BELLNUNNALLY
ATTORNEYS & COUNSELORS

TEXAS LEGAL COUNSEL BREAKFAST
JANUARY 30, 2018

Latest and Greatest Developments in Labor & Employment Law Update 2018

Presented By:
Sonja J. McGill, Tammy S. Wood

LABOR

The DOL

The Department of Labor has rescinded the Independent Contractor guidance issued in June 2015 and the Joint Employer Guidance issued in January 2016 which both greatly expanded the definition of "employer" under the FLSA. Both doctrines were critical in heightening the Agency's investigative capacity to expand its tentacles to businesses traditionally managed on lean staffs and, of course, empowering an expansion of private litigation that will be quelled with their rescission. Time will tell whether this stems the current tide.

The NLRB

BROWNING FERRIS' JOINT EMPLOYER DOCTRINE OVERTURNED

The newly Republican controlled NLRB rescinded the hated *Browning-Ferris*' Joint Employer ruling with *Hy-Brand*, 365 NLRB No. 156 (2017). For a joint employer to exist, one entity's employees will be found to be joined with another company's employees only if one of the companies exercised actual, direct control over the other or subordinate company's "essential employment terms." It is not enough that the stronger company, like a franchisor, *retains the right* to exercise that control when it deems appropriate. Now, proof of indirect control, contractually-reserved control that has never been exercised, or control that is limited and routine will not be sufficient to establish a joint-employer relationship. Further, such actual, direct control must be exercised in a manner that is not "limited and routine."

NLRB RESTORES THE BARGAINING UNIT, OVERRULING *SPECIALTY HEALTHCARE*

The focus of micro-units from Specialty Healthcare was the target of the NLRB's ire in *PCC Structurals, Inc.*, 365 NLRB 160 (2017). Of course, in *Specialty Healthcare*, the "overwhelming community-of-interest" test permitted a union to assert representation over excluded "micro-units" that might be distinct from those already represented by a union. In *PCC Structurals, Inc.*, the Board reinstated the traditional community-of-interest standard outlined in United Operations, Inc. Under the United Operations standard, the Board found that it is required to weigh both the shared and distinct interests of petitioned-for and excluded employees. In

reaching this conclusion, the Board noted that at no point does the burden ever shift to the employer to show an overwhelming community of interest between the excluded and petitioned-for employees. As a result, the Board remanded the matter to the region for appropriate action under the traditional community-of-interest standard test.

WORK RULES DON'T IMPINGE ON SECTION 7 RIGHTS AS A *PER SE* MATTER

Employer facially neutral policies, rules and handbook provisions that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights will be reviewed under a balancing test that specifically overrules the test articulated in *Lutheran Heritage*. Under the *Boeing Company*, 365 NLRB 154 (2017), the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. With new test, the Board will remain focused on its "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy, focusing on the perspective of employees, which is consistent with Section 8(a)(1).

As the result of this balancing, the Board will established three categories of employment policies, rules and handbook provisions (hereinafter referred to as "rules"):

- Category 1 will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in William Beaumont Hospital, and other rules requiring employees to abide by basic standards of civility.

- Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

- Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

The Courts

THE NLRA PERMITS CIVILITY RULES BUT NOT WHOLESALE RECORDING BANS

In *T-Mobile USA v. NLRB*, 865 F.3d 265 (5th Cir. 2017), the Fifth Circuit found that civility rules in the workplace do not violate Section 7 or 8(a) of the NLRA but the policy prohibiting all recordings was so broad that an employee could reasonably construe the recording ban to cover Section 7 activities. The 5th Circuit specifically found that the recording ban infringed on protected activity because a reasonable T-Mobile employee, armed with knowledge of his right to engage in protected activity, would read the language to as plainly forbidding a means of limiting that conduct, like such as even an off-duty employee photographing a wage schedule posted on a corporate bulletin board. It will be interesting how this part of the 5th Circuit's ruling stands in contrast to the Board's decision in the *Boeing Company* that a no-camera rule does not similarly violate the NLRA.

FLSA

FLUCTUATING WORK WEEK REQUIRES CLEAR UNDERSTANDING BETWEEN THE PARTIES

Hills v. Entergy Operations, 866 F3d 610 (5th Cir. 2017): In this case, a group of security officers alleged violations of the FLSA to the extent that the employer required them to work more hours in a week than was their understanding when they converted from contract status to regular, full-time employees. While the plaintiffs admitted they agreed to a shift of 48 hours one week, and 36 hours the next week, they alleged the company was requiring them to work more hours than stipulated in that schedule, and therefore, they were owed overtime. The 5th Circuit reversed the district court's summary judgment for the employer and remanded the case for the court to determine whether the parties' original understanding as to whether they would be paid a fixed salary was in fact, based on a fluctuating work week standard, where the employees' fixed salary was intended to compensate for all straight hours no matter how many or few.

A YEAR'S TIME LAPSE IS NOT A DEATH KNELL FOR FLSA PROTECTED ACTIVITY CLAIMS

In *Starnes v. Wallace*, 849 F.3d 627 (5th Cir. 2017), a risk manager who was not responsible for human resources received a complaint from a co-worker that the co-worker's husband, also working for the company, was not getting paid for this travel time as a maintenance worker or his overtime. The plaintiff referred the co-worker to the human resources manager, but ultimately spoke to the human resources manager herself, on the co-workers' behalf. After the plaintiff told the human resources that she believed the company "'violating the law by the way [it was] paying [the maintenance worker],'" she also made the same complaint up the management chain, who assured her the issue would be resolved. After the plaintiff assisted the maintenance worker in getting his claim paid, the company laid her off, along with the co-worker's wife who originally came to her. The appellate court ruled that a reasonable jury conclude that the company targeted the plaintiff and the maintenance worker's wife for retaliation by laying them off, where the evidence demonstrated their efforts to constantly complain about the lack of overtime due to the maintenance worker, in combination with the fact

that out of the 5 people targeted for layoff, they were the only 2 who remained unemployed after the company's reorganization. So, the year lapse in time was not too long for the company to retain a retaliatory motive against them.

EMOTIONAL DISTRESS DAMAGES ARE AVAILABLE FOR RETALIATION CLAIMS

In *Pineda v. JTCH Apartments*, 843 F.3d 1062 (5th Cir. 2016), a married couple whose husband worked for an apartment complex in exchange for reduced rent brought a FLSA suit for overtime, for which they received a notice of eviction three days after serving the citation on the complex. After a jury found for Pineda, the maintenance worker, on both his overtime wage claim and his retaliation claim, the couple appealed the court's failure to instructing the jury on his claim for emotional harm damages. The 5th Circuit concluded that its jurisprudence interpreting the ADEA was no an obstacle to joining other circuits in deciding that the FLSA's broad authorization of "legal and equitable relief" encompasses compensation for emotional injuries suffered by an employee on account of employer retaliation.

Portal to Portal Act

In *Bridges v. Empire Scaffold*, 875 F.3d 222 (5th Cir. 2017), employees for an oil refining company contended the company violated the FLSA by failing to pay them for pre-shift waiting time as envisioned by the Portal to Portal Act. While the company bused in employees from the parking lot to the refinery from 5 to 6:15 a.m. every morning, the company did not require them to do anything else other than wait for their shifts to begin at 7 a.m. The 5th Circuit determined that the compensability under the Portal-to-Portal Act hinged on whether the wait time, between arriving at the refinery and the 7 a.m. shift time, was integral and indispensable to the principal activities which they were employed to perform. Affirming the district court's summary judgment, the 5th Circuit agreed that the time spent waiting to begin one's shift was not compensable overtime because it was neither tied to nor necessary to the "principal activities of the employee's duties" as defined by the regulations.

EMPLOYMENT

Discrimination

How Far back Can a Continuing Violation Go?

In *Heath v. Bd. Of Supervisors for S. Univ. Agric. & Mech. Coll.*, 850 F.3d 731 (5th Cir. 2017), the plaintiff alleged she had been the victim of sexual harassment since 2003 but did not file her first charge in 2013. The magistrate judge granted summary judgment on the harassment claim, concluding that most of the acts occurred outside of the 300 day window for a charge. The Fifth Circuit reversed the summary judgment, arguing that under the continuing violation doctrine, a fact finder could consider the entire period of harassment as long as one action occurred within the filing period. Thus, actions dating back to 2011 could be considered as continuing acts since the employer failed to take any remedial action to address that conduct before the charge was filed.

"Annoying" Conduct is Insufficient for Hostile Work or Constructive Discharge

In *Vanderhurst v. Statoil Gulf Services, LLC*, 2018 WL 541912 (Tex.App.—Houston[1st Dist.] 2018, no pet.), a former employee alleged that after he ended a romantic relationship with a co-worker, the co-worker threatened him and his wife, which he then reported through the company's internal reporting system. The plaintiff alleged the hostile work environment created by his former lover included her walking by his desk many times a day and staring at him from across the room during work meetings. The First Court of Appeals said that while such behavior might be annoying, it failed to support a claim for hostile work environment or to be such that a reasonable person in the plaintiff's position might feel compelled to resign his job.

Who is a Proper Comparator?

The plaintiff in *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572 (Tex. 2017), alleged he was discriminated against under the TCHRA based on his race and national origin by failing to give him to take a second drug screening following an initial positive test, and thereby remain working. The Texas Supreme Court maintained that the two of the three comparators offered by the plaintiff were not similarly situated as higher ranked employees. So, he could not sustain a prima facie case of discrimination since his comparator employees with different responsibilities, supervisors, capabilities, work rule violations, or disciplinary records are not considered to be 'nearly identical. The third comparator also was not similarly situated since he successfully rehabilitated himself following the positive drug screening, and hence, was eligible for active status.

"Other" Adverse Employment Actions

Three police officers alleged that they were subjected to adverse employment actions as whistleblowers under the Texas Whistleblowers Act in *Burleson v. Collin County Commty. College Dist.*, 2017 WL 511196 (Tex. App.—Dallas 2017). One of the officers was given an

employee coaching that the employer said was not sufficient for a prima facie case of retaliation. The Dallas Court of Appeals disagreed. Although the reprimand was entitled "coaching," and purported to give constructive feedback, the court found that the overall tone of the document denoted more, it warned that further infractions could result in termination, and it was accompanied by an undesirable shift change that the plaintiff was told resulted from the reprimand.

A Reminder that Changing Explanations Can Demonstrate Pretext

In *Caldwell v. KHOU-TV*, 850 F.3d 237 (5th Cir. 2017), the Fifth Circuit reminded us that where the employer's explanation for the employee's adverse action "transforms" over time, that is sufficient evidence of pretext to defeat a motion for summary judgment. The Court recounted at least 4 separate explanations for the plaintiff's inclusion in the company's reduction in force. First, the tv station asserted that the plaintiff shirked his responsibilities by refusing to do work he had been assigned and then later claimed that the plaintiff did not take the initiative to seek out additional work. Next, in a letter to the plaintiff's attorney and later in response to a series of interrogatories, the Defendants first stated that their decision to fire the plaintiff was a result of his refusal to work. Later, in a letter to the EEOC, the Defendants stated that the plaintiff was terminated not because he was a "slacker" but rather because of his "inability and unwillingness to adapt to technological changes." Finally, the news editor responsible for the ultimate decision to fire the plaintiff testified before the district court that terminating the plaintiff had "[a]bsolutely nothing at all" to do with his work ethic. The Court easily reversed the summary judgment by saying it was the jury's prerogative to determine their truthfulness.

The Return of the Cat's Paw

After the plaintiff in *Fisher v. Lufkin Indus.*, 847 F.3d 752 (5th Cir. 2017), complained that his supervisor engaged in racial discrimination against him by referring to the plaintiff, an African-American man, as "boy," the supervisor set up a "sting" to catch the plaintiff selling pornographic DVDs to others while on company property. Even though the company properly investigated the plaintiff for engaging in conduct that violated company property, the 5th Circuit declared the investigation itself, even credible, to be tainted by the supervisor's retaliatory animus because it would not have occurred but in retaliation for the plaintiff's complaint. The appellate court reversed the magistrate's judge ruling granting the employer's summary judgment motion.

The ADEA

Pain & Suffering/Punitive Damages Not Available for ADEA Claims

In *Vaughan v. Anderson Regional Medical Center*, 849 F.3d 588 (5th Cir. 2017), the 5th Circuit reaffirmed its earlier decision in *Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), that pain and suffering damages, along with punitive damages, are not available under the ADEA since no intervening changes had changed the principle established by that ruling.

The ADA

CONDITIONAL OFFER WITHDRAWN FOLLOWING FAILED PRE-EMPLOYMENT EXAM NOT EVIDENCE EMPLOYER REGARDED EMPLOYEE AS DISABLED

In *Arthur v. BNSF Railway Co.*, 2017 WL 2889498 (5th Cir. 2017), the pre-employment medical examination disqualified the plaintiff from the job he originally sought, but the company reserved the right to reconsider the plaintiff for the same position after 6 months when his condition might be different. Since that decision was temporary, the court ruled the company did not regard the plaintiff as disabled under the ADA for that position or any other vacant position for which the plaintiff might be qualified.

INDEFINITE LEAVE IS NOT ALWAYS A REASONABLE ACCOMMODATION

Moss v. Harris County Constable, Precinct One, 851 F.3d 413 (5th Cir. 2017): If an employee submits an ADA accommodation request that seeks indefinite leave, without a specified date of return, or with the intent of never returning to work, that is not considered as reasonable. In addition, someone claiming retaliation under the ADA must also be a qualified individual with a disability at the time the alleged retaliation occurred.

KNOWLEDGE OF AN EMPLOYEE'S DISABILITY CAN BE IMPUTED TO THE DECISIONMAKER

The Texas Supreme Court ruled incontinence itself can qualify as a disability that is eligible for accommodation that under the TCHRA in *Green v. Dallas County Sch.*, ___ S.W.3d ___, 2017 WL 1968829 (Tex. 2017). The supreme court also determined that the jury reasonably determined that the decisionmaker's knowledge of the plaintiff's disability, when the plaintiff was fired, could be imputed through the agency's "officers and employees."

FMLA

In *Texas Workforce Comm'n v. Wichita County, Texas*, 507 S.W.3d 919 (Tex.App.—Fort Worth 2016, rev. granted), the Fort Worth Court of Appeals ruled that employees on leave protected by the FMLA cannot qualify for unemployment compensation under TEX. LAB. CODE § 201.091(a) since such an employee technically remains employed throughout the pendency of that leave.

Miscellaneous

THE EEOC'S SUBPOENA POWER IS ALMOST PARAMOUNT

The Supreme Court ruled in *McLane v. EEOC*, ___ U.S. ____, 137 S.Ct. 1159, 197 L.Ed. 500 (2017), that the EEOC's subpoena power will be evaluated under an abuse of discretion standard when it comes to requesting/obtaining evidence from an employer it considers to be relevant to a pending investigation.

CHAPTER 21 OF THE TEX. LABOR CODE DOES NOT PREEMPT SEXUAL ASSAULT CLAIMS

The plaintiff in *B.C. v. Steak N Shake Ops.*, 512 S.W.3d 276 (Tex. 2017) alleged that her supervisor attempted to rape her in a bathroom on the company's property at the end of a long shift of work, but his attempt failed when she was able to run away after he lost balance and fell to the ground. The defendant argued her claims were preempted by the Texas Labor Code. The Texas Supreme Court agreed, finding that the essence of her claim was sexual assault rather than a hostile work environment claim based on her sex, wherein the company fostered or tolerating a pattern of unwelcome sexual conduct towards her. The Texas Supreme Court determined that the plaintiff was not attempting to repackage harassment into assault so as to recover under the common law because the essence of her claim was assault. When the gravamen of a claim brought by a plaintiff is sexual assault versus a hostile work environment claim of sexual harassment, such claims are not preempted by Chapter 21 of the TEX. LAB. CODE.