

Committee Brief

American Bar Association
Section of Labor and Employment Law

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A Word From the Editor . . .

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As a sampling of the value of our Committee to those who are active, this newsletter contains excerpts from each of the six annual supplement reports presented at this year's Midwinter Meeting in Puerto Vallarta, Mexico. Each of the subcommittees that produced these reports (the full version of which is available through the ABA) is eager to add individuals who have an interest and would like to be part of the group.

If you'd like to get involved with our Committee, or if you are interested in submitting an article or idea for us to consider including in our next Committee Brief, please contact me directly, or speak with Co-Chairs Michael Ossip, (215) 963-5761, or Greg McGillivary, (202) 833-8855.

David

Plans for Future Committee Meetings

Our Committee will be meeting at the ABA's Annual Meeting in San Francisco, CA. on Monday, August 11, 2003 at 7:30 a.m. at the Grand Hyatt. This year's program promises to be particularly timely and informative. In addition to our usual discussion of Committee business, Monica Gallagher, former Associate Solicitor of the U.S. Department of Labor and now an Attorney-Consultant in Washington, D.C., will lead a panel discussion on "New Developments In Litigation Under the Fair Labor Standards Act," featuring experienced attorneys on both sides of the table who will share their insights in this ever-increasing area of the law. The highlight of this program will be a debate concerning the DOL's proposed revisions to the white collar exemption regulations, which were published for comment in the Federal Register on March 30, 2003, and which are expected to be finalized early next year. In addition, as in the past, Committee members will be presenting programs on "FMLA Basics" and "FLSA Basics" in conjunction with the ABA's Young Lawyers Division.

Please join us. If you are interested in the Committee, but cannot attend the meeting in San Francisco, drop by the meeting room and leave us your card. Or track me or any other Committee member down and tell us of your interest.

The Committee will be back in Washington, D.C. for its Fall Meeting on October 17, 2003 at the beautiful new offices of Morgan, Lewis & Bockius, 1111 Pennsylvania Avenue. At that meeting, representatives of the U.S. Department of Labor and other government officials will discuss the latest developments affecting those areas covered by the Committee.

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Subcommittee Reports *(Annual Reports Covering Cases and Developments in 2002)*

The following are excerpts from the annual reports of our subcommittees. For copies of the full reports, please visit the www.abanet.org/labor, click “Publications” on the left nav bar, and then click on “Committee Documents”.

Age Discrimination in Employment Act

Subcommittee Chair: Daniel G. Vliet, Davis & Kuelthau SC, Milwaukee, WI

EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002).

After the defendant law firm demoted 32 of its equity partners to “counsel” or “senior counsel,” the former partners filed an ADEA charge with the EEOC. The agency then issued a *subpoena duces tecum* to the firm, seeking to resolve whether the partners had been “employees” prior to their demotion or “employers,” as employers are not entitled to protection under the ADEA. The case was devoted to ruling what evidence was properly sought under the subpoena; the firm had asserted that a partner is an employer if (a) his income included a share of the firm’s profits, (b) he made a contribution to the capital of the firm, (c) he was liable for the firm’s debts, and (d) he had some administrative or managerial responsibilities, and further argued that because it had provided sufficient evidence going to those points, the subpoena was improper.

The court noted that because neither party had addressed, as a legal policy matter, why some or all members of partnerships should be deemed statutory “employers” outside the protection of federal civil rights laws, it had to grapple with that issue *sua sponte*. In so doing, it stated that the purpose of the underlying statute is relevant to the issue of who constitutes an employee versus employer. The court recognized that the ADEA’s purpose could lead the argument either way: it could be that simply because partners are classified as employers for state law principles does not mean that they should be so classified for federal discrimination purposes; on the other hand, they possibly should be considered employers because the law of partnership inherently protects them from oppression, and because partnership law places paramount importance upon partner relations and the ability to choose ones associates.

A very important fact in the court’s opinion was that the law firm’s power base, which apparently made decisions of promotion, demotion, and termination, resided in a small committee, members of which were appointed rather than elected by the partners at large. The court was concerned that this system potentially left the non-committee members partners powerless with regard to important decisions, and potentially “on the hook” for a disproportionate share of firm liability. In this regard, the court paid close attention to the fact that all of the partners, including the plaintiffs before their demotion, had personal liability for firm debt and could be sued by outside creditors without limitation. Although an important traditional aspect of partnership and employer status is the sharing of profits, moreover, (which these partners did), the court noted that many corporations share profits with employees as well without deeming them “employers.”

Because the court found that the issue remained “murky,” it held that the EEOC was entitled to full compliance with the subpoena to the extent that the evidence gathered would enable the Commission to determine whether the partners were employees or employers. The agency’s particular area of interest was the way in which profits were spread across the firm: whether they were concentrated in the executive committee so that the 32 demoted partners might as well have been employees of a corporation. The court took pains to state that it was ruling on the ultimate question of partner employee status, but was merely enabling the facts to be developed so that such a determination would be possible.

EEOC v. Board of Regents of the Univ. of Wis. Sys., 288 F.3d 296 (7th Cir. 2002).

The EEOC brought an ADEA action against the Board of Regents of the Wisconsin state university system, alleging discriminatory termination of four university press employees. After trial, the defendants moved for judgment as a matter of law, arguing that its Eleventh Amendment immunity protected it from suit. The Seventh Circuit held that the Eleventh Amendment did not bar the EEOC from suing the state on behalf of terminated employees.

The University of Wisconsin Press is a nonprofit organization associated with the UW Graduate School and under the direction of the UW Board of Regents. As the court noted, “If this case was to be prosecuted in federal court, the EEOC had to do it. . . . It is . . . a well-established principle that the fact that the states retain sovereign immunity from private lawsuits does not mean that they are protected from suit by the federal government.” The defendants’ argument, however, was that its immunity did not extend to cases where the agency took action in pattern and practice cases, but that immunity remains intact in cases where the EEOC is “simply standing in the shoes of the individuals and is acting in privity with them as their representative.”

The court responded that the Supreme Court’s holding in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), decided this argument against the defendants. In that case, which saw the EEOC filing an ADA action on behalf of a former Waffle House employee who had signed a binding arbitration agreement, the defendant had argued that an arbitration agreement prohibited the EEOC from “pursuing victim-specific judicial relief.” The Supreme Court had held that upon filing of an EEOC charge, the agency has exclusive authority over the case and its direction, and further noted that in selecting a particular individual’s case for enforcement, the EEOC was nevertheless still working to vindicate a public interest. The Board of Regents court thus found itself bound by the Waffle House mandate, and therefore ruled that the defendant could not rely upon sovereign immunity as a defense.

National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

The Supreme Court confirmed that a charge must be filed with the EEOC within 180 days, or 300 days in deferred states, of the unlawful employment practice. The court further clarified that “[a] discrete retaliatory or discriminatory act occurred on the day that it happened.” A party, therefore, must file a charge within either 180 or 300 days of the date of the act or lose the ability to recover for it.

Sain v. American Red Cross, 233 F. Supp. 2d 923 (S.D. OH 2002).

Generally, the district court only has jurisdiction over ADEA claims if those claims had been included in a charge filed with the EEOC or if the claims are based on conduct occurring after the filing of the charge with the EEOC, but reasonably related to the conduct alleged in the charge. If a claim is not included in the EEOC charge, the EEOC may still consider it if reasonably related to the allegations in the Plaintiff’s complaint.

In *Sain*, Plaintiff filed, but later withdrew, a charge of age discrimination with the EEOC. Numerous courts have held that a Plaintiff who abandons or withdraws a claim before the EEOC has reached a determination cannot be deemed to have exhausted his administrative remedies. Plaintiff, however, attempted to salvage his claim by arguing that his age discrimination claim grew out of the EEOC investigation of his pending race discrimination claim. The district court rejected this argument, finding no suggestion of age discrimination in Plaintiff’s charge, no attempt to check the box for age as a basis for discrimination, and no age-related factual allegations therein.

Fakete v. Aetna Inc., 308 F.3d 335 (3d Cir. 2002).

The court held that a statement by a supervisor, responsible for the termination decision at issue, that he wanted “younger” employees and who warned the plaintiff that because of his age he “wouldn’t be happy there in the future” was direct evidence of age discrimination. In *Fakete*, the District Court had granted summary judgment for the employer. The Appellate Court reversed and remanded finding that this single conversation was sufficient to survive summary judgment. Significantly, the court detoured into a substantial discussion of the labels applied to age

discrimination cases. After expressing its dissatisfaction with the various labels -- e.g., mixed motive, direct evidence, etc. -- it concluded it should adhere to the “direct evidence” label. The District Court had concluded that the supervisor's statement was “a stray remark that did not directly reflect the decision-making process of any particular employment decision.” The Appellate Court found that the supervisor’s statement was not a stray remark because it had been made in a discussion about Fakete’s prospects for continued employment.

Peters v. Lincoln Elec. Co., 285 F.3d 456 (6th Cir. 2002).

The court affirmed summary judgment for the employer on an age claim despite comments by a supervisor referring to an employee as a “little old gray-haired man” who was “waiting to retire.” Because the employee to whom the supervisor was referring was not the plaintiff and, in fact, was 74 years old and had already announced retirement plans, the Sixth Circuit agreed with the District Court that the comments at issue did not constitute direct evidence of any discriminatory intent regarding the plaintiff.

Vesprine v. Shaw Indus., 221 F. Supp. 44 (D.C. Mass. 2002).

The District Court found direct evidence of age animus in the following comments: During a meeting regarding the future job duties of the plaintiff, the plaintiff’s manager stated that he “should step back” that he should “let the young stallions run the business” and that it was “time to smell the flowers.” The plaintiff also testified that during this meeting his managers told him that he was “not going to be here much longer” and suggested he spend “more time at his house in Florida ‘taking it easy’ and playing golf.” The court rejected the notion that characterizing these statements as stray remarks was a basis for granting summary judgment, although it did, in fact, grant summary judgment to the employer on the grounds that it would have decided to terminate the plaintiff regardless of the age-related animus.

Wallace v. O.C. Tanner Recognition Co., 299 F.3d 96 (1st Cir. 2002).

The plaintiff’s evidence of animus was rejected as mere stray remarks. Two of the incidents involved the employee’s supervisor’s predecessors. In the first of these, the plaintiff’s supervisor asked about his retirement plans on two occasions. His retirement plans were again discussed by another supervisor on two occasions. The third incident involved a comment by the company’s president during the termination meeting. In that meeting, the president noted that the plaintiff was in the protected age class, and observed that his only way to contest his termination would be to claim age discrimination, but concluded by stating that “since we weren’t doing that, we should go ahead.” The court affirmed the grant of summary judgment despite this evidence.

Weigel v. Baptist Hosp. of E. Tenn., 302 F.3d 367 (6th Cir. 2002).

The court ultimately rejected the plaintiff’s retaliation claim. In so doing, the court noted that in the absence of direct evidence, retaliation claims were governed by the McDonnell Douglas burden shifting framework. Applying this analysis, the court first reversed the District court’s decision that no prima facie case had been established, upon proof that the decision to reject the plaintiff’s application was made shortly after the decision-makers became aware of the plaintiff’s previous complaints about age discrimination. The plaintiff demonstrated not only a temporal connection, but also that the decision-makers had specifically considered an exit questionnaire she had completed during a prior employment which contained complaints about discrimination. Nonetheless, the court upheld the grant of summary judgment by the District Court because the plaintiff could not create a genuine issue of material fact concerning the validity of the hospital’s explanation that she was not rehired because of her chronic absenteeism and failure to give the required two weeks notice prior to resigning her previous position.

Anderson v. Consolidated Rail Corp., 297 F.3d 242 (3rd Cir. 2002).

The employer terminated the employment of thirty employees during a reduction in force (“RIF”); all but one was in the 40 to 55 year age range. The next year, the employer announced a voluntary separation program that offered more generous payments than those given to involuntarily discharged employees. The previously RIFed employees

sued, claiming violations of both the ADEA and ERISA. They claimed that the employer's reason for the reduction in force was to make room for younger employees. Plaintiffs argued that they were entitled to relief because each of them suffered as a result of the RIF and that they did not each, individually, have to make out a *prima facie* case. They largely relied on anecdotal evidence and the fact that the workforce was predominately middle-aged, which plaintiffs claimed "boded badly" for the company's future because there was little upcoming leadership. The district court granted summary judgment for the employer, finding that the employees could not demonstrate the fourth element of the McDonnell Douglas test, namely, that they were replaced by younger employees. In reviewing the district court's decision, the Third Circuit held that to make out *prima facie* case, the plaintiffs had to show not that they were replaced by a younger employee, but that the employer retained a similarly situated employee who was sufficiently younger. The court upheld the district court's entry of summary judgment, however, because the plaintiffs were unable to show either that the retained employees were sufficiently younger, or that they were similarly situated.

Equal Pay Act

Subcommittee Chair: Allen S. Kinzer, Vorys Sater Seymour LLP, Columbus, OH

To establish a *prima facie* case under the Equal Pay Act (29 U.S.C. § 206(d)), a plaintiff must demonstrate that (1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (3) the jobs are performed under similar working conditions. *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). If a *prima facie* case is established, the burden shifts to the employer to prove that the wage differential is justified by a preponderance of the evidence under one of four affirmative defenses: (1) a seniority system; (2) a merit system; (3) a system pegging earnings to quality or quantity of production; or (4) any factor other than sex. 29 U.S.C. §206(d)(1)(i)-(iv). Below is a sampling of cases from 2002:

***Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. 222*, 297 F. 3d 1146 (10th Cir. 2002).**

Anita Ferroni was employed by Teamsters Local No. 222 from February 1996 until she was laid-off in January 1999. She was initially hired as an organizer, but began to assume duties of a business agent in 1996. She was promoted to a "business agent" in 1998. Ferroni continued to perform the duties of both an organizer and a business agent until her employment ended. Three men were hired as business agents in 1996 and 1997, after Ferroni was hired. Ferroni claimed that she performed the same work as those three men, was paid less, and was laid-off on the basis of her sex. The District Court granted summary judgment on all claims, including the Equal Pay Act claim.

The Tenth Circuit considered whether Ferroni's work as a business agent was equal to the work of the male business agents. The Tenth Circuit repeated an earlier holding: "like" or "comparable" work does not satisfy the standard, and "[i]t is not sufficient that some aspects of the two jobs were the same." The Tenth Circuit observed that after her promotion in 1998, Ferroni was paid the same as the male organizers based on the tier wage system the Local Union had instituted. Thus, the dispute concerned whether Ferroni was performing the same work as the three males before her promotion to business agent. The Tenth Circuit found, as the District Court found, the Ferroni produced no evidence to show that her combination of work as an organizer and business agent was substantially equal to the duties performed by the male business agents. Thus, the Tenth Circuit ruled that she failed to state a *prima facie* case under the Equal Pay Act.

***Hunt v. Nebraska Public Power Dist.*, 282 F. 3d 1021 (8th Cir. 2002).**

Plaintiff worked as a clerk for defendant, a power company, which generates, distributes, and sells electricity. Plaintiff started as a part-time clerk and was promoted to full-time general clerk I. When plaintiff's supervisor retired, plaintiff was assigned some of those duties but was not promoted and did not receive an increase in salary.

The jury found for plaintiff, but the District Court vacated the jury verdict, holding that plaintiff had failed to show that her work was substantially equal to that of her former supervisor.

The Eighth Circuit reversed the District Court and reinstated the jury verdict. The Court stressed the high standard for overturning a jury verdict and found that it was not unreasonable for a jury to have found that plaintiff was performing substantially equal work as her former supervisor. This determination is a factual inquiry and “insubstantial or minor” differences in job duties will not suffice to defeat the plaintiff’s *prima facie* case.

Swihart v. Pactiv Corp., 187 F. Supp. 2d 18 (D. Conn. February 13, 2002).

Plaintiff was originally hired by defendant either as a temporary worker who was later offered a permanent position or as the replacement for a former worker who had been in charge of human resources. Some dispute remained about plaintiff’s initial status, but plaintiff’s duties included discussing the salaries and potential raises for at least two other employees with the manager of the plant. Plaintiff was later discharged, allegedly as part of a cost-reduction effort. Plaintiff claimed, *inter alia*, that defendant had violated the Equal Pay Act by paying her less than the male employee she was replacing.

The Court denied defendant’s motion for summary judgment because a genuine issue of fact remained as to whether plaintiff’s skills, experience, and responsibilities were the same as the former employee’s. Resolution of that issue depended on the factual circumstance of plaintiff’s job and the job of the former male employee. The Court held that such an issue was inappropriate to resolve through summary judgment.

Hammock v. Nexcel Synthetics, Inc., 201 F. Supp. 2d 1180 (N.D. Ala. 2002).

Plaintiff held a number of positions with defendant, a manufacturing company that produces synthetic yarn products. She started as a quality control operator in 1990 and finished as a night shift plant manager when she was terminated in October, 2000. Plaintiff filed an Equal Pay Act claim alleging that defendant paid her substantially less than male supervisors performing the same job duties.

The District Court granted defendant’s motion for summary judgment and dismissed Plaintiff’s EPA claim. Defendant argued as an affirmative defense that the disparity in pay was based on levels of experience, education, and/or predicted/planned advancement between plaintiff and her male co-workers. Plaintiff did not attack the truth of the reasons defendant gave for the pay difference, but merely attacked the wisdom of the decisions that were made. The Court held that such an attack was insufficient to defeat the defendant’s affirmative defense, and therefore, did not consider whether plaintiff had established a *prima facie* case.

Fair Labor Standards Act

Subcommittee Co-Chairs: Susan Eisenberg (Management), Akerman Senterfitt, Miami, FL.;

David Borgen (Union), Goldstein Demchak Baller Borgen & Dardarian, Oakland, CA.

Johnson v. Unified Gov’t of Wyandotte County, 180 F. Supp.2d 1192 (D. Kan. 2001).

The district court upheld the jury’s determination that 26 full-time Kansas City Police Department officers were independent contractors, not employees, when they worked during their off duty time as security officers for the local Housing Authority. The court determined that there was sufficient evidence to support the jury’s verdict under the economic realities test. The Housing Authority exercised virtually no control over the officers because they required no supervision and because the officers had substantial flexibility in determining when, how often, and how they performed their patrols. The officers furnished their own uniforms, firearms, and personal protection gear. They controlled their own profit or loss because they determined how often they worked, and several officers testified that they also worked for other entities. In addition, according to the court, the relationship was not permanent because

none of the officers worked for the Housing Authority for an extended time period of time. Further, the officers were highly skilled and trained for the work they performed. Several officers testified that their skills and training were substantial and exceeded that of a private security guard. Moreover, none of the officers were required to take nor did they receive any additional training to perform their patrol responsibilities for the Housing Authority. The court determined that there was sufficient evidence to support the jury's conclusion the security program was not an integral part of the Housing Authority's business, as the Housing Authority functioned without security patrols for many years, both before and after the relevant time period.

Rowe v. Laidlaw Transit, Inc., 244 F.3d 1115 (9th Cir. 2001).

The Ninth Circuit affirmed summary judgment in favor of the employer on a former supervisor's FLSA overtime claim holding that providing undesignated but FMLA-qualifying leave did not affect plaintiff's exempt status and ineligibility for overtime compensation. After an injury caused the supervisor to exhaust all of her sick leave and vacation, the employer granted her request that she return to work on a reduced part-time schedule. The court held that, although the supervisor did not request that her leave be designated as leave under the Family and Medical Leave Act and the employer did not discuss designation of the leave with her, plaintiff's reduced schedule qualified as FMLA leave. Therefore, the court concluded that the leave was consistent with the DOL regulation (29 C.F.R. § 825.206 (a)) which provides that if an employee is otherwise exempt, providing unpaid FMLA qualifying leave will not affect the employee's FLSA exempt status.

Schaefer v. Indiana Michigan Power Co., 197 F.Supp. 2d 935 (W.D. Mich. 2002).

The district court granted summary judgment for the employer, rejecting the employee's claim that his exempt status had been invalidated when his employer required him to account for at least forty hours of work on his timesheet per week and to make-up for partial day absences by either working extra hours on another day or taking part of a vacation day. The court observed that the majority of courts that have considered this issue have found nothing in the Act to suggest that an employee loses his exempt status simply because his employer disciplines him in a non-monetary fashion for failing to work his scheduled time. Rather, an employee's exempt status is lost only when the employer docks the employee's base pay.

Oral v. Aydin Corp. 2001 U.S. Dist. LEXIS 20625 (E.D. Pa. 2001).

A federal district court in Missouri rejected the employer's argument in its motion for summary judgment that it was entitled to use the window of correction to reimburse employees for improper deductions where questions of fact remained as to whether the employer had an actual practice of such deductions. In rejecting the employer's argument, the court sided with the Department of Labor interpretation that the window of correction is not available to an employer with a policy creating a significant likelihood of deductions or an actual practice of deductions.

Howard v. City of Springfield, 274 F.3d 1141, 7 WH Cases2d 884 (7th Cir. 2001).

Police officers with the canine unit claimed that the city violated the FLSA by failing to compensate them for all time spent caring for dogs on days not covered by the applicable collective bargaining agreement. The district court held that a genuine dispute of material fact existed as to whether certain premium payments made pursuant to the collective bargaining agreement could be used to offset overtime for unpaid kennel time, but held that payments for court time could be used to offset overtime liability. The Seventh Circuit reversed. Pursuant to the collective bargaining agreement, officers were paid a premium for appearing in court at least two hours at one and one-half times the officer's regular rate of pay, even if the officer did not spend two hours in court. The city argued that such payments can be offset from any overtime liability, because, under FLSA Section 207(e)(7), it is extra compensation provided by a premium rate pursuant to contract "for work outside of the hours established in good faith by the contract . . . as the basic, normal, or regular workday . . . or workweek." The Seventh Circuit rejected this argument because there was no language in the collective bargaining agreement establishing a basic, normal, or regular workday, and because the city paid the premium rate for court time regardless of whether it fell within the hours estab-

lished as part of the regular workday. But the Seventh Circuit allowed premium payments made for work performed on regular days off to be used as offsets under Section 207(e)(6) of the FLSA. Finally, the Seventh Circuit held that the city could not apply all premium payments to all overtime liabilities. Rather, considering the overall purposes of the FLSA, the Seventh Circuit held that premium payments could only offset overtime liability that occurred in the same time period.

Singh v. Jutla & C.D. & R's Oil, Inc., 214 F. Supp.2d 1056, 8 WH Cases2d 165 (N.D. Cal. 2002).

The court denied the employer's motion to dismiss an illegal alien's claim of retaliation under the FLSA and the California Labor Code. The defendant recruited the plaintiff-alien to work in the United States, promising him a place to live, tuition for education, and eventual partnership in the defendant's business. The plaintiff entered the United States illegally and worked for approximately three years, but did not receive any pay from the defendant. The plaintiff filed a wage claim against the defendant with the California Department of Labor Relations, seeking unpaid wages and overtime pay. After the plaintiff filed the claim, the defendant threatened to report him to the Immigration and Naturalization Service ("INS") unless the claim was dropped and attempted to force the plaintiff to sign a written waiver of his claims. California's Labor Commissioner awarded the plaintiff \$69,633.73 and the defendant appealed to superior court. On the first day of trial, the parties settled. The following day, the INS arrested and detained the plaintiff. The plaintiff filed a claim in the district court alleging the defendant contacted the INS and provided them with information about the plaintiff's status in an act of retaliation that violated the FLSA and the California Labor Code. The defendant argued that the Supreme Court's decision in *Hoffman Plastic Compound, Inc. v. NLRB*, 535 U. S. 137 (2002), barred the plaintiff's claims by restricting the remedies available to undocumented workers. In *Hoffman*, the Supreme Court held that back pay is not an available remedy for undocumented workers who bring claims pursuant to the National Labor Relations Act because an award representing pay to an illegal alien for years of work "not performed" ran counter to the policies of the Immigration Reform and Control Act ("IRCA") of 1986. The defendant in *Singh* argued this restriction also barred the plaintiff from other legal remedies. The district court rejected this argument, reasoning that *Hoffman* did not hold that undocumented employees are barred from recovering unpaid wages for work actually performed and did not explicitly preclude other traditional remedies. The district court explained that, absent the availability of FLSA remedies to undocumented workers, employers would have a disincentive to hire legal employees, as the employers could refuse to pay the undocumented workers minimum wage or overtime without fear of redress. This result would contravene the intent of the IRCA. Accordingly, the court held that *Hoffman* does not prevent undocumented workers from seeking legal relief. The plaintiff was a proper party and could maintain a cause of action for retaliation under the FLSA.

Family & Medical Leave Act

Subcommittee Chair: Robert M. Hale, Goodwin Procter & Hoar LLP, Boston, MA

Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed.2d 167, 7 WH Cases2d 1153 (2002).

Ragsdale presented the United States Supreme Court's first opportunity to address the FMLA and the related regulations promulgated by the Department of Labor. In a five to four decision, the Court determined that the penalty for an employer's failure to designate leave pursuant to 29 C.F.R. §825.700(a) exceeded the authority of the Secretary of the Department of Labor and was therefore invalid. Pursuant to this provision, if an employer fails to designate leave, the leave taken does not count against an employee's FMLA entitlement.

Wolverine granted Ragsdale's request for 30 weeks of medical leave under its leave policy in 1996. It refused her request for additional leave and terminated her employment when she did not return to work. Ragsdale filed suit claiming that because Wolverine did not designate the 30 weeks of leave as an FMLA qualifying leave, the leave taken did not count against her FMLA entitlement and Wolverine was required to grant her an additional 12 weeks

of leave pursuant to 29 C.F.R. §825.700(a). The Supreme Court determined that the regulation exceeded the Secretary of Labor's authority under the FMLA.

The Court acknowledged that the Secretary's judgment that a particular regulation is necessary to carry out the FMLA must be given considerable weight. However, it also stated that a regulation cannot stand if it is "arbitrary, capricious or manifestly contrary to the statute." The Court noted that the central provision of the FMLA guarantees eligible employees 12 weeks of leave in a one year period. Moreover, the FMLA specifically states that nothing in the Act should be construed to discourage employers from adopting more generous leave policies.

In determining that the penalty provision set forth in 29 C.F.R. §825.700(a) exceeded the Secretary's authority, the Court pointed out that the penalty is unconnected to any prejudice the employee might have suffered. The Court considered the categorical penalty to be incompatible with the FMLA's comprehensive remedial mechanism which provides a remedy tailored to the harm suffered by the employee. As a result, the regulation alters the FMLA's cause of action in a fundamental way - it relieves the employee of the burden of proving any real impairment of his or her rights and resulting prejudice. The Court also determined that the regulation amended the FMLA's most fundamental substantive guarantee - the employee's entitlement to "a total of 12 workweeks of leave during any 12-month period." The regulation in effect gives an employee the right to more than 12 weeks of leave.

Moreover, the Court contrasted the heavy sanction imposed by §825.700(a) for failure to follow the regulatory notice requirements with the more moderate monetary penalty provided for under the statutory notice requirement. An employer that fails to provide employees with notice of their general rights under the FMLA, as required by the statute, faces a monetary penalty of \$100 for each offense only for willful violations. In contrast, an employer faces potentially greater sanctions for even inadvertent failures to follow the regulatory notice requirements for designating leave.

The Court also pointed out that the regulation was in tension with the FMLA's admonition that it should not be construed to discourage employers from adopting more generous leave policies. The potential for being required to provide leave in excess of 12 weeks will likely only apply to those employers with more generous leave policies. Because of the risk of this significant penalty, employers may be hesitant to adopt more generous leave policies.

As a result of these considerations, the Court determined that the categorical penalty set forth in 29 C.F.R. §825.700(a) exceeded the Secretary's authority and was therefore invalid. The Court expressly declined to decide whether the underlying regulatory requirements that employers designate FMLA leaves and provide individual notices of FMLA rights were within the Secretary's authority to promulgate.

Scamihorn v. General Truck Drivers, 282 F.3d 1078, 7 WH Cases2d 1172 (9th Cir. 2002).

The employee, Scamihorn, took leave for several months to care for his 73 year old father, who had fallen into a deep depression following his sister's murder. When Scamihorn returned from his leave, he was told that he lost his seniority and had to start over as a probationary employee. He brought suit, alleging that his leave was protected by the FMLA, and that he was therefore entitled to reinstatement without loss of seniority.

The district court granted summary judgment for the employer on Scamihorn's FMLA claim, finding that the leave was not covered because Scamihorn's father did not suffer from a "serious health condition," nor did Scamihorn "care for" his father within the meaning of the FMLA. On appeal, the Ninth Circuit reversed. The court noted that the case was governed by the interim regulations, but stated that it was also appropriate to look at the final regulations for guidance. On the serious health condition issue, the court did not find dispositive the fact that the father missed no time from work, as the father testified that on some days when he worked from home his wife performed his work for him. On the "to care for" issue, the court noted that Scamihorn talked to his father daily about his sis-

ter's death, performed various physical chores around the house, and drove him to some counseling sessions. While Scamihorn did not actively participate in his father's treatment by attending the sessions with him, the court found that the phrase "to care for" encompassed that type of psychological care Scamihorn provided. Accordingly, the Ninth Circuit found that a fact issue existed about whether Scamihorn's leave was covered by the FMLA, and reversed the grant of summary judgment.

Ruder v. Maine General Medical Center, 204 F. Supp.2d 16, 7 WH Cases2d 1441 (D. Me. 2002).

Ruder began work for Maine General on January 17, 2000. On January 5, 2001, Ruder took a leave of absence for a medical condition. At that time, Ruder had at least two weeks of unused accumulated vacation time at his disposal. Maine General denied Ruder's request for leave under the FMLA, but he was granted an medical leave of absence through April 1, 2001. Upon his return to work, Ruder was terminated from employment. His former position was divided into two jobs and Maine General refused to rehire Ruder for either position. Ruder claimed that Maine General violated the FMLA by denying his requested FMLA leave, failing to reinstate him upon his return from FMLA leave, and ultimately terminating his employment.

Maine General moved to dismiss the suit on the grounds that he had not met the FMLA's twelve-month eligibility requirement. The court denied this motion. The issue before the court was whether the FMLA permits an employee to use accrued vacation time to satisfy the FMLA's 12-month employment requirement to become eligible for FMLA protection. Relying on the language of 29 C.F.R. §825.110(b), the court held that, "leave time taken at the end of the first year of employment counts toward an employee's FMLA eligibility just like leave time taken earlier in the year." Therefore, according to the court, an employee may take a vacation prior to becoming eligible under the FMLA, during which the employee remains on the employer's payroll, and through that vacation pass the 12-month eligibility threshold. The decision noted that in at least three other cases, courts had reached a different conclusion.

Dierlam v. Wesley Jessen Corp., 222 F. Supp.2d 1052, 8 WH Cases2d 403 (N.D. Ill. 2002).

In Dierlam, the court held that the release of FMLA claims by the employee, Dierlam, in a separation agreement was unenforceable, and that the reduction of a "stay bonus" by the employer, Wesley Jessen, to reflect the leave that Dierlam took for adoption of a child violated the FMLA.

When Wesley Jessen was acquired, it offered to pay its employees a "stay bonus" if they remained actively employed until a certain date for the purpose of transition. Dierlam took leave for the adoption of a child, and then returned to work until the required date. Wesley Jessen reduced Dierlam's "stay bonus" to reflect the adoption leave. Dierlam signed a separation agreement, which released her claims based on the FMLA.

Dierlam claimed that the reduction of her "stay bonus" violated the FMLA. The court granted her summary judgment, on the ground that the release of FMLA claims was unenforceable under 29 C.F.R. 825.220(d), and that the "stay bonus" was the type of "perfect attendance" bonus which could not be reduced for the taking of FMLA leave under 29 C.F.R. 825.215(c)(2).

Government Contracts

Subcommittee Chair: Terry R. Yelig, Sherman, Dunn, Cohen, Leifer & Yelig, P.C., Washington, D.C.

The Service Contract Act ("SCA")

International Union United Government Security Officers of America v. Chao, Civil Action No. C01-1230Z (W.D. WA. Dec. 19, 2002).

Section 4(c) of the SCA provides that a government contractor that succeeds another contractor in the performance

of a service contract must pay its service employees not less than the wages and fringe benefits, including any prospective increases provided for in a collective bargaining agreement to which service employees would have been entitled if they were employees under the predecessor government contract. The plaintiff union was party to a collective bargaining agreement with the predecessor contractor that had been replaced by a new contractor that was awarded a one-year contract with four one-year option periods by the U.S. Marshall Service. The Marshall Service took the position, and the Department of Labor agreed, that the successor contractor's obligation to pay its service employees in accordance with the wages and fringe benefits in the union's collective bargaining agreement with the predecessor contractor extended only to performance of the initial one-year contract, and not to performance of the four one-year option periods. HELD: The plain language of § 4(c) of the SCA and its legislative history clearly require a successor SCA contractor to comply with the wages and fringe benefits set forth in a predecessor contractor's collective bargaining agreement for the full term of the agreement.

The Davis-Bacon Act ("DBA") and Related Acts

Wage Survey Data May Be Filed Electronically

On June 28, 2002, the Wage and Hour Division announced on its website that Form WD-10, entitled "Report of Construction Contractor's Wage Rates," was available on-line and could be used for the electronic submission of data. (The data submitted on a Form WD-10 is used in prevailing wage surveys.) The electronic form reportedly uses encryption to guarantee the confidentiality of the data submitted. Contractors may still use the paper form if they choose. (When we checked in December, the electronic form was "temporarily unavailable.") See <http://www.dol.gov/esa/programs/dbra/wd-10.htm>.

Wage Determinations Available On-line

DBA area-wide wage determinations are now available for free at <http://www.gpo.gov/davisbacon>.

State and Federal Court Decisions

Favel et al. v. American Renovation and Const. Co., 312 Mont. 285, 59 P.3d 412 (Mont. 2002).

Plaintiffs were construction workers employed by subcontractors on a project covered by the Davis-Bacon Act. The contracting officer determined the workers had been misclassified and paid less than the prevailing wage rate for their proper classification. The prime contractor made partial payment to the workers with funds withheld from the subcontractors. However, the payments were substantially less than the total amount owed. In addition, the contracting officer failed to withhold funds from the prime contractor to pay the workers. The workers first sued under the Miller Act, but the federal district court stayed the action on the grounds that DOL had not made an independent determination of wages owed. The workers then sued for the underpayments in state court. HELD: The Davis-Bacon Act does not preempt state remedies for unpaid wages under prevailing wage contract provisions. Therefore, the workers may sue the prime contractor in state court as third-party beneficiaries to the prime contract so long as they had exhausted available administrative remedies. In this case, the court found the workers had exhausted administrative remedies because (1) the contracting officer made a final decision as to moneys owed the workers; (2) the contractor/employer failed to contest the contracting officer's decision with DOL; and (3) the workers had no other administrative recourse to obtain payment.

Grochowski v. Phoenix Construction, Dkt. No. 01-7560, 2003 U.S. App. Lexis 505 (2d Cir. Jan. 14, 2003).

Plaintiff roofers and bricklayers sued their employers to recover wage underpayments on three separate public works projects covered by the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act, 40 U.S.C. §327 ("CWHSSA"). The trial court dismissed their state law claims for breach of contract and *quantum meruit* as third party beneficiaries of federally funded construction contracts. The trial allowed the issue of whether the plaintiffs were paid in accordance with the federal minimum wage and overtime provisions in the Fair Labor Standards Act

to be presented to a jury, which awarded the plaintiffs damages for unpaid minimum wages and an equal amount in liquidated damages because the jury found the employers' failure to pay minimum wages was willful. The trial court refused, however, to allow the plaintiffs to calculate their overtime compensation at one and one-half times the prevailing hourly wage rates. Instead, the trial court calculated the plaintiff's overtime compensation at one and one-half times the hourly rates plaintiffs were actually paid. **HELD:** The Davis-Bacon Act and the CWHSSA create no private right of action. Accordingly, the appeals court affirmed dismissal of plaintiffs' state law claims for breach of contract and *quantum meruit* as third party beneficiaries of federally funded construction contracts, because it held both claims were indirect attempts at privately enforcing Davis-Bacon prevailing wage requirements. The appeals court also held that the trial court had properly limited the plaintiffs' claims under the FLSA for unpaid overtime compensation to one and one-half times the hourly rates actually paid. The appeals court's analysis did not, however, address the provision in the Department of Labor's FLSA regulations, 29 C.F.R. § 778.5, that says "Where a higher minimum wage that that set in the [FLSA] is applicable to an employee by virtue of such other legislation, the regular rate of the employee, as that term is used in the {FLSA}, cannot be lower than such applicable minimum, for the words 'regular rate at which he is employed' as used in section 7 [of the FLSA] must be construed to mean the regular rate at which he is lawfully employed."

The dissenting opinion observed that the appeals court had held in *Chan v. City of New York*, 1 F.3d 96, 102-03 (2d Cir. 1993), that even though the Davis-Bacon Act does not create a private right of action, "the fact that a statute conferring substantive rights does not itself give its beneficiaries a private right of action to enforce it does not mean that the beneficiaries are without a private remedy." Accordingly, the appeals court held in *Chan* that the plaintiffs were entitled to sue for violations of the Davis-Bacon Act under 42 U.S.C. § 1983. The dissent was bewildered as to why the Davis-Bacon administrative remedy scheme that did not foreclose reliance on § 1983 to enforce the Act is, nevertheless, sufficiently comprehensive to preempt the state remedies invoke by the plaintiffs in this case.

WARN & EPPA

Subcommittee Chair: Todd M. Nierman, Baker & Daniels, Indianapolis, IN

Watson v. Michigan Indus. Holdings, Inc., 311 F.3d 760 (6th Cir. 2002).

Michigan Industrial Holdings, Inc. ("MIHI") supplied automobile parts to Dana Corporation ("Dana") under a written supply agreement. Dana was MIHI's primary customer and the parties' agreements were negotiated on a yearly basis. The most recent contract between the parties expired on August 31, 1995. Prior to the contract's expiration, Dana indicated to MIHI that it would continue to use MIHI as a supplier at least through the end of 1996. The contract was not renewed, although business continued between the two companies on a month-to-month basis. Because of MIHI's stressed financial condition, MIHI and Dana operated on payment terms that required Dana to pay MIHI within seven days after being invoiced. On January 19, 1996, Dana refused to pay MIHI and, as a result, MIHI was forced to discontinue its operations. Dana did not provide MIHI with advance notice of its refusal to pay. A group of former MIHI employees sued MIHI and alleged that MIHI violated the WARN Act by failing to provide 60 days' advance notice of the plant closure. The district court granted MIHI's motion for summary judgment and held that the unforeseeable business circumstances exception relieved MIHI of its notice obligations.

On appeal, the plaintiffs argued that the district court improperly focused on Dana's failure to pay MIHI in January in determining that the unforeseeable business circumstances exception applied. Rather, the plaintiffs contended that the "totality of the objective factual circumstances," namely MIHI's loss of its supply contract with Dana in August of 1995, proved that MIHI's demise was foreseeable and thus the WARN Act required MIHI to provide its employees with 60 days' notice of its closure.

The Sixth Circuit disagreed, ruling that "WARN was not intended to force financially fragile, yet economically

viable, employers to provide WARN notice and close its doors when there is a possibility that the business may fail at some undetermined time in the future.” The court stated that it must “evaluate whether the closing was foreseeable and not whether the eventual demise of the business was inevitable.” Because Dana’s refusal to pay on January 19, 1996, was unexpected, it was not “reasonably foreseeable” on November 19, 1995 (sixty days prior to the closure), that the plant would close. Accordingly, the court held that Dana’s refusal to pay constituted an “unforeseeable business circumstances” and thus it was unnecessary for MIHI to comply with the WARN Act’s notice requirements.

Johnson v. Telespectrum Worldwide, Inc., 29 Fed.Appx. 76 (3rd Cir. 2002).

The plaintiffs filed a class action against Telespectrum Worldwide, Inc. (“Telespectrum”) that sought statutory damages as a result of Telespectrum’s alleged violation of the WARN Act. The WARN Act requires a showing that (1) 50 employees, not including part-time employees, (2) at a single site of employment (3) suffered an employment loss. The district court granted summary judgment for Telespectrum because the plaintiffs failed to establish the threshold number of employment losses to trigger the WARN Act’s protections. The plaintiffs appealed and argued that five employees who “quit” their employment with Telespectrum should have been counted toward the number of employment losses because they may have left Telespectrum “due to a lack of work, Telespectrum’s closing of its night shift or its announcement of closing [at another Telespectrum] site.” The Third Circuit disagreed and held that “employees who voluntarily forego an opportunity to continue their employment do not suffer an employment loss...”

In addition, the plaintiffs contended that another employee who left Telespectrum “over a misunderstanding with a supervisor” should have been counted because “she may have quit or her discharge may not have been ‘for cause.’” As to this employee, the court also found that the plaintiffs did not establish a question of material fact as to whether the employee suffered an “employment loss” because the voluntariness of an employee’s departure may be called into question “only in light of evidence of coercion, creation of a hostile or intolerable work environment, application of undue pressure by the employer or similar circumstances.” Because the plaintiffs offered no such evidence, the court found that the plaintiffs did not demonstrate the threshold number of employment losses and thus affirmed the district court’s award of summary judgment to Telespectrum.

Calbillo v. Cavender Oldsmobile, Inc., 288 F.3d 721 (5th Cir. 2002).

The court held that an otherwise independent polygraph examiner can be an “employer” covered by the EPPA if he or she meets the “economic realities” test. The EPPA prohibits an employer from discharging an employee who fails or refuses to take a polygraph examination, but provides a limited exception in situations involving an economic loss investigation.

Calbillo was fired after he failed a polygraph examination in connection with the suspected theft of freon from the workplace. Calbillo sued his employer (who settled) and the private investigator/polygraph examiner (“PI”) hired by Calbillo’s employer. The PI interviewed all involved employees and asked the employees to take a polygraph test. The PI gave the employer a packet of information about polygraph testing, and at the employer’s request, spoke to its attorneys about the EPPA. The employer then requested that the PI test Calbillo.

Under the EPPA, an employer is “any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee.” 29 U.S.C. § 2001(2). The Secretary of Labor’s interpretive regulations state that a polygraph examiner employed or hired “for the sole purpose of administering polygraph tests ordinarily would not be deemed an employer with respect to the examinees.” 29 C.F.R. § 801.2(c).

The Fifth Circuit adopted the “economic realities” test to determine if the PI was an “employer” under the EPPA. The economic realities test, borrowed from FLSA case law, considers whether the examiner went beyond the role of an independent entity and exerted control, as a matter of economic reality, over the employer’s compliance with the

EPPA. The court reasoned this test was consistent with the EPPA definition of “employer” (similar to FLSA) and the Secretary’s regulations. In this context, the court used a 4-part test to determine whether an examiner meets the economic realities test:

- (a) whether the examiner decided that a polygraph test should be administered;
- (b) whether the examiner decided which employee would be tested;
- (c) whether the examiner provided expertise or advice to the employer regarding compliance with EPPA’s requirements, or the employer relied on the examiner to ensure compliance; or
- (d) whether the examiner decided whether the examined employee would be subjected to disciplinary action, or merely reported the results of the polygraph examination to the employer.

Midwinter Meeting 2004 Promises to be Sweet in Sugar Bay

The Federal Labor Standards Legislation Committee’s 2004 Midwinter Meeting will be held February 18-20 at the Wyndham Sugar Bay Resort & Spa in St. Thomas, USVI. As always, we are looking forward to another successful meeting, and welcome participation from the Committee’s veterans as well as newcomers and first-time attendees.

Registration materials will be available in Fall 2003, and full event information will be linked from the program title on the Section’s online calendar of events at www.abanet.org/labor/calendar.html. If you have any questions regarding this program, contact Committee Co-Chairs Michael Ossip (mossip@morganlewis.com) and Greg McGillivray (gkm@wglmblaw.com).

Upcoming Events

2003

ABA Annual Meeting

August 9: FMLA Basics, FLSA Basics

August 11: “New Developments in Litigation Under the FLSA”

San Francisco, CA

October 17: Fall Committee Meeting

Washington, D.C.

2004

February 18-20: Midwinter Committee Meeting

St. Thomas, USVI

August 5-10: ABA Annual Meeting

Atlanta, GA

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