EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

***Dept. of Labor Makes Awards To Employers For Best Practices*.** DOL announced that it will give eight and a half million dollars to eight service organizations to continue their work in developing models, providing assistance and demonstrating best practices to improve work opportunities for people with disabilities. In addition, several more million will be given to organizations which provide disability technical assistance to employers. The chief recipient is the Jobs Accommodation Network (JAN) at West Virginia University, which provides free advice and assistance to employers throughout the U.S.

U.S. SUPREME COURT

The 2015 Supreme Court session began in October. During the coming months the Court will hear cases and make decisions which not only become "the law of the land," but may significantly affect employment practices and liabilities for many years. Following are details of one interesting case which may expand criminal liability for employers and a listing of other cases to watch.

"Fish Shredding" – Is A Grouper A Document? *Yates v. United States*. One part of the Sarbanes-Oxley Act applies to virtually all businesses and prohibits the intentional destruction of "any record or document . . . with intent to obstruct a government investigation." (Sec. 1519.) Business owners and employees who do so can be criminally charged. This law was enacted after the *Enron* case in which financial documents were shredded to destroy evidence of wrongdoing. The U.S. Supreme Court has agreed to hear the case of *Yates v. United States*, to determine the scope of this provision. The Miss Katie fishing boat was stopped by the federally deputized Florida Fish and Wildlife Commission Patrol and found to have caught a number of undersized red grouper. Captain Yates was ordered to return to port where the fish would be seized as evidence. However, on the trip

back the crew threw the undersized fish overboard and proceeded to catch and replace a number of them with right-sized grouper. There was a prosecution of employees involved under Sarbanes-Oxley §1519 and conviction for destroying documentary evidence to obstruct the investigation. The appeal to the Court is about the question of whether a fish is a "record or document?" Whether a law intended to cover papers and computer records is relevant to "fish shredding," or is that too broad of an interpretation?

Other Employment Cases On 2015 Supreme Court Docket

Young v. UPS. Should employers be required to provide light duty reasonable accommodation of pregnancy the same as for disability?

Integrity Staffing v. Busk. Is checking through a security clearance station compensable time under the Fair Labor Standards Act? Entering or leaving work through the security station often takes 10 to 25 minutes waiting in line.

EEOC v. Abercrombie & Fitch Stores, Inc. Must stylish clothing company reasonably accommodate and allow Muslim applicants' head covering, which it claims runs counter to its "stylishness" image?

Mach Mining v. EEOC. Can the EEOC's efforts to "reasonably conciliate" prior to bringing suit be challenged and reviewed by district courts, with dismissal of a case if the court finds an inadequate pre-filing conciliation process?

LITIGATION

Fair Labor Standards Act

Fed Ex Will Pay Millions To Correct Misclassification Of Independent Contractors. Thousands of Independent Contractor drivers should have been employees, and Fed Ex will pay large amounts in back pay and overtime, employment taxes and benefit contributions. The drivers were not treated as "independent." Instead, they were required to follow employment policies, wear company uniforms, drive only company-approved vehicles, and follow company directions about when, where and how to deliver. This did not match the standards of "independent" under the DOL, IRS or various state rules. *Slayman v. Fed Ex* (9th Cir., 2014) and *Alexander v. Fed Ex* (9th Cir., 2014).

Discrimination

National Origin

Grocer Pays $6.5 Million To Settle Unequal Pay Case. In *Estrada (and EEOC) v. Bashas Inc.* (D. Az., 2014), a grocery chain will pay $6.5 million to Hispanic employees. The case alleged that the company adopted separate pay scales for its stores in Hispanic areas (with 75% Hispanic employees) from those in non-Hispanic areas (with only 15% Hispanic employees). The workers in the Hispanic area stores made significantly lower wages for identical work. The case was brought under Title VII and 42 U.S. Code §1981.

Age

"I Didn't Swallow" Was Not An Effective Rationale. A Wal-Mart employee was fired for "grazing" food – chicken poppers – from the hot food take-out counter. This violated the store's strict policy on taking consumable products. She first denied the act, then admitted that she put the poppers in her mouth "as a quality control test," but claimed she quickly spit them out. She claimed she did not eat the food and therefore could not be guilty of "grazing." She sued for age discrimination claiming the company's discharge reasons were pretext in order to replace her with a younger employee. The Court did not agree. First, there was nothing in her job description or duties regarding quality control or tasting. Second, the company did not set out to target her as an older worker. In fact, it was investigating grazing by a young employee. He then pointed a finger at her, "She does it too!" The younger employee was also fired. Third, the no-grazing rule did not require swallowing; once it is in the mouth, the product is no longer sellable. There was no evidence of pretext or discrimination. *Simon v. Wal-Mart Associates, Inc.* (E.D. Mich., 2014).

Disability

Selective Impairment Does Not Substantially Limit Police Supervisor. A police sergeant had ongoing communication issues. He was described as arrogant and abusive and those under his supervision filed grievances claiming he was "tyrannical, belittling, threatening, and intimidating." The sergeant was placed on leave as the charges were investigated. While on leave he informed the Department that he had ADHD which impaired his interpersonal communications, and he requested reasonable accommodation to assist in his communication issues. The Department, though, decided to discharge due to the inappropriate behaviors. The sergeant sued under the ADA for failure to accommodate. The court dismissed the case, finding that his ADHD did not create a substantial limit on the major life activity of effectively interacting with others. It appeared that all of the inappropriate behavior was directed toward subordinates. The sergeant could routinely communicate very well, and perfectly appropriate with those above him. Selective communication issues do not meet the ADA standard. *Weaving v. City of Hillsboro* (9th Cir., 2014).

University Acted On Presumption – Failed To Verify. In *EEOC v. Howard University* (D.C., 2014), an applicant was denied a job as a security guard when he revealed that he received regular kidney dialysis. The University concluded he therefore could not meet the essential function of working rotating shifts with frequent dialysis treatments. The EEOC brought suit on his behalf. The evidence showed he had worked for five years previously as a security guard, on rotating shifts, and managed his dialysis and work schedules. The University did not appear to do the "individualized assessment" which is required by the ADA.

Sex

Requiring Same Sex Instructor Was Wrongful – Attempted Remedy For Sexual Harassment Created Worse Discrimination. A trucking company was sued for sexual harassment when a male trainer harassed three new female driver-trainees. As a cure, the company adopted a same-sex policy for the over-the-road training. Only female trainers would be on the road with female trainees. However, the company had only a very few female trainers, and many male trainers. This resulted in a backlog for newly-hired women. There was a "female waiting list" which could be a year long before the training occurred. Some women dropped out of the process due to the long wait. Newly-hired men got almost immediate training, and quickly started earning money as drivers. As a result, men with the same offer of hire date got a much quicker "start" date, with months earlier seniority in the ability to get priority in assignments, etc. The effort to prevent harassments had created a worse sex discrimination problem. *EEOC v. New Prime, Inc.* (W.D. Mo., 2014). The company's same sex cure also seemed to stereotype all men as being unable to train a woman without engaging in harassment; as if male truck drivers are somehow not as capable of adult, appropriate, professional behavior as are men in other occupations, where both genders train and work together without a segregated system.

New Mayor Authorizes $38 Million To Settle Unequal Pay Case. *Andrews v. New York City* (S.D. NY, 2014) involved 5,000 female School Safety Agents who did essentially the same work as male Special Officers, but were paid $7,000 less per year. They filed a case under the Equal Pay Act and Title VII. In the 2013 election campaign, candidate Bill de Blasio pledged that if he was elected Mayor he would resolve the case. He was elected and has now authorized settlement. If the case had gone to trial it may have resulted in even more liability.

Job Steering – Biscuit Assembler or Dumpster Stacker. OFCCP Charges Discrimination Against Men. The Office of Federal Contract Compliance and a federal contractor have settled a case alleging that job applicants at an Alabama plant were steered to job categories based on gender. Male applicants were slotted into Dumpster Stacker jobs, a more physical and less skilled job. Women were steered to Biscuit Assembler positions, a less physical and more mechanized job. There were a lot more

Biscuit Assembler positions than Dumpster Stacker jobs. The result is that many fewer men were hired. The alleged steering significantly limited hiring opportunities for men. *OFCCP v. Hilshire Brands Co.* (Agency settlement, 2014).

Race

Negative Comments About Interracial Relationship Were Not The Cause Of Discharge. An African-American hospital employee claimed that his romance with a White nurse was the reason for his discharge. He cited evidence of critical comments made about the relationship by others at the hospital prior to the discharge. However, the court found that the negative comments were not about race. Instead, they were about the negative effects of the romance and about the couple using work time for personal conversation and not paying attention to clients and excessive personal calls to each other on work time. The critique was race neutral. Further, the plaintiff could not refute the evidence that the discharge was due to lack of attention to patients and filling out false reports. *Thompson v. The Webber Hospital Assoc.* (D. Me., 2014).

White Teacher Has Case For Bias And Stereotyping. In *Hendricks v. Pittsburgh Public Schools* (W.D. Pa., 2014), a White teacher was fired after receiving negative reviews from her African-American supervisor. The court denied summary judgment to the school district finding evidence that the reviews were tainted by racial prejudice and stereotyping. It also found evidence of retaliation, since she was fired only two months after filing an EEO complaint. There were supervisory comments that White teachers were "not equipped to teach Black students" because they were White. The plaintiff's supervisor told her to "look in the mirror" to see what race you are, because "some people aren't made for the hood!" The plaintiff alleged she was not provided the support to succeed, including evidence of different standards for student discipline applied to White teachers. African-American teachers could use more aggressive discipline and assertive verbal behavior toward students, whereas a White teacher doing the same would be labeled a "racist" and receive critique.

Labor Relations

Pregnancy Is Not An On-Duty Injury. A police department created light duty for injuries which occurred while on the job. An officer filed a grievance when her request was denied for light duty to accommodate her pregnancy and its resulting on-the-job difficulties in performing duties. The arbitrator ruled that pregnancy did not qualify as an "injury," and it was not an on-the-job caused condition. Thus, it did not fit within the scope or purpose of the light duty policy. *In re Village of Menomonee Falls and Menomonee Falls Police Assoc.* (2014).

Family and Medical Leave Act

Overly Rigid Attention To Forms vs Reality Violated FMLA. The model DOL forms for FMLA leave contain a space for the employee to fill in "date of return." An employee did not complete this blank, because she and her doctors could not predict whether treatment of her daughter's cancer would take a longer time, or the daughter would pass away soon, and end the leave. The employer knew this was the situation. The employer fired the employee for unauthorized absence, because she had failed to properly complete the FMLA form. *In Gienapp v. Harbor Crest Nursing Home* (7th Cir., 2014), the court found a violation of the law. The form should be fully completed for planned or foreseeable absence. However, "unforeseeable leave does not require employees to tell employers how much leave they need, if they do not know yet themselves."

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