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Wright Daves & Jones, PLLC
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Briefly

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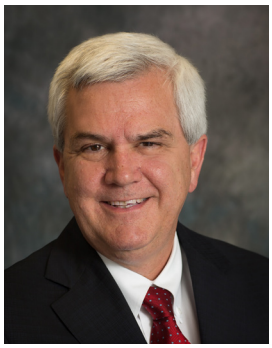

Howard B. Jackson

"The bottom line is that while employers may have defenses to elements of alleged consequential damages, the universe of available remedies to employees, and thus, risks to employers, has expanded."

THE NLRB HAS BEEN BUSY

In a series of decisions and actions the National Labor Relations Board ("NLRB" or "Board") has increased risks to employers and expanded certain rights of unions and employees in a variety of ways. Four examples are discussed in this article, three of which flow from Board decisions in December of 2022.

Remedies For Unlawful Discharge

The Board through its prosecutorial arm, the General Counsel, has long pursued claims on behalf of employees that it believes were discharged unlawfully under the National Labor Relations Act ("Act"). For many years the primary remedy in such claims was back pay.

In on of the December decisions, *Thyve, Inc*., the Board held that where an unlawful discharge is found the remedy will include "consequential damages" as well. What are consequential damages? They can include any number of harms that flowed causally from the discharge. For example, suppose the unlawfully discharged employee no longer has health insurance and has a health event. The healthcare costs over and above the amount the employee would have had to pay under the employer's plan could be consequential damages. Suppose the employee was unable, despite reasonable efforts, to obtain a comparable job for several months and to make ends meet incurred credit card debt, or made a 401 (k) withdrawal? Those items may be considered consequential damages and awarded to the employee.

The Board noted that during the compliance process (a stage after there has been a decision on the merits of the unlawful discharge allegation) the employer can raise issues to be considered. For example, did the employee make reasonable efforts to obtain alternate employment? Could the employee have obtained health insurance via alternate means at reasonable cost and failed to do so? Did the employee have greater credit card debt because of spendthrift conduct and not a genuine need?

The bottom line is that while employers may have defenses to elements of alleged consequential damages the universe of available remedies to employees, and thus or risks to employers, has expanded.

Unit Determination In Elections

When a union petitions to represent a group of employees, call the "unit", the petition describes the group that the union seeks to represent. In another December of 2022 decision, *American Steel Construction*, the Board changed the rules related to unit determination.

Where the employer seeks to broaden the definition of the unit stated in the petition, the employer must show that the employees it seeks to add share an "overwhelming community of interest" with the petitioned-for group. That is a very high standard which will be very difficult to meet.

The import of this change in the rules means that so long as the petition describes a rationally discernible group that group will almost certainly be accepted as the unit for purpose of the election. One might ask, what difference does that make?

It can make a huge difference in whether or not the union wins the election. For example, supposes there is a group of production workers in one department who want to bring in a union. There are twenty of these employees. There are two hundred production and maintenance employees in the plant. A union can seek an election among the twenty in the department. To prevail, the union would need for eleven employees to vote for representation. To prevail in a plant wide election among production and maintenance

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Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Cookeville, and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., in Atlanta GA; and M. Lee Daniels Jr., P.C., in Greeneville SC.

PWFA AND PUMP - NEW LAWS FOR PREGNANT AND NURSING WORKERS

Mary C. Moffatt

"Employers subject to PWFA and the PUMP Act should plan ahead by considering what solutions and accommodations would be available to covered employees."

Two new laws contained in the $1.7 trillion spending package entitled the "Consolidated Appropriations Act of 2023" ("CAA") provide protection for pregnant and breastfeeding employees beyond existing protections. The purported goal of these two laws was to fill in gaps in existing laws made evident in recent Court decisions such as *EEOC v. Wal-Mart*, which held that Wal-Mart's light duty policy offered only to employees injured on the job (thus denying similar accommodations to all pregnant employees) violated neither Title VII of the Civil Rights Act of 1964 nor the Pregnancy Discrimination Act. *EEOC v. Wal-Mart*, No. 21-01690 (7th Cir. 2022).

Much like the Americans with Disabilities Act (ADA), the federal Pregnant Workers Fairness Act (PWFA) requires employers to make temporary reasonable accommodations for pregnant workers, such as providing extra bathroom breaks or physical accommodations such as a stool or chair for a pregnant employee. This law covers employers with 15 or more employees. The PWFA requires employers to provide such accommodations to the "known limitations" of qualified employees who have conditions related to pregnancy, childbirth or related medical conditions whether or not such conditions meet the definition of disability under the ADA. Covered employers are prohibited from requiring qualified employees to accept an accommodation other than a reasonable accommodation arrived at through the interactive process and also prohibits employers from requiring a leave of absence (whether paid or unpaid) if another reasonable accommodation can be provided. The PWFA takes effect on June 27, 2023 and provides remedies for violations which are the same as Title VII, i.e., damages, reinstatement, attorneys fees, etc. During 2023, the EEOC is expected to issue regulations regarding compliance with the PWFA.

Also included in the CAA is the Providing Urgent Maternal Protections (or "PUMP") for Nursing Mothers Act. This Act is very similar to Tennessee Code §50-1-305, and it amends the Fair Labor Standards Act by requiring employers to provide reasonable break time for lactating employees, including a place for such lactation to take place, which, like the Tennessee law, cannot be a bathroom and must be private. The break time does not have to be compensated unless the employee is expected to perform work duties during the break time. The PUMP Act took effect on December 29, 2022 but the ability for employees to file complaints based on violations is not effective until April 2023. Unlike Tennessee's law, (which provides employers will be held harmless if they have made a good faith effort to comply), the remedies available to employees under PUMP are the same as under the FLSA (back/front pay, reinstatement and liquidated damages); however before suing the employer, the employee must give the employer a 10-day opportunity to cure an alleged failure to comply. The notice requirement is waived in the event the employee has been terminated or if the employer has refused to comply.

There is a small employer exemption from the PUMP Act for employers with less than 50 employees if the employer can establish that compliance with the law would create undue hardship due to significant difficulty or expense, but bear in mind that exemption does not affect the Tennessee law already in effect for employers with one (1) or more employees, which requires Tennessee employers to provide accommodations for nursing mothers in the workplace (Tenn. Code Ann. §50-1-305). Tennessee employers with 15 or more employees are also prohibited from discrimination with respect to pregnancy, childbirth and related medical conditions under the Tennessee Pregnant Workers Fairness Act, (TPWFA) which took effect October 1, 2020 (Tenn. Code Ann. §50-10-102); the law also provides remedies for employees who are adversely affected by violations of the law.

Employers subject to the PWFA and the PUMP Act should plan ahead by considering what solutions and accommodations would be available to covered employees. Employers may want to consider updating ADA-accommodation policies and/or pregnancy-related policies to address these recent laws and of course, it is advisable to work with experienced employment attorneys in doing so.

STRATEGIES FOR DEALING WITH STUBBORN EMPLOYEES

G. Gerard Jabaley

"So, what is a disgruntled or stubborn employee? Literally it is an employee that "grunts"…"

No matter how good a culture an employer has, it is likely that the employer will have to deal with a disgruntled or stubborn employee. The question is how to effectively deal with such an employee. There are many options available to the employer when encountering a disgruntled employee. Usually, the task is assigned to Human Resources to determine whether a disgruntled employee can be properly guided so that they can remain a productive part of the organization. Especially in our current job market it is important for employers to retain qualified employees. So, the first goal should be to rehabilitate and retain the employee.

So, what is a disgruntled or stubborn employee? Literally it is an employee that "grunts" or is opposed to something either inside or outside the workplace. There are many challenges to dealing with a disgruntled or stubborn employee, but human resources task is to attempt resolution so the employee does not remain dissatisfied.

If an employer is unable to properly interact with and motivate a disgruntled employee the employer may end up with that proverbial rotten apple that negatively impacts other employees in the workplace.

It is important for the employer to determine what may have caused the employee's dissatisfaction. Oftentimes the employee may be disgruntled for reasons that are outside of the workplace. Although issues arising outside of the workplace are beyond the employer's control proactively addressing the employee's issue is well within the employer's control. To begin the process of addressing the employee's concerns the first task is to determine the origin of the dissatisfaction. There are many things that may result in an employee becoming disgruntled or dissatisfied within the workplace. Obviously, human resources has to determine the origin of dissatisfaction before a proper resolution plan can be put in place to properly address and remedy the employee's dissatisfaction.

The Society for Human Resource Management (SHRM) has identified four primary issues to look for including (1) poor performance, (2) absenteeism, (3) bad attitude, and (4) drops in performance. It is important to note that none of these issues may be present in a disgruntled employee. Likewise, one or more of these issues may be present which does not necessarily equate to the employee being disgruntled.

When managing a disgruntled employee, it is important for the employer to remain professional at all times even though the process may be challenging depending on how boisterous the employee may be during the process. As an employer does in all other types of investigations the matter should remain as confidential as possible within the organization. All employers are well aware that the process needs to be well documented. Obviously, the employer's goal in managing a disgruntled employee is to resolve the issue, however, discipline may be necessary. Depending on the facts the discipline may range from an oral or written warning up to suspension or discharge.

Once the origin of dissatisfaction is known human resources can develop a plan of action to address and remedy the issues presented. It is a good practice to follow up with the employee following original communications to ensure that the resolution plan is effective. If so, perhaps just one more follow-up will be necessary. If not, then human resources will have to continue the dialogue with the disgruntled employee to address and hopefully resolve the source of dissatisfaction.

If the employee is reasonably receptive to input from human resources then the employee can be successfully retained. However, if the employee does not participate in good faith and/or chooses to disregard the employer's input continued employment is unlikely.

A WORD TO THE WISE

Many claims employers face *are insured*. These can include workers' compensation, employment practices, or a variety of commercial or general liability disputes. If you are interested in making sure that your insurer permits you to work with your Wimberly Lawson attorney when claims come up, there are various steps you can take. ***When a claim is filed***, ask for us. We are on many panels. ***When you renew your coverage***, specify in the policy that you can use our Firm. Many insurers are open to this. ***When you are considering new coverage***, ask your broker or the insurer in advance whether we are on the panel. We love working with you, and sure hope you will want to work with us when needs arise. So we wanted to offer some tips for how you can make sure that happens.

employees the union would need to have one hundred and one employees vote for representation.

Third Party Employer Property Rights

In some situations employees who have a dispute with one employer protest on the property of another employer. A classic example is when employees of a subcontractor protest on property owned by the property owner of a construction site. Can the property owner/third-party employer force the protesters to leave?

Before the December of 2022 decision in *Baxter County Performing Arts Center*, the answer was most of the time, yes. The Baxter decision changed that rule significantly,

The new rule is that unless the protesters "significantly interfere" with the use of the property, or the property owner has other legitimate business reasons for removing the protesters, the protesters are allowed to remain. The level of evidence required to permit lawful removal of the protesters is high. The import, then, is that most peaceful protests on the third party's owner's property will be protected.

Section 10 (j) Injunctions

The Board's General Counsel, Jennifer Abruzzo, has indicated that the Board will seek such injunctions more regularly. This form of injunction, named for the section of the Act where it is found, allows the General Counsel to go directly to federal district court to seek an injunction in circumstances where the General Counsel believes that following the normal Board process would result in ineffective relief and would in effect allow the employer's alleged unlawful actions to succeed.

The most typical circumstances when the General Counsel seeks such relief is when an employer discharges employees who are known leaders in an organizing campaign. In that situation the Board can bring unlawful discharge allegations but under the typical process they would take a year and sometimes more to resolve. By seeking an injunction the General Counsel has an opportunity to achieve reinstatement more quickly.

In 2022, the Board make good on Ms. Abruzzo's promise to use pursue such injunctions. In August of 2022, the federal district court for the Western District of Tennessee ordered reinstatement of seven employees of Starbucks in Memphis, Tennessee. The employees had been involved in efforts to organize store employees. In another example, the Board sought reinstatement of an Amazon employee who had encouraged coworkers to support a union organizing effort. In November of 2022 the New York federal court ordered reinstatement.

Conclusion

Employers should be aware of the increased risks to discharges alleged to be unlawful and the greater flexibility given to employees and unions in the organizing context. Expect more in the way of increasing risks to employers, decreasing deference to employer property rights, and greater protection for employee conduct in the workplace from the current Board.