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BY ROBERT E. GREGG AND THE BOARDMAN CLARK LABOR & EMPLOYMENT LAW GROUP

LEGISLATION AND ADMINISTRATIVE ACTIONS

This past month was very active regarding federal employment rules.

Pregnant Workers Fairness Act – Final Rule. On April 15, 2024, The EEOC issued its Final Rule to implement the Pregnant Workers Fairness Act (PWFA). The Rule is extensive and will become effective July 19, 2024 (you can view the Rule at https://www.federalregister.gov/documents/2023/08/11/2023 – 17041). Though the PWFA is a sex discrimination law, much of the Rule's language and requirements follow the reasonable accommodation principles of the Americans with Disabilities Act.

Joint Employer Rule Repealed. Congress has repealed the recently implemented National Labor Relations Board Joint Employer Rules. These rules increased the number of organizations that could be jointly liable for employment issues. Joint employment continues to be a legal liability issue. This Congressional action rolled back the expansion that applies to labor relations and unfair labor practices. This Congressional action follows the decision in *Chamber of Commerce, et al. v. NLRB, et al.* (E.D. TX, 2024), in which the court vacated the rules, barring their enforcement.

New FLSA Salary and Overtime Rules. On April 23, 2024, the Department of Labor issued a Final Rule on overtime pay and exempt employees. This Final Rule significantly increased the salary threshold required for an employee to qualify as an exempt employee. Legal challenges with this Final Rule have already arisen. For more information, read DOL Issues Final Overtime Rule.

Federal Trade Commission Rule Bans Noncompete Agreements. On April 23, 2024, the FTC issued a Final Rule banning most noncompete clauses. For Further

details, read Federal Trade Commission Issues Nationwide Ban on Non-Compete Agreements. Courts have been more restrictive in enforcing non-compete agreements for some time, and several states have banned them. So, this new rule follows an already existing trend.

Department of Education Issues Title IX Rule Amendments. Title IX prohibits sex discrimination in educational institutions that receive federal funds. It covers employees, students, and other program participants. On April 19, 2024, the U.S. Department of Education issued Amendments that make significant changes in the scope of coverage and requirements of the Title IX regulations. To view a detailed description of these changes, read Department of Education Issues Amendments to Title IX Regulations: Considerations for School Districts.

TRENDS

Right to Disconnect After Working Hours – Protecting Employees' Personal and Family Time. The Right to Disconnect Act has been introduced in California. The proposed law would give employees the right to ignore work-related, non-emergency calls, texts, and emails when the regular workday ends, or on weekends. If the employer violates the law by attempting to contact their employees outside of working hours for non-emergency reasons, they could be fined. Employees working remotely from other states for a California employer would also be covered, *but* those living in California and working remotely for employers in other states would *not* be covered. This is the first state attempting to pass such a law in the United States. New York City considered it but did not pass a disconnect ordinance in 2018. However, several European countries and Canada have Right to Disconnect laws.

Another Warning to Beware of Legal Advice From AI. New York City started a small business AI chatbot advice service to help businesses understand employment laws and regulations. The chatbot generated answers to basic questions as to how different laws would apply to their situations. However, in answering small business owners' questions, the chatbot gave misleading answers, and in some instances, gave answers directly opposing the law. For instance, the chatbot advised employers that it is legal to fire an employee who has complained about sexual harassment; and that employees are required to disclose pregnancy to their company or face termination. The website had a disclaimer that said that it might "*occasionally produce incorrect answers,*" and that its answers were "*not legal advice*." However, the city appeared to have set up the small business AI chatbot service in order to give advice. This is one more warning about using caution when consulting AI.

LITIGATION

Constitution – First Amendment

Legislator Fires Officer Manager for Reporting Mold. The First Amendment protects public sector employees who speak out on matters of "public interest." These can include workplace issues that affect that person *and* other employees, clients, or the public. A regional office manager for a state legislature representative noticed odd odors, and she and others began experiencing headaches. She suspected a pollutant in the office was the cause. However, the representative and the landlord did nothing to investigate. She contacted the state Republican House Caucus coordinator, who advised her to buy a test kit to try to identify the issue and said she would be reimbursed. The manager did as she was advised. She opened an air vent and saw a lot of black gunk. The test swab showed several types of toxic mold. She reported this to the landlord and the state representative she worked for. Rather than expressing concern and gratitude for identifying serious health risks, the state representative responded with an angry, profane email including "Who the F*** gave you permission to do this!" He then demanded both the office manager and the caucus coordinator be fired. The office manager was fired. She then filed a First Amendment retaliation case. The court found the manager had engaged in protected activity. Her report of mold was a matter of public interest in the protection of other employees, those who come to the office, and the public in general. A discharge in retaliation for doing so was actionable under the First Amendment. *Ingram v. Dunbar (3rd Cir. 2024).*

Discrimination

Age

"You're Old and Walk Funny." — Comments Overcome Employer's Defense. A 62-year-old quality control engineer filed a case for age and disability discrimination after being discharged. The employer claimed that the discharge was for insufficient performance and incidents of inaccurate work. The engineer, however, showed evidence that younger employees made similar or worse errors without suffering any critique or consequences. Also, his manager made several derogatory comments about his age and the difficulty he had walking due to bone spurs. These included the comments, "You're old and walk funny," and that he "walked crooked like Fred Sanford" (the elderly TV character in Sanford and Son). The court found evidence of performance problems, so the employer could have had a valid reason for the discharge. *However*, the manager's negative age and disability-related comments were enough to cast doubt on the legitimacy of the

employer's defense. They showed the discharge could be tainted by discriminatory bias. Thus, this case will go to a jury to decide. *Brown v. FCA U.S. LLC* (E.D. MI, 2024).

Standard of Proof

"Similarly situated" must be equivalent, not just somewhat akin. An employee can prove discrimination by showing that another "similarly situated," "comparative" employee did essentially the same thing without being discharged. A male employee was discharged for inappropriate behavior toward others. He filed a Title VII case claiming that a female employee had also engaged in inappropriate behavior toward others and was not discharged. However, the court found the two situations were not similarly situated. Though both employees used "inappropriate behavior," the employees' actions were completely different from one another. The male employee's inappropriate behavior involved grabbing another employee's butt and pressing against the employee. The female employee had been rude and belligerent toward others when she thought she was denied a special benefit, but there was no sexual behavior involved in any way. The sexual behavior of the fired employee was severe and far outweighed any comparison to the female's rude behavior. So, they were not similarly situated. The court approved the summary judgment against the male employee. *Choate v. Atlanta Radio LLC* (11th Cir., 2024).

Race

Racist Comedian at Corporate Event Creates Case. A hospital's board chair and CEO hired a comedian to provide after-dinner entertainment at a management retreat. The CFO raised a concern that the comedian's usual routine had inappropriate racial and sexual content, and she suggested they use a different entertainer. Her concern was not heeded. At the event, the White comedian impersonated Black people, made stereotyped characterizations of Black people, and several demeaning jokes about women. Following the event, the CFO wrote a letter of objection regarding the discriminatory performance and stated the hospital should issue a letter expressing that the performance did not reflect the values of the organization. The CEO disagreed and felt no action was needed. Soon after, the CEO fired the CFO. The CFO then filed Title VII and 42 U.S.C. Sec. 1981 cases for retaliation. The hospital defended itself by claiming the discharge was not due to concerns about the discriminatory performance. Instead, it was "interpersonal business issues," the CFO's poor management of her team, and communication issues. The court did not find these reasons credible. There was no contemporaneous documentation of the supposed problems. Just prior to her complaint, the CEO gave the CFO a glowing evaluation and praised her

establishment of a "cohesive team," that was "engaged, enthusiastic, and happy." The court found that the hospital's evidence against the CFO was put together after the complaint. The CEO's *post hoc* documentation appeared to be a pretext to retaliate after the complaint about the comedian he had hired. The lengthy racist-sexist performance at a large company event was sufficiently overt and severe to create a hostile environment and support a case of retaliation for protected activity under Title VII and Sec. 1981. *Coffman v. Grand View Health Foundation LLC, et al.* (E.D. PA, 2024). [For more information on the dangers after-the-fact documentation, see the article "We Have the Straw that Broke the Camel's Back — But where is the Rest of the Camel?"]

Race-Based Staffing – Care Service Catered to Whites Only Requests. A care service will face a trial due to charges that it honored patients' requests to have only White nurses and caregivers. Two Black nurses filed Title VII discrimination cases alleging the company posted scheduling sheets listing whether a patient wanted White-only caregivers and assigned people based on this racial preference. If there were not enough White employees to meet the need, the company would pass over Black workers and call in off-duty White-employees for the extra shift overtime work. The plaintiffs were often passed over and were not eligible for the extra overtime compensation given to White-employees only, and the open catering to racial discrimination created a racially hostile environment. *Brewer v. Chapters Health System, Inc.* (M.D. FL, 2024).

Race and Disability

Staffing Agency will Pay $2.2 Million for Discriminating Against White, Black, and Asian Employees. A staffing agency will pay $2.2 million to settle an EEOC charge that it engaged in preferentially recruiting and placing only Hispanic workers in "low-skilled" positions and rejected White, Asian, and Black candidates. The settlement also covers Americans with Disabilities Act violations for referring only workers who had no history of any previous injury, regardless of whether the injury had any relevance to the ability to do the job. *In RE Baron HR* (EEOC Settlement, 2024).

Sex

Union Liable for Sex Discrimination in Hiring Hall. Unions, as well as employers, can be sued for discrimination. *Longshoremen Assoc. #1413 – 1465 v. Mass. Commission Against Discrimination* (Mass. App., 2024) involved a hiring hall process in which the union chose which people were assigned to work. A female forklift driver was repeatedly denied placement, even when there were no other qualified people available for the placement. Instead of hiring the female forklift driver, the

union bypassed her and assigned men who did not have forklift qualifications to the job. The union had a pattern of assigning women to only the lowest-paid and non-skilled work. It did not grant full union membership with pension rights to women. The court upheld an arbitration award to the plaintiff of $50,000 plus full union membership and retroactive seniority and pension benefits.

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Author

Robert E. Gregg
(608) 283-1751