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CLIENT ALERT

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Second Circuit Clarifies What Must Be Alleged to Establish "Joint Employer" Liability in the Context of Federal Employment Discrimination Claims

The "joint employer" doctrine has been used with increasing frequency by the plaintiffs' bar to broaden the scope of target defendants in discrimination cases beyond those who would be traditionally regarded as the employer. This is true even in the construction industry, which has seen a rise in cases where general contractors or construction managers are being targeted when discrimination is alleged on a construction project, even when the GC or CM is far removed from the underlying events and had no control over the employees in question.

Until now, the Courts in the federal circuit which includes New York City (the Second Circuit) have been left to decipher a patchwork of case law to ascertain the scope and extent of joint employer liability in discrimination cases. This week, the Second Circuit Court of Appeals in *Felder v. United States Tennis Association, et al.*, 19-1094, issued a comprehensive decision which provides a helpful summary of what must be pled and proven to broaden liability under the joint employer theory in discrimination cases.

Felder involves discrimination claims by a security guard who worked for a contractor that provided seasonal security for the United States Tennis Association ("USTA"). In 2012, Felder alleged discrimination in the doling out of assignments for the U.S. Open, and his claims were settled. Four years later he began working for another security company, AJ Security, which also provided security for USTA events. Felder was assigned to work the U.S. Open for AJ Security in 2016, but he was allegedly denied the opportunity because the USTA rejected his credentials due to his past complaints about racial discrimination. Felder sued the USTA for race discrimination and retaliation, including claims that USTA was his joint employer.

The District Court dismissed his claims, and the Second Circuit affirmed the dismissal of most of his claims. However, the appeals court has decided to permit him one last chance to replead his retaliation claim using a joint employer theory, and has now sent it back to the District Court to allow this to occur. In reaching its decision, the Court recognized that "[a]lthough this Court has not previously identified a specific test for determining what renders an entity a 'joint employer' in a Title VII case, today we join our sister Circuits in concluding that non-exhaustive factors drawn from the common law of agency, including control over an employee's hiring, firing, training, promotion, discipline, supervision, and handling of records, insurance, and payroll, are relevant to this inquiry."

The Court held that a plaintiff who claims discrimination in not being hired must plead that if hired, he would have been more like a traditional employee of the putative employer than an independent contractor. The plaintiff must plausibly allege that the alleged employer would have exerted control over the terms and conditions of the anticipated employment by, for example, "training, supervising, and disciplining [him]."

The Court noted that Felder's complaint did not allege that USTA exerted any control over AJ Security's hiring process or that it would be involved in training him, supervising him, issuing his paychecks, or providing him a uniform. The Court recognized that Felder only alleged that USTA refused to give him credentials to work the U.S. Open, and that this was simply not enough to render the USTA a joint employer. As noted above, because Felder's attorneys persuaded the Court that they could cure the deficiencies in the complaint insofar as Felder was suing for retaliation, the Court was willing to give him another chance.

For employers seeking to avoid liability as a "constructive employer," the key takeaway from the Court's decision is to carefully limit control over the workforce of companies with whom you may contract. For instance, in the construction industry, it is imperative to limit the scope of any training, supervision, or discipline of another employer's workforce; to avoid paying directly other companies' employees; and to carefully document any interactions in this regard as well as the relative responsibilities of each party in your governing documents.

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