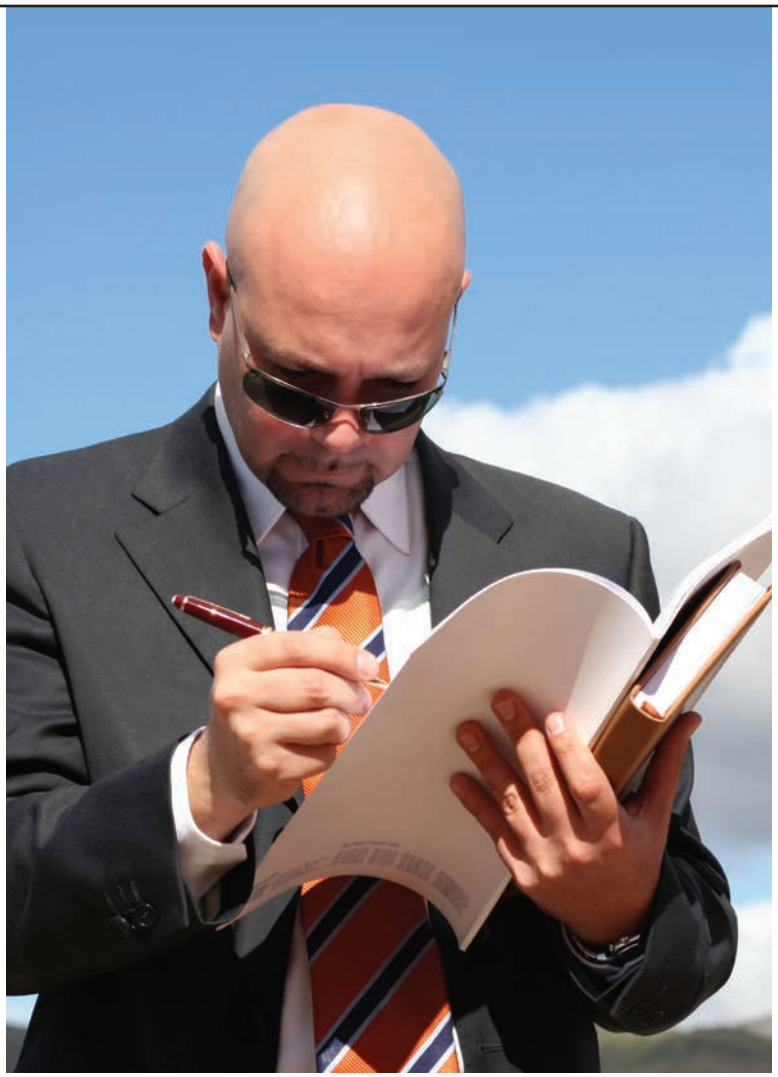
Employment Law Briefing



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Exempt vs. nonexempt

Special investigators challenge insurer's classification

Nationwide Insurance employs Special Investigators (SIs) to assist in its claims review process. These employees are generally seasoned investigators with backgrounds in law enforcement or insurance claims.

Believing they were underpaid for work performed, SIs across the country formed a class action suit in *Foster v. Nationwide Mutual Insurance Company*. It alleged that Nationwide had violated their rights under the Fair Labor Standards Act (FLSA).

3-prong test

The central issue in the case involved the insurer's decision to classify SIs as "exempt" employees under the FLSA's "administrative exemption." Because Nationwide considered SIs exempt, the company didn't pay them at an overtime rate for each hour worked per week beyond 40 — a requirement reserved for nonexempt employees. Instead, SIs were paid a set salary regardless of the number of hours worked.

In January 2012, a district court ruled in favor of Nationwide. The SIs then appealed to the U.S. Circuit Court of Appeals for the Sixth Circuit. For the SIs to qualify under the administrative exemption, Nationwide had to demonstrate that the SIs met the exemption's three-prong test:

1. The exempt employee must be compensated at a rate of not less than $455 per week.
2. The exempt employee's primary duty must be the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers.
3. The exempt employee's primary job duties must include the exercise of discretion and independent judgment with respect to matters of significance.

Prong one wasn't in dispute, so the court focused on the other two.

An integral function

The SIs drew from previous case law to support their argument regarding prong two — namely, *Schaefer v. Indiana Mich. Power Co.* They believed this case supported their contention that the exempt employee's work must directly relate to assisting with the running or servicing of the business, as distinguished from, for example, working on a manufacturing production line or selling a retail product. Investigating potential fraud was akin to day-to-day production work, they argued, because SIs produced a product that Nationwide sold: the promise of asset protection.

But the Sixth Circuit determined that, because SIs didn't write or sell insurance policies, they couldn't be fairly characterized as "producing" Nationwide's product. The court found that the SIs' work was "directly related" to the business of Nationwide because the SIs performed an integral function in Nationwide's claims adjustment process, which is an important aspect of its general business operations.

Independent judgment

The Sixth Circuit then turned to prong three, "exercise of discretion and independent judgment." Here the SIs argued

that their investigative work was highly regulated, including strict guidelines and quality control measures. As a result, they argued, they had no decision-making power.

Investigating fraud was akin to day-to-day production work, the plaintiffs argued, because SIs produced a product that Nationwide sold: the promise of asset protection.

Yet the court viewed the SIs' primary duties as investigating claims using independent judgment. Indeed, the district court had reached this conclusion in part from SI testimony that it was their job to find "the truth." Thus, the Sixth Circuit concluded that seeking the truth required the SIs to use factual findings — a process that necessarily required judgment and discretion, a requirement of prong three.

Scrutiny of duties

Nationwide prevailed in its classification of SIs as exempt administrative employees. Nonetheless, the case demonstrates how closely a court will scrutinize the actual daily work activities performed when determining whether an employee may be labeled exempt. The position's title and description carries little weight in the classification analysis.

Accordingly, employers should carefully examine an employee's actual duties. They need to consider how those duties play into the company's larger operations before deciding on an appropriate "exempt vs. non-exempt" classification. ♦

Another "administrative exemption" case

Whether an employee qualifies as exempt under the "administrative exemption" of the Fair Labor Standards Act (FLSA) is a common question. (See main article.) Another example was provided last year when the U.S. Court of Appeals for the Fourth Circuit decided *Altemus v. Federal Realty Investment Trust*.

The female plaintiff began working at Federal Realty Investment Trust (FRIT) in September 2003 as the sole assistant to the president. FRIT had approximately 400 employees during the plaintiff's tenure, including 10 to 14 executive assistants. Of them, only she was classified as exempt.

The plaintiff spent much of her time coordinating the president's travel arrangements, monitoring his communications and assisting him with various professional organizations. She alleged that her administrative tasks made up about 20% to 25% of her schedule. From 2007 to 2009, the plaintiff received regular raises and substantial annual bonuses. Her pay was markedly higher than that of other FRIT executive assistants and her three performance reviews (in 2005, 2007 and 2009) were glowingly positive.

Her employment with FRIT concluded in March 2010, at which time she commenced a lawsuit alleging that her employer had violated the FLSA by not paying her overtime. The plaintiff's primary argument was the so-called "50% rule" — that employees who spend less than 50% of their time on administrative functions don't qualify as exempt. Both the district court and the Fourth Circuit rejected this argument, with the latter noting that the 50% rule is neither hard nor fast. That is, employees who fall under the administrative exemption will *most likely* devote more than 50% of their time to administrative functions. But that alone won't make the case.

How much is enough?

Sexual harassment case turns on amount of evidence

In *Westendorf v. West Coast Contractors of Nevada, Inc.*, a district court dismissed the plaintiff's claims that her employer had sexually harassed her by creating a hostile work environment. Could she prevail on appeal? That was up to the U.S. Court of Appeals for the Ninth Circuit.

Speaking to the president

The female plaintiff began working for West Coast Contractors of Nevada Inc. in February 2008. During her first month of employment, the plaintiff's male supervisor referred to her duties as "girly." The comment was overheard by West Coast's president, who told her he'd speak with her supervisor and that she should let him know if anything similar happened again.

Six weeks later, the supervisor called the plaintiff to ask "what the hell" she'd told the president. After telling him that the president had overheard the "girly" comment, the supervisor replied that situations like this had happened before and "it's just not happening" again.

In May, the plaintiff began working a day a week on one of the company's construction sites. There, another West Coast employee under the same supervisor would regularly make offensive sexual comments to her. The plaintiff reported each incident to the president, as well as her supervisor's failure to intervene.

In July, the president arranged for a court reporter to take notes while he separately questioned the plaintiff, her supervisor and the other West Coast employee. Afterward, the president warned the supervisor that "drastic action" would be taken the next time he either spoke offensively to the plaintiff or failed to intervene on her behalf.

Giving up

The president left for vacation several days later and, according to the plaintiff, her supervisor began treating her far more critically. On July 29, the plaintiff told a subcontractor that West Coast's employees would be unable to attend a party because they'd all be at the supervisor's daughter's wedding. When the supervisor heard this, he profanely told the plaintiff that he was "offended" at her using his daughter's wedding as an excuse.

She went straight to the president, who had just returned from vacation. The plaintiff complained about the recent incident and protested that he [the president] wasn't going to do anything about it. The president replied that he'd wearied of the conflict and suggested she leave the company.

The plaintiff eventually filed suit, alleging that she had been sexually harassed in violation of Title VII of the Civil Rights Act. The district court granted West Coast's motion for summary judgment, and the plaintiff appealed.

Considering the circumstances

To establish a hostile work environment claim based on sexual harassment, a plaintiff must show that he or she was subjected to verbal or physical conduct of a sexual nature that was unwelcome and sufficiently severe or pervasive to alter the conditions of his or her employment. Furthermore, an employer will be liable for a hostile work environment created by a plaintiff's co-worker if it knew or should have known about the improper conduct and failed to take "prompt and effective remedial action."

To determine whether a hostile work environment claim is actionable, courts consider the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfered with the plaintiff's work performance.

Although the Ninth Circuit condemned the other West Coast employee's conduct specifically, it

noted that the small number of incidents presented simply didn't amount to enough to establish a hostile work environment. The appellate court affirmed the district court's judgment.

Learning the lesson

The outcome of this case could have been different had the plaintiff spent more time on-site with her abusive co-worker. And the supervisor's poor responses only exacerbated a bad situation. Employers must hold supervisors accountable for combating sexual harassment, including early intervention and immediate action to end it. ♦

Scouts get burned by knotted training program

The danger of treating employees inconsistently is a recurring theme throughout employment law. Recent case in point: *Aly v. Mohegan Council, Boy Scouts of America*, a decision handed down by the U.S. Court of Appeals for the First Circuit.

Recommended for training

Mohegan Council is a local council of the Boy Scouts of America. It employed the plaintiff as a District Executive from Aug. 6, 2001, until his resignation on Oct. 19, 2005. During his employment, the plaintiff participated in two professional development training programs: Professional Development Learning I (PDL-I) in December 2001, and PDL-II sometime in 2003. He also received four annual evaluations during his tenure, receiving:

- Positive performance reviews after his first two years,
- A slightly worse review after his third year, and
- An even poorer review his fourth year.

One of the plaintiff's responsibilities was recruitment. As a Muslim, he held recruitment meetings in mosques in 2003 and 2004. Previously, recruitment meetings were typically held in churches or schools. Moreover, before the plaintiff took over recruiting, Mohegan had no Muslim scouts or volunteers.

Sometime in late 2003 or early 2004, the plaintiff became eligible for PDL-III. But, unlike with PDL-I and PDL-II, an employee needed a recommendation following a career evaluation to be chosen for PDL-III. The plaintiff asked

his supervisor once a week for six months for a recommendation. Finally, on Aug. 30, 2004, he received his career evaluation and was recommended to attend PDL-III "within six months."

Superseded by another

About five months after the plaintiff received this recommendation, another one of Mohegan's professional scouts was also recommended for PDL-III. This professional scout, a Lebanese Christian born in the Dominican Republic, was sent to PDL-III three months after receiving his recommendation.

Despite being told that he would receive PDL-III by February 2005, the plaintiff didn't receive it. A new supervisor replaced his former one in August 2005. During a meeting on Sept. 8, the succeeding supervisor told the plaintiff that he wouldn't be sent to PDL-III

because "key volunteers in the district told [the new supervisor] they don't want [the plaintiff] anymore."

The supervisor offered to place the plaintiff on a 90-day performance improvement plan starting Oct. 1. About a month after this meeting, the plaintiff told his supervisor via e-mail that, if he wasn't promoted, he'd resign. The supervisor never replied and, a week later, the plaintiff sent another e-mail containing his resignation. The supervisor accepted it, again via e-mail, the same day.

Argument rejected

The plaintiff later sued Mohegan, alleging that he was denied career advancement opportunities because of his religion and national origin. During the trial, evidence established that there hadn't been a previous case in which a District Executive was recommended for PDL-III but wasn't provided it. The second supervisor also testified that he'd never conducted a formal investigation into the plaintiff's discrimination allegations, nor did he inform the Boy Scouts' HR Department. The jury returned a verdict in the plaintiff's favor, and Mohegan appealed.

The First Circuit rejected Mohegan's primary argument — that the plaintiff wasn't provided PDL-III because his performance had declined over the previous two years. This position was directly contradicted by the fact that the plaintiff was recommended for PDL-III. If his work was on such a decline during the preceding two years, he shouldn't have been recommended for the training program during the same period.

Moreover, the plaintiff was able to produce a non-Muslim individual of roughly equivalent qualifications that was provided training. But Mohegan couldn't provide evidence that an employee with the plaintiff's qualifications had ever been denied training after receiving a recommendation. Ultimately, the First Circuit affirmed the lower court's decision in its entirety.

Jury to convince

This case demonstrates the importance of treating similarly situated employees consistently. Should a lawsuit arise in which such employees are treated differently, the employer will have to convince a jury that it had legitimate reasons for the inconsistent treatment. ♦

Why written job descriptions are so important

They say the pen is mightier than the sword. Employers may want to heed this expression when it comes to creating, updating and following *written* job descriptions for their various positions. The case of *Knutson v. Schwan's Home Service, Inc.*, which went before the U.S. Court of Appeals for the Eighth Circuit, provides a strong example of precisely why.

Eligibility requirements

Schwan's Home Service Inc. (SHS) delivers frozen food to people at their homes or workplaces. The company employed the plaintiff as a Location General Manager. SHS required all such managers to meet Federal Department of Transportation (DOT) eligibility requirements, including having:

- A conventional driver's license,
- A license that allows the operation of trucks weighing more than 10,000 pounds, and
- Corresponding medical certification.

This information was included in the plaintiff's Offer of Employment letter.

The plaintiff suffered a severe eye injury in 2008, and SHS required that he receive either a Medical Examiner's Certificate (MEC) or a waiver before returning to work. The plaintiff was unable to receive either by December, so SHS placed him on a 30-day leave of absence beginning on Jan. 6, 2009. He was told that he had until the end of the leave to obtain either an MEC or a non-DOT

qualified job at the company. Otherwise, he'd be terminated.

The plaintiff was eventually fired because he did fail to get the MEC or find a non-DOT position at SHS. He, in turn, sued his former employer — alleging that he was terminated because of a disability in violation of the Americans with Disabilities Act (ADA). The district court granted SHS's motion for summary judgment, and the plaintiff appealed.

5 primary points

To show a violation of the ADA, the plaintiff needed to establish, among other things, that he was qualified to perform the essential functions of his job. SHS argued that being DOT-qualified to drive a delivery truck *was* an essential job function. The company contended that, because the plaintiff had failed to obtain an MEC and was therefore no longer authorized to drive a delivery truck, he couldn't perform an essential function of his position.

When deciding whether a job function is essential, courts consider five primary points:

1. The employer's judgment as to which functions are essential,
2. Any written job descriptions prepared before advertising or interviewing applicants for the job,
3. The amount of time an employee spends performing that function,
4. Any consequences that may arise if the employee isn't required to perform the function, and
5. The current work experience of similarly situated employees.

In support of its motion, SHS provided the court with a written job description for the plaintiff's position. It set forth that managers "must meet the [DOT] eligibility requirements, including … corresponding medical certification as a condition of employment for this position." The company also presented the plaintiff's Conditional Offer of Employment, signed by him, that required the plaintiff to meet DOT and SHS standards for a pre-employment physical examination.

The offer letter further stated, as mentioned, that the plaintiff must be DOT-qualified for driving trucks weighing over 10,000 pounds. Importantly, DOT requires that a driver of a commercial motor vehicle be medically certified as physically qualified to operate it. A commercial motor vehicle is a vehicle weighing 10,001 pounds or greater. SHS's delivery trucks weighed more than 10,000 pounds.

Evidence and arguments

SHS also produced evidence that, while managers don't drive the trucks every day or even every week, they do drive the delivery trucks from time to time to deliver products as well as to train new employees. If managers didn't drive trucks, the company pointed out, SHS would deliver fewer products and have to restructure how it trains new drivers. At the time of the plaintiff's termination, all other managers were DOT-qualified.

The plaintiff argued that SHS had failed to provide him with a reasonable accommodation, because he was able to work as a manager without driving a delivery truck. But the Eighth Circuit dismissed this argument and noted that an accommodation isn't reasonable if it requires the employer to eliminate an essential function of the job.

Additionally, the court found that SHS did provide the plaintiff with a reasonable accommodation by giving him the option to apply for a non–DOT-qualified position. Accordingly, the Eighth Circuit affirmed the lower court's grant of summary judgment in favor of SHS.

Thorough documentation

This case is yet another example of how an employer helped itself out through thorough documentation. Written job descriptions are typically highly persuasive in essential job function cases. As long as the employer adheres to it, a clearly written job description that completely outlines a given position should go a long way in helping the company defend itself against a disability discrimination lawsuit such as the one in *Knutson*. ♦

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.

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