EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

EEOC Issues Guide on Use of Artificial Intelligence (AI) in Employment Selection Procedures Under Title VII. On May 18, 2023, the EEOC issued a Technical Assistance Guide on use of AI tools in selection procedures under Title VII, which covers race, sex, national origin and religious discrimination. AI tools may include software designed for resume-screening, hiring, video interviewing, and employee monitoring. The EEOC guidance confirms that these types of tools, like more traditional employment decision-making procedures, must be monitored to ensure that they do not disproportionately exclude applicants or current employees based on a protected class, known as an "adverse impact." The EEOC advises employers to monitor AI use and do self-analysis to check for discriminatory effects. The EEOC has already issued a prior guidance on AI use and the Americans with Disabilities Act.

LITIGATION

Safety

Personal Criminal Liability for Fatal Chemical Release. Economic damages are not the only issue in employment cases. Some employment situations result in criminal prosecution of both the company and individual managers. Upon conviction, the judge cannot put the company in jail; it is subject to fines and other sanctions, including probation and supervision. The responsible managers, however, can be placed on probation or be incarcerated. *United States (Environmental Protection Agency) v. E.I. du Pont Nemours Co, et al.,* (S.D. TX, 2023) involved a toxic insecticide release which killed four employees at a chemical plant. The company and the Insecticide Operations Leader pled guilty to criminal negligence of release of an extremely hazardous chemical. The manager received a one-year sentence. The company will pay a $12 million penalty and serve two years' probation, giving the US Probation Officer access to all of its operating locations and records.

TikTok Can Be Liable for Harm to Mental Health of Content Moderators. TikTok is under fire from multiple directions. Now, a federal court has allowed Content Moderators to sue for emotional distress and negligent harm to their mental health. Content Moderators are supposed to prescreen all submissions to assure that improper content is identified and blocked. This can require viewing thousands of submissions per day, day after day. The plaintiffs claim they had to watch endless hours of submissions containing graphic violence, sexual content, child pornography, animal abuse, and worse. Content and volume which was impossible to "unsee," and the ongoing volume of disturbing videos created harm to

their mental health. The court found that TikTok's equipment and system contributed to the harm. The software claimed that it gave Moderators "control" to limit exposure to graphic content. It supposedly offered different "queues" which did not have such content, which would allow Moderators to take viewing breaks and have "respite" from seeing graphic content. However, the queue system was allegedly defective. There was still a significant amount of the same highly disturbing content in the supposedly non-graphic queues. So, no respite. Just a constant barrage of gruesome, violent, disturbing videos, day after day. Since TikTok had full control over the system and the defects of the queues the Moderators had a viable case for negligence. *Young et al. v. Byte Dance, Inc. (TikTok),* (N.D. CA, 2023) This is not the first such case. In 2022 YouTube paid $4.3 million to settle a similar case of psychological trauma brought by its Moderators. In 2020 Facebook paid $52 million to a class of Content Moderators due to psychological damage. [One wonders how effective TikTok and other media companies' overall "screening" really is. If Content Moderators are required to view thousands of submissions daily, then the "quality screening" is a couple of seconds. It should not be surprising that a lot of inappropriate content still gets posted to the public.]

Benefits

Severance Pay Guarantee Was No Guarantee--Free to Not Pay and "Sell You Out in The End." The employment laws do not cover every seemingly unfair result. As the courts have often opined, an employer's decisions can have poor processes, errors, defects, or be outright wrong or unfair, without being illegal. If an employer poorly designs a process, it may be inefficient or even unfair, but "unfairness" is not the standard for a lawsuit. The courts are not a "super board of directors," to "second guess" basic business decisions. As long as a legal factor is not involved, then the company is free to adopt whatever process it wishes or to make whatever good or bad management decisions it wishes. *Carlson et al. v. Northrup Grumman Severance Plan, et al.,* (7th Cir., 2023) is a case involving denial of severance pay. Employees were told there was a Benefit Plan to pay severance in the event of layoffs. When a layoff came, some employees received severance; a number of others did not. The latter sued to enforce their rights under the Benefit Plan. However, the court ruled against them. The Plan had a provision allowing the company's HR Department discretion to provide a notice to those receiving the severance. There were no plan standards as to why it could or could not give a notice and payment. So, all those who did not receive the letter about payment had no rights. The court found that unlike an ERISA Retirement Plan, which vests and has guaranteed payments, these sorts of non-retirement Welfare Benefit Plans can be established according to the employers' "own interest." If the Plan has discretionary language – to pay or not – then the language of the Plan controls. The court was very critical of the company and its choice to cut employees out of what they thought was a guaranteed benefit. Judge Easterbrook stated that the company's "*official policy to its employees is Don't Count on Us – We'll sell you out in the end*." However, regardless of whether the court felt the action to be unfair, it violated no law. Therefore, the case was dismissed.

Appeals Court Stays Lower Court's Ban on Preventive Care-- Insurers Must Continue to Cover Treatments. The recent Texas Federal circuit court ruling that an anti-abortion medication was not properly approved and cannot be distributed seems to have unleashed other cases seeking to invalidate the distribution and use of vaccines, other well-established medications, and care provisions of the Affordable Care Act (ACA). The ACA has provisions requiring health insurance providers to cover pre-existing conditions and to cover a variety of necessary medical procedures and screenings. In *Braidwood Management, Inc., et al. v. Becerra,* a Federal District Court judge in Texas ruled that the ACA's recommendations for preventive services were not validly made and voided the preventative care coverage requirements. Among the medical procedures voided are: screening for breast, cervical, colorectal, lung, and skin cancer; screenings for diabetes, depression, hepatitis, and vision problems in children; screening and treatment for HIV; and, care for those who are pregnant and breastfeeding, and their young children. On appeal, the Fifth Circuit issued a temporary stay of the judge's order, which

keeps in place insurance coverage for these procedures, for now. The stay is in place pending the outcome of the government's appeal of the lower court's ruling. Those who have, or are concerned about, any of the conditions impacted by this ruling, should perhaps get screening and treatment now, before there is a next decision in this case, or another case challenges people's rights for coverage or to even obtain the medications, screenings, or medical care they need.

Contracts/Severance Agreements

Organization and CEO Can Be Liable for Violation of Mutual Nondisparagement Clause. Severance agreements often contain nondisparagement clauses prohibiting the employee from making future negative statements about the organization, its managers, products, services, etc. The organization believes these clauses are important for its protection from later bad publicity and reputational damage. However, a mutual nondisparagement works both ways. Often the organization fails to adequately inform managers about their obligation to not speak ill of the departed. Managers either did not understand or forget and then say things which violate the organization's obligations under the mutual nondisparagement clause. In *Wright v. Eugene and Agnes Meye Foundation, et al.,* (D. DC, 2023) a former manager sued both the Foundation (a nonprofit corporation dedicated to social and racial equity) and its CEO personally for violating the mutual nondisparagement clause in her severance agreement. After the employment ended, rather than keeping quiet, the Foundation CEO described the former manager to a third party as "toxic" and "fostering a negative climate that made other staffers want to leave." The court found the alleged comments were sufficient for both a breach of the contract and a defamation case against both the organization and the CEO personally. So, be careful with mutual nondisparagement clauses. Inform managers and key staff about the clause and their obligations to "speak no ill." If you believe some people in the organization are too upset to control or for some reason just cannot limit their verbal, electronic, or social media comments, then do not put a mutual clause into a severance agreement.

Discrimination

Disability

Split Circuits - ***Accommodation Requirement Depends on Which States You Operate In***. If your organization has operations in two or more states, you are probably aware that the employment laws can be different. Even the same Federal law can be interpreted differently in the various Federal Circuit Courts of Appeal, imposing different obligations for one location than for another. This is the case when it comes to the ADA's accommodation of placing a disabled employee into an alternative position. The split of authority regards whether a disabled employee has a right to be placed into a vacancy for which they are qualified when they cannot do the duties of their prior job. Or whether the employee only has an opportunity to be considered for a vacant position. The EEOC has generally taken the position that an employer must place the person into the alternate position without any competitive process, except in circumstances such as a guaranteed seniority posting process or other special situations. The courts do not all agree. For example, i*n EEOC v. Methodist Hospital of Dallas* (2023), the Fifth Circuit Court of Appeals ruled that the alternate position accommodation only gave the disabled employee the right to be considered for a vacancy. The hospital could then choose what it considered to be the most qualified applicant. The disabled employee did not have a superior right to the job over other candidates. On the other hand, the 10th Circuit Court of Appeals is among those which have ruled that the disabled employee does have a greater right to be placed into a vacant alterative position absent a compelling reason otherwise, holding that the "most qualified applicant" approach effectively eliminates reassigning a disabled employee as a reasonable accommodation. Until the Supreme Court someday concretely rules on this issue, the accommodation standard can depend on where you are located. Even in this *Methodist*

Hospital case, the Fifth Circuit ruled that each accommodation matter must still be individually examined to be sure there were no "special circumstances" which warrant automatically granting the alternative position to the disabled employee, and it remanded the case back to the District Court because there had been no proof of such an examination of circumstances by the hospital.

Sex (and Tennis)

U.S. Tennis Association (USTA) May Be Liable for Coach's Sexual Assault of Professional Player. The USTA selects the players and coaches for Team USA at the Olympics and other international events. In *McKenzie v. U.S. Tennis Association, Inc*. (M.D. FL, 2023), the court held that the USTA may be held liable for a coach's sexual assault of a USTA female player. There was evidence to support the claim that the Association's senior management had prior knowledge of the coach's "inappropriate sexual proclivities" because of reports by other USTA staff. The USTA allegedly did not take action or curtail the coach's behavior and he continued his access to the players. Thus, the assault could be "imputable" to the Association.

Race (and Tennis)

County Club Settles Tennis Pro's Racial Harassment-Retaliation Case. A Black female tennis pro at a Charleston, South Carolina area country club raised concerns about offensive racial comments made to her by club members and other staff. These included allegedly having a member's children call her the N-word as she was conducting a youth tennis clinic; other employees often used racial jokes and stereotypes in her presence; and, commented that she, as Black person, did not fit in with the membership and should not be employed by the club in a professional capacity. Though she repeatedly used the club's internal complaint process, no action was taken regarding the comments. In one meeting, the HR Director allegedly told the tennis pro to just keep quiet. Instead, she continued to raise racial incidents and was then replaced by a White male tennis pro who had allegedly been fired from his prior job for mishandling a sexual harassment/assault complaint. The Black female tennis pro filed a Title VII race, sex, and retaliation action. The country club has settled the case in a private agreement. *Wilkins v. Daniel Island Golf Club, LLC* (D. SC, 2023)

Age & Sex

Years of Good Performance Can Be Overcome by One Significant Incident. A Veterans Administration (VA) hospital administrator was forced to retire due to serious concerns about her actions during an audit. She sued for sex and age discrimination claiming that decades of positive performance evaluations were proof that she had performed well, met expectations, and that forcing her to retire was invalid. The VA's defense focused on a national audit of VA hospitals regarding concerns about inadequate care and treatment. After the inspectors left her hospital, they filed a complaint about the administrator's behavior during the audit. The complaint alleged that the administrator followed the inspectors through the facility and questioned staff who had been interviewed, bullied staff, and created a fear of retaliation if they gave information during the audit. The inspectors were prepared to recommend disapproval of the hospital's accreditation because of the administrator's conduct. The court found this one instance of almost costing the hospital its accreditation was sufficient cause for a discharge or to force retirement. "*Past performance alone is insufficient to overcome a genuine issue of current significant behavior or performance*." *Claflan v. McDonough* (9th Cir., 2023)

Retaliation

Employee Does Not Have to Be "Right" To Be Protected From Retaliation. Title VII and a number of other laws prohibit retaliation against those who make complaints, report concerns, or are witnesses in investigations or cases. Policies on harassment, ethics, safety, and more encourage employees to report any instances or observations they believe may be in violation of these policies or related laws. *Misane v. City of Bungor* (W.D. MI, 2023) involved a police officer who reported alleged comments he believed to be sexually harassing. He was discharged soon after. He sued under Title VII and state law for retaliation. It turns out that the comments the officer reported did not amount to anything which constituted sexual harassment under the law. However, that did not mean the city could take action against him. The officer was still protected from retaliation. One does not have to be correct in reporting concerns. One can be misinterpreting, misconstruing, or just plain wrong. Nonetheless, the anti-retaliation provisions apply and give protection against acts such as discharge. A jury awarded the discharged officer $1 million in lost pay, benefits, and other damages. Be careful when reacting to complaints and reports which, upon investigation, do not bear out and seem less than well founded. Managers may tend to label these as "nuisance," "false" or "frivolous," and wish to sanction the employee for having raised such a weak "illegitimate" issue. Too many anti-harassment policies actually give a warning stating that "Any complaint found to be false or frivolous can result in disciplinary action." The EEOC views these statements as a violation of Title VII, serving only to "chill" employees' ability to raise issues, out of fear they will be disciplined if they cannot absolutely prove their allegations or observations. A frustrated manager's subjective opinion that a report was "false" or "frivolous" can be another jury's opinion that the resulting retaliation is worth a million dollars. [For more information and advice on this issue see the article Retaliation by Boardman Clark LLP]

First Amendment Freedom of Speech

Employee Does Not Have Freedom of Speech to Talk to or Influence Witnesses During Workplace Investigation. A utility worker was ordered to not communicate with witnesses about the facts of an investigation into his alleged misconduct; allegedly lying about needing to stay home to care for his children, but then actually going to a pancake restaurant for the morning. He was then fired following the investigation. The employee filed a First Amendment Claim alleging the employer violated his speech rights by prohibiting him from discussions of his actions with others. The court found no violation of any rights. The First Amendment protects expression on "matters of public concern." The employee's pancakes were not a matter of public concern. His actions affected only himself and not the broader public or public policy. The employer had a legitimate interest in preventing witness interference during an investigation. Further, the directive was limited to discussion of the absence/pancake incident and did not bar the employee from talking to coworkers about anything else; it was narrowly tailored to meet the needs of the situation. *Roberts v. Springfield Utility Board, et al.,* (9th Cir., 2023).

Labor Relations

Latitude For Outbursts and Heated Behavior Under the National Labor Relations Act. Do you or other managers get upset when employees are disrespectful, argue with you, or angrily tell you their opinion about your directions or policies? Did the employee curse at you? Do you label this as "insubordination" or violation of the respectful workplace rules? Be careful. Some sorts of angry outbursts and disrespectful comments are "*protected activity*" under various laws. Labor relations are, by their nature, often "heated" and fraught with emotions. The National Labor Relations Act (NLRA) protects such behavior to a reasonable degree. Recently, the NLRB has expanded the scope of what is a "reasonable degree," ruling profane or hostile comments and social media posts about workplace issues should be analyzed based on the "totality of the circumstances" that surround them. "Frank and not

always complimentary exchanges must be expected and permitted." *In Re United Steel Workers v. Lion Elastomers* (NLRB, 2023). This decision is actually a return to the pre-2020 standards, which were modified during the last administration. Be Aware that the NLRA's protections are not just for companies with unions. They apply to all private sector employers. Many non-union companies find themselves defending Unfair Labor Practice charges, because the law protects "concerted activity" expression by all employees. So, before managers react and discipline when upset, be careful and assess the specific statements and the situation. Get legal advice. The outburst may be cause for a discharge, or it may be protected activity.

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