

January, 2005:

Mistake Of The Month - Independent Contractors In The Headlines Again

In a potential upending of independent contractor law, on July 19, 2004, Governor Romney signed a bill amending the state “independent contractor” law. This amendment took effect immediately and both limits which workers may be classified as independent contractors and expands the presumption of employment status to other wage and hour, taxation and workers’ compensation statutes. In addition, another new law, effective September 8, 2004, increases the sanctions for misclassification.

The Massachusetts Attorney General (“AG”) is responsible for enforcing the independent contractor statute. Following the amendment to this statute, the Attorney General issued an advisory providing guidance on the new statute. The guidance is entitled “An Advisory from the Attorney General Chapter 193 of the Acts of 2004 Amendments to Massachusetts Independent Contractor Law, M.G.L. c. 149 sec. 148 2004/2,” and is at the Attorney General’s website at www.ago.state.ma.us/filelibrary/148BAdvisory.pdf.

These recent changes to the Independent Contractor Law were made as part of legislation almost exclusively aimed at further regulating public construction. One question, therefore, is whether or not the Legislature really intended these amendments to apply to industries other than construction. At least for now, however, the AG interprets those amendments as having such a broad application that, if upheld by the courts, additional legislation will be required to avoid the reclassification of many current independent contractors in fields outside of the construction industry.

According to the AG, the new law “**excludes far more workers from independent contractor status than are disqualified under the traditional state and federal law tests, including the 20 Factors Test set forth in the Internal Revenue Service (“IRS”) Revenue Ruling 87-41, the Fair Labor Standards Act (“FLSA”) and the Massachusetts common law.**” (emphasis supplied). For that reason, the AG suggests that employers will need to reexamine many of their work relationships to determine whether they are in compliance with the new law.

The new amendment creates a presumption of employee status unless a company can establish that **each of the following three factors is present:**

- (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
- (2) the service is performed outside the usual course of the business of the employer; and,
- (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Thus a company may only classify a worker as an independent contractor under Massachusetts law if the company can establish all three of these factors. The AG’s Office has characterized this three-factor test as a “rigid [test that is] unlike the well-established IRS, FLSA, National Labor Relations Act (“NLRA”) and state law tests, which have flexible criteria that must be balanced according to the circumstances of the work arrangement.” Accordingly, satisfying the definition of “independent contractor” under these various federal statutes will not allow a company to classify a worker as an independent contractor for state law purposes unless the

relationship also satisfies the new three-factor test.

A fuller discussion of these new amendments and the AG's Advisory is on our website at www.mhtl.com.

The Harshbarger Report

Aligning Perception With Practice

Aligning perception within the company with the company's actual practice reinforces the company's organizational values and perpetuates sound governance. One key way of accomplishing this is creating a self-critical environment. Complaint reporting procedures, regular communication with employees (providing for feedback), and manager-employee communications are key components in creating such an environment. We note, however, that any internal complaint-reporting procedures should be real with real consideration, and not just existing on paper or considered a nuisance by managers and supervisors.

Creating a self-critical environment is practicing good governance. Encouraging an open and inclusive organization with opportunities for critique, comment and introspection is part of the practice of good governance, and aligns the company's practice with what it would like the perception to be.

AT THE SUPREME COURT

A Real Quick Turnaround On This Case

In a highly unusual handling of a case, the United States Supreme Court held that when a police officer's activities, even though outside the workplace and not directly related to his employment, had an injurious effect on the employer's mission, the activities did not enjoy First Amendment protection. *City of San Diego, California v. Roe*, 2004 WL 2775950 (U.S. 12/6/04). In this case, the City of San Diego terminated a police officer for selling home-made videotapes through eBay of himself stripping off a police uniform and masturbating.

What was unusual about this case was the Court's dispatch. Ordinarily a petitioner files his or her petition for review with the Court, the other party files a brief, and then the parties can wait months before the Court decides whether to accept the case or not. Then there is a briefing schedule covering a couple of months, and then oral argument some months later, with a decision normally months after that. Here, the Court decided the case on the basis of the petition papers themselves, which is very unusual and may indicate how strongly the Court felt about the subject matter of this case.

The Plaintiff was a San Diego police officer, who made a video showing himself stripping off a police uniform and masturbating. He sold the video on the adults-only section of eBay, the popular online auction site. The uniform apparently was not the specific uniform worn by the San Diego police, but it was clearly identifiable as a police uniform. Plaintiff also sold custom videos, as well as police equipment, including official uniforms of the San Diego Police Department and various other items such as men's underwear. His eBay user profile identified him as employed in the field of law enforcement. The Department learned of his activities and ordered him to stop. When he failed to stop, he was terminated. He sued the Department, claiming that, among other things, the termination violated his First and Fourteenth Amendment

rights to freedom of speech. The District Court granted summary judgment to the City. The Ninth Circuit Court of Appeals reversed.

The Supreme Court noted that a government employee “does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment.” Nevertheless, a governmental employer may impose certain restraints on speech even though such restraints would be unconstitutional if applied to the general public. Such restraints include statements made outside the workplace and not related to employment but that are injurious to the mission of the employer. Here, the “use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as ‘in the field of law enforcement,’ and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute.”

The Court also noted that the balancing of an employee’s right to comment upon matters of public concern and the governmental employer’s right to protect its own legitimate interests in performing its mission does not even deserve any “balancing” test where the employee’s comments do not touch on a matter of public concern. Here the Court found no basis whatever for finding that the officer’s activities and comments touched a matter of public concern such that they should be protected, contrary to the ruling of the Ninth Circuit Court of Appeals (the most-overturned federal circuit court of appeals, by the way, by a long shot).

OTHER EMPLOYMENT LAW HEADLINES

Skiing As Part of Employment?

In this case, *Linda Hammond’s Case*, No. 04-P-1040 (Suffolk, 12/16/04), the employer, Millennium Events Corporation, hired the employee as an event coordinator. As part of her employment, she planned a weekend ski trip to Stowe, Vermont for the client’s employees, which included obtaining and distributing ski lift tickets, hotel reservations, providing snacks and movies during the bus ride to Stowe, responding to the needs of the client’s employees, and arranging for transportation throughout the weekend. During the first ski trip, the employee did not ski over the weekend, and upon her return, the President of the company voiced his surprise to her that she had not skied.

During a second ski trip in the same year, the employee went skiing and was injured. She filed a workers compensation claim. The Division of Industrial Accidents (“DIA”) administrative law judge concluded that the employee had met her burden of proving that she had been injured in the course of her employment, because the employer, given the nature of her job, authorized her to attend and enjoy the events involved along with the clients and that the conversation with the president encouraged her to ski on the second trip. The Industrial Accident Board (“IAB”) summarily affirmed the administrative judge’s determination that the employee was not engaged in purely recreational activity.

The Massachusetts Appeals Court reversed the Board’s decision. The Court noted that ordinarily injuries resulting from an employee’s purely voluntary participation in recreational activities have been deemed by the Legislature to be outside the scope of compensability. However, the Appeals Court also noted that “‘purely voluntary participation [in any recreational activity]’ is noncompensable when injury occurs during the recreational activity and the employer has done nothing more than pay for the costs of that activity.” The Court reversed the Board’s decision in favor of the employee by finding that the employer’s requirement that the

employee be present at the ski area while escorting clients “does not suggest that her participation in the skiing was anything other than purely voluntary.”

Employer Could Bar Facial Piercings

In a case we first reported on in May of last year, the First Circuit Court of Appeals recently affirmed the judgment of the District Court in *Cloutier v. Costco*, 390 F.3d 126 (1st Cir. 12/1/04). If you recall, the plaintiff was a member of the Church of Body Mortification (“CBM”), which is “a national organization of some thousand members that emphasizes, as part of its religious doctrine, spiritual growth through body modification.”

Affirming the District Court, the First Circuit ruled that it would be an undue hardship to require a retail store operator to allow a cashier to wear facial jewelry, so that the discharge of the cashier for continuing to wear facial jewelry did not violate Title VII or state law, even though the cashier claimed that her religion required her to wear facial jewelry. The Employer has a legitimate interest in presenting a workforce to customers that was, in the Employer’s eyes, reasonably professional in appearance. Thus where the cashier had regular interaction with customers, it was within the Employer’s discretion to determine that facial piercings detracted from the professional image the Employer wished to project.

Indefinite LOA Not A Reasonable Accommodation Under ADA

In *Fogleman v. Greater Hazleton Health Alliance*, 2004 WL 2965392 (3rd Cir. 12/23/04), the Plaintiff was employed as a pharmacy technician. She injured her back at work, and was later terminated on the grounds of excessive absenteeism and for failure to contact the Medical Center for three consecutive work days. She sued, claiming, among other things, failure to accommodate in violation of the ADA. The District Court granted Defendants' motion for judgment as a matter of law, and the Plaintiff appealed.

The District Court found Plaintiff failed to demonstrate that she requested accommodations or assistance for her disability. Plaintiff on appeal argued that she requested reasonable accommodation “in the nature of time off from work for treatment.”

As the Appeals Court noted, “[i]n some instances, it may be possible for a requested leave of absence to constitute a reasonable accommodation. . . . [but] `the federal courts that have permitted a leave of absence as a reasonable accommodation under the ADA have reasoned, explicitly or implicitly, that applying such a reasonable accommodation at the present time would enable the employee to perform his essential job functions in the near future.’ . . . The plaintiff bears the burden of identifying the reasonable accommodation.”

Here, the Plaintiff did not present evidence from which one could reasonably find that a leave of absence, beginning in June 2000 and extending for an unknown period of time, would have enabled her to perform the essential job functions within a reasonable amount of time. Nor did the Plaintiff identify record evidence that specifies the duration of the requested leave.

Thus the Court ruled that “[t]here is no evidence that permits any conclusion other than that the requested leave was for an indefinite and open-ended period of time. This does not constitute a reasonable accommodation.”

Court Holds Transfer Of Police Sergeant Not An Adverse Employment Action

In *O’Neal v. Chicago*, 2004 WL 2930972 (7th Cir., 12/20/04), Plaintiff, an African-American female, was a sergeant in the Chicago Police Department. In May 2002, she was transferred from her position as “administrative sergeant” in the Narcotics Unit to the position of

"beat sergeant" in one of the districts. Plaintiff brought suit against the City, alleging that this transfer was the result of racial and gender discrimination in violation of Title VII of the Civil Rights Act of 1964. The District Court granted summary judgment to Defendants on all claims, essentially finding that the Plaintiff, even construing the evidence in a light most favorable to her, did not establish that she suffered a legally cognizable adverse employment action. Plaintiff appealed the grant of summary judgment only as to her gender discrimination claim.

As the Seventh Circuit noted, "[t]o advance a prima facie case of gender discrimination, O'Neal must establish four elements: (1) she is a member of a protected class; (2) she performed her job satisfactorily; (3) she suffered an adverse employment action; and (4) defendants treated similarly situated employees outside her class more favorably." Though it was undisputed that the two positions held the same rank within the police department and received the same pay and benefits, the Plaintiff argued that her transfer effectively was a demotion because she lost overtime opportunities, the beat position was less "prestigious," and as a result she would lose out on promotional opportunities.

The Court found, however, that Plaintiff's proof fell short: "In support of this assertion, however, O'Neal offers only speculation, which is insufficient to defeat summary judgment. . . O'Neal presents no objective evidence that sergeants in the Narcotics Unit are more likely to be promoted than sergeants working in the districts." The Court also noted that "[w]hile adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action."

Thus the Court ruled that the Plaintiff's transfer from a narcotics unit to the position of beat sergeant was not an adverse employment action, as required for the Plaintiff's prima facie case of race and gender discrimination. The two positions held the same rank within the police department and received the same pay and benefits, and there was no evidence that the narcotics position was more advantageous than the beat position in terms of other terms and conditions of employment.

Skin Allergy Caused By Workplace Was Not A Disability

In *Haynes v. Williams*, 2004 WL 2913246 (D.C. Cir. 12/17/04), the Plaintiff worked as a budget analyst for the District of Columbia. He developed a skin allergy at work and complained about his workplace, going so far as to file an OSHA complaint. He was diagnosed as suffering from "idiopathic pruritus," which according to his own doctor was both caused and exacerbated by his workplace. As a result of the consequent itching, he often could not fall asleep until 4:00 a.m. or later, typically getting under four hours of sleep. And because Plaintiff had so much trouble sleeping, he also had trouble arriving at work on time. Often, he would not arrive at the office until the afternoon.

As a result of a change in supervisor, the District's former "liberal" attendance policy was discontinued and the Plaintiff was required to work from 8:15am - 4:45pm. Plaintiff then complained that "the District had failed to test his office's air quality and to accommodate him with a work schedule that would permit him "to come to work at later times when [he] suffered sleep deprivation." After air tests turned up no problem and the Plaintiff still failed to adjust his schedule, he was terminated. Plaintiff sued the District, claiming that the District failed to reasonably accommodate his disability. The District Court granted the District's motion for summary judgment, finding that the Plaintiff was not disabled within the meaning of the Americans With Disabilities Act ("ADA"). Plaintiff appealed.

The Appeals court ruled that Plaintiff had failed to raise a jury question regarding

whether he was disabled, and found that the evidence showed that the Plaintiff's condition was brought on almost exclusively by the employee's office building and thus was not permanent enough to satisfy the ADA. The Court wrote that the Plaintiff did not offer any evidence of a location besides his office that triggered his condition to an extent that seriously limited his ability to sleep: "If Haynes could have avoided the itching that seriously affected his sleep simply by working at a different location, then he was not 'substantially limited' in the major life activity of sleeping," the Court explained. The Court noted that Plaintiff's better argument would have been that he needed to avoid multiple workplaces to mitigate his condition so then "he might have argued that he was substantially limited in the major life activity of working. But he does not make that claim here."

Legislative/Regulatory Actions Of Note

OSHA Issues Reminder Of February 1, 2005 Posting Requirement

In a January 10, 2005, advisory, the Occupational Safety and Health Administration ("OSHA") reminds us that beginning February 1, employers must post a summary of the total number of job-related injuries and illnesses that occurred last year. Employers are only required to post the Summary (OSHA Form 300A) -- not the OSHA 300 Log -- from Feb.1 to Apr. 30, 2005. The summary must list the total numbers of job-related injuries and illnesses that occurred in 2004 and were logged on the OSHA 300 form. Employment information about annual average number of employees and total hours worked during the calendar year is also required to assist in calculating incidence rates. Companies with no recordable injuries or illnesses in 2004 must post the form with zeros on the total line. All establishment summaries must be certified by a company executive. The form is to be displayed in a common area wherever notices to employees are usually posted. Employers must make a copy of the summary available to employees who move from worksite to worksite, such as construction workers, and employees who do not report to any fixed establishment on a regular basis. This OSHA advisory is at www.osha.gov.

Yes, News Of Another Posting Requirement

On December 10, 2004, President Bush signed the Veterans Benefits Improvement Act of 2004 ("VBIA"), which extends the maximum period for health plan continuation coverage under the Uniformed Services Employment and Reemployment Rights Act ("USERRA") and adds a notice requirement for employers. (USERRA establishes certain reemployment and health plan continuation coverage rights and other benefits for employees who serve or have served in the uniformed services.) Previously, an employee who was absent from employment for uniformed service had the right under USERRA to elect to continue health plan coverage (including coverage for any dependents) for up to 18 months. The new law extends the maximum period for USERRA continuation coverage to 24 months. This change applies to elections for USERRA coverage that are made on or after December 10, 2004. In addition, the new law requires employers to notify employees of their rights and obligations under USERRA using a notice to be provided by the DOL by March 10, 2005, at which time the posting requirement becomes effective. This requirement may be met by posting the notice where the employer customarily places notices for employees.

Coordinated Group Health Insurance Final Rules Issued By Three Agencies

On December 30, 2004, the Internal Revenue Service (“IRS”), Employee Benefits Security Administration of the Department of Labor (“EBSA”), and the Centers for Medicare & Medicaid Services, Department of Health and Human Services, published final regulations governing portability requirements for group health plans and issuers of health insurance coverage offered in connection with a group health plan. The rules implement changes made to the Internal Revenue Code, the Employee Retirement Income Security Act, and the Public Health Service Act enacted as part of the Health Insurance Portability and Accountability Act of 1996.

These final regulations do not significantly modify the framework established in the April 1997 interim rules. Instead, these final regulations implement changes to improve the portability of health coverage while seeking to minimize burdens on group health plans and group health insurance issuers. These final regulations become applicable to plans and issuers on the first day of the plan year beginning on or after July 1, 2005. Each plan or issuer must continue to comply with the April 1997 interim rules until these final regulations become applicable to that plan or issuer.

Among other things, the rules set limits on pre-existing condition exclusions in group health plans under HIPAA. The agencies also announced that they are weighing whether to issue future guidance establishing criteria for the point at which a group health plan's use of a "benefit-specific" waiting period might constitute a pre-existing condition exclusion. HIPAA generally bars group health plans from denying coverage or charging extra for coverage based on a person or his family member's past or present health history.

The agencies also issued proposed rules providing a time extension for individuals to exercise some HIPAA portability rights; they also specify that any period of time during which a person does not have health coverage while on leave under the Family and Medical Leave Act does not count against him or her with respect to HIPAA's protections. The final and proposed rules can be found at www.dol.gov/EBSA, or www.cms.hhs.gov/hipaa.

IRS Issues Revised FUTA Regulations

The Internal Revenue Service Nov. 30 issued final regulations increasing the minimum threshold for Federal Unemployment Tax Act (“FUTA”) deposits, which the IRS stated will reduce the tax compliance burden for more than 4 million small businesses. Under the new rules, published in the Dec. 1 Federal Register and effective Jan. 1, 2005, employers are required to make quarterly deposits for unemployment taxes only if the accumulated tax exceeds \$500; the current threshold is \$100 and was established in 1970. Information about the new regulation is at <http://www.irs.gov>.

Mass AG “Advises” Employers Of Employment “Best Practices”

Yes, another AG “Advisory.” In a curious form of regulatory advising - in areas in which his jurisdiction is questionable at best - the Massachusetts Attorney General’s Office (“AG”) recently issued, and apparently mailed to nursing home operators, a document entitled “Advisory on the Civil Rights of Immigrant Workers Prohibitions on National Origin, Race and Color Discrimination.” The Advisory basically deals with two issues: (1) English-only workplace policies, and (2) preventing hostile work environments. While there is nothing startling in this Advisory’s contents for the most part, it does emphasize the basics of English-only policies, which is that they must be supported by business necessity, cannot apply to all

areas of the workplace at all times, and that there should be reasonable notice of the policy and the consequences for violating it. The AG's advisory is on his website at www.ago.state.ma.us.

OSHA Issues Hospital Worker Guidance

On December 21, 2004, the Occupational Safety and Health Administration ("OSHA") released a guide for protecting hospital workers caring for patients injured in incidents involving chemical, biological, or radiological materials. This document is designed to provide hospitals with practical information to assist them in developing and implementing emergency management plans that address the protection of hospital-based emergency department personnel during the receipt of contaminated victims from mass casualty incidents occurring at locations other than the hospital. Among other topics, it covers victim decontamination, personal protective equipment, and employee training, and also includes several informational appendices.

The guide, *OSHA Best Practices for Hospital-Based First Receivers of Victims from Mass Casualty Incidents Involving the Release of Hazardous Substances*, is at http://www.osha.gov/dts/osta/bestpractices/firstreceivers_hospital.html.

FLSA/FMLA Cases

No Right to Cure Medical Certification Deficiency When Employee Submitted No Medical Documentation At All

In a case that might seem like a no-brainer to the uninitiated, in *Urban v. Dolgencorp of Texas*, 2004 WL 2810080 (5th Cir. 12/3/04), the Fifth Circuit held that the provision of the Family and Medical Leave Act (FMLA) requiring an employer to provide an employee a reasonable opportunity to cure any deficiency in her medical certification form did not apply if the employee never submitted any medical certification at all.

In this case, the employee began working for Defendant in May 2001. During the next year, the employee requested medical leave under the FMLA, and the employer informed the employee that it would be necessary to produce medical certification from her physician to approve the leave under the FMLA. After an extension of 15 days to the deadline to submit the medical certification, and the expiration of the company's 30 days of non-FMLA medical leave, the employer terminated the Plaintiff for unauthorized absences.

On appeal, the issue was whether or not the FMLA regulations require an employer to provide an employee with the opportunity to cure a deficiency in an incomplete medical certification where the employee failed to submit any medical certification in the first place. The Court said "no." The Court reasoned that since the employer notified the employee of the need to submit medical certification, the employer told her of the consequences of not submitting the information, and the employer gave her an extension of 15 days to submit the medical certification, the termination was lawful and the employer need not give the employee an opportunity to cure a deficiency in medical certification when the employee submitted no medical certification whatsoever.

What The Heck Is The "Worksite" Under The FMLA?

In *Harbert v. Healthcare Services Group, Inc.*, 2004 WL 2850075 (10th Cir., 12/13/04), the Tenth Circuit Court of Appeals reversed the district court's upholding of a

Department of Labor (DOL) regulation and found that the regulation, as applied to the situation of an employee with a fixed worksite yet subject to joint employments, was arbitrary, capricious and contrary to Family Medical Leave Act (“FMLA”).

In this case, the plaintiff brought an action against her former employer alleging that the Defendant wrongfully denied her request for medical leave under the FMLA. The Defendant contracts out housekeeping and laundry services to long-term care institutions. In 1997, Plaintiff became employed as a Housekeeper Supervisor at a site which was more than 75 miles from the Defendant’s main office in Golden, Colorado. A year later the Plaintiff injured her right hip in a non-work related automobile accident. The Defendant granted Plaintiff two 30-day periods of leave but denied the Plaintiff’s request for FMLA leave because it employed fewer than 50 employees within 75 miles of Sunset Manor, despite employing approximately 17,000 employees with contracts with 1,300 long-term care facilities in 42 states.

The FMLA only applies to those employees whose employer employs at least 50 employees within 75 miles of that employee’s “worksite.” The DOL defined the “worksite” of an employee who is jointly employed by two or more employers as:

For purposes of determining that employee’s eligibility, when an employee is jointly employed by two or more employers (see §825.106), the employee’s worksite is the primary employer’s office from which the employee is assigned or reports. The employee is also counted by the secondary employer to determine eligibility for the secondary employer’s full-time or permanent employees.

Defendant claimed this regulation was invalid, and the Court agreed. After finding that Congress did not express a clear intent with respect to the meaning of “worksite” for an employee who is jointly employed, the court reviewed the common meaning of the term “worksite,” the legislative purpose of the 50/75 provision, and the arbitrary distinction the regulation created between sole and joint employers. The court found that these factors “all militate strongly against deference to the agency’s construction of the statute as applied to the Plaintiff.” That is, the Court found that Congress “intended the term ‘worksite’ to be construed as the employee’s regular place of work.”

Alleged FMLA Retaliation Victim Had To Be “Eligible Employee”

In *Humenny v. Genex Corp.*, 2004 WL 2804935 (6th Cir., 12/8/04), Plaintiff was an area sales manager. She was unable to attend a particular meeting, which involved travelling, because of a personal emergency regarding her ailing mother. After the meeting her supervisor allegedly told her to either take a full-time unprotected leave or perform her job at 100% including overnight travel, or she would be fired.

She then was offered and took another job with the Company. On the first day in her new position, Plaintiff went on sick leave for her own illness. Following the end of her leave period, she asked for an extension, which included medical certification that her doctor would evaluate her ability to work in 30 days. The Employer denied her request allegedly because the midwest region was already behind its yearly goal and because the Company had lost \$150,000 in revenue in January of 2002. On February 13, 2002, Appellant was terminated. She sued on a number of bases, but we are here concerned with her Family Medical Leave Act (“FMLA”) claim, which was that she was terminated in retaliation for seeking FMLA leave, even though

the Company did not have 50 employees at her location. She argued that while she might not have been entitled to FMLA leave, she was entitled to protection against retaliation for seeking such leave. The District Court ruled against her and dismissed this claim along with the rest of the case, and Plaintiff appealed.

The Sixth Circuit Court of Appeals agreed with the District Court and affirmed its judgment. In short, the Court held that the "eligible employee" requirement of the FMLA applied to an employee's retaliation claim against an employer, and thus, because the Plaintiff was not an eligible employee (because there were fewer than 50 employees employed by the Company within 75 miles of the Plaintiff's worksite) the Plaintiff could not maintain her claim for FMLA retaliation.

On The Employee Benefits Front

Court Upholds Arbitration As Means Of Dispute Resolution Under ERISA Plan

In *Kergosien, et. al. v. Ocean Energy, Inc.*, 2004 WL 2451351 (5th Cir., 11/2/04), the Fifth Circuit upheld an arbitrator's decision awarding severance benefits to excluded employees. In this case, the company, while attempting to facilitate a merger, amended its ERISA plan that gave severance benefits to employees fired within two years of a "change of control," such as a merger, by excluding those employees who retained their jobs with "sold divisions" of the company. Plaintiffs were a group of the excluded employees.

The Plan itself was an ERISA plan, but under it any disputes would be submitted to arbitration, where the arbitrator would have the responsibility of reviewing the plan under federal ERISA law. The Company lost and appealed to federal District Court, which vacated the arbitration award as being beyond the arbitrator's jurisdiction.

The Fifth Circuit reversed. The Court found that arbitration having been provided for in the Plan, it had to review the case under the law providing for highly deferential review of arbitrator's decisions, rather than as an ERISA denial of benefits case. Thus the Court first held that the arbitrator did not exceed his powers. In reaching this conclusion, the Court found that the provision of the Plan limiting the arbitrator's powers merely set out his standard of review. Second, the Court held that the arbitrator's award was rationally inferable from the Plan and that the arbitrator did not manifestly disregard the law when he found that the Company had violated its fiduciary duty to the plaintiffs in denying their claims.

Thus the moral here is if you want to provide for arbitration in any document, be it a plan or an employment agreement, you have to be prepared to live with the outcome in arbitration, because review of arbitration awards is extremely limited, even in ERISA cases.

On The Public Sector Front

First Circuit Adopts "Course Of Proceedings" Test For Notice Of Punitive Damages Against Individual In §1983 Actions

In *Powell v. Alexander, et. al*, 2004 WL 2676747 (1st Cir. 11/24/04), Ms. Alexander was the former City Solicitor of Pittsfield, Massachusetts. In 1991, Walter Powell, an African-American police officer filed several state and federal actions against the City, the Acting Chief of Police, and the former Mayor for impermissible race

discrimination leading to his termination from the police force. In 1993, Ms. Alexander entered into a settlement agreement on the City's behalf and agreed to pay Mr. Powell \$81,000 and to reinstate him as a police officer "conditioned upon" certain requirements including "re-training" and a physical examination. Nearly three years passed between the time when the settlement agreement was signed and Mr. Powell's reinstatement.

Plaintiff alleged retaliation under 42 U.S.C. §1983 stemming from the lengthy delay in his reinstatement to the police force following the settlement of his race discrimination claim. The District Court found that the defendants began a "campaign of obstruction, choreographed by the City Solicitor, designed to pressure or manipulated Powell into abandoning his plan to return to the police force." Thus among other things the District Court awarded \$10,000 in punitive damages against Ms. Alexander for her especially egregious misconduct.

Ms. Alexander appealed, and argued in large part that she had not been on fair notice that she had been sued individually and thus she should not be personally liable for the \$10,000. The Court ruled that it found nothing clearly erroneous in the findings of the district court that, cumulatively, the City Solicitor engaged in " 'particularly egregious misconduct' . . . that was 'outrageous and worthy of condemnation.'" Then the court held that pursuant to the district court's detailed factual analysis of the City Solicitor's conduct supported a finding that she acted " 'in the face of a perceived risk that [her] actions [would] violate federal law [Powell's First Amendment right under §1983],'. . . and thus with sufficient 'evil motive' or 'reckless or callous indifference to the federally protected rights of others,' met the legal standard for punitive damages under §1983."

Finally, the Court adopted a "course of proceeding" test for determining sufficiency of notice to government officials for when they are being sued individually. The Court refused to adopt the so-called "per se" test used by some other Circuit Court of Appeal, which it described as "Under this approach, a defendant governmental official is presumed to be sued solely in his or her official capacity unless the complaint specifically states otherwise." Rather, the Court wrote that

We now join the multitude of circuits employing the "course of proceedings" test, which appropriately balances a defendant's need for fair notice of potential personal liability against a plaintiff's need for the flexibility to develop his or her case as the unfolding events of litigation warrant. In doing so, we decline to adopt a formalistic "bright-line" test requiring a plaintiff to use specific words in his or her complaint in order to pursue a particular defendant in a particular capacity. However, we do not encourage the filing of complaints which do not clearly specify that a defendant is sued in an individual capacity. To the contrary, it is a far better practice for the allegations in the complaint to be specific. A plaintiff who leaves the issue murky in the complaint runs considerable risks under the doctrine we adopt today.

Under this approach, explained the Court, "courts are not limited by the presence or absence of language identifying capacity to suit on the face of the complaint alone. Rather, courts may examine 'the substance of the pleadings and the course of proceedings in order to determine whether the suit is for individual or official liability.'"

Thus wrote the Court, "[v]iewed as a whole, the course of proceedings in this case gave Alexander fair notice that she was being sued in her individual capacity and was subject to

personal liability for punitive damages.”

On The Labor Front

Correction - Calling Your Boss A “bastard red-neck son of a bitch” Is Not Protected Conduct Under The NLRA

As we reported in our March, 2004, issue, the National Labor Relations Board (“Board”) ruled last year that calling your supervisor a “racist” and a “bastard red-neck son of a bitch” can be protected conduct under the National Labor Relations Act (“Act”). Last month, however, the Fourth Circuit Court of Appeals disagreed with the Board and reversed its decision. *Media General Operations Inc. d/b/a Winston-Salem Journal v. NLRB*, 2005 WL 39254 (4th Cir., 1/10/05). The Court ruled that an employee’s foul language directed at his boss in complaining about perceived racism by a supervisor was not protected activity under the Act.

Disagreeing with a 2-1 ruling by the Board, the Fourth Circuit wrote that using the term “bastard” or the phrase “redneck son-of-a-bitch” during a conflict between a pressman and his supervisor at the *Winston-Salem Journal* was not protected activity because the language had nothing to do with articulating a grievance. The Court wrote that such expletive-filled language was “devoid of substantive content and of meaningful value that could convey a message of grievance or concern. They are simply words of offense.”

Board Overturned For Refusing To Defer To Arbitration

As a general rule in grievance settlements, the NLRB will defer to a settlement when the proceedings appear to have been fair and regular, all the parties are bound, and the agreement is not repugnant to purposes and policies of the National Labor Relations Act (“Act”). However, in *Titanium Metals Corporation v. NLRB*, 2004 WL 2710041 (D.C. Cir. 11/30/04), the Court ruled that the NLRB abused its discretion when it did not defer to a settlement agreement.

In this case, an employee had been terminated for insubordination for publishing and distributing a newsletter containing articles about employees wage, hours and working conditions. The union pursued a grievance under the parties’ collective bargaining agreement (“CBA”), and ultimately the employer and the union entered into a settlement agreement which stated that the employee had been discharged for insubordination and other inappropriate conduct and not for engaging in protected activities under the Act.

When the employee filed a charge at the National Labor Relations Board (“Board”), the employer sought to defer the charge to arbitration, since it was an arbitrable issue under the CBA. The Board refused to defer the case and found that the employee’s activity was “protected concerted activity” under the Act, and thus found the employer liable for an unfair labor practice.

The Employer appealed, claiming that the Board should have deferred the case, and the Court agreed. The Court ruled that the settlement agreement was a valid “settlement agreement” subject to the Board’s deferral policy. The Court found that “there was nothing legally impermissible in terms of agreement, agreement was properly executed pursuant to CBA's terms, and both parties received consideration under the agreement, in that employer secured disciplinary action against employee and union received reaffirmation of its rights.” Thus the Court found that the Board had abused its discretion in determining that the settlement agreement was not “fair and regular” and in declining to defer to the agreement.

Curiouser And Curiouser

Generally where an employer unilaterally changes the terms and conditions of employment in violation of Section 8(a)(5) of the National Labor Relations Act (“Act”), a discharge resulting directly from that unilateral change also violates Section 8(a)(5). In *Essex Valley Visiting Nurses Association*, 343 NLRB No. 92 (11/30/04), the Employer unilaterally transferred nurses to field positions. After a training period, the nurses were terminated because they lacked basic nursing skills necessary to their new job.

Here, according to the Board, “the unilateral change was the decision to transfer the UM nurses to field nurse positions. However, the discharge was the result of a failure to cooperate and a failure to perform adequately as a field nurse. Thus, the discharge was not the direct result of the transfer; it was the direct result of failures to cooperate and perform in the new position.”

The Board cited the case of *Anheuser-Busch, Inc.*, 342 NLRB No. 49 (2004)(reported in our September, 2004 Newsletter) in support of its decision.. In *Anheuser-Busch*, the Board found that the employer violated Section 8(a)(5) by unilaterally installing and using surveillance cameras, but found that the employer was privileged to discharge 16 employees whose misconduct was observed through the unlawfully installed cameras. The Board reasoned that because the employees were discharged for violating preexisting plant rules, there was “an insufficient nexus . . . between the Respondent’s unlawful installation and use of the cameras and the employee’s misconduct.”

Thus the Board wrote here that “as in *Anheuser-Busch*, we find that there was an ‘insufficient nexus’ between the Respondent’s unilateral transfer of the UMs and the Respondent’s decision to discharge them. Thus, the Respondent discharged the UMs because, according to their own admission, they could not perform the job of field nurse.” But they would never have been in that position had the transfers not occurred.

And again, the dissenter, Member Walsh, probably had it right. He wrote that absent the unlawful transfers of the employees, the Employer would have had no basis to terminate the nurses. That is, if the transfers were unlawful, as even the majority agreed, then any adverse action taken that flowed from those transfers also ordinarily would be ruled unlawful. For some reason that did not happen here.

Employer Ordered To Pay Union’s Organizing Costs

According to the Daily Labor Report, 12/16/2004 (No. 241, BNA), an arbitrator has ordered the California Pacific Medical Center to pay an SEIU Local for the costs of its organizing campaign at the Hospital, including the wages and benefits of union personnel assigned to the effort, and attorneys' fees expended on the campaign. The Hospital had a contract with SEIU Local 250, which included “a provision . . . that provided a method for the union to organize unrepresented workers at the hospital.” *California Pacific Medical Center*, Arb., No. 04-061 (McKay, 2004). The Arbitrator found that the Hospital violated the contract provisions, which included a requirement that the parties “will conduct a positive and nondisruptive campaign,” in almost every paragraph of the eight-paragraph article. Ultimately there apparently was no election, due to the Hospital’s violations of the agreement. Thus the Arbitrator wrote that while he could not order the Hospital to recognize the Union as to those employees, he could make the Union whole for its time and expenses, and thus ordered the Hospital to pay the Union its organizing and legal expenses.

Did You Know . . . ?

That January's Molecule of the Month is Arsine, an important molecule in the history of forensic science, being a favorite of early 19th century poisoners who easily could obtain it from rat poisons. Symptoms of arsenic poisoning could be confused with those of cholera. See Cary Grant in "Arsenic and Old Lace."

That January's flower is the Carnation, and its birthstone is the Garnet?

That January is named for Janus, the Roman God of doors and gateways, and is, among other things, Alzheimer's Awareness Month, National Mentoring Month, Wheat Bread Month, Bread Machine Baking Month, National Hobby Month and National Soup Month?

That January 8 is Rock 'n Roll Day, the 10th is Peculiar People Day, the 19th is National Popcorn Day, January 21 is National Hugging Day, January 23 is National Pie Day, January 25 is National Opposite Day, and January 26 is National Compliment Day?