

This Issue:

Insubordination
ADA
Absenteeism/alcohol
Handbooks

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United States
Court of Appeals
Pabst v. Oklahoma Gas &
Electric Company

"On-call" time found to be compensable

The U. S. Court of Appeals for the Tenth Circuit affirmed a decision that electronic technicians employed by a utility company were entitled to compensation for time spent monitoring pagers and home computers. The employees were required to respond to alarms via pager and/or home computer during all hours that they were not present at the employer's facilities. The employees normally only reported overtime when they actually responded to a call.

The court articulated the test for determining whether on-call time is compensable as "whether on-call time is spent predominantly for the benefit of the employer or the employee." In making its determination, the court considered: (1) the agreement between the parties; (2) the nature and extent of restrictions; (3) relationship between services rendered and the on-call time; (4) degree to which burden on employee interferes with their personal pursuits; and (5) all surrounding circumstances.

The court emphasized the facts that employees were on-call at all times they were not at the employer's facility, the employees received five calls per night on average, and employees complained that being on-call interfered with their personal pursuits, particularly getting a full night's sleep. The court rejected the employer's argument that it had no notice the employees were working overtime while on-call, because the employer created the on-call situation. Time spent on personal pursuits was not subtracted from the award of overtime.

Ball v. Memphis
Bar-B-Q Company, Inc.

Squealing manager is not protected by FLSA

The U. S. Court of Appeals for the Fourth Circuit ruled that an employee cannot assert a retaliatory discharge claim under the protection of the Fair Labor Standards Act (FLSA). Ball was a manager of a Memphis Bar-B-Q restaurant. One of his waiters had retained an attorney and was prepared to file suit under the

FLSA, alleging the company had deprived him of compensation. Sorin, the company president, contacted Ball and "suggested how Ball might testify, but Ball indicated that he 'could not testify to the version of events as suggested by Sorin'." Ball was subsequently discharged and claimed that it was "because he did not agree to testify as Sorin had suggested."

The court examined the actual language of the FLSA to reach the conclusion that Ball was not protected. Judge Niemeyer wrote that retaliation after a "formal proceeding" has begun, not after an employee has made a complaint to a supervisor, was necessary for the FLSA's provisions against retaliation to apply. No lawsuit was filed when Ball was discharged. As a result, the prohibition against "discharg[ing] any employee because such employee is about to testify in [a] proceeding" did not apply.

As used in the Act, a "proceeding" must be instituted and provide for testimony under oath or affirmation. Niemeyer further wrote, "we do not condone [the company's] conduct [b]ut this moral judgment does not justify a conclusion contrary to the plain language of the FLSA that Ball's complaint states a cause of action under the Act."

The court rejected the position of the Secretary of Labor that the anti-retaliation provision protects employees who intend to testify in an anticipated proceeding.

United States
Court of Appeals
NLRB v. Aluminum Casting &
Engineering Co., Inc.

Union-free statement in employee handbook OK'd

The U. S. Court of Appeals for the Seventh Circuit refused to enforce part of an NLRB order, which characterized an anti-union policy statement in an employee handbook as an unfair labor practice. The handbook communicated the employer's "intention to do everything possible to maintain our company's union free status for the benefit of our employees and [the company]." The handbook cited a prior bad experience with unions.

The court noted that the handbook was originally published three years before a union campaign and was reissued shortly after a union election. The court stated that it would evaluate these types

of matters in the context of each case. Unlike the NLRB, the court found no objective evidence that employees perceived the statement to indicate a willingness to use illegal tactics to keep a union out. The court indicated that no express disclaimer of willingness to use illegal tactics was required for these types of statements, particularly where the handbook is published before any organizational activity has begun.

Denial of bonus is not actionable

Hunt v. City of Markham

The U. S. Court of Appeals for the Seventh Circuit's Chief Judge Posner reversed the district court's grant of summary judgment against four police officers who sued the City of Markham, a Chicago suburb, alleging the City discriminated against them because of their age and because they were white. The City's mayor, who is a black man, and other black officials had made several racially charged statements to the officers and others, such as the city needed "to get rid of all the old white police officers"; "when are you going to quit so we can bring these young black men up?"; "it is the black's turn to self-govern in Markham, and if you are white, get out"; "its our turn; you are in the minority now; you lost, you might as well move out; we don't owe you nothing." Several of the officers presented evidence that they were denied raises because of their age and race.

The court found that the denial of raises, unlike bonuses (denial of a bonus is not an adverse employment action for Title VII purposes) are an adverse employment action. "But there is a difference between a bonus and a raise. Bonuses generally are sporadic, irregular, unpredictable, and wholly discretionary on the part of the employer. Raises are the norm for workers who perform satisfactorily."

Stressed-out attorney denied workers' comp

North Carolina
Court of Appeals
Lovekin v. Lovekin and Ingle

The Court of Appeals of North Carolina reversed a decision of the North Carolina Industrial Commission. The Full Commission had awarded workers' compensation benefits to a partner in a law firm who claimed that he required heart bypass surgery due to stressful working conditions occurring over a period of 8 months. Among the "stressors" cited by the plaintiff were: increased caseload, two associate attorneys and a paralegal leaving the practice, a malpractice suit, an IRS audit, and the firm's purchase of their office building on a personally guaranteed loan.

The court found that the plaintiff's heart condition was not compensable because it was not an injury by accident under North Carolina's Workers' Comp law. The court noted that an accident is the result of an event, not a series of multiple events occurring over a period of time.

"Flipping-the-bird" is insubordination

Arbitration
Rotex, Inc.

Arbitrator Frank Keenan, denying the grievance of Steelworkers Local 14734 and sustaining a 3-day suspension without pay, ruled that "despite the great coarsening of American society in say the last two decades, flipping-the-bird or giving-the-finger continues to be regarded as a clear and overt gesture of disdain and disrespect."

The employee met with several managers to commemorate his 5-year anniversary of employment. As part of the recognition, a photo was snapped of the employee receiving a silver mug and a baseball cap prominently displaying the Company name "Rotex." The photo was posted on 3 bulletin boards. Two employees complained because the photo "clearly depicts grievant holding his baseball cap in his right hand by its visor, with only his right middle finger extended over the visor, and pointed directly to the Company name on the front of that cap."

The arbitrator found just cause, observing that "it is well established that conduct disrespectful of supervisors, and the

institution of the Company itself, is also a form of insubordination."

Physician, heal thy self

United States
Court of Appeals
Bekker v. Humana Health Plan, Inc.

The U. S. Court of Appeals for the Seventh Circuit held that a hospital did not violate the Americans with Disabilities Act (ADA), when it terminated a physician it believed was treating patients while under the influence of alcohol. The physician and the hospital entered into an employment contract after the hospital was alerted to the fact that the physician had an alcohol problem. Patients and fellow physicians had reported that they smelled alcohol on her breath during patient examinations. The contract stated that the hospital had the right to terminate the contract if it reasonably believed that the health and safety of patients was endangered by the physician.

The court held that the severity of the risk to patient safety presented by a physician's alcohol use and the persistent nature of the problem substantiated the hospital's concerns and justified its decision to terminate the employment contract. Last, the court found that the hospital, by establishing that it had a reasonable belief that the physician presented a "direct threat" to the health and safety of patients, provided a non-discriminatory reason for the doctor's discharge.

Arbitration
Keystone Steel & Wire Co.

Employee with alcohol problems works as bartender!

"M" was asked if there was any reason for his absenteeism during his termination meeting. M denied having any problems. After his discharge, M contacted his union and admitted an alcohol problem. The union contacted the company and asked that the termination be reconsidered. The company answered that it was too late to discuss M's alcohol problem.

Arbitrator Elliott Goldstein determined that M was discharged for just cause, because (1) the union never protested or grieved any of M's 4 prior violations of the progressive attendance policy; (2) M waited 6 months to seek treatment after his revelation; (3) he never specified how long he stayed at the rehabilitation center and was evasive when asked how far he went in the 12-step program; (4) he did not attend AA meetings after rehabilitation-M even worked as a bartender after receiving counseling; (6) the company could only consider facts known to it at the time of discharge and any retroactive mitigation would add or modify the collective bargaining agreement, something the arbitrator cannot do.

Honesty is always the best policy

Texas Court of Appeals
Metal Industries, Inc. of
California v. Farley

The Court of Appeals of Texas (Texarkana) ruled that an employer violated the anti-retaliation provisions of the Texas Workers' Compensation law. The employee was diagnosed and treated for carpal tunnel syndrome after doing work for fifteen years that involved repetitive motions with her hands. When she returned to work, she was given light clerical duties and then work on a foot-operated machine. She then attended a month-long work hardening program in order to increase her work abilities. She returned to work and performed all her duties without complaints from her superiors.

Soon thereafter in 1996, she was terminated. The employer listed "reduction in force" as the reason for the termination, but management later testified that it was untrue. Evidence showed that the company had hired 101 people between the date of the employee's discharge and the end of 1997. The court rendered judgment for the employee in the amount of \$121,194, representing past and future lost earnings, benefits, and mental anguish.

The Appeals Court ruled that the plaintiff must prove that, but for her filing a workers' comp claim, the Company would not have fired her when it did. The court found "strong" evidence that the stated reason for discharge was false; that alone is a sufficient basis from which to infer a causal link between an employee's workers' compensation claim and subsequent discharge.

United States
Court of Appeals
Chathas v. Local 134 IBEW

Union members take business manager to task!

Mike Fitzgerald, the business manager of IBEW Local 134, created a social organization of members of the local the "Unified Social Club." He allegedly "solicited and received tens of thousands of dollars in contributions to the Club from employers with which the local bargain[ed], the purpose being to solidify [his] hold over the union by enabling the Club to provide attractive social outings for union members. The more lavish its outings, the more likely he is to be reelected business manager." A few members of the local "who [were] on the outs with [Fitzgerald]" brought suit against him to prohibit "solicit[ing] employer contributions," a prohibition of Section 302 of the National Labor Relations Act, as amended.

The U. S. Court of Appeals for the Seventh Circuit upheld a permanent injunction for the plaintiffs, "forbidding the defendants to solicit or receive contributions to the Unified Social Club from employers doing business with the local." The plaintiffs wanted "a declaratory judgment or at least a finding in or accompanying the permanent injunction that the defendants had violated the law." The lower court had accepted the union's offer to enter the permanent injunction, but the offer was not to be construed as an admission of liability.

Judge Posner would not give the plaintiffs their wish, but did remand the case for a finding on whether union officers created a conflict of interest and violated the Labor-Management Reporting and Disclosure Act by "dealing with the union as an adverse party (by) taking money from employers in order to solidify their control of the union (and) obtain[ing] a personal interest adverse to the union thus creating a conflict between their interest in reelection and their duty to deal with employers at arm's length."

Nothing in this newsletter should be relied upon as legal advice in any particular matter. Tennessee law requires the following statement: Tennessee does not certify specialists in the law and we do not claim certification in any listed area. Comments on articles and suggestions for future articles are welcome.