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WORKPLACE INVESTIGATIONS

Courts uphold dismissal of fired NFL coach's defamation claims

by Tom Harper
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You may remember that Jonathan Martin, a former starting offensive tackle for the Miami Dolphins, suddenly left the team during the 2013 season. He was a second-round draft pick in 2012 who played college football at Stanford. In college, he was twice selected as an All-American offensive lineman. During the 2012 season, he played at 6'5" and 304 pounds—not someone you would think could be bullied. Then again, his work crew—the Dolphins' offensive line—weren't your normal size either.

After he left the team because of harassment, a workplace investigation led to the firing of one of the coaches. The U.S. 11th Circuit Court of Appeals (whose rulings apply to all Florida employers) recently dismissed the fired coach's defamation lawsuit. Read on to find out why.

Flag on the play

In 2013, Martin was 24 years old and in just his second NFL season. As a rookie, he started every game for the Dolphins. He quickly gained a reputation as a talented offensive tackle and started in every 2013 game until he left. He even reportedly signed a four-year, $4,784,267 contract that included a $1,919,468 signing bonus and a guaranteed annual salary of $1,196,067!

In late October, midway through the 2013 season, news articles in the sports pages reported that Martin had "gone AWOL" and had abruptly left during a team dinner at the Dolphins practice facility. One commentator reported that the incident was the "final straw" and that as a result, Martin had checked himself into a psychiatric hospital for treatment.

Soon reports began to appear claiming that Martin had been a victim of "bullying," "harassment," and "ridicule" by his teammates. The story quickly went viral. After the Dolphins' staff learned of a voicemail message that center Richie Incognito had left for Martin months earlier, in which he used a racist slur and made vulgar taunts, the team quickly suspended Incognito.

Within a week of Martin's departure, NFL Commissioner Roger Goodell announced that the NFL had retained New York law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP to conduct "an independent investigation" of what happened to Martin. The firm was instructed to investigate issues of "workplace conduct" and to prepare a report for the commissioner, which would be made public.

Unnecessary roughness

The Dolphins had distributed a workplace conduct policy to all players,

AGENCY ACTION

Change likely to NLRB's union election rules. The National Labor Relations Board (NLRB) published a Request for Information in December 2017 asking for public input on the Board's 2014 rule that shortened the process of holding union representation elections. The NLRB was seeking comments on whether the 2014 rule should be retained, modified, or rescinded. The Board's action on the election rule was one of a string of party-line 3-2 votes taken in December just days before Republican member and Chairman Philip A. Miscimarra's term ended on December 16. His departure leaves the Board with two Republicans (Marvin E. Kaplan and William J. Emanuel) and two Democrats (Mark Gaston Pearce and Lauren McFerran). Other actions included decisions overruling Obama-era decisions on union organization of "microunits," joint employment, employee rights related to handbook provisions, the "reasonableness" settlement standard in single-employer claims, and bargaining obligations required before implementing a unilateral "change" in employment matters.

OSHA comments on increase in fatal occupational injuries. The Occupational Safety and Health Administration (OSHA) commented in December on the Bureau of Labor Statistics' Census of 2016 Fatal Occupational Injuries showing a seven percent increase in workplace fatalities from the 2015 figures. The 2016 statistics show there were 5,190 workplace fatalities in 2016. The fatal injury rate increased from 3.4 per 100,000 full-time-equivalent workers in 2015 to 3.6 in 2016. More workers lost their lives in transportation incidents than any other event in 2016, accounting for about one out of every four fatal injuries. Workplace violence injuries increased by 23 percent, making it the second most common cause of workplace fatality. The number of overdoses on the job increased by 32 percent in 2016.

EEOC at work on 2018-22 Strategic Plan. The Equal Employment Opportunity Commission (EEOC) released for public comment a draft of its Strategic Plan for Fiscal Years 2018-22 in December as part of the process of approving a new plan. The EEOC accepted comments on the plan through January 8, 2018. The draft plan released for comment has not been approved by the commission and is still under review. The Strategic Plan serves as a framework for the EEOC in achieving its mission through the strategic application of the agency's law enforcement authorities, preventing employment discrimination and promoting inclusive workplaces through education and outreach, and striving for organizational excellence, the EEOC said. The EEOC currently is operating under the Strategic Plan for Fiscal Years 2012-16, as amended through 2018. ✤

who had to sign an acknowledgement that they understood the policy and agreed to abide by it. The policy defined harassment to include "unwelcome contact; jokes, comments and antics; generalizations and put-downs."

After a three-month investigation, the report concluded that three starters on the team's offensive line—Incognito, John Jerry, and Mike Pouncey—had engaged in a pattern of harassment directed not only at Martin, but also at another young offensive lineman, identified only as "Player A", and an unnamed assistant trainer. However, Martin's case was more complicated because of his background and his unusual relationship with Incognito.

According to the firm's report, Martin and Incognito "developed an odd but seemingly close friendship." The two men "often communicated in a vulgar manner." Incognito claimed it was friendly teasing that he described as "locker room banter meant in good fun and that Martin was a willing and active participant in verbal sparring, never letting on that he was hurt by it." For his part, Martin admitted that although he did participate in the banter, it was his attempt to deflect and defend himself from harsher treatment. The report included analysis from a psychologist that "such a reaction is consistent with the behavior of a victim of abusive treatment."

The law firm also discovered that Martin had been the victim of bullying while in middle and high school, which diminished his self-confidence and self-esteem and contributed to what he self-diagnosed as periodic bouts of depression. He claimed that the depression he experienced in high school recurred as a result of mistreatment by his Miami teammates and that on two occasions in 2013, he even contemplated suicide.

During interviews, Martin claimed that he was "distressed" by insults from his teammates and experienced "emotional turmoil" because he thought that he was soft and couldn't stop the verbal insults being hurled at him. However, the report concluded that his "vulnerabilities [didn't] excuse the harassment that was directed at him. That the same taunts might have bounced off a different person is beside the point. Bullies often pick vulnerable victims, but this makes their conduct more, not less, objectionable."

Ejected from the game

Five days after reading the report, the Dolphins fired offensive line coach James Turner, who was identified by the firm as having acted unprofessionally and played a role in Martin's struggles. The report found that the coaches and players had created a culture that enabled bullying by discouraging players from "snitching" on other players.

The taunting was so offensive and awful that we won't reprint it here. However, the firm chose not to "tone down" the racist, sexually explicit, and homophobic words used by players and staff in the interviews. As the report states, "The actual words must speak for themselves, for they are crucial in understanding how the players and others interacted, and they show why we concluded that some of the behavior of Martin's teammates exceeded the bounds of common decency, even in

an environment that often features profanity and mental and physical intimidation."

Six months after being fired, Turner sued the law firm and the lawyer who led the investigation, Ted Wells, Jr. He filed suit under Florida law in federal court in Miami for defamation of his character in their report. The district court decided that he had made three different claims: (1) defamation per se, (2) common-law defamation based on actual malice, recklessness, or negligence, and (3) defamation by implication.

The law firm asked the court to dismiss Turner's suit for three reasons. First, the report consisted of opinions and therefore wasn't actionable in a defamation suit. Second, his complaint misstated what the report actually said and failed to identify any false statement of fact. Lastly, he was a "public figure" and had failed to adequately claim "actual malice" by the firm or Wells in his suit.

The district court sided with the law firm and Wells and threw out Turner's suit. He appealed the dismissal to the 11th Circuit. The appeals court issued its decision on January 18, 2018.

Reviewing the game tape

The appeals court began by listing the requirements for defamation in Florida:

- The publication of harmful material;
- The statements or content are false;
- The statements were made with knowledge of or reckless disregard for the truth concerning a public official, or at least negligently concerning a private person;
- The person suffered damages; and,
- The statements must be defamatory.

But statements that are true—or that are not "readily capable of being proven false"—and statements of "pure opinion" are protected from defamation suits by the First Amendment to the U.S. Constitution.

Turner's appeal pointed to four specific passages in the report that he claimed included certain statements that were false, defamed his professional reputation, and cost him his job.

Blow-up doll gift by Turner

The report described that the unnamed Player A had been the target of homophobic jokes, even though no one thought that he was gay. However, at Christmas in 2012, Turner gave each offensive lineman a gift bag. All of the gift bags contained female blow-up dolls except for the gift bag that Player A received, which contained a male blow-up doll.

In the interview with Turner, he didn't credibly deny that he gave this gift bag to Player A. Further, Martin told the law firm he was "offended that Turner endorsed this humiliating treatment of Player A by participating in it." Turner claimed that the blow-up doll was a "joke—a satirical commentary on male Player A's unsuccessful attempts at dating women." He argued that the purpose of his gifts was to encourage the players to work on their relationships with their significant others, lest they end up alone, and that the particular gift to Player A "in no way expressed cruelty or homophobia on Turner's part."

The appeals court rejected this argument and found that none of the statements in the report that described the doll incident was defamatory. It laid out several undisputed facts in reaching this finding: "(1) that linemen players engaged in persistent homophobic taunting of Player A, (2) that Turner knew about that taunting, and (3) that Turner gave other linemen a female blow-up doll, but gave Player A, and him alone, a male blow-up doll."

Because the law firm's assessment of his conduct was based on facts that couldn't be easily disputed, the court found its conclusion to be "opinion" and thus not unlawful defamation in Florida.

Insulting comments to Martin

The report concluded that Martin's teammates subjected him to verbal taunts and made disparaging remarks about members of his family, including "sexually crude references" to his sister and mother. He told the investigators that he was "particularly offended" by these comments, but "his obvious discomfort only increased the frequency and intensity of the remarks."

Again, Turner claimed that the lawyers defamed him through two statements they made in the report: that he was "certainly aware of some of the insulting comments directed to Martin" and that "it [was] undisputed that [he] never sought to stop the behavior."

But here, also, the court concluded that there was no defamation because he didn't say that he was never present when Martin was subjected to the insulting taunting, nor did he identify any action he took to stop the taunts.

The Judas code

The report noted that the offensive linemen enforced a "Judas code" against snitching through an internal fine system. The NFL allowed players to establish fine systems as long as any money collected was put to a common, team-oriented purpose, such as a post-season party.

The investigators found that the offensive line began to enforce fines for trivial things such as wearing "ugly shoes." Watching tape from games, if a player pointed out that he wasn't at fault on a missed block, he was assessed a "Judas" fine for blaming the missed block on another player. This atmosphere contributed to Martin's

decision not to come forward and complain about the hazing and taunting that he received.

In deciding if this was defamation, the court noted that the report had stated that Turner denied knowing about a Judas code or what it meant. But his denial wasn't credible because evidence indicated that he "was aware of the 'Judas' concept and . . . that he [had] discussed its meaning with a number of linemen, even explaining how the biblical Judas had betrayed Jesus Christ and so became a 'snitch.'" In view of the facts, the court found that there was no false statement to support his defamation claim.

Texting to Martin by Turner

When Martin walked out, he checked himself into a hospital and asked for psychiatric help. As news spread in the media, Incognito became the focus of considerable criticism as a leader in harassing Martin.

Turner reached out to Martin in the hospital to ask him to publicly say that Incognito wasn't at fault. He sent a text saying, "Richie Incognito is getting hammered on national TV. This is not right. You could put an end to all the rumors with a simple statement. DO THE RIGHT THING. NOW." Martin answered that he had been advised not to say anything.

Turner couldn't accept Martin's refusal to make a statement. He responded, "John I want the best for you and your health but make a statement and take the heat off Richie and the lockerroom [sic]. This isn't right." When there was no response, he texted, "I know you are a man of character. Where is it?" Three days later, he texted again, "It is never too late to do the right thing!"

The law firm's report concluded that Turner "should have realized that it was inappropriate to send such text messages to an emotionally troubled player" and that his conduct "demonstrated poor judgment." He claimed these conclusions were defamatory, but the court dismissed his claims, finding that "the . . . conclusions of 'inappropriate' and 'poor judgment' [were] pure opinion" and did not constitute defamation under Florida law.

The appeals court also found that Turner was a public figure and was required to prove that the lawyers had "actual malice" in writing and publishing their statements. He had to "allege facts sufficient to give rise to a reasonable inference that the false statement was made with knowledge that it was false or with reckless disregard of whether it was false or not." His complaint didn't allege sufficient facts to support a finding of "actual malice." *James L. Turner v. Theodore V. Wells Jr., Paul, Weiss, Rifkind, Wharton & Garrison, LLP,* Case No. 16-15692 (11th Cir., January 18, 2018).

Takeaway

Although the law firm's 144-page report is lengthy, it's a good example of the thoroughness and balance required in conducting investigations. Bringing in an outsider is a good way to remove preconceived ideas about employees and practices and have an objective view of the facts. In today's harassment environment, those of us in HR will be facing more investigations of this type.

For a copy of the report, send an e-mail to the author at tom@employmentlawflorida.com. ✤

OFFICE ROMANCE

Does #MeToo movement mean #TheEnd for workplace romance?

Recent reports of serious sexual misconduct by prominent men across the country have drawn renewed attention to a variety of issues involving sexual harassment in the workplace. One such issue is how to tell when romantic and/or sexual overtures at work cross the line into sexual harassment or misconduct. The line is often clear—especially for egregious misconduct—but not always. The challenge for employers is to design policies and procedures that make the line clearer for employees and give the employer an opportunity to identify and manage potentially problematic relationships.

Workplace romance policies fall on a spectrum from strict (prohibiting office romances completely) to more permissive (setting certain parameters for such relationships) to no policy at all. While there isn't a "one-size-fits-all" policy that will work for all employers, there are a number of common features to consider and choose from. Let's take a quick look at some of them.

Option 1: strict no-dating policy

While it can be tempting to prohibit employees from dating each other entirely, few employers choose that approach. Not only is it unlikely to prevent employees from getting together, but it also incentivizes them to keep their relationships secret. It's generally better for you to know about office entanglements so that you can take steps to prevent the types of problems they can cause (more on that below).

In addition, some employees would rather give up their job than their relationship, which may result in a loss of valuable employees that could have been prevented with a more moderate policy.

Option 2: ban on supervisor-subordinate relationships

Most employers that have a workplace romance policy (most don't) prohibit relationships between managers and their direct reports or others with a similar difference in rank. This is important for a number of reasons:

- It can protect lower-level employees from unwanted harassment by a supervisor.
- It can provide some protection from certain types of harassment claims for the employer.
- Assuming there is no harassment going on, it can prevent poor morale among other employees who feel the lower-level employee in the relationship is benefiting from preferential treatment as a result.

Your policy should specify what steps will be taken if a relationship like this does arise. For example, you could require the employee with less seniority (not necessarily the lower-ranking one) to make whatever change is necessary to eliminate the reporting relationship. That could be anything from leaving the company to changing departments or reporting to a different supervisor.

Option 3: disclosure of all relationships

You may want to think about requiring employees to inform you when they become involved with a coworker. While relationships between employees who are at similar levels within the organizational structure don't create the same inherent concerns as those between a boss and a subordinate, it's still better for you to know about them.

First, it gives you the opportunity to lay the ground rules for appropriate conduct in the workplace. (In other words, no PDA.) Second, if the relationship ends, it could degenerate to the point that one of the employees ends up claiming sexual harassment or retaliation. Finally, even if there isn't a problem in the relationship, other employees may complain that it adversely affects them in one way or another, which can hurt productivity and morale.

That is why, at a minimum, you need to have a conversation with the employees (documented in their personnel files) confirming that:

- The relationship is consensual in nature;
- They both understand the company's sexual harassment policy and reporting procedure; and
- They won't allow the relationship (or the end of the relationship) to negatively affect their job performance.

While some employers require employees to memorialize their understanding in a signed agreement, 75 percent of HR professionals view these so-called love contracts as ineffective because they may cause employees to hide their romantic relationships.

#ActNow

For the past 10 years, the Equal Employment Opportunity Commission (EEOC) has consistently received about 27,000 charges alleging sexual harassment. That number is expected to skyrocket in 2018—in large part because of the renewed national awareness of harassment but also because of a new online tool that makes it much easier to file a charge.

WORKPLACE TRENDS

Survey finds few employers prepared for surge in work automation. A survey by Willis Towers Watson shows that work automation, including the use of artificial intelligence (AI) and robotics, is expected to surge in the next three years in companies throughout the United States. The survey also shows that few companies and HR departments are fully prepared to address the organizational change requirements related to automation as well as less reliance on full-time employees and more reliance on contingent talents. The Global Future of Work Survey found that U.S. companies expect automation will account for on average 17% of work being done in the next three years. That compares with 9% of work companies say is being done using AI and robotics today, and just 5% three years ago. The survey shows that less than 5% of companies say their HR departments are fully prepared for the changing requirements of digitalization.

Bad hires found to be costly problem for most employers. A survey from CareerBuilder finds that companies lost an average of $14,900 on every bad hire in the last year, and hiring the wrong person is a mistake that affects nearly three in four employers (74%). When asked how a bad hire affected their business in the last year, employers cited less productivity (37%), lost time to recruit and train another worker (32%), and compromised quality of work (31%). The survey was conducted online by Harris Poll from August 16 to September 15, 2017, and included a representative sample of 2,257 full-time hiring managers and HR professionals and 3,697 full-time workers across industries and company sizes in the U.S. private sector.

Study shows many employees not taking full advantage of HSAs. Forty-three percent of all employees enrolled in health savings accounts (HSAs) in 2017 didn't contribute any of their own money to these tax-advantaged accounts, according to the 22nd annual Best Practices in Health Care Employer Survey from Willis Towers Watson. With nearly three-quarters of employers (73%) offering their employees a high-deductible health plan tied to an HSA, this is a missed opportunity for many to reduce their out-of-pocket healthcare costs and potentially save for retirement. To encourage greater participation, a majority (62%) of employers that offer HSAs are giving their employees a head start by contributing seed money to these accounts. In 2017, median seed amounts ranged from $300 to $750 for employee-only coverage and $700 to $1,400 for family coverage, depending on whether employers offered automatic seed money or automatic plus "earned" seed money. ✤

UNION ACTIVITY

Union praises Atlanta ordinance on airport job security. UNITE HERE issued a statement in December 2017 commending an Atlanta City Council vote approving a worker retention ordinance for contracted service workers at the city's Hartsfield-Jackson Atlanta International Airport. The union's statement said that until the ordinance was passed, the airport's contracted service workers had little to no job security. A changeover in contractor could result in large-scale displacement for that company's employees, even when their employer was replaced by another company that performed the exact same service. The ordinance ensures that qualified displaced workers get first opportunity to work the new job.

UAW applauds certification of graduate worker union at Columbia. The United Auto Workers (UAW) praised the National Labor Relations Board's (NLRB) December decision to certify the Graduate Workers of Columbia-UAW (GWC-UAW) as the union for 3,000 research and teaching assistants who work at Columbia University. The Board rejected Columbia's objections to the December 2016 union vote. GWC-UAW leaders immediately requested that the university administration fulfill its obligation to start contract negotiations.

Farmworkers denounce EPA proposals on pesticides. The United Farm Workers (UFW) and the UFW Foundation in December condemned a proposal from the U.S. Environmental Protection Agency (EPA) to rescind two pesticide protections for field workers that were issued by the previous administration. The union opposes voiding the requirement that farmworkers who mix, load, and apply pesticides be at least 18 years old. It also denounced a proposed EPA rule change annulling the right of agricultural employees to obtain information about the pesticides to which they are exposed through their representatives, such as unions or legal aid workers.

Union criticizes poultry industry's push to end line speed limits. The president of the United Food and Commercial Workers International Union (UFCW) in December sent a letter to U.S. Agriculture Secretary Sonny Perdue and leaders in the Senate and House agriculture committees explaining why the union opposes a recent petition by the National Chicken Council to eliminate line speeds at poultry plants. The letter cited a report from the Government Accountability Office on safety and health in the poultry industry as confirmation of the UFCW's concerns. In the letter, the union's president, Marc Perrone, stated: "If this petition is accepted, poultry companies will be allowed to run their food processing lines as fast as they please. Allowing this to occur will put hard-working poultry workers at greater risk of being injured and consumers at greater risk of becoming ill from eating improperly inspected chicken." ✤

Now is the perfect time to get ahead of the wave. Implement or update a workplace romance policy before the #MeToo movement says #YouToo. ✤

DISCRIMINATION

Apples to apples: 11th Circuit holds comparators must be 'nearly identical'

by Lisa Berg
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To support a lawsuit after being terminated, some employees will claim that coworkers with similar performance issues weren't treated as harshly. In a recent case, the 11th Circuit held that a fired African-American bank employee couldn't establish a prima facie (minimally sufficient) case of race discrimination because she didn't identify a similarly situated nonminority employee who engaged in the same or "nearly identical" conduct but was disciplined in a different way.

Burden of proof

Ann Marie Hill—a business banking relationship manager (BBRM) for SunTrust Bank—sued her former employer following her termination, alleging race discrimination and retaliation in violation of civil rights law Section 1981. The district court granted summary judgment (dismissal without trial) on each of her claims in favor of SunTrust, and she appealed to the 11th Circuit.

In deciding this case, the 11th Circuit applied the same analytical framework and proof requirements that are used in cases under Title VII of the Civil Rights Act of 1964. Specifically, the court used a burden-shifting framework that puts the burden on the employee to establish a *prima facie* case of discrimination. This framework requires an employee to show that:

- She is a member of a protected class;
- She was qualified for the position;
- She suffered an adverse employment action; and
- Her employer treated similarly situated employees outside of her protected class more favorably or replaced her with someone outside of her protected class.

If the employee can establish these elements, the burden then shifts to the employer to produce a legitimate nondiscriminatory reason for the alleged disparate treatment. If it can, the burden then shifts back to the employee to show that the proffered reasons are merely pretextual (meaning untrue).

Apples-to-oranges comparators

On appeal, Hill argued that the district court erred in rejecting her comparator evidence. She claimed that two other SunTrust BBRMs—a white male and female—similarly underperformed but weren't disciplined or terminated in the same fashion.

In evaluating whether other employees were adequate comparators, the court analyzed "whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." It decided that the comparators have to be similarly situated in all relevant respects.

Furthermore, in the disciplinary context, the court analyzed the "nature of the offenses committed and the nature of the punishments imposed," and required the "quantity and quality" of the misconduct to be "*nearly identical*" to avoid second-guessing an employer's reasonable employment decision. Based on the evidence, the court concluded that the two white coworkers weren't adequate comparators because the "quantity and quality" of their performance differed from Hill's, despite the fact that they, too, were underperforming in certain respects.

For example, Hill received an overall rating of "2—needs improvement," whereas the comparators both received "3—Fully Successful" ratings. She also received the lowest score among the three employees in the most heavily weighted category. Thus, the court concluded, the two white coworkers weren't proper comparators because their performance issues weren't "nearly identical." *Hill v. Suntrust Bank,* 2018 WL 526081 (11th Cir., January 24, 2018).

Bottom line

When deciding on appropriate discipline, it's prudent to examine how you have disciplined similarly situated employees with "nearly identical" performance issues. This case reinforces the importance of keeping accurate performance records and consistently applying policies and imposing discipline so that similarly situated employees are treated in a uniform fashion.

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LABOR LAW

Republican majority on NLRB targets Obama-era rulings

During former President Barack Obama's eight years in office, the National Labor Relations Board (NLRB) took an aggressively proemployee approach. It issued a number of rulings that expanded the protections of the National Labor Relations Act (NLRA) beyond pretty much anyone's expectations. Protection of labor rights in nonunion workforces was of special interest to the NLRB in those years. Only one year into Donald Trump's presidency, the Board has already started whittling away at the most aggressive of those rulings.

Background

The NLRB is a federal agency that, according to its website, is charged with "protect[ing] the rights of private-sector employees to join together, with or without a union, to improve their wages and working conditions." Historically, however, its rulings have tended to line up with the political preferences and agenda of whoever is in the White House at a given time.

In other words, when a Democrat is in the White House, the NLRB is more likely to issue rulings that are broadly favorable to employees, whereas when a Republican is in the White House, it's more likely to take an approach—on many issues anyway—that is more employer-friendly. That's largely due to the fact that the five members of the NLRB are appointed by the president and serve five-year terms, so new presidents typically get the chance to appoint a new member or two early into their presidency.

We have seen this play out recently, with President Trump already appointing three conservative members to the NLRB (because of some vacancies under Obama). The new Board has acted quickly to overturn some of the more controversial rulings during the Obama years.

Target 1: joint-employer standard

The concept of joint employment is frequently used to hold one company liable for the illegal actions of a related company (such as a subsidiary or franchise) or one with which it has one or more joint employees (such as a temp agency). In 2015, the NLRB greatly expanded the definition of joint employment, saying that it could exist when one company had a right to exercise control over another, even if it never did so.

The NLRB has now restored the definition of joint employment that was in effect before 2015, stating that two or more entities will be deemed joint employers under the NLRA only if one of them has *exercised control* over essential employment terms of the other's employees and has done so *directly and immediately* in a manner that is *not limited and routine.*

The restored definition of joint employment is good for employers in several ways, including that it is much easier to understand than the definition used by the Obama NLRB and is more in line with the approach to joint employment taken by other federal agencies in their enforcement of other federal laws.

Target 2: employee handbooks and policies

Long-standing NLRB precedent held that an employment policy violated the NLRA if employees could "reasonably construe" it to bar them from exercising their rights to engage in protected activity. That

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was applied in new and unexpected ways during the Obama administration, including, for example, to (1) policies regarding confidentiality, conflicts of interest, and social media and (2) policies encouraging "positivity" and discouraging gossip in the workplace.

The Trump NLRB recently abandoned the old standard for reviewing employment policies, saying it would instead weigh a given policy's impact on workers' rights against the employer's reasons for maintaining it. This is a significant change that should make it easier for employers to defend against many charges of unfair labor practices.

Target 3: expedited union elections

In 2014, the NLRB implemented a rule that significantly sped up the union election process. Many felt the rule gave an unfair advantage to unions by (1) shortening the time between the filing of an election petition and the election (giving the employer less time to make its case against unionization) and (2) delaying legal challenges until after elections had already been held.

On December 14, 2017, the NLRB released a Request for Information (RFI) seeking input on the election rule. The RFI is widely viewed as the first step to rescission of the rule.

More to come?

The above rulings are probably only the beginning. According to a recent memo from the NLRB's General Counsel, it appears the Board is also reconsidering rulings that:

- Classified a sexual harassment complainant's activities as protected activity under the NLRA;
- Provided a presumptive right for employees to use their employer's e-mail system to engage in NLRA-protected activities; and
- Protected an employee from discipline for obscene, vulgar, or other "highly inappropriate" conduct in support of an upcoming election.

Stay tuned for more information on this quickly evolving area of the law. ✤

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