

MISTAKE OF THE MONTH - - More FMLA

The Tail Wagging The Dog - An Intermittent Leave Nightmare

In *Manns v. ArvinMeritor, Inc.*, 2003 U.S. Dist. LEXIS 20776 (N.D.OH., 11/5/03), the employee had narcolepsy and his doctor certified his need for intermittent leave while he was being treated; later the doctor clarified that “intermittent” in this case meant a day or two a month. The Plaintiff’s narcolepsy was largely controlled by medication.

Nevertheless, Plaintiff took 12 weeks of FMLA leave from 4/1/99 - 4/1/00, and between 4/1/00 - 9/1/00 was absent from work for 63 days. He failed to respond to the employer’s repeated requests for verification of his continued need for intermittent leave or reasonable notice when he would not be coming in. The Plaintiff apparently would not even call in when he was not going to come into work, but would just not show up. The company put him into the disciplinary track for unexcused absences, but after he threatened to go to the DOL the company backed off, stopped making requests for verification and notice, rescinded discipline, and thereafter simply recorded every absence as FMLA time.

After a while, he simply began not coming into work during his regularly scheduled work week; rather, he signed up for and worked time and one-half and double time weekend shifts. His irregularity disrupted production, other employees complained, and the employer even hired a full-time employee to cover his regular shift and simply reassigned that employee on those days when Plaintiff actually showed up.

When the employer realized he had taken 63 FMLA days (3 over the 12 week requirement for the year in only 5 months), it finally fired him. He sued, claiming he was harassed for verifications and notice, and that in fact 7 of those 63 days should not have been recorded as FMLA but some other legitimate absence so he was still entitled to his job. The Court, obviously recognizing what was going on here, rejected the Plaintiff’s claims. It wrote that if all 63 days were FMLA, then he was over the 12 weeks and it was lawful to fire him. And if those 7 days should have been something else, in any event they were unexcused absences for which the Plaintiff could not seek cover under the FMLA. Finally, the Court noted that an employer has a duty under the FMLA to investigate leave requests and that it was lawful under the FMLA to make reasonable verification and notice requests.

This is your classic “tail wagging the dog” case in which an employer allowed itself to be buffaloed by an employee; don’t make the same mistakes. An employer is within its rights to require verification for FMLA leave, intermittent or otherwise, and to request reasonable notice when possible. Unexcused absences are a legitimate subject of disciplinary action. While intermittent leave situations can be somewhat confusing at times, an employee on intermittent leave still is subject to the same job requirements and policies as other employees.

EMPLOYERS AND CORPORATE GOVERNANCE

Former AG Harshbarger Cautions HR Advisors On Corporate Governance

Lots of companies wait until the Attorney General or the federal prosecutor knocks at the door to commence an investigation before taking “preventive” measures, be it an OSHA case, an

overtime case, or an internal fraud or malfeasance case. We suggest it makes a lot more sense to be proactive.

There is a huge opportunity in almost every case -- whether you are acting proactively or responding to a crisis or problem-- for you to control your own destiny and seize a window of opportunity to achieve results that are appropriate, common sense and predictable. One of the keys to control is to understand better than anyone what is going on at every level in your business about the various governance/compliance systems, in place, and to have early warning and detection/risk management systems and reporting up to the highest levels.

Among other benefits, you will be able to assess realistically any external customer, press, regulatory or enforcement inquiry and be in a position to respond in an informed way. More importantly, you will be able to make action decisions and negotiate from strength -- and not be faced with a need to defend out of fear of the unknown, or to criticize regardless of whether the request or inquiry is legitimate and may even have merit. These and other problem-solving techniques and principles are not rocket science, but they are not always readily obvious.

One goal is to have HR persons implement company-wide the common sense problem-solving techniques and skills you already have. One way to do that is to help you understand and be able to assess your strengths and weaknesses in any of these areas, so you can make the best possible decisions, rather than simply reacting, in this new era of heightened focus on corporate governance, accountability and integrity.

Don't put yourself in the position of having to be reactive when the authorities knock on your door. Preparation and conscientious attention to the many compliance procedures and policies you have is a major element of good governance, which equals good business.

OTHER EMPLOYMENT LAW HEADLINES

Keep Track Of Those Naps

In *Ramos v. Schaumburg/Oakbrook Marriott Hotels, Inc.*, 2003 U.S. Dist. LEXIS 20268 (N.D.Ill., 11/7/03), a 12 year employee observed apparently sleeping on a couch in a restroom while on the clock. She claimed she was ill for about 30 minutes, and not asleep. The employer investigated, determined she had been sleeping while on the job and terminated her.

She sued for age discrimination. The employer argued that she could not make out a prima facie case of age discrimination because she was not meeting the employer's legitimate job expectations because she was sleeping on the clock. The Court rejected this argument because she denied sleeping, and thus there was a disputed issue of fact that a jury had to resolve.

More interestingly, however, the Plaintiff also came forward with specific evidence that a younger male employee (in the same department working under the same supervisor) had been caught napping on the job twice and received only a verbal warning each time, although he was fired when he was caught a third time. The company claimed that the circumstances were different (in part because the male employee allegedly had napped for shorter periods of time) and thus the two employees were not "similarly situated." The Court rejected this argument too, noting that the employer's policy did not mandate differing discipline based on the amount of nap time.

Finally, there was evidence in the record that the manager who investigated the allegations about the Plaintiff lied about the investigation: “specific facts in the record [] call into question [the manager’s] credibility.” Because “a fact-finder may infer discrimination from an employer’s untruthfulness, evidence that calls truthfulness into question precludes a summary judgment.”

Thus there are two morals to this case: (1) apply your policies consistently; and (2) realize that the untruthfulness of supervisors and managers trying to cover up their own mistakes(s) can create liability in and of itself, even for an otherwise legitimate disciplinary action.

ADA Bars Disability-Based Hostile Work Environment

In *Shaver v. Independent Stave Co.*, 2003 U.S.App. LEXIS 24180 (8th Cir., 12/1/03), the 8th Circuit Court of Appeals joined two sister Circuit Courts in holding that the Americans with Disabilities Act (“ADA”) protects employees from a disability-based hostile work environment.

In this case, the Plaintiff had epilepsy and alleged that he was routinely the butt of rude jokes and insults, including “stupid,” “not playing with a full deck” and “platehead” (Plaintiff did in fact have a plate in his head). The Court ruled that a plaintiff could maintain an action for a disability-based hostile work environment under the ADA based on analogies with other federal anti-discrimination statutes that provide protection for hostile environment claims, and thus joined the 4th and 5th Circuits in so ruling. On the other hand, the Court ruled that the insults and rudeness suffered by the Plaintiff in this case did not rise to the level that an objective person “would consider hostile or abusive.”

In another interesting aspect of the case, Plaintiff had been fired after an argument with his supervisor. He then applied for several jobs and gave that supervisor as a reference. That supervisor told prospective employers that he could not recommend the Plaintiff for employment because he had a get rich quick scheme that involved suing his employers. Plaintiff maintained this reference was retaliation for his complaints about workplace harassment. The employer argued, and the District Court had agreed, that the employee had given the supervisor as a reference to bait him into giving a poor reference so the employee could sue the supervisor. On this issue the Court reversed the District Court. It ruled that negative job references can constitute adverse, retaliatory action, and that there was no “manufactured claim” exception to the retaliation provision of the ADA. Thus this part of the case was remanded to the District Court for trial.

30 Years Of Excellent Evaluations Undermines Termination For Poor Performance

In *Ferrell v. Leake & Watts Services, Inc.*, 2003 U.S.App. LEXIS 23727 (2nd Cir., 11/20/03), a teacher with 30 years service and excellent performance reviews got a new principal. The new principal had all teachers write an essay on why they stayed and worked at the school, and re-interviewed all teachers. The principal considered the teacher’s essay and interview performance “poor,” and placed her on a one-month probation with two other younger teachers. A subsequent series of seven classroom observations by the vice-principal (who also was accused of stating that the teacher was “too old” to be in the classroom) generated seven negative observation reports in which the teacher was rated a “one,” the lowest mark, in all reports in all

categories. The teacher then was terminated, allegedly without following the school's own termination policies.

The District Court had entered summary judgment on the employer's behalf, holding that even if the plaintiff had made out a prima facie case of age discrimination, the employer had come forward with a legitimate non-discriminatory reason (poor performance) which the plaintiff had been unable to show was a pretext for discrimination. The 2nd Circuit reversed the District Court and sent the case back for trial. The Court ruled that there was evidence in the record by which a reasonable juror could find that the poor performance reason offered was a pretext, such as (1) the alleged statement by the vice-principal; (2) the inherent incredulity of a 30 year teacher with excellent performance evaluations suddenly being rated a 1; and (3) the alleged failure to follow policies for termination.

The alleged statement by the vice-principal was important because she also was the observer and thus was integral to the decision-making process, so the alleged remark could not necessarily be considered a "stray" remark. The failure to follow the school's own policies is always going to be a problem as it was in this case. Finally, with respect to the suddenness of the teacher's poor performance after 30 years of excellent classroom evaluations, the Court wrote that a "teacher who had excelled for thirty years could be so uniformly poor strains credulity."

Restructuring Methodology Was Not Age Discrimination

In *Cerutti v. BASF Corp.*, 2003 U.S.App. LEXIS 23789 (7th Cir., 11/21/03), the employer reorganized a plant and terminated 23 employees after it determined they did not have the skills to meet new expectations. The evaluation process consisted of a telephone "problem solving" interview with a consultant, and then review by a management committee and other individuals, including the company's EEO officer. Ten of the 23 sued for age discrimination, claiming that the company's decision not to use prior performance evaluations resulted in lesser-rated and younger employees being retained.

The Appeals Court affirmed the District Court's prior entry of summary judgment in favor of the employer. The Court wrote that because the company did not rely on prior evaluations at all, they could not be used to show the company favored younger over older employees. The Court noted that the purpose of the review of employees via problem solving was to determine if employees could meet the revised and increased expectations prospectively, and that the company chose to "utilize a process that did not take into account the plaintiffs' prior written performance evaluations is of no import." The Court also noted that [e]mployers, not employees or courts, are entitled to define the core qualifications for a position, so long as the criteria utilized by the company are of a nondiscriminatory nature."

Was ULP To Terminate Non-Union Employee For Complaining To Client

In *Bowling Transportation, Inc. v. NLRB*, 2003 U.S.App. LEXIS 24604 (6th Cir., 12/8/03), it was an unfair labor practice ("ULP") for the employer to fire two employees who complained to its only client about how the employer passed through (or did not pass through to the employees) a bonus paid by the client. The client had demanded that the two employees be kept off its premises and threatened to terminate Bowling's contract if they returned. The Court affirmed the

Board's ruling that the employees had been engaged in protected concerted conduct by complaining to the client about the bonus. The burden then was on the employer to show it would have terminated the employees despite their protected conduct, which the Board and the Court found the employer had not done. The prohibition on their presence on the client's property was directly generated by their complaints to the client, which was protected conduct, thus the reason for termination flowed directly from the protected activity. Neither the Board nor the Court found that the client's demand that the employer keep the complaining employees off of the premises was a sufficient reason to terminate the employees - despite the fact that this client was the employer's only client - because, again, that demand was a direct result of the protected conduct. The Court wrote that the employer "had an obligation to stand up to [the client] when it threatened Bowling's ejection if the employees were not removed."

WAGE & HOUR/FMLA DEVELOPMENTS

Any Late Wage Payment Violates State Payment Of Wages Statute

In the December, 2003, case of *Parow v. Howard*, the City of Malden, Massachusetts, apparently because of problems coordinating the authorization of overtime pay with City funding approvals, at least on some occasions paid its firefighters' overtime a few days or a couple of weeks late. The state statute provides that all wages earned in a pay period must be paid within seven days of the end of the pay period. The firefighters sued the City in a class action case, claiming that any late payment violated the statute and subjected the City to treble damages, interest at 12% on late payments, and attorneys fees. The City argued that any late payments were *de minimus* and thus should not trigger liability.

Justice Malcolm Graham of the Massachusetts Superior Court agreed with the firefighters. The Judge noted that there was no support either in the statute or the caselaw for the City's *de minimus* argument, and that generally the only defense to such a claim was for an employer to be able to show timely payment of the correct amount. He awarded treble damages (which would be on the interest owed because all the wages due ultimately were paid) because the repeated nature of the late payments demonstrated a "willful indifference" to the requirements of the statute.

This case, coupled with last month's reported case of *Dobin v. CIOview Corp.*, 2003 Mass. Super. LEXIS 291 (10/28/03)(Company liable for late wage payment despite employee's agreement), appear to illustrate one of the maxims courts use in interpreting statutes, that is, if the language is clear, just apply it. The statute says wages must be paid within 7 days of the end of the pay period, and if they are not, then there is liability.

Probation Period Extensions Might Violate FMLA And/Or USERRA

In *Schmauch v. Honda of America* (reported at 12/17/03 Daily Labor Report, A-8 and E-1), the U.S. District Court for the Southern District of Ohio ruled that the employer's attendance program may have violated either or both the FMLA or the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). The Plaintiff had been placed in the employer's attendance improvement program ("AIP") after several violations of the employer's attendance policy. In essence, an employee is on probation during the period in AIP, but that probationary

period was extended by the number of days spent on certain types of leave, including FMLA, USERRA, personal, medical and educational. While on probation, the employee spent time on both FMLA and military leave, so his probationary period was extended accordingly. He was terminated after an unexcused absence a few days before his probationary period was to expire. He noted that other types of leave did not extend a probationary period, such as workers comp, bereavement and court appearances.

He sued and claimed that his FMLA and USERRA leaves should not have extended his probationary period, so at the time of the unexcused absence for which he was fired he would not have been on probation and could have an unexcused absence under the policy and would not have been fired; thus he was effectively terminated for his use of FMLA and USERRA leave.

The Court ruled that by extending the employee's probationary period by the days spent on FMLA leave, the employer could be found by a jury to have discouraged his used of FMLA leave, in violation of DOL FMLA regulations. A jury also could find that being terminated because of the extension could be construed as using FMLA leave as a negative factor in employment actions, also barred by DOL regulations. With respect to the USERRA, the Court applied the same rationale - but for the extension of the probation due to military leave, the employee would not have been fired for the unexcused absence. Thus the Court denied the employer's motion for summary judgment and ruled a jury should resolve the disputed issues.

Litigation Too Late To Challenge Need For FMLA Leave

In *Smith v. University of Chicago Hospitals*, 2003 U.S. Dist. LEXIS 20965 (E.D.Ill., 11/24/03), a radiation therapist suffered from depressive symptoms and took FMLA leave, which was supported by medical documentation and approved by the employer. There were a series of disputes which culminated in the Plaintiff, by her account, being fired and replaced; the employer claimed her position was eliminated.

During litigation, however, the employer sought discovery of the Plaintiff's medical records in an apparent effort to argue that she had not been entitled to FMLA leave in the first place and thus was not protected by the FMLA and could not maintain her FMLA claims against the employer. The employer argued that it should not be precluded in litigation from contesting her right to FMLA leave even if it did not contest the leave at the time. The Court rejected this argument and ruled that litigation was far to late to contest an employee's need for FMLA leave. The Court noted in particular the FMLA provisions allowing employers to question the validity of an FMLA request, and the right to seek second and third medical opinions if it had a legitimate question. The Court thus ruled that the FMLA provided the exclusive means of challenging the validity of a leave, and not doing so then but trying to do so in later litigation was just too late.

AT THE SUPREME COURT

Supreme Court Sends "Failure To Rehire" Case Back To Lower Court

On December 2, 2003, (in a case first discussed in our November 1, 2003, Update), the Supreme Court issued a unanimous decision in *Raytheon Co. v. Hernandez*, 124 S.Ct. 513 (12/2/03), a case in which an employee challenged an employer's "no-rehire for prior

misconduct” policy because it amounted to disability discrimination against former substance abusers. The Court found that the lower court had applied the wrong analysis in its decision and remanded the case to the 9th Circuit to reevaluate the case. The 9th Circuit, wrote the Court, really had analyzed the case under a “disparate impact” theory and had ruled that the policy as applied to former drug addicts violated the Americans with Disabilities Act (“ADA”). The Supreme Court wrote that the claim brought actually was a “disparate treatment” claim, so the focus should have been on this individual plaintiff’s treatment rather than how the policy may have affected a broad class of employees.

The Court did, however, emphasize that a no-rehire for prior misconduct policy was a legitimate non-discriminatory reason for not rehiring someone in a disparate treatment case analysis, and thus the burden on remand is for the employee to show that this reason was a pretext for disability discrimination. However, the Court failed to reach the question on which it had accepted the case in the first place, whether or not the ADA confers preferential rehire rights on disabled employees lawfully terminated for workplace misconduct. Also unanswered after the Court’s decision is whether or not such a no-rehire policy could be vulnerable under a disparate impact analysis in the right case.

Court Accepts “Constructive Discharge” Case

In a sexual harassment case that could have far-reaching implications for employment-related litigation in general, the Supreme Court on December 1, 2003, agreed to review the 3rd Circuit’s decision in *Suders v. Pennsylvania State Police*, 325 F.3d 432 (3rd Cir., 2003). Most of you are likely familiar with the concept of “constructive discharge,” in which an employer is alleged to have created, or allowed to be created, a work environment so difficult that an employee has no recourse but to quit. The claim in subsequent litigation basically is that “you made working conditions so awful that you made me quit, so that really amounts to having been fired.”

Here, the employee claimed that she was continually sexually harassed during her five months on the job as a state police dispatcher, and the employer did nothing about it. She then quit after being accused of stealing paperwork related to her employment, being handcuffed at work, photographed, read her rights and questioned. She sued, claiming in substance that she was the victim of a sexually hostile work environment because she was viewed as a political appointee.

The case revolved around two prior Supreme Court decisions, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), in which the Court had held that an employer could be strictly liable (that is, regardless of fault) for the harassing conduct of its supervisors when the discrimination results in a “tangible employment action,” which the Court described generally as often involving an economic loss, such as being fired or demoted or failing to promote or reassignment to a less desirable job. The Court also held in those cases that if there was no such “tangible employment action,” the employer may raise an affirmative defense (and shield itself from liability) that it exercised reasonable care to prevent harassment and that the employee unreasonably failed to utilize internal complaint procedures.

Here, the employer argued that the Plaintiff had not suffered any tangible employment action because she had voluntarily quit. The 3rd Circuit ruled that a “constructive discharge, when proved” did indeed constitute a “tangible employment action” so that the employer could not raise the affirmative defenses noted above. Thus the Court sent the case back to the District Court for a trial on the issue of whether the Plaintiff had proved a constructive discharge or not - the summary judgment granted by the District Court was inappropriate given the claim of constructive discharge.

The Supreme Court accepted the case to resolve the question of whether or not people who quit their jobs but later sue for a sexually hostile work environment have the same rights as employees who have actually been fired. Argument on this case is expected in the Spring of 2004, with a decision likely before the close of the Court’s term in early summer. While this case technically is specific to sexual harassment and the ability to raise an affirmative defense, the reasoning of a Court ruling that a constructive discharge is not a “tangible employment action” could trickle down into all sorts of other types of cases in which a constructive discharge is claimed, thus the case bears watching.

Court To Decide If Benefit Suspensions Violate ERISA “Anti-Cutback” Rule

It is common for multi-employer pension plans to suspend retirement benefits if a retiree is engaged in certain types of post-retirement employment (usually if in the same industry), and such limits generally are lawful under ERISA. But also under ERISA it generally is unlawful to “cut back” or reduce previously existing benefits for people who already are retired and receiving benefits.

On December 1, 2003, the Supreme Court accepted the case of *Central Laborers’ Pension Fund v. Heinz*, 303 F.3d 802 (7th Cir., 2002), for review. In this case the pension plan had a long-standing provision suspending benefits for certain types of post-retirement employment, which was fine. Later, however, the plan enacted an amendment which expanded the types of post-retirement employment that would result in benefit suspension, with the result that some retirees who had retired prior to the amendment had their benefits suspended. The 7th Circuit held that the amendment violated ERISA’s anti-cutback rule because it read the rule to prohibit any “reductions” in benefits attributable to service before the amendment. Therefore, as applied to people whose benefits were attributable to service performed before the amendment, the amendment was unlawful.

The Supreme Court apparently took the case because the 7th Circuit explicitly disagreed with a prior decision of the 5th Circuit on the same issue, *Spacek v. Maritime Assoc.*, 134 F.3d 283 (5th Cir., 1998), and thus there is a conflict between circuit courts, which is a frequent reason for the Supreme Court to accept a particular case. The 5th Circuit had ruled that a similar suspension of benefits amendment did not violate the anti-cutback rule because a “suspension” was not a “reduction” in benefits under the rule. Argument on this case is expected in Spring, 2004, with a decision likely prior to the end of the Court’s term at the beginning of the Summer.

LEGISLATIVE AND REGULATORY ACTIONS OF NOTE

Wage/Hour Regulation Revision Process Will Go Forward For Now

After a flurry of last-minute maneuvering, the so-called "Harkin" amendment, which would have barred the federal Department of Labor from proceeding with its proposed wage & hour regulation revisions, has not been included in the final omnibus spending bill before Congress. So at the moment, DOL will continue sifting through the 80,000 comments it received on the proposed revisions and presumably engage in some redrafting of its original proposed changes. DOL states that it plans to issue a final rule in March, 2004.

This fight is far from over, however, as Congressional Democrats have indicated that they intend to refile the amendment next session, and/or could seek to use the Congressional Review Act to kill final regulations. The Congressional Review Act authorizes Congress to revoke agency regulations within a certain period of time after being finalized by a majority vote of both houses. So stay tuned - it seems likely we will see much the same fight this same time next year while in the midst of a Presidential election campaign.

New EEOC Rule "Clarifies" Right To Sue Under ADEA

A new regulation of the Equal Employment Opportunity Commission ("EEOC"), published in the December 17, 2003, *Federal Register*, provides that a charging party does not need to wait until the EEOC dismisses a charge or issues a "right to sue" letter before filing an ADEA suit in court. Private civil actions may be filed sixty (60) days after filing an ADEA charge with the EEOC, regardless of the status of the charge. The regulation also provides that when the EEOC learns of a private suit on which there is a charge pending, it will "terminate further processing of the charge . . . unless it is determined that further proceedings will effectuate the purposes of the ADEA." Employers should note that the EEOC's view is that it may investigate an ADEA claim even if no charge has been filed or even if the charge has been dismissed.

Recent Medicare Bill Creates Health Savings Accounts

Recent Medicare legislation signed into law by President Bush on December 8, 2003, includes the creation of Health Savings Accounts ("HSA"s) effective January 1, 2004. Under the new statute, employees may set aside tax free up to \$4,500/year (on a sliding scale depending on income) to save for medical expenses. Employees and employers may contribute tax-free to HSAs, which may last the employee's lifetime. Money not spent each year simply stays in the account and gains tax-free interest, much like an IRA.

EEOC Plans September 04 Publication Of Final Rule On Retiree Health Plans

Last July the EEOC issued a proposed regulation providing guidelines for the coordination of retiree health benefits with Medicare eligibility without violating the Age Discrimination in Employment Act ("ADEA"). In essence, the regulation allows employers to reduce or terminate retiree health benefits when a retiree becomes eligible for Medicare without running afoul of the ADEA's possible prohibitions on offering different levels of benefits based on age. The regulation also applies to state-provided employee health plans. The regulation is supposed to encourage the provision of retiree health benefits up until a retiree reaches Medicare eligibility,

since the previous choice faced by employers at least arguably was either to provide retiree health care benefits for all retirees or none at all.

The EEOC now estimates that after sifting through comments it has received on the proposed rule, it will issue a final rule in September, 2004.

Department Of Homeland Security Issues Proposed H-1B Visa Regulations

In the December 22, 2003, *Federal Register*, the Department of Homeland Security (“DHS”) published proposed rules governing the H-1B visa program that will implement changes enacted by Congress as part of a series of legislative acts in 2000. The American Competitiveness in the 21st Century Act of 2000 (P.L. 106-313), made a series of changes to the H-1B program, including new employer attestation rules, a whistle-blower provision, increased filing fees and increased penalties. The new rules, according to DHS, are designed to conform current regulations to the law’s changes and to make sure that DHS’s practices accurately reflect those changes.

OSHA Will Use Model MSDSs For Workplace Investigations

The Occupational Safety and Health Administration (“OSHA”) announced on December 16, 2003, that its compliance officers will begin using “model” material safety data sheets (“MSDS”) for ensuring the accuracy of the MSDSs kept by the employer. Employers are required under OSHA regulations to maintain MSDSs for hazardous chemicals kept in the workplaces. OSHA states that inaccurate MSDSs have been implicated in several workplace fatalities. OSHA also promises that guidance will be posted on its website in early 2004.

Sarbanes-Oxley Act Whistleblower Claims

Since the July, 2002, enactment of the Sarbanes-Oxley Act, 169 whistleblower charges alleging securities or corporate governance malfeasance have been filed with OSHA, making such claims the second largest source of whistleblower claims at the agency. Under Sarbanes-Oxley, an employee adversely affected by an employment action in retaliation for complaining about securities or corporate governance malfeasance must first file a claim with OSHA, then if OSHA does not reach a final ruling after 180 days the employee may pull the claim out of OSHA and file a civil action. If the claim is left at OSHA, OSHA’s decision may be appealed to a Department of Labor Administrative Law Judge, with further rights of review if necessary. OSHA states that they have completed 79 investigations of charges, of which 77 were resolved favorably for the employer.

ON THE EMPLOYEE BENEFITS FRONT

Fund Required To Credit Years Of Service Prior To Break In Service

In *Veltri v. Building Service 32B-J Pension Fund*, 2003 U.S. Dist. LEXIS 20576 (S.D.N.Y., 11/15/03), the Plaintiff had worked as a doorman and elevator operator from 1957 to 1969, and then again from 1980 - 1992, when he retired. When he applied for pension benefits the Fund only credited him with his 1980-92 years of service, and relied on the Fund’s “break in service” rule to

deny him service credits for the 1957-69 time period.

The Court ruled that under ERISA, a pension plan must give a participant credit for all years of service (unless one of three narrow exceptions apply), even if those years of service pre-date ERISA's enactment in 1974, and that any plan provision to the contrary is ineffective. The Court explained that while pre-ERISA plan "break in service" provisions may be applied to vesting requirements, they may not be applied to the accrual of benefits. Thus the Fund must go back and recalculate the Plaintiff's pension benefit including his years of service from 1957-1969.

Does The Plan Document Or The SPD Govern The Administrator's Discretion?

In *Shaw v. Conn. Gen. Life Ins. Co.*, 2003 U.S.App. LEXIS 25860 (11th Cir., 12/19/03), the employee sought long-term disability benefits under an employer's plan. He was denied because the insurer's medical opinions were contrary to the opinion of the employee's three physicians. The employee sued, claiming that the plan administrator either abused his discretion or acted arbitrarily and/or capriciously by denying benefits.

This case was remanded by the Court back to the District Court for a trial on the disputed issues among the medical professionals, but the interesting aspect of the Court's discussion was a dispute over what standard of review to apply. The least rigorous standard of review is so-called "de novo," in which the Court reviews the evidence before the plan administrator, and in cases of disputed facts may hear evidence, and determines whether or not the administrator made the correct decision in interpreting the plan; that is, the administrator's decision receives no deference from the Court. This standard applies where the plan documents do not give the administrator any discretion in interpreting the plan. If on the other hand the administrator does have discretionary authority, then the standard is the so-called "arbitrary and capricious" standard, which means the administrator's decision is subject to deference from the Court and cannot be overturned unless it can be said that the administrator acted arbitrarily and capriciously or abused his discretion in his determination under the plan.

The problem in this case was that the plan document (the underlying insurance policy) did not grant the administrator any discretion in interpreting the plan, while the summary plan description ("SPD") did grant the administrator broad discretion in plan interpretation. So which standard to apply? The Court noted that the plan document contained a provision stating that any material amendment to the terms of the plan had to be in writing and signed by a series of employer and insurance company officials, and since that was not done with respect to the administrator's discretion, the SPD could not override the plan document. Thus review of this case was de novo and the case remanded for trial to resolve disputed factual issues. The moral here is to make sure that the plan documents and the SPD are both updated and consistent with each other.

Abuse Of Discretion Times Two

Boswell v. Reliance Standard Life Ins. Co., 2003 U.S.App. LEXIS 25519 (5th Cir., 12/17/03), is an illustration of how the "arbitrary and capricious" or "abuse of discretion" standard of review works. Here, the employee applied for long term total disability benefits after a stroke. The administrator determined that the plaintiff was totally disabled only to a certain

date, after which some medical evidence suggested that the plaintiff was 95% recovered and so could return to full activity. The employee appealed, was denied, and then filed suit.

Here, the plan document provided the administrator with discretionary authority to construe the terms of the plan and to accept or deny claims for coverage. Thus the Court noted that the arbitrary and capricious standard applied, so review of the record was for “some concrete evidence in the administrative record that supports the denial of the claim.” In this case, the District Court had ruled in favor of the plaintiff and held that the administrator abused his discretion in denying the claim.

On review, the Court ruled that the District Court judge had in turn abused his discretion by finding in favor of the plaintiff because it was improper for the lower court judge to “substitut[e] its judgment for that of the plan administrator.” That is, under the abuse of discretion standard, it is not enough (as it is under the *de novo* standard) for the judge to conclude that he would have ruled in the plaintiff’s favor on the same evidence as was before the plan administrator. If there is some concrete evidence in the record to support the plan administrator’s decision, under this standard the administrator’s decision must be upheld, even if the court would have reached a different decision itself. So here, the District Court abused its discretion by finding that the plan administrator abused his discretion.

The “Golden Parachute” Didn’t Open In This Case

In *Curby v. Solutia, Inc.*, 2003 U.S.App. LEXIS 25210 (8th Cir., 12/15/03), the plaintiff’s position was eliminated in a restructuring and she accepted a transfer into a new position. While she received a raise, she felt she had less responsibility and considered the move a demotion, so she resigned, claiming that she had “good reason” to resign under a “golden parachute” agreement and so anticipated that she would be eligible for severance benefits under the agreement. The company accepted her resignation but took the position that only a “change in control” triggered severance under the agreement and denied her severance benefits.

She sued under Section 510 of ERISA, claiming that the severance agreement was a “plan” under ERISA and that she was effectively terminated because she made a claim for benefits under the severance agreement. Section 510 of ERISA makes it unlawful for an employer to take adverse employment action against an employee for exercising any rights she may have under an ERISA plan. The District Court entered summary judgment on behalf of the employer, ruling that the plaintiff could not reasonably have believed she was entitled to benefits under the severance agreement because only a change in control triggered the right to benefits and there had been no change in control.

The 8th Circuit agreed and upheld the District Court. It was undisputed that there was no change in control, wrote the Court, and thus the plaintiff had no right to severance under the agreement. Since her claim for benefits was not reasonable, she could not even make out a *prima facie* case under Section 510 since she had not engaged in any protected activity under that statute. Moreover, because she had resigned, she had not suffered any adverse employment action. The Court wrote that “[a]n employee cannot submit a resignation and then claim the employer’s acceptance of the resignation is an adverse employment action.”

ON THE LABOR FRONT

All Nurses In System Must Be Included In Bargaining Unit

In *Stormont-Vail Healthcare, Inc.*, 340 NLRB No. 143 (11/28/03), Teamsters Local 959 had filed a petition seeking to represent registered nurses at a large medical complex in Topeka, Kansas. The employer took the position that the only appropriate unit included all its registered nurses at all its facilities, some of which were satellite facilities 60-70 miles away from the main campus. After a hearing, the Regional Director applied the Board's so-called "single unit presumption" (meaning that a single location is presumed to be an appropriate unit, so to add additional locations to a unit generally means having to show substantial interrelationships and interchange of employees between locations to overcome that presumption) and ruled that the appropriate unit was those nurses employed at the main complex and at buildings within a six block radius of the main campus.

The employer sought Board review and argued that there was interchange among the entire group of nurses, there was central management and labor relations of all sites, all the nurses performed similar work and attended common meetings, and all received the same benefits and pay scales. The Board agreed, and ruled that the appropriate unit was all registered nurses at all of the employer's facilities, basically finding that the employers facilities were well-integrated and governed by common management and supervision and labor relations.

In a similar case issued the same day, *St. Luke's Health System, Inc.*, 340 NLRB No. 139 (11/28/03), the Board again overruled a Regional Director and held that all the various satellite units of a health system had to be included in a single all-professional bargaining unit, largely for the same reasons discussed above.

Bar On "Sympathy" Strike In Contract Must Be Express

In *Standard Concrete Products, Inc. v. General Truck Drivers*, 2003 U.S.App. LEXIS 25619 (9th Cir., 12/18/03), the 9th Circuit Court of Appeals reversed an \$800,000 District Court judgment in favor of an employer who had sued a union for violation of a collective bargaining agreement's no-strike provision. The union had engaged in a sympathy strike for another Teamsters local and refused to cross picket lines of the other local. The employer sued under Section 301 of the Labor Management Relations Act ("LMRA"), arguing that the no-strike provision of the CBA barred a sympathy strike. After a trial, the employer was awarded over \$800,000.

The 9th Circuit reversed. It ruled that a sympathy strike is conduct protected under Section 7 of the National Labor Relations Act ("Act"), so for a contract to waive the employees' right to engage in such protected conduct, a waiver had to be "clear and unmistakable." Here, the contract's no-strike clause, while barring a "strike," did not expressly bar a "sympathy" strike. Moreover, there was another provision stating that employees were not required to cross a picket line. Thus, the Court ruled, the employer had not shown that the union had clearly and unmistakably waived its right to engage in a sympathy strike.

Solicitation/Distribution Policy Must Be Uniformly Enforced

In three recent cases, the Board found an unfair labor practice where an employer discriminatorily enforced a solicitation/distribution policy only against a union. In *Wal-Mart Stores*, 340 NLRB No. 144 (11/28/03), the employer's policy was to allow distribution and solicitation outside its stores, at least 15 feet from entrances and exits, and that it was the company practice to inform prospective solicitors of the policy. Here, however, when union organizers appeared, the company did not inform them of the policy and insisted that the union organizers leave its premises. While the Board found that the policy was discriminatorily enforced against the union and thus the company was liable for an unfair labor practice, really the problem was that the company did not apply the policy to the union when it applied it to other groups. In another case issued the same day, *Lincoln Center for the Performing Arts*, 340 NLRB No. 134 (11/28/03), the employer created a no-leafleting policy in order to discourage union organizers at its facility, and then threatened to have violators arrested. The policy applied to public areas around the employer's facility, which was problematic in and of itself; then threatening arrest for violating an unlawful policy only exacerbated the unfair labor practice.

Finally, in a case decided December 15, 2003, *City Market, Inc.*, 340 NLRB No. 151, the Board ruled that an employer violated Section 8(a)(1) of the Act during an organizing campaign when it promulgated a no-solicitation rule. The majority said that although that rule was facially valid, the Respondent instituted it specifically in response to its employees' union organizing activities. Chairman Battista and Member Walsh held that the Respondent failed to show that it promulgated the rule to maintain production and discipline.

Broad Cease And Desist Order Imposed By Board

In *Detroit Newspaper Agency*, 340 NLRB No. 121 (11/21/03), a split panel of the National Labor Relations Board imposed a "cease and desist" order on the employer for the unlawful discharge of two strikers premised upon serious misconduct that the Board found they did not commit. As noted in last month's discussion of *Shamrock Foods, Inc. v. NLRB*, 346 F.3d 1130 (D.C.Cir., 10/21/03), if an employer disciplines an employee for misconduct committed in the course of otherwise protected conduct, the employer has to be correct that the misconduct actually occurred to impose discipline; a good faith belief that it occurred is not enough. Here, again, an employer was wrong about the two fired employees actually engaging in strike-related misconduct and was ordered to reinstate the two employees with back pay.

The contentious issue in the case, which generated a dissent from Member Schaumber, was whether or not a broad "cease and desist" order was appropriate. The Board ordered that the employer cease and desist from discharging striking employees "who have not engaged in serious misconduct." Member Schaumber argued that such a requirement was unfair to the employer because it amounted to an order that the employer not make innocent mistakes in the future at the risk of being held in contempt of the Board's order, and thus the employer might avoid lawful discipline of employees because of that risk. He reasoned that there was no evidence that the employer conducted an inadequate investigation or otherwise deliberately avoided learning the truth about the incidents. The majority countered that cease and desist orders were an ordinary remedy in this type of case and there was no reason to depart from that practice.