

December, 2004:

Mistake Of The Month - The NLRA Bites Another Non-Union Employer

In *United Services Automobile Association v. NLRB*, 2004 WL 2514343 (D.C.Cir., 11/9/04), the Company did not have a union in its workplace, and this situation did not involve any organizing activity either. An employee anonymously distributed fliers after working hours expressing coworkers' concerns about the company's layoffs of long-term employees. The company interrogated her about who was involved. Fearing retaliation, she was evasive in her responses. When she later admitted to the general manager of the company that she had distributed the fliers, she was discharged for lying during the interrogation. She filed a charge with the National Labor Relations Board ("Board").

The Board ruled that the company violated section 8(a)(1) of the National Labor Relations Act ("Act"), by interrogating the employee about concerted activity protected under section 7 of the Act, and by terminating the employee for engaging in such activity. The company appealed and contended that the employee's concerted activity was not protected under section 7 because it violated the company's valid workplace rules, and that even if the activity was protected, the company did not violate section 8(a)(1) because it had legitimate business reasons for questioning the employee about her hours and work. Further, the company contended that it properly discharged the employee for lying, irrespective of her concerted activity.

The Court upheld the Board. The Court ruled that the Company failed to show that the Board erred in finding that the workplace rules were invalid because overly broad or not clearly disseminated to employees. The company also failed to show that the Board erred in finding that the interrogation was coercive in view of the company's admissions and the questions asked. The Court ruled that the employee's actions were protected by Section 7 of the Act in that they were both "protected," i.e., related to terms and conditions of employment generally, and were "concerted," i.e. engaged in for the benefit of employees generally. Because the Company questioned the employee about who else was involved in this activity protected by Section 7 of the Act, the questioning was viewed as "interrogation," particularly where the Company admitted it was trying to find out who else was involved.

Finally, with respect to the Company's claim that it lawfully terminated the employee for lying, the Court wrote that:

The company's contention that it could lawfully terminate Williams for lying during the interrogation, even if her discharge was also motivated by retaliation against her for distributing the fliers, is without merit. . . . There was substantial evidence in the record to support the Board's finding that Williams had responded evasively during the interrogation because she feared retaliation against her for engaging in protected concerted activity. The Board was thus warranted in concluding that Williams had no obligation to respond to the questions in any particular manner and that her dishonesty about her protected concerted activity did not constitute a lawful reason to discharge her.

Thus the Court enforced the Board's order, which included reinstatement and

backpay.

The Harshbarger Report

What Is Trust Worth?

The costs of not having a climate of integrity should be *unacceptable* to corporations. High integrity is good for business. High levels of corporate integrity will add significant value to the corporation both by avoiding costs and, more importantly, by avoiding damaging losses of brand equity, reputation, and marketplace influence - valuable sources of competitive advantage. High integrity is good for business.

Unfortunately, without decisive leadership, the loss of credibility and trust will be with us for a long while. Legislators, regulators, critics and other external parties will have all the ammunition they need to impose their own reform agenda on both publicly owned and non-profit corporations. Without an aggressive program of internal reform, CEOs, corporate leaders and boards of directors risk becoming irrelevant to the process.

Thankfully, there is a lot that can be done about corporate integrity from the inside. It is not a "by the numbers" issue, but the consequences of *not* addressing corporate integrity are tangible, expensive and potentially disastrous. Generating compliance with new and explicit integrity guidelines is an important first step. Creating an organizational climate that will motivate all members of the company to live and act with integrity is a second. The best test, of course, is whether the company acts with integrity in a consistent manner, properly balancing its own interests with the interests of the general public. No leader could leave a better legacy than this, and nothing could do more to restore public trust in American business.

OTHER EMPLOYMENT LAW HEADLINES

Notice Of Nonrenewal Not The Equivalent Of A Constructive Discharge

In *Cigan v. Chippewa Falls School District*, 2004 WL 2483132 (7th Cir., 11/5/04), the Plaintiff physical-education teacher claimed that she was forced to retire by the school district's failure to accommodate her ailments--arthritis, bursitis, degenerating spinal discs, scoliosis, and spondylitis. Suffering from these afflictions, Plaintiff had begun to take more time off and come to school late; she also needed the school's other teachers to cover her duties or adjust the length of their own class periods while she rested. For its part, the school district concluded that Plaintiff either had become a slacker or had accumulated so many physical problems that she no longer could do the job even with accommodations; thus in January 2003 the superintendent notified Plaintiff that he would recommend that the district not renew her contract. Plaintiff then gave 6 months notice of her retirement, which apparently improved her benefits package.

Plaintiff claimed that she was constructively discharged. Under prior cases, the Court noted that "unendurable working conditions" are functionally the same as a discharge, but this was not the Plaintiff's claim. Basically the Plaintiff argued a notice of intent to commence a process leading to discharge may be treated, at the employee's election, as a completed discharge, even if the employer does not undermine the employee's position, perquisites, or dignity in the interim. Both the District Court, and the 7th Circuit Court of Appeals, rejected this argument. The Court ruled that this

approach would require courts to engage in total speculation about what might or might not have happened had the discharge process been allowed to run its course, especially in light of grievance procedures in collective bargaining agreements, and in light of the fact that a public employee generally is entitled to notice and an opportunity to be heard prior to discharge.

Plaintiff also claimed not that she was actually “disabled,” but that she was regarded as disabled and thus entitled to a reasonable accommodation. The Court noted that a person is “regarded as disabled” when the employer, rightly or wrongly, believes that she has an impairment that substantially limits one or more major life activities. However, the Court refused to go so far as to rule, as the Plaintiff suggested, that because the district made some efforts at accommodation, it *must* have regarded her that way. As the Court noted, “[d]ecent managers try to help employees cope with declining health without knowing or caring whether they fit the definition in some federal statute. Managers also may respond to state laws, local regulations, collective bargaining agreements, and other norms that go beyond federal law. These may create legal entitlements or practical expectations without implying anything about ‘disability’ under the ADA. Cigan offers no reason to conclude that the principal at her school knew, supposed, or cared anything about the effect of her conditions on ‘major life activities’ when providing breaks, chairs, and other assistance to continue teaching.”

Thus the Court ruled that because “the record would not permit a reasonable trier of fact to conclude that the school district regarded Cigan as ‘disabled,’ we need not decide whether the ADA requires an employer to accommodate the demands of a person who is regarded as disabled but lacks an actual disability. That is a subject on which decisions are in conflict.”

Arrest For Possession Of Drug Paraphernalia, And Subsequent Lies About It, Sufficient To Justify Random Drug Testing

In *Relford v. Lexington-Fayette Urban County Government*, 2004 WL 2674289 (6th Cir., 11/24/04), the Plaintiff began work as an electrician with the County in July 1993. He was arrested and imprisoned on May 29, 1997, on charges of criminal trespass and possession of drug paraphernalia. As a result of his incarceration, Plaintiff was unable to report to work on the following day, and he commissioned a friend to help him devise an excuse that would innocently explain his absence from work. Shortly thereafter, this friend apparently contacted the County and falsely reported that Plaintiff's absence was due to sickness. Plaintiff's supervisor subsequently learned of his arrest and his improper use of sick leave, and suspended the Plaintiff for a period of five (5) days and issued him a notification of Reasonable Cause Testing ("RCT"), meaning that the Plaintiff would thereafter be subject to random drug testing.

Plaintiff refused to submit to random drug testing and the County began termination proceedings through the state Civil Service Commission, which ultimately upheld discipline but reduced Plaintiff's termination to a thirty (30) day suspension with a requirement that Plaintiff participate in the County's Employee Assistance Program ("EAP"). Random drug testing was part of the EAP process, and when Plaintiff was randomly selected, he tested positive for drug use, whereupon the County recommenced termination proceedings. Plaintiff then resigned, claiming he had found another job. He then sued the County, claiming, among other things, that an arrest for

possession of drug paraphernalia did not constitute reasonable grounds for randomly drug testing a government employee. The District Court entered judgment as a matter of law in favor of the County after finding that, under the circumstances of this case, the County had reasonable suspicion to support its order requiring Plaintiff to undergo random drug testing.

On Plaintiff's appeal to the 6th Circuit Court of Appeals, that Court affirmed the District Court. The Court found that the Plaintiff had been arrested for possession of drug paraphernalia, falsely called in sick, abused sick leave, and falsified a report. As the Court wrote:

The nature of Relford's employment misconduct, i.e., his dishonesty to his employer exemplified by his efforts to cover up the reasons for his work absence, when accompanied by his arrest for criminal trespass and possession of drug paraphernalia, reasonably suggests his use of the paraphernalia for the consumption of illegal narcotics. Whether a mere allegation of possession of drug paraphernalia, standing alone, would support reasonable suspicion sufficient to justify employee drug-testing is not before us. In the present controversy, however, the undisputed facts sufficiently establish reasonable suspicion that Relford was probably using controlled substances.

Thus the requirement that the Plaintiff participate in the drug and alcohol abuse EAP and be subject to random drug testing did not constitute an unreasonable search for Fourth Amendment purposes.

Update - Plaintiff Prevails On First Circuit Remand Case, Reversing Original Decision

In a case we first reported on in last May's Newsletter, *Cariglia v. Hertz Equipment Rental*, the 1st Circuit Court of Appeals had ruled that a corporation can be held liable for discrimination when neutral decision makers, free of any age-based animus themselves, rely on information that is manipulated by another employee who harbors age-based discriminatory animus. The Court remanded the case to determine whether or not the Plaintiff had shown that his former supervisor withheld crucial information from the decision-makers.

Judge Lindsay, on November 5, 2004 (2004 WL 2490658 (D.Mass., 11/5/04)), wrote that "[t]he First Circuit concluded that if [the Plaintiff's supervisor] Heard is found to have withheld the aforementioned exculpatory information from his superiors, then 'the subordinate [Heard], by concealing relevant information from the decisionmaking employee[s] or feeding false information to [them], is able to influence the decision.' . . . Thus, 'the issue of the booms as grounds for termination would be impermissibly tainted with Heard's animus.' And so it is based on the foregoing finding. Accordingly, I find HERC liable as to the plaintiff's claim of age discrimination."

Thus the Court entered judgment for the Plaintiff in the amount of approximately \$827,000.00 (of which \$170,000.00 was for emotional distress), plus 12% interest per year for each year since 1996 when the case was filed.

Mass. Appeals Court Affirms Jury Finding Of "Actual Malice" In Interference With Employment Claim

In *Falcon v. Leger*, 62 Mass. App. Ct. 352 (10/29/04), the Plaintiff was an at-will quality-control employee who worked for the Defendant wire and cable manufacturer. He claimed that his supervisor, Leger, wrongfully interfered with his employment by firing him for his refusal to comply with the supervisor's instructions to interfere with a product inspection process conducted by a private, independent testing laboratory upon which government inspectors rely to insure the safety of the public. A jury found in Plaintiff's favor, and the Defendant appealed.

On appeal, the Defendant argued that the evidence did not support a conclusion that his conduct in firing the Plaintiff from his quality control job constituted "actual malice," and that the judge erroneously denied his motions for a directed verdict and judgment notwithstanding the verdict or in the alternative for a new trial. He also argued that the evidence was insufficient to show that he was not acting within the scope of his privilege to terminate an at-will employee when he let Plaintiff go, and that Plaintiff had failed to overcome that privilege with sufficient evidence that Leger acted with a "spiteful, malignant purpose, unrelated to the legitimate corporate interest."

The Court disagreed and affirmed the jury verdict for the Plaintiff. The Court ruled that there was plenty of evidence that "supported the conclusion that Falcon was discouraged, both explicitly by Leger and by the implicit threat of discharge, from reporting suspected UL violations by JM that had the potential to affect the safety of the population at large. Falcon's good faith dispute with management over an electrical product deemed to be unsafe by an independent testing laboratory concerned much more than just matters internal to JM." Thus Leger's conduct amounted to a violation of a clearly established public policy grounded in statutes and regulations designed to minimize potential hazards of fire and shock associated with poorly insulated electrical wire. Consequently, as Leger's actions did not comport with any legitimate corporate interest, the Plaintiff succeeded in establishing that Leger abused his privilege to fire Falcon. Thus the jury's verdict against Leger stands.

Less Than Ideal, But Not Hostile

In *Smith, Gerrero, Weaver, and Reeves v. Northeastern Illinois University*, 2004 WL 2475104 (7th Cir. (Ill.) 11/4/04), the Plaintiffs were employed by the University's Public Safety department. From 1984 through 1997, there were instances of offensive and derogatory language and other questionable conduct by police officers and directors at the Department. After the employees requested an independent investigation to determine whether there were racially-motivated incidents and retaliation, the external investigation found that there were personality clashes but no racial discrimination. Then the Plaintiff Weaver urged the Department to hire experts to address racial discrimination, and the experts found that there was no racial discrimination but there were tensions, which may have appeared "racial in nature on the surface."

The employees sued, and claimed that they were victims of discrimination on account of their race by the Employer creating and tolerating a hostile work environment. The District Court had granted summary judgment for two of the employees. The District Court allowed two other employees to go to trial, and they lost, whereupon the Court denied their motion for a new trial.

On appeal to the 7th Circuit Court of Appeals, the Court affirmed the rulings of the District Court. The Court first addressed the hostile work environment claim and how a

plaintiff must show “(1) he was subject to unwelcome harassment; (2) the harassment was based on his race; (3) the harassment was severe or pervasive so as to alter the conditions of the employee’s work environment by creating a hostile or abusive situation; and (4) there is a basis for employer liability.” The Court noted that in order to satisfy the “severe or pervasive” prong, the plaintiff must show that the work environment was both subjectively and objectively offensive, which is a reasonable person standard. The Court agreed with the District Court that these Plaintiffs had not satisfied this prong because the work environment was not objectively hostile within the meaning of Title VII. That is, “[o]ne utterance alone does not create an objectively hostile work environment”; especially in this situation where the harassment was not directed at the complaining party.

Next, the Court addressed the plaintiffs’ claim that the defendants retaliated against them by creating and tolerating a hostile work environment after they complained about the alleged unfair treatment. The Court explained that the plaintiffs must prove that they “(1) engaged in statutorily protected activity; (2) suffered an adverse employment action taken by the employer; and (3) a causal connection between the two.” Here, the court held that alleged events such as intimidation during a car ride, an anonymous letter, and a comment directed at one of the plaintiffs stating “those two will be losing their homes,” did not create an abusive environment that would change one’s employment for one of the two plaintiffs alleging retaliation. Additionally, for the other plaintiff alleging retaliation, the court ruled that the plaintiff did not establish that the actions she complained of made it harder to do her job.

Bad Attitude Versus Race Discrimination

In *Herron v. Daimler-Chrysler Corporation*, 2004 WL 2453755 (7th Cir., 11/3/04), the Plaintiff, an African-American male, became a supervisor in 1994. From 1994 to 2000, however, he was continually disciplined due to his difficulty interacting with his subordinates, peers, and superiors. Plaintiff also made two complaints to the Workforce Diversity group during his employment. Both times subsequent investigation resulted in a finding of no discrimination. Plaintiff then resigned, claiming that his work environment was so hostile that he was constructively discharged, and sued the Company claiming race discrimination, harassment, and retaliation. The District Court entered summary judgment on behalf of the Company.

The Plaintiff appealed to the 7th Circuit Court of Appeals, which affirmed the holdings of the District Court. The Court found that Plaintiff had a “confrontational and disrespectful attitude” at the work place. The court systematically analyzed each of the Plaintiff’s allegations. First, race discrimination, the Court found that Plaintiff failed to establish a prima facie case because he did not show that he was meeting the Company’s legitimate expectations of job performance or that any similarly situated employee was treated more favorably. Second, the court held that Plaintiff failed to establish a retaliation claim; this claim, based on such actions as a two-month delay in payment of overtime or transfers to different departments and shifts, the Court ruled constituted “minor annoyances” and not adverse employment actions. Moreover, Plaintiff failed to prove that the causal connection between the statutorily protected activity and the retaliation due to inconsistencies in timing.

The Court also found that Plaintiff’s racial harassment allegation based upon a hostile work environment failed because Plaintiff offered no evidence that the alleged

harassment was *based on his race*. Rather, the court stated that “[h]is problems were not related to his race—they were related to him.” The court further explained that the allegations of transfers, late overtime payment, and difficulties with managers was “neither severe nor pervasive enough to constitute harassment,” but was “normal workplace friction.”

Legislative/Regulatory Actions Of Note

IRS “Clarifies” Employment Tax Treatment Of Payments Made For Signing Or Cancelling Employment Contract

On November 23, 2004, the Treasury Department and the IRS published two revenue rulings clarifying that payments by employers to employees made in connection with employment contracts are to be treated as wages for purposes of FICA, FUTA and Federal income tax withholding.

The first ruling, Revenue Ruling 2004-109, clarifies that employment taxes must be paid – and income taxes withheld – on bonuses paid for signing of an employment contract. The ruling addresses situations such as signing bonuses paid in connection with the first contract between a baseball club and a baseball player and payments made upon ratification of a collective bargaining agreement. The bottom line is such payments are treated as wages for purposes of employment taxes and income tax withholding.

The second ruling, Revenue Ruling 2004-110, concerns payments made in connection with the cancellation or termination of an employment contract. The ruling clarifies that, if an employment contract is cancelled before its agreed-upon end and a payment is made in lieu of the remaining period of employment, the payment is treated as wages for purposes of employment taxes and income tax withholding. Both Revenue Rulings can be found at www.treas.gov/press/releases/js2114.htm.

Because these rulings revoke or modify prior rulings, the IRS states that the new rulings will not apply to certain payments made before January 12, 2005, such as signing bonuses, sign-on fees or other amounts paid in connection with an employee's initial employment or payments made or agreed to on the cancellation of an employment contract. This relief applies only where the facts and circumstances relating to the payments are substantially the same as the revoked or modified rulings.

H-1B Relief, Sort Of

The budget bill approved by the Senate and House on November 20, 2004 (and probably signed by President Bush by the time you read this), contains several provisions relating to the H-1B employment-based visa program for highly skilled workers. As we reported in October, the annual 65,000 cap on new H-1B visas was exhausted even before the 2005 fiscal year began on October 1. The new legislation provides for another 20,000 available visas for FY 2005, but has a few strings attached. These visas are available only for foreign master's and doctoral degree candidates who are currently enrolled in an American college. The \$1,000 filing fee for employers is raised to \$1,500, and has added to that a new \$500 “fraud” fee. Another change is that the employer must pay 100% of the Department of Labor prevailing rate, rather than the current 95%.

OFCCP Proposes Pay Bias Standards And Self-Evaluation Guide

In the November 16, 2004, Federal Register, the Office of Federal Contract Compliance Programs (“OFCCP”) published two items of interest to federal contractors and their subcontractors. The first is “guidance” on compliance with OFCCP’s regulatory requirement under Executive Order 11246 (basically subjecting federal contractors and their subcontractors to non-discrimination in employment) that employers routinely review their compensation programs to determine whether there are any gender, race or ethnicity-based disparities. As OFCCP notes, one problem in these self-evaluations is that they can, at least arguably, be used in litigation against the employer. On the other hand, there also arguably is a “self-evaluation” privilege, so maybe those self-evaluations cannot be used in litigation. OFCCP provides a set of standards which, if complied with, will satisfy the requirement to do an appropriate self-evaluation. OFCCP also states that an employer may “certify” that such a self-evaluation was done, rather than provide the self-evaluation to OFCCP and thus maybe destroy any privilege that might apply. But of course OFCCP then will take their own look at the employer’s compensation practices without regard for the analysis or results of the self-evaluation. So you’re really darned if you do and darned if you don’t.

The second publication offers OFCCP’s interpretation of EO 11246’s non-discrimination requirements, which apparently is the first time the agency has issued anything in writing on this issue. Essentially OFCCP provides that it will interpret the Executive Order as banning systemic discrimination in employment compensation “involving dissimilar treatment of individuals who are similarly situated, based on similarity in work performed, skills and qualifications involved in the job, and responsibility levels.” The document is lengthy and federal contractors and their subcontractors should review it carefully. The latter document can be found at <http://frwebgate3.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=3169866748+0+0+0&WAIAction=retrieve>; the former document can be found at <http://frwebgate3.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=3169866748+2+0+0&WAIAction=retrieve>.

FLSA/FMLA Cases

A Reasonable Employee Would Have Attempted To Resolve Things Before Quitting And Suing

In *Haley v. Alliance Compressor*, 2004 WL 2608271 (5th Cir., 11/17/04), Plaintiff was employed in the Company’s Human Resources department. After a couple of years of good evaluations, an employee survey was critical of Plaintiff and her subsequent evaluations raised performance issues. After a meeting with her supervisor at which he raised performance deficiencies, Plaintiff completed a temporary disability claim form; the next day she saw her physician who diagnosed a stress/anxiety disorder, which Plaintiff claimed arose from her employment. Her doctor recommended that she take a leave of absence from work, and she took FMLA leave. While on leave she received a merit wage increase. While on leave there apparently was some discussion about terminating Plaintiff’s position, and when she returned she was put on a performance improvement plan. Plaintiff claimed that subsequently her performance was constantly monitored and she was micromanaged, and she resigned shortly thereafter.

She then sued the Company, claiming she had been constructively discharged and

alleging that the Company had violated the Family Medical Leave Act ("FMLA"), by (1) denying or interfering with her protected FMLA right to be restored to her pre-leave job and (2) retaliating against her for using approved leave under the FMLA. Specifically the Plaintiff alleged that the Company fabricated deficiencies in her work performance and set an overly strict performance plan for her; threatened to fire her if she did not meet her teamwork goals; micromanaged her; excluded her from HR Department meetings; and ridiculed her in front of her coworkers. Thus, Plaintiff reasoned, the Company interfered with her working conditions upon her return from leave and retaliated against her for taking such leave, which compelled her to resign. The District Court granted summary judgment for the Company because it found Plaintiff did not provide material evidence of a constructive discharge; that is, by an objective person standard, a reasonable person in the Plaintiff's shoes would not have felt compelled to resign, and thus evidence of the Company's intent was not relevant.

On appeal to the 5th Circuit Court of Appeals, the Court determined that while the District Court applied the wrong standard, even under the correct standard the Plaintiff still had not proven her case. The Court first noted that evidence of the Company's intent was relevant in applying the "reasonable person" standard. Thus, the Court ruled that "the correct question to ask here is whether a reasonable employee who received similar information of what events had transpired while she was on leave, including the excluded evidence construed as showing employer intent, and otherwise experienced what Haley did after her return to work at Alliance would have felt compelled to quit."

Still, the answer was "no." As the Court wrote:

Haley's situation is analogous to those cases where this Court has affirmed summary judgment for the employer on constructive discharge. Haley contends she faced humiliation and ostracization from her peers, in addition to an overly severe performance plan and micromanagement by her superiors. She also produced evidence, which the district court incorrectly excluded, tending to show her superiors' intent to remove her from her job while she was on leave. However, upon her actual return from FMLA leave, Haley (1) was not demoted; (2) received a three percent merit salary increase approved while she was on leave; (3) had similar, more focused job responsibilities; (4) was not assigned menial or degrading work; (5) was reassigned to Hokky and Anderson because Risinger had resigned; and (6) was favorably accommodated when Alliance changed her schedule to 40-hour work weeks. Therefore, the only factor Haley can rely on to meet the reasonable employee test is "badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation."

The Court then determined that the treatment alleged by the Plaintiff "does not constitute the type of badgering or harassment designed to encourage the employee's resignation that is required for constructive discharge. Also, having one's work micromanaged may be unpleasant but does not constitute a 'greater degree of harassment than that required by a hostile environment claim.' . . . Plus, a reasonable employee who genuinely felt these working conditions were upsetting to the point of intolerable would have attempted resolution of these concerns before choosing to quit after just over two weeks back on the job."

Thus the Court affirmed the District Court's grant of summary judgment in favor

of the Company.

Restoration Position Was Substantially Similar Despite Minor Changes In Duties

In *Mitchell v. Dutchmen Manufacturing, Inc.*, 2004 WL 2660639 (7th Cir., 11/23/04), the Plaintiff worked on a recreational vehicle assembly line where vehicles were finalized and prepared for sale. Her job consisted of various cleaning tasks, such as sweeping, wiping, and applying sticker decals and putty to the vehicles. During a FMLA leave for treatment of depression and anxiety, the Company consolidated two of its production lines and reassigned personnel to different tasks and departments; before consolidation, there were five cleaning positions; after consolidation, only two.

Upon her return from FMLA leave, Plaintiff was assigned to her former department and retained the same pay and benefits, but some of the tasks expected of her had changed. She was now required to use certain small hand tools, including an electric screw gun, a screwdriver, and a seal (caulking) gun. She was expected, for each vehicle, to apply caulk, crimp four wires, and install six or seven screws, two with a screwdriver and four or five with a screw gun. Aside from these new tasks requiring her to use the tools, the Plaintiff continued to perform the same cleaning duties as before her leave. A week after her return, Plaintiff, using a screw gun for the first time, injured her wrist. Eventually Plaintiff returned to work after visiting a physician and told her supervisor of certain restrictions, so he excused her from using the screw gun but informed her that she should continue to use the seal gun, using her left hand if necessary. As soon as her supervisor advised her to continue using the seal gun, Mitchell walked off the job and did not return. The Company's Director of Human Resources then mailed a letter to Plaintiff offering to "accommodate" her new work restrictions and informed her that her failure to return to work would be considered a voluntary resignation. Plaintiff did not communicate further with the Company.

She sued, claiming that the Company failed to restore her to the duties she held before leave, and that the Company constructively discharged her in retaliation for taking the leave. The Company moved for and was granted summary judgment by the District Court, which essentially found that Plaintiff's duties before and after her leave were equivalent, and thus she had been restored to the same or a substantially similar position.

The 7th Circuit Court of Appeals affirmed the District Court's judgment. The Plaintiff argued that her "new duties" created at least a factual question as to the equivalency of her jobs before and after taking leave and thus she was entitled to a trial. The Court disagreed, and wrote that:

Not only did she retain the same pay and benefits after taking leave, but her duties remained substantially similar. For each vehicle, Mitchell estimates spending between a half an hour and an hour to complete her tasks after taking leave. The majority of that time was spent on tasks she had performed before her leave: she spent approximately "five to ten minutes" vacuuming, "thirty minutes" wiping, and "five to six minutes" applying decals. For the rest of the time, Mitchell performed the new tasks using small, not physically taxing, hand tools. The tasks using the tools took only a limited time--she applied caulk for

"two to ten" and "four to five" minutes, cut wires for "a couple of minutes," used a screwdriver for "a few minutes," and a screw gun for "a couple of seconds." According to Mitchell's estimates, she spent approximately 40 to 45 minutes on the same tasks that she had performed before her leave, and only 10 to 23 minutes on the new tasks. Given that the new tasks were neither overly time consuming nor physically demanding, we agree with the district court's assessment that Mitchell's duties before and after her leave were substantially similar.

On The Employee Benefits Front

Employer Ordered To Continue Health Benefits For Retirees

In *McCoy v. Meridian Automotive Systems*, 2004 WL 2624677 (6th Cir., 11/19/04), Plaintiffs are a class of former employees who retired after August 1, 1994. Several agreements between the plant's owners and the employees' union purported to govern the health benefits for employees and retirees, one of which specifically tied the health insurance to receipt of pension benefits. On the other hand, the Summary Plan Descriptions ("SPD") stated that health insurance benefits would terminate when the collective bargaining agreement ("CBA") did. The Company closed the plant and terminated the CBA and retiree health insurance benefits.

The District Court entered a preliminary injunction ordering the Company to maintain the retiree health insurance, at least pending resolution of the litigation. The Court concluded that language in a supplemental agreement to the CBA equated eligibility for retiree health benefits with eligibility for a pension, which thus established a likelihood that the Plaintiffs would prevail on their claim that the health benefits vested upon retirement. "[W]hen this factor is combined with the certain irreparable harm that may be suffered by individual retirees during [the] pendency of this litigation," the District Court reasoned, "an injunction must issue." The Company appealed this issuance of a preliminary injunction.

On appeal, the 6th Circuit Court of Appeals upheld the preliminary injunction. The Court first noted that parties to a collective bargaining agreement may contract for benefits that continue beyond the life of the agreement. Thus basic principles of contract interpretation determine whether benefits survive the expiration of an agreement. The Court also noted that while prior cases had recognized an inference that "status" benefits, including retiree benefits, continue as long as the status is maintained, they also recognized that such benefits are not necessarily interminable and no federal labor policy establishes a presumption of vesting.

Here, the Court ruled that because the supplemental agreement tied eligibility for retirement-health benefits to eligibility for a pension, that the retiree health benefits had vested and could not be terminated at all - at least, if the CBA incorporated the supplemental agreement, which was a much closer question. On that issue the Court ultimately ruled that "while the ambiguities in [the agreements] permit argument until one is 'blue in the face,' . . . the district court correctly concluded--at least at this stage of the litigation--that the collective bargaining agreements incorporated the Supplemental Agreement."

OK To Charge For Retroactive COBRA Payments

In *Chaganti v. Sun Microsystems*, 2004 WL 2677169 (N.D.Cal., 11/23/04), the Plaintiff was laid off from the Defendant Company in 2001. The Defendant's claims administrator sent Plaintiff his COBRA notice to the wrong address, so Plaintiff never received it. Plaintiff learned of his COBRA rights in 2001 and contacted the administrator. In June 2002, the administrator invoiced Plaintiff for approximately \$2,200 for retroactive coverage from November 2001 through June 2002. Plaintiff paid the amount under protest because he believed he was not obligated to pay for premiums for a period in which he did not have any benefits.

When Plaintiff failed to pay premiums in July 2002, the administrator terminated his COBRA coverage. Plaintiff then sued, arguing a COBRA violation by the Defendant's failing to provide him with notice of his right to continued coverage and then by terminating his coverage in July 2002.

The District Court found that the Defendant violated COBRA by failing to give Plaintiff timely and proper notice of his COBRA rights. The Court ordered the Defendant to pay a penalty of \$12 per day, for a total of \$2,292. The Court ruled that even if the Defendant did not act in bad faith, the Plaintiff still suffered some prejudice because of the lack of notice.

However, the Court rejected Plaintiff's claim that the Defendant violated COBRA by terminating his benefits in July 2002 after he failed to make premium payments. Plaintiff's claim was that the lump-sum payment he made in June 2002 covering his retroactive premiums should have been applied to future months because it was unlawful for Sun to charge him retroactive premiums. The Court held, however, that "COBRA coverage begins immediately on the date of the qualifying event, here, Chaganti's termination." Thus the Court found that the Defendant acted in compliance with COBRA by charging Plaintiff retroactive premiums. The Court also suggested that the Plaintiff here seemed a bit piggish:

Chaganti ... seeks to be placed in a better position than if he had been properly notified of his COBRA rights in the first place; if he had been so notified he would have had to pay for coverage beginning with the date of his termination regardless of whether he incurred any medical expenses during that period of coverage. No court has held that a plan is required to permit a former employee to commence COBRA continuation coverage several months after the event that qualified the employee for such coverage.

On The Public Sector Front

Replacement Overtime Costs Not "Undue Disruption" Sufficient To Deny Use Of Comp Time

In a compensatory time case involving police, *Beck v. City of Cleveland*, 2004 WL 2566068 (6th Cir., 11/12/04), past and present Cleveland Police Officers sued the City claiming that the City unlawfully denied them use of their comp time. The Plaintiffs contended that under the "undue disruption" rule in Section 207(o)(5) of the Fair Labor Standards Act ("FLSA"), a municipality cannot refuse to honor a police officer's timely leave request solely to avoid payment of overtime to substitute police officers. The City in turn contended that its compensatory leave system did not violate Section 207(o)(5) because Congress amended the FLSA to reduce its financial burdens upon governmental entities; that under Section 207(o)(5), the City can deny compensatory leave where the payment of overtime to substitute police

officers would impose a financial burden upon the City; and that granting the officers' leave requests would result in undue disruption of the City's police services within the meaning Section 207(o)(5). The District Court granted the City's motion for summary judgment, and the Plaintiffs appealed.

On appeal, the 6th Circuit Court of Appeals reversed the District Court's judgment and remanded the case for additional factual findings. The Court found that the statutory phrase "unduly disrupt" in Section 207(o)(5) is ambiguous, and thus concluded that judicial deference was owed to federal Department of Labor opinions that the payment of overtime to honor an officer's request for compensatory time does not qualify as unduly disruptive under Section 207(o)(5). Hence, the City could not deny a timely compensatory leave request solely for financial reasons. In addition, on the record before the Court, it concluded that the City had not proved that granting the Plaintiffs' otherwise timely requests for compensatory leave would result in an unreasonable financial burden and thereby cause an undue disruption of its operations. Absent a clear showing by the City of undue disruption of its police services, due to severe financial constraints to pay overtime to substitute officers, the City's denials of the Plaintiffs' timely requests for accrued compensation leave must be held to violate Section 207(o)(5).

Thus the Court remanded the case to the District Court to flesh out the factual record on whether or not police services would be unduly disrupted by the Plaintiffs' use of comp time apart from the payment of overtime to substitute officers issue.

Liability For Unlawful "Comp Time" Program Did Not Include Comp Time Already Taken

In *Lupien v. City of Marlborough*, 2004 WL 2415088 (1st Cir., 10/28/04), the City and its police union had a collective bargaining agreement ("CBA") providing for the payment of "comp time." Before trial, the City conceded that the comp time plan was in violation of the Fair Labor Standards Act ("FLSA") and admitted liability (despite the union having lost an arbitration on this issue - one good reminder that the provisions of the FLSA generally trump a public sector CBA). On the issue of damages, it argued that any remedy should take into account the fact that almost all of the comp time had been given to the officers in the form of paid time off rather than cash payment. The Plaintiffs' theory was that damages should equal the dollar value of the total amount of FLSA overtime accrued in the relevant liability period, regardless of whether any such overtime was paid out in the form of comp time. The District Court rejected the plaintiffs' theory, holding that, for remedial purposes, the plaintiffs' compensatory damages under the FLSA were limited to the dollar value of "banked" or unused comp time then existing.

On appeal, the Plaintiffs argued that "back wages [should] be calculated ... using a cash only system and allowing no offset for compensatory time taken outside the individual seven-day workweek in which the overtime compensation is due." The City, in turn, argued that "[t]he statutory and regulatory scheme obviously contemplates that the *accrual* of comp time at a rate of 1 1/2 hours for each hour of overtime worked, and then the subsequent use of the comp time for *paid* time off, is the equivalent of being paid the overtime in the first place." The City argued that although the comp time scheme in this case was unlawful, the officers, when they took paid time off, were *paid* according

to the principle in the statutory scheme. As a result, the proper measure of damages is the amount of unused comp time which remained banked by the plaintiffs (amounting to approximately \$13,535.41). The City also noted that following the plaintiffs' theory of damages would give the plaintiffs a "gigantic windfall."

The First Circuit Court of Appeals agreed with the District Court and affirmed its judgment. The Court wrote that the District Court "correctly held that in computing the plaintiffs' compensatory damages, the City's liability under the FLSA could be offset by the used comp time hours. On this record, the sum of \$13,535.41 in unused, banked comp time is not contested by the plaintiffs, and it is the correct measure for compensatory damages. . . . The City's liability (all hours for which comp time credits were granted but not used within the same week during the relevant damages period) *minus* offset for comp time paid out *equals* compensatory damages."

The Court also noted that "[t]his is not a case in which the employer forced employees to work overtime for free. Although there may have been some detriment caused by the rules and practices governing when officers could use the comp time it is uncontested that the plaintiffs received banked comp time for their overtime hours, which they could choose to use later, subject to the restrictions in the CBA."

Arbitrator's Reduction Of Termination For Failing To Report Assault On Detainee Upheld By Appeals Court

In *Sheriff of Suffolk County v. Jail Officers and Employees of Suffolk County*, 62 Mass. App. Ct. 915 (11/5/04), a pretrial detainee was assaulted by two jail officers, Donnelly and Benson, while housed at the medical unit of the Suffolk County jail. A hearing officer of the sheriff's department of Suffolk County rejected the two officers' contention that the detainee's wounds were self-inflicted and found that subsequent to a verbal altercation with the detainee, the two officers entered his cell and assaulted him. The sheriff's investigation of the incident alleged that a third jail officer, Upton, witnessed some aspects of the events, failed to report the matter to his superior officer, and lied to investigators in an attempt to cover up the malfeasance. For these violations, Upton was terminated by the sheriff. The termination was grieved by the officer's union, which claimed that Upton's termination violated the just cause provisions of the collective bargaining agreement.

After a hearing, the arbitrator found that the detainee had been assaulted, that Upton had witnessed it, that Upton had failed to file a proper report and maintain a proper log, and that Upton had not cooperated with the investigation. The arbitrator thus found that there was just cause for the imposition of discipline against Upton, but revoked his discharge, ordering him "suspended for six months with no pay or benefits and without accumulation of seniority" from the original date of discharge. Upton was ordered to "be reinstated [at the end of six months] with full back pay and benefits, less any outside earnings and/or unemployment compensation." The Sheriff sought to vacate the arbitration award, arguing that it exceeded the arbitrator's authority and was contrary to public policy. On cross motions for summary judgment, a Superior Court judge denied the sheriff's motion and allowed the union's motion, and confirmed the award. The Sheriff appealed.

The Appeals Court wrote that "in light of the Supreme Judicial Court's narrow view of what conduct might violate public policy. . . . we affirm the judgment." Largely

referencing a prior case that concerned the submission of a false report and the filing of false criminal charges by a police officer, the Court wrote that “[i]n both cases, the final element necessary to a proper finding that an arbitrator’s award was contrary to public policy was lacking, i.e., ‘the conduct at issue cannot simply be “disfavored conduct, in the abstract, ... [but must instead be] disfavored conduct which is integral to the performance of employment duties”’ (emphasis omitted). While the result may be unpalatable for the reasons stated, it also appears to be compelled.”

Thus the Court upheld the arbitrator’s award.

Promises, Promises

In *Saxonis v. City of Lynn*, 2004 WL 2481308 (Mass. App. Ct., 11/8/04), the Plaintiff alleged that she closed her beauty salon business of twenty-three years in December, 1996, in order to act as a permanent substitute for a cosmetology teacher at Lynn Vocational Technical Institute, in reliance on the assurances of the school’s principal and others that the cosmetology teacher, then on indefinite leave, would be retiring at the end of the school year and that he would hire Plaintiff to replace her. Plaintiff further alleged that the cosmetology teacher did retire but that the principal hired someone else instead. These were the central allegations of the Plaintiffs’ twenty-one count complaint against the twenty-six named defendants. A judge of the Superior Court granted summary judgment in favor of the Defendants on all of the Plaintiffs’ claims.

On the Plaintiff’s appeal to the Massachusetts Appeals Court, the Court wrote that

as to the principal’s promises to keep Plaintiff in service as a permanent substitute, “they cannot be enforced because they run counter to the express legislative policy that made her, as matter of law, an at-will employee. . . . Moreover, Saxonis was presumed to know that these representations were contrary to law and that she could not rely on them.

On the other hand, the principal was “vested by law with the authority, subject to approval by Lynn’s superintendent of schools, to hire Saxonis as Lazaris’s replacement . . . although he would not have been required to retain her for the ninety-day period necessary under G.L. c. 71, § 42, to give her rudimentary rights to notice and a hearing prior to dismissal.” But the promise to hire her permanently that was within the principal’s authority “may form the basis for a detrimental reliance claim. . . . A jury could reasonably conclude that, based on Malagrifa’s promises and Saxonis’s detrimental reliance thereon, a contract was formed to hire Saxonis as Lazaris’s replacement (on an at-will basis), and that Saxonis could recover reliance damages (primarily from closing her business) for the breach.”

Thus the Court ruled that summary judgment should not have been allowed on this part of the case, and remanded the case back to the Superior Court for a trial on this claim.

FMLA Applies To County Auditor’s Office Of Only 12 Employees

In *Fain v. Wayne County Auditor’s Office*, 388 F.3d 257 (7th Cir., 10/27/04), the Plaintiff, an employee of the county auditor’s office, alleged miscellaneous Family Medical Leave Act (“FMLA”) violations. The District Court granted summary judgment to the Auditor’s Office, holding that the Plaintiff was not an eligible employee under the

FMLA. The court's decision was based upon the number of persons employed by the Auditor's Office. The undisputed evidence was that the Auditor's Office never employed more than 12 employees at one time. Plaintiff appealed, and the 7th Circuit Court of Appeals reversed the District Court and remanded the case.

As the Court wrote:

The FMLA generally applies only to employers with 50 or more employees, but the statute treats public agencies differently. The FMLA specifies that public agencies are "employers" under the statute regardless of the number of employees. . . . That numerical limitation, however, is resurrected elsewhere in the FMLA, which limits eligibility for FMLA protections to "eligible employees." . . . The term "eligible employee" in the FMLA includes "any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." . . . The regulations make clear that this provision applies to public agencies, stating "employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (e.g.State) employed 50 employees at the worksite or within 75 miles." . . . Therefore, even though public agencies fall within the FMLA regardless of the number of employees, those employees cannot seek FMLA benefits unless the agency employed at least 50 employees within a 75 mile area.

As for what is a "public agency," the Court noted that the federal Department of Labor regulations dealt with that issue. The regulations provide that "[a] state or a political subdivision of the state constitutes a single public agency, and, therefore, a single employer for purposes of determining employee eligibility. For example, a state is a single employer; a county is a single employer; a city or town is a single employer. Where there is any question about whether a public entity is a public agency, as distinguished from a part of another public agency, the U.S. Bureau of the Census' 'Census of Governments' will be determinative. . . ."

Here, the Plaintiff asserted that the Census of Governments ("Census") established that the Auditor's Office is a part of the County and not a distinct public agency in itself. The County, while conceding that the Census, if consulted, would defeat their position, asserted that the Census controlled only if state law does not already provide the answer. Thus where state law clearly reflects that the Auditor's Office is a distinct public agency, there is no question and therefore no need to resort to the Census.

The Court ruled that even if the County was correct that one looks first to state law, state law here was not conclusive, so resort had to be to the Census anyway. There was no authoritative state law source indicating that the Auditor's office was separate from the County government. In fact, the Auditor's office is located in the County building along with other County departments, Plaintiff's paycheck is issued by the County government, not by the Auditor's Office, and the Auditor in this case relied on the County personnel department to handle the administration of Plaintiff's leave. Furthermore, the duties of the Auditor's Office are closely tied to County government. Even the County acknowledged that the Auditor provides services to the county, county

executive, and county fiscal body. One of the primary functions of the Auditor's Office under Indiana state law was to act in a secretarial capacity for the County. Other duties included providing notice of County meetings, preparing the budget for the County Council, and engaging in other responsibilities that "impact the financial well-being of county government," which interweave the auditor's position with the County government as a whole.

Thus, the Court ruled, there was at least a question about whether or not the Auditor's office was or was not part of the County, and thus the Census resolved the question against the County.

On The Labor Front

Flip-Flop, Flippity-Flop - Again

In a 2000 case, *Sturgis, Inc.*, 331 NLRB No. 173 (2000), the National Labor Relations Board ("Board") changed the law and held that the consent of all the employers involved was not required for leased employees and regular employees to be combined in a single bargaining unit. Previously the Board's theory was that all employers had to consent, a theory which itself had only been around about 10 years. As you might infer, the Board has yo-yoed considerably on this issue over the last 35 years or so.

Anyway, in *Sturgis* the Board held that even a joint employer is an "employer" under the National Labor Relations Act ("Act"), and thus the consent of the other joint employer(s) is not necessary for there to be effective collective bargaining between the union and only one of the joint employer, somewhat thin reasoning we think. The Board contrasted that situation with what it termed true "multiemployer" bargaining status, in which two or more companies, usually in the same industry and each with their own employees, decide to join forces to bargain with a union via a united front in negotiations. There, none of the employers is also a joint employer of the other's employees. *Sturgis* was a very controversial decision four years ago.

Guess what? Forgetaboutit. In *Oakwood Care Center*, 343 NLRB No. 76 (11/19/04), the Board changed its mind again, and returned to pre-*Sturgis* law, or at least the law as it stood immediately prior to the *Sturgis* decision. That is, as this Board wrote:

we conclude that permitting a combined unit of solely and jointly employed employees, as the Board did in *Sturgis*, contravenes Section 9(b) [of the Act] by requiring different employers to bargain together regarding employees in the same unit. We hold that combined units of solely and jointly employed employees are multiemployer units and are statutorily permissible only with the parties' consent.

Work Rules Barring Profane Language And Harassment Upheld By Board

In *Martin Luther Memorial Home, Inc.*, 343 NLRB No. 75 (11/19/04), the Employer maintained workplace rules prohibiting "abusive and profane language," "harassment," and "verbal, mental and physical abuse." The General Counsel of the National Labor Relations Board ("Board") argued that the mere maintenance of these rules violated Section 8(a)(1) of the National Labor Relations Act ("Act") because the rules reasonably tended to chill employees in the exercise of their Section 7 rights.

The Administrative Law Judge ("ALJ") ruled that these rules were lawful, and the

Board affirmed. As the Board noted, it will find a Section 8(a)(1) violation where an employer maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Thus the first question is whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Here, the Board agreed with the ALJ that rules barring “abusive and profane” language, and harassment, are not unlawful on their face. As the Board wrote, “employers have a legitimate right to establish a ‘civil and decent work place.’” The Board also recognized that employers have a legitimate right to adopt prophylactic rules banning such language because employers are subject to civil liability under federal and state law should they fail to maintain “a workplace free of racial, sexual, and other harassment” and “abusive language can constitute verbal harassment triggering liability under state or federal law.” In addition, the Board agreed with the ALJ that there was no basis for a finding that a reasonable employee would interpret a rule prohibiting such language as prohibiting Section 7 activity.

Hospitals Unlawfully Refused To Hire Another Hospital’s Striking Employees

In *Allina Health System*, 343 NLRB No. 67 (10/29/04), a group of hospitals entered into a coordinated bargaining agreement preparatory to negotiations with the Minnesota Nurses Association (“MNA”). The agreement provided that if the MNA struck one hospital, the others would refuse to hire striking nurses as per diems during the strike. The union and General Counsel claimed that the agreement violated the nurses’ Section 8(a)(1) rights in that the other hospitals were denying employment based on union membership or protected activities under the National Labor Relations Act (“Act”). The hospitals defended on the basis that the refusal to hire strikers was akin to a lockout - and a lockout is a legitimate economic weapon to use in an impasse-strike situation.

The Board rejected the hospitals’ position, stating that “[t]he only purpose of the Respondents’ refusal to hire the striking [] nurses at that point was to influence the outcome of the ongoing dispute between [the struck hospital] and the Union. In effect, the Respondents expanded this bilateral labor dispute by introducing a new front of economic warfare. This conduct cannot be reconciled with the Act’s objective of encouraging collective bargaining to reduce industrial strife. Respondent was seeking to intrude in a labor dispute not its own, involving a union other than the one with which it was then in an untroubled relationship, for the reason that a settlement of the labor dispute favorable to that union could have an economic effect upon it. To allow this collateral or indirect interest in a labor dispute to be deemed a legitimate business interest sufficient to serve as justification for a lockout of Respondent’s own employees is to arrive at a far-reaching result never intended” under the Act.”

Was ULP Not To Grant Negotiator-Employees Unpaid Release Time For Negotiations

In *Ceridian Corp.*, 343 NLRB No. 70 (11/12/04), the National Labor Relations Board's General Counsel alleged that the Company, during negotiations for a first contract, unlawfully refused to grant unpaid leave to employee members of the Union's bargaining committee for the purpose of attending bargaining sessions, and by insisting that employee members of the Union's negotiating committee must use their paid time off for time spent at negotiations, while the Company refused to meet at times when employee members of the Union's bargaining committee were not scheduled to work. The Company admitted that employee members of the Union's bargaining committee were subject to its personal days off (PDO) policy, as were all other employees, and that it declined to accord employee members of the Union's collective-bargaining committee preferential treatment, as compared to other employees, with respect to its PDO policy.

The Board, adopting the Administrative Law Judge's opinion, ruled that it is a violation of the National Labor Relations Act for an employer to insist that bargaining taking place during the working day while at the same time refusing to allow employee union negotiating committee members to take "uncompensated leave" or "unpaid time off" to negotiate. The Company's assertion that it never denied employee-members of the Union's negotiating committee time for negotiations was correct, but that did not, in the Board's view, address the ramifications of the Company's actions for the employees on the Union's committee. What the Company's actions amounted to basically was a requirement that the employee-members utilize their vacation time just to be able to participate in negotiations. Similarly, the Company's position that the employees are free to participate in negotiations but may lawfully suffer a penalty for doing so may technically be correct, but what the Company may not lawfully do is unfairly penalize the employee-members of the Union's negotiating committee by requiring them to utilize their personal/vacation time to participate in negotiations. As the ALJ wrote, "[t]o allow the Company to force the employee-members to utilize their personal/vacation leave time for negotiations is dictating who will make up the Union's committee. Some employees who might otherwise be willing to participate may nonetheless not be willing to surrender their vacation time to do so."

Thus the Board found a violation of the Act.

No "Waiver" Of Union Right To Bargain In General "Policies" Contract Article

In *Enloe Medical Center*, 2004 WL 2461349 (10/29/04), the Medical Center was a hospital that provides acute inpatient and outpatient medical care with a Women Center's that consists of labor and delivery departments. The Women's Center adopted a mandatory on-call policy that required nurses to take one mandatory four-hour on-call shift every four weeks in addition to their regular shift. The Employer implemented this change in working conditions without notifying or bargaining first with the Union representing its registered nurses. The Union filed a charge alleging, among other things, that the Medical Center was obligated to bargain over the decision to have a mandatory on-call policy, and to bargain over the effects of that policy.

The Administrative Law Judge ("ALJ"), affirmed by the National Labor Relations Board ("Board"), ruled that the Employer violated Section 8(a)(5) of the National Labor Relations Act ("Act") when it refused to bargain over the effects of the new on-call

policy. The ALJ had found that the Medical Center was not obligated to bargain over the decision to implement the new on-call policy, but the ALJ found that since the Union did not waive its rights over bargaining about the effects of the policy in the parties' contract, that the Medical Center violated Section 8(a)(5). The ALJ noted that the contract's provision about the implementation of personnel policies contained only a generalized right to promulgate and implement new policies, and did not constitute a waiver of the Union's right to bargain over the effects of specific policies, especially brand new ones.

Did You Know . . . ?

That the Molecule of the Month is Maleimide-Polyethylene Glycol (known as MPEG for short)? This is a molecule created by artificially modifying human hemoglobin. It can be used as a substitute for blood, and so has applications in medical operations and transfusions.

That December's flower is the Narcissus or the Pointsettia, and its birthstone is the Turquoise or the Blue Topaz?

That December is, among other things, Walnut Month, Seasonal Depression Awareness Month, National Drunk and Drugged Driving Prevention Month, Safe Toys and Celebrations Month, Smart Client Month, International Sharps Injury Prevention Awareness Month, and Taxi Aware Month?

That December 3 is Worldwide Day of No Pesticides Use, December 5 is International Volunteer Day, December 12 is Poinsettia Day, and December 26th is Boxing Day? (No, that's nothing to do with the boxing ring.)