

Employment Law Briefing



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No overtime for detailers, says the Supreme Court

Do the job duties of pharmaceutical sales representatives, or “detailers,” qualify for overtime pay under the Fair Labor Standards Act (FLSA)? That was the question set before the U.S. Supreme Court in *Christopher v. SmithKline Beecham Corp.*, and it answered in the negative.

Nonbinding commitments

According to FLSA, eligible (or “nonexempt”) employees must be paid one and a half times their regular hourly rate (otherwise known as “time-and-a-half” or “overtime pay”) for all hours worked exceeding 40 hours in one workweek. But there’s an exception to this rule for employees who qualify for various exemptions, one of which is the “outside salesmen” exemption.

How do detailers fit in? Pursuant to federal law, detailers are restricted from actually selling prescription drugs. Instead, they try to obtain “nonbinding commitments” from physicians to prescribe the drugs sold by their respective employers.

Under the FLSA exemption, outside salesmen are required to make “sales.” The plaintiffs in *Christopher* argued that, because they were forbidden from actually selling prescription drugs, they couldn’t qualify for the exemption.

The U.S. Department of Labor (DOL) submitted an amicus brief in favor of the plaintiffs’ position. The brief argued

that a “sale” requires a transfer of title. Because there was no transfer of title in the “nonbinding commitments,” the DOL agreed that the detailers aren’t outside salesmen.

Quite unpersuasive

The Supreme Court began by noting that the DOL wasn’t entitled to deference on this matter and, even if it were, the agency was “quite unpersuasive” for several reasons.

For starters, the DOL changed its interpretation during the course of this litigation. In arguments before the lower courts, it claimed that a “sale” required a “consummated transaction.” Then, despite changing its position to the title-transfer requirement, the agency failed to provide “fair warning” to the pharmaceutical companies that would be affected by its new interpretation.

Detailers try to obtain “nonbinding commitments” from physicians to prescribe the drugs sold by their respective employers.

Moreover, the DOL had been silent on this issue for decades. Detailers had long been considered — and paid — like exempt employees, and, before *Christopher*, the DOL had never initiated any enforcement actions with respect to a possible misclassification. The Court found this indicated that the agency had acquiesced in the position that detailers are exempt, outside salesmen.

In the capacity

Turning to the DOL’s interpretation itself, the Court noted that the requirement of a transfer of title “plainly lacks the hallmarks of thorough consideration.” What’s more, this interpretation is “flatly inconsistent” with the text of the FLSA itself, which allows that a “sale” can include a “consignment for sale,” which doesn’t involve a transfer of title.



Interpreting the statute itself, the Court placed particular emphasis on the fact that the FLSA exempts anyone employed “in the capacity of [an] outside salesman.” The use of the word “capacity” favors a “functional, rather than formal inquiry,” and the definition of “outside salesman,” therefore, needs to be examined in the context of the employee’s particular industry.

Additionally, the FLSA’s definition of “sale” provides that “[s]ale or ‘sell’ includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” Using the word “includes” as opposed to

“means,” the Court pointed out, indicates that this isn’t an exhaustive list. The definition also ends with the catch-all phrase “other disposition.” The Court held that, when read together, these factors support the interpretation that a “sale” can include “nonbinding commitments.”

Precise language

Employers who don’t pay the overtime rate to employees they consider exempt must be sure that the workers in question meet the criteria for one of the exemptions. This case demonstrates the importance of adhering to the precise language of these exemptions. ♦

Temp to perm

ADA case turns on severity of employee’s injury

An employee’s ability to perform a given job can change in an instant. Such was the circumstance in *Jones v. Walgreen Co.*, a case heard by the U.S. Court of Appeals for the First Circuit.

Fateful warning

While working for Walgreens in January 2004, the plaintiff slipped on ice in front of a Walgreens office and badly injured her knee. She went on medical leave until May and had knee surgery in June.

Around April 2005, while still on leave, the plaintiff sent her boss, a district manager, a letter expressing her hopes of returning to work. The plaintiff also sent him a report from her orthopedist explaining that, upon her return, she’d be limited to lifting weights less than 25 pounds and would be able to only minimally bend, stoop and squat.

In October 2005, Walgreens offered the plaintiff a position as store manager in Springfield, Mass. She accepted but “warned” the district manager in an e-mail that she’d be physically limited and her management approach would be to delegate as many physical tasks as possible to other staff members.

Updated medicals

In September 2006, about one year after starting work at the Springfield location, the plaintiff sent the district manager a message informing him of her difficulties with the



job’s physical aspects. In response, he asked her to provide updated medical information.

The plaintiff’s physician provided the district manager with a report stating that, in the doctor’s medical opinion, the plaintiff had several *permanent* physical restrictions. The district manager provided her with a notice of termination shortly after receiving this report. The notice explained that she was being terminated because it was “clear” that she could “no longer perform the essential functions” of a store manager.

The plaintiff filed a lawsuit alleging, among other things, discrimination in violation of the Americans with Disabilities Act (ADA). The district court, finding that she was unable to perform the job’s essential functions, granted Walgreens’ motion for summary judgment. The plaintiff appealed.

Decision involving the ADA goes another way

In *Jones v. Walgreen Co.* (see main article), the employer was able to successfully defend its definition of “essential” job functions under the Americans with Disabilities Act (ADA). The case of *Valle-Arce v. Puerto Rico Ports Authority* also involved the ADA and was likewise heard by the U.S. Court of Appeals for the First Circuit. But it revolved around what was a reasonable accommodation for an essential job function.

Here the plaintiff had been diagnosed with chronic fatigue syndrome in 2000. After submitting a report from her physician, the plaintiff and her supervisors came to an unofficial agreement: She could work a flexible schedule as long as she put in 37.5 hours per week. The plaintiff did so until 2005.

At that time, a new supervisor was hired over the plaintiff. The supervisor immediately began reprimanding her for “tardiness” and even forced her to move out of the only air-conditioned office. This added stress led to a decline in the plaintiff’s health, for which her doctor prescribed two extended medical leaves in 2005 and 2006, respectively.

In January 2006, the supervisor took disciplinary action against the plaintiff for allegedly mishandling a file. This led to the plaintiff’s termination in 2007.



The plaintiff sued the Ports Authority for violating the ADA — specifically, for failing to provide her with a reasonable accommodation to her disability. Overturning a district court’s decision, the First Circuit sided with the plaintiff.

In the court’s view, the plaintiff would have been able to perform the essential function of “regular attendance” with the reasonable accommodation of a flexible schedule. Indeed, the plaintiff’s attendance *was* regular from 2003 to 2005 while she was working the previously established flex-time hours.

2 fundamental responsibilities

A plaintiff seeking to establish a prima facie case of disability discrimination under the ADA must show, among other things, that he or she was able to perform the essential functions of the job in question — with or without a reasonable accommodation. An essential function is “one that is ‘fundamental’ to a position rather than ‘marginal.’”

While reviewing Walgreens’ written job descriptions, the First Circuit focused on two *fundamental* responsibilities of the store manager:

1. Improving and maintaining store condition, maintenance and appearance for the safety, health and well-being of customers and employees, and
2. Implementing corporate planograms and merchandising guidelines, which includes properly using endstands, promotional space and display tables.

The court also reviewed the depositions of two former store managers, as well as the district manager, all of whom explained the physical requirements expected of the position.

New information

The First Circuit concluded that the physical demands discussed were essential functions. The court further noted that simply because a job function is delegable doesn’t necessarily mean it’s not essential.

Once a function is considered essential, the question becomes whether a plaintiff could perform that function with or without a reasonable accommodation. In this case, the plaintiff relied on the fact that, after her knee surgery, she was already working as a store manager for about a year before her termination.

The First Circuit found this argument unconvincing because “an ADA plaintiff may not rely on past

performance to establish that she is a qualified individual without accommodation when there is undisputed evidence of diminished or deteriorated abilities.” After receiving her doctor’s updated report in September 2006, Walgreens’ understanding of the plaintiff’s injuries and limitations had changed — going from temporary to permanent.

Therefore, the court agreed with the lower court. Based on this new information, no reasonable person could conclude

that the plaintiff was able to perform the essential functions of a store manager, with or without accommodation.

Essential functions

As *Jones* shows, employers generally have a substantial amount of say regarding which functions of a given job are legally defensible as “essential.” For best results, however, draft your job descriptions before interviewing applicants. This way, the descriptions may later be used in court as evidence. ♦

Does Title VII apply to the spouse of an illegal immigrant?

In *Cortezano v. Salin Bank and Trust Company*, the U.S. Court of Appeals for the Seventh Circuit weighed in on whether Title VII of the Civil Rights Act covers discrimination based on illegal immigrant status. Specifically, the case involved an employee who claimed national origin discrimination based on her marriage to a Mexican citizen who was unlawfully residing in the United States.

Opening accounts

The plaintiff and her husband were married in February 2001. Before that, the husband had been living without a valid visa or work permit since unlawfully entering the United States from Mexico in 1997.

The plaintiff began working for Salin Bank and Trust in March 2007 and was promoted to sales manager within one month. Around this time, her husband tried to start his own company, but his undocumented status made it difficult to open a business banking account. After somehow obtaining an individual tax identification number, the husband opened a joint account at Salin with the plaintiff and then used the plaintiff’s help to open both a personal and a business account.

The husband’s business was unsuccessful, and he returned to Mexico in December 2007 to sort out his citizenship status. When he left for Mexico, the plaintiff asked her supervisor for a two-week vacation, during which she planned on helping her spouse with his proceedings. It was during this request that the plaintiff informed her supervisor of her husband’s illegal immigrant status.

Becoming heated

While the plaintiff was on vacation, the supervisor notified Salin’s security officer that the plaintiff had joint accounts at the bank with a known undocumented alien. Concerned about possible ramifications, specifically bank fraud, the security officer scheduled a meeting with both the supervisor and the plaintiff (upon her return from Mexico).

During this meeting, the security officer expressed his concern that, for the plaintiff’s husband to have opened up an account with the bank, he must have produced fake documents. Losing his temper, the security officer began demeaning the plaintiff’s husband and demanding that the plaintiff admit her spouse had used fraudulent documents. The plaintiff refused, maintaining that her husband’s accounts were legitimate. The meeting concluded with the security officer telling the plaintiff that he would be filing a report.



Refusing to participate

While collecting information for his report, the security officer e-mailed several Salin supervisors and notified them of recent events relating to the plaintiff and her husband. Specifically, he referred to the likelihood that fraudulent documents were used to open the accounts for the plaintiff's husband.

The report itself focused on the husband's undocumented status. Additionally, a termination notice for the plaintiff was drafted around this time, identifying her complicit behavior in her husband's alleged fraud as the reason for the termination. But this notice was never signed or sent to the plaintiff.

About a week after the security officer submitted his report, a hearing regarding the ongoing investigation was scheduled. When the plaintiff arrived with her attorney, the attorney was denied entry. Salin representatives claimed that the hearing was a "private matter" for employees only. The plaintiff refused to enter without her attorney and walked out.

Salin sent the plaintiff a letter that afternoon, terminating her for refusing to participate in the meeting. After the plaintiff's termination, the security officer reported her activity to U.S. Immigration and Customs Enforcement and warned other banks in northeast Indiana that she was fired for opening fraudulent accounts with "an illegal immigrant who is now back in Mexico."

The plaintiff sued Salin, alleging, among other things, violation of Title VII. The district court granted the bank's motion for summary judgment, and the plaintiff appealed.

Citing the Supreme Court

The Seventh Circuit agreed with the lower court that it was the husband's undocumented status, and not his national origin, that led to the plaintiff's discharge. The question then became whether Title VII protects against "alienage-based" discrimination.

Citing a decades-old U.S. Supreme Court case, *Espinoza v. Farah Manufacturing Company*, the court held that Title VII doesn't cover this form of discrimination. In *Espinoza*, the Supreme Court narrowed the definition of "national origin" discrimination, one of the enumerated protected statuses in Title VII, to exclude discrimination based on "citizenship or immigration status." (This exclusion was later codified in 8 U.S.C. § 1324b.)

Concluding that any discrimination suffered by the plaintiff was because of her marriage to an unauthorized immigrant, a group not protected by Title VII, the Seventh Circuit affirmed the district court's grant of summary judgment.

Making sure

This case demonstrates that not all groups are protected by antidiscrimination statutes, such as Title VII. When a group isn't protected, the employment-at-will doctrine applies — and a discharge may well be lawful — even if circumstantially unfair or arbitrary. Still, in such cases, advice of counsel is highly advised. ♦

Use your best (business) judgment

Equal Pay Act's burden of proof put to the test

The Equal Pay Act of 1963 (EPA) generally doesn't get as much attention as the antidiscrimination law passed just a year later: the Civil Rights Act of 1964 (which includes Title VII).

But the EPA's burden of proof — which is different from Title VII's — was put to the test recently in *Bauer v. Curators of the University of Missouri*. Here the U.S. Court of Appeals for the Eighth Circuit considered whether a

district court had erred when it gave the jury a "business judgment" instruction.

Objection, your honor

The EPA prohibits employers from paying wages to employees "at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex ... for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."



The plaintiff worked as an advanced practical nurse at the University of Missouri Hospital and Clinics. Claiming that she was being paid less than a male co-worker who performed nearly identical duties, she sued the university under the EPA. During trial, and over the plaintiff's objection, the judge gave the jury the following "business-judgment" instruction:

You may not return a verdict for the plaintiff just because you might disagree with the defendant's decision or believe it to be harsh or unreasonable.

The plaintiff believed this instruction shouldn't have been given in an EPA case and moved for a new trial. This motion was denied, and she appealed.

Plain error

On appeal, the university first argued that the plaintiff's objection to the jury instruction was too vague, making the issue "not preserved for appeal." But the Eighth Circuit held that, even if an issue wasn't properly preserved, an appellate court may still review it upon a showing of "plain error." This may occur if:

1. The district court deviates from a legal rule,
2. The error is clear under the law, or
3. The error affects "substantial" rights (meaning it affects the outcome of the proceedings).

An appellate court, however, won't correct a plain error unless it "seriously affects the integrity, fairness, or public reputation of judicial proceedings."

EPA vs. Title VII

The plaintiff argued that, while gender discrimination claims may be brought under both the EPA and Title VII, the two laws are different and should have distinct jury instructions. With Title VII, the burden is on the plaintiff to prove discrimination, and the employer need only "articulate" a legitimate, nondiscriminatory reason behind its adverse action.

With the EPA (a strict liability statute), all the plaintiff must show is that an employer paid men more than women. The employer, now carrying the burden of proof, may avoid liability only by showing that this pay disparity was the result of a seniority system, a merit system, a pay system based on quantity or quality of work, or a disparity based on any factor other than gender.

The Eighth Circuit agreed. Because of this difference, a business-judgment instruction is irrelevant in an EPA case and shouldn't have been given unless the plaintiff had raised both an EPA and a Title VII issue.

With Title VII, the burden is on the plaintiff to prove discrimination, and the employer need only "articulate" a legitimate, nondiscriminatory reason behind its adverse action.

Accordingly, the court held that the district court included incorrect language in its jury instructions. The Eighth Circuit still, however, affirmed the district court's decision because the instructions, taken as a whole, "fairly and adequately represent[ed] the evidence and applicable law in light of the issues presented to the jury in a particular case."

Defensible position

Although perhaps not as well known as Title VII, the EPA is a statute with which employers should familiarize themselves. Considering that the burden of proof shifts to the employer in these matters, you should conduct regular salary and pay system reviews in consultation with your attorney. Doing so will help ensure you're in a legally defensible position if ever faced with an EPA complaint. ♦

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