



HIPAA PRIVACY RULES AND NON-HEALTH CARE EMPLOYERS

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Most employment lawyers know the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) as merely the “insurance portability” law. Until Recently, HIPAA’s impact on employers was relatively minimal and fairly straightforward. New health information privacy regulations, however, which were finalized on August 9, 2002, and which take effect on April 14, 2003, represent sweeping changes in how an individual’s medical information is used and disclosed to others. While at first blush the privacy rules appear to have a minimal effect on the typical employer, HIPAA’s regulations will indeed change the flow of certain employee information in virtually all workplaces. Employers will no longer have relatively unfettered access to employee health information. Sharing worker medical data with insurers, health plan or health care providers is now a highly-regulated activity.

This article will provide a brief, and greatly simplified, overview of HIPAA’s expansive privacy regulations, and then discuss several issues that employers, employees and employment lawyers should consider as the effective date nears.

Overview of the privacy regulations

The privacy rules set the standard for protection of Personal Health Information (“PHI”). The law defines PHI as *individually identifiable information* that is:

- (a) created or received by a health care provider, health plan, health care clearinghouse or employer; and
- (b) related to the past, present or future physical or mental health or condition of an individual, or the provision or payment of health care for an individual. 45 CFR § 164.501.

Under the regulations, “covered entities” may not *use or disclose* PHI without *authorization* from the individual who is the subject of the information, or as permitted by the regulations (for such things as treatment, payment or health care operations). 45 CFR § 164.502(a). In most cases, even when use or disclosure of PHI is allowed, only the “minimum necessary” amount of PHI to accomplish the intended purpose of the use, disclosure or request may be provided.

HIPAA defines “covered entities” as:

- *health plans*, such as medical, dental and long-term care plans and health flexible spending accounts (except health plans with less than 50 participants *and* that are self-administered by the employer);

- *health care providers*, including providers of medical or other health services and any other person or other organization who furnishes, bills or is paid for health care in the normal course of business, 45 CFR § 160.103; and
- *health care clearinghouses*, entities that convert data from a standard format to a non-standard format or vice-versa.

Because the privacy regulations go into effect in April 2003, covered entities have been (or should have been) working for months to become compliant by the effective date. Small health plans, with annual receipts of \$5 million or less, are provided an additional year to comply.

Employers are not generally considered covered entities, unless they meet the definition above. This has resulted in complacency among employers, employees and their counsel and an indifference to the impending compliance deadline. Employers and employment lawyers must understand, however, that HIPAA’s new privacy rules will have a major impact on the workplace, principally in the area of employee benefits.

Impact on Health Plan Sponsors

Employers who provide group health care benefits for their workforce, through either fully insured or self-insured plans, will feel the weight of the new regulations. Make no mistake, virtually every employer that offers health insurance is affected by the regulations. The reason is simple: while an employer might not be a covered entity, it will often receive PHI from the covered plan. The receipt of this information is regulated by HIPAA. Therefore, an employer cannot obtain and use an employee’s PHI from its health plan (or any other covered entity) without authorization from that employee. However, if an employer wants regular access to PHI without such authorization, the employer and its health plans must jump through more than a few hoops, discussed below, before the effective date.

It is important to first distinguish between *self-insured* plans and *fully insured* plans. For self-insured plans, the employer is considered a “hybrid entity.” For hybrid entities, the privacy rules apply only to the part of the entity that is the health care component, yet the requirements are quite onerous. In this regard, hybrid entities in essence must comply with all of HIPAA’s requirements related to disclosure of PHI to business associates, protection of individual privacy rights, privacy notices and administrative requirements such as the appointment of a privacy official, workforce training and the imposition of sanctions on employees for improper use and disclosure of PHI. 45 CFR § 164.530. These requirements are beyond the scope of this article. Please note, however, that flexible spending accounts are also subject to these onerous rules.

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HIPAA PRIVACY RULES AND NON-HEALTH CARE EMPLOYERS

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For fully insured plans, where the employer merely purchases a group health policy and generally has limited plan administration responsibilities, the privacy rules give employers (plan sponsors) a choice: either cut off the flow of PHI from the health plan to the employer or live by a long list of requirements provided by the privacy rules. Remember, while plan sponsors are not covered entities and are therefore not directly regulated by the privacy rules, they will be tied into, and bound by, HIPAA if they want to receive PHI from their plan. This is accomplished by HIPAA through its plan sponsor obligations (the aforementioned "hoops"), which include the following:

Plan documents must be amended to:

1. describe to participants and beneficiaries how PHI will be used by the plan sponsor;
2. identify those employees or classes of employees who will have access to PHI and under what circumstances this access will be permitted;
3. establish an effective mechanism for resolving any issues of non-compliance; and
4. provide that the health plan will only release PHI to the sponsor upon receipt of a certification from the sponsor that the plan documents have been so amended.



"Let's see, I need my files on HIPAA, ERISA, ADA, FMLA, workers' comp, the union contract . . ."

Plan sponsors must certify to the plan that they will:

1. not use PHI for employment or other benefit plan purposes (but only for plan administration purposes);
2. assist employees in exercising their right to access and amend PHI;
3. ensure that appropriate "firewalls" are in place to prevent disclosure of PHI from those employees authorized to receive PHI and those who are not. See 45 CFR § 164.504(f).

The employer's certification that PHI will not be used for employment purposes, including hiring, promotion and termination decisions, is noteworthy. Employers often rely upon employee health information in their possession in making employment determinations related to such issues as drug testing, FMLA and ADA compliance, sick leave use, and in connection with other benefit plans. Under the plan sponsor rules described above, however, employers will be required to certify that PHI received from the covered entity (the plan) cannot be so used. Therefore, employers are advised to contact their insurers to discuss limiting the information flow between the plan and the plan sponsor to "summary health information" (e.g., de-identified information related to claims history, expenses and types of claims) for use in obtaining premium bids and/or performing settlor functions, or for the

enrollment and disenrollment of employees from the plan. Under HIPAA if such restrictions are in place, plan sponsors will not be required to make these plan amendments and certifications.

Importantly, only *health* plans are covered entities under the privacy rules. Other benefit plans, such as life, LTD/STD, and workers' compensation, are not required to comply with HIPAA's privacy regulations. Therefore, the health information flow among employees, employers and these non-covered plans is unregulated by HIPAA. Of course, if the information flow is between a non-covered plan and a covered entity, such as the employee's physician or the employer's health plan, specific authorization is required from the employee.



What to do with "Individually Identifiable Information."

For employers who do not receive PHI from health plans, and therefore do not trigger HIPAA privacy compliance requirements, the most significant effect of the privacy rules is *money*. The administrative costs of covered entities will likely be passed on to non-covered employers in the form of higher premiums.

HIPAA's Relationship to Other Employment Laws

While the privacy rules attempt to place control of PHI in the hands of the individual who gets to decide whether to authorize its disclosure, it is important for employers and employment lawyers to understand that nothing in the regulations prohibits employers from requiring, as a condition of employment, that employees authorize the release of protected health information for employment-related reasons. In this regard, an employee who refuses to authorize the release of PHI to satisfy a lawful employer requirement is subject to the same disciplinary procedures that were permitted prior to the privacy regulations.

Briefly, HIPAA has no significant impact on the operation of other employment laws:

- *Employee Retirement Income Security Act of 1974*: the privacy rules do not conflict with ERISA's provisions regulating pension and employee welfare benefit plans. The privacy rules' preemption provisions do not give effect to state laws that would otherwise be preempted by ERISA.
- *Americans with Disabilities Act*: the ADA imposes its own confidentiality obligations upon employers with respect to applicant and employee medical information. The privacy rules do not conflict with those obligations. Additionally, the privacy rules do not permit employers to request or use PHI in violation of the ADA (or other anti-discrimination laws).
- *Family Medical Leave Act*: employers are entitled under the FMLA to receive medical certification of an employee's need for FMLA recognized leave. Covered entities will need to obtain the employee's authorization before disclosing medical information to the employer. If an employee does not authorize release of the medical information, of course, then the employee loses the protection of the FMLA.

- *Workers' compensation laws*: the privacy rules state that a covered entity may disclose, *without the individual's authorization*, protected health information for purposes of workers' compensation. A covered entity may make this disclosure to: (a) a party responsible for payment of workers' compensation benefits to the individual; and (b) an agency responsible for administering and/or adjudicating the individual's claim for workers' compensation benefits.

Penalties for Noncompliance

The privacy rules are enforced by the Department of Health and Human Services. The Secretary of HHS is authorized to investigate any complaints filed regarding alleged violations of the regulations. A finding of noncompliance can result in major liability for the employer, including civil penalties of up to \$100 per person per violation and up to \$25,000 for violations of a single standard within a single calendar year. Criminal penalties, ranging from \$50,000 and/or one year imprisonment for a knowing violation to \$250,000 and/or ten years for a violation with intent to sell, transfer or use PHI for commercial gain.

Practical Steps

Employers should take stock of their benefit plans and their use of employee health information in advance of the effective date of the privacy rules. Some measures to consider are as follows:

- Employers should designate a HIPAA leader or team of employees to work with legal counsel, health insurance issuers and other consultants, to address the employer's potential compliance requirements under HIPAA and conduct adequate training of administrative employees, plan trustees and other workforce members;
- Employers should inventory their current uses and disclosures of employee health information. In this regard it is advisable to identify the flow of information between benefit plans, labor organizations, human resources personnel, etc. Additionally, employers should examine how health information is presently used for employment-related decisions;
- All health plans should be reviewed to determine whether they are fully insured or self-insured (even partially);
- Health insurance issuers and HMOs should be consulted to determine the feasibility of limiting disclosures between the covered entity and the employer to summary health information and/or enrollment and disenrollment information;
- Employment lawyers should review employee disciplinary procedures to ensure appropriate inclusion of disciplinary and remedial measures for employees' impermissible use and disclosure of PHI;
- A timeline for compliance with HIPAA should be developed immediately to map out an effective and comprehensive compliance strategy that will be implemented before the effective date.
- Lastly, employment counsel should recognize this as an opportunity to motivate idle employer clients to review all uses of medical information and ensure compliance with ADA requirements, discrimination prohibitions and other state and federal employment laws. ■

THE CONTINUING VIOLATIONS DOCTRINE AFTER NATIONAL RAILROAD PASSENGER V. MORGAN: DID THE UNITED STATES SUPREME COURT QUIET OR CONTINUE THE CONFUSION?

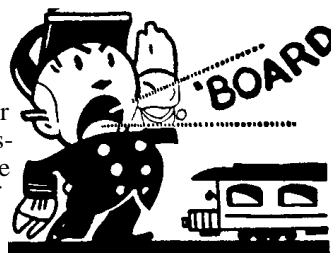
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I. Introduction

The Continuing Violations Doctrine has been called vexing, confusing, inconsistent and muddled.¹ This judicially created doctrine allows courts to toll limitation periods for conduct that is deemed continuing in nature. Thus, plaintiffs can recover based upon conduct that would otherwise be time-barred. On June 10, 2002, the United States Supreme Court attempted to eliminate some of the confusion generated by this doctrine with its opinion in *National Railroad Passenger Corporation v. Morgan*.² Before this recent opinion, there were three main approaches to the Continuing Violations Doctrine in the federal courts. While *Morgan* silenced the debate regarding these different approaches, it simultaneously created a vague standard with regard to the application of the doctrine to hostile environment claims. This article explores the *Morgan* decision and its impact on the future application of the Continuing Violations Doctrine in employment suits.

II. National Railroad Passenger Corporation v. Morgan

In *Morgan*, Abner Morgan sued his employer, National Railroad Passenger Corporation, better known as "Amtrak," for race discrimination, retaliation and hostile work environment under Title VII of the Civil Rights Act of 1964.³ He alleged a series of discriminatory incidents from the beginning of his employment in August of 1990 until his termination on March 3, 1995.⁴ On February 27, 1995, Morgan filed a charge with the Equal Employment Opportunity Commission (EEOC) and the California Department of Fair Employment and Housing. The EEOC issued a "Notice of Right to Sue," and on October 2, 1996 Morgan filed suit in the United States District Court for the Northern District of California. Amtrak filed a motion for summary judgment arguing, in part, that it was entitled to a judgment on all incidents that occurred after the applicable 300-day statute of limitations period. The district court granted the motion. It held that Amtrak was not liable for incidents occurring prior to the applicable limitations period. The remaining allegations proceeded to trial and resulted in a verdict in Amtrak's favor. Morgan appealed.⁵ The issue on appeal was whether, under the Continuing Violations Doctrine, Amtrak was liable for the incidents occurring prior to the applicable 300-day limitations period. The Ninth Circuit reversed the district court, holding that the incidents occurring prior to the limitations period were sufficiently related to the inci-



"Getting up to speed on the Amtrak decision."

dents that occurred within the limitations period to trigger the operation of the Continuing Violations Doctrine.⁶ Amtrak appealed the Ninth Circuit's holding, and the United States Supreme Court granted certiorari.

III. The Previous Split among the Federal Courts

Before the Supreme Court's opinion in *Morgan*, the federal courts generally applied three different analyses to the Continuing Violations Doctrine. These analyses are best illustrated by the Seventh Circuit's *Galloway v. General Motors Service Parts Operations*,⁷ the Fifth Circuit's *Berry v. Board of Supervisors*⁸ and the Ninth Circuit's opinion in *Morgan v. National Railroad Passenger Corporation*.⁹

A. The Galloway Analysis

In *Galloway v. General Motors Service Parts Operations* Judge Posner concluded that the statute of limitations is triggered once a plaintiff has notice of harassment or discrimination. Judge Posner wrote that a plaintiff can avail himself of the Continuing Violations Doctrine when it would be "unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized as actionable harassment only in light of events that occurred later, within the period of the statute of limitations."¹⁰ Judge Posner called this the "concept of cumulation."¹¹ He reasoned:

We do not want to encourage premature or precipitate litigation. If the victim of sexual harassment sues as soon as the harassment becomes sufficiently palpable that a reasonable person would realize she had a substantial claim under Title VII, then she sues in time and can allege as unlawful conduct the entire course of conduct that in its cumulative effect has made her working conditions unbearable.¹²

B. The Berry Analysis

The *Berry* Court, like the *Galloway* Court, emphasized the plaintiff's obligation to assert claims once notice has been provided of the existence of a claim. In *Berry*, however, the Court used a multifactor test to determine if a plaintiff can avail himself or herself of the Continuing Violations Doctrine.¹³ Under this test the plaintiff must prove that: 1) the alleged acts "involve the same type of discrimination"; 2) the alleged acts are "recurring"; and 3) the alleged acts "have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights."¹⁴ The *Berry* Court noted that the third factor was "perhaps of most importance."¹⁵

C. The Ninth Circuit's Analysis

In *Morgan*, the Ninth Circuit rejected both the *Galloway* and the *Berry* analyses. The Court looked to its own reasoning in *Felder v. UAL Corporation*,¹⁶ conditioning the use of the Continuing Violations Doctrine only upon whether "the pre-limitations conduct" was sufficiently related to the "post-limitations conduct."¹⁷ Following *Felder*, the Ninth Circuit distinguished between systemic and serial violations of Title VII. The Court defined a serial violation as "a series of related acts one or more of which are within the limitations period."¹⁸ The Court defined a systemic violation as "a systemic policy or practice of discrimination that operated, in part, within the limitations period."¹⁹ Applying this analysis to Title VII claims, the Court stated that a plaintiff must prove "1) the existence of a continuing violation – be it serial or systemic, and 2) that the violation continued into the limitations period."²⁰

IV. Defendant Amtrak's Argument

In its Supreme Court brief, Amtrak argued for the adoption of either the *Galloway* or the *Berry* analysis.²¹ Amtrak preferred the *Galloway* Approach, however, because it provided "great predictability without denying relief" and gave employees "incentive to act quickly."²²

V. Plaintiff Morgan's Argument

Morgan argued, predictably, for the Supreme Court's adoption of the Ninth Circuit's analysis. He argued that the *Galloway* or *Berry* approaches improperly emphasized "the desire to encourage prompt filing of claims and conflicts with harassment victims' entitlement to the maximum benefit under the law."²³ Notably, Morgan stated that there was a "natural affinity between hostile environment claims and continuing violations."²⁴

VI. Summary of Opinion

In *Morgan*, the Supreme Court voted 5-4 to affirm the Ninth Circuit's approach to the Continuing Violations Doctrine as to hostile environment claims only.²⁵ Thus, the Supreme Court silenced the debate regarding which analysis any given court should use when applying the Continuing Violations Doctrine to hostile environment claims. However, as stated above, it created a new debate by adopting an extremely vague standard with regard to the application of the doctrine to these claims.

A. The Majority Opinion

The majority opinion, written by Justice Thomas, for the first time, emphasized the clear distinction between applying the Continuing Violations Doctrine to "hostile environment claims" and applying it to "discrete claims of discrimination or retaliation." Thomas wrote that discrete acts of discrimination or retaliation, such as discriminatory discipline or retaliatory termination, should be treated entirely differently than claims of hostile environment. Indeed, the Court reversed the Ninth Circuit with regard to "discrete acts of discrimination or retaliation," holding that Title VII "precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period."²⁶ The Court stated:

The Court of Appeals applied the continuing violations doctrine to what it termed "serial violations," holding that so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act may also be considered for the purposes of liability. With respect to this holding, therefore, we reverse.

Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice." Morgan can only file a charge to discrete acts that "occurred" within the appropriate time period.²⁷

With regard to hostile environment claims, however, the Court stated that "[p]rovided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability."²⁸ The Court reasoned that "[i]f Congress intended to limit liability to conduct occurring in the period within which the party must file the charge, it seemed unlikely that Congress would have allowed recovery for two years of backpay."²⁹ Furthermore, the Court stated "[i]t also makes little sense to limit

the assessment of liability in a hostile work environment claim to the conduct that falls within the 180- or 300-day period given that this time period varies based on whether the violation occurs in a state or political subdivision that has an agency with authority to grant or seek relief."³⁰

B. Opinion of O'Connor, J.

Justice O'Connor's opinion will undoubtedly encourage continued debate with regard to the Continuing Violations Doctrine and the standard adopted by the Majority. Justice O'Connor concurred with the majority's opinion regarding discrete acts of discrimination or retaliation, but disagreed with the majority's opinion regarding hostile environment claims.³¹ She wrote: "Unlike the Court, I would hold that §2000e-5(e)(1) serves as a limitations period for *all* actions brought under Title VII, including those alleging discrimination by being subjected to a hostile working environment."³²

Justice O'Connor reasoned that "[a]llowing suits based on . . . remote actions raises all of the problems that statutes of limitations and other similar time limitations are designed to address."³³ In addition, Justice O'Connor disputed the majority's reasoning with regard to the two-year limitations on backpay and the variable 180 or 300 day limitations period. She pointed out that, pursuant to "potential adjustments to the charge-filing period based on equitable doctrines, two years of backpay will sometimes be available even under my view."³⁴ With regard to the charge filing times Justice O'Connor stated:

The Court concludes that "[s]urely . . . we cannot import such a limiting principle . . . where its effect would be to make the reviewable time period for liability dependent upon whether an employee lives in a State that has its own remedial scheme." But this is precisely the principle the Court has adopted for discrete discriminatory acts – depending on where a plaintiff lives, the time period changes as to which discrete discriminatory actions may be reviewed. The justification for the variation is the same for discrete discriminatory acts as it is for claims based on hostile work environments. The longer time period is intended to give States and other political subdivisions time to review claims themselves, if they have a mechanism for doing so. The same rationale applies to review of the daily occurrences that make up a part of a hostile environment claim.³⁵

In short, Justice O'Connor argued that each act of a hostile environment claim should restart the statute of limitations.³⁶ She wrote:

Although a hostile environment claim is, by its nature, a general atmosphere of discrimination not completely reducible to particular discriminatory acts, each day the worker is exposed to the hostile environment may still be treated as a separate "occurrence," and claims based on some of those occurrences forfeited. In other words, hostile environment is a form of discrimination that occurs every day; some of those daily occurrences may be time barred, while others are not.³⁷

V. Impact

The most significant impact of the Court's opinion in *Morgan* is that the Court decided what test to apply to continuing violations with regard to hostile environment allegations. In analyzing whether the Continuing Violations Doctrine can be used by a plaintiff to bring a hostile environment claim on incidents occurring out-

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THE CONTINUING VIOLATIONS DOCTRINE AFTER *NATIONAL RAILROAD PASSENGER V. MORGAN*: DID THE UNITED STATES SUPREME COURT QUIET OR CONTINUE THE CONFUSION?

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side the charge filing period, a court will have to determine whether these incidents are "sufficiently related" to or are "an act contributing to" the incidents that occur within the charge filing period.³⁸ Before the Court's opinion, employment litigators spent a significant amount of time and energy determining what test any given court would apply to continuing violations. Now, however, employment litigators' time will be shifted to the confusing task of applying this new, vague standard to particular hostile environment factual scenarios.

Notably, the Supreme Court did not endorse the Ninth Circuit's "serial violations v. systemic violations" analysis.³⁹ To the extent that the Ninth Circuit held that the Continuing Violations Doctrine applied to all serial violations, the U.S. Supreme Court rejected the Ninth Circuit's analysis.⁴⁰ As Justice Thomas wrote, a plaintiff cannot argue that independent actions, such as a failure to promote, a denial of transfer and a termination, together constitute a serial violation. These are separate, discrete acts. Each act, if based on discrimination or retaliation, triggers the clock on the plaintiff's charge filing period. A plaintiff cannot use a discrete act that occurred within the charge filing period to resuscitate a discrete act that occurred outside the charge filing period.

It is also notable that the application of the Continuing Violations Doctrine to what the Ninth Circuit labeled "systemic violations," remains an open question. In a footnote, Justice Thomas wrote: "We have no occasion here to consider the timely filing question with respect to 'pattern or practice' claims brought by private litigants as none are at issue here."⁴¹

Thus, the Court affirmed only the portion of the Ninth Circuit's opinion that allowed incidents occurring prior to the limitations period to be considered as part of a hostile environment claim. In deciding whether a plaintiff can use the Continuing Violations Doctrine to introduce evidence of incidents occurring outside the charge filing period, a court will now have to determine whether these incidents are "sufficiently related" to or are "an act contributing to" the incidents that occur within the charge filing period.⁴²

The phrase "sufficiently related" will undoubtedly be litigated repeatedly in the future. Plaintiffs' counsel will attempt to argue that even the most remote event in a series of events allegedly constituting a hostile environment are "sufficiently related" to an event occurring within the charge-filing period. Employer's counsel will likely argue the opposite. Historically, this is just the type of argument that occurs in hostile environment cases generally. For example, a plaintiff might try to link an employer's use of foul language with other harassing acts to establish a hostile environment sexual harassment claim. On the other hand, counsel for employers usually attempt to diffuse claims of hostile environment in this context by arguing that an employer's use of foul language is just that – use of foul language. It is a completely legal discrete act. Thus, although the frequency with which these arguments are made may increase, the substance of the arguments will be nothing new.

IV. Conclusion

The Supreme Court did a disservice to employment litigators by affirming the Ninth Circuit's opinion concerning hostile environment cases. Admittedly, some leeway must be given any analysis of the statute of limitations with regard to claims of hostile environment. However, the Majority seems to have ignored Congressional intent to place a charge filing limitation period on *all* Title VII claims. Under Justice Thomas's decision, a hostile environment plaintiff has no incentive to act diligently to file his or her claim. Indeed, the opposite is true. As long as the incidents of alleged harassment are "sufficiently related," a plaintiff can wait to file a claim. This is contrary to the whole idea of a limitations period. On the other hand, however, Justice O'Connor's view that each act restarts the limitation period running again is not completely consistent with the nature of the hostile environment claim. Thus, both Justice Thomas and Justice O'Connor got it wrong.

The test that embraces both the rationale behind a limitations period and the nature of hostile environment claims is the test that Judge Posner articulated in *Galloway*. Judge Posner's cumulative concept allows a hostile environment plaintiff time to analyze a Title VII employer's conduct but yet honors the purpose of the EEOC charge filing period. Although this cumulative approach prompts litigation over when "a reasonable person would realize she had a substantial claim," it does not open the employer to a floodgate of claims based on allegedly old violations. In addition, the cumulative concept does not forfeit an employee's claim without taking a close look at the totality of the circumstances, as mandated by existing hostile environment law. By not adopting a clear test, similar to the *Galloway* test, the Supreme Court has perpetuated the confusion with regard to the Continuing Violations Doctrine.

— END NOTES —

¹ See Lisa S Tsai, Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 Tex L Rev 531, 531 (2000); 2 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 1351 (3d ed 1996); see also *Galloway v General Motors Service Parts Operations*, 78 F3d 1164, 1165 (7th Cir 1996).

² See *Morgan v. National Railroad Passenger Corp.*, 232 F3d 1008 (9th Cir 2000), cert granted.

³ See *id.*, at 1010.

⁴ See *id.*, at 1011-1013.

⁵ See *id.*, at 1014.

⁶ See *id.*, at 1017.

⁷ 78 F3d 1164 (7th Cir 1996).

⁸ 715 F2d 971 (5th Cir 1983).

⁹ See *Morgan*, *supra*.

¹⁰ See *Galloway*, *supra*, at 1167.

¹¹ See *id.*, at 1166.

¹² See *id.*, at 1166.

¹³ See *Berry*, *supra*, at 981.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000).

¹⁷ See *id.*

¹⁸ See *Morgan*, *supra*, at 1015.

¹⁹ See *id.*, at 1015-1016.

²⁰ See *id.*, at 1016.

²¹ Pet. Br. at 8.

²² See *id.*

²³ Resp. Br. at 10.

²⁴ See *id.*

²⁵ See *National Railroad Passenger Corporation v. Morgan*, No. 00-1614, slip op. at 20, 536 U.S. ___, (Thomas, J., Majority Opinion, June 10, 2002).

²⁶ See *id.*, at 2.

²⁷ See *id.*, at 11.

²⁸ See *id.*, at 14.

²⁹ See *id.*, at 16-17.

³⁰ See *id.*, at 17.

³¹ See *id.*, at 1.

³² See *Morgan*, No. 00-1614, slip op. at 2, 536 U.S. ___, (O'Connor, J., concurring in part and dissenting in part, June 10, 2002) (emphasis added).

³³ See *id.*, at 3.

³⁴ See *id.*, at 4.

³⁵ See *id.*, at 4.

³⁶ See *id.*, at 3.

³⁷ See *id.*

³⁸ See *id.*, at 14.

³⁹ See *Morgan*, No. 00-1614, slip op. at 11, 536 U.S. ___, (Thomas, J., Majority Opinion, June 10, 2002).

⁴⁰ See *id.*

⁴¹ See *id.*, at 12.

⁴² See *id.*, at 14. ■

HOIST WITH THEIR OWN PETARD

Stuart M. Israel
*Martens, Ice, Geary, Klass,
 Legghio, Israel & Gorchow, P.C.*

I've heard the "petard" phrase frequently in connection with a recent trial. The jury enforced a contract against parties who originally drafted it for their own benefit. The drafters were "hoist" with their "own petard."

The phrase communicates a sense of ironic justice, that someone has been deservedly undone by an instrumentality of his own making. It comes from *Hamlet*. In act III, scene 4, Hamlet reveals his mistrust for Rosencrantz and Guildenstern. He relishes the prospect of turning these plotters into victims of their own "knavery." Hamlet observes: "For 'tis the sport to have the engineer hoist with his own petard." Such turnabout, Hamlet says, "'tis most sweet."



"I've gotta stop talking to myself!"

A petard, of course, was an iron, fused, bell-shaped explosive device, manually attached to a gate, door or wall by a sapper — a military "engineer" — to blow up the barrier. The sapper strategically placed the petard, lit the fuse, and withdrew. Occasionally, however, poor quality control produced premature ignition, and the explosion would blow up the sapper along with the barrier; he'd be "hoist" — blown into the air — with his "own petard."

Perhaps the fact that Hamlet found this "most sweet" accounts for the present connotation of the phrase, which has an element of *schadenfreude*, taking pleasure in the misfortune of others, particularly when the misfortune is deserved. I had the "most sweet" experience of hoisting a hospital with its own petard in a labor arbitration. I represented a nurse discharged by the hospital. Here's how I remember it.

A seriously-ill patient's feeding tube and other tubes were dislodged from their appropriate placements and improperly replaced by a person unknown. This was discovered by the night nurse on her initial rounds, just after 11:00 p.m. The problem was promptly corrected, avoiding adverse effect on the patient. Still, the hospital held the afternoon nurse responsible, and fired her.

The hospital called the night nurse as a witness. She testified that the afternoon nurse, who went off duty at 10:30 p.m., had not reported any problem. The night nurse attributed the misplaced tubes to the afternoon nurse's inattention. The night nurse portrayed herself as the patient's rescuer. So did the hospital. While hospital managers could not pinpoint when the tubes were dislodged and improperly replaced, they concluded it must have occurred between the afternoon nurse's last charted round — at 8:30 p.m. — and the end of the afternoon shift — at 10:30 p.m.

The hospital next called an expert witness, a Ph.D. nursing professor from a major Midwestern university. I won't identify the university; let's just say its initials are U of M. Anyway, the professor

testified that the hospital was right on track. She explained that as a matter of professional ethics, nurses have absolute responsibility for the condition of patients under their care. She reviewed the three-page "hypothetical" supplied by the hospital recounting the events and rendered her expert opinion: (1) the afternoon nurse was absolutely responsible for the patient; (2) while under the nurse's care, the patient's well-being was put in serious jeopardy; (3) having allowed this to occur on her shift, the nurse transgressed professional standards; and (4) the hospital was fully justified in terminating the nurse's employment. The professor's judgment was as unforgiving and absolute as that meted out to Lot's wife.

On cross-examination, I highlighted the gulf between the just cause principle and the professor's strict liability standard.

- Q. Look again at the hospital's "hypothetical." You can't say who is responsible for the dislodged tubes, can you?
- A. The duty nurse is responsible.
- Q. I mean, you don't know who actually dislodged the tubes or who improperly replaced them, do you? Whether it was the patient, or the nurse, or a doctor, or an orderly, or someone else; you don't know, right?
- A. I can't tell exactly how it happened. What I can tell you is that the duty nurse is professionally responsible for her patient's condition.

The professor had the hospital's theory down pat. Time for some *reductio ad absurdum*.

- Q. Would it be the duty nurse's responsibility if the patient dislodged and replaced the tubes?
- A. Correct. The duty nurse is responsible for the condition of patients under her care.
- Q. What if a doctor did it?
- A. It is the duty nurse's responsibility to make sure of the patient's condition.
- Q. Well, what if a burglar climbed in the window and over the patient and in the process dislodged the tubes? You're saying that even if the duty nurse was down the hall and totally unaware of this situation, it's still her responsibility?



"It's all your fault!"

- A. It is her responsibility. She is professionally responsible for her patients.
- Q. So if something bad happens on a nurse's shift, she's absolutely responsible? Her shift, her responsibility, period?
- A. That's right.

If this wasn't enough, I had the proverbial ace in the hole.

- Q. The afternoon nurse's shift ran until 10:30 p.m. you know that from the "hypothetical."

HOIST WITH THEIR OWN PETARD

(Continued from page 7)

A. Yes.

Q. And the “hypothetical” shows that the night nurse came on duty at 10:00 p.m., and discovered the patient’s condition shortly after 11:00 p.m. on her initial rounds?

A. Yes.

Q. Professor, what time, exactly, were the patient’s tubes dislodged and improperly replaced?

The expert consulted the “hypothetical,” looking for the answer. She read it again. And again. She read in vain. The “hypothetical,” like the testimony, did not specify when the tubes were dislodged and replaced. After several minutes of reading, page-shuffling, and uncomfortable (for her) silence, the expert answered.



“Hoist with his own petard.”

A. I don’t know.

Q. It’s not in there, right?

A. No, it’s not.

Q. All you know is that it happened sometime between the last afternoon shift chart entry, at 8:30 p.m., and the first entry on the night shift, after 11:00 p.m., right?

A. Yes.

Q. Maybe it happened between 10:00 p.m. and 10:30 p.m. when both nurses were on duty and meeting on patient conditions?

A. I don’t know.

Q. Maybe it happened at 10:35 p.m., during the night shift, after the afternoon nurse was gone?

A. I don’t know.

Q. If it happened during the night shift, it wouldn’t be the responsibility of the afternoon nurse, right?

A. No, it wouldn’t.

Q. Maybe the night nurse was responsible instead of the afternoon nurse, professor, what do you think?

A. I don’t know.

Q. So, the opinion that you gave to the hospital attorney — that the afternoon nurse was responsible and was justifiably discharged — you really can’t support that opinion, can you?

A. Uh . . . no.

Q. We should disregard your opinion, shouldn’t we?

A. I guess . . . yes.

Q. Thank you. Nothing further.

To mix literary allusions, oh, how the mighty fall after being hoist with their own petard. ■

WHEN A PICTURE IS WORTH MORE THAN 1000 WORDS!

Sheldon J. Stark

Education Director

Institute of Continuing Legal Education

Employment law is not the only practice area where overt racial discrimination can be a factor that makes a difference in determining the actions of a defendant.

I once agreed to represent an African-American man who — while incarcerated in a suburban Detroit jail — was intentionally burned by his cellmate. The case appealed to me because of a racial dimension. I had experience handling race cases, and thought I detected it here. My client, who I will call Luke, was arrested in connection with a relatively minor misdemeanor. Unable to post bond, Luke was a guest of the city for several days. It must have been a slow week for crime in that community, because most of the cells were empty. Luke was the only African-American in custody, and he was given his own cell segregated from the white prisoners. I was never able to determine conclusively whether the decision to separate Luke from the white prisoners was motivated by racial bias, but there was more to come.

Luke’s assailant was brought in just before dinnertime on Luke’s second day in custody. I will call him Kareem. Also African-American, Kareem was placed in the cell with Luke. Not only was space available in cells holding white prisoners, other cells were empty altogether. Nonetheless, Kareem and Luke were made roommates. Coincidence? I did not think so. It was the assignment of Kareem to Luke’s cell that initially offended me about the case. The defendant city had a history of racial segregation and mistreatment of black people; and I had a hunch that racial factors had controlled cell assignment.

Someone ordered pizza for dinner that evening. After dinner, Luke fell asleep. He was dreaming about eating barbecue when he was startled awake only to realize he was on fire! Kareem had gathered newspapers, the pizza box and other combustible materials, set them ablaze under Luke and stepped back to enjoy the show. Luke suffered third degree burns to his legs and spent time in the hospital. I no longer remember how severe the burns were or how long the hospitalization. It was a serious injury. When Luke returned to the jail from the hospital, Kareem was long gone, sent on to bigger, better and presumably more fireproof facilities elsewhere.

“Do you know why he burned you?” defense counsel asked during Luke’s deposition.

“I don’t know,” Luke answered.

“Did he say anything to you before he did it?”

“No. I was asleep.”

“Did the two of you talk at all during the time you were in the cell together?”

“Yes.”

“Well,” demanded counsel: “What did he say?”

“He asked me if I was a Christian.”

"What did you say?"

"I said 'yes'."

"Well," counsel began again, growing increasingly frustrated, "What did he say to that???"

"He said, 'I'm a Muslim!'"

No other words were exchanged. Apparently, Kareem now knew all he needed to know. Luke went to sleep; Kareem went to work torching the only Christian in the cell.



"A picture is worth 1000 words."

I argued that racism had motivated the city to place Kareem in that cell with Luke. They were the only black prisoners. Had Kareem been assigned at random, the odds were against placement with Luke. Moreover, I believed the jailers knew or should have known Luke was dangerous. The danger he posed was another reason not to bunk Kareem with whites.

It was my claim that the city was recklessly indifferent to Luke's safety and security when they (1) put them in a cell together; (2) did not segregate Kareem; and (3) allowed Luke to be burned as a martyr while taking a snooze. The lawyer for the defendant city denied any racism and argued that this wasn't even a tort. According to the defense, Luke was injured in a Jihad. How could anyone have predicted, they asked, that a counter-Crusade would erupt in the city's jail.

The case presented a whole host of legal issues including governmental and good faith immunity. The key factual issue to emerge was whether the city had notice that Kareem was dangerous at the time they placed him in the cell with Luke. It would greatly bolster my case if I could prove Kareem was mentally ill and that the city knew it. City procedures required that mentally unbalanced prisoners be kept in a special cell by themselves. The most concrete evidence that Kareem was dangerous or mentally ill was a prison record so long it would have made Junior Soprano blush. The record included at least two assault convictions and one stay in a state hospital — albeit years before. There was no concrete evidence that Kareem was known to be mentally ill before his attempt to barbecue Luke. On the other hand, Luke, though hardly a model citizen, was simply a guy down on his luck. He would never have shared a cell with a hard case like Kareem but for the skin color they shared. I believed that every juror would believe that the only reason that the city placed them together was race.

During the final 30 days before trial, I struggled to figure out how to discuss Kareem with the jury. I feared they would need to see Kareem to grasp what a dangerous individual he was. If the jury did not appreciate that danger, they were unlikely to appreciate the risk of assigning him to Luke's cell. If the risk was not appreciated, it was unlikely the jury would accept my claim that the defendant was deliberately indifferent to the safety and security of my client. I wanted to look Kareem in the eye and take his measure. I wanted the jury to meet Kareem and take his measure. I wondered what Kareem would tell us concerning the threat he posed to others. But Kareem wasn't available. We were unable to locate him during discovery. Late one night it occurred to me that I might be inspired if I could only see what Kareem looked like. Maybe, if he looked dangerous, I could blow his picture up and put it in front of the jury. A picture is worth a thousand words, I thought. Maybe I'll get lucky.

I subpoenaed Kareem's criminal file and mug shots for trial.

The records custodian was sitting outside the locked court room when Luke and I arrived to select a jury. Initially reluctant to share the file without defense counsel, I eventually persuaded her to let me see Kareem's mug shot.

I got lucky. It was unbelievable! I had in my hand a picture of Kareem, a picture taken mere minutes before they shoved him into Luke's cell! I had in my hand the picture of a man about whom you would believe just about anything was possible.

I had known Kareem wore a beard. Luke told me that. I had not anticipated that it would be a long pointy one — almost Mephistophelean. It curled up and pointed back at his nose. Although the picture was a mug shot, a very serious moment in the booking process, Kareem had his fingers in his mouth pulling his face wide apart as he stuck his tongue out at the camera. They are not called "mug shots" because people mug before the camera. There was only one reason Kareem looked the way he did: The authorities were clearly too frightened of Kareem to force him to behave. His eyes were totally crazed. If a cartoonist had drawn Kareem at that moment, he would have drawn Kareem's eyes filled with pulsating circles.

The best is yet to come: In the center of Kareem's face was a large postage stamp pasted squarely between his eyes. Kareem looked crazed *and* menacing all at the same time.

When defense counsel arrived, I asked if he had seen the photograph. He had not. "Is it bad?" he blinked. "Not to my way of thinking," I replied as I handed it over. To his credit, the defense counsel never flinched. There was a moment of hesitation before he said, "I have to make a call." I have often wondered what words he used to obtain settlement authority. Of course, the case settled before we left the court house. Before that morning, I had uttered thousands of words in a vain effort to convince defendant to offer my client compensation for his injury. My words were unpersuasive. After the picture came to light, I didn't have to say another word. The picture said it all. A picture is truly worth a thousand words. — and then some. ■



LOOKING FOR Lawnotes Contributors!

Lawnotes is looking for contributions of interest to Labor and Employment Law Section members.

Contributions may address legal developments, trends in the law, practice skills or techniques, professional issues, new books and resources, etc. They can be objective or opinionated, serious or light, humble or self-aggrandizing, long or short, original or recycled. They can be articles, outlines, opinions, letters to the editor, cartoons, copyright-free art, or in any other form suitable for publication.

For information, contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., 1400 North Park Plaza, 17117 West Nine Mile Road, Southfield, Michigan 48075 or (248) 559-2110 or israel@martens-ice.com.



A VIEW FROM THE CHAIR

Roy Roulhac, Chair
Labor and Employment Law Section

When you read this issue of *Lawnnotes*, my tenure as chair will have ended. The opportunity to serve has been an experience that I will always cherish. The success of the Section during this bar year was made possible by the service of a dedicated and committed Council and by members who demonstrated an interest in moving the Section forward. I extend sincere thanks to all for contributing their time and talent.

During the past bar year, the Section sponsored or co-sponsored five continuing legal education opportunities, and continued its commitment of participating in the State Bar of Michigan's Access to Justice Campaign. The Section's \$2,500 contribution in 2001 earned it a spot on the AJC's Benefactor's Club. In May 2002, Robert Battista, past chair of the LELS (1980-81), was nominated to be chair of the National Labor Relations Board. He will become the first Michigan resident to serve on the Board since its inception in 1935. During the annual meeting in September, former Council member Reginald Turner began his term as president of the State Bar, and Theodore J. Saint Antoine, University of Michigan law professor and LELS past chair (1979-80), received the Champion of Justice Award for his extraordinary accomplishments and devotion to a cause. Congratulations, on behalf of the entire Section, are extended to each of them.

As previously reported, December 15, 2002 marks the Section's 50th anniversary. Initially organized as the Labor Relations Section, it was the first bar section established in Michigan. As part of the 50th anniversary celebration, CAS-Media, a unit of the Michigan State University College of Communication Arts and Sciences, has been commissioned to

produce a 25 to 30 minute broadcast quality video production that will document and preserve the contributions of Michigan lawyers to the development of labor and employment law. The video will be premiered during the Section's mid-winter meeting, January 31-February 1, 2003, and will be offered for airing and use by Michigan public and cable television stations, and educational institutions. A committee of past chairs, led by MSU-DCL Professor and past chair (1991-92) Robert McCormick, are spearheading the project.

In commenting on the video project's importance, Professor St. Antoine observed that he had "become increasingly concerned that one of the most important and exciting periods in U.S. and Michigan industrial history — call it the second generation in the development of unionization and collective bargaining and their legal regulation — could be lost for today's young people unless it is recaptured while some of the old-timers are still around. Many of the giants, of course, are already gone — Bob Howlett, Harry Platt, Ted Sachs, to name only a few I got to know well. But there are enough left to recall much — among arbitrators alone, I can think of such persons as Gabe Alexander, Dick Mittenthal, Chuck Rehmus, Mark Kahn, Dallas Jones, et al."

I share Professor St. Antoine's sentiment. If we fail to take steps to document and preserve our history, it will be lost. In reflecting on how the passage of time distorts history, I am reminded of the story of Jacque "Jocko" Graves, a twelve-year old African, who in December 1776 volunteered to join George Washington as he prepared to cross the Delaware River to launch a surprise attack on the British forces. Washington, however, considered him too young to fight, ordered him to tend the horses and keep a lantern burning to direct the company's return after the battle. Hours later, when Washington and his men returned, they found Graves frozen to death with the burning lanterns still clenched in his fist. Because of his devotion, Washington commissioned a statue, the "Faithful Groomsman," to stand in Graves' honor at Mount Vernon. The statue was a depiction of a handsome black youth in colonial dress holding a lamp.

As time passed, it was not uncommon to find "Jocko" statues on plantations throughout the South. They, like the North Star, pointed fleeing slaves to safe houses on the Underground Railroad. A green ribbon tied to a statue's arm — whether clandestinely or with the owner's knowledge — indicated safety; a red ribbon meant danger. Today, one hundred thirty-five years after the end of slavery, throughout the South, Jocko's representation has been replaced by caricature lawn jockeys intended as demeaning racial stereotypes directed at African Americans rather than as a proud moment in U.S. history. Although Graves' story is an extreme example, it illustrates how the passage of time distorts history. In my view, the video project represents the first step in insuring that the contributions of Michigan's labor and employment lawyers will be preserved.

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Oh wise and terrible arbitrator, speak to us of post-hearing briefs. What do you like to see? What do you not? — A.C., Madison Heights

Arbitrators are perhaps wiser and more terrible than other people, but we are not, as a rule, more energetic. The way to win an arbitrator's heart is to make his work easier. And the way to make his work easier is to do it for him.

The goal for the advocate should be to write a brief from which the arbitrator will be inclined to lift big chunks and put them directly into the award. In order to accomplish this many lawyers will need to lower their volume and moderate their tone. For those lawyers this will make writing briefs less fun. Sorry. If you want to have fun, go to the beach. If you want to indulge your flair for insult and invective, go to a PTA meeting. Your goal in a brief should be to get your

thinking into the award. The less work an arbitrator has to do to convert your thinking into award language, the more of it will turn up there.

I am talking about several different kinds of work here. There is, for instance, logical

work. A post-hearing brief should contain a simple, straightforward, chronological statement of the facts. This saves the arbitrator the task of constructing one out of bits of testimony scattered throughout the record. There is analytical work — the matter of applying the contract language to the facts. This, too, should be set out in clear, noninflammatory language. Rhetorical excess may be admired but will rarely be adopted. And there is the work of legal scholarship. If you are going to cite a case, include a copy. If you want the arbitrator to note specific language, highlight it.

In short, make your arguments easy to follow; make your exhibits easy to find; and make your language easy to steal.

The single thing you can do that will help the most in this regard is submit your brief on a disk. This saves time and money because the arbitrator doesn't have to retype your contract provisions. And it gets your language on his screen — a drag and drop away from the award.



"In conclusion, we ask as additional relief that the Arbitrator direct that opposing counsel be drawn and quartered at Hart Plaza at high noon on Labor Day. Respectfully submitted. . ."

NLRB PRACTICE AND PROCEDURE

William C. Schaub, Jr.
Regional Director, Region Seven
National Labor Relations Board

In my last column I mentioned *BE & K Construction Company v. NLRB* as a Board case that was before the Supreme Court involving the issue of whether the NLRB, in a *Bill Johnson's* type case, may impose liability on an employer who filed a losing, retaliatory lawsuit even if the employer can show that the lawsuit was not objectively baseless. On June 24, 2002, the Supreme Court handed down its decision in *BE & K* reversing the Board and holding that merely because litigation is unsuccessful is not a sufficient basis to impose liability for filing a retaliatory lawsuit, absent a finding that the suit is also objectively baseless. *BE & K Construction Company*, 122 S. Ct. 2390, 170 LRRM 2225 (6/24/02).

In another recent case of interest, the Board in *Croft Metals, Inc.*, 337 NLRB No. 106 (June 21, 2002) held that parties to a representation case hearing must be given at least five business days notice, absent waiver or unusual circumstances, of the hearing date. The Board concluded that "by providing parties with at least five working days notice, we make certain that parties to representation cases avoid the Hobson's choice of either participating unprepared on short notice or refusing to proceed at all."

This will be my last column for *Lawnotes* as it is my intention to retire as Regional Director of Region Seven at the end of September 2002. It has been a privilege to write this column and to work with so many of you over the past 30 plus years. As most of you know, the Region, in partnership with Wayne State University Law School and the Labor and Employment Law Section of the State Bar, conducts the annual Bernard Gottfried Memorial Labor Law Symposium. This year the Symposium will be held on Thursday October 24, 2002 at Wayne State University. I hope to say my goodbyes to all of you at the Gottfried Symposium and it is my sincere hope that as many as possible will be able to attend. I look forward to seeing you there. As a final note I want to thank *Lawnotes* editor Stuart Israel for inviting me several years ago to write this column and giving me the opportunity to share with you my thoughts about practice and procedure before Region Seven of the NLRB. ■

WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for *Lawnotes*. But the muse is elusive. And you just can't find the perfect topic. You make the excuse that it's the press of other business but in your heart you know it's just writer's block. We can help. On request, we will help you with ideas for article topics, no strings



attached, free consultation. Also, we will give you our expert assessment of your ideas, at no charge. No idea is too ridiculous to get assessed. This is how Larry Flynt got started. You have been unpublished too long. Contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., 1400 North Park Plaza, 17117 West Nine Mile Road, Southfield, Michigan 48075 or (248) 559-2110 or israel@martensice.com.

U.S. SUPREME COURT UPDATE

Daniel B. Tukul
Butzel Long, P.C.

Court Upholds EEOC Regulation Regarding "Direct Threat" To Health Or Safety

In *Chevron U.S.A. Inc. v. Echazabal*, No. 00-1406 (S. Ct. June 10, 2002), the Court unanimously upheld an EEOC regulation which allows an employer to refuse to hire an individual with a disability if the individual's condition would endanger his own health or safety on the job. 29 CFR § 1630.15(b)(2).

Echazabal worked for independent contractors at oil refineries owned by Chevron. Twice he applied for positions to work directly for Chevron. Chevron offered him a position, subject to passing a company physical. Each time the physical results showed liver problems, ultimately identified as Hepatitis C, and each time the employment offer was withdrawn. After the second exam, the company asked the contractor employing Echazabal to either reassign him to a job which would not expose him to harmful chemicals, or else remove him entirely from the refinery. The contractor laid Echazabal off. Echazabal sued, alleging that the failure to hire him because of his liver condition violated the ADA. Chevron's defense was based on the EEOC regulation, the company contending that Echazabal's condition posed a direct threat to his own health.

The ADA creates an affirmative defense for employers that have qualification standards that have the effect of excluding individuals with conditions that would otherwise be protected, if certain conditions are met. The standards must be shown to be job related for the position in question, and must be consistent with business necessity. Such qualification standards can include a requirement that an individual "shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 USC § 12113(b). The EEOC regulation goes further than the specific ADA language. The regulation permits employers to screen out individuals who pose not only a direct threat to the health or safety of "other individuals in the workplace," but also who pose such a direct threat to themselves.

The Court upheld the EEOC regulation, finding that it was not "unreasonable." The Court said that, in order to assert the "direct threat" defense, the decision not to hire an individual must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence. The decision must only be made after an individualized assessment of the person's present ability to safely perform the essential functions of the job, considering the imminence of the risk and the severity of the potential harm.

Although the decision clarifies the issue of an employer's ability to deny employment because of a direct threat to the individual employee, it can be expected that there will continue to be litigation regarding the reasonableness of the medical judgment concerning the direct threat to the individual, the immediacy of the potential risk and the severity of the potential harm.

Court Addresses Continuing Violation Theory In Harassment Cases

In *National Railroad Passenger Corporation v. Morgan*, No. 00-1614 (S. Ct. June 10, 2002), the Court clarified when a Title VII claimant can file suit for events that fall outside the statutory agency filing period. In that case, Morgan brought a Title VII action

alleging both discrete acts of discrimination and retaliation, and that he was subject to a racially hostile environment throughout his employment. Title VII requires that a charge be filed with the EEOC within either 180 or 300 days after the unlawful act occurred. Morgan claimed that he had been consistently harassed throughout his employment. Some of the acts about which he complained occurred within 300 days of his filing, while others occurred outside that period.

The Court first indicated that it was mandatory to file a charge with the EEOC within the statutory period after the "unlawful employment practice" occurred. The critical question for Court focused on the meaning of the term "unlawful employment practice." With regard to discrete acts of retaliation or discrimination the Court "easily" concluded that the act "occurred" "on the day that it happened," and that the filing period begins to run from that day. The Court also concluded that a series of discrete acts, even if related, do not become a single "act" for purposes of calculating the filing period. Based on these conclusions, the Court listed a number of principles: 1) Time-barred discrete acts are not actionable, even if related to acts which are timely; 2) Each discrete act starts a new "clock" for purposes of the filing deadline; 3) Knowledge by an employee of time-barred prior acts does not preclude charges for related discrete acts, if the related discrete discriminatory acts are sufficiently independent, and a charge is timely filed.

The Court then turned to the continuing violation issue. The court found that serial discrete acts which occur outside the filing period, even if related to acts occurring within the filing period, cannot be considered for liability purposes. The Court identified certain acts which are "discrete," including: termination, failure to promote, denial of transfer and refusal to hire. The Court found, however, that hostile environment claims are different in nature from discrete acts of discrimination or retaliation. By its very nature harassment occurs over a period of time. A single act of harassment may not in and of itself be actionable. Consequently, the "unlawful employment practice" cannot be said to occur on any particular day, harassment claims are based on the "cumulative affect of individual acts."

That being the case, the Court indicated that a hostile work environment claim is comprised of a series of separate acts that collectively constitute one "unlawful employment practice." Since the statute only requires that a charge be filed within a certain number of days after the unlawful employment practice occurs, the Court held that the filing need only be made within the required number of days after the occurrence of one of the acts which is part of the harassment. If at least one act contributing to the claim occurred within the filing period, the entire period of the hostile environment could be considered by the finder of fact for purposes of liability. Thus, the entire course of harassing conduct becomes actionable, even if some of the particular acts occurred outside the filing period.

The Court indicated that it was not leaving employers "defenseless" against claims of hostile work environment which allegedly occur over long periods of time. Because the agency filing period is not jurisdictional, it is subject to defenses of waiver, estoppel and equitable tolling "when equity so requires." Employers may, therefore, assert a laches defense, provided they can show lack of diligence by the filing party, and resulting prejudice to the defense.

While *National Railroad* arose in the context of a filing with the EEOC, the principals discussed are instructive in the larger context of civil actions involving harassment claims and continuing violation theories. It can be expected that plaintiffs may seek to assert harassment theories in order to pursue claims involving acts occurring over long periods of time which would otherwise be barred by statutes of limitation. ■

SIXTH CIRCUIT ADDRESSES SECONDARY ACTIVITY, MOTOR CARRIER EXCEPTION TO THE FLSA, THE SCOPE OF THE ADEA AND OTHER EMPLOYMENT LAW ISSUES

Gary S. Fealk
Vercruyse Metz & Murray, P.C.

From May of 2002 through July of 2002, the Sixth Circuit published about 18 cases dealing with a wide variety of labor and employment issues. The full text of Sixth Circuit decisions are available on the Internet at: "<http://pacer.ca6.uscourts.gov/opinions/main.php>".

Motor Carrier Act Exception to FLSA

In *Vaughn v. Watkins Motor Lines, Inc.*, Docket No. 01-3049 (May 30, 2002), the Sixth Circuit held that the overtime provisions of the FLSA did not apply to truck loaders who exercised judgment and discretion in loading trucks. These plaintiffs had a substantial effect on the safe operation of the trucks and therefore fell within the FLSA's exception for employees for whom the Secretary of Transportation has the power to establish maximum hours. As a result, the plaintiff's claim for overtime payments under the FLSA was dismissed.

NLRA: Secondary Activity

In *F.A. Wilhelm Co., Inc. v. Kentucky State District Council of Carpenters*, Docket Nos. 00-6008/6009 (June 12, 2002), the Sixth Circuit affirmed the NLRB's finding of an unfair labor practice against the union defendant for engaging in an unlawful secondary boycott. In this case, it was held that the union unlawfully attempted to force the plaintiff (a construction industry contractor) to stop doing business with a subcontractor with whom the union had a dispute. The evidence showed that union representatives engaged in a direct, advance solicitation of plaintiff's employees to form a picket line against the primary employer. This conduct was held to constitute illegal secondary activity under the NLRA.

NLRA: Failure To Bargain

In *FiveCAP, Inc. v. NLRB*, Docket Nos. 00-2162, 2390, 2398, 01-1058 (June 28, 2002), the Court enforced an NLRB order finding that the employer, who operates Head Start programs, failed to bargain over the compensation of bus drivers, the elimination of data entry positions and classroom consolidations. The Sixth Circuit enforced the Board's findings that these changes were not fundamental changes in the nature of the business so as to be exempt from bargaining under *First National Maintenance v. NLRB*, 452 US 666 (1991) and its progeny.

Pregnancy Discrimination

In *Prebilich-Holland v. Gaylord Entertainment Co.*, Docket No. 00-5946 (July 18, 2002), the Sixth Circuit affirmed the district court's grant of summary judgment to defendant on plaintiff's pregnancy discrimination claim. In this case, the plaintiff was terminated two days after she announced that she was pregnant. However, the plaintiff failed to prove that the decision makers had actual knowledge that she was pregnant when they made the termination decision and thus could not establish a prima facie case.

ADEA Protects Younger Employees

In *Cline v. General Dynamics Land Systems, Inc.*, Docket No. 00-3468 (July 22, 2002), the Sixth Circuit held that the ADEA prohibits a company from providing certain health benefits only to those employees over 50, while denying those benefits to other employees who were between the ages of 40 and 49. The Court held that the ADEA not only protects older workers from discrimination, but it also protects employees from being treated differently because they are younger.

Title VII/ADEA: Adverse Employment Action

In *Policatro v. Northwest Airlines, Inc.*, Docket No. 00-4484 (July 29, 2002), the Sixth Circuit affirmed the district court's decision to dismiss the plaintiff's gender and age discrimination claims. The plaintiff in this case was a salesperson. Plaintiff sued for discrimination after her sales territory was changed. The Court of Appeals held that the plaintiff failed to establish a prima facie case of discrimination because the change in plaintiff's sales territory did not effect her salary or benefits, did not require her to spend any more commuting time and did not diminish her responsibilities. Therefore, the Sixth Circuit held that the change in plaintiff's sales territory was not an adverse employment action and was not actionable under Title VII or the ADEA. ■

ELEVEN TIPS FOR CLEAR, CONCISE LEGAL WRITING

Nancy Caine Harbour
Butzel Long

A. PLAN

1. DEFINE YOUR OBJECTIVES.
2. WRITE AN OUTLINE.
3. USE LOGICAL ORGANIZATION. Put the most important point up front.

B. WRITE

4. GIVE YOUR READER A "ROADMAP."
5. CHOOSE PRECISE WORDS. Use plain English.
6. CONTROL SENTENCE LENGTH. Maximum 20 words is a good guide.
7. STATE THE POSITIVE; STATE THE NEGATIVE POSITIVELY.
8. USE BASIC SENTENCE STRUCTURE: subject, verb, object.
9. USE THE ACTIVE VOICE.

C. EDIT

10. OMIT UNNECESSARY WORDS. Use adjectives and adverbs sparingly.
11. SIMPLIFY.



"Choosing precise words."

EASTERN DISTRICT UPDATE

Jeffrey A. Steele
Brady, Hathaway, Brady & Bretz

Ballplayers' "Outrageous" and Improper Conduct Cannot Sustain Hostile Environment Suit Due to the Plaintiff's Failure to Timely Complain.

In *Kesner v. Little Caesars Enterprises, Inc.*, 2002 US Dist. LEXIS 12366, Judge Zatkoff dismissed the majority of a flight attendant's claim that she was sexually harassed by several Detroit Tigers players. Judge Zatkoff initially found that "the players' alleged behavior — e.g., calling the plaintiff pejorative names such as 'bitch,' 'cunt,' and 'hide,' asking the plaintiff about her sexual practices, and touching the plaintiff's breasts and buttocks without consent" — was severe enough for a "reasonable person to conclude that the plaintiff was subjected to an intimidating, hostile, or offensive work environment." Judge Zatkoff dismissed the hostile environment harassment claim against Little Caesars Enterprises, Olympia Entertainment, Inc. and the Detroit Tigers, however, because each organization promptly investigated and adequately responded to the only incident the plaintiff brought to their attention. The hostile environment count against Olympia Aviation, a subsidiary of Olympia Entertainment, survived summary judgment due to the plaintiff's allegation that she complained to "the head of Olympia Aviation" about the ballplayers' alleged activities.

Judge Zatkoff then dismissed the plaintiff's sex discrimination and retaliation claims because she failed to proffer evidence sufficient to prove that the defendants' legitimate nondiscriminatory explanation for her termination — the decision to outsource all flight operations — was a pretext for sex discrimination or retaliation.

Finally, expressing profound disappointment that "heroes to many young boys and girls" would perpetrate "shameful and disgraceful" conduct and expect it to be tolerated "simply because of their ability to hit a ball with a bat and run around bases," Judge Zatkoff concluded that the ballplayers' conduct was sufficiently "outrageous" to sustain an intentional infliction of emotional distress claim. The claim could not go to a jury, however, because the plaintiff "does not contest Defendants' assertion that said individuals acted outside of their authority, and the Court has no reason to believe that said individuals were authorized to perform such conduct."

Minority Shareholder Possessed and Exercised Sufficient Control over Defunct Corporation to be Liable for its Alleged WARN Act and Collective Bargaining Violations.

The union plaintiff in *UAW v. OEM/Erie Westland, LLC*, 2002 US Dist. LEXIS 8760, sued three distinct corporations for breaching a collective bargaining agreement and violating the WARN Act. One of those corporate defendants, Libralter Plastics, Inc., moved to be dismissed out of the case because it did not sign the collective bargaining agreement and was not an "employer" under the WARN Act. Judge Rosen denied the motion because Libralter Plastics exercised sufficient control over the operations of the defunct corporation (OEM/Erie Westland, LLC) to be an employer under the WARN Act and liable under the "alter ego" theory for breaching the CBA. Although the corporations did not share the same directors and personnel policies, Libralter (a) held a 24% share of Westland, (b) leased equipment to Westland, (c)

retained sole authority to dictate Westland's accounting system, (d) directed the hardware, software and mechanics Westland used, and (3) influenced Westland's demise by refusing to make a capital contribution. Such evidence, according to Judge Rosen, "cannot foreclose as a matter of law the possibility that Libralter might be liable" for the plaintiff's claims.

Being Female is Not A BFOQ of Working in a Female Prison

In *Everson v. Michigan Dept. of Corrections*, 2002 US Dist. LEXIS 12544, Judge Cohn declared that gender-based assignments at a women's prison violated state and federal anti-discrimination law. Acknowledging that certain tasks, such as those involving privacy issues, may be reserved for female officers, Judge Cohn ruled that the employer failed to prove that all correction-related tasks must be performed by women. Accordingly, and because the employer failed to establish that it lacked a reasonable alternative to hiring only women corrections officers at the female prison, the employer failed to sustain its BFOQ argument and had to amend its policy.

Comparable Employees Are "Similarly Situated" Only If They Work The Same Job and Have the Same Experience and Education.

Judge Zatkoff ruled in *Ainsworth v. Home Depot USA, Inc.*, 2002 US Dist. LEXIS 8746, that in order to sustain her burden of proving that "similarly situated males were treated differently than she was," the plaintiff must show that the allegedly comparable employees' "employment was nearly identical to Plaintiff's in all relevant aspects." Based on this standard, Judge Zatkoff dismissed the plaintiff's Equal Pay Act claim because the male employees to whom she compared herself had more training and education. Judge Zatkoff refused to even consider the plaintiff's attempt to compare herself to employees in a different department who, according to plaintiff, were required to use the same skill, responsibility and effort as the plaintiff, ruling that: "Because they are different positions, the Court finds that [the prospective comparables] are not similarly situated to Plaintiff."

Defamation Claim Against Union Subject to Section 301 Preemption.

The plaintiff in *Jones v. UAW*, 2002 US Dist. LEXIS 12553, claimed that his union and several members thereof defamed him by falsely accusing him of sexual harassment and poor performance. Relying heavily on a 1992 Sixth Circuit case, Judge Hood rejected the plaintiff's contention that defamation is exclusively a state law claim that does not involve the governing collective bargaining agreement. Judge Hood then held that the plaintiff must exhaust his administrative remedies under the collective bargaining agreement because the issue "whether defendants had a privilege to publish information regarding plaintiff's alleged sexual harassment turns on the interpretation of the CBA."

Improper to Remove WDCA Retaliation Claims.

Arguing that a 1993 unpublished Sixth Circuit case held that WDCA retaliation claims are not cognizable under Michigan law, the employer in *Knoz v. Roy Jorgensen Associates, Inc.*, 2002 US Dist. LEXIS 8927, removed the plaintiff's claim to federal court. Rejecting the argument, Judge Hood rules that "[b]ecause the retaliation claim is now a statutory claim, such a claim arises under Michigan's WDCA, and, therefore, may not be removed to this Court." ■

MICHIGAN SUPREME COURT UPDATE

Kurt M. Graham

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Lesner v. Liquid Disposal, Inc., 466 Mich. 95; 643 NW2d 553 (2002). The Supreme Court held that the formula for calculating workers' compensation benefits set forth in *Weems v. Chrysler Corp.*, 448 Mich. 679; 553 NW2d 287 (1995), is inconsistent with MCL § 418.321, which governs death benefits for dependents, and provides a formula for calculating the benefits to be paid to partially dependent persons. The Supreme Court ruled that, on its face, the statute requires a factual determination of the amount contributed by the deceased worker to the partial dependent in order to determine the total amount of benefits to which the partial dependent is entitled. In *Weems*, the Court acted contrary to the plain language of the statute by creating its own formula for determining the amount of benefits for partial dependents. Instead of merely examining "the amount contributed by the employee" as the statute directs, the *Weems* Court substituted other factors to determine the amount of benefits. The Court overruled the portion of *Weems* that provided a formula for calculating workers' compensation death benefits for surviving partial dependents. The Court ruled that the new formula be applied "to other cases pending decision by a workers' compensation magistrate or on appeal, to either the Workers' Compensation Appellate Commission." *Lesner*, at 109.

The Court further held that *Weems* correctly held that the minimum and maximum limits in MCL § 418.355(2) and MCL § 418.356(2) do not require altering after the partial dependent benefits calculation. Finally, the Court held that the 500-week limitation on benefits applies to benefits for partially dependent persons.

Kurtz v. Faygo Beverages, Inc., 466 Mich. 186; 644 NW2d 710 (2002) (*per curiam*). The Supreme Court held that under procedures established by the Workers' Compensation Appellate Commission (WCAC), a court reporter's delay in preparing a transcript does not necessarily excuse a late filing where the appellant fails to request an extension. Under the WCAC appeal procedure, an original hearing transcript must be filed no later than 60 days after filing the Claim for Review. See MCL 418.861a. Extensions of time are normally granted when they are requested before the scheduled deadline provided good cause is shown. The WCAC dismissed the plaintiff's appeal because the transcript was not timely filed. In his motion for reconsideration, the plaintiff explained that the reporter failed to prepare the hearing transcript by the required date. The Supreme Court held that this explanation "did not excuse [plaintiff's] failure to timely request an extension," and that the WCAC's decision was not an abuse of discretion. *Kurtz*, at 192.

Veenstra v. Washtenaw Country Club, 466 Mich. 155; 645 NW2d 643 (2002). The Supreme Court, per Justice Young, held that an employee discharged solely because of his conduct is not protected by the Elliott-Larsen Civil Rights Act ("ELCRA"), as the statute only prohibits an employer from making decision because of race, sex, age, marital status, or any of the other protected classifications enumerated in the ELCRA.

In *Veenstra*, the plaintiff was employed as the defendant's golf professional from 1991 to 1996, based on a yearly employment contract. In January 1996, the plaintiff moved out of his marital home and began having an adulterous affair with a married woman. Since the plaintiff escorted his mistress to club events, his activities were

well known to members of the club and the subject of discussion among members. In June 1996, the defendant distributed a survey to its members to evaluate various personnel, including the plaintiff. The surveys indicated that a number of club members were unhappy with the plaintiff's performance as the club golf professional, and he received far more negative reviews than any of the other employees. The defendant then informed the plaintiff of its decision to not renew his employment contract. The plaintiff became divorced in May 1997, almost one year after his discharge, and filed suit in December 1997 alleging that his discharge violated the ELCRA because it "was motivated in part if not entirely because of his status as a divorced person." *Veenstra*, at 158.

The Supreme Court stated "that the unambiguous language of the ELCRA [MCL 37.2202(1)] protects *only* the consideration of a person's marital status. Adverse action against an individual for conduct without regard to marital status provides no basis for recourse under [ELCRA]." *Id.* at 162-63. Thus, the defendant's adverse action against the plaintiff for his adulterous conduct, without regard to his marital status, provided no basis for relief under the ELCRA. In response to the dissent's argument that the Court's holding creates a "rule *per se* excluding conduct from the protections of the ELCRA," Justice Young noted that conduct may still be protected under the ELCRA "if such conduct is mere pretext for action based on consideration of a protected status category." *Id.* at 166. Additionally, the Court clarified its earlier ruling in *McCready v. Hoffius*, 459 Mich. 131; 586 NW2d 723 (1998) (*McCready II*), holding that *McCready II* should not be read as creating a right to cohabitate under MCL 37.2502(1). Rather, the plaintiffs in *McCready II* stated a claim because they produced sufficient direct evidence of discrimination based on their marital status.

Crawford v. Dep't of Civil Service, 466 Mich. 250; 645 NW2d 6 (2002) (*per curiam*). The Supreme Court held that the "safe harbor" provision of the Michigan Civil Rights Act, MCL § 37.2210, does not bar a plaintiff's constitutional or federal law claims, and that the plaintiff had standing to challenge the defendant's decision not to transfer and promote him.

The plaintiff, a corrections officer, applied for a lateral transfer to a sergeant position in another correctional facility. The plaintiff was required to apply for the transfer as if he was seeking a promotion, and took a written test as a part of the application process. Ultimately, the plaintiff was denied the transfer position, which was given to minority applicants with lower test score rankings. The plaintiff brought an action against the Civil Service Commission, the Department of Civil Service, and the Department of Corrections under 42 USCS § 1983, the ELCRA, and Article 11 §5 of the Michigan Constitution, seeking declaratory and injunctive relief.

In *Sharp v. City of Lansing*, 464 Mich. 792; 629 NW2d 873 (2001), the Michigan Supreme Court recently held that an employer is insulated from liability under the safe-harbor provision of § 210 of the Civil Rights Act where an employer's affirmative action plan is approved by the Civil Rights Commission. (See *Michigan Supreme Court Update, Lawnotes, Fall 2001*). However, the Supreme Court's opinion in *Sharp* also emphasized that the safe-harbor provision does not protect an employer against other claims, noting, "the mere existence of an approved affirmative action plan does not insulate a state employer, or its plan, from all judicial scrutiny." *Id.* at 800. In *Crawford*, the Supreme Court clarified

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its ruling in *Sharp*, stating that the safe-harbor provision of MCL § 37.2210 does not prevent plaintiffs from seeking declaratory or injunctive relief under federal law or the Michigan Constitution.

Finally, the Court held that the plaintiff had standing to pursue his claim as articulated by the Court in *Lee v. Macomb Co. Bd. Commrs.*, 464 Mich. 726; 629 NW2d 900 (2001). There existed a “case of actual controversy” because the plaintiff alleged that the government’s affirmative action programs violate the federal and state constitutions and the defendant denied such claims. In addition, the plaintiff alleged that he was denied a promotion for which he was qualified and would have received but for unlawful racial discrimination. This is an injury in fact, fairly traceable to the challenged action by the defendant. The Court of Appeals’ decision was reversed, and the case was remanded to the Circuit Court.

Koontz v. Ameritech Services, Inc., 466 Mich. 304; 645 NW2d 34 (2002). The Supreme Court, per Chief Justice Corrigan, held that MCL § 421.27(f)(1) requires coordination of unemployment benefits with an individual’s pension benefits.

In this case, Ameritech notified Koontz that it planned to close the office where she had worked for 30 years and offered to transfer her to another office. Koontz refused the offer and chose to retire. She was entitled to \$1,052.95 monthly pension allowance, but elected to receive her pension in the lump-sum amount of \$185,711.55. Additionally, she chose to transfer the lump-sum amount directly into her individual retirement account (IRA) rather than receive monthly pension payments under Ameritech’s retirement incentive program. Koontz then filed for unemployment compensation. The Unemployment Agency offset Koontz’s unemployment benefits by the amount of pension payments she would have received under Ameritech’s monthly pension payment option. As a result, she was ineligible for unemployment benefits. This reduction of benefits was ultimately upheld by both the Employment Security Board of Review and the Grand Traverse Circuit Court. However, the Court of Appeals reversed finding that MCL 421.27(f)(5) governed and did not require coordination of benefits.

The Supreme Court first found that, contrary to the Court of Appeals’ decision MCL 421.27(f)(5) did not exempt Koontz’s pension benefits from coordination with unemployment benefits. The Court concluded that the Michigan Employment Security Act (MESA) was clear and unambiguous, and subsections (f)(1) and (5) were not inconsistent. The Supreme Court also held the meaning of the term “liquidation” as used in the MESA pertains only to multiple accounts. The distribution of a single employee’s vested interest did not qualify as a “liquidation” of the pension fund. Finally, in an issue of first impression, the Supreme Court ruled that Koontz “received” her retirement benefits notwithstanding the fact that Ameritech transferred the pension funds directly into her IRA.

The judgment of the Court of Appeals was reversed. The Court’s decision expressly overruled *White v. McLouth Steel Products*, 453 Mich. 522; 556 NW2d 478 (1996). ■

MICHIGAN COURT OF APPEALS UPDATE

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Plaintiffs Must Adhere to Strict Jurisdictional Procedures When Appealing Determinations of the Civil Service Commission: *Davis v. Department of Corrections (Per Curiam) No. 225150 (May 21, 2002)*

Janet Davis was discharged from the Michigan Department of Corrections (“MDOC”) after exhausting her medical leave of absence and being deemed unable to return to work without restrictions. On June 5, 1998, the Michigan Department of Civil Service (“MDOCS”) reviewed Davis’ termination and decided that her separation was justified because she could not return to work a full capacity.

On July 30, 1998, Davis filed a petition for judicial review in the Ingham County Circuit Court naming MDOC as the sole defendant. An amended petition was filed twenty-seven days after the initial filing deadline, adding the MDOCS. Both defendants brought a motion to dismiss for lack of jurisdiction, which the circuit court denied, finding that Davis had made a good-faith effort to proceed properly. Instead, the Ingham Circuit Court allowed the amendment and reversed the decision of the MDOCS, finding that the decision was not supported by substantial evidence.

The defendant agencies appealed to the Court of Appeals claiming that the amendment naming MDOC as a party, twenty-seven days after the deadline, failed to vest the court with jurisdiction to hear an appeal from a decision of the Civil Service Commission (“Commission”). The appeals court observed that a claim of lack of subject matter jurisdiction may be raised at any time, even if for the first time on appeal, and that the issue was a question of law subject to de novo review.

The court took notice of the statutory filing requirements under Michigan’s Administrative Procedures Act which require that the application for review from an agency decision be filed within sixty days of the date of the mailing of notice of the decision. The court noted that the burden of establishing jurisdiction is with the petitioner.

In this case, the court found that Davis failed to satisfy her burden. Unlike civil actions wherein the statutory limitation periods are subject to tolling, the Court of Appeals held that failure to file a timely claim of appeal from an agency decision deprives the court of subject matter jurisdiction. Unlike the circuit court, the appellate court found that Davis’ attempt to cure the initial defect by amending the petition to add the MDOCS was ineffective for two reasons: (1) the amendment was procedurally invalid; and (2) MDOCS and the Commission are separate entities, and serving MDOCS did not confer subject matter jurisdiction over the Commission’s final decisions.

Davis initially argued that MCR 7.105(C) permits the filing of a delayed petition. The court dismissed that argument because, on its face, MCR 7.015(C) only permits such a filing where per-

mitted by the applicable review statute. The applicable statute in this matter, MCL 24.304, contained no provision permitting the filing of a delayed appeal. The court went on, however, to note that MCR 7.105(C) defines the respondent as “a person who seeks to sustain the decision of the agency.” MCR 7.105(C). The court, in an analysis similar to that applicable to indispensable parties, found that the Civil Service Commission was a respondent without whom the courts could not proceed.

The court went on to distinguish the MDOCS from the Civil Service Commission holding that the Commission’s authority is constitutionally vested and exists as a separate and distinct entity from the legislatively enabled MDOCS. The court found that as the final authority and the entity that regulates the terms and conditions of employment in the civil service, the Commission should have been recognized as a necessary party to defend the final decision.

With regard to the problems with Davis’ amendment, the court found that the only petition filed within the sixty-day period for judicial review named MDOC as the defendant. The amended petition adding the MDOCS was filed outside the sixty-day period. Davis argued that the leave to amend was properly granted and the amendment related back to the original filing. The appeals court summarily dismissed that argument holding that, even if the amendment had properly named the Civil Service Commission instead of MDOCS, the relation-back doctrine does not encompass the addition of parties. Therefore, regardless of the propriety of granting leave to amend, neither MDOCS nor the Commission was timely added as a party. The court concluded that the trial court lacked subject matter jurisdiction to consider the appeal. Although couched in terms of filing deadlines and failure to include necessary parties, the decision was based on a subject matter jurisdiction theory making no allowance for equitable factors.

Class Certification Improperly Granted In Alleged Department-wide Race Discrimination Case: *Neil v. James*, No. 226353 (per curiam), June 21, 2002.

The plaintiffs were persons who either held or sought employment with the City of Detroit’s law department from 1994 to 1999 in positions that required a law school education, including law clerks, legal interns and lawyers. The complaint also purported to state a claim on behalf of all unnamed persons similarly situated with the plaintiffs.

Plaintiffs alleged that racial discrimination began after Dennis Archer was elected mayor of the City of Detroit and appointed defendant Phyllis James to the position of corporation counsel to oversee the law department. James reorganized that department and created several new upper management and supervisory positions. Plaintiffs alleged that the new supervisors hired by defendant James created a hostile and discriminatory work environment for African-Americans.

In an Order entered on March 15, 2000, the trial court had ruled that, based upon allegations of racial discrimination, a class could be certified composed of and limited to “all African-Americans who

sought employment with, or were employed by, the City of Detroit Law Department from January 1, 1994 through December 1, 1999 in job classifications that had the prerequisite of a law school education, which included: law clerks, legal interns and lawyers.”

The appeals court reviewed the certification de novo under the criteria set forth in MCR 3.501(A)(1). Pursuant to that rule, one or more members of a specific class may bring suit on behalf of other members of the class only if the following elements are shown to exist:

- (a) the class is so numerous that joinder of all members is impracticable;
- (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
- (c) The claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
- (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

Because there is limited case law in Michigan addressing class certifications, the Court of Appeals relied upon federal cases construing the identical federal rules on class certification.

First, the court observed, when evaluating a motion for class certification, the trial court is required to accept the allegations made in support of the request for certification as true and the merits of the case are not examined. The defendants did not challenge the first requirement under MCR 3.501(A)(1)(a), that “the class is so numerous that joinder of all members is impracticable.” In their motion for certification, plaintiffs alleged that they were able to identify over 350 African-American employees who were adversely affected by the reorganization of the department and another one hundred individuals who had applied for jobs during that same period.

The trial court found that numerosity of the class was established because there were over forty members who fell within the class parameters. The Court of Appeals did not comment on the “over forty” test, but simply stated that it appears the numerosity requirement had been met.

The court next considered the commonality requirement, explaining that this factor is concerned with whether there “is a common issue the resolution of which will advance the litigation.” The court explained that commonality requires that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.

The court ruled that the facts and proofs in this case were too highly individualized because the only common issue or questions surrounded defendant James’ reorganization of the law department

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MICHIGAN COURT OF APPEALS UPDATE

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and how that policy allegedly led to discrimination against African-Americans. Relying upon federal case law, the court ruled that the mere fact that the challenged employment decisions were made during a workforce reorganization was not enough to satisfy the commonality requirement.

The court found that the claims made by the representative plaintiffs in their complaint did not involve general policies or practices that were discriminatory. Instead, "resolution of the merits of the instant dispute will require independent consideration of each plaintiff's qualifications for his or her position, their previous work performance and duties, as well as the qualifications and work history of the white employees allegedly granted preferential treatment." The court expressly limited the applicability of the class action device to environments with a standardized employment practice or policy, using the example of a biased testing procedure. The court continued, "the issue of whether a particular job assignment or promotion denial was discriminatory would depend upon any number of factors peculiar to the individuals competing for the vacancy, including relative seniority, qualifications, availability for work and desire to perform the job."

Moving on to the typicality requirement, the court explained that the named representatives must have claims which were typical of those of the entire class. That is, the representative's claim must arise from "the same event or practice or course of conduct that gives rise to the claims of the other class members and . . . [be] based on the same legal theory." . . . In other words, the claims, even if based on the same legal theory, must all contain a common "core of allegation."

The Court of Appeals, relying largely on its analysis regarding commonality, ruled that the named plaintiffs were not typical of the class as they have only alleged individual claims of discrimination, not any overriding policy or practice.

In evaluating the fourth factor, that the representative parties will fairly and adequately assert and protect the interests of the class, the court utilized a two-step inquiry.

First, the court examined whether the named plaintiff's counsel was qualified to sufficiently pursue the putative class action. The court dismissed an argument from the defendants that the lawyers might be called upon as witnesses.

Second, the court continued, the members of the advanced class may not have antagonistic or conflicting interests. The court found that because there are claims that some members were denied promotions, there might be conflicts among the class members related to competitions for the same position. Further, falling once again on its arguments pertaining to commonality, the court felt that

because of the highly individualized nature of the claims presented, it was unlikely that the named plaintiffs could adequately represent all of the interests of the entire class.

Finally, the court addressed the least quantifiable factor: whether maintenance of the actions as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. The court, in ruling upon this factor, once again relied upon its discussion relating to the lack of commonality.

Based upon its analysis of these factors, the court ruled that the class certification in the circuit court was improper.¹

\$21 Million Dollar Sexual Harassment Verdict Upheld: *Gilbert v. DaimlerChrysler Corp.*, No. 226352 (per curiam), July 20, 2002

This column usually limits discussion to published cases of the Courts of Appeals. This section deviates from that practice for two reasons: (1) the dog days of summer have made for a light number of published employment decisions from the Court of Appeals; and (2) the affirming of a \$21 million sexual harassment verdict is news without regard to whether the decision is published.

In July 1999, a Wayne Circuit Court jury awarded Linda Gilbert, a millwright at Chrysler's Jefferson North plant, more than \$21 million on her sexual harassment claim. The company appealed this verdict, which still stands as one of the largest individual verdicts for harassment.

Without going into excessive detail, Gilbert alleged that her co-employees urinated on her chair, passed around pornographic Polaroids of male genitalia, refused to assist her in her job, and otherwise subjected her to constant harassment. Gilbert had been the first female millwright at the Jefferson North plant.

In its decision, a unanimous three-judge panel of the Court of Appeals rejected the auto company's claim that it had responded effectively to complaints made by Linda Gilbert about severe and pervasive harassment at the Jefferson North assembly plant in Detroit. The court also found that Gilbert's attorney had not improperly exaggerated the nature of her treatment on the job or its effect on her. Gilbert suffered from severe alcoholism and depression, and attempted suicide several times, according to testimony in the case. Plaintiff claimed a relapse into these conditions was the result of the harassment, which Chrysler denied.

Plaintiff notified Chrysler management of harassment six times.

In an interesting side note, the Court of Appeals held that because Chrysler learned of several incidents of harassment during Gilbert's deposition, and because she was still employed at Chrysler, the company had actual notice of, and had responsibility for investigating, those claims of harassment.

— END NOTE —

¹In dicta, the court also indicated that dismissal is appropriate where disparate impact discrimination claim does not specifically identify an allegedly discriminatory policy. ■

SUPERVISORS SHOULD NOT BE PERSONALLY LIABLE UNDER ELCRA

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In Michigan, individual supervisors or management officials of employers are frequently co-defendants in discrimination lawsuits. In the vast majority of these cases, these individual defendants do not have the financial resources either to pay the costs of their defense or to pay a significant settlement or judgment. Often these individual defendants are merely floor supervisors, or managers earning only a few dollars more per hour than the employees they supervise. Accordingly, other than defeating a removal petition to federal court, based on a diversity argument by an employer from a jurisdiction outside Michigan, there appears to us to be little value to a plaintiff in including his or her supervisor in a discrimination claim under the Elliott-Larsen Civil Rights Act (ELCRA). Obviously, a supervisor, like anyone else, can always be sued individually under some other tort or contract theory, but our position is that they should not be sued individually or be liable as individuals under ELCRA.

Individuals are not subject to liability under Title VII. Accordingly, many practitioners and commentators have long wondered why ELCRA, which was generally modeled after Title VII, has frequently been interpreted to allow individuals to be sued as actual defendants in discrimination cases. A recent case decided by the Michigan Court of Appeals seems to support our position that an individual should not be sued or held liable under ELCRA.

On August 9, 2002, the Michigan Court of Appeals decided *Jager v. Nationwide Truck Brokers, Inc.*, (2002 WL 1832806). In its opinion the Court ruled that a plaintiff cannot bring a claim against an individual supervisor under ELCRA. More specifically, the Court, in *Jager*, held that an employee employed in a supervisory capacity, can not be held individually liable under ELCRA, separate from his/her employer, for violations of ELCRA's prohibition against sexual harassment.

A. History of Individual Liability Under ELCRA

The Court's decision in *Jenkins v. Southeastern Michigan Chapter American Red Cross*, 141 Mich. App. 785; 369 NW2d 223 (1985), is the starting point from which to begin the discussion of individual liability under the CRA. In *Jenkins*, the plaintiff alleged that his former employer and two of its employees engaged in race discrimination in violation of ELCRA. The Michigan Court of Appeals addressed the trial court's decision to enter a directed verdict with respect to the individuals' claim that they were not employers within the meaning of M.C.L. § 37.2201(a). Because the two individual defendants "were responsible for making personnel decisions affecting plaintiff, and were agents within the meaning of § 201(a)," the Court found them to be liable under ELCRA.

Notably, the Court of Appeals in *Jenkins*, noted that its decision was controlled by *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459 (ED Mich., 1977). Further the *Jenkins* Court made it per-

fectly clear that it "has examined defendant's attempt to distinguish *Munford* and policy arguments against application of *Munford* in the present case, and finds them to be without merit." *Jenkins* at 800. Reliance on the *Jenkins* case may now be misplaced since, *Munford*, which the Michigan Court of Appeals found to be controlling, has been overturned by the Sixth Circuit in *Wathen v. General Electric Co.*, 115 F3d 400, 403-406 (CA 6, 1997).

In *Wathen*, the plaintiff appealed the District Court's grant of summary judgment to her former employer and three former employees in her cause of action alleging sexual harassment. The plaintiff argued that the use of the term "agent" in Title VII allows for suits against the individual defendants in their individual capacities as agents for the employer. *Id.* at 405. The Court disagreed however and argues that the term "agent" in Title VII in the definition of employer was to create respondeat superior liability. The Court found that "the statute as a whole, the legislative history and the case law support the conclusion that Congress did not intend individuals to face liability under the definition of 'employer' it selected for Title VII. *Id.* At 406. Thus the Sixth Circuit rejected the holding in *Munford*."

B. The Jager Decision

In *Jager*, the Court found that "with respect to coverage, Michigan's ELCRA is similar to Title VII, although ELCRA broadens the scope of employers covered." *Id.* at 7. The scope of employers covered is merely different in that Title VII applies to employers with fifteen or more employees whereas ELCRA covers employers with one or more employees. This distinction alone should not mean that individual liability is included under ELCRA. In *Jager*, the Court articulated that:

"This more expansive definition of employer covered by the act merely increases the scope of employers covered rather than extending liability to individuals. Our Legislature sought to protect all employees, not just those employees of employers more likely to be able to withstand the costs associated with litigating discrimination claims under the ELCRA . . . Consequently, we find that ELCRA's definition of employer concerning the number of employees does not make individuals as well as employers liable under the act." *Id.* at 7-8.

The *Jager* Court also opined that the use of the word "agent" in ELCRA was meant merely to denote respondeat superior and was not intended to create individual liability.

The Michigan Court of Appeals in *Jager* is the first Michigan Court to address this issue since the *Walthen* decision. The Court of Appeals' decision may mark a change in Michigan's interpretation of ELCRA which we contend is long overdue. We feel that the *Jager* decision is solid support for our argument that ELCRA should be interpreted like Title VII, so that an individual supervisor may not be held personally liable for employment discrimination claims. ■

THAT REMINDS ME OF A "WAR STORY"

We all know that our own legal war stories are perfect gems: instructive, humorous, justice triumphs, no gratuitous nudity and violence. So why won't our colleagues listen?

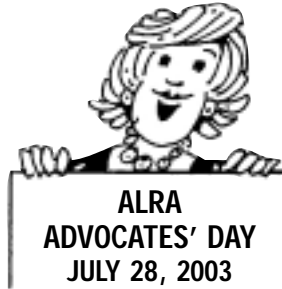
They say they've heard our stories before. Or they get that glazed look and ask which client can be billed for this "conference."

Or worse, they subject us to their own long-winded, pointless, self-aggrandizing war stories as the price of listening to our gems. Have they no self-awareness? Philistines!

Now there is an outlet for your wisdom: *Lawnotes*. Send us your best war stories for possible publication (at the whim and caprice of the editor). Your stories should be instructive and succinct.

They can be humorous or serious. They can change the names to protect the innocent and the guilty, or not. They can be practical to the nth degree or the stuff that myths are made of. They can be impeccably true or filtered through your self-interested prism. They are WAR STORIES!

Contact us to discuss format, length, content and the bounds of good taste. In the tradition of Aesop, tell your story and get your name in print. Call *Lawnotes* editor Stuart M. Israel at (248) 559-2110 or write or e-mail: Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., 1400 North Park Plaza Building, 17117 West Nine Mile Road, Southfield, Michigan 48075 or israel@martensice.com.



MICHIGAN LABOR RELATIONS AGENCIES TO HOST NATIONAL CONFERENCE

In late July of 2003, labor relations advocates and agencies in Michigan will have the unique opportunity to showcase our state and the wealth of labor history in our area when we host the Annual Conference of the Association of Labor Relations Agencies (ALRA).

ALRA is a nonprofit organization of some 67 private and public labor relations agencies at the federal, state, and provincial levels in the United States, Canada and elsewhere. Member agencies include MERC, NLRB, Canada Labour Relations Board, FMCS, National Mediation Board, Federal Labor Relations Authority, Michigan Civil Service Commission and other labor relations agencies from around the world.



Every summer, ALRA hosts an annual conference in the locale of a member agency, featuring nationally known speakers and providing member agencies with the opportunity to share information. The July 2001 Conference was held in Montreal, and presenters included John Truesdale, former NLRB member and Chairperson, along with Bob White, former head of the Canadian Auto Workers. At the July 2002 San Diego conference, presenters included Arturo Rodriguez, President of the United Farm Workers of America, and former NLRB Chairperson Bill Gould.

The 2003 ALRA Conference will take place on July 26-30, 2003, at the Marriott Detroit Renaissance Center, and will be hosted by MERC, FMCS (U.S. and Canada), NLRB, Michigan Civil Service Commission, and the Ontario Provincial Labour Relations Agency. On Monday, July 28, 2003 we will host an Advocates' Day, and the program will be open to attorneys, arbitrators, labor union representatives, management personnel, mediators, and other labor relations professionals.

PLAN TO ATTEND ALRA ADVOCATES' DAY AT THE MARRIOTT DETROIT RENAISSANCE CENTER ON JULY 28, 2003

A reception will follow the Advocates' Day presenters, who will share their unique perspectives on the nuances of labor relations. All of this will occur in our great City of Detroit – the catalyst of the labor movement.

**FOR MORE INFORMATION ON ALRA
ADVOCATES' DAY, CONTACT MERC DIRECTOR
RUTHANNE OKUN AT (313) 456-3519.**

E-MAIL & THE INTERNET IN THE WORKPLACE

Adam S. Forman

Miller, Canfield, Paddock & Stone, P.L.C.

CASE LAW

When Does The Statute Of Limitations Accrue For Online Defamation Claims? In *Firth v. New York*, 2002 WL 1418699 (NY Jul 2, 2002), the New York Court

of Appeals adopted the "single publication rule" and

held that, under New York law, the statute of limitations for defamation actions based on online

content runs from the date the content is first

posted on an Internet website. The court also concluded that each subsequent viewing or website "hit" does *not* constitute a republication of the document nor is the addition of other documents to the site, unrelated to the allegedly defamatory material, republication.

E-mail Policies Continue To Eliminate Any Reasonable Expectation Of Privacy Employees May Have In E-mail. Federal district courts in Pennsylvania and Massachusetts recently confirmed that an employer's written e-mail policy, reserving the employer's right to monitor employee e-mail, eliminates any reasonable expectation of privacy the employee may have in his or her e-mail. In *Kelleher v. City of Reading*, 2002 WL 1067442 (ED Pa, May 29, 2002), the plaintiff, a public employee, sued her employer for invasion of privacy after one of the defendants accessed her workplace e-mail and provided some of its contents to the media. Because the employer's e-mail policy "explicitly informed employees that there was no . . . expectation of privacy," the court granted the employer's motion for summary judgment. Notably, reasoning that the outcome of the privacy question depended on the "circumstances of the communication and the configuration of the e-mail system," the court declined to hold categorically that a reasonable expectation of privacy could never attach to workplace e-mail communications. The court in *Garrity v. John Hancock Mutual Life Insurance Co.*, 2002 WL 974676; 18 IER Cases 981 (D Mass, 2002) similarly granted summary judgment to the defendant-employer on the plaintiffs' invasion of privacy claims. In that case, the employer had an e-mail policy warning employees not to use the company's e-mail for inappropriate purposes, including forwarding sexually explicit e-mails to coworkers, the offense for which the plaintiffs were fired. Interestingly, the court "flatly rejected" the plaintiffs' argument that an employer's instruction to create passwords and personal e-mail folders created a legitimate expectation of privacy. The court also rejected plaintiff's Massachusetts Wiretap and public policy claims because reading e-mails after transmission to the recipient doesn't constitute "interception" and because a common law claim cannot be brought where a plaintiff has an available statutory remedy.

"The Following Call May Not Be Monitored For The Improvement Of Our Service." Companies seeking to monitor and record telephone calls to evaluate and improve customer service should take note of the recent decision in *Schmerling v. Injured Workers' Insurance Fund*, 795 A2d 715; 18 IER Cases 873 (Md, 2002). In that case, the Maryland Court of Appeals concluded that the use of the "Racal system," a telephone monitoring system, violated Maryland's Wiretapping Electronic Surveillance Act and does not fit within the "telephone exemption" of the Act. To be "telephone equipment" under Maryland's statute (which, like Michigan's is more protective of privacy than the Federal Electronic Communications Privacy Act of 1986), the equipment "must further the use of or functionally enhance the telecommunications system." According to the court, "the utility of the add-on equipment must have some relation to the enhancement of the communication system." The exemption was found inapplicable because the "Racal system" only monitored and recorded telephone transmissions, it did not "contribute to the functionality of the phone system in that [the recorders] do not relate to the facilitation of communication."

Are E-mail Messages Stored On Government Computers Subject To FOIA? In May, 2002, the Florida Court of Appeals concluded that private or personal e-mails sent from or received by City of Clearwater employees using government computers, fall outside the definition of public records because they are not "made or received pursuant to law or ordinance" nor created in connection with official city business. The case, *Times Publishing Co. v. City of Clearwater*, 2002 WL 944630 (Fla App 2 Dist, May 10, 2002), was subsequently withdrawn and certified to the state supreme court in July. See, *Times Publishing Co. v. City of Clearwater*, 2002 WL 1426532 (Fla App 2 Dist, Jul 3, 2002). Will this decision withstand strict constitutional scrutiny? Only time will tell. The answer, however, will likely impact the manner in which public employers treat electronic messages on their employees' personal computers.

Union Official's E-mail Access Lawfully Blocked By State. In *Benson v. Cuevas*, 293 AD2d 927 (NYAD 3 Dept, 2002), the New York Supreme Court, Appellate Division, affirmed the Public Employee Relations Board's decision to revoke a union official's e-mail privileges because the union employee used the e-mail for unauthorized union activities. According to the court, the fact that the employer had an e-mail policy prohibiting unofficial use and had issued the employee warnings supported the employer's decision to deny him e-mail access. It will be interesting to see how the National Labor Relations Board addresses similar issues in the future.

UPDATES

In an earlier *Lawnnotes* this column reported on the decision in *Trulock v. Freeh*, 275 F3d 391 (CA 4, 2001), in which the court held that multiple users of a computer could *not* consent to the search of the other users' password protected files. The petition for a rehearing and rehearing *en banc* was denied in April, 2002. See *Trulock v. Freeh*, 289 F3d 829 (CA 4, 2002).

(Continued on page 22)

E-MAIL & THE INTERNET IN THE WORKPLACE

(Continued from page 21)

NEWS & TRENDS

- *Individuals Seek Damages For Defamatory Web Postings.* Claims for defamation based on web postings is nothing new. Corporations have been bringing such actions for some time now. The number of individuals bringing such claims, however, is increasing. For example, in May, 2002, a retired school teacher sued his former student after the student posted a message on a website called "Friends Reunited," which claimed that the teacher was terminated from his job for "making rude remarks about girls" and for strangling a student. Ultimately, the teacher was successful in his lawsuit. He was awarded only £1,250, however. Similarly, in July, 2002, an Australian high school administrator threatened legal action based on an e-mail sent to parents and students which accused him and his deputy administrator of engaging in gross sexual acts with unnamed male students.
- *Monitoring Employees In Foreign Countries.* Generally speaking, private sector employers in the United States are permitted to monitor the electronic communications of their employees. The lines are just being drawn in foreign countries. Consider the following:
 - Canadian employees appear to have far more protection from monitoring than their neighbors to the south. Canada's Personal Information Protection and Electronic Documents Act generally limits workplace surveillance to "appropriate purposes." IN May, 2002, Canada's Privacy Commissioner stated that monitoring of employee Internet and e-mail would generally constitute a violation of the Act. He further stated that such monitoring is a violation of basic privacy rights and is not an essential part of an employer's obligation to prevent workplace harassment.
 - In connection with the preparation of the European Commission's first report on the implementation of the European Union's Data Protection Directive, the Commission began a survey which asked, in part, for views on whether employers should be permitted to read incoming and outgoing employee e-mail messages. The results of the survey are sure to influence the Commission's report.
 - According to a recent survey by the Japan Institute of Labor, an affiliate of the Ministry of Labor, Health and Welfare: 35% of Japanese companies monitor their employee's electronic activities to ensure that company online facilities are not used for private purpose; 40% have implemented an electronic usage policy and 75% of those with a policy prohibit private usage.
 - Korean employers, under legislation roughly translated as the "telecommunications secrecy law," must secure explicit "agreement" from their employees when implementing e-mail filtering or monitoring software.
- Australia is still grappling with workplace surveillance issues. In December, 2001, the NSW Law Reform Commission recommended that the state adopt the "Surveillance Act" which would recognize the right and responsibility of employers to monitor e-mail and Internet usage. It would also require employers to disclose the monitoring, implement a Internet and e-mail policy and consistently enforce the policy. As of July, 2002, the NSW Government has not acted on the Commission's recommendations.
- 25% of employers in the United Kingdom have fired employees for Internet misuse, according to a July, 2002 survey, performed by *Personnel Today* magazine. Well over half of the terminations were because the employee accessed pornographic sites. In fact, Hewlett-Packard recently disciplined several employees in its Briton and Ireland offices, ranging from suspension to discharge, for inappropriate use of company e-mail.
- *Halting E-mail = Greater Productivity?* In July, the City of Liverpool, UK, banned the use of internal e-mail, one day a week, in an effort to persuade employees to start talking to each other. Estimating that 95% of internal communications were electronic, the city council hopes its experimental ban will make the council more efficient.
- *File Online Or Pay A Fine.* Under a recent proposal in a United Kingdom finance bill, employers who fail to file their tax returns online face fines up to £3,000. Estimating a saving to the Inland Revenue of £35m, the rules would impose the sliding-scale fine on those employers who are not in compliance by 2010.

SAFEGUARDING THE ELECTRONIC WORKPLACE

Electronic espionage and hacking is on the rise. Inevitably, employers who grant their employees liberal access to the company's e-mail and Internet systems open themselves up to increased risks. A recent report from the United Kingdom's Department for Trade and Industry revealed that 48% of the worst security breaches of U.K. companies was attributable to disgruntled employees. The following recent items and tips should serve as a warning to employers that they must be ever vigilant in safeguarding their computer networks and systems.



- In May, Michigan's High Tech Crime Unit, Attorney General Jennifer Granholm's 3-year-old initiative, charged a software company executive with embezzlement, using a computer to commit a crime, and computer intrusion. The executive allegedly stole highly sensitive files, accounting records, supplier contracts and other records from the company's computer system, just two weeks before resigning. He then allegedly used the information to secure a job with a competitor.

- **Instant Messaging At Work Increases Risks To Employer.** According to research firm IDC, 54 million employees will use a consumer instant messaging (“IM”) system on the job. While they can increase efficiency and productivity, popular free IM systems, such as AOL Instant Messenger and MSN Messenger, do not contain security features needed to protect corporate networks. Because most free IM systems do not scramble messages as they travel via the Internet, they can create back doors for computer hackers. Unless and until safeguards are implemented, employers would be wise to ensure that their employees have not installed these IM systems on their own computers.
- **Virtual Shredding.** The alleged improper shredding of electronic documents by Enron’s accountants has spawned increased demand for software that completely deletes e-mail. Software that encrypts or self-destructs e-mail after a designated period of time has recently been introduced by four companies — Authentica, Disappearing Ink, Hush Communications and ZipLip.

**Note:* The Securities and Exchange Commission takes the position that federal securities laws require brokerage firms to retain electronic mail relating to the brokerage firm’s overall business for three years.

- **RIAA Police Seeks Unlawful MP3s.** The Recording Industry Association of America (“RIAA”) has begun going after companies that it believes are aiding copyright theft by allowing workers to swap music and movies in the



workplace. In April, 2002, Integrated Information Systems, a high tech company in Arizona, agreed to pay RIAA \$1 million to settle a case brought by RIAA to halt an employee-operated computer server that allowed coworkers to download and exchange copyrighted songs, or MP3 files, from the Internet. In July, Microsoft sent an e-mail

to its employees warning them not to swap music or other files over the company’s computers or networks.

- **PA\$\$wOrd Tips#.** Perhaps the largest security risk to corporations is the individual passwords of their employees. Much of the damage done to an employer’s system is by former disgruntled employees. Heather Newman of the Detroit Free Press, suggests the following instructive tips on how to protect a password: (1) make it long; (2) don’t use it if it can be looked up in a dictionary or if it’s obvious (e.g., no pets’ or children’s names or birthdays); (3) use phrases rather than single words; (4) don’t use personal information (e.g., mother’s maiden name); (4) combine letters, numbers and punctuation; (5) use different passwords for different systems; and (6) change password often. Employers should consider encouraging, or even requiring, their employees to follow this prudent advice. ■

STATE OF THE ART CLE!



“CLE and lunch in one seminar!”

Plan to attend the 28th Annual Labor and Employment Law Institute on April 8 and 9, 2003 at the MSU Management Education Center in Troy. Co-sponsored by the Institute of Continuing Legal Education, the Federal Mediation and Conciliation Service and the State Bar of Michigan Labor and Employment Law Section, this seminar has it all: Title VII, ELCRA, ADEA, ADA, PWDCRA, FMLA, FLSA, HIPAA, NLRA, PERA, privacy, evidence, mediation, negotiation, litigation, arbitration, lunch on Thursday and Friday, a discount for LELS members, and more!

ONE VERY WEAK CASE IN THE WESTERN DISTRICT

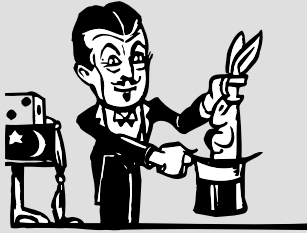
John T. Below and Heather G. Ptasznik
Kotz, Sangster, Wysocki and Berg, P.C.

Defendant Which Had No Knowledge Of Plaintiff’s Race Cannot Be Found To Have Violated Title VII.

Copeland v. Delphi E. & E, Case No.: 1:01:cv01 (June 27, 2002) Judge Douglas W. Hillman granted Defendant’s Motion for Summary Judgment on Plaintiff’s intentional race discrimination claim. Plaintiff was employed by Delphi Automotive (“Delphi”) between 1973 and 1998 when it was sold to Lear Corporation. Plaintiff then went to work for Lear. In May 1999, Plaintiff applied for two advertised positions at Delphi. The supervisory personnel at Delphi determined that, based upon his resume, Plaintiff was not sufficiently qualified for either of the positions and did not interview him. Plaintiff alleged he was not hired because of his race.

The Court granted Delphi’s Motion because there was nothing in Plaintiff’s cover letter or resume indicating his race. Additionally, the supervisory personnel involved in the hiring process testified they were unaware of Plaintiff’s race when they made their decision and although Plaintiff was a former employee of Delphi, no one had access to his former employment information.

“A defendant cannot be said to have intentionally discriminated unless it had the knowledge necessary to form that intent.” Accordingly, Because the supervisory personnel who decided not to interview Plaintiff had no knowledge of Plaintiff’s race, Plaintiff failed to demonstrate the existence of a genuine issue of material fact on his claim of intentional race discrimination.



INSIDE *LAWNOTES*

- Jeff Wilson previews the new HIPAA privacy rules and their impact on non-health care employers.
- Charlotte Rowan considers the continuing violations doctrine after *National Railroad Passenger Corporation v. Morgan*.
- Jim Perry and Jennifer Nowaczok discuss supervisors' personal liability for employment discrimination.
- Barry Goldman reveals what arbitrators like to see in post-hearing briefs and Nancy Caine Harbour offers 11 tips for clear, concise legal writing.
- Stuart Israel explores the joy of hoisting others by their own petards and Shel Stark proves that a picture is worth a thousand words — and then some.
- NLRB Region Seven Director Bill Schaub writes his last official column before hanging up his “gone fishin’” sign.
- Jeff Steele summarizes the case showing that the Tigers are now Detroit’s “bad boys” — off the field.
- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, websites to visit, and more.
- Authors John T. Below, Gary S. Fealk, Adam S. Forman, Barry Goldman, Kurt M. Graham, Nancy Caine Harbour, Stuart M. Israel, Jennifer K. Nowaczok, James B. Perry, Heather G. Ptasznik, Roy Roulhac, Charlotte G. Rowan, William C. Schaub, Jr., John W. Smith, Sheldon J. Stark, Jeffrey A. Steele, Daniel B. Tukel, Jeffrey D. Wilson, and more.

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