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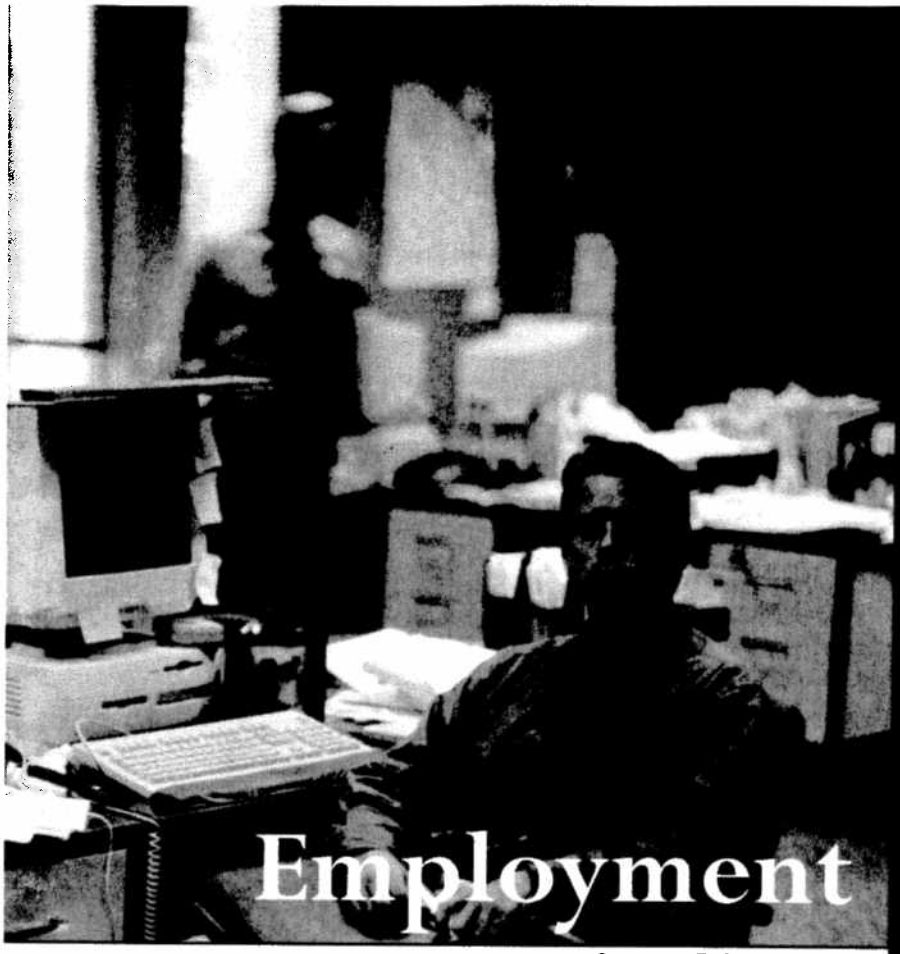

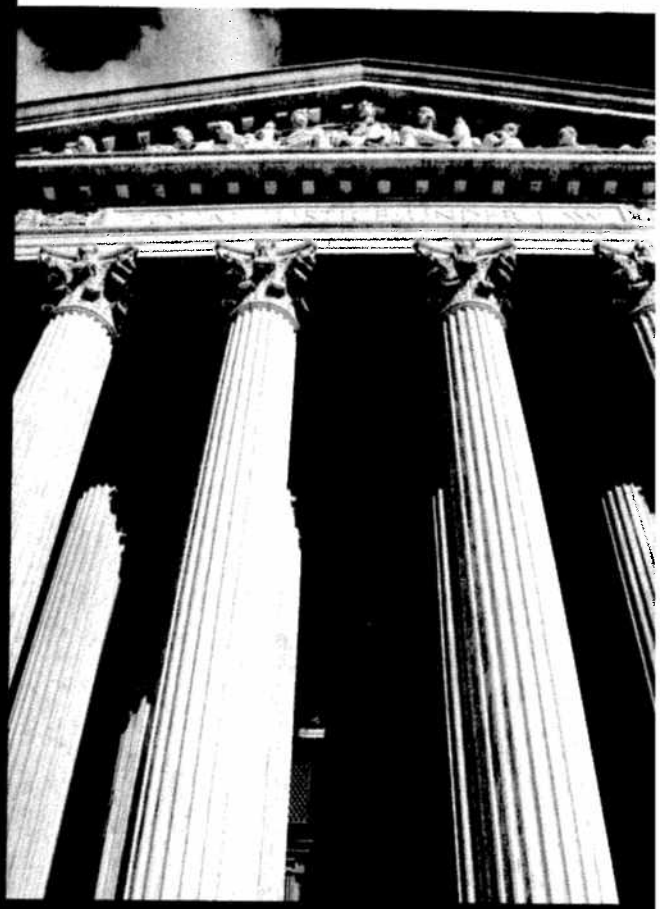

Employment Law Briefing

Insights on Legal Issues in the Workplace

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Employers flout overtime-pay rules at their peril

The Fair Labor Standards Act (FLSA) requires employers to pay most types of employees time and a half for all hours worked over 40 weekly. But the FLSA exempts bona fide executive employees. Does merely labeling a job as "managerial" exempt a worker from overtime-pay requirements? An employer learned — the hard way — that mere labels weren't enough to get it off the hook under the FLSA in *Damassia v. Duane Reade Inc.*

Clerks or managers?

Employees qualify for the executive exemption if they:

- Are paid on a salary basis (as defined in the rules) not less than $455 weekly,
- Primarily manage an enterprise or manage an enterprise's customarily recognized department or subdivision,
- Customarily and regularly direct the work of at least two other full-time employees or their equivalent, and
- Are authorized to hire or fire other employees or if management must give their suggestions and recommendations particular weight as to the hiring, firing, advancement, promotion or any other change of other employees' status.

In *Damassia*, a drugstore chain denied overtime pay to night stock clerks by calling them "assistant night managers." Two stock clerks sued the chain in federal court, alleging it schemed to underpay them by using deceptive titles to falsely imply that they were executives. The chain moved to dismiss, claiming the clerks' claims were barred because:

1. The statute of limitations for *nonwillful* violations had run, and
2. The three-year statute of limitations for *willful* violations didn't apply because the clerks hadn't adequately pled willfulness.

Unpersuaded, the court found without merit the chain's argument that the clerks had failed to adequately allege willfulness. The court conceded that a complaint may not rest on mere "legal conclusions, deductions or opinions couched as factual allegations." But an employer violates the FLSA "willfully" when it knows its actions are unlawful or when it acts with reckless disregard as to whether its actions are unlawful.

> *An employer violates the FLSA "willfully" when it knows its actions are unlawful or when it acts with reckless disregard as to whether its actions are unlawful.*

Willful or nonwillful?

Thus, "willfulness" is not a legal conclusion but rather a factual state of mind that can be pleaded generally under the Federal Rules of Civil Procedure. Moreover, the complaint provided ample factual detail by specifically stating the kind of work the clerks were required to do. Furthermore, the complaint alleged that classifying stock clerks as exempt executives was part of the chain's "policy and pattern or practice," that the chain was aware of the FLSA provisions, and that it intentionally designated the clerks as managers to avoid overtime pay.

The court concluded it couldn't imagine what further "facts" the clerks could allege to establish willfulness, because they had "clearly" asserted that the chain had acted "willfully, with full knowledge of what the law required, full knowledge that

its conduct violated the law, and indeed with the deliberate and devious intention of mislabeling their employees to cover up the violation." Accordingly, the court denied the dismissal motion in its entirety.

Audited and approved?

The court also rejected the chain's defense that the Department of Labor (DOL) had previously "audited" its employment practices and approved denying overtime pay to stock clerks. The court found that three letters from the DOL that the chain relied on either:

1. Concerned the chain's payment of civil penalties assessed earlier for child-labor violations, or
2. Threatened further action owing to the chain's failure to submit proof that it had paid these penalties.

The court found that the DOL letters failed to provide any details about the investigation's scope and discussed no findings other than the specific violations that led to the penalties. The letters provided no basis for concluding that the DOL had reviewed or approved the chain's practice of exempting "assistant night managers."

Burden on employers

Employers should be aware that failure to pay overtime rates to nonexempt employees who work more than 40 hours weekly violates the FLSA. Employers have the burden of proving that they meet all exemption criteria under the act. Giving employees managerial-sounding titles or paying them salaries will not suffice to establish overtime-pay exemptions.

Other FLSA exemptions

In addition to exempting executives from overtime pay, the Fair Labor Standards Act (FLSA) also exempts bona fide administrative and professional employees. Here's how to determine exemptions:

Administrative exemption. **Employees qualify for the administrative exemption if they:**

- **Are paid on a salary basis (as defined in the rules) not less than $455 weekly,**
- **Primarily perform office or nonmanual work directly related to the employer's (or the employer's customers') management or general business operations, and**
- **Primarily perform duties that include exercising discretion and independent judgment regarding significant matters.**

Professional exemption. **These exemptions come in two types: learned and creative. To qualify for the *learned* professional employee exemption:**

- **An employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 weekly,**
- **An employee's primary duty must be to perform work requiring advanced knowledge — defined as work that is predominantly intellectual and requires the consistent exercise of discretion and judgment,**
- **The advanced knowledge must be in a science or learning field, and**
- **The advanced knowledge must be acquired customarily by a prolonged course of specialized intellectual instruction.**

To qualify for the *creative* professional employee exemption:

- **An employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 weekly, and**
- **An employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized artistic or creative field.**

Draft releases carefully when laying off workers

To avoid lawsuits when laying off workers, employers often deny severance pay unless the workers agree not to sue the employer. But poorly drafted agreements can result in discrimination lawsuits. A case in point is *Thomforde v. IBM*.

A two-part agreement

When IBM laid off an engineer as part of a permanent reduction in force, it offered him severance benefits for signing a two-part document in which he agreed:

1. To release IBM from all claims, demands, actions or liabilities related to his employment, and
2. Not to file any kind of claim against IBM except actions based solely on the Age Discrimination in Employment Act (ADEA).

The agreement provided that if he sued — except for ADEA suits — he'd have to pay IBM's legal fees.

IBM intended the agreement to release the engineer's substantive ADEA claims while preserving his right to challenge the release's validity through a lawsuit, as the Older Workers Benefit Protection Act's (OWBPA's) rules require. The engineer asked his supervisor whether the not-to-sue covenant's exception for ADEA claims meant that he could sue IBM if he limited his case to ADEA claims.

The supervisor referred the question to IBM's legal department. It sent the engineer an e-mail stating: "Regarding your question on the General Release and Covenant Not to Sue, the wording is as intended by IBM. The site attorney was not comfortable providing an interpretation for you and suggested you consult your own attorney." After meeting with his attorney, the engineer concluded that he could sign the agreement and still pursue age-discrimination claims as long as he limited them to ADEA claims.

An employer's failure to meet any OWBPA statutory requirement voids a waiver as a matter of law.

Suit filed and thrown out

The engineer sued for age discrimination, and IBM asked the court to throw out the suit without a trial, arguing that:

- The engineer — by signing the agreement and accepting severance benefits — had waived the right to pursue any claims against IBM,
- The engineer knowingly and voluntarily signed the agreement,
- The waiver conformed with OWBPA's specifications,
- The agreement was unambiguous,
- The agreement's covenant-not-to-sue portion was entirely separate from the release portion, and each portion performed different functions, and
- The not-to-sue covenant didn't "undo" his release of the ADEA claims but merely exempted him from liability for IBM's attorney fees to defend a suit.

The engineer alleged that he didn't knowingly and voluntarily waive his ADEA rights, because the agreement expressly

preserved his right to file ADEA charges. Moreover, the waiver didn't conform to OWBPA's requirement that it be written so that a person signing the agreement would understand it. The trial court threw out his ADEA claim, ruling that the agreement was enforceable because it was unambiguous on its face. The engineer appealed.

Knowing and voluntary

First, the Eighth Circuit found that OWBPA provides that a person may waive any ADEA right or claim only if the waiver is knowing and voluntary. A waiver may not be considered knowing and voluntary unless — at a minimum — it is part of an agreement between an employee and the employer that is written so that the employee or an average person eligible to participate can understand it. And an employer's failure to meet any OWBPA statutory requirement voids the waiver as a matter of law.

Next, the Eighth Circuit found that a release is the relinquishment, concession or giving up of a right, claim or privilege by the person in whom it exists to the person against whom it might have been demanded or enforced. And a not-to-sue covenant is a covenant by someone who had a right of action at the time of making it against another person by which he or she agrees not to sue to enforce the right of action.

Amorphous and obscure

Finally, the Eighth Circuit found that the legal differences between a release and a not-to-sue covenant are fairly amorphous and might not be readily apparent to a lay reader. Because IBM used legal terms of art in the agreement, it had a duty to carefully explain the provisions. Yet the agreement failed to explain the relationship between the release and the not-to-sue covenant. And IBM also used the terms so as to suggest that they were interchangeable, frequently referring to the entire agreement as the "release."

Thus, the Eighth Circuit was able to see how the engineer could construe the agreement to permit him to sue if he limited his complaint to ADEA issues. Because of the agreement's lack of clarity and IBM's failure to explain what its language meant, the court held that the agreement was not written so that the intended participants could understand it, as required by OWBPA. Because the release failed to satisfy OWBPA's statutory-waiver requirements, the court reinstated the case and sent it back to the trial court for further proceedings.

Too much and too little

In this case, IBM may have tried to do too much while at the same time doing too little. Was it really necessary to obtain a not-to-sue covenant when it already had a release? How likely would the employee have been to sue if he had signed the release without the covenant?

On the other hand, having chosen to put the release and the covenant in the agreement, IBM could have gone further to explain the interaction between the two provisions. Clearly, IBM's failure to answer the engineer's question didn't benefit IBM, but it gave the Eighth Circuit a strong basis for reversing the lower court. This case shows the difficulty of complying with OWBPA requirements.

Can employees be fired while on FMLA leave?

The question before the Eighth Circuit was whether a hospital violated the Family and Medical Leave Act (FMLA) by firing a registered nurse while she was on medical leave, without telling her that she was entitled to 12 weeks of leave. Let's see how the court settled this thorny issue raised by *Throneberry v. McGehee Desha County Hospital*.

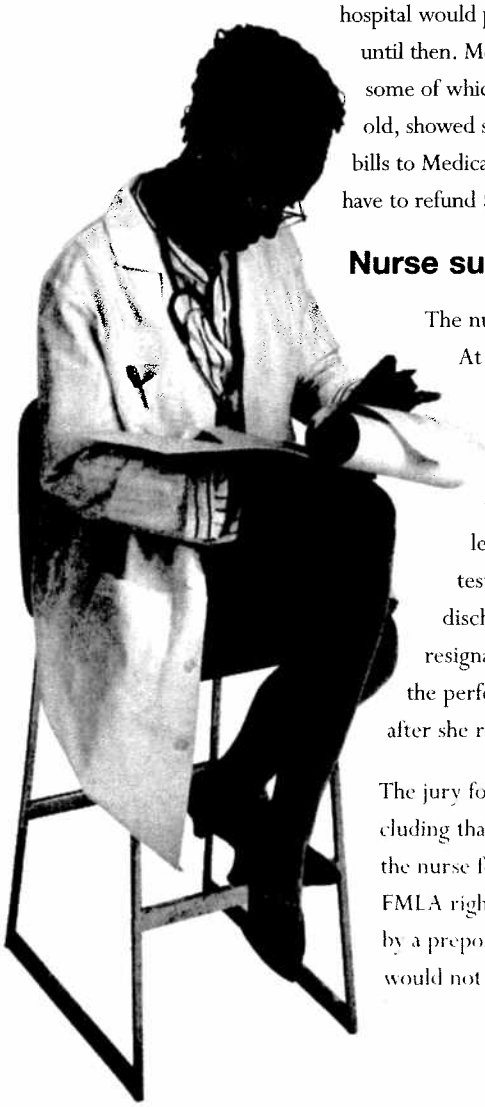
Problems pile up

The nurse had worked at the hospital for more than 10 years. During that time, the hospital gave her above-average performance reviews and increased her responsibilities.

But after her father died and she divorced, her mental health deteriorated to the point that it adversely affected her performance. She sometimes didn't come to work at all or left early to visit a casino, and she left important mail unread or didn't complete her work. Suffering a nervous breakdown, she began taking several prescription drugs.

A few months later, the nurse's mental and emotional problems came to a head. She had difficulty concentrating and completing tasks, and nearly anything could make her cry. After several tumultuous days, the hospital administrator recommended that the nurse take a month's medical leave. She agreed but continued to show up at the hospital while medicated, disrupting the workplace. The administrator visited the nurse's work area and found her inappropriately dressed, laughing and giggling while sprawled in a chair.

After this incident, the administrator asked the nurse to resign. She refused, overdosed on Xanax and was hospitalized. When released, she agreed to resign at year's end if the hospital would pay her salary and benefits until then. Meanwhile, her unopened mail, some of which was more than five months old, showed she had submitted improper bills to Medicaid, causing the hospital to have to refund $40,000.



Nurse sues under FMLA

The nurse sued the hospital. At trial, she testified that she would have continued her medical leave if she had known she was entitled to 12 weeks of FMLA leave. The administrator testified that she would have discharged the nurse before her resignation took effect, based on the performance issues discovered after she resigned.

The jury found for the hospital, concluding that it would have discharged the nurse for cause, regardless of her FMLA rights. The hospital had proved by a preponderance of evidence that it would not have reinstated the nurse when her leave expired. So the court denied the nurse's motion for judgment notwithstanding the verdict.

Eighth Circuit decides

On appeal to the Eighth Circuit, the nurse argued that, under the FMLA, an employer is strictly liable whenever it interferes with an employee's FMLA rights. But the court ruled no liability attaches if the employer can prove it would have made the same decision had the employee not exercised FMLA rights.

The Eighth Circuit held that an employer isn't liable if it can prove it would have made the same decision had the employee not exercised FMLA rights.

The Eighth Circuit found that the hospital had interfered with the nurse's FMLA rights when it asked her to resign before her 12 weeks were up and without giving her notice of her rights. But though an employee is entitled to reinstatement when leave expires, an employer is not required to retain an employee on FMLA leave when the employer would not have retained the employee had the employee not been on FMLA leave.

The Eighth Circuit found that the FMLA specifically states that an employee taking FMLA leave is not entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." Moreover, Department of Labor rules provide:

> An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

Employers' FMLA rights and duties

Thus, an employer can lay off employees in the normal course of events while they are on FMLA leave. Similarly, employees

unable to perform an essential function of their positions because of a physical or mental condition have no right to ask for job restoration under the FMLA when their leaves expire. And employees hired to work for a specific term or to work only on a discrete project aren't entitled to restoration when the specific term or project ends and the employer would not otherwise have continued to employ them.

The FMLA requires employers to treat employees who exercise their FMLA rights the same as other employees who enjoy protected status. That is, they can't discriminate against them, but, at the same time, their status doesn't immunize them from any adverse actions. Finally, documentation is necessary to substantiate the reasons for an adverse action against an employee to avoid undesirable results in any possible litigation.

Don't leave your company open to retaliation charges

In *Flowers v. Columbia College Chicago*, an employee who was fired solely for having filed a religious-discrimination charge against another entity alleged that his firing constituted retaliation in violation of Title VII. The Seventh Circuit had to decide whether to reverse dismissal of his suit.

The case arose when the college assigned an employee to be a guidance counselor at a Chicago public high school that had contracted with the college for this service. After the principal refused to allow the counselor to wear a religious head covering, he filed a discrimination charge with the EEOC, naming the school district as his employer.

The college fired the counselor solely for complaining that the high school practiced religious discrimination. The counselor then sued the college, alleging it had retaliated against him for having filed the discrimination charge. The trial court dismissed the suit for failure to state a claim, ruling that Title VII allows an employer to fire an employee who complains about another entity's discrimination.

The counselor appealed the dismissal to the Seventh Circuit, which reversed. It noted that, if the college and the trial court were right, any firm could opt out of Title VII by adopting a holding-company structure in which one corporate entity would perform operations and the other corporate entity would be a personnel company that would hire and pay all employees. This would be absurd. Thus, the only rational interpretation of the antiretaliation proviso would be to bar any retaliatory act against someone who makes or supports a discrimination charge against any employer.

This case demonstrates that employers can't avoid the impact of Title VII and all other employment laws by leasing their employees from another entity. Both entities are generally considered to be joint employers who are jointly responsible for unlawful employment actions.

FRANKLIN, GRINGER & COHEN SUCCESSFULLY REPRESENT TWO COMPANIES IN LITIGATION

We have recently received two favorable court rulings involving two companies we represent. The first involved a commercial bakery in Brooklyn, NY, in an action in United States District Court for the Eastern District of New York to enjoin Local 3, Bakery Confectionary and Tobacco Workers, from commencing an arbitration to determine whether the company violated seniority provisions of its collective bargaining agreement with Local 3 when it retained permanent replacement workers over striking employees who requested reinstatement.

In her decision, Magistrate Judge Marilyn Dolan Go found that the collective bargaining agreement terminated, along with the duty to arbitrate, when the Union went out on strike on April 25. On May 3, the Union ended the strike and requested that its members be returned to work. However, the company gave preference to permanent replacement workers who had been hired during the strike over the striking workers. The Union sought arbitration claiming that the striking employees had greater seniority than the permanent replacements and were thus entitled to "bump" them. In her decision, Magistrate Judge Go credited the testimony of Franklin, Gringer & Cohen partner Martin Gringer that he never agreed to extend the terms of the contract in discussing the reinstatement of the striking employees with the Union's attorney citing a letter written by the Union's attorney memorializing the conversation with Gringer which did not mention any extension of the collective bargaining agreement. The judge concluded that unless the contract had been extended, there was no duty to arbitrate the seniority issue.

In this case, the Union attempted an end-run around the National Labor Relations Act, which permits the permanent replacement of strikers, by trying arbitration. Striking employees, who had been replaced, individually filed unfair labor practice charges against the company with the National Labor Relations Board, which after investigation dismissed all the charges.

CONSENSUAL AFFAIR LEADS TO FINDING OF NO HARASSMENT

In the second case, our firm recently obtained a dismissal of an employee's sexual harassment and emotional distress claims against a company in New York State Supreme Court. The plaintiff and her husband were both employed by the defendant company. Plaintiff commenced a consensual sexual affair with the unmarried president of the company and her husband learned of it. Plaintiff later resigned. Subsequently, she brought this action for $2,000,000 in which she claimed that the president sexually harassed her by urging her to continue the affair, and that her resignation constituted a "constructive discharge."

The Supreme Court, in granting defendant's motion for summary judgment, concluded:

> [A]n employee who chooses to become involved in an intimate affair with her employer ... removes an element of her employment relationship from the workplace, and in the realm of private affairs people do have the right to react to rejection, jealousy and other emotions which the Human Rights Law says have no place in the workplace.

The court acknowledged that a party in a failed consensual workplace affair may demonstrate unlawful harassment where an employer afterwards uses his authority to "blackmail" an employee into accepting his sexual advances. However, in this case, the plaintiff's own testimony established that the president made no threats to her following the termination of their relationship, did not change her job duties, and made no comments relating to their affair in front of other employees. Moreover, the court cited the plaintiff's admission that her reason for leaving the company was the strain on her marriage created by the fact that her husband was also employed by the defendant company. Accordingly, the court granted the defendant's motion for summary judgment dismissing plaintiff's claims.

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