



Illegal Workers Injured on the Job Cannot Recover Lost U.S. Wages

In [Balbuena v. IDR Realty, LLC](#) and [Sanango v. 200 East 16th Street Housing Corp.](#) (12/28/04), the Supreme Court of New York ruled that undocumented aliens who are injured while working cannot recover damages based on the wages they might have earned working illegally in the United States. Although undocumented aliens may recover damages for injuries suffered while working, including pain and suffering and medical expenses, they are not entitled to an award based on wages they might have earned unlawfully in the United States if they had not been injured, because such an award would be inconsistent with the United States' strict policies prohibiting the employment of illegal aliens. An undocumented worker may, however, seek damages based on the wages he or she would have been able to earn in his or her home country.

Policy Requiring Female Employees to Wear Makeup Is Not Discriminatory

Harrah's Casino adopted personal appearance standards for its personnel. Under these standards, female bartenders were required to wear full makeup and nail polish and to have their hair teased, curled or styled, and male bartenders were required to maintain short haircuts and fingernails and were prohibited from wearing makeup. Darlene Jespersen, who had worked as a bartender at Harrah's for several years, objected to wearing makeup on the grounds that it made her feel sick, degraded, and exposed, and interfered with her ability to do her job by causing the patrons to treat her with less respect. Because of her refusal to comply with the personal appearance standards, Jespersen's employment was terminated. She then sued Harrah's, claiming that its policy was sexually discriminatory because it treated women differently than men.

In [Jespersen v. Harrah's Operating Co.](#), (12/28/04), the U.S. Court of Appeals for the Ninth Circuit ruled that Harrah's personal appearance standards did not constitute discrimination because they did not impose a greater burden on women than men. The court also rejected Jespersen's argument that she had been illegally forced to comply with a sexual stereotype as a condition of employment. According to the court, Jespersen failed to state a legally viable claim because she failed to allege that she had been sexually harassed because of her failure to comply with the stereotype.

Terminating Employees for False Information on Applications Did Not Constitute an Unfair Labor Practice even though Employees Were also Involved in Protected Concerted Activities

Overnite Transportation Company has a strict policy that employees who falsify their employment applications will be subject to disciplinary action, up to and including dismissal. In the course of investigating the theft and destruction of company property, Overnite performed background checks on all employees and supervisor/managers who had not been subjected to a pre-hire background check. Overnite discovered that seven employees and one supervisor had failed to disclose criminal records on their applications and terminated the employment of all eight individuals. Six of the employees filed an unfair labor practice claim against Overnite, asserting that Overnite had actually discharged them because of their union activities.

In [Overnite Transportation Co.](#) (12/16/04), the National Labor Relations Board ruled that even assuming Overnite's actions were motivated in part by the employees' union activities, Overnite proved that it would have discharged the employees even if they had not engaged in protected conduct. In particular, the NLRB relied heavily on evidence that Overnite consistently terminated employees for application falsification. Accordingly, the terminations did not violate the National Labor Relations Act.

Severe Stutter May Constitute Disability under the ADA

Barbara Andresen suffers from a severe stuttering disorder that makes speaking very difficult for her and also can cause her to experience an excess build-up of saliva and difficulty breathing. Notwithstanding this impairment, she worked for over 15 years at a Fuddrucker's restaurant in a variety of jobs. For most of her employment, Andresen was given good reviews and was not the subject of any customer complaints. When new managers were assigned to the restaurant, however, they started finding problems with Andresen's work. The managers also claimed to be concerned about possible food contamination due to her excess saliva and associated drooling problem. A few months after placing Andresen on a performance "action plan," Fuddrucker's terminated her employment on the grounds that her performance had not improved to an acceptable level. Andresen sued Fuddrucker's claiming that she had been discriminated against on the basis of her disability in violation of the Americans with Disabilities Act. Fuddrucker's defended its action by arguing that Andresen was not disabled under the ADA and that, even if she was disabled, she drooled onto food that was served to customers, and thus was a direct threat to the health and safety of others.

In [Andresen v. Fuddrucker's](#) (12/14/04), the U.S. District Court for Minnesota ruled that Andresen was entitled to present her discrimination claim to a jury at trial. The court concluded that speaking is a major life activity under the ADA and that Andresen had offered enough evidence that her stuttering substantially limited her ability to communicate with others to justify allowing her to go forward to a trial. Andresen also provided evidence that she was capable of performing her job, and further, that Fuddrucker's had failed to provide her with reasonable accommodations. The court rejected Fuddrucker's claim that Andresen's drooling constituted a reasonable non-discriminatory reason for her termination, concluding that a jury might find that the drooling allegation was merely a pretext and that Fuddrucker's did not consider Andresen to pose a threat to others, but, instead, fired her because she stuttered.

Employer's General Knowledge that the FMLA May Apply Does Not Prove that the Employer Willfully Violated the FMLA

Susan Hanger, the Human Resources and Safety Administrator for the Lake County Board of Commissioners, requested and was granted a leave of absence under the Family and Medical Leave Act. While she was on leave, the Board hired Pamela Parkinson to act as the interim department head of the Human Resources Department. The Board was so impressed with Parkinson's work, it decided to continue Parkinson's employment and, when Hanger returned to work, ordered her to report to Parkinson. Although Hanger continued to receive the same salary and benefits, she was effectively demoted by the Board's decision to place Parkinson in a supervisory position over her. After working under these conditions for a few months, Hanger resigned.

Two years and one week after her resignation, Hanger sued the Board, claiming it had violated the FMLA by failing to restore her to the same or an equivalent position after her leave. The Board responded by arguing that Hanger's lawsuit was untimely since the FMLA has a two year statute of limitations for most violations. In response, Hanger argued that the Board's violation of the FMLA was willful, and thus, that she had three years to file her claim. In support of this claim, Hanger relied on evidence that Parkinson had advised the Board to seek legal advice on whether its plan to make her Hanger's supervisor would violate the FMLA and that the Board had failed to do so.

In [Hanger v. Lake County](#) (12/7/04), the U.S. Court of Appeals for the Eighth Circuit rejected Hanger's argument. According to the court, although the Board was aware that the FMLA might apply and would have been well advised to obtain legal advice before making its employment decision, its failure to do so did not demonstrate a willful violation of the FMLA. Thus, even though Hanger was not restored to an equivalent position after her leave as required by the FMLA, she waived her right to recover damages under the FMLA by waiting over two years to file her lawsuit.

Failure to Define "Cause" in Employment Agreement Results in PJR for Terminated Employee Seeking Severance Pay

Lindsay Grachen and Metro Marketing Resources entered into an employment agreement that contained a provision for severance upon termination of her employment. However, the agreement provided that severance was not payable "should you be terminated for cause (to be defined)." The agreement did not define the term "for cause." Metro Marketing terminated Grachen's employment and she sued to recover severance pay. As part of the lawsuit, Grachen sought a prejudgment remedy against Metro Marketing to secure an anticipated judgment in her favor. During the hearing on her request for a PJR, Metro Marketing argued that the severance clause incorporated the definition of "for cause" that appeared in its employee handbook and that, under that definition, Grachen was not entitled to any severance. In Grachen v. Metro Marketing Resources, Inc. (10/20/04) the Connecticut Superior Court rejected Metro Marketing's explanation and granted Grachen's request for a PJR in the amount of nearly \$85,000. The court found that the absence an express definition in the agreement rendered the agreement ambiguous and, given that Metro Marketing drafted the agreement, the court construed the agreement against it. The court also found that, if Metro Marketing intended to incorporate the handbook language into the agreement, it should have done so expressly. Finally, the court refused to incorporate other definitions of "for cause" because it found that the parties had bargained for a particular definition of "for cause" but did not include that definition in the agreement

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