EMPLOYMENT LAW UPDATE

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by
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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

OMB Approves President Obama's Revised OFCCP Discrimination Categories. The Office of Management and Budget has approved issuance of the revisions to the OFCCP's discrimination protections written at the end of the Obama administration. This includes sexual orientation and gender identity as protected categories and prohibits negative action against any employee or applicant for revealing to, inquiring of, or discussing with others their wages or other compensation.

Dept. of Labor – Request For Information For New Rules. The U.S. Dept. of Labor has announced that it will be considering revisions to FLSA Regulations on Overtime Exemptions. The Request for Information sets a 60-day period ending September 25th regarding revising the criteria for salary level and duties tests for executive, administrative, professional, computer professional and outside sales exemptions.

Restaurant Tipped Pool Rule Changes. In another development, DOL has announced that it will overturn the Obama administration's Tipped Pool Rule for restaurants, which prohibited the mandatory pooling of tips by tipped employees who made the full minimum wage directly to distribute them among both wait staff and back-of-house staff. The effective date has not been announced.

LITIGATION

Fair Labor Standards Act

Blaming Accountant Was Not Effective Defense For Restaurant. A restaurant chain attempted to avoid $2 million in extra liability for intentional FLSA violations by claiming it just followed the advice of its accountant. Normally following the advice of attorney, accountant or other professionals is a good defense against charges of

intentional wrongdoing, and can prevent the significant extra damages (though not the general basic liability for the underlying violations). In this case the defense did not work. There was ample evidence of an intent to violate the law. Employees had been ordered to falsify time records to hide up to 20 or more hours a week of overtime work. Employees had been coached by management to cover up the true facts when the DOL auditors interviewed them. The managers, not the accountant, adjusted time sheets to show fewer hours. *Perez v. El Tequila LLC* (10th Cir., 2017).

Discrimination

Age

Supreme Court Declines Review – Leaves A Distinction Between Employees and Applicants. The U.S. Supreme Court declined review of *Villarreal v. R. J. Reynolds Tobacco Co.* (11th Cir. – Cert. denied 6/26/2017), leaving the lower court decision in effect. The 11th Circuit had ruled that there are two different standards in age discrimination cases. The ADEA allows existing employees to sue for adverse impact; where a seemingly unintentional practice or policy has a greater negative effect on older workers. However, it denied a job applicant's adverse impact case, holding that an applicant must show individual and intentional discrimination in order to sue under the ADEA. The court decided that unlike Title VII, which allows anyone to file an adverse impact case, the language of the ADEA only used the term "employee" in its relevant hiring provisions.

"Fresh Face" Was A "Facially Neutral" Comment. A 63-year old employee did not receive a promotion to a new position. Instead, a younger person was hired from outside. He sued, claiming that the CEO had stated the company was "looking for a fresh face" and this demonstrated an age bias. The court disagreed. Fresh face is a "facially neutral" comment; it did not specify what age the new face should be. Without more evidence, one would have to make a stretched interpretation to get an age meaning. *Aulick v. Skybridge American, Inc.* (8th Cir., 2017).

National Origin/Immigration Act

Undue Scrutiny Results In $226,000 Settlement. An agricultural company has settled a Dept. of Justice action regarding discriminatory scrutiny of legal immigrant workers. 95.5% of legal resident workers were required to submit List A - I-9 extra documents which were submitted to E-verify to prove work authorization. Yet only 2.15% of U.S. citizens were required to do the same. The practice allegedly violated the INA, which prohibits National Origin discrimination. The company agreed to pay $226,000 and submit periodic compliance reports. *U.S. v. Washington Potato Co.* (Dept. of Justice Settlement, 2017).

Sex

This Firing "Is Best For You And The Baby. . . ." An employer should have known that direct references to pregnancy would be direct evidence of discrimination and would undermine any defense to a discharge case under the Pregnancy Discrimination Act. An administrative employee working for an all female-owned and managed health care company was fired the night she went to the hospital due to concerns about her pregnancy following an auto accident. As she was spending the night there, the president of the company texted that management felt *"it's best for you and the baby if we just cut ties now b/c ur too stressed working here and can cause harm to the baby. We don't want to cause you or the baby any stress or further problems."* There had been prior tension between the employee and president and prior management statements of displeasure when the employee began missing work due to doctor visits. Earlier, the employee had said to the president that she was under stress, but had to keep working to have health insurance. After the discharge, when the employee filed for unemployment compensation benefits, the company tried to deny U.C. claiming that the discharge was for company policy violations, but then added that also the employee *"was very emotional due to pregnancy."* The court decided that there was just too much direct evidence of pregnancy discrimination. Further, the violation of policies claim was suspect, since the employee had just received a favorable performance evaluation prior to having doctor's appointments for the pregnancy. *Ruh v. Superior Home Health Care, Inc.* (M.D. La., 2017). [It is interesting how some managers try to "ease the pain" of a discharge by referencing a "concern for the employee." It is predictably insulting to tell an employee that a discharge is "for their own good." When one also adds a reference to their medical condition or family situation it can be predictably fatal to the defense of any aftermath litigation. In fact, the insult probably guarantees a suit.]

Race

Ancestry Testing Leads To Racial Harassment Of White Police Officer. A White police officer took an ancestry test – as seen on the TV commercials. He told fellow officers that the test showed that he had 18% sub-Saharian African ancestry. Co-workers then began racist comments, racial taunts, and placing Black figurines in his area. The officer alleges that department managers and top officials engaged in and did not stop the harassment; and it worsened after he complained. He sued under Title VII claiming both race and "perceived as" African-American discrimination. The city's defense included a claim that the officer cannot file a racial claim because he is White and does not have sufficient genetics to be African-American. [An interesting defense considering that even 1% of "Black ancestry" meant you were "Black by law" in many states well into the 1970s.] The city also argues that since he is White he cannot be "perceived as" African-American, and "perceived as" should not be covered under the race discrimination law, it is an ADA concept. *Brown v. City of Hastings* (W.D. Mich., 2017). This yet to be decided case illustrates the strange and convoluted concept of race in the United States. Race seems often to be whatever others choose to perceive as and treat as a race, rather than any real DNA or scientific basis. Title VII has recognized mixed-race as a protected

category. Also, U.S. immigrant laws previously categorized White Europeans into the Southern European Races (lower immigration quotas) and the Northern European Races (encouraged to immigrate, with higher quotas), without regard to any genetic information.

Disability

Accommodations Must Be Done Without Harassment. *In Duryea v. Metro Cast Cablevision of NH* (D.N.H., 2017), an employer granted the several accommodations requested by an employee with severe foot, back and respiratory disabilities, however, allowed harassment by co-workers and managers. The court found no violation of the accommodation or job placement requests, but did find a case for a hostile work environment. Among other things, co-workers ridiculed her for using a handicapped parking place and absences due to her illnesses. They belittled her for getting to wear sneakers as an accommodation for foot pain, while they did not get to do so. She had to use a wheelchair or scooter, but management forbid her to take it into her office, forcing her to hobble to her desk. At a work-related dinner, the employee spilled her glass and a manager made her get out of her wheelchair, crawl around the floor on her hands and knees to clean up the spill in front of the assembled group.

Inability To Be Near Potentially Unruly Students Could Not Be Accommodated. A Vice Principal had a series of knee operations. Her doctor gave a permanent medical restriction that she could have one-on-one contact with well controlled, good students, but "should not be in the vicinity of potentially unruly students," since that might involve a need for active movement in order to deal with or avoid "unruliness." The school district decided that there was no place in a school which was not in the vicinity of the potentially unruly. It had no other non-school located positions, so it terminated her employment. The vice principal sued for failure to accommodate under the ADA. The court granted Summary Judgment, dismissing the case. The essential function of a vice principal is to deal with all students, in almost all situations, especially to assure safety and order. All students are "potentially" unruly and a school cannot evaluate all students, make a list of naughty or nice, and then create a segregation system in which the potentially unruly are not allowed to be anywhere near the vice principal. *Brown v. Milwaukee Bd. of School Directors* (7th Cir., 2017).

Temp Worker Not Entitled To Time Off Accommodation For Medical Treatment. A Kelly Services employee was temporarily placed with a client company to fill in for an employee who was on leave. Then the temp worker received a cancer diagnosis and she requested the accommodation of time off for a full week, followed by five radiation treatments, requiring more days off, plus an unspecified number of treatment appointments. This was denied. The client said it could not have that much absence. Kelly Services did not have another temp position which fit. So the employee had no work for that time. She sued both Kelly Services and the client, as joint employers, for failure to accommodate under the ADA. The court did not agree. It found that substantial time off from a temporary job is not a reasonable accommodation; consistent

attendance is an essential function of a temp job. A major purpose of a temp position is to fill in for regular employees who are on leave for ADA, FMLA or other reasons. The employer who has accommodated its regular employee by leave, should not then have to accommodate the temporary fill-in with leave, and perhaps have to get a temp to fill in for the temp. That is not what a client contracts with a temp service to achieve. *Purt v. Kelly Services, et al.* (10th Cir., 2016). [Be aware that if a leased employee is on a long-term assignment, there could be a different result under both ADA and FMLA.]

Labor Relations - Arbitration

Auto Technician Falsified Odometer Reading, Then Had To Destroy Mother-In-Law's Car In Attempt To Cover-Up. Pennsylvania state law required emission testing if a vehicle brought in for repairs had over 5,000 miles in the prior year. A senior technician with 38 years of employment at an auto dealership brought in his mother-in-law's 16 year old Buick for repair. He knew it would not pass the emissions test, so he fudged the odometer mileage on the form to reflect less than 5,000 and save the money for any compliance work. However, another technician had recorded the correct mileage on a different form while doing the repair. When the tech was asked to explain the discrepancy and why he had filled out a test form on his own family's vehicle – against policy, he insisted his number was accurate. He was asked to bring in the vehicle. He refused, and was sent home on suspension. He then went to the other technician's house to ask him to state that he got the repair order mileage wrong. The other tech refused. He then had his mother-in-law's car scrapped and destroyed in order to have no evidence left and try to save his job. He was fired for the repeated falsifications. The tech grieved and lost. The arbitrator ruled that not only did he falsify, he repeatedly dug deeper with more cover-up attempts. Further, the falsification of an emission test form jeopardized the dealership's license with the state to do the testing, a lucrative part of its business. *In Re North Hills Toyota and International Assoc. of Machinists No. 98* (2017).

Paying Double. The Postal Service used non-union employees to perform high wage work, without properly negotiating with the union. An arbitrator ruled that the union employees must be paid the extra wages for a six month period for all the higher level work they did not do, but should have. Thus, the Postal Service had to pay not only the people who actually did the work, but the union members for the same work they did not do. *In Re USPS and American Postal Worker Union* (2017). [This is a lighter penalty than an earlier situation in which union workers were laid off due to economic reasons, and replaced by volunteers. The arbitrator ruled that due to an absence of proper bargaining, the employer had to pay the laid off workers' full wages for every hour the volunteers put in – for a five year period. *In Re Local Bd. of Ed. v. Ohio Assoc. of School Employees* (2013). The message is to communicate and bargain over any work in which bargaining unit members are replaced, or not given the opportunity to perform work.]

Madison EEO SEMINAR - August 23, 2017

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Seminar Location:
Madison Marriott West Hotel and Conference Center
1313 John Q. Hammons Drive
Middleton, WI 53562
Free onsite parking

Registration: Begins at 8:00 AM

Program Hours: 9:00 AM—4:00 PM

Agenda:

- Employer Wellness Programs and the EEOC
  Laurie Vasichek, Senior Trial Attorney, EEOC Minneapolis Area Office
- Do's and Don'ts of Documentation
  Robert E. Gregg, Boardman & Clark LLP, Madison, WI
- Nuts and Bolts of Workplace Harassment
  Susan Love, Buelow Vetter, Waukesha, WI
- Update on EEOC and EEO Law - How to Avoid Being a News Headline
  César J. del Peral, Senior Trial Attorney, EEOC Milwaukee Area Office

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Benefits of Attending:

- Seminar participants will receive a link to our comprehensive eight-volume Resource Guide on EEO issues.
- HRCI, SHRM & Wisconsin CLE credits – Certification credits will be requested.
- Investigator Refresher Credits—This seminar meets the yearly refresher training requirement for federal agency EEO investigators.
- A continental breakfast, lunch, and morning and afternoon breaks will be provided.

Hotel Accommodations:
Registrants are responsible for making their own hotel and travel arrangements. The Madison Marriott West has a limited number of discounted guest rooms that are available on August 22 and August 23, 2017 for EEOC seminar attendees at a nightly rate of $115.00 plus taxes. Last day to book is August 1, 2017. Click here to make your online reservation or go to bit.ly/MadisonRSVP.

Who Should Attend?

Human Resources Professionals

EEO Managers and Staff

Attorneys

Managers and Supervisors

State and Local Government Officials

Union Officials

General seminar questions: Contact Maria Flores, Outreach and Education Coordinator, EEOC Milwaukee Area Office, phone 414-297-3594, maria.flores@eeoc.gov

REGISTRATION QUESTIONS & ASSISTANCE:

Contact the EEOC Training Institute, toll free at 1.866.446.0940, TTY 1.800.828.1120, eeoc.traininginstitute@eeoc.gov | Event Code: 17TCHI02