Cincinnati Law Library News

A Monthly Newsletter from the Cincinnati Law Library Association June 2007

Inside This Issue

1	Whether You Call Them Whistleblowers or Tattletales, They Are Protected
3	How to Save Your Internet Favorites
Back	Ohio Codes Get a Makeover

The Cincinnati Law Library Association

Hamilton County Courthouse
1000 Main Street, Room 601
Cincinnati, OH 45202

513.946.5300
Fax: 513.946.5252
Circulation: 513.946.5302
Reference: 513.946.5303

Open Monday-Friday 8 - 4

www.cincinnatilaw.org

Whether You Call Them Whistleblowers or Tattletales, They Are Protected

By Allen S. Kinzer, Esq.

Workers who complain about their pay are likely protected by the Fair Labor Standards Act (FLSA) from disciplinary action arising from their complaints (see ¶941 of the *Guide*). Section 15 of the FLSA prohibits an employer from discharging or in any other manner discriminating against an employee who has filed any FLSA complaint or instituted any FLSA proceeding (29 U.S.C. §215(a)(3)).

In a recent case, for example, a recruiting manager for Unisource Worldwide, Inc., proceeded to trial on his FLSA discrimination claim (*Bythewoodv. Unisource Worldwide, Inc.*, 413 F.Supp2d 1367 (N.D. Ga. 2006)).

Charles Bythewood, who worked in the company's recruiting department, complained internally to the employer's in-house counsel and human resources director that his new manager was treating recruiters as exempt from overtime when they were, according to Bythewood, properly nonexempt and thus subject to the FLSA's overtime protections. Bythewood also complained that his new manager was instructing recruiters to record only 40 hours a week on their timesheets, regardless of whether they worked overtime.

After making these internal complaints, Bythewood alleged that his new manager became critical of his work performance. Within three months of his internal complaints, Bythewood was discharged. He then sued under the FLSA, alleging unlawful discrimination and retaliation for complaining internally about his manager's pay practices.

Elements of an FLSA Discrimination Claim

Generally, to make a successful claim of FLSA discrimination — also known as a claim of retaliation —the plaintiff must initially establish the following three elements: (1) he engaged in activity protected by the FLSA; (2) he subsequently suffered an adverse employment action; and (3) the adverse employment action was causally related to his protected activity.

If a plaintiff can produce evidence supporting all three of those elements, then the employer has a chance to offer evidence of legitimate, non-discriminatory reasons for the adverse action, such as poor work performance. The plaintiff then must prove that the employer's stated reasons were not the real reasons, but were a mere pretext for discrimination or retaliation.

Adding to the confusion with the FLSA whistleblower protections is that the federal courts do not agree on the first element; that is, they do not agree on what conduct is protected by the FLSA. A majority of federal courts conclude that informal workplace complaints about pay are protected by the FLSA (*see, for instance, Grey v. City of Oak Grove*, 396 F.3d 1301 (8th Cir. 2005); *Wolf v. Coca-Cola Co.*, 200 F.3d 1337 (11th Cir. 2000); *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390 (10th Cir. 1997)).

Other federal courts conclude that such informal complaints are not FLSA-protected. To be protected, according to

Continued on page 5

The right connections make all the difference.

West's Ohio Integrated Practice System connects relevant law for you.

Connections in West's® Ohio Integrated Practice System make it easy for you to track relevant law across a broad Ohio library – from *Baldwin's™ Ohio Revised Code Annotated, Ohio Cases 2d,* and *West's Ohio Digest* to *Ohio Jurisprudence 3d, Baldwin's Ohio Practice Library™,* and more.

The result? Maximum information in minimum time.

For details about West's powerful Ohio system, call 1-800-762-5272.

THOMSON WEST™

The right environment for your practice.

west.thomson.com

© 2005 West, a Thomson business L-307482/1-05

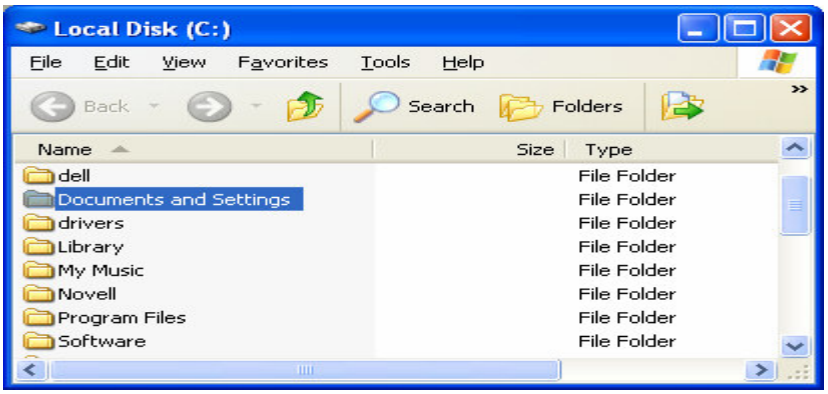
How to Save Your Internet Favorites

Julie Koehne, Assistant Law Librarian

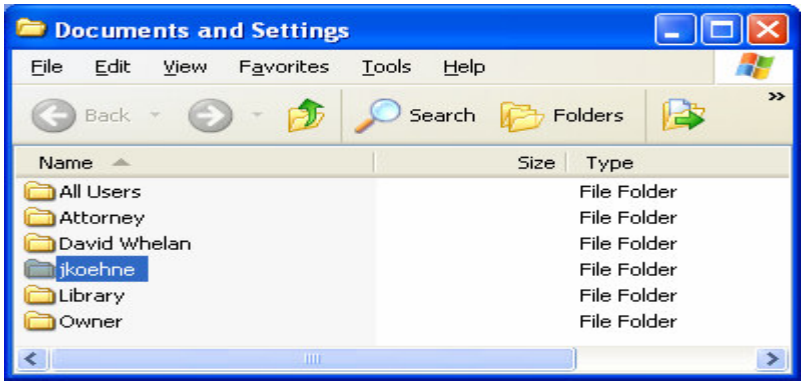
How can you take your favorites internet links with you from computer to computer? Here are some easy steps to accomplish this task. Your favorites are saved locally to your PC by default. What we will do is find where all your local setting are saved and copy these favorites to a place where you can access them.

First, double click on "My Computer". Here you will see all places data can be stored. Next, open the Local Disk (C:) by double clicking on the icon.

Now double click on the "Documents and Settings" file folder.



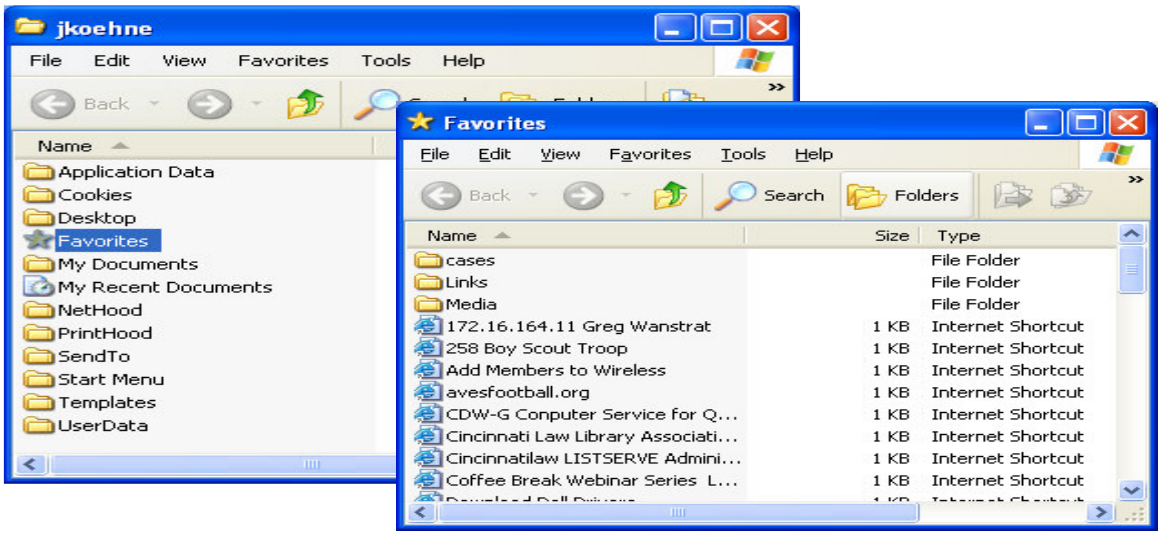
Open the user's folder by double clicking in it. For this example I will use "jkoehne."



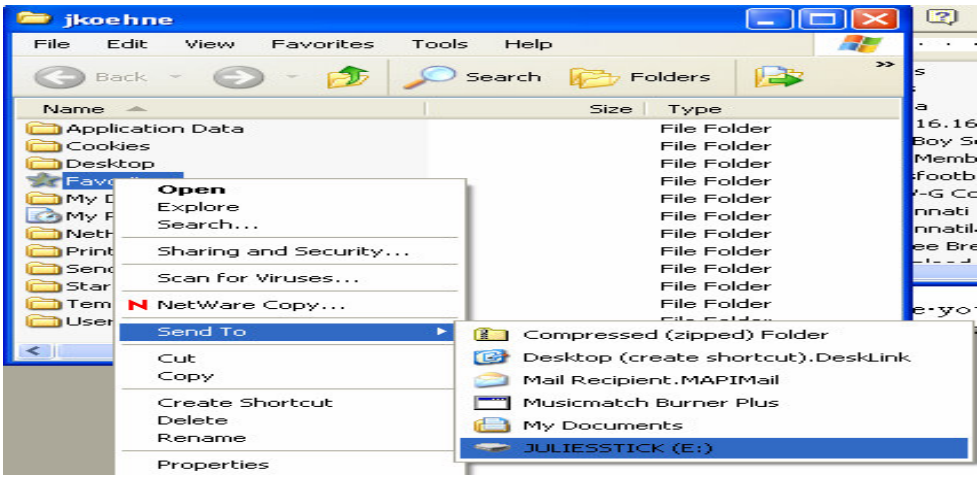
Continued on page 4

Internet Favorites , continued from page 3

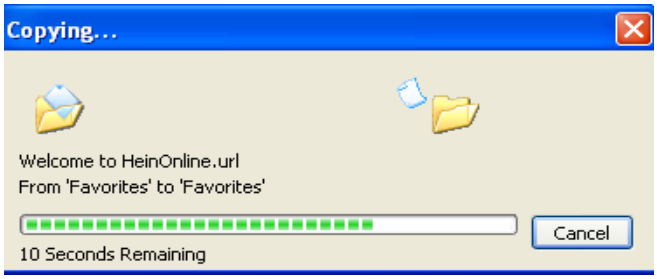
Next, double click on the "Favorites" icon to view all of your favorites you have saved in Internet Explorer. If you copy these favorites to a flash drive or a network drive you will have a backup of all your favorites when you get a new machine or a software upgrade clears them out.



If you have a flash drive and would like your favorites saved on it, hook it up to your computer at this time, wait for the computer to recognize the flash drive, then right click on the Favorites icon. Select the "Send to" option and click on your flash drive.



All of the user's favorites will be saved.



Whistleblowers, continued from page 1

these federal courts, the employee must have filed a lawsuit or complained to the U.S. Department of Labor or a similar government agency about the pay issues. Thus, according to the minority view of the federal courts, the employee must have made a "formal" complaint to the government. (*See, for instance, Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360 (4th Cir. 2000); *Lambert v. Genessee Hospital*, 10 F.3d 46 (2d Cir. 1993).

In Bythewood's case, Georgia is within one of the federal court circuits following the majority view. Therefore, his "informal" workplace complaints to the human resources department and in-house counsel satisfied the first element of the FLSA-discrimination claim: He had engaged in FLSA-protected activity when he made his workplace complaints.

Causation: Linking Complaint to Action

Bythewood and Unisource did not dispute the second element required for an FLSA discrimination claim, that Bythewood suffered an adverse employment action because he was discharged. Thus, when Unisource attempted to have the case dismissed before a jury trial (on motion for summary judgment), the dispute focused on causation, the third element. The Georgia federal court found that Bythewood had enough evidence concerning a causal connection between his internal complaint and his discharge to proceed to a jury trial.

First, the court found that Bythewood's new manager, the human resources department and in-house counsel were aware of his internal complaints: He had complained directly to them. Additionally, just before his discharge, Bythewood had again complained to them about the overtime issues. Furthermore, the court reviewed precisely when Bythewood's new manager started her complaints about his work performance and found that they began just after his first complaints about the overtime issues. Bythewood's discharge occurred within a month of his last overtime pay complaint.

The court also found that the testimony of two human resources employees was at least ambiguous about what was motivating Bythewood's manager to want to discharge him. Therefore, the court concluded that Bythewood had produced enough evidence to satisfy the initial three elements of his claim.

Unisource still had an opportunity to dismiss the case before going to a jury trial, if it could show that it had legitimate, non-discriminatory reasons for Bythewood's discharge and Bythewood could not show that those reasons were really a pretext for discrimination.

Unisource offered the following reasons for Bythewood's discharge: (1) poor interviewing skills of several prospects; (2) poor decision-making; and (3) inability to think strategically. The court found that Unisource met its burden of offering legitimate, non-discriminatory reasons. The burden then went to Bythewood to show that those reasons could be a pretext for discrimination. To show pretext, Bythewood could persuade the court that either: (a) discrimination or retaliation more likely motivated Unisource than Unisource's stated reasons for the discharge; or (b) Unisource's stated reasons were false. The court concluded that Bythewood had presented enough evidence to show that Unisource's reasons could be a pretext and thus ruled that the case should go to a jury.

First, the court found that Bythewood had raised enough evidence to show that the first reason, poor interviewing skills, was not likely a motivating reason for his discharge. He had worked for Unisource for more than two years and had never received such criticism until he complained about the overtime issues of his staff. As to the second and third reasons, several Unisource employees testified at their deposition that he was a good manager, and Bythewood had never been counseled or disciplined for such criticism before his internal complaints. Furthermore, the criticism about an inability to think strategically first arose directly after Bythewood's complaints that the recruiters were not exempt from overtime.

Conclusion

Employers should be aware that internal complaints can be protected by the FLSA, and the complainers may not be discriminated against because of their complaints. If the employer does take action against the complainer, the employer should make sure that there are legitimate, non-discriminatory reasons for the action.

For an employee with at least a few years of service, those reasons should have surfaced before the employee's FLSA protected complaints and be supported by documents and testimony, particularly where little time has passed between the employee's complaints about pay practices and the adverse action against the employee.

Allen S. Kinzer, Esq., is a partner in the Columbus, Ohio office of Vorys, Sater, Seymour and Pease LLP, where he practices labor and employment law.

Ohio Codes Get Makeover

David Whelan, Law Librarian

You may have noticed a change in the look of the free, online versions of the Ohio Revised Code (ORC) and Ohio Administrative Code (OAC). The Legislative Services Commission inked a deal to replace the OAC and ORC online versions provided by Anderson Publishing with content from LAWriter, the company behind Casemaker. The ORC and OAC are now found at a new Web site and have some new features.

Both online ORC and OAC remain free services. The new site is less clunky than the Anderson site, which relied on multiple "framed" windows that meant the statute you were viewing often was squeezed into a small space.

1. The first thing you will notice about the online ORC is that its home page shows a list of the ORC titles. Scroll down the list and click on a code Title, and you will immediately see the relevant chapters. Click on a Chapter and you will see the first statute in that Chapter you are researching.
2. A table of contents appears on the right-hand side of your research. This table changes based on context. If you click on a Chapter, it will show you all of the statutes in that Chapter. If you do a search, it will show a list of your search results.

At the top of the right-hand results table there are links for ***previous*** or ***next***. This enables you to browse the ORC section by section, or type in the specific code section you want in the ***Go To*** box above, and go directly to an ORC section.

Overall, the ORC is an improvement over the previous online version. The biggest defect is in the statutory history of each section. The LAWriter-version of the ORC does not provide any information about the session laws that affected your statute; it provides only the effective dates. If you want to know which House or Senate bill was involved, you will need to resort to some other resource.

You can easily access the OAC by clicking on the ever-present link to it at the top of the ORC screen. Notice that you can toggle back to the ORC from the OAC by clicking in the same place again! Just like the Anderson's versions of the ORC and OAC, the look and feel of the OAC mirrors the LAWriter ORC in layout and organization. You can browse through the OAC sections, jump directly to a citation, and view the regulatory history of a particular rule.

Relevant Links

Legislative Services Commission (LSC):
http://www.lsc.state.oh.us/

LSC-sponsored Ohio Revised Code:
http://codes.ohio.gov/orc/

LSC-sponsored Ohio Administrative Code:
http://codes.ohio.gov/oac/

Cincinnati Law Library Association
Hamilton County Courthouse
1000 Main Street, Room 601
Cincinnati, OH 45202

ADDRESS CORRECTION REQUESTED

INSIDE THIS MONTH

• Whistleblowers or Tattletales
• Tech Tip: Saving your Favorites
• Ohio Codes Get Makeover

June 2007 Law Library Newsletter