Employment Law Update

June 7, 2023

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Housekeeping

- **CLE** – The ACC-CLT Chapter will coordinate CLE for this webinar.
- **Legal disclaimer** - Portions of this communication may qualify as "Attorney Advertising" in some jurisdictions. However, Parker Poe intends for it to be used for educational and informational purposes only. This communication also is not intended and should not be construed as legal advice. For questions, contact ParkerPoe@parkerpoe.com.

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Today's Presenters

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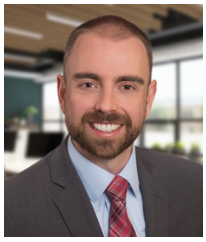

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AGENDA

I. Judicial Decisions

- U.S. Supreme Court
- 4th Circuit
- North Carolina

II. Legislative Update

III. Regulatory/Agency Update

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SUPREME COURT DECISIONS

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EXEMPT STATUS OF HIGHLY COMPENSATED EMPLOYEES

Helix Energy Solutions Group, Inc. v. Hewitt
(Decided February 22, 2023)

- Per FLSA, highly compensated employees (HCE) (i.e., earning more than $107,432/year ***may*** be exempt from overtime).
- Executive exemption from overtime:
  - Salary basis test
  - Salary level test (at least $684/week=$35,568/year)
  - Job duties test
    - Managing the enterprise
    - Directing other employees
    - Exercising power to hire and fire

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EXEMPT STATUS OF HIGHLY COMPENSATED EMPLOYEES

Helix Energy Solutions Group, Inc. v. Hewitt
(Decided February 22, 2023)

- HCE Exemption from overtime: Same as executive exemption, except employee only needs to exercise one of the specified duties
- **Issue**: Whether HCE exemption applied to a highly compensated employee (earning over $200,000/year) who was paid on a daily basis?
- **Held**: HCE exemption can apply to employees paid on a daily basis; but, only if they receive at least the minimum weekly salary amount on a salary or fee basis.

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EXEMPT STATUS OF HIGHLY COMPENSATED EMPLOYEES

Helix Energy Solutions Group, Inc. v. Hewitt
(Decided February 22, 2023)

- Daily pay can only count towards meeting the salary threshold if employee is paid a minimum salary or fee of at least $684 per week.
- Kavanaugh dissent: "[I]t is questionable whether the Department's regulations [re: salary basis and salary level] will survive if and when the regulations are challenged as inconsistent with the Act."
- An invitation to challenge longstanding overtime regulations???

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TITLE VII RELIGIOUS ACCOMMODATION STANDARD

Groff v. DeJoy
(Argued April 18, 2023)

- 1977 SCOTUS opinion in *TWA v. Hardison* held that the standard for "undue hardship" is whether it would require an employer "to bear more than a *de minimis* cost."
- Issues:
  - Whether to overturn *Hardison* and reject the "more than *de minimis"* cost test?
  - Whether an employer can demonstrate undue hardship on the conduct of its business by showing that the requested accommodation burdens the employee's coworkers rather than the business itself?

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TITLE VII RELIGIOUS ACCOMMODATION STANDARD

Groff v. DeJoy
(Argued April 18, 2023)

- Examples of accommodations
  - Schedule or shift changes
  - Exceptions to dress and grooming standards
  - Job reassignment
  - Remote work
  - Time off—paid or unpaid
  - Prayer breaks
- Most risk averse strategy: use same interactive process and standard as ADA undue hardship analysis.
- DOCUMENT, DOCUMENT, DOCUMENT!

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FOURTH CIRCUIT DECISIONS

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"USUAL AND CUSTOMARY" NOTICE PROCEDURES

Roberts v. Gestamp West Virginia, LLC
(Decided August 15, 2022)

- FMLA regs permit employer to "require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances."
- "Usual and customary" could include any procedures an employer has accepted "by informal practice or course of dealing with an employee."

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"USUAL AND CUSTOMARY" NOTICE PROCEDURES

Roberts v. Gestamp West Virginia, LLC
(Decided August 15, 2022)

- Can include messaging via social media.
- Train managers and supervisors on call-in policies and procedures.
- Policies and procedures must be consistently enforced, lest deviations allow informal notice methods be deemed to have been accepted as "usual and customary."

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ADA PROTECTS GENDER DYSPHORIA

Williams v. Kincaid
(Decided August 16, 2022)

- Issue: Whether gender dysphoria is a disability protected by the ADA?
- ADA broadly defines disability as "a physical or mental impairment that substantially limits one of more major life activities of such individual."
- ADA specifically excludes: "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."

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ADA PROTECTS GENDER DYSPHORIA

Williams v. Kincaid
(Decided August 16, 2022)

- Held: Gender dysphoria is protected by ADA
- DSM of Mental Disorders (5th Ed.) defines "gender dysphoria" as "the 'clinically significant distress' felt by [persons] who experience an incongruence between their gender identity and their assigned sex."
- Gender dysphoria did not exist as a diagnosis when the ADA was passed in 1990.
- "Gender dysphoria, unlike 'gender identity disorder' concerns itself with distress and other disabling symptoms, rather than simply being transgender."

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ADA PROTECTS GENDER DYSPHORIA

Williams v. Kincaid
(Decided August 16, 2022)

- Request for rehearing denied by 8-7 vote.
- Employers must engage in interactive process with transgender employees suffering from gender dysphoria who request an accommodation.
- Accommodations may include:
  - Leaves of absence for medical treatment
  - Restroom usage
  - Pronouns
  - Employer sponsored housing
- Don't assume a transgender employee has gender dysphoria!

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SLUR BY 6-YEAR-OLD CAN CREATE HOSTILE WORK ENVIRONMENT

Chapman v. Oakland Living Center, Inc.
(Decided August 30, 2022)

- Found allegations of racial slur by 6-year-old son of supervisor/grandson of owner was sufficient to state a claim for Title VII hostile work environment.
- Did not matter that child was too young to understand meaning of his words because harassment is actionable under Title VII if it has the effect of creating a HWE.
- Employer can be liable for a third party creating a HWE "if the employer knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment"

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HOSTILE WORK ENVIRONMENT

Laurent-Workman v. Wormuth
(Decided November 29, 2022)

- Sporadic racial comments were made over an extended period of time.
- Comments were not about or directed at plaintiff.
- Plaintiff's allegations must be evaluated based on the totality of the circumstances.
- When viewed against Fourth Circuit precedent across the past several decades, this case illustrates a lower threshold for stating actionable claims.
- Underscores the need for employers to conduct periodic training of employees and supervisors and to be vigilant in enforcing anti-harassment policies.

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PLAINTIFF'S BURDEN OF PROOF IN TITLE VII CASES

Balderson v. Lincare, Inc.
(Decided March 15, 2023)

- Fourth Circuit found that trial court failed to consider the possibility that employer made a bad business decision that had nothing to do with sex.
- Even where an employer fails to establish a legitimate, nondiscriminatory reason for its action, plaintiff still must come forward with evidence establishing the ultimate issue of discriminatory intent.
- It is not enough to *disbelieve* the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.

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EMPLOYER'S RIGHT TO MAKE MEDICAL INQUIRIES

Lashley v. Spartanburg Methodist College
(Decided April 18, 2023)

- Choose words more carefully than this employer:
  - "Tell me about your health issues."
  - "She and [the college] 'were not a good fit' for each other."
- Employer may inquire about disability if inquiry is "job-related and consistent with business necessity."
- Plaintiff's perception of the inquiry as rude, angry or mean was immaterial.
- Court takes an objective, not subjective, approach to determine whether the examination or inquiry is job-related and consistent with business necessity.

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EMPLOYER'S RIGHT TO MAKE MEDICAL INQUIRIES

Lashley v. Spartanburg Methodist College
(Decided April 18, 2023)

- "Not a good fit" can be a legitimate reason for terminating an employee; **but**, employer had better be able to demonstrate exactly why the employee was a poor fit.
- "Good fit" can be a subterfuge for discrimination.
- Better to identify the specific, objective grounds for why the employee was not a good fit.

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NORTH CAROLINA

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CONTINUED SCRUTINY OF NONCOMPETITION AGREEMENTS

- Courts continue to strike down noncompetition and nonsolicitation agreements.
- Restrictions should be limited to the "same or similar" position with a competitor.
- Beware of "directly or indirectly."
- Geographic scope must be defined narrowly as courts are reluctant to employ blue pencil doctrine.

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CONTINUED SCRUTINY OF NONCOMPETITION AGREEMENTS

- Nonsolicitation of customers should be limited to customers with whom employee had contact, absent showing that employee had access to confidential information.
  - "All of employer's customers" will usually be found to be overly broad.
  - Employee's contacts should be material.
- Once a customer doesn't mean always a customer.
- Consider the recency of the customer relationship.

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Federal Legislation

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FEDERAL LEGISLATIVE UPDATE

The Speak Out Act
(December 7, 2022)

- Voids pre-dispute nondisclosure and nondisparagement agreements concerning incidents of sexual harassment or assault.
- Review and tailor nondisparagement and nondisclosure provisions.

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FEDERAL LEGISLATIVE UPDATE

The Pregnant Workers Fairness Act
(December 29, 2022)

- Requires reasonable accommodations for pregnant workers unless an undue hardship.
  - E.g. changes in work duties, work schedules, or seating
- Applies to employers with 15+ employees.
- Effective June 27, 2023.

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FEDERAL LEGISLATIVE UPDATE
The PUMP Act
(December 29, 2022)

- Amends FLSA to require reasonable break time and private space to express breast milk.
- Applies to **all** employees (previously only non-exempt).
- Potential exemption if fewer than 50 employees and undue hardship.

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Federal Agency Update

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FEDERAL AGENCY UPDATES
EEOC

- Artificial Intelligence
  - ADA (5/12/22):
    - ADA applies to algorithms and AI systems.
    - Beware disparate impact and disability-related inquiries.
    - Promising practices – ensure accessibility, limit to necessary qualifications, broadcast availability of accommodations.
  - Title VII (5/18/23):
    - Beware disparate impact.
    - Even if disparate impact, OK if job-related and consistent with business necessity.

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FEDERAL AGENCY UPDATES EEOC

- Promising Practices to Prevent Harassment (4/20/23)
  - Leadership and accountability.
  - Prevention and intervention training.
  - Robust reporting system.
- Hearing Disabilities (1/24/23)
  - Prohibited inquiries.
  - Reasonable accommodation – assistive listening devices, captioning, interpreters.

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FEDERAL AGENCY UPDATES NLRB

- Joint employer rule (9/6/22)
  - Indirect or reserved control is sufficient.
- Electronic monitoring and algorithmic management (10/31/22)
  - Potential interference with Section 7.

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FEDERAL AGENCY UPDATES NLRB

- Confidentiality and nondisparagement in separation agreements (3/22/23)
  - Infringement of Section 7 rights.
  - Trade secrets/proprietary info OK.
  - Limit non-disparagement to defamation.
  - Application to settlement agreements?

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FEDERAL AGENCY UPDATES NLRB

- Non-compete Opinion (5/30/23)
  - General Counsel opinion.
  - Most noncompetes/nonsolicits interfere with Section 7 rights.
  - Focus on mid and lower-level employees.
  - Exception for special circumstances (???)

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FEDERAL AGENCY UPDATES FTC

- Non-compete Ban (1/5/23)
  - Ban on noncompetition provisions – functional approach.
  - Exceptions: sale of business, non-solicitation, confidentiality.
  - 27,000 comments; Final vote – 2024.
- Civil enforcement against no-poach agreements

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FEDERAL AGENCY UPDATES DOJ

- Criminal enforcement against no-poach agreements and wage fixing:
  - Losses pile up (4 high-profile this year)
  - DOJ continues enforcement push

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FEDERAL AGENCY UPDATES OSHA

- Severe violator program
- Electronic OSHA 300 logs
  - 100+ employees in certain industries
- Workplace violence
  - Healthcare emphasis
- Heat Standard
  - National Emphasis Program

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Contact Us With Questions

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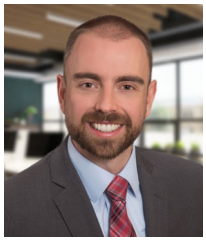

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Additional Resources

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Keith M. Weddington

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Keith Weddington has been representing employers for more than 30 years and has defended Fortune 500 and middle-market companies in a broad array of disputes with employees and former employees. Named a *Best Lawyers* "Lawyer of the Year" in Charlotte four times for employment law or litigation, he is a go-to attorney for clients' most sensitive and potentially high-profile employment disputes. Whether the case requires resolute and intensive litigation or delicate negotiations to achieve a favorable resolution, Keith provides results-oriented solutions to achieve clients' objectives.
"My experience with him has been fantastic," one of his clients told *Chambers USA*, which develops rankings using in-depth interviews and objective research. "He is incredibly responsive and provides very practical advice."

In addition to defending U.S. and international employers in discrimination, harassment, retaliation, wrongful discharge, wage and hour, FMLA/ADA, and ERISA matters, he brings his more than 30 years of experience to bear in advising employers on strategic employment practices, human resources policies, and the continuum of employment compliance issues.
Keith has earned a Yellow Belt Certification in Legal Lean Sigma® and Project Management from the Legal Lean Sigma Institute. He teamed up with clients to earn the certification through a two-day course that Parker Poe hosted.

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Tory Summey focuses on employment counseling and litigation. On the counseling front, he helps employers navigate complex and ever-changing federal and state laws and regulations that govern the modern employment relationship. Tory assists client with day-to-day issues such as recruiting and hiring, accommodation requests, discipline and corrective action, and terminations. He helps client implement practical policies that compliant with applicable law and to find creative solutions to challenging situations in the workplace. Tory regularly represents employers in various industries, including higher education, manufacturing, municipalities, healthcare, and physician practices.

Tory has been a leader at Parker Poe in monitoring the dizzying legal changes facing employers in the modern workplace and helping clients to react and adjust to new challenges. Tory frequently writes client alerts about evolving employment laws, regulations and guidance, and business and legal organizations have asked him to present to their members on a variety of topics.

On the litigation front, Tory helps clients understand the risks and benefits of litigation while aggressively pursuing each client's best interest. He has experience at the trial and appellate levels of state and federal courts, including the North Carolina Business Court, the N.C. Court of Appeals, the N.C. Supreme Court, and the U.S. Court of

Appeals for the Fourth Circuit. Tory has defended numerous clients from lawsuits relating to alleged discrimination and retaliation and also pursued relief for his clients on various complex issues such as misappropriation of trade secrets or unfair and deceptive trade practices. Tory also represents clients in proceedings before the Equal Employment Opportunity Commission and the North Carolina Department of Labor.