EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

DOL Seeks Input On Electronic Use - Wages And OT. Does every text or email by an employee create paid time? Smart phones and other technology have complicated the on-off the clock issue. "The Department is seeking information on the use of technology, including portable electronic devices, by employees away from the workplace and outside of scheduled work hours. . ." This is not a rulemaking process. It is informal information gathering. However, it may morph into a formal process. So this may be the time to participate, early, and have more influence on an outcome. By the time the formal process is announced, the department may well already have determined the direction it wishes to go.

The First Amendment Defense Act (S. 1598, H.R. 2802) would allow people to legally refuse to provide services to anyone due to *"religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage."* It would allow Federal employees or employees of contractors or grant recipients to refuse to serve anyone or process anything (i.e.: Social Security checks, benefit applications, etc. etc.) on this basis. This would allow discrimination against any LGBT person married or not, if there was a romantic relationship involved. The broad wording "sexual relations are properly reserved to such a marriage" may also allow refusal of service to heterosexuals as well, if a man and woman have unmarried sex. No living together or premarital sex allowed for anyone, without fear of denial of government services.

LITIGATION

Family & Medial Leave Act

Farmer's Almanac Is Not The Proper Authority For FMLA Eligibility. The FMLA provides that an "overnight stay" in a hospital is a qualifying event for coverage. An employee was fired for missing work because he had to go to the hospital, was admitted and then released the next morning. The company's position was that he did not qualify for FMLA because he checked in after sunset 5:02 pm (November 14th) and was released before sunrise 7:07 am (November 15th). Thus, he had not spent a whole "night." It used the Old Farmer's Almanac as its legal authority to show the exact times of sunset/sunrise (the "night"). The employee argued that his admission from one calendar date evening to the next calendar date morning qualified as a night. The lower court bought the company's argument and adopted the Farmer's Almanac standard. The appellate court reversed, finding that the Almanac method leads to "odd or absurd results." It would mean that a person admitted to the hospital on May 14th at 8 pm, and discharged 7 am May 15 would qualify due to the later and earlier sunset/rise, yet the same hours of admission on November 14th would not qualify. So when you had a medical issue, rather than what you had, would be the determinator. The court ruled in favor of the calendar days of admission/discharge standard and rejected the Farmer's Almanac. *Bankowski v. Oberg Industries, Inc.* (3rd Cir., 2015) (the court still required an "admission" to qualify. A simple ER visit at 11 pm until 1 am would not qualify as a "stay").

Official Handbook v. Departmental Practices. *Hudson v. Tyson Fresh Meats, Inc.* (8th Cir., 2015) illustrates a far too common problem. The company's Employee Handbook contains the official policies, enforced by HR and central administration. However, local department directors often set up their own practices, even sending memos to staff, which create a new and contradictory policy. In *Hudson,* the official attendance policy requires a personal call-in for absence. Hudson texted his director his need for several days of FMLA absence. He was fired for policy violation. However, the evidence showed that the department had a practice of letting people text for absence. The supervisors accepted these and also had used texting for their own absences. The court found inconsistent policies and the discharge was an interference with Hudson's FMLA rights.

One Case – Three Important Points. *Mendel v. City of Gibraltor* (6th Cir., 2015) was brought by a part-time police dispatcher who took FMLA. He was terminated prior to the end of 12 weeks of leave. In the decision, the court addressed issues of jurisdiction, measurement of leave and circumstances of termination.

1. "Volunteers" Can Count. The city argued that although Mr. Mendel was an employee who had worked the requisite 1,250 annual hours, the city itself did not have 50 employees. Thus, the FMLA did not apply. Mendel argued that the city's volunteer firefighters and others actually met the standards of "employee." The court agreed. The "volunteers" received more than nominal fees and benefits, so they could be counted as

employees to reach the 50 mark for jurisdiction (for further information, request the article Liability Issues Regarding Volunteers by Boardman & Clark).

2. Part-Time Weeks Off Are Full FMLA Weeks – Not "Intermittent." Mendel, as part-time, worked 30 hour weeks and took several full calendar weeks of absence. He argued that this should be counted as "intermittent leave" since each represented less than 40 hours of actual work. His theory was the 12 FMLA weeks are 480 hours (12 x 40), so he should not have been charged for a "full week" when he only used 30 hours. The court disagreed. A "reduced schedule" leave (part days or parts of a week) does track according to the actual regular schedule hours used within each week. However, a full week of leave burns a full one-twelfth of the FMLA regardless of whether one is a full or a part-time employee. Also, the FMLA gives an employee 12 weeks at their usual level. So a part-time employee does not get 480 hours. He gets 12 x regular weekly hours.

3. Non-Ability To Return Is Defense To Early Termination – FMLA Is Not "Tolled," Mr. Mendel was on leave and approaching the 12 week mark. His doctor stated that he must remain off work for several more weeks, pending further testing. This extended the time beyond the FMLA term, and the city ended his position. He was not cleared to do any work until yet another three and a half months later. In the case Mendel argued that the early termination violated the law and froze his rights and tolled the running of FMLA at that moment. The city should have waited until the whole time actually passed before any decision. Thus, when he was finally cleared to work he should have been reinstated and still credited with the amount of FMLA time still left at the time of early termination. The court disagreed with this argument. Mendel's doctor clearly stated he was unable to return and would not return until well after FMLA was over. Thus there was no harm to him by a termination at that time. It did not deny him any real FMLA usage.

Discrimination

Age

"Impossible Test" Was Not Age Discrimination. Due to budget cuts, a small town fire department downsized positions and required all administrative employees to also qualify and serve as a firefighter or an EMT, as needed. A 55 year old clerical, with 21 years employment, was reassigned to Office Manager-EMT. She could not pass the physical agility test for EMT training and certification. After employment was terminated, she sued for age discrimination, claiming the test was "impossible" for someone of her age to pass and her position should not have been made hybrid clerical-EMT. The court dismissed the case. The township had a valid economic reason to consolidate duties. All administrative employees of any age were required to do hybrid duties. The ADEA does not require special exceptions to be made – as jobs change incumbents must adapt or they cannot continue. Though the test may have had an adverse impact on older people, it was valid for the duties of the EMT job. *Green v. Township of Addison* (6th Cir., 2015). (Age is not why people pass or fail agility tests. "Ability" is the factor. Some younger people

also do not pass, some older people are successful. What we may stereotype as "age" may actually be an ADA "ability" issue, where accommodation in testing should be considered for those of any age. See case of 71 year old lifeguard in the article The Aging Workforce, or see Pre-Employment Testing by Boardman & Clark LLP.

Race

Doctor Did Not Have To Be Aware That Hostility Was Racially Motivated To Maintain Discrimination Case – After The Fact Discovery Created Case. An African-American dermatologist/associate professor at a medical school experienced "overt and covert hostility" and job interference to the extent she was forced to resign. There was no apparent racial reference or component to the negative treatment. Title VII does not prohibit all negative attention, there must be an EEO category involved to create a discrimination case. However, after the fact information surfaced to show there were ongoing "behind the scenes" motivation due to her race, "secret references" to her as "that Black b____!," and a covert campaign to rid the department of its Black Assistant Professor. She then filed the race discrimination case. The organization defended with a "what she didn't know shouldn't hurt her" rationale. She could not possibly complain about racial harassment when there was no racial context to the negative behavior. The court disagreed. Whether overt or hidden, if race is a motivating factor, then it is racial discrimination, if discovered within the relevant statute of limitations (300 days for Title VII, four years for 42 US Code §1981) *Junkins-Hopkins v. Johns Hopkins Hospital* (E.D. Pa., 2015).

Disability

"Do I Have To Get Pregnant To Sit Down?" – Refusal To Provide Chair Was Failure To Accommodate. A sales employee with severe leg circulatory issues requested a chair or stool to use when standing or walking was not necessary. His supervisor refused. The salesman presented a doctor's verification that the chair was needed to prevent severe pain and to prevent possibly fatal circulatory complications from eight hours of standing per day. In fact, the salesman had instances of hospitalization due to inflammation caused by prolonged standing. The salesman pointed out that a pregnant female employee had been given a chair and allowed to sit anytime she deemed it necessary. He asked the supervisor "Do I have to get pregnant to sit down?" The supervisor responded "yeah!" and continued to refuse to provide a chair or stool. In the ensuing ADA case, the company defended by claiming that because the employee was still capable of doing his job – no matter the pain or risk to his health – it had no duty to provide an accommodation. It only had a duty to accommodate if the employee could no longer actually perform a duty such as standing. The court rejected this, the ADA cannot be so rigidly read: "the ADA's implementing regulations require employers to provide reasonable accommodations not only to enable an employee to perform his job, but also to allow the employee to "enjoy equal benefits and privileges of employment as are enjoyed by . . . similarly situated employees without disabilities." Here, the employee needed a chair to work as other employees do – without great pain and a high risk of

infection. *Gleed v. AT&T Mobility Services* (6th Cir., 2015). This case seems to be the "flip side" of the Supreme Court's *Young v. UPS* ruling on the Pregnancy Discrimination Act, which held that a pregnant employee cannot be denied accommodations if the company gave them to similarly situated disabled workers.

Five Hour Daily Bus Commute Was Not A Reasonable Accommodation. A Dept. of Homeland Security employee was responsible for communications for an entire region. He was located in El Paso, Texas, but lived over 60 miles away near Las Cruces, New Mexico. He had incurable glaucoma, and could no longer drive long distances nor at night for any distance. He requested that his work be transferred to a DHS office in Las Cruces. This was denied. He then requested a soon to be open position in Las Cruces for which he qualified. This was denied. Instead, he was offered the reasonable accommodation of using the agency's Federal car pool program, or taking public transportation between work and home. The problem was that the car pool was a program "on paper" at the Federal level; it simply did not exist in his region; nor did management make any efforts to bring it into existence. The public transportation, with transfers, took five hours per day. Plus, for much of the year the employee would still have to drive before sun up and after sunset to get from home to and from the public transportation site. He was compelled to leave his employment. In *Montoya v. Napolitano* (D. NM, 2015), the court found that there was no evidence of a valid reason for the Department to deny the transfer. The regional communication job could be done from any office in the region. There was no foundation for denying the request for the open position in Las Cruces. Instead, the Department offered the unreasonable accommodation of a non-existent car pool, or a grueling five hour per day commute which still involved night driving at either end. Thus, there was a valid Rehabilitation Act claim for failure to accommodate.

Sex

Ineffective Action To Stop Peeping Customer. A sales associate filed a hostile environment sexual harassment claim. A major issue was alleged failure to act to prevent ongoing harassment from a customer. A male customer was lurking under stairs taking video and looking up skirts as she and another saleswoman went up and down. The employee reported to her supervisor, who said "It's a big city and you're a pretty girl, what do you expect? . . . These things happen." After reporting the incident to other managers, the employee was told there had been "several incidents involving the same male customer" who sat under stairs, staring up skirts of female staff and customers. She asked for the police to be called and was told the police were only brought in for theft. Later she was improperly and overtly touched by another customer. When she reported this and asked for the police to be contacted, she was again told that the customer had been escorted out of the store, and it was "not a problem" anymore. In the case, the company claimed it did not have control over customers and should not be found liable. The court found that the company was well aware of the peeping customer, and his repeated violations, and had a duty to keep him out and avoid further incidents. Thus, the sales associate could claim to be a victim of the company's failure to exercise its duty to

act, and its allowing a continuing hostile environment. *Swiderski v. Urban Outfitters* (SD NY, 2015).

Fair Labor Standards Act

Verbal Gripes Are As Valid As Formal Complaints – And Don't Pull A Gun On The Complainer. The FLSA has a "safe harbor" provision which generally requires employees to make a complaint to management, and give the organization an opportunity to correct before filing with the DOL (if you have a proper safe harbor policy statement). In *Greathouse v. JHS Security, Inc.* (2nd Cir., 2015), the company defended a wage and retaliation case by claiming the employee never made a formal written complaint. Thus, the case should be dismissed. The court ruled that the law does not mandate a formal written complaint. The employee went to the company president to verbally complain about several months of late and insufficient wages. A verbal complaint to a supervisor is the "company's knowledge" of the issue, and opportunity to cure. It did not help that the president's response to the complaint was to draw a pistol, aim it at the complainer and say "I'll pay you when I feel like it!" The employee left and did not return. The court found ample evidence of both a FLSA wage violation, and retaliatory constructive discharge. Most companies do not have such an extreme reaction, but this case is another reminder of the importance of supervisory training on recognizing issues. Too many untrained supervisors have a tendency to "blow off" verbal gripes. This can be very costly. Train people to know the crucial complaint topics where they should report an issue rather than let it pass.

Labor Arbitration

The "Any Darned Fool Rule." A city received a citizen complaint of vehicles being stored on residential property in violation of zoning codes. The property owner was sent a request to provide a response to the complaint. The property turned out to be owned by a city property inspector. Instead of responding, the inspector used the city's computer system to enter a "legal non-conforming" authorization for her property and vehicles, so the official record showed the vehicles were not a zoning violation. This, in fact, turned out to be a valid "non-conforming exception." However, the inspector was disciplined for this self-help end-run of the standard process. She grieved, claiming that there was no written rule prohibiting her from using the system to address a complaint about her own property and own actions. The city admitted there was no written rule, but claimed that the *"any darned fool rule"* should apply, since any darned fool would know that this was a conflict of interest, and an ethics issue for a city enforcement agent; no different than police officers fixing their own traffic tickets. The arbitrator agreed. It was not a dischargeable offense (first instance), but did warrant a suspension due to a "patently obvious" conflict of interest between the inspector's role and her behavior. *In Re AFSCNE Council 5 and City of St. Paul* (2015).

Video Exonerates Police Officer From Harassment Charge. Much recent focus has been on car and body-cam video of questionable police behavior. However, the

technology also shows the truth when officers are falsely accused. A woman who was transported in a squad car to the police station claimed that when the car arrived at the station an officer then engaged in several minutes of touching her thigh and other improper romantic behaviors. However, surveillance video proved that the officer was at the square car for only 17 seconds, in getting the woman from the vehicle. The complaint against the officer was not credible; the acts alleged were not possible in the time frame. *In Re City of Del Rio Grievance* (2015).

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