FIREHOUSE LAWYER

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EXCESSIVE ABSENTEEISM JUSTIFIES MEDICAL EXAM

The 9th Circuit Court of Appeals recently held that an employee with excessive absenteeism can be required by the employer to undergo an independent medical exam. A state tax auditor had experienced absenteeism well above the average for similar employees. After numerous absences, (one lasting more than 30 days), the employee was asked again to submit to a medical exam and responded by filing a lawsuit under the Americans with Disabilities Act. Although the court recognized the general rule that employers may not inquire about an individual's disability by using medical examinations to search for disabilities, the court recognized an exception when the medical exam is shown to be job related and consistent with business necessity. Probably the case should be read carefully and limited to those cases involving egregious absenteeism. The court did state that excessive absenteeism will prevent an employee from being able to meet the requirements of their job. See *Yin v. State of California,* 95 F.3d 864 (9th Cir. 1996).

ADA DOES NOT REQUIRE INDEFINITE LEAVE AS REASONABLE ACCOMMODA-TION

In two 10th Circuit cases, the U.S. Circuit Court of Appeals held that an employer is not required to grant an indefinite leave as a reasonable accommodation to a disabled employee. In the first case, the employer argued that when the person was fired they had shown no indication of seeking treatment and no indications of when, if ever, they would be able to return to work. The court agreed that allowing leave is a reasonable accommodation, but the employer is not required to grant an open ended leave under the ADA. See *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996).

In the other case, the employee took a seven month paid leave after a back injury. An application for long term disability benefits was denied; the employee returned to work unannounced and asked for their old job back. The position had been filled and there were no open positions for which the employee was qualified. The employee was put on unpaid leave while the company sought relocation. That effort was unsuccessful and so the employee was terminated and then sued under the ADA. The court ruled that the ADA does not require an employer to keep an employee on indefinite leave until an appropriate position opens up. See *Monett v. Electronic Data Systems*, 90 F.3d 1173 (10th Cir. 1996). Thus, it is clear that an employer is not

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required to keep an individual's job open indefinitely, while they are in an unpaid medical leave status. We suggest that the employer has a business necessity for filling a position after a reasonable period of time, which may vary depending upon the position. In public employment, we often have the option of a temporary appointment, but frequently under Civil Service rules or local resolutions, this temporary position is limited to three months, but may be extended for up to six months. These kinds of time limits suggest how long an employer might keep an employee on leave without pay for medical reasons.

WHAT THE FLSA DOES NOT REQUIRE

The Thompson Publishing Group's FLSA Handbook recently had a helpful article discussing things the FLSA does not require. Some of the points of the article are summarized here, because we found it particularly useful and fundamental.

Here are some "non-requirements":

1. Employers are not required to provide meal or rest periods regardless of consecutive hours worked. Giving employees a meal break is standard practice and may be required by a collective bargaining act; state labor laws or OSHA regulations, but it is not an FLSA requirement. The FLSA does address compensability of meal or rest periods at 29 C.F.R. Section 785.19. Mealtime must be counted as compensable hours worked unless the break is at least 30 minutes long and the employee is relieved of all duties. Generally short break periods of 5 to 20 minutes should be counted as hours worked.

2. FLSA does not require premium pay for holiday or weekend work, but frequently collective bargaining agreements or state law so require it.

3. FLSA does not require discharge notices for employees terminated. Some states require that a final paycheck be provided within a certain time after termination.

4. FLSA does not require paid or unpaid leave for sick leave, holidays, vacations, jury duty, personal time or military service, nor does the FLSA require severance pay. Several states have laws requiring unpaid leave, however, as do certain federal laws. The Family and Medical Leave Act (FMLA) requires covered employers to give employees up to 12 weeks of unpaid leave in any 12 month period for their own serious health conditions and those of their spouses, parents or children. This is just one example and many state laws enter into this area.

5. The FLSA does not mandate pay raises or fringe benefits. The Act provides a minimum wage, currently at $4.75 per hour.

6. The FLSA does not require overtime based on daily, but rather weekly, hours worked. A few states may require time-and-a-half for hours worked over 8 in a day, at least in certain industries. Thus, the FLSA generally does not preclude employers from placing an employee on a 10-4 work schedule where an employee works four 10 hour days in a week.

7. FLSA does not require notice to or consent from employees in scheduling overtime. Scheduling of overtime is within the employer's discretion, unless bargained away in a collective bargaining agreement or the like. There are special rules for younger workers under 16 years of age.

8. FLSA does not require employees' records to be kept in any particular format. For example, the regulations and

FLSA Does Not Require … (con't)

DOL opinion letters recognize that computer record storage is

acceptable as long as it is an accurate representation of time worked and provided the employer is able to convert the data or any part of it suitable for inspection. Also, the Act does not require that records even be maintained for employees not covered by the Act such as independent contractors, elected officials, or their personal staff members. Records must be kept, however, for exempt employees, such as those qualifying for the executive or administrative exemptions.

9. The FLSA does not require non-exempt employees to be paid on an hourly basis even if the minimum wage is stated in those terms. Although rare, non-exempt employees can be paid on a salary, commission, piece rate or any other basis.

10. The FLSA does not require an employee's weekly work period to coincide with a calendar week. The regs define a work week as any seven consecutive 24 hour periods (See 29 C.F.R. Section 778.105). The work week is presumed to be Sunday through Saturday, however, unless an employer declares a different work week by an appropriate resolution or other official action. The regulations also provide that each work week stands alone and employees' worked hours may not be averaged over two weeks to avoid overtime liability.

11. The FLSA does not require employers to pay O.T. to employees who work fewer than 40 hours in a week. Suppose an employee normally works 35 or 37½ hours in a week. Even though that is their normal work week, the FLSA does not require overtime if they go beyond that amount but work less than 40 hours in the work week. Depending on the agreement, understanding, or collective bargaining agreement with the employee, the employer may have to pay straight time for the extra hours. Generally, unless the employee is salaried, and is paid by the hour, they are likely owed straight time pay for that extra work.

12. The FLSA does not require premiums for night or weekend work. If an employer chose to provide a 25¢ per hour incentive for night work, that 'premium' must be included in the employer's calculation of the employee's "regular rate" of pay for purposes of computing overtime.

13. FLSA does not require snow days or special leaves, but state law may require them.

14. FLSA does not mandate frequency of pay. Under the FLSA, pay days may occur weekly, every two weeks, twice a month, monthly, etc. as the employer sees fit and the employee or the bargaining representative agrees. Some states regulate frequency of payment and the timing of employer payment after termination.

15. Incidentally, there is no requirement in the FLSA regarding payment of overtime weekly. Instead, the rules state that generally overtime pay earned in a particular work week must be paid <u>on a regular payday</u> for the period in which such work week ends. In other words, for employees paid monthly, if overtime is earned in any work week during the month, then the overtime compensation is due when payday comes around. There is nothing preventing an employer from paying some of the overtime earlier, ifthe overtime is earned in a work week early in the month and it is possible to provide some of the overtime pay by the time the payroll is paid. In any event, the regulations provide that, although payment of overtime may be delayed if circumstances require it, "in no event may payment be delayed beyond the next payday after the overtime computation can be made." (29. C.F.R. Section 778.106)

PARAMEDICS/ FIREFIGHTERS ARE EXEMPT UNDER 207(k)

Under Section 207(k) of the FLSA, persons trained as firefighters qualify for the exemption which allows employers to pay overtime whenever the fire protection employee works more than 212 hours during a 28 day work period. (This work period is flexible, and many employers use a slightly different work period as allowed by the FLSA.) In a recent case in the 8th Circuit Court of Appeals, the court held that paramedics who are trained and certified as firefighters do come within the scope of the exemption.

Sometimes, this determination is not cut and dried. In this particular case, from Gladstone, Missouri, the trial court had found that, although the paramedics were engaged in fire fighting activities, they spent more than 20% of their time on unrelated activities and were therefore non-exempt personnel, requiring O.T. after 40 hours per week. Reversing that ruling, the 8th Circuit found that the paramedics spent nearly all of their time on either fire fighting or EMS and further concluded that providing paramedic services on accident and medical emergency calls unrelated to fires or MVAs did not alter the nature of their duties or cause them to perform tasks unrelated to their job.

Sec. 207(k) regulations contain a four part test defining an employee engaged in fire protection activities as one who:

- Is employed by an organized fire department or fire protection district;
- Has been trained to the extent required by state statute or local ordinance;
- Has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and
- Performs activities which are required for and directly concerned with the prevention, control or extinguishment of fires. (See 29 C.F.R. Section 553.210)
- The regulations also make it clear that fire protection duties also include incidental non fire fighting functions such as housekeeping, equipment and apparatus maintenance, as well as attending drills, and inspections. Status as trainee, probationary or permanent, makes no difference in this determination, the definition includes rescue and ambulance personnel if they form an integral part of the agency fire protection activities (29 C.F.R. Section 553.215). Thus, paramedics or paramedic/ firefighters ordinarily will qualify for the 207(k) exemption, even though they spend a very small portion of their time fighting fires. Obviously, in Washington and many other states under current conditions, even firefighters who are not paramedics probably spend the lion's share of their time engaged in fire protection activities other than actually fighting fires. EMS calls are frequently 70% or more of the total dispatches for most fire protection districts in Washington.

In the Gladstone, Missouri case, the court of appeals followed many other circuits when it took a broad view of the definition of fire fighting activities. The 8th Circuit would only hold the paramedic work non-exempt if it was distinct from and unrelated to fire protection activities or if the essential nature of the job changed and the person was required to perform tasks unrelated to their job. The work need not stem from the fire call or vehicular accident. The court noted that the federal Dept. of Labor had not interpreted the regulations to mean that only time spent by paramedics on calls stemming from fires or MVAs was related to fire protection activities. Notwithstanding the decision, even the 8th Circuit would rule that paramedics who are not permitted to fight fires or enter a burning building or who are only dispatched to fires to treat injured

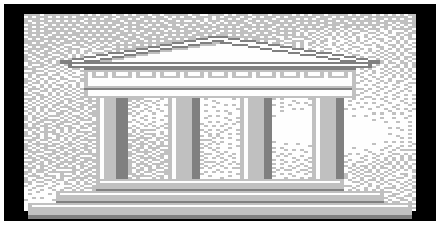
Paramedic/Firefighters are Exempt … (con't)

persons are <u>not</u> engaged in fire protection.

MERE OBESITY NOT ADA PROTECTED

The Ohio highway patrol established physical fitness criteria and weight limits for its officers. 76 officers failed to meet the weight limits or other criteria and allegedly became subject to discipline. They filed suit against the State of Ohio and others in federal court alleging discrimination based on a perceived disability in violation of the ADA and Section 504 of the Rehabilitation Act. The court granted a motion to dismiss for failure to state a claim, and the officers appealed to the U.S. Court of Appeals, 6th Circuit.

The Court of Appeals held that since the District Court did not know what criteria were used in fixing the weight and health standards, it could not adequately determine based only on the pleadings whether the criteria were job related and consistent with business necessity. Nonetheless, the Court of Appeals affirmed the District Court's dismissal, finding that the officers failed to adequately allege a perceived impairment. The court noted that under the law the alleged impairment must qualify as a physiological disorder. The officers failed to show that their degree of obesity qualified as such. They did not show that they suffered from "morbid obesity" or any other physical or mental condition that prevented them from meeting the required standards. They simply alleged they did not meet the weight limits or the fitness criteria, and the court held this was not enough proof. This case certainly means that an employer can establish fitness criteria and weight limits without violating the ADA or the Rehabilitation Act, unless someone's obesity rises to the level of a physiological disorder such as morbid obesity. The case does not speak to the requirements, if applicable, to bargain with employees' representatives before imposing the new policy. See *Andrews v. State of Ohio*, 104 F.3d 803 (6th Cir. 1997).



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NOTA BENE:

Since January 1, 1997, Mr. Quinn has developed a fire department safety checklist and a set of forms for safety officers. Designed to help fire departments comply with the new WAC 296-305 safety standards, these materials are available to non-Pierce County departments for $50.

In June, 1997, a model Safety Resolution and complete set of operating instructions (SOPs) have been completed, to comply with the "vertical standards". Mr. Quinn has also been developing numerous policy Resolutions and SOPs on various department topics such as open meetings, open records, patient records, etc.

Please call for information.