

February/March Edition, 2005

MHTL Presents South Shore Chamber Of Commerce Employment Law Update, March 15, 2005

We are pleased to extend to you an invitation to our annual Employment Law Update on March 15, 2005. Murphy, Hesse, Toomey & Lehane, LLP will present on various timely topics from 7:30 am to 12:30 pm at The Boston Marriott Hotel in Quincy, MA.

Our attorneys will provide an overview of major developments in employment law over the past twelve months. Emphasis will be placed on the implications of these legal developments for your day-to-day HR administration and tips for minimizing liability. In addition, attorneys will be discussing topics in greater detail including the rapidly changing independent contractor landscape in Massachusetts and a “Basics” program track which includes both Hiring and Firing and Wage and Hour. Again, this year, the attorneys will repeat the expanded “Ask the Attorneys”

session which will provide you with an opportunity to raise your questions and issues with a panel of experienced attorneys.

We present this program annually and always receive very positive feedback. The program is especially useful to human resource professionals. It is our pleasure to extend you an invitation to attend this year’s presentation as a guest of Murphy, Hesse, Toomey & Lehane, LLP. If you are unable to attend, you may extend the invitation to a Human Resource Colleague.

Kindly R.S.V.P. by telephoning Michele Errico at (617) 691-1915 by March 11, 2005. Please do not hesitate to contact us if you have any questions. We look forward to seeing you on March 15th.

Mistake Of The Month

Another Non-Union Employer Gets Bitten By The NLRB - AND How Not To Fire Someone

In National Specialties Installations, Inc., 344 NLRB No. 2 (1/18/05), two employees (a married couple) complained together to the company president that their paychecks had been returned for insufficient funds. They were fired. The Company (a non-union workplace) claimed one was terminated for incompetence and the other voluntarily quit. Resting his decision on credibility grounds, the Administrative Law Judge (“ALJ”), with Board approval, found that “there was no credible evidence that the Company discharged Erin Hardcastle-Mehlhose for incompetence and that her husband Matthew Mehlhose voluntarily thereafter quit his employment.”

The employees’ activity in complaining to the company president was “protected” under the National Labor Relations Act (“Act”) because it involved terms and conditions of employment, i.e., pay. It was “concerted” because they acted together. To take employment action against someone for engaging in protected concerted activity violates the Act.

Here the ALJ discredited the testimony of the company president, who claimed he had fired the husband for incompetence, and the wife thereupon quit. The testimony of the two employees was quite different, as the ALJ found:

According to the two, they met with company president Beydoun that afternoon to

discuss the “bad” returned checks. They testified the meeting was long and that company president Beydoun became angry and said he didn’t like it. The Mehlhoses asked that the bounced checks be replaced by cash because they did not want to have the checks continuing to bounce. Beydoun declined to provide cash, insisting on any replacements being checks.

According to the two Mehlhoses, company president Beydoun brought out a gun, waved it about, and said that was the way things like this were handled in his country.

According to the two Mehlhoses, company president Beydoun fired them both, stating I don’t want either one of you working anymore for me. Matthew Mehlhose testified the gun company president Beydoun waved about was a 40 caliber semi-automatic weapon.

We don’t recommend this as the standard protocol for a termination.

The Harshbarger Report

Necessity of Fraud For Whistleblower Protection

The Sarbanes-Oxley Act of 2002 offers protection for whistleblowers, but as the Administrative Law Judge pointed out in this case, “fraud is an integral element of a cause of action under the whistleblower provision.” In *In the Matter of Charles Wayne Tuttle v. Johnson Controls, Battery Division*, 2004 SOX 0076 (U.S. Dept. of Labor Office, 1/3/05), the Administrative Law Judge granted summary judgment for Johnson Controls because the employee failed to show that: (1) he “reasonably believed the employer violated one of the laws or regulations enumerated” in Sarbanes-Oxley Act of 2002; (2) that the employer engaged in any fraud or any transaction relating to securities, (3) that the employer engaged in activities involving “intentional deceit or resulted in a fraud against shareholders or investors.” Rather, the terminated employee merely pointed out that he had reported to the employer that “significant numbers of its batteries were defective,” and since the employee did not allege any fraud or intentional deceit and the employee did not show that he reasonably believed the employer violated one of the laws or regulations of Sarbanes-Oxley, the court found that the employee did not engage in activities protected under the Sarbanes-Oxley Act of 2002.

ALJ Orders Whistleblowing CFO Reinstated

In a case reported in the February 24, 2005 issue of the Daily Labor Report, a Department of Labor Administrative Law Judge (“ALJ”) ruled that a Virginia bank must reinstate its former chief financial officer. *Welch v. Cardinal Bankshares Corp.*, DOL ALJ, No. 2003-SOX-15, 2/15/05). The ALJ found that the CFO blew the whistle on alleged violations of the Sarbanes-Oxley Act (“Act”). The CFO had complained that the company President had overridden internal financial controls and improperly sold stock shortly before a stock split was announced. The ALJ ruled in favor of the CFO, and found that his activity was protected under the Act and that he was entitled to be “made whole.” Since the parties did not discuss or brief “front pay,” the ALJ ordered the CFO reinstated, despite considerable evidence of opposition from the Board of Directors and shareholders. We expect this case will be appealed and that we haven’t heard the last of it yet.

OTHER EMPLOYMENT LAW HEADLINES

What The Heck Is A “Blog,” And Why Should I Worry About It?

In our first issue of this newsletter, November, 2003, we discussed the then relatively new phenomenon of cell phones with cameras, and pointed out the privacy, trade secret and other workplace issues that could result if policies were not appropriately tailored for their use.

Yes, there is something else relatively new out there, or at least dramatically increasing in its use, and that is “blogs,” or “web logs.” These are essentially online diaries maintained by individuals on their own individual web pages, which almost any ISP can provide. They can be personal, or they can be a venting outlet for unhappy employees, or both. Are your information technologies being used for employee blogs, and are your company or supervisors being maligned or defamed on an employee’s blog? Now might be the time to review your technology policies regarding employee use of computers and internet connections, as well as blogging itself. It’s bad enough to be badmouthed on the internet, but you don’t have to pay for the privilege.

Delta Airlines, Microsoft and Google have all recently been involved in terminations or disputes over comments critical of the employer being made on a blog, or photos used inappropriately on a blog. While an employer could not prevent employees from having a blog, a specific anti-blogging policy, which need not be extensive, could be worth considering. A policy could put clear limits on the permissible contents of a blog vis a vis the employer, and reserve the right to take action if employees go over the line. Any policy certainly should aim to prevent employees from identifying the company (either by name or implication) or maligning the company, its employees and/or customers. It might also be advisable to provide that employee blogs should not contain anything inconsistent with the employer’s equal employment policies, and indicate that any comments bringing the employer into disrepute will become a disciplinary issue.

There also is the post-termination issue - an employee terminated for inappropriate blogging will certainly blog it all over the internet, thus perhaps giving the situation a much wider audience and longer life than it otherwise would have had. Thus there certainly should be a confidentiality clause applicable to the internet in any separation agreement. There also would be recourse to state defamation law in appropriate cases, but you certainly want to avoid that if possible.

Now of course employees will protest, and certainly public sector employers generally will have to walk a finer line than private sector employers will have to due to free speech concerns. Still, an ounce of prevention beats a pound of cure most days of the week.

Man Bites Dog

In a case dripping with irony, *Castillo v. Dominguez*, 2005 WL 44963 (9th Cir., 1/10/05), the Defendant Dominguez is the Chairperson of the Equal Employment Opportunity Commission (“EEOC”), and the Plaintiff, an Asian Filipina woman, is an EEOC employee who alleged discrimination and retaliation in the denial of a promotion, in violation of Title VII. Title VII, of course, is one of the federal laws the EEOC is charged with enforcing. The Plaintiff lost in the District Court on summary judgment, and appealed to the 9th Circuit Court of Appeals.

The Appeals Court ruled that the Plaintiff failed to prove race discrimination under Title VII in the selection of another employee for a promotional position; the Plaintiff’s claim that the other employee was promoted in exchange for that employee’s decision to drop her own complaint of discrimination could not lead a reasonable jury to find a pretext for discrimination

against the Plaintiff based on a protected ground, as opposed to a pretext designed to cover up an earlier "deal" with the other worker.

On the other hand, the Court reversed the District Court on the Plaintiff's retaliation claim. The Court ruled that genuine issues of material fact as to whether the Plaintiff's non-selection for a promotional position was in retaliation for actions protected under Title VII, including her complaints about discrimination against her and her testimony at a hearing about a co-worker's discrimination complaint, precluded summary judgment against the Plaintiff on her retaliation claim.

Thus the case was remanded to the District Court for a trial on the Plaintiff's retaliation claim.

Bartender Fails To Show Makeup Policy Disproportionately Burdened Females

In *Jespersen v. Harrah's Operating Company, Inc.*, 392 F.3d 1076 (9th Cir. 12/28/04), the casino employer's grooming policy for many years encouraged but did not require female bartenders to wear makeup. In February, 2000, the Employer changed the policy to require female bartenders to wear makeup and to wear their hair "teased, curled, or styled" each day, but only required male bartenders to maintain short haircuts; men actually were prohibited from wearing makeup. The Plaintiff female bartender, a 20 year employee, refused to wear makeup and was terminated for that reason. The Plaintiff sued the employer for sex discrimination under Title VII, alleging that the policy discriminated against her on the basis of sex because it imposed an unequal burden on her not imposed on male bartenders. The District Court granted summary judgment for the Employer and held that the policy did not constitute sex discrimination because it imposed equal burdens on both sexes.

The 9th Circuit Court of Appeals affirmed the District Court's judgment. The Court noted that "an employer's imposition of more stringent appearance standards on one sex than the other constitutes sex discrimination even where the appearance standards regulate only 'mutable' characteristics such as weight" does constitute sex discrimination. Thus the Court had to "assess the actual impact that [the policy] has on both male and female employees." The Plaintiff argued that because women had to wear makeup and men were barred from wearing makeup, female bartenders were burdened more than male bartenders. The Employer argued that one had to consider the whole policy, not one requirement in isolation; for example, some parts of the policy burdened men only, such as the requirement that men maintain short haircuts and neatly trimmed nails.

The Court agreed with the Employer's argument, and wrote that:

Jespersen contends that the makeup requirement imposes "innumerable" tangible burdens on women that men do not share because cosmetics can cost hundreds of dollars per year and putting on makeup requires a significant investment in time. There is, however, no evidence in the record in support of this contention. Jespersen cites to academic literature discussing the cost and time burdens of cosmetics generally, but she presents no evidence as to the cost or time burdens that must be borne by female bartenders in order to comply with the makeup requirement. Even if we were to take judicial notice of the fact that the application of makeup requires *some* expenditure of time and money, Jespersen would still have the burden of producing some evidence that the burdens associated with the makeup requirement are greater than the burdens the "Personal Best"

policy imposes on male bartenders, and exceed whatever "burden" is associated with ordinary good-grooming standards. Because there is no evidence in the record from which we can assess the burdens that the "Personal Best" policy imposes on male bartenders either, Jespersen's claim fails for that reason alone.

Thus despite what some media accounts of this case might have suggested, it does not stand for the proposition that employers may impose more burdensome appearance standards on females. In fact, Plaintiff could have won this case had she presented the court with the proper evidence and done the right discovery. All she needed was deposition testimony of male bartenders about how time-consuming and expensive it was for them to comply with the policy, and deposition testimony of female bartenders about how expensive and time-consuming it was for them to comply with the policy. If there then proved to be a significant additional burden on female bartenders, then the Plaintiff very well could have prevailed under the standard used by the Court.

The Notorious Boston “Meter Maid” Case

In a by now well-known Boston case, *Noviello v. City of Boston*, 2005 WL 357671 (1st Cir., 2/16/05), Plaintiff is a Boston parking enforcement officer who claimed she had been subjected to sexual harassment discrimination, retaliation and a hostile work environment. In one incident, the Plaintiff’s supervisor, one Ortiz, “forcibly unhooked the plaintiff’s brassière, ripped it from her body, hung it on the van’s outside mirror, and bellowed a crude sexual remark to a fellow employee on the street. Over the next few days, the plaintiff reported the incident to a number of municipal hierarchs. They promptly investigated the matter, suspended Ortiz a week after the incident, and ultimately cashiered him.” Soon after Ortiz was fired, “coworkers began to subject the plaintiff to sundry indignities, or, in the words of the employees themselves, to ‘bust [] her chops.’” There is a litany of offenses laid out in the Court’s opinion, too long for this discussion, which the Plaintiff claimed was co-worker retaliation for getting Ortiz fired, and the City did little or nothing about it, and it ultimately created a hostile work environment. The District Court entered summary judgment for the City on all the Plaintiff’s claims, and she appealed to the 1st Circuit Court of Appeals.

There were many issues in this case, but for our purposes the most interesting was the Court’s ruling that a hostile work environment generally created by co-workers in retaliation for complaining about unlawful discrimination was an “adverse employment action” that could support a retaliation claim. As the Court noted, generally “a plaintiff may recover on [a hostile environment claim] when ‘the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’” Ultimately the Court, despite noting that other courts were divided on the issue, held “explicitly that a hostile work environment, tolerated by the employer, is cognizable as a retaliatory adverse employment action for purposes of 42 U.S.C. § 2000e-3(a). This means that workplace harassment, if sufficiently severe or pervasive, may in and of itself constitute an adverse employment action sufficient to satisfy the second prong of the prima facie case for Title VII retaliation cases.”

Thus the Court remanded that portion of the case back to the District Court for trial.

This Looks Like A Pretty Rough Place To Work

In *Dick v. Phone Directories Co.*, 95 Fair Empl.Prac.Cas. (BNA) 293 (10th Cir., 2/11/05),

the Plaintiff office employee sued her Employer, alleging that she was subjected to a sexually hostile work environment based on gender by her female supervisor and coworkers, in violation of Title VII. Plaintiff described “the alleged harassment in terms of ‘a working environment permeated by sexually explicit banter, insults, lewd jokes, gestures, games, and devices’”, and the specific allegations are a litany of some really outlandish sexually oriented statements and suggestive actions, as well as exhibitionism. Most of the harassment was by allegedly lesbian coworkers of the Plaintiff. The District Court entered summary judgment on behalf of the Employer, and ruled that (1) on the hostile work environment claim, the Plaintiff had not shown that the alleged same-sex harassment was because of her sex, and (2) on her retaliation claim, the Plaintiff had not shown an adverse employment action. Plaintiff appealed.

On appeal, the 10th Circuit Court of Appeals noted a circuit split on what evidence was required to support at least one type of claim of same-sex sexual harassment: “At first blush, it might appear that the crucial component . . . is that the victim put on ‘evidence that the harasser [is] homosexual.’ Indeed, some courts have so held. . . . [because such evidence creates an inference that the harassment was ‘because of sex’] Other courts require the victim to show that the harasser was ‘motivated by sexual desire.’” Then the Court squarely held that “whether same-sex harassment is because of the victim's sex hinges on whether the harasser's conduct is motivated by sexual desire”, which then would be because of the victim's sex. While noting that the Plaintiff only had to show the motivation of sexual desire, the Court also noted that this did not mean necessarily showing that the harasser was homosexual - the issue here is “whether the harasser acted out of sexual desire. A plaintiff who makes this showing establishes that the harassment took place because of her sex, regardless whether she has also demonstrated that her harasser is homosexual.”

Here, there was a plethora of evidence from which a reasonable jury could infer that the alleged acts of harassment were motivated by sexual desire on the part of the harasser. As such, according to the Court, the Plaintiff was entitled to a trial on her claim, and the case was remanded to the District Court on this issue.

10th Circuit Approves ADA Hostile Environment Claims

In *Lanman v. Johnson County, Kansas*, 2004 WL 3017258 (10th Cir. 12/30/04), Plaintiff was a female former deputy sheriff who allegedly was treated like she was “crazy.” Co-workers made fun of her and joked about her going off her medication, losing control, and “going off the deep end.” She admitted that “officers commonly teased each other, and that some of the comments made about her were good natured. She also admitted some officers disliked her, and that this was the reason she was ridiculed. Further, she thought some people disliked her because ‘[she] was the only female back in classifications ... It was a boys club back there and [she] didn't fit in.’” Eventually she was ordered to undergo a psychological fitness for duty exam. The treating physician found no signs she was unfit for duty and cleared her to return to work. Upon returning to duty in new a unit, she was assigned to work with a training officer. She confronted her supervisors about the assignment arguing that she was an experienced officer and did not need to be trained; however, the assignment was not changed. She then went to her duty station in the jail and yelled at her fellow officers in front of the inmates. As a result, she was suspended for three days without pay.

After then taking almost a month of medical leave, Plaintiff was set to return to work in mid July. However, a few days before, the officers were informed at roll call that she would be returning and told that any concerns they might have could be raised privately with the

supervising sergeant. Upon hearing this had occurred, Plaintiff submitted her resignation stating she wanted to pursue other career opportunities, and she never returned to work. In a termination form given to the County, she further stated she "felt the need to voluntarily resign due to the extreme hostile conditions [she] faced repeatedly since 2001." She had never made any related written or oral grievances to the County. Plaintiff then filed suit against the County alleging violations of the Americans with Disabilities Act ("ADA").

While the Plaintiff eventually lost this case because the Court found she was not perceived as disabled because of the nature of the comments by co-workers, and even requiring her to undergo a psychological examination was a routine employer responses to somewhat unsettling behavior. What is important about this case is that the Court ruled that there was a cause of action under the ADA for a hostile work environment based upon disability. Thus where co-workers and supervisors create a hostile work environment for an individual either because he/she is disabled, or because he/she is regarded as disabled by them, then there is potential liability for the employer. Thus it is important to monitor the workplace to ensure, as with sexual harassment and other forms of hostile work environments (based on race or age, for example), that employees treat each other respectfully and do not torture those perceived to be different. Of course this case also suggests that there is a certain amount of good-natured kidding that can take place, but there is a line somewhere, and liability can be heavy for an employer if that line is crossed.

No Good Deed Goes Unpunished

These days employers often host flu shot clinics for employees, either because such a shot might be necessary for the particular environment, such as a hospital or nursing home, or just because it is a convenience for employees and might help reduce absenteeism during the winter months. But such clinics have their dangers, as *Hick's Case*, 2005 WL 78499 (Mass.App.Ct., 1/18/05), shows.

In this case, the Plaintiff was an electrocardiogram (EKG) technician employed by a hospital. She filed a workers' compensation claim against the hospital seeking temporary total incapacity and medical benefits on the ground that the flu shot provided by the hospital caused her optic neuritis, vision loss, and blindness. The Department of Industrial Accidents reviewing board ("DIA") reversed the decision of an administrative law judge who concluded that the Plaintiff had failed to prove that her injury arose out of and in the course of her employment. The Plaintiff appealed to the Massachusetts Appeals Court.

The Court noted that an injury arises out of the employment, for purposes of a workers' compensation case, if it arises out of the nature, conditions, obligations, or incidents of the employment; in other words, out of the employment looked at in any of its aspects. For an injury to arise out of employment for workers' compensation purposes, the employee need not necessarily be engaged in the actual performance of work at the moment of the injury; it is enough if he is upon his employer's premises occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment. If an employee is injured on the employer's premises while engaged in a purely personal activity, the injury will not be considered to arise out of the employment, for purposes of a workers' compensation claim.

With that backdrop, the Court held that in this case the Plaintiff's injuries did in fact arise out of her employment. The Employer was a hospital that had an interest in, and commitment to, promoting the public health, the Plaintiff was an EKG technician who had direct contact with high risk patients, the flu shots were administered by hospital employees on the hospital's

premises, and the Plaintiff received her flu shot during her lunch hour, on a day that she was working. These facts were sufficient, ruled the Court, for the Plaintiff to show that receiving the flu shot essentially was part of her employment, and thus compensable under workers comp.

Age Discrimination and Employer's "Inadequate Explanation"

In *Currier v. United Technologies Corp.*, 2004 WL 2955259 (1st Cir. 12/22/04), the First Circuit upheld a jury verdict in favor of the former employee because the employer offered "unpersuasive" explanations for the discharged employee's low evaluation ratings. In this case, the former employee worked for a division of United Technologies for twenty-one years, and had advanced to positions of increasing responsibility and received merit pay increases and commendations for the quality of his work. During a reduction in force, the Employer discharged the Plaintiff, who then filed a lawsuit alleging age discrimination. The jury found for the Plaintiff and awarded him \$101,000 in back pay and \$275,000 in compensatory damages.

As the district court noted and the First Circuit agreed, the case was "close," but the jury's decision was supportable. While the Plaintiff had been unable to point to a single comment about age and testified that the first time he felt age bias was when he was terminated, the Court ruled that the jury's decision was reasonable due to the employer's inadequate explanations of why the Plaintiff had been let go. The employer had an evaluation "Matrix" to evaluate the performance of the employees. The Matrix contained five categories: "achieve results," "criticality of skills," "qualifications," "business orientation," and "interpersonal skills." The Matrix was "entirely subjective," and the First Circuit stated that the "jury could well have been dissatisfied with the employer's vague explanations as to why the former employee received low scores in some of the Matrix categories."

Thus, the "unpersuasive" explanations for the former employee's low ratings "loom[ed] large in the absence of any other explanation," and although the "case was not strong," there "was sufficient evidence for the jury to infer" that the Plaintiff's age "was the real reason" he was selected to be terminated.

Temporal Proximity and Pregnancy Discrimination

In *Hill v. Dale Electronics, Corp.*, 2004 WL 2937832 (S.D.N.Y., 12/19/04), the plaintiff brought a lawsuit under the Pregnancy Discrimination Act contained in Title VII of the Civil Rights Act of 1964 alleging that her former employer fired her because she became pregnant. The court held that the plaintiff satisfied her burden in stating a prima facie claim and allowed the case to go forward. In particular, the court noted that the "temporal proximity between the plaintiff's announcement of her pregnancy and her firing" was sufficient to raise an inference of discrimination.

On March 11, 2002, the plaintiff was hired as a receptionist and was told that she was on probation for six months assuming that she had satisfactory job performance. Two days before her probation was to expire, and the same day that she told her co-workers about her pregnancy, the employer informed her that it was extending her probationary period for two weeks and thus her medical coverage would also be delayed for two weeks as a consequence. She was then fired three weeks later just after informing her supervisor of her pregnancy. The Court determined that the temporal proximity of her firing and her announcement led to an inference of discrimination, and her claim could proceed.

At The Supreme Court

Contingent Payment To Attorney Was Includible In Income

You may recall us noting in last October's and November's newsletters that the Supreme Court was considering two companion cases, *Commissioner of Internal Revenue v. Banks* and *Commissioner of Internal Revenue v. Banaitis*. In *Banks*, the 6th Circuit Court of Appeals held that while an employment discrimination settlement payment was taxable income under the Tax Code, that portion of the payment paid by the taxpayer to his attorney under a contingent fee agreement was not taxable to the taxpayer. In *Banaitis*, the 9th Circuit Court of Appeals also ruled that settlement monies were taxable to the taxpayer, but that portion paid directly to the taxpayer's attorney was not taxable to the taxpayer. The IRS was contesting the result in these cases.

After the Court took these cases for review, on October 22, 2004, President Bush signed legislation that allows prevailing employment discrimination plaintiffs to deduct from their income taxes that part of their monetary award allocated to attorney's fees and costs. Currently such plaintiffs, at least according to the Internal Revenue Service ("IRS"), are taxed on the total award including whatever they have to pay in attorney's fees, and then the attorney must pay taxes on that income. So going forward Congress has resolved this issue, which the Court noted in its decision, although the legislation is not retroactive.

On January 24, 2005, the Supreme Court handed down its decision in these cases. The Court sided with the IRS and held that when a litigant's recovery, by judgment or settlement, constitutes taxable income, such income includes any portion of the recovery paid to the litigant's attorney as a contingent fee. The Court wrote that a contingent fee agreement is really an anticipatory assignment of the taxpayer's income to his or her attorney, and thus should be considered "income" under the Tax Code, at least before the new legislation. Thus the Court reversed the Court of Appeals' decisions in both cases.

Supreme Court Takes "Walking To Workstations" Cases

In two consolidated cases that could have far-reaching implications for many employers, the Supreme Court on February 22, 2005, accepted two consolidated cases which raise the issue of whether or not the time spent by employees walking to and from their workstations after donning protective gear is compensable time under the Fair Labor Standards Act ("FLSA"). In the first case, *IBP Inc. v. Alvarez*, 339 F.3d 894 (9th Cir., 2003), involving a meatpacking plant, the Appeals Court had ruled that employees had to be paid from the moment they began putting on safety gear required for their jobs until they took off the gear. In the second case, *Tum v. Barber Foods*, 360 F.3d 274 (1st Cir., 2004), the Appeals Court had held that employees of a chicken plant should not be paid for time spent waiting to begin work after donning safety equipment.

Oral argument and decision in this case is not likely until Fall, 2005, at the earliest.

Legislative/Regulatory Actions Of Note

IRS Issues Final Rule On Defined Contribution Plan Distribution Cuts

A new IRS regulation, which took effect January 25, 2005, modifies the circumstances under which certain forms of distribution previously available are permitted to be eliminated

from qualified defined contribution plans without violating anti-cutback rules.

Section 411(d)(6)(A) of the Code generally provides that a plan will not be treated as satisfying the requirements of section 411 if the accrued benefit of a participant is decreased by a plan amendment. Section 411(d)(6)(B) prior to a recent amendment provided that an amendment is treated as reducing an accrued benefit if, with respect to benefits accrued before the amendment is adopted, the amendment has the effect of either eliminating or reducing an early retirement benefit or a retirement-type subsidy, or, except as provided by regulations, eliminating an optional form of benefit.

The new regulation provides that a defined contribution plan does not violate the anti-cutback rule in section 411(d)(6) merely because the plan is amended to eliminate or restrict the ability of a participant to receive payment of accrued benefits under a particular optional form of benefit for distributions with annuity starting dates after the date the amendment is adopted if, after the plan amendment is effective with respect to the participant, the alternative forms of payment available to the participant include payment in a single-sum distribution form that is otherwise identical to the optional form of benefit that is being eliminated or restricted.

The regulation further explains that a single-sum distribution form is “otherwise identical” to an optional form of benefit that is eliminated or restricted only if the single-sum distribution form is identical in all respects to the eliminated or restricted optional form of benefit (or would be identical except that it provides greater rights to the participant) except with respect to the timing of payments after commencement.”

The new regulation can be found at www.irs.gov/pub/irs-regs/td_9176.pdf.

FMCSA Seeks Comments On “Hours Of Service” Rules

In the now long-running saga of the Federal Motor Carrier Safety Administration (FMCSA) efforts to revise the “hours of service” rules for truckers, the latest installment has the FMCSA seeking public and industry comments on the revised rules, particularly its health effects on drivers, as it essentially was ordered to by the District of Columbia Court of Appeals a couple of months ago. We have previously reported on this saga in our Client Alerts of February and September, 2004.

In its latest request for comments, published in the January 24, 2005, *Federal Register*, which is outlined in a notice of proposed rulemaking, FMCSA is particularly interested in comments about any negative effects that the hours-of-service rules are having on drivers' health.

Under the 2004 revised regulations (currently in effect by act of Congress), truckers may drive for up to 11 hours--an hour longer than allowed before 2004--within a 14-hour period. An off-duty period of 10 consecutive hours, up from the previous 8 hours, is then required. Moreover, while drivers still have the same 60 hour cap in seven days or 70 hours in eight days, drivers can now take a 34-hour rest period and then restart the clock for tracking such hours.

Comments on the proposed rule are due 45 days after publication of the notice in the *Federal Register*. They may be submitted, among other means, to the Department of Transportation's website at <http://dms.dot.gov>.

President Signs Class Action Legislation

On February 18, 2005, President Bush signed into law the Class Action Fairness Act, which is intended to move product liability and mass tort class action cases from state courts to the federal courts. It will, however, apply to employment cases as well, which as a practical matter mostly means Fair Labor Standards Act class action cases, such as *Archuleta v. Wal-Mart*

discussed below. Only time will tell what the real effect of this legislation will be.

EEOC Issues New Employer Training Material

The Equal Employment Opportunity Commission (“EEOC”) has published a new pamphlet entitled The ABCs of EEO for Small Businesses and Supervisors. This material is supposed to aid small employers in meeting their obligations under the various federal antidiscrimination laws. It includes sections on various human resource issues, guidance for dealing with a discrimination charge, various checklists and resource lists. The guide is available for \$14.95 and can be ordered at the EEOC's Web site at www.eeotraining.eeoc.gov.

FLSA/FMLA Cases

Profane Tirade Justified Termination, Despite FMLA Claim

In *Hoffman v. Professional Med Team*, 2005 WL 27136 (6th Cir. 1/7/05), Plaintiff was a female emergency medical technician diagnosed with migraine headaches. She originally was granted intermittent leave. Later a dispute developed over the adequacy of the Plaintiff’s medical certification. This dispute led to heated exchanges between Plaintiff and her supervisor, in which Plaintiff used profanity. The Employer dismissed Plaintiff, citing the profanity as the reason for her termination. More than two years later, Plaintiff sued, alleging that the Employer interfered with her assertion of FMLA rights. She also alleged that the Employer terminated her employment because of retaliation. Plaintiff bore the burden of proving that the Employer violated the statute willfully in order for her claims not to be time-barred.

The District Court found that the Employer was reasonable in rejecting Plaintiff’s request for leave, and that it did not willfully discriminate against her based on FMLA grounds when it discharged her. Therefore, Plaintiff’s claims were barred by the statute of limitations.

On appeal, the 6th Circuit Court of Appeals agreed with the District Court. It ruled that the Employer did not willfully disregard its obligations under the Family and Medical Leave Act (FMLA) in denying the Plaintiff’s request for medical leave due to migraine headaches, and that the Employer did not intentionally adopt an incorrect reading of FMLA regulations in order to deny the Plaintiff’s request. As the Court wrote, “[a]t the outset we recognize that a confusingly worded Department of Labor regulation and medical certification form make it difficult to determine whether Hoffman's request for leave should have been granted.” The Court thus found that the Employer's refusal of the Plaintiff’s medical certification reflected conclusions derived from meetings with counsel, and the Employer tried to meet its FMLA obligations by consulting with counsel and employee. Thus the alleged violation was not intentional or “wilful,” and because Plaintiff brought her claim more than two years later, the statute of limitations barred her claim.

Moreover, the Court found that the Employer had legitimate non-discriminatory reasons motivating it to discharge the Plaintiff after she was denied leave for migraine headaches; while the Plaintiff may have reasonably believed that she was entitled to FMLA leave, she was discharged due to her hostile and profane objections to the employer's denial. As the District Court had noted, “it [was] reasonable to believe that Schmiedeknecht [a supervisor] and PMT viewed [Hoffman's] hostile behavior as completely inappropriate and justifying termination.”

Adjusting Salaried Employees’ Hours Without Losing Exemption

In *Archuleta, et. al. v. Wal-Mart Stores, Inc.*, 395 F.3d 1177 (10th Cir. 2/1/05), the Tenth Circuit held that under the Fair Labor Standards Act (“FLSA”), an employer may prospectively make adjustments in salary with a like adjustment in scheduled hours to accommodate business needs without losing an employee’s exemption from overtime pay. However, if the salary changes are so frequent as to make the salary the equivalent of an hourly wage, then the court will treat the “salary” as a “sham” and “deny the employer the FLSA exception for professional employees.”

In this case, full-time pharmacists brought actions in state and federal courts against Wal-Mart for violations of the FLSA. Wal-Mart has a policy where “[e]ach full-time pharmacist is paid by salary,” and the full-time pharmacists were assigned a certain number of base hours (typically 90 hours for two weeks), and were “paid a specified minimum salary each pay period.”

In addition to their minimum salary, they were provided certain benefits such as bonuses, insurance, and salary continuation if they were unable to work and paid for any time worked over base hours. The full-time pharmacists contended that Wal-Mart’s actual policy involved “prospectively reducing full-time pharmacists’ base hours with a commensurate reduction in salary in response to sales declines, a policy that they contend[ed] [was] inconsistent” with the Department of Labor’s (“DOL”) definition of salary.

Under the FLSA and DOL regulations, an employee is considered to be paid on a “salary basis” if he or she “regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.” While the court reversed the grant of summary judgment claim for overtime wages, it denied Wal-Mart’s motion to dismiss because the plaintiffs’ complaint was sufficient to state a claim when the complaint alleged that Wal-Mart’s payment scheme rendered them hourly employees.

Exempt Status As A “Prestige” Issue

In *McDaniel v. Transcender, LLC*, 2005 WL 221534 (6th Cir., 1/31/05), Plaintiff was the Employer’s Human Resources Manager. Shortly after she started, the Plaintiff embarked on a reclassification of the exempt/non-exempt status of various employees who previously had been classified as exempt. Some differences of opinion developed about certain employees’ eligibility for exempt status between the Plaintiff and other managers, and certain employees reclassified as non-exempt also complained that they were “offended by [management’s] perception that Transcender viewed their work as less important than work done by exempt employees”. Plaintiff was then terminated “as a result of her inefficiency in recruiting, mistakes in the FLSA employee classifications, and problems with software development employees.” The Plaintiff sued, claiming, among other things, that she was terminated in retaliation for “her efforts to have certain software development employees classified as non-exempt.” The District Court ruled in favor of the Employer, and the Plaintiff appealed.

On appeal, the 6th Circuit reversed the District Court on the retaliation claim. It found that on the facts presented, “a jury could reasonably infer that McDaniel’s failure to implement the change in the FLSA classifications was the reason for her termination.” Moreover, “[v]iewing this evidence in the light most favorable to McDaniel, a reasonable jury could conclude that Transcender’s purported justification for firing McDaniel was mere pretext because the company modified employee job descriptions in an apparent effort to change those employees’ FLSA statuses from non-exempt to exempt.” Thus the FLSA retaliation claim was remanded to the District Court for trial.

Reading between the lines of this case, the issue appears really to have revolved around the “prestige” associated with being exempt, which to some people means a more important job than a non-exempt job. The managers and employees in this case were “offended” at certain reclassifications from exempt to non-exempt status, and this contributed to a great deal of dissension at the reclassifications, and the employer apparently decided to make those employees happy even if that action was not consistent with the FLSA. This is a situation our clients run into every day, and it is difficult to resolve because it involves peoples’ feelings, status and reputation. Nevertheless, the law is the law, and while there may be close calls that sometimes require making a judgment, in most cases the right classification answer becomes readily apparent.

Prior Approval Precludes Employer’s Later Challenge To FMLA Leave

In *Charles S. Sorrell v. Rinker Materials Corp*, 395 F.3d 332 (6th Cir. 1/14/05), the Sixth Circuit addressed whether the doctrine of equitable estoppel bars an Employer from challenging an employee’s entitlement to leave under the Family and Medical Leave Act (“FMLA”) and whether the employer is precluded from contesting the employee’s eligibility for leave by failing to comply with certain procedures under the FMLA. This case was brought by an employee who took FMLA leave, and after attempting to return to work at the expiration of his leave, alleged that his employer unlawfully failed to offer to him his prior position or an equivalent position. As for the first issue, the Sixth Circuit remanded the question back to the district court, but noted that other courts—the Second, Seventh, and Eighth circuits—have refused to allow an Employer to challenge an employee’s entitlement to leave after giving prior approval.

The second issue was the alleged preclusive effect of contesting an employee’s eligibility for leave by allegations of the employee’s failure to comply with or to avail itself of certain procedures under the FMLA. The employee noted that the employer failed to advise him that his medical certification was incomplete or provide him a reasonable opportunity to cure any deficiency in certification under 29 C.F.R. §825.305(d). The Sixth Circuit found that this provision imposed an affirmative duty on the employer. That is, if the employer found that the medical certification was incomplete, it had a duty to advise the employee of that fact and provide a reasonable opportunity to cure the deficiency in certification. Thus the Court remanded the case back to the District Court on the issue of whether or not the employer found the medical certification incomplete so as to trigger the affirmative duty. It could not fail to advise the employee of any deficiency, and later claim the employee failed to provide adequate information.

In The Public Sector

The Rat Can Stay, According To The 6th Circuit

In *Tucker v. City of Fairfield*, 176 L.R.R.M. (BNA) 2705 (6th Cir., 2/11/05), the City had an ordinance barring “structures” in a right of way. The Plaintiff labor union picketers had put up a giant inflatable rat. As the Court noted, “[t]he rat has long been used as a symbol of efforts to protest unfair labor practices.” The picketers were cited by the City’s Zoning Inspector for erecting a “structure” in a public right of way. The picketers sued the City, claiming that such a regulation infringed on their free-speech rights. The District Court entered a preliminary injunction barring the City from enforcing the ordinance, and the City appealed to the 6th Circuit

Court of Appeals.

The 6th Circuit upheld the decision of the District Court. The Court wrote that “[i]n our view, there is no question that the use of a rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment, especially given the symbol's close nexus to the Union's message.” The Court found that the rat was easily deflated and portable, and was not a permanent structure. While the City ordinance did not place any restrictions on speech, since it regulated only the time, place and manner of speech, the Court wrote that “[t]here is no objective evidence in the record before us suggesting that the temporary placement of the balloon in the public right-of-way has any adverse effects, such as obstruction of pedestrian or automobile traffic. By applying the ordinance to prohibit the temporary use of the balloon in this case, it therefore appears that the City has applied its ordinance in a manner that is ‘substantially broader than necessary’ to achieve its interests.”

Thus the Court ruled that the District Court had not abused its discretion in granting the preliminary injunction.

Another “Free Speech” Case

In *Baca v. Sklar*, 2005 WL 361785 (10th Cir., 2/16/05), after accusing his employer, the University of New Mexico ("University"), of engaging in illegal financial dealings with the state Department of Health ("DOH"), Plaintiff allegedly endured a campaign of retaliation culminating in his resignation. Plaintiff was a Project Manager in the University's School of Medicine. He raised concerns about accepting certain funds because he believed the proposal skirted the state's competitive bidding laws, and was also tied to hiring a certain individual without an open application process. After a great deal of skirmishing, Plaintiff claimed that Sklar made his work life so miserable because of his complaints that he was forced to quit. Plaintiff then sued the University and Dr. David Sklar, his supervisor, claiming First Amendment retaliation and discrimination based on ethnicity. The District Court granted summary judgment to the Defendants on all claims.

The Court upheld the District Court as to summary judgment on Plaintiff's claims of ethnic discrimination, wrongful termination and constructive discharge. However, the Court reversed the District Court and ruled that there was enough evidence to go to trial on Plaintiff's claim of retaliation for his exercise of his First Amendment right to free speech. As the Court noted, “[t]he Supreme Court has held that the First Amendment protects statements by public employees even when such statements are directed at their employer, but only when the statements relate to matters of public concern.” Here, the Court held that the Plaintiff's interest in making allegations of the University's illegal financial dealings with the state Department of Health and its violation of University procedure in hiring another employee outweighed the University's interest in regulating his speech, for purposes of the Plaintiff's First Amendment retaliation claim. Thus the Court ruled that there was a genuine issue of material fact as to whether the Plaintiff's protected speech substantially motivated the University to take adverse employment actions against him. The case was remanded to the District Court for trial on that issue.

On The Labor Front

CBA Could Not Require Employees To Wear Union Insignia

In *Lee v. NLRB*, 2005 WL 14896 (4th Cir., 1/4/05), a collective bargaining agreement (“CBA”) provided that all employees in certain job classifications, even if non-union, were required to wear both the Employer’s logo and the union’s logo. Two non-union employees filed a charge with the National Labor Relations Board (“NLRB”) claiming that being forced to wear the union logo violated their rights to not support the union under Section 7 of the National Labor Relations Act (“Act”). The Board ruled that placement of the union logo on company uniforms implicates Section 7 interests, but also that the collectively bargained uniform policy was a "special circumstance" which outweighed any intrusion on Section 7 rights and accordingly dismissed the case. The two employees appealed to the 4th Circuit Court of Appeals.

The Employer and union argued that “the display of the union logo on the uniforms signifies a labor-management partnership which makes service interruptions due to labor disputes less likely and represents that their employees are well-trained, well paid, and more experienced with a stable work environment.” The Court disagreed that the display of the two logos reasonably conveyed the public image the Employer sought to project. As the Court wrote, “[t]here is no evidence that the display of the union insignia conveys BellSouth's intended message. In fact, rather than view the union logo as representing a labor-management partnership which makes labor disputes less likely and a reflection of a stable work environment, the public may view the union logo with suspicion and associate it with service disruptions and labor disputes . . . particularly in a right-to-work State such as North Carolina.”

Thus the Court found that the Board's conclusion that the mandatory display of the union logo is lawful because special circumstances are present was not supported by substantial evidence. Ultimately the Court ruled that “[b]y paying to place the union logo on the uniforms and making the wearing of the union logo on uniforms a condition of employment, Bell-South violated Section 8(a)(1), (2), and (3) of the Act. Similarly, CWA violated Section 8(b)(1)(A) and 8(b)(2) of the Act by proposing and agreeing to require employees to wear the union logo and by accepting BellSouth's financial support.”

While this case was brought by two non-union employees, the Court did not explicitly distinguish between union and non-union employees. However, the Court’s basic rationale, that the CBA agreement infringed on the Section 7 rights of employees, applies equally to the union-represented employees, and the Court did discuss the union’s lack of ability in this case to waive bargaining unit members’ Section 7 right to refuse to support the union.

Employer Ordered To Provide Subcontractor Information To Union

In *West Penn Power Company v. NLRB*, 2005 WL 57972 (4th Cir. 1/12/05), the Court affirmed the National Labor Relations Board’s decision that a power company was required to provide its union with various information relating to its use of subcontractors, an issue on which the parties had bargained repeatedly in the past. While there were several information request issues in this case and the analysis was pretty standard, the most interesting - and troublesome - issue was the Employer’s argument that it need not respond to the union’s request because the union flooded it with information requests in bad faith. The union submitted 82 separate requests for information concerning 43 different subjects over a nineteen-month period, which sought information on a broad range of subjects including pension coverage, safety issues and accidents, employee evaluations, disciplinary issues, underground training, workers' compensation procedures, clothing issues, safety equipment costs, tool repair, and vacation and sick pay.

While the Court noted that where "the predominate purpose of the party making the

request [is] one of bad faith," the other party has no duty to respond, it also found that neither the administrative law judge or the Board ever made a finding of bad faith, nor could have on the record. According to the Court, all the information requests concerned legitimate subjects of bargaining and related to the Union's ability to police the collective bargaining agreement and fulfill its representational obligations to its members, even if there were an awful lot of them. Thus absent some demonstrated showing of bad faith, the Employer had to provide the requested information.

The standard for information requests, that basically all the union has to do is articulate some sort of relevancy, means that it generally is problematic not to respond and can result in an unfair labor practice charge being filed. On the other hand, information requests can be onerous, time-consuming and expensive to respond to. Particularly if the relationship with the union is difficult, unions can and do use information requests to harass the Employer. It should be noted, however, that the Board and courts have held that the obligation to provide information is a two-way street, and one of the most underutilized tactics of employers is making information requests of the union.

Was Not Discriminatory Under NLRA To Fire Union Activists For Failing To Disclose Criminal Record On Job Applications

In *Overnite Transportation Company*, 343 NLRB No. 134 (12/16/04), after an investigation into thefts at one of its facilities, the Employer terminated seven employees - who also were open union activists - for falsification of their employment applications because they had failed to disclose prior criminal convictions, even though they had been employed for several years. The union filed a charge alleging that the employees were terminated for their union activities. The Administrative Law Judge ("ALJ") hearing the case agreed with the union and rejected the Employer's explanation that the employees were fired for falsifying their applications, in large part because the Employer's "policy stated that such conduct (i.e., failure to disclose criminal records on job application) would be subject to 'disciplinary action, including dismissal' and therefore dismissal was not mandated."

The Board, however, reversed the ALJ and dismissed the complaint. The Board found that in light of the thefts it was not unreasonable to investigate employees' backgrounds, so there was no improper motivation. Moreover, "[t]he Respondent's subsequent decision to terminate those employees whom it discovered had falsified their job applications was consistent with its widely published company policy. It is undisputed that all seven employees failed to disclose criminal backgrounds on their job applications. Their prior undisclosed criminal histories collectively included, among other offenses, convictions for manslaughter, rape, drug possession, possession of weapons, and unemployment fraud. The Respondent's job application itself notified the employees that 'incomplete or deceptive' responses to application questions 'would result in termination.' The 1994 employee handbook further notified employees that such falsification would be subject to disciplinary action 'including dismissal.'" The Board also found that the Employer's decision to terminate those seven employees was consistent with its past practice both at that particular facility and at other facilities.

We caution, however, that at least in Massachusetts there are restrictions on the ability of an employer to require criminal history information on job applications, or to otherwise access such information from the Criminal Offenders Registration Board, the so-called "CORI checks."

Did You Know . . . ?

That February's Molecule of the Month is Kevlar, a long chain-like molecule known as a polymer? It is one of the strongest human-made substances, and is strong enough to withstand a bullet fired at a bullet proof vest.

That February's flower is the Violet, and its birthstone is the Amethyst?

That February is, among other things, African Heritage Month, American Heart Month, Pets Dental Health Month, National Bird Feeding Month and International Friendship Month?

That February 14-20 is International Flirting Week, the 17th is Random Acts of Kindness Day, and the 20th is Love Your Pets Day?

That March's Molecule of the Month is Hexenal, which is the key aroma substance emitted when grass is cut, which behavioral studies have shown has a healing effect on the psychological damage caused by stress?

That March's flower is the Crocus, and its birthstone is the Aquamarine?

That March is, among other things, National Nutrition Month, Kidney Month, Reading Month, Women's History Month, National Craft Month, National Colorectal Cancer Awareness Month, Family Eye Health Month, Newspaper in Education Month, Red Cross Month, National Peanut Month, Social Work Month and Archaeology Awareness Month?