EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATION ACTIONS

Employer's Guide To The Family And Medical Leave Act. The Dept. of Labor has issued a new 75-page explanation of FMLA which is intended to make it easier for employers to understand and comply with this often complex law. DOL describes this as "a new comprehensive, plain-language and visually rich resource . . . designed especially for employers, managers, human resources specialists and professional leave administrators which walk readers step-by-step through the process."

EEOC Reporting Rule On Wage Information. The EEOC has issued a revised proposal for employers to begin reporting job category wage information in 2017. More details are described in the article Proposed Rule Would Require Reporting of Pay Data by Andy DeClercq, Jennifer Mirus, Doug Witte, www.boardmanclark.com, or Boardman & Clark's HR Heads UP publication.

LITIGATION

Fair Labor Standards Act

Uber Settles Independent Contractor Case For $100 Million BUT Wisconsin Drivers Start Another. Uber has agreed to settle a FLSA case by drivers alleging they should be employees instead of Independent Contractors. It will pay drivers in California and Massachusetts over $100 million. *O'Conner, et al. v. Uber*, but continue to classify them as independent contractors (with changes in how they are "managed"). However, that is just one of the over a dozen cases filed by Uber drivers around the country. The most recent is *Lathan v. Uber* (E.D. Wis., 2016) on behalf of all current and former Wisconsin drivers.

Discrimination

Disability

Fear Of Dark-Skinned People Supports Border Agents Transfer From Mexican Border. A Border Patrol officer developed PTSD, causing a debilitating fear of dark-skinned people who speak a foreign language, due to his prior military service in Afghanistan. This impaired his ability when he was assigned from the Canadian border to duty in Texas. He requested and was denied "compassionate transfer" to a more northern location. He took medical leave for treatment in Michigan, and filed for an injunction requiring the Department to grant the transfer. The court issued a temporary order in the agent's favor, citing sufficient evidence of a disability to require further exploration of the reasonable accommodation request for the compassionate transfer. *Gazvoda v. Secy. Of Homeland Security* (E.D. Mich., 2016).

Religion

Two cases out of the same court have different results.

Flu Shot Was Reasonable Mandatory Requirement For Muslim Hospital Worker. A Muslim pediatrics employee refused the hospital's flu shot requirement, because the vaccine contained a pork product. The hospital offered an alternative vaccine without any pork. The employee changed her position to state that her religion forbid any vaccination. The hospital then offered her the opportunity for other non-direct patient contact positions, but informed her she could not work with patients without the shot. The employee did not actively pursue other positions, and was ultimately terminated; characterized as a "resignation with ability to be rehired" at a later date. The court dismissed the resulting religious discrimination case. It found the hospital had a compelling health care reason to protect patients, especially children, from unvaccinated staff. The hospital engaged in accommodation efforts, while the employee shifted her reasons, and did not actively pursue the accommodation. *Robinson v. Children's Hospital* (D. Mass., 2016).

Christian Hospital Employee Should Have Been Allowed to Skip Flu Shot. In *EEOC v. Baystate Med. Center* (D. Mass., 2016), the EEOC claims a hospital discriminated by not accommodating a Christian employee's refusal to take a flu shot based on her Biblical interpretation, and would not wear a surgical mask at all times while on the job if she was granted a shot exception. The employee worked in administration as a recruiter. She did not have patient contact. The EEOC recognized patient safety as a compelling reason to require shots, if one had regular patient interaction. However, it asserts the medical facility did not show a reasonable basis for the requirement for a person who works in a non-patient area, nor of having to wear a face mask at all times when working with non-patients, and largely with other people who are not in direct patient contact.

Race

"Perceived As Race" (Jewish) Creates Case. 42 U.S. Code §1981 prohibits race discrimination. In *Cupek v. Byn Mellom* (S.D. NY, 2016), a non-Jewish employee alleged that she was assigned to lower paying accounts and denied more lucrative clients due to her manager's erroneous perception that she was of the Jewish Race. She cited the manager's statements about making assignments based upon one's "culture." The court, in allowing the case to proceed, ruled that discrimination based upon a mistaken perceived group status is nonetheless discrimination and just as damaging. [For more information on the complex, shifting and critical issue of "What is Race?" attend the Boardman & Clark program at the 2016 Wis. State SHRM Conference.]

Test Designed To Overcome Discrimination Still Has Discriminatory Impact, But Survives Challenge. Due to concerns about political favoritism and discrimination, a police promotion exam was redesigned, with extensive study and expert input, to "fairly test skills and abilities which can be practically and reliably measured and which are actually required on the job." It was designed to eliminate racial and ethnic bias or other improper considerations. Nonetheless, a disproportionate number of African-American and Hispanic officers were eliminated from promotional consideration by the new test. They sued for discrimination. The court found that indeed the test had a real "adverse impact," creating a *prima facie* showing of discrimination. However, an adverse impact/*prima facie* showing does not win a case. It just creates a "presumption" of discrimination, which then shifts the burden to the defendant to show "validity;" that the test fairly measures the job requirements and is consistent with job necessity. In this case the test was determined to meet the validity standards. The test was fair and unbiased in spite of the adverse outcome. The plaintiffs could show no viable alternative to the test content or methods. *Lopez v. City of Lawrence, Mass.* (1st Cir., 2016). [For more information, request the articles Validity and/or Pre-employment Testing by Boardman & Clark.]

Supervisor's Attempt To Get Rid Of Racist Client Backfires. In *Lambert v. New Horizons Community Support Services* (W.D. Mo., 2016), the court found plausible evidence of racial discrimination. The disability services agency had a difficult client with a propensity for physical aggression and overt racial hostility toward African-Americans. A supervisor wished to have the client leave, and the evidence indicated the supervisor had a plan that if the client was paired with a Black case worker then she would leave the program or be forced out. This was done, and it worked. The newly-assigned African-American caregiver had no information about the "plan," nor about the client's propensities. The client reacted racially and by physically assaulting and injuring the case worker. The case worker then sued the agency under Title VII and 42 U.S. Code §1981, alleging racial discrimination. Though the plan was intended to get rid of a racist client, the case worker was also a victim because she was selected for a hostile assignment, placed in danger, and injured specifically due to her race.

LABOR ARBITRATION

Intentional Bias Not Required For Discharge Due To Racial Profiling. A police department encouraged and rewarded officers for a high volume of tickets, arrests for impaired driving, driving without a license, texting, etc. One officer decided to be very successful in this system. Virtually every shift he targeted a trailer park with almost 100% Hispanic occupants. He ran checks on the license plates of virtually every single vehicle in or out of the trailer park, regardless of whether there was any violation or suspicion. He did this because of a belief that a mostly Hispanic residential area would have a number of undocumented immigrants who could not get validly licensed, and were driving illegally. Thus, he could maximize his achievement points with the department by focusing on this area. This resulted in a disproportionate number of tickets and arrests for the town's Hispanic population; an adverse impact. There were complaints, and the officer was fired for racial profiling. The officer challenged the discharge, claiming that he had no racial or ethnic motive. In fact the arbitrator agreed, finding the officer had many Hispanic connections, friendships, and shared an apartment with a Hispanic roommate. There was no evidence of overt prejudice or racial motive. The motive was to get points for more tickets and arrests under the department's encouragement system. However, racial motive is not the issue. The bottom line fact is that he specifically targeted a minority segment of the population for special scrutiny due to his stereotyping assumption about its residents. He overly scrutinized all vehicles, whether or not there was cause, in an effort to find "something" he could use to boost the points; a scrutiny which would not have been done in non-Hispanic areas of town. Government scrutiny of innocent people in order to try to "catch them at something," especially based on their national origin, violates the Constitution. There may have been as many or more violators of OWI, texting, non-seat belt use, etc. in other parts of town, but they were not targeted for special close scrutiny because they were not in the Hispanic area. So, the non-Hispanic residents got more of a "free pass" for their violations. Regardless of "intent" or "motivation," the end result was tangible discrimination. The officer had a duty to know better and to equally treat all areas of the community. The arbitrator upheld the discharge. *City of Chaska and Law Enforcement Labor Services, Inc. #201* (2016).

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