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EMPLOYMENT LAW QUARTERLY

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Cuyahoga Court of Appeals Strikes Arbitration Agreement

by Stephen S. Zashin*

Recently, the Cuyahoga County Court of Appeals denied enforcement of an arbitration agreement. In *Hardwick v. Sherwin-Williams Co.*, former employees sued their employer for sexual harassment and other employment-related torts. The employer moved to stay the court proceedings and compel arbitration.

The employer created an arbitration procedure designed to ameliorate workplace complaints. Instead of drafting a contract, the employer circulated a leaflet stating that all employees were eligible to use the arbitration procedure. At no point did the employer require employees to sign an arbitration agreement as a condition of employment.

Additionally, the policy stated that employees who used the procedure *may* be precluded from seeking relief in court. Furthermore, while the policy purported to cover all employee claims against the employer, the arbitration procedure did not cover the company's claims against its employees.

The employer moved to stay the court proceedings and compel arbitration. According to the employer, the leaflet and accompanying documents manifested a mandatory and binding arbitration agreement. Further, the employer argued that it expressly conditioned employment upon assenting to this arbitration agreement.

The trial court denied the employer's motion. The Cuyahoga County Court of Appeals affirmed the trial court's decision. The court noted that the parties must agree to arbitrate their differences. Absent mutual assent, the employer and employee did not have an arbitration agreement. Significantly, the employees never signed an arbitration agreement.

Furthermore, the arbitration program's literature presented the arbitration program as an option. The leaflet never

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Inside this issue:

Bonus Payments Only Offset Overtime in Same Workweek

by Michele L. Jakubs*

The Sixth Circuit recently held that an employer can use extra compensation earned within a workweek to offset overtime owed to employees within that same workweek. In *Herman v. Fabri-Centers of America, Inc.*, the Department of Labor ("DOL") sued the employer for violating the Fair Labor Standards Act ("FLSA").

The employer calculated certain employees' base pay using two different formulae. When calculating overtime for those employees, the employer used only the base pay and did not include other variables such as non-discretionary bonuses and shift differentials. As a result, the employer conceded an FLSA violation.

The employer, however, contended that the court should offset contract premi-

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Zashin & Rich Welcomes Helena J. Oroz to Employment & Labor Group

Zashin & Rich recently welcomed a new addition to its Employment and Labor department. Helena J. Oroz has joined the firm to practice in the areas of labor relations, equal employment opportunity, employment discrimination, and all other employment-related torts. Helena works extensively in benefits litigation. As part of her employment benefits concentration, Helena counsels employers on the Employee Retirement Income Security Act ("ERISA"), the Consolidated Omnibus Budget Reconciliation Act ("COBRA") and the Health Insurance Portability and Accountability Act ("HIPAA").

Helena joined Zashin & Rich in 1999 as a law clerk. Helena earned her Juris Doctor in May 2002 from the Cleveland-Marshall College of Law and became a certified member of the Ohio Bar in November 2002. She is also certified to appear before the United States District Court for the Northern District of Ohio. Helena is a member of the Ohio State Bar Association and the Cleveland Bar Association

Jury Awards Hospital Employee $11.65 Million in FMLA Claim

by Helena J. Oroz*

A federal jury awarded a former hospital employee $11.65 million for an intentional infliction of emotional distress claim based on a violation of the Family and Medical Leave Act ("FMLA"). The verdict is believed to be the highest awarded in an FMLA case.

In *Schultz v. Advocate Health and Hospitals Corp.*, N.D. Ill. No. 01 CV 102, an employee sued his former employer alleging violations of the FMLA and other common law torts. The employee worked for over 26 years as a janitor for a Chicago-area hospital. During that time, the employee won an employee-of-the-year award–an accolade usually reserved for doctors and executives.

In 1999, the employee requested medical leave under the FMLA to care for his parents. His mother suffered from heart disease and diabetes; his father suffered from Alzheimer's disease. The employee's mother died in 2000, but he continued to request leave to care for his father. As a result, the employee took leave intermittently over several months.

Apparently, the employee's relationship with his supervisors deteriorated. One of the employee's supervisors told others that he intended to find grounds to dismiss the employee. His supervisor instituted new monthly performance standards for workers in the building maintenance department. Rigid enforcement of the standards led to the employee's termination. The supervisor apparently enforced performance standards even though he knew the employee took increments of leave each month to care for his declining father.

The hospital terminated the employee on November 7, 2000. Shortly thereafter, the employee sued the hospital, alleging retaliatory discharge, FMLA violations and intentional infliction of emotional distress. In addition, the employee joined two of his supervisors. The tort claims left the hospital open to potential punitive damages.

At trial, the jury issued a verdict in favor of the employee. As a result, the jury awarded the employee $750,000 in compensatory damages and $10 million in punitive damages for his intentional infliction of emotional distress claim. Additionally, the jury awarded the employee $200,000 in compensatory damages and $250,000 in punitive damages from two of his former supervisors. In all, damages totaled $11.65 million–not including attorney fees.

This case demonstrates the potential for crushing damages in all employment cases. In this case, the jury held the hospital liable for $10.75 million. This price tag does not include the employee's attorney fees. The verdict also slapped the individual supervisors with $550,000 in damages.

This case clearly reinforces the need for effective leave programs and supervisory training. Supervisor statements and actions embroiled the hospital in a multi-million dollar lawsuit. Proactive and preventative leave policies could have saved the hospital millions of dollars.

****Helena Oroz** *practices in all areas of employment discrimination and employee benefits litigation, including cases involving ERISA, HIPPA, COBRA and the FMLA. For more information about the FMLA, please contact Helena J. Oroz at (216) 696-4441 or hjo@zrlaw.com.*

Asthma Does Not Seriously Impair Major Life Activity of Breathing

*By Robert C. Hicks**

Asthma is not a disability under the ADA, the Northern District of Ohio recently concluded. In *White v. Honda Mfg. Inc.*, a former employee alleged that her employer failed to accommodate reasonably her asthma.

The employee worked as an office assistant in a manufacturing plant's plastics department. During her first week of employment, the employee began to suffer sever asthma symptoms. The employer moved her to another department. The plaintiff visited a doctor, who recommended that she avoid paints, thinners, solvents, exhaust and gasoline.

To accommodate the employee's asthma, the employer ran numerous air quality tests in the plastics department. The employer also attempted to fit the employee with a paper dust mask and a respirator to wear as she passed through other, more offensive departments.

None of these measures succeeded. After over a year of medical leave, the employer terminated the employee.

The employee filed suit against her employer, alleging failure to accommodate under the Americans with Disabilities Act ("ADA") and O.R.C. § 4112.02. The employer filed for summary judgment, arguing that the employee's asthma was not a disability under the ADA.

The court granted the employer's motion for summary judgment. The court concluded that the employee's asthma did not substantially limit any of her major life activities.

Both parties recognized asthma as a physical impairment. The central question, then, became whether the employee's asthma substantially impaired a major life activity.

The employee argued that her asthma substantially impaired the major life activity of breathing. Although the

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Firm Update

Attorneys Speak at "Personnel Law Update" in Columbus

Stephen S. Zashin, Michele L. Jakubs and Robert C. Hicks each gave presentations at COEM's Personnel Law Update, held on March 13th and March 14th in Columbus, Ohio. Mr. Zashin spoke on the interplay between the ADA, FMLA and Worker's Compensation laws. Ms. Jakubs addressed the FLSA and Ohio's wage and hour laws. Mr. Hicks' presentation covered privacy issues in the electronic workplace.

Zashin, Oroz Speak on Post-Termination Issues in Ohio

Stephen S. Zashin and Helena J. Oroz spoke at the Post-Termination Issues in Ohio seminar, held on January 21, 2003 in Cleveland, Ohio. Mr. Zashin addressed the proper composition and implementation of arbitration agreements. Ms. Oroz's presentation covered employment termination issues arising under ERISA, COBRA and HIPAA.

Zashin Addresses Northern Ohio Human Resources Council

On March 14, 2003, Mr. Zashin addressed the NOHRC. Mr. Zashin's presentation described how to respond effectively to inquiries from state and federal agencies. The presentation detailed how to deal with unexpected inspections from various local and federal agencies, including OSHA, the Department of Labor and the INS.

Firm to Moderate HR Seminar

On May 2nd, Mr. Zashin will moderate a seminar on conducting a human resources audit in Ohio.

Court Allows Employer to Offset Overtime Pay in Same Workweek

(Continued from page 1)
ums against the amount of overtime it owed employees. Essentially, the employer argued that the FLSA permitted an employer to credit all premium payments toward the total overtime owed.

By contrast, the DOL argued that premiums could only offset missed overtime within the same workweek. The DOL noted that the FLSA, while allowing employers to credit extra compensation toward overtime payable to an employee, did not define a relevant time period.

Faced with legislative silence, the DOL argued that the policy underlying the FLSA did not support the employer's argument. Rather, the DOL argued that the statute allowed extra compensation to offset missed overtime within the same workweek.

The district court agreed with the employer. Specifically noting the absence of qualifying language within the statute, the district court held that the employer could credit all premium payments toward the total overtime owed. The district court concluded that Congress could have specified a workweek limitation on the sections concerning premium offsets. Absent congressional limitation, the district court refused to impose limitations.

The Sixth Circuit reversed. In making its determination, the Court applied principles of statutory construction. As a preliminary note, the Court recognized that the germane section of the FLSA does not impose a time limit. The FLSA merely allows employers to credit extra compensation toward overtime compensation. Thus, the plain language of the statute did not resolve the issue.

The Court then turned to the statutory history of the FLSA. As initially enacted, the relevant portion of the FLSA allowed employers to claim credit for premium payments toward any compensation owed. Congress amended the statute, and inserted the current language. Notably, Congress eliminated the word "any." Additionally, new sections of the FLSA specifically reference the workweek.

According to legislative history, Congress considered it unfair to force the employer to include premiums—like the one Fabri-Center offered to its employees—in the regular rate of pay for overtime. Congress also considered it fair to give employers credit for certain contractual premiums to offset overtime they might owe.

To maintain fairness to the employee, however, the DOL argued that Congress intended to limit these credits to the standard workweek. Thus, employers could offset premiums paid in a workweek against overtime owed for that same week.

The employer could not use premiums used in another workweek to offset past or future overtime owed to an employee. The workweek, the DOL argued, provided the key to understanding the permissible scope of offsetting overtime with premium payments.

The Court agreed with the DOL. The Court rejected the employer's argument that Congress' deletion of the word "any" represented a minor shift in text. Adopting the argument proffered by the DOL, the Court held that by eliminating the word "any" Congress clearly did not intend for the premium offsets to apply to any premium.

In further support of its decision, the Court noted that other provisions of the FLSA support limiting offsets to overtime earned within the same workweek. Additionally, the Seventh Circuit adopted similar logic and allowed employers to offset overtime with premiums paid in the same workweek. Consequently, the Court allowed the employer to offset owed overtime with other premiums paid to the employees within the same workweek.

This case clarifies a previously cloudy issue under the FLSA. Employers cannot simply add up the total dollars paid in premium payments and subtract the number from the total overtime compensation owed. Rather, the overtime owed and the permissible offset must be calculated on a week-by-week basis.

The most important lesson of this case, however, is to ensure compliance with the FLSA in the first place. Even if the Sixth Circuit sustained the employer's ability to offset all overtime owed with all premiums paid, the employer would still owe its employees approximately $432,000. This number does not include the legal fees and costs associated with pursuing this type of case. By crafting pay methods more carefully, the employer might have avoided a great deal of expense.

***Michele L. Jakubs** practices in the areas of labor relations, equal employment opportunity, employment discrimination, the Fair Labor Standards Act, and state wage and hour laws. For more information about the FLSA, please contact Michele L. Jakubs at (216) 696-4441 or mlj@zrlaw.com.*

Asthma Fails to Seriously Affect Life Activity of Breathing

(Continued from page 3)
asthma attacks occurred intermittently, the employee claimed that when the attacks struck, they debilitated her.

By contrast, the employer argued that the employee's intermittent asthma problems proved that it did not affect a major life activity. The employer emphasized that the employee controlled her asthma with medication and inhalers.

Based on the circumstances of this case, the court decided that the employee's asthma did not substantially limit her breathing.

First, the court rejected both parties' reliance upon pure medical tests, and looked to the circumstances of the employee's asthma. The court noted that many other cases declined to hold that asthma substantially limited a person's life activities.

Additionally, the employee's asthma only affected her in certain limited environments. Furthermore, the employee controlled her condition with medication and inhalers. Since the employee's asthma only affected her in limited situations, the court held that asthma did not substantially limit one or more of the employee's major life activities.

The employee also claimed that her employer regarded her as substantially limited in the life activity of working. To succeed on this claim, the employee needed to prove that her employer regarded her as unable to work in a broad class of jobs.

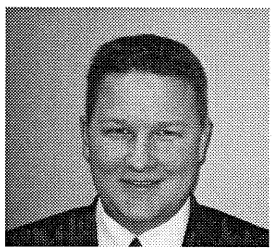
The court, however, rejected this argument. According to the employer's human resources manager, the employer sought to accommodate all medical restrictions regardless of the ADA. In fact, the employer shuttled the employee around a number of departments seeking a suitable work environment. The employer also upgraded the plastics department's HVAC system to improve air quality.

The court also rejected the employee's argument that the employer blackballed her from receiving a different position with the company. Although the employee applied for 14 other positions within the company, she did not possess the requisite skills for any of those positions. Also, the employee did not submit her resume on time for nine of the positions. As a result, the court found that the employer did not illegally prevent the employee from receiving a position with the company.

The employer in this case took appropriate steps to accommodate the employee. After her complaint, the employer tested the air in her department and took steps to insure its purity. Furthermore, the employer attempted to fit the employee with masks to protect her from harmful irritants in the air.

Finally, the employer considered the employee's applications for other jobs and used ordinary business judgment to hire the best person for the job.

The employer's effective responses to an employee's medical situation satisfied the requirements of the ADA. By implementing and following these procedures, the employer disposed of this claim with minimal legal cost and expense.



***Robert C. Hicks** practices in the areas of employment discrimination, wrongful discharge, unfair competition and occupational safety and health. For more information on the ADA, please contact Robert C. Hicks at (216) 696-4441 or rch@zrlaw.com.*

LEGAL LINES

Listen to "Legal Lines" with Bob, Andrew & Stephen Zashin every Saturday from 9—10 a.m. on AM 1300 WERE Cleveland. Tune in, call with questions, and enjoy truly rousing discussions about current legal issues.

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Court Finds Employer's Arbitration Agreement Unenforceable

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suggested that employees *must* submit their claims to arbitration. Rather, the accompanying literature stated that arbitration remained available for employees.

The leaflet further stated that arbitration may preclude employees from asserting their claims in court. Neither the leaflet nor any accompanying letters mention the mandatory and binding nature of the arbitration "agreement."

The Court held that the parties never reached a mutual assent. Absent such a meeting of the minds, no contract existed. Consequently, the Court upheld the trial court's denial of the employer's motion to stay and compel arbitration.

This case illustrates nicely the potential consequences of poor drafting. This "agreement" did not clearly convey to employees its mandatory and binding nature.

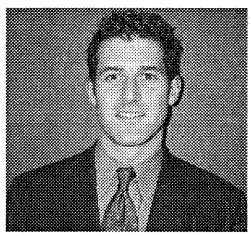
The "agreement" used words such as "may" and "are eligible," indicating that employees could choose whether to use the arbitration program. Furthermore, neither the leaflet nor the accompanying literature conditioned employment upon assenting to arbitration.

Clearly, the most effective way to enforce an agreement is to have a signed writing, rather than relying upon inference and implication to create (possibly) a binding arbitration agreement.

Finally, the employer's program contained another flaw the court did not address. The purported agreement bound only the employee, not the employer. This lack of mutuality usually elicits a great deal of judicial scrutiny, and quite possibly judicial scorn.

Even with assent, the court might have struck this arbitration agreement because it unilaterally bound the employee without binding the employer. When drafting an arbitration agreement, it behooves the employer to bind itself to arbitration as well.

As this case demonstrates, clear and precise drafting provides the key to enforcing any contract, including arbitration agreements. Before implementing an arbitration program, employers must ensure that the agreement clearly binds all parties to arbitration. Without such essential elements, your arbitration agreement might not be an agreement at all.



***Stephen S. Zashin** is an OSBA Certified Specialist in Labor and Employment Law and has extensive experience in all aspects of employment law. For more information about arbitration programs, please contact Stephen S. Zashin at ssz@zrlaw.com or (216) 696-4441.*

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