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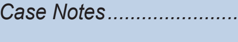
SAVE THE DATE!



Advanced Labor Topics 2023

May 19-20, 2023

Ritz-Carlton

Amelia Island

The Pendulum Swings Back:

The NLRB's Notice of Proposed Rulemaking on the Joint-Employer Standard

By Melanie Matamoros Cruz, Tampa

The National Labor Relations Board (NLRB or Board) has embarked on its latest effort to redefine the joint-employer standard under the National Labor Relations Act. On September 6, 2022, the Board released a Notice of Proposed Rulemaking, announcing its intention to revise the current joint-employer standard that took effect April 27, 2020 (2020 Rule).[1] The proposed rule would establish the following:

- An employer is a joint employer if there is an employment relationship with particular employees "under established common-law agency principles and the employer shares or codetermines those matters governing at least one of the employees' essential terms and conditions of employment."[2]
- The "share or codetermine" test turns on whether an employer "possesses authority to control (whether directly, indirectly, or

See "Pendulum," page 7

Supreme Court Term Employment Cases

By Aaron Tandy, Miami

On February 22, 2023, the United States Supreme Court (SCOTUS) issued its decision in *Helix Energy Solutions Group, Inc. v. Hewitt*,[1] discussing the circumstances under which an employee may be classified as exempt as a "highly compensated employee." SCOTUS reiterated its position that in the employment context, clear textual provisions prevail over "even the most formidable policy arguments."[2]

Michael Hewitt worked on an offshore oil rig as a "tool pusher," overseeing aspects of rig operations but not as a manager or supervisor. He was paid on a daily-rate basis (i.e., paid by the day he worked, not by hours), so his weekly pay fluctuated depending on the number of days he worked. Pursuant to this salary structure, Hewitt annually made over $200,000. Helix classified him as an exempt executive employee under the "highly compensated employee" standard promulgated by the Department of Labor and did not provide overtime.

Justice Kagan framed the issue before the Court this way: "The question here is whether a high-earning employee is compensated on a 'salary basis' when his paycheck is based solely on a daily rate—so he receives a certain amount if he works one day in a week, twice as much for two

See "Supreme Court," page 10

CHAIR'S MESSAGE

Sacha Dyson

Happy Spring, Section members! I hope your 2023 is off to a great start. We have been busy bees this year in the Section. We have already hosted three live seminars and have an exciting seminar planned for Amelia Island on May 19–20, 2023! We continue to focus on our mission and provide opportunities to enhance our connection together.

On October 20–21, 2022, we continued our long-term, successful partnership with the City, County, and Local Government Law Section in jointly sponsoring the **48th Annual Public Employment Labor Relations Forum** in Orlando. The success of this program was due, in large part, to the talented program chairs, Glenn Thomas and Janeia Ingram, and the insightful and knowledgeable speakers. The program spanned the topics of public employment, including updates on the Eleventh Circuit, PERC, pension issues, mental health, ADA and FMLA compliance, labor arbitration, and personnel manuals. If you missed it, you can purchase a copy of the program here.

We then hosted the return of the **Litigation Skills** seminar on December 2, 2022, at the historic Le Meridien Hotel, located in the former United States Courthouse in Tampa. The seminar room, a former courtroom, brought back many nostalgic memories for attendees and speakers alike. A lunchtime presentation by Professor James M. Denham took us down memory lane and reminded us of the monumental cases decided in the courthouse. The program, which was masterfully designed by Benjamin Yormak, LaKisha Kinsey-Sallis, and Samuel Horovitz, is one that no litigator should miss, covering—as it did—the beginning to end of a case, with expert tips for navigating jury selection, developing a trial theme, addressing tricky discovery issues, and handling summary judgment motions in state and federal court. We are grateful for our speakers, including several federal judges, who volunteered their time to make this program a great success! The program is on-demand and available on CD/DVD here.

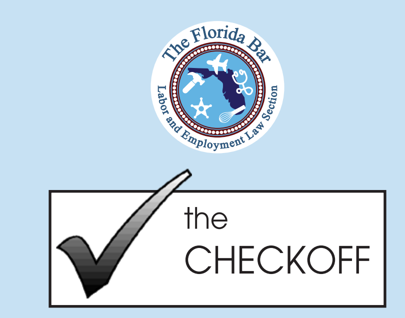
We returned to Orlando on January 19–20, 2023, for the **23rd Annual Update and Certification Review Seminar**. This seminar was expertly crafted by Karen Evans-Putney and Chelsie Flynn who recruited fantastic speakers to provide an update on the world of labor and employment law. The breadth of this program is always amazing to me! If you missed it and want a comprehensive tour into every aspect of our practice area, look no further than this program. In addition to the valuable educational content, the food served at the seminar was worth the price of admission. We even had lobster bisque and dim sum. Don't have FOMO, join us at our next event!

On May 19–20, 2023, we will be hosting **Advanced Labor Topics** at the breathtaking Ritz-Carlton on Amelia Island. This is an exciting program, coordinated by Lisa Berg and Janet Wise, which will have presentations on hot topics in traditional labor law, and on remote work, internal investigations, mediation, federal court practice, and practice before DOAH. As is our tradition with Advanced Labor Topics, this seminar also will include dinner. I hope you will be able to find time to join us! Be on the lookout for registration information.

In addition to producing these seminars, our Executive Council has been busy with other projects. In the fall, we adopted a sponsorship policy to create additional opportunities for our membership to connect to local bar organizations and other entities. We also have created a committee to study our CLE programming and pricing to make sure we are providing the best value we can to L&E Section members. Finally, we have embarked on an ambitious history project with our past Section chairs to document their words of wisdom so that we can remember our past and create a connection to our future.

Our Section continues to be vibrant and strong. We are so grateful for all of the volunteers who give their time and talent to our Section. Please reach out to me (sacha.dyson@gray-robinson.com) or any member of the Executive Council if you want to speak on a topic, write an article, or have an idea to further the mission of the Section. If you want to get involved and don't know where to start, email me.

I hope to see you all at Amelia Island in May!



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Ten Ways to Aggravate an Arbitrator—A What-Not-to-Do Guide

By Leslie W. Langbein, Miami Lakes

More employment cases are finding their way to the arbitral process, either through voluntary submission or mandatory arbitration clauses. While arbitration has traditionally been heralded for its privacy, efficiency, and finality, it is also unfamiliar terrain for practitioners who revel in case law and records for appeal. Other lawyers believe the relative informality of the arbitration process provides leeway to deviate from expected courtroom decorum. Given that precedent is not binding, discretion is the rule rather than the exception, and few means exist to overturn an award, an arbitrator's latitude is something to be respected.[1] This article lists (tongue in cheek) ten "what-not-to-do" ways to raise an arbitrator's blood pressure and increase the difficulty of his or her ruling in your favor.[2] I first published this list years ago, but it is as relevant today as it was then.

1. Lack Preparation. Because arbitration is more informal, why nitpick about evidentiary and procedural matters? Just wing it! Wait until the last minute to find witnesses and line up experts since the other side will surely settle pre-hearing. Bring affidavits instead of witnesses; they're better because you can't cross-examine a piece of paper! No need to contemplate opposing counsel's objections to those pesky rules of evidence! But wait, you didn't get around to completing discovery? Not a problem. We'll just postpone the hearing. After all, arbitrators have all the time in the world and can easily reschedule the hearing into their calendars. And, when we finally get to the hearing, discard thoughts about exhibit notebooks and a sufficient number of exhibit copies for witnesses, opposing counsel, and the arbitrator, much less thoughts about supporting case law. That's the joy of arbitration!

2. Lack Courtesy, Respect, and Professionalism. Arbitrators love advocates who use every ploy known to goad the opposition. Pre-hearing, wrangle over every discovery request. Make them file motions to compel with the arbitrator before handing over a single document. Hide witnesses from deposition, ha ha! Arbitrators can't enforce sanctions! At hearing, object to requests for witnesses to testify out of order to accommodate their needs. Also, theatrics are effective in making your case to the arbitrator. Try stage whispers about the credibility of testimony or opposing counsel's arguments. It also helps to roll your eyes and laugh or groan at choice moments. Show your displeasure with the arbitrator's ruling on evidentiary issues by throwing your pen on the table. Your histrionics at hearing will not reflect on your client or the merits of his or her case. After all, arrogance is a great way to impress clients, the opposition, and, of course, the arbitrator.

3. Waste Hearing Time. Suppose your witnesses arrive late or not at all? Run to the nearest Starbucks for café latte. Better yet, call your office and dictate a complete appellate brief in another case. Squeezing fifteen extra minutes shouldn't be a problem. Arbitrators aren't judges and won't take into account your lack of respect for their authority. Arrive late, tell the arbitrator you need to leave early, and take a loooong lunch at a fancy restaurant while the arbitrator eats fast-food to save your client money and to get back to the hearing on time. Ask for additional breaks after each witness' testimony so that you can prepare for cross-examination (see 1 above).

4. Make Discovery a Living Hell. Ready, aim, fire those shotgun discovery requests seeking boxfuls of documents. You'll find that smoking-gun memo to win your case. Inconvenience opposing counsel and his or her client and witnesses by continually postponing and resetting depositions. Depose the claimant/respondent for hours, or better yet, days. Be obstreperous. Refuse to produce any of the documents sought by the other side. Make opposing counsel and the arbitrator endure a three-hour telephone conference to rule on each and every objection. You will not only educate the arbitrator on the case, but also on what he or she can expect of you at hearing!

5. Keep the Arbitrator on His or Her Toes. Let the arbitrator know early that you will appeal an unfavorable award. The presence of a court reporter will do just fine. Turn each and every adverse ruling into a diatribe about the statutory grounds to vacate the arbitration award. Note other arbitrators (who are smarter) who've ruled the right way in past cases. Of course, honey works better than vinegar. Curry the arbitrator's favor by hinting that you intend to use the arbitrator again in the future. The arbitrator won't view pandering as a lack of respect for his/her integrity.

6. Ex Parte the Arbitrator. Arbitrators love to talk to the parties or their witnesses during breaks so use the time wisely. Mention casually to the arbitrator that the sexual harassment claimant is a stripper on the weekends and has been divorced four times. Ask the arbitrator for advice on how he or she would rule in a hypothetical situation with facts that mirror your case. Buddy up to the arbitrator in the hallway so the other party suspects the arbitrator is your brother-in-law. Try to sit near (or with) the arbitrator at lunch so he or she can overhear your conversation about the case. One more trick that never fails: Ask lawyers who know the arbitrator to call and tell him or her what a great job you think he or she is doing. Finally, don't forget to send pleadings directly to the arbitrator without the other party's knowledge or consent.

7. More Is Better. Three witnesses, rather than one, increase a state-

ment's credibility. As a corollary, jam the hearing room with the claimant's wife and three kids to engender sympathy. Bury the arbitrator and the other side with meaningless documents that tangentially relate to an issue at hearing. Turn the hearing into a mini-trial of each witness, their peccadillos and their biases. (See 3 above). Berate the arbitrator for attempting to control the hearing and excluding your irrelevant or immaterial evidence. (See 2 above). Remind the arbitrator about vacatur. (See 5 above).

8. Ask for a Postponement at the Last Minute. Nothing makes an arbitrator happier than to have an extra three days to him or herself that were set aside nine months ago for your hearing. The arbitrator shouldn't be mad. Now he or she can take a cruise or read a favorite book! Never mind that the arbitrator and many witnesses have booked airline tickets, hotels, and rental cars to come to your out-of-town arbitration, or that the arbitrator turned away other cases on the same hearing dates you have now cancelled.

9. Let Your Clients Control You. Arbitrators are impressed by clients who take an interest in their cases and sit as second chair. Who knows better how to present the case than the client? He or she can convey every minute detail of his or her ordeal. And, it is better to give the arbitrator more details than less! (See 7 above). Since the client is paying both your and the arbitrator's fees, he or she is entitled to poke you in the ribs repeatedly at hearing, shuffle through large stacks of papers on the table, scribble notes that distract your train of thought, call witnesses liars, and ask the arbitrator for breaks to instruct you how to better try his or her case. Arbitration is also therapeutic as a means for the client to rid him or herself of pent-up emotion.

10. Make the Arbitrator Guess Damages or Remedies You Seek. Arbitrators are very smart (that's why they are arbitrators). They can jump tall buildings in a single bound; bend steel; and, best of all, read minds. Not so! Give us a damage calculation. Better yet, give alternative damage calculations for your fallback positions. Arbitrators are known to craft alternative awards. But then, you knew all along that arbitrators are crafty.

L. LANGBEIN

***Leslie Langbein** is a member of the AAA's national panels of labor, commercial, employment, and consumer arbitrators. Over the past thirty-two years, she has served as a sole arbitrator, chair, and panelist in cases involving grievances, breach of contract, wage and hour, discrimination, non-compete, and other labor and employment claims. She is a partner in the firm of Langbein & Langbein, P.A.*

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Endnotes

1 As Mel Brooks once said, "It's good to be the king."

2 The advice in this article is based on gripes shared among arbitrators at happy hour.

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***Editor's Note: In this space, we typically highlight individual authors who have made significant contributions to* The Checkoff. *As a previous editor has noted on these pages, "*The Checkoff *is an excellent resource because of the consistent dedication and hard work of contributors, the quality of their articles and case notes, and the pride of ownership they exhibit." This time we put the spotlight on an entire firm, Allen, Norton & Blue, for its sustained commitment to* The Checkoff.**

Allen, Norton & Blue (ANB) is devoted exclusively to the practice of labor and employment law, representing management interests for state, national, and international clients in the public and private sectors for over fifty years. Established in Coral Gables in 1969 as a traditional labor law firm, ANB was on the forefront of labor relations in Florida as labor organizing rights expanded to public employees in the state. ANB soon expanded its scope to all areas of labor and employment law with additional office locations in Tampa, Winter Park, and Tallahassee. ANB is now the only Florida member of the Worklaw Network, an international network of more than 350 labor and employment attorneys who share research and resources in twenty-three states, as well as Australia, Canada, China, India, Mexico, and many European countries.

ANB attorneys have handled hundreds of litigations, arbitrations, and administrative proceedings, conducted countless investigations, and counseled public and private sector clients on the wide range of human resources and labor relations issues. Most ANB lawyers have dedicated their careers to this field, and ANB proudly has Florida Bar board certified attorneys in each of its offices. The firm and its lawyers are recognized by *Best Lawyers*®, *Super Lawyers*®, and *U.S. News*, and by *Martindale Hubbell* as AV Preeminent® rated. The firm's attorneys have literally rewritten the book on jury instructions for employment cases (*ABA Model Jury Instructions Employment Litigation* Second Edition), and their extensive trial experience enables ANB to anticipate the concerns, questions, and reactions of jurors and judges and to advise clients accordingly. ANB is proud to move forward into its sixth decade of providing labor and employment law counsel to employers facing the challenges of the modern workforce.

Out of the office, ANB attorneys support a wide range of civic, professional, and philanthropic initiatives. The firm's managing partners include the former president of the Orange Bowl Committee and former chair of the Greater Miami Chamber of Commerce (Susan Potter Norton); the former chair of the Public Employees Relations Commission (Michael Mattimore); and the former Orange County Bar president and Florida Bar Board of Governors member (Wayne Helsby). Other ANB attorneys are in leadership positions with the American Bar Association, state and local bar associations, and various chambers of commerce. Firm attorneys also participate in philanthropic organizations such as Habitat for Humanity, United Way, and Boys' and Girls' Town. You may even find ANB attorneys at your next local BBQ competition, represented by ANB's competitive BBQ team, "Red Red Swine."

ANB has been a consistent contributor to *The Checkoff* on a range of labor and employment law topics. Almost every issue in recent years has had a case note or an article authored by an ANB attorney, including shareholders Wes Gay, Matthew Stefany, and Jason Vail, as well as associates Ben Lagos, Barron Dickinson, and Melanie Matamoros Cruz (whose article on the proposed revisions to the joint-employer standard headlines this issue).

PENDULUM, *continued from page 1*

- both), or exercises power to control (whether directly, indirectly or both), one or more of the employees' essential terms and conditions of employment."[3]
- Essential terms and conditions of employment are defined to include a non-exhaustive list of "wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance."[4]
- Common-law agency principles govern "whether an employer possesses the authority to control or exercises the power to control employees' essential terms and conditions of employment," and the Board will give weight to this evidence regardless of whether the control is reserved or indirect.[5]
- "[C]ontrol over matters that are immaterial to the existence of an employment relationship under established common-law agency principles, or that otherwise do not bear on the employees' essential terms and conditions of employment" is irrelevant to the joint-employer question. This includes, for instance, routine "contractual terms limited to 'dictat[ing] the results of a contracted service,' that aim 'to control or protect [the employer's] own property,' or to 'set the objective, basic ground rules, and expectations for a third-party contractor.'"[6]
- The party asserting joint-employer status has the burden to establish it by a preponderance of the evidence, in accordance with the prior rule.[7]

The 2020 Rule[8] now in place provides a narrower test for joint employment, requiring a finding that the entity possesses and exercises substantial direct and immediate control over one or more essential terms and conditions of employment that would warrant concluding the business meaningfully affects employment matters.[9] "Substantial direct and immediate control" is defined as direct and immediate control that has "regular or continuous consequential effect" on terms and conditions of employment.[10]

The 2020 Rule also makes clear that indirect forms of control, such as contractually reserved but never exercised authority over essential terms and conditions of employment, or control over mandatory subjects of bargaining other than essential terms and conditions, are probative of joint-employer status, but only to the extent that indirect forms supplement or reinforce evidence of direct and immediate control.[11] The essential terms and conditions of employment that determine whether an employer exercises direct and immediate control are a closed list extensively defined in the rule. The list is as follows:

- Wages—The entity "actually de-

continued, next page

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termines the wage rates, salary or other rate of pay that is paid to another employer's individual employees or job classifications. An entity does not exercise direct and immediate control over wages by entering a cost-plus contract (with or without a maximum reimbursable wage rate)."

- Benefits—The entity "actually determines the fringe benefits to be provided or offered to another employer's employees. This would include selecting the benefit plans (such as health insurance plans and pension plans) and/or level of benefits provided to another employer's employees. An entity does not exercise direct and immediate control over benefits by permitting another employer, under an arm's-length contract, to participate in its benefit plans."
- Hours of work—The entity "actually determines work schedules or the work hours, including overtime, of another employer's employees. An entity does not exercise direct and immediate control over hours of work by establishing an enterprise's operating hours or when it needs the services provided by another employer."
- Hiring—The entity "actually determines which particular employees will be hired and which employees will not. An entity does not exercise direct and immediate control over hiring by requesting changes in staffing levels to accomplish tasks or by setting minimal hiring standards such as those required by government regulation."
- Discharge—The entity "actually decides to terminate the employment of another employer's employee. An entity does not exercise direct and immediate control over discharge by bringing misconduct or poor performance to the attention of another employer that makes the actual discharge decision, by expressing a negative opinion of another employer's employee, by refusing to allow another employer's employee to continue performing work under a contract, or by setting minimal standards of performance or conduct . . . ."
- Discipline—The entity "actually decides to suspend or otherwise discipline another employer's employee. An entity does not exercise direct and immediate control by bringing misconduct or poor performance to the attention of another employer that makes the actual disciplinary decision, by expressing a negative opinion of another employer's employee, or by refusing to allow another employer's employee to access its premises or perform work under a contract."
- Supervision—The entity engages in "instructing another employer's employees how to perform their work or by actually issuing employee performance appraisals. An entity does not exercise direct and immediate control over supervision when its instructions are limited and routine and consist primarily of telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it."
- Direction—The entity assigns "particular employees their individual work schedules, positions, and tasks. An entity does not exercise direct and immediate control over direction by setting schedules for completion of a project or by describing the work to be accomplished on a project."[12]

The proposed rulemaking is yet another pendulum swing for the joint-employer standard. Before 2015, the Board's "share or codetermine test" included the requirement that putative joint employers actually, directly, and immediately exert control that was not limited or routine.[13] In 2015, the Board took a more expansive view in *Browning-Ferris Industries of California Inc.* (*2015 BFI*), a case in which Browning-Ferris challenged the NLRB's decision that the company was a joint employer with the staffing agency that provided workers for BFI's California plant, whose workers were seeking to unionize.[14]

In *2015 BFI*, the Board found that employers are joint employers "if they 'share or codetermine those matters governing the essential terms and conditions of employment.'"[15] In that analysis, the questions are whether there is a common-law employment relationship and whether the putative joint employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."[16] The Board thereby rejected limiting requirements it had established in prior decisions, no longer requiring employers to both *possess* and *exercise* the authority to control employees' terms and conditions of employment.[17] In *2015 BFI*, the Board also eliminated the requirement that an employer's controls must be "exercised directly and immediately," instead allowing evidence of indirect control and reserved control as "probative" in the joint-employer analysis.[18]

While the NLRB's decision in *2015 BFI* was on appeal to the D.C. Circuit, the Board issued a notice of proposed rulemaking containing a standard that departed significantly from the standard used in *2015 BFI*.[19] During the comment period of this proposed rule, the D.C. Circuit essentially punted the decision back to the Board. Affirming in part, the court ruled that the Board "correctly determined that the common-law inquiry is not woodenly confined to indicia of direct and immediate control" but that "an employer's indirect control over employees can be a relevant consideration."[20] However, the court remanded the decision for the Board to further refine its test—as "the Board failed to confine it to indirect control over the essential terms and conditions of the workers' employment"—and for the Board to "explain and apply its test in a manner that hews to the common law of agency."[21] Ultimately, the final and current rule promulgated in 2020 under the Trump administration swung back towards a more constrained approach, restoring

continued, next page

pre-*2015 BFI* standards.

The 2022 proposed rule would expand the parameters of the joint-employer standard, thereby making it easier for employers to be labeled joint employers. This in turn could broaden liability for employers, as it increases the chances that an entity other than the direct employer also has a duty to bargain or is jointly responsible for unfair labor practices committed by staffing companies, franchisees, and other related organizations with which employers may contract. The broadened rule also means determinations of joint-employer status will become more fact intensive.

Initial comments on the 2020 Rule were due on or before December 7, 2022. Reply comments, in turn, were to be submitted on or before December 21, 2022.[22]

M. CRUZ

Melanie Matamoros Cruz *is an associate in Allen Norton & Blue's Tampa office.*

Endnotes

1 Standard for Determining Joint-Employment Status. 87 Fed. Reg. 54,641 (Sept. 7, 2022) (to be codified at 29 C.F.R Part 103).

2 *Id.* at 54,645.

3 *Id.* at 54,646.

4 *Id.*

5 *Id.* at 54,648.

6 *Id.* at 54,650–54,651 (internal footnote omitted).

7 *Id.* at 54,651.

8 Joint Employers, 29 C.F.R. § 103.40 (2020).

9 *Id.* at § 103.40(a).

10 *Id.* at § 103.40(d).

11 *Id.* at § 103.40(a).

12 *Id.* at § 103.40(c)(1)–(8).

13 *See, e.g., In re Airborne Express*, 338 N.L.R.B. 597 (2002).

14 *See BFI Newby Island Recyclery*, 362 N.L.R.B. 1599, 1600 (Aug. 27, 2015) (*2015 BFI*) (holding that BFI is a joint employer and rejecting the requirement that employers must both *possess* and *exercise* the authority to control terms and conditions, arguing that reserved authority and indirect control are relevant to the question).

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 1600, 1611.

19 29 Fed. Reg. 46681 (Sept. 14, 2018) (now codified as 29 C.F.R. § 103.40).

20 *Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195, 1209 (D.C. Cir. 2018).

21 *Id.*

22 NLRB, News & Publications, *NLRB Extends Time for Submitting Comments on Proposed Rule Concerning the Joint-Employer Standard* (Oct. 14, 2022) https://www.nlrb.gov/news-outreach/news-story/nlrb-extends-time-for-submitting-comments-on-proposed-rule-concerning-the#:~:text=Under%20the%20proposed%20rule%20announced,and%20scheduling%2C%20hiring%20and%20discharge%2C.

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days, three times as much for three, and so on. We hold that such an employee is not paid on a salary basis, and thus is entitled to overtime pay."[3]

SCOTUS began its analysis with the premise long ago articulated in *Jewell Ridge Coal Corp. v. Mine Workers*[4] that well-paid employees are still entitled to benefits under the Fair Labor Standards Act. The Court reiterated that an employee classified as exempt (i.e., not entitled to overtime) must meet all of the standards, not just come close to meeting those standards. Here, the question centered on whether Hewitt's pay met the "salary basis" test. Finding that it did not—because his pay fluctuated week to week—SCOTUS determined that Hewitt was entitled to overtime.

SCOTUS focused its attention on the provisions for "highly compensated employees" under 29 C.F.R. § 541.601. Under that rule, an employee earning over $107,432 may be classified as an executive if he or she carries out three listed responsibilities: managing the enterprise, directing other employees, and exercising power to hire and fire (or at least having input into those decisions).[5] While the "highly compensated employee" rule creates a more flexible duties test, thereby allowing more employees within an organization to be so classified, the provisions do not alter other requirements, like method of pay and guaranteed amount of pay at a particular level week to week. Finding that Helix did not pay Hewitt a predetermined amount "without regard to the number of days or hours worked" as required under Section 602(a), SCOTUS determined that Hewitt was not properly classified as an exempt employee.

Another employment case before the Court this term is *Mallory v. Norfolk Southern Railway Company.*[6] The central issue is whether an employee may sue an employer in a state based solely on its registration to do business there, even if the employee never worked in the particular state.

The case involves Robert Mallory's alleged exposure to asbestos and other toxic chemicals while working for Norfolk Southern Railway in Virginia and Ohio. Mallory, a Virginia resident, brought his Federal Employer's Liability Act complaint against the Railway in Pennsylvania, claiming that the Railway had consented to jurisdiction in that forum by registering to do business within the state. The Pennsylvania Supreme Court ruled against Mallory in December 2021, finding the state's statutory scheme unconstitutional.

The question before SCOTUS is whether a state can require a company to consent to personal jurisdiction as part of granting a right to do business within the state. Although the case was brought in the context of an employment action, it has broader implications for issues of state rights, federalism, and forum shopping. If the Justices side with Mallory, it is likely that state courts will hear cases that do not directly involve their forums' laws, or their citizens, residents and visitors, simply because a company has registered to do business within the state. On the other hand, allowing corporations to operate within a state without being fully subject to its jurisdiction would necessitate additional jurisdictional hurdles for plaintiffs and may create inconsistencies depending on the type of case, injury, or plaintiff. The case was heard on November 8, 2022, and a decision is expected in the early spring.

A. TANDY

Aaron Tandy *is in-house general counsel for Boucher Brothers Management Inc., one of the largest employers in Miami Beach.*

Endnotes

1 No. 21-984 (Feb. 22, 2023).
2 *Hewitt*, slip. op. at 17 (citations omitted).
3 *Id.* at 1.
4 325 U.S. 161 (1945).
5 *Hewitt*, at 3.
6 Docket No. 21-1168 (Pa. 2021).

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ELEVENTH CIRCUIT CASE NOTES

By Jeffrey D. Slanker, Tallahassee

Fast-food employees plausibly pled concerted action in Sherman Act suit involving franchisees' agreement not to recruit or hire each other's employees.

Arrington v. Burger King Worldwide, Inc., 2022 WL 3931471 (11th Cir. Aug. 31, 2022).

Prior to September 2018, Burger King and its independently owned franchisees (more than 99% of Burger King's restaurants worldwide are independently owned) entered a "No-Hire Agreement" under which each agreed not to hire any former employees of another Burger King restaurant within six months of that employee leaving the prior location. Plaintiffs sued, asserting that the Agreement deprived them of job mobility and led to artificially depressed wages and decreased benefits in violation of antitrust law.

The district court found that Burger King and its franchisees were not separate actors for anti-trust purposes and thus were incapable of taking "concerted action" under Section 1 of the Sherman Act. However, the Eleventh Circuit Court of Appeals disagreed. As the Supreme Court discussed in *American Needle v. National Football League*, 560 U.S. 183 (2010), the relevant inquiry for "concerted action" is whether there is an arrangement among separate decision makers pursuing separate economic interests, thus depriving the marketplace of independent centers of decision-making. Pursuant to *American Needle*, the Eleventh Circuit noted the question does not come down to whether the entities engaged in concerted activity for all decision-making, but whether the decision in question involved concerted action.

The Eleventh Circuit found that Burger King and its franchisees were pursuing their own separate economic interests when hiring employees. Importantly, explicit in Burger King's standard franchise agreement, franchisees were independent contractors—not the agents, partners, joint venturers, joint employers, or employees of Burger King—and no fiduciary relationship existed between the corporation and a franchisee. In fact, the Burger King Disclosure Documents stated that franchisees may be in competition with one another. Additionally, such independence extended to hiring decisions, as franchisees enjoyed "the sole right to hire." For these reasons, the Eleventh Circuit concluded that Burger King and its franchisees had separate and different economic interests and could be subject to antitrust claims for concerted activity under the No-Hire Agreement at issue.

Neither the "manager rule" nor the requirement that opposition be to activity by current employer has basis in text of Title VII's anti-retaliation provision; summary judgment in favor of employer reversed where HR manager was terminated for her opposition to conduct by her former employer.

Patterson v. Georgia Pacific, LLC, 2022 WL 2445693 (11th Cir. July 5, 2022).

The plaintiff was employed by Georgia Pacific as a senior human resources (HR) manager. She was terminated a week after Georgia Pacific found out she had testified against her former employer in a pregnancy discrimination lawsuit. The HR manager filed suit against Georgia Pacific, arguing she was fired for conduct covered under both the opposition and participation clauses of Title VII's anti-retaliation provision.

The district court initially dismissed the case, finding Title VII's anti-retaliation provision inapplicable under a so-called "manager exception," or a "manager rule," and finding, alternatively, that the plaintiff's opposition to the actions of a former employer were not protected conduct for the purposes of applying the anti-retaliation provision to a current employer. The Eleventh Circuit disagreed, holding there is neither a manager exception nor current employer requirement under Title VII's anti-retaliation provision.

Property damage investigators are factfinders, not "administrative employees" who are exempt under the FLSA.

Fowler v. OSP Prevention Grp., Inc., 2022 WL 2297641 (11th Cir. June 27, 2022).

In this Fair Labor Standards Act (FLSA) case, the Eleventh Circuit determined that fraud investigators working for OSP Prevention Group did not qualify as exempt employees under the FLSA and thus were due overtime. This determination was made largely due to the nature of the investigators' work, which involved investigating damage to broadband infrastructure, determining who was liable for it, and calculating the cost of repair. Relying on *Calderon v. GEICO General Insurance Company*, 809 F.3d 111 (4th Cir. 2015), in which the Fourth Circuit Court of Appeals distinguished fraud investigators from insurance adjusters, the Eleventh Circuit determined that the investigators' primary work in the instant case was fact-finding, which qualified as "production work" and was not directly related to the employer's management or primary business operations. Essentially, because the investigators merely reported factual determinations to their superiors, they were not engaged in any decision-making for the business and thus failed to qualify for the FLSA's administrative exemption.

Alleged whistleblower plaintiff under the National Defense Authorization Act failed to state a

CASE NOTES

claim upon which relief can be granted when she cited a possible "parade of horribles" rather than demonstrated a reasonable belief that disclosed actions concerned gross mismanagement, abuse of authority, or a violation of law.

Fuerst v. Housing Authority of City of Atlanta, Georgia, 2022 WL 2231611 (11th Cir. June 22, 2022).

Claiming whistleblower status under the National Defense Authorization Act (NDAA), Karen Fuerst, an attorney with the Atlanta Housing Authority (AHA), alleged in a lawsuit filed in the United States District Court for the Northern District of Georgia that she was terminated for opposing the negotiation tactics employed by AHA's CEO. The NDAA protects employees of federal contractors and subcontractors from retaliation for disclosing information the employee believes is gross mismanagement, abuse of authority of a federal contract or grant, or a violation of law, rule, or regulation relating to a federal contract or grant.

The district court dismissed Fuerst's lawsuit; she appealed, arguing that the district court erroneously concluded that the NDAA did not apply to an employee of a federal grantee and erroneously found that Fuerst merely alleged a difference of opinion, not a specific violation of a contract or grant. The Eleventh Circuit agreed that Fuerst fell within the class of protected persons under the NDAA, but affirmed the district court's dismissal, finding that Fuerst failed to show that her belief that the CEO's actions constituted gross mismanagement, abuse of authority, or a violation of law was reasonable. Quoting the United States Court of Appeals for the Federal Circuit, the Eleventh Circuit explained that a reasonable belief is when "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude[s] that the actions of the government" constituted a violation of the law and, further, that "debatable differences of opinion concerning policy matters are not protected disclosures." Here, the court found that Fuerst's allegations concerning the CEO's planned conduct, which conduct "*could* result in a parade of horribles," amounted to "blow[ing] the whistle *before* the foul."

County training program participant who learned forensic photography and gained valuable experience for free over a six-month period, was not paid for participating in the program, and understood she would not be entitled to a job upon completion of the program was an "intern," not an "employee," under FLSA. Her claim for unpaid wages was dismissed.

McKay v. Miami-Dade County, 2022 WL 2073589 (11th Cir. June 9, 2022).

In this FLSA case, a former intern sued the county for unpaid wages. She claimed she was an employee while participating in the county's autopsy forensic photography training program. The parties stipulated that the plaintiff's participation in the program was "solely to acquire training in forensic photography." Under the "primary beneficiary" test established by the Eleventh Circuit, the trial court held that the plaintiff was an intern, not an employee. The Eleventh Circuit affirmed, finding that the plaintiff did not qualify as an employee under the FSLA because the plaintiff was the primary beneficiary of the relationship. The facts showed that the plaintiff learned forensic photography from a highly regarded program for free over a six-month period. In participating in the program, the plaintiff also understood that she would not be paid and was not entitled to a county job following her internship. Lastly, the plaintiff gained valuable practical experience and training from forensic photography professionals.

To trigger an employer duty to provide reasonable accommodation under the Rehabilitation Act, an employee must identify a disability and explain how the requested accommodation would allow the employee to do the job.

Owens v. Georgia, Governor's Office of Student Achievement, 2022 WL 16826093 (11th Cir. 2022).

The question in this case was whether an employee properly requested an accommodation under the federal Rehabilitation Act. The plaintiff teleworked for one day a week and then asked to telework full-time for several months after undergoing a Cesarean section. The plaintiff's doctor provided notes concerning this request, but the notes did not explicitly state that the employee needed to telework due to a disability. The plaintiff mentioned childbirth-related complications separately to her employer but did not provide details.

The employer asked the employee to provide more documentation regarding the disability or, alternatively, to return to work. The employee failed to provide more documentation and did not return to work. She was terminated and subsequently filed suit. The district court dismissed the suit, and the Eleventh Circuit affirmed. In affirming, the Eleventh Circuit held that to trigger an employer's duty to provide a reasonable accommodation under the Rehabilitation Act, an employee must identify the disability and explain why the requested accommodation would permit the employee to perform the job. "The bottom line is that employees must give employers enough information to respond effectively to an accommodation request," the court said.

J. SLANKER

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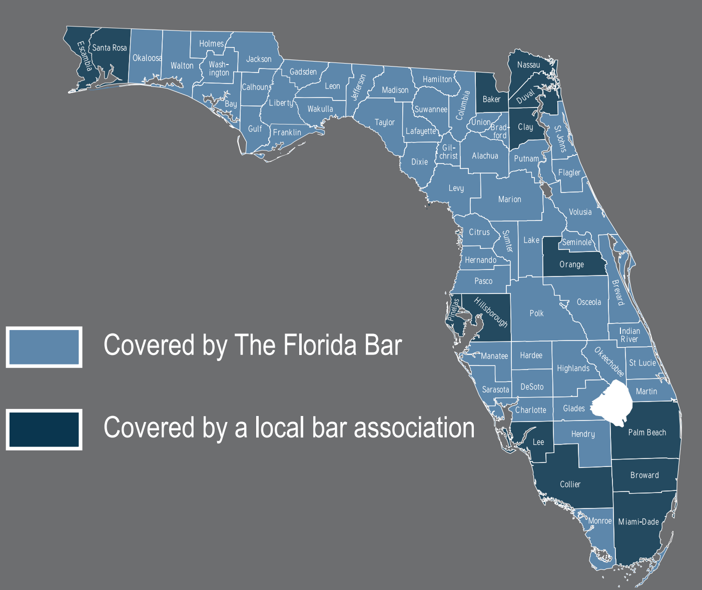

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