

Labor & Employment Law Update

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EEOC ADOPTS 2013-2016 Strategic Enforcement Plan

On December 17, 2012, the Equal Employment Opportunity Commission (“EEOC”) adopted a Strategic Enforcement Plan (SEP) that (1) establishes its priorities for the next four fiscal years and (2) integrates all components of the EEOC’s private, public, and federal sector enforcement. The SEP was adopted after a public comment period had expired on a previously published draft plan. According to the EEOC, the purpose of the SEP is to “focus and coordinate the EEOC’s programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.” In so doing, the EEOC identified six national priorities for the 2013-2016 fiscal years:

- 1. Eliminating Barriers in Recruitment and Hiring.** The EEOC will target class-based recruitment and hiring practices which discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities.
- 2. Protecting Immigrant, Migrant and Other Vulnerable Workers.** The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.
- 3. Addressing Emerging and Developing Issues.** The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations.
- 4. Enforcing Equal Pay Laws.** The EEOC will target compensation systems and practices that discriminate based on

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gender.

5. Preserving Access to the Legal System.

The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts.

6. Preventing Harassment Through Systemic Enforcement and Targeted Outreach.

The EEOC will pursue systemic investigations and litigation and conduct a targeted outreach campaign to deter harassment in the workplace.

The EEOC intends to allocate the necessary budgetary resources for fiscal years 2014 - 2017 to align with the SEP.

Indeed, in light of the aggressive enforcement agendas of the EEOC and other federal agencies, a thorough audit of all employment practices is highly recommended.

The national priorities of the SEP outlined above will be complemented by district and federal sector priorities, which will take into consideration those issues which are most salient to each area. The EEOC has directed its General Counsel and the Director of the Office of Field Programs, each District Office Director and Regional

Attorney, in consultation with Field, Local, and Area Office Directors in their district, to develop a District Complement Plan to the SEP by March 29, 2013. At a minimum, those plans are required to: 1) identify how the office will implement the SEP priorities; 2) identify local enforcement priorities, including areas for systemic investigation and litigation and strategies for addressing them; and (3) identify strategies for collaborative legal and enforcement efforts.

What does this mean for employers?

Employers should review their policies to assure compliance with the myriad of employment laws related to their employment practices. For instance, considering that the EEOC recently issued guidance on the use of criminal background information, it is likely that the EEOC will focus its attention on an employer's use of background checks in the hiring process. Specifically, if a company decides to use a prior conviction to disqualify an applicant from employment, it must ensure that it applies such practice consistently, and that the reason for the disqualification is job-related and consistent with business necessity.

Employers should also note the EEOC's emphasis on enforcing equal pay laws. For pay claims, the EEOC does not necessarily need an individualized complaint from an employee to initiate an investigation, but can file directed charges or commissioner charges as a means of enforcement. Because of this, the agency may not focus on a specific employee's

pay, but rather may look at the pay practices for the entire workforce. Employers should audit their compensation systems on at least an annual basis to assure that any potential areas of concern are addressed before they fall under the scrutiny of the EEOC. We encourage clients to consult with counsel to conduct such audits so that they are arguably protected by the attorney-client privilege.

Indeed, in light of the aggressive enforcement agendas of the EEOC and other federal agencies, a thorough audit of all employment practices is highly recommended. Such proactive efforts will go far to minimize the consequences should the EEOC or another federal agency come knocking. Please contact your counsel with questions about conducting an employment practices audit. ■

David J. Kramer
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Fourth Circuit Opinion Reaffirms Protections Afforded by Pregnancy Discrimination Act, but Raises Questions About Pregnancy and the ADAAA

On January 9, 2013, the Fourth Circuit Court of Appeals issued its decision in *Young v. UPS* in which it considered whether UPS's "facially neutral" light duty policy violated the Pregnancy Discrimination Act (PDA).

Despite arguments from Young and the ACLU (which submitted an amicus brief in support of Young) that UPS's facially neutral policy was both "direct and indirect" evidence of pregnancy discrimination, the Fourth Circuit concluded that UPS's policy of not offering light duty to pregnant employees (while offering it to several other categories of employees) was lawful.

Young started working for UPS in 1999 and began driving a delivery truck in 2002. By 2006 and throughout the relevant time period, Young held a position as a part-time, early morning driver. Young took a leave of absence to try her third round of *in vitro* fertilization in July 2006. When she became pregnant, she sought to extend her leave. In September 2006, she left a note with her supervisor indicating that she could not lift more than twenty pounds for the first twenty weeks of her pregnancy and not more than ten pounds thereafter. Young's supervisor informed her that she could not return to work with a twenty-pound lifting

restriction because the essential functions of her job required her to lift up to seventy pounds. At that time, Young was not ready to return to work anyway.

In October 2006, Young's medical provider again opined in writing that Young should not lift more than twenty pounds. Young approached her supervisor with her medical provider's note and requested to return to work. In response, her supervisor explained four things: (1) UPS only offered light duty for those with on-the-job injuries, those accommodated under the ADA, and those who had lost DOT certification, but not for pregnancy; (2) Young did not qualify for short-term disability benefits because she had presented no note stating she could not work at all; (3) Young had exhausted her leave under the Family and Medical Leave Act; and (4) Young could not continue working as a driver with a twenty-pound lifting restriction.

By November 2006, Young's FMLA leave had expired. She then went on an extended leave of absence, receiving no pay and eventually losing her medical coverage by the end of that year. Young gave birth on April 29, 2007 and returned to work for UPS at some point thereafter.

Young sued UPS in October 2008 alleging, among other things, that UPS discriminated against her on the basis of her sex in violation of Title VII and on the basis of disability in violation of the ADA. The trial court granted summary judgment in favor of UPS on all of Young's claims. Young appealed to the Fourth Circuit, specifically claiming that UPS discriminated against her

because she was pregnant and that it impermissibly regarded her as disabled under the ADA.

The heart of Young's appeal was that her supervisor had drawn inaccurate conclusions about her ability to work because he regarded her as disabled.

With regard to her ADA claim, the heart of Young's appeal was that her supervisor had drawn inaccurate conclusions about her ability to work because he regarded her as disabled. The Fourth Circuit wrote that "given the relatively manageable weight restriction – twenty pounds – and the short duration of the restriction, there is no evidence that Young's pregnancy or her attendant lifting limitation constituted a disability within the meaning of the ADA." The Fourth Circuit conceded, however, that its analysis relied upon cases interpreting the pre-2008 ADA rather than the ADAAA because the relevant facts of Young's case occurred in 2007. The Fourth Circuit went on to acknowledge that the "ADAAA effectively overruled" the cases it relied upon to affirm the trial court's dismissal of Young's ADA claim, thus leaving open the question of whether the ADAAA would require UPS to accommodate pregnant women with temporary physical limitations. It is worth noting that both Young and the ACLU argued that the ADAAA would require UPS to offer such accommodations.

Young argued to the Fourth Circuit that UPS's policy of not

providing light duty for pregnant employees while providing it for others constituted direct evidence of pregnancy discrimination. Specifically, Young and the ACLU argued that the PDA required UPS to provide light duty for pregnant employees if it had a policy of providing light duty to any other class of employees suffering from temporary physical limitations. The Fourth Circuit noted that such an argument “posits that the PDA creates a cause of action . . . by compelling employers to grant pregnant employees a ‘most favored nation’ status with others based on their ability to work, regardless of whether such status was available to the universe – male and female – of non-pregnant employees.” In rejecting that interpretation of the PDA, the Fourth Circuit quoted the Seventh Circuit’s 1994 holding in *Troupe v. May Dep’t Stores, Co.*, wherein the court wrote: “The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars . . . require employers to offer maternity leave or take other steps to make it easier for pregnant woman to work. Employers can treat pregnant woman as badly as they treat similarly affected but non-pregnant employees” To hold otherwise, the Fourth Circuit concluded, would “imbue the PDA with a preferential treatment mandate that Congress neither intended nor enacted”

The Fourth Circuit’s decision reaffirms the protections afforded by the PDA, but certainly raises questions about how trial and appeals courts might decide future, similar cases under the ADAAA. ■

George E. Martin, III

Nebraska Supreme Court Upholds Award of Workers’ Compensation Permanent Disability Benefits to Illegal Immigrant

This month, the Nebraska Supreme Court ruled that an illegal immigrant was protected by the Nebraska Workers’ Compensation Act and therefore entitled to recover permanent disability benefits despite his illegal work status. *Moyera v. Quality Pork International*, 2013 Neb. LEXIS 2 (2013).

The plaintiff, Ricardo Moyera, moved to Nebraska from Mexico and purchased residency papers in order to obtain employment under a false name. He secured employment at a meat processing plant in March of 2007. In August of 2008, he suffered a workplace injury when a forklift ran over his right foot, breaking several bones. Moyera’s physician diagnosed him with “reflex sympathetic dystrophy,” a painful nerve disorder, and a gait derangement causing pain in his hips and lower back. Moyera’s physician prescribed him a narcotic pain medication and directed him to walk with a cane.

The employer placed Moyera in a temporary light duty janitorial position and allowed him to elevate his foot above the waist as needed. In May of 2010, the employer’s insurance carrier notified the employer that it intended to terminate Moyera’s temporary partial disability

benefits and commence paying permanent partial disability benefits. Shortly thereafter, the employer audited its employment files, determined that Moyera did not have proper immigration documents, and terminated his employment on May 28, 2010.

In August of 2010, Moyera’s physician concluded that Moyera had reached maximum medical improvement with a permanent 20% whole body impairment. He concluded that Moyera was incapable of performing anything but sedentary work. A rehabilitation consultant concluded that Moyera suffered a 100% loss of earning capacity due to his lack of transferrable skills to sedentary jobs in the Omaha labor market. Notably, Moyera did not speak English.

The Nebraska Workers’ Compensation Court also found that Moyera sustained a permanent total loss of earning power and awarded him future medical care for treatment of his injury. The court rejected the employer’s argument that Moyera was not entitled to the benefits because of his illegal residency status. The court reasoned that the Nebraska Workers’ Compensation Act defined “employee” to include “aliens” and did not distinguish between legal and illegal aliens. The review panel affirmed the court’s decision, and the employer appealed to the Nebraska Supreme Court.

In support of its appeal, the employer emphasized that Moyera had no plans to return to Mexico or become a legal resident of the United States. The employer argued that Moyera

had no earning capacity to lose because he had no legal right to be employed in the United States. In support of its argument, the employer cited a Nebraska Supreme Court case holding that an unauthorized worker was not eligible to receive vocational rehabilitation benefits because it conflicted with the Nebraska Workers' Compensation Act's purpose of returning workers to "suitable" employment. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005). The employer argued that Moyera's claim for permanent loss of earning power should also be barred – similar to a claim for vocational rehabilitation benefits – because the claim depended upon his ability to obtain lawful employment in the United States.

The Nebraska Supreme Court rejected the employer's argument. The Court reasoned that, while an award of disability benefits was similar to an award of vocational rehabilitation benefits, it differed in that it was not conditioned upon legal eligibility for employment with the same employer or a new employer. Rather, the Court reasoned that it was conditioned on only two issues: (1) the employee's inability to perform the work he was trained to perform, and (2) the absence of skills required to perform other available work within his physical limitations. The Court affirmed the lower court's ruling that Moyera's illegal resident status did not bar an award of permanent disability benefits.

The Nebraska Supreme Court also noted that its ruling was consistent with rulings of other state courts, which have reasoned

that excluding undocumented workers from receiving disability benefits creates a financial incentive for employers to continue hiring them. The Court also reasoned that allowing employers to escape liability for work-related injuries of undocumented employees would give such employers an unfair advantage over competitors who follow the law.

The Nebraska Supreme Court's ruling in *Moyera* reinforces a long-held policy of holding employers accountable for the costs of their employees' work-related injuries. Employers should continue to verify their employees' eligibility to work in the United States, but also be mindful of unauthorized workers' rights under the Nebraska Workers' Compensation Act. ■

Todd A. West

Dillard's to Pay \$2 Million to Settle Class Action Disability Discrimination Lawsuit by EEOC

Dillard's Inc., a national retail chain, agreed to pay \$2 million and commit to extensive, company-wide injunctive relief to settle a class action disability discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission ("EEOC"). At issue was Dillard's longstanding national policy and practice of requiring all employees to disclose personal and confidential medical information in order to be approved for sick leave. The settlement also resolves claims that Dillard's terminated a class of employees nationwide for taking sick leave beyond the maximum amount of time allowed, in violation of the Americans with Disabilities Act (ADA).

The EEOC originally filed its lawsuit in 2008 in the United States District Court for the Southern District of California, on behalf of Corina Scott, a former cosmetics counter employee at a Dillard's store in El Centro, California, and others who were required to disclose the exact nature of their medical conditions to be approved for sick leave since 2005.

While the class members had verifications from doctors to assure Dillard's that the absences were due to medical reasons, many did not feel comfortable disclosing the specifics of their conditions to the company.

According to the EEOC, Scott - who was absent from work for a mere four days - and others were then fired in retaliation for their refusal to provide details of their medical conditions, despite the fact that many of their own doctors advised them not to disclose specific medical information in accordance with the law.

The EEOC argued that the policy violated the ADA which prohibits employers from making inquiries into the disabilities of their employees unless such inquiries are job-related and necessary for the conduct of business. The District Court ruled that Dillard's medical disclosure policy was facially discriminatory under the ADA.

Additionally, the EEOC claimed that Dillard's enforced a maximum-leave policy limiting the amount of health-related leave an employee could take and, in practice, did not regularly engage in an interactive process with employees to determine if more leave was allowed under the ADA as an accommodation of the employee's disability.

Lessons Learned

Employers should evaluate their leave policies to assure they are not requiring more medical information than necessary from employees to justify the need for leave. Likewise, employers with strict, maximum leave policies should reassess those policies, as the EEOC has consistently argued they violate the law and that at the conclusion of a leave period, an employer cannot automatically terminate the employee (even upon the expiration of FMLA

leave). The employer must first engage in the interactive process to determine whether a reasonable accommodation is available which would enable the employee to return to work (which often involves some extension of the leave). ■

Kelli P. Lieurance

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Other State-Specific Developments:

Iowa: The Iowa Supreme Court recently held that an Iowa dentist who fired his dental assistant because he viewed her as a threat to his marriage did not unlawfully discriminate against her based on her gender. After the dentist's wife found out that the two had been texting each other about personal matters, she demanded that he terminate the assistant's employment. When explaining the reason he fired the dental assistant, the dentist told the assistant's husband that he feared he would try to have an affair with her if he did not fire her. The dental assistant alleged the dentist discriminated against her based on her gender. The dentist denied this allegation, noting that all of his assistants were women. Instead, he contended that her firing was due to the threat to his marriage. The Iowa Supreme Court found there was no gender discrimination, citing cases that state an employer does not engage in unlawful gender discrimination by discharging a female employee who is involved in a relationship

that has triggered personal jealousy.

Kansas: On January 4, 2013, the U.S. District Court for the District of Kansas ruled that the Employee Retirement Income Security Act ("ERISA") does not preempt an employee's state law claim that his employer breached an employment contract to provide disability insurance. The District Court, relying on previous Tenth Circuit holdings, noted that ERISA only preempts four categories of state laws because they "relate to" a benefit plan. Specifically, according to the Tenth Circuit, ERISA preempts state laws that regulate plan benefits and terms; those that create plan requirements for reporting, disclosure, funding, or vesting; those that provide benefit calculation rules; and those that prescribe misconduct remedies. The District Court concluded that the employee who asserted the breach of contract claim was not seeking plan benefits paid from the plan, but rather was "asking for promised benefits from [the defendant employer] which are alleged to be part of an employment contract." Therefore, the District Court found that enforcing the contract "should have no impact upon the plan in question or the goals of ERISA to ensure that plans are subject to uniform regulation." *McNeal v. Frontier AG Inc.*, No. 6:12-cv-01284-RDR-KGS (D. Kan., Dec. 4, 2013).

Minnesota: On January 3, the Minnesota Workers' Compensation Court of Appeals found in favor of the employer in a case in which an employee sued for benefits after injuring his Achilles tendon in an employer-

sponsored flag football game. The game was a fundraiser for the United Way, and the employer hoped to increase charitable contributions by allowing employees paid company time to play. A Minnesota statute provides: "Injuries incurred while participating in voluntary recreational programs sponsored by the employer, including . . . athletic events . . . do not arise out of and in the course of the employment even though the employer pays some or all of the cost of the program. This exclusion does not apply in the event that the injured employee was ordered or assigned by the employer to participate in the program." The Court found the employee's participation in the game was voluntary, and thus, the employee's claim failed.

Missouri: A former employee of a Missouri Licensing Office recently pled guilty to participating in a conspiracy to produce illegal drivers' licenses and identifications to undocumented aliens. According to the United States Attorneys' Office, undocumented immigrants traveled from across the country to obtain licenses from the employee. The employee admitted that he accepted stolen birth certificates from undocumented immigrants and issued licenses using the stolen identities. The illegal aliens, in turn, used the licenses to obtain employment and remain in the United States. According to the employee's plea agreement, he must pay a minimum judgment of \$125,000. He faces a maximum prison sentence of five years and a fine of up to \$250,000.

Montana: The Montana Federal District Court recently denied a Motion for Summary Judgment on an age and disability discrimination and wrongful discharge suit. The Court rejected the employer's argument that the Wrongful Discharge From Employment Act (WDEA) barred the discrimination claim based on prior precedent. However, it agreed that if the jury concluded that there had been discrimination, the plaintiff could not also recover for the wrongful discharge claim. Second, the Court denied summary judgment on both claims because the plaintiff presented evidence of pretext. Specifically, the employer alleged it had discharged him as part of a RIF because he was the only lab training coordinator and they did not need one. The plaintiff submitted evidence that only ten percent of his duties were training, he otherwise performed as a lab technician, and he never applied for the training position. Additionally, the employer did not apply its RIF criteria for lab technicians to him and had it done so, the plaintiff should have been retained. Moreover, while he was on a leave of absence, the employer hired a new lab technician.

Montana: Montana approved a referendum effective January 1, 2013 which precludes illegal aliens from employment with a state agency or receiving a professional license, professional permit, unemployment insurance, —or vocational rehabilitation among other rights and privileges. The Montana Immigrant Justice Alliance has filed suit to obtain an injunction, arguing that the law is unconstitutional in various respects, including being pre-

empted by federal law. The hearing is set for February 7, 2013.

North Dakota: The North Dakota Supreme Court recently held an oil company that retained an independent contractor to drill and complete its oil wells was not responsible for the death of the drilling company's employee, even though it owned the drilling and occupancy rights for the property where the death occurred. The Court highlighted the general rule that an employer is not liable for the torts of an independent contractor and found that the oil company did not retain sufficient control over the property to subject itself to liability. The Court reasoned that the oil company's requirement that the drilling company adhere to various "safety regulations" on the property failed to satisfy the amount of control necessary to impose liability, particularly where the parties agreed that the oil company "shall have no direction or control of [the independent contractor] or its employees and agents except in the results to be obtained."

South Dakota: In *Baker v. Masco Builder Cabinet Group* ("MBCG"), the South Dakota Supreme Court held that MBCG was contractually obligated to pay its former employees severance after it had sold its Rapid City plant to another company. MBCG had issued a memo to its Rapid City employees stating that the plant would be closing by the end of September 2009 and that any employees who stayed until the plant closed would receive severance. However, a few months later, before the plant closed, the plant was purchased by another company. MBCG then announced

that only employees who were not hired by the successor company would receive severance. The South Dakota Supreme Court held that the promise to pay severance was an enforceable contract, unaffected by the sale of the plant.

Wyoming: A proposed bill would prevent employers from firing workers because they disagree with the workers' political party affiliation. The measure will make it illegal for employers to fire, refuse to hire, or discriminate in other ways against employees because of their political affiliation. It also prohibits employers from retaliating against workers who file a discrimination complaint based on their political party affiliation. The legislation will be considered during the Jan. 8th session. ■

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