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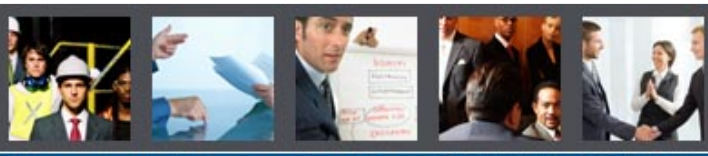

# The Job Description

The Newsletter of the Employment Law Committee

May 10, 2011 Volume 23 Issue 2

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## In The Job Description




Committee Chair
Mark A. Fahleson
Rembolt Ludtke
(402) 475-5100
mfahleson@rembolt.com

Committee Vice Chair
Amy L. Miletich
Miletich Pearl
(303) 825-5500
amiletich@mplawllc.com

Newsletter Editor
Eric E. Kinder
Spilman Thomas & Battle
(304) 340-3893
ekinder@spilmanlaw.com


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### Seminars


## From the Chair

### Chair's Report

*by Mark Fahleson*

On March 18, the leadership for your DRI Employment Law Committee held what is believed to be its first Fly-In to DRI's Chicago headquarters in over a decade. The purpose of this meeting was strategic planning for our Committee, and we established 4 overarching goals for 2011 that will guide our Committee's efforts:

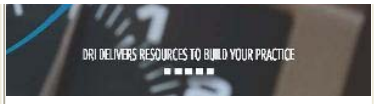
1. Be ***the*** leading Employment and Labor Law Defense Organization/Committee in the nation.
2. Serve as a visible and useful resource to Committee members for educational and networking purposes.
3. Have an active and robust Committee membership.
4. Make certain we have ***fun*** while accomplishing the first 3 goals!

One decision we deferred until after our May seminar in Scottsdale is whether we should change the name of our Committee. We spent quite a bit of time discussing the merits of changing the name of the DRI Employment Law Committee to the "Employment & Labor Law Committee" or "Labor & Employment Law Committee." This discussion was generated by the decision to title the Committee's upcoming seminar the "Employment and Labor Law Seminar" and renewed activity in traditional labor law that presents marketing opportunities for the Committee.

***What are your thoughts?*** I'd like to hear from you, either by e-mailing me at mfahleson@remboltludtke.com or sharing your opinion at the May 2011 Seminar. We will likely be making a recommendation to DRI Board later this year.

I look forward to seeing you in Scottsdale May 18-20!

## From the Editor




**Employment and Labor Law Seminar**
**May 18-20 2011**
**Scottsdale, Arizona**

**DRI Publications**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## Editor's Comments

*by Eric E. Kinder*

After teasing us for a number of weeks, Spring has finally arrived here in Charleston, West Virginia. And, of course, as any long time member of the DRI's Employment Law Committee knows, Spring means that it is time for our annual conference. If you have not already done so, there is still time to sign up and join us in Scottsdale for what promises to be the best employment and labor law seminar of the year. I look forward to seeing you out in Arizona and working with you to help determine the future of this Committee (including its name, for more on that topic, check out Mark Fahleson's Notes from the Chair in this edition.)

This quarter's Job Description newsletter contains a number of terrific articles that will be of great service to all L&E practitioners. First, Brian Vandiver of Mitchell Williams in Little Rock, Arkansas, provides a very timely assessment of the EEOC's regulations on the ADA Amendments A ct; what got better for employers and what did not. Abbott Jones and Leslie Allen of Christian & Small in Birmingham, Alabama, summarize two important employment law decisions from the beginning of the United States Supreme Court's current term. Jason Fogg, who chairs our EPLI subcommittee, offers always pertinent advice on how to keep your insurance clients happy. And Scott Adams of Spilman Thomas & Battle in Winston-Salem, North Carolina, shares and examines an employer-friendly FLSA decision out of the Fourth Circuit – great precedent to have at your back when dealing with a problematic classification issue, especially now that the Department of Labor is looking into these issues more closely.

As always this newsletter can only be as good as you help make it. We are always looking out for new articles and authors, particularly individuals willing to keep an eye on important decisions out of their Circuit Court. If you have an idea for an article or would like to track a circuit, please shoot me an e-mail at ekinder@spilmanlaw.com or give me a call at (304) 340-3893.

Until I see you in Scottsdale, happy reading.

Eric E. Kinder
Spilman Thomas & Battle, PLLC
Charleston, West Virginia
ekinder@spilmanlaw.com

**Featured Articles**

## The ADAAA Final Regulations: What

## Changed From The Proposed Regulations?

*by Brian A. Vandiver*

On March 24th, the EEOC's final regulations for the ADA Amendments Act ("ADAAA") were made public. The EEOC originally proposed its implementing regulations (the Notice of Proposed Rulemaking or "NPRM") for the ADAAA on September 23, 2009. After receiving hundreds of comments and conducting several public meetings, the EEOC revised its regulations.

According to the EEOC, the "final regulations modify or remove language that groups representing employer or disability interests had found confusing or had interpreted in a manner not intended by the EEOC." The EEOC provides the following examples of how the final regulations differ from the NPRM:

- Instead of providing a list of impairments that would "consistently," "sometimes," or "usually not" be disabilities (as had been done in the NPRM), the final regulations provide the nine rules of construction to guide the analysis and explain that by applying those principles, there will be some impairments that virtually always constitute a disability ["predictable assessments"]. The regulations also provide examples of impairments that should easily be concluded to be disabilities, including epilepsy, diabetes, cancer, HIV infection, and bipolar disorder.

- Language in the NPRM describing how to demonstrate that an individual is substantially limited in "working" has been deleted from the final regulations and moved to the appendix (consistent with how other major life activities are addressed). The final regulations also retain the existing familiar language of "class or broad range of jobs" rather than introducing a new term, and they provide examples of individuals who could be considered substantially limited in working.

- The final regulations retain the concepts of "condition, manner, or duration" that the NPRM had proposed to delete and explain that while consideration of these factors may be unnecessary to determine whether an impairment substantially limits a major life activity, they may be relevant in certain cases.

The EEOC also has enumerated nine "rules of construction" to apply when determining whether when determining whether an impairment

substantially limits an individual in a major life activity. These rules of construction are:

(1) The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.

(2) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(3) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

(4) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.

(5) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(6) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(7) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(8) An impairment that substantially limits one

major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(9) The six-month "transitory" part of "transitory and minor" exception to "regarded as" coverage does not apply to the definition of "disability" under the first prong ("actual disability") or second prong ("record of" a disability). The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

Other changes found in the EEOC's final regulations for the ADAAA include:

- The final regulations explicitly state that the old standard for determining whether an activity qualifies as a major life activity – that it be of "central importance to most people's daily lives" – no longer applies.

- The regulations have added psychotherapy, behavioral therapy and physical therapy to the examples of mitigating measures.

- The EEOC has eliminated "surgical interventions, except for those that permanently eliminate an impairment" as an example of a mitigating measure.

- The EEOC has added a paragraph to make clear that reasonable accommodations may be required for individuals with a record of an impairment that substantially limits a major life activity.

- The EEOC has deleted certain language about myths, fears, and stereotypes in relation to perceived disability.

- Though the comparison of an individual's performance of a major life activity to the general public usually will not require scientific, medical or statistical analysis, the final regulations say that such evidence is not prohibited.

In addition, the EEOC has significantly revised the Appendix (aka the "Interpretive Guidance") to incorporate many of these new changes. The Appendix also includes many new examples to illustrate the new regulations.

One area of concern for employers may be the heretofore relatively seldom used second definition of disability – a record of disability. It is clear from the final regulations that a record of a disability is to be interpreted like an actual disability. If an employer must provide an

accommodation for a record of a disability, then employees may attempt to do an end-run around the new ban on failure to accommodate claims for perceived disability claims. For example, the Appendix states that "an employee who in the past was misdiagnosed with bipolar disorder and hospitalized as the result of a temporary reaction to medication she was taking has a record of a substantially limiting impairment, even though she did not actually have bipolar disorder." Sound familiar? Moreover, an employee can be an individual with a record of a disability without the employer ever having any notice of the record (although proving intentional discrimination may be a hurdle for the employee). Going forward, employers should be more wary of record of disability claims.

At first glance, many of the revisions contained in the ADAAA's final regulations appear to be somewhat favorable to employers and the ADA's other covered entities, such as the three changes highlighted by the EEOC as noted above. Nonetheless, there is little dispute that the ADAAA and its final regulations have made and will to continue to make defending ADA claims more difficult. Employers and other covered entities under the ADA should review their policies and practices to ensure compliance with the ADAAA and its final regulations.

The EEOC's press release is available at: http://www.eeoc.gov/eeoc/newsroom/release/3-24-11.cfm.

The EEOC's final regulations for the ADAAA and other documents relating to the ADAAA and its final regulations are available at: http://www.eeoc.gov/laws/statutes/adaaa_info.cfm

Brian A. Vandiver
Mitchell Williams Selig
Little Rock, AR
bvandiver@mwlaw.com

## Cautionary Signs for Employers: Recent Supreme Court Decisions

*by Leslie A. Allen and Abbott Marie Jones*

Though it is relatively early in the Term, already the United States Supreme Court has issued two significant employment decisions that signal potentially expanding pitfalls of liability for employers. In January, the Court expanded the scope of persons entitled to protection from retaliation under Title VII. *Thompson v. N. Am. Stainless, LP*, 113 S. Ct. 863 (Jan. 24, 2011). In March, the Court expanded the scope of persons

whose discriminatory actions and conduct can create liability for employers under the "cat's paw" theory. *Staub v. Proctor Hospital*, Case No. 09-400, 2011 WL 691244 (U.S. March 1, 2011). The Court was unanimous in the outcomes of both cases (although, in *Staub*, two justices agreed with the result but concurred in the judgment based on different reasoning than relied on in the opinion). Just how far the impact of these new pitfalls will extend remains to be seen in subsequent cases.

## I. *Thompson* – Potential Liability for Retaliation by Association

*Thompson v. North American* involved Title VII's anti-retaliation provision, which provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge" under Title VII. 42 U.S.C. § 2000e-3(a). The employer in that case, North American Stainless, LP ("NAS") terminated Eric Thompson three weeks after it received notice that Thompson's fiancée, also an employee of NAS, filed a charge of sex discrimination with the Equal Employment Opportunity Commission (the "EEOC"). After his termination, Thompson filed his own EEOC charge and subsequently sued NAS, alleging that NAS violated the antiretaliation provision of Title VII by terminating him three weeks after learning that his fiancée had filed an EEOC charge. NAS contended that it terminated him for performance reasons.

The Eastern District of Kentucky granted summary judgment to NAS after determining that Title VII did not permit third party retaliation claims. Sitting *en banc*, the Sixth Circuit affirmed, reasoning that, because Thompson did not engage in any statutorily protected activity, either on his own or on behalf of his fiancée, he was not among "the class of persons for whom Congress created a retaliation cause of action." *Thompson*, 113 S. Ct. at 867. The Supreme Court granted *certiorari* and considered two questions, both of which it answered in the affirmative: First, did NAS's firing of Thompson constitute unlawful discrimination? Second, if it did, does Title VII grant Thompson a cause of action?

With regard to the first issue, the Court had "little difficulty concluding that, if the facts alleged by Thompson are true, then NAS's firing of Thompson violated Title VII." *Id.* (citing *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53 (2006)).

Readily finding that Thompson had alleged unlawful retaliation, the Court found the second issue of standing to be "[t]he more difficult question" in the case. *Id.* at 869. In determining whether Thompson was entitled to sue NAS for its alleged violation of Title VII, the Court reasoned

that Title VII standing was more narrow than the standing provision in Article III of the U.S. Constitution but broader than the position advocated by NAS, limited to only the employee who engaged in the protected activity. *Id.* at 869-870. Accordingly, the Court adopted a "zone of interests" standard, which confers standing to those who fall within the zone of interests sought to be protected by the statutory provision at issue. *Id.* at 870 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990)).

Applying that test, the Court held that Thompson fell within the zone of interests protected by Title VII and, therefore, had standing to sue. He was an employee of NAS, and Title VII's purpose is to protect employees from the unlawful actions of their employers. Moreover, Thompson was not an "accidental victim" of the retaliation because hurting him was actually the unlawful act by which NAS punished his fiancée. *Thompson*, 131 S. Ct. at 870. In short, Thompson was afforded Title VII's anti-retaliation protections because of his close and well known association with the employee whom NAS sought to punish for filing an EEOC charge, not because of any protected activity in which he actually engaged.

## II. *Staub* – Potential Liability for Discrimination by Non-Decision Makers who Influence Employment Decisions

This case involves the Uniformed Services Employment and Reemployment Act ("USERRA"), which makes it unlawful to discriminate against an employee because of his membership in the military or his performance of military duties, if the military service is "a motivating factor in the employer's action." *See* 38 U.S.C. § § 4311 (a), (c). Although at first glance, the case seemingly has limited application, USERRA is actually very similar to Title VII, which prohibits employment discrimination on the basis of race, color, religion, sex or national origin, where any one of those factors "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. §§ 2000e-2(a), (m). Thus, *Staub* likely will have a broader impact on employment discrimination cases decided under federal laws with similar language, not only on USERRA cases alone.

Vincent Staub, a member of the U.S. Army Reserve, worked as an angiography technician with Proctor Hospital until he was terminated in 2004. During his employment, his supervisors were openly hostile to his military obligations and indicated to Staub's co-workers their desire to "get rid of him." *Staub*, 2011 WL 691244, at *2.

In January 2004, one of Staub's supervisors gave

him a "Corrective Action" disciplinary warning, which the evidence indicated was motivated by discriminatory animus. A few months later, the supervisor reported to the Hospital's vice president of human resources that Staub had violated the directive by leaving his desk without informing a supervisor. Relying in part on the supervisors report and in part on his own review of Staub's personnel file, the vice president of human resources decided to fire Staub.

Staub unsuccessfully challenged his firing through the Hospital's grievance process and ultimately sued the Hospital under USERRA, claiming that his discharge was motivated by hostility to his obligations as a military reservist. The jury agreed and awarded Staub damages. The Seventh Circuit reversed, holding that the Hospital was entitled to judgment as a matter of law because the decision maker had relied on more than the report of the supervisor in making her decision. The Supreme Court granted *certiorari* to consider whether an employer may be liable for employment discrimination based on the discriminatory animus of a supervisor who influenced, but did not make, the ultimate employment decision. *Id.* Prior to *Staub*, the circuits had been applying different standards when considering so-called "cat's paw" cases. "Cat's paw" liability occurs when an employer is held liable for the animus of a supervisor who was not charged with making the ultimate adverse employment decision. *Id.* at *3. The term derives from a 17th century fable about a monkey who persuaded a cat to pull chestnuts from a fire, leaving the cat to get burned while the monkey made off with the chestnuts. *Id.* at *3 n.1.

Reversing the Seventh Circuit, the Supreme Court upheld the "cat's paw" theory of liability but clarified the circumstances when it is properly imposed: "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." *Id.* at *6 (emphasis in original).

Notwithstanding the Court's resolution of the issue of the "cat's paw" theory of liability, a number of questions remain after *Staub*. First, the Court remanded the case for the Seventh Circuit to determine whether the difference between the Court's standard for liability and the jury instruction, which only required a finding that military status was a motivating factor in the discharge decision, was harmless error or mandated a new trial. Additionally, the Court specifically left open the question of whether "cat's paw" liability could be imposed if a co-worker, rather than a supervisor, committed the discriminatory act that influenced the ultimate

employment decision. What is now clear after *Staub* is that, if a supervisor has an unlawful bias against an employee and intentionally influences an employment decision, the employer can be held liable, even if someone else within the organization carried out the decision; the bias does not have to be held by the one with the ultimate decision-making authority.

Conclusion

Truly understanding the impact of these decisions will be a challenging task left for courts and juries in future cases, as they test the limits of these holdings under different facts and circumstances. Without question, however, these decisions at a minimum raise issues that employers and those advising employers should consider carefully when making employment decisions.

***Leslie A. Allen*** *and* ***Abbott Marie Jones*** *are attorneys with Christian & Small LLP in Birmingham, Alabama. Leslie is a member of the Firm's labor and employment practice group, as well as its business and commercial litigation and health care practice groups. Abbott is a member of the Firm's appellate, post-verdict, and briefing practice group.*

## DRI Employment and Labor Law Seminar

DRI Employment and Labor Law Seminar
May 18-20, 2011
The Westin Kierland
Scottsdale, Arizona

DRI's 34th Annual Employment and Labor Law Seminar sets the bar for practical continuing education programs for employment defense attorneys, management-side labor attorneys, in-house attorneys, insurance professionals and human resources professionals.

Hear from first-rate speakers about the implications of the latest case law, legislative changes and administrative developments on matters critical to employers. This year's program will offer a choice of two practical skills workshops: a primer series focused on managing common employee scenarios and a trial tactics program for seasoned practitioners. The line-up includes perennial favorites, such as the popular Annual Labor and Employment Law Year in Review, as well as:

• Up-to-the-minute electronic discovery strategies from Judge Scheindlin, author of the landmark *Zubulake* decisions

- Judge Bennett's perspective on the ethics of advocacy in the courtroom
- Recent policy and labor initiatives from National Labor Relations Board Member Mark Pearce
- Tactics for navigating today's most challenging wage and hour issues, from an experienced wage and hour practitioner and former Administrator for the U.S. Department of Labor's Wage and Hour Division
- Legislative initiatives affecting employers, described by a leading policy expert from the U.S. Chamber of Commerce
- Risk management strategies on advanced labor and employment issues from some of the nation's top in-house corporate counsel
- Tips on how to work with, and not against, your client's Employment Practices Liability insurance carrier from experienced EPLI claims professionals
- Deception detection techniques to give you an edge in a workplace or litigation setting, from experienced employment attorney and criminal prosecutor trained in research-based lie detection techniques
- Plaintiff-side secrets to improve effectiveness in depositions and written discovery, from a top plaintiff's lawyer and author of *Deposing and Examining Employment Witnesses*

Attending without a colleague? Not to worry – this a collegial group of professionals, and there will be plenty of opportunities to put that to the test. One of the highlights in this regard is the annual Thursday night dine-around. Sign up for dinner at one of the many high-caliber restaurants Scottsdale has to offer, and you have instant dinner companions.

In addition, you do not have to attend without a colleague. DRI has launched a new program that provides you with a unique business development opportunity to bring a client. DRI members can invite an in-house counsel to attend the seminar with them **for free** (the guest is responsible for travel and lodging expenses). In-house counsel are defined as licensed attorneys, who are employed exclusively by a corporation or other private sector organization, for the purpose of providing legal representation and counsel exclusively to such employer corporation, its affiliates and subsidiaries. In addition, if you are a member of DRI's Corporate Counsel Committee, you can attend for free.

Join us in Scottsdale at the beautiful Westin Kierland resort for three days of incomparable educational and networking opportunities.

## The Next Step: Solidifying Your Relationship With a Carrier

*by Jason A. Fogg*

You jumped through all the hoops, schmoozed with six different VP's, filled out countless forms, slashed your rates, agreed to a slew of litigation guidelines, accepted electronic billing and you're finally on the panel list for an insurance carrier. Now, the real work begins. As hard as it can be to get in the door, the real gatekeepers at a carrier are the front line claim professionals – those are the people you have to keep happy in order to grow your business. If the front line people don't like working with your firm, you're efforts will have been a huge waste of time. Here's a short list of relationship killers you need to keep in mind:

1. Failing to get to know the front line claim handlers' styles – each person has their own way of handling a file and they tend to gravitate to the defense firms that they work with the best. Some claim people like it short & to the point, others want to talk through a problem. Some prefer deposition summaries, others like to see the transcripts. Some want to know jury verdict ranges, others don't. Some may want regular updates, others only want to know when something important happens. Tailoring your "product" to the claim professional's tastes will go a long way toward becoming the 'go to' firm for each style of claim handler;

2. Don't promise what you can't deliver – lawyers never want to turn down work, so when asked if they can handle a certain case, regardless of their area of expertise, the answer is always, "sure, we do that." But accepting an assignment outside of your actual expertise is a surefire way to ruin a relationship; first, the client (our customer) will be doing its own research – so if your website lists you as an employment lawyer, telling the carrier you can handle an IP matter sets the insurer up to look bad with its insured; second, if you have to commit extra time and resources to 'get up to speed' in a particular area of law, that's going to show up in the bills that are being reviewed by both the carrier and the client; finally, the results usually bear out when an attorney is in over his or her head and that's a conversation you don't want to have with the carrier. Stick to what you know and be secure in your abilities;

3. Another relationship killer is unilaterally reassigning files to partners or associates without the carrier's knowledge or consent. While you may have the utmost confidence in your

colleagues, the carrier's going to be coming to you for answers and if you have to punt to someone else in your firm, the claim professional is not going to be happy. If you have to get someone else involved, be upfront with the carrier immediately (we understand you have other clients & cases) and introduce your team to the carrier and the insured, but it's imperative that you continue to keep a supervisory eye on the case;

4. Be upfront. No one likes to hear bad news, but cases do take bad turns and the earlier the carrier knows about it, the better able we are to make adjustments. The same goes for positive developments. The information counsel supplies to the carrier has a far larger impact than you may realize; insurers set pricing for their products based on actuarial assumptions that come from information about overall claim development. If the claim numbers are wrong (high or low), we've priced our product, often for the next several years, incorrectly (either we charged too much and lost business opportunities, or we didn't charge enough and will face a problem when it's time to pay claims);

5. Be smart. When there are important developments, pick up the phone and put a call into the claim professional *before* you send out a report to the carrier and the client. Being prepared to manage client expectations & reactions is a large part of the claim professional's job and we need your help to do this; surprises are a carrier's worst nightmare;

6. Finally, be patient. Claim professionals are a skeptical bunch to begin with and they've heard the same lines from countless law firms – what matters to them are results, and results take time. Don't expect an avalanche of new assignments the minute you make the list; most carriers will give you a couple files and then wait to see how things develop. If you start pestering for work, you'll soon find your calls going straight to voice-mail.

Every carrier, and every claim person, has their own quirks, likes, dislikes, preferences and requirements – the firms that can adapt to the client's style, while providing results, are the ones who will see their business grow.

***Jason A. Fogg*** *is Vice-President, Claims & Regulatory Compliance for Monitor Liability Managers, a professional liability underwriter specializing in Employment Practices Liability,*

*Accountants & Lawyers Professional Liability, Directors & Officers Liability, Non-Profit Liability and Management Liability insurance.*

## Damages for Misclassified Employees Under the FLSA: Growing Support for the Half-Time Rate

*by R. Scott Adams*

The United States Court of Appeals for the Fourth Circuit recently provided additional support for calculating unpaid overtime compensation under the Fair Labor Standard Act ("FLSA") by paying damages to misclassified employees at 50% of the regular rate where the employees were paid a fixed salary for payment for all hours worked by the employee in each workweek. This half-time ruling brings the Fourth Circuit in line with the First, Fifth, Seventh, and Tenth Circuits, all of which have deemed the half-time method to be proper, and is an important decision in light of increased enforcement efforts against misclassified employees.

The damages provision of the FLSA states, "Any employer who violates the provisions of [29 U.S.C. 206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. 216(b). In determining that the half-time method is proper for calculating damages for misclassified employees, the Fourth Circuit emphasized the Supreme Court's express guidance in Overnight Motor Transportation Co. v .Missel, 316 U.S. 572 (1942), as well as general principles of compensatory damages.

*Background*

In Desmond v. PNGI Charles Town Gaming, LLC, 630 F.3d 351 (4th Cir. 2011), Plaintiffs were racing officials whom the employer treated as exempt, originally paying them a per diem rate. Over the ensuing years, the employer changed their pay structure to a fixed weekly salary that the parties intended to cover all hours worked, and they were treated as exempt under the administrative exception to the FLSA. 630 F.3d at 353. Plaintiffs often worked in excess of forty hours per week. Id. at 354. After Plaintiffs unanimously declared the wrong horse to have won a race, the employer dismissed them from employment. Id.

The Fourth Circuit previously reviewed the district court's determination that Plaintiffs held

administrative positions and were exempt from the overtime provisions of the FLSA. 564 F.3d 688 (4th Cir. 2009). After concluding that Plaintiffs did not qualify for the administrative exemption under the FLSA, the Fourth Circuit remanded the case for further proceedings. Id. In this most recent appeal, Plaintiffs challenged the manner in which damages for unpaid overtime compensation were calculated, claiming that they should receive time and a half (based on their regular rate) for all hours worked over 40 in a given workweek, rather than 50% of the regular rate for all hours worked over 40 in a given workweek. Desmond, 630 F.3d at 353. Additionally, the employer appealed the district court's grant of summary judgment on the issue of willfulness, which the Fourth Circuit overturned.

*Analysis of Overnight Motor and Cases Regarding the 50% Multiplier*

In reaching its decision that paying damages at the half-time rate is proper, the Fourth Circuit reviewed the Supreme Court's Overnight Motor decision, which addressed how to calculate unpaid overtime compensation under 29 U.S.C. 216(b). The Supreme Court held that when calculating the "regular rate" of pay for an employee who agreed to receive a fixed weekly salary as payment for all hours worked, a court should divide the employee's fixed weekly salary by the total hours worked in the particular workweek. 316 U.S. at 579-80 (analyzing section 7 of the FLSA, now codified at 29 U.S.C. 207(a)(1)). The court should complete this calculation for each workweek at issue to obtain a regular rate for a given workweek, which could vary depending upon the total hours worked. Id. The employee should receive overtime compensation for all hours worked beyond 40 in a given workweek at a "rate not less than one-half of the employee's regular rate of pay." Id.

The Fourth Circuit recognized the four other circuits that all have determined that a 50% overtime premium was appropriate in calculating unpaid overtime compensation under 29 U.S.C. 216(b) in mistaken exemption classification cases, "so long as the employer and employee had a mutual understanding that the fixed weekly salary was compensation for all hours worked each workweek and the salary provided compensation at a rate not less than the minimum wage for every hour worked." See Urnikis-Negro v. Am. Family Prop. Servs., 616 F.3d 665 (7th Cir. 2010); Clements v. Serco, Inc., 530 F.3d 1224 (10th Cir. 2008); Valerio v. Putnam Assocs., Inc., 173 F.3d 35 (1st Cir. 1999); Blackmon v. Brookshire Grocery Co., 835 F.2d 1135 (5th Cir. 1988).

In reviewing the considerations that each sister

circuit considered in finding that a 50% overtime premium was appropriate, the Fourth Circuit reviewed the key facts of the four mistaken exemption cases. The Courts of Appeals in Blackmon, Valerio, and Clements all relied on 29 C.F.R. § 778.114 to determine that a 50% multiplier was appropriate and did not discuss Overnight Motor. However, the Urnikis-Negro Court rejected the district court's application of 29 C.F.R. § 778.114, instead relying on Overnight Motor. 616 F.3d at 679-84. The Seventh Circuit held that when an employer and employee agree that a fixed salary will constitute payment at the regular rate for all hours worked and the rate is not lower than the minimum wage, a court should rely on Overnight Motor to calculate unpaid overtime compensation under the FLSA. Additionally, the court calculates the unpaid overtime compensation using a 50% multiplier rather than a 150% multiplier.

In addition to decisions of federal courts, the Department of Labor has approved using a 50% multiplier to calculate unpaid overtime compensation in a mistaken exemption classification case. See "Retroactive Payment of Overtime and the Fluctuating Workweek Method of Payment, Wage and Hour Opinion Letter," FLSA 2009-3 (Dep't of Labor, Jan. 14, 2009). The employer requesting the opinion letter asked how to compensate employees mistakenly classified as exempt, and the DOL expressly endorsed the half-time rate for unpaid overtime compensation. The DOL reasoned that "the fixed salary covered whatever hours the employees were called upon to work in a workweek" and "the employees received and accepted the salary knowing that it covered whatever hours they worked." Accordingly, the DOL said that using the 50% multiplier conforms with FLSA requirements.

*The Correct Measure of Damages*

After reviewing and analyzing the decisions of other jurisdictions, the Fourth Circuit concluded that the district court was correct in holding that Overnight Motor provides the appropriate method for calculating unpaid overtime compensation under 29 U.S.C. § 216(b). The district court found there was an agreement that Plaintiffs' fixed weekly salary covered all hours worked, and then reasoned that Overnight Motor's regular-rate determination implies the previously paid weekly salary covers the base compensation for all hours worked. As such, an award of 50% of the regular rate would provide the employees their "unpaid overtime compensation." 661 F.Supp.2d at 584.

The Fourth Circuit made short order of Plaintiffs' counterarguments. Plaintiffs attempted to argue that relying on Overnight Motor improperly expands federal common law; that Chevron

deference to 29 C.F.R. § 778.114 requires application of a 150% multiplier; and that allowing a 50% multiplier would create an incentive for employers to pay a fixed weekly salary, never to pay overtime, and then simply pay a 50% premium on the regular rate if the employers ever get caught misclassifying non-exempt employees. The Fourth Circuit said that Plaintiffs ignored the teaching of Overnight Motor, which specifically provides the formula to compute the overtime due an employee paid a fixed weekly salary intended to cover all hours worked.

Finally, the Fourth Circuit highlighted the fact that traditional principles of compensatory damages support the use of a 50% multiplier in calculating the damages for unpaid overtime compensation. Noting that Black's Law Dictionary defines "compensatory damages" as "[d]amages sufficient in amount to indemnify the injured person for the loss suffered," the Fourth Circuit said that Plaintiffs agreed to receive straight time pay for all hours worked in a given workweek and had already received such pay. Therefore, the "loss suffered" is the 50% premium for their overtime hours.

In a time when the Department of Labor has increased its enforcement efforts against misclassified employees, the Fourth Circuit's decision provides additional clarification for the proper method of calculating damages for employees misclassified as non-exempt. Where the parties have a mutual understanding that the fixed weekly salary was intended to cover all hours worked in a given workweek, the correct measure of damages is 50% of the of the regular rate. This calculation provides the employees with their unpaid overtime compensation since they already received their base salary to cover all hours worked. Moreover, the Fourth Circuit emphasized the logic of Overnight Motor rather than the guidance in the FLSA regulations. In advising clients on potential damages in misclassification situations

Richard Scott Adams
Spilman Thomas & Battle
Winston Salem, NC
sadams@spilmanlaw.com

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