EMPLOYMENT LAW UPDATE

April, 2017

by
Bob Gregg, Legislative Director
Jefferson County HRMA
rgregg@boardmanclark.com

Boardman & Clark Law Firm
www.boardmanclark.com

LEGISLATIVE AND ADMINISTRATIVE ACTION

Blacklisting Rule Voided. In the ongoing process of voiding some prior Executive Orders, and leaving others alone, President Trump signed his own order preventing the prior administration's "Blacklisting" rule from taking effect. That rule would require federal contractors to disclose all allegations of misconduct going back three years – regardless of whether the allegations were ongoing, dismissed, proven, unproven or had been found to be groundless. These disclosures would then be considered in the decision to award contracts.

LITIGATION

U.S. Supreme Court

NLRB Appointment Invalid, And Decisions Subject To Invalidity. In *National Labor Relations Board v. S.W. General, Inc.* (March 21, 2017), the U.S. Supreme Court ruled, in a 6 to 2 decision, that the acting appointment of NLRB General Counsel Lafe Solomon violated the Federal Vacancies Reform Act. President Obama nominated Mr. Solomon to be the General Counsel in 2011. The Republican-controlled Senate refused to act upon the nomination. It was eventually withdrawn in 2013. Solomon served as Acting General Counsel during that time. However, the Court found that all of the time served in the "acting capacity" between 2011 and 2013 was not according to the requirements of the FVRA. Therefore, all actions by Mr. Solomon may be subject to being overturned or voided.

Equal Pay Act

Factors Other Than Gender Wins Pay Case. A pharmacist alleged that her pay while working as a temporary manager was sexually discriminatory. She alleged that she performed the same work as male managers, but at lower pay. The Equal Pay Act prohibits paying men and women unequally based on gender. However, it allows a defense of pay "based on other factors besides sex" (i.e., seniority, experience, etc.). Perhaps the plaintiff picked the wrong comparators - full-time managers. "Temporary" managers, which she was, are not similarly situated to a full-time manager. When a regular manager is absent, a lower level pharmacist temporarily manages, at a dollar an hour more than their regular pay. Though the duties are the same, they are temporary. Full-time managers receive a lot more, but based on being full-time – not on gender. Full-time managers were more experienced than the lower level pharmacists – a non-gender pay factor. She also seemed to selectively pick the comparator, a male, rather than also recognize that a female regular full-time manager in the same store was also more highly compensated than other male pharmacists. So, obviously gender was not the determinative pay factor. The court granted summary judgment in favor of the employer. *Gosa v. Wal-Mart Stores East* (S.D. Ala., 2017).

Discrimination

Age

Employer Cannot Fire Older Waitresses For Missing A Shift When Young Waitresses Routinely Are Allowed To Show Up Drunk And Shirk Work. An older waitress worked the breakfast shift for 30 years. A manager scheduled her to work one afternoon. She told him she could not work afternoons, and thought she had then been taken off that shift. Nonetheless, he kept her on the schedule, and fired her when she did not show up. She filed an age discrimination case, and the court found ample evidence the discharge was a pretext for discrimination. Younger waitresses were allowed to violate rules on a routine basis without any consequences. They missed shifts, came in late and drunk, sat down with customers to talk and show off their tattoos. Younger waitresses' schedules were altered at their request, even at the last minute. Finally, the manager had made negative comments about elderly people, such as *"old people have a smell about them, like dead fish." Wyman v. Evgeras, Inc.*(N.D. Ill., 2017).

Sex

"I Have Too Many Pregnant Workers" Was Not Enough To Create Case. A prison nursing aide could not show her security violation discharge was a pretext for pregnancy discrimination, in spite of a statement made by her supervisor. The pregnant nursing aide was fired after an inmate gave her a love note. Instead of reporting it, she took the note home with her, a major security violation. The fired nursing aide claimed the supervisor was motivated by pregnancy discrimination. At the time there were several pregnant nursing aides. A month before the discharge the supervisor had been informed of yet

another employee (not the nursing aide at issue) who would be taking reduced schedule due to pregnancy. He blurted "Are you kidding me? I don't know how I'm going to handle the schedule with all these people pregnant at once! I have too many pregnant workers!" The court found this insufficient to show discrimination. It was a "stray remark" of perhaps unwise, but understandable, frustration by a scheduling manager. It was not about the terminated employee. None of the other pregnant employees were disciplined or discharged. The nursing aide could not overcome the seriousness of the security violation. Further, higher management, not the supervisor, made the termination decision. *Fassbender v. Correct Care Solutions LLC* (D. Kan., 2017).

"Suck It Up" Was Not The Best Response To Male Nurse's Sexual Harassment Complaint. A male nurse in a predominantly female staffed and managed skilled care facility complained about ongoing sexual comments and attention from his female co-workers. His repeated complaints were ignored by the female management, or met with comments such as "suck it up" and deal with it. He was fired a few days following his most recent complaint. The court found sufficient evidence to support a trial for sexual harassment. *Oberdorf v. Penn Village Operations LLC (M.D. Pa., 2017).*

OFCCP Pursues First Potential Debarment Case Over LGBT Discrimination. The OFCCP takes action against government contractors which refuse to cooperate in its investigation of a discrimination complaint. OFCCP can impose sanctions or debar companies from further contracts when they refuse to provide information or block access to investigators. *OFCCP v. AccuWeather, Inc.*(Dept. of Labor Hearing 2017-OFC-11) is the first such action for a LGBT discrimination complaint under the Obama administration's Executive Order, which designated LGBT as a covered category. This also follows President Trump's decision to leave that Executive Order in place for government contractors. [The issue of whether LGBT status is protected under Title VII for non-government contractor organizations continues to be a subject of ongoing litigation and splits of opinion among the courts.]

National Origin

Fishing Company Pays $1.85 Million And Publicly Apologizes for Overt Harassment Of Hispanic Workers. An Alaskan fishing company was sued for national origin discrimination and retaliation. During the process the company was taken over by new owners, who decided to settle the case. They agreed to pay $1.85 million in damages, and made the unusual step of issuing a frank apology, stating they were *"stunned and saddened" to learn about the past "abhorrent" treatment of plaintiff and his Hispanic co-workers. The former management team has been replaced and the new owners are committed to diversity and equal opportunity for all.* The new owners were commended for having "the integrity to recognize the gravity of the allegations when faced with actual proof, and then did more than just pay money to fix it." The evidence in the case showed overt and brutal treatment of Hispanic ship workers. It was brought by a U.S. citizen of Mexican heritage who was fired after he complained of the treatment of himself and others. The evidence showed that the ship's captain openly expressed contempt for

Mexicans and Hispanics, calling them overt ethnic slurs instead of their names. He complained that Mexicans were "taking White guys' jobs" and should be let go to "swim back to Mexico." The captain and first mate forced Hispanic crew members to work 22 to 24 hour shifts with one short meal break, while White co-workers got shorter shifts, regular rest breaks, and longer meal periods. The primary plaintiff was fired after he raised the concern that one of his Mexican co-workers had died after being forced to work the very long, hard hours while seriously ill. *Miranda v. Alaska Longline LLC* (W.D. Wash., 2017).

Disability - *Remember To Complete All The Evaluations*.

Two cases, both from Federal courts in Michigan, show the importance of the interactive process, and the importance of fully completing the medical evaluation processes. Also, remember that the pre-employment medical evaluation allowed by the ADA should be done **before** the person starts to work. It really isn't "pre" after that.

Employee's Refusal To Cooperate Broke The Interactive Process. An automotive trim specialist had hand surgery. The company created a one-handed light duty position while he recuperated – for nine years. Then an independent medical evaluation (IME) declared him restriction free and the company asked him to resume two-handed work. He refused, claiming he still had restrictions. He submitted restriction notes from his doctor. The company then asked for a third evaluation to further explore the issue. The employee refused to attend the appointment. He then stated a refusal to agree to any full examination of his work capacity and refused to sign any consent for the company to communicate with his personal doctor who had submitted the restrictions. The employee then went on long-term leave rather than resume two-handed work, and he sued the company for "constructive discharge." The court dismissed the case, finding that it was the employee who broke the ADA's required interactive process. The company was entitled to rely on the IME. The employee had a duty to cooperate if he wanted the company to consider further restrictions, he could not just submit his own doctor's note and then refuse to engage in further exploration and evaluation. *Roring v. Ford Motor Co.* (E.D. Mich., 2017).

Regarded As Disabled – Cannot Rely On Unevaluated Concerns (And Pre-Employment Evaluation Should Actually Be Done Before The Job Is Started). A healthcare center made a job offer to hire a Community Outreach Coordinator, with the requirement for her to have a standard pre-employment medical evaluation. The pre-employment evaluation was conducted five weeks after she started working. In the evaluation she revealed that she had migraines due to a prior auto accident. The medical evaluator recommended she be put on a "pre-hire medical hold" due to concerns the migraines might interfere with the Coordinator job duties. The "hold" would be pending a further Functional Capacity Evaluation. The health center terminated her employment based on the concerns raised by the medical evaluation, without allowing the FCE. In the ensuing ADA case, the court found "a textbook case of unlawful discrimination based on a perceived disability." There was no showing that the migraines actually constituted a

"disability," as she had worked for over five weeks without a single incident of job impairment. The employer "inexplicably fired her" without waiting to do the recommended FCE to determine whether there was any real issue at all. It seemed to base the decision on unfounded concerns and "myths, fears and stereotypes associated with disabilities." *EEOC v. M.G.H. Family Health Center* (W.D. Mich., 2017).

Labor Arbitration

FMLA Error In Your Favor. An employee was entitled to 480 hours of FMLA. However, a clerical error by Human Resources notified him that he had 680 hours. At the end of 480 hours the error was discovered. The employee was notified of the error and told that he should return to work, due to exhaustion of FMLA. He refused. He claimed that he was entitled to use the 680 hours error in his favor. The employment was terminated after several attempts to persuade him that his FMLA had expired. He grieved the discharge, and lost. He had clear knowledge that an error had been made. Just as in other error cases such as overpayment of wages, or bank errors, the employee cannot just keep the money and expect the error to remain uncorrected in their favor. He had a duty to abide by the rules, once he knew of the error. In *Re Teamsters Local 471 and Dairy Farmers of America* (2017).

Former Employees Entitled To Retroactive Pay. Negotiation of a new contract took the greater part of a year. Employees continued to work under the old CBA. During that time some employees moved on, voluntarily or not, to other employment. When ratified, the new contract made pay increases retroactive to the end of the old contract. The former employees heard of this and a demand was made for the retroactive pay. The arbitrator ruled that the pay increases were also due to former workers from the date retroactivity was effective until the date they left the company. In *Re Century Link and CWA #6300* (2017).

F:\DOCS\WD\27570\0\A2743686.DOCX