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Overtime Wages and the Suffer or Permit to Work Standard under the Fair Labor Standards Act[1]

by Robin Potter

I. Introduction

In the late 1800s and early 1900s, sweatshop conditions, long hours, low wages, and dirty unsafe facilities characterized the landscape of the American workplace and factory.[2] Men, women and children labored eighty hour work weeks, and carpenters worked fourteen to sixteen hours a day for a mere fifty cents.[3] By the turn of the twentieth century, hundreds of men, women, and children worked seventy to eighty hours a week, seven days a week, under substandard conditions and wages in hundreds of New York City garment shops.[4] If the workers did no work on Sunday, they suffered from the industrial capital punishment of discharge, and no job to return to on Monday morning.[5]

By the time of the 1884 convention of the Federation of Organized Trades and Labor Unions, workers threatened that if the eight hour day was not won by May 1, 1886, they would strike.[6] Ignored by their employers, on May 1, 1886, over 300,000 workers participated in the first general strike in the history of the international labor movement.[7] In 1886 alone, over 600,000 workers fought for an eight-hour work day by participating in over 1,500 strikes and lockouts nationwide.[8] They called for "eight hours for work, eight hours for rest, eight hours for what we will."

Legislation to control hours of work was often met with corresponding reductions in pay leading to further workplace strife. Such was the case in the Lawrence textile strike of 1912:

> The State Legislature had just passed a law reducing the hours of labour from 56 to 54 per week, and there was rumour that our pay would be reduced accordingly. Our next pay day was Friday, January 12 . . .
>
> There was a sharp whistle. It was the call that said . . . "Come and get your pay!" Just like any other Friday, the paymaster, with the usual armed guard, wheeled a truck containing hundreds of pay envelopes to the head of a long line of anxiously waiting people . . . When the great moment came, the first ones nervously opened their envelopes and found that the company had deducted two hours' pay. They looked silly, embarrassed and uncertain what to do. Milling around, they waited for someone to start something. They didn't have long to wait, for one lively young Italian had his mind thoroughly made up and swung into action without looking into his pay envelope. "Strike! Strike!" He yelled. To lend strength to his words as he ran, passed our line, then down the room between spinning frames. The shop was alive with cries of "Strike!" after the paymaster left . . . A tall Syrian worker pulled a switch and the powerful speed belts that gave life to the bobbins slackened to a stop. There were crises: "All Out!" And then hell broke loose in the spinning room.[9]

On May 24, 1937, President Franklin Delano Roosevelt introduced the bill that later became the Fair Labor Standards Act (FLSA). Senator Hugo Black of Alabama (who later served as an associate justice of the Supreme Court) and Representative William Connery of Massachusetts sponsored the bill in their respective houses of Congress. Roosevelt told Congress that there was no justification for "chiseling workers' wages or stretching workers' hours."[10] A year later, the FLSA became law.[11] The purpose behind the FLSA was to protect employees from "substandard wages and excessive hours, which endangered the national health and well-being . . ."[12] In the words of FDR, "Our nation so richly endowed . . . should be able to devise ways and means of insuring to all able-bodied

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working men and women a fair day's pay for a fair day's work."[13] The FLSA combated the evils of overwork and underpay by establishing substantive rights to a minimum hourly wage and to overtime pay at a rate of time and a half for work over forty hours in a work week for the working class.[14] The minimum wage was initially set at $.25 per hour and the maximum workweek was initially set at forty-four hours.[15]

This article explores a major area of litigation and compliance deficiencies under the FLSA. It focuses on the requirement that employers pay the overtime premium whenever they "suffer or permit" employees to work more than forty hours in a week.

II. An Overview of the FLSA

The FLSA requires that employers pay employees at least $5.15 per hour,[16] although Illinois statute sets a higher minimum. The act also prohibits the employment of "oppressive child labor,"[17] which the statute defines as employment of a child under sixteen or a child between sixteen and eighteen years old in violation of regulations issued by the Secretary of Labor.[18] The FLSA requires that employees be paid one and one-half times their regular rate of pay for hours worked in excess of forty in a workweek.[19]

However the workweek is defined, it does not have to coincide with the calendar week, but once established must be fixed and regularly recurring.[20] Regular rate of pay is defined to include "all remuneration for employment paid to, or on behalf of, the employee" with certain enumerated statutory exceptions.[21] Regular rate includes wages, salaries, commissions, production bonuses, piece rates, and night shift differentials, as well as other forms of compensation discussed in the Department of Labor (DOL) regulations.[22]

Public and private sector employers must compensate employees for all hours worked under the FLSA. In the public sector, assuming the employer meets the requirement of the Act to have an agreement or understanding prior to the performance of the work, the employee may be paid compensatory time off in lieu of overtime pay. Public sector employees are generally limited to accrual of up to 240 or 480 hours of compensatory time, the latter for public safety employees.[23]

The FLSA created within DOL the Wage and Hour Division (WHD).[24] FLSA cases represent approximately 83 percent of all of the cases handled by the WHD every year.[25] In 2003, as a result of WHD investigations, 314,660 employees collected $182 million in back wages for violations of the Fair Labor Standards Act, which was a 27.4% increase over the $143 million collected for 241, 568 employees in 2002.[26] In addition, WHD fined employers $9,993,041.44 in FLSA civil money penalties.[27]

It is black letter FLSA law, that to protect workers from substandard wages and oppressive working hours, there are only two ways an employee may waive a claim for back overtime.[28] First, a claim may be settled if an employee accepts the back overtime payment authorized and supervised by the Secretary of Labor (assuming the employer paid all wages due or agreed to by the DOL); second, a claim may be waived by entry of court judgment.[29]

In *Barrentine v. Arkansas-Best Freight System, Inc.*,[30] the Supreme Court held that employees who pursued their wage claims through the grievance and arbitration procedure of their collective bargaining agreement and lost were not barred from bringing suit under the FLSA by the adverse arbitration decision. In holding that the FLSA claim was independent of the outcome of the grievance under the collective bargaining agreement, the Court placed the issue in the context of a long line of precedent concerning waivers of FLSA rights:

> This Courts' decisions interpreting the FLSA have frequently emphasized the nonwaivable na-

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Ms. Potter is a member of the ABA and from 1995-2003, was the Plaintiffs' Chair of the ABA's Labor & Employment Committee, Workers' Dislocation Subcommittee. She is also a member of the ISBA, National Employment Lawyers' Association (NELA), ATLA (Civil Rights and Individual Employee Rights Sections); the Taxpayers Against Fraud (lawyers representing plaintiffs in Qui Tam litigation) and the AFL-CIO Lawyers Coordinating Committee. She served on the NELA/Illinois Executive Board for over 10 years and as the organization's President from 1997-1999. She founded the state-wide newsletter, the *Illinois Advocate*. In 1996 and again in 2001, Ms. Potter was appointed as a government *Election Supervisor*, overseeing and conducting elections for delegates to the International Convention of the Laborers' International Union of North America (LIUNA). Her appointment was pursuant to the Consent Decree between LIUNA and the United States Department of Justice. In the fall of 2003, she was appointed by the United States District Court for the Northern District of Illinois as the Special Master in *EEOC v. The Dial Corporation*, a pattern and practice sexual harassment case.

> ture of an individual employee's right to a minimum wage and to overtime pay under the Act. Thus we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate. Moreover, we have held that congressionally granted FLSA rights take precedence over conflicting provisions in a collective bargained compensation arrangement.[31]

Barrentine remains the seminal authority holding that unsupervised waivers of FLSA rights are void. Thus, forcing employees to agree to work off the clock without overtime pay, violates *Barrentine*. For example, in *Belbis v. County of Cook*,[32] nurses employed at Cook County hospital sued, claiming they were not paid pre- and post-shift, for job training and that the hospital failed to keep required records of hours worked. Cook County claimed that the employees waived their overtime claims by not filing a grievance under their collective bargaining agreement.[33] Judge Darrah followed *Barrentine* and held that FLSA rights are independent of a collective bargaining agreement and are not waivable.[34] This ruling directly affirms the "suffer or permit doctrine" and strikes down employers' attempts to whittle away at its continued potency, under the guise of "preemption," "estoppel" or other litigation ruses.

"[T]he duty to pay overtime in conformity with the FLSA is a reflection of Congressional policy by which employees are protected in spite of agreements and/or other actions that would normally be a defense to such payment."[35] In *Hardrick v. Airway Freight Systems, Inc.*, the company did not "require," but allowed overtime if the employees agreed to accept straight time pay.[36] Following *Barrentine* and its progeny, the court held that the unsupervised waiver was invalid.[37] Simply put, the FLSA does not distinguish between whether the employee was required or requested to work — if the employees work more than forty hours a week, they must be paid time and a half.

III. Notable Overtime Litigation

The American workforce is not exploited by the same horrendous working conditions and wage exploitation found at the turn of the twentieth century. Yet wage and hour exploitation continues in other forms, including failure to pay workers for all hours worked or at overtime rates. Such employer violations have led to numerous class and collective action lawsuits with large verdicts or settlements.

In *Mynaf v. Taco Bell Corporation*, 3,000 current and former managers claimed that they were essentially crew members, but their employer had misclassified them as executives to avoid compensating them for overtime labor. After three weeks in trial, Taco Bell settled for $9 million plus attorneys' fees and litigation expenses.[38] In 2001, a California jury awarded $90 million to a class of 2,400 insurance claims adjusters alleging denial of overtime pay in *Bell v. Farmers Insurance Exchange*. The award was upheld by the California Court of Appeal.[39] In *Martins v. Payless Shoe Source Inc.*, 1,500 members of a class of salaried store managers alleged that the defendant purposely misclassified them to save millions of dollars in payroll and taxes. The parties settled in mediation for almost $4 million.[40]

In *Kelley v. Pacific Telesis*, Case No. 97 C 2729 *N.D. Cal.) Pacific Bell settled misclassification overtime claims in 2001 for $35 million and ended a five year class action case that involved 1,500 members.[41] In *Belazi v. Radioshack Corporation, Tandy Corporation*, 1,300 plaintiffs challenged their misclassification and the employer's failure to pay for twelve to thirteen overtime hours per week they regularly worked selling to customers. After three mediation sessions, the parties settled for $29,900,000.[42] Finally, in *Albright v. United States*, 161 Ct. Cl 356 (1963) the U.S. Bureau of Prisons settled an arbitration case for pre-shift and post-shift overtime under the Federal Employee Pay Act for approximately 1,000 bargaining unit employees for $14 million plus attorneys' fees.[43]

Other major FLSA overtime litigation is on-going. For example, in *Finnigan v. American Intercontinental University Online*,[44] hundreds of Illinois telemarketers contend that their employer suffered or permitted them to work off the clock to deny them overtime and meet production guidelines. The employees allege that through "duress, coercion, and the threat of discipline and/or termination, defendant maintains a company-wide policy and practice whereby it compels its Admissions Advisors to work numerous hours of unpaid overtime" and "regularly instructed admissions advisors to alter, falsify and destroy their time sheets in order to under-report the number of overtime hours they worked."[45] Other employees complain of retaliatory discharge for protesting the company's FLSA violations.[46]

IV. The Suffer or Permit to Work Standard

The Fair Labor Standards Act requires that an employee be paid overtime pay if the employer "suffers or permits" the employee to work overtime.[47] The Act's regulations are clear that "[w]ork not requested but suffered or permitted is work time."[48] The standard applies to all private and public sector employees with some

exceptions, as noted below.

Both private and public employers who know or should have known that an employee is working overtime must pay the employee for the overtime.[49] An employer may not stand by and allow an employee to perform overtime work without proper overtime compensation. "Suffer" and "permit" mean with the knowledge of the employer, either actual or constructive.[50]

It is the employer's duty to make a reasonable effort to ensure that work that management does not want performed is not done. [51] If employer merely enacts but does not enforce a rule against overtime, it is not relieved of FLSA liability. If the employer knows, or has reason to believe, the employee is working overtime, but fails to send the employee home, those hours are "counted as hours of employment for purposes of the act, even though no permission has been given or the employer has expressly instructed the employee not to perform the work during such periods."[52] Public and private employers alike, have a duty of "reasonable inquiry," to determine if work is being performed on their behalf, given the work environment, the conditions in the business and their actual knowledge.[53]

In *Hallemeier v. Schnuck Markets, Inc.*, the plaintiffs alleged that defendant violated the FLSA by failing to properly pay overtime compensation.[54] Specifically, plaintiffs alleged that they would clock out at the end of their shift and continue to work.[55] The employer denied that it had knowledge of any wages due other than what its time records showed.[56] Because a fact issue existed as to what the employer knew or should have known, defendant's motion to dismiss was denied.[57] To show that defendant suffered or permitted plaintiffs to work, plaintiffs only had to show that the defendant knew or should have known that an employee was working overtime.[58] If there is constructive knowledge, an employer must comply with FLSA overtime requirements. [59]

Amendments to DOL's FLSA regulations, the Fair Pay rules, became effective on August 23, 2004.[60] The new regulations revise salary and duties tests for overtime exemptions for executive, professional and administrative employees, and re-define these white collar exemptions. The revisions contained no substantive amendments to the "suffer or permit" requirements of the Act. Consequently, if an employee is not exempt, the employee remains entitled to overtime for all hours that the employer suffers or permits the employee to work.

V. The Suffer or Permit Standard in the Public Sector

Since the passage of the FLSA, the public sector has increased its share of non-farm employment by 3 percentage points. Overall one out of every six jobs in the non-farm economy is in governmental service; the extent of public employment peaked in March 2001 and has been in decline since August 2003.[61]

Initially, the FLSA did not apply to government workers. The FLSA was amended in 1966 to cover state and local governmental employees of hospitals, nursing homes, mental institutions, schools and mass transit systems. In 1972, the Education Amendments applied FLSA protections to employees of public preschools. By 1974, the FLSA was amended to apply to most federal employees, and to state and local governmental employees.

The standards applied to overtime claims of federal employees differ from the general suffer or permit approach. *Doe v. United States* [62] was an intriguing and seminal overtime class action case involving federal employees. Attorneys employed by the Department of Justice sued for their unpaid overtime. They won initially, but on appeal, the United States Court of Appeals for the Federal Circuit reversed the award of summary judgment for the class and granted summary judgment to the United States. The court relied on the Federal Employees Pay Act ("FEPA"),[63] which provides for overtime compensation only when overtime has been "officially ordered or approved."[64] The operative Office of Personnel Management regulation requires that overtime be officially "ordered or approved . . . in writing." [65] Unlike the broader "suffer or permit" standard of the FLSA, under the FEPA, "because the overtime here was not officially ordered or approved in writing as required by the regulation, . . . the plaintiffs were not entitled to compensation . . ."[66]

Although the suffer or permit standard applies to state governments, some state employees have less redress than their local government or private sector counterparts. In *Alden v. Maine*,[67] the Supreme Court held that the Eleventh Amendment bars FLSA suits by state employees against their state employers in either federal or state court. This is true whether or not their employers "suffered or permitted" them to work. However, some state statutes permit suits for FLSA violations and suits may be brought by the DOL against state employers. The Eleventh Amendment sovereign immunity recognized in *Alden* does not extend to local governments or other political subdivisions of the states.

The case law is uniform, except as noted above for FEPA claims and where claims are barred by Eleventh Amendment sovereign immunity. If the employer knows or has reason to believe that the employee continues to work, the additional hours must be counted."[68] It is a crucial lexicon of the

"suffer or permit" doctrine, and part of the basic underpinning of both the statutory promise and language of the FLSA that management "cannot sit back and accept the benefits without compensating for them."[69]

In *Adam v. Brown County*,[70] the employer told the nursing staff that they were expected to perform certain tasks for a few minutes during a lunch break or for a few minutes before or after their shifts but they would not be compensated.[71] The employees did not fill out cards required by the employer to claim overtime, but their time card punches reflected the additional time that they worked. The employer argued that without documents of the employee's overtime, it had no notice or obligation to pay.[72] The court disagreed, finding that the plaintiffs' supervisors told them to work and not record their time and thus, the employer had knowledge.[73] Moreover, the county had access to its time clock records which it used to dock pay when an employee clocked in late or clocked out early, so it could have used the records for determining overtime compensation.[74]

In *Abel v. Kansas Department of Corrections*,[75] the plaintiffs alleged that they were not paid for the meals that they missed due to staff shortages or emergencies.[76] The defendant moved for summary judgment, arguing that the plaintiffs should be equitably estopped from recovering overtime for the missed breaks since they did not record them on their time sheets.[77] The court denied the defendant's motion because there was evidence to infer the defendant had knowledge of the overtime work.[78] Specifically, the defendant had staff shortages that required some plaintiffs to miss their breaks.[79] Additionally, the plaintiffs testified that "some of the supervisors discouraged them from reporting uncompensated overtime, that their claims for missed break periods were sometimes denied or ignored, and that their supervisors told them to record every break period whether or not they took a break."[80] This testimony of the employer's manipulation of the records, not only contravened the FLSA's record-keeping requirements, but called into question the reliability of the defendant's time records, and created a jury issue.[81] Because the evidence showed that the employer had at least constructive knowledge, this case was not an example of employees concealing their overtime and later making a claim for it.[82] Thus, the case could proceed to trial on whether the employer "suffered or permitted" the employees to work.

In Hiner v. P*enn-Harris-Madison School Corp.*,[83] the Penn-Harris-Madison school district employed plaintiffs to operate school buses on a daily basis during the school year.[84] Both the school district and the United States Department of Transportation required plaintiffs to conduct several safety inspections each day in addition to their driving duties.[85] Before their morning departure, plaintiffs had to perform detailed pre-trip inspections: inspect the engine compartment, the front of the bus, the front and rear suspensions, wheels, brakes, exhaust system, lights, seats, and emergency accommodations on the vehicle.[86] After finishing their routes in the afternoon, plaintiffs had to conduct a complete walk-through of their buses to ensure they were empty and that all the windows were closed.[87] Plaintiffs were not compensated for conducting these inspections.[88] In addition, plaintiffs were not compensated for all of their driving time. Plaintiffs were paid for the time from their first morning pick-up until their final afternoon drop-off; however, they were not paid for the time it took them to drive to their first morning pick-up and from their final afternoon drop-off.[89]

The court held that plaintiffs' pre-first pickup and post-final drop off driving time constituted working time for purposes of overtime compensation under the FLSA.[90] In addition, the court held that plaintiffs' time spent conducting pre- and post-route bus inspections also constituted working time for purposes of overtime compensation under the FLSA.[91]

Many suffer or permit to work issues in the public sector involve police officers. Two reoccurring issues concern pay for roll call and pay for tasks performed while officially off duty.

In *Barefield v. the Village of Winnetka*,[92] police officers and civilians were not paid overtime for roll call. Their meal time was not considered part of the work day. The roll call was a fifteen minute pre-shift daily event.

Roll call was mandatory. During roll call uniform and equipment inspections were conducted and current orders, memoranda, pertinent activity on prior watches, and assignments of vehicles and beats were reviewed.[93] Sometimes, a police officer would even have to handle a call on the street during roll call.[94]

In *Barefield*, plaintiffs sought compensation for the unpaid roll calls for an eleven-year period.[95] The Court of Appeals for the Seventh Circuit found that the Winnetka Police Department did not have to compensate the police officers for the roll call time. The FLSA allows public employers to establish a work period of up to twenty-eight days for employees who provide police or fire protection services. When such a work period is established, the employer is not required to pay overtime unless an employee works more than 171 hours in a 28-day period.[96] Because the addition of the fifteen minute per day roll call did not bring the police officers' total time above 171 hours per work

period, the police officers were not entitled to overtime.[97] As for the civilian employees, the court found that their regular eight-hour work periods included thirty minutes of meal time, which was not "work" time under the FLSA. Thus, the paid meal time offset the unpaid roll call time worked by plaintiffs and no overtime payment was required.[98]

In *Bartoszewski v. Village of Fox Lake*,[99] plaintiffs were police officers and civilian employees of the Fox Lake Police Department who attended uncompensated roll call ten minutes before beginning their shifts each day. The Illinois Appellate Court for the Second District held that the plaintiffs stated a claim for a willful violation of the FLSA.[100] Although the collective bargaining agreement covering the police officers referred to a 28-day work cycle, there was no discussion in the court's opinion of village adoption of a 28-day work cycle or its effect on the village's FLSA liability.

In *Bartoszewski*, the plaintiffs also claimed that the village had violated a village ordinance by not paying for roll call time. The court found that the Village Code provided for a work week of forty hours and for compensation of authorized overtime at the regular pay rate or by being granted compensatory time. The court concluded that the civilian employees who were not represented by a union stated a claim.[101] The court held, however, that the sworn police officers did not have a claim for violation of village ordinance because their collective bargaining agreement superceded the village ordinance and the officers were required to pursue their claim through the contractual grievance procedure.[102] In other cases, Illinois courts have upheld claims brought against other municipalities for breach of contract or ordinance provisions.[103]

Police officers engage in a variety of activities outside of their regular shifts. Many of these activities have resulted in FLSA litigation. Much of the litigation has involved time spent by K-9 officers caring for their dogs. Courts have held generally that such activity is conducted for the benefit of the employer and is compensable under the FLSA as long as it is reasonable.[104] Courts have held that time transporting the dog to and from work may be compensable depending on whether the officer is required to provide care for the dogs during transportation, is precluded from making personal stops or whether the dog is a mere passenger in the officer's regular commute.[105] In *Treece v. City of Little Rock*,[106] the court held that K-9 officers were entitled to overtime compensation for time spent outside the regular workday cleaning, fueling and maintaining their police vehicles. The court found that the city held officers responsible for the maintenance of their assigned vehicles and that special care was needed to ensure cleanliness because the plaintiffs were constantly transporting their dogs in the vehicles. The court held that the activities were undertaken for the employer's benefit and that, to the extent that the time expended was not de minimis, the officers were entitled to overtime.[107]

Courts have also considered claims by police officers to overtime compensation for their off-duty time spent washing and maintaining their uniforms and maintaining their firearms and other equipment. Compensability for such time has turned on whether the officers undertake such activities for the benefit of the employer and whether such time is de minimis.[108] In *Albanese v. Bergen County*, the court held that a Drug Abuse Resistance Education (DARE) officer was entitled to overtime for time spent off-duty preparing for and scheduling presentations to schools and youth groups.[109]

V. Conclusion

That the FLSA remains a viable and often litigated statute reflects that employers continue to violate the law. The wise words of FDR ring as true today as in 1937, that there is no justification for employers "chiseling workers' wages or stretching workers' hours." It is the hope of this author, that this article will assist employers to comply with the law and to reward

Notes

1. The author acknowledges the contributions of Lindsey Daggett and Amy Carollo, Chicago-Kent College of Law class of 2005, to this article.
2. *See* John J. Flagler, The Labor Movement in the United States 25 (1970).
3. *Id.* at 26.
4. *See* Howard Zinn, A People's History of the United States 318 (1980).
5. *Id.*
6. *See* Donald L. Miller, City of the Century: The Epic of Chicago and the Making of America 473 (1996).
7. *Id.*
8. *Id.*
9. Fred E. Beal, *Strike*, *in* Rebel Voices: An I.W.W. Anthology 176, 177-78 (Joyce L. Kornbluh ed., 1964).
10. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, *available at*, http://www.dol.gov/asp/programs/history/flsa1938.htm (last visited May 13, 2005).
11. ch. 676, 52 Stat. 1, codified as amended at 29 U.S.C. §§ 201-62.
12. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945).
13. 81 Cong.Rec. 4983 (May 24, 1937).
14. 29 U.S.C. §§ 206-07.
15. *See* Grossman, *supra*, note 10.
16. 29 U.S.C. § 206.
17. *Id.* § 212.
18. *Id.* § 213(l).
19. 29 U.S.C. §207.
20. 29 C.F.R. § 778.105.
21. 29 U.S.C. § 207(e).
22. 29 C.F.R. Part 778.
23. 29 U.S.C. § 207(o).
24. 29 U.S.C. § 204.
25. *See Wage and Hour Fiscal Year 2003 Enforcement Continues Record Climb, at* <http://www.dol.gov/esa/regs/compliance/whd/fairpay/statistics_2003.htm> (last visited May 13, 2005).
26. *Id.*
27. *Id.*
28. *Lynn's Food Stores, Inc. v. U.S. Dept. of Labor*, 679 F.2d 1350, 1352-53 (11th Cir. 1982); *Manning v. New York University*, 2001 U.S. Dist. LEXIS 12697, at *35 (S.D.N.Y. August 21, 2001).
29. *Lynn's Food Stores, Inc.*, 679 F.2d at 1353.
30. 450 U.S. 728 (1981).
31. *Id.* at 740-41 (citations and footnote omitted).
32. 2002 U.S. Dist. LEXIS 22426 (N.D. Ill.

Nov. 18, 2002).
33. *Id.* at *9-10.
34. *Id.* at *10.
35. *Hardrick v. Airway Freight Systems, Inc.*, 63 F. Supp. 2d 898, 901 (N.D. Ill. 1999) (citing *Duncan v. Brockway Std., Inc.*, 1992 U.S. Dist. LEXIS 21165, at *11 (N.D. Ga. 1992).
36. *Id.* at 901-02.
37. *Id.* at 902.
38. *See* Ron Gaswirth, *FLSA: An Old Law that Can Cost Companies Millions*, 18 Tex. Law., Mar. 3, 2003, at 11.
39. *Id.*; *Bell v. Farmers Ins. Exchange,* 9 Cal. Rptr. 3d 544 (Cal. Ct. App. 2004).
40. Gaswirth, *supra* note 38.
41. *Id., See also Kelly v. SBC, Inc., Pacific Telesis Group,* 5 Wage & Hour Cas. 2d (BNA) 16 (N.D. Cal. 1998); Lisa Girion, *PacBell to Settle Overtime Lawsuit*, L.A. Times, Dec. 4, 2001, pt.3, at 1.
42. Case No. 00CC 3817 (July 15, 2002) Jury Verdict Weekly (California) Vo1. 1, No. 34. *See also* Adam Geller, *Workers Go to Court to Claim Overtime Pay*, San Gabriel Valley Trib., Aug. 2, 2002; *Radio Shack to Settle Store Managers' Claim*, San Diego Union-Trib., July 17, 2002, at C-8.
43. 161 Ct. C1. 356 (1963).
44. (Cir. Ct., Cook County, Case No. 03 CH 18335) (complaint filed Oct. 31, 2005, class certification pending).
45. *Finnigan*, Plaintiff's Amended Class Certification Memorandum (Cook County Circuit Court, filed Dec. 6, 2003).
46. *See Skelton and Abbinanti v. Am. Intercontinental Univ. Online*, Case No. 03 C 9009 (N.D. IL. Complaint filed Dec. 15, 2003).
47. 29 U.S.C. §203(g).
48. 29 C.F.R. §785.11.
49. *See Jerzak v. City of South Bend*, 996 F. Supp. 840, 845 (N.D. Ind. 1998).
50. *Hallemeier v. Schnuck Mkts., Inc.*, 1994 U.S. Dist. LEXIS 5751, at *2 (D. Kan. April 20, 1994).
51. *See* DOL Opinion Letter, 1964 DOLWH LEXIS 175, at *4 (March 3, 1964).
52. Opinion Letter, 1965 DOLWH LEXIS 160, at *4, (September 1, 1965).
53. *See Gulf King Shrimp Co. v. Wirtz*, 407 F. 2d 508, 512 (5th Cir. 1969).
54. 1994 U.S. Dist. LEXIS 5751, at *1 (D. Kan. April 20, 1994).
55. *Id.* at *4.
56. *Id.* at **4-5.
57. *Id.* at *9.
58. *Id.* at *2.
59. *Id.*
60. 69 Fed. Reg. 22260 (2004), to be codified at 29 C.F.R. pt. 541.
61. Julie Hatch, *Employment in the Public Sector : Two Recessions' Impact on Jobs,* Monthly Lab. Rev., Oct. 2004, at 38.
62. 372 F.3d 1347 (Fed. Cir., 2004), c*ert. denied,* 125 S. Ct. 1591 (2005).
63. 5 U.S.C. §5542.
64. *Id.* § 5542(a).
65. 5 C.F.R. § 550.111(c).
66. *Doe*, 372 F.3d at 1349.
67. 527 U.S. 706 (1999).
68. *Hellmers v Town of Vestal,* 969 F. Supp. 837, 845 (N.D.N.Y. 1997 (*citing Reich v. Dept. of Conservation & Natural Resources*, 28 F.3d 1076, 1082 (11th Cir. 1994)).
69. *Id.*
70. 570 N.W.2d 62 (Wis. Ct. App. 1997), unreported opinion available at 1997 Wisc. App. LEXIS 835.
71. *Id* at *4.
72. *Id* at *12.
73. *Id.*74. *Id.*
75.1995 U.S. Dist. LEXIS 13565 (D. Kan. July 26, 1995).
76. *Id.* at *5.
77. *Id.* at *14-15.
78. *Id.* at *17.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 18.
83. 256 F. Supp. 2d 854 (S.D. Ind. 2003).
84. *Id.* at 855.
85. *Id. at* 857.
86. *Id.*
87. *Id.*
88. *Id. at* 855.
89. *Id.* at 857.
90. *Id. at* 865.
91. *Id.*
92. 81 F.3d 704 (7th Cir. 1996).
93. *Id.* at 707.
94. *Id.*
95. *Id.*
96. 29 U.S.C. § 207(k).
97. *Barefield*, 81 F.3d at 710.
98. *Id.* at 710-11.
99. 269 Ill.App.3d 978, 647 N.E.2d 591 (2d Dist. 1995).
100. *Id.* at 987, 647 N.E.2d at 597-98.
101. *Id. at* 981-82, 647 N.E.2d at 594.
102. *Id.* at 986-87, 647 N.E.2d at 596-97.
103. *Cannella v. Village of Bridgeview*, 284 Ill.App.3d 1065, 1068, 673 N.E.2d 394 (1st Dist. 1996); *Airdo v. Village of Libertyville,* 184 Ill.App.3d 653, 540 N.E.2d 861 (2d Dist.1989).
104. *See*, *e.g.*, *DeBraska v. City of* Milwaukee, 11 F. Supp. 2d 1020 (E.D. Wisc. 1998), *aff'd in part on other grounds, reversed in part of other* grounds, 131 F.3d 1032 (7th Cir. 1999); *Jerzam v. City of South Bend*, 996 F. Supp. 840 (S.D. Ind. 1998);Albanese *v. Bergen County*, 991 F. Supp. 410 (D.N.J. 1997); *Treece v. City of Little Rock*, 923 F. Supp. 1122 (E.D. Ark. 1996).
105. *Compare DeBraska v. City of* Milwaukee, 11 F. Supp. 2d 1020 (E.D. Wisc. 1998), *aff'd in part on other grounds, reversed in part of other* grounds, 131 F.3d 1032 (7th Cir. 1999) *with Jerzam v. City of South Bend*, 996 F. Supp. 840 (S.D. Ind. 1998).
106. 923 F. Supp. 1122 (E.D. Ark. 1996).
107. *Id.* at 1125-26.
108. *See* Albanese *v. Bergen County*, 991 F. Supp. 410, 413 (D.N.J. 1997); *Treece v. City of Little Rock*, 923 F. Supp. 1122 (E.D. Ark. 1996).
109. *Albanese*, 991 F. Supp. at 421. ◆

Recent Developments

Recent Developments is a regular feature of The Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the two collective bargaining statutes and the equal employment opportunity laws.

IELRA Developments

Interference with Protected Activity

In *North Shore District, No.* 112*, v. North Shore Education Association, IEA-NEA and Nan Stein*, No. 2003-CA-0001-C (IELRB 2005), the IELRB reiterated that in dual-motive cases, alleging violations of sections 14(a)(3) and 14(a)(1) of the IELRA, an employer may not merely rely on legitimate grounds to take an adverse employment action, but must prove that the action would have been taken notwithstanding the employee's protected concerted activity.

Nan Stein was a non-tenured art teacher for the Wayne Thomas School. Following a conflict regarding requested leave and a few other matters, her contract was not renewed by the district. Stein requested time off, as explicitly allowed by the collective bargaining agreement.

Half of her request was denied by the principal at Wayne Thomas School. On one of the days for which Stein was denied leave she had a scheduled doctor's appointment. She notified the principal one day in advance of the appointment. When challenged on the propriety of her actions, Stein furnished a letter from the doctor's office substantiating that she was at the office that day. A few days later, when Stein was out on her

granted leave and a substitute teacher was in charge of Stein's art classes, the principal stopped by the classroom. The principal was disappointed to find that Stein's lesson plan for the day had not kept the students busy for the full class time. Upon complaint to Stein, Stein submitted an altered lesson plan for any further absences. The principal assured Stein that the lesson plan was "fine"and Stein received no further complaints regarding her lesson plans. A few months later, Stein left the school building for a short time without giving notice to the principal's office, as she was required to do under the collective bargaining agreement.

A short time later, the principal completed Stein's evaluation, although Stein had to wait a month before seeing the evaluation. The principal rated Stein as not meeting the district's standard and recommended that she not be rehired. Prior to receiving her evaluation, Stein wrote four letters which responded, in turn, to each of the principal's accusations and complaints, though the principal was dismissive of the letters. A month later Stein wrote another letter to address the actual evaluation. Stein pointed out that her teaching abilities were not criticized in the evaluation; rather her protected activity was the subject of complaint. A short time later, the school board decided not to rehire Stein for the following term.

The North Shore Education Association and Stein filed an unfair labor charge alleging violations of sections 14(a)(3) and 14 (a)(1). The Administrative Law Judge issued a Recommended Decision and Order in favor of the school district.

The IELRB reversed and found violations of both sections of the IELRA. To establish a prima facie case that an educational district has violated section 14(a)(3) of the IELRA where retaliation for protected activity is alleged, the complainant must show that: 1) the employee engaged in protected concerted activity; 2) the district was aware of that activity; and 3) the district took adverse employment action against the employee that was motivated by the employee's protected activity. The IELRB found that: Stein engaged in protected activity when she requested and took leave and wrote letters of complaint, the district was necessarily aware of her activity, and the district's decision not to renew Stein's contract was motivated by her protected activity. The principal admitted to unlawful motivation in claiming that she began to consider recommending that the district not renew Stein's contract based on the amount of leave Stein had requested.

There was also circumstantial evidence of the district's unlawful motivation. Unlawful motivation can be inferred through the following factors: expressions of hostility toward unionization with knowledge of the employee's union activities, timing, disparate treatment or targeting of union supporters, inconsistencies between the reason offered by the district for the adverse action and other actions of the district, and shifting explanations for the adverse action. The district expressed hostility toward Stein's protected activity as evidenced by the principal's testimony that she told Stein that she was concerned about Stein's request for "a lot of time off" the previous September. The district's hostility toward Stein's request itself and toward the amount requested were indicative of unlawful motivation in the non-renewal of her contract. While the district had the right to deny Stein's request, its hostility toward Stein's request demonstrated that its subsequent decision not to renew Stein was unlawfully motivated by her protected activity.

The IELRB found that the district relied, in part, on Stein's misuse of sick leave, her poor substitute lesson plans and her leaving school property without informing the office, when it decided not to renew her contract. Because this was a dual motive case, the district had to show by a preponderance of the evidence that Stein's contract would not have been renewed notwithstanding her protected concerted activity of requesting and using leave and writing the letters to the principal. Although the district may have had legitimate grounds to not renew Stein's contract, it failed to prove that Stein's contract would not have been renewed notwithstanding her protected concerted activity. The district did not show that the legitimate grounds for its action were its determinative motivation.

IPLRA Developments

Hearing Procedure

In *State of Illinois, Department of Central Management Services v. AFCSME Council 31,* Case No. S-RC-04-038 (ILRB, State Panel 2005), the State Panel ruled that the assignment of an Administrative Law Judge who had not attended the hearing to rule on the case did not violate principles of due process. The Illinois Department of Central Management Services (CMS) contended that the ruling judge's assignment to the case after the hearing had been held and attended by a different judge violated the due process owed to it. The State Panel ruled that due process was not denied because the hearing was not adversarial in nature, and instead was for fact-finding. Thus, the substituted Administrative Law Judge was in no worse position to rule on the case after reviewing the evidence than the original Administrative Law Judge would have been.

CMS also claimed that the new judge's factual findings were "inherently unreliable" and that the

Administrative Law Judge that had presided at the hearing was in a better position to judge the credibility of the witnesses when coming to a decision. The ILRB disagreed, pointing out that CMS had not pointed out any instances in which credibility determinations could have or did affect the new judge's ruling. The State Panel explained, "Just because an Administrative Law Judge makes findings of fact, which may tend to mirror one's party's testimony over another, does not mean that she makes credibility determinations."

Subjects of Bargaining

In *AFSCME Council 31 v. Village of Orland Park*, No S-CA-03-197, (ILRB State Panel 2005), the State Panel found that the Village of Orland Park violated sections 10(a)(4) and (1) of the IPLRA by refusing to bargain with AFSCME concerning its decision to implement a new system of project evaluations for its public works employees. The panel found that the procedural aspects of the project evaluation system were mandatory subjects of bargaining, but that the substantive aspects of the system were not.

The Village of Orland Park had administered an annual employee evaluation plan for the prior nine years. According to the collective bargaining agreement, these evaluations served as the basis for employees' step wage increase. Prior to January 2003, foremen, a position not included in the bargaining unit, completed the annual employee evaluations with some possible input from crew leaders throughout the year. In fall 2002, the village sought to implement a system of evaluations on employees' progress on individual projects that would then justify the ratings given on and serve as the basis for the annual employee evaluations. Employees would be evaluated on projects selected by the foremen at least every two to three months, ensuring that at least four project evaluations preceded any annual evaluation. The village implemented the project evaluations on April 1, 2003, without first bargaining with AFSCME.

The Administrative Law Judge found that the village violated sections 10(a)(4) and (1) of the IPLRA, but did not make a distinction in his decision between the procedural and substantive aspects of the evaluation system. The State Panel agreed with the overall result that the village violated the Act but found there to be distinctions between the procedural and substantive aspects of the evaluation system.

Parties are required to bargain collectively regarding employees' wages, hours, and other conditions of employment; therefore a public employer violates its obligation to bargain, and consequently sections 10(a)(4) and (1) of the Act, when it makes a unilateral change in a mandatory subject of bargaining without granting prior notice and an opportunity to bargain to the exclusive bargaining representative. The village did not dispute that it did not bargain with AFSCME before implementing the evaluation system; therefore, the question left to the panel was whether the project evaluations constituted mandatory subjects of bargaining. This was an issue of first impression for the board.

In making its decision, the panel looked to the decision in *Central City Education Association, IEA/NEA v. IELRB*, 149 Ill. 2d 496, 599 N.E.2d 892 (1992). In *Central City,* the court held that a topic is a mandatory subject of bargaining if it concerns wages hours and terms and conditions of employment and: (1) is either not a matter of inherent managerial authority; or (2) is a matter of inherent managerial authority, but the labor board determines that the benefits of bargaining outweigh the burdens bargaining imposes on the employer's authority.

In applying the test, the State Panel found the difference between the mechanical, procedural aspects of the employee's evaluation and the substantive factors by which the work performance was rated to be critical. Under the first prong of *Central City*, the panel found it clear that the project evaluations affected employee terms and conditions of employment because they contained different criteria than those included on the annual evaluations, were completed by crew leaders as opposed to foremen, occurred more frequently throughout the work year, and served as a basis for the annual evaluations, which in turn controlled employee wage increases. The panel then turned to the second prong of the *Central City* test and found that nothing about the mechanical aspects of an employee's evaluation implicated any of the managerial concerns set forth in section 4 of the IPLRA; therefore the panel found the procedural aspects of the project evaluations to be mandatory subjects of bargaining.

On the other hand, the panel found the substantive aspects of the evaluations to involve matters of inherent managerial discretion. The panel found the purpose of the evaluations in assessing the quality of work performance to involve important policy determinations and to involve the overall direction of the village's workforce. In addition, the panel found the village's ability to determine the standard and level of employee work performance to relate directly to the standards of service it provided to the surrounding community; therefore, the State Panel found the village's decisions about the substantive portion of the project evaluation system to impact matters of inherent managerial authority. The panel also concluded that the benefits of bargaining over the substantive

aspects of the project evaluations did not outweigh the burdens of bargaining because the panel found the substantive criteria of the employee evaluations to be crucial to the village's ability to direct its employees. Requiring bargaining over those criteria would severely impede that ability.

Unit Clarification

In *State of Illinois, Department of Central Management Services and AFSCME, Council 31 v. David Suarez*, No. S-UC-S-04-038 (ILRB State Panel 2005), the State Panel dismissed the employer's and union's petition for unit clarification to exclude David Suarez, an individual employed as an Information Systems Analyst II, from the bargaining unit.

On October 13, 2004, Acting Executive Director Fred Wickizer issued an order of clarification excluding Suarez from the bargaining unit. Suarez filed a timely appeal and the employer filed a timely response. After reviewing the record, the State Panel reversed and dismissed the petition for unit clarification.

According to the panel, the unit clarification device is used only to resolve confusion over the composition of an existing bargaining unit by clarifying whether particular positions or titles are properly within the scope of the unit. Where employees have been intentionally and historically included in or excluded from a bargaining unit, however, it is inappropriate to use the clarification process to disrupt the parties' existing arrangement. For this reason, the board has recognized four limited circumstances in which the unit clarification procedure can be used: (1) where a new job title is created which entails job functions substantially similar to those performed by bargaining unit employees; (2) where substantial changes occur in the duties and responsibilities of an existing title, raising an issue as to the title's unit placement; (3) where a significant change takes place in statutory or case law which affects the bargaining rights of employees; and (4) where an existing job title which is logically encompassed within the existing unit was inadvertently excluded by the parties at the time the unit was established.

The panel found that none of the four circumstances were met in this case. Suarez's job was not newly created; there had been no change in statutory or case law that raised questions about his placement in the bargaining unit, and no one claimed that the analyst's job duties had substantially changed.

The panel then examined the fourth circumstance and found that a unit clarification petition is appropriate if the position to be added to the bargaining unit existed when the unit was originally formed, but was omitted through mere inadvertence. However, in this case, the parties were not seeking to include Suarez's position, but to exclude his position. Additionally, the panel found that Suarez had been included in the unit for over eight years, holding the analyst title for the last four, and that the significant amount of time in this case was not what the board contemplated when it created the "inadvertent omission" doctrine.

The panel pointed to *County of Fulton and Fulton County Circuit Clerk*, 6 PERI ¶ 2024 (ISLRB 1990), where the State Board held that the unit clarification process could not be invoked to exclude employees from an established bargaining unit on the basis that they were mistakenly included in the first place. The panel also pointed to *City of Chicago*, 8 PERI & 3002 (ILLRB 1991) in which the Local Board rejected an attempt by an employer to exclude a title that had been included in an existing bargaining unit for five years after the unit's clarification because the city had not exercised due diligence when it sought to remove the title from the existing bargaining unit five years later. The State Panel found these cases analogous to the instant case and ordered the unit clarification petition dismissed.

EEO Developments

Age Discrimination

In *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005), the Supreme Court found that employers can be held liable for disparate impact claims arising under the Age Discrimination in Employment Act (ADEA). Petitioners, a group of police and public safety officers for the City of Jackson, Mississippi, challenged a pay plan which granted raises to all city employees. Under the plan, employees with less than five years tenure received proportionately greater raises when compared to their former pay than those with more seniority. Petitioners filed suit under the ADEA claiming disparate treatment and disparate impact. The city defended on the ground that any disparate impact was justified by a legitimate business reason. The reason proffered was that, in order to remain competitive in the marketplace, the city needed to raise the pay scale of younger employees. This is the first time that the Supreme Court has analyzed whether disparate impact claims may proceed under the ADEA.

The Court analyzed the legislative history of the ADEA and Title VII of the Civil Rights Act of 1964. Congress utilized the same language in the statues, proclaiming that it is unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive any individual of employment opportunities or otherwise adversely affect his statues an employee, because of such individual's age . . ." The language of the ADEA is verbatim from Title VII,

save for the word "age." The Court determined that the congressional intent was clear, and that it was more than reasonable to presume that Congress intended the text to have the same meaning in both statutes. Following a lengthy discussion of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and subsequent case law, where the Court reiterated the legitimacy and reasoning of disparate impact claims, the Court delved into the legal ramifications of disparate impact claims under the ADEA.

The ADEA, unlike Title VII, was not affected by the Civil Rights Act of 1991. For that reason, the Court carefully explained that the scope of disparate impact liability under the ADEA is narrower than that of Title VII. The 1991 amendments expanded the coverage of Title VII but had no impact on any interpretations of ADEA, or of disparate impact liability. The Court made it clear that the analysis set forth in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) applies to disparate impact claims arising under the ADEA. The *Wards Cove* decision required an employee to identify the specific employment practice that he or she challenged, and to demonstrate how that practice creates a disparate impact. After the plaintiff satisfies this burden, the employer receives an opportunity to rebut the prima facie case by demonstrating that the challenged practice serves significant and legitimate employment interests. Under *Wards Cove*, the ultimate burden of proof is on the plaintiff. This schema, which was essentially overruled by the 1991 amendments to Title VII, now applies to ADEA disparate impact analysis.

While ruling with the petitioners on the applicability of disparate impact analysis to the ADEA, the Court nonetheless dismissed the petitioners' case because their employer had an "unquestionably reasonable" explanation for the policy. Justice Stevens wrote the majority and was joined by Justices Breyer, Ginsburg, Scalia, and Souter. Justices Kennedy, O'Connor, and Thomas, agreed in disposing of the petitioners claim but would not have permitted disparate impact claims under the ADEA. ♦

Further References

(compiled by Yoo-Seong Song, Librarian, Institute of Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign)

Lemons, Bryan R. PUBLIC PRIVACY: WARRANTLESS WORKPLACE SEARCHES OF PUBLIC EMPLOYEES. *UNIVERSITY OF PENNSYLVANIA JOURNAL OF LABOR AND EMPLOYMENT LAW,* vol. 7, no. 1, Fall 2004. pp. 1-37.

A public employer may want to search an employee's workplace for many different reasons. The author discusses key issues to be considered when a public employer decides to search an employee's workplace which would include desks, offices, cabinets, computers, and other equipment. To comply with the Fourth Amendment, two questions must be resolved: 1) does a reasonable expectation of privacy exit? and 2) if a reasonable expectation of privacy exists, was the search reasonable? The author presents factors to help make a determination for each question.

Gazley, Beth. & Brudney, Jeffrey L. VOLUNTEER INVOLVEMENT IN LOCAL GOVERNMENT AFTER SEPTEMBER 11: THE CONTINUING QUESTION OF CAPACITY. *PUBLIC ADMINISTRATION REVIEW,* vol. 65, no. 2, March/April 2005. pp. 131-142.

This article examines the impact of volunteerism on local governments after September 11. The authors argue that when promoting volunteerism on federal and local levels, only the supply-side (potential volunteers) is being emphasized whereas the demand-side (local governments and employees) is often neglected. While the number of volunteers for local governments have increased after September 11, there still are a few issues to be resolved. Interestingly, a significant percentage of public employees oppose volunteer involvement for several reasons — most notably, volunteers may pose a challenge to their jobs and authority.

Lemke, Robert J. ESTIMATING THE UNION WAGE EFFECT FOR PUBLIC SCHOOL TEACHERS WHEN ALL TEACHERS ARE UNIONIZED. *EASTERN ECONOMIC JOURNAL*, vol. 30, no. 2. Spring 2004. pp. 273-291.

While union membership in the private sector has been decreasing, over 90 percent of public school teachers were reported to be unionized in 1990. The author investigates the effectiveness of teachers' unions in terms of negotiating salaries by focusing on the state of Pennsylvania. The author concludes that the union wage effect achieved by teachers' unions in Pennsylvania is comparable to that achieved by private sector unions as well as other public sector unions. Also, it is similar to the union wage effect for teachers' unions in 1970 when union membership for public school teachers was less than 30 percent.

(Books and articles anotated in Further References are available on interlibary loan through ILLINET by contacting your local public library or system headquarters.)

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