

IN BRIEF

The newsletter of

Feldman, Franden, Woodard, Farris & Boudreaux

June 15, 2002

Tulsa, Oklahoma



I tell you, no American Will Ever Read IN BRIEF!

SUPREME COURT DECIDES HOW MUCH IS TOO MUCH

The Supreme Court put the brakes on large punitive damage awards by striking down a \$145 million dollar punitive damage award. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, the court, in a 6-3 opinion, found that an award based on an award of \$1 million in actual damages was too high. The court rejected the argument that a defendant can be punished in one state for activities in another. “[A] State ha[s] [no] legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.” The Court also said that other conduct, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. “Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis.”

Justice Kennedy said the ratio of punitive damages to compensatory damages almost never should exceed single digits -- a maximum of nine to one, in other

words -- and that in many cases punitive damages should not exceed compensatory damages at all. “Single-digit multipliers are more likely to comport with due process, while still achieving the state’s goals of deterrence and retribution, than awards with ratios in the range of 500 to 1 or, in this case, of 145 to 1.”

The Court ruled that neither a defendant’s wealth nor its out-of-state conduct could be a factor in calculating punitive damages. “A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business”. . . . “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damage award.”

Kennedy said the ruling was an elaboration of *BMW v. Gore*, in which the Court held that judges should consider the reprehensibility of a defendant’s action, as well as the relation to compensatory damages and to other comparable civil penalties, in determining whether a punitive damage award is excessive.

State Farm Mut. Auto. Ins. Co. v. Campbell, 155 L. Ed. 2d 585, 123 S.Ct. 1513 (2003)

WE ARE PROUD OF . . .

. . .our lawyers for their recent accomplishments

Joe Farris and Jody Nathan successfully resisted a motion for new trial in a suit against an insurer for breach of contract and bad faith. Plaintiff sought unsuccessfully to overturn the jury’s verdict in our client’s favor.

Paul Boudreaux won defense verdicts in three jury trials of personal injury suits.

Joe Farris and Paula Quillin obtained dismissal of a lawsuit wherein the plaintiff sought to recover for art work allegedly stolen in London in the late 1800s.

Jason Goodnight filed a motion in a slip and fall case, whereupon the plaintiff saw the folly of her ways and dismissed the case.

Jody Nathan and Bob Franden won the appeal of a summary judgment motion granted to GRDA. The Oklahoma Supreme Court decided an issue of first impression — whether GRDA, a public agency, is within the scope of the Oklahoma Governmental Tort Claims Act. The ruling impacts other attempted tort claims against this nonprofit agency.

Paul Prather won summary judgment in a homeowners’ suit against a company relating to the remediation of allegedly toxic mold.

Paula Quillin won summary judgment in a complex legal negligence suit.

Joe Farris and Paula Quillin successfully opposed a motion for receivership of two commercial properties.

Joe Farris and Paula Quillin won an appeal in a breach of contract action involving the sale of a bank. Judgment for our client was affirmed.

Joe Farris and Paula Quillin obtained the dismissal of a legal malpractice suit.

Jason Goodnight won a motion to dismiss a civil rights suit against a private college.



Have A Safe July 4!

Labor Department Proposes Changes in Overtime Regs

By Paula J. Quillin

The Department of Labor has recently proposed changes in overtime regulations. Here is a summary of the proposed new regulations:

The Minimum Salary Level Will Be Increased: Under current rules, an employee earning only \$155 a week can qualify as a “white collar” employee not entitled to overtime pay. The Department’s proposal would raise this minimum salary to \$425 a week—an increase of \$270 a week and the largest increase since the Fair Labor Standards Act was passed by Congress in 1938. The proposed changes would guarantee overtime to:

- An employee working 50 hours per week managing a restaurant for \$15,600 per year.
- A worker putting in 60 hours a week managing a department store for \$18,000 per year.
- An employee working 42 hours a week supervising a machine shop for \$17,000 per year.

Duties Tests Rely on “Primary Duty”: The proposed rule retains the current “short test” reliance on an employee’s primary duty. The proposal would eliminate the long-inactive “long test” rule restricting exempt employees from devoting more than 20% of time in a workweek performing non-exempt duties.

Executive Duties: The proposed executive duties test has three requirements: managing the enterprise; directing the work of two or more employees; and having authority to hire or fire (or such recommendations are given particular weight).

Administrative Duties: The proposal would replace the “discretion and independent judgment” test, which has been the subject of confusion and litigation, with a new test that employees must hold a “position of responsibility.”

Professional Duties: The proposal rec-

ognizes as exempt “learned professionals” certain employees who gain equivalent knowledge and skills through a combination of job experience, military training, attending a technical school or attending community college.

Employees Treated More Equitably: The Department proposes to allow deductions from the salary of exempt employees for full-day absences taken for disciplinary reasons, such as sexual harassment or workplace violence. Currently, only hourly workers’ wages are subject to such deductions. The proposal retains the “salary basis” rule prohibiting deductions from exempt salary for partial-day absences.

You may download a reference chart from our website in pdf format at <http://www.tulsalawyer.com/dolproposal.pdf> or in Word format at <http://www.tulsalawyer.com/dolproposal.doc>

DISNEYLAND CHANGES CORPORATE POLICY

Political correctness prompted officials at Disneyland to remove guns from the hands of tour guides at the Jungle Cruise who had been shooting the animatronic hippos that attack the boat.

You remember the Jungle Cruise. It's right beside the "Snow White and the Seven Height Challenged Employees Hired Under the Americans with Disabilities Act" exhibit.

QUOTABLE

Fashion is the abortive issue of vain ostentation and exclusive egotism: it is haughty, trifling, affected, servile, despotic, mean and ambitious, precise and fantastical, all in a breath -- tied to no rule, and bound to conform to every whim of the minute.

-William Hazlitt,
Sketches and Essays, 1839

A LITTLE SHAKESPEARE



We heard that someone thinks our newsletter lacks serious literary content.

We are sensitive to such criticism. In fact, many an anguished wail arose from many a cubicle of the IN BRIEF Department here at Feldman Franden when this critique reached our shame-infused, burning red ears.

Because we are sycophants and curry your everlasting good will (and would like to keep our newsletter jobs), the following is from a contest that asks readers to submit instructions for something (anything) written in the style of a famous person. The winning entry was "The Hokey Pokey" (as written by W. Shakespeare).

O proud left foot, that ventures quick within

Then soon upon a backward journey lithe.

Anon, once more the gesture, then begin:

Command sinistral pedestal to writhe.

Commence thou then the fervid Hokey-Poke,

A mad gyration, hips in wanton swirl. To spin! A wilde release from Heaven's yoke.

Blessed dervish! Surely canst go, girl. The Hoke, the poke -- banish now thy doubt

Verily, I say, 'tis what it's all about.

-- by William Shakespeare

TRIVIA:

The phrase "sleep tight" originated when mattresses were set upon ropes woven through the bed frame. To remedy sagging ropes, one would use a bed key to tighten the rope.



Sexual Harassment Crossing the Line

By Paula J. Quillin

Under the Civil Rights Act of 1964, it is an unlawful employment practice to discriminate against an individual "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). The Act also prohibits discharge of an employee because the employee "has opposed any practice made an unlawful employment practice" by Title VII. 42 U.S.C. § 2000e-3(a). A claim under federal law for discrimination based on sexual harassment pursuant to § 2000e-2 was first established in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986), where the United States Supreme Court recognized that sexual harassment may take two forms:

(1) harassment involving the conditioning of employment benefits on sexual favors, known as quid pro quo harassment; and

(2) harassment that is so severe and pervasive that, while it may not affect economic benefits, it creates a hostile or offensive working environment that effectively alters the victim's conditions of employment and results in an "abusive working environment."

The U.S. Supreme Court recognized same-sex sexual harassment as a cognizable claim under Title VII in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998). There, a male employee sued his former employer, co-workers, and supervisor based on repeated sex-related, humiliating conduct, including threats to his physical well being. Holding that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex," the court delineated the critical areas of inquiry under a Title VII claim as being (1) whether members of one sex are exposed to disadvantageous conditions

of employment because of their gender, and (2) whether the behavior in question is so objectively and subjectively offensive as to alter the conditions of the victim's employment.

The court in *Oncale* emphasized that its decision was not intended to expand Title VII into a "general civility code," however, and that the conduct in question must be viewed in the context of the workplace where it occurs:

[T]he statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. . . . [I]t forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment. . . .

In same-sex (as in all) harassment cases, [the] inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

The first question, relating to the "because of gender" element of a claim, does not necessarily require evidence that the harassing conduct was "motivated by sexual desire to support an inference of discrimination on the basis of sex." *Oncale*, 523 U.S. at 80. A victim might also offer evidence that the harasser is motivated by a general hostility toward persons of the harasser's own

gender in the workplace, or offer comparative evidence about how the harasser treats members of both sexes in a mixed-sex workplace. *Id.* at 80-81, 118 S.Ct. at 1002. "[E]ven if some of the alleged conduct was not 'explicitly sexual in nature,' . . . if it reasonably could be inferred that the conduct was related to gender or arose out of a context in which admittedly sex and gender-related conduct occurred, then it is for the fact finder to decide whether such an inference should be drawn." *O'Shea*, 185 F.3d at 1097. Stated another way, "[a]ny harassment of an employee 'that would not occur but for the sex of the employee . . . may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII.'" *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1537 (10th Cir. 1995).

As to the other issue, the severity and pervasiveness element - a plaintiff must show that "the environment was both objectively and subjectively hostile." *Penry v. Fed. Home Loan Bank of Topeka*, 155 F.3d 1257, 1261 (1998). The inquiry would necessarily include an evaluation of the nature of the work environment itself, as contemplated by *Oncale*. However, a plaintiff need not demonstrate psychological harm, nor must he show his work suffered as a result of the harassment.

It is important for employers to train employees concerning the avoidance of sexual harassment, and to develop clear guidelines on how to deal with any issue that arises. An employer's indifference, or failure to develop appropriate reporting procedures to deal with complaints is fertile ground for litigation. The company's zero-tolerance policy should be announced clearly and frequently, so that employees get the message. The appropriate discipline of employees who offend the company's policy helps to serve as a workplace deterrent to others who might erroneously believe that sexual harassment is not to be taken seriously, or that a seemingly "harmless" joke has no consequences.

OKLAHOMA COURT OF APPEALS REJECTS BIFURCATION IN BAD FAITH SUIT

Plaintiff sued for alleged bad faith arising from the denial of a property damage claim on his roof, located on a commercial building in Tonkawa, Oklahoma. The trial court sua sponte bifurcated the issues of breach of contract and bad faith. The trial court found that the letters and other evidentiary material collected by plaintiff and submitted to Insurer as a supplemental proof of loss was "admissible and highly relevant" to the bad faith claim, but would be "prejudicial" to introduce such evidence to the jury in the breach of contract claim. The trial court ordered the contract action to be tried first.

The Court of Appeals reversed. The Court noted that trial court incorrectly described plaintiff's suit as "two causes of action." Actually, plaintiff had only one cause of action: for damages arising out of Insurer's failure to pay the claim. In support of that cause of action, plaintiff had two interrelated theories of recovery. The first, sounding in contract, was for damages arising out of the insurer's failure to pay the claim, in breach of the insurance contract. The second theory of recovery sounds in tort, based on the allegation that insurer acted in bad faith by ignoring relevant information in its investigation of the claim, leading to its decision not to pay. The Court held that these theories were connected and should not have been bifurcated.

The Court also reversed the award of attorney fees — not only because the insurer was not the prevailing party, but because the insurer did not comply with 36 O.S. § 3629(B) by submitting a written offer of settlement or rejection of the claim to the insured" within 90 days after plaintiff presented the insurer with a supplemental proof of loss following the first denial of the claim. The Court ruled that once an insurer had breached the terms of § 3629(B), the insurer had waived its right to an attorney's fee under that statute.

Cales v. LeMars Mut. Ins. Co., 2003 OK CIV APP 41



ASK MR. LAW GEEK

Dear Mr. Law Geek: My boyfriend and I split up and he won't give back my MP3 player. What should I do? —Tuneless

Dear Tuneless: Can't you play MP3s on your computer? Why a separate player? It reminds me of people who have donut makers, or popcorn poppers, or hot dog cookers. There is even a separate machine for "toast," although toast will brown quite well in any oven. Same for coffee. Just boil it in a pan.

Dear Mr. Law Geek: Thanks for nothing.

Dear Tuneless: Surely.

...

Dear Mr. Law Geek: I was picked up for driving while intoxicated. To make a long story short, I was not drunk. How can I get this off my record? —Margarita

Dear Margarita: You can't, but a few drinks will help you forget about it.

...

Dear Mr. Law Geek: My brother-in-law was indicted by a Grand Jury for "Rico" violations. He has never been anywhere near Puerto Rico. What's the deal? He is innocent! —Julie

Dear Julie: RICO means "Racketeering Influenced and Corrupt Organizations Act." It means criminal behavior.

Julie: Oh. Okay. Never mind.

...

Dear Mr. Law Geek: What's with the ruddy cheeks in your IN BRIEF photo? High blood pressure? And do you wear lipstick? Also, that tie looks like it's covered with some kind of microbial growth.—Curious

Dear Curious: Objection! Sustained.



Jody Nathan attended the ABA's technology conference in Chicago. She took her PDA, USB flash drive, a laptop, cellular phone, digital camera, GPS tracking system, and an assortment of power cords. No satellite dish, though.

Emily Short is working with us this summer as a legal intern. She will be completing her last year of law school at OU beginning this Fall.

Curtis Roberts graduated from law school and will soon take the Oklahoma Bar exam.

Paula Quillin will be speaking at the NAIW (National Association of Insurance Women) this summer concerning contract negotiations.

Paul Boudreaux spoke about bad faith for The National Business Institute to a group of lawyers and insurance people.

John Woodard, along with another attorney, have conceived and developed the Friends of TU Law Committee to raise money for support of the TU College of Law.

SHORT JOKE

When Peters learned that he was being fired, he went to see the head of human resources.

"Since I've been with the firm for so long," he said, "I think I deserve at least a letter of recommendation."

The human resources director agreed and said he'd have the letter that next day.

The following morning, Peters found the letter on his desk. It read, "Jonathan Peters worked for our company for eleven years. When he left us, we were very satisfied."

ARE YOU PREPARED FOR AN EMERGENCY?

The U.S. government has a website at www.ready.gov which explains the various emergency symbols in use. This simple guide will help you to further understand the pictorial messages used to communicate how to deal with emergencies.



If you have set yourself on fire, do not run.



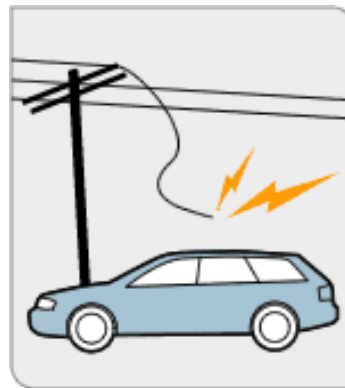
If you spot a terrorist arrow, pin it against the wall with your shoulder.



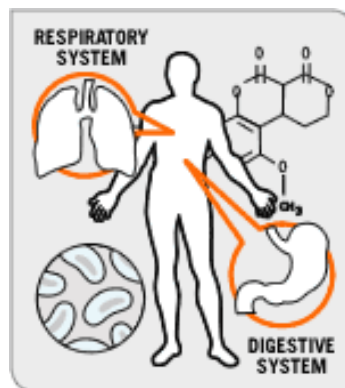
After exposure to radiation, you may have mutated to gigantic dimensions. Watch your head.



If you lost a contact lens during a chemical attack, do not stop to look for it.



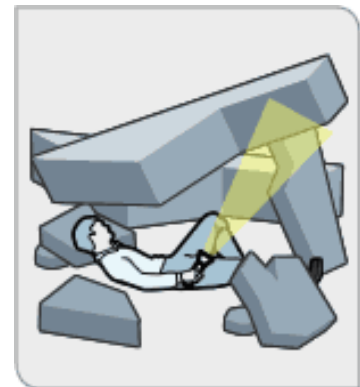
Do not drive a station wagon if a power pole is protruding from the hood.



If your lungs and stomach start talking, stand with your arms akimbo until they stop.



If you hear the Backstreet Boys, Michael Bolton or Yanni on the radio, cover in a corner or run.



Use your flashlight to lift the walls right off you.



If you are sprayed with an unknown substance, stand and think about it instead of seeing a doctor.

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