EMPLOYMENT LAW UPDATE

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by
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LEGISLATIVE AND ADMINISTRATION ACTIONS

Three Months Until Salaried-Exempt Rule Changes – Are You Ready? The Dept. of Labor's new rule, requiring $47,476 minimum salary ($913 a week) for exempt positions takes effect December 1, 2016. Many employers are not yet prepared and have not planned how to compensate positions which will no longer qualify. Due to this, a great amount of litigation is expected following the change by employees who are not properly classified or paid. Also, be aware that December 1st may not be the "pay start" date for the new salary depending on when you start your work week. Employers can start their work week on any day they choose. Exempt salary must be correct for that whole week. December 1st is a Thursday; so for those employers who start the work on Sundays (a common day) the new salary must actually be in effect starting at the beginning of that pay week – Sunday, November 27, 2016. Plan now, don't delay.

LITIGATION

THEMES OF THE MONTH
Failure to Investigate and LGBT Rights

This month's Update shows the ongoing state of flux in LGBT discrimination rights. One of the following cases rules that Title VII does not include these rights, while another prohibits a state from creating infringements on these rights.

Two cases discussed below also illustrate the dangers of failing to do a proper investigation (or any investigation) prior to termination. Regardless of how clear the issue may *seem*, it may be necessary to actually clarify the facts before acting. (See 83 year old receptionist, and drunken professor cases.)

Discrimination

Religion & Constitution

Mississippi Religious Freedom Law Held Invalid. Mississippi passed a law which gave the right to discriminate, free from liability, if one was discriminating against people because you hold any of three specific religious beliefs: (1) that marriage is or should be between one man and one woman; (2) that sexual relations should be confined to such a union (whether the couple was heterosexual or LGBT); or (3) that biological sex is immutable and determined at birth. The court held the law "violates both the guarantee of religious neutrality and the promise of equal protection of the laws" under the 1st and 14th Amendments. The law only targeted sexual orientation or sexual relations. It did not authorize an exemption for discrimination on the basis of the many other things people find religiously objectionable (race, gender, ethnicity, or against members of other religions), all of which people may sincerely hold as religious views. It targeted only one very narrow group of people who could be freely discriminated against and allowed that discrimination to be based on only one particular set of religious viewpoints giving special state protection or "preference" for that view (as opposed to the many other religious values which may be different or opposite). The court stated: "The design, purpose and effect of HB 1523 is to single out LGBT and unmarried citizens for unequal treatment under the law. Authorization of arbitrary discrimination violates the Equal Protection clause. The law also "established preferred religious beliefs." "The First Amendment prohibits states from putting their thumb on the scales in this way." "HB 1523 does not honor" the tradition of religious freedom, "nor does it respect the equal dignity of all of Mississippi's citizens. It must be enjoined."

Sex and LGBT

Seventh Circuit Rules That Sexual Orientation Is Not Covered By Title VII. The lines are being drawn for a potential Supreme Court case. Last year the EEOC reversed its long held position that LGBT was not included under Title VII, and declared, on its own initiative, without legislative input, that LGBT is now a protected status under the category of sex/gender discrimination. The EEOC has been aggressively pursuing cases under this new interpretation. Because there was no Congressional action to specifically incorporate LGBT into Title VII, the cases have been challenged as administrative overreach, and legally without foundation. Some courts have allowed the new Title VII cases. However, in *Hively v. Ivy Tech Community College* (7th Cir., 2016), the court dismissed a case of sexual orientation discrimination, finding it is not clearly a covered category. In its decision, the court seemed sympathetic to the plaintiff and discussed the reasons why sexual orientation should legally be covered, but it could not extend that coverage on its own and overrule prior interpretations without the direction of Congress or the Supreme Court. "Perhaps the writing is on the wall . . . [but] until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent." This decision will have an effect on several other LGBT cases currently filed

with lower courts within the 7th Circuit. [This is a Title VII case. The Supreme Court ruled long ago that sexual orientation is a protected category under the Constitution's Equal Protection clause for public sector issues. See the above Mississippi decision.]

Disability

Person Who Never Applied For Job Wins A Discriminatory Application Complaint For ADA And GINA. A retired police officer was interested in a warehouse job at a farming products business. However, when he looked at the on-line application, it included a three-page medical questionnaire including inquiries about allergies, epilepsy, depression, sexual diseases and much more. It also asked whether the applicant had "consulted with a physician" within the past 24 months, and whether future diagnostic testing had been advised. He decided not to apply for the job due to the invasive questions, and the ridiculousness of asking whether a person had seen a doctor in the past 24 months. However, he decided to inform the EEOC of what he believed to be an illegal application. The EEOC took action. The application violated the ADA, which prohibits any medical inquiry prior to an actual conditional offer of employment. GINA was also violated because diagnostic testing often reveals genetic information as defined under that law. Again, no such inquiry can be made at the application stage. Though he did not apply, the non-applicant received $10,000 in the settlement for his report of illegality to the EEOC. *EEOC v. Grisham Farm Products, Inc.* (W.D. Mo., 2016). [The ADA has been in effect for a couple of decades. One wonders how any employer could still be so uninformed of the law as to post such an application.]

"Magic Words" Not Required For Employer To Understand Request For Accommodation. A coal mine supervisor was fired only two days after asking the company for "cooperation" in scheduling a neck surgery and telling the manager that his doctor recommended a change in duties. The company defended the resulting ADA failure to accommodate and retaliation case by claiming there had been no clear disability request for a reasonable accommodation. However, the court ruled that the ADA does not require the use of the "magic words" reasonable accommodation. A request for "cooperation" regarding a medical condition was "specific enough to put an employer on notice he was seeking accommodation." *Foster v. Mountain Coal Co.* (10th Cir., 2016).

Race

Black Teacher May Sue For Racially Hostile Environment Created By Black Superintendent. Employment relations can defy stereotypes. Discriminatory hostile behaviors are not limited; people of all categories can engage in discrimination, including against people of their own groups. In *Goode v. Tukwila School Dist.*, 406 (Wash. Ct. App., 2016), an African-American physical education teacher claimed a racially hostile environment was created by the African-American superintendent's ongoing discriminatory remarks. The superintendent allegedly made numerous statements, including referring to African-American employees as slaves; referring to a Black

employee with the initials J.D. as "J Darky," commenting on a male employee having another child as "typical Black man," and stated that hiring more African-Americans "makes the District look like a ghetto." The court decided that this was sufficient to create a hostile environment claim for African-American employees, even if not all comments were directed to the teacher specifically. Though the superintendent resigned following the harassment allegation, the District can still be liable for any improper behavior of its key executive. [Being a member of the same group as one is commenting about does not create immunity. There are a number of cases in which the negative race, age, sex or ethnic remarks are made by managers of that very group. Sometimes the manager may claim they are "just joking" or believe their membership gives them a special "insider" status to get away with these comments. They are mistaken. The effect on employees is still offensive, and these managers are held to the same legal respectful workplace standards as any other manager. See the article It Was Just A Joke by Boardman & Clark. Key managers may be held to a higher standard, and their less frequent or less severe behavior can create liability for the organization [see the article The Undefendable (Top Managers are "Undefendable" – Your Harassment Policy is not Enough) by Boardman & Clark].

Age

Old And Sick. AARP has joined in with plaintiffs to challenge a layoff. The case alleges that Spirit Airlines intentionally singled out older and sicker employees for layoff in order to save on its health insurance costs. It also did not rehire these workers when there were post-layoff recalls. The AARP's senior litigation counsel states that the "treatment of older workers was unprecedented, unequal and unlawful." The case also claims that the severance agreements given to the laid off workers did not meet the required disclosure standards of the Older Workers Benefit Protection Act. The company has denied any discrimination. *Raymond v. Spirit Aero Systems Holdings, Inc.* (D. Kan., 2016).

83 Year Old Receptionist Removed Without Investigation Has Case. A security staffing firm placed an 83 year old employee into a receptionist job at a client company. The client asked that she be removed. It claimed she was "unable to perform new technology-related tasks." The staffing company complied, terminated the 83 year old's employment, and replaced her with a 29 year old. In the resulting age discrimination case, the court found the employee had a *prima facie* case, and the staffing company had a problematic defense. It conducted no investigation into the "unable to perform" allegations prior to the removal. It did not verify that she was not able to do the job. It just acquiesced to the client's statement, without any basis in fact. The EEOC and the courts have long held that a staffing company may not give life to the discriminatory requests of clients. It must exercise its own anti-discriminatory practices. There was an obligation to do some degree of assessment before acting. The courts are also imposing joint liability for discrimination, upon both the staffing company and the client with which the workers are placed. *Nicholson v. Securities Sec, Services, Inc.* (5th Cir., 2016).

Labor Arbitration

Discharge For Passing Out Drunk At Work Is Overturned. A university professor was found passed out, drunk in his office. He was fired. However, the discharge was overturned by an arbitrator. Why? The arbitrator found that the professor did violate the being under the influence at work rule. However, the school violated a variety of due process obligations in the discharge. At the pre-termination investigation meeting, the professor was given a total of *one minute* to tell his side of the story and provide any mitigating explanation. The termination letter had been prepared in advance of the "due process" meeting and was handed to him immediately after his "one minute." The school, thus, did not investigate or consider the professor's statement that a prescription medication had contributed to the passing out. Any person is entitled to have his story examined before a decision, even if it seems implausible. Other factors included the professor's 13-year unblemished career and the fact that this was not an overt instance of public drunkenness and did not affect his student interaction, safety, etc. In reinstating the professor, the arbitrator did recognize the seriousness of the misconduct by not awarding any back pay; it became a very long unpaid suspension. In re *St. Leo University and United Faculty of St. Leo U.* (2016).

Suspension Given 20 Months Late Was Invalid. A prison employee received a suspension for making inappropriate sexual comments. However, 20 months had passed between the incident and the giving of the suspension. The employer could provide no logical, credible explanation of why it delayed so long. The arbitrator determined this was a denial of due process and that punishing an employee so long after an infraction failed to achieve the purpose of efficient and timely corrective action. In re *Fed. Bureau of Prisons At Florence Col. And American Federation of Govt. Employees #1112* (2016).

Fair Labor Standards Act

Court Rejects $100 Million Uber Settlement. A judge rejected the $100 million settlement reached between Uber and a class of drivers in California and Massachusetts who challenged their Independent Contractor status, and sought employee rights, wages and benefits. (The August Update noted that Uber and the attorneys for the class of drivers had reached agreement on the settlement and submitted it to the court for approval.) However, in reviewing the agreement, the judge believed that $100 million was "not fair, adequate and reasonable" to provide a remedy to the many drivers in the class action. So, the matter goes back into negotiations or to trial. *O'Conner, et al. v. Uber*. As noted in the August Update, this is just one of the multiple FLSA classification cases against Uber around the U.S. No wonder Uber has a plan to experiment with driverless cars next year.

Contracts of Employment

Store's Handbook Created Greater Protection Than The Law For Marijuana "Unfair Discharge." A company's employment policies can create broader job rights than are afforded by state or Federal laws, and can override the employment-at-will status. A clear policy can create expectations which can be enforced as a contract. Kohl's Department Stores issued a policy stating that workers in states allowing medical marijuana use, and who have a valid prescription, will not be discriminated against in employment decisions. A shift supervisor with a prescription was fired for marijuana use. He had no case under California's fair employment laws, because the state courts have ruled that employers are not required to tolerate drug use which is still illegal under Federal law. However, Kohl's policy did create a viable Contract of Employment case, for wrongful discharge. *Shepherd v. Kohl's Dept. Stores, Inc.* (E.D. Cal., 2016). [See the article Blundering Into Liability – Unwitting Creation of Employment Contracts, Boardman & Clark, for more warnings and advice on this issue.]

New Wisconsin Case On Non-Competition. A Wisconsin court has invalidated a "too broad" solicitation provision in a non-compete agreement. A more detailed article is in the Boardman & Clark HR Heads UP, www.boardmanclark.com.

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Alcohol, Breakups, Retaliation & More:

An update on trending workplace legal issues

2016 Labor & Employment Bagels & Coffee with Boardman & Clark

Bagels & Coffee with Boardman & Clark is a complimentary seminar series designed to educate attendees on trending legal issues in a single, short morning of informative presentations.

September 16, 2016

7:30 a.m. - Sign-in & Breakfast | 8:00 - 10:30 a.m. - Presentations

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TOPICS

Retaliation
Alcohol in the workplace
Separation agreements
Concerted activity
Personnel files

WHO SHOULD ATTEND

Human resources professionals
Managers & department heads
CFOs & controllers
Business owners
Anyone responsible for hiring, evaluating or terminating employees

TO REGISTER: Email Nick Sayers at **nsayers@boardmanclark.com** with subject line "BAGELS"

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