EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

EEOC Issues Proposed Wellness Plan Regulations. On April 16th the EEOC issued proposed regulations on how the ADA will apply to company wellness plans. They include: (1) Incentives/penalties linked to participation in a wellness program will be permitted up to 30% of the cost of employee-only coverage; (2) Wellness programs must be reasonably designed to promote employee health; (3) Participation cannot be mandatory; (4) Medical information collected as part of the program must be kept confidential; (5) Employers must provide reasonable accommodations to those who cannot meet wellness program requirements due to a disability; and (6) Employers must provide employees with a notice that describes what medical information will be collected as part of the wellness program, who will receive it, how the information will be used, and how it will be kept confidential. These are proposed regulations subject to a 60-day comment period. The full proposed regulations can be found: https://www.federalregister.gov/articles/2015/04/20/2015-08827/regulations-under-the-americans-with-disabilities-act-amendments.

Utah's Balanced Religious Rights & Anti-Discrimination Law. Utah Republican Gov. Gary Herbert signed a new law which seeks to avoid the recent uproar over religious rights laws which allow businesses to refuse service on the basis of their beliefs. The Utah law expands anti-discrimination protections for LGBT employees and customers. It also protects people's "reasonable expression" of their faith-based beliefs in the workplace or business in a non-harassing, non-disruptive manner. The law involved input by many groups and was supported by the LDS Church, the Chamber of Commerce, and Equity Utah, an LGBT advocacy group.

LITIGATION

Constitution

Bias–Hate Speech Law Unconstitutionally Vague. A White public employee's conviction for violating the New Jersey Bias Intimidation Act was overturned and the relevant section of the law ruled unconstitutional. The law created liability for "bias intimidation" not based upon intent, but rather whether the victim perceived the behavior or comments to be due to bias. Guilt may depend on the *"distinctive cultural, historical and family heritage and prior experience"* of the victim. The White employee had participated in an overt workplace prank against an African-American co-worker. The prank warranted discharge, but the case was prosecuted under the Bias law. Though a jury found no evidence that race was a factor, and specifically found the employee had no racial intent whatever in the prank, there was a conviction because the victim "perceived" a racial motive. The state Supreme Court overturned and voided the law. It violated the essential Constitutional due process/fair warning principals. It would require one to guess the unknown "culture, history, family heritage, and prior experiences" of others and guard against doing anything which might create a subjective impression of bias. The law "creates a trap for the unwary" rather than serves to punish intentional acts. *State v. Pomiamek* (N.J. S. Ct., 2015).

Corporate Structure

When is one company liable as a "joint employer," "indirect employer" or "successor" of another company? If the second company exercises enough control of the work environment, or the terms or conditions of employment it too may be sued for harms done to its leased or subcontracted workers. For instance, the Dept. of Labor has recently alleged that McDonald's national corporation is liable for wage and hour issues of its numerous separately incorporated franchisees. The following cases show a lack of the requisite connections.

What Is In A Name? – No Liability If That Is All It Is. A holding company licensed its name for use by adult entertainment clubs. In *Shiflett v. Scores Holding Company* (2nd Cir., 2015), the court found this did not create enough connection and found the holding company was not liable for the acts of the franchises. A former employee of Go West Entertaining, doing business as Scores West Side, sued the club she worked at for sex and race harassment, alleging improper sexual advances and hostile comments about her Chinese ancestry. Go West filed for bankruptcy, and she then named Scores Holding as a defendant, a joint employer, in order to seek damages. The court dismissed, finding insufficient connection. The holding company only licensed use of its name, it had no role in

the management, control of labor, or financial operations of the separate companies who then used that name.

No "Indirect Employer" Status. A foreman for a subcontractor on a construction project got into an altercation with another subcontractor's worker. The primary contractor then barred him from the project. His own company then could not use him, and he was discharged for lack of other work. He sued his company and the prime contractor. His company was not liable because it was not the decision maker about his inability to go onto the project site. Further, he could not show the primary contractor was his employer. It exercised no employment power over wages, duties, or termination. It only exercised reasonable security precautions over the premises, it made no decision as to whether he could or could not work elsewhere for his own company. *Love v. JP Cullen & Sons* (7th Cir., 2015).

Discrimination

Disability

The Four Corners Of The ADA. The ADA prohibits discrimination against those who are disabled, are perceived as disabled, are associated with a disabled person, and requires reasonable accommodation of disabled employees. Cases this month cover all of these:

Implausible Defense – Manager Knew Of The Disability. A state agency defended an ADA case by claiming it was unaware of any anxiety-depression disability at the time the employee was discharged. This defense fell apart when there was evidence of the employee's e-mails to her supervisor requesting accommodations for the condition, and of her supervisor calling a meeting with other managers to discuss the request prior to the discharge. *Jacobs v. N.C. Admin. Office of the Courts* (4th Cir., 2015).

"Your Job Or Your Daughter." A discharged employee was able to maintain a case under the ADA and the New York City Human Relations Law. She took time off for treatments required by her infant daughter's "low oxygen-potential asthma" condition. Though she had not yet demonstrated excessive absence, the supervisor told her he could not trust her to be there. He needed "someone without children" to staff the front desk "how can you guarantee me that two weeks from now your daughter is not going to be sick again . . . so, what is it, your job or your daughter?" The supervisor then fired her. The court found this statement to be "smoking gun" evidence of discrimination for being associated with a disabled person.

Firing Employee Who Added Disabled Spouse To Health Insurance Violates ADA. A city audit clerk with a good record had a fiancé with cancer. They married and she added him to her city health insurance. The city auditor made comments that the ill spouse's

insurance costs "were going to affect the budget." The auditor fired the clerk soon after receiving the first bill for the husband's chemotherapy. A court found sufficient evidence that the discharge was due to the employee's "association with" a disabled individual to warrant trial on the matter. *Crossley v. City of Cashocton* (S.D. Oh., 2015).

Assault Victim Perceived As HIV Threat. A woman was assaulted (not work-related). In the aftermath, her company and manager were supportive. Then it was discovered that the assailant was HIV positive. Suddenly her manager's concern and support allegedly changed to avoidance. He stopped conversing with her, leaned away when he had to be near, avoided any contact. The manager started being more critical of her work, and soon fired her for poor work quality (despite evidence of other employees with a longer history of even poorer work quality). Though the employee did not have nor develop HIV, there was "sufficient showing that her treatment and discharge were due to the manager perceiving her as having that disability." *Zabell v. Medpace, Inc.* (S.D. Oh., 2015).

Teacher's Fear Of Young Children Could Not Be Accommodated. A language teacher had the condition of pedophobia, a debilitating fear of young children, and could not teach anyone 12 or younger. She taught high school French. French was eliminated at the high school level, and the only open position was at a middle school. After several months, the teacher's physician certified that her condition would not allow her to be at the middle school, due to younger children being present. She asked to be assigned to high school Spanish. She was told this was not an open position. She left employment and sued for failure to accommodate. The court found that her accommodation was not reasonable. It would either require the school to create a special extra class for her (during a time when it was cutting back language classes) or to transfer the existing Spanish teacher to another assignment. The ADA does not require creating special positions, nor bumping other employees as a form of accommodation. *Walther-Willard v. Marimont City Schools* (6th Cir., 2015).

Sex

Too Pretty For Drilling Rig. A female applicant was rejected for a job as floor hand on oil drilling operations in Texas, Oklahoma and Wyoming. She had prior drill rig experience. A supervisor made a statement "You know I won't hire you – you're too pretty." Another female applicant was told "The guys would look at you instead of getting work done." The court found a *prima facie* case for sex discrimination. A contributing factor was that in spite of a number of female applicants over a two year period, the company had hired 1,600 male floor hands and zero women. *EEOC v. Unit Drilling Co.* (N.D. Ok., 2015).

Victim Of Physical Assault May Defend Herself. "Violence cannot be endorsed as a suitable response to an instance of harassment," at least in most situations. However, in *Speed v. WES Health Syst.* (E.D. Pa., 2015), the court found an exception. A health care worker was sexually harassed, verbally, by a male co-worker for several months. When she complained, management took no action. This emboldened the male co-worker, and

he became physical. He groped her legs. She warned him not to touch her. He moved in and reached out to grope again, and she smacked him on the side of his face. She then told her supervisor; who discouraged her from making a report, because her physical reaction could "get her in trouble" as well as the man. She persisted, and the company fired both she and the male co-worker. She sued and the company asked for dismissal, claiming her violent act took her out of the protection of the law. The court disagreed. The groping was directly related to the company's failure to stop the prior harassment, and adopting a rule which prevents sexual harassment victims from defending themselves against physical assault would be inconsistent with Title VII.

Family and Medical Leave Act

Employee Wins Case, Then Blows Reinstatement By Failing Drug Test. A plaintiff won a jury verdict of $543,841 back pay, and $375,466 attorneys' fees, plus an order that she be reinstated to her former position. The jury found her discharge for poor attendance violated the law because it included incidents of protected FMLA leave, in violation of the law's prohibition of counting FMLA absences in computing discipline. However, she then failed the standard drug screen given to all hires, rehires, or those returning from long leaves. The company refused to reinstate her, and she sued to enforce the court order. The court ruled that she was still entitled to the monetary awards. However, the failed drug test ended any further obligations. The test was standard and not directed at her. The employer routinely rejected anyone who failed. *Walters v. Mayo Clinic Health Systems* (W.D. Wis., 2015).

Too Broad Policy Gives Rights To Ineligble Employee. An employee worked in a small unit of under 50 employees, more than 75 miles from any other. Thus, he was not covered by the FMLA (50 people within a 75 mile radius). However, the employee handbook's FMLA policy simply stated that all employees who had worked 1,200 hours in a year were covered by FMLA. The employee took leave for a heart condition, submitting an FMLA request. He was fired while on leave, and he sued. The employer requested dismissal because there was no FMLA coverage of the small, remote unit. The court agreed that the FMLA would not normally cover the situation, however, the handbook policy created coverage. The handbook did not have any disclaimer or explanation about the 75 mile radius. It gave a blanket "unqualified assurance" of FMLA rights to all employees. Having created a reasonable reliance on its own policy, the employer could not now deny the employee his full FMLA rights. *Tilley v. Kalamazoo Co. Road Comm.* (6th Cir., 2015). This case illustrates a growing trend of courts to look closely at handbook provisions and use poorly drafted or overbroad policies to extend rights to employees who otherwise would not be covered by various laws. Another recent example involves the anti-harassment policy in *Marini v. Costco Wholesale*, covered in the February, 2015 Update.