

MHTL Monthly Labor/Employment/Benefits Update Useful Cases And Updates - December 1, 2003

Late-Breaking News-FCRA Third-Party Investigations Changes Approved By Senate

As noted last month, the Fair Credit Reporting Act (“FCRA”) currently requires—at least according to the Federal Trade Commission (“FTC”)—employers who use a third-party investigator to investigate alleged employee misconduct to notify the employee before conducting the investigation, to obtain the employee’s consent, and to fully disclose investigation reports to the employee before taking any adverse employment action. Employer organizations lobbied hard to change this.

On November 21, the House, and on November 22, the Senate, approved changes to the FCRA that employment situations from many of these requirements. Daily Labor Report, No. 228, (11/27/03). While the revisions still require employers to provide a summary of a report to an employee if an adverse employment action is taken, the prior notification and consent requirements have been eliminated. The employer also does not need to disclose the source of a report. The effective date of these changes is something of an open question. The legislation provides that its effective date will be determined jointly by the FTC and the Federal Reserve System Board of Governors, who also are to issue final regulations within two months of the President signing the legislation into law. The effective date is supposed to be no later than 10 months after issuance of the final rules. So it could be a year before these changes actually take effect.

When this actually happens, it means that employers may engage outside investigators to look into alleged workplace misconduct, such as in a sexual harassment investigation, without the peculiar requirement of having to notify the alleged perpetrator and obtaining his/her consent.

MISTAKES OF THE MONTH - Spotlight On The FMLA -

“I Never Heard Of This FMLA Law Before”

In *Jines v. Evans Motors, Inc.*, N.D.Ind., 10/29/03 (11/5/03 DLR), the employee claimed he was fired while on leave. He had broken a clavicle when thrown from a golf cart on 9/2/02 and asked for two weeks off, which was approved. In mid-September, his doctor told him not to work for another six weeks, and the employer allegedly told him he had a job as long as he was under a doctor’s care. There was no further contact until October 24, when plaintiff called his manager and was told he had been replaced, that the employer “had to fill the position.”

Plaintiff appeared at work the next day with printouts of the FMLA which he had downloaded from the internet. The employer, who had never heard of the FMLA before, said he still was fired, that Indiana was a “right to hire, right to fire” state. Nevertheless, the employer offered the plaintiff a porter’s position, though at lower pay.

Once the plaintiff filed his complaint, he received a letter claiming that there always had been an open porter position at equivalent pay, with an unconditional offer of reinstatement to that job, which plaintiff accepted. Plaintiff quit that job after one day, however, claiming he was not really being used as a porter.

Generally under the FMLA, an employee is (1) entitled to leave if the medical criteria are met, and (2) entitled to reinstatement after the leave to either the same position, or an equivalent position, including equivalent pay and benefits. Here, the Court found the medical criteria were met. By terminating the plaintiff during his leave and within the FMLA 12 weeks, without even telling him, and failing to reinstate him into at least an equivalent position, the Court found that a reasonable jury could find that the employer violated the FMLA.

This was a case requiring an exceptional amount of backfilling by the employer because of pure ignorance. It is one thing to be aware of a statute and just make a mistake in its application, quite another thing to be ignorant of it entirely. This lack of inquisitiveness certainly is not going to play well with a jury, one would think.

No, You Don't Have Discretion In Granting FMLA Leave

While this case is somewhat baffling in part, it does illustrate some of the real-life problems employers can run into with the FMLA. In *Liu v. Amway Corp.*, 2003 U.S.App. LEXIS 22320 (9th Cir., 10/30/03), on June 27, 1998, plaintiff went out on maternity leave and had her child in August. She told her supervisor then that she would return September 19. Two weeks before her return date, her supervisor, who was under a lot of pressure to complete certain projects and who testified that he was working evenings and weekends to cover the plaintiff's job and was anxious for her to return, called her to make sure she would be back on the 19th. She, in turn, asked for an extension of leave until December because she still was not feeling well and also wanted more time to bond with her child. He denied the extension. After a chance meeting a week later, he agreed to an extension until November 16, but transferred her from pregnancy leave to personal leave status. In early October, plaintiff called the supervisor and told him she wanted another extension until December so she could go to China to care for her terminally ill father and continue bonding with her child. He denied the extension. A few days later, plaintiff complained to the HR Department, and was told someone would speak with her supervisor. Shortly thereafter, the supervisor called plaintiff and granted an extension until November 23.

Meanwhile, the department was being downsized. In early October, just before she was to leave for China, the supervisor called in the plaintiff and gave her a poor performance evaluation (in contrast to her good evaluation of only 6 months before) that directly resulted in her being selected for the layoff. Upon her return from China on November 18, the supervisor informed the plaintiff that she had been terminated. It does not appear from the Court's discussion that the plaintiff and the supervisor discussed or were even aware of the FMLA during this entire time.

The Plaintiff sued, basically claiming that the employer unlawfully interfered with her right to take FMLA leave and retaliated against her for taking FMLA leave by rigging her evaluation and thus terminating her. On these issues, the District Court ruled in favor of the

employer, but on appeal the 9th Circuit Court of Appeals reversed and sent the case back for trial.

On the retaliation issue, the Court's rationale is simple - one cannot take adverse employment action against an employee for asserting rights under the statute, even if the employee herself did not specify that her leave was for FMLA purposes. According to the Court, once an employee puts an employer on notice of a leave request and the reason for it, it then is the employer's job to determine if such leave qualifies for the FMLA. Here, that was not done, nor was any effort made to do so. The employer should have known her leave was FMLA, and the supervisor rigging her evaluation and thus ensuring her termination could be found by a reasonable jury to be retaliation under the statute.

On the interference claim, the Court's rationale is baffling. According to the Court, the supervisor's denial of leave extension requests was unlawful interference, as were his attempts to get her to come back sooner than she wanted. But the leave right is only for 12 weeks - it is not unlawful to refuse to grant an FMLA extension beyond the 12 weeks; there may be an Americans With Disabilities Act issue there, but certainly not an FMLA issue.

One can see the problem with respect to the initial denial in early September, at least until the 12 weeks would have expired on September 27, and one can also see the problem with changing the payroll status prior to the end of the 12 weeks. But the Court does not appear to focus on those events, and certainly fails to carve them out for particular treatment. So apart from those two instances, the Court's reasoning is somewhat mysterious.

In any event, this case at the very least highlights the importance of training supervisors in basic FMLA requirements, and the necessity of designating leave as FMLA leave if it qualifies as soon as possible. It also shows the lack of discretion employers have over FMLA leave, which is none at all, which is something of which front-line supervisors should be aware.

FUNNY BONE CASE OF THE MONTH

Maybe It Was A Stale Bagel

In *Argueta v. North Shore Long Island Jewish Health Systems, Inc.*, 2003 U.S. Dist. LEXIS 20456 (E.D.N.Y., 11/6/03), an employee was terminated for a one-sided attack with a bagel on a co-worker at a workplace breakfast. Several witnesses testified that plaintiff repeatedly struck a co-worker with the bagel, though plaintiff denied the attack. Apparently the plaintiff did not contribute to the breakfast, but another employee told her she could have a bagel. Another co-worker complained because of plaintiff's lack of contribution. That dispute ended in the bagel attack. Testimony was that the attack left the co-worker's forearm swollen. Plaintiff sued the employer for race, color and national origin discrimination.

Two elements of this case are interesting, aside from its entertainment value. First is the Court's ruling that "[f]or the purposes of deciding whether Argueta was terminated based on her race, color, or national origin, the relevant question is not what happened, but rather, what the decisionmakers believed happened Argueta presents no evidence suggesting that those charged with the decision to terminate her harbored any discriminatory animus whatsoever." This decision makes sense since in a disparate treatment case (rather than an "impact" case) it is the employer's intent which is at issue. Thus a reasonable good faith belief that misconduct

occurred ordinarily should be sufficient to defeat such a claim.

Second, twice before in the early 1990s plaintiff had complained about workplace discrimination. In each instance she ended up being promoted and a supervisor was transferred. She claimed in this case that those prior instances were “admissions of [prior] invidious discrimination” which supported her claim in this case. In response, the Court wrote that “it would be both unwise and unfair to employers to treat every accommodation made in response to an allegation of discrimination as an admission of discrimination. Such an approach would discourage (by penalizing) precisely the sort of behavior the law should encourage.” The Court also noted that this evidence was not helpful anyway, since all it showed was that when the employer learned of discrimination in the workplace it was corrected. Thus the Court granted the employer’s motion for summary judgment.

OTHER EMPLOYMENT LAW HEADLINES

Camera Cell Phones At Work, Or “Hey, How Did I Get On The Internet?”

As if e-mail and internet use were not headaches enough for employers, now we have camera cell phones. Technology certainly is a double-edged sword, and these new cell phones are just the latest example. No longer does James Bond have to smuggle the film from his miniature camera out of the nuclear plant in a hail of explosions - with one of these phones those top secret plans (and your trade secrets or other confidential information) can be transmitted instantly onto the internet, some other company’s network or an employee’s home computer. Not to mention the vulnerability of employees to those few misguided souls who want to share their fun and their co-workers’ embarrassing moments with the whole world.

Before it gets any worse, or hopefully before it gets started at all in your workplace, now is the time to develop and implement a policy about cameras generally (and camcorders), but particularly the use of these camera cell phones. Certainly they should, at the least, be banned from any sensitive areas, product development areas, etc.; in health care they should at least be barred from patient, operating and examination rooms and other patient care areas. A policy ought also to include restrictions on use during work, especially in relation to co-workers - whether there is a right of privacy in the workplace or not is an issue sure to come up and we suggest being proactive. A ban on use in rest rooms and changing rooms is obvious.

Any such policy should be strictly enforced. We guarantee you that some employers are going to be defendants in cases by employees alleging defamation or invasion of privacy by failing to prevent co-employees from inappropriate use of camera phones, and we don’t want you to be one of them. Similarly, protection of your confidential information is critical, especially in the realm of trade secrets and other types of competitive-oriented data.

Termination For Violation Of Last Chance Agreement Was Not Disability Discrimination

In *Longen v. Waterous Company*, 2003 U.S.App. LEXIS 21190 (8th Cir., 10/20/03), the plaintiff had recurring substance abuse issues and had gone through five treatment programs from 1993 through 1996 while employed. This case involved the fourth last chance agreement

("LCA") between the plaintiff, his union and the employer. Under this agreement, plaintiff was returned to work following a suspension, but "[f]uture use of any mood altering chemicals, including alcohol or violation of working rules generally related to chemical dependency will result in immediate termination of employment". Four years later, in 2000, while out on workers' comp, plaintiff was arrested for drunken driving; he later pled guilty. When the employer learned of the arrest, plaintiff was terminated.

He sued, claiming wrongful termination under the ADA and Minnesota anti-discrimination statutes. The 8th Circuit Court of Appeals, affirming the District Court, first assumed that plaintiff had met his prima facie case of proving (1) a disability; (2) that he was qualified; and (3) that he suffered an adverse employment action as a result of his disability. Then the burden shifted back to the defendant to articulate a legitimate, non-discriminatory reason for the termination, here, a violation of the LCA. Then the burden shifted again to the plaintiff to demonstrate that the reason offered was a pretext - here, he claimed the agreement itself violated the ADA because it subjected him to different employment conditions than other employees solely on the basis of his disability. The Court rejected this argument and noted that LCAs by their very nature subject an employee to different employment conditions, and cited numerous other cases upholding the use of such agreements in the face of discrimination claims. The employee, after all, signs off on them, however reluctantly.

Plaintiff's final argument was that the LCA violated the ADA because it restricted out-of-work drug use but an employer could only regulate workplace conduct under the ADA. The Court wrote that this argument "completely misses the point." While the ADA refers to employers being able to require that employees not be under the influence of alcohol in the workplace, the Court ruled that it does not limit the types of restraints an employee may place upon himself via a LCA. Thus the Court affirmed the District Court's entry of summary judgment in favor of the employer.

Going Fishing Is Not Necessarily A Vacation

In this case, *Townsend Industries, Inc. v. United States of America*, 342 F.3d 890 (8th Cir. 9/15/03), the employer had a 40 year history of taking its salespeople to a two day meeting and then sponsoring a four day Canadian fishing trip with all expenses paid. Two days were spent on a bus back and forth, and one evening was devoted to a state of the company speech by the Company president. The rest of the time employees were free to pursue their own interests, though most of them fished. Ongoing, however, were work-related discussions about new products, product improvements, competitors, sales issues, clients, problem-solving and other work topics. Several employees testified that the trip was a needed opportunity for the national sales staff to interact with the employees who manufactured and assembled the employer's printing products.

The IRS determined that there was no legitimate business purpose of the trip (i.e., a junket) and so the per-employee cost of the trip was wages and the employer should have withheld income tax, FICA and Medicare taxes from those amounts. The District Court agreed.

On appeal, the 8th Circuit reversed, ruling that employees viewed the trip as part of their regular course of business, that company-related business was conducted during the trips, and the

company had a realistic expectation that it would gain concrete future benefits from the trips. Thus the trips qualified as working condition fringe benefits and bona fide business expenses under the Tax Code and the company properly excluded the trip expenses from the employees' gross income. The Court basically found that the trip was not a junket or vacation, but was a real work-related event. As one employee noted, "I don't go on vacation with 60 people I work with. I go on vacation with my wife and kids."

Absent "Actual Malice," It's OK To Report Employee To State Licensing Authorities

In a Massachusetts Appeals Court case, *Sklar v. Beth Israel Deaconess Medical Center*, 59 Mass. App. Ct. 550 (10/10/03), an occupational therapist ("OT") was terminated after an internal peer review, triggered by a patient complaint, found that her "performance was inconsistent with professional expectations of a senior occupational therapist." Her supervisor then filed a complaint against her with the state Board of Allied Health Professions alleging violations by the OT of professional standards. The Board later notified the supervisor that it "had closed the case for lack of evidence and cautioned her against filing frivolous complaints."

The OT sued the supervisor, accusing her of intentionally interfering with her employment, malicious prosecution and defamation. She also made a claim against the Hospital, claiming that the employee handbook created a contract that the Hospital breached when it failed to allow her, as part of the internal appeal process (which she utilized) to, among other things, call and interrogate witnesses. The Superior Court judge entered summary judgment on behalf of the supervisor and the Hospital, and the OT appealed.

With respect to the claims against the supervisor, the Court ruled plaintiff could not prevail on her intentional interference with employment claim because she could not show that the supervisor acted with "actual malice"; the supervisor had acted on the basis of the internal report and there was no evidence that the report was fabricated or that it was so flawed or superficial that it provided no reasonable basis for making the complaint to the Board. The defamation claim failed "for essentially the same reason." In the employment context, an employer has a so-called "conditional privilege" to publish defamatory information if doing so is reasonably related to its legitimate business interest. While the privilege does not apply where it has been abused, the standard for showing abuse is effectively the same as the "actual malice" standard on the first claim. Finally, the same is true of the claim for malicious prosecution - if there is no malice then such a claim cannot survive.

On the handbook claim, the Court ruled that even if the handbook were a contract, "the plaintiff exercised that [appeal] right all the way to the very top of the corporate pyramid and, at least absent bad faith or other misdeeds at that level, the contract entitled her to no more. Thus, there was no breach of contract." The Court also appeared to suggest, without actually ruling so, that this handbook was not a contract and the plaintiff was an employee at will and thus generally remained "subject to dismissal for good reason, bad reason, or no reason at all" (subject, of course, to other applicable laws such as anti-discrimination laws).

Workers' Comp Exclusive Remedy For Emotional Distress From

Interrogation

Most if not all states' workers' compensation laws provide that they are the exclusive remedy for workplace injuries, including mental or emotional injuries. The traditional trade-off is that employees receive compensation for workplace injuries on a "no fault" basis, and in return cannot sue the employer for those injuries, although most states have a rarely used "opt out" provision, such as Massachusetts.

In this California case, *Palacio v. Longs Drug Stores*, 2003 Cal. App. Unpub. LEXIS 10500 (Ct. App., 1st Dist., Div. 4, 11/7/03), the employer suspected several employees of theft and one by one brought them into a room with security officers and asked them questions, sometimes aggressively, for 30-60 minutes. The main plaintiff signed a statement acknowledging that she could leave at any time and consenting to the interview. She testified that the questioning was intense and stressful, and denied any theft. She was fired when she signed a confession which she later recanted. She sued for false imprisonment and intentional infliction of emotional distress. The jury specifically found she was not falsely imprisoned and could have left at any time, but awarded each plaintiff \$50,000.00 for emotional distress.

The employer appealed, claiming that investigation of workplace theft was a normal incident of the employment relationship and to the extent any emotional distress was involved, it was covered by the exclusivity provisions of the state workers' compensation laws. The Court agreed and vacated the jury verdict; workers' compensation was the exclusive remedy for emotional distress suffered as the result of one's employment even if the employer's conduct was intentional and egregious. The Court noted that the same rule applied to disciplinary action, demotions, terminations, criticism, and frictions in the workplace.

"Significant" Age Disparity Required To Maintain Age Discrimination Action

Following the lead of several other courts, the 6th Circuit Court of Appeals recently ruled that the age difference between the plaintiff's age (54), his temporary replacement's age (48) and ultimate replacement's age (51), was not significant enough, absent direct evidence of age discrimination, to support plaintiff's claim. In *Grosjean v. First Energy Corp.*, 2003 U.S.App. LEXIS 23122 (6th Cir., 11/13/03), the plaintiff, after 30 years of employment culminating as a machine shop supervisor, was stripped of his supervisory duties supposedly due to poor management skills. Those supervisory duties were first temporarily reassigned to a 48 year old, and later permanently to a 51 year old. Plaintiff claimed that he was the victim of age discrimination. The Court ruled that while an age discrimination plaintiff need not show he or she was replaced by someone outside the protected class (under 40), a plaintiff did need to show he or she was replaced by someone "significantly younger." Thus the Court reviewed dozens of other cases and settled on a "bright line" rule that an age disparity of 6 years or less could not support a prima facie case of age discrimination. Earlier this year, in *Knight v. Avon Products*, 438 Mass. 413 (2003), the Massachusetts Supreme Judicial Court adopted 5 years as a bright line test under the state anti-discrimination statute, G.L. c. 151B.

Inconsistent Positions In SSDI and ADEA Claims Fatal To ADEA Claim

In *Detz v. Greiner Industries, Inc.*, 2003 U.S.App. 20416 (3rd Cir., 10/7/03), the

millwright plaintiff injured his left arm and hand. He performed light duty in the warehouse until he was laid off in 1997 when business declined. He then applied for SSDI benefits and stated that he had stopped working due to his disability. His application was first denied, then granted after a hearing on the basis that he had been disabled from the date of his layoff. Notably, he omitted any reference to the light duty position he held when he was laid off, and his application focused on not being able to perform millwright work. In 2001 he sued the employer and alleged that he had been involuntarily terminated on the basis of his age. In order to establish his prima facie case of age discrimination, he had to, and did, assert in his complaint that at the time of his termination he was qualified for the position he had held and was capable of continuing to perform it.

The 3rd Circuit Court of Appeals agreed with the District Court's grant of summary judgment for the employer. It first found that the plaintiff's positions "genuinely conflicted": to Social Security, he had claimed he was too disabled to work, whereas in his ADEA complaint he claimed he was able to do his job. Given such a finding, it then is up to the plaintiff to reconcile the apparent inconsistency. Plaintiff attempted to explain this apparent inconsistency away by arguing that he was disabled for SSDI purposes by virtue of his layoff, an explanation which the Court did not buy because it still contradicted his numerous sworn assertions to Social Security that he was physically incapable of performing his prior job. The Court wrote that "[i]nstead, Detz appears to have manipulated the facts, and perhaps the system, to obtain SSDI benefits. He succeeded in convincing the agency to award benefits based on his first assertion [physical incapacity], and his inability to adequately reconcile the patently inconsistent positions dooms his ability to pursue his ADEA claim."

ADHD Not, In This Case At Least, A Disability Under The ADA

In a Massachusetts case, *Whitlock v. Mac-Gray, Inc.*, 345 F.3d 44 (1st Cir., 11/3/03), the First Circuit Court of Appeals ruled that the plaintiff's Attention Deficit Hyperactivity Disorder ("ADHD") was not a "disability" under the ADA. The employer allowed plaintiff to construct partitions around his work area and use a radio so that he would not be distracted, and that was all he ever wanted for a reasonable accommodation. In 1998, the company reorganized its office space; as a result plaintiff took a short-term disability leave and returned to work in July, 1999. Upon his return, he again was allowed partitions and use of a radio. The employer also allowed him to work only four days a week with no overtime requirement. In March, 2000, he sued the employer, claiming a hostile work environment, harassment and disability discrimination. In September, 2000, he took another short-term disability leave. While on leave, in February of 2001, his doctor wrote a note stating that plaintiff was "totally disabled" and advised the plaintiff not to return to work at Mac-Gray at all. In July, 2001, plaintiff apparently resigned.

The first question in an ADA case is whether or not the plaintiff is disabled. First, he must show an impairment, and then that the impairment substantially limits a major life activity, which in this case was claimed to be working. The Court assumed that working was a major life activity. Making that assumption, there was no evidence that plaintiff was restricted from "a broad class of jobs" as the caselaw requires. Finally, the Court noted that plaintiff's own deposition testimony was that he could do his job and that the employer believed he could do his

job despite his ADHD. Thus he could not satisfy the “substantially limits” prong of the analysis.

Moreover, quoting a recent Supreme Court case, the Court noted that it was “insufficient for individuals attempting to prove disability status . . . to merely submit evidence of a medical diagnosis of an impairment.” Here, his doctor’s “conclusory assertion of total disability” was not enough to demonstrate exactly how the plaintiff’s impairment affected his ability to perform his job, especially in the face of his contrary deposition testimony.

How Not To Handle A Reasonable Accommodation Situation

In a recent case from the District of Massachusetts, *LaBrecque v. Sodexo, USA, Inc.*, 2003 U.S. Dist. LEXIS 18657 (D. Mass., 10/17/03), the plaintiff suffered from fibromyalgia, which according to the Court is a condition that is long-term, highly individualized, and the severity of pain and symptoms may fluctuate depending on a variety of factors. It is “widely accepted in the medical community as a recognized, diagnosable syndrome, even if its etiology and process are not entirely understood.”

In this case, plaintiff’s condition was medically well-documented, which according to the Court distinguished her case from several others in which courts had found that fibromyalgia did not limit a major life activity under the ADA. She began working for the defendant in 1995, after she had been diagnosed with fibromyalgia. She began as a cook at a college campus facility run by defendant, then she worked as a cook/cashier at a café on the same campus. The cook/cashier position required her to sit for up to three hours at a time; this sedentariness exacerbated her condition, and her supervisors accommodated her by allowing periodic breaks to walk around, which lessened but did not eliminate her condition.

In September, 1996, she was promoted to a shift supervisor at another campus restaurant where she worked a regular 9-5, 5 days/week position which afforded her a full range of physical motion, so she was able to manage her condition in this position. In December of 1998, she was transferred to the position of a supervisor/cashier at a Subway, and her hours were reduced from 40 to 33.5/week - why this took place is not clear. “Most significantly, she was scheduled to work two back-to-back shifts of twelve to thirteen hours each, as well as two shorter shifts of five and four and one half hours each.” She told her supervisor she could not work those shifts because of her condition, and got a note from her doctor stating that she could not work shifts of more than 8 hours. She asked that her schedule be revised and she was willing to continue to work 8 hours shifts.

Two days later, January 14, the same supervisor asked her to work a 13 hour shift on January 17, a couple of days before her new schedule was to take effect. She told him she could not work the longer shift but would work 8 hours. He suggested that if she couldn’t work the longer shifts then she could just work the two short shifts. She protested because she would lose her health insurance working only 9.5 hours/week. He told her he would get back to her about the schedule. She did not work on the 17th.

On January 19, the supervisor left a message on her answering machine “in which he expressed his assumption that she had resigned because she failed to appear for her thirteen-hour shift on January 17.” She left him a message saying that he was supposed to get back to her about the 17th and did not and that he knew she would not be able to work a 13 hour shift. The

next day the supervisor informed her that he would not alter her schedule, and that her choice was working the 9.5 hour week or working the 12-13 hour shifts. She resigned the next day.

The first issue in this case was whether or not plaintiff's fibromyalgia was an impairment that substantially limited a major life activity under the ADA so that she could be considered "disabled." Given the medical evidence presented by the plaintiff, the Court found both that she suffered from an impairment and that she was substantially limited in the major life activity of working. With respect to whether or not the plaintiff was able to perform the essential functions of the job with or without a reasonable accommodation, the Defendant did not challenge her assertion that she was. She claimed "only that her disability rendered her unable to work back-to-back twelve and thirteen hour shifts - an arduous schedule even for someone with no disability - and there is no indication that such lengthy shifts were essential functions of the job." Indeed, the Court noted that the record suggested otherwise.

The final issue was whether or not the employer had offered a reasonable accommodation. The employer claimed "it was prevented from offering LaBrecque a reasonable accommodation because she resigned on January 21, 1999, before the [interactive] negotiating process had run its course." However, the Court wrote, "A factfinder could conclude that defendant offered LaBrecque a classic Hobson's choice, and rejected any effort at a reasonable accommodation." She asked for an accommodation at least three times, and the supervisor's "somewhat bizarre response" to her first request not to work 12 and 13 hours shifts back-to-back was "to ask her to work a twelve to thirteen hour shift on January 17." His other "unworkable alternative" was for her to work a 9.5 hour week. "It is true LaBrecque then resigned, but a reasonable jury could easily conclude that it was a resignation in name only, and that she was forced to resign by Sodexho's failure to reasonably accommodate her disability." Thus the defendant's motion for summary judgment was denied and the plaintiff was entitled to a trial on her claims.

We are not sure this case needs any further elaboration. For whatever unspecified reason, the supervisor appears either oblivious, or had a desire to move the plaintiff out of his operation. In either event, this was about one of the clumsiest attempts at a reasonable accommodation we have seen, if it even was an attempt at a reasonable accommodation.

Each Paycheck Is A "Fresh" Act Of Discrimination

In *Reese v. Ice Cream Specialties, Inc.*, 2003 U.S.App. LEXIS 22296 (7th Cir. 10/30/03), the plaintiff began working for the defendant in early 1997, and after six months was supposed to receive a \$.45/hour wage increase. He claimed his white co-workers did receive such a raise but he did not because he was African-American. Curiously, it was not until August 2000, that he noticed he had not gotten that raise. He then filed a charge of race discrimination with the EEOC, which the EEOC dismissed as untimely. Ordinarily, a plaintiff has 300 days from the alleged act of discrimination to file a charge, and if the discriminatory event was the discrete act of failing to give plaintiff the raise, then EEOC was correct. And so the District Court found.

The 7th Circuit Court of Appeals reversed. The rationale is a little confusing, but the Court drew a distinction between acts of discrimination such as a failure to promote or hire, which are fixed in time even though there may be a recurrent effect on one's paycheck, and an

act such as a failure to give a raise, which recurs each and every paycheck in the future. It is a fine distinction, but the Court relied on Supreme Court precedent to reach its result. In this case, the Court noted that even so, plaintiff could only recover for short paychecks due within the 300 day window for filing a claim, and could not go back to 1997.

Thus if the discrimination claimed is of an unlawful pay practice, as opposed to a failure to hire or promote, each paycheck appears to constitute a discrete, individual act of discrimination. This result would appear potentially to open the door to very old claims, such as “I should have gotten a raise in 1980 but I didn’t because I was female, and not getting that raise is still reflected in my paycheck today; therefore I can still sue you even if I can’t go back beyond 300 days.” Problematic, of course, is that a plaintiff getting anything likely triggers attorneys’ fees under the statutes, so even the likelihood of a small recovery covering 300 days may be sufficient to generate such claims, especially where any pay increase required thereafter would go forward as well. And if an unlawful reduction resulted in lower pension/retirement/401(k) contributions, then that could be an issue as well.

SJC Rules Plaintiff Attorneys May Contact Ex-Employees

In *Clark v. Beverly Health and Rehabilitation Services*, 2003 Mass. LEXIS 716 (10/29/03), a nursing home resident died, allegedly from a negligently administered shot of morphine. The executor of her estate hired a lawyer, who during discovery located a former nurse at the nursing home, who had been on duty the night of the death, was directly involved in the incident, was willing to talk about it and who was not represented by counsel. The nursing home then sought and obtained a protective order barring plaintiff’s counsel from contacting former nursing home employees unless the nursing home’s lawyer was present or had granted permission for such contact.

The Supreme Judicial Court reversed. The Court cited other recent decisions in which it had ruled that an organization’s attorney-client relationship is “appropriately protected when the no-contact rule is construed to prohibit ex parte communication with employees `who are so closely tied with the organization or the events at issue that it would be unfair to interview them without the presence of the organization’s counsel.’” It also noted that “the disclosure of unfavorable facts merely because they happen to have occurred in the workplace is not a legitimate organizational interest for purposes of applying” attorney disciplinary rules.

Thus it appears that, in Massachusetts at least, a plaintiff’s counsel may interview virtually any former employee, and certain categories of current employees as well, without informing the defendant’s counsel.

WAGE & HOUR DEVELOPMENTS

Company Liable For Late Wage Payment Despite Employee’s Agreement

In *Dobin v. CIOview Corp.*, 2003 Mass. Super. LEXIS 291 (10/28/03), a Massachusetts Superior Court judge ruled that a company that paid an employee’s salary months late, even though she agreed to defer her wages until the company’s financial situation improved, was liable under the state Payment of Wages statute, G.L. c. 149, sec. 148. Thus the employee, a

highly compensated manager, was entitled to back wages, attorneys' fees and treble the interest she had foregone. The judge ruled that the statute did not allow employees to waive its protections, one of which is the prompt payment of wages within 6 days of the end of the pay period. That she ultimately was paid before she filed her suit did not eliminate all the treble damages exposure; the Court ruled that while late payment is not a defense to a complaint, a pre-complaint late payment was a defense to treble damages on the wages, but still treble interest was ordered.

But that was not all. At some point the employee told her boss that she had spoken with the Attorney General's office, and had been told it was unlawful to delay her compensation even if she agreed to it. One week later she was terminated. The Court dismissed her claim of common law wrongful termination, but ruled that her claim of retaliatory termination for invoking her rights under the Wage Payment statute could go forward.

One moral here obviously is do not defer wage payments to employees, even salaried exempt employees, even if they agree, even if they want to. Note that there was an agreement here, but for some reason the employee became disaffected enough that she went to the AG's office.

Fired Employee Due Vacation Pay

While the Supreme Judicial Court ducked the interesting question in this case, *Electronic Data Systems Corp. v. Attorney General*, 2003 Mass. LEXIS 720 (11/5/03), it nevertheless is a good reminder to have clear personnel policies. Electronic Data Systems had a vacation policy that read:

Vacation time at EDS is not earned and does not accrue. If you leave the company, you do not receive vacation pay for unused vacation time.

Plaintiff was terminated, and EDS refused to pay him his vacation time. The Attorney General argued that an employer could not force an employee to forfeit already earned vacation time; the employer countered with the argument that the entitlement to vacation is contingent on the policy that creates it, and if that policy contains a forfeiture then that is allowed.

This is an issue which has faced many employers over the last few years, especially since the Attorney General's 1999 Advisory on vacation pay - can you deny a terminated employee vacation pay through a forfeiture provision in a vacation policy? The Court evaded the question here, and ruled that the policy itself was ambiguous, that because EDS drafted the policy any ambiguity would be construed against it, and thus "leave the company" under the policy meant voluntarily to leave the company. Since the plaintiff left involuntarily, the forfeiture in the policy did not apply to him so he was entitled to his vacation pay. Be aware, however, that the AG's view is that there cannot be any forfeiture of vacation pay at all.

AT THE SUPREME COURT

Is It Reverse Age Discrimination When Older Employees Receive More Benefits Than Younger Employees?

This is the issue on which the United States Supreme Court heard oral arguments on November 12, 2003. Under a collective bargaining agreement (“CBA”) between General Dynamics and the United Auto Workers, only employees who reached age 50 by July 1, 1997 were eligible for retiree health benefits; the plaintiffs were between the ages of 40 and 49 as of that date and so are not eligible for retiree medical benefits. Plaintiffs claimed that it was unlawful reverse discrimination to favor older employees over younger employees when those younger employees were still within the Age Discrimination in Employment Act’s (“ADEA”) protected category of being 40 or more years of age.

The District Court dismissed the case, finding that the ADEA did not provide a cause of action for so-called “reverse discrimination.” *Cline v. General Dynamics Land Systems, Inc.*, 98 F.Supp. 2d 846 (N.D. Ohio, 2000).

On appeal, however, the 6th Circuit Court of Appeals reinstated the case. *General Dynamics Land Systems, Inc. v. Cline*, 296 F.3d 466 (6th Cir. 2002). The Court ruled that the ADEA was clear and unambiguous and prohibited discrimination against anyone 40 or older on the basis of age. These plaintiffs were receiving a benefit that was different based on how old they were. This was age discrimination within the plain language of the statute, and thus the plaintiffs could maintain their claim. The Court acknowledged that most other courts addressing the “reverse discrimination” issue had gone the other way and ruled that there was no such claim, but it found those cases “unpersuasive.”

The Supreme Court accepted the case and heard arguments two weeks ago. In a somewhat unusual but not surprising confluence of interests, both union and employer groups filed amicus briefs supporting General Dynamics in this case, supporting mutually agreed upon collective bargaining agreements. A decision is expected in early 2004.

Supreme Court Accepts HMO ERISA Preemption Cases

On November 3, 2003, the United States Supreme Court accepted two consolidated cases on ERISA preemption, a constant topic of litigation in the federal courts and a frequent flyer at the Supreme Court as well. As discussed below with respect to the case of *DiFelice v. Aetna U.S. Healthcare*, HMOs did not really exist when ERISA was enacted in 1974, so how to handle HMOs, where cost-containment is one prominent goal, in the context of ERISA where decisions are supposed to be made by plan fiduciaries on behalf of participants, is a difficult issue for courts to resolve.

In these cases, *Aetna Health, Inc. v. Davila* and *CIGNA Healthcare of Texas, Inc. v. Calad*, (together reported at *Roark v. Humana, Inc.*, 307 F.3d 298 (5th Cir. 2002) with two other consolidated cases which are not subject to Supreme Court review), the Court has agreed to determine whether or not ERISA restricts the ability of HMO participants to sue the HMO for negligence under state laws, which generally are more generous in terms of the damages available. With respect to the claims of Davila and Calad, the 5th Circuit found that the respective HMOs in their cases were not acting as plan fiduciaries when they denied medical treatment, and thus Section 502 of ERISA did not preempt their claims. The Court relied on a prior Supreme Court case, *Pegram v. Herdrich*, 530 U.S. 211 (2000), in which the Court had held that mixed eligibility and treatment decisions were not subject to ERISA because those

types of decisions are not fiduciary acts.

Both HMOs asked the Supreme Court to take the case, principally because, as Aetna wrote, review of this issue was “sorely needed to resolve the deepening divide” over the preemptive effect of ERISA. Barring any delays, a decision on this case is possible before the end of the Supreme Court’s current term in Spring, 2004.

LEGISLATIVE AND REGULATORY ACTIONS OF NOTE

Status Of Wage/Hour Regulations Still In Limbo

As reported last month, the Senate approved an amendment to a DOL appropriations bill that would bar the DOL from using funds to continue developing and implementing revised overtime/exemption regulations under the Fair Labor Standards Act. The House did not approve such legislation originally, but later passed a non-binding resolution supporting the inclusion of such an amendment. The two versions then went to a joint Conference Committee to reconcile the differences and report out a final version. As of November 22, 2003, it’s still there, and apparently is the only issue standing in the way of an appropriations bill. Various solutions have been floated, but it does not seem that any progress has been made. President Bush has promised to veto any bill that contains the amendment. Stay tuned.

Senate, But Not House, Votes To Expand I-9 Program

On November 12, 2003, the Senate voted to approve an extension and expansion of a pilot program allowing employers to verify the work authorization documents of newly hired employees electronically. This action would expand the program to all 50 states by December 1, 2004. The House thus far has failed to approve similar legislation. The pilot program will expire this month without reauthorization.

Amendment Killing Cash Balance Regulations Approved

A Senate-House Conference Committee has agreed on an amendment to the Treasury Department’s 2004 appropriations bill that would bar the Department from using any funds to proceed with drafting and implementing regulations allowing and governing the conversion of traditional defined-benefit pension plans to cash balance plans. The proposed regulations would allow such conversions if they are made on a age-neutral basis and provide older employees with pay credits equal to or greater than those received by younger employees. This legislation is in response to a decision by a federal district court in Illinois, which ruled that IBM violated ERISA’s ban against age discrimination when it converted a defined-benefit plan to a cash balance plan, which had the effect of cutting benefits available to older employees. *Cooper v. IBM Personal Pension Plan*, 274 F.Supp. 2d 1010 (S.D.Ill., 7/31/03).

EEOC Establishes National Call-In Center For Charge Advice

The Equal Employment Opportunity Commission (“EEOC”) has decided to establish a two year pilot national “call in” center, to begin operations in October, 2004. The purpose of the center is to have a central location which individuals could call to obtain guidance on filing an

EEOC charge.

Substance-Free Workplace Website

The federal Department of Labor's website recently has been enhanced with an interactive tool to help employers create and tailor drug-free workplaces programs and policies. The site also has an extensive library of information related to drug and alcohol abuse in the workplace. It can be accessed at www.dol.gov/dol/workingpartners.htm

ON THE EMPLOYEE BENEFITS FRONT

SJC Rules Same Gender Couples May Wed

In a high-profile case, the Massachusetts Supreme Judicial Court ruled that under the Massachusetts Constitution, the Commonwealth could not bar the marriage of same gender couples. In *Goodridge v. Department of Public Health*, 2003 Mass. LEXIS 814 (11/18/03), a divided court (4-3) ruled that the Commonwealth had failed to identify any "constitutionally adequate reason for denying civil marriage to same-sex couples". The Court appeared emboldened by the recent United States Supreme Court case of *Lawrence v. Texas*, 123 S.Ct. 2472 (June 26, 2003), in which the Supreme Court struck down a Texas statute barring certain acts of intimacy between people of the same gender - this was the first case cited in the SJC's decision.

This ruling has obvious implications for employers and benefit program administrators. It may no longer be up to plan drafters whether or not an employee's same-sex "partner" could participate in a family health insurance plan, for example, or who may have survivorship rights under a pension plan. The decision also, for example, may affect employees' FMLA rights. The federal DOL regulations on the FMLA define "spouse" for FMLA purposes as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides . . ."

While the SJC mentioned it would give the state legislature 180 days to respond to its decision, what role the legislature even has at this point is uncertain. We suggest that employers review their plans and policies now to determine if any changes would be necessary. Employee benefit plans provided by and/or administered by religious organizations may have particular issues with this decision, and there may be a conflict between state constitutional law and freedom of religion under both the state and federal constitutions.

Being Nosy Is Not Cause To Deny Severance Pay Under ERISA Plan

In *Johnson v. U.S. Bancorp Broad-Based Change In Control Severance Plan*, 2003 U.S. Dist. LEXIS 14024 (D.Minn., 8/11/03), as the result of a merger the plaintiff remained employed under the terms of a severance agreement designed to encourage retention. The agreement provided severance pay if certain employees lost employment as a result of the change in control from prior to successor employers, but specifically provided that severance would not be paid to employees terminated "for cause." The Bank then discovered that some confidential, though not specially protected, files had been accessed in the Bank's system, and

the plaintiff admitted accessing those files without any legitimate business purpose. Some files were Bank information, some others were a personal file of a superior dealing with the superior's wedding, with invitations and a guest list. She and three other employees were terminated for violating company policy about accessing confidential files, and she was denied severance under the plan because her termination was for cause.

She sued under ERISA, claiming that the plan administrator abused its discretion in determining that she was disqualified from receiving severance benefits (not that she had been wrongfully terminated). Under the "abuse of discretion" standard, wrote the Court, the question was whether "a reasonable person *could* have reached a similar decision, given the evidence before him, not that a reasonable person *would* have reached that decision." Applying this standard, the Court was "unwilling to accept" the Bank's contention that its policies barred plaintiff from accessing the material in question. Wrote the Court, the computer drives were shared and unprotected, there were "absolutely no safeguards in place to prevent" such access and there was no specific policy in place, just a generalized confidentiality policy. Therefore, "the Court is not persuaded that Johnson's access resulted in gross and willful misconduct. Johnson may have been nosy, and her common sense should have prevented her access, but this does not rise to the level of 'Cause' under the terms of the Severance Plan."

Follow-Up - Contingent Employee Status Under ERISA Plans

Following up on last month's discussion of the status of contingent employees under benefit plans, two recent cases illustrate that it is the terms of the plan that govern, so care should be taken in the description of persons eligible under the plan. In the first (a Massachusetts case), *Kolling v. American Power Conversion Corp.*, 2003 U.S.App. LEXIS 20983 (1st Cir., 10/16/03), plaintiff worked as a consultant for the defendant for 4 years, after which he was hired as the CFO. During his consultancy, he was paid hourly but under a 1099 rather than a W-2. During this time he did not participate in the employer's benefit or stock option plans, but was on the employer's health insurance on the condition he pay the full premium. When hired as an employee, he was given credit for his consulting time for purposes of vacation days and vesting under the stock option plan. Two years later he resigned, and four years after that he submitted a claim for benefits seeking contributions under the stock option plan for the time he had been a consultant, claiming that he had been a common-law employee despite his payroll status. The plan denied the claim because plaintiff had not been an eligible employee under the plan during his consulting period, principally because he had not been paid on a W-2 basis.

Under the plan, the administrator had the discretion to make judgments about eligibility, so the question was whether or not that judgment was an abuse of that discretion. The Court ruled it was not. The Court noted that while the plaintiff may have had "a plausible argument that he was a common law employee . . . it is the language of the Plan, not common law status, that controls." Here, the definition of an eligible employee was an "Employee of the Employer," and it was not unreasonable for the administrator to interpret that language as covering only employees paid under a W-2. The administrator also offered evidence that it had consistently taken that position and on numerous occasions in the past had denied benefits to individuals who were not W-2 employees. Thus the Court rejected plaintiff's ERISA claim.

The second case, *MacLachlan v. ExxonMobil Corp.*, 2003 U.S.App. LEXIS 23672 (5th Cir., 11/20/03), involved a similar situation with a similar result. There, a class action complaint was brought by a group of individuals who had performed services for the defendant for years but who always had been directly employed by outside third-party contractors. They claimed they were common-law employees and as such fit within the Plan's definition of "regular employee." That term once had been defined under the Plan as one who was "employed by an employer corporation for work," but that definition was amended in 1994 to specifically exclude employees of third parties and independent contractors. By 1999, MacLachlan, the lead plaintiff, had performed services for the defendant for 11 years, and requested retroactive employment benefits under various benefit Plans. The administrator denied the request because plaintiff had never been on the payroll and thus was not an eligible employee.

Under the abuse of discretion standard, the Court ruled that the administrator had acted reasonably in interpreting the Plan to exclude plaintiff and others similarly situated on the basis they were not "regular employees." No person not on the payroll had ever been paid benefits before, noted the Court, and the contract between the defendant and plaintiff's employer stated that the plaintiff was on the third party contractor's payroll and was entitled to benefits from that employer. The Court held that "ERISA does not require Mobil to define its benefits plans in such a way as to provide coverage for all employees," and thus affirmed the District Court's grant of summary judgment for the employer.

3rd Circuit Court Of Appeals Pleads For Preemption Guidance

Health insurance costs are on every employer's mind, and have been for quite a while. One issue sure to affect those costs is the scope of ERISA's preemption of state court medical negligence suits against HMOs. What is and is not preempted under ERISA has been litigated in thousands of cases since 1974, and the picture has not exactly cleared up much - witness the difficulty of the 3rd Circuit Court of Appeals in the case of *DiFelice v. Aetna U.S. Healthcare*, 2003 U.S.App. LEXIS 20942 (3rd Cir. 10/15/03). Whatever the resolution is, it certainly is unlikely to make health insurance cheaper.

In this case, the plaintiff claimed that the defendant HMO's instruction to his treating physician that a particular tube was not medically necessary in his case was negligent under state law. Plaintiff also claimed that the HMO's insistence that he be discharged from a hospital before his physician thought it was medically appropriate also was negligent. The HMO argued that both claims were preempted by ERISA, meaning that plaintiff's only recourse was under ERISA in federal court. This is important because the damages available under state law, and the range of actions available, are typically more generous and extensive than the limited remedies available under ERISA, including the area of punitive damages.

The Court began by noting generally that under ERISA's civil enforcement provision, Section 502, if a claim could have been brought under Section 502 then it cannot be the subject of a state law claim - it is preempted by the federal law. Section 502 allows a civil action only to recover benefits available under the terms of a plan. The Court noted also that "[d]etermining whether a claim could have been brought under ERISA has proven to be anything but an exact

science. . . . the exercise seems to have taken on a life of its own, and not a very satisfying or productive life at that.”

Here, the Court found that the claim regarding the particular tube was preempted by Section 502 because the plaintiff could have brought an ERISA action under that section for a benefit that should have been provided under the terms of the plan. With respect to the claim that the HMO interfered with his care by insisting that he be discharged before his attending physician agreed, the Court ruled that claim was not preempted because the plan set forth no discharge policy or any agreed benefit about duration of hospital stays, and thus plaintiff could not have brought an action under Section 502 for that claim.

The actual result in this case is not so unusual. What is a little different is the lengthy concurrence by Judge Becker, who agreed with the result but wrote separately to discuss the problems inherent in determining preemption issues in a world of HMOs, cost-containment and concerns about tort liability. For example, he notes that when ERISA was first enacted in 1974, there were no HMOs, but ERISA preemption creates the situation of ERISA having evolved “into a shield that insulates HMOs from liability for even the most egregious acts of dereliction committed against plan beneficiaries.” He continued:

Indeed, existing ERISA jurisprudence creates a monetary incentive for HMOs to mistreat those beneficiaries, who are often in the throes of medical crises and entirely unable to assert what meager rights they possess.

He indicated that the distinction created by courts under ERISA, in which eligibility decisions are preempted but medical decisions are not, was “a hopeless endeavor . . . [and] the price of all this has been descent into a Serbonian bog wherein judges are forced to don logical blinders and split the linguistic atom to decide even the most routine cases.” (In a footnote, Judge Becker defined a “Serbonian bog” as, in part, “a mess from which there is no way of extricating oneself.”)

Thus he, along with Judge Ambro, basically pleaded with Congress to amend ERISA, or for the Supreme Court to impose some order. And maybe the Supreme Court heard this plea - see the discussion above regarding the consolidated cases of *Aetna Health, Inc. v. Davila* and *CIGNA Healthcare of Texas, Inc. v. Calad*. But obviously this issue affects, or may affect, the cost of insurance, which is a concern of all employers - if HMOs are exposed to more financial risk and have to pay out more in damages, or if they have to provide more in the way of covered services to try to minimize liability, then costs to employers and employees likely will increase.

ERISA Does Not Preempt State Law Employment Contract Claim

In yet another preemption case, *Holder v. Petree & Stoudt*, 2003 U.S. Dist. LEXIS 16836 (D.M.D.NC, 9/19/03), plaintiff was covered by profit-sharing and bonus plans paid out at year’s end. In mid-year he gave 6 months notice of his retirement (as his supervisor had previously requested in order to have enough time to train a replacement), to be effective January 1 of the following year, and he specifically was told he would receive the profit-share and bonus. He was terminated a month after giving his notice.

He sued in state court under state law, claiming breach of a contract to continue to employ him for the full 6 month notice period, and claiming as damages lost wages and the profit-sharing and bonus to which he otherwise would have been entitled. The defendant removed the case to federal court and filed a motion to dismiss, claiming that all of plaintiff's claims were preempted by ERISA since all the claims "related to" the ERISA-governed benefit programs. Plaintiff filed a motion to remand the case to state court, arguing that ERISA did not preempt the case because he was not seeking benefits under the plans, only that the benefits which would have been due under the plan were the measure of his damages under his contract.

The Court agreed with the plaintiff. ERISA preempts state law claims that "relate to" ERISA benefit plans, but state law claims with too tenuous a connection with such claims are not preempted, so claims that would exist regardless of the existence of an ERISA plan are not preempted. Plaintiff's employment contract, if there was one, existed independently of the ERISA plans. The Court ruled that the plans in question merely provided a way to measure plaintiff's damages under his state law contract claim, and that plaintiff was not seeking benefits under the plans themselves; therefore the claims were not preempted. Thus the Court remanded the case back to state court for that court to rule on the state law claims.

ON THE LABOR FRONT

Proposed Legislation Would Require Board To Certify Card Checks

Legislation was filed this month in both the U.S. Senate and House of Representatives that basically would require employers to recognize a union solely on the basis of a so-called "card check." A card check is where a union provides an employer with evidence that a majority of employees in an appropriate bargaining unit have signed union authorization cards. Under current law, an employer may refuse to recognize a union on the basis of a card check and insist upon a secret ballot election administered by the National Labor Relations Board. The "Employee Free Choice Act" was filed by Senator Edward Kennedy (D-Mass.) and Representative George Miller (D-Cal.) on November 13, 2003, and requires the Board to certify a union on the basis of signed authorization cards. The proposed Act also provides for mediation and binding arbitration if the union and employer cannot reach a contract after 90 days, and increases the remedies available under the National Labor Relations Act for unlawful actions taken by employers during union organizing, such as treble backpay damages.

Weingarten Redux

Continuing our discussion of *Weingarten* from last month's Alert, the National Labor Relations Board ("Board") recently ruled that it was unlawful for an employer to limit the role of a *Weingarten* representative to that of a silent observer. In *Barnard College*, 340 NLRB No. 106 (10/21/03), the Board wrote that an employee has the right to advice and active assistance from the *Weingarten* representative, and that in a union situation the selection of an employee's

representative belongs to the employee and the union in the absence of extenuating circumstances, as long as the selected representative is available at the time of the meeting. Nevertheless, representatives “may not turn the meeting into an adversarial proceeding, may not prevent the employer from questioning the employee, even repetitiously, and may not interfere with legitimate employer prerogatives.” The Board ruled that preventing the representative from speaking and participating was inconsistent with the right of the employee to have the assistance of the representative during an investigatory interview.

In the same case, the Board ruled that suspending an employee because he demanded the participation of not one, but two, union representatives was lawful; such an insistence was not protected conduct because the *Weingarten* right extended only to the presence of one such representative.

Good Faith Not Enough; You Have To Be Right

In *Shamrock Foods, Inc. v. NLRB*, 346 F.3d 1130 (D.C.Cir., 10/21/03), the District of Columbia Court of Appeals upheld a Board determination that an employer unlawfully discharged an employee due to his union organizational efforts. The employee was a well-known union supporter with a clean five-year work history. Nonetheless, the employer learned that the employee allegedly physically threatened two other employees in an effort to get the two employees to sign union authorization cards. When the two employees confirmed the alleged threats, the employer terminated the employee, despite his denial of making threats.

The Court wrote that the Act is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew so, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct. Here, soliciting cards would be protected activity, the employer knew that, and the basis of the misconduct was threats in the course of that protected activity. Thus the only remaining question was whether or not the employee was actually guilty of the alleged misconduct. The Administrative Law Judge had disbelieved the two employees allegedly threatened, believed the terminated employee’s denial, and also credited two other corroborating witnesses for the employee. Thus the ALJ, Board and Court all found that the employee had not actually threatened the other two employees. Thus the employer was liable for an unfair labor practice despite its good faith belief that the misconduct had occurred. While there is a good faith element to the analysis, if the employer can show it acted in good faith then the burden shifts to the Board’s General Counsel (who prosecutes unfair labor practices, among other things) to prove that the employee did not commit the misconduct, which in this case he was able to do.

So you have to be right in the context of discipline for misconduct committed in the course of an employee’s protected activity, as opposed to, for example, the bagel case discussed above, where a good faith belief that the bagel attack occurred was sufficient to defeat plaintiff’s discrimination claims.