Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
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SCOTUS SINKS NAVY SEALS' COVID-19 RELIGIOUS EXEMPTION APPEAL

Simple on the surface but roiling below, a 6:3 majority of the U.S. Supreme Court upheld the U.S. Navy's limitations on deployment of 35 Seals and other special forces personnel who refused vaccinations against COVID-19 on religious grounds. *Austin v. U.S. Navy Seals*, 1-26, 21A477 (March 24, 2022).

The Court's majority order provided no explanation for the decision. The Navy's limitations had been justified by Defense Secretary Lloyd Austin as warranted for personnel safety and mission success since Seals and other Special Warfare sailors often work in tight quarters, including submarines. Texas U.S. District Court Judge Reed O'Connor had blocked the limitations pending full trial and the U.S. Court of Appeals for the Fifth Circuit declined to lift the District Court's order. Justice Kavanaugh, in a substantive concurrence to the majority reversal of the District Court, had no such qualms. Perhaps revealing the thinking of his fellow Justices on what he termed the "bedrock constitutional principle" that the president is Commander in Chief of the armed forces, he wrote: "The Navy has an extraordinarily compelling interest in maintaining strategic and operational control over the assignment and deployment of all Special Warfare personnel . . ."

Justices Alito, Gorsuch and Thomas dissented, as they have in every denial of a religious accommodation challenge to COVID-19 vaccinations reviewed by the Court. Deploring the "great injustice" of treating the Seals "shabbily," Justice Alito joined by Justice Gorsuch in a dissent would have permitted limits only on a showing of "special need" rather than the Navy's tactical discretion upheld by the majority. The challenge will now proceed through litigation in the usual course, Seals subject to the Defense Secretary's order.

U.S. DOL SEEKS TO BRING HOME THE "DAVIS" BACON FOR FEDERALLY FUNDED CONSTRUCTION PROJECTS

On March 11, 2022, the U.S. Department of Labor's Wage and Hour Division ("DOL") announced proposed regulatory changes ("Proposal") to increase prevailing wages and benefits for workers at government funded construction projects covered by the Davis Bacon Act and the Davis-Bacon and Related Acts (collectively, the "DBRA"). The ninety-year-old DBRA generally applies to certain contracts for construction, alteration, or repair (including painting and decorating) to which the federal government is a party. The Proposal seems to address promises made by President Biden under the Bipartisan Infrastructure Law to "rebuild the infrastructure of this country" and reinvigorate the ever-increasing inflationary economy through infrastructure and transportation projects.

By way of background, the DBRA was originally passed to protect construction workers on certain federally funded or assisted construction projects by requiring contractors to pay laborers and mechanics the prevailing wage and fringe benefit rates as established by corresponding work on similar projects in the jurisdiction where the work is performed. The DBRA directs the DOL to determine such locally prevailing wage rates. Initially, rates were set using a three-step process that considered (1) any wage rate paid to a majority of covered workers; (2) absent a majority wage rate, then the rate paid to the greatest number of workers so long as the workers represent at least 30 of those on the project (*i.e.*, the so-called "Thirty Percent Rule"); and (3) absent satisfaction of the Thirty Percent Rule, DOL was authorized to use the weighted average rate ("Weighted Average Rule"). However, the Reagan Administration DOL removed the Thirty Percent Rule, leaving the agency only with a two-step process. Many prevailing rates since that time have been set using the Weighted Average Rule.

The Proposal would revert to, among other changes, the three-step process used from 1935 to 1983 to determine prevailing rates, because the DOL found that over the last forty years, over-application of the Weighted Average Rule was to the detriment of and caused underpayments to construction workers. Reforms also include periodically updating prevailing wage rates to address out-of-date wage determinations, providing the DOL broader authority to adopt state or local wage determinations when certain criteria is met, issuing supplemental rates for key job classifications when no survey data exists, and strengthening worker protections and enforcement, including debarment and anti-retaliation rules to protect whistle-blowers. The DOL believes this well-needed reform is essential to ensure "prevailing wages reflect actual wages paid to workers in the local community" and to "prevent the unintended consequence of depressing workers' wages during the government's extensive construction contracting activity."

Given the Biden Administration's efforts to rebuild America with high-quality broadband and transportation infrastructures, and that the 71 DBRA laws cover 1.2 million U.S. construction workers and approximately $217 billion annually in federal spending on construction, the Proposal if approved will shield construction workers from exploitation, improve enforcement, and reduce cheating. Indeed, in 2017 alone, according to a recent article, nearly 8,000 workers were the victims of wage theft and the DOL successfully prosecuted and obtained almost $30 million in back wages. Accordingly, the Proposal is poised to create substantial impacts such as litany of labor-related statutory and contractual claims of underpayments for DBRA covered employers. Since the Federal Register published the Proposal on March 18, 2022, the public has until May 17, 2022 to submit comments to the DOL.

GEORGIA FEDERAL COURT RULES HOSPITAL MAY HAVE VIOLATED ADA WHEN IT RESCINDED A JOB OFFER AFTER LEARNING APPLICANT IS HIV POSITIVE

Earlier this month, a federal district judge in Savanah, Georgia, denied the Defendant's motion for summary judgement in a lawsuit brought by the Equal Employment Opportunity Commission ("EEOC") against a hospital, accusing it of violating federal law when it rescinded a job offer of safety officer to Plaintiff after learning he is HIV positive. *See, EEOC v. St. Joseph's/Candler Health Sys. Inc.*, No. 4:20-cv-112, 2022 BL 71994 (S.D. Ga. Mar. 3, 2022). The principles of this decision may be applied to the "other virus" afflicting the U.S., COVID-19, in an increasing number of COVID-19 based discrimination complaints being filed in the federal courts.

The court granted the EEOC's motion for partial summary judgment on the issue of whether the employee, on whose behalf the EEOC brought the action, satisfied the prerequisites for the safety officer position, but determined "a question of material fact exist[ed] as to whether [the employee] posed a 'significant risk to the health or safety' (and, thus, a direct threat) to others and thus whether he was a qualified individual under the ADA [Americans with Disabilities Act of 1990]." *Id.* at *12. As explained by the court, human immunodeficiency virus ("HIV") attacks a person's immune system and if untreated can lead to acquired immunodeficiency syndrome ("AIDs"). While presently incurable, HIV can be treated, and individuals diagnosed with HIV can lead long and healthy lives. As the court further explained, "HIV is transmitted through sexual contact or blood-to-blood transmission." *EEOC,* 2022 BL 71994, at *1. Notably, "[t]he probability of HIV transmission depends on the infected individual's 'viral load.'" *Id.* "Viral load" "is the amount of HIV in the blood of someone who has HIV." *Id.* at *2. Importantly, "[i]f an infected individual maintains an 'undetectable viral load' then that individual is less likely to transmit HIV to others." *Id.*

According to the opinion, although Plaintiff had an undetected viral load each of the two times he was tested, the hospital was concerned about the potential for blood-to-blood transmission during violent interactions he potentially would encounter as a safety officer. In deciding to rescind Plaintiff's offer of safety officer, the hospital employee reviewing Plaintiff's case viewed several online sources including a healthline.com article that stated that "HIV-positive individuals may experience 'blips.'. . . blips are 'temporary, oftentimes small increases in viral load.' . . . blips 'may occur between tests, and there may be no symptoms." *Id.* at *4. Based on her review of the healthline.com article, among other sources, the hospital employee determined that while transmission was "unlikely in an individual with a low viral load, viral loads can fluctuate without the individual knowing." *Id.* The employee admitted in deposition testimony that "she did not have enough information to know whether [Plaintiff's] viral loads were fluctuating and that she did not ask [Plaintiff] to provide her with any additional lab tests." *Id.* Based on the employee's review of the online records and data about reported safety officer assaults and restraining injuries, she concluded "that [plaintiff] could transmit HIV if (1) he was involved in an altercation; (2) he was injured and bleeding; (3) the patient involved in the altercation had an open wound; and (4) [Plaintiff's] blood went into the patient's open wound at a time when [Plaintiff's] viral load was not undetectable." *Id.* at *5. The court, however, pointed

out that "a factual dispute exist[ed] as to the threat 'blips' pose[ed] with [Plaintiff]" given "nothing in the record indicate[ed] that [Plaintiff] ha[d] ever experienced blips or that his viral load ha[d] reached detectable levels since being diagnosed with HIV." *Id.* at *10.

The court also found that "an issue of material fact exist[ed] as to whether [Plaintiff] suffered an adverse employment action" and denied Plaintiff's motion for partial summary judgment and the hospital's motion for summary judgment on the issue of "[w]hether the hospital took the adverse employment action because of [Plaintiff's] disability." *Id.* at *15. The court's decision thus clears the way for trial for a case that raises significant issues of how to properly balance public safety concerns and employees' rights.

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