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Employment Law Update

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TRENDS

Witness to Firing — Lots of Witnesses. Supervisors are often advised to have another management witness present during terminations to verify what occurred. A new trend is for employees to have a witness — but without the knowledge of the managers. Employees are recording or taping their discharge sessions or layoff meetings and then, angrily or proudly, posting them on social media — to be seen by hundreds of other people. When a termination or layoff is virtual, employees are live-streaming their own dismissal on social media platforms. While they record themselves being fired, other users can tune-in and watch the meeting unfold. These sometimes go viral and get thousands of hits when the supervisor, HR manager, or CEO says something particularly problematic, insensitive, flip, or dumb — these statements also come back as evidence in employment cases. Live-firing events and videos have even tanked the public image of some organizations. As technology advances, it is easier to create such recordings and harder to prevent them. So, employers should *presume* that discipline, discharge, or layoff meetings are being recorded and act accordingly. Make sure all conversations are professional and appropriate, and **script** before the meeting to ensure the message does not include problematic content. Stick to the script, and perhaps review it with Human Resources or legal counsel prior to the meeting.

LITIGATION

Strangest Case of the Month

Nurse Came for New Employee Orientation — Got Strip Searched. A nurse was hired to work at a County Regional Jail Center. She showed up for her first day of work wearing medical scrubs and asked for directions to the New Employee-Nursing Orientation. She was directed to an entry that also served for inmates returning from

work-release or other off-premises purposes. The nurse stated that she was there for New Employee Orientation and was directed to take a seat in a waiting area. Returning inmates are supposed to first be verified and have their files checked and then be strip-searched as part of the return procedure. In this case, no such verification happened. An officer came into the waiting area, told the nurse to follow them into another room, and proceeded to conduct a pat down and strip search. The nurse objected, stating she was"here as a nurse." The officer responded that it did not matter what she did for a living,"all kinds of people end up in jail," and proceeded with the strip search. The error was discovered before the nurse was locked up. The nurse filed suit against the county and the officers involved for violation of her Fourth Amendment Constitutional unreasonable search and seizure rights. The officers claimed"qualified immunity" from the suit because the incident was a mistake rather than an intentional violation. This immunity concept applies to public employees who commit errors but"could reasonably believe their actions were lawful." The court denied the qualified immunity defense, ruling that the search was"objectively unreasonable," there were too many skipped procedures, and failures in the process which resulted in a departure from the scope of"reasonableness." *Amisi v. Brooks, et al* (4th Cir., 2024)

U.S. Supreme Court

Whistleblower Standard. In *Murray v. UBS Securities* (2÷8÷2024), the U.S. Supreme Court clarified the burden of proof for whistleblower retaliation cases under the Sarbanes-Oxley Act (SOX). Mr. Murray's job was to independently certify the accuracy of financial reports. However, he alleges, he was told to falsify his reports to be more positive for the companies, which the USB stock trading advisors wished to favor. This could constitute fraud upon the stockholders/investors. When he reported this to his supervisors and declined to alter the reports, Mr. Murray was removed from his position and terminated despite having just received an excellent performance evaluation. He filed a SOX Whistleblower case. The Supreme Court needed to decide whether Murray should have to produce direct evidence that managers discussed his reports of SOX violations and expressed these as the reasons for discharging him or if the company should have to refute the general allegation of retaliation by presenting valid non-retaliatory reasons for the discharge. The latter would place a greater burden of proof upon the company and a lesser one on the plaintiff. If the plaintiff can then cast suspicion upon the company's version (such as showing an excellent performance evaluation just before his discharge), then he can win **without** having any direct evidence (ie. a smoking gun) of intent. The Supreme Court ruled that a plaintiff does not have to show direct evidence of intent. Therefore, the employer now has a greater burden of proof to back up discharge decisions with valid evidence.

Personal Liability

Managers Receive Prison Sentence for Accident Cover-Up. A Wisconsin Federal Court sentenced a Vice President of Operations, Food Safety Manager, and the Environmental Manager of Dideon Milling, Inc. to two years each in prison, plus additional supervision afterward, for their role in a multiple fatality plant explosion and cover-up. Three additional shift supervisors were convicted of felonies for falsifying safety logs before the explosion and were fined and sentenced to probation. A fourth supervisor awaits sentencing. Last year the company pled guilty to falsifying safety documents and paid $10.25 million in restitution and another $1 million fine (see Employment Law Update December 2023).

Off-Duty Behavior

Off-Duty Volunteer Social Committee Role Can Warrant Discharge. A Southwest Airlines customer service agent volunteered to be on an independent social committee to organize off-duty social events for other employees. The events were funded by employees' voluntary contributions. She became committee treasurer and was thereafter found to have spent committee funds for personal purposes and kept the expense records in a way that obscured this personal spending. The company found out and fired her. The employee challenged this under state law, claiming her volunteer off-duty activities were separate from her paid CSA job and anything relating to her job. The funds were from co-workers, not Southwest, so it could not be considered as a job-related violation. The court disagreed. The funds were contributed to the committee by co-workers because it was organized and promoted under the company's auspices, for the benefit of Southwest workers, and often on Southwest facilities. Thus, the company had an interest in ensuring the funds were managed and spent appropriately. So, the committee's role was sufficiently connected to the employment to warrant the discharge. *Wright v. Southwest Airlines, Inc.* (Neb. S. Ct., 2024)

Discrimination

Age

Operating With Rusty Medical Instruments. A city-run clinic fired a doctor of podiatry when it discovered she was using rusty medical instruments on patients. She was discharged for"conduct unbecoming a public employee." The podiatrist filed an age discrimination case against the city, and a state law claim against the Medical Director, personally, alleging her actions did not warrant discharge, and were a pretext for age discrimination. However, she could not produce any direct evidence of age bias or unequal treatment. The court found that the use of rusty medical implements on patients was a legitimate non-discriminatory reason for a discharge,

and the podiatrist could not show that it was a pretext. *Bennett v. City of Newark* (D. NJ, 2024)

Nickname Was Not Enough to Show Age Discrimination. A bank Vice President alleged that she was discharged due to age. She was the company's second oldest Chicago Branch employee. She sued under the Age Discrimination in Employment Act (ADEA). Among her allegations was that her younger Branch Manager frequently referred to her as "Jie Jie," which the employee claimed meant"older sister" in Chinese. She alleged this helped create a hostile environment"permeated with discriminating intimidation ridicule and insult." The VP also alleged that unequal work assignments and standards were applied to her. The court did not find age discrimination, and the evidence did not support the allegation of unequal standards or assignments. The nickname was not severe or overtly hostile, nor was it sufficient to create the hostile or"permeated" environment that was alleged. *Zhang v. Bank of China* (N.D. IL, 2024). **Be Aware** that nicknames **can** create valid harassment cases. This case of a non-overt, non-"severe" nickname, can be distinguished from another recent case in which Hispanic workers frequently got away with calling their Black co-worker"Memin," because he did not understand that its meaning was a racial insult. In that case, the court ruled that the nickname was overt,"severely offensive," pervasive, and established a clear case of harassment. *Batiste v. City of Richmond* (N.D. Cal. 2023). Employers would be wise to quickly stop the use of any nicknames that can have a sexual, racial, ethnic, religious, age, etc. related connotation. Even if not"severe or pervasive," they routinely come back to haunt you later as allegations of having allowed a discriminatory environment. Also, even if the comment or nickname is intended to be a term of"respect," ("older sister") it may later be reinterpreted in a case; and one person's or culture's version of respectfulness or "humor" is often seen as disrespectful or rude by another. [For more information on this area, request the article, "It Was Just a Joke" by Boardman Clark or the webinar "Is It Humor or Harassment?"]

Religion

Beard Policy Costs $70,000. Blackwell Security Services paid $70,000 to settle a religious discrimination charge. A Muslim employee was ordered to shave his beard because the company had adopted a Clean-Shaven Policy. He stated that the beard was a religious requirement for him and requested accommodation. This was denied. He filed a Title VII complaint and the EEOC filed suit on his behalf claiming the company had shown no evidence of any undue hardship in allowing the beard: no cost, no safety reason, no client complaints, no effect on performance, nothing. Thus, the company illegally denied the accommodation. The company elected to settle the case. *EEOC v. Blackwell Security Services* (N.D. IL, 2024). **Be aware** that the standard on undue hardship to deny a religious accommodation has greatly increased since

the U.S. Supreme Court *Groff v. DeJoy* decision in June 2023. **Also**, several states have adopted special hairstyle and beard anti-discrimination laws, giving additional protections to employees.

Disability

Employer Can Determine What Accommodation Is "Reasonable." A delivery driver sued his employer under the ADA for failure to accommodate his Tourette Syndrome. The condition caused him to utter racist terms and profanities involuntarily. This led to ongoing customer complaints about the offensive language. The company required"excellent customer service," and this was creating an offensive situation for customers. The driver was removed from his route and transferred to a non-customer interaction job in a warehouse. He quit, claiming the transfer constituted a constructive discharge. He claimed he should have instead been given another delivery route that did not require customer interaction. The court found that excellent customer service was an essential function for a delivery driver, and the Tourette Syndrome behavior rendered him unable to meet this requirement. The transfer to an alternate job is a form of reasonable accommodation. There were no non-customer interaction delivery routes, and an employer is not required to create a special position as an accommodation. The ADA permits the employer to select a reasonable alternative position, whether or not the employee finds it most desirable. The employee's dislike of the warehouse job was not enough for a constructive discharge. He presented no evidence that the work was difficult or created intolerable working conditions. Thus, the employer's accommodation was adequate. *Cooper v. Dolgencorp, LLC* (6th Cir., 2024)

Sex

Equal Pay Act Does Not Require Intent. Some employment practices violate the law without the need for an intent to discriminate. A variety of hiring, testing, screening, and evaluation practices have been found to unintentionally deny opportunities to large numbers of people, having an"adverse impact," under Title VII, the ADA or ADEA, or just being *"per se"* discrimination. A medical company recently found the Equal Pay Act is one such law. A hospital psychologist learned she was paid significantly less than the male psychologists for the same work. When the hospital did not address her concern, she brought an Equal Pay Act case. The hospital defended by claiming it did not *intentionally* set her pay lower, and it did not do so because of her gender. It quickly found this defense was inadequate. EPA cases simply look at the pay inequality, and the intent is immaterial. Equal work deserves equal pay. A valid EPA defense to different pay can be a valid non-gender factor such as seniority, special skills, or differences in performance levels. A defense that is routinely rejected is"we paid them based on what they got in previous employment."

This does not change the basic fact of unequal pay for the same work, and in fact, may simply incorporate and perpetuate pay discrimination of the prior employers and have an adverse impact on women or certain minority groups that are generally underpaid. In this case, the court found a violation of the law, awarded backpay, and awarded triple damages due to the hospital's failure to correct the disparity. *Mundell v. Acadia Hospital Corp.* (1st Cir., 2024)

Fair Labor Standards Act

A Lot of Little Things Add Up to $3.5 Million Payout. Sometimes a couple of minutes can create a Fair Labor Standards Act issue. A couple of extra minutes logging in or checking out per day can add up to hours over time, and thus overtime pay. Just requiring or allowing people to clock in a couple of minutes early for lunch can turn the whole meal break into paid time. In *Vasquez, et al v. Leprino Foods Co.* (E.D. Cal, 2024) workers alleged a variety of small on-call meal breaks and clocking-in or out violations that impacted virtually all hourly workers. Even though each issue did not affect all employees, almost all were subject to one or more. The company has settled the case and will pay $3.5 million to the impacted employees. [For more information on cases in which little bits of time add up to large liabilities **and** the Department of Labor's growing focus on these issues, request the article De Minimis – No Small Matter by Boardman Clark]

Patients/Clients May Be Employees Due Wages. A residential drug rehabilitation center required participants to engage in a work therapy program as part of their treatment. The rehabilitation center had contracts with businesses where the patients were placed, doing standard factory or maintenance work. The business paid the rehabilitation center, which used the funds to pay for the expenses of housing, feeding, and counseling the patients. The patients, however, felt they should receive pay for their work and filed a Fair Labor Standards Act case for wages. The court found sufficient grounds to allow the case to proceed as a class action lawsuit. The patients did jobs for companies in interstate commerce and their work directly contributed to the commerce and profits of the companies. The jobs were not simply training or assisted-work therapy, they were of a standard job nature. The rehabilitation center acted the same as a temporary staffing agency. In the trial, the rehabilitation center will have the opportunity to show the work program was actually"treatment", that the patients'"therapeutic" value from the placements was more than just bringing in money for the center, and that the costs of housing, feeding and counseling the patients significantly outweighed the value of the funds received from placing them into work assignments. Under the FLSA standards, this can be a difficult burden of proof. *Klick et al v. Cenikor Foundation* (5th Cir., 2024) This case is a word of caution for non-profit organizations that provide rehabilitation or

development programs that include work skill components. These programs can pose a fine line between"client service" and the clients being entitled to wages for "work."

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