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Sam J. Smith[1]
Marguerite M. Longoria[2]
Burr & Smith, LLP
442 W. Kennedy Blvd., Suite 300
Tampa, FL 33606
Tel: (813) 253-2010
Fax: (813) 254-8391
ssmith@burrandsmithlaw.com
mlongoria@burrandsmithlaw.com
www.burrandsmithlaw.com

Burr & Smith specializes in the practice of complex class, collective action and multi-party litigation in the fields of wage and hour law, employment discrimination and civil rights.

A. INTRODUCTION

This paper will supplement the FLSA Basic Outline by focusing on recent developments and issues which have arisen in the courts involving retaliation, record keeping, calculating overtime and payments to tipped employees.

B. RETALIATION

Section 215(a)(3) of the FLSA, in pertinent part, provides that (a)… it shall be unlawful for any person … (3) to discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on any industry committee; …"

1. Covered Plaintiffs

The jurisdictional qualifiers to the word "employees" which are contained in §§ 206 and 207 of the FLSA are not included in the language of § 215(a)(3). In Wirtz v. Ross Packaging Co., 367 F.2d 549, 550 (5th Cir. 1966), the Fifth Circuit, in a case predating the institution of the enterprise coverage of the FLSA based upon dollar volume, held that neither the employee nor his employer need be engaged in activities covered by the Act's wage and hour provisions in order for the strictures against discriminatory discharge to be invoked. The court stated that unlike the Act's wage and hour provisions, which provide coverage only to an employee "engaged in commerce or

[1] Sam J. Smith is the managing partner of Burr & Smith, LLP.
[2] Marguerite M. Longoria is a partner at Burr & Smith, LLP.

the production of goods for commerce," the retaliation provisions protect "any employee" and proscribe the behavior of "any person." Id. at 550.

The protections afforded under § 215(a)(3) of the FLSA are also properly interpreted to apply to both citizens and aliens who are employed by an employer, and if aliens, whether documented or not. Contreras v. Corinthian Vigor Insurance, 25 F.Supp.2d 1053 (N.D. Cal. 1998). Former employees are also protected against retaliation under § 215(a)(3). Contreras v. Corinthian Vigor Insurance Brokerage, Inc., 103 F.Supp.2d 1180 (N.D. Cal. 2000).

2. Covered Defendants

Section 215(a)(3) provides that it is unlawful for "any person" to engage in retaliatory conduct. Following the reasoning in Wirtz, in Sapperstein v. Hagar, 188 F.3d 852, 854 (7th Cir. 1999), the Seventh Circuit held that the jurisdictional annual dollar volume of sales for an employer under the FLSA do not apply to "a person" under § 215(a)(3). The court stated that the prohibitions of § 215(a)(3) extend to "any person" and that, accordingly, they extend beyond the covered employers to whom the substantive provisions of §§ 206 and 207 apply. Id. at 856.

An interesting case has arisen out of the Southern District of New York which involved a small grocery whose volume of gross sales did not reach the jurisdictional amount. In Lamont v. Frank Soup Bowl, Inc., the district court stated that an interpretation of § 215(a)(3) which fails to apply the jurisdictional requirements for actions under §§ 206 and 207 of the FLSA "divorces the anti-retaliation provision from any basis for the exercise of regulatory power under the Commerce Clause and would extend the reach of the statute to purely intrastate employment which has no affect on interstate commerce. 2001 U.S. Dist. LEXIS 6289, *14 (S.D.N.Y. May 16, 2001). The court observed that in Sapperstein, there was some evidence of interstate commerce based upon the possibility the employer met the jurisdictional requirement, and in Wirtz, the court had subject matter jurisdiction and one of the joint employers was involved in interstate commerce. However, where the employer indisputably failed to meet the jurisdictional prerequisites of the Act, the Lamont court held that the employer was not subject to the FLSA anti-retaliation provision.

3. Protected Conduct

The majority of Circuits recognize an employee's complaint or informal assertion of rights in the workplace to be protected conduct under the FLSA. See Lambert v. Ackerley, 180 F.3d 997, 1003 (9th Cir. 1999)(citing cases). It is not a requirement that the conduct an employee opposes actually be unlawful. See, e.g., Sapperstein v. Hager, 188 F.3d at 857. However, the Second Circuit has adopted the view that informal complaints to an employer do not meet the Act's requirements. Nicolaou v. Horizon Media, Inc, 402 F.3d 325 (2d Cir. 2005). In Nicolaou, the plaintiff was discharged after reporting to her employer that its pension plan was underfunded. The court held that Sections 15 and 16 of the FLSA did not make it unlawful for an employer to retaliate

against an employee for bringing internal complaints, instead it only protected formal complaints to a regulatory agency.

Similarly, in the absence of a controlling opinion on this issue in the Fifth Circuit, in Dronet v. Lafarge Corp., 2001 U.S. Dist. LEXIS 8565, 10 (E.D. La. June 20, 2001), a federal district court in the Eastern District of Louisiana held that a truck driver's informal complaints to management regarding compensation were not protected activity.

Section 215(a)(3) extends its protections to a person who "has testified or is about to testify" in a proceeding under or related to the FLSA. However, the Fourth Circuit has held that the phrase "about to testify" does not include an individual who experiences retaliation based upon an intention to testify in a proceeding that is anticipated, but not actually pending or proceeding. Ball v. Memphis Bar-B-Q Co., 228 F.3d 360 (4th Cir. 2000). In Ball, the plaintiff filed a lawsuit alleging that his discharge was retaliatory in violation of the FLSA in that he was "about to testify" in "a proceeding under or related to the Act." The plaintiff told the company president that if he were deposed in a yet-to-be-filed lawsuit by another employee that he would not testify to the version of events suggested by the president. Id. at 362. The Fourth Circuit stated that because Ball did not make a complaint against the employer, but merely communicated with the president about the complaint of another employee, that he had correctly filed under the "about to testify" rather than the "complaint" provision of § 215(a)(3). Id. at 363. However, the court held that his conduct was not covered by the Act because his comment only described how he would testify *if* he was called to testify in the anticipated lawsuit. Id. at 364.

4. Pretext Cases

Once an employer articulates legitimate non-retaliatory reasons for discharging an employee, the burden is on the employee to show that the employer's articulated reason are nothing more than a "pretext" for unlawful retaliation. An employee will not meet this burden by simply denying that he or she did that the acts the employer articulated. Grey v. City of Oak Grove, 396 F. 3d 1031, 1035 (8th Cir. 2005). In Grey, the Eighth Circuit affirmed summary judgment to dismiss the plaintiff's retaliation action because there was no sufficient evidence to create a genuine issue of material fact on the question of whether defendant's reasons for discharge were a pretext for retaliation. Id. The plaintiff, a city police officer, sought overtime compensation for taking care of a city police dog at home. Id. at 1032. The plaintiff filed a lawsuit for the overtime and the case was settled. Id. A few months later, the defendant discharged the plaintiff for violating city personnel and police department policies. Id. at 1033. The court assumed a prima facie case of retaliation against the defendant but acknowledged that the plaintiff needed to present sufficient evidence to create a genuine issue of material fact as to the question of whether defendant's discharge was in retaliation for the FLSA claim. Id. at 1035. The plaintiff simply denied doing the acts he was accused of but the court explained that this evidence, without more, was insufficient to raise an issue of fact whether the defendant fabricated the charges. Id. In addition, the court noted that approximately a year passed between the initial submission of the FLSA suit and the defendant's decision to terminate

the plaintiff, which weakened the inference that the reasons for discharge were pretext. Id.

Even if there is close proximity between the protected activity and the adverse employment action, courts will refuse to find a casual connection between the two if there is sufficient evidence to prove that the employer contemplated the adverse action prior to the protected activity. Cichon v. Exelon Generation Co., 401 F.3d 803, 811 (7th Cir. 2005). In Cichon, the plaintiff was removed from his supervisory position just within a month after filing a FLSA claim for overtime compensation. Id. at 807. However, the Seventh Circuit held that no casual connection existed because the record clearly established that the defendant had contemplated demoting the plaintiff due to unsatisfactory performance well before it learned that the plaintiff filed an FLSA overtime compensation lawsuit. Id. at 812. The court explained that employers do not need to suspend their previously planned actions upon learning that an FLSA suit has been filed. Id. at 811.

4. Remedies

a) Preliminary Injunctive Relief

In Bailey v. Gulf Coast Transportation, Inc., 139 F. Supp.2d 1358 (M.D. Fla. 2001), a group of taxi drivers sued Gulf Coast for minimum wage and overtime alleging they were misclassified as independent contractors. Immediately thereafter, Gulf Coast terminated all the drivers who had filed consents to join with the court. Id. The plaintiffs then amended their complaint to allege retaliatory discharge, seeking reinstatement through a preliminary injunction. Id. The district court held that it did not have authority under the FLSA retaliation provisions to provide injunctive relief to a private litigant because the right to seek injunctive relief belongs exclusively to the Secretary of Labor. Id. at 1363.

The Eleventh Circuit reversed the district judge's determination that it could not grant a preliminary injunction to a private litigant. Bailey v. Gulf Coast Transportation, Inc., 280 F.3d 1333 (11th Cir. 2002). The Eleventh Circuit reasoned that the retaliation provision of § 216(b) is broader than the minimum wage and overtime provisions at §§ 206 and 207. Unlike the minimum wage and overtime provisions, which do not provide for a private litigant to seek injunctive relief, the court held that the plain language of the retaliation provision of § 216(b), which provides a private right of action to employees to seek legal or equitable relief for an employer's violation of the § 215(a)(3) retaliation protections, mandated a finding that a private litigant may seek injunctive relief, including a preliminary injunction and reinstatement. The court also rejected the defendants' argument that § 216(b) does not allow for injunctive relief unless the lawsuit concludes with a finding of liability. The court concluded that because § 216(b) states that the relief available includes "*without limitation* employment, reinstatement, [and] promotion," it could not find that it is a "necessary and inescapable inference" that Congress meant to restrict courts from issuing preliminary injunctions to preserve the *status quo* during the pendency of the lawsuit. Id. at 1337 (emphasis in original).

b) Compensatory Damages

In Travis v. Gary Community Mental Health Center, Inc., 921 F.2d 108, 112 (7th Cir. 1990), the Seventh Circuit held that emotional distress damages are available for a retaliation claim under Section 215(a)(3). In Lambert v. Ackerley, 180 F.3d 997 (9th Cir. 1999), the Ninth Circuit held that an award of $75,000 in emotional distress damages to each of six ticket sales employees who were terminated in retaliation for protected conduct was not excessive.

c) Punitive Damages

A jury's award of punitive damages, without an underlying compensatory damage award, was upheld by the Seventh Circuit in Shea v. Galaxie Lumber & Construction Co., 152 F.3d 729 (7th Cir. 1998). In so doing, Shea was following precedent set by Travis v. Gary Community Mental Health Center, Inc., 921 F.2d 108, 111-12 (7th Cir. 1990), in which the Seventh Circuit construed the legal and equitable relief afforded under § 216(b) to include all damages awarded at common law, including punitive damages. In Lambert v. Ackerley, 180 F.3d 997, 1011 (9th Cir. 1999), the Ninth Circuit upheld a punitive damage award that exceeded $4 million to six plaintiffs who prevailed on a wrongful discharge retaliation claim. The court noted that it found the Seventh Circuit's reasoning in Travis to be persuasive, but declined to rule on the issue of whether punitive damages are available under Section 215(a)(3) of the FLSA because the defendants waived their argument that the FLSA retaliation provision did not provide for retaliation damages. In Snapp v. Unlimited Concepts, Inc., 208 F.3d 928 (11th Cir. 2000), cert. denied, 532 U.S. 975 (2001), the Eleventh Circuit held that punitive damages are not available under Section 216(b) because it found that all of the relief provided under Section 216(b) is compensatory in nature.

d) Liquidated Damages

The FLSA directs the awarding of liquidated damages in an amount equal to the plaintiff's actual damages except that a court can, in its "sound discretion" excuse the defendant from paying all or any portion of the liquidated damages provided in Section 16(b). In Brown v. Pizza Hut of America, Inc., 1997 U.S. App. LEXIS 11945 (10th Cir. 1997), the Tenth Circuit affirmed a district court award of amount of liquidated damages equal to the jury's unpaid overtime award plus the back pay awarded under Section 216(b) for plaintiff's retaliation claim. The court affirmed the district court's approval of the jury's compensatory damage award for front pay and/or compensation for "future losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life." Id. at *6. The court held that this lump sum could not be doubled as liquidated damages because the jury did not differentiate between front pay, which could be doubled, and emotional distress damages, which are not subject to doubling, and the plaintiff did not object to such a verdict. Id. at *7.

C. RECORD KEEPING REQUIREMENTS

The Secretary of Labor is the only entity with enforcement power over the record keeping requirements in the FLSA at § 11(c). 29 U.S.C. § 217. Plaintiffs may, however, derive significant advantage by alleging violations of those requirements in their pleadings with respect to proving damages and establishing a willful violation for the purpose of extending the statute of limitations.

An employer that fails to adhere to the Act's record keeping requirements cannot later complain that its employees' evidence of damages is inexact or imprecise. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946). In this circumstance, if (1) the evidence shows that the employee performed work for which there was improper compensation, and (2) the amount and the extent of work can reasonably be inferred, then the wages owed to an employee should be awarded even if approximate. Id. at 687-88. The burden of proof shifts to the employer to produce evidence of the precise amount of work the employee performed or evidence that negates the just and reasonable inferences drawn from the employee's evidence. Id.

In Elwell v. University Hospitals Home Care Serv., 276 F.3d 832, 844 (6th Cir. 2002), the Sixth Circuit held that a district court should properly have instructed a jury that evidence of recordkeeping violations can be an element of recklessness or willfulness. A finding of willfulness would have operated to extend the normal two-year statute of limitations to three years. Id. at 842. The evidence at trial revealed the University failed to keep records of time worked. The court began its analysis by observing that the FLSA does not authorize employee suits for violations of FLSA's recordkeeping requirements. Id. at 843. Nonetheless, recordkeeping violations can corroborate an employee's claims that the employer acted willfully in failing to compensate for overtime. Id. at 844; see also, Harold Levinson Assoc., Inc. v. Chao, 2002 U.S. App. LEXIS 9796 (2d Cir. May 22, 2002) (stating that the "defendants' utter failure to implement proper recordkeeping even after the investigation giving rise to a FLSA settlement, supports the finding that the defendants' violations were willful).

D. CALCULATING OVERTIME

2. Exclusions from the Regular Rate

Section 29 USC § 207 excludes from the regular rate payments that are not considered compensation for hours of employment. The Eighth Circuit held that sick leave buy-back payments should not be excluded from the regular rate under this section. Acton v. City of Columbia, 436 F.3d 969, 977 (8th Cir. 2006). In Acton, the defendant sought to exclude the payments under 29 U.S.C. § 207(e)(2) because they did not constitute "compensation for [the employee's] hours of employment." Id. at 976. In rejecting this argument the court relied on 29 C.F.R. § 778.223 which recognizes that "monies paid to employees to remain on call, while not related to 'any specific hours of work,' are nevertheless awarded as 'compensation for performing a duty involved in the employee's job'-namely, the employee's willingness and commitment to work unscheduled hours if requested." Id. The court interpreted this regulation to mean that

"all monies paid as compensation for either a general or specific work-related duty should be included in the regular rate." Id. The court held that because the plaintiffs' sick leave buy-back payments were accumulated through consistent workplace attendance, they should be considered a general duty of employment and therefore constitutes remuneration for employment. Id.

The function of § 207(e)(2) is to forbid the courts from deeming that the regular rate include non-work pay, however it does not suggest that courts should intervene when employers have already included such pay in the regular rate through a collective bargaining agreement. Wheeler v. Hampton Township, 399 F.3d 238, 244 (3d Cir. 2005). In Wheeler, Third Circuit Court of Appeals held that an employer is not entitled to offset an overtime compensation claim for including non-work compensation into the regular rate through a collective bargaining agreement that would otherwise be excluded under the FLSA. Id. The plaintiffs' overtime pay was based on a rate that included payments for non-working time such as vacation, sick leave, and personal days. Id. at 241. The defendant argued that the language of 29 USC 207(e)(2), which states the regular rate "shall not be deemed to include" such payments, requires the court to offset the amount of the non-work payments against the plaintiffs' overtime claims. Id. at 243. However, the Third Circuit disagreed with the defendant and held that this language only means that an employee cannot require that this non-work pay be added to the regular rate. Id. at 244. The court explained that the language of 207(e)(2) is passive and it does not require the courts to intervene when such payments have already been included in the regular rate through an agreement. Id. at 244.