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

DOL Salary Rules Blocked. A Texas Federal court granted an injunction which temporarily blocked the December 1, 2016, implementation of the new increase in pay rules for salaried-exempt employees. This puts the rule, and employers' obligation to adopt new pay practices, on hold until further developments. *Nevada et al. v. DOL* (E.D. Tx., 2016). [For more detailed information, see the November HR Heads Up Overtime Rule at boardmanclark.com.]

OSHA Rules Upheld. On November 29th a Texas Federal Court denied an effort by business groups to block the December 1st implementation of new OSHA rules regarding retaliation, including a limitation on post-accident drug testing. These rules are now in effect. *Texo ABC/AGC,Inc., et al. v. Perez* (N.D. Tx., 2016).

Another Injunction Attempt – AARP Tries To Block Wellness Program Rules. The EEOC finally adopted guidance for employer health plans to have wellness programs and use health insurance premium incentives (not penalties) to encourage voluntary participation. The AARP is now asking a court to grant an injunction to stop these rules from becoming effective on January 1, 2017. It alleges the rules violate the ADA, GINA, and the Administrative Procedures Act. The AARP asserts that the rules allow employers to force involuntary disclosure of older employees' health and genetic (family health history) information. *AARP v. EEOC* (D.C. D.C., 2016).

TRENDS

Is Job Recuiting On College Campuses Age Discrimination?

A series of cases are challenging employers' traditional college recruiting practices. The AARP is strongly advocating that college recruiting has an adverse impact, favoring youth, and is a practice which severely limits the ability of older workers to find out about and

participate in the interview and hiring process. College recruiting is automatically focused overwhelmingly on youth. This is not the first such challenge: In *Villarreal v. R.J. Reynolds Tobacco Co.* (11th Cir., 2016), one Federal Court ruled that the plaintiff did not make a good case that college recruiting was an effort to cut older people out of consideration. However, the EEOC is now more closely scrutinizing the issue. There are more cases pending in other Federal Courts regarding college recruiting and other hiring methods seeming to heavily focus on reaching only younger people, and/or to avoid reaching older workers. Besides campus recruiting, heavy emphasis on youth-oriented media, youth-oriented organizations and conventions, and ads which emphasize a desire for those who "grew up as Digital Natives" – "born into the Technical Age" have been targeted. Neither AARP nor the EEOC have proposed that college recruiting be stopped; the focus is about finding a balance. If an employer has campus recruiting, there should also be other conscious outreach methods designed to reach older workers, and give them a fair chance to apply and interview as well. This is similar to the already well-established principles (and liabilities) that placing the employers' advertising primarily in all-white areas or in primarily male-focused publications is not likely to result in minority or female applicants. Companies and their recruiters may be wise to now apply these lessons to prevent age challenges, and will have a better chance of success if there is proof of tangible efforts to balance and seek applicants from all potential ages and groups.

LITIGATION

Genetic Information Non-Discrimination Act

Home Care Company Pays $125,000 For GINA Infraction. A home care provider will pay $125,000 to settle a case regarding improper hiring. Applicants and employees were asked health questions about family medical history (as opposed to just their own personal, job-related medical information). GINA prohibits inquiry into genetic information, which includes family medical history. The ADA also requires medical inquiries to be only after a conditional job offer and "job-related and consistent with business necessity." Inquiries about one's family do not meet this criteria. *EEOC v. BNV Home Care Agency, Inc.* (E.D. N.Y., 2016).

Discrimination

Arrest & Conviction Records

Census Bureau Misread Hundreds Of Thousands Of Applicant Criminal Records - $15 Million Payout. The U.S. Census Bureau will pay $15 million to settle a class action for shutting out hundreds of thousands of Hispanic and African-American applicants due to faulty and overly restrictive screening of arrest and conviction records. In addition to payments to rejected applicants, the Bureau will hire consultants to develop better hiring criteria for the 2020 census. The Bureau used incorrect information and a less than thorough process to screen applicants. The process had an adverse impact on minority applicants. Under the EEOC guidelines (and the laws of many states), an employer may

not consider an old arrest record which never resulted in conviction. A conviction must be "substantially related" to the job before it can be used to deny employment. *Gonzalez v. Pritzker* (S.D. N.Y., 2016). [Also see November, 2016 Update Note on Trends.]

On The Other Hand

Challenge To EEOC Criminal Record Coverage. The Fifth Circuit Federal Court of Appeals has remanded for reconsideration a case challenging the EEOC's position that considering Arrest or Conviction Records can be discrimination under Title VII. *Texas v. EEOC* (5th Cir., 2016). The District Court ruled that the State of Texas did not have jurisdiction to challenge the EEOC rules and dismissed its case (the same court which ruled in favor of Nevada and Texas, et al. to enjoin the Department of Labor's new salaried basis increases). If, on remand, the Court finds there is jurisdiction, then it will proceed to hear the merits of whether or not the EEOC's position is valid.

Sex

Improper Sexual Comments To Lumberjacks. This was a case of dueling complaints. *Pittington v. Great Smokey Mountain Lumberjack Feud LLC* (E.D. Tenn., 2016) was a retaliation case in which a female stagehand at a lumberjack show tourist attraction complained that she was reassigned from the performance arena to the front office after she complained about a manager's sexually tinged conversations with her and other female employees. However, the court found that the transfer did not occur until after there were complaints about the stagehand by male lumberjack performers. She engaged in ongoing "heavy flirtation" which made several of the lumberjacks very uncomfortable. Among the behaviors were ongoing phallic references, and grabbing at the tear when a lumberjack ripped his pants. The court concluded that the transfer was due to the lumberjack performers' complaints about her unwelcome comments and behaviors and its distraction and interference with their work. The court also ruled that a transfer to a job of same hours and same pay was not a materially "adverse action" to show retaliation.

Sexual Orientation & Identity

Another Court Rules That Title VII Covers Sexual Orientation – Continuing Split Of Opinions. The EEOC reversed its long held position that Title VII did not cover LGBT status. Since then courts have been divided. Some have accepted the defense that the EEOC overstepped its authority and have found that LGBT is not a protected category. (See September, 2016 Update) Others have adopted the new interpretation allowing LGBT discrimination cases. In *EEOC v. Scott Medical Health Center*, the W.D. Pennsylvia Court joined-in by ruling that a sexual orientation discrimination case does fit within Title VII. The issue may ultimately be decided by the U.S. Supreme Court.

Nowhere To Go. A security officer for a school district, hired as female, was transitioning to male. The officer began dressing as, and identifying as male. The district forbade the officer from using the male restrooms until there was a legal change in gender. It also

forbade using the female restrooms as long as the officer continued to dress as a man. There were few, and often difficult to access unisex restrooms. The officer then did get a legal gender change, and presented the court order and his new driver's license, as male, to human resources. However, the district continued to refuse the use of either the male or female restrooms. With nowhere to go, the officer sued under the new Title VII recognition of LGBT status discrimination, and Nevada state law. After the suit was filed, the district relented and allowed use of the men's room. However, the court allowed the case to continue on the issue of damages up to that point and any other appropriate relief. *Roberts v. Clark Co. School Dist.* (D. Nev., 2016).

Race/Retaliation

White Employee Fired For Supporting African-American Supervisor. A White chief nurse at a VA hospital was questioned as a witness in an investigation into improper document procedures of her supervisor. She raised a concern that the investigation was part of an attempt to remove her supervisor who was African-American. She stated a belief, based on office interactions, that there was a conspiracy by several White managers to remove the African-American supervisor. She followed this with a written statement of concern. She then suffered a series of negative actions and a demotion. She filed a retaliation charge. The court found substantial evidence to support the retaliation case. Prior to the complaint the nurse had a spotless, exemplary employment record. Suddenly there was fault finding. She was removed from committees. She was referred to as "toxic" and "radioactive." Management violated its standard policies in overruling a hiring committee's recommendation that she receive a promotion. She suffered a $15,000 a year demotion instead. *Faulk v. Shinseki* (W.D. La, 2016).

Religion

Onionhead Is A Religion. Concerned about low morale, and wishing to improve the corporate culture, a company brought in a motivational consultant to implement a program titled Harnessing Happiness/Onionhead. The motivational program was mandatory, and integrated into daily company practices. Then employees complained. The program seemed more "devotional" than motivational, and conflicted with their personal religious values; one citing her specific Catholic beliefs. The program required employees to daily "thank God for their jobs," to say "I love you" to managers and co-workers, and program materials referenced God, demons, Satan, "divine destiny" and the 12 virtues related to the Garden of Eden. Employees were pressured to personally adopt the Onionhead belief system and management allegedly coerced those who were resistant. The EEOC found that this met the definition of imposing a religion. The EEOC Guidelines state that religion includes new and uncommon belief systems that are "not part of a formal church or sect," even if "only subscribed to by a small number of people," and even if the beliefs "seem illogical or unreasonable to others." The court agreed that Title VII defines religion broadly, and could include this situation. *EEOC v. United Health Programs of America* (E.D. NY, 2016). [This situation might also create an issue under the National Labor Relation Board's rulings regarding company policy or practice which tends to chill

employees' rights to complain about management, work conditions and culture. Forcing people to thank God for their job, and to say I love you to managers seems to run counter to the NLRB's interpretation of the protected right of employees to openly gripe and complain.] This case may be a caution against requiring employees to "zealously" follow the principles of the newest motivational theory by the latest management guru.

Labor Arbitration

Intimidating Statements Warrant Discharge. An employee was fired after making intimidating statements to two supervisors. He told the supervisors not to bother him because "you know I'm crazy!" He made statements implying harm to the supervisors' families, mentioning that he was having homicidal thoughts. He then grieved the discharge. He claimed that no one should have considered his statements as true threats because he "made crazy statements every day" and had not had prior discipline. The arbitrator ruled for the employer, finding the statements were truly intimidating and threatening as to make the supervisors and company legitimately be in fear. *In Re: U.S. Steel Corp. and United Steelworkers 1557*. Warning. This decision on threats seems clear. However, the fired worker may have had a strong point. There are ADA cases which have found that a company's tolerance of ongoing intimidating behaviors can preclude a sudden discharge for an instance of that behavior, even if it is "somewhat" more pronounced than the tolerated pattern. There are discrimination cases in which an employee is fired for threatening behavior, yet the company has for a long time allowed its owner, CEO, a department manager or a doctor to overtly abuse, scream, threaten others and taken no action at all. Early identification of intimidating behavior and consistent enforcement of harassment and respectful workplace rules are crucial. Otherwise you may end up unable to effectively act to stop the threatening behavior.

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