EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

Executive Order Requires Paid Sick Leave For Federal Contractors and Subcontractors. Executive Order 13706, signed September, 2015, requires Federal contractors and their subcontractors to provide seven days of annual paid sick leave to employees for illness, family illness, domestic violence, sexual assault or stalking. The leave is allotted at one hour for every 30 hours worked up to 56 hours per year.

Obama Administration Assures Religious Beliefs. The Administration has proposed a revised rule under the DOL Faith Based Neighborhood Partnership which funds job training and job creation programs run by religiously affiliated organizations. The rule would provide greater protection to clients or participants against being required or coerced into participation in overtly religious activities. The rule also provides equal protection for the faith based organizations. It places them on an equal basis with other non-profits for award of Federal funds. It lightens the current scrutiny on restricted "religious activities," by replacing the term "inherently religious" with "explicitly" and "overtly" religious activity, thus giving more latitude to the organizations.

Trends – Domestic Partners

Domestic Partner Benefits On Decline. During the last decade companies and governments began providing health insurance and other benefits to domestic partners – non-married employees and their significant others. This was largely done to provide benefits to same sex couples who could not legally marry and receive the same benefits as married employees. Many organizations and some states expanded the domestic partner definition to include any committed non-married couple – including heterosexuals, and even non-romantic cohabitants. FMLA benefits are available in some states for domestic partners – the same as for spouses. Now that same sex marriage is legal, much of the original reasoning has changed. Corporations (i.e. Verizon, Delta, IBM, and more) are

stopping domestic partner coverage and simply returning to benefits for married couples. Some states are also considering eliminating the domestic partner category from their FMLA and benefits laws.

LITIGATION

Personal Liability

***Perceived As Gay – Harassment Of Heterosexual Firefighter*.** A court found sufficient evidence to support charges of both Title VII employment harassment and personal suit of fire department supervision for intentional infliction of emotional distress under state law. The victim was a young EMT. He joined the fire department at the end of high school. Two older managers learned that the EMT had declined to have sex with a very intoxicated young woman after a high school dance. They believed that any "real man" would have eagerly taken advantage of that situation; thus the young EMT must be gay, and not the sort of "man" who belonged in the Department. They began a prolonged campaign of name calling they knew to be offensive and unwelcome. They began to look for any other "signs" that the youth was not a real man and began criticizing his clothes, his mannerisms, even the car he drove as less than masculine.

They informed other employees and the public that the EMT was gay. They even contacted his former girlfriend and his current girlfriend to let them know he was gay. The fire department sought to defend the suit by saying it was "just teasing and horseplay" as part of the routine camaraderie. The court disagreed, ruling that a jury could find the conduct was deliberate, intentional and outrageous and "utterly intolerable in a civilized community." *Tyndall v. Berlin Fire Co.* (D. Md., 2015).

Discrimination

Vague and Subjective Standards

Vague And Subjective Reasons Are Not Valid For Discharge, And Transgender Defense Did Not Work. A Federal court has allowed four female restaurant managers to pursue sex discrimination cases due to the vague and undefined standards used in their terminations. *Reynolds, et al. v. Chipotle Mexican Grill* (S. D. Oh. 2015). The reasons used for discharge included "did not display leadership," "faded into the background," and "did not represent herself well." There were no definitions and no tangible examples provided to back up these characterizations. The court found the company's reasons were so vague and subjective that it raised an inference of pretext. Further there was evidence that male managers with lower ratings were retained. Finally the company tried to defend one discharge by claiming the female manager had been replaced by another woman. However, the replacement was a transgender person who identified and presented as male. The court ruled that the replacement should be considered male.

Vague And Subjective Criteria Are Not Sufficient To Justify Layoffs. "Validity" is

required to defend against charges of discrimination. Objective, definable and explainable decision making criteria are a fundamental element of validity. In *Chicago Teachers Union v. Bd. Of Education of the City of Chicago* (7th Cir., 2015) the plaintiffs challenged the closure of schools and layoffs of teachers. The court found sufficient basis for a class action suit based on "subjective review, rather than objective measurable criteria." The closure had a highly disproportionate impact on schools in African- American sections of the city, and although only 27% of Chicago teachers were African- American, 51% of those losing their jobs were African-American.

Race

Co-workers Racial Turmoil Does Not Warrant Case. Two postal employees, one White, one Black, "went after each other" based upon their personal antagonism, largely fueled by racial animosity. Other workers complained that this created a racially hostile environment for everyone else in the workplace with "constant turmoil" and frequent outbursts. Then the two hostile employees filed cross-complaints against each other. Management suspended both during an investigation. They determined that both were equally at fault. They were then allowed to return after suspension. The White employee sued over the discipline claiming discrimination. The court dismissed, finding that both employees were disciplined equally. There was no evidence to show the White employee was any less at fault than the other employee. *Dieters v. Brennan* (6th Cir., 2015).

"Slavic" Is A Race, But "Eastern European" Is Not A National Origin. An employee of Bulgarian origin sued, alleging his company discriminated against ethnic Poles, Russians, and Bulgarians. He filed under Title VII for National Origin discrimination – "Eastern European origin," and Title VII and 42 U.S. Code §1981 for racial discrimination – "Bulgarian Race." The court dismissed the national origin claim, stating that Eastern Europe is not a "nation;" it is several nations. A region does not qualify. However, it allowed the case for race discrimination. It rejected the employer's argument that "Race" is confined to "the rigidly-defined categories of American Indian, Asian, Hispanic, Black, White, Native Hawaiian (the U.S. Office of Management & Budget official categories). "Color does not define race . . . common ancestry, culture, genetics, and related languages" may create a racial category, and Bulgars, Poles, Russians and other Eastern European peoples do form a broader Slavic group. Other courts have also previously recognized Slavic as a race. *Petrov v. Herbert Research Inc.* (W.D. Wash., 2015) [a hundred years ago the U.S. Congress also gave a foundation for this interpretation when it passed anti-immigration rules to give preference to the "Northern European Races," and keep out Asians and "the Southern European Races," including the "Slavic Race."]

National Origin

Damages And Fines For Preferring Guest Workers Over U.S. Citizens. A Texas agricultural company has been assessed liability and fines for hiring legal H-2A guest workers from Mexico while rejecting qualified U.S. citizen applicants. The Dept. of Justice filed on behalf of Enrique Romero and other U.S. citizens who remained unemployed for a whole season and won back pay and fines for the violation of the guest worker program rules, requiring hiring of qualified U.S. employees first. *United States v. Estopy* (DOJ – Administrative Hearing Office, 2015).

Disability

School Bus Driver Kept In The Dark About Possible Accommodation. A former school bus driver has a valid case of failure to accommodate. She drove an un-air-conditioned bus, in Georgia, transporting special needs students. During a record heat summer, on a 100° day she suffered an episode of breathing difficulty and incapacity and was unable to drive further. Her doctor diagnosed a respiratory disability, but stated that an air-conditioned bus would alleviate the problem. However, all air-conditioned buses were already assigned. The law does not require disadvantaging other employees (drivers) by taking away their duties (or buses) to accommodate a disabled person. The district stated that no other buses were available. However, it did not inform her that a number of air-conditioned buses were on order and would soon be arriving. She resigned due to inability to return to driving the hot bus. The court determined there was sufficient evidence of the district's failure to adequately engage in the "interactive process" by providing full and adequate information. *Hill v. Clayton Co. School Dist.* (11th Cir., 2015).

Family & Medical Leave Act

Failure To Count One Day Makes A Great Difference. An employee requested reduced schedule leave during pregnancy. The company denied the leave and terminated her for inability to work a full schedule. She filed an FMLA suit. The company claimed that she did not qualify for FMLA because she worked less than the required full year. However, she was hired the prior November 17th. Though the company claimed it made the discharge decision on November 13th, it did not give her notice until she checked in to work on November 16th, stating "this is your last day of employment." The company still claimed that she was a day short of the full year FMLA eligibility. The court disagreed, finding she had reported for work on the 16th, and that completed a full year of employment. November 17th would have been a year and a day; the company miscounted. She had full eligibility at the time of discharge and should have been allowed the FMLA leave. A jury agreed, awarding back pay, attorneys' fees, and liquidated damages. *Wages v. Stuart Management Corp.* (8th Cir., 2015).