

# Employment Law Briefing



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# Outside the law?

## *Illegal immigrants seek to invoke FLSA protections*

**E**mployees hired illegally may seem outside the law in many respects. But are they? In *Lucas v. Jerusalem Café*, the U.S. Court of Appeals for the Eighth Circuit tackled the question of whether illegal immigrants may invoke the protections of the Fair Labor Standards Act (FLSA).

### **Status withheld**

The plaintiffs — six undocumented restaurant workers — alleged that they worked for less than minimum wage and without receiving overtime wages for certain periods of their employment. After filing suit, the workers amended their complaint to request that their immigration status be withheld from the jury during trial. The court granted the motion, finding that their status was irrelevant to the FLSA inquiry.

Later, during cross-examination, one of the workers testified that the employer “knew that he would get in trouble if he would have hired illegals like us.” Later, the owner testified that he could not “I-9” the workers, referring to his inability to produce proper legal work status documents. Ultimately, the parties agreed to dissolve the motion that barred mention of the workers’ status.

### **Damages assessed**

The jury awarded the workers \$141,864.04 in actual damages for the unpaid wages and another \$141,864.04 in liquidated damages based on a finding that the employer was “willful” in its failure to pay proper FLSA wages. The employer then moved for judgment as a matter of law or a new trial, arguing that the employees lacked standing to sue under the FLSA and that the decision to dissolve the motion precluding the discussion of the workers’ status was in error.

The district court rejected both arguments. The court found that the workers had standing to sue because:

1. They had “suffered an injury in fact,”
2. “This injury was the direct result of [the employers’] failure to pay the lawful wage,” and



3. “The court’s judgment will redress the [workers’] injuries.”

As for the motion to preclude discussion of the workers’ status, the court found that immigration status was irrelevant because illegal aliens aren’t precluded from recovering unpaid wages under the FLSA. The employer appealed.

### **Decision distinguished**

The Eighth Circuit first noted the broad definition of “employee” under the FLSA. An employee is defined as any individual employed by an employer. By its plain terms, the statute doesn’t limit the definition to legal citizens.

The court also addressed the employer’s argument that the U.S. Supreme Court had already settled the issue in *Hoffman Plastic Compounds, Inc. v. NLRB*, wherein the Court held that unauthorized aliens may not receive back pay after being terminated for engaging in union activities protected by the National Labor Relations Act (NLRA). There, the Supreme Court found that awarding back pay would conflict with the Immigration Reform and Control Act (IRCA), which prohibits employers from hiring illegal aliens.

## A little more about *Hoffman*

In *Hoffman Plastic Compounds, Inc. v. NLRB* (see main article), an employee was fired after supporting a union campaign and distributing authorization cards to co-workers.

The National Labor Relations Board (NLRB) found that his termination violated the National Labor Relations Act (NLRA) and ordered the employer to reinstate the plaintiff with back pay. The NLRB believed the most effective way to accommodate and further the policies embodied in the Immigration Reform and Control Act (IRCA) was to provide the NLRA's protections to undocumented workers in the same manner as to other employees.

On appeal, however, the U.S. Supreme Court determined that awarding back pay to an illegal alien is contrary to the policies underlying the IRCA, which seeks to prevent illegal aliens from obtaining employment in the United States. The Court argued that awarding back pay in such an instance would encourage illegal workers to evade apprehension by immigration authorities, as well as condone previous and future IRCA violations.

Why? Because, the Court explained, the employee in question would qualify for back pay only if: 1) he or she remains in the United States illegally, and 2) he or she couldn't mitigate damages by seeking future employment without triggering new IRCA violations or by finding employers willing to ignore the IRCA and hire illegal workers.

The Eighth Circuit distinguished *Lucas* from *Hoffman* by concluding that the question in *Hoffman* was whether the National Labor Relations Board (NLRB) had remedial power extending far enough to allow it to award back pay to an illegal alien “for years of work *not* performed.” In *Lucas*, the plaintiffs weren't seeking prospective relief, but back wages for work actually performed.

*The plaintiffs — six undocumented restaurant workers — alleged that they worked for less than minimum wage and without receiving overtime wages for certain periods of their employment.*

### Congressional intent

The Eighth Circuit also looked to congressional intent. A House Committee on Education and Labor report, cited in the court's decision, posited that Congress didn't intend that any provision of the IRCA would limit the powers of state or federal labor standards agencies. In other words, even though the IRCA prohibits employers from hiring undocumented workers, those workers must be paid in

accordance with the standards of the Department of Labor (DOL). Thus, the two statutes don't necessarily conflict.

The court also based its decision on the DOL's interpretation of the FLSA. The Eighth Circuit quoted the DOL Secretary, who explained that applying the FLSA to unauthorized aliens “is essential to achieving the purposes of the FLSA to protect workers from substandard working conditions, to reduce unfair competition for law-abiding employers, and to spread work and thereby reduce unemployment by requiring employers to pay overtime compensation.”

### Simple lesson

The lesson in *Lucas* is simple: An employer cannot benefit from its own wrongdoing. By hiring unauthorized workers, a company will not only violate the IRCA, but also face liability for any FLSA wage violations. ♦



# Tread carefully when firing employees on FMLA leave

**D**eciding to terminate any employee is risky. But the risk level associated with terminating those who have requested leave under the Family and Medical Leave Act (FMLA) is markedly greater. Case in point: *Mercer v. The Arc of Prince Georges County*.

## Plaintiff terminated

The plaintiff's employer, The Arc, is a nonprofit that provides programs and services to people with developmental disabilities. The plaintiff was a finance and benefits coordinator. Her job duties included assisting the organization's clients in applying for and processing initial benefits under the food stamp program and Social Security.

While the plaintiff was away on medical leave, the employer discovered that she'd failed to timely file certain benefits applications on behalf of its clients. As a result, many of The Arc's food-stamp-eligible clients were no longer receiving benefits. Upon the plaintiff's return, she was given an opportunity to remedy the filing errors.

More than a year later, The Arc again discovered that some food-stamp-eligible clients were no longer receiving benefits. The plaintiff was given one final opportunity to improve her job performance.



About a year after this, the plaintiff was involved in a car accident and went on FMLA leave for a little over three weeks. During her leave, her co-workers discovered yet again that she'd failed to timely file paperwork on behalf of clients. The plaintiff was placed on administrative leave and eventually terminated because of "unsatisfactory job performance."

*While the plaintiff was away on medical leave, the employer discovered that she'd failed to timely file certain benefits applications on behalf of its clients.*

## Entitlement not granted

The plaintiff sued in district court, alleging that her termination constituted unlawful interference with and retaliation for the exercise of her FMLA rights. She sought, among other things, declaratory and injunctive relief — including reinstatement and damages for back pay and lost benefits. The plaintiff cited her positive performance reviews and, as evidence that her employer's reasons for firing her were pretext for retaliation, she claimed to have not been given a reason for being placed on administrative leave.

The district court granted the employer's motion for summary judgment on both FMLA claims, finding that, even if the plaintiff hadn't taken FMLA leave, she wouldn't have been entitled to keep her job. Therefore, her employer hadn't interfered with her FMLA rights in firing her. The plaintiff appealed.

## Related to performance

The U.S. Court of Appeals for the Fourth Circuit ruled in favor of the employer, finding that the fact that the leave permitted The Arc

to discover the problem couldn't logically bar its ability to fire the plaintiff. Citing *Yashenko v. Harrah's NC Casino Co.*, the court explained that "the FMLA does not require an employee to be restored to his prior job after FMLA leave if he would have been discharged had he not taken leave."

As for the plaintiff's retaliation claim, the Fourth Circuit analyzed it under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*. This precedent requires a plaintiff to make a prima facie case and, to do so, she needed to establish that:

- She engaged in a protected activity,
- Her employer took an adverse action against her, and
- The adverse action in question was causally connected to her protected activity.



The plaintiff claimed she was fired because she'd taken FMLA leave (the protected activity). The Arc responded by pointing to the plaintiff's job performance and the decision to place her on administrative leave. Ultimately, the court found that the employer's explanation *wasn't* pretext, and the decision to terminate the plaintiff *was* related to her job performance — not her FMLA leave.

### Action can be taken

Ultimately, this case was a positive for employers. If performance issues are discovered while an employee is on FMLA leave, you don't have to ignore them — corrective action can be taken. But tread carefully and consult your attorney before doing so. ♦

## Totality of circumstances

### Factoring "neutral incidents" into a harassment claim

Just about every legal precedent comes with the disclaimer "depending on the facts and circumstances of the case." In *Waldo v. Consumers Energy Co.*, the U.S. Court of Appeals for the Sixth Circuit considered whether one particular set of circumstances — a series of "neutral" incidents involving the plaintiff — should be considered in assessing a harassment claim.

#### No formal investigation

The plaintiff, a female electrical line worker in a predominantly male workforce, alleged that she was subjected to "constant and unwelcome gender/sexual harassment" over a period of years. She testified that she was constantly called derogatory names, describing multiple instances of harassment — including one where her co-workers locked her in a trailer with instructions to clean up their tobacco-chew spit from the floor. She also claimed that, on her first day of apprenticeship training, her supervisor told her that he didn't want women in the program.

The plaintiff complained many times to her supervisor, a union representative and HR staff. One of the HR

staffers testified that no formal investigation took place after the complaint and no formal reprimands were given to any of the plaintiff's co-workers or supervisors. She also testified that, while the plaintiff's complaint did lead to a "diversity training session," the training involved no discussion of the kinds of sexual harassment about which the plaintiff complained.

#### New trial awarded

A jury found in favor of the employer, but the district court disagreed. It determined that this was contrary to the clear weight of evidence, and it awarded the plaintiff a new trial. In that second trial, the jury found in favor of the plaintiff and awarded her substantial damages.

The employer appealed, arguing that the district court had abused its discretion in granting a new trial. The employer argued that a reasonable jury couldn't have believed that the plaintiff was subjected to harassment based on gender because many of the incidents complained of were "neutral" — in other words, not sexual.

## Williams test applied

To analyze the plaintiff's claim, the Sixth Circuit used the test it had articulated previously in *Williams v. CSX Transportation Co.* Here, plaintiffs must establish that:

1. They belong to a protected group,
2. They were subject to unwelcome harassment,
3. The harassment was based on sex,
4. The harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment, and
5. The defendant knew or should have known about the harassment and failed to act.

To determine whether the harassment is sufficiently severe or pervasive, courts look to the "totality of the circumstances" of the work environment, as articulated by the U.S. Supreme Court in *Harris v. Forklift Systems, Inc.*

Based on this analysis, the Sixth Circuit rejected the employer's argument that neutral incidents shouldn't be included in the totality of circumstances. It found that, as long as some circumstantial or other basis exists for inferring that sex-neutral incidents were discriminatory, neutral incidents can be factored into the test. Thus, the plaintiff's alleged neutral incidents were indeed properly considered in her overall hostile work environment claim.



## Response insufficient

In this case, even in the face of harassment accusations, the employer might have avoided liability by taking remedial action. The fifth element of the *Williams* test noted above can be met only if the employee shows that the employer's response, as articulated by the Sixth Circuit in *Jackson v. Quanex*, "manifested indifference or unreasonableness in light of the facts the employer knew or should have known."

If the employer had responded with corrective action that specifically addressed the complained-of behavior with the employee-offenders, the outcome of the case might have been different.

## Address the issue

*Waldo* reiterates that employers must regard every harassment complaint seriously. Remedial action, where appropriate, should be taken and companywide training provided to address the specific forms of harassment alleged. ♦

# Another WARNing shot regarding mass layoffs

The Worker Adjustment and Retraining Notification (WARN) Act requires employers to provide adequate notice of mass layoffs or plant closings. In *Sides v. Macon County Greyhound Park, Inc.*, the U.S. Court of Appeals for the Eleventh Circuit fired another warning shot to remind employers of the necessity to comply with the act.

## Lawsuit filed

Macon County Greyhound Park (MCGP) in Alabama was a former greyhound racetrack converted into a casino. MCGP also hosted electronic gaming.

In 2008, the Governor of Alabama issued an executive order that created the authorization for a Task Force on Illegal

Gambling. The Task Force began cracking down on illegal gambling, with a specific emphasis on electronic gaming. In early February 2010, the Task Force arrived at MCGP's location and seized all electronic gaming machines.

MCGP immediately filed a complaint against the Task Force in the Circuit Court of Macon County, which entered a temporary restraining order against the Task Force. On Feb. 4, however, the Alabama Supreme Court vacated the Circuit Court's order.

Immediately after the Alabama Supreme Court issued its decision, MCGP laid off all of its employees. Notably, about a month before the decision, the company had already laid off 68 employees because of scheduled renovations. MCGP failed to provide any formal notice to affected employees before either event.

### Company closes

A second lawsuit was filed against the Task Force in early March 2010, this time by Macon County officials and citizens. On March 5, the Macon County Circuit Court again entered a temporary restraining order against the Task Force, and that order was later converted into a preliminary injunction.

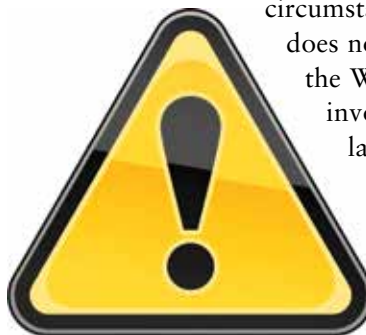
MCGP almost reopened after this news; however, the celebration was short lived because on July 30 the Alabama Supreme Court again reversed the Circuit Court and rescinded the injunction. On Aug. 9, MCGP permanently closed its doors. As with the January and February layoffs, MCGP did not provide any formal notice to affected employees.

MCGP's former employees filed a class action against the company in October 2010, alleging that MCGP had violated the WARN Act when it failed to provide adequate notice of the layoffs. The district court found in favor of the plaintiffs, and MCGP appealed.

### Defense rejected

WARN specifically sets forth that "[a]n employer shall not order a plant closing or mass layoff until the end of the 60-day period after the employer serves written notice of such an order." Failure to provide adequate and timely notice subjects an employer to various liabilities, including:

- Back pay for each working day of the violation,
- Lost employee benefits, and
- Attorneys' fees.



The district court held that MCGP had violated WARN when it failed to provide notice before the February layoff and August casino closing. MCGP appealed.

MCGP argued that it was entitled to the statutory defense of an unforeseeable business circumstance and, therefore, it wasn't required to provide notice. Under the unforeseeable business circumstance defense, "[a]n employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required."

The Eleventh Circuit rejected MCGP's argument. Even if MCGP was entitled to the unforeseeable business circumstance defense, the court noted, the "defense does not jettison this absolute requirement under the WARN Act; even where the defense is properly invoked, some notice must be given." The appellate court did clarify that, under the defense, businesses can obtain a reduction of the notification period.

### Publicity isn't notice

MCGP's final argument was that, even if there was a notice requirement, such notice need not be formal. Moreover, because what was occurring at MCGP was so publicized and obvious, the plaintiffs were effectively put on notice.

The Eleventh Circuit disagreed, cautioning that it's "inconceivable that MCGP's supposed 'notice' in the form of billboard ads, third-party newspaper articles, Internet postings and memoranda blaming the Governor for raids, satisfies the type of 'brief statement of the basis for reducing the notification period' that Congress envisioned in drafting the WARN Act."

### It's the law

Compliance with the WARN Act is often a double-edged sword. On the one hand, failure to adhere to the act's provisions subjects employers to extensive legal exposure. (It's also necessary to look at state law, which may have even more onerous notice requirements.)

On the other hand, notifying a workforce of a potential mass layoff or plant closing may be extremely detrimental to company morale — as well as potentially hazardous to attempts at salvaging the company. Nonetheless, the law is the law. ♦

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*“Above all, we are at your service ...”*



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