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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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SUPREME COURT GIVES NEW GROUNDS FOR CHALLENGING FEDERAL REGULATIONS

Over the years, an increasing part of this country's legal system has been based not on laws passed by legislators or the Congress, but regulations issued by administrative agencies. The courts have long struggled with the issues pertaining to whether the federal regulations were valid, but instead were issues that should be determined by the voters acting through their designated representatives in Congress. In recent rulings, however, the Supreme Court has shifted discussion to the perspective that Congress must explicitly give agencies the power to regulate "major questions" with significant economic or political implications. The most recent application of the policy occurred in the Environment Protection Agency's (EPA) authority to regulate power-plant emissions. *West Virginia v. EPA*, 597 U.S. ____ (June 30, 2022.)

In a 6-3 ruling, written by Chief Justice John Roberts, the Court struck down the EPA's plan to shift power generation away from fossil-fuel plants. Chief Justice Roberts said that agencies "must point to clear Congressional authorization" when undertaking policies of great "economic and political significance." In a separate concurrence, Justice Gorsuch said the doctrine has its roots in the bedrock principle of separation of powers. Justice Gorsuch writes that the doctrine applies when "an agency claims the power to resolve a matter of great political significance." Second, an agency "must point to clear Congressional authorization when it seeks to regulate a significant portion of the American economy." Third, it may apply when an agency seeks to intrude "into an area that is a particular domain of state law." Although the major questions doctrine has been around for over 25 years, it has now been applied three times by the U.S. Supreme Court in the past term, including the eviction ban issued by the Centers for Disease Control and Prevention (CDC) and the vaccine mandate issued by the Occupational Safety and Health Administration (OSHA).

Some contend that the expanded use of the major questions doctrine presents a risk to the ability of the administrative agencies to adopt rules to address engaging circumstances. Others say that the concept simply emphasizes the nature of a democracy, that the people have the right to make these choices through their elected representatives. In other words, Congress must give direction before the Executive Branch through agencies can write costly rules.

RECENT TRENDS IN COVID-19 LITIGATION

Many businesses purchase business interruption insurance to protect the company against disasters. Almost 2,000 lawsuits have been filed against insurers on the issue of whether COVID-19-related shutdowns constitute a "direct physical loss of or damage to" property, as defined in the language of many business interruption insurance policies. To date, virtually every federal and state appellate court ruling on these issues has found no coverage and ruled in favor of the insurers.

In other cases, businesses have tried to rely on state or federal pandemic laws or regulations to exempt them from liability from COVID-19 related claims. Assisted living facilities have been hit with negligence claims for failure to take precautions regarding their residents. In general, the courts have strictly construed such COVID immunity statutes and regulations so as to allow such negligence claims to be brought.

In a case involving meat processing plants, some businesses have contended that President Trump's April 28, 2020 executive order to the Department of Agriculture required meat processing plants to stay open if they were following guidance from the federal Centers for Disease Control and Prevention and the Occupational Safety and Health Administration. In July, 2022, the U.S. Court of Appeals for the Fifth Circuit case involving Tyson Foods ruled that the executive order did not relieve meat processors from COVID-19 related claims. Employers have also argued that government-mandated shutdowns of business for COVID-19 or other reasons amounts to an unconstitutional "taking" of property. In a decision in Florida, the court found that such actions were a lawful exercise of government police powers, and the facts constitute a compelling enough government interest that it weighed against a finding that the plaintiffs' properties had been taken. *Orlando Bar Group v. DeSantis* (Fla. 5th DCA June 30, 2022.)

Most claims brought by employees against employers related to COVID-19 are subject to workers' compensation, as opposed to court negligence litigation. Reports indicate that a large number of these workers' compensation claims are being allowed by the state agencies as work-related. At the same time, the workers' compensation concept allows employers to escape court litigation over negligence. A few cases, however, are now addressing whether the workers' compensation pre-emption defense applies to a family member at home infected by a worker who acquired COVID-19 due to employer alleged negligence.

Editor's Note - This writer at one time investigated a claim that a shut down caused by government action, such as by Immigration and Customs Enforcement (ICE), generated a business interruption claim for the employer's losses of business. Most business interruption policies contain an exception for recovery for governmental actions. However, some case law suggests that if the government actions were illegal or unconstitutional, the exception may not apply and recovery might have been allowed.

BLACK LIVES MATTER BUTTONS AND BANS RESULT IN VARIOUS LEGAL RULINGS

Cases are starting to come out now dealing with the subject of whether an employer can ban buttons pertaining to the Black Lives Matter (BLM) movement. The cases involve various legal theories such as the concerted activity doctrine under the Labor Act, the discrimination laws, and the free speech laws pertaining to public employers under the First Amendment.

Consider the following complications. If an employer allows BLM buttons, must it also allow White Lives Matter buttons, Blue Lives Matter buttons, etc.? Can the employer discriminate among people wearing buttons based upon the message? Does allowing these type buttons create a "hostile environment" for others? The questions are numerous and quite legally complicated.

In a case involving the National Labor Relations Board (NLRB), the Board's General Counsel has alleged that employers violate federal labor law by preventing employees from displaying the message "Black Lives Matter" on their clothing. The NLRB General Counsel believes that racial issues "directly impact the working conditions of employees." In a June ruling involving Home Depot, an NLRB administrative law judge found that the Black Lives Matter messaging lacked "an objective and sufficiently direct, relationship to terms and conditions of employment" to be legally protected. He wrote that the message "originated, and is primarily used, to address the unjustified killings of

black individuals by law enforcement and vigilantes. To the extent the message is being used for reasons beyond that, it operates as a political umbrella for societal concerns and relates to the workplace only in the sense that workplaces are part of society."

A similar case is pending against Whole Foods, contending that the dress code that workers were only permitted to wear name tags and approved promotional buttons, except in the case of legally-protected union-related buttons, violated the workers' rights to engage in activities "for their mutual aid and protection." That case is pending before an administrative law judge.

In June, the U.S. Court of Appeals for the First Circuit ruled that the lower court was correct to dismiss an action against Whole Foods for discrimination from the disciplining of employees who wore Black Lives Matter face masks to work, holding that there could plausibly be non-race-related reasons for the dress code enforcement. The court relied in its ruling on the "common sense" conclusion that the company had non-race-based reasons prohibiting the wearing of the masks. The workers had challenged Whole Foods' practice of sending home, docking pay from and terminating some employees who wore a mask supporting the racial justice movement. The lower court judge had found the claims did not amount to a civil rights act violation, as that law "cannot be read expansively enough to extend it protections to employees who have been disciplined for wearing clothes that violate a company's dress code . . . ."

On the other hand, the Third Circuit Federal Court of Appeals in a case involving the Allegheny County Port Authority, found the public employer's policy prohibiting political and social adornments on employee uniforms that was updated to include Black Lives Matter messaging, was likely unconstitutional. The Port Authority had long prohibited its uniformed employees from wearing buttons "of a political or social protest nature," concerned that such masks would disrupt its workplace. The court found that wearing of such masks was protected under the Constitution as free speech.

Editor's Note - The Constitutional issue only applies to public employers, state or federal. Therefore, private employers need be primarily concerned with the NLRB doctrine of concerted activity and the discrimination laws. It is likely that bans on such political and social issues will survive challenges under the discrimination laws, but the outcome of the NLRB case law under the current Administration is uncertain. It is likely that whatever dress code policy employers choose in this regard must be enforced objectively, however, as selected enforcement may likely result in liability.

"OLD WHITE MAN" ALLOWED TO SUE EMPLOYER'S DIVERSITY AND INCLUSION PLAN

In *DiBenedetto v. AT&T Services, Inc.*, a 58-year-old White male defeated the defendant AT&T's efforts to dismiss his case in connection with a reduction in force. The question according to the Atlanta federal court was whether the plaintiff had alleged sufficient facts to plausibly support an inference that his termination was motivated in part by his race or gender. According to Plaintiff, AT&T's diversity program was a company-wide initiative which had the purpose and effect of biasing hiring and retention decisions in favor of non-White and female employees. Plaintiff alleged that the senior leadership circulated detailed company demographic information to decision makers - explicitly broken down in terms of race and sex - to both inform and, according to plaintiff, influence employment decisions. Plaintiff also noted that non-White and female candidates were disproportionately hired in the finance department as the diversity program was implemented.

While the court indicated that this evidence may not count heavily in the end, it stated that Plaintiff's allegations were more serious in the period leading up to his termination. The CFO had sent an email to the finance department explaining the decision makers "must focus more on attracting and retaining diverse employees throughout our organization, especially at senior levels." Around the same time, the CFO was stressing that there was "more work to do" on implementing the diversity program, and the Vice President told the plaintiff that he was unlikely to succeed as Vice President of the group because he was "an old, White male." Just two months later, plaintiff received notice he would be let go. The workforce reduction cut at least a dozen employees from plaintiff's department, and all were White, and 75% were male. Further to the point, and around the same time, another announcement came out that the company was "doubling down" on its diversity efforts.

The court found that the allegations were supported by detailed factual allegations, and together they at least plausibly suggested that plaintiff's race or gender had played an unlawful role in his termination.

The court was quick to say that its ruling was not meant to be a statement on the virtue of efforts by AT&T and other companies to promote diversity and inclusion in their workforces. "The only question presented here is a very narrow one: Whether AT&T's [diversity and inclusion plan] - however laudable in theory, was unlawfully applied in this case."

Editor's Note - These cases are often called "reverse discrimination," and such cases allege discrimination against the majority rather than any minority. Most employers lawfully adopt and apply various diversity policies, including Affirmative Action Plans, but in this case, the anecdotal evidence of inappropriate statements made to plaintiff alleging that given his age and race, he was unlikely to be successful, created enough of an inference of discrimination that the Defendant would be unable to have the case dismissed without further discovery and potentially trial proceedings. Therefore, even in implementing diversity programs, employees must be careful in how they apply their programs. This is particularly true when an adverse action occurs to those not a part of the diversity efforts.

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