# Labor & Employment News

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## Recent Expansions to the Family & Medical Leave Act Cover Military Families

On January 28, 2008, President Bush signed the National Defense Authorization Act ("the NDAA"), amending the Family & Medical Leave Act ("the FMLA") for the first time since its enactment in 1993. The NDAA, which was effective immediately, essentially creates two new categories of employees who are eligible for FMLA leave. First, an FMLA-eligible employee whose spouse, son, daughter, or parent is on active duty in the Armed Forces in support of a "contingency operation" is entitled to a total of 12 workweeks of leave during a 12-month period. Second, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember is entitled to 26 total workweeks of FMLA leave during a 12-month period. There is no requirement under the NDAA that an employer provide paid leave to employees who exercise their FMLA rights, and employers may require their employees to substitute any accrued paid vacation time, personal leave, family leave, or medical or sick leave for any portion of the available 12 or 26 weeks of FMLA leave.

For purposes of the NDAA, the Armed Forces includes members of the National Guard and Reserves. A "covered servicemember" is a member of the Armed Forces who is undergoing medical treatment, recuperation, or therapy, who is otherwise in outpatient status, or who is otherwise on the temporary disability retired list, for a serious injury or illness. Generally, "contingency operations" are those military operations that either (a) are designated by the Secretary of Defense as operations in which members of the armed forces are or may become involved against an enemy of the United States or an opposing military force, or (b) result in the calling or ordering of uniformed services personnel to active duty during a war or national emergency.

On a related note, on February 11, 2008, the Department of Labor ("the DOL") issued proposed wide-spread revisions to the current FMLA regulations, as well as proposed regulations relating to the NDAA. As a general matter, the revisions seek to improve the process of administering FMLA claims and clarify several issues, based on several recent court rulings, two studies the DOL conducted, and the public's and the DOL's experience with the FMLA over the last nearly 15 years. The DOL accepted comments on the proposed revisions to the regulations until April 11, 2008, and now anticipates issuing final regulations fairly quickly. An explanation of the proposed revisions and the reasons for them can be found at http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf.

*Stephanie S. Rojo*

# Compliance with Overtime and Minimum Wage Requirements: Are Volunteers Really "Volunteers"?

According to the Department of Labor's enforcement statistics, the amount of back wages collected by the Wage and Hour Division for unpaid overtime has increased steadily in recent years, despite the fact that the number of employee complaints seems to be on a downward trend. See http://www.dol.gov/esa/whd/statistics/200712.htm. As a result, the Fair Labor Standards Act's overtime provisions have received a decent amount of attention lately from employers and employment law practitioners. But what about the FLSA's minimum wage provisions? And what about non-profit organizations? For non-profits, and especially those who utilize a large number of volunteers or who allow their employees to volunteer for the organization in addition to performing their normal work duties, it is prudent to step back from time to time and consider whether the organization's volunteers are actually "volunteers."


The FLSA, found at 29 U.S.C. §§ 201 *et seq.*, applies, with some exceptions, to all "employees," circularly defined as "individual[s] employed by an employer." To "employ," under the FLSA, is to allow an individual to "suffer" for you or to "permit" them to work for you. As the United States Supreme Court has previously stated, these definitions are of little to no assistance to employers, but Congress and the Supreme Court have made it clear that bona fide volunteers and independent contractors, among others, are exempt from the FLSA's overtime and minimum wage requirements. Other courts have followed suit, carving out FLSA exemptions for individuals such as prison inmates involved in labor programs.

Volunteers for public agencies are specifically excluded from the definition of "employee" found in the FLSA, but only if they receive no compensation for the services they perform (other than paid expenses, benefits, or nominal fees, under certain circumstances) *and* only if the services are not of the same type as those the individual is employed to perform. The FLSA does not define "volunteer," but the accompanying regulations contain the following definition:

> An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours.

Before this definition was added to the regulations, the Supreme Court defined "volunteers" as individuals who "without promise or expectation of compensation, but solely for [their] personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit." The Supreme Court has also directed that FLSA exemptions are to be construed narrowly and in favor of employees.

Whether an individual is an employee or a volunteer is a question of law, and simply labeling someone a "volunteer" does not qualify them for FLSA volunteer status. For example, the Supreme Court held in 1985 that a foundation deriving its income from the operation of a number of commercial businesses, staffed largely by the foundation's "associates," was responsible for paying minimum wages and overtime to those associates. The associates, according to the Court, were mostly drug addicts, derelicts, or criminals before their conversion and rehabilitation by the foundation, and the foundation did not pay them cash salaries, but instead provided them with food, clothing, shelter, and other benefits. Both the foundation and the associates who were interviewed considered their work to be "volunteering," but the Supreme Court found that the economic reality was that the benefits the associates received constituted wages.

On the other side of the spectrum, the Fifth Circuit recently held that a group of unpaid police officers for a small town in Texas were volunteers, even though the city maintained their police commissions with the state licensing agency. While a group of officers argued that the unpaid officers worked for the city

## Compliance with Overtime and Minimum Wage Requirements: Are Volunteers Really "Volunteers"? cont'd

solely for the purpose of maintaining their police commissions—which would have meant the city employed more than five police employees, thus requiring the city to pay the officers overtime—the city argued that the unpaid officers had to be motivated only *in part* by civic, charitable, or humanitarian reasons to be considered volunteers under the FLSA.

The Fifth Circuit found that anyone performing public services without the expectation of compensation, and with no tangible benefits for themselves, is volunteering for civic, charitable, and/or humanitarian reasons. The Court further held that the maintenance of the officers' commissions was *not* a tangible benefit sufficient to cause them to be employees. In considering the city's maintenance of the officers' commissions, the Fifth Circuit noted that there was no evidence of any cost to the city for maintaining the commissions, and that the city merely had to list them as being commissioned when reporting to the state licensing agency.

At least one other court has reached a different result, due to slightly different facts. In that case, the officer at issue had an agreement with the township, whereby he would work as an unpaid police officer in exchange for receiving additional paid employment as a road construction flagman. As a general matter, there is a fair amount of disagreement among the courts across the country about who will qualify as a volunteer depending on the benefit the individual is receiving. Accordingly, it is important to evaluate an organization's circumstances under the law as spelled out by the courts sitting in the state where the volunteers or the organization is located.

Another concern is how to handle regular employees of an organization who also volunteer their time outside of their normal working hours. In 2006, the Department of Labor ("DOL") was faced with a club that primarily provided services to children, especially at-risk youth, and club employees who were interested in volunteering to chaperone field trips with the children when tickets to cultural and sporting events were donated. The DOL issued an opinion letter and reiterated that employees are permitted to volunteer for their employers outside of their normal working hours, provided that (1) the services are not the same type of service the person is employed to perform for that organization, and (2) the employee is a bona fide volunteer who wishes to perform the services for civic, charitable, or humanitarian reasons without coercion or undue pressure.

According to the DOL, the fact that the individual would receive a ticket to the event they were chaperoning would not disqualify them from being a volunteer, because they could not perform the chaperoning services without a ticket, and the ticket did not appear, in the DOL's eyes, to be in the nature of compensation. Similarly, employees of the same organization who wished to run a charitable bingo game could do so as volunteers as long as the work was performed outside of the employee's normal working hours, the work was not substantially similar to their regular duties, and they did so for civic, charitable, or humanitarian reasons. The DOL reached a different conclusion in 2002, however, when faced with a for-profit retailer whose use of volunteers for a charitable purpose resulted in reduced working hours for the company's paid employees.


In sum, in order for non-profits to ensure compliance with the FLSA's overtime and minimum wage requirements, it is wise for those organizations to routinely assess the activities being performed by their volunteers and the benefits those individuals may be receiving for donating their time. Organizations should consult with qualified legal counsel with questions about their employees' and volunteers' status under the FLSA and the application of the law to their own situations.

*Stephanie S. Rojo*

# FMLA Leave Can Run Concurrently With Workers' Compensation

Recently, the Seventh Circuit Court of Appeals, in *Dotson v. BRP US Incorporated*, addressed the novel issue as to whether an employer can run an employee's leave under the Family Medical and Leave Act ("FMLA") concurrently with a workers' compensation absence. The plaintiff, Brian Dotson, worked for BRP US Inc. ("BRP") in a job called "grind and trim," which entailed drilling and cutting in cramped spaces under boats. In January 2004, Dotson injured his back; and, at BRP's direction, he saw a doctor on January 19th.

In March 2004, Dotson had lower back surgery; and his doctors did not release him for full duty work until August 2004. Thus, from January 19, 2004, through the August work release, Dotson was unable to perform his job duties due to his back injury. Dotson applied for FMLA leave and had only 194 hours (approximately 24 days) remaining. On February 24, 2004, Dotson was terminated due to excessive absenteeism. Subsequently, Dotson filed suit alleging that the discharge was in retaliation for filing a workers' compensation claim.

The FMLA allows eligible employees to take up to twelve weeks of unpaid leave during a 12-month period for a "serious health condition" that makes the employee unable to perform his job. BRP's absenteeism policy stated, (emphasis added):

> *All FMLA time runs concurrent with short term disability and workers' compensation or any qualifying event. When an employee has exhausted twelve weeks of FMLA time during a rolling calendar year, employment with BRP may be terminated. An employee who is unable to work for more than twelve weeks will be considered automatically terminated at the expiration of that period, regardless of the reason for the inability to work.*

Accordingly, BRP's absenteeism policy provided that all FMLA time taken by an employee runs concurrent with workers' compensation absence.

Apparently, Dotson assumed that his workers' compensation absence did not count against his remaining FMLA time. Thus, Dotson argued that BRP illegally counted the time towards his FMLA total when he was off work collecting workers' compensation benefits. The FMLA regulations allow an employer to run FMLA leave concurrently with workers' compensation absence; however, **the employer must supply the employee with appropriate notice**. In this case, BRP provided two forms of appropriate notice to Dotson that his FMLA time ran concurrent with short-term disability and workers' compensation or any qualifying event in (1) the employee handbook, that stated the absenteeism policy (see above) and (2) the January 19th letter that not only notified Dotson that the FMLA leave was running concurrently with his workers' compensation absence, it also informed Dotson that his FMLA leave for the injury began on January 13th and was expected to end on February 23rd.

The appellate court affirmed the district court's decision to dismiss the case in favor of BRP. The court found that Dotson exceeded the twelve-week leave period allowed by the company's absenteeism policy; thus, he was not terminated in retaliation for filing a workers' compensation claim.

Based on this case, it is pertinent that employers realize that the FMLA regulations allow FMLA leave to run concurrent with workers' compensation, only if the employers provide the employee with appropriate notice. This case is helpful to employers in that it is a textbook example of how a company should provide notice to an employee if it runs FMLA time concurrent with a workers' compensation absence.

*Derrick G. Parker*

# "Me Too" Evidence—At Least It's A Two-Way Street

In our last edition of the *Newsletter, "But It Happened To Me, Too!!!,"* we reported the U.S. Supreme Court had before it for consideration the issue of the extent to which "me too" evidence is admissible in discrimination cases. Typically, "me too" evidence involves testimony of fellow employees of the plaintiff in a discrimination case that they, too—the fellow employee(s)—were subjected to discrimination of a similar nature. (Although, as discussed, below, an *employer* can also offer "me too" evidence—evidence of favorable treatment towards other employees who are similarly situated to the plaintiff—to *negate* the existence of discriminatory intent.) Lower federal courts have diverged widely regarding the extent to which such evidence is admissible. "Me too" evidence can significantly affect the settlement value or verdict exposure in a case, and employment lawyers and employers were hopeful the Supreme Court would provide meaningful guidance regarding when such evidence should be admitted. Unfortunately, the Court's decision in *Sprint/United Management Co. v. Mendelsohn*, decided on February 26th, provided no bright-line guidance.

In *Mendelsohn*, the plaintiff sued Sprint, claiming her discharge as part of "an ongoing, company-wide" reduction-in-force was based on her age, 51. At trial, she sought to introduce testimony from five other older employees who had been released as part of the same RIF—but who did not work in the same division of the company as plaintiff, had different supervisors, a different chain-of-command, and who were selected for layoff by a different manager than the one who had selected the plaintiff. The district court excluded the evidence, but the Tenth Circuit Court of Appeals reversed and remanded the case for a new trial, with directions to admit the evidence. A majority of the appellate court thought the district court had improperly applied a *per se* rule, excluding such evidence, rather than evaluating the relevance of the evidence based on the facts of the case.

The Supreme Court reviewed the case "to determine whether, in an employment discrimination action, the Federal Rules of Evidence require admission of testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff." In a unanimous decision written by Justice Thomas, the Supreme Court viewed the record differently from the Court of Appeals, concluding that the basis for the district court's ruling was not clear and the appellate court had failed to give proper deference to the district court's decision. Accordingly, the Court remanded the case with directions that the case be sent back to the district court so the trial judge could clarify the basis for his ruling.

Most of the opinion dealt with the proper scope of review which should be applied by an appellate court to evidentiary rulings and to the Court's interpretation of the record. The Court did not meaningfully provide guidance concerning the factors which should be considered in determining the admissibility of "me too" evidence, stating only (1) such evidence is neither *per se* admissible, nor *per se* inadmissible; and (2) whether such evidence should be admitted "is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case" and that determination is in the discretion of the trial court. Clear as mud, right? In other words, admissibility of "me too" evidence is going to vary from case to case depending on how a particular trial judge interprets the evidence, and the existence of such evidence in a case will continue to complicate a case evaluation.

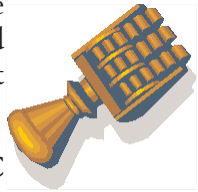
However, "me too" evidence can be a two-way street. Earlier this month, in one of the first reported cases after the Supreme Court's decision in *Mendelsohn*, a federal district court allowed an employer to present "me too" evidence of *non-discrimination*. In *Elion v. Jackson*, 2008 WL 921854 (D. D.C. April 8, 2008), the plaintiff sued for race and sex discrimination and for retaliation because the employer had abolished the unit in which she had worked and reassigned her to another position. In pretrial motions, plaintiff asked the court to bar the employer from calling as witnesses two employees who, like plaintiff, were black females and who intended to testify concerning the *favorable* treatment they had been afforded by the employer regarding promotions and career progression. Citing *Mendelsohn*, the court denied the request, holding "'me too' evidence of an employer's past non-discriminatory and non-retaliatory behavior may well be relevant . . . because [such evidence] can create an inference that the employer lacks discriminatory intent.'"

So, although the Supreme Court did not provide the guidance for which we might have hoped, at least plaintiffs' lawyers are faced with the same uncertainties in attempting to evaluate a case in advance of trial.

*John L. Ross*

# When Is A "Charge" A "Charge"??

Under both TITLE VII and the federal age discrimination statute, before an applicant, employee or former employee can file suit, the individual must first exhaust administrative remedies by timely filing a "charge" of discrimination with the EEOC or a state or local fair employment practices agency within (in Texas) 300 days of the date of the alleged discrimination. A similar requirement exists under the Texas discrimination statute; although the Texas statute refers to the filing of a "complaint" rather than a "charge," and the time limit for filing is 180 days. If a "charge" or a "complaint" is not timely filed, the Charging Party may be foreclosed from pursuing his or her claim.[1] Additionally, the federal age discrimination statute also requires that a charge be filed at least sixty days before the Charging Party can file suit against the employer. Accordingly, the date on which a "charge" or "complaint" is filed can often be a critical fact in employment litigation.



Receipt of a "charge" by the EEOC also triggers important rights for employers. Upon receipt of a "charge," the EEOC is supposed to promptly give the employer notice of the charge, which can afford the employer the opportunity to promptly obtain and preserve evidence with which to defend itself before memories fade or employee-witnesses move on to other employment and before documents or data are lost or destroyed. Notice of a charge also affords the employer an opportunity to attempt to resolve the matter informally and confidentially at the administrative stage, without having to incur the expense and inconvenience of being blind-sided with a public lawsuit.

The EEOC has long promulgated EEOC Form 5, *Charge of Discrimination*, for use in fulfilling the statutory charge-filing requirements. However, individuals who feel they have been the victim of unlawful discrimination or retaliation are often unsophisticated in the legal requirements for pursuing a claim and sometimes contact the EEOC or a state agency by writing a letter or by completing an EEOC *Intake Questionnaire* (EEOC Form 283) or some other document other than an EEOC Form 5.

So, what constitutes a "charge" or a "complaint"? Well, according to a couple of recent court decisions, it depends. On February 27th, in a long-awaited decision, *Federal Express Corp. v. Holowecki*, the U.S. Supreme Court wrestled with the question of what constitutes a "charge" under the federal age discrimination statute—specifically, whether completion of an EEOC *Intake Questionnaire* can fulfill the charge-filing requirement; and, based on the facts of the case, seven justices said "yes." However, the opinion did little to provide clear guidance for other cases.

In *Holowecki*, a Federal Express employee sued for age discrimination, claiming some of the company's performance standards were discriminatory. Before filing suit, the plaintiff had not filed an EEOC Form 5 with the EEOC. She had, however, completed an EEOC *Intake Questionnaire* and had attached a five-page affidavit to the questionnaire. But, the EEOC did not assign a charge number to the documents, did not notify Federal Express of the allegations, and did not initiate an investigation. Upon receipt of the lawsuit, Federal Express moved to dismiss on grounds the employee had not filed a "charge" with the EEOC more than sixty days before filing suit. The district court dismissed the suit, but the Second Circuit Court of Appeals reversed. The Supreme Court affirmed the court of appeals. Explaining the basis for the decision is relatively simple. However, the devil is in the details and in the uncertainty which the opinion creates for future cases.

First, the Court noted that, although filing a "charge" is a statutory requirement under the age discrimination statute, the statute does not define the term. EEOC regulations, however, provided a "charge shall [at a minimum] mean a statement . . . which alleges" a violation and identifies the respondent. The regulations also state that a "charge" *should* (but need not) include the Charging Party's identifying and contact information, the number of employees employed by the employer, an allegation the Charging Party was a victim of discrimination, and a statement of whether the Charging Party has initiated proceedings under state law. The Court considered these regulations—as far as they went—a reasonable exercise of the EEOC's authority.

Second, over the years the EEOC had adopted internal directives for its field offices regarding when the offices should treat as a charge a document which met the minimal regulatory requirements. Under those directives, field offices were to treat such a document as a charge when "taken as a whole" the document could be construed as a request for the EEOC to take action on the Charging Party's behalf. The Court considered the

[1] I say "may" be foreclosed, because federal courts recognize a concept of "equitable tolling" of the limitations period in some instances under the federal statutes; whereas, the Texas Supreme Court has held the time limits under the state statute are mandatory and jurisdictional.

## When Is A "Charge" A "Charge"?? cont'd

EEOC's interpretation of its own regulations as also reasonable, holding "if a filing is to be deemed a charge, it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee."

Finally—although the EEOC office which had received Holowecki's questionnaire and affidavit had not treated the documents as a charge—the Court independently concluded the two documents "taken as a whole" met the minimum regulatory requirements and requested action by the EEOC.

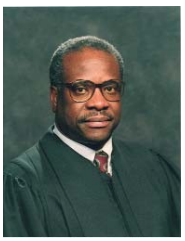
Although the decision resolved the issue of whether it is *possible* for an *Intake Questionnaire* to satisfy the charge-filing requirement, *Holowecki* will likely generate more litigation than it might have otherwise resolved. Justice Clarence Thomas—who, under President Reagan, served as Chairman of the EEOC—warned in his dissenting opinion (joined by Justice Scalia), "Today the Court decides that a 'charge' of age discrimination . . . is whatever the . . . EEOC says it is." Indeed, the Court itself ominously acknowledged, "[i]t is true that under [the EEOC's regulations and directives] a wide range of documents might be classified as charges." Conversely, the Court also stated, "the [EEOC] is not required to treat every intake questionnaire as a charge." Finally, the Court cautioned Charging Parties and their attorneys:

> As a cautionary preface, we note that the EEOC enforcement mechanisms and statutory waiting periods for ADEA claims differ in some respects from those pertaining to other statutes the EEOC enforces, such as TITLE VII . . . While there may be areas of common definition, employees and their counsel must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.

The Court's point is well taken. Unlike the ADEA, TITLE VII and the EEOC's regulations governing TITLE VII specifically require that a charge be in writing, signed and verified. The Texas statute goes even further, requiring that a "complaint" *must* be in writing, made under oath, and *must* state that an unlawful employment practice has occurred, the facts on which the complaint is based, "including the date, place, and circumstances," and identification of the respondent. A recent opinion by a federal district court in Austin demonstrates what can happen when a Charging Party's attorney doesn't heed the Supreme Court's "cautionary preface."

In *Ojedis v. JetBlue Airways Corp.*, 2008 WL 961884 (W.D. Tex. Apr. 9, 2008), a magistrate judge recommended dismissal of the plaintiff's discrimination suit filed under the Texas discrimination statute, because the documents filed by the plaintiff had not satisfied the statutory requirements for a "complaint." Fifty-seven days after Ojedis' discharge from his position as a flight attendant, Ojedis' attorney sent a letter and an unsworn *Intake Questionnaire* to the EEOC's San Antonio office and to the Texas Workforce Commission ("TWC") and requested both agencies draft a charge of discrimination. The TWC responded, declining the request, because Ojedis had asked the EEOC to draft the charge. Accordingly, the TWC never notified JetBlue of Ojedis' allegations. Nine months later, the attorney mailed a verified EEOC Form 5 and a copy of the *Intake Questionnaire* to the EEOC's New York District Office and to the New York discrimination agency. The EEOC issued a right-to-sue notice, and Ojedis filed suit under the Texas statute in state court. JetBlue removed the case to federal court based on diversity.

After removal, JetBlue moved to dismiss for lack of subject matter jurisdiction, arguing that Ojedis had failed to file a timely "complaint" with the TWC. Distinguishing *Holowecki*—and specifically referencing the Supreme Court's "cautionary preface"—the magistrate judge agreed Ojedis' *unsworn Intake Questionnaire* did not satisfy the statutory requirements of a "complaint" under Texas law. Accordingly, the magistrate judge recommended that the district court grant the motion to dismiss.



In his dissenting opinion in *Holowecki*, Justice Thomas warned that the majority's interpretation of what constitutes a "charge" was "so malleable that it . . . [failed to provide any] discernable standards." Regardless of whether that characterization of the majority's opinion might be a bit hyperbolic, *Holowecki* is sure to spawn substantial continued case-specific, fact-specific litigation regarding the meaning of a "charge" or "complaint" under both federal and state statutes.

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