work. He was out on workers compensation for over 11 months. The office employee responsible for processing Workers Comp issues posted a Facebook statement to her professional contacts network: "Amazing" how one employee returned from heart bypass surgery in just a month, while Shoun has missed 11 months for just a shoulder injury." The posting stayed up for 76 days. The posting was seen by a number of managers in businesses where the injured employee was applying for other work – which he could do within his shoulder limitations. The employee sued, claiming the posting was done "with intent to expose him to public scorn and ridicule and to blacklist him among prospective employers," and violated privacy and the confidentiality provisions of the ADA. The court agreed. Employers and their administrative staff have a duty of confidentiality, regardless of their personal opinions. *Shoun v. Best Formed Plastics* (N.D. Ind., 2014). [For more guidance, see the articles Rediscovering the Lost Art of Verbal Conversation and When is Honesty the Best Policy (an "honest opinion can be a discriminatory statement)", by Boardman & Clark LLP.]

Firefighter's Fear Of Burning Buildings Is Not A Disability. A fire department captain developed a fear of burning buildings. He was removed from duties, and he then sued under the ADA. The appeals court ruled that the fire phobia did not qualify as a disability. Inability to have a special quality needed for a particular job is not a disability. "Reluctance to charge into a burning building is not a mental impairment at all; it is a *normal* human response, which firefighters are required to overcome." The court also used a basketball analogy. Professional ballplayers must have special skills and overcome things, which then allow them to have more than usual skill. Thus, those who are unable to play pro ball are not "disabled," they are simply "normal"; just as anyone who is fearful of entering a burning building. One cannot claim the absence of a special, more-than-normal ability constitutes a "disability." *City of Houston v. Proler* (Tex. S. Ct., 2014).

Religion

SSN Is Not "Mark Of The Beast". A job offeree refused to provide his social security number, stating that it was a "mark of the beast" prohibited by his religion. He requested a religious accommodation of not being required to give the SSN. The company declined to hire, and he sued under Title VII. The court dismissed the case. The SSN is a federal IRS requirement, over which the company had no control. The suit against the company was misdirected. Further, the company could not accommodate; it would be subject to

legal penalties if it paid an employee without an SSN for required reporting to the IRS. *Yeager v. First Energy Corp.* (N.D. OH, 2014).

Fair Labor Standards Act

Can't Buy Off The Key Plaintiffs In Class Action. Three employees filed a class action FLSA case, on behalf of themselves and all other similarly-treated employees regarding pay of overtime and benefits. The company offered to pay the named plaintiffs the full relief they requested, and asked the court to dismiss the case, based on the offer of full payment of all claims. The court declined. Paying off just the named plaintiffs would then eliminate the ability to discover and remedy FLSA class violations which possibly affected many more people. All class actions have only one or a few named plaintiffs, and "all others similarly-situated." The purpose of class actions is to discover and provide overall remedies of widespread violations. To allow a defendant to shut down a class action by "picking off" the one or few named plaintiffs would destroy the whole purpose of class actions, and allow much more widespread wrongdoing to continue undiscovered and unremedied. *Wicke v. L&C* Insulation (W.D. Wis., 2014).

National Labor Relations Act - Arbitration

Dishonesty And Aggression After Parking Lot Accident Warrant Discharge. A hospital employee hit a parked car in the parking garage, drove away and never reported the accident as required by hospital policy. The incident was witnessed and reported by another. The hit car owner also reported the damage. When confronted, the perpetrator tried to deny the incident, and became loud and argumentative when pressed about details, and refused to supply more information. She then followed the owner of the damaged car, and began screaming at her for reporting the incident. The employee was fired, but then filed a grievance. The arbitrator found the dishonesty and screaming incident were serious violations which deserved discharge. *In Re Metrohealth Med Center and AFSME Local 3360* (2014).