EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

EEO-1 Report Due September 30th. Companies with 100 employees must file an annual EEO-1. The Employer Information Report is due this month. Government contractors may soon be asked to file an Electronic Compensation Data report as part of the EEO-1.

Vets – 100/100A Report Due September 30th For Federal Contractors. The Vietnam Era Veterans Readjustment Assistance Act requires contractors to report data on veterans hiring job categories and placement in the company each year.

Dept. Of Labor Seeks To Conform FMLA To Supreme Court Ruling. The *U.S. v. Windsor* decision ruled that same sex marriage must be recognized by the IRS in tax filing and inheritance tax. The FMLA, however, provides that family leave for a "spouse" is based upon each state's law regarding same sex marriage in the state where the employee is located. So, national companies may grant FMLA to an employee with a same sex spouse in one state, yet deny it in another state. Now DOL has proposed a rule to modify the FMLA to require spousal FMLA based on the state the marriage occurred in, rather than where the employee works when the leave is requested. This will create uniformity. It will also simplify administration of FMLA for multi-state employers.

LITIGATION

Discrimination

Equal Pay Act

Nationwide Class Action Certified Against Accounting Firm. A court has found sufficient evidence that 7,000 female accountants and managers were paid less than male

counterparts for substantially equal work. The firm argued that each office or district should be viewed individually. The court disagreed, and certified a nationwide analysis under the Equal Pay Act. *Kassaman, et al. v. KPMG, LLP* (SD NY, 2014).

Sex

***Correction Counselor Fired For Having Sexual Relations In The Office Can Still Sue For Sex Discrimination – But Not For Hostile Environment Due To Other Employee's Similar Use Of Her Office*.** A substance abuse counselor in a prison had a sexual relationship with the prison's Major in charge of custody. It was carried out in the facility. Her counseling office was one of the few places in the prison with a private area, where curtains could be drawn to block security cameras. When the behavior was discovered, she was fired. However, the male Major was moved but allowed to continue to work for the corrections department. She filed a Title VII sex discrimination suit for unequal discipline. She also alleged a charge of harassing hostile work environment, because a number of other correction employees were also having sexual relations at work – in her office, thus creating an ongoing disturbing environment; her desk and personal space had been used by others for this purpose and she was humiliated because everyone knew about it. The court found ample evidence of sex discrimination in the unequal discipline given to her, compared to the man. In fact, the higher ranking Major should probably have been held more responsible for conduct violations. As to the office use by others, though, the court dismissed. First, her office was not being "violated" due to her gender, as required by Title VII. Instead, it was simply the only private place available, which was blocked from the security videos. Second, it is difficult to maintain a hostile environment case when complaining that others are doing exactly what the plaintiff has been engaged in herself. *Orton v. Indiana* (7th Cir., 2014).

Sexual Stereotyping – Man Harassed For Objecting To Vile Comments About Women. A male office worker objected to the crude sexual comments and jokes which were common among his male co-workers. They then started harassing him, calling him "gay" and referring to him with female anatomy names. His supervisor refused to take action. When he complained about physical threats he was fired, because he was "the common denominator" in the office unrest. The court found a case of sexual stereotyping under Title VII. His co-workers and supervisor considered his objection to their sexual comments to show a lack of maleness, a refusal to fit their version of how a man should act. *Barrett v. Pennsylvania Steel Co.* (E.D. Pa., 2014).

Auto Repair Company Fails To Act To Protect Female Mechanic. A new hire was the only female mechanic. Her male co-workers immediately told her "women don't belong working on cars," and engaged in overt crude sexual comments, physical rubbing, bra snapping, and touching her rear. When she complained the manager just told them to stop. Instead, the co-workers got worse, and even accosted her in a back room in a threatening manner. Her direct manager was present during some of the overt sexual comments and dirty jokes and just laughed. On hearing of the continuing behavior one

manager said "girls do not deserve to work on cars." She quit after only a couple of weeks; then filed a constructive discharge-harassment case. The company defended by claiming the behavior had not gone on long enough to be "pervasive and establish a hostile environment." The court disagreed. Harassment can be established on behavior that is either severe or pervasive. The alleged behaviors were certainly severe. They were also constant – so even if for only a short time they were pervasive. The employer did not take effective action to address the issues, despite repeated complaints. Just "talking to" employees who engage in overtly crude, hostile and physical harassment is grossly inadequate. *Schmidlin v. Uncle Eds Oil Shop Inc.* (E.D. Mich., 2014).

Race

HR Manager Failed To Investigate And Failed To Protect Employee In Spite Of Knowledge Of Supervisor's Racial Bias. The court found a valid case of race discrimination based on the discharge of a company's only African American area manager. The manager had raised repeated concerns to Human Resources about racial discrimination by his supervisor. The HR Manager failed to investigate. The HR manager then accepted the supervisor's request to fire the area manager. The crucial evidence for the case came after the fact, from the person hired as a replacement. The supervisor told her that he had fired the previous area manager due to race, and also made several racial comments. The replacement told the HR manager that the supervisor was a racist. The HR manager replied that he had known for some time that the supervisor had a reputation as *"KKK without the hood."* The court found this to be compelling evidence that the company knew about, and failed to address racial discrimination. The HR manager's failure to investigate and protect the area manager from a known racist was evidence it violated its Duty of Care to its employees. *Kirkland v. Cablevision Systems* (2nd Cir., 2014).

White Officers Can Be Fired For Falsifying Discrimination Charges. Five white sheriff's officers filed a harassment complaint claiming that an African American officer had made hostile racial statements to them. The investigation of their claims resulted in a conclusion that the five officers had made up the allegations in order to get the African American officer in trouble. They were fired. They sued under Title VII and New York Civil Rights Act, claiming retaliation for having engaged in protected activity. The court disagreed. Though the law does protect people who in good faith make erroneous, mistaken, even "frivolous" complaints, it does not protect those who falsify. In fact, the five white officers appeared to have been the discriminators, attempting to racially harass the African American co-worker via the false complaint. *Cox v. Onandaga County Sheriff Dept.* (2nd Cir., 2014).

Postal Service Tricked African American Manager To Resign For Misconduct, Even After It Knew He Had Been Cleared Of All Charges. An African American postmaster had filed a EEO complaint. It was settled. Then his management instituted an investigation of him for "criminal delay of mail," by the Inspector General's Office. The

Inspector General found no evidence of any wrongdoing, and cleared the postmaster. However, the managers did not inform him of that. Instead, his supervisor continued to repeat that "the IG is all over" the charge, and "the criminal issue could be a life changer for you." Management pressed the postmaster to submit a resignation, and sign a Settlement and Release if he wanted the charges to be dropped. He did so. The postmaster later discovered the deception and filed a retaliation case. There was sufficient evidence of retaliation for a continuing cause of action. However, the Postal Service may be able to in large part get away with the deception; by the time the plaintiff discovered the duplicity, some of the issues were time-barred. Some were not. There may be monetary damages, but not the opportunity to reverse the resignation and get an order of reinstatement. *Green v. Donahue* (10th Cir., 2014).

Religion

Fired Minister Has Direct Evidence Of Discrimination. A retail employee had excellent ratings. Then his manager discovered he was an Assembly of God minister in his off-work time. The manager's treatment immediately changed. The manager stated that he had once been an Assembly of God member but "had bad experiences" and bad feelings. The manager then began publicly referring to the employee as "pastor," rather than by his name. He began telling derogatory religious jokes and crude off-color jokes deliberately in the presence of the employee. Then the manager began faulting the employee's performance and fired him. The court found direct evidence of discrimination. Not only were the manager's comments religiously hostile, but the employee was singled out for discipline and discharge for performance, while others who had even more errors and worse performance were retained. *Calame v. Aarons, Inc.* (S.D. Ill., 2014).

Disability

Walgreens Settles Eating On Job Case For $180,000. The June, 2014 Update included *EEOC v. Walgreens* (N.D. Cal.). A long-term employee suffered a hypoglycemic emergency and ate a bag of chips to keep from passing out. He then tried to pay, but management did not accept his attempt and fired him for unauthorized eating/theft of product. Walgreens has now agreed to settle, rather than go before a jury. It will pay $180,000 plus post notices and give management training regarding disability discrimination.

Family and Medical Leave Act

Consistent Documentation Wins Case. A Wal Mart manager in Wisconsin was fired four months after taking a six-week FMLA leave. She sued, claiming the FMLA was the reason, rather than her performance. The court dismissed the case. The manager could not disprove the poor performance defense. She failed to present evidence that she was meeting the company's legitimate performance expectations. The manager could not

show any others who had worse performance and had not been discharged. A crucial factor was consistency of documentation. The manager had received a poor performance evaluation and performance improvement plan a year before taking FMLA. The performance critiques and discharge following FMLA were simply a consistent continuation of the same concerns; rather than suddenly focusing on performance after the FMLA. *Langerbach v. Wal Mart Stores Inc.* (7th Cir., 2014). [The lesson in this case applies far beyond FMLA. Too often managers let problem performance go undocumented until very late in the process. This documentation is only for the short time prior to the discharge and looks insufficient to justify discharge. All too often there has been some sort of event (FMLA, complaint of discrimination, wage dispute, etc.) just prior, which makes the documentation and discharge seem like retaliation. Start documenting when problems arise and continue consistently. This also has the greatest chance of solving problems before they drift on and on to discharge. For more information, request the article We Have The Straw That Broke The Camel's Back, But Where Is The Rest of the Camel?, by Boardman & Clark.]