

September, 2004:

Mistake Of The Month - Once Again, Inconsistencies And Delay

In *Prindle v. TNT Logistics of North America*, 2004 WL 1844586 (W.D.WI, 8/11/04), a female employee doing loading dock work sued the Employer claiming that the Employer created a hostile work environment, discriminated against her on the basis of her sex and retaliated against her for complaining about sexual harassment. Plaintiff first complained to management about being picked up between the thighs by one employee, who also uttered crass remarks to her, and later about another employee [Langlois] who fondled her breasts (she also smelled alcohol on his breath), and on a later occasion looked up her shorts. The second employee also was known in the workplace for being crass and routinely addressing female employees as “dear” and “honey.”

During the HR investigation, Langlois was suspended and HR concluded he had a serious alcohol problem. Other female employees came forward during the investigation and related similar stories about their interactions with Langlois, mostly related to touching of various body areas. At the conclusion of HR’s investigation, Plaintiff’s immediate supervisor was fired for failing to take action in response to plaintiff’s complaint of sexual harassment against Langlois. Langlois was transferred to a supervisory position on another side of the plant so he would not have contact with the Plaintiff, and she in fact had no personal contact with Langlois after his transfer. Langlois later resigned.

Meanwhile, Plaintiff was suspended for a second incident of failing to secure a load, which had resulted in property damage and some loss to the Employer. Her suspension ended up being for seven weeks, which was considerably longer for the nature of the offense than any other employee had suffered, and it required her filing a grievance to be reinstated.

On Plaintiff’s claim of a hostile work environment, the Court noted that to maintain a claim of a hostile work environment, the plaintiff must demonstrate that her co-worker or supervisor harassed her because of her sex and that this harassment was “so severe or pervasive as to alter the conditions of [the victim’s] employment and create an abusive environment.” Moreover, a hostile work environment is one that is “both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” The parties agreed that plaintiff was offended by Langlois’s actions. The Court concluded that “[a] reasonable jury could find Langlois’s touching of plaintiff’s breasts sufficiently invasive, humiliating and threatening to poison plaintiff’s working environment. It is undisputed that after the breast touching incident, plaintiff viewed Langlois’s habitual references to her and other female employees as ‘honey’ or ‘dear’ as problematic. Therefore, I conclude that there is at least a genuine issue of material fact whether the breast touching incident created a hostile work environment for plaintiff.”

The next issue was whether or not the Employer could be held liable for Langlois’ harassing conduct. The Court ruled that Langlois was not a “supervisor” within the meaning of Title VII, and thus the Employer was not automatically liable for his conduct and could avoid liability if it could show that it took prompt and effective remedial action. Here, Plaintiff contended that the Employer was negligent in its response to Langlois’s harassing behavior because it never disciplined him or took any serious action to prevent the harassment from occurring in the first place.

As the Court wrote:

Defendant argues that HR's investigation and subsequent transfer of Langlois meets the standard for avoiding liability. However, the undisputed facts show that defendant was aware of Langlois's behavior toward plaintiff at least four months before it investigated plaintiff's complaint against him. This four-month delay at least raises a question of material fact whether defendant's response was prompt. . . . Gleissner's failure to act on plaintiff's complaint against Langlois may have caused her injury by exposing her to further inappropriate behavior by Langlois. . . . That defendant ultimately fired Gleissner for failing to act on plaintiff's complaint is of no consequence. A reasonable jury could determine that defendant's response to plaintiff's harassment complaint was not prompt or appropriate and therefore, could find that defendant was negligent."

Finally, as to Plaintiff's retaliation claim, she argued that the Company retaliated against her for complaining to Gleissner about Langlois after the breast touching incident because soon after her complaint, Gleissner suspended her for failing to secure a load. Plaintiff contended that her seven week suspension was suspicious because there was no evidence of extensive property damage to justify the length of her suspension, and other employees who had not complained of sexual mistreatment were not disciplined as harshly for failing to secure a load. But as the Court noted, "[t]he undisputed facts contain many contradictions and ambiguities about the reason for plaintiff's suspension, its length, and who was responsible for determining the length of her suspension. For example, it is undisputed that plaintiff's suspension began on June 11, 2001 and was for an indefinite period because the length of the suspension depends on the outcome of the investigation. It is undisputed also that [company policy] imposes different levels of discipline depending on the amount of property damage that occurs from an employee's mistake." Under Company policy, damage under \$2,500 should have resulted in a suspension of not more than five days, but Plaintiff was suspended for seven weeks.

Thus the Court concluded that:

Defendant's explanation for the disparity in treatment between plaintiff and other employees is that other employees' mistakes resulted in less property damage, leading to less punishment. Yet the Employer did not know the level of property damage caused by plaintiff when it decided to bring plaintiff back to work without pay after seven weeks. Therefore, it is difficult to understand how defendant can offer such an explanation with any confidence. Furthermore, defendant admits that the length of the initial one or two-day suspension that Gleissner gave plaintiff was *not* based on the level of property damage done or on any prior violations. Comparing the differing treatment between plaintiff and Burdick [another employee] alone, a reasonable jury could conclude that Gleissner suspended plaintiff because of his discriminatory animus toward her. . . . Because material questions of fact exist, I will deny defendant's motion for summary judgment as to plaintiff's discrimination claim."

Thus the Court denied the Employer's motion for summary judgment and ordered the case to trial. But you can see how inconsistencies in explanations, and inconsistencies in the application of a policy, can create trouble. Never mind how long it took the Company to take some action against the alleged harasser. There are some lessons to be learned from this case.

The Harshbarger Report

Develop New Systems To Define And Control Corporate Integrity

The set of written policies and procedures that deal with integrity practices differs from other kinds of performance standards. Rather than focusing on what should be done (i.e., achieve a 10 percent increase in revenues or reduce costs by \$1.7 million), integrity guidelines need to be framed initially in terms of what is out of bounds, articulated as clearly and fully as possible the “shalt nots.” They should define unacceptable behavior, the minimum ethic, not the “shoulds” or the “we hope you wills.”

We have learned from experience that integrity guidelines framed primarily in terms of what should be done will be viewed as purely aspirational, idealistic, and therefore largely irrelevant.

If integrity standards and boundaries are going to actually influence people’s behavior, the policies and guidelines must be actively discussed. Most difficult issues have competing interests or are fact specific, and those impacted by the guidelines must talk about the gray areas, the tensions, and reason underlying them. These sessions can benefit from outside facilitation but, in the end, senior executives must participate in, if not lead the sessions or seminars.

Senior executives must be willing to personally discuss exactly what their positions and thoughts are. They must be willing to help people think through the various ways of addressing ethical or integrity dilemmas. The dialogue will lead to feedback, greater understanding, and eventually to greater ownership.

New systems to define and control integrity will be an essential ingredient of the public face of the corporation or company. They serve notice of these policies to all stakeholders. Increasing the transparency of the entire issue of corporate integrity often deters those who might be inclined to violate the policies. We know from experience that the likelihood of detection or punishment is a key component of deterrence in white-collar crime. Visible enforcement is crucial. It may be better to have no code than to have one that is given only lip service.

OTHER EMPLOYMENT LAW HEADLINES

Court Rejects New FMCSA “Hours Of Service” Rules; Agency Seeks Stay

As we reported in last February’s edition, the Federal Motor Carrier Safety Administration (“FMCSA”) issued new “hours of service” rules for truck drivers. The new rules provided that truckers may be on duty for up to 14 consecutive hours, and drive for a maximum of 11 of those hours, before a rest period of 10 hours is required. The old standard was 15 duty hours with a maximum of 10 hours of driving after 8 hours of rest. Drivers still would be limited to 60 on-duty hours in any seven day period (or 70 hours in 8 days).

In *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C.Cir. 7/16/04), those rules were challenged and the Court ultimately invalidated them, finding that FMCSA did not consider the effect of the rules on the health of drivers. The rule was challenged by a group of public interest groups, who raised a variety of challenges. The Court, however, in a relatively harsh opinion, quickly held that:

the final rule is arbitrary and capricious because the agency neglected to consider a statutorily mandated factor - the impact of the rule on the health of drivers. In

promulgating "regulations on commercial motor vehicle safety," and HOS regulations are undoubtedly on that exact subject, the FMCSA is required "[a]t a minimum [to] ensure that ... the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators."

The Court found that FMCSA did not even consider the effect of the rules on drivers' health and could point to nothing in the rulemaking record to show that it had. Thus the Court had little difficulty invalidating the rule just on that basis.

The Court did, however, address some of the other concerns raised by the plaintiffs, most of which it found justified, so the agency could fix those issues. For example, while the final rule increased the minimum amount of off-duty time from eight to ten hours, and decreased permissible driving-eligible on-duty time from fifteen to fourteen hours, it increased the maximum permissible daily driving time from ten to eleven hours. The Court noted that FMCSA had essentially two justifications for increasing maximum daily driving time - the decrease in overall daily driving-eligible "tour of duty" from fifteen to fourteen hours, and the increase in mandatory off-duty time from eight to ten hours justified the increase in daily driving time in light of the cost-benefit analysis it had conducted. The Court wrote that:

We have our doubts about whether these two justifications are legally sufficient. The agency freely concedes that "studies show[] that performance begins to degrade after the 8th hour on duty and increases geometrically during the 10th and 11th hours" on duty. *Id.* Despite this finding, the agency cited absolutely no studies in support of its notion that the decrease in daily driving-eligible tour of duty from fifteen to fourteen hours will compensate for these conceded and documented ill effects from the increase.

The agency also had originally proposed a requirement that trucks be equipped with electric on-board recorders ("EOBR") in order to boost compliance with the hours-of-service rules. This requirement was dropped from the final rule, and the Court criticised the agency for not at least even studying EOBRs and doing a cost-benefit analysis:

Without such a cost-benefit analysis, accounting for benefits as well as costs, we do not understand how the remainder of the agency's explanation, all of which focuses solely on the costs of the rule, could pass muster in this court on petition for review. The second and third primary justifications for not requiring EOBRs - that implementing a performance, rather than a design, standard might be difficult, and that EOBRs might be unduly intrusive - might well be outweighed by the benefits of requiring EOBRs in the first place. We and the agency, however, have no idea whether they would, because the agency has not bothered to study what benefits EOBRs might have. This one-sided and passive regulatory approach in all likelihood does not comport with Congress's direction for the agency to "deal[] with" this issue in light of the statutorily mandated factors for which it has provided.

On September 2, 2004, the FMCSA filed a motion with the Court seeking to stay further action in the case and leave the new rules in place for now. The agency argues that it already has begun the process of addressing the Court's concerns and believes a stay is necessary to avoid substantial disruption in the enforcement of HOS requirements. On September 1, 2004 the

Federal Register published an Advance Notice of Proposed Rulemaking describing the agency's request for information pertaining to the costs and benefits associated with Electronic On-Board Recorders (EOBRs). (see below) The agency states that it already has entered into contracts with several entities for literature reviews relating to the effect of the new hours of service regulations on driver health.

Religious Accommodation For Mandatory OT Did Not Apply To Voluntary OT

In *Fox v. Lear Corporation*, 327 F.Supp.2d 946 (S.D.Ind. 7/28/04), Plaintiff was a maintenance employee in Lear's Edinburg, Indiana plant. The Employer sometimes had mandatory weekend work, and sometimes voluntary weekend work. A collective bargaining agreement ("CBA") with the UAW required the Employer to seek volunteers in order of seniority depending on the last person to volunteer. If too few maintenance employees volunteer, the Employer can mandate employees to fill the remaining slots, beginning with the least senior employee.

Plaintiff is a member of the Presbyterian Reformed Church of America, which bars members from performing work on the Sabbath, other than work of mercy or necessity. Plaintiff defined the Sabbath as sundown on Saturday through sundown on Sunday. In requesting relief from mandated weekend work, Plaintiff was concerned that lost attendance points could lead to his termination. Ultimately the Plaintiff, UAW and the Employer agreed that the Employer would "not apply the attendance policy as written from Sundown Saturday to Sundown Sunday." The Employer also agreed to adjust the Plaintiff's weekend work hours to avoid a conflict with his Sabbath.

Plaintiff began working weekends under this accommodation agreement. Since May 2000, the Employer has always accommodated Plaintiff in instances where it mandated weekend work, i.e. full schedule or draft situations. However, in late January 2001, a dispute arose concerning whether the May 2000 accommodation applied to instances where Plaintiff could volunteer for weekend work, as opposed to mandatory weekend work. The Employer maintained that the May 2000 accommodation applied only to those circumstances in which Lear mandated that Fox work, and did not apply to volunteer weekend work.

Plaintiff sued the Employer, claiming that it violated his rights under Title VII by refusing to change his work schedule so it would not interfere with his Sabbath when he worked voluntary overtime as the Employer did for he mandatory overtime. The Court began by noting that Title VII of the Civil Rights Act of 1964 requires employers to make reasonable accommodations for their employees when an employee's bone fide religious practice conflicts with a job requirement. Then the Court wrote:

There is no dispute that Fox engaged in a "bona fide religious practice" of declining to work on his Sabbath, i.e. between sundown on Saturday and sundown on Sunday. However, Fox fails to establish the first element of the prima facie case because he cannot show that his practice of not working on his Sabbath conflicts with an employment *requirement*. Voluntary work is exactly that--voluntary. In other words, Lear did not *require* Fox to work during voluntary weekends. Put another way, this is not a situation where Fox had to choose between his religious convictions and the requirements of his job. Instead, Fox's choice was between his religious convictions and additional money, i.e. working

voluntary overtime. This is not the type of "conflict" that Title VII was meant to alleviate.

Thus the Plaintiff's ability to decline voluntary weekend work without retribution "eliminates the conflict between employment requirements and religious practices" and satisfies Lear's duty to provide a reasonable accommodation.

Moreover, the Court continued, even assuming Plaintiff could meet his prima facie case, the Employer "satisfied its duty to provide a reasonable accommodation for the same reasons described above, i.e. Fox can decline to work without retribution. As a result, Lear need not show that Fox's proposed alternative accommodation imposes an undue hardship. 'The Supreme Court has instructed that 'where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternatives would result in undue hardship.' "

Thus the Court entered summary judgment on behalf of the Employer.

Internal Grievance Procedure Must Be Exhausted Prior To Court Case

In *Neiman v. Yale University*, 270 Conn. 244 (7/20/04), plaintiff sued Yale alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent misrepresentation stemming from the university's decision not to offer her a tenured position. While there was an internal grievance procedure in the faculty handbook, plaintiff failed to use it and filed her court case.

The Court ruled that, at least as to handbook grievance provisions governing faculty members, the exhaustion of remedies doctrine applied and thus the plaintiff was required to use that procedure before she could file a court case. The Court's language was fairly specific to academic institutions, but it could provide a basis to apply the doctrine in grievance disputes in any industry. The Court wrote that "We agree with the majority of jurisdictions that the exhaustion of remedies doctrine applies to the internal grievance processes provided by academic institutions." The Court also expressed some reluctance to get involved in academic tenure disputes, since "the decision of whom to grant tenure is an integral part of academic freedom."

Finally, the Court noted that requiring exhaustion of an internal grievance procedure does not bar access to the courts if the employee is dissatisfied with the outcome. It only means that the parties themselves should have an opportunity to work things out before using up scarce judicial resources.

Arbitrator's Reinstatement Of Employee Who Threatened Violence Against Supervisors Upheld By Court

In *New York State Electric & Gas Corp. v. IBEW*, 2004 WL 1752172 (2nd Cir. 8/4/04), an employee was fired for violating the Employer's code of conduct for repeatedly "expressing a desire to harm certain managerial and supervisory employees." The union representing the employee grieved the discharge and it went to arbitration. The arbitrator, Stuart Pohl, found that although the employee's threats were "wrong" and that he exercised poor judgment, he nevertheless was not violent or dangerous and did not pose a threat to his co-employees. The arbitrator ordered the employee to be reinstated with a last chance agreement, but without any backpay and not until he had undergone a psychological examination at the Employer's request. The Employer refused to reinstate the employee and appealed, arguing that the reinstatement of

an employee who had made specific threats to co-employees was contrary to public policy and should be reversed by the Court.

The Court, noting that the grounds for reversing an arbitrator's decision were extremely limited, ruled that only an award in contravention of established public policy could be overturned. The Court noted that "An award contravenes public policy only when it 'create[s][an] explicit conflict with other laws and legal precedents' and thus clearly violates an identifiable public policy," and wrote that:

Nevertheless, the law does not support a finding that Arbitrator Pohl's decision is contrary to public policy. Although Plaintiff's submissions illustrate that OSHA, and employers in general, are concerned about workplace violence, Plaintiff's submissions acknowledge that no agency has implemented any specific legal regulations governing the issue. . . . In this case, Arbitrator Pohl's decision violated no specific provision of any law or regulation. OSHA has not promulgated any express rules or regulations that require an employer to terminate an employee who has simply made verbal threats. Although the common law establishes that employers have a duty to protect employees, such a generalization does not meet the standards [for the public policy exception]. . . . Finally, since case law requires the Court to look at an arbitrator's final decision, this Court's review is limited to the question of whether reinstating an employee who has threatened others violates existing "laws and legal precedents." Plaintiff has not met the burden of providing any specific laws and legal precedents which the award violates.

This decision, and others like it, obviously is troubling. Even the Court recognized that the threats made were specific and not just generalized griping, but the Court felt bound by the facts as found by the arbitrator. But if there is not a well-defined public policy against workplace violence, as this and other courts have found, then employers are between a rock and a hard place in these types of situations.

SJC Nixes Prop 2-1/2 Override Contingency For CBA Funding

In a case of deep concern to municipalities, unions and taxpayers alike, the Massachusetts Supreme Judicial Court ("SJC"), in *Local 1652 IAFF v. Town of Framingham*, 442 Mass. 463 (8/16/04), held that town officials could not fulfill their obligation to provide full funding for the third year of a collective bargaining agreement by submitting a budget that made full funding of a contractual staffing provision contingent on the town's voters approving a property tax override to cover an anticipated budget shortfall.

In prior firefighter negotiations, the town agreed to certain so-called "minimum manning" provisions, i.e., 35 firefighters per shift. The contract was fully funded in the budgets proposed by town officials to town meeting in the first two years of the contract. The town had budget difficulties in preparation for the third year of the contract, so town officials proposed two alternative budgets to town meeting. Alternative 1 was a "balanced budget" that did not fund the staffing provision. Alternative 2 was a "contingency budget" which fully funded the staffing provision (and the rest of the town's services), but made such funding contingent on the passage of a Proposition 2-1/2 override. Town officials recommended the contingency budget. The union sought a court order requiring the town officials to submit a fully funded, non-contingent budget to town meeting, which was granted by a Superior Court judge. The SJC took the case on its own initiative, and rendered a decision even though the town voters later passed an

override and the issue was moot.

The SJC acknowledged that state law did not require municipalities to negotiate with unions over staffing provisions, and that once a staffing provision becomes part of a collective bargaining agreement and is approved by the local legislative body it is enforceable for only one fiscal year. The Court further noted that once town officials submit a request for appropriation, town meeting has no obligation to fund it. Nevertheless, the Court focused on the town's obligation under the state's public sector collective bargaining law that required town officials to "submit to the appropriate legislative body ... a request for an appropriation necessary to fund the cost items [CBA] contained therein." Thus the Court wrote that:

Given the plain language of [state collective bargaining law] and this case history, we conclude that the town was required to submit a budget that unconditionally and fully funded the staffing provision. For the same reasons, we also reject the town's argument that it satisfied its statutory obligation to submit a request to fund fully the staffing provision by its express reminder to the town meeting members that they could "make the appropriate motion" to fund the staffing provision fully.

Thus the Court ruled that town officials have an obligation to submit a non-contingent budget request to town meeting that fully funds collective bargaining agreements. Town meeting, of course, as the Court noted, does not have to vote to fund the agreements or agree to the budget, but full funding must at least be presented to the town meeting and be recommended by town officials.

Be Careful What You Wish For

In *Abrahamson, et al., v. Wappingers Falls Central School District*, 374 F.3d 66 (2nd Cir. 7/1/04), Plaintiffs were tenured teachers over the age of 55. Under the 1998-2001 collective bargaining agreement ("CBA"), certain teachers were offered a Salary Elective Program ("SEP") that acted as a retirement incentive. That SEP applied to teachers who met three criteria:

- (1) 15 years of District service,
- (2) 20 years of member service in the New York State Teacher's Retirement System ("NYSTRS"), and
- (3) eligibility for a service retirement pursuant to the rules and regulations of the NYSTRS.

The third element could be met in a number of ways, each of which except one required that the teacher reach age 55; the only exception is where a teacher has 35 years of service.

Teachers who met these criteria for the first time during the term of that CBA had the opportunity to elect retirement during the first year they became eligible and obtain a \$20,000 payment in addition to general retirement benefits. Between 1998 and 2001, Plaintiffs all met the three criteria for the first time but chose to continue working rather than to retire and collect the \$20,000 payment. Under this provision of the SEP, the first year in which a teacher met all three of the criteria was the only time he or she could elect retirement and receive the \$20,000 payment. If the teacher chose to continue to work, as each of the appellees did, she lost the opportunity to receive the \$20,000 payment upon future retirement.

A new 2001-2006 CBA modified the SEP by offering a second option, called Option # 2.

This second option had the same eligibility criteria and the \$20,000 payment was still an option. The new wrinkle was that for teachers who met the retirement criteria for the first time between 2001 and 2006 were offered the additional choice to continue working and receive a \$7,000 per year payment for three years. Thus a teacher who met all three of the eligibility criteria for the first time had two options in the year the teacher became eligible: (1) to retire and receive the same \$20,000 payment that was available under the old CBA, or (2) to continue to work and receive an additional \$7,000 per year for up to three years with no requirement that the teacher retire at any particular time. The practical effect of this arrangement would be that teachers who chose Option # 2 would receive an augmented salary for three years that would then serve to increase their pension payments upon retirement. Plaintiffs, who had chosen continued employment rather than retirement under the old CBA, were never offered Option # 2; it was available only to teachers who became newly eligible for retirement during the term of the new CBA. Those teachers sued Wappingers and the Union claiming that Option # 2 discriminated against them on the basis of age in violation of the Age Discrimination in Employment Act ("ADEA").

The District Court found in favor of the teachers, and ordered that the CBA comply with the ADEA, possibly by eliminating Option #2. The Court did not order the School system to make Option #2 available to the plaintiffs. The School system appealed from the judgment that Option #2 violated the ADEA, and the Plaintiffs appealed from that part of the judgment refusing to make Option #2 available to them.

The 2nd Circuit Court of Appeals affirmed the judgment of the District Court. It held that Plaintiffs over the age of 55 who met criteria for early retirement under the 1998-2001 CBA but chose to continue working rather than receiving \$20,000 lump sum payment met their *de minimis* burden of establishing a prima facie case of age discrimination under the ADEA because age, not years of service, was the trigger for eligibility under Option #2.

This result was not changed by the so-called "safe harbor" provision of the ADEA, which the School system argued applied. That provision provides that an "employee benefit plan" that otherwise discriminates on basis of age may still be valid if: (1) it adheres to an "equal benefit or equal cost" principle under which an employer essentially spends equal amounts on both younger and older workers; or (2) it is a voluntary early retirement incentive under which the employer does not need to spend equal amounts so long as the plan is voluntary and consistent with ADEA's goals of protecting workers from arbitrary age discrimination. Here, while the enhanced salary would increase teachers' pension payments, Option #2 provided no real incentive to retire and actually supplied an incentive for teachers to continue working for at least three years beyond the date on which they first became eligible to retire.

Finally, the Court rejected the Plaintiffs' appeal that the District Court abused its discretion in fashioning its remedy of requiring the CBA to comply with ADEA, possibly through elimination of Option #2 altogether, rather than making Option #2 benefits available to teachers who, under the earlier CBA, elected to continue working rather than retiring during first year of eligibility.

Thus all these Plaintiffs accomplished was to eliminate Option #2 from the CBA and deprive those teachers who would have become eligible during the 2001-2006 CBA of Option #2. They did not get Option #2 for themselves, which obviously was what they wanted. So be careful what you ask for.

Termination Of LTD Benefits Does Not Support ADEA Or ADA Claim

In *Estades-Negroni v. Associates Corporation of North America*, 377 F.2d 58 (1st Cir. 7/28/04), after reporting financial irregularities in 1992, which resulted in the firing of several employees including her supervisor, Plaintiff alleged she experienced a "pattern of discrimination, that her workload was increased to the point of being "excessive." She requested that her workload be reduced or she be provided an assistant; the Employer refused both requests. She also claimed that several co-workers and the director of human resources made "age motivated remarks" towards her. Subsequently Plaintiff experienced chest pains and she was diagnosed with severe depression. She applied for and received short-term disability benefits for the maximum period. Plaintiff then applied for long-term disability ("LTD") benefits, which were granted after originally being denied. She then applied for Social Security Disability Insurance benefits ("SSDI"), which were granted.

The Employer then contracted with a new health insurance carrier, who sent Plaintiff a letter stating that, under a plan provision, she was required to file for SSDI benefits and to provide them with proof of application. The letter further informed Plaintiff that failure to comply would result in suspension and termination of benefits. Rather than comply with Aetna's request, Plaintiff told the new carrier to ask the old carrier for a copy of her SSDI award letter. Plaintiff claimed that she refused to provide the new carrier with a copy of the letter because "they had been so bad to her."

The new carrier then terminated Plaintiff's LTD benefits. She appealed, but still refused to provide a copy of the SSDI award letter, so the carrier denied her appeal. Plaintiff did not make any further effort to collect LTD. When Plaintiff's LTD benefits were terminated, the Employer also terminated her from its active payroll, and thereafter she never contacted the Employer about her availability or not to work. Plaintiff then sued her Employer, claiming that they violated the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA") by terminating her and refusing to accommodate her disability (depression). On the Employer's motion for summary judgment, the District Court ruled in favor of the company and dismissed Plaintiff's ADEA and ADA claims.

The 1st Circuit Court of Appeals agreed with the District Court. On Plaintiff's ADEA claim, it first noted that "[i]t goes without saying that a plaintiff's failure to present a triable question of material fact as to her having suffered an adverse employment action dooms an ADEA claim from the start." Here, the Court noted that when she first became ill, Plaintiff applied for and obtained short-term disability benefits under the Employer's STD plan. Before those benefits expired, the Employer told Plaintiff that she could apply for long-term disability benefits and recommended that she apply for SSDI. The insurer at first denied Plaintiff's request for LTD, but notified her of the right to appeal which she exercised. She then was awarded LTD benefits, but they were later terminated, at which time she was terminated from employment. The Court thus wrote that "[w]e find that this sequence of events does not contain a discharge actionable under the ADEA. . . . Accordingly, we affirm the dismissal of Estades's ADEA claim, agreeing with the district court that she failed at the threshold to support the claim that she suffered an adverse employment action.

As to her ADA claim, Plaintiff claimed that the Employer violated the ADA by refusing to grant the accommodations she requested, namely reduction of her workload or provision of an assistant. The Court first noted that "[a]n employer violates the ADA if it "knows of a disability yet fails to make reasonable accommodations. . . . To survive

summary judgment on her "reasonable accommodation claim, [Estades] must produce enough evidence for a reasonable jury to find that (1)[s]he is disabled within the meaning of the ADA, (2)[s]he was able to perform the essential functions of the job with or without a reasonable accommodation, and (3) [Associates], despite knowing of [Estades]'s disability, did not reasonably accommodate it." Even assuming, the Court wrote, that Plaintiff could show #1 and #2, she could not show #3, because the Employer was never made aware that Plaintiff suffered from a disability.

The Court wrote that "[b]efore she was diagnosed with depression, Estades requested a reduced workload or the aid of an assistant. Under the ADA, requests for accommodation must be express and must be linked to a disability. . . . An employer need not provide accommodations where it does not know an employee has a disability. . . . Associates did not know Estades was disabled when she requested the accommodation--she had not yet been diagnosed with a disability at the time she sought a reduced workload or an assistant. Although Estades argues that her depression was evident when she requested the accommodation, the record does not support this claim. Finally, there is no evidence that the request was expressly repeated after Estades was diagnosed with a mental disability."

Thus the Court upheld the District Court's judgment on Plaintiff's ADA claim.

Legislative/Regulatory Actions Of Note

New Overtime Regulations In Effect

Yes, they're finally here, those new federal Department of Labor revisions to the decades-old "white collar" overtime regulations. They went into effect on August 23, 2004. For a full description of the new regulations, please visit www.mhtl.com and take a look under "Latest News." The new rules revise the salary and duties tests to determine who is or is not eligible for overtime under the Fair Labor Standards Act. The new rules generally do not affect state wage and hour laws unless a particular state has adopted the federal interpretations. While Congressional efforts to stop the rules are likely to continue, it does not appear likely that such attempts will be successful. Court challenges are also likely, so stay tuned.

EEOC Regulation On Retiree Health Benefits Stymied By AARP

According to the July 30, 2004, issue of the Daily Labor Report, the Equal Employment Opportunity Commission ("EEOC") is backing away from its widely supported rule change regarding retiree health benefits. Prior to August 2001, EEOC maintained that employee benefit plans that end or are reduced when a retiree becomes eligible for Medicare violated the Age Discrimination in Employment Act ("ADEA"). In August, 2001, the agency apparently realized that that position could, as a practical matter, discourage employers from providing health care benefits for its retirees. On April 22, 2004, after a public comment period, the agency approved a new rule allowing employers to reduce or end benefits when a retiree becomes eligible for Medicare without violating the Age Discrimination in Employment Act. This proposal had been widely supported by employers and unions, and was intended to address a concern that ADEA liability concerns could lead employers to eliminate or reduce retiree health benefits entirely.

AARP is apparently the only opponent of the new measure, but has brought its considerable lobbying muscle to bear on the EEOC and Congress. It claims that the new rule allows employers to discriminate against older employees and that EEOC had not adequately

studied whether or not employers actually had changed their retiree benefit policies due to EEOC's prior interpretation of the ADEA. While the proposed rule is currently in the administrative review process, the DLR reports that unnamed sources at EEOC state that the rule is dead at least until after this November's Presidential election. Its fate thereafter is up in the air. Unfortunately, the EEOC website at www.eeoc.gov is silent on the current status of the rule.

Sarbanes-Oxley Whistleblower Rules Issued

On August 24, 2004, the Occupational Safety and Health Administration ("OSHA") published its new rule governing the handling of whistleblower complaints made under the Sarbanes-Oxley Act. The rule establishes procedures for the expeditious handling of discrimination complaints made by employees or by persons acting on their behalf. Included in the rule are procedures for submitting complaints under the Sarbanes-Oxley Act, investigations and issuing findings and preliminary orders. A major part of the rule details litigation procedures and how one can object to the findings and request a hearing. The final section of the rule discusses miscellaneous provisions including withdrawals of complaints and settlements and judicial review and judicial enforcement. Information about the rule and the rule itself can be found on OSHA's website at www.osha.gov.

FMCSA Seeks EOBRs Information

On September 1, 2004, the Federal Register published the Federal Motor Carrier Safety Administration's (FMCSA) request for comments on potential amendments to its new regulations concerning the use of on-board recording devices to document compliance with the Federal hours-of-service rules. 69 FR 53386. Because the current regulations do not reflect the considerable advances in the technology used in current-generation recording devices (also known as electronic on-board recorders, or EOBRs), the agency seeks information concerning issues that should be considered in the development of improved performance specifications for these recording devices. Its purpose is to ensure that any future requirements would be appropriate as well as reflect state-of-the-art communication and information management technologies. As noted above, FMCSA is scrambling to save its new hours-of-service regulations recently invalidated by the District of Columbia Circuit Court; one of the principal critiques of the Court was the agency's failure to require the use of EOBRs to boost compliance. For further information, visit the FMCSA website at www.fmcsa.dot.gov.

FLSA/FMLA Cases

Agency Home Health Aides Covered By FLSA

In *Coke v. Long Island Care at Home*, 376 F.3d 118 (2nd Cir. 7/22/04), the issue was whether or not home health aides employed by an agency, rather than by the patient himself/herself, were entitled to minimum wage and overtime under the Fair Labor Standards Act ("FLSA"). The FLSA generally requires minimum wage and overtime compensation; the "companionship services" exemption relieves employers from paying such compensation to those employees who work in domestic service as babysitters and companions to the elderly and infirm. Two regulations at issue implement the exemption with respect to companions. The first is a regulation that defines the exemption. It includes within the exemption (1) those who perform household work related to the care of the elderly or infirm and (2) those who also

perform housework incidental to their "companionship services" as long as the housework accounts for less than twenty percent of the weekly hours worked. The second regulation applies the exemption to "[e]mployees who are engaged in providing companionship services . . . and who are employed by an employer or agency other than the family or household using their services."

Coke filed the claim alleging she was denied overtime and minimum wage for work as a "home health-care attendant" for the company. Coke alleged that the regulations were invalid and unenforceable. She challenged both the third-party employer rule and the general definition of "companionship services." The District Court rejected her claim because of the high level of deference it accorded DOL regulations implementing the FLSA.

The 2nd Circuit Court of Appeals affirmed in part and reversed in part. First it agreed with the District Court that the regulation defining the "companionship services" exemption from FLSA's minimum-wage and overtime requirements to include those individuals who perform household work related to care of elderly or infirm and those who also perform housework incidental to their companionship services as long as housework accounts for less than 20 percent of weekly hours worked--is enforceable on its face, since the regulation is not arbitrary, capricious, or manifestly contrary to the statute. Moreover, the Plaintiff failed to provide evidence as to duties that she and her co-workers actually performed as "home healthcare attendants," thus it was impossible to address the question of whether particular work she did was considered by Congress to be outside exemption.

Second, as to the third-party exception, the Court ruled that regulation was inconsistent with Congress' likely purpose in enacting 1974 FLSA amendments creating the "companionship services" exemption . . . since Congress wanted to expand FLSA coverage to "domestic service employees," and to exempt from coverage only those "domestic service employees" engaged in "companionship services" when it sought to amend the FLSA in 1974, and it was implausible that Congress, in wishing to expand FLSA coverage, would have wanted DOL to eliminate coverage for employees of third-party employers who had previously been covered. Moreover, the regulation is inconsistent with other regulations that DOL promulgated under the FLSA immediately following 1974 amendments creating "companionship services" exemption; the internal inconsistency between these regulations, when coupled with earlier promulgated regulations, strongly argued against enforcement of this regulation. This was especially so since the DOL's initial proposed regulation would have covered employees of third party employers.

Finally, the regulation was inconsistent with other positions taken by DOL over time, and DOL's reasoning in support of the regulation was inadequate and demonstrated a lack of thoroughness in its consideration, especially since DOL offered virtually no explanation for the direct inconsistency between this regulation and other regulations that DOL promulgated immediately following the 1974 amendments. Moreover, DOL did not adequately explain what accounted for its about-face after putting regulations out for notice and comment in 1974, which resulted in third-party employers being entitled to claim the exemption for the first time.

Thus the Court ruled that DOL's definition of companionship services was valid, but its extension of the exception to employees of third parties was invalid.

Equivalent Job Offer Under FMLA Can Include Additional Training Requirement

In *Oby v. Baton Rouge Marriott*, 2004 WL 1774550 (M.D.La. 8/10/04), Plaintiff was the Housekeeping manager at a hotel, one of the three highest paid employees. When she went out

on Family Medical Leave Act (“FMLA”) leave, on March 26, to care for her elderly parents, she was told she was considered a key employee and would not necessarily be entitled to reinstatement. Plaintiff originally was scheduled to be out one month, but the day before her return she advised her supervisor that she would not be returning as scheduled. The Hotel granted her additional leave, but informed Plaintiff that if she did not return by May 10, she would be permanently replaced. She did not return and a replacement was hired. The replacement had to give two weeks notice at his old job, so he was not yet actually working when Plaintiff returned to work on June 21. She was then offered several other managerial positions at the same pay and benefits, which she refused.

She sued the Employer under the FMLA claiming that (1) since her replacement had not yet started working, the Employer had an obligation to put her back into that job; and (2) she was not offered an equivalent position because the positions offered would have required additional training.

The Court found that because the Employer had informed Plaintiff at the time of her leave that she was a “key” employee under the FMLA and could be permanently replaced, and because her replacement already had been hired even if he had not yet begun work, the Employer had not violated the FMLA. Besides, putting Plaintiff back in her old position would have meant paying two housekeeping managers. Under the FMLA, a key employee may be permanently replaced and there is no obligation to restore that employee to equivalent employment.

The Court ruled, in the alternative, that the other positions offered to the Plaintiff were “equivalent” to her prior position. They had the same level of pay and benefits, and similar levels of managerial responsibility. As to Plaintiff’s claim that required additional training rendered the jobs not equivalent, the Court wrote that “[t]his Court does not believe the FMLA should be interpreted in such a way that would prevent [the Employer] from requiring an employee who returns from FMLA leave to undergo additional training for a position.”

Thus the Court entered summary judgment on behalf of the Employer.

On The Employee Benefits Front

Employee Who Could Perform Accommodated Job Not Entitled To STD

In *Blickenstaff v. R.R. Donnelley & Sons Co. Short Term Disability Plan*, 378 F.3d 669 (7th Cir. 8/9/04), Plaintiff was a materials handler who went out on STD with lower back pain, then returned to work with permanent restrictions that were accommodated by her employer. Some months later she reapplied for STD for her back and collected for 19 weeks. Then the plan administrator terminated her benefits when a functional capacity examination indicated that she could perform her accommodated job. The record evidence also indicated that her treating physician agreed she could perform the accommodated job. The Plaintiff, after the denial, came forward with new medical documentation that she suffered from fibromyalgia. The plan administrator refused to consider this post-denial medical evidence because it was not relevant, having come two months post-denial.

Plaintiff sued the Plan under ERISA, and claimed that the plan administrator acted arbitrarily and capriciously in (1) terminating her benefits because he used the wrong job description and because the medical evidence did not support the termination; and (2) refusing to consider her evidence of disability due to fibromyalgia rather than her back. The District Court found in favor of the Plan on both issues.

The 7th Circuit Court of Appeals affirmed the District Court’s decision. First, it ruled that

the plan administrator and the District Court had compared her physical ability with her accommodated job, not her prior unaccommodated job, so they used the correct standard. Second, the Court ruled that the medical evidence did support the termination of benefits because the functional capacity examination showed the Plaintiff could perform her accommodated job, and because the plan administrator had sent that examination result to Plaintiff's treating physician, who agreed she could perform light duty for 8 hours a day. Thus the plan administrator was not arbitrary and capricious in his denial of Plaintiff's STD claim for her back pain.

Finally, the Court recounted some of the facts with respect to Plaintiff's claim of fibromyalgia:

the Plan spoke with Blickenstaff's physician, Dr. Williams, about the fibromyalgia diagnosis. Dr. Williams stated that he was unsure whether Blickenstaff had fibromyalgia, noting that when he initially started treating her she just complained of chronic back pain. More recently, he observed, Blickenstaff complained of all the textbook symptoms of fibromyalgia, but he couldn't determine whether they were real or if she had just done a lot of research on the disease. He reiterated that he continued to agree with the results of the February exam and that he had no objective evidence for the Plan in support of her fibromyalgia claim. The Plan denied the appeal.

Blickenstaff appealed again, this time submitting a May 3, 1999 report from Dr. Acosta-Rodriguez, the physician to whom Donnelley had referred her in the past and who was not her own treating physician. His report did not confirm the fibromyalgia diagnosis, either. In fact, it stated: "When presented to me the patient states that essentially she has had chronic back pain since she last saw me and that she is sure it is because of the fibromyalgia that I diagnosed her with. I did not recall ever diagnosing her with fibromyalgia, I rechecked my notes and found no mention of fibromyalgia" The report goes on to state that "[o]n classic fibromyalgia tender point examination the patient had only 3 out of 18 spots that were tender consistent with fibromyalgia." Dr. Acosta-Rodriguez ultimately diagnosed her with "very mild thoracic outlet symptoms, very mild fibromyositis of the lumbar fascia, more consistent with fasciitis than [sic] fibromyalgia or myofascial pain syndrome." He noted that the last diagnosis was based only on Blickenstaff's subjective complaints of pain and not on any objective findings.

The Court ruled that the plan administrator was justified in denying STD benefits because the medical evidence did not support her claim of fibromyalgia. Moreover, the plan administrator did not act arbitrarily and capriciously in refusing to consider another doctor's letter (which diagnosed her only with intermittent back pain) submitted two months after the denial of benefits because it represented her condition as of the date of the exam, May 18, 1999, and not the date of the eligibility determination, March 14, 1999. The Court wrote that:

The district court properly determined that the decision to deny Blickenstaff's second appeal was not arbitrary and capricious. It's evident from the record that the Plan took Blickenstaff's second appeal seriously and examined the materials she submitted in its support. Yet, Dr. Acosta-Rodriguez's report did not show she suffered from fibromyalgia as she claimed, and he confirmed in writing that she could perform light-duty work as found in the February exam. Although Dr. Acosta-Rodriguez and Dr. Douglas diagnosed

Blickenstaff with medical conditions, we agree with the district court that the Plan was not obligated to accept these diagnoses as relevant to her condition as of the March 1999 decision to terminate her benefits. Both diagnoses were made in May, two months after the Plan's determination. As observed by the district court, it was not unreasonable for the Plan to refuse to speculate as to whether those diagnoses existed as of the March decision, especially when Dr. Acosta-Rodriguez specifically stated, despite his diagnosis, that he believed Blickenstaff was capable of performing light-duty work eight hours a day and when Dr. Douglas had no established history with Blickenstaff.

Thus the Court affirmed the District Court's judgment in favor of the plan administrator.

Workers' Comp Retaliation Claim Preempted By ERISA

In *Neumann v. AT&T Communications*, 376 F.3d 773 (8th Cir. 7/6/04), Plaintiff was a Customer Sales and Service Specialist. She had back problems dating back to at least 1994. On October 6, 1998, she returned to work after having been out for several days for back treatment, and that very day slipped and fell in the office. She experienced pain in her lower back and was taken to a hospital emergency room. She did not work during the ensuing months. Plaintiff was evaluated and treated by a Dr. Buttermann, as well as other physicians.

Plaintiff participated in the Employer's Sickness and Accident Disability Benefit Plan ("SADBP"), an ERISA-governed plan. The SADBP has two mutually exclusive categories of benefits: "sickness" benefits, and "accident" benefits. "Sickness" includes "injury other than accidental injury arising out of and in the course of employment by the Company," and "accidental injuries" are those that result "solely" from an accident "during and in direct connection with the performance" of an employee's job duties. Plan payments are coordinated with workers' compensation benefits. An employee who is eligible for both workers' compensation and SADBP benefits may receive payments from the plan only up to the amount, if any, by which the plan benefit exceeds the amount mandated by the workers' compensation law.

The Employer classified Plaintiff's injury as a "sickness" under the SADBP. The amount of "sickness" benefits payable varies depending on an employee's tenure, for a total of no more than 52 weeks. Plaintiff received SADBP "sickness" benefits and workers' compensation benefits for a period of 52 weeks. Had her condition been characterized as an "accident" under the SADBP, her eligibility for benefits would not have been limited to a total of 52 weeks, and she asserts that her employment would have been assured during the period of her disability.

Plaintiff claimed that she planned to return to work with restrictions on September 20, 1999. According to her, the Employer instructed her not to report for work and cancelled ergonomic modifications to her work station. The Employer told Plaintiff in a letter that "[y]our 52 weeks of Sickness Disability Benefits will end on October 12, 1999. The Health Affairs organization has advised us that you will not be returning to work. Therefore, you will be taken off the active payroll effective October 12, 1999."

Plaintiff claimed she was discharged in retaliation for seeking workers' compensation benefits, and that the Employer had refused to offer continued employment to her when employment was available within her physical limitations, in violation of Minnesota workers' comp law. The Employer removed the action to the district court on the ground that Plaintiff's claims were preempted by ERISA. At the same time, Plaintiff appealed the classification of her injury as a "sickness" under the SADBP to the AT & T Benefit Claim and Appeal Committee

("BCAC"). The BCAC reviewed Plaintiff's medical records and other reports, and determined that Plaintiff's back condition did not arise "solely" from her October 6, 1998 accident, and that--with the exception of the day of the incident--she was entitled to sickness, not accident, benefits.

The District Court held that Plaintiff's state law workers comp retaliation claim was preempted by ERISA because that claim required an interpretation of an ERISA plan, and that the plan administrator's decision that Plaintiff had a "sickness" under the plan rather than an "accident" was reasonable. Plaintiff appealed both decisions.

The Appeals Court affirmed the decision of the District Court. First, it ruled that the Plaintiff's workers comp retaliation claim was "completely preempted" by ERISA. It reasoned that

Like the district court, we believe the "heart of the lawsuit" filed in state court is Neumann's claim that AT & T violated its ERISA plan by classifying Neumann's condition as a "sickness" rather than an "accident." Neumann's arguments require interpretation of the plan. . . . Neumann's claim also involves an attempt to recover benefits that she alleges are due to her under the benefit plan, so her exclusive cause of action is under Section 502(a) of ERISA.

Second, the Court ruled that the District Court's dismissal of Plaintiff's ERISA claims also was proper. The Court wrote that:

In support of her claim that the benefit determination suffered from procedural irregularities, Neumann asserts that Gates McDonald [the plan administrator] failed to consider certain medical evidence when it initially denied accident benefits. . . . When it considered Neumann's appeal from the initial denial by Gates, however, the BCAC considered Neumann's medical records and rehabilitation reports that were contained in the 328-page administrative record. . . . We conclude that the administrator's determination was reasonable. . . . The BCAC's interpretation is consistent with clear language of the SADBP. "Solely" means "to the exclusion of alternate or competing things," . . . and the most natural reading of that term in Section 4.6 of the SADBP excludes injuries that are related to pre-existing conditions.

Finally, the Court ruled that "[t]he ultimate decision applying the plan terms to Neumann's case was supported by substantial evidence," and that the undisputed medical evidence showed that Plaintiff's condition did not result "solely" from the workplace incident. After performing an independent medical evaluation of Plaintiff, Dr. Barnett, opined that "the current level of symptoms and Ms. Neumann's dysfunction are related to conditions that predate her October 6, 1998 injury." Moreover, one of Plaintiff's own treating physicians, Dr. Buttermann, opined that she had a preexisting back condition, and that her current condition was 75% attributable to her preexisting condition and "25% to the work injury of October 6, 1998." The Court wrote that "[u]nder these circumstances, we hold that the district court correctly ruled that there was no genuine issue for trial concerning the denial of Neumann's claim for accident benefits."

On The Labor Front

Win One, Lose One

In a somewhat curious decision, *Anheuser-Busch, Inc.*, 342 NLRB No. 49 (7/22/04), two members of a three member National Labor Relations Board panel agreed with the administrative law judge (“ALJ”) and ruled that the Employer violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to notify and bargain with the Union prior to the installation and use of surveillance cameras in the workplace. This decision is consistent with prior Board law and itself is not remarkable.

But due to the Employer’s installation of the cameras in work and break areas, 16 employees were disciplined for misconduct that the Employer observed solely through use of the cameras. A different panel majority agreed with the ALJ’s decision not to revoke the discipline imposed on those 16 employees. They agreed with the ALJ’s conclusion that the employees’ misconduct was in violation of plant rules, and such conduct was the basis for the suspensions and termination.

The dissenter on this issue, Member Walsh, probably had it right, at least in terms of the Board’s usual approach to remedy issues. He wrote that absent the unlawful installation and use of the cameras, the Respondent had no basis to even question those 16 employees, let alone to discipline them. That is, if the cameras were unlawfully installed, ordinarily the Board would void any disciplinary action taken as a result of information gained through use of the cameras, but for some reason that did not happen here.

Not A ULP To Call Police About Picketers On Public Way Creating Safety Problem

In *CSX Hotels, Inc. v. NLRB*, 377 F.3d 394 (4th Cir. 7/24/04), the Employer appealed a September, 2003 Board ruling that found it had violated federal labor law by summoning the police to deal with non-employee union representatives who were picketing along a busy public road near an entrance to the property. Generally an employer has no control over picketers engaged in protected activity on a public way near its facility since it has no legal control over public property, unless that picketing creates a public safety issue such as with traffic slowing down, cars parked on the side of the road, etc.

Here, the Board found that the picketing did not cause a potential traffic problem, despite apparently all sorts of record evidence that “the Union’s picketing made the stretch of Highway 60 adjacent to the Greenbrier’s property and entrances more prone to congestion and the possibility of traffic accidents.” There were also photographs showing that “the picketers were stationed just inches off the roadway and mere feet” from the entrance, and that the “picketers bore signs that were clearly intended to be read by motorists approaching from both sides of the entrance.”

Thus the Court wrote that it was “readily foreseeable that passing motorists attempting to read the signs or simply distracted by the presence of the picketers so close to the roadway would slow down considerably from the posted 55 m.p.h. speed limit and pay attention to the picketers rather than the roadway and other traffic.” Because there was an obvious safety issue posed by the picketers’ conduct, the Employer did not violate federal labor law “by merely requesting that local law enforcement officials assess the situation and take appropriate action.”

Anonymous Phone Threats To Anti-Union Employees Sufficient To Overturn Union Election Win

In *Cedars-Sinia Medical Center*, 342 NLRB No. 58 (8/2/04), the Board, contrary to the administrative law judge, sustained a portion of the Employer's Objection 1, set aside the election of December 11, 12, and 13, 2002 and ordered that a new election be held. The tally of ballots showed 695 for and 627 against, the Petitioner (California Nurses Association), with 10 challenged ballots, an insufficient number to affect the results.

The Employer then filed numerous objections to the election and alleged, in its Objection 1, that the Union, by its agents or supporters, made anonymous telephonic threats to antiunion bargaining unit employees Christine Foxon and Scott Barnes during the "critical period" between the filing of the petition for election and the election itself. The judge agreed and also found that these threats were disseminated to other employees in the bargaining unit. However, applying the Board's standard for a party's conduct the judge concluded that the threats did not have "the tendency to interfere with employees' freedom of choice" and that the employees in the unit had no reason to believe that the callers who had threatened Foxon and Barnes had the power to effectuate violence on a significant number of bargaining unit employees. The judge therefore recommended that the portions of Objection 1 relating to Foxon and Barnes be overruled.

Unlike the judge, the Board found that the threats to Barnes constituted objectionable conduct under the standard for party conduct. It ruled that the judge erred in positing that the threats were somehow less "threatening" because they were made anonymously rather than directly. The Board wrote:

"[W]e believe that, in these circumstances, the anonymous threats were potentially even *more* menacing than a direct threat might have been, given that the callers, through some unexplained means, knew specific details about Barnes' life . . . Threats such as these are certainly quite severe; and where, as here, they are tied to an employee's antiunion stance or activities, the threats are reasonably calculated to interfere with his freedom of choice.

The NLRA As It Applies To The Financial Services Industry

We have constantly harped on the common misconception that the National Labor Relations Act is something that an employer does not have to worry about if there is no union in its particular workplace, or at least if there is no organizing activity going on. One recent case illustrates just how wrong that misconception is.

In *Citizens Investment Services Corp.* 342 NLRB No. 26 (6/30/04), the Employer provided financial services and sold financial investment products. The employee in question was a financial consultant, to whom Mellon Bank would refer prospective clients, and who would meet with the clients and assist them in making appropriate investments. The consultants were paid commissions on their investment sales. One financial consultant repeatedly raised the consultants' compensation issues during monthly meetings conducted by management, sought changes in the structure of consultant compensation and complained about problems with the current compensation scheme.

The financial consultant was discharged, and he then filed a charge against the Employer at the National Labor Relations Board, claiming that he had been discharged in retaliation for his having engaged in concerted, protected activity, even though there was no union involved at all. The Board agreed with the Administrative Law Judge who heard that case that the financial consultant had been engaged in "protected" conduct because he had been complaining about

wages, and had been engaged in “concerted” conduct (on behalf of other employees) because some of his complaining took place in monthly meetings before a group of other financial consultants. And because he was terminated for his complaints, he had made out a case of discriminatory discharge before the Board.

This Employer is now required to offer the financial consultant reinstatement, back pay and benefits.

Talk About Spinning One’s Wheels - Your Tax Dollars At Work

In the July 27, 2004, Federal Register, the National Labor Relations Board published notice of proposed rulemaking setting forth a new, voluntary procedure that would allow employers and unions as part of a stipulated election agreement to consent to the resolution of all disputed pre-election and postelection issues by a regional director, with no appeal to the board. Currently, the Board’s rules provide for two agreement options in which post-election issues are resolved by the Regional Director with no appeal to the Board (so-called “consent” election), or by the Board (so-called “stip” election). The new rule apparently is designed to provide the parties with the same option with respect to pre-election issues, such as unit composition.

The rationale, according to the rulemaking notice, is that if “if the parties voluntarily agree to utilize this new procedure they will be assured of a more expeditious and final resolution of their question concerning representation by a Regional Director, who will act in a neutral, expert, and conclusive fashion.” In our experience, however, consent elections are rarely used since most parties, or at least most employers, want to keep as many options open for as long a time as possible; thus even in the event of an election agreement, ordinarily a stip rather than a consent election is used. We would not expect this new procedure, if implemented, to be used much at all given its lack of attractiveness to employers. The proposed rule and the Board’s discussion of it can be found on the Board’s website at www.nlrb.gov.

Did You Know . . . ?

The Molecule of the Month is Trimethylamine, the culprit in human “fish breath syndrome”?

That September’s flower is the Chrysanthemum, and its birthstone is the Sapphire?

That September is, among other things, National Food Safety Education Month, National Ovarian Cancer Awareness Month, Weather Radio Awareness Month, National Census Month, Arthritis Month, Leukemia and Lymphoma Awareness Month, National Cholesterol Education Month, Baby Safety Month, American Newspaper Month, Be Kind to Editors and Writers Month, Chicken Month, Beach Cleanup Month, Coupon Month, Mushroom Month and International Self-Awareness Month?