EMPLOYMENT LAW UPDATE

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by
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LEGISLATIVE AND ADMINISTRATION ACTION

California and New York pass $15 per hour minimum wage. These minimums do not go into effect immediately. They phase in, by 2018 for New York, by 2023 for California by size of the employer. The New York law also phases in by geographic area.

Religious Conscience and LGBT Service

Florida. Effective July 1, 2016, an individual employed by a church or religious organization (clergy) while acting in the scope of that employment may not be required to solemnize any marriage or provide services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, or celebration of any marriage if such action would cause the individual or entity to violate a sincerely held religious belief (Ch. 2016-50). This law is largely political symbolism, since the U.S. Constitution has provided the same protections for clergy for the past 200 years. Regardless of what the Courts or legislature state regarding same sex marriage, the Constitution's First Amendment absolutely protects, and always has protected, clergy from being compelled to perform any ceremony outside the scope of their faith.

Mississippi and North Carolina go further. Both Mississippi and North Carolina passed the same symbolic clergy protection but then Mississippi also allowed people in business to deny goods or services to LGBT customers if they had a religious objection to LGBT. North Carolina prohibits any local law or ordinance which would extend non-discrimination rights to LGBT people, thus assuring a protection to those who do choose to discriminate. There were also gender/restroom provisions which generated much publicity, but the greater effect of these laws seems to be in the permission of a much broader scope of discrimination, including in employment.

THEME OF THE MONTH
Coverage Can Vary Under Different Laws

Indian Owned Corporation Immune from Title VII Race Discrimination Case – But Not Age Case. The employment laws are complex, and there are a lot of them. Each law covers different items. Some laws cover the same category – but not in the same way. Congress has granted "immunity" from some laws to various organizations (sovereign immunity to Indian Nations, to states, to certain special organizations such as the American Legion, VFW, Red Cross, and all religious organizations) yet Congress did not put those immunities into all laws.

Title VII is the major antidiscrimination law (race, sex, national origin, religion). Chugach Government Services, Inc. is a business owned by a Native Alaskan Tribe. It operates in various states, contracting with the U.S. Government. A white employee working in Washington, D.C. sued for race and age discrimination with the EEOC, and then in Federal Court. His Title VII case was dismissed. Tribes are immune, not covered, under Title VII. However, he also filed under the 42 U.S. C. §1981 Race Discrimination Law and the Age Discrimination in Employment Act. Neither of these laws have any immunity for Tribes. So the same race case could continue – under the different law. The age case was also not precluded, but the court found problems with the statute of limitations and "exhaustion of EEOC remedies" requirements. So it may be dismissed on other grounds. *Daniels v. Chugach Govt. Serv., Inc.* (D. DC, 2016).

"Ethnicity" may be "race" – though everyone is "White" – under § 1981. In *Village of Freeport v. Barrelle* (2nd Cir., 2011) a white Italian-American job applicant challenged the hiring of a white Cuban born police chief as being racial discrimination. The Village defended, claiming that the plaintiff was white, and the newly-hired chief had consistently identified himself as white on all forms and paperwork. So how could there be a racial case? The Court found that there was, under 42 U.S.C. §1981. The Village had given major publicity to the hiring of its "First Hispanic Police Chief". Under §1981 certain ethnicities, including Hispanic (LaRaza), have been accepted as "races". Even though both the applicant and the hired person were white – "race can include ethnicity" under §1981. So the white Italian-American can sue over the hiring of the white Cuban. This case is in line with American history in which Congress passed laws restricting immigration of the "Southern European Races: (Italian, Greek, Turk, Spanish, Serbs – all of whom were white) yet encouraging emigration of Northern European Races (also white). Earlier the "Irish Race" suffered much discrimination. "Race" is a very strange concept in the United States. It seems to shift according to our politics and social changes. Under Title VII, this case may have come out differently. Different laws, different definitions.

Contest Lines Drawn Over Sexual Orientation Coverage – Court Dismisses Case. Title VII of the Civil Rights Act prohibits gender discrimination. It makes no mention of sexual

orientation nor sexual identity. For decades the EEOC and courts strongly stated that LGBT status was NOT covered by Title VII; "gender" was confined to male/female. (Many states have passed laws prohibiting sexual orientation discrimination. Wisconsin was the first under a Republican Legislature.) Some sexual orientation cases were allowed under the indirect "sexual stereotyping" theory, but the EEOC and courts still insisted that this did not mean that LGBT status itself was a covered Title VII category. Recently the EEOC did an abrupt about-face, and declared that LGBT status is in fact included within the Title VII sex discrimination coverage. The EEOC has now brought its first two cases alleging direct LGBT protection, rather than "sexual stereotyping." *EEOC v. Scott Health Center* (W.D. Pa) and *EEOC v. Pallett Cos.* (D. Md.).

However, In *Christiansen v. Omicron Group, Inc.* (S.D. NY, 2016) the Court dismissed a Title VII suit by a gay man which alleged sexual orientation Title VII discrimination. The Court ruled that sexual orientation was not included in Title VII coverage. In the opinion, the Judge, herself, expressed sympathy and urged an appeal to forward the issue toward the highest courts for a broadening of the law. However whatever her personal sympathies, the Judge felt she could not impose her personal view; she could not insert LGBT into the wording of the statute where she found it did not exist, nor overrule the clearly established prior case precedents set by the appellate court – that LGBT was not included in Title VII coverage. The decision was promptly appealed. This shows the contest lines which will now be argued in the new line of EEOC cases. It is likely that we will see differing decisions by different courts – until the matter may be resolved by the Supreme Court. The *Christiansen* appeal has moved that process forward.

These cases illustrate the complexity of employment laws, and the multiple ways an employer may have to defend its actions. One door closes, another remains open. The previously cited *Christiansen* cases denied LGBT coverage under Title VII. Yet sexual orientation has long been recognized as a protected category under 42 U.S. C. §1983 in public sector employment and under federal Equal Protection – Hate Crime Laws ("Violation of Civil Rights"). The definition of "race" can be more expansive under 42 U.S.C. §1981 than under Title VII. When a plaintiff alleges violation of several laws, some may be dismissible, while others, covering the same items, may stick.

LITIGATION
Fair Labor Standards Act

Auto Service Advisor. In another case illustrating coverage differences the Supreme Court has agreed to hear *Encino Motor Cars v. Navano* on appeal from the 9th Circuit. The FLSA has a special exemption for overtime pay for salespeople, parts people, and technicians/mechanics in auto and truck service departments. There has been an ongoing dispute as to whether "service writers/advisors" are also included. They do a good deal of technical assessment. A number of states (such as Wisconsin) specifically include service writers/advisors in their state versions of the same OT exemption. The Department of

Labor has sometimes argued that since the position is not mentioned under the federal law, it is not exempt. It has at times allowed the exemption. It is confusing. Several circuits have made differing rulings. The 9th Circuit found the position was not exempt based on DOL's current version of its position. The Supreme Court may finally settle the matter under both federal and state laws.

DISCRMINATION

Another theme this month is how little comments can give life to a case. Some comments were the tipping factors toward liability. Some comments were deemed not directly tied to adverse employment actions – but were enough to cause the employer to have to spend funds and resources in defense of age, sex or GINA cases.

AGE

"Should Learn How to Apply For Social Security." A laid off 50 year old showed sufficient evidence to maintain an age discrimination case; 31 of the 37 people laid off were over age 40. The plaintiff's replacement appeared to be less qualified. The supervisor making the decision had made prior comments that the employee "should learn how to apply for Social Security" – a direct reference to being older. *Friedman v. Swiss Re American Holding Corp.* (2nd Cir., 2016).

SEX

"*All the testosterone is gone" is not sufficient evidence – and "mostly" good performance is not enough*. A male plasma center supervisor filed a sex discrimination case over his termination. He alleged that his performance was good in most areas. Also, after the discharge a female manager stated it was "nice that all the testosterone is gone". The Court found this to be insufficient. The after-the-fact statement was made by a manager who had no role in the discharge, so the comment was not valid evidence. Further, though the fired supervisor had mostly good performance he could not refute the fact of poor performance, and failure to correct in some other important performance areas. "Mostly good" is not sufficient to avoid discharge. *Denn v. CSL Plasma, Inc.* (8th Cir., 2016)

Genetic Information Non-Discrimination Act

Voluntary Comments did not create GINA nor ADA Case. A "temp" receptionist had a lot of absences. She eventually stated that she had breast cancer, and some of the absences were due to treatment. Some were due to the effects of the condition and need to leave early, or not get there on time. She also once mentioned to a supervisor that her mother, grandmother, great-grandmother, cousin and aunt also had breast cancer. The company (not the supervisor who she told of her family history) called the placement agency and

complained of the attendance, and continuing unreliability. The receptionist was removed. She sued claiming that both the placement agency and the company where she was placed violated GINA and the ADA. The Court dismissed both claims. The receptionist had not requested a tangible accommodation, she just kept missing work. She provided no information as to the potential duration of the situation, by which an employer could do planning. Indefinite duration is not required to be accommodated. Under GINA she claimed the company used its knowledge of family history to make discriminatory presumptions about her ability. The court rejected this. Voluntary comments, not solicited by the employer, do not generally violate GINA, and there was no proof the supervisor or anyone else used this information. All actions were based on her own absences – not on family history. *Punt v. Kelly Services* (D. Col., 2016) [For more information on GINA and voluntary v. illegal information request the article *GINA II – Cautions for Employers About Obtaining Information* by Boardman & Clark].

DISABILITY

Position Description Worked – Jury Ruled for Employer. The EEOC filed a disability and sex discrimination case alleging an employer did not accommodate a woman with a 15 lb. lifting restriction, yet kept a man who had a lifting restriction. The evidence showed that 50 to 75 lb. lifting was routine. The position description clearly contained heavy lifting requirements at least 30 to 40 times a day as a "routine part of the job" – an essential function. Removing this requirement would alter the job beyond what was reasonable. An employer is not required to re-create a job – removing core duties. As to the male employee, he was not similarly situated. He did have a lifting restriction in one arm. However, he routinely lifted 50 to 75 lbs. with his other arm. So he continued to perform the essential function of the job. The jury found no violation of the law. *EEOC v. Auto Zone* (7th Cir., 2016).

Self Reporting Does Not Establish Disability. A case management nurse for an insurance company exhibited erratic behavior. At a holiday party she mentioned to a supervisor that she was "bipolar." The nurse engaged in several incidents of yelling at people to "shut up" in meetings, or even when someone said "good morning" to her. In a regional meeting she went off into a story of her Vegas vacation with her husband, dressing up as a cat, and details of their bedroom activity – while meowing. In all incidents the nurse claimed she was in a manic state, had not taken her Prosac, etc. and had no recall. The company referred her to the Employee Assistance Program on two occasions. It set up work from home for a time, much of the case management was electronic, but she failed to abide by the security rules, and forwarded the information to her personal non-safe phone. During this time she did not submit any medical verification of her claimed bipolar condition or medications. She was eventually fired due to failure to process a needed transfer for an insured patient. Again she claimed she was in a manic state and had no recall. The nurse sued for disability discrimination and the Company's failure to follow its standard disciplinary process. The Court dismissed the case for failure to show a disability.

Self-diagnosis, and self-description are not sufficient; medical verification is required to be provided to the employer. The claim for not following standard process was also invalid since it was based on the hospital giving her extra steps, not firing her as soon as it could have, in order to try the EAP referrals and other efforts toward correction. The non-transfer incident was a non-pretextual valid reason for discharge. *Poulsen v. Humana Insurance Co.*, (D. Kan. 2016).

Was "driving" or "traveling" the essential function of the sales job? A pharmaceutical sales agent worked from her home office and spent much of the time driving to and meeting with doctors and administrators of medical facilities. She was a sales star, winning multiple awards, and inducted into the company's sales "Hall of Fame." Then an eye condition precluded her from driving. She requested additional computer enhancements for her home office and a driver. She researched and provided cost estimates for driver and shuttles to get to sales locations. The Company provided the computer enhancements, but rejected the driver. It claimed that driving was an essential job function, and she must drive; a driver was not reasonable, increased company costs, and might set a precedent for other employees who later claimed performance problems. It did not do specific assessment of the costs, etc. The sales agent filed an ADA case, claiming that "travel" was an essential function, but personal driving by the salesperson was not. The issue was getting there – not how. The court agreed that this was a crucial issue for a jury to decide. Further the Company should have done more assessment to justify its decision that providing a driver was "unreasonable". *Stephenson v. Pfizer* (4th Cir., 2016).

DISCOVERY

EEOC's Investigation of Staffing Company Extends to Clients. The EEOC alleged that a staffing agency engaged in age discrimination in filling jobs for its clients. It then expanded its discovery requests to demand information about all of the agency's clients, and all placements with the client companies in order to identify discriminatory requests by the agency's clients. The Company resisted, but the court enforced the EEOC's expanded discovery. The EEOC claimed that it identified "hundreds of discriminatory requests." It can now open investigations of the agency's clients, and expand the scope beyond just age, and bring actions against those other client companies. *EEOC v. Aerotek, Inc.* (7th Cir., 2016). This is a significant decision. Instead of requesting information directly from a potential defendant company, the EEOC can use an indirect source to get access to other companies' information. Those organizations may have no knowledge and no ability to protect that information. Another message is that one should not make improper requests or try to get around legal requirements by indirectly asking a vendor or other third party to stretch the rules.