EMPLOYMENT LAW UPDATE

November, 2016

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LEGISLATIVE AND ADMINISTRATION ACTION

***EEOC Starts Small Business Resource Center*.** The EEOC has a new online service to help start-ups and small businesses which cannot afford an HR staff or attorney to explain basic information and EEO processes. It is designed to provide plain, easy to understand information at www.EEOC.gov.

TRENDS

More Employers Are Hiring People With Criminal Records. The economy seems to be good and there is close to full employment. So it is difficult to find qualified employees. What used to be "minimum hiring qualifications" is being repeatedly redefined as applicants become fewer, and employers become more desperate to fill vacancies. A criminal conviction has long been seen as a bar to hiring. Yet in the past two decades the great political surge to "be tough on crime" has led to more laws criminalizing more things, and requiring convictions rather than alternatives. The result is a huge increase in the percentage of convicted Americans; often for non-violent behavior which in the past would not have resulted in a criminal record at all. Now more and more employers are rethinking the criminal record consideration, and taking the calculated risk (or no risk) of hiring those with past convictions. Many are signing on to the "Fair Chance Business Pledge" to give a fair chance, and "create a pathway for a second chance" for those with records. At the same time, one must be careful and consider whether a past conviction is "substantially related" to the job in question, in order to avoid later issues of harm to others and a case for negligent hiring. [For more information, see the article Use and Abuse of References (background checks) by Boardman & Clark.]

LITIGATION

Uniformed Services Employment and Re-Employment Rights Act

Return From Duty Restoration And Two Year Service Injury Restoration Are Mutually Exclusive Provisions of USERRA. USERRA requires employees to give prompt notice of intent to return, and then be restored to their jobs "upon completion of a term of active duty in the military service." Another USERRA provision allows a two year extension for an employee convalescing from an active duty-related injury; stretching the job restoration right. In *Huff v. Winston* (Va S. Ct., 2016), a deputy sheriff returned from active duty and was promptly restored to her job. Five months later she began requesting several week leaves for service-related PTSD and heart problems. These became a seven month leave, and then a three month partial leave. Her employment was terminated. She sued, claiming all of her leave was well within the two years since her return from active duty. The court ruled that the two year provision did not apply. It extends the requirement to "report back to employment" for up to two years. However, it ends once one is reinstated to a job. Since she promptly reported back and was reinstated following active duty, her USERRA rights and the ability to claim any extra time ended.

Discrimination

Retaliation

Malicious Prosecution – Suing Those Who Criticize The Management Is Retaliation. A project manager for a bearing plant made an Equal Pay Act complaint, alleging that she and other women were paid less for the same jobs than men. The EEOC investigated and closed the charge without any finding of unequal pay. Then the employer decided to get back at the project manager by filing a Malicious Prosecution case against the employee; seeking damages for having to defend the EEOC investigation. It continued to pursue the case even after notice from the EEOC that this constituted retaliation. The EEOC then sued the company. The court awarded $37,000 in damages to the employee for having to defend the case, and ordered the company to dismiss the case and refrain from any future such cases. "An absolute privilege attaches to the filing of charges with the EEOC." Any later adverse actions by an employer are "egregious attempts to undermine peoples' rights to raise concerns in a proper manner under the laws." *EEOC v. Hudson Bearing, Inc.* (W.D. Mo., 2016).

Retaliation - RIF "Reeks." A scientist of Asian descent complained of national origin discrimination at the University of Mississippi Medical Center. She alleged that co-workers made racial comments and slurs about Asians, and that her manager treated her more negatively and took no action to stop the anti-Asian comments. After she made the discrimination complaint the manager allegedly said that she "was trouble," and started an effort to eliminate her position. She was then laid off in a one-person Reduction in Force. The RIF was based on negative evaluations of her and her position made by a selected

group of co-workers – only those she had complained about. The evidence was that the manager had gone to those other employees and ordered them to write negative letters about the plaintiff's performance and professionalism. He avoided the opinions of other co-workers, especially of other Asian co-workers. The court stated that this "reeks of animus and a jury may find it repugnant." *Zahn v. U. of Miss. Medical Center* (S.D. Miss., 2016).

Sex

Harassment In The Arctic Wilderness (Sometimes the weather is not the worst hostile environment factor). A female graduate student was assigned to participate on a peregrine falcon Arctic research trip with a supervising scientist/professor, who would be the experienced guide and mentor. The two month project was in remote, uninhabited Arctic Alaska. They were alone in a cabin, or often in a tent, sleeping with rifles as protection from polar bears. The male scientist allegedly "waged a campaign" to have sexual relations. He made continuing overt sexual comments and propositions, took photos of her when she was undressed, and repeatedly argued with her when she kept declining his advances. After return to the university, she left school and filed a harassment/violation of equal protection case under 42 USC §1983, naming the professor personally in the suit. The court denied the professor's motions to dismiss, noting that this was a particularly hostile environment situation. Unlike the usual "office environment," the subject of the harassment could not report the misconduct to anyone, and could not distance herself to avoid or diminish the unwelcome attention, alone in the wild with her supervisor. Her physical survival and safety was totally dependent on the experienced professor/guide. It is difficult to imagine how she could distance herself from the sexual attentions in a remote cabin or tent on the Arctic tundra surrounded by polar bears. *Jenkins v. University of Minnesota* (8th Cir., 2016).

Disability

If Not Yet Fired, Accommodation Effort May Re-Set The Clock On Termination. If an employee reveals a disability and requests accommodation prior to actually being fired, the employer may have to restart the evaluation process. In *Erickson v. Dept. of Workforce Development* (W.D. Wis. 2016), a state vocational rehab counselor had poor performance marks and was being considered for discharge. The employee then raised the issue of a hearing disability, and requested accommodation. She was subsequently discharged, after the accommodation had been in effect only six weeks; in large part based on performance issues arising prior to the request for accommodation. In the ensuing ADA and Rehabilitation Act case, the court denied summary judgment to the employer, finding that use of the pre-accommodation performance did not give a fair chance to judge the employee's ability once accommodation was in place.

Accommodation Is A Two-Way Street. Employee Must Make Efforts To Succeed. A city public works field supervisor suffered a permanent back injury. After a year's leave he

was released with a restriction to do "administrative type" office duties. He was placed in the only available administrative assistant job; a form of accommodation under the ADA. He did not like the job, and expressed his unhappiness. He did not fully participate in or complete the training for the new job. He repeatedly missed work without proper notice, and gave false reasons for absence. At work he was found surfing the Internet, playing computer games, making personal calls and sleeping. He was fired. He then sued for "failure to reasonably accommodate," arguing that once the city knew the administrative assistant's job was a "poor fit," it should have searched for other more suitable jobs, especially since some of his restrictions had been lifted. The court disagreed, finding that he had broken the interactive process. Once he had accepted the administrative assistant job, "it was up to him to make an honest effort" to learn and perform the duties. Even if he wished other jobs to be considered, he should have continued to request them, while still making every good faith effort at the job he was in. He broke the interactive process by his own less than good faith behaviors. *Dillard v. City of Austin* (5th Cir., 2016).

Religion

Mixed Motive – "Not Going To Church" Was One Of The Reasons For Discharge Of State Employee. A clerk was fired by the Kansas Assistant Secretary of State. She apparently had several performance issues, including attendance, personal cell phone use on the job, and repeated visits at work by her boyfriend. She also had refused to attend the ongoing religious devotional meetings held in the government office by the Secretary of State. She was invited up to 10 times and declined to attend. After she was discharged the Assistant Secretary of State told the employee's grandmother (a personal friend) that "one of the reasons was for not going to church." The former clerk filed a religious discrimination claim. The court found the statement to the grandmother provided solid evidence to support the claim. In a mixed motive case an employee may well have performance problems, *but* if any of the several reasons for discharge is illegal, then it taints the entire discharge, and makes it discriminatory. This is especially so when a key actor in the discharge is the one who makes the illegally discriminatory statement. *Canfield v. Rucker* (D. Kan., 2016).

Labor Arbitration

Driving While Standing. A bus driver was observed driving a bus, without a seat belt, while standing up, and using a cell phone. He was fired. He grieved the termination as being too severe for the situation. The arbitrator disagreed and upheld the discharge. The employer had gone to extra efforts to inform drivers of the serious consequences of using cell phones while driving. In this case the employee had not only violated the cell phone policy, but exacerbated the public safety dangers by the two other seat belt and standing infractions. *Amalgamated Transit Union 1560 v. Transdev Services* (2016).