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ADMINISTRATIVE INACTION

Union Sues EEOC Due to Its Inaction on Government Worker's Sexual Harassment and Other Complaints. The EEOC is responsible for investigating discrimination complaints from private and public sector employees. The EEOC must issue a Notice of Rights to sue before the complainant can proceed to take their case to federal court. The EEOC has recently issued numerous Notice of Rights letters for private sector complainants, often without any prior investigation, so they can proceed to file their cases in court. However, it has apparently put a hold on processing complaints of Federal employees *without* issuing Notice of Rights letters; holding them in limbo with no ability to proceed to the next step of taking action to remedy discrimination. These unprocessed cases include a number of class action complaints alleging sexual harassment and other overt forms of discrimination. The American Federation of Government Employees (AFGE) has filed suit against the EEOC to force it to release those cases. The suit claims EEOC violated the Administrative Procedures Act by imposing a blanket indefinite suspension on processing class action and other complaints filed by Federal employees. These employees claim to continue to be harmed by unaddressed and unremedied—event "escalating"—sexual harassment and discriminatory adverse impacts, and are being deliberately denied any remedy from ongoing harm. The agency responsible for elimination of discrimination is being accused of complicity to *enable* it. *AFGE v. EEOC* (D.C. D.C., 2026)

LITIGATION

THEME OF THE MONTH

Complexities

Employment law and relationships can create tangled webs for the Human Resource Manager. Issues surrounding remote work, leased employees, technology, and security can add to the complexity, creating questions about *where* employment is taking place and *who* the employer really is. This month's Update includes a multi-jurisdiction conflict, as well as another case involving both joint employment of a leased worker *and* the growing issue of use of personal cellphones/recording on work premises.

Where is the Employment? – Convolution of Multi-state Operations. Things used to be simpler. Employment was usually in one state. You lived, worked, and sued in the same jurisdiction. However, national and global corporate operations and remote work have changed that and created increasing complexity in employment law. Trying to sort out the confusion can be a real HR headache. An engineer for a California headquartered software company lived and worked remotely from Utah. He was arrested and jailed in Florida due to his actions in a traffic accident (charges were later dropped). A decision to fire him due to the arrest and resulting unexcused absences was made by company officials located in Illinois. The Engineer sued under the California Labor Law prohibiting arrest record discrimination, which provides that an employer "*may not utilize as a factor in determining any condition of employment, including termination, any record of arrest or detention that did not result in conviction*." The California Court analyzed these situations and decided that the California law could not be applied *extraterritorially*. None of the employee's work, nor the arrest, nor the termination decision occurred in California. There simply was not sufficient contact with the state to warrant applying the California statute. The company simply had headquarters in the state and there was not enough of a connection with any of the facts or circumstances. The case was dismissed. *Suberin v. Alation, Inc.* (Cal. Ct. of Appeals, 2026) *Beware* that California has applied its Labor Statutes to allow suit by employees whose only connection was to be sent from out of state for a couple of days of remote work or to attend a conference in California. For instance, it has ruled that its overtime pay for more than 8 hours of work in a day applies to out of state employees who worked those hours on the couple of days they *were in California*. So, an HR question is "Where is the employment, ***today***?"

Does the Leasing Organization Have to Reinstate a Leased Employee Who Files a Union Grievance Against His "Real" Employer? Contracted workers are the employees of the company that contracts them out to other locations (their W-2 employer). The employees of that company also may have a Collective Bargaining Agreement (CBA) with their employer – to which the company using the employees is not a party. So, what happens if the worker is fired by their W-2 employer for acts done on the leased work premises, then gets it settled in the union grievance process? Does the leasing location have to take them back? *McCoy v. Mullin-Dept. of Homeland Security (DHS)* (7th Cir., 2026) involves DHS contracting with a security company, Paragon, which provided security guards at Federal facilities. Mr. McCoy was sent by Paragon to provide security at a Social Security office. He was fired by Paragon after DHS claimed he violated protocols and took pictures of the customers with his personal cell phone while dealing with an unruly, disruptive customer. He grieved the discharge under Paragon's CBA, and reached a settlement that he would be reinstated if DHS determined he was suitable to continue to work under a DHS contract. However, DHS refused to allow him to return to its facilities. So, McCoy sued DHS, not Paragon, claiming age discrimination. A manager at DHS had allegedly once referred to him as "*too old and not in shape.*" DHS attempted to get the case dismissed on the grounds that it was not his employer, and it had not been a party to the union CBA or the grievance process. However, the lower court rejected this. Courts have often considered the lessor and leasee of leased workers to be Joint Employers. The lower court found that "*DHS had just as much authority as Paragon if not more so…*" when it came to the discharge and to the ability to reinstate. So, McCoy could sue DHS for age discrimination. On appeal, however, while the appellate court questioned but did not decide whether DHS was actually a joint employer with Paragon in this instance, the court then went on to affirm judgment against Mr. McCoy because he did not present sufficient evidence to prove age was the reason for his discharge or for the refusal to reinstate. DHS was not bound by a grievance process it did not participate in. It could still assert its own valid non-discriminatory reasons to not want Mr. McCoy back, since he had violated DHS security protocols. (More on this below…)

Use of Personal Devices in the Workplace. *McCoy v. Mullin – Dept. of Homeland Security (DHS)* (7th Cir., 2026) As well as Joint Employment, this case involved the use of a personal cell phone to take pictures during the course of work. Mr. McCoy, a security guard, was discharged for not following several protocols during an incident of detaining an unruly customer. He took pictures of the detained customer with his personal cell phone. This created security, confidentiality, and privacy issues that the court found to be valid reasons for ending his service and not reinstating him. **This case illustrates the growing complications of personal devices in the workplace.** Employees' devices can take pictures, audio, and video recordings of workplace interactions, documents, customers, manufacturing techniques, and virtually everything that occurs. Employees are increasingly being discharged for their use of personal devices at work. Employees have not only been fired but have been sued for personally taking the work-related content. Employees have also had their personal devices seized by police to preserve evidence when they took pictures or recordings of incidents that the authorities are investigating. The police can hold the devices as long as they need. Both employers and employees need to be much more aware of this complexity. Employers have difficulty in controlling this use, and many have to carefully design policies to balance employees' labor law rights with the organization's significant interests to address employees' personal device use for work issues or in the workplace in general.

Discrimination

Retaliation

Can't Call Your Manager Nasty Names – Even if He Admits to Fitting the Label - and Company Had Legitimate Reasons for its Actions. A newly hired Team Leader at a construction company, in her first week, complained that the supervisors and managers she worked with were not valuing or accepting her opinions and she was being disrespected. She then had a continuing series of complaints about her ideas being treated in a demeaning and disrespectful manner by the various supervisors she worked with. She then sent an email to her manager calling him a "*prick*". She copied a number of other company employees in this email. The manager acknowledged that he was indeed "*known to be a prick at times*" when things needed to be done his way. The Team Leader later sent emails stating she would not work with the manager because she was "*not in the mood to be ostracized*." In another incident, a hotel contracted to house company employees complained that the Team Leader had been disrespectful and angrily screamed at hotel staff. The company decided to try to alleviate the discord by transferring the Team Leader to another area. She resigned and filed a Title VII case claiming she had been subjected to sex discrimination because all of the supervisors and manager who disrespected her were men and the company always sided with men and "*men are always right in the eyes of the company*." She claimed the transfer was retaliatory for having complained. The court found that the Team Leader did not mention a sex discrimination concern in her earlier complaints regarding the frictions with her supervisors. There was no direct evidence of any sex or gender statements by the men involved, the whole case was based upon her own unsupported conclusions and self-serving presumptions; the company had a valid non-discriminatory foundation for its transfer decision, including the ongoing frictions, the Team Leader's behavior toward the hotel staff, and the name-calling hostile email about the manager that she circulated to others. Further, even if the manager acknowledged that he could be difficult to deal with, Title VII does not prohibit personality conflicts or insensitive, or even harsh supervision unless it is due to a discriminatory category. Since there was no tangible evidence to connect any treatment or decisions to sex or retaliation, the court dismissed the case. *Joseph v. Thomas-Grace Construction, Inc.* (8th Cir., 2026)

Disability

Reasonable Accommodation Does Not Require Creating an Alternative Leave Benefit Program. A Federal Bureau of Alcohol Tobacco and Firearms (ATF) employee held a GS-9 level position. The stress of the position exacerbated her cardiac condition, and her doctor recommended intermittent leave of absence as necessary and a transfer to a less stressful position. The agency quickly granted flexible use of her 240 hours of accrued paid time off (PTO). There were no other GS-9 openings; only GS-7 levels. The employee instead requested to use non-paid leave as needed. She wanted to save her PTO for vacation or family needs. AFT refused this request stating that she must first use the accrued paid leave. She continued to request unpaid leave. AFT continued to offer very flexible use of her paid PTO as the accommodation. Ultimately, the employee accepted a demotion to a GS-7 job with less stress. Her cardiac condition improved. She then filed a Rehabilitation Act suit for failure to accommodate in that ATF had denied unpaid leave and had not transferred her to another GS-9 level position. The court found that her accommodation requests were unreasonable and that ATF had taken appropriate action to accommodate the needs of the condition. An employer has the right to require exhaustion of paid time off or other accrued paid leave before considering the grant of any unpaid leave. ATF's allowance of PTO under its regular paid leave policy fully met the accommodation needs prescribed by the employee's doctor. Nothing about the disability required an offer of unpaid leave in addition to her existing paid leave; she just preferred to save those hours for her own non-disability purposes. "*The ADA and Rehabilitation Act do not require an employer to create a disability-specific program to accommodate an employee when an existing program already provides the accommodation the employee needs*." [Reasonable unpaid leave after all paid leave is exhausted can be a required accommodation, but that was never at issue in this case.] As to the move from a GS-9 to GS-7 position, there were no other GS-9 positions open. It was unreasonable to demand a lateral transfer to a position that does not exist and an employer is not required to create new, special positions. *Kingsolver v. Dept. of Justice Bureau of Alcohol, Tobacco and Firearms* (11th Cir., 2026)

Constitutional Limitations

At-Will Employment Agreements Can Not Get Around City Charter. The Cincinnati Fire Chief's employment contract clearly stated that he could be dismissed At-Will, without cause at anytime and would not be afforded any of the City's Civil Service protections or pre-termination hearing rights. As part of the hiring process, the Chief signed a Forfeiture of Rights in which he acknowledged and agreed to those terms. Two years later he was fired. He requested a list of charges against him and a hearing to address and refute reasons for discharge. This was denied, based on his Employment Agreement. The City Manager then held a News Conference and distributed news releases announcing the discharge, stating the Chief was terminated for cause and listing several areas of alleged mismanagement and ineffective leadership. The discharged Chief sued for violation of his Constitutional Due Process rights and sued the City Manager individually under state law for defamation. The court found that the Chief had a viable case for both causes of action. The Cincinnati City Charter *guaranteed* that terminated officials, including the Fire Chief, could demand written charges and the right to a hearing. The City could not create an employment contract that was outside the parameters of the Charter. Any Forfeiture of Rights was void since the City officials had no authority to draft such an agreement disregarding the Charter's guarantees of a due process hearing. Even if the City might be able to enter into a contract with a release of rights, the one at issue was not explicit enough to do so. Lengthy, clear, explicit, and "unmistakable" detailed description of the rights being forfeited is required and the Fire Chief's contract was too short and *un*explicit. So, his Due Process claims could proceed to trial. The defamation case was also held valid, since the City Manager denied the Chief any opportunity to address and present evidence to refute the charges against him. The Manager released public information as if the charges were true, without the opportunity to learn any contrary information. The Chief presented evidence to indicate several of the alleged termination causes were *not* accurate. Thus, the City Manager's public statements could be defamatory. *Washington v. Cincinnati, OH, et al* (6th Cir., 2026) This case is similar to many other challenges regarding public organizations or agencies exceeding authority. The Constitution, the statutes, or city charters set the parameters and purposes. All of the agency regulations, agreements or actions have to fit within those limits and purposes. When they exceed those boundaries, the courts frequently trim them as being "*ultra vires*", or beyond the authorized powers, and void any actions taken due to the overreach.

OTHER RECENT ARTICLES

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