

November, 2004:

Mistake Of The Month – What Were They Thinking?

“Stray” Age Comment Enough To Get To A Jury

In *Olson v. Northern FS, Inc.*, 2004 WL 2365381 (7th Cir., 10/22/04), the Seventh Circuit reversed and remanded the district court’s entry of summary judgment in favor of the defendant. Early in 2001, Defendant hired a twenty-two year old sales person without any experience to replace Plaintiff, who had received several sales awards during his more than forty years of experience with the company.

After Plaintiff’s termination, he filed an age discrimination charge with the EEOC, which found reasonable cause. Plaintiff filed suit alleging age discrimination under the Age Discrimination in Employment Act (ADEA). The Seventh Circuit held that there are two ways in which to prove discrimination under the ADEA—i.e. with direct evidence or by “constructing a ‘convincing mosaic’ of circumstantial evidence that ‘allows a jury to infer intentional discrimination by the decision maker.’ ”

In this instance, the court found that since the younger employee who replaced Plaintiff had no sales experience and was not more qualified than Plaintiff, coupled with the fact that Plaintiff’s supervisor said that Plaintiff was “undesirable because of his age” (even though five months before termination), were “sufficient to let a jury decide whether [Plaintiff’s] age actually played a role in [Defendant’s] decision to terminate [Plaintiff’s] employment.” The Tenth Circuit also found that this evidence could also be used to show that Defendant’s reason for terminating Plaintiff was pretextual.

While a jury will ultimately decide this case, barring settlement, there seems to be no end to cases in which some supervisor makes an age-related comment to an employee in the over-40 protected class. And replacing a 40 year employee with an excellent record with an unproven 22 year old also generally is not a good idea. We would suggest some training.

The Harshbarger Report

Redefine Consequence Management Practices

Organizational climates are largely defined by what we call “*consequent management*.” What are the consequences attached to behavior or performance, especially to bad behavior or poor performance? What criteria determine promotions? What behavior leads to formal reprimands - or the lack of any? Does the corporation explicitly sanction high integrity acts by its members? What happens to those who generate results by cutting ethical corners?

The latter poses an especially difficult challenge within high-performing corporations. Setting high financial and market performance targets is advised as a mark of strong leadership. Yet high-performance cultures can easily overlook integrity as a meaningful performance standard. Leaders of such organizations are usually driven by “the numbers” and pride themselves in their dedication to “making the numbers.” Only when there are obvious lapses does integrity become a true performance issue.

This tells us that many corporations have failed to establish the right integrity systems with the right formal and informal controls, and that too often members of the organization believe it may pay to behave in questionable ways. It tells us that nobody is accountable for watching what goes on around the edges - that the consequence management practices are

inadequate.

Appoint An Integrity Point Person

We strongly recommend that the CEO appoint a high-level executive to monitor all aspects of the complex and difficult process of corporate integrity reform. This point person works with the CEO to prove to the organization and the general public that higher levels of corporate integrity are a strategic imperative. Acting as the CEO's new independent eyes, ears and alter ego while new standards of corporate integrity are being debated, the integrity point person asks the hard questions and probes into the corners. The focus is on the performance and image of the entire company, ensuring that all mistakes and errors are just that and no more, and are properly remedied. A good advisor will ferret out that very, very small percentage of folks who are actually corrupt.

His or her primary loyalty is to the integrity of the enterprise. The best way to be loyal is to ask questions, keep the CEO and Board informed, and advocate positions they might not want to hear and may decide not to follow. With the right kind of integrity point person, the CEO will at least know the nature of current and potential ethical trouble spots.

OTHER EMPLOYMENT LAW HEADLINES

Continuing Violation Theory Also Applies To Claims Of Retaliation

In *Clifton v. MBTA*, 62 Mass. App. Ct. 164 (9/30/04), the Plaintiff claimed various forms of race discrimination and retaliation. The most interesting issue on appeal, however, was whether or not the co-called "continuing violation" theory – where acts beyond the statute of limitations can be used to buttress a plaintiff's claim - applied to Plaintiff's retaliation claim as well as his claims of discrimination. The Massachusetts Commission Against Discrimination found that it did, as did a Superior Court judge on appeal. Both parties then appealed various aspects of the case to the Massachusetts Appeals Court.

The MBTA argued that the judge erred in applying the continuing violation doctrine to Plaintiff's claim of retaliation. The Court, however, ruled that "[t]he judge did not err in applying the continuing violation doctrine to the retaliation claim in this case because the plaintiff's evidence disclosed a series of arguably retaliatory incidents constituting a pattern of retaliation throughout Clifton's employment, both within the limitation period and preceding it, and emanating from substantially the same source. Just as in the case of a discrimination claim based on a hostile work environment, an employee may be 'unable to appreciate that he is [the object of retaliation] until he has lived through a series of acts and is thereby able to perceive the overall [retaliatory] pattern.'"

Cleansing Blood Through Dialysis Was A "Major Life Activity" Under The ADA

In *Fiscus v. Wal-Mart Stores, Inc.*, 2004 WL 2219323 (3rd Cir., 10/5/04), the Plaintiff suffered from end-stage renal disease that required her to undergo "time-consuming and uncomfortable" dialysis treatments to eliminate waste from her blood. When the store manager proposed that the Plaintiff take a day shift position, such as a "Greeter," she asked that she be able to perform dialysis on Wal-Mart's premises. This request for accommodation was denied,

and Plaintiff was told that there were no available positions for her. Instead, the store manager advised her to take disability leave, which she did. Later, Plaintiff underwent a kidney transplant and was unable to work for five and a half months; Wal-Mart then terminated Plaintiff because she had been unable to return to work within a year.

Plaintiff sued, and claimed that Wal-Mart removed her from her position because of her disability, failed to accommodate her disability, and terminated her because of her disability. The Company filed a motion for summary judgment, arguing that Plaintiff was not "significantly limited in a major life activity." Plaintiff countered by asserting that she was substantially limited in the major life activity of "processing body waste and cleaning her blood" and that "complete failure of [her] kidneys substantially limits her ability to perform the major life activities of eliminating body waste; of cleaning her blood; and of caring for herself."

The District Court agreed with the Company, and ruled that elimination of waste from blood was not a major life activity under the Americans with Disabilities Act ("ADA"). On appeal, the Third Circuit Court of Appeals disagreed and reversed.

The Court noted that under the ADA, in order for an employee to "establish a statutorily protected disability, the employee must show that she has an impairment; identify the major life activity that she claims is limited by the impairment; and prove that the limitation is substantial. Here, the main issue was whether cleansing and eliminating waste from the blood constituted a "major life activity" under the statute. The court noted the fact that the ADA itself does not comprehensively define what is a "major life activity," but that by reviewing previous case law and regulations the court held that a "major life activity need not constitute volitional or public behavior; it need not be an activity that is performed regularly or frequently; but it does have to have importance to human life comparable to that of activities listed in the regulatory examples"—including, breathing, walking, caring for oneself, etc.

Here, the Court wrote that "we disagree with the District Court's conclusion that impaired elimination of waste and blood cleansing are nothing more than characteristics of kidney failure. Rather, they are the *effect* of kidney failure in the same way that impaired thinking is the *effect* of organic brain disease. And the fact that the effect of kidney failure is felt on an internal autonomous organic activity is . . . not incompatible with a finding of substantial limitation of a major life activity."

Thus the Court found that cleansing and eliminating waste from her blood constituted a major life activity, and that the Plaintiff had "established that her end-stage renal disease substantially limited her ability to care for herself."

Another Circuit Splits On Whether "Interacting with Others" Is A "Major Life Activity" Under The ADA

In *Jacques v. DiMarzio, Inc.*, 2004 WL 2223317 (2nd Cir., 10/8/04), for over forty years the Plaintiff [Jacques] had suffered from psychiatric problems. After two depressive episodes in 1992, she was diagnosed with a form of "Bi-polar II Disorder." From 1990 through 1996, her supervisor "repeatedly expressed safety concerns" to her superiors, and the Plaintiff's supervisors felt that they had "to tiptoe around [Jacques] and not say something wrong to get [Jacques] upset and cause a whole scene." The Company subsequently asked Plaintiff to be an independent contractor and work from home, but before they could agree on the final terms, another employee filed a harassment complaint against Ms. Jacques. The Company then terminated the Plaintiff. Plaintiff then sued the Company under the Americans With Disabilities

Act (“ADA”), claiming that the Company unlawfully “regarded” her as disabled and fired her as a result.

In the District Court, the jury found that the Company terminated Plaintiff because it “perceived” her as being disabled in the major life activity of “interacting with others” and awarded her \$50,000 in compensatory damages and punitive damages. The Court subsequently awarded \$140,000 in post-judgment interest for back pay.

On appeal to the Second Circuit Court of Appeals, the basic issue was whether or not ‘interacting with others’ is a ‘major life activity’ protected under the ADA and, if so, what showing is necessary for a plaintiff to be considered ‘substantially limited’ in ‘interacting with others.’ The Court accepted the Ninth Circuit Court of Appeal’s reasoning in a prior case that held that “ ‘interacting with others’ is a ‘major life activity’ under the ADA.” The Court did, however, create its own test for determining whether the limitation was substantial. The Second Circuit’s test is that a “plaintiff is ‘substantially limited’ in ‘interacting with others’ when the mental or physical impairment severely limits the fundamental ability to communicate with others.” This standard is met, according to the Court, when the “impairment severely limits the plaintiff’s ability to connect with others, i.e., to initiate contact with other people and respond to them, or to go among other people—at the most basic level of these activities.” Under this standard, the communication must rise to a level of being “inappropriate, ineffective, or unsuccessful.” This could result by the Plaintiff demonstrating isolation resulting from autism, agoraphobia, depression, or other conditions.

Thus, the Court held that “the district court committed reversible error when it instructed the jury that an impairment that allegedly caused a ‘perceived’ demeanor of (inter alia) ‘hostility’ and ‘social withdrawal’ qualified under the ADA as a ‘perceived’ disability substantially limiting Jacques’s ability to ‘interact with others.’” The Court then remanded the case to the District Court for a new trial.

It should be noted that there is a considerable split among the federal Circuit Courts of Appeal on how to deal with ADA claims brought by employees who have problems “interacting with others.” Employers may be wondering whether every abrasive, combative employee is actually suffering from a personality disorder and entitled to accommodation under the ADA. Obviously these situations have to be dealt with on an individual basis, but we think we can expect more of this type of claim for the next few years until either the courts reach a consensus or the Supreme Court rules on these issues.

In This Case, It Might Have Been Better To Have Known

In *EEOC v. Grief Brothers Corp.*, 2004 WL 2202641 (W.D.N.Y, 9/30/04), the Complainant, a homosexual male – whose sexual orientation was unknown to his co-workers during his employment - claimed that he had been sexually harassed by his fellow male employees because he “did not conform to the stereotypical view of masculinity,” and that he had effectively been forced to resign after the Company failed to prevent the harassment. He filed a charge with the Equal Employment Opportunity Commission (“EEOC”) alleging same-sex sexual harassment and constructive discharge, which subsequently filed this case on the Complainant’s behalf. The Company filed a motion to dismiss, and argued, among other things, that because no one at the Company was aware of the Complainant’s homosexuality, that could not have been the basis of the harassment. And because Title VII does not prohibit harassment or discrimination simply because of an individual’s sexual orientation, there was no unlawful harassment.

The Court disagreed, however. It did note that, unlike many state laws (including those in Connecticut, Massachusetts, New Hampshire, New York (enacted after this complaint was filed), Rhode Island and Vermont), Title VII does not prohibit harassment or discrimination because of an individual's sexual orientation. But here, because none of the alleged harassers knew about the Complainant's sexual orientation any alleged harassment had to have occurred simply because the plaintiff was male, and that was unlawful. The Court added that "nonconformance with gender stereotypes is a viable theory of sex discrimination (either same-sex or between sexes) under Title VII." Thus the Court denied the Defendant's motion for summary judgment in its entirety.

Same-Sex Harassment Must Be Personal

In *James v. Platte River Steel Company, Inc.*, 2004 WL 2378778 (10th Cir., 10/25/04), the Tenth Circuit reviewed the district court's entry of summary judgment in favor of the defendant. Plaintiff, James, claimed that he was sexually harassed by a fellow employee, and thus, as a result of the same-sex sexual harassment, was subjected to a hostile work environment and constructively discharged. The Court affirmed the District Court's entry of summary judgment in favor of the defendant.

The court noted that the issue in the case was "whether a hostile work environment claim [could] be based on same-sex sexual harassment." After citing the three different evidentiary routes by which a plaintiff in a same-sex case can prove that the offensive conduct constituted discrimination because of sex, the court found that the plaintiff failed to meet any of the three tests. Additionally, the Tenth Circuit held that the plaintiff "cannot rely on a hostile work environment theory to support a constructive discharge claim."

The court also noted that plaintiff's assertion of sexual harassment liability based on defendant's "alleged long-standing practice of tolerating male-on-male sexual harassment in the workplace" must fail without plaintiff establishing that he was "*personally* discriminated against because of his gender" (emphasis added).

Legislative/Regulatory Actions Of Note

President Bush Signs Law Eliminating Double Taxation Of Civil Rights Awards

According to the October 25, 2004, edition of the Daily Labor Report, (No. 205, 10/25/04), on October 22, 2004, President Bush signed legislation that allows prevailing employment discrimination plaintiffs to deduct from their income taxes that part of their monetary award allocated to attorneys' fees and costs. Currently such plaintiffs, at least according to the Internal Revenue Service ("IRS"), are taxed on the total award including whatever they have to pay in attorneys' fees, and then the attorney must pay taxes on that income. This legislation applies to a variety of civil rights laws including Title VII, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Age Discrimination in Employment Act.

You may recall us noting in last month's newsletter that the Supreme Court was about to hear oral argument in 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 was contesting the result in these cases.

While the Court likely will still decide these cases since the situations involved arose years ago, at least going forward Congress has resolved the issue.

Busy, Busy, Busy . . . EEOC Issues Two New ADA Guides

On October 20, 2004, the Equal Employment Opportunity Commission ("EEOC") issued a new fact sheet addressing the employment rights of individuals with "intellectual disabilities," which the EEOC describes as "the condition once commonly referred to as 'mental retardation,'" which comprises approximately 1% of the population.

The new fact sheet addresses such topics as:

- when an intellectual impairment is covered by the ADA;
- when an employer may ask an applicant or employee questions about his or her intellectual disability;
- what types of reasonable accommodations employees with intellectual disabilities may need on the job;
- how to address safety concerns and conduct issues in the workplace; and
- how an employer can prevent harassment of employees with intellectual disabilities.

According to the EEOC, this fact sheet helps to advance the goals of the "'New Freedom Initiative,' President George W. Bush's comprehensive strategy for the full integration of people with disabilities into all aspects of American life. The New Freedom Initiative seeks to promote greater access to technology, education, employment opportunities, and community life for people with disabilities. An important part of the New Freedom Initiative's strategy for increasing employment opportunities involves providing employers with technical assistance on the ADA." The fact sheet may be found on the EEOC's website at www.eeoc.gov/facts/intellectual_disabilities.html.

And on October 28, 2004, the EEOC issued a new guide entitled "How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers." This guide is designed to assist restaurants and other food service employers in complying with the employment provisions of the Americans with Disabilities Act (ADA). The EEOC worked with the Food and Drug Administration ("FDA") in addressing the particular problems facing the food service industry, and tries to coordinate the ADA with the FDA Food Code, which is a model code providing guidance on health issues in the food service industry.

The guidance covers such topics as how the FDA Food Code provisions about restricting and excluding sick employees interact with the ADA's requirements; types of reasonable accommodations, including the use of service animals; and what an employer should do if a charge of discrimination is filed against his or her business. The guide can be found at www.eeoc.gov/facts/restaurant_guide.html.

New Hours-Of-Service Trucking Rules Remain In Effect For Now

As we have previously reported, new hours-of-service and other new regulations governing the trucking industry went in to effect earlier this year, but were struck down by a

federal appeals court decision in August. On September 30, 2004, President Bush signed legislation that allowed the new rules to remain in effect for one year while the Federal Motor Carrier Safety Administration reviews the rule and considers changes suggested by the Court. So for now at least, the new rules are the rules.

Wage-Hour Cases

Overtime Claimants Did Not Have To Exhaust Grievance Procedure Before Filing State Law Action

In *Newton v. Commissioner of Youth Services*, 2004 WL 2383354 (Mass. App. Ct. 10/27/04), plaintiffs were employees at a youth forestry camp operated by the Defendant. Under their collective bargaining agreement (“CBA”), there were certain provisions for overtime, call-back and stand-by pay, which plaintiffs claimed they had not been paid. Rather than use the grievance and arbitration provisions of their CBA, they sued in state court under state law. The Defendant moved to dismiss the case, claiming that the Plaintiffs had failed first to exhaust their remedies under the CBA. The Superior Court agreed and dismissed the case.

On appeal, the Massachusetts Appeals Court agreed with the Plaintiffs. The Court recognized that generally “where a collective bargaining agreement exists and the subject matter of the dispute is encompassed therein, public policy favors the resolution of the dispute between an employee and employer within the framework of the grievance and arbitration procedures.” Nevertheless, the Court ruled that there are “certain personal, statutory rights that can be enforced judicially even though they are incorporated into a collective bargaining agreement.” Just because those rights are created both by statute and by the CBA does not mean they are not separate and distinct rights.

Thus the Court ruled that “the right to timely payment of wages is a distinct independent statutory right that can be enforced judicially even though the subject matter of overtime, call-back, and stand-by pay is incorporated in the plaintiffs’ collective agreement.” So the Plaintiffs were not required to exhaust their administrative remedies before commencing their state law action, and the case was remanded to Superior Court.

On The Employee Benefits Front

Even Applying A Heightened Standard of Review, The Plaintiff Loses

In *Bader v. RHI Refractories America, Inc.*, 2004 WL 2278687 (3rd Cir., 10/1/04), the Plan Administrator determined that the plaintiff’s resignation from the Company “did not qualify as a voluntary termination for ‘Good Reason’ and, therefore, [plaintiff] was not entitled to receive enhanced severance benefits under the terms of the Plan.” After a change in control of the Company, the Plaintiff felt his job duties had changed, and thus that his resignation effectively had been forced and thus qualified for enhanced severance under the Plan. The Plaintiff sued, and lost in the District Court. On appeal to the Third Circuit Court of Appeals, he claimed that the District Court had used an overly deferential standard of reviewing of the Plan Administrator’s decision because the Administrator had a “conflict of interest” in that it was both the administrator and the funder of the plan.

The Third Circuit agreed and, rather than apply the more deferential “arbitrary and capricious” or “abuse of discretion” standards of review, applied a heightened standard to the

Administrator's decision because of the "inherent" conflict of interest, using a "sliding scale method" where the degree of scrutiny intensified to match the degree of the conflict.

Nevertheless, the Court found that the plaintiff "presented no evidence, other than his personal perceptions and conjectures, of material and adverse changes to his job responsibilities following the RHI acquisition." Thus the court ruled that the administrator of the Plan "had sufficient evidence to justify a conclusion that Bader's voluntary resignation was not for 'Good Reason,' as defined in the Plan, and to deny [the plaintiff's] application for enhanced severance benefits."

On The Public Sector Front

Court Backs School Board In Tenure Denial Due To Relationship With Former Student

In *Flaskamp v. Dearborn Public Schools*, 2004 WL 2256028 (6th Cir., 10/5/04), a public high school physical education teacher was denied tenure for her sexual or otherwise-intimate relationship with a former student within nine months of the student's graduation. In 1997, the Defendant had hired the Plaintiff as a physical education teacher. Three years later, a senior student was assigned to work with the Plaintiff and apparently a "friendship" developed in which cards, emails, and gifts were exchanged. Plaintiff denied the relationship, or the extent of the relationship, when questioned by her principal. In April, 2001, the school board unanimously denied the Plaintiff tenure. She then sued under 42 U.S.C. §1983, claiming that Defendants had violated her Fourteenth Amendment rights to intimate association, privacy, and right to be free of arbitrary state action. The District Court granted the Defendants' motion for summary judgment, and the Plaintiff appealed.

The Sixth Circuit Court of Appeals first decided that any possible intrusion into Plaintiff's "intimate associations" via the principal's questioning and the school board's tenure denial was not direct and substantial because it involved only the teacher and former student and did not reach a large segment of society. The Court then used a "rational basis" level of review of the governmental action - the most lenient level of review - and found that (1) Plaintiff's lack of truthfulness about the relationship when questioned by the principal could alone have provided "a legitimate explanation for the board's decision to deny" tenure; (2) the board "rationally could conclude that the romantic relationship started before graduation"; and (3) the school board could "act prophylactically in this area by prohibiting sexual relationship between teachers and former students within a year or two of graduation."

Thus the Sixth Circuit affirmed the District Court's summary judgment in favor of the defendants.

Town Not Immune Under Tort Claims Act For Injuries Caused By Snow Salter/Sander Accident

In *Ku v. Town of Framingham*, 2004 WL 2315063 (Mass. App. Ct., 10/18/04), the Town hired independent contractor truck drivers to supplement its snow salting/sanding crew. The only instructions the Town's supervisors gave to the drivers was that both sides of the roads required sand and salt treatment. There were no written directions given to drivers concerning the performance of this task when other traffic impeded free movement of the trucks. Truck drivers sometimes drove in the middle of the road at night when they were salting two-lane roads (i.e., one lane in each direction), thereby spreading salt on both lanes at once. The Town let each

driver decide whether to drive in the middle of the road. The Town also had a policy of limiting its own employees to ten or twelve consecutive hours of operation during storms, but that policy did not apply to independent contractors; it appears that the particular driver in this case had been working over twenty-five consecutive hours at the time of the accident.

The Town filed a motion for summary judgment based upon the immunity provisions of the Massachusetts Tort Claims Act (“MTCA”), and also argued that the driver was an independent contractor, for whose negligence the Town was not liable. The Court rejected the latter argument, and ruled that, although the question “was close,” the driver was acting both within the scope of his employment and on behalf of the public employer. Thus under a “retained control” theory, where if the employer retains control over any aspect of the work it is obligated to exercise reasonable care for the protection of others, the Town could be liable. However, whether or not the employer exercised sufficient control to trigger liability was, in the Court’s view, a question of fact for the jury to resolve.

Next the Court got into the meat of the 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)(the so-called “public duty” rule), 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” Here, the Plaintiffs claimed that the Town’s negligent supervision of the driver caused their injuries. The Court ruled that a public employer was not immune under the public duty rule in a case of “retained control” because the driver was the original cause of the Plaintiff’s injuries, and because the Town retained control of the driver’s work, the Plaintiff’s injuries were “originally caused by the public employer.”

Finally, the Town argued immunity under the “discretionary function” provision of the MTCA. First the Court ruled that because the driver in effect had no particular guidelines to follow in the sanding of the roads, that is, his discretion was not limited by a statute, ordinance or policy of the Town, he did in fact have discretion in the performance of the work. Then on the second prong of analysis, the issue was whether or not the discretion involved was the type for which the statute provides immunity. The case law holds that the discretion protected by the statute applies only to policy-making or planning types of decisions. Thus the Town argued that its decision not to have any guidelines was a discretionary planning decision involving the allocation of the Town’s scarce economic resources. The Court rejected this argument because the Town did in fact have a policy of sanding and plowing the roads, and thus the negligence asserted by the Plaintiffs in this case concerned the carrying out of established policies rather than actual policy-making and planning.

Thus the Court affirmed the Superior Court’s denial of the Town’s motion for summary judgment.

CBA May Override Statutory Reinstatement Rights Of Disabled Retirees

In *Thomas v. Department of State Police*, 61 Mass. App. Ct. 747 (9/2/04), Plaintiffs were several state police troopers who had taken a disability retirement, but later returned to work. Under the state public retirement statute, Massachusetts General Laws, Chapter 32, Section 8(2), an employee returning to work after a disability retirement is generally entitled to return to a “position from which he retired or a similar position within the same department.” Plaintiffs argued in this case that they also were entitled to not only the same position in rank and title

previously held, “but also to a higher pay grade and seniority credits, the level of which the troopers contend they would have achieved had there not been any intervening disability retirement.” The Defendant Department of State Police countered that a collective bargaining agreement (“CBA”) between it and the State Police Association controlled the terms of the troopers' return to service, and that the phrases referring to "position" in §8(2) were not intended by the Legislature, and cannot be construed, to override and displace the negotiated terms of reinstatement to the department as set forth in the CBA. A Superior Court judge found in favor of the Department, but reported the case up to the Appeals Court “given the novel issue presented.”

The Massachusetts Appeals Court agreed with the Superior Court and ruled that “the terms of employment upon reinstatement under G. L. c. 32, § 8(2), may be governed by a collective bargaining agreement; G. L. c. 32, § 8(2), does not, either in its plain meaning or implicitly, entitle State troopers who are reinstated to the police force following disability retirement, to the same pay grade or level of seniority that they may have had at the time of their disability retirement; the subject CBA in effect at the time of the events in this case controls the terms of the plaintiffs' reinstatement with respect to such pay grade and level of seniority determination; and there is no conflict between the CBA and [the statute].”

Thus, at least as to the reinstatement rights of disability retirees returning to work, the parties may address those rights in a CBA and provide for something different than the statute would provide in the absence of any CBA provisions.

Stipend Position Not In Contract Does Not Count Towards Retirement

In *Kozloski v. Contributory Retirement Board*, 61 Mass. App. Ct. 783 (9/7/04), Plaintiff was a high school teacher who also served in a stipended position as the school's audio-visual coordinator. The issue was whether or not the extra \$1,500/year the Plaintiff received for this position would count towards his three highest consecutive years of regular compensation for purposes of calculating his retirement allowance under Massachusetts General Laws Chapter 32 (the public retirement statute). The definition of "regular compensation" in G. L. c. 32, §1, excludes extras such as bonuses, overtime, severance pay, and certain other payments, but specifically includes, for those in the teachers' retirement system, "salary payable under the terms of an annual contract for additional services in such a school." In 1994 the TRB by regulation defined "annual contract" to mean the collective bargaining agreement in effect for the unit and the term "regular compensation" to include "[s]alary payable under the terms of an annual contract for additional services so long as: (1) [t]he additional services are set forth in the annual contract."

Plaintiff's audio-visual coordinator position used to be in the teachers' collective bargaining agreement up (“CBA”) until 1993, but for some reason thereafter it was dropped from the CBA. Because the position was not named in the CBA, the Teachers' Retirement Board (“TRB”) ruled that the additional compensation would not count towards the Plaintiff's retirement allowance, a decision later upheld by the Contributory Retirement Appeals Board (“CRAB”). After the TRB ruling, however, the schools and the teacher union executed a “Memorandum of Agreement,” in which the parties stated that the audio-visual coordinator stipend had been inadvertently omitted in the drafting of the CBAs.

The Plaintiff appealed, lost in the Superior Court, and then lost in the Massachusetts Appeals Court. The Court wrote that the TRB regulations are “designed to bring certainty and definiteness to the words ‘annual contract’ as used in G. L. c. 32, §1, the obvious purpose of which is to provide clear records of approved stipends so as to avoid confusion and uncertainty at

some later time when retirement boards are called upon to calculate pension benefits and would be in an untenable position if they had to sift through a multiplicity of alleged oral or side agreements about which memories might well be hazy.” Plaintiff also challenged the TRB’s and CRAB’s refusals to accept the “Memorandum of Agreement” as an “adequate substitute for the contemporary inclusion of the audio-visual coordinator position in the collective bargaining agreement.”

The Court wrote that “[t]he contention that the memorandum should suffice has weaknesses on several levels. First, as a purely technical matter, the memorandum of agreement postdated the decision of the TRB, which, barring some other, unargued flaw, was correct when made. If CRAB’s function is to review the correctness of the TRB’s decision, it cannot be faulted for so recognizing. . . . Nevertheless, CRAB was properly skeptical about the effect to be given to the memorandum of agreement. The memorandum purporting to clarify the collective bargaining agreement was entered into six years after the last of the applicable collective bargaining agreements had been fully performed and the period to which it related had passed. Moreover, the two individuals who signed the memorandum of agreement, different from the individuals who had signed the collective bargaining agreement, were not shown to have knowledge of the negotiations at the time the collective bargaining agreements were entered into nor to have been authorized to speak for the school committee or the union even in 2000.”

Thus the Appeals Court affirmed the judgment of the Superior Court in favor of CRAB.

On The Labor Front

Termination Of Steward For Harassment Of Dissident Union Member For Filing Decertification Petition Upheld By Board

In *Exxon Mobil Corp.*, 343 NLRB No. 44 (9/30/04), a National Labor Relations Board (“Board”) majority reversed the administrative law judge (“ALJ”) and dismissed the complaint, finding that the Employer lawfully terminated a union’s chief steward for his unprotected harassment of a fellow employee because of that employee’s dissident union activities.

The Board noted that ordinarily steward activity is protected conduct, but “[t]he Board also has made clear, however, that the protections afforded to grievance activity do not extend to harassing conduct. ‘While Section 7 shields employees from potential employer discipline or other adverse action in the exercise of Section 7 rights, it does not permit employees to use grievances as a sword to gain immunity from the consequences of harassment.’”

Here, the harassed employee had filed a decertification petition with the Board, attempting to have the union voted out. Shortly thereafter, the steward secured copies of court records showing a prior DUI conviction of the harassed employee and distributed it to unit members, supposedly in support of a later-filed grievance alleging disparate application of the Employer’s alcohol policy.

The Board found that:

It was not until April 11, just before the unit voted that day in favor of decertification, and representation ceased, that [the steward] filed a grievance alleging disparate treatment under Respondent’s drug and alcohol policy. We find that [the steward’s] grievance filing was an attempt to cloak his unprotected harassment of Breneisen for filing a decertification petition.

Thus the Board upheld the steward's termination because his harassing conduct was unprotected by the Act.

Employer's Refusal To Deal With Particular Union Representative Upheld

In *Pan American Grain Co., Inc.*, 343 NLRB No. 32 (9/30/04), The national labor relations board held, contrary to the administrative law judge ("ALJ"), that the Employer did not act unlawfully by barring the Union's chosen representative from its facilities and by refusing to bargain with him, allegedly because of his misconduct.

On May 9, 2000, during a phone conversation with the Employer's human resources director, Luis Juarbe, the union rep (Figueroa) became furious over Juarbe's position concerning an information request. Figueroa told Juarbe that if he would not change his position, they would have to resolve their pending issues by "exchanging blows." On May 12, 2000, an anonymous recorded message was left on Juarbe's answering machine. The message began with an unidentified voice stating, "One has to be killed. One has to be taken away, whichever, I will start the trunk. I will watch him go through." The next voice on the tape subsequently identified as Figueroa's replied, "That's the son of a bitch, Jose Gonzalez. That's the trunk." Juarbe reported the message to the Employer's president, who instructed Juarbe that the Employer should have no further contact or communications with Figueroa. The Employer also filed a criminal complaint regarding the threatening message.

The ALJ found that Figueroa's misconduct was not so serious that his presence would render good faith bargaining impossible or futile. The Board disagreed, noting that Figueroa's misconduct in 2000 occurred against the background of his already troubled history with the Employer (the Employer had barred Figueroa in May 1998 from all or most of its facilities based on an allegedly similar incident). It observed that the Employer could reasonably consider the 1998 bar in conjunction with the 2000 incidents in deciding that a complete bar was warranted and that the 1998 bar against Figueroa was still in effect in 2000 when the events at issue occurred. The Board also found it significant that Figueroa actively participated in making an apparent death threat against Gonzalez.

Thus the Board upheld the Employer's bar of the union representative from its premises and its refusal to deal with him.

Claim Of Financial "Distress" Did Not Trigger Obligation To Provide Financial Information To Union

In *AMF Trucking & Warehousing, Inc.*, 342 NLRB No. 116 (9/21/04), the Board considered whether the Employer's statements during the course of negotiations effectively communicated a claim of inability to pay, such that its subsequent refusal to furnish the union with requested financial information violated the National Labor Relations Act ("Act").

During negotiation sessions, the Union proposed increasing the health insurance and pension fund benefits. When the Employer calculated the cost of the Union's proposal to be an additional \$3 per hour per employee, it took the position that no changes should be made to health insurance or pension benefits and stated that the Union was asking for "pie in the sky," that the Employer had purchased the Company "in distress a year and a half earlier, and that the company was still in distress," that it was "fighting to [stay] alive," and was "weaker this year" than it had been in previous years.

Based on the Employer's claims, the Union requested access to its financial records and in response, the Employer denied that it was claiming an inability to pay and refused to grant the

Union access to its financial records. Generally where an employer pleads an “inability to pay” at the bargaining table, a union is entitled to examine the employer’s financial information in order to verify the claim. The ALJ ruled that by its financial distress statements, the Employer had “effectively communicated an inability to pay,” and thus was obligated to provide the union with the requested financial information.

The Board, however, overruled the ALJ. The Board wrote that the phrase “inability to pay”

means more than the assertion that it would be difficult to pay, or that it would cause economic problems or distress to pay. “Inability to pay” means that the company presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract that is being negotiated. Thus, inability to pay is inextricably linked to nonsurvival in business. Consistent with this analysis, the Respondent here has not claimed an inability to pay, as it has neither claimed insufficient assets nor stated that acquiescence to the Union’s demands would cause it to go out of business.

Thus the Board found that the Employer’s statements in this case did not go so far as to claim an “inability to pay” and dismissed the complaint against the Employer.

Making Health Insurance Changes According To Past Practice Not Unlawful

In *The Courier-Journal*, 342 NLRB No. 113 (9/22/04), the Employer implemented health insurance premium increases for employees as well as a number of health insurance plan changes on January 1, 2002. The Employer and the union at the time were working under an expired contract and in negotiations for a successor agreement. At a negotiation session on October 3, 2001, the Employer informed the union of the pending changes, about which it had already informed employees in a memo on September 24, 2001. The Employer had for years unilaterally made increases in employee premium contributions and changes in the plans themselves, sometimes while a contract was in effect, sometimes during hiatus periods when no contract was in effect. The union objected to the changes on October 4, 2001, but the Employer maintained it had the right to make such adjustments based on its past practice. The union filed a charge alleging a unilateral change in the status quo.

The Board, reversing the ALJ, ruled that the Employer had acted consistently with its past practice, and thus actually had maintained the status quo, and dismissed the complaint. The Board wrote that

a unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo - not a violation of Section 8(a)(5). . . . Thus, the Board has found unilateral changes to be lawful where employers passed on portions of employee health care premium increases pursuant to established past practices of sharing premium costs with employees according to fixed percentages. . . . Where employers unilaterally passed on premium increases to employees in the absence of an established past practice, however, the Board has found the changes unlawful. . . .

Consistent with these principles, we find that the Respondent's January 2002 changes in unit employees' health care premiums of benefits did not violate Section 8(a)(5). The changes were implemented pursuant to a well-established past practice. . . .

In sum, the Respondent acted in a manner consistent with a lawful, established past practice concerning a mandatory subject, as entitled to do. For the reasons stated above, we find that it did not act unlawfully in so doing.

Thus the Board dismissed the Complaint against the Employer.

Handbook Rules Barring “Gossip” And Job Abandonment Upheld By Board

In *Wilshire at Lakewood*, 343 NLRB No. 23 (9/30/04), the Employer maintained two contested rules in its employee handbook. The first was a rule requiring employees "not to participate in rumors and gossip ... that could cause any type of damage to the facility or anyone employed by the facility." It further stated that disciplinary action could be instituted against an employee whose statements "slander or cause pain to anyone with a malicious intent." The National Labor Relations Board ("Board"), agreeing with the administrative law judge ("ALJ"), found that this rule was not vague and ambiguous. Rather, it was "written in plain and simple English, which should be understandable to anyone who is literate in the English language. . . . How such a statement could be reasonably misconstrued by employees to restrict or inhibit their Section 7 rights simply escapes the undersigned. It is neither logical nor reasonable to conclude that the rule in question would cause employees to refrain from either union or protected concerted activity." The ALJ noted that while "the Board has held that it is overly broad and restrictive for an employer to prohibit merely 'false' statements, the same is not true for a prohibition against 'malicious' statements. . . . The term 'malicious intent' denotes deliberate conduct sufficiently egregious to alert employees that such conduct will not be tolerated. Any employee should reasonably read such language as not including what would be understood to constitute protected activity. I am of the view that the term 'malicious intent' in the rule in question is sufficiently clear to remove the prohibition from being considered overly broad or restrictive of employees' Section 7 rights."

The second rule prohibited employees from "[a]bandoning your job by walking off the shift without permission of your [s]upervisor or [a]dministrator." This was viewed as a restriction on the employees' right to strike. As the Board noted, however, "the Board has made clear that strikers may lose the protection of the Act if they fail 'to take reasonable precautions to protect [the employer's operations] from foreseeable imminent danger due to sudden cessation of work.'" Here, in context (that is, a nursing home with elderly and infirm patients), "employees would necessarily read the rule as intended to ensure that nursing home patients are not left without adequate care during an ordinary workday.

Thus the Board upheld both rules and dismissed the Complaint with respect to those allegations.

Clear Contract Language Trumps Arbitrator's Decision

In *Citgo Asphalt Refining Company v. Paper, Allied-Industrial, Chemical, and Energy Workers International Union Local No. 2-991*, 2004 WL 2303315 (3rd Cir., 10/14/04), the Company was a New Jersey partnership involved in the oil refining industry. In 1998, it announced a new uniform national substance abuse policy that it implemented in its more than sixty locations. The policy contained a zero tolerance policy, which did not offer second chances if someone was found to be under the influence during a random drug test.

The Union brought a grievance claiming that the policy was unreasonable and improperly implemented. After both parties stipulated that the refinery is a "hazardous work environment"

and “drug impairment may pose a threat to co-workers, to the workplace, to the environment, and to the public at large,” the arbitrator found no contractual breach but found that part of the zero tolerance policy was unreasonable.

Citgo appealed, claiming that the arbitrator had exceeded his authority and thus his decision and award should be vacated. The District Court granted the Union’s motion for confirmation of the arbitrator’s award in its entirety. The Company appealed to the Third Circuit Court of Appeals. There the Court found that the Management Rights Clause of the collective bargaining agreement “expressly gives Citgo the right ‘to make and enforce rules for the maintenance of discipline and safety’” and both parties are prohibited from “using the grievance process to amend” the collective bargaining agreement. Given that language, the Court did not understand how the arbitrator could have concluded that the zero tolerance policy is “unreasonable without substituting his own judgment for Citgo’s and ignoring Citgo’s expressly reserved right ‘to make . . . rules for . . . safety.’”

Thus the Court reversed the District Court’s order enforcing the arbitrator’s decision and vacated the decision and award.

Did You Know . . . ?

That the Molecule of the Month is Morphine, the most abundant of opium’s 24 alkaloids. It is named after the Roman god of dreams, Morpheus, who also became the god of slumber; the drug morphine, appropriately enough, numbs pain, alters mood and induces sleep.

That November’s flower is the Chrysanthemum, and its birthstone is the Topaz?

That November is, among other things, Peanut Butter Lover’s Month, National Adoption Month, International Drum Month, Military Family Appreciation Month, CPR Month, National Novel Writing Month, National Diabetes Month, Lung Cancer Awareness Month, and Wilderness Watersheds Month?

That November 2 is National Deviled Egg Day, November 7 is National Bittersweet Chocolate with Almonds Day, that November 12 is National Pizza with the Works except Anchovies Day, that November 15 is National Clean Out Your Refrigerator Day, and the 23rd is National Cashew Day?