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IMPORTANT FLSA CASE AT SCOTUS

The U.S. Supreme Court heard oral argument[1] on November 5, 2024, on what appears to be an important Fair Labor Standards Act (FLSA) case. As our readers know, the FLSA governs the issue of when an employer owes overtime if alleged "employees" work more than 40 hours in one week. However, sometimes the employer contends that the worker is not an employee subject to the FLSA, but instead fits within one of many exceptions or exemptions. One example is the case of "outside salesmen."

In the case of *E.M.D. Sales, Inc. v. Carrera,*[2] the employer contends that the burden of proof applicable to whether an individual is an "employee" should be "preponderance of the evidence" and not "clear and convincing evidence," as some courts have held. The Fourth Circuit Court of Appeals held that the employer did not prove by "clear and convincing evidence" that in fact the plaintiffs were outside salesmen and therefore they were entitled to overtime pay at time-and-a-half, affirming the trial court which had awarded the workers liquidated damages equivalent to two years' worth of overtime pay.

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[1] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/23-217_hejm.pdf

[2] https://www.scotusblog.com/case-files/cases/e-m-d-sales-inc-v-carrera/

The U.S. Supreme Court (SCOTUS) granted review to determine which standard of proof should be applied in such exemption cases. Although it is not certain that a decision in this case will have application beyond FLSA exemption cases, there are certainly many other FLSA exemptions that might be affected. Examples include the executive and administrative exemptions (used with key employees), the 207k exemption applicable to firefighters, the IT employee exemption and a few others. Thus, we think this case is important even if only limited to FLSA exemption cases. And the logic of this case may even be applicable in the context of whether an individual is a "volunteer."

The employer argues that the clear and convincing evidence standard, absent explicit legislative directives, is not ordinarily applied to cases where "monetary relief" is all that is at issue. The employer contrasted that situation with such more severe remedies as those dealing with "core liberty issues" like avoiding involuntary commitment, denaturalization or loss of parental rights. The employer relied on the Supreme Court case of *Encino Motorcars, LLC v. Navarro,* (2018)[3] which of course would "outrank" any Fourth Circuit authority.

In the *Encino* case, SCOTUS held that "service advisors" in an automobile dealership were FLSA-exempt, partly because such FLSA exemptions should be given a fair reading based on the text of the law and therefore a "narrow reading" of the exemptions was rejected. Therefore, the employer argues, the Fourth Circuit should not have applied the "clear and convincing evidence" standard, but rather the "preponderance of the evidence" standard. "Preponderance of the evidence" means proving that something is true more probably than not. In effect this means evidence of at least 51%, as opposed to arguably about 90% in the "clear and convincing evidence" standard.

We wonder if the Court is forgetting that the FLSA, enacted in 1938, was originally intended to deal with unfair labor practices. As such, it would seem to be a remedial statute. Remedial statutes are ordinarily interpreted in favor of the party or parties they were intended to protect, and therefore exemptions are narrowly construed. Nonetheless, given the current makeup of the Supreme Court, it seems rather obvious that SCOTUS will hold that the "preponderance of the evidence" standard applies here. We doubt that the Court will give any weight to the argument that the employee/plaintiffs are members of a disadvantaged group, or that the risk of an erroneous outcome is unequal in this case. We predict that the employer will succeed in solidifying the applicability of the preponderance of the evidence standard to FLSA exemptions.

AN IMPORTANT PRIVACY CASE IN WASHINGTON COURT OF APPEALS

On October 31, 2024 Division 3 of the Washington Court of Appeals issued an important published opinion in a privacy breach case.[4] In a cyberattack against the Chelan-Douglas Health District, hackers accessed personal records, including personal health information (PHI) held by that agency. Plaintiffs filed suit against the health district alleging the district was negligent in gathering, storing, and securing their personal information. The district moved to dismiss for

[3] https://www.supremecourt.gov/opinions/17pdf/16-1362_gfbh.pdf

[4] https://www.courts.wa.gov/opinions/pdf/395715_pub.pdf

failure to state a claim, arguing that it did not owe the plaintiffs a duty of care, because the injury, if any, was caused by the criminal acts of a third party. Secondly, the district alleged the lack of any cognizable injury to support a negligence claim for damages.

The Court of Appeals reversed the trial court's decision dismissing the case, holding that a company or entity that collects and stores personal identifiable information (PH) and personal health information (PHI) has a duty to use reasonable care in collecting and storing the information. That duty includes taking reasonable steps to prevent unauthorized access and disclosure of the information. The court also said that there was enough evidence to show, in a preliminary fashion, that cognizable injury exists, when there is some showing of identity theft and consequent mental distress and inconvenience. At the pleading stage, a certain amount of deference must be afforded to the plaintiffs and it appears possible that plaintiffs can prove some damages.

Based on the facts of this case, it appears that the district was aware of its vulnerability to cyberattack well before it occurred. Nonetheless, the district did not act in a timely manner to address the security deficiencies, the court said. Eventually, FBI agents contacted the district to warn of an impending cyberattack. Before the district improved its security measures, two cyberattacks and one email phishing attempt took place. Two months later, the data breach occurred. The Attorney General's report noted that "full names, Social Security numbers, dates of birth/death, financial account information, medical treatment/diagnoses, medical records, or patient numbers, and health insurance policy information" were all compromised. Approximately 109,000 Washington State individuals were affected by this breach.

One plaintiff noted an increase in spam telephone calls after that breach. Some of the callers impersonated a health district employee. Her credit monitoring service indicated her Social Security number appeared twice on the dark web. That plaintiff spent a great deal of her time trying to mitigate the impact of the data breach. She claimed an unauthorized business license was opened in her name. Ultimately, she claimed a waste of five hours of her time (thus far) in dealing with the problem, in addition to the mental distress.

Another plaintiff, with no known connection to the health district, was affected by the breach, and alleged PH and PHI were exposed in the data breach. The case was filed and certified as a class action. The trial court dismissed the action but now Division 3 of the Court of Appeals has reversed, and one might surmise that the Supreme Court of Washington may eventually rule on this case.

The Court of Appeals reviewed the decision of the trial court de novo since that court ruled on a motion to dismiss under Rule 12(b)(6) for failure to state a claim. Under that rule, any hypothetical set of facts conceivably raised by the complaint is legally sufficient to defeat such a motion to dismiss because the facts alleged are presumed to be true. In a negligence case, basically a plaintiff must prove (1) the existence of a duty owed to the plaintiff, (2) breach of that duty, and (3) resulting injury (damages) and (4) a proximate cause of the injury by the breach of duty. Citing the *Munich* case (which we have discussed in the *Firehouse Lawyer* in recent years) of the State Supreme Court, Division 3 judges said determination of duty is a de novo legal decision for the court. With little hesitation, the Court of Appeals held that a duty existed to protect such persons from a

foreseeable harm perpetrated by a third party, regardless of the criminal nature of the conduct, relying on the Restatement of Torts and several case precedents.

The court also pointed out several Washington State policies designed to protect citizens from identity theft. Those included criminal statutes and business regulations relating to privacy. Also mentioned, although not very prominently, was the Uniform Health Care Information Act, set out in chapter 70.02 of the Revised Code of Washington. The court also cited RCW 19.373, known as the "Washington My Health My Data" Act.[5] This law, whose proscriptions went into effect in late March of this year, and which applies to "consumer health data" and specifically excludes data subject to HIPAA and RCW 70.02, may be the subject of a future *Firehouse Lawyer* article.

Finally, the court noted that privacy considerations are addressed in the state's Public Records Act—RCW 42.56—in several sections. Washington has even created an "Office of Privacy and Data Protection" to provide a resource for local governments and the public in developing best practices for handling personal (private) information. See RCW 43.105.369.

We think this thorough and significant opinion may well be taken up by the State Supreme Court, but the result is hardly surprising, given the plethora of Washington State policies (and federal laws) designed to protect private information such as health care information. We also think that the Court of Appeals made the right decision.

[5] https://app.leg.wa.gov/RCW/default.aspx?cite=19.373

REVISITING THE "UNDUE HARDSHIP" DEFENSE IN RELIGIOUS DISCRIMINATION CASES

A recent Washington Supreme Court decision relates to a long saga concerning the religious exemption in a case arising under the Washington Law Against Discrimination (WLAD).[6] The case began in 2019, when a devout Christian named Adelina Suarez alleged her public employer—the Yakima Valley School—failed to grant her request for a reasonable religious accommodation and terminated her in violation of public policy and the WLAD. Suarez was denied time off to attend church. She started skipping work to attend religious festivals or to observe the Saturday sabbath. A more accommodating (by schedule) position opened up but she failed to apply for it. Eventually, she was terminated due to poor attendance. The school's defense relied upon the "undue hardship" doctrine that we have discussed here before. The school operates a nursing facility for vulnerable adults, and so providing adequate staffing for medical reasons is critical. Their preset and very specific nurse schedule cannot easily be changed. The schedule is embodied in the CBA. Understaffing results in a high level of nurse burnout and makes for a generally unpleasant work environment. Therefore, unanticipated absences are very burdensome to the school, and adversely affect not only the patients, but also the co-workers. For these reasons, the trial court found that the employee's accommodation would be an undue hardship and so the court granted summary judgment.

Three years later, the Court of Appeals reversed that decision, holding that a question of

[6] https://www.courts.wa.gov/opinions/pdf/1013868.pdf

fact existed on failure to accommodate her religion and on whether the termination was wrongful, as against public policy. The Court of Appeals appeared to adopt the "more than *de minimis"* test that we have previously discussed in these pages. The Court of Appeals also seems to have concluded that only financial hardships to the employer could be considered in the "undue hardship" analysis. Our review of federal cases arising under Title VII of the Civil Rights Act of 1964 reveals that it would be easy to draw that conclusion.

Our Supreme Court agreed with the employer and reversed the Court of Appeals, basically agreeing with the trial court (five years after the case was filed). They held that the "undue hardship" determination is not limited to the employer's financial considerations. Other "hardships" may be considered, such as safety concerns, other governmental regulations, and even the interference with performance of other employees. The Supreme Court relied on Title VII cases to conclude that hardships need not all be financial to be considered. The Court actually found that granting the accommodation would have constituted preferential treatment to the detriment of her co-workers.

DO 24-HOUR SHIFTS HAVE TO BE ALL "WORKING TIME"?

Apparently not. We have always assumed that those firefighters working shifts of 24 hours or longer were compensated as if the full shift was working time under the FLSA. Most of the collective bargaining agreements (CBAs) we have seen in Washington State either state or imply that, and as far as we know, it is the universal practice of our clients to consider the entire shift as "working time" and therefore fully compensable. But that is not required by current law, i.e. the federal regulations promulgated under the Fair Labor Standards Act.

29 C.F.R. Section 785.22[7] actually states:

> "Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep…."

Since most fire departments that use 24-hour shifts have adequate sleeping facilities, let's focus on the second prong of this test. What if you are a rural department that wants to have firefighters and/or EMTs or paramedics available during the wee hours of the morning and yet the call volume would be so low that "usually" they would get the 8 hours of uninterrupted sleep? We think you could do that with a proper agreement with the employee or their union.

We believe this is the case, because the regulation continues after the above-quoted sentence, as follows:

> "If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no express or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked."

[7] https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-B/part-785/subpart-C/subject-group-ECFRecc40629d2c64c8/section-785.22

This language tells us two things. First, just make an agreement that the sleeping period is for 8 hours—no more and no less. Let's say you agree in writing that the sleeping period is midnight to 8:00 a.m. Second, remember that if you do not have an agreement like that, the sleep time would still be compensated "working time." The regulation then cites several cases to support what the regulation allows.

29 C.F.R. Section 785.22(b) provides more clarification by stating:

"If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted [as working time]. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time. (See *Eustice v. Federal Cartridge Corp.,* 66 F. Supp. 55 (D.Minn. 1946)." So, as you can see, a one or two hour call or response means that the remainder of the sleeping period is not working time, but the time spent on the call *is* working or compensable time. While this may seem to be somewhat burdensome administratively to monitor these details, it might well be worth it for a rural district where "usually" the sleep is not unduly disrupted and the firefighters get at least five hours of uninterrupted sleep. Probably, however, those urban fire districts or RFAs in Washington, where few nights include no interruptions at all, do not need to be bothered. Moreover, we imagine that this past practice would be difficult to change through bargaining.

As we see it, the CBA or other agreement with the employee could basically include the language of the regulation in the agreement to make it clear that the parties are agreeing to follow that law. We do not believe that such an agreement would be necessary or appropriate in those departments when interruptions would be numerous or frequent, but it might be an ideal agreement for a rural district that wants the night-time coverage but cannot afford to pay for the entire shift every time the firefighters work.

You might be asking: "Why would an employee or their union ever agree to such an arrangement?" We think that actually it is a way of dealing with problems like burnout of firefighters, by assuring them of a decent night's sleep, at least on some of their shifts. Also, it might be a good way to initiate a new shift system in a rural department, where both parties see the benefits of 24-hour shifts (or more) but there is doubt about the employer's ability to pay for such 24x7 coverage.

If a department wanted to start such a new system of deploying its firefighters, it would need to be mindful of the state law on lunch and other breaks. *See* RCW 49.12.480. The statute would not seem to apply during a sleeping period, but the parties might want to specifically agree that it does not apply or is satisfied through this agreement.

CORRECTION: In our previous issue, we indicated that the applicable driver course is approved by the L&I director. We meant to say the director of the Department of Licensing. The rest of the article still holds: https://firehouselawyer.com/Newsletters/SeptemberOctober2024FINAL.pdf