EMPLOYMENT LAW UPDATE

June, 2016

by
Bob Gregg, Legislative Director
Jefferson County HRMA
rgregg@boardmanclark.com

Boardman & Clark Law Firm
www.boardmanclark.com

LEGISLATIVE AND ADMINISTRATION ACTION

The Defend Trade Secrets Act became law on May 11th. It gives added protection and rights to companies for misappropriation of Trade Secrets. Though not directly an "Employment Law," it certainly has employment effects if employees misappropriate. The law also contains a Whistle Blower provision for those who reveal trade secrets in the process of reporting illegal activity to a government agency. This provision requires all new Trade Secret and Confidentiality Agreements with employees, independent contractors, or consultants to contain specific language about the whistleblower rights. So employers should modify their non-disclosure and confidentiality agreements to include the new provisions.

DOL Issues Final Salaried Basis Rules - $47,476. The long expected final rules on salary level will go into effect December 1, 2016. The DOL lowered the proposed minimum salary level to $47,476 per year ($913 per week), double the current level, and revised its annual cost of living increase, to an every three year review of increases. [For more details, see the May 27th HR Heads Up, by Jennifer Mirus at boardmanclark.com.]

OSHA Fact Sheet on Zika Virus. OSHA has issued a fact sheet for employers providing interim guidance on protecting workers from Zika. The guidance focuses on workers engaged in mosquito control work, and health care workers who may be in contact with patients or blood samples infected with Zika.

EEOC Advice on Leave as a Reasonable Accommodation. Citing a "troubling trend" of employment policies which restrict use of leave as a reasonable accommodation the EEOC has issued a "Resource Document," Employer Provided Leave and the ADA. This is not a

policy or a rule; it is educational advice, answering common questions about leaves and employer policy issues.

LITIGATION
Fair Labor Standards Act

Restaurant Group Will Pay $1.2 Million for Wage Violation. A 13 restaurant group will pay over a million dollars for failure to properly pay wait staff and kitchen staff. Minimum wage violations included the practice of requiring servers to give a percentage of their tips back to the employer. The restaurant also required workers at some locations to purchase their uniforms, which reduced their earnings below the minimum wage. The employer failed to pay cooks, dishwashers, and runners for all hours worked, which resulted in these employees not earning minimum wage for all of their hours and not receiving time-and-one-half for their hours worked beyond 40 in a workweek. The restaurants also failed to keep proper time and attendance records. The restaurant group entered a consent decree with the Dept. of Labor. *DOL v. LaHacienda Mexican Grill, et al.* (D. SC, 2016).

False Claims

Personal Liability for Outsourcing Disabled Workers Jobs Overseas - $3.1 Million. False Claim Acts impose personal liability for intentional and fraudulent activities in regard to government contracts or other government reimbursement programs. A tech company and two of its executives, personally, will pay $3.1 million to resolve claims of violating contracts. The Company contracted to provide secure data services for the state government. The contract required all work to be done in the US, and the funding required that the Company use disabled employees and veterans. Instead the Company did not hire disabled people and veterans, it outsourced the work to a contractor in India at a far cheaper price, and kept the profits. The overseas outsourcing to an unauthorized foreign business also compromised the data security of over 16 million state residents. ***New York v. Focused Technologies Imaging Services*** (Settlement, 2016).

Discrimination

Retaliation

Public Disclosure and Breach of Confidentiality. A nuclear power plant electrician filed an ADA, failure to reasonably accommodate, complaint with the EEOC. As part of the investigation the EEOC requested the contractor that he worked for provide the names and contact information of all other electricians working at the plant who might be potential witnesses. The Company did so. However, it also sent letters to all of those other electricians warning them the EEOC may contact them. The letter named the Complainant, gave details about his medical condition/restrictions and the accommodations he had requested. The letter informed the other electricians that they could refuse to talk to the

EEOC and that they could have a Company attorney present if they did talk to the EEOC. The EEOC filed a separate suit against the Company. It charged that in addition to violating the ADA medical confidentiality requirements the Company had retaliated against both the Complainant and sought to chill the rights of all others who might raise issues in the future. The Company letter sent a message that anyone who complained would be subjected to public disclosure of their own medical information and was designed to dissuade anyone else from complaining about discrimination. The letter was "meant to coerce, intimidate, threaten, or interfere with the electricians in the exercise of their ADA rights." *EEOC v. Day & Zimmerman NPS, Inc.* (D. Conn., 2016).

Retaliation By Dog Attack. A female K-9 officer for a Transit Authority complained of sex discrimination by a more senior officer. An investigator found "inappropriate behavior" but not sex discrimination. The accused officer was upset. A few weeks later the accused officer was in charge of a dog training exercise in which officers take turns as a "decoy" to be attacked, once. The officer in charge made the female officer serve as decoy repeatedly. Even after she suffered injury and was in obvious distress he ordered her into the decoy role over and over. Other officers offered to take her place and were refused. She was hospitalized with herniated disks, missed 6 months of work, and was unable to return to K-9 duties for a year. She sued for retaliation. The court found ample evidence of "cruel and heartless conduct" which appeared to be a "get back" effort designed to "teach her a lesson" about making sex discrimination complaints. *Elmore v. Washington Metro Area Transit Authority* (D. DC., 2016).

Disability

Independent Contractors Can File Disability Cases Under Rehab Act. One factor motivating the use of independent contractors is that they are not employees. The organization pays no employment benefits, employment taxes, and independent contractors cannot file employment cases. However, that is not a blanket immunity. Though the ADA employment discrimination provision may not apply, the Rehabilitation Act is a different law. In *Flynn v. Distinctive Home Care* (5th Cir. 2016) an independent contractor pediatrician with mild ASD was removed from her job with a federal contractor one day after revealing her diagnosis. The Court would not allow an ADA case, but did allow her to sue under the Rehabilitation Act. The Court found the Rehab Act is not limited to employment; it prohibits discrimination "under any program or activity receiving federal financial assistance," in general.

One arm vs. two for lifting. In *Evangelista v. Auto Wares, LLC,* (E.D. Mich. 2106) an auto parts company required its delivery drivers to lift up to 50 lbs. It rejected an applicant who had a 20 lb. restriction with his right arm, but demonstrated he could lift 50 lbs., or more, using both arms. The company's own pre-hire medical examiner certified the applicant for hire, based on his two arm lifting ability. He had been successfully performing virtually the same job, lifting the same sorts of items, for two other auto parts companies. However,

Auto Wares insisted that its 50 lb. deliveries could not be "balanced" between two arms. Even if lifting 50 lbs. with both, he had to lift 25 lbs. with each, in an "equal balance" as an essential function. The Court was skeptical, and allowed the case to proceed to trial. [compare this case with *EEOC v. Auto Zone* reported in the May 2016 Update, in which a company validly rejected applicants with overall 75 lbs. lifting restrictions, but validly employed a man who had a one arm restriction but could lift a full 75 lbs. with the other arm].

Offer of Different Job With 20¢ Pay Raise Was Not a Failure to Accommodate Walmart Stocker. A Walmart shelf stocker with progressive MS had increasing medical restrictions limiting ladder use, and requiring extra breaks. These were accommodated in 2006, 2009, and January, 2011. Late in 2011 her doctor limited her to no ladder climbing and limited standing, lifting and walking requirements. She was assigned to one of the lightest stocking jobs, but soon reported that she could not do it because she would still need a ladder. The store transferred her to the available job of cashier, which had no ladder work and paid 20¢ more per hour. She sued, claiming she was forced into a job she did not want, with new tasks to learn. The Court rejected this argument. The change was not an "adverse action", it was a reasonable accommodation within the ADA requirements. She was qualified for the cashier's job. It paid more. The other alternative would have been a termination for inability to be able to perform the essential ladder function of shelf stocking. *Kelleher v. Walmart Stores* (8th Cir. 2016).

Race

Walmart Stocker Improperly Fired Due to Biased Supervisor. An African-American Walmart shelf stocker won a $99,000 award for racial discrimination, plus attorneys' fees. His supervisor reported that the stocker was insubordinate and engaged in excessive profanity. This led to the discharge. However, the evidence showed that the supervisor was harsher toward the employee and scrutinized him more and gave him heavier workloads than other employees. The supervisor referred to the stocker as a "monkey" and told the employee "the way you people think is dumb," in a racial context. The evidence also showed the supervisor's accusations were pretext, the employee had not been insubordinate and did not use profanity any more than other workers who were not disciplined, and did not use profanity toward the supervisor. *Stallworth v. Walmart Stores East L.P.* (OH. Ct. App., 2016).

Sex

Porn Viewing Parties in the Cubicles Created Hostile Environment. A group of male federal employees frequently, on work time, gathered in a work cubicle to view pornography on the occupant's computer. A female employee complained to management because the cubicle was adjacent to her own work area. Nothing was done. The porn parties continued. She sued for sexual harassment. The agency defended by claiming that

none of the behavior was directed at her, and she did not have to actually view any of the pornography; she could avoid it by not going into that cubicle, or taking her work elsewhere until the gathering ended. The Court disagreed. Though she did not have to see the pictures, she did have to listen to the men's groans, grunts, whoops, hoots, and loud and overt comments about what they were viewing. It would be impossible for this not to substantially affect her environment and her work. Employees should also not have to abandon their own work area to flee from the improper, offensive sexually overt behavior of others. *Stewart v. Federal Communications Comm.*, (D. DC., 2016).

Labor Arbitration

Seniority Does Not Excuse Loafing. A 22 year employee was fired after multiple instances of loafing on the job. He failed to correct the behavior. In the grievance the employee claimed that he should have received lesser discipline due to his 22 years of service. The arbitrator disagreed. "Long service does not permit the employee to provide no service." An employee does not get to decide for himself to just take an hour of non-work when he wishes. *Carmeuse Lime & Stone v. United Steelworkers #81* (2016).

Opening Other Workers Personal Mail. A hospital office employee was fired for invasion of privacy in opening other workers' mail, including mail from doctors containing medical information and test results. An arbitrator reversed the discharge. The employee's duties were to route mail and deal with returned mail. The hospital never developed a policy, so the employee developed her own rules, and used them *for over 12 years.* Having allowed (or overlooked, or not bothered to check) the practice for a dozen years the hospital could not now, suddenly, discharge the employee it had tacitly authorized to develop her own process for opening the mail. *Teamsters v. South Peninsula Hospital* (2016). [This case is a good warning that there are many department or unit policies and procedures of which top management is unaware, and which may be in conflict with your handbook – or the law. See the article *Blundering Into Liability* at boardmanclark.com].

Wrong Gun. A female officer with an excellent Police Department record, was hired by the County Sheriff's Department. She was then discharged at the end of the training period for failure to qualify with the Glock pistol. She grieved claiming that she should have been allowed to qualify using the smaller 9 mm pistol which was used by the Police Department, and with which she was well skilled. The Sheriff's Department in fact allowed its officers to use alternative pistols – but only after two years of employment. The Arbitrator ducked the reasonableness of the two year rule – refusing to find it invalid. However, the Department skipped a step in its process and should have suspended the officer instead of firing her. So the Arbitrator ordered her reinstated, and since the grievance proceedings had taken so long it was now two years since she had been initially hired. So the Arbitrator ruled that she must now be allowed to substitute her 9 mm weapon in the qualification testing. *In re AFSCME Council #18 and Bernalillo County* (2016).

AMERICAN ASSOCIATION FOR ACCESS, EQUITY & DIVERSITY

EEO/AA AND TITLE IX TRAINING - MADISON, WI

REGISTER NOW FOR THE JUNE 2016 PROFESSIONAL DEVELOPMENT AND TRAINING INSTITUTE (EEO/CAAP TRAINING) AND TITLE IX INSTITUTE

Hosted by

boardman & clark llp
LAW FIRM

DATE & LOCATION

Boardman & Clark LLP
One S. Pinckney Street
Suite 410
Madison, WI 53703
608-283-1747

Webpage / Registration:

http://boardmanclark.com/PDTI

JUNE 20 -25

8:00 a.m. - 5:00 p.m.

PDTI CAAP Training

June 20 - 25, 2016
8:00 a.m. - 5:00 p.m.

Title IX Institute

June 23, 2016
8:00 a.m. - 5:00 p.m.

PDTI CAAP TRAINING

Take advantage of the 30% Member Discount. Code: AAAAPDTI

Registrants may obtain the Certified Affirmative Action Professional (CAAP) credential by registering for one, two or all three of the following courses. A CAAP certificate will be awarded after the successful completion of all three courses.

- **June 20 - 21** - Equal Employment Opportunity and Alternative Action Law (16 hrs) | 8:00 am - 5:00 pm
- **June 22 - 23** - Developing and Implementing an Affirmative Action Program (16 hrs) | 8:00 am - 5:00 pm
- **June 24 - 25** - Complaint Processing, Counseling and Resolution (16 hrs) | 8:00 am - 5:00 pm

(HRCI Credit has been applied for these CAAP courses)

TITLE IX INSTITUTE

- **June 23** - 8:00 am - 5:00 pm (8 hrs)
  This training will present an overview of the law and topics in Title IX Compliance. A certificate of completion will be given at the end of this 8 hour training program.

AAAED's Professional Development and Training Institute (PDTI) has been a primary sponsor of quality training in equal employment opportunity (EEO) and affirmative action law and poilcy since 1991. PDTI faculty consist of experienced educators who understand both the theory and the applications of EEO, affirmative action and diversity policy. PDTI offers the Certified Affirmative Action Professional (CAAP) and Senior Certified Affirmative Action Professional credentials (Sr. CAAP). PDTI also offers courses and certificate programs in areas ranging from "Diversity Managment" and "Title IX Investigations" to "Latest OFCCP Compliance Developments." PDTI courses are eligible for continuing education credits awarded by the Human Resources Certification Institute (HRCI). For more information, visit: http://www.aaaed.org/aaaed/Classroom_Training.asp