Employment Law BRIEFING

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What makes a leader an executive?

Appeals court considers a key FLSA exemption

Overtime pay under the Fair Labor Standards Act (FLSA) continues to be a contentious issue in U.S. courts. In the recent *Garrison v. ConAgra Packaged Foods*, the Eighth Circuit Court of Appeals was tasked with deciding whether the trial court had properly granted summary judgment in favor of an employer. The employer's argument? That the employees fell under the "executive exemption."

DEFINING "EXECUTIVE"

Employees who worked as salaried "team leaders" brought suit against their employer, alleging they were misclassified as exempt and weren't paid overtime in violation of the FLSA. The employer argued that the employees came under the executive exemption and therefore weren't entitled to overtime pay. As team leaders, they were charged with monitoring the work and behavior of other hourly employees. This included identifying poor work performance and any rule violations.

According to Department of Labor (DOL) regulations, an employee is employed in a bona fide executive capacity and exempt from overtime if:

1. The employee is compensated on a salary basis at a rate of not less than $455 per week,
2. The employee's primary duty is management of the enterprise,
3. The employee customarily and regularly directs the work of two or more other employees, and
4. The employee has the authority to hire or fire other employees, or his or her "suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight."

Both parties agreed that the first three prongs were met. And the employer conceded that the team leaders didn't have authority to hire or fire. The issue before the court was whether their suggestions on any change of status of other employees were given "particular weight."

The trial court found that the exemption applied because the team leaders monitored the performance and behavior of hourly workers and could reassign or recommend the reassignment or discipline of those workers. The team leaders appealed.

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APPEALS COURT AGREES

On appeal, the team leaders argued that their recommendations didn't have "particular weight" because they didn't always represent the final say about another

employee's employment status. However, the Eighth Circuit agreed with the trial court, affirming its grant of summary judgment in favor of the employer.

The court relied in part on DOL regulation 29 C.F.R. § 541.105. It states that an employee's recommendation may have "particular weight" even if a higher-level manager's recommendation receives greater weight and the employee lacks authority to "make the ultimate decision" about a subordinate worker's status.

The court pointed out that:

- The team leaders had testified that upper management followed their advice *most of,* if not all of, the time,
- There was evidence that each team leader was involved in at least one personnel decision regarding an hourly employee he or she supervised,
- Evidence showed that upper management primarily relied on the team leaders' evaluations of hourly workers when determining whether to discharge, promote or demote, reassign, and discipline employees.

Thus, the plaintiffs were properly classified as exempt.

The court also vacated the trial court's denial of the employer's motion for costs. It stated that, because the FLSA was silent on whether a prevailing defendant employer could recoup costs, the employer in this case wasn't precluded from collecting the costs. The appeals court remanded that matter back to the trial court.

MAKE IT CLEAR

Many employers are understandably confused about which employees are exempt from overtime — particularly since the DOL raised the minimum salary threshold for executives from $455 to $913 per week in 2016.

When evaluating employees, keep in mind that executive-exempt employees should actually have the authority to hire and fire, or their suggestions should have "particular weight." Also be sure to document these employees' suggestions and the personnel decisions taken in response. Bottom line: It takes more than the supervision of two or more employees to meet executive exemption requirements. ■

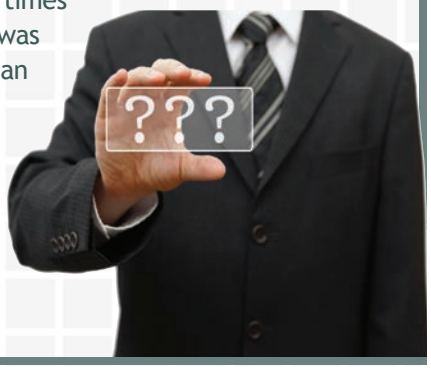
OPAQUE EVIDENCE LEADS TO UNCLEAR CONCLUSION

The executive exemption to overtime pay under the Fair Labor Standards Act (FLSA) was asserted by an employer in another recent case (see main article). However, when asked to decide whether an employee was exempt from overtime under the executive exemption, the U.S. District Court, N.D. Alabama, wasn't as decisive as the *Garrison v. ConAgra Packaged Foods* court.

The employee in *Lankford v. Double Eagle Sports and Events* argued that he didn't fall within the executive exemption because his suggestions and recommendations as to the hiring, firing and advancement of other employees weren't given particular weight. When the employer moved for summary judgment, arguing that the employee was exempt, it was denied. According to the court, there were genuine issues of material fact regarding the employee's duty to make suggestions and whether those suggestions were given particular weight.

On that issue, the court considered DOL regulations — questioning whether it was the employee's duty to make suggestions and recommendations, how often he made them, and how often the employer relied on his opinions. His job description didn't include the duty to make suggestions or recommendations regarding the status of other employees and the employee testified that it wasn't part of his regular responsibilities. Therefore, the duty factor wasn't met.

Regarding how often the employee made suggestions and how often they were relied on, the evidence was unclear. The employee had testified that the employer hired individuals he'd recommended "a couple" of times but in "some cases" it didn't. He was once given approval to terminate an employee but wasn't approved to fire "several" others. In addition, he could recommend pay raises but wasn't sure how often he did. In the end, the court couldn't conclusively determine if the factors were met.



ADA accommodation

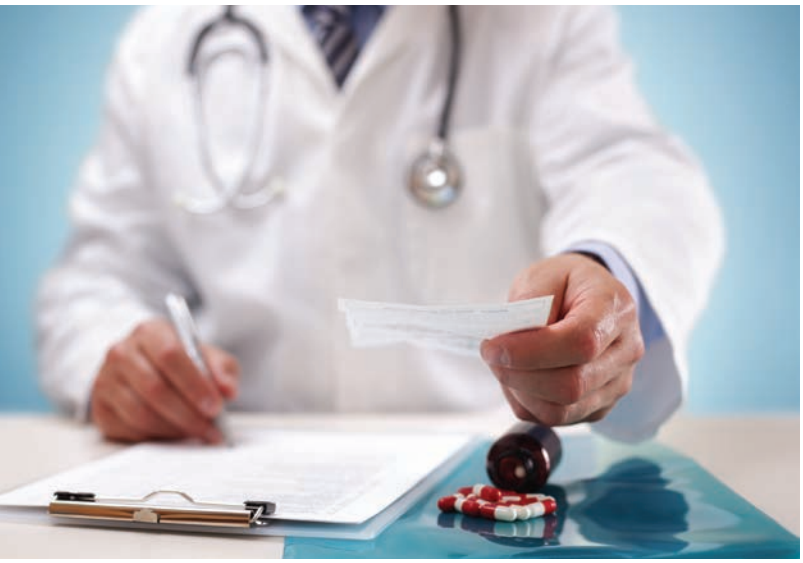
Improper paperwork doesn't excuse employers

When is an employer doing enough to accommodate an employee under the Americans with Disabilities Act (ADA)? The employer in *Foster v. Mountain Coal Company* learned the hard way that it wasn't when the issue appeared before the Tenth Circuit Court of Appeals.

A MISSING FORM

While at work on February 5, 2008, the plaintiff turned his head quickly and felt a pop in his neck. He went to the emergency room and was cleared to return to work on February 8. That day the employee had a regularly scheduled week off and after that had time off for a previously scheduled surgery. As a result, he was unable to work until March 28. On February 10, the human resources manager told the employee that the emergency room doctor's return-to-work form was insufficient and that he needed to have the doctor complete the company's form.

The employee claimed that he was unable to get the form from the emergency room doctor. So the employer instructed him to take it to his primary-care physician to fill out. The employee asserted that he retrieved the form from his physician's office and, because no one was available at the employer's HR office, he left the form on an HR employee's desk. The HR employee denied receiving the form. The employee stated that he went back to his primary-care physician and had him fill out a second form. The employer received this second form dated March 18 but believed that the plaintiff lied about dropping off a first form.



The appeals court held that the employer's inconsistent reasons for terminating the employee could be pretext.

BACK TO WORK

The employee returned to work on March 31 and on April 3 was asked to meet with the general manager (GM) and an HR representative. He claimed that they told him he was being suspended because he'd obtained the return-to-work form from his primary-care physician, who hadn't treated him for his neck injury — even though it was the HR manager who had told the employee to get the form from his own doctor. The employee claimed that, during the meeting, he stated that he was going to go to his physician to schedule surgery and that the GM and HR representative responded by telling him to do nothing.

The employer stated that the employee was told he was suspended because of his dishonesty in lying about delivering the first return-to-work form to HR. The employer also stated that it decided to terminate the employee on April 9 but was unable to reach him.

On April 11, the employee received a note from his physician that said he would need another surgery. The employee read this note to his supervisor over the phone. On April 14, the employee received a letter from

the employer dated April 11 stating he had been terminated "effective April 9" because he had given "false information as to a credible Return To Work Slip."

LAWSUIT ENSUES

The employee brought suit against his employer, alleging retaliation in violation of the ADA. To prove he had engaged in protected activity by making an adequate request for an accommodation, the employee relied on his April 3 meeting statements. He also cited reading his physician's letter to his supervisor on April 11.

The trial court granted summary judgment in favor of the employer, and the employee appealed. He argued that the court had erroneously determined that his requests for an accommodation were inadequate to put the employer on notice of a disability.

But the Tenth Circuit reversed the trial court's grant of summary judgment, holding that the employee's testimony about accommodation requests was enough. A reasonable jury could find that he was terminated after his April 11 request for accommodation. In addition, the appeals court held that the employer's inconsistent reasons for terminating the employee could be pretext.

BEYOND PROTOCOLS

Foster reminds employers that they can't avoid accommodating employees by adhering to strict protocols. If you're on notice that an employee is requesting an accommodation you must take part in the interactive process — regardless of whether the paperwork is proper. ■

Why employers must set harassment policies in motion

Recently, the Fifth Circuit Court of Appeals decided whether a trial court had erroneously granted summary judgment in favor of an employer in a Title VII sexual harassment claim. At issue in *Pullen v. Caddo Parish School Board* was whether the employer, simply by having a harassment policy, had done enough to prevent claims.

MAKING ALLEGATIONS

A clerical employee in a school alleged that her supervisor had verbally and physically harassed her. She never complained to the school board. However, another clerical worker made a complaint involving the same supervisor and referenced the first employee as a person who could have been subjected to similar conduct. The first employee then filed a suit against the school board.

The alleged harasser remained the employee's supervisor for a period of time until she was transferred to a different department. According to the employee, the harassment continued even after she was transferred.

APPLYING TWO LEGAL STANDARDS

Both parties moved for summary judgment. The trial court analyzed the claim under two different legal standards: one for the period of time when the alleged harasser was the plaintiff's supervisor, and one for when he wasn't.

For the first time period, the trial court applied the *Ellerth/Faragher* defense. Such a defense would allow an employer to not be held strictly liable for a supervisor's harassment if the harassment didn't result in a tangible employment action and the employer could establish two things:

1. It exercised reasonable care to prevent and promptly correct any harassing behavior.
2. The plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid any harm.

The court concluded that the employer had maintained a sexual harassment policy and provided harassment training, so there were no material factual issues.

As for the second time period, the trial court decided that the employee hadn't set forth any evidence to show that her employer knew or should have known about the harassment. The court cited the fact that she hadn't filed a claim until two years after the conduct occurred.

REVIEWING THE COURT'S DECISION

The Fifth Circuit reversed for the period during which the alleged harasser was the plaintiff's supervisor, but affirmed for the period during which he wasn't. The appeals court held that disputes existed as to whether the employee was aware of the policy so that she could take advantage of it and whether the employer exercised reasonable care in preventing harassment. The employee stated that she could produce other clerical employees as witnesses. They could testify that they weren't informed of the policy and weren't advised about whom to contact regarding harassment complaints. The employee alleged that these witnesses would also testify that they hadn't received sexual harassment training. Even though the school board provided evidence to the contrary, the court held that there were genuine issues of fact.

The court applied a different standard for the period of time when the alleged harasser was no longer the employee's supervisor: An employer would be vicariously liable for sexual harassment by a co-worker if the employee could establish that the employer knew or should have known of the harassment and failed to take prompt remedial action. The employee in this case had conceded that the school board didn't have actual notice until she reported it two years later. Thus, because she hadn't established that the school board knew or should have known of the harassment, the court affirmed the district court's grant of summary judgment for that time period.

TAKING ACTION

Employers should know that having an antiharassment policy alone isn't effective in rebuffing sexual harassment claims. The policy must be provided to all employees and clearly explained to them so that they are aware of what isn't permitted and have a reasonable avenue for complaint. ■

Dead end

Discrimination case bumps up against limits of Title VII

Both employees and employers may be surprised to learn that sexual orientation isn't a protected class under Title VII of the Civil Rights Act. When an employee accused her former employer of discrimination, she encountered unexpected obstacles.

EMPLOYMENT DENIED

The plaintiff in *Hively v. Ivy Tech Community College, South Bend* began working as a part-time adjunct professor in 2000. From 2009 to 2014, she applied for six full-time teaching positions. She claimed that she met the job requirements for all six positions and had no negative evaluations, yet she received no interviews. In 2014, her employment contract wasn't renewed.

As a result, the employee filed a charge with the Equal Employment Opportunity Commission (EEOC) claiming that she had been discriminated against on the basis

of her sexual orientation because she had been blocked from full-time employment without just cause. She then brought suit against the employer, claiming that she was denied full-time employment and promotions based on her sexual orientation in violation of Title VII.

The employer argued that Title VII doesn't apply to claims of sexual orientation discrimination, so the employee's claim had no legal remedy. The trial court agreed and granted the employer's motion to dismiss. The employee appealed.

WHAT'S COVERED, WHAT ISN'T

The Seventh Circuit Court of Appeals affirmed, holding that claims for sexual orientation weren't covered by Title VII. Therefore, the employee couldn't overcome the motion to dismiss.

The court also addressed criticism it had received from the EEOC about the rationale of recognizing gender nonconformity claims as sex-based discrimination, but denying sexual orientation claims. The EEOC believed that the two claims were similar.

A gender nonconformity claim is one where an individual is discriminated against because he or she doesn't act according to gender conventions — for example, a woman who doesn't act stereotypically female or dress in a so-called feminine manner. A sexual orientation claim is one where an individual is discriminated against because of his or her orientation — for example, a woman who identifies as a lesbian.

The court reviewed past sex-based discrimination decisions and found that some of the results were "odd" because different courts analyzed these types of cases differently. Some courts denied sex-based discrimination claims if they involved any sexual orientation allegations, while others denied the claims if sexual orientation and gender nonconformity allegations were intertwined. Certain courts attempted to separate the sexual orientation from the gender nonconformity allegations, allowing only the gender nonconformity allegations to go forward. Other courts allowed gender nonconformity claims only if the plaintiff exhibited stereotypically gay or lesbian behavior.

Ultimately, the court decided that, even when taking into consideration the EEOC's criticism and inconsistencies in the case law, the employee in this case failed to make a Title VII claim. Because her claim was solely for sexual orientation discrimination, it was beyond the scope of Title VII.

HANDS TIED

The court asserted that it could "see no rational reason to entertain sex discrimination claims for those who defy gender norms by looking or acting stereotypically gay or lesbian (even if they are not), but not for those who are openly gay but otherwise comply with gender norms." The court also stated that it seemed inconsistent to "allow two women or two men to marry, but allow employers to terminate them for doing so."

Nonetheless, the court was bound by its precedent, which clearly held that Title VII was *not* a proper avenue for sexual orientation claims. The court noted that Congress had intended a narrow reading of the term "sex" when it passed Title VII and had since rejected legislation that would have extended coverage of the act to include sexual orientation. Even though many judicial opinions held that sexual orientation discrimination couldn't be accepted, Congress had failed to amend the act.

The court stated that it would need a compelling reason to overturn the circuit's precedent — such as a Supreme Court decision or legislative change. However, the court predicted that in time the rationale used to distinguish between gender nonconformity cases and sexual orientation cases wouldn't hold up and would lead it to reconsider its precedent.

NOT GOING AWAY

Although Title VII doesn't protect employees from sexual orientation discrimination, many states have laws that do. Furthermore, the EEOC and other agencies continue to bring sexual orientation charges under that law. So to avoid unnecessary lawsuits, employers should take steps to ensure they aren't discriminating against individuals due to their gender or sexual orientation. ■

A message to our clients and friends …

The attorneys in our Employment and Labor Section are available to answer your questions about the articles in the Briefing. We also stand ready to respond to any other questions you might have. It has always been our goal to provide timely and practical advice whenever and wherever a client has a problem. You can contact each of us directly. Call us or send us an email message. We will be there for you.

"Above all, we are at your service …"

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