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BY ROBERT E. GREGG AND THE BOARDMAN CLARK LABOR & EMPLOYMENT LAW GROUP

LITIGATION

Most Unusual Case of the Month

Sentenced to Employment – After Assaulting Fast Food Worker with a Burrito Bowl. A customer was dissatisfied with her food at Chipotle. So, she reacted by angrily hurling the hot burrito bowl into the face of the worker who had given her the order at the service counter. The customer was arrested and then received a six-month jail sentence. However, the judge gave her the choice of only three months in jail if she took a fast-food restaurant job for the other three months. The judge reasoned that facing the rigor of fast food work and being on the receiving end of customer reactions might "teach her to learn how to treat people and give her a sense of empathy." It also reduces the taxpayers' expense to house and feed an inmate in jail for those three months. *City v. Hayne (Parmer, OH Municipal Ct.,* 2023)

Family and Medical Leave Act

Strangest Grievance of the Month

Union Claims Wearing Seatbelts is Dangerous for Drivers – Employer Can Fire Bus Driver on FMLA. A city bus driver had five incidents within nine months of not wearing his seatbelt while driving. 1. A traffic accident; 2. A passenger complaint; 3. Collision with another vehicle; 4. Another passenger complaint about not wearing the seatbelt; 5. An argument with a passenger in which the driver was not wearing the seatbelt. Failure to wear the seatbelt did not *cause* the accidents, however, all incidents were clearly documented by the bus security video as violations of the required seatbelt use policy. The Transit Authority gave progressive discipline for each incident. In a most unusual grievance, the driver's union claimed that, "Seatbelts posed a safety risk to drivers" since some might be attacked by

passengers and would be trapped by their seatbelt. So, the Transit Authority should disregard the state law's seatbelt requirements due to the "danger of seatbelt use." This argument was made and rejected in two of the incidents. Sometime after Incident #4, the driver began FMLA leave. The following day, the employer received the passenger's complaint about Incident #5, which occurred the day before the driver started FMLA leave. The employer notified him of the incident and then fired him while he was still on FMLA leave. The union declined to grieve the discharge. The employee sued for violation of his FMLA rights because he was fired while he was on FMLA leave. In ruling in favor of the Transit Authority, the court found that the employer followed its standard practices. There was no evidence it treated the driver any differently, and no one else had as many violations. There is no FMLA prohibition on firing someone on leave. *"If an employer were authorized to terminate an employee if he were not on FMLA leave, the FMLA does not shield an employee from the same lawful discharge."* The five violations warranted discharge. So, there was no interference with FMLA rights. *Baker v. Rock Region Metropolitan Transit Authority* (E.D. AR, 2023)

Discrimination

Age

The following two cases seem to be in the *"should have known better"* category. Any policy which has an age-based provision is automatically suspect under the Age Discrimination in Employment Act (ADEA). In order to justify such a policy, the employer must show clear evidence of a valid substantially business-related necessity for the policy and that it has engaged in an analysis rather than a blanket application of the policy. Neither of these factors were present in the following instances. The employers should have known that the policies would be challenged and could result in liability.

Contract Pay Provision Created Automatic Age Discrimination. In *EEOC v. Urbana School District and Urbana Education Assoc. IEA-NEA* (C.D. IL, 2023) the court granted summary judgment in favor of the EEOC. The district and union Collective Bargaining Agreement (CBA) had a provision limiting salary increases of teachers who were within 10 years of the age 55 retirement eligibility to no more than 6% above their previous year's salary. This was to keep down the increased pension contributions and costs resulting from salary increases. Thus, anyone older than 45 had a cap. This salary cap covered all includable income such as regular raises, raises for postgraduate classes or certifications, and extra duties of coaching or advisor to student clubs. Those over 45 were turned down for extra duties or offered less pay; higher education or obtaining certifications could result in no extra pay if it exceeded the salary cap. Younger teachers had no limit on their annual raises or on how many

"add-on" activities or postgraduate credentials they could get extra pay for. The ADEA prohibits discrimination due to age. The court ruled that the CBA provision was "facially discriminatory and drew an express line between teachers age 45 and older and those under 45." The court ordered the district to raise the pay of those who were affected by the policy and to give backpay for the time the provision had been in effect.

Mandatory Retirement Age for Doctors Causes $7 Million in Liability. *EEOC v. Scripps Clinic Medical Group* (EEOC settlement 2023) involved a policy which set a mandatory retirement age for physicians at age 75 regardless of their ability to perform their work. The EEOC investigated a complaint and found that this was a clear violation of the ADEA. Any policy which creates an automatic negative action based on age alone is automatically age discrimination. The EEOC stated, "Older workers make crucial contributions to our nation's workplaces." Scripps will pay approximately $7 million to the affected doctors to settle the matter, and immediately remove its retirement policy. The EEOC also noted that a mandatory age policy could also violate the Americans with Disabilities Act because it creates a presumption that an individual cannot perform essential job functions simply due to age, without having done any actual assessment of abilities. People do not get too old to do a job. They may become unable, but this is generally due to some sort of disability. Yet managers too often jump to the conclusion of "too old to do the work" and end the employment. Yet when a 32-year-old is unable to do the job due to a disability, the manager considers a reasonable accommodation under the ADA requirements before ending employment. Making a stereotyped presumption about age and ability thus can result in being sued under both the ADEA and the ADA.

Disability

Department Can't Stick to Its Guns. In *Hampton v. Utah Dept. of Corrections (DOC)* (10th Cir., 2023), the plaintiff moved to Utah after successfully working as a Corrections Officer in Arizona. He was hired by the Utah DOC. Part of the new hire training is weapons qualifying with a Glock 17 handgun. The officer was born without two of his five fingers, which created difficulty in using the Glock 17. He had successfully and accurately used a Springfield 1911 in his prior correction work and requested the accommodation of being able to use that weapon. His request was denied, and the officer was therefore unable to pass the training. He filed a suit under the Rehabilitation Act for failure to accommodate. The DOC could show that the use of a weapon was an essential function of a Correction Officer position, however, it could not show why the particular Glock 17 was the only option. It did not present persuasive evidence that the Springfield handgun was not a reasonable and effective accommodation, nor that purchasing and allowing the officer to use the Springfield created an undue hardship for the DOC.

Legal in the State is Still Illegal for Federal Employment Laws. Marijuana has become a confusing issue in enforcing drug testing policies and disability accommodations. So, employers and employees may find themselves caught between conflicting standards and laws. This is illustrated by the case of *Hill v Dayton Freight Line, Inc.* (N.D. IL, 2023) Marijuana and its derivatives are legal for medical use in most states, and recreational use in many. However, marijuana remains an illegal Schedule 1 drug under the Federal Controlled Substances Act. A tractor mechanic in Illinois, where medical marijuana use is legal, was prescribed marijuana by his doctor to alleviate symptoms during cancer treatment. He had a valid state medical marijuana use card and followed the doctor's directions on usage. The mechanic then tested positive on a workplace random drug test. He documented his medical prescription and requested the employer grant an exemption from its drug-free workplace policy. The employer refused to do so. The employment was terminated. The mechanic sued under the Americans with Disabilities Act, alleging a failure to reasonably accommodate his disability. The court, however, dismissed the case. The ADA has its own exceptions to what an employer must consider as a disability and accommodate. The ADA does not cover the use of or accommodation of Schedule 1 substances. The court ruled that under the CSA "Schedule 1, drugs like marijuana have no currently accepted medical use in treatment in the United States." Thus, no accommodation is required under a federal law such as the ADA, and a request for a federally illegal accommodation fails to state a cause of action under that law. The outcome might have been different if the case had been filed under the *state* version of the disability discrimination laws. Some states have required employers to recognize disabilities and accommodations that are not covered under the ADA. So carefully check your state laws.

Race

Is it Harassment if Employee Does Not Understand He is Being Insulted in Another Language? A Black city maintenance employee worked in a unit where most others and the supervisor were bilingual in Spanish and English. He did not speak or understand Spanish. The co-workers gave him the nickname, Memin, which he thought was a reference to his baldness. It was not. He accepted the nickname, and it was used consistently by co-workers and the supervisor for a lengthy period. Then the worker discovered that Memin is a Mexican cartoon that depicts Black people as monkeys. He realized that his co-workers had been racially humiliating him, and making overt fun of him due to his linguistic and cultural unawareness for a long time. When he complained to Human Resources, instead of prompt action, HR advised him that he could file a complaint with the EEOC. He did so and then proceeded to file a Title VII racial harassment case against the city and a California Fair Employment Act case against both the city and the supervisor personally for

having fostered the harassment. The city and supervisor defended by claiming that the worker "welcomed" the nickname by accepting its use without objecting for a long time. Thus, there was no harassment; one cannot be offended if one does not know offensiveness is occurring. The court did not agree with this theory. It opined that a person cannot "welcome" attention if he does not understand the connotation. The nickname was overtly racist, was used pervasively, could be seen as an intentional racial insult, and the worker could validly claim that once he discovered the actual meaning he was humiliated and devastated and suffered emotional and other damage. *Batiste v. City of Richmond* (N.D. CA, 2023)

"Diversity" Policies Do Not Imply Discrimination or Create a Foundation for Discrimination Cases. A White Ohio State Police Sergeant cannot maintain a "reverse discrimination" case by simply pointing to the fact the Department has a "Diversity Policy" or its administrator's statements about the importance of diversity in recruitment and retention and efforts to reach historically Black colleges in recruitment efforts. The sergeant was discharged after prior disciplinary actions and rejecting a "last chance agreement." The final infraction was a deliberate failure to arrange a police detail for a local parade. The sergeant filed a Title VII race discrimination case claiming that the Department's Diversity Policy and statements should be interpreted to mean that it was trying to replace white supervisors and his discharge was part of this discriminatory process. The court ruled that the sergeant had presented no foundation for a discrimination claim and granted summary judgment, dismissing the case. A plaintiff's subjective and stretched interpretation of a policy is not evidence of discrimination. Nothing in the department's policy or statements indicated any intent to discriminate or do anything more than have broader recruiting and retention. The same is done regarding gender, veterans, and people with disabilities. None of the issues the sergeant was disciplined for involved a racial factor. He presented no evidence that race was considered in any way. He presented no similarly situated non-White comparators who were treated differently. The case was based on an unfounded stereotype and speculation about what "Diversity" might mean. *Peterson v. Ohio Highway State Patrol* (N.D. OH, 2023)

National Origin

Trucking Companies Demanded Wrong Documents Under INA. A consortium of trucking companies will pay $700,000 in penalties for violating the Immigration and Nationality Act (INA) by requiring non-US citizens to produce more documentation than others when applying for jobs. The INA requires applicants to provide forms of identity documentation, but its non-discrimination provision provides that an applicant can choose which of the list of validly legally acceptable documents to produce, regardless of citizenship. The trucking companies ignored this provision and required non-citizens to produce extra documentation for proof of authorization

to work in the US. The anti-discrimination provisions protect both immigrants and people who are *suspected of being immigrants or illegal immigrants* simply due to their ethnicity, race, or accent from excessive scrutiny which is not imposed upon those who do not appear to be foreign. In settling the matter, the companies will pay the penalty, revise policies, engage in training managers on proper procedures, and be subject to ongoing monitoring*. U.S. Dept. of Justice v. Covenant Transport, Inc.* (Settlement approved, E.D. TN, 2023)

Fair Labor Standards Act

Paid For Sleeping in Truck. Long haul trucking companies often use a team of two drivers in a vehicle with a "sleeper berth." One driver can sleep while the other drives, so the truck can stay in continuous motion for almost 24 hours a day. This means the company covers a lot more territory and makes more deliveries.
A number of the drivers filed a class action FLSA suit claiming that the sleeping time should be compensated since they are captive in the truck, unlike other sorts of employees who are free to leave the workplace for any unpaid personal time. Therefore, they were not "off duty" while not driving. The court substantially agreed with the drivers. The FLSA rules do allow for an 8-hour uninterrupted, unpaid sleep break on the work premises in certain jobs. So, the court allowed for these 8 hours to be unpaid. However, any time in the sleeper berth or sitting in the truck cab for over 8 hours was compensable because the drivers had no choice but to stay in the truck and this was primarily for the employer's interest. The court granted summary judgment in favor of the drivers. *Montoya et. al. v. CRST Expedited, Inc.* (1st Cir., 2023)

When Is a Settlement and Release Not a Release – Former Employee Takes the Money and Sues Anyway. A manager left their employer and then sent a message claiming he was owed money for state and federal labor law violations and demanded $20,000 to settle. The company negotiated a $7,500 payment, and the manager signed a Settlement and Release of all claims agreement. He cashed the check. A year later, he filed a Fair Labor Standards Act case claiming he was owed unpaid overtime and the employer had violated Federal FLSA and New York "Wage Theft" provisions. The employer requested dismissal of the case, based on the Settlement and Release Agreement and its release of all claims. The court did so regarding the New York state claims. However, it would not dismiss the FLSA case. The judge found there had not been a statement of specific FLSA violations at the time of settlement, only a general allegation. Further, the Dept. of Justice views "private contracted settlement of FLSA rights as against public policy" and that a federal court should review an FLSA release for fairness before it is signed. So, the former employee could keep the money and still sue for more. *Melendez v. Rockaway Maintenance Partners Corp.* (S.D. NY, 2023) This case illustrates the quandary of

trying to settle disputes without litigation when the court then opines that one cannot do so for FLSA claims unless they are filed in court.

Labor Relations

Taking Pictures of Who is Parking In the Reserved Spaces is Not a Dischargeable Offense. Enforcing the rules regardless of the circumstances is not always wise. The National Labor Relations Board is more closely examining employment policies and especially the enforcement of those policies to ensure they do not infringe on protected rights to address workers' concerns about their conditions of employment, wages, or hours. *Philips 66 Company* (NLRB 2023) involved a parking issue. The company operated a refinery. Under the Federal Maritime Transportation Safety Act, it was required to develop security policies to safeguard the petroleum supply and protect against terrorist threats. This included policies on taking of photos or videos of sensitive physical areas or processes. The company contracted for a facility repair project. The contract workers started parking in the area reserved for regular Philips 66 employees. This was a great inconvenience for the employees, often resulting in them being tardy for work. Some employees then took pictures of the contract workers' vehicles in the employee parking area to document the problem and gave them to plant management. Rather than act to solve the employees' parking problems, the company disciplined them for violating the policy against taking unauthorized photos or videos. The employees filed an Unfair Labor Practice charge with the NLRB, which ruled that the discipline was unfair. Policies have to be enforced in line with their legitimate business purposes. This policy was written to protect sensitive information or details of strategic equipment. Photos of a parking lot did not capture any confidential or sensitive information nor jeopardize national safety or security. Thus, enforcing this particular policy in this situation did not serve its legitimate interest and was a violation of employees' protected concerted activity rights regarding the terms and conditions of their employment.

Safety

Dollar General Fined Over $1 Million for Safety Violations – Not for First Time. OSHA issued $1.3 million in fines to Dollar General operations in Georgia due to safety hazards for employees. These included blocked exits, dangerously stacked boxes of merchandise, and electrical issues. This is the latest in fines for Dollar General. It has received almost $7 million in fines in the past five years – in several states. According to an OSHA statement, *"Dollar General continues to demonstrate a willful pattern of ignoring hazardous working conditions and a disregard for the wellbeing of its employees… Despite similar citations and sizable penalties in more than 70 inspections, the company refuses to change its business practices."* Dollar General

issued the following statement, *"The safety of our employees and customers is of paramount importance."* It also stated that it promptly addresses all safety issues. *In Re Dollar General* (Dept. of Justice OSHA, 2023)

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Author

Robert E. Gregg
(608) 283-1751