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Third Circuit Espouses Fact-Sensitive Inquiries in Considering Joint Employer Liability and Compensation for Meal Periods: What Employers Can Do to Brighten the Lines

In a pair of published opinions, raising novel employment issues in this Circuit, the Third Circuit Court of Appeals addressed the test for determining whether a "temporary" worker is an "employee" eligible to assert Title VII claims against the company which contracts their services, and the test for determining whether time spent on meal breaks is compensable under the FLSA. In each case, the Third Circuit adopted fact-sensitive and multi-factor inquiries, rather than articulating bright line tests.

In *Faush v. Tuesday Morning, Inc.,* the Court considered whether plaintiff, a temporary worker who claimed to have experienced racially-motivated "harassment," was an "employee" who could bring suit under Title VII against the company that contracted with his "technical" employer to provide temporary workers. Considering how common the use of "temporary" workers is in today's economy, and coming on the heels of the NLRB's landmark *Browning-Ferris* decision, *Faush* is an important decision for employers. In *Babcock v. Butler County*, the Court adopted the "predominant benefit test" in concluding that corrections officers failed to state a claim under the FLSA for unpaid portions of their meal breaks.

Third Circuit Expands Joint Employer Liability: *Faush v. Tuesday Morning, Inc.*

Plaintiff in *Faush* was an African-American employee of Labor Ready, a staffing firm that provided temporary workers to defendant Tuesday Morning, a home-goods retailer. Plaintiff alleged that he and other minority temporary workers were wrongly accused of stealing because of their race, subjected to racial slurs, and eventually terminated. Plaintiff asserted claims of racial discrimination against Tuesday Morning under Title VII. The District Court granted summary judgment dismissing plaintiff's claim, reasoning that because plaintiff was not Tuesday Morning's employee he could not pursue a

Title VII claim against it.

In a case of first impression, the Third Circuit reversed, holding that "a rational jury applying the factors announced by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden* [503 U.S 318 (1992)] could find on these facts that [plaintiff] was Tuesday Morning's employee for purposes of Title VII[.]" Under *Darden*, the Court of Appeals explained, courts look to a "non-exhaustive list of relevant factors" to determine "whether a hired party is an employee under the general common law of agency" including:

- the skill required;
- the source of the instrumentalities and tools;
- the location of the work;
- the duration of the relationship between the parties;
- whether the hiring party has the right to assign additional projects to the hired party;
- the extent of the hired party's discretion over when and how long to work;
- the method of payment;
- the hired party's role in hiring and paying assistants;
- whether the work is part of the regular business of the hiring party;
- whether the hiring party is in business;
- the provision of employee benefits; and
- the tax treatment of the hired party.

"Significantly," the Third Circuit admonished, "the inquiry under *Darden* is not *which* of two entities should be considered the employer of the person in question. Two entities may be 'co-employers' or 'joint employers' of one employee for purposes of Title VII."

In applying the *Darden* factors to the particular facts before it, the Third Circuit stressed several circumstances which, in the Court's view, supported plaintiff's assertion that he was effectively Tuesday Morning's employee. For example:

- Under its contract with Labor Ready (the "Agreement"), Tuesday Morning "bore certain responsibilities with respect to the temporary employees' wages" such as "notify[ing] Labor Ready if any 'government mandated minimum statutory wage' should be paid to temporary employees" and exercising "its 'primary responsibility' for ensuring compliance with prevailing-wage laws";

- "Tuesday Morning paid Labor Ready for each hour worked by each individual temporary employee at an agreed-upon hourly rate" plus any applicable overtime, and thus, "[e]ssentially, Tuesday Morning indirectly paid the temporary employees' wages";

- Tuesday Morning had "ultimate control over whether Faush was permitted to work at its store" even if it could not "terminate his employment with Labor Ready";

- "Tuesday Morning personnel gave Faush assignments, directly supervised him, provided site-specific training, furnished any equipment and materials necessary, and verified the number of hours he worked on a daily basis" and "the tasks assigned to the Labor Ready employees [such as plaintiff] … were *no different* than those assigned to Tuesday Morning employees"; and

- "Although not dispositive, the fact that Labor Ready and Tuesday Morning characterized Faush, and the other workers supplied, as 'Temporary *Employees*,' rather than independent contractors also bolsters [plaintiff]'s position. … Most significantly, Tuesday Morning pledged to 'provide a

> workplace free from discrimination and unfair labor practices' … Evidently, Tuesday Morning agreed that it bore many of the legal responsibilities of a traditional employer, including compliance with Title VII."

In considering this final factor, employers should not avoid providing temporary workers with information concerning their anti-harassment policies, and should inform temporary workers about the avenues available to them if they believe they are being harassed. However, the information and training provided to temporary workers should be distinct (i.e., different literature, separate training, etc.) from that provided to regular employees.

The Third Circuit acknowledged that these same circumstances "will pertain to a large number of temporary employment arrangements, with attendant potential liability under Title VII [and likely other employment laws] for the clients of those temporary employment agencies." The Court was untroubled, however, predicting that its holding would not "vastly expand such liability, as entities with fifteen employees are already subject to Title VII." The Court did not comment, however, on the true impact of its holding – while companies that engage temporary labor contractors may indeed be "already subject to Title VII" in relation to their *own* employees, the Third Circuit has now made it more likely that they will *also* be subject to Title VII in relation to temporary workers if the contractual arrangement is not properly structured.

Third Circuit Adopts "Predominant Benefit Test" under FLSA: *Babcock v. Butler County*

Plaintiffs in *Babcock* sought to represent a putative class of corrections officers employed by Butler County, Pennsylvania, who alleged that the County failed to compensate them for a portion of their daily meal period, in violation of the FLSA. Specifically, under the terms of an applicable Collective Bargaining Agreement (CBA), the officers "work eight and one-quarter-hour shifts that include a one hour meal period, of which forty-five minutes are paid and fifteen minutes are unpaid."

Plaintiffs alleged that they were entitled to compensation for that fifteen-minute period. Plaintiffs argued that "[d]uring the meal period, [they] may not leave the prison without permission from the warden or deputy warden, and they must remain in uniform, in close proximity to emergency response equipment, and on call to respond to emergencies." Plaintiffs further argued that they "cannot run personal errands, sleep, breathe fresh air, or smoke cigarettes during mealtime, and if an emergency or unexpected situation arises, the officers must respond immediately in person, in uniform, and with appropriate response equipment."

The District Court dismissed plaintiffs' complaint, reasoning that because the officers enjoyed the "predominant benefit" of the meal period, they were not entitled to compensation under the FLSA. The Court of Appeals affirmed.

The Third Circuit noted that it had not previously established a test to determine whether an employee's meal period is compensable under the FLSA, but observed that a majority of Circuit Courts have adopted the "predominant benefit" test. The Court explained that "[t]he predominant benefit test asks 'whether the officer is primarily engaged in work-related duties during meal periods.'" Explaining that "Courts have generally eschewed a literal reading of a Department of Labor regulation" requiring compensation during meal times unless the employee is "completely relieved from duty" in favor of "assess[ing] the totality of the circumstances to determine, on a case-by-case basis, to whom the benefit of the meal period inures[,]" the Third Circuit adopted the predominant benefit test.

Applying that test to the facts before it, the Court held that the plaintiff officers enjoyed the predominant benefit of the fifteen-minute unpaid portion of their meal period and thus were not entitled to compensation under the FLSA. The Court reasoned that plaintiffs "could request authorization to leave the prison for the meal period and could eat lunch away from their desks." The Court further observed that the CBA "provides corrections officers with the benefit of a partially-compensated mealtime and mandatory overtime pay if the mealtime is interrupted by work" and "consider[ed] the agreed-upon characterization of the fifteen-minute unpaid meal break as a factor in analyzing to whom the predominant benefit of the period inures."

In short, the Third Circuit concluded that "although Plaintiffs face a number of restrictions during their meal period, … on balance, these restrictions did not predominantly benefit the employer." Rather, plaintiffs "receive the predominant

benefit of the time in question and are not entitled to compensation for it under the FLSA."

The Lessons of *Faush* and *Babcock*

In both *Faush* and *Babcock*, the Third Circuit openly embraced multi-factor tests of the sort which invite fact issues that could potentially thwart summary judgment applications. There are steps employers can take, however, to avoid this potential outcome:

- First, wherever possible, identify the full panoply of factors that a court is likely to consider in evaluating a particular issue. Bear in mind that courts typically decline to articulate exhaustive lists. Nonetheless, those factors which the courts cite are likely to be central, even if not necessarily dispositive.
- Second, determine the ideal set of "ground rules" that must exist in your workplaces to meet the applicable factors. In other words, envision what you would want your summary judgment fact statement to say.
- Finally – and most importantly, as ultimately it will be the actual facts in existence which control – ensure that the realities of your workplace meet those "ground rules" to the greatest extent possible.

Obtaining early favorable dispositions, whether by dismissal on the pleadings or by summary judgment, remains the overriding goal for employers facing litigation. While doing so in the face of fact-sensitive inquiries can be challenging, prudent planning and (critically) closely managing the "facts on the ground" can help employers meet that challenge. Faced with an increasing array of "totality of the circumstances" tests, employers would be prudent to ensure that their workplaces closely match the applicable factors. While strict adherence to any particular test may be challenging, achieving the "right" circumstantial totality should help limit liability.

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