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EMPLOYMENT LAW QUARTERLY

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Ohio Courts Warn Against Retrospective Application of Vacation Policy

*by Helena J. Oroz**

In *Braucher v. Allied Truck Parts Co.*, an Ohio Court of Appeals recently held an employer liable for vacation pay to a former employee earned before the company revised its vacation policy.

The employee worked for the company from 1980 to November 2000. The vacation policy in the company's January 1999 Employee Handbook stated that employees had to take their accrued vacation time the year after they earned the time. The company revised the policy in November 1999 to require employees to take vacation time in the *same* year they earned the time.

When the employee left the company in 2000, the company refused to pay him for his 1999 vacation time, citing the revised policy. The employee sued in small claims court and won $2,512.00.

On appeal, the company played the at-will employment card—and folded. The company argued that the at-will nature of the employment relationship allowed the employer to change the terms and conditions of employment at any time. The company further argued that the Employee Handbook did not create a contractual obligation.

Courts throughout Ohio have upheld these propositions in employment cases brought by former employees. So why is this case different?

The Court held that the company's application of its revised vacation policy to the 1999 vacation time was *retrospective*-not prospective-in nature.

The Court found that the employee had already earned that time when the company changed its policy. In addition, the Court found that the company failed to prove that the employee knew he would forfeit his 1999 hours.

The employee's signed acknowledgement of receipt of the revised Handbook did not convince the Court that the

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Inside this issue:

DOL Proposes Dramatic Changes to the FLSA Exemption Regulation Rules

*by Michele L. Jakubs**

The Wage and Hour Division of the Department of Labor ("DOL") recently proposed dramatic changes to the Fair Labor Standards Act's (FLSA) regulations concerning "white-collar" exemptions.

According to the DOL, the proposed changes could affect 6.5 million U.S. businesses, 109.5 million employees and annual payrolls totaling near $2.8 trillion.

Employers and employees alike have long criticized the existing overly complex exemption regulations. The two biggest suggested changes concern the salary thresholds for exempt employees (last updated in 1975), and the duties (test unchanged since 1949).

The DOL's proposed changes include an increase in the minimum salary levels

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Seventh Circuit Says an Employee Can Provide FMLA Notice While Sleeping

*by Stephen S. Zashin**

In *Byrne v. Avone Prods. Inc.,* the United States Court of Appeals for the Seventh Circuit (covering federal courts Wisconsin, Illinois and Indiana) held that firing an employee for sleeping on the job may violate the Family and Medical Leave Act ("FMLA").

In this case, the employee worked as a stationary engineer on the night shift and had exemplary performance for more than four years. Two weeks before his eventual termination, the employee began to read and sleep in an area employees used as a break room for hours at a time.

Management attempted to discuss the situation with the employee on his next shift after a surveillance tape demonstrated that the employee spent most of his time in the break area with the lights out on work time. The employee left his shift early that day and told co-workers he did not feel well.

The company tried calling the employee at home, but only reached the employee's sister who said he was "very sick." When management did reach him, the employee agreed to attend a meeting. When he failed to appear, the company terminated his employment.

The employee, who apparently failed to appear because he suffered from depression, sought treatment for the following two months.

When the company refused to reinstate the employee, he brought suit under the FMLA and the Americans with Disabilities Act ("ADA").

The trial court granted summary judgment to the employer, ruling that neither statute excused sleeping on the job. On appeal, the Seventh Circuit held that the employee could not be a "qualified individual" under the ADA if he could not work for an extended period of time.

However, the Court took a unique look at the employee's FMLA claim. The Seventh Circuit remanded the case back to the trial court to determine if the employer should have reclassified his last two workweeks as FMLA qualifying leave.

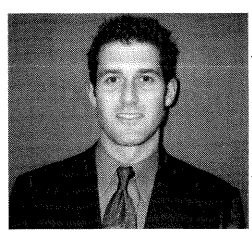
Generally, an employer's obligation to provide FMLA leave rests on the employee disclosing the he/she has a "serious health condition." In this case, the employer asserted that it had no notice of the employee's condition at the time of his termination.

On appeal, the Seventh Circuit focused on whether the employee's "unusual behavior" provided the employer with adequate notice that he suffered from a serious health condition. The Court went so far as to state: "unusual behavior gives all the notice required." The Court did note, in a moment of clarity, that the employee's behavior could have been "no more than malingering."

The remainder of the Court's analysis, however, rested on whether the employee could give proper notice. The Court noted that medical evidence in the record suggested that a jury could conclude the employee was unable to provide notice. If a jury could determine, therefore, that either his behavior provided sufficient notice, or that he was mentally unable to give notice, the employee would be entitled to FMLA leave covering the period of time in question. Because the trial court did not consider such possibilities, the Seventh Circuit remanded the case back to the trial court.

This case places employers in a difficult position. Essentially, this Court determined that in some circumstances an employee puts an employer on notice of the need for FMLA leave simply by performing his or her job in a manner not consistent with prior job performance. Previously, most courts have required that an employee inform an employer that the employee is sick, ill or injured and needs time away from work. *Byrne* is a noticeable departure from prior case law.

Hopefully, other courts will not follow the Seventh Circuit's lead on this issue. Otherwise, employers may have to express concern rather than disappointment if they catch employees napping on the job.



***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 the FMLA, please contact Stephen at ssz@zrlaw.com or (216) 696-4441.*

No Heightened Showing Required In Mixed-Motive cases

*by Robert C. Hicks**

"Mixed motive" cases involve discrimination actions in which evidence exists of both legitimate and illegitimate reasons for the adverse employment action. The United States Supreme Court recently held that plaintiffs need not present "direct evidence" of discrimination to establish liability in a mixed-motive action brought under Title VII of the Civil Rights Act of 1964. The decision in *Desert Palace, Inc. v. Costa* has some important implications for employers.

The case involved a terminated employee who brought suit against her former employer under Title VII alleging sex discrimination.

The employee was the company's only female warehouse worker/heavy equipment operator. After disciplining the employee for various infractions, the company finally terminated her following a physical altercation with a co-worker.

At trial, the employee presented evidence that the company subjected her to tougher discipline and less favorable treatment than her male co-workers for the same conduct. The jury awarded the employee backpay, as well as compensatory and punitive damages.

The employer objected at trial to the court's mixed motive jury instruction (i.e. to find in favor of the employee if the jury found that her sex motivated the employer's treatment of the employee, even if a lawful reason also motivated the employer's conduct). The trial court further instructed the jury to award damages unless the employer proved that it would have treated the employee the same regardless of her sex.

The employer argued at trial that the employee failed to present "direct evidence" that sex was a motivating factor in her termination or other treatment. Therefore, the employer argued that the court should not provide a mixed motive instruction to the jury.

Courts of Appeals have split on this

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Z&R Update

Zashin Speaks on ADA, FMLA and Workers' Comp

Stephen S. Zashin will speak at The Council on Education in Management's Personnel Law Update 2003 on September 10. He will present materials on techniques for managing the interplay of the ADA, FMLA, and Workers' Compensation laws.

COSE Update features Z&R Attorneys

COSE Update, has featured articles written by Stephen S. Zashin and Helena J. Oroz. The articles covered alternative dispute resolution programs, health insurance benefits and employment practices liability insurance.

Zashin Speaks at Cleveland Accounting Show

Stephen S. Zashin will speak to the Ohio Society of CPAs at their 2003 Cleveland Accounting Show. Stephen will present "Employment Law Update" on September 18, 2003 at the IX Center.

Z&R to Provide HR Certifications

Stephen S. Zashin and Lois A. Gruhin will provide training for the Council on Education and Management's HR Certification Program on November 17 and 18 in Columbus, Ohio.

Gruhin Moderates Council

Lois A. Gruhin will moderate the Council of Education and Management's Personnel Law Update 2003 on December 10 and 11 in Columbus, Ohio.

Proposed Changes to FLSA Exemption Regulations

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associated with the FLSA's salary basis test. The proposal calls for an increase from $155 per week to $425 per week wage cut-off to qualify an employee as exempt from receiving overtime pay, provided the employee meet the duties test. The proposal applies to bona fide executives, administrators, and professionals.

The updated duties test alters the types of duties required of today's employees, and mandates that white-collar employees meet one of three revised duties tests to qualify as exempt.

If accepted, the DOL's proposal will replace the current executive "long" and "short" tests with a "standard" duties test. A new streamlined test will require an exempt executive to manage the employer's enterprise or subdivision of the organization; regularly direct the work of two or more employees; and hire and fire employees or have considerable input on related personnel decisions.

In addition, the DOL's proposal recognizes any employee, who owns at least 20% equity interest in his/her employer, as an exempt executive.

The proposed changes for the exempt administrator duties test retain the requirement that the employee have a primary duty of "performing office or non-manual work related to the management policies or the general business operations of the employer or the employer's customers."

The DOL's proposal, however, replaces the "discretion and independent judgment" rule with a new requirement that the employee hold a "position of responsibility" with the employer. The proposal requires an exempt administrator to perform work of substantial importance, or work that requires a high level of skill or training.

The DOL's proposal also recognizes learned professionals as exempt. A combination of work experience and academic instruction now provide an employee with the equivalent knowledge and skill. The proposal no longer requires a degree and recognizes work experience in lieu of a degree.

The other exempt employees addressed in the proposal include creative professionals, computer professionals and teachers. The proposed regulations set forth specific changes to the duties of each group.

Another component to the DOL's proposal includes a highly compensated employee exemption. An employee who performs office or non-manual work, and earns a yearly salary of at least $65,000 falls within this classification. Generally, an employer would not have to pay such an employee overtime even if the employee performs non-exempt duties. The proposal also contains various exceptions to this general rule.

The following demonstrates a clear illustration of the DOL's proposal. If an employee earns below $425, the employee is not exempt and must receive overtime regardless of the employee's duties. If an employee earns between $425 and $1,249 per week, the employee must pass the appropriate duties test to qualify as exempt. If an employee earns $1,250 or more per week, the employee is automatically exempt from overtime regardless of the employee's duties (subject to certain limitations).

The proposed regulations also address deductions from an exempt employee's pay. While the current regulations prohibit deducting less than a week's earnings from an exempt employee, the DOL's proposal will permit employers to withhold less than a week's pay from exempt employees as a disciplinary deduction. An employer will not have to fear the loss of the exemption so long as the employer makes deductions in accordance with a written policy.

These proposed changes, if enacted, intend to promote small business growth and guarantee overtime pay for an additional 1.3 million low-wage workers. Employers stand to lose $334 to $895 million in direct payroll costs for the proposed changes.

The DOL predicts a decision regarding its proposal by the end of 2003, or early 2004. If the DOL's proposal becomes a reality, employers must reevaluate each employee to ensure proper evaluation of exempt status.

***Michele L. Jakubs** practices in the areas of equal employment opportunity, employment discrimination, the Fair Labor Standards Act, and state wage and hour laws. For more information about overtime or other wage and hour issues, please contact Michele at (216) 696-4441 or mlj@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 discussions about current legal issues.

Un-Mixing a Circuit Split

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issue, and the Ninth Circuit disagreed with the employer and upheld the jury verdict in favor of the employee.

The United States Supreme Court agreed with the Ninth Circuit. The Court's unanimous opinion focused on the language of the statute. According to the U.S. Supreme Court, Title VII "does not mention, much less require, that a plaintiff make a heightened showing through direct evidence."

The Court further reasoned that Title VII's silence with respect to the type of evidence required in mixed-motive cases suggests that regular civil rules, requiring proof by preponderance of the evidence using direct *or* circumstantial evidence, apply. The Court held that an employee need not present a heightened showing with direct evidence in a mixed motive case.

Keep in mind that "direct evidence" attempts to prove a fact without inference or presumption. In essence, it moves a juror from points A to B, and finally C with a statement, document or other evidence that shows on its face that improper motives fueled the adverse employment action.

Indirect, or circumstantial, evidence on the other hand presents jurors with only "A" and "C" and then asks a jury to "connect the dots." Indirect evidence is much easier to come by than, say, a notation on company letterhead proclaiming, "You're fired because you're a [protected class]!"

This decision involves a lot of legal lingo, but in everyday terms it means that employees have a lighter load to bear in bringing their cases before juries. Unfortunately, this decision means a heightened risk of liability for employers.

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

Retrospective Vacation Policies

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employee knew he gave up his earned time by continuing his employment under the revised policy. The Court of Appeals found no lawful basis, therefore, to reverse the small claims court's judgment.

This little case packs a big punch. This case involved one employee—but think about the impact of improperly implementing a revised vacation policy with respect to many employees. Multiply $2,512.00 by 10, 50, or 100 employees, and you have a devastating situation on your hands.

In Ohio, vacation time is a creature of company policy. Ohio courts (especially municipal or small claims) will typically enforce company policies even if they are not contracts. So take a tip: If your employees earn vacation time pursuant to company policy that allows for accrual, they might just be able to take it with them when they leave.

If your company wants to revise its vacation policy, do so in a manner that does not have the effect of depriving employees of earned benefits.

Further, every employer should ensure that its vacation policy is in writing and accurately reflects the manner in which the company administers vacation time (e.g. accrual, payment upon termination, etc.).

***Helena J. 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 vacation policies, please contact Helena at (216) 696-4441 or hjo@zrlaw.com.*

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Discrimination Charges on the Increase

*by Lois A. Gruhin**

As a weak economy results in widespread layoffs, an increased number of laid-off employees have taken their grievances to the Equal Employment Opportunity Commission ("EEOC").

The EEOC received 84,442 charges of employment discrimination from September 2001 to September 2002. This amounted to a 4.5 percent increase over the prior year.

Most of the increases involved charges of discrimination based on national origin (13% increase), religion (21% increase) and age (14.5% increase).

All employers should take charges of discrimination seriously. While employers have an ongoing responsibility to address discrimination, employers may need to take more proactive and preventative efforts.

Employers can avoid many discrimination claims by making a committed effort to ensure equal treatment of employees regardless of any protected classification.

Type of Claim	Number of Charges	Percent Increase
Race	29,910	3.5
Sex/Gender	25,536	1.6
Retaliation	22,768	2
Age	19,921	14.5
Disability	15,964	(3)
National Origin	9,046	13
Religious	2,572	21
Equal Pay Act	1,256	unchanged

Training supervisors on how to identify and respond to discrimination, developing and communicating clear policies and procedures regarding discrimination and providing employees with an avenue to complain about feelings of perceived discrimination go a long way to remove perceptions of discrimination in the workplace.

By taking such preventive measures, employers can avoid many charges of discrimination and improve employee morale.

***Lois A. Gruhin**, a member of the firm's Columbus office, is a former general counsel for Schottenstein Stores Corporation and has extensive experience in corporate compliance, employment discrimination and wrongful discharge matters. For more information about the EEOC or employment discrimination issues, please contact Lois at (614) 861-7612 or lag@zrlaw.com.*