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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

New Mental Health Parity Rules. The U.S. Dept. of Health and the U.S. Dept. of Treasury jointly issued the Requirements Related to Mental Health Parity (Parity Rule) on September 9, 2024. The Parity Rule is an accompaniment to the Mental Health Parity And Addiction Equity Act (MHPAEA) which requires insurance plans to provide equal mental health and substance abuse treatment as they do for other medical conditions. Among other things, the new Parity Rule requires health care plans and insurers to conduct assessments to identify and address any "material differences" in access to MHPAEA services, including having an adequate number of mental health and substance use providers and ensuring out-of-network rates for these services are the same as for standard medical services.

OSHA Issues Proposed Heat Standards. At a timely moment, after the hottest summer on record and the warmest winter ever recorded for U.S. Territories in the southern hemisphere, the Occupational Safety and Health Administration has issued its proposed Heat Injury and Illness Prevention in Outside and Inside Work Settings standards. OSHA will take comments until November 1st. There will then be public hearings and consideration of comments before final standards take effect.

EEOC Finds "High Tech, Low Inclusion." In September, the U.S. Equal Employment Opportunity Commission and Government Accountability Office (GAO) issued a report on its study of employment in the high-tech industry, titled *High Tech, Low Inclusion: Diversity in the High-Tech Workforce and Sector from 2014 – 2022*. It covers 56 Science, Technology, Engineering, and Math

(STEM) occupations/industries. The Report acknowledges some "limited progress" but found significant disparities in the inclusion of Women, Black, Hispanic, and Older workers in numbers and pay.

TRENDS

Mr. Smile Is Watching You! — AI Surveillance in Customer Service. Companies in Japan have adopted an Artificial Intelligence application called "**Mr. Smile**" which surveils employees for the quality of their customer interactions. Mr. Smile uses over 450 measures to evaluate the employees' facial expressions, tone of voice, and volume to "*standardize all staff members' smiles and satisfy customers to the maximum.*" Several thousand Japanese employees are being monitored by Mr. Smile and pressed to conform to an AI-based standard – contorting their normal facial appearances to achieve standardized smiles and tones. This system has generated some interest from U.S. employers seeking to achieve better customer service. However, it would likely run into certain legal issues here. ADA-covered disabilities may create issues for some people to conform to standardized facial and tonal expressions. *Whose smile is the base?* AI has repeatedly been shown to have racial, cultural, ethnic, and gender biases when used as a screening or standard-setting tool. This can be especially so when judging tonal emotions and facial features and expression across different genders, cultures, races, and ethnic groups. A number of discrimination cases have been filed and new laws now cover this area of AI use in setting a desired norm or "type" when screening employees or job applicants. Also, state Biometric Privacy Acts would apply to facial and tonal monitoring, requiring levels of informed consent and careful handling of all monitored information.

On The Other Hand

Toning Down Customer Anger. Another AI tool is being developed to protect telephone Customer Service Representatives (CSRs) from irate, angry customers. Customer abuse and harassment can cause major stress and health issues for customer service employees – customers unleash their frustrations on the CSRs hour after hour. The AI software will tune out and tone down the anger in people's voices, making them sound calmer. It won't change words, but at least the profanities may "sound nicer." It may make customer service healthier and reduce the high turnover rates. (Will

customers complain that this violates their consumer protection rights to fully express their complaints and discontent?)

LITIGATION

Employment Contracts – Agreements

Separation and Release Agreements in English Not Valid for Non-English-Speaking Employee. Any contract is supposed to consist of mutually agreed-upon terms. An employment Severance and Release Agreement is a contract in which the terminating employee "voluntarily and knowingly" takes a severance payment in exchange for releasing the employer from future liability under the employment laws. A terminated assembly line worker and Haitian immigrant who spoke limited English signed a Severance and Release Agreement in exchange for two weeks' worth of severance pay. Later she filed Title VII and ADA complaints. The employer moved to dismiss, based on the Release Agreement. However, the court found the Agreement was void and unenforceable. The evidence supported claims that the company knew the worker did not understand the English text of the Agreement. No interpreter was provided. The employee was told she must sign that day, and not given opportunity to go and seek advice or interpretation or consult with an attorney. Demanding a signature on the same day indicated the employer had intended to rush the process and was likely to prevent understanding. The court found a "misleading" process in which the "voluntarily and knowingly" element of the Severance and Release Agreement was absent. Thus, the Title VII and ADA cases could proceed. *Marie St. Louis v. New Hudson Facades, LLC* (E.D. PA, 2024). This is another in a series of cases in which courts have invalidated Agreements signed by employees. Employers should be aware that it is not sufficient to just give a document to the employee or former employee. *A lesson from this case* is to exercise care in providing Release Agreements. Be sure to follow the requirements of the various laws regarding severance, and to give the employee the proper opportunity to review it and get advice. *Never* allow the employee to sign on the same day they receive the agreement, regardless of one's language abilities. Releases are legal documents, and it is important that they are signed with *knowledge* of what they mean. The employer may later have the burden of proof to show the entire process was appropriate, fair, *clear*, and provided proper information and time to be "voluntary and knowing."

Clicking Submit Did Not Obligate Job Applicant to Arbitration Agreement. Arbitration agreements are enforceable but there must be a clear showing of the employee's understanding and assent to the terms. Courts often find this element missing. An applicant for a hospital nursing job did not pass the pre-employment physical agility test. She filed an ADA case alleging the test was invalid and thus discriminatory. However, the hospital moved to dismiss the case and compel her into arbitration based on the lengthy Arbitration Agreement which was appended to the online application. Her clicking of "Submit" constituted assent to the agreement. The court rejected this argument. A lengthy, legalistic document that is included as an additional element in an online application site is not designed to adequately apprise the applicant of its meaning and is not "reasonable notice." Clicking the Submit button *did not* clearly indicate agreement to arbitrate." *Marshall v. Georgetown Memorial Hospital* (4th Cir., 2024)

Discrimination

Sex

Get Her Off the Island! – Deep Sea Bomb Diver Wins Sexual Harassment Case. *Schlesser v. VRHabilus, LLC* (6th Cir., 2024) involved a female underwater diver who specialized in retrieving and disposing of unexploded ordinance (bombs, missiles, grenades, artillery shells, etc.) from the seafloor. The diving unit was located on an island off the Atlantic Coast. She was the only female diver. From the inception of her assignment, she was subject to overt hostility from the male divers. She was frequently called "*B — -"* and other obscenities, told she was "*not a real diver,"* even though records show she outperformed several of the men. She was physically pushed and threatened by her supervisor and coworkers. A manager watched but did nothing. After 10 weeks she complained to the Site Manager, who called Human Resources and said, "*She's b — -ing about her treatment*." The HR Director replied, "*Oh, the female*!" The manager then said he wanted the OK to "*purchase a ticket, pick her up first thing in the morning, and get her off the island*" and then replace her. This was done. A jury found overtly severe and pervasive harassment based on gender and awarded back pay and attorneys' fees. On appeal, the Circuit Court upheld the verdict, finding that the company created a hostile environment, failed to act to address clearly obvious hostile, discriminatory treatment, and retaliated when the diver complained to the Site Manager. [This case is a good reminder that the EEOC issued a lengthy

Enforcement Guidance on Harassment in The Workplace in April 2024, with extensive advice to employers on how to recognize and appropriately address such situations. The Society for Human Resources Management (SHRM) has also recently published a suggested Harassment Complaint form and a Checklist Guidance for investigating complaints, based on the EEOC's guidance, which are available to SHRM members at HRWorks.com. It may be wise for HR Managers and other managers to review the EEOC Guidance to prevent cases such as the above.]

Disability

Banishing Employee to Work from Home is Not Reasonable Accommodation for Perfume Allergy. An economist for the Environmental Protection Agency had severe allergies which were exacerbated by working near coworkers who wore perfume. He requested a small, enclosed office space or conference room as an accommodation. Instead, the agency offered him 100% telework from home. The economist, though, claimed that a home set-up would be inadequate for his work, and he needed in-person collaboration with others in the office. The agency declined to consider his requests and insisted on the remote work arrangement as the only accommodation. The economist filed an ADA suit. The court found the agency had failed to properly engage in the interactive process. The ADA discourages "segregating" or "isolating" people as a form of accommodation. Though working from home *might* be a reasonable accommodation, the employer had an obligation to thoroughly consider and explore the employee's requested accommodation and other alternatives before any decision. In this case, it had not done so. *Ali v. Regan & EPA* (D.C., D.C., 2024)

Retaliation for Protected Activities

"Very Little" Is Enough. A railroad employee sued, claiming he was discharged due to his report of safety problems identified in air-brake tests, a protected activity under the Federal Railroad Safety Act (FRSA). The company claimed the discharge was for a number of other work misconduct issues. The lower court found in favor of the company, ruling that the air-brake report had been only a "*minimal factor*" and contributed only "*very little*" to the discharge decision. On appeal, the Circuit Court reversed. The standard for a retaliation case is whether the protected activity "*was **a** factor*" in "*any part*" of the decision, not the degree of that factor. The fact that the protected activity played **any** role, and was given **any** consideration, even if

"*very little,*" is enough to be the basis of a retaliation case. *Parker v BNSF Railway Co.* (9th Cir, 2024) The warning of this case is to carefully separate any concern or even mention of any form of protected activity or protected complaints from all employment decisions. [For more information see the article Retaliation at www.BoardmanClark.com Labor & Employment reading room.]

OTHER RECENT ARTICLES

These additional, recent articles can be found at BoardmanClark.com in the Labor & Employment section:

EEOC Files Its First Pregnant Workers Fairness Act Lawsuit

By Doug Witte | 9.24.24

The New "Welcome Corps at Work" Program

By Nikki Schram | 9.30.24

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