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SEPTEMBER/OCTOBER 2011

Volunteer or employee?

Golf coach looks for overtime green in FLSA case

In educational settings, teachers or other staff members will often take on additional coaching or extracurricular leadership duties. Whether the Fair Labor Standards Act (FLSA) should cover these volunteers has long been a contentious matter. The U.S. Court of Appeals for the Fourth Circuit issued its opinion regarding one particular situation in *Purdham v. Fairfax County School Board*.

Teeing up a lawsuit

The plaintiff was employed as a safety and security assistant for the Fairfax County School Board. In addition, he served as the golf coach at a district high school.

His security assistant job wasn't conditioned on his coaching activities, and he was free to relinquish his coaching duties at any time without adversely affecting his job. The school board permitted him to serve as golf coach during his regular workday as well as to take administrative leave without loss of pay when his golf team had a tournament during his normal working hours. He was reimbursed for his expenses and received a stipend, which rose as high as $2,114.

For a short period, the school board paid the plaintiff and other coaches overtime rates when their total hours exceeded 40 in a week. It did so out of "an abundance of caution" after other school districts had faced litigation because of failure to pay such overtime. Eventually, to limit its exposure to wage and hour litigation, the school board decided to no longer permit nonexempt employees such as the plaintiff to coach.

But, before the change in policy could be implemented, the Department of Labor issued a guidance opinion letter as to when school coaches were subject to the FLSA. In response, the school board decided to continue allowing nonexempt employees to coach but discontinued its policy of paying overtime.

The plaintiff filed suit, and a federal district court granted the school board's motion for summary judgment. The plaintiff appealed.

Qualifying for the exemption

Under the FLSA, to "employ" means to "suffer or permit to work," and employees must be paid minimum wage

and receive an overtime rate for hours worked beyond a 40-hour week. But there's an exemption for individuals who volunteer to perform services for a public agency if:

- The individual receives no compensation or is paid expenses, reasonable benefits or a nominal fee to perform the services, and
- The services aren't the same type of services for which the individual is employed.

Department of Labor regulations define "volunteer" as an "individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered." The individual must offer his or her services "freely and without pressure or coercion, direct or implied, from an employer."

Rejecting the arguments

In applying these definitions, the Fourth Circuit first noted that the plaintiff hadn't been coerced into accepting the golf coach position, and his employment wasn't dependent on his coaching. Although the stipend appeared to provide some motivation, the record showed sufficient evidence that the plaintiff was largely driven to coach by his long-standing love of golf and dedication to his student athletes.

The appeals court also rejected his argument that the grant of administrative leave to perform his coaching duties made him an employee. The court concluded that such an interpretation would likely discourage and impede volunteerism, contrary to Congress's intent in enacting this exemption. Last, the appeals court rejected his argument that the stipend was more than a nominal fee, noting that, on an hourly basis, it was less than minimum wage.

Ultimately, the Fourth Circuit concluded that the plaintiff was a volunteer not entitled to FLSA coverage.

Reviewing your obligations

Employers who retain volunteers should be aware of how the FLSA does and doesn't affect these individuals. Public agencies aren't alone in incurring the risk of litigation. Religious, charitable or other nonprofit organizations also need to review their rights and obligations. ♦

For-profit organizations have an FLSA exemption, too

The case of *Purdham v. Fairfax County School Board* (see main article) demonstrates how public agencies, as well as other nonprofit organizations, can exempt volunteers from coverage under the Fair Labor Standards Act (FLSA). But do for-profit businesses have such an exemption?

According to the Department of Labor, there are some circumstances under which a for-profit employer may lawfully choose not to compensate an intern. To qualify for an FLSA exemption, the internship must:

1. **Provide training similar to that which would be given in an educational setting — even though it includes actual operations at the employer's facilities,**
2. **Offer experiences for the intern's benefit,**
3. **Not displace regular employees but take place under close supervision of existing staff,**
4. **Provide no immediate advantage for the employer — in fact, it may occasionally impede operations,**
5. **Not necessarily entitle the intern to a job at its conclusion, and**
6. **Include an understanding that the intern isn't entitled to any wages.**

If these six factors are met, an employment relationship doesn't exist and FLSA minimum wage and overtime provisions don't apply.

The Department of Labor further states that the more an internship program revolves around a classroom or academic experience — such as when the school oversees the program and provides educational credit — the more likely it will view the program as an educational experience. On the other hand, if the intern regularly performs routine business tasks (such as clerical work or assisting customers), the agency will more likely view that person as an employee.

In short, employers shouldn't view unpaid interns as a source of free labor. Interns working for the employer's benefit should be paid at least the minimum wage and overtime for hours worked beyond 40 per week.

Employer, pregnant worker clash over frequent absences

Work/life balance is an important human resources concept. But when an employee tips the scales more toward "life" than "work," conflicts may arise. Throw in the fact that said worker is pregnant, and litigation becomes a major risk. Such were the circumstances in *Trierweiler v. Wells Fargo Bank*, a case heard by the U.S. Court of Appeals for the Eighth Circuit.

Attendance issues

The plaintiff began working as a teller for Wells Fargo in October 2006. When hired, she received an employee handbook emphasizing that excessive absences were grounds for discipline — including termination.

In December, the plaintiff informed her supervisors that she was pregnant. Because she'd been employed less than a year, she wasn't eligible for leave under the Family and Medical Leave Act (FMLA).

In April 2007, the plaintiff met with her supervisor to discuss her attendance. The supervisor verbally warned the plaintiff that, so far that year, she'd already taken 11.5 days of her 20-day paid time off (PTO) allotment. And none of these absences were pregnancy-related.

Drive-through goodbye

On May 9, the plaintiff took another PTO day to stay home with a sick child. She claimed that on May 11 she was warned that, if she took another day off before year end, she "would be done working there."

On her next workday, the plaintiff left a message for her supervisor saying that she had a doctor's note for pregnancy-related leave for the entire week. The supervisor replied with a message saying, "This isn't going to work, you taking time off."

The plaintiff claimed that, after she'd informed her employer of her pregnancy, supervisors made impossible attendance demands to force her resignation.

The plaintiff claimed that she understood the message to mean that she no longer had a job. So, on the last day of her medical leave, the plaintiff left her keys with a drive-through teller and said she was done. She also left her supervisor a message saying that she'd dropped off her keys and asking that a teller retrieve her personal items.

The plaintiff then filed a lawsuit against Wells Fargo in federal district court claiming that she'd been constructively discharged in violation of Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act of 1978. The district court granted the employer's motion for summary judgment, concluding that the plaintiff had failed to present sufficient evidence that she'd been constructively discharged. The plaintiff appealed.

Employee's obligation

To establish a claim of constructive discharge, the plaintiff had to show that "a reasonable person would have found the conditions of employment intolerable and that [Wells Fargo] either intended to force [her] to resign or could have reasonably foreseen that [she] would do so as a result of its actions."

The plaintiff claimed that, after she'd informed Wells Fargo of her pregnancy, supervisors made impossible attendance demands to force her resignation. She argued that her supervisor's statement that, even with her due

date approaching, she couldn't miss one more day without being fired was a comment that could "only be designed to strongly encourage the employee to quit."

But the Eighth Circuit disagreed. It found that the plaintiff hadn't suffered any adverse employment action, let alone that she'd been constructively discharged. Rather, the court concluded that the plaintiff, at most, may have experienced "an unpleasant and unprofessional" working environment.

A claim for constructive discharge required considerably more evidence. The Eighth Circuit stated that the plaintiff should have tried to resolve her problems with Wells Fargo before quitting — emphasizing that it's an employee's obligation to not assume the worst or jump to conclusions too quickly.

3 helpful factors

Employers must step carefully when dealing with pregnant employees who have attendance problems. In this case, three factors helped Wells Fargo: 1) the employee already had a history of non–pregnancy-related absences, 2) the employee quit, forcing her to meet the substantial burden of establishing constructive discharge, and 3) the employee was ineligible for FMLA coverage. ♦

Drawing the line on customer abuse of employees

In business, there's a saying: "The customer is always right." But, when it comes to employee discrimination and harassment at the hands of customers, this isn't true. The case of *Aguiar v. Bartlesville Care Center*, heard by the U.S. Court of Appeals for the Tenth Circuit, provides one example of when an employer must draw the line.

Inappropriate proclivities

The plaintiff was employed as a certified medication aide at the Bartlesville Care Center. Her job was to distribute medication to residents, including one who she claimed sexually harassed her.

When he arrived in August 2006, the resident was involved in criminal proceedings concerning domestic abuse, assault and battery, and violation of a protective order. By January 2007, the center was aware that he had a proclivity for acting inappropriately with staff.

His care plan mandated that two staff members be in the room when care was being provided. It also listed, as a goal, helping the resident "demonstrate socially acceptable behaviors" and discouraging requests for only one caregiver at a time.

By the end of February, the plaintiff had complained several times about the resident's conduct. On Feb. 22, the resident complained to the director of nursing that the plaintiff was

trying to avoid him. The director told him that the plaintiff was uncomfortable with his "affections."

The next morning, the resident complained to the director that the situation was worsening. The director set up a meeting where she, the resident and the plaintiff could discuss the situation. The resident agreed to stop touching and kissing the plaintiff's hand, and the plaintiff agreed that she'd administer care to him as long as he acted appropriately.

Continued misbehavior

On Feb. 26, the plaintiff told the director that the resident had criticized her for complaining that he was "too touchy." They then went to the resident's room, where the

director told him that there should be no inappropriate language or touching.

Despite these admonitions, the resident continued his conduct, which included various sorts of inappropriate touching, and the plaintiff continued to complain. The center would admonish the resident and even have someone else deliver his medications. But, according to the plaintiff, that only made the situation worse because he would seek her out.

On May 13, the resident began loudly complaining about the plaintiff. When a nurse tried to calm him, the resident responded with angry profanities. Later, when a supervisor came to his room to test his blood sugar, the resident demanded to know why the plaintiff hadn't given him his medication.

The resident then walked to the nurse's desk where he confronted the plaintiff by asking, "Can't you do your job?" The plaintiff replied that she could do her job if he didn't interfere. In response, the resident called her a profanity and shoved a medicine cart into her. He then came at the plaintiff and moved his hand as if to strike her but stopped. The plaintiff was sent home and the resident was sent for an outside psychiatric evaluation.

The following day, the plaintiff was told to report to the administrator's office. In the presence of her supervisors, he asked her whether she'd called the resident a profanity. When she admitted doing so, he fired her.

The supervisors said nothing about what had happened the previous day, nor did they explain to the administrator the history of the resident's conduct. The administrator was unaware of the plaintiff's complaints about the resident when he terminated her.

Court begs to differ

The plaintiff filed a federal district lawsuit alleging that the center had created a hostile work environment by failing to act on her complaints about the resident and had engaged in unlawful retaliation by terminating her for making those complaints.

The district court granted the center's motion for summary judgment on both claims. Regarding the hostile work environment claim, the court found that the center had adequately responded to the plaintiff's complaints by modifying the resident's care plan to require two staff members and by giving her the option of asking another aide to take medications to the resident.

With respect to the retaliation claim, the court concluded that the center had a legitimate reason for terminating the plaintiff and she had failed to show that the reason given was a pretext for retaliation. The plaintiff appealed.

The Tenth Circuit agreed that summary judgment was appropriate for the retaliation claim. But it begged to differ regarding hostile work environment. The court concluded that the plaintiff had presented enough evidence to allow a rational trier of fact to conclude that the center's response to her complaints was inadequate after supervisors learned that initial steps to mediate the situation were proving ineffective.

Recognize and resolve

Employers are obliged to protect employees from unlawful harassment by customers — even if it means the loss of a customer. Supervisors should be trained to recognize abusive situations, clearly communicate the details to upper management and quickly resolve the problem. ♦

Don't go easy

ADA case reveals risk of lenient performance evaluations

Employers that accommodate a worker under the Americans with Disabilities Act (ADA) may feel obliged to "go easy" on that employee during performance evaluations. But, as revealed in a case heard by the U.S. Court of Appeals for the Sixth Circuit, failing to exercise objectivity in a job review could leave the employer vulnerable in a lawsuit.

Bad English

The plaintiff in *Whitfield v. State of Tennessee*, who was blind in one eye and had cerebral palsy, began working for the State of Tennessee in 1998 as a telephone operator with the Department of Finance and Administration (DFA). In that position, she answered calls, looked up

information on a computer, wrote letters and e-mails and updated a directory.

She was later promoted to the position of telephone operator II, which included training duties. The DFA accommodated her disabilities by providing her with a large monitor and special one-handed keyboard. The plaintiff consistently received favorable evaluations.

In September 2007, while still employed at the DFA, the plaintiff obtained a new position with the Department of Mental Health and Developmental Disabilities (DMHDD). The job began with a six-month probationary period during which she could be terminated for almost any reason.

Before the plaintiff started the new position, her new supervisor, who had a mobility disability herself, provided the plaintiff with a special left-handed keyboard, an even larger monitor and a printer/scanner at her desk so she wouldn't need to walk around the office. Despite these accommodations, the plaintiff had many performance problems.

For instance, she made serious spelling and grammatical mistakes while performing data entry duties. When told to correct her errors, she responded (via e-mail): "sorry about my Grammar and English never have done complete sentences very well Thanks." The plaintiff also made mailing label errors and erroneously entered or failed to enter accurate county names on many forms. Her explanation: "[I] just wasn't looking that close, you know."

In February 2008, the DMHDD terminated the plaintiff within her probationary period. She filed suit in federal district court alleging that her termination was an ADA violation. The district court granted the employer's motion for summary judgment, and she appealed.

Overwhelming evidence

The Sixth Circuit held that, to establish a prima facie case of employment discrimination, the plaintiff had to show five things: 1) She was disabled, 2) she was otherwise qualified for the position, with or without reasonable accommodation, 3) she had suffered an adverse employment decision, 4) her employer knew or had reason to know of her disability, and 5) the position remained open while the employer sought other applicants or the employer replaced the plaintiff.

Once she established a prima facie case, the burden would shift to the DMHDD to articulate a nondiscriminatory reason for the employment action. If the defendant could articulate such a reason, the burden would then return to

the plaintiff to prove that the nondiscriminatory reason given was to cover up the actual discriminatory reason.

The court noted that the plaintiff may have succeeded in creating a genuine issue as to whether she could have adequately performed certain job functions with the proper accommodations. But she didn't address the serious errors she routinely made while performing tasks that weren't affected by her disabilities — such as confirming that an envelope had a ZIP code on it before she mailed the correspondence in question.

Thus, the Sixth Circuit concluded that summary judgment for the employer was appropriate because the plaintiff had failed to establish any question of whether her termination was because of poor performance rather than her disability.

A possible explanation

Interestingly, as noted, the plaintiff had received a promotion and satisfactory performance evaluations in her previous DFA job. Yet it seems unlikely that her performance there could have been wholly satisfactory in light of the problems that arose at the DMHDD.

One possible explanation: Her DFA supervisors may have avoided giving the plaintiff negative job reviews. Although doing so didn't affect the outcome here, an employer that gives an employee undeservedly positive performance reviews could see these evaluations later used against it if the worker files a discrimination lawsuit. ♦

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