

Mistake Of The Month - - You Have To Get Your Story Straight

In *Brimm v. Building Erection Services*, 2004 U.S. Dist. LEXIS 5394 (D.Kan. 3/31/04), one of plaintiff's supervisors addressed him by various racial epithets and told racially offensive jokes. Co-workers engaged in similar conduct. Despite complaining to the Company's EEO officer, the conduct continued. Then the general foreman told plaintiff he was being fired because he did not have welding papers, even though he had never been told he needed to be a certified welder. He filed a racial harassment and discrimination charge with the EEOC, where the Company claimed the reason for plaintiff's termination was because of excessive absenteeism, the work was ending, and because he had exploded a firecracker on a job site. After the case went to federal court, the Company gave similar reasons for the discharge, even though plaintiff had not been told of those reasons at the time he was terminated.

The Company moved for summary judgment, essentially arguing that the alleged conduct did not constitute a hostile work environment, and that plaintiff could not establish illegal retaliation. The trial court denied the motion. The Judge found that, at least at this stage of the case, the plaintiff had shown that the harassment--including continual racial epithets and jokes--was sufficiently severe and pervasive to create an abusive working environment.

The Court ruled that the company's "shifting explanations" for the plaintiff's discharge supported his claim that the motivation for the discharge was a retaliatory one, the court said. Coupled with evidence that other employees had set off firecrackers on the job but were not disciplined, those shifting explanations were enough to establish an inference that the discharge was a pretext for discrimination, at least for purposes of denying the Company's summary judgment motion. Finally, the Company argued that the plaintiff had not established any causal link between his termination and the harassment because no harassment occurred during his final three weeks; the Court, however, ruled that the "temporal proximity" between the harassment in October and plaintiff's termination was sufficient to establish causation. Thus the Court denied the Company's motion for summary judgment.

This case illustrates one of the common issues in terminations that later are litigated, a discharge reason that either (1) at the time seems justifiable, but upon later and calmer reflection seems to need some beefing up to survive litigation; or (2) one that is limited at the time of termination because an employer does not want to be seen as "piling on." In either case, we suggest that a little more foresight should go into these decisions, and that if an employee is to be terminated, he or she be given all the rational reasons why. As this case shows, shifting reasons, or additional reasons not given to the employee at termination but raised only later in litigation, make the employer look untruthful.

The Harshbarger Report

The Value Of Corporate Integrity

In many respects, corporate integrity - the ethics and core values of a business enterprise - is nothing more than individual integrity writ large. People expect business corporations to have values, to act according to their values in a consistent manner, and to make the right choices where the public good is at odds with corporate self-interest. This expectation has long applied to the corporation's official acts: how it accounts for revenues, what business practices it encourages

or condones, and what it says in its annual reports.

From now on, expectations of high integrity are going to be more rigorously applied to the personal acts of corporate leaders, especially CEOs. This broader definition of corporate integrity is a result of two perceived realities: first, the exposure of misbehavior and excesses of a few CEOs, and second, the continued reform foot-dragging by corporations themselves.

Corporate leaders are placed in an impossible position. Like public elected and appointed executives before them, they are increasingly being held accountable for the personal behavior of *all* of the members of their organization. But not only can they not oversee each and every individual, most are unaccustomed to defining and discussing “high integrity behavior.”

Is there a way to inculcate high integrity, maximizing the likelihood that *all* the members of an organization will do the right thing? How can the corporation’s constituencies and the public be confident that top leadership has done all that can be reasonably expected to address corporate integrity? This is a challenge, but it is not impossible - there are some basic steps, each of which will be expanded upon in subsequent issues:

- Articulate and discuss integrity standards and expectations;
- Assess existing integrity systems;
- Develop new systems to define and control integrity;
- Develop high integrity leadership practices, including:
 - Directness;
 - Openness; and
 - Involvement.
- Redefine consequences management practices.

EMPLOYMENT LAW HEADLINES

First Circuit Rules Company May Be Liable For Discrimination Even Where Decisionmaker Lacked Discriminatory Animus

In an important age discrimination case under G.L. c. 151B, out of the 1st Circuit Court of Appeals (covering Massachusetts, Rhode Island, New Hampshire, Maine and Puerto Rico), *Cariglia v. Hertz Equipment Rental*, 2004 U.S.App. LEXIS 6423 (1st Cir. 4/5/04), the Court ruled that a corporation can be held liable for discrimination when neutral decision makers, free of any age-based animus themselves, rely on information that is manipulated by another employee who harbors age-based discriminatory animus.

Plaintiff was the Boston Branch Manager for the Company. He significantly improved the financial condition of the branch during his tenure. He then had a dispute with his boss over when the painting of some equipment, “boom trucks,” would be done and expensed. Several witnesses testified at a bench trial in the District Court that the boss denigrated plaintiff, who was born in 1934, because of his age. The boss also ordered an audit of the Boston branch "motivated not by sound business reasons, but by a desire on the part of [the boss] to 'get the goods' on Cariglia because [the boss] believed Cariglia was 'over the hill,' 'not our kind' and 'should not be here.'" Evidence showed that this audit was “atypical,” according to the Court. The auditor

testified that the boss “asked me to . . . see if I could get any more information about . . . anything that was going on at the branch so that we could try to get rid of Mr. Cariglia.” The result of the audit was a "poor" rating for the Boston branch.

At about the same time, the Company received a copy of a letter from the attorney of a Boston branch employee which alleged improper business practices at the Boston branch, including equipment rented without proper rental agreements, money offered in exchange for ignoring improper rentals, equipment leased to customers without accounts, and equipment rented to customers but returned by others. In conjunction with the audit results, this letter spurred an internal corporate security investigation. While the allegations in the letter were not substantiated, the investigation did reveal some areas of concern, including “slipshod” internal controls. The investigation generated yet another internal audit, particularly surrounding the painting of the boom trucks. This audit concluded that the boom trucks had been out on rental and not available for painting.

Ultimately, senior management, based largely on information provided by the plaintiff’s boss, ordered that he be terminated for “gross misconduct.” The District Court found as a factual matter that the senior managers were free of any personal age-based animus towards plaintiff when they made this decision, but that his boss was motivated by age-based animus. Plaintiff was replaced with an individual who was under 40. Plaintiff filed suit against Hertz and his boss. Following a five-day bench trial, the district court ruled in favor of both defendants. This appeal followed.

The focus of the case was the correctness of the District Court’s decision that "the decision to terminate Cariglia was independent of any discriminatory animus that underlay Heard's derogatory, age-based remarks" because "there is no evidence in this case that any of [senior management] was motivated by discriminatory animus. There is no evidence that Heard ever discussed or otherwise infected [senior management] with his age-based bias against Cariglia." The Court ruled that “[t]his focus on whether Heard's animus infected people (the decision makers) rather than the process (manipulating the information relied upon by the decision makers) was erroneous.”

Relying on prior decisions both in Massachusetts and other jurisdictions, the Court ruled that a company may be liable for the discriminatory animus of a supervisor where that animus infected the decision making process, even though other individuals untainted by bias may have made the ultimate decision. “Although the district court's explicit findings approach an implicit finding that Heard never divulged to [senior management] all of the circumstances surrounding the booms issue, we are reluctant to rely on an implicit finding

on this critical issue. Accordingly, we remand to the district court so that it can address whether Heard did indeed fail to provide [senior management] with the full story regarding the booms. If the court so finds, then . . . ‘the subordinate [Heard], by concealing relevant information from the decision making employee[s] Plescia, Steele, and Kaplan,] or feeding false information to [them], is able to influence the decision.’ This influence makes Heard's animus ‘probative in an employment discrimination case’ Under the relevant law, the issue of the booms as grounds for termination would be impermissibly tainted with Heard's animus.”

Last Chance Agreement Was Strictly Applied

In an odd case, *Conoshenti v. Public Service Electric & Gas Co.*, 2004 U.S.App. LEXIS 7152 (3rd Cir. 4/13/04), plaintiff along with his union signed a last chance agreement (“LCA”) in 1999 to resolve a charge of keeping inaccurate time records and leaving his shift early. The LCA required, among other things, “reporting to work every day and on time.” Any violation “would automatically constitute just cause for his immediate discharge.” In December 1999, plaintiff was struck by an automobile and sustained a serious injury that required hospitalization. Shortly thereafter, on December 6, 1999, plaintiff informed his boss of his accident and the seriousness of his injuries. He also informed his boss that his physician had indicated that he would need to be out of work for at least two weeks in order to recover. At no time did the employer notify plaintiff of his FMLA rights. He then had surgery in January 2000, and sent the employer a form completed by his doctor that indicated his diagnosis and that he would be unable to work until approximately April 2000.

The employer then decided to terminate plaintiff’s employment for violating the LCA because he did not report for work after his accident, but postponed action when plaintiff requested FMLA leave, which the union recommended to him. The employer then determined to terminate plaintiff on his first day back from leave. In April 2000, plaintiff’s doctor authorized his return to unrestricted work duty. On April 17, 2000, plaintiff reported for work. After one hour on the job, however, he was called into his supervisor's office and told he was being terminated for violation of the LCA. The termination letter stated, in part, that “On December 6,

1999, you were unable to report to work as a result of being involved in a motor vehicle accident. Subsequently, you were out of work for 92 days, a violation of the terms and conditions of your "Last Chance Agreement." As a result of your failure to comply with the terms and conditions of this agreement, your employment with Public Service Electric and Gas Company is being terminated April 17, 2000."

It was undisputed that plaintiff's absence from work exceeded the twelve weeks of leave that are protected by the FMLA. After his discharge, plaintiff and his union filed a grievance and the case was arbitrated pursuant to the LCA. Although the arbitrator noted that the LCA was very stringent and possibly even "draconian," he nevertheless found that plaintiff had violated its terms and therefore denied the grievance. This FMLA case followed.

In this case the plaintiff made two claims: (1) that he was terminated in retaliation for taking FMLA leave; and (2) that the employer "interfered" with his right to FMLA leave by not informing him of his rights under the FMLA, and that had he known he was entitled to only 12 weeks of leave, he could have postponed his surgery and reported for work at an appropriate time. The District Court entered summary judgment on behalf of the employer on both claims. On appeal, the 3rd Circuit agreed that plaintiff should lose his discharge case, but reversed the District Court on the "interference" claim, finding that it was the employer's burden to show at the summary judgment stage that the plaintiff had not shown any prejudice by virtue of the employer failing to provide him with FMLA information, and that the employer had not made such a showing.

On the discharge claim, the Court first noted that plaintiff "must show that (1) he took an FMLA leave, (2) he suffered an adverse employment decision, and (3) the adverse decision was causally related to his leave. There is no dispute that Conoshenti took an FMLA leave and that PSE&G discharged him on April 17, 2000. The issue for decision, accordingly, is whether the summary judgment record reflects a material dispute of fact as to whether there was a causal connection between the two." The Court ruled that there was not. Even when viewed in a light most favorable to plaintiff, "the record clearly indicates that Conoshenti would have been discharged absent any consideration of his twelve weeks of FMLA-protected leave. Conoshenti himself conceded . . . that any violation of the LCA 'would be deemed automatic just cause and he would be fired.' Here, there is no question that Conoshenti exceeded his twelve weeks of protected leave and, under the LCA, he was subject to immediate discharge on the very first workday that he was both absent from work and no longer protected by the FMLA." It thus was lawful to terminate plaintiff under the LCA since the FMLA 12 weeks protected period is 84 days, and after that his leave was unprotected. Having been out 92 days, it was permissible, according to the Court, to terminate plaintiff for not reporting to work the 85th day and thereafter.

On plaintiff's interference claim, the court agreed with the District Court that FMLA regulations imposed a duty on the employer to advise the plaintiff of his FMLA rights and that a failure to do so could result in an "interference" under § 2615(a)(1). The Court noted that if it were possible that the plaintiff could have restructured his leave had the proper information been provided by the employer, then he might be able to prevail. Here, nothing in the record indicated that plaintiff knew he was entitled to only twelve weeks of protected leave. Similarly, the record contained no evidence regarding the alternatives that would have been available to plaintiff had the employer advised him of his rights when he requested leave on December 6th. Thus the Court ruled that ". . . these gaps in the record . . . clearly did not warrant the grant of PSE&G's motion. Accordingly, we conclude that PSE&G, as the moving party, did not satisfy its initial burden of

pointing to an absence of evidence as to whether Conoshenti had been prejudiced. Conoshenti was therefore not required, pursuant to Fed. R. Civ. P. 56(e), to respond with specific facts establishing a genuine issue with respect to the prejudice requirement." That issue will be left for a later summary judgment motion or perhaps a trial.

"Church Of Body Modification" Practices

In a Massachusetts case, *Cloutier v. Costco Wholesale*, 2004 U.S. Dist. LEXIS 5128 (D.Mass., 3/30/04), the plaintiff was a member of the Church of Body Modification ("CBM"), which is "a national organization of some thousand members that emphasizes, as part of its religious doctrine, spiritual growth through body modification." The Court noted that "[a]ccording to the mission statement on the CBM website, members of the CBM believe that the practice of body modification and body manipulation strengthens the bond between mind, body, and soul, thus ensuring that adherents live as spiritually complete and healthy individuals. Among the practices of members of the CBM are body modifications such as piercing, tattooing, branding, transdermal or subcutaneous implants, and body manipulation, such as flesh hook suspensions and pulling." Plaintiff engaged in the practices of tattooing, piercing, cutting, and scarification. Although it does not appear that CBM doctrine demands the display of body modifications, plaintiff had interpreted church doctrine as "requiring her to display her body modifications at all times."

Ultimately the issue in this case revolved around the plaintiff's eyebrow ring and Costco's policy barring "visible facial or tongue jewelry," and the employer's obligation to reasonably accommodate an employee's sincerely held religious beliefs. Plaintiff was told she could not wear her eyebrow ring at work and she refused to take it out or place a band-aid over it. Another employee, also a member of the CBM, accepted the accommodation of using a "retainer," apparently a thin strand of clear plastic inserted into the eyebrow ring hole to prevent it from healing and closing, and which is much less noticeable than the ring itself. Plaintiff was terminated. She then sued, arguing that "wearing a band-aid over her facial piercing, or replacing her jewelry during working hours with a clear plastic retainer, would violate her personal religious convictions. Cloutier avers that it is her sincere belief that her religion, the CBM, requires that she display her facial jewelry at all times. Short of excusing her from the dress code policy entirely, Cloutier does not believe there is any accommodation that Costco could offer that would satisfy the tenets of her religion. Costco asserts that allowing Cloutier to be exempted from its neutral dress code policy would be an undue hardship on its business in that an exemption would undermine Costco's interest in presenting a professional appearance to its customers."

The Court began by noting that "where an employee's bona fide religious belief or practice conflicts with an employment requirement, Title VII requires the employer to accommodate [the belief or practice], within reasonable limits." There is a two-part test: "First, the plaintiff must "establish a prima facie case of religious discrimination based on a failure to accommodate." The plaintiff must show that "(1) a bona fide religious practice conflicts with an employment requirement, (2) he or she brought the practice to the [employer's] attention, and (3) the religious practice was the basis for the adverse employment decision." Second, if the plaintiff establishes a prima facie case, then the burden shifts to the employer "to show that it made a reasonable accommodation of the religious practice or show that any accommodation would result in undue hardship." While the Court engaged in a length discussion of how difficult it is to determine

whether or not a practice is a “bona fide religious practice,” it basically assumed that the plaintiff had satisfied her three elements.

As to the employer’s accommodation, the Court initially noted that “[i]t is important to underline that the search for a reasonable accommodation goes both ways. Although the employer is required under Title VII to accommodate an employee's religious beliefs, the employee has a duty to cooperate with the employer's good faith efforts to accommodate.” The Court wrote that the “accommodation offered by the employer does not have to be the best accommodation possible, and the employer does not have to demonstrate that alternative accommodations would be worse or impose an undue hardship,” and noted the “obvious fact that Title VII does not afford protection for “what amounts to a purely personal preference.”

The Court wrote that:

the weakness of the evidence supporting a prima facie case is fairly striking. Accepting the CBM as a bona fide religion -- a point that defendant hotly disputes -- the plaintiff appears to agree, and the court's own examination of the materials available seems to confirm, that the CBM in no way requires a display of facial piercings at all times. The requirement that she display her piercings, openly and always, represents the plaintiff's personal interpretation of the stringency of her beliefs.

Thus in the end the Court held that “Costco's offer of accommodation was manifestly reasonable as a matter of law. The temporary covering of plaintiff's facial piercings during working hours impinges on plaintiff's religious scruples no more than the wearing of a blouse, which covers plaintiff's tattoos. The alternative of a clear plastic retainer does not even require plaintiff to cover her piercings. Neither of these alternative accommodations will compel plaintiff to violate any of the established tenets of the CBM. Significantly, Cloutier herself suggested an accommodation along these lines in June of 2001. . . . Costco has a legitimate interest in presenting a workforce to its customers that is, at least in Costco's eyes, reasonably professional in appearance. The defendant's proffered accommodation reasonably respected the plaintiff's expressed religious beliefs while protecting this interest. In contrast, the plaintiff, after backing off from her original proposal, has offered no accommodation whatsoever, insisting instead that the defendant may not limit her piercings in any way, either in nature or number, without compelling her to disregard her religious scruples and thereby violating Title VII.”

Initial Consensual Nature Of Relationship Did Not Insulate Employer From Sexual Harassment Claim

In *Pergine v. Penmark Management*, 2004 U.S. Dist. LEXIS 7262 (E.D.PA., 4/22/04), the plaintiff engaged in what she admitted was initially a consensual sexual relationship with her supervisor; the two frequently utilized the office after-hours. After a series of on-again, off-again episodes, the plaintiff attempted to finally end the relationship after about a year. Plaintiff was given an anniversary review, in which she was told by the supervisor that she had problems with her attitude, that she was poorly looked upon by others within the office, and that she lacked independence. About a month later, plaintiff was granted a \$1,200 increase in salary, and also was also given \$ 1,000 for classes and seminars, and ten "men-hours" in the next year for maintenance work to be performed on her home with the condition that she not discuss personnel

issues with other employees, that she not discuss her salary until 30 days prior to her next anniversary, and that she comply with the terms set forth in a memorandum from the supervisor, which provided that the plaintiff report to work by 9 a.m. each morning, that she take only a one hour lunch break, work a minimum of eight hours each day and a minimum of 40 hours per week, keep a daily log of her hours, and that she control her emotional outbursts. Approximately two weeks later, the supervisor terminated her, supposedly at the request of his bosses because of plaintiff's "bad behavior" in the office.

She sued, claiming *quid pro quo* sexual harassment. The Court noted that to establish *quid pro quo* sexual harassment, a plaintiff must show that her response to unwelcome sexual advances or other verbal or physical conduct of a sexual nature was subsequently used as a basis for a decision about compensation, terms, conditions, or privileges of employment. The Company argued that the consensual nature of plaintiff's relationship with the supervisor automatically removed plaintiff's claims from "Title VII's purview" as a matter of law. The Court rejected this argument and referenced prior caselaw indicating that the initial consensual nature of a sexual relationship does not in and of itself insulate a company from liability where attempts were made to break off the relationship. The Court wrote that as to whether or not the supervisor's advances were "unwelcome," "the correct inquiry is whether [plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary. . . . While plaintiff may have voluntarily entered at first into a relationship with [her supervisor], there is a genuine issue of material fact whether after plaintiff attempted to terminate the relationship, the subsequent sexual overtures by Mr. Cafiero were unwelcome."

The plaintiff then must "establish a causal link between her response to the unwelcome advances and a subsequent employment decision." The Court found that plaintiff had offered sufficient evidence from which a reasonable trier of fact could find a causal link between plaintiff's stated desire to terminate the relationship with the supervisor and her subsequent termination. Not only did the evidence support the claim that the supervisor threatened plaintiff with termination, there is also a relatively close temporal proximity between plaintiff's latest attempt to express her displeasure with the supervisor's sexual advance and plaintiff's subsequent termination.

Moreover, noted the Court, "there are inconsistencies in defendants' proffered reason for plaintiff's termination." The Company claimed that plaintiff had been terminated because of her job performance, and pointed to "a litany of performance-related issues including plaintiff's lack of computer skills, her lack of organizational skills, her lack of confidence in her abilities, her lateness to work and extended lunch breaks, her lack of independence, her lack of communication skills, and her inability to delegate work." While the Court found there was "ample evidence" of these performance issues, "the uncontested fact that plaintiff received an almost 4 percent annual pay increase, a \$1000 benefit to take after-work computer courses, and 10 'men-hours' of maintenance work by Penmark to be performed on plaintiff's home, just two weeks before her termination belies defendants' argument and may cast doubt on the proffered reason for plaintiff's termination."

Thus the Court denied the employer's motion for summary judgment.

Pay Discrimination Claim Rejected Where Each Assistant Coach Had

Different Duties

In *Horn v. University of Minnesota*, 2004 U.S.App. LEXIS 6466 (8th Cir. 4/6/04), the plaintiff was the male "Second Assistant" women's ice hockey coach at the University. There also was a female head coach and a female First Assistant. The First Assistant had an 11 month contract at \$3,000/month, while the Second Assistant had a 10 month contract at \$2,000/month. The two assistants shared a general job description of "Assistant," but each were also given "itemized lists of separate, individual job duties." The First Assistant served as the "external liaison" with various groups, started and maintained a booster club, represented the team at meetings in the head coach's absence, organized all team travel and arranged meals and transportation for home games, and created a database to monitor information about potential recruits. The Second Assistant served as the internal liaison with the athletic trainer, strength and conditioning staff, academic counselor, and equipment manager, and had the additional responsibilities of identifying and evaluating potential recruits and breaking down the videotape of games.

Both Assistants received good evaluations and were renewed for the following year with salary increases. At some point during the season, plaintiff discovered the original and ongoing difference between his salary and that of the other Assistant and complained to the Director of Women's Athletics. Plaintiff alleged that after he made his initial complaint, the head coach began to treat him poorly, failed to communicate effectively with him, and undermined his authority in front of players. She also gave plaintiff a poor performance evaluation for the 1998-99 season and recommended that his contract not be renewed. Additionally, the head coach failed to invite plaintiff to participate in her independently run summer 1999 hockey camp. Nevertheless, after the 1998-99 season, the University offered plaintiff a new 12-month contract with another salary increase. Plaintiff rejected the offer and left the University for another employer in the fall of 1999.

The Plaintiff sued, claiming wage discrimination, retaliation, and constructive discharge in violation of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. Plaintiff alleged that the University paid him less than a similarly situated female assistant coach, retaliated against him for complaining about the wage disparity, and constructively discharged him. The District Court concluded that the two assistant coaches did not hold substantially equal positions, that plaintiff was not subject to an adverse employment action, and that Horn's working conditions were not intolerable. Thus the District Court entered summary judgment on behalf of the University.

On the plaintiff's appeal to the 8th Circuit Court of Appeals, the Court affirmed the judgment of the District Court. On plaintiff's wage discrimination claim, the Court noted that to establish a prima facie case under the Equal Pay Act (and a Title VII wage claim), a plaintiff must show discrimination on the basis of sex by paying different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Since it was undisputed that plaintiff was paid less than the First Assistant, he had to "come forward with evidence that the two assistant coaching positions were "substantially equal" in order to survive summary judgment. While it was clear that both Assistants did not have identical duties, plaintiff argued that both Assistants shared a number of basic coaching duties, as well as a number of separate duties that required equal amounts of skill, effort, and responsibility.

The Court disagreed. While both may have expended equal amounts of time and effort in fulfilling the duties of their respective positions, their duties required skills and experience that

were distinct from each other. In describing her decision to name the First Assistant, the head coach noted that her ability to communicate with the public and her experience as a highly-recruited player in a Division I program gave her an edge in making recruiting contacts, coordinating a booster club, and appearing in place of the head coach at public speaking events. The head coach also, at least initially, was equally complementary of plaintiff's abilities to identify potential recruits, break down game tape, and coordinate with other University staff such as the trainers, equipment managers, and academic counselor. "Nevertheless, these abilities, skills, and responsibilities differed significantly from those of the First Assistant. . . . Because the two positions required different types and degrees of skill and responsibility, they were not 'substantially equal' as required by the Equal Pay Act and Title VII. We will not engage in a subjective assessment of the University's decision to value the duties of the 'First Assistant' over those of the 'Second Assistant' where the duties themselves were different."

Plaintiff also alleged that the University retaliated against him for filing a wage discrimination complaint with the Women's Athletic Director. In order to survive summary judgment, plaintiff must show that he suffered an adverse employment action on account of his participation in the protected activity of complaining. Here, even though the head coach recommended that he not be retained, the University offered him renewal with a raise. The head coach's failure to invite plaintiff to participate in her independently run hockey camp was unrelated to the terms or conditions of his employment. And while plaintiff's working conditions may have become somewhat uncomfortable after he filed his complaint, he failed to offer any evidence that the deterioration of his working relationship with the head coach resulted in any materially significant disadvantage to him: "Indeed, [plaintiff] not only retained his job with the University, he received an offer for an extended contract term of 12 months at an increased salary."

Finally, plaintiff alleged that the head coach "created such intolerable working conditions that he was forced to quit his job and seek employment with another institution." The Court, however, found that even if the head coach wanted plaintiff to quit "and took steps to prevent him from being rehired for the 1999-2000 year, her actions do not rise to the level of a constructive discharge unless her actions created 'intolerable' working conditions for" plaintiff. While the Court agreed that the head coach's "documentation of his alleged performance problems and her unprofessional treatment of him in the presence of players . . . may have been uncomfortable or difficult for [plaintiff], they did not rise to the level of 'intolerable working conditions' as defined under Title VII."

Thus the 8th Circuit affirmed the entry of summary judgment on behalf of the University.

"Toxic" Work Environment Not Necessarily Actionable

In *Sharon Hesse*¹ v. *Avis Rent A Car System, Inc.*, 2004 U.S. Dist. LEXIS 4553 (D.Minn. 3/18/04), plaintiff began working for Avis in April 1995, first as a customer service representative, then as a rental agent, then a promotion to Maintenance & Damage Clerk. In the summer of 1999, she was given additional clerical duties, for the first time under the supervision

¹ No, not any relation to Katherine of which we are aware.

of a male manager. Plaintiff's complaints began when her manager asked her two or three times to make a telephone call; she refused and told him to make it himself. The manager kicked the corner of plaintiff's desk and shoved the back of her chair. When plaintiff told him to stop, he responded, "What are you going to do about it." Plaintiff told him she would "get [him] for harassment," and he pushed her chair again. They then agreed to speak with the manager's supervisor. After plaintiff related her version of the incident, the supervisor indicated she wanted to speak to each of them individually. Plaintiff returned to her desk, and afterward, plaintiff observed the two in the hallway "talking and laughing," and she concluded that the supervisor "wasn't going to respond to [her] plea."

Although plaintiff was aware of Avis's anti-harassment policy and several other avenues for reporting harassment within the company, she made no attempt to use these options. Instead, after leaving work, she made a 911 call to the police to report the incident, saying she was afraid to return to work. The police complaint was dismissed as unfounded the next day. In her subsequent meetings with an HR representative, plaintiff was asked to identify her manager's "disturbing" conduct. Plaintiff claimed that Johnson frequently "clapped his hands together really loud," knocked on the glass that separated her office from the garage area, and deliberately squeaked his tennis shoes to create a loud noise. Plaintiff believed he intended to intimidate and harass her with the noise, and stated that he sometimes laughed when she asked him to stop. Plaintiff also stated she felt offended and harassed by his supervision because he "badgered" her by "repeating a question over and over." She acknowledged she disliked his criticism and would sometimes refuse to answer him. Based on plaintiff's complaints, the manager was required to attend a management class in the winter of 1999, and she was promised the noise making would stop.

The hand-clapping and shoe-squeaking subsided, and nearly a year passed, during which time plaintiff made no complaints about the manager. However, in October, 2000, plaintiff and the manager had a second conflict when he shouted a question to plaintiff from his office and she refused to answer. The manager emerged from his office, visibly angry, and yelled at plaintiff, who threatened to call the police if he did not leave her alone. The manager immediately reported plaintiff's response to his supervisor, who advised plaintiff to leave the work area if she felt threatened. Following this incident, the manager wrote to his supervisor and HR complaining about plaintiff's response and asking for guidance. His letter referred to plaintiff's prior 911 call, indicating that he had not forgotten the incident. In a subsequent group meeting, plaintiff advised the manager that she did not like him to yell or repeatedly ask her questions. Although she did not dispute making mistakes, plaintiff felt her manager unfairly criticized her work, and characterized his comments as "nitpicking." Plaintiff nonetheless admitted falling behind in her work.

In her deposition, plaintiff asserted she was also sexually harassed by a female manager and a female co-worker, and that throughout her employment, she felt harassed by what she perceived as the female manager's inappropriate flirtation with her manager. Plaintiff felt similarly harassed by another female employee's attention to her husband, and recalled a single incident in the summer of 2001 when that female employee made a joke with sexual overtones about plaintiff's husband.

After September 11, 2001, Avis experienced a significant drop in rental business. In response to its revenue loss, Avis made efforts to cut costs, including reducing the size of the vehicle fleet. In November, 2001, Avis reduced its payroll by, in part, eliminating plaintiff's job

and reassigning her duties. Plaintiff and thirteen male employees were laid off. Because plaintiff's position was eliminated, she was never called back to work. She learned, however, through her husband of other open positions, including that of rental clerk. She never contacted Avis to inquire about or apply for another job. Four months after being laid off, she found a job with another company.

As you might have guessed by now, plaintiff sued Avis claiming that she suffered under a hostile work environment, and that she received disparate treatment because of her gender. She also alleged Avis terminated her employment in retaliation for her complaints of sexual harassment. The employer moved for summary judgment in its favor, which after discussion the Court granted.

The Court began by noting that "Plaintiff is female, and as such, is a member of a protected group. The Court assumes she found Johnson's conduct unwelcome, and that he was plaintiff's supervisor." Thus she satisfied the first three prongs of a *prima facie* case of sexual harassment. Nevertheless, "the Court concludes plaintiff has failed to demonstrate a triable question of whether Johnson's alleged conduct -- making noise, 'badgering' her, and pushing her chair -- was based on sex, or sufficiently severe and pervasive to affect her employment. Plaintiff therefore cannot establish a *prima facie* case of sexual harassment. Beyond this, Avis has produced overwhelming evidence showing it took proper remedial action regardless of the nature of the individuals' disagreements."

The Court found that "[a]busive behavior is not 'based on sex' if the harasser subjects both men and women to similar abuse. . . . Similarly, a supervisor's legitimate criticism of a female employee's mistake -- however harsh or insensitive -- is not harassment based on sex if the supervisor would have reacted the same way to a male employee's mistake." Here, plaintiff conceded that everyone at the Avis office was subjected to the manager's hand-clapping, shoe-squeaking, window-rapping and general noisiness. Thus the Court ruled that she was unable to show that the manager's behavior was directed at her because of her gender.

Nor was the plaintiff able to show that the conduct was sufficiently "severe and pervasive." To be actionable, conduct must be "extreme and not merely rude or unpleasant" in order to materially affect the terms or conditions of employment. As a rule, "isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms or conditions of employment." Here, according to the Court both parties "appear to have overreacted. No one disputes plaintiff and Johnson had a difficult working relationship; he bumped her chair, and she made a '911' emergency call and filed a police complaint about it. The Court hasn't the slightest doubt this was unpleasant, and it was certainly uncongenial on both sides. . . . Plaintiff was clearly offended by Johnson's behavior but cannot prove that a reasonable person would be similarly offended. The record reflects no other employee complaints about Johnson's noise making." Thus plaintiff could not show that the manager's conduct was severe or pervasive.

The Court recognized that an employer "may not be vicariously liable for the sexual harassment if it (a) . . . exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Here, the human resources manager contacted plaintiff several times afterward to ensure the manager's conduct was no longer a problem. Although it appears the noise making never quite stopped, even plaintiff acknowledged it diminished. There was no record of any further incidents of the manager shoving plaintiff's chair or kicking her desk. Plaintiff made no

further complaints about the manager to any Avis supervisor. The Court ruled these facts strongly suggested that the employer's response was effective and so ruled as a matter of law.

Finally, plaintiff was unable to show that Avis' reason for her layoff was either a pretext for unlawful discrimination, or in retaliation for her sexual harassment complaints. As the Court noted, "[a]bsent evidence linking Hesse's termination either to gender or to statutorily protected activity, her claim fails as a matter of law. Hesse has failed to produce evidence showing Avis did not terminate her based on a genuine need to reduce costs in response to a downturn in business." Thus the Court entered summary judgment on behalf of the employer.

One might certainly wonder about this case, and the utter waste of resources both of the employer and the judicial system it has generated. Actually, the Court's opening paragraph says it all:

"People do not always get along. And people occasionally overreact. And sometimes people who do not get along overreact in the workplace. This can be a toxic condition. But toxicity is not equivalent to discrimination, nor is it actionable in federal court. This is one such case."

“Mother” Stereotype Could Support Sex Discrimination Claim

In *Back v. Hastings On Hudson Union Free School District*, 2004 U.S.App. LEXIS 6684 (2nd Cir. 4/7/04), Plaintiff was hired as a school psychologist at an elementary school in 1998 on a three-year tenure track. At the end of that period, when plaintiff came up for review, she was denied tenure and her probationary period was terminated. She sued, alleging that the termination violated her constitutional right to equal protection. The school contended that Back was fired because she lacked organizational and interpersonal skills. Plaintiff asserted that the real reason she was let go was that the defendants presumed that she, as a young mother, would not continue to demonstrate the necessary devotion to her job, and indeed that she could not maintain such devotion while at the same time being a good mother.

In essence, in her second year plaintiff took three months maternity leave. She claimed that once she returned, despite garnering outstanding evaluations, her two female supervisors repeatedly expressed concern about her good performance “being an act” until she got tenure, after which she would slack off to pay more attention to child-bearing and rearing. Plaintiff claimed she was repeatedly told that her job was not for a female with young children, that caring for young children was inconsistent with her job responsibilities and the commitment she would have to demonstrate and the hours she would have to work. Suddenly, she began being criticized for her work performance and she began receiving negative evaluations. Ultimately her two supervisors recommended that she not be awarded tenure, and she was not.

The District Court granted summary judgment for the defendants, on the grounds (a) that a "sex plus" claim could not be brought under §1983, (b) that defendants' comments were "stray remarks" which did not show sex discrimination, (c) that plaintiff had failed to prove that the reasons given for not granting her tenure were pretextual, (d) that there was no genuine issue of material fact supporting §1983 liability against the superintendent and the School District, and (e) that qualified immunity justified summary judgment in favor of the three individual defendants, on the grounds that the two supervisors had objective cause to deny tenure, and that the superintendent had relied upon their evaluations and conducted an impartial review.

The Court began by noting that “it takes no special training to discern [gender]

stereotyping in the view that a woman cannot 'be a good mother' and have a job that requires long hours, or in the statement that a mother who received tenure 'would not show the same level of commitment [she] had shown because [she] had little ones at home.'" The school argued, however, that "stereotypes about pregnant women or mothers are not based upon gender, but rather, 'gender plus parenthood,' thereby implying that such stereotypes cannot, without comparative evidence of what was said about fathers, be presumed to be 'on the basis of sex.'" The Court rejected this argument; while noting that her case would have been stronger if she had some comparison evidence of the school treating similarly situated men differently, she did not have to produce such evidence in order to maintain her claim. The comments alleged created an inference of discrimination, and plaintiff did not have to go further.

Thus the Court held that plaintiff had produced sufficient evidence to defeat summary judgment as to the two female supervisors. She had made out her prima facie case by offering evidence of discriminatory comments. The Court concluded that their cited justifications for their adverse recommendation and evaluation were pretextual, and that discrimination was one of the "motivating" reasons for the recommendations against plaintiff's tenure. As to plaintiff's case against the superintendent, the Court agreed with the District Court that no material facts existed that could support a jury finding of his liability under §1983. There was no allegation that he engaged directly in any discriminatory conduct, nor did the evidence suggest "deliberate indifference" of the sort that shows that "the defendant intended the discrimination to occur." Here, the superintendent conducted his own inquiry into plaintiff's tenure worthiness that included two sessions of personal observation; he examined her personnel file, spoke to parents, and drew on the information supplied to him by plaintiff's direct supervisors. The superintendent also conducted an inquiry into plaintiff's claim of discrimination, interviewing both supervisors about the allegations. There was no indication that either his observations or his investigation were undertaken with a jaundiced eye. Thus none of the evidence tended to show that the superintendent meant to discriminate. Moreover, the Court wrote, even if the jury were to find that the two supervisors intended to discriminate against plaintiff, the fact that the superintendent judged their motives differently does not by itself constitute evidence that he also intended to discriminate.

Finally, plaintiff argued that the Board of Education itself, the final decision-maker, evinced such "deliberate indifference" to the allegations of discrimination as to show that "the defendant intended the discrimination to occur." But the Court decided that plaintiff's allegations failed to establish that the Board of Education's response to the alleged discrimination was "clearly unreasonable in light of the known circumstances." The Board appointed an independent review panel pursuant to the Collective Bargaining Agreement between the District and the Teachers' Association to investigate plaintiff's situation, and that panel concluded that tenure denial was merited. "Under the circumstances, we believe that no jury could find that the Board intended that Back suffer the effects of gender discrimination based on stereotypes."

Plaintiff Terminated For Violation Of Harassment Policy Did Not Have A Religious Discrimination Claim

In *Bodett v. Coxcom, Inc.*, 2004 U.S.App. LEXIS 8154 (9th Cir. 4/26/04), in essence the plaintiff was terminated for violating the Company's harassment policy by coercing and harassing an openly gay subordinate. Plaintiff was a white female evangelical Christian

who supervised an openly gay employee ("Carson"). When they first began working together, plaintiff told Carson that homosexuality was against her Christian beliefs. In June of 2000, at a "coaching session", Carson was in a "state of emotional distress," because she had recently broken up with her partner and was concerned she could no longer afford to make house payments. Carson asked for plaintiff's advice, at which point, plaintiff told Carson that "the relationship she was in, was probably the cause of the turmoil in her life," that "God's design for a relationship was between a man and a woman," and "that homosexuality is wrong, [and] considered by God to be a sin" On Carson's suggestion, plaintiff shut the door and the two prayed together. Carson referred to this event as when plaintiff "made [her] born again." Shortly thereafter, Carson attended church with plaintiff at least once. Plaintiff also informed Carson about a "Women of Faith Conference," and offered to purchase a ticket for Carson despite the fact that Carson said she could not afford to go and that she already had plans for that night. Carson ended up attending the event after plaintiff purchased the ticket for her.

In November of 2000, Carson received a job offer from Defendant's Omaha office. Carson told another supervisor that she was leaving because she was uncomfortable with the way plaintiff had treated her sexuality. Carson gave as an example a recent conversation in which plaintiff had mentioned to Carson at the end of performance review that she would be disappointed if Carson were dating another woman, but happy if she were dating a man. When the supervisor asked Carson why she had not informed plaintiff that her behavior made her uncomfortable or filed a complaint with human resources, Carson explained that she had not done so because plaintiff "was her boss and she could not afford to lose her job." Carson did admit that plaintiff helped her in her pursuit of the Omaha job.

After her conversation with Carson, the supervisor discussed the issue with HR, which felt that the Company's harassment policy had been violated. The Company determined that if the plaintiff admitted to making the statements that Carson alleged, termination would be appropriate. Plaintiff did admit the occurrence of the events and conversations described by Carson. At the conclusion of the meeting, plaintiff was terminated, and told that her actions were "a gross violation of Cox's policy." Plaintiff filed this case alleging religious discrimination. The district court granted summary judgment for the Company on all of plaintiff's federal and state claims and this appeal ensued.

The Court first noted that "[a] plaintiff may show *either* that similarly situated individuals outside her protected class were treated differently, *or* 'other circumstances surrounding the adverse employment action give rise to an inference of discrimination.' As the district court correctly noted, Bodett failed to present any legitimate 'comparator' evidence on her religious discrimination claim. Viewing the evidence that she did present to the district court in the light most favorable to Bodett, we cannot say that she has demonstrated other circumstances surrounding her termination that demonstrate a bias or animus against her religion that give rise to an inference of discrimination.

Assuming that plaintiff had made out a *prima facie* case, the Company did come forward with the legitimate non-discriminatory reason for termination. The Cox harassment policy clearly stated that an employee can be terminated for harassing or coercing another employee on the basis of sexual orientation. Plaintiff did not dispute that she was on constructive notice of this policy, or that she admitted she had made

certain statements to Carson, specifically that she told Carson at the end of a performance review that she would be disappointed if Carson was dating another woman. According to the Court, from either an objective or subjective viewpoint, these statements clearly fall within the gambit of harassment, particularly because plaintiff was in a position of authority over Carson. At the summary judgment stage, these admissions alone were enough to "allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus, "but instead by a facial violation of Cox's Policy.

Moreover, again agreeing with the District Court, the Appeals Court found that plaintiff was unable to rebut the evidence submitted demonstrating a legitimate nondiscriminatory reason for firing her--that she violated the company's harassment policy by coercing and harassing an openly gay subordinate. Because plaintiff thus failed to raise an inference of disparate treatment on the basis of religion, and failed to argue or demonstrate that the Company failed to accommodate her religious beliefs, the Court affirmed the entry of summary judgment on behalf of the Company.

193 Unapproved Absences Over Five Years Enough To Justify Termination Of Diabetic

In *Brenneman v. Medcentral Health System*, 2004 U.S.App. LEXIS 8132 (8th Cir. 4/26/04), plaintiff was a pharmacy tech in a hospital, who had diabetes. During his employment plaintiff had substantial attendance deficiencies. According to his employment records, plaintiff had 193 unapproved absences and 34 late arrivals or early departures during five years prior to his termination, chiefly related to medical problems other than plaintiff's diabetes, such as six work-related injuries and other general illnesses. Defendant granted plaintiff FMLA leave on five occasions, none of which was for diabetes. Per its attendance policy, defendant disciplined plaintiff numerous times for his attendance problems. For example, plaintiff received a number of verbal and written warnings and suspensions. Although each disciplinary form affords the employee an opportunity to respond to the disciplinary action, plaintiff never once protested the imposition of discipline or mentioned his diabetes.

On March 31, 2000, plaintiff informed defendant that he "wasn't doing well and . . . wouldn't be in" that day. At that time, he did not mention that his absence was in any way related to his diabetic condition. On April 4, 2000, plaintiff met with his supervisors regarding his attendance deficiencies. During this meeting, however, plaintiff never referenced his diabetes as the reason for his latest absence. Under defendant's attendance policy, this absence triggered another suspension of plaintiff. Moreover, pursuant to that policy, this suspension triggered plaintiff's termination because it was his third attendance-related suspension within five years. Thus, at the conclusion of the meeting, plaintiff was terminated.

On April 6, 2000, plaintiff requested and attended a final exit interview with defendant's Vice President of Human Resources. Plaintiff, for the first time, mentioned that his March 31st absence was due to his diabetes and produced a doctor's note stating that the absence was due to an extended episode of diabetes-related hypoglycemia. Defendant, nevertheless, finalized plaintiff's termination. Plaintiff sued for disability discrimination and under the FMLA.

The District Court granted summary judgment for defendant on plaintiff's state and federal disability discrimination claims on the ground that plaintiff had failed to establish a

prima facie case of such discrimination; specifically, the District Court held that plaintiff was unqualified due to his inability to satisfy defendant's basic attendance requirements. The Court of Appeals agreed that plaintiff, as a matter of law, had failed to establish that he was otherwise qualified for the position of Pharmacy Technician with or without reasonable accommodation. Plaintiff's disability discrimination claims basically hinged upon defendant's failure to grant plaintiff the reasonable accommodation of FMLA leave for his diabetes-related absences and defendant's ultimate termination of plaintiff under its attendance policy based upon its assessment of points for these diabetes-related absences. "However," wrote the Court, "even if defendant had granted plaintiff medical leave for those absences which plaintiff specifically alleges were diabetes-related absences on February 16, 1996; February 9, 1999; and March 31, 2000, plaintiff, as a matter of law, would not have been qualified to perform the essential functions of the Pharmacy Technician position due to his excessive absenteeism."

According to one of the Company's affidavits, regular attendance is an essential function of the Pharmacy Technician position, which entails preparing and delivering medications to hospital patients, ordering, receiving, and stocking medications, and posting charges to patients' accounts. The court wrote that "[c]learly, plaintiff could not perform these duties when absent from defendant's premises. [The Company] further testified that plaintiff's excessive absences placed a great strain on the Pharmacy Department. Specifically each time plaintiff was absent, [the manager] would have to either call in an unscheduled employee to cover plaintiff's shift or else reassign plaintiff's duties to employees who were already scheduled to work. Consequently, according to [the manager], plaintiff's excessive absenteeism increased both employees' workloads and the department's pay-roll expenses and decreased the Pharmacy Department's morale. . . . In sum, plaintiff, as a matter of law, has failed to demonstrate that he was qualified to perform the essential functions of the Pharmacy Technician position, even if he had received medical leave as a reasonable accommodation for his diabetes; rather, the record is replete with evidence of plaintiff's excessive absenteeism, which rendered him unqualified for that position. Thus, the district court properly granted defendant summary judgment on plaintiff's disability discrimination claims under the ADA and Ohio law."

Plaintiff also claimed that defendant unlawfully interfered with plaintiff's exercise of his rights under the FMLA by counting various absences that he alleges were FMLA-qualifying absences on February 16, 1996; February 9, 1999; and March 31, 2000 under its "no-fault" attendance policy and by subsequently terminating plaintiff pursuant to that policy. The district court granted summary judgment to defendant on plaintiff's FMLA claim on the ground that plaintiff, as a matter of law, failed to give defendant sufficient notice of a FMLA-qualifying reason for these alleged diabetes-related absences.

The Court of Appeals agreed. The Court wrote that "[p]laintiff can point to only two instances in which he received attendance points for absences that he allegedly, expressly informed defendant were diabetes-related-his absences on February 16, 1996, and February 9, 1999. . . . Even if plaintiff had given defendant timely and sufficient notice that his February 16, 1996, absence was diabetes-related and, thus, FMLA-qualifying, plaintiff, as a matter of law, failed to give defendant, upon its request, medical certification that confirmed that this absence was, in fact, caused by plaintiff's diabetes-

the condition for which plaintiff would have given defendant the proper notice. . . . [as to February 9, 1999]. We assume *arguendo* that defendant had sufficient notice that plaintiff suffered from diabetes as a chronic health condition, and that defendant knew that plaintiff's diabetic condition caused him to use an insulin pump. While plaintiff testified at length about the physical effects that he experienced due to the insulin pump becoming disconnected from his body, plaintiff does not claim that he relayed this information to defendant. Rather, according to plaintiff, he merely told defendant that he was having a problem with his insulin pump. This statement, as a matter of law, could not have reasonably apprised defendant that plaintiff's February 9, 1999, absence was due to a 'serious health condition' under the FMLA.

Thus the Court of Appeals affirmed the District Court's entry of summary judgment on behalf of the Employer.

Employee On "Brink Of Discharge" Not Saved By Last Minute Revelation That He Had AIDS

In *Buie v. QuadGraphics*, 2004 U.S.App. LEXIS 8242 (7th Cir. 4/27/04), plaintiff was an African-American male with AIDS. Plaintiff worked in a finishing department producing printed materials. His supervisors warned him about frequent absenteeism three times between March 1998 and September 9, 1999. When providing the latest warning, his supervisor wrote that "if Anthony continues to have attendance problems he may be termed [sic] from Quad Graphics." Plaintiff was nonetheless absent without excuse and without notice again on September 24 and October 10, 1999.

On October 15, 1999, plaintiff again called in sick after his shift had already begun. Plaintiff's supervisor responded by saying that Buie's job was in jeopardy. Buie then said, for the first time, that he had AIDS and that his absenteeism was because of the syndrome. After his supervisor learned that plaintiff had AIDS, he told him not to return to work. Plaintiff then met with an HR manager, who told him that he could apply for FMLA leave for some of the absences when he had called in sick. She also told him not to report to work until he had completed the FMLA application and his attendance issue was resolved. Only after plaintiff returned to work, however, did yet another supervisor decide that plaintiff's leave would be considered a disciplinary suspension for excessive absenteeism.

In November, the HR manager then told plaintiff that she had excused many of his absences and requested that short-term disability benefits be paid to him for those absences. But plaintiff still had 14 unexcused absences during the preceding 11 months, including six no-call, no-show absences. On November 16, 1999, plaintiff was presented with a last chance agreement and offered the choice between signing or being fired immediately. Plaintiff signed the agreement, which also provided that he could be fired for any violation of the employee services manual or the agreement itself. Plaintiff "then returned to work, but the peace was short-lived."

Soon thereafter plaintiff had a confrontation with a supervisor during which a series of racial comments were exchanged. Several employees confirmed the supervisor's version of events and plaintiff was issued a written warning. Then a week later, plaintiff sought out one of the employees who corroborated the supervisor's story and confronted her. According to her, plaintiff pointed his finger at her and said, at a range where she "could feel Buie's spittle on her face, "I'll get you, bitch." When she asked him whether that was a threat, plaintiff replied that it was and asked where her witnesses were. Later that day, the housemother of the halfway house in

which the other employee lived received a call from a man identifying himself as "Anthony," who stated that if "something happens to [the employee] on the bus tonight, it's her own fault." At that point, plaintiff was terminated the next day. Plaintiff later was found guilty of disorderly conduct as a result of his confrontation with the employee.

Plaintiff sued the Company. The District Court entered summary judgment for the Company on all claims. On appeal, plaintiff pursued only claims of disability discrimination and FMLA retaliation. The Court of Appeals affirmed the District Court's judgment. Plaintiff's theory of discrimination under the ADA was that, although he was a qualified employee, the Company suspended him without pay, imposed a last chance agreement on him, and then fired him, because of his AIDS.

As to the theories that the Company violated the ADA by first suspending him without pay, and then discharging him, because he had AIDS, plaintiff put forth no direct evidence in support of either proposition. He did, however, present circumstantial evidence - the short time period between his suspension and the decision to fire him (they occurred on October 15 or 17 and December 1, respectively) and his announcement on October 15 that he had AIDS. The Court noted that while suspicious timing can give rise to an inference of discrimination, standing alone it is not enough to enable a plaintiff to recover. As the Court wrote, "the undisputed evidence shows that [plaintiff] was on the brink of discharge before anybody at Quad/Graphics knew that he had AIDS."

The Court also ruled that even if plaintiff had established a *prima facie* case of indirect discrimination, *i.e.*, that he was a member of a protected category and could perform the essential functions of the job with or without a reasonable accommodation, the Company had put forth a legitimate non-discriminatory reason for his termination - that he was chronically absent without excuse or warning, and that he threatened another employee. The Court wrote that "[t]hese reasons are nondiscriminatory, and thus, to avoid summary judgment, Buie had to put forth evidence that they were actually lies designed to camouflage that Quad/Graphics really acted against Buie because he had AIDS." The Court concluded that he had not. While plaintiff did put forward evidence that other employees without AIDS had problems with attendance and threats and were not terminated, he did not show that the problems were as serious, or even that those employees had been disciplined by the same decision makers, "which means that the discipline that they may (or may not) have received sheds no light on the decisions to suspend or terminate Buie." The plaintiff also argued that the lesser discipline received by the employee he threatened established pretext, but the Court wrote that "[a]n employer's decision to punish the instigator of a violent, or nearly-violent, episode more severely than it treats his victim is evidence of rationality, not pretext."

Thus the Court affirmed the District Court's entry of summary judgment on behalf of the employer.

ON THE EMPLOYEE BENEFITS FRONT

Fraud Claim Of Independent Contractor Preempted By ERISA

In *McGowin v. ExxonMobil Chem. Corp.*, 2004 U.S.App. LEXIS 6456 (5th Cir., 4/5/04), plaintiff performed services for ExxonMobil while on the payroll of a third-party employer ManPower. She came to work for ManPower only after learning of a job opportunity at

ExxonMobil that the company required to be filled by one of ManPower's employees rather than by a direct employee of ExxonMobil. As a condition of obtaining employment with ManPower, plaintiff signed a statement acknowledging that she was an employee only of ManPower. She received weekly paychecks and insurance benefits from ManPower. On her annual tax returns, plaintiff reported ManPower as her employer. "Nevertheless, she represents to the courts that she was, at all relevant times, an employee of ExxonMobil entitled to its employee benefits." After her termination from ManPower and the end of her duties at ExxonMobil, plaintiff sued ExxonMobil and ManPower in state court, alleging age discrimination, intentional infliction of emotional distress, fraud, and conspiracy to commit fraud, all in connection with the refusal to pay ERISA benefits. Plaintiff's theory is that "ExxonMobil falsely informed her that she was not an employee of ExxonMobil and was not entitled to its employee benefits."

The employer removed the case to federal court and then moved to dismiss, claiming plaintiff's causes of action were preempted by ERISA, and that under ERISA she had failed to exhaust her administrative remedies under the plans. The District Court agreed and dismissed the case.

On the plaintiff's appeal to the Fifth Circuit Court of Appeals, the Court ruled that plaintiff "may characterize her cause of action as arising under the common law of fraud, but she seeks a determination of her eligibility for benefits under an ERISA-governed plan, and she prays for relief specifically provided by § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Such a claim is completely preempted by ERISA and is removable to federal court." The Court also agreed that plaintiff had not exhausted her administrative remedies under the applicable plans, and wrote that "[c]laimants seeking benefits from an ERISA plan must first exhaust available administrative remedies under the plan before bringing suit to recover benefits." While plaintiff claimed that she had been denied information and access to the plans' internal review processes, "it strains credulity to think that McGowin—whether through counsel or not—possesses the sophistication to pursue a lawsuit in state and federal courts but lacks the basic capacity to ask a plan administrator for information on the filing of a claim. This contention is meritless."

Thus the Fifth Circuit affirmed the District Court's dismissal of the case.

Claim For "Loss Of Benefits" Was Preempted By ERISA

In *Carvin v. Exxon Mobil Corporation*, 2004 U.S. Dist. LEXIS 7082 (W.D. Tex. 4/1/04), Plaintiff alleged that she was terminated from her employment with Exxon Mobil for allegedly stealing a clock/cd player that had been provided to Exxon Mobil by a vendor as a free gift. Exxon Mobil had allegedly received the alarm clock/radio but had expressed no plan to dispose of it for several weeks. Plaintiff alleged that, when her alarm clock at home broke, she told the acting manager that she was going to take the free clock/cd player because hers had broken, and the manager nodded. Shortly thereafter, she was terminated for theft of company property. She alleges that, as a result, she lost her retirement benefits, medical benefits, and other employment benefits. The only cause of action set forth under an independent heading in the Petition was a cause of action for defamation. In the section entitled "Damages," she alleged that "as a direct and proximate result of the Defendants' aforementioned acts, omissions and conduct, Plaintiff CHERYL CARVIN has missed work, lost her job, lost her benefits, has been denied other employment opportunity, has been underemployed and suffered a loss of earning capacity." Later in her Complaint she specifically claimed that she had been terminated so the employer could avoid paying her benefits.

The plaintiff filed her case in state court. The Company removed the case to federal court on the basis that plaintiff's complaint really stated a federal ERISA claim and thus she could not maintain a state law action because of preemption. The plaintiff in turn sought to persuade the federal court to remand the case back to state court because her claim was not preempted by ERISA. Thus, noted the Court, "the question is whether the complaint fairly states a claim that is pre-empted by ERISA." The Court held that it did. The Court wrote that "[f]ederal courts have drawn a distinction between a complaint that alleges that the employer wrongfully terminated an employee to avoid paying benefits and a complaint in which loss of benefits is merely an element of damages for wrongful conduct. The first is preempted by ERISA; the second is not."

The Court found that plaintiff "clearly alleges a separate cause of action for termination to avoid paying benefits. She expressly 'sues for all causes of action which she is entitled to bring for wrongful ... termination to avoid paying benefits.'" The next sentence is, 'All conditions precedent to bringing these causes of action have been met.' Thus, on the face of the complaint, Plaintiff alleges a cause of action for wrongful termination to avoid paying benefits. This claim is preempted by ERISA and thus removal jurisdiction exists." Thus the Court ruled that it was appropriate for this case to remain in the federal court.

On The Labor Front

"Joint Employers" Liable For Unfair Labor Practices

In *Dunkin' Donuts Mid-Atl. Distribution Ctr. Inc. v. NLRB*, 2004 U.S.App. LEXIS 63120 (D.C.Cir. 4/2/04), the Court ruled that the National Labor Relations Board was correct in ruling that a labor supplier and a Dunkin' Donuts distribution center were "joint employers" liable for numerous unfair labor practices and appropriately ordered the labor supplier to bargain with a union that narrowly lost a representation election.

The labor supplier provided about 100 employees to Dunkin' Donuts to assist staffing in its warehouse and distribution center, some warehousemen and some drivers. A union began an organizational campaign among the leased employees, and ultimately lost an election by a narrow margin (48-43). The leasing company and Dunkin' Donuts ("Dunkin' Donuts played a key role in some of the events that the Board ultimately found to be unfair labor practices") were found liable for many unfair labor practices as a result of its conduct during the campaign. Among other remedies, the Board ordered the leasing company and Dunkin' Donuts to offer reinstatement to employees illegally discharged; to make whole employees who suffered losses; to purge the files of employees who suffered illegal discharges or discipline; and to post remedial notices. The Board also ordered the labor supplier to bargain with the union on request.

The Court wrote that "[t]he evidence here fully supports the Board's finding that Dunkin' Donuts 'was, to varying degrees, involved in decisions relating to employment tenure, discipline, assignment of work and equipment, recognition and awards, and day-to-day direction of the leased employees.'" Thus, ruled the Court, it was proper for the Board to find the two employers were joint employers jointly liable for the unfair labor practices.

Board Refuses To Order Employee Promoted

In *Georgia Power Co.*, 341 NLRB No. 77 (4/704), the Board ruled that the Employer violated the Act by failing and refusing to promote an employee to a supervisory position because

he engaged in protected concerted activities. By a 2-1 majority, however, the Board rejected the Administrative Law Judge's recommendation that the Employer offer the employee a promotion to the supervisory position. The majority ordered that the Employer reconsider the employee for a supervisory position, pay him back pay at the rate he would have received if he had been selected for the supervisory position, and continue to pay him at the supervisory rate until such time as he is promoted to a supervisory position.

Although the majority rejected the Employer's position that the Board lacked the authority to order the employee promoted to a supervisory position because such positions are not covered by the Act, they found merit in the Employer's contention that the judge's proposed remedy potentially infringed on the Employer's managerial hiring prerogatives. Because the employee had never held a supervisory position and had never been selected by the Employer's management to be a supervisor, the majority wrote that "by ordering his promotion to the supervisory ranks at this time we would be effectively assuming the 'managerial responsibility of weighing a wide variety of factors involved in [the] decision' as to whether Lewallen is suitable for a supervisory position." Accordingly, they chose not to assume that "managerial responsibility" and left to the Employer the ultimate decision as to whether the employee should be offered a supervisory position.

Board Orders Work Schedule Restored

In *Willamette Industries, Inc.*, 341 NLRB No. 75 (3/31/04), a 2-1 Board majority ruled that the Employer violated the Act by adversely changing the work schedules of a group of its corrugator employees from two nonrotating shifts to three rotating shifts in retaliation for their activity on behalf of a union, and ordered reinstatement of the prior schedule. The change was implemented only three days after an NLRB hearing officer recommended that the union be certified after a hotly contested election in which the Board found the employer committed numerous unfair labor practices. "It is uncontested that the employees most affected by the change, the first shift corrugator crew, unanimously supported the Union and that [the company] was aware of their support," the Board wrote. It found the entire day shift wore pro-union t-shirts the day of the first election and the supervisor indicated that he thought the day shift was 100 percent union.

Moreover, a supervisor had threatened such a change several times if the union won the election. Despite the Company's claim that it had been considering the change for months previously, the Board wrote that "when considered together with the timing of the announcement, shortly after the second election, the absence of a plausible explanation gives rise to the inference that the [company] was waiting for the results of the second election to implement the changes so as to retaliate against the employees."

The majority also ruled that "[i]n order to restore the status quo ante ... , the remedy must include both back pay, to compensate the affected employees for the loss of overtime suffered as a result of the schedule change, and the reinstatement of " the previous two nonrotating shift system.

Use Of "Ride Alongs" During Election Campaign Not Unlawful

In *Frito Lay, Inc.* 341 NLRB No. 65 (3/31/04), the majority certified the results of a decertification election in which the Employer prevailed. The Regional Director had ordered that

the election be set aside and another election held because of the Employer's use of "ride-alongs" (using nonunion truckdrivers from other facilities and company managers and supervisors, to ride along with employees while they drove their routes) to communicate with the unit employees prior to the election. The Board, applying a totality-of-the-circumstances test, found that Frito Lay's use of ride-alongs under the circumstances did not interfere with employee free choice because "[t]he tenor of the conversations during the ride-alongs was casual, amicable, and nonthreatening, and there was no pressure from management to discuss the election."

LEGISLATIVE AND REGULATORY ACTIONS OF NOTE

They're Here!

The federal Department of Labor has finally released its final rule revisions to the white-collar exemptions under the Fair Labor Standards Act. Please follow this link to our special update and explanation.

Pension Funding Stability Act Signed By President Bush

On April 10, 2004, President Bush signed the Pension Funding Stability Act, a law that will lower required employer contributions to traditional pension plans for two years and provide airlines and steel manufacturers relief from contributions required for underfunded plans. This legislation replaces the 30-year Treasury bond interest rate with a higher composite corporate bond rate as the benchmark for plan funding calculations, allows certain companies to postpone deficit reduction contributions, and allows certain multiemployer plans to temporarily delay the amortization of specified losses. In Notice 2004-34, the IRS issued the new interest rate in the form of a table listing the composite corporate bond rates for each month from January 2000 through March 2004. The notice also included a table of corporate bond weighted average interest rates for the same period, and said IRS will publish both rates each month.

FMCSA Issues Final Rule On Commercial Truck Driver Records

The Federal Motor Carrier Safety Administration has issued its final rule requiring current and former employers of commercial truck drivers to respond to inquiries from prospective employers seeking driving record information. 69 Fed. Reg. 16683. The new rule is effective April 29, 2004. Motor carriers hiring a new driver must investigate the individual's safety record at each organization where he or she worked in the previous three years, including whether the individual violated any hours-of-service rules, was involved in an accident, or was found to have misused alcohol or controlled substances. Motor carriers also must maintain a registry of accident information for three years (rather than the current one year), and make information from that registry available to prospective employers. Current and previous employers will have 30 days to respond to a prospective employer's inquiry, and prospective employers have five days to provide the applicant, upon written request, with the records provided by his or her current and previous employers, although prospective employers still retain the option of immediately hiring an applicant and having him or her work during the 30-day investigation period.

Did You Know?

That May is National “Good Car Care Month,” “Salad Month,” “Egg Month,” “Barbeque Month,” “Revise Your Work Schedule Month,” “Hamburger Month” and “Fungal Infection Awareness Month?”

That May 9 is “Lost Sock Memorial Day,” May 11 is “Eat What You Want Day,” May 14 is “National Dance Like A Chicken Day,” May 17 is “Pack Rat Day,” May 21 is “National Memo Day,” May 24 is “National Escargot Day” and May 31 is “National Macaroon Day?”

That the May 2004, “Molecule of the Month” is Osmium Tetroxide, a chemical believed to be at the center of a recent alleged bomb plot foiled by UK and US intelligence agents.