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EEOC and OSHA Focus on Retaliation and Whistleblowing

The federal workplace related agencies don't necessarily coordinate their efforts, but sometimes it feels that way. Such is the case with the EEOC's January 21, 2016, release of Proposed Enforcement Guidance on Retaliation following on the heels of OSHA's November 2015 Proposed Guidance on Protecting Whistleblowers. (OSHA administers the anti-retaliation/whistleblower provisions of twenty-two different statutes, including the Occupational Safety and Health Act, Sarbanes-Oxley, and the Affordable Care Act).

The EEOC's current enforcement guidance regarding retaliation was issued in 1998. Since then, the number of retaliation charges filed with the Commission has doubled, reaching a point where approximately forty-three percent of all discrimination charges allege retaliation. Approximately five years ago, retaliation became the single most likely alleged discrimination claim filed before the agency. EEOC Chair Jenny R. Yang stated that "insuring that employees are free to come forward to report violations of our employment discrimination laws is the cornerstone for effective enforcement. If employees face retaliation for filing a charge, it undermines the protections of our federal Civil Rights laws. The Commission's requests for public input on this proposed enforcement guidance will promote transparency. It will also strengthen EEOC's ability to help employers prevent retaliation and to help employees understand their rights."

The EEOC has invited public comment through February 24, 2016, on its proposed seventy-three pages of enforcement guidance. The proposed guidance stakes out familiar, and pro-employee, ground for the Agency on hot issues such as: permitting HR managers and other supervisors to claim retaliation protection when they receive or investigate complaints for others (see page 3 of last month's ELB for an example of such a case where the EEOC filed an amicus brief); and treating complaints of sexual orientation discrimination or harassment as protected based on the EEOC's July 2015 guidance that it would interpret Title VII's prohibition against discrimination "because of sex" as including sexual orientation and gender identity. It also alerts its readers to employee protections for violating pay secrecy policies or instructions under laws and regulations other than those the EEOC enforces (Executive Order 11246 and the NLRA). Courts generally give some deference to the EEOC's guidance, thus we will follow this process carefully and review with our readers employer rights once the Commission processes the comments and issues its final Guidance.

OSHA's proposed guidance included five core principles to prevent retaliation: 1.) Establish an executive team commitment against retaliation.

2.) Build a culture of no retaliation. 3.) Establish a process where employees can report retaliation. 4.) Conduct organization wide training about retaliation and prohibited behavior. 5.) Monitor the program.

Two debates have arisen regarding the proposed OSHA guidance. The first area of debate concerns whether OSHA should encourage employers to put in place procedures that encourage employees to report complaints internally. The National Whistleblowers Center, an advocacy organization for whistleblowers, alleged, "Until there is a sufficient attitudinal change towards whistleblowers within the corporate community, internal programs cannot, at this time, be trusted to protect employees. Any actions taken by the U.S. Department of Labor to provide guidance on effective internal programs, regardless of intention, may be misunderstood by whistleblowers or abused by corporate employers." The National Whistleblowers Center challenged OSHA to establish a whistleblowing/no retaliation process that does not depend on reporting the behavior to the company. According to the National Whistleblowers Center, employers exploit internal reporting programs by persuading courts to deny whistleblower protection for employees who make only internal reports.

The second area of debate concerns OSHA's recommendation to eliminate safety-related incentive programs, such as reward and recognition for the number of days without a work-related accident or injury. OSHA claims that approximately two-thirds of all job-related accidents or injuries are unreported, and that an individual who would report an accident or injury with a result of a group of employees losing an incentive will face retaliatory action by fellow employees or the employer. Employer advocacy groups have raised concerns about OSHA's stance. According to the American Exploration & Production Council, "Properly managed incentive programs—even those based on injury rates—can and do result in positive workplace improvements."

As a practical matter, employers need to maintain a cautious approach to avoiding retaliation claims: include "no retaliation" as a core principle and establish reporting avenues for suspected violations of the company's commitment against retaliation; if in doubt, assume even internal complaints about any violation of law or regulation may be protected; set up an early detection system to ensure that complaining employees do not experience unwarranted adverse actions, even and especially adverse actions that don't affect pay or advancement; and give careful review to coincidences of timing where an adverse action is set in motion or scheduled to occur days or weeks after a protected complaint. In such circumstances, the employer should be sure that the adverse action is consistent with how other employees have been treated and that the documentation and discussion of the decision have been free of retaliatory bias.

Will Robots Replace Us All?

Amazing technological developments may soon reach an unimaginable point of a self-driving automobile and voice command administrative functions in the workplace. Of course the self-driving automobile is an appealing option for those who are poor drivers and the occasional not-so-sober driver. However, the expansion of technology will have a significant impact on job elimination.

According to the World Economic Forum, there will be a net loss of approximately five million jobs during the next four years due to the expansion of robotics, artificial intelligence and technological innovation. The report surveyed fifteen economies that cover sixty-five percent of the world's workforce (including the United States, China, Brazil, Germany, and Japan). According to the report, approximately two-thirds of those jobs eliminated will be office and administrative functions, with "routine white collar office functions at risk of being decimated." Jobs that will expand include those that are in the computer, engineering, and mathematical fields. The report highlighted the impact of these changes based upon gender. According to the study, women will be most adversely affected by these changes, as their numbers are disproportionally low in the fields of science, technology, mathematics, and engineering.

In order to avoid a situation where employers and employees wonder "what just happened?" the report

encourages collaborative efforts by employers and employees to prepare for the inevitable. According to the report, "it is critical that businesses take an active role in supporting their current workforces through retraining, that individuals take a proactive approach to their life-long learning and that governments create the enabling environment, rapidly and creatively, to assist these efforts."

Employer Withdraws Job Offer – ADAAA Liability?

One of the cornerstones of the Americans with Disabilities Act, which was unaffected by the ADA Amendments Act, is that an employer has the right to require to make a job offer conditioned upon submission to a medical exam and/or extensive medical inquiry. If the medical information indicates a potential limitation which may interfere with the job, the employer should engage in an interactive reasonable accommodation process, rather than simply withdrawing the offer. In the case of *Cannon v. Jacobs Field Services, North America, Inc*., (5th Cir. Jan. 13, 2016), a post-offer medical exam resulted in the withdrawal of an offer based on the employer's mistaken belief that the medical condition did not qualify as a disability. Thus, the employer's mistake gives it the privilege of defending its actions before a jury.

The employer, Jacobs Field Services ("JFS"), is a mining contractor. The employee, Cannon, had twenty years of experience as a field engineer when he applied for an opening at JFS in 2011. Cannon's post-offer medical exam showed that he had a rotator cuff injury that limited his ability to lift his arm above his shoulder and that had also resulted in his being prescribed a painkiller. On that basis, JFS withdrew the offer, believing that his rotator cuff injury was not a "disability," but, even if it qualified as a disability, that Cannon could not perform the essential job functions because of limitations on his ability to drive due to the painkiller he was prescribed and his presumed inability to climb a ladder. JFS withdrew the offer even though Cannon offered evidence that he was being weaned from or had totally stopped using his prescription painkiller (in fact, he passed a post-offer drug test) and even though Cannon's doctor wrote a letter affirming that he could climb a ladder.

In reversing summary judgment for JFS, the Fifth Circuit Court of Appeals stated that Cannon provided evidence to substantiate that he met the ADA definition of "substantially limited" in the major life activities of lifting and reaching. In ordering the case to go to a jury, the court noted that the threshold definition of "disability" under the ADA Amendments Act is a light one. In this particular case, Cannon raised questions of fact for a jury to consider whether he was substantially limited in the major life activities of lifting and reaching, and, if so, whether he could perform the job's essential functions, with or without reasonable accommodation. Back pay and perhaps front pay, plus attorneys' fees are the potential outcomes of this case.

What is the lesson learned for employers? The EEOC believes that whether someone meets the statutory definition of a disability under the ADA Amendments Act is basically a nonissue. Rarely does the EEOC conclude that an individual's physical or mental condition fails to qualify as a disability under the ADA. Therefore, an employer will not risk an ADA violation by engaging in a reasonable accommodation dialogue with an applicant or employee when the employer is not sure if the condition qualifies as a disability. If after the interactive dialogue, the employer attempts to accommodate are unsuccessful, the employer had reduced the risk of an ADA claim, but if one is brought, the employer has enhanced the opportunity to prevail. In this case, the employer erroneously concluded that the applicant's condition did not qualify as a disability and, therefore there was no need to engage in an interactive reasonable accommodation process. If in doubt, give the benefit of the doubt to the interactive process.

Happy New Year from the IRS!

As many of you have likely realized, the IRS has delayed the due dates for the 2015 Affordable Care Act information reporting requirements. IRS Notice 2016-4 extends the due dates as follows:

- 2015 Forms 1095-B and 1095-C are now due to be furnished to employees by March 31, 2016 (previously due February 1, 2016);

- 2015 Forms 1094-B, 1095-B, 1094-C, and 1095-C are now due to be filed with the IRS by May 31, 2016 (previously due February 29, 2016), if not filing such forms electronically. If forms will be filed electronically, they are now due by June 30, 2016 (previously due March 31, 2016)

The penalties established under Code §§6722 and 6721 for failure to timely furnish and file such returns remain in full effect. Employers may be subject to up to $250 per incorrect or unfiled form, with a maximum possible $3 million penalty per employer, per year. However, the IRS has indicated that penalties will not be imposed on employers who file incorrect or incomplete information if the filer can show that it made a good faith effort to comply with the requirements for 2015. Although employers are appreciative of this "happy new year" extension, many had already made significant progress towards completion of these documents by the time the IRS Notice was released. Furthermore, employers who had not yet begun preparing these forms should still not delay, as it is clear that significant time and effort is necessary to properly complete them. Moreover, many employers are aiming to complete their Forms 1095 as soon as possible so they may distribute them to their employees in an effort to avoid employee misunderstandings with regard to filing their taxes. It is also important to remind "mid-size" employers, those with fifty to ninety-nine employees, who were not subject to the employer mandate in 2015; are still required to meet the ACA reporting requirements and deadlines referenced above. Applicable large employers that offer self-insured coverage must complete Form 1095-C, Parts I, II and III, for employees who enroll in health coverage for any month of 2015. It is the responsibility of the health insurance company to complete Form 1095-B. Self-insured employers should also take note that coverage offered to retirees must be reported either using Form 1095-B or Form 1095.

NLRB Tips: Developments at the NLRB

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 205.323.8217.

Adjunct Faculty Choose Union Representation

Non-tenured track faculty at Brandeis University voted for the Service Employees International Union ("SEIU") in a Board conducted election, becoming the latest success story in faculty organizing efforts.

SEIU had most recently won an election to represent non-tenured track faculty at the University of Chicago. Expect this trend to continue nationwide, with unions winning the vast majority of union elections as professors' jobs become less secure.

In a separate case, on January 14, 2016, Northeastern University and the SEIU reached a tentative contract covering approximately 930 adjunct faculty members. The agreement averted a threatened one day strike by the adjunct professors. The SEIU Local 509 had narrowly won a Board election in May of 2014.

Graduate Students Likely to be Considered "Statutory Employees" by the NLRB

Look for the NLRB to overrule its 2004 decision in *Brown University,* 342 NLRB 483 (2004), which found that graduate assistants were primarily students and could not be considered employees under the National Labor Relations Act.

In the *Columbia University* decision issued in late December of 2015, the NLRB has agreed to review the New York Director's decision applying *Brown.* The Agency has invited the filing of amicus briefs by interested parties. The questions posed by the NLRB are as follows:

1. Should the Board modify or overrule *Brown University*?
2. If the Board modifies or overrules *Brown University,* what should be the standard for determining whether graduate student assistants engaged in research are statutory employees, including graduate student assistants engaged in research funded by external grants?

3. If the Board concludes that graduate student assistants, terminal master degree students and undergraduate students are statutory employees, would a unit composed of all these classifications be appropriate?

4. If the Board concludes that graduate student assistants, terminal master's degree students and undergraduate students are statutory employees, what standard should the Board apply to determine whether they constitute temporary employees?

Amicus briefs are due by February 29, 2016. Responsive briefs are due on or before March 14, 2016. A similar case involving graduate assistants at the "New School" is also currently pending review before the Board

Columbia's Position:

On November 13, 2015, Columbia filed a "conditional" request for review, arguing that should *Brown University* be reconsidered, there are compelling reasons to reverse the Regional Director's finding that undergraduate and masters students with instructional appointments should be included in a bargaining unit with doctoral students serving as teaching assistants and research assistants. The university's conditional request for review was granted by the Board, and look for Columbia to test the certification should it lose a vote in a Board-ordered election.

If the NLRB gets its way ultimately, look for a substantial impact on union representation at around 60-odd public universities nationwide, as graduate students flock to unions for representation.

A *Browning-Ferris* Update

On January 12, 2016, the NLRB determined that Browning-Ferris (BFI) illegally refused to bargain with the Teamsters after the union won certification in the controversial representation case decision. In granting summary judgment, the Board stated that BFI did not raise any special circumstances that would justify re-examining the representation case ruling finding Leadpoint and BFI to be joint employers.

As per the usual procedure, the NLRB General Counsel filed for summary judgment before the Board after Browning-Ferris denied that it violated the Act. Referred to as a "technical" refusal to bargain in order to test the certification, both Leadpoint and BFI can now seek judicial review of the unfair labor practice case in a federal appeals court, where the employers will attack the underlying certification of the Teamsters as the bargaining representative.

On a side note, Board Chairman Mark Gaston Pearce and Member Philip A. Miscimarra, in an interview given to Law360, claim that the *Browning-Ferris* decision left enough uncertainty about whether the ruling applies to "franchises" that the Board will have to specifically address the issue in the near future.

Both Pearce and Miscimarra agree that it is "too soon to write an epitaph for the ubiquitous franchise system" and both agree that they expect the issue to come before the Board this year.

Class Action Waivers Still Contested Before the U.S. Court of Appeals

Employers Resource, a payroll and personnel services provider, has asked the Fifth Circuit Court of Appeals to deny enforcement of an NLRB order that found that an arbitration agreement that the company gave to a client was unlawful because it forced a worker into arbitration rather than seeking a class action. The Board had ordered the company to get rid of its mandatory arbitration employment agreement or revise it to make clear that workers were not signing away their right to pursue class or collective claims.

As readers recall, the Fifth Circuit has consistently ruled against the Board - in *D. R. Horton* and *Murphy Oil USA, Inc.* LMVT does not expect a contrary result in this case.

In another mandatory waiver case, a solar energy company that required employees to waive their right to participate in class actions did not avoid an adverse unfair labor practice finding by allowing employees to file charges with government agencies.

SolarCity argued that agencies like the NLRB and EEOC frequently seek class or group remedies for employees, but the NLRB said that this possibility did not satisfy the agency's requirement that employees not be limited in accessing judicial forums to pursue class or collective claims.

> Filing a charge with a government agency 'is not an adequate substitute for filing a lawsuit asserting a joint, class or collective claim . . .'

As noted in ELBs past, look for this question not to be resolved until the U. S. Supreme Court reviews the NLRB position on mandatory waivers.

OSHA Tips: Interpreting OSHA Standards

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at 205.226.7129.

Useful aids in understanding OSHA's standards enforcement posture are the agency's posted responses to questions submitted. The following includes samples of such responses.

A question was submitted as to whether the electrical guarding standard, 29 C.F.R. §1910.3(g)(2)(1), applies to voltages below 60 volts DC. OSHA answered as follows: the provision in question generally requires that live parts of electrical equipment operating at 50 volts or more be guarded against accidental contact by use of approved cabinets or other forms of enclosures. The equipment applies to both AC and DC voltage.

In another interpretation letter an employee scratched his finger and began walking to the first aid station when he met a co-worker who had a Band-Aid. The co-worker started to apply the Band-Aid and when the worker saw a small amount of blood, he fainted. The question asked was whether this was a recordable injury case. The answer given was that the worker sustained a work-related laceration that contributed to the fainting incident and, thus, should be recorded.

OSHA is asked in another case to clarify who is responsible for recording injury and illness cases of contingent workers when supervision is shared by host employers and a staffing agency. The answer given is that host employers are required to record the recordable injuries and illnesses of workers they supervise on a day to day basis, even if these workers are not carried on their payrolls. 29 C.F.R. §1904.31(b)(2) clarifies this.

The following question was posed to OSHA: "Who is responsible for the laundering of fire retardant clothing that is provided to employees?" OSHA answered by referencing the Agency's criteria for personal protective equipment. This standard is 29 C.F.R. §1926.95, which states that pursuant to requirements of this standard, home laundering is not prohibited but notes that the employer must monitor and train employees in the proper care of such clothing.

Wage and Hour Tips: Current Wage and Hour Issues

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act. Mr. Erwin can be reached at 205.323.9272.

At the end of 2015 Wage and Hour published some statistics regarding their enforcement activities during FY-2015 which ended on September 30, 2015. The report states that they collected almost $247 million in back wages—an increase of $6 million over the previous year. These wages were paid to 240,000 employees with the average employee receiving slightly over $1,000.

As in recent years, the Department has concentrated its efforts on "low wage" industries. Those industries included agriculture, day care, restaurants, garment manufacturing, guard services, health care, hotels and

motels, janitorial and temporary help. This resulted in over 100,000 employees receiving almost $75 million. Among this group were 4,800 investigations of restaurants that resulted in back wage collections of more than $38 million.

Another industry where they spent a large amount of time was the construction industry. These investigations resulted in 28,000 construction workers receiving over $42 million in back wages. The report also indicates that 17,000 health care workers received over $14 million in back wages.

Following its recent policy, the DOL has continued its targeted approach with more than 40% of its investigations last year being in these industries. One reason they are able to spend this much time in the targeted industries is the fact that they received only 22,000 complaints, the lowest number in nearly 20 years. During the fiscal year, they completed only 28,000 investigations which continued a downward trend of the last 4 years. This is only about one-half the number they completed in 1998 when they had substantially less staff than they currently have. The report also points out that approximately 20% (both directed and complaint) of the investigations found the employer to have paid its employees properly under the FLSA.

In addition to the Wage and Hour enforcement activities, private litigation continues to rise each year. During the year the number reached an all-time high of 8,954 cases filed in federal court. This is an increase of more than 700 cases from what was filed in the previous year and more than four times than were filed in FY 2000. In addition to those filed in federal court there were a substantial number file in state and local courts. Thus employers need to take every precaution they can to ensure they are doing their utmost to comply with the FLSA. As you are aware the employer can be liable for back wage for a two or three year period. Additionally, there is the potential for liquidated damages (an amount equal to the back wages), plus attorneys' fees.

During 2015, there was some $2.48 billion (yes that is "b" for billion) back wage settlements as compared to $1.87 billion in 2014. In addition the federal courts granted employment plaintiffs class certification in 123 cases while denying class certification in only 23 cases. The greatest number of the cases was filed in the areas covered by the Second Circuit of Appeals (Connecticut, New York, Vermont) and the Ninth Circuit Court of Appeals (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington).

Stay tuned as I expect there will be significant DOL issues raised in the next few months. According to the latest information I have seen it is expected that the Department will issue revised regulations covering the "White Collar" exemptions. In the meantime if I can be of assistance please give me a call.

2016 Upcoming Events

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Florence – March 23, 2016
Robert Trent Jones Golf Trail at The Shoals
990 SunBelt Parkway
Muscle Shoals, AL 35661
(256) 446-5111
www.rtjgolf.com/theshoals

Montgomery – April 20, 2016
Staybridge Suites Montgomery – Eastchase
7800 Eastchase Pkwy
Montgomery, AL 36117
(334) 277-9383
www.staybridge.com/Montgomery

Decatur – May 12, 2016
Sykes Place on Bank
726 Bank St NE
Decatur, AL 35601
(256) 355-2656
www.sykesplace.com

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Ashley Marler at 205.323.9270 or amarler@lehrmiddlebrooks.com.

Did You Know . . . ?

. . . that an employer policy statement docking the exempt employee's pay did not void the exemption? In the case of *Shafir v. Continuum Health Partners, Inc.*, (S.D.N.Y. Jan. 15, 2016), the employer had a policy that an exempt employee's salary would by docked if the employee worked a partial day. Shafir, an $81,000.00 a year exempt Physician's Assistant, asserted that she should be paid overtime based upon the employer's policy. However, the employer never implemented the policy. Shafir's pay was not cut, nor was the pay of other exempt employees. The court ruled that when the pay was not actually docked, an employer's policy statement would not convert an exempt employee to non-exempt. It is likely that the employer had the policy to deter exempt employees from missing partial days. Nonetheless, since the employer did not actually dock pay, the policy did not result in converting the salary exempt employee to an employee entitled to overtime compensation.

. . . that an employer had the right to not schedule a driver who refused to participate in the employer's health study? *Parker v. Crete Carrier Corporation* (D. Neb. Jan. 20, 2016). This case is a novel one, addressing the issue of an employer's rights to refuse to assign job duties to an employee who will not participate in an employer's wellness program. Parker was an over the road driver. The employer, concerned about sleep apnea, required its drivers with a body mass index of 33 or higher to participate in a sleep study for the purpose of determining if those employees had obstructive sleep apnea, which could disqualify them from driving a commercial vehicle under DOT regulations and would pose risk of increased fatigue or falling asleep at the wheel. Parker refused to participate in the test, stating that he was healthy and did not have a sleep problem. The employer terminated him for his failure to participate. The court upheld the employer's decision, as the medical exam and sleep study requirement were "heavily related to the ability of its drivers to lawfully continue to drive under DOT regulations." The court also said that the sleep study initiated by the employer is considered the "gold standard" to determine whether someone has sleep apnea. Furthermore, the employer showed that "its policy is job related, vital to its business, and no broader or more intrusive than necessary."

. . . that an employer's failure to sign a mandatory arbitration agreement precluded the employer from enforcing that agreement? *Shank v. Fiserv, Inc.* (E.D. Pa. Jan. 14, 2016). Employee Kim Shank signed an agreement to submit any employment claim to arbitration. She alleged that she was terminated based upon her age (57) and in retaliation for taking leave under the Family and Medical Leave Act. The employer included language stating that each party's signature to the agreement was consideration for the other party to agree to submit any claims to arbitration. The agreement contained a signature line for Shank, which she signed, and two signature lines for the employer, which were unsigned. In ruling that the agreement could not be enforced, the employer stated that an agreement was not reached because of the employer's failure to sign it. The language of the agreement meant that "because the [employer] did not sign the Agreement, there is no intent to be bound, nor any consideration for the [employee's] promise." The specific language of the agreement required signatures for the agreement to be valid, ruled the court. The obvious lesson learned for employers: any document requiring an employee or employer signature should be signed; otherwise the employer risks the employee saying that he or she did not receive the document or that terms of the document will not be enforced.

. . . that the EEOC continues its push to establish that Title VII prohibits discrimination based upon sexual orientation? We wrote in our July ELB that the EEOC will now consider sexual orientation discrimination charges as a form of sex discrimination under Title VII. The EEOC is pursuing this issue in the appellate courts, filing amicus briefs in *Burrows v. College of Central Florida* (11th Cir. January 6, 2016) and in *Evans v. Georgia Regional Hospital* (11th Cir. 2015). The district courts that heard these cases granted summary judgment in the employers' favor, ruling that sexual orientation was not protected class under Title VII. In response, the EEOC stated that "although it is true that Congress has not amended Title VII or passed new legislation to protect against sexual orientation discrimination explicitly, the Supreme Court has made clear that the outcome of legislative efforts to amend Title VII over the years says

nothing about what the existing statute prohibits." According to the EEOC, the prohibition of sex discrimination based upon sexual stereotyping and gender identity all may include discrimination based upon sexual orientation. Therefore, prohibition of discrimination based upon sex inherently prohibits discrimination based upon sexual orientation.

. . . that Wal-Mart will close 269 stores, yet increase wages and benefits for 1.1 million employees? Wal-Mart recently announced that it is closing 269 stores, 154 of which are located in the United States. However, beginning in February, Wal-Mart will increase wages and benefits for 1.1 million employees. Pay will be raised to at least $10 an hour or a lump sum payment. The top hourly rate for a Wal-Mart employee will rise to $15 an hour, and Wal-Mart will expand benefits programs available to its employees. The United Food and Commercial Workers Union has spent well over $10 million to try to unionize Wal-Mart employees. While arguably the UFCW focus on Wal-Mart pay, benefits, and scheduling practices has influenced the retailer, the UFCW and other unions have failed to gain even one member from their international focus on Wal-Mart.

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