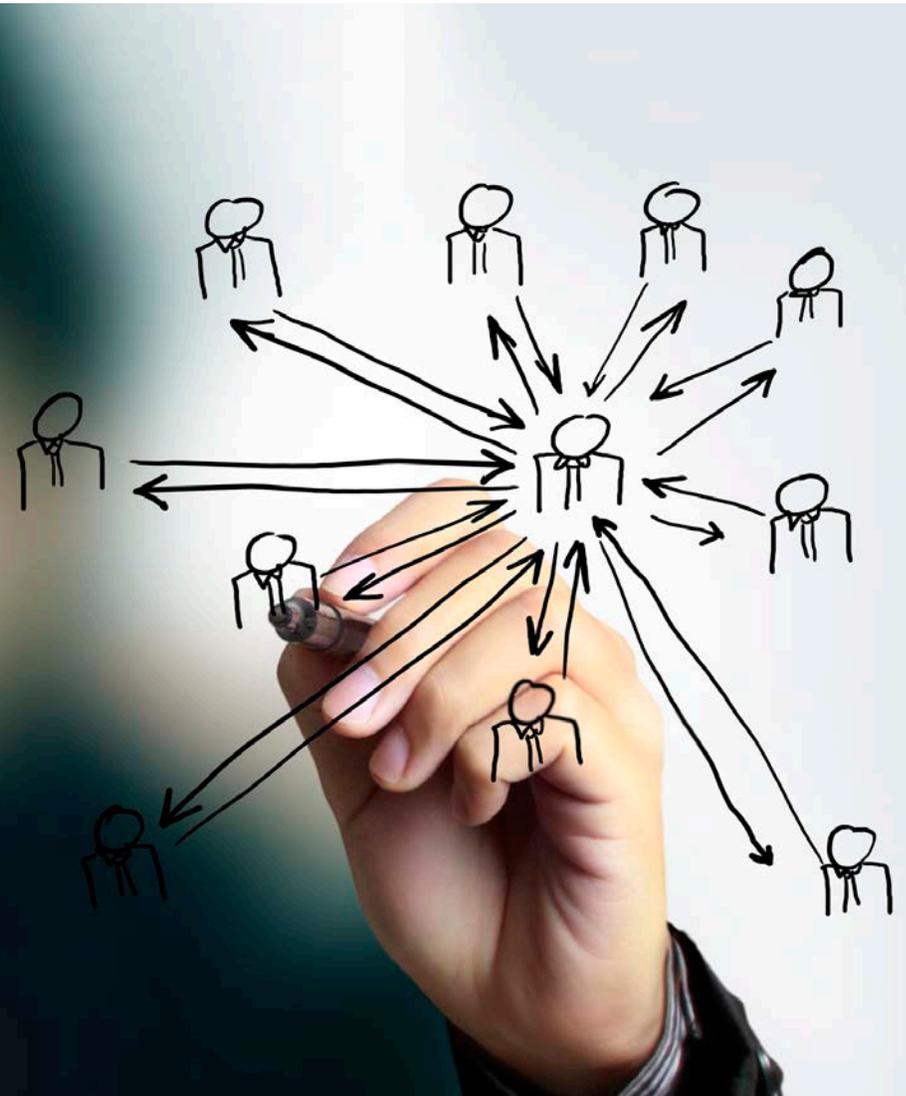


Employment Law

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Outcome of employee classification suit hinges on discord

Employee or independent contractor? It's a question few employers can afford to ignore when classifying workers — particularly as authorities have stepped up their scrutiny in recent years. In one recent case, *Lancaster Symphony Orchestra v. National Labor Relations Board*, the U.S. Court of Appeals for the District of Columbia considered whether a National Labor Relations Board (NLRB) determination that musicians were employees and not independent contractors should be upheld.

SWEET SOUNDS TURN SOUR

It all started when a union filed a petition for certification pursuant to the National Labor Relations Act (NLRA) seeking to represent the musicians of the Lancaster Symphony Orchestra of Lancaster, Pennsylvania. The orchestra fought the petition, arguing that its musicians were independent contractors and didn't have the right to join a union. The Regional Director of the local NLRB office agreed with the orchestra.



However, upon appeal, the NLRB held that, because of the orchestra's "control" over the musicians and their limited "entrepreneurial opportunity," the musicians could qualify as employees. When the NLRB conducted an election, the union won. The orchestra petitioned for review to the appeals court. Meanwhile, the NLRB cross-applied for enforcement of its determination.

CONFLICTING VIEWS

When reviewing the NLRB's determination, the court didn't apply a *de novo* standard. (Applying such a standard entails considering a legal question for the first time, affording no deference to the lower court's determination.) Instead, the court found that making a determination involved common law principles of agency, which don't require administrative expertise necessitating the special credence usually given an agency's judgment. So it applied a lesser standard whereby the NLRB's determination would be upheld if "it can be said to have made a choice between two fairly conflicting views."

The court considered the same factors of agency that the NLRB had set forth in Section 220(2) of the Restatement (Second) of Agency, including:

- ❑ The extent of control the employer had over the musicians' work,
- ❑ Whether the musicians' work was part of the employer's regular business,
- ❑ Whether the musicians were paid by the job or the hour,
- ❑ Skills required to perform the job,
- ❑ The length of time musicians were employed,
- ❑ Whether the musicians and employer believed they were creating an employer-employee relationship, and
- ❑ Whether the musicians had a significant entrepreneurial opportunity for gain or loss.

The court found that several factors favored the musicians being employees. For example, the orchestra practically regulated all facets of the musicians' performance and exercised ultimate authority over their work. (The orchestra argued that the musicians exercised control over their performances by practicing before rehearsals. Also, there was an orchestra committee and the principal musicians instructed other orchestra

WORKER DISCRETION EQUALS CONTROL



As in *Lancaster Symphony Orchestra v. National Labor Relations Board* (see main article) musicians also took center stage in *Lerohl v. Friends of Minnesota Sinfonia*. Again, the players' classification as employees or independent contractors was in question. The stakes were a little different, though – whether the workers were entitled to Americans with Disabilities Act (ADA) and Title VII protections.

The Eighth Circuit Court of Appeals affirmed the trial court's grant of summary judgment in favor of the orchestra. The court applied the common law agency test, noting that it weighed all of the factors and that no one factor was determinative. But because the musicians were highly skilled professionals, the court considered whether questions about their discretion to decline a concert or perform elsewhere were more relevant than whether the orchestra could tell the musicians where to sit and when to play. The court found that the musicians *did* enjoy such discretion; therefore, they retained control.

In addition, the orchestra paid the musicians as independent contractors. It didn't withhold income or FICA taxes or document payments on an IRS Form 1099. And the orchestra provided no employee benefits other than contributions to an independent union pension fund – further evidence of independent contractor status.

Thus, when weighing all of the factors, the appeals court concluded that the musicians were independent contractors, not employees. The court said it didn't want to hinder the parties' freedom to choose what form of relationship they agreed upon or change it after the fact. It also asserted that Congress could extend ADA or Title VII protections to independent contractors if it decided such a change was in the public interest.

members.) The court further determined that the musicians' work was part of the orchestra's regular business and they were paid by the hour because they received additional compensation when rehearsals exceeded a certain amount of time.

The orchestra practically regulated all facets of the musicians' performance and exercised ultimate authority over their work.

As for the musicians' opportunity for gain or loss, the court found that they didn't have much. While they could decline performances and perform with other orchestras or have other jobs, the musicians couldn't contract to fill multiple chairs or assign, sell or hire someone to fill their places. However, three

other factors favored the musicians being independent contractors. Their work required a high degree of skill, their length of employment was short and they signed agreements stating they were independent contractors.

Because the factors could lead to a conclusion that the musicians were either employees *or* independent contractors, the court stated that "two fairly conflicting views" existed. Therefore, it deferred to the NLRB's decision. The court noted that it wasn't deciding how it would classify the musicians, only whether there were conflicting views for deferral.

EMPLOYEES OVER CONTRACTORS

Among other things, the outcome of this case is a sign of the times. When their status is challenged, workers increasingly are found to be employees rather than independent contractors. For employers, this means that workers are entitled to the protections of wage and hour and employment discrimination laws. ■

Great expectations

Employee requests pregnancy accommodation – with mixed results

Employers should always be careful when weighing pregnancy accommodation requests, even when they're following facially neutral policies — ones that don't appear to be discriminatory on their face. The employer in *Legg v. Ulster County* provided nondiscriminatory reasons for its failure to accommodate a pregnant worker, yet the U.S. Court of Appeals for the Second Circuit ruled in favor of the employee.

HIGH-RISK POLICY

The employee in the case, a corrections officer at the Ulster County jail, had a high-risk pregnancy and was instructed by her doctor to work light duty. Her doctor's note stated that she was able to work but couldn't have direct contact with inmates. The sheriff denied her request for an accommodation and the employee was informed that light duty assignments were given at the sheriff's discretion for work-related illnesses or injuries only.



The employee was given the option of being re-evaluated to return to work full duty or using her accrued time and filing for disability benefits. However, a lieutenant reached out to her and said he would assign her to light duty positions if she obtained a new doctor's note that had no restrictions.

She obtained the note and was assigned to light duty tasks for about one month. Thereafter, she was required to work with inmates and when seven months pregnant she was bumped by an inmate during a fight. After this incident, the employee didn't return to work until after she gave birth.

When she returned to work, the employee brought an action against the county and sheriff alleging that the denial of her request for an accommodation was pregnancy discrimination. The trial court granted the defendant's motion for judgment as a matter of law, finding that the policy couldn't be discriminatory because it was facially neutral with respect to pregnancy. The Second Circuit vacated the judgment and remanded for a new trial.

SHIFTING THE BURDEN

The U.S. Supreme Court decision in *Young v. United Parcel Service, Inc.* provides a test to establish a pregnancy discrimination failure to accommodate claim. Under this test, a plaintiff must show that:

- ❑ She belonged to a protected class,
- ❑ She sought an accommodation,
- ❑ The employer didn't accommodate her, and
- ❑ The employer did accommodate others similar in this ability or inability to work.

The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its policy. If articulated, the employee must then establish that the employer's justification was pretext for discrimination. The employee can do so by presenting sufficient evidence that the employer's policies impose a significant burden on pregnant workers and that the employer's legitimate, nondiscriminatory reasons aren't sufficiently strong to justify the burden. A genuine issue of fact as to the existence of a significant burden may be created if the employee can show that the employer accommodated a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.

The employee in *Legg* established a *prima facie* case because she requested a light duty accommodation and the county didn't accommodate her, but provided light duty accommodations to other employees who were unable to perform non-light duty tasks as a result of on-the-job injuries. The county claimed a legitimate and nondiscriminatory reason for distinguishing between on-the-job and off-the-job injuries when providing light duty work. It cited a state law that required municipalities to pay corrections officers injured on the job, but didn't require pay for those who were injured off the job.

APPEALS COURT WEIGHS IN

The appeals court agreed that compliance with the state workers' compensation law was a neutral reason for the employer's distinction in accommodations. Therefore, the burden shifted back to the employee to show pretext.

But the court also found that the employee had presented sufficient evidence to support a pregnancy discrimination claim under the *Young* standard. It determined that, by denying light duty accommodations to pregnant women, the county imposed a significant burden on pregnant employees. Furthermore, the

employee could demonstrate that the county failed to accommodate 100% of its pregnant employees.

The county argued that pregnant workers weren't significantly burdened because only 176 corrections officers were affected. However, the court held that, in determining the burden on pregnant employees, the question isn't how many were denied accommodations in relation to *all employees*, but how many pregnant employees were denied accommodations in relation to *all pregnant employees*.

The court acknowledged that there were costs associated with accommodating pregnant workers. But the court also restated *Young's* warning that "cost alone is generally not a legitimate basis for refusing to accommodate pregnant employees on the same basis as other employees similar in their ability or inability to work."

NEUTRAL NO LONGER

This case is a reminder that employers may no longer rely on facially neutral policies to avoid providing accommodations to qualified employees. Ensure that your organization's seemingly neutral policies don't significantly burden one class of employees. ■

Employers: Exhaust all options before taking adverse action

Employers must do more than pay lip service to the Americans with Disabilities Act (ADA): They must exhaust administrative remedies before taking adverse action. The U.S. Court of Appeals for the Fourth Circuit recently affirmed this principle in *Lisotto v. New Prime, Inc.*

APPLICANT FAILS TEST

A prospective employee applied for a commercial truck driver position and was told that, as part of the hiring process, he would have to pass a physical examination

and drug test. In anticipation of the examination and test, the applicant obtained a letter from his physician stating that he took an amphetamine drug to manage narcolepsy, a sleeping disorder, and that he *was* able to operate a commercial motor vehicle. The applicant told the employer's medical examiner that he was taking an amphetamine and provided him with his physician's note.

But the medical examiner stated that the employer only approved another medication for treating narcolepsy and that the applicant needed to take that drug

for six weeks before beginning employment. A few days later, the employer's medical review officer told the applicant that his physician needed to contact the officer within five days about his condition and medication. Otherwise, the officer would report a positive drug test to the Department of Transportation (DOT).

The applicant's physician attempted to contact the employer's medical review officer to no avail. He also changed the applicant's prescription to the medication specified by the employer.

After six weeks of being on the approved medication, the applicant attempted to contact the employer. However, a personnel office employee told the applicant that he couldn't work for the employer because he'd tested positive for amphetamines.

The applicant appealed to the medical review officer, but was told in a letter that narcolepsy was a safety concern. Thereafter, the applicant found out that he did *not* have narcolepsy and he forwarded the results to the medical review officer. He received no reply. The applicant filed a claim against the employer alleging ADA violations.



The employer argued that the applicant should have exhausted his administrative remedies with the Federal Motor Carrier Safety Administration (FMCSA). This government agency resolves disagreements between company physicians and employee physicians over medical examinations. The employer moved to dismiss the complaint and the trial court agreed.

NO DISAGREEMENT EXISTS

The applicant appealed, arguing that there was no "disagreement." He asserted that the employer had discriminated against him when it failed to hire him based on an erroneous verified positive drug test. He also claimed that the employer's medical review officer had failed to change the verified positive drug test result to a negative one after the applicant produced a legitimate medical explanation for the positive result.

The applicant asserted that the employer had discriminated against him when it failed to hire him based on an erroneous verified positive drug test.

Agreeing with the applicant, the court vacated and remanded. It held that the trial court had mischaracterized the issue as a conflict between physicians over the applicant's physical qualifications to be a driver, for which the FMCSA regulations provide administrative recourse. However, there was no such disagreement between the physicians.

The employer's medical examiner had said that, if the applicant took the approved narcolepsy medication, he could work for the employer. The court ruled that the issue in the case was the employer's refusal to hire the applicant based on his positive drug test result and the medical review officer's actions regarding it.

CHECK YOUR POLICIES

If your organization administers drug tests to job applicants and employees, be sure you have proper review policies in place. Positive drug test results and reasons for those results should be reviewed before denying employment or taking adverse actions against individuals. ■

Where's the proof?

Why successful discrimination claims require support

For an employee to receive equitable relief on a Title VII discrimination claim, the individual must be able to prove damages. This inability was the plaintiff's undoing in U.S. Court of Appeals for the Eighth Circuit case *Olivares v. Brentwood Industries*.

SEEKING EQUITABLE RELIEF

The plaintiff brought a cause of action for discrimination based on his Mexican ancestry. He worked as a shift supervisor and had spoken with his supervisor about providing permanent employment applications to temporary workers he supervised. The supervisor allegedly told the employee not to give applications to any Mexican workers because he didn't "want to employ more Mexicans."

Later, the supervisor saw that two of the temporary workers, in violation of company policy, weren't wearing safety gear. The employee and two workers were disciplined, but they claimed the violation had never occurred. Thereafter, the employee was terminated. The employer argued that the employee had overlooked safety violations of the workers he managed. But a jury found that he was terminated because of his race and awarded him \$1 in nominal damages.

The employee sought equitable relief in the form of:

1. Reinstatement to his previous job, or
2. Front pay to compensate for the loss of future employment opportunities.

Although he found another job, the employee testified that it paid about half of what he'd earned when working for his previous employer.

The trial court concluded that reinstatement was neither possible nor practical and that the employee hadn't presented sufficient evidence that he was entitled to front pay. The employee appealed.

AFFIRMING THE TRIAL COURT'S DECISION

On appeal, the Eighth Circuit decided that the trial court had correctly held that reinstatement wasn't practical or

possible because comparable positions were filled. In addition, a productive working relationship would be impossible. The employer had alleged that there was a "trust issue" between management and the employee because he had failed to enforce company rules.



The employee argued that the trial court shouldn't have rejected or contradicted the jury's findings. However, the appeals court determined that, because the jury

hadn't made any findings as to whether the employee had failed to enforce rules, the trial court could credit the employer's testimony on that issue.

The appeals court also found that the trial court hadn't abused its discretion when denying front pay because the employee had failed to set forth a *prima facie* case for equitable damages. He'd provided only vague estimates of his postverdict salary — which were insufficient to establish damages. The employee could have supported his claim for future lost wages by presenting current pay stubs showing his earnings. However, he only set forth his testimony and old wage documents, which weren't enough to support his claim of front pay.

The appeals court agreed with the trial court's refusal to speculate about damages. Ultimately, it affirmed the lower court's decision.

GOING TO TRIAL

Courts still require proof of damages from plaintiffs in discrimination cases. So if your organization is faced with a discrimination suit where the employee can't prove damages, you may want to consider going to trial. If you choose this option, be ready to show that reinstatement wouldn't be possible or practical and the employee failed to set forth enough evidence of damages. ■

A message to our clients and friends ...

The attorneys in our Employment and Labor Section are available to answer your questions about the articles in the Briefing. We also stand ready to respond to any other questions you might have. It has always been our goal to provide timely and practical advice whenever and wherever a client has a problem. You can contact each of us directly. Call us or send us an email message. We will be there for you.

“Above all, we are at your service ...”



Steve Lyman
(317) 977-1422
slyman@HallRender.com



Bruce Bagdady
(248) 457-7839
bhadgady@HallRender.com



John Ryan
(317) 977-1423
jryan@HallRender.com



Michael Kim
(317) 977-1418
mkim@HallRender.com

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Jon Bumgarner
(317) 977-1474
jbumgarner@HallRender.com



Kevin Stella
(317) 977-1426
kastella@HallRender.com



Jon Rabin
(248) 457-7835
jrabin@HallRender.com



Robin Sheridan
(414) 721-0469
rsheridan@HallRender.com



Dana Stutzman
(317) 977-1425
dstutza@HallRender.com



Larry Jensen
(248) 457-7850
ljensen@HallRender.com



Melvin Sabey
(303) 801-3535
melsabey@HallRender.com



Mark Sabey
(303) 801-3538
marksabey@HallRender.com



Sevilla Rhoads
(206) 795-6878
srhoads@HallRender.com



Jennifer Gonzalez
(248) 457-7840
jgonzalez@HallRender.com



Jarrod Malone
(317) 977-1494
jmalone@HallRender.com



Mary Kate Liffriig
(317) 977-1455
mliffriig@HallRender.com



Bradley Taormina
(248) 457-7895
btaormina@HallRender.com



Charlotte Fillenwarth
(317) 977-1476
cfillenwarth@HallRender.com



Nicholas Johnston
(317) 429-3618
njohnston@HallRender.com



Lindsay Ramsey
(317) 429-3637
lramsey@HallRender.com



Fred Bachmann
(317) 977-1408
bachmann@HallRender.com



Bill Roberts
(502) 568-9364
ebplans@HallRender.com



Calvin Chambers
(317) 977-1459
cchambers@HallRender.com