Labor & Employment Law Update

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Legislation & Administrative Actions

The Marijuana Opportunity Reinvestment and Expungement Act A law has been introduced in the House (HR 3884) and Senate (S 2227) to remove marijuana from the Controlled Substance Act, and expunge a number of marijuana possession convictions. Removing marijuana as a controlled substance would also allow federal small business funding to cannabis-related businesses the same as other businesses.

Even Playing Field Act Senate Democrats have introduced the Even Playing Field Act (S 2253) in the wake of the U.S. Women's Soccer Team's World Championship. The women soccer players have a greater winning record, and bring in more attendance and millions more annual revenue yet are paid far less (only 38%) of what the U.S. Men's Soccer Team receives. The proposed Act would ensure equal pay and conditions for player, coaches and team staff.

Litigation

PRIVACY

Inadequate Efforts To Prevent Breaches A court has allowed a class action Privacy Act suit by federal employees unions against the U.S. Office of Personnel Management (OPM). The case focuses on a cyberattack which stole the personal identity information, fingerprints, Social Security numbers, dates of birth, home addresses of more than 21 million past and present government employees, their spouses and children. The case alleges that the Office of Personnel Management willfully failed to establish basic security measures which were recommended and required by the Act. Further, in the four years since the breach, OPM has not yet implemented those security measures to protect from new attacks. *In Re U.S. OMD Security Breach and AFGE/NTEU* (D.C. Cir. 2019).

FAMILY AND MEDICAL LEAVE ACT

Late Medical Certification – Including Dates Which "Should Have Been FMLA" Violates The Law The FMLA requires employees to provide medical certification of serious medical conditions and the need to take leave. The employer must give at least 15 days for the certification to be submitted before the FMLA leave can be denied. But don't read the rules too strictly! In *Williams v. E-TRADE Financial Corp.* (D. Utah, 2019), the employee's recertification document was late. He explained that his doctor was out of the country, and could provide the document when the doctor returned. The employer never stated that this was insufficient. The employee did submit the recertification once the doctor returned. Then a few months later, the employee was fired due to attendance issues. These included dates during the "gap period" when the doctor was out of the country. The fired employee sued. The court ruled in his favor. The FMLA prohibits inclusion of any protected leave in attendance discipline. The court found that the gap period days should have been FMLA, since the doctor did

eventually certify them. The court granted summary judgment in favor of the employee without the need for a trial. This is a good lesson in not holding too rigidly to the "minimum" FMLA requirements and being too hasty to deny a leave request. This is especially so when the employee provides mitigating information.

DISCRIMINATION

AGE

Did Not Apply For Job – But Still Has Case For Failure To Hire Normally, one has to actually apply for a job and be rejected before suing for not being hired. A 50-year-old police officer filed an ADEA case due to not being selected for a promotion. The municipality defended by claiming the officer never applied for the promotion, and therefore could not be considered. This did not seem to hold water. First, the promotion opportunity was never posted or advertised – it was known only to a select few. Second, three younger officers received the promotion, yet two of them also did not apply. They were just recommended by the Chief and approved by the Board. The Chief dug up a 5-year-old promotional application by one of the younger officers and said he used it in the process. However, the older officer had also applied for a promotion only two years earlier – yet the Chief claimed that this was not an application which could be considered for the present promotion. This seemed to be pretext. *Remus v. Village of Dolton*.

DISABILITY

Bought Alcohol On Company Credit Card To Hide Purchases From His Wife A UPS manager had a company credit card for business purchases. Against company policy, he also used it for buying alcohol. When this was discovered, he said he was trying to hide the purchases from his wife so she would not be upset over how much he drank. The manager was fired. He then filed ADA and Minnesota Human Rights Act disability cases claiming he was fired due to the disability of alcoholism and should have been accommodated (such as allowed to get treatment rather than discharged). The court ruled otherwise. The manager knowingly violated UPS credit card policy. That was clearly a discharge offense, regardless of any disability. A disability generally does not excuse serious rule violations nor is an employer required to accommodate such violations. Further, the manager did not inform UPS of any alcoholism diagnosis. He just mentioned trying to hide how much alcohol he bought. *Landsdale v UPS* (D. MN, 2019).

Chicken Pox Not A Disability Chicken pox, even if severe, is not a disability under the ADA. The illness caused hospitalization and then a 6-week absence, mostly recuperating at home. The duration and severity was not sufficient to be "substantially limiting" on major life activities. The physician advised the employee to stay home from work until further evaluation, but did not specify any other medical or physical restrictions. The employee was new and not yet eligible for FMLA. The employer's decision to replace her did not violate either the ADA or FMLA. *Hurt v. RHA Health Service* (M.D.N.C., 2019).

RACE

Two cases this month illustrate the point that being accused of and investigated for offensive behavior toward another race is not itself race discrimination. The same is true that being disciplined for sexual harassment of another gender is not sex discrimination toward the perpetrator. It is simply enforcing the anti-discrimination policies.

Not Racial Discrimination To Fire Officer For Racist Facebook Posts A White police officer's race discrimination claims following his discharge for posting racist Facebook posts failed. He made offensive racial posts on multiple occasions. He rejected the notion that the posts were racially insensitive, and refused to take them down. A federal court held that the "similarly situated" Native American comparator that he identified was not similarly situated because he had made only one offensive Facebook post, expressed remorse when confronted, and immediately removed it. Also, the employee could not rebut the employer's other stated reasons for his removal: his refusal to remove the posts when confronted, and the overwhelmingly negative public reaction to the posts impaired, the functioning and efficiency of the police department. *Husk v. City of Talladega* (ND Ala., 2019).

Fired For Calling Supervisor "Evil" And Being Questioned About Racial Statement Is Not Racial Discrimination A White hospital medical assistant filed cases alleging FMLA retaliation and Title VII race discrimination. A number of months after taking FMLA leave, the medical assistant was critiqued for poor performance. A doctor also reported the assistant had made negative racial statements about a Black nurse. She was questioned about these, and refused to cooperate, claiming that being questioned was racial discrimination. Thereafter, when the assistant then abruptly left a meeting about her performance, the supervisor went to her work area. The assistant yelled at the supervisor to stay away from her and called her "evil." This resulted in discharge. The assistant filed the retaliation and race discrimination cases. The court granted judgment against her on both counts. The hospital had valid performance and overt behavior reasons for discharge. The FMLA leave was so many months in the past that it could not be tied-in with the discharge action. An employer is required to investigate concerns about negative EEO situations, one cannot equate being questioned under a harassment policy as race discrimination itself. There was no indication the assistant was treated differently than any other employee of any other race in this situation. *Lovelace v. Washington School of Medicine* (8th Cir., 2019).

LABOR ARBITRATION

Consequences For Rudeness In an era in which anger and rudeness toward others is increasing, even becoming the model set by our political and social leaders, it becomes more important to emphasize civility in the workplace. Three cases show that employers are acting and their decisions being upheld.

Rudeness Warrants Discharge A city parking ticket issuer was fired for temper and repeated rudeness. In a few months, several citizen complaints were received about his behavior. In spite of training on how to deal with conflict and being directed to walk away from any confrontation, he continued to engage in antagonistic, profane confrontations. This included a confrontation with a parker who turned out to be a city manager in charge of the streets-traffic-parking operations. When the manager identified himself, and asked the employee to become more civil, the employee cursed at him, saying "you're not my f_____ boss," then smirked and walked off (too late of a walk off to avoid confrontation). Then a cell phone video showed him threatening and picking a confrontation with a pizza delivery driver. He was fired. He grieved the action. The arbitrator upheld the discharge ruling that instead of avoiding rude confrontations, the employee "seemed to seek them out;" he seemed to deliberately engage in improper behavior toward the public he was supposed to be serving. *In Re City of Worchester v. NAGE #495* (2019).

Rude, Unbecoming Conduct A Department of Veteran Affairs employee engaged in overtly insubordinate and insulting emails to his manager. This started when his response to a directive from the section director was *"I do not follow orders from you ... I report to my supervisor, you are unqualified to tell me anything."* He was officially informed that the director was higher than the supervisor and had authority to give directions. The employee then refused to come to section meetings. Then he replied to a question from the director, *"I do not consider you competent, let alone a supervisor. Take me off your email list."* The employee followed with another email, "*You are proving to be incompetent. I will not tolerate stupidity!"* Then, "If you want a report from me, you can get it yourself." He also sent similar emails to others. He was fired. In the grievance, the arbitrator found the employee engaged in threatening and intimidating behaviors toward supervisors and co-workers and termination was appropriate for conduct unbecoming of a federal employee. *In Re Veterans Health Care Systems and AFGE #3553* (2019).

Don't Call Co-Worker "Looney" And Copy Everyone Else On The Email. An arbitrator upheld discipline for an employee who got in a tiff with a co-worker, then sent angry emails, including calling the co-worker "looney," and then copied a number of other employees, to cause embarrassment. The behavior was unprofessional and without justification. *In Re Clackamas County & Clackamas Co. Employee Association* (2019).