EMPLOYMENT LAW UPDATE

March, 2015

by
Bob Gregg
rgregg@boardmanclark.com

Boardman & Clark Law Firm
Labor and Employment Practice Group
www.boardmanclark.com

LEGISLATIVE AND ADMINISTRATIVE ACTION

OFCCP Proposes To Bring Sex Discrimination Rules Into The 21st Century. The OFCCP sex discrimination rules for government contractors have not been revised in four decades. It has now proposed new rules to bring them in line with the EEOC's Title VII guidelines (which are also several years old). The new rules will address compensation, harassment, pregnancy accommodation, gender identity and family caregiver discrimination. The proposals will be open for comment and review over the next several months. (In the meantime, the EEOC will be refining its guidance on inclusion of LGBT into the sex discrimination category.)

Wisconsin Legislature Fast Tracks Right To Work. The Republican Legislative majority has passed a bill to make Wisconsin a Right to Work state, where individuals can opt out of membership in union represented workplaces. Governor Walker states that he will sign the Act into law.

LITIGATION

Fair Labor Standards Act

Extra Innings – Ball Park Construction Workers Win In Overtime. A group of workers who built the new Miami Marlins Stadium alleged they were denied proper overtime pay. A lower court ruled against them. However, on appeal the 11th Circuit found in their favor. In its opinion the Court decision cited the Field of Dreams movie – "If you build it they will come . . . but the builder ought to pay them the wages they are due." *Calderon, et al. v. Baker Concrete Construction* (11th Cir., 2015).

Personal Liability

CEO and Board Chair Are Personally Liable For $11.3 Million In Sarbanes Oxley Retaliation Case. A CFO of a video game company reported concerns of financial fraud, first internally under the company's SOX-required ethics code, then to the company's outside law firm, and finally to the SEC when the internal complaints were ignored. She was then fired. The ensuing SOX retaliation case resulted in a verdict of $950,000 plus $384,000 attorneys' fees. The court ruled that emotional damages of $357,000 were also recoverable under SOX. Also, though the jury found the company liable for the damages, the court, and the Appeals Court, found that both the CEO and the Chair of the Board could also be personally liable. This means the plaintiff has a choice of collecting from the company or from either or both individuals instead of the company. *Jones v. Southpeak Interactive Corp.* (4th Cir., 2015). The problem for the CEO and Board Chair is that collecting from the individual rather than the company may result in a tax advantage for the winning plaintiff. Also, both the company's insurance policy and its corporate bylaws may prohibit reimbursement indemnification to Executives and Board members for acts of retaliation or other "misfeasance." So, the personal liability could hit very hard. [For more insight, see the article Are You In The "Crosshairs? (Your Personal Liability in Employment Cases) by Boardman & Clark LLP.] Executives and Board members should be careful and seek legal counsel before acting in frustration toward a whistleblower or other "thorns in the side."

"Most Of The Time They Deserve It," And Other Hostile Comments Warrant Personal Suit Of Mayor. A city clerk alleged she was subjected to ongoing hostile comments about herself and other women made by the Mayor and City Manager. These included frequent profane slur references to women; comments that "women were not smart enough to do city work"; and when female citizens complained of domestic abuse, that "most of the time they deserve it." The Clerk complained to Human Resources and legal counsel. The city manager then ordered her to not speak to anyone about her concerns or she would be fired. She did tell others, was fired, and filed sexual harassment and retaliation charges against the city and the Mayor personally. The Mayor sought dismissal, but the court denied the motion holding "there was little doubt he was aware, and he should have expected to be named in a lawsuit." *Huntsberger v. City of Yerington* (D. Nev., 2015).

Discrimination

Disability

Probationary Employee Should Get Same Leave Accommodation As Everyone Else. A pipe fitting manufacturer had a policy of granting up to 26 weeks paid medical leave to

non-probationary employees. A probationary Marine Corps. Veteran asked for six weeks unpaid leave for treatment of seizures caused by service-related injuries in Iraq. The company denied the accommodation based on the probationary status and fired the employee. The EEOC found that this violated the ADA's reasonable accommodation requirement. The company has settled, agreeing to pay $65,000 and other relief to the veteran. The company also agreed to modify its policy. Though it is not required to provide paid leave to probationary employees, it will provide unpaid accommodation leave to those with disabilities. *EEOC v. EZEFLOW USA, Inc.* (D.C. W. Pa., 2015).

Delay Dooms Defense – The Employer Should Have Acted Sooner. A warehouse worker told other employees that he was having homicidal thoughts at work. They reported this to management. The company did nothing for almost a month. During that time the employee then came to managers and made several requests for leave for medical insurance paid care for his severe depression. The company then fired him for his earlier statements about homicidal thoughts, claiming it violated the company policy about threats and workplace violence. He filed an ADA case, and the court ruled in his favor. It found that the several week delay was a problem. If the company had fired him quickly then there would have been no case at all – he did violate the anti-violence policy. However, management waited, and waited until he raised the issue of disability and requested treatment under the "expense of the company's health insurance." Then they fired him. It created every appearance that the disability and health expenses were the real reason for the discharge. *Walton v. Spherion Staffing* (E.D. Pa., 2015).

National Origin

Arab Manager Fired And Told To "Go Work With Your Kind At 7-Eleven." A 54-year old Walgreens manager of Arab origin was assigned the most problematic store in one of the toughest areas of East Oakland. He turned it around to one of the best in the district, with the lowest shoplifting, and most profit margin. A new district manager took over and began "nitpicking" in an apparent effort to find fault. This included giving discipline for the "serious and gross misconduct" of being 5 minutes late to a manager's meeting (due to handling an emergency security issue at the store). The new DM made comments about the manager being too old and suggested he retire. The DM complained openly about the manager's accent, and ridiculed the accent in public in front of other employees. The DM ultimately told the manager he should quit and "go work at 7-Eleven with your kind of people" – a stereotype about Arabs and people from India. The manager was fired. He sued under Title VII and the Age Discrimination in Employment Act (ADEA). The court found ample evidence for a case of Age and National Original discrimination. *Almaweri v. Walgreens Specialty Pharmacy* (N.D. Cal, 2015).

Religion & Associational Discrimination

Jewish Wife Creates Valid "Associated With" Case. A Christian street department equipment operator was harassed because he was married to a Jewish woman. He was often subjected to comments and name calling such as "Jew lover"; "Hitler had the right idea", and much more. His complaints to management were mostly ignored. Supervisors also made anti-Semitic remarks, including that Jews will never be hired here. The employee filed a Title VII and a state discrimination claim. The court ruled that though he was not Jewish, his treatment due to association with a Jewish wife and alleged retaliation for complaining about this gave him a valid case for religious discrimination. *Chiara v. Town of New* Castle (N.Y. App. Div., 2015).

Arbitration

Kicking Older Patient Not Excusable. A hospital employee kicked an elderly patient, hard. She was fired, and then grieved the discharge. At the hearing she claimed the patient had struck her in the chest with both fists, so she was acting in self-defense. The arbitrator denied the grievance because two witnesses did not verify her story, and the self-defense version was a different story than her first account of the incident. [Changing stories lose cases for both employers and employees.] *In Re Washington Fed. Of State Employees and Washington Dept. of Social and Health Services* (2015).

Extensive Damage Was Not Enough To Fire Forklift Driver – Employer Was Contributorily Negligent – Training Is The Key. A forklift driver was fired after he drove over and ruptured pipes. This resulted in massive destruction of company products and property. The arbitrator revised this to a suspension, finding that there would have been less, or even no product or property damage if the company itself had not created the problem. Products should never have been stored directly under the pipes, because of their inherent danger of leakage. The company had given NO training on the location of the shut off valves, so it took 15 minutes of disorganized fumbling to find them. Had there been proper training, there would have been a quick shut off, and perhaps no damage at all. *In Re Brescone Bartar and Teamsters Local 443* (2015).

Toy Junior Archerty Set Was Not A Weapon Of Mass Destruction. A bus driver had bought a toy Junior Archery Set for his child. It was rated as "safe for age 8." He decided to return it to the store, unopened, and took it to work because his regular bus break was in the parking area of the store. Management heard that he had this weapon on the bus, and in spite of his showing it was a toy, never taken

from its packaging, fired him for violating the workplace violence policy for bringing a weapon "designed in such a manner to inflict harm or injury or used in a manner to inflict harm or injury to another person." The arbitrator ordered reinstatement and back pay. Of course the policy could be literally read to cover almost anything, from a toy archery set, to a pencil, to a paperclip which could be used to inflict harm, but it was a great stretch to fit the toy into the logical scope of the policy. Also, the driver had an unblemished 23-year work history. The discharge was an unjustified overreaction. *In Re Amalgamated Transit Union and King County Metro Transit* (2015).

F:\DOCS\WD\25211\LEGAL\A2109166.DOCX