

Employment Law

BRIEFING



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Exempt or nonexempt?

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It's a hot topic for many employers right now: how to determine whether an employee is exempt or nonexempt under the Fair Labor Standards Act (FLSA). The recent decision in *Williams v. Genex Services* could help. In this case, the U.S. Court of Appeals for the Fourth Circuit considered whether a registered nurse (RN), who said that she was *not* an exempt employee, was owed overtime pay by her employer.

JOB QUALIFICATIONS

The employer provided services to help control health care and disability costs for companies and ensure quality health care for injured workers. It hired the plaintiff as a field medical case manager (FMCM) at a salary of more than \$80,000 annually. The state required that an FMCM be a licensed RN, which the plaintiff was.

As part of her job, the plaintiff:

- ▣ Assessed injured workers' medical conditions and treatments,
- ▣ Monitored workers' conditions,
- ▣ Educated workers and insurance companies about the worker's injuries and treatment,
- ▣ Made recommendations for alternative treatments,
- ▣ Developed individualized care plans to assist workers in returning to work, and
- ▣ Prepared status reports on the workers' progress.

The plaintiff admitted that, when developing care plans and status reports, she used her medical knowledge and training.

DEFINING "EXEMPT"

Department of Labor (DOL) regulations define an employee employed in a bona fide professional capacity as someone who is compensated on a salary basis of at least \$455 per week. In addition, that person's primary duty is the performance of work requiring advanced



knowledge in a field of science or learning that's customarily acquired in a prolonged course of specialized intellectual instruction. A person employed in a bona fide professional capacity is exempt from overtime.

The plaintiff argued that she didn't perform exempt work because a layperson could perform her job duties, which were mostly clerical and of a routine nature. She claimed that she acted merely as a liaison between the employers and doctors and was "nothing more than a scribe relaying information back to the adjustors."

The employee exercised independent judgment and discretion frequently, wasn't closely supervised and used her registered nurse skills on a daily basis.

The plaintiff's employer argued that she wasn't entitled to overtime compensation because she was exempt based on the undisputed facts of her job

responsibilities and position. The employer further claimed that the plaintiff exercised independent judgment and discretion frequently, wasn't closely supervised and used her RN skills on a daily basis. The employer moved for summary judgment, arguing that the plaintiff fell under the "learned professional" exemption of the FLSA and wasn't entitled to overtime. The trial court ruled in favor of the employer.

On appeal, the Fourth Circuit stated that the plaintiff's own description of her core job responsibilities undermined her argument that her work was primarily clerical. What's more, it said, the evidence demonstrated that the plaintiff regularly used her skills, training and knowledge as an RN to perform her duties, and she had to use her advanced nursing knowledge to analyze and make deductions. Furthermore, the plaintiff performed her work with minimal supervision and received a high salary. The court believed that this last fact created

doubt as to whether the plaintiff would fall within the FLSA's intended protected class, which is designed to protect lower-paid workers.

DUTIES, NOT TITLE

Employers can draw several conclusions from the case's outcome. Perhaps the most important is that an employee's exempt or nonexempt status depends on the individual's actual primary duty, not his or her educational background or job title.

To avoid potential legal action, ensure that your employees' primary job duties fall within the exemption you're seeking to use. This means that, for example, if you're seeking to use the learned professional exemption, it's not enough that an employee possesses a qualifying degree. That employee also must use the degree or knowledge acquired in his or her daily work duties. ■

A DECISION TO BANK ON

In an older case involving a registered nurse (RN) (see main article), the U.S. Court of Appeals for the Seventh Circuit weighed whether the employee was paid a salary so that the employer could claim she was exempt from overtime pursuant to the learned professional exemption of the Fair Labor Standards Act (FLSA).

The plaintiff in *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, an RN, claimed that she was entitled to overtime pay for hours worked in excess of 40 hours per week. Her employer contended that the plaintiff was employed in a professional capacity and wasn't entitled to overtime pay because she was exempt. The trial court granted partial summary judgment in the employee's favor.

The plaintiff was a staff nurse with a B.S. in nursing and was also certified and licensed. She was paid for 80 hours every two-week period. Any hours the plaintiff worked in excess of eight hours per shift were recorded in a "comp time" bank. The plaintiff was able to use her comp time for additional time off. If she worked more than four hours extra per shift, she could choose to be paid for those hours instead of putting them in her comp time bank. On the other hand, if she worked less than eight hours per shift, she had to use her comp bank balance or would be considered to be in "negative comp time."

However, the plaintiff's pay wasn't reduced because of negative comp time. Her employer had a code of conduct policy which called for suspension in certain circumstances. When the plaintiff was suspended, she wasn't paid for the full day she was issued the suspension – only for the time she was at work.

The appeals court affirmed the trial court's grant of summary judgment in favor of the employee. It found that the employer's compensation plan for nurses – which allowed them to earn comp time, assigned negative comp time when they didn't work a full shift and subjected them to unpaid suspension for tardiness, rude behavior, or unprofessional appearance – demonstrated that nurses were *not* paid on a salaried basis. Therefore, the plaintiff wasn't exempt from overtime.



Why job duties should line up with titles and salaries

Job titles — and pay — don't always keep pace with an employee's responsibilities. Yet this common situation can lead to a lawsuit. Such was the case in *Jaburek v. Foxx*, where the U.S. Court of Appeals for the Seventh Circuit considered discrimination and retaliation claims under Title VII and the Equal Pay Act (EPA).

NEW DUTIES, OLD TITLE

The plaintiff, a woman of Mexican descent, was hired as a secretary by the Federal Aviation Administration (FAA) at a pay grade of GS-5. She was promoted to Administrative Support Assistant with a pay grade of GS-6. Later, she was briefly promoted to Program Analyst with a pay grade of GS-7. Four months after that, she was reassigned to her Administrative Support Assistant position and her pay was reduced to the GS-6 pay grade.

Some time afterwards, the plaintiff was assigned to another location where she worked with two Program Analysts. One of the analysts retired and another changed positions, so the plaintiff began to perform their tasks. She didn't receive a pay increase, nor did she ask for an increase when she took on the new tasks.

Management changed and the plaintiff was asked to create a description of her duties. In her description, she stated that she was "acting in the capacity of the FAA Program Analyst." Thereafter, the employer removed the plaintiff's Program Analyst duties, describing in a letter her "assigned duties as a secretary." The employer also revoked her access to a government database to which secretaries didn't have access.

The EPA prohibits employers from paying different rates to men and women for the same work at the same "establishment."

COMPLAINTS MADE AND DENIED

The plaintiff filed an internal complaint contending that her manager's acts of sending her the secretary job description and revoking her database access constituted discrimination and retaliation. The plaintiff claimed that the FAA should have conducted an audit of her duties after she submitted a description of them when acting as a Program Analyst. Management claimed that the plaintiff never requested an audit. No discrimination was found and her internal complaint was dismissed.

The plaintiff then filed an action against the FAA claiming that she was discriminated against because of her gender and national origin in violation of Title VII and the Equal Pay Act (EPA). She alleged that she was paid less than other employees who did the same work and wasn't promoted. In addition, she alleged that she was retaliated against for complaining of the discrimination. The trial court granted summary judgment in favor of the employer, holding that the plaintiff had failed to produce necessary evidence to establish prima facie claims for any of her causes of action.

NO CAUSAL CONNECTION

The appeals court found that the plaintiff couldn't establish a prima facie case of failure to promote because she'd



never applied for the position of Program Analyst and thus wasn't rejected for the position. Moreover, no one else was promoted to the position. The court determined that the plaintiff's letter to management with a description of her duties and her claim that she'd requested an audit didn't establish that she'd applied for the Program Analyst position. Therefore, she didn't establish a failure-to-promote claim and couldn't prove that she should have been compensated at a higher pay grade.

In addition, the plaintiff's retaliation claim failed because the alleged adverse action (loss of access to the database) had occurred *prior* to her complaints of discrimination. So she couldn't establish a causal connection between the two events.

EPA CLAIM FAILS

The EPA prohibits employers from paying different rates to men and women for the same work at the same "establishment." To establish an EPA claim, a plaintiff

must show that 1) higher wages were paid to opposite-sex employees for equal work requiring substantially similar skills, effort and responsibilities, and 2) the work was performed under similar working conditions.

The appeals court noted that the same "establishment" means the same geographical city. The plaintiff had identified three male Program Analysts. However, none of them worked in the same offices as the plaintiff. In addition, her EPA claim failed because she didn't produce evidence of the male employees' duties or of common tasks that would allow a jury to determine the comparability of the work.

ON NOTICE

Although the employer in this case prevailed, *Jaburek* should put employers on notice. To avoid EPA claims, ensure that your employees' job duties match their job titles and pay grades. Also, employees with the same core responsibilities and seniority should be paid equally. ■

Good touch, *bad* touch

Employers must be sensitive to same-sex harassment

In a sexual harassment case, a male employee charged his employer with failing to take prompt and corrective action to remedy a hostile work environment. The trial court in *Smith v. Rock-Tenn Services, Inc.*, ruled in favor of the plaintiff, awarding him compensatory damages. But the employer appealed the judgment, sending the case to the U.S. Court of Appeals for the Sixth Circuit to consider the Title VII violation. The court's decision is instructive for employers faced with same-sex sexual harassment claims.

EMPLOYEE SUFFERS HARASSMENT

The plaintiff worked in his company's Converting Department, where he was a support technician on a die cutter machine. The department comprised approximately 70% men and 30% women.

The plaintiff witnessed a male co-worker groping a male die cutter machine operator's backside. The co-worker then slapped the plaintiff's backside as he walked away. The plaintiff responded by warning the co-worker to keep his hands off of him. One week later, the co-worker again groped the plaintiff's backside. In response, the plaintiff pointed his finger in the co-worker's face and warned, "You're going to cause somebody to get hurt in here." The employer's sexual harassment policy required employees to speak with harassers directly and then, if the conduct didn't stop, to bring their concerns to management.

A month later, the co-worker grabbed the plaintiff around the hips from behind. In response, the plaintiff held the co-worker by the throat and lifted him off of the ground. The plaintiff reported the incident to the die cutter operator, who advised him to go outside and



calm down. However, the plaintiff was still upset, so he was sent home. That weekend, the plaintiff spoke to another colleague who, in turn, told the plant's superintendent about the incident.

EMPLOYER RESPONDS

During a meeting the following Monday, the plaintiff reported the incident to his direct supervisor. According to the plaintiff, the supervisor responded that the co-worker had "done ... this again." Thereafter, the superintendent told the plaintiff that nothing could be done until the following Friday because his supervisor, the operations manager, was on vacation.

Then the plaintiff was sent back to work in the same area as the harassing co-worker. But he found it difficult to concentrate and suffered an anxiety attack. He requested and was granted leave to seek counseling for sexual harassment.

About 10 days later, a group of managers investigated the plaintiff's charges and recommended terminating the harasser. However, he was only suspended for two days. The plaintiff never returned to work.

PREVAILING ON TITLE VII CLAIM

To prevail on a Title VII hostile work environment claim, a plaintiff must show that:

1. He or she is a member of a protected class,
2. He or she was subjected to unwelcome harassment,
3. He or she was harassed based on sex,
4. The harassment created a hostile work environment, and
5. The employer is liable.

When a plaintiff is alleging same-sex harassment, the requisite inference of discrimination based on sex can be established in one of three ways: 1) The harasser making the sexual advances is acting out of sexual desire; 2) the harasser is motivated by general hostility to the presence of men in the workplace; or 3) the plaintiff offers direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.

APPEALS COURT RULES

In this case, the appeals court affirmed the trial court's holding that the jury could have found the conduct to be severe or pervasive even though the employer characterized the repeated sexual contacts as "horseplay." The court believed that the conduct went beyond horseplay. It also held that the workplace was a mixed-sex workplace because 30% of the employees who worked in the same department as the plaintiff were female. Further, the plaintiff was able to show sex-based discrimination by his male co-worker by presenting evidence that he slapped, pinched and touched only male workers' behinds — not those of female employees.

The court found the employer to be liable for the harassment. To impose liability on an employer for a co-worker's harassment, a plaintiff must show that the employer's response to the employee's complaints manifested indifference or was unreasonable in light of facts that the employer knew of or should have known. The court held that there was sufficient evidence that the employer had failed to respond appropriately. The employer didn't respond for 10 days after the complaint was made and it failed to separate the harasser and plaintiff.

MINIMIZING LIABILITY

All cases of sexual harassment — including those involving same-sex employees — need to be taken seriously. Employers that don't act immediately face potential liability. So if a complaint is made, investigate it thoroughly and, while the investigation is taking place, physically separate the complainant and the alleged harasser. If your investigation results in proof that harassment took place, discipline the harasser in a way that corresponds with the seriousness of the harassment and your organization's policies. ■

Title VII in the courts

Exercise caution when considering transfer requests

When might denying an employee's transfer request be considered an adverse employment action under Title VII and Section 1983? In *Bonenberger v. St. Louis Metropolitan Police Dept.*, the U.S. Court of Appeals for the Eighth Circuit weighed the question and came to some interesting conclusions.

JUST THE FACTS

The plaintiff, a white male employee, applied for a transfer to the position of Assistant Academy Director of the St. Louis Police Academy. The position was a high-profile job with supervisory responsibilities and opportunities for promotion. It also had a regular schedule with holidays off, which the plaintiff didn't have in his current position.

The plaintiff was told by his supervising officer that he shouldn't bother applying for the position because the job was going to a black female, and "there was no way they were going to put a white male in that position." The Chief of Police subsequently chose an African-American woman without having interviewed her for the job. The plaintiff filed an internal grievance. In response to the grievance, the Chief stated that he'd selected the African-American woman because she had the most rank and a clean disciplinary record — statements that were inaccurate.

The plaintiff sued the Police Department and officials, alleging race discrimination and conspiracy to discriminate. A jury found in the plaintiff's favor and the officials appealed. They claimed that the plaintiff hadn't established an adverse employment action because the position in question wasn't a promotion. In addition, the plaintiff wouldn't have experienced a change in pay or rank if he had been selected for the job.

DIFFERENCE OF INTERPRETATION

To establish a prima facie case of discrimination under Title VII, a plaintiff must present evidence of an adverse employment action brought on by the employer's discriminatory motive. An adverse employment action is a

change in working conditions that results in a material employment disadvantage.

In *Bonenberger*, the appeals court held that the employer's denial of transfer *was* an adverse employment action because the position would constitute a material change in working conditions. It found that changes in supervisory duties, prestige, and eligibility for promotion could produce materially different working conditions.

To prove a Sec. 1983 conspiracy claim, a plaintiff must establish that:

1. The defendants conspired with others to deprive him or her of constitutional rights,
2. One of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy,
3. The overt act injured the plaintiff, and
4. The defendant reached an understanding to violate his or her rights.

The employer in this case argued that the employee couldn't prove that there was an agreement or understanding because the supervisor's comment didn't indicate that the supervisor and the Lieutenant had agreed to hire only a black woman. The court found this to be a reasonable interpretation. However, it went on to find that that evidence also could be interpreted to support an inference that the supervisor and the Lieutenant had reached an agreement because the supervisor used "they" in the statement "there was no way *they* were going to put a white male in that position." A reasonable jury could interpret "they" to mean that the supervisor was referring to himself and the Lieutenant.

MOTION DENIED

The appeals court affirmed the trial court's denial of the employer's motion for judgment as a matter of law. Employers take note: Denying an employee a lateral transfer could be considered an adverse employment action if the transfer would offer material changes in working conditions — even if those changes don't involve pay or rank. ■