

October, 2004:

Mistake Of The Month - Not So Much A Mistake As A Very Unpleasant Surprise To This Employer, Although The Final Chapter Has Yet To Be Written

Are sick leave buyback payments made to employees a non-discretionary “bonus” such that they have to be included in the employees’ “regular rate” of pay for overtime purposes under the Fair Labor Standards Act (“FLSA”)? According to the U.S. District Court for the Western District of Missouri, the answer is “yes.” You should be aware, however, that this decision is contrary to the decision of the 6th Circuit Court of Appeals in *Featsent v. City of Youngstown*, 70 F.3d 900 (6th Cir. 1995), so who is correct on this issue is still up in the air, and we ourselves are skeptical of the Court’s reasoning.

In *Acton v. Columbia, Mo.*, 2004 WL 2152297 (W.D.Mo., 9/10/04), the City of Columbia had a City Ordinance which required it to buy back sick time accumulated (at 75% of the employee’s hourly rate) in excess of six month’s sick time accrual. A group of firefighters sued the City, claiming that the compensation paid for unused sick time should be included in their regular wage rate for purposes of calculating their overtime compensation. They claimed such payments were in the nature of a non-discretionary attendance bonus, and thus should have been included in the regular rate.

The Court noted that a “bonus” is included in the regular rate if it is non-discretionary. Here it was non-discretionary because any employee who qualified for buyback was entitled to it - the City did not have a choice whether or not to pay it under its ordinance. Moreover, the amount of the buyback was specified under the ordinance as 75% of the employee’s hourly rate of pay, so the amount was not discretionary either.

The more difficult question, wrote the Court, was “whether the buyback program is a bonus.” On this issue, the Court reviewed a 1986 Opinion Letter of the U.S. Department of Labor (“DOL”) which supported the firefighters’ position. The DOL had opined that “bonuses which are announced to employees to induce them to work steadily or more rapidly or more efficiently, or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, or bonuses contingent upon the employee’s continuing in employment until the time the bonus is to be made are in this category . . .”

The Court agreed and found that the payments were made to encourage attendance and non-use of sick time because employees “with regular attendance habits create value for their employer in the form of lower compensation and administrative costs, fewer hours spent trying to coordinate scheduling, and better work place morale.” Thus the Court concluded that the buyback program “operates as an attendance bonus.”

The final question was whether or not the bonus was “remuneration for services rendered?” The Court wrote that effectively “the buy back program permits the city to retroactively give more money to those employees who have worked steadily because their services were more valuable than the services of an employee who regularly uses his sick leave time. In essence, the payments are for work already done and, therefore, qualify as remuneration.” Thus while acknowledging that this was “a close case,” the Court held that the sick leave buyback payments were a non-discretionary bonus that should be included in employees’ regular rate of pay for overtime calculation purposes.

So what does this mean? Well, for employees who have not worked any overtime, it

doesn't matter whether the Court is right or wrong. But if the Court is right, for employees who have worked overtime during the period which is covered by the bonus, it means going back and recalculating the regular rate for every overtime week within that period, and then recalculating the overtime pay for that week. This is likely to be, at the very least, a tremendous administrative hassle, even if it doesn't amount to a lot of money (though of course it could). It also could result in having to redo W-2s, and pension and other benefit plan contributions if they are based on a percentage of pay.

But before reacting to this decision, remember that it is one federal district court out of hundreds, that the 6th Circuit Court of Appeals has held differently, and that the Court itself acknowledged it was a "close call." In addition, this case may be reversed by the 3rd Circuit Court of Appeals.

The Harshbarger Report

Develop High Integrity Leadership Practices

What people *say* certainly helps determine the norms of an organization, but what they *do* has an even more profound effect. What specific leadership practices are associated with perceptions of high integrity? What can leadership do to reinforce and develop these key practices?

We have conducted studies that identify aspects of leadership most frequently associated with high integrity climates: *directness*, *openness* and *involvement*. Corporations that reinforce, reward and endorse these patterns of behavior will more likely generate trust.

Directness. High integrity leaders generate trust by being direct, clear and to the point. This makes them believable and predictable. Direct leaders are not always loved, admired or even followed, but they are viewed as having integrity, leading others to have it too.

Openness. Leaders who are open are perceived to have higher levels of integrity than leaders who are secretive, aloof or hard to read. High integrity climates encourage open communications, widespread sharing of information, frequent debate and dialogue. Transparent performance, visible rewards, and candid proxy statements and annual reports all build trust.

Involvement. Leaders who are participatory and invite others' contributions are perceived to be less arrogant, more accepting and more open than leaders who seems to have all of the answers. Involvement implies humility, and leaders with high involvement styles are perceived to have higher levels of integrity. A climate of integrity is usually more participative and more accepting of diversity.

Top leadership must have the courage to hold all of the members of their organization accountable for demonstrating these three patterns of high integrity behavior. They must not reward or ignore an arrogant, hypercritical, autocratic executive. They must not look the other way when a manager fails to level with his/her people, acts without listening or says one thing and does another.

Of course, it also means role modeling high integrity personal leadership. No other

factor will have a greater impact on the climate of integrity than the day-to-day practices of the leaders. A climate of integrity depends upon having the right kind of leaders practicing the right kind of leadership.

Court Holds Sarbanes-Oxley Act Does Not Apply To Foreign Nationals

In *Ruben Carnero v. Boston Scientific Corp.*, 2004 WL 1922132 (D.Mass. 9/27/04), the court summarily dismissed Plaintiff's claim under the Sarbanes-Oxley Act of 2002 ("SOAct"). In this case, Plaintiff was an Argentinean citizen who worked for the Argentinean and Brazilian subsidiaries of Defendant Boston Scientific Corporation. After Plaintiff allegedly reported accounting irregularities, he was terminated. After Plaintiff's termination, he filed an administrative complaint with the Occupational Safety and Health Administration ("OSHA") of the U.S. Department of Labor (which has enforcement authority of the SOAct), in which he alleged retaliatory termination and other discrimination in violation of the Corporation and Criminal Fraud Accountability Act of 2002, which was incorporated as Title VIII of the SOAct. The OSHA administrator determined that OSHA lacked jurisdiction over the Plaintiff's complaint because he was a foreign national working in a foreign country, and thus the SOAct was not applicable to him. He appealed that determination.

The Court dismissed Plaintiff's appeal. The Court reviewed the statutory language, and applied the general principle that "Congressional legislation is meant to apply within the United States, absent any evidence of contrary intent." Thus the Court found that "[n]othing in §1514A(a) remotely suggests that Congress intended it to apply outside of the United States. No distinction is drawn between overseas employees and domestic employees." The Court also noted that enforcement of the SOAct in this context might well conflict with foreign law, which Plaintiff already had invoked in Argentina.

Thus, the court held that the "protection of workers is a particularly local matter, and nothing in the legislative history supports plaintiff's assertion that the language of §1514A(a) protecting an 'employee' was meant to include all employees wherever they may work."

Sarbanes-Oxley Whistle-Blower Claim Survives Summary Judgment

In *Collins v. Beazer Homes USA, Inc.*, 2004 WL 2023716 (N.D. GA. 9/2/04), Plaintiff accepted a position as Director of Marketing for Defendant's Jacksonville, Florida division. According to the offer, Plaintiff was subject to a ninety day assessment review period where either of the parties could terminate employment "without giving a reason." After beginning work, Plaintiff expressed concern to the Vice President of Sales and Marketing about some problems in the Jacksonville office including an "assertion that marketing costs were not being properly categorized." Plaintiff expressed other concerns to the Vice President of Human Resources, who in turn spoke with the Executive Vice President and Chief Operating Officer. A few days later, Plaintiff sent an email to the Chief Executive Officer asserting that "cover-up/corruption" existed in the company. After Plaintiff was subsequently terminated (according to the Defendant principally because she could not get along with fellow employees), and after going through the administrative filing requirements with the Occupational Safety and Health Administration ("OSHA"), she filed a federal court complaint, alleging that she was terminated for making complaints about unlawful activity.

The District Court denied the employer's motion for summary judgment. As the Court noted, in a Sarbanes-Oxley claim, a "plaintiff must show by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew of the protected activity; (3) she

suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action.”

So first a plaintiff must show that she engaged in protected activity. In demonstrating this element, the plaintiff is “not required to show an actual violation of the law, but only that she ‘reasonably believed’ that there was a violation of one of enumerated laws or regulations.” Moreover, “reasonably believed” is based on a reasonable person standard. Here, the Court found that Plaintiff engaged in protected activity because of her identification of four specific disclosures to the company and the Court’s conclusion that Sarbanes-Oxley does not merely apply to accountants but rather “employees.”

Next, a plaintiff must show that Defendant knew of her protected activity. Since Plaintiff made numerous complaints to her supervisor(s), Defendant did not contest awareness, but it did maintain that only one person was the final decision-maker and that decision-maker was unaware of the Plaintiff’s allegations. The Court, however, noting that this alleged sole decision-maker did engage in numerous discussions about Plaintiff’s activities, ruled that “[t]o permit an employer to simply bring in a manager to be the ‘sole decisionmake’” for the purpose of terminating a complainant would eviscerate the protection afforded to employees by Sarbanes-Oxley.” Thus the Court ruled that Defendant was aware of Plaintiff’s complaints.

The third element, that a plaintiff suffer an adverse employment action, was a given here since the Plaintiff had been terminated. The fourth element of “whether circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action,” was also satisfied in this case. The Court ruled that the fourteen day time frame between Plaintiff’s complaints and her termination was sufficient to at least raise an inference of temporal proximity.

Finally, the Court looked to whether or not Defendant could “establish by clear and convincing evidence that they would have fired Plaintiff absent her participation in protected activity”. On this issue the Court found the Defendant did not carry its burden of proof at the summary judgment stage. Thus the Court denied the employer’s motion for summary judgment and there will be a trial in this case absent settlement.

ON THE SUPREME COURT DOCKET

As of this writing, there are three employment or employment-related cases pending at the United State Supreme Court.

Scheduled for oral argument on November 1, 2004 are two companion cases, *Commissioner of Internal Revenue v. Banks* and *Commissioner of Internal Revenue v. Banaitis*. In *Banks*, the 6th Circuit Court of Appeals held that while an employment discrimination settlement payment was taxable income under the Tax Code, that portion of the payment paid by the taxpayer to his attorney under a contingent fee agreement was not taxable to the taxpayer. In *Banaitis*, the 9th Circuit Court of Appeals also ruled that settlement monies were taxable to the taxpayer, but that portion paid directly to the taxpayer’s attorney was not taxable to the taxpayer. The IRS is contesting the result in these cases.

Scheduled for oral argument on November 3, 2004, is an Age Discrimination in Employment Act (“ADEA”) case, *Smith v. City of Jackson*. There, the 5th Circuit Court of Appeals held that “disparate impact” claims could not be maintained under the ADEA, as opposed to “disparate treatment” claims. In short, a disparate treatment claim is a claim that a particular over-40 employee was treated differently, and worse, than other employees because of his/her age. A disparate impact claim is one in which an age-neutral employment practice or

policy has a disproportionate effect on older employees, such as here, where it is alleged that a new performance pay plan had the effect of granting substantially larger salary increases to younger employees, particularly those with five or fewer years of service. Five Circuit Courts of Appeal have ruled that disparate impact claims cannot be maintained under the ADEA, while three have ruled that such claims can be maintained.

Finally, in *Jackson v. Birmingham Board of Education*, (not yet scheduled for oral argument), the issue is whether or not Title IX of the Education Amendments of 1972 provides a claim for retaliation for complaints about sex discrimination made unlawful by Title IX. There, a male coach of a girl's basketball team complained about practices that he believed discriminated against his team. He claims that the school retaliated against him by removing him from his coaching position. The 11th Circuit Court of Appeals ruled that Title IX does not contain a private right of action for individuals who, although not themselves the victim of gender discrimination, suffer retaliation because they have complained about gender discrimination suffered by others.

OTHER EMPLOYMENT LAW HEADLINES

“Business Necessity” Defense To An ADA Claim May Include Safety Concerns

There has been much confusion under the Americans with Disabilities Act (“ADA”) about the interplay between two defenses available to employers in disability cases. One is the “business necessity” defense, under which a job requirement must be shown to be job-related and consistent with business necessity; the other is the “direct threat” defense, under which an employer has to show that an employee presented a “direct threat” to himself or others. The EEOC has taken the position that the “direct threat” defense must be used when considering safety-related qualification standards. The EEOC has issued an Interpretive Guidance, which states that "an employer must demonstrate that the requirement, as applied to the individual, satisfies the 'direct threat' standard ... in order to show that the requirement is job related and consistent with business necessity."

In *Verzini v. Potter*, 2004 WL 1946513 (3rd Cir., 9/3/04), a Rehabilitation Act (upon which the ADA was modeled) case involving the Postal Service, the Plaintiff was a satisfactory employee. Then he told his supervisor about certain harassment he was undergoing at night, with neighbors peering in the windows, etc. The supervisor ordered him to take a fitness for duty exam, and the examining psychiatrist diagnosed Plaintiff with chronic paranoid schizophrenia. The doctor recommended that Plaintiff not be allowed back on duty until his condition improved. Plaintiff sought a second opinion, but that doctor also felt Plaintiff needed immediate psychiatric attention and should not return to duty. Both doctors were concerned that Plaintiff might react violently if he should feel threatened enough, even though he had no history of violent behavior.

The employer then gave the Plaintiff three options: agree to be treated by a psychiatrist, possibly with medication; apply for disability retirement; or resign from the Postal Service. There was a factual dispute over whether or not Plaintiff chose any of the options, but on September 16, 1994, the Postal Service terminated him, stating that he did not meet the requirements of his position because he was not fit for duty. Plaintiff then sued for disability discrimination under the Rehabilitation Act. The employer responded that Plaintiff was not discriminated against because of his disability and that it had a legitimate business reason for

firing him-- namely, to ensure the safety of the workplace. A jury found in favor of the Postal Service.

The interesting and important issue on appeal was whether or not an employer could assert workplace safety concerns in justifying a business necessity defense for a termination, rather than having to show that the employee presented a "direct threat" in the workplace. The two are particularly different in this case where there was no history of violence, only the diagnosed potential for future violence. Put another way, it is extremely difficult as a practical matter, if not impossible, for an employer to maintain a "direct threat" defense absent some history. And if the EEOC is correct that the business necessity defense actually incorporates the "direct threat" defense and nothing less, then the business necessity defense as it may apply to workplace safety is meaningless.

Here, Plaintiff had not violated any work rules except for the general requirement that he be mentally fit (i.e. not have a mental illness). As the Court wrote, "[i]t is clear that he wasn't fired because of his conduct, but rather because of the future actions that his mental illness might cause. If future misconduct did occur, it might well be grounds for discharge, but the employer's concern was to protect the workplace by keeping the employee out of the workplace until he had been treated so that future misconduct would not occur. The Postal Service asserts that Verzeni was fired because he would not take steps necessary to render him fit and to prevent that future misconduct from occurring."

The business necessity defense requires that a qualification be both job related and consistent with business necessity. Plaintiff argued, and the EEOC agrees, that to satisfy the business necessity defense, when the business necessity concerns an employee posing a safety risk, the direct threat defense must be met. The Court disagreed, and wrote

Congress amended the Rehabilitation Act and the Americans with Disabilities Act to include such a [direct threat] defense. However, although the direct threat defense is mentioned in the applicable amendments to the ADA, it is fairly clear that the statute does not require that the direct threat defense be used across-the-board when considering a safety qualification. . . . [The ADA] lays out the defenses available to safety qualifications: "It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards ... has been shown to be job-related and consistent with business necessity...." The statute goes on to mention the direct threat defense: "The term 'qualification standard' *may* include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* (emphasis added). Clearly, by the use of the word "may," Congress intended to include the direct threat defense as a permissive factor to consider. That permissive inclusion does not, however, require that it always be invoked when considering safety-related qualification standards.

Nevertheless, the EEOC would require that the direct threat defense be used when considering safety-related qualification standards under the Interpretive Guidance cited above. But the Court wrote that "[t]his requirement does not, however, comport with the plain language of the statute." The Court also noted that the Supreme Court "has expressed its skepticism of the EEOC's interpretation, noting that 'it might be questioned whether the Government's interpretation, which might employ a higher burden on employers to justify safety-related qualification standards than other job requirements, is a sound one....'" Moreover, the 9th Circuit

Court of Appeals in a prior case had rejected the EEOC's position.

Thus the Court ultimately ruled that: "We agree with the Ninth Circuit and hold that a defendant need not satisfy the direct threat defense every time that a safety qualification has an adverse impact on a disabled employee. It may be sufficient for the employer simply to rely on the business necessity defense as laid out in the statute. . . . Whether the Postmaster satisfied the business necessity defense in this case was properly left to the jury. There was ample medical testimony that Verzeni was not only seriously ill but could become violent and be a danger to the workplace if he felt threatened enough. Such a danger would certainly be job related, pertaining to an 'essential function of the job.' . . . Based on the experts' testimony, and Verzeni's own account of his condition, a reasonable jury could clearly consider the risk of harm based on objective medical testimony and conclude that the Postmaster's fit for duty qualification standard [that an employee be mentally fit] was job related and consistent with business necessity."

Employee "Regarded As" Disabled Entitled To Reasonable Accommodation

In *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751 (3rd Cir., 8/26/04), the 3rd Circuit Court of Appeals addressed one of the more conceptually difficult questions under the Americans with Disabilities Act ("ADA") - whether or not employees who are "regarded as" disabled are entitled to reasonable accommodation in the same way as are those who are actually disabled.

Here the Plaintiff was a police officer who was unable to carry a firearm as the result of a mental condition, and was additionally perceived by his employer to be unable to have access to firearms, or be around others carrying firearms. He sued his employer under the ADA, arguing that "he met the criteria for . . . [actual disability] because he had 'a physical or mental impairment that substantially limits one or more of the major life activities,' in that his mental condition prevented him from carrying firearms. Williams further asserts that he met the criteria for . . . [regarded as disabled] because his employer, PHA, wrongly perceived him to be disabled when it treated him as unable to work with, have access to, or be around others carrying, firearms." The District Court granted summary judgment in favor of the employer. The District Court held essentially that Plaintiff was not significantly restricted in the major life activity of working because his restrictions did not prevent him from performing work in a broad range of jobs in various classes. The District Court also found for the employer on the Plaintiff's claim of retaliation because he had not offered sufficient evidence to support that claim.

On appeal, the 3rd Circuit agreed with the District Court on the retaliation claim, but reversed on the discrimination claim because the ADA regulations provide that one is substantially limited in the major life activity of working if one is significantly restricted in one's ability to perform "either a class of jobs or a broad range of jobs." The Court noted that it is "clear from the regulations that, even if one has the ability to perform a broad range of jobs, one is nevertheless disabled if one is significantly restricted in one's ability to perform most of the jobs in one's geographical area that utilize training, knowledge, skills and abilities similar to the job one has been disqualified from performing."

The most important aspect of this case, however, was the "regarded as" issue. There is an inherent conceptual problem in some "regarded as" claims, and that is because someone making a "regarded as" disabled claim usually is claiming not to be actually disabled at all. And if he or she is not actually disabled at all, then there would not seem to be any point in reaching the issue of whether or not there is a reasonable accommodation that could assist the person in performing the essential functions of the job.

Here, the employer argued that a "regarded as" disabled employee is not entitled to accommodation under the ADA and that, accordingly, Plaintiff suffered no adverse employment action other than his termination and the employer could not be liable for a failure to provide a reasonable accommodation. The Court noted that other Circuit Courts have split on this issue. For example, the 1st Circuit Court of Appeals has held that a "regarded as" disabled employee is entitled to be accommodated, and the "better-reasoned district court decisions reach the same result." On the other hand, two Courts of Appeals (9th and 8th) have reasoned to a contrary conclusion, and two have so concluded without analysis (6th and 5th). The 8th Circuit, for example, "acknowledged that the statutory text did not distinguish between actually and 'regarded as' disabled employees. It declined to apply the statute as written, however, because doing so, in its view, 'would lead to bizarre results.'" In so concluding, it declined to attribute to Congress an intent "to create a disparity among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of the employers' misperceptions, a right to reasonable accommodations...." The 9th Circuit had supported the 8th, finding that a "formalistic reading" of the ADA would lead to "bizarre results." Specifically, that Court endorsed a so-called "windfall theory": "it seems odd to give an impaired but not disabled person a windfall because of her employer's erroneous perception of disability, when other impaired but not disabled people are not entitled to accommodation."

Ultimately the Court wrote that "[w]hile we do not rule out the possibility that there may be situations in which applying the reasonable accommodation requirement in favor of a 'regarded as' disabled employee would produce 'bizarre results,' we perceive no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of its text. Here, and in what seem to us to be at least the vast majority of cases, a literal reading of the Act will not produce such results. Accordingly, we will remain faithful to its directive in this case."

Basically the Court reasoned that, to the extent the employee is perceived as disabled, he or she is entitled to a reasonable accommodation. The Court explained that

The record in this case demonstrates that, absent PHA's erroneous perception that Williams could not be around firearms because of his mental impairment, a radio room assignment would have been made available to him and others similarly situated. PHA refused to provide that assignment solely based upon its erroneous perception that Williams's mental impairment prevented him not only from carrying a gun, but being around others with, or having access to, guns--perceptions specifically contradicted by PHA's own psychologist. While a similarly situated employee who was not perceived to have this additional limitation would have been allowed a radio room assignment, Williams was specifically denied such an assignment because of the erroneous perception of his disability. The employee whose limitations are perceived accurately gets to work, while Williams is sent home unpaid. This is precisely the type of discrimination the "regarded as" prong literally protects from Accordingly, Williams, to the extent PHA regarded him as disabled, was entitled to reasonable accommodation.

Thus in the end the Court ruled that "[b]ecause the District Court did not consider whether such limitations [actual or perceived] would prevent Williams from performing work in a class of jobs, and because a reasonable jury could conclude that Williams was actually (or perceived to be) precluded from working in a class of jobs, we will now reverse that grant of summary judgment and remand Williams's ADA discrimination claim . . . for further

proceedings.”

“Off The Record” Conversation Leads To Summary Judgment Denial

In *Owens v. Sprint/United Mgt.*, 2004 WL 1878810 (D.Kan. 8/23/04), Plaintiff was a Director of International Service Management when Sprint decided to relocate her position from Kansas to Virginia, and in doing so removed Plaintiff from her position and assigned a younger male to the position. According to Sprint, it removed Plaintiff from the position because she did not want to relocate to Virginia. According to the Plaintiff, while she advised Sprint that she preferred to remain in Kansas, she ultimately expressed to Sprint that she was willing to relocate if necessary to keep her current position. The Company gave Plaintiff’s position to a younger male and assigned her to a temporary position in Kansas with the same pay and benefits. While in this job Plaintiff sought a permanent Director-level position, but was unable to secure one. Thus she had to accept a lower level Group Manager position at reduced pay and benefits.

Plaintiff sued, claiming that Sprint discriminated against her on the basis of her age and/or her gender when it removed her from the Director/ISM position and placed her in the temporary position. She also claimed that the Company’s stated reason for removing her from the position is pretextual and that Sprint removed plaintiff from the Director/ISM position on the basis of her age in violation of the Age Discrimination in Employment Act (“ADEA”), and/or on the basis of her gender in violation of Title VII of the Civil Rights Act of 1964.

Sprint moved for summary judgment because, it argued, the Plaintiff could not show that she suffered an adverse employment action as she was "moved into an equivalent director position." The Court rejected this argument, and concluded that genuine issues of material fact existed with respect to whether the Plaintiff suffered an adverse employment action. As the Court wrote,

“[w]hile defendant describes plaintiff’s new assignment as a "director" position, there is ample evidence in the record that the position was not a director position at all. According to plaintiff, she lost her supervisory responsibilities when she was reassigned to the new position. Although defendant concedes that plaintiff’s responsibilities were different in her new position, it contends that the responsibilities were nonetheless "director level" responsibilities. Plaintiff testified, however, that she ‘sat idle’ nearly the entire time she was in the special projects position because she’"was not assigned anything to do.’ . . . In fact, the position was budgeted for only five months and at the end of the five-month period, plaintiff was essentially forced to accept a demotion to the Group Manager position after she was unable to obtain another director-level position.”

Sprint also argued that, even if Plaintiff had suffered an adverse employment action, it still had a legitimate, nondiscriminatory reason for its decision, which here was Plaintiff being “extremely reluctant to move.” Plaintiff claimed this reason, however, was a mere pretext to mask Sprint’s discriminatory animus. The Court ruled that there were enough factual disputes on this issue to warrant a trial. For example, “during the one and only discussion that anyone had with plaintiff concerning whether she might be willing to relocate, plaintiff was informed that no final decision had been made and that Sprint was simply wanting an ‘off the record’ sense of how plaintiff would feel about relocating.” Plaintiff also testified that she specifically told Sprint that she would move rather than lose her position, even though she preferred not to relocate. The Court also noted that the Plaintiff’s replacement had no experience or background

in the ISM area. Finally, the Court noted that “preferring not to move” is not the same thing as expressing a “reluctance” or “unwillingness” to move, particularly where Plaintiff testified that she clearly advised Sprint that she would relocate to Virginia to keep her position.

Too Much Time Destroys Causal Connection In Discrimination Case

In *Mole v. University of Massachusetts*, 442 Mass. 582 (9/1/04), a former tenured state university professor sued the University and employees of the University, alleging that his termination was in retaliation against him for his wife’s (also a professor) sexual harassment complaint against a department head.

The Massachusetts Supreme Judicial Court first laid out the established prima facie case for proving retaliation. That is, if the plaintiff lacks direct evidence of a retaliatory motive, then the plaintiff has the burden of establishing an indirect prima facie case of retaliation. To make out a prima facie case, the plaintiff must show that (1) he or she engaged in the protected conduct, (2) he or she suffered some adverse action, and (3) a causal connection existed between the protected conduct and the adverse action. If the plaintiff makes out the prima facie case, then the employer may introduce a nonretaliatory reason for the action taken. After the employer offers the nonretaliatory reason(s), then the plaintiff has the burden of proving that the employer’s articulated nonretaliatory reason(s) were a pretext designed to mask a retaliatory motive.

Here, the Court focused on the alleged causal relationship between the protected action and the adverse employment action. The Court explained that while the causal relationship can be inferred from the timing and sequence of events, the mere fact that one event follows another is not sufficient in and of itself. While it is true that there may be a causal inference if an adverse employment action followed closely on the “heels of protected activity,” as more time elapses between the events, the “inference weakens and eventually collapses.” In this case, the alleged adverse employment actions were taken against the Plaintiff three and four years (reduction in salary) after his wife filed the sexual harassment complaint, and then nine years later with respect to his final termination. The Court ruled that these time frames were insufficient as a matter of law to establish an inference of a causal link.

Most notably, the Court also ruled that even if the immediate supervisor has a retaliatory or discriminatory motive against an employee, a “third person’s independent decision to take adverse action breaks the causal connection between the supervisor’s retaliatory or discriminatory animus and the adverse action.” Thus the Court rejected the Plaintiff’s case.

A Negative Reference Was An “Adverse Employment Action”

In *Hillig v. Rumsfeld*, 2004 WL 1909460 (10th Cir. 8/27/04), the 10th Circuit ruled that an employer’s negative reference could establish an adverse employment action even if the employee could not prove that he or she would have received the prospective job. This decision contributes to a split among some of the federal Circuit Courts of Appeal on this issue that ultimately may have to be resolved by the Supreme Court.

Plaintiff was an African-American employee who had worked in a clerical position at the Defense Finance Accounting Service (DFAS) for five years. During her employment, the Plaintiff filed two discrimination complaints against her supervisors. The complaints were settled in 1996, and Plaintiff’s personnel file was expunged of any negative information, she was retroactively promoted, and her performance appraisal was upgraded. In 1998, Plaintiff applied for a position as a Personnel Clerk/Assistant with the Department of Justice. After a positive

interview with the Department of Justice, the interviewer disqualified her for the position because of her “long fingernails” that would interfere with typing. However, a subsequent EEO investigation revealed that during the application process the Department of Justice was provided two negative evaluations of Plaintiff by her supervisors at DFAS. She sued, claiming discrimination.

As part of Plaintiff’s case, she had to show that she had suffered an “adverse employment action,” and she claimed that a negative reference was such an action even if she could not show she would have gotten the job but for the negative reference. The 10th Circuit Court of Appeals agreed. A “tangible employment action” is one “entailing ‘a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’” The Court stated that the “longstanding rule in our circuit has been to ‘liberally define the phrase adverse employment action’ and not limit the term to simply monetary losses in the form of wages or benefits.” Thus the Court held that, whether oral or written, a negative reference is not de minimis and it is an adverse employment action.

The Court noted that both the 9th Circuit and the District of Columbia Circuit have had similar holdings that a negative job reference is an adverse employment action, and that the 3rd Circuit also appears to support this position. The Court rejected cases from the 2nd and 11th Circuits that require the employee, as part of his or her prima facie case, to either prove that the negative reference “caused or contributed to the rejection by the prospective employer”(2nd Circuit) or that the employee would have received a job but for the negative reference (11th Circuit).

Legislative/Regulatory Actions Of Note

New Overtime Regulation Website

On September 3, 2004, the federal Department of Labor, Wage & Hour Division, announced the creation of an interactive website designed to assist employers and employees with understanding the newly-effective revisions to the so-called White Collar overtime regulations. The new website is at www.dol.gov/elaws/overtime.htm, and more information about the website and the new regulations can be found at www.dol.gov/fairpay.

No More H-1B Visas For FY 2005

As of October 1, 2004, the Department of Homeland Security's office of U.S. Citizenship and Immigration Services has already reached this fiscal year's 65,000 cap for H-1B visas. Unless Congress acts to increase the cap, employers now may not hire employees under the H-1B program until October 1, 2005, although such petitions may be filed starting in April, 2005. Last year was a similar situation, with the cap being reached four months into the federal fiscal year, which begins October 1. Petitions for H-1B employees already in the U.S., including extensions and employment changes, will continue to be processed. Some H-1B visas are not subject to the cap and also will continue to be processed, such as those for institutions of higher education, nonprofit research organizations, and government research organizations.

EEOC Reaches Out To Teenage Employees

On September 21, 2004, the Equal Employment Opportunity Commission (“EEOC”) announced a new initiative and website designed to educate and inform teenage employees about their rights and responsibilities in the workplace. Apparently the EEOC has seen a recent upsurge in charges filed by teenage employees, mostly involving sexual harassment or retaliation. The website describes the different types of job discrimination and provides some tools for dealing with discrimination and/or harassment in the workplace. It also contains an interactive tool for teenage employees to test their understanding of anti-discrimination laws. The website is at <http://youth.eeoc.gov>.

FLSA/FMLA Cases

DOL “Clarifies” FMLA Recertifications

A nettlesome issue under the Family Medical Leave Act (“FMLA”) is the intermittent leave provision and being able to require a medical recertification of the necessity for intermittent leave. A May 25, 2004, Opinion Letter issued by the federal Department of Labor, Wage & Hour Division, at least explains the DOL’s view, although how consistent that view is with the actual language of the FMLA statute is an open question.

Section 103(e) of the FMLA itself states only that the employer may require subsequent recertifications "on a reasonable basis." The DOL’s regulations under the FMLA, while supposedly created to illuminate what “on a reasonable basis” means, limit the situations under which recertifications may be requested, perhaps to an extent not exactly consistent with the statute itself. In any event, the regulations, at §825.308(a), limit recertification for pregnancy, chronic, or permanent/long-term serious health conditions, when no minimum duration of incapacity is specified on the medical certification, to no more often than every 30 days, provided the recertification is done only in connection with an absence. If circumstances have changed significantly, or the employer receives information which casts doubt upon the continuing validity of the certification, recertification may be requested more frequently than every 30 days.

In its Opinion Letter, DOL opines on a couple of situations involving patterns of Monday/Friday absences. DOL does agree that a pattern of Friday/Monday absences can constitute "information that casts doubt upon the employee's stated reason for the absence" 29CFR(§825.308(a)(2)), thus allowing an employer to request **recertification** more frequently than every 30 days. “provided there is no evidence that provides a medical reason for the timing of such absences and the request for recertification is made in conjunction with an absence. A recertification under these circumstances could thus be justified, for example, if a medical certification indicated the need for intermittent leave for two or three days a month due to migraine headaches, and the employee took such leave every Monday or Friday (the first and last days of the employee's work week).”

Another issue is the employer’s ability to involve the employee’s medical provider. DOL wrote that “[t]he FMLA does not prohibit an employer from including a record of an employee's absences along with the medical certification form for the health care provider's consideration in determining the employee's likely period of future absences. Nor does the FMLA prohibit an employer from asking, as part of the recertification process, whether the likely duration and frequency of the employee's incapacity due to the chronic condition is limited to Mondays and Fridays.” DOL also noted that “Regulation §825.307(a) permits a health care provider representing the employer to contact the employee's health care provider for purposes of

clarifying the information in the medical certification. Such contact may only be made with the employee's permission.”

On The Employee Benefits Front

ERISA Section 510 Completely Preempts State Law Claims

In *Tobin v. Nadeau*, 2004 WL 1922134 (D.Mass., 8/30/04), Plaintiff, a Liberty Mutual salesperson, sued three former co-workers, alleging that they conspired to deprive him of his job because of his disability (bi-polar mania) and disability benefits. He claimed that prior to his termination, he told one defendant that if he was not doing well at work, he would take a disability leave. He was told he was doing fine. When he was terminated, his testimony was that he stated he would apply for disability benefits, and was then told that disability benefits were only available to current employees, and he had just been terminated. (There is a companion disability case with a long and tortured fact pattern, but basically Plaintiff lost in the District Court).

In this case, Plaintiff sued his three former co-workers individually in state court for intentional infliction of emotional distress, negligent infliction of emotional distress, and intentional interference with contractual relations. The defendants removed the case to federal court, arguing that the Plaintiff's claim of being terminated and deprived of disability benefits fell within Section 510 of the Employee Retirement Income Security Act (“ERISA”), and thus preempted his state law claims, and thus should result in the dismissal of the case. Plaintiff moved to remand the case to state court, and defendants moved to dismiss the case.

While Plaintiff's claims were not aimed at enforcing the terms of Liberty Mutual's disability or pension plans, the Defendant argued that Plaintiff's claims are completely preempted insofar as they fall within the scope of §510 of ERISA. Section 510 states:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . .or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . .

Relying on cases from other jurisdictions, the Court ruled that Section 510 “completely preempts state law claims even where the relief requested in the state law claims is not available under § 502, which is the case with Tobin's claims. . . . I find these cases persuasive, and thus, I similarly conclude that claims that fall within the scope of § 510 are completely preempted by ERISA.”

Then the question was whether or not Plaintiff's claims fell within Section 510; the Court held they did. As the Court wrote, “While Tobin does not explicitly allege that defendants conspired to terminate him for the purpose of interfering with his right to disability benefits, the substance of his claims indicates exactly that. Tobin alleges that Schwitters did not want Tobin to file a disability claim because it would prevent her (or her superiors) from firing him, and thus, Schwitters essentially tricked him into not filing a disability claim while simultaneously orchestrating his termination. Thus, at the core of Tobin's claims is his contention that defendants acted to get him fired before he could file a disability claim. This constitutes the type of interference with ERISA rights proscribed by §510.”

Thus the Court dismissed Plaintiff's case as being completely preempted by Section 510 of ERISA.

Get An Independent Evaluation For A Denial Of Benefits "Close Call"

In *Fought v. UNUM Life Insurance Company of America*, 379 F.3d 997 (10th Cir. 8/13/04), prior to Plaintiff employee's enrollment in the Employer's group disability plan, she was diagnosed and treated for coronary artery disease. After three months enrollment in the plan, she underwent surgery. During the surgery there were complications with the actual procedure, and after the surgery Plaintiff experienced other complications such as an infection for which she had to be hospitalized. The Defendant denied Plaintiff coverage under the long-term disability plan.

The Defendant was the benefit plan as well as the administrator, and it determined that Plaintiff's "pre-existing condition 'caused, contributed to, or resulted in the condition(s) for which [she was] claiming disability.'" After exhausting her internal appeals, Plaintiff sued in federal court under ERISA. The District Court granted summary judgment in favor of the Defendant Plan and administrator.

Generally, in reviewing a plan administrator's decision, the federal courts use an "arbitrary and capricious standard" of review in which the courts are "limited to the 'administrative record, i.e. the materials compiled by the administrator in the course of making his decision.'" However, in cases where a conflict of interest exists between the benefit plan and administrator, such as here, the 10th Circuit clarified the so-called "sliding scale" standard of review. In cases where an ERISA "fiduciary plays more than one role pursuant to ERISA, which creates a conflict of interest," but where the plaintiff "cannot establish a serious conflict, then we will view the conflict of interest as one factor in determining whether the plan administrator's denial of benefits was arbitrary or capricious." However, if the fiduciary has an inherent conflict of interest, the court applies a burden-shifting rule, and the "burden is on the fiduciary to establish by substantial evidence that the denial of benefits was not arbitrary and capricious."

Here, the Court noted that there was a conflict of interest because the insurance company was also acting as the plan administrator, and thus its coverage decisions results in it exercising discretion over situations in which it can incur a direct and immediate expense, or not. Here, the Court found both that (1) there was an inherent conflict of interest because the insurer also was the plan administrator vested with discretion under the plan in making coverage determinations, and (2) there was at least arguably a procedural irregularity in the decision-making process because the administrator did not seek any independent review of the Plaintiff's application before denial. Thus the Court ruled that the least deferential standard of review applied, and the plan and administrator were obligated to demonstrate that the denial of benefits was not arbitrary and capricious.

Under that standard, according to the Court, the Defendants had failed to demonstrate that their denial of benefits was not arbitrary and capricious, and the Court remanded the case for further proceedings. The Court found that although the plan contained an exclusion for disabilities caused by pre-existing injuries, the plan interpreted this provision too broadly and applied it to a disability caused by surgery for a pre-existing condition. This may seem like a fine line, and it is, but the Court cited to various sources in support of its ruling that there are limitations on pre-existing condition exclusions, and given the conflict of interest involved, the plan went a little too far in this case. The Court also noted that if the plan were to exclude complications from surgery for a pre-existing condition, it could have just said so in the plan,

rather than contort the existing plan language.

Finally, the Court also noted that, even though it is not required, Defendants in these types of situations should be encouraged to seek independent evaluation or investigation in cases of conflict of interest. It seems reasonable to suggest that in this case, had the plan secured an independent evaluation that supported its denial of benefits, it would have won this case outright.

State Law Claims Not Preempted By ERISA

In *Daponte v. Manfredi Motors, Inc.*, 2004 WL 2071479 (E.D.N.Y. 9/9/04), Plaintiff was hired by Defendant Staten Island Motors as a salesperson. In 1998, Plaintiff was fired, but then was re-hired after he was allegedly promised health insurance within ninety days after commencing employment. Plaintiff was issued medical coverage on April 1, 2000. Shortly after he was issued medical coverage, Plaintiff was diagnosed with throat cancer. He worked up to the day of his surgery, April 28, 2000, and then went on medical leave. He apparently was terminated about a year later. Plaintiff sued the Defendant for alleged violations of the Americans with Disabilities Act (ADA), as well as common law claims for negligent and fraudulent misrepresentation. Marica Daponte brought a common law claim for loss of consortium. The crux of Plaintiff's claims appear to have been an alleged denial of medical coverage after he had become reemployed and relied on a promise of medical insurance coverage to accept reemployment.

The Court decided that Plaintiff failed to establish a prima facie case of disability discrimination under the ADA. The Court explained that a disability is defined as a "physical or mental impairment that substantially limits one or more of the major life activities; a record of such an impairment; or being regarded as having such an impairment." In this case, the Court found that Plaintiff did not show that his impairment of the larynx affected a major life activity of speaking or that the Defendants regarded him as having a substantial limitation in the life activity of speaking, because there was only a slight difference in the tone of his voice and he still performed his job as a sales person. Thus the disability claims were dismissed.

Next, the Court decided whether or not the state law claims were preempted by ERISA. As for the fraudulent and negligent misrepresentation claims, the court went through following analysis. First, the court asked whether the alleged misrepresentations relate directly to the Plaintiff's benefits under Defendants' medical benefit plan. The court held that that the Plaintiffs have claimed misrepresentations with respect to a collateral employment agreement, i.e., that Plaintiff would not have agreed to reemployment if there had not been a promise of medical benefits, and that he was not making a claim under the plan.

Second, the court considered the nature of Plaintiff's harm from his reliance on the Defendants' alleged misrepresentations. Here the Court found that since the Plaintiff alleged "severe mental, emotional and physical injury, pain and suffering, loss of enjoyment of life and loss of earning capacity" after he accepted reemployment, the harm was not lack of coverage or failure to secure additional benefits under a benefits plan. Lastly, the Court inquired whether allowing the Plaintiffs to "pursue their detrimental reliance claims 'would pose some genuine threat of interference with the administration of primary plan functions.'" Here, the Court decided that it would not, and thus the Plaintiffs' misrepresentation claims and the loss of consortium claim were not preempted by ERISA. Thus the Court granted summary judgment on the ADA claims, and dismissed without prejudice the fraudulent misrepresentation, negligent misrepresentation, and loss of consortium claims so that the case could be adjudicated in a state court.

On The Public Sector Front¹

Public Sector “Volunteers” Could Be Entitled To Overtime

According to the Daily Labor Report of Thursday, September 23, 2004, the federal Department of Labor recently issued an opinion letter addressing whether or not public employees who also volunteer for their employer are entitled to overtime for that volunteer work. While this is not new law, it does come up frequently in schools and is worth revisiting. The basic rule is that if the volunteer work involves the same duties as the employee’s regular job, then that is not real volunteer work and the employee must be compensated. For example, a bus driver may “volunteer” to drive the school basketball team to away games, but because driving a bus (albeit students to and from school rather than a team) is his/her regular job duty, that is compensable time.

On the other hand, if the bus driver volunteers to coach the basketball team, that is not compensable time because coaching is not part of the bus driver’s regular job duties. And on yet another hand, and the most interesting part of this opinion letter, the DOL opined that if the bus driver is a parent of one of the players, then his or her time spent driving the bus is not compensable time - DOL does “not assert FLSA (Fair Labor Standards Act) violations for time spent by a public school employee who is also the parent . . . of a child in that school, when the parent volunteers in activities directly involving the child’s education and participation”.

Finally, if the bus driver volunteers as a basketball coach, as noted above the time spent coaching is not compensable time. But if the bus driver also drives the bus while being a coach, that bus driving time still is compensable time because bus driving is part of his/her regular job duties (unless the bus driver is a parent of one of the students, as noted above). So in this case, the driving time is compensable, the coaching time is not. And obviously, if any of these compensated hours push the employee into hours over 40 in a work week, time and one-half must be paid for those hours worked over 40 in that work week.

Tort Claims Act Bars Claim Against City For Teacher’s Alleged Negligence

In *Bilodeau v. City of Leominster*, 18 Mass. L. Rptr. 203 (Worcester Superior Court, Agnes, J., 9/20/04), the claim was that a teacher, although aware that a particular student had a propensity for violence, nevertheless left a classroom unsupervised temporarily. That student then allegedly injured another student, who in turn sued the City for his injuries based upon the teacher’s alleged negligence in leaving the classroom unattended.

The City filed a motion for summary judgment based upon the immunity provisions of the Massachusetts Tort Claims Act (“MTCA”). Generally under the MTCA, a public employer is liable for the negligence of its employees up to a maximum recovery of \$100,000.00. There are several exceptions in the statute, however, which bar any recovery at all depending upon the factual circumstances. One of those exceptions is Section 10(j), which provides a bar to recovery for “any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer”

The Court noted that prior cases have held that this section shields public schools from

¹ A new feature for our friends and clients in the public sector.

liability “where the injury was caused by the tortious conduct of another student despite being put on notice of an impending threat.” The Court contrasted the situation in this case, where a teacher simply left a regular classroom unattended momentarily, with a situation of a teacher affirmatively taking two students who had been fighting and placing them together in an unsupervised room. That, wrote the Court, would have been a situation “originally caused” by the teacher, rather than here, where there was no such affirmative act as explained under the prior caselaw.

Thus the Court found that, while the teacher’s conduct may have been negligent, it was not the original cause of the student’s injuries - rather, the teacher simply failed to “prevent or diminish a harm originally caused by another student.” Therefore summary judgment was granted in favor of the City.

On The Labor Front

Hospital Had To Provide Incident Reports To Union

In *Borgess Medical Center*, 342 NLRB No. 109 (9/20/04), the hospital terminated an RN for a medication error and for covering it up. The RN’s supervisor filed an incident report over the situation. The union grieved the termination and sought other incident reports dealing with situations in which there were medication errors documented, in part to determine whether or not discipline had been issued in those cases. The hospital, citing a Michigan state confidentiality law, refused to provide the reports. The union then filed an unfair labor practice charge, claiming that the reports were relevant since they concerned employees’ terms and conditions of employment, and that in asserting confidentiality, the hospital had an obligation to seek an accommodation that would balance its confidentiality concerns with the union’s need for the information.

The National Labor Relations Board (“Board”) agreed. It wrote that while the hospital had raised a legitimate confidentiality concern, the information also was “presumptively relevant” to the union’s grievance and thus the union’s interest in reviewing the reports outweighed the hospital’s interest in keeping them confidential. The Board wrote that:

When an employer demonstrates a substantial confidentiality interest, it cannot simply ignore the Union’s request for information . . . [and thus the Hospital had] refused to bargain in good faith because it refused to offer a reasonable accommodation of the Union’s request.”

Here, the administrative law judge had ruled that the union should be able to review the reports with certain restrictions, such as redacting patient names. The Board noted that the hospital’s offer to have a manager testify at the arbitration that there were no other employees who had not been disciplined for medication errors was not adequate because that testimony would not establish whether or not other employees had failed to self-report and whether the failure to self-report had been treated as a cover-up.

So the law appears to be the following: where a union requests information that is relevant to its duties as the collective bargaining representative, the employer must (1) raise a confidentiality concern if it has one, and (2) if it does have a legitimate confidentiality concern, it then has an affirmative obligation to propose an accommodation to the union that would both protect the confidentiality of the information but also give the union what it needs to work with,

not always an easy task.

No-Solicitation/No-Distribution Rule Upheld By Board

In *St. Luke's Memorial Hospital*, 342 NLRB No. 106 (9/15/04), the hospital had a no-solicitation/no-distribution rule, and in a collective bargaining agreement (only covering some employees) had granted access to union representatives if they gave advance notice of the visit. The hospital told the union it had to give one or two days notice, and the union did not object to this requirement, though it apparently usually just gave a few hours notice. On one occasion, however, a union organizer, apparently seeking to organize other employees, again gave a few hours notice and then sat at a table in the cafeteria, distributed materials and talked with employees. The organizer was asked to leave, refused, but finally left when two police officers arrived.

The administrative law judge ("ALJ") found that the eviction was unlawful under the National Labor Relations Act ("Act") because the hospital usually allowed the distribution of two local newspapers in the cafeteria, and because on one occasion an employee had distributed flyers in the cafeteria advertising her nail polishing business. The ALJ also ruled that the advance notice rule was an unfair labor practice because the rule was not applied to other people/groups.

The Board reversed the ALJ. It found that there was not enough evidence to show that the newspaper distribution, which consisted simply of placing stacks of newspapers in the cafeteria for people to pick up if they wanted, was sufficiently similar to the union's activity of actively passing out material to warrant a finding of disparate treatment. The nail polishing business distribution, the Board ruled, in light of the hospital's testimony that it was unaware of such distribution, failed to show that the hospital tolerated such conduct routinely, and thus also failed to demonstrate that union distribution was treated any differently than any other kind of distribution.

Finally, the Board ruled that the advance notice requirement was not unlawful in this case because there was "no evidence that the request applied only to the Union and not to other organizations. Indeed, there is no evidence that any other organizations were permitted, or even attempted, to enter onto the hospital's property without advance notification."

A note of caution, however - the Board majority did indicate in a footnote that the only issue in the case was of disparate treatment, of the union distribution being treated differently than other types of distribution, a claim which the evidence did not support. But there were other theories that could have applied but which were not presented to the Board, such as the hospital's conduct possibly interfering with employees' right of access to their union representative, or a unilateral change to the collective bargaining contract and past practice regarding notification greater than a few hours.

Successor Employer Not On Hook For Accrued Sick Leave, But . . .

In *Allegheny Health, Education and Research Foundation et al. v. National Union of Hospital and Health Care Employees*, 2004 WL 2086056 (3rd Cir., 9/20/04), Tenet bought the assets of four hospitals through a bankruptcy court proceeding. The employees at all the hospitals were covered by collective bargaining agreements ("CBA") with the union. Tenet assumed the CBAs as part of the transaction, but only going forward, and obligations incurred by the seller prior to the sale were specifically excluded, including obligations under the CBAs.

After the sale closed, Tenet offered to credit union members with 40 hours of accrued sick leave, which it later conditioned upon the union agreeing to eliminate sick leave pay for the

first day of any absence. The union rejected that proposal, and Tenet responded by refusing to credit members with any accrued sick leave. The union then filed a grievance accusing Tenet of refusing to abide by the terms of the collective bargaining agreements. The grievance proceeded to arbitration on the following questions: "Did the Employer violate the collective bargaining agreements by refusing to pay employees sick leave starting with the first day of absence and by refusing to pay employees accumulated sick leave? If so, what shall be the remedy?"

Tenet maintained the position that the grievance was not arbitrable, but it participated in the hearing, preserving its objection for judicial review. The arbitrator observed that the issue of arbitrability was reserved for judicial determination and that his powers were limited to interpreting the collective bargaining agreements signed by the prior employer and the union. He concluded that those agreements provided for accrued sick leave and payment for the first day of leave, as requested by the union. Accordingly, he ordered Tenet to pay sick leave that had accumulated before the closing date, and to pay employees sick leave for the first day of each absence.

Tenet appealed, arguing that the employees' accrued sick leave was a liability expressly excluded in the asset purchase agreement. The Court found in favor of Tenet on this issue, and ruled that accrued sick leave, albeit a "contingent" liability, was nevertheless a liability excluded by the contract of sale, which had been approved by the bankruptcy court. Thus there was no obligation on Tenet's part to either pay for or credit employees with sick leave that had accrued prior to the sale. Thus the Court vacated that part of the arbitrator's award.

On the other hand, the Court found that Tenet had assumed the CBA obligations going forward, and one of those obligations was to pay sick leave when an employee was out sick, with no provision that sick leave did not have to be paid the first day of a sickness. The Court wrote that "[i]nclusion of the District 1199C collective bargaining agreements as 'assumed contracts' would seem to be conclusive evidence that Tenet indeed assumed them (with respect of obligations that accrued after the closing date, that is, not that it reserved the right to set them aside and bargain for new terms." Thus the Court upheld that part of the arbitrator's award.

Court Vacates Subcontracting Arbitration Award

While it is difficult to get a court to overturn an arbitrator's decision, it can be done. In *Rock-Tenn Company v. Paper, Allied-Industrial, Chemical and Energy Workers International Union*, 2004 WL 1950436 (5th Cir., 9/3/04), the company subcontracted out its long-haul routes, with the result that existing drivers lost overtime, although no one was laid off. The union grieved and the dispute went to arbitration. The arbitrator ruled that, although there was subcontracting language in the parties collective bargaining agreement ("CBA") which seemingly gave the company the right to subcontract, commentary from other arbitral decisions justified his decision to rule against the company and order the company to reinstate the runs. The company appealed, and the District Court found in favor of the company and vacated the arbitrator's award. Then the union appealed to the 5th Circuit Court of Appeals.

That Court affirmed the District Court's decision. It noted that court review of an arbitration award was limited, but "when an arbitrator ignores the express language of a CBA, he has exceeded his authority and the arbitration award must be vacated." Here, the contract language read:

Nothing in this Agreement shall limit in anyway [sic] the Company's subcontracting

work or shall require the Company to perform any particular work in this plant rather than elsewhere.

The 5th Circuit agreed with the District Court's conclusion that this provision by its plain terms gave the company an unlimited right to subcontract work and that the arbitrator exceeded his authority by imposing a limitation on this right. We agree. By its terms, Article III reserves to management the right to subcontract work - "Indeed, the arbitrator himself recognized this, noting that Article III by its literal terms allows Rock-Tenn to subcontract without explicit limitation. Nonetheless, the arbitrator pointed to the commentary of other arbitrators to justify his decision to depart from the clear language of the CBA. As we have noted in the past, '[a]rbitral action contrary to express contractual provisions will not be respected.' . . . Given that the language of the CBA is clear and express, the arbitrator was without authority to ignore its terms to pursue his 'own brand of industrial justice.'"

Finally, the Court noted that its conclusion was reinforced by the CBA's arbitration provisions, which included common language limiting the authority of an arbitrator:

[t]he jurisdiction and authority of the impartial arbiter and his opinion and award, shall be confined to the interpretation of the provision or provisions of this Agreement at issue between the Company and the Union. The impartial arbiter shall have no authority to add to, detract from, alter, amend, or modify any provision of this Agreement or impose on any party hereto a limitation or obligation not explicitly provided for in this Agreement.

Here, the Court found, the arbitrator violated this instruction by imposing on the company a contracting restriction not simply to use company drivers for some long-haul routes, but to use them to the maximum extent allowed by Department of Transportation regulations. "In so ruling, the arbitrator wrote into the CBA a new provision limiting the ability of the company to subcontract its trucking routes or to vary the extent to which it relies on subcontractors for shipping purposes. The CBA nowhere imposes such a limitation, and indeed Rock-Tenn's past practices-- relying on subcontractors to fulfill anywhere from 66 percent to 90 percent of the shipping needs--indicate that no such obligation has ever been contemplated. The arbitrator exceeded the authority delegated to him under the CBA by imposing a limitation on Rock-Tenn's subcontracting ability.

Thus the Court vacated the arbitration award.

Did You Know . . . ?

The Molecule of the Month is Butane (C₄H₁₀), a colorless, flammable hydrocarbon that is present in natural gas and can be obtained when petroleum is refined. Butane is a gaseous alkane. It is extremely stable, has no corrosive action to metal, slightly soluble in water and readily soluble in alcohol, ether and chloroform.

That October's flower is the Calendula (which stands for grief or jealousy), and its birthstone is the opal?

That October is, among other things, Computer Safety Month, Health Literacy Month, Breast

Cancer Awareness Month, National Pet Wellness Month, Family History Month, Virginia Wine Month, Fire Prevention Month, Earth Day & Energy Awareness Month, Window Covering Safety Month, Michigan Car-Deer Crash Safety Awareness Month, National Energy Awareness Month, Texas Music Month, Parent Involvement Month, National Arts & Humanities Month, Marathon Month, Crime Prevention Month, and National Statistics Month - as well as being the end of a long wait for Red Sox fans?