Employment Law Briefing

NOVEMBER/DECEMBER 2008

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When must employers pay for commuting time?

That was the question before the Second Circuit in *Singh v. The City of New York*. Fire-alarm inspectors alleged they were entitled to portal-to-portal pay under the Fair Labor Standards Act (FLSA) because the briefcases of documents they were required to carry to and from work increased their commuting time.

The inspectors alleged they occasionally missed a bus or train or had to catch trains going opposite to where they were headed so they could board less-crowded trains with more room for their briefcases. And because they had to safeguard the work documents, they had to take them home directly after work. The trial court ruled for the city without a trial, and the plaintiffs appealed.

FLSA requirements

The Second Circuit found that, to prevail under the FLSA (as amended by the Portal-to-Portal Act), the plaintiffs had to demonstrate that carrying the documents during their commutes:

1. Constituted work under the FLSA, and

2. Was an integral and indispensable part of their inspecting duties.

The court analyzed the FLSA claim in two parts: 1) whether the plaintiffs were entitled to pay for their *entire* commutes, and if not, 2) whether they were entitled to pay for any *additional* commuting time caused by the city's policy.

Who benefited?

Whether an employee's time expenditure is considered work under the FLSA turns in part on whether the time spent predominantly benefits the employer or the employee. The court found that carrying a briefcase during a commute burdened the plaintiffs only minimally because they were required to perform no other employment-related tasks during their commutes.

The court found that the city certainly benefited from the plaintiffs' carrying the documents, but it wasn't the predominant beneficiary. The inspectors also benefited

because they didn't have to first pick up the documents at their office before going to their worksites and then return them to the office at day's end.

The Second Circuit found that, although the city pushed the limits on the burden it could impose on its employees during a commute before it must pay them for the time, carrying a briefcase during a commute — without any other employment-related activity — didn't transform the *entire* commute into work for FLSA purposes.

The time was de minimis

The city unquestionably benefited from any *additional* commuting time. But because it was de minimis as a matter of law, the court found it needn't determine whether carrying documents was an integral and indispensable part of inspecting duties.

The de minimis doctrine permits employers to disregard for FLSA purposes otherwise compensable work when "only a few seconds or minutes of work beyond the scheduled working hours" is involved. Employees must be compensated only when they are required to give up "substantial … time and effort."

Courts consider three factors in determining whether otherwise compensable time should be considered de minimis:

1. The practical administrative difficulty of recording additional time,
2. The claim's aggregate size, and
3. Whether the claimants regularly performed the work.

First, the Second Circuit noted the practical difficulty of recording and monitoring additional commuting time for each inspector. Second, the inspectors' depositions showed that the aggregate claims were quite small — generally amounting to only a few minutes. Finally, several inspectors conceded that their commutes were actually lengthened only on days when they missed a train or bus.

Concluding that the additional commuting time was de minimis, the Second Circuit affirmed the trial court's ruling.

Lesson for employers

Employers should be wary of assigning any off-duty tasks to employees that could transform nonworking time into compensable working time. Requiring employees to be "on call" while off duty can result in this kind of liability. ♦

Employee fired for on-the-job sleeping alleges retaliation

The issue before the Eighth Circuit in *Soto v. Core-Mark International Inc.* was whether an employer's good-faith belief that an employee was sleeping on the job sufficed to sustain firing him. He claimed he was the victim of retaliation for previously complaining of national-origin discrimination.

Discrimination alleged

After an employee injured his back, he informed his employer of his doctor's instructions to periodically stretch and rest his back. A few months later, he claimed he was being discriminated against based on his national origin because white employees were allowed to wear jackets over their uniforms and he wasn't. The company posted a memo restating its no-jacket policy.

About a month later, the employee again complained that white employees were wearing jackets, and again he was told that wasn't allowed.

When the employee again wore a jacket and the operations director told him he couldn't, he again alleged discrimination, claiming white workers were allowed to wear jackets. He said the director then told him to "get out of my office."

The company sent him a letter about his "continued unacceptable conduct and behavior" and told him he could meet with Human Resources if he scheduled an appointment. And if his "disruptive" conduct continued, he'd risk "disciplinary action up to and including termination of employment."

The plaintiff had claimed he was being discriminated against based on his national origin because white employees were allowed to wear jackets over their uniforms and he wasn't.

Two weeks later, a co-worker told a manager that the employee was sleeping at his workstation. When the manager woke him, he claimed he was awake, his eyes were open, his head was facing down, and he was stretching his back as instructed by his doctor. Two additional witnesses

told the company in writing that the employee appeared to be sleeping, and the company fired him.

The employee alleged national-origin discrimination and retaliation. The trial court ruled that the facts were undisputed and the company was entitled to judgment without a trial.

The Eighth Circuit weighs in

The plaintiff argued that the employer used the sleeping incident as a pretext to retaliate against him for complaining about discrimination. In evaluating pretext evidence, the key question isn't whether the stated firing basis actually occurred but whether the employer believed it occurred.

So the Eighth Circuit held that the trial court hadn't erred in concluding the employer believed in good faith that the plaintiff was asleep on the job, because the employer had based its decision on two witnesses' statements and the manager's report.

Was the motive retaliatory?

The court rejected the plaintiff's argument that, in light of 1) the letter the company sent him, 2) the operations director's comment during their meeting, and 3) white employees being allowed to wear jackets, a reasonable jury could find that the employer's firing motive was retaliatory.

The court found that 1) the letter simply advised him to make an appointment before speaking with Human Resources, didn't bar him from opposing discriminatory practices and in no way evidenced a discriminatory intent, 2) not even the operations director's ordering him out of his office demonstrated a retaliatory animus, and 3) the plaintiff continued to ignore the company's jacket policy. So the evidence — at most — showed the director was frustrated from repeatedly having to tell him to follow company rules.

Finally, the Eighth Circuit noted that the plaintiff produced no evidence showing that the company hadn't reprimanded white workers who disobeyed the jacket rule or hadn't also required white workers to make appointments to see Human Resources.

So the Eighth Circuit affirmed the trial court's ruling in favor of the employer.

Lesson for employers

This case illustrates the endless variety of excuses that employees can create to justify bad behavior. No matter how strong an employer's employment decision may appear to be, someone may find a way to challenge it. Here the company was wise to get witnesses' statements that the employee appeared to be sleeping on the job. ♦

Offensive language can create a hostile work environment

In *Reeves v. C.H. Robinson Worldwide*, the Eleventh Circuit had to decide whether daily exposure to language and radio programming that could be construed as offensive to women but not targeted at the plaintiff met the elements of a hostile-work-environment claim under Title VII.

The only female sales representative in a branch office worked in a cubicle near other sales reps. For three years, her male co-workers subjected her daily to sexually offensive language and jokes. Each morning, they tuned the office radio to a program that discussed topics offensive to women. When she complained, her supervisor — who himself often used the word "bitch" — told her that she could change the station. But when she did, her co-workers soon returned the dial to the offensive program.

5 elements

The rep resigned and sued, alleging in part that the sexually offensive language created a hostile work environment in violation of Title VII. The trial court threw out her suit because the alleged harassment wasn't "based on" her sex.

On appeal, the Eleventh Circuit found that, for an employee to recover under the hostile-work-environment theory, she must show that:

1. She belongs to a protected group,

2. She has been subjected to unwelcome sexual harassment,

3. The harassment was "based on" her membership in a protected group,

4. The harassment was sufficiently "severe or pervasive" to alter her employment conditions and create an abusive working environment, and

5. A basis exists for holding the employer liable.

Here, only two elements were at issue: the "based on" and "severe or pervasive" elements.

The "based on" element

The Eleventh Circuit first considered whether harassment in the form of offensive language could be "based on" the plaintiff's membership in a protected group even when she wasn't the language's target, and other employees were equally exposed to it.

The court had previously held that "sex specific" profanity is "more degrading to women than to men" and thus "may be considered" for whatever weight it has on the "sexual harassment scales." So, even if everyone in the office was indiscriminately and equally exposed to it, the effect on the plaintiff was discriminatory because it was degrading. Thus, the court held that her evidence survived dismissal on the "based on" element.

The "severe or pervasive" element

Conduct is "severe or pervasive" only if 1) the plaintiff subjectively found it so, and 2) a reasonably objective person would find it so. Clearly, the plaintiff here subjectively perceived the harassment to be sufficiently severe or pervasive.

As for the effect on a reasonably objective person, this is somewhat fact intensive, but the Supreme Court has identified four factors to guide the analysis:

1. The conduct's frequency. The Eleventh Circuit found this factor weighed in the plaintiff's favor because she testified that the conduct occurred every day for three years.

2. The conduct's severity. This factor weighed in the employer's favor because it wasn't ever directed at her, even though for the sole woman in a workplace to be exposed to this language and conduct can arguably be severe.

3. Whether the conduct is physically threatening or humiliating or merely an offensive utterance. This factor also weighed in the plaintiff's favor, because — while she wasn't physically threatened — a jury could find that an objectively humiliating work environment was created, particularly because she was the only woman in the workstation.

4. Whether the conduct unreasonably interferes with the employee's job performance. This factor also weighed in her favor, because although she received positive performance reviews and was assigned significant responsibilities, to be actionable the conduct needn't have tangibly affected her job performance. She testified that the conduct made concentrating difficult and often caused her to retreat to the hallway. Also, she often took time away from her work to complain to her superiors, to ask her co-workers to stop or to make a record of offensive incidents.

"Sex specific" profanity is "more degrading to women than to men" and thus "may be considered" for whatever weight it has on the "sexual harassment scales."

Three of the four factors weighed in her favor, so the Eleventh Circuit reversed the ruling and sent the suit back to the trial court for further proceedings.

Not a democracy

Why did this employer ignore the plaintiff's complaints about offensive language? Why didn't it remove the radio when the men insisted on inappropriate programming? A workplace isn't a democracy where the majority rules. To avoid liability, management must proactively protect all workers' rights. ♦

Beware of pretextual firing reasons

Could a white photographer who was replaced by a black photographer maintain an action for race discrimination? That was the question before a federal trial court in *Maioriello v. New York State Senate*.

The case begins

In 2002, then state Senator David Paterson (who is black and is now governor) was elected to the position of senate minority leader. Paterson fired the previous leader's white photographer and replaced him with a black photographer. Paterson feared that the white photographer wouldn't transfer his loyalty to him from the defeated leader, who was still a sitting senator.

The fired photographer sued the state of New York, the state senate and the state senate minority. The defendants moved to dismiss the suit without a trial on a summary-judgment motion. The court denied the motion.

Special circumstances not required

First, the defendants argued that, because the plaintiff was white (a member of a "majority group"), he had to allege special circumstances to survive summary judgment.

The court disagreed. It cited the Second Circuit's ruling in *Terry v. Ashcroft* that even a Caucasian — who is a member of the majority — can be discriminated against based on his race and isn't required to show special circumstances.

A prima facie case

Then the court applied the three-step burden-shifting process articulated in *McDonnell Douglas Corp. v. Green*:

First, the court found that the plaintiff had established a prima facie case of discrimination because:

1. As a Caucasian, he was allegedly discriminated against on the basis of his race,

2. He offered evidence demonstrating that he had satisfactorily performed his photographer duties for 26 years,

3. He suffered an adverse employment action, and

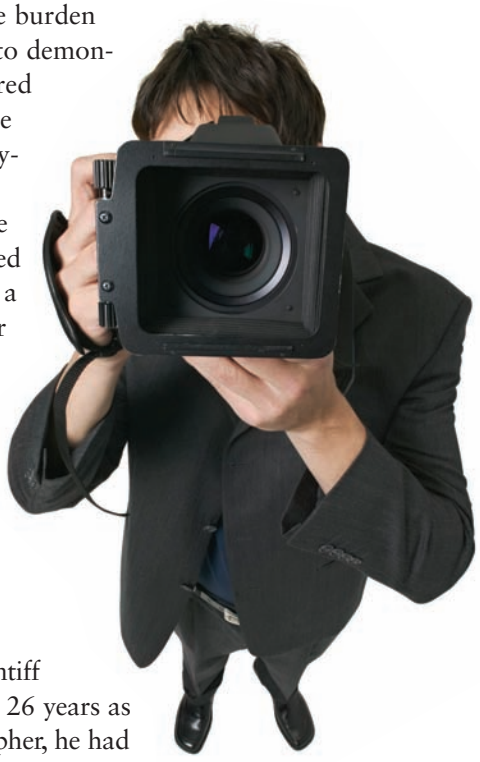
4. Viewing the facts in the light most favorable to him, the firing circumstances gave rise to an inference of discrimination on the basis of race because an African-American replaced him.

Second, the burden then shifted to the defendants to articulate a legitimate nondiscriminatory reason for its actions. Paterson claimed he believed that the plaintiff would often be in his presence and have the "opportunity" to hear his "confidential discussions." He feared that the former staffer might be loyal to the previous leader who was still in the senate. While both photographers "were equally competent at their craft," Paterson determined he could trust the replacement based on recommendations received from confidants.

The court held that Paterson's doubts about the plaintiff's loyalty were a legitimate nondiscriminatory reason for terminating his employment because it had no bearing on the plaintiff's race.

A pretext for unlawful discrimination

Third, this shifted the burden back to the plaintiff to demonstrate that the proffered reason wasn't the true reason for the employment decision and that race was the true reason. The court cited evidence from which a reasonable fact finder could conclude that Paterson's firing decision based on his doubts about loyalty was a pretext for unlawful discrimination based on race.



Furthermore, the plaintiff stated that, during his 26 years as a legislative photographer, he had

never traveled with or was a confidant of any legislative leader, wasn't present during any unguarded conversations between a legislative leader and any other person, and wasn't a policy-making member of any legislative leader's staff.

So the court concluded that — when viewed in the light most favorable to the plaintiff — Paterson had no basis on which to question the plaintiff's loyalty because he didn't occupy a position that required loyalty and trust.

Avoid risk

This case demonstrates that no employer is immune from discrimination laws. Many employers believe that a discrimination lawsuit can't happen to them — until they are sued. To avoid litigation, all employers, large and small, need to exercise caution when making employment decisions. ♦

NEW ACT BARS GENETIC DISCRIMINATION

The Genetic Information Nondiscrimination Act (GINA) was signed into law in May 2008. The act bars insurers and employers from discriminating against people whose genetic tests show a predisposition to cancer or any other disease.

GINA applies to employers, employment agencies, labor organizations and joint labor-management committees. Title II specifically bars — as an unlawful employment practice — covered entities from discriminating against a person by denying employment, promotions or health coverage, or by firing or otherwise discriminating with respect to employment compensation, terms, conditions or privileges, because of the person's genetic information.

GINA also bars covered entities from limiting, segregating or classifying employees, persons or members because of genetic information in any way that would deprive them of employment opportunities or otherwise adversely affect their status as employees.

In addition, GINA bars covered entities from requesting, requiring or buying an employee's genetic information except for specified purposes, such as the following:

- The information is requested or required to comply with certification requirements of the Family and Medical Leave Act or state family and medical leave laws.
- The information is to be used for genetic monitoring of the biological effects of toxic substances in the workplace.
- The employer conducts DNA analysis for law enforcement purposes as a forensic laboratory.

Covered entities that already possess any genetic information must maintain it in separate files and treat it as confidential medical records.

Finally, GINA bars covered entities from disclosing genetic information except:

1. To the employee or member upon request,
2. To an occupational or other health researcher,
3. In response to a court order,
4. To a government official investigating compliance with GINA if the information is relevant to the investigation,
5. In connection with the employee's compliance with the certification provisions of the Family and Medical Leave Act or state family and medical leave laws, or
6. To a public health agency.

GINA's provisions pertaining to group health plans will take effect in May 2009, and the employment provisions will take effect in November 2009.

A message to our clients and friends …

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

"Above all, we are at your service …"

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