EMPLOYMENT LAW UPDATE

March, 2018

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

Boardman & Clark Law Firm
www.boardmanclark.com

U.S. Supreme Court

Dodd-Frank Whistleblower Must File With SEC. *Digital Realty Trust, Inc. v. Somers*. In a unanimous decision, the U.S. Supreme Court ruled that the Dodd-Frank Act only protects whistleblowers who report violations of securities laws to the SEC. It does not protect those who make internal reports of misdoing from retaliation; in this case a supervisor for the Chicago Stock Exchange made an internal complaint of trading irregularities. This ruling overturned the SEC's own opinion that an internal complaint is covered by the anti-retaliation provisions. [Be aware that other laws such as Title VII for discrimination do clearly cover internal actions as "protected activities."]

Evidence

Shredded Notes Can Lose A Case. The Dept. of Labor, which usually enforces employment records laws, destroyed notes regarding interviews and decision making in a promotion process. It claimed it waited the "two years" required by its own regulation for retention of records. However, the plaintiff had already filed a Title VII race and sex discrimination action over the promotion. The court found "spoliation" and that a conclusion could be reached that the Department was trying to cover up evidence which could harm it. The Department's action was contrary to its own advice that there is a three year statute of limitations and all records must be retained once a complaint has been made – until all litigation is over. DOL has often cited and sued employers for destruction of records prior to the end of the three year statute of limitations or completion of a case. So it had little defense for violating its own advice and legal positions. *Elliott v. Acosta D.C.* (2018).

Privacy and Romantic Complications

Looking Up Ex And His Wife. In *Grievant & City of Brooklyn Park, MN*, a discharge was upheld for abuse of position. A public employee used her special access to multiple public data sources to repeatedly get confidential information on her former husband and his new wife for her own personal purposes.

Police Officers Have Constitutional Right To Have Affairs. In *Perez v. City of Roseville* (9th Cir., 2018), the court ruled that a police department could not discharge officers who engaged in an off-duty extra-marital affair. A public employer may not take adverse action due to an employee's private sexual conduct unless it demonstrates that the conduct affected the employee's job performance or created public controversy. Both officers were married but separated. They were discreet and the relationship created no disruption to the department. It came to light when reported to the Chief by one of the officer's spouses. The Constitution protects rights of privacy and freedom of association from undue governmental scrutiny and interference.

Discrimination

Sex

"Not Uber-y Enough," Happy Hour Comment Makes Case. A woman successfully performed an acting Brand Manager job as an independent contractor for Uber for several months. She applied for the full-time job. However, a man with fewer qualifications and significantly less experience was hired. Sometime later she saw one of the hiring Managers drinking at a tavern during happy hour. She approached him and asked why she had not gotten the job. He told her that she "just wasn't Uber-y enough." She asked what the man who replaced her had that was "Uber-y." The Manager replied, "He's a dude!" She filed a state law sex discrimination case. The court found the Manager's statement was strong evidence of sex discrimination in the hiring decision. Uber has previously been sued for sex discriminatory practices and the case could result in punitive damages. *Diamond v. Uber*, San Francisco Superior Ct. (2018). This case is another example of Managers' off-the-cuff remarks when they think they are "off the clock." Work-related discussions when drinking are generally unwise, can bind the company, and may create liability.

Another Court Rules That Sexual Orientation Is Covered By Title VII. In *Zarda v. Altitude Express, Inc.* (2nd Cir., 2018) another Federal Circuit Court of Appeals ruled that sexual orientation discrimination is a form of standard sex discrimination and is included under Title VII coverage. This is not the definitive word on the subject. It is a "step." Other Federal Courts have ruled the opposite. This ruling does not overcome those other courts' decisions, so there is a split of authority in the country. There is also a split among Federal agencies with the Dept. of Justice arguing LGBT is not covered by Title VII, while the EEOC argues that it is. Further, this case was about Sexual Orientation; it did not specifically address sexual identity or transgender issues. So this simply moves these issues closer to further appeal and an ultimate decision by the Supreme Court – or clarification by Congress. Of particular interest in this case was the large number of amicus briefs filed by Fortune 500 companies in support of LGBT rights and urging protection under Title VII.

Disability

Lengthy Accommodation Did Not Have To Be Continued. Wal-Mart accommodated an employee for 15 months following a stroke. It agreed to "temporarily" lessen the physical requirements of his Parts Clerk job while he rehabilitated and regained functional capacity. This meant several essential functions were not required. After 15 months it became clear that his restrictions were permanent, and he would not be able to do the essential duties of the job. Wal-Mart then transferred him to a Coordinator position, which was within his medical restrictions. However, he also had difficulties with those duties, including incidents of unsafe operations. With no other positions available, the employment was terminated. The employee filed an ADA case claiming that Wal-Mart should have continued the long-term altered duties accommodation, and not removed him from the Parts Clerk job. The court ruled that the ADA does not require altering a position to eliminate essential functions. The fact that the company did so for 15 months did not bind it to continue the accommodation forever. The parties had a good faith belief that the employee would recover and be able to do the full job. The court found that management had exceeded its obligations to stretch the accommodation for so long, and "courts cannot punish a defendant for bending over backwards to accommodate." The 15 months was not a "concession" that the accommodation was permanent. *Moore v. Wal-Mart Stores East* (W.D. NC, 2018). [Be aware that some courts have found that long-term accommodations or long-term "light duty" does alter a job, and creates a new and permanent "regular position." This can be especially so under some state disability laws, which have different standards than the ADA.]

Religion

HR Let Accused Manager "Handle It." Two Baptist car salesmen stated that they would work on Sundays, but did not believe they should make cold calls to potential customers which could violate the peace and sanctity of other peoples' Sabbath. They would serve customers who came in, or those who had indicated it was ok to call on a Sunday, but would not otherwise do Sunday cold calls. The Sales Manager refused this accommodation request. So the salesmen called the company's HR Anti-Discrimination Hotline and left a message regarding the situation and the Manager's refusal. The HR Manager did not call them back. Instead, the next week she called the Sales Manager and informed him of the call. He replied, "I'll handle it." HR never contacted the salesmen. When the Sales Manager called her a day later to report, "I handled it," HR did not even ask what was done; it simply closed the matter. The Sales Manager indeed "handled it." He called in the salesmen and chewed them out for going over his head to HR. He ordered them to make the calls. When they objected he profanely belittled them. He allowed others to harass them and he gave their commissions to others. He openly told them they should quit, which eventually occurred. They filed a Title VII religious discrimination suit. The court found a failure of the HR process, which specifically guaranteed that HR would investigate concerns raised on the Hotline. HR should not have reported them to the very person they had raised the concern about, much less let

that person "handle it." There was a valid case for both failure to accommodate and retaliation. *Perticone v. Bell Motors LLC* (D. Az., 2018).

Family Medical Leave Act

Recuperation In Trinidad Was Not An Abuse Of FMLA Or ADA Leave. A Health Services Marketing Manager in New York took FMLA to recover from brain tumor surgery. She was incapacitated and her family brought her and her children home to Trinidad to provide care. Company Managers expressed frustration and made ongoing comments about her taking a trip to a tropical island with nice beaches. We're in winter and the West Indies must be really nice this time of year, etc. They expressed ongoing doubt about the validity of the need for the medical leave, in spite of clear medical verification of the employee's serious incapacity. The employee was terminated while still on leave, due to failure to submit additional disability paperwork. A court found this reason to be pretext, since management gave the employee an unreasonably short time for the paperwork, especially since she was out of the country. The company also knew she had been in contact with the third party administrator and that the reason for not getting the paperwork submitted was due to the administrator experiencing delay in its process. Finally, the company altered the date of the termination to make it look like its action took place after FMLA expired, rather than while the FMLA period was still in effect. The court found this violated Federal and state FMLA and ADA rights. *Watson v. Emblem Health Services* (NY App., 2018). The case might well also have been brought as national origin discrimination. It is less likely that Managers would have expressed doubt about the leave had the employee been taken home for care in cold, icy Minnesota or North Dakota rather than a tropical Caribbean country. This case is also a good reminder that "falsification" or "abuse" of FMLA requires clear and convincing tangible evidence. Unfounded speculations are not evidence of abuse. However, frustrated mutterings and snarky comments and emails by Managers are evidence which can result in liability for the employer.

Fair Labor Standards Act

Employer Is Responsible To Monitor When There Are No Deviations In Lunch Time. Under the FLSA an employer can establish a "record the exceptions" system. Rather than having everyone clock out and back in for meals, it can do a routine automatic deduction, and tell employees to record any deviations, when they do not take the meal time. They then get paid for that time they record. In *Magpayo v. Advocate Health & Hospital* (N.D. Ill., 2018), nurses claimed they regularly were interrupted and called on to work during the lunch time and discouraged from using the "no lunch code" to record the deviations from the automatic deduction. The court found that the hospital pay administrator should have known something was amiss, because there was such a consistent lack of recorded deviations. A consistent 8 hour, 8 hour, 8 hour record over a long time just does not fit the normal work situation in which there are usually more deviations. The great lack of deviation should have triggered a closer look. When such a non-standard "record the exceptions" system is used, the employer has an extra

obligation to monitor and check that it is working correctly. "The responsibility for ensuring the timesheets accurately show real hours rests with the employer." Even if the nurses did not record deviations out of personal neglect, they were still entitled to pay for work, and the unusual and consistent absence of deviation records should have alerted the payroll administrators that something was amiss, and to go investigate.

Child Labor

Wendy's Franchise Pays $258,000 For Child Labor Violations. A Michigan franchise of Wendy's restaurants has paid a quarter of a million dollars for violating the hours and duties provision of the DOL child labor rules. It permitted 14 and 15 year old employees to operate prohibited cooking equipment, such as open deep fryers. It had over 400 minors working outside permitted hours on school days, and working over the allowed hour limits on non-school days. The restaurant franchise will also be subject to, and pay for, repeated future audits of its practices. *DOL v. WM Limited Partnership* (DOL Settlement). Amounts assessed in child labor cases are generally not for wages owed to the young workers; all of them received all pay due for hours worked. Instead, these are penalties for violating the law. Child labor violations routinely carry higher penalties/fines than other employment law issues.

Labor Arbitration

Possession Of Cell Phone Warrants Termination. More and more employers are banning cell phones at work. Some for security or safety reasons; others because some employees cannot seem to control their use during working time. In Re *Greater Cleveland Transit Authority and Amalgamated Transit Union*, there was a clear rule prohibiting carrying any electronic device on the job. A train driver was found to have a cell phone in her pocket. The arbitrator upheld the discharge. This ruling is not surprising considering several high profile instances of train wrecks when the driver was texting.

Bus Driver Should Not Beat Up Riders. A rider called a bus driver the sexual slur "B_ _ _ _" as he got off the bus. The driver followed the rider off the bus, slammed him into the side of the vehicle, and choked him. The arbitrator upheld the resulting discharge. There was no justification for the assault. There was no physical threat, the rider was not intimidating, the driver outweighed him by 150 lb., and the bus video camera showed he made no aggressive gestures, and was peaceful exiting the bus. The assault was an unwarranted overreaction to a verbal insult. In Re *Greater Dayton Transit Authority and Amalgamated Transit Union*.