IADC COMMITTEE NEWSLETTER

EMPLOYMENT LAW

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#MeToo, Dress Codes, and Sincerely Held Religious Beliefs: Recent developments in Title VII.

Title VII Updates

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Prof. Corbett and Kelly ("the Two Bills") speak together frequently at the Louisiana Association of Defense Counsel ("LADC") annual winter CLE. Prof. Corbett has served as Executive Director of the LADC since January 2001.

ABOUT THE COMMITTEE

The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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1. Musings on The "#MeToo" Landscape: What Will it Change?

As of time of this printing, effects of the "#MeToo" movement and the so-called "Harvey Weinstein Effect" continue to hit the news on a seemingly hourly basis. What may perhaps be most striking about this news is how many women have come forward from so many various industries, professions and lines of work over a time period that spans for decades. It may come as no great surprise to anyone that there has been a "casting couch" in Hollywood, or that locker-room banter may be prevalent in the food service industry. But one question that comes to mind is whether, once those arguably far reaches of the pendulum's full swing come under attack, how a jury might now view similar allegations in a professional services company, or at a large corporation, when defending against similar allegations.

Whether or how this news and zeitgeist will impact what a court or jury will regard as unwelcome, severe or pervasive, or even hostile conduct "because of" a protected class or characteristic is yet to be seen. But clearly now is the time to urge that clients update and train on their anti-harassment and anti-retaliation policies. Now is the time to review policies, handbooks and clients' articulation of clear, multiple paths of reporting for such conduct. Given the prevalence of this news of late, "we just didn't think about it" will be particularly problematic and may, if egregious, become a basis for punitive damages that, before recent events, may not have survived motion practice.

IADC will continue to monitor and report on developments surrounding these issues in the immediate future.

2. A race-neutral rule prohibiting dreadlocks, culturally associated with people of African descent, cannot constitute intentional race discrimination; *EEOC v. Catastrophe Management Solutions*, 852 F.3d 1018 (11th Cir. 2016).

Facts: The EEOC filed suit on behalf of Chastity Jones, a black job applicant whose offer of employment was rescinded by Catastrophe Management Solutions pursuant to its race-neutral grooming policy when she refused to cut off her dreadlocks. The EEOC alleged that this constituted race discrimination under Title VII: "prohibition of dreadlocks in the workplace constitutes race discrimination because dreadlocks are a manner of wearing the hair that is physiologically and culturally associated with people of African descent." Importantly, the EEOC asserted only a disparate treatment claim, which requires a showing of intentional discrimination on the basis of race. The EEOC's argument was that although the CMS grooming policy is race neutral, its prohibition on dreadlocks constitutes race discrimination because dreadlocks are physiologically and culturally associated with a certain race. The lower court dismissed

the claim under 12(b)(6) on the grounds that it did not plausibly allege intentional racial discrimination on the part of CMS.

Issue: Whether a race-neutral rule prohibiting something culturally associated with one race can constitute intentional race discrimination.

Holding and Rationale: No. First, the EEOC's argument blended disparate treatment and disparate impact, the latter theory which the EEOC did not plead. The two theories are not interchangeable. The court rejected the argument that the Supreme Court's opinion in Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015), supported use of disparate impact arguments in a disparate treatment claim. Second, the court rejected the EEOC's definition of race as including individual expression tied to race. The court considered the definition of "race" and concluded that, at the time of enactment of Title VII, the term probably referred to common characteristics shared by a group of people and transmitted by ancestors over time. The court reasoned that the characteristics must be immutable and a matter of birth, not culture. Even if race today is considered a "social construct"—an idea and not a biological fact—that does not control what it meant in 1964. Eleventh Circuit precedent prohibits discrimination based on immutable characteristics but not cultural practices. The EEOC did not allege that dreadlocks, although culturally associated with race, are an immutable characteristic of race. Third, the court was unpersuaded by the EEOC's Compliance Manual position that Title VII prohibits discrimination based on cultural characteristics linked to race because the position was inconsistent with the agency's position in an administrative appeal in 2008. Fourth, no court yet has accepted the position of the EEOC that Title VII protects hairstyles culturally associated with race. Finally, the court acknowledged that there have been calls for a more expansive interpretation of the concept of "race" as including cultural characteristics. The court noted additional issues that would arise from such an expansion. It then explained that the task of courts is to interpret the statute enacted by Congress rather to "grade competing doctoral theses in anthropology or sociology." *Catastrophe Management Solutions*, 852 F.3d at 1034. Determining the meaning of "race" today should be left to the democratic process.

3. An employee's sincerely held religious beliefs, even if arguably implausible and erroneous, must be accommodated; *EEOC v. Consol Energy, Inc.*, 860 F.3d 131 (4th Cir. 2017), petition for cert. filed, 17-380 (Sept. 12, 2017).

Facts: Claimant worked as a coal miner for 37 years without incident. When the employer implemented a biometric hand scanner to track employees, claimant informed the employer that she could not use the system for religious reasons. Claimant was an evangelical Christian and an ordained minister who believed that using the scanner would result

in his receiving the "Mark of the Beast"—the Antichrist in the Biblical book of Revelation. Although the employer provided an alternative to the scanner for employees who could not use the scanner for non-religious reasons (employees with injured hands permitted to enter their personnel numbers on a keypad attached to the system), it refused to accommodate claimant other than to have him scan his left hand rather than his right hand (as the Biblical Mark of the Beast is to be on the right hand or forehead). Claimant retired under protest. The EEOC sued, alleging that the employer violated Title VII by constructively discharging claimant rather than accommodating his religious beliefs. The jury returned a verdict for the EEOC, awarding claimant $150,000 in compensatory damages but not punitive damages. The court awarded back pay and front pay, for a total award of about $587,000.

Issue: Whether the evidence was sufficient to establish a conflict between the employee's religious belief and the employer's requirement that he use the hand scanner.

Holding and Rationale: Yes. The employer essentially argued that there was no conflict because the employer explained fully that the scanner would not imprint a physical mark on his hand. The court explained that the employer's argument was based on its disagreement with claimant's religious beliefs. The employer opened oral arguments with quotations from scripture to demonstrate that plaintiff's belief was wrong. The court explained that it is not the role of the employer or the court to question the correctness or the plausibility of the employee's religious beliefs. As long as there is evidence that the employee's beliefs are sincerely held and are in conflict with a requirement of the employer, that is all that is required. Beyond the issue of the correctness of the claimant's religious beliefs, almost nothing was in dispute. The employer acknowledged that it could permit him to bypass the scanning with no additional burdens or costs, as it was doing with employees who needed to do so for non-religious reasons.

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