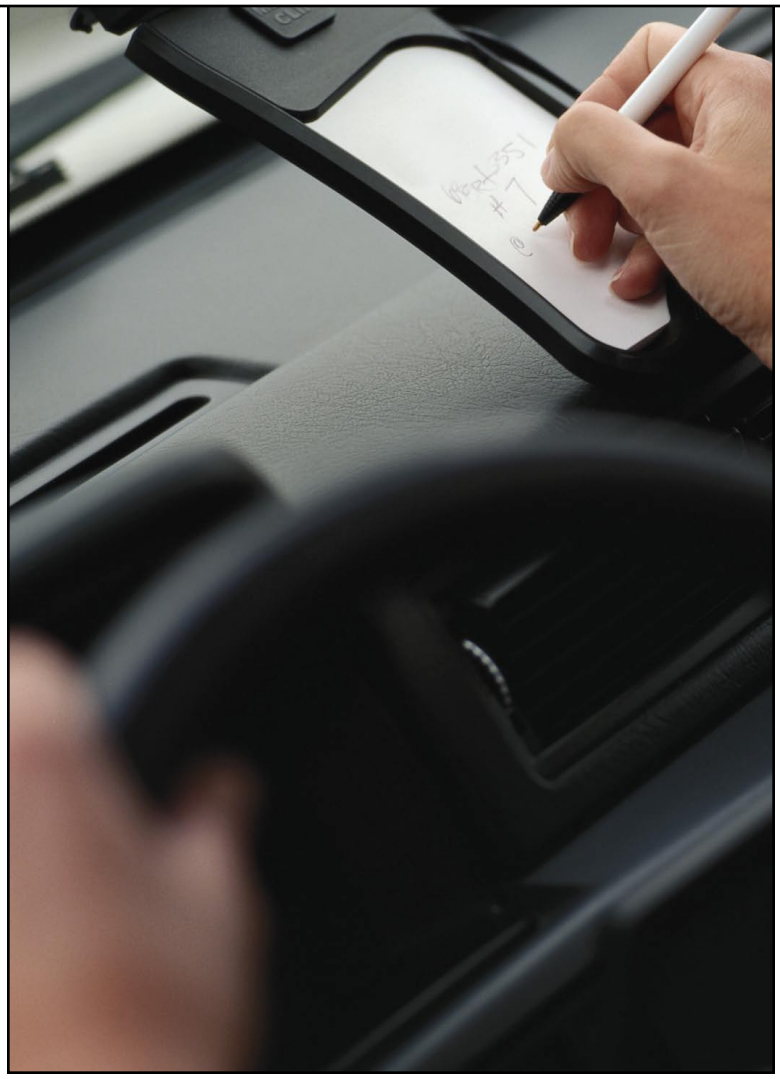
Employment Law Briefing



MAY/JUNE 2010

Before and after: Employee commute drives FLSA case

To some employees, commutes are merely a hassle. But, to the plaintiff in *Rutti et al. v. Lojack Corporation*, commutes were the basis for a lawsuit. And, in its ruling, the U.S. Court of Appeals for the Ninth Circuit had to take the Fair Labor Standards Act (FLSA) into consideration.

Drive-time lawsuit

The plaintiff was employed by Lojack as a technician, installing and repairing vehicle recovery systems at the company's client locations. He was paid hourly by Lojack beginning when he arrived at his first job location and ending when he completed his final installation or repair of the day.

The technician filed a lawsuit seeking compensation for time spent commuting to job sites in Lojack vehicles and for time spent on preliminary and follow-up activities performed at home. The district court granted Lojack summary judgment, and the technician appealed.

ECFA requirements

On appeal, the technician argued that he was entitled to compensation for commuting time because the commute amounted to a condition of his employment and he was required to use Lojack's vehicle, which he couldn't use for personal pursuits. The court disagreed.

Pursuant to the Employee Commuting Flexibility Act (ECFA), the court explained, where the use of the vehicle "is subject to an agreement on the part of the employer and the employee," it isn't part of the employee's principal activities and, thus, not compensable. Courts have been clear that the cost of commuting is not compensable unless the employees show that they "perform additional legally cognizable work while driving to their workplace."

The appeals court also explained that neither the ECFA nor its legislative history contained any suggestion that the agreement can't be a condition of employment, nor did the law limit an employer's right to place restrictions on the use of the vehicle. Thus, the court affirmed summary judgment on the technician's commuting claim.

De minimis matters

ECFA also provides that an employer need not compensate an employee for "activities which are preliminary to or postliminary to said principal activity or activities."

So, to be entitled to compensation for his off-the-clock activities, the technician needed to show that they were related to his "principal activities" for Lojack. The term "principal activities" is liberally construed by courts "to include any work of consequence performed for an employer no matter when the work is performed."

The technician argued that he was entitled to compensation for commuting time because the commute amounted to a condition of his employment.

In addition, to be compensable, the extra time must be more than de minimis. In determining whether otherwise compensable time is de minimis, courts consider:

- The practical administrative difficulty of recording the additional time,
- The aggregate amount of compensable time, and
- The regularity of the additional work.

The court found that the technician's morning activities weren't integral to his principal activities. Instead, these activities — "receiving, mapping, and prioritizing jobs and

routes for assignment" — were related to his commute and thereby noncompensable under the FLSA.

The court also stressed that, to the extent any activities were distinct from the technician's commute and related to his principal activities, they were de minimis. Thus, the court affirmed the grant of summary judgment on the technician's claim for compensation for preliminary activities.

Points to the plaintiff

Finally, the technician argued that, after he completed his last job for the day and was "off the clock," he was required to send a transmission to Lojack concerning all the jobs he'd performed that day. The court found that these transmissions *were* part of his principal activities.

Lojack maintained that, even if the transmissions were part of the technician's principal activities, they were de minimis. But the technician asserted that the transmissions had to be made every day and took about 15 minutes a day — or more than an hour a week.

Thus, the court found that, while there were difficulties in recording the time spent on a particular transmission, the other two prongs — "the aggregate amount of compensable time" and "the regularity of the additional work" — favored the technician. Therefore, the court vacated the summary judgment finding regarding the technician's "postliminary" activities.

Tricky time

This case demonstrates how tricky it can be for an employer to determine whether time is compensable. If you have any doubts about time your workers are logging, review the matter with your employment attorney. ♦

Age discrimination case involves stolen property

The theft of company property and an age discrimination lawsuit may seem like two separate matters. But, in *Velez v. Thermo King de Puerto Rico, Inc.*, the U.S. Court of Appeals for the First Circuit considered whether a plaintiff could proceed to trial on his age discrimination claim after he'd been fired for profiting from the sale of company property.

Tool time

The plaintiff worked for Thermo King from 1978 to 2002. In September 2002, this 56-year-old employee worked as a tool crib attendant in charge of maintaining, dispatching and safeguarding the company's tools and maintenance materials as well as preparing purchase requisitions for new tools and materials.

One day the plaintiff reported to Thermo King that, when he'd arrived at work, he'd noticed that a padlock had been broken and equipment was missing. Thermo King launched an internal investigation, which produced evidence that the plaintiff and other employees had stolen and sold company property for their own financial gain.

A prima facie case

In November, Thermo King terminated the plaintiff. In turn, he filed a complaint with the Equal Employment Opportunity Commission (EEOC), which issued a right-to-sue letter. The plaintiff then commenced a lawsuit alleging that his termination violated the Age Discrimination in Employment Act (ADEA). The court granted Thermo King's motion for summary judgment, and the plaintiff appealed.

The plaintiff had to establish a prima facie case of discrimination under the ADEA by showing that:

1. He was at least 40 years old at the time he was fired,

2. He was performing his duties at a level that met his employer's legitimate expectations,

3. He was fired, and

4. The employer subsequently filled the position, demonstrating a continuing need for the plaintiff's services.

The only disputed issue was the second prong. Thermo King maintained that the plaintiff's misconduct made him unqualified for the job. The First Circuit, however, explained that a court may not consider the employer's alleged nondiscriminatory reason for taking an adverse employment action when analyzing the prima facie case.

The court reasoned that to do so would bypass the burden-shifting analysis and deprive the plaintiff of the opportunity to show that the nondiscriminatory reason was, in actuality, a pretext designed to mask discrimination. Thus, the court concluded that the plaintiff could establish a prima facie case.

Burden back-and-forth

The burden then shifted to Thermo King to offer evidence that the adverse employment action was not motivated by discriminatory intention. Thermo King asserted that the plaintiff was fired for violating the company's code of conduct and profiting financially from the sale of its property. The appeals court found that these were both legitimate, nondiscriminatory reasons for firing him. So the burden shifted back to the plaintiff to show that these reasons were pretextual.

First, he pointed out that initially the company hadn't provided him with any explanation for the termination. A month later, Thermo King told the EEOC that the plaintiff had been fired for violating the company's policy on receiving gifts from suppliers. It wasn't until more than a year later that Thermo King, responding to this lawsuit, first

Salary freeze sparks lawsuit

In another age discrimination case, *Inman v. Klockner Pentaplast of America*, the U.S. Court of Appeals for the Fourth Circuit considered whether the employer had violated the Age Discrimination in Employment Act (ADEA) when it terminated a 58-year-old executive.

In September 2005, Klockner instituted a salary freeze. The executive complained about the freeze to colleagues and later lied to his supervisor about having complained. In December, Klockner terminated the executive for his opposition to the salary freeze. The executive then filed an ADEA lawsuit. The trial court granted Klockner's motion for summary judgment, and the executive appealed.

The executive argued that Klockner's reason for terminating him — opposing the freeze — was pretextual. The appeals court pointed out that, just months before his termination, the executive's supervisor had met with a consulting company regarding Klockner's future. The consultant expressed a desire for "young — energetic, future people," according to the supervisor's handwritten notes.

Although the consultant played no role in the executive's termination, the supervisor did. Thus, the appeals court found that it was for a jury to decide:

- **What the consultant meant,**
- **What the supervisor understood the reference to mean when he wrote it down, and**
- **Whether the supervisor adopted the goal of having "young, energetic" workers as his own.**

Therefore, the appeals court vacated the summary judgment finding.

claimed that the plaintiff had been fired for stealing and selling company property. The appeals court found that the employer's shifting explanation could support a finding that the reason it ultimately settled on was fabricated.

Second, the plaintiff asserted that a number of younger employees weren't fired — despite their alleged complicity in the theft or sale of company property. The appeals court found that, based on that evidence, a jury could conclude that Thermo King had treated the plaintiff differently from younger employees who were similarly situated. Therefore, the court vacated the summary judgment finding and permitted a trial on the age discrimination claim.

Shifting reasons

This case demonstrates the importance of being consistent when giving reasons for a termination. When a reason or reasons shift, the law permits the inference that the reason(s) cited may be pretextual and the true motive unlawful. ♦

Is a leave of absence a "reasonable accommodation"?

The "reasonable accommodation" clause of the Americans with Disabilities Act (ADA) is the crux of many a legal argument. Such was the case in *Graves v. Finch Pruyn & Company, Inc.*, which was heard by the U.S. Court of Appeals for the Second Circuit.

Spurring a lawsuit

In 1999, the plaintiff, who was employed as a paper inspector for paper manufacturer Finch, Pruyn & Company, began experiencing problems because of a bone spur on his heel. By early 2000, the inspector could no longer perform his essential job duties without surgical repair and treatment of the bone spur. So, for January through May, Finch assigned the inspector light-duty work.

In mid-May, however, the inspector had surgery and remained out of work until September — all while receiving full pay. When the inspector returned to work, he was still limited to light duties until Oct. 30. At that point, Finch informed the inspector that it didn't have any more light-duty work for him to do. The inspector then went out on disability leave a second time until January 2001.

Upon his return, Finch gave the inspector three options:

1. Return to full-duty work immediately,

2. Take a 64% pay cut and work at a desk job, or

3. Provide a statement from a doctor that he was totally disabled and take disability retirement with resulting disability pension benefits.

In response, the inspector requested a two-week unpaid leave of absence to determine his chances for rehabilitation by consulting a foot specialist. Finch denied this request and, as a result, the inspector chose option No. 3 — disability retirement.

The inspector then sued Finch, alleging disability discrimination. The court granted Finch's motion for summary judgment, and the inspector appealed.

Facing the third prong

To establish a prima facie case of disability discrimination under the ADA, a plaintiff must pass a four-pronged test that requires showing that:

1. The plaintiff is a person with a disability under the meaning of the ADA,

2. The employer is covered by the statute and had notice of his disability,

3. With reasonable accommodation the plaintiff could perform the essential functions of the job at issue, and

4. The employer has refused to make such accommodations.

The only issue on appeal was the third prong: whether the plaintiff had made a prima facie showing that, with reasonable accommodation, he could perform the essential functions of his job. It was undisputed that, without accommodation, the plaintiff couldn't perform the essential functions of a paper inspector at the time of his leave request. After all,

those job functions included standing on his feet for long periods as well as lifting and pushing large rolls of paper.

Hearing the appeal

The appeals court noted that it had never expressly held that a leave of absence constituted a "reasonable accommodation." But, even if the court had expressly held such a thing, the leave must enable the employee to perform the essential functions of the job within the time sought.

The appeals court also pointed out that a January 2001 report from one of the plaintiff's doctors stated that "it is unlikely that [the inspector] will be able to return to his previous occupation." The doctor went on to explain that, even if the inspector recovered, "there will probably [be] some restrictions in the amount of standing, walking, lifting, and carrying that he can do."

Therefore, the appeals court concluded that, at the time the inspector requested the leave, Finch had no assurance that the accommodation would allow the inspector to perform the essential functions of his job.

The inspector also attempted to argue that Finch had failed to engage in the interactive process to find an accommodation that would allow him to continue working. But the appeals court explained that an employee may not rely on a company's failure to engage in an

interactive process if he or she cannot also make a prima facie showing that a reasonable accommodation existed at the time of the adverse employment action. Thus, the appeals court affirmed the summary judgment.

Remaining vigilant

In this case, the employer went above and beyond what it was required to do under the law: It paid the plaintiff full salary for four months while he was recuperating and let him work on light duty for full salary for another six months — and its reward was a lawsuit!

Even when employers have helped employees to such an extent, they cannot become complacent that workers won't sue if the opportunity presents itself. Companies must remain vigilant at all times to protect themselves from employee lawsuits. ♦

A not uncommon quandary

Another employee vs. independent contractor case to consider

The employee vs. independent contractor quandary is not uncommon in many industries. One recent context for it is the case of *Cromwell v. Driftwood Electrical Contractors, Inc.* Here the U.S. Court of Appeals for the Fifth Circuit considered whether welders engaged in splicing work for an electrical contractor were employees entitled to overtime or independent contractors.

A lawsuit is filed

As part of the Hurricane Katrina restoration, the two plaintiffs provided cable splicing services for Driftwood Electrical Contractors and its customer on the restoration project, BellSouth Telecommunications. The welders provided these services for 11 months, working 12-hour days — 13 days on, one day off — and were paid a fixed hourly wage for their work.

The welders filed a lawsuit alleging that they weren't paid an overtime premium for hours worked, pursuant to the Fair Labor Standards Act (FLSA). The district court granted the defendants' motion for summary judgment on the grounds that the welders were independent contractors exempt from overtime under the FLSA. The welders appealed.

The facts are considered

To determine whether a worker qualifies as an employee under the FLSA, courts focus on whether, as a matter of economic reality, the worker is dependent on the alleged

employer or is, instead, in business for him- or herself. To do so, courts consider five nonexhaustive factors:

1. The degree of control exercised by the alleged employer,

2. The extent of the relative investments of the worker and the alleged employer,

3. The degree to which the worker's opportunity for profit or loss is determined by the alleged employer,

4. The skill and initiative required in performing the job, and

5. The permanency of the relationship.

No single factor is determinative.

The welders here maintained that they were employees because they reported to BellSouth's location every morning to receive their assignments unless they hadn't completed their jobs from the previous workday, in which case they could check in by phone. They also noted that they were given descriptions of the type of work that needed to be performed for each assignment and were instructed by BellSouth supervisors to follow certain general specifications.

In addition, Driftwood and BellSouth representatives checked on their work progress. Meanwhile, BellSouth supplied materials, such as closures and cables, while Driftwood provided workers' compensation insurance and liability insurance.

Driftwood and BellSouth maintained that the welders were independent contractors because they provided their own trucks, testing equipment, connection equipment, insulation equipment and hand tools — totaling over $50,000 for one of the welders and approximately $16,000 for the other. They were also responsible for their own vehicle liability insurance and employment taxes.

Plus, Driftwood and BellSouth didn't train the welders, nor did the defendants control the details of how the welders performed their assigned jobs.

The court weighs in

The appeals court noted that the facts in this case appeared to be evenly balanced between employee and independent contractor status.

But, the court continued, the welders worked steadily and reliably over a substantial period — about 11 months — exclusively for their purported employers. The permanency and extent of this relationship, coupled with Driftwood and BellSouth's complete control over the welders' schedule and pay, severely limited any opportunity for profit or loss on the welders' part.

The court also noted that, as a practical matter, the work schedule established by Driftwood and BellSouth precluded significant outside work. Additionally, Driftwood and BellSouth's act of providing work assignments limited the welders' need to demonstrate initiative in performing their jobs. Therefore, the court vacated the summary judgment finding that they were independent contractors.

Factors must be considered

Depending on the venue, different courts or agencies can come to different conclusions about the employee vs. independent contractor question. All of these venues, however, balance a variety of factors in making their determinations. Accordingly, it's unwise for an employer to rely on only one factor to define its relationship with an independent contractor. ♦

Legal contexts for employee vs. independent contractor issue

The issue of whether a worker is an employee or independent contractor can arise in many contexts before courts and administrative agencies. A few common legal situations in which it comes up are:

- **When deciding whether workers' compensation or unemployment insurance contributions should have been paid,**
- **When determining a worker's entitlement to employment benefits, and**
- **When assessing whether I-9 forms should have been completed or taxes withheld.**