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LABOR & EMPLOYMENT UPDATE

Bob Gregg | Employment Attorney | 608.283.1751 | *Sign up to receive the update by emailing Bob: rgregg@boardmanclark.com.*

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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

Dept. of Labor Reinstates Opinion Letters. DOL has long issued Opinion Letters when employers raise questions on difficult or confusing situations. These could provide a bit of a "safe harbor" to the employer which requests and relies upon the advice. They are also public, and can be used as general guidance by others. DOL stopped this practice in 2010. It has now announced that it will again respond to employer inquiries with Opinion Letters.

LITIGATION

U.S. Supreme Court

Travel Ban Partially Upheld. *Trump v. International Refugee Assistance Project, et al.* (June, 2017). The Court agreed to take the case regarding President Trump's travel restrictions on people from six countries for argument and decision in the next term. In the meantime, it partially lifted the lower court restraints. It allowed enforcement of a general ban but continued to require admission to the US of those with a work, student, family, etc. connection. The employment significance of this decision is that those with job offers, work permits, etc., can still enter the country. Employees from those countries can still leave the US and be able to re-enter – so one can go back home for a visit or take a Caribbean cruise vacation, or a business trip to Canada, etc., and not be barred from re-entry. The Justices were unanimous in the decision to allow the President's Order to take effect, at least partially.

Some Large Health Care Corporations Can Be ERISA Exempt. *Advocate Health Care Network, et al. v. Stapleton* (June, 2017). ERISA covers employment retirement plans of private sector for-profit and non-profit organizations. It has always had an exclusion for church plans "established and maintained by a church or a principally religious purpose body." This exclusion is due to the First Amendment separation of church and state, which prohibits governmental intrusion into the affairs or operations of a religious body. Under the exclusion there is no requirement for religious organizations to maintain viably funded plans, and indeed a number of church plans have gone bust, leaving employees without expected retirement and without any legal remedy. The question in this case was whether large nationwide church affiliated medical networks – which charge full fees to patients, take standard medical insurance payments, take Medicare/Medicaid monies from the government, and make multi-millions in charging for services, are "religious purpose" organizations. The court ruled that they are "religious organizations" and exempt from ERISA, as long as they were established by and maintain a close relationship with a church or religious denomination and maintain a formal "non-profit" corporate status. Thus, their employees have no ERISA protections, and no right to challenge the details or solvency of the plans under ERISA. This was not a close case, based on "party lines." All the Justices voting agreed that religiously affiliated

organizations were exempt. (J. Gorsuch abstained because the case was argued before he took office.)

These recent cases are interesting in the lack of political divisiveness. The Justices were unanimous in agreeing on the basic principle involved. Disagreements were over the degree, rather than the basic issue.

Employment Contracts – Choice Of Law

Michigan Non-Compete Agreement Law Enforced By Courts In Louisiana. A Michigan company hired a medical device salesperson for its Louisiana territory. He signed a non-competition agreement, which stated that Michigan law would apply to any agreement enforcement or disputes. The salesperson quit and promptly started servicing the same customers on behalf of a competitor. The company sued to enforce the non-compete agreement. The employee and his new employer defended by claiming (1) all sales and customers were and always had been in Louisiana. There was no Michigan connection – except for where the pay and commission came from and the product was manufactured. (2) Louisiana law strongly disfavors non-compete agreements, and it should be applied since the suit and all customers were there. The Louisiana-based Federal court disagreed and applied Michigan law. Louisiana's interest in protecting one employee was less than the company's interest, and Michigan's interest, in protecting its businesses from unfair competition (*Stone Surgical LLC v. Stryker Corp.* (6th Cir., 2017). Choice of law is a hotly contested issue in contract cases with multi-state parties. The employer seeks to use the state law most favorable to it. The employee seeks to use a court in a state most favorable to employees, and get it to substitute its law. Some states, such as Wisconsin and California, have ben prone to ignore the contract choice of law and substitute in their own laws in deciding a non-compete case.

Fair Labor Standards Act

Company Tried To Avoid Overtime Pay By Using "Travel Reimbursement" Checks. Fuel shipment inspectors were often called in on their scheduled days off to measure and sample fuel containers on cargo ships. Instead of being paid hours and overtime for the work, they received a separate check for "travel reimbursement." The pay record still reflected that they had taken a day off. Six employees sued for overtime pay (which triggered an audit and potential three-year back OT pay for all inspectors). The evidence showed that the payments were really for work – not travel. The reimbursements had no relationship to the actual miles. Employees were told by management that the payments were meant to be "under the table" wages, and were directed to claim mileage they did not drive in order to get the reimbursements up to a straight time pay rate, but not to an OT rate. *Taylor v. American Spec LLC* (D.C. TX, 2017).

Discrimination

Age

Color Blind Was Not A Disability But Discharge For Colorblindness Was Age Discrimination. A 60-year old security officer failed the "Ishinhara" color test. He was discharged due to the supposed importance of distinguishing color in a security position. He sued claiming disability and age discrimination. The court dismissed the disability claim, finding that a "color vision deficiency" did not substantially limit the ability to see or work enough to be a disability. But the age claim was very strong. Younger security officers who failed the Ishinhara test were routinely allowed to retest using a "far less stringent" exam, and continued to be employed. *Vannattan v. Vendt Tech-SGI* (D. Kan., 2017).

Disability

Employee Was Disabled BUT Repeated Disciplinary Infractions May Mean "Not A Qualified Person," BUT Performance Evaluations Create A Problem. A cashier claimed she was fired due to failure to accommodate her Crohn's disease. The company's defense was that the employee was fired due to numerous disciplines for unprofessional conduct. The court found that bad behavior or general poor performance, unrelated to the disability, could render the plaintiff "not a qualified person with a disability." There is no duty to accommodate or retain a person "not qualified" to do the job. But the employee then produced three positive performance evaluations. She had never received a poor review, and, so, must be "qualified" to do the job. The court found that this confused the situation. How could a person with good evaluations not be qualified and entitled to accommodation? Was the discipline a pretext for disability discrimination? So, summary judgment was denied, and the case will go to a jury to decide. *Pittman v. Columbus Rural King, Inc.* (S.D. Ind., 2017). This case is a good warning about performance evaluations. *If you do not do them well it may be better not to do them at all.* Performance evaluations are too often poorly designed, done without supervisory training, and in a rush to meet an annual deadline. Far too often fired employees can then show they had "satisfactory" or even "excellent" evaluations – and win cases. A person who received serious discipline should never receive a "meets standards" evaluation. Performance evaluations can be very useful if done correctly. However, if they are not done with care, planning, training and sufficient time and effort they become harmful loose cannons in litigation. [For more information, request the article, or supervisory seminar, Validity in Performance Evaluations, Boardman & Clark LLP.]

Religion

Don't Debate Theology – Just Go Ahead And Accommodate. A coal miner stated that the company's new hand scan clock-in system violated his Christian beliefs. He could not use it because it "carried the Mark of the Beast," which would imprint on his hand. He asked for another form of clocking in. The company felt that the employee was "mistaken." It offered its own "alternative interpretation of the Bible" and how a left hand clock-in could not be harmful since the Mark of the Beast seems to be associated with the right hand. The company had the system provider write the employee "assurances" that the scanner did "not place a Mark." The employee continued to cite his sincerely held belief and cite his own sincere view of the Book of Revelations. The company refused to budge, claiming they had made the "left hand accommodation." The employee refused to clock-in, had to resign, and filed a religious discrimination complaint. The EEOC sued on his behalf and won $576,000 in lost wages, compensatory damages, plus attorneys' fees. The court ruled that it is not the company's role "to question the correctness of an employee's beliefs or the plausibility of the employee's religious understanding." Title VII protects sincere religious beliefs and interpretations, regardless of whether they make sense, or seem implausible or bizarre to the employer or others. The employer's role is to see if a belief can be reasonably accommodated. Another thing that sank the company's case was the evidence that it had accommodated miners with hand injuries and other hand conditions, which made it difficult to use the new scanner. It had set up a finger punch key pad code-in system for them – at the same time it was arguing with and refusing the other miner's request. The accommodation was already in place for those with disabilities. *EEOC v. Consol Energy, Inc.* (4th Cir., 2017).

Fired For Objecting To Supervisor's Proselytizing – CEO Made No Effort To Investigate. A non-Mormon agricultural tractor driver was subject to ongoing religious proselytizing by his Mormon supervisor; both verbal and being given religious literature and questioned about his "progress" in reading the Mormon Bible. He had excellent performance, and compliments on his work, and a promotion. He finally went to the company president/CEO to complain. The president allegedly told him to listen to his supervisor and threatened him with discipline if he did not. Then the supervisor learned of the complaint and promptly fired the employee due to "poor communication." In the ensuing Title VII and state EEO case the evidence showed that the supervisor had always described the employee as "a good performer with a great attitude," thus making the discharge seem pretextual. The CEO testified that he fully understood the employee was

complaining about religious harassment, but he then personally "jumped to a conclusion" there was no discrimination, so did not do any investigation. Thus, he failed to put forth the required effort to seriously follow up on complaints of discrimination. *Magden v. Easterday Farms* (E.D. Wash., 2017). This is another example of management substituting its own opinions and conclusions rather than seriously listening to an employee's religious concerns. It is also an example of the danger of not taking a serious look into the harassment concerns raised by employees, as is required by the EEO laws; whether you personally "believe" the complaint or not (see next case).

Sex

Quick Action Wins Case. In *EEOC v. Auto Zone, Inc.* (6th Cir., 2017), the court dismissed a case alleging sexual harassment by an employee's lead worker. When the employee made an internal complaint about "lewd and obscene" behavior, sexual comments and overt touching, Human Resources promptly came to the facility, interviewed witnesses, and transferred the lead worker pending the outcome. It then fired the lead worker. The employee continued to work for the company but filed an EEOC complaint and the EEOC brought suit on her behalf. The court found the company had taken the required prompt and serious look at the situation and took prompt corrective action. It met its legal duty of care and therefore had no liability.

Labor Arbitration

Officer Uncuffed Drunken Detainee and Challenged Him To A Fist Fight. A police officer was investigating a crime scene when a drunken passerby began making offensive, profane comments and loudly criticizing the officer. The officer made several attempts to calm the man, redirect him, and get him to go home. Then the drunken man threatened to tramp around the crime scene and contaminate it, and moved to do so. The officer arrested him, applied handcuffs and placed the man in the squad car. The man continued his profane insults and then added insults about the police department and the officer's family. At this point the officer lost his calm, pulled the drunken man out of the car, removed the handcuffs and challenged the arrestee to a fist fight! The man backed down and refused to fight and was again confined and taken in. The department viewed this as unprofessional conduct and was action "bringing discredit upon the department" and recommended termination. Thje recommendation was based in part on the fact that the officer also had a prior Last Chance Warning for performance. An arbitrator agreed that the conduct was unprofessional and warranted serious discipline. However, the prior Last Chance Warning could not be used as an enhancer. It was seven years old. The officer had exemplary performance since then. It was too stale to consider. The arbitrator ruled that a 45-day suspension without pay was appropriate discipline. In *Re City of San Antonio and San Antonio Department Government* (2017).