

LABOR PERSPECTIVES

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PUERTO RICO SUPREME COURT OPINION: A HORNBOOK ON WAGE AND HOUR ISSUES

On January 19, 2007, the Puerto Rico Supreme Court issued a landmark opinion regarding multiple wage and hour issues in the case of Jiménez Marrero et al. v. General Instruments, Inc., 2007 TSPR 013. This case was litigated by attorneys of McConnell Valdés' Labor and Employment Law Practice Group.

In their complaint, originally filed on July 28, 1998, the two plaintiffs claimed, among others: that they were entitled to triple compensation at their regular salary rate for work performed on their seventh consecutive day of work ("seventh day work") which coincided with hours worked in excess of 40 during their workweek, the corresponding penalty for working during their meal period, payment of a shift differential for overtime work which falls within a shift where such differential applies, and payment of compensation, as a penalty, for improper fractioning of vacation leave.

The Court of First Instance entered judgment for the two plaintiffs which was upheld by the Puerto Rico Court of Appeals. We then filed a Certiorari Petition with the Puerto Rico Supreme Court to vacate both judgments. The Supreme Court upheld part of the Court of First Instance's judgment, and made important expressions regarding the issues raised by the parties.

Rate of compensation for seventh day work which overlaps with work in excess of forty hours per week.

Local Act No. 289 of April 9, 1946 provides for a day of rest for every six consecutive days of work, for non-exempt employees working on enterprises which are not subject to the "Act to Regulate the Operations of Business Establishments," commonly known as the "Closing Act." Work performed on such day of rest has to be paid at twice the rate of salary agreed upon with the employee, for regular hours of work.

On the other hand, local Act No. 379 of May 15, 1948, as amended, provides for extraordinary compensation for work performed in excess of 8 hours a day, or 40 per week (the "regular workweek").

In accordance with the plaintiffs' position, the Court of First Instance and the Court of Appeals held that the work performed by an employee during his/her seventh consecutive day, which overlaps with hours worked in excess of the regular workweek had to be paid at a rate of **three times** the employee's regular rate. The lower Courts' rationale was that this period was to be paid **once** on account of the work performed, **plus once** since it was work performed in excess of forty

hours per week and a **third time** since it was seventh day work.

The Supreme Court vacated this holding. According to the Supreme Court, the absence of a clear expression by the P. R. Legislative Assembly

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establishing a different and particular rule for compensating seventh day work which coincides with work in excess of the regular workweek, supports the conclusion that in these instances, payment at three times the employee's regular rate is not warranted.

Under this scenario, the employee is to be paid just twice for work performed in his/her day of rest in accordance with Act No. 289, regardless of whether it is in excess of 40 hours per week.

Shift differentials and payment of overtime.

In Jiménez, the employer voluntarily provided for premium payments as nightshift differentials. The terms of this benefit were defined in the Employee Manual. The Manual stated that a shift differential of \$0.25 was to be paid to the employees working after 3:30 p.m., and of \$0.40 after 10:00 p.m. However, the language used in the Manual did not limit the benefit to those employees specifically assigned to and who regularly worked the workshift to which the shift differential applied.

As a result, the Supreme Court held, based on the language set forth in the Employee Manual, that once the employee continues working beyond his/her regular workshift and into the "next shift" (which is subject to the shift differential), he/she shall be entitled to receive the shift differential. Additionally, overtime hours worked during such next shift have to be compensated taking into account the differential.

This conclusion was further supported by the Court's analysis of the definition of the term "salary" under Act No. 379 which, as a matter of fact, includes "salary, day wages, payment, and **any other form of cash compensation.**" See 29 L.P.R.A. §288(4); emphasis provided. In sum, if as

a result of an employer's policy or practice the employee is entitled to receive a shift differential, such premium pay becomes part of the employee's salary.

However, the fact that the Supreme Court's analysis is primarily based on the unconditional language used in the Employee Manual where the scope of the benefit is defined, may provide room to argue that an employer may expressly define the entitlement of this benefit through a policy or a manual and thus limit its application in order to avoid a result similar to that in Jiménez.

Separately, it would not be a surprise if a plaintiff were to attempt to use the Jiménez holding to support claims alleging that, to the extent that a shift differential is part of the employee's salary, it should also be considered as part of the employee's regular hourly rate in the accrual and liquidation of paid leaves (i.e. vacation leave, sick leave, maternity leave, etc.).

This issue, however, was not subject to court analysis in Jiménez.

Meal periods.

With respect to meal periods, the Supreme Court restated the statutory requirement that employees may agree with the employer to reduce the meal period to less than one hour for their mutual convenience. However, in the absence of a written agreement, **the reduction is not valid.** In fact, in Jiménez, the employer's impossibility to produce the agreement in evidence led the Court to conclude that one of the plaintiffs was entitled to receive, as a penalty, payment for each half-hour of meal period in which he engaged in work in addition to the payment received for such workperiod. In the case of the other plaintiff, there was evidence of a written agreement to reduce her meal period to 30 minutes. However, in this case the issue was different. The plaintiff had worked

The absence of a clear expression by the P. R. Legislative Assembly establishing a different and particular rule for compensating seventh day work which coincides with work in excess of the regular workweek, supports the conclusion that in these instances, payment at three times the employee's regular rate is not warranted

through part of her reduced meal period and, on occasions, during her meal period. The employer's defense for this claim was that such period worked was insubstantial and, therefore, could be disregarded, in accordance with the "*de minimis*" doctrine established in federal cases.

The *de minimis* doctrine, proposed by the U.S. Supreme Court in Anderson v. Mt. Clemens Pottery Co., 328 US 680 (1946), establishes, in general, that: "... insubstantial or insignificant periods of time...[worked], which cannot, as a practical administrative matter, be precisely recorded for payroll purposes, may be disregarded." See 29 C.F.R. §785.47. However, the application of this doctrine to the meal period issue at hand was rejected in Jiménez because the federal statute does not regulate meal periods. This is a right arising from local Act No. 379 only, for which reason the *de minimis* doctrine is inapplicable. Additionally, according to the Court, the application of the doctrine to a reduced meal period may have the effect of reducing the period beyond what Act No. 379 expressly authorizes, in particular, to those cases where a meal period can be reduced to 20 minutes; or in some instances, eliminating it entirely.

Consequently, the Supreme Court held that the employer was required to pay the employee for the meal period, or fraction thereof worked, plus an equal amount as a penalty.

Fractioning of vacation leave.

In relation to this claim, the Court of First Instance and the Court of Appeals ruled in favor of one of the plaintiffs, who had alleged that his vacation leave was unduly fractioned by the employer. Both courts held that the employer was required to pay, as a penalty, the total leave accrued by the employee notwithstanding the fact that he had taken the vacation and been paid for the same. However, the Supreme Court overruled both courts with respect

to this holding. Although it concurred with the lower Courts in that the leave was unduly fractioned, the Supreme Court determined that the employer was not required to pay again for the vacation leave taken by the employee.

With respect to the application of a civil penalty, consisting of monetary compensation, in those cases where the vacation leave was fractioned without an agreement, the Court agreed with our position. It held that the statute did not provide for a penalty applicable to this violation, and accordingly, the lower Courts erred when they concluded otherwise and ordered the employer to pay again for the leaves already taken

With respect to the fractioning issue, the Supreme Court concluded that pursuant to former Act No. 84 of July 20, 1995, and Act No. 180 of July 27, 1998, employees may take their leave consecutively or, **upon agreement**, it may be apportioned, the days need not be consecutive, **provided the employee enjoys at least five consecutive working days of vacation leave during the year.** In Jiménez, the Supreme Court found that the employer had failed to prove the existence of an agreement to fraction the leave. This conclusion suggests that the Court understood that in order to prove the existence of the agreement, a **written** agreement had to exist, even though the statute does not require it. As a matter of fact, Act No. 180 requires written requests or agreements only in two instances: to include non-working days within, or at the beginning or end of the vacation leave and, the partial liquidation of accrued vacation leave in excess of ten days.

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However, the Supreme Court cautioned that even though there is no statutory civil penalty, the P. R. Secretary of Labor may file for injunctive relief to stop the practice of unilateral fractioning of vacation leave. Additionally, such practice constitutes a misdemeanor punishable by fine and/or imprisonment.

Employers must be aware of the precepts established by the Puerto Rico Supreme Court in the Jiménez case and evaluate their wage and hour practices accordingly. In case of any doubts or questions, please contact one of the attorneys in our Labor and Employment Law Practice Group. **M&V**

DOMESTIC VIOLENCE: A SOCIAL PROBLEM THAT EMPLOYERS ARE CALLED TO ADDRESS UNDER NEW LEGISLATION

Violence in the workplace usually deals with disgruntled employees who suddenly and unexpectedly turn around and attack co-workers or visitors. These attacks at times may cause serious physical damages, injuries, and death. The reports of these incidents often result in the implementation of company policies that prohibit violence in the workplace, provide employee assistance programs, and disseminate open door policies to channel complaints. These policies are nowadays an integral part of most employee manuals.

In Puerto Rico, however, the employers concern with violence in the workplace is more distinctly related to the prevalent social problem of domestic violence. Puerto Rico statistics on domestic violence for the last five years are alarming. The government has reacted by amending local laws to increase penalties, facilitate and amplify the scope of restraining orders, and establish alternative mechanisms to fight the problem and protect the victims. This last initiative is where employers come in.

As of September 29, 2006, all private employers and local government entities are required to implement a protocol for the handling of domestic violence situations that transcend to the workplace. Act No. 217 of that date requires employers to assume a hands-on approach and share in the government's intent to eradicate domestic violence in Puerto Rico.

Although Act No. 217 provides no specifics as to how a protocol should

As of September 29, 2006, all private employers and local government entities are required to implement a protocol for the handling of domestic violence situations that transcend to the workplace. Act No. 217 of that date requires employers to assume a hands-on approach and share in the government's intent to eradicate domestic violence in Puerto Rico

be prepared, it mentions that an employer's domestic violence protocol must include, at a minimum, the following sections: a declaration of public policy, its legal basis and applicability, the respective responsibilities of personnel, and a procedure as well as uniform measures to handle domestic violence cases in the workplace. Act No. 217 further states that the local Office of the Solicitor of Women Affairs will provide employers the necessary technical assistance to prepare and implement these protocols and the local Department of Labor is charged with overseeing the employers' compliance with the law's mandate.

Therefore, upon preparing a domestic violence protocol, employers need to identify who in the Company will be in charge of handling these cases. Natural choices would be sympathetic employees with experience in human resources, health, or safety. As part of the protocol's implementation, employers will also need to provide awareness training to their supervisors and case managers.

As to the required protocol, it must specify how to proceed when a domestic violence situation arises or is identified in the workplace; it needs to detail the steps that the case manager and supervisors must take to ensure that a proper investigation is conducted, adequate safety measures in the workplace are implemented, and work-related assistance and benefits are provided to the victim employee. These may include, for example, a leave of

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AMENDMENT TO ACT 100 PROVIDES ANOTHER CAUSE OF ACTION FOR EMPLOYEES AGAINST THEIR EMPLOYERS

by Jan Carlos Bonilla Silva

absence or modified work schedule that will allow the employee to seek further assistance and/or avoid unwanted contact with the aggressor. The case manager should be prepared to advise the victim; such advice may refer to the proper judicial and other government channels or social service organizations that are available to provide additional support and protection to domestic violence victims. Also, employee manuals and workplace policies should be modified accordingly. These should advise employees of the company's policy on zero-tolerance of domestic violence by or against its employees and of the existence of the new protocol.

It is not clear whether the implementation of the protocol mandated by Act 217 will serve as an affirmative defense in a situation of alleged discrimination by an employee who is a victim of domestic violence, sexual aggression, or stalking, where the affected employee did not follow the procedure established in the protocol. Certainly those employers who have a protocol in place will be in a better position to defend a claim of discrimination presented by an employee who belongs to this newly protected category under local Act 100.

If you need assistance in the preparation of a domestic violence protocol, the attorneys of the Labor and Employment Law Practice Group of McConnell Valdés can help you prepare one that is suitable to your company's particular needs. **M&V**

Act Number 271 of December 17, 2006 ("Act 271"), amended Act Number 100 of June 30, 1959 ("Act 100"), known as the Puerto Rico Discrimination Act. Act 271 provides a new cause of action against employers who discriminate against an employee for being a victim of or being perceived as a victim of domestic violence, sexual aggression or stalking. The definitions of the terms "domestic violence", "sexual aggression" and "stalking" to be used are the ones established in Act 54 of August 15, 1989 ("Act 54"), The Puerto Rico Penal Code of 2004, and Act Number 284 ("Act 284") of August 21, 1999, respectively.

Act 271 establishes two new presumptions in favor of the employee who files a complaint against his or her employer under this new cause of action. First, it will not be presumed that an employer knew of the personal situation of an employee who is a victim, or presumably is a victim, of domestic violence, sexual aggression, and/or stalking. However, if the employer was in a position to know of the employee's personal situation, then a presumption will be activated that the employer actually knew of

the employee's personal situation. Second, once the employer has information that a dangerous situation might occur, Act 271 imposes a new obligation on them: the obligation to provide reasonable accommodation to protect its employees from a possible aggressor. If the employer does not provide reasonable accommodation, it will be presumed that the employer engaged in discriminatory conduct.

Furthermore, Act 538 of September 30, 2004 ("Act 538") provides for an employer to request the Puerto Rico courts a protective order against a person who is engaging in domestic violence against an employee. There are two requirements: 1) the acts that constitute domestic violence must occur in the workplace; and 2) the employer must notify the affected employee of its intention to request the protective order. The obtention of a protective order should help the employer maintain a peaceful work environment.

Employers should not take Act 271 lightly. A violation of Act 271 could result in further employer exposure. **M&V**



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AVOIDING CYBER SEXUAL HARASSMENT IN THE WORKPLACE: SOME PRACTICAL RECOMMENDATIONS

The use of technology and electronic communication tools, such as internet access and e-mail, has irreversibly changed the way business is conducted and become the mechanism of choice for communicating in the workplace. The benefits the internet provides to businesses are endless, including reduced operating costs, facilitating and creating instant communication between people in the workplace and added efficiency, among others.

Despite the ease of communication and access to data, the internet has also become an open invitation for some employees to engage in internet chat, personal e-mailing and other types of activities which can prevent them from maximizing work hours. On the other hand, while technology can be lauded for the ways in which it has helped business, it also raises concerns that previously did not exist. A growing number of cases involve employees using company e-mail accounts, internet access and other multimedia work tools to engage in what has become known as “cyber sexual harassment.”

In order to address this growing trend, on November 30, 2006, the Puerto Rico Legislature enacted Act No. 252 (“Act 252”) to amend Article 3 of Act No.17 of April 22, 1988, as amended (“Act 17”), our local sexual harassment statute. Act 252 expands the scope of circumstances which constitute sexual harassment as originally defined by Act 17 to include: “[a]ny type of undesired sexual approach, demand for sexual favors and any other verbal or physical behavior **or what is reproduced using any communication medium, including, but not limited to,**

the use of multimedia tools through the cybernetic network or by any electronic means, when one or more of the following circumstances occur:

- (a) When submission to said conduct becomes, implicitly or explicitly, a term or condition of the person’s employment.
- (b) When submission to or rejection of such conduct by the person becomes the grounds for decisions on the job, or regarding the job, that affect that person.
- (c) When that conduct has the effect or purpose of interfering unreasonably with the performance of such person’s work or when it creates an intimidating, hostile or offensive working environment. (Emphasis provided.)

Employers can undoubtedly be held liable for any sexual harassment that occurs in the workplace. Thus, what can both employers and supervisors do to reduce the risk of cyber sexual harassment cases in the workplace? Every employer has the obligation to implement a sexual harassment policy. The following are some practical recommendations you should consider when establishing your sexual harassment policy in order to avoid potential liability and particularly to avoid cyber sexual harassment claims:

- Make sure you have a written policy which clearly defines sexual harassment. In addition to traditional types of behavior, it should also contain examples

of the multiple forms of behavior which can constitute cyber sexual harassment, including being subject to raunchy e-mails, sending pornographic material over the e-mail, offensive text messaging from co-workers or supervisors, among others. Every employee should receive a copy of the policy and sign an acknowledgment of receipt.

- Employees should be aware that among the criteria that defines any given behavior as sexual harassment is how he/she perceives said behavior, regardless of the harasser’s intentions.
- Make sure your policy is written in a clear and simple way in order for it to be understood by all employees, regardless of their background, education and experience. (It should be available in English and Spanish in places who have Spanish speaking persons working.)
- Employees should understand the established procedures for raising internal complaints.
- Prohibit any retaliation against employees who file complaints or participate in the investigation process of sexual harassment claims.
- Provide employees with periodic training sessions on sexual harassment and prevention. In addition to sexual harassment policies which clearly ban the use of company multimedia tools

to engage in sexual harassment, employers should also consider the following suggestions in order to significantly reduce the risk of sexual harassment liability from cases arising from misuse of internet access or company e-mail by employees:

- Implement an Internet Use Policy that clearly indicates what types of internet use will be permitted by the Company.
- Only allow employee access to company e-mails when the duties and responsibilities of his or her position justify its use.
- Avoid permitting employees full internet access unless necessary. This can significantly reduce the potential for employees to access pornographic or explicit material and reproduce the same over company e-mail accounts to other co-workers.
- Provide passwords to employees whose work warrants internet use. This way, computer use may be tracked, if necessary.
- Consider the use of a computer firewall. Firewalls can register unlawful attempts to gain access to private networks and can block specific website addresses or key words, such as "sex," "adults" or "x." These systems, which can be in the form of either hardware devices or software programs are designed to rapidly identify these types of "suspicious" addresses and immediately deny entry to the user.

Complete and appropriate company policies will most certainly serve as a defense for employers against claims for the unlawful actions of employees. Are your Company's policies up-to-date? **M&V**

PRACTICE GROUP NEWS



Agustín Fortuño Fas is a partner in the Labor and Employment Law Practice Group of McConnell Valdés.

The Labor and Employment Practice Group held an Employment Developments Conference for clients on March 30, 2007. Nearly 100 clients attended the all-day event, held at the San Juan Marriott Resort & Stellaris Casino. Fourteen attorneys gave presentations about the latest developments in various areas of labor and employment law, as well as practical considerations relevant to employers with respect to these developments.

The morning session consisted of presentations on the most recent pending legislation, new laws and court decisions in the labor and employment field. The speakers included attorneys María Antongiorgi, Luis Roberto Amadeo, Miguel Rivera Arce, Francisco Vargas, and Jessica Figueroa Arce. After the morning session, the attendees and presenters enjoyed a luncheon at the hotel's Tuscan Restaurant.

After lunch, there were various interesting presentations regarding discrimination in employment, harassment in the workplace, union activity, disability discrimination, reasonable accommodation, immigration, HIPAA, Medicare, electronic communications, and privacy rights in the workplace. The panel of speakers of the afternoon session included Alfredo M. Hopgood-Jovet, Director of the Practice Group; Francisco Chévere, Assistant Director of the Practice Group; Héctor M. Lafitte, former Judge of the Federal District Court of Puerto Rico; Radamés (Rudy) Torruella; Elaine Maldonado Matías; Agustín Fortuño Fas, who was also the coordinator of the event; Rica López de Alós; Sandra Negrón Monge; and Juan Felipe Santos.

The Labor and Employment Law Practice Group will be conducting other conferences for the firm's clients and will keep them advised of upcoming events. **M&V**

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