BoardmanClark

Labor & Employment Law Update

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Legislation & Administrative Actions

NLRB Issues New Joint Employer Proposed Rule Joint employment – whether and when employees of different companies can be included together for collective bargaining purposes – has been an ongoing and confusing area of controversy. The NLRB has issued new proposed rules to clarify the issue. The proposed standard is that an employer may be considered a joint employer of a separate employer's employees only if the two employers share or co-determine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. The joint employer must possess and actually exercise substantial, direct, and immediate control over the employee's essential terms and conditions of employment in a manner that is not limited and routine. This proposed standard is published in the *Federal Register*. [Be aware that other agencies, EEOC, DOL, also make joint employment determinations, and use their own standards.]

No Panic Buttons For Hotel Workers in California Hotel workers, especially cleaning staff, are among those most exposed to sexual assault and violence at work, and are often alone in unprotected, isolated places which are ripe for assault. Some states are showing concern. California is the first to act, with a proposal to provide electronic "panic buttons" to be worn on the wrist or on a lanyard by all hotel workers. The bill was opposed by the California Chamber of Commerce and California Hotel and Lodging Association, which claimed it would add expense and be a "job killer," harming the employment of hotel cleaning staff. The legislature defeated the bill. Some local governments though have passed protective measures for hotel workers. The California bill was modeled after one in Seattle.

Litigation

FAIR LABOR STANDARDS ACT – WAGES & HOURS
DISCRIMINATION

Time Shaving – Nothing Is Too Small For A Case A transit system engaged in "shaving off" any "trivial" time increments for bus drivers. It paid drivers only for the regularly-scheduled time for their routes if there were only a couple of minute overages. In the ensuing suit the employer argued that these couple of minutes were "de minimis," only averaging six minutes a day for a driver, and should be too small to warrant suit, and would be too difficult for a pay system to track. The court disagreed. Newer technology makes it possible to accurately track even the smallest of time increments. Further, six minutes a day adds up; 30 minutes a week, two hours a month in overtime. When multiplied by all drivers, this is no longer a "de minimis" or "trivial" matter. *Singer v. Regional Transport Authority*

(N.D. Ill., 2018).

Company Owner Arrested For Wage Theft An FLSA suit may not be the worst thing that can happen in a wage dispute. The owner of a construction company was arrested and arraigned under New York law, on grand larceny felony and scheming to defraud charges due to failure to properly pay workers. The owner allegedly stopped making regular wage payments, then made false promises to pay in full soon in order to keep people working. The company then paid only sporadically, enough to keep some employees working in their hope of full payment soon. The charges are for $29,000 in unpaid wages, and deception – lying to employees. The case is against both the company and its owner personally. *New York v. WWJ Construction, Inc.*

DISCRIMINATION

Legislature's Prohibition Of Local Wage Ordinances May Be Discriminatory Several state legislatures have passed laws forbidding municipalities and counties from having their own minimum wage requirements, greater than federal or state minimums. Most of the affected municipalities have large minority populations. The legislatures are predominately white. African-American workers in Birmingham, Alabama were judged to have sufficient claims in their lawsuit against the State of Alabama to proceed with their claim that the state had a discriminatory motivation when it passed a mandatory uniform statewide minimum wage of $7.25 per hour law that overrode Birmingham's ordinance, which set the city's minimum wage at $10.10 per hour. The state law could be found to be discriminatory toward the city's poorest black residents; it was passed in a rushed fashion during a racially-divided legislative process, and the state has a history of using its power to deny local black majorities authority over economic decision-making (*Lewis v. Alabama* (11th Cir., 2018). [Interestingly, the same legislators which passed these laws prohibiting local control and initiative, are often the same ones which vehemently protest federal rules which they claim "infringe upon local government rights of control." It seems somewhat contradictory.]

PROCEDURE

EEOC's Six Year Delay Does Not Preclude Suit Some complain that government processes are lengthy. However, six years for the EEOC to act seems unreasonable, at least to the employer on the defending side of *EEOC v. Wynn Las Vegas LLC* (D. Nev., 2018). The EEOC received a charge of disability discrimination and retaliation. The EEOC sat on the issue for six years, then brought suit on behalf of the complainant. The employer moved to dismiss the case due to the excessive time frame and the unfair situation of having to defend an ancient claim, when evidence and witnesses were no longer available. It argued the defense of "laches," a term meaning the other side has unreasonably delayed in order to disadvantage the defendant. The court denied the motion, finding that once a complaint has been filed there is no statute of limitations on how long the EEOC has to process and act on it. The court did state that the company could still pursue its laches defense. However, it would have to do so as an element of the now ongoing litigation. This case should be a word of caution regarding preservation of evidence, and witness statements once any sort of complaint is filed. Federal and state discovery rules require preservation. The EEOC regulations require preserving all relevant documents and records once a complaint is filed, "until the end of all proceedings." Since discrimination complaints are based on "comparisons," this means preservation of records of all relevant employees – not just the complaining person

AGE

"SWAT Ain't A Retirement Home – Older Officers Need To Go" In *Pisoni v. State of Ill.* (S.D. Ill., 2018), a jury found in favor of three state police officers over age 40 who had been forced off of the SWAT team. Younger officers engaged in a campaign to get rid of the older officers, complaining that their continued presence impaired their own prospects for promotion. The younger officers engaged in ostracism, safety infractions affecting the older officers, and hostile comments, including postings of "SWAT ain't no retirement home" and "older officers need to go." Management ignored complaints, refusing to take any action against the younger instigators, and then even participated in the campaign, subjecting the older officers to a double standard, focusing on the older officers' alleged infractions, while

ignoring similar instances by younger officers. All three officers were eventually removed from the SWAT team and reassigned. The jury found the department engaged in willful and intentional age discrimination.

Age Comments And Shifting Reasons A 65 year old doctor has a case for age discrimination on his removal as a Medical Director. His employment contract was not renewed following the hiring of two younger physicians. Prior to this he began receiving inquiries from administration about his retirement plans and comments about how some other doctors his age had passed away and "We are all getting older," "the corporate people want to know about your retirement so they can give younger physicians an idea, younger doctors need to carry on the center." Once the removed doctor filed an ADEA case, the defense was inconsistent. The medical center's reasons for its actions kept changing. First, it claimed the reason was failure to adequately manage a subordinate and high turnover; then it alleged the doctor made negative comments about the center at a staff meeting; and then the employer made conflicting representations as to who even made the non-renewal decision. The court found ample evidence to support an age discrimination case based on direct age-related statements, and pretext in the reasons given for the action. *Hoffman v. Bethesda Foundation, Inc.* (S.D. OH, 2018).

DISABILITY

Pay Rate Injunction The EEOC won a permanent injunction against UPS Freight to stop it from pay discrimination against disabled drivers. Under a UPS Freight policy, drivers with disabilities who were temporarily reassigned to non-driving work for medical reasons were paid 10 percent less than their non-disabled colleagues. Drivers who were unable to drive for non-medical reasons, including convictions for driving while intoxicated, earned the full (100 percent) pay rate. However, those who performed non-driver work due to medical disqualification, including ADA-qualifying disabilities, earned only 90 percent of the pay rate. *EEOC v. UPS Ground Freight, Inc.* (D. Kan., 2018).

RELIGION

Overloading Truck As Retaliation For Accommodation Request A delivery driver requested a religious accommodation of not having to work past sundown on Fridays. Her supervisor made negative comments about the request. Then the company began over-packing her truck in a disorganized fashion, so that it became impossible to complete the work by sundown. This overloading also resulted in physical injuries. The evidence was that other drivers continued to have neatly packed regular volume loads. The employee's complaints of over-packing and safety were ignored. She filed a Title VII suit, and the court found sufficient evidence of retaliation for having requested a religious accommodation. *Johnson v. UPS* (D. Md., 2018).

SEX

HR Specialist Witnessed Harassment And Did Not Act – County Can Be Liable A female former administrative assistant can go to trial on her claim for sexual harassment by her male supervisor, who made sex jokes about her in front of other employees and suggested that she should have sex with him. Though the department had a sexual harassment policy and took prompt corrective action when she formally complained, a Human Resources employee witnessed the previous instances of the supervisor's harassment and no effective action was taken to ensure that the behavior didn't recur, until she had to complain. (*Kastanidis v. Commonwealth,* M.D., 2018.)

Judge Acting Badly A female probation officer sued, claiming that she was sexually harassed and assaulted by a county judge. The judge claimed there had been a consensual romantic relationship. However, the court ruled that the allegations must be decided at trial, and even if the original relationship was consensual, there was evidence that after it ended the judge requested that the probation officer film herself performing sexual acts and pressured her into unwelcome social situations with him. *Stranes v. Court of Commission Pleas of Butler County* (W.D. Pa., 2018).

Butcher Harassed And Threatened With Knives And Cleavers Though it is not often reported, there are ongoing instances of heterosexual men overtly sexually harassing and groping and even assaulting other heterosexual men. It is a form of bullying of someone perceived to be weaker or vulnerable or "unliked," which escalates to a sexual level. Bullying can be a "glide path to harassment," and this case is our illustration. This occurred in a large Chicago butcher

shop. The court found ample evidence that "the genital groping, reaching down his pants, buttocks groping and sex pantomiming the bullied butcher experienced from male co-workers behind the meat counter did not extend to female employees, in the mixed gender workplace." Therefore, Title VII applied because the harassment was based on the butcher's gender, since he, a man, was singled out. When he complained, not only did management not stop the acts, supervisors started to actively participate. Retaliation after complaining often involves negative comments and ostracism. However, in this case it involved knives and cleavers. The co-workers would rhythmically clank their cleavers when the complainant came in. They would point their butcher knives at him as they walked by. His tires were slashed and windshield smashed in the "secure" shop parking lot. He quit. He sued. He won $2.4 million for discrimination, and other included causes of action. The court ruled that the post complaint actions were not mere "retaliation," they were "*terrorism." Smith v. Rosebud Farms, Inc./Rosebud Farmstand* (7th Cir., 2018).

RACE

Court Chief Administrator Video Creates Case. An African-American court employee's harassment case has substantial evidence to proceed to a trial as an "ongoing pattern of discrimination against Black employees." The evidence included no action taken when complaints were made of discriminatory statements made by court employees. The clincher was a video made by the court's Chief of the Criminal Division making hostile racially derogatory remarks about her African-American subordinates. This video was posted on social media where other court employees and the public could see. When complaints were filed, the administrator stated that she was "*just joking*" and meant no harm. Rather than discipline the Division Chief, a staff meeting was held in which the complaining employee was criticized for having reported the "off work" video. Most of the White employees joined in a condemnation of the African-American employee for complaining. Then the evidence was that supervisors and co-workers refused to talk to her in a pattern of ostracism, making it impossible for her to do her job. More derogatory social media comments followed directed at the complainant. The employee eventually resigned due to a hostile environment, and filed a harassment and retaliation suit. *Burrell v. Shepard* (D. DC, 2018).

White Manager Discriminated Against For Firing Black Employee. A White UPS terminal manager was denied an annual bonus and his wage frozen the last year before retirement. He was told that "the problem was that he, a White man, had fired a Black employee." This apparently looked bad for the company, in a racially charged period of time. He sued for Title VII racial discrimination. The court first examined the termination, and found that the discharged employee had engaged in repeated and ongoing absences with many chances and the discharge was clearly warranted. The company defended the case by claiming bonuses were "discretionary." However, the manager had always received a bonus. The bonus system had criteria, which the manager had met. The only reason for denial and pay freeze seemed to be the company's concern for trying to avoid adverse racial publicity. If he had fired a White employee, the manager would have suffered no criticism or bonus denial at all. Ostensibly, if an African-American manager had done the discharge it would also have been OK. The court believed the apparent reason for the adverse action was the manager's race. *Trost v. UPS Ground Freight, Inc*. (ND Ill., 2018).

WORKERS COMPENSATION – RETALIATION

Rib Rage – Throwing Slab Of Meat Justified Discharge. In many states a discharge soon after a workers compensation incident is presumed to be retaliation. There is a greater burden placed on the employer to prove otherwise. A pork processing plant worker injured her shoulder and knee at work and received workers compensation benefits. She was cleared to return to work, but still required ongoing treatment. She then had a safety violation for not stopping a saw when trying to dislodge a stuck piece of meat. Then she became frustrated at another employee for allegedly not properly placing meat on the line. So, she picked up a slab of ribs and threw it across the conveyor belt to hit the other person. He complained about this assault and safety violation. She was fired and then she filed a state law case claiming the discharge was in retaliation for her workers compensation claim. A court granted summary judgment to the company, finding two serious safety violations, especially throwing pork products at others, overcame any inference of retaliatory motive. *Hernandez v. John Murrell Co. – Smithfield Foods* (D.C. Ia., 2018).

LABOR ARBITRATION

Mitigation – 41 Years Coal Mining For The Company Warrants Lesser Discipline For Major Infraction. A miner filed a grievance contesting his termination for insubordination, refusal to continue working after being told his shift was asked to stay over. The arbitrator found just cause for discipline but he reduced the termination to a 30-day suspension. The employee may have had a valid complaint but he should have followed the "work now, grieve later" principle. In becoming angry, however, the employee directed his anger at the company and did not personally threaten his supervisor. Furthermore, he had been a coal miner for 41 years, was a good worker, and had no prior discipline. As a result, a suspension was more appropriate than termination. In *Re Local Union 1503, District 17, The International Union, United Mine Workers of American and Black Oak Mining*. This case illustrates that employers can mitigate and give different discipline for the same infractions without violating discrimination laws, if there are special circumstances. The ADA may require reasonable accommodation/mitigation if a disability is part of the causation. Long-term good services (especially *hard service* as provided by coal miners) certainly makes an employee not "similarly situated" to those with the same infraction but fewer years.