Summer Edition, 2005

Mistake Of The Month - The Law Of Unintended Consequences

A new enforcement initiative by the U.S. Department of Labor, originally designed to enforce greater union compliance with the Labor-Management Reporting and Disclosure Act of 1959 (“LMRDA”), could significantly impact employers and Taft-Hartley trust funds as well. This new development will force employers to reconsider heretofore relatively common business practices, such as occasionally providing union officers and employees with meals and outings, as such practices are prohibited by the Labor Management Relations Act of 1947 (LMRA). Employers must disclose all such expenditures — of any “thing of value” — on form LM-10, which has been required by the LMRDA since its enactment in 1959, but largely unenforced.

While there are limited exceptions, the phrase “thing of value” has been interpreted broadly, including cash, in-kind contributions, reimbursed expenses, meals, entertainment, and the like. Moreover, employers may not make such payments to union officials, regardless of whether the union actually represents the employer’s workers.

On July 15, 2005, the Department of Labor indicated that it will provide guidance regarding the LM-10 to employers “in the near future,” which of course we have yet to see as of this writing. The Department further indicated that it will provide a grace period for employers to file the LM-10 for 2004 (normally due within 90 days of the close of the fiscal year). The Department says it will not take enforcement action against those who file within this grace period, even if they have not previously filed the LM-10 as required.

This was an initiative originally developed by the current administration in an effort to promote accountability for union spending by enhancing the forms unions must file. As it turns out, DOL is applying the same scrutiny to something it has practically never scrutinized before, that is, the analogous employer reports required by the LMRDA. These reports require listing virtually every nickel spent for a union save for some few and very narrow exceptions under the LMRA. What’s worse, the LMRA generally makes unlawful any payment to a union or union representative that is not exempt under Section 302 of the LMRA. So, the upshot is that the LMRDA requires employers to report to the DOL payments they have made that may be illegal under the LMRA. And there are civil and criminal penalties for violating either statute.

If you are an employer involved with a union or unions, or contribute to a Taft-Hartley Trust Fund, we strongly advise seeking legal counsel before making any reports to the DOL.

The Harshbarger Report

Court Orders 2 Executives Preliminarily Reinstated Under Sarbanes-Oxley

In *Bechtel v. Competitive Techs. Inc.,* 2005 WL 1138790 (D.Conn., 5/13/05), the Plaintiffs, two former vice-presidents of a technology company, alleged they were fired for complaining about corporate fraud in violation of the Sarbanes-Oxley Act (“Act”). The federal Secretary of Labor, acting through the Occupational Safety and Health Administration (“OSHA”) preliminarily determined that the Defendant company did violate the Act and ordered that the Plaintiffs be reinstated pending the outcome of the case. An OSHA Administrative Law Judge (“ALJ”) refused to delay the reinstatements, and so the Plaintiffs went to federal District

Court seeking a court order affirming their preliminary reinstatement.

The Court found that under the Act, preliminary reinstatement is mandatory once the Secretary of Labor has ordered it, unless an ALJ grants an employer's motion for a stay of the reinstatement, which the ALJ in this case refused to do, despite objections filed by the company with the ALJ. Thus the Court ordered the company to preliminarily reinstate the two vice-presidents pending the outcome of the company's appeal to the ALJ on the merits of the case.

Hertz Ordered To Reinstate Alleged Whistleblower

According to the May 2, 2005, edition of the Daily Labor Report (DLR No. 83, May 2, 2005), the Occupational Safety and Health Administration ("OSHA") has ordered Hertz Corporation ("Hertz") to rehire an employee and pay her more than $154,000 in legal fees, backpay and interest. OSHA found that the employee was fired in violation of the Sarbanes-Oxley Act of 2002 (SOX), because of her whistleblowing activities. Linda Kimble, a lead auto rental representative was fired August 30, 2003, after she had complained to her supervisors about illegal billing practices, including selling insurance to clients who had purchased long-term monthly rentals even though the insurance was already included in the rental contracts. Thus OSHA ordered Hertz to (1) reinstate Kimble to her former position; (2) remove any disciplinary letters from her personnel file; and (3) reimburse her a total of $154,364.31 in backpay with interest, attorney's fees and compensatory damages. Both the company and Kimble have 30 days from the date of the order to file objections and request a hearing on the case with the Labor Department's Office of Administrative Law Judges.

OTHER EMPLOYMENT LAW HEADLINES

In Massachusetts, SJC Decides Discrimination RIF Standard

In *Sullivan v. Liberty Mutual Insurance Co.*, 444 Mass. 34 (4/15/05), the Plaintiff was an attorney representing the company's insureds. There was a reduction in force ("RIF") in which the Plaintiff, along with five other attorneys, was laid off. Three of the attorneys who were laid off, including the Plaintiff, worked in the Boston office, two were from the Bedford office, and one was from the Worcester office. Three of the six attorneys terminated were women. Five of the six were over forty years of age; the sixth was thirty-eight years old. At the time of her layoff, Plaintiff was forty-nine years old. Her cases were transferred to six other attorneys, five of whom were men, all of whom were substantially younger than the Plaintiff. While Plaintiff's performance evaluations were generally positive, they were not the highest when compared to other attorneys in the Boston office, and beginning as early as 1992, the company Liberty had noted some concerns with Plaintiff's "lack of responsiveness to clients, and, later, her 'collegiality' and 'human relations skills,' especially concerning her interactions with clerical staff." The Plaintiff then sued for sex and age discrimination in Massachusetts Superior Court. The Superior Court entered summary judgment in favor of the company, and the Plaintiff appealed. The Massachusetts Supreme Judicial Court ("SJC") took the case on its own initiative.

The SJC noted that a Plaintiff's *prima facie* case consists of producing evidence on four elements: that she is a member of a class protected by the state anti-discrimination statute; she performed her job at an acceptable level; she was terminated; and her employer sought to fill her position by hiring another individual with qualifications similar to hers. However, the Court

wrote, the fourth element is "nonsensical" in the context of a RIF since by definition there is no position to fill. Thus "[t]his case presents our first opportunity to consider how the fourth element of the prima facie case must be varied so that a plaintiff who is laid off (or otherwise harmed) during a reduction in force may establish a prima facie case of unlawful discrimination."

After a lot of discussion and review of cases from other jurisdictions, the Court settled on the following standard in discrimination cases resulting from a RIF: ". . . consistent with the purpose of the *prima facie* case, and joining the majority of other jurisdictions, we conclude that a plaintiff in a reduction in force case may satisfy the fourth element of her *prima facie* case by producing some evidence that her layoff occurred in circumstances that would raise a reasonable inference of unlawful discrimination." Helpfully (or not, as the case may be), the Court added two observations: "the plaintiff's initial burden of establishing a prima facie case is not intended to be onerous, " and "[s]econd, in almost all such cases, as in this case, summary judgment follows discovery, during which the employer would have disclosed its reason for selecting a particular plaintiff for 'reduction,' i.e., discharge from the work force. As noted by the United States Court of Appeals for the Sixth Circuit, a plaintiff who 'was truly singled out for discharge' because of membership in a protected class 'should be able to develop enough evidence through the discovery process or otherwise to establish a prima facie case.' . . . . It is not onerous to require a plaintiff who has had the benefit of discovery to produce some evidence that the decision to lay her off (rather than some other employee) occurred in circumstances that raise an inference of unlawful discrimination. In this case for example, Sullivan established through discovery that some of the attorneys retained by Liberty in its Boston office had been assigned a lower rating than she had in their performance evaluations. That a terminated plaintiff has been ranked or evaluated above a younger or male coworker working in the same position who is not laid off is precisely the kind of indirect evidence of discriminatory intent that discovery elicits, which will permit a plaintiff to establish a *prima facie* case."

Applying this standard to the Plaintiff's case, the SJC determined that she had extablished a *prima facie* case of both sex and age discrimination, for the same reasons. That is, the company's retention of younger, male and lower rated attorneys, according to the Court, "would permit a jury reasonably to conclude that Liberty's termination of Sullivan, 'if otherwise unexplained, [is] more likely than not based on the consideration of impermissible factors.'"

The burden then was on the company to articulate a legitimate non-discriminatory reason for laying off the Plaintiff rather than younger, male and lower rated attorneys. The Court determined that the company explained the reasons for the layoff, and specifically noted that the company was under no obligation to lay off the lowest rated employees. The Court thus wrote that "[w]e agree with the motion judge who concluded that Liberty articulated a credible nondiscriminatory reason for its choice to terminate Sullivan 'by demonstrating that it was engaged in a legitimate reduction in force and chose Sullivan to be terminated on the basis of a history of sub-par performance evaluations combined with recent serious complaints from clients regarding her handling of cases.' . . . . 'we agree with the motion judge who concluded that Sullivan has not established with credible evidence that Liberty's proffered reasons for her layoff were merely a pretext for a true intent of sex discrimination. We also conclude that Sullivan has failed to make a sufficient showing with respect to her age discrimination claims.'"

Thus the Court affirmed the Superior Court's grant of summary judgment in favor of the company.

The *Jespersen* Case Is Back

In a case reported in our February/March, 2005 issue, *Jespersen v. Harrah's Operating Co*., 392 F.3d 1076 (9th Cir., 2004), a divided 3-judge panel of the 9th Circuit Court of Appeals had ruled that an employer policy which required women to wear makeup but allegedly did not impose analogous burdens on male employees was lawful because the Plaintiff had failed to demonstrate that the policy actually did impose more stringent and onerous requirements on female bartenders. This case received a considerable amount of press play because of the media's misunderstanding that the case means that employers may impose more burdensome appearance standards on females. That is not what the Court ruled.

In any event, on May 13, 2005, the full 9th Circuit Court of Appeals, sitting *en banc*, agreed to rehear the case. This action vacates the prior Court decision. We will keep you advised.

"Single, Attractive Male" Has No Discrimination Claim

In *Blitzer v. Potter*, 2005 WL 1107064 (S.D.N.Y., 5/6/05), an applicant for a letter carrier job claimed that the U.S. Postal Service discriminated against him because of his status as a "single, attractive male." While the fact pattern is lengthy and detailed, the Court described the Plaintiff 's allegations in the case as: "[s]ince his teenage years, Blitzer has been unable to obtain or maintain employment both because of his 'status as an attractive male' and because of societal discrimination against unmarried men, who are perceived as less responsible than their married counterparts and who bear the brunt of married coworkers' 'jealousy and resentment' due to 'their perceived freedom.'" The Court also described the following encounter during the Plaintiff's interview process:

> Blitzer, along with the other applicants, was then introduced to Velazquez, who, to Blitzer's "amaze[ment]," was "wearing a rather short skirt" for a person in authority. According to Blitzer's own complaint, he "moved his upper torso to get a look" of Velazquez's skirt, due to "[t]he normal male reaction at seeing a scantily clad female." Velazquez's attire also aroused Blitzer's fear that she would catch him looking at her legs and that he would suffer in the application process as a result. Indeed, upon noticing Blitzer staring at her, Velazquez "began laughing hysterically" and walked away. Blitzer believes that she shared this interaction with the other hiring officers with the intention of ensuring that Blitzer would not be hired; he does not allege, however, that she actually did so.

Finally, the Court wrote that during a later follow-up telephone conversation, "Blitzer then inquired as to whether he had been disqualified, which Ashe answered in the negative while instructing Blitzer to be patient. At this point, Blitzer heard a third party, whom he believes to have been Velazquez, shout, 'No pretty boys!'"

The Court recognized that under certain circumstances a single male could pursue a "sex-plus" claim of unlawful discrimination under Title VII where a prospective employer has engaged in sexual stereotyping based on an applicant's gender plus another factor, including marital status or physical attractiveness. Here, however, the Plaintiff provided no proof whatever that his perceived physical attractiveness was a factor in his not being hired or that similarly situated married or unattractive males had been treated differently. Even if he had produced such proof, continued the Court, the Post Office had articulated a legitimate

nondiscriminatory reason for failing to hire him, his unstable work history, which he freely admitted. Thus the Court entered summary judgment on behalf of the Postal Service.

Job Performance Does Play Out In Disability Analysis

In *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852 (7th Cir., 5/11/05), a blind employee claimed that his careless behavior and poor attitude we not relevant in determining whether or not he was a "qualified individual with a disability" capable of performing the essential functions of his general laborer position under the Americans With Disabilities Act (ADA"). The Plaintiff was legally blind and was fired during his 90 day probationary period after a series of incidents. After a bench trial, the District Court determined that Plaintiff was not a qualified individual with a disability because he failed to show he was capable of performing the essential functions of the job, with or without reasonable accommodation, and his work difficulties were not the result of his blindness but his poor attitude and the danger he posed to himself and his co-workers.

The Plaintiff appealed to the 7th Circuit Court of Appeals, and argued that "this so-called 'non-disability-related evidence' of an individual's inability to perform up to an employer's expectations should not factor into the determination of whether or not an individual is a 'qualified individual with a disability.'" The Appeals Court disagreed. The Court wrote that "an employer [] is certainly entitled to expect its workers, disabled or otherwise, to use care and caution in the workplace and to adhere to factory-wide safety policies and requirements . . . act responsibly and comply with work rules and policies, and maintain production pace and quality-control standards. Evidence that Hammel did not do so was relevant to whether he was a 'qualified individual,'" and thus the employer "was certainly justified in discharging him based solely on his behavior and attitude, without regard to his disability."

8 Discriminatory Incidents Over 5 Years Not A Hostile Work Environment

In *Bourini v. Bridgestone/Firestone North America Tire*, 2005 WL 712881 (6th Cir., 3/30/05), the Plaintiff, a recent immigrant, alleged a pattern of discriminatory treatment he claimed constituted a hostile work environment under Title VII, and pointed to eight alleged incidents of harassment. These incidents included an unnamed co-employee saying "Steve, I don't want to go outside and see your camel tied to my wheels"; another employee called the Plaintiff a "camel jockey," for which he was counseled and the two ended up being "good friends"; another incident allegedly involved another employee attempting to run over the Plaintiff with a forklift, which the employee denied. Plaintiff also pointed to two statements shortly after September 11, 2001, made by yet another co-worker that (1), "If it were up to [me], they would put him back--put him in a box and send [him] back to [his] country"; and the next day the same employee allegedly said "[I]f you'd get the sand out of your ears you'll hear me better." Because of a lack of evidence the employee was not disciplined, though he was reminded of the company's anti-harassment policy. After filing an EEOC complaint for religious and national origin hostile work environments, the Plaintiff alleged four other more or less similar retaliatory incidents.

As the Court noted, under Title VII a plaintiff establishes a prima facie case of hostile work environment based on race or religion by demonstrating the following five elements: (1) that he was a member of a protected class; (2) that he was subjected to unwelcomed racial and/or

religious harassment; (3) that the harassment was based on race or religion; (4) that the harassment had the effect of unreasonably interfering with the plaintiff's work performance by creating an intimidating, hostile, or offensive work environment; and (5) that the employer was liable for the harassment.

Here, the Appeals Court agreed with the District Court that the Plaintiff had been unable to show element number four. A hostile work environment occurs "[w]hen 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." The Court ruled that the incidents were not sufficiently pervasive to establish an abusive working environment. The eight alleged incidents were spread out over a period of five years, starting in 1998 and ending in 2003. The Court wrote that "[t]hese relatively infrequent and isolated incidents are thus insufficient to constitute discriminatory changes in the terms and conditions of employment." The Court also ruled that "while several of the incidents were offensive and highly inappropriate, the incidents collectively do not arise to the 'threatening' or 'humiliating' level of severe conduct required to create an objectively hostile or abusive work environment under Title VII, especially in light of their infrequency."

Finally, the Court also noted that in any event the Plaintiff had been unable to establish that the company was liable for the harassment. In order to hold an employer directly liable in this context, the plaintiff must show "that the employer knew or should have known of the conduct, and that its response manifested indifference or unreasonableness." Here there was no such evidence offered. Thus the Court affirmed the District Court's summary judgment in favor of the company.

Being "Set Up To Fail" Satisfies *Prima Facie* "Causation" Analysis In Retaliation Case

In *Hall v. Eastman Chemical Co.*, 2005 WL 705775 (6th Cir., 3/28/05), the Plaintiff was a "baler technician," whose principal job was to cut bales of product at designated times. In July 1999, she was put on a development and coaching plan and was warned not to have any more absences. In 2000, her position was outsourced, but all balers were encouraged apply for a higher position. Plaintiff took and passed the required test. However, when a supervisor reviewed her file, he was alarmed at her absences and placed her on Awareness Warning, the first level of progressive discipline. The Plaintiff then complained that she had been sexually harassed between 1996 and 1998 by a customer who made periodic visits to the plant. An initial investigation uncovered no wrongdoing; however, after Plaintiff disclosed incriminating audio tapes, the company performed a second investigation which confirmed her allegations. Plaintiff then was assured that the company would correct the problem.

In January 2001, Plaintiff failed to cut three bales of product on time, and she was placed on Final Warning. A few months later, she was allegedly threatened by a co-worker, suffered a panic attack, and needed to take medical leave. Upon her return, a company physician noted that Plaintiff might be a danger to others, so the company assigned her to a painting job she could do alone. Shortly thereafter, she obtained a note from her own psychiatrist clearing her of all work restrictions.In June 2001, Plaintiff was assigned to a different job, had difficulty in this new position and needed significant help from coworkers because she could not troubleshoot or fix broken machines. Because of these problems, a disciplinary board recommended her dismissal. This board invited Plaintiff to submit a written statement but did not allow her to present

witnesses on her behalf. The board terminated Plaintiff, in part, because of a defective bale that was allegedly delivered to a customer and returned to the company.

Plaintiff then sued for disability discrimination and retaliation. The company moved for summary judgment, which the District Court granted in its entirety. The Court reasoned that the Plaintiff could not show that her complaints of discrimination had caused her discharge because her discharge was more than 9 months after her complaints.

On appeal to the 6th Circuit Court of Appeals, the only issue was the retaliation claim. The Court reversed and remanded the case back to the District Court on this issue. While the Court noted that if “a lengthy period of time elapses between the plaintiff's complaint and her adverse employment action, the inference of causation is weakened,” and that “temporal proximity alone is insufficient to establish causation,” nevertheless the Court ruled that there was other evidence from which a reasonable juror could find causation. Here, the Plaintiff argued, and offered evidence, that the company “set her up to fail"; that the company initially determined that her allegations of sexual harassment were untrue; that the company did not allow Plaintiff to present witnesses at her termination meeting; that the company did not follow proper procedures when it claimed that Hall had shipped a defective bale to a customer; and that the Plaintiff was assigned to a job without proper training.

The Court focused on the last claim and ruled that the Plaintiff had shown, at least at this stage of the case, that she had been assigned to a more difficult job but not provided the proper training. This was, wrote the Court “evidence of being ‘set up to fail’ because she was allegedly assigned a job without proper training. This evidence, combined with the evidence stated above is sufficient to set forth a *prima facie* case of retaliation.”

Thus the Court remanded the case to the District Court.

At The Supreme Court

Supreme Court Accepts Title VII Jurisdictional Case

In *Arbaugh v. Y & H Corp.*, 380 F.3d 219 (5th Cir., 2004), a bartender/waitress won a $40,000 sexual harassment verdict against her employer. Only after the verdict, however, did the employer claim that it did not have enough employees to subject it to federal court jurisdiction under Title VII of the 1964 Civil Rights Act. It argued that delivery drivers, owners and the owners’ wives were not “employees” for purposes of Title VII, and if those people were not counted then the employer did not have the requisite 15 employees to subject itself to Title VII liability.

The District Court agreed, and set aside the verdict. It reasoned that as a general rule the subject matter jurisdiction of the federal courts is an issue that can be raised at any time, since if a Court does not have proper jurisdiction of a case then any action it takes is void. Thus the District Court ruled that the Plaintiff's failure to qualify the Defendant as an "employer" under Title VII deprives the federal courts of subject matter jurisdiction.

In August, 2004, the 5th Circuit Court of Appeals agreed with the District Court that the 15-employee requirement is a jurisdictional issue that can be raised at any time, even after entry of judgment, and not an attack on the merits of the claim that can be waived by failure to raise the defense in a timely fashion.

On May 16, 2005, the U.S. Supreme Court agreed to consider this case and to determine

whether or not the $40,000 verdict was properly overturned when the employer submitted post-judgment evidence that it had too few employees to be covered by Title VII. The case likely will be argued sometime in Fall, 2005, with a decision likely to issue some months later.

Legislative/Regulatory Actions Of Note

35,000 New H-2B Exemption Visas Available

On May 25, 2005, the Department of Homeland Security ("DHS") will begin accepting applications for employers seeking seasonal, low-skilled foreign workers for current job openings under the H-2B visas program. This action gives effect a new immigration statute exempts from the 66,000 annual cap foreign workers who have used the H-2B program in the past three years and returned to their home countries when their visas expired. According to the DHS, the new exemption for returning workers is retroactive for applications made in the current fiscal year, which means that there are an additional 35,000 visas available immediately for summer seasonal workers who have not previously used the H-2B program.

Special H-1B Visa Slots Still Available

According to the Department of Homeland Security ("DHS"), as of May 20, 2005, more than 13,000 H-1B visa slots remain available this fiscal year for employers seeking highly skilled foreign workers if those workers have at least a master's degree from a U.S. academic institution.

Last year Congress passed, and President Bush signed, a new law adding 20,000 visas to the H-1B total, but only for workers with advanced degrees from U.S. academic institutions.

Anti-Cutback Relief Guidance Published

On April 18, 2005, the United States Treasury Department and Internal Revenue Service published guidance on relief from anti-cutback rules for multi-employer plan sponsors that amended certain suspension of benefits provisions. Revenue Procedure 2005-23 purports to limit the retroactive application of the United States Supreme Court's 2004 decision in the case of *Central Laborers' Pension Fund v. Heinz,* 124 S. Ct. 2230 (2004). As we reported in our July, 2004 issue, in *Heinz* the Supreme Court ruled that ERISA §204(g) bars a plan amendment from expanding the categories of post-retirement employment that trigger suspension of the payment of early retirement benefits if those benefits are already accrued. Thus the import of the Court's ruling is that such a limiting amendment cannot be imposed after a benefit had accrued and that the right to receive benefit payments on a certain date may not be limited by a more limited new condition.

In essence, the guidance requires that a plan adopt certain reforming amendments that would cure the ills outlined in *Heinz,* and if such curative amendment are adopted the IRS will provide relief from plan disqualification. "Examples to Illustrate Heinz Revenue Procedure Compliance" can be found at http://www.irs.gov/retirement/article/0,,id=137638,00.html.

FLSA/FMLA Cases

LMRA Does Not Preempt State Break Law

In *Valles v. Ivy HillCorp.*, 410 F.3d 1071 (9th Cir. 6/6/05), a group of employees sued their employer in state court for failing to provide them and other unionized employees with either a 30 minute uninterrupted meal period each five hours, or with an hour's pay in lieu of the break, as required by California state law. The Employer removed the case to federal court on the ground that the meal period claims were completely preempted by Section 301 of the Labor-Management Relations Act, which generally covers court cases alleging violations of private sector collective bargaining agreements ("CBA"). The employees moved to remand the case to state court, arguing that there was no preemption. The District Court agreed with the Employer and thus denied the employees' motion and granted summary judgment in favor of employer. The employees appealed.

The 9th Circuit Court of Appeals disagreed with the District Court. It ruled that employees' right to meal periods and penalties under California state law applied to employees covered by CBAs, and (2) the state-established right to meal periods and penalties were nonnegotiable rights and had not been (and could not be) waived in a CBA. The Court wrote that a claim brought in state court on the basis of a state-law right that is independent of rights under a CBA will not be preempted by §301 of the LMRA, even if a grievance arising from precisely the same set of facts could be pursued. Moreover, when the meaning of contract terms is not the subject of dispute, the bare fact that a CBA will be consulted in the course of state-law litigation does not require claim that the claim be preempted.

Thus the Court reversed and remanded the case to the District Court.

Claiming "Stress" Not Enough For FMLA Notice To Employer

In *Woods v. DaimlerChrysler*, 409 F.3d 984 (8th Cir. 6/7/05), on two occasions the Plaintiff employee had left the employer's plant during his shift without permission, and despite being given further opportunity to provide substantiation for his unauthorized absence, the Plaintiff failed to submit any verification to his employer that he had a serious health condition which would qualify him for FMLA leave. Instead, the Plaintiff offered vague statements that he was under stress and in one letter wrote that he had left work on April 20 in a "state that precluded rational consideration of other options" and that the "same state of mental and physical distress prompted [his] physician to immediately prescribe medical treatment combined with time away from the workplace upon seeing him as early as his schedule permitted on Monday, April 23, 2001." Despite being told that the company would be conducting an investigation into his unauthorized absences during his suspension, Plaintiff made no further attempt to substantiate his proffered excuse or to request FMLA leave. He never submitted a statement from a doctor identifying any type of medical treatment or physical or mental health condition which required his absence from work or made him unable to perform the functions of his job.

Plaintiff sued, claiming that from April 20, 2001 to May 7, 2001 he had suffered from a serious health condition making him unable to perform the functions of his position and that DaimlerChrysler's failure to restore him to his former position or its equivalent on May 7 violated FMLA. The Employer asserted that Woods had never requested FMLA leave, that he had not suffered from a serious health condition, and that he had produced no evidence that he was terminated for attempting to obtain FMLA leave.

The District Court ruled in favor of the Employer. The Court concluded that Plaintiff had failed to give the company adequate notice of a need for FMLA leave. He had never informed it of any medical problem and gave no indication that he was having a medical emergency before leaving on April 20. Despite having been warned about unauthorized absences after a prior incident, he made no attempt to contact the company during the weekend following his departure and failed to request leave at all.

The 8th Circuit agreed with the Employer and the District Court. It observed that a "claim under the FMLA cannot succeed unless the plaintiff can show that he gave his employer adequate and timely notice of his need for leave, and an employer has the right to request supporting information from the employee." The Court ruled that the Employer did not deny Woods FMLA leave or discharge him after his initial communications. Rather, the Employer repeatedly sought medical documentation which the Plaintiff failed to supply. The Court wrote that "[i]f he wanted FMLA leave, Woods had the responsibility to give notice 'as soon as both possible and practical' that a serious health condition caused his absence."

Thus the Court concluded that the Plaintiff failed "to make out a prima facie case under the FMLA and that he has failed to make a showing that he was discharged for requesting FMLA leave rather than for his employer's stated reason (absence from work on March 16 and April 20 without authorization . . . ." The Court affirmed the judgment in favor of the Employer.

No Strict Liability Under FMLA, At Least According To The 8th Circuit

In *Throneberry v. McGehee Desha County Hosp.*, 2005 WL 820313 (8th Cir., 4/11/05), the Plaintiff for years was a staff nurse with excellent reviews and increased responsibility. In 1998, after her father's death and her divorce, the Plaintiff's mental health gradually deteriorated and in summer of 1998 her mental and emotional problems came to a head at work. At trial, Plaintiff testified that "I know that I had difficulty concentrating.... I could not complete tasks.... I was depressed. I was having mood swings. I could cry about-I would cry about almost anything. I was upset." The acting Hospital administrator then met with the Plaintiff and recommended "she please take a month's leave of absence to get herself together and we would re-evaluate at the end of the month." Plaintiff agreed to take a month of paid medical leave to address her serious health condition. Nevertheless, Plaintiff continued to show up at work "acting just like she was before: over-medicated, antsy, [and] disrupting the work-their workplace." The administrator decided to offer Plaintiff the opportunity to resign since termination would mean a report to the state nursing board. Plaintiff refused to resign and went home, where she overdosed on Xanax and was hospitalized. She then sought to resign, signed a severance agreement and accepted benefits. After her resignation, coworkers discovered discrepancies in her work which ultimately required the employer to reimburse Medicaid approximately $40,000, for which the Hospital testified it would have fired the Plaintiff had it known.

Plaintiff then sued, claiming that she "would have continued [her] medical leave" if she had known she had been entitled to twelve weeks of FMLA leave. She alleged that the Hospital violated the FMLA by interfering with her FMLA rights, failing to reinstate her, and retaliating against her for taking FMLA leave. A jury found in favor of the Hospital on Plaintiff's reinstatement claim, and found that the Plaintiff would have been discharged regardless of her exercise of her FMLA rights. Plaintiff appealed to the 8th Circuit Court of Appeals.

On appeal, Plaintiff's essential claim was that the FMLA mandates strict liability for an employer whenever it interferes with an employee's FMLA rights. The Court rejected this claim, and held that "an employer who interferes with an employee's FMLA rights will not be liable if the employer can prove it would have made the same decision had the employee not exercised the employee's FMLA right." The Court noted that the FMLA specifically provides that an employee's restoration rights are limited, such that no employee taking FMLA leave is entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." As the Court wrote, "the FMLA's plain language and structure dictates that, if an employer were authorized to discharge an employee if the employee were not on FMLA leave, the FMLA does not shield an employee on FMLA leave from the same, lawful discharge." This interpretation also was consistent with the federal Department of Labor's interpretation of the FMLA, and with the one other Appeals Court case addressing the same issue. Thus the Appeals Court affirmed the District Court's judgment in favor of the Hospital.

Discipline For Violation Of Sick Leave Rule Committted During FMLA Leave OK

In *Callison v. Philadephia*, 128 Fed. Appx. 897 (3rd Cir. 4/19/05), Plaintiff was a maintenance technician who had perfect attendance in his first year of work. In about January 2000, Plaintiff was diagnosed with deep anxiety reaction and stress, caused by stress at home and at work. That year he used twenty-six, and the following year used twelve, days of sick leave. The City put Plaintiff on a Sick Abuse List on October 30, 2000. Employees on this list are required to obtain medical certification for all sick days and are subject to progressive penalties for violations of the sick leave policies. The employee manual provided that "During regular working hours, when an employee is home on sick leave, the employee must notify the appropriate authority or designee when leaving home and upon return." Plaintiff then took another sick day while on the Sick Abuse List, but never notified the Sick Control Hotline that he was leaving his home, and when an investigator telephoned his residence he was not there. For this he received a warning. Then Plaintiff was out on three months of approved FMLA leave. While he was out the City conducted additional investigations and found that Plaintiff was not home on two dates and had failed to notify the hotline, so he received a one and three day suspension, respectively, for his failures to notify the hotline that he was leaving his home. Plaintiff then sued the City, claiming that the City interfered with his FMLA rights. The District Court entered summary judgment on behalf of the City and Plaintiff appealed.

The 3rd Circuit noted that to show an employer has interfered with an employee's FMLA rights, a plaintiff only needs to show that he or she was entitled to benefits under the law and that the employer denied those benefits; it is not necessary to show that the employee was treated differently from co-workers, and the employer cannot justify its actions by establishing a legitimate business purpose. Since it was undisputed that the Plaintiff was entitled to FMLA benefits, the only question was whether the City interfered with this right by enforcing its sick leave policy. The Plaintiff claimed that once FMLA leave was granted, he should be "left alone." The Court disagreed, and ruled that "the call-in procedure does not serve as a prerequisite to entitlement of FMLA leave . . . . Rather, the procedure merely sets forth obligations of employees who are on leave, regardless of whether the leave is pursuant to the FMLA."

Finally, the Court specifically noted that "Nothing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse their leave." Thus the Court upheld the District Court and ruled that disciplining the Plaintiff for a violation of the employer's sick leave rules, uniformly applied to all employees, was lawful even if the employee was out on FMLA leave at the time.

In The Public Sector

Policy Of Not Rehiring Disability Pensioners Violates ADA

In *Knight v. The Metropolitan Government of Nashville and Davidson County, Tennessee*, 2005 WL 758239 (6th Cir., 4/4/05), the Plaintiff police officer injured his back and neck in a motorcycle accident in 1975. Following years of intermittent work thereafter with the employer and other entities, Plaintiff's doctor finally cleared him to return to the police force in 1999 with no restrictions. Plaintiff sought reinstatement but, for reasons in dispute, he was never rehired. He sued the County and claimed that the failure to reinstate him was a violation of the Americans with Disabilities Act ("ADA") because it was part of a department-wide unofficial policy of not rehiring disability pensioners. The case was tried to a jury, which found that the County regarded Plaintiff as disabled, that the County was aware that Plaintiff had a record of a disability, and that the County's proffered reasons for failing to rehire Plaintiff were pretextual. It awarded Plaintiff $150,000 in compensatory damages, and the judge awarded Plaintiff an additional $27,482 in back pay and ordered his reinstatement. The County appealed.

The 6th Circuit ruled in favor of the Plaintiff. The Court noted that Plaintiff's testimony regarding his work history was sufficient evidence for a jury to conclude that he was previously limited in the major life activity of working and that he therefore had a record of being disabled. The Court further agreed with the Plaintiff's claim that the County regarded him as disabled because it mistakenly believed that he had a limiting impairment, despite his doctor's clearance. Finally, the Court found that there was sufficient evidence that the County did in fact have an informal policy of refusing to rehire disability pensioners, even though they were authorized to return to work with no restrictions. Thus the Court held that Plaintiff had presented sufficient evidence from which a reasonable jury could have ruled in his favor, and upheld the damages judgment and the order of reinstatement.

On The Employee Benefits Front

Failure To Act On Claim In Timely Manner Earns De Novo Review And Waives Failure To Exhaust Administrative Remedies Defense

In *Nichols v. Prudential Insurance Co. Of America*, 406 F.3d 98 (2nd Cir. 4/21/05), Plaintiff was an auditor for a bank who applied for long-term disability benefits. Prudential started paying her benefits, then terminated them in December 2001 after reviewing her claim. Plaintiff appealed the termination of benefits on April 11, 2002. Prudential contacted her 67 days later on June 17, 2002, informing her it was reviewing her appeal and would contact her in 30 days. On July 1, 2002, Prudential requested that Plaintiff submit to an independent medical examination, which she refused to do. On July 25, 2002, Prudential informed Plaintiff it still

was reviewing the appeal, and requested further medical records. Nichols filed a lawsuit in the district court on Oct. 25, 2002, which was 197 days after she had filed her appeal.

In court Prudential argued that Plaintiff failed to exhaust her administrative remedies. She responded that she was not required to exhaust her administrative remedies because ERISA regulation 29 C.F.R. § 2560.503-1(h)(1)(i) requires that a benefits denial must be decided within 60 days of a participant's appeal, or 120 days if an extension is requested. The district court dismissed Plaintiff's claim without prejudice, finding that Prudential was in "substantial compliance" with the regulations because while Prudential technically did not comply with the letter of the regulation, Prudential exhibited good-faith efforts to gather new evidence and resolve Plaintiff's appeal, which she resisted.

On appeal, the 2nd Circuit overruled the District Court and held that "substantial compliance" does not apply to excuse a long-term disability benefit plan administrator's failure to comply with ERISA regulations. The Court wrote that since application of "substantial compliance" can delay accrual of the right to sue and would permit plan administrators to frustrate participants, "who are often in immediate need of benefits, with ongoing requests for information. Such a result would render the plain language of Section 2560.503-1(h)(1) a nullity."

Finally, the Court also ruled that a claim is deemed denied if not acted on within the 60 or 120 days, and that such a "deemed denied" claim is entitled to de novo review by the courts, meaning that rather than give the decision-maker deference, the court may view the evidence and make its own decision.

On The Labor Front

Rule Barring Complaining To Customers Ruled Unlawful By NLRB

In *Guardsmark, LLC*, 344 NLRB No. 97 (6/7/05), the Employer maintained a work rule that "forbids employees 'dissatisfied with any ... aspect of [their] employment' from 'register[ing] complaints with any representative of the client.'" The Employer had another work rule that "directed employees not to 'fraternize on duty or off duty, date[,] or become overly friendly with the client's employees or with co-employees.'" The General Counsel for the National Labor Relations Board ("Board") claimed that these rules violated Section 8(a)(1) of the National Labor Relations Act ("Act") because they would "chill" the right of employees to engage in protected activity. The case was tried to an Administrative Law Judge ("ALJ"), who ruled (1) that the first rule (complaining to clients) violated the Act because employees had a right to enlist the support of an employer's customers regarding complaints about their terms and conditions of employment; and (2) that the second rule (fraternization) was lawful because, read reasonably, it does not preclude employees from discussing the terms and conditions of their employment, but only applied to social conduct.

The Board agreed with the ALJ. As to the first rule, the Board wrote that "such a rule explicitly trenches upon the right of employees under Section 7 to enlist the support of an employer's clients or customers regarding complaints about terms and conditions of employment.In exceptions, the Respondent argues that its chain-of-command rule applies exclusively to on-duty conduct and is therefore a permissible regulation of employee conduct. We find no merit to the exception. By instructing employees to follow the chain of command

‘while on duty,’ the Respondent's rule arguably limits its prohibition on lodging complaints with employees outside the chain of command to working time only. However, its prohibition on discussing terms of employment with customers is not similarly time-limited. It is absolute– ‘[d]o not register complaints with any representative of the client.’" Thus the Board ruled that this rule violated the Act.

As to the second rule, the Board agreed with the ALJ that such a rule "does not on its face, or by reasonable implication, preclude activities protected by the Act." The General Counsel argued that employees reasonably would understand the rule to prohibit activity protected by Section 7, but the Board found “no merit” in this argument. It cited a prior case in which it had found lawful a work rule stating that "[e]mployees are not allowed to fraternize with hotel guests anywhere on hotel property", and found that there were no significant differences between the two rules. Thus the Board upheld the ALJ.

Harassment of Co-Workers Bars Unfair Labor Charge

In *Aramark Services, Inc.,* 344 N.L.R.B. No. 68, (4/29/05), a cashier at a food store was terminated after becoming involved in a dispute with co-workers over whether or not there should be an internal union negotiation to unseat a steward while contract negotiations with the employer were ongoing. The union filed a grievance while the cashier filed a charge with the National Labor Relations Board (“Board”). The Board deferred the charge pending the outcome of an arbitration. The arbitrator ruled that the cashier’s activity was unprotected under the National Labor Relations Act (“Act”) and that there was just cause for discipline, but that termination was too stiff a penalty in light of the cashier’s prior work record; he ordered the cashier reinstated, but with no backpay or benefits.

The Board’s Administrative Law Judge (“ALJ”), after hearing the case, refused to defer to the arbitrator’s decision and found that the cashier’s activity was protected under the Act, and that her conduct was not so egregious as to lose that protection. Thus he recommended to the Board that it find the employer liable for an unfair labor practice, reinstatement and backpay.

The Board, in a 2-1 decision, overruled the ALJ and dismissed the Complaint. The Board noted that “the line between protected and unprotected in this context is not a clear one” and that the arbitrator’s conclusions were not unreasonable. The Board found that the cashier’s harassing behavior removed her conduct from the protection of the Act because it was reasonable for the arbitrator to have found that her conduct went over that line, wherever that line is. Thus the Board held that the ALJ should have deferred to the arbitrator’s decision because it was not “repugnant” to the Act and should have dismissed the Complaint.

On The Other Hand . . .

In another case issued the same day, *Stanford New York LLC,* 344 N.L.R.B. No. 69 (4/29/05), a hotel maintenance engineer was told by his boss to inform a union organizer that he was a supervisor and thus ineligible to be in the bargaining unit, which apparently enraged the engineer. As the National Labor Relations Board (“Board”) described the subsequent scene:

> Kim (the boss) threatened Park (the engineer) in Korean that if he did not tell Lanci (the union representative) that he was a supervisor, he would be fired. Park called Kim a liar and a bitch and pointed his finger at him. Kim rose to leave, stating that he could not

> continue with the meeting. Park loudly called Kim a "f--ing son of a bitch" in English. An employee who had entered the breakroom overheard this remark. Kim again threatened Park with discharge, stating in Korean that he could fire Park at any time because he was a supervisor.

The Administrative Law Judge ("ALJ") had found that the engineer engaged in protected concerted activity when he met with the union representative and asserted his right to union representation and inclusion in the collective-bargaining unit, and the Board agreed. While the Board emphasized that it did not condone insubordination, the engineer "did not lose the protection of the Act because of his intemperate response while protesting [the general manager's] unlawful conduct."

Thus the Board upheld the ALJ and ordered the employer to reinstate the employee and reimburse him for lost pay and benefits.

Following Up On *Alexandria Clinic* - Board Upheld By 8th Circuit

As we reported in November, 2003, on the case of *Alexandria Clinic*, 339 NLRB No. 162 (8/21/03), the National Labor Relations Board ("Board") held that a union must begin picketing at the date and time in its Section 8(g) notice, and thus it was lawful for the employer to terminate 22 nurses who began a strike four hours after the time stated in the notice.

The Minnesota Licensed Practical Nurses Association appealed this decision, and on May 11, 2005, the 8th Circuit Court of Appeals upheld the Board and ruled that it was lawful for the employer to fire twenty-two nurses who began a strike four hours after the time designated in their required notice for engaging in an illegal strike, the Eighth Circuit rules. *Minnesota Licensed Practical Nurses Ass'n v. NLRB*, 406 F.3d 1020 (8th Cir. 5/11/05).

The Court wrote that the language of Section 8(g), requiring 10 days notice of a strike at a health care institution "unambiguously precludes unilateral extensions of the commencement of a strike." Thus the Board's interpretation of the language was rational and consistent with the statutory policy to protect patient health care. Thus the Court upheld the Board and the termination of the 22 nurses for engaging in an unlawful strike.

Following Up On *Anheuser-Busch, Inc.* - Split Decision For Board In D.C. Circuit Court

As we reported in September, 2004, in a somewhat curious decision, *Anheuser-Busch, Inc.*, 342 NLRB No. 49 (7/22/04), two members of a three member National Labor Relations Board panel agreed with the administrative law judge ("ALJ") and ruled that the Employer violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to notify and bargain with the Union prior to the installation and use of surveillance cameras in the workplace. But due to the Employer's installation of the cameras in work and break areas, 16 employees were disciplined for misconduct that the Employer observed solely through use of the cameras. A different panel majority agreed with the ALJ's decision not to revoke the discipline imposed on those 16 employees. They agreed with the ALJ's conclusion that the employees' misconduct was in violation of plant rules, and such conduct was the basis for the suspensions and termination.

The Employer appealed the camera part of the decision, and the Union appealed the discipline part of the order. In *Brewers and Maltsters, Local Union No. 6. v. NLRB*, 2005 WL 1560399 (D.C.Cir. 7/5/05), the Court upheld the Board's ruling that the installation of hidden videotape cameras was a mandatory subject of bargaining. But the Court agreed with the Union that the Board had failed to justify its refusal to grant make-whole relief given the Board's own precedent, which seemed to require such relief. Thus the Court ruled that "[b]ecause the Board failed to distinguish adequately its prior decisions that support ordering make-whole relief, a remand is necessary so the Board can apply, distinguish adequately, or overrule those precedents."

So we have yet to hear the last of this case.

Did You Know . . . ?

That the Molecules of the Month are:

May=British Anti-Lewisite, a chelating (to remove a heavy metal from the body) molecule that is used to treat heavy metal poisoning?

June=Dichlorodifluoroethane (Freon), the Chloro-Flouro Carbon refrigerant gas that damages the ozone layer?

July=Quinine, the anti-malarial drug that's found in gin and tonic?

August=Linezolid, one of the only new class of antibiotics developed in the last 40 years.

That May's flower is the Lily of the Valley, and its birthstone is the Emerald?

That May 3 is Lumpy Rug Day, May 7 is National Roast Leg of Lamb Day, May 9 is Lost Sock Memorial Day, May 11 is Twilight Zone Day, May 14 is National Dance Like a Chicken Day, May 25 is National Escargot Day, May 29 is End of the Middle Ages Day, May 30 is My Bucket's Got A Hole In It Day, and May 31 is National Macaroon Day.

That June's flower is the rose, and its birthstone is the pearl?

That June 2 is National Bubba Day, June 3 is Doughnut Day, the 4th is Give Your Dog A Bone Day, the 14th is Family History Day, the 16th is Recess at Work Day, the 18th is National Splurge Day, the 21st is Vegan World Day, the 22nd is Stupid Guy Thing Day and the 28th is Hand Shake Day.

That July's flower is the Water Lily, and its birthstone is the ruby?

That July was named after Julius Caesar? And that July 5th is Workaholics Day, the 7th is Chocolate Day, the 17th is Peach Ice Cream Day, the 20th is Lollipop Day, the the 26th is Groovy Chicken Day, the 28th is Hamburger Day, and the 31st is Jump For Jellybeans Day?

That August's flower is the Gladiolus, and its birthstone is the Peridot?

That August was named after Augustus Caesar? And that August 3 is Watermelon Day, the 8th

is Cheesecake Day, the 10th is Lazy Day, the 13th is Left-Handers Day, the 15th is Sit Back and Relax Day, the 17th is #2 Pencil Day, the 22nd is Be An Angel Day, the 23rd is Hug Your Sweetheart Day, the 25th is Kiss And Make Up Day and the 30th is Toasted Marshmallow Day?