EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

Expanded FMLA Enforcement – Systemic Audits. The Department of Labor is expanding the scope of FMLA enforcement. Instead of focusing on the facts of an individual complaint, the Department will increasingly use the occasion of one person's complaint to request the overall FMLA records (policies, leave requests, medical certifications, leave determinations, pay/attendance records, etc.) for the entire workforce. It can then determine whether there are systemic issues in need of correction and other employees who should also receive economic damages or other remedies. This is similar to DOL's general approach to wage and hour complaints. Employers should examine their FMLA process and records and be prepared for a much more extensive audit.

LITIGATION

Jurisdiction

***South Carolina Law Covers Air Traffic Controller at Antarctic Research Station*.** Though it is a long way from the Palmetto State, jurisdiction can extend to the frozen bottom of the world. An air traffic controller at an Antarctic Naval Research Station was fired after he complained that the Weather Observance Staff were creating a distracting, unsafe situation in the control tower, by loud music, playing video games, and coming to work intoxicated. The air traffic controllers were civilian contractors, hired by a private corporation. The fired controller was shipped home, then filed a wrongful discharge case in South Carolina, where the contractor was located and where he had been hired, and paid from. Though all actions and the firing had occurred in Antarctica, the court allowed jurisdiction, since South Carolina was the home base of the employment relationship. (The Court ultimately dismissed the case, finding it failed to state a sufficiently valid claim

within the meaning of South Carolina's narrow wrongful discharge law). *Desmarais v. Scientific Research Corp.* (D.S.C., 2015). The message is that when employees work in multiple locations, they may have multiple jurisdictions in which to bring a case. Just because the work is done in one location, does not mean they cannot invoke the laws of another place, especially when any degree of authority or administration is in that place. Sometimes the cases are brought under the laws of several states at once. Things get even more complex if you send employees to work outside the U.S. (in a country with its own laws – unlike Antarctica).

Fair Labor Standards Act

Minor League Baseball Players Certified for FLSA Case. In *Senne, et al. v. Kansas City Royals Baseball Corp., et al.* (N.D. Cal., 2015) the Court has allowed a group of minor league players to sue for not being paid minimum wages and overtime. They allege that minor league players receive small pay ($3,000 to $5,000) for a five month season of over 50 hours a week. They receive no pay for spring training, and less than minimum wages for post season playoffs.

Direct TV Liable for Wages Not Paid by Sub-Contractor. TV service installers worked for a subcontractor, which did not properly pay their minimum wage/overtime/travel time, etc. (The installer's "piece rate" compensation did not meet FLSA standards.) The court rejected Direct TVs argument that the installers were not its employees. All of their work was for Direct TV. They wore Direct TV insignia, and Direct TV scheduled and directed the work. Both Direct TV and the subcontractor could be liable for all wages due. When a subcontractor has insufficient funds, goes out of business, etc. the deeper pocket pays. The court ordered Direct TV to pay $395,000, plus conduct a nationwide audit of all its subcontractors to determine if further FLSA issues requiring payments may be due. *Thompson v. Brewster Assoc. (& Direct TV)* (M.D. Tenn., 2015).

Discrimination

Age

"Not Looking for Old White Guys" - Age Comments Result in Class Action Against Restaurant Chain. The EEOC has brought a class action suit alleging that a restaurant chain had a practice of rejecting older applicants. Evidence includes the restraints hiring manager's statements such as "we are not looking for old white guys"; "we are looking for fresh employees"; and trying to project a "youthful image". Some well qualified older applicants were told "you are too experienced", and young people with little or no experienced were hired. *EEOC v. Darden Restaurants, Inc.* (S.D. Fla., 2015).

Dinosaur Wins Case. A plumbing and gutter supply company paid a half million dollars to settle a case of involuntary retirement of a 63 years old executive. Significant evidence was that the company's largest shareholder and board member told the executive "you're a dinosaur" and it's time to bring in younger employees to take the company into the future. *Dinkgrave v. Genova Products, Inc.* (Mich. Cir. Ct., 2015).

Unions Charged With Age Discrimination and Retaliation. Unions are liable under the ADEA especially when the union's own "hiring hall" determines which members are allowed to work, and which jobs they receive. In *Kazolias v. IBEW* (2nd Cir. 2015) two older journeyman wiremen complained that they were being passed over for referrals due to age. They first complained internally. Following the complaints they received no work for approximately six months, until filing with the EEOC. In that time a union business agent made negative and profane comments about the two complainers. The Court found sufficient evidence for valid cases of both age discrimination and retaliation.

Disability

Steak n. Shake Manager Loses Case. The Court dismissed the case of a former restaurant manager who alleged he was demoted due to his condition of depression. The demotion took effect after he notified the company of the depression and took short term disability leave for treatment. However, he was notified of the impending demotion, due to a poor performance of his restaurant, several days prior to informing the company of his condition. The Court found the decision was made without knowledge of depression, and could not possibly have been based on the disability. The fact that the already decided demotion took effect while the employee was on a STD leave did not change this. He was restored to the lesser position of which he had previously been informed. *Cosby v. Steak n. Shake* (8th Cir. 2015).

Race

$4.5 Million for Race Discrimination Against White Professor. A jury awarded $4.5 million to a White college professor who was laid off in a reorganization/reduction in force at a historically African American university. After a new African American department chair was appointed, the professor raised concerns about racial discrimination. An African American professor also raised concerns about the new department chair's racially biased comments, and was warned about speaking out. The RIF of the White professor was allegedly due to "budget reductions". She was the only person affected. Then the Department hired two new, and less experienced African American faculty, to teach her courses, at a cost of $23,000 more than she was paid. In the trial no one in the administration could explain why the professor had been chosen for layoff. Not a single administrator would take responsibility for being involved in the decision. The college failed to follow its own policies on the RIF. The university failed to preserve evidence regarding the RIF, and wiped the professor's email account, destroying possibly damaging

evidence. Finally, the university's HR manager testified that she had been ordered not to investigate the White professor's complaint about discrimination; "it was the first time in 15 years" she had been directed to ignore a discrimination complaint. The jury awarded $1.35 million economic and emotional damages, and $3.5 million punitive damages under Federal and Missouri State discrimination laws. *Wilkins v. Harris Stowe State U.,* (Mo. Cir. Ct., 2015).

Sex

Guns Taken Away From Pregnant Police Officers. In *U.S. Department of Justice v. Triborough Bridge & Tunnel Authority* (E.D. N.Y., 2015) the Authority has settled a sex/pregnancy discrimination case. It had a practice of requiring its female security police officers to surrender their weapons, and work in limited duty status the moment it became aware of a pregnancy. This was regardless of the officer's physical condition or ability to perform; there was no individualized medical assessment. The limited duty status reduced the officer's pay. The Authority will pay $206,000 and revise its practice. Just as in ADA cases, the pregnancy discrimination law requires an individualized assessment consistent with business necessity in order to eliminate or diminish duties.

Surrogate Mother Expressing Milk to Donate. Federal and some state laws require employers to provide reasonable opportunity and space for expressing milk for infants. In a case of first impression a court addressed whether this must be for one's own infant. A surrogate mother gave birth, and for a short time provided milk to the adoptive parents. That then stopped but her doctor advised that she continue expressing milk for her own health. She donated the milk, to be provided to mothers who could not produce their own. Her employer first granted lactation breaks while she was sending the milk to the child she gave birth to. Then it denied the breaks, in spite of a doctor's note advocating a health need to continue, once the milk was going to others. Human Resources allegedly informed her that since she was not feeding her own child she was not eligible for breaks and not entitled to accommodation. The employee allegedly suffered clogged ducts, pain, and other medical complications. She sued under Title VII, and California State antidiscrimination laws for failure to accommodate a pregnancy related condition. The court rejected the employer's contention that the milk expressing rules only apply to one's own child. The law does not specify that. Further the employee's doctor verified the medical reason to continue expressing milk following pregnancy. Thus the situation fit within the accommodation of a pregnancy related condition. *Gronzules v. Marriott Int.* (C.D. Cal. 2015).

"Rude" Female Doctor Fired, But "Angry" Male Doctor Sent to Counseling (and Hospital Liable, Not Placement Agency). A hospital's doctors were all placed and paid through a medical placement agency. The hospital received complaints about rude, but not overt, behavior by a female doctor. The hospital told the placement agency to remove her, it would no longer allow her to practice there. However, at the same time there were many

complaints about a male doctor having repeated overt angry, loud, profane outbursts, toward other staff. The hospital counseled the male doctor and sent him to anger management classes. In the title VII case the court found clear evidence of sex discrimination. The Court rejected the hospital's defense that the doctors were not its employees. It set the terms of employment, made all decisions on both doctors, and directed the placement agency to remove the doctor. Under Title VII it was clearly liable as a joint employer. In fact it has all the liability; the court found the placement agency was not involved in and had no liability for any of the decisions. Once the hospital said the doctor could not practice there, the agency had no authority to have her continue. *Scott v. Sarasota Doctor's Hospital, Inc.* (M.D. Fl, 2015).

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