EMPLOYMENT LAW UPDATE

October, 2014

by
Bob Gregg
rgregg@boardmanclark.com

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

LEGISLATIVE AND ADMINISTRATIVE ACTION

***Republican Proposes Paid Sick Leave – Tax Credit For Four Weeks Paid Leave*.** Sen. Deb Fischer (R-Neb.) has introduced a bill (S. 2618) to give a 25% tax credit to employers who voluntarily grant four weeks of paid sick leave. The bill has FMLA-like provisions, requiring a year of employment to be eligible and anti-retaliation provisions for employers who interfere with leave. However, it is not just for employers of over 50 people. The bill is co-sponsored by Independent Sen. Angus King of Maine. Other bills in Congress propose paid leave under the FMLA, but not for smaller employers, and hearings on the FMLA issue were held this summer before the Senate Subcommittee on Children and Families. The new Republican-sponsored bill may be a counter measure, since it promotes the same sort of outcome – but without any mandate – only voluntary action by employers who wish to get the tax credit.

LITIGATION

Theme Of The Month - Franchises

Franchises are usually independent locally-owned businesses, often family operations. Your local hardware store, farm implement dealer, cleaning service, pizza delivery, fast food restaurant, auto dealership and many more are locally owned and independently operated separate corporations. They pay a national company for the ability to be a local outlet, and the local business takes on all the same risk as any other local small business. The national brand provides product, sets quality standards, but makes no decisions about the local business employment operations. Plaintiffs' attorneys suing a local franchise have often sought to draw in the national brand, and hold the national responsible for a "deeper pocket" of liability. Class action suits are particularly attractive, since a local small business is not a viable target for big damages; but a national class action could

hold the national brand liable for the sins of multiple franchisors across the country – even if the national had no role or authority in the many various decisions made by each of the individual business owners. (The courts usually do not allow the inclusion of the national to cover the acts of the local.) Now the NLRB is adopting this same strategy of nationwide liability.

NLRB Claims McDonald's Is A Joint Employer For Labor Violations. The National Labor Relations Board general counsel has issued a preliminary determination that McDonald's Corporation is a joint employer with its local franchises. Labor groups organized coordinated demonstrations and strikes against thousands of locally-owned McDonald's stores across the country, demanding higher wages. Many strikes resulted in unfair labor practice charges against the particular stores. The NLRB general counsel has decided to consolidate them into a class action against McDonald's national corporation, rather than deal with each as a separate local business issue. This is at the starting block, with many arguments on the issue to come, but it could be a very significant case for all national brands and locally-owned independent franchise businesses.

California Decides That A Franchise Is A Local Business And The National Brand Is Not Liable For The Sins Of The Franchisee. In *Patterson v. Dominos Pizza*, 2014, the California Supreme Court ruled that the national company cannot be held liable in a sexual harassment case filed by an employee of a locally-owned pizza franchise. Though the national company does set standards on each local store's quality, product ingredients, and requires local participation in national marketing/promotional campaigns, the national has no control whatever over the hiring, firing, pay, benefits, or supervision of local employees. The local is a separately operated independent corporation making its own employment decisions. Thus, the national cannot be held liable under California's Fair Employment and Housing Act. (This has been the general rule, but the NLRB's federal level action may change that rule.)

Why Is This A Significant Issue**?** This matter goes beyond simply finding a "deeper pocket" for liability. "Joint Employer" status may make very small local businesses (i.e. 10 employees) "aggregate" and required to comply with FMLA, WARN Act, and a variety of other laws intended only for larger employers – thus imposing very expensive and onerous compliance, administration and liability costs. National brands may become much more reluctant to franchise if they hold the overall liability for thousands of independent businesses. They will either (1) exercise far more control – diminishing the ability of a local company to run its own business or (2) limit franchising. Why have a franchise if you have the same liability as a company-owned store – may as well own the store, have all the control, and take all the profit to the national headquarters. Small businesses keep and spend their profits locally. Local entrepreneurs take risks and open franchises in markets that large corporations would not – rural counties, inner cities and "secondary markets" creating local jobs. A national brand would not do so on its own, since it takes all the risk of lower profits and liabilities. Many of the locally-owned franchises may simply disappear from small markets or "risky" areas. Minority-owned

franchises may be the first to suffer. This issue could have major effects on local economies. Both local businesses and local governments should be aware.

Discrimination

Age

Age Statements Make Case. A school district replaced a 62 year old guidance counselor with a brand new college graduate, 37 years younger. It cited serious performance deficiencies as the reason. However, in the months leading up to the counselor's non-renewal, the Superintendent asked the counselor if he was planning to retire and told him he might not be renewed "because we have two good young counseling interns" (one of which was the replacement). *Dunn v. Lyman School Dist.* (D. Sd., 2014).

National Origin

Chinese Professor Refused To Foster Anti-Japanese Discrimination. A professor of Chinese origin received a favorable review for tenure. Then her department chair, also originally from China, sent her a very derogatory email regarding Japanese, with a message that she (the department chair) "hated Japanese deep in her bones." The chair asked the professor to forward the derogatory email to other contacts in the Chinese community. The professor refused, claiming the message was discriminatory. The chair then sent an email labeling the professor as a "betrayer," and then tenure was denied. In the ensuing Title VII case the court found ample evidence for a retaliation case based on national origin and opposing discrimination. *Li v. Jiang (Youngstown State University)* (N.D. Oh, 2014).

Disability

Attorneys Should Know Better. The ADA and Rehabilitation Act do not hold disabled people to a higher standard on the basis of their profession (even disabled HR Managers have the same rights as other employees). However it would seem that attorneys should at least have a greater grasp of the requirements, and assure that they are in compliance before suing. The next two cases illustrate this point.

Attorney Resigned Rather Than Submit Verifying Medical Information. A Department of Veterans Affairs legal counsel informed the agency that she had chronic lymphedema, requiring daily treatment, and requested to work from home on a full-time basis. Management met with her to discuss the request and asked for more medical information to help them determine the most appropriate accommodation. However, the attorney resigned rather than supply more documentation. She then sued under the Rehabilitation Act. The court dismissed the complaint. It found the agency engaged in "good faith dialogue" and the employee prematurely cut off the interactive process. *Ward v. McDonald* (D.C. Cir., 2014).

Instant Accommodation Not Required. An attorney for a state Department of Justice developed an orthopedic disability which seriously impaired her ability to walk. She requested the accommodation of a reserved parking space by the Department of Justice building, rather than the staff parking lot two blocks away. There were only six on-site spaces, reserved for senior department heads. However, the Department of Justice told her that it would consider the request (someone else would have to be bumped out of their spot). In the meantime, she could have exclusive use of the handicapped parking slots by the building as the accommodation request was being considered. The attorney rejected this, and filed suit for failure to accommodate. The court granted summary judgment against her, finding that she had unreasonably ended the interactive process. The court found the attorney had engaged in a "I want what I want – now" demand. Her insistence on immediate and unconditional granting of exactly what she demanded was responsible for breakdown of the process. *Feist v. State of Louisiana Dept. of Justice* (E.D. La, 2014) [Reasonable accommodation requires discussion, give and take. An employee is not entitled to the accommodation they request. The employer may implement any accommodation which reasonably meets the needs of the person to accomplish the job. The employer has the right to choose among viable accommodations and select the one which also best meets the organization's operational needs. It has the right to reasonably study and consider the accommodation request and alternatives before deciding.]

Missing Evidence Forwards Case To Trial. A school band director's case of disability discrimination can proceed to trial. He requested accommodations for Attention Deficit Hyperactivity Disorder. At the school district's request he submitted medical information. He was then placed on a Corrective Action notice, and fired three months later, without any accommodations being implemented. The district claimed that his medical information was inadequate, thus the accommodations were not made. However, the district could not produce the communication which informed the band director of any deficiencies in his medical documentation. This missing evidence was enough for the court to conclude the school district may have been responsible for a breakdown of the required interactive process and resulting failure to accommodate. *Gilreath v. Cumberland Co. Bd. of Ed.*(E.D. N.C., 2014).

Grocery Store Employee's Profane Outburts Do Not Have To Be Accommodated. A grocery bagger with Down's Syndrome had a number of performance issues regarding following policies, work rules, and procedures. The company accommodated with forbearance from discipline, providing a job coach, extra training, etc. The forbearance included not firing the employee for unauthorized taking of products, and for an angry outburst toward other workers. The employee then had an angry, profane outburst toward a cashier in front of all of the customers. He was fired. In the ADA case the court ruled that the employer had made repeated accommodations. It was not required to tolerate ongoing abusive behavior toward others as a form of accommodation. All

employees should be required to abide by the employer's anti-harassment policy. *Reeves v. Jewel Food Stores, Inc*. (7th Cir., 2014).

In a similar, but more overt case, the court found that a medical center did not have to accommodate an x-ray technician's death threats against his supervisor. "Nothing in the ADA requires an employer to tolerate serious misconduct, even if it results from a disabling mental illness." The employee denied he made the threats. However, there were several signed witness statements verifying that he did. The employer had a good faith, non-discriminatory belief that he violated its policies on threatening behavior. *Williamson v. Bon Secours Richmond Health Systems* (E.D. Va., 2014).

Religion

Court Reverses Jury Verdict. Employee Did Not State A Valid Foundation For Refusal To Say The Rosary. A nursing home fired an aide when she refused to assist when a patient asked for help in saying the Rosary. The aide, a Jehovah's Witness, was awarded $70,000 for religious discrimination. The 5th Circuit Court of Appeals reversed. It found insufficient evidence to support the verdict. All employees were required to assist in patient's faith-based needs, as well as physical and other psychological needs. When requested to help the patient, the aide told a co-worker "I'm not Catholic" and did not help. She had four prior disciplines for false statements, petty theft from a patient, and attendance. She was fired for this fifth infraction, refusal to perform duties. However, she never told management that she was a Jehovah's Witness, and never told management how or why her faith would prohibit her assisting in the Rosary reading. Thus, she did not create a valid basis upon which a reasonable accommodation was required to be considered. *Nobach v. Woodland Village Nursing Center* (5th Cir., 2014).

Family and Medical Leave Act

Error In Calculation. A hospital surgical technician requested FMLA for an ongoing serious medical condition (which was also a disability). The hospital granted the leave until September 30th. Later, though, HR realized an error had been made, and FMLA rights only went until September 21st. A phone message was left for the employee on leave, "Please contact us about your leave." She did call back and leave a message. No one returned her call. A certified letter was sent informing her of the date error, but there was no proof of receipt, and she was at a different location from her residence during her FMLA recuperation. September 21st came, she did not return, and was fired. She did return on September 30th, but was informed she had been terminated. She sued under the FMLA and ADA. The court ruled in the employee's favor. Not only did the hospital misinform her and create reasonable reliance under the FMLA, it also violated the ADA by failing to engage in the interactive process for considering additional leave once FMLA was exhausted. *Baxter v. Spring Valley Hospital & Med. Center* (D. Nev., 2014).

In a similar case, the court found in favor of an employee because the employer claimed it sent a notice regarding date of required return to work, but could not prove the employee on leave ever actually received it. *Lupyan v. Corinthian Community College* (3rd Cir., 2014).

Theft Of Baby Formula Justified Discharge While Employee Was On Leave. A medical clinic employee brought suit because she was fired while still on FMLA for birth of a baby. The clinic defended by claiming the employee visited the clinic while on leave and took home six cases of baby formula and other baby care supplies, without permission. The court granted summary judgment for the clinic. The employee "should not be shielded from wrongdoing simply because she was on FMLA leave." *Bloom v. Group Health Plan Inc.* (D. Minn., 2014).

F:\DOCS\WD\25211\LEGAL\A1991944.DOCX