Westlaw Journal
EMPLOYMENT
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 29, ISSUE 17 / MARCH 17, 2015

WHAT'S INSIDE

ADMINISTRATIVE RULES

Public notice, comment unnecessary for rule interpretation changes, Supreme Court says

A federal agency does not need to follow formal rule-making procedures, including eliciting public comment, when it changes its interpretation of federal statutes and regulations, the U.S. Supreme Court has ruled.

Perez et al. v. Mortgage Bankers Association et al., Nos. 13-1041 and 13-1052, 2015 WL 998535 (U.S. Mar. 9, 2015).

The Administrative Procedure Act, 5 U.S.C. § 551, does not require an agency to follow the public notice and comment process when it first issues an interpretative rule, the high court said, so an agency does not have to seek comments when it makes a change.

The U.S. Department of Labor had argued that agencies must be free to update statute interpretations without formal procedures, while a real estate finance trade group countered that a substantive change requires the full administrative process under the APA.

REUTERS/Stelios Varias

The high court overturned a District of Columbia U.S. ircuit Court of Appeals decision that said based on the circuit court's ruling in *Paralyzed Veterans of America v. D.C. Arena LP,* 117 F.3d 579

CONTINUED ON PAGE 23

COMMENTARY

High court ruling reels in 6th Circuit precedent favoring vesting of retiree benefits

Judith Williams-Killackey of Quarles & Brady discusses a recent U.S. Supreme Court ruling on standards the 6th Circuit used to determine that a collective bargaining agreement provides lifetime health benefits for retirees and considers how courts will apply the decision in future contract disputes.

SEE PAGE 3

COMMENTARY

Supreme Court expands whistleblower protection

Attorney Jeffrey S. Ettenger of Kaufman Dolowich & Voluck discusses the U.S. Supreme Court's recent decision in *Department of Homeland Security v. MacLean* and what the ruling means for future whistleblowers.

SEE PAGE 6

41737936

Westlaw Journal Employment

Published since May 1986

Publisher: Mary Ellen Fox

Executive Editor: Donna M. Higgins

Managing Editor: Tricia Gorman
Tricia.Gorman@thomsonreuters.com

Managing Desk Editor: Robert W. McSherry

Senior Desk Editor: Jennifer McCreary

Desk Editor: Sydney Pendleton

Graphic Designers: Nancy A. Dubin
Ramona Hunter

Westlaw Journal Employment
(ISSN 2155-594X) is published biweekly by Thomson Reuters.

Thomson Reuters
175 Strafford Avenue, Suite 140
Wayne, PA 19087
877-595-0449
Fax: 800-220-1640
www.westlaw.com
Customer service: 800-328-4880

For more information, or to subscribe, please call 800-328-9352 or visit west.thomson.com.

For the latest news from Westlaw Journals, visit our blog at http://blog.thomsonreuters.com/westlawjournals.

How to Find Documents on Westlaw
The Westlaw number of any opinion or trial filing is listed at the bottom of each article available. The numbers are configured like this: 2015 WL 000000. Sign in to Westlaw and on the "Welcome to Westlaw" page, type the Westlaw number into the box at the top left that says "Find this document by citation" and click on "Go."

Westlaw

TABLE OF CONTENTS

High court ruling reels in 6th Circuit precedent favoring vesting of retiree benefits

By Judith Williams-Killackey, Esq.
Quarles & Brady

In late January the U.S. Supreme Court ruled in a case addressing the principles that should apply in deciding whether retiree welfare benefits in a collective bargaining agreement vest so that they survive expiration of the agreement.

The circuits had been split on the issue. The 6th U.S. Circuit Court of Appeals, in particular, essentially created an inference in favor of finding such benefits vested, even if a CBA was silent as to the duration of the benefits. *UAW v. Yard-Man Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983), and its progeny.

On Jan. 26 the Supreme Court squarely addressed that inference in *M&G Polymers USA LLC v. Tackett* 135 S. Ct. 926 (2015). A proposed class of retirees had filed a complaint against former employer M&G Polymers in the Southern District of Ohio in 2007 after M&G began requiring the retirees to contribute to the cost of health benefits provided under a CBA.

Three of the class representatives were residents of Ohio but had retired from M&G's plant in West Virginia. If the complaint had been filed in West Virginia, the case would have been decided by 4th Circuit law, which was not as favorable to vesting as the 6th Circuit.

Ultimately, the Supreme Court rejected the way the 6th Circuit was purportedly applying principles of contract law to determine whether retiree welfare benefits in a CBA vest.

FACTUAL BACKGROUND

M&G (and its predecessors) had entered into a series of CBAs and pension, insurance and service award agreements, or P&I agreements, with the union, that included descriptions of health care benefits. The P&I agreement contained the following language:

> Employees who retire on or after Jan. 1, 1996 and who are eligible for and receiving a monthly pension under the 1993 pension plan ... whose full years of attained age and full years of attained continuous service ... at the time of retirement equals 95 or more points will receive a full company contribution towards the cost of [health care] benefits. ... Employees who have less than 95 points at the time of retirement will receive a reduced company contribution. The company contribution will be reduced by 2 percent for every point less than 95. Employees will be required to pay the balance of the health care contribution, as estimated by the company annually in advance, for the [health care] benefits. ... Failure to pay the required medical contribution will result in cancellation of coverage.

When the last CBA with the union expired, M&G announced that it would require retirees to contribute to the cost of benefits.

The retirees asserted that the "full company contribution" language established a vested right to health care benefits and that the employees meeting age and term of service qualifications were entitled to fully covered, contribution-free health care benefits. Retirees not meeting these qualifications were entitled to coverage, but with certain contribution requirements.

They said that, by unilaterally modifying the health care benefits and shifting a large part of the health care costs to retirees, M&G breached the CBA in violation of the Labor Management Relations Act, the employee welfare benefit plan in violation of the Employee Retirement Income Security Act and its fiduciary duty under ERISA.

> The retirees asserted that language in the collective bargaining agreement established a vested right to fully covered, contribution-free health care benefits.

M&G denied these claims, maintaining that several separate letters of understanding, provided that, if benefits reached a certain cost, retirees would share the cost of the premium. In addition, M&G claimed that its obligation to provide retirees benefits terminated when the CBA expired based on the duration clause in the CBA.

PROCEDURAL HISTORY

The District Court initially granted a motion to dismiss the complaint, ruling that it did not have jurisdiction to hear the claims and the complaint failed to state a claim. But the 6th Circuit reversed that decision and remanded the case. *Tackett v. M&G Polymers USA LLC*, 561 F.3d 478 (6th Cir. 2009).

The 6th Circuit noted that health care benefits vest only if the parties so intend. Then, in determining the parties' intent in this case, the court applied the *Yard-Man* principles, under which a court must:

Judith Williams-Killackey is a partner at **Quarles & Brady** in Milwaukee, where she concentrates her practice in the area of labor and employment law, with a focus on representing management. Her practice includes an emphasis on litigation, including class actions in federal and state courts and before administrative agencies, traditional labor law, counseling employers on various employment-related issues, investigating complaints by former and current employees, and representing employers litigating whistleblower claims.

(1) look to the explicit language, (2) evaluate that language in light of the context that led to its use, (3) interpret each provision ... as part of the integrated whole, (4) construe each provision consistently with the entire document and the relative positions and purposes of the parties, (5) construe the terms so as to render none nugatory and to avoid illusory promises, (6) look to other words and phrases in the document to resolve ambiguities, and (7) review the interpretation ... for consistency with federal labor policy.

The 6th Circuit ultimately found that the retirees had sufficiently stated a claim to survive a motion to dismiss. The appellate court found, contrary to the district court, that the "full company contribution" language suggested that the parties intended M&G to cover the full cost of health care benefits for those employees meeting the qualification requirements.

SUPREME COURT DECISION

On appeal, the Supreme Court unanimously decided that the 6th Circuit, despite its pronouncement to the contrary, had in fact not applied ordinary contract principles in deciding whether the retiree health benefits under the CBA vested. The high court vacated and remanded the case to the 6th Circuit to apply ordinary contract principles.

The Supreme Court agreed with the 6th Circuit that courts should interpret a CBA, including ones with ERISA plans, based on ordinary principles of contract law when doing so is not inconsistent with federal labor policy. Further, the meaning of an unambiguous CBA must be determined based on its plainly expressed intent.

However, the Supreme Court took issue with the 6th Circuit's application of *Yard-Man* inferences to conclude that, absent extrinsic evidence to the contrary, the CBA indicated an intent to vest retirees with lifetime, contribution-free benefits.

> The 6th Circuit said it was unlikely that the union would have agreed to language in the CBA ensuring full company contributions if M&G could unilaterally change the amount of the contribution it was providing.

The court also found it unlikely that the union would have agreed to language ensuring full company contributions if M&G could unilaterally change the amount of the contribution it was providing. Further, M&G's promise would be "illusory" since it would not violate the CBA by lowering the contribution to zero. Finally, the 6th Circuit based its decision on the fact that the CBA tied eligibility for health care benefits to pension benefits.

The case was then remanded to the District Court. After a bench trial, the court found that most of the retirees were entitled to lifetime health benefits contribution-free. *Tackett v. M&G Polymers USA LLC*, 853 F. Supp. 2d 697 (S.D. Ohio 2012).

The 6th Circuit affirmed this decision on appeal. *Tackett v. M&G Polymers USA LLC*, 733 F.3d 589 (6th Cir. 2013). In doing so the 6th Circuit reiterated that, in interpreting a CBA, a court needs to determine whether the parties intended to vest benefits by applying traditional rules of contract interpretation, but then went on to discuss the principles enunciated in *Yard-Man* and its progeny.

The court noted that in *Yard-Man*, the 6th Circuit found ambiguous as to duration a provision stating that the employer would provide health benefits. The 6th Circuit purported to apply ordinary contract law in resolving this ambiguity.

First, the appeals court inferred an intent to vest these benefits for life because the CBA had termination provisions for other benefits, but not these benefits. Second, it found that without vesting, the promise would be illusory for the retirees who would not become eligible for benefits before the CBA expired.

Finally, it found that, in the context of labor negotiations, the parties intended the benefits to vest for life because they are not subject to mandatory bargaining, are unlikely to have been left to future negotiations, and are based on retirement status. The *Yard-Man* court concluded that these "clues outweigh[ed] any contrary implications derived from a routine duration clause."

After *Yard-Man*, the 6th Circuit took this analysis even further. In subsequent cases involving language similar to wording it had previously found ambiguous, the court ruled such language unambiguously conferred lifetime benefits — and it refused to give any weight to other provisions supporting a contrary construction.

In addition, the *Yard-Man* reasoning was extended so that, unless there was specific durational language referring to retiree benefits, a general durational clause was not relevant and a provision tying eligibility for retirement health benefits to eligibility for pension essentially equated to vesting.

The Supreme Court found that that the inferences applied in *Yard-Man* and its progeny do not represent ordinary principles of contract law, but instead "place a thumb on the scale in favor of vesting retiree benefits in all" CBAs in ascertaining intent.

In particular, the Supreme Court took issue with the several aspects of the 6th Circuit's decision:

Instead of relying on known customs and usages in a particular industry based on actual evidence, the 6th Circuit relied upon its own suppositions as to what parties intended when negotiating retiree benefits. For example, in *Yard-Man* the appeals court asserted, without any foundation that "when ... parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree." But the Supreme Court noted that, while a court may look to known customs or usages in an industry to determine contract meaning, those customs or usages must be proved based on the evidence. Further, it said, the 6th Circuit made matters worse by applying this supposition no matter the industry at issue.

The 6th Circuit relied on inferences without factual foundation. For instance, the appeals court relied in part on the premise that retiree health care benefits are not a subject of mandatory collective bargaining. However, the Supreme Court noted that the parties can voluntarily agree to bargain retiree benefits. The high court also found that the 6th Circuit relied on the premise that retiree benefits are a form of deferred compensation while Congress had determined they are welfare plans.

The 6th Circuit's refusal to apply general durational clauses to provisions governing retiree benefits conflicts with the principle that a written agreement is presumed to encompass the whole agreement of the parties. In *Yard-Man,* the court inappropriately concluded that its inference that parties would not leave retiree benefits to future negotiations and that such benefits generally last as long as the recipient remains a retiree, outweighed any contrary implications of a durational clause terminating the CBA. This error was later compounded by other decisions requiring a specific durational clause in order to prevent retiree health care benefits from vesting.

The 6th Circuit, based on the doctrine of illusory promises, construed provisions that benefited only some retirees as illusory merely because they did not benefit all retirees. However, a promise that is "partly" illusory by its terms is not illusory.

The 6th Circuit failed to consider that contractual obligations normally end when a contract, including a CBA, expires. Parties can vest lifetime benefits by providing in explicit terms that certain benefits continue after its expiration. However, a court may not infer the parties intended these benefits to vest for life simply because a CBA is silent as to how long the benefits will last.

While all of the justices agreed that ordinary contract principles should be used, four justices joined in a concurring opinion emphasizing principles that would find that such benefits vest, unlike the majority. For instance, the concurring opinion noted that a provision stating retirees will receive health care benefits if they are receiving a monthly pension is relevant to the analysis.

The concurring opinion also pointed out that a benefit clause stating survivors of retirees will continue to receive benefits until death or marriage suggests a finding that benefits are vested.

> The Supreme Court unanimously decided that the 6th Circuit had not applied ordinary contract principles in deciding whether the retiree health benefits under the CBA vested.

The 6th Circuit failed to consider that courts should not construe ambiguous writings to create lifetime promises. While recognizing that traditional contract interpretation requires a clear manifestation of intent before conferring a benefit, the 6th Circuit found that, once a benefit was conferred, it could not be limited — at least if it was in a CBA. However, the appeals court was willing to find such benefits could be limited if they part of a contract that was not bargained between an employer and a union, as opposed to in a CBA. The Supreme Court found that the different treatment of these types of contracts underscores *Yard-Man*'s deviation from ordinary principles of contract law.

PRACTICAL IMPLICATIONS

The Supreme Court in *Tackett* sends a clear message that courts in construing contracts should ascertain the parties' intent. The 6th Circuit deviated from this principle when, as the result of its decisions, it created inferences regarding how courts should interpret the parties' intent when determining if retiree health benefits in a CBA vested.

Further, the Supreme Court's opinion suggests that if a specific durational clause exists, the parties' intent would appear to be that the benefits do not vest and do not last beyond the expiration of the CBA. Further, general durational clauses are also relevant and must be considered in deciding whether benefits vest.

Before the Supreme Court's decision, when a company announced a decision to reduce or stop benefits, there was often a race to the courthouse with retirees trying to file in a jurisdiction subject to the 6th Circuit's inferences. The Supreme Court decision may make that less likely, but it remains to be seen how the lower courts will apply ordinary contract principles in this context based on the Supreme Court's pronouncements.

While the justices unanimously agree that ordinary contract principles apply, the majority opinion emphasized rules that seem to weigh against vesting, whereas the concurring opinion emphasized rules that seem to favor vesting.

It is entirely possible that some courts will use the more employee-friendly rules the concurrence emphasized by the concurrence, while others will use the employer-friendly ones the majority emphasized.

For existing CBAs, the decision at least provides those employers in the 6th Circuit with a possibility that a court will not interpret the CBA as vesting benefits. However, to avoid a concern that a court will interpret retiree benefits as vesting, in drafting CBAs in the future the parties should make their intentions explicit. The best way to do this is to specifically state in no uncertain terms in the CBA that the benefits will be provided only for the duration of the agreement if the intent is that they not vest.

It is also important to keep notes of bargaining to establish bargaining history. If a CBA is found ambiguous, the history will be considered in deciding whether the parties intended benefits to vest.

It remains to be seen how the lower courts will apply the Supreme Court's pronouncements in *Tackett* but, at the least, any inferences in favor of presumption in the 6th Circuit should no longer be applied. WJ

Supreme Court expands whistleblower protection

By Jeffrey S. Ettenger, Esq.
Kaufman Dolowich & Voluck

The U.S. Supreme Court, in a split decision, has affirmed the decision of the U.S. Court of Appeals for the Federal Circuit holding that plaintiff Robert J. MacLean is entitled to whistleblower protection pursuant to the Whistleblower Act, 5 U.S.C. § 2302(b)(8)(A). *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015).

The decision expands whistleblower protections for federal workers by limiting prohibition to the disclosure of information to those addressed via statute and not those addressed via regulation.

BACKGROUND

Former federal air marshal MacLean was terminated by the Transportation Security Administration for publicly disclosing sensitive information. Specifically, in July 2003, the TSA briefed MacLean and his fellow air marshals about a potential plot to hijack domestic passenger flights. As a result, the TSA stationed various air marshals on overnight flights in an apparent effort to thwart any hijacking attempts.

Soon thereafter, MacLean received a text message from the TSA stating that the stationing of air marshals on overnight flights from Las Vegas was being canceled until August 2003. MacLean questioned the directive and was advised that budgetary concerns required the action. He made further inquiries with the Department of Homeland Security, which advised that the TSA's decision would not be changed.

According to MacLean, he believed that the TSA's directive was illegal as 49 U.S.C. § 44917(b) requires the TSA to place an air marshal on every flight that presents "high security risks." Because his superiors appeared unwilling or unable to reverse the TSA's decision and because he believed the law had been violated, MacLean contacted an MSNBC reporter regarding these events.

Soon thereafter, MSNBC published a story about the TSA's directive, causing an immediate response from Congress and ultimately a reversal of course by the TSA. Within 24 hours of the story being published, air marshals were again assigned to Las Vegas overnight flights.

About one year later, MacLean appeared for an interview on "NBC Nightly News" regarding an unrelated topic, but the TSA became suspicious and began investigating whether he was the source of the July 2003 story published on MSNBC. MacLean ultimately admitted that he was the source, and the TSA terminated him.

MacLean challenged his termination with the Merit Systems Protection Board, arguing he was entitled to whistleblower protection pursuant to 5 U.S.C. § 2302(b)(8)(A). The MSPB upheld MacLean's termination, stating that he was not entitled to whistleblower protection because his disclosure was "specifically prohibited by law," citing 49 C.F.R. § 1520.5(a)-(b), which defines sensitive security information.

FEDERAL CIRCUIT

The Federal Circuit vacated the MSPB's decision, holding that MacLean's disclosure did not violate a specific law, but in contrast only violated a regulation, which was not sufficient to deny him whistleblower protection.

SUPREME COURT

The high court determined this case to be important enough to review inasmuch as it involved a careful review of the delicate balance between employee "free speech" rights as protected by the Whistleblower Protection Act and "secrecy regulations" promulgated by federal regulatory agencies, particularly the TSA.

The Supreme Court looked first to the Whistleblower Protection Act, which states that "an employer shall not take or threaten to take any action against an employee because the employee discloses information that they reasonably believe violates any law, rule or regulation."

This rule applies so long as the disclosure is not specifically prohibited by "law" and if such information is not specifically required by executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

Here, there appears to be no dispute between the parties that MacLean disclosed the information to MSNBC because he reasonably believed a law, rule or regulation was violated in removing the air marshals from the Las Vegas flights.

Thus, the Supreme Court determined that MacLean's action did fall within the basic whistleblower protections of Section 2302(a)(8). This allowed the court to focus solely on whether MacLean's actions were prohibited by law or executive order, the latter of which would not afford MacLean the protections he sought.

The DHS argued that MacLean's disclosure was prohibited by TSA regulations regarding sensitive security information, specifically 49 C.F.R. §§ 1520.5(a)-(b), 1520.7(j) (2003).

Jeffrey S. Ettenger, of counsel at **Kaufman Dolowich & Voluck** in Woodbury, N.Y., concentrates his practice in the area of labor and employment law, assisting employers with their day-to-day employment needs, as well as all areas of employment litigation. He can be reached at jettenger@kdvlaw.com.

In an effort to strengthen its argument, the DHS said this specific regulation was authorized by 49 U.S.C. § 114(r)(1), which prohibits the disclosure of any information relative to the number of air marshals deployed, specific deployment of missions or the manner in which missions are conducted.

MacLean did not dispute the regulation but argued that it was enacted by the TSA — an administrative agency — and is not a "law"; therefore, he was entitled to the full protection of the whistleblower statute.

The Supreme Court agreed, holding that the TSA regulation was not a "law" and MacLean's disclosure was not prohibited. The court performed a thorough analysis of Section 2302, examining the whistleblower provisions outlined in Section 2302(b)(8) in addition to the balance of the remaining provisions relating to a wide variety of employment-related decisions.

By emphasizing that Congress used the phrase "law, rule or regulation" in various other provisions within the statute but only used the word "law" in Section 2302(b)(8), the Supreme Court found that Congress acted purposely and deliberately when drafting this particular provision of Section 2302.

The court rejected the DHS' argument that the TSA regulation prohibiting the disclosure of air marshal activity was promulgated by Section 114(r)(1)(c), and thus MacLean's actions did in effect violate a "law."

To the contrary, the court determined that Section 114(r)(1)(c) itself did not prohibit any specific act. Instead, it simply authorized the TSA to promulgate regulations the agency deemed necessary to protect sensitive information.

The high court also rejected the government's public policy argument that individual TSA agents who obtain sensitive information cannot be permitted to use their discretion regarding whether to disclose this information to the public. To allow this form of discretion could place the public at greater risk.

Although the justices were clearly sensitive to this concern, they simply stated that it was either Congress' or the president's obligation to change the law if either deemed it necessary to protect this public interest.

It is noteworthy that the Supreme Court's decision was not unanimous. Justices Sonia Sotomayor and Anthony M. Kennedy issued a strong dissenting opinion, taking exception to a portion of the majority's ruling.

Specifically, the dissent concluded that Section 114(r)(1) does prohibit the type of disclosures MacLean made. The dissent said the majority's holding leaves the discretion to violate the TSA regulations in the hands of each TSA agent, which is, according to the dissent, a "dangerous exercise" in discretion. Thus, the dissent concluded that a law was violated and MacLean was not entitled to whistleblower protection.

LOOKING AHEAD

With the recent, well-publicized stories of whistleblowers Edward Snowden and Chelsea (Bradley) Manning, both of whom leaked classified documents, among others, the Whistleblower Act has caused great debate among the public and in Congress regarding the balance between the "importance" of federal employees' public disclosure of sensitive information that may harm the public against protecting information the government does not want the general public or the United States' enemies to have.

The solution is far more complex.

The inherent purpose of the Whistleblower Act is to prevent the government from hiding from the public that which is illegal. The law encourages employees to publicly speak out against illegal government acts without risking retribution, specifically termination. This appears to be a noble endeavor, but when the disclosure of the information may risk public safety or the personal safety of government agents, the question arises as to whether these employees are protected. Congress and the courts wrestle with these debates often.

The *MacLean* decision significantly broadens the protections of the whistleblower statute. By prohibiting disclosure of information to that only prohibited by "law" or "executive order," the Supreme Court is sending a clear signal to prospective whistleblowers that, absent an amendment by Congress or an act of the president, in most instances their actions will entitle them to whistleblower protection.

More importantly, by limiting the statutory language, the high court has put Congress on notice that if it desires to limit whistleblower protection, it must amend the statute to do so.

Congress can limit protection in two ways.

First, it can pass laws against the disclosure of specific information by government employees, in this case TSA employees. Thus, if an employee discloses said information to the public, the disclosure would violate a "law" and the whistleblower would not be entitled to statutory protection.

Second, Congress could simply amend Section 2302(b)(8) to include the term "law, rule or regulation." If Congress were to take this action, it would be a clear signal that it intends for all regulations, including TSA regulations, to have the same effect as laws. A congressional action of this nature would significantly limit whistleblower protection going forward.

The Supreme Court also sent a signal to the White House that if it desires to limit whistleblower protection, it has the inherent power to do so by executive order.

The president can accomplish this in two ways.

First, the president can sign specific executive orders articulating that certain information is prohibited from disclosure and, thus, whistleblower protections do not apply.

Second, the president can sign an executive order stating that all government regulations regarding the nondisclosure of information about security measures have the effect of law. The Supreme Court even implied that this would be a simple way to resolve the issue.

A consensus of critiques on the matter reveals that neither Congress nor the president will act any time soon.

For either to act in the manner described above would be an indication that they desire to limit whistleblower protection. This is a signal neither Congress nor the president seeks to relay to their constituents at this time.

Instead, Congress, through statute, or the president, via executive order, may promulgate specific laws that prohibit the disclosure of particular information with respect to certain government agencies. While this may limit some whistleblower activity, it would be on a case-by-case basis and would be far more fact-specific than a general limitation of whistleblower protection.

With a new Congress and only two more years until a new presidency, it will be interesting to see how this issue progresses. WJ

Supreme Court hears argument in Muslim woman's discrimination suit against Abercrombie

By Tricia Gorman, Managing Editor, Westlaw Journals

Oral argument at the U.S. Supreme Court on Feb. 25 in a discrimination suit against clothing store Abercrombie & Fitch centered on whether a job applicant needs to ask for a religious accommodation.

Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores Inc., No. 14-86, oral argument held (U.S. Feb. 25, 2015).

The case, filed by the Equal Employment Opportunity Commission, could have major implications for companies' hiring practices involving minorities.

The EEOC argued that Abercrombie failed to hire a Muslim woman who wore a hijab to a job interview after assuming that she wore the headscarf for religious reasons and would wear it on the job.

The clothing retailer countered that the woman did not ask for a religious accommodation to wear the scarf and was not hired because the hijab violated its "look policy," which requires Abercrombie employees to only wear the store's clothing.

The EEOC has asked the high court to review a 10th U.S. Circuit Court of Appeals ruling that an employee or job applicant must specifically ask for an accommodation for an employer to be held liable under federal civil rights law.

A company acting on assumptions about an employee or job applicant's religious practices should be sufficient to show discrimination, the agency said. The EEOC went on to say the appeals court improperly ruled that the onus was on the employee or job applicant to ask the employer for a religious practices accommodation.

Following the arguments, attorneys **Puja Gupta** and **Hina Hussain** of **Joseph, Greenwald & Laake**, who were not involved in the suit, said the exchanges between the justices and attorneys showed the impracticality of the appellate decision.

REUTERS/Jim Bourg

Muslim woman Samantha Elauf (R), who was denied a sales job at an Abercrombie & Fitch store in Oklahoma in 2008, stands with her mother, Majda, outside the U.S. Supreme Court on Feb. 25, 2015, after oral arguments in her discrimination case against the retailer.

Reaction to the arguments

Joint statement by Puja Gupta and Hina Hussain of Joseph, Greenwald & Laake

Religious expression battled it out with an employer's right to set policy in a spirited exchange between the justices, particularly Justices Ruth Bader Ginsburg, Sonia Sotomayor, Samuel Alito and Elena Kagan, and the attorneys for the parties.

Abercrombie's position that it couldn't hire Samantha Elauf because her headscarf violated its look policy is both at odds with its concession that interviewees aren't expected to comply with the look policy during interviews, and taking the facts in the light most favorable to EEOC, with the interviewer's purpose for calling her supervisor and explaining Elauf's headscarf was for religious reasons.

We are interested to see what credence, if any, the court gives Abercrombie's argument that applicants are distinct from employees and whether the court concludes the same rules for employees should apply to applicants entitled to a religious accommodation.

Typically, employees are more likely to have been presented with an employee handbook or terms of employment that the employee knows may conflict with her religious practices. If, once the employee knows of a conflict between her religious practice and the employer's rule, she seeks an accommodation, there is little confusion about her burden to commence a dialogue seeking an accommodation with her employer.

Applicants, however, may not be in the best position to initiate the need for religious accommodation without knowledge of all the rules that might present a conflict to their religious practices.

"The arguments showed that no justice seriously thinks that employers have no burden to recognize a likely need for accommodation," R. Scott Oswald said.

"Affirming the 10th Circuit's rule that so clearly relieves the employer of the burden of accommodating religious practices may place an inordinate and impractical burden on interviewing applicants," Gupta and Hussain said in a statement. "A job applicant does not know all of a potential employer's policies, so the applicant would not know to raise the issue of a religious practice that may conflict with such policies."

During the arguments, most of the high court justices indicated they rejected the idea that a job seeker cannot claim accommodation discrimination if they do not make a specific accommodation request, according to **R. Scott Oswald**, managing partner at **The Employment Law Group PC**, who was not involved in the case.

"The justices' line of inquiry — clarifying what and when an employer is obliged to ask — dominated the arguments, and showed that no justice seriously thinks that employers have no burden to recognize a likely need for accommodation," Oswald said.

However, the justices seemed to acknowledge that it is difficult to require managers to make judgment decisions regarding religious issues, said **Barnes & Thornburg** partner **Bill Nolan**, who is not involved in the suit.

"Unless the Supreme Court simply affirms the Court of Appeals' decision, it seems that it will need to opine on the extent to which the employer must proactively identify whether apparel is worn for religious purposes," Nolan said. "The justices asked numerous questions and seemed to be wrestling with how to draw that line."

HIJAB WORN AT INTERVIEW

The EEOC filed the suit on behalf of Samantha Elauf, who was denied a sales job at an Abercrombie Kids store in Tulsa, Okla., in 2008.

Although the person who interviewed Elauf said she assumed Elauf wore a hijab for religious reasons, the store did not hire her and failed to offer an accommodation to its look policy, in violation of Title VII of the Civil Rights Act, the agency said.

A federal judge ruled in favor of Elauf and the government, but in an October 2013 ruling, the 10th Circuit found that Elauf was required to ask for an accommodation. *EEOC v. Abercrombie & Fitch Stores*, 798 F. Supp. 2d 1272 (N.D. Okla. 2011); 731 F.3d 1106 (10th Cir. 2013).

In October 2014 the Supreme Court granted the EEOC's petition for *certiorari*.

On Feb. 10, numerous religious groups, including the American Jewish Committee and the American-Arab Anti-Discrimination Committee, filed *amicus* briefs with the court in support of the EEOC and Elauf.

The U.S. Chamber of Commerce and other business groups supported Abercrombie in several *amicus* briefs filed in late January.

ACCOMMODATION DISCUSSIONS

Ian Gershengorn, on behalf of the EEOC, argued that Elauf's case was a "straightforward" example of a company making religious consideration part of the hiring process and failing to make proper accommodations.

If Abercrombie made "hiring decision on the merits ... Ms. Elauf would have been hired," he said.

Gershengorn suggested that the employer should start the discussion about accommodation if there is some concern during an interview, rather than expecting an applicant to request it. This was the process Congress intended in passing Title VII, he argued.

In response, Chief Justice John Roberts expressed concern that such a dialogue begun by an employer could lead to stereotyping certain applicants based on appearance and other factors.

Justice Antonin Scalia said the EEOC could adopt the appeals court's rule and place the burden on the applicant to request accommodation to avoid stereotyping.

Statement from Bill Nolan, partner at Barnes & Thornburg

Unless the Supreme Court simply affirms the court of appeals' decision, it seems that it will need to opine on the extent to which the employer must proactively identify whether apparel is worn for religious purposes. The justices asked numerous questions and seemed to be wrestling with how to draw that line. While it is always difficult to predict results from the content of an oral argument, it seems unlikely from the questions that a majority will affirm the court of appeals.

A likely result is that the court will require employers to notify applicants of policies that implicate religious practices, and inquire whether the applicant has any concerns about complying. While that creates work for employers, it is analogous to what many employers do in the context of disability discrimination issues: Many employers provide a job description highlighting any physical requirements of a job and ask the applicant if he/she can perform them, with or without accommodation. Such a process invites any accommodation dialogue up front.

The worst result for employers would be one that puts front line managers in a position of having to make individual judgment calls on whether certain apparel or other practices implicates religious issues. The court seemed mindful of the difficulty of such an arrangement.

"Once you notify the employer that (wearing the headscarf is) for a religious reason, you got 'em," Justiice Scalia said.

Gershengorn countered that an applicant may not be aware of company policies and would not know to ask for an accommodation.

During Abercrombie's arguments, attorney Shay Dvoretzky said the high court must devise a rule for when an employer becomes liable for accommodations. Some outward signs of a religious nature are more obvious than others for a company to assume an accommodation may be necessary, he said.

The court must decide "at what level of knowledge does the employer have to have before the duty to accommodate is triggered," Dvoretzky said.

Justice Stephen Breyer expressed support for the EEOC's position that an employer who believes a religious accommodation is necessary is obliged to accommodate the worker unless the accommodation is overly burdensome under the law. "What's wrong with that?" he asked.

Dvoretzky argued that religion is a very personal, individual issue, so the applicant or employee should initiate the conversation about accommodation.

"For 40 years, the EEOC's own guidance has put the burden to initiate the conversation on the employee because only the employee knows," he said.

Dvoretzky echoed Chief Justice Roberts' concerns about an employer stereotyping by asking about the need for accommodation. In an attempt to avoid liability under Title VII, an employer would have to treat applicants differently, which essentially violates Title VII, he said.

"Under the EEOC's own regulations, if the employer asks the neutral-sounding question and then chooses not to hire the person for a reason completely unrelated to religion, the EEOC will infer that there was discrimination," Dvoretzky said. WJ

Attorneys:
Petitioner: Ian H. Gershengorn, U.S. Department of Justice, Washington

Respondent: Shay Dvoretzky, Jones Day, Washington

Related Court Document:
Transcript: 2015 WL 782707

NEWS IN BRIEF

LOCKHEED MARTIN TO PAY $62 MILLION IN 401(K) SUIT

Defense contractor Lockheed Martin has agreed to pay participants in its 401(k) retirement plan $62 million to settles claims the plan was mismanaged, according to documents filed Feb. 20 in the U.S. District Court for the Southern District of Illinois. The plaintiffs filed a class action in 2006 on behalf of more than 100,000 plan participants, alleging the company violated the Employee Retirement Income Security Act by concealing fees and that plan administrators' investments were overly conservative. The fees and poor investment decisions reduced participants' returns, the suit said. According to the settlement agreement, Lockheed denied wrongdoing, but agreed to make payments to participants' 401(k) plans. Attorney fees and costs could reach $22.5 million, the settlement says.

Abbott et al. v. Lockheed Martin Corp. et al., No. 06-00701, settlement reached (S.D. Ill. Feb. 20, 2015).

NYC SETTLES THIRD OVERTIME SUIT BY POLICE SERGEANTS

For the third time, New York City and its police department have agreed to pay thousands of current and former police sergeants several million dollars to settle claims the sergeants were denied overtime compensation. In the latest class action, filed in Manhattan federal court in May 2014, more than 5,000 NYPD sergeants alleged the city continues to violate federal wage laws by failing to pay overtime, despite two similar suits filed in the last decade. The city has agreed to pay $8.09 million to settle the suit. In November 2012 the city settled a similar suit with 4,300 sergeants for $14 million in back pay and $6 million in liquidated damages. *Mullins v. City of New York*, No. 04-2979, *settlement approved* (S.D.N.Y. Nov. 19, 2012). The second suit involved more than 4,100 NYPD sergeants and settled for $9.88 million in October 2013. *McInnis v. City of New York*, No. 12-2957, *settlement approved* (S.D.N.Y. Oct. 25, 2013).

Small et al. v. City of New York et al., No. 14-03469, settlement reached (S.D.N.Y. Feb. 25, 2015).

CALIFORNIA LABOR CONTRACTOR OWES BACK PAY TO MIGRANT WORKERS

Manuel Quezada, who provides laborers for a variety of harvests in northern California, must pay 59 migrant workers $163,000 in back pay, the U.S. Department of Labor announced Feb. 24. According to the Labor Department, Quezada violated the federal Migrant and Seasonal Agricultural Worker Protection Act and minimum wage laws during last year's grape harvest at a California winery. Quezada failed to pay the migrant workers at least twice a month, failed to provide wage statements and did not disclose employment conditions to the harvesters, the Labor Department statement says.

Walgreens rightly fired pharmacist for refusing to immunize, judge says

Drugstore chain Walgreens was justified in firing a pharmacist who refused to perform flu immunizations on customers, a Pennsylvania federal judge has ruled, rejecting the pharmacist's age discrimination claims.

Prewitt v. Walgreens Co., No. 11-2393, 2015 WL 712787 (E.D. Pa. Feb. 19, 2015).

U.S. District Judge Lawrence F. Stengel of the Eastern District of Pennsylvania denied pharmacist Rodney Prewitt's age discrimination claims and granted Walgreens summary judgment, finding Prewitt was terminated because he would not fulfill an essential aspect of his job.

"The plaintiff's refusal to perform this job function gave Walgreens every right to take an adverse employment action against him," Judge Stengel said.

According to the judge's opinion, Walgreens hired Prewitt as a full-time, salaried pharmacist in 2006 and he began working at a store near his Oxford, Pa., home.

In 2010 the retail pharmacy chain began offering the flu shot and other immunization services to its customers. As part of its program, the company required its pharmacists to be certified to perform immunizations, and anyone who was not certified could only work certain shifts and would "float" among stores, the opinion said.

Prewitt notified his district supervisor that he was morally opposed to performing immunizations because he said a close friend had died from complications of the neurological disorder Guillain-Barre syndrome following a flu shot.

According to the opinion, Prewitt's supervisor offered him a floating position in September 2010 during flu season, but Prewitt refused because the position would be at a store far from his home with late-night, reduced hours.

In January 2011, Prewitt corresponded with his supervisor about returning to his position after flu season, but also reiterated his opposition to the immunization program. Ten days later he received notice from Walgreens that he had been terminated retroactive to Dec. 13, 2010, the opinion said.

Prewitt, who was 62 at the time, sued Walgreens in April 2011 and included federal and state law age discrimination claims. Prewitt argued that younger pharmacists who were not certified to immunize had been able to keep working their regular hours at their normal store locations.

The plaintiff was morally opposed to performing immunizations because he said a close friend had died from complications of a neurological disorder following a flu shot.

According to the opinion, the suit originally included a claim under Pennsylvania's Conscience Policy, 49 Pa. Code § 27.103, which allows pharmacists to avoid dispensing a prescription for moral reasons. Prewitt alleged Walgreens had wrongfully discharged him because of his opposition to immunizations.

He later dropped the claim as "legally deficient" after finding that no other pharmacist who opposed Walgreens' immunization program continued to work for the company and thus, he was treated no differently than any other pharmacist, the opinion said.

Walgreens filed a motion for summary judgment, arguing that its offer to make Prewitt a floating pharmacist with reduced hours was not because of his age, but because he refused to immunize customers.

Judge Stengel found that Prewitt had established a *prima facie* case of age discrimination by showing that Walgreens might have treated younger pharmacists more favorably than it treated him.

However, the judge said, Walgreens showed that it had a legitimate, non-discriminatory reason for changing Prewitt's hours and location: Immunizing customers had become an essential part of a pharmacist's job.

Prewitt provided no evidence to suggest that Walgreens had used his immunization stance as a mere pretext for terminating him because of his age, according to the opinion. Based on Prewitt's original complaint, he believed that his objection to immunizing customers was the reason for his termination, Judge Stengel noted.

REUTERS/Rick Wilking

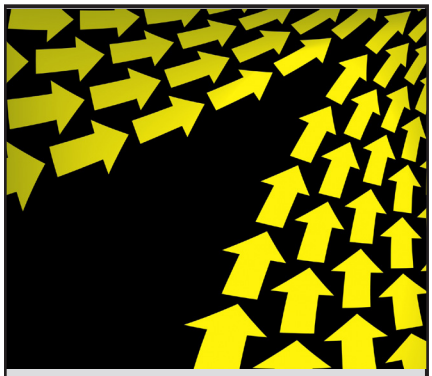
"The plaintiff proceeded under the theory that his suspension/termination were 'wrongful' based on his moral objection up until he realized that this claim was legally deficient," the judge said. "The plaintiff admitted that he knew of no pharmacists who refused to immunize and who continued to be employed at Walgreens."

Moreover, the record of correspondence between Prewitt and his supervisor shows that Walgreens would have reinstated him to his previous position if he had agreed to immunize, the opinion said.

"Though Mr. Prewitt's objection may have been genuine and sincere, he has not established any unlawful discrimination by his employer," Judge Stengel concluded. WJ

Related Court Document:
Opinion: 2015 WL 712787

See Document Section A (P. 29) for the opinion.



ADA

6th Circuit says worker not required to tie disability to job request

(Reuters Legal) – A U.S. appeals court has rejected an Ohio hospital's "novel" argument that a former janitor's failure to link the brain damage he suffered from a stroke to his request for easier work precluded his disability discrimination claims after he was fired.

Mobley v. Miami Valley Hospital, No. 14-3665, 2015 WL 795310 (6th Cir. Feb. 25, 2015).

A unanimous three-judge panel of the 6th U.S. Circuit Court of Appeals on Feb. 25 said Bryan Mobley's disabilities, including a speech impediment and trouble reading and writing, were obvious enough that his supervisors at Miami Valley Hospital should've known they were related to his poor job performance.

Mobley cleaned surgical suites at the hospital for more than five years without difficulty, the 6th Circuit said, and was transferred in 2012 to removing trash from patient rooms.

According to the suit he filed that year in the U.S. District Court for the Southern District of Ohio, he had trouble completing the new job and was fired within weeks.

He said the hospital violated the Americans with Disabilities Act, 42 U.S.C. § 12101, in assigning him work he couldn't handle and failing to accommodate his request to have his old job back.

U.S. District Judge Timothy Black last year dismissed the suit, agreeing with the hospital that Mobley had to explicitly link his request for his old job to his disabilities to sustain ADA claims. *Mobley v. Miami Valley Hosp.*, No. 13-102, 2014 WL 2573118 (S.D. Ohio June 9, 2014).

The 6th Circuit on Feb. 25 said Mobley's initial transfer was not discriminatory, but that his failure to accommodate claim should proceed because his need was obvious.

The panel included Circuit Judges Julia Gibbons, Jeffrey Sutton and David McKeague.

Mobley's attorney, Adam Webber, declined to comment. A lawyer for the hospital did not return a request for comment.

The decision came on the same day the U.S. Supreme Court heard arguments in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores Inc*, No. 14-86, *oral argument held* (U.S. Feb. 25, 2015), which questions whether a specific request for a religious accommodation must be made and denied before an employer can be sued for religious discrimination.

The court's decision could impact ADA cases like Mobley's since the law's accommodation requirements mirror those in Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, sex, age, religion and national origin.

Miami Valley in claiming Mobley failed to link his disabilities to his request cited a 2004 1st Circuit decision in *Estades-Negroni v. Associated Corp.*, 377 F.3d 58 (1st Cir. 2004), and a later case that said workers must explain their medical need for an accommodation.

The 6th Circuit, considering the issue for the first time, did not reject the 1st Circuit rulings but said they didn't apply to Mobley's suit because the hospital knew about his medical issues. WJ

(Reporting by Daniel Wiessner)

Attorneys:
Plainitff-appellant: Adam Webber, Dayton, Ohio

Defendant-appellee: Gretchen Treherne, Bieser Greer & Landis, Dayton

Related Court Document:
Opinion: 2015 WL 795310

9th Circuit asks California high court to clarify 'ambiguous' labor laws

The 9th U.S. Circuit Court of Appeals says it cannot rule on an appeal of a wage-and-hour class action by Nordstrom department stores' retail employees until the California Supreme Court explains ambiguous workweek language in the state's laws.

REUTERS/Chip East

The suit was brought by hourly workers at Nordstrom who claimed they were required to work more than six straight days without a day off.

Mendoza et al. v. Nordstrom Inc., No. 12-57130, 2015 WL 691304 (9th Cir. Feb. 19, 2015).

The federal appeals court certified questions to the state court that it says "are of extreme importance to tens of thousands of employees in California."

A three-judge appellate panel has asked the state high court if the law mandating a day of rest during consecutive days of work applies to each workweek or any seven-day period, and if a worker can waive his or her day of rest by agreeing to work extra time.

"The consequences of any interpretation of the day-of-rest statutes will have profound legal, economic, and practical consequences for employers and employees throughout the state of California and will govern the outcome of many disputes in both state and federal courts in the 9th Circuit," Judge Susan Graber wrote for the panel.

Christopher Mendoza and Meagan Gordon, two former hourly workers for Nordstrom Inc., sued the retailer alleging it violated several sections of the California labor law by requiring employees to work more than six consecutive days without a rest day.

The class action sought damages on behalf of thousands of Nordstrom workers in the state.

According to the appellate opinion, Section 551 of the state's labor law says a worker is entitled "to one day's rest therefrom in seven," and another section includes an exemption "when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof." Section 552 prohibits an employer from causing "employees to work more than six days in seven."

U.S. District Judge Cormac J. Carney of the Central District of California dismissed the suit, finding Nordstrom had not violated the laws.

Judge Carney said the day-of-rest requirement applies on a rolling basis to any seven-day period and ruled Mendoza and Gordon were exempted because they each worked fewer than six hours on at least one of the seven days at issue.

Even if the hourly exemption did not apply, Judge Carney said, the company did not cause the plaintiffs to work excessive days because each had voluntarily agreed to work extra time for a co-worker. The plaintiffs appealed.

The appeals court certified the questions to the California Supreme Court after finding the "text of the applicable statutes is ambiguous" and that there is no state precedent to guide its conclusions. The panel said it is unclear from Sections 551 and 552 whether the mandated rest day applies to a workweek or not. Neither provision uses the term "workweek," while other sections of the labor code do use it, the panel said.

Examining a typical, full-time schedule for a company, like Nordstrom, that begins its workweek on Sunday, the appellate panel concluded that if the labor code provision applies to a workweek, then Nordstrom did not violate the law, but if it applies to any seven-day period, then the retailer did violate the law.

Section 556 of the labor code, which provides the exemption for fewer than six hours worked, is equally unclear, the appeals court said.

According to the appellate order, the District Court had relied on *Brinker Restaurant Corp. v. Superior Court,* 53 Cal. 4th 1004 (Cal. 2012), to determine that Nordstrom had not compelled the plaintiffs to work extra days. In *Brinker*, a class action over rest and meal breaks, the state high court said an employer must have a policy providing rest and meal breaks but does not have to force employees to take the breaks.

However, the appeals court questioned the applicability of a decision involving breaks, rather than full days of rest.

The *Brinker* decision does not answer the question of whether an employer violates the law by allowing workers to switch shifts and thus exceed the number of days they should work, the panel said.

The appeals panel asked the high court to explain what it means for any employer to cause a worker to exceed consecutive days worked under Section 552. WJ

Attorneys:
Plaintiff-appellant (Mendoza): André E. Jardini and K.L. Myles, Knapp, Petersen & Clarke, Glendale, Calif.

Plaintiff/intervenor-appellant (Gordon): R. Craig Clark, James M. Treglio and Laura M. Cotter, Clark & Treglio, San Diego; David R. Markham, San Diego

Defendant-appellee: Julie A. Dunne, Dawn Fonseca, Lara K. Strauss, Michael G. Leggieri and Joshua D. Levine, Littler Mendelson, PC, San Diego

Related Court Document:
Order: 2015 WL 691304

DirecTV denied California workers overtime and breaks, suit says

Satellite television provider DirecTV violates California labor laws by failing to pay full wages and denying hourly workers mandated rest and meal breaks, a class action says.

Spratt v. DirecTV Enterprises LLC et al., No. BC572409, complaint filed (Cal. Super. Ct., L.A. County Feb. 13, 2015).

Hourly employees, working on an alternative four-day schedule, regularly work more than 40 hours a week and work through their breaks without proper compensation, the suit says.

Former maintenance worker Steven Spratt filed the class action in the Los Angeles County Superior Court on behalf of current and former hourly DirecTV employees who worked for the company in California since 2011.

DirecTV has "engaged in a uniform policy and systematic scheme of wage abuse against their non-exempt employees," the complaint says.

Spratt alleges the company improperly instituted its alternative workweek schedule, in which employees work four 10-hour days. The company did not hold a secret ballot election among its workers to ascertain whether a majority wanted to change to the new schedule, a procedure mandated by the state wage-and-hour laws, Spratt says.

Under the new schedule, workers often work more than 40 hours in a week and the company "willfully" requires workers to work through their rest and meal breaks, the suit says.

Spratt's suit includes claims under multiple provisions of the state labor code.

According to the complaint, the law requires employers to pay at least time and a half for hours worked beyond 40 per week and mandates uninterrupted rest and meal breaks based on the number of hours worked per day.

REUTERS/Jonathan Alcorn

> DirecTV has "engaged in a uniform policy and systematic scheme of wage abuse against their non-exempt employees," the complaint says.

Workers are entitled to a 30-minute meal break when working at least five hours and a second break if they work 10 hours, the complaint says.

Despite making employees perform work during break times, DirecTV failed to provide compensation for that time, Spratt alleges.

The suit also includes claim under California's unfair-competition law, Cal. Bus. & Prof. Code § 17200, alleging DirecTV's actions are "unfair, unlawful and harmful" to Spratt and other hourly workers.

The class action seeks unspecified monetary damages for unpaid wages and statutory penalties, as well as injunctive and declaratory relief.

Spratt's suit came days after the Judicial Panel on Multidistrict Litigation refused to consolidate and transfer as many as 41 federal suits against the satellite provider.

The nationwide suits allege DirecTV misclassifies its technicians as independent contractors to avoid federal wage laws. *In re DirecTV Inc. FLSA and Wage and Hour Litig.*, MDL No. 2594, 2015 WL 500826 (J.P.M.L. Feb. 6, 2015).

The JPML said centralization would not serve the convenience or interests of the parties where the individual claims of nearly 500 plaintiffs implicate 30 state laws. Many of the plaintiffs are represented by the same attorneys and they can coordinate discovery without consolidation, the panel added. WJ

Attorneys:
Plaintiff: Douglas Han and Shunt Tatavos-Gharajeh, Justice Law Corporation, Glendale, Calif.

Related Court Document:
Complaint: 2015 WL 797035

Arbitrator to make threshold decision in contractors' $60 million employment suit

An arbitrator must decide whether a group of security contractors who worked in Iraq and Afghanistan must arbitrate claims that their employer improperly classified them as independent contractors and denied them certain benefits, a federal judge has ruled.

Mercadante et al. v. XE Services LLC et al., No. 11-CV-1044, 2015 WL 186966 (D.D.C. Jan. 15, 2015).

U.S. District Judge Colleen Kollar-Kotelly of the District of Columbia said the plaintiffs' employment contracts with XE Services LLC and its affiliates, including former Blackwater entities, provide that questions regarding whether an agreement is subject to arbitration are to be decided by an arbitrator.

She granted the defendants' request to compel arbitration and stayed the plaintiffs' employment benefits lawsuit in the meantime.

> The complaint says the defendants improperly classified the plaintiffs as independent contractors even though the companies controlled the work and provided gear and training.

THE UNDERLYING CLAIMS

C.J. Mercadante, Robert Biddle, Johnny Jefferson and Phillip W. O'Hara sued XE Services and its affiliated firms in the District Court in 2011, alleging the defendants improperly classified them as independent contractors.

According to the suit, the plaintiffs signed contracts with the defendants to work as security personnel in Iraq and Afghanistan between 2006 and 2009. The defendants held contracts with the United States to provide protection and other services in those nations, the suit said.

The contracts, which were called "independent contractor service agreements," provided that the plaintiffs were independent contractors and were responsible for paying withholding taxes and payroll taxes, the complaint says.

The defendants issued annual 1099 forms to the plaintiffs and did not pay money on their behalf to federal, state or local governments for unemployment and income tax withholding, the suit alleges.

The complaint says the plaintiffs were classified as independent contractors even though the companies controlled the work and provided gear and training.

The plaintiffs allege that as a result of this improper classification they have suffered financial losses due to taxation matters and have not received certain health, disability and retirement benefits from the defendants.

The suit raises causes of action for breach of contract, fraud, intentional and negligent misrepresentation, and violations of fiduciary duty under the Employee Retirement Income Security Act, 29 U.S.C. § 1101.

The plaintiffs seek a court order determining that they are the defendants' employees, and they also request unspecified compensation for the benefits allegedly owed, plus $20 million for noneconomic damages and $40 million in punitive damages.

DEFENDANTS SEEK ARBITRATION

XE Services and its co-defendants moved to compel arbitration of the case, based on the plaintiffs' independent contractor service agreements.

Judge Kollar-Kotelly ruled in favor of the defendants, finding that each plaintiff's ICSA contains a clause providing that any disputes will be resolved by arbitration under the American Arbitration Association's rules.

The AAA rules mandate that an arbitrator will decide questions of arbitrability, meaning whether a matter is subject to arbitration.

The incorporation of the rules into the ICSAs constitutes clear and unmistakable evidence that any questions concerning arbitrability were delegated to an arbitrator, Judge Kollar-Kotelly said. Parties can agree to arbitrate gateway questions such as whether they have consented to arbitrate and whether an arbitration contract covers a particular dispute, she explained.

The defendants

Blackwater Worldwide Trust, Health and Welfare Plan and Trustees

U.S. Training Center Inc.

USTC Security Consulting LLC, formerly known as Blackwater Security Consulting LLC

XE Services LLC

The arbitration provision in each ICSA is enforceable, so an arbitrator must make the threshold determination of whether the plaintiffs' underlying claims against the defendants are to go to arbitration, Judge Kollar-Kotelly ruled.

She said the lawsuit would be stayed while the arbitration was pending. WJ

Related Court Documents:
Opinion: 2015 WL 186966
Complaint: 2011 WL 9203835

1st Circuit revives bisexual worker's claims against Bank of America

(Reuters Legal) – A U.S. appeals court has reinstated claims against Bank of America Corp. by a former call center employee who says the harassment she faced when she began dating a female co-worker led to her termination.

Flood v. Bank of America Corp. et al., No. 14-1068, 2015 WL 855752 (1st Cir. Feb. 27, 2015).

A unanimous three-judge panel of the 1st U.S. Circuit Court of Appeals on Feb. 27 said Shelly Flood, who worked at a Maine customer service center from 2006 to 2010, could proceed with wrongful termination and hostile work environment claims under the state's Human Rights Act.

> A jury should decide if the alleged harassment was severe or pervasive enough to alter the conditions of the plaintiff's employment, the appeals court said.

Flood's 2012 suit, removed from state court to U.S. District Court in Maine, says her supervisors did not know she was bisexual until she started dating a female janitor who worked in the office. When that happened, she says, two supervisors became cold toward her, gave her inexplicably poor performance reviews and advised her not to talk about her personal life even though her co-workers did so routinely.

REUTERS/Chris Keane

The harassment became overwhelming, she claims, and she stopped going to work. Though she explained to a supervisor that she felt she was being treated differently, the company said she had abandoned her job and fired her, the suit says.

U.S. District Judge George Singal in 2013 agreed with Bank of America that because Flood chose not to show up at the office, her suit should be dismissed. *Flood v. Bank of Am. Corp. et al.,* No. 12-105, 2013 WL 4806863 (D. Me. Sept. 9, 2013). The 1st Circuit panel, however, said a jury could find that Bank of America's claim that Flood abandoned her job was merely a pretext.

The court said the standard was whether the alleged harassment was severe or pervasive enough to alter the conditions of Flood's employment.

Since that's a question of fact, Circuit Judge Kermit Lipez wrote, it should be decided by a jury and not on a motion for summary judgment. The panel also included Circuit Judges Jeffrey Howard and Bruce Selya.

Flood's attorney, Marshall Tinkle, said that he was pleased with the ruling.

"The decision sends an important message to the trial courts that issues relating to the severity of discriminatory harassment (and) whether an employee was forced out of a job should ... be resolved by the jury," said Tinkle, of the Hirshon Law Group.

A Bank of America spokesman declined to comment.

The janitor whom Flood dated and later married, Keri Flood, separately sued Bank of America, claiming she was also fired for being open about the relationship. The bank settled that case for an undisclosed sum. WJ

(Reporting by Daniel Wiessner)

Attorneys:
Plaintiff-appellant: Marshall Tinkle, Hirshon Law Group, Portland, Maine

Defendant-appellant: Caroline Turcotte, Locke Lord Edwards, Boston

Related Court Document:
Opinion: 2015 WL 855752

Ordinary repair work not covered by Wisconsin statute of repose, appeals court rules

A pipe insulation repairman's estate has won continuation of a wrongful-death suit against his employer, with a Wisconsin appeals panel's ruling that the state's construction statute of repose does not cover asbestos claims stemming from routine maintenance and repairs.

Peter v. Sprinkmann Sons Corp. et al., No. 2014AP923, 2015 WL 321551 (Wis. Ct. App. Jan. 27, 2015).

In an unpublished opinion, the three-judge Court of Appeals reversed a trial judge's summary judgment against the estate. The panel said the claim is exempt from the requirement to file legal action within 10 years after completion of the work because the law applies only to permanent "improvements" to real property.

For more than 36 years, beginning in 1956, Donald Peter worked for Sprinkmann Sons Corp. as a maintenance machinist at a Pabst Brewery, according to the panel's opinion.

During that time, Sprinkmann had a contract with Pabst to install, maintain and repair asbestos insulation on steam pipes on machines at the brewery, the opinion said.

After Peter was diagnosed with the asbestos-related lung cancer mesothelioma in May 2012, he sued Sprinkmann in the Milwaukee County Circuit Court, alleging workplace exposure to asbestos insulation caused his illness.

When Peter died in October 2013, his wife, as executor of his estate, amended the complaint to add a wrongful-death claim, the opinion said.

Sprinkmann moved for summary judgment, asserting that Peter's alleged damages accrued too late for his action to be timely under the state's construction statute of repose.

The statute bars an action against any person involved in an improvement to real property if the action is not brought within 10 years of substantial completion of the improvement.

The judge dismissed the suit on grounds that Peter filed suit too late and that his work was an improvement to the property as defined in the statute, the opinion said.

In reversing the trial judge, the appeals panel agreed with Sprinkmann that Peter filed suit more than 10 years after he completed his work but said the determinative issue was whether Sprinkmann's contract was for an improvement to real property.

Sprinkmann argued that the pipe insulation work at the brewery was a property improvement because it involved multiple installations of a product.

The panel said that to qualify as an improvement under the statute the work must be a "permanent addition" or "betterment" to the property that added capital value, as distinguished from an ordinary repair.

Peter did not claim exposure to asbestos from the initial installation of insulation, the panel said, but rather from routine insulation replacement years later.

"These repairs were not permanent additions," the panel said. "Rather, they were maintenance done to keep the pipes in proper condition." WJ

Related Court Document:
Opinion: 2015 WL 321551

Policy exclusion bars coverage for wage, labor suit

An auto part supplier's insurance policy does not cover a lawsuit alleging it forced employees to work off-the-clock and skip mandated meal periods, a California federal judge has ruled.

Admiral Insurance Co. v. Kay Automotive Distributors Inc. et al., No. 13-5100, 2015 WL 400634 (N.D. Cal. Jan. 29, 2015).

Admiral Insurance Co. filed suit in the U.S. District Court for the Northern District of California, seeking a declaratory judgment that it owes no duty to indemnify Kay Automotive Distributors Inc. in the lawsuit.

Granting the insurer's motion for summary judgment, U.S. District Judge Dean D. Pregerson ruled that all the potential claims against Kay fall within a policy exclusion barring coverage for damages arising from violations of California's wage-and-hour laws.

The underlying suit was filed in state court by Christopher Ingram, who worked as a delivery person for Kay from 2007 to 2011.

According to Ingram, the company failed to pay minimum, regular and overtime wages; provide mandated meal and rest periods; make payments within the required time; provide itemized wage statements; maintain adequate records as to wages and hours worked; and reimburse business expenses.

Ingram also accused the company of violating California's unfair-competition law, Cal. Bus. & Prof. Code § 17200.

> The judge said he found "little ambiguity" in the exclusion's wording.

Kay submitted the claims to Admiral under its employment practices liability policy, but the insurer said it owed no coverage because the policy excluded any claims arising from or directly or indirectly resulting from "any federal, state, local or foreign wage-and-hour laws."

Judge Pregerson agreed the exclusion relieved Admiral of any duty to indemnify Kay for any potential damages stemming from Ingram's claims, finding "little ambiguity" in the exclusion's wording.

Even Ingram's unfair-competition claim is excluded from coverage because it relates to the company's failure to abide by the state's Labor Code provisions, the judge said.

"This claim, too, arises out of wage-and-hour laws and is subject to the exclusion," Judge Pregerson said.

He added that Admiral's liability for the cost of defending Ingram's claims is limited to $100,000 based on the terms of Kay's policy. WJ

Related Court Document:
Order: 2015 WL 400634

Insurer had no duty to cover theft of $111,000 worth of 5-Hour Energy shots

An insurer did not act in breach of contract or bad faith when it refused to provide coverage to a wholesaler for more than $111,000 in missing 5-Hour Energy-brand shots based on a policy exclusion dealing with proof of loss, an Alabama federal judge has ruled.

W.L. Petrey Wholesale Co. Inc. v. Great American Insurance Co., No. 2:14-CV-868, 2015 WL 404523 (M.D. Ala., N. Div. Jan. 29, 2015).

U.S. Magistrate Judge Charles S. Coody of the Middle District of Alabama said the wholesaler had used "inventory calculations" to prove a loss had occurred, but the policy prohibits using this method as the only source to show a loss.

82,000 BOTTLES MISSING

W.L. Petrey Wholesale Co., based in Luverne, Ala., supplies products to convenience stores.

The company had a business insurance and crime protection policy issued by Great American Insurance Co. The policy provided coverage for "dishonest acts committed by an employee." However, it excluded coverage for a loss when the sole proof of the loss is "an inventory computation" or "a profit and loss computation," the judge's opinion says.

W.L. Petrey fired one of its delivery drivers in May 2013. After reviewing the inventory on the driver's truck and in his storage unit, the wholesaler discovered more than 82,000 bottles of 5-Hour Energy, valued at more than $111,000, were missing from the his inventory, according to the opinion.

The wholesaler says it filed a police report and submitted a claim with Great American, which denied the claim based on the inventory shortage exclusion, the opinion says.

W.L. Petrey sued the insurer for breach of contract and bad faith, and Great American moved for summary judgment.

Judge Coody determined that the exclusion applied.

He said the computations W.L. Petrey used to calculate the inventory shortage were "inventory computations" as specified in the exclusion. He also said those calculations

Policy provisions

Employee Dishonesty

We will pay for loss of, and loss from damage to, money, securities, and other property resulting directly from dishonest acts committed by an employee, whether identified or not, acting alone or in collusion with other persons, with the manifest intent to:

a. cause you to sustain loss; and also

b. obtain financial benefit (other than employee benefits earned in the normal course of employment, including: salaries, commissions, fees, bonuses, promotions, awards, profit sharing or pensions) for:

(1) the employee; or

(2) any person or organization intended by the employee to receive that benefit.

EXCLUSIONS:

We will not pay for loss as specified below:

Inventory Shortages:

Loss, or that part of any loss, the proof of which as to its existence or amount is dependent upon:

a. an inventory computation; or

b. a profit and loss computation.

were the only evidence the company offered as proof of loss.

"Even if Great American's employees were the only ones who *could* have stolen [the driver's] inventory, there is no evidence, apart from inventory calculations, that any inventory *was* in fact stolen by anybody," the judge said.

Judge Coody rejected W.L. Petrey's argument that the exclusion rendered coverage for employee dishonesty "illusory" because inventory computations are the only method to prove such a loss.

He noted that W.L. Petrey could have used other calculations based on its business records or other evidence such as security camera footage, eyewitness statements or employee confessions.

"In short, the inventory shortage exclusion by no means 'completely contradicts' the coverage provided by the employee dishonesty policy," the judge said.

W.L. Petrey had also claimed that Great American waived its right to rely on the exclusion after it paid a similar claim for almost $123,000 in missing inventory in 2011 after the wholesaler had provided a proof of loss consisting of inventory computations.

Judge Coody disagreed, finding that the insurer's payment of that claim "does not operate as a waiver of the inventory shortage exclusion in this case." WJ

Attorneys:
Plaintiff: Harold D. Mooty Jr. and Robert S. Mooty, Mooty & Associates, Montgomery, Ala.

Defendant: Barbara J. Wells, Capell & Howard, Montgomery

Related Court Document:
Opinion: 2015 WL 404523

Delayed action on accommodation may create liability for constructive discharge, even for joint employers

By Linda Jackson, Esq., Melanie Augustin, Esq., and Eunju Park, Esq.
Littler Mendelson PC

By virtue of their relationship with their federal clients — and relationships formed to service them — government contractors may find themselves deemed "joint employers" that are potentially liable for the discriminatory acts of other entities. Steps can be taken, however, to avoid joint employer status and/or a finding of liability.

This commentary discusses a recent federal court decision that addressed a flawed response by joint employers to a worker's request for disability accommodation. It also more generally discusses joint employer liability under the Americans with Disabilities Act and the Rehabilitation Act of 1973.

CONSTRUCTIVE DISCHARGE UNDER FEDERAL DISABILITY LAW

When it amended the ADA in 2008, Congress made it clear that employers should focus less on whether an individual has a covered disability and more on the interactive process of providing reasonable accommodations. A recent opinion from the U.S. District Court for the Eastern District of Virginia, which denied a defendant's motion to dismiss a constructive-discharge claim based on an alleged failure to accommodate, highlights the potential liability for failing to promptly engage in the interactive process. This is an informal, collaborative process in which the employer and the employee requesting an accommodation discuss the employee's limitations and potential reasonable accommodations.

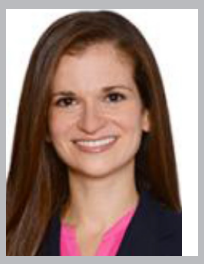
In *Crump v. TCoombs & Associates LLC*, No. 2:13-cv-00707, 2014 WL 4748520, at *1 (E.D. Va. Sept. 23, 2014), plaintiff Summer Crump claimed she was jointly employed by the government contractor that hired her and the U.S. Department of the Navy. She claimed that she was constructively discharged under the ADA and the Rehabilitation Act.[1] Her case underscores the challenges that government contractors face when an employee requests an accommodation while working on a federal contract.

Crump, who is nearly deaf, was employed by TCoombs & Associates and TCMP Health Services as a physician assistant at Sewell's Point Branch Medical Clinic in Norfolk, Va. She claimed that her work at the Navy facility created a joint employer relationship among TCA, TCMP and the Navy.[2] Crump took a leave of absence in April 2011 to undergo cochlear implant surgery. Three days before she was scheduled to return to work in June 2011, she submitted a request to TCA and TCMP for an ADA accommodation that she claimed was needed. She specifically sought the elimination of unnecessary excessive noise in the clinical environment and an effective alternative form of telecommunication.

In late July 2011, Crump withdrew the request to eliminate noise but maintained her request for an alternative form of telecommunication. She also provided information as to options, such as a sign-language interpreter or video relay service on a video phone or iPad 2. A month and a half later, TCA and TCMP responded by offering her a telephone headset attachment and a non-signing staff person to paraphrase communications by phone. Crump said the proposed accommodations were insufficient because the headset attachment would only amplify sound and the non-signing staff person might improperly relay patient communications. In August 2011, TCA and TCMP told Crump they had approved her accommodation request and she would be allowed to return to work once they resolved the details.

Despite these apparent ongoing efforts to accommodate, on Oct. 12, 2011, the Navy sent Crump a written "request for accommodation" form. Crump completed the form and submitted it five days later. The plaintiff claims TCA, TCMP and the Navy agreed to meet with her to discuss accommodations, but she said the conference had not occurred by February 2012. Having received no response from the Navy, she notified it by letter Feb. 21, 2012, that she would take legal action if it did not respond within 10 days. The Navy did not respond until June 2012, after Crump had filed claims against it under the Rehabilitation Act.

In its response, the Navy proposed accommodations but failed to ensure that they would be approved. It also did not offer information as to when the accommodations would become operational. By July 27, 2012 — more than a year after Crump first requested the accommodation — none


Linda Jackson (L) is co-chair of **Littler Mendelson PC**'s government contractors industry group and is a shareholder in the firm's Washington and Tysons Corner, Va., offices. She has extensive experience representing clients before federal, state and appellate courts, administrative agencies and in arbitration proceedings. Jackson can be reached at ljackson@littler.com. **Melanie Augustin** (C) is an associate in the firm's Washington office and is a member of its government contractors industry group. She represents clients on a variety of employment law matters and can be reached at maugustin@littler.com. **Eunju Park** (R) is an associate in Littler's Washington office. She can be reached at epark@littler.com.

of the defendants had instituted any accommodations enabling her to return to work. Crump remained on unpaid leave for a year, and she eventually claimed that she was constructively discharged.

Crump filed suit in December 2013. The constructive-discharge claim survived the Navy's motion to dismiss. To prove constructive discharge in the 4th Circuit, a plaintiff must prove that the working conditions were intolerable and that the employer's actions were deliberate and intended to induce him to resign.[3]

The court found Crump sufficiently alleged deliberateness because she claimed the Navy falsely led her to believe it was interested in engaging in the interactive process but then failed to identify an appropriate accommodation for nearly nine months. It further found that Crump met the "intolerable working conditions" standard by alleging that the Navy's failure to accommodate prevented her from earning a livelihood.

In *Johnson v. Shalala*, 991 F.2d 126, 132 (4th Cir. 1993), the 4th U.S. Circuit Court of Appeals decided that a failure to accommodate can constitute constructive discharge. After leaving her employment with the National Institutes of Health, the plaintiff in *Johnson* claimed she was constructively discharged under the Rehabilitation Act because the agency failed to provide her with a requested accommodation for narcolepsy. The plaintiff first requested flexible work hours or a car pool arrangement so she would not be responsible for driving to or from work. Although the NIH agreed to the car pool arrangement, the accommodation proved to be inadequate. The plaintiff later requested leaves of absence, which the NIH granted. The NIH even offered her a different position, but she declined the reassignment because it was to a lower pay grade. Ultimately, the plaintiff resigned and received disability retirement benefits.

The 4th Circuit reversed the District Court's ruling that the NIH constructively discharged the plaintiff. It found the NIH's actions were not deliberate because the agency responded to the requests for accommodation. The plaintiff's dissatisfaction with the responses was insufficient to prove that the agency deliberately intended to force her from the job, the court decided.

The court recognized, however, that a plaintiff might succeed in proving deliberateness where an employer completely fails to accommodate an employee who makes repeated requests for accommodation. The appeals court was clear, however, that refusal to provide the accommodation to which the employee is entitled is by itself insufficient to constitute constructive discharge. Instead, it said, there must be evidence that the "employer intentionally sought to drive [the employee] from her position."

Notably, not all circuits require a showing of deliberateness to prove constructive discharge. A number of circuits apply a more lenient standard that requires the employee to prove only that a reasonable person would have felt compelled to resign as a result of the workplace conditions.[4] This standard is significantly less onerous than the deliberateness standard articulated in *Johnson*.

In *Lowe v. Independent School District No. 1*, 363 Fed. Appx. 548, 549 (10th Cir. 2010), the 10th Circuit applied the "reasonable person" test in reversing the lower court's award of summary judgment to a school district that allegedly constructively discharged a teacher by failing to accommodate her post-polio condition. The court determined that a question of fact existed regarding whether a reasonable person would have felt compelled to resign if, like the plaintiff, her teaching assignment would require enough standing and movement to hasten her muscular degeneration and need for a wheelchair.[5]

THE JOINT EMPLOYER RELATIONSHIP

Engaging in the interactive process presents unique challenges when, as in *Crump*, an employee has joint employers. An employee may be considered jointly employed by the government if the United States exerts significant control over the terms and conditions of the employment relationship.[6] In determining whether a joint employer relationship exists, courts may consider whether the government entity:

- Has the ability to hire, fire, reinstate, evaluate, discipline or compensate the individual; exerts budgetary authority to influence hiring and firing.
- Informs individuals that they are subject to hire, termination and/or reinstatement by the government entity (assuming de facto responsibility).
- Determines the qualifications of the position; is contractually entitled to determine the suitability of an individual to serve in the position.
- Determines tasks and responsibilities by directing the course of daily duties, providing equipment and periodically testing abilities.

In *Vann v. White*, 2003 WL 21715328, at *4 (D. Kan. July 21, 2003), the U.S. District Court for the District of Kansas determined the U.S. Army was *not* a joint employer of the plaintiffs, who worked for an aerospace company as heavy equipment operators and automotive workers. Therefore, the Army was not liable under Title VII.[7] In reaching this conclusion, the court considered that the company's contract with the Army explicitly provided that contractor personnel were employees of the company and that the Army would not exercise any supervision or control over them. It also noted that the company hired the plaintiffs, they reported to a company supervisor, the company set their wages and paid their salaries, and the company maintained independent budget authority over its employees. .

In contrast, in *McMullin v. Ashcroft*, 337 F. Supp. 2d 1281 (D. Wyo. 2004), the U.S. District Court for the District of Wyoming found that the U.S. Marshals Service *was* a joint employer of the plaintiff. A security company employed the plaintiff as a court security officer working on a contract with the USMS. Unlike in *Vann*, the USMS reserved the right to determine the suitability of court security officers who were working on the contract.. It also helped select the plaintiff for the position, conducted his background check, helped determine and direct some of his tasks and responsibilities, provided him with law enforcement equipment and periodically tested his ability to perform his job functions.

After learning that the plaintiff used medication for depression, insomnia and sleep deprivation, the USMS told the company to replace him because it believed he was not medically qualified for the job. The USMS denied requests by the company and the plaintiff to reconsider its decision, and the company terminated his employment.

The court found sufficient evidence that the USMS exercised enough control over the essential terms and conditions of the

plaintiff's employment to qualify as a joint employer. The court ultimately found that the plaintiff failed to establish he was disabled or regarded as disabled under the ADA or Rehabilitation Act. But if the court had found otherwise, both the company and USMS may have been liable.

These decisions make it clear that where the United States exercises significant control over a contractor's employee, both the contracting entity and the government may be liable as joint employers for a failure to accommodate a worker's disability.

JOINT EMPLOYERS' RESPONSIBILITIES FOR ACCOMMODATIONS

Equal Employment Opportunity Commission guidance requires direct employers and joint employers to engage in the interactive process with employees and provide reasonable accommodations to them absent undue hardship.[8]

These obligations may seem arduous when an employee works on location for a government client that has ultimate control of the work environment. However, by providing thorough training to managers and human resources professionals and by working closely with government clients when necessary to engage in the interactive process and implement reasonable accommodations, contractors can help ensure compliance and reduce the risk of liability.

In facilitating these processes, it is important to note that even if a joint employer relationship is deemed to exist, it is not necessarily the case that both employers will be found liable for failing to make a reasonable accommodation. This is especially true if the ability to take corrective measures or make accommodations was out of the contractor's control by virtue of its government client's requirements, actions or management of the work site.[9] In other words, the conduct of one joint employer will not always — and should not always — be imputed to the other.

With respect to disability accommodations, joint employers are not obligated to provide the accommodation if doing so would impose an undue hardship. An undue hardship may exist for joint employers where the accommodation would involve a significant expense for both, even with combined resources.[10] Moreover, a joint employer may establish undue hardship where it lacks sufficient resources to provide the accommodation and its good-faith efforts to obtain contributions from the other entity are unsuccessful.

PRACTICAL POINTERS

- Train managers and human resources professionals to recognize and promptly respond to requests for disability-related accommodations.
- When appropriate, coordinate and engage in good-faith best efforts to participate in the interactive process with the other joint employer entity and to ensure all parties are working on a cohesive and responsive strategy.
- Remain actively involved in the interactive process and ensure that any necessary reasonable accommodations are implemented promptly, even for employees who work on location for a government client.
- Continue to communicate with employees throughout the interactive process, regularly updating them on the status of their accommodation requests and, when applicable, notifying them of the expected dates for implementation of any accommodations.
- Thoroughly document the interactive process, including the employer's efforts to engage in the process, communications with the employees and any communications with the government client or other joint employer entity regarding its efforts and, if applicable, their refusal to engage.
- Consider contract provisions that allocate responsibility for providing reasonable accommodations.
- Consider contract indemnification provisions that hold your company harmless for the actions of the other employer with respect to employees.
- Be aware of and responsive to allegations of potentially discriminatory actions of any sort with respect to your government client or business partner and your employees, and engage in (and document) your good-faith meaningful efforts to address, resolve and remediate.

CONCLUSION

By taking the above-outlined steps, government contractors can reduce their risk of being held liable for the discriminatory actions of another entity while meeting their obligations to provide reasonable accommodations for their employees' disabilities. WJ

NOTES

[1] 29 U.S.C. § 701. Using the same standards for determining employment discrimination as the ADA, the Rehabilitation Act of 1973 prohibits discrimination based on disability by the federal government, certain federal contractors and programs receiving federal funding.

[2] The factual allegations are as described in the opinion and asserted by the plaintiff.

[3] *Crump v. TCoombs & Assocs. LLC*, No. 2:13-cv-00707, 2014 WL 4748520, at *6 (E.D. Va. Sept. 23, 2014) (citing *Whitten v. Fred's Inc.*, 601 F.3d 231, 248 (4th Cir. 2010) (quoting *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1353-54 (4th Cir. 1995)) (both sexual harassment and constructive discharge case).

[4] *See Cham v. Station Operators Inc.*, 685 F.3d 87, 95 (1st Cir. 2012); *Campbell v. Obayashi Corp.*, 424 Fed. Appx. 657, 658 (9th Cir. 2011); *Lanza v. Postmaster Gen. of the United States,* 570 Fed. Appx. 236, 240 (3d Cir. 2014); *Siudock v. Volusia County Sch. Bd.,* 568 Fed. Appx. 659, 664 (11th Cir. 2014).

[5] *See also Hurley-Bardige v. Brown*, 900 F. Supp. 567, 574, n.7 (D. Mass. 1995) (refusing to make a wheelchair-bound employee's workplace wheelchair accessible, or refusing to relocate an employee with a respiratory condition to a smoke-free work area, may by itself create a working environment so hostile that a reasonable person would resign their position and therefor possess a claim for constructive discharge).

[6] *See Bristol v. Bd. of County Comm'rs of the County of Clear Creek,* 312 F.3d 1213, 1218 (10th Cir. 2002).

[7] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, prohibits discrimination by employers based on race, color, religion, sex or national origin. In *Vann v. White*, the court determined that the U.S. Army was not a joint employer of the plaintiff and therefore could not be liable as an employer under Title VII.

[8] U.S. Equal Employment Opportunity Comm'n, Enforcement Guidance: Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms (Dec. 22, 2000), *available at* http://www.eeoc.gov/policy/docs/guidance-contingent.html.

[9] *See Sosa v. Medstaff Inc.*, 2013 WL 6569913, at *3 (S.D.N.Y. Dec. 13, 2013) (citing *Lima v. Addeco*, 634 F. Supp. 2d 394, 400 (S.D.N.Y. 2009) (for a joint employer to be liable for the other's actions, it must be found that the joint employer knew or should have known of the discriminatory conduct and failed to take corrective measures within its control)); *see also Watson v. Adecco Employment Servs.*, 252 F. Supp. 2d 1347, 1356-57 (M. D. Fla. 2003) (same); *Takacs v. Fiore*, 473 F. Supp. 2d 647, 657 (D. Md. 2007); *Signore v. Bank of Am.*, 2013 WL 6622905, at *6 (E.D. Va. Dec. 13, 2013).

[10] *See* Enforcement Guidance, *supra* note 8.

Supreme Court

CONTINUED FROM PAGE 1

(D.C. Cir. 1997), an interpretive rule may require the formal rule-making process.

"The *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rule-making provisions, and it improperly imposes on agencies an obligation beyond the 'maximum procedural requirements' specified in the APA," the high court said.

Justice Sonia Sotomayor wrote for the court, joined by Chief Justice John Roberts and Justices Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer and Elena Kagan.

Justices Samuel Alito, Antonin Scalia and Clarence Thomas agreed with the rest that the appeals court's *Paralyzed Veterans* ruling was contrary to the APA, but each wrote a separate concurring opinion.

Attorney **R. Scott Oswald** of **The Employment Law Group**, who was not involved in the case, welcomed the decision.

Noting the justices' unanimous concurrence on the judgment, Oswald said the Supreme Court's overturning of the *Paralyzed Veterans* doctrine was not a surprise and was overdue.

"It was welcome, furthermore, because the *Paralyzed Veterans* doctrine has enabled big-business obstructionism to the Labor Department's employee-friendly rule changes. The overtime rule in [this case] never should have been challenged," Oswald said.

Attorney **Denise Pipersburgh** of **Wolff & Samson**, who was not involved in the suit, but co-wrote an article about it for a previous issue of Westlaw Journal Employment (see Vol. 29, Iss. 11, 29 No. 11 WJEMP 13), was pleased with the high court's decision and its reasoning.

"The Supreme Court reined in the judiciary's authority over interpretative guidance, and restored to the federal agency the full power and authority over promulgating interpretive rules," Pipersburgh said. "Any other holding may have adversely altered the manner in which all federal agencies issue interpretative guidance and potentially offset the careful balance among the executive, legislative and judicial branches of government with regards to interpretative guidance."

CHANGE TO FLSA OVERTIME QUALIFICATIONS

The Mortgage Bankers Association, a trade group representing real estate finance companies, sued the Labor Department in 2011 after the agency revised an earlier interpretation of the Fair Labor Standards Act and said mortgage loan officers do not qualify for the law's administrative exemption.

The exemption says administrative and executive employees, as well as outside salespeople, are exempt from the FLSA's minimum-wage and overtime provisions.

The Mortgage Bankers Association's suit in the U.S. District Court for the District of Columbia said the department's 2010 interpretation was invalid because the agency did not follow proper practices under the APA. It sought to vacate that interpretation in favor of the department's previous opinion on the law issued in 2006.

The District Court granted the government summary judgment, agreeing with the department's argument that the APA does not require public notice and comment when an agency is simply changing a prior interpretive rule.

On appeal to the District of Columbia Circuit, the Mortgage Bankers Association cited *Paralyzed Veterans* and the three-judge appellate panel unanimously reversed the District Court's decision and remanded the case to vacate the Labor Department's 2010 interpretive rule.

The appeals court did not rule on the merits of the department's interpretation of the FLSA provisions but instead focused on the process for issuing the interpretation. It said an agency that significantly revises interpretation of a regulation has essentially amended its rule and should follow APA procedures.

The Supreme Court granted the government's *certiorari* petition in June. In its petition, the Labor Department stressed the importance of high court review since all federal agencies are subject to the District of Columbia federal courts and would be negatively affected by its ruling.

INTERPRETIVE RULES ARE EXEMPT

Ruling in the government's favor, the Supreme Court said the text of the APA clearly exempts an agency's interpretive rules from the formal rule-making process.

According to the high court opinion, the appeals court focused its decision on Section 1 of the APA, which explains the rule-making process. However, the justices said, Section 4 of the APA says "the act's notice-and-comment requirement 'does not apply ... to interpretative rules.'"

"This exemption of interpretive rules from the notice-and-comment process is categorical, and it is fatal to the rule announced in *Paralyzed Veterans*," the high court said.

> The Supreme Court has "reined in the judiciary's authority over interpretative guidance and restored to the federal agency the full power and authority over promulgating interpretive rules," attorney Denise Pipersburgh said.

In *Paralyzed Veterans*, the appeals court created a "judge-made procedural right" to notice and comment when an agency changes one of its rule interpretations, the Supreme Court said, but "imposing such an obligation is the responsibility of Congress or the administrative agencies, not the courts."

According to Oswald, the decision is significant because it did not overturn the high court's ruling in *Auer v. Robbins*, 117 S. Ct. 905 (1997), and other cases that said courts will defer to an agency's interpretation of its own regulations.

"*Auer* isn't perfect, but the alternative would be a patchwork of different legal interpretations by courts in different jurisdictions, which would be unfair to anyone subject to federal regulations," he said.

"Perhaps a reckoning on *Auer* is inevitable, but for now common sense has prevailed, and employees (and citizens generally) can count on federal agencies to do their job without judicial meddling," Oswald said. WJ

Attorneys:
Petitioner: Deputy Solicitor General Edwin S. Kneedler, Department of Justice, Washington

Respondents: Allyson N. Ho, Morgan, Lewis & Bockius, Dallas

Related Court Document:
Opinion: 2015 WL 998535

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Damages Sought
Appel v. Reed Elsevier Inc. 2015 WL 745453	S.D.N.Y.	1:15-cv-01283	2/23/15	Reed Elsevier Inc. terminated plaintiff in retaliation for filing a work safety complaint after she became ill from the carcinogenic and toxic air in defendant's office, where heavy illegal construction work was being performed.	Damages in excess of $100 million, punitive damages, fees and costs
Hernandez v. The Fresh Diet Inc. 2015 WL 773940	S.D.N.Y.	1:15-cv-01338	2/24/15	The Fresh Diet and Late Night Express Courier Services failed to provide overtime pay to plaintiffs in relation with the meal delivery plan.	$1.5 million in damages, compensatory and punitive damages, interest, fees and costs
Ouedraogo v. Bonkoungou 2015 WL 773938	S.D.N.Y.	1:15-cv-01345	2/24/15	Defendants lured and trafficked plaintiff from Burkina Faso with false promises of legal employment and the opportunity to go to school, but denied plaintiff such opportunities, poorly treated her and did not pay her adequate compensation.	Compensatory, liquidated and punitive damages; declaratory relief; order to return personal belongings of plaintiff; unpaid wages and overtime pay; interest; fees and costs
Hall v. Daimler Trucks North America 2015 WL 797508	Or. Cir. Ct, (Multnomah)	15CV04279	2/24/15	Daimler Trucks subjected plaintiffs to constant and pervasive harassment and assault because they are black.	$9.6 million in damages, fees and costs
Jones v. Quality Coast Inc. 2015 WL 797505	Cal. Super. Ct. (Los Angeles)	BC573529	2/24/15	Quality Coast wrongfully terminated and refused to offer continued employment to plaintiff based on his national origin.	In excess of $10 million in liquidated, punitive and exemplary damages; interest; reinstatement; fees and costs
Erasmus v. Deutsche Bank Americas Holding Corp. 2015 WL 786932	S.D.N.Y.	1:15-cv-01398	2/25/15	Deutsche Bank harassed, discriminated against and wrongfully terminated plaintiff in retaliation for opposing the unlawful employment practices in the workplace.	Monetary and punitive damages, disbursements, interest, fees and costs

Westlaw Court Wire is a Thomson Reuters news service that provides notice of new complaints filed in state and federal courts nationwide, sometimes within minutes of the filing.

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Damages Sought
Acosta v. Frito-Lay Inc. 2015 WL 797506	Cal. Super. Ct. (San Francisco)	CGC-15-544370	2/25/15	Class action. Frito-Lay failed to pay minimum wages and overtime compensation and to provide meal and rest breaks and itemized wage statements to its truck driver employees.	Class certification; compensatory, exemplary, punitive and statutory damages; restitution; penalties; declaratory and injunctive relief; interest; fees and costs
Josephs v. Santander Holdings USA Inc. 2015 WL 860776	S.D.N.Y.	1:15-cv-01451	2/27/15	Santander Holdings and Santander Bank violated the Family and Medical Leave Act by wrongfully denying plaintiff's leave of absence and terminating her after she suffered a serious injury.	Compensatory and liquidated damages, injunctive relief, reinstatement, interest, fees and costs
Bennett v. Rocart Inc. 2015 WL 905830	Cal. Super. Ct. (Los Angeles)	BC574298	3/3/15	Class action. Rocart Inc. and Location Education West Inc. misclassified plaintiff Nickelodeon Studios teachers as independent contractors.	Class certification, civil penalty, fees and costs
South v. CNA Financial Corp. 2015 WL 971728	S.D.N.Y.	1:15CV01627	3/5/15	CNA Financial discriminated against and terminated plaintiff in-house senior trial attorney based on age.	In excess of $570,000 in compensatory damages, $5 million in punitive damages, disbursements, fees and costs

Westlaw Court Wire is a Thomson Reuters news service that provides notice of new complaints filed in state and federal courts nationwide, sometimes within minutes of the filing.

ILLINOIS LABOR BOARD MAJORITY: ISSUANCE OF DISCIPLINARY NOTICE DOESN'T EQUAL UNFAIR PRACTICE

Ruling: A majority of the Illinois Labor Relations Board, Local Panel reversed an administrative law judge's conclusion that the municipal employer violated Sections 10(a)(3) and 10(a)(3)(1) of the state's Public Labor Relations Act by issuing a notice of a second pre-disciplinary hearing to the individual charging party, an aviation security officer. The ALJ found that the issuance of the second notice resulted from charging party's service of a subpoena on his supervisor as a witness in disciplinary proceedings. The second notice did not constitute an adverse employment action under the PLRA, where there was no actual harm to charging party's terms and conditions of employment, the LRB majority found.

What it means: The LRB majority explained that, while an action need not necessarily have an adverse tangible consequence under PLRA provisions, there must be some qualitative change or actual harm to an employee's terms or conditions of employment.

Logan and City of Chicago, 31 PERI 129 (Ill. Labor Relations Bd., Local Panel Jan. 16, 2015).

CALIFORNIA PERB RULES SAYS EERA PROTECTS TEACHER'S CHALLENGE TO CURRICULUM, REMEDIAL PROGRAM

Ruling: The California Public Employment Relations Board reversed the dismissal of an unfair-practice charge brought by a teacher against the his school district. He alleged that the employer took adverse actions against him, in violation of provisions of the state's Educational Employment Relations Act, in retaliation for his protected activity. PERB found that the teacher's questioning of the school curriculum and a remedial program for certain teachers constituted protected activity under the EERA. It remanded the case for issuance of an unfair-practice complaint in accordance with its decision.

What it means: PERB determined that EERA provisions protect certificated teachers' right to be represented in their professional and employment relationship with their public school employer, including their right to have a voice in the formulation of educational policy.

Crowell v. Berkeley Unified School District, 39 PERC 98 (Cal. Pub. Employment Relations Bd. Feb. 19, 2015).

CITY'S DENIAL OF $1,000 BONUSES TO UNIONIZED EMPLOYEES CONTRAVENES PERA

Ruling: The Michigan Employment Relations Commission partly affirmed an administrative law judge's recommended decision regarding an unfair-practice charge. It agreed with the ALJ's conclusion that the municipal employer violated Section 10(1)(a) of the state's Public Employment Relations Act when it prohibited union members from speaking at city council meetings or to the media. However, the employer did not violate PERA provisions by refusing to approve a licensure-related pay increase for one water department employee. The employer violated PERA Sections 10(1)(a) and 10(1)(c) by providing the $1,000 pay adjustment to all employees except those who had just joined the union, MERC decided.

What it means: MERC noted that an employer may not blame the union for non-receipt of pay increases without violating PERA provisions. MERC found that, here, once the employer chose to award $1,000 bonuses to all municipal employees, it could not lawfully deny them only to union employees and then blame the union for that denial.

City of Lowell and International Brotherhood of Electrical Workers, Local 876, 28 MPER 62 (Mich. Employment Relations Comm'n Jan. 28, 2015).

N.J. SUPREME COURT MAJORITY ADOPTS *ELLERTH/FARAGHER* STANDARD IN SEXUAL HARASSMENT CASES

Ruling: A majority of the New Jersey Supreme Court reversed the dismissal of a state employee's claims under the Law Against Discrimination. The claims stemmed from the alleged sexual harassment of the employee by her supervisor. The court majority determined that a plaintiff maintains the initial burden of presenting a *prima facie* hostile-work-environment claim in a certain type of sexual harassment case under the LAD. According to the majority, if no tangible employment action has been taken against the plaintiff, the employer may assert the two-pronged affirmative *Ellerth/Faragher* defense established by the U.S. Supreme Court for judging liability in supervisory sexual harassment cases in *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). The New Jersey high court remanded the case for further proceedings on the employee's LAD claims.

What it means: The court majority expressly adopted the *Ellerth/Faragher* analysis for supervisor sexual harassment cases in which a hostile work environment is claimed pursuant to the LAD and in which no tangible employment action is taken. Under that analysis, if no such employment action has been taken against the plaintiff, the defendant employer may assert a two-pronged affirmative defense.

Aguas v. State of New Jersey, 41 NJPER 103, 2015 WL 659543 (N.J. Feb. 11, 2015).

FLORIDA MAYOR'S VETO OF COUNTY COMMISSION'S IMPASSE RESOLUTION UNFAIR

Ruling: The Florida 1st District Court of Appeal reversed a portion of a state Public Employees Relations Commission majority's decision and remanded for further proceedings. It ruled that a county employer committed an unfair labor practice when its mayor vetoed the county commission's impasse resolution under Fla. Stat. § 447.403. That statutory section does not permit an executive to participate in the legislative body's decision-making process beyond his or her role as an advocate, the court found.

What it means: The appeals court explained that Section 447.403 prescribes the procedure for resolving an impasse in negotiations, including an opportunity for mediation and a hearing before the special magistrate. The language of Section 447.403(4)(d) clearly and unambiguously contemplates the resolution of any impasse by the employer's legislative body.

Dade County Police Benevolent Association v. Miami-Dade County Board of County Commissioners, 41 FPER 270 (Fla. 1st Dist. Ct. App. Feb. 26, 2015).

SEARCH OF COMPANY-OWNED VEHICLE DOES NOT CONSTITUTE INVESTIGATORY INTERVIEW

Ruling: The National Labor Relations Board Division of Advice determined a telecommunications employer lawfully searched a company vehicle used by an employee, who was the subject of an investigation into her possible possession of marijuana, notwithstanding that it did not afford the employee her rights established by the U.S. Supreme Court in *NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975).

What it means: A unionized employee is entitled to union representation at an investigatory interview that she reasonably believes may result in disciplinary action. For *Weingarten* purposes, an investigatory interview is one in which the employer "confronts the employee and asks her to answer questions related to a disciplinary investigation." Here, although the employer's discussions with the employee before and after the vehicle search were investigatory interviews under *Weingarten*, the search of the company-owned vehicle itself did not trigger a *Weingarten* right to representation. The Division of Advice found that the search was not a continuation of the prior investigatory interview because the employer did not ask the employee any questions, even implicitly. Therefore, the employee did not have a need for the assistance of a union representative.

Southwestern Bell Telephone Company, 42 NLRB AMR 22 (N.L.R.B. Feb. 6, 2015).

COURT UPHOLDS HEART AND LUNG ACT BENEFITS FOR PRE-CLOCK-IN INJURY

Ruling: A Pennsylvania Commonwealth Court judge declined to vacate an arbitrator's award that determined a uniformed corrections officer, who sustained a pre-shift hand injury in the lobby of a state prison, injured her hand in the performance of her duties, thereby entitling her to benefits under the state's Heart and Lung Act. The appellate court found that judicial precedent guided the arbitrator's reasoning, and that the award adequately addressed the tenuous demarcation between preparing for duty and being on duty.

What it means: An arbitration award will be upheld and made final and binding on the parties unless the award is without foundation or does not draw its essence from the collective bargaining agreement. Here, the award fell within the confines of the collective bargaining agreement and did not violate public policy. The issue in dispute — whether an injury occurs in the performance of duties for purposes of benefits under the Heart and Lung Act — clearly fell within the scope of the CBA, the court determined. Additionally, where the CBA granted authority to the arbitrator to determine eligibility under the Heart and Lung Act, the appellate court reasoned that this authority did not bind the arbitrator to use judicial opinions, but rather merely to use them as a guide.

Pennsylvania Department of Corrections v. Pennsylvania State Corrections Officers Association, 46 PPER 73 (Pa. Commw. Ct. Feb. 17, 2015).

TOWNSHIP UNABLE TO EXCLUDE CERTAIN POSITIONS AS CONFIDENTIAL OR SUPERVISORY

Ruling: A Pennsylvania Labor Relations Board hearing examiner concluded a township employer failed to sustain its burden of demonstrating that a petitioned-for treasurer position constituted a confidential employee or that the duties of the roadmaster and utilities supervisor positions were supervisors, excludable from a proposed unit of a township's full-time and regular part-time nonprofessional, blue- and white-collar employees.

What it means: Under Section 301(13) of the state's Public Employee Relations Act, an individual qualities as a confidential employee if she works in a personnel office of a public employer, has access to information subject to collective bargaining; or the employee works in a close continuing relationship with an employer representative associated with collective bargaining on behalf of the employer. Here, the township was unable to demonstrate the confidential status of the treasurer position because there was no evidence the treasurer worked in a close and continuing relationship with a management level employee or employer representatives associated with collective bargaining. Similarly, the asserted supervisory duties of the roadmaster and utilities supervisor positions did not support an exclusion under Section 301(6) of PERA because the positions only assigned routine work and there was insufficient record evidence that the at issue employees spent the majority of their time performing supervisory duties.

In re West Manheim Township, 46 PPER 74 (Pa. Labor Relations Bd., H. Exam'r Feb. 24, 2015).

BOROUGH COMMITS UNFAIR PRACTICE BY REFUSING TO ARBITRATE GRIEVANCE

Ruling: A hearing examiner for the Pennsylvania Labor Relations Board ruled a union representing a part-time borough police officer sustained its burden of proving that the borough unlawfully refused to advance to arbitration, a grievance contesting the removal of the officer from scheduled shifts because of accusations of using excessive force. The borough's challenge to the arbitrability of the grievance was not a defense to its refusal to arbitrate the grievance, the hearing examiner determined.

What it means: Determinations regarding arbitrability are for an arbitrator to decide, not the employer.

Teamsters Local 205 v. Somerset Borough, 46 PPER 75 (Pa. Labor Relations Bd., H. Exam'r Mar. 4, 2015).

CASE AND DOCUMENT INDEX