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EMPLOYMENT LAW

Third Circuit: 'Willful' Conduct Does Not Require 'Egregiousness'

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Special to the Legal

Many employment law statutes base the level of damages or length of the applicable statute of limitations on a determination of whether the employer's actions were "willful." While the U.S. Court of Appeals for the Third Circuit had previously indicated that a finding of willfulness required a level of "egregious" conduct, in *Stone v. Troy Construction,* ____ F.3d ___, 2019 U.S. App. LEXUS 24769 (3d Cir. Aug. 20, 2019), the appellate court clarified that "egregiousness" is not required to support a finding that the employer's actions may have been willful.

FLSA BASES LIMITATIONS PERIOD ON 'WILLFULNESS'

The *Stone* case arose under the Fair Labor Standards Act, which provides that actions "must be commenced within two years 'except that a cause of action which arises out of a willful violation may be commenced within three years after the cause of action accrued,'" see *McLaughlin v. Richland Shoe*, 486 U.S. 128, 129 (1988). Under the FLSA, therefore, determining whether the employer's actions were "willful" is critical to both the size of a potential class, as well as potentially adding a third year of damages for class members.

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Troy Construction builds "and maintains oil and gas pipelines and compressor stations across the country, including in Pennsylvania." The work is rather specialized and, therefore, many of Troy's employees travel long distances from their permanent homes to the Pennsylvania work sites. Troy, however, also employs local employees.

PER DIEM PAY NOT COUNTED FOR OVERTIME RATE

Troy paid a per diem to both local and nonlocal employees. The "intent of the per diem was found to reimburse out-of-pocket expenses 'related to traveling to the job, lodging while the job is going on and meals.'"

While the FLSA requires that "all remuneration for employment" is to be included in an employee's "regular wage rate," reimbursement for travel expenses (and other similar payments) is not considered to be compensation to the employee. The "regular wage rate" is important because it is used as the basis for calculating overtime payments. Because the per diem was genuinely reimbursing the nonlocal workers for travel expenses, there was no issue with Troy's classification of per diem payments to nonlocal employees with respect to the calculation of their "regular wage rate." The payments were not considered to be "remuneration for employment." However, for the local employees, there was no travel or lodging expenses to reimburse. As such, applying the Department of Labor's handbook: "the entire amount of the payments should be included in determining the regular rate." Troy, however, "did not include per diem payments to local employees in its

calculation of those employees' regular rate of pay when determining the company's overtime obligations."

Linda Stone was a local employee of Troy whose employment ended in March 2013. She received per diem pay, but the payments were not reflected in her "regular rate," which impacted her overtime compensation. Notably, in January 2014, nine months after Stone's termination, Troy began treating per diem paid to local employees as taxable income, recognizing that such payments "would not have been viewed by the IRS as a proper reimbursement." Even then, however, the company did not include the per diem payments to local employees in calculating their "regular wage rate."

In February 2014, Stone brought suit against Troy on behalf of herself and fellow local employees claiming that Troy had improperly calculated her "regular wage rate." Ironically, Stone did not file an opt-in form until more than two years after filing suit. Both parties filed motions for summary judgment on the issue of whether Stone's claims were subject to a two-year or three-year statute of limitations, based upon whether there was a genuine issue of fact as to Troy's willfulness in violating the FLSA.

'WILLFULNESS' PART OF MANY STATUTES

Initially, the court noted that the definition of willfulness arises, not just under the FLSA, but in a number of statutes, including the Age Discrimination in Employment Act. However, the definition of what constitutes willfulness in violating a statute is common to all statutes. The U.S. Supreme Court has explicitly referenced the FLSA in applying the standard of willfulness to the ADEA.

The district court granted summary judgment for Troy, finding that there were "insufficient facts for a fact finder to reasonably conclude that the company's conduct amounts to a willful, FLSA violation."

The Third Circuit reversed the district court's decision, finding that the court had "required a showing of conduct worse than the recklessness" meant by the Supreme Court's definition of willfulness in *McLaughlin*.

'NOT PERFECTLY CONSISTENT' DEFINITION OF WILLFULNESS

The Third Circuit found, principally, that while Troy was aware of the tax implications of per diem payments to nonlocal employees, there was a genuine issue of fact as to the company's "professed ignorance" about the implication of such payments made to local employees. Rather, the court noted that while the term willful has not been "given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent." The court noted that willfulness can be shown where the "employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." "Reckless disregard," in turn, may be shown through "evident indifference"—which is a lower standard than a showing that conduct was "egregious"—defined as "extremely or remarkably bad."

By clarifying that willfulness does not require egregiousness, the court has clearly lowered the standard by which conduct is measured.

One of the considerations for the Third Circuit was Troy's change to its accounting practices with respect to per diem payments to local employees. The appellate court found that while Troy "made the accounting change at a time of its choosing ... its recognition of the need for the change may have come earlier." In considering the evidence of Troy's efforts to rectify the issue after Stone's termination, the court noted that "policy concerns sometimes prompt the law to forbid later corrective actions from being used as evidence, so as not to pose a disincentive to appropriate changes in behavior." The court did not resolve this tension, because neither party raised the issue in its briefing.

By clarifying that willfulness does not require egregiousness, the court has clearly lowered the standard by which conduct is measured. This is a boon to employees, who will no longer need to show extreme conduct when willfulness is challenged. •