

## ***MISTAKE OF THE MONTH* - Be Careful How You Explain Plan Benefits To Employees**

In *Jones v. American General Life & Accident Ins. Co.*, 2004 U.S.App. LEXIS 9628 (11<sup>th</sup> Cir., 5/18/04), a class of retired insurance agents sued American when the company terminated a retiree group life benefit. The Plan stated, in various incarnations over a 40 year period, that retirees would retain their group life benefit at the company's expense. The Plan also contained, however, a "reservation of rights" clause, which generally stated that the company could amend or terminate the Plan at any time. The Company terminated the retiree group life benefit effective January 1, 2001. Plaintiffs claimed that a conversion to individual coverage was cost prohibitive and not a viable option for most of them.

The Plaintiffs raised two claims. First, they argued that under ERISA Section 502(a)(1)(B), they had a right to future benefits due them under the Plan. Under this section they argued both that (1) under the clear language of the Plan they were guaranteed a company paid retiree life benefit for the duration of their retirement, and (2) even if the Plan was ambiguous or unclear, they relied on representations of the company that they would always have this benefit. As to this argument, the Court upheld the District Court's entry of summary judgment on behalf of American. The Court ruled that "the language upon which the Appellants rely merely describes the period of time during which the Appellants were eligible to receive the group life benefit, so long as the Plan continued to exist. . . . This language is not inconsistent with the reserved right to unilaterally modify the benefits that American General provided through the Plan, and, as such, it cannot render the Plan ambiguous." Thus the benefit had not "vested."

Second, the Plaintiffs argued that under ERISA Section 502(a)(3), American breached its fiduciary obligations, "not by withholding a vested benefit, but by engaging in a systematic pattern of misrepresentation that caused the Appellants to believe that their insurance benefit would not be changed during their retirement. According to their complaint, 'Independent Life employees were routinely told by the company's management that if they stayed with the company until they were eligible for retirement, they would receive free, lifetime life insurance coverage'". The Plaintiffs further contended that they "relied on these misrepresentations to their detriment in making financial plans for themselves and their families."

As to this argument, the Court reversed the District Court's entry of summary judgment on behalf of American and remanded the case back to the lower court. First the Court noted that the weight of caselaw held that participants in an ERISA-governed plan may state a claim for breach of fiduciary duty based on allegations that the plan administrator had given vague and incorrect answers to them concerning the terms of their plan. The District Court had ruled in favor of the Company and not reached the merits of this claim because "if the remedy for [the Appellants'] injuries is an award of benefits under Section 502(a)(1)(B), they cannot also bring claims under Section 502(a)(3). This is true even if Defendant breached its fiduciary duty." The Appeals Court, however, ruled that the District Court had misconstrued prior cases and should not have dismissed the case on this basis. Thus "[b]ecause the Appellants concede for purposes of this claim that they are not entitled to the group life benefit under the terms of their plan, the Appellants 'must rely on [§502(a)(3)] or they have no remedy at all.' . . . . We cannot extend [our prior case] to deny the Appellants the remedy that the Supreme Court explicitly endorsed in *Varity*, or allow it to effectively eviscerate ERISA's clear mandate that fiduciaries discharge their duties 'solely in the interest of the participants and beneficiaries.' . . . Accordingly, we must

reverse the district court's dismissal of the Appellants' Section 502(a)(3) claim and remand for consideration of its merits.”

## ***The Harshbarger Report***

### **Articulate And Discuss Integrity Standards And Expectations**

CEOs must articulate their expectations when it comes to integrity. In today's environment, if CEOs fail to articulate and clarify their expectations and goals regarding personal and corporate integrity, employees and investors will both hear a very loud silence. Just as corporate strategy requires a mission statement that captures the essence of its strategic intent, corporations, for profit and non-profit, need an *integrity statement* that captures their ethical standards and sets the tone for the entire organization.

Articulating the standards of corporate integrity is an ongoing process, one that must be led by the CEO. Executives must *talk* about integrity. They must encourage discussion, debate, and candid conversations about the dilemmas and conflicts inherent in the corporate standards. Conversations will not necessarily convert a sinner into a saint, but they help people to recalibrate their positions on sensitive issues.

CEOs should see that forums are created to encourage integrity conversations, and not just around the water cooler. The most obvious forum is an integrity training experience. In addition to training programs, other occasions could be leveraged to include frank and open discussions of integrity issues and dilemmas: staff, sales and executive team meetings, board meetings, and the company newsletter and website. Integrity must become part of the air that everyone breathes.

It is crucial that the standards and expectations be realistic and specific to the organization, taking into account the real-life stresses the employees actually do face. Lofty statements generally do not drive behavior in specific situations. We have found that case discussions that include integrity dilemmas geared to the competing goals employees must negotiate are sure-fire ways of dealing with issues in a non-threatening manner. For example, we orchestrated such interactive sessions at Pepsi International by using one or two-paragraph case studies. We even created an “integrity maze” as a platform to help Pepsi executives have candid discussions about how to apply the Foreign Corrupt Practices Act to their international business situations. Constructive debate helps organizations define appropriate behaviors.

Articulating explicit integrity standards and making corporate integrity a mandatory topic for discussion are the best ways to ensure that leadership's expectations will be understood and accepted. Moreover, free and open dialogue will help leaders learn about real life ethical dilemmas that people throughout the organization must face.

## **OTHER EMPLOYMENT LAW HEADLINES**

### **Flip-Flop, Flippity Flop**

Yes, our own Massachusetts Supreme Judicial Court (“SJC”) is back in the news again. In four consolidated cases essentially raising the same issue, *Stonehill College v. MCAD*, 2004 Mass. LEXIS 271 (5/6/04), the Court changed its mind on whether or not employers are entitled to a jury trial on G.L. c. 151B claims of employment discrimination after an MCAD hearing.

The history goes like this: in *Dalis v. Buyer Advertising, Inc.*, 418 Mass. 220 (1994), the Court held that the Massachusetts Constitution entitled plaintiffs with sex discrimination claims under G. L. c. 151B, §9, to a jury trial, rather than having to try the case at MCAD or to a judge in the Superior Court. A year later the Court extended this right to a jury trial to claims of handicap discrimination in *Whalen v. NYNEX Info. Resources Co.*, 419 Mass. 792 (1995), and the next year to all plaintiff damage claims under G. L. c. 151B, §4, in *MacCormack v. Boston Edison Co.*, 423 Mass. 652 (1996). Finally, two years later in *Lavelle v. MCAD*, 426 Mass. 332 (1997), the Court ruled "the reasoning of this court in its *Dalis* opinion identifying the constitutional right of a complainant to have a trial by jury applies equally to a respondent such as Lavelle. If one side to a dispute has a constitutional right to a jury trial, generally the other side must have a similar right." The result was that after *Lavelle*, according to the Court, the Massachusetts Constitution dictated that defendants in employment discrimination cases were entitled to a jury trial in Superior Court if they wished, even after a §5 hearing at the MCAD. And as recently as 2000 the Court approved the holding of *Lavelle* - "We acknowledge that in *Wynn & Wynn, P.C. v. MCAD*, 431 Mass. 655 (2000), we spoke approvingly regarding *Lavelle*."

Not any more. In *Stonehill College*, the Court upheld the jury trial option of employment discrimination plaintiffs set out in the *Dalis*, *Whalen* and *MacCormack* cases, but pulled back on the constitutional right of defendants to a jury trial. The Court wrote that:

After reflection, we conclude that the constitutional analysis set forth in *Dalis* does not apply to parties in a §5 proceeding. The *Lavelle* court's pronouncement to the contrary circumvents the comprehensive scheme set out by the Legislature for the resolution of discrimination claims and (unintentionally) undermines the commission's authority to fulfil its mandate of protecting citizens of the Commonwealth from discriminatory employment decisions and punishing unlawful discrimination in the workplace.

The Court's "rationale" essentially was that "while the main object of a judicial proceeding under §9 is to recover damages for the individual victim of unlawful discrimination, . . . the primary purpose of an [§5] administrative proceeding before the MCAD is to vindicate the public's interest in reducing discrimination in the workplace by deterring, and punishing, instances of discrimination by employers against employees." Thus if a complainant elects to remain at the MCAD for hearing, the MCAD's interests in vindicating the public interest become paramount and the constitutional interests of the employer become irrelevant.

There is an awful lot of bobbing and weaving and backfilling in this decision, and it consequently is very long. Nevertheless, the upshot is that, as the Court wrote, "[s]hould the complainant choose to remain within the MCAD, then both parties are subject to the formal administrative process, and neither has a right to a jury trial. . . . Alternatively, if the complainant chooses to bring her claim to the Superior Court, then either party may elect a jury trial".

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### **MCAD's "Each Day" Continuing Violation Theory Rejected By SJC**

In another SJC case, *Ocean Spray Cranberries, Inc. v. MCAD*, 2004 Mass. LEXIS 276 (5/12/04), plaintiff on September 15, 1995, filed a charge of discrimination against Ocean Spray, alleging that the Company failed to accommodate his impaired vision despite his requests for

accommodation beginning in May, 1993. After an MCAD hearing, MCAD found that plaintiff was a "handicapped person" under G. L. c. 151B, and that Ocean Spray had failed to accommodate his handicap. The MCAD ultimately awarded plaintiff \$50,000 for emotional distress incurred from the time he first requested accommodation in May, 1993, until his termination in June, 1995. The MCAD also ruled that plaintiff's complaint was timely under the "continuing violation doctrine" because "at least one discriminatory act had occurred after his return to work in April, 1995, and there was a substantial relationship between that discriminatory act and others that had occurred between May, 1993, when Rapoza first sought an accommodation, and November, 1994, when he took his medical leave." The MCAD ruled that because "Ocean Spray continuously denied his requests from April 1993 through June 1995 . . . we conclude that . . . a new violation is deemed to occur each day [plaintiff] was unlawfully denied an accommodation." Under this "each day" theory, the MCAD maintained that the failure to make a reasonable accommodation is an act of discrimination that recurs each day that the employer fails to provide that accommodation, whether the employee is aware of the failure or not.

The Court rejected this application of the "continuing violation" theory. It concluded that "when an employer responds to a request for a reasonable accommodation with equivocal action or inaction, the limitations period in G. L. c. 151B, §5 [now 300 days rather than 6 months], begins to run at the point thereafter when the employee knew or reasonably should have been aware that the employer was unlikely to afford him a reasonable accommodation." Thus here "there is no basis in the record to support the conclusion that Rapoza did not know or should not reasonably have been aware that his request was not going to be accommodated. . . . Rapoza also testified that his request to be transferred to another area of the plant was twice met with the statement from his supervisor that "you're either going to make it here or you're not going to make it." In these circumstances, ruled the Court, the plaintiff was on adequate notice that his request was not going to be accommodated at least by the time he left for heart surgery in November, 1994. Thus the six-month limitations period for Ocean Spray's failure to accommodate a request first made in May, 1993, expired long before plaintiff filed his charge of discrimination on September 15, 1995.

Yet what one hand giveth, the other taketh away. As the Court went on to write, "[o]ur conclusion that the limitations period has run for this earlier failure to accommodate does not, of course, make those events irrelevant. We have held in the hostile work environment context that a 'plaintiff who has a seasonable claim may use events that occurred prior to the six-month limitation period as background evidence . . . even though she cannot recover damages for the time-barred events.' . . . Similarly, evidence of an employer's previous responses or inaction to an employee's request for accommodation is relevant as background evidence to determine whether subsequent actions by the employee should be understood as requests for accommodation, and whether the employer's response to a subsequent request meets the 'employer's obligation to participate in the interactive process.' Thus, in evaluating whether Ocean Spray failed to accommodate Rapoza in 1995, what occurred in response to his time-barred request for accommodation is relevant." Thus even though plaintiff cannot recover for the time-barred period, that evidence still comes in and can be heard by the jury or other fact-finder, which likely will not be helpful to the defendant's case.

So the plaintiff could not recover for emotional distress incurred more than 6 months (now 300 days) prior to filing his charge, thus in this case there should be some reduction in the

\$50,000 emotional distress award.

### **ADA Interactive Process Does Not Include An Employee's Attorney**

In *Ammons v. Aramark, Inc.*, 2004 U.S.App. LEXIS 10036 (7<sup>th</sup> Cir. 5/21/04), plaintiff was a 40 year employee as an engineer/mechanic. He injured his knee at work and had surgery. He tried coming back to light duty work, but then took a medical LOA. Ultimately his doctor concluded that he could not resume his normal duties and put a list of standing/bending/lifting restrictions on his activities. A workers compensation vocational rehabilitation therapist examined the Plaintiff and concluded that due to his restrictions he was limited to sedentary work. (Interestingly, plaintiff later hired this vocational specialist as an expert witness in this case and she changed her opinion; the Court rejected her testimony because it was “speculative”). Pursuant to a collective bargaining agreement, Plaintiff was terminated 18 months after going out on leave. He sued under the American With Disabilities Act (“ADA”), claiming (1) that he could perform the essential functions of the job with or without a reasonable accommodation; and (2) the employer failed to engage in an interactive process because it did not agree to a meeting with the vocational therapist and plaintiff’s attorney. The District Court ruled in favor of the employer and entered summary judgment on its behalf.

On appeal to the 7<sup>th</sup> Circuit Court of Appeals, the Court accepted that Plaintiff was disabled and focused on the question of whether or not he could perform the essential functions of his job with or without a reasonable accommodation. Since his job required the ability to repair heavy machinery, the Court noted that it required considerable physical exertion, lots of lifting and pulling of heavy loads, and climbing. In light of his own doctor’s restrictions that, according to the vocational specialist’s first opinion required him to work a sedentary job, the Court found that Plaintiff could not perform the essential functions of his job at all. The Court also found that the only suggested accommodations (having another person perform significant functions of the job, and turning the other part of his job into a “troubleshooter” type of position) would have required the employer to create a new position, which was not required under the ADA. Thus the Court affirmed the District Court’s ruling in the employer’s favor.

Plaintiff’s other claim, that the company failed to engage in an interactive process, the Court rejected. The Court wrote that “[t]he duty to engage in an interactive process does not mandate a meeting with an employee's attorney and vocational counselor. Aramark satisfied its duty to discuss reasonable accommodations with Ammons through its face-to-face meeting with Ammons in January 1999. . . . We find no support, and Ammons has offered none, for the conclusion that an interactive process must include an employee's counsel or other persons including a rehabilitation counselor. Although there may be cases where an attorney or a vocational expert would be of considerable assistance in the interactive process, there is no requirement that an attorney and/or vocational expert need to participate. The ADA envisions no more than ‘a flexible, interactive process by which the employer and employee determine the appropriate reasonable accommodation.’”

### **“Honestly Held” Belief Of Decision-Maker Precluded Finding Of Pretext**

In *Hill v. Steven Motors, Inc.*, 2004 U.S.App. LEXIS 8849 (10<sup>th</sup> Cir. 5/5/04), Plaintiff was promoted to General Manager of an auto dealer, but complained because she was not given the resources to make the store successful. During this time the owner was negotiating to lease the space to a Dodge dealership. Then Plaintiff had a stroke and she was unable to work for 5 months. While she was out, the negotiations were consummated and the operation became a

Dodge dealership under the managership of the dealership's General Manager. Plaintiff was then told that even if she could come back full-time, she would not have her old job back. When her doctor released her to return to work, she was restricted to no more than 40 hours/week and 8 hours/day. On her return, Plaintiff was transferred to another manager position at \$1,000 less a week. She filed a charge claiming sex and age discrimination. While this charge was pending, she was promoted to another management position with a 6 month salary guarantee. When the 6 months was up, that guarantee lapsed. Plaintiff also apparently began spreading rumors that the General Manager was being fired, and lied when asked about the rumors. She then amended her lawsuit to claim the latter facts as retaliation for maintaining her original charge, and also added disability discrimination claims. She was then terminated for poor performance and her failure to "get along" with another manager.

The District Court entered summary judgment on behalf of the employer. On appeal to the 10<sup>th</sup> Circuit Court of Appeals, Plaintiff first argued that she should have been returned to her old General Manager position. The Court rejected this argument because she had been restricted to working no more than 8 hours/day and 40 hours/week, and even she admitted in her deposition that while she held the job she ordinarily worked at least 70 hours/week. While she claimed she only had to work such hours because she was given no help with the job, the Court wrote that she had not "produced any other evidence that senior management did not sincerely believe that the job of General Manager required working significantly more than forty hours per week."

Plaintiff's next argument was that she was terminated because of her age and sex. The Court also rejected this claim. First the Court noted that "[e]ven though we view the facts in the light most favorable to Plaintiff, 'a challenge of pretext requires us to look at the facts as they appear to the person making the decision to terminate [the] plaintiff.' . . ." Then the Court reviewed the termination decision in light of this standard and ruled that "[i]n this case Mr. Steven made all the hiring decisions and approved Plaintiff's termination, but Mr. Shaffer was the one who actually terminated Plaintiff. We must view the facts from his perspective. 'The relevant inquiry is not whether [Mr. Shaffer's] proffered reasons were wise, fair or correct, but whether [he] honestly believed those reasons and acted in good faith upon those beliefs.' . . . What we must look at . . . 'is the manager's perception of the employee's performance . . . , not [the employee's] subjective evaluation of [her] own relative performance.' . . . Plaintiff argues about the accuracy of Mr. Shaffer's belief; that is, whether his belief that [she and another manager] did not get along was correct. But 'arguing about the accuracy of the employer's assessment is a distraction because the question is not whether the employer's reasons for a decision are *right* but whether the employer's description of its reasons is *honest*.'" Because Plaintiff was unable to cast any doubt upon the reasons offered for her termination, the Court affirmed the entry of summary judgment for the employer on this claim.

Plaintiff also claimed that she was discriminated against on the basis of her disability, or that she was "regarded as" disabled. The Appeals Court, agreeing with the District Court, ruled that the Plaintiff was not "disabled" within the meaning of the ADA. Plaintiff identified (1) "learning, thinking, and reasoning" and (2) "moving" as the major life activities substantially limited by her stroke, and the Court assumed that these are major life activities. The Court then turned to the third element of disability, whether "the impairment substantially limits one or more of those activities." Despite her claim of being substantially impaired to the Court, her deposition testimony indicated a different conclusion:

Q: As we sit here today, do you have any continuing effect from the stroke you had in July of '99?

A: No, I would say it is nothing short of a miracle. Except . . . I have to watch my step. And occasionally I lose my balance . . . . I have slipped or tripped.

Thus the Court refused to find that the Plaintiff was substantially impaired, and thus found that she was not actually disabled. As to the “regarded as” claim, the Court noted that “[t]o be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job.” Thus despite Plaintiff’s claim that the employer’s actions showed that it “believed [she] was disabled from a class or range of jobs,” the Court found it was “undisputed that Steven Motors placed Plaintiff in a Fleet and Leasing Manager position after her stroke, and later promoted her to F&I Manager.” Thus the Court ruled that Plaintiff was not regarded as disabled.

Finally, the Court addressed Plaintiff’s retaliation claims. Plaintiff had a laundry list of allegedly adverse actions which were retaliatory, all of which the Court rejected, some because they were not actually “adverse” because they did not significantly affect her employment and others were not supported by the evidence. The two principal claims were the failure to return her to her General Manager’s job, and her termination. As to the first, the Court noted that this happened before she had engaged in any protected activity. As to the second, the Court wrote that “for the same reasons that we rejected her disparate- treatment discrimination claims, we hold that she has failed to satisfy her ultimate burden of rebutting defendant’s stated reason for its employment decision. As explained above . . . Plaintiff’s opinions about her own performance and assertions about the accuracy of Mr. Shaffer’s beliefs fail to establish that Steven Motors manufactured its proffered reasons for terminating her.” Thus the Court affirmed the entry of summary judgment for the employer.

### **“Similarly Situated” Means Similarly Situated “In All Relevant Respects”**

In *Mohr v. The Hoover Company*, 2004 U.S.App. LEXIS 9689 (6<sup>th</sup> Cir. 5/14/04), the Plaintiff worked as a forklift operator. She also was diabetic (Type II). In response to another employee’s absentee problem stemming from his diabetes, the Company reevaluated its policy of allowing diabetic employees to operate forklifts. During this review, the Company doctor “became concerned about the safety problems that could arise from a diabetic employee operating dangerous machinery such as a forklift.” Plaintiff’s medical records showed that she suffered a pattern of recurring “hypoglycemia episodes,” including incidents where she “passed out, got lost coming home, and fell asleep standing up.” Thus the company doctor barred Plaintiff from operating a forklift or any other dangerous machinery.

Plaintiff’s doctor in turn wrote a letter to the Company doctor stating that Plaintiff “had told her that she was fit to operate the forklift.” The Company doctor found this letter unconvincing because it simply repeated Plaintiff’s own opinion about her condition, and it did not state her physician’s professional opinion. The Company then invited the Plaintiff “to bid on fifty other positions that paid at least as much as the high rider position. She selected one of those positions and was transferred to it. In her brief [Plaintiff] asserts that she has ‘suffered a yearly net loss of income ... [of] approximately \$ 25,0000 [sic]’ because in her new position she

cannot earn overtime, but she cites no record references to support the claim.” Prior to the foregoing events, in October 1999, Plaintiff had filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that she was required to work without the proper safety harness. Later that month, OSHA inspected the plant and issued a citation to Hoover.

Plaintiff sued Hoover, alleging (1) that in removing her from her high rider position and transferring her to another job (the “removal and transfer”), Hoover violated the Americans with Disabilities Act (“ADA”); (2) sex discrimination; and (3) that the removal and transfer were made in retaliation for Plaintiff’s filing of the OSHA complaint. The District Court entered summary judgment on all claims in favor of Hoover. It rejected Plaintiff’s claim under the ADA because she had not shown that she was “disabled” under that Act or that, if she were disabled, she was qualified to perform the duties of the high rider position. It held that Plaintiff had not established her claim of sex discrimination because she had not shown (1) that she was subject to an adverse employment action, (2) that she was qualified for the high rider position, or (3) that another diabetic employee who was permitted to operate a forklift was similarly situated to her. Finally, it rejected Plaintiff’s claim that Hoover removed and transferred her in retaliation for her filing the OSHA complaint “because there [was] no apparent causal connection between any adverse employment action and a protected activity.”

The Circuit Court agreed with the District Court. As to the Plaintiff’s ADA claim, it wrote that “[t]he only specific job that Hoover apparently regarded Mohr as unqualified to perform was that of forklift operator, who functioned as a high rider. This is a far cry from being ‘significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes.’ Indeed, the record here shows only that she is unable ‘to perform a single, particular job,’ which under the [EEC’s regulations] ‘does not constitute a substantial limitation in the major life activity of working.’” Plaintiff also argued that she was not disabled, but “regarded as” disabled. As the Court noted, however, to be regarded as disabled within the meaning of the ADA, the Plaintiff had to show that the employer “mistakenly believed that [her] actual, nonlimiting impairment substantially limits one or more major life activities.” Here the Plaintiff claimed that the company regarded her as disqualified from all jobs “involving the operation of machinery.” The Court found, however, that the medical restriction barred her only from using “dangerous” machinery. Moreover, “[t]hat Hoover did not regard her as precluded from performing ‘either a class of jobs or a broad range of jobs in various classes’ is shown by its inviting her to bid on fifty different jobs.”

As to the Plaintiff’s sex discrimination claim, the Court ruled that this claim failed because she had not shown that she had been replaced by someone outside of the protected classification, or that “similarly situated non-protected employees were treated more favorably.” Even though another male employee with Type II diabetes had been allowed to continue to operate a forklift, that employee had never had the hypoglycemia blackout-types of episodes that the Plaintiff had suffered. Thus the Court ruled that this comparison was inappropriate since the “similarly situated” means similarly situated “in all relevant respects.”

Finally, as to her OSHA retaliation claim, the Court noted that to establish a prima facie case of retaliation, Plaintiff was required to show, among other things, that “there was a causal connection between the protected activity and the adverse employment action.” Here, the Plaintiff failed to “provide any factual basis for a connection between the filing of the complaint and the action taken against her.” There was no evidence that the medical restriction on her work was anything other than the company doctor’s professional judgment, besides which the

doctor stated in an affidavit that he had not known about the OSHA complaint at the time he issued the work restriction. And even though proximity in time between protected activity and an adverse employment action may create an inference that the two events are causally linked, that was not the case here where the company doctor knew nothing of the OSHA complaint and there was no evidence to suggest the contrary.

Thus the Appeals Court affirmed the judgment of the District Court.

### **Refusal Of Transfer For Purely Personal Reasons Not Discriminatory**

In *Williams v. R.H. Donnelley Corp.*, 2004 U.S.App LEXIS 9363 (2<sup>nd</sup> Cir. 5/13/04), the Plaintiff, an African-American female, was first hired in 1996, then was promoted several times between 1996 and 1999. Her voluntary acceptance of the last position required her to relocate from Las Vegas to Purchase, New York, where the Company's sales training department is located. After working in New York for approximately ten months, Plaintiff sought to return to Las Vegas, where she still maintained a home, and where the Company permitted her to work one week out of every month.

Plaintiff then applied for a series of positions in Las Vegas. One position, Account Manager, required two to three years of proven performance working with medium to large accounts with minimum monthly billings of \$ 1,800. Plaintiff conceded she did not have this experience. She then requested that, if she were found unqualified for the Account Manager position, the Company create a new management position for her in the Las Vegas office. Approximately two months later, in December 1999, the Company denied her application for the Account Manager position and offered the position to another woman. The Company also refused Plaintiff's request that a management position be created for her in the Las Vegas office. On December 21, 1999, Plaintiff requested a transfer to Las Vegas as an Account Executive, the position she had held before being promoted. The Company denied this request as well. In January 2000, the Company advertised a vacant DSM III position in its Las Vegas office. Williams inquired about the DSM III position, even though she did not have the requisite two years of experience as a DSM II.

The Company again rejected the Plaintiff's application and, in February 2000, gave the DSM III position to an African-American male, who up to that time held a DSM II position. Two days before that employee's promotion took effect, Williams, on the advice of her physician, requested an indefinite disability leave of absence until her medical condition stabilized. The Company thereafter, without soliciting applications, filled her DSM II position with a white male. The Plaintiff remained on disability leave until July 2000, when the Company offered her the choice of two Account Executive positions in Las Vegas. In September 2000, Plaintiff resigned. She sued, alleging that the Company's failure to promote her to the Account Manager and DSM III positions and to create an Account Manager position in Las Vegas was the result of race and sex discrimination. She further alleged that the Company's failure to grant her request for a lateral transfer to the Account Executive position in Las Vegas, or to consider her for a promotion to the DSM II position, was discriminatory.

The District Court granted summary judgment in the Company's favor on all claims. The Court found that Plaintiff did not establish that she was qualified for any of the promotions she sought, and that the denial of her requests for a lateral transfer and the creation of a new position did not constitute adverse employment actions in violation of Title VII. The 2<sup>nd</sup> Circuit agreed with the District Court. As the Court noted, the familiar standard for establishing a prima facie

case of discrimination is that a plaintiff must demonstrate that: (1) she is a member of a protected class; (2) she applied and was qualified for a job for which the employer was seeking applicants; (3) she suffered an adverse employment action; and (4) the circumstances surrounding that action permit an inference of discrimination.

On the Account Manager claim, the Court ruled that Plaintiff failed to prove that she met the employer's qualifications for the position because she did not have "the two to three years of proven performance working with medium to large accounts required for that position." Plaintiff, however, argued that the Company previously interpreted the requirements for the Account Manager position loosely and interviewed candidates without the required experience. She offered but one comparator, a white male applicant. It was undisputed, however, that this person, unlike the Plaintiff, had two to three years experience in sales, and "ranked in the top third" of his peer group in sales. Thus the Company's decision to interview the white male rather than Plaintiff for the position did not suggest that the Company relaxed the qualifications necessary for the Account Manager position.

On the Plaintiff's claim that the Company should have created a management position in Las Vegas for her, the Court noted that because she had not shown that the Company had ever created a position for an employee -- white or otherwise -- who sought a transfer for purely personal reasons, she could not establish that she had been treated differently because of her race or gender. The Court also ruled that the Company's failure to transfer the Plaintiff to the position of Account Executive in Las Vegas failed because that inaction was not an "adverse employment action" because it did not work a material change in working conditions that was more than a mere inconvenience or a change in job duties. Moreover, the Court wrote that "the record suggests that, if anything, Williams would have suffered an adverse employment action if she *had* been transferred to the Account Executive position. Donnelley avers, and Williams does not dispute, that the Account Executive position actually paid less than, and organizationally was a demotion from, the STM position she held when she requested the transfer. Clearly, an employer's denial of a transfer request that would have resulted in a reduction in pay and the employee's demotion within the organization, without more, does not constitute an adverse employment action."

Finally, Plaintiff argued that the Company discriminated against her by denying her a promotion to the DSM II position. The Court ruled that this claim also failed because Plaintiff did not establish that she was qualified and available for this position. Although the Company did not challenge Plaintiff's contention that she possessed the necessary skills and experience for the DSM II position, it argues that she was nonetheless unqualified for the position because she was on indefinite disability leave at the time the position became vacant, and thus was not available to assume the DSM II. The Court agreed, writing that "[i]n addition to possessing the skills and experience necessary for a position, an applicant must be available to assume an open position by the date an employer designates as necessary. Where, as here, the applicant has taken an indefinite leave of absence, and has given no indication of when she will return to the workplace, she need not be considered available to fill a position for which there is an immediate need, and will be deemed unqualified. Because she was unavailable to assume the vacant DSM II position within any specified time, Williams failed to establish a prima facie case of discrimination for this failure to promote claim."

## **WAGE & HOUR DEVELOPMENTS**

### **Required Counseling Sessions Were Compensable Under FLSA**

In *Sehie v. Aurora, Ill.*, 2003 U.S. Dist. LEXIS 13051 (N.D.Ill. 7/24/03), a federal District Court ruled that an employee's time spent in counseling sessions required by the employer for the employee to keep her job was time worked and thus compensable under the Fair Labor Standards Act ("FLSA"). After a health-related absence, the City scheduled the plaintiff for a fitness for duty evaluation to determine if she was able to return to work. The doctor concluded that plaintiff was fit to return to work but that she should undergo weekly counseling with a clinical psychologist, for six months. The City told the plaintiff she was required to attend this counseling as a condition of retaining her job, and she did. She claimed she was told she would be paid for attending these sessions.

The Court noted "[t]he general rule is that compensation is required under the FLSA 'for all time spent in 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer or his business.'" The City argued, however, that plaintiff's claim was barred by a regulation of the United States Department of Labor, which stated that "[t]ime spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked." Since the plaintiff's counseling sessions occurred outside of her "normal working hours," the City reasoned, they were not compensable.

The Court disagreed. It ruled that the regulation only defined what is "hours worked," and did not define what is not "hours worked." Moreover, the Court cited numerous opinion letters of the DOL essentially stating that time spent in medical examinations as a condition of retaining a job was compensable because "[t]ime spent in taking such examinations is time during which the employee's freedom of movement is restricted for the purpose of serving the employer and time during which the employee is subject to the employer's direction and control. Therefore, such time spent must be counted as hours worked under FLSA."

### **Time Spent Donning And Doffing Specialized Protective Gear Is Compensable**

In *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9<sup>th</sup> Cir., 8/5/03), the central dispute was whether IBP, Inc. ("IBP") should be required to compensate its meatpacking plant employees for the time it takes to change into required specialized protective clothing and safety gear. Because of the nature of this "kill and processing" plant, employees were required to wear an array of clothing; as the Court wrote, "In sum, all employees must wear a sanitary outer garment that is provided and washed each night by IBP; all employees must wear some form of a plastic hardhat, a hair net, and ear plugs, and all employees . . . must wear a face shield or safety goggles; all employees wear some sort of glove, with most processing employees using a number of sets per day of grip-facilitative and warmth-providing 'yellow cotton gloves,' and with some slaughter employees donning these yellow gloves and/or plastic or rubber gloves for enhanced grip and protection against blood and water saturation; all employees wear liquid-repelling sleeves, aprons, and leggings; all employees wear safety boots/ shoes, all of which must be wiped/hosed after the end of a shift; and many employees opt to wear weight-lifting-type belts to prevent back injury. In addition, so-called 'knife users' don an assortment of protective gear on their hands, arms, legs, and torsos; this gear often constitutes chain-link (i.e., 'mesh') metal aprons, leggings, vests, sleeves, and gloves, and plexiglass arm guards, Kevlar gloves (that is, 'can't cut' or 'Polar'

gloves), and puncture-resistant protective sleeves.”

A group of union employees brought a class-action lawsuit, claiming that they were not being paid, and should be, for three aspects of their work-day: (1) the pre-shift donning of protective gear and the preparation of work-related tools, including the attendant waiting and walking; (2) the requisite donning and doffing of protective gear during the thirty-minute unpaid meal-break; and (3) the post-shift doffing, cleaning, and storing of protective gear and tools.

The District Court found that the Fair Labor Standards Act, “which excludes ‘clothes changing’ and ‘washing’ time from compensable time when these activities are the subject of collective bargaining, offered IBP no relief because sec. 203(o)'s ‘changing clothes’ and ‘washing’ exclusions did not reach donning, doffing, and cleaning of specifically protective, non-clothing-like gear; that IBP lacked ‘good faith’; and that the Portal-to-Portal Act did not operate to plaintiffs' disadvantage because the donning, doffing, and cleaning of protective gear was ‘integral and indispensable’ to their jobs, fulfilling mutual obligations of employer and employee. Walking and waiting time, the district court continued, occurred during the principal workday and was thus compensable.”

The 9<sup>th</sup> Circuit Court of Appeals agreed. First the Court noted that the donning and doffing of most of the protective gear in this case “is required by law, by rules of [IBP], [and] by the nature of the work,” and thus this donning and doffing is “necessary” to the “principal” work performed. The employer mandated the donning and doffing of clothes and gear at various intervals throughout the workday, requiring employees to wait for and to retrieve that gear in particular areas at particular times. Second, the Court ruled that the donning, doffing, washing, and retrieving of protective gear is, at both broad and basic levels, done for the benefit of IBP, not for the employee personally. In particular, the Court noted that requiring employees to wear such clothing satisfied IBP’s obligation under OSHA and USDA safe workplace and sanitation standards. Thus the plaintiffs' donning, doffing, and cleaning activities are “integral and indispensable” to IBP’s “principal” activity, and thus were compensable under the FLSA.

However, the Court also agreed with the District Court that the time spent donning and doffing non-unique protective gear such as hardhats and safety goggles is not compensable: The time it takes to perform these tasks vis-a-vis non-unique protective gear is *de minimis* as a matter of law. As the Court wrote, “[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours,’ the Supreme Court has observed, ‘such trifles may be disregarded[, for] split-second absurdities are not justified by the actualities or working conditions or by the policy of the [FLSA].’”

### **LEGISLATIVE AND REGULATORY ACTION OF NOTE:**

#### **New COBRA Rule Finalized**

On May 25, 2004, the Department of Labor’s Employee Benefits Security Administration issued its final rule for health care continuation coverage. The final rules set minimum standards for the timing and contents of the notices required under COBRA. These rules also provide model notices to be used by group health plans to assist them in satisfying the COBRA notice requirements.

Under COBRA, most group health plans must give employees and their families the opportunity to temporarily continue their group health coverage when coverage would otherwise be lost for reasons such as termination of employment, divorce or death. In order to give plans

enough time to modify their notice procedures, the new rules will be effective the first plan year that begins six months after publication of the rules in the Federal Register (which was May 26, 2004). Before that date, plans may rely on either the proposed rules or the final rules (including the model forms as proposed or as finalized) to meet their COBRA notice obligations.

The final rule and model notices are available for download from EBSA's Web site at [www.dol.gov/ebsa](http://www.dol.gov/ebsa).

### **ON THE EMPLOYEE BENEFITS FRONT**

#### **Backpay Not A Remedy Under ERISA Section 510**

In *Millsap v. McDonnell-Douglas*, 2004 U.S.App. LEXIS 10092 (10<sup>th</sup> Cir. 5/21/04), the District Court found that the Company had studied the correlation between closing a plant with a more senior workforce and maximizing a surplus from its pension plans. The plant had, on average, the most senior workforce within the company. The Company learned it stood to gain \$24.7 million in pension and health care coverage savings if the plant closed, so the Company closed the plant. A class of former employees sued the Company under ERISA Section 510, which provides in relevant part: "It shall be unlawful for any person to discharge . . . or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan". After a bench trial, the District Court found that the employer closed the plant specifically in order to deprive over 1,000 employees of benefits under ERISA plans, and thus had violated ERISA Section 510. The Company did not contest this finding on appeal.

On appeal, the issue was the remedy. The District Court had ruled that Plaintiffs could recover lost benefits under the plans and backpay, but not reinstatement and/or front pay. The Court reasoned the circumstances of this case made reinstatement impossible and front pay inappropriate because the court could not conclude that but for the Company's discriminatory conduct the plant would still be open. The District Court held, however, that Plaintiffs could recover backpay because the award constituted "equitable relief" under ERISA §502(a)(3). The Court reasoned backpay constituted "equitable restitution" or alternatively could be awarded because Plaintiffs sought backpay in conjunction with lost pension benefits, lost vacation pay, lost insurance, and reinstatement or front pay.

The Appeals Court disagreed on the issue of backpay and ruled that backpay is not recoverable in an ERISA Section 510 action, for basically two reasons. First, the Court engaged in a lengthy and somewhat arcane legal discussion of whether or not backpay was a "legal" (that is, purely monetary) remedy, or an "equitable" remedy (that is, restitutionary in nature). Only "equitable" remedies are available under ERISA. Ultimately the Court concluded that backpay, in part because it was measured by the employee's loss rather than the employer's gain, was "legal" in nature and thus could not be recovered in an ERISA Section 510 case.

The second principal reason was the detailed and comprehensive statutory scheme under ERISA. ERISA is very detailed in how it works, what actions may be brought and by whom and against whom, and is detailed in the monetary relief available. The Court reasoned that in such a highly detailed statutory structure, if Congress had intended backpay to be available, it would have provided so explicitly. And because ERISA Section 502 is the exclusive remedy for rights protected by ERISA and does not provide for backpay, it simply is not available as a remedy.

Thus, at least in the 10<sup>th</sup> Circuit, backpay is not a remedy for a violation of ERISA

Section 510.

## **“Honest Belief” In Employee’s Misconduct Protects Employer In ERISA**

### **Section 510 Action**

In *Koons v. Aventis Pharmaceuticals, Inc.*, 367 F.3d 768 (8<sup>th</sup> Cir. 5/7/04), as part of a reorganization the employer developed a severance plan for which the Plaintiff was eligible. Plaintiff was allowed to work from home for several months prior to his end date under the reorganization plan and pursued a real estate career, with the employer’s approval. However, he used an associate list to solicit for his real estate ventures and ran up 3,000+ minutes/month on a company cell phone. As a result he was terminated prior to his end date and the company denied him severance benefits, asserting that under the plan severance was not payable to an employee who had been terminated for misconduct.

Plaintiff sued the company, claiming that he was entitled to severance under the plan and for interference with his ability to attain such benefits under ERISA Section 510. After a bench trial, the District Court found for the Company on both claims and entered judgment accordingly. Plaintiff appealed, claiming the trial court erred in finding that he was not entitled to severance benefits and that he was not terminated by Aventis with the intent to interfere with his ability to claim severance benefits. The Appeals Court affirmed the judgment of the District Court.

As to the first claim, the Appeals Court found that under the plain terms of the severance plan, an employee terminated for misconduct was not entitled to severance benefits. Plaintiff argued, however, that even if he was terminated for violating company policy, he should still be eligible for severance benefits under the Plan because the Summary Plan Description (SPD) did not contain the same language. He relied on the notion of conflicting plan documents. That is, where an SPD conflicts with the terms of another plan document, it has often been said that the SPD governs. The Court noted, however, that this general rule is qualified. Specifically, "this rule of construction does not apply when the plan document is specific and the SPD is silent on a particular matter." And if the SPD does conflict with other plan documents, a participant must generally show that he relied on or was prejudiced by the SPD's description of the plan's benefits. Here, the Court wrote that “[w]e see no conflict between these two descriptions of the Plan's eligibility requirements. On the issue of whether being terminated for a violation of company policy is a condition of eligibility, the Plan's description includes such a condition, while the SPD is silent, as it is with death, disability, and resignation.” Here, since Plaintiff testified that he was aware of the Plan’s “misconduct” exception, the Court ruled that he could not have relied to his detriment on the SPD and any alleged conflict between the two.

As to whether or not the Plaintiff actually had violated company policy, the Court ruled “[t]here is abundant evidence in the record in support of the trial court's findings, at least with regard to Koons' personal use of his cell phone and his unauthorized personal use of the associate address list. As to each, a reasonable factfinder could conclude that there was a policy in place and that the policy was violated. Therefore, we cannot conclude that the trial court clearly erred in finding that Koons violated company policy.” While the Court apparently found that Plaintiff did not act outside of his authority in allowing the ex-employee to retain her cell phone, it ruled that since the other two reasons were supported in the record, the lack of evidence on the latter did not matter.

As to Plaintiff’s second claim, that he was terminated in an effort to deprive him of ERISA protected benefits, the Court noted that “[t]o succeed, Koons had to prove that Aventis terminated his employment with the ‘specific intent’ to interfere with his severance benefits.

This specific intent is present where the employee's (future or present) entitlement to protected benefits is a motivating factor in the employer's decision. A factor is motivating if it can be said that it has 'a determinative influence on the outcome.' In other words, Koons had to show that he would not have been terminated had he not been entitled to benefits." The Court also noted that "[e]ven if Koons had not violated company policy, if Aventis honestly believed he did and terminated him for that reason, then no section 1140 action would exist."

Here, the Court found the Defendant's opinion that the Plaintiff had violated company policy was honestly held, that Plaintiff did not produce evidence of any disparate treatment as between him and others for similar conduct, and that hundreds of other employees were laid off in a restructuring and no one else targeted for reduction was terminated for misconduct just prior to their scheduled layoff. Finally, Plaintiff argued that the harshness of the consequences - his loss of a total of \$200,000 in severance benefits over a \$700 cell phone bill - was disproportionate to his misconduct. The Court wrote that "[r]elief is not warranted under ERISA merely because the employer was disproportionate in its punishment. And if the loss of severance benefits is only incidental to the termination, Koons would also not be entitled to relief. It is hard, then, to see how an employer's awareness of the consequences of its business decisions attributes to it an unlawful intent, especially to the extent it would take to reverse the trial court's decision at this juncture."

Thus the Court upheld the District Court's entry of judgment on behalf of the company.

### **Was Lawful Under ERISA To Condition Receipt Of Severance Benefits On Release**

In *Petersen v. E.F. Johnson Co.*, 366 F.3d 676 (8<sup>th</sup> Cir. 4/29/04), Plaintiff claimed a right to severance benefits after he was laid off, and eventually terminated, by his employer. The dispute arose when the company adopted a new and less-favorable employee severance benefits plan between his lay-off and his termination. Plaintiff believed he was entitled to benefits under the old plan, while the company believed he was limited to the new-plan benefits, but only if he agreed to waive his claim for the former plan benefits. Petersen elected not to waive his claim.

Plaintiff originally filed this suit as a breach of contract action in state court. The Company removed the case to federal court contending Plaintiff's right to severance benefits was governed by ERISA. The District Court ruled that Plaintiff's right to severance benefits was governed by ERISA and denied his motion to remand the case to state court. The District Court also ruled that Plaintiff had no right to severance benefits under the old plan (a determination he did not challenge on appeal), but went on to determine the company inequitably conditioned his eligibility for new-plan benefits upon his execution of a release of the claim for old-plan benefits, and ordered the Company to extend Plaintiff the more limited benefits available under the new plan.

The Company appealed, contending it could lawfully condition new-plan eligibility upon Plaintiff's release of the claim for old-plan benefits. The Circuit Court agreed with the Company on appeal and reversed the District Court judgment that the Company could not condition eligibility for the new-plan benefits on a release.

The Court first reviewed a series of prior Supreme Court and 8<sup>th</sup> Circuit cases, all of which basically stood for the proposition that an employer may "permissibly ask an employee to waive employment-related claims in return for receiving benefits the employer is not otherwise required to provide." Thus an employer may condition payment of benefits upon the signing of a

release of other employment-related claims because an employer has no obligation to offer any benefits whatsoever and therefore has the "right unilaterally to amend or eliminate a severance plan."

Thus the Court concluded that "the company had the right to condition Petersen's receipt of benefits under the new plan upon his execution of a waiver of his right to claim potential benefits under the former plan. While the Court sympathized with the Plaintiff's dilemma, it noted that "the company could have eliminated the old plan altogether and not offered its employees a new plan. Had that occurred, [plaintiff] would be in the same position he is now. He would have pursued his claim for old plan benefits and lost, as he had no accrued right to benefits under the old plan before it was eliminated. When the company decided to offer its employees a new plan, Petersen had the choice either to pursue his potential claim for benefits under the former plan, or accept the less-favorable benefits under the new plan. He chose to pursue the more-favorable benefits under the old plan, refused to sign the release, and subjected E.F. Johnson to the expense of the suit it sought to avoid by requesting the release. As it turns out, hindsight has revealed Petersen should have signed the release and accepted the reduction in benefits. The end result may seem unfair from Petersen's point of view, but it is not inequitable under the law because the company could lawfully ask Petersen to waive his potential claim for old-plan benefits in exchange for the right to benefits under the new plan."

### **ON THE LABOR FRONT**

#### **Board Clarifies Access Rights Of Off-Site Employees**

In *ITT*, 341 NLRB No. 118 (5/13/04), the Board originally decided that an employer had committed an unfair labor practice when it barred offsite, off-duty employees (from another plant) from handbilling in another plant's parking lot due to security concerns. On appeal to the United States Court of Appeals for the District of Columbia Circuit, the Court vacated the decision and remanded the case to the Board.

The law according to the Board is, in brief, that an employer is prohibited from denying off-duty employees entry to parking lots and other non-working areas to handbill except where justified by business reasons. *Tri-County Medical Center*, 222 NLRB 1089 (1976) (dealing with off-duty but on-site employees). Board cases also hold that an employer's employees from one plant are considered employees of the employer when they handbill at another of the employer's plants. The D.C. Circuit vacated the Board's original decision in this case because "none of the Board's previous cases . . . take any account of the Court's different access decisions or the trespass considerations articulated therein."

On remand, the Board reconsidered the application of *Tri-County* to off-duty employees from another plant, and quoted another recent Board case:

- (1) Under Section 7 of the Act, offsite employees (in contrast to nonemployee union organizers) have a non-derivative access right, for organizational purposes, to their employer's facilities;
- (2) that an employer may well have heightened private property-right concerns when offsite (as opposed to onsite) employees seek access to its property to exercise their Section 7 rights; but
- (3) that, on balance, the Section 7 organizational rights of offsite employees entitle them to access to the outside, nonworking areas of the employer's property, except where justified by business reasons, which may involve

considerations not applicable to access by off-duty, onsite employees. To this extent, the test for determining the right to access for offsite visiting employees differs, at least in practical effect, from the *Tri-County* test for off-duty, onsite employees.

Applying this test to *ITT*, the Board still found a violation of the Act. First, the off-duty, offsite employees enjoyed a non-derivative Section 7 right of access, which was enhanced by the attempt in this case to organize a multi-facility unit, so that both the on-site and off-site employees had a clear personal interest in the organizing. Thus the Board found that the Section 7 right asserted in this case was “substantial.”

Next the Board found that the company did indeed have legitimate private property concerns. The Company claimed that it prohibited access to its parking lot based on security considerations, and cited in support its policy of denying access to persons not employed at that plant. The only exception to this rule was that relatives and friends of employees are allowed to drop off or pick up employees from work, but they are not allowed to get out of their vehicles when they arrive on the parking lot. The Company also cited various incidents of vandalism to vehicles and the threats to personal security that occurred over the past few years. And, after an incident involving a threat to one of its employees, the Company conducted an investigation and had a cyclone fence installed around its property.

Finally, the Board “balanced” those legitimate property concerns with the Section 7 rights of the employees. First the Board noted that the handbillers were employees, albeit not at that site, thus their presence did not implicate the security concerns expressed by the Company since as employees they were subject to discipline if they engaged in misconduct. Second, the handbilling occurred at a busy time, so there was less likelihood of unobserved vandalism. The Board also thought it was significant that, even though the company had erected a fence, it did not employ security guards or install security cameras. Third, there was no evidence or claim that the handbilling would disrupt traffic in the parking lot.

Thus the Board ruled that “[i]n view of these factors, it is clear that the Respondent's complete refusal to allow handbilling by its own offsite employees was not reasonably tailored to address its concerns about protecting its property against vandalism or violence against its onsite employees. Weighing the Section 7 organizational rights of the Respondent's offsite employees against the Respondent's security concerns, we find that the Respondent has not met its burden . . . of demonstrating that its security needs warranted the absolute prohibition of handbilling on its property by offsite employees.”

### **Illustrating Again That The NLRA Can Surprise Non-Union Employers**

In *Orchard Park Health Care Center, Inc.*, 342 NLRB No. 93 (4/30/04), two employees called the New York State Department of Health Patient Care Hotline to report excessive heat in the employer's nursing home. One was terminated and the other suspended because the employer claimed that the employees made false and fraudulent statements in the hotline call and because they provided false information about the call in a subsequent internal investigation. The two employees filed a charge with the National Labor Relations Board, claiming that by making the phone call they were engaged in concerted, protected activity under the National Labor Relations Act (“Act”), and thus their discharge and discipline was retaliatory and unlawful under the Act.

The Administrative Law Judge found that their conduct in calling the hotline was concerted activity, and protected because it involved a working condition. He reasoned that a

posted patient care hotline notice—informing employees that they are “required” by New York State Public Health Law to report physical abuse, mistreatment, or neglect—is an important part of the employees’ working conditions in caring for the patients. The judge concluded that the company unlawfully disciplined the employees to discourage employees in their unit from reporting any unsafe conditions for patients and that the employer feared that employees’ using the hotline to report the excessive heat in violation of a State regulation requiring “safe and comfortable temperature levels” could adversely affect the State license to operate the nursing home.

The Board agreed that the employees’ conduct was “concerted” under the Act because they acted together in making the phone call. The Board disagreed, however, that the employees’ conduct was “protected” under the Act. The Board noted that “protected” conduct involves that which extends to employee efforts “to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” The Board also noted that it “has held repeatedly that employee concerns for the ‘quality of care’ and the ‘welfare’ of their patients are not interests ‘encompassed by the ‘mutual aid or protection’ clause.”

Moreover, “some concerted activity bears a less immediate relationship to employees’ interests as employees than other such activity,” and “at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the ‘mutual aid or protection’ clause.” Here, wrote the Board, the employees’ “call to the State health department hotline did not involve a term or condition of their employment and was not otherwise an effort to ‘improve their lot as employees.’ [They] explicitly disclaimed an interest in their own working conditions when they called the hotline. [One employee] called the hotline to express their concern about patients, as distinguished from an effort to improve their lot as employees. Indeed, [one employee] went out of her way, to the point of lying, to tell the authorities that she was a relative of a resident. If [she] wanted to complain about employee conditions, she need only to have truthfully identified herself as an employee.”

Thus the Board reversed the ALJ and dismissed the Complaint.

### **Union Information Request For Employee Medical Records Rejected By Board**

In *U.S. Postal Service*, 342 NLRB No. 94 (4/30/04), a female employee filed a hostile environment sexual harassment charge against several of her co-workers, one of whom was the union steward. The employee went on leave during the investigation, and apparently returned to a modified work schedule. She also claimed a work-related injury due to the harassment under the federal employee workers compensation program.

The steward then made an information request to the employer, in which he sought, among other things, the female employee’s entire medical record and workers compensation records. The preprinted language on the form stated that the steward was requesting the information “in order to properly identify whether or not a grievance does exist and, if so, their relevancy to the grievance.” Ultimately the employer denied the request on the basis that the information on its face was confidential and privileged, and not relevant to terms and conditions of employment of bargaining unit members.

In a nutshell, an employer’s duty to bargain includes the duty to furnish information which is relevant to and necessary for a union’s performance of its duties as the employees’

collective-bargaining representative. This duty is not limited to contract negotiations but extends to requests, during the term of the contract, for information that is relevant to and necessary for contract administration and grievance processing. Where the information sought relates to the wages, hours and terms and conditions of employment of unit employees, it is presumptively relevant. Although a showing of relevance by the union is required where it seeks information that does not directly pertain to unit employees, the Board has historically applied a liberal discovery-type standard in assessing relevance.

The Board and the courts have also held that a union's interest in arguably relevant information does not always predominate over all other interests. In *Detroit Edison v. NLRB*, 440 U.S. 301 (1979), the Supreme Court held that, under certain circumstances, confidentiality claims may justify a failure or refusal to provide otherwise relevant information to a union. When an employer raises a legitimate and substantial claim of confidentiality, the Board must balance the union's need for the information against the confidentiality interests established by the employer. The party asserting confidentiality has the burden of proving that such interests are in fact present and of such significance to outweigh the union's need for the information. The Board has also held that an employer must timely raise and prove its confidentiality claim and must seek an accommodation through the bargaining process in order to satisfy its obligations under the Act.

Here, the Administrative Law Judge, whose decision the Board affirmed in its entirety, rejected the claim that the employee's medical records were presumptively relevant. He wrote that "[p]resumptive relevance typically applies to information such as the names, job classifications, wages, hours, benefits, etc. of unit employees. Such information essentially relates to those subjects over which the parties are required to bargain under Section 8(d) of the Act. An individual employee's medical condition, her consultations with her doctors and other personal information that would be contained in the files sought by the Union are not ordinarily the subject of negotiation between the parties to a collective-bargaining agreement. Such personal and private information only becomes relevant when it impacts the bargaining unit or requires application of a specific term of the contract."

Thus the union had to demonstrate relevance. Here, the sole reason the steward gave in his testimony was so he could review doctors' reports to see if what Marsh told the doctors about her work environment was consistent with what the Respondent's investigators told Manley and the other employees was the basis of her sexual harassment complaint . . . [but] Allowing a union to obtain information for the purpose of attacking the credibility of a unit employee that the Union has a duty to represent fairly, where no other unit employee has been disciplined based on that employee's complaint seems contrary to the policies of the Act. Even assuming there was some relevance, or need, for the Union to attack Marsh's credibility, the request for 'all medical information relating to Janet Marsh' went beyond anything that would be relevant to this issue."

As to the employer's claim of confidentiality, the ALJ found "that these concerns are 'legitimate and substantial.' The Board and the courts have long recognized the sensitive nature of an individual employee's medical information." Thus the ALJ balanced the confidentiality interests raised by the employer against the union's asserted need for the information that was arguably relevant, and found "that the confidentiality interests should prevail under the circumstances here." In particular, the ALJ noted that the steward's request was "vindictive" and that it "was apparent from his testimony that Manley was not so much interested in Marsh's light duty assignment as he was in going after her for having the audacity to file a complaint against

him and the other white male employees in the TACS office. . . . the Respondent was justified in attempting to protect the confidentiality of this employee's sensitive personal medical information."

***Did You Know . . .***

June is: Dairy Month, National Safety Month, Rose Month, Lane Courtesy Month, Turkey Lover's Month, National Accordion Awareness Month;

That June 5 is Festival of Popular Delusions Day, June 10 is National Yo-Yo Day, June 13 is Kitchen Klutzes of America Day, June 15 is Smile Power Day, June 18 is National Panic Day, and June 30 is Meteor Day.

And that the Molecule of the Month is Flunitrazepam (Rohypnol).