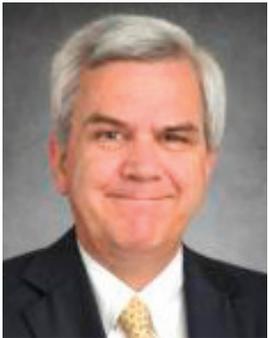




NLRB EXPANDS “JOINT EMPLOYER” DOCTRINE TO SUPPORT LABOR



Howard B. Jackson

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On August 27, 2015, the NLRB issued its long-awaited decision in *Browning Ferris*, 362 NLRB No. 186, which, as predicted, has greatly expanded the “joint employer” theory of employer liability under the National Labor Relations Act. The new doctrine will increase the number of situations in which one company can be found liable for another company’s unfair labor practices, and in which more than one employer may be required to negotiate a collective bargaining agreement that covers one set of employees. The Board described its goal by stating: “Our aim today is to put the Board’s joint-employer standard on a clear and stronger analytical foundation, and, within the limits set out by the Act, to best serve the federal policy of encouraging the practice and procedure of collective bargaining.”

Historically, the NLRB has determined whether two separate entities are joint employers by assessing whether each exerted such direct and significant control over the same employees that they jointly determined those matters governing the essential terms and conditions of employment. The current ruling expands the analysis substantially by ruling that an employer’s “right to control” aspects of employment, whether exercised in practice or not, will generally result in finding that joint employment exists. Such decisions will be made on a case-by-case basis.

The traditional relationship of temporary employment agency and primary (or “user”) employer provides a prototypical example. In such a situation, the Board observes that where the “user” firm owns and controls the premises, sets starting and ending shift times, dictates the essential nature of the job, expects compliance with its policies (for example, plant safety policies), and imposes the broad, operational contours of the work -- and the supplier firm, pursuant to the user’s guidance, makes specific personnel decisions and administers job performance on a day-to-day basis -- the employees’ working conditions are jointly set and controlled. Therefore, the temporary employment agency and the “user” employer are joint employers of the agency employees who work at the “user” employer’s site.

In making its ruling, the NLRB majority also introduces a concept previously unknown to collective bargaining. That is, as a general rule, a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control. This standard could easily result in considerable debate, and litigation, over what terms and conditions a given employer controls.

In its 3-2 ruling, the NLRB was split along party lines as the ruling was supported by the Board’s three Democrats. The two Republicans on the Board stated that:

“[T]he new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, tenant-subsubsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act.”

The dissent points out that the change in joint employer determinations will subject many entities to unprecedented new joint bargaining obligations that most do not even know they have, to potential joint liability, and to economic protest activity, including what has heretofore been unlawful secondary boycotts. The dissent believes the majority’s test will foster substantial bargaining instability by requiring the non-consensual presence of many entities with diverse and conflicting interests on the “employer” side, and the involvement of multiple employers with each being required

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to bargain only with respect to the term of employment that it possesses the authority to control. The dissent suggests that this new test will introduce segmented issue-by-issue negotiating and confusion over which entities must (or must not) engage in bargaining over particular employment terms.

Notably, Senator Lamar Alexander has already introduced legislation designed to reverse the impact of this decision. Time will tell whether this or similar legislation will become law. Until then, the newer and much broader standard applies.



Mary Moffatt Helms.....

“[A]n employer allowing the posting of politically charged symbols by employees is akin to placing a target on the employer for a lawsuit.”
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DOES YOUR OFFICE HAVE A POLICY GOVERNING OFFICE DECOR? FLAGS AND RAINBOWS MAY BE CONTROVERSIAL

In the last month, high profile news events have demonstrated the power of symbols to inspire strong reactions—both positive and negative. For example, the display of the confederate flag evokes feelings of “heritage” or “racism,” depending on the background of the viewer. Likewise, the rainbow symbol of gay pride has been widely displayed to celebrate the U.S. Supreme Court decision of marriage equality, yet marriage equality is contrary to the religious views of others. What happens when employees display these or other politically and/or emotionally charged symbols in the workplace? Should employees be allowed to display any politically charged symbols, photographs, memes, or texts in the workplace? From the perspective of the management side employment attorney, the answer is probably not, for both legal and practical reasons.

From a legal perspective, an employer allowing the posting of politically charged symbols by employees is akin to placing a target on the employer for a lawsuit. The symbols posted by an employee may be used as evidence of the company’s attitude toward race or gender or any other protected category, even if they do not truly reflect the company’s corporate philosophy. Earlier examples of problematic posted materials are calendars containing photos of scantily clad, seductively posed women. These calendars were often distributed by vendors and posted in conspicuous places in all-male or predominantly male workplaces.

As the law forbidding sexual harassment has evolved, the majority of employers now recognize that such calendars can be considered offensive to some women, and the calendars can be used as very compelling visual evidence against the company in a sexual harassment lawsuit. As a result, these calendars are no longer posted in many workplaces.

Employers face a similar issue with confederate flag imagery in the workplace. Many African-Americans (and others) consider the confederate flag to be a symbol of racism. An employer that allows employees to post such an image, or takes no action to prevent the posting of such an image, in the workplace runs the risk of seeing that image, or a photo of it, as evidence in a race discrimination lawsuit.

The rainbow imagery presents a different dilemma for the employer. One employee’s gay pride image may offend another employee’s strongly held religious beliefs. Does the employer then allow the religious employee to post religious materials that denounce same-sex marriage?

The most practical solution is to enact a uniform workplace décor policy that allows neither to be posted in the workplace. Such a policy will address how employees can, and cannot decorate their workspaces. The policy may provide that the only personal items an employee may display in his/her office or on a desk are photographs of family, friends or pets. The company may even consider how many or how large the photographs may be. The display of any other symbols or items can lead to discipline, up to, and including discharge.

Alternatively, a workplace décor policy may prohibit the display of any matter that could be considered “offensive” to other employees. This type of policy is less restrictive yet also more subjective, and it requires the diligence of a designated management or human resources official to make the ultimate determination as to what is or is not considered “offensive.” As in the case of all workplace policies, the company must be consistent in the enforcement of workplace décor policy. However, even the drafting of a provision against “offensive” displays raises controversial legal

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issues, both in drafting and in application. The drafting portion pertains to controversial National Labor Relations Board (NLRB) guidance on overbroad company policies that might “chill” legitimate union or other concerted activities by employees. The theory is that a policy can be so broad as to prohibit or at least discourage employees from engaging in lawfully-protected activities such as supporting a political candidate on labor-backed issues, or engaging in some sort of protest against management actions pertaining to the employment relationship. Further, in application, an employee may wish to display religiously-based symbols such as a statue of Jesus.

The answer to these type issues is not that appropriate rules cannot be drafted, but only that they must be drafted and/or reviewed by competent labor relations counsel.

In addition, there are the practical considerations of employee morale and company image on social media that favor the implementation of a workplace décor policy. While some employees may feel that their “freedom of expression” is being limited by such a policy, the company has the right to control what is displayed on its premises. Furthermore, the display of items that potentially offends a group of people is likely to undermine the morale and productivity of workers who belong to that group.

Finally, companies need to be aware of the power of social media to hold a company responsible for something posted by an individual employee. A recent example of this is the controversy involving the clothing manufacturer Lilly Pulitzer. A magazine’s photo tour of the company’s corporate headquarters showed two cartoons drawn by a Lilly Pulitzer employee that have been characterized as “fat-shaming.” One read “Just another day of fat, white, and hideous...you should just kill yourself.” The other read “Put it down, carb-face.” Pictures of the sketches were spread though social media, leading some consumers to call for boycotts of the brand, and the company to issue an apology for its employee’s actions. Keep in mind that with the ubiquity of camera phones, anyone—an employee (especially a disgruntled one), vendor, visitor, service person-- can take a photo of a potentially offensive image in a workplace and post it to a number of social media sites, where it can then be re-posted by others. When that happens, chances are that the image will be identified with the company, and not the individual employee who posted it.

In conclusion, many companies may wish to consider implementing a policy that limits the types of images and items that employees can display on the workplace premises. Such a policy can prevent litigation or a morale or public relations nightmare. In addition to the policy, it is recommended that management and/or Human Resource officials regularly check employee workspaces to ensure that the policy is being followed. Such a policy can then be appropriately put into the company’s equal employment and harassment policies, as putting the policy in the context of prohibitions against unlawful practices provides additional protection from NLRB claims that the policy is overbroad.



KNOW YOUR ATTORNEY

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NEW HORIZONS IN DISCRIMINATION: SEXUAL ORIENTATION AND GENDER IDENTITY



Ashley R. Griffith

“The EEOC already has sued employers whom they allege to have discriminated against transgendered employees.”

Federal anti-discrimination laws were designed to prohibit disparate treatment based on immutable characteristics – things we were born with, such as gender, race, color, and national origin. They were expanded to include other factors over which we had no control, such as age and disability. Now, the prohibition on discrimination is being further expanded to prohibit disparate treatment based on choice and self-perception: specifically, sexual orientation and gender identity. This is not an entirely new concept. For example, religion is not written in anyone’s genetic code, yet we prohibit discrimination based on religion. Sexual orientation and gender identity issues, however, are gaining prominence, and it is only prudent for an employer to stay informed.

First, some definitions:

- Sexual orientation means one’s emotional or physical attraction to the same and/or opposite sex.
- Gender identity means one’s inner sense of one’s own gender, which may or may not match the sex assigned at birth. Different people choose to express their gender identity differently. For some, gender may be expressed through, for example, dress, grooming, mannerisms, speech patterns, and social interactions. Gender expression usually ranges between masculine and feminine, and some transgender people express their gender consistent with how they identify internally, rather than in accordance with the sex that they were assigned at birth.

Title VII does not expressly prohibit discrimination with respect to sexual orientation and gender identity. The EEOC, the Federal agency that enforces Title VII, however, has taken the position that these categories are protected by Title VII. In fact, the EEOC issued the following statement: “Employers and employees often have questions about whether discrimination related to [lesbian, gay, bi-sexual, and transgender] LGBT status is prohibited under the laws the EEOC enforces. While Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases, the Commission, consistent with case law from the Supreme Court and other courts, interprets the statute’s sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.” See http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

Following suit with the above statement, the EEOC already has sued employers whom they allege to have discriminated against transgendered employees. In June, the EEOC sued a check-printing and financial services corporation in Minnesota, alleging that it violated Federal law by subjecting a transgender employee to sex discrimination. This is the third lawsuit filed by the EEOC alleging discrimination on the basis of gender identity/transitioning/transgender status. In April 2015, a Florida eye clinic paid \$150,000 to settle an EEOC lawsuit filed in September 2014, seeking relief for an employee who had been transitioning from male to female. Also, in September 2014, the EEOC filed suit against a Michigan funeral home which allegedly fired an employee for transitioning from male to female.

The most recent lawsuit alleged that an employer refused to let an employee use the women’s restroom after the employee informed her supervisors that she was transgender. The EEOC’s lawsuit alleges that the employee’s supervisors and coworkers subjected her to a hostile work environment, including hurtful epithets and intentionally using the wrong gender pronouns to refer to her. This case is now pending before a United States District Court in Minnesota. (*EEOC v. Deluxe Financial Services*, No. 15-cv-02646 D. Minn. 2015).

Moreover, the EEOC has already issued a few rulings in transgender discrimination cases. In *Lusardi v. McHugh*, the Commission ruled that denying employees use of a restroom consistent with their gender identity and subjecting them to intentional use of the wrong gender pronouns constitutes discrimination because of sex, and thus violates Title VII. In addition, in 2012, the EEOC ruled in *Macy v. Dep’t of Justice* that employment discrimination against employees because they are transgender, because of their gender identity, and/or because they have transitioned (or intend to transition) is discrimination because of sex and/or based on their failure to conform to gender stereotypes, which is sex discrimination that violates Title VII.

The EEOC has posted on its website some guidance on lesbian, gay, bi-sexual and transgender (LGBT) issues (www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm - 42k). The EEOC has announced that coverage of LGBT individuals under Title VII’s sex discrimination provisions is an enforcement priority. The EEOC accepts and investigates charges related to LGBT status, such as claims of sexual harassment or allegations that an adverse action was taken because of a person’s failure to conform to sex-stereotypes. While the EEOC position is that Title VII covers every type of LGBT issue, it is far from clear that its position will be accepted in court.