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You Be the Judge—Top Staffing Cases From 2016

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Tuesday, Oct. 25
11 a.m.–12:15 p.m.



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

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Risk Is Often Everywhere But Hard to Really See

-  Tort Liability
-  Exempt / Nonexempt
-  Restrictive Covenants / Trade Secrets
-  Joint Employment
-  FLSA

But What Is It Really Like?



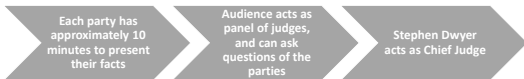


You Get to Decide



How This Time Will Work

- Will present three cases, time permitting
- Each side will be either plaintiff attorney or defendant attorney



- The audience will vote at the end of the proceedings, and Chief Judge will provide verdict
- Cases are adapted from actual cases. Attorneys will discuss the verdict and legal theory applied in the real-life version, and answer questions.

Let's Get Started!



Sexual Harassment or Not?



- To prove a hostile-work-environment claim, a plaintiff must establish the following elements: (1) he belongs to a protected group; (2) he has been subjected to unwelcome **sexual harassment**, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) the harassment was based on the protected characteristic; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis exists for holding the employer liable.

Deckard v. Off World Colony

- The Players
 - Off World Colony: steel-processing company with a facility in Fairfield, Alabama
 - Rick Deckard: Temporary worker brought in to work on a line where he banded steel coil products together so they would not unravel

The Key Facts

Deckard alleged a co-worker hugged him and touched his buttocks three times in a row while stating "Good job, good job." There were no witnesses.

Deckard reported the incident, and management agreed to move Deckard to a different department, instruct the co-worker to not have any contact with Deckard, and to investigate the incident.

Two days later Deckard worked overtime and the co-worker was working. Deckard informed the manager he did not want to be around the co-worker, and the manager agreed to have Deckard work with him (the manager) instead.

At some point Deckard was alone and kneeling down while working, and he alleges that the co-worker came over, grabbed his head, and made three pelvic thrusts in his face.

Deckard packed up his gear, informed the staffing company of the issue (but not the employer), left, and did not come back. The Company investigated both incidents. The co-worker was disciplined for initiating contact (he admitted to the hug), but harassment could not be substantiated.

What Happened?

- Deckard sued Off World Colony for hostile work environment, constructive discharge, and additional state claims. Off World Colony filed for summary judgment.

The Issue and Law

The Issue

- Was Deckard subjected to a hostile work environment?

The Law

- The Law:(3) the harassment was based on the protected characteristic; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis exists for holding the employer liable.

The Verdict



Smith v. Bouncer Inc.

• The Players

- Bouncer, Inc.: security staffing firm.
- First Bank: company that entered into a staffing agreement with Bouncer, Inc.
- Nancy Smith: 83 year old employed by Bouncer and placed as a receptionist at First Bank.

The Key Facts

Smith worked as a receptionist at one of First Bank's offices. First Bank requested that Smith be removed from the worksite because she was "unable to perform new technology-related tasks." Without investigation, Bouncer removed Smith, who was replaced by a 29 year-old employee.

Bouncer then terminated Smith's employment after determining there were no other positions she could fill. Smith sued Bouncer and First Bank for age discrimination.

What Happened?

- First Bank settled with Smith, leaving Smith and Bouncer as the remaining parties.
- Bouncer obtained summary judgment from the District Court on Smith's age discrimination claims; Smith appealed to the Fifth Circuit.

Smith v. Bouncer, Inc.



- Should Bouncer, Inc., as a staffing agency, have known about its client's (First Bank's) potentially discriminatory transfer request?
- Can the fact that Bouncer failed to follow its usual practice of investigating employee removal requests support Smith's argument that Bouncer should have known about First Bank's alleged discriminatory practices?
- Was Bouncer, Inc. Smith's "employer" for the purposes of the ADEA?

The Verdict



Bluto v. Faber Residential Co.

• The Players

- Faber Residential Co.: A company that owns several residential properties and developments.
- Wormer Staffing: staffing company that contracts with senior living communities to provide service coordinators and employees who work directly with residents.
- Janice Bluto: an employee of Wormer Staffing.

The Key Facts

Wormer Staffing had a contract with Faber Residential to provide service coordinators and other employees who worked directly with senior citizens living at Faber Residential. Wormer Staffing hired Bluto to be a service coordinator at one of Faber Residential's living communities.

In Bluto's employment agreement with Wormer Staffing, she expressly agreed that a company she was providing services for (through her employment with Wormer Staffing) could request that she be removed from the job site. In the agreement, Wormer Staffing also reserved the right to terminate her employment.

While working at the Faber Residential job site, Bluto called her supervisor at Wormer Staffing and Faber Residential's HR Dept. and reported that a Faber Residential maintenance worker had shown her non-work appropriate anatomical pictures on his phone.

Faber Residential investigated the matter and fired the maintenance worker, but also asked Wormer Staffing to remove Bluto from the site based on reports of her inappropriate conduct with the offending maintenance worker. Wormer Staffing then terminated Bluto's employment.

What Happened?

- Bluto sued Faber Residential and Wormer Staffing for sexual harassment and retaliation.
- Faber Residential argued that it was not Bluto's employer and therefore could not be held liable.

Bluto v. Faber Residential

The Issue

- Did Faber Residential exercise sufficient control over Bluto's terms and conditions of employment, such that it was Bluto's joint employer and could be held liable for violations of Title VII?
- Did Bluto's removal from the Faber Residential job site and subsequent termination of her employment with Wormer Staffing constitute retaliation?

The Verdict



Granger v. Firebolt Auto Indus. of Am.

• The Players

- Rose Granger: hired by ABC Employment Agency to work at Firebolt Auto Industry of America
- ABC Employment Agency: temporary employment agency
- Firebolt Auto Industry of America: manufacturer of doors, fenders and other automotive parts

Key Facts

Granger was hired by ABC Employment to work at Firebolt. ABC and Firebolt each exercised control over Granger's employment. ABC paid, and provided a uniform to Granger, and had control over discipline and termination decisions. Firebolt determined Granger's work schedule and arranged job training. Firebolt supervised Granger while she was at work.

Granger claimed that her Firebolt supervisor verbally and physically harassed her at work. Granger reported the harassment to both ABC and Firebolt. A few days later, Granger's supervisor implied she could save her job if she performed sexual favors for him. Granger refused. Granger was terminated from Firebolt later that day.

Granger v. Firebolt Auto



- Did Firebolt exercise enough control over Granger to be liable as her "joint employer" under Title VII?
- Did the district court correctly apply the joint employment doctrine?

Granger v. Firebolt Auto



- Three tests to determine whether a joint employer relationship exists: economic realities test, the control test, and the hybrid test. Control is the most important factor under the hybrid test, but is not dispositive. The hybrid test combines parts of the economic realities test and the control test.
- Factors in the hybrid test include:
 - Type of occupation and whether the work requires a supervisor
 - Skill required
 - Location of work and who supplies the tools
 - Duration of assignment
 - Method of payment (time or per job)
 - Availability of vacation time
 - Payment of social security taxes
 - Intention of the parties
 - Whether the work is an "integral part" of the business of the "employer"
 - How the work relationship is terminated

The Verdict



Faust v. Sunrise Home Goods, Inc.

• The Players

- Luis Faust: an African-American employee of a staffing company
- Workers Plus: staffing company
- Sunrise Home Goods, Inc.: a closeout home-goods retailer

Key Facts

Faust was hired by Workers Plus and assigned to Sunrise Home Goods. A Sunrise supervisor accused Faust and other African-American temporary employees of stealing store merchandise and said that "white employees" wouldn't steal. Other Sunrise employees used racial slurs towards Faust and other African-American employees. Faust's supervisor at Sunrise refused to hear his complaints.

Workers Plus provided Faust with a time card and billed Sunrise for the hours Faust worked. Workers Plus set Faust's pay rate, and paid his wages and taxes. Sunrise supervised and directed Faust at work and provided safety orientation and training, as well as protective clothing and equipment necessary for his job. Workers Plus pulled any temporary employee that Sunrise complained about within the first two hours.

Faust v. Sunrise Home Goods, Inc.

The Issue

- Was Sunrise a joint employer of Faust?

The Law

- The *Darden* test: considers the hiring party's right to control the means and manner of work. Relevant factors include, but are not limited to: required skill; source of tools; location of the work; duration of the relationship; method of payment; whether the work is part of the regular business of the hiring party; and tax treatment of hired party.

The Verdict



Adams v. Corleone Paving & Excavating

• The Players

- Kay Adams: A temporary employee assigned by Clemenza, Inc. to work at Corleone Paving & Excavating
- Corleone Paving & Excavating: A construction company that does work including the laying of pipe inside trenches
- Clemenza, Inc.: A staffing firm

The Key Facts

Adams worked for four hours laying pipe inside a trench when the trench collapsed, causing serious injuries. Adams pursued and received worker's compensation benefits from Clemenza, Inc.

Adams sued Corleone Paving in a third-party action.

Adams v. Corleone Paving

The Issue

- Was Corleone Paving a joint employer of Adams?
- Was there worker's compensation (through Clemenza, Inc.) exclusivity?
- Did Corleone Paving's worker's compensation policy cover the accident?
- Did Corleone Paving's Commercial General Liability Policy apply?

The Verdict



Questions?



38

Thank You for Attending



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