

# Employment Law Briefing



JANUARY/FEBRUARY 2016

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# Winning attorneys' fees when the government goes too far

The Equal Access to Justice Act (EAJA) provides for the recovery of attorneys' fees from the government when it acts in bad faith or pursues a matter that isn't substantially justified. In the case of *Gate Guard Services, L.P. v. Perez*, the U.S. Court of Appeals for the Fifth Circuit considered whether the Department of Labor (DOL) should pay a plaintiff's attorneys' fees under the EAJA.

## DOL investigation

The plaintiff was a provider of gate attendants for remote drilling sites of oilfield operators. The gate attendants remained at the drill sites and recorded the license plates of vehicles entering and leaving the oil field. The attendants often lived on-site and were paid daily rates.

A former employee of the plaintiff complained to a friend, who worked as a DOL investigator, that he believed his wages were miscalculated. After speaking with another service technician and a gate attendant, the investigator suspected that the plaintiff had violated the Fair Labor Standards Act (FLSA) by not paying the gate attendants overtime.

The investigator, who had little training in contractor misclassifications, opened a formal investigation. After that investigation, which included only 17 interviews, the investigator calculated a potential penalty of over \$6 million in back wages for the misclassification of 400 gate attendants.

## 2 ways to recovery

The plaintiff sued the DOL, seeking a declaration that it was in compliance with the FLSA. The plaintiff also sought attorneys' fees, under the EAJA, if it prevailed. The DOL countered by filing its own FLSA enforcement action for back wages and injunctive relief. During



litigation, the DOL opposed nearly every motion — even routine ones — and acted belligerently during the discovery phase of litigation.

While the case was pending, the trial court held in another matter that gate attendants weren't employees under the FLSA. Yet the DOL continued with the prosecution. Because of the weaknesses in the agency's case, however, the trial court granted summary judgment in the plaintiff's favor.

The EAJA provides two ways for the recovery of attorneys' fees from the government:

1. When a party has acted in bad faith, and
2. When the government's position wasn't substantially justified (or special circumstances make the award just).

The trial court awarded attorneys' fees to the plaintiff under the EAJA's "substantially justified" provision, but it denied fees under the "bad faith" provision. Both parties

appealed. The DOL acknowledged that it had made mistakes but asserted that attorneys' fees weren't warranted because its position was substantially justified. The plaintiff asserted that attorneys' fees were due under the bad faith provision.

### Bad faith provision

The appeals court reversed the trial court's decision, finding that attorneys' fees *were* appropriate under the EAJA's bad faith provision, and remanded the case back to the lower court for further consideration. The appellate court held that the trial court had applied too rigid a test for bad faith, which was unsupported by precedent.

Specifically, the trial court had stated that, to constitute bad faith, the plaintiff must have shown that:

- The DOL's position was meritless,
- This lack of merit was known to the agency, and
- The DOL's position was advanced or maintained for an improper purpose, such as harassment.

The trial court had concluded that the DOL didn't act in bad faith because facts pointed in both directions regarding whether gate attendants were employees. Thus, the agency's position wasn't entirely frivolous or wholly unsupported. (For more about the frivolous argument aspect of the case, see "The issue of frivolity" at right.)

*The DOL acknowledged that it had made mistakes but asserted that attorneys' fees weren't warranted because its position was substantially justified.*

The appeals court disagreed, holding that the three-part test didn't afford the court the flexibility required by equity and the interest of justice. What's more, the precedent was to *not* follow such a test.

The appellate court set forth that bad faith is found when an attorney knowingly or recklessly raises frivolous arguments or argues a meritorious case for the purpose of harassing an opponent. And the court held here that there was bad faith because the DOL's lead investigator had deliberately destroyed evidence, inflated damages calculations by millions of dollars, and broken protocol in presenting his findings.

Indeed, the appeals court stated that it had upheld awards for attorneys' fees where the government deliberately concealed information and consistently violated an agency's internal regulations.

### Avenue of recourse

If your organization ever finds itself defending against a government agency using overly aggressive or harassing tactics, remember that the EAJA represents your avenue of recourse. Work closely with your attorney to leverage its provisions effectively. ♦

## The issue of frivolity

An additional important matter in *Gate Guard Services, L.P. v. Perez* (see main article) was the issue of frivolity. That is, if the Department of Labor (DOL) was actively making frivolous arguments in its case, the plaintiff may well have recourse under the Equal Access to Justice Act.

In *Gate Guard*, the DOL had opposed routine case administration motions for no reason and continued to prosecute the matter despite an overwhelming amount of contradictory evidence. Therefore, in the view of the U.S. Court of Appeals for the Fifth Circuit, the agency had knowingly or recklessly raised frivolous arguments.

In addition, the trial court had found that the DOL's position wasn't entirely frivolous because of facts pointing in both directions, as is common with FLSA claims. But the appeals court held that a claim may still be frivolous if the facts undeniably favor one party and no reasonable person could find otherwise.

The appellate court stated that the frivolousness test should take into account the government's duty to pursue only clearly meritorious enforcement actions. Thus, even though determining employee status was a fact-intensive test, it didn't preclude a finding of frivolousness.



# Ignore employee complaints at your own peril

**W**hen one employee constantly complains, an employer may be tempted to take a “boy who cried wolf” approach and ignore those protestations. But doing so can lead the complainer to a lawsuit and the employer to court. Such were the circumstances behind *Baird v. Gotbaum*, a case in which a frustrated employee eventually filed a claim of retaliatory hostile work environment.

## Plaintiff’s allegations

The plaintiff was an African-American female who worked as an attorney for a federal agency. She was also the former president of the employees’ union and frequently filed Title VII discrimination claims on behalf of herself and others. In this case, the plaintiff claimed that, in retaliation for her Title VII activities, the employer had

made her work environment a hostile one. Specifically, the plaintiff alleged that she’d:

- Received rude emails, including a co-worker suggesting she had “litigation induced hallucinations,”
- Endured name-calling, including being called “psychotic” and being verbally assaulted by a co-worker who pounded his fists on a table as he spoke, and
- Dealt with unprofessional behavior, such as being falsely accused of violating her ethical duties and accused of sending a harassing email.

The plaintiff claimed that she reported these incidents to HR, but her employer never investigated or resolved the issues. A trial court dismissed the plaintiff’s claim and she appealed.

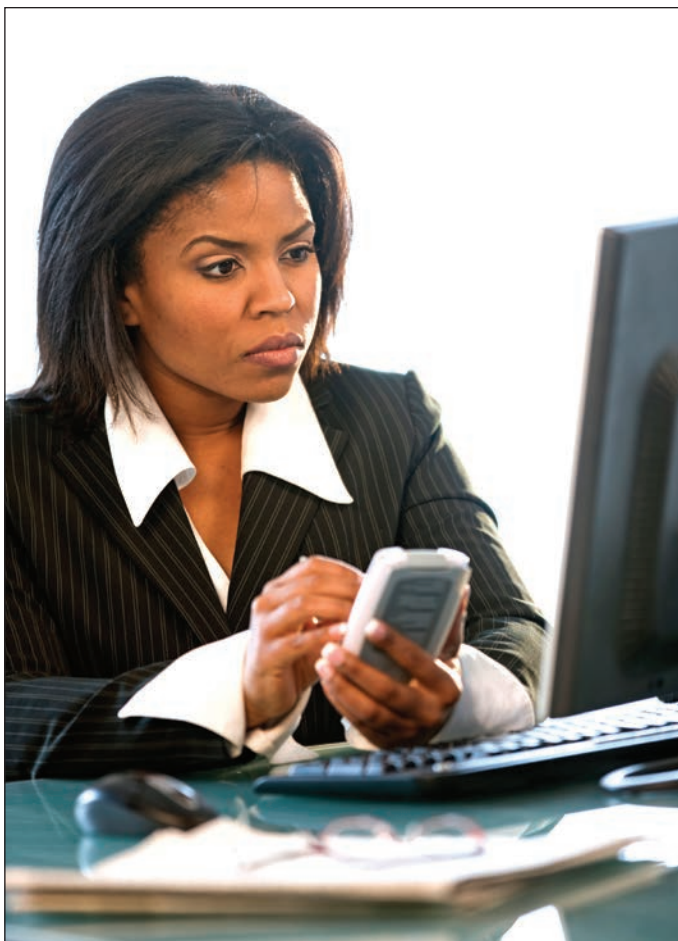
## Actionable requirements

The appeals court held that a retaliation claim based on a complaint of a hostile work environment was an actionable one. The court further stated that a retaliatory hostile work environment claim could consist of several individual acts that may not be actionable on their own, but can become actionable because of their cumulative effect.

*The appeals court held that a retaliation claim based on a complaint of a hostile work environment was an actionable one.*

But the acts must be adequately linked to form a coherent hostile environment claim. For example, the acts would have to occur frequently, involve the same type of employment actions and be perpetrated by the same supervisors.

In this case, the appeals court affirmed the trial court’s dismissal of the plaintiff’s claims. The appellate court held that the acts alleged by the plaintiff weren’t adequately





linked because they occurred over eight years, involved different people doing different things in different contexts and, otherwise, didn't have much to do with one another. Further, the court found that the plaintiff had failed to even try to tie the acts together.

### **A pile of feathers**

The plaintiff argued that the common link was that her employer's HR department had repeatedly failed to investigate or remediate her complaints. But the appeals court held that a retaliatory failure-to-remediate claim wouldn't be actionable unless the underlying incidents themselves were actionable. The court reasoned that, if the conduct itself wouldn't dissuade a reasonable person from making or supporting a charge of discrimination, the employer's failure to investigate that conduct wouldn't either.

Moreover, the court found that the incidents alleged by the plaintiff wouldn't themselves constitute a retaliatory hostile work environment because they were immaterial slights, workplace disagreements and personality conflicts — none of which are actionable. Although she alleged a number of incidents, the plaintiff didn't sway

the court, which stated that “a long list of trivial incidents is no more a hostile work environment than a pile of feathers is a crushing weight.”

The plaintiff also argued that the conduct was actionable because it affected her emotional and physical health. But the standard for severity and pervasiveness is objective, not subjective. The question is whether a reasonable person would be dissuaded from making or supporting a charge. Therefore, because the allegations were objectively trivial and immaterial, the fact that she suffered emotional harm was subjective and not controlling or sufficient for her to succeed on her claims.

### **Important lesson**

Although the employer in *Baird v. Gotbaum* prevailed, there's still an important lesson to be learned here. Establish solid antiharassment policies and, when complaints arise, fully investigate those allegations. Had the employer in this case investigated the plaintiff's many complaints, she might have never filed a lawsuit and the organization could have avoided six years of litigation and all of the associated legal costs. ♦

# **Reasonable, not preferred**

## *An employer's obligation under the Americans with Disabilities Act*

**A**n employer that provides an accommodation to an employee under the Americans with Disabilities Act (ADA) may think it's out of the woods. But employees aren't always satisfied even with reasonable accommodations. The recent case of *Swanson v. Village of Flossmoor* represents a constructive example to consider.

### **Request denied**

The plaintiff, a detective for the defendant village, suffered from strokes. After his first stroke, the plaintiff took a leave of absence pursuant to the Family and Medical Leave Act (FMLA) for three weeks. Upon his return, he provided a doctor's note that suggested part-time work for the following month. The plaintiff used two days of his accrued medical leave each week, allowing him to receive a full paycheck while working only three days a week.

Thereafter, the plaintiff claimed that he started experiencing headaches and lightheadedness, so he asked whether he could be placed on light duty. The employer asserted that its policy permitted light-duty work at the discretion of the employee's department and required a physician's report specifying the employee's limitations.

The plaintiff's request, however, was denied. He was told that no light-duty position existed in his department, nor did his doctor recommend it after the first stroke. Rather, the physician recommended part-time work, which the plaintiff was granted under the aforementioned three-day-a-week arrangement.

### **Lawsuit filed**

Later, the plaintiff suffered a second stroke that rendered him completely unable to perform his job responsibilities.



He requested another FMLA leave, which the employer approved while the plaintiff continued to also use his paid medical leave to cover his absence.

About two and a half months later, the plaintiff received a letter informing him that his FMLA leave had expired and that his paid medical leave would also expire in one week. The letter further stated that the plaintiff could request an unpaid leave of absence — even though his FMLA leave had expired — and, upon his return to work, he'd most likely be reassigned to another division.

*The court held that the ADA didn't entitle the disabled employee to his preferred accommodation. Rather, it entitled him to a reasonable one.*

The plaintiff's doctor released him back to work without any restrictions, but the plaintiff suffered another medical episode. After this episode, his doctor prohibited him from returning to work. The plaintiff resigned from his job, stating that he was physically unable to perform his job duties with the department as a detective. He requested to remain on unpaid medical leave for a few months so that he could still remain on the employer's health plan. The employer approved this request.

Nonetheless, the plaintiff filed a lawsuit claiming that the employer had violated the ADA by not providing him with light-duty work after his first stroke. The trial court granted summary judgment in the employer's favor, and the plaintiff appealed.

### **Judgment affirmed**

The U.S. Court of Appeals for the Seventh Circuit affirmed the trial court's grant of summary judgment in favor of the employer. It found that the defendant hadn't violated the ADA by choosing not to place the plaintiff in a light-duty position.

The appeals court relied on the fact that the defendant's

employee manual made it clear that the decision to offer an employee light-duty work was at the discretion of the department in which he or she worked. The manual also stated that a request for light-duty work would be considered only when the employee submitted a doctor's note specifying the employee's limitations so the department head could determine whether a suitable light-duty accommodation was available.

As noted, the doctor's note for the plaintiff in this case suggested the employer place him on part-time duty but didn't recommend light-duty work. And the employer provided him with that part-time work.

The court held that the ADA didn't entitle the disabled employee to his preferred accommodation. Rather, it entitled him to a reasonable accommodation — which he received when given part-time work. Also, allowing the employee to use paid leave could be considered an additional reasonable accommodation. Therefore, the court held that his claim had no merit.

### **Be forewarned**

This case emphasizes that, as an employer, you're obligated to provide a disabled employee with a reasonable accommodation — not one of his or her preference. Still, you must engage in an interactive process with the employee to determine what the reasonable accommodation would be, if any. Unfortunately, as this case also shows, even when an employer reasonably accommodates a disabled employee, it can still face a lawsuit claiming that more could have been done. ♦

# Attorney at law ... or not so much?

One might think that an attorney performing contract work for a law firm is indisputably engaged in the “practice of law.” But this was indeed a matter of dispute in the case of *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*. At stake was whether the attorney’s employer had violated the overtime provisions of the Fair Labor Standards Act (FLSA).

## Reviewing documents

Regulations of the FLSA state that any “employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof” is exempt from the requirement to receive overtime pay.

The plaintiff in this case had filed a lawsuit asserting that he should have been entitled to overtime pay under the FLSA because, even though he was an attorney, he didn’t practice law. He contended that he was a contract attorney who did document review and was paid \$25 an hour and worked about 45 hours per week.

The trial court granted summary judgment in the employer’s favor, holding that the plaintiff was indeed practicing law and, as such, he was exempt from overtime as a professional. The plaintiff appealed.

## Going to Carolina

The U.S. Court of Appeals for the Second Circuit vacated the trial court’s finding and remanded the case back to the lower court for further consideration. The appeals court held that the plaintiff had adequately alleged in his complaint that he didn’t engage in the practice of law.

Because federal law was silent on the definition of the “practice of law,” and the plaintiff lived and worked in North Carolina, the court looked to North Carolina state law. The state defines the “practice of law” as “performing any legal service for any other person ... or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person ... .”

North Carolina law doesn’t clarify whether legal services included the performance of document review. But the appeals court stated that inherent in the definition of the



“practice of law” was the exercise of independent legal judgment, and many other states also consider legal judgment an essential element of the practice of law.

## Performing duties

The appeals court further stated that a fair reading of the complaint in the light most favorable to the plaintiff was that he provided services that a machine could have provided. The plaintiff alleged that his work was closely supervised by his employer and his only responsibility consisted of document review. Specifically, he would:

- Look at documents to see what search terms appeared therein,
- Mark those documents into categories set forth by his employer, and
- Redact portions of documents based on his employer’s protocols.

So the employer provided the plaintiff with the documents he reviewed, the search terms he looked for and the procedures to follow if those terms appeared. Thus, according to the court, the plaintiff didn’t actually engage in the practice of law because he didn’t use any independent legal judgment in the course of his duties.

## Determining overtime

Heed the warning of this case. When determining exemption from overtime status, ensure that you’re properly classifying your employees according to actual job duties and not just title or occupation. ♦

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