

HRAGC LEGAL UPDATE

JANUARY 16, 2025

FEDERAL

First Circuit Court of Appeals

The First Circuit Court of Appeals recently affirmed a judgment for an employer who terminated an employee (a TSA agent) had filed two EEOC complaints, was pregnant and was denied accommodation requests. She had an extensive record of poor attendance over several years and was terminated primarily for her attendance record and failure to follow leave notice requirements. Plaintiff claimed she was denied accommodations (including schedule changes), a supervisor commented negatively on her being pregnant, she was discriminated against due to her pregnancy, gender, parental status and disability, and she was being retaliated against for filing EEOC claims.

TSA prevailed because there was a lengthy record of documented attendance problems and discipline, and no evidence to refute the documentation. Though she disputed many of the records she did so without evidence. The Court found TSA produced “ample evidence” of “legitimate nondiscriminatory reasons” for its decisions and plaintiff could not show that those reasons were a pretext for discrimination or retaliation. Ultimately, TSA’s explanation that it was short-staffed and needed plaintiff at work, based on this record, carried the day. The denial of plaintiff’s accommodation request was not problematic because TSA had provided many accommodations, including modified schedules, and the record demonstrated she continued to have attendance issues even when working the modified schedule she indicated would address her poor attendance. The disparaging remark, which was assumed to be true at the summary judgment stage, was deemed to be isolated and insufficient to create a factual dispute to be resolved by the jury.

This case is a good reminder of the value of documenting poor attendance and other performance issues, taking appropriate and timely action to address those issues (and not avoiding action), and moving forward with discipline or termination if the record justifies it, even in the face of an EEOC complaint (or two) and even with an employee who is in a number of protected categories. The case is *Serrano-Colon v. U.S. Dept. of Homeland Security* (November 13, 2024).

Equal Employment Opportunity Commission

The EEOC issued a guidance on wearable technologies, such as smart watches; environmental or proximity sensors that warn wearers of nearby hazards; smart glasses and smart helmets that can measure electrical activity of the brain or detect emotions; exoskeletons and other aids that provide physical support and reduce fatigue; Global Positioning System devices that track location and other devices. The use of wearables implicates various EEO laws and employers should be alert to potential problem areas, including:

- Required use of the device may be a “medical examination” or “disability-related inquiry” under the ADA
- Some data that is collected may have to be treated as confidential and maintained in separate medical files
- Use of the information may lead to discrimination on the grounds of pregnancy, religion, race, disability or other
- Employers may have to make exceptions to the use of wearables as a required accommodation

The EEOC advises employers consider the following: (1) What data wearables collect, including their accuracy and validity across different protected bases; (2) How those data are stored; and (3) Whether and how those data are used in employment-related decision-making, including whether their use impacts employees of different protected bases differently.

NEW HAMPSHIRE

Legislature

Consideration of bills is underway and committees are holding public hearings and working through the proposed legislation. A record number of bills were filed and it is taking some time for all LSRs to be assigned bill numbers. As a result, some LSR numbers remain.

A terrific resource to check on the status of a bill is www.legiscan.com/nh.

LSR58	Directing the dissolution of the department of health and human services' office of health equity department of environmental services' functions for civil rights and environmental justice and the governor's council on diversity and inclusion.
HB128	Establishing a committee to study unemployment insurance. Three House members to study why the government monopolization of this "industry" and related matters, including would some consumers benefit by having no unemployment insurance at all.
HB192	Relative to recommendations of the joint committee on employee classification.
HB225	Relative to the employment of military spouses in the event of involuntary deployment of service member.
HB238	Prohibiting collective bargaining agreements from requiring employees to join or contribute to a labor union.
HB280	Relative to wage payments.
HB282	Increasing the maximum benefits for first responders critically injured in the line of duty.
HB299	Relative to the award of attorneys' fees and costs in workers compensation claims.
HB303	Relative to requiring the department of labor review and adopt workers' occupational safety requirements that are similar to OSHA standards.
HB353	Relative to hearing protection for employees of nightclubs and music venues.
HB378	Relative to an employee's unused earned time.
HB379	Relative to youth employment during the school year and at night.
LSR379	Relative to weekly benefit amounts for unemployment compensation.
LSR408	Relative to workers' compensation indemnity benefits percentage.
HB442	Relative to prohibiting payment of subminimum wages.
HR6	Condemning the judicial doctrine of "disparate impact." This is a House Resolution that if passed would not have the force of law.

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