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1. Compensation Practices of Government Contractors Coming Under Increased Scrutiny by the OFCCP

The U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") has ratcheted up its scrutiny of government contractors' pay practices. Citing a 2011 Bureau of Labor Statistics report that indicates that women are paid approximately 80 cents for every dollar paid to men and that greater disparity exists for African-American women (70 cents) and Latina women (60 cents), the OFCCP, in its 2012 budget submitted to Congress (on Feb. 13, 2012), asserted that "[n]arrowing the persistent pay gap between men and women is a key priority for OFCCP" According to OFCCP Director Patricia Shui, pay disparities based on sex and race remain a "very serious problem" that will not "go away unless addressed." The increased emphasis on examining pay disparity is reflected in the percentage of OFCCP compliance reviews that result in formal conciliation agreements ("CAs"). In 2011, 20 percent of CAs involved pay discrimination, up from 14 percent in 2012 and 4 percent in 2009. According to Pamela Coukos, a senior OFCCP policy advisor, "we are shifting our focus on and allocating resources towards compensation enforcement." This stepped up scrutiny of contractors' pay practices comes on the heels of OFCCP's plans to issue new interpretive standards and guidelines for compensation discrimination in 2012 and to expand the compensation data required to be submitted by contractors during a compliance review.

2. Vow to Hire Heroes Act Reinstates Hostile Work Environment Claims for Veterans

In March 2011, the U.S. Court of Appeals for the Fifth Circuit (Louisiana, Mississippi, and Texas), in a ruling of first impression at the appellate court level, held in *Carder v. Continental Airlines Inc.*, 636 F. 3d 172 (5th Cir. 2011), that, unlike Title VII, the Age Discrimination in Employment Act, or the Americans With Disabilities Act ("ADA"), the Uniformed Services Employment and Reemployment Rights Act ("USERRA") did not provide a cause of action for a hostile work environment. The Fifth Circuit noted that Title VII and the ADA both prohibit discrimination in "terms, conditions, or privileges of employment," but USERRA was less expansive, prohibiting discrimination based on "initial employment, reemployment, retention in employment, promotion, or any benefit of employment"

Also, the Fifth Circuit held that “Congress’s choice to not include the phrase ‘terms, conditions, or privileges of employment’ or similar wording in USERRA weighs in favor of the conclusion that USERRA was not intended to provide for a hostile work environment claim” And, perhaps as a call to action, the Fifth Circuit added that “[i]f Congress has intended to create an actionable right to challenge harassment on the basis of military service under USERRA, Congress could easily have expressed that intent by using the phrase, ‘terms, conditions or privileges of employment’”

That call to action was apparently heard loud and clear. Less than eight months later, on November 21, 2011, President Obama signed the Vow to Hire Heroes Act of 2011. The fix was simple. USERRA now clearly and emphatically prohibits discrimination based on “terms, conditions, and privileges of employment.”

What does this mean for employers? A cause of action now exists for hostile work environment claims based on military/veteran status. What should employers do? To the extent that anti-harassment policies concerning sex, race, age, disability, etc., are in place, amend those policies to add military/veteran status. And if training programs are undertaken, address the prohibition against discrimination/harassment based on military/veteran status. Finally, make sure that any complaints of discrimination/harassment based on military/veteran status are taken seriously and investigated promptly and fairly.

3. The Potential for Individual Liability Means Supervisors Have a Big Stake in FMLA Compliance

The U.S. Court of Appeals for the Third Circuit recently ruled that individual supervisors, whether publicly or privately employed, may be held personally liable under the Family and Medical Leave Act (“FMLA”). See *Haybarger v. Lawrence County Adult Probation and Parole*, 667 F. 3d 408 (3d Cir. 2012).

In reaching its decision, the Third Circuit relied on the FMLA’s definition of “employer,” which includes “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.” See 29 U.S.C. § 2611(4)(A)(ii)(I). The Third Circuit also cited the Department of Labor’s implementing FMLA regulations, which explicitly provide that “individuals such as corporate officers ‘acting in the interest of an employer’ are individually liable for any violations of the requirements of FMLA.” See 29 C.F.R. § 825.104(d). Finally, the Third Circuit relied on decisions interpreting the Fair Labor Standards Act (“FLSA”), reasoning that those decisions offer the best guidance for construing the term “employer” as used in the FMLA, since the definition of “employer” in both statutes is materially identical.

The Third Circuit discussed that an individual is subject to FMLA liability when he or she exercises supervisory authority over the complaining employee and was responsible, in whole or part, for the alleged violation while acting in the employer’s interest. In analyzing an individual supervisor’s control over the employee under the FLSA and the FMLA, most courts examine the totality of the circumstances as to whether the individual supervisor carried out the functions of an employer with respect to the employee. Relevant factors include whether the individual supervisor: (1) had the power to hire and fire the employee; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. The Third Circuit noted, however, that any relevant evidence should be considered and no one of the four factors standing alone is dispositive.

4. GINA and Social Media

The Genetic Information Non-Discrimination Act (“GINA”) prohibits employers, with 15 or more employees, from discriminating against employees and applicants on the basis of their genetic information. GINA also prohibits employers from requesting or obtaining employee and applicant genetic information. See 42 U.S.C. § 2000ff *et seq.* According to the EEOC’s regulations implementing GINA, a “request” includes conducting an Internet search on an individual in a way that is likely to result in obtaining genetic information. See 29 C.F.R. § 1635.8(a).

However, the general prohibition against an employer acquiring genetic information does not apply to the “inadvertent” acquisition of that information. The EEOC regulations clarify that the inadvertent acquisition exception applies not only to interactions within the workplace, but also to interactions that take place in the “virtual” world – i.e., through a social media platform. The regulations specifically state that “[t]he exception for inadvertent acquisition of genetic information” applies in situations where:

A manager, supervisor, union representative, or employment agency representative inadvertently learns genetic information from a social media platform which he or she was given permission to access by the creator of the profile at issue (e.g., a supervisor and employee are connected on a social networking site and the employee provides family medical history on his page).

See 29 C.F.R. § 1635.8 (b)(1)(ii)(D).

Additionally, employers that unintentionally acquire genetic information from commercially and publicly available sources, such as the Internet, will not violate GINA. See 29 C.F.R. § 1635.8 (b)(4). That exception, however, does not apply to genetic information acquired from medical databases, court records, restricted scientific research databases, or sources where an employer is likely to obtain genetic information, such as websites and online discussion groups that discuss genetic testing and genetic information. See 29 C.F.R. § 1635.8 (b)(4)(i)(iii)&(iv). Further, the exception does not apply to genetic information acquired through sources with limited access, such as social networking sites and other media sources that require permission for access from a specific individual or where access is conditioned on membership in a particular group, unless the employer can show that access is routinely granted to all who request it. See 29 C.F.R. § 1635.8 (b)(4)(ii).

In light of GINA’s requirements, employers should consider taking steps to reduce the risk of inadvertently acquiring genetic information about employees or applicants. Those steps may include training supervisors about GINA’s requirements and what constitutes protected genetic information and on how to avoid acquiring that information. Additionally, supervisors should be advised not to ask follow-up questions after any inadvertent discovery of genetic information and to refrain from taking any action based on the inadvertently discovered information.

5. Issues Arising When Communicating (or Not) with Employees on FMLA Leave

The following two cases illustrate the quandary facing employers when maintaining (or not maintaining) contact with employees who are out on FMLA leave.

In *Terwilliger v. Howard Memorial Hospital*, 770 F. Supp. 2d 980 (W.D. Ark. Jan. 27, 2011), the court initially ruled that a jury should decide Terwilliger’s FMLA interference claim. Terwilliger was employed as a housekeeper at Howard Memorial Hospital (“Hospital”). After taking 11 weeks of FMLA leave, she was released by her doctor to return to work. Terwilliger’s supervisor contacted her weekly during the leave to inquire when she was going to return to work. During one phone call, Terwilliger asked her supervisor if her job was in jeopardy. In response, the supervisor told her that she should return to work as soon as possible. Nearly one month after returning to work, Terwilliger was terminated based on suspicion of theft. Terwilliger sued the Hospital, alleging FMLA retaliatory discharge and interference claims. The court granted summary judgment dismissing the FMLA retaliation claim but initially denied the Hospital’s motion with respect to the FMLA interference claim.

Terwilliger’s FMLA interference claim was based, in part, on her allegation that she was denied a full 12 weeks of FMLA leave because she felt pressured by her supervisor to return to work after only 11 weeks. The Hospital argued that, because Terwilliger came back to work after her doctor released her to return, she was not entitled to another week of FMLA leave, and, therefore, she could not claim that she was denied an FMLA benefit. The court, at first, rejected that argument, reasoning that any act taken by an employer to chill (i.e., deter or discourage) an employee from exercising his or her rights under the FMLA constitutes interference with the employee’s exercise of FMLA rights. Accordingly, the court denied, in part, the Hospital’s motion for summary judgment, ruling that a jury should decide if the Hospital’s conduct (i.e., weekly calls from Terwilliger’s supervisor along with a statement that

Terwilliger should “return to work as soon as possible”) amounted to unlawful FMLA interference.

Nearly 10 months later, however, upon the Hospital’s renewal of its summary judgment motion, the court reversed itself and dismissed Terwilliger’s FMLA interference claim. *See Terwilliger v. Howard Memorial Hosp.*, No. 09–CV–4055, 2011 WL 5827201 (W.D. Ark. Nov. 18, 2011). The court reasoned that, because her physician released her to return to work, Terwilliger did not have a serious health condition that rendered her unable to perform her job; thus, she was not entitled to an additional week of FMLA leave. Since Terwilliger could not prove that the Hospital denied her an FMLA benefit to which she was entitled, she also could not prove that the Hospital interfered with her FMLA rights.

In *Hofferica v. St. Mary Medical Center*, No. 10-CV-6026, 2011 WL 4374555 (E.D. Pa. Sept. 20, 2011), the court denied, in part, a motion to dismiss by St. Mary Medical Center (“Medical Center”), ruling that Hofferica stated a claim for FMLA retaliation. Hofferica’s FMLA retaliation claim was based, in part, on her allegation that her supervisor demonstrated animosity towards her for taking FMLA leave by refusing to return her calls. Specifically, Hofferica alleged that her supervisor did not return the calls that she or her husband made on November 4, 2008, to explain that Hofferica’s physician might postpone her return to work date (then scheduled for November 6, 2008), and again on November 6, to request an extended leave of absence until November 13. Despite the alleged calls, however, Hofferica received a letter from the Medical Center, dated November 7, 2008, informing her that she had been terminated because her FMLA leave expired and she had not returned to work.

In denying the Medical Center’s motion to dismiss the FMLA retaliation claim, the court noted that “while an employer’s failure to return an employee’s phone calls does not constitute overt antagonism, it certainly suggests an antagonistic attitude toward the employee, particularly where – as here – such refusal began after the employee initiated FMLA leave, and continued despite regular communications from the employee.” The court explained that if Hofferica could prove her allegations, then a reasonable fact-finder could conclude that the supervisor’s refusal to return her calls demonstrates sufficient antagonism to establish a *prima facie* case for FMLA retaliation.

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