EMPLOYMENT LAW UPDATE

July 2012

by

Bob Gregg
rgregg@boardmanclark.com

Boardman & Clark Law Firm
www.boardmanclark.com

LEGISLATIVE AND ADMINISTRATIVE ACTION

Department of Labor abandons rules on farm child labor. DOL has announced its intent to cease development of new rules limiting the agricultural work which can be done by those under age 16. The rules would have limited the "parental permission exemption" and was intended to reduce agricultural injuries among minors. The proposed rules were met with such an onslaught of opposition from the agriculture and farm industries that the effort has been abandoned. DOL states that it will work with the Department of Agriculture to create an educational program on farm safety for minors instead.

Pregnant Workers Fairness Act introduced. Democrats in the U.S. Congress have introduced HR-5647 which would require reasonable accommodations of pregnant employees. The current Title VII pregnancy provisions prohibit discrimination, treating pregnant employees differently or stereotypically. The proposed law would require employers to additionally provide accommodations to enable employees to continue working if the pregnancy created restrictions or difficulties in job performance. This is one of several "pro-women" bills being introduced by Democrats during the pre-election period to ostensibly force Republicans to have to make a "pro" or "anti" women's rights vote.

Congress Gives and Takes Away

Protecting Older Workers Against Discrimination Act proposed. In a bipartisan effort, Senator Kohl (D-Wis) and Senator Grassley (R-Ia) are co-sponsoring the POWAD Act (Bill S-2189). The senators find that the long-term unemployment rate for those 55+ who
are actively seeking employment is more than double the rate of other Americans. The proposed bill would alter the tougher burden of proof imposed by the Supreme Court in *Gross v. FBL Financial Services* (2009). The Act would bring age discrimination cases in line with the Title VII proof standards and make it easier for plaintiffs to show discrimination.

**House to kill funding for EEOC's age discrimination rules.** Republicans have voted to prohibit any funding for the EEOC to implement its new ADEA rules. The rules are designed to conform to the U.S. Supreme Court's *Smith v. Jackson* and *Meacham v. Knowls Atomic Power* decisions which placed a burden on employers to prove "reasonable factors other than age" (RFOA). The Representatives expressed the view that the rules will create more expense in the EEOC process for businesses. Of course, whether the EEOC uses the rules or not, the Supreme Court decisions do not change. The ultimate burden of proof is the same. So, defunding the rules simply delays the issue; the employer will still have to follow the RFOA standard when litigation is commenced.

**LITIGATION**

The Legal Update includes new developments and matters of interest throughout the United States. Be aware that our various federal circuit courts reach somewhat differing conclusions. So a federal court decision in another part of the country, and especially a different state's court decision, may not quite be "the law" in your jurisdiction. Some courts lead the way; others lag behind. The Legal Update lets you see the overall trends and compare them with your jurisdiction. Wisconsin is part of the Federal Seventh Circuit (Wisconsin, Illinois and Indiana).

**U.S. Supreme Court - Affordable Care Act**

*National Federation of Independent Business, et al v. Sebelius.* The U.S. Supreme Court ruled on challenges to the constitutionality of the Affordable Care Act. It generally upheld the law, finding the individual mandate was constitutional. The requirement that states would lose all Medicaid funding for failure to comply with the law was limited. For a copy of the opinion, see [http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf](http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf). The opinion leaves the law intact. Employers should monitor guidance and ensure that their health plans comply with the Affordable Care Act and the requirements which continue to phase in over the next years. This decision keeps the Affordable Care Act and its eventual outcome center stage in election year politics. Election ads and distortions are already appearing. [For more accurate information, request the Boardman & Clark Employment Law Newsletter by Attorney Cindy Van Bogaert or contact Attorney Van Bogaert at evanbogaert@boardmanclark.com.]


Family and Medical Leave Act

After-the-fact remedy and liability. A truck driver applied for FMLA but was denied due to being five hours short of the required annual hours to qualify. He was terminated while on medical leave due to not having FMLA. Prior to this, the driver had received a suspension, which he grieved. The suspension grievance proceeded, even though he was terminated. The arbitrator ruled that the suspension had been improper and restored the suspension days and pay. Then the arbitrator ruled that those days should count as hours worked. So now the driver was eligible for FMLA, retroactive to the time of his original request. Therefore, his termination was also without proper foundation. He was awarded all FMLA remedies of reinstatement, full back pay, etc. A grievance over a small suspension turned into a major liability. Sysco Food Services-Chicago & Teamsters Local 710 (2012).

Fair Labor Standards Act

Mall sweep for child labor: first of a new enforcement program. Usually the enforcement agencies investigate a specific business. Recently, though, the Department of Labor targeted the entire Jersey Garden Shopping Mall for a child labor investigation. It came in and inspected every store. It assessed several thousands of dollars in penalties. The biggest violations were for allowing 16 and 17 year olds to operate the mall trash compactor. This is a prohibited, unsafe activity for non-adult employees. In announcing the findings, DOL stated that it will be conducting other "concentrated enforcement" efforts focused on shopping malls and other child labor intensive venues around the country.

Walmart pays $5.3 million to settle misclassification claim. The Department of Labor determined that over 4,500 vision center managers and asset protection coordinators were misclassified as salaried exempt when their duties were actually hourly non-exempt. The "managers" did not meet the management criteria, and the asset protection employees did not meet the administrative exemption criteria. The settlement included $4.83 million in back overtime wage payments to the employees and $463,815 in penalties paid to the DOL (out-of-court settlement).

Discrimination

Conviction Records

Turn-a-bout is fair play: EEOC sues employer, then must defend its own practices. In EEOC v. Kaplan Higher Education (N.D., Ohio), the U.S. Equal Opportunity Employment Commission sued an employer alleging its practice of credit checking certain job applicants had a discriminatory impact on certain minority applicants. Then
in the discovery process, Kaplan demanded that EEOC produce all information on its own credit check practices, all positions it checked and the standards it uses to determine which jobs warrant a check. The EEOC objected, claiming that what the federal government does is irrelevant to the case at hand. The court ruled for Kaplan. It found that the EEOC's own internal standards are directly relevant as to what is and is not a valid, non-discriminatory reason for credit checks on applicants. If the EEOC itself credit checks job applicants, it should not be able to hold companies to any higher standard than it applies to itself. The defendant company is entitled to have information to show whether or not its practices are any better or worse than the EEOC's.

**Disability**

**Long-term light duty should not have been changed.** A Walgreen's beauty department employee's spinal stenosis musculoskeletal disorder limited her ability to lift over five pounds, and limited pulling, bending or stooping. Other employees chipped in to help when this work was necessary. For over seven years the employee received excellent evaluations for her overall performance. Then a new manager arrived. Upon learning of her limitations, he stated that she was "obviously disabled" and would be a liability. He took her off the schedule for not being able to do the essential physical duties of the job, thus forcing her into retirement. In the ensuing ADA case, Walgreen's presented evidence that lifting, bending, stooping, etc., were essential job functions. However, in this particular situation, the evidence showed that years of accommodation had enabled excellent function without hardship on others or on the overall operation. So, Walgreen's "essential functions" arguments were not compelling when measured against a long-term successful accommodation. *Barlow v. Walgreen's* (MD, Fla., 2012).

**Race/Disability**

**Race discrimination leads to disability case.** An African American Electronic Tech was allegedly subjected to a period of racial harassment, discriminatory treatment and then retaliation after he complained. As a result, he developed a stress and anxiety disorder. His doctor advised that he could not return to work in the environment which produced the disorder. The Technician requested a transfer to an open position in another location but was denied. He sued under the ADA for failure to accommodate. The court found sufficient evidence for a disability discrimination case. Transfer to an open position is a well recognized form of reasonable accommodation, and the employee could have accomplished the functions of his position at another location "where he could escape the racially offensive-environment" and not exacerbate his stress and anxiety disorder. *Lucas v. City of Philadelphia* (E.D. Pa., 2012). This case is a good illustration of how bullying or discriminatory harassment can create additional areas of liability. This case was not about the original racial discrimination; instead it was about the resulting disability. In
fact, the bullying or harassment constructive discharge case may be harder to prove, while an ADA case has a lower standard required for the plaintiff.

Religion

**Perceived as Jewish, plus harassing supervisors change story when caught on video.** In *Cowher v. Carson & Roberts* (N.J. Superior Ct., 2012), a non-Jewish truck driver's religious harassment case, because he was perceived to be Jewish, was found valid. He alleged a pattern of highly offensive anti-Semitic remarks, overt and highly profane slurs directed at him and anti-Jewish jeers in general. He alleged that he protested to higher management and informed the harassers he was not Jewish. They did not believe him, and the company took no action to stop the harassment; in fact, it got worse. The two supervisors involved adamantly denied any such behavior. They claimed the employee was fabricating the issue. However, they had to change their stories when the trial discovery process revealed video/audio tapes of them engaging in the behavior. They had to admit they were untruthful in their denials -- they had engaged in the anti-Semitic behaviors. [For more information on religious discrimination or "perceived as" discrimination, see the article Religion in the Workplace at BoardmanClark.com Reading Room.]

**Muslim convert wins $5 million -- state gets a windfall -- company had no one in charge.** An employee converted to Islam. Thereafter, she was subjected to mockery of her head covering, negative emails on Islam, repeated Bible quotes and Christian literature being forced upon her by those upset by her conversion, and a supervisor pulling the scarf from her head in meetings. Her complaints to HR, located out of state, went unanswered. She sued in state court and won $5.12 million. Only $120,000 was in actual pay damages. $5 million was in punitive damages. The court faulted the company because, "There was really no one in charge of the rule-breaking harassers. The company has human resource people located in different cities, and an investigator in Texas, and it was just a recipe for disaster." Under Missouri law, one-half of all punitive damages goes to the state treasury. The employer's failure to act may balance the state's budget. *Bashir v. S.W. Bell Telephone Co.* (Mo. Cir. Ct., 2012).

Sex

**Unequal severance can be sex discrimination.** An HR manager's position was eliminated after 25 years of service. She was offered a three-month pay and benefits Severance and Release. She objected that male managers received "sweetheart" severance deals with much larger payouts. When her severance was not increased, she rejected the offer, was laid off without separation pay, and then sued under Title VII. The court found that though severance is not a guaranteed form of compensation, it does qualify as an employment action under Title VII. A disparity in separation packages
based on gender can be actionable discrimination, and the plaintiff can sue for the greater amounts given to the laid off male managers, plus her attorney fees and other compensatory damages allowed under Title VII (similar actions could be maintained under any of the other discrimination laws). *Gerner v. County of Chesterfield* (4th Cir., 2012).

**Sexual Orientation**

**Gay worker fired for minor email violation can sue state of Kentucky.** A gay state employee and a heterosexual employee both violated their department's Internet usage policy; he in a minor way; she in a major way. He was fired; she was not. The gay employee engaged in email referring to his gay partner, used some mild homosexual slang, and exchanged in what the court found to be friendly banter. The content was mild, non-overt, about being gay. The heterosexual employee circulated a series of email photos entitled "Pampered Chef" which showed nude male models holding kitchen utensils. Management was aware of both infractions, but chose to launch a full scale investigation of only the gay man's violations. The court found this "inexplicable" since the heterosexual woman's emails "easily surpassed in indecency" anything the fired employee had done. There was a clear *prima facie* case of discrimination. *Stroder v. Commonwealth of Kentucky Cabinet for Health and Family Services* (W.D. Ky., 2012).

**National Labor Relations Act - Arbitration**

**Not just joking -- banter in front of residents warranted discharge.** Two aides at a nursing facility turned a discussion of a work issue into banter. They had a several-minute exchange with humorously caustic or sharp remarks in the presence of the unit's residents. One remark included profanity and an obscenity. The obscene aide was fired. The arbitrator upheld the discharge. Obscene, offensive language violated the facility's handbook policies, and such language in the presence of the residents was a serious disregard for their welfare. *Communicare Health Services & SEIU #199, Health Care & Social Services Union* (2012).

**"Thinking about" is not enough.** A medical technician was under stress due to her role as a union steward. She met with a supervisor, stated that she had rough-drafted a resignation letter and was thinking about quitting to escape the stress. She wanted to discuss her situation and thoughts. The supervisor kept the letter. The next day the technician was informed that her resignation was accepted, and she was promptly ushered out of the workplace, against her objections. An arbitrator ordered reinstatement and pay. An undated, unsigned draft letter does not constitute a resignation. *U. Mass. Memorial Medical Center & United Food and Commercial Workers #1445* (2012).
RESPECTFUL WORKPLACE PROGRAM
(Preventing Harassment, Bullying, Violence and the Manager's Duty of Care)

Friday, July 27, 2012

Location: US Bank Plaza Conference Center, First Floor
One S. Pinckney Street, Madison, Wisconsin 53703

Hours of Program: 8:15 a.m. - 12:00 noon
Registration/Coffee/Refreshments: 7:45 a.m.

Preventing Liability for Harassment, Bullying and Violence. This program focuses on harassment, bullying and safe place issues in the workplace. It covers a manager’s Duty of Care, how to recognize and address harassment, intimidation and threat situations.

- Learn the legal definition of respectful workplace under the Equal Opportunity Harassment and Safe Place Laws.
- Gain an understanding of how the laws apply to practical, everyday situations.
- Understand each person’s rights and obligations under the law.
- Understand (especially for supervisors) the steps to take upon being informed of the existence of a hostile environment in the workplace.
- Understand how to resolve situations before they harm people and generate legal action.

This program brings understanding of employees’ responsibilities toward each other and covers how to effectively address and resolve issues. It may be used for 3.5 hours SHRM recertification or CLE credits.

About the Presenter: Bob Gregg, a partner in Boardman & Clark of Madison, Wisconsin, has been professionally involved in employment relations and civil rights work for over 30 years. He litigates employment cases. Bob has designed anti-harassment policies and procedures for numerous public and private employers and academic institutions. Bob is a member of the Society for Human Resource Management, the National Speakers Association, and is a national faculty member of the American Association for Affirmative Action.

Cost: $70.00 per attendee, including materials

To Register: Mail this form with your registration fee, made payable to Boardman & Clark, to: Jan Murray, Boardman & Clark, P.O. Box 927, Madison, WI 53701-0927

Name/Affiliation: __________________________
Phone/Address: ___________________________

If you have any questions, contact Jan at 608-283-1747 or jmurray@boardmanclark.com.