Holland and Holland L.L.C.

Volume 2, Issue 1

January 2008

EMPLOYMENT LAW DIGEST

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Protection from Liability for Work-Related Injuries Extended for Premises Owners

Four legislators have asked the Texas Supreme Court to reverse their recent decision in *Entergy Gulf States v. Summers*, in which it held that a premises owner can meet the definition of "general contractor" under the Workers' Compensation Act so as to qualify for the exclusive remedy defense.

In the case, John Summers sued Entergy Gulf States, Inc. for injuries he sustained while working at Entergy's Sabine Station plant as an employee of International Maintenance Corp. (IMC). IMC had contracted with Entergy to perform construction and maintenance on Entergy's premises, and IMC was referred to as an independent contractor in the contract. Entergy obtained and provided workers' compensation insurance to IMC's Sabine plant employees, and Mr. Summers was injured while this policy was in effect. He applied for and received benefits under the policy and then proceeded to sue Entergy for negligence. Entergy claimed that it was a general contractor, and thus a deemed employer shielded from Mr. Summer's suit under the Texas Workers' Compensation Act. The district court agreed with Entergy and granted summary judgment in its favor. However, the court of appeals reversed.

Under the Texas Workers' Compensation Act (as codified in the Texas Labor Code), unless an employee waives workers' compensation coverage, the employee forfeits any common-law or statutory right of action to recover damages from an employer for personal injury or death sustained in the course and scope of employment, and the employee's sole remedy against the employer is recovery of workers' compensation benefits. Therefore, the Labor Code makes workers' compensation benefits an employee's "exclusive remedy" against an employer for work-related injuries. The Labor Code defines a "general contractor" as a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors.

In this case, the Court held that the Act's current definitions of "general contractor" and "subcontractor" do not preclude a dual role for a premises owner. This holding abrogates *Williams v. Brown & Root, Inc*., which held that an entity that did not contract with the owner, but instead was the owner, was not protected by the exclusive remedy provision. The Court in *Entergy* insisted that the Labor Code's definition of "general contractor" does not prohibit a premises owner who undertakes to procure the performance of work or a service from also being a general contractor. Moreover, the Court pointed out that the current definition of "subcontractor" means a person who contracts with a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform. Under this definition, a premises owner is not precluded from serving as its own general contractor and undertaking to perform work on its premises by retaining subcontractors.

In applying this analysis to the fact pattern in *Entergy*, the Court decided that Entergy was a general contractor because it undertook to procure the performance of work from IMC. Thus, Entergy was a general contractor entitled to the "exclusive

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remedy defense" under the Workers' Compensation Act, which barred Mr. Summers from suing Entergy after receiving benefits under the workers' compensation insurance policy. The fact that Entergy also owned the premises where the accident occurred was immaterial.

The decision in *Entergy Gulf States v. Summers* has prompted critics to proclaim that the Texas Supreme Court is a republican court following a republican agenda of favoring big business. Plaintiff's attorneys and union officials fear that this decision will expand the ability of plant owners to seek liability protection from workplace accidents under the Texas workers' compensation laws. In their brief, the lawmakers seeking reversal of the decision noted that the Workers' Compensation Act provides immunity from liability to employers who have purchased workers' compensation insurance for their direct workers and that the Court has wrongly expanded that immunity. In their opinion, the Court elected to ignore the legislature's specific language in interpreting the meaning of "general contractor" and "subcontractor." (*Entergy Gulf States v. Summers*, 50 Tex. Sup. Ct. J. 1140 (Tex. 2007)).

This decision is remarkable as it appears (at least for now) to have dramatically expanded the protection afforded employers under the "Borrowed Servant Doctrine." This doctrine protects companies from negligence lawsuits by third parties who are not the direct employees of the company but who are employees of a company who is performing services on behalf of the indirect employer. Usually, this doctrine is used to protect general contractors from lawsuits against employees of the subcontractors who have been contracted for services by the general contractor. In the past, the actual owner of the premises did not receive this type of protection but obviously this case has expanded the protection afforded to general contractors all the way to the premises owners. It remains to be seen how the Texas Legislature will handle this matter and of course we will keep you apprised through this newsletter as this interesting matter develops.

Computer Employee Exemption under FLSA

Employees performing computer tasks may qualify as exempt workers under the Fair Labor Standards Act (FLSA) based on either the special computer employees exemption or under the traditional professionals exemption that applies to certain professions. An employee who fits this exemption is exempt from the overtime compensations requirements of the FLSA.

In order to qualify for the exemption, computer systems analysts, computer programmers, software and similarly skilled employees must be paid on a salary or fee basis of a rate not less than $455 per week, exclusive of board, lodging or other facilities, or on an hourly basis of not less than $27.63 an hour. Additionally, the exemptions apply only to computer employees whose primary duties consists of: (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; (2) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or (4) a combination of the aforementioned duties, the performance of which requires the same level of skills.

Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of the exemption for employees in computer occupations. The exemption does not apply to employees engaged in the manufacture or repair of computer hardware and related equipment. Moreover, employees whose work is heavily dependent on computers do not qualify for the exemption. However, computer employees who do not qualify for this exemption may still qualify for the executive or administrative exemption. In fact, computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field are often eligible for exemption as professionals.

For instance, in the case of *Bergquist v. Fidelity Information Services, Inc.* the court held that an employee's primary job duties satisfied the necessary criteria for the computer programmer exemption from the overtime compensation requirements of the FLSA where his duties involved designing, developing, and modifying programs, which required a high degree of skill in programming and required application of highly-specialized knowledge in programming. (See *Bergquist v. Fidelity Information Services, Inc.*, 399 F. Supp. 2d 1320 (M.D. Fla. 2005)).

The FLSA remains one of the most confusing and violated laws in our country. As many of you know, this firm's advice has always been to err on the side of caution and if unsure, treat the employee as non-exempt. Only if an employee clearly meets all the elements of an exemption should the employer treat that employee as exempt from the minimum wage or overtime requirements of the Act.

Shifting Reasons Make an Unstable Defense to Failure-to-Promote Claims

In the recent Fifth Circuit case of *Burrell v. Dr. Pepper/Seven Up Bottling Group, Inc*., a terminated African-American managerial employee sued his former employer, Dr. Pepper, alleging race discrimination and retaliation.

An employer must be consistant in its reason(s) for any adverse action taken against an employee.

Adam Burrell, an African-American, began working for Dr. Pepper as a corporate purchasing manager in May 2001, reporting to the vice president of purchasing. When the vice president resigned, she recommended Burrell as her replacement. Burrell then worked from May through October 2002 as the interim VP of purchasing. However, in October 2002, the permanent VP of purchasing position was awarded to Ed Kolster who is white. At that point, Burrell suspected race discrimination. Because Burrell then had to report to Kolster, their working relationship was a complete failure. Burrell demonstrated a complete lack of respect for Kolster and made comments accusing Kolster of bias. Burrell was fired and then he brought suit. He was allowed to proceed to a jury on his failure-to-promote claim but not on his wrongful termination claim.

Before the Equal Employment Opportunity Commission, Dr. Pepper asserted Burrell's lack of purchasing experience as the reason for its passing him over for promotion. However, with the trial court, Dr. Pepper asserted Kolster's superior bottling experience as its reason that Burrell was passed over for promotion. Moreover, in the appellate court, Dr. Pepper claimed that Kolster was selected over Burrell because of his greater purchasing experience in the bottling industry. . Dr. Pepper apparently gave shifting reasons to explain its actions, which it felt helped to clarify the situation. Unfortunately for Dr. Pepper, the appellate court found that there was enough conflict between the three distinct explanations given that a jury could conclude that Dr. Pepper's underlying motivation was unlawful.

What we can learn from this case is the fact that an employer must be consistent in its reason(s) for any adverse action taken against an employee. Trying to provide greater clarity for a particular adverse employment action can land an employer in trouble. It is better to simply stick with your decision once it has been made instead of going back again and again and trying to explain the decision with slight differences each time. Consistency is best even if the shifting explanation was merely an attempt to provide greater clarity. In a situation in which an incumbent employee is performing an interim job satisfactorily or better but you want another person in the position, you may find yourself in a Dr. Pepper situation. While you may have plenty of good, legitimate reasons for awarding the position to someone other than the incumbent, be aware that courts will be suspicious of your actions, especially if the interim employee is a minority or a female. Consistency is key.

In the *Burrell* case, Dr. Pepper fired Burrell when his insubordinate comments crossed the line so that a working relationship became impossible and that was the appropriate time to act. That is why his termination was not questioned. However, because Dr. Pepper gave inconsistent explanations for its failure to promote Burrell, that issue was allowed to go to the jury. The key to this case is simple: give a legitimate reason for your action and stick to that explanation.

State Court Loss Not Res Judicata for EEOC Suit for Injunctive Relief

The Court of Appeals for the Fifth Circuit held in *E.E.O.C. v. Jefferson Dental Clinics, PA* that the Equal Employment Opportunity Commission (EEOC) could proceed with a lawsuit alleging that a Texas dental firm engaged in sexual harassment and retaliation against four female employees, even though the women already lost in a state court lawsuit based on the same conduct. However, the Fifth Circuit limited the EEOC to seeking only injunctive relief and barred it from asserting "make-whole" claims in federal court.

The court held that the employees' unsuccessful state court suit did not block an EEOC lawsuit brought in the public interest, but did preclude giving the former employees two chances to receive make-whole relief (i.e. cash).

In this case, the employees filed a private action in state court against their employer Jefferson Dental Clinics, P.A. During the pendency of that suit, the EEOC decided to bring suit in federal court for the same alleged behavior. When the employees lost their state court claims at trial, they decided they wanted to join the EEOC in its suit against their employer which was denied by the Federal District Court. However, Jefferson Dental's Motion to Dismiss the entire suit in federal court was also denied concluding that the EEOC was not in privity with the employee's earlier suit in state court and therefore the doctrine of res judicata could not apply.

On appeal, Jefferson Dental argued that the district court erred in denying its motion for summary judgment because, under Texas law, the EEOC's claims are barred by the doctrine of res judicata. Under Texas law, a party seeking to have an action dismissed on the basis of res judicata must establish the presence of three things: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action.

The Court of Appeals for the Fifth Circuit held that the state court judgment satisfied the first element. As to the second element, there are three ways in which parties can be in privity under Texas law: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action. The court held that the second element was not satisfied because the EEOC did not exercise control over the state court litigation so as to create privity with the charging parties.

Moreover, the court agreed with the EEOC's argument that its interest in eradicating workplace discrimination is unique and incompatible with a finding that the EEOC's authority to bring and maintain an enforcement action can be extinguished by a judgment in a private suit to which it was not a party. Therefore, the court allowed the EEOC to proceed with its suit for injunctive relief. However, the court held that the EEOC's public interest did not justify giving the plaintiffs two chances to receive make-whole monetary (back pay) relief. Therefore, the state court judgment was res judicata as to an assertion of make-whole claims by the EEOC against Jefferson Dental. (*E.E.O.C. v. Jefferson Dental Clinics, PA*, 478 F.3d 690 (5th Cir. 2007)).

This case illustrates the occasional confusion and arguably unnecessary expenditure of time and resources when the EEOC decides to prosecute on its own discrimination claims where the employees themselves have either decided to prosecute their claims in another venue (state court) or the employees have actually settled with their employer. Unfortunately, federal law gives the EEOC the right to pursue injunctive relief (such as a promise by the employer not to behave in certain ways again) even though the employees themselves have actually settled their differences with the employer or have pursued private remedies with private attorneys in state court. Unfortunately, if your welcome is unlucky enough to have to deal with this situation, you cannot have the EEOC's federal injunctive relief action dismissed because you have settled with the employees or because the employees' state law claims for the same conduct have been adjudicated.

Bill To Guarantee Seven Paid Sick Days Each Year

The Healthy Families Act is a federal measure which has been introduced with an aim to guarantee at least seven paid sick days a year to workers employed by companies with at least 15 employees. The Act would provide a minimum paid sick leave of seven days annually for those who work at least 30 hours per week. It would provide a prorated annual amount for part-time employees who work between 20 and 30 hours per week or between 1,000 and 1,500 hours per year.

Under the Act, workers would be allowed leave to attend to their own medical needs or to care for the medical needs of certain family members. The Act would allow employers to request certification from employees who request three or more consecutive days.

In support of the bill, Edward Kennedy, Chairman of the Senate Health, Education, Labor and Pension Committee, noted that 57 million Americans do not have paid sick days at all, leaving many working parents unable to care for sick children. He urges that the bill is meant to aid working families in balancing family and work needs.

The Bill, although active, has not yet become law. House Bill 1542 and Senate Bill 910, which are identical, represent the Healthy Families Act. Both have been introduced and referred to subcommittees. HB 1542 has been referred to the Subcommittee on Health, Employment, Labor and Pensions, while Senate Bill 910 has been referred to the Committee on Health, Education, Labor, and Pensions.

Although seemingly innocuous, this Bill, if made into law, could have a dramatic impact on smaller companies' budgets. Many smaller companies provide occasional paid days off to their employees at the company's management discretion. This law, however, would force such companies to provide up to seven days off with pay at the discretion of the employee – not management. If you are interested in discussing this measure with your favorite Congress person, you are urged to do so sooner rather than later as this measure may come up for a vote in the near future.

FMLA EXPANDED TO COVER MILITARY FAMILIES

Recently, Congress passed a Bill to provide additional reasons why qualified employees of military families can take up to twelve weeks of unpaid leave under the Family and Medical Leave Act. Once President Bush signs the Bill (which he is expected to do) covered employers will be required to provide leave to qualified employees for two new reasons:

(1) To manage qualifying exigencies relating to the family member's call to duty; and
(2) To care for an injured service member's serious injury or illness.

Eligible employees will be entitled to take FMLA leave for any "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter or parent is on active duty or has been notified of an impending call or order to active duty. The proposed amendment does not change the amount of time off eligible employees may receive – it only changes the reasons they can take the leave. The United States Department of Labor is required to define the "qualifying exigency" and until DOL issues its regulations, employers should be very careful in denying an employee of a military family leave to care for a family member's call to duty or serious injury or illness.

With respect to qualified employees who need leave to care for serious injury or illness of a service member, the amendment does expand the amount time these employees can take unpaid leave. Under the proposed Bill, such employees can take up to 26 weeks of unpaid leave during a single 12 month period to care for a service member. Employees eligible for this expanded amount of time off include employees who are the son, spouse, daughter, parent or a "next of kin" of a service member who has a serious injury or illness. The term "next of kin" means the service members' nearest blood relative.

No changes have been made to the Acts coverage so covered employers continue to be those with at least 50 or more employees in each working day in 20 or more calendar weeks working within 75 miles of each other. Eligible employees will continue to be those who have been employed for at least 12 months and have worked at least 1250 hours in the preceding 12 months prior to the requested time off.

Check It Out!!

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Is Up And Running:

www.hollandfirm.com

USELESS BUT TRUE INFORMATION

Long ago, when people wanted to get rid of others who were unwanted but didn't want to kill them, they would burn down their houses in order to get the person to move on. The practice became known as "firing" the person.

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Keeping Employers Out of the Courtroom for over 19 Years

If you, or anyone in your office, would like a copy of this newsletter on a quarterly basis, at no cost, please contact Deanna Jennings at (210) 824-8282.
E-mail copies are also available

ABOUT THE FIRM

Holland & Holland L.L.C. Represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—**management counseling**

—review and preparation of **personnel policy** and procedures including employee handbooks;

—representation in administrative matters before the **Equal Employment Opportunity Commission**;

—**representation of management in state and federal court** for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—**protection of trade secrets** and other confidential information through the use of covenant not to compete and non-interference agreements;

—preparation of **arbitration agreements**, non-subscriber programs and waivers of jury trial agreements;

—**management training** on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

—general **human resource audits** to promote compliance with the myriad of legal and regulatory obstacles facing employers on a daily basis;

—**wage/hour compliance** audits and defense of FLSA collective actions.