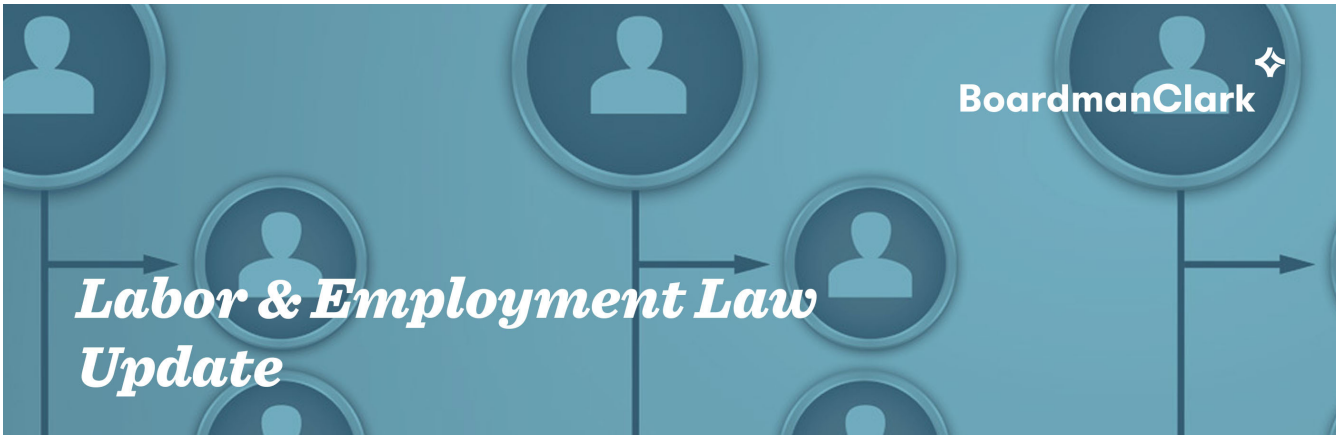

SEC Whistleblower Payments Reach $1 Billion

ROBERT E. GREGG | 10.07.21

LEGISLATIVE AND ADMINISTRATIVE ACTIONS

SEC Whistleblower Payments Reach $1 Billion. Whistleblowers who report violations of the Securities laws can receive a "bounty" if their information leads to findings of wrongdoing. The Securities & Exchange Commission started this program in 2012. SEC investigations, finding of violations, and prosecutions have increased. This is in part due to a dramatic escalation in whistleblower-provided information and findings of larger violations. The $500 million mark was reached in early 2020. So only the past year and a half have resulted in half of the $1 billion in awards. A great number of the tipster whistleblowers are employees or former employees of the companies which are then investigated and found in violation of laws. This is just one of the federal programs which provide payments to those whose reports lead to successful exposure of serious violations. The False Claims Act is another such major law impacting those who contract with and/or bill the federal government.

LITIGATION

Theme of the Month – Negligent Training of Employees

Three cases this month illustrate that training employees and managers in how to implement policies and practices is important. The cases allege that the failure to properly educate staff and supervisors led to the harm of other employees or customers. All managers should have a solid understanding of company policies and how to properly use them. Employees should also be trained on how to handle critical or stressful situations; in these cases security or angry customers.

Privacy and Fourth Amendment

Contractor's Strip Search in Parking Lot Violates 4th Amendment. Like several other states, Georgia contracts with private companies to operate its prisons. A female prison guard/correctional officer set off the metal detector as she exited the prison. The company was well aware that the detector was prone to false alarms. Nonetheless, the company's security team followed her and stopped her in the middle of the parking lot, then conducted a full strip search and invasive body cavity search for contraband, in full view of the public, her co-workers and the inmates looking out the prison windows. They found nothing. In spite of this, security called the local city police and falsely reported tht the officer "had contraband on her person." She remained in custody until the police arrived. The police searched her vehicle. Then they performed a second public strip search and body cavity exploration and again found nothing. The correctional officer alleged she suffered physical and psychological harm and could not continue work. She sued the company, the security captain, and the city police department for the "dehumanizing" search, under the Fourth Amendment of the Constitution for unreasonable search and seizure; negligence in employee training; and failure to implement effective policies. The Constitution generally applies to acts of public sector government agencies, not to the private sector. The company defended by claiming it is a private sector company and this was a matter of private employment (where personal injury cases may be more limited by Workers Compensation laws). It asked for the case to be dismissed. The court disagreed. The company was a government contractor, which operated in place of the state carrying out a state government function – prison operation. The company and its employees were "state actors" in carrying out security functions when searching the officer. Thus, the private government contractor is subject to the Fourth Amendment suit. *Curtis v. CoreCivic Inc., et al.* (S.D. GA, 2021).

Injury to Customers

Negligent Training – Argument Over Grout Leads to Assaulting a Customer. A court held there is sufficient evidence for a jury trial as to whether Lowe's lack of training was responsible for injury when an employee punched a customer, causing permanent injuries. A new employee who had not completed initial training was assigned to work alone and unsupervised in the Flooring Department. He got into an argument with a customer over the proper grout to use for a project. At some point, the employee struck the customer in the head. The employee claimed the customer had threatened to strike him. The court stated that "It would seem self-evident that a store employee has an obligation not to assault the store's customers." However, the employer also has an obligation to train employees as to how to properly handle confrontational situations. Thus, a jury should decide whether negligence in provid-

ing such proper training was a factor in the employee causing the customer injury. *Tymiv v Lowe's Home Centers* (Supreme Ct. of NJ, 2021). *Fair Warning*: This case should serve as an important warning to all businesses which serve the public. Angry customer incidents have increased dramatically, with frequent occurrences of insulting and yelling at staff and customers assaulting employees or other customers. These are no longer "isolated incidents." They occur every day. It should be a "known hazard." So, it is foreseeable that your operation will experience this, and training your employees in how to respond should be a required part of all employees' training. The failure to do so creates a potential "negligent training" and "unsafe place" liability, both to the injured customer and/or the injured employee.

Discrimination

EEOC Sued For Discrimination in Seven Federal Cases. In what may seem to be a role reversal, the US Equal Employment Opportunity Commission finds itself in the unusual position of being the defendant in seven current federal court cases brought by EEOC employees. The employees allege differing sorts of illegal discrimination, all of which are covered under the EEOC's own Title VII responsibilities.

Race *Medley v Burrows* (D.C. DC, 2021) alleges racial mistreatment and demotion.

Race and Gender *Menoker v Lipnik* (D.C. DC, 2021) was filed by a Black 30-year career EEOC attorney alleging white and male employees received more favorable treatment in selection for Administrative Law Judge positions. When she complained, she suffered ongoing retaliation.

Unique Pay *Hardiman v Lipnic (N.D. Ill, 2021)* A Black, female IT Specialist has alleged unequal pay and promotions as compared to White, male IT employees.

LGBT In *Kigasari v Dhillois* (N.D. Cal, 2021), an EEOC investigator alleges that she was subject to negative treatment and discipline because she is a gender non-conforming lesbian.

Sexual Harassment Three different harassment cases have been filed against the EEOC's Florida office. Male EEOC investigators allege that their female manager made unwelcome sexual advances and retaliated when they rebuffed them. *Hernandeza v EEOC; Nieves v EEOC; and Tour v EEOC, et al.* (S. D. FL, 2021).

The EEOC has denied discrimination and is vigorously defending all seven cases. It is not unusual for any very large organization to have a case or two filed by its employees, even the EEOC. But seven going on at once is an unusual number.

Disability

Unclear Policies and Lack of Management Understanding and Training Makes Case. A Wal-Mart employee was injured on the job. She then had a number of absences. She was fired for "excessive absence." The employee filed a disability discrimination case over being fired for disability-related absences to care for her condition from the recent on-the-job injury and Wal- Mart's failure to accommodate. The court found sufficient grounds for the case to go to a jury. It was unclear whether there were sufficient unauthorized absences to warrant discharge, or whether the disability-related absences were the main reason. The absence policy itself was "ambiguous" and unclear to employees regarding time off for work-related injuries or disability versus other reasons. The court found that it was questionable "whether store management even understood the policy upon which it based the termination;" "it doesn't seem the rule was well understood by the management." *Benson v Wal-Mart Stores East* (1st Cir, 2021). This case is a reminder that policies should be clear and understandable, and managers should be required to actually read and demonstrate that they understand the policies they are supposed to be responsible to implement.

Inflammatory Cartoons Reverse Fire Drill Injury Verdict. An appellate court reversed a jury verdict in an ADA and New Jersey state discrimination law case. It found the jury was prejudiced by "inflammatory cartoons" the plaintiff's attorney used in closing arguments. The case was brought by a state employee who used a wheelchair. She was injured during a fire drill because there was no protocol for accommodating disabled employees and the employer did not provide necessary instruction or assistance to her. In the drill, she was denied use of the elevators and ordered to use the stairs, which resulted in injury to her. She was unable to return to work. In closing arguments, the plaintiff's attorney introduced cartoon posters that had not been shared in advance with the other side. The trial court allowed them over the defense's objection. The cartoons included "buffoonish caricatures" of the employer and supervisors. A cartoon depicting severe pain surrounded by flames. A cartoon of a seriously distressed figure in a wheelchair saying, "Oh No! Oh No! What Now!" (which did not match the evidence). The Appellate court decided these cartoons did not reflect the evidence and "went well beyond the wide latitude afforded in closing arguments." *Migut v State of N.J. et al.* (Superior Ct. of N.J., 2021).

Benefits

Ed Asner Can Continue ERISA Suit. A court has declined to dismiss a case filed by now-deceased actor Ed Asner, against the Screen Actors Guild – American Federation of TV and Radio Artists Health Fund. (Asner was once president of the SAG Actors Union.) The suit alleged that in a SAG-AFTRA merger, the organizations misrepresented the health coverage impacts, resulting in a substantial decrease of coverage for senior performers and retirees. The defendants sought dismissal, among

other reasons because Mr. Asner had passed away and could no longer pursue the case. The defendants also argued the ERISA case should be pre-empted by the age discrimination laws. The court disagreed on both issues. Asner was not the only plaintiff, and several plaintiffs are seeking a class action certification which may add even more to carry on the suit. Also, there was no preemptive effect since the ERISA allegations covered misrepresentations under the Plan's fiduciary duty, which is not within the scope of the age discrimination laws. *Asner v SAG-AFTRA Health Fund et al.* (D Cent. Cal, 2021). Sometimes the death of a plaintiff will render a case moot, and result in dismissal or greatly decrease liability. (See March 2020 Update regarding two attorneys who tried to keep the death of their client secret in order to stall and get a substantial case settlement). Other times, the court can allow substitution of another person to continue the case; or as here, there may still be other plaintiffs to carry on.

Labor Relations

Benefits Switch Without Bargaining Violated NLRA. Most companies are concerned about benefit costs and explore alternatives during renewal periods. However, it is important to remember the people these plans cover, especially when there is a Collective Bargaining Agreement (CBA) covering wages, hours, terms, and conditions of employment, including benefits. A concrete company changed to a less expensive health plan and administrator. It did so without bargaining with its union since the CBA gave the company the right to change carriers "at its discretion, as long as benefits remain substantially the same" following any changes. The union filed an Unfair Labor Practice charge. The NLRB found that the new health coverage forced workers to change their doctors and health care network and led to considerable increases in co-pays and costs to the employees; it limited or eliminated several categories of care and is "substantially inferior" to the old plan. It did not offer "substantially the same benefits", as required by the CBA. The company violated its duty to bargain before making the change. In Re: *County Concrete Corp. and Teamsters Local 783* (NLRB, 2021).

Author

Robert E. Gregg
(608) 283-1751