NEWSLETTERS

THE PASCHOS LAW UPDATE NEWSLETTER

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I. EMPLOYMENT LAW

Test for Whether a Shareholder-Director of a Professional Corporation is an Employee for Purposes of Title VII Extends to Business Entities that are not Professional Corporations

In *Mariotti v. Mariotti Bldg. Products, Inc.*, --- F.3d ----, 2013 WL 1789440 (3d Cir. (Pa.) April 29, 2013, the sons (plaintiff and his brothers) of the founder of Mariotti Building Products joined the business, later incorporated as MBP. The business grew to have annual sales of $60 million. Plaintiff served as vice-president, secretary, and a member of the board of directors, and was a shareholder. Plaintiff had a "spiritual awakening" in 1995. He claims that the change resulted in antagonism toward him. Plaintiff delivered a eulogy at his father's 2009 funeral, which upset family members. Days later, plaintiff received notice of termination of his employment and that various benefits would cease. The letter explained that "[y]our share of any draws from the corporation or other entities will continue to be distributed to you." Plaintiff continued on the board of directors until August, 2009, when the shareholders did not re-elect him.

Plaintiff filed charges of religious discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1) and of hostile work environment. The district court dismissed, finding that he was not an employee under Title VII and did not establish existence of a hostile work environment. The Third Circuit was faced with the issue of whether the Supreme Court's holding in *Clackamas Gastroenterology Associates, P.C. v. Wells*, which set out a test for determining whether a shareholder-director of a professional corporation is an "employee" under the ADA, applies to business entities that are not professional corporations in a Title VII employment action.

In *Clackamas*, the Supreme Court considered whether the shareholder-directors of a professional corporation should be counted as employees in determining whether the entity met the threshold number of employees, and therefore qualified as an employer, under the ADA. Noting the ADA's attempt to define the term "employee," the Court began its analysis by declaring that the statute "simply states that an 'employee' is 'an individual employed by an employer." The Court identified six factors that are relevant in determining whether a shareholder is an employee: (1) Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) Whether and, if so, to what extent the organization supervises the individual's work (3) Whether the individual reports to someone higher in the organization; (4) Whether and, if so, to what extent the individual is able to influence the organization; (5) Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; (6) Whether the individual shares in the profits, losses, and liabilities of the organization.

The Third Circuit held that the *Clackamas* decision did not restrict itself to professional corporations and explicitly covers major shareholders, therefore, the *Clackamas* test applied to the plaintiff's activities as a shareholder in the corporation. Applying these factors to the case at hand, the court found that because the plaintiff participated in the management, development, and governance of MBP, and had the ability to participate in the fundamental decisions of the business, the plaintiff's complaint failed to allege that he is an employee.

Partial Deafness is Not a Disability Under the ADA

In *Mengel v. Reading Eagle Co.*, Slip Copy, 2013 WL 1285477 (E.D.Pa. March 29, 2013), plaintiff, Ms. Mengel, was employed as a page designer at Reading Eagle Company since 1999. Grant Mahon, a design editor at Reading Eagle, was Ms. Mengel's immediate supervisor. Mr. Mahon reported to David Mowery, Reading Eagle's managing editor. Mr. Mowery reported to Harry Dietz, Reading Eagle's editor.

Mr. Mahon gave Ms. Mengel satisfactory evaluations from 2001 to 2008. Starting in November, 2007 Ms. Mengel became totally deaf in one ear and had balance problems due to surgery removing a brain tumor. Ms. Mengel was able to continue performing her job functions without accommodation, but had difficulty concentrating. Ms. Mengel received a satisfactory evaluation in 2008, very soon after her deafness and balance problems arose.

In September 2008, Ms. Mengel had a meeting with Mr. Mahon, Mr. Mowery, and Bill Reber, one of her co-workers. At this meeting, Mr. Reber complained that Ms. Mengel did not “follow his instructions” and called her a “tar baby.” Ms. Mengel felt by using the term “tar baby,” Mr. Reber was “trying to demean [her], make [her] feel small.”

In January 2009, Reading Eagle decided to perform a reduction in force layoff. Reading Eagle performed the reduction in force by rating its employees on a matrix and eliminating the lowest scoring employees. The reduction in force matrix for Ms. Mengel was filed on March 18, 2009. Ms. Mengel received the lowest matrix score in her department. She received a score of 13, while the next lowest score was a 24.

Ms. Mengel complained about the “tar baby” comment in her undated, annual self-evaluation. Ms. Mengel then filed a complaint with the EEOC for gender discrimination, disability discrimination, and retaliation. Ten days later, Reading Eagle executed its reduction in force. Ms. Mengel was among the terminated employees.

The court analyzed whether plaintiff presented a prima facie case of discrimination under the ADA. The court focused on whether Ms. Mengel was disabled, and if she was, whether the adverse employment determination was due to that disability.

Through regulation, the EEOC has determined that “deafness substantially limits hearing,” that hearing is a major life activity, and therefore a deaf person is disabled. However, Ms. Mengel only provided evidence of hearing loss in one ear rather than bilateral deafness. And, Ms. Mengel failed to present evidence that her partial hearing loss substantially limited her hearing noting that she testified that her deafness in her left ear was not a distraction, and she did not mention any specific instances where her hearing loss caused a problem other than that she “didn't hear some things.” As such, the court held that plaintiff's partial hearing loss was not a disability under the ADA.

Despite the fact that Ms. Mengel presented evidence that she may have been “regarded as disabled,” the court found that she had not produced evidence of a causal link between her alleged disabilities and her termination noting the long gap in time between the hearing loss and the termination and Ms. Mengel's satisfactory evaluation shortly after her surgery refute the necessary causation.

I. GENERAL LITIGATION

Insurers Timely Letter Rejecting an Arbitration Award Was Sufficient to Trigger its Right to Nullify the Award Even Though the Insurer Did Not Expressly State it Was "Demanding a Trial"

In *Vega v. 21st Century Ins. Co.*, 430 N.J.Super. 18, 61 A.3d 170 (N.J.Super. 2013), plaintiff Marleny Vega claimed to have been injured when her motor vehicle, which was insured by defendant 21st Century Insurance Company, was struck by a hit-and-run driver. She made a claim under the policy's uninsured-motorist (UM) endorsement, and the parties proceeded to arbitration, which resulted in an award of $87,500.

Because the award exceeded the minimum-liability coverage required by law, “either party” had the right to “demand the right to a trial on all issues,” provided that the demand was made in writing within thirty days of the arbitrators' decision. When this policy provision is

properly triggered, the award is nullified and the claimant must resort to filing a complaint; without such a demand, the award becomes “binding.”

Within thirty days of the award, 21st Century's attorney wrote to Vega's attorney, stating: “Pursuant to the provisions of the 21st Century Insurance Policy ... the UM Arbitration Award of June 16, 2011 is hereby rejected. Kindly be guided accordingly and contact the undersigned to discuss possible settlement of this matter.”

Plaintiff then filed this action for an order enforcing the arbitration award, claiming the letter did not “demand a trial” and, thus, by operation of the insurance policy's terms, the award became binding. Summary judgment was entered in plaintiff's favor. The judge found the language of the July 8 letter did not satisfy the requirements of the policy.

On appeal, the court held that the 21st Century’s timely letter rejecting an arbitration award was sufficient to trigger its right to nullify the uninsured motorist arbitration award even though the insurer did not expressly state it was "demanding a trial." The court provided that the insurer's letter "rejected the arbitration award" and invited settlement discussions, and could not be plausibly interpreted as meaning anything other than that the insurer had invoked its right to demand a trial.

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