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## Section Co-Chair's Corner

Thanks to the generous efforts of Steering Committee members, the Section and its activities are off to a terrific start this Fall. In addition to several informative educational programs, we have embarked on a number of public service projects designed to leverage the skills and knowledge of our Section members in the service of improved public understanding of employment law and legislation affecting the workplace.

Our activities kicked off with our annual Open House and Judicial Panel. Attendees gained insights from state and federal judges on how employment litigation plays out in their courtrooms. In addition, there was a welcome opportunity to network and get to know fellow members of the bar.

Through CLE programs and Brown Bag lunches, we have offered members programs on topics ranging from the privacy of e-mail communications (including attorney-client communications) to current hot issues regarding severance and settlement agreements. In addition, as part of the BBA's ongoing efforts to promote diversity in the legal profession, we hosted a wonderful Brown Bag Lunch program on successful strategies for recruiting and retaining lawyers of color.

We co-sponsored with the NLRB and Department of Labor the Annual Labor Law Conference at Suffolk University Law School which featured an overflow crowd and insightful talks by the Solicitor of Labor and the General Counsel of the NLRB. Upcoming activities in this area will include a program co-sponsored with the Health Law Section on Labor Law issues in the Health Care sector.

The Commonwealth's historic legislation on Health Insurance Reform remains a focus of our activities. We have joined with the Health Law Section on an Ad-Hoc Committee to educate the bar on the implementation of the far-reaching legislation. Watch for upcoming events with experts from Beacon Hill and the relevant agencies.

We have also convened a committee to review and propose revisions to the state's core antidiscrimination statute (Chapter 151B) in order to make it more accessible and understandable. Under the leadership of Jay Shepherd and Jim Weliky, we expect that this working group will make an important contribution.

Finally, the finishing touches are being applied to our manual on Employment Law Fundamentals to be distributed to nonprofit organizations and small businesses who lack regular access to employment counsel. Jody Newman and David Henderson have ably led this Committee and the full draft is currently receiving a round of expert editing by Nina Kimball.

Upcoming Brown Bag Lunches organized by Justine Brousseau and Suzanne Suppa will address cutting edge issues around taxability of settlements; current initiatives by the EEOC, and the emerging field of Collaborative Law.

As always, we welcome your suggestions for topics to be addressed at future Brown Bag Lunches and CLE Programs. The Section is dedicated to your needs and interests as practitioners. We endeavor to be timely and even prescient in presenting our programs. For example, a front page Boston Globe article reported on a lawsuit challenging a termination for smoking cigarettes during non-working hours -- a topic addressed in our Spotlight Program in the Spring. With your help we will continue to provide valuable educational and public service programs on current and upcoming issues in our field.

## CALENDAR

### Meet the EEOC Legal Staff

Tuesday, January 2, 2006  
12:30 p.m. – 2:00 p.m.  
Boston Bar Association

Markus Penzel and Arnold Lizana of the EEOC will discuss

- how the agency decides which cases to bring to litigation
- a number of pending cases
- the agency's approach to litigation

There will be ample time for Q&A on virtually any topic requested by the attendees.

### SAVE THE DATES: BROWN BAG LUNCHES

The following Brown Bag Lunches will take place from **12:30 p.m. – 2:00 p.m.** at the Boston Bar Association.

#### Introduction to and Discussion of Collaborative Law

Tuesday, February 6, 2007

#### How to Draft & Respond to Demand Letters

Tuesday, March 6, 2007

TBA

Tuesday, April 3, 2007

#### Discussion of Key Labor Law Cases and Developments, including *NLRB v. Kentucky River Community Care*

Tuesday, May 1, 2007

TBA

Tuesday, June 5, 2007

### UPCOMING CLE PROGRAMS

#### CLE: Labor Law Issues in the Health Care Arena

Thursday, February 8, 2007  
4:00 p.m. – 7:00 p.m.  
Boston Bar Association

**\*\*Sponsored by the Labor & Employment and Health Law Section**

For more information or to register for upcoming CLE programs, please visit <http://www.bostonbar.org/cle/index.htm>.

### MEET THE EEOC LEGAL STAFF

Tuesday, January 2, 2006  
12:30 p.m. – 2:00 p.m.  
Boston Bar Association

To RSVP, please visit

<http://www.bostonbar.org/calendar.cfm>

### CLE: LABOR LAW ISSUES IN THE HEALTH CARE ARENA

Thursday, February 8, 2007  
4:00 p.m. – 7:00 p.m.  
Boston Bar Association

**\*\*Sponsored by the Labor & Employment and Health Law Sections**

Until recently, the labor environment in the health care industry had been relatively quiet for the past few years. However, recent months have clearly reversed the trend. In a relatively short time, the industry has seen a number of high profile strikes and threatened-strikes, contract negotiations, and vigorous organizing activity. Many health care lawyers within the industry are rather quickly finding themselves in the midst of the unfamiliar territory of labor law. Simultaneously, long-time labor law practitioners are facing familiar issues, but in the context of a new industry setting the brings its own unique set of concerns.

This program, jointly sponsored by the BBA's Labor & Employment and Health Law Sections, aims to help both health care and labor lawyers navigate this new environment. The program will bring together a panel of leading experts from both health care management (including in-house and outside counsel) and labor to explain the issues that are driving this dramatic increase in activity. Bob Dylan may have said it best when he wrote, "the times they are 'a-changin'."

Topics addressed will include:

- Issues Arising in Current Organizing Efforts/Campaigns, including:

- A basic overview of NLRA and the rules affecting organizing efforts;
- Perspectives of the major management and labor actors;
- The responsibilities and challenges faced by management and labor during organizing campaigns; and
- Issues currently arising in/motivating organizing efforts

- Issues Arising in Current Collective Bargaining Relationships

- The intersection of labor and health care law: industry-specific problems and concerns

For more information or to register, please click here:

<http://www.bostonbar.org/cle>

### MCAD TRAINING OPPORTUNITY

The Massachusetts Commission Against Discrimination (MCAD) is offering the opportunity for individuals who currently provide or seek to provide employment discrimination prevention training or conduct internal discrimination complaint investigations to attend three MCAD-certified training programs.

To participate in one or both of the Train-the-Trainer courses on preventing discrimination and harassment in the workplace, participants must also enroll in two mandatory half-day prerequisite sessions. The MCAD is also offering a two-day course titled Conducting Internal Discrimination Complaint Investigations, which does not require enrollment in any prerequisite courses.

These MCAD courses are designed for:

-Human resources managers, EEO officers, training directors and others who conduct training and/or investigations in the workplace.

-Employment lawyers, diversity consultants and others who provide training and/or investigations as external consultants to employers.

The tuition fees range from \$150 to \$995 depending on the courses selected. The deadline for applications is December 29, 2006. For further information, please call the MCAD Training Unit at 617-994-6072 or contact the MCAD by e-mail at [training.assistant@state.ma.us](mailto:training.assistant@state.ma.us).

## REPORT ON LABOR & EMPLOYMENT SECTION OPEN HOUSE

By: Valerie Samuels and Sharen Litwin

On **September 20, 2006**, the Section hosted its annual **Open House**. This year we were honored to have three distinguished judges on our panel: Judge Richard Stearns of the U.S. District Court for Massachusetts and Justices Margaret Hinkle and Peter Lauriat of the Massachusetts Superior Court. Sharen Litwin and Valerie Samuels organized the Open House and served as moderators during the question and answer portion of the program. The Open House was a worthwhile learning experience and also offered a valuable opportunity to meet and mingle with the judges during the reception following the question and answer panel session.

The judges discussed a wide variety of topics including use of experts, discovery disputes and sanctions, electronic discovery, the award of emotional distress damages under the standards established by the Supreme Judicial Court in *Stonehill v. MCAD*, and the award of attorneys' fees to prevailing plaintiffs.

Some of the specific suggestions offered by the judges included the following:

1) One judge observed that plaintiff's counsel should ensure that prospective jurors are asked if they have negative views about emotional distress damages and should adequately address the subject of emotional distress damages in the opening statement.

2) Another judge said that in many cases plaintiff's counsel fail to focus sufficiently on the issue of causation which leads to an adverse verdict. Plaintiff's counsel also must be careful to make sure that a plaintiff who claims to be disabled actually appears to be so even when going across the street to get lunch where he or she might be observed by some of the jurors. Counsel should also fully utilize the new juror questionnaires and be reasonable with suggested questions for the court to use on juror voir dire. The judge said that he always allows the jurors to ask questions during the trial.

3) Another judge cautioned that, in his experience, plaintiffs who are seen as ultra-sensitive are not well-liked by jurors. Counsel, therefore, should be careful not to overstate things that a reasonable person would not find offensive. He said that he has found jurors generally to be sympathetic to pregnancy and age discrimination claims. He also stated that typically he would not admit into evidence a probable cause or lack of probable cause finding by the Massachusetts Commission Against Discrimination. He also said that it is a strategic mistake for plaintiff's counsel to file a "kitchen sink" complaint which lists every imaginable legal claim. He suggested that counsel focus the case on the main issues.

4) The judges universally agreed that they dislike discovery abuse and would not hesitate to issue sanctions. They emphasized that counsel should use their imagination when suggesting proposed sanctions to the court given the broad discretion judges have to fashion an appropriate remedy. All three judges agreed that they are inundated by paperwork and that the shorter and more concise motions are, the more

likely the court will focus on them sooner.

We welcome any comments Section members may have about the program or any suggestions about future open houses. Please address them to either the Section Co-Chairs, Jennifer Tucker and Paul Holtzman, or feel free to contact Sharen Litwin or Valerie Samuels.

## SUMMARY OF RECENT BROWN BAG LUNCHES

On **October 3, 2006**, the Brown Bag lunch meeting was an open discussion about the privacy of employee's email communications in the workplace given recent case law on the subject. Specifically, a new case found that an employee has a right to privacy, even where using the employer's computers in the workplace, if the employee is accessing a personal email account such as Yahoo or Hotmail.

The group discussed this case, along with others across the country with different holdings. A lively discussion was held and included the question of whether the court's result would have been different if the communication at issue was not an attorney-client communication.

On **November 2, 2006**, Katherine J. Michon and Naomi Thompson, co-chairs of the Diversity Committee of the BBA, organized an informative and lively Brown Bag Lunch program titled, *Striving for a Diversified Workplace: Recruiting and Retention Issues*. The panelists, Wayne A. Budd, Rachael Splaine Rollins and F. Chase Hawkins, discussed ways in which law firms and businesses alike can attract and retain a diverse workforce, and the benefit to employers of focusing on diversity. The program concluded with an interactive presentation where the attendees explored their own tendencies toward labeling and prejudicial opinions.

If you were unable to attend the Striving for a Diversified program and would like to order the course materials, please email [sections@bostonbar.org](mailto:sections@bostonbar.org).

## SUMMARY OF 34<sup>TH</sup> ANNUAL ROBERT FUCHS LABOR LAW CONFERENCE

On October 19, 2006, the Labor and Employment Law Section of the Boston Bar Association co-sponsored the 34<sup>th</sup> Annual Robert Fuchs Labor Law Conference, hosted by Suffolk University Law School. Along with the BBA, labor and employment sections from the six New England state bar associations joined in sponsoring the Conference, which is presented annually by Region One of the National Labor Relations Board and the U.S. Department of Labor. As in the past, the conference was well-attended, and feedback on the program from attendees at all portions of the program was positive.

Keynote speakers at this year's event were Ronald Meisburg, newly confirmed General Counsel of the NLRB, and Solicitor of Labor Howard M. Radzely. General Counsel Meisburg discussed the role of the General Counsel's office and its effect on national labor policy, and described how the General Counsel's office makes its prosecutorial decisions. In addition, he shared his vision for how he intended to fulfill those roles. Solicitor Radzely's presentation reviewed recent developments in the laws affecting the American workforce, including the recently enacted Pension Protection Act of 2006, and provided information on the Department of Labor's increasing focus on systemic employment violations.

Following the plenary addresses by the keynote speakers, attendees were invited to attend one of three concurrent workshops focusing, respectively, on NLRB practice, the FLSA and USERRA, and recent whistleblower protection cases. The NLRB panel addressed the question of

when an employer may make unilateral changes during the term of a collective-bargaining agreement. That discussion focused on the Bath Iron Works case currently on appeal before the First Circuit, and featured counsel who argued both sides of the case as members of the panel. The FLSA and USERRA workshop focused on timely issues affecting servicemembers and employers under USERRA as well as current issues under the Fair Labor Standards Act, specifically dealing with independent contractors and recent revisions to the regulations applying Executive, Administrative, and Professional exemptions. Finally, the whistleblower protection panel discussed recent developments under the Sarbanes-Oxley (SOX) whistleblower protection provisions, as well as a discussion of issues arising under ERISA and OSHA regulations.

## JUDICIAL UPDATE

By: Megan Bisk  
Ropes & Gray LLP

### Proposed Amendments to the Federal Rules of Civil Procedure Relating to E-Discovery

The impending changes to the Federal Rules of Civil Procedure (the "Rules"), scheduled to take effect December 1, 2006, focus on the discovery of "electronically stored information" ("ESI") and the heightened risks and unique issues raised by the proliferation of "e-discovery." Specifically, the proposed amendments to Rules 16, 26, 33, 35, 37, 45, and revisions to Form 35 focus on giving early attention to issues relating to electronic discovery, and addressing frequently-recurring problems involving the preservation of evidence and the assertion of privilege and work-product protection both early on and throughout the litigation process.

The amendments give both courts and parties considerable flexibility in determining the parameters of any e-discovery that will occur. Under the

amendments, Rule 26(f) directs parties to discuss any issues relating to the disclosure or discovery of ESI at their initial conference, including the form or forms of production of ESI, methods of preservation, and the possibility of reaching an agreement on approaches to asserting claims of privilege or work-product protection after inadvertent production. The discussions relating to privilege and work-product protection are especially important as the high volume of information that may potentially be produced increases the risk that one of these issues will arise. As amended, Rule 16 permits the court to address these issues in its scheduling order by incorporating any agreement reached by the parties on the discovery or production of ESI.

The proposed amendments to Rule 26(a), 33, and 34 provide clarification as to the actual procedures for identifying and discovering ESI. Rule 26(a) is amended to clarify a party's duty to include in its initial disclosures a copy of, or a description by category and location of, all ESI that supports its claims and defenses. The changes to Rule 33 make clear that a party is permitted to respond to an interrogatory that involves the review of business records by providing access to the requested information if the opposing party can find the answer "as readily" as the responsive party. Rule 34(b), as amended, sets out the procedure to be used where there has been no court order, party agreement, or request for a specific form of production. In this situation, the rule permits a party to produce responsive ESI in the form in which it is "ordinarily maintained" or in a form that "reasonable usable."

The proposed amendments to Rule 26(b) and 37 address the major problems that are associated specifically with the discovery of ESI. First, Rule 26(b)(5) is amended to provide a default provision, applied in situations where there is no party agreement, for dealing with the inadvertent production of privileged or work-product protected material. The Rule provides that the producing party should notify the receiving party of the claim and the receiving party must return, sequester, or destroy this information and must take reasonable

steps to retrieve any such information that has been disclosed to a third party. The receiving party may not use or disclose this information until the court rules on whether it is privileged or protected and, if so, whether a waiver has occurred.

Second, Rule 26(b)(2) is amended to provide a procedure for parties to respond to unreasonably burdensome requests for ESI. Parties are authorized to respond to requests for ESI that is not "reasonably accessible" by simply identifying the sources of ESI that may be responsive. If the requesting party still moves for production, the responding party has the burden to show that the ESI is not in fact reasonably accessible. Even if this burden is met, however, the court retains the discretion to order disclosure for "good cause."

Third, Rule 37(f) addresses the preservation problems associated with the normal use procedures used to manage electronic information systems. The amended rule provides limited protection against sanctions for discoverable ESI that has been lost as a result of the routine operation of an electronic information system, as long as that operation is in "good faith." The rule provides no protection, however, for ESI that has been intentionally destroyed in anticipation of litigation or for information that is lost due to exploitation of the routine operation of an information system.

Finally, the amendments to Rule 45 alter the provisions for subpoenas to conform to all of the previously discussed Rule changes involving ESI, expressly making these materials responsive to subpoena requests and providing procedures for addressing the inadvertent production of privileged or work-product materials. Form 35 is also amended to include the parties' proposals regarding disclosure or discovery of ESI in the parties' report to the court.

In sum, while these amendments provide broad guidelines for conducting e-discovery and responding to the new issues raised by the increasing amount of information contained in electronic form, it is clear that they are not entirely

comprehensive. It will be interesting to see how the judiciary chooses to resolve the undefined or ambiguous details.

**Valez v. Janssen Ortho LLC, Mass. Lawyers Weekly No. 05-2721, 2006 WL 3114299 (1st Cir. 2006)**

In a case of first impression, the First Circuit recently held in *Valez v. Janssen Ortho LLC* that to establish a prima facie case of retaliatory failure-to-hire the plaintiff must show, as part of the adverse employment action element of the claim, that she applied for a discrete, identifiable position and did not merely express interest in a wide range of positions.

The Plaintiff, who had previously worked for defendant Janssen Ortho LLC ("Janssen") at its Gurabo chemical plant, had filed suit while still employed, claiming she was sexually harassed by her supervisor and that her boss retaliated against her for submitting reports of manufacturing irregularities to the Food and Drug Administration. When Janssen later decided to close the Gurabo plant, the Plaintiff lost her job, and two weeks later amended her original complaint to include an additional claim for retaliation based on Janssen's failure to transfer her to a new position when the plant was closed.

More than two years later, the Plaintiff sought re-employment through a general cover letter and resume sent to Janssen's human resources department. The letter expressed interest in "any position available" and referred to a wide range of general job categories. The Plaintiff faxed an identical letter and resume to the human resources department a few days later. In response to the Plaintiff's inquiries, Janssen's director of human resources sent her a letter informing her that she would not be considered for an interview or "rehiring," mentioning the Plaintiff's prior lay-off and severance and the company's "business needs" in explanation.

The Plaintiff again sued, filing her complaint in the U.S. District Court for the District of Puerto Rico and alleging violations of the Americans with Disabilities Act, Title VII, and Puerto

Rico law. The district court granted summary judgment for Janssen, noting that to make a prima facie case the Plaintiff had to show that she had engaged in protected activity, had suffered an adverse employment action, and that a causal connection existed between her protected activity and the adverse employment action. The district court found that the Plaintiff had not engaged in protected activity as her previous lawsuits were "unreasonable." Alternatively, the district court held that the Plaintiff had failed to satisfy the causation element of her prima facie case because her application letters did not specify a particular job opening and she sent them at a time when there were no positions open to external candidates.

On appeal, the First Circuit focused on the second prong of the retaliatory discrimination test--the existence of an adverse employment action--noting that the district court did not explicitly address this element. After examining precedent from other circuits, the court concluded that a plaintiff alleging retaliatory failure-to-hire must show that she applied for a particular position, that the position was vacant, that she was qualified for the position, and that she was not hired for that position. Turning to the facts before it, the First Circuit held that the district court had properly entered summary judgment for Janssen on Plaintiff's Title VII claim, finding that the Plaintiff had failed to make a prima facie showing of an adverse employment action as her application letters merely expressed her interest in a wide range of positions, thus not meeting the requirement that she apply for a "discrete, identifiable position." Similarly, the First Circuit affirmed summary judgment on the Plaintiff's retaliation claim brought under Puerto Rico law, finding that this claim was also barred by the fact that she had not suffered an adverse employment action. The Plaintiff did not raise the dismissal of her Americans with Disabilities Act claim on appeal.

**Massachusetts Nurses Ass'n v. North Adams Reg'l Hosp., 467 F.3d 27 (1st Cir. 2006)**

In *Massachusetts Nurses Ass'n v. North Adams Reg'l Hosp.*, the First

Circuit held that a nurses' union could not use a prior arbitration award, which found that the hospital's staffing of nurses on a particular floor violated the union's collective-bargaining agreement ("CBA") with the hospital, to bypass the contractual grievance provision and obtain direct relief in federal court for subsequent complaints about the same issue. In 2002, nurses employed by North Adams Regional Hospital ("the Hospital") filed a number of complaints, later converted to formal grievances, alleging inadequate staffing on Three North, a specific floor of the hospital, in violation of the applicable CBA. After hearings on the issue, an arbitrator sided with the nurses and issued an order requiring the hospital to cease and desist violating the specific provision of the CBA addressing the disputed staffing issue and to make payments to both the union and the nurses who had worked the grieved shifts.

In 2005, the nurses at the Hospital brought similar complaints, alleging additional violations of the same CBA provision. Although some of the reports involved an event on Three North, the majority of reports referred to events occurring in other areas of the hospital. Rather than converting these complaints into formal grievances, the union elected to file a direct action in federal district court, seeking enforcement of the cease-and-desist portion of the 2002 Arbitration Award. The Hospital answered the complaint and then moved for judgment on the pleadings, arguing that "the 2005 reports arose out of a variegated set of factual predicates materially different from the factual predicate on which the earlier grievances reposed and that, therefore, enforcement constituted an inappropriate avenue for relief."

The First Circuit agreed, noting that although there were certain circumstances in which it would be appropriate for a court to order the enforcement of a prior arbitration award in order to resolve a subsequent labor dispute, those circumstances were not before it. Reviewing several of its earlier decisions, the court articulated the test for whether a prior arbitration award could be used as a

substitute for normal grievance procedures, stating that the grievance procedure could be bypassed only where the prior award was clearly intended to have prospective effect and there is no "colorable basis for denying the applicability" of the prior award to the existing dispute.

The court held that although the prior award was clearly meant to provide prospective relief, "the intervening passage of time and the changed nature of hospital staffing patterns and practices" indicated the possibility of material factual differences between the two sets of complaints which precluded direct enforcement of the prior arbitration award. The court found that the mere fact that the complaints were all based on violations of the same provision of the CBA did not cure this deficiency and affirmed the district court's dismissal of the lawsuit.

**RIS Paper Company, Inc. v. Wave Graphics, Inc., 21 Mass.L.Rptr. 449 (Mass. Super. 2006)**

The Massachusetts Superior Court, Justice Thayer Fremont-Smith, recently held in *RIS Paper Company, Inc. v. Wave Graphics, Inc.* that the principal of a dissolved commercial printing business did not wrongfully transfer proprietary information where he provided his new employer with the benefit of the personal relationships he had formed while working at his previous employment. *RIS Paper Company ("RIS")*, a creditor who was owed money by *Wave Graphics, Inc. ("Wave Graphics")*, brought suit against the dissolved company and its principal, *Edward J. DeStefano, Jr. ("DeStefano")*, who had subsequently accepted employment with *Unigraphics, Inc. ("Unigraphics")*. *RIS* alleged that under his employment contract with *Unigraphics*, *DeStefano* received significant payments for his misappropriation and fraudulent transfer of *Wave Graphics'* customer list to *Unigraphics*.

The Court stated that the crucial determination was whether the information that *RIS* alleged was protected is, "in fact and in law, 'confidential.'" In making this determination, the court first noted

that although there was information regarding each customer on *Wave Graphics'* computer, there was no physical "customer list." Second, the court noted that none of *Wave Graphics'* employees had been required to sign non-disclosure or non-compete agreements, no evidence indicated that salesmen were instructed to keep customer information confidential, and none of the company's documents were labeled "confidential." Third, the Court observed that the customary industry practice was for salesmen to take their customers with them when changing employment. From the foregoing, the court determined that "what is valuable is not the identify of the customer as such, but rather a salesman's personal relationship with such a customer" and found that the payments made to *DeStefano* recognized the value of his personal relationships with customers, rather than the identity of these customers or any customer list. The Court therefore held that the payments were not in consideration of any wrongful transfer of proprietary information by *DeStefano* from *Wave Graphics* to *Unigraphics*.

## LEGISLATIVE UPDATE

By: Christine Wichers  
Choate, Hall & Stewart LLP

On **August 28, 2006**, the Legislature enacted H.4663, a bill to mandate treble damages for any violation of the Wage Payment Act, MGL ch. 149, sec. 148. This bill passed on a voice vote while the Legislature was in informal session. This bill would have overridden the SJC's holding in *Wiedmann v. Bradford Group, Inc.*, 444 Mass. 698 (2005), that treble damages are discretionary. Governor Romney vetoed H.4663 on September 7, 2006. To override the veto before the current legislative session ends on January 2, 2007, the Legislature will have to hold a formal session, which is not expected to happen. It is expected, however, that the bill will be resurrected in the new session starting January 3, 2007.

## AGENCY UPDATE

By: Chris Powell  
Ropes & Gray LLP

### National Labor Relations Board Issues New Guidance on the Meaning of "Supervisor": Oakwood Healthcare

In what has been described as a landmark decision, the National Labor Relations Board (the "Board") in Oakwood Healthcare, Inc. issued new guidance on the interpretation of the term "supervisor" contained in the Section 2 of the National Labor Relations Act, as amended.

Specifically, the Board clarified the definitions of the terms "independent judgment," "assign," and "responsibly to direct" that form significant parts of the test for supervisory status. The Board was responding to the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, in which the Court had rejected a previous Board gloss on "independent judgment" that excluded such judgment as involved only "ordinary professional or technical judgment in directing less-skilled employees to deliver services."

In Oakwood, the Board held that to exercise independent judgment means that a person "at a minimum, act[s], or effectively recommend[s] action, free of the control of others and form[s] an opinion or evaluation by discerning and comparing data." It described a continuum of behavior ranging from completely "controlled" to completely "free". At the "controlled" end of the continuum, circumstances, which may include but are not limited to detailed instructions contained in company policies or rules, verbal instructions of a superior or provisions of a collective bargaining agreement may literally or effectively dictate the actions that must be taken in response to a particular situation. According to the Board, independent judgment enters the picture when guidelines, whatever their form, permit discretionary choices. However, this discretion must involve

the freedom to choose between "meaningful" choices".

Interpreting the term to "assign", the Board held that it means to "designat[e] an employee to a place . . . [to] appoint . . . an employee to a time . . . or [to] give . . . significant overall duties...to an employee." It drew a distinction between making an assignment and giving an instruction for a discrete task. To illustrate, the Board distinguished between a charge nurse designating an LPN to regularly administer medications to a patient or a group of patients, and a charge nurse ordering an LPN to immediately give a sedative to a particular patient. The former qualifies as "assigning" while the latter does not.

Finally, the Board held that the term "responsibly to direct" involves two elements. First the employee must be in a position to decide "what job shall be undertaken next or who shall do it." In other words, "direct" here covers that area of supervisory function that "assign" does not; namely, the delegation of discrete tasks. Second, there must be accountability. The putative supervisor must have the authority to correct the performance of the task by the employee to whom she delegated it, and must herself be liable to incur some adverse consequence if the task is not properly performed.

The effect of the Board's decision in Oakwood will become clear as the new standards of "independent judgment", "assign" and "responsibly to direct" are applied to more fact patterns. As the Board has vacated and remanded at least nine cases for reconsideration under the new standards, it should not take long for the actual contours of the new regime to begin to come into focus.

### Senate Confirms Two Members and a New General Counsel of the NLRB

On August 3, the Senate confirmed nominees Peter C. Schaumber and Wilma B. Liebman as Members of the National Labor Relations Board for 5-year terms. This is Member Schaumber's second term. It will expire August 27, 2010. Member Liebman is serving her third term. It

will expire on August 27, 2011. This brings to Board to its full complement of five members.

On the same day, the Senate confirmed Ronald Meisburg as NLRB General Counsel for a 4-year term. Meisburg had previously served as General Counsel under a recess appointment.

### Earp Takes Chair of EEOC

Naomi Churchill Earp became Chair of the U.S. Equal Employment Opportunity Commission (EEOC) on August 31, 2006. In her first official statement as chair, Earp said: "I plan to focus on race and color issues - in particular, enhancing the Commission's efforts regarding race and color-based merit factor cases and cause findings." She forecast that race and color would also be significant issues in the Commissions "renewed focus on systemic litigation." Earp's term will expire on July 1, 2010.

## WARNING: COURTS ARE CLOSELY SCRUTINIZING SEPARATION AGREEMENTS

By: Mark H. Burak and Scott J. Connolly  
Morse Barnes-Brown & Pendleton, P.C.

During the past year, employment counsel have been closely monitoring — and growing increasingly concerned about — court decisions from across the country that have invalidated employee releases of claims contained in separation agreements. These recent cases signal a focusing of enforcement efforts by the EEOC and increased scrutiny of employee releases.

Obviously, employers generally should not pay money to a terminated employee in exchange for a release of claims if the release will not hold up in court. This article briefly discusses recent developments and offers some practical guidance on separation agreements to help ensure that employers do not pay severance in exchange for a defective release. The

BBA recently conducted a seminar on this topic where this topic was covered exhaustively. This article is intended to briefly highlight the major points.

### **Separation Agreements May Not Prohibit the Filing of EEOC (or Other Agency) Charges**

Typically, releases contain language whereby the employee waives the right to file any type of claim against the employer. If the employee later sues the employer on a released claim, the employer can use the release as an affirmative defense to dismiss the employee's lawsuit. In comparison, a covenant not to sue is a promise not to file claims against the employer. If the employee sues despite that promise, the employer will have a claim against the employee for breach of contract. Such covenants typically provide that the employee must pay the employer's legal fees and costs in defending against the suit.

Although an employee can waive the right to file court claims seeking to recover money damages and also (based on recent court decisions) probably can waive the right to recover money damages arising from a charge with the Equal Employment Opportunity Commission ("EEOC") (or other federal and state administrative agencies), recent cases hold that any release by which an employee waives the right to file a charge of discrimination with the EEOC is void as against public policy. (The EEOC is charged to investigate and eliminate unlawful discrimination in the workplace. Thus, the EEOC takes the position that any release prohibiting an employee from filing a charge effectively interferes with the EEOC's investigative powers.) Moreover, the EEOC also has taken the position that such releases are "per se" retaliation against the affected employee.

In *EEOC v. Lockheed Martin, Inc.*, a case decided in federal court in Maryland on August 8, 2006, the EEOC sued to attack an employer's release. In connection with a reduction in force, the employer, Lockheed Martin, had presented several employees with a release as part of a severance arrangement. The release explicitly prohibited the filing of a

charge with the EEOC. One employee, after receiving the release (but before receiving the severance pay), filed a charge with the EEOC alleging race, gender and age discrimination. Lockheed Martin told the employee that she would have to dismiss her EEOC charge before being eligible to receive the severance pay. The federal court ruled that Lockheed had retaliated against the employee because: (1) the release was retaliatory on its face in that it prohibited the filing of a charge with the EEOC; and (2) Lockheed had told the employee that it would not pay her severance unless the employee withdrew the EEOC charge.

Lockheed Martin is only one of several recently reported EEOC attacks on separation agreements. On September 1, 2006, the EEOC and Ventura Foods entered into a consent decree to settle litigation brought by the EEOC, challenging Ventura Foods' practice of offering enhanced severance pay in exchange for employees' agreement not to file a charge with the EEOC.

### **Separation Agreements May Not Preclude Cooperation With the EEOC**

A separation agreement should not explicitly — or even implicitly — suggest that an employee cannot cooperate with the EEOC (or other federal or state agency) in connection with an investigation. If it does, the employer runs the risk that the separation agreement and release will be void. This problem usually arises in overbroad confidentiality provisions that require the terminated employee to maintain complete confidentiality of the severance arrangements. See *EEOC v. Astra USA, Inc.*

### **Confusing Separation Agreements May Render Releases Ineffectual Against Age Claims**

Many employers are aware of the special rules that apply to releases of age claims under the Older Workers Benefit Protection Act ("OWBPA"). A compliant agreement must include the following provisions (among others): (i) a 21 day consideration period; (ii) a 7 day revocation period; and (iii)

advice to consult with an attorney prior to executing the agreement. Otherwise, the release will not be valid to release age claims under federal law. Moreover, in most situations involving the termination of two or more employees, special rules apply to release federal age claims, including additional time for consideration (45 days) and detailed informational disclosures. Recent cases reflect that the EEOC and courts are scrutinizing separation agreements very closely for compliance with OWBPA, focusing on the overarching requirement that the release be "knowing and voluntary."

One of the purposes in enacting the OWBPA was to protect older workers from being coerced or manipulated into waiving their rights under the Age Discrimination in Employment Act ("ADEA"). As such, the OWBPA specifically addresses waivers of rights and claims under ADEA and provides that waivers may be valid and enforceable under ADEA only if the waiver is "knowing and voluntary." In order to be "knowing and voluntary," the waiver must among other things be written in plain language "in a manner calculated to be understood" by an average employee. Short and plain sentences should be used and legal jargon should be eliminated as much as possible. This "knowing and voluntary" requirement provides the greatest danger to employers using form separation agreements that have not been reviewed by counsel recently. The danger lurks in agreements containing language or provisions that could be viewed as ambiguous, confusing or internally inconsistent. Employees can use such problems to claim that their release was not "knowing and voluntary" because the agreement was not written "in a manner calculated to be understood" by an average employee.

In *Syverson v. International Business Machines, Inc.*, a case decided by the Court of Appeals for the Ninth Circuit on August 31, 2006, the court ruled that IBM's release in connection with a severance agreement offered to employees as part of a reduction in force did not release IBM from liability for age discrimination claims later brought by employees (even though they had received severance pay). The

problem for IBM was that its separation agreement contained a release of claims and a covenant not to sue that appeared to conflict. The release gave up all rights to sue for age discrimination, but the covenant not to sue seemed (according to the Plaintiff) to carve out claims under the ADEA. The court found that: "the phrasing of the release and covenant not to sue engenders confusion over whether ADEA claims are in fact covered by the release or are excepted from it." This confusion ran afoul of the OWBPA "knowing and voluntary" requirement because the agreement was not drafted "in a manner calculated to be understood" by an average employee.

### What Should Employers Do (and Not Do)?

Recent cases caution employers to:

- Consider (in appropriate cases) eliminating the covenant not to sue from separation agreements; or, if both a release and covenant not to sue are used together, explain in the agreement — clearly and unambiguously — how the two provisions dovetail;
- Consider including language in separation agreements advising employees that they are not giving up any right that cannot be waived by law, including the right to file a charge of discrimination with the EEOC and other federal and state agencies;
- Carefully draft release language to make clear that the employee is giving up the right to file claims in court seeking monetary damages and giving up the right to recovery monetary damages in an agency proceeding, but not the right to file an administrative charge;
- Avoid conditioning severance pay on the employee's waiver of the right to file charges with administrative agencies (or demanding that an employee withdraw or dismiss a charge in order to receive the severance pay); and,
- Avoid references to "charges," "administrative proceedings" and the like in the release language and consider including an explicit statement in the release that the

release does not impair the employee's right to file a charge with the EEOC or state agency.

- Include severability provisions in separation agreements

### Conclusion

Whether to offer a terminated employee a severance package in return for a release of claims depends on a number of employer specific factors, such as employer policy, practice and employee relations philosophy. Generally, providing severance in exchange for a release can be a worthwhile investment, as the amount of severance generally is insignificant compared to the cost of defending an employee claim. Severance agreements also can be effective tools to prevent litigation in the context of layoffs, where there are risks of multiple claims. In light of the very recent court decisions discussed above, however, employers (and their employment counsel) must be very careful — provisions deemed acceptable in the past are now being successfully challenged.

## MASSACHUSETTS COURT SAYS ANTIDISCRIMINATION LAW PROHIBITS DISCRIMINATION BASED ON MOTHERHOOD

By: Sarah N. Turner  
Shepherd Law Group, PC

For the first time, a Massachusetts court has ruled that the state's antidiscrimination law prohibits discrimination on the basis of being a working mother.

Lisa Sivieri worked as a paralegal for the Massachusetts Department of Transitional Assistance. She received positive reviews and earned increased responsibilities, including training new paralegal hires. When Sivieri was five months pregnant, she applied for an opening as a training paralegal. The

position was given to another woman, who had less experience and whom Sivieri had trained. After she had her baby, Sivieri's supervisor frequently made negative remarks about women having children. She was then repeatedly passed over for other promotions, and less-experienced women without young children were hired.

When she asked her manager why she was not promoted, he said that management assumed that she didn't want the promotion because she had recently given birth. After that conversation, her manager scrutinized her decisions, criticized her work, and curtailed her responsibilities. Sivieri eventually asked to be selected for a voluntary layoff. She then sued the department for sex discrimination.

The court found precedent supporting Sivieri's case. The First Circuit has held that stereotypical comments regarding a women's inability to be both a good worker and a good mother supported a finding of sex discrimination. The Massachusetts Commission Against Discrimination has found discrimination when employers had the stereotypical belief that a woman's job performance will suffer if she's the primary caretaker for her child. Given two precedent, the court concluded that the law required protection for working-mother status.

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