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Recent Developments in Labor & Employment Law

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EEOC Rules That Sexual Orientation Discrimination Is Sex Discrimination

- Ruling issued July 2015
- First time EEOC has held that sexual orientation discrimination = sex discrimination under Title VII
- Stereotypical traits not necessary.
- Mirrors U.S. Attorney General's position.
- Courts may follow or not
- Shows us where Federal Government is going.
- Will negatively impact federal contractors required to report "for cause" determinations.

DOL Interpretation “Clarifies” Independent Contractor Qualifications

- Issued July 15, 2015
- “Most workers are employees under FLSA’s broad definition.”
- Stresses “economic realities” test over “right to control” test
  1. The extent to which the work performed is an integral part of the employer’s business;
  2. The degree of control exercised or retained by the employer;
  3. The extent of the relative investments of the employer and the worker;
  4. The permanency of the relationship;
  5. Whether the work performed requires special skills and initiative; and
  6. The worker’s opportunity for profit or loss depending on his or her managerial skill.
- This is a qualitative rather than quantitative analysis (not a checklist).
- To do:
  - Re-evaluate independent contractor agreements
  - Preferably contract with an entity rather than a person
  - Evaluate objective reality of the relationship
  - Convert to employee if necessary
  - Pay for results, not time spent.
  - Provide little material & supplies

- July 2015 = FedEx settles California misclassification class action for $228mm. (Faces similar suits in 15 other states)
- July 2015 = California Labor Commission that Uber misclassified its drivers.

Federal Court Holds Employer May Be Liable for Actions of An Anonymous Harasser

- July 2015 – (Fourth Circuit) *Pryor v. United Airlines*
- Black flight attendant found racially offensive/threatening drawing in her company mailbox (Noose, “N-word”, advocating killing of minorities)
- Pryor complained to supervisor
- Supervisor did not investigate because Pryor could not I.D. any suspects and video camera did not cover mailbox area.
- Pryor sued and won.
- “even if a diligent response may not have been successful, a company is not thereby excused for its lack of diligence,” and here a jury could conclude that United’s response to the complaint was neither prompt nor reasonably calculated to end the harassment.

SCOTUS Rules Same-Sex Marriages Are Legal

- *Obergefell v. Hodges* – SCOTUS held:
  1. Equal Protection Clause of Fourteenth Amendment requires all states to perform same-sex marriages
  2. States must recognize same-sex marriages legally performed in other states
- Does not require recognition of civil unions.
- Ancillary impacts:
  1. FMLA – Same-sex marriage = spouse
  2. ADA – Same-sex marriage = "closely associated with."
  3. Title VII – none known yet.
- To do:
  1. Handbook
  2. Insurance Policy

Employer's Duty to Accommodate Religious Beliefs

EEOC v. Abercrombie and Fitch Stores, Inc. (U.S. June 2015)

- A&F has a "Look Policy" requiring all employees to dress in clothing similar to what it sells and prohibits "black clothing" and "caps."
- Plaintiff was qualified and applied for a position, but was not hired because she wore a head scarf which was inconsistent with the Look Policy. Plaintiff filed a charge with the EEOC, which sued A&F for failing to accommodate plaintiff's religious beliefs.

- Plaintiff never told A&F she wore scarf for religious reasons. BUT interviewer admitted that she believed it was due to religious beliefs.
- SCOTUS held that an applicant/employee need not specifically tell employer of need for religious accommodation.
- "An applicant need only show that his need for an accommodation was a motivating factor in the employer's decision."
- If employer's motive was to avoid making the accommodation, the fact it did not know that the accommodation was due to religion is irrelevant.
- Use caution

U.S. S. Ct. Rules that Employers Must Treat Pregnancy as a Disability-sort of (U.S. S. Ct. March 25, 2015)

Young v. UPS

- UPS light duty policy applied to work-related conditions only-per CBA.
- Young had 20 lb. lifting restriction due to pregnancy, requested light duty.
- UPS refused per policy and Young took extended unpaid leave.

- Young sued arguing that UPS's policy violated PDA:

  “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes… as other persons not so affected but similar in their ability or inability to work…”

- Young argued that PDA required UPS to provide pregnant employees with same accommodations it provided to non-pregnant employees.
- UPS argued a facially pregnancy-neutral policy complied with PDA.

U.S. S. Ct. in essence rejected both.

- PDA does not grant pregnant employees "most favored nation" status.
- *McDonnell Douglas* test should be applied to determine if pregnant employee has suffered discrimination.

Employee's burden:

- Employer's reason was a pretext.
  - **Employee may show "pretext" by showing employer's policies impose a "significant burden" on pregnant employees and employer's justification for policy is not "sufficiently strong."**
  - **Employee may establish "significant burden" by showing that employer accommodates a large percentage of non-pregnant employees but refuses to accommodate a large percentage of pregnant employees.**

June 25, 2015 EEOC Issued Revised Enforcement Guidance on Pregnancy Discrimination and Related Issues

- Employees should read the guidance. (43 pages)
- http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

Department of Labor Publishes Proposed Rule, Increasing Minimum Salary for White-Collar Exemption From $23,660 to $50,440

- Sixty day comment period
- Estimates 10,000,000 to 15,000,000 exempt employees will lose exemption
- Not clear what impact bonuses will have
- No proposed changes to “duties” test

NLRB Opinion June 5, 2015

- Scope of protected activity
- Picketer –
  - “Hey, did you bring enough KFC for everyone,”
  - “Hey, anybody smell that? I smell fried chicken and watermelon.”
- Directed to African-American workers
  - Employer fired picketer per anti-race harassment policy.
  - Picketer filed ULP Charge and won.
  - Holding of board:
    - Picketer was engaging in protected activity.
    - No violence or threats of violence.
    - Employee reinstated with back pay

OSHA – Best Practices Guide to Restroom Access for Transgender Workers

- Issued June 1, 2015
- Employers should allow the employee to determine which restroom provides the “most appropriate and safest option for him-or-herself.”

Beware of Inadvertent GINA Violations (4th Circuit, 2015)

- Atlas Logistics employee repeatedly defecated in warehouse.
- Atlas required warehouse employees to provide cheek (mouth) swabs for DNA matching.
- Guilty employee and one other sued Atlas for improperly obtaining genetic information.
- Employees won over $2,000,000.00, over $1,750,000.00 of which was punitive damages.

NLRB SAYS EMPLOYEES CAN CALL YOU A "MOTHER FUC*ER"

- *In re Pier Sixty, LLC* (March 31, 2015 NLRB upheld ALJ ruling)
  - Unhappy employee posted on Facebook:

    "Bob is such a NASTY MOTHER FUC*ER don't know how to talk to people!!!!! Fuc* his mother and his entire fuc*ing family!!!!What a LOSER!!!! Vote YES for the UNION." [Note: the employee wasn't as constrained to include the asterisk.]

- Pier Sixty fired employee
- The NLRB sided with the employee:

  [W]hile distasteful, the Respondent tolerated the widespread use of profanity in the workplace, including the words “fuc*” and “motherfuc*er.” Considered in this setting, Perez’ use of those words in his Facebook post would not cause him to lose the protection of the Act.

Retaliation: The Gift that Keeps on Giving

Sharp v. Aker Plant Services Group (6th Circ. Jan. 2015)

- Sharp RIF'd:
- **Supervisor explained "The company decided to keep younger employees who would stay with the company longer."**
- Sharp sued for age discrimination.

- While suit was pending (15 months after filing suite), PEO referred Sharp to Aker for temp position.
- Aker rejected Sharp, claiming he was fired for violation of company safety policies. (Not RIF'd)
- Sharp filed second suit—for retaliation.

- Aker argued that 15 months was too long to create presumption of retaliation.
- Trial court and 6th Cir. Rejected Aker's argument. The refusal to place from the PEO was Aker's first opportunity to retaliate.
- Sharp won both suits.

Leave as Reasonable Accommodation

- The EEOC is considering developing an Enforcement Guidance on extended leave as a reasonable accommodation, which should be issued in 2015. (*Refer to EEOC Officials, Attorneys Discuss Priorities Under the Agency's Strategic Enforcement Plan*, Daily Lad. Rep. (BNA) No. 11, at C-1 (Jan. 16, 2015)).

EEOC Sends Notice of Proposed Rulemaking on ADA and Wellness Programs to OMB for Clearance.

- The EEOC voted on March 20 to send a Notice of Proposed Rulemaking on the interplay of ADA and the ACA with respect to voluntary wellness programs to the White House Office of Management and Budget for clearance.

- This proposed rule would amend the regulations implementing the equal employment provisions of the ADA to address the interaction between Title I of the ADA and financial incentives as part of wellness programs offered through group health plans.

- Program is “voluntary” so long as “reward” or “penalty” does not exceed 30% of the cost of health insurance for a single worker.

- The submission of the NPRM to OMB represents the start of the regulatory process. After OMB approval, the proposed rule will be published in the Federal Register for a 60-day public notice and comment period. The NPRM cannot be made public prior to its publication in the Federal Register.

Religious Garb and Grooming in the Work Place

- On March 6, 2014, the EEOC issued new guidance. (http://eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm). The guidance essentially provides that employers who have employees with sincerely held religious beliefs that require the employees to wear religious clothing or maintain certain grooming habits must provide those employees with accommodations for the beliefs unless it would pose an undue hardship to do so.

- The guidance further provides that it is not a reasonable accommodation to require the employee to cover their religious garb, markings or article of faith or to require the employee to refrain from the employee's religious grooming habits, absent undue hardship for the employer.
- Workplace safety, security and health concerns may qualify as reasons to refuse to grant the accommodation.

FMLA

Regular mail is **not adequate** to prove delivery of FMLA notices

Luyan v. Corinthian Colleges (3rd Cir., Dec. 2013) and *Gardner v. Detroit Entertainment, LLC.* (E. Dist. Mich., Oct. 2014)

- The Third Circuit found that the mail box rule does not create a conclusive presumption of receipt and that the plaintiff's testimony that she never received the FMLA notice was sufficient to overcome that inference.
- The Court of Appeal found fault with the employer's use of regular mail rather than certified mail or other form of transmission that would have created a receipt or tracking number. (The Third Circuit covers Delaware, New Jersey and Pennsylvania).

Fair Pay and Safe Workplace Executive Order (July 31, 2014)

- Applies to federal contracts of more than $500,000
- The Order becomes effective in 2016. https://www.whitehouse.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces

Proposed Regulations Published May 27, 2015

- Contracting parties must identify "violations" of fourteen (14) Federal laws to Contracting Officer.
  - Violation = administrative merits determinations, arbitrations awards, civil judgments.
- Administrative merits determinations = OSHA citation, OFCCP show cause notice, NLRB Regional Director complaint, EEOC for cause determination.
- Contracting party must collect similar data related to sub-contractors.
- Suspension or debarment are possible results.
- Regulations will not be final until 2016, but employees should begin to prepare now.

Executive Order 11246 as amended

Executive Order 11246

- Prohibits Federal Contractors from discriminating "against any employee or applicant because of race, color, religion, sex, or national origin."
- Amended by President Obama's executive order on July 21, 2014, to add sexual orientation and gender identity to the list of protected categories.

Executive Orders 11478 and 13087 as amended

- Prohibits discrimination against federal employees on the basis of race, color, religion, sex, national origin, disability, and age.
- Further Amended by President Obama's executive order to include gender identity.

U.S. Attorney General's Position

Memorandum on Transgender Claims Under Title VII issued December 15, 2014:

- Federal government's approach has "evolved over time"
- Title VII can "go beyond the principal evil to cover reasonably comparable evils"*
- Sex Discrimination includes <u>gender identity</u> and <u>transition to another sex.</u>

*Citing *Oncale v. Sundowner Offshore Servs.,* 523 U.S. 75, 79 (1998).

NLRB General Counsel Issues Report on Handbook Rules (March 2015)

http://www.employmentandlaborinsider.com/wp-content/uploads/sites/328/2015/03/GC-15_04-Report-of-the-General-Counsel-Concerning-Employer-Rules.pdf

Report attempts to explain several years of Board decisions and positions.

OVERVIEW OF THE GENERAL COUNSEL'S POSITION

- Rules that an employee would "reasonably" construe a rule as prohibiting any form of protected concerted activity are unlawful. <u>The fact that the policy did not actually restrict anyone is irrelevant.</u>

WHAT WASN'T IN THE REPORT

- The GC does not meaningfully address the effect of "savings language" such as, *"Nothing in this handbook should be construed to prohibit any form of Section 7 activity under the National Labor Relations Act and nothing herein is intended to prevent, deter, or interfere with employees in the exercise of any employee rights under the National Labor Relations Act."*

Questions?