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LEGISLATION AND ADMINISTRATIVE ACTIONS

Senate Confirms Wages and Hours Director. Jessica Looman has been confirmed as the Department of Labor's Wage and Hour Division Director. The position has been vacant for about three years; however, Ms. Looman was Deputy Director and has been essentially serving as the Acting Director. Top DOL positions are notoriously difficult for receiving confirmation in a closely divided Senate, regardless of the administration, because the DOL has significant impact in almost every area of employment. If the candidate is perceived as "pro-business" the labor lobby objects; if "pro-labor," the business lobby fights the confirmation. Given that Looman has spent years as Acting Director, this confirmation will probably not result in much change.

National Labor Relations Board Finalizes New Joint Employment Rule. The NLRB rule, which broadens the rights of leased workers and employees of franchised operations, may not really be "new." It continues the Board's process of returning its standards to what existed prior to changes made by the previous administration. Now it becomes easier for leased workers to organize unions or file Unfair Labor Practice complaints at the locations in which they are placed and for employees of franchise locations to join in franchise-wide union organizing and file complaints against the franchisor, not just their local franchise. The lessee of the worker and the overall franchisor can become joint employers with the placement agency and local store. The rule applies if the franchisor or lessee exercises control regarding key job terms, pay, benefits, or is significantly involved in these issues, or has a right to insert itself into these areas (even if it does not actually do so.) Companies which lease employees usually do control the work conditions and direction of leased workers and negotiate the pay rates with the placement agency. A franchisor may have a greater ability to avoid joint liability if it carefully avoids imposing employment

related policies and control over the franchise operations. This rule applies to labor organizing and unfair labor practice charges. Other federal and state agencies also have standards which create joint liability for discrimination and a variety of other cases. These have been in place for a long time, so employers should already be well aware that leasing workers from an agency does not make them somehow immune from employment suits.

LITIGATION

This month's Update features a couple of unusual employers — Beer and Snake Handlers. The issues are not strange, but we rarely think of beer in the employment context except for the Drug and Alcohol Policy in the company handbook, and we don't think of snake handlers at all. Yet there are brewers and snake handling companies, and they have employees – with the full range of employment issues.

Consensual Relations

The Anti-Harassment laws prohibit **unwelcome** attention of a sexual or other discriminatory nature. They do not cover welcome consensual relationships. Nonetheless, those welcome relationships can also lead to complications, legal and otherwise, so employers often have policies and pay attention to those as well.

Snake Handler Slithers Out of Liability After Wife Discovers CEO's Affair with HR Manager. Pro Exotics Reptiles specializes in shipping live snakes to individuals, pet stores, etc. around the U.S. It is owned by former NFL professional football linebacker, Chadwick Brown. *Hersch v. Brown, et al*. (D. CO., 2023) is a case in which the company's Human Resources and Finances Manager sued, alleging she was fired when Brown's wife discovered her long-term romantic affair with Brown. She claimed that Brown had previously talked her out of breaking up with him and urged her to stay with the company, and the affair continued. Therefore, he had created a contract type guarantee of employment stability. She argued that she could not be fired without a just cause showing that she was not adequately performing her job duties. The court ruled that there was no foundation and dismissed the case. The relationship was consensual; there was no evidence of any threat to the job for not continuing it. Simply pleading with or persuading someone to stay in a relationship does not create a promise that it will continue for any set time. There was no evidence that any promise or assurances had been made about job security or an implied employment contract. There was nothing which would alter the general At-Will nature of employment with the company and create damages for termination of that employment. The court accepted the argument that "it is not illegal to have an extramarital relationship, and when one person terminates it, the other person is not entitled to compensation." [It turns out that there are a number of companies which

ship reptiles, including thousands of live snakes. It seems to be a thriving trade. The next time you are on a plane, there might be other cargo also along for the ride.]

Federal Judge Abruptly Resigns After an Ethics Probe on Failure to Reveal Romance with an Attorney. Judge David Jones from the Southern District of Texas Federal Court abruptly resigned from his employment on October 15, 2023, in the wake of an ethics probe into his years-long romantic relationship with an attorney. The judge had not disclosed their relationship as conflict-of-interest rules required. The attorney and her firm continued to represent clients before Judge Jones and received a number of favorable rulings and awards of fees. There is no rule which prohibits judges from having romances or other personal relationships. However, judges are supposed to disclose any close romantic, family, business or other relationships they have with the law firms or the parties who have cases in their court. Such conflicts of interest can create perceptions of favoritism and taint cases. Judges should generally recuse themselves from cases in which these conflicts are present. When the romance was discovered, Judge Jones claimed that since he and the attorney were not married, he thought disclosure was not necessary. However, the ethical conflict-of-interest rules apply to domestic partners, romantic partners or other intimate or close relationships. Judge Jones' years-long undisclosed romance cast doubt upon the objectivity of his decisions in which the attorney or her law firm were involved. This now may require the Federal District Court to revisit and review **every decision he ever made involving that firm** during the term of the romance. It may lead to reversal of decisions. Several former litigants have already filed petitions for review and reversal of decisions. This issue is not confined to the courthouse. Many other public entities and corporations have policies regarding consensual romantic or other relations which can create favoritism or conflicts of interest. These range from prohibiting them, to allowing them but requiring the parties to inform the employer of the relationship. For more information, cautions, and examples of policy models, request the article *Restrictions on Workplace Romance and Consensual Relationship Policies* by Boardman Clark.

Trade Secrets

Brewer Sues for Pirating of Secrets. Boston Beer Company, the brewer of Samual Adams and Angry Orchard, sued a departing employee alleging he took secrets and confidential information about the processes, business plans, finances, and marketing strategies and went to work for a direct competitor. The company alleges that shortly before departing, the former manager connected his own USB device to the company computer, copied the critical information, and walked out with it. The craft beer business is highly competitive and taking information can be extremely damaging to Boston Beer. The company is seeking to have the manager banned from

working for the competition for a year and from using the misappropriated information, plus additional damages to be determined. *Boston Beer Corp. v. Soudant, et al.* (S. Ct. of Suffolk Co., MA, 2023) [The author of this Update, Bob Gregg, once worked for a brewery as a Beer Taster, and can attest that formulas, processes, and market strategy were highly guarded secrets subject to great security and can "make or break" the success of a brewer. On a further note, the job was "Taster," swallowing the product was not allowed.]

Discrimination

Sex

Paternity Leave Suit Nets $5 Million. A steel company will pay $5 million to settle claims that it denied male employees requests for paid parental leave following birth of their children, while granting such paid leave for female employees. The company allowed 6 to 12 weeks of paid "maternity leave" yet limited men to 30 days of unpaid leave. This was not an FMLA case, over that law's **non**-paid parental leave requirements. Rather, it was a Title VII sex discrimination case over different treatment and the company's "stereotypes about men's roles as breadwinners and women's roles as caregivers," i.e., men are not capable of "bonding" with newborns, and don't need such paid leave. The company changed its policy to be gender neutral this past spring. It will provide backpay to the men who were denied the leaves. *Johnson v. Gerdau Macsteel, Inc.* (E.D. MI, 2023)

Guess Will Pay $30 Million to Settle Harassment Case Against Company Founder and Board of Directors. Clothing company Guess will pay $30 million to settle a suit which alleged the company CEO and co-founder engaged in years of sexual harassment and "predatory behavior" toward corporate employees and models, and that other officers and the Board of Directors ignored complaints which fostered and sustained the harassment. Models allege that for years, when they reported the CEO's harassment, Human Resources told them it had received prior complaints of the same behavior, and then no action was taken to address the issue. The suit named the CEO, other officers, and board members. The case was brought by **a pension fund/stockholder as a shareholder derivative suit** rather than by the individuals who were harassed. The pension fund alleged a violation of fiduciary duty which has had an adverse impact due to negative publicity, loss of business, and liability costs on the stock value and profits which is harmful to shareholders. In addition to the $30 million payment to the Pension Fund and to affected individuals, the settlement bans the CEO from contact with models except in highly public venues, and the company will create a Diversity, Equity and Inclusion Committee which will implement concrete mechanisms to identify, investigate, and remedy

sexual harassment including measures to address the special challenges presented by executive misconduct. The settlement is accompanied by the resignation/ "retirement" of the company's other co-founder. *Employees Retirement System of Rhode Island v. Marciano, et al .and Guess?,* (Del. Ct. of Chancery, 2023)

Even Minor Discrepancies Add Up. Pfizer, Inc. will pay $2 million in back wages to 86 women in its corporate headquarters. A Department of Labor – Office of Federal Contract Compliance Programs (OFCCP) audit found they were underpaid. The investigation found that the employees in the company's Affirmative Action unit were paid somewhat less than male employees. The OFCCP found the matter involved "minor pay discrepancies," but they added up over time. The company denied any intent to create unequal pay and will analyze its compensation package for fairness and set aside an additional $500,000 for potential salary adjustments. In *RE Pfizer, Inc.* (U.S. Dept of Labor, 2023)

Same Department – Different Jobs. A senior Photographer-PR Specialist in a company's Marketing Department filed an Equal Pay Act (EPA) case. She claimed that she was paid less than a male coworker and that the company paid women in the department less than the relevant industry standard while men received pay at the industry standards. The case, however, failed to meet the standards of the EPA, which requires an employer to provide equal pay for men and women performing the same job duties. The Photographer compared her pay with a male coworker in a Graphic Designer position. She was also unable to present evidence that other women were in the same jobs as allegedly higher paid men. There was no one-to-one direct comparison, the job duties were different. Though a plaintiff might be able to establish a Title VII discrimination case on a pattern and practice of paying women in general at lesser industry standards than men, that was not the case here. This case could not meet the EPA requirements and the court granted dismissal of the case. *Noonan v. Consolidated Shoe Co., Inc.* (4th Cir., 2023)

Disability

Commuting to Work is Becoming an Accommodation Issue. The ADA has generally focused on an employee's abilities to do the essential functions of the job, and reasonable accommodations regarding the position's duties. Getting to and from the job is the employee's responsibility and the employer has generally not been required to accommodate this non-work time, non-job duties area. This is now changing. The EEOC and more courts are allowing employees to bring cases over failure to accommodate commuting difficulties. *EEOC v. Charter Communications* (7th Cir., 2023) involved a call center employee with a vision disability which made night driving difficult and dangerous. His 30-minute commute from Racine to Milwaukee, Wisconsin, was increasingly difficult due to his noon to 9pm schedule. The public

buses stopped running to Racine before 9pm, so public transportation was not available. Taxis would cost more than his full wages every week. He requested a temporary schedule change of 10am to 7pm, which would allow riding the bus in winter, while he searched for a residence closer to work. The employer said it was not required to accommodate commuting needs. It suggested he try to find rides with coworkers who might live in his area, **but** then the company refused to provide names of those who did, saying that is confidential information. The employee filed an ADA complaint and the EEOC filed suit in court. Modified work schedules are a form of reasonable accommodation The court ruled that the employer failed in its interactive process duty to explore the accommodation, stating: "If an employee's disability substantially interferes with his ability to travel to and from work, the employee may be entitled to a reasonable accommodation if commuting to work is a prerequisite to an essential job function, including attendance…and if the accommodation is reasonable under all the circumstances. An employee who has chosen to live far from the workplace or failed to take advantage of other reasonable options, including public transportation, will rarely if ever be entitled to an employer's help in remedying the problem." **However**, in this case "he was not asking for an unaccountable, work-when-able schedule or a permanent accommodation. He did not demand the company itself transport him to work. He asked only for a temporary work schedule that would start and end two hours earlier while he found time to move closer. A requested accommodation could be reasonable." Charter did not show a temporary schedule modification was an undue hardship. So **be aware** that the standards are changing. It is never a good practice to reject any request for accommodation without first engaging in a serious interactive process and good faith consideration.

Plaintiff Cannot Claim a Failure to Engage in the Interactive Process When Company Offered 134 Accommodation Options. A Costco employee filed a disability case alleging that the company failed to reasonably accommodate her after she injured her knee and wrist at work and could no longer perform her duties as a Stocker. She alleged that Costco refused to engage in good faith efforts to accommodate and forced her to stay on medical leave. However, the evidence showed the company held three meetings with her to assess her abilities and offered her 134 available positions over an eight-month period. She declined all. The company finally assigned her to an Optical Assistant position which met all her work restrictions and told her to return to work. She worked seven shifts and resigned while still in the training period, claiming the work was too tedious and she did not understand it, and alleged it was not a good faith position offer. The court granted Summary Judgment, dismissing the case. Costco made extensive efforts to communicate and accommodate. The position she quit was a reasonable alternative and her quitting had nothing to do with any knee or wrist limitations, or with her

ability to achieve understanding of the job by completing training and with more time in the position. *Barnett v. Costco Wholesale Corp.* (9th Cir., 2023)

Uniformed Services Employment and Reemployment Rights Act — Disability

Jury Awards 2.5 Million For Failure to Accommodate Veteran. A Texas State Trooper suffered permanent lung damage from toxic chemical exposure while deployed to Iraq as an Army Reservist. Over time this resulted in a need for accommodation in his Trooper position. He requested and was granted temporary accommodation. Then he requested permanent accommodation of being placed in a different position. His supervisor recommended the transfer be granted, but no action was taken. He made a second request, but again no action. He resigned due to inability to continue the Trooper duties and filed a Uniformed Services Employment and Reemployment Rights Act (USERRA) case in state court for disability discrimination. USERRA requires accommodation of veterans who are injured in the scope of active duty. A jury found that the Texas Department of Public Safety (DPS) abrogated its duty to even try to explore an accommodation, "There was no evidence – literally none – that DPS looked for another position, despite their lawful duty to do so." *Torres v. Texas Dept. of Public Safety* (Nueces Co. TX, 2023)

Labor Relations

Medieval Times Loses Trademark Case Against Union. In part of its opposition to a union, the theme dinner theater venue Medieval Times sued the union for infringing its trademark by calling itself Medieval Times Performers United. It claimed the use of its name would lead the public to believe the company endorsed the union and the union was somehow a branch of the company. The court dismissed the case, finding that this "was not likely to confuse consumers." Many unions have long used the name of the company when the employees unite. The National Labor Relations Board (NLRB) has long held the position that suing a union because it includes the company name or logo is meritless. The union has now asked the court to award it $70,000 in legal fees for having to defend a meritless case. *Medieval Times USA v. Medieval Times Performers United, et al.* (D. NJ, 2023). The union has now also filed a complaint with the NLRB alleging the company's suit was an unfair labor practice aimed at "union busting" and retaliation for its protected activities.

Strangest Case of the Month

Judge Removed for Waving Loaded Gun at Litigant in Courtroom. The New York Commission on Judicial Conduct removed a state judge from office due to improper

conduct. "While presiding over his courtroom the judge drew a loaded gun and pointed it at one of the parties who was presenting no threat to anyone." Then the judge proceeded to boast about his action to colleagues, and the press and at a political fundraiser, "while repeatedly and gratuitously, referring to the litigant's race" (Black). The judge claimed that he had kept a loaded gun in the courtroom, with a conceal carry permit, for years in the event of any dangerous situation. However, he also admitted that there was no danger, and he was not justified in pulling out the gun and pointing it directly at the other person. In upholding the Commission's decision, the State Court of Appeals stated, "The courthouse is where threats or acts of gun violence should be resolved dispassionately, not generated irrationally. It is indefensible and inimical to the role of a judge to brandish a loaded weapon in court, without provocation or justification, then brag about it repeatedly with irrelevant racial remarks. The court's ruling today makes clear that there is no place on the bench for one who behaves this way." In *Re: Putorti* (NY Ct. App., 2023)

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