EMPLOYMENT LAW UPDATE

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LITIGATION

Leased And Contracted Workers

***Joint Employer Or Not – Liability Either Way For Leased Or Contracted Employees*.** Recent Updates have warned about the growing issue of allowing leased workers to sue the lessor as a "joint employer" under the various employment laws, even though the workers are paid and employed by a placement agency. However, a finding that the worker is not a joint employee may still result in a suit for unfair termination. In *Lomastro v. Lacovelli* (R.I. S. Ct.), an employee of a contracted company alleged that he was fired by his company based on the recommendation of the organization for which he provided services. He sued for "intentional interference with employment," a recognized civil suit in many states. Though he eventually lost the case, the court recognized it as a valid case with potential liability. These tort cases do not have the liability caps that could be applied to a "joint employment" case under the employment laws, so liability could be greater. Also of interest, a leasing or contracting provider of workers may be able to plead Employment at Will and escape liability; yet the "interfering" organization would have no such immunity – not being an "employer." So, a ruling of "joint employment" of leased workers creates liability, but a ruling of not joint employment also has liability potential when the lessor is the party actually making the termination recommendations.

Labor Arbitration - Bereavement

***Dog's Death Warranted Excused Day Off And Time To Grieve*.** A firefighter's dog died on the last day of a vacation trip. The firefighter called in to report that he was too distraught and ill over the event to safely drive the five hours back and report to work the next day. The supervisor denied the time off, because death of a pet was not a valid reason.

The firefighter did not drive back that night, and was disciplined for the unexcused absence and refusal to obey the order to report. The Arbitrator overturned the discipline. Under the contract there was a narrow range of reasons justifying not obeying an order, among which were safety and/or "suffering of an immediate harm which could not be remedied later." The Arbitrator found both. The employee had stated that he was too ill and distraught to safely drive. Also, returning to work now, then grieving later, would have deprived the employee the chance to grieve for the dog at the time of the loss, and this could not be remedied later. *Am. Fed. Of Govt. Employees 1121 v. Marine Corps. Air Station, Yuma* (2015).

Clergy Not Required For Funeral Leave. Employees could receive up to three days funeral leave for death of a family member. An employee requested leave due to the death of her father. Management was informed that the ceremony was secular, involving a memorial speech by the widow, planting a memorial tree and a meal of remembrance. The leave was denied because a "valid funeral" requires a member of the clergy to conduct the service, and a certificate of validation of the funeral by a member of the clergy. So the absence was unexcused. The employee grieved the denial, and won. The Arbitrator found no such clergy requirement in the company funeral leave policy. A non-traditional service was still a commemoration of the deceased and qualified. *Mich. Milk Producers Assoc. & Int. Brotherhood of Teamsters Local 7* (2015). [The employer's action may also violate the Title VII prohibition against religious discrimination. It mandated conformance to a certain religious view of a "valid" observance, and left no room for other forms of spirituality.]

Appearance Rules

"Piercings Are Part Of Modern Life." Generally an employer can adopt a dress code as long as it is non-discriminatory and has some sort of reasonable basis. Under a Collective Bargaining Agreement, a general standard is that an employer is permitted to adopt rules of personal appearance as long as the rules have a reasonable relationship to (1) the employer's image or (2) health and safety considerations. Furthermore, employers are not permitted to regulate an employee's personal appearance away from work, unless harm is caused to the employer's business by that appearance. *In re Amalgamated Transit Union #1070 and Indianapolis Public Transportation Corp.* (2015), a bus driver had three cheek piercings at the time she began working. A year later the bus company implemented a no-facial piercings policy and ordered her to remove them. Unlike some piercings which could be temporarily removed during work, the facial piercings had grown into the cheek and removal would require surgery (not covered by health insurance) and leave scars. She was disciplined for non-removal, and filed a grievance. The Arbitrator ruled that the dress code did not meet the standards of "reasonable relationship." There was no safety issue. Surgical removal would certainly cause the employee's appearance away from work to change. The employer could show no reasonable harm to its business or reputation due to piercings. Many bus riders had piercings. No rider complaint had ever been received

about drivers' piercings. There had not been any survey of customers' attitudes, nor any evidence of any effect of piercings on ridership. The Arbitrator stated that "piercings have become part of modern life," and the policy did not match changing trends. [For more information, see the article "Appearance: Laws and Cases" by Boardman & Clark, or the Boardman & Clark seminar, Spandex is a Privilege, Not a Right! (Casual Days, Dress Codes and Work Appearance).]

Genetic Information Non-Discrimination Act (GINA)

Post Offer Medical Evaluation Violated GINA. Most employers are aware of the ADA rule that no medical inquiry can be made until after a "conditional offer of employment." Then a medical evaluation can be done, if job related. However, some employers are still not aware that another law, GINA, puts further restrictions on that evaluation. In *EEOC v. Joy Mining Co.* (EEOC settlement, 2016), it seems the company was o.k. under the ADA, but was accused of violating GINA by post-offer asking about family medical history and whether there was any family history of TB, cancer, diabetes, epilepsy or heart disease. The company settled by consenting to changes in its process, training of hiring staff, and monitoring of its HR practices.

Discrimination

Age

Ideal Age Range Costs $100,000. A company has agreed to resolve an EEOC age discrimination case by paying $100,000 and consenting to EEOC monitoring of hiring practices. In a hiring process for a Senior VP of Sales, an applicant was asked, in an e-mail interview, if he was in the ideal age range of 45 to 52 years of age. It allegedly rejected the applicant when it learned he was older than that. *EEOC v. Seymour Midwest* (EEOC settlement, 2016).

Disability

Wellness Program Did Not Violate ADA. The EEOC charged that a company's wellness program violated the ADA's prohibition against non-job specific medical exams, since a health risk assessment by its insurance company was required for participation in the company's health insurance coverage. In *EEOC v. Flambeau Inc.* (W.D. Wis., 2015), the court ruled that the wellness program did not violate the ADA. The insurance company did the assessment, and gave wellness advice to the participants. The employer had no knowledge of any results. It did not matter what the results were, it only meant wellness counseling occurred. The program was a valid method to help the company to underwrite and administer its health insurance risks and was "not a subterfuge to evade the purposes of the ADA."

Positive Test For "Back Pain" Drug Did Not Indicate A Disability. A company policy required informing HR of any prescription which could affect safety. A truck driver tested positive for Oxycodone in a random drug test. It was a drug which would affect safety for a driver. He told the testing lab and then HR that he had been prescribed the drug for "back pain." However, he had not given any previous information about the prescription before being caught by the positive test. He was fired for violating the duty to inform – safety policy. He then filed an ADA suit. The court ruled (1) employers have the right to get information about safety issues; (2) employers have the right to get verification of prescription medications; and (3) "back pain" did not give sufficient information for the employer to believe a "disability" might be at issue. The discharge for the safety policy violation was valid. *Angel v. Lisbon Valley Mining Co.* (D. Utah, 2015).

Race

Effect Of Comments Creates Harassment – Intent Does Not Matter – 10 Minutes Training Insufficient. The only African-American employee in a home care operation was subjected to ongoing racially-related comments by her supervisor and 20 co-workers. None of the comments were made about her. Rather, they were "casual comments" about such things as rap music. "Boom Boom, N---a, Boom!; or "we need to bring back lynching, we have enough trees" in reference to newspaper stories about a Black criminal; or a "joking" direction to say "yes massa!" to a supervisor; or why don't you *get ghetto*" when asked how to respond to an aggressive client; and several other comments using the N-word. When she complained, the supervisor said "don't be so sensitive." She finally got the attention of a company VP and Human Resources. HR issued a "final warning" to the supervisor. The Regional Manager gave a 10 minute training on improper comments to the staff. The employee subsequently sent memos to HR that nothing had changed. The 10 minute training had evidently not been a sufficiently serious effort to address the issue. Following termination of employment, she sued under 42 US Code 1981 for racial discrimination. The court credited the employer's defense that the comments were not intended to be harmful. They were "innocent" or "casual" and unintentional. However, that did not solve the problem. The comments nonetheless "polluted the environment." The court stated "the important question is not the speaker's intent. It was the effect on contributing to a hostile environment." The offensive, harassing effect on the receiving employee is the same, regardless of unintentional, insensitive ignorance of the speakers about their effect upon others. *Lounds v. Lincare Inc.* (10th Cir., 2015). [For more insight, see the article "It Was Just a Joke!" by Boardman & Clark.]

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