

Summer, 2006

Mistake Of The Month

An Important Lesson For HR Reps

Curiosity and followup are critical for HR reps, as this case demonstrates. In *Howard v. Winter*, 446 F.3d 559 (4th Cir. 5/4/06), the Plaintiff was a civilian secretary in the Navy Air Systems Command making a claim of sexual harassment against a co-worker. She had reported to an HR specialist that, among other things, "this mother-f---r put his hands on me, and I don't like it." She admitted that she did not tell the HR specialist the specifics of the alleged incident, nor, apparently, did the HR specialist ask any followup questions. Instead, the HR specialist counseled her to write the harasser a telling him to stop, keep notes on any further incidents, and let him or someone else know if she was harassed again. The harassment continued, and then the Plaintiff told a co-worker, who then told two supervisors, who investigated and transferred the harasser away from the Plaintiff, even though the internal investigation did not substantiate the Plaintiff's claims.

The District Court dismissed her claim, and found that the Navy acted quickly once it was put on notice, and it did not act earlier because the Plaintiff failed to "give the employer adequate information to trigger the kinds of response [she was] requesting" when she had the conversation with the HR specialist.

The 4th Circuit Court of Appeals reversed in part. The Court wrote that "[w]hile a reasonable juror could find that [the HR specialist's] response to [the Plaintiff] was sufficient given the lack of details in her allegation, we believe a reasonable juror could also conclude otherwise At the very least, a juror could conclude that it was unreasonable ... to not ask follow-up questions in an effort to determine the exact way in which [the harasser] put his hands on [the Plaintiff]." The Court did agree with the District Court that once the Navy became officially aware of the Plaintiff's allegations some seven months later through the co-worker, it acted promptly and reasonably to end the harassment by transferring the harasser to a different floor. It concluded that the Navy's potential liability to the Plaintiff was cut off at that time.

The moral here, obviously, is to ask questions of someone who appears to be complaining about sexual harassment (or another other form of discrimination) so that you know exactly what you're responding to. In fairness it should be noted that the events of this case occurred in 1995-1996, basically the Stone Age of sexual harassment law, so recognition of the issue might not have been as high then as it probably would be today.

At The Supreme Court

Supreme Court Limits Public Employee Free Speech Rights

In a case we first reported in April, 2005, *Garcetti v. Ceballos*, 2006 WL 1458026 (5/30/06), the 9th Circuit Court of Appeals had ruled 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 Court had ruled that Ceballos' statements at the suppression hearing were "matters of public concern" and thus the DA did not have immunity. The Court wrote 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.

In a 5-4 decision, the Supreme Court reversed, and narrowed the scope of a public employee's ability to claim First Amendment protection. The Court held that public employees who make statements as part of their official job duties are not protected by the First Amendment and are not immune from being disciplined. Thus Ceballos' comments to his supervisor, and his testimony at the suppression hearing, were not protected free speech because the speech was part of Ceballos's job as a deputy district attorney. The Court wrote that "[w]e hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Justice Souter argued in dissent that although public employers have an interest in supervising employees and making sure decisions are carried out, when public employees act as whistleblowers there should be First Amendment protection.

Subrogation Claim Was "Equitable" Under ERISA

In *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S.Ct 1869 (5/15/06), the Sereboffs were beneficiaries under a health insurance plan administered by Mid Atlantic, which requires a beneficiary injured by a third party to reimburse Mid Atlantic for benefits it pays on account of those injuries, if the beneficiary recovers for those injuries from the third party. The Sereboffs were involved in an automobile accident and suffered injuries and the plan paid the couple's medical expenses. The Sereboffs secured a settlement from the third party driver, and Mid Atlantic filed suit under § 502(a)(3) of ERISA, seeking to collect the medical expenses it had paid on the Sereboffs' behalf. The District Court court found in Mid Atlantic's favor and the Fourth Circuit affirmed in relevant part. The Courts of Appeals were divided on the question whether § 502(a)(3) authorizes recovery in these circumstances. The Supreme Court granted review to resolve this disagreement.

The Court held that Mid Atlantic properly sought "equitable relief" under § 502(a)(3) and that the Sereboffs had to reimburse the plan. Under §502(a)(3)(B), a fiduciary can file a civil action "to obtain ... appropriate equitable relief ... to enforce ... the terms of the plan." Here, Mid Atlantic sought identifiable funds within the Sereboffs' possession and control - that part of the tort settlement due Mid Atlantic under the ERISA

plan and set aside in the investment account, and thus allowing the plan access to those funds for reimbursement purposes was “equitable” under ERISA. The Court reasoned that the plan provision for recovery from a third party essentially specifically identified a particular fund apart from the Sereboffs' general assets, and a particular share of that fund to which Mid Atlantic was entitled. Thus, Mid Atlantic could rely on a “familiar rul[e] of equity” to collect for the medical bills it had paid by following a portion of the recovery “into the [Sereboffs'] hands . . . as soon as [the settlement fund] was identified,” and essentially imposing on that portion a constructive trust or equitable lien. Thus the Court ruled that Mid Atlantic's claim was not considered equitable because it was a subrogation claim. Rather, it was considered equitable because it is indistinguishable from an action to enforce an equitable lien established by agreement.

On The Wage & Hour/FMLA Front

FLSA Settlements Continue To Make News

We have often written of the tremendous potential liability involved in various common types of wage & hour violations, be it misclassification of exempts/nonexempts, failure to pay for time spent donning and doffing safety gear, failure to pay for worked meal periods or travel time, failure to pay overtime at all, and failure to pay the wages listed in labor certifications for immigrant workers.

More recent examples include:

-In the financial services industry, brokers apparently traditionally have been classified as exempt administrative employees, but are hired primarily to sell securities and thus to not meet the definition of “administrative” under Department of Labor regulations (either the old or the new). In the last year alone, Smith Barney agreed to pay \$98 million to settle a class-action suit involving thousands of brokers, Merrill Lynch paid \$37 million to settle similar claims, as did Switzerland-based UBS (\$89 million), and Morgan Stanley (\$42.5 million);

-Labor contractor Global Horizons Inc. agreed to pay nearly \$156,995 in back wages (and almost as much in fines) to settle claims that it underpaid 88 Thai workers sent to Hawaii to harvest produce. The Company was alleged to have failed to pay the wages guaranteed in the labor application filed for the workers for their H-2A nonimmigrant agricultural visas, sponsored by Global Horizons. Moreover, the visas were approved for Arizona work, not work in Hawaii.

-George's Processing, Inc., an Arkansas poultry processing company, agreed to pay \$1.235 million back overtime wages to thousands of current and former employees to settle claims that it failed to pay employees for time they spent putting on and taking off protective clothing and other gear. The Department of Labor (“DOL”) also alleged that the company failed to pay employees for the time spent walking between the locations where safety equipment was donned

and doffed and their work stations. (In November, 2005, the Supreme Court held that such time is compensable in *IBP v. Alvarez*, 126 S. Ct. 514 (2005)).

-Gold City Supermarket Inc., agreed to pay \$228,950 in back overtime pay to 99 employees; DOL had alleged that the Queens, New York, supermarket did not properly pay employees 1 1/2 times their regular rate for work over 40 hours/week. Moreover, DOL alleged that the store failed to maintain proper records of employees' hours of work and rates of pay.

Time Spent Picking Up, Dropping Off Employer Cars Is Compensable

In *Burton v. Hillsborough County*, 2006 WL 1374493 (11th Cir. 5/18/06), county engineers were required to use employer cars to perform their duties, which consisted of traveling to and inspecting public construction sites. The cars were kept at a county parking facility remote from their work office, but the employees were not paid until they arrived at a work site. The 11th Circuit Court of Appeals, affirming a District Court ruling, held that employees who are required to drive from their home to a parking lot to pick up a county car should be compensated from the moment they get the company car until they drop it off at the end of the day. The Court wrote that "[u]ltimately, the employees who used the county vehicles had no choice but to begin and end their work day not at a work site, but at a county parking facility And without the county vehicles the employees could not perform the principal activities for which they were employed--driving through Hillsborough County and inspecting public works construction sites."

This Fellow Went To The FMLA Well Once Too Often

In *Crouch v. Whirlpool Corp.*, 2006 WL 1028489 (7th Cir. 4/20/06), Plaintiff began working for the company in 2000, but his girlfriend had worked there since 1969; thus she got a much better choice of summer vacation weeks under the company's vacation selection policy. In 2002, after being denied vacation dates coinciding with his girlfriend's, Plaintiff claimed a knee injury from doing yard work and gave the company a doctor's note covering his absence during the two weeks he had asked for. The company granted the leave. The next summer, the exact same thing happened, and it turned out that for most of that time he was in Las Vegas with his girlfriend. Now suspicious, the company hired a private investigator who videotaped the Plaintiff doing yardwork during his disability/FMLA leave. On his return from leave, he was fired for falsifying company forms. He then sued the company under the FMLA, claiming he was unjustly fired for requesting FMLA leave. The District Court entered summary judgment in favor of the company.

On Plaintiff's appeal to the 7th Circuit Court of Appeals, the Court affirmed the District Court. Plaintiff's principal argument was that if the company had a genuine doubt about the legitimacy of his FMLA request, it could have asked for a second medical opinion, as it has the right to do under the FMLA. The Court rejected that argument and wrote that "an employer's honest suspicion that the employee [is] not using

his medical leave for its intended purpose is enough to defeat the employee's substantive rights FMLA claim."

Thus, concluded the Court, "Whirlpool had, under its Shop Rule 1, just cause to terminate employees for falsification of personnel or any other company forms Because Whirlpool could terminate [Plaintiff] for this violation while he was at work, it could also terminate him for it while he was on leave." The company's suspicion based on the identical disabilities in 2 consecutive years on the same dates was reasonable, and "[t]he surveillance video ... confirmed the suspicion."

Plaintiff Not Entitled To Frequent And Erratic Bathroom Breaks Under FMLA

In *Mauder v. Metropolitan Transit Authority of Harris County*, 446 F.3d 574 (5th Cir. 4/14/06), Plaintiff was an internal Support Center Analyst, basically manning phone lines and giving computer technical support to various branches of the Transit Authority. At some point in 2000, he was diagnosed with Type II diabetes. On his return to work from an apparently unrelated leave in 2002, he was on a diabetes medication that apparently caused uncontrollable diarrhea for some period of time and caused him to need frequent and unscheduled bathroom breaks. The company had very strict industry standard guidelines for time away from his desk and for time spent performing various functions.

After a lot of back and forth, the company refused to allow the Plaintiff the frequent unscheduled bathroom breaks he claimed were necessary. In addition, he was being frequently written up for failing to meet his performance standards and for being tardy returning from his scheduled breaks. Finally he was put on a corrective action plan, with which he failed to comply, and as a result he was fired. Just before being fired, he asked for FMLA leave so that he could take the frequent unscheduled bathrooms breaks he claimed to require. He sued the company, claiming that he was fired for requesting FMLA leave. The District Court entered summary judgment for the company.

On the Plaintiff's appeal to the 5th Circuit Court of Appeals, the Court agreed with the company and the District Court. The Court found that diabetes is a serious health condition under the FMLA. Nevertheless, the Court also found that whether the diabetes was the cause of the need for bathroom breaks, or the diarrhea, the Plaintiff still had not shown that his condition left him "incapacitated" as required by the FMLA. Thus the Court wrote that "[a]ccordingly, we find that [the Plaintiff] has not shown that he was incapacitated or that his condition prevented him from going to work. . . . He does not meet the requirements of 29 C.F.R. § 825.114(a)(2)-the regulation defining a 'serious health condition involving continuing treatment by a healthcare provider' for purposes of FMLA leave. First, he was not absent from work for the 'more than three consecutive days'; the record reflects that [Plaintiff] was never absent from work or unable to go to work because of either his diabetes or his diarrhea. Second, he obviously was not incapacitated due to pregnancy or prenatal care. Finally, he was not incapacitated and did not receive treatment for such incapacity due to a chronic serious health condition."

Finally, the Court also noted that the Plaintiff had failed to comply with reasonable company requests for further information about his condition: "[Plaintiff's] failure to provide his employer with requested information to effectuate the leave he

asked for in the first place is a sufficient reason for us to hold that the district court did not err in granting summary judgment in favor of [the company] on this issue.” The Court also rejected Plaintiff’s retaliation claim, ruling that he did not ask for leave until 3 weeks into his 4 week corrective action plan, and he knew he would be terminated if he did not comply with the plan, and he simply did not comply with the plan. Thus the company “was not required to suspend [Plaintiff’s] termination pending his FMLA filing”.

OTHER EMPLOYMENT LAW HEADLINES

“Regarding an employee as having a limitation that is not itself a disability cannot constitute a perception of disability”

In *Breitkreutz v. Cambrex Charles City Inc.*, 2006 WL 1312362 (8th Cir. 5/15/06), the Plaintiff factory worker experienced back pain and was cleared to work with lifting restrictions, specifically a limit of 50 pounds of pushing or pulling certain bulky items. The employer applied this limitation on pushing and pulling to all aspects of his job. The Plaintiff argued that the company regarded him as disabled, while the company claimed "it did not regard [the Plaintiff] as someone with an impairment substantially limiting a major life activity, but merely as someone who could not perform the essential functions of the particular job." The Plaintiff sued on a perceived disability claim under the Americans with Disabilities Act (“ADA”). The District Court entered summary judgment in favor of the company.

On appeal, the 8th Circuit Court of Appeals affirmed. The Court noted that “[i]n this case, [Plaintiff] must show [the company] mistakenly regarded him as having an impairment substantially limiting one or more major life activities, or mistakenly believed he had an actual, non-limiting impairment which substantially limited one or more major life activities." Specifically, the Plaintiff claimed that the company regarded him as “substantially limited in the major life activities of working and lifting, and terminated him due to those misconceptions.”

First, the Court noted that lifting itself is not a major life activity. Rather, “it is part of a set of basic motor functions that together represent a major life activity.” Since, however, the Plaintiff did not allege that the company perceived him as unable to do routine manual tasks central to most people’s lives, he could not maintain that part of his claim. The Court wrote that “[r]egarding an employee as having a limitation that is not itself a disability cannot constitute a perception of disability.”

Second, Plaintiff claimed that the company perceived him as disabled in the major life activity of working by “refusing to allow him to work despite his being able to perform the essential functions of his job and because [the company] placed additional restrictions on him beyond those recommended by doctors.” The Court first noted that a finding a plaintiff is substantially limited in working “requires a showing that his overall employment opportunities are limited. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.” This the Plaintiff did not show, according to the Court.

The Court wrote that the ADA section addressing perceived disabilities was intended to combat the effects of archaic attitudes, erroneous perceptions, and myths that

work to the disadvantage of person with or regarded as having disabilities. However, “[i]f a restriction is based upon the recommendations of physicians, then is it not based upon myths or stereotypes about the disabled and does not establish a perception of disability.” The company’s additional restrictions were consistent with the doctor’s recommendations, and thus did not rise to a triable issue of fact.

“Pregnancy-Blind” Light Duty Policy Upheld Under PDA

In *Reeves v. Swift Transportation Co.*, 446 F.3d 637 (6th Cir. 5/16/06), the Plaintiff truck driver was required to do all sorts of heavy lifting and bending and twisting as part of her job. Three months after becoming employed, she learned she was pregnant. Her doctor restricted her lifting to 20 pounds and “light duty” work. The company’s light-duty policy applied only to employees who sustained on-the-job injuries. Such employees were accommodated with light-duty assignments, including basic office work, consistent with their injuries and the company's needs. The Plaintiff repeatedly asked for light duty assignment and was consistently refused.

She was then terminated on the grounds that the company had no work for her and she was not eligible for leave under the Family and Medical Leave Act because she had worked there for less than a year. She sued for disparate treatment, arguing that the company’s policy of providing light-duty work as an accommodation only to employees who had been injured on the job was a per se violation of the Pregnancy Discrimination Act (“PDA”), 42 U.S.C. § 2000e(k), and direct evidence of discrimination. The District Court entered summary judgment in favor of the company because the Plaintiff did not show that the company's light-duty policy was a pretext for pregnancy discrimination since it neither takes pregnancy into account or that the company makes exceptions for nonpregnant employees that it does not make for pregnant employees.

On appeal, the 6th Circuit Court of Appeals also rejected her claim. The Court wrote that the company’s “policy cannot be viewed as direct evidence of discrimination because the [PDA] merely requires employers to 'ignore' employee pregnancies. . . . [the company]'s light-duty policy is indisputably pregnancy-blind. It simply does not grant or deny light work on the basis of pregnancy, childbirth, or related medical conditions. It makes this determination on the nonpregnancy-related basis of whether there has been a work-related injury or condition. . . . The district court correctly noted that [Plaintiff’s] view of the law demands preferential, not equal treatment, and therefore finds no support in the Act.”

ADA “Association” And FMLA Claims Fail

In *Overley v. Covenant Transportation, Inc.*, 2006 WL 1133292 (6th Cir. 4/27/06), the Plaintiff truck driver claimed that she was discriminated against because of her association with her disabled daughter. Under 42 U.S.C. § 12112(b)(4), the Americans with Disabilities Act (“ADA”) forbids discrimination against an employee "because of the known disability of an individual with whom the qualified individual is known to have a relationship or association."

The Plaintiff was fired after she told her employer she had “obligations” to her daughter on a particular day and could not find a substitute driver. As the Court noted,

Plaintiff claimed that “she was fired because of her daughter's disability”. The Court wrote that “[u]nlike a claim brought by a disabled person, an employer is not required to reasonably accommodate an employee based on her association with a disabled person.” Thus the Plaintiff could not claim that the employer discriminated against her by not granting her sufficient time off or allowing her to modify her schedule so that she could care for her daughter, the court stated. The Court noted the limited subset of categories under which an employee could maintain a claim under this section of the ADA: “Courts have surmised that an employee would be protected under the statute if the employee was only distracted at work, but did not require a reasonable accommodation, or if the employer's decision was based solely on the unsubstantiated belief that the employee would have to miss work because of the association.” But neither scenario applied to this case.

Plaintiff also brought an FMLA claim in this case, which the Court found also failed. “The FMLA does not provide leave for every family emergency,” the court wrote, and the Plaintiff did not show either that she was “needed to care for” her daughter that day or that her activities constituted FMLA-qualifying care. She testified that her main reason for needing the day off was to meet with the overseer of her daughter's trust, established as a result of a childhood injury that disabled the daughter. “Even assuming that this meeting qualifies as providing FMLA-qualifying ‘care,’ there is no indication that it needed to occur on” the particular day she needed off” the court wrote. The Plaintiff’s other activities that day, such as dealing with her daughter's laundry and making arrangements with a funeral home, were “routine activities [which] do not qualify as ‘physical or psychological care’ under the FMLA, even under the broadest reading of the statute”. Since the Plaintiff could not show that she was “needed to care for” her daughter on January 4 or that her activities on this day qualified as ‘care’ under the governing regulations, she has not shown that she was entitled to leave under the FMLA.”

“I think it’s time to hang it up and for you to retire” Remark Not Direct Evidence Of Age Discrimination

In *Martin v. Bayland Inc.*, 2006 WL 1308017 (5th Cir. 5/12/06), a 73 year old, 21 year, Plaintiff employee allegedly was told by the company’s owner that “I think it's time to hang it up and for you to retire.” Shortly thereafter, the Plaintiff was terminated, ostensibly for safety reasons and a corporate downsizing due to economics. On the basis of that remark and a couple of others, the Plaintiff sued for age discrimination. The District Court entered summary judgment on behalf of the company, and the Plaintiff appealed.

Plaintiff fared no better in the 5th Circuit Court of Appeals. Plaintiff’s “direct” evidence of age discrimination on the basis of the owner’s remark “cannot be considered direct because it requires one to infer that he was fired because of his age, based on [the owner's] comment that it was time for him to retire. . . . There is a link between retirement and age, but it is not a necessary one.” Thus the Court found that the owner’s remark was “innocuous,” and that “[t]he word ‘retire’ does not, by its very use bear this kind [of] weight.”

The Plaintiff also claimed that the company's nondiscriminatory reasons for the Plaintiff's termination - safety and economic considerations - were pretextual and unworthy of credence. The Court rejected this claim as well, and noted that the Plaintiff had fallen "at least seven times" during his 21 years of employment, and that "[g]iven the number of accidents Martin admitted to in his deposition, we find no error in the district court's characterization of a 'pattern' of accidents". While another worker fell on the job at some point, claimed the Plaintiff, arguing disparate treatment, the Court noted that that was a single fall and not a "pattern." Thus the Plaintiff was unable to show that the company's safety rationale for termination was a pretext for unlawful discrimination.

Finally, as to the company's economic rationale for the Plaintiff's termination, the Plaintiff claimed that the company's economic problems were actually improving by the time he was fired. The Court, however, found that the company had in fact reduced its staff by 50 percent. Thus neither the company's failure to fire Martin earlier nor the fact that its finances were improved established that the economic rationale was a pretext.

“Repertoire of Ribaldry” Alone Not A Hostile Work Environment

This case falls into the “you’ve got to be kidding” category. In *Nitsche v. CEO of Osage Valley Elec. Coop.*, 446 F.3d 841 (8th Cir. 5/8/06), the Plaintiff male utility worker was removed from active employment while on long-term disability leave, which had stemmed from multiple incidents in the workplace in which the he had either punched or threatened other employees. One apparently vigorous argument with a coworker was over whether on another occasion the Plaintiff had hit another coworker only once or multiple times. The Plaintiff then sued the employer, claiming that for years he had found his fellow line foreman's unwanted sexual banter about women "highly offensive" and thus he had had to endure a hostile work environment. He also complained about a litany of incidents such as playing cards at the foreman's house while a pornographic movie was playing, having the foreman show him Playboy, and being called a “dumbass.” The list goes on. Plaintiff did acknowledge that the foreman never solicited sex from him but said that on two or three occasions, he stuck a shovel between his legs and rubbed him with it. He also admitted that he laughed at some of the foreman's jokes - but not the "dirty" ones - and that the foreman would stop telling off-color or sexual jokes if a woman approached.

The District Court rejected his claim. The Court ruled that the evidence was insufficient to show that the foreman's conduct toward the Plaintiff was based on sex, that it affected a term, condition, or privilege of his employment, or that the employer either knew or should have known about it.

On appeal, the 8th Circuit agreed with the District Court on the second ground. The Court ruled that the foreman's "crude and immature" behavior occurred only sporadically over 20 years but was not physically violent or threatening nor did it unreasonably interfere with the Plaintiff's work performance. The Court noted that “the conduct complained of must be extreme in nature and not merely rude or unpleasant. . . . Allegations of a few isolated or sporadic incidents will not suffice; rather, the plaintiff must demonstrate the alleged harassment was 'so intimidating, offensive, or hostile that it poisoned the work environment.' ” Bearing in mind that sexual harassment law is "not

designed to purge the workplace of vulgarity," the Court concluded that the Plaintiff failed to demonstrate an actionable hostile work environment sexual harassment claim.

Affirmative Action Gone Awry

In *Mastro v. Potomac Elec. Power Co.*, 2006 WL 1359604 (D.C. Cir. 5/19/06), the Plaintiff was a white engineer with no disciplinary history fired allegedly because he was untruthful about his conversation with an African-American employee he supervised who had been incarcerated. The internal investigation, headed by an African-American employee relations investigator, concluded that the Plaintiff had been untruthful, and as a result the company fired the Plaintiff. He in turn sued the company for reverse race discrimination. The District Court ruled in favor of the company and entered summary judgment on its behalf.

On appeal to the District of Columbia Circuit Court of Appeals, the Court reversed. The court ruled that there is nothing inherently suspicious about an employer's decision to fire a white employee, and therefore a majority-group plaintiff alleging Title VII discrimination must show "additional background circumstances that support the suspicion that the defendant is that unusual employer who discriminates against the majority." Such circumstances can be shown through evidence indicating that the employer "has some reason or inclination to discriminate invidiously against whites," or through evidence indicating that "there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination."

Here, the Court found that a jury could reasonably conclude that the company might be inclined to treat minority employees in a preferential manner. The Court noted as reasons for its conclusion the company's \$38 million settlement in 1993 of a race and gender discrimination class action, which also required the company to take "certain affirmative steps," as well as apparent reluctance by the company to discipline African American employees. The court also found evidence that suggested that the Plaintiff had no reason to lie. Ultimately the Court wrote that "we believe that by itself and in conjunction with the ... consent decree, the evidence [Plaintiff] has presented is sufficient for a reasonable jury to discern sufficient 'background circumstances' to support a suspicion that [the company is 'the unusual employer who discriminates against the majority.' "

Finally, the Court noted that while the consent decree expired four years before the circumstances in this case, "it is unreasonable to assume that because the consent decree nominally expired in 1998, [the company] immediately ended the 'affirmative steps' it had established pursuant to the decree's terms, or that the decree's lingering effects were not still felt four years later when the events giving rise to this litigation took place."

And In Massachusetts . . .

Massachusetts Discrimination Claims Survive Plaintiff's Death

In *Gasior v. Massachusetts Gen. Hosp.*, 446 Mass. 645 (5/11/06), the Plaintiff was a plumber at Massachusetts General Hospital who allegedly was refused

reinstatement following a medical leave of absence. He sued the hospital for handicap discrimination under G.L. c. 151B, but died for unrelated reasons the week before trial was scheduled to start. The hospital moved to dismiss, arguing that the Plaintiff's discrimination claim did not survive his death. The Trial Court disagreed, but did rule that damages would be limited to compensatory damages, and the Plaintiff's estate could not recover punitive damages.

On appeal, the Supreme Judicial Court affirmed the ruling that the discrimination claim survived the Plaintiff's death, but reversed on the issue of punitive damages. The Court ruled that claims for employment discrimination under c. 151B, including all available remedies, survive an at-will employee-plaintiff's death because they represent an implied contractual right. "[W]e have had no difficulty in concluding that an at-will employment relationship contains implied terms, the breach of which is actionable," and, at common law, implied contract claims generally survive the death of a party, the Court wrote.

As to punitive damages, the Court wrote that "[w]e see no reason to distinguish as to statutory remedies between a plaintiff who has suffered the indignities of unlawful discrimination (if proved) and who survives, and a similarly aggrieved plaintiff who is deceased, simply because the exigencies of court scheduling may delay the granting of relief until after the plaintiff's death".

Volunteers Not Covered By Massachusetts Sexual Harassment Statute

In *Lowery v. Klemm*, 446 Mass. 572 (4/21/06), the Plaintiff was a volunteer at a "swap shop" located at a town's waste management facility. She claimed the facility's supervisor often visited the shop and made sexual advances towards her for three years. For reasons not clear from the Court's decision, the town ultimately dispensed with the Plaintiff's services and the Director of Public Works issued a "no trespass order" against her. She then sued the supervisor under G.L. c. 214, s. 1C, a state statute barring sexual harassment.

The issue was whether G.L. c. 214, s. 1C, which states that "[a] person shall have the right to be free from sexual harassment, as defined in" G.L. c. 151B and 151C, applied to volunteers. A judge in the Superior Court granted summary judgment for the defendant because the alleged conduct did not occur in an employment or academic context. The Appeals Court determined that volunteers were covered, and reversed the order.

On appeal to the Supreme Judicial Court, the volunteer lost. The Court held that G.L. c. 214, s. 1C, was intended to cover "persons" only in the employment or academic contexts and to supplement the coverage in G.L. c. 151B and 151C. The Court concluded by writing that "[f]inally, we emphasize that volunteers, like the plaintiff, who experience sexual harassment are not without recourse: although not protected by G.L. c. 214, s. 1C, they may bring actions under other statutes, including the civil rights act, G.L. c. 12, s. 11I, as well as common-law claims for sexual harassment or related injuries that would be barred for employees by the exclusivity provisions of G.L. c. 151B, s. 9; G.L. c. 214C, § 1C; and the workers' compensation statute. Because volunteers retain these common-law rights and remedies, our decision today does not leave employers free sexually to harass volunteers with impunity."

Misconduct Related To Disability May Be Grounds For Discipline

In *Mammone v. President & Fellows of Harvard College.*, 446 Mass. 657 (5/12/06), the Plaintiff had bipolar disorder. He worked as a museum receptionist at Harvard's Peabody Museum for nearly seven years, answering questions and directing individuals and groups touring the facility. Prior to 2002, there was no indication that his bipolar disorder affected his ability to perform his job or that the employer was even aware of his condition. In mid-August 2002, however, Plaintiff began exhibiting manic behavior, engaging in loud and animated conversations, establishing a Web site to denounce low pay at Harvard, and singing and dancing at his work station. After a short hospitalization, he returned to work in September in East Indian dress, adorned with necklaces, bracelets, and rings. Plaintiff then proceeded to make numerous phone calls, speaking very loudly. He refused to meet with his supervisor, dismissing her as "evil." When university police officers were summoned, Plaintiff sat on the floor and refused to leave the building. He subsequently was handcuffed and dragged from the building and arrested for trespassing and disorderly conduct. Plaintiff was subsequently discharged for his workplace conduct. He then sued under federal and state anti-discrimination law, claiming that he was terminated because of his disability and that he was able to perform the essential functions of his job with or without a reasonable accommodation. The Trial Court entered summary judgment in favor of the employer.

On appeal, the Supreme Judicial Court affirmed the Trial Court. The Court ruled that a person who engages in "egregious conduct" simply cannot show he is a "qualified handicapped person" under state antidiscrimination law, and such behavior precludes the employee from "performing the essential functions of the position" with or without a reasonable accommodation. The Court rejected Plaintiff's argument that there is a distinction between misconduct due to alcoholism and misconduct due to mental illness or that state antidiscrimination guidelines support that position. The Court buttressed its conclusion by reference to the majority of court decisions that have addressed this issue when interpreting similar federal law.

Thus an employee who commits egregious misconduct in the workplace as the result of an impairment is not "handicapped" within the meaning of G.L. c. 151B, and is not protected under state anti-discrimination law.

In The Public Sector

City Canvassing Ordinance Violated Union's Free Speech Right

In *Service Employees Int'l Union Local 3 v. Mount Lebanon*, 446 F.3d 419 (3rd Cir. 4/28/06), Mount Lebanon, Pa., enacted a city ordinance requiring door-to-door canvassers distributing written material or discussing political or religious issues to first register with the local police department. The Service Employees International Union ("SEIU") sued the city in October, 2004, alleging that the ordinance violated the First Amendment to the U.S. Constitution. The Union had planned to canvas door-to-door to distribute literature emphasizing the importance of voting in the 2004 Presidential election and to encourage people to vote.

The District Court ruled in favor of the city, finding that the registration requirement struck a careful balance between the legitimate safety interests of the public and allowing all citizens to engage in public discourse. The 3rd Circuit Court of Appeals reversed. That Court ruled that the canvassing ordinance violated the First and 14th amendments' guarantee that state or local entity may not abridge freedom of speech. The Court noted the recent Supreme Court *Watchtower* case, in which that Court had held that a similar ordinance violated the First Amendment, in part because it was “offensive” to notions of democracy and free speech for a citizen to have to report to and register with the government if he or she wanted to speak with his or her neighbors and fellow citizens.

Here, the ordinance extended to the core First Amendment areas of religious and political discourse, and its regulation of written material encompassed all subject matter without limitation. The appeals court then examined the degree to which the rules are tailored to serve the interests cited by the municipality, which the city claimed was to prevent fraud and crime. However, the Court found that the ordinance was not narrowly tailored to prevent fraud and crime. The Court wrote that persons intent on committing crimes can avoid the registration requirement simply by asking homeowners for directions or to use their telephone, instead of discussing religious or political issues or distributing written materials. As the Court wrote, “[a]fter all, if they are not deterred by the substantial criminal penalties which exist for burglary and violent crime, it is not reasonable to expect that they will alter their behavior because of a \$300 fine for failing to register” with the local police.

Legislative/Regulatory Developments

CDC Recommends Mumps Immunization For Health Care Workers

FYI, on June 1, 2006, the Centers for Disease Control and Prevention recommended that health care workers receive routine vaccination for mumps. A recent outbreak of mumps in the United States has resulted in 2,597 reported cases of mumps in 11 states in the first four months of this year. CDC now recommends that all employees of health care facilities be immune to mumps. People born from 1957-to-date need two doses of a live mumps vaccine absent other evidence of immunity. People born prior to 1957 should consider one dose of the vaccine. The CDC’s recommendations can be found at www.cdc.gov/mmwr/preview/mmwrhtml/mm55e601a1.htm.

Massachusetts Enacts Health Insurance Expansion Legislation

As part of an effort to avoid losing about \$385 million in Medicaid reimbursement, the state Legislature has enacted legislation dramatically restructuring the health insurance landscape in Massachusetts. According to the Conference Committee Report, the legislation will “redeploy current public funds to more affectively cover currently uninsured low-income populations, and would make quality health coverage more affordable for *all* residents of the Commonwealth. The bill promotes individual responsibility by creating a requirement that everyone who can afford health insurance obtain it, while also responding to concerns about barriers to health care access.”

As of July 1, 2007, all residents of the Commonwealth must obtain health insurance, with an exception for residents for whom there is no affordable coverage. Residents will have to verify this on their 2007 tax returns in some manner. The state Department of Revenue will enforce this provision by financial penalties, beginning with the loss of the personal exemption in tax year 2007.

The legislation requires employers who do not provide health insurance, or who do not provide a "fair and reasonable" contribution to its cost, to make a "Fair Share Contribution" to the state of approximately \$295 per full-time employee. This requirement applies only to employers of 11 or more workers, and is prorated for part-time employees. There also is a "Free Rider" surcharge which will be levied on employers who do not provide health insurance and whose employees use free care. This surcharge will range from 10-100% of the state's cost of services, with the first \$50,000 of services exempted. The legislation also requires employers of 11+ employees to offer "Section 125" plans to employees. Information about the legislation can be found at, among other places, www.mass.gov/legis/.

On The Labor Front

Board Rules Forging Co-Employees Signature On A Grievance Form Is Protected Activity

In *Allied Aviation Fueling of Dallas, LP*, 347 NLRB No. 22 (5/31/06), an employee was fired when he deliberately altered his own signature style and signed the name of another employee on a grievance form without that employee's permission. The Board found that the employee did not engage in conduct so egregious as to lose the Act's protection by forging the co-employee's signature. The Board found that the facts showed that the employee acted in the good-faith belief that his action was necessary to preserve a contractual grievance claim, that he derived no direct benefit from the grievance filing, and that he quickly and voluntarily withdrew the grievance and acknowledged the forgery to management upon learning that the affected employee opposed the filing. The Board did not rule on whether deliberate falsification of signatures on grievance forms would be protected in other circumstances.

"I'd go broke" Assertion Triggered Employer's Obligation To Open Books

In *International Chemical Workers Union Council v. NLRB*, 2006 WL 1118514 (9th Cir. 4/28/06), during contract negotiations a union representative asked the employer if "things were really that bad" that the company had to ask for some economic concessions and offer only a minimal wage increase. The employer said that "things are tough" and "Have you seen sales lately?" Then the union representative asked, "Are you saying that you can't afford the Union's proposals?" The employer replied "No, I can't. I'd go broke." Two months later, the company conducted a temporary layoff of employees, including six of the eight bargaining unit members, citing poor financial results. As could be expected, the union representative then asked for the employer's

financial records, which the employer refused to provide. The union filed a charge with the National Labor Relations Board (“Board”), which ruled in favor of the employer. The Board reasoned that the employer’s claims that it would “go broke” were not necessarily a claim of an inability to pay, and the employer unequivocally told the union that it was not making such a claim.

The union appealed to the 9th Circuit Court of Appeals, which agreed with the union and reversed the Board’s decision. The Court ruled that the Board ignored the significance of the “I’d go broke” remark and failed to consider other statements of the employer during negotiations. While the employer never actually said it was unable to pay for the union’s proposals, it “could not have used simpler words” to indicate that its rejection of the union’s demands were based on its financial situation. The Court wrote that “[c]lear statements of a company’s inability to pay cannot be cast aside as abruptly as the Board did here.” Moreover, the Court found that the owner’s remarks, coupled with its layoffs and proposals to reduce some benefits, demonstrated that the employer had communicated an inability to pay, which opens its financial records to the union to verify the claim.

Claim Of Bad Faith Bargaining Rejected By Board

In *Manhattan Day School*, 346 NLRB No. 89 (4/25/06), shortly after reaching a first contract with the union, the employer subcontracted out its maintenance and kitchen work, even though the wages paid to the workers were below industry standards. The contract language the parties agreed to permitted the employer to subcontract operations “provided such subcontracting is justified by economic circumstances,” and the employer relied on this language. At some point, a supervisor also allegedly told an employee that the employer “intended to subcontract unit work because it did not want the Union, and if [the employee] was in the Union, he ‘better start looking for a job.’”

The union filed a charge with the Board and claimed that the supervisor’s statement was an unfair labor practice. The union also asserted that the employer “planned to subcontract all unit work from the time of the Union’s certification as bargaining representative and that, through intentional misrepresentations, it induced the Union to agree to a subcontracting provision designed to provide legitimate ‘cover’ for its plan,” and thus had not bargained in good faith as required by the National Labor Relations Act.

The Board found that the supervisor’s statement was a “coercive statement threatening subcontracting for antiunion purposes,” and thus violated the law. On the bargaining in bad faith issue, however, the Board ruled in favor of the employer. The Board wrote that “[i]f the Union was concerned about the breadth of the subcontracting language, it should have satisfied its concern by negotiating further to define ‘economic circumstances,’” rather than relying on oral statements made in negotiations. The Board noted that the employer “never promised not to exercise its right to subcontract,” and that the Union was fully aware during negotiations that the employer had solicited subcontracting bids “but nevertheless agreed to the broad language of the subcontracting clause.” Given that evidence, “the General Counsel has failed to show that the

Respondent used misrepresentations to induce the Union's agreement to the subcontracting provision."

The Giant Inflatable Rat Pops Up Again

In *Laborers' Eastern Region Organizing Fund*, 346 NLRB No. 105 (4/28/06), the union picketed at various locations where the employer, a concrete pourer, was performing work. The union had made several demands on the employer to recognize it as the employee's exclusive bargaining representative, but the employer had declined. Thus the union set up pickets at three sites where the employer was doing jobs, on one occasion using a 15 foot inflatable rat, and a 30 foot inflatable rat on another occasion. The employer filed a charge with the Board, and argued that the object of the union's picketing was to force the owners of the sites to cease doing business with the employer.

The Administrative Law Judge ("ALJ") found that the union's conduct at the jobsites amounted to picketing and, in this context, found that the union's demand that The Ranches use a "responsible" contractor was the equivalent of asking The Ranches to sever its relationship with the employer. The Board agreed, and determined that the union's activity had a prohibited secondary objective aimed at a neutral employer, The Ranches, in pursuit of a recognitional dispute with the primary employer. The Board further agreed with the ALJ's conclusion that the union's recognitional picketing intermittently conducted at the three separate jobsites over a period covering 4 months was unreasonable, even though the picketing occurred on only 28 specific days during that period.

Having found that the union's protest activities at The Ranches constituted unlawful picketing, the Board deemed it unnecessary to consider the further implications of the union's use of an inflated rat, and did not rule on the ALJ's conclusion that the union's use of the rat itself constituted picketing.

Lawyer Jokes Of The Month

That's a real bargain

A Dublin lawyer died in poverty, and many people donated to a fund for his funeral. The Lord Chief Justice of Orbury was asked to donate a shilling. "Only a shilling?" said the Justice, "Only a shilling to bury an attorney? Here's a guinea; go and bury twenty more of them."

Stupid Question

"How can I ever thank you?" gushed a woman to Clarence Darrow, after he had solved her legal troubles.

"My dear woman," Darrow replied, "ever since the Phoenicians invented money there has been only one answer to that question."