Employment Law
BRIEFING

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Put it in writing

When employment terms factor into overtime pay eligibility

When are employees exempt from overtime compensation? The Sixth Circuit Court of Appeals tackled the issue recently in *Hughes v. Gulf Interstate Field Services, Inc.* At the center of the case were two workers who asserted they were entitled to overtime pay according to the Fair Labor Standards Act (FLSA) and comparable Ohio Minimum Fair Wage Standards Act (OMFWSA).

NOTHING'S GUARANTEED

The two employees worked as welding inspectors. When they were hired, they received offer letters stating that they were entitled to a salary of $337 per day worked. They were also verbally told by their employer that they would be working six days per week and ten hours per day. The number of days and hours was *not* guaranteed in writing.

Throughout their employment, the employees each earned more than $100,000 per year. During the time that they worked, there didn't appear to be a week during which they didn't receive pay consistent with a guarantee of a weekly salary equivalent to six days of work at ten hours per day. However, the employees filed suit, alleging that they were owed overtime compensation. The employer argued that the employees were exempt from overtime requirements because they qualified as highly compensated employees. The employees conceded that they were paid at a rate consistent with being exempt, but argued that their salaries weren't guaranteed and, therefore, they were entitled to overtime. The employer's response was that it didn't matter that the employees' salaries weren't guaranteed. What mattered was that they were compensated well above the minimum requirement.

Under FLSA regulations, an employee qualifies as an exempt, highly compensated employee if three tests are met.

A trial court ruled in favor of the employer. But the employees appealed the decision.

SALARY REGULARITY IS KEY

The FLSA requires qualifying employees to receive compensation in excess of forty hours per week at a rate not less than one and a half times their regular rate. Some employees, however, are exempt from this requirement. Under FLSA regulations, an employee qualifies as an exempt, highly compensated employee if three tests are met:

1. Duties test,
2. Salary-level test, and
3. Salary-basis test.

At issue in this case was the third, salary basis, test and whether the workers' salaries were guaranteed by their

ANOTHER LOOK AT COMPENSATION UNDER THE FLSA

What a difference a guarantee can make. Unlike the employees in *Hughes v. Gulf Interstate Field Services, Inc.* (see main article), the worker in *Anani v. CVS Rx Services, Inc.* was told by an appeals court that he wasn't eligible for overtime under the Fair Labor Standards Act.

The employee was hired as a full-time pharmacist and classified as a salaried professional. His employer told him that he would receive a guaranteed minimum base salary every two weeks. The employer also offered premium pay as an additional incentive for pharmacists who worked extra shifts. Although the employee's base hours were set at 44 hours per week, he often worked between 60 and 80 hours per week. As a result, he received substantial amounts of premium pay.

After several years, the employee resigned from the company and filed suit, alleging that the employer had improperly classified him as a salaried professional and, therefore, he was entitled to overtime compensation at a rate of time and a half. He argued that, because his total compensation was calculated as a function of the hours he worked, he wasn't compensated on a salary basis and wasn't exempt from receiving overtime pay. But the trial court decided that the employer did pay on a salary basis by providing the employee with a guaranteed minimum base salary.

The Second Circuit Court of Appeals agreed. The highly compensated employee exemption provides that an employee with total annual compensation of at least $100,000 is deemed exempt if the employee customarily and regularly performs one or more of the exempt duties or responsibilities of an executive, administrative or professional employee. The court held that the employee *was* exempt from overtime pay because, in addition to the fact that he'd made above the weekly minimum amount, his salary was guaranteed.

employer. Governing regulations state that employees meet the salary-basis test if they regularly receive each pay period on a weekly basis a predetermined amount constituting all or part of their compensation. This amount shouldn't be subject to reduction because of variations in the quality or quantity of the work employees have performed.

The regulations also require that the employer pay the employee at least the minimum weekly required amount on a salary basis. The appeals court held that the regulations provided textual evidence of the importance of a guarantee because they emphasize that an employee's compensation must not be reduced because of variations in quality or quantity of work performed. The verbal guarantees the employer provided to the employees at the outset of their employment contradicted the offer letters they received. Although the letters guaranteed a specific daily pay rate, they never guaranteed the number of days the employees would work.

Based on the salary-basis test, the court held that there *was* a question of material fact as to whether the employees' salaries were guaranteed. It overturned the trial court's decision and remanded the case.

FLSA CAN BE NUANCED

The workers in *Hughes* were compensated well above the minimum requirement for them to qualify as highly compensated employees. But because their salary wasn't guaranteed, they weren't necessarily exempt from overtime. If you employ similarly compensated employees, consider putting all employment terms in writing. ■

Double whammy

"Sex plus age" theory is tested in court

The "sex plus age" theory is a relatively new approach to arguing that an employer has discriminated against an employee. Some courts have accepted the theory, but as the Fifth Circuit Court of Appeals' decision in *Dawn Best v. William Johnson* proves, there's no judicial consensus.

SEX-PLUS-AGE THEORY

The employee had worked for her company for more than 20 years and was over 40 years old when she applied for a general manager position. Previously, she had served as an engineer and also as a customer service manager. Despite her qualifications and experience, the employee wasn't selected for the position. Instead, after conducting an extensive application process and multiple interviews, the employer offered the job to a younger, male employee.

The employee subsequently filed a complaint alleging gender and age discrimination under Title VII of the Civil Rights Act and the Age Discrimination in Employment Act (ADEA) based on a theory of "sex-plus-age" discrimination. This refers to policies or practices by which an employer classifies employees on the basis of sex, plus another characteristic, such as race or age. In a "sex plus" case, not all members of a disfavored class are discriminated against. Rather, an employer discriminates against a subclass of men or women instead of the entire class. The employee in this case argued that she was discriminated against because she was a woman *and* older than forty.

COURTS CONSIDER CASE

The trial court determined that the employee wasn't entitled to a trial for the age discrimination claim, but that her gender discrimination claim would proceed to trial. The employer argued that, in the jury's instructions for the gender discrimination claim, any mention of age should be removed. Ultimately, the court ruled in favor of the employer for the age discrimination claim and a jury found for the employer on the gender discrimination claim. The employee appealed,

stating that the court should have accepted a sex-plus-age theory of gender discrimination under Title VII. She also faulted the court for failing to give the jury proper instructions.

The employee presented a case about sex-plus-race discrimination. She contended that, because the Fifth Circuit had in other cases decided that sex-plus-race discrimination is a valid theory of recovery under Title VII, it should also accept a sex-plus-age theory. The court reminded her that, although both sex and race are explicitly protected under Title VII, age isn't. Instead, age is protected under the ADEA (and therefore isn't recognized under Title VII). Also, the Fifth Circuit hadn't previously decided whether sex-plus-age discrimination is gender discrimination under Title VII. Not surprisingly given its reasoning, the appeals court affirmed the trial court's decision concerning the age discrimination claim. It remanded the gender discrimination claim for further review.

SUBCLASSES DO EXIST

Even though not all courts have yet accepted "sex plus" theories of discrimination, employers should be aware of them. Some circuits consider such theories valid, and if this case had been heard in one of those courts the outcome of *Dawn Best* might have been very different.

In striving to comply with antidiscriminatory hiring policies, be mindful that subcategories of protected classes may exist. Even if it doesn't seem like you're discriminating against a protected class, you may inadvertently be discriminating against one of these subsets of employees. ■

How gender stereotypes contribute to sexual orientation discrimination

A skydiving instructor was fired for alleged misconduct with a female client. However, he claimed he was really fired because he was gay. To show that this termination was actionable under Title VII of the Civil Rights Act, the employee in *Zarda v. Altitude Express, Inc.* had to argue before the Second Circuit Court of Appeals that discrimination based on sexual orientation is a form of sex discrimination.

EMPLOYEE'S CANDOR BACKFIRES

Before he was terminated, the employee regularly participated in tandem skydives, strapped hip-to-hip and shoulder-to-shoulder with clients. In an environment where close proximity was common, the employee sometimes told female clients about his sexual orientation to reduce any anxiety they might have about being strapped to a man. One day, he told a female client that he was gay. She later complained that he touched her inappropriately and asserted that the only reason he had told her he was gay was to excuse his behavior.

The employee denied touching the female client, but he was terminated. He argued that he was fired because of his sexual orientation and filed a claim under Title VII. The employer responded by pointing out that, when Title VII was enacted, Congress didn't consider sexual orientation discrimination to be the same as gender discrimination. The trial court agreed with the employer. The employee appealed.

TITLE VII DEFINES "SEX"

Title VII provides that it's unlawful for an employer to discriminate against any individual "because of … sex." An employer has engaged in impermissible consideration of sex when sex is a motivating factor — regardless of whether the employer was also motivated by other factors.

In considering the former skydiving instructor's case, the appeals court decided that sexual orientation is a subset of sex discrimination because sex is necessarily a factor in sexual orientation. Sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions. The court held that, because it's impossible to fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex, which is protected under Title VII.

The court relied on the comparative test, which the Supreme Court has used to determine whether an employment practice constitutes sex discrimination. The test examines whether the trait that is the basis for discrimination is a function of sex by asking whether an employee's treatment would have been different *but for* that person's sex. In the context of sexual orientation, the court stated that a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. Making an employment decision based on sexual orientation is sex discrimination.

The Supreme Court has held that employment decisions can't be predicated on mere stereotyped impressions about male or female characteristics.

THROUGH THE GENDER-STEREOTYPING LENS

The appeals court stated that sexual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted. Therefore, an employer can't discriminate on the basis of sexual orientation without taking sex into account.

Viewing the relationship between sexual orientation and sex through the lens of gender stereotyping, the court pointed out that sexual orientation discrimination is almost invariably rooted in stereotypes about men and women. The Supreme Court has held that employment decisions can't be predicated on mere stereotyped impressions about male or female characteristics. The question of whether there has been improper reliance on sex stereotypes can sometimes be answered by considering whether the behavior or trait at issue would have been viewed more or less favorably if the employee were of a different sex.

Applying this reasoning, the appeals court held that, when an employer acts on the basis of a belief that men can't be attracted to men (or must not be), yet takes no action against women who are attracted to men, the employer has acted in violation of Title VII on the basis of gender. In the end, the court found for the employee.

STAY TUNED

Note that, although several appellate courts besides the Second Circuit have decided that sexual orientation discrimination is actionable under Title VII, others haven't. Because of this inconsistency, the issue is likely to be considered by the Supreme Court in the near future. Employers should ensure that they remain current on the latest developments and update employment policies and practices accordingly. ■

ADEA case pivots on communication attempts

In *Tolliver v. Trinity Parish Foundation et al.*, an employee who was on medical leave alleged that she had been terminated from her job due to age and disability in violation of the Age Discrimination in Employment Act (ADEA) and the Rehabilitation Act of 1973. The Third Circuit Court of Appeals reviewed the facts for signs that discrimination had occurred.

DENYING REQUESTS

The employee was an executive director of a charitable foundation when she was granted short-term disability leave through her employer's insurance carrier. The employer requested a note from her doctor explaining the nature of her medical condition, her medical limitations and the length of time those limitations were

expected to continue. The employer followed up this request with an email stating that it was entitled to the information and didn't want to access her confidential medical information beyond what it had specified in its request. The employee responded by filing a grievance with her employer's Executive Committee, alleging that the employer's request amounted to harassment because it had contacted her disability insurance carrier and was aware of the nature of her disability. Nevertheless, the employee's doctor provided a letter stating that the employee wouldn't be able to return to work until July 1, 2013.

The Executive Committee ultimately decided that the employee's complaint had no merit and it denied her request to have her disability payments supplemented with her full salary. The employer's policy was that it didn't pay an employee's salary while that employee was receiving disability payments. The employee then retained legal counsel, who sent the employer a letter stating that the employee was unable to perform the essential duties of her job as executive director. The attorney's letter didn't provide an anticipated return to work date. The employee had no further communication with the employer regarding her ability to return to work. When she didn't return to work by July 13, she was terminated.

The employee filed a claim stating that she had been fired due to her age and disability. The employer stated it had terminated her because she hadn't returned to work and had stopped communicating regarding her ability to return to work. The trial court agreed with the employer, and the employee appealed.

SEEKING PRETEXT

The employee had to show the appeals court that her employer's proffered reasons for terminating her were pretext for discrimination or that discrimination was more likely than not a cause of termination. The evidence showed that her attorney had advised the employer that the employee could no longer perform the essential functions of her job as executive director. In addition, the employee was never able to identify a date by which she would be capable of performing the job's essential functions.

The employer had terminated the employee because she hadn't returned to work and had stopped communicating regarding her ability to return.

The appeals court held that terminating her because she couldn't return to her job and was unable to perform the position's essential functions indefinitely was a legitimate reason for her termination and not pretext for discrimination. The case was remanded.

STAYING IN TOUCH

As similar decisions have demonstrated time and again, employers must maintain regular communication with employees who are on medical leave. In this case, the employer's attempt to communicate with the employee was met with resistance and hostility. But had the employer not attempted to get in touch with the employee and then terminated her, the court's decision might have been different. ■