EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

Protecting Older Workers Against Discrimination Act Introduced. In a bipartisan effort, Republican and Democratic senators have introduced the POWADA, which will allow "mixed motive" claims for age discrimination under the ADEA. This would erase the Supreme Court's 2009 *Gross v. FBL Financial Services* decision which ruled that the Age Discrimination in Employment Act required a "but for" standard. If there was any other valid reason for an employment decision, the mere fact that there may also have been age animus cannot be used; age must be the reason. The proposed law will allow a verdict for a plaintiff if age was "a factor," among other reasons.

Ban The Box For Federal Contractors. The Senate Homeland Security and Governmental Affairs Committee has proposed the Fair Chance Act. It will prohibit Federal contractors and government agencies from inquiring about conviction records in most hiring situations until after a conditional offer of employment. An Executive Order is already in effect prohibiting federal agencies from inquiry into conviction records during the initial part of the hiring process.

Trends
Close Examination Of The Employment Relationship

A growing number of agencies, NLRB, DOL, IRS, OSHA, and states are examining whether there is "employment" liability for use of Independent Contractors, volunteers, leased workers and the workers of Sub-Contractors. Recently DOL has been ruling that Independent Contractors and Joint Employers may have FMLA rights. When the company has the right to have strong "influence" in hiring, firing, terms and conditions of employment, it may be "the employer." The DOL issued an Administrative Warning that

it considers most Independent Contractors to be "employees" and entitled to FMLA and other wage and hour rights. The test is "whether the worker is economically dependent on the employer" or truly in a well-established independent business with multiple other clients.

The NLRB issued Joint Employment rulings, *In Re Browning-Ferris Ind.* (NLRB, 2015), finding a "common law" employment liability if a lessor company "shared or codetermined" terms or conditions of employment with the placement or leasing agency. Under the FMLA the DOL has declared that in Joint Employment both the lessor and the placement/leasing agency must count leased employees as their own in arriving at the 50 employee coverage level, and both must give FMLA rights to those workers. (However, only the one which issues the payroll is responsible for giving FMLA notices, and maintaining health insurance benefits during FMLA.)

LITIGATION

Family And Medical Leave Act

***"FMLA Vacation" Cruise Was Not Medically Necessary*.** An employee had been granted intermittent FMLA leave for migraines. She then submitted a doctor's note excusing her from work for a two week *"FMLA vacation."* The employer then discovered the two weeks were indeed a vacation, in which she and her husband were on a cruise ship. The employer requested clarification from the doctor. The doctor responded that the employee was actually able to work during the two weeks; he wrote the note for "FMLA vacation" when the employee told him she had some paid time off available and they hoped a little time off work might relieve stress and lessen the migraines. The company fired the employee due to misuse of FMLA. She sued. The court ruled for the employer. Though the stress relief vacation could be a reasonable attempt to see if it helped migraines, it was not medically necessary, and did not fit the statutory scope of FMLA. If the employee wanted vacation, she should have scheduled it appropriately rather than characterizing it as FMLA. *Fitterer v. State of Wash. Employment Security Dept.* (E.D. Wash., 2015). [On the other hand, any employer should have questioned a doctor's note for "FMLA vacation" before it occurred.]

Discrimination

Testing

Drivers Strength Test From Test Seller Was Invalid. A trucking company has resolved an EEOC case by agreeing to stop the use of a strength test it purchased from a test vendor. The EEOC charged that the strength exam had an adverse impact, eliminating a disproportionate number of women and older applicants. The test was not "job-related and consistent with business necessity" because many drivers did not have any requirements to

utilize the strength required in the test. They did not load, unload, or do other strenuous physical activity; they drove. Though the vendor developed the test, the company had all liability for its adoption and use of the test. *EEOC v. CRS* (2015 settlement).

Religion

Singled Out As "Evil." A county court supervisor singled out a Muslim woman of Saudi Arabian descent for hostile treatment, denied her leave for Muslim holidays, and forced her to attend a Christian prayer meeting at work. The supervisor openly commented that she and the other workers were "good church-going Christians" rather than the "evil" Muslim employee. The employee filed a Title VII religion and national origin case. The court found sufficient evidence of harassment to deny summary judgment and warrant a jury trial. *Huri v. Office of the Chief Judge of Cook County* (7th Cir., 2015).

Sex

OFCCP – Job Steering. Home Depot has agreed to pay $83,000 to settle a OFCCP charge that a California store engaged in "steering" women applicants to cashier positions while equally or less qualified men were placed into higher paid sales positions. In the settlement, Home Depot did not admit any fault and asserted that it engaged in non-discriminatory practices; in fact, it claims that a regional vice president and two division presidents are women who started as cashiers.

Culture Of Raunchy Sexual Comments And Harassment By Two Managers. A court has found ample evidence for a harassment case by a male accounting employee in a mostly female work unit. The women had created an accepted culture of overt discussion of their sexual experiences, sexual comments about male employees, and telling raunchy sex jokes. The male employee expressed embarrassment and a dislike for the comments. Two top female managers focused on the new male employee and began sexually overt comments, touching, and "grinding" against him. They also called or texted him after hours, while they were out drinking, asking him to come and engage in sexual activity and requesting pictures of his genitals. The male employee objected and asked for the behavior to stop. It continued. He was told by other supervisors to "try to ignore it." The two managers continued the behavior, and accused him of being gay for not wanting to have sexual relations with them. When he continued to protest, the managers began to focus on his performance and attendance. He was fired for a day of no call-no show. The two managers claimed they had consulted with and relied on negative reports by the employee's supervisors. However, the two relevant supervisors testified that they had not been consulted before the discharge, had no serious problem with the employee's performance, and one had pre-approved the day off for which the employee was fired. The court found pretext in the reasons given for discharge and ample evidence for both a harassment and retaliation case. *Isenhour v. Outsourcing of Millersburg Inc.* (M.D. PA, 2015).

Disability

Operational Changes Over Time Can Alter Reasonability Of Accommodation. An employer accommodated an employee's hour limitations (due to diabetes and a heart condition) by not making him work the mandatory overtime all others were required to do, under the Collective Bargaining Agreement (CBA). The union ok'd this accommodation. The accommodation was in effect for several years. Then both the business needs for OT increased and multiple other employees sought work hour accommodations for medical conditions. Those without disabilities were now pulling much greater OT loads, complaining, and filing grievances. The union and company decided to end the accommodation and require mandatory OT. The employee was transferred to a lesser position, without OT. He sued under the ADA and Minnesota Human Rights Act. The court ruled for the employer. An accommodation is not carved in stone. When conditions change, a once reasonable accommodation may not be so anymore and can be modified or stopped. In this case continuation of the accommodation would violate the CBA, once the union withdrew its waiver. Also, in this case the growing number of others seeking accommodation of hours created a problem. Continuation of the original employee's accommodation without accommodating the newly-disabled would create an unequal situation. Accommodating all would create an impossible burden upon the other workers who would have to work all of their OT hours. *Chavira v. Crown Cork & Seal USA Inc.* (D. MN, 2015).

"Transitory" Condition Can Be An ADA Disability. The language of the ADA Amendments Act states that even short-term conditions which are "transitory" may be covered disabilities, requiring accommodations, if it substantially limits a major life activity. *In Green v. Teddie Kossof's Salon & Day Spa* (N.D. Ill., 2015), the court ruled that an employee's short-term ovarian cyst condition substantially limited the ability to walk, sleep and sit. Thus, she should have been given accommodations of shorter hours, and less strict attendance requirements for a reasonable time. This case adds confusion for employers about the definition of who must be accommodated and whether any short-term FMLA medical condition may also be a disability.

Employer Was Entitled To Request Return To Work Exam. A case that almost begs for bad puns, is the ADA claim of a sewage plant worker for the City of Flushing, Mich. He submitted a psychologist's note for FMLA stating "needs to be on sick leave." He was granted leave, with the requirement of medical evaluation and clearance for return to work. He refused the return to work evaluation, and lost the job. He filed an ADA claim. The court sent the case down the drain, ruling that an employer has a standard right to require a return to work evaluation and certification. It did not single out the plaintiff, nor just people with disabilities in its return to work practices. *Penn v. City of Flushing* (E.D. Mich., 2015).

Unified Services Employment And Reemployment Rights Act

Deployed Doctors' Rights Are Limited By Short-Term Contract. A surgeon entered into a one-year contract with a hospital. He had been offered a permanent position, but declined in order to keep his options open. The hospital started recruitment for a permanent surgeon. The doctor was then called to active duty in Iraq. When he returned, the year was past, and he was not restored to the position. He sued under USERRA. The court dismissed the case, ruling that the law's restoration provisions do not give greater rights than one had before deployment. The law does not convert a one year term to a greater length. *Slusher v. Shelbyville Hospital Corp.* (6th Cir., 2015).

Labor Arbitration

Cupcakes Did Not Violate Drug And Alcohol Policy. An employee brought alcohol-laced "adult cupcakes" to work for an office Halloween party. She was fired for violating the Drug and Alcohol Policy which prohibited "possession or drinking of intoxicating alcoholic beverages" on the property. An arbitrator reversed the termination, ruling that the policy did not cover the incident. A cupcake is not a beverage. One does not drink a cupcake. Also relevant was that the employer never tested the cupcakes to determine if they had enough alcohol to be "intoxicating." Further, it only disciplined the woman who brought the treats, and none of those who consumed them, knowing they were "adult cupcakes." *In Re First Student Inc. and Teamsters Local #957* (2015). This case is a message that one may wish to review and refine your company's D&A policy.

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