Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
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"All that serves labor serves the Nation. All that harms labor is treason to America. No line can be drawn between these two. If any man tells you he loves America, yet hates labor, he is a liar. If any man tells you he trusts America, yet fears labor, he is a fool. There is no America without labor, and to fleece the one is to rob the other."

Abraham Lincoln

WHEN IS CBS NOT CBS?
WHEN IT IS NOT A SINGLE-EMPLOYER

A recent decision of the U.S. District Court for the Southern District of New York illustrates that allegations common to parent-subsidiary corporations do not alone extend overlapping liability, absent specific facts of control over the employee claiming sexual harassment and discrimination. *Musiello v. CBS Corp, CBS Radio, Inc. CBS Sports Radio Networks, Inc. et al*, 20 Civ. 2569 (PAE) (S.D.N.Y. Feb. 11, 2021)

Jacquelyn Musiello was employed by CBS Radio and CBS Sports in the Human Resources Department, both subsidiaries of parent CBS Corp. She used email, employment material and access common to all three companies, such as "CBS AND YOU." During her employment, Musiello alleged that radio host Dan Taylor sexually harassed her for dates, with innuendo, jokes and unwanted gifts, all of which she declined to no avail. Musiello left her employment when refused her requested medical leave resulting in a worsening condition leaving her unable to return to work. Instead, Musiello sued CBS, CBS Radio and CBS Sports for hostile work environment and sex discrimination under the New York State and City Human Rights Laws, condemning the "top down sexist culture" allegedly permeating the companies from Taylor to former CEO and Chairman Leslie Moonves who was forced to resign under a barrage of sexual misconduct allegations.

CBS Corporation moved to dismiss and Judge Englemayer agreed, finding CBS Corporation was not a "single employer" with its subsidiaries. The Court discounted Musiello's factual allegations as nothing more than "familiar if not routine in the context of a parent-subsidiary corporate relationship." Rather, the Court stressed that Musiello, Taylor and others named in the complaint were employed by CBS Radio and Musiello failed "to set forth specific facts as to how CBS Corp. actually exercised control over CBS Radio's employees – and Musiello in particular." Absent such specific pleadings, lumping the CBS companies together failed to state a claim under longstanding Second Circuit precedent, he explained, requiring dismissal of the action.

BIDEN ADMINISTRATION AT EEOC CONTINUES DISMANTLING TRUMP ERA RULES

After a series of rule changes, reinterpretations, pauses, and freezes by other federal government agencies since the beginning of the Biden administration, the Equal Employment Opportunity Commission ("EEOC") has joined in. On February 12, 2021, the EEOC announced that it would pause implementation of a Trump era rule which ended the long-standing practice of permitting union officials to use official, on the clock time to attend to Federal workers' discrimination cases. This is part of the Biden administration's freezing of so-called "midnight regulations" issued at the last gasp of the Trump administration.

In early January 2021, the EEOC voted 3-2, on party lines, to end the practice of paying federal workers for time spent working on workplace discrimination cases, but only for union representatives. This decision undid a fifty-year long practice at the agency. The stated rationale was that such practices should be bargained for by the employees' union, an odd position for an administration which broadly sought to limit federal employees' bargaining rights.

During the comment period of the proposed rule, the large majority of comments were against the proposed rule. Moreover, the Democratic dissent on the Commission argued that the "partisan" rule was intended to harm unions and that it would ultimately have a chilling effect on discrimination claimants as it would deprive them of effective representation.

The pausing of the rule by the Biden administration comes before it ever appeared in the Federal Register. Democratic members of the Commission are still not in the majority, thus limiting the EEOC's ability to promulgate new rules, and such freezes may continue in order to reverse Trump rules.

In addition to the "official time" rule withdrawal, the EEOC also froze a proposed rule related to incentives for workers to encourage enrollment in employee wellness programs. The Trump rule permitted "*de minimis"* incentives in the form of, for example, an inexpensive gift item. This was in response to practices which led employers to offer substantial gifts like rollbacks on insurance premiums as a reward for participation in employee wellness programs. Such practices, many employers believed, would lead to discrimination claims. The issue had become particularly sensitive due to employers' concerns about employees receiving the COVID vaccine. The Biden administration has not yet offered guidance as to how to address the issue.

DEPARTMENT OF LABOR REVERSES TRUMP GIG WORKER GUIDANCE

In another reversal from a Trump era policy last week, the United States Department of Labor ("DOL") reversed a Trump era opinion letter which allowed "gig economy" firms to classify their workers as independent contractors under the federal Fair Labor Standards Act, thus exempting the workers from myriad worker protections. In 2019, the DOL had issued the opinion

letter adopting the arguments of companies like Uber and Grubhub that they have used to defend against misclassification claims.

In the DOL's Wage and Hour Division opinion, the "gig" workers set their own hours, were free to work elsewhere, and were not "integral" to the business, as they merely sued the software to claim work. Based on this analysis, the DOL found that these workers were not employees entitled to the FLSA's protections, including such things as overtime and minimum wage.

It is expected that the Biden DOL will approach these issues in a similar fashion to the Obama administration, which considered the "economic realities" of workers' relationships with companies to determine questions of independent contractor. This approach is the one favored by many states and labor unions.

DC CIRCUIT REMINDS NLRB WHO'S BOSS

In a withering critique, on February 19, 2021, a unanimous panel of the United States Circuit Court of Appeals for the District of Columbia Circuit gave the National Labor Relations Board ("NLRB" or "Board") a dressing down, reminding the NLRB how it is required to conduct its business. In *Leggett & Platt Inc. v. NLRB*, No. 20-1060 (D.C. Cir. February 19, 2021), the Circuit, with Judge David Sentelle, a Reagan appointee, writing for Judges Rao, a Trump appointee and Srinivasan, an Obama appointee, upbraided the Board for "miserably failing" to explain its rationale for the failure to follow its' own precedent.

The case involved a worker, Keith Purvis, who was attempting to petition the NLRB to decertify his union, the International Association of Machinists ("IAM"), at a Leggett & Platt mattress factory. In late 2016, Purvis gathered signatures and presented a decertification petition to management. In early 2017, Leggett withdrew recognition of the Union and refused to bargain with the IAM. In response, the IAM began a new petition drive and obtained signatures of a majority of the unit. The Union then filed an unfair labor practice charge with the NLRB, alleging that the withdrawal of recognition without a decertification election violated federal labor law.

In 2019, the NLRB agreed with the Union and stayed the matter pending Purvis' appeal. Meanwhile, the NLRB issued its decision in *Johnson Controls* which shifted the law in this area. *Johnson Controls* held retroactively that a withdrawal of recognition may in fact be based strictly on petition signatures and not a vote, and that a Union's counter-signatures cannot block the decertification.

In light of *Johnson* Controls, the D.C. Circuit remanded the *Leggett & Platt* appeal to the NLRB for reconsideration. The NLRB surprisingly then favored the Union in finding that because it had issued a bargaining order to Liggett & Platt, it would not now apply *Johnson Controls*, as doing so would be disruptive to the bargaining process. Leggett & Platt appealed this order to the DC Circuit, leading to last week's decision.

The DC Circuit emphatically reversed the Board, finding that "the Board has miserably failed to explain how it is a manifest injustice to recognize the party's right of appeal." Moreover, the Court held that the NLRB had failed to offer any rationale for its refusal to retroactively apply the new precedent nor explain why adherence to the Board's own rulings could possibly be disruptive to the administrative process. Judge Sentelle actually accused the Trump Board of hostility to employers and warned against purportedly punitive future rulings. The Court's decision and language augers for even more activist DC Circuit review of NLRB decisions, clear encouragement to employers to appeal adverse Board decisions.

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