

9th Circ. 'Willful' Ruling Could Extend Beyond FMLA Context

By **Joshua Zuckerberg** and **LaKeisha Caton** (December 9, 2020)

On Nov. 23, the U.S. Court of Appeals for the Ninth Circuit applied the Fair Labor Standards Act's important willfulness standard in a lawsuit alleging violations of the Family and Medical Leave Act. The court's importing of this standard could have far-reaching implications.

It signals the federal appellate courts' desire to articulate a unified standard for willfulness across various discrimination statutes. Such a unified standard may be a welcome form of judicial consistency for employment law practitioners.

In *Olson v. U.S.*, the plaintiff alleged that the Bonneville Power Administration, or BPA, violated the FMLA by willfully interfering with her rights under the act.[1] The FMLA makes it "unlawful for an employer to interfere with, restrain, or deny the exercise [of] or the attempt to exercise, any right provided by the Act." [2]

However, the critical question in this case of first impression for the court was how far back could Andrea Olson go to attack BPA's conduct. Under the FMLA, an action must generally be brought within two years after the date of the last event constituting the alleged violation for which the action is brought.

This limitation is extended to three years for a willful violation.[3] The three-year window was critical because the plaintiff filed her complaint in 2017, and the relevant conduct occurred in 2014. In short, if BPA's alleged interference was willful, the applicable statute of limitations would be three years, and the plaintiff's action would be timely.

Olson worked as a reasonable accommodation coordinator for BPA and was responsible for assisting employees in need of accessibility accommodations at work and training managers and employees on their rights and responsibilities.[4] She began experiencing anxiety and requested her own accommodation in March 2014.[5]

After some back and forth with BPA regarding potential accommodations, BPA agreed to allow Olson to telework more and proposed a five-hour trial work period.[6] Olson interpreted this trial work period as including training her replacement and decided not to accept BPA's offer or return to work.[7]

While Olson argued before the panel that BPA "interfered with her FMLA rights by failing to provide her notice of those rights," the court declined to address the substance of Olson's allegations." [8]

Instead, the court determined that it did not need to decide whether BPA's conduct constituted interference with the plaintiff's FMLA rights because, even if the plaintiff had shown that a violation occurred, the lower court "did not clearly err in determining that such interference was not willful." [9] Because BPA's conduct was not willful, a two-year statute of limitations applied rather than a three-year statute of limitations, and the plaintiff's claim was thus time barred.



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Notably, the FMLA does not define the term "willful." Other circuit courts, including the U.S. Courts of Appeals for the First, Second, Sixth, Seventh, Eighth and Tenth Circuits, have previously held that the standard for willfulness in FLSA cases adopted by the U.S. Supreme Court in *McLaughlin v. Richland Shoe Co.* in 1988 also applies to FMLA cases.[10] Pursuant to the *McLaughlin* standard, in order for a violation of the FLSA to be willful, "the employer must know, or show reckless disregard for whether, its conduct was prohibited by the statute." [11]

The Ninth Circuit determined that the *McLaughlin* willful standard should apply to the case at hand because "the FLSA's statute of limitations provision is structured similarly" to the FMLA's statute of limitations provision, other circuits have applied the *McLaughlin* standard to FMLA claims, and the *McLaughlin* standard has been accepted in other non-FLSA contexts.[12]

For example, in *Trans World Airlines Inc. v. Thurston*, the Supreme Court held in 1985 that a violation of the Age Discrimination in Employment Act is willful "if the employer knew its conduct was prohibited by the ADEA or showed a reckless disregard for whether it was prohibited." [13]

Based on the Ninth Circuit's analysis, it would be reasonable to surmise that other circuits may also embrace the *McLaughlin* standard for willfulness in FMLA cases, as well as outside of the FLSA and FMLA context. In its decision, the Ninth Circuit noted the adoption of the *McLaughlin* standard in an ADEA matter, which, according to the court, signals the potential broader application of this standard.[14]

In other words, courts will likely interpret *Olson v. U.S.* to mean that the *McLaughlin* standard may also be applied in cases involving other federal statutes in which "willful" is not defined.

Indeed, some courts have already deferred to the FLSA's definition of "willful" when determining if a party willfully violated the Uniformed Services Employment and Reemployment Rights Act and the Fair Credit Reporting Act.[15]

Given the decision in *Olson v. U.S.*, it is likely that this trend will continue. It is also expected that where the statute at hand does not contain a relevant definition, courts will rely on the definition adopted in FLSA actions or inactions involving other statutes with similar language.

Considering that willful violations of certain employment laws may increase the time that employees have to file a complaint and subject employers to liquidated damages, employers should be mindful that such a violation may consist of a knowing infraction or reckless disregard exhibited by the employer in FMLA, USERRA and FCRA cases, and potentially under other circumstances.

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[1] Olson v. United States , No. 19-35389, 2020 WL 6864653 (9th Cir. Nov. 23, 2020).

[2] Id. at *3.

[3] Id. at *4.

[4] Id. at *1.

[5] Id. at *2.

[6] Id.

[7] Id.

[8] Id. at 3.

[9] Id. at *4.

[10] McLaughlin v. Richland Shoe Co. , 486 U.S. 128 (1988).

[11] Id. at 128.

[12] Olson, 2020 WL 6864653 at *4.

[13] Trans World Airlines, Inc. v. Thurston , 469 U.S. 111, 113 (1985).

[14] Olson, 2020 WL 6864653 at *4.

[15] See Fryer v. A.S.A.P. Fire & Safety Corp., Inc. , 658 F.3d 85, 90-92 (1st Cir. 2011) (the court considered the definition of willful used in FLSA actions when determining whether a company willfully violated USERRA); Safeco Ins. Co. of America v. Burr , 551 U.S. 47, 57 (2007) (the court referred to the meaning of willful used for actions brought under the FLSA when determining whether there was a willful violation of the FCRA).