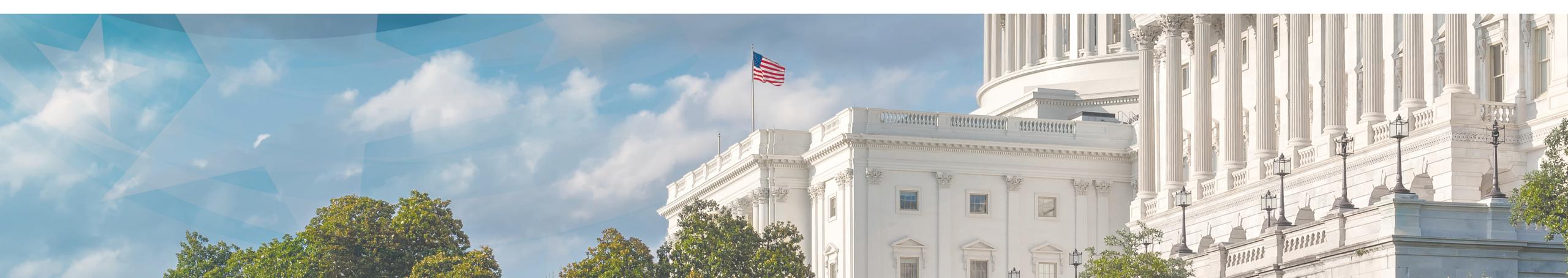


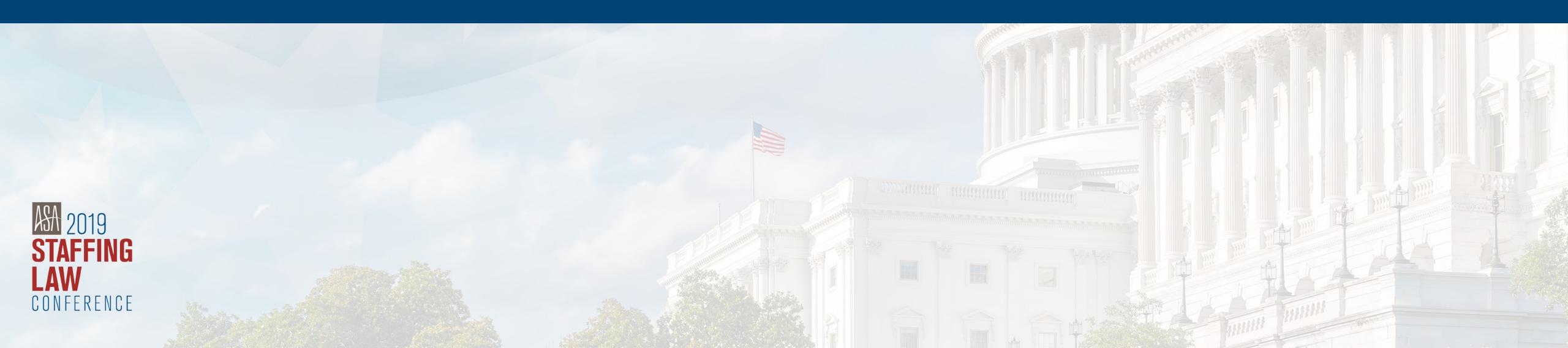
STAFFING LAW CONFERENCE



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YOU BE THE JUDGE—TOP STAFFING CASES FROM 2018





You Be the Judge—Top Staffing Cases From 2018

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How This Will Work

- The Attorneys will present their case for either the Plaintiff or the Defendant
- The Judge and/or Jury (i.e., you) will ask questions to clarify the facts
- The Jury will vote for either the Plaintiff's or Defendant's case
- The **Judge** will pronounce the verdict
- The Attorneys will explain the verdict on the basis of the legal theory applied in the real case
- The Judge and Attorneys will take questions



Case No. 1



Independent Contractor or Employee



The Players:

- Top-Tier Deviation: specializes in drilling oil wells
 In its operations, Top-Tier uses staffing firms to hire and pay directional drilling consultants ("DD") who advise the company on how to best effectuate the well drilling plan—primarily making drilling calculations.
- Vanish and similarly situated individuals: a DD and classified as an independent contractor



The Key Facts:

- The industry and work that Top-Tier is involved in is highly specialized.
- Top-Tier utilizes DDs that are independent contractors ("ICs") and DDs that are Top-Tier's own W-2 employees. The primary difference between the two classifications of DDs is that the ICs can turn down work and negotiate their pay.
- The IC DDs are paid on a per-job basis and also receive mileage to and from the job site. ICs are paid on a pay scale based on their experience.
- The employee DDs are paid a salary plus a bonus for each day they are on the job, a car allowance, a per diem, and other benefits. They cannot turn down a drilling project.



■ The Case:

- Vanish filed a Fair Labor Standards Act ("FLSA") collective action lawsuit against Top-Tier alleging that it misclassified him (and others similarly situated) as an independent contractor, and failed to properly compensate him for overtime.
- The district court held that the workers were employees; Top-Tier appealed.



■ The Issue:

• Were the DDs employees or independent contractors?

■ The Law:

- Under the FLSA, courts evaluate the "economic realities" of the relationship to determine whether an individual is an employee. Under this test, courts evaluate a list of nonexhaustive factors, which include
 - The degree of control the putative employer has over the manner in which the work is performed
 - The extent of the relative investments of the worker and the company
 - The degree to which the worker's opportunity for profit or loss is determined by the company
 - The degree of skill and initiative required to perform the job
 - The permanence of the relationship



You Decide



- The Decision:
 - The DDs were independent contractors, finding in favor of Top-Tier
- Reasoning:
 - Factors favoring employee status
 - Relative investments of workers and employer
 - Factors favoring independent contractor status
 - Degree of control exercised by employer
 - Degree to which workers' opportunity for profit or loss was determined by employer
 - Skill and initiative required in performing workers' job
 - Permanency of the relationship between workers and employer



Case No. 2



Impact of FMLA Leave on Termination



- The Players:
 - Taylor: temporary worker employed by Staffing Services Inc. and assigned to work at Insurance Co.'s facility as an analyst
 - Swift Co.: insurance company
 - Staffing Services Inc. ("Staffing Services"): staffing company



The Key Facts:

- Taylor requested and received intermittent Family Medical Leave Act ("FMLA") leave to care for her daughter and grandfather over a 15-month period.
- Taylor had performance deficiencies before and after she took leave and received performance counseling from both Swift Co. and Staffing Services.
- Several months after Taylor's FMLA leave concluded, she was terminated by Swift
 Co. when a performance audit showed significant continued deficiencies.



■ The Case:

- Taylor sued Swift Co. and Staffing Services under the FMLA for interference with her rights and for discrimination and retaliation.
- Taylor claimed that Swift Co. unlawfully terminated her employment after she exercised her rights under the FMLA, and that Staffing Services refused to place her with another company.



■ The Issue:

 Did Taylor show that Swift Co. and Staffing Services viewed her FMLA leave negatively when they terminated her and failed to provide her with another assignment?

■ The Law:

• To determine whether plaintiff asserts an interference or a retaliation claim under the FMLA, they must show that the defendant considered FMLA leave and request to return a negative factor in its decision to terminate them.



You Decide



■ The Decision:

• Taylor did not prove that Swift Co. or Staffing Services considered her use of FMLA leave as a negative factor in their decision to terminate her and to not provide her with another placement.

Reasoning:

- Swift Co. had granted Taylor leave without objection every time she asked for it and had even offered her more leave than she used.
- Staffing Services had advised her that it had no subsequent jobs available, and Taylor stopped calling to inquire about available work.



Case No. 3



Enforceability of Arbitration Provision for FLSA and NLRA Claims



The Players:

- Daffy: employed by Looney Tunes Staffing, and works from home for a consulting firm as a virtual call center support provider
- Looney Tunes Staffing ("Looney Tunes"): provides outsourcing and consulting services to companies around the world



The Key Facts:

- Daffy spent time logging on to the employer's computer application so he could perform his job and also spent time solving technical connection problems and logging off the network.
- These activities extended his total work time beyond 40 hours during most weeks.
- Daffy alleges he (and 1,600 other co-workers) was not compensated for his time spent doing these tasks.



■ The Case:

ASA 2019

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- Daffy initiated a Fair Labor Standards Act ("FLSA") claim against Looney Tunes alleging that he was not properly paid for the time it took him to log in and out of the employer's network and for fixing technical problems.
- More than 1,600 other temporary workers opted into the litigation, approximately half of whom had signed Looney Tunes' arbitration agreement requiring wage and hour claims to be arbitrated on an individual basis.
- Looney Tunes moved to compel individual arbitration for those workers who had signed arbitration agreements.
- The district court denied Looney Tunes' motion to compel arbitration and found that the arbitration agreements violated both the National Labor Relations Act ("NLRA") and the FLSA.

- The Issue:
 - Do the FLSA or NLRA trump the Federal Arbitration Act?
- The Law:
 - A federal statute does not trump the Federal Arbitration Act unless it includes a "clear and manifest" congressional intent to make individual arbitration agreements unenforceable.



You Decide



■ The Decision:

 The court compelled arbitration for the workers who had signed individual arbitration agreements.

Reasoning:

- While the case was on appeal, the U.S. Supreme Court rendered its decision in *Epic Systems Corp. v. Lewis*, holding that the NLRA does not prevent the use of arbitration agreements, with class and collective action waivers, covered by the Federal Arbitration Act.
- Relying on the Supreme Court's reasoning in *Epic Systems*, the court held that a statute must expressly invalidate the use of arbitration agreements and that the FLSA does not expressly prevent the use of arbitration agreements.



Case No. 4



'Willful' Violation of the FLSA



■ The Players:

- Dark Knight LLC: staffing company
- Harvey Dent: employee who worked for Dark Knight LLC who processed payroll and issued paychecks
- Gotham Co.: contracted with Dark Knight LLC and located people to work at various companies
- Wayne Enterprises: company where Gotham Co. placed individuals to work
- Secretary of Labor: government official who brought this action



The Key Facts:

- Wayne Enterprises tracked its employees' hours in a spreadsheet and sent this to Gotham Co., which would then send it to Dark Knight LLC.
- The spreadsheets indicated overtime hours for a number of workers, but Wayne Enterprises told Gotham Co. that all hours should be paid at straight time.
- When Harvey Dent raised the issue of overtime, Gotham Co. instructed Dark
 Knight LLC to pay straight time in accordance with Wayne Enterprises' instructions.
- Dark Knight LLC complied with Wayne Enterprises' instructions and did not pay overtime to its employees over 1,000 different times.



■ The Case:

- The Secretary of Labor moved for summary judgment and argued that Dark Knight LLC engaged in repeated willful violations of the FLSA.
- Dark Knight LLC contended its undisputed violations of the FLSA could not qualify as willful because it is a very large company that cannot be expected to always comply with the FLSA and because the relevant violations were the result of negligence by low-level employee Harvey Dent.



- The Issue:
 - Were Dark Knight LLC's violations of the FLSA willful?
- The Law:
 - An employer acts willfully if it is aware of its obligations under the FLSA and takes no affirmative action to ensure compliance with them.



You Decide



Secretary of Labor v. Dark Knight LLC

The Decision:

Dark Knight LLC acted willfully in violation of the FLSA.

Reasoning:

- Dark Knight LLC failed to question the legality of Wayne Enterprises' instructions and ignored its own payroll-software program's warnings that overtime wages were owed.
- Dark Knight LLC took no affirmative action to ensure that payroll processing was correct.
- The court rejected Dark Knight LLC's arguments that a low-level employee, Harvey Dent, was at fault and that the violations only made up a small percentage of the total payments.



Case No. 5



FLSA Outside Sales and Combination Exemptions



- The Players:
 - Leslie and Ann: two employees who worked for Interstellar LLC
 - Interstellar LLC: staffing company



The Key Facts:

- Leslie and Ann spent about half their time making sales and doing sales-related tasks.
- Both spent some time engaging in "matchmaking" tasks that involved the exercise of discretion and independent judgment.
- Interstellar LLC classified both employees as exempt.



■ The Case:

- Interstellar LLC brings a renewed motion for summary judgment alleging that two of its employees were exempt employees under the FLSA.
- The district court found that the two employees were exempt because they met the administrative exemption.
- The appeals court found that the employees did not meet the administrative exemption because their administrative duties were not their primary duties.
- The appeals court remanded the case to the district court.



■ The Issue:

- Do the employees meet the outside sales exemption?
- Do the employees meet the combination exemption?

■ The Law:

- The outside sales exemption applies to an employee whose primary duty is making sales or obtaining orders or contracts for services and who is customarily and regularly engaged away from the employer's place of business when performing such duties. Any work that furthers the employee's sales efforts is regarded as exempt work.
- The combination exemption applies to an employee whose primary duties involve a combination of exempt duties.



You Decide



The Decision:

 The two employees qualified as exempt under both the outside sales and the combination exemptions.

Reasoning:

- The court found that, based on the amount of time the employees devoted to sales and sales-related activities (greater than 50% of their time), the employees' primary duty was sales and thus they qualified for the outside sales exemption.
- The employees further qualified for the combination exemption because they also performed exempt administrative duties by matching candidates with clients, and their sales and matchmaking duties made up the majority of their work.



Case No. 6



Religious Accommodation



- The Players:
 - Muslim Employees: 14 employees who worked for Dunder Mifflin in a warehouse and who were practicing Muslims
 - Dunder Mifflin: logistics company



The Key Facts:

- The Muslim employees claimed that, after the area in the warehouse where they prayed during break times was converted into an inventory and forklift space, they were not provided reasonable alternative sites for prayer.
- Although Dunder Mifflin managers proposed the breakroom, the lobby, and other locations outside the warehouse, the workers claimed the alternative sites lacked a sufficient measure of cleanliness, were not isolated from noise, and were not large enough spaces to pray.
- The Muslim employees walked off the job after not being able to pray.
- Dunder Mifflin later cleared a space in the breakroom and put up curtains to provide privacy for workers when they were praying.



■ The Case:

- The Muslim employees brought claims under Title VII for religious discrimination, based on a failure to accommodate, and for retaliation.
- Dunder Mifflin moved for summary judgment.



■ The Issue:

- Did Dunder Mifflin make a reasonable attempt at providing a religious accommodation for the Muslim employees?
- Did Dunder Mifflin retaliate against the Muslim employees?

■ The Law:

- Employees must show (along with two other elements not at issue in this case) that they were discharged or disciplined for failing to comply with the conflicting employment requirement.
- If the employees establish this (along with the two other elements), then the employer has the burden to show that it could not reasonably accommodate the employees without undue hardship.
- Undue hardship exists when the employer bears more than a de minimis cost in order to accommodate an employee's religious beliefs.



You Decide



■ The Decision:

• The court determined that Dunder Mifflin was not entitled to summary judgment on the religious accommodation claim or the retaliation claim.

Reasoning:

- The court held that a jury should decide if Dunder Mifflin made a reasonable attempt at accommodating the Muslim employees' religious beliefs.
- The court also held that a jury should decide if the accommodation was an undue burden on Dunder Mifflin.
- The court further held that a jury should decide whether the Muslim employees voluntarily abandoned their jobs, or whether Dunder Mifflin discharged the Muslim employees in connection with their demand to pray in a suitable location.



Questions?

