APRIL 2024

BY ROBERT E. GREGG AND THE BOARDMAN CLARK LABOR & EMPLOYMENT LAW GROUP

LEGISLATION AND ADMINISTRATIVE ACTIONS

Federal Trade Commission Expresses Concerns About Artificial Intelligence Monitoring Employees. The Director of the FTC, Division of Privacy and Identity Protection, has announced that the agency is taking a closer look at AI surveillance in the workplace to determine if the agency should take action. Companies are collecting personal information on workers, including monitoring their activities, tracking work productivity, meeting times, phone calls, and keystrokes down to the second. New software can measure employees' psychological and physical condition, health, tone, emotion, and location. Employers are even providing their employees with wearable devices that can take these measurements at all hours, locations, and on and off the job. Employees do not know the scope of the information employers are collecting, how it is retained or used in employment decisions, and whether it is sold to third parties. "Enormous amounts" of personal data are being collected without safeguards. Among its responsibilities, the FTC is tasked with preventing unfair, deceptive, and anti-competitive trade practices as they affect workers who are within the definition of "consumers."

LITIGATION

Caution of the Month

Agreements Signed in New Employee Orientation May Not Be Enforceable. New employee orientation often includes signing multiple forms and documents in little time, which can make new hires feel inundated and

overwhelmed. These forms include, but are not limited to, Confidentiality/Non-Disclosure Agreements, Work-Product Ownership, Non-Solicitation/Noncompete Agreements, and Compulsory Arbitration Clauses. Typically, employers want their new hires to sign these forms by the end of orientation, which does not give the new employees time for thoughtful consideration and a clear understanding of the legal implications of the documents they're signing. Some courts are now voiding these agreements because of this. In *Rocha v. Asurion, LLC* (E.D. WA, 2024), the court refused to enforce a compulsory arbitration of all employment claims agreements and allowed the employee to file her wrongful termination claim in regular court. The 13-page Agreement had been part of a packet given to employees on the first day of employment with a request to sign during that orientation meeting if they wished to continue the job. The court ruled that the employee had no meaningful choice in whether or not to sign the document, and they had inadequate time to review or understand its effects. The court's decision used the terms "unconscionable," "procedurally and substantively unfair," and "under pressure" in describing the employer's process. *This case should be a fair warning to employers* about using a careful, transparent process with adequate advance information when asking employees to sign critical documents — especially those that are important for the protection of the company, its business information, property, and customer/client confidentiality, etc., and have any post-employment enforcement provisions. Several states now require "restrictive covenant" agreements to be provided well in advance of the hire date so the person can understand it, and even consult with their attorney before signing. Providing some documents before the hire date may be good practice generally. Documents like restrictive covenant agreements should be mentioned and included in the offer letter so the person has time to ensure they understand them before they decide whether to take the job. It is too late on day-one orientation to give any meaningful assent to the terms of agreements like this.

THEMES

Two themes are illustrated in five of this month's cases.

1. *Company Policy.* A company's policy is not the only consideration in employee relations. Cases on the ADA and Labor Relations show that rigidly following a policy can backfire.

2. *Freedom of expression.* Employees have the right to express and discuss opinions and concerns with each other regardless of company policy. Two other cases illustrate that employers too, have certain freedoms of speech and expression of opinions.

Constitution – First Amendment

Florida's Anti-WOKE Law Frozen. Florida's "Anti-WOKE" campaign has been the impetus for several other states to pass legislation seeking to ban Diversity, Equity, and Inclusion (DEI) from workplaces and other venues. Florida's Individual Freedom Act (IFA), the "Stop WOKE Act," law has hit yet one more blockage. That law prohibits public and private sector workplace training that "espouses, advances, or promotes a set of beliefs related to race, color, sex or nation of origin," which the state finds offensive (all Title VII categories *except* religious beliefs – which presumably Florida employers can espouse or promote in mandatory training). The law does *not* seem to prohibit mandatory training which *rejects* ideas or viewpoints the state considers to be against "WOKE" viewpoints. A group of private sector companies sued, claiming this law interfered with their rights to decide how to run their business and violated their First Amendment Constitutional rights. In *Honey fund.Com, Inc., et al. v. Governor of Florida, et al.,* the U.S. 11th Circuit Court of Appeals sided with the companies and blocked enforcement of the IFA. The Court found the law violated the First Amendment stating that *"by barring only speech that endorses only those ideas [the state does not like], it penalizes certain viewpoints – the greatest First Amendment sin…" … "such restrictions are an egregious form of content discrimination… That favoritism violates the First Amendment which demands an equality of status in the field of ideas."* The court then went on to provide more insight into the purpose of freedom of expression *"Under our Constitution the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers… No government can shut off discourse solely to protect others from hearing it. We must tolerate insulting, even outrageous, speech to provide breathing space to the freedoms protected by the First Amendment."* The court found that no matter how controversial an idea is, *"allowing the government to set terms of debate is poison, not an antidote…"* The government has no legitimate, compelling interest in enforcing an unconstitutional law. So, at least for now, private-sector Florida companies still have the freedom to think for themselves.

Discrimination

Religion

Mandatory Diversity Training Did Not Violate Employees' Free Speech or Religious Rights. Two Minnesota Department of Human Services (DHS) security employees, a father and son, objected to having to attend a diversity training which they claimed violated their religious beliefs regarding gender identity and their political views on race. They were denied a religious accommodation to not go through the training. They then filed Title VII and First Amendment claims against DHS. The court ruled against them on both issues. Attending the training did not violate their religious beliefs or expression rights. The decision stated that the First Amendment protects the right to be free from compelled speech which requires individuals to adopt a certain state-approved point of view as their own. However, the diversity training did not do so. No participant was "*forced to affirmatively agree*" with any of the training content. They were "*not prohibited from expressing countervailing viewpoints regarding race or gender identity*". They were only required to listen. In fact, they could take the training by video, and the only requirement was to click the video *"ON,"* watch it, and then click *"OFF"* at the end. No Constitutional or Title VII provision prohibited employees from having to listen to and be aware of the existence of other viewpoints. *Norgren v. MN Dept. of Human Services* (8th Cir., 2024)

National Origin

Fear of Voodoo. A job offer for a Nursing Home Administrator was withdrawn when the hiring manager discovered the individual was originally from Haiti. The manager made comments about "Voodoo" and "Haitian rituals," and about voodoo dolls once being placed outside the HR office after a former Haitian employee was disciplined. The manager feared the new Administrator would favor Haitian employees and bring voodoo into the operation. This resulted in a Title VII Nation of Origin suit. The company settled, with backpay to the rejected applicant, and mandated management training, new policies on discrimination in hiring, and compliance monitoring by the EEOC. *EEOC v. Hobe Sound OPCO* (M.D. FL, 2024)

Disability

Removal of Accommodation Violated ADA – Company Policy Did Not Justify Action. Once a reasonable accommodation has been put in place, be very

careful before changing or stopping it. There should be some documentable, compelling reason or change in circumstances along with a documented interactive process or discussion with the employee before any change happens. This did not seem to occur in *EEOC v. Walmart Stores East* (D.SC, 2024). A worker with a prosthetic leg and joint disease was provided the accommodation of using one of the store's electric carts to move around the store to do his job. Several months later, he was abruptly informed that the company policy was that carts were for *customers only*, and he could no longer use the cart. No other form of accommodation was offered or discussed with him, and since the employee could no longer effectively get around the store, he was placed on an indefinite, unpaid leave. He filed a disability complaint with the EEOC, which found the company's actions in violation of the ADA. There appeared to be no evidence the provision of the cart had caused any hardship on the company or customers during the months it was in effect. Simply pointing to a "policy" about carts being for customers was not enough. Reasonable accommodation often requires some modification of standard policies. Walmart agreed to pay the employee $70,000, stop eliminating any existing accommodations, and be subject to EEOC monitoring for two years.

Labor Relations

Ordering Employees to Stop Discussing Their Gripes Was Unfair Labor Practice, Even Though Supervisor Was Trying to Follow Handbook Policy. Several workers expressed concerns about racism and discrimination. Their supervisor told them they should cease talking about their complaints among themselves and all complaints should go "through the chain of command," otherwise there "would be a problem" and they could be in trouble. One person in the group was then fired when he continued to discuss complaints. He filed a charge with the National Labor Relations Board, which found that the fired employee and the others had been engaged in protected concerted activity and the firing was an unfair labor practice. On appeal, the court upheld this decision. The supervisor claimed he was only trying to follow the company policy of how all complaints of discrimination should go to department management and Human Resources, as stated in the handbook. The supervisor's warning, regardless of intent, interfered with workers' rights to discuss work issues among themselves. *Colant Americas Inc. v. NLRB* (3rd Cir., 2024). This matter could also be a Title VII or state EEO law retaliation issue for punishing those who raise discrimination concerns. Also, regardless of what a policy may state about complaint processes and procedures, all employees

have a right to discuss their concerns with co-workers. Making management formally aware of a complaint, versus comparing experiences, empathizing with, or griping with co-workers are two different things. Both can be protected activities under a variety of laws. Supervisors should be made aware of employee rights in both of these activities, so they do not blunder into liability, as did the supervisor in this instance.

Unlawful Surveillance. In *NCRNC, LLC v. NLRB* (DC. D.C., 2024), The National Labor Relations Board ruled that a company committed unfair labor practices during a union organizing drive. The company suddenly created a Manager On Duty Plan which increased the number of supervisors present during the unionizing effort. The NLRB found this was for monitoring and looking for activities that might show which employees were pro-union. This sudden change from the regular supervising level seemed to be an intimidating factor to workers' rights to engage in a fair election process. *On the other hand*, the NLRB ruled that the employer *did* have the right to hand out flyers and other literature advocating against having a union. This activity was within the employer's Free Speech rights. The NLRB could regulate surveillance behaviors, but not employers' expression of opinions or ideas. [Also see prior case note on *Honeyfund.Com v. Governor of Florida* – employers' free speech case.]

Personal Liability

Immigration – Criminal Liability — Four Years in Prison. The owner of several hospitality staffing agencies was sentenced to four years in prison and $3.5 million restitution for having arranged the employment of unauthorized aliens, and related tax evasion. He arranged placements in hospitality venues – hotels, bars, restaurants. Federal and state taxes were not withheld from the worker's wages or reported to the IRS. Other actors in the staffing agencies and hospitality sites were also prosecuted as co-conspirators and will also be sentenced. *U.S. v. Sutka, et al.* (S.D. FL, 2024)

Family & Medical Leave Act

Reduced Hours Warrants Modified Performance Standards. An employee took FMLA leave which significantly reduced the hours she worked during that time. Following the leave, she was fired for having not met her performance standards for work production, which included the period of FMLA leave. In the ensuing suit, the court found there was a valid FMLA claim that the employer

unlawfully failed to adjust its performance expectations to reflect the leave in the evaluation. This could constitute retaliation for having taken the leave by imposing the same standard as if she had worked full time, then firing her for not having produced while she was actually off work – a seemingly impossible requirement to meet. *Wayland v. OSF Healthcare Syst.* (7th Cir., 2024)

OTHER RECENT ARTICLES

What Businesses Need to Know About the Corporate Transparency Act (CTA)

By Patrick Neuman, Peter Tirella, Luann Peterson, Jeff Storch | 3.7.24

Author

Robert E. Gregg
(608) 283-1751