

JOB Law

EMPLOYMENT LAW ISSUES: 2002 IN REVIEW

New Corporate Fraud Statute Prohibits Retaliation

Prompted by recent corporate fraud scandals, President George W. Bush signed the Sarbanes-Oxley Act into law on July 30, 2002.¹ The primary goal of the Sarbanes-Oxley Act is to improve the "accuracy and reliability" of disclosures made by corporations pursuant to securities laws. In addition, the Act provides protection to those who "blow the whistle" on corporate fraud.

The Sarbanes-Oxley Act prohibits officials and employees of publicly traded companies from retaliating against a whistleblower employee who discloses her reasonable belief that her

company is violating federal laws which prohibit securities fraud against shareholders.² A whistleblower who believes her employer has engaged in retaliation may file a complaint against the company with the Secretary of Labor within 90 days of the retaliatory act. In addition to an administrative action, a whistleblower may bring an action in federal district court if the Secretary of Labor fails to render a final decision within 180 days of the filing of the complaint. A whistleblower who successfully prosecutes a claim under the Sarbanes-Oxley Act is entitled to broad relief, including reinstatement, back pay,

attorney fees, and expert witness fees.

In addition to civil remedies, the Sarbanes-Oxley Act provides for possible criminal sanctions (including fines and up to ten years in prison) against anyone, potentially including privately held companies and their employees, who retaliates against a whistleblower.³ As discussed on pages 2 and 3, Minnesota whistleblowers have for many years been protected from retaliation in certain circumstances. The Sarbanes-Oxley Act adds the protection of a federal cause of action and raises the stakes of a whistleblower claim by providing for criminal penalties.

United States Supreme Court: 2002 In Review

Last year, the most significant employment decisions out of the United States Supreme Court addressed the Americans with Disabilities Act ("ADA"), the Federal Arbitration Act ("FAA"), and the Family Medical Leave Act ("FMLA").

• ADA

In *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 122 S. Ct. 681 (2002), the Supreme Court examined the issue of whether a plaintiff is "substantially limited" in a major life activity under the ADA. An

ADA plaintiff is disabled when she can demonstrate that she has a "physical impairment that substantially limits a major life activity," such as performing manual tasks. In *Williams*, the Supreme Court addressed whether a plaintiff suffering from carpal tunnel syndrome and myotendinitis was "substantially limited . . . in the major life activity of performing manual tasks" and therefore disabled. Manual tasks include walking, seeing, and hearing.

Significantly raising the bar

for ADA claims, the Court held that for a plaintiff to be substantially limited in performing manual tasks, she must have an impairment that **"prevents or severely restricts [her] from doing activities that are of central importance to most people's daily lives."** The impairment's impact must also be permanent or long term. According to the Court, the inquiry should not be restricted to whether a person is unable to perform the tasks associated with her specific job, but must

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United States Supreme Court: 2002 In Review

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consider the person's ability to perform important non-work related activities. The Court concluded that the plaintiff was not substantially limited in performing manual tasks in part because she still could "brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house."

- **FAA**

On January 15, 2002, the Supreme Court issued *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 122 S. Ct. 754 (2002), a decision addressing the Federal Arbitration Act. In *Waffle House*, the Court held that a mandatory arbitration clause, signed by an employee, does not affect the EEOC's ability to seek "victim-specific relief," such as backpay, reinstatement, and damages in an action against an employer on behalf of an employee under the ADA. According to the Court, the EEOC is not bound by a mandatory arbitration agreement because once an employee files a charge of discrimination, "the EEOC is in command of the process" and because the EEOC is not a party to the arbitration

agreement. Under this case, therefore, the EEOC has the authority to pursue enforcement actions against employers, even if that employer has a mandatory arbitration agreement with its employees which would prohibit the employees from suing the employer in court. The Court declined to address whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the type of relief the EEOC may seek.

- **FMLA**

On March 19, 2002, the Supreme Court issued *Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002), a decision addressing the Family and Medical Leave Act ("FMLA"). In *Ragsdale*, the Court invalidated a Department of Labor regulation that prohibited employers from counting against the 12 weeks of unpaid leave they must provide under the FMLA, any leave taken by an employee that was not *prospectively* designated as "FMLA leave." The Court concluded that the regulation conflicted with the statute because it required employers to provide additional leave to employees even if the employees had not suffered any harm from the employer's failure to comply with the

regulation's notice requirement. The Court suggested that the FMLA notice requirement might itself be invalid but declined to strike it down.

Ragsdale was a positive development for employers in this area, as it eliminates harsh penalties for an employer's technical error in complying with the notice requirements and removes the disincentive created by the regulation to grant more than the 12 weeks of leave prescribed by the FMLA.

- **Other Cases**

In *Chevron U.S.A. Inc. v. Echazabal*, 122 S. Ct. 2045 (2002), the Supreme Court upheld under the ADA an EEOC regulation permitting an employer to decline to hire an individual with a disability because the job poses a "direct threat" to the individual's health.

In *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002), the Supreme Court held that the ADA does not "ordinarily" require an employer to place a disabled worker in a position when another worker is entitled to that position under the employer's seniority plan.

Minnesota Courts: 2002 In Review

- **Whistleblower Act Expanded**

While the Minnesota employment law landscape remained relatively quiet throughout 2002, early in the year the Minnesota Supreme Court

issued two significant opinions addressing the Minnesota Whistleblower Act, Minn. Stat. §181.932. The Minnesota Whistleblower Act provides that:

[a]n employer shall not discharge, discipline, threaten, otherwise

discriminate against, or penalize an employee . . . because:

- (a) the employee . . . in good faith, reports a violation or suspected

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Minnesota Courts: 2002 In Review

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violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official.

Since the Whistleblower Act was enacted in 1987, the courts have grappled with the issue of whether the Act implicitly requires a plaintiff to base his claim on a reported violation of a law that contravenes a clear mandate of public policy. In *Anderson-Johanningmeier v. Mid-Minn. Women's Center, Inc.*, 637 N.W.2d 270, 277 (Minn. 2002), the Minnesota Supreme Court definitively eliminated the requirement that an employee who reports a violation or suspected violation of law must implicate public policy in order to qualify for protection under the statute. The court reasoned that because the statute does not expressly include a public policy requirement, such a requirement should not be implied. Accordingly, the main requirement of a whistleblower claim now is the employee's good faith belief, which the court believes "serves to limit the nature of actionable claims."

The Minnesota Supreme Court again addressed the Whistleblower Act in February 2002 when it decided *Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn. 2002). In *Abraham*, the court held that employees asserting whistleblower claims have a right to a jury trial so long as they seek only the recovery of money damages. Because such lawsuits are akin to other common law wrongful discharge

claims which have existed since the adoption of the State's constitution, the court reasoned, the plaintiffs had a constitutional right to a trial by jury.

These two decisions could significantly expand the ability of claimants to bring lawsuits under the Whistleblower Act and the potential exposure of employers who are sued in Minnesota. With the elimination of a public policy interest, plaintiffs conceivably could bring a viable whistleblower claim involving trivial or frivolous violations or suspected violations of law. In addition, the *Abraham* decision suggests that plaintiffs seeking only money damages under other state law causes of action that are akin to "tort actions for wrongful discharge" -- such as discrimination and retaliation claims under the state's Human Rights Act -- may also be constitutionally entitled to a jury trial, something which is arguably not available to them right now. At a minimum, the Minnesota Supreme Court's expansive interpretations of the statute ensures a rise in the number of whistleblower claims that will be brought in the coming years.

• Arbitration and Invasion of Privacy

The Minnesota Court of Appeals issued some notable decisions under the Federal Arbitration Act and the common law tort of invasion of privacy last year. In *Alexander v. Minn. Vikings Football Club LLC*, 649 N.W.2d 464, 465-68 (Minn. Ct. App. 2002), the court of appeals affirmed the district court's holding that plaintiffs' request to replace the arbitrator identified in their employment contracts because of

bias failed to state a claim upon which relief can be granted. The court noted that the "Federal Arbitration Act does not provide for pre-award challenges to an arbitrator for bias" and, therefore, that plaintiffs' complaint failed to state a claim. While refusing to remove an arbitrator prior to the arbitration award so long as the purportedly biased arbitrator is disclosed to the contracting parties, the Minnesota Court of Appeals left open the possibility that the validity of an arbitration clause may be subject to challenge prior to the arbitration award.

In *Bodah v. Lakeville Motor Express, Inc.*, 649 N.W.2d 859, 860-61, 867 (Minn. Ct. App. 2002), plaintiffs brought a class action suit for invasion of privacy against a trucking company for disclosing its employees' social security numbers to the managers at sixteen trucking terminals. The district court dismissed the suit on the grounds that the dissemination of social security numbers was a private communication as the recipients were agents of the trucking company. The Minnesota Court of Appeals reversed, holding that social security numbers constitute private facts. The court concluded that the publication of private facts is actionable when it "unreasonabl[y] exposes the [plaintiff] to significant risk of loss under all the circumstances." The party disseminating the information has the burden of proving that it took reasonable steps to safeguard it; the plaintiff then must show widespread dissemination and improper use of the information.

Wage and Hour Litigation On The Rise: Oregon Jury Finds Wal-Mart Guilty of Failing to Pay Overtime Wages

Recently, over 400 present and former Wal-Mart employees brought suit against Wal-Mart, alleging that (1) managers required employees to work after their shifts had ended (for example, by requiring them to perform cleaning duties after employees had punched out for the day) and (2) managers actually *removed* time data from employee time cards.⁴ In addition, the employees claimed that Wal-Mart reprimanded employees who claimed overtime.⁵ On December 19, 2002, after a four-week trial, an Oregon jury agreed, finding that Wal-Mart violated the Fair Labor Standards Act (“FLSA”) by failing to pay some of its Oregon employees for time worked when they were off the clock.⁶ A new jury will determine damages.⁷

Wal-Mart’s failure to pay its employees for time worked “off the clock” is alleged to be a company-wide practice.⁸ According to some Wal-Mart managers around the country, they feel pressure to require employees to work without paying them in order to meet payroll limits established by the company. In addition, other Wal-Mart employees testified that they were pressured to alter time cards by removing overtime entries. Wal-Mart has

previously settled two other lawsuits regarding the payment of overtime wages and has thirty-nine other class-action lawsuits pending against it in 30 states.⁹

Although some of the practices alleged in the Wal-Mart suits constitute obvious violations of the FLSA, not all suits involve intentional misconduct. Claims against employers for the non-payment of overtime wages is a rapidly growing trend in employment law. To limit exposure to such litigation, employers should ensure that their managers and supervisory personnel are complying with the overtime requirements outlined in the FLSA and state wage laws. Simply having a policy that requires employers to pay employees for overtime worked might not be enough. In addition, employers should train managers and supervisory personnel in the laws applicable to overtime pay, as well as consider random audits of overtime practices or other procedures to ensure compliance.

• “Exempt” vs. “Nonexempt” Classifications

In addition to the wave of “off-the-clock” litigation, employers should be aware of the widespread litigation against employers for improperly classifying employees as “exempt” under the FLSA and

state wage laws. The FLSA generally requires employers to pay employees overtime wages for any time worked over forty hours in a given week.¹⁰ This requirement, however, does not apply to “exempt” employees.¹¹ Employees who serve as executives, administrators, or professionals qualify as “exempt” and are therefore not entitled to the payment of overtime wages. The issue giving rise to the increase in wage and hour litigation is whether employees who are classified by their employers as “exempt,” and therefore not earning overtime pay, are actually serving as “non-exempt” employees. For example, in July 2002, Radio Shack settled a class action suit brought by store managers from various California stores for approximately \$29.9 million.¹² The managers contended that Radio Shack improperly designated them as “exempt” employees and, therefore, owed them lost overtime pay. According to the managers, they simply implemented policy handed down from higher levels of the company and spent most of their hours as salesmen, duties inconsistent with their exempt status.

UPCOMING CHANGES TO THE FLSA'S WHITE-COLLAR EXEMPTION RULES¹³

In response to increased FLSA litigation and employer dissatisfaction with the traditional classifications, the Department of Labor ("DOL") is gearing up to propose dramatic changes to the FLSA's white collar exemption regulations in 2003. One proposal would amend the outdated salary basis test, which includes outdated minimum salary requirements for exempt employees. The DOL also will likely propose changes to the white-collar exemption duties test, which provides executive, administrative and professional exemptions if employees perform functions demonstrating their independence, creativity and exercise of discretion. Because these tests are similarly outdated and difficult to apply, the DOL is considering instituting other categories of exemptions and issuing more guidance on the existing categories to make it easier for employers to comply with the FLSA.

FAIR LABOR STANDARDS ACT ("FLSA") QUESTIONS & ANSWERS

Q. Will an employee lose his FLSA exempt status under the salary basis test if his pay is docked for taking sick leave?

A. An exempt employee, who has exhausted his paid leave, can lose his exempt status under the salary basis test if his employer reduces his pay for taking sick leave for less than one full workday. However, the employee will not lose his exempt status if (1) his employer docks his pay for taking sick or disability leave for at least one full workday and (2) the deduction is made in accordance with a bona fide sick leave policy.

In addition, an employer may dock an exempt employee's pay for leave of less than a full day without jeopardizing his exempt status if the leave qualifies as FMLA leave.

Q. When an employee's exempt status is challenged, who has the burden of proving that an employee is, in fact, exempt under the FLSA?

A. An employer currently has the burden of proving that an employee qualifies as exempt under the FLSA. The DOL is considering shifting the burden of proof to the employee.

Q. What kind of damages will an employee recover if an employer violates the FLSA?

A. Generally, an employee is entitled to recover "the amount of unpaid minimum wages, or unpaid overtime compensation" and liquidated damages when she has been aggrieved by an employer's violation of the minimum or maximum wage sections of the FLSA. An employee is also entitled to the recovery of attorney's fees and costs.

Footnotes:

1. Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745.
2. 18 U.S.C. § 1514A.
3. 18 U.S.C. § 1513.
4. Linda Hilsee Coady (Editor, Employment Litigation Reporter), *Jury Finds Wal-Mart Violated Overtime Laws*, at <http://www.andrewsonline.com/topstory.html>; *Court Victory Sweet for Wal-Mart Workers*, at <http://www.cnn.com/2002/US/Northeast/12/20/walmart.suit.ap/index.html> (Dec. 20, 2002).
5. *Court Victory Sweet for Wal-Mart Workers*, at <http://www.cnn.com/2002/US/Northeast/12/20/walmart.suit.ap/index.html> (Dec. 20, 2002).
6. *Jury Finds Wal-Mart Violated Overtime Laws*, at [- Northeast/12/20/walmart.suit.ap/index.html; see also *Thiebes v. Wal-Mart Stores, Inc.*, No 98-902-KI, Jury Verdict; *Court Victory Sweet for Wal-Mart Workers*, at <http://www.andrewsonline.com/topstory.html>.
 7. *Court Victory Sweet for Wal-Mart Workers*, at <http://www.cnn.com/2002/US/Northeast/12/20/walmart.suit.ap/index.html>.
 8. Steven Greenhouse \(The New York Times\), *Suits Say Wal-Mart Forces Workers to Toil Off the Clock*, at <http://www.gofortbragg.com/Walmart.htm> \(June 15, 2002\).
 9. *Court victory sweet for Wal-Mart Workers*, CNN.com, at <http://www.cnn.com/2002/US/Northeast/12/20/walmart.suit.ap/index.html> \(Dec. 20, 2002\).
 10. 29 U.S.C. § 207
 11. 29 U.S.C. § 213
 12. Adam Geller \(Associated Press Writer\),](http://www.cnn.com/2002/US/

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- Workers Wage War on Overtime*, at www.Southcoasttoday.com (August 4, 2002).
13. Address by Eugene Scalia, Solicitor of Labor at the 2002 Annual Meeting of the American Bar Association, Section of Labor and Employment Law, August 12, 2002.

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