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Reporter

Employment Law

by Kelly O. Scott, Esq.

The Danger of Understaffing

Poor customer service, reduced productivity, low morale; these are some of the problems commonly associated with understaffing. But one of the worst problems frequently goes unnoticed by employers until it is too late to correct and the employer is faced with a costly lawsuit. The recent California Court of Appeal case of *Heyen v. Safeway, Inc.* serves to illustrate this point.

Linda Heyen worked as an assistant store manager for Safeway. Safeway required managers to make the “operating ratio” or “O.R.”, which were the number of labor hours budgeted to a Safeway store based on the store’s sales. Managers would be disciplined for missing O.R. in any week. According to Heyen, managers could not run the store and maintain O.R. unless the manager and assistant manager performed the same jobs as hourly employees. This meant that Heyen spent time stocking shelves, cleaning, bookkeeping, working the cash register, etc. Heyen worked

long hours performing these and other tasks. Indeed, Heyen believed that she worked so many hours that she actually made less money on an hourly basis than she did when she was an hourly employee.

Heyen ultimately filed a lawsuit against Safeway, alleging that Safeway should have classified her as non-exempt and paid her overtime. Following jury instructions issued by the trial court, the jury concluded that Heyen spent more than 50% of her time performing non-exempt work routinely done by hourly paid workers and awarded her damages for unpaid overtime.

On appeal, Safeway argued that Heyen could simultaneously perform both exempt and non-exempt work, such as managing a store while bagging groceries. Safeway also argued that Heyen could have chosen to perform non-exempt work on her own rather than performing it because

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Thursday, August 29, 2013 - 8:30 a.m.-10:00 a.m.

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by Kelly O. Scott, Esq. and Karina B. Serman, Esq.

Thursday, August 29, 2013 - 10:30 a.m.-12:00 p.m.

Effective Performance Reviews and Disciplinary Actions
by Kelly O. Scott, Esq. and Karina B. Serman, Esq.

Please contact Brandi Franzman at bfranzman@ecjlaw.com for registration information.

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Safeway realistically expected her to do so. Based on these arguments, Safeway claimed the trial court had improperly instructed the jury.

The Court of Appeal disagreed with Safeway, holding that the “multi-tasking” or “concurrent activity” standard proposed by Safeway was not consistent with California law. The court noted the Code of Federal Regulations sections incorporated by the relevant Wage Order do not recognize “hybrid” activities. Rather, tasks are either classified as “exempt” or “non-exempt.” Work that is non-exempt is not made exempt merely by the fact that a supervisor performs it. An otherwise non-exempt task can be exempt, however, when it is performed by the supervisor because it is helpful in supervising employees or contributing to the smooth functioning of the department.

Since the non-exempt tasks undertaken by Heyen were not performed to help supervise employees or to contribute to the smooth functioning of the store, they were non-exempt. Further, Safeway’s “realistic expectations” were, in fact, “unrealistic” in that Heyen could not meet O.R., keep checkout lines short, etc., without performing significant non-exempt work.

The Heyen case is a prime example of a problem which is increasingly common: after years of staffing and budget cuts, managers are often forced to perform numerous non-exempt tasks alongside hourly workers. Employers should know that the manager title and the significant amount of exempt work performed by the manager won’t prevent the employee from being reclassified as non-exempt if the employee is performing non-exempt work more than half the time.

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That ECJ’s Employment Law Reporter will be going digital with the October issue? If you are not already receiving electronic communications from ECJ, please make sure we have your e-mail address on file, so that you can continue to receive this publication as well as notices of upcoming seminars. If you have been receiving a printed copy of the Employment Law Reporter, you will receive in the mail an update card that you can return with any missing or updated information. If you do not receive an update card by August 15th, please contact Brandi Franzman at bfranzman@ecjlaw.com or 310.281.6328 to update your information. We look forward to staying in touch with you!

That beginning with the August 2013 employment seminars, registrants may view the live presentation on-line and listen to the audio over the phone? If you are interested in registering for the August 2013 seminars listed on the front page, whether you would like to attend in person or on-line, please contact Brandi Franzman at bfranzman@ecjlaw.com or 310.281.6328 for registration information.

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