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Does job title exempt an employee from overtime pay?

That was the question before the Eleventh Circuit in *Rodriguez v. Farm Stores Grocery Inc.* A grocery chain's laid-off "store managers" alleged that they were entitled to overtime pay under the Fair Labor Standards Act (FLSA) because their primary duties weren't managerial.

Managers and sales associates

The grocery chain employed between three and six workers in each of its 103 stores. The chain gave the title "store manager" to one worker at each store and paid him or her a weekly salary and called the others "sales associates" and paid them hourly wages.

When the chain laid off 26 store managers, they alleged that FLSA entitled them to back pay for time-and-a-half for each hour they'd worked beyond 40 hours weekly. The chain countered that the store managers were exempt from overtime pay because they fell within the act's "executive exemption." (See "Overtime exemptions" at right.)

The key issues

The jury found that the store managers didn't fall within FLSA's executive exemption and collectively awarded them $297,000.

On appeal, the key issue was whether the store managers' *primary* duties were managerial. The Department of Labor rule sets out five factors to use in determining whether an employee's primary duties are managerial:

1. The amount of time spent performing managerial duties,
2. The relative importance of an employee's managerial and nonmanagerial duties,
3. The employee's frequency in exercising discretionary powers,
4. The employee's relative freedom from supervision, and
5. The relationship between the purportedly exempt employee's wages and the wages paid to other employees performing similar nonexempt work.

Overtime exemptions

Under the Fair Labor Standards Act (FLSA), employees are exempt from overtime if they 1) are salaried, 2) earn at least $455 weekly, and 3) are employed as a bona fide executive, administrative, professional or outside-sales employee.

In general, employees are salaried if they receive a predetermined amount of compensation each pay period, regardless of variations in work quality or quantity. They must receive their full salary for any week in which they perform any work — regardless of the number of days or hours worked — except when absent for one full day or more for personal reasons other than sickness or disability.

To qualify as an "executive," an employee must meet these three requirements:

Managing. **The employee's *primary* duty must be managing an enterprise or its customarily recognized department or subdivision. Generally, "management" includes activities such as interviewing, selecting, evaluating, directing, disciplining, and training employees; setting their rates of pay and hours of work; handling their complaints; and apportioning the work among them.**

Supervising. **The employee must customarily and regularly direct the work of at least two other full-time employees or their equivalent.**

Hiring and firing. **The employee must have the authority to hire or fire other employees, or the employee's recommendations as to the hiring, firing, or any other change of employee status must be given particular weight.**

Conflicting evidence

At trial, the chain introduced evidence showing that the managers interviewed, hired, trained, evaluated and disciplined employees; maintained store inventory; and were relatively free from supervision of their daily activities. The chain's expert witness testified that — based on his review of the store managers' job descriptions — their primary duties were managerial.

But the store managers testified that their primary duties were sales related — not managerial. They spent almost no time performing managerial tasks, lacked real authority over their stores and employees, and had to consult their district managers before making managerial decisions. The expert witness for the store managers reviewed their affidavits and job descriptions and testified that their primary duties weren't managerial.

Jury's resolution reasonable

The Eleventh Circuit agreed that the chain had presented abundant documentary evidence and testimony at trial to indicate that the store managers' primary duties were managerial. And the court noted that it would have affirmed if the jury had returned a verdict in the chain's favor.

But the issue wasn't whether enough evidence had been presented for the chain to have won, but rather whether the evidence was sufficient for it to have lost. The court explained that it had to leave intact a jury result when

evidence existed from which the jury could reasonably have resolved the matter the way it did.

So the court concluded that enough evidence had been presented for the jury to reasonably find that the managers' primary duties were not managerial.

Employers, beware

The lesson for employers is that merely calling employees "managers" doesn't establish exempt status unless their actual primary duties fall under FLSA's definition of "managerial." ♦

Sexual harassment suit hinges on physician's employment status

The question before the Second Circuit in *Salamon v. Our Lady of Victory Hospital* was whether a specialist was a hospital employee eligible to sue for harassment under Title VII or an ineligible independent contractor, as the hospital alleged.

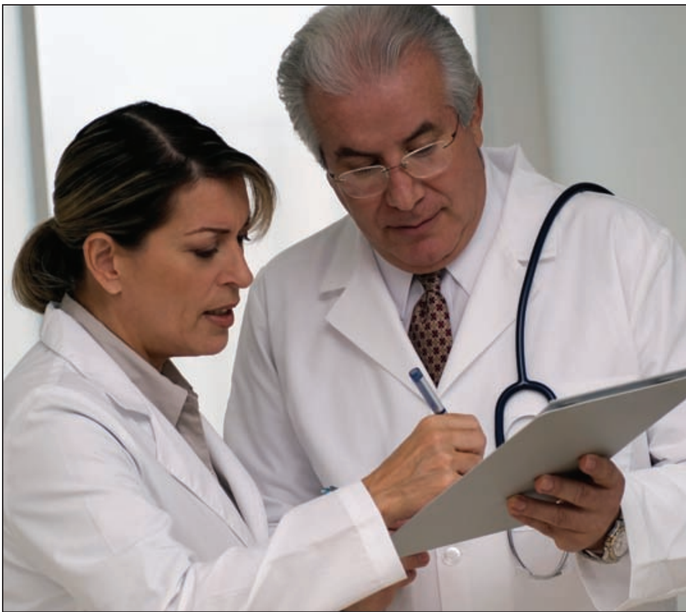
Staff privileges granted

A hospital extended full medical staff privileges to a gastroenterologist, subjecting her to the same duties as all other staff physicians at the hospital. She wasn't paid a salary but rather billed patients (or their insurers) directly for her services. The hospital billed them for use of its facilities.

The specialist set her own hours, maintained her own patient load and was free to have staff privileges at other hospitals. But she had to use the hospital's nursing and support staff when treating her patients at the hospital, comply with staff rules and hospital bylaws, attend quarterly staff meetings, and participate in the hospital's quality-assurance program.

Sexual harassment alleged

The specialist accused her supervisor (another doctor who was a hospital administrator) of sexually harassing her by making inappropriate comments and unwanted advances.



She alleged that, when she complained, he retaliated against her with undeserved negative performance reviews that seriously damaged her career prospects.

The specialist sued the hospital for sexual harassment in violation of Title VII of the 1964 Civil Rights Act. The trial court ruled for the hospital without a trial on grounds that, because the fact was undisputed that she wasn't an employee, she was ineligible for Title VII protection. The physician appealed.

A circular definition

The Second Circuit first noted that Title VII applies only to "employees," but that it defines an employee circularly as a person "employed by an employer." The Supreme Court held in *Nationwide Mutual v. Darden* that, whenever statutes fail to specifically define "employee," courts are to define it under the common law of agency rather than under individual state law.

Courts must conduct a fact-specific analysis based on 13 factors articulated by the Supreme Court in *Community for Creative Non-Violence v. Reid*:

1. The hiring party's right to control the manner and means used to accomplish the product,
2. The skill required,
3. The source of the instrumentalities and tools,
4. The work location,
5. The duration of the relationship between the parties,
6. Whether the hiring party has the right to assign additional projects to the hired party,
7. The extent of the hired party's discretion over when and how long to work,
8. The payment method,
9. The hired party's role in hiring and paying assistants,
10. Whether the work is part of the hiring party's regular business,
11. Whether the hiring party is in business,
12. The provision of employee benefits, and
13. The hired party's tax treatment.

In the context of antidiscrimination cases, courts "place special weight on the extent to which the hiring party controls the 'manner and means' by which the worker completes" assigned tasks.

Control is key

The Second Circuit noted that the most important factor in determining the existence of an employment relationship is the employer's "control or right of control" that "characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor." The court explained that the issue wasn't merely the right to dictate the outcome of the work, but the right to control the "manner and means" by which the hiree accomplishes that outcome.

Applying this standard, the Second Circuit found that the hospital:

- Chose administrators to supervise the specialist,
- Substantially controlled not only her practice's treatment outcomes but also details and methods of her work,
- Required her to perform some procedures and controlled the timing of others, and
- Affected her choices about which medications to prescribe — not in the interest of medical judgment but to maximize hospital profit.

Moreover, the specialist alleged that her supervisors' control over her practice wasn't intermittent but continuous, not

merely for negative medical outcomes but also for "variations" from recommended procedures.

The Second Circuit concluded that the specialist had demonstrated a genuine factual conflict regarding the degree of control the hospital exercised over her work. So the court reinstated the suit and sent it back to the lower court for trial.

The lesson for employers

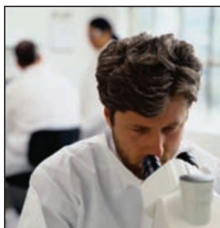
The significance of this case is that even a person not labeled an "employee" may be held to be an employee under Title VII and other statutes. Before treating a worker as an "independent contractor," analyze applicable law to determine whether the worker is an employee or independent contractor. ♦

Employer needn't provide Sabbath observer's preferred accommodation

In *EEOC v. Firestone Fibers*, the Fourth Circuit found that an employer had reasonably accommodated the religious beliefs of a worker who was unable to work on Saturdays and religious holidays.

Reassignment creates conflict

After seven years on the job, an employee who worked as a laboratory floater joined a church that forbade him from working on his Sabbath (from sundown on Friday to sundown on Saturday) and on 14 religious holidays. This presented no conflicts because floaters weren't scheduled to work during the Sabbath and could take vacation days for religious holidays.



But after a series of layoffs, an employee with more seniority exercised his right under the collective bargaining agreement (CBA) and bumped the floater from his position. He was reassigned as a lab technician with a new shift that required Sabbath work.

No further accommodations

The technician asked for a shift change, but this wasn't possible without violating the CBA. Also, he lacked the seniority and skills to be assigned a different job. The employer couldn't afford to not cover his shift on his Sabbaths and, after a week's consideration, informed him that it couldn't further accommodate him.

The employer fired the employee for excessive absenteeism. He filed a charge of religious discrimination with the EEOC, which filed suit. The trial court ruled for Firestone without a trial, and the employee appealed.

Burden of proof on employer

The Fourth Circuit noted that, when an employee establishes a prima facie case of religious discrimination, as the technician here did, the burden shifts to the employer to demonstrate that it either:

1. Reasonably accommodated the plaintiff's religious observances, *or*

2. Couldn't accommodate his beliefs without incurring an undue hardship.

Under the statute, any reasonable employer accommodation suffices to meet the accommodation obligation, and the employer needn't provide an employee's preferred accommodation. The court also emphasized that religion doesn't exist in a vacuum in the workplace. Rather, it coexists with secular arrangements such as collective bargaining agreements and the marketplace.

4 accommodations

The Fourth Circuit explained that the employer had offered the employee four accommodations provided to all employees:

1. The employer's seniority-based bidding system for working shifts constituted a neutral way of minimizing the times that employees had to work when they preferred not to.

2. The governing CBA gave each employee 15 eight-hour vacation days and three floating holidays. The EEOC Guidelines on Discrimination Because of Religion highlights the use of flexible scheduling — such as "floating or optional holidays" — as one "means of providing reasonable accommodation."

3. The employer allowed its employees to swap shifts up to twice per quarter, for a total of eight times annually, another means of reasonable accommodation described by the EEOC Guidelines.

4. The employer's company-attendance policy provided all employees with 60 hours of unpaid leave. This accommodation was commonly referred to as the "no fault" attendance policy because employees could take unpaid leave for any reason. This flexible, nonrestrictive attendance policy represented a significant accommodation.

The employer also specifically tailored two accommodations just for this employee: It allowed him to take more half-day vacations than the CBA allowed and reviewed shift schedules weekly in an effort to move shifts to accommodate him.

In light of these accommodations, the Fourth Circuit affirmed the trial court's ruling and held that "no reasonable juror could conclude that" the employer had failed to reasonably accommodate the employee's religious observances.

Employers have flexibility

This opinion demonstrates how much flexibility employers have in responding to accommodation requests. Employees lack the right to dictate any particular accommodation. What is ultimately held to be reasonable depends on the facts in each case. ♦

Diabetes and the ADA

In *Robbins v. WXIX Raycom Media*, the court had to decide whether an employee's Type II diabetes interfered with the major life activity of eating, qualifying her as disabled under the Americans with Disabilities Act (ADA).

The diagnosis

A traffic manager at a television station oversaw a staff of 40 who were responsible for airing commercials at the correct times. After she was diagnosed with Type II diabetes, she informed her boss and asked whether some of her duties could be eliminated or given to other employees so that she could reduce her hours. He not only failed to respond to her repeated requests over the next several months, but twice *added* to her duties.

The manager resigned and sued for discrimination on the basis of disability.

The plaintiff alleged that her Type II diabetes was a physical impairment that substantially limited her in the major life activity of eating.

The employer filed a motion for a ruling in its favor without a trial on grounds that material facts weren't in dispute and the employer was entitled to judgment as a matter of law. The trial court denied the motion, ruling that a trial was necessary to establish the facts.

Qualifying under the ADA

First, the court noted that plaintiffs qualify as disabled under the ADA if they:

1. Have a physical or mental impairment that "substantially limits" at least one "major life activity,"

2. Have a record of such impairment, or

3. Are regarded as having such impairment.

EEOC rules interpreting the ADA define "substantially limits" as being unable to perform a major life activity that the average person in the general population can perform or being "significantly restricted" in performing a particular major life activity as compared to how the average person in the general population can perform that same major life activity.

No dispute on physical impairment

The manager alleged that her Type II diabetes was a physical impairment that substantially limited her in the major life activity of eating.

The employer didn't dispute that her disease constituted a "physical impairment" within the meaning of the ADA, nor did it dispute that eating is a major life activity. Rather, the employer contended that her diabetes didn't "substantially limit" her eating and that she was less "limited" by it than she had been by her previous Weight Watchers diet.

The employer also maintained that what her doctor told her to do to maintain a healthful lifestyle (eating healthy foods in moderate portions and exercising) was the same before and after her diagnosis and didn't differ from what is prescribed to the general population for weight control and general good health.

Finally, the employer noted that she wasn't insulin dependent — unlike other plaintiffs who had succeeded on disability claims based on diabetes.

Evidence of restrictions

The court cited the Supreme Court's ruling in *Toyota Motor Mfg. v. Williams* that "substantially limited" should be "interpreted strictly to create a demanding standard for qualifying as disabled." So the court here held that the manager couldn't rely solely on her diagnosis to establish a substantial limitation.

But the manager had presented evidence as to her eating restrictions. Specifically, she had to check her blood sugar exactly two hours after she began a meal and avoid foods that caused it to rise too high. She had to eat three meals a day at the same time each day, with regular snacks between meals to maintain consistent blood sugar.

In addition, when her blood sugar dropped too low, it caused headache, shaking, profuse sweating, nausea and anxiety. And when her blood sugar rose too high, she felt ill and had to stop what she was doing until her system adjusted.

Diabetes and other major life activities

The Sixth Circuit in *McPherson v. Federal Express* held that diabetes wasn't a disability under the Americans with Disabilities Act (ADA). The plaintiff was fired for missing work while undergoing treatment for diabetes and failing to properly document his need for medical leave.

The trial court threw out the suit on the ground that his diabetes didn't substantially limit a major life activity and thus wasn't a disability under the ADA. (See main article.) The plaintiff appealed, alleging that his diabetes substantially limited his abilities to see and to care for himself.

The Sixth Circuit found that the plaintiff's having to regularly check his blood sugar and see his doctor didn't establish that he was substantially limited in his ability to see or to care for himself. Furthermore, though he had previously had trouble seeing, he wasn't substantially limited in his ability to see, because his vision had been improving, and he didn't suffer from any permanent eye damage.

Nor was he substantially limited in his ability to care for himself, despite testimony about eye or nerve damage, neuropathy in lower extremities, and aches and pains in his legs. And he had failed to assert that taking insulin shots was substantially limiting. Finally, nothing in the record supported a connection between his diabetes and a substantial limitation in his ability to see or care for himself.

So the court concluded that genuine issues of material fact existed as to whether the manager was substantially limited in her ability to eat so as to make her disabled for ADA purposes.

Avoid making assumptions

Determining whether an employee is disabled under the ADA requires a complex analysis and review of the applicable definitions in the statute and case law. ♦

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MERITAS LAW FIRMS WORLDWIDE

Abbott Nicholson Attorneys Named Michigan Super Lawyers

Esshaki, Gilbride, Quilter, Weller, Youngblood and Weikert Receive Prestigious Designation

Detroit law firm Abbott Nicholson, P.C. announced that attorneys Gene Esshaki, William Gilbride, Thomas Quilter, Robert Weller and John Youngblood were named "Michigan Super Lawyers 2008," and Michael Weikert was named a "Michigan Super Lawyers Rising Star 2008."

The Super Lawyer designation is awarded to outstanding Michigan attorneys. This is the third year Super Lawyers magazine has conducted a review in Michigan and those named to the list represent only five percent of the state's licensed practitioners. Michigan Super Lawyers rates individual lawyers based on an annual statewide survey of all lawyers who have been in practice for at least five years, independent research and a peer review by practice area.

Gene Esshaki was recognized for his work in the area of alternative dispute resolution. A founding shareholder of the firm, Esshaki specializes in business and corporate law, complex commercial litigation and alternative dispute resolution. Esshaki was named a Super Lawyer in 2007 as well.

William Gilbride is the firm's managing shareholder and chief operating officer. He was recognized by Michigan Super Lawyers for his expertise in alternative dispute resolution. More broadly, Gilbride is a business lawyer whose primary areas of practice include representing business interests in the areas of contracts, business and corporate law, dispute resolution, real estate, zoning and land use law. He is also a former chairman of the firm's litigation section.

Thomas Quilter is a founding shareholder of the firm. His primary areas of expertise include business planning, corporate law and estate planning for wealthy individuals and business owners and he is recognized by Michigan Super Lawyers in the area of business/corporate. Quilter was formerly a member of the firm's board of directors and chairperson of the firm's business section. Quilter was also named a 2007 Super Lawyer.

Robert Weller was recognized for his work in general litigation. With over 28 years of experience, Weller is a member of the Abbott Nicholson's board of directors, and co-chairs the firm's auto dealer practice group. He concentrates on commercial litigation and business counseling, with an emphasis on automobile dealer law. Weller, along with auto dealer practice co-chair John Youngblood, leads the firm's representation of a number of retail motor vehicle dealerships and their affiliated dealer advertising associations.

John Youngblood has practiced law with Abbott Nicholson since 1979 and has over 35 years of practice experience. He was recognized by Michigan Super Lawyers for his expertise in the area of franchise/dealership law. Youngblood co-chairs the firm's auto dealer practice group, is a member of the corporate and labor sections, and is a member of the Abbott Nicholson's board of directors.

Michael Weikert was named a "Michigan Super Lawyers Rising Star 2008." According to Super Lawyers, no more than 2.5 percent of lawyers are named to the Rising Star list. Weikert is a shareholder with the firm and is a member of the auto dealer and litigation practice groups.

"It is an honor to have such a high percentage of our attorneys named to the Michigan Super Lawyers list," said Gilbride. "This is a testament to the deep knowledge and high level service Abbott Nicholson provides to its clients."

Abbott Nicholson, P.C. is a full service, Detroit-based, corporate law firm. It specializes in solving the legal, tax, and business issues confronting corporations, public entities, entrepreneurs, and individuals. It is a member of Meritas, a global alliance of more than 170 commercial law firms located in over 60 countries. Abbott Nicholson is the only law firm in southeast Michigan that is a member. Members are ranked among the top firms in most cities. For more information, visit www.abbottnicholson.com.

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