Insight

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These Foolish Things – The Oddest Employment Issues of the Past Year

BY PETER PETESCH AND BETSY CAMMARATA

"When the going gets weird, the weird turn professional."

—Hunter S. Thompson, *Fear and Loathing on the Campaign Trail*

Even outside the Capital Beltway, this has been a strange year. Those of us who handle labor and employment issues everyday often think we've seen it all—only to be proven wrong time and again. As April Fools' Day approaches, we pause to review some of the more bizarre labor and employment opinions and developments from the last year. They may be unbelievable, but they are also 100% authentic…

Oh, the Drama!

One cautionary tale reminds us that unchecked reality-TV-type behavior in the workplace can be more than a mere distraction.[1] In this case, the plaintiff was allegedly terminated in part due to her connection to ongoing "office drama." Her coworkers spread rumors that she had attended a meeting with the chief executive officer while wearing a revealing (*i.e.*, see-through) shirt but not a bra. The plaintiff conceded she was not fan of bras and did not wear one to that particular meeting. She disputed that she had shown the CEO her breasts, however, and reported the upsetting rumors to the corporate controller. Her employer allegedly did not support discipline against the coworkers and, instead, wrote up the plaintiff and then fired her, all within about three weeks of her complaint.

At the summary judgment phase, the district court noted the questions before it included whether the employer's consideration of "office drama" surrounding the plaintiff could support her claim for retaliation and whether the unwanted coworker gossip supported a claim for hostile work

1 *Baez v. Anne Fontaine USA, Inc.*, 2017 U.S. Dist. LEXIS 1630 (S.D.N.Y. Jan. 5, 2017).

environment. The court sided with transparency, and the plaintiff, on both issues. Indeed, the court found that these facts were sufficient for the plaintiff's claims to survive—though (ahem) barely.

Onions and Flying Spaghetti Monsters

Oscar Wilde once wrote that "truth, in matters of religion, is simply the opinion that has survived." Two recent federal court opinions explored the sensitive boundaries of what constitutes a "religion" for purposes of accommodations. In the first case, out of Nebraska, an inmate sued prison officials for failing to accommodate his religion.[2] The inmate belonged to the Church of the Flying Spaghetti Monster ("FSMism"). As a self-proclaimed Pastafarian, he claimed, among other things, entitlements to wear full pirate regalia while proselytizing, to a seaworthy vessel, to treat Fridays as holidays, and to wear a "Colander of Goodness"—that is, an actual colander—on his head.[3] Facing the question of whether plaintiff's beliefs were entitled to protection as a religion, the court focused on three factors: (1) whether FSMism "addresses fundamental and ultimate questions having to do with deep and imponderable matters"; (2) whether FSMism is "comprehensive in nature," resembling a "belief-system as opposed to an isolated teaching"; and (3) whether FSMism could be recognized by "certain formal and external signs." The court held that FSMism did not need to be treated as a genuine religion by prison officials because it failed to satisfy these criteria.

A New York court came to a different conclusion when considering Title VII discrimination claims brought by the EEOC on behalf of employees of an employer that allegedly endorsed a program known as "Onionhead"[4] or "Harnessing Happiness."[5] The CEO instituted the program, which his aunt created, to serve as a multi-purpose conflict resolution tool. Employees objected to forced participation, however, because materials included references to God, demons, Satan, purity, and miracles. Evidence also showed employees were told to burn candles and incense to cleanse the workplace, and to chant or pray in their workplace. The New York court did not follow the Nebraska court's three-factor test, which is disfavored in the Second Circuit. Instead, the court asked whether a jury could find that: (1) the employer's belief in Onionhead was sincere; and (2) whether that belief is, in "the believer's own scheme of things, religious." Under that standard, the court readily found that Onionhead was religious in nature and allowed the plaintiffs' claims to proceed.

Beware the Mark of the Beast

A jury in West Virginia addressed yet another memorable religious accommodation claim.[6] There, the plaintiff, who had worked at a coal mine for 35 years, refused to comply with a new policy at the mine—requiring employees to "clock-in and clock-out using a biometric hand scanner." The plaintiff requested a religious exemption to this policy, asserting he "feared damnation from its use." Specifically, the plaintiff believed the scanner "was part of an identification system and collection of personal information that would be used by the . . . Antichrist, as described in the New Testament Book of Revelation, to identify his followers with the 'mark of the beast.'" The employer denied his request even though an alternative had been

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2 *Cavanaugh v. Bartelt,* 2016 U.S. Dist. LEXIS 48746 (D. Neb. Apr. 12, 2016); see Darren E. Nadel & William E. Trachman, Claims to Accommodate Flying Spaghetti Monster-ism Hit the Wall in Nebraska Court, Littler Insight (Apr. 25, 2016).

3 Perhaps disappointingly, no pasta appears to be eaten in FSM ritual, though colanders are commonly associated with draining pasta. FSMism developed out of opposition to the teaching of intelligent design in public schools. FSMism's original proponent argued that it is just as likely that a Flying Spaghetti Monster set the universe in motion as it is that God did so.

4 "Onionhead," of course, should not be confused with the 1957 Andy Griffith movie, or the notorious drug dealer of the same name who operated in the 1980's in Manhattan's Chinatown. There is no apparent nexus to *Eraserhead*.

5 *U.S. Equal Opportunity Emp't Comm'n v. United Health Programs of Am., Inc.,* 2016 U.S. Dist. LEXIS 136625 (E.D.N.Y. Sept. 30, 2016); see Darren E. Nadel & William E. Trachman, *Company Practices "Onionhead"—Employees Cry Reverse Religious Discrimination*, Littler Insight (Oct. 13, 2016).

6 *U.S. Equal Opportunity Emp't Comm'n v. Consol Energy, Inc.,* 2016 U.S. Dist. LEXIS 15475 (N.D. W. Va. Feb. 9, 2016). The defendant-employers have appealed.

developed, and threatened discipline (including discharge) if he repeatedly missed hand scans. After being assured this policy would be enforced against him, the plaintiff retired.

At trial, the jury concluded the employer failed to reasonably accommodate the plaintiff's sincerely-held religious belief that the scanner was immoral and represented "a showing of allegiance to the Antichrist." The jury also found the employers had constructively discharged the plaintiff. The court denied the employer's post-trial motion, upholding the jury's verdict and (beastly) award of nearly $600,000.

You Should Have Listened to Your English Teacher (or "The Milk Man Cometh")

Excitement understandably runs amok in overtime pay cases, and discourses on punctuation. No issue thrills grammar aficionados belonging to Garrison Keillor's Professional Organization of English Majors ("P.O.E.M.") more than the ongoing (never-ending?) debate over use of the Oxford comma. The "Oxford" or "serial" comma refers to the use of a second comma when reciting a list of three or more items.[7] Proponents of the Oxford comma insist that it adds clarity—and an appellate court recently agreed.

The case, which NPR discussed in a full-length feature, involved claims for unpaid overtime compensation brought by dairy delivery drivers.[8] Their employer argued an exemption in the state wage and hour law applied to the drivers, such that they were not entitled to payment for overtime. The exemption covers employees who perform work in "canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of . . . perishable foods."[9] The employer interpreted this exemption as applying to workers who pack perishable foods and, separately, to workers who distribute such items, such as the drivers. The drivers, on the other hand, contended that the exemption extends to individuals who work in "packing" that is undertaken in preparation "for shipment or distribution" of perishable foods.

Upon awakening, the court explained, "if that exemption used a serial comma to mark off the last of the activities it lists, then the exemption would clearly encompass any activity that the drivers perform." In the absence of the Oxford comma, however, the statute was ambiguous. And, given that ambiguity, the court employed its default rule of construction, favoring liberal interpretation of wage and hour laws to effectuate their beneficial, remedial purposes. The court therefore adopted the drivers' narrower interpretation of the exemption and reversed the lower court's ruling for the dairy. The court held that "[i]f the drivers engage only in distribution and not in any of the stand-alone activities . . . [they] fall outside of the [exemption's] scope and thus within the protection of the Maine overtime law."

No commas were harmed in the making of this opinion.

We're Just Here for the Food

There are certain industries that tend to generate misclassification claims, where workers contend they are treated erroneously as independent contractors when they should be treated as employees. For whatever reason, exotic dancers are one such group that frequently brings misclassification actions—earning careful scrutiny from the judiciary.

In a case last year, an Ohio federal court assessed whether the plaintiffs, two exotic dancers, had been misclassified by their so-called "employers," an adult nightclub known as The Brass Pole and its owner.[10] Using the "economic realities" test approved in the Sixth Circuit, the court considered numerous factors, including, among other things, the degree of skill involved for plaintiffs to perform their work, the plaintiffs'

7 For example, the Oxford comma appears between "dork" and "or" in the following sentence: *I dream about the Oxford comma, and I don't mind at all if you call me a dweeb, a dork, or a geek.*

8 *O'Connor v. Oakhurst Dairy*, 2017 U.S. App. LEXIS 4392 (1st Cir. Mar. 13, 2017).

9 Me. Stat. tit. 26, § 664(3)(F).

10 *Lester v. Agment LLC*, 2016 U.S. Dist. LEXIS 52916 (N.D. Ohio Apr. 20, 2016).

opportunity for profit or loss, the degree of control exercised by the nightclub management, and whether plaintiffs' services were integral to The Brass Pole's business. Although the defendants contested each factor, the court was not convinced.

Concerning the opportunity for profit or loss, for example, the court found that the evidence clearly showed the defendants bore the risk. The court reasoned that the defendants played the bigger role in drawing customers because they "chose the location of the business, set the business hours, maintained the facilities and aesthetics, maintained the inventory of food and beverages, and advertised." And, as for whether the dancers' work was integral to the nightclub, the defendants implied the plaintiffs' contribution to the enterprise was minimal. That position got a rise out of the court, which pointed out "[d]efendants have offered no evidence as to how exotic dancers were not an integral part of a bar doing business as 'The Brass Pole' and where exotic dancers performed at the club every night that it was open." The court ultimately granted summary judgment in the plaintiffs' favor, holding "[n]o reasonable juror could conclude that customers primarily came to the club for its other offerings, which included beer, liquor, and frozen burgers from Sam's Club."

An Arizona appellate court reached a similar conclusion in a workers' compensation case.[11] There, the claimant was not an exotic dancer but regularly worked for a company that sold custom wrestling videos. Customers of the business selected female models/performers to appear in the videos, along with the length and the wrestling techniques to be featured. The claimant, who worked several days a week for the business, was injured during filming and sought workers' compensation. The court focused on the company's right to control the claimant's work in determining whether she was an employee or an independent contractor and, thus, whether she was entitled to benefits. The record demonstrated that the business supplied all of the equipment, including "the wrestling ring, the cameras, the costumes worn by the models/performers—30 to 40 bikinis and 20 one-piece suits—and various props used in filming the videos." Moreover, the business owner directed the videos, taught the wrestling techniques, instructed the claimant what persona to portray, dictated her hair color, and relied on the models/performers for his operation. In light of this evidence, the appellate court affirmed the underlying decision that the business exercised control over the claimant's work, rendering her an employee.

You Can Make Me Work, But You Can't Make Me Like It

Section 7 of the National Labor Relations Act—which generally applies to both unionized and non-unionized non-supervisory employees working in the private sector—grants employees "the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."[12] In recent years, the National Labor Relations Board ("Board") has become increasingly critical of workplace rules or policies that dissuade non-supervisory employees from exercising their rights to advance their mutual aid or protection. From the employer's perspective, one recent case exemplifies how the Board has stretched this proposition too far.[13] This time, the Board assailed what Friedrich Nietzsche once called "that roguish and cheerful vice, politeness."

In the case, the hospital terminated the employment of two nurses following investigation into communication problems, which were identified as issues contributing to a scenario resulting in a patient's death. The hospital terminated their employment after learning they had exhibited negative, intimidating, and bullying behavior toward other nurses.

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11 *Percy v. Industrial Comm'n of Ariz.*, 2017 Ariz. App. Unpub. LEXIS 248 (Ariz. Ct. App. Mar. 7, 2017).

12 29 U.S.C. § 157.

13 *William Beaumont Hosp.*, 363 N.L.R.B. No. 162 (Apr. 13, 2016).

The administrative law judge and the Board found several terms of the hospital's code of conduct unlawful and repressive. Specifically, the Board took issue with the policy's prohibitions on conduct:

- that "impedes harmonious interactions and relationships";
- such as "[v]erbal comments or gestures directed at others that exceed the bounds of fair criticism";
- including "[n]egative or disparaging comments about the moral characters or professional capabilities of any employee or physician made to employees, physicians, patients, or visitors"; and
- such as "behavior that is . . . counter to promoting teamwork."

Despite the seemingly innocuous, commonsense nature of these rules designed to promote polite discourse, the Board struck the provisions as illegal because employees "would reasonably construe the language to prohibit Section 7 activity."

The Dude, from the Coen brothers' *The Big Lebowski*, might have remarked: "yeah, well, that's just, like, your opinion, man."

In an actual dissent, however, Member Philip Miscimarra—now the Acting Chairman—more eloquently urged the Board to abandon this approach. He argued that "reasonable work requirements have become like Lord Voldemort in *Harry Potter*: they are ever-present but must not be identified by name" lest they be stricken. He encouraged a more tempered approach, which would drop the assumption that facially-neutral rules "operate, first and foremost, to extinguish . . . protected activity" and recognize that workplace policies may have legitimate purposes.

You Want Paid Leave for What?

Finally, we draw your attention to a couple novel proposals for leave time, both of which might come into play for employees hoping to expand their families.

First, a town in Sweden is considering a measure to boost the local birthrate.[14] Officials in Overtornea proposed legislation that would provide one hour of paid break time each week for all municipal employees to go home and attempt procreation. Supporters of the bill argue that granting employees such leave time would nourish intimacy in couples, improve employee morale, and reduce stress. Detractors point out that it would be impossible to enforce such a policy, may not be the best use of taxpayer funds, and is potentially intrusive and embarrassing. Moreover, according to one opponent, one hour simply would not be enough time to . . . fulfill the purposes of the leave.

Second, employees of a Scottish brewery are treated to another special leave benefit.[15] BrewDog, which is scheduled to open its first U.S. location in Ohio this year, offers one week of paid "paw-ternity" leave to employees worldwide. This "puppy parental leave" is available for employees who need to care for and bond with new puppies or adopted rescue dogs. In implementing the policy, the brewery acknowledged that it can be tricky to juggle both work and caring for a furry, four-legged arrival. It also allows both staff and patrons to bring their pooches to all bar locations. The new policy has been praised by dog lovers everywhere, though Grumpy Cat and the offspring of Mr. Bigglesworth have retained counsel.

And, with that, we wish you a very Happy April Fools' Day! Without a doubt, truth is stranger than fiction, or, as the venerable Hunter S. Thompson wrote, "it never got weird enough for me."

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14 Dan Bilefsky & Christina Anderson, *A Paid Hour a Week for Sex? One Swedish Town Considers It*, N.Y. Times, Feb. 24, 2017, at A6.

15 BrewDog, *Dog Days: Taking Time Out for Paw-ternity Leave*, BrewDog Blog (Feb. 13, 2017), https://www.brewdog.com/usa/lowdown/blog/dog-days.