EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATION ACTION

***EEOC Considers New Retaliation Rules*.** Retaliation complaints have become the largest category of EEOC discrimination filings. The last regulations on retaliation were issued in 1998, and the level of retaliation complaints have more than doubled since. They now constitute 43% of all charges, dwarfing any other EEO discrimination category. The EEOC wants to revise its rules to protect complainants and witnesses, but also to educate and help employers prevent retaliation liability. [Also see the article Retaliation by Boardman & Clark LLP.]

EEO-1 Report Will Require Employers To Submit Compensation Data On All Employees. In February, 2016 the Dept. of Labor published proposed regulations which will require W-2 wage information to be included according to job categories, with 12 "pay bands." All companies with 100 employees are required to submit an annual EEO-1 Report to the EEOC. The new report does not require personal identity information, rather it will track the EEO category and wages of each employee within each pay band. This report will be used in the analysis of pay disparities based on gender, race, ethnicity, etc. The rules would go into effect in September, 2017.

OFCCP Drops Pay Reporting Proposal. The DOL's Office of Federal Contract Compliance has announced that it is dropping its proposal that Federal contractors report on pay ranges. The OFCCP states that the EEOC regulation (above) will cover the same territory, and a duplication is not necessary. OFCCP can use the EEO-1 Report information for its own assessments.

LITIGATION

Fair Labor Standards Act – Wage Claims

Franchise Owner Sentenced To Jail For Overtime Pay Violations. A Papa John's Pizza franchise owner was found to have violated the FLSA and state law by failing to pay overtime. The company, under the owner's direction, paid only straight time for hours worked over 40 per week. It also created fictitious names for employees' use after the first 40 hours, to hide OT work. The company will pay $960,000 in back wages, punitive damages and penalties. The owner was found criminally liable and will spend several months in jail. *In Re: New York v. BMY Foods and J. Khokhar* (N.Y., 2016). [Engaging in loose pay practices is dangerous, not only for business owners, but also for board members, COOs, HR managers, and even supervisors. The FLSA imposes personal liability for violations – the back pay and penalties can be assessed against the individuals involved and collected from the personal assets of those individuals and their families. The DOL, IRS, and some states, as illustrated in this case, can also have the individuals criminally prosecuted.]

Discrimination

Sex

Mom Of CEO – Employee Fired For Rejecting Meddling Mothers Machinations. A TV station employee was supervised by the mother of the station's Chief Executive Officer. The mother became fixated on the desirability of her son marrying the employee, and began a campaign to accomplish that mission. The employee did not want to be involved with the CEO and stated so. Mom persisted, making statements like, "I'm going to be your mother, one way or another;" "marry him now or you'll be old and your babies will be retarded." When the employee continued to resist, the mother engaged in what was described by the court as "mercurial, volatile, disruptive and abusive behavior," and began an effort to get the employee fired. When the employee complained to the CEO about his mother's efforts to couple them, and rumors spreading about their romance, his reaction was "at least the rumors make me look good." Complaints to HR and the Chief Financial Officer also got no result. The employee was fired. She sued under Title VII, and the court found a valid basis for sexual harassment and retaliation claims. The court rejected the company's defense that Mom, herself, was not seeking a sexual relationship with the employee, therefore the situation was not sexual harassment. The court ruled that the employee was subjected to severe and persistent negative attention because of her gender, when she resisted a romantic relationship. She had an adverse employment decision based on rejection of romantic advances; regardless of who instigated the advances it fits the *quid pro quo* mold. She was fired in retaliation for complaining about the harassment. *Allen v. TV One LLC* (D. Md., 2016). [Even if family members are not supervisory employees, their acts can still generate liability for family-owned or closely-held companies. Non-

employee board members and influential family often have great influence, and are able to engage in improper acts toward employees, thus creating cases. For more information, see the articles Son of CEO and/or The Undefendable by Boardman & Clark LLP.]

Disability

Trend Continues – Medical Marijuana Use Not Protected. Though marijuana use is legal in a number of states, most of those states are ruling that an employer can fire workers who test positive, even when the drug is prescribed and used off-work to treat a disability. Marijuana use is not a protected accommodation under the American with Disabilities Act, since it remains an illegal controlled substance under federal law. Most of the legal marijuana states also recognize that Federal law, and try to balance a state right to use with an employer's interest in maintaining a drug-free workplace. *In Swan v. Safeway Inc.* (W.D. Wash., 2016), an employee filed a disability case after being fired for failing a post-accident drug test. He produced evidence that he had been prescribed marijuana for a disability, and claimed that the company's action was a failure to accommodate. The court disagreed. Though he had a state law right to use the drug, the employer did not have to alter its drug-free workplace policy. The discharge was valid. [Be cautious. If medical marijuana is legal in your state, check the state law and decisions. This case represents a trend; not every state has or will rule this way.]

"Thin Evidence" Warrants Trial. A construction company withdrew an engineering job offer after a post offer medical evaluation discovered the candidate had a rotator cuff impairment. Its reasons were inability to do essential job functions such as driving and climbing ladders. It also claimed the employee's pain medication would create a safety issue. The court found the shoulder condition was an ADA disability, or was "perceived as" a disability by the company. Then it held that the company's reason for non-hire seemed too "thin" to be valid. The company withdrew the job offer very quickly after learning of the rotator cuff; too quickly for any legitimate interactive process as required by the ADA. The company's reasons were also refuted by a video showing the applicant satisfactorily climbing a ladder. The applicant's doctor also stated that the pain medication would not impair driving and the course of medication was ending prior to the job starting. *Cannon v. Jacobs Field Services Inc.* (5th Cir., 2016). This case is a warning about being too hasty in rejecting a candidate after a post-offer medical evaluation. The ADA requires "validity" and proof of an effective interactive process before decisions.

Stripper Remark To Teenager Warranted Discharge. A cashier at the National Gallery of Art gift shop was discharged after he told a teenage customer that he was handing over his money like he was in a strip joint – "That's how you give money to a stripper." The employee claimed that his epilepsy was at issue; he had no awareness of what he might say during a seizure. He claimed the employer should have accommodated, and excused the incident, and that the discharge was a pretext for discriminating against a person with epilepsy. The court dismissed the case. There was insufficient evidence of a seizure right

at the time of the incident, and he did not inform the manager making the decision of a seizure. The decision maker had no knowledge the person had epilepsy; so could not have considered it. The statement to a teenager was a sufficient violation of the Gallery's "table of offenses" policy. *Donovan v. Powell* (D. DC, 2016).

Race

Prison Guard Couple Harassed For Interracial Relationship. Two Maryland correctional officers, a White female and an African-American male, began dating and established a romantic relationship. Their supervisors apparently were offended. The evidence was that the couple were suddenly getting special scrutiny, and subjected to negative action for "infractions" that no other guards received. They were denied breaks, and prohibited from seeing each other at lunch. Managers made comments such as "It's disgusting that you two are together;" "You know if your White a—gets pregnant, he's just going to leave you and the kid – that's what Black men do." A Captain yelled at the woman, "Get your White a—out of my office!" Then later the Captain locked her into a restroom and said she would not let her out until she understood, "How the real world works when dealing with a Black man." When the couple complained, the female officer's shift schedule was suddenly changed so that she could no longer care for her child. The couple filed state and Federal harassment charges. The court found ample evidence to support the claim of racial harassment. The court also found grounds for a retaliation case on the part of the female officer. Actions against the male officer were sufficiently harassing but not severe enough to create a retaliation claim (counseling and reprimands but without formal transfers or suspensions or actual loss of pay). *Antrey v. State of Maryland* (D. MD, 2016).

National Origin

"Communication Style" Does Not Equate To National Origin. A discharged manager from Nigeria claimed that critique of his communication and eventual discharge was due to his national origin and accent. However, the court ruled that there was no apparent connection. The manager claimed that his supervisor frequently gave him criticism on his manner of speaking and facial expressions; "your eyes pop out, your nose flares, and your manner of speaking is very offensive." He was told that he was "arrogant, animated, aggressive, and intimidating" and that he should communicate with others in writing because it was less offensive. The court found no evidence of any comments about Nigeria, about national origin, nor that accent was at issue. The plaintiff did not claim that the style of communication described by the manager was a national original related trait. Thus, there was no connection between the communication style critique and national original. The case was dismissed. *Harry v. Dallas Housing Authority* (N.D. Tex., 2016).

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