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Briefly

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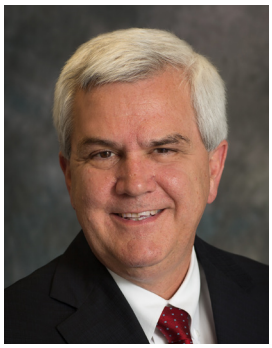

Howard B. Jackson

"This case is one in a growing trend that supports employers' ability to establish and enforce a vaccine mandate."

COURT GROUNDS HAWAIIAN AIRLINES EMPLOYEES' VACCINE MANDATE CHALLENGE

In *O'Hailpin et. al v. Hawaiian Airlines, Inc.* a group of employees brought a putative class action that challenged Hawaiian Airlines' practices in connection with its vaccine mandate and handling of claims for medical or religious exemptions. The employees sought a temporary restraining order and preliminary injunction against Hawaiian Airlines' practices. Suffice it to say that the Court was not impressed.

Hawaiian Airlines set its policy up in an organized manner and gave employees very reasonable notice of its requirements. The company announced in August of 2021 that effective November 1, 2021 all U.S.-based employees were required to be vaccinated. Hawaiian Airlines created a policy that, among other things, created a path to request reasonable accommodation based on disability or sincerely held religious belief. In addition, employees who declined to be vaccinated would receive a 12-month unpaid leave of absence.

In considering requests for accommodation, Hawaiian Airlines viewed guest-facing employees differently than those who are not guest-facing. The company granted exemptions to many employees who were not guest-facing and could maintain social distancing and wear masks. It denied accommodations to guest-facing employees.

The plaintiffs in the case included flight personnel, a customer service agent, and a corporate trainer. Hawaiian Airlines had denied their requests for accommodation on health or religious grounds, and in some cases both.

As noted above the plaintiffs asked the Court to enter an injunction requiring Hawaiian Airlines to stop its practice of denying accommodations. To obtain an injunction the party requesting it must show that, absent the injunction, the party will suffer "irreparable harm. In general, irreparable harm is a type of harm that cannot be remedied by money damages.

The plaintiffs alleged that denying the injunction would result in various types of irreparable harm. They alleged that denial would result in a "chilling effect" on other employees who wished to seek health or religious exemptions, because they would be faced with a 12-month unpaid leave of absence in the event of denial. The Court pointed to the clear policy set by Hawaiian Airlines in advance - including its policy and practices regarding accommodation - and found the plaintiffs' contention unpersuasive.

Plaintiffs contended that the policy forced them into a "crisis of conscience" because they had to choose between their health, or their beliefs, and their employment. The Court founds this unpersuasive as well, noting that Hawaiian Airlines did not force anyone to be vaccinated.

Plaintiffs put forward a few other contentions, which the Court also dismissed. In short, the Court found that plaintiffs did not establish irreparable harm.

Another factor that a party seeking an injunction must show is that the party has a reasonable likelihood of success on the merits of its claim. The plaintiffs in the Hawaiian Airline case contended that their requests for accommodation were reasonable, thereby putting the burden on Hawaiian Airlines to show that granting the requests would create an undue burden on the company.

The Court addressed the plaintiffs' contention with respect to both religion and disability. On this subject the

Continued on page 4

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LUCKY PENNIES OR RETALIATORY CONDUCT?

Carol R. Merchant

"In addition to [the Georgia 'pennies'] case, the DOL has pursued FLSA legal action in recent months against at least five other employers for retaliatory activity against employees, for asserting their rights [under the FLSA]."

Most of us read the story a few months ago about an employer in Georgia paying an employee his final paycheck in a pile of more than 91,000 greasy pennies weighing roughly five hundred pounds.

Some of you may not have read the follow-up story about the U. S. Department of Labor, Wage and Hour Division, subsequently suing the employer and alleging that the method of payment constituted retaliatory conduct by the employer for the employee having complained to the Wage and Hour Division (WHD) about not receiving his final paycheck. The lawsuit also said the employer included a note with an expletive on the pile of pennies and posted defamatory remarks about the former employee on the firm's website. Failure to pay overtime to employees is a further element of the WHD's lawsuit.

So, what should we take from this? Obviously, the U.S. Department of Labor (DOL) is no longer only looking exclusively at employers' compliance with the monetary requirements of the Fair Labor Standards Act (FLSA) for payment of minimum wage and overtime. *An employer's treatment of employees who assert their rights under the FLSA is also turning out to be an element for consideration.*

In addition to this Georgia case, the DOL has pursued FLSA legal action in recent months against at least five other employers for retaliatory activity against employees, for asserting their rights. The employers range from the auto repair store in Georgia to a bakery in Connecticut to a construction company in Massachusetts. The retaliatory actions were instigated against employees for such things as:

- Complaining to a supervisor about not receiving overtime;
- Being suspected of complaining to WHD;
- Cooperating with the WHD during an investigation; and
- Cashing a back-wage check issued as the result of a WHD investigation.

As a result of these employee actions, employers variously engaged in the following types of retaliatory behavior:

- Harassed employees;
- Threatened termination;
- Threatened to report employees to immigration; or
- Threatened to blacklist them.

Punitive damages are being sought by the DOL, and in two instances, courts have already awarded $75,000 and $100,000 respectively in purely punitive damages for the retaliatory actions.

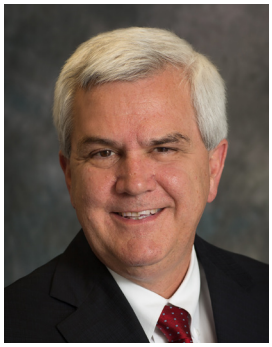
While these legal actions by the DOL are a very strong cautionary warning against an employer doing anything that could be considered retaliatory against an employee who asserts his or her rights under the FLSA, they also serve as a very strong signal of the likelihood that the WHD is going to be taking a more aggressive approach to enforcement than we have seen in the last four years.

Further signals of this approach are a proposed $30 million increase in the 2022 WHD budget, and the rescinding of three Final Rules issued by the Trump administration (on independent contractors, joint employers and tipped employee requirements). All three of the Final Rules that were rescinded were more employer-friendly than the ones that have replaced them.

Another indication of the likelihood of a more aggressive enforcement attitude, is the appointment of David Weil (not yet confirmed by the Senate, as of the time of this writing) as the WHD Administrator. Mr. Weil was the WHD Administrator under the Obama administration and was known for a forceful approach, particularly with regard to the types of employer actions that were found to be a willful failure to comply with FLSA requirements. A determination of willfulness results in higher back-wages and penalties.

So, that pile of pennies might be a metaphor that the WHD is going to be more hard-hitting and employee-friendly than what we have known recently.

EEOC SETTLES CLASS ACTION OVER HIRING PRACTICES FOR $5 MILLION



Howard B. Jackson

"The EEOC presented more than statistics [on American Freight's discriminatory hiring practices]. The allegations included both conduct and directives from corporate management designed to keep females out of warehouse and sales positions."

In February, the U.S. Equal Employment Opportunity Commission ("EEOC") settled a nationwide class action lawsuit against American Freight Management Company ("American Freight") for $5 million. In that case the EEOC alleged that the company, which owns and operates furniture stores, intentionally did not hire women into sales and warehouse jobs.

The EEOC's evidence included statistics. In the Complaint filed in the U.S. District Court for the Northern District of Alabama, the EEOC presented a snapshot related to warehouse positions for 14 stores with employee compliments ranging from 70 to over 300. According to the allegation, for the years 2013 to 2016 there were no female warehouse employees in 13 of the 14 stores. In the other store there was one female warehouse employee.

One might suspect that in the warehouse setting there tend to be fewer female employees. Are those figures actually so unusual? The EEOC further alleged that for 2013, American Freight hired 821 warehouse workers nationwide, only 1.2% of which were female. This compared with an industry average of 6.9%. Accordingly, while the industry average showed a low percentage of females hired, American Freight's figures were far lower than the average for the industry.

The EEOC painted a similar picture with respect to sales positions. The EEOC presented a chart that focused on 12 stores at locations around the country and their hires from 2013 to 2016. Several hired zero, one, or two females, out of more than 30 total hires. Some stores hired over thirty females, out of around 150 total hires.

The number of females hired in sales was clearly a higher percentage than those hired into warehouse positions. Even so, the percent was well below the industry average. The Complaint alleged that in 2013, American Freight hired females into sales positions at 32.2%, compared to the industry average of 48.7%.

The EEOC presented more than statistics. The allegations included both conduct and directives from corporate management designed to keep females out of warehouse and sales positions. The EEOC alleged that store managers had observed corporate managers discard applications from females. In addition, corporate managers told store managers not to hire women because "women complain and make trouble." The EEOC alleged that former employees heard store managers say that American Freight did not hire women because they "b too much," because they are "too much of a distraction" to male employees in the warehouse, because they "can't lift," and because women do not "do as great a job of selling furniture" as men.

In addition to the monetary amount of $5 million, the settlement included a 3-year consent decree. Commitments in the decree include American Freight's commitment to appoint a Title VII Coordinator, develop a recruitment plan for women in sales and warehouse positions, and provide periodic reports to the EEOC regarding the number of women who apply and are hired.

There are many industries where certain positions have traditionally been filled by men, or by women. Obviously, any employer who intentionally continues that trend, such as American Freight was alleged to have done, is creating significant legal exposure.

Even where there is no intentional action, there is potential exposure where there are clear disparities in positions. This is true whether the disparity is based on gender or race or any other protected status. If you find your organization in that position, it would be well to engage in a thoughtful analysis of questions such as:

1) How the circumstance came to exist;

2) What trends supported it in the past;

3) What trends may contribute to the pattern continuing, and

4) What efforts can be wisely and lawfully made to help bring about a course correction?

At the risk of stating the obvious, it would not be wise to simply run out and hire as many persons in the under-represented status as possible. It is of course unlawful to discriminate in hiring decisions on the basis of any protected status. Rather, an employer can take steps such as engaging in the training of its management team, its

Continued on page 4

"AIRLINE EMPLOYEES' VACCINE MANDATE CHALLENGE" continued from page 1

company noted the following burdens in connection with setting out its undue hardship defense:

1) Unvaccinated employees posed an increased risk to other employees and passengers;

2) Testing would create a substantial administrative burden, particularly given the current shortage of tests;

3) Administrative difficulties of revising schedules to reincorporate unvaccinated persons;

4) Difficulties with pending union grievances; and

5) The problems associated with scheduling unvaccinated flight crew on international flights.

The Court found that reasons (1), (2) and (5) were particularly impactful. Accordingly, the Court held that plaintiffs had not met their burden of establishing a likelihood of success on the merits.

This case is one in a growing trend that supports employers' ability to establish and enforce a vaccine mandate. This is particularly true where the employer sets up its policy in advance, communicates it well, and includes appropriate paths for seeking and obtaining accommodation for health and religious reasons. Notably, Hawaiian Airlines did not summarily deny requests. It made reasonable distinctions between employees who were guest-facing and those who were not in such positions.

Of course, if Hawaiian Airlines was a Tennessee company it would have had to make some changes to its policy and practice. Tennessee and some other governments restrict the ability of employers to require, or to effectively enforce, vaccine mandates. Accordingly, employers who operate in multiple states must be aware of the rules in each of their locations.

"EEOC SETTLES CLASS ACTION" continued from page 3

recruiters, and its employees; and such steps as expanding recruiting sources, and developing relationships that can help provide outreach and training to under-represented groups, and the like. Steps of this nature can and should go a long way towards creating a more balanced and inclusive workforce, and towards keeping your organization away from the EEOC's crosshairs.

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