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LABOR & EMPLOYMENT REPORT

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COURT BARS EMOTIONAL DISTRESS DAMAGES IN FMLA CASES

The Eighth Circuit Court of Appeals (which covers Minnesota) recently handed down a huge victory for employers in our Circuit by ruling that damages for emotional distress are not available in lawsuits for claimed violations of the Family and Medical Leave Act (FMLA). This should lower the stress levels for employers grappling with this law that remains very confusing and difficult to administer. Here's what happened.

Absenteeism fires up disagreement

Barbara Rodgers worked in a clerical position for the Fire Department in Des Moines, Iowa. As a result of various medical conditions, including fibromyalgia and diabetes, she requested and received intermittent FMLA leave in May of 2000. Just one month later, Rodgers received her annual performance review that referenced a need for improvement in her attendance. Rodgers took another four weeks of FMLA leave in April, 2001.

In January of 2002, Rodgers received a letter summarizing her rather significant amount of lost work time and telling her that she needed to "take whatever steps are necessary to demonstrate significant and sustained improvement in attendance." The next week, Rodgers applied for future intermittent FMLA leave, which was denied due to a lack of specificity in the request and because Rodgers altered a portion of the leave request form in a way that might have deprived the city of certain reserved rights to obtain additional medical information regarding Rodgers' condition.

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The dispute heats up

Over the next 8 months, Rodgers and the City danced back and forth regarding Rodgers' application for FMLA. The City insisted that they needed more specific information regarding the timing and extent of the anticipated absences so that they could have sufficient staffing available when Rodgers was not present. Rodgers and her health care providers were unable to satisfy this request since her condition did not lend itself to this sort of predictability. The City then requested that Rodgers submit to a second opinion, as permitted under FMLA. When the physician providing the second opinion submitted a report agreeing that the timing and extent of Rodgers' absences were unpredictable, Rodgers was granted intermittent leave on September 13, 2002.

In March of 2003, the City instituted a budget-based reduction in force that resulted in the elimination of Rodgers' job in the Fire Department. She was therefore transferred to the newly created job of Administrative Analyst in the City's Public Works Department with her same pay and benefits. In August of that year, Rodgers sued the City claiming that while her leave was eventually approved, they made her feel as if she should never have requested the leave.

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Rodgers remained with the Public Works Department after filing the lawsuit. However, her attendance continued to be a point of contention as her new manager encouraged Rodgers to improve her performance and issued her a warning in December, 2004, regarding absenteeism. After taking another one-month FMLA leave in January, 2005, she was transferred to a different job in the Call Center, at her same wage and benefits, where she was to remain until her intermittent leave concluded.

Court douses emotional distress damage claim

The City was successful in its motion for Summary Judgment (early dismissal) and the lower court threw out all of Rodgers' claims. She appealed to the Eighth Circuit, claiming among other things that the trial court was wrong in ruling that she could not sue for emotional distress damages. Obviously, this was the primary claim for monetary damages since Rodgers never lost her job or suffered a loss in pay or benefits.

The Appeals Court agreed with the lower court and sided with the City in finding that FMLA did not allow an award of damages for emotional distress. Like every other Circuit that had addressed this issue, the judges observed that the specific language of FMLA states that employees may only recover for "wages, salary, employment benefits or other compensation denied or lost." When such damages are not present, the employee may still recover "any actual monetary losses sustained…as a direct result of the violation…" The appeals court concluded that since the statute only references actual losses (i.e. those that are tangible), damages for emotional anguish must not have been contemplated when the law was enacted. *Rodgers v. City of Des Moines*, 435 F. 3rd 904 (8th Cir. 2006).

The Afterglow

This is a huge win for Minnesota employers. Even though the result could be predicted, confirmation of the unavailability of emotional distress damages in FMLA cases is a welcome development. FMLA is a very difficult law to apply, and it is easy for employers to lose their way when they also have to navigate through the disability discrimination and workers compensations laws. With no money damages available for emotional anguish claims, we should see a reduction in litigation over the complexities of FMLA administration. But remember – claims for back pay still exist if employees lose their job, and attorney's fees are still available to successful claimants.

Dennis J. Merley
612.373.8434
dmerley@felhaber.com

Chambers USA Guide Recognizes Firm Attorneys L&E and Real Estate Practices

Felhaber is pleased to announce that five attorneys were selected for inclusion in the prestigious 2006-2007 Chambers USA Guide: **James Dawson**, **Jan Halverson**, **Penny Phillips**, and **Paul Zech**, Labor & Employment attorneys, and **David Eide**, Real Estate attorney. Chambers & Partners Publishing produces widely recognized guides to the legal profession. Its researchers spent a year canvassing clients and lawyers across the U. S. to obtain a consistent market view of which firms and attorneys are considered leaders in their field. The Felhaber Law Firm made the Minnesota Top 5 List for **Labor & Employment** (ranked #2) and **Real Estate** (ranked #3).

James Dawson

Jan Halverson

Penny Phillips

Paul Zech

David Eide

BIG CHANGE IN EXEMPT STATUS FOR DRIVERS

There are several exemptions to the overtime requirements of the Fair Labor Standards Act (FLSA), including the widely used "motor carrier exemption." The motor carrier exemption applies to employees "with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service" under the Motor Carrier Act.

Prior to August 10, 2005, the FLSA motor carrier exemption applied to most employees who drove any type of motor vehicle (for example, a van or delivery truck no matter what size) in interstate commerce. Recent changes to the Motor Carrier Act, however, have had a major impact on the overtime exemption for certain vehicles.

The old version of the law addressed only "motor vehicles." The new legislation inserted the word "commercial" before the definition of "motor vehicle". The term "commercial" is defined to include only vehicles with a gross weight of at least 10,001 pounds, vehicles designed to transport more than eight passengers for compensation, vehicles designed to transport more the fifteen passengers not for compensation, or vehicles used to transport hazardous materials. This means that an entire class of vehicles which had previously been exempt under the old definition of "motor vehicle" are no longer exempt because they do not fit the definition of "commercial motor vehicles." For example, delivery vehicles that regularly crossed state lines formerly qualified for the exemption; now they do not qualify unless they meet the weight specifications for a commercial vehicle..

The practical impact of this change is that employees who may have been exempt in the past because they drove vehicles across state lines are no longer exempt.

One example would be service technicians who cross state lines in vehicles once covered under the old definition of motor vehicle under the Motor Carrier Act. These employees would no longer be eligible for the overtime exemption under the new definition of motor vehicle because they are not driving "commercial" motor vehicles.

The DOL has not commented on the changes and has not changed their website to reflect the changes. It is not clear that the DOL even knew about the changes when they took place or that Congress actually intended that the changes in the Motor Carrier Act impact the FLSA. There has been some discussion that Congress may pass legislation in the near future to limit the impact. Until that happens, however, employers should review the status of any employees that they consider to be exempt under the motor carrier exemption and determine whether they drive vehicles that still allow them to be considered exempt.

Penelope J. Phillips
612.373.8428
pphillips@felhaber.com

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SARBANES-OXLEY: THE HIDDEN TRAP FOR NON-PROFIT EMPLOYERS

Congress enacted the Sarbanes-Oxley Act ("SOX") in 2002 in response to the corporate and accounting abuses that came to light in 2001 and 2002. The Enron and WorldCom bankruptcies, the indictment of Arthur Anderson LLP, and other corporate scandals shook investor confidence and caused substantial losses for shareholders and employees who had invested in their employer's stock as part of their retirement portfolio. Corporate officers were accused of deceit in preparing financial statements and independent auditors were accused of covering up the deception and not preparing truthful financial statements.

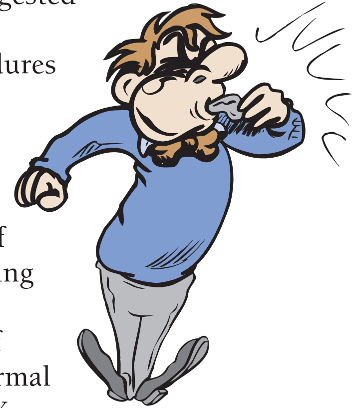
The Sarbanes-Oxley Act was intended to protect investors and employees, and to restore public confidence in the corporate world by promoting transparency, accountability, and reliability. With two very important exceptions, SOX applies to publicly traded companies only. Nevertheless, many commentators on the nonprofit sector suggest that nonprofits comply with SOX's other standards that are adaptable to the nonprofit sector as "best practices." The California state legislature has already adopted a Nonprofit Integrity Act, and legislators in New York have discussed similar legislation, specifically addressing fraud by nonprofit corporations. Minnesota may not be far behind.

Whistleblower Protection

The two provisions of the Sarbanes-Oxley Act applicable to both nonprofit and publicly traded companies address whistleblower protection and document destruction.

The whistleblower provisions of SOX prohibit both nonprofits and for-profits from retaliating against an individual who reports reasonably suspected fraudulent or illegal activities.

Violation of this provision can result in criminal penalties including imprisonment for up to ten years. Employees who have been retaliated against may also seek civil remedies.



Commentators have suggested that nonprofit boards of directors develop procedures through which any employee, volunteer, or other person with knowledge of questionable activities of the organization may bring those concerns to the attention of the board of directors outside the normal chain of command. SOX specifically requires the audit committee of publicly traded companies to establish procedures for the receipt, retention, and treatment of employee complaints regarding auditing or accounting matters, and for the confidential and anonymous submission of complaints regarding such matters. A nonprofit that has established such procedures would enable volunteers or employees wishing to make a complaint to know how to do so and be able to do so without fear of retaliation.

Document Destruction

The document destruction provisions of SOX prohibit both nonprofits and for-profits from knowingly altering, concealing, covering up, destroying, or falsifying records which could be of use in any investigation with the intent of obstructing or influencing such investigation. Criminal penalties include fines and imprisonment for up to twenty years. Nonprofits, therefore, should develop and adhere to a written document retention and periodic destruction policy, making sure to address the handling of electronic files and voicemail.

Relevance of Other Sarbanes-Oxley Act Provisions to Nonprofits

Although nonprofit organizations *must* concern themselves with SOX's provisions on whistle blowing and document destruction, many commentators on the nonprofit sector suggest that nonprofits *should* consider voluntarily adopting as "best practices" the other provisions that are adaptable to nonprofits. Many of the Act's provisions are adaptable to nonprofits, such as those on conflicts of interest, but the remainder

of this article will focus on those relating to auditing. Nonprofits may find these provisions the most applicable, since several states have already introduced or enacted legislation requiring charitable organizations with revenues exceeding certain amounts to file audited financial statements.

The Sarbanes-Oxley Act requires each publicly traded corporation to have an independent and competent audit committee responsible for the oversight of the company's auditors. Nonprofits conducting outside audits should consider having an Audit Committee, independent of the Finance Committee and composed of board members uncompensated for their service on the committee. Because the finance and audit committees should be separate, it may be challenging for a nonprofit to find enough financially literate members. At least one member of the Audit Committee should have such literacy and be able to analyze and understand the financial statements of the nonprofit and the competency of the outside auditor. The Audit Committee – not the nonprofit organization's management – should have responsibility for hiring and overseeing the outside auditor.

The Sarbanes-Oxley Act also requires independent auditors, defines what services auditors may provide, and requires the company to rotate auditing firms on a regular basis. Nonprofits should consider adopting the SOX rules of changing lead and reviewing partners of the auditing firm every five years and not permitting auditors to provide services other than auditing, such as bookkeeping.

While only the whistleblower and document destruction provisions of the Sarbanes-Oxley Act apply to nonprofits, SOX has raised expectations of corporate governance in a way that the public may come to expect of nonprofit organizations.

New state legislation covering nonprofits and the public indignation over scandals involving the United Way and American Red Cross already indicate greater expectations for confidence and trust in nonprofit governance. Proactively adopting the applicable provisions of SOX could potentially help a nonprofit organization far more than it could hurt.

For more information, contact Tom Hughes of our Minneapolis Office.

Thomas M. Hughes
612.373.8516
thughes@felhaber.com

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Please attend one of our upcoming seminars, with discussions on a variety of timely legal topics. The seminar presenters include our firm attorneys who have expertise in the seminar subject matter. Seminars include a complimentary continental breakfast and/or luncheon.

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Labor & Employment Law	Friday, November 17	Airport Marriott, Mall of America

To receive a seminar invitation, **e-mail kdyck@felhaber.com**. State your name and address with the name of the seminar(s) you wish to attend. You may also log on to **www.felhaber.com**, which will have online seminar registration available three weeks prior to the seminar date.

MINNESOTA RECOGNIZES HOSTILE ENVIRONMENT CASES FOR DISABILITY

Minnesota's law against discrimination, the Minnesota Human Rights Act, is one of the most intimidating pieces of legislation for employers because of its extraordinary penalty provisions. Employers who violate this law can be assessed up to three times the amount of back pay that a former employee claims to have lost, as well as unlimited damages for emotional anguish and an uncapped potential for a civil penalty payable to the state. When you add in the requirement of paying the employee's attorney's fees if they win, the total bill for employers can be astronomical.

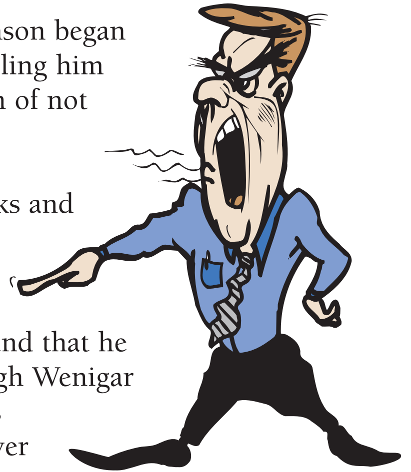
Not surprisingly, it is big news when the courts decide to accept a new theory of recovery under the Minnesota Human Rights Act. Even if federal law already covered the situation, the application of the expanded damages provisions of the state law means higher stakes and greater exposure. For this reason, the following case is very significant to Minnesota employers because it opens the door for disability-based hostile work environment claimants to seek those sky-high damage awards under our Human Rights Act.

Bad facts make bad law

Lee Johnson owned and operated a pig farm with approximately 700 hogs. He worked out a deal with local restaurants, hotels and grocery stores to collect used and unwanted food to feed to his hogs. One of his employees, Lester Wenigar, was a 57 year old fellow with minimal literacy skills and an I.Q. of 54. Wenigar lost his mother at a young age and later moved from a farm to the Twin Cities area to live with his uncle until he was 18. He worked in a variety of settings, including a local café and a scrap yard, before finding work with Johnson in 1993.

Wenigar was hired to clean pig pens, bed the pigs, wash empty food cans, and spread manure in the fields. Despite his arduous schedule (7:00 a.m. to 4:30 p.m. six days a week) he enjoyed his job and even took to calling Johnson "Dad." He was paid $5.50 an hour and $.50 for each can of discarded food that he emptied and cleaned.

Wenigar began working nights in 1994 when Johnson decided he needed someone on the premises due to a rash of incidents of people breaking into and stealing from his barns. Johnson told Wenigar not to record his night time hours but that he would be paid at some future date.



Beginning in 1997, Johnson began shouting at Wenigar, calling him names and accusing him of not completing his chores. Wenigar was denied the chance to take any breaks and though he attempted once to take a vacation, Johnson called him in the middle of it to demand that he return to work. Although Wenigar felt like quitting, he was afraid that he would never find another job since Johnson and the other workers teased him and called him "stupid" and "retarded" on a daily basis.

Really bad facts…

By 1998, Wenigar's work day had expanded to where he would arise at 3:00 a.m. to prepare the trucks for collecting food. He would then go out with the trucks, return later that day to perform farm chores and wash the food cans, working non-stop until 11:00 p.m. Even after retiring for the few remaining hours in the night, he would often wake up to keep watch and investigate possible disturbances.

Johnson provided Wenigar with living space in a small storeroom over a garage with no heat, air-conditioning, electrical outlets, windows, carpet or paint. Wenigar's complaints that it was too hot in the summer or cold in the winter were ignored, leaving him to sleep in the business office when his room became unbearable. Wenigar's refrigerator did not work properly and while there was a microwave oven at his disposal, Johnson ordered Wenigar not to use it because of the electric bill.

Testimony at his trial established that Wenigar suffered emotional and psychological injuries as a result of his working and living conditions. He looked sickly and weak, became withdrawn and called a friend from work to cry and complain about Johnson. When his work environment overwhelmed him, he would hide in the straw in the barn and cry.

Wenigar's job ended in 2001 due to a work-related injury. Thereafter, he began meeting with a psychologist who diagnosed him as having post-

traumatic stress disorder and dysthymia, a disorder that is milder but longer-lasting than depression. The psychologist reported that Wenigar likely would never fully recover from the "intended and deliberate" harm inflicted upon him.

A psychiatrist testifying at the trial further explained that Wenigar was more vulnerable to emotional and psychological injury as a result of his limited cognitive abilities. He deemed Wenigar's description of the work environment as a "negative, antagonistic, persecutory environment" and concluded that the job resulted in Wenigar being sleep and food deprived and overworked. At the time of trial, Wenigar still experienced nightmares and woke up crying every night, and took medication designed to alleviate the emotional distress.

…make new law

Wenigar eventually sued Johnson for disability discrimination in violation of the Minnesota Human Rights Act, intentional infliction of emotional distress and violations of various federal and state overtime and wage payment laws. The trial court ruled in Wenigar's favor in all aspects of the lawsuit. On appeal to the Minnesota Court of Appeals, Johnson overcame Wenigar's claims for violations of the overtime and wage payment laws on the grounds of specific exemptions for agricultural employees.

Johnson then tried to get the Minnesota Human Rights Act claims tossed by arguing that the law does not authorize recovery for claims of hostile work environment based on disability. This issue had never been addressed before in Minnesota and the appeals judges eagerly waded into the analysis by first noting that this same claim has been recognized under federal law (the Americans with Disabilities Act) by the 8th Circuit Court of Appeals (which covers Minnesota). The judges felt that it was appropriate to be guided by such decisions when the federal and state laws are so very similar, as they are here. In fact, the appeals court recalled one of their previous decisions where they had remarked upon the similarity between the ADA and the Human Rights Act for comparison purposes.

The judges also noted that Congress appeared to have intended to permit claims for hostile work environment under the ADA because its language "prohibited a broad range of employment practices, including workplace harassment."

Since the ADA and Human Rights Act are so similar in their language, and since their stated purposes are identical, the Court felt that it was time to recognize a cause of action for disability-based hostile work environment harassment under the state law as well.

Johnson then tried to persuade the judges that even if the law recognized such a claim, Wenigar had not proven its existence in this case because he is not disabled. The appeals judges quickly ruled in Wenigar's favor by citing such factors as his illiteracy, lack of a driver's license, low IQ, limited mental capacity and lack of formal education in concluding that he was disabled. Interestingly, they never actually identified the actual disabling condition; they merely noted that these factors materially limited his social and economic opportunities. Obviously, Wenigar is a very sympathetic individual and the court can be forgiven a little if they glossed over a difficult interpretive issue to rule in his favor on this issue. Nevertheless, the reference to intelligence, education and other challenges outside of physical or mental impairments as evidence of a disability makes us wonder whether the floodgates just opened for claims that personal and environmental factors constitute disabling conditions.

Johnson next argued that any harassment Wenigar experienced was not based on a disability. The judges had an easy time with this one by noting the extensive name-calling and teasing that Wenigar endured on a daily basis in regard to his mental capacities. They made a special point of mentioning that Johnson himself participated and even initiated some of this behavior. While giving deference to previous rulings that that mere rude or insensitive conduct is not illegal, the judges had no difficulty deciding that the treatment that Wenigar received exceeded these standards and constituted harassment based on disability.

Finally, Johnson claimed that the alleged harassment did not affect Wenigar's terms and conditions of employment. The judges disagreed, noting that Wenigar had little time to eat or sleep, that he was relentlessly teased and mocked and that he suffered severe mental and physical injuries. They had no trouble concluding that this was sufficient evidence that the harassment was "severe and pervasive enough to create an objectively hostile or

Minnesota Recognizes… article continued on page 6

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abusive work environment-an environment that a reasonable person would find hostile or abusive."

Wenigar's win on the disability harassment claim (and on the claim for intentional infliction of emotional distress) netted him over $300,000 for doubled back pay, emotional distress and future distress, as well as attorney's fees in an amount to be determined. *Wenigar v. Johnson* (MN Ct App No. A05-158, April 4, 2006).

What do we learn?

As is often the case, an extreme set of facts resulted in a significant change in the law. Although hostile work environment cases had been recognized under the ADA, the potential exposure for this sort of conduct has increased now that Minnesota employers face the prospect of being socked with the huge damage awards available under our Human Rights Act. Add this to the troubling language regarding what factors contribute to a determination of disability and you have a very sobering development in Minnesota employment law.

Ryan M. Olson
612.373.8514
rolson@felhaber.com

Labor & Employment Report

The Labor & Employment Report is an update on legal developments. It is not intended to be legal advice and should not be relied upon without consulting counsel.

Felhaber Larson Fenlon & Vogt

A Professional Association – Attorneys at Law

TWIN CITIES LOCATIONS

Minneapolis
220 South Sixth Street | Suite 2200
Minneapolis, MN 55402-4504
612 339 6321 | Fax 612 338 0535

St. Paul
444 Cedar Street | Suite 2100
St. Paul, MN 55101-2136
651 222 6321 | Fax 651 222 8905

www.felhaber.com

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Felhaber Larson Fenlon & Vogt

220 South Sixth Street | Suite 2200
Minneapolis, MN 55402-4504