EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

EEOC & FTC Give Background Check Guidance. In a joint effort, the Federal Trade Commission (Fair Credit Reporting Act) and EEOC (Discrimination and GINA Enforcement) have provided guidance for use of pre-employment background checks. The guidance answers questions regarding appropriate practices. Background checks: what applicants and employers should know. EOC.gov/EEOC/publications/background_check_employees.cfm.

Wisconsin Becomes Latest State to Adopt Employee and Applicant Social Media Law. Over half the states have now adopted laws prohibiting employers from accessing an employee's or applicant's private social media accounts, or from requesting employees to grant access. Wisconsin law will provide $1,000 per instance fines, plus allow individual applicants and employees to sue for additional damages under the Wisconsin Fair Employment Act. For more information on the law's provisions, see the article New Law Restricts Employer Rights to Employee and Applicant Social Media Accounts by Jennifer Mirus, Boardman & Clark LLP.

LITIGATION

Theme of the Month – Change in Ownership; Let the Buyer and Seller Beware

Selling Company Should Have Included Employee on Active Duty in List of Employees for Buyer to Hire. A National Guard member was called to 12 months active duty. While he was gone, the company sold its assets to another corporation, which planned to hire many of the company's employees. The buyer asked for a list of employees. The seller did not include the active duty person. When he returned from duty, there was no job with the new company. He sued under USERRA. The purchasing company was not

liable; it had no knowledge. The court ruled the selling company had liability for violating USERRA by failure to preserve his reinstatement rights. *Dorris v. TXD Services LP* (8th Cir., 2014).

Company Purchase Medical Inquiry Was Illegal. One health care company purchased another's assets in order to create a new corporation. It hired 225 of the prior company's employees. However, prior to hire it asked all 300 to have a drug test and medical evaluation. This was done before any actual offers of employment were made, since the new corporation was not yet in existence, and all was done "in anticipation" of the purchase of the company. Some of the 75 non-hires sued under the ADA. The company defended on the basis that the new company did not yet exist at the time of the pre-employment evaluation, so technically it was not the actor in any ADA violation. The court granted summary judgment in favor of the plaintiffs. The evaluation clearly violated the requirements that all medical evaluations, including drug tests, be done only after a conditional offer of employment. The defendant could not hide behind the "not yet a corporation" claim. The original health care company was an "agent" of the soon-to-be employer and it and the soon-to-be company were liable for all illegal actions. *EEOC v. Grane Healthcare Co.* (W.D. Pa., 2014). Further, there is a question as to whether a purchaser who will hire most of the seller's workers should do a "pre-employment medical evaluation," even after a job offer. All the workers are already employed. Is the corporate change-over really "new employment." Since the person is already in the job (which will not change), should any change of ownership evaluation be done? Would it meet the ADA's "business necessity" provisions?

$26 Million Verdict Due to New Company's Discharge of 64-Year Old Manager. In *Nickle v. Staples Contract & Commercial, Inc.*, a jury awarded $26 million to a fired 64-year old manager. Staples bought the Corporate Express Company and continued with most of its employees. A few months later, it fired the older manager. The trial evidence showed that the new Staples managers complained that the Corporate Express pay was higher than Staples and they needed to "get rid of" older, higher paid managers. They also referred to him as "the old coot" or "old goat." An employee testified that she had been ordered to give false statements about the 64-year old, in order to justify firing him. The court found that the employer had "acted with malice, oppression and/or fraud." Staples has stated disagreement and is appealing the verdict.

Fair Labor Standards Act

Tyson Food Pays $19 Million for Overtime. Unless there is a bargained agreement with a union, changing into required work clothing after arriving at work, or at the end of work before leaving, is paid time. Tyson Foods did not pay for clothing changes at shift start and end. It had no collective bargaining agreement on this lack of pay. In *Acostu v. Tyson Foods, Inc.* (D. Neb., 2014), the Company agreed to settle a class action suit on this issue by paying $6.26 million in overtime pay plus $12.52 million in additional liquidated damages, plus a large amount of yet to be determined fees to the plaintiffs'

attorneys. The recent US Supreme Court case, *Sandifer v. U.S. Steel*, which found "donning and doffing" were not compensable, was based on a specific agreement with a union, which did meet the valid exception rule.

Contracts – Enforcement of Provisions

Teenager's Facebook Costs Father's Settlement Proceeds. A school administrator sued for age discrimination after non-renewal of his contract. He then reached a settlement. The settlement agreement had a confidentiality and non-disclosure clause. The administrator's daughter promptly posted to her Facebook "Papa won the case against Gulliver. Gulliver is now paying for my vacation to Europe!" Many of the 1,200 recipients were Gulliver School students or parents. The school promptly claimed a breach of the agreement and refused to pay an $80,000 settlement. The court ruled that the plaintiff's daughter's act was a breach, and the school was entitled to refuse to pay. The plaintiff had a duty to control his immediate family's disclosure; otherwise a confidentiality clause has no meaning. So, the case was settled and dismissed, but the plaintiff (and his attorneys) forfeited the proceeds. *Gulliver School, Inc. v. Snay* (Fla. D. Ct. App., 2014).

Discrimination

Religion

***School's Beard Length Policy Violates Religious Rights*.** Philadelphia School District's policy requiring beards to be trimmed to 1/4th inch allegedly violates the right of those Muslim employees who believe they are religiously prohibited from trimming beards. The Department of Justice cited the District for violating the duty of reasonable accommodation; "individuals should not have to choose between maintaining their jobs and practicing their faith, when accommodations can reasonably be made." The Department has asked for an injunction to prohibit the policy while the case proceeds. *United States v. School Dist. of Philadelphia* (E.D. Pa., 2014).

***Church's Ministerial Claim Was Too Broad to Survive – Teachers Can Continue Age Discrimination Case*.** The First Amendment prohibits the government/courts from interfering with religious internal affairs. Thus, employees with "ministerial/religious duties can not usually use the employment laws to challenge decisions. Church school teachers with religious education duties are covered by this exclusion. Several terminated Catholic school teachers sued for age discrimination. The school claimed that "all Catholic school teachers – regardless of their duties – are ministers of the church." The court found this too broad. There was no proof that these teachers did anything more than teach academic topics. There must be specific defined religious education or religious practice duties in the position description in order to invoke the ministerial exemption. Absent this, the teachers could continue their case. *Hough v. Roman Catholic Diocese of Erie* (W.D. Pa., 2014).

Room 911 Was Not Discrimination. A Muslim employee was asked to go to Atlanta for a business trip. He objected, complaining that travel was not in his job description. He was ordered to go. On arrival at the hotel in Atlanta, he found himself placed in Room 911. He asked for a change, but no other room was available. The employee filed a discrimination complaint, claiming the company specifically selected the room "to humiliate him as a Muslim, reminding him of the Sept. 11, 2001 terrorist attacks." The court dismissed the case, finding absolutely no evidence that the employer had any role in the room assignment. There was no communication whatever regarding the room assignment, only a generic travel arrangement hotel reservation. Any room assignment appeared to be at the hotel's end. *Rahman v. Crystal Equation* (W.D. Wash., 2014).

Sex

Hot Coffee Throwing, Tire Slashing and Reciprocal Behavior Washes Out Sexual Harassment Case. A New Hampshire DOT employee filed a sexual harassment case, claiming that his male co-worker/trainer created a hostile environment and that he was then fired after he complained. He alleged that the other man called him names, made obscene gestures, referred to him as homosexual and implied a desire for sexual acts. He complained to management, and was first ordered to transfer to a different location, and then fired. The evidence, however, showed that the plaintiff also called the trainer names, loudly argued, refused to follow directions, and told the trainer that he should use the gas pump to douse himself and light a match. The plaintiff made a large middle finger sign and waved it and banged it on a table toward the trainer. When the trainer made a middle finger response, the plaintiff complained to management. Management separated the two by assigning the new employee to a different location. He refused to go, returned to the regular site, slashed the trainer's tires, scratched the vehicle paint, and then threw a cup of hot coffee on the trainer. This resulted in discharge. The court granted summary judgment dismissing the case. It found that a "culture of inappropriate behavior prevailed at the DOT." However, the new employee was a full-fledged participant, and his own overt and improper behavior showed that he was a contributor to the hostile environment, rather than a victim. The transfer was a logical act to defuse the situation, rather than an adverse action. The plaintiff's own violent behaviors were more than enough to warrant discharge. The full story overturned the complaint. *Ferro v. R.I. Dept. of Transportation* (D. RI, 2014).