

MISTAKE OF THE MONTH - - Promises, Promises

A case recently decided by the Connecticut Supreme Court illustrates the dangers of off-hand promises of job security to employees. In *Stewart v. Cendant Mobility Services Corp.*, 267 Conn. 96 (12/23/03), the plaintiff and her husband both worked for Cendant, a relocation company. He was terminated after a reorganization, and the plaintiff was concerned that if her husband got another job with a competitor, her own job could be in jeopardy. She expressed her concerns to her supervisor, who told her that she shouldn't be concerned and that her husband's reemployment in the relocation industry would not affect her job status. He also told her that Cendant's President also stated that she should have no reason for concern if her husband began work for a competitor. On the basis of these representations, the plaintiff continued her employment and did not seek other jobs.

Sure enough, the husband took a job with a Cendant competitor. The plaintiff then had her duties reduced and her interaction with clients restricted. Cendant also requested that the plaintiff verbally agree to the provisions of a document drafted by Cendant that purported to delineate her obligations to Cendant in relation to her husband's work on behalf of any competitor of Cendant. When she refused to sign, she was terminated.

What is important about this case is the theory on which the plaintiff prevailed. She did not win on her contract claim. She principally won on a claim called "promissory estoppel." Promissory estoppel is a claim based upon a clear and definite promise, upon which a reasonable person would rely taking into consideration all the circumstances, and in fact is relied on by a person in taking or refraining from taking a particular action, to that person's ultimate detriment. This is the case even if the person who makes the promise has no intention of being bound to that promise.

Here, the plaintiff claimed that a promise that her husband's job would not affect her own, given by her supervisor and reiterated by the company President, was a sufficiently clear and definite promise, and that she relied to her detriment on that promise in continuing her employment and not seeking employment elsewhere. A jury found in her favor, awarded her \$850,000.00, and the Connecticut Supreme Court upheld that verdict.

Thus it is dangerous to make promises in any discussion involving an employee's job security. Any supervisor with hiring and firing authority could be held to such a promise. Most if not all states accept the theory of promissory estoppel, including Massachusetts, and there are a number of cases where this issue has been litigated, and we have seen several ourselves. Any conversation with an employee which begins anything like "Gee whiz, I know the company's having some trouble and there's this job I could take . . . what should I do?" is trouble in the making.

EMPLOYERS AND CORPORATE GOVERNANCE

As you may have read in the mass media, the collapse of WorldCom has precipitated an avalanche of litigation. In particular, *In re WorldCom, Inc. ERISA Litigation*, is a case brought by a class of former WorldCom employees who participated in the company's 401(k) plan, which was heavily loaded with WorldCom stock. When WorldCom's stock price plunged following

revelations of accounting irregularities, the pension plan, and its participants, lost millions of dollars. The class has sued, among others, certain members of the company's Board of Directors. They claim that, under ERISA, anyone who has the authority to appoint plan fiduciaries also has a continuing fiduciary duty of their own to monitor the performance of the plan fiduciaries they appoint.

On January 16, 2004, the federal Department of Labor ("DOL") weighed in on the side of the plaintiffs by filing an *amicus* brief which articulates the DOL's position that those who appoint fiduciaries have the ongoing duty to monitor performance of those appointees. The Department takes pains to acknowledge that the appointing fiduciaries are not a guarantor of the actions or the success of the investments of the plan fiduciaries. Rather, the obligation is to make appointment and removal decisions with prudence and loyalty, and to periodically monitor the performance of those they appoint. The DOL's brief also suggests that appointing fiduciaries have an obligation to develop and implement reasonable procedures to review and evaluate the performance of appointees on an ongoing basis.

This litigation illustrates yet another corporate governance issue confronting companies, which really comes down to having the appropriate policies and procedures in place - and taking them seriously - for the monitoring of the various aspects of a company's financial performance and of the actions of the individuals involved.

OTHER EMPLOYMENT LAW HEADLINES

Is A Mold-Free Office A Reasonable Accommodation?

It will be up to the jury in this case. In *Burnley v. San Antonio*, 2004 U.S. Dist. LEXIS 421 (W.D. Tex., 1/6/04), the plaintiff developed respiratory problems allegedly caused by air-borne mold in her workplace, which was a state office building. The state investigated and hired a company which supposedly removed mold and fungi from the building; the plaintiff had been temporarily transferred in the meantime to another building. After an extended leave, the city ordered her to return to work. She refused, stating that the building was not mold-free and her doctor told her to work only in a mold-free environment. The plaintiff then sued the city under the Americans with Disabilities Act ("ADA"). She alleged that a mold-free work environment was a reasonable accommodation which was denied to her.

The city moved for summary judgment on the case, arguing that she was not disabled under the ADA and that her accommodation request was not reasonable. The Court denied this motion relating to the ADA claim, and ruled that there was sufficient evidence that the plaintiff was disabled to allow the case to go forward. On the reasonable accommodation claim, the Court ruled that the reasonableness of a proposed accommodation is a question of fact that only a jury could decide and that a court could not decide on this type of pretrial motion. Thus the motion was denied.

At-Home Work Not A Reasonable Accommodation Where Physical Presence Is Essential Function

In *Mason v. Avaya Communications, Inc.*, 2004 U.S. App. LEXIS422 (10th Cir., 1/13/04),

the plaintiff worked as a service coordinator scheduling appointments for field service technicians; this position required her to monitor a computerized system which regulated the entire repair scheduling process, and required her to communicate with technicians by computer, telephone and fax. Previously she had been a postal worker who witnessed an incident described only as the 1986 “Edmond Post Office Massacre,” and subsequently was diagnosed with post-traumatic stress disorder (“PTSD”). From 1998-2000 she worked for Avaya without incident, but in March, 2000, she was told about a recent incident at work in which one co-worker pulled a knife on another co-worker, and she also heard that that employee had threatened to “go postal.”

When that employee was cleared to return to work, the plaintiff called in sick and again was diagnosed with PTSD. She told Avaya that she could not work in the same building with the co-worker and requested either that he be transferred, that she be transferred, or she be allowed to work at home. The Employer determined that the other employee was not a threat and that transferring him was not an option. The plaintiff transferring also was not an option because the only similar jobs were at that facility. The Employer told her that working from home also was not an option because her physical presence at the workplace was an essential function of her job.

She sued and argued that physical presence in the workplace was not essential to her job because most of her duties were performed over computer and phone lines, and that the job description did not mention any on-site requirement nor reference teamwork among the other service coordinators (covering for each other during breaks and such). The Employer argued that because the service coordinators worked as a team and required supervision, their physical presence in the workplace was an essential function of the job.

The Court agreed with the Employer. According to the Court, the plaintiff’s only evidence supporting her claim was the lack of specificity in the job description and her own “self-serving testimony.” The Court noted its prior cases holding that an employee’s request that s/he be relieved from an essential function of a job “is not, as a matter of law, a reasonable or even plausible accommodation.” The Court outlined a two-part analysis: where a job’s essential functions require physical presence in the workplace, a request to work at home is per se unreasonable, but where physical presence in the workplace is not essential, then each case must be looked at individually. Because the plaintiff’s physical presence at work was essential to her job in this case, her request was per se unreasonable, and thus judgment entered on behalf of the Employer.

Overtime Beefs Do Not A RICO Claim Make

In *Miller v. Yohohama*, 2004 U.S.App. LEXIS 309 (9th Cir., 1/12/03), the plaintiff claimed that throughout his eleven years of employment he was ordered to work many overtime hours for which he was never paid overtime, and that his managers falsely represented to him and others that they were not entitled to overtime because they were salaried. He alleged that because he was not a lawyer, he “trusted and placed confidence in his employer, who he argues had superior knowledge concerning his status and entitlement to overtime pay. In sum, Miller alleges that the misrepresentations and failure to pay overtime wages constitute a fraudulent scheme.” In furtherance of that scheme, claimed the plaintiff, paychecks and W-2 forms were sent through the mail to him and others. He sued the Employer under state law and the federal Racketeer

Influenced and Corrupt Organizations Act (“RICO”), claiming that the fraudulent scheme was furthered by the use of the mails, and thus was “racketeering” activity under the statute because mail fraud is an indictable act.

The Court denied his claim. The Court noted that generally statements of “law are normally regarded as expressions of opinion which are generally not actionable in fraud even if they are false.” There are exceptions where the party making the misrepresentation claims some special knowledge or expertise, but none of these exceptions applied to this case, stated the Court. The Court’s attitude can be gleaned from the very first sentence of its opinion: “This case involves an effort to transform a California state law wage and hour claim into a federal RICO claim under 18 U.S.C. §1962(c) and (d).” Also please note the case discussed further along in this Alert, *Berry v. Allstate Ins. Co.*, 2004 U.S.App. LEXIS 23 (5th Cir., 1/5/04), which also involved in part a plaintiff trying to transform one claim into a RICO claim.

Denial Of Lateral Transfer Was An “Adverse Employment Action”

In *Stewart v. Ashcroft*, 2003 U.S.App. LEXIS 26165 (D.C.App., 12/23/03), the plaintiff, an African-American male, was a Senior Litigation Counsel in the federal Department of Justice’s Environmental Crimes Section (“ECS”). He applied for a lateral transfer to the position of Chief of ECS, a transfer which would have brought some increased responsibilities, but had the same pay and benefits. His request was denied, and he claimed that a less-qualified Caucasian was selected. He sued for race discrimination, claiming first, that denial of the transfer was an adverse employment action under Title VII, and that he was qualified for the position. The Defendant argued that the denial of a lateral transfer was not an adverse employment action and that the successful candidate was better qualified and had more managerial experience.

A divided Court ruled in favor of the Defendant on the “adverse action” issue. The majority wrote that “we agree with [plaintiff] that the District Court erred in failing to find his non-selection to be an adverse employment action, but because we agree with the District Court that [plaintiff] failed to rebut the Government’s legitimate, nondiscriminatory reason for not selecting him, we affirm.” The majority noted that while the transfer may have been “lateral” in terms of pay and benefits, the Chief of ECS supervised the plaintiff’s position, so non-selection was more like the denial of a promotion than of a lateral transfer. It was “adverse” because non-selection denied the plaintiff “the opportunity to advance within the hierarchy of the ECS and the Department [of Justice] more generally.”

With respect to the plaintiff’s qualifications (an issue on which the entire Court agreed), the Court noted that the successful candidate had shown a “more keen” interest in management than the plaintiff, who rarely attended management meetings. There was no evidence at all that race played a factor in the decision, wrote the Court, and in fact the plaintiff’s only witness on that issue testified that she did not know whether race played a factor in the decision or not. Thus the Court affirmed the District Court’s alternative ruling that the plaintiff had failed to rebut the Employer’s legitimate non-discriminatory reason for selecting another candidate over the Plaintiff.

Request For ADA Accommodation Is Protected Activity

In a local case, *Wright v. CompUSA*, 2003 U.S.App. LEXIS 25896 (1st Cir., 12/19/03), a CompUSA employee was diagnosed with Attention Deficit Disorder (“ADD”) in 1997 and told his employer, although he did not request any accommodation at that time. In 1998, plaintiff got a new manager, and soon thereafter began experiencing severe stress and anxiety on the job due to conflicts with his manager, which exacerbated his ADD symptoms. Plaintiff’s physician recommended a leave of absence, and the Employer granted him a two-week medical leave. While on leave plaintiff requested a transfer or to be able to work at home, both of which were denied. Plaintiff returned to work with some accommodations, some of which he claimed his manager ignored. In August, 1998, the plaintiff’s son suffered a head injury and the plaintiff had to be late for a work meeting at another store to take his son for care; the plaintiff was told to report for the meeting thereafter, but instead he reported to his home store. His manager then fired the plaintiff, allegedly for insubordination due to his failure to go to the other store.

He sued under the ADA and state law, claiming that he was disabled by his ADD. The Court accepted as undisputed that plaintiff suffered from ADD, but ruled that even so, he was unable to show that he was substantially limited in a major life function. The Court noted that the plaintiff had functioned well prior to being put under the new manager. Thus while the plaintiff had presented evidence that the new manager put him in a stressful work environment, he had failed to demonstrate that “his ADD generally rendered him unable to perform some usual activity compared to the general population or that he had a continuing inability to handle stressful situations.” Therefore the Court upheld the District Court’s entry of summary judgment on behalf of the Employer on the plaintiff’s disability claim.

The plaintiff’s retaliation claim came out differently. The Court first noted that a plaintiff does not need to win his ADA claim to succeed on a retaliation claim; they are separate issues. It then ruled that the mere act of requesting an accommodation is protected activity, and thus a claim of retaliation for making such a request could be maintained under the ADA and Massachusetts law. The 1st Circuit became the fifth circuit court to so hold. Thus here, the Court ruled that a reasonable juror could conclude that the plaintiff had made out a prima facie case of retaliation (request for accommodation + discharge + causal connection between protected activity and the discharge), and that the Employer’s proffered legitimate non-discriminatory reason (insubordination) was a pretext, especially given the history of acrimony between the plaintiff and his manager. Therefore the Court reversed the District Court and remanded the case for a trial on the retaliation claim.

No Religious Discrimination Claim For Employee Fired For Posting Scripture

In *Peterson v. Hewlett-Packard*, 2004 U.S.App. LEXIS 72 (9th Cir., 1/6/04), the Employer began a diversity initiative, consisting in part of a series of five posters, “each showing a photograph of a Hewlett-Packard employee above the caption ‘Black,’ ‘Blond,’ ‘Old,’ ‘Gay,’ or ‘Hispanic.’” The plaintiff thereupon posted three passages from Scripture condemning homosexuality in his cubicle. In a series of meetings, the plaintiff essentially stated that he would remove the passages if the Employer removed the “Gay” poster. The Company refused the offer

and gave the plaintiff some time off with pay to reconsider, but when he returned to work he reposted the passages and refused to remove them. He was then terminated for insubordination.

He sued the Company, claiming religious discrimination in violation of federal and state law and wrongful discharge. He first made a “disparate treatment” claim, in which he would have to show that others similarly situated were treated more favorably. On this element his claim failed, according to the Court. The plaintiff basically argued that his views against homosexuality were treated less favorably than views in favor of homosexuality, but the Court noted that the Company’s diversity initiative was carefully planned and “entirely consistent with the goals and objectives of our civil rights statutes generally.” As to his ancillary claim that he had been subjected to an “inquisition” and pressured to change his religious beliefs, the Court ruled that the evidence was to the contrary, that the Company consistently respected his views, acknowledged the sincerity of his beliefs, and did not object to anti-gay bumper stickers on his car nor an anti-gay letter to a local paper he had written. The Company “simply requested that he remove the posters and not violate the company’s harassment policy - a policy that was uniformly applied to all employees.”

The plaintiff’s second claim was that the Company failed to accommodate his religious beliefs. The Court ruled that the only accommodations which the plaintiff was willing to accept - removal of his postings in return for the Company eliminating the “Gay” poster, would have imposed an “undue hardship” on the Company. The Court reasoned that allowing the plaintiff to maintain his postings and the Company’s posters would require the Company to accept workplace messages that demeaned and harassed co-workers, and removing both would be to exclude sexual orientation from his diversity initiative, either of which the Court ruled would have created an undue hardship for the Company. Thus the Court affirmed the District Court’s grant of summary judgment to the Employer.

After-Acquired Evidence Of Daily Drug Use Does Not Bar Discrimination Claim

In *Ricklefs v. Jiffy Lube*, 2003 U.S. Dist. LEXIS 22978 (N.D.Iowa, 12/19/03), the plaintiff Jiffy Lube manager brought claims of sexual harassment and a sexually hostile work environment which led to her constructive discharge. While there were several elements to this case, we focus on the Court’s discussion of so-called “after acquired” evidence. The Employer sought to defeat the plaintiff’s claim by asserting that evidence acquired by it after the plaintiff’s termination provided a valid reason for her discharge had they known about it. Specifically, the Employer claimed to have learned after her discharge that the plaintiff smoked marijuana daily, and at least twice while at work. Under the Company’s drug use policy, argued the Employer, such conduct was grounds for immediate termination.

The theory of after-acquired evidence in essence is that it does not vitiate the plaintiff’s claim altogether - a plaintiff can still prevail on a claim of discrimination - rather, the after-acquired evidence goes to the issue of remedy. As the Court noted, “it would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.” As to potential backpay, generally a successful plaintiff would be awarded backpay between the time of the unlawful termination and

the time at which it reasonably could be said that the employer would have learned of the conduct meriting a lawful termination.

Here, the Court wrote that to cut off a plaintiff's remedy, an employer must establish that the conduct was sufficiently severe that the employee actually would have been terminated had the employer known about it. Here, despite the handbook language, the Court noted evidence that the plaintiff's drug use at work had been with other managers and employees, and that the Employer had been aware of a prior arrest on marijuana charges, and that her immediate supervisor was aware of her alleged marijuana addiction. Thus the Court ruled that the Employer was unable to show - at least at the summary judgment state of proceedings - that the plaintiff actually would have been terminated for drug use since at least some managers already knew about it. Therefore the Court denied the Employer's motion for summary judgment.

WAGE & HOUR/FMLA DEVELOPMENTS

Not Reducing Billable Hour Requirement During FMLA Leave Creates Claim

In this case reported in the Daily Labor Report (BNA) of December 29, 2003, *Carmen v. Unison Behavioral Health Group, Inc.*, N.D. Ohio (12/17/03), the plaintiff took time off because of an injured foot and as a result fell behind on her job's productivity standards, measured by billable hours. She worked as a community support program advisor, and ordinarily drove throughout the community meeting with clients and assisting them with maintaining safe living spaces. Her injury precluded her from driving, so others transferred clients who could make office visits to her. Nevertheless, she did not meet the billable hours requirement, at least in part because of ongoing intermittent medical treatment.

The plaintiff sued the employer under an "interference with FMLA leave" theory and claimed that she was required to use sick leave, and that if her leave had been properly designated as FMLA leave, her absences would have been factored into the billable hours requirement. The Court rejected the employer's motion for summary judgment, and wrote that the employer was on notice of a medical condition, and if it did not have enough information to determine whether or not the leave should have been designated as FMLA leave, it should have inquired further. Her failure to provide medical certification was irrelevant because the employer never asked for it. The plaintiff had come forward with enough evidence that her condition could have qualified her for FMLA leave, and thus the court ruled there would have to be a trial.

This case is yet another reminder that any medical absence should be evaluated to determination whether or not it should be designated as FMLA leave. Making an assumption that a particular medical issue is not FMLA covered can result in litigation down the road, as this employer learned, which can be costly even if the employer ultimately prevails.

Summers Off To Care For Child With ADD Not Covered By FMLA

In *Perry v. Jaguar of Troy*, 2003 U.S.App. LEXIS 26328 (6th Cir., 12/30/03), the plaintiff's son had ADD and ADHD and had a problem with "impulsive behavior." The son was described as "Educable Mentally Impaired;" he could brush his teeth and feed and dress himself, rode the bus to and from school and attended a class for emotionally and mentally impaired students during the

school year. When not in school, He played video games, watched television, played with neighborhood kids, rode his bike and swam. After school, he stayed with a neighbor or went to the after-school day care program. Prior to 2001, the son was either watched by his mother or other family members during the summer months. His mother was unable to watch him in the summer of 2001 because of her work schedule, and the family was forced to consider other arrangements. The plaintiff claimed that his son “must be constantly monitored for safety reasons and to ensure that his behavior is socially acceptable. He also stated that they were unable to find affordable day care that would meet Victor's need for full-time attention from a child care provider in a "very controlled environment."

In April, 2001, the plaintiff informed the employer that he would be absent from work from June 13 through August 27. He claimed he requested the leave as FMLA leave and his supervisor “basically said okay.” Two weeks later he was informed in writing that his leave was not considered FMLA leave by the employer. At the end of the summer when plaintiff returned to work, he was told his job had been filled and there were no other openings. He then sued the employer.

The Court ruled that the plaintiff’s lack of notice was not sufficient to defeat his claim, nor was his lack of a medical certificate, since the employer was at least early on on notice that the plaintiff claimed FMLA leave. Where the plaintiff lost the case was in the Court’s determination that his son did not suffer from a “serious medical condition” that effectively “incapacitated” him during the summer and required the father to stay home with him at all times over the summer. The plaintiff argued that his son was incapacitated because he could not attend a regular day camp because he needed “extraordinary” supervision, and because he could not engage in regular daily activities. The Court noted that the son in fact engaged in many ordinary childhood activities, and just because he could not attend a day camp did not mean he was incapacitated under the meaning of the FMLA. Thus the Court affirmed the District Court’s grant of summary judgment to the Defendant employer.

Emotional Distress Damages Available In FLSA Retaliation Claims

In *Moore v. Freeman*, 2004 U.S.App. LEXIS 741 (6th Cir., 1/13/04), the 6th Circuit Court of Appeals held that emotional distress damages were available under the Fair Labor Standards Act (“FLSA”) for claims in which it could be proven that an employee had been retaliated against under the Act. The plaintiff had been hired along with 2 other city code inspectors, with a white female making considerably more than two african-american males. This disparity created some hard feelings, and the plaintiff and the others made a series of complaints. Their supervisor attempted to extend the probationary periods of all three; one quit, one stayed, and the plaintiff was fired. He was out of work for 4 months and testified that during this period he was demoralized, worried constantly about paying bills and had to take his children out of a soccer league because he was afraid they would be injured and he had no health insurance. He later got a better paying job. He claimed he was retaliated against for complaining about disparate pay, and a jury agreed with him and awarded him \$40,000 in emotional distress damages.

On appeal, the city argued that there was no provision under the FLSA for an award of emotional damages, and asked the Court to reverse that part of the case. The Court refused, and

joined three other federal judicial circuits in ruling that emotional distress damages were available for retaliation claims under the FLSA. It ruled that the FLSA “allows any legal or equitable relief that is appropriate to further the purposes of” the Act, “one of which is to ensure that employees feel free to report grievances under the FLSA.” The Court noted that the statutory scheme contemplates compensation in full for any retaliation employees suffer from reporting grievances, and there is no indication that it would not include compensation for demonstrable emotional injuries, as well as economic ones.

Employees Working In Antarctica Not Entitled To Overtime

Just in case you were wondering, or actually do have employees in Antarctica, Antarctica is a “foreign country” under the FLSA, and thus any employees you may have there are not entitled to overtime, at least according to Judge Tauro of the Massachusetts District Court (federal) in *Smith v. Raytheon*, 2004 U.S. Dist. LEXIS 47 (D.Mass., 1/5/04). Raytheon had contracted with the National Science Foundation to provide support services for the Foundation’s Antarctic Program, which performs a variety of research activities on the continent. Several employees sued Raytheon claiming they were entitled to overtime pay while working on those support services.

The Court dismissed the case. The FLSA does not cover “work performed in a foreign country”. Plaintiffs argued that because the United States did not recognize any other nation’s claims to sovereignty in Antarctica, the Act should apply. The Court noted that other nations in fact have claimed sovereignty over Antarctica, and thus there was a real risk that the United States’ application of its domestic law might offend other nations, regardless of whether the US recognizes any nation’s claim to Antarctica.

LEGISLATIVE AND REGULATORY ACTIONS OF NOTE

New Hours-Of-Service Rules For Truckers In Effect

New federal regulations governing cargo-carrying interstate drivers went into effect on January 4, 2004, although the Federal Motor Carrier Safety Administration (“FMCSA”) says it will focus on education rather than enforcement for the first 60 days. The new rules provide that truckers may be on duty for up to 14 consecutive hours, and drive for a maximum of 11 of those hours, before a rest period of 10 hours is required. The old standard was 15 duty hours with a maximum of 10 hours of driving after 8 hours of rest. On-duty non-driving time often involves loading and unloading the truck. Drivers are still limited to 60 on-duty hours in any seven day period (or 70 hours in 8 days).

Short haul drivers (who return to the place where they started their day) may work a 16 hour day once every seven days, but are still subject to the 11 hour driving maximum. Forty-seven states also have incorporated the new rules into their regulatory schemes for inter- and intra-state driving, including all the northeast states. More information is available at the FMCSA website at www.fmcsa.dot.gov.

Senate Passes Pension Funding Relief Bill

On January 28, 2003, the United State Senate passed legislation substituting a higher corporate bond interest rate for defined benefit pension plan funding in place of the 30-year Treasury bond rate. The Pension Benefit Guaranty Corporation (“PBGC”), the federal agency which oversees and insures private pension plans, estimates that this change will save businesses about \$80 billion over the next two years by reducing payments employers would be required to make for underfunded pension plans. This bill must now be reconciled in committee with a similar bill passed by the House. The bills enjoy broad support from both business and labor and we can reasonably expect some version of it to be enacted in the next month or so. The possible hang up would be another part of the Senate version which would allow employers in some industries (airlines and steel, for example) to waive “catch up” payments, an element not present in the House version and which the White House has said would precipitate a veto of the entire bill. We will keep you informed.

OSHA Seeks Guidance On “Piercing Corporate Veil”

In a somewhat questionable endeavor, the Occupational Safety and Health Administration (“OSHA”) has solicited “amici” (friend of the court) briefs from interested parties regarding the authority of OSHA to pierce the corporate veil in enforcement cases. Put another way, OSHA wants to be able to hold individual business owners liable for OSHA Act violations by disregarding the corporate form despite the general corporate rule of limited liability of individuals for corporate actions. Even OSHA’s administrative law judges have split on this issue. Now OSHA seemingly seeks to tap the legal expertise of the private sector to buttress its goal. More information about this issue is available at OSHA’s website at www.osha.gov.

NIOSH Plans To Study Women’s Depression In The Workplace

The National Institute for Occupational Safety and Health (“NIOSH”) has announced plans to study the relationship of workplace factors to depression in women. NIOSH stated that depression accounts for more lost work days than other health diagnoses and that its workplace costs rival those for heart disease. The study will review workplace factors such as changes in workload, social support and work roles and attempt to determine whether or not such factors are linked to depressive symptoms in women, who suffer depression at much higher rates than men.

NIOSH is part of the federal Centers for Disease Control and is the federal agency charged with conducting research into occupational illnesses. Its announcement was published in the Federal Register on January 23, 2004, and comments must be submitted within 30 days. More information can be obtained at the NIOSH website at www.cdc.gov/niosh.

Budget Bill Passed, But Revised Overtime Regulations Still Will Be Attacked

On January 22, 2004, the Senate passed an omnibus spending bill including funding for the Department of Labor. As noted in prior Updates, there was immense controversy over the DOL’s proposed revisions to federal wage & hour regulations, and one holdup was an amendment to bar use of DOL funds for those revisions. In the face of a threatened veto by President Bush, that amendment was removed in conference committee, but the bill still had to survive a Democratic filibuster to be passed. It now goes to the President for his signature.

Congressional Democrats, however, have promised to use the Congressional Review Act in an attempt to rescind the rules once they are published in final form by the DOL. The Congressional Review Act allows Congress to rescind agency regulations by a simply majority vote and no filibustering is allowed. We will continue to report on developments as they occur on this important issue.

U.S. Chamber Of Commerce Releases Results Of Latest Benefit Survey

On January 21, 2004, the U.S. Chamber of Commerce released the results of its annual benefits survey, which showed that employee benefit costs have risen to 42.3% of payroll costs for calendar year 2002. In 2001, that figure was 39%. Medical benefit costs, unsurprisingly, accounted for much of the increase, according to the Chamber, rising from 11% in 2001 to 15.2% in 2002. On average of the 372 companies surveyed, employees received approximately \$18,000 above wages for benefits, including health and life insurance, time not worked and retirement benefits. The Chamber's website is at www.uschamber.com.

ON THE EMPLOYEE BENEFITS FRONT

Supreme Court Remand Finally Decided

In May, 2003, the Supreme Court decided the case of *The Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003), which held that an ERISA disability plan was not required, as is the case in Social Security cases, to give controlling weight to the opinion of a participant's treating physician and no weight to the plan's own physician. The Court then remanded the case back to the 9th Circuit Court of Appeals, which had ruled that the employee's physician's opinion had to be given controlling weight.

On January 23, 2004, the 9th Circuit finally decided the case and reversed itself. The Court noted that where a plan administrator has "discretionary authority to determine eligibility for benefits," the Court would review the decision under an "abuse of discretion" standard, rather than a "de novo" standard (meaning that the Court would look at the evidence and make its own decision rather than having to defer to the plan administrator's decision unless the administrator's decision could be said to constitute an abuse of discretion). Here, the administrator had discretion. However, the other aspect of the case was a perceived conflict of interest on the part of the plan administrator, because Black & Decker was both the plan funder and the plan administrator. Thus the Court wrote that "where the benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion."

But a conflict of interest is not enough, in and of itself, to constitute an abuse of discretion. There must also be "material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self-interest caused a breach of the administrator's fiduciary obligation to the beneficiary." That evidence can be inconsistencies in the administrator's reasoning, insufficient reasons, or procedural irregularities in the processing of the claim. If the administrator cannot rebut that evidence, then the claim is reviewed under the de novo standard.

Here, the plaintiff was unable to show any viable evidence, beyond the mere fact of the conflict of interest, that the administrator's self-interest contributed to its decision to deny benefits

to the plaintiff. Thus the Court upheld the prior District Court's decision upholding the plan administrator's denial of benefits.

Continuing Violation Theory Fails To Salvage ERISA Section 510 Claim

As we noted last month in our discussion of *Curby v. Solutia, Inc.*, 2003 U.S.App. LEXIS 25210 (8th Cir., 12/15/03), Section 510 of ERISA makes it unlawful for an employer to take adverse employment action against an employee for exercising any rights she may have under an ERISA plan. In this month's case of *Berry v. Allstate Ins. Co.*, 2004 U.S.App. LEXIS 23 (5th Cir., 1/5/04), the plaintiffs were former temps supplied to the defendant by a temp agency. The plaintiffs then were hired by the defendant, but told that they would not be eligible for Allstate employee benefit programs. Years later, plaintiffs sued, claiming under ERISA Section 510 that the defendant fired and rehired all its office staff to avoid benefit eligibility, and fraudulently misled the plaintiffs into believing they were not eligible for benefits. Added to their ERISA claim was a claim under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO").

The defendant argued that the claims were barred by the applicable statute of limitations, which in this case was two years. The plaintiffs countered with the so-called "continuing violation" theory, which basically means that the discriminatory act performed has kept repeating itself over time, and each repetition is, in effect, a fresh act of discrimination. Here, the plaintiffs claimed that the act of denying benefits has effectively continued from the original decision to deny benefits from years ago until today. Defendants argued that, even if there was a discriminatory act, there was only one and it was more than two years before the case was filed, and therefore the plaintiffs lose.

The Court agreed with the defendant that the original denial of benefits was a discrete act and that the continuing violation theory did not apply because it was a one-time event. The Court noted that this was a different situation from a hostile work environment claim - to which the plaintiff had attempted to analogize the case - which by its very nature involves repetitive behavior. The Court declined to rule on the question of whether or not the continuing violation theory was a viable theory under ERISA Section 510; all it said was even if it was a viable theory, the plaintiff still loses.

ON THE LABOR FRONT

Parking Lot Handbilling By Non-Employees Barred

In *Walmart Foods v. NLRB*, 2004 U.S.App. LEXIS 642 (D.C.Cir., 1/16/04), the Employer operated a stand-alone supermarket in California. Aside from allowing the Girl Scouts to sell cookies, the Employer uniformly enforced its no-solicitation policy. In 1999, union organizers appeared and attempted to distribute handbills to store customers; the handbills urged customers not to patronize the store. The manager spoke with the handbillers, then called the police; by the time the police arrived, the handbillers had departed. The union filed an unfair labor practice charge ("ULP") against the store, and the National Labor Relations Board ("Board") eventually ruled that it was unlawful for the store to bar such handbilling and to call the

police. The Board ruled that under California law, the store did not have a right to bar nonemployee union organizers from the property, and thus it was a ULP to do so.

The Court reversed the Board. As the Court noted, generally an employer may bar nonemployee union organizers from its premises under the 1992 Supreme Court case of *Lechmere v. NLRB*, 502 U.S. 527 (1992). Thus unless California state law conferred a greater right on nonemployees than federal law did, *Lechmere* should govern the case and the Board was wrong. That is what the Court held. The Court ruled that under state law, the Employer had to permit nonemployee access only to the extent it was required to permit other “expressive” activity. Because the store was a stand-alone, and not part of a larger plaza or mall, it was not required to permit any expressive activity, and thus did not have to permit union organizing either. Thus the Court reversed the Board’s decision.

We note that the result in this case might well have been different had the store been in a plaza or mall-type of situation, as the case below suggests, though for other reasons. In such a case, the area might well be a quasi-public forum in which the store would have to allow union handbilling. Such shopping centers have been equated to the “functional equivalent of a town center,” to which public access had to be allowed. Thus this case highlights the necessity of being aware not only of federal labor law requirements for union organizer access to property, but also of the parameters of state law.

Employee Access, However, Is A Different Story

In another access case, this one from the Board and involving employees, *Town & Country Supermarkets*, 340 NLRB No. 172 (1/14/04), the Board ruled that employees were allowed to picket and handbill in front of their Employer’s store at a shopping plaza, and thus it was an unfair labor practice to ask the police to remove them.

While as noted above, nonemployee union organizers may be treated as trespassers, employees are not strangers to the employer’s property, but are already rightfully on the employer’s property pursuant to their employment relationship, thus implicating the employer’s management interests rather than its property interest. Thus generally off-duty employees may engage in protected solicitation and distribution in nonwork areas of the employer’s property.

Here, the Employer argued that it had received customer complaints about the picketers and handbillers, and that these complaints justified its actions in attempting to remove the picketers. The Board ruled, however, in agreement with the Administrative Law Judge, that these complaints on the whole involved a “variety of annoyances” such as placing fliers on the windshields of cars or into passing cars. The Employer’s documentation of a few instances of misconduct, which occurred only sporadically over a period of several months, in the Board’s view did not amount to substantial evidence establishing that a ban on picketing and handbilling was justified.

The Employer also argued that entrance and exit areas were work areas, and that “therefore a rule against employee solicitation in such areas is presumably valid to prevent disruption to the employer’s business.”_ However, the Employer failed to show that it maintained a rule regarding employee solicitation and distribution._ “Indeed, the judge found that [the Employer] has not had a written policy regarding solicitation or distribution at its stores._ Thus,

[the Employer] cannot justify its prohibition against employee picketing and handbilling by relying on a valid rule regarding employee solicitation and distribution in work areas.”

Thus the Board found that the Employer had violated the Act “by prohibiting its employees from engaging in picketing and handbilling on behalf of UFCW near the exit and entrance of its Portage and Valparaiso stores; threatening employees with arrest for such picketing and handbilling in front of its Valparaiso store; and causing the arrest of employee Jeff Kimbrough for handbilling on behalf of UFCW in front of the Portage store.”_

Board Finds Unlawful Impasse On Permissive Subjects Of Bargaining

In *ServiceNet*, 340 NLRB No. 148 (12/15/03), during successor contract negotiations the Employer made two proposals. The first was to create an employee committee that would meet with the Employer “prior to any changes being made in the group health insurance plan, to discuss whether to keep the current group health insurance plan in lieu of the other options which may be available at that time.” The second provided that upon contract expiration, “if agreement has not been reached on a successor Agreement, that all of the terms and provisions of this Agreement shall be kept in full force and effect until a successor collective bargaining agreement is agreed upon and ratified by the parties.” The union refused to agree to these two provisions, and the Employer declared an impasse.

The Board ruled that the Employer violated the Act by insisting on these two proposals to the point of impasse because both proposals were permissive rather than mandatory subjects of bargaining. Generally an employer may insist to the point of impasse only on mandatory subjects of bargaining, not permissive subjects. The Board held that the former proposal was permissive because it “allows the [Employer] to circumvent the Union and negotiate directly with the employees over a term or condition of employment, namely, the company health insurance plan,” rather than having the union involved. This aspect of the decision at least arguably appears to be relatively consistent with prior caselaw.

With respect to the latter proposal, the Board wrote that “[w]hile duration clauses are generally treated as mandatory subjects of bargaining, [this] article [] is different. Unlike the typical clause, it does not simply govern the duration of the agreement during its term. Rather, this article also requires adherence to the contract—including any no-strike and no-lockout undertakings—*after* it has expired and while negotiations for a new agreement are ongoing. The parties are, of course, free to enter into such an agreement—i.e., it is not an illegal proposal. By so agreeing, they would thereby voluntarily forego their respective rights to take economic action in support of their bargaining positions and indeed would afford a measure of stability and certainty during the negotiation process. But, neither party can be compelled to relinquish its right to exercise its economic weapons perpetually.”