EMPLOYMENT & HUMAN RESOURCES *newsletter*

Fall 2016

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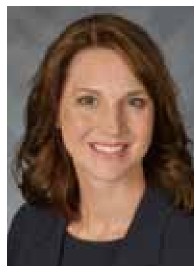
THE NEW OVERTIME RULES: WHAT YOUR BUSINESS NEEDS TO CONSIDER



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On May 18, 2016 President Obama and Secretary of the Department of Labor ("DOL"), Perez announced the publication of the Department of Labor's final rule updating the overtime regulations. According to the DOL, the new regulations will automatically extend overtime pay protections to over 4 million workers within the first year of implementation. The changes apply to all businesses and individuals covered by the Fair Labor Standards Act. The new rules are effective December 1, 2016.

Minimum Salary Threshold for Exempt Status

Generally, unless exempt, employees covered by the Act must receive overtime pay for hours worked over 40 in a workweek at a rate not less than time and one-half their regular rates of pay. The new regulations did not change the general

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Overtime
WEEKLY SCHEDULE
Activities
All
+
Staff Meeting
Daily Report
Customer Visit
Presentation
11.00-12.00
12.00-13.00
13.00-14.00
14.00-15.00
15.00-16.00
16.00-17.00
visit
Meet with
Laura

rule; instead, changing the exemptions. The regulations raised the minimum salary threshold for exempt status from $23,660 to $47,476 a year, or from $455 to $913 a week. The minimum salary threshold will be automatically updated every three years to ensure that the threshold is maintained at the 40th percentile of full-time salaried workers in the lowest income region of the country. Additionally, the regulations raise the threshold for the "highly compensated employee" exemption from $100,000 to $134,004. As before, the employee still has to meet the duties test to qualify as exempt status.

Small businesses with a high number of hourly and seasonal employees, nonprofits, and retail, restaurant, and manufacturing industries will be most affected by the regulations.

Counting Bonuses and Incentive Payments Toward Salary Threshold and Catch-Up Payments

The new regulations allow employers, for the first time, to count nondiscretionary bonuses and incentive payments (including commissions) toward up to 10 percent of the new salary level. For the nondiscretionary bonuses and incentive payments to count toward a portion of the salary, such payments must be paid on a quarterly or more frequent basis. Thus, end of the year bonuses will most likely not count. An easy way to ensure commission-based employees meet the weekly threshold basis is to give a guaranteed draw of $913 a week.

If an employee does not earn enough in non-discretionary bonuses or incentive payments (including commissions) in a quarter to retain salary level for exempt status, an employer may provide a "catch-up" payment at the end of the quarter. The employer has one pay period to make up the shortfall but it can only be up to 10 % of the salary. If the employer does not or cannot make a catch-up payment, the employee becomes eligible for overtime pay that quarter.

Implementing the New Regulations

The DOL has provided implementation suggestions with the new regulations. Employers can:

1) Increase the salary of an employee who meets the duties test to at least the new salary level to retain exempt status;

2) Pay an overtime premium of 1.5 times the employee's regular rate of pay for overtime hours worked;

3) Reduce or eliminate overtime hours;

4) Reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage- currently $7.25/hour) and add pay to account for overtime hours worked over 40 in the workweek, to hold weekly pay constant; or

5) Use some combination of the above.

When considering how to implement the new regulations, an employer should consider not just the numbers, but also the concerns of their employees. Generally, employees see their exempt status as a professional achievement they have worked to achieve and appreciate the flexibility of the status. Switching an employee from exempt to hourly can create moral issues, which can affect a business in many other ways. To minimize this affect, let employees who could be impacted by the change know there is a chance they may be reclassified to nonexempt. Employers should communicate the changes and reason for the changes to employees now to prepare them for the potential impact come December.

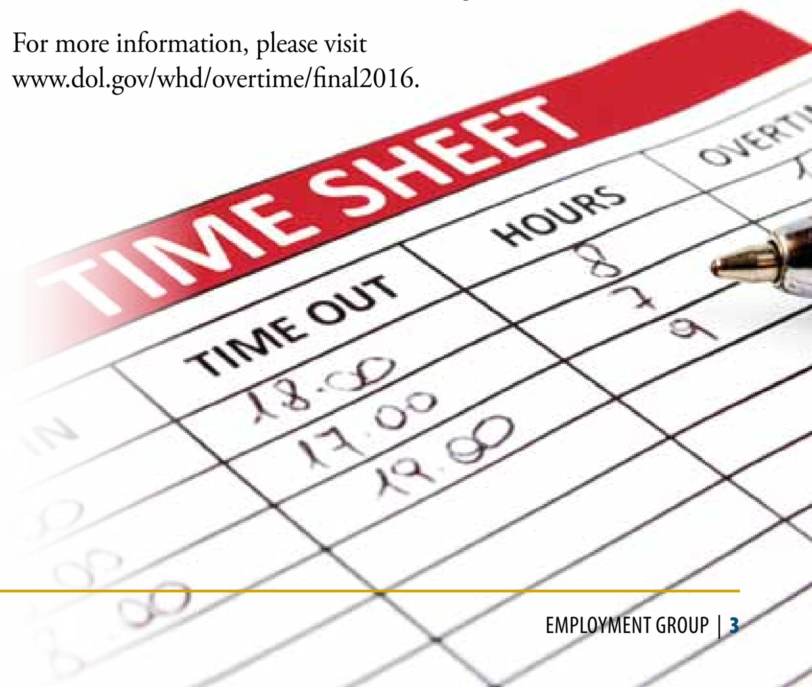
Employers should also train managers prior to the communications so they can be prepared to answer employee questions and assist in tracking hours. Additionally, employers should start tracking hours for exempt salaried employees who are at or below the $47,476 threshold. (This is already the law in Minnesota.)

Action Items

Most employers think of the typical updates that need to be performed, such as checking to see whether any employees are affected by this new law, ordering new posters on the overtime laws and developing a communication plan for responding to employee questions, concerns or demands. However, other issues may be lurking under the surface that employers have not considered. For example, if an employee's compensation increases because of the new overtime regulations, will that employee be making more than his/her supervisor? If so, should the supervisor get a raise as well? Is that something the business can afford?

Employers may wish to consider performing a preliminary audit to identify employees affected by the new regulations, which would include an analysis of how salary changes to the affected employee would affect other employees who are above the salary threshold. Employers may also want to consider an attorney audit of its classification decisions. Doing so can decrease potential exposure to claims from a 3-year to a 2-year statute of limitations under the FLSA, and avoid an award of double damages.

For more information, please visit www.dol.gov/whd/overtime/final2016.



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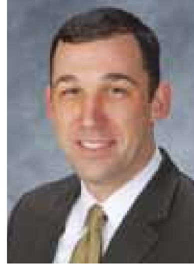

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Many government bureaucracies are touting the advantages of Big Data. It is professed that by collecting and publicizing data, employers can be encouraged to comply with regulations. At the same time agencies such as the EEOC have reasoned that without data to analyze, they cannot measure how well they are achieving their statutory duties. Now OSHA is following suit;

On May 12, 2016 the Occupational Safety and Health Administration issued a final rule to revise its Recording and Reporting Occupational Injuries and Illness regulation. In short, certain employers which had previously been required to keep injury and illness data will have to report that data. Further, that data will be posted on a publicly accessible web site. Additionally, the rule requires employers to inform employees of their right to report without retaliation; explicitly requires a "reasonable" reporting procedure; and clarifies employees' rights to access records. The final rule becomes fully effective on January 1, 2017.

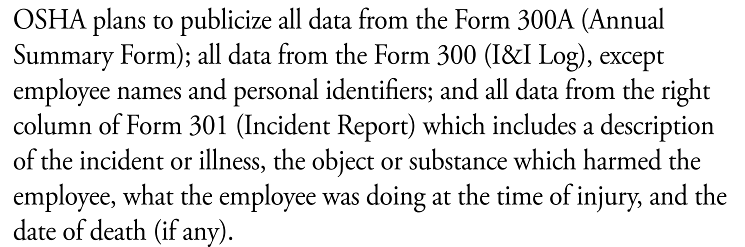
Who's Covered: OSHA's regulation 29 CFR part 1904 already requires employers with more than 10 employees in most industries to keep records of occupational injuries and illnesses. These employers must record employee injury and illness on an OSHA Form 300, which is the "Log of Work-Related Injuries and Illnesses," or equivalent. Employers must also prepare a Form 301 "Injury and Illness Incident Report" with additional details about each case recorded on Form 300. Finally, at the end of each year, employers prepare a summary report of all injuries and illnesses on Form 300A, which is the "Summary of Work-Related Injuries and Illnesses," and post the form in a visible location in the workplace. Nothing about record keeping—what must be recorded and who must record it—has been changed.

What's changing is how OSHA will collect this data and what it will do with it. OSHA currently obtains data from these forms only through onsite inspections or survey.

Under the new rule, establishments with 250 or more employees will electronically submit information from their part 1904 recordkeeping forms (Forms 300, 300A, and 301) to OSHA annually. Establishments with 20 to 249 employees, in certain designated industries, will submit information from their part 1904 annual summary (Form 300A). All employers, if notified, will electronically submit information from part 1904 recordkeeping forms.

Publication of Employer Data: OSHA will then post ***establishment-specific*** injury and illness data on its public web site at *www.osha.gov*. OSHA does not intend to post any information on the web site that could be used to identify individual employees, but it will identify employers and establishments.

OSHA's stated belief is that publication of this data will encourage or "nudge" employers to improve workplace safety. "Shame" might be a better term.



OSHA plans to publicize all data from the Form 300A (Annual Summary Form); all data from the Form 300 (I&I Log), except employee names and personal identifiers; and all data from the right column of Form 301 (Incident Report) which includes a description of the incident or illness, the object or substance which harmed the employee, what the employee was doing at the time of injury, and the date of death (if any).

Retaliation. The OSH Act already prohibits discriminating against any employee because that employee has exercised any right under the Act. Currently, OSHA can only cite employers for retaliation if the employee files a complaint. Under the new rule, OSHA will have the authority to act upon retaliation even if the employee does not complain. Such an occasion may include when an employer requires drug and alcohol testing of every employee involved in a workplace injury or illness.

A Reasonable Process. The new rule requires employers to maintain a process for reporting workplace injuries and illnesses that is reasonable and will not deter or discourage reporting. Employers currently maintaining blanket drug testing described above are considered by OSHA to be in violation of this rule because their policy has the increased likelihood of deterring employees from reporting injuries and illnesses. However, this finding does not discourage testing entirely. Rather the agency strongly suggests "limit[ing] post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use." 81 FR 29673 (the same applies for alcohol testing despite OSHA's outline of "drug" use and testing only). And, the agency announces, this exception would not require employers to "specifically suspect drug use before testing[.]" 81 FR 29673. The agency also recognizes that some employers may be required to test all employees pursuant to other federal or state laws. If employers are not subject to such requirements, but still maintain a blanket testing policy, they should review these policies and develop a protocol for determining whether testing is appropriate following an injury or identification of illness to avoid penalty.

Informing Employees. The new rule also requires employers to inform employees how to report an injury as well as their right to report work-related injuries and illnesses without retaliation. (The rule does not specify how employees must be informed.) The new rule also holds that any reporting procedure which is unreasonably difficult or complex will be considered as discouraging reporting.

As of the moment, no employers or other entities have stepped up to challenge this new rule in court. However, many employers and scholars have questioned whether collection and publication of such data might violate the First and Fourth Amendments. If litigation occurs, it might follow the actual publication and misuse of data on a specific employer.

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Please RSVP by October 23, 2016.

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TOPICS TO INCLUDE:

ESOPs: Why small businesses are giving them a second look; who should consider one; and HR issues that arise in implementation and administration.

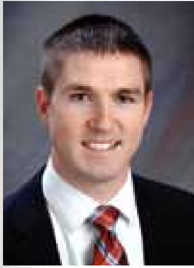
Drug Testing – The Latest and Greatest

Cybersecurity

Case Law and Legislative Update

Continuing education credits will be applied for.

CASE LAW UPDATE



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In Constructive Discharge Cases Under Title VII, the Statute of Limitations Period Begins to Run When the Employee Gives his Notice of Resignation. *Green v. Brennan*, 578 U.S. ____ (2016).

THE FACTS: The plaintiff is a former employee of the U.S. Postal Service. He initially complained to his employer that he was passed over for a promotion because he was African American. Shortly after making the complaint, his supervisors accused him of intentionally delaying the mail, a federal crime, which he believed was in retaliation for his discrimination complaint. On December 16, 2009, he signed an agreement with the Postal Service under which the Postal Service agreed not to pursue any further criminal action against him and gave him the option of retirement or demotion. On February 9, 2010, the plaintiff submitted his resignation. On March 22—41 days after submitting the resignation, but 96 days after signing the December 16 agreement—the plaintiff first contacted the EEOC counselor to report an unlawful constructive discharge.

THE DISPUTE: Plaintiff sued his employer in Federal District Court in Colorado under Title VII of the Civil Rights Act which prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin, alleging that the Postal Service constructively discharged him by threatening criminal action and forcing him to sign the December 16 agreement.

LEGAL ISSUES: Under Title VII regulations, federal civil servants must first initiate contact with an equal employment opportunity counselor at his agency "within 45 days of the date of the matter alleged to be discriminatory" as a prerequisite to filing a lawsuit. The Postal Service argued that the date of the agreement requiring plaintiff to choose between retirement or demotion was the date of constructive discharge, not the date he gave his notice of resignation. Thus, the Court had to decide when a constructive discharge claim arises such that the statute of limitations begins running—the date of the discriminatory conduct resulting in the constructive discharge, or the date the employee resigns.

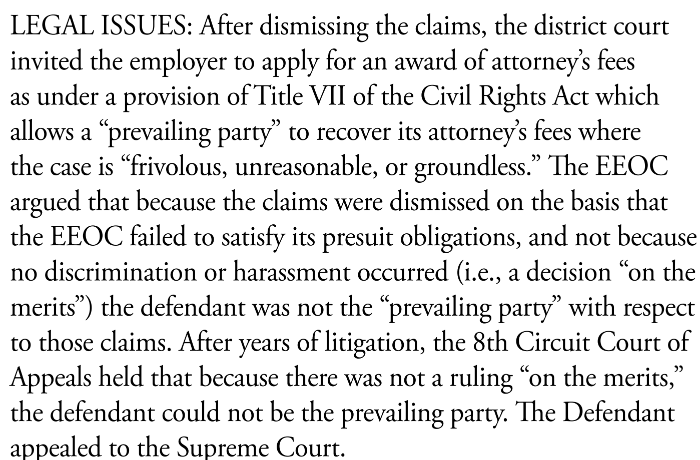
CONCLUSIONS: The Supreme Court concluded that for constructive discharge claims under Title VII, the 45 day period in which a federal employee must contact the EEO counselor begins running at the time the employee submits his resignation or quits, not from the time the discriminatory conduct occurs. The Court explained that a necessary part of any constructive discharge claim is that an employee must actually resign or terminate employment, and therefore, the employee cannot bring any lawsuit until after resignation. The Court further noted that the general rule is that a statute of limitations begins running only when the plaintiff has a complete cause of action. The Court applied that general rule to constructive discharge claims here and concluded that the statute of limitations begins running when the employee can actually bring a lawsuit, which is not until the employee has given notice of resignation. This conclusion revived the plaintiff's lawsuit.

While the Supreme Court was applying a regulation applicable to federal employees and employers, the decision was broad enough to encompass any constructive discharge claim under Title VII. Thus, the applicable statute of limitations will begin running at the time the employee submits a notice of resignation.

Employer Need Not Obtain a Favorable Ruling on the Merits of an Employment Discrimination Charge in Order to be the "Prevailing Party," Thus Entitling the Employer to Recovery of Attorney's Fees. CRST *Van Expedited, Inc. v. EEOC*, 578 U.S. ____ (2016).

THE FACTS: An employee filed a charge of sexual harassment with the Equal Employment Opportunity Commission (EEOC) against her employer, a trucking company and the eventual defendant. The EEOC investigated the employer and determined that the trucking company subjected a class of employees and potential employees to sexual harassment.

THE DISPUTE: The EEOC attempted conciliation but determined conciliation had failed to resolve the claims. The EEOC then brought a lawsuit against the employer, identifying 250 allegedly aggrieved employees or prospective employees. The district court dismissed all of the claims, including those on behalf of 67 women which were barred because the EEOC did not adequately investigate those claims or attempt sufficient conciliation—both prerequisites to a lawsuit by the EEOC.



LEGAL ISSUES: After dismissing the claims, the district court invited the employer to apply for an award of attorney's fees as under a provision of Title VII of the Civil Rights Act which allows a "prevailing party" to recover its attorney's fees where the case is "frivolous, unreasonable, or groundless." The EEOC argued that because the claims were dismissed on the basis that the EEOC failed to satisfy its presuit obligations, and not because no discrimination or harassment occurred (i.e., a decision "on the merits") the defendant was not the "prevailing party" with respect to those claims. After years of litigation, the 8th Circuit Court of Appeals held that because there was not a ruling "on the merits," the defendant could not be the prevailing party. The Defendant appealed to the Supreme Court.

CONCLUSIONS: The Supreme Court reversed the 8th Circuit's decision, holding that a favorable ruling on the merits is not necessary to conclude that a defendant is a prevailing party to enable the defendant to recover attorney's fees. The Court explained that nothing in the statute limits recovery to situations where the defendant prevails "on the merits" and instead, Congress's intent was to allow recovery whenever a defendant succeeds in defending against frivolous litigation, regardless of the particular grounds or theory on which the defendant succeeds. Therefore, the Court concluded whenever frivolous litigation is resolved in a defendant's favor, the defendant is a "prevailing party" under Title VII and entitled to an award of attorney's fees.

Employer Need Not Accommodate Individuals Using Medical Marijuana to Treat Disability or Serious Medical Condition. *Garcia v. Tractor Supply Company*, 2016 WL 93717, ___ F. Supp. 3d ___ (D. N.M. 2016).

THE FACTS: The plaintiff suffered from HIV/AIDS and was approved to use medical marijuana to treat his disease under New Mexico's Compassionate Use Act. When he applied for a manager position with Tractor Supply Company (Tractor Supply), he informed them of his disease and his marijuana use. After the plaintiff was hired, he was required to undergo drug testing. When the results revealed he tested positive for marijuana use, Tractor Supply terminated him.

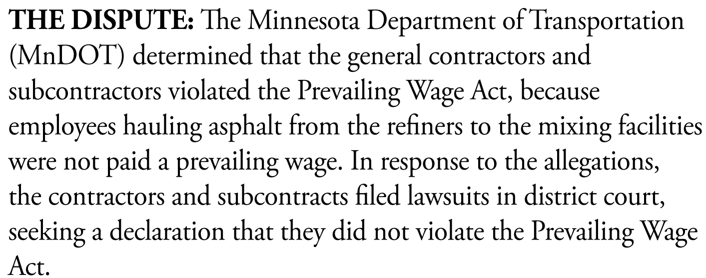
THE DISPUTE: After exhausting administrative remedies, the plaintiff brought suit against Tractor Supply, alleging that Tractor Supply terminated him based on his serious medical condition and his physician's recommendation that he use medical marijuana, allegedly violating the New Mexico Human Rights Act which prohibits discrimination against those with a "serious medical condition."

LEGAL ISSUES: The plaintiff argued that under the New Mexico Human Rights Act, read in conjunction with the Compassionate Use Act, employers are required to provide an accomodation for employees legally using marijuana to treat a serious medical condition. Tractor Supply moved to dismiss the plaintiff's lawsuit, arguing that terminating the plaintiff for using marijuana was not prohibited under the New Mexico Human Rights Act.

CONCLUSIONS: A federal district court applying New Mexico law agreed with Tractor Supply and dismissed the plaintiff's lawsuit. The Court explained that the plaintiff "was not terminated because of or on the basis of his serious medical condition" because "testing positive for marijuana was not because of Mr. Garcia's serious medical condition." The Court followed decisions interpreting other state laws regarding medical marijuana use in holding that there is no cause of action when an employer terminates an employee for using marijuana, even when that marijuana was used lawfully to treat a serious medical condition.

Under Minnesota's Prevailing Wage Act, Only Employees Hauling Materials To, From, or On the Site of a Public Works Project are Subject to the Prevailing Wage Act. *J.D. Donovan, Inc. v. Minnesota Department of Transportation*, 878 N.W.2d 1 (Minn. 2016).

THE FACTS: Two general contractors hired for public highway projects were required under the contract to incorporate a particular grade of asphalt cement into the asphalt concrete mixture. Subcontractors were hired to haul asphalt from oil refineries to the general contractors' permanent asphalt mixing facilities where it was pumped into storage tanks and later mixed into asphalt concrete to be used in paving projects. None of the asphalt delivered by the subcontractors was delivered to a work site. The subcontractors did not pay their truck drivers a "prevailing wage."



THE DISPUTE: The Minnesota Department of Transportation (MnDOT) determined that the general contractors and subcontractors violated the Prevailing Wage Act, because employees hauling asphalt from the refiners to the mixing facilities were not paid a prevailing wage. In response to the allegations, the contractors and subcontracts filed lawsuits in district court, seeking a declaration that they did not violate the Prevailing Wage Act.

LEGAL ISSUES: The Prevailing Wage Act requires that all employees employed by a contractor or subcontractor who is performing "work under a contract" must be paid a prevailing wage. MnDOT took the position that haulers delivering asphalt from refineries to mixing facilities which was eventually used in a highway project were performing "work under a contract." The contractors and subcontractors contended that the Prevailing Wage Act was limited to hauling activities to, from, or on the site of a state highway project and that because none of the subcontractors delivered materials to a work site, there was no violation. The district court and Minnesota Court of Appeals disagreed and held that payment of a prevailing wage was required. The contractors and subcontractors appealed.

CONCLUSIONS: The Minnesota Supreme Court examined the language of the statute and the language of certain regulations implementing the statute and concluded that the language was ambiguous. The Court then looked at rulemaking history and concluded that only hauling materials to, from, or on a work site constituted "construction activities" which could be "work under a contract." The Court also noted that these cases were the first instance in over twenty years that MnDOT attempted to apply the Prevailing Wage Act to hauling asphalt from refiners to fixed asphalt mixing facilities. Based upon this, the Court agreed with the contractors and subcontractors, holding that in order for hauling activities to constitute "work under a contract," the hauling activities must be to, from, or on the site of a public works project. The Court concluded that the Prevailing Wage Act did not apply to hauling materials from the refineries to the asphalt mixing facilities.

Employee Did Not Quit Her Employment Under Unemployment Law When She Informed Her Employer She Could Not Complete Her Work Assignment Because of Family Emergency and That She Would Reengage With the Employer Later. *Posey v. Securitas Security Services USA, Inc.*, 879 N.W.2d 662 (Minn. Ct. App. 2016).

THE FACTS: A contract employee with U.S. Bank had a number of family issues which interfered with her employment. The employee's children had chronic asthma and her family was evicted from their home. Two days after the eviction, the employee sent her manager at U.S. Bank a text message indicating that she "couldn't be [at work] right now" and communicated to another manager at her prime employer that she "would be getting back in contact with him." Seven days later, her prime employer sent a letter confirming termination, indicating she "quit with no notice."

THE DISPUTE: The employee then applied for unemployment benefits after receiving the termination letter, but was denied on the grounds she was discharged for misconduct. The unemployment law judge then determined she had quit her employment and upheld the denial of benefits.

LEGAL ISSUES: The dispute centers around whether the employee's conduct following her eviction demonstrated that she intended to quit her employment. If the employee had quit, she would not be entitled to unemployment benefits.

CONCLUSIONS: The Court of Appeals concluded there was not substantial evidence in the record to support a conclusion that the employee had quit. The Court noted that while she indicated to U.S. Bank that she would be unable to continue complying with the attendance policy due to her family circumstances, she did not indicate any intent to quit from her prime employer. The Court noted that she could not have "quit" from U.S. Bank, because she was never actually employed by U.S. Bank. Moreover, the Court noted that given that her prime employer had previously allowed her to take time off to family reasons, it was not misconduct for the employee to attempt to take time off to address her family's living situation. Thus, the Court reversed and concluded that the employee was entitled to unemployment benefits.

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