EMPLOYMENT LAW UPDATE

July, 2023

by
Bob Gregg, Legislative Director
Jefferson County HRMA
rgregg@boardmanclark.com

Boardman Clark LLP
www.boardmanclark.com

TRENDS

Pew Research Center Ceases Generational Categorizations.
(We can't blame it all on Gen Z or millennials anymore.)

Generational trait categorization has been a major focus for Human Resources for the past decade or longer. The supposed differing traits of Baby Boomers, Gen X, Millennials (Gen Y) and Gen Z, have spawned a huge industry for consultants, and much literature on how to effectively recruit and manage each of these groups. Many employers have devoted effort to designing their selection, promotions, and employment policies and practices upon these generational traits. Now, Pew Research Center, one of the major initiators of this generational trait theory and research has concluded that it really has little or no validity. It is largely "generalization." stereotyping which falls apart under closer examination. There is little basis to support generation-wide traits. There are so many other variables not generational which lead to the same behavior across several generations. Economic, social, and demographic factors create widely different and contradictory behaviors and motivations within the same generational group. Phases of life tend to make people change to become more like the prior generation – generations do not maintain the same traits over time (we tend to become our parents). Pew Research Center concluded that the Generational Trait research reaches false conclusions. The generational trait research field has been flooded with content presented as research, but which is "more like clickbait or marketing mythology." Pew concluded that the generational labeling can do harm. Labels perpetuate bias and stereotypes and can create exclusion and underutilization of talent when incorporated into employment practices and management philosophy. Harvard professor Louis Menand, perhaps sums this up best, pointing out that there is no unique generational DNA and that making employment decisions based on "*the differences between a Baby Boomer and a Gen X-er is about as meaningful as the difference between a Leo and a Virgo."* However, do not expect all the generational labels or the generation trait consultants to suddenly vanish. Generational trait theory has become a big business and an established management philosophy in many organizations.

U.S. SUPREME COURT

Religious Accommodation Standard. Under Title VII, employers are required to reasonably accommodate employees whose sincerely held religious beliefs or observances conflict with work requirements, unless doing so would create an undue hardship for the employer. In *Groff v. DeJoy* (June 29, 2023), the Supreme Court reversed dismissal of a postal carrier's Title VII religious accommodation

suit. The carrier had asked for a religious accommodation of no work on Sundays. The Postal Service terminated his employment when he could not find people to switch with or otherwise cover his Sunday shifts. The lower court ruled that employers have a low requirement for religious accommodation and more than a "*de minimus*" cost on an employer would be an "undue hardship" (unlike the ADA, which places a much higher obligation on employers). The Supreme Court, however, in a unanimous decision, ruled that the Title VII "undue hardship" standard requires the employer show a "substantial increase in costs in relation to the conduct of its particular business," thus increasing the burden on employers to show a particular religious accommodation is an undue hardship. Like the ADA, this requires a case-by-case analysis of all the relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer. The Court remanded the case for the lower court to conduct that analysis. The Court did note that that there has been years of litigation which has helped define what an undue hardship means and that the EEOC has issued regulations and guidance which may also be useful. The Court did not explicitly adopt the EEOC's guidance or regulations, but its discussion of these resources suggests it feels lower courts and employers might find them useful as a starting point.

Harvard and UNC lose Affirmative Action Cases. In *Students for Fair Admissions v. President and Fellows of Harvard* and *Students for Fair Admissions v. University of North Caroline (June 29, 2023),* the Supreme Court voided the Universities' Affirmative Action (AA) programs which gave considerations to race and ethnicity in admissions. The AA plan did not meet the exceedingly narrow standards required for such a program. This is not an employment case. However, many people may believe it may somehow diminish employers' Affirmative Action requirements. Be aware that those are entirely different matters, and this case may not have an effect on employment obligations. Government contractors are required to have Affirmative Action programs and file Affirmative Action compliance reports with the Office of Federal Contract Compliance Programs (OFCCP). These AA plans cover categories of Veterans, disability, sex, race, and national origin. However, this sort of Affirmative Action does not involve any specific goals, quotas, or tangible group-based preferences (except for Veterans in some situations). In fact, that would be illegal under the OFCCP's rules. Affirmative Action in the employment setting is focused on the obligation to eliminate disparity in hiring and promoting of groups, eliminate underutilization, ensure equal opportunity, and identify barriers which interfere with EEO to all employees. So, this decision may have little impact on employment Affirmative Action programs and any diversity initiatives.

LITIGATION

This month's Update includes strangest defenses of the month. Sometimes in the zeal to win, frustration, or ire toward the employee who filed a complaint, or just trying to cut corners in defense costs, parties in litigation use defenses which are stretched, specious, or try to "throw in anything that might work." Not only does this not win, but it often backfires in terms of extra liability and even sanctions by the court. One case shows the dangers of using the Artificial Intelligence (AI) shortcut; and, the other of asserting extreme defenses (i.e., the more offensive the behavior to everyone, the less liability argument.)

Artificial Intelligence

Hallucinating Cases Which Don't Exist – Using AI in Court. Another caution about artificial intelligence (AI). In *Mata v. Avianca Inc.* (S.D. NY, 2023) attorneys for one of the parties are facing sanctions by the court for presenting briefs and other legal arguments they sourced from CHAT GPT. These briefs contained citations and quotes from nonexistent cases. The AI source actually provided full copies of the supposed case decisions, along with the names of the judges who supposedly made them -

some also nonexistent. When the judge in the case questioned the seemingly false legal sources, the attorneys claimed they had "*verified*" the accuracy by using CHAT GPT itself, asking "Is this a real case?" Then CHAT GPT answered, "Yes, it's a real case." The judge did not find this to meet a reasonable standard of legal research. It appears that AI is programmed to please and meet the requests of the user paying for the information. It can "hallucinate" results and invent legitimate sounding cases or other content which does not exist. Then it can self-validate, assuring you about the results. Beware!

Discrimination

Sex

Graphic Rap Lyrics in Warehouse Create Harassment Case. A company allowed employees to play music as they worked in the warehouse. Some chose to loudly play lyrics containing graphic sexual descriptions, demeaning sexual slurs, and sexual violence. The company received a number of complaints about the lyrics from women and men, however, it did not take action to address the issue. The offended employees then sued for sexual harassment under Title VII. The company defended the case by claiming that since the music was not directed at any person in particular, no one could claim any intent to harass them specifically. The company also claimed that since both women and men were offended there was no gender specific harassment; everyone was equally impacted, thus no discriminatory effect. The court rejected these arguments. It ruled that the ongoing loudly played lyrics created a toxic environment for anyone who had to listen, "widespread sights and sounds can amount to sex discrimination" if they have sexually offensive or demeaning messages. Also, auditory and visual harassment do not need to be targeted at a particular worker in order to infect a workplace. Finally, the court found that a Title VII claim is not barred just because the conduct offends more than one gender. *Sharp, et al. v. S & S Activewear, LLC* (9th Cir., 2023). The company's "*offended both genders defense*" seems particularly troublesome. If accepted, it would seem to bar almost any offensive environment harassment case. Under the company's theory, if hearing overt antisemitic slurs was also offensive to non-Jewish employees, then the slurs would not be discriminatory. If overt racial hostility also offended people of any other race, then it would not be discriminatory. So, the more toxic the behavior, designed to offend the most people, across the board, would be less actionable according to the company's theory; encouraging a downward spiral in workplace behaviors.

Race

Lamb or Goat? Either Way, Fired Starbucks Regional Manager Wins $25.6 Million for Discriminatory Discharge. A Starbucks store made national news when a manager called police to arrest two Black men who were quietly sitting, waiting for a friend, but had not made a purchase. In the aftermath Starbucks fired the store manager but then also publicly touted that it had taken serious corrective action by firing a high-level Regional Manager. The Regional Manager, who is White, then filed a Title VII and state law discrimination case alleging she had been singled out because Starbucks was looking for a high-level White person to fire. The Regional Manager oversaw over 100 stores and was not involved in the incident. However, the manager who actually oversaw the smaller District and was more directly responsible for the store where the incident occurred, was Black, and suffered no consequences. The case alleged Starbucks was not going to pick a Black employee for sanctions because "it would have blown up in their faces." "It was all about the appearance, the optics of what they did." Throughout the case, the Regional Manager was variously referred to as a "*sacrificial lamb*" and a "*scapegoat.*" Starbucks did not show that the fired Regional Manager had any particular responsibility for the incident, or that she did anything wrong in the aftermath. The jury found the firing was due to the Regional Manager's race. It awarded $600,000 in compensatory and $25 million in punitive damages. So, whether Sacrificial Lamb or Scapegoat, the result was a lot of liability. *Phillips v. Starbucks, Corp.* (D.C. NJ, 2023)

Employee Fired for Calling Police on Black Birdwatcher Loses Appeal. A Franklin Templeton portfolio manager was fired after an off-duty incident became national news. She called police claiming that she was being "Threatened by an African American man" in a city park. The incident was caught on video. The man was a birdwatcher. He had asked the woman to please leash her dog, as required by park rules. He was several feet away at all times. She reacted by calling police. When the incident became public, her employer investigated, then terminated her employment with a public statement that the company "did not tolerate racist behavior. The fired employee sued for defamation and discrimination. She claimed the statement that someone is a "racist" means that she was fired because she is White. The lower court dismissed the case, and the appellate court affirmed the dismissal. It ruled the term racist focuses on a person's behavior, not on their particular race. Taking action due to alleged racism is not the same as discriminating on the basis of race. The employer did not focus on or mention the employee's race in its statement. *Cooper v. Franklin Templeton* (2nd Cir., 2023)

Labor Relations

Supreme Court Declares Some Strike Actions Are Not Protected by the National Labor Relations Act (Workers Walked Off and Left Trucks Full of Concrete.) In an 8-1 decision, The United States Supreme Court ruled that not all strikes are protected under the NLRA. Some egregious actions can still allow an employer to sue a union if it failed to take reasonable precautions to safeguard the employer's property when it struck. In this case, a concrete company's union called a strike in the middle of the workday. They turned off the trucks full of concrete and left the contents to harden. This caused the concrete to be discarded and could have ruined any trucks the company could not manage to quickly restart and empty. The court found the strike was structured to cause intentional damage to the employer's property. The NLRA does not shield strikers who fail to take "precaution to protect the employer's property from foreseeable aggravated and imminent danger due to the sudden cessation of work." *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Union 174* (U.S. S. Ct. 2023)

Court Ends 40-Year Oversight of Teamster Pension Fund. In 1982 the Teamsters' Central States, Southeast and Southwest Areas Pension Funds were placed under federal oversight by a court appointed fiduciary due to the fund's entanglement with organized crime. The court for the Northern District of Illinois has now ended that oversight, turning the pension fund's management back over to the Teamsters' Union. The judge found the original purpose of the oversight has been achieved and there has been no hint of wrongdoing for years.

Department of Justice Seeks Emergency Court Order to Appoint Overseer of Pension Fund. The DOJ is suing the United Employee Benefit Fund's trustees and related parties over alleged mismanagement of the funds. The Department has filed an Emergency Order to stop the trustees from spending any further money and to appoint a federal trustee to oversee the fund, "before the current trustees completely drain the fund of assets." The Department alleges the fund shrunk by almost 50% in a short time due to large payments and personal loans to the trustees, exorbitant transfers to its attorneys for suspect legal fees and expenses and paying off a trustee's personal home debt. The court has not yet ruled whether to grant the Emergency Order. *Walsh v. Fensler, et al.* (N.D. Ill, 2023)

Wages & Hours – Fair Labor Standards Act

Employer Cannot Slash Wages During Peak Periods to Avoid Overtime Costs. *Thompson v. Regions Security Services, Inc.* (11th Cir., 2023) involved a company which drastically reduced the hourly wage during peak periods in which a lot of overtime was required. Though time and a half was paid for all OT, the slashed hourly wage meant far less pay per OT hour. The result was working a lot of extra OT hours, yet only being paid approximately the same as the prior non-peak times when no overtime was worked--a

lot of extra work and no more pay. Workers alleged that yo-yoing the wage meant the company accomplished getting them to work all the extra hours for nothing. The court found that this manipulation of wages, higher per hour in low periods and suddenly slashed per hour pay in peak periods, could violate the Fair Labor Standards Act if it "is a subterfuge, used as a device to avoid paying overtime compensation." [Lowering wages does not violate the FLSA if it is for a legitimate purpose, such as during a business recession, company calamity, etc.]

Safety

Restaurant's Mandatory Wine Tasting Results in Tragedy and Liability. A high-end fine dining restaurant held a wine tasting to familiarize its service staff with the wine menu. The tasting session was a mandatory paid event. One participating employee left to drive home at the end of the event with a blood alcohol level over twice the legal limit. She had a head-on accident on the way home and died shortly thereafter as a result. Her estate is pursuing a case of negligence and wrongful death against the restaurant. The case includes allegations that there was no monitoring for intoxication, no limitation of how many wines employees were urged or requested to taste, and no provision for rides home or alterative arrangements for anyone who did imbibe a significant amount. *Administrator of the Estate of J. Silva v. 165 Wooster Street, Inc., et al.* (New Haven Superior Ct., MA, 2023). The restaurant could also be liable for injuries to the parties in the other car in the accident, since the employee became intoxicated in the course of paid work. This case should also be a warning to many other employers, not just restaurants. Many employees in various businesses engage in client entertainment, hosting or sponsoring events, or other activities with alcohol, while in the scope of their jobs. So, any intoxicated behavior – driving, harassment, assault, or other mayhem – is done while they are an "agent" of their company. The employer can be liable. Workplace social events, outside of paid time, are a different issue, but can still generate liability. [For information on the dos and don'ts and protecting your organization from this, request the article Office Parties – When Good Times Go Bad by Boardman Clark LLP]

Personal Liability

Former Employees Must Pay $2.1 Million for Violating Non-Compete Agreement. Non-Competition Agreements are under siege. Courts are applying stricter scrutiny to their terms. The National Labor Relations Board recently issued a caution that it may consider non-competition agreements to be a violation of workers' rights under the National Labor Relations Act (NLRA). More states are outright banning non-competes; Minnesota is making them unenforceable beginning July 2023. However, these agreements are still alive and enforceable in many jurisdictions (such as Wisconsin and, in this case, Georgia) if properly drafted. In *Anderson, et al. v. USI Insurance Services, LLC, etc*. (N.D. GA, 2023), a jury decided that three former employees owe their prior company $2.1 million for violating their non-competition agreements by suddenly quitting and immediately, the same day, going to work for a competitor. The employees tried to argue that the agreements were unenforceable. However, the court found the terms of the agreements were narrowly enough drafted to be valid under Georgia law and allowed the case to proceed to a jury. The $2.1 million will come out of the personal assets of the three employees. [Be aware that other forms of "restrictive covenants" are still very alive and recognized in states which ban non-competes. Confidentiality and Nondisclosure, Non-Solicitation Agreements, Trade Secrets and Work Product Ownership Agreements can still protect a company's interests. Again, they must be carefully drafted and narrowly focused on the specific company interests in need of protection. "One size fits all" and "kitchen sink" including too broad a scope will be struck down by the courts.]

Uniformed Services Employment and Reemployment Rights Act (USERRA)

Benefits During Military Leave Must Be Treated the Same as Other Paid Administrative Leaves. In *Myrick, et al. v. City of Hoover, Ala* (11th Cir., 2023) the court upheld a decision ordering the City to pay benefits for employees, police officers in this case, who went on military leave. The City continued to pay for the benefits of others who went on non-voluntary leaves, such as officers put on suspensions during investigations, jury duty, or other excused paid work absences. Under USERRA those with military leave must be treated similarly. So, the City should have paid for insurance benefits and allowed accrual of sick leave, vacation, and other benefits during the military leaves.

OTHER RECENT ARTICLES

These additional, recent articles can be found at BoardmanClark.com in the Labor & Employment section:

Recent Developments in HR Law for Minnesota Employers
By Attorneys STORM B. LARSON, BRIAN P. GOODMAN |Boardman Clark LLP | 06.14.23

Flexibility Allowing Remote Viewing of I-9 Documents Ends July 31, 2023
By Attorney NICOLE S. SCHRAM | Boardman Clark LLP | 06.12.23

\\msnfs2\share\DOCS\WD\27570\0\A4936309.DOCX