

Will Plaintiffs Keep Trying?

Supreme Court Squelches Overreaching Class Actions

On June 22, 2011, the U.S. Supreme Court issued its much-anticipated decision in *Wal-Mart v. Dukes*, its first major class action opinion in the employment context in almost 30 years. As most observers expected, the Court rejected the plaintiffs’ overreaching request to certify a nationwide class of 1.5 million female Wal-Mart employees located in 3,400 stores throughout the country. The plaintiffs contended that this class had been discriminated against on the basis of gender as to pay and promotions. The Supreme Court reversed the U.S. Court of Appeals for the Ninth Circuit, situated in California, which had affirmed certification of this enormous class.

Most legal practitioners would agree that *Wal-Mart v. Dukes* does not drastically alter the class action landscape. In 1998 the U.S. Court of Appeals for the Fifth Circuit had issued a highly influential opinion, *Allison v. Citgo Petroleum Corp.*, which was then followed by most other federal appellate circuits. The *Citgo* court had sensibly observed that broad-based discrimination claims (so-called “across-the-board” complaints) may be inherently unsuitable for class action treatment because the nature of the claims inevitably calls for resolution of countless factual issues in a multitude of individual settings.

Nevertheless, a number of federal trial courts, such as the California court in the *Wal-Mart v. Dukes* case, continued to push the envelope by certifying broad-based attacks on employment practices despite the reality that trying the certified case would be a logistical impossibility. As the trial judges approving such classes no doubt knew, the *in terrorem* effect of class certification is a powerful incentive for settlement, whether warranted or not. But, as is often the consequence, overly ambitious claims can backfire on plaintiffs, and that happened here. Never before had so impossibly large a class been certified in an employment

context. And while one part of the Supreme Court’s opinion — dealing with the “commonality” requirement of Federal Rule of Civil Procedure 23(a) — might be branded as the product of a conservative majority, other key aspects of the Court’s opinion were unanimous.

The plaintiffs in *Wal-Mart v. Dukes* argued that they could meet the “commonality” requirement for class certification by challenging as discriminatory hundreds of thousands of individual promotion and pay decisions (each allegedly causing significant individualized damages), because Wal-Mart had allegedly created a corporate culture that fostered discriminatory decisions. The plaintiffs asserted, paradoxically, that Wal-Mart’s policy of vesting local management with the authority to make the challenged decisions at the store level led to a pattern of discriminatory decision-making. The predictable social science expert — no doubt viewed by several members of the Court as a purveyor of junk science —

Inside This Edition

- Sexual Harassment Liability Redefined 3
- The Obama NLRB: Feeling Its Oats, But About To Be Corralled? 4
- Courts Address Nuances In FMLA Cases 6
- Plenty Of Recent Action Under The ADA 8
- OFCCP And Midwest Region In Transition . . . 11
- New Guidance For “No-Fault” Policies And Leaves? 12
- Beware The WARN Traps 12
- Misclassification Remains In The Spotlight . . . 13
- Some SOX Whistleblower Claims Don’t Fit . . . 14
- Even Non-Employees Sue For Discrimination . 15

Overreaching Class Actions *from page 1*

had attempted to analyze the collective psyche of the local decision-makers as they went about making promotion and pay decisions in thousands of separate Wal-Mart stores. The internal tension in the plaintiffs' theory that a centralized and uniform policy (based on supposed "corporate culture") had impacted so many individual subjective decisions in so many locations was readily apparent to the Court.

The Court reminded the bench and bar of the purpose behind the class action rule's commonality requirement: promoting efficiency of adjudication while maintaining a manageable approach. In other words, would class action treatment materially advance the just resolution of the thousands of individual promotion and pay decisions that would have to be analyzed? Clearly not. And merely asserting that the case involved claims of gender discrimination that could have been impacted by a pervasive "corporate culture" was not sufficient. Every decision would still have to be evaluated on its own merits. Each class member's qualifications, her job performance, and how she compared to those who did receive a specific promotion or pay increase would have to be analyzed. Because it could not be established with reasonable certainty that a centralized directive "from above" removed any material disputed questions of fact, labeling the lawsuit a class action provided no advantage and accomplished nothing other than to burden the system with an unmanageable amalgam of individualized claims.

After *Wal-Mart v. Dukes*, it will be a rare employment discrimination case in which the threshold requirement of "commonality" can be established if the plaintiffs

attempt to reach beyond the realm of the individual decision-maker. Only attacks on exclusionary factors such as tests or across-the-board qualification requirements are likely to lead to certifications of broad classes in the future.

While the Court's approach to "commonality" garnered a five-member majority, the Court unanimously agreed on a second proposition: the action should not have been certified under Rule 23(b)(2), a rule intended for cases that seek injunctive or declaratory relief that would benefit the class as a whole. The plaintiffs sought significant monetary relief and punitive damages that were not merely "incidental" to a request for class-wide equitable relief. Rule 23(b)(2), the Court said, does not authorize a federal court to certify a class if each class member would be entitled to an individualized monetary award. The class in *Wal-Mart v. Dukes*, which unavoidably required individualized backpay assessments, was improperly certified for that reason as well.

The Court left open the question whether certification would be permissible if the amount of each class member's relief was modest and calculable by a formula. But the Court unanimously rejected the novel notion (approved by the Ninth Circuit) that individualized backpay computations could be replaced with a "trial by formula," which would extrapolate the total recovery for the entire class from the results obtained in a pilot group of cases. This should serve as an additional deterrent to future efforts to certify overly broad class actions, given that money is the underlying motivator in most class actions today.



Overreaching Class Actions *from page 2*

Following the remand of the case to the trial court, the plaintiffs filed an amended complaint on October 27, 2011, reducing the class to 90,000 current and former California Wal-Mart employees, and contending that new statistical evidence demonstrated that women in comparable positions had been paid less than men.

The plaintiffs will no doubt argue that unequal pay claims can more readily meet the commonality and typicality requirements of Rule 23, but it remains to be seen whether this will bear out. It is doubtful that a significant percentage of a group of 90,000 present and former employees could be said to be working identical jobs under virtually identical circumstances. If not, commonality and typicality would likely be lacking, resulting in dismissal of class action allegations.

Appellate courts in Michigan have for many years taken a sensible approach very similar to the U.S. Supreme Court's pronouncements in *Wal-Mart v. Dukes*, and that approach should certainly not change now.

The message for employers is clear: If a broad class action is filed (or pending), the employer should first focus on the corporate decision-making process to demonstrate that a smaller class than the one sought by the plaintiffs is more appropriate, or that no class at all is appropriate. The next focus must be on the pleadings and discovery to ascertain whether, and to what extent, the plaintiffs are seeking damages that could be described as more than incidental to simple injunctive relief. Given the wide spectrum of damages that can theoretically be recovered under both Michigan and federal law, and the fact that the hope of a large damages recovery will typically be driving the litigation, most attempts to certify large classes around allegedly discriminatory employer policies should be rejected.

Thomas G. Kienbaum

Mr. Kienbaum specializes in the defense of class action litigation and has been influential over the past four decades in the development of class action law in Michigan, other states, and the federal courts.

Michigan Supreme Court Redefines Liability For Sexual Harassment

On July 29, 2011, in a fairly dramatic development, the Michigan Supreme Court pruned back employer liability in a *quid pro quo* sexual harassment case under Michigan's Elliott-Larsen Civil Rights Act (CRA). In doing so, the Court overruled its 1996 decision in *Champion v. Nation Wide Security*, which had expanded employer liability where a supervisor accomplished a criminal sexual assault through the exercise of his supervisory power over the victim.

In its new opinion in *Hamed v. Wayne County, et al.*, the Court concluded (by a 4-3 vote) that "Michigan law has never imposed liability on an employer for the unforeseeable criminal actions of its employees, except in *Champion*," nor has it "incorporated an exception based on an aided-by-agency theory of liability." Finding that *Champion* could not be reconciled with prior precedent or with the CRA itself, the Court held that an employer cannot be held vicariously liable for an agent's act unless it had knowledge of prior similar conduct and actual or constructive knowledge of the agent's propensity to act in that fashion.

The factual circumstances of *Hamed* involved the rape of an inmate by an officer employed by the Wayne County jail. He was the only sheriff's deputy on duty when the inmate, Hamed, arrived at the jail. The officer thereafter made sexually charged comments to and demands of Hamed, promised her better treatment if she complied, and raped her when she refused. The County discharged the officer and he was subsequently convicted of criminal sexual conduct.

Hamed then sued Wayne County and other parties alleging *quid pro quo* sexual harassment under the CRA. The employer defendants moved for summary disposition because they had no notice of the officer's sexually harassing conduct and thus should not be held vicariously liable for his criminal actions.

Sexual Harassment Liability Redefined *from page 3*

The trial court agreed, but the Court of Appeals reversed. Applying *Champion*, the appeals court found that the officer had used his authority as a sheriff's deputy to exploit Hamed's vulnerability and perpetrate the harassment; accordingly, under *Champion*, the County was vicariously liable for his criminal sexual conduct.

The Michigan Supreme Court reversed, finding that the officer's sexual assault was an independent action accomplished solely in furtherance of his own criminal interests, and that there was insufficient cause to impute the officer's acts to Wayne County because it neither knew, nor should have known, of a propensity to commit this type of act.

Citing the general rule that an employer is not liable for acts of its employees committed outside the scope of its business, the Supreme Court emphasized that "[a]n employer may still be liable for an act of *quid pro quo* sexual harassment that was committed within the scope of employment or for a foreseeable act that was committed outside the scope of employment." The Court further wrote that it has consistently recognized that an employer can be held liable for its employee's conduct if "the employer 'knew or should have known of [the] employee's propensities and criminal record'" before the employee committed an intentional tort. This "foreseeability" test asks whether an employer had (1) actual or constructive knowledge of prior similar conduct and (2) actual or constructive knowledge of the employee's propensity to act in accordance with that conduct.

Addressing the facts in *Hamed*, the Supreme Court concluded that the officer's prior failure to obey workplace policies, his use of a police vehicle without authorization, some threatening calls to his landlord, and his physical altercation with a male inmate were not similar to the violent sexual assault against Hamed. Consequently, the officer's prior actions did not constitute actual or constructive knowledge of similar criminal sexual misconduct and the employer defendants were not vicariously liable to *Hamed* under the CRA.

Elizabeth P. Hardy

The Obama NLRB: Feeling Its Oats, But About To Be Corralled?

The Democratic appointees to the National Labor Relations Board (NLRB) have been on a fast gallop over the past year to enact a pro-union agenda and reverse the direction the Bush II Board had followed during the prior eight years. But has the Obama Board ridden too fast and too far, and in a too transparently political way? There is no question that 2011 has seen more dramatic and aggressive activity by the Board and Congress than at any time in memory.

On August 27, 2011, long-time Board member and recent chair Wilma Liebman's term expired, dropping the Board's cohort to three members — newly designated chair Mark Gaston Pearce (Democrat), Craig Becker (Democrat), and Brian Hayes (Republican). The Board's normal complement is five members, with staggered terms, but the political gridlock in Washington, D.C. has failed to produce the confirmation of additional members. And Becker's recess appointment expires at the end of 2011. This means that, unless one or more compromise candidates were to be confirmed by the end of this year, the Board will once again drop to two members and be rendered largely ineffectual, based on last year's U.S. Supreme Court decision in *New Process Steel*. While President Obama could theoretically make another recess appointment for a third member, Senate Republicans may thwart that effort by not going into recess.

At the same time the Board itself is facing a member shortfall, the agency as a whole has become a lightning rod for House and Senate oversight committees — to a degree perhaps unprecedented in the NLRB's 76-year history. A number of bills are pending in Congress that would rewrite sections of the National Labor Relations Act (NLRA) to restrict the Board's discretionary authority in election cases, or to cut back its remedial authority

The Obama NLRB: Feeling Its Oats, But About To Be Corralled? *from page 4*

in unfair labor practice cases, or to partially or completely defund the agency. While such efforts have no chance of passing the Senate, or being signed by President Obama, they have created a spectacle.

What did the NLRB do to bring this on itself? Here are some of the more attention-getting things the NLRB has done in recent months.

The Boeing Case. The NLRB's acting general counsel, Lafe Solomon, riled conservative politicians by issuing a complaint against Boeing asserting that its decision to locate a second manufacturing complex for its new 787 Dreamliner in South Carolina, rather than in Washington state, was illegally motivated by anti-union animus. The administrative hearing scheduled to begin last June has now been adjourned indefinitely as the company, the union, and the NLRB do battle in U.S. District Court over subpoenaed documents and confidentiality issues. South Carolina's Republican Senator Lindsey Graham and his colleagues in Congress have not made life easy for Solomon, subpoenaing documents and calling him in to explain. (As we went to press, there was word of a possible settlement with Boeing.)

Mandatory NLRB Notice-Posting. Late in 2010, the Board's Democratic majority published a notice of proposed ruling-making that would require all employers covered by the NLRA to post a standardized NLRB notice describing employees' rights to organize and to charge employers with unfair labor practices (with much less attention given to countervailing rights). Despite a well-articulated dissent by Republican member Hayes, and in the face of thousands of comments criticizing the Board's assertion of authority as well as the language of the proposed notice, the Board went ahead and adopted the requirement on August 30, 2011, with an effective date for mandatory posting of November 14, 2011. A number of lawsuits were filed to enjoin the rule, and on

October 5, 2011, the Board decided to delay the effective date until January 31, 2012 — ostensibly to permit more public education in the meantime.

Proposed Changes To Election Case Procedures.

On June 21, 2011, the Board published a proposed rule that would alter long-established NLRB procedures to dramatically lessen the period between the filing of a petition and the conducting of a union election. The length of that period has for decades been one of organized labor's primary grievances concerning the NLRB. In addition to compressing time periods, the proposed rules would reduce the issues that could be litigated,

defer most voting eligibility issues until after the election, consolidate all appeals into a single post-election appeals process, and make Board review discretionary rather than mandatory. Republican members of Congress quickly drafted proposed legislation to combat this. At this writing, the Board has not finalized the rule, but may do so before it loses its quorum at yearend.

Pro-Union Presumption For Bargaining Units. On August 26, 2011, the last business day before

Liebman's term ended, the Board issued three controversial decisions that had been pending for some time, one of which created new bargaining unit presumptions favorable to unions. In *Specialty Healthcare and Rehabilitation Center*, the Board's Democratic majority "clarified" that, when a union petitions for an election in an identifiable group of employees who share a "community of interests," and the employer responds that only a larger group of its employees is appropriate, the burden of proof is on the employer to demonstrate that the additional employees "share an *overwhelming* community of interests" with the employees for whom the union had petitioned. Republican member Hayes dissented, arguing that the majority was "overstepping the bounds of its discretion in making sweeping changes to established



The Obama NLRB: Feeling Its Oats, But About To Be Corralled? *from page 5*

law” for the “purely ideological purpose of reversing the decades-old decline in union density in the private American work force.” Once again, Republican members of Congress have proposed legislation amending the NLRA to reverse this.

Election Bar Following Voluntary Recognition. In 2007 the Bush II Board issued a decision in *Dana Corp.* which allowed employees to petition for an election within a short period following their employer’s voluntary recognition of a union. Distasteful to unions, this rule was high on the hit list for the Obama Board, and it was predictably knocked off in *Lamons Gasket Co.* on August 26, 2011, the last business day of Liebman’s term. The Democratic majority expressly overruled *Dana* and held that an employer’s voluntary recognition of a union will bar an election petition for a “reasonable” period of bargaining, which will be “no less than six months after the parties’ first bargaining session and no more than one year.” Republican member Hayes dissented.

Election Bar Following Successorship. Also on August 26, 2011, the Board’s Democratic majority issued an opinion in *UGL-UNICCO Service Co.*, which overruled the Bush II Board’s 2002 decision in *MV Transportation*. The *MV Transportation* decision had created a “rebuttable” presumption that a union enjoyed continuing majority support following a change in the ownership of a business, which could in some circumstances permit an immediate election. The *UGL-UNICCO* decision changed that to an “irrebuttable” presumption for a “reasonable” period of time to permit bargaining between the union and the new employer, which will generally be six to twelve months depending on how the relationship began.

NLRB As Social Media Director. In the past year the NLRB has attracted another type of attention, and become something of a laughing stock, by publicizing a large number cases in which it challenged an employer’s social media policies or its job actions vis-à-vis employees who had divulged too much information, or had done so ungraciously or vulgarly, on such sites as Twitter and Facebook. Is this really an appropriate use of our tax dollars?

More Aggressive Remedial Measures. Lastly, acting

NLRB general counsel Solomon and the Board have changed the landscape in a number of other ways that favor unions or employees. For example, calculating larger back pay numbers has been made easier, interest on back pay has become more generous, and the use of injunctive power against employers has become more common, especially in “nip in the bud” cases during a union’s organizing campaign. Efforts are also being made to require employers to circulate notices through email or intranet postings, and, at least for a time, some NLRB settlements required that either a high-level company official personally read the customary (but rarely understood) notice to assembled employees, or, alternatively, stand next to an NLRB agent while the agent read it.

Theodore R. Opperwall

Courts Address Nuances In New FMLA Decisions

The factual permutations for claims under the Family and Medical Leave Act (FMLA) are virtually limitless. Here are some recent examples.

Employee Failed To Show That Reason For Termination Was Pretextual. In *Clark v. Walgreen Co.*, the employee-plaintiff claimed that he had been fired in retaliation for taking FMLA leave — rather than because he violated company policies by completing training for fellow employees and directing them to finish additional mandatory company training on their own time. In claiming his discharge was retaliatory, Clark relied in part on a comment he attributed to his supervisor (“because of your health, we’re just going to go ahead and terminate you”) which he claimed implied that Walgreen was considering his potential future use of FMLA leave and expenditure of health benefit funds. The U.S. Court of Appeals for the Sixth Circuit disagreed. It held that the alleged statement, even drawing all inferences in Clark’s

Courts Address Nuances In New FMLA Decisions *from page 6*

favor, did not require the conclusion that his prior leave prompted the firing. The court found that the temporal proximity (two months) between Clark's leave and his firing weighed in favor of establishing a causal connection, but that Walgreen had established a legitimate nondiscriminatory reason for the termination (Clark's policy violations), which Clark did not refute.

“Exacerbation Theory” Is Not Viable Under The FMLA. The U.S. Court of Appeals for the Seventh Circuit held in *Breeneisen v. Motorola Inc.* that the plaintiff's “exacerbation” theory — i.e., that an employer's discriminatory conduct made an employee's medical condition worse so he was unable to return to work — is not a valid theory of liability for FMLA interference or retaliation claims. Breeneisen took twelve weeks of FMLA leave, and then a second (non-FMLA) leave for treatment of gastroesophageal reflux. Motorola eliminated his position after his first (FMLA) leave, and reinstated him to a different job at the same pay rate. After his second (non-FMLA) leave, Breeneisen's medical condition worsened. He then took a third (non-FMLA) leave, after which he was found permanently disabled from returning to work, and was terminated. He did not claim that his termination was in violation of the FMLA, but instead alleged that his medical condition worsened due to his supervisor's mistreatment which ultimately caused him to take his third and final (non-FMLA) leave from which he never returned. The court affirmed the dismissal of Breeneisen's FMLA lawsuit because the statute does not address the *cause* of an employee's medical condition. Employees are protected from work-related aspects of retaliation, but once FMLA leave has

expired, an employee is not entitled to relief based on subsequent medical issues. The court added that, even if this were not the case, Breeneisen was no longer protected by the statute when the alleged retaliation occurred because he had exhausted his FMLA leave.

FMLA Claim Fails Where There Is No Adverse Job Action. In *Quinn v. St. Louis County*, the U.S. Court of Appeals for the Eighth Circuit affirmed summary judgment for the county on a former employee's FMLA interference claim, despite her contention that the county had discouraged her from taking FMLA leave by initially refusing her requests. Quinn suffered from anxiety and depression. She requested and was granted leave and a reduced work schedule. She never claimed that her FMLA leave had been denied, but instead asserted that the county had improperly interfered by discouraging it and telling her that future requests might be denied. In evaluating Quinn's

FMLA interference claim, the court acknowledged that it would be unlawful for an employer to discourage an employee from using FMLA leave or engaging in manipulation to avoid responsibilities under the FMLA. The court nevertheless dismissed Quinn's interference claim because she did not contest the fact that she received the full twelve weeks of FMLA leave each year she requested it. The court similarly dismissed her retaliation claim because she failed to establish an adverse job action. The only alleged adverse action she identified was a purported constructive discharge, which was not factually supported by the record.

Alleged Defect In FMLA Notice Did Not Constitute Unlawful Interference. In *Heidger v. Gander*



Courts Address Nuances In New FMLA Decisions *from page 7*

Mountain Co., a gunsmith stopped working after he lost the use of his right hand, which made it impossible for him to do his job. Gander Mountain gave him six months of leave under company policy to obtain treatment for neurological damage to his elbow. Then it decided to terminate him. After his supervisor informed Heidger that his employment was being terminated, he unsuccessfully tried to return to work. A U.S. District Court in Michigan found that Gander Mountain did not interfere with Heidger's FMLA rights by terminating his employment after giving him the full allotment of leave, or by failing to inform him that he was entitled to FMLA leave. Even if Heidger had not been informed of his FMLA rights, the court reasoned, he could not claim it amounted to unlawful interference because he had received more than double the amount of leave time required by the FMLA.

Failure To Show A Bona Fide RIF Precludes Summary Judgment. In *Hillins v. Marketing Architects Inc.*, a U.S. District Court in Minnesota denied the employer's summary judgment motion where the employee-plaintiff raised genuine questions whether the company's stated reason for her termination — a workforce reduction — was pretextual. The employer claimed that it had terminated Hillins during a RIF that eliminated two business units (and four other employees) due to supposed financial issues, and not because of Hillins' maternity leave. In RIF cases, there is generally a higher burden of proof for an employee, but the court found that inapplicable in light of evidence casting doubt on the genuineness of the RIF. Although Hillins had been terminated along with four other employees who had not taken FMLA leave, the company produced no objective evidence of a decline in business, nor any objective criteria by which it had determined which jobs would be eliminated in the RIF. Moreover, at the time of the RIF, the company had twelve job openings pending and had posted more than 50 positions in the year following Hillins' termination, including some for which Hillins appeared qualified. In addition, Hillins had been removed from key job responsibilities within a couple days of announcing her preg-

nancy and her intent to take protected leave, and her employer stopped discussing its intention to promote her to a vice president position.

Failure To Follow Established Practice Results In A Triable FMLA Claim. In *Lynch v. Largo*, a fire inspector terminated for alleged time card falsification while taking intermittent FMLA leave was found to have raised triable retaliation and interference claims. A U.S. District Court in Florida held that Lynch established the requisite causal linkage because of the temporal proximity (two days) between her last use of protected leave and her termination. The court also concluded that the employer's failure to follow its normal protocol of asking employees to correct time card mistakes, along with its inconsistent explanation about why and how Lynch had been terminated, could allow a reasonable jury to find that the business justification was pretextual.

Shannon V. Loverich

Plenty Of Recent Action Under The ADA

Disability cases have been on the rise since the passage of the ADA Amendments Act in 2008 (effective 2009). Here are some recent items of interest.

EEOC Lawsuits And Settlements Show Increased Focus On Disabilities. The ADA Amendments Act (ADAAA) broadened the scope of covered disabilities, and the EEOC regulations and comments confirm a heightened emphasis on disability claims. EEOC reasonable cause findings for ADA charges increased almost 20 percent in 2010, and the Commission has been boasting about several significant settlements of disability claims in recent months. With the focus now less on the threshold issue whether an employee meets the statutory definition of "disabled," employers must look more closely at the interactive process with employees who indicate a

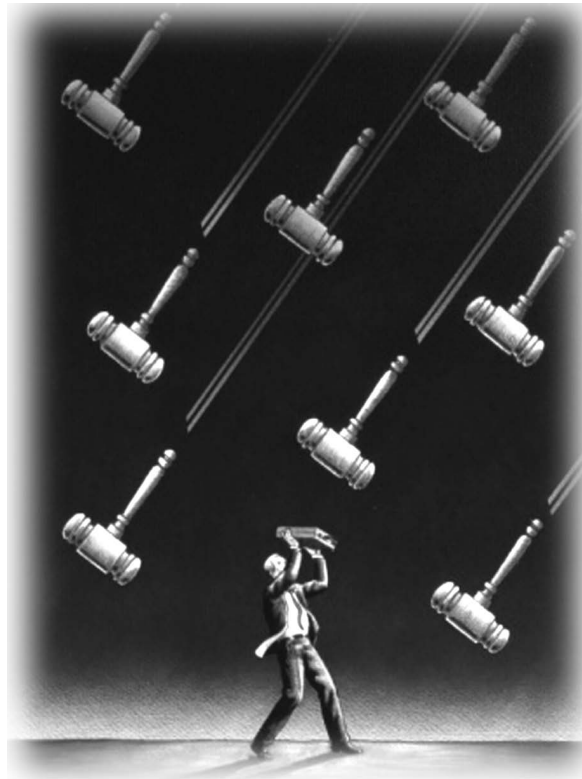
Plenty Of Recent Action Under The ADA *from page 8*

need for accommodation, determine reasonable accommodations, and avoid decision-making processes that could be deemed discriminatory or retaliatory.

EEOC Explains “Shy Bladder Syndrome” Can Be A Covered Disability. The EEOC recently issued what it calls an “informal discussion letter” concerning employees with paruresis (“shy” or “bashful” bladder syndrome). The condition is generally considered an anxiety disorder and is often treated with cognitive-behavioral therapy. An employer questioned whether employees with this syndrome may sue under the ADA if subjected to adverse employment actions based on their inability to provide a urine specimen for a drug test or who are denied alternative testing that does not involve urination. The EEOC noted the significantly broadened definition of “disability” under the ADA. Major life activities now include major bodily functions including bladder and brain functions, and the “substantially limits” standard is not a demanding one. The EEOC opined that paruresis can, depending on individual circumstances, constitute a covered disability. Thus, a person suffering from “shy bladder syndrome” may be entitled to reasonable accommodation such as being permitted to provide hair or saliva for drug testing rather than urine.

Bridge Worker With Fear Of Heights Can Proceed To Trial On Disability Claims. In *Miller v. Illinois Dep’t of Transportation*, the U.S. Court of Appeals for the Seventh Circuit reversed summary judgment for the employer, holding that the plaintiff, a bridge-crew worker, was substantially limited in the major life activity of

working because of his acrophobia (fear of heights). The court rejected the employer’s argument that working above 25 feet was an essential function of the plaintiff’s job where there was a history of job swapping among crew members based on their strengths and limitations. The court also held that there were fact issues regarding whether the plaintiff was fired in retaliation for his accommodation request.



Pregnancy-Related Complications Can Be A Disability.

In *Serendnyj v. Beverly Health Care*, the Seventh Circuit cited an EEOC interpretive guidance in holding that pregnancy complications can rise to the level of an ADA-qualifying disability if they are the product of a physiological disorder. The court was careful to point out, however, that because pregnancy is of limited duration — and complications that arise generally dissipate once a woman gives birth — an ADA plaintiff asserting substantial limitation of a major life activity under these circumstances faces “a tough hurdle.” The court affirmed summary judgment

for the employer because the plaintiff was not substantially limited in any major life activity where her pregnancy-related complications did not last throughout her pregnancy or beyond. Thus, the conditions were too temporary to constitute a disability.

No Duty To Accommodate Under ADA’s Association Provision. The U.S. Court of Appeals for the Sixth Circuit recently decided an issue of first impression concerning a claim of discrimination based on the plaintiff’s association with a disabled person. In *Stansberry v. Air Wisconsin Airlines Corp*, the plaintiff’s wife suffered from an auto-immune disorder that caused a stroke and other

Plenty Of Recent Action Under The ADA *from page 9*

lasting health problems. Her condition worsened and required a series of treatments. During the treatment period, the airline disciplined Stansberry for various performance problems and ultimately fired him. Stansberry sued, claiming a violation of the ADA provision prohibiting the denial of equal job benefits to a person because of the known disability of an individual with whom the person is related or has an association. Stansberry alleged that his wife's condition caused a distraction of which his employer wanted to rid itself. The Sixth Circuit held that employers are not required to accommodate non-disabled workers under the associational provision. Consequently, while Stansberry's poor performance was likely due to his wife's illness, that fact was irrelevant. Moreover, Stansberry failed to show that his wife's disability was in any way connected with the airline's decision to discharge him.

Employee With Cerebral Palsy Fails To Prove Disability Discrimination. In *Whitfield v. State of Tennessee*, the Sixth Circuit affirmed summary judgment for the employer where there was overwhelming evidence of poor job performance unrelated to the plaintiff's disability. Whitfield worked as an administrative assistant for the State Department of Mental Health and Developmental Disabilities. Due to her blindness in one eye and cerebral palsy, the employer accommodated her with a special computer keyboard, a larger computer monitor, and a printer-scanner near her desk. Whitfield made numerous basic clerical errors, admitting in an email to her superiors: "Sorry about my Grammar and English never have done complete sentences very well Thanks." Her direct supervisor began doing more of Whitfield's work herself and assigning it to other staff members. Soon after, Whitfield was fired. She sued, claiming ADA violations. She argued that the accommodations she had been given were insufficient. The employer responded that it was never notified of a need for additional accommodation. The Sixth Circuit held there was no genuine issue of fact as to whether the discharge was due to Whitfield's poor performance — there was overwhelming evidence establishing that. While some of Whitfield's

performance problems could be attributed to her disabilities and the employer's failure to implement successful accommodations, many of her problems were completely unrelated to her disabilities.

Worker Fired At End Of Paid Disability Leave Unable To Show Discrimination. The U.S. Court of Appeals for the Ninth Circuit, in *Dep't of Fair Employment and Housing v. Lucent Technologies, Inc.*, affirmed summary judgment for the employer which had terminated an employee returning from a 52-week disability leave who could not perform essential lifting duties. The employee, Carauddo, had originally worked as a telecommunications installer, a largely physical job, running cables and wiring electronic components. It required lifting and maneuvering various items that often weighed over 30 pounds. Carauddo suffered a back injury and went out on leave pursuant to Lucent's disability benefit plan. The plan provided that if an employee did not return to work after 52 weeks, he would be terminated from the active payroll. After a year on leave, Carauddo's physicians confirmed his ability to return to work, but with significant lifting restrictions. Lucent determined that no accommodation of that nature was feasible, and Carauddo was terminated pursuant to the disability plan. The Ninth Circuit held that Lucent asserted a legitimate non-discriminatory reason for the discharge because Carauddo could not perform the essential functions of his job upon his return to work. The court rejected the argument that Lucent failed to individually evaluate Carauddo, noting that Lucent regularly attempted to accommodate him by assessing him with its own medical treaters. The court also rejected the claim that Lucent failed to interact with Carauddo concerning any potential accommodation since the evidence showed that Carauddo had not brought alternative accommodations to Lucent's attention. The court finally concluded that Lucent was not required, as an accommodation, to indefinitely extend Carauddo's disability period.

Jay C. Boger

OFCCP And Its Midwest Region Lost In Transition

The Office of Federal Contract Compliance Programs (OFCCP) is shifting gears under the direction of OFCCP Director Patricia Shiu — and it has not been a smooth transition so far. While increasing outreach efforts to employees and applicants and emphasizing its role as an “enforcement” agency, the OFCCP’s compliance audits have significantly decreased both in number and in back-pay collected under Director Shiu in comparison to the Bush and Clinton Administrations. Speaking at a National Employment Law Institute conference in Chicago on October 20, 2011, Shiu advised that this trend will continue. The caveat for federal contractors, however, is that audits will be more thorough than in the past.

Tension between the Director’s agenda and its implementation by agency staff is readily apparent, as exemplified by Shiu’s position on the controversial subject of “indicators” of discrimination in pay. OFCCP’s position has been that the agency will move beyond the normal desk audit of affirmative action materials to come on-site at the employer’s facility if one or more “indicators” are found at the desk audit stage. Shiu’s announced position is that OFCCP has too few resources to deploy when a desk audit reveals no indicators. However, when questioned on this position during the October 20 NELI conference, Melissa Speer, OFCCP’s Regional Director for the Southwest and Rocky Mountain Region, voiced her opinion that OFCCP is coming on-site despite the absence of indicators and has the discretion to do so in every desk audit.

The intra-agency tension has been very obvious in OFCCP’s Midwest Region, which includes Michigan. In June 2011, Sandra Ziegler, OFCCP’s long-time Midwest Regional Office Director, abruptly announced her early retirement effective June 30. Retiring at the same time was the Midwest Region’s Deputy Director Shirley Thomas. These two sudden retirements left the Midwest Region in a state of confusion that has delayed decision-making — something that is likely to continue for months to come.

Under Zeigler, the Midwest Region had become highly centralized, with regional management scheduling all affirmative action plan audits, rather than district directors (as is the norm). Federal contractors subjected to audits in the Midwest Region also experienced the “team” audit concept, under which compliance officers from two or more different district offices divided audit duties. Many contractors found the “team” audit a frustrating experience, resulting in duplicate requests for information, e.g., when a compliance officer in Kansas City needed data that the contractor had already forwarded to a compliance officer in Chicago or Detroit.

OFCCP is now in the process of decentralizing the Midwest Region so it will “act like OFCCP’s other regional offices,” according to Shiu. The agency needs to put new management in place including several district directors, whose cohort had dwindled from an allotted number of 14 across the Region to only three as of Zeigler’s retirement. In the interim, Shiu advised, there will continue to be a lag in determinations concerning open audits in the region. She further opined that duplicate requests should be a nuisance of the past, as contractors should never have to submit data more than once. For the immediate future, Southwest and Rocky Mountain Regional Director Speer is also acting as Interim Midwest Regional Director.

Federal contractors have continued to raise questions about 830 audit scheduling letters sent by the Midwest Regional Office in early June 2011. In some instances, contractors received ten or more notices of audit on the same day, prompting complaints in the contractor community. On June 17, 2011, OFCCP’s national office sent letters rescinding all 830 scheduling letters. While the timing coincided, the agency has denied that the promptly rescinded mass mailing was connected to the Midwest Regional Office retirements.

Julia Turner Baumhart



New Guidance For “No-Fault” Policies And Leaves?

Can an employer discipline employees under a “no-fault” attendance policy for absences due to medical issues? Most employers know that if the employee has qualified for intermittent leave under the Family and Medical Leave Act (FMLA) based on the medical condition, the answer would presumably be no. But, according to the EEOC, employers also may be taking a risk by applying such “no-fault” policies to some medically-related absences for employees who are not FMLA-eligible or have used up their FMLA leave — if the condition causing the absence qualifies as a disability under the Americans with Disabilities Act (ADA).

The definition of disability under the ADA was greatly expanded in 2009 with the passage of the Americans with Disabilities Act Amendments Act, which means this issue could impact many more employees and employers in significant ways. In fact, the EEOC recently announced a \$20 million settlement, the largest disability discrimination settlement in a single lawsuit in EEOC history, in a case in which an employer’s no-fault attendance policy allegedly did not consider whether some or all of an employee’s absences should be allowed as a reasonable accommodation for an ADA-protected disability.

Can an employer terminate an employee who has used up all of her FMLA leave and is still medically unable to return to work? Not without considering whether additional leave would be a reasonable accommodation for a disability under the particular facts and circumstances — or else the employer again runs the risk of violating the ADA. The EEOC also has been aggressively suing employers with blanket leave policies requiring termination of employees who are not able to return to work after a given amount of leave time, such as at the expiration of the employee’s FMLA leave, or when they have been absent for six months or a year.

In the past several years, the EEOC has announced several seven-figure settlements involving allegations that an employer’s policy containing a strict leave limitation violates the ADA. Again, the EEOC takes the position that the employer must consider all of the facts and circumstances in determining whether additional leave time

would constitute a reasonable accommodation of a disability. Other than concluding that a leave of indefinite duration is not required as a reasonable accommodation and insisting that employers make individualized assessments of whether additional leave time is reasonable, the EEOC has offered little guidance to employers facing these tough issues.

However, the EEOC held a public hearing regarding these and related leave issues in June 2011, and it is expected to release an enforcement guidance on this topic sometime in the future. We may be able to bring you the highlights of that guidance in our next issue of *Insight*.

Sonja L. Lengnick

Beware The WARN Traps

As tough economic times for businesses continue, employers planning workforce reductions or plant closings must remember to review the intricate regulatory framework of the federal Worker Adjustment and Retraining Notification (WARN) Act. The WARN Act requires 60 days’ advance notice to employees (and others) of certain “mass layoffs” or “plant closings” that impact 50 or more workers, and, in the case of mass layoffs, affect one-third of the workers at a single site of employment. Two recent court decisions offer guidance on those difficult situations involving the sale of a business and unforeseen circumstances that lead to a need to make cuts earlier than 60 days.

In *Day v. Celadon Trucking Services, Inc.*, a U.S. District Court in Arkansas held that the purchaser of a business violated WARN by providing fewer than 60 days’ advance notice of a layoff to employees it did not keep upon purchasing the business. The defendant company, Celadon, purchased the assets of Continental but decided not to “rehire” 658 employees of Continental. Celadon argued that it was never the employer of the workers

Beware The WARN Traps *from page 12*

who were not given offers of employment after the sale. The court disagreed, finding that Celadon had maintained the purchased facility as a “going concern” following the sale. The court stated that “any transaction that transfers all or part of the employer’s overall operations as a going concern” falls within the universe of transactions “for which the WARN Act deems the seller’s employees to be employees of the buyer immediately after the sale.”

Businesses considering similar transactions should watch out for the WARN trap in this type of asset purchase, and provide for appropriate notice by one of the parties if the threshold number of job losses will occur in the course of the transaction.

A U.S. District Court in Minnesota recently addressed the issue of unforeseen business circumstances that forced the shutdown of an iron ore plant without providing 60 days’ advance notice. Although the shutdown of an entire plant normally requires such notice, WARN has an exception for “unforeseeable business circumstances” that can excuse the failure to give the full notice. In *Steelworkers Local 2660 v. U.S. Steel Corp.*, the court assessed whether the employer had acted with “commercially reasonable judgment” in anticipating the business circumstances in its market.

The test in this context, oddly enough, is whether the choice made by the employer would have “raise[d] the eyebrows of any prudent business person” in not anticipating sooner the need for a shutdown. After outlining this legal standard, the court analyzed causation, foreseeability, and sufficiency of the notice that was actually given. Causation was not disputed in the lawsuit — the shutdown was brought on by the sudden economic downturn, especially as it affected the automotive industry. The court found that the downturn in November 2008, after a period of high demand in the steel industry, was not a foreseeable business circumstance. While the prospect of government bailouts of the automotive industry might have sustained the demand for steel, the bailouts were uncertain. The court also concluded that the employer had given adequate

notice to the affected workers and their union as soon as practicable, even though it was less than 60 days.

Although U.S. Steel was held to be acting in good faith in this circumstance, the inquiry into foreseeability is highly fact-specific and will be evaluated by the courts on a case-by-case basis. It is not an exception in which a prudent business person should ordinarily place a great deal of comfort or reliance.

Eric J. Pelton

Misclassification Remains In The DOL-IRS Spotlight

Over the past several years, whether an organization’s workers who are employees have been incorrectly classified as independent contractors has been an enforcement priority for the U.S. Department of Labor (DOL). Misclassification of employees as non-employees costs federal and state governments a significant amount in lost employment tax revenues. Recently, the DOL and the Internal Revenue Service (IRS) signed a memorandum of understanding to coordinate their efforts in combatting misclassification, primarily by increasing information-sharing between the two agencies. A number of states have signed similar memoranda with the DOL and IRS, thereby permitting a free flow of information. Some states, including Michigan, have created “misclassification task forces” specifically charged with battling worker misclassification.

Further highlighting the issue of employee misclassification, on September 21, 2011 the IRS announced a program that permits certain employers to voluntarily reclassify workers formerly classified as independent contractors as employees for federal employment tax purposes. Under this program, known as the Voluntary Classification Settlement Program (VCSP), an employer would pay only about 10% of the taxes owed for the

Misclassification Remains In The DOL-IRS Spotlight *from page 13*

past three years rather than paying all back taxes owed, penalties, and interest for three years of misclassification. To participate, an employer must not be under investigation or audit by the IRS, DOL, or a state agency concerning worker classification; must have consistently treated the workers at issue as non-employees; and must have filed all required Forms 1099 for the workers for the prior three years.

The not-insubstantial risks of the VCSP are that participation has no impact on possible state law audits and



resulting violations. Nor will it preclude state agency or DOL audits or private lawsuits under the Fair Labor Standards Act (FLSA) or equivalent state laws (such as for unpaid overtime). Any employer contemplating applying for participation in the VCSP should carefully consider these risks.

Even further illuminating the issue of misclassification is proposed federal legislation, the Employee Misclassification Prevention Act (EMPA), which was reintroduced on October 13, 2011. This bill would amend the FLSA to impose strict recordkeeping requirements on businesses for workers treated as independent contractors, require notices to all workers regarding their classification, impose penalties (from \$1,100 to \$5,000 per worker) for a violation of the notice or recordkeeping requirements or for misclassification, make it a “prohibited act” to misclassify a worker as a non-employee, and impose penalties and increase damages for willful misclassification.

In addition, the EMPA would direct the DOL to establish a “misclassification” web site that would enable workers to file complaints online and report misclassification information to the IRS, as well as to conduct targeted audits of “certain industries with frequent incidence of misclassifying employees as non-employees.”

Despite the increased focus on employee misclassification, nothing prevents a business from utilizing independent contractors who are properly classified that way. Nevertheless, it is advisable that employers utilizing independent contractors pay special attention to this issue, and, in close cases, assess the comparative risks and benefits.

Jennifer A. Zinn

Some SOX Whistleblower Claims Fit, Some Don't

Lawsuits against former employers by “whistleblowing” employees under the Sarbanes-Oxley Act (SOX) continue to wend their way through the federal courts, with interesting facts and often mixed results. Here are two recent examples.

In *Sharkey v. J.P. Morgan Chase & Co.*, a former Vice President of J.P. Morgan claimed that she had been fired after reporting to her supervisors that a long-term firm client might be involved in money laundering and fraud. J.P. Morgan moved to dismiss the lawsuit because Sharkey had failed to allege which of the federal statutes enumerated in SOX — e.g., mail fraud, wire fraud, bank fraud, securities fraud — she believed the client had violated. It also argued that Sharkey had failed to provide details of her alleged whistleblowing by identifying exactly what she had reported to each of her supervisors and when.

The U.S. District Court in New York rejected both of J.P. Morgan’s arguments and allowed Sharkey to proceed with her lawsuit. The court held that SOX requires nei-

SOX Whistleblower Claims *from page 14*

ther an actual violation of law nor the citation of a particular statute. Rather, employees who “reasonably believe” they have reported the types of fraud listed in SOX are covered and hence protected. Additionally, the court held that Sharkey had sufficiently alleged the details of her whistleblowing by claiming that she had submitted a written internal report recommending that J.P. Morgan end its relationship with the client due to the suspected misconduct, and that she had repeated her concerns in subsequent e-mail messages, telephone calls, and in-person meetings with her superiors.

Contrast the decision in *Riddle v. First Tennessee Bank*. A former corporate security investigator claimed that he had been fired for reporting a suspected violation of federal law by another bank employee, who had taken cash advances on a corporate credit card. The bank moved to dismiss the lawsuit on the ground that Riddle was merely performing his job as an investigator and thus had not engaged in protected activity as defined by SOX. The bank also argued that Riddle did not “reasonably believe” that the credit card advances constituted any of the types of fraud listed in SOX.

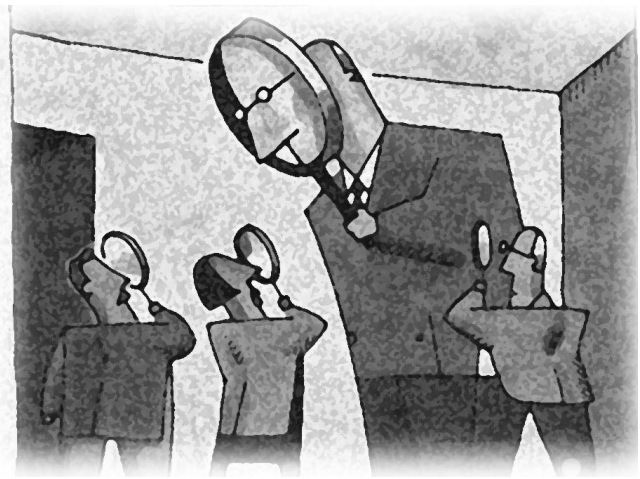
The U.S. District in Tennessee agreed with the bank and dismissed the lawsuit. The court explained that Riddle was acting in his role as an internal bank investigator when he reported the credit card misuse to his supervisors, and that he never “stepped out of that role” by notifying the bank’s CEO, legal department, or ethics hotline. The court also reasoned that Riddle (who touted his extensive background in bank fraud analysis) could not “reasonably believe” that the credit card advances were tantamount to shareholder fraud under SOX. Moreover, the court noted, the bank had demonstrated by clear and convincing evidence that it would have fired Riddle for poor performance regardless of his alleged protected activity.

Whistleblower claims under SOX (and similar state laws) can be very technical and potentially difficult for employers to navigate. Feel free to contact us if you have questions about these issues.

William B. Forrest III

Even Non-Employees Can File Discrimination Suits

In 2005 the Michigan Supreme Court held in *McClements v. Ford Motor Company* that a secondary employer can be liable for discriminatory acts *against a non-employee* under Michigan’s Elliott-Larsen Civil Rights Act, if it affected or controlled the terms, conditions, or privileges of the non-employee’s employment with a primary employer. A recent unpublished decision by the Michigan Court of Appeals, *Seudeal v. Ciena Health Care Management*, illustrates the application of this principle in a somewhat unusual factual context.



The plaintiff in *Seudeal*, a physical therapy assistant who had emigrated from Guyana, was employed by Willowbrook Manor, a nursing home. Willowbrook contracted with Ciena to manage part of its facility. Under the management agreement, Ciena did not control hiring and firing decisions, but did “recruit and present professional and administrative candidates” to Willowbrook and also “recommended certain actions.”

After Seudeal complained about discriminatory treatment, she was terminated for patient abuse, which she denied. In the aftermath of her termination, she corresponded with a Ciena human resource representative who

Non-Employee Discrimination Suits *from page 15*

decided to investigate the situation, responded to her inquiries, and, in a manner of speaking, upheld the termination decision. Seudeal then sued both Ciena and Willowbrook under the Elliott-Larsen Act.

The trial court dismissed Ciena as a non-employer, and the Michigan Court of Appeals affirmed the dismissal under the authority of *McClements*, finding that Seudeal had failed to show that Ciena “‘affected or controlled a term, condition, or privilege’ of [her] employment.” The court relied heavily on provisions of the management agreement that said that Ciena lacked authority to make personnel decisions for Willowbrook. Further, even though Ciena’s representative had investigated the termination and upheld the decision, this did not demonstrate the requisite control over Seudeal’s employment, because the management agreement did not grant Ciena this duty, there was no indication that Ciena could have vetoed Willowbrook’s termination decision, and there was no evidence that Willowbrook would have reconsidered or reversed its decision based on the outcome of the Ciena representative’s investigation.

Seudeal is a close case and a good reminder for businesses operating in a multi-tiered employment world that, if they can affect or control a non-employee’s employment with another entity, they can be drawn into a discrimination claim against that entity.

Ryan D. Bohannon

Firm News

Elizabeth Hardy Receives Honors

We are pleased to announce that Elizabeth Hardy, one of our firm’s founding principals, was recently appointed by the State Bar of Michigan’s President to the State Bar’s Judicial Qualifications Committee. As requested by the Governor, this Committee interviews, evaluates, and rates candidates for appointment to judicial vacancies in Michigan. Liz’s appointment is to a two-year term. She previously served on this Committee as co-chair from 1999 to 2004 and as member from 1991 to 1994 and 1996 to 2004.

Liz was also recently elected to membership in the American Board of Trial Advocates (ABOTA) and its Michigan Chapter. A distinguished group of attorneys from across the country, ABOTA has as its founding principle the preservation of the constitutional right to trial by jury. Candidates for election are required to have had substantial jury trial experience and pass a peer review for civility, integrity, and collegiality. As a member, Liz will help mentor junior attorneys to achieve a higher level of trial advocacy.



KIENBAUM OPPERWALL
HARDY & PELTON, P.L.C.
ATTORNEYS AND COUNSELORS

280 North Old Woodward Avenue, Suite 400, Birmingham, Michigan 48009 • Phone (248) 645-0000 • Fax (248) 645-1385
1001 Woodward Avenue, Suite 1100, Detroit, Michigan 48226 • Phone (313) 961-3926 • Fax (313) 961-3945
www.kohp.com

©2011 Kienbaum Opperwall Hardy & Pelton, P.L.C. *Insight* is published periodically to offer timely perspectives on legal issues in the employment and labor field. The information contained in this newsletter is not legal advice. If you wish to discuss a matter that is similar in nature to a case or development covered in this newsletter, or if you wish to be added to our mailing list, please contact us at our Birmingham office.