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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

Dept. of Labor Issues Guidance on AI in Hiring. The Department of Labor has announced the publication of the AI & Inclusive Hiring Framework, a tool designed to help employers use AI technology to advance inclusive hiring policies, especially for people with disabilities. The guidance is a "*tool*" to help employers reduce the risks of creating unintentional discrimination and barriers to accessibility as they use AI hiring technology. The initiative will also help workers and job seekers navigate the potential benefits and challenges they may face with AI-enabled hiring technology. DOL's Assistant Secretary for Disability Employment Policy, Taryn Williams, states, "*These employers recognize that AI tools can improve recruitment and hiring but may also impact workplace culture and inclusion of disabled employees. The AI & Inclusive Hiring Framework published today charts a clear course for employers to navigate this transformation successfully.*"

CFPB Issues FCRA Guidance – AI is Expanding the Scope of the Fair Credit Reporting Act "Digital Tracking." A Fair Credit Reporting Act document titled "Consumer Report for Employment Purposes" is not just about searches of credit, bankruptcy, work history, or conviction records anymore. Artificial Intelligence is expanding the scope. The Consumer Financial Protection Bureau (CFPB) has issued a Guidance regarding employers' use of AI automated systems to track employees' locations, social media usage, community and union labor-related activities, and on-the-job performance metrics (sometimes issuing "automatic warnings" to employees who are not meeting standards – without any supervisory involvement). These AI systems are operated by third-party providers, which gather and assess the information and report it to the

employer. The CRPB believes this fits the definition of a Consumer Reporting Agency under the FCRA. The Guidance describes the necessity of informing employees of these AI or similar information systems, having them sign a consent, and following all other FCRA protocols.

LITIGATION

Strangest Defense of the Month

Manager Claims He Intended to Fail Employee but Just Forgot. A utility company Ground Worker was in a multistep training program to become an Overhead Line Worker. She passed Step 5 and after a period of good performance reviews, she started on Step 6. She was then diagnosed with cancer and had to take leave for treatments, which she requested as ADA accommodation leave. On the day of her return from leave she was told by her manager that she was now being placed back in Step 5 because of her absence. She complained about this decision and claimed she should be allowed to continue with Step 6 training. Then the manager claimed that he had actually "*meant to fail her at Step 5*" but had *forgotten* to send that information to anyone. In the ensuing ADA case, the court rejected the "*I forgot to fail her defense"* as pure pretext. The total absence of any contemporary evidence of this, the period of good performance reviews following Step 5, and the company then assigning the employee to start Step 6 all served to refute the after-the-fact created defense. Only after she requested and took disability accommodation leave did the company appear to have any concerns about the employee, and its actions appeared to be retaliatory for having exercised her ADA rights. *Washington v. Dominion Energy* (W.D. VA, 2024).

Discrimination

Age

One Little Comment is Enough to Create a Case. A 69-year-old city Grant Writer was let go after 45 years of apparently satisfactory work. The city said this was due to a reorganization of the position. During the termination meeting, the city's Chief Administrator's comments included the statement, "*You have had a long run here. It's time for you to leave."* In the ensuing age discrimination case, the court found this one statement could show direct evidence of age discrimination. It also did not help the city's defense that it could show no evidence of any real plan or reasons to "reorganize" the grant writing before the termination. So, the stated reason could be seen as a pretext. *Baldi, III v. Upper*

Darly Township (E.D. PA, 2024). This case is a great illustration of the importance of prior scripting for discipline conversations. Loose comments, even very small comments, can take on a life and create cases.

National Origin

Punching Hole in the Wall Outweighs Discrimination Claim. A Production Supervisor worked for a meat packaging plant for 23 years. In recent years, he had ongoing issues of attendance and aggressive, unprofessional behavior for which he received warnings, performance improvement plans, and a suspension. After another attendance incident, he was called into a Final Warning meeting. During this meeting, the Production Supervisor talked over his manager, stood up, began shouting obscenities at the manager, and then punched his fist through the conference room wall and walked out. He was fired. He then filed a Title VII National Origin discrimination case, claiming that he is Hispanic. He claimed another non-Hispanic manager had similar behavior, angrily punching a computer, but was not fired. The court examined and rejected his claim and granted Summary Judgment, dismissing the case. The Production Supervisor's behavior was clearly over the top and would warrant discharge. There was no evidence about the alleged other manager's actions *except* for the plaintiff's own unverified, unsupported hearsay allegation. There was no proof of a computer punch, or any other damage. Further, the record of the other alleged manager was different, with less extensive attendance issues which had been corrected before ever reaching the PIP or suspension stage. The court opined that "*No reasonable jury would equate the two*." *Medina v. Menasha Packaging Co*. (E.D. PA, 2024)

Race

Left Alone in Unheated Building. A court ruled that a White school district's Early Childhood Director presented sufficient evidence of racial discrimination to proceed to a jury trial. She alleged that the District's mostly African American administration sought to force her to resign from the mostly African American department due to her race. The evidence included remarks by her supervisor that she should look for another job, yet her performance was good. She was informed that a new certification was required for her job, but then management denied her the authorization to take the necessary training to be certified. Then everyone in the department was moved to a new building and given new furniture and equipment, except her. She remained alone in the empty space. Then she was informed the heat would not be turned on for the winter. After enduring the cold until the end of December, she resigned. This

presented sufficient evidence to support a constructive discharge case. *Sharkins v. Montgomery Co. Bd. of Education, et al.* (M.D. AL, 2024)

Sex

Stop Means Stop! – Nothing Vague about It. A Fire Chief became a fired chief due to sexting texts and emails with a female subordinate. They had a friendly texting relationship for several months. Then, his messages began to include comments on her attractiveness and grew increasingly sexually related. She asked the Chief to stop and requested he cease any non-work-related communication. However, he continued to send comments on her sexuality and sexiness. When she filed a complaint, the Chief was fired for violating the Department's harassment policy and conduct unbecoming of an officer. The Chief then filed a First Amendment case claiming the anti-harassment policy was unconstitutionally too vague for enforcement. It prohibited "*offensive*" texting but provided no clear definition to inform people of what could be offensive; therefore, it could not be enforced against him. The court rejected this Void for Vagueness claim, finding that "*offensive*" is not vague and is a commonly understood term that does not require extensive definition in a policy. Further, the subordinate had clearly informed the Chief she found his messages unwelcome and asked him to stop. His continuation clearly met the definition of sexual harassment under the law. In dismissing the case, the court opined that "*people of ordinary intelligence*" would understand such conduct was prohibited by the policy. *DeVito v. Palm Beach County* (S.D. FL, 2024)

Why Would You Want to Do a Man's Job? A waste disposal company is paying $3.1 million to settle a class action sex discrimination in a hiring case. The EEOC alleged they refused to hire women for truck driving positions at its multiple locations. During the hiring process, female applicants were asked improper gender-related questions like, "*Why would you want to do a man's job*?" and were subjected to derogatory comments about their female appearance. The case alleged many well-qualified women were denied jobs in favor of less qualified male applicants. In addition to paying the large monetary award, the company will also conduct supervisory training on proper hiring practices and be subject to a period of EEOC monitoring of its employment practices. *EEOC v. Waste Industries USA et al.* (N.D. GA, 2024) ***Why would any manager ask such an overtly discriminatory question?*** The anti-discrimination laws have been in effect since 1964 – 60 years! The courts have often ruled that after so long it is "*inexcusable*" for supervisors to not know the basic improper areas of inquiry in hiring. Such ignorance or disregard results in extra damage awards.

Unfortunately, some companies have cut back on supervisory training and monitoring in the area of EEO compliance. The 2023 Harvard Supreme Court decision against Affirmative Action in student admissions led several employers to falsely assume that this somehow negated or diminished the EEO discrimination rules in employment. The Harvard case had nothing to do with employment. Then Florida's "War On Woke" law followed by several other states eliminating Diversity, Equity, and Inclusion (DEI) programs in public agencies, and a number of large corporations also curtailing their DEI programs, further fostered the misconception by employers and many individual managers that the EEO laws were no longer a factor to be concerned about. So, some cut back on training and monitoring for proper practices. Of course, pro-active DEI programs are very different from EEO legal compliance. Though DEI is being attacked, compliance requirements are alive and being enforced. This is a good time to refute managers' misconceptions that cases on Affirmative Action and the diminishment of DEI somehow lessen their EEO compliance responsibilities. This is the time to reinvigorate supervisory training on EEO requirements and other employment laws.

Fair Labor Standards Act

$13 Million Penalty Awarded Against Company Which Always Had Another Excuse and Tried to Blame ADP. *Hornaday, et al. v. Outokumpu Stainless USA, LLC* (11th Cir., 2024) was a class action FLSA suit alleging the company failed to keep accurate records, failed to pay for all hours worked, and failed to pay proper overtime. After a protracted period of the company's non-compliance with, and efforts to thwart the pretrial discovery process, the court had had enough. It sanctioned the company by granting a $13 million judgment to the plaintiffs *without a trial*. The Court of Appeals found the decision was warranted due to the company's "*intentionally subversive approach*" to discovery. Over a two-year period, the company stalled and failed to produce records or cooperate with Court Orders. The court found that the company "*always had another excuse,*" and when the company did produce information it was falsified and full of "*outrageous misrepresentations*." When this was caught, the company then attempted to blame its payroll provider, Automatic Data Processing (ADP) for the inaccuracies and then tried to blame ADP for providing the false information. However, the court found ADP had diligently cooperated and had promptly, fully, and accurately complied with every subpoena it received. The sanction of granting a $13 million judgment without a trial was warranted. *One lesson* is that litigation is vigorous, and strong defenses are part of the process.

However, obstructive behavior and a "*delay and resist*" at all points strategy often backfires and can prove to be fatal to an employer's case.

Failure to Pay Voids Decision. Arbitrators are private judges hired to conduct trial-type hearings and render legally binding decisions on disputes. The parties enter into an Arbitration Agreement that includes provisions on payment of the Arbitrator. Employers often prefer arbitration due to the belief that Arbitrators may be more employer-friendly and render lower damage awards than a court or jury. *O'Dell v. Ava Healthcare, Inc.* (S.D. CA, 2024) involved an employment wage and hour dispute that went through the arbitration hearing, and a decision mostly favorable to the employer was issued. However, the employer did not pay the Arbitrator's fee within the 30 days provided under the Arbitration Agreement. The employees involved then filed the case in court claiming the Arbitrator's decision was void due to the company's breach of the Arbitration Agreement terms. The company argued that since the decision had already been made and issued, it was valid and enforceable whether or not the Arbitrator had been paid. The court, however, ruled that the Arbitration Agreement terms included the payment, and since payment had not been made, the Decision was *not final*. The non-payment breached the Agreement, and it was too late to be cured. So, the employees could now have another chance of getting their claims decided by the court in a standard FLSA case.

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