Quarterly Bytes

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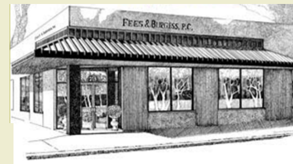

LITIGATION SPOTLIGHT

Recent Decisions Show Potential For Personal Liability Under FLSA For Employers

The Fair Labor Standards Act (FLSA) is one of the more difficult employment laws for employers to comply with and follow. The FLSA governs the areas of employees' wages, pay, leave benefits, overtime compensation, work hours, and recordkeeping and notice of these benefits. Recently, the Court of Appeals for the Eleventh Circuit has issued certain opinions addressing FLSA issues of which employers should take notice, particularly with regard to the potential for personal liability.

In <u>Moore v. Appliance Direct, Inc.</u>, plaintiffs originally sued Appliance Direct and its CEO for alleged violations of the overtime provisions of the FLSA. During that lawsuit, Appliance Direct did not offer plaintiffs the opportunity to become independent contractors as it did with its other drivers, and eventually terminated plaintiffs. Plaintiffs then filed another lawsuit, alleging Appliance Direct and its CEO retaliated against them for filing the overtime pay lawsuit. The case proceeded to a jury trial against the CEO, and the jury returned a verdict for plaintiffs. The CEO appealed, claiming that he was not an "employer" under the FLSA, and that plaintiffs failed to sufficiently prove their damages.

In affirming the jury's verdict, the Eleventh Circuit found that the CEO was an "employer." The FLSA defines an employer as including "any person acting directly or indirectly in the interest of an employer in relation to an employee." Under Eleventh Circuit precedent, a corporate officer is personally liable as an FLSA employer if he has "operational control of a corporation's covered enterprise," which may be involvement in the day-to-day operation of the company or direct supervision of the employee at issue. Since the CEO was the 75% owner of Appliance Direct, guided company policy, negotiated company contracts, and was the ultimate decision-maker of the company, he was indeed an "employer" under the FLSA. Furthermore, as a matter of first impression, the Eleventh Circuit held that the FLSA does not mandate the imposition of liquidated damages after a finding of liability for retaliation, unless excused by proof of reasonable good faith of the employer, the same as after a finding of liability for unpaid minimum wages and overtime. Thus, liquidated damages are within the district court's discretion to award.

In <u>Lamonica v. Safe Hurricane Shutters, Inc.</u>, plaintiffs sued their former employer, Safe Hurricane Shutters, as well as its CEO and two directors, to recover unpaid overtime wages under the FLSA. After trial, the jury found in favor of plaintiffs against all defendants. The district court also determined that plaintiffs were entitled to liquidated damages. Defendants filed a number of post-trial motions, all of which were denied by the district court.

LITIGATION SPOTLIGHT

Recent Decisions Show Potential For Personal Liability Under FLSA For Employers...*continued from page 1*

The Eleventh Circuit affirmed the judgment and the district court's orders denying the post-trial motions. In doing so, it made a number of significant holdings. Among them, the Court rejected defendants' argument that plaintiffs could not recover under the FLSA since they failed to accurately report their income to the IRS, and one plaintiff was an undocumented alien not authorized to work in the United States. The Eleventh Circuit has held that undocumented aliens are "employees" who may recover unpaid wages under the FLSA. Moreover, plaintiffs' income tax violations were not "connected with the matter in litigation" to find them culpable of violating the FLSA with defendants, and they could still recover under the statute. In addition, the two defendant directors could be personally liable as "employers" under the FLSA. While Eleventh Circuit case law has held that a corporate officer may be personally liable, a supervisor's title does not in itself establish or preclude his or her liability under the FLSA. Thus, the FLSA's broad definition of "employer" allows for the imposition of liability against others who meet the qualifications.

Moore v. Appliance Direct, Inc., 708 F.3d 1233 (11th Cir. 2013);
Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299 (11th Cir. 2013)

HR CORNER

NLRB Releases Opinions Reshaping Employer Obligations Before And After A Collective Bargaining Agreement is Signed

At the end of 2012, the National Labor Relations Board (NLRB) released two opinions with significant implications for employers that have unionized workforces. The first of these cases addressed the issue of an employer's obligation to bargain with a certified union regarding employee discipline before a collective bargaining agreement has been signed. The second case deals with an employer's obligation to deduct union dues from employee paychecks after a collective bargaining agreement has expired.

Alan Ritchey, Inc., and Warehouse Union Local 6, International
Longshore and Warehouse Union, AFL-CIO

In Alan Ritchey, Inc., the employer and the recently-certified union were in the process of negotiating their first collective bargaining agreement, when the employer disciplined four union employees for issues that included absenteeism, insubordination, threatening behavior, and failure to meet efficiency standards. The disciplinary actions taken ranged from a formal warning to termination. All of these disciplinary actions were taken pursuant to established policies of the employer that were in place prior to the union coming on the scene. Upon learning of these actions, the union alleged that the employer had violated multiple provisions of the National Labor Relations Act by imposing discretionary discipline on union employees without giving the union prior notice and an opportunity to bargain before taking action.

HR CORNER

NLRB Releases Opinions Reshaping Employer Obligations Before And After A Collective Bargaining Agreement is Signed...*continued from page 2*

The NLRB held that, if a union has been certified, in the absence of a collective bargaining agreement, the employer still has an obligation to notify and negotiate with the union prior to taking certain types of discretionary disciplinary action. The NLRB limited its holding to disciplinary actions that have an inevitable and immediate impact on employees' tenure, status, or earnings, such as suspension, demotion, or termination. They went on to say that most warnings, corrective actions, mandated counseling, and similar actions would not require the employer to bargain with the union, absent a collective bargaining agreement requiring it, unless those actions automatically result in additional discipline based on the employer's progressive discipline system. An example of this last point would be an employee engaging in conduct that would normally result in a formal warning, but, since it is the employee's third warning, under the terms of the progressive discipline system, the employee would be subject to immediate termination. In that instance, the employer would still be required to give the union notice of its intended action and bargain in good faith.

The NLRB deemed the discipline at issue to be discretionary even though it was pursuant to established policies and conformed to the employer's past disciplinary practices. The NLRB held that, if an established policy mandates that certain conduct be disciplined in a specific way, the portion of the policy that is set in stone does not have to be negotiated with the union. However, if the employer has discretion under the policy regarding the type of disciplinary action to be taken or whether or not to discipline at all, that discretionary aspect of the policy, as it applies to union employees, must be negotiated with the union.

If the duty to bargain applies, the employer must provide the union with sufficient notice to allow for meaningful discussion of the grounds for disciplining the employee and the nature of the discipline. The duty also includes an obligation to provide the union with relevant information, if a timely request is made. The employer is not required to negotiate with the union until an agreement or an impasse is reached before taking action. If an agreement is not reached, the disciplinary action can be taken, but the employer will have an obligation to continue bargaining afterwards. Finally, there is no duty to bargain prior to imposing discipline if exigent circumstances exist. Exigent circumstances exist when an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, immediate danger to the employer's business or personnel. In those circumstances, the employer could take immediate action, promptly notify the union of its action and the basis for it, and bargain over the discipline after the fact.

<u>WKYC-TV, Inc., and National Association of Broadcast Employees and Technicians, Local 42 a/w Communications Workers of America, AFL-CIO</u>

NLRB Releases Opinions Reshaping Employer Obligations Before And After A Collective Bargaining Agreement is Signed...*continued from page 3*

For fifty years, the NLRB had held that an employer's obligation to deduct union dues terminates when the collective bargaining agreement calling for the deductions terminates or expires. In WKYC-TV, Inc., the NLRB elected to reverse its stance on this issue and follow the rationale adopted in a number of cases decided by the U.S. Court of Appeals for the Ninth Circuit holding that the obligation to deduct union dues, like most other terms and conditions of employment, survives the termination of the collective bargaining agreement that originally provided for such an arrangement.

Prior to this decision, employers could use the threat of cutting off union dues as a bargaining chip in negotiations with a union when trying to reach a new collective bargaining agreement. Under WKYC-TV, Inc., it appears that is no longer an option.

Supreme Court To Consider Constitutionality Of Recess Appointments To The NLRB

While the NLRB decisions discussed above have significant implications for employers with union employees, there is some question as to whether these decisions are valid. In January of 2012, President Obama made three recess appointments to the NLRB filling vacancies that had been open for some time. The NLRB is supposed to be made up of five members. The NLRB has no authority to act unless at least three members concur on an opinion before it is released. After the January appointments, arguments were raised in various lawsuits that the recess appointments by President Obama were done in violation of the U.S. Constitution and are invalid. The U.S. Courts of Appeals for the D.C. Circuit and the Third Circuit have since issued opinions holding that those appointments were unconstitutional. If the appointments were unconstitutional, then there were not enough validly-appointed members sitting on the NLRB from January 2012 to the present to constitute a quorum with the authority to act. That means there is some question as to whether the decisions released by the NLRB during that period are valid law.

On June 24, 2013, the U.S. Supreme Court announced that it would consider the issue of whether the recess appointments were unconstitutional. Oral argument in that case is expected this fall. Until then, the safest approach for employers is to abide by whichever NLRB decisions, whether decided before or after the recess appointments, would be most restrictive on employers, since there is uncertainty as to whether the NLRB decisions over the last year and a half will be deemed invalid. If you end up before the NLRB before these quorum issues are resolved, you should discuss with your legal counsel whether it might be appropriate to challenge the NLRB's authority to hear the matter or the validity of any adverse decisions against you based on the lack of a valid quorum. Depending on the circumstances, there could be a variety of methods used to assert such an argument and preserve your right to contest the NLRB's authority.

PROTECTIVE MEASURES

THINK AGAIN!
Supreme Court Changes Its Mind on Coverage – Unambiguous Language Wins

Price-Williams sued Admiral Insurance Company under a statute allowing for a direct action against an insurance company when an insured has been found liable. In February, the Alabama Supreme Court held that Price-Williams could recover from Admiral because (1) the injury was caused by two acts; (2) the wording of Admiral's exclusion was narrow and did not apply to injuries caused by one of the individual defendants (not an insured); and (3) the national organization did not expect or intend the local chapter to ignore the requirement to institute a program, its failure to do so constituted an occurrence. On May 17, 2013, the Court changed its mind. Admiral Insurance Company v. Price-Williams, 2013 WL 2149491 (Ala. May 17, 2013).

On rehearing, Price-Williams focused his argument on the fact that one of the actors was not an insured or additional insured, and, therefore, not subject to the exclusion. The Court disagreed and found that all of Price-Williams' injuries resulted from an assault in which two insureds participated. The policy did not allow for coverage as a result of assault and/or battery. Price-Williams' direct action against Admiral required proving that the actors were insureds. Because the insurance policy unambiguously excluded injuries for assault and battery, it did not matter whether the third person was an insured. Price-Williams was not able to recover on the policy, and the Supreme Court withdrew its original opinion.

SUPPLY CHAIN MANAGEMENT

When Negotiating Warranty Terms, Silence Can Be Golden

People who negotiate contracts on a regular basis tend to find or develop contract terms that they like to include in agreements to address certain issues. Sometimes, it is a matter of the company's legal department having boilerplate language they direct the contracts personnel to use when negotiating deals. Warranties are one area where contracting professionals and lawyers often develop standard language they try to push for in all their contracts. While it is nice to have standard contract language on hand that is well thought out and limits your risk, sometimes it is better to keep silent on an issue rather than push for your ideal language.

A good example of this arises in contracts for the sale of goods. Forty-nine of the fifty United States have adopted some version of Article 2 of the Uniform Commercial Code as the law governing contracts for the sale of goods in their state (Louisiana is the exception). Article 2 includes a number of implied warranties that apply unless they are expressly disclaimed, and, in some cases, they have to be disclaimed using specific language. These implied warranties include a warranty that the seller will transfer good title to the buyer, free of any security interests.

When Negotiating Warranty Terms, Silence Can Be Golden...*continued from page 5*

If the seller is a merchant regularly dealing in such goods, there is an implied warranty that the goods will be delivered free from any third-party claim of infringement, unless the parties agree otherwise or the infringement results from compliance with the buyer's specifications. If the seller is a merchant with respect to the kind of goods sold, there is also an implied warranty of merchantability, which is a fairly broad warranty that requires, among other things, that the goods be fit for the ordinary purpose for which they are used. If a seller signs a contract for the sale of goods without expressly disclaiming these warranties, they will apply, as long as the transaction is governed by the laws of a state that has adopted Article 2. In the international context, similar warranties may also apply under the United Nations Convention on Contracts for the International Sale of Goods, under the right circumstances.

More than once, we have had a client who was buying goods push to negotiate its preferred warranty terms with a seller after the seller submitted a quote or some other proposed contract document without including a warranty disclaimer. From the client's perspective, they want to make sure they get the warranty coverage they feel they need. However, they may already have warranty coverage under these implied warranties that is just as good, if not better, than their boilerplate warranty terms, if they just allow the contract to remain silent on the issue. But, if they decide to broach the topic of warranties, the seller will almost certainly push back on the client's preferred language, and the client could end up getting less than they would have if they had just remained silent on the issue. In short, when it comes to warranty terms in connection with the sale of goods, sometimes less is more.

FEES & BURGESS, P.C. — Calendar of Events

Fees & Burgess, P.C., is proud to present, and participate in the presentation of, the following upcoming seminar:

Free Four Part Lunch and Learn Continuing Education at ADTRAN

Last Session, Open to the Public. Bring your lunch to the meeting.
11:30 AM to 1:00 PM

Location: ADTRAN, Inc., 901 Explorer Blvd NW, Huntsville, AL, at 2 East Tower, "Waterside" Conference Room 252 (follow the signs when entering the building).

Map available at: https://www.adtran.com/pub/Library/Corporate/ADTRAN_Campus_map.pdf

Session 4: What Happens When a Good Deal Goes Bad? Planning and Drafting for Dispute Avoidance and Resolution
Wednesday, September 18, 2013

Presented by NCMA Certified Professional Contract Managers and attorneys Allen Anderson and Jeffrey Roth of Fees & Burgess P.C., regular speakers at the NCMA World Congress, and ISM International Supply Management Conference. Speaker biographical information at www.feesburgess.com.

Attendees this session will be qualified to receive 1.3 hours of continuing education from each session for both the National Contract Management Association (NCMA) and the Institute for Supply Management (ISM).

Space is limited to 45 attendees per session!

For more information, including how to register for this class click here. Or call Fees & Burgess P.C. at 256-536-0095 and ask for Sylvia Taylor or email: staylor@feesburgess.com.

SEMINARS

During these rough economic times, it is important to get the most for your money. The lawyers of Fees & Burgess, P.C., combined, have many years experience working in various fields, as both in-house and private counsel, representing a diverse clientele. Our attorneys have extensive experience in many areas of law, including employment law; intellectual property; supply chain management; mergers and acquisitions; contract negotiation; dispute resolution; and various other fields.

This wide field of knowledge provides our attorneys with the insight and know-how to be able to provide quality training on various topics. Our programs can be customized to fit any business need while keeping the costs of our training competitive, without sacrificing quality.

Topics that Fees & Burgess, P.C., can provide training on include, but are not limited to:

A Recession Era Guide to Collecting on Construction Contracts

Conducting Effective Workplace Investigations

Construction Contracting

Contingent Employees and Labor Outsourcing

Diversity Training

Elements of an Electrical Manufacturing Services Contract

Employment Law Survival Training for Managers

Family Medical Leave Act

Hiring and Firing

Immigration Compliance

Incoterms® 2010

Indemnity and Limitation of Liability Contract Clauses

International Contracting

Limiting Liability for Sexual Harassment

Managing Gender Identity Issues in the Workplace

Negotiation and Resolution of Federal Contract Claims

Privacy in the Workplace

Reducing Employee Benefits Costs for Alabama Businesses

Reducing Risk in Purchasing Terms and Conditions

Reduction in Workforce Strategies

Retaliation and Whistleblowers

Uniform Commercial Code: Primer to Articles 1, 2, and 2A

Violence in the Workplace

Wage and Hour Issues/Fair Labor Standards Act

Americans with Disabilities Act

Managing Employee Use of Internet and E-mail in the Workplace

Ethics, Business Conduct and Compliance in Government Contracting

For more information on these and other programs, please visit us online at www.feesburgess.com; contact us by e-mail at seminars@feesburgess.com; or by phone at (256) 536-0095.

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SPEAKERS

FEES & BURGESS, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program, please contact us at seminars@feesburgess.com.

NEWSLETTERS

FEES & BURGESS, P.C., also publishes *F&B HR Corner,* focusing on human resource issues; and *F&B SCM Memo,* focusing on the supply chain management industry. To receive any of these e-newsletters, please provide your contact information to newsletters@feesburgess.com.

To remove your name from our mailing list, please contact us at newsletters@feesburgess.com.

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"No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers."