FALL 2017 NEWSLETTER

EMPLOYMENT LAW UPDATE

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A. Fifth Circuit Court of Appeals

***Adams and Associates, Inc. v. National Labor Relations Board,* 871 F.3d 358 (5th Cir. 2017)**

Two contractors should be liable for anti-union efforts that occurred when they started operating a youth job training center in Sacramento, California, for union members that were bypassed for hiring, and for working conditions that were changed unilaterally.

When the two contractors took over the center's operations, they avoided recognizing the union and unilaterally imposed working condition and benefit changes without participating in the bargaining process. The previous operator of the job center had a collective bargaining agreement with the American Federation of Teachers Local 4986 ("AFT"). Under the NLRA, a new employer does not have an obligation to hire the predecessor company's employees, but it must "not discriminate against union employees in its hiring."

The Fifth Circuit held that the two contractors were jointly liable for anti-union actions in violation of the National Labor Relations Act ("NLRA") that occurred when they took over the Department of Labor contract to run the youth job training center. The Fifth Circuit found that the contractors prevented union employees from working in positions in the jobs center. Furthermore, the court held that the CEO's statements in an internal memorandum were indicative of the company's methods of attempting to avoid union recognition, and that it was widely known within in the company that the CEO wanted to avoid the union. The transition team also "sanitized records" in part when they shredded documents pertaining to five unhired residential advisors. The court also found that the contractors improperly imposed employment terms because the company retained former employees and failed to tell the employees of its planned changes. Finally, the Fifth Circuit agreed with the National Labor Relations Board and held that the contractors must reinstate or hire nine employees who were either not offered jobs or fired, rescind its imposed employment terms, and bargain with the AFT.

***Logisticare Solutions, Inc. v. National Labor Relations Board,* 866 F.3d 715 (5th Cir. 2017)**

An employee's right to participate in class or collective action litigation is not a substantive right under Section 8(a)(1) of the National Labor Relations Act ("NLRA").

Logisticare Solutions, Inc. ("Logisticare") required job applicants to sign a class

or collective action waiver. The National Labor Relations Board ("NLRB") concluded that the waiver explicitly violated Section 8(a) and that the waiver was independently unlawful because employees would reasonably read the rule as restricting their right to file charges with the Board.

The Fifth Circuit rejected both of the NLRB's findings. The court concluded that the employee waiver does not explicitly violate Section 8(a)(1) and that employees would not reasonably read the rule as restricting their right to file charges with the Board. As a result, the Fifth Circuit held that Logisticare did not act unlawfully in requiring applicants to sign the waiver.

***Convergys Corp. v. National Labor Relations Board*, 866 F.3d 635 (5th Cir. 2017)**

An employer can lawfully require applicants to sign a class-action waiver and seek to enforce the waiver.

Convergys Corporation required its applicants to sign a class-action waiver, even though it was not part of an arbitration agreement. The National Labor Relations Board ("NLRB") argued that Section 7 of the National Labor Relations Act ("NLRA") guarantees that employees have the right to class or collective action litigation against their employer and that it is unlawful for an employer to enforce such a waiver.

Under the Fifth Circuit's *Murphy Oil USA, Inc. v. NLRB* and *D.R. Horton, Inc. v. NLRB* decisions, the Fifth Circuit panel held that Section 7 of the NLRA does not guarantee a right to class or collective action litigation. The court reaffirmed that "abrogation of the asserted right to participate in class and collective actions was not abrogation of a Section 7 right and therefore does not constitute an unfair labor practice." Therefore, the issue of the waiver not being part of an arbitration agreement has no bearing as to the legality of the waiver. As a result, the Fifth Circuit held that Convergys Corporation did not act unlawfully in requiring applicants to sign a class-action waiver or in seeking to enforce such a waiver.

***T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265 (5th Cir. 2017)**

An employee handbook may contain the following provisions without violating an employee's unionization rights under the National Labor Relations Act ("NLRA"): (1) a provision encouraging employees to "maintain a positive work environment;" (2) provisions prohibiting "arguing or fighting," "failing to treat others with respect," and "failing to demonstrate appropriate teamwork;" and (3) a provision prohibiting access to electronic information by non-approved individuals. However, a provision prohibiting all photography and audio or video recording in the workplace did violate the NLRA.

The National Labor Relations Board ("NLRB") challenged four T-Mobile workplace rules, alleging that they prohibit employees from exercising unionizing rights. T-Mobile's employee handbook: (1) encouraged employees to "maintain a positive work environment"; (2) prohibited "[a]rguing or fighting," "failing to treat others with

respect," and "failing to demonstrate appropriate teamwork"; (3) prohibited all photography and audio or video recording in the workplace; and (4) prohibited access to electronic information by non-approved individuals. The Board determined that all four provisions violated the National Labor Relations Act because each of them discouraged unionizing or other concerted activity protected by the Act. T-Mobile sought review of the Board's order.

The court determined that (1), (2), and (4) do not prohibit protected activity, finding that a reasonable employee reading the rules would not interpret them to prohibit conduct protected by the NLRA. However, (3), the prohibition against all photography and audio or video recording was a violation of the NLRA due to the broad reach of the provision prohibiting "all" recording of any kind. The court determined that because of the breadth of the provision a reasonable employee, generally aware of employee rights, would interpret it to discourage protected concerted activity, such as even an off duty employee photographing a wage schedule posted on a corporate bulletin board.

The court ordered that the Board's order prohibiting the recording provision would be enforced. However, it overturned the Board's order on the other three provisions.

***Credeur v. Louisiana*, 860 F.3d 785 (5th Cir. 2017)**

Where attendance in the office is an essential function of an employee's position, an employer is not required to accommodate a disabled employee by allowing them to work from home.

The employee was an Assistant Attorney General for the State of Louisiana. After a kidney transplant and resulting complications, she worked from home for several months and then needed more time, using her FMLA leave of twelve weeks of unpaid leave on an intermittent basis. After a couple of months working from home, the Attorney General's Office ("AGO") requested an accounting of her work hours and certification of her illness. After her work load was reduced, she was given a "last chance" agreement to sign, requiring that she improve her work performance. The "last chance" agreement specifically stated that she could not work from home.

Later, her condition worsened, and she requested to work from home. The AGO denied her request. As a result, she returned to work for approximately three months and then resigned. She later filed suit against the AGO, alleging a failure to accommodate, disability-based harassment, and retaliation under the Americans with Disabilities Act ("ADA") and state law. The trial court granted summary judgment for the AGO, and the former employee appealed.

In order to establish a *prima facie* case for failure to accommodate under the ADA, an employee must first show that he or she is "qualified" for the position by demonstrating an ability to perform the "essential functions" of the job with or without reasonable accommodation. Relying on EEOC regulations, the court determined that

"the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards nor to require employers to lower such standards," and that "there is general consensus among courts, including ours, that regular work-site attendance is an essential function of most jobs."

The Fifth Circuit found that the AGO's practices and policies indicated that regular work attendance in the office was an essential function of a litigation attorney in the AGO and that the AGO had consistently maintained its position regarding this policy, including its written correspondence to the employee that "[l]itigation attorneys in the [AGO] are not allowed to work from home except on rare occasions and only on a temporary basis" as it "places considerable strain on supervisors and staff." Additionally, several AGO attorneys testified that the role of litigation attorneys in the AGO was interactive and team-orientated, which further supported the court's conclusion that office attendance was essential to the position. The Fifth Circuit held that the ADA does not require employers to "reallocate essential functions" of a job to accommodate an employee with a disability; therefore, the employee was not qualified for her position. As a result, the AGO was entitled to summary judgment on her ADA claims.

***Edionwe v. Bailey*, 860 F.3d 287 (5th Cir. 2017)**

The rights to employment that a professor had at one university do not transfer to another university.

The professor was an associate professor at the University of Texas-Pan American ("UTPA"). His tenured status entitled him to employment at UTPA "until retirement or resignation unless terminated because of abandonment of academic programs or positions, financial exigency, or good cause." The state Legislature passed a measure abolishing UTPA and the University of Texas at Brownsville and created a consolidated university, University of Texas-Rio Grande Valley ("UTRGV"). The Legislature directed the board of regents to "facilitate the employment ... of as many faculty and staff" as is prudent and practical, leaving the exact procedures up to the board. After failing to be hired as a professor at UTRGV, the professor brought a wrongful termination claim against the University of Texas System, UTPA, UTRGV, and two administrators.

The Fifth Circuit held that the professor did not have a constitutionally protected interest in employment or tenure with UTRGV and the UT System. The professor's protected property interests were limited to the institution that granted him tenure, UTPA, and while his interest in continuing employment at UTPA was protected, "it is clear that the procedure used by the state to terminate it satisfied due process." Furthermore, the court noted that the UTPA handbook explains that if a tenured professor's academic program is terminated, then the professor can be terminated as well. Thus, the Legislature effectively abolished the professor's academic program and his employment along with the school. As a result, the Fifth Circuit upheld the district court's dismissal of the professor's wrongful termination claims.

1. U.S. District Courts

***Nevada v. U.S. Department of Labor*, 4:16–CV–731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017)**

The U.S. Department of Labor's overtime exemption regulations ("EAP exemption") that were set to be implemented in 2016 are unlawful. The EAP exemption provided that employees could not qualify for the white-collar exemption to the minimum-wage and overtime requirements of the Fair Labor Standards Act ("FLSA"), regardless of their duties, unless they earned more than $47,476 per year. The district court's ruling makes the prior preliminary injunction permanent.

The district court determined that the FLSA applies to the States because Congress has the proper authority under the Commerce Clause to impose the FLSA's minimum wage and overtime requirements on state and local employees. The district court held that the Department exceeded its statutory authorization because Congress intended for the white-collar exemption to apply based on employees' job duties. The Department's salary-level test did not account for an analysis of an employee's job duties for the purposes of determining whether an employee is exempt from overtime pay. The court reasoned that although the Department has the authority to implement a salary-level test for overtime exemption eligibility, the EAP exemption raised the salary level too high, thereby impermissibly supplanting an analysis of an employee's job duties. The district court also clarified that the Department may use a salary-level test so long as it does not supplant a duties test.