

April Edition, 2005

### **Mistake Of The Month - Agreeing To Staffing Language**

In *North Adams Regional Hospital*, AAA Case No. 1130-0920-03 (Stutz, 2/21/05), the Massachusetts Nurses Association (“MNA”) represented registered nurses at the Hospital. In the last round of contract negotiations, the Hospital agreed to the following language in the parties’ collective bargaining agreement (“CBA”):

#### 18.07 Standards of Nursing Practice

1. NARH shall promulgate and enforce policies, rules and regulations to ensure that applicable professional standards of nursing practice (e.g. E.N.A. Critical Care) are established and carried out so that safe and effective nursing care is provided to patients. . . .
4. The hospital will only keep and admit the number of patients that registered nurses can safely care for. The hospital will take measures such as adding nurses, stopping admissions or other measures to ensure that this occurs.

In this arbitration proceeding under the CBA, the MNA proffered 9 instances of unsafe staffing, mostly involving a shortage of staff at a particular time, which the Arbitrator determined were legitimate and violated the contract language above. As the Arbitrator noted, “[a]lthough management did not concede the case, the testimony of the Employer’s witnesses largely supported the grievance reports that census and/or acuity were higher than they should have been on most if not all of these nine occasions.” Moreover, “[t]he Hospital policies require a system to determine acuity of patients, but this system has not been implemented. At least at the time of the grievance, there was no acuity system in place that management consulted”.

The Arbitrator explained that via the above language “the parties expressed an intent to assure nurses that their professional standards will be respected and that nurses will not be assigned to a greater number or acuity of patients than they can safely care for. Should census or acuity threaten to become too high, then management must collect [FIC] the situation by adding nurses, stopping admissions or taking other measures to ensure that nursing assignments remain within safe parameters.” He also noted that nurses are subject to professional standards, and that in addition “nurses are subject to Massachusetts State law which holds them directly accountable for delivery of safe nursing care.”

As a result, the Arbitrator found that “[t]he nine grievances established that the Hospital violated Article 18.07 on these occasions by failing to add staff or limit patient admissions to numbers that the nurses could safely care for.” Thus as a remedy the Arbitrator ordered the Hospital (1) to “cease and desist” from violating Article 18.07 of the contract; (2) to pay the MNA an amount of money equal to the pay of one RN for each of the nine shifts grieved; and (3) pay the RN’s working the nine shifts time and one half for those nine shifts, i.e. the difference between time and one half pay and what they actually were paid.

### **The Harshbarger Report**

## **More Preliminary Reinstatements Ordered For Sarbanes-Oxley Retaliation Complainants**

As we predicted in last month's issue, we are seeing more cases of preliminary reinstatement as a remedy in Sarbanes-Oxley Act ("SOX") whistleblower cases. Under SOX, if the federal Department of Labor ("DOL") makes a preliminary determination that a complaint of retaliation is reasonably-based, it may order the preliminary reinstatement of the Complainant pending final resolution of the litigation.

Thus this month brings us the case of *Bechtel & Jacques v. Competitive Technologies, Inc.*, 2005-SOX-00033 (3/29/05), in which two employees claimed they had been terminated in retaliation for making complaints protected by SOX. DOL found there was a reasonable basis to their charge of retaliation, and ordered them preliminarily reinstated. The Employer appealed.

In arguing against preliminary reinstatement, the Employer argued that it has acquired evidence of misconduct by Complainants that allegedly occurred before and after their tenure of employment that would have led to their termination. In addition, the Employer claimed that the Complainants, particularly Complainant Bechtel, demonstrated animosity beyond that anticipated by the inherent friction of litigation so as to make reinstatement difficult, especially in consideration of the small size of the Employer's operation and workforce.

The Administrative Law Judge ("ALJ") rejected these arguments and ordered preliminary reinstatement. He wrote that "[i]ndeed, the purpose of preliminary reinstatement is to guarantee the protections of the Act to employees whose complaints are found to be reasonable after investigation by DOL. The fact that the statute mandates reinstatement upon such finding strongly militates in favor of finding that public policy supports reinstatement of the Complainants, even given the uncomfortable circumstances that would reasonably accompany their return to the workplace. As the Court concluded in *Brock v. Roadway Express*, 481 U.S. 252 (1987), the government's interest in protecting employees from discrimination is promoted by providing interim relief such as preliminary reinstatement." As to the alleged "after-acquired" evidence, the ALJ wrote that "[t]he evidence of Respondents' acquisition of knowledge of Complainants' alleged improper conduct, both during and post employment, is facially insufficient to establish that it would have terminated the Complainants on those grounds alone. In any event, after-acquired evidence of Complainants' misconduct is more probative of the remedies to which Complainants would be entitled, if successful in their actions."

## **And ERISA Has A Whistleblower Provision Too, Sort Of**

In *Nicolaou v. Horizon Media, Inc.*, 2005 WL 700951 (2<sup>nd</sup> Cir., 3/28/05), the Plaintiff was the Defendant's Director of Human Resources. She was also a trustee and fiduciary of the Employer's 401(k) plan. Shortly after she began working at Horizon, Nicolaou "discovered a serious payroll discrepancy involving underpayment of overtime to all non-exempt employees of the [New York City] and Los Angeles offices." This "discrepancy" had apparently existed for more than a decade, resulting in what the complaint termed "a historical under funding of Horizon's 401(k) plan." Plaintiff made various attempts to bring this situation to higher management, which culminated in an interview with the Company President, who "appeared disturbed ... and not at all pleased that this issue was being brought to his attention." Plaintiff claimed that within days a campaign of retaliation began against her and she ultimately was terminated. The Plaintiff then sued and made two claims for illegal retaliation arising from her allegations that the Defendant demoted and eventually terminated her after she had raised

concerns about the Defendant's funding of its 401(k) plan: (1) a violation of Sections 15 and 16 of the Fair Labor Standards Act ("FLSA"); and (2) a violation of Section 510 of the Employee Retirement Income Security Act ("ERISA"). The District Court granted summary judgment for the Defendant on the basis that neither the FLSA or ERISA protects internal complaints of wrongdoing. Plaintiff appealed.

On appeal, the 2<sup>nd</sup> Circuit Court of Appeals agreed with the District Court that Plaintiff's claim under the FLSA had to be dismissed since the FLSA retaliation provisions only apply where an employee had made a complaint to an external authority such as the federal Department of Labor. But the Court reversed the District Court's judgment on the scope of ERISA Section 510, which generally provides for protection against retaliation for an individual who has provided information or testified in an inquiry or proceeding related to ERISA. The Court found that the retaliation provision in this section was broader than the similar FLSA provision, and that, as the Court wrote, "[t]he 'informal gathering of information' thus falls within the plain meaning of 'inquiry,' and we need go no further to conclude that it is protected by Section 510."

Finally, the Court ruled on the facts that if the Plaintiff could demonstrate that she was contacted to meet with the Defendant's President in order to give information about the alleged underfunding of the Plan, her actions would fall within the protection of Section 510. Thus, the district court erred in concluding that, as a matter of law, the Plaintiff's allegations could not survive a motion to dismiss because they do not establish the existence of "a formal, external inquiry." As the Court wrote, "[t]he meeting with Koenigsberg was something less than a formal proceeding, but we believe it was sufficient to constitute an 'inquiry' within the meaning of Section 510." Thus the Court remanded the case to the District Court on the Plaintiff's ERISA Section 510 claim.

## **OTHER EMPLOYMENT LAW HEADLINES**

### **Mass. Appeals Court Addresses "Joint Employer" Issue In Discrimination Case**

In *Commodore v. Genesis Health Ventures & Omega, Inc.*, 03-P-1623 (Mass. App. Ct., 3/2/05), Plaintiff was the Director of Nursing at a nursing home owned by and licensed to Omega but operated by Genesis under a contract with Omega. Plaintiff sued both and claimed she had been terminated because of her race, color and national origin. Omega filed a motion to dismiss, arguing that it was not the employer of the Plaintiff, but that Genesis was. Under the parties' contract, the Director of Nursing (as well as all other nursing staff) was selected, hired and employed by Genesis. On the other hand, under state licensing statutes and regulations, it was Omega that was responsible for the operation of the facility from the licensing perspective. As the Court wrote, "[i]n addition, the regulations provide that the licensee 'shall be responsible for procurement of competent personnel, and the licensee and the administrator shall be jointly and severally responsible for the direction of such personnel and for establishing and maintaining current written personnel policies, and personnel practices and procedures that encourage good patient or resident care.' 105 Code Mass. Regs. §150.002(D)."

A Superior Court judge entered summary judgment on behalf of Omega, though on what basis is not clear from the Court's discussion. In any event, the Appeals Court reversed and ruled that there was a genuine issue of fact on whether or not Omega was a "joint employer" of

the Plaintiff along with Genesis. As the Court noted, "[t]he basis of [a joint employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer." Also noting that Omega retained significant financial control in the contract, it nevertheless "negotiated for the creation of the director of nursing position in the agreement. It provided the money to pay Commodore's and all other employees' salaries. Also, the extent to which Omega contracted away the employment function while still being able to fulfil its obligations as a licensee is unclear from the record. The contract language obscures the issue both by broadly delegating responsibility for the employment relationship to Genesis and leaving Omega the responsibilities required by law and regulation. Those requirements, however, preclude the contracting away of responsibility over personnel issues related to quality patient care. In this regard, the agreement is ambiguous." And because the Agreement was ambiguous, a trial was required to flesh out the joint employer status.

The Court also ruled that under the Massachusetts Whistleblower statute applicable to health care providers and facilities, G.L. c. 149, §187, Omega was liable anyway because liability was not dependent on its being a joint employer - rather, simply being a health care owner/facility was enough.

### **OK To Require Blanket FCRA Authorization As Condition Of Employment**

In *Kelchner v. Sycamore Manor Health Center*, 2005 WL 503774 (3rd Cir., 3/3/05), Plaintiff, an 18 year employee, refused to sign an "Annual Statement of Personnel Policy Understanding," which would have authorized the Defendant to obtain "consumer reports" containing information relating to employees' "credit standing, character, general reputation, personal characteristics, or mode of living" for the purposes of investigating "theft from residents, coworkers, or PHI property; potential fraud in insurance claims; or other forms of dishonesty." Plaintiff was warned that if she did not sign the Statement, the Defendant would consider her employment "abandoned." Plaintiff again refused to sign and her employment ended on June 30, 2001. She sued, claiming that the federal Fair Credit Reporting Act ("FCRA") barred such blanket authorizations as a condition of employment. The District Court ruled in favor of the Defendant, and Plaintiff appealed.

On appeal, the Plaintiff claimed that the defendant had no valid employment purpose for which it sought her credit report authorization; that it could not require her and other employees to sign a blanket, advance authorization form; and that it was unlawful for the Defendant to constructively terminate her for her refusal to sign the authorization form.

The 3<sup>rd</sup> Circuit Court of Appeals affirmed the District Court's ruling. First the Court noted that all the Employer sought was the right to secure a credit report if and when necessary, not that it was going to run out and get one as soon as the Plaintiff signed the form. The Court agreed with the Defendant's argument that it might have to do an internal investigation at some point, and that such investigations normally cannot wait for employee authorization. The Court also noted that under the FCRA, "an employer may obtain a credit report for employment purposes if 'a clear and conspicuous disclosure has been made in writing to the consumer *at any time before the report is procured* or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and the consumer has authorized in writing ... the procurement of the report by that person.'" Thus, ruled the Court, the plain language of the statute authorizes the employer to obtain an employee's

written authorization at "any time" during the employment relationship.

Finally, as to the Plaintiff's claim that employee authorization under the FCRA must be voluntary and cannot be compelled as a condition of employment, the Court wrote that "we see nothing in the statute that implies such a limit on an employer's ability to obtain blanket authorization from an employee, at least in the context of an at-will employment relationship. But even if we were to view the statute as ambiguous on this point, we are persuaded by a 1999 advisory opinion letter issued by the FTC, which opined that the FCRA 'does not prohibit an employer from taking adverse action against an employee or applicant who refuses to authorize the employer to procure a consumer report.'"

Thus, ruled the Court, "the District Court was clearly correct in its interpretation of the Act and the defendants were entitled to summary judgment on Kelchner's claims under the FCRA. We will affirm."

### **Inappropriate Religious Comments Cause For Discharge**

In *Morales v. McKesson Health Solutions, LLC*, 2005 WL 648216 (10<sup>th</sup> Cir., 3/22/05), Plaintiff was a telephone triage nurse. The Employer requires its triage nurses to query the callers using a computer-based set of branching algorithms designed to sort patients into different risk categories. Nurses may not make personal observations. In disregard of the procedures and apparently occasionally instilling fear in patients, Plaintiff injected Roman Catholic prayer and dogma into triage calls. Despite being warned, Plaintiff persisted in making religious comments such as reciting the "Divine Mercy" prayer to a caller (even though Plaintiff acknowledged that it was "probably more than [she] should do.") The Plaintiff also engaged in a series of harassing incidents involving co-workers, including telling one co-worker she was under attack by the "powers of darkness," and implying that another was Satan, or possessed by Satan. The Employer sought assurances that the Plaintiff would refrain from discussing religious beliefs or praying with callers, and from broaching religious discussions in the workplace without the invitation of another employee. Plaintiff refused to agree to these conditions and she was terminated. Plaintiff filed this religious discrimination suit alleging that she was discharged for her nonacceptance of McKesson's secularism. The District Court ruled in favor of the Employer, and the Plaintiff appealed.

Here, the 10<sup>th</sup> Circuit first noted that for Plaintiff to prevail, she would have to show that: (1) she is a member of a protected class; (2) she was qualified to perform her job; (3) despite her qualifications, she was discharged; and (4) the job from which she was terminated was not eliminated. The Court assumed all of these factors, and then proceeded to the next part of the analysis, which was the Employer's legitimate, nondiscriminatory reason for terminating the Plaintiff. The Court found that the Employer's proffered justification, that Plaintiff engaged in harassing and rule-violative behavior, was such a reason. Thus it was up to the Plaintiff to show that the Employer's reason was a pretext for unlawful religious discrimination, and here her case failed. As the Court noted, pretext involves calling into question the honesty or good faith of the employer's assessment of the situation; "Pretext may be demonstrated by revealing 'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action [such] that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reason.'"

Because the Plaintiff failed in her showing of pretext, ruled the Court, her whole case failed, and the Court affirmed the decision of the District Court.

## *At The Supreme Court*

### **ADEA “Disparate Impact” Claims Allowed**

In *Smith v. City of Jackson, Mississippi*, 2005 WL 711605 (U.S.S.Ct., 3/30/05), thirty over-40 police officers and dispatchers for the Jackson, Miss., police department sued the City after the implementation of a new performance pay plan that granted substantially higher salary increases to employees with less than five years of service, most or all of whom were under 40 years of age. The 5<sup>th</sup> Circuit Court of Appeals had held that “disparate impact” claims could not be maintained under the Age Discrimination in Employment Act (“ADEA”), as opposed to “disparate treatment” claims. In short, a disparate treatment claim is a claim that a particular over-40 employee was treated differently, and worse, than other employees because of his/her age. A disparate impact claim is one in which an age-neutral employment practice or policy has a disproportionate effect on older employees, such as here, where it is alleged that a new performance pay plan had the effect of granting substantially larger salary increases to younger employees, particularly those with five or fewer years of service. Five Circuit Courts of Appeal had ruled that disparate impact claims could not be maintained under the ADEA, while three had ruled that such claims could be maintained.

A sharply divided Court ruled that disparate impact claims could be maintained under the ADEA, but also ruled that these particular plaintiffs still had not proven such a claim. Thus the Court affirmed the 5<sup>th</sup> Circuit’s judgment in favor of the City. The Court first ruled that there was nothing in the ADEA itself barring such claims, and that the ADEA’s language was similar to language in Title VII of the Civil Rights Act of 1964, which already had been held to permit disparate impact claims in race, sex and other types of discrimination cases. However, such claims were a little narrower than those that could be brought under Title VII because the ADEA also permits any “otherwise prohibited” action “where the differentiation is based on reasonable factors other than age”.

Thus here, addressing the merits of the alleged disparate impact, the Court ruled that the City’s revision of its employee pay plan, *i.e.*, granting raises to police and public safety officers in order to bring their salaries up to regional average, did not violate the ADEA, even though older, higher ranking officers received raises representing a lower percentage of their salaries. Such a decision to grant larger raises to lower echelon employees for the purpose of bringing salaries in line with those of surrounding police forces was a decision based on a “reasonable factor other than age” that responded to the City’s legitimate goal of retaining police officers.

### **Title IX Claim Lies For Retaliation**

In *Jackson v. Birmingham Board of Education*, 2005 WL 701076 (U.S.S.Ct. 3/29/05), a male coach of a girl’s basketball team complained about practices that he believed discriminated against his team, such as unequal funding and access to athletic facilities. He claimed that the school retaliated against him by removing him from his coaching position, in violation of Title IX of the Education Amendments of 1972. The District Court dismissed the complaint on the ground that Title IX’s private cause of action does not include claims of retaliation, and the 11<sup>th</sup> Circuit agreed and affirmed. The 11<sup>th</sup> Circuit Court of Appeals ruled that Title IX does not contain a private right of action for individuals who, although not themselves the victim of gender discrimination, suffer retaliation because they have complained about gender discrimination suffered by others.

The Supreme Court reversed. The Court held that when a funding recipient (of federal educational assistance) retaliates against a person because he or she complains of sex discrimination violative of Title IX, this in itself constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX. It is a form of "discrimination" because the complainant is subjected to differential treatment; it is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. Moreover, the Court found that the statute is broadly worded and simply does not require that the victim of the retaliation also be the victim of the discrimination that is the subject of the original complaint. Where the retaliation occurs because the complainant speaks out about sex discrimination, the statute's "on the basis of sex" requirement is satisfied. The complainant is him- or herself a victim of discriminatory retaliation, regardless of whether he or she was the subject of the original complaint.

Thus the Court reversed the 11<sup>th</sup> Circuit and remanded for a trial. As the Court noted, however, "[t]o prevail on the merits, Jackson will have to prove that the Board retaliated against him because he complained of sex discrimination. At the present stage, the issue is not whether he will ultimately prevail, but whether he is entitled to offer evidence to support his claims."

### **Public Employee "Free Speech" Case Accepted By Court**

On February 28, 2005, the Supreme Court accepted review of a case dealing with the limits of free speech protection for public employees. The Court agreed to review the 9<sup>th</sup> Circuit Court of Appeals' decision in *Ceballos v. Garcetti*, 361 F.3d 1168 (9<sup>th</sup> Cir., 2004), in which the Court had held that Los Angeles County Deputy District Attorney Richard Ceballos' comments about alleged lies by a deputy sheriff in obtaining a search warrant were protected speech even though they were spoken as part of Ceballos' job. Ceballos claimed that after he testified at an evidence suppression hearing that the deputy sheriff had lied, he was retaliated against including removal of many of his duties, the threat of transfer to a lower-level position, and denial of a promotion. He sued the county, then District Attorney Gil Garcetti in his official capacity, and several individual members of the DA's office in their personal capacities, alleging violations of his First Amendment right to free speech.

The District Court had dismissed the case, finding that the defendants were immune from liability under the 11<sup>th</sup> Amendment as an "arm of the state." The 9<sup>th</sup> Circuit reversed, and ruled that Ceballos' statements at the suppression hearing were "matters of public concern" and thus the DA did not have immunity. The Court found that public employees should not be stripped of their right to free speech and to report wrongdoing because governmental integrity would be compromised by such a rule. Moreover, Ceballos' comments were deserving of protection even if he made them to his supervisors rather than publicly.

The Supreme Court accepted the defendants' petition for review, seemingly because of some considerable confusion among the various Circuit Courts of Appeal about the appropriate standard for determining whether or not public employees' speech is protected under the First Amendment. Argument and a decision in this case is not expected until the Court's next term, which begins in October, 2005.

### **Legislative/Regulatory Actions Of Note**

#### **Update On EEOC Retiree Health Benefit/ADEA Rule - It's Now Stymied In**

## **Court**

As we reported in September, 2004, the Equal Employment Opportunity Commission (“EEOC”) has promulgated a rule change regarding retiree health benefits. Prior to August 2001, EEOC maintained that employee benefit plans that end or are reduced when a retiree becomes eligible for Medicare violated the Age Discrimination in Employment Act (“ADEA”). In August, 2001, the agency apparently realized that that position could, as a practical matter, discourage employers from providing health care benefits for its retirees. On April 22, 2004, after a public comment period, the agency approved a new rule allowing employers to reduce or end benefits when a retiree becomes eligible for Medicare without violating the Age Discrimination in Employment Act. This proposal had been widely supported by employers and unions, and was intended to address a concern that ADEA liability concerns could lead employers to eliminate or reduce retiree health benefits entirely. The American Association of Retired Persons (“AARP”) has been vociferous in opposing the rule, and managed to hold up its issuance until after the 2004 Presidential election. The AARP argues that giving over-65 retirees health benefits inferior to those offered to under-65 retirees is age discrimination in violation of the ADEA.

The AARP now has gone to Court to prevent the EEOC from publishing, and making effective, the rule. In *AARP v. EEOC*, 2005 WL 723991 (E.D.Pa., 3/30/05), the AARP asked the Court for an injunction barring EEOC from publishing the rule on the basis that the rule violates the ADEA. The Court agreed with the AARP and ruled that the rule was contrary to the plain language of the ADEA. The Court relied upon a prior 3<sup>rd</sup> Circuit case (which was why this case was brought in Pennsylvania, which is within the 3<sup>rd</sup> Circuit), *Erie County Retiree Association v. County of Erie*, 220 F.3d 193 (3<sup>rd</sup> Cir. 2000), in which the Court specifically had held that “it was clear from the face of the [ADEA] that Congress intended for the ADEA's prohibitions against age discrimination to apply to the practice of reducing retiree health benefits when retirees become eligible for Medicare.” Thus the Court ruled that the EEOC did not have the authority to promulgate a rule that was contrary to the provisions of the ADEA, and permanently enjoined the EEOC from publishing or implementing the challenged regulation.

An appeal is expected.

## **IRS Issues Proposed Rules For 401(k) Roth Contributions**

On March 2, 2005, the United States Treasury Department and the Internal Revenue Service issued proposed rules for Roth Contributions to 401(k) Plans. Roth contributions, which were created in the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), will allow for employees to designate all or a portion of their 401(k) employee deferrals on an after-tax basis. Most distributions of the amount contributed as well as any earnings on those contributions will be tax-free. Although these Roth contributions are not effective until taxable years beginning after December 31, 2005, many plan sponsors are interested in amending their plans and establishing procedures for administering these accounts. Releasing these proposed rules at this time will enable Treasury and the IRS to finalize the rules in time for plan sponsors to implement this valuable retirement savings opportunity beginning in 2006. Similar rules will apply to Roth contributions available under 403(b) plans sponsored by tax exempt organizations and public schools. The proposed rules can be found at <http://www.treas.gov/press/releases/reports/rothproposed.pdf>.

## **EBSA Rules Insurers Must Disclose Commissions And Fees To Plan Administrators**

On February 24, 2005, the federal Department of Labor's Employee Benefits Security Administration ("EBSA") issued an opinion letter in which it ruled that insurers and other benefit providers of an ERISA plan must disclose to the plan administrator any direct or indirect commissions and fees paid to brokers, agents and other persons. EBSA opined that this information was necessary for plan administrators to accurately complete Schedule A of the Form 5500, and thus insurers must provide plan administrators with a proportionate allocation of commissions and fees attributable to each contract for which a Schedule A must be filed. A copy of the opinion, Opinion Letter 2005-02A, can be found at the EBSA Web site at <http://www.dol.gov/ebsa/regs/aos/ao2005-02a.html>.

## **EBSA Also Opines On Fiduciary Duties**

In another opinion letter dated February 23, 2005, EBSA addressed the issue of a trustee of a local union health and benefit fund who received, and later returned, political contributions for his election and re-election to a county legislature from several current and prospective service providers to the fund. The trustee also was the business manager of the local. He did not participate in the provider selection or process.

EBSA noted that ERISA Section 406 prohibits self-dealing with respect to the plan, but that "a fiduciary may avoid engaging in an act described in section 406(b)(1) or (b)(2), absent any arrangement, agreement, or understanding with respect to the selection and compensation of any service provider, by removing him[self] or herself from all consideration by the plan concerning such service and by not otherwise exercising, with respect to the proposed transaction, any of the authority, control, or responsibility which makes him or her a fiduciary".

Nevertheless, EBSA also stated that a fiduciary's duty may not cease simply because he recused himself from a decision-making process: "if a fiduciary has material information, including information regarding potential service providers, that would be necessary in order for other plan fiduciaries to make an appropriate and prudent decision, we believe the fiduciary's duties under Section 404 of the Employee Retirement Income Security Act would require informing the deciding fiduciaries of that information".

Finally, EBSA noted, but did not address, that a fiduciary's solicitation of money from a current or prospective provider could constitute a crime. A copy of this opinion letter can be found at the EBSA's website at <http://www.dol.gov/ebsa/regs/ILs/il022305.html>.

## **Don't Bother Submitting H-1B Applications Until USCIS Provides Guidance**

On March 8, 2005, U.S. Citizenship and Immigration Services ("USCIS") stated that it was currently preparing regulations for the implementation of the Omnibus Appropriations Act for Fiscal Year 2005. Pursuant to an exemption established under this Act, USCIS will be able to process additional petitions for H-1B workers for FY 2005. The available petitions for FY 2005 will be applied to all qualified H-1B nonimmigrant aliens, and will not be limited to those individuals holding a master's degree or higher degree from a U.S. institution of higher learning. The effective date is March 8, 2005. However, USCIS advises employers **not** to file H-1B petitions seeking approval for workers who may benefit from these provisions until USCIS publishes a rule concerning the Visa Reform Act and related issues. USCIS will reject any new H-1B petition that is received prior to the filing date set forth in the regulations.

Complete information, including the exact date and address for filing, will be published in the *Federal Register* as soon as possible, according to the agency. USCIS also stated that “[h]owever, employers also should be aware that the filing date announced in the regulation may occur shortly after publication of the regulation. Employers should monitor the Federal Register and [www.uscis.gov](http://www.uscis.gov) and prepare their filings accordingly.”

### **The Poster Is Finally Here**

As we reported in our January edition, the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) was recently amended to add, among other things, a notice requirement, administered by the federal Department of Labor (“DOL”). 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 or, according to DOL, by e-mailing or handing out to employees.

DOL also has promulgated a new interim final rule regarding the notice requirement, and also now has a poster available for downloading from its website. This information including the poster is available on the DOL website at <http://www.dol.gov/vets/programs/userra>.

## **FLSA/FMLA Cases**

### **1<sup>st</sup> Circuit Holds That Pharmacists Are Professional Employees**

In what is apparently the first federal appeals court case addressing the issue, in *De Jesus-Rentas v. Baxter Pharmacy Services Corporation*, 400 F.3d 72 (1<sup>st</sup> Cir., 3/9/05), the 1<sup>st</sup> Circuit Court of Appeals in Boston has ruled that pharmacists employed by the Defendant drug manufacturer/distributor are professional employees under the Fair Labor Standards Act (“FLSA”) and thus not entitled to overtime (if paid “on a salary basis”). The Plaintiff pharmacists argued that, while they did satisfy the education requirement of being a professional employee under the FLSA, they were not “professionals” because their work did not require the consistent exercise of discretion and judgment, mostly because they were required to follow the employer’s standard operating procedures (“SOPs”). The District Court found that the Plaintiffs were professional employees, and the 1<sup>st</sup> Circuit affirmed.

The Court found that the Plaintiffs consistently exercised discretion and judgment in performance of their jobs, and thus were professionals exempt from the overtime-pay provisions of the FLSA, even though they were bound to follow the employer's standard operating procedures (“SOPs”). The Plaintiffs evaluated the safety and propriety of prescriptions for particular patients and were responsible for contacting the prescribing physician to discuss possible modifications if they considered the prescription contraindicated, they spent a significant portion of their time supervising other employees while not being subject to close supervision themselves, they could depart from SOPs if necessary to fulfill their ultimate duty to patient health, and they were consulted on the SOPs. And even apart from the SOPs, the Court found that the Plaintiffs “[w]ith little supervision [] use their specialized knowledge to make numerous discretionary decisions including how to follow up with a physician over a questionable prescription; when a drug should not be dispensed because of a potential danger to the patient; and how to assign, supervise, and review the work of the technicians.”

Thus the pharmacists did exercise independent discretion and judgment in their job, and they were professional employees exempt from overtime.

We do caution, however, that titles and classifications in and of themselves do not make for an exemption. An employee classified by the employer as a professional still has to be doing professional work, including the use of discretion and independent judgment on the job. A pharmacist who actually does only pharmacy technician work is not going to qualify for the professional exemption.

## **In The Public Sector**

### **Some Of The Ins And Outs Of G.L. c. 41, §111F Leave**

In *Patterson v. Tortolano*, 2005 WL 602364 (D.Mass., 3/14/05), in 1983 the Plaintiff City of Woburn firefighter injured his back on the job and since then suffered from recurring back problems and was in and out of work on G.L. c. 41, sec. 111F leave. On August 18, 2004, Plaintiff was forced to take injury leave again. While on leave he continued receiving his pay from the City. On September 9, 2004, the Plaintiff's physician cleared Plaintiff for light duty work. Expecting a letter from the Fire Chief, Plaintiff waited before returning to work. On September 25, 2004, with no prior notice or opportunity to explain his absence, the City terminated Plaintiff's employment and discontinued his injury leave, but did not inform him of his termination until September 30, 2004. Plaintiff's first hearing before the City was held on October 18, 2004. After settlement discussions, the City reinstated Plaintiff to his limited-duty employment effective November 1, 2004. The City, however, refused to pay Plaintiff's salary from September 25, 2004 to November 1, 2004. Plaintiff sued the City and the Chief, and claimed that he had been fired and his injury leave benefits terminated with no pre-deprivation notice or opportunity to be heard in violation of his right to due process of law under the Fourteenth Amendment.

Judge Tauro in the federal District Court for Massachusetts, split the baby. The Court found that the Woburn Municipal Code provided a permanent employee with a right to a pre-termination hearing, and despite the City's claim that the Plaintiff had voluntarily resigned because he did not return for light duty work, the Court ruled that since no one from the City ever contacted the Plaintiff about any return to work, he did not voluntarily resign and he retained his property interest in continued employment. Thus the Court found for the Plaintiff with respect to his claim of an unlawful termination. However, the Court also found that the City had lawfully terminated the Plaintiff's injury leave benefits because he had been cleared to return to work, albeit light duty, because the City had light duty work for the Plaintiff to perform. Even though the City never contacted the Plaintiff to return to light duty work, given his lengthy history of his benefits terminating when cleared for light duty work, he was on notice that those benefits would cease. Thus Plaintiff had sufficient notice that his benefits would be terminated, and there was no constitutional violation.

## **On The Employee Benefits Front**

### **Plan Lacked "Reservation Of Rights" Clause, So "Lifetime" Benefit Claim Could Go Forward**

In *Bland v. Fiatallis North America, Inc.*, 2005 WL 590074 (7<sup>th</sup> Cir., 3/15/05), Plaintiffs

were former retired salaried and hourly employees of Fiatallis North America, Inc., who retired in the late 1970s through 1988 and their surviving spouses. Most were at least eighty years of age and presumably on fixed incomes. Before or upon their retirement, each of the Plaintiffs received summary plan descriptions ("SPDs") that described the medical and dental benefits that they would receive and that allegedly contained explicit promises that retirees and their spouses would continue to receive these benefits at little or no cost until their death. Late in 2000, however, the Plaintiffs received plan documents containing new benefit descriptions, which stated that costs for medical and dental coverage would dramatically increase as of February 1, 2001 and warned that benefits could be modified even after retirement. The Plaintiffs sued under ERISA, claiming that their plan benefits had "vested" and were thus unalterable. The District Court ruled in favor of the Defendant, and the Plaintiffs appealed.

The 7<sup>th</sup> Circuit Court of Appeals reversed. As the Court noted, generally upon vesting, benefits become forever unalterable, and because employers are not legally required to vest benefits, the intention to vest must be found in clear and express language in plan documents. "Lifetime" language contained in the SPDs was ambiguous as to whether some or all of the retiree benefits vested, which defeated the usual presumption against the vesting of welfare benefits. As the Court wrote, "[u]nlike previous cases, where the interpretation of explicit 'lifetime' language was constrained by reservation of rights clauses allowing an employer to modify or terminate retiree welfare benefits, the plan documents at issue here contain no such limiting language. Accordingly, we find that the 'lifetime' language, as used here, is ambiguous as to vesting, and so we reverse the grant of summary judgment to the defendant and remand this case for further proceedings."

The moral here, obviously, is always to include a reservation rights clause in your plan.

### **Trustees Breached Fiduciary Duty By Terminating Employer For Union Organizing Goals**

In *Duer Construction Company v. Tri-County Building Trades Health Fund*, 2005 WL 406347 (6<sup>th</sup> Cir., 2/18/05), the Fund was a multi-employer health fund and Duer was a contributing employer. Both union and non-union employers could participate in the Fund, and Duer was not a union shop. However, the Laborers and Bricklayers unions were attempting to organize Duer. In April, 2003, the Fund's Trustees voted to terminate Duer from the Fund. Duer sued in federal District Court, claiming, among other things, that the Trustees breached their fiduciary duties under ERISA. The District Court found that the Fund and the trustees breached their fiduciary duties under ERISA because they acted in the interest of the Laborers and Bricklayers unions, not in the interest of the bricklayers employed by Duer. The District Court thus granted a permanent injunction preventing the Fund from terminating Duer as a contributing employer and its bricklayers as participants.

On the Fund's appeal, the 6<sup>th</sup> Circuit affirmed. The Court reviewed fiduciary law, writing that "[t]he duties charged to an ERISA fiduciary are the highest known to the law," and noted that the Supreme Court "has remarked that an audit request by a plan would be illegitimate under the standard of loyalty if it were in reality an effort by plan trustees 'to acquire information about the employers to advance union goals.'" The Court also noted that the District Court's factual findings were that the Trustees voted to terminate Duer because it was not a party to a collective bargaining agreement ("CBA"), but that each Trustee would not have so voted had the company been party to a CBA. Thus the only reason Duer was terminated was because it was not party to a CBA. Thus, the Court ruled, "the district court's fact finding that the Trustees

acted ‘in the interests of the Laborers and Bricklayers unions,’ supports its legal conclusion that Tri-County breached its fiduciary duties under § 1104(a) to act ‘solely in the interest of’ and ‘for the exclusive purpose’ of providing benefits to participants and beneficiaries.”

Thus the Court affirmed the District Court’s decision and issuance of a permanent injunction barring the Fund from terminating Duer from the Fund.

### **Claim Alleging Breach Of Fiduciary Duty By Overcharging For Insurance Benefits Can Go Forward**

In *Toussaint v. JJ Weiser & Co.*, 2005 WL 356834 (S.D.N.Y., 2/13/05), Plaintiffs were participants in a health benefits plan open to members of the Transport Workers Union Retirees Association ("Retirees Association"), which is composed of retired employees of the New York Metropolitan Transit Authority ("MTA") who were members of Transport Workers Union, Local 100 ("Local 100"). The Defendants were JJ Weiser ("Weiser"), an insurance brokerage firm that helped issue the Plan to the Retirees Association, former and current officers of Weiser, and two former directors of the Retirees Association. Plaintiffs claimed that defendants "grossly overcharged the Plaintiffs for insurance benefits provided" through the Plan, in violation of their fiduciary duty under ERISA, and basically that “the benefits offered under the Policy were not proportional to the premiums charged.”

First the Court ruled that the Defendants might be fiduciaries, but that there was not sufficient evidence before the Court to determine that one way or another. Since at this early stage of the litigation the allegations of the Complaint are assumed to be true, the Court reserved that issue for later decision. Then the Court ruled that “upon a liberal reading of the Complaint,” the Defendants may be found to have breached their fiduciary duty to Plaintiffs under ERISA by failing to fulfill duties of care, disclosure, and loyalty. In particular, the Plaintiffs alleged that the Defendants breached their fiduciary obligations to act in the best interests of the Plan and its participants and beneficiaries, in violation of ERISA Section 1104, by charging grossly excessive premiums and failing to disclose to Plaintiffs the amounts of benefits paid out and expenses incurred by Defendants in administering the Policy. Thus, the Court ruled, Plaintiffs “may proceed with their ERISA claims under a theory that defendants breached fiduciary duties of loyalty, care, and disclosure.”

## **On The Labor Front**

### **Union On Hook For Hostile Work Environment**

In *Eliserio v. United Steelworkers of America, Local 310*, 2005 WL 425397 (8<sup>th</sup> Cir., 2/24/05), the Plaintiff was a Hispanic male who had resigned from the union after crossing a picket line during a strike against the employer, was then demoted and reinstated by the employer, and then cited stress from graffiti and other continual racial harassment at work by union supporters as reason for his subsequent departure from the employer. He then filed hostile work environment and retaliation claims under Title VII against the union and its divisional chairman. The District Court granted summary judgment for the union, and the Plaintiff appealed.

On appeal, the 8<sup>th</sup> Circuit Court of Appeals reversed and remanded the case for trial. The Court held that a genuine issue of material fact existed as to whether the union's goal in issuing "No Rat" stickers to employees was to demonstrate union support for a discriminatory graffiti campaign against the Plaintiff, which precluded summary judgment on the Plaintiff’s hostile

work environment claim. The Court found that although the union contended that the stickers were part of a time-honored tradition of encouraging union members not to snitch on each other for petty misbehavior, the union official who had purchased and distributed the stickers was well aware of graffiti combining the term "Rat" with the Plaintiff's name, drawings of rats, and derisive references to the Plaintiff's Hispanic heritage.

The Court also ruled that a request by a union official for the employer to somehow get the Plaintiff out of the area for complaining about union-initiated racial harassment was a "meaningful adverse action" needed to support the Plaintiff's prima facie case of retaliation under Title VII. The Court noted that while a union has no affirmative duty under Title VII to investigate and take steps to remedy employer discrimination, a union itself may be held liable under Title VII if the union itself instigated or actively supported the discriminatory acts.

Thus the Court remanded the case back to the District Court for trial.

## **Did You Know . . . ?**

That April's Molecule of the Month is Serotonin, "A Molecule of Happiness." "One role of this 'wonder drug' is as a neurotransmitter, allowing numerous functions in the human body including the control of appetite, sleep, memory and learning, temperature regulation, mood, behavior, cardiovascular function, muscle contraction, endocrine regulation and depression."

That April's flower is the Daisy, and its birthstone is the Diamond?

That April is National Poetry Month, (and also, at least according to T.S. Eliot, "the cruellest month"), Cancer Control Month, Humor Month, Alcohol Awareness Month, Panda Month, National Landscape Architecture Month, National Child Abuse Prevention Month, Internet Safety Month, National Autism Awareness Month, International Customer Loyalty Month and Stress Awareness Month?

"The first of April is the day we remember what we are the other 364 days of the year." Samuel Langhorne Clemens, (AKA Mark Twain).