EMPLOYMENT LAW UPDATE

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LEGISLATION AND ADMINISTRATIVE ACTION

EEOC Religious Garb and Grooming Guidance. The EEOC has issued a Technical Assistance and Q&A publication about religious dress and grooming issues under Title VII. They emphasize that reasonable accommodations are required in dress codes or grooming requirements. The guidance addresses how to assess whether a garb or style is based on a sincerely-held religious belief so as to require accommodation. [For more information on dress codes, request the article Appearance: Laws and Cases, by Boardman & Clark LLP.]

LITIGATION

The Legal Update includes new developments and matters of interest throughout the United States. Be aware that our various federal circuit courts reach somewhat differing conclusions. So a federal court decision in another part of the country, and especially a different state's court decision, may not quite be "the law" in your jurisdiction. Some courts lead the way; others lag behind. The Legal Update lets you see the overall trends and compare them with your jurisdiction. Wisconsin is part of the Federal Seventh Circuit (Wisconsin, Illinois and Indiana).

Theme of the Month - Friends

Friends are a nice thing - usually. Not always. Especially when friends create conflicts of interest.

Investigation by Friend was Faulty and Biased. A sheriff department baliff claimed that she was sexually harassed, including physically assaulted, by a department sergeant. She took maternity leave, and then refused to return due to the inadequate investigation of her

complaint, and the continuing presence of the sergeant. She filed suit and the court found that the department failed to take adequate action to either investigate or correct the hostile environment. The sheriff assigned a detective to investigate the complaint. That detective was one of the sergeant's best friends and openly considered the sergeant to be his "mentor." The detective had no experience in employment investigations (which are substantially different than criminal investigations) and he had no training in the area of discrimination or standards of harassment. He was provided no guidelines or definitions for a harassment investigation. Then the detective devoted most of his focus to the fact that the complainant was an unwed mother, and to her relationship with the firefighter who was the father of her child; ostensibly to find "dirt" to make the complainant look bad, and take attention away from his friend, the sergeant. When the detective found "no harassment," the sheriff dropped the investigation. The court found that the department failed to meet its duty under the Faragher/Ellerth standard to take effective action to remedy the situation. *Kramer v. Wasatch County Sheriff's Office* (10th Cir., 2014).

New EMS Director Fires Employee and Rehires his Harassing Friend. A female EMS employee reported sexual harassment. The department promptly investigated and fired the male co-worker at issue. The department head retired and a new director was appointed; who happened to be a close friend of the fired worker. He soon fired the woman who had complained, and rehired his friend. He expressed the belief that her earlier harassment complaint was untrue. She filed a retaliation case under Title VII and the Tennessee Human Rights Act. The director's defense was that he terminated the EMS due to complaints about her. However, the court found this to be pretext. The complaints he cited were old and stale, and made before he was director. They had long ago been investigated by the county and found to be without foundation. The new director seemed to be dredging up old issues to find an excuse to fire the woman, in retaliation, to be able to rehire his friend. *Lawson v. White* (E.D. Tenn., 2014).

Free Food to Friends Justifies Discharge. A male casino employee was fired for giving away drinks and buffet entry to two female romantic interests. His defense was that they did not actually eat everything they took, so it was not enough of an amount to justify discharge; it should have been a lesser discipline. The arbitrator disagreed and upheld the discharge for theft of company property. Further, even if the employee was right about the amount eaten, once taken, the food could not be returned to the buffet and counted as lessening the amount taken. *In Re Unite Here Local 2262 and Harrah's Casino, Tunica Miss.*

Supreme Court

SOX Whistleblower Protection Applies to Subcontractors. In *Lawson v. FMR LLC*, the U.S. Supreme Court extended the reach and liability for the Sarbanes-Oxley Act. SOX applies to publicly-traded corporations and the financial industry and has extensive protection for employees who are whistleblowers - reporting a

variety of fraudulent or harmful practices. Two employees of a subcontractor were fired by their employer (a non-traded company) for reporting concerns about the corporation they were providing services to. The court ruled that their company, as a subcontractor to a "covered entity" was also covered by the whistleblower rules and could be sued by the two people who were fired. The message is that subcontractors may have to adopt the policies, reporting mechanisms, and liabilities under the SOX law.

***United States v. Quality Stores, Inc*.** Severance pay is "income" for standard income tax purposes, but is it "wages for work" subject to FICA tax? A lower court found that an employer and recipients of severance pay could request a refund of those taxes and contributions. The IRS appealed. The Supreme Court ruled in favor of the IRS. All taxes and employer contributions must still be made when paying severance or back pay amounts in settlements of employment issues.

Family and Medical Leave Act

FMLA Covers Accompanying Mother on Last Trip to Vegas. FMLA to care for a family member does not have to be for medical treatment. It can include providing care necessary for the family member to travel and gamble. The Fairygodmother Foundation grants wishes to terminally ill older adults. It did so for a person who wanted to take an end of life trip to Las Vegas. The grantee's daughter, a municipal employee, sought FMLA to care for her mother on the trip. When the daughter's employer found out that the trip had been to Vegas, and included gambling and shows, it fired her for abuse of FMLA. In *Ballard v. Chicago Park Dist.*(7th Cir., 2014), the court ruled for the daughter. She had provided care, assisted mother in travel, managed medications, etc. The mother could not have traveled, stayed alone, or done activities without ongoing care by another person. The FMLA does not specify where care must be provided, and under what circumstances, as long as it is for a serious condition. The 7th Circuit opinion is a departure from cases decided by the 2nd and 9th Circuits. [Was the employer's decision based on the age of the person and moral judgment about the type of activity? The Make a Wish Foundation gives trips to Disney World, etc. to terminally-ill children. Numerous employers have readily granted time off and FMLA to the parents to accompany and care for their children. The parent also participates in the trip experience, theme park rides, cruise activities, etc., without it being questioned as a legitimate leave. So, why would similar care for an older adult, with adult activities, be any different?]

DISCRIMINATION

Age

St. Louis Rams Wanted "Young Inexpensive Grinders." In *Fabian v. The St. Louis Rams* (E.D. Mo. 2014), the court found evidence that the NFL football club engaged in a

pattern of trying to eliminate older, more highly-paid employees. The case was brought by an employee who was let go after 16 years. Evidence included comments about being "too old for the job," and that the club wished to "change the culture" by bringing in "young, inexpensive grinders" who would grind out more work and work longer hours for less pay. A number of older workers were let go and replaced by people under age 40. The St. Louis Rams disagree, and are proceeding to contest the decision.

Sex

Fraudulently-Induced but Consensual Sexual Conduct was Not Basis for Case. A county employee represented to a woman that he had the ability to hire a massage therapist for a physical therapy position at a county hospital. In exchange, he requested sexual contact. She engaged in the requested contact. She then found there was no job, and he had no management position and no authority to hire anyone. She sued the county under Title VII (quid pro quo sexual harassment in hiring) and 42 US Code §1983 (due process and sex discrimination-equal protection violations). The court granted Summary Judgment to the county, dismissing the case. If there had been a job open, and the employee did have authority to fill it, then there could have been a Title VII case. However, the employee at issue never had authority and could not have possibly engaged in a quid pro quo effort. Similarly, there was no §1983 case because he was not acting in any official government capacity. He had no authority, he was simply acting on his own in an opportunistic fraud of which the county was unaware and for which it was not responsible. *Wilson v. Cook County* (7th Cir., 2014). This was not quite the end of the story. The fraudulent county employee was criminally charged and convicted for using his public job for official misrepresentation/misconduct/bribery.

No Sexual Harassment at Strip Club. A waitress at a strip club could not maintain a case for sexual harassment. She complained that a manager had made sexual comments and propositions to her and that she was subjected to a sexually hostile environment. The owner promptly investigated and fired the manager within three days. The court found that the club met its duty to take prompt and effective action to stop the harassment. The sexually hostile environment claim failed because the waitress frequently visited the club in her off-time to socialize and testified in her deposition that she "enjoyed the sexually-charged atmosphere," but not the manager's overtly crude attention to her. *Wyly v. WFKR, Inc*. (W.D. Tx., 2014). Note: sexually oriented entertainment businesses ("strip clubs," casinos, etc.) are often more successful in harassment cases than standard businesses, and even religious organizations. Businesses with an overt sexualized focus are often much more attuned to their extra duty to protect employees from the anticipated comments and attentions which can result. They take extra precautions, have extra and vigilant security, and act quickly to remove or discharge those who engage in over-the-line behaviors. Before casting aspersions about the nature of the business, some "standard" organizations might learn lessons about harassment prevention.

Sexual Orientation

Mohawk Hairstyle Rule Was Not Orientation Discrimination. A flight attendant was ordered to alter his Mohawk haircut, since it violated the appearance standards. He refused and was suspended from flights until he conformed. He sued claiming this was sexual orientation discrimination-harassment. The court granted Summary Judgment, dismissing the case. A Mohawk haircut is not unique to, nor symbolic of a gay orientation. No comments were made about sexual orientation in discussions of the appearance standard issue. There was no evidence of anyone else, of any sexual orientation, who was treated more leniently. The plaintiff's case was based on speculation and conjecture instead of any factual basis. *Falcon v. Continental Airlines* (C. NJ, 2014).

Retaliation

Retaliation For Refusal To Retaliate. A West Virginia municipal police chief was fired for refusing to follow the mayor's directive to retaliate against an African-American officer who had filed a racial discrimination complaint against the city. The mayor was upset about the complaint and told the chief to plant a GPS device on the officer's car and track him in order to find some reason for discipline or discharge. The chief refused to engage in retaliation, and the mayor fired him. He filed a wrongful discharge in violation of public policy case. The W. Va. Supreme Court found a valid retaliation case. The mayor's defense of "qualified immunity for public officials" was rejected because it is not available for "fraudulent, malicious, or oppressive acts." *Brown v. City of Montgomery* (W. Va. S. Ct., 2014).

Fair Labor Standards Act

$73 Million For Off-Clock Work. Bank of America has agreed to pay $73 million to settle claims that it forced employees to work overtime without compensation. Tellers were allegedly told that only 40 hours were allowed in a week. Then, when ordered to work extra, the company allegedly removed any excess hours from the time records. It did give "comp-time" for some of those hours; however, comp-time is illegal under the FLSA for private sector businesses. *Dept. of Labor, In Re Bank of America* (D. Kan., 2014).

National Labor Relations Act - Arbitration

Employers Drug Test Was Invalid. Employers can purchase drug test kits and have supervisors administer them at work. Positive tests may then be forwarded to a testing lab. This is a lot cheaper than sending all tested employees to a laboratory. *In Re US Steel Corp. and United Steelworkers #2122* involved a termination of an employee for an adulterated test. The arbitrator reversed and ordered reinstatement with back pay. The test was conducted by a person who was not trained and was inexperienced in drug

testing. Then the employer did not monitor the important chain of custody protocols in sending the sample to a testing lab. A message from this case is that any on premises company testing should be done carefully, with adequate training of the supervisors, and attention to protocol. Purchasing on-site self-administered test kits is cheaper than always using a testing laboratory - unless you have to defend cases, pay legal expenses, reinstate fired employees, and pay full back wages.

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