BOB GREGG | LABOR & EMPLOYMENT GROUP | (608) 283 1751 | SIGN UP: RGREGG@BOARDMANCLARK.COM

Legislation & Administrative Actions

Semi-Synthetic Opioids Added To DOT Drug Screening List. Hydrocodone, Hydromorphone, Oxymorphone and Oxycodone, -- all semi-synthetic opioids, have been added to the list of drugs to be tested for under the DOT rules concerning transportation and pipeline work. These are prime substances related to the "opioid epidemic." These may also be validly prescribed prescription medications for medical conditions or disabilities. So, positive tests must be handled with care by the testing lab and medical review officers to avoid discrimination. Non-DOT covered employers may also add these substances to their drug testing lists, but must also use caution to assure that this does not result in discrimination due to prescription usage.

The Filing Deadline For The 2017 EEO-1 Survey Has Been Extended To June 1, 2018. All employers, or "affiliated companies" with 100 or more employees are required to file an Employer Information Report EEO-1, otherwise known as the EEO-1 Report. It is required to be filed with the U.S. Equal Employment Opportunity Commission's EEO-1 Joint Reporting Committee. **The Filing Deadline for the 2017 EEO-1 Survey has been extended to Friday, June 1, 2018.**

Trends

Bullying Bosses Create "A Glide Path To Illegal Harassment." General harsh supervision and uncivil or threatening demeanor by a manager is not illegal harassment under the anti-discrimination laws. A recent study, however, finds evidence that this behavior creates "a glide path," a slippery slope that can lead to illegal harassment. Many employment attorneys will support that conclusion. Failure to address incivility and bullying is a precursor to hostile environment cases under the various laws. Though demeaning supervision starts out as a neutral character trait, it seems that bullying supervisors tend to unconsciously pick on those who seem more vulnerable or are different. This quite often translates to gender, race or disability, which are protected classifications under the harassment laws. Abusive supervision also creates an atmosphere in which other employees also become uncivil toward each other, often with sexual, racial, ethnic, or religious overtones leading to harassment cases. An employer which disciplines or discharges non-management harassers can lose the "unfair discharge" cases if it has allowed a bullying manager to continue similar abusive behaviors with no consequences. The harassers get reinstated with back pay. It becomes a liability no-win. (There are some states with "healthy workplace" laws which do categorize general abusiveness and bullying as illegal harassment. Overt abusiveness can also violate OSHA's safe place - anti-violence provisions.) Supervisors lacking good management or motivational skills often do get quick results by bullying and threatening behavior. This short-term result is replaced by long-term harm. Additional studies have found workers subjected to this sort of supervision had the lowest productivity, quality, sales and profitability and

highest rates of sick leave, absences and turnover in the long-term. Organizations may wish to focus on civility and Respectful Workplace policies, as well as Anti-Discriminatory Harassment policies, not only to prevent bullying supervisors from descending the glide path to harassment, but for the positive effects on their productivity, well-being and "bottom line."

Litigation

DISCRIMINATION

AGE

Middle-Aged Accountants Claim Numbers Don't Add Up – Job Fairs At Issue. Middle-aged accountants are suing the Price Waterhouse Coopers firm alleging that its excessive focus on college campus job fair recruiting illegally favors young accounting applicants over those who are older. Older people do not receive the same outreach or opportunity to be aware of jobs and apply. The plaintiffs allege a discriminatory intent. The court denied the company's motion to dismiss and scheduled a trial due to evidence that younger applicants had a 538% greater chance of being hired than those over 40. This was compelling evidence of a significant age-related imbalance to warrant a trial. *Rabin v. Price Waterhouse Coopers LLP* (N.D. Cal., 2018).

"Step Aside And Let The Young People Shine." A jury awarded $200,000 to an employee who was fired after complaining about age discrimination. The employee had a 30-year exemplary record, however, a new supervisor began treating her as less important to the operation, making statements such as "step aside and let the young people shine" and that at her age she had "pretty much done everything you can do here." The employee complained to upper management. However, nothing was done, except that her supervisor gave her a demotion and pay cut. She was then fired a couple of months later. The jury found the demotion and discharge were due to age and retaliation. *Konsavage v. Mondelez Global LLC* (M.D. Pa., 2018).

Texas Roadhouse Pays $12 Million To Older Bartenders/Servers. In *EEOC v. Texas Roadhouse* (2018 settlement), the restaurant chain will pay $12 million and change its recruiting and hiring practices. The case alleged that the restaurants declined to hire older bartenders, servers and hosts.

DISABILITY

Kentucky Fried Franchise Forced Employee To Flush Her Meds Down Toilet. *EEOC v. Hester Foods* (S.D. Ga., 2018). A Kentucky Fried Chicken franchise will pay $30,000 to settle EEOC charges that it wrongfully fired a restaurant manager. When she informed the owner of her bi-polar condition, he made profane comments about the particular medication and forced her to flush her medicine down the restroom toilet. When she then said she would continue to follow her doctor's advice and take the prescription, she was fired. The EEOC stated "employers are not allowed to force workers to choose between their jobs and their health," and a company manager is not allowed to substitute their own opinions about medication for that of the employee's physician.

Objective Medical Opinion Requires Doctor To Actually See And Examine The Employee Before Opinion. A court refused to find that an employer had a valid medical foundation to deny a crane operator's return to work due to nerve damage following spinal surgery. The operator was cleared by his own doctor, but the company felt he may pose a direct threat to safety, and required an evaluation by its medical expert. That doctor stated that he was unable to clear the employee to work until he conducted a more thorough review of medical records. He then requested the records. Then the company terminated the employment based on its doctor's failure to authorize the return. The employee filed an ADA case. The court found that it was unclear whether the doctor had actually completed the records review in order to reach a final decision. Even if a review had been completed, a document review is not enough. The company's doctor never actually examined the employee nor consulted with the treating neurologist. This did not meet the ADA's requirement for a fact-intensive "individualized assessment." *Pisani v. Conrad Industries* (W.C. La., 2018).

Stock As A Settlement. Usually employment cases result in awards of back pay, compensatory damages, etc. in money – cash in the bank account. In a settlement of a disability action, American Airlines/Envoy Air has agreed to provide "$14 million current value" of stock to the class of affected employees and former employees. The EEOC brought an action over the company's requirement that following medical leaves employees must provide a return to work "with no restrictions." This violates the requirement that the employer must consider reasonable accommodations which would allow return even with restrictions. *EEOC v. American Airlines/Envoy Air* (N.D. Az., 2018).

Choice Of Accommodations. The following two cases illustrate the principal that employees are not entitled to the accommodation they "prefer." Rather, the employee can choose one which works, if there are alternatives.

Employees Claim That Yoga Class Was A Necessary Medical Treatment Ruled To Be A Stretch. A legal secretary's successful treatment for cancer left residual neuropathy and numbness in her arms and legs. She was allowed a flexible schedule to attend physical therapy sessions for several months at a medical clinic. Then she requested an ongoing schedule change to attend a yoga class "with her favorite instructor" during the workday, in order to continue the course of her recovery. This was denied. The employee filed an ADA failure to accommodate case. The court granted Summary Judgment against the employee. Though the physical therapy was medically prescribed, the yoga class was not. Further, even if yoga was beneficial, the employee was not entitled to a "preferred accommodation" based on her favorite instructor, when there were many classes available at other times, which would not disrupt the work schedule. *Flynn v. McCabe and Mack LLP* (S.D. NY, 2018).

Telecommuting Not Necessary Accommodation, When Alternative Is Available. A supervisor rejected telecommuting from home as an accommodation for her Meinieres disease, random episodes of vertigo and chronic imbalance. Her doctor recommended that she not drive. Thus, she requested the ability to telecommute and work from home. The employer denied this, and instead set up a rideshare arrangement, so she could ride to and from work with others. It also provided arrangements if she were to experience a vertigo episode at work. She ceased work and filed an ADA failure to accommodate case. The court ruled for the employer. The ADA does not require providing the preferred accommodation. Instead, the employer can use an alternative which works. The employee's doctor did not state that she could not work in the office; only that she should not drive to get there. So, the employer provided an adequate alternative. Further, the essential job duty was to supervise a work team, in the office. That could only be reasonably done in person. So work from home would not have met the "reasonableness" test. *Morris-Hughes v. GEICO* (M.D. Fla., 2018).

RELIGION

Spied-On Employee Has Case. A Quality Assurance Specialist was the only non-white and Muslim employee in a transit authority department. He alleged a hostile work environment and discriminatory discipline based on his supervisor's suspicions of Muslims. He was spied on, being watched through the windows at work, and the supervisor monitored and commented on his off-the-job social media posts, and even printed out a post and showed it around the office. He was subjected to comments, including "Muslims are taking over the world and need to be nuked and wiped out!" He was subjected to "unique" requirements and discipline, and denied the schedule flexibility given to others and which was guaranteed in the contract. *McIntosh v. Greater Cleveland Regional Transit Authority* (N.D. Oh., 2018).

RETALIATION

Police Officer Retaliated Against For Criticizing Ticket Quotas. A veteran police officer raised concerns that the department had a rigid traffic ticket quota system that disproportionately targeted African-Americans in mostly minority areas of the city in order for officers to achieve their quotas. He was then "blacklisted" and denied all promotions and forced out. He then tried to reapply, and was denied reinstatement, in spite of his exemplary record. The court found evidence that an HR specialist handling the reapplication selectively contacted only references she knew would oppose the return to duty, and ignored those who would provide positive opinions. This supported the retaliation case. George v. City of Cincinnati (S.D. OH, 2018).

SEX

Dollar General Pays $45 Million For Equal Pay Case, After 10 Years. Dollar General retail stores will pay $45 million to settle a class action suit regarding systematically paying female store managers less than male managers, for the same work. The case has been vigorously litigated for 10 years prior to reaching a settlement agreement. This is another example of how litigation is not a quick method for resolving disputes (see April, 2017 Update on case which took 17 years). It is also an illustration of the importance of paying close attention to establishing wages and the high price for not doing so; in addition to the money paid in settlement, Dollar General incurred several million in its own legal fees as well. *Scott v. Family Dollar Stores, Inc*. (W.D. N.C., 2018).

Another Court Finds Use Of Prior Salary In Hiring Is Discriminatory. "Prior salary is not job-related and perpetuates the very gender-based assumptions about the value of work that the Equal Pay Act was designed to end" was the ruling in *Rizo v. Yovino* (9th Cir., 2018). This case is one in a continuing split of opinions as to whether an employer may set starting pay based on the applicant's past pay history, rather than on the actual duties and responsibilities of the work. Since men have generally higher pay histories, for similar work, the past pay use will result in the male hires getting more money for doing the same work as female new hires. The inequity then tends to be perpetuated since future raises are based on one's original pay level. This case reversed a lower court opinion that prior salary history could be used to set starting pay. [An employer may use other, non-gender effect criteria to set different hiring pay. These include years of experience, publications and or professional awards, demonstrated high levels of sales, management of large projects v. smaller, etc.]

FAMILY AND MEDICAL LEAVE ACT

Facebook Voids FMLA. A maintenance technician requested a two-week FMLA leave due to inability to walk or stand or be mobile because of knee and foot injuries. However, Facebook postings showed him on the first weekend as one of the three "Tim's Golf Scramble Champs" at a charity golf tournament. Then the next weekend of the FMLA leave there were Facebook postings of him "tubing the Rolf River." These activities were inconsistent with his claim of inability to walk, stand and be mobile. Upon return to work, the technician was confronted with the Facebook postings. He could not adequately explain, and received a lengthy suspension for falsifying the leave, and a "no more infractions" warning. He was then found sleeping on the job and fired. The technician sued, claiming that he was discharged in retaliation for having taken FMLA, because the employer began following him and watching him after he took FMLA. The court dismissed the case. The FMLA does not prevent employers from disciplining due to abuse or falsification of leave. Such a falsified leave is not a protected activity that would create a foundation for a retaliation case. The employer would have a valid reason to keep a closer eye on an employee who had just been disciplined for improper conduct, and the employee could not refute that he had been sleeping on the job. *Sharrow v. S.C. Johnson & Son, Inc*. (E.D. Mich., 2018).