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Briefly

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NLRB TAKES POSITION ON WORKERS WHO PARTICIPATE IN POLITICAL OR PRO-IMMIGRATION DEMONSTRATIONS

Gary Wright

"The memo appears to strike a "middle ground" protecting workers from discrimination for some types of political advocacy, but providing for limitations to the protective nature of such activities."

On July 22, the General Counsel of the National Labor Relations Board (NLRB) issued a guideline memorandum describing the framework for analyzing unfair labor practice charges involving workers who engage in political advocacy, such as participating in pro-immigration demonstrations. The memo appears to strike a "middle ground" protecting workers from discrimination for some types of political advocacy, but providing for limitations to the protective nature of such activities.

Under the National Labor Relations Act, employees have the right to engage in union or other concerted activity for "mutual aid or protection." Such activities include engaging in a strike or other concerted withholding of labor, but there are limits to the protected nature of such activities. NLRB General Counsel Ronald Meisburg determines that the test for determining whether political advocacy is protected is "whether there is a direct nexus between a specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees." Further, Meisburg says that qualifying political activity can lose the protection of the Act if it is carried out by unprotected means.

Applying these tests to political advocacy by employees, Meisburg said that qualifying political advocacy meets the basic test if it is non-disruptive, and takes place during the employee's own time in non-work areas. However, he found that engaging in qualifying political advocacy while on duty, by leaving or stopping work to engage in it, "is subject to the restrictions imposed by lawful and neutrally-applied work rules." "As a matter of enforcement policy under the Act, we do not want to equate political disputes with labor disputes, or promote the use of strikes and similar activity for resolving what are essentially political questions," he said.

Meisburg cites examples of how employee appeals to legislators or government agencies were protected, citing cases involving employee political advocacy regarding issues including visas for foreign workers, the minimum wage, a right-to-work provision, engineer licenses, hospital staffing levels, "living" wages and benefits, employee drug testing, and workplace and environmental safety laws. These type appeals are deemed directly related to employee working conditions, and are therefore protected concerted activities.

On the other hand, "complaints to governmental bodies that do not involve working conditions are not protected under the 'mutual aid or protection' clause," Meisburg said. He cited precedent that distributing material supporting certain candidates "without reference to any particular employment-related issues or advocate[ing] the creation of a workers' party are too attenuated" from employees' own concerns as employees to be protected.

Meisburg made particular reference to the charges filed in late 2006 in a series of cases involving the discipline of employees who participated in "demonstrations organized to protest pending legislative proposals that would impose greater restrictions and penalties on immigrant employees and their employers." Because "immigrant employees and even non-immigrant employees could reasonably believe that the [legislation] could impact their interests as employees,"

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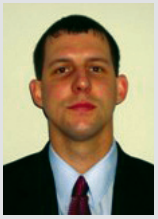
Andrew J. Hebar



Andrew J. Hebar is an Associate in the Knoxville office of the firm, joining in June 2008. His law practice includes an emphasis on defense of workers' compensation claims for employers and employment law. Andrew is a native of Black Creek, WI. Andrew is a 1997 graduate of the National Academy of Railroad Sciences in Overland Park, KS. He worked several years with the Burlington Northern and Santa Fe Railway. Andrew graduated summa cum laude with a B.B.A. in Business Management from the University of Memphis in 2002, as the top student in the Business Management program. He also minored in Political Science and received top student recognition in that program. He obtained his Doctor of Jurisprudence degree from the University of Tennessee College of Law in Knoxville, TN, graduating in 2005. Andrew worked in various positions in the subrogation department of a large boutique insurer of commercial trucking before reaching a position as in-house subrogation counsel prior to entering the private practice of law.

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COURTS EXPAND DEFINITION
OF DISABILITIES IN ADVANCE OF ADA AMENDMENTS

Fred Bissenger

"The Court did acknowledge, however, that the employer would have to have knowledge of the precise limitation if the employee were asserting the employer failed to accommodate the disability."

An amendment to the Americans With Disabilities Act (ADA) passed the House of Representatives by a 402-17 vote on June 25. The amendment greatly expands the definition of "disability" to include those who have only a small limitation on a single major life activity, define 5 "major life activities" quite broadly, and prohibits consideration of mitigating devices, such as hearing aids, in determining the disability. Even in advance of this new amendment to the ADA, which is currently pending in the Senate and supported by the Administration, courts already seem to be reacting to the issue by expanding the definition "major life activity."

On July 1, the United States Court of Appeals for the District of Columbia found that sleeping is unquestionably a major life activity, noting that sleep is essential to life and that the brain engages in critical and essential processes during sleep. Desmond v. Mukasey, 530 F.3d 944 (C.A.D.C. 2008). The court further held that plaintiffs are not required to show that their sleep disorders affected their waking activities in order to bring a disability discrimination claim that they were terminated because of their disability, which in the case before the court was post traumatic stress disorder. The court noted that plaintiffs would only need to show that the limitation on the ability to sleep affected another work related activity if they were seeking an accommodation.

A few weeks later, in a July 18 opinion in Adams v. Rice 531 F.3d 936 (C.A.D.C. 2008), the court found that the ability to have sex and to engage in intimate relationships qualified as a major life activity. In the latter case, the lower court had dismissed the plaintiff's claim reasoning that the plaintiff's cancer did not qualify as a disability because it was not long-term or permanent. The plaintiff declared that her history with cancer had "crippled indefinitely and perhaps permanently" her ability to enter into romantic relationships. The opinion quoted Genesis in pronouncing sex a "significant human activity, one our species has been engaging in at least since the biblical injunction to 'be fruitful and multiply.'" In its decision the Court rejected the government's

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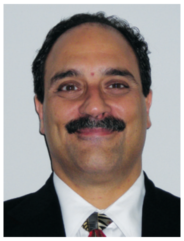
INTERSTATE TRANSPORTATION

EXEMPTION FROM OVERTIME NARROWED



Gerard Jabaley

"The bottom line appears to be that this exemption will now have a clearer, but more difficult, set of criteria that must be met for the exemption to apply."

One of the exemptions to the overtime requirements of the FLSA, is the motor carrier exemption, which basically exempts certain classes of employees (i.e., drivers, drivers' helpers, loaders or mechanics) who are employed by a motor carrier or motor private carrier, and whose work affects the safety of operation of motor vehicles in interstate commerce. Effective June 6, 2008, the motor carrier exemption to the FLSA has been amended. These classes of individuals employed by motor carriers or motor private carriers, and who perform duties on motor vehicles that are not commercial motor vehicles must be paid overtime unless a different overtime exemption applies. Commercial motor vehicles must: (a) weigh 10,001 pounds or more; (b) be designed or used to transport more than 8 passengers (including the driver) for compensation; (c) be designed or used to transport more than 15 passengers (including the driver) not for compensation; or (d) transport hazardous materials. The bottom line appears to be that this exemption will now have a clearer, but more difficult, set of criteria that must be met for the exemption to apply.

The amendment also includes a very critical reference to employees "whose work in whole or in part" is performed on non-qualifying motor vehicles, suggesting that an employee who may historically have been exempt from overtime, who performs any duties on non-qualifying motor vehicles, is now entitled to overtime unless some other exemption is applicable besides the Motor Carrier Exemption. This change is significant and will affect a variety of industries, including many other then trucking. An employee in the future will apparently be entitled to overtime for any week in which he or she occasionally performs work on a non-qualifying motor vehicle as opposed to a qualifying "commercial motor vehicle." Thus, many employers may chose to segregate the employees who are performing duties during any part of the week for non-qualifying motor vehicles, such as part-time employees, employees who would not work more than 40 hours per week, or even contracting out this type work. This segregation would avoid "tainting" or losing the overtime exemption that otherwise would be applicable, and ensures that the other employees who perform "Safety affecting activities" only on "commercial motor vehicles," continue to be exempt from overtime pay.

PLAINTIFFS' LAWYERS

HAVE DIFFICULTY REPRESENTING UNDOCUMENTED IMMIGRANTS

Anita Patel

"The two main problems relate to a concern that their client will not be around during the entire case, and the problem of obtaining legal relief."

At a June meeting of the National Employment Lawyers' Association in Atlanta, attorneys explained their difficulties in representing undocumented immigrants. The two main problems relate to a concern that their client will not be around during the entire case, and the problem of obtaining legal relief.

Undocumented plaintiffs may fear that their involvement in litigation may expose themselves to the authorities. Further, defense attorneys often attempt to make inquires about immigration status during the case, arguing that the Supreme Court ruling in Hoffman Plastics Compounds, Inc. v. NLRB, 535 U.S. 137 (2002), allows inquiries about immigration status because legal remedies like back and front pay to undocumented workers are usually not allowed.

Plaintiffs' lawyers expressed several theories to get around the problem. First, even if an undocumented worker cannot get back pay or front pay, they can get punitive and compensatory damages, particularly in certain forms of harassment cases. Some plaintiffs' attorneys therefore do not ask for back pay and reinstatement in litigation because it might open a door to immigration questions. In addition, plaintiffs' counsel may attempt to seek protective orders from the court barring questions about immigration status. Or, plaintiffs' counsel may advise their clients to plead the Fifth Amendment on the theory that the answer might lead to discovery of a potential crime. In such cases, plaintiffs' counsel are confronted with the fact that an employer in response will attempt to argue negative inferences about the employee, which could become an issue before the judge and jury.

Because of these concerns, oftentimes plaintiffs' attorneys attempt to settle cases before they come to litigation so their clients will not have to reveal their immigration status.

STEELWORKERS AND EUROPEAN UNION
CREATE GLOBAL UNION

Jeff Jones

"The new organization will claim three million workers on both sides of the Atlantic, and increase bargaining power with multi-national corporations."

On July 2, the United Steelworkers and the United Kingdom-based Unite the Union signed an agreement creating the world's first global union, called Workers United. The new organization will claim three million workers on both sides of the Atlantic, and increase bargaining power with multi-national corporations. The consolidated new union represents workers in every sector of the global economy, with 46% of the members in manufacturing and mining, and 44% of transportation and services. The new organization hopes that other unions will become part of Workers United in the future.

Commentators note that one significant issue will be the difficulty in formulating joint strategies, as most U.S. unions are more conservative and worried about the viability of their industries, while the European unions are part of a broad Socialist movement.

NLRB TAKES POSITION
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he took the position that employees who attended or supported such demonstrations engaged in activity for "mutual aid or protection."

However, protection of the Act depends in part on the methods used. Meisburg said "it is well-established that political advocacy of employment-related matters that is engaged in during non-work time in non-work areas typically may not be the subject of employer discipline absent disruption of work operations or interference with the 'right of employers to maintain discipline in their establishments.'" He found it also "is well-established that discriminatory enforcement of facially valid work rules or past practices, based upon the content of protected conduct," violates the Act.

Applying these concepts, Meisburg concludes that leaving work or not showing up for scheduled work in order to attend an immigration demonstration raises the issue of whether such absences should be treated as a strike. Although an employer generally cannot discharge or discipline employees who leave work to participate in a strike, "when employees leave work in support of a political cause, either to mobilize public sentiment or to urge governmental action," those are matters that are outside their employer's control.

Editor's comment – The bottom line of the analysis appears to be as follows. If the concerted employee activities relate to advocating a political issue and has a direct nexus to an employment concern of the participating employees, then such concerted activities are protected if the methods used do not interfere with the right of employers to maintain discipline in their establishments. This means that an employer may presumably apply valid work rules or past practices that may prohibit such activities during working time and in working areas, such as facially valid attendance policies that are enforced in a non-discriminatory manner. The guidelines thus strike a middle ground of supporting employee advocacy of political changes in working conditions while at the same time allowing an employer to enforce its non-discriminatory work rules.

COURTS EXPAND DEFINITION OF DISABILITIES
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argument that an employer can only be held liable if the employee proves that the employer knows how the employee's impairment substantially limited her ability to engage in a major life activity. The Court did acknowledge, however, that the employer would have to have knowledge of the precise limitation if the employee were asserting the employer failed to accommodate the disability.

Editor's note – As a result of these rulings, at least one federal circuit court suggests that impairments that promote sleeplessness or the inability to have sex are covered by the ADA. This result will allow many plaintiffs to show that their impairment affected a major life activity. To state a prima facie case the employee would still have to show that the limitation substantially affected the particular activities at issue. Indeed in neither Desmond nor Adams did the D.C. Circuit find that the plaintiffs had done so; rather, the court only found that the employees had presented enough information for juries to decide the issue. Other courts construe the statute more conservatively, covering only those who cannot care for themselves, perform manual tasks, walk, see, hear, speak, breathe, learn or work. The implication of the rulings expand the coverage of the Act significantly, since the Center for Disease Control and Prevention estimates that 10% of American adults suffer from a sleep disorder, and twice as many suffer from some sexual dysfunction. These rulings are only a small sample of the increased litigation that will occur if the amendments to the ADA are passed in the U.S. Senate.