



ROBINSON & COLE LLP

# Labor, Employment & Benefits



## **Employee's Exempt Status Not Jeopardized by Full Day Deduction if Employee Chooses Not To Work Due to Inclement Weather**

The U.S. Department of Labor Wage and Hour Division released opinion letters on [October 24, 2005](#) and [October 28, 2005](#), clarifying that employers may make full-day deductions from an exempt employee's salary if the employee chooses not to work due to inclement weather, but the employer's workplace is open for business. In addition, the Department of Labor stated that an employer may require its exempt employees to use available accrued paid leave time for absences due to inclement weather, even if the workplace is closed, provided that the employees are paid an amount equal to their guaranteed salaries.

However, the Department of Labor clarified that if the employer chooses to close due to inclement weather and the exempt employee has no available accrued paid leave, the employer may not deduct from the employee's regular salary without jeopardizing the employee's exemption. According to the Department of Labor, if the employer closes the office due to inclement weather (or other disaster) for less than a full work week, the employer must pay the employee's full salary even if (1) the employer does not have a bona fide benefits plan, (2) the employee has no accrued benefits in the leave bank, (3) the employee has limited accrued leave benefits and reducing that accrued leave will result in a negative balance or (4) the employee already has a negative balance in the accrued leave bank.

## **Kidnapped Employee's Claim Against Employer Not Barred by Workers' Compensation**

Azhar Ali Khan worked as an accountant for Parsons Global Services Ltd. In March 2001, Khan signed an employment contract accepting a two-year assignment to work in Manila. The contract, signed in Washington, D.C., stated that the D.C.'s workers' compensation statute would provide the full and exclusive compensation for any compensable bodily injury, occupational disease, or death resulting from, arising out of and in the course of Khan's employment for Parsons.

Khan arrived in Manila in May 2001. Shortly after his arrival, Khan was kidnapped and held hostage for three weeks. During his incarceration, Khan's kidnappers chained him to the floor, attempted to hang him, and tortured him. The kidnappers demanded an undisclosed amount of ransom from Parsons, which the company refused to pay until it received a videotape showing the kidnappers cutting off a portion of Khan's ear. At that point, the company paid the ransom and Khan was released.

Following his release, Khan and his wife sued Parsons for negligent and intentional infliction of emotional distress. The suit alleged that Parsons promised Khan's wife that it would pay the ransom, but later told her the company would not pay because doing so would encourage future kidnappings of Parsons employees. Khan also alleged that the company withheld information from Khan's wife, gave her inconsistent explanations regarding the company's actions, directed her to make false promises to the kidnappers that the ransom would be paid soon, and subsequently delayed paying the ransom. Finally, Khan alleged that Parsons pressured him to resume work just a few days after his release, threatened to cut off his housing allowance and stop paying his medical expenses, and threatened to transfer him to Pakistan, despite his objection that he would not feel safe there. Parsons moved to dismiss the lawsuit based on its contention that Khan's injuries were covered by the D.C. workers' compensation law. The trial court agreed and dismissed the claim. Khan and his wife appealed.

In [Khan v. Parsons Global Services Ltd.](#) (11/15/05), the U.S. Court of Appeals for the District of Columbia Circuit disagreed with the trial court and ruled that Khan could proceed with his negligence and emotional distress claims against Parsons. The court based its decision on the fact that D.C.'s workers' compensation statutes were not intended to cover all activities secondary to a long-term relocation for work purposes. First, the court noted that the D.C. courts have adopted the "coming and going" rule that an employee sustaining injuries in the course of his or her commute to and from work is not covered by the workers' compensation statute because the injury did not occur "in the course of employment." Second, although D.C. does recognize a "traveling-employee" exception to the "coming and going" rule, the court distinguished the exception from a situation where an employee is hired to relocate for a lengthy period to a different city. If the traveling-employee exception were that broad, the court concluded, it would cover all of Khan's activities in the Philippines, regardless of any connection to his work, which it clearly was not intended to do.

## **Workers' Compensation Does Not Bar Claim Based On Assault By Colleague**

Michelle Butler worked as a clerk at Southern States, a business cooperative specializing in agricultural supplies sales in Middleburg, Virginia. Several years into her employment, Southern States hired Clarence Allen as a delivery man. At the time he was hired, the company was aware that Allen had been convicted of felony rape and had violated his parole. The month following Allen's hire, Butler was assigned to help Allen make a delivery. When Butler got into the cab of the delivery truck, Allen told her that she was "getting him all excited." Thereafter, he stopped the truck, removed his seatbelt and grabbed Butler's face with his hands, attempting to kiss her and grabbing her forcibly. Butler resisted Allen's advances until he eventually stopped. Butler reported the incident to the police and Allen was convicted of misdemeanor assault and battery. Butler sued Southern States alleging negligent hiring and retention, liability for Allen's assault and battery, and intentional infliction of emotional distress. The company argued that the claims were barred by Virginia's Workers' Compensation Act, as the injuries arose "out of and in the course of" Butler's employment. The trial court agreed with Southern States and dismissed the case, calling it "a classic example of a workers' compensation act situation." Butler appealed.

In [Butler v. Southern States Cooperative, Inc.](#) (11/4/05), the Virginia Supreme Court reversed the trial court and concluded that Butler's claims were not barred by the workers' compensation statute. The appeals court noted that when an employee sustains an injury by an accident "arising out of and in the course" of an individual's employment, workers' compensation is the sole and exclusive remedy for that injury. However, while it was beyond question that the physical assault against Butler arose in the course of her employment, the appeals court concluded that the injury did not "arise out of" Butler's employment, because the assault was against Butler personally, and not directed against her because of her job. In addition, the assault was in no way made in furtherance of Southern States' business. Accordingly, the appeals court concluded that Butler was not prohibited from pursuing her claims against Southern States.

## **Employee May Proceed in Sexual Harassment Claim Based on Insufficient Employer Response**

Dollie Mainor worked as a bus driver for the Chicago Transit Authority. During her employment, she allegedly suffered multiple incidents of sexual harassment by a service supervisor, Charles Williams. Specifically, upon returning to the terminal at the end of her shift, Mainor alleged that Williams grabbed her "by the back of her head ... and shoved his tongue in her mouth." Mainor pushed him away and told him to stop. Williams admitted that prior to his physical advances he deliberately moved out of the view of the bus' cameras because he did not want to be seen. Mainor alleged that Williams then lured her into his car with the promise of a favor. While they were in the car, Williams allegedly put his hand between Mainor's thighs. She protested and the next day reported the incident to her supervisor. Later that day, Williams went to Mainor's house to return a set of lost keys. Williams pushed his way through the front door, and attempted to touch and kiss Mainor. Williams objected again and reported the incident. She also filed a complaint with the Chicago police department.

The Transit Authority investigated Mainor's complaint. In response, it suspended Williams for three weeks and ordered him to attend a sexual harassment prevention training course. However, the Transit Authority declined Mainor's request for a transfer at that time. Several days later, Mainor alleged that Williams stared at her in a threatening manner and Mainor immediately began a three month leave of absence. Soon after her return, she alleged that Williams gave her a "nasty sexual grin." Mainor complained and took another unpaid leave of absence. Upon her return, Mainor was transferred to another terminal. Mainor sued the Transit Authority for sexual harassment and retaliation for complaining of sexual harassment. The Transit Authority moved to dismiss the claim prior to trial.

In [Mainor v. Chicago Transit Authority](#) (11/15/05), the U.S. District Court for Illinois found that the alleged incidents were severe enough for Mainor to proceed to trial with her claim. The court found sufficient evidence that Williams' alleged conduct "[fell] on the actionable side of the line dividing abusive conduct from behavior that is merely vulgar or mildly offensive." The court also rejected the Transit Authority's argument that it had sufficiently responded to the allegation of sexual harassment. The court found that the Transit Authority failed to correct and prevent the harassment when it ignored Mainor's requests for transfer and kept her at the same work site as Williams. The court also found that the Transit Authority failed to take Mainor's final two complaints regarding staring seriously. Although the staring incidents were less significant than the alleged unwanted touching, the court concluded that the company was obligated to respond, particularly in light of its notice of previous harassment. The court, however, rejected Mainor's claims that she was retaliated against for filing a complaint of sexual harassment because she did not experience an adverse employment action. "While evidence that Williams stared and grinned at Mainor in a threatening manner support Mainor's claim that she was subjected to a hostile work environment, these same instances are not sufficient to establish the objectively intolerable work environment required to sustain a claim of retaliation."

### **"Employee" Prevails in Wrongful Termination Claim Despite Never Actually Working for Company**

Dan Reust is an Alaskan pipeline worker. Reust claimed that Alaska Petroleum Contractors, a construction company, offered to hire him as a project manager. Reust interviewed with APC and, at the conclusion of the interview, was given a "hire packet" to complete. Reust alleged that he was told that, when he returned the packet, he could begin working the following day. The evening before he was supposed to start work, Reust claimed he was told to report to an APC manager. When he met with the manager, Reust claimed he was told that he was being "let go" because he participated as a witness in a lawsuit between APC and a former employee. APC denied that Reust had been given a job offer and denied that he was told that his testimony was the reason for not hiring him. Reust sued APC, alleging retaliation for his testimony in the court proceeding. APC argued that Reust should not be able to pursue his claim because Alaska does not specifically prohibit retaliation for testifying with respect to general matters, as opposed to a matter specifically protected by law, such as discrimination.

In [Reust v. Alaska Petroleum Contractors, Inc.](#) (10/28/05), the Alaska Supreme Court ruled that Reust could proceed in his claim against APC, even in the absence of a specific tort covering retaliation against employees who testified generally. The court explained that both retaliation and witness protection are recognized public policy concerns in Alaska. Therefore, the court determined that witness retaliation violated the state's public policy and that Reust's job offer, even in the absence of one day of work, was enough to support a wrongful termination claim. The court noted that "subjecting employers to tort liability for retaliating against employees who testify ... dissuades retaliatory conduct ... [and] also reduces the temptation for employees, fearing adverse responses from their employers, to provide false testimony or disobey a subpoena."

### **Former Employee May Not Bring Retaliatory Failure to Hire Claim**

Homer Baker worked as a bus driver for the Campbell County Board of Education in Kentucky. Baker was terminated from his position as a bus driver and successfully sued the board of education for violating his due process rights. The school board appealed, but ultimately settled the case prior to a decision. While the case was ongoing, a principal at Campbell County School offered Baker a position as a part-time physical education teacher and Baker accepted. The school's superintendent, however, vetoed the hiring decision. Baker sued the board of education a second time, alleging he was not hired in retaliation for his first federal lawsuit. The trial court dismissed Baker's claim based on its conclusion that Kentucky does not recognize a cause of action for retaliatory failure to hire. Baker appealed.

In [Baker v. Campbell County Board of Education](#) (10/28/05), the Kentucky Court of Appeals agreed with the trial court. In upholding the dismissal, the court of appeals relied on the fact that Kentucky recognizes "at-will employment," meaning employees may be terminated for any reason or no reason, provided it is not an unlawful reason. The appeals court concluded that, "by analogy, an employer should be able to refuse to hire an employee for any cause not specifically prohibited by applicable state or federal authorities." Although the appeals court noted that, while Kentucky had established limitations on the employment at-will doctrine, those limitations were based on employment decisions that violated "fundamental and well-defined public policy" evidenced by constitutional or statutory provisions. In this instance, the appeals court ruled that "Baker has not pointed to any authority from this Commonwealth showing that any public policy involved in retaliatory failure to hire exists, much less exists in a 'well-defined' state." The appeals court concluded, "the existence of an established relationship between an employer and employee creates certain expectations of conduct and trust that simply do not exist between an employer and a job applicant. So it is logical that public policy would afford more protections to an employee than to a prospective employee."

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