EMPLOYMENT LAW UPDATE

December, 2023

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

Boardman Clark LLP
www.boardmanclark.com

LEGISLATION AND ADMINISTRATIVE ACTIONS

NLRB Joint Employer Rules Delayed. The National Labor Relations Board has delayed the implementation of its new Joint Employer liability rules from December 26, 2023, to at least February 26, 2024. This is to give time to consider several legal challenges filed as soon as the final rule was announced in October.

LITIGATION

Remote Work

Where is the "Brain"? *Where is a Company These Days?* Technology and remote work have drastically changed the concept of where a company is located. Long ago it was the place where the company was incorporated. However, for decades many organizations incorporated in tax-friendly Delaware, yet have no actual office there, and are headquartered elsewhere. Now, even the concept of a "Headquarters" can be up for interpretation. *Evans v. Cardlytics* (C.D. CA, 2023) is one such case. Cardlytics is incorporated in Delaware but headquartered in Atlanta, GA. Evans, who lived in California was discharged and sued over unfair discharge and violation of an employment contract. The case was filed in California. However, Cardlytics challenged this and sought to have the case removed under the federal "diversity" provision to Georgia, where its "principal place of business" was located. So, the question for the court was, *Where is the business?* The majority of executives actually lived in California and worked remotely from there; rarely going to the Atlanta headquarters. The Court assessed the question of *"Where is the principal place of business for a company whose leadership cadre lives, works and makes decisions far away from its corporate headquarters?"* The court decided that the principal place of business is its "Nerve Center and brain" where corporate officers direct, control and coordinate the corporate activities. The principal place of business is "*the brain*" and "the CEO and COO are akin to the prefrontal cortex and the hippocampus, i.e., the part most responsible for decision making." They live in and work from California. So, the case stays in California. The judge added that the decision "*is a function of evolving corporate practices and the dispersion of the workforce through remote work*."

Artificial Intelligence

CHAT-GPT Turns One! On November 29, 2023, CHAT GPT had its first birthday. In just one year, it has become a major force in research, literature, education, and law—already generating controversy-and cases far exceeding its brief existence.

AI – A New Realm of Lie Detection Testing. In *Baker v. CVS Health Corp.* (D. MA, 2023), the court has allowed a class action lawsuit to proceed regarding the use of Artificial Intelligence (AI) enhanced software which incorporates computer lie detection to screen video interviews of job applicants. This is not the standard lie detection testing in which the subject is connected to a device. AI is rapidly expanding the scope of what can be done without the subject ever knowing it is going on. That was the issue; the case alleges that lie detection testing was conducted without the knowledge or consent of perhaps thousands of job applicants. In a motion to dismiss, the company argued that the video screening was not actually a "lie detection" device. However, the AI software provider clearly advertised the interview screening product as "able to make credibility assessments, much like a lie detector" and to "scale your lie detection, screen out embellishers, and hone in on those who are actually a fit for the role."

Strangest Case of the Month

Generating Fake Exhibits and a Whole Fake Newspaper. There have been numerous instances of Artificial Intelligence (AI) generating false information; just making things up. Even attorneys have been caught submitting AI-authored briefs that cite completely made-up cases decided by non-existent judges. Now an attorney has been sanctioned for using AI to generate an entire newspaper, "The Saudi Sun" with a long article about Saudi and Egyptian arbitration judgments in favor of his clients. He submitted the newspaper as an exhibit to support a suit to collect on these judgments against assets held in the U.S. Opposing counsel subsequently discovered that The Saudi Sun did not exist nor did some of the judgments cited in the article. The court dismissed the case and sanctioned the attorney by ordering him to pay the $268,000 in legal fees which the other parties incurred in defending the case. In an even stranger twist, the sanctioned attorney then challenged the court's order. He claimed it was an illegitimate, fake order which had actually not been written or signed by the judge. *AI-Qarqani, et al. v. Chevron Corp., et al.* (N.D. CA, 2023). Finally, the attorney is also being investigated in Egypt for fraud due to alleged similar actions in the underlying cases in that country.

Discrimination

Age

$16 Million Settlement of Age Discrimination Case. Hewlett Packard Enterprises has agreed to pay $16 million to settle a case alleging that it sought to rid its workforce of older employees by targeting them in layoffs. The case alleged that the company laid off more experienced, older workers and replaced them with recent young college graduates. The case alleged that HP's CEO made multiple statements about seeking to make the company "younger." *Forsythe, et al. v. HP, Inc., et al.* (N.D. CA, 2023)

Sex

Goldman Sachs Pays $215 Million to Settle Evaluation Case – One of the Largest Adverse Impact Sex Discrimination Settlements Ever. Goldman Sachs has settled a sex discrimination class action for $215 million. The case alleged that its evaluation method, "360 reviews" and "quartering," systematically unfairly disadvantaged women. Women were consistently placed in lower rankings than men, resulting in an adverse impact in pay and promotions. Goldman Sachs will also modify its evaluation methods, bringing in an outside economist to oversee the process. *Chen-Oster v. Goldman Sachs & Co.* (S.D. NY, 2023). Poorly designed evaluations are often the subject of legal challenges. Various laws require evaluations to have "validity," which means provable to be based on sound principles and substantially job related, with managers trained in how to conduct them. Too many employment evaluations are done on generic forms (often copied from the Internet or some other company) without carefully validated metrics and supervisors who have received no special training before they mark boxes and write sometimes problematic comments. These are predictably going to generate eventual liability. If your organization is going to do performance evaluations, then they should be done correctly with validated

criteria, professional forethought, and planning. [For more information on validity and the proper foundation for evaluations, request the article Performance Evaluations by Boardman Clark LLP.]

Race

Firing Due to Bullying Behavior is Not Discrimination. Making complaints about discrimination or other protected activities can generate legal protections against retaliation but it does not immunize an employee from the consequences of their subsequent performance problems. *Berry v. Crestwood Healthcare, LP* (11th Cir., 2023) involved a discharged emergency room nurse. She alleged that she had been fired in retaliation for having made complaints about racial discrimination toward her and other Black employees. The company asserted the discharge was for the nurse's own improper behaviors. The hospital was investigating concerns about its work environment. It interviewed 24 hospital staff members, and 16 of these focused on this particular nurse as "bullying," and "causing chaos," and being a disrupting force in the environment. The court found this evidence sufficient to overcome the charge of retaliation. Close timing between engaging in protected activity and a discharge can often create a "presumption" of retaliation. However, that presumption can be rebutted by tangible evidence of a valid non-discriminatory reason for the action. The plaintiff can overcome this by showing the employer's defense is a "pretext," by showing contradictory, fabricated, inconsistent reasons, or other weakness of the evidence. However, in this case, the nurse could not overcome the tangible statements of the other workers about her disruptive behaviors. Thus, the court upheld a summary judgment in favor of the employer.

Restrictive Covenants

Stretching the Limits on Non-Solicitation Agreement. Non-Solicitation Agreements generally prohibit former employees from contacting their former customers for business reasons for a year or two after leaving a company. This protects the company from having people leave and take the customers or entice them away. However, the restrictions are supposed to be "reasonable." In *Automation & Modular Components, Inc. (AMC) v. Blackford, et al.* (E.D. MI, 2023) a company sued a former employee and his new employer for violation of the one-year Non-Solicitation Agreement. The violation alleged that the former employee attended a public charitable golf event in which there were also some of his former customers and was sponsored in part by another. There was no evidence that he did anything but play golf and say hello to people he knew. He made no sales attempts. AMC sought an Order requiring Blackford to quit his new job and have no further contact with his former AMC customers. The court denied the request. It found that simply being at the same public event with former clients and hundreds of other people was too much of a stretch to interpret as any form of "solicitation." A restrictive covenant must be "reasonable" and "narrowly tailored" to be enforceable. There was no evidence AMC had suffered any harm. Under AMC's proposed interpretation, former employees might not be able to attend any event where former customers might be present; sports events, theaters, concerts, perhaps even weddings of mutual friends for a year after leaving AMC. In order to validly enforce the agreement, the former employer must show more tangible evidence of an actual attempt to approach the customer about doing business; not just be in the same proximity.

Safety – Criminal Liability

Company Cannot Be Jailed, But Officers and Managers Might Be. A grain factory exploded, killing five employees. In the aftermath, state and federal inspectors found safety violations and an intentional cover-up. A Federal Grand Jury indicted the company on counts of falsifying records, fraud, and conspiracy; supervisors knowingly falsified logbooks used to determine safe handling of grain dust and compliance with dust handling regulations. The company entered a plea agreement to pay a $1 million fine and $10.5 million to the families of the deceased workers. The corporation received a five-year probation sentence, subject to frequent unannounced inspections. *U.S. v. Didion Milling Inc., et al.* (W.D.

WI, 2023.) You can't put a whole corporation in jail, regardless of the conviction. However, three of its managers, a VP, the Food Safety Superintendent, and the plant Environmental Manager are personally being criminally tried on charges of conspiracy, fraud, and falsifying records.

OTHER RECENT ARTICLES

These additional, recent articles can be found at BoardmanClark.com in the Labor & Employment section:

Should You Implement a Nonqualified Deferred Compensation Plan?
Jeff Storch |Boardman Clark LLP 11.20.23

\\msnfs2\share\docs\WD\27570\0\A5063216.DOCX