

Mistake Of The Month - Spotlight Again On Inconsistent Explanations

In *Platero v. Williams Field Services Company*, 2004 U.S.App. LEXIS 10473 (10th Cir. 5/27/04), Plaintiff, a Navaho woman over forty, challenged her termination during a reduction in force (RIF) after nineteen years' employment with defendant and its predecessors. She claimed that she was selected for the RIF based on her race, gender, and age. The basis for her selection, as the Court described it, was a “‘Right Way, Right Results’ (RWRR) assessment process, in which plaintiff was very unfavorably evaluated This process, insofar as it is evidenced in our record, consisted of a single-paragraph string of conclusory subjective judgments wholly without grounding in concrete factual reference. Indeed, as the district court acknowledged, the level of reference is in some instances so vague that it is impossible to determine in a meaningful way what the criticism even means. We have repeatedly stressed that subjective judgments are viewed with skepticism in the pretext inquiry. But the subjective generality of the RWRR is not even the primary concern here. The dispositive deficiency in defendant's case arises from a comparison of the RWRR with a roughly contemporaneous supervisory evaluation of plaintiff's performance completed in the ordinary course of her employment” which was generally positive.

The District Court found that Plaintiff had made out a prima facie case for age and race discrimination, but held that defendant had offered a legitimate basis for terminating plaintiff and that plaintiff had failed to demonstrate a triable case that this rationale was a pretext for discrimination. The 10th Circuit Court of Appeals disagreed. The Court first noted that “a plaintiff can show pretext by revealing 'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action [such] that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reason.'” Here, “every criticism in the RWRR is facially inconsistent with, if not in flat contradiction of, ratings plaintiff received from her supervisor for job performance and professional development during the year immediately preceding the RIF.”

Thus the Court concluded “we hold that, on the record developed thus far, the numerous facial inconsistencies between plaintiff's performance evaluation and the RWRR assessment give rise to a triable issue of pretext precluding summary judgment. . . . however, additional factual development could potentially alter that conclusion. Thus, while we reverse summary judgment, we do not specifically remand ‘for trial’ but more generically ‘for further proceedings,’ which does not rule out a properly supported second motion for summary judgment.”

The Harshbarger Report

Effective Corporate Integrity Assessments

Every organization has an integrity system, even though it may be unarticulated, unconscious, or buried in the language and behaviors that shape its culture. An assessment of the existing systems is an absolute necessity. The process of conducting the assessment sends a powerful message, and the results provide a roadmap for reform and action. If done right, the message will be heard by employees and the investing public alike.

The most effective integrity system assessments include a review of all written codes of

conduct, ethics policies, reporting procedures, compliance programs, and the like, along with interviews with selected leaders, managers and employees at all levels to get input, feedback and reality checks on policies and programs. It is important to target practices and areas that are candidates for questionable integrity practices - such as financial reporting, recruiting and hiring policies, antifraud and abuse systems, conflict-of-interest and harassment policies, vendor selection, lobbying, campaign financing and compensation plans. Are they all aligned with explicit corporate values?

In addition, hot issues raised by media and prosecutorial or regulatory agencies should be part of the assessment process. A comprehensive audit can be done within a 30 to 60 day period, including a full report prepared for the CEO and the Board containing a set of recommendations with specific accountability and timelines for implementation.

The plan of action should be communicated broadly within the corporation with comments and feedback invited. A summary of the plan as adopted by the Board should be made public and highlighted in proxy and other statements. At a minimum, the presence of such a program will give corporate leaders the benefit of doubt with investors, employees, the media, and external regulators. Of course, the key to rebuilding trust is not in the plan, but in the action(s) that results from the plan.

Court Rejects “Compelled Self-Defamation” Theory In Massachusetts

In *White v. Blue Cross & Blue Shield of Massachusetts, Inc.*, 442 Mass. 64 (6/11/04), the Plaintiff was accused by the employer, after a client complaint, of divulging the details of a confidential settlement between Blue Cross and the client to other hospitals. He subsequently applied for numerous jobs in health care management without result. This was predictable, he alleged, because most prospective employers inquired about his reason for leaving Blue Cross. Because he refused "to lie," he was "compelled," he claimed, to reveal that he was discharged "for allegedly disclosing confidential financial information." Plaintiff did not claim that Blue Cross communicated the alleged defamatory statements (the accusation that he improperly divulged confidential information) to any third person. Rather, Plaintiff argued that his own disclosure of the accusation to prospective employers permits him to recover from Blue Cross for defamation because such disclosure should have been reasonably foreseeable by Blue Cross. This claim called upon the Court to decide whether or not it should adopt the theory of "compelled self-publication defamation." The Court declined to adopt this theory.

To prevail on a claim of defamation, generally a plaintiff must establish that the defendant was at fault for the publication of a false statement regarding the plaintiff, capable of damaging the plaintiff's reputation in the community, which either caused economic loss or is actionable without proof of economic loss. The Court recognized the "conundrum faced by discharged employees who are required by prospective employers to explain the circumstances of their discharge." Nevertheless, as the leading authority on defamation has explained, compelled self-publication defamation in the employment context is "troubling conceptually. . . .It is the termination and the reasons for it, not the communication, about which the plaintiff is actually complaining" The Court noted that any harm arising from the employee's discharge is more appropriately dealt with under principles of employment law, and not under the law of libel and slander. The Plaintiff could have demanded an employment contract with Blue Cross, but did not do so. "The law should not permit him to secure indirectly what he

failed to negotiate directly.”

Moreover, compelled self-defamation is not "a natural extension of Massachusetts case law," but a dramatic departure from the principles governing employment at will. As the Court wrote, “recognition of the doctrine of self-publication would run counter to another important aspect of employer-employee relations, an employer's privilege to `disclose defamatory information concerning an employee when the publication is reasonably necessary to serve the employer's legitimate interest in the fitness of an employee to perform his or her job.’ . . . Communications between former and prospective employers concerning an employee are similarly privileged... These privileges serve the important public purpose of promoting the free flow of information in the workplace, and are lost only when the employer recklessly makes ‘unnecessary, unreasonable or excessive’ publications”

Thus Massachusetts does not recognize the doctrine of compelled self-defamation.

Inconsistent Explanations Again Sink Employer

In *Firestine v. Parkview Health System, Inc.*, 2004 U.S.App. LEXIS 11538 (7th Cir. 6/10/04), Plaintiff sued Defendant under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e to e-17, alleging that the company retaliated against her by removing her from her position for complaining about religious discrimination. Plaintiff apparently was fairly open about her recent conversion to Catholicism at work, and her immediate supervisor was a lesbian. Plaintiff told her supervisor that her Catholic beliefs prevented her from approving of the supervisor’s lifestyle, but that it would not affect their friendship. The supervisor also allegedly told the Plaintiff that if she sent her son to a Catholic school, he would become “brainwashed.”

When Plaintiff received her first evaluation from this supervisor, her tune changed - in particular she objected to a comment on the evaluation "to be continually aware of the need for confidentiality and to maintain a quiet and professional manner in patient care areas." Plaintiff’s view was that this comment was unduly harsh, and the only explanation was her Catholicism. Apparently the Plaintiff also had a conversation with another employee in which she mentioned her supervisor’s sexual orientation. She was then removed from her job and given 30 days to find another internal position. She could not and accepted a position with another employer.

She then sued for retaliation. The District Court granted summary judgment in favor of Parkview, concluding that Plaintiff could not establish that she had engaged in protected activity and, alternatively, had no evidence that Parkview's stated, non-discriminatory reason for removing her from her position was pretextual. The 7th Circuit Court of Appeals disagreed and remanded the case to the District Court.

The Court began with the standard framework for proving such claims: For a prima facie case, the plaintiff must demonstrate that (1) she engaged in statutorily protected activity, (2) she was performing her job according to her employer's legitimate expectations, (3) despite meeting those expectations, she suffered a materially adverse action, and (4) she was treated worse than a similarly situated employee who did not engage in statutorily protected activity. If a prima facie case is established, the burden then shifts to the defendant to provide a legitimate, non-discriminatory reason for the adverse employment action. Once the defendant has provided a legitimate reason, the burden shifts back to the plaintiff to show that the proffered reason is pretextual.”

Here, the Court ruled that in order to establish that she had engaged in a protected

activity, Plaintiff was required to demonstrate that she complained about an act that she "reasonably believed in good faith ... violated Title VII." Only a groundless claim "resting on facts that no reasonable person possibly could have construed as a case of discrimination" could not constitute a statutorily protected activity. And a mistake as to the merits of a complaint does not cost an employee the protection of Title VII. The Employer argued that the Plaintiff did not show that she made her complaints in good faith and that her evaluation overall was good, despite the contested comments, but the Court rejected that argument: "The validity of such comments and their characterization, however, is disputed. When these disputes of fact exist, it is the role of the factfinder to determine whether Firestine believed in good faith that [the supervisor's] comments stemmed from a discriminatory animus." Thus the Court found that there was a disputed issue of material fact as to whether or not the Plaintiff had engaged in protected conduct.

The Court also found that the Plaintiff had suffered an adverse job action: "Here the evidence established that Firestine suffered an adverse action--she was removed from her job, she had to use some of her vacation time to seek another position at Parkview, and ultimately the jobs made available to her paid less, involved entirely different work, and had less desirable hours. There is no dispute that these jobs were not comparable."

Next the Court examined the Employer's proffered legitimate explanation, which the Court described as "[a]ccording to Parkview, Firestine failed to meet its legitimate expectations only to the extent that after receiving her evaluation she commented on [the supervisor's] sexual orientation in the course of complaining to coworker Slabaugh during an after-hours conversation about perceived discrimination." As the Court wrote, "[i]n this case, whether Parkview actually viewed Firestine's after-hours conversation with Slabaugh as violating the policy forbidding negative comments against another's sexual orientation is a proposition sufficiently dubious to require resolution by the trier of fact. . . . Although we do not stand as a superpersonnel department and the proffered reason must only be sincere, 'a determination of whether a belief is honest is often conflated with analysis of reasonableness.' . . . To view Firestine's speculation about [the supervisor's] motivation as a negative comment *on her sexual orientation* and therefore in violation of the policy is not objectively reasonable, creating doubt as to the sincerity of Parkview's reason."

Finally, the Court noted what it perceived to be the Employer's inconsistent story: "In addition, Parkview presents an inconsistent story. Parkview argues that [two higher supervisors] made the decision to remove Firestine for violating the anti-discrimination policy after learning of her conversation with Slabaugh. But Parkview was specifically asked in an interrogatory why it removed Firestine from her position, and in its response the company did not state that Firestine had violated a company policy. And Parkview added to its story again at summary judgment, asserting alternatively that [another supervisor] was the decisionmaker and had determined that [the immediate supervisor] and Firestine could not work together before Firestine's conversation with Slabaugh even occurred." However, other supervisory witnesses testified that no one ever had a conversation with the other supervisor. Thus the Court wrote that "Parkview's competing explanations call into question their veracity."

In the end, the Court ruled that there were issues of fact that needed to be decided by a jury, and thus remanded the case back to the District Court for trial.

ADA "Association" Claim Rejected By Court

In *Larimer v. IBM*, 370 F.3d 698 (7th Cir. 6/3/04), Plaintiff was hired in August of 2000, and in May of the following year his wife, who was also an employee of IBM, gave birth to twin daughters after only 29 weeks of pregnancy. At birth the two girls suffered from a variety of serious medical conditions owing to their prematurity, including respiratory distress, jaundice, apnea, and sepsis. One of the girls also had bleeding in the brain and the other had a lesion on her nose. They were hospitalized for almost two months at a total expense of almost \$200,000, all of which IBM's employee health plan paid for. By the close of discovery in January 2003 the two children seemed to be healthy and normal, but there is some probability that they will develop serious physical or mental handicaps as they grow older.

Plaintiff was terminated shortly after the children came home from the hospital. As the Court described the reasons, “the uncontradicted evidence . . . demonstrated that he failed to obtain an adequate understanding of the product that he had been hired to sell (Lotus software) and as a result was unable to convince prospective customers that the product was the answer to their needs. He was especially poor at convincing them to buy the various ancillary services that are an important part of the revenue of many software producers, including IBM.”

Plaintiff's principal claim is that IBM violated the Americans with Disabilities Act “by firing him because his daughters are disabled. Are they? They seem fine at present, and so the question, left open in *Goldman v. Standard Ins. Co.*, 341 F.3d 1023, 1026 and n. 2 (9th Cir. 2003), and not elsewhere answered definitively, is whether a possible, or even probable, future disability can ever be a disability that triggers the protections of the Act. . . . The Supreme Court's decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83 (1999), suggests . . . that the answer is “no” unless the individual is mistakenly regarded by his employer as having a disability; such a mistake is an alternative trigger of the Act's protections.”

But even if the daughters were disabled, continued the Court, Plaintiff must lose because he “is suing not on their behalf but on his own, under a provision of the ADA that forbids discrimination against ‘a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.’” The Court noted the “oddity” of the Plaintiff having to prove that he is a “qualified individual” when relying on a third person's disability, when the Plaintiff himself did not have any disability. The Court did note that it was at least theoretically possible to maintain such a claim where a termination was alleged to be the result of the employer attempting to avoid heavy employee health expenses, but here there was no evidence that health benefits were in the budget of the IBM unit that employed the Plaintiff.

The Court also engaged in a lengthy and interesting discussion of so-called “association” claims, i.e., discriminating against an employee because of his or her association with someone with a disability. But the upshot was, as the Court wrote: “Had Larimer identified a similarly situated employee of IBM who had not applied for substantial welfare benefits yet had been treated better than he, he would have made out a prima facie case of retaliation . . . [provided] that he also showed that he was performing his job in a manner that satisfied his employer's legitimate expectations. He strikes out on both counts. Declining ostrich-like to mention, let alone try to distinguish, *Stone*, even though his opponent relies heavily on it, he makes no effort to identify a comparable employee of IBM who did not apply for atypically large welfare benefits and was treated better than Larimer was, though it would be easy to find such an individual if one existed. Nor does he show that he was performing up to his employer's

expectations [as noted above].”

Thus the Court dismissed Plaintiff’s association claim.

A Reasonable Accommodation Is Not Necessarily What An Employee Requests

In *Smith v. Honda of America Manufacturing*, 2004 U.S.App. LEXIS 10336 (6th Cir. 5/24/04), the Plaintiff, a production worker for Honda, developed breathing problems while working in Honda's paint department. Honda transferred her to a production position in the assembly department, but Plaintiff claimed that the transfer did not alleviate her breathing problems. Plaintiff then asked to be transferred to an office position, but Honda declined because the company considered her unqualified for the positions for which she applied. Honda assembled a team of specialists to evaluate where Plaintiff could work, based on her doctor’s recommendations. This team consisted of a medical doctor specializing in occupational health, a registered nurse, an environmental engineer, and an occupational placement specialist. The team collected the plant's historical data on the specified airborne contaminants, including isocyanates, over the past decade. The team recommended that Plaintiff return to her most recent position in the assembly department, based on data showing that it had the lowest concentration of the specified airborne contaminants. While no contemporaneous measurements of airborne contaminant concentration were taken, Honda took air samples at that work station in April 2001 for this litigation and found no detectable levels of isocyanates. The team also determined that even an office position sought by the Plaintiff would involve frequent presence in all the production departments and therefore would have a higher exposure to isocyanates and other airborne irritants than Smith's current position. Plaintiff apparently still works in the assembly department.

She sued under the ADA, claiming that she was disabled within the meaning of the ADA and that Honda had denied her a reasonable accommodation of her disability. The District Court found that there was a genuine issue of material fact whether Plaintiff was disabled under the ADA, but concluded that she was unqualified for any of the office positions, and therefore granted summary judgment to Honda. The Appeals Court affirmed, but on different grounds.

As the Court wrote: “The disabled employee bears the burden of proposing an accommodation and showing that it is objectively reasonable. . . .Where there is more than one reasonable accommodation, the choice of accommodation is the employer's. ‘The employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.’ ‘An employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided.’ An employee who declines an offered reasonable accommodation forfeits the status as a ‘qualified individual with a disability.’”

Here, Honda discharged its obligation to provide a reasonable accommodation by transferring Plaintiff to a production position where she undisputedly would not be exposed to undue amounts of airborne contaminants. Plaintiff claimed that the accommodation was unsuccessful. But the Court wrote that “there is strong evidence on Honda's side of the question, most strikingly, that Smith eventually did return to the offered position and apparently continues to work there. Smith, in her briefs, offers no explanation of this fact. Nor is there anything in the record to suggest that in the interim Honda took any measures to render the position, which

was intolerable in 1999, acceptable in 2001. To the contrary, measurements both before and after Smith rejected the position found no detectable levels of isocyanates, and showed that Smith's work station had the production area's lowest levels of other airborne contaminants. Smith's objective medical tests undertaken while she was at this position indicate that she suffered no impairment there."

Finally, while the Company's accommodation was unsuccessful since it did not cure the Plaintiff, the Court noted that "the ADA does not demand the impossible or the pointless, and there is simply no evidence showing either that her continuing problems were caused by continued exposure to irritants at her new job posting, or that transfer to a desk job within Honda's facility would have helped her. The undisputed evidence indicates precisely the opposite." Thus Honda discharged its duty of reasonable accommodation by placing the Plaintiff in a working environment that conformed to her medical restrictions. There was no further duty to transfer her to a position that would have been no better for her condition and probably worse. Thus the Court affirmed the judgment of the District Court.

Transsexual Firefighter Protected By Title VII

In *Smith v. City of Salem, Ohio*, 369 F.3d 912 (6th Cir. 6/1/04), Plaintiff was a 7 year firefighter lieutenant for the City who was diagnosed with Gender Identity Disorder ("GID"), i.e., "a disjunction between an individual's sexual organs and sexual identity." After being diagnosed with GID, Plaintiff began "expressing a more feminine appearance on a full-time basis" - including at work - in accordance with international medical protocols for treating GID. Soon thereafter, Plaintiff's co-workers began questioning him about his appearance and commenting that his appearance and mannerisms were not "masculine enough." As a result, Plaintiff notified his immediate supervisor about his GID diagnosis and treatment. He also informed the supervisor of the likelihood that his treatment would eventually include complete physical transformation from male to female. Plaintiff had approached his supervisor in order to answer any questions he might have concerning his appearance and manner and so that the supervisor could address co-workers' comments and inquiries. Plaintiff, however, specifically asked his supervisor not to tell the Chief of the Department, which of course the supervisor promptly did. The Chief then set in motion machinery to discharge the Plaintiff, including meetings of City officials and violations of the state open meeting law, and concocted a plan to require the Plaintiff to undergo three separate psychological examinations in the hopes that he would resign. Ultimately the Plaintiff was suspended for three days for violation of a Department policy; this suspension was later overturned by an Ohio state court.

Plaintiff sued the City and various individual defendants, asserting Title VII claims of sex discrimination and retaliation. The District Court dismissed Plaintiff's case, and specifically held that transsexuals were not protected by Title VII. On appeal, Plaintiff contended that the District Court erred in holding that: (1) he failed to state a claim of sex stereotyping; (2) Title VII protection is unavailable to transsexuals; (3) even if he had stated a claim of sex stereotyping, he failed to demonstrate that he suffered an adverse employment action; and (4) he failed to state a claim based on the deprivation of a constitutional or federal statutory right, pursuant to 42 U.S.C. § 1983.

The case turned on two issues: whether Plaintiff properly alleged a claim of sex stereotyping, in violation of the Supreme Court's pronouncements in *Price Waterhouse v.*

Hopkins, 490 U.S. 228 (1989), and whether Plaintiff alleged that he suffered an adverse employment action. On the first issue, the Court held that “[h]aving alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.” The Court relied on the Supreme Court’s reasoning in *Price Waterhouse*, in which a female aspirant for partner was told she should take courses in charm school and act and dress more femininely, that she was considered too “macho” to make partner. The Court ruled that the same reasoning applied in reverse, to a male exhibiting female characteristics, and was similarly protected under Title VII.

Put another way, as the Court wrote, “After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.”

On the second issue, the District Court held that Plaintiff’s suspension was not an adverse employment action because the Court of Common Pleas, rendering the "ultimate employment decision," reversed the suspension, and that accordingly, Smith's Title VII claim could not lie. Again, the Appeals Court disagreed. An adverse employment action is defined as a "materially adverse change in the terms and conditions of [plaintiff's] employment.” While a “bruised ego” or a “mere inconvenience or an alteration of job responsibilities” is not enough to constitute an adverse employment action, more substantial actions are, such as firing, failing to promote, reassignment with significantly different responsibilities, a material loss of benefits, suspensions, and other indices unique to a particular situation. Here, the Plaintiff was suspended, so there was an adverse employment action.

Thus the Court reversed the District Court and remanded the case.

At The Supreme Court

Supreme Court Reaffirms Broad Scope Of ERISA Preemption

Cases on which we reported last December and April were decided recently by the Supreme Court. In *Aetna Health, Inc. v. Davila* and *CIGNA Healthcare of Texas, Inc. v. Calad*, (together reported at *Roark v. Humana, Inc.*, 307 F.3d 298 (5th Cir. 2002) with two other consolidated cases which are not subject to Supreme Court review), the Court agreed to determine whether or not ERISA restricts the ability of HMO participants to sue the HMO for negligence under state laws, which generally are more generous in terms of the damages available. With respect to the claims of Davila and Calad, the 5th Circuit found that the respective HMOs in their cases were not acting as plan fiduciaries when they denied medical treatment, and thus Section 502 of ERISA did not preempt their claims. The Court relied on a prior Supreme Court case, *Pegram v. Herdrich*, 530 U.S. 211 (2000), in which the Court had held that mixed eligibility and treatment decisions were not subject to ERISA because those types of decisions are not fiduciary acts. On June 21, 2004, the Supreme Court decided these cases in favor of the HMOs. 2004 U.S. LEXIS 4571.

The Plaintiffs had brought separate Texas state-court suits, alleging that the HMOs had

refused to cover certain medical services in violation of an HMO's duty "to exercise ordinary care" under the *Texas Health Care Liability Act* (THCLA), and that those refusals "proximately caused" Plaintiff's injuries. The HMOs removed the cases to federal courts, claiming that the actions fit within the scope of, and were thus completely pre-empted by, §502 of the Employee Retirement Income Security Act of 1974 (ERISA). The District Courts agreed, declined to remand the cases to state court, and dismissed the complaints. Consolidating these and other cases, the Fifth Circuit reversed. It found that respondents' claims did not fall under ERISA § 502(a)(2), which allows suit against a plan fiduciary for breaches of fiduciary duty to the plan, because petitioners were being sued for mixed eligibility and treatment decisions that were not fiduciary in nature, and did not fall within the scope of §502(a)(1)(B), which provides a cause of action for the recovery of wrongfully denied benefits, because THCLA did not duplicate that cause of action.

The Supreme Court unanimously held that the Plaintiff's state law causes of action fell within ERISA §502(a)(1)(B), and were therefore completely pre-empted by ERISA §502 and removable to federal court. First, the Court ruled that any state-law cause of action that duplicates, supplements, or supplants ERISA's civil enforcement remedy conflicts with clear congressional intent to make that remedy exclusive, and is therefore pre-empted. Second, if an individual could have brought his claim under ERISA §502(a)(1)(B), and where no other independent legal duty is implicated by a defendant's actions, then the individual's cause of action is completely pre-empted by ERISA §502(a)(1)(B). Here, Plaintiffs brought suit only to rectify wrongful benefits denials, and their only relationship with the HMOs is the HMOs partial administration of their ERISA-regulated benefit plans; Plaintiffs therefore could have brought §502(a)(1)(B) claims to recover the allegedly wrongfully denied benefits.

Third, the 5th Circuit erred in distinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them (contract or tort); this would allow parties to evade ERISA's pre-emptive scope simply by relabeling contract claims as claims for tortious breach of contracts. And the fact that a state cause of action attempts to authorize remedies beyond those that ERISA §502(a) authorizes does not put it outside the scope of ERISA's civil enforcement mechanism. Fourth, the Court also found unavailing Plaintiffs' argument that the THCLA is a law regulating insurance that is saved from preemption by ERISA §514(b)(2)(A). Finally, coverage decisions are purely eligibility decisions, and thus do not implicate the different rule applicable to mixed eligibility/treatment decisions. A benefit determination under ERISA is part and parcel of the ordinary fiduciary responsibilities connected to the administration of a plan. That it is infused with medical judgments does not alter this result. Here, the HMOs were neither Plaintiffs' treating physicians nor those physicians' employees.

Thus coverage decisions under ERISA are not subject to attack under state laws.

ERISA Anti-Cutback Rule Bars New Post-Retirement Employment Restrictions

In a case first reported here in January, *Central Laborers Pension Fund v. Heinz*, 124 S.Ct. 2230 (6/7/04), a multi-employer pension plan had a long-standing provision suspending benefits for certain types of post-retirement employment, which was fine. Later, however, the plan enacted an amendment which expanded the types of post-retirement employment that would

result in benefit suspension, with the result that some retirees who had retired prior to the amendment had their benefits suspended. Specifically Heinz retired prior to the amendment and took a job as a supervisor in the construction industry, which was permissible under the prior rule. After he took that job, however, the plan barred any post-retirement construction employment, so his benefits were cut off. The 7th Circuit held that the amendment violated ERISA's anti-cutback rule because it read the rule to prohibit any "reductions" in benefits attributable to service before the amendment; therefore, as applied to people whose benefits were attributable to service performed before the amendment, the amendment was unlawful.

The Supreme Court agreed, and held that ERISA §204(g) prohibits a plan amendment expanding the categories of postretirement employment that triggers suspension of the payment of early retirement benefits already accrued. First, the Court reasoned that the anti-cutback provision is crucial to ERISA's central object of protecting employees' justified expectations of receiving the benefits that they have been promised. The provision prohibits plan amendments that have "the effect of . . . eliminating or reducing an early retirement benefit." The question here was whether the Plan's amendment had such an effect. Although the statutory text was not as helpful as it might be, it is clear as a matter of common sense that a benefit has suffered under the amendment. Heinz accrued benefits under a plan allowing him to supplement his retirement income, and he reasonably relied on that plan's terms in planning his retirement. The 1998 amendment undercut that reliance, paying benefits only if he accepted a substantial curtailment of his opportunity to do the kind of work he knew. There is no way that, in any practical sense, this change of terms could not be viewed as shrinking the value of Heinz's pension rights and reducing his promised benefits.

Second, the Court rejected the "technical" justifications offered by the Plan. To give the anti-cutback rule the constricted reading urged by the Plan -- applying it only to amendments directly altering the monthly payment's nominal dollar amount and not to a suspension when the amount that would be paid is unaltered -- would take textual *force majeure*, and certainly something closer to irresistible than language in 29 U.S.C. §1002(23)(A) to the effect that accrued benefits are ordinarily "expressed in the form of an annual benefit commencing at normal retirement age." And the Plan's argument that §204(g)'s "eliminate or reduce" language does not apply to mere suspensions misses the point. ERISA permits conditions that are elements of the benefit itself but the question here is whether a new condition may be imposed after a benefit has accrued. The right to receive certain money on a certain date may not be limited by a new condition narrowing that right. Finally, ERISA §203(a)(3)(B) -- which provides that the right to an accrued benefit "shall not be treated as forfeitable solely because the plan" suspends benefit payments when beneficiaries like respondents are employed in the same industry and the same geographic area covered by the plan -- is irrelevant to the question here. Section 203(a) addresses the entirely distinct concept of benefit forfeitures. And read most simply and in context, §203(a)(3)(B) is a statement about the terms that can be offered to plan participants up front, not as an authorization to adopt retroactive amendments.

Affirmative Defenses Available In Constructive Discharge Cases

In *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (6/14/04), the Supreme Court decided a case first reported here last January. Here, the employee claimed that she was continually sexually harassed during her five months on the job as a state police dispatcher, and

the employer did nothing about it. She then quit after being accused of stealing paperwork related to her employment, being handcuffed at work, photographed, read her rights and questioned. She sued, claiming in substance that she was the victim of a sexually hostile work environment because she was viewed as a political appointee, and was constructively discharged.

The District Court had granted the Pennsylvania State Police's ("PSP") motion for summary judgment. Although recognizing that Suders' testimony would permit a fact trier to conclude that her supervisors had created a hostile work environment, the court nevertheless held that the PSP was not vicariously liable for the supervisors' conduct. In support of its decision, the District Court referred to *Faragher v. Boca Raton*, 524 U.S. 775, 808, 141 L. Ed. 2d 662, 118 S. Ct. 2275. In that case, and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257, decided the same day, the Supreme Court held that an employer is strictly liable for supervisor harassment that "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." But when no such tangible action is taken, both decisions also held, the employer may raise an affirmative defense to liability. To prevail on the basis of the defense, the employer must prove that "(a) [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that (b) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Suders' hostile work environment claim was untenable as a matter of law, the District Court stated, because she unreasonably failed to avail herself of the PSP's internal antiharassment procedures. The court did not address Suders' constructive discharge claim.

The Third Circuit reversed and remanded the case for trial. The appeals court disagreed with the District Court in two key respects: First, even if the PSP could assert the *Ellerth/Faragher* affirmative defense, genuine issues of material fact existed about the effectiveness of the PSP's program to address sexual harassment claims; second, Suders had stated a claim of constructive discharge due to hostile work environment. The appeals court ruled that a constructive discharge, if proved, constitutes a tangible employment action that renders an employer strictly liable and precludes recourse to the *Ellerth/Faragher* affirmative defense.

The Supreme Court held that to establish "constructive discharge," a plaintiff alleging sexual harassment must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may assert the *Ellerth/Faragher* affirmative defense to such a claim unless the plaintiff quit in reasonable response to an adverse action officially changing her employment status or situation, *e.g.*, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.

The Court reasoned, first, that under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign? This doctrine was developed by the National Labor Relations Board (NLRB) in the 1930's, and was solidly established in the lower federal courts by 1964, when Title VII was enacted. The Court agreed that Title VII encompasses employer liability for a constructive discharge. Second, this case concerned employer liability for one subset of constructive discharge claims: those resulting from sexual harassment, or "hostile work

environment," attributable to a supervisor. The Court's starting point was the *Ellerth/Faragher* framework. Those decisions delineate two categories of sexual harassment claims: (1) those alleging a "tangible employment action," for which employers may be held strictly liable; and (2) those asserting no tangible employment action, in which case employers may assert the affirmative defense. The key issues here are: Into which *Ellerth/Faragher* category hostile-environment constructive discharge claims fall, and what proof burdens the parties bear in such cases. A tangible employment action, the Court stated, is an "official act of the enterprise" and "falls within the special province of the supervisor." In contrast, when supervisor harassment does not culminate in a tangible employment action, it is less obvious that the agency relation is the driving force. The Court also recognized that a liability limitation linked to an employer's effort to install effective grievance procedures and an employee's effort to report harassing behavior would advance Title VII's conciliation and deterrence purposes.

Third, the constructive discharge at issue stems from, and can be regarded as an aggravated case of, sexual harassment or hostile work environment. For an atmosphere of harassment or hostility to be actionable, the offending behavior must be sufficiently severe or pervasive to alter the victim's employment conditions and create an abusive working environment. A hostile-environment constructive discharge claim entails something more: working conditions so intolerable that a reasonable person would have felt compelled to resign. Suders' claim is of the same genre as the claims analyzed in *Ellerth* and *Faragher*. Essentially, Suders presents a "worse case" harassment scenario, harassment ratcheted up to the breaking point. Like the harassment considered in *Ellerth* and *Faragher*, harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts. Unlike an actual termination, which is *always* effected through an official company act, a constructive discharge may or may not involve official action. When it does not, the extent to which the agency relationship aided the supervisor's misconduct is less certain, and that uncertainty justifies affording the employer the chance to establish, through the *Ellerth/Faragher* affirmative defense, that it should not be held vicariously liable. The Third Circuit erred in drawing the line differently.

Finally, the Court ruled that, following *Ellerth* and *Faragher*, the plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard.

Thus although the Third Circuit correctly ruled that the case, in its current posture, presents genuine issues of material fact concerning Suders' hostile work environment and constructive discharge claims, that court erred in declaring the affirmative defense described in *Ellerth* and *Faragher* never available in constructive discharge cases.

Legislative/Regulatory Actions Of Note

OSHA Releases Voluntary Ergonomics Guidelines for Retail Grocery Stores

The Occupational Safety and Health Administration ("OSHA"), on March 28, 2004, released voluntary ergonomics guidelines for retail grocery stores that are intended to help prevent musculoskeletal disorders. According to the agency, "[t]he guidelines emphasize various solutions that have been implemented by grocery stores across the country and have been effective in reducing work-related injuries and illnesses." The Guidelines may be reviewed and

downloaded from OSHA's website at www.osha.gov.

FLSA/FMLA Cases

Donning And Doffing Special Clothing Was Compensable, And Time Spent In Paid Meal Period Not Creditable Towards Overtime

In *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir., 6/3/04), Plaintiffs were a class of employees in a silicon chip plant, who were required to varying degrees to don special clothing for work and were not paid for that changing time (an ancillary issue was the employer paying for a 30 minute meal period but crediting that payment against overtime). As the Court explained: "Part of the silicon wafer manufacturing process takes place in 'cleanrooms' -- environments that have few of the air-borne impurities that exist in the ambient air. Cleanrooms are classified by the number of particles of contamination permitted per cubic foot. Therefore, a Class 10,000 cleanroom has more impurities than a Class 10 cleanroom. All employees who work in cleanrooms must wear gowns to help maintain the environment. The gowns worn in the cleanrooms are referred to as 'bunny suits.' The process of preparing oneself to enter the cleanroom is called 'gowning.' More gowning is required in a Class 10 cleanroom than in a Class 10,000 cleanroom. For example, employees who work in a Class 10,000 cleanroom complete eight steps before entering, five of which involve "donning gowns," whereas employees who work in a Class 10 cleanroom must complete ten to twelve steps. Some, but not all, of the cleanrooms have an air shower that employees must proceed through prior to entering the cleanroom. During the relevant times, Wacker required Fab 1 and 2 employees who worked in cleanrooms to complete the gowning process prior to beginning their shifts or prior to clocking in." The District Court found in favor of the Defendant on all claims.

On appeal, Plaintiffs asserted three principal errors. They contended that the district court erred in concluding that: (1) paid-lunchtime compensation did not constitute remuneration regularly received for employment and is therefore excludable from the regular rate of pay used to calculate overtime compensation; (2) time spent by employees changing into and out of plant uniforms at the work-site was not "work-time" under the FLSA, and therefore is not compensable; and (3) the employer could lawfully credit the "paid lunch" time payments against overtime compensation due the employees. The Company's basic claim was that it was entitled to credit the paid but duty-free 30 minute meal period towards donning and doffing time, and thus no overtime was owed at all, a claim with which the District Court had agreed.

The 9th Circuit agreed in part and disagreed in part. First the Court noted that it was proper for the Defendant to exclude the duty-free meal period from "hours worked" for purposes of calculating each employee's regular rate of pay. It relied on a Department of Labor regulation providing that "The parties may reasonably agree that the time [spent in certain activities] will not be counted as hours worked. Activities of this type include eating meals between working hours. Where it appears from all the pertinent facts that the parties have agreed to exclude such activities from hours worked, payments for such time will be regarded as qualifying for exclusion from the regular rate." Since here there was no dispute on this issue, the Defendant lawfully excluded that time.

On the clothes-changing issue, the Court noted that while "ordinary" clothes-changing is not compensable, under another DOL regulation "If an employee in a chemical plant, for

example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.” The Court also noted that “‘where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work,’ the activity may be considered integral and indispensable to the principal activities.” Thus because the Company required the use of the “bunny suits,” and their use was integral to the employees’ work, time spent donning and doffing such suits was compensable work time. However, noted the Court, “[a] question still remains, however, as to whether the time spent on this activity was *de minimis*. . . . Here, the time is apparently not similarly insubstantial. Nor is it difficult to monitor. Plaintiffs presented evidence that some 20 to 30 minutes were spent daily by Fab 2 employees performing these tasks; Wacker disagrees but offers no estimate of its own. Because the amount of time is in dispute, there is a genuine issue of material fact to be resolved by the fact-finder on remand.”

Finally, the Court addressed the issue of using the paid 30 minute meal period to offset up to 30 minutes of overtime. As noted earlier, the Court had ruled that this time could be excluded from “hours worked” for purposes of calculating the employees’ regular rate of pay. It is a different question, however, whether that paid time could be offset against overtime hours, as the Defendant maintained.

The Court ruled that both the Defendant and the District Court were plainly wrong: “Wacker's position is untenable. First, section 7(h) of the FLSA expressly provides that sums excluded from the regular rate “shall not be creditable toward . . . overtime compensation required under this section.” Here, compensation for the paid lunch periods is excluded from the regular rate under section 7(e)(2) . . . Accordingly, the use of paid lunch compensation to offset wages or overtime compensation due for hours worked is in direct violation of the express provisions of section 7(h). . . . Even without section 7(h), we emphasize that it would undermine the purpose of the FLSA if an employer could use agreed-upon compensation for non-work time (or work time) as a credit so as to avoid paying compensation required by the FLSA. The Supreme Court has held that in enacting the FLSA Congress intended ‘to guarantee either regular or overtime compensation for all actual work or employment. To hold that an employer may validly compensate his employees for only a fraction of time consumed in actual labor would be inconsistent with the very purpose and structure’ of the Act. Crediting money already due an employee for some other reason against the wage he is owed is not paying that employee the compensation to which he is entitled by statute. It is, instead, false and deceptive ‘creative’ bookkeeping that, if tolerated, would frustrate the goals and purposes of the FLSA.”

Thus the Court remanded the donning/doffing and meal period crediting portions of the case back to the District Court.

No “Interference” With FMLA Where Employee Received More Than 12 Weeks Leave

In *Geromanos v. Columbia University*, 2004 U.S. Dist. LEXIS 11558 (SDNY 6/14/04), Plaintiff had an alcohol dependency and was put on FMLA leave, and required to apply for short-term disability (“STD”) benefits. She eventually was terminated for failing to provide required progress reports and for working at another job while on STD. She sued for interference with her FMLA rights, even though she had received a full 12 weeks of leave.

Specifically, she claimed that Columbia interfered with her rights under FMLA by 1) failing to inform her of her FMLA rights; 2) failing to inform her she was being placed on FMLA leave; 3) requiring her to submit weekly progress reports while on leave; and 4) terminating her for failing to provide the progress reports and for working a second job. The Employer argued that the plaintiff had been "put on disability status because of the assessment of your healthcare provider that you were unable to work." In addition, "We have been informed that you have not complied with the conditions outlined in my April 4th letter to you in that you have not submitted weekly progress reports to the Return to Work Program. Because of this your employment as a Research Nurse at Columbia will be terminated effective today."

The Court began by noting that "[t]o make out a prima facie case on a claim for interference with FMLA rights . . . a plaintiff must establish five elements: 1) that she is an eligible employee under the FMLA; 2) that defendant is an employer as defined in FMLA; 3) that she was entitled to leave under FMLA; 4) that she gave notice to the defendant of her intention to take leave; and 5) that she was denied benefits to which she was entitled under FMLA."

The Court concluded that "Plaintiff has failed to establish a prima facie case because there is no evidence that Columbia denied her any benefits to which she was entitled under FMLA. FMLA grants employees two distinct rights: the right to take leave for the treatment of a serious health condition and the right to be reinstated to the former position or an equivalent position at the end of leave. Plaintiff received over twelve weeks of paid leave from Columbia, and plaintiff had no right to reinstatement because she was incapable of performing the essential functions of her position at the end of the twelve weeks." Since Plaintiff's return to work date was two months after expiration of her 12 week FMLA leave, she had no right to reinstatement. She had received at least 12 weeks of leave. Thus she received everything to which she was entitled under the FMLA, and the District Court dismissed her claim.

On The Employee Benefits Front

Cash Balance Conversion Plan Did Not Discriminate On Basis Of Age Under ERISA

In *Tootle v. ARINC, Inc.*, 2004 U.S. Dist. LEXIS 10629 (D.Md. 6/10/04), Plaintiff was terminated in 2002. He then sued, claiming that the employer's conversion of a defined benefit plan to a cash balance pension plan constituted age discrimination because it favored younger employees. Plaintiff then moved under Count V of his Complaint to certify a class of employees who were similarly situated and similarly discriminated against.

Prior to 1999, Defendant offered its employees a defined benefit plan, in which employees were entitled to a fixed monthly payment from an annuity upon their retirement. The annuity payment was calculated based on two variables-the employee's years of service and a percentage of his or her highest three consecutive years of salary within the ten years preceding retirement. Effective January 1, 1999, Defendant converted to a cash balance plan. Under this

plan each employee maintained a hypothetical account, which received annual credits based on two variables—a percentage of the employee's current salary and an interest credit at a guaranteed interest rate. A retiree had the option of receiving an annuity or taking a lump sum payment. All employees who were eligible to participate in the existing pension plan at the time of the conversion and who were transferred to the new plan received initial credits to their cash balance accounts equal to the lump sum value of the benefits they had accrued under the existing plan, as well as bonus "transition credits." A group of almost 300 employees were offered a choice between continuing to accrue benefits under the defined benefit plan, or switching and accruing future benefits under the new cash balance plan. The Defendants claimed that only employees who were "vested" participants under the existing pension plan, and who were either 55 years old or had 25 or more years of service under the plan, were eligible for this option. Plaintiff, on the other hand, alleged that all employees over the age of 55 were offered the choice, regardless of their years of service under the plan.

In Count V, Plaintiff moved for certification of the class of: "All ARINC Retirement Plan participants who have suffered age discrimination due to the conversion of the ARINC Retirement Income Plan from a final average formula to a cash balance plan on January 1, 1999." This claim alleged that Defendant's conversion from a defined benefit to a cash balance pension plan constituted unlawful age discrimination under ERISA because the manner in which accrued benefits are calculated under the new plan favored younger employees. However, a class cannot be certified if the named plaintiff has failed to state a claim upon which relief can be granted. Where "all other similarly situated plaintiffs would likewise fail to state a claim," it is appropriate to deny class certification and to dismiss the claim.

Here, the Court ruled that Plaintiff failed to state a claim under ERISA and thus his motion for class certification was denied. As the Court explained, a defined benefit plan violates ERISA if "an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age." The Court wrote that "[c]ash balance plans currently are regulated in the same manner as defined benefit plans under ERISA, and therefore are subject to this age discrimination provision. The theory that cash balance plans violate this provision is based on a series of premises. For defined benefit plans, ERISA directs that accrued benefits are calculated in terms of 'an annual benefit commencing at normal retirement age,' in other words in terms of a traditional annuity beginning at age 65. In order to apply this definition to a cash balance plan, the current hypothetical balance in an employee's account must be translated into the equivalent age-65 annuity that those sums could purchase. The claim of age discrimination arises because money contributed to a younger employee will be worth more (when expressed as an annuity starting at age 65) than the same amount of money contributed to an older employee, because the contribution to the younger employee will have more years to accrue interest before normal retirement age. This inevitably results in a declining benefit accrual rate as an employee ages, in apparent violation of ERISA."

"In other words," the Court continued, "all cash balance plans per se violate the ERISA age discrimination provision, by virtue of their design. Even if the age discrimination provisions apply to employees prior to normal retirement age, employers should not be forced to calculate accrued benefits under a cash balance plan in terms of an age-65 annuity, as ERISA requires for traditional defined benefit plans. Calculating accrued benefits in terms of an age-65 annuity is not the only option available under ERISA. For plans which involve individual accounts, such as traditional defined contribution plans, accrued benefits are calculated as 'the balance of the

individual's account.' ERISA's prohibition on age discrimination for defined contribution plans also differs slightly, stating that a plan satisfies the requirement as long as 'allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age.' These ERISA provisions provide a better measure for examining possible age discrimination in cash balance plans."

The Court found that applying the ERISA provisions designed for traditional defined benefit plans to cash balance plans could lead to illogical results, as illustrated in this case. The Court noted that "[o]n its face, the terms of the ARINC cash balance plan appear to favor older employees. All employees are entitled to regular interest credits at the same guaranteed rate, the regular contribution credits are based on a percentage of an employee's salary that increases with age, and the transition credits were provided on terms slightly more favorable to older employees. The potential claim of age discrimination arises only by applying a definition for accrued benefits which does not fit with the way cash balance plans are structured. The more sensible approach is to measure benefit accrual under cash balance plans by examining the rate at which amounts are allocated and the changes over time in an individual's account balance, as the ERISA provisions designed for traditional defined contribution plans would direct." Thus under either approach, the Defendant's cash balance plan did not discriminate against employees because of their age. Thus Plaintiff's motion for class certification was denied and Count V dismissed.

HR Manager Was Not A "Fiduciary" Under ERISA

Estate of Weeks v. Advance Stores Company, Inc., 2004 U.S.App. LEXIS 10637 (4th Cir. 6/1/04) is a sad story. Weeks worked at the Defendant's distribution center for 5 months before suffering a relapse of leukemia. When he became sick, his parents drove him from Virginia to a St. Jude's hospital in Tennessee, where they remained at his bedside until he died in June. Apparently no one opened mail from Weeks' employer until after he died. Shortly after he was hospitalized, his mother contacted a human resources manager of the Defendant, who informed her that Weeks' health and life insurance coverage had ceased upon his resignation, and did not tell her that he could have continued those coverages. Several months after her son died, his mother found an employee handbook and various summary plan descriptions, which indicated Weeks could have continued those coverages under either COBRA or ERISA, and thus have some of his medical expenses defrayed, as well as recovering under a life insurance policy. Mrs. Weeks sued the Defendant as executrix of her son's estate, claiming that she was misled to her and her son's detriment by the HR manager, to their detriment. The District Court dismissed her claim, and she appealed to the 4th Circuit Court of Appeals. She argued in essence that the district court erred by concluding that she and Weeks were not entitled to rely on the HR manager's statements as to the termination of Weeks' medical and life insurance coverage because she did not qualify as an ERISA fiduciary.

The 4th Circuit reviewed the definition of "fiduciary" under ERISA, and basically found that a fiduciary is someone who exercises some discretion in the administration of the plan, which the Court found the HR manager did not have. "As a human resources manager for Advance Stores, Yates was primarily responsible for recruiting new employees, informing them of company policies and their benefits, maintaining personnel files and answering employee questions or directing such questions to the proper person. In answering employee questions,

however, Yates simply repeated information that was given to her by upper-management or that had already been inputted into the company's computer database. Thus, although Yates may have exercised some discretion in the overall performance of her job duties, Yates did not have any discretionary authority or control over the manner in which employee plans were managed and administered. Nonetheless, Mrs. Weeks argues that Yates became an ERISA fiduciary by answering her questions about Weeks' benefits rather than transferring her call to the benefits department. We have held, however, that 'reading a computer screen to determine who is and who is not covered' does not make someone an ERISA fiduciary because such a function is administrative rather than discretionary. . . . Such an act is merely administrative because in performing it an employee does not exercise any discretionary authority over the manner in which the ERISA plan is managed or administered. . . . Here, Yates, as illustrated by her job duties listed above, simply did not exercise the requisite discretionary control over Weeks' medical and life insurance plans. Moreover, we note that Mrs. Weeks and Weeks could have corrected any misstatements made by Yates, an administrative employee, by going through the documentation, such as the employee handbook, that was provided to Weeks."

Thus the Court found that the HR manager was not a fiduciary, and thus Mrs. Weeks could not recover under ERISA for any misstatements she might have made.

A "Guaranty" Means A Guarantee

In *LaForest v. Honeywell*, 2004 U.S.App. LEXIS 11098 (11th Cir. 6/7/04), Honeywell was a successor corporation to Bendix. In 1974, Bendix divested itself of three unionized operations and sold them to Facet, which later was taken over by Honeywell. In its impact negotiations with the UAW, Bendix entered into an agreement entitled a "Guaranty," by which it promised, in essence, that certain retirees, vested employees, and surviving spouses would retain - for life - the level of health benefits in place at Bendix on April 1, 1976. In September 2002, those benefits were reduced below the level in place in 1976. A class of employees sued, seeking to hold Honeywell to the Guaranty. The District Court ruled in favor of the employees and ordered Honeywell to honor the Guaranty.

On appeal, among other arguments, the Company proffered the, well, idiotic argument that "the UAW 'tacitly' agreed to Motor Components' [an intervening successor] reduction of benefit levels insofar as it did not 'vigorously' contest that reduction - and therefore that Honeywell is not liable to provide for benefit levels above those resulting from this 'agreement.'" The Court quickly rejected this argument, as had the District Court. The Company also offered up a bunch of technical contract defenses such as lack of consideration, but the Court rejected those also. Thus the upshot is that Honeywell is on the hook to maintain a 1976 level of retiree benefits agreed to by its predecessor.

On The Labor Front

Flip-Flop, Flippity-Flop

In *IBM*, 341 NLRB No. 148 (6/9/04), the National Labor Relations Board ("Board") once again reversed course on the issue of the applicability of *Weingarten* rights to unorganized

employers. Under *Weingarten*, a 1975 Supreme Court case, union-represented employees have the right to have a union steward or representative present during an investigatory interview that the employee reasonably believes might lead to his or her discipline. Over the last 20 years, the Board has seesawed on whether or not a similar right, to have a co-worker present at such an interview, extends to unorganized employees.

In 2000, in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), enfd. in relevant part, 268 F.3d 1095 (D.C. Cir. 2001), the Board ruled that an employee in a nonunionized setting was allowed to have a coworker present at an investigatory interview that the employee reasonably believed might result in discipline. In *IBM*, the Board reversed this case, with the result being that *Weingarten* rights apply only to union-represented employees (at least for now).

The Board reasoned that the application of *Weingarten* to unorganized workplaces was a permissible interpretation of the National Labor Relations Act (“Act”), but not applying *Weingarten* also was a reasonable interpretation of the Act. Thus it had a federal labor relations policy decision to make. As the Board continued, “[t]he years after the issuance of *Weingarten* have seen a rise in the need for investigatory interviews, both in response to new statutes governing the workplace and as a response to new security concerns raised by terrorist attacks on our country. Employers face ever-increasing requirements to conduct workplace investigations pursuant to federal, state, and local laws, particularly laws addressing workplace discrimination and sexual harassment. We are especially cognizant of the rise in the number of instances of workplace violence, as well as the increase in the number of incidents of corporate abuse and fiduciary lapses. Further, because of the events of September 11, 2001 and their aftermath, we must now take into account the presence of both real and threatened terrorist attacks.”

The Board then noted the principal reasons why *Weingarten* should not extend to the unorganized workplace: co-workers do not represent the interests of the entire workforce, co-workers cannot redress the imbalance of power between employer and employee, co-workers do not have the same skills as a union representative, and that the presence of a co-worker may compromise the confidentiality of information. On balance, the Board concluded that “[a]fter careful reexamination of the rationale of *Epilepsy Foundation*, we find that national labor relations policy will be best served by overruling existing precedent and returning to earlier precedent . . . which holds that *Weingarten* rights do not apply in a nonunion setting.”

It should be noted, however, that the Board was careful to state what it was not holding: “We are *not* saying that a nonunion employee lacks a Section 7 right to seek mutual aid and assistance from a fellow employee. We are *not* saying that a nonunion employee is incapable of representing a fellow employee. We are *not* saying that nonunion employees lack the legal right to seek to stand up for each other. We are *not* saying that nonunion employees lack the protection of the Act or that such protection is endangered. In sum, employees have the right to seek such representation; they cannot be disciplined for asserting those rights. . . . Our only holding is that the nonunion employer has no obligation to *accede* to the request, i.e., to deal collectively with the employees.”

Stay tuned on this issue.

Midcontract-Term Modification Of Wage Rates, Even To Increase Them, Was A ULP Absent Union’s Consent

In *St. Barnabas Medical Center*, 341 NLRB No. 151 (6/10/04), a union represented the nurses at the Medical Center. The parties' collective bargaining agreement, as most do, contained specific wage rates for the various classifications, and did not contain a so-called "reopener" provision (which generally allows one or both parties to "reopen" negotiations solely as to wages). The Medical Center at some point faced a "staffing crisis," and the union sought to reopen the contract for wages for particular classifications. The parties apparently went back and forth with proposals, but at some point the Medical Center notified the union that its last proposal was not acceptable to the Medical Center and that the parties were at impasse, and thus the Medical Center would implement its own last proposal.

The union then filed a charge with the Board, alleging that the Medical Center unilaterally modified the collective bargaining agreement in mid-term absent the union's consent, a violation of Section 8(d) of the National Labor Relations Act ("Act"). The Medical Center argued, in turn, that "the rules governing the midterm modification of contracts do not apply here because, 'once the Union urgently requested that wages be reopened and the Medical Center agreed, the Union and Medical Center incurred the same bargaining obligations and rights that they would enjoy or have had no contract been in existence.'"

The Board explained that it "has long held that the proposal of a midterm modification does not impose a bargaining obligation. Nothing in [Section] 8(d) 'suggests a party *making* a midterm proposal should be treated differently from a party *receiving* such a proposal. As the recipient of a midterm proposal clearly has no duty to discuss or agree to it, we find the party proposing a midterm modification does not incur a bargaining obligation by tendering its proposal.' . . . Furthermore, absent a wage reopener provision, the parties do not incur traditional bargaining obligations by meeting and discussing proposals for a midterm modification. . . . Thus, by simply requesting that the Respondent meet with the Union to discuss the 'feasibility of a wage reopener,' the Union did not incur traditional bargaining obligations. Accordingly, we agree with the judge's finding that the Respondent unlawfully implemented wage increases during the term of the contract without the Union's consent."

That's the law, like it or not.

No-Strike Provision Did Not Justify Suspending Employees For Picketing Shareholders Meeting

In *Englehard Corp.*, 342 NLRB No. 5 (6/18/04), relying upon its interpretation of a contractual no-strike provision, the employer suspended 38 employees because they picketed its shareholders' meeting, which was over 70 miles from the facility where the employees worked. The employees picketed in an effort to put pressure on the employer during successor contract negotiations. The no-strike language read:

The Union agrees that it will not call, participate in, or sanction, during the term of this Agreement, any strike, boycott, picketing, work-stoppage or slow-down whatsoever. The Union further agrees that any Employee engaging in an unauthorized strike, boycott, picketing, organized work slowdown or stoppage, or any other type of interference with the Employer's business, shall be subject to immediate discharge at the discretion of the Employer with no recourse to the grievance procedure contained herein.

As the Board explained, this language did not constitute a “clear and unmistakable” waiver of the union’s Section 7 right to picket in these circumstances. The Board wrote that: “We agree with the judge's analysis and conclusions Specifically, we affirm his finding that article 28 does not constitute a clear and unmistakable waiver by the Union of the employees' right to engage in the May 4 picketing of the shareholders' meeting in Woodbridge, New Jersey. The parties' mutually expressed intent in undertaking their correlative obligations in article 28 is plain: to prevent any suspension of work due to labor disputes. Article 28 was expressly intended to prohibit conduct that would reasonably lead to the suspension of work. The picketing of the shareholders' meeting in Woodbridge, New Jersey, could not reasonably be expected to (and in fact did not) lead to the suspension of any work at the Respondent's plant over 70 miles away in Peekskill, New York. Thus, we affirm the judge's finding that the May 4 picketing in question was not prohibited by article 28, but was instead protected by Section 7 of the Act. Consequently, we affirm the judge's findings and conclusions that the Respondent unlawfully threatened to discipline employees for participating in the picketing, engaged in unlawful surveillance of their activity, unlawfully suspended employees who participated, and unlawfully threatened to discipline employees if they participated in further picketing.”

Did You Know . . . ?

That the Molecule of the Month is Atenolol, a beta blocker drug used for treating high blood pressure and angina?

That July was named for Julius Caesar?

That July’s flower is the water lily, and its birthstone is the ruby?

That July is Blueberry Month, National Ice Cream Month, National Cellphone Courtesy Month, American Beer Month, Recreation and Parks Month, Auto Theft Awareness Month, National Moshing Month, and Adopt a Rescued Rabbit Month?