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BY BOB GREGG AND THE BOARDMAN CLARK LABOR & EMPLOYMENT LAW GROUP

ADMINISTRATIVE ACTIONS

Challenge to Federal Agencies' Authority to Hear Cases and Render Decisions. This month's Administrative Actions section is not about rules made or regulatory guidance by administrative agencies. Instead, it is about court actions that have sought to significantly trim the ability of agencies to enforce rules. The authority for federal regulatory agencies, such as the Department of Labor or the National Labor Relations Board, to hold hearings and render decisions regarding violations of the laws or regulations has been under increasing attack and judicial scrutiny. Two courts have enjoined agencies' ability to do so, finding the agencies' hearing processes, in place for decades, likely violate the Constitution. These decisions create questions as to whether these or other federal agencies have the authority to enforce the laws they were established to oversee.

Space Exploration Technologies Corp v. National Labor Relations Board (5th Cir. 2025). SpaceX challenged a NLRB ruling that it had committed unfair labor practices. It did not directly challenge the facts of the specific case to argue that the outcome should be different. Instead, SpaceX challenged the right of the NLRB to even hear cases at all. It claimed that the appointment process of the NLRB's Administrative Law Judges was unconstitutional under Article II, and no ALJ had the authority to rule on anything. Article II of the

Constitution gives the Executive branch the ability to create federal agencies, with the president having authority over them. Federal ALJs have certain civil service protections and cannot be removed without just cause and using a civil service process. The Fifth Circuit Court of Appeals ruled that this violated Article II because it removed ALJs from the President's authority over the Executive branch agency. The President, it ruled, should have authority to remove agency Board Members and ALJs at will, without any procedure, in order to accomplish his Executive agenda. So, currently, the NLRB is enjoined from making or enforcing its decision in the Fifth Circuit until the case is decided on the merits or by the US Supreme Court.

Sun Valley Orchards, LLC v. U.S. Dept. of Labor (3rd Cir. 2025). In this case, an employer challenged a DOL ruling that it committed H-2A worker violations by failing to provide adequate housing, transportation, and wages/hours records. The company challenged the DOL's right to even rule in the matter. It cited Article III of the Constitution, which sets up the Federal Court System, and the right to have a court hear disputes. The company claimed the administrative proceedings, heard by an Administrative Law Judge, violated Article III, and that an administrative agency like the DOL had no right to make decisions in the matter; it should be decided by a regular federal court, and any administrative proceeding was unconstitutional. The court agreed that at least certain types of violation claims could not be decided by ALJs and must be brought in court by the DOL. This case was of a contract nature, but the court did not specify the scope of types of cases it believed might be affected. Sun Valley also brought an Article II challenge, but the court found it unnecessary to address that issue once it had ruled on the Article III challenge.

These cases are part of increasing challenges to federal agencies' ability to pass rules, enforce regulations, or issue decisions. They challenge the very structure of the agencies. These cases are against two agencies but could apply to most others. Though many employers do not relish government inspections and dealing with complaints or violation citations by regulatory agencies, the agencies, on the other

hand, provide more rapid resolution of issues, with more consistency, more predictability, and far less time and expense than the standard court litigation process. So, voiding agency ability to decide issues may well throw many more matters into an already overburdened court system, create lengthy processes, expensive litigation, and may place matters before juries, which can be prone to make far greater damage awards against employers than a federal agency would.

LITIGATION

Retaliation cases seem to be a theme this month. Annually, there are more Retaliation cases than any other type of employment complaint. This is because there are such a large number of "protected activity" laws that have anti-retaliation provisions. [For a list of the major antiretaliation laws and details on the dynamics of retaliation cases, request the article Retaliation by Boardman Clark.]

Food Safety Modernization Act

Retaliation by Investigation — Food Safety Complaints Lead to a Discharge. Among the laws that protect employees from retaliation for engaging in protected activities is the Federal Food Safety Modernization Act (FSMA), which covers farms and food facilities. This case illustrates the concept that adverse action soon after an employee engages in protected activity can be presumed to be retaliatory. *Finley v. Kraft Heinz, Inc.* (4th Cir. 2025) involved a Production Manager in a meat processing plant who raised concerns about improper sealing of plastic packaging that he believed could allow pathogens to enter the meat. Also, he raised concerns about bone fragments in the finished product and repeatedly showed his manager the bones in the meat. He allegedly was instructed to continue processing and not discard the product. On one occasion, he shut down the production lines. He gathered data and showed written documentation of meat quality issues to higher management. Two weeks later, he was suspended, then fired, for an investigation of his supposed untruthfulness in an unrelated disciplinary action of an

employee under his supervision. The Plant Manager then filed an FSMA retaliation suit. The timing of his discharge soon after his food safety complaints raised suspicion and a "presumption" or "inference" of retaliation that the employer may need to rebut. The employer's defense of "untruthfulness" did not seem to hold up. A co-manager who gave similar statements suffered no consequences; the company's evidence was contradictory, the supposed "untruthfulness" seemed to consist of a minor inconsistency which would not warrant discharge, if any action at all. Thus, the discharge soon after raising food safety concerns seemed to be evidence that the protected activity played a part in the company's action. This case illustrates the concept of "retaliation by investigation." When an investigation of supposed wrongdoing or sudden closer scrutiny of an employee's work begins soon after protected activity, it can be predicted to be interpreted as retaliatory. Even if the employee has a long record of problem performance or behavior, why did the employer wait until now to suddenly start scrutinizing, documenting, and focusing disciplinary attention?

Confidentiality

Revealing FMLA Form Information Violates ADA and Rehabilitation Act Confidentiality Provisions. Most employment laws do not operate alone; they have overlays with others. This is true of the various laws that require confidentiality of medical information. *Mullin v. Dept. of Veterans Affairs* (11th Cir. 2025) was a Rehabilitation Act case involving several issues. Among these, the Department employee had submitted an FMLA Leave Request for breast cancer treatment. A member of the Human Resources staff told the employee's union steward about the cancer diagnosis on the FMLA form. The employee alleged this was a violation of the Rehabilitation Act. The court agreed. It found that FMLA forms constitute a "medical inquiry" under both the ADA and the Rehabilitation Acts. These require all medical information to be confidential, kept in a separate, more secure manner than other records, and not revealed to anyone without a significant need to know. The union steward had been involved in the

employee's accommodation discussions about a different disability, but had no involvement in and no need to know about the breast cancer. The unauthorized revelation could be challenged under the Rehabilitation Act. Different laws have different liability provisions. So, if a single issue violates two or more laws, the plaintiff can choose the most advantageous. Warning: The employee union representative's connection is too often the cause of this sort of confidentiality breach. HR meets with the employee and the union representative on various and sometimes sensitive issues and has in-depth conversations with the representative on these issues. HR can then presume that it can discuss the employee's other employment-related matters with the representative. However, unless the employee specifically authorizes that communication, it becomes a confidentiality violation. Just because someone brings a union representative into discussions of some medical and disability issues does not constitute authorization to reveal information about other matters.

Discrimination

Age

A One-Two Punch – Firing and Delay in Reinstatement – Police Officer Can Bring Retaliation Case and Seek Additional Award. Officer Smith, a Police Department's oldest and most senior officer, age 52, committed several errors in responding to a burglary and car chase. He was accompanied by a younger officer who was also involved in the errors. The Police Chief recommended firing Smith. However, the Chief gave instructions not to investigate the younger officer. During Smith's pre-discharge meeting, the Chief said "younger officers did not make the 'mistakes'," that Smith had. Upon being discharged, Smith filed both for Arbitration under the Collective Bargaining Agreement and an EEOC complaint for Age Discrimination. The Arbitrator ruled that the firing was unjustified. The alleged errors were "minor and excusable" under the circumstances; the Department had failed to follow its own progressive discipline process; the younger, similarly situated officer had not been

investigated or cited. The arbitrator concluded the discharge was, "so unreasonable and so outside what could be considered rational," that it indicated, "other motivations existed," for the decision to discharge. The Arbitrator ordered immediate reinstatement to duty. However, the Department waited a month and then told Smith he must have a fitness for duty evaluation before returning. The evaluation was held two weeks later, and the doctor found Smith fit and cleared for immediate return to duty. However, the Department, again, delayed re-instating Smith for another month. During this time, it conducted a promotion process open only to currently active officers. Thus, Smith, the most senior officer, was not included. The person promoted to Lieutenant was the same younger officer who had been involved in the errors which got Smith fired. Also, during this delay, the Department negotiated a raise for all currently active officers. The Department then allowed Smith to return two days after the pay raises went into effect. Meaning all other officers were now at higher pay – except him. Smith sued under the Age Discrimination in Employment Act for discrimination in the discharge and retaliation for having filed the EEOC complaint. The court found there was substantial evidence of disparate treatment to show age discrimination in the discharge and indicate the long delay in reinstatement could be punishment for filing an EEOC charge. Smith could seek damages for the denial of the promotion opportunity, and the denial of the raise, even though the Arbitrator had awarded him back pay for the period he was out of work. Smith could also seek additional damages for that discharge period under the ADEA. Different laws can have different liability provisions, and sometimes pursuing one does not mean a person cannot also pursue another and collect damages under it as well. In this case, the Department seems to have engaged in a "One-Two Punch" of adverse actions against Officer Smith. However, he double-punched back with both Arbitration and retaliation cases.

Sex

Sexist Statements Are Not Enough to Win Case – One Still Has to Meet the Job Requirements. A Walmart employee applied for

a manager position that she did not receive. A male employee was promoted instead. Following the selection process, the store manager who made the decision said he promoted the male candidate because "he was sick and he has a family to support." The rejected employee filed a Title VII sex discrimination case. The court found that the store manager's statements were the sort traditionally associated with gender bias and "could create an inference of unlawful discrimination." However, the manager job at issue required passing the company's Supervisory Leadership Assessment. The plaintiff had not passed the exam. The male applicant had. So, the female applicant would not have been selected regardless of any biased comments. It is not enough to show the presence of biased attitudes or discriminatory statements in the process. One still must meet the requirements for the job. *Brady v. Walmart Stores, Inc*. (8th Cir. 2025)

Disability

Employee Can Violate Rules and Still Win Retaliation Case. Usually, solid proof that an employee committed rule violations, had poor performance, or engaged in wrongful behavior is more than sufficient for discharge and to win any case, but not always. It can also be important to show consistency in comparison with other similarly situated employees. *Gray v. State Farm Mutual Auto Insurance Co.* (6th Cir. 2025) involved an employee, Ms. Gray, who advocated for another employee to receive a disability accommodation. This included researching the ADA, writing an advocacy letter to Human Resources, and filing an internal complaint against the manager of her and the other employee's work unit for his repeated overt obstruction of the accommodation process. The result: the supervisor issued a warning about not discussing accommodations with co-workers. After receiving a letter from an attorney, the company granted the accommodation, allowing the disabled employee remote work and transferring Gray to another unit. A couple of months later, the former supervisor was substituting in the new unit while the regular manager was on vacation. He began a close scrutiny of Gray's work and time records, something the regular manager had not done for anyone previously. He found discrepancies, including extended lunch

times and breaks, and late arrivals, but not reporting them. He took them to HR and advocated to discharge Gray due to falsified time records. Ms. Gray was discharged. She filed an ADA retaliation suit. The court found evidence of retaliation. The special scrutiny was an unusual procedure started by a former manager who was upset about Ms. Gray's complaint about him. He focused his scrutiny only on Ms. Gray. Other employees also had the same or more time discrepancies, some of whom were on the same extended lunches with Ms. Gray, and nothing was done regarding those violations. The manager on vacation had a "flexible" approach to time and allowed ongoing deviations. So, even though it was clear Ms. Gray had time recording violations, she could still bring a retaliation case. If no one else got fired, she can contest her discharge as retaliation and seek reinstatement and damages.

OTHER RECENT ARTICLES

These additional, recent articles can be found at BoardmanClark.com in the Labor & Employment section:

Update on the Scope of Arrest Record Protections by Storm Larson, Doug Witte, and Brian Goodman

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Author

Bob Gregg
(608) 283-1751