2020 Labor & Employment Virtual Seminars

Employment Law Case Update

Megan Meadows and Brian Peterson
Supreme Court Cases
Bostock v. Clayton County, GA

• Facts (three cases consolidated into one):
  • Bostock v. Clayton County:
    • Child welfare advocate alleged that his employment was terminated because he began participating in a gay recreational softball league.
  • Altitude Express v. Zarda:
    • A sky diving instructor alleged that his employment was terminated shortly after disclosing that he was gay.
  • R.G. & G.R. Harris Funeral Homes v. EEOC:
    • Employee alleged that their employment was terminated shortly after disclosing their intention to transition to living and working full-time as a gender other than the one they were assigned at birth.

• Issue: Does Title VII, which prohibits discrimination “because of sex,” also implicitly prohibit discrimination because of sexual orientation or transgender status?
Bostock v. Clayton County, GA

• Holding: Yes, Title VII prohibits discrimination because of sexual orientation and transgender status:

“[Title VII’s] message for our cases is equally simple and momentous: An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against the individual based on sex . . .”
Our Lady of Guadalupe School v. Morrissey-Berru

• **Facts:**
  • Two women were employed by Catholic elementary schools as teachers.
  • The women were not priests. But, as teachers, they were directly involved in performing important religious functions within the school.
  • The elementary schools terminated both teachers’ employment.
  • The teachers sued the elementary schools under the ADEA and the ADA respectively.

• **Issue:** Does the First Amendment’s religion clause prevent the teachers from asserting employment discrimination claims against their religious employer? (i.e. Do the teachers fall within the “ministerial exception”?)
Our Lady of Guadalupe School v. Morrissey-Berru

• **Holding:** Yes.
  • The Ninth Circuit was too rigid in its application of *Hosanna-Tabor*’s “ministerial exception” factors.

  • When determining whether an employee qualifies as an exempt minister, courts should focus on what an employee does rather than on their religious training or title.

  • That does not mean that religious employers enjoy a general immunity from secular laws. But it does mean that the First Amendment protects religious employer’s autonomy with respect to internal management decisions that are essential to the employer’s religious mission.
Eighth Circuit Court of Appeals
Williams v. UPS, 963 F.3d 803

• **Facts – Part 1:**
  • Cedric Williams (an African American man) was employed by UPS as a District Labor Manager.
  
  • During his employment, Mr. Williams engaged in two purported protected activities:
    • 2011 – Provided input on whether another employee’s employment should be terminated (that employee also happened to be African American). As part of his input, Mr. Williams said UPS should treat employees fairly and be consistent in how they apply policies.
    • 2012 – Deposed on UPS’s behalf as part of an employment discrimination case.
  
  • In 2013, after putting him on a performance improvement plan, UPS demoted Mr. Williams to a lower level position.
Williams v. UPS, 963 F.3d 803

• **Facts – Part 2:**

  • It was undisputed that the UPS managers who approved the demotion were not involved in the 2011 disciplinary action or the 2012 deposition.

  • Mr. Williams filed suit under § 1981 alleging that UPS demoted him in retaliation for prior statements he had made about the company’s treatment of African American employees.

  • The district court granted UPS’s motion for summary judgment.
Williams v. UPS, 963 F.3d 803

- Legal Issue: Was there a sufficient causal connection between Mr. Williams’ protected activities and his demotion?

- Holding: No.
  - A causal link does not exist if the decision makers are unaware of the protected activity. In this case, it was undisputed that the decision makers were not involved with and had no knowledge of the protected activities.

  - We have previously held that, without more, an interval of more than two months is too long to support an inference of causation. In this case, the demotion occurred nearly a year after the alleged protected activities.
Button v. DM&E Railroad Corp., 963 F.3d 824

• Facts:
  • Rhonda Button was employed by DM&E Railroad Corp. (d/b/a “CP Railway”) as an Operations Supervisor. She was the only female employee working in the Kansas City office.
  • In 2016, a visiting manager, (who also happened to be female) but was not Button’s actual supervisor, allegedly made the remark that “the Kansas City Desk was no place for a woman.”
  • Also in 2016, CP Railway implemented a RIF that ultimately resulted in the termination of Ms. Button’s employment.
  • Ms. Button sued CP Railway under the FMLA and the MHRA.
  • The district court held that Ms. Button’s MHRA claim failed as a matter of law.
Button v. DM&E Railroad Corp., 963 F.3d 824

• Legal Issue: Did the visiting manager’s comment create a genuine fact issue as to whether Ms. Button was selected to be laid off as part of the RIF because of her sex? (Note: This case was decided under the “contributing factor” standard).

• Holding: No.
  • Even if the visiting manager’s statement showed discriminatory intent, it cannot be direct evidence of discrimination because the visiting manager was not a decisionmaker.
  • The statement could not constitute indirect evidence of discrimination because none of the RIF decision makers heard the comment and none were aware of it at the time the RIF was implemented.
**Bharadwaj v. Mid Dakota Clinic, 954 F.3d 1130**

- **Facts – Part 1:**
  - Mid Dakota Clinic ("MDC") is a private Oncology practice.
  - Jayaram Bharadwaj ("Dr. JB"), who was born in India and immigrated to the US, was employed by Mid Dakota Clinic as a doctor for 4.5 years. He was a shareholder for the final two years of his employment.
  - Dr. JB did not have a good working relationship with the other doctors and staff.
  - The working relationship got so bad that MDC eventually forced Dr. JB to undergo a fitness to practice evaluation at Vanderbilt University.
Bharadwaj v. Mid Dakota Clinic, 954 F.3d 1130

• Facts – Part 2:
  • The Vanderbilt evaluation revealed that Dr. JB was competent but had very bad interpersonal skills. The evaluator suggested that Dr. JB undergo a training program on how to work better with others.
  
  • While Dr. JB was in the training program, another doctor at MDC (Dr. Robert Roswick) authored a letter to the MDC shareholders stating that he felt Dr. JB was being treated differently because of his race.
  
  • It is undisputed that MDC fired Dr. Roswick specifically for authoring the letter. Dr. Roswick would ultimately successfully sue MDC for unlawful retaliation and obtain a $1,000,000 judgment against it.
Bharadwaj v. Mid Dakota Clinic, 954 F.3d 1130

• **Facts – Part 3:**
  • After returning from the training program, a nurse allegedly made derogatory comments toward Dr. JB about his nationality. Dr. JB reported the derogatory comments to the HR Department.
  
  • After the incident with the nurse, MDC gave Dr. JB an ultimatum. The other shareholders would take a vote to kick him out of the practice or he could “voluntarily” resign without a vote.
  
  • Dr. JB resigned and then sued MDC under Title VII for unlawful retaliation.
  
  • The district court entered summary judgment in favor of MDC.
Bharadwaj v. Mid Dakota Clinic, 954 F.3d 1130

• Legal Issue: Was there a genuine issue of material fact as to whether Dr. JB was forced out of MDC because he reported the nurse’s racist comments?

• Holding: No.
  • Dr. JB cannot use Dr. Roswick’s strong retaliation claim to bootstrap his weak one. Even if MDC retaliated against Dr. Roswick for writing the letter, this does not mean that it also retaliated against Dr. JB for complaining about something else. Retaliation against one employee is insufficient, standing alone, to prove retaliation against another employee when the underlying activity is so different.
Main v. Ozark Health, Inc., 959 F.3d 319

• **Facts – Part 1:**
  • Ozark Health, Inc (“OHI”) is a medical center in Clinton, Arkansas
  
  • Sheila Main was employed by OHI as its Radiology Manager. She was 51 years old.
  
  • In 2012, Darrell Moore became COO of OHI and therefore became Ms. Main’s direct supervisor.
  
  • Mr. Moore began receiving multiple complaints about Ms. Main’s job performance:
    • Bullying
    • Unnecessarily criticizing maintenance staff
    • Failing to timely complete reports for department
Main v. Ozark Health, Inc., 959 F.3d 319

• Facts – Part 2:
  • Things came to a head when Ms. Main allegedly acted rude and unprofessional at a vendor presentation.
  
  • Ms. Main’s conduct at the meeting caused Mr. Moore to give her an ultimatum: she could “voluntarily” retire with the possibility of being brought back on an as needed basis for part-time work or OHI would terminate her employment immediately.
  
  • Ms. Main refused to take the part time job and was fired. She subsequently sued OHI under the ADEA, Title VII, and the Arkansas Civil Rights Act.
Main v. Ozark Health, Inc., 959 F.3d 319

- **Facts – Part 3:**
  - During discovery, Ms. Main obtained testimony from other attendees at the vendor presentation. Those individuals testified that they did not feel Ms. Main was acting unprofessional or being rude.
  
  - Nonetheless, the district court granted summary judgment in favor of OHI.
  
  - On appeal, Ms. Main argued that the district court erred in concluding that she failed to raise a genuine issue of material fact as to whether the reasons for her termination (i.e. bad performance culminating in very unprofessional behavior at a vendor presentation) was a pretext for unlawful discrimination.
Main v. Ozark Health, Inc., 959 F.3d 319

- **Legal Issue:** Did the testimony of other meeting attendees create a genuine issue of material fact as to whether the reasons given for the termination of Ms. Main’s employment were a pretext for unlawful discrimination?

- **Holding:** No.
  - Under the honest belief rule, a decision maker’s belief, even if it is subsequently proven to be incorrect, can still be a lawful and legitimate reason for terminating someone’s employment as long as it is honest and truly believed.
  
  - The record suggests that Mr. Moore honestly believed that Ms. Main acted very unprofessionally. The testimony of other attendees might have shown that Mr. Moore’s observations were unfair or mistaken. But the testimony does not show that Mr. Moore did not truthfully believe that Ms. Main’s behavior was inappropriate.
Thompson v. Kanabec County, 958 F.3d 698

• Facts – Part 1:
  • Wendy Thompson, the mother of 8 children, was employed by the County as a registered nurse.
  
  • A criminal investigation was opened regarding her husband’s alleged sexual abuse of one of their children.
  
  • A child protection/neglect investigation was opened to determine whether Ms. Thompson allowed the abuse to happen.
  
  • Ms. Thompson was placed on administrative leave from her job at the County pending resolution of the child protection/neglect investigation.
Thompson v. Kanabec County, 958 F.3d 698

• Facts – Part 2:
  • After conducting its own investigation of the matter, the County’s outside counsel suggested that the County terminate Ms. Thompson’s employment. But the County chose to delay its decision pending a formal maltreatment determination from the courts.
  
  • During the suspension from work and investigation, Ms. Thompson learned that she needed surgery. Ms. Thompson notified her supervisor that she would require the surgery and subsequently filed an FMLA leave request.
  
  • But at nearly the same time as the FMLA issue was arising, the child maltreatment proceeding concluded and it was ultimately confirmed that Ms. Thompson mistreated her child by exposing her to abuse.
Thompson v. Kanabec County, 958 F.3d 698

• Facts – Part 3:
  • Despite the pending FMLA leave request, the County moved forward with making a final determination on whether to terminate Ms. Thompson’s employment.

  • The County notified Ms. Thompson of a meeting where the Board would vote on whether her employment should be terminated and invited her to attend.

  • Ms. Thompson decided to voluntarily resign rather than risk the possibility that the Board may vote to involuntarily terminate her employment.

  • Ms. Thompson subsequently sued the County under the FMLA alleging that it unlawfully interfered with her rights under the FMLA.
Thompson v. Kanabec County, 958 F.3d 698

• **Issue # 1:** Did the County unlawfully interfere with Ms. Thompson’s rights under the FMLA?

• **Holding:** No.
  • Even if an employee establishes a prima facie interference claim, the claim will fail unless the employee also shows that the employer’s interference prejudiced the employee as a result of a real, remediable impairment of their rights under the FMLA.

• Ms. Thompson did not show any prejudice resulting from the County’s delay in acting on her FMLA request or its failure to give her notice of her FMLA rights. Thompson was already on administrative leave when she requested FMLA. And even if she had received proper notice of her rights and the County acted immediately on her FMLA request, the County would still have required her to exhaust her PTO before placing her on unpaid leave.
Thompson v. Kanabec County, 958 F.3d 698

• Issue # 2: Did the County unlawfully discriminate against Ms. Thompson because she requested FMLA leave?

• Holding: No.
  • An employee’s request for FMLA leave does not insulate her from employment decisions that are based on reasons other than FMLA usage. If the employer demonstrates that it would have terminated the employment had the employee not exercised her FMLA rights, then the employer faces no liability.

• The record does not demonstrate a causal link between Ms. Thompson’s FMLA request and the Board’s decision to proceed with a vote on whether to terminate her employment. The Board’s actions were based on the maltreatment determination, not on Ms. Thompson’s exercise of rights under the FMLA.
• **Facts – Part 1:**
  • Jennifer Paskert was employed at Auto Smart as a Sales Associate.
  
  • Her supervisor was Brent Burns. Mr. Burns was a bad manager.
  
  • It was undisputed that Mr. Burns frequently lost his temper; regularly screamed at and ridiculed employees; referred to female customers with derogatory names; and threw objects in the office.
Paskert v. Kemna-ASA Auto Plaza, 950 F.3d 535

• Facts – Part 2:
  • The evidence also showed that Mr. Burns regularly harassed Ms. Paskert:
    • Told Ms. Paskert that “he never should have hired a woman”
    • Told Ms. Paskert that “he wanted to make her cry”
    • Told Ms. Paskert that “if you weren’t married and I weren’t married, I could have you. . . .
      You’d be mine. I’m a closer!”

  • Due to poor sales performance, Ms. Paskert was demoted from Sales Associate to a non-sales position.

  • Shortly after the demotion, Ms. Paskert was fired for getting into an argument with Mr. Burns. The purported reason for the termination was insubordination.
Paskert v. Kemna-ASA Auto Plaza, 950 F.3d 535

• Facts – Part 3:
  • Ms. Paskert filed suit against the Dealership alleging hostile work environment discrimination on the basis of sex.
  • The district court granted summary judgment in favor of the Dealership.
Paskert v. Kemna-ASA Auto Plaza, 950 F.3d 535

• Legal Issue: Was Mr. Burns’ conduct severe and pervasive enough to constitute actionable sexual harassment?

• Holding: No.
  • This court has previously described the ‘boundaries of a hostile work environment claim’, and demonstrated that some conduct well beyond the bounds of respectful and appropriate behavior is nonetheless insufficient to violate Title VII.

• In light of these precedents, Burns’ alleged behavior, while certainly reprehensible and improper, was not so severe and pervasive as to alter the terms and conditions of Paskert’s employment. **However, the Dealership and Burns should both be embarrassed and ashamed for how they treated her.**
Tenth Circuit Court of Appeals
Frappied v. AGBH, LLC, 966 F.3d 1038

• Facts:
  • Christine Frappied and eight other employees were employed by Affinity Gaming Black Hawk, LLC (the “Casino”); all were over the age of 40.
  • The Casino terminated all nine employee’s employment.
  • Plaintiffs sued under Title VII alleging that they were terminated because they were women over the age of 40.
  • The Casino moved to dismiss plaintiffs sex-plus-age claim arguing that sex-plus-age claims are not a recognized theory of liability under Title VII. The district court agreed and granted the Casino’s motion to dismiss.
Frappied v. AGBH, LLC, 966 F.3d 1038

- **Legal Issue:** Are sex-plus-age claims cognizable under Title VII?

- **Holding:** Yes.
  - Ample precedent holds that Title VII forbids ‘sex-plus’ discrimination in cases in which the plus characteristic is not itself protected under the statute. So long as sex plays a role in the employment action, it has no significance that a factor other than sex might also be at work, even if that factor plays a more important role than sex in the employer’s decision.

  - It is irrelevant that age discrimination is separately protected under the ADEA. ADEA claims and Title VII sex-plus-age claims address different harms. An ADEA claim addresses discrimination against an older worker because of his or her age, whereas a Title VII sex-plus-age claim brought by an older woman addresses discrimination against her because of her sex.
Jensen v. W. Jordan City, 968 F.3d 1187

• **Facts – Part 1:**
  • Aaron Jensen was employed by Jordan City as a police officer.
  • During his employment, Mr. Jensen reported that he was being sexually harassed by his superiors.
  • Shortly after his sexual harassment complaint, Jordan City opened an internal affairs investigation into Mr. Jensen’s completion of investigative reports. Mr. Jensen was placed on administrative leave during the pendency of the internal investigation.
  • During the administrative leave, unaccounted for drugs and money were discovered in Mr. Jensen’s locker.
Jensen v. W. Jordan City, 968 F.3d 1187

• **Facts – Part 2:**
  - Mr. Jensen’s employment was terminated. Due to the nature of the allegations, it was very difficult for Mr. Jensen to obtain new employment.
  
  - Mr. Jensen subsequently sued Jordan City under Title VII arguing that the internal investigation was started in retaliation for his sexual harassment complaint and that the drug/money evidence was fabricated/planted.
  
  - A jury ruled in favor of Mr. Jensen. As part of the award, he received $1M in future lost earnings damages.
  
  - On appeal, the parties disputed whether the future lost earnings award was subject to Title VII’s damages cap.
Jensen v. W. Jordan City, 968 F.3d 1187

• Legal Issue: Are damages for future lost earnings subject to Title VII’s statutory damages cap?

• Holding: Yes.

• Title VII’s damages cap limits recovery to $300,000 against employers who have more than 500 employees. But the cap applies only to remedies that were not available under the pre-1991 version of the Civil Rights Act. Relevant here, front pay is a remedy that was available under the pre-1991 version of the Civil Rights Act, but lost future earnings are not. . . . the district court correctly concluded that lost future earnings are subject to Title VII’s damages cap because lost future earnings are closely analogous to common law torts that were not available under the pre-1991 version of the statute. . . . Because of the similarity between lost future earnings and common law torts that were not available under the pre-1991 version of the statute, we agree with the Seventh Circuit’s analysis in Williams and conclude that Jensen’s future lost earnings award falls within the category of other non-pecuniary losses.” Thus, the district court correctly concluded that Jensen’s Title VII award is subject to Title VII’s damages cap.
Jackson v. KSD 500, 799 F.App’x 586

• Facts – Part 1:
  • Marcia Jackson was employed by Kansas City, Kansas Public Unified School District No. 500 (“KSD 500”)
  • Ms. Jackson alleged that, starting in October of 2016, she was regularly bullied and sexually harassed by a co-worker.
  • But Ms. Jackson did not report any of the alleged conduct until she got into a loud argument with the co-worker in December of 2016. During the argument, Ms. Jackson used profane language toward the co-worker.
  • KSD 500 responded by placing both Ms. Jackson and the co-worker on administrative leave pending an investigation into the incident.
Jackson v. KSD 500, 799 F.App’x 586

• Facts – Part 2:
  • KSD 500 fired the co-worker for the harassing conduct. But it also terminated Ms. Jackson for her conduct during the argument. Specifically, it terminated her employment for violating school district policies prohibiting the use of profanity and/or abusive language.
  
  • Ms. Jackson filed a pro se lawsuit against KSD 500 under Title VII asserting a hostile work environment sex discrimination claim.
Jackson v. KSD 500, 799 F.App’x 586

• Legal Issue: Did KSD 500 reasonably respond to Ms. Jackson’s report of sexual harassment?

• Holding: Yes.
  • To assess the reasonableness of an employer’s response to a report of sexual harassment, we ask whether the remedial preventative action was reasonably calculated to end the harassment. Here, KSD 500 took actions that totally stopped the harassment. Therefore, the hostile work environment claim failed as a matter of law.
Vazirabadi v. DPS, 2020 WL 4214373

• **Facts – Part 1:**
  • Alireza Vazirabadi ("Mr. Vazirabadi") is an Iranian American man in his mid-fifties.
  • He applied and was interviewed to become a Process Improvement Engineer at Denver Public Schools ("DPS").
  • He was selected as one of four candidates to undergo in-person interviews.
  • A part of the in-person interviews was facilitating a group discussion about team-building activities in Denver.
Vazirabadi v. DPS, 2020 WL 4214373

• Facts – Part 2:
  • Mr. Vazirabadi received low marks on the team building portion of the interview because the interview panel felt that he dominated the discussion and did not try to get input from everyone. Therefore, Mr. Vazirabadi was not offered the position.
  
  • All individuals who were selected for the position received high marks on the discussion facilitation portion of the interview.
  
  • Mr. Vazirabadi filed a pro se lawsuit under Title VII alleging that he was not hired because of his national origin. The only evidence he offered in support of his claim was proof that he was qualified for the position and his own testimony regarding his perceived performance during the interview.
Legal Issue: Was there a genuine issue of material fact as to whether the stated reason that Mr. Vazirabadi was not selected for the position was a pretext for unlawful discrimination?

Holding: No.

It is insufficient for Mr. Vazirabadi to rely on his own beliefs and impressions about how he felt the interviews went. He must do more to show that the reason DPS gave for not selecting him is a pretext for unlawful discrimination. He did not present any evidence of weaknesses, implausibility, inconsistencies, incoherencies, or contradictions in the reason offered by DPS. Therefore, his national origin discrimination claim failed as a matter of law.
**Ade v. Conklin Cars Salina, 800 F.App’x 646**

- **Facts – Part 1:**
  - Jillian Ade was a car salesperson that was paid, in part, on commissions.
  - Ms. Ade had been counseled multiple times about being unprofessional and not managing people appropriately.
  - On June 10, 2016, Ade sent an e-mail to her supervisor complaining about how Conklin Cars was administering a sales contest.
Ade v. Conklin Cars Salina, 800 F.App’x 646

• Facts – Part 2:
  • In the e-mail, she described Conklin as a “shit show” and a “cluster F---”. She also said the following:

    • “There is no reason the contest payouts should be taken out of the salesperson’s guarantee. If it’s a bonus it’s a bonus. They should be paid the 1,500 plus the bonus they won. You do this to get them excited to sell and then turn around and not pay. That is just wrong. I think the contest works for creating excitement but they won’t anymore if this is how you are going to play it. So either do it right or don’t do it at all.”
Ade v. Conklin Cars Salina, 800 F.App’x 646

• **Facts – Part 3:**
  • Ms. Ade’s employment was terminated shortly after she sent the e-mail because of ongoing performance issues.
  
  • Ms. Ade filed a lawsuit against Conklin Cars alleging that she was fired in violation of the KWPA in retaliation for raising a compensation issue.
Ade v. Conklin Cars Salina, 800 F.App’x 646

• Legal Issue: Could Ms. Ade’s e-mail airing her grievances about how the sales contest was being conducted support a retaliation claim under the KWPA?

• Holding: No.
  • In order to invoke the protections of the KWPA, an employee must either file a claim under the act or raise a complaint that is clear enough that the employer would understand that the employee is asserting rights protected by the KWPA.

  • Even when viewed in a light most favorable to Ms. Ade, her e-mail did not put Conklin Cars on notice of an alleged KWPA violation. The message conveys only that Ms. Ade disagreed with the way the contest was structured, not that she believed it violated employees’ legal rights under the KWPA.
Missouri State Court
Lin v. Ellis, 594 S.W.3d 238

• Facts – Part 1:
  • Dr. Lin was employed by the Washington University’s School of Medicine as a staff scientist.
  
  • Dr. Lin began experiencing chronic back pain and was diagnosed with two herniated discs.
  
  • Dr. Lin informed her supervisor of the diagnosis and requested an accommodation to avoid tasks that aggravated his condition. The requested accommodation was granted by assigning Dr. Lin to micro array work for a particular grant that did not require extended periods sitting at the lab bench.
**Lin v. Ellis, 594 S.W.3d 238**

- **Facts – Part 2:**
  - All at the same time: (1) a complaint was filed against Dr. Lin and (2) the School discovered that the grant work which allowed her to avoid extended bench work would likely have its funding eliminated.
  
  - The School told Dr. Lin she was eligible to apply for and transfer to a different position within University for which she was qualified.
  
  - Dr. Lin applied to multiple open positions but was not selected for any of them. Her position was terminated in November of 2012.
Lin v. Ellis, 594 S.W.3d 238

• Facts – Part 3:
  • Dr. Lin sued under the MHRA alleging, among other things, unlawful retaliation for requesting a reasonable accommodation
  • A jury returned a verdict in favor of Dr. Lin. The School filed a JNOV which was denied by the circuit court and appealed.
Lin v. Ellis, 594 S.W.3d 238

- **Legal Issue:** Whether a reasonable accommodation request qualifies as a “protected activity” under the MHRA for the purposes of a retaliation claim?

- **Holding:** No.
  - Although federal authorities interpreting the ADA is persuasive, the court cannot ignore the plain language of the MHRA.
  - The language of Section 213.070.1(2) does not indicate that a plaintiff can bring a retaliation claim under the MHRA based on a mere request for a reasonable accommodation. Dr. Lin’s accommodation request was not “opposition to unlawful conduct.”
M.W. v. Six Flags St. Louis, LLC, 2020 WL 4091530

• Facts – Part 1:
  • MW was a sixteen year old that worked at Six Flags as a ride operator during the summer seasons of 2016 and 2017.

• During her employment, MW experienced two instances of harassing conduct:
  • **The Glasses Room Incident:** Two male co-workers (who were also under the age of 18), confronted MW in a small storage room where 3D glasses for the ride were stored. They both pulled their pants down (but not their underwear) and allegedly said “we should all get it on.” MW said no and they all left the room without incident.

  • **The Cell Phone Video Incident:** One of the male co-workers who was involved in the Glasses Room Incident, showed MW a video on his cell phone of his girlfriend performing oral sex on him.
M.W. v. Six Flags St. Louis, LLC, 2020 WL 4091530

• **Facts – Part 2:**
  • MW did not report the Glasses Room Incident to Six Flags. But she immediately reported the Cell Phone Video Incident.
  
  • Six Flags responded by launching an investigation.
  
  • During an interview conducted as part of the investigation, JoAnn Hamilton (the HR Manager) allegedly told MW that she shouldn’t let these incidents bother her; that “boys will be boys”; and that “this type of thing is going to happen in workplaces.”
M.W. v. Six Flags St. Louis, LLC, 2020 WL 4091530

• Facts – Part 3:
  • Six Flags offered to move MW to a different area of the park and operate a different ride if that would make her feel more comfortable.
  • Six Flags terminated the employment of both male co-workers.
  • Nonetheless, MW subsequently sued Six Flags under the MHRA asserting a hostile work environment sexual harassment claim. The circuit court grant SJ in favor of Six Flags.
  • On appeal, the parties disputed whether the work environment was “objectively hostile.”
M.W. v. Six Flags St. Louis, LLC, 2020 WL 4091530

• Legal Issue # 1: Did the circuit court err when it concluded that no reasonable person could conclude that the Glasses Incident, the Cellphone Video Incident, and the comments during the investigation created a hostile work environment?

• Holding: No.

• Under Missouri and federal precedent examining hostile work environment claims under the MHRA, some inappropriate behavior objectively does not rise to the level of actionable harassment as a matter of law.

• The storage room incident, the cellphone video incident, and the comments during the interview were undeniably inappropriate and should not be tolerated in the workplace—especially one that employs minors. However, the conduct was limited to three brief instances of no more than a few minutes each and occurred over the span of four consecutive days during the first season of MW’s employment and was largely on the part of one co-worker.
M.W. v. Six Flags St. Louis, LLC, 2020 WL 4091530

• Legal Issue # 2: Did Six Flag’s offer to move MW to a different ride in a different area of the park constitute a tangible adverse employment action?

• Holding: No.

• There was no decrease in pay and there was no evidence that the move would have impacted MW’s terms and conditions of employment in any material way.
Emerging L&E Issues
The Equal Pay Act & Prior Salary History

• “No employer having employees subject to any provisions of this section shall discriminate, . . . on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to . . . a differential based on any other factor other than sex: . . . ”) See 29 U.S.C. § 206(d).
The Equal Pay Act & Prior Salary History

• Is an employee’s prior salary history a “factor other than sex”?

• Some courts say yes:
  • *Taylor v. White*, 321 F.3d 710, 718 (8th Cir. 2003) (acknowledging potential problems associated with utilizing salary history when setting pay but refusing to adopt a *per se* rule that prior salary history is not a legitimate factor other than sex).

• Some courts say no:
  • *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020) (holding that procedure for setting employee's starting salary, which started with employee's prior wages, was not a “factor other than sex” that could defeat prima facie case of EPA violation).
The Equal Pay Act & Prior Salary History

- Carefully evaluate how individual employee’s salaries are being set
- Be on the lookout for difficult to explain differences in pay between male and female employees that are performing the same and/or very similar jobs.
- Continue monitoring the circuit split. It is possible that SCOTUS may have to take up this issue in coming years.
- Carefully review state and local laws. Some states and cities have passed laws which prohibit reliance on a person’s prior salary history in setting pay.
Employee vs Independent Contractor

• The Gig-Economy

• DOL Issues Proposed Regulations for Determining Independent Contractor Status Under the FLSA (September 22, 2020)
Thank You

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