EMPLOYMENT LAW UPDATE

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

Boardman & Clark Law Firm
www.boardmanclark.com

LEGISLATIVE AND ADMINISTRATION ACTION

***EEOC Issues New Retaliation Guidance*.** Retaliation is now the single greatest category of EEO suits; more than several other areas combined. Retaliation cases are now 45% of all EEOC filings. Also, plaintiffs win more retaliation cases than in any other sort of case. So, it is crucial for business owners, HR and supervisors to pay attention and be more informed about this area. The EEOC has issued new Retaliation Guidance covering a variety of discrimination laws, Title VII, ADA, ADEA, GINA, Equal Pay Act and Rehabilitation Act. The Guidance is accompanied by a Q&A document and Fact Sheet for small businesses (EEOC.Gov). This replaces the last Guidance, which was issued in 1998.

OSHA Drug Testing Rule Effective November 1, - But Guidelines Not Yet Published. OSHA is seeking to limit employee drug/alcohol testing policies to, among other things, prohibit automatic post-injury testing. OSHA believes mandatory testing after all injuries will discourage reporting of OSHA-related incidents – because it evidently believes so many American workers take illegal drugs that they or their work friends will simply not report an injury/safety situation for fear of being found out by the ensuing drug test. OSHA's new view balances the interest of having all injuries reported, against the previous interest of making a safe drug-free workplace. OSHA is expected, hopefully, to issue Guidelines just before the November 1st effective date of the new rules. The Guidelines are expected to make a distinction between minor injury and serious accident, and allow alcohol/drug testing for serious accidents or serious injury. The definition of "serious" remains to be seen.

OFCCP Paid Sick Leave Rule. On September 29th the OFCCP issued its final rule requiring Federal contractors to provide seven days of paid sick leave per year.

LITIGATION

THEME OF THE MONTH
Millions And Millions

Employment cases are expensive! It seems that several recent cases have resulted in multi-million dollar awards or settlements. Even the "small" cases are in the half-million range. Some of these large awards are for group discrimination, and will be spread among a number of people. However, some are awards for an individual. Federal laws often have liability caps, which make multi-million dollar awards rare. But, state laws can be different; with no limit, as can be seen by some of the following case notes. This is why employees often file one case under both the Federal and state laws. These cases also illustrate why Employment Practice Liability Insurance may be a very wise purchase -- especially for smaller employers who cannot afford the liability, or even the defense costs to win one of these cases. Even then the EPL policy may not cover "punitive damages" for intentionally wrongful acts – as with millions in punitive damages in the following cases. [For more information, see the article Employment Practices Liability Insurance Considerations by Boardman & Clark.]

Fair Labor Standards Act

Twenty One States And U.S. Chamber of Commerce Challenge New FLSA Salary Increases. Twenty one states and the U.S. Chamber of Commerce have filed suits to stop the Dept. of Labor's new salaried basis rules, which double the required pay to qualify as a salaried-exempt employee. The rules become effective December 1, 2016. The plaintiffs are claiming that the Dept. of Labor exceeded its administrative rulemaking authority, and did not have authority to unilaterally increase the minimum salary level (just as it could not, on its own, decree a new national minimum wage without Congressional approval). The states also allege the rules violate their 10th Amendment rights. *State of Nevada et al. v. U.S. Dept. of Labor* (E. D. Tx., Sept. 20, 2016).

The Wages Of Sin! Have you heard the term "The Wages of Sin?" Exotic dancers are not Independent Contractors. *Mcfeeley, et al. v. Extasy Exotic Dance Club/Jackson St. Entertainment*. (4th Cir. 2016) was a case in which exotic dancers at a Gentleman's Club were all told that they were Independent Contractors, and worked purely for tips and the bills customers stuffed into their costumes. However, in an FLSA suit the court found that the club exercised substantial direction and control, and management decision-making. It ruled the club should have treated the dancers as employees and been giving pay checks, making tax deductions, SSI, U.C., worker's compensation contributions, and paying other benefits. It ordered the club to pay a substantial amount in back payments. In this case "The Wages of Sin" are at least minimum wage, overtime, and benefits.

Discrimination

Age

$16 Million For Theft Of A Bell Pepper. A 64 year old long-term physical plant manager was fired due to the alleged "theft" of a bell pepper. He sued and won an age discrimination case. The evidence included statements by the employee's manager to other managers that they should "take a closer look at the older people" and "write them up and get rid of them" unless they were top performers. The physical plant manager was fired after a salad spilled on the floor from an office refrigerator he was cleaning and he decided to eat the pepper as he was putting the rest of the salad in the trash. A jury decided that this seemingly petty reason was insufficient and was a pretext to "write up" and "get rid" of older workers. The original award was $23 million, but on appeal it was reduced to only $16 million; $13 million of that in punitive damages. *Nickel v. Staples Contract & Commercial Inc.* (Cal. S. Ct., 2016).

Race

Staffing Agency Pays $435,000 To Settle Race Discrimination In Placement Case. The EEOC filed a case alleging a temporary placement agency discriminated against African Americans and in favor of Hispanics regarding temp placements at a Fed Ex facility in Mississippi. The settlement calls for $435,000 remedial pay, plus mandated training and reporting requirements. *EEOC v. Resource Employment Solutions LLC* (N.D. Miss., 2016).

Sex

Auto Dealer Failed To Remedy Sexual Harassment – Inadequate Investigation Nets Half Million Dollar Award. An auto dealership blew its opportunity to solve a problem and avoid liability. Good reporting policies and prompt action can provide a "safe harbor," which gives an employer the chance to solve problems, and, thus, avoid further liability. In *Gyulakian v. Lexus of Watertown, Inc.* (Mass. S. Ct., 2016) an auto dealership had knowledge that a finance manager was being sexually harassed by her supervisor. He made overt propositions, openly discussed the type of sex he wanted with her, and attempted to throw coins down her blouse. This was observed by the dealership's general manager and other managers. Even when the sales manager filed a formal internal complaint, the dealership glossed over the investigation. It did not interview any of the witnesses "because it did not want to undermine the supervisor." A jury found the dealership guilty of intentional, knowing violations of the law and awarded $40,000 in compensatory damages and $500,000 in extra punitive damages, plus attorneys' fees and costs. (Punitive damages are often not covered by Employment Practice Liability Insurance.)

Surgeon's Harassment Of Assistant Brings $1.4 Million Jury Verdict. A surgeon sexually harassed surgical assistants. One of them sued. The evidence included his ongoing overt comments during surgery, including "let's get down on the floor and take care of our sexual tension;" crude descriptions of sexual acts he would like; questioning assistants about their sex lives; and comments about the desirability of the assistants' private body parts. Prior complaints had been made about the surgeon, but he was allowed to continue both his harassment and his presence at the facility. Commentary on the case included "At hospitals this kind of sexual misconduct by doctors toward staff has been common. Nobody tells them what to do. They are their own bosses." In this case allowing the conduct had a $1.4 million cost. *H. K. v. Spine Surgery Center LLC* (Or. Cir. Ct., 2016). Medical facilities are liable for the acts of the doctors, even if the doctors are Independent Contractors. The medical facility can still be liable for allowing the doctor to continue to be there after wrongful behavior. Some medical facilities are requiring independently contracted physicians to personally assume the liability for harassment, and guarantee reimbursement of all liabilities and legal costs to the facility if there is a finding of harassment.

Sexual Orientation

Family Values – Executive Ousted From Family-Owned Bank When He Revealed He Was Gay. A jury awarded $3.5 million to a former bank executive whose own family fired him. He had been the very successful Chief Executive Officer and Chair of the Board for many years. Then he asked for a divorce from his wife, and revealed that he was gay. His father had founded the bank. His family owned the shares. In his divorce his wife received a large part of the CEO's shares of the bank. His ex-wife and his own sister then moved to use their stock ownership to remove him from the Board because his coming out as gay had "tarnished the family name." When he filed a state EEO complaint about this he was fired from the CEO position. The court found sexual orientation discrimination and retaliation. It awarded $3.5 million – some payable now, but $100,000 per year for the next 21 years (with 2.5% interest each year). *Habberstad v. Country Bankers Inc.* (Minn. Dist. Ct., 2016).

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