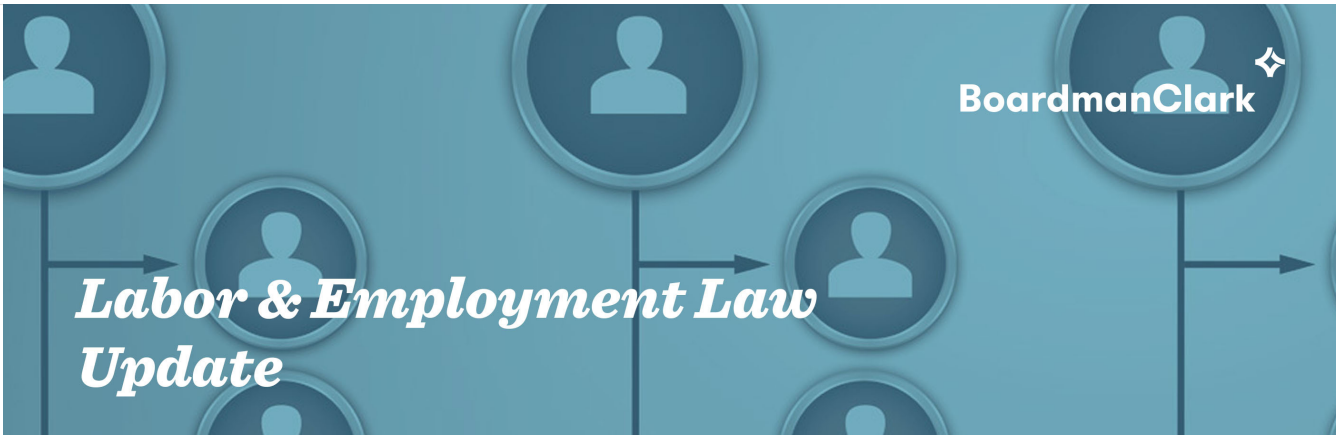

ChatGPT Claims That Everyone Should Just Know That It Provides False Information And Cannot Be Trusted

This and more in this month's roundup of cases impacting the world of labor and employment law.

ROBERT E. GREGG | 08.02.23

LITIGATION

Strangest Defenses of The Month

ChatGPT Claims That Everyone Should Just Know That It Provides False Information And Cannot Be Trusted. OpenAI, the parent of ChatGPT, is defending a defamation case brought by a radio host. ChatGPT reported that the radio personality had been an officer of a gun rights organization and had been accused of misappropriation of funds and embezzlement from the organization. This information was widely disseminated. The truth is that the radio host had no involvement with the organization and had never been accused of embezzlement of anything. He sued OpenAI for defamation, for having reported the false information. In defending the case OpenAI has stated that the information ChatGPT provides cannot "reasonably be relied on" and "by its very nature AI-generated content is probabilistic and not always factual," and there is "near universal consensus" that it should not be trusted, without extensive fact checking and research to see if it is fact or a fictitious invention. So, no one should have actually believed the report. The company goes further in its defense. Defamation generally requires an element of "malicious intent" or "acting with malice" when giving false information. OpenAI

claims that ChatGPT is incapable of this. Malice depends on a "state of mind." AI has no mind. It has no feelings or emotions at all. It is incapable of having a malicious state of mind, and thus cannot be accused of having the intent required for a defamation case. It just mindlessly spews out content without any thought of whether it is truth or fiction. OpenAI has asked the court to dismiss the case, based upon these defenses. *Walters v. OpenAI, LLC* (ND. GA, 2023) {Just one more warning about the use of AI for employment purposes. Even its own parent says it is untrustworthy.}

Misdirected Defense — Investigate the Investigators' Tactic Backfires in $35k Sanctions. A certain defense tactic seems to be a trend. When things are not going your way, and the facts may be against you, try to shift the focus and try to blame and discredit the court, the judge, the election officials, the auditors or the government agency trying to hold you accountable. In *Cal. Civil Rights Dept. v. Activision Blizzard, Inc.* (Superior Ct. of Cal. – LA, 2023) the company was under pressure in a discrimination charge of having a "Frat boy culture" and allowing consistent sexual harassment of female employees. Rather than just defending the actual allegations made by the female employees, the company engaged in an extensive effort to also investigate and try to discredit the Department's investigators who had done the fact finding in the case. In spite of the court's cautioning the company of this area of inquiry, the company persisted in gathering substantial information on the two investigators and peppering the Department with discovery requests about the investigators, which had no relevance to the facts of the actual discrimination charges. The court found this tactic to be unwarranted and that the company had persisted in it "over objection and without substantial justification, outside the scope of permissible discovery." The company's tactic was described as "baseless and intrusive." The court-imposed sanctions against Activision of $35,000 to be paid to the two investigators.

Benefits

Amazon Settles COBRA Notice Case. *Lites v. Amazon.com Services, Inc.,* (S.D. FL, 2023) is a suit over improper COBRA notices and violation of ERISA. The case alleged employees received notices written in a misleading, confusing, and intimidating manner, which were intended to discourage people from staying on the health plan. The notices contained language emphasizing penalties and criminal charges which could be brought against those who filled out forms improperly or put erroneous information on their applications. These threatening statements outbalanced the standard information regarding COBRA rights and how to apply for health insurance continuation. Amazon's defense was even if the notices "were not perfectly drafted in

every word, they were still legal." The parties have agreed to settle the case for undisclosed terms.

Age

$2.4 Million Settlement – Company Announced Discrimination. A pharmaceutical company is paying $2.4 million to settle an age discrimination case. The company had a large number of older workers and announced that it was making a push to hire more millennials (the age 25 to 40 generation). Thereafter, older job applicants alleged they were subjected to higher scrutiny and tougher standards and were rejected at higher rates than younger candidates. The EEOC brought an ADEA case on behalf of the older applicants. The company settled without any admission of fault. The $2.4 million will be paid to applicants whom the EEOC alleged were wrongfully denied jobs. The company's position was not helped by its announced push to hire younger people. *EEOC v. Lilly USA, LLC* (S.D. IN, 2023)

Disability

Can't Test the Dog. A firefighter requested the accommodation of allowing his service dog to be at work to help alleviate his PTSD symptoms. He did not request the dog accompany him on fire calls, just in the station house. The city ordered psychological evaluation of the firefighter to verify his PTSD condition. *It also ordered that the service dog undergo testing and evaluation* so it could decide if it was truly qualified as a service animal. It denied the accommodation until the employee submitted the dog for testing. This resulted in an ADA case. The court ruled that the city did not have valid grounds to "compel the dog to sit for an examination." The core issue was whether it would be an undue hardship to allow a dog in the workplace. Putting the dog through its paces to ascertain exactly what services it was qualified for and how it performed them was of little relevance to this issue. In fact, the court then found that the city's push for testing and evaluation of the dog was actually an admission that a service dog (trained to the city's approval) would be reasonable in a firehouse. Otherwise, there would have been no reason to ask for the testing. Thus, the denial of accommodation was not based on any undue hardship and did not comport with the ADA. *Meyer v. City of Chehalis* (W.D. WA, 2023)

Deputy Wins $750k in Shoe Dispute. A deputy sheriff requested the accommodation of wearing soft-soled boots to alleviate his hip deterioration condition and to be assigned to one of the vehicles which had a lower platform for getting in and out. The department refused to grant either accommodation and threatened discipline if he wore soft-soles. It then proceeded to assign the more accessible vehicles to less senior officers. In addition, the department ordered the deputy to undergo additional physical training not required of others. The deputy filed an ADA case for failure to

accommodate and retaliation. A jury found in his favor. There was no showing of why soft-soles would create any undue hardship, and in fact, other officers occasionally wore soft-soles without anyone apparently noticing or caring. The extra training was found to be retaliatory and creating a hostile environment. The award was $750k. The plaintiff's attorneys will also submit an additional claim for attorneys' fees. *Timm v. Sangamon County* (C.D. IL, 2023)

Sex

Doctor's Bedside Manner Outweighs Discrimination Claim – Don't Curse at Patients and Call Them Names. A doctor sued a hospital alleging that she was discharged due to sex discrimination. She claimed that women were held to higher standards than men, and subject to discriminatory treatment and her termination was discriminatory. The hospital defended the Title VII sex discrimination case claiming the doctor was fired for continuing hostile behavior toward staff and patients. The doctor had received three performance warnings for her unprofessional behavior. Among the incidents cited were telling a technician she "was going to f — — kill someone right now!" and threatened to slap the technician. As she was treating a patient in severe pain she told him, "You should have taken responsibility for your own health and that is why you're in this situation!" The final incident was calling a patient an "asshole" and then yelling, "I don't have time for this f — — patient!" The court found this evidence and the hospital's repeated attempts to give warnings were sufficient to justify a discharge and overcame any allegations of discrimination. *Quayle v. Catholic Health Initiatives of Colorado, et al.,* (10th Cir., 2023)

Wrongful Termination

Football Coach Stays Fired. A former head college football coach lost the appeal of his termination. He challenged the sufficiency of the evidence against him, and claimed the penalty was too severe for the situation. The court ruled that his failure to report a fight between two of his players in which a gun may have been involved was a clear violation of his duty as a college employee and possibly of the federal Clery Act anti-crime and violence reporting requirements. The coach was actually involved in the incident and went to the players' dormitory to intervene and stop the situation. He knew a gun may be involved but did no search, did not report to campus security as he should have, or to other campus authorities in the next days. He also found prohibited marijuana in the dorm room, gave it to one of the player's fathers to dispose of, and did not report it to anyone. When the incident later came to light, the university terminated the coach's employment. The court upheld the discharge. *Boulware v. University of North Carolina Board of Governors* (N.C. Ct. of Appeals, 2023)

Wages and Hours – Fair Labor Standards Act

DOL's Tip Credit Rule Withstands Challenge. A number of restaurant industry groups sued to block the Dept. of Labor's (DOL) Tip Credit Rule (effective December 2022). In *Restaurant Law Center, et al v. U.S. Dept. of Labor* (W.D. TX, 2023), the court rejected the challenge that DOL exceeded its authority in promulgating the rule. It found the DOL acted within its scope of authority under the FLSA. The Tip Credit Rule allows a sub-minimum wage if workers can keep tips for performing waitstaff or similar tipped duties. It prohibits employers from siphoning off any portion of the tips and requires full minimum wage for hours spent in non-tipped duties.

Missing Records Shutter Window Company's Defense. Keeping records is crucial. A court has found validity in several window blind installers' claims they were due high levels of overtime pay. The installers claimed they often worked 70 hours per week, without overtime pay. The company denied any such excessive level of hours worked. The *standard FLSA burden* is placed upon the employee to "*prove with definite and certain evidence that he performed work for which he was not compensated.*" The installers did not actually have such clear evidence, except their own word and a few work orders. *However*, the company had not preserved the time records. It had nothing with which to refute the allegations. This voided the standard burden of proof. When employers do not keep records for the required period, the DOL or the courts may presume the employer is trying to avoid paying proper wages, and then may simply accept the worker's word about how many hours they worked. The burden now shifts to the company to show "definite and certain evidence" to refute those allegations. *Flores, et al. v. FS Blinds* (5th Cir., 2023). Employment records require a maintenance system. Wage and hour claims have up to a three-year statute of limitations, so these records should be kept at least that long. Other sorts of records have even longer retention requirements. Failure to retain records can result in court decisions such as this one, or fines and penalties by the various regulatory agencies.

Court Rejected Settlement Agreement Due to Confidentiality Provision. In the FLSA overtime pay case of *Melendez v. Cosun Construction Company* (S.D. NY, 2023), the court rejected the settlement reached by parties because it contained a confidentiality provision which would prevent the plaintiff from talking to others, including the press, about details of the complaint he had filed. The court found all other provisions of the settlement to be fair and reasonable but balked at the "gag order" provision. The provision was viewed to violate public policy and deny other workers the chance to learn of information relevant to their own rights and remedies. If and when the parties remove the provision, the court will approve the settlement. "Gag order" confidentiality clauses are coming under increasing

scrutiny. Congress made them illegal in settling sexual harassment cases. Such no-tell provisions are seen as allowing employers to cover up wrongdoing by paying off and silencing individuals, while continuing to engage in the same problem practices toward the rest of the workforce.

Labor Relations

Starbucks Ordered to Post Employee Rights Notices in All Stores Nationwide. A NLRB administrative law judge (ALJ) found a pattern of unfair labor practices by Starbucks in its efforts to thwart union organizing and pro-union elections by its employees. According to the judge, Starbucks' actions in those locations which organized send a nationwide message to employees at all of the 9,000+ Starbucks stores that "they can only assume they are risking their livelihood by organizing…" Starbucks was ordered to "cease in any manner interfering with, restraining or coercing employees…" It must reopen three stores it closed after the employees voted to unionize and rehire all those laid off. Starbucks must also post paper notices in all stores and send electronic versions to all employees, nationwide, about their rights to organize and their protection when doing so. In *Re Starbucks and Workers United* (NLRB, 2023).

NLRB Orders Union Election for Duke University PhD Student Assistants. In a continuing line of decisions giving employee rights to student athletes and teaching assistants, the National Labor Relations Board (NLRB) has ordered Duke University to hold and recognize the results of a union election by its PhD student teaching and research assistants. The university argued the graduate assistants were not employees and were only engaged in educational-related activities. The NLRB disagreed, finding the money paid to the assistants was for productive work, which were duties regularly performed by faculty or staff for pay. The assistants were supervised and required to meet performance standards, the same as any other employee. In *Re Duke and South Regional Workers United* (NLRB, 2023)

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