Employment Law Strategist

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September 2002

FMLA

Unforeseen Leave: Courts Take A Harder Look

By Darrell R. VanDeusen

The purpose of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601 et seq., is to balance the requirements of work and family. This balance is sometimes sorely tested when an employee takes time off that is unforeseen and immediate.

The expectation created by the balancing of the rights of employees and employers under the FMLA requires that the employee be straightforward with his employer about the reason for his absence. Communication is key, and courts are more frequently looking to whether the employee has put the employer on notice that the absence might be FMLA qualifying before permitting a case to proceed past summary judgment. If the employee has simply gone AWOL, has stated only that he is "sick" or has otherwise failed to be upfront with his employer, the likelihood that a court will find that the employer did not have sufficient notice is substantially increased.

FMLA Coverage

The FMLA, of course, covers employers who have 50 employees within a 75-mile radius for 20 weeks in the current or preceding calendar year. An employee is eligible for up to 12 weeks of leave in a 12-month period if he or she has worked for the employer for 12 months (these need not be consecutive) and has worked at least 1,250 hours in the 12 months immediately preceding the leave. Leave may be taken for

continued on page 4

FLSA

Requirements Employers Must Satisfy When Paying Less Than Minimum Wage

By Jeffrey Pollack

Under certain circumstances, the Fair Labor Standards Act (FLSA) allows employers to pay employees less than minimum wage. This article will discuss the tip credit, under which employers can take credit toward the minimum wage for tips received by "tipped employees," and the minimum wage exceptions for students, learners, apprentices and messengers employed pursuant to a certificate issued by the secretary of labor.

FLSA § 203 allows employers to credit the "tips" a "tipped employee" receives against the minimum wage. (The FLSA also allows a credit for employer-provided meals and lodging. 29 U.S.C. § 203(m).) A tip is an amount "presented by a customer as a gift or gratuity in recognition of some service performed for him." 29 C.F.R. § 531.52. Gifts other than money (e.g., merchandise) are not tips. 29 C.F.R. § 531.53. A "tipped employee" works "in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). Where an employee performs more than one function, one or more of which are in a position where he does not customarily and regularly receive $30 in tips per month, the employer can use the tip credit only for time spent performing "tipped" work. 29 C.F.R. § 531.56(c).

The FLSA permits employers to pay a tipped employee cash wages of $2.13 per hour, provided the employee's gross compensation (tips plus cash wages) equals at least the minimum wage. (Many states require a higher wage, so be sure to check applicable laws.) Sec. 203(m)(1) provides that "the cash wage paid such employee...shall be not less than the cash wage required to be paid such an employee on Aug. 20, 1996." On Aug. 20, 1996, the minimum wage was $4.25 per hour, and § 203(m) provided:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips...,but not by an amount in excess of 50 per centum of the applicable minimum wage....

Thus, the cash wage requirement remains fixed at $2.13 per hour and the allowable tip allowance will increase along with any increase in the minimum wage. (Congress amended § 203(m) to its current incarnation in 1998.)

Use of the tip credit has two conditions, both of which an employer must satisfy before claiming credit for tips received by a tipped employee:

- The employer must explain the credit to the employee in advance; and

continued on page 2

In This Issue

National Litigation Hotline....6
Recent Developments From Around the States....9
Employment Bibliography....11

Minimum Wage

continued from page 1

• The employee must retain all tips he receives.

The second condition has two exceptions: (1) tip pooling—employees who "customarily and regularly receive tips" may pool their tips; and (2) employers may reduce tips paid by credit card to reflect the fee charged by the credit card company.

A Leading Case

Kilgore v. Outback Steakhouse of Florida Inc., 160 F.3d 294, 4 WH Cases 2d 1729 (6th Cir. 1998), is the leading case on the tip credit. Among other things, plaintiff-class claimed that Outback failed to inform them of the tip credit. The court disagreed, holding that an employer must merely inform employees of its "intent to take a tip credit," not explain it. 4 WH Cases 2d at 1732. The court also held that the FLSA does not limit the amount of tip-out (the amount servers have to share with other employees) to a customary or reasonable amount.

Plaintiffs also challenged the restaurant's inclusion of hosts in the tip pool. The court upheld Outback's policy.

Plaintiffs'argument that hosts are not tipped employees fails because (1) Department of Labor regulations indicate that tips received from a tip pool should be considered as tips for the purpose of subsections 203(m) and (t), and (2) hosts at Outback are part of an occupation that customarily and regularly receives tips and are employees who customarily and regularly receive tips. *Id.* 1734.

Hosts worked in an occupation in which they customarily and regularly receive tips "because they sufficiently interact with customers in an industry (restaurant) where undesignated tips are common." *Id.* Noting that hosts greeted guests, seated them, gave them menus and "enhanced" their wait, the court distinguished them from "employees like dishwashers, cooks, or...janitors who do not directly relate with customers at all." *Id.* See also *Dole v. Continental Cuisine Inc.*, 751 F. Supp. 799 (E.D. Ark. 1990) (maitre'd lawfully participated in tip pool).

In contrast, in *Ayres v. 127 Restaurant Corp.*, 12 F. Supp.2d 305 (S.D.N.Y. 1998), *aff'd*, 201 F.3d 430 (2d Cir. 1999), the court held that defendant improperly included the restaurants' general manager in the tip pool because managers do not customarily and regularly receive tips. (The court also found the violation willful, extending the statute of limitations from two to three years.) See also *King v. Friend of a Farmer Corp.*, 2001 U.S. Dist. Lexis 10630 (S.D.N.Y. 2001) (defendant's motion for summary judgment denied where plaintiff alleged defendant took funds from tip pool "to balance the cash register"); *Zhao v. Benihana Inc.*, 2001 U.S. Dist. Lexis 10678 (S.D.N.Y. 2001) (court authorized

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EmploymentBibliography

Roundup of Select Articles For Employment Practitioners

Despite Family Leave Act, Employees Pay at Work for Caregiving at Home

By David Hechler

(Miami Daily Business Review, Sept. 19)

A law professor calls it a "new glass ceiling" that has spurred a small litigation trend in an underdeveloped area of discrimination law.

Though women have won broad rights in the workplace, a new generation of working mothers has begun to sue employers, claiming they have been discriminated against when tending to family needs. And something else is new, the professor added: Fathers have joined in.

"Employers know enough not to say that women aren't welcome here," said the Washington. D.C., law professor, American University's Joan Williams. But some haven't recognized this second form of discrimination, she said. In their view, "when they say 'mothers aren't promotable,' that's not bias. That's just one of the hard truths of life," Ms. Williams said.

In a recently released study titled "The New Glass Ceiling: Mothers—and Fathers—Sue for Discrimination," Ms. Williams and co-author Nancy Segal examined more than 20 cases. They found plenty of statements of open bias.

Encouraging Compliance With EEO Laws

By M. Elaine Jacoby

(New Jersey Law Journal, Sept. 16)

Real compliance with equal employment opportunity laws comes about when employers, from the top down, are committed to it. And they are more likely to be compliant when they understand the public policy embodied in the laws and believe that implementing regulations and judicial interpretations accurately express that public policy.

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The transformation of the workplace during the past 35 years demonstrates what can be achieved when employers embrace compliance, as they generally have done with respect to Title VII and the Age Discrimination in Employment Act.

The jury still seems to be out, however, on the Americans with Disabilities Act and the Family Medical Leave Act, perhaps in part because of at least some regulations that do not serve the underlying purposes of the statutes.

This point is illustrated tellingly by the unfortunate fact that the first case under the FMLA to reach the U.S. Supreme Court, *Ragsdale v. Wolverine World Wide Inc.*, 122 S. Ct. 1155, 152 L. Ed.2d 167, 2002 U.S. LEXIS 1936, came about because of a Department of Labor regulation that, the Court held, did not embody the public policy the statute was intended to express.

Employment Law Issues One Year After: Security Planning

By Philip M. Berkowitz

(New York Law Journal, Sept. 12)

A year after Sept. 11, there exists an urgent need for employers to develop emergency contingency plans to cope with the heightened potential for workplace violence. This article will discuss employers' legal obligations, as well as practical steps which an employer should consider in developing such plans.

Regulations issued by the Occupational Safety and Health Administration (OSHA) require employers to make contingency plans for emergencies. These plans must include:

- emergency escape procedures;
- emergency escape route assignments;
- procedures to be followed by employees who must remain in the facility to operate critical equipment before they evacuate;
- rescue and medical duties for those employees who are required to perform them;
- the means of reporting the emergency or a fire; and,
- the identification of those persons (title, name) or departments who employees can contact to obtain further information.

In addition to this regulation, the OSHA "general duty" clause, which requires an employer to protect its employees against "recognized" hazards to safety and health, can and has been used by OSHA to issue citations to employers for failure to protect employees against workplace hazards, including workplace violence that could arise in a terrorist occurrence. For example, OSHA recently issued guidelines to protect employees against the hazard of exposure to anthrax which became an issue after Sept. 11.

Employer Can Insist on Arbitration Agreement

By Jason Hoppin

(The Legal Intelligencer, Sept. 5)

The U.S. Court of Appeals for the Ninth Circuit overturned one of its more controversial employment law decisions in recent years when it ruled that employers can force workers to sign arbitration agreements as a condition of employment.

In a decision one plaintiffs lawyer described as "heartbreaking," a divided panel ruled that the law firm of Luce Forward Hamilton & Scripps did not violate the law when it rescinded an employment offer to a legal secretary, Donald Scott Lagatree, because he refused to give up his right to sue for workplace discrimination.

"[Mr.] Lagatree did not engage in a protected activity when he refused to sign the Luce Forward arbitration agreement, and consequently, Luce Forward did not retaliate when it refused to hire him," Judge Stephen Trott wrote.

The suit was brought on behalf of Mr. Lagatree by the U.S. Equal Employment Opportunity Commission, which argued that Luce Forward unlawfully retaliated against Mr. Lagatree for refusing to sign the agreement.

In reaching its conclusion, the Ninth Circuit overturned *Duffield v. Robertson Stephens*, 144 F.3d 1182, which held that employees cannot lose their jobs for refusing to agree to have their Title VII workplace dis-

continued on page 10

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Bibliography

continued from page 11

crimination claims settled by an arbitrator.

Court Weakens the Workers' Compensation Bar

By Ronald Grayzel

(New Jersey Law Journal, Sept. 2)

There were 14 decisions in tort law this term, the highest profile case being *Laidlow*, where the Court weakened the workers' compensation bar and expanded the rights of workers to sue their employers when they are aware that injuries are substantially certain to occur on unguarded industrial machines.

A great deal of attention was paid to the field of medical malpractice, where the court expanded the cause of action for informed consent to include a physician's misrepresentations about his credentials. Two cases dealt with the failure of trial courts, in complicated cases, to construct jury charges that are adapted to the facts and theories of the case and that accurately reflect the existing state of the law. And the justices finished their rehabilitation of a plaintiff's right to obtain damages for pain and suffering against public entities.

Court Seems to be Moving to a More Moderate Approach in the Area of Employment Law

By Rosemary Alito

(New Jersey Law Journal, Sept. 2)

Although employee-plaintiffs continued to prevail more often than not, the legal principles evolving from the New Jersey Supreme Court are decidedly more practical—and some would say a bit more moderate—than in years past.

The newer members of the court continued to dominate the employment law docket this term, with Justices Peter Verniero and Jaynee LaVecchia each authoring two opinions and Justice Virginia Long writing one. In two cases where the court was divided, Justices Long, James Zazzali and Gary Stein joined together in dissent.

In *Gaines v. Bellino*, 173 N.J. 301 (2002), the court held specifically what had been implicit in several prior opinions—that an employer that exercises due care to prevent hostile work environment sexual harassment by establishing an effective anti-sexual harassment policy and complaint mechanism will not be vicariously liable.

That's good news for employers generally, who place great reliance on this variation of the federal-law defense established by the U.S. Supreme Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). But it was not so good for the employer in *Gaines*.

Infertility and Contraception Under the ADA, PDA and Title VII

By Richard Reibstein And Rachael Akohonae

(New York Law Journal, Aug. 28)

How much time off should an employer give an employee who needs to take hormone injections to stimulate her ovaries? Should an insurance plan cover in vitro fertilization? What about artificial insemination?

Case law under the Americans with Disabilities Act, the Pregnancy Discrimination Act (PDA), and Title VII of the Civil Rights Act has at the same time both limited and expanded protection for employees coping with infertility, pregnancy and contraception. Here are some cases that have approached these issues and created the following general guidelines.

In 1998, the U.S. Supreme Court opened the door to claims that infertility is a disability under the ADA. In *Bragdon v. Abbott*, the Court declared "reproduction" a major life activity. In *Bragdon*, the plaintiff, who had AIDS, alleged she was a "person with a disability" under the ADA because she was substantially limited in her ability to reproduce.

The Court agreed and noted "reproduction and the sexual dynamics surrounding it are central to the life process itself." While the Court modestly avoided any further explanation of what "sexual dynamics" are, it is likely that the physical act of sex, the growth of a child in the uterus and birth itself are all major life activities.

Just last year, the U.S. District Court for the Southern District of New York, interpreting *Bragdon*, explicitly held that infertility was a disability under the ADA.

In *Saks v. Franklin Covey*, an employee tried to become pregnant through a variety of invasive and expensive treatments, including intrauterine inseminations, hormone therapy, injectable drugs and in vitro fertilization. She visited specialists in infertility and reproductive endocrinology and suffered three miscarriages.

Applying *Bragdon*'s "clear-cut rule," the court found that the plaintiff was substantially limited in her ability to reproduce and was a "person with a disability" within the meaning of the ADA. But the court quickly rejected the argument that the plaintiff was not covered because she could still engage in the act of sexual intercourse (unlike the HIV-positive plaintiff in *Bragdon*).

The court found that *Bragdon* offered protection under the ADA to people who were "substantially limited in their ability to reproduce, that is, to conceive and bear a child" and thus defendant's attempt to focus on the act of sex itself missed the point.

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Minimum Wage

continued from page 1

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notice to potential class members where plaintiff alleged defendant required servers to share tips with kitchen helpers and did not inform servers about tip credit); *Cao v. Chandara Corp.*, 2001 U.S. Dist Lexis 8631 (S.D.N.Y. 2001) (defendant violated FLSA by taking tip credit without informing plaintiff); *Realite v. Ark Restaurants Corp.*, 7 F. Supp. 2d 303 (S.D.N.Y. 1998) (plaintiffs claimed that defendant required improper tip pooling and failed to explain the tip credit).

Employers seeking to take advantage of the tip credit must inform all tipped employees about the credit prior to its use and ensure that the employees retain all their tips (or participate in a proper tip pool).

Minimum Wage Exception

FLSA § 214 permits employment of full-time students (in compliance with applicable child labor laws), learners, apprentices and messengers at subminimum wages, pursuant to a certificate issued by the secretary of labor.

Additionally, § 213(a) provides minimum wage exemptions for certain classes of employees, including executives, administrators and professionals. See 29 U.S.C. §213(a); "Reviewing Overtime White-Collar Exemptions," NYLJ, April 19, 2000, page A-1. Separately, § 206(g) exempts newly hired employees under age 20, who may work for as little as $4.25 per hour during their first 90 calendar days of employment.

Retail or Service Establishments

Retail or service establishments may employ full-time students at 85 percent of minimum wage (or more). 29 U.S.C. §214(b)(1)(a). A full-time student "receives primarily daytime instruction at the physical location of a bona fide institution." He retains that status even during vacation periods. 29 C.F.R. § 519.2(a).

The statute contains certain conditions for issuance of a certificate for full-time students, including:

- The certificate must be necessary to prevent curtailment of opportunities for employment;
- Employment of the students will not create a substantial probability of reducing the full-time employment opportunities of other persons;
- There is no strike or lockout in progress at the establishment; and
- The employer has no serious FLSA violations.

See 29 U.S.C. §214(b); 29 C.F.R. §§ 519.5, 519.6(m).

Full-time students employed pursuant to a certificate may not work more than 20 hours in any workweek—40 when school is not in session—and no more than eight per day. 29 U.S.C. § 214(b)(4)(a); 29 C.F.R. § 519.6(j). Regardless of the total hours worked, employment at subminimum wages is limited to hours outside of school. 29 C.F.R. § 519.6(l).

The FLSA also restricts the total number of hours full-time students may work at subminimum wages based on a proportion to the hours worked by regular employees. See 29 U.S.C. § 214(b)(1)(b). There is also a presumptive limit of six full-time students working for an employer at subminimum wages on any workday, which applies to the "highest structure of ownership or control...the controlling conglomerate or enterprise would be the employer." 29 C.F.R. § 519.2(f). Nevertheless, the employer must file a separate application for each physical establishment in which it seeks to pay subminimum wages.

Students Employed by Schools

Full-time students enrolled in an institution of higher education may work for that institution at 85 percent of minimum wage. 29 U.S.C. § 214(b)(3). Most of the requirements mirror those for retail or service establishments, except for the presumptive limit of six students. See generally 29 C.F.R. §§ 519.11-519.19.

Elementary or secondary schools that employ their own students as "an integral part of the regular education program provided by such school" may qualify for exemption from the minimum wage and overtime requirements for such student employees. 29 U.S.C. § 214(d).

Learners, Apprentices and Messengers

Employers must pay learners at least 95 percent of minimum wage. 29 C.F.R. § 520.408(a)(1). Learners are training "for an occupation, which is not customarily recognized as an apprenticeable trade, for which skill, dexterity, and judgment must be learned and who, when initially employed, produces little or nothing of value." 29 C.F.R. § 520.201(b). Student learners must receive at least 75 percent of minimum wage. 29 C.F.R. §520.506(a). Student learners are "at least 16 years of age...receiving instruction in an accredited school, college or university... employed on a part-time basis, pursuant to a 'bona fide vocational training program....'" 29 C.F.R. § 520.201(c).

Apprentices are at least 16 years old and "employed to learn a skilled trade through a registered apprenticeship program." 29 C.F.R. § 520.201(d). (For the definition of "skilled trade," see 29 C.F.R. § 520.300.) The apprenticeship program itself establishes the minimum rates of pay. 29 C.F.R. § 520.409(b).

Employers must pay messengers at least 95 percent of minimum wage. 29 C.F.R. §§ 520.201, 520.407. Messengers are "primarily engaged in delivering letters and messages for a firm whose principal business is the delivery of such letters and messages."

The conditions for obtaining a certificate for learners, apprentices or messengers are basically the same as for students, except the employer must show that employment at subminimum wage will not create an unfair labor cost advantage nor impair the working standards of experienced workers. For a learner certificate, the employer must also demonstrate (1) the unavailability of qualified, experienced workers despite reasonable efforts to recruit workers at minimum wage or higher, (2) availability of learners for work, and (3) that current employees have the opportunity for full-time employment at the end of the learning period. See generally 29 C.F.R. § 520.404.

Employers wishing to take advantage of these minimum wage exceptions must follow the Department of Labor's requirements in order to obtain a certificate allowing employment at subminimum wage.

While the FLSA allows employers to pay less than minimum wage in certain circumstances, employers must satisfy all statutory and regulatory requirements before permitting anyone to work for less than minimum wage.