was no statutory or jurisprudential duty to preserve the evidence in a criminal investigation for the personal benefit of the victim of a crime, and the record was "devoid of evidence of any special relationship or affirmative agreement or undertaking by the Sheriff's Office to preserve the evidence for the plaintiff's emotional well-being, personal sense of security, or possible civil remedy." Further, even if such a personal duty existed, the court "seriously question[ed] the cause-in-fact of the plaintiff's damages," as it could not be said that "but for" the negligent disposal of the criminal evidence, Dennis would not have suffered emotional distress. "It [was] evident …that regardless of whether the criminal evidence was preserved the serial killer was not linked to the plaintiff's attack," and "this reality [was] the cause-in-fact of the plaintiff's emotional distress." *Dennis v. Wiley*, No. 2009 CA 0236, 2009 WL 3164426 (La. Ct. App. Sept. 11, 2009).

Personnel and Employment

Drunk Calls Not FMLA Notice

Scobey was an employee of Nucor Steel -Arkansas. Pursuant to the employer's attendance policy, it was entitled to fire an employee after the fourth incident of an unexcused absence. On April 09, 2005, Scobey left a message with a supervisor, asking him to call back but without giving a reason. He also called another supervisor to say that he needed time off on the 13th to go to a funeral, and was told he could if another employee agreed to cover his shift. The next day, April 10, Scobey did not come to work. Instead, an apparently drunk Scobey called a manager, saying "he was through and done with us." The same evening, Scobey (still drunk) called a supervisor to say the same thing. On April 11, Scobey told his immediate supervisor that he had had a nervous breakdown. The supervisor thought Scobey sounded intoxicated and disbelieved his claim of a breakdown, concluding that he was making excuses to avoid work because he was drunk. Scobey failed to show up on April 12 and 13, but called the human resources department on the 13th to request Family and Medical Leave Act (FMLA) leave. On April 20, he was referred to a facility for treatment for alcoholism and depression. Nucor did not designate Scobey's absences for treatment as FMLA leave, but as paid leave, and demoted Scobey based on his unexcused absences due to drunkenness from April 10 to 13. Scobey sued Nucor, asserting interference and discriminatory retaliation under the FMLA. He claimed that his calls should have demonstrated to the employer that his inebriated state was a manifestation of his underlying depression and gave sufficient and timely notice that he had a serious health condition requiring FMLA leave. The district court dismissed his claims on summary judgment, finding that, on the interference claim, Scobey failed to provide notice that his absences might be FMLA-qualifying leave, and that, with respect to the retaliation claim, there was no genuine dispute as to whether Nucor demoted Scobey for absences that were not protected by the FMLA.

On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed, finding that the employee had failed to give his employer the necessary notice under the FMLA. In order to state a claim for interference under the FMLA, Scobey must have given notice of his need for FMLA leave. Although the FMLA did not define the type and timing of the notice required when the need for leave was unforeseeable, the employee "must do more than merely call in sick to trigger an employer's duties" under the Act. His request for a day off to attend a funeral was not protected by the FMLA. His calls stating that he wanted to terminate his employment were not notice that he needed time off from work, and the incoherent and drunken comments were "inadequate to apprise Nucor of any possible obligations under the FMLA." Because Scobey failed to show that he had provided adequate notice to Nucor that he had a "serious health condition" rendering him "unable to work," his FMLA interference claim failed. *Scobey v. Nucor Steel-Arkansas*, 580 F.3d 781 (8th Cir. 2009).

FLSA Overtime and "On Call" Duties

In a case that has some significance in this age of Blackberries, pagers, laptops and cell phones, an Ohio court has recently dealt with entitlement to overtime compensation and "on call" pager duties. The plaintiff had been employed by the defendant company as a customer service representative, and her duties included handling incoming calls from customers. She worked a 40-hour week in the office, but, because the employer also used a "roll-over" call system to deal with customer inquiries after regular business hours and on weekends, she would be paged for any calls that came in during these times (the calls did not go to her home phone). This meant taking the call, logging-in the call details, and scheduling a technician to come and address the problem. Each service call, from start to finish, could take as little as 30 minutes or as much as two hours to complete. The plaintiff claimed that her pager duties became near-daily and interfered significantly with her personal time; the employer alleged that monitoring the pager was completely voluntary and that the plaintiff was free to forego monitoring the pager at any time. After the plaintiff was fired for attendance problems unrelated to her pager duties, she brought an action under the Fair Labor Standards Act, 29 U.S.C.A. § 201 *et seq.* (FLSA), seeking compensation for the time she worked after hours and on weekends "on call," and for the time spent actually responding to such calls. The FLSA provides that an employee must receive compensation at "not less than one and one-half times the regular rate at which he is paid" for hours worked in excess of 40 hours per week, 29 U.S.C. § 207(a) (1), but the Act does not specify whether time spent "on-call" constitutes time spent working.

The employee filed a motion for summary judgment and the district court denied the motion. Notwithstanding the lack of an express provision in the FLSA, the U.S. Supreme Court had held that such time was compensable in some cases. On-call time spent at home could be compensable if the restrictions

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