

# U.S. DEPARTMENT OF LABOR PUBLISHES FINAL RULES REVAMPING WHITE COLLAR EXEMPTIONS FOR OVERTIME PAY

by: José A. B. Nolla-Mayoral

After a lengthy dispute between the Congress and the executive branch over their implementation, the Federal Register recently published the final rules issued by the United States Department of Labor ("DOL") revamping its white collar exemption regulations under the Fair Labor Standards Act of 1938 ("FLSA"). The final rules will become effective on August 21, 2004. See Summer 2003, and Winter 2003-2004 issues of *Labor Perspectives* for detailed discussions on the proposals and their status.

The new rules streamline, reorganize and update the current regulations in several ways. Moreover, the DOL has made numerous changes from the proposed rules in the final rules. The final rules revised the requirements for exemption from the FLSA for executives, and administrative, professional, computer and outside sales employees. Changes were made in the exempt classifications, salaries and duties test, and other related areas.

The final rules raise the minimum salary threshold to \$455 weekly (\$23,660 annually). Without a doubt, the revised minimum salary threshold, up from \$22,100 in the regulatory proposal published in March 2003, in and by itself, will have a profound budgetary impact upon many employers, particularly among companies with lower-wage management positions. Also exempt would be "highly compensated" employees

receiving \$100,000 or more a year (counting base salary, commissions, non-discretionary bonuses and other non-discretionary compensation), a \$35,000 increase over the proposal. These employees must perform non-manual work, and "customarily and regularly" perform any of the identifiable executive, administrative or professional functions as described in the "standard duties test" and receive at least \$455 per week. If a "highly compensated" employee's total annual compensation does not equal at least the guaranteed annual amount by the end of the year, the employer may make a payment by the next pay period sufficient to bring the employee to the guaranteed level.

The final rules also revise the circumstances under which an employer may make salary deductions without violating the salary test, including the deductions stemming from certain disciplinary suspensions. They also relax the effects of unlawful deductions, and provide for a new "safe harbor," allowing an employer to avoid additional liability for an employee's claim of improper deductions by addressing and correcting any such claims in a timely manner. The "safe harbor" provision requires, for example, that the employer publish its policy on this topic, including a complaint mechanism, and engage in good faith compliance efforts.

The final rules simplify the duties tests by, among other things, creating a "standard

duties test" which retains the current "short test" reliance on an employee's primary duty and eliminates the "long test" rule requiring that a specific percentage of time in a workweek be devoted to the performance of exempt duties.

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The rules and the preamble to the final rules discuss specific classifications which may be considered exempt or non-exempt. For example, laborers and blue collar workers, such as non-management production line employees, employees in construction and maintenance, and inside sales persons, personnel clerks, technicians, security personnel, employees who conduct surveillance and investigations, licensed practical nurses and, so called, “first responders” are deemed non-exempt.

New guidance provided by the DOL discusses other classifications which, depending on the facts, may be exempt. Most of the guidance in this area stems from specific case law. In that regard, the DOL considered and incorporated into the new rules the reasoning of many judicial interpretations, even in instances where the Courts criticized the current rules, the DOL’s interpretative guidelines, and/or the position assumed then by the agency in litigation.

Among possible exempt activities and positions discussed in the final rules are those of funeral directors and embalmers, financial industry services, human resources managers, insurance claim adjusters, accountants, certain physician assistants, team leaders for major projects, consultants, computer/data base administrators and certain chefs (as opposed to cooks).

One general category of employees which will be expressly recognized by the DOL as possibly exempt are employees in the financial services industry, if as their duties include work such as collecting and analyzing information regarding the customer’s income, assets, investments or debts; determining which financial products best meet the customer’s needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer’s financial products. This category of employees may very well include loan officers, analysts and processors. However, an employee whose primary duty is selling financial products will not qualify for this administrative exemption. We are extremely proud to report that, consistent with the new DOL guidance, during the public comment period, McConnell Valdés submitted a

position letter to the DOL on behalf of a client in the banking, mortgage banking, insurance and financial services industry in Puerto Rico, in favor of such expansive interpretation of the exemptions.

The rules specifically provide that exempt employees may perform both exempt and non-exempt work, provided that the employee’s primary duty is exempt work. However, we should note that the DOL did not adopt into the final rules all case law favoring exemptions under the current regulations. Thus, we anticipate that there will be areas where the courts may have

*The final rules revised the requirements for exemption from the FLSA for executives, and administrative, professional, computer and outside sales employees. Changes were made in the exempt classifications, salaries and duties test, and other related areas*

the opportunity to consider whether an employee is exempt or not under the final rules and the validity of the DOL’s position.

One area that received considerable attention in public comments was the DOL’s proposal to eliminate the “discretion and independent judgment” component of the administrative employees’ duties test, replacing it with a requirement that the employee hold “a position of responsibility.” In that regard, the final rules eliminate the proposed “position of responsibility” criteria and the required “high level of skill or training” standard. Instead, the final rules require that exempt administrative employees exercise

“discretion and independent judgment with respect to matters of significance.”

The standard executive duties test in the final rules has suffered minor changes from the proposal, yet additional guidance is provided in the preamble. The primary duty of the executive must be to take part in the management of the enterprise or a customarily recognized department or subdivision thereof, even if the employee works concurrently on exempt and non-exempt work. On the other hand, the proposed “sole charge” executive exemption was eliminated. The final rules add the requirement that employees who own at least a bona fide 20-percent equity interest in an enterprise are exempt only if they are “actively engaged in its management.” The final rules retain the “long” duties test requirement that an exempt executive must at least have authority to make recommendations which are “given particular weight” as to the “hiring, firing, advancement, promotion or any other change of status” of another employee. That is, the executive may provide guidance as to tangible employment actions or changes in employment, but the executive does not need to have full authority to make the ultimate decisions regarding an employee’s status. Lastly, language regarding duties in production or sales work was removed from the final rules on executive employees.

As to the professional employee exemption, the final rules require the employee to engage in “work requiring advanced knowledge,” as one of the three essential elements of the professional primary duties test. Such work is defined as “work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment.” In addition, the final rules have removed the “equivalent combination” language relating to the attainment of educational requirements, yet still allow for the exemption of the occasional employee who does not possess the academic degree usually required for the entry into a profession. Also, the DOL has added a requisite standard that the professional must employ the “consistent exercise of discretion and judgment.”

On the proposed rule to exempt employees whose primary duties are administrative functions directly related to academic

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instruction or training in an educational establishment, the DOL has added academic counselors to the list of examples of possible exempt employees and added a list of factors for considering other educational institutions as covered by the relevant section.

The creative professional employees exemption was amended to provide additional clarity without substantive changes. This is also the case for computer employees, since Section 13(a)17 of the FLSA provides for this exemption, the DOL has not departed from its prior interpretation of the exemption. Furthermore, for the same reason, the DOL took the position that the "highly compensated" exemption did not apply to computer employees.

On outside sales employees, the DOL retained the proposed general rule, except that it clarified that the "primary duty" of selling may be met by obtaining a commitment to buy from the customer and providing credit to the employee for the sale; it also clarified that when outside sales occur in connection with displaying products at a trade show, the employee does not lose the exemption.

We recommend that employers evaluate how the regulatory changes will impact actual workers, their classifications and pay practices in the workplace. Employers should analyze the final rules and their workforce to determine whether some workers may be reclassified as exempt or non exempt, before the date of effectiveness of the final rules.

Also, employers should be aware that Regulation No. 13 of the Puerto Rico Minimum Wage Board ("Regulation No. 13"), outlining the requirements for certain exemptions under local law, remains unaltered and that there are specific rules on how to deal with the situation when an employee is exempt from the FLSA, but not exempt under Regulation No. 13 and Puerto Rico wage and hour standards. Finally, employers should take steps to implement the allowed "safe harbor" provision both as a matter of policy and also as an effective dispute resolution practice.

Lastly, employers are reminded that several efforts are ongoing before the Congress to affect the implementation of the final rules. We will keep you abreast of any definitive developments in that direction. ■

## UNLAWFUL DENIAL OF BENEFITS CLAIMS AND THE REVIEW OF PLAN ADMINISTRATORS' DECISIONS UNDER ERISA *by: Francisco A. Vargas*

On February 14, 2004, the United States Court of Appeals for the First Circuit stated again that, when a plan administrator has discretion under the plan to confer or deny benefits, and has substantial evidentiary grounds for its decision, the decision should not be replaced by that of the reviewing court. See Bonnie Gannon v. Metropolitan Life Insurance Company, 360 F.3d 211 (2004). The case summarizes the First Circuit's previous cases regarding unlawful denial of benefits under ERISA, and illustrates how the "arbitrary and capricious" standard of review should operate.

Metropolitan, involves a claimant ("Gannon") whose benefits were denied by the plan administrator ("MetLife") after determining that Gannon was no longer "disabled" under the terms of the plan. In order to be "disabled" under the plan, the individual had to be unable to perform any gainful work or service for which he/she was reasonably qualified. MetLife concluded that Gannon was capable of doing sedentary work; it based its decision upon statements made by claimant's attending physicians, a functional capacities evaluation, an independent medical consultant's analysis, and a transferable skills analysis which identified three occupations that Gannon should be capable of performing. Gannon appealed the decision to the plan, but the appeal was denied. Subsequently, Gannon filed a complaint against MetLife for wrongful termination of disability benefits in violation of ERISA.

The district court granted Gannon's motion for summary judgment, and determined that MetLife's termination of benefits was arbitrary and capricious because it was not supported by reasonable substantial evidence. MetLife appealed the decision, and the First Circuit reversed. Inasmuch as cases of this type are based on an analysis of the record, the appellate court granting the appeal made a de novo review of the evidence, that is, without granting any deference to the district court's appreciation.

The opinion began by stating that when, as in this case, the plan administrator has

discretion to determine an applicant's eligibility for an entitlement to benefits, the administrator's decision must be upheld unless it is "arbitrary, capricious, or an abuse of discretion." Under this standard, the administrator's decision shall be upheld if it is reasoned and supported by substantial evidence. The evidence is substantial if it is reasonably sufficient to support a conclusion.

In concluding that MetLife's decision was not arbitrary and capricious, the First Circuit noted that the existence of contrary evidence does not, in and of itself, make the administrator's decision arbitrary, and that ERISA does not require plan administrators or reviewing courts to accord special deference to the opinions of treating physicians. Metropolitan is the clear example of these two assertions. First, the record contained evidence that contradicted or undermined the evidence upon which MetLife relied on, and second, statements by Gannon's treating physicians, which favored a disability determination, were not afforded any special deference. The First Circuit stated that it is not for courts to evaluate how much weight an insurer should accord to the opinion of an independent medical consultant relative to the opinions of the claimant's own physicians. On the contrary, the responsibility of the reviewing court is that of determining whether the administrator's decision is rationally supported "[i]n light of the record evidence as a whole." Accordingly, the First Circuit reversed the district court opinion because, despite the contradictory medical opinions, MetLife's determination that Gannon was capable of performing sedentary work was rationally supported by evidence.

On the basis of the foregoing, plan administrators should not be afraid to deny benefits under a plan due only to the mere existence of contradictory medical opinions regarding the participant's health condition. As long as the record contains substantial (reasonably sufficient) evidence to sustain a denial, and, when taken as a whole, the record rationally supports the denial, the denial may be upheld by the courts. ■

# SEXUAL ORIENTATION DISCRIMINATION: IS THERE A COGNIZABLE CAUSE OF ACTION?

by: Miguel Rivera-Arce

Considerable protection against discriminatory employment practices exists both at the federal and local level. Title VII of the Civil Rights Act of 1964 ("Title VII") makes it unlawful for an employer to discriminate against an employee on the basis of race, color, religion, sex or national origin. From the plain text of the statute, it appears that such protection does not encompass discrimination based on sexual orientation, as it is not included in one of the specified categories.<sup>1</sup> The same is true about Puerto Rico Act No. 100 of June 30, 1959 ("Act 100"), which prohibits discrimination in employment on the basis of age, race, color, religion, sex, political ideology, national origin and social condition, but does not explicitly include a prohibition for sexual orientation discrimination. Neither does Puerto Rico Act No. 17 of April 22, 1988 ("Act 17"), which specifically prohibits sexual harassment in the employment as a form of discrimination on the basis of sex. Thus, in the absence of a statutory provision which specifically prohibits discrimination on the basis of sexual orientation, the only remaining alternative for plaintiffs seeking recognition for such a claim would be a liberal interpretation by the courts of federal and local statutory prohibitions of discrimination "because of sex".

## **Sexual Orientation Discrimination: Interpretation of Title VII by the Federal Courts**

Although caselaw has established that Title VII's protection against gender and sex discrimination does not extend to discrimination based on sexual orientation, the language used and the theoretical approach taken by some of the federal courts has created uncertainty with respect to this topic. Nevertheless, the current

consensus among the courts is that, absent any simultaneous instances of harassment of a sexual nature or of a clear adverse employment action because of failure to meet gender stereotypes, plaintiffs exclusively claiming harassment on account of not being heterosexual do not have a valid Title VII cause of action.

### **Gender Stereotyping Recognized**

In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the Supreme Court of the United States first recognized claims based on gender stereotyping. The plaintiff, a woman, was denied partnership because she failed to exhibit stereotypical feminine qualities. For example, one partner advised her to "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry." The Court found that the plaintiff was denied partnership exclusively because she failed to exhibit the qualities of a feminine woman. The Court reached the conclusion that the plaintiff was judged differently from other candidates just for being a woman. Consequently, this different standard amounted to sex stereotyping actionable under the prohibition of sex discrimination of Title VII.

In Nichols v. Azteca Restaurant Enterprises, 256 F.3d 864 (9th Cir. 2001), the plaintiff, Antonio Sánchez, sued his employer for gender stereotyping after his male coworkers and a male supervisor verbally harassed him for being effeminate. Sánchez claimed that "the holding in Price Waterhouse applies with equal force to a man who is discriminated against for acting too feminine." The Ninth Circuit Court of Appeals agreed. The Court concluded that the plaintiff had met his burden of showing that the harassment was "because of sex." This decision seemed

to open the possibility for sustaining a discrimination claim exclusively on grounds of hostility towards non-heterosexual sexual orientation. However, as will be discussed below, this same court later retreated from this position.

### **Same-Sex Harassment**

In Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), the Supreme Court first addressed same-sex sexual harassment under Title VII. A fellow employee and two supervisors subjected Joseph Oncale to humiliating actions with sexual overtones, sexually assaulted him, and threatened him with rape. Oncale quit his job and filed suit. Both the district court and the Fifth Circuit Court of Appeals held that Oncale, as a male, had no cause of action under Title VII.

The Supreme Court reversed, holding that the prohibition of discrimination "because of ... sex" found in Title VII protects both men and women. It further stated that same-sex sexual harassment is actionable regardless of whether one of the parties to the harassment is homosexual. In other words, the conduct need not be motivated by sexual desire in order to constitute harassment; it simply must be directed at the victim "because of" his or her sex. While acknowledging that Title VII did not initially intend to target same-sex harassment against men, the Court explained that "statutory prohibitions often go beyond the principal evil to cover reasonable comparable evils..."

In determining whether conduct is directed at a victim "because of" his or her sex, the Court required an inquiry into whether the victim was subjected to an offensive treatment that members of the other sex do not experience. Once a court finds disparate and offensive

treatment, it determines whether such treatment rises to the level of harassment from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.

However, the Court's opinion left unclear whether there is a cognizable cause of action for discrimination on the basis of sexual orientation, absent any physical harassment of a sexual nature.

### No Cognizable Claim Under Title VII for Sexual Orientation Discrimination

In Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir 2002), cert. denied, 123 S.Ct. 1573 (2003), the Ninth Circuit recognized a Title VII same-sex discrimination claim when "physical conduct of a sexual nature" occurred as part of employment harassment. Medina Rene, an openly gay man, alleged that his male coworkers and his supervisor submitted him to unwanted physical conduct of a sexual nature.

The Court treated as irrelevant whether the plaintiff was targeted because of his sexual orientation and instead focused simply on the notion that acts directed to body parts "clearly linked to ... sexuality[,] satisfy the "because of sex" requirement in Title VII. Because Rene was mistreated as compared with other men, the Ninth Circuit concluded that a valid Title VII discrimination claim was sustainable.

The language of the opinion, in conjunction with the Nichols decision, seems to recognize the possibility of a valid claim for discrimination exclusively on grounds of hostility towards homosexuality. However, in what many claim to be a theoretically unsound argument, the court emphatically asserted that the plaintiff had a valid cause of action only because of the physical harassment of a sexual nature which he endured, not because there was any animosity against his alleged sexual preference.

This interpretation is further sustained by Bibby v. Philadelphia Coca Cola Bottling Co., 260 F. 3d 257 (3rd Cir. 2001), cert.

denied, 534 U.S. 1155 (2002), in which the Third Circuit reaffirmed that Title VII does not prohibit same-sex harassment based on sexual orientation. Bibby, who is gay, was a victim of a physical assault with no sexual content, and of several instances of harassment and name-calling because of his sexual orientation.

The Court stated that the plaintiff had to prove: that the physical assault was of a sexual nature; or that he was being harassed for being a man; or that his harassers were motivated by sexual desire; or that his employer took adverse employment actions because of his gender; or that he was harassed because he failed to comply with societal stereotypes of appearance and behavior of men. Nevertheless, he only claimed that he was discriminated because of his sexual orientation, which, according to Court, is not actionable under Title VII.<sup>2</sup>

Consequently, although the federal caselaw has gone to great lengths to recognize same-sex harassment and gender stereotyping discrimination claims under Title VII, it has yet to recognize discrimination exclusively on the basis of sexual orientation. Thus, absent any physical harassment of a sexual nature, or any adverse employment decisions based strictly on gender stereotyping, courts have not allowed claims for sexual orientation discrimination to proceed under Title VII.<sup>2</sup>

### Puerto Rico's Stance on the Issue

The Puerto Rico Supreme Court has yet to decide whether a sexual orientation claim can be sustained under Act 100 or under Act 17. However, in Irizarry v. Roger Electric, Inc., 2002 T.S.P.R. 56, the Court clearly recognized the validity of same-sex harassment claims, as prohibited both by Act 100 and Act 17.

The plaintiff, a male, was subjected to numerous unwanted sexual advances and physical conduct of a sexual nature by his supervisor, who was also a male. The supervisor's behavior was motivated by sexual desire. The Supreme Court established that same-sex harassment was within the scope of

the legislative intent. The Court emphasized the mandate of Article II, Section 8, of the Puerto Rico Constitution, which specifically prohibits abusive attacks against a person's honor, integrity and privacy. Thus, given this constitutional imperative, and the general prohibition against sex discrimination, the Court concluded that a same-sex harassment claim was sustainable under both Act 100 and Act 17.

The Supreme Court left unclear whether the aforementioned statutory provisions would also extend to prohibit harassment and/or discrimination on the basis of a person's sexual orientation, absent physical harassment of a sexual nature, or absent the sexual desire as motivating factor for the alleged discriminating conduct.

### Conclusion

It is recommended that employers make all the necessary efforts to prevent or suppress any kind of behavior, be it from other employees or from management, that could constitute to discrimination on the basis of sexual orientation. Although it is clear that the federal and local courts have not recognized claims for discrimination based exclusively on alleged hostility towards an employee's sexual orientation, employers still face potential liability for same-sex harassment and gender stereotype claims. In this regard, as discussed above, there are many factual scenarios where a plaintiff could sustain a same-sex harassment or gender stereotype as a result of actions which originally arose from hostility towards the employee's sexual orientation. ■

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1. *There is one exception to this statement. Executive Order No. 13,087, issued by former President Clinton, prohibits discrimination on the basis of sexual orientation in the federal service. See, 3 C.F.R. 191 (1999), reprinted as amended in 42 U.S.C. 2000e (2000).*

2. *Many other courts applied similar approaches in reaching the same conclusion See Simonton v. Runyon, 232 F.3d 33 (2nd Cir. 2000); Hammer v. St. Vincent Hosp. & Health Center, Inc., 224 F. 3d 701 (7th Cir. 2000); Fitzpatrick v. Winn-Dixie Montgomery, Inc., 153 F. Supp. 2d 1303 (M.D. Ala. 2001); Salvatore v. KLM Royal Dutch Airlines, 181 FEP 873 (S.D.N.Y. 1999).*

# EMPLOYERS MAY SUCCESSFULLY DEFEND A CLAIM UNDER ADA WHEN THE IMPAIRMENT IS ALCOHOLISM AND WORK IS THE MAJOR LIFE ACTIVITY SUBSTANTIALLY LIMITED BY SUCH IMPAIRMENT

by: Karen Morales Ramírez

Recently, the United States Court of Appeals for the First Circuit (“the First Circuit”) decided the case of John F. Sullivan v. The Neiman Marcus Group, Inc., 358 F.3d 110 (1st Cir. 2004). This case illustrates how an employer can successfully defend a claim under the Americans with Disabilities Act (“ADA”). Here, the alleged impairment was alcoholism, and the employee invoked work as the major life activity substantially limited by this impairment. Briefly, the facts are the following:

Plaintiff-Appellant John F. Sullivan had a long history of problems with alcohol. He had enrolled in a detox center, had joined Alcoholics Anonymous and undergone other forms of treatment, but his problems with alcohol persisted. Nevertheless, Sullivan had a successful employment history in the retail sector. At approximately the same time he was dealing with his alcoholism, he worked at a retail store and took several retail jobs over the years. His tasks covered from selling to planning and stocking the opening of a new health and nutrition store. In one of his jobs, Sullivan excelled in performance and was promoted to a low level management position. Although he did not remain in these jobs for an extended period of time, he did not leave them for disciplinary reasons.

In March 1999, Sullivan was hired as a sales associate at Neiman Marcus. Subsequently, he was promoted to Assistant Manager, where he was responsible for supervising Ramón Lora

(“Lora”). On August 11, 1999, Sullivan and some co-workers had lunch at a local Mexican restaurant; he ordered a vodka and cranberry juice. Although he did not consume the drink at lunch, according to a Human Resources Coordinator who was present, Sullivan “was acting kind of strange”, “didn’t seem himself” and “sounded intoxicated.” Sullivan remained in the bar area after his co-workers left. By the time the Human Resources Coordinator reported her observations to the Human Resources Manager, Sullivan had already called and requested permission to leave early because his father had medical problems. Later that day, Lora supposedly informed the Human Resources Manager that he was resigning from his job because he did not respect Sullivan, Sullivan frequently drank at work, was drunk during the day and abused him when he drank. Lora also gave this information to Neiman Marcus’s Loss Prevention Manager and informed him that Sullivan had been drinking vodka out of a soda bottle while at work. The Loss Prevention Manager searched Sullivan’s desk and found an empty vodka bottle and a cold drink bottle in one of the drawers. Based on this information, the Human Resources Manager concluded that Sullivan had been drinking during working hours.

During the next four days, Sullivan did not report to work nor did he call the store. On August 12, 1999, the Human Resources Manager contacted the Company’s headquarters; she allegedly decided to terminate Sullivan on that day.

On August 16, 1999, Sullivan contacted the Human Resources Director and informed her that he had an alcohol problem and that he was entering an alcohol rehabilitation program. After being discharged from the rehabilitation program, Sullivan contacted the Human Resources Manager and she informed him that she needed to talk to him concerning his employment termination. Although they agreed to meet the next day, Sullivan did not attend the meeting. On September 10, 1999, Neiman Marcus sent Sullivan a letter informing him that his employment had been terminated on August 25, 1999, for violation of company policies regarding the use of alcohol on the job. After his termination from Neiman Marcus, Sullivan worked as a bus driver and as a server with a catering company.

Sullivan filed a complaint against Neiman Marcus in the United States District Court alleging that the company failed to make a reasonable accommodation to his disability or, in the alternative, that it illegally discriminated against him because of his disability. In turn, Neiman Marcus alleged that Sullivan was terminated due to his consumption of alcohol during working hours in violation of the Company rules and not because he was an alcoholic and that the decision to terminate Sullivan was made before he notified the Company that he was entering into a rehabilitation program. Subsequently, Neiman Marcus filed a motion for summary judgment, which was granted by the Court. Sullivan appealed.

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The First Circuit affirmed the District Court's decision. In reaching its decision, the Court evaluated whether Sullivan had an actual impairment or whether Neiman Marcus regarded him as being impaired. In essence, the Court stated that although alcoholism is an impairment under the ADA, "mere impairment without more is insufficient to establish that a claimant is disabled under the ADA." The claimant must demonstrate that his impairment substantially limited one or more of his major life activities.

The Court held that a claimant, such as Sullivan, whose alleged impairment is alcoholism and who invokes work as the major life activity that was substantially limited by said impairment, faces a Catch-22 dilemma. This dilemma arises when the claimant must demonstrate that he is a "qualified individual" for the position at issue in order to be eligible for ADA protection. On the other hand, if he demonstrates that his ability to work is substantially impaired, he may demonstrate that he is unqualified for the position, and therefore, excluded from the protection of the ADA. Furthermore, if the employee attempts to use the deficiencies in his job performance to demonstrate that alcoholism substantially impaired his ability to work, he may establish that he cannot meet the legitimate requirements for the job for ADA coverage. Also, the claimant must demonstrate that his impairment substantially interfered with his ability to work. Specifically, the claimant must demonstrate that he is significantly restricted from performing a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. In view of the above, the Court concluded that Sullivan did not prove that his alcoholism affected his ability to work at Neiman Marcus or elsewhere. On the contrary, Sullivan had demonstrated that his alcoholism had not interfered with his ability to

work at other jobs before and after his employment at Neiman Marcus.

Moreover, the Court held that Neiman Marcus did not regard Sullivan as being substantially impaired. In essence, the Court stated that the purpose of the "regarded as" prong is "to cover individuals 'rejected from a job because of the myths, fears and stereotypes associated with disabilities.'" An employee can demonstrate that his employer regarded him as disabled if: "the covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or [the] covered entity mistakenly believes that an actual nonlimiting impairment substantially limits one or more major life activities."

Sullivan alleged that Neiman Marcus unfairly believed that, as an alcoholic, he could not perform his job, because it terminated him. However, the Court rejected this argument and held that "[a] plaintiff claiming that he is 'regarded' as disabled cannot merely show that his employer perceived him as somehow disabled; rather, he must prove that the employer regarded him as disabled within the meaning of the ADA." The Court concluded that Sullivan failed to introduce evidence beyond his termination demonstrating that Neiman Marcus may have believed that he could not perform the essential functions of either a class of jobs or a broad range of jobs in various classes. It also held that Neiman Marcus was aware of Sullivan's alcoholic problems, but terminated him due to his violation of company policies, rather than for his status as an alcoholic.

The reasoning used by the Court in resolving this case may be indicative that, in the near future, the Court may not accept work as a major life activity under the ADA because of the conceptual difficulties this argument poses for the claimants. ■

## U.S. COURT OF APPEALS AFFIRMS DONNING AND DOFFING DECISION

by: Maggie Correa-Avilés

Good news for employers! Although the United States Court of Appeals for the First Circuit granted the rehearing requested by plaintiffs, and supported by the Secretary of Labor, affirmed its prior decision in the case of Abdela Tum, et al. v. Barber Foods, Inc., 331 F.3d 1 (1st Cir. June 11, 2003), in favor of the employer. On March 10, 2004, the Circuit Court held that:

1. The Fair Labor Standards Act ("FLSA") requires an employer to record, credit and compensate employees for all the time which the employer requires or permits employees to work;
2. Even when an activity is properly classified as "work," the Portal-to-Portal Act exempts from compensation activities which are preliminary or postliminary to an employee's principal activity;
3. Some activities that may qualify as "work" and fall outside of the Portal-to-Portal Act nevertheless do not require compensation because the activities require such little time that they are adjudged as de minimis;
4. The donning and doffing of required gear is an integral and indispensable part of the employees' principal activities in the Tum case;
5. The donning and doffing of gear not required by the employer nor by the regulations, and that is worn by the employees at their own discretion, is not compensable under the FLSA;
6. The periods during which employees walk from the area where they obtain the required gear to the time clocks, and the period spent walking to the area where they dispose of clothing and equipment after they punch out is not compensable under the Portal-to-Portal Act;
7. A reasonable and short amount of time spent waiting in line to receive the required clothing or equipment, and to punch in at the time clocks, is also not compensable; and
8. Finally, the time spent by Barber Food's employees donning and doffing the required gear is de minimis, and therefore not compensable.

The decision does not state the specific amount of time which is considered de minimis. Also, there are other variables in donning and doffing cases, like whether the equipment is required by the employer or by regulations. These cases are very fact specific. Therefore, whether time spent donning and doffing is compensable, will depend on the facts of each case. ■

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