

2016 Legal Opinions Which Impact Human Resources

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OVERVIEW – EEO 2016 YEAR IN REVIEW

- Disability Discrimination
- Sex Discrimination
- Age Discrimination
- Religious Discrimination
- Retaliation
- Harassment
- Miscellaneous
 - EEOC Plan

DISABILITY DISCRIMINATION

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DISABILITY DISCRIMINATION GENERAL

Flynn v Distinctive Home Care, Inc, 812 F3d 422 (CA 5, 2016)

Where a physician was a subcontractor providing medical services to an Air Force Base, the court of appeals concluded that the physician's disability discrimination lawsuit brought under the Rehabilitation Act was allowed to proceed because Section 504 of the Act allows employment discrimination suits by independent contractors

Rodriguez v Eli Lilly & Co, 820 F3d 759 (CA 5, 2016)

Summary judgment for the employer on the plaintiff's claim of ADA disability discrimination was upheld because the remarks were not direct evidence

DISABILITY DISCRIMINATION — ACCOMMODATION/INTERACTIVE PROCESS

Frazier-White v Gee, 818 F3d 1249 (CA 11, 2016)

Where an employee's proposed accommodations were (1) indefinite light-duty assignment or (2) reassignment to an unspecified position, the court of appeals held that the employer was not required to create a permanent light-duty position for the employee

DISABILITY DISCRIMINATION — ACCOMMODATION/INTERACTIVE PROCESS

Kowitz v Trinity Health, 839 F3d 742 (CA 8, 2016)

Where a hospital employee was placed on medical restrictions that did not permit her to perform the physical examination necessary to maintain her CPR life support certification, and was subsequently terminated for not being CPR certified, summary disposition for the employer was reversed

DISABILITY DISCRIMINATION — SUBSTANTIAL LIMITATION DEFINITION OF “DISABILITY”

Neely v Benchmark Family Servs, 640 Fed Appx 429 (CA 6, 2016)

Summary judgment properly granted because the plaintiff was unable to establish that he suffered from a physical or mental impairment that caused his sleeping problems

Oehmke v Medtronic, Inc, 2016 US App LEXIS 23031 (CA 8, 2016)

The plaintiff presented sufficient evidence that her cancer and its lingering effects on her health and her suppressed immune system rendered her disabled under the ADA. The court agreed that “cancer is an impairment, [and] the functioning of one’s immune system is a major life activity.” The court also held that “an impairment that is . . . in remission, . . . is a disability if it would substantially limit a major life activity when active.”

DISABILITY DISCRIMINATION — SUBSTANTIAL LIMITATION CONTINUED

Makeda-Phillips v Ill Sec’y of State, 642 Fed Appx 616 (CA 7, 2016)

Summary judgment properly granted because the plaintiff presented no expert medical evidence that any of her major life activities were substantially limited by her high blood pressure

Morriss v BNSF Railway Co, 817 F3d 1104 (CA 8, 2016)

Summary judgment properly granted because Plaintiff, who suffered from morbid obesity, provided no medical evidence to prove that his obesity was the result of a physical impairment or an actual disability under the ADA

Wilson v Iron Tiger Logistics, Inc, 628 Fed Appx 832 (CA 3, 2015)

Summary judgment properly granted because the plaintiff, a truck driver, failed to present sufficient evidence that any of his major life activities were substantially limited by his frostbite

AGE DISCRIMINATION

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AGE DISCRIMINATION

Villarreal v RJ Reynolds Tobacco Co, 839 F3d 958 (CA 11, 2016)

Where an employer targeted job applicants “2-3 years out of college,” a 49 year old applicant’s claim of disparate impact was dismissed because the ADEA only provides for disparate impact claims by employees. It does not cover mere job applicants.

SEX DISCRIMINATION

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SEX DISCRIMINATION

Chavez v Credit Nation Auto Sales, 641 Fed Appx 883 (CA 11, 2016)

The district court's grant of summary judgment in favor of the defendant-employer was reversed in part because the plaintiff proffered sufficient evidence to permit a rational fact finder to infer her employer's discriminatory intent

Jackson v VHS Detroit Receiving Hosp, Inc, 814 F3d 769 (CA 6, 2016)

Summary judgment reversed because a reasonable jury could infer that the female plaintiff was terminated because of her sex

SEX DISCRIMINATION (CONT'D)

Burns v Johnson, 829 F3d 1 (CA 1, 2016)

“The idea that discrimination consists only of blatantly sexist acts and remarks was long ago rejected by the U.S. Supreme Court. Stereotyping, cognitive bias, and certain other more subtle cognitive phenomena which can skew perceptions and judgments also fall within the ambit of Title VII of the Civil Rights Act of 1964’s prohibition on sex discrimination.”

“The ultimate question is whether the employee has been treated disparately ‘because of sex,’ and this is so regardless of whether the employer consciously intended to base the adverse employment action on sex, or simply did so because of unthinking stereotypes or bias”

HARASSMENT

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SEX HARASSMENT – PROMPT ACTION

Smith v Rock-Tenn Servs, 813 F3d 298 (CA 6, 2016)

Where a male co-worker pinched and/or slapped a male employee's buttocks and grinded his pelvis into the employee's backside, the jury's conclusion that such conduct was not mere horseplay was not so unreasonable as to entitle the defendant employer to judgment as a matter of law. Further, the fact that the co-worker only engaged in such conduct with male employees was direct comparative evidence sufficient to establish an inference of discrimination based on sex.

Finally, defendant did not take prompt and remedial action where defendant's total inaction for ten days, where defendant knew that the male-employee had touched plaintiff, and had told the male-employee that further complaints would result in termination, was unreasonable.

SEX HARASSMENT (CONT'D)

Nichols v Tri-Nat'l Logistics, Inc, 809 F3d 981 (CA 8, 2016)

Where a female truck driver was subjected to a male co-driver's sexual advances while on the road and during a mandatory 34-hour rest period at the co-driver's home, the district court erred by not considering the conduct that occurred during the rest period. The rest period was mandatory and the law did not require the plaintiff to choose between performing her job and removing herself from the harassment.

Further, because the employer waited seven (7) days to arrange for a different co-driver for the plaintiff, there was a genuine issue of material fact as to whether the employer took appropriate remedial action.

SEX HARASSMENT (CONT'D)

Xiaoyan Tang v Citizens Bank, NA, 821 F3d 206 (CA 1, 2016)

Where the female plaintiff's male supervisor had made numerous boorish comments to her that were not overtly sexual, the district court's grant of summary judgment for the employer was overturned because the context of the statements gave them a sexual tone

HOSTILE WORK ENVIRONMENT - SEVERE AND PERVASIVE

Cole v Bd of Trs, 838 F3d 888 (CA 7, 2016)

Summary judgment properly granted to the employer because the African-American plaintiff failed to present sufficient evidence to establish a racially hostile work environment

RELIGIOUS DISCRIMINATION

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RELIGIOUS DISCRIMINATION

Guessous v Fairview Prop Invs, LLC, 828 F3d 208 (CA 4, 2016)

Numerous disparaging remarks regarding religion, race and national origin support claim of hostile work environment

Marrero-Méndez v Calixto-Rodríguez, 830 F3d 38 (CA 1, 2016)

Comment made during mandatory prayer that “he doesn’t believe in what we believe in” may give rise to discrimination

RELIGIOUS DISCRIMINATION—ACCOMMODATIONS

Summers v Whitis, 2016 U.S. Dist. LEXIS 173222 (SD Ind. 2016)

A deputy county clerk refused to process a same-sex couple's paperwork seeking a marriage license. The deputy clerk requested a religious accommodation, but was terminated for insubordination. The former deputy clerk's subsequent religious discrimination lawsuit was dismissed. The court held that the former deputy clerk's religious convictions did not excuse her from performing the ministerial duties of her job, including processing marriage licenses.

RACE DISCRIMINATION

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RACE/NATIONAL ORIGIN DISCRIMINATION

Henry v Abbott Labs, 651 Fed Appx 494 (CA 6, 2016)

African-American customer relations employee has a triable race discrimination claim because the plaintiff had presented sufficient evidence that every other employee with performance scores similar to the plaintiff's during past 10 years had been promoted except the plaintiff. The employer argued that the plaintiff was not qualified for the promotion because she failed the required assessment test.

RACE/NATIONAL ORIGIN DISCRIMINATION (CONT'D)

Bagwe v Sedgwick Claims Mgmt Servs, 811 F3d 866 (CA 7, 2016)

The employer did not wrongfully terminate the former employee, born in India and of Indian descent, based on her race or national origin in violation of Title VII, despite the employer's admission that the employee's termination had nothing to do with her job performance

REVERSE RACE/NATIONAL ORIGIN DISCRIMINATION

Nelson v Ball Corp, 656 Fed Appx 131 (CA 6, 2016)

Summary judgment properly granted in favor of the defendant-employer on the plaintiff's reverse discrimination claim under state law because the white plaintiff failed to present sufficient background circumstances to establish that the employer was the unusual employer that discriminated against the majority

REVERSE RACE/NATIONAL ORIGIN DISCRIMINATION (CONT'D)

Garceau v City of Flint, 2016 U.S. Dist. LEXIS 117599 (ED MI, 2016)

In a reverse discrimination case by fourteen white officers, who believed they were passed over for promotion in favor of other black officers, the district court properly granted summary judgment in favor of the defendant-city because the plaintiffs' circumstantial evidence that their supervisor allowed African-American police officers to call the white plaintiffs the "N***** Beating Crew," despite a Department of Justice investigation that cleared the plaintiffs from any alleged wrongdoing, was insufficient to establish racial bias.

PREGNANCY DISCRIMINATION

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PREGNANCY DISCRIMINATION

Young v United Parcel Service, 135 S Ct 1338 (2015)

A plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act, which requires employers to treat “women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work,” may make out a prima facie case by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others similar in their ability or inability to work.

PREGNANCY DISCRIMINATION (CONT'D)

Neidigh v Select Specialty Hosp, 2016 US App LEXIS 21421 (CA 3, 2016)

“To establish pretext in a pregnancy discrimination case, the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer’s articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.”

“The employee must show not merely that the employer’s proffered reason was wrong, but that it was so plainly wrong that it cannot have been the employer’s real reason.”

PREGNANCY DISCRIMINATION (CONT'D)

Huffman v Speedway LLC, 621 Fed Appx 792 (CA 6, 2016)

Summary judgment properly granted to the defendant-employer on the plaintiff's pregnancy-discrimination claim brought under state law because the plaintiff failed to make the required showing of discriminatory motive

RETALIATION

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RETALIATION—*TEMPORAL PROXIMITY INSUFFICIENT*

Fairchild v All Am Check Cashing, Inc, 815 F.3d 959 (CA 5, 2016)

Plaintiff's evidence of temporal proximity between her employer learning of employee's pregnancy and the challenged employment action is insufficient, without more, to prove that employer's proffered reasons for its action was pretextual. Judgement granted to the employer.

Hutton v Maynard, 812 F3d 679 (CA 8, 2016)

Discharge was not pretext for retaliation, even though the discharge occurred one day after protected activity. Temporal proximity alone is insufficient to establish pretext.

MISCELLANEOUS TOPICS

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EEOC STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017 – 2021

EEOC's substantive area priorities for Fiscal Years 2017-2021 are:

- Eliminating barriers in recruitment and hiring
- Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination
- Addressing selected emerging and developing issues
- Ensuring equal pay protections for all workers
- Preserving access to the legal system
- Preventing systemic harassment

EEOC STRATEGIC ENFORCEMENT PLAN SPECIFICS

- Focus on Gender-based Pay Discrimination

The Commission extends its equal pay priority to explicitly reach all workers in recognition of the pay disparities that persist based on race, ethnicity, and for individuals with disabilities and other protected groups

- Focus on Immigrant, Migrant and Other Vulnerable Workers

The Commission will create district offices to assist in the identification of vulnerable workers for the development/strengthening of significant partnerships with these groups

- Focus on Employer Retaliatory Policies

The Commission refines this priority to focus on significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights, as well as to focus on retaliatory policies

THANK YOU



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Bar Admissions

Michigan State and Federal Courts

Maria Fracassa Dwyer is a Member in the firm's Labor and Employment Group. She is also the Practice Leader of the Food, Beverage & Hospitality team. Maria is a trusted advisor and counselor to senior management across a wide range of industries including public and private employers. Maria represents clients across the entire spectrum of employment and labor law, and her expertise includes: Title VII, ADEA, ADA, FMLA, FLSA, and state law harassment, discrimination, whistleblower and retaliation claims, breach of contract, wrongful discharge, defamation, non-compete, trade secret cases, class action litigation and complex business litigation, trying discharge and contract interpretation arbitrations, drafting high level executive employment and severance agreements and employment contracts, advising and training clients on personnel policies, documentation and supervisory relations.

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Mikyia S. Aaron is an associate with the Labor & Employment Practice Group in Clark Hill's Detroit Office. Mikyia counsels employers, management, and human resource personnel regarding labor and employment best practices, including: discrimination, wage and hour, and terminations and grievances. Prior to joining Clark Hill, Mikyia gained substantial experience with labor and employment relations while assisting plaintiffs' counsel with various collective-bargaining employment matters.

Mikyia has been the recipient of several awards and scholarships, including the 2015 Outstanding Woman Law Student Award and scholarship presented by the Women Lawyers Association of Michigan Foundation. She has also been featured as a "Young Progressive Leader on the Rise" by Progressive Leaders Magazine (Metro Detroit edition).

DISCLAIMER

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