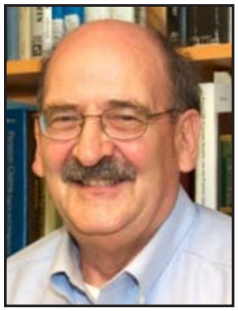
TORT TRIAL & INSURANCE PRACTICE

Committee News

Defending Liberty Pursuing Justice

Fall 2014

Employment Law & Litigation



FLSA PLEADING: YOUR WAY, MY WAY, AND THE MIDDLE WAY

By Robert B. Fitzpatrick, Esq.

In Davis v. Abington Mem'l Hosp., Nos. 12-3514, 3515, 3521, and 3522, 2014 U.S. App. LEXIS 16472, 2014 WL 4198903 (3d Cir. Aug. 26, 2014), the Third Circuit, with Judge Chagares writing for the unanimous panel in an FLSA overtime case, affirmed the district court's dismissal on the ground that plaintiffs' third amended complaint did not state a plausible claim of an overtime violation. This question has "divided courts around the country." Nakahata v. N.Y.-Presbyterian Healthcare Sys., Inc., 723 F.3d 192, 200 (2d Cir. 2013).

At the outset of its analysis, the Third Circuit identifies both the most "lenient" and most "stringent" approaches to pleading standards. The most stringent, in the Court's view, is exemplified by Jones v. Casey's Gen. Stores, 538 F. Supp. 2d 1094, 1102-03 (S.D. Iowa 2008). There, the Judge held that a complaint alleging that the plaintiffs "regularly worked regular time and overtime each week but were not paid regular and overtime wages" was "implausible on its face." (internal quotation marks omitted). See also Villegas

Continued on page 9

IN THIS ISSUE:

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LETTER FROM THE CHAIR

As the 2014-2015 Chair of the TIPS Employment Law and Litigation Committee, I'd like to welcome you to a new year of wonderful opportunities for our committee members. First off, we will be using our LinkedIn Group Account as a ListServ for the Committee. If you haven't already joined, please do so by clicking here. Within days, you should be approved for access and can post relevant information to share with others, but most importantly, you can post questions and receive answers from labor and employment law practitioners all over the country. So, if you are wondering what the law is in another state, all you have to do is ask our members through our LinkedIn account! Also, please follow the workings of our committee on Twitter and Facebook. If you have something you'd like us to post there, please e-mail our Social Media Chair, Kristen Johnson at kristenj@ssbclaw.com. We will try to keep you apprised of all that is going on and of opportunities for your career advancement.

In that vein, we publish a quarterly newsletter. Members are free to submit articles for this publication. So, in addition to receiving legal updates from your colleagues in the know, you can enjoy a national platform on which to publish your own writings. If you've written something for your law firm or another legal publication, please consider sending it into our Newsletter Editor, Brian Bank at brian.bank@rivkin.com for possible re-publication. Please also feel free to contact him if you have an idea for an article you would like to write for the newsletter. In addition, watch for our Annual Survey of Employment Law which will be published in the TIPS Law Journal in March, 2015. If you'd like to write a book to be published by ABA Publishing through TIPS, please contact our Publications Chair, Phil Bauknight at PCBauknight@pbnlaw.com. For those of you who like to give back, Dan Gunning, our Community Involvement Chair will be planning some community service activities for our committee. Our Chair of Labor Relations Issues, Mike Lotito, will keep you apprised of all new developments with respect to labor relations issues.

We will also launch several new membership initiatives which involve raffling off books written by members of our committee and published by TIPS, so be sure to think of colleagues you can invite to join our committee. Feel free to send those names to Sierra Spitzer, this year's Membership Chair, at sierra@ssbclaw.com. Our Diversity Chair this year, Angela Reddock at angela@reddocklaw.com, will be helping us think of creative ways to broaden our membership base. Please help her by recruiting plaintiffs' attorneys and in-house counsel as well as those from other under-represented groups to our committee. We have a lot to offer our members as we are the only national employment law organization that pulls in members from the plaintiffs' and defense bars, as well as in-house counsel and insurance law practitioners while offering easy access to leadership positions and national publication opportunities. If you know law students who would like to get involved, please contact our Law School Liaison and Law Student Recruitment Chair, Nick Foderaro at NikeFoderaro@johnsonkrol.com.

If you have ideas about more ways that we can help you be successful, please feel free to let myself, Beth@BethWhittenbury.com, or our Chair-elect, Shari Berry, know. We are always looking for ways to make your membership pay off for you. Please join our monthly telecoms to get involved in the committee, to find out more about what we do every month and to express interest in a leadership position. We wish you a great year of involvement with our committee. ⚖

All the best,

Beth Whittenbury
Chair, TIPS Employment Law and Litigation Committee

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CASE NOTE: *HARRIS v. QUINN*: THE FUTURE OF MANDATORY AGENCY FEES IS ON SHAKY GROUND AFTER RECENT SUPREME COURT DECISION

By: Shari Berry, Esq. and Shawnnell Brown

The Supreme Court in Harris v. Quinn, 134 S. Ct. 2618 (2014), struck down an Illinois law requiring in-home caregivers paid through Medicaid to pay agency fees to the unions representing them. The Court held that requiring in-home caregivers, who are considered only partial public employees, to financially support union activities, in which they do not participate or support, violated their First Amendment right to free expression and association.

The Court distinguished its prior decision in Abood v. Detroit Bd. of Education., 431 U.S. 209 (1977), which held that public employees who opted out of union association may still be compelled to pay an agency fee to support union activities that benefit all workers. The court in Harris found that in-home caregivers are not considered full-fledged public employees, and therefore Abood was not controlling in this case. The Court reasoned that although the state of Illinois provided the in-home caregivers' wages, the caregivers answer to their individual supervisor and not the state. Additionally, the caregivers do not enjoy the same rights and protections from the union as do state employees.

Ultimately, the Court concluded that none of the interests asserted by the state of Illinois are furthered by requiring an agency-fee. Accordingly, the Court found that the state of Illinois had no justification to impinge on the First Amendment rights of the caregivers. Although the Court expressed strong discomfort with agency-fee provisions, the Court declined to overrule Abood. The decision in Harris signifies a change in how similarly situated public employees may challenge mandatory agency fees. It also supports future potential challenges to abolish the decision in Abood, which could bar public employee unions from collecting agency fees from non-members, including fees that support activities directly concerning non-members.

Shari Berry, Esq. is an in-house counsel with OSF Healthcare Systems in Peoria, Illinois. Shawnnell Brown is a third-year law student at Emory University School of Law.

HOBBY LOBBY: A NARROW DECISION REGARDING THE IMPACT OF BUSINESS OWNERS' RELIGIOUS BELIEFS

By: Nicholas J. Foderaro

Recently, the United States Supreme Court held, in a 5-to-4 ruling, that it is unlawful to require small, closely held corporations to pay for insurance coverage for contraception under the Affordable Care Act. In Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), the Court stated that it was a violation of a federal law protecting religious freedom to require family and/or closely held companies to fund the insurance which provides birth control for female employees when there are alternative means which do not interfere with the religious beliefs of the company.

Hobby Lobby is a nationwide arts and crafts store with approximately 13,000 employees. The stores owners, the Green family, have operated and managed the store based upon their strong Christian beliefs. Notably, the company's owners do not believe in the use of birth control or contraception. Pursuant to the recently passed Affordable Care Act ("ACA"), however, for-profit employers must provide contraception to their female employees.

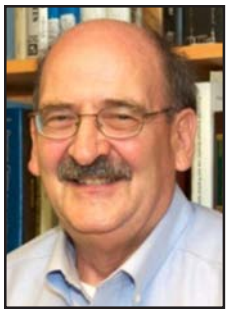
On September 12, 2012, Hobby Lobby filed a federal lawsuit against the Secretary of Health and Human Services. In the suit, Hobby Lobby claimed that the ACA requirement to provide coverage for contraception in their health plan was a violation of the First Amendment Free Exercise Clause and the Religious Freedom Restoration Act of 1993 ("RFRA"). Specifically, in the suit, Hobby Lobby sought a preliminary injunction of the tax penalties assessed, which was denied by the district court. Upon appeal, the U.S. Court of Appeals for the District Court for the Tenth Circuit reversed the district court's decision denying the preliminary injunction. On November 26, 2013, the United States Supreme Court granted certiorari to hear the case.

The Supreme Court narrowed in on the issue of whether the RFRA permitted the United States Department of Health and Human Services to require that closely held corporations provide insurance coverage for contraception, even when the use of contraception violates the company owners' religious values and beliefs.

Justice Alito rendered the opinion of the Supreme Court, holding that the requirement to provide contraception, when company owners found contraception to be against their religious values, was a violation of the RFRA. First, the Supreme Court held that the RFRA was applicable to corporations, not just individuals. Next, the Supreme Court had to determine whether Hobby Lobby, the corporation required to provide the contraceptive coverage, was the least restrictive means of providing employee access to contraception. The Supreme Court reasoned that there is a substantial interest in providing contraception to female employees, but requiring Hobby Lobby to do so would be a substantial burden to Hobby Lobby because the owners of Hobby Lobby find contraception to be against their deeply held religious beliefs. Further, the Supreme Court went on to reason that there are less restrictive means to satisfy the substantial government interest in providing contraception, such as government funded contraception coverage, or other options with private insurance.

In summary, this case issues a narrow ruling that allows closely held, for-profit corporations to be exempt from the ACA requirement which require a closely held corporation to provide contraception – against their religious beliefs – where there is are less restrictive means of advancing the government interest of providing cost free access to contraception.

Nicholas J. Foderaro is a third-year law student at The John Marshall Law School in Chicago, IL.



STATUTE OF LIMITATIONS STARTS RUNNING BEFORE TERMINATION DATE IN CONSTRUCTIVE DISCHARGE

By: Robert B. Fitzpatrick

In Green v. Donahoe, No. 13-1096, 2014 U.S. App. LEXIS 14290, 2014 WL 3703823 (10th Cir. July 28, 2014), a panel of the 10th circuit, Judge Hartz writing, held that a claim for constructive discharge does not accrue at the time when plaintiff resigns. Instead, the claim accrues on the date of the employer's last misconduct. In Green, the plaintiff, a postal employee, agreed to resign his employment on December 16, 2009, but was permitted to use accrued annual and sick leave until March 31, 2010, at which point he could choose either to retire or accept a significantly lower position at a facility some 300 miles distant. Plaintiff filed an informal charge of retaliation with an EEO counselor on January 7, 2010, but did not file a formal charge until February 17, 2010. On February 9, 2010, plaintiff notified his employer that he planned to retire, pursuant to their earlier agreement, effective March 31, 2010. Plaintiff initiated EEO counseling on March 22 and filed another formal charge of retaliation on April 23, alleging constructive discharge for his forced retirement. Plaintiff's eventual lawsuit was dismissed when the district court held that it was untimely because plaintiff had not contacted an EEO counselor about it within 45 days.

In reviewing the lower court's decision, the Tenth Circuit first examined the nature of a constructive discharge claim. The Court explained that "[c]onstructive discharge occurs when an employer unlawfully creates working conditions so intolerable that a reas[nable person in the employee's position would feel forced to resign." Green, 2014 U.S. App. LEXIS 14290 at *19 (quoting Lockheed Martin Corp. v. Admin. Review Bd., 717 F.3d 1121, 1133 (10th Cir. 2013)). The key issue before the court was when the constructive discharge claim accrued. The Court framed its analysis by noting that "[f]or most federal limitations periods, the clock starts running when the plaintiff first knew or should have known of his injury." Green, 2014 U.S. App. LEXIS 14290 at *22 (internal quotations omitted). In the employment context, this generally means that the claim accrues when the "disputed employment practice" occurs. Id. (internal quotations omitted).

The Tenth Circuit, however, found this general rule to be inappropriate in the context of constructive discharge claims. The Tenth Circuit distinguished constructive discharges from other adverse actions, stating "[a] constructive discharge involves both an employee's decision to leave and [the employer's] precipitating conduct." Id. (emphasis in original) (alterations in original) (quotations omitted).

The Tenth Circuit went on to identify the core question for resolution – whether the date of the accrual of plaintiff's constructive discharge claim "can be postponed from the date of the employer's misconduct until the employee quits or announces his future departure." Id. at *22. The Court framed this question as a choice between accrual at the time when the "employee quits or announces his future departure" and when the last "discriminatory act" occurs. As an initial matter, the Court noted that most courts to consider this issue had "no occasion" to choose between these approaches. See, e.g., Jeffery v. City of Nashua, 163 N.H. 683, 48 A.3d 931, 936 (N.H. 2012) (plaintiff unsuccessfully argued that claim accrued on effective date of resignation, not when she gave notice of resignation); Patterson v. Idaho Dept. of Health & Welfare, 151 Idaho 310, 256 P.3d 718, 725 (Idaho 2011) (same); Whye v. City Council, 278 Kan. 458, 102 P.3d 384, 387 (Kan. 2004) (same); Hancock v. Bureau of Nat'l Affairs, Inc., 645 A.2d 588, 590 (D.C. 1994) (same). The Court, however, did identify "several" decisions holding that the claim accrued on the date of the resignation, on the rationale that the resignation was a "distinct discriminatory act." See Flaherty v. Metromail Corp., 235 F.3d 133, 138 (2d Cir. 2000); Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 1111 (9th Cir. 1998); Young v. Nat'l Center for Health Servs. Research, 828 F.2d 235, 237-38 (4th Cir. 1987).

The Court rejected that approach. Declaring that "we cannot endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer", the Court sided with the Seventh and D.C. Circuits in holding that a claim for constructive discharge must be filed such that there is at least one "discriminatory act" by the employer within the statutory limitations period. See Mayers v. Laborers' Health & Safety Fund, 478 F.3d 364, 367, 370, 375 U.S. App. D.C. 134 (D.C. Cir. 2007) (notice of resignation was within limitations period but no discriminatory act of employer was); Davidson v. Ind.-Am. Water Works,

953 F.2d 1058, 1059-60 (7th Cir. 1992) (same). In so holding, the Court reasoned that "delaying accrual past the date of the last discriminatory act and setting it at the date of notice of resignation would run counter to an essential feature of limitations periods by allowing the employee to extend the date of accrual indefinitely." Green, 2014 U.S. App. LEXIS 14290 at *25 to *26.

This leaves us with three distinct approaches to the accrual of constructive discharge claims for limitations purposes:

1) The limitations period runs from the date on which the employee provides notice of her resignation. This is the approach adopted by the Second, Fourth, and Ninth Circuits.

2) The limitations period runs from the date of the final discriminatory act, which cannot be the employee's resignation. This is the approach adopted by the Seventh, Tenth, and D.C. Circuits.

3) The limitations period runs from the date on which the employee actually ceases to work for the employer. This appears to be a minority position, but has been endorsed, for example, by the Court of Appeals for Oregon. See Hernandez-Nolt v. Wash. Cnty., 315 P.3d 428 (Ore. App. 2013). ⚖

Robert B. Fitzpatrick is the principal of the law firm of Robert B. Fitzpatrick, PLLC in Washington, D.C., where he has practiced employment law for over forty years.

CASE NOTE: *HUANG v. CONTINENTAL CASUALTY CO*: EMPLOYER'S FAILURE TO LIST ON-CALL DUTY IN JOB DESCRIPTION DID NOT INVALIDATE IT AS A LEGITIMATE WORK EXPECTATION IN DISCRIMINATION CASE

By: Shari Berry, Esq. and Shawnnell Brown

The Seventh Circuit recently held on-call duty is a legitimate work expectation even though an employer fails to include it in the job description. In Huang v. Cont'l Cas. Co., 754 F.3d 447 (7th Cir. 2014), an Asian American plaintiff asserted race, national origin and retaliation claims under Title VII and Section 1981 against his employer after being terminated for refusing to work on-call duty during the weekend. The trial court granted summary judgment for the employer.

On appeal, plaintiff argued his job description failed to list on-call weekend duty as a requirement. The employer asserted plaintiff failed to meet work expectations by refusing on-call weekend duty. The Seventh Circuit agreed with the employer and found that its failure to memorialize the requirement in the job description did not invalidate it as a legitimate work expectation.

Going further, the Seventh Circuit rejected plaintiff's contention that he met work expectations because he offered a suitable alternative to the on-call weekend duty requirement, i.e., he offered to work in the office on Sundays but refused to carry a pager on Saturday and Sunday. Providing leverage for employers who require employees to work undesirable shifts, the court stated, "although a longing to spend more time with family is understandable, it does not undermine the legitimacy of a work schedule that cuts into family time." The court also found plaintiff failed to identify similarly situated non-Asian or non-Chinese employees who were treated more favorably than plaintiff. Under Haung, an employer is entitled to decide whether an employee is meeting its legitimate work expectations and will not be found liable for terminating an employee who refuses to do so. ⚖

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FLSA PLEADING: YOUR WAY...

Continued from page 1

v. J.P. Morgan Chase & Co., 2009 U.S. Dist. LEXIS 19265, 2009 WL 605833 at *5 (N.D. Cal. Mar. 9, 2009) (granting motion to dismiss where the plaintiff "attempt[ed] to state a claim by reciting that she did not receive properly computed overtime wages . . . because it is not much more informative than an allegation that she was not paid for overtime work in general"); Bailey v. Border Foods, Inc., 2009 U.S. Dist. LEXIS 93378, 2009 WL 3248305 at *2 (D. Minn. Oct. 6, 2009) (granting motion to dismiss where the plaintiff "failed to identify their hourly pay rates, the amount of their per-delivery reimbursements, the amounts generally expended in delivering pizzas, or any fact that would permit the Court to infer that [plaintiffs] actually received less than minimum wage").

The most lenient, by contrast, is characterized by the approach of the federal district court for the District of Maryland in Butler v. DirectSat USA, LLC, 800 F. Supp. 2d 662, 668 (D. Md. 2011). In Butler, Judge Deborah K. Chasanow held that "[w]hile defendants might appreciate having Plaintiffs' estimate of the overtime hours worked at [the pleading stage]," an FLSA complaint will survive dismissal so long as it alleges that the employee worked more than forty hours in a week and did not receive overtime compensation. See also Uribe v. Mainland Nursery, Inc., 2007 U.S. Dist. LEXIS 90984, 2007 WL 4356609 at *3 (E.D.Cal. Dec. 11, 2007) (denying motion to dismiss where plaintiffs alleged they were "non-exempt employees for a wholesaler of plants who have not been paid the applicable overtime wages under the FLSA"); Xavier v. Belfor, USA Group, Inc., 2009 U.S. Dist. LEXIS 11751, 2009 WL 411559 at *5 (E.D. La. Feb. 13, 2009) (denying motion to dismiss where the plaintiff alleged that "they were paid on an hourly basis, that they routinely worked in excess of 40 hours per week, and that they were not paid an overtime premium").

Rather than adopt either the Jones or Butler approaches, the panel stated that it agreed with "the middle-ground approach" adopted by the Second Circuit in Lundy v. Catholic Health Sys. of Long Island, Inc., 711 F.3d 106 (2d Cir. 2013). In that case, Chief Judge Dennis Jacobs, writing for the unanimous panel, stated: "[I]n order to state a plausible FLSA overtime claim, a plaintiff must sufficiently allege [forty] hours of work in a given workweek, as well as some uncompensated time in excess of the [forty] hours." Id. at 114.

Having adopted the Lundy approach, the Third Circuit held that the plaintiffs' allegations in Davis, the case at issue, failed to satisfy the Lundy test. In Davis, the named plaintiffs alleged that they "typically" worked 37.5 hours per week and "occasionally" worked an additional 12.5 hour shift or "slightly longer". Plaintiff also indicated that she "typically" worked during thirty-minute meal breaks, and was not compensated for this work. Plaintiff argued that these allegations were sufficient to plausibly plead that at least some uncompensated work was performed during weeks when the plaintiffs' total work time was more than forty hours.

The Third Circuit disagreed. While noting that the determination whether a plausible claim has been pled is context-specific, the Court found that none of the named plaintiffs had alleged a single workweek in which they worked at least forty hours and also worked uncompensated time in excess of forty hours. Accordingly, the court found the allegations to be insufficient and declined to provide plaintiffs with an opportunity to file a fourth amended complaint. In rejecting plaintiffs' pleadings, the Court cited and quoted at length from Lundy and an earlier Second Circuit decision, Nakahata v. N.Y. Presbyterian Healthcare Sys., Inc., 723 F.3d 192, 200 (2d Cir. 2013). In Nakahata the Court held that "[p]laintiffs must prove sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than forty hours in a given week."

The Court then went on to state that it was not holding that a plaintiff must identify the exact date(s) and time(s) that s/he worked overtime. The Court stated: "for instance, a plaintiff's claim that she 'typically' worked forty hours per week, worked extra hours during such a forty-hour week, and was not compensated for extra hours beyond forty hours he or she worked during one of those forty hour weeks would suffice" (footnote omitted). Finally, on the pleading issue, the Court emphasized that it read Lundy to hold only that "a plaintiff must connect the dots between bare allegations of a 'typical' 'forty-hour workweek' and bare allegations of work completed outside of regularly scheduled shifts, so that the allegations concerning a typical forty-hour week include an assertion that the employee worked additional hours during such a week, and we believe that this middle-ground approach is the correct one." ⚖

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2014 - 2015 TIPS CALENDAR

October 2014

15-19 **TIPS Section Fall Leadership Meeting** — **Meritage Resort and Spa in Napa Valley, Napa, CA**
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Speaker Contact: Donald Quarles – 312/988-5708

23-24 **2014 Aviation Litigation Program** — **Ritz Carlton Hotel, Washington, DC**
Contact: Donald Quarles – 312/988-5708

November 2014

5-7 **FSLC & FLA Fall Meeting** — **Ritz Carlton Hotel, Philadelphia, PA**
Contact: Donald Quarles – 312/988-5708

December 2014

8 **Member's Monday** — **Free Teleconference**
Contact: Ninah F. Moore – 312/988-5498

January 2015

15-17 **LHPR Midwinter Symposium** — **Loews Ventana Canyon, Tucson, AZ**
Contact: Ninah F. Moore – 312/988-5498

21-23 **Fidelity & Surety Committee Midwinter Mtg** — **Waldorf Astoria Hotel, New York, NY**
Contact: Felisha A. Stewart – 312/988-5672

February 2015

5-8 **ABA Midyear Meeting** — **Hilton of the Americas, Houston, TX**
Contact: Felisha A. Stewart – 312/988-5672

19 -21 **Insurance Coverage Litigation Midyear Mtg** — **Arizona Biltmore, Phoenix, AZ**
Contact: Ninah F. Moore – 312/988-5498

March 2015

11- 13 **Transportation Megaconference** — **Sheraton Hotel, New Orleans, LA**
Contact: Donald Quarles – 312/988-5708

April 2015

1 **TIPS/ABOTA National Trial Academy** — **National Judicial College, Reno, NV**
Contact: Donald Quarles – 312/988-5708