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The Express Lane

Retailer's Recap

Religious exceptions to appearance codes continue to bedevil retailers. In 2011, the U.S. Equal Employment Opportunity Commission sued Abercrombie & Fitch for allegedly refusing to allow a Muslim sales employee to wear a *hijab*, the head covering that Muslim women wear. Recently, another Muslim woman has sued Walt Disney Co. for the same thing, although Disney says that it made repeated attempts to accommodate the employee, all of which she rejected. Title VII of the Civil Rights Act of 1964 protects the right of employees to exercise their religious beliefs, as long as the beliefs are "religious" in nature and are sincerely held, and as long as allowing the exercise does not create an "undue hardship" for the employer. Appearance is a sensitive issue in retail environments, where customer perceptions are so important. In the Abercrombie case, the company is expected to argue that the *hijab* was not consistent with the "all-American look" that is Abercrombie's signature. Will that one fly? We'll see.

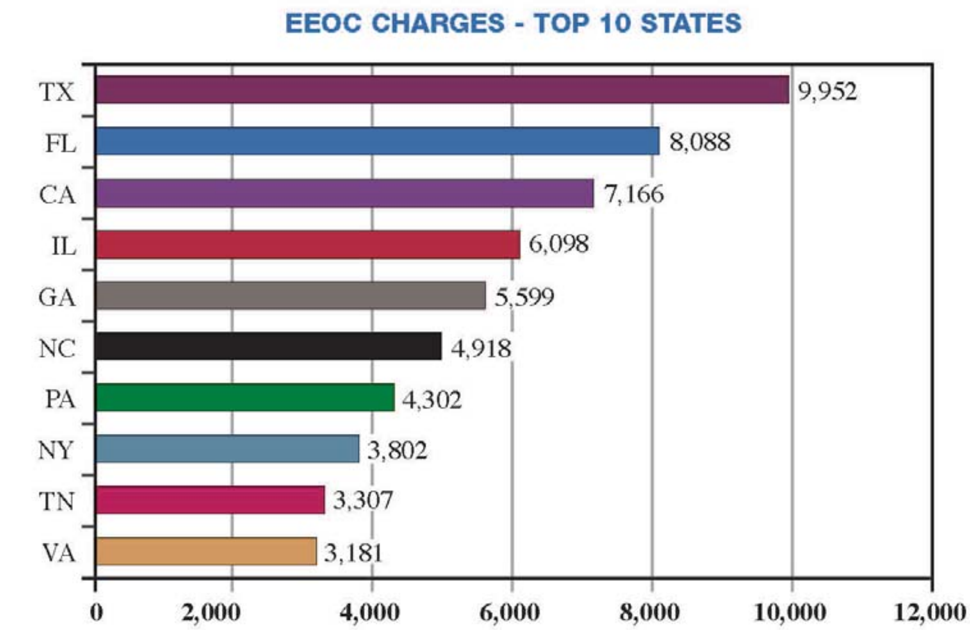
And speaking of appearance, court allows Starbucks to limit employees' pro-union "pieces of flair." The U.S. Court of Appeals for the Seventh Circuit (Illinois, Indiana, and Wisconsin) **refused to enforce** an order by the National Labor Relations Board, in essence upholding the upscale coffee chain's right to limit baristas from wearing more than one pro-union button at a time. The court noted that Starbucks had a comprehensive dress code designed to ensure that employees "present[ed] a clean, neat, and professional appearance appropriate of [sic] a retailer of specialty gourmet products" and also encouraged employees to wear multiple *Starbucks* pins as part of its employee-reward and product-promotion programs. "[T]he company is . . . entitled to avoid the distraction from its messages that a number of union buttons would risk."

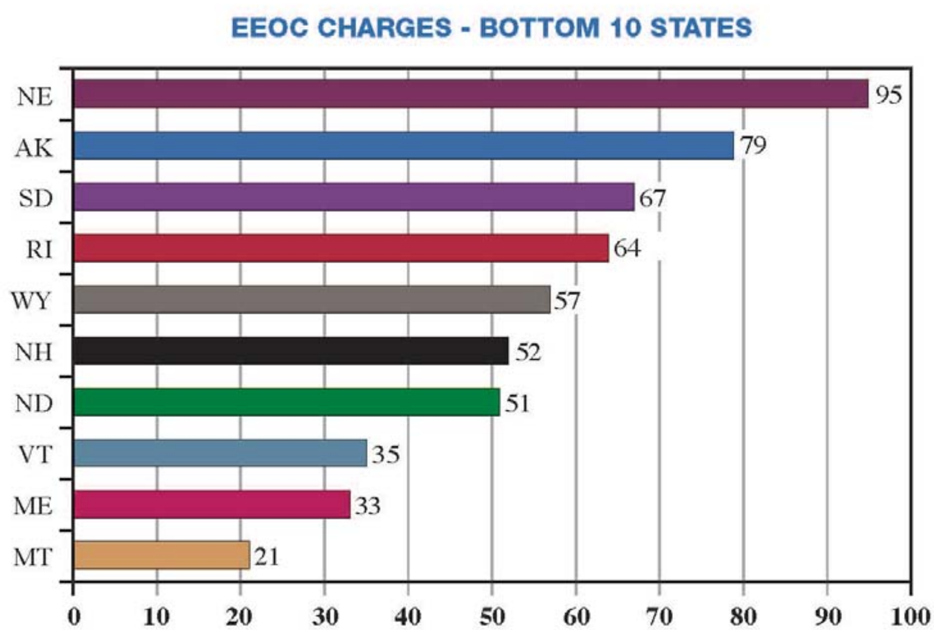
No private right of action on "lactation accommodation" claim, but retaliation claim survives. We've **previously reported** on the requirement in the Patient Protection and Affordable Care Act (also known as "Obamacare") that employers provide unpaid breaks and a private place for employees who are nursing mothers to express breast milk. A federal court in Iowa recently **dismissed** some claims of a convenience store employee who alleged that her employer failed to do so. The court said that the plaintiff had the right to file a complaint with the U.S. Department of Labor but not a lawsuit against the store chain. According to the plaintiff, she was told to express milk in a store office, which worked out fine until she learned that there was a surveillance camera in the office. When she told management about the camera, they refused to remove the camera but told her to cover the lens while she was expressing milk. She alleged that she continued to feel uncomfortable and that her milk production suffered as a result. Although the court dismissed her "accommodation" claim, it allowed her retaliation claim to go forward. (She alleged that she was constructively discharged after complaining.)

Fall 2012

Employer need not have airtight case to be able to fire for fraudulent FMLA leave, court says. In a decision that is great news for retail employers, the U.S. Court of Appeals for the Sixth Circuit, which hears appeals from federal courts in Kentucky, Michigan, Ohio, and Tennessee, has held that an employer should have a good-faith basis for believing that an employee committed FMLA fraud before terminating the employee, but the employer doesn't have to prove that the employee was "guilty beyond a reasonable doubt." In *Seeger v. Cincinnati Bell Telephone Co.*, an employee on FMLA leave for a herniated disc was reportedly seen partying down at the local Oktoberfest. The company investigated, determined he was guilty, and fired him. However, a few co-workers who had seen him at the festival said that he looked as if he was in pain. The plaintiff argued that the company should have given more weight to this evidence and should not have terminated his employment. The court disagreed, and affirmed summary judgment for the company based on its honest belief that the plaintiff had committed FMLA fraud.

Noteworthy Numbers





News & Analysis

What Are Retailers Doing About the New Health Law Requirements?

According to a Mercer survey of approximately 1,200 employers, retail and restaurant industry employers are more likely to drop their health plans or cut workers' hours when some requirements of the Patient Protection and Affordable Care Act take effect in 2014. The Act requires employers with 50 or more full-time employees, defined as those working at least 30 hours a week, to offer health insurance coverage. If a covered employer fails to offer health insurance and at least one of its employees turns to the government for coverage, the employer must pay a penalty.

The survey revealed that approximately 46 percent of restaurant and retail companies said they would have to change in some way once the law goes into effect. By comparison, only 16 percent of financial services companies said that they anticipated making similar changes. A representative of McDonald's Corp. determined that each of its restaurants would incur additional annual costs of between $10,000 and $30,000. A representative of Papa John's International estimated that the law's requirements would add 11 to 14 cents to the cost of a pizza.

The Mercer survey indicated that retail employers who do not currently offer health insurance coverage are more likely to consider cutting employees' hours to avoid the requirements of the law. The survey showed that approximately 9 percent of retail and hospital employers were considering dropping their existing health plans in 2014, compared with 6 percent of companies in other sectors. On the other hand, manufacturing employers said they were more likely to create new health plans or expand existing plans in response to the law.

EEOC Plows Ahead on Systemic Discrimination, Despite Slapdowns From the Courts

The EEOC has taken several hits in recent systemic discrimination cases. For instance, in ***EEOC v. Peoplemark, Inc.***, the EEOC was ordered to pay $750,000 in attorneys' fees in a systemic case alleging that the company had a blanket policy of rejecting applicants with criminal histories. After six years of investigation and litigation, the court found that 22 percent of the 286 applicants supposedly not hired by Peoplemark had, in fact, been hired. Finding that the EEOC's claims "were without foundation from the very beginning," a federal judge in the Western District of Michigan ordered the agency to pay attorneys' fees to Peoplemark. A great victory for the company, but $750,000 probably didn't begin to compensate it for the time and manpower spent in defending a case for six years.

In ***EEOC v. CRST Van Expedited, Inc.***, another systemic sex discrimination case, the EEOC was ordered to pay $4.5 million in attorneys' fees and expenses. A federal judge in the Northern District of Iowa found that the EEOC did not conduct a reasonable investigation, did not engage in good-faith conciliation efforts, and did not have a basis for bringing the claim. The U.S. Court of Appeals for the Eighth Circuit (Arkansas, the Dakotas, Iowa, Minnesota, Missouri, and Nebraska) has since reversed summary judgment on a handful of the claims and therefore **vacated** the award of attorneys' fees without prejudice because the company was no longer the prevailing party. "Without prejudice" means that the court can revisit the attorneys' fees issue when the case is completely concluded. In any event, the impact of the decision remains.

Still, the EEOC will not be dissuaded from pursuing systemic discrimination cases. In fact, the EEOC has unleashed a four-year plan that calls for increased pursuit of systemic cases and maximization of its resources to pursue those cases. The new plan requires the EEOC to maintain a baseline number of systemic cases that must be maintained in the litigation docket, and that number must increase by a certain percentage each year until 2016. With its new plan, the EEOC will give priority to its systemic cases when choosing cases to litigate. As a result, we anticipate that investigators will be looking for any opportunity to transform a single charge into "systemic" case.

Nobody "Likes" Employers Who Demand Non-Public Social Media Information

Although the true extent of the problem is not clear, there have been media reports of employers using Facebook and other social media to gather information about applicants and employees, and even requiring applicants to provide passwords. Not surprisingly, these news reports have not been well received by the public, by politicians, or even by Facebook, which has announced that it will work to stop employers from requesting applicants' account information. The U.S. House of Representatives is considering the Social Networking Online Protection Act, which would prohibit employers from requiring applicants to disclose user names, passwords, or other access to non-public online content. A number of states are also taking steps to prohibit employers from accessing employees' social media sites. The governors of Maryland and Illinois have signed into law bills that prohibit employers from requesting social media passwords from applicants and employees. Many other states, including New York, California, New Jersey, and Washington, are considering similar legislation.

Oh, for Cryin' Out Loud! Now "At-Will" Disclaimers Are Illegal?

An administrative law judge with the National Labor Relations Board has recently **concluded** that overly broad "employment-at-will" disclaimers contained in employee handbooks have the effect of chilling or interfering with employees' exercise of their rights to engage in protected concerted activity.

For decades, employers have included at-will disclaimers in their employee handbooks to avoid creating implied contracts of employment. The disclaimers state that employment is "at will" and may be terminated at any time and for any reason that does not violate the law or public policy.

But now an administrative law judge with the NLRB has held that an employer violated the National Labor Relations Act by maintaining an overly broad at-will disclaimer. The judge found the following language to be unlawful: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."

The judge concluded that this acknowledgement restricted employees' rights to engage in **protected concerted activity** by discouraging employees from concertedly advocating a change to their at-will status. The ALJ concluded that an employee would assume that his or her at-will status could not be changed even through collective bargaining, and, therefore, that the employee might be deterred from engaging in collective action by voting in a union or collective bargaining.

An ALJ decision is the first step in a long NLRB process, and it is possible that this decision will be reversed at some point in the future. However, to be safe, retail employers should review their employment-at-will policies, as well as similar disclaimers in employment applications and offer letters. As most retailers know by now, **the NLRB is scrutinizing employers' social media policies, as well**.

Court Enforces Private FLSA Settlement

For years, the seminal case on the non-enforceability of private settlements of claims under the Fair Labor Standards Act has been ***Lynn's Food Stores, Inc. v. United States***, which held that FLSA claims may not be settled without approval by a court or the U.S. Department of Labor. Of course, this also means that it can be very difficult to keep FLSA settlements confidential, as courts are increasingly rejecting requests to review and approve settlements under seal.

What many retail employers may not know is that private settlements may be permissible when there is a genuine dispute about liability, at least within the Fifth Circuit, which hears appeals from federal courts in Louisiana, Mississippi, and Texas.

The Fifth Circuit has recently upheld a private settlement of FLSA claims. In ***Martin, et al. v. Spring Break '83 Productions, LLC, et al.***, a group of union workers who had been working on a movie set filed a grievance alleging that they had not been paid wages for work that they performed. After an investigation, a union representative concluded that it would be impossible to determine what hours the workers had worked without pay. Accordingly, the parties entered into a settlement agreement regarding the number of hours in dispute.

Before the settlement was signed, the workers filed suit over the disputed hours. A district court granted summary judgment to the employer based on the settlement agreement, following ***Martinez v. Bohls Bearing Equip. Co.***, that a private compromise of claims under the FLSA is permissible where there exists a *bona fide* dispute as to liability. The Fifth Circuit affirmed.

The *Martin* and *Martinez* cases could be very helpful to retail employers attempting to settle with finality unverifiable "offclock-work" claims. Caution should be exercised, however, because there remains a significant amount of case law holding that private waivers and releases of FLSA claims, without approval from a court or the U.S. Department of Labor, are unenforceable.

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.