PIETRANTONI MENDEZ & ALVAREZ LLC

PUERTO RICO SUPREME COURT FINDS AGENTS, OFFICERS AND SUPERVISORS NOT PERSONALLY LIABLE FOR RETALIATION CLAIMS

In Caballer Rivera v. Nidea Corporation, 199 DPR __ , 2018 TSPR 65 (April 19, 2018), the Puerto Rico Supreme Court held that an employer's managers and supervisors are not personally liable for alleged acts of retaliation under Puerto Rico Acts No. 69 of July 6 (sex discrimination), 1985 and No. 17 of April 22, 1988 (sexual harassment), (the "Acts").

The Supreme Court reviewed the text of both Acts and determined that while both included a broad definition of "employer", certain provisions (for example, Act 17's requirement that the employer maintain the workplace free of sexual harassment; give adequate publicity to the sexual harassment policy; and, establish adequate and effective internal policies to deal with sexual harassment claims) clearly apply only to the employer and not to its agents, officers and supervisors. In those contexts, agents and supervisors are excluded. The Acts refer to responsibilities that only apply to the employer or to acts that can only be committed by the employer.

The Court distinguished its decision in Rosario v. Dist. Kikuet, Inc., 151 DPR 634 (2000), where it had found a supervisor to be an "employer" personally liable for his own acts of sexual harassment and explained that the personal liability of the harasser arises because he/she committed the acts and the employer's liability arises because it knew or should have known about the problem and should have taken corrective action. However, acts of retaliation always constitute acts by the employer. A supervisor, officer, administrator or agent acts under the authority granted to him/her by the employer. The employer is the only actor, regardless of who carries out the act in his/her name or under his/her instructions.

U.S. SUPREME COURT - CLASS ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS DO NOT VIOLATE NATIONAL LABOR RELATIONS ACT

On May 21, 2018, the United States Supreme Court held in three consolidated cases that class action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act (FAA). Epic Systems Corp. v. Lewis, No. 16-285; Ernst & Young LLP et al. v. Morris et al., No. 16-300; National Labor Relations Board v. Murphy Oil USA, Inc., et al., No. 16-307.

The Supreme Court decision resolves the circuit split on whether class or collective action waivers contained in employment arbitration agreements violate the National Labor Relations Act (NLRA). The Court held that the FAA states that arbitration agreements providing for individualized proceedings are enforceable and neither the FAA nor the NLRA require otherwise.

The Supreme Court stated that the protections established by the NLRA are focused on employees' rights to unionize and engage in collective bargaining and that they do not extend to protecting an employee's right to participate in a class or collective action.

The Court noted that the employees challenging the arbitration agreements did not allege that their agreements were obtained in an unconscionable way that would render them unenforceable. Instead, the employees objected that the agreements require individualized arbitration proceedings instead of class or collective ones. By attacking only the individualized nature of the arbitration proceedings, the employees sought to interfere with the traditionally individualized and informal nature of arbitration, which the Court deemed a fundamental attribute of arbitration.

U.S. SUPREME COURT DECLINES TO REVIEW EMPLOYMENT DISCRIMINATION CASE REGARDING AFRICAN-AMERICAN HAIRSTYLES

On May 14, 2018, the U.S. Supreme Court announced that it had declined to review an Eleventh Circuit Court of Appeals ruling in EEOC v. Catastrophe Management Solutions, 852 F.3d 1018 (2016) that the employer did not violate federal civil rights law when it rescinded a job offer because the applicant wore her hair in dreadlocks and refused to cut them in order to secure the job.

The EEOC filed suit on behalf of Chastity Jones, an African-American job applicant whose offer of employment was rescinded by Catastrophe Management Solutions pursuant to its race-neutral grooming policy when she refused to cut off her dreadlocks. The Eleventh Circuit held that the EEOC's complaint did not state a plausible claim that the employer had intentionally discriminated against Jones because of her race. The Court of Appeals followed precedent which holds that Title VII of the Civil Rights Act of 1964 protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices, such as hair style.

PROPOSED AMENDMENT TO ALLOW SALARY DEDUCTIONS FOR REPAYING CASH AND MATERIAL ADVANCES IN EMERGENCY SITUATIONS APPROVED BY PUERTO RICO LEGISLATURE

Senate Bill 693 was approved by the PR House of Representatives on May 14, 2018 and on May 21, 2018, the Senate concurred with the amendments made by the House. The bill had previously been approved by the Senate on December 8, 2017. The bill will now be sent to the Governor, who will decide whether to sign it, allow it to become law or veto it.

The proposed Act amends Puerto Rico Act Number 17 of April 17, 1931, which regulates salary payments and deductions. The bill would allow employers to deduct from employee salaries salary advances and payments for materials and equipment provided to employees in emergency situations. Thus, employers could deduct a fixed amount at regular intervals from the employee's salary for the total payment without interest of any loan, payroll

advance, or of any equipment, material or goods provided by the employer, whose benefit, use or enjoyment is directly related to an emergency situation as formally declared by the President of the United States, the Federal Emergency Management administration ("FEMA") or the Governor of Puerto Rico that is applicable to the whole of Puerto Rico, the municipality where the employee resides or where the workplace is located.

The amount of the deduction or payroll withholding authorized may not exceed twenty percent (20%) of the amount payable to the employee in his regular payroll period, after all deductions, both voluntary and legally-required.

A written authorization by the employee is required, which must include a breakdown of how the employee will make the total payment of the amount owed. The agreement must also include how the debt will be repaid in case the employment relationship is terminated, voluntarily or involuntarily, before the repayment is completed. In cases of deductions to repay equipment or material provided by the employer, the amount to be repaid cannot exceed the expense incurred by the employer.

The bill does not address the legal requirement that employers fill out forms NT-12 and NT-13 to inform the Puerto Rico Department of Labor and Human Resources about salary deductions. This requirement is still legally required but is not currently enforced by the Department.

NATIONAL LABOR RELATIONS BOARD

On May 9, 2018 the National Labor Relations Board announced that it is considering engaging in rulemaking to establish the standard for determining joint-employer status under the National Labor Relations Act. The announcement arose soon after the Republicans retook control of the Board with the Senate's confirmation of John Ring to the Board on April 11, 2018 and the administration's subsequent announcement on April 12 that he will be designated as the agency's Chair.

The joint employer doctrine has been a contentious issue since the Obama Board overturned longstanding precedent Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (Aug. 27, 2015). The doctrine is used by the Board to determine whether two separate business entities exercise control over the terms and conditions of employment of a group of employees and should thus be jointly liable under the National Labor Relations Act. The expanded definition under the Browning-Ferris Industries ruling had made it easier for companies to be held liable for violations committed by their contractors or franchisees.