

The WorkSheet

BEINS, AXELROD, KRAFT, GLEASON & GIBSON, P.C.

We are proud to announce that this issue of the newsletter marks both a name change to The WorkSheet and a change in the name of the firm. Specifically, the shareholders determined that effective July 1, 2002, the firm's name is: Beins, Axelrod, Kraft, Gleason & Gibson, P.C.

BAKGG: On The Job

- Ed Gleason, counsel to the labor and human rights charitable foundation, The Burma Institute for Democracy and Development (BIDD), recently established a memorial fund in the name of a young Burmese woman, Ma Suu. After being sold into slavery, Ma Suu earlier this month was beaten and tortured to death by those who claimed to "own" her. Her killers, who are still at large, accused the eighteen-year-old woman of stealing household items. They severely beat her, set her on fire and then dumped her in a ditch, apparently believing she was dead. Despite suffering massive injuries and third-degree burns over much of her body, she survived for nearly a week only to die in a Bangkok hospital. BIDD and another foundation intervened on behalf of the stricken woman, an orphan. BIDD will continue in its efforts to ensure that Ma Suu's killers are brought to justice and that other young Burmese women do not suffer a similar fate. Donations to the Ma Suu Memorial Fund are kindly welcomed and much appreciated. Contact Ed Gleason for more information.
- David Kelly obtained a significant arbitration award finding that an employer not only violated the collective bargaining agreement by disciplining and threatening employees who were union officials/employees but also violated Sections 8(a)(1) and (a)(3) of the NLRA. Because the NLRB deferred the statutory issues to the arbitration process, the arbitrator made express findings concerning the statutory violation. The case involved the employer's retaliation against employees for communicating truthfully with the employer's customers.
- Regina Markey has analysis of the recently-enacted "NoFEAR" Act. The Act is intended to protect federal employees from certain discrimination and retaliation. Feel free to contact Regina for details of this development.
- Rich Gibson and Ed Gleason have been reappointed as adjunct professors at Georgetown University Law School. They will again teach Advanced Labor Law.
- Sarah Starrett convinced a large federal agency to, rather than fire, offer reasonable accommodation to an employee who suffers from bipolar disorder. She also won an arbitration case on behalf of a federal sector union, after first convincing the arbitrator that the case was arbitrable. The arbitrator directed the agency to comply with an agreement it had negotiated over a year ago but then chose to repudiate.

Legislative Watch: Your Lawmakers At Work

Federal Workers Civil Rights Bolstered with Accountability Provisions of "NoFEAR" Act

Pointing to chronic problems of discrimination and retaliation against federal employees, Congress and the President recently passed and signed into law the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (NoFEAR Act of 2002, 107 P.L. 174).

2nd Quarter, 2002

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Back (Pay) Pain

This newsletter identifies certain Labor, ERISA, and Individual Employment cases and issues that may be of general interest to the Firm's clients and friends. The newsletter is provided as a courtesy to clients and friends and is for general informational purposes only. The newsletter does not represent the views of any of the Firm's clients. Any editorial comments are for entertainment purposes only. Likewise, this newsletter is not a substitute for specific legal advice.



Heralded as the first new civil rights legislation of this century - the NoFEAR Act creates accountability at federal agencies for existing rules against workplace discrimination based on race, religion, gender, national origin, age, disability, marital status, and political affiliation.

The law's provisions require notification of employees of their rights regarding employment discrimination and whistleblowing, and quarterly posting of complaint statistics on agency websites. Heralded as the first new civil rights legislation of this century, the NoFEAR Act creates accountability at federal agencies for existing rules against workplace discrimination based on race, religion, gender, national origin, age, disability, marital status, and political affiliation. Also targeted is discrimination/retaliation against federal employees who report information about violations of the law, waste of funds, or abuse of authority (retaliation).

The Act covers federal agencies, termed "executive agencies", the U.S. Postal Service and the Postal Rate Commission. Executive agencies do not include entities of the legislative or judicial branches and do not include the Office of the Architect of the Capitol or Library of Congress. The NoFEAR Act was signed into law May 16, 2002, and its provisions become effective October 1, 2003. The Equal Employment Opportunity Commission (EEOC) is developing implementation regulations.

Hill Conducts Hearings on Unionization of Homeland Security Workers

Congress recently commenced hearings concerning whether some or all of the employees who will work at the new Homeland Security Agency should be afforded organizing and collective bargaining rights. These hearings should be monitored.

In the opinion of the Editorial Board, the suggestion that unionized employees are somehow less patriotic or pose a greater risk to national security than non-union employees is a small-minded, obnoxious and offensive non-sequitor and an insult to working people everywhere.

Recent Cases In The Workplace: You Be The Judge

LABOR:

Supreme Court Tightens Bill Johnson's Standards
In *BE & K Construction Co. v. NLRB*, 2002 U.S. Lexis 4653 (June 24, 2002), the Supreme Court set aside the NLRB's longstanding approach for determining when lawsuits filed for the purpose of interfering with employees' rights to organize can be found to violate Section 8(a)(1) of the National Labor Relations Act (NLRA).

Nearly 20 years ago in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Supreme Court held that a party who files a lawsuit both meritless and for retaliatory purposes within the meaning of the NLRA,

engages in unfair labor practice. Thereafter, the NLRB determined that if plaintiff's lawsuit in such case has been concluded (or withdrawn) and the plaintiff has not prevailed, the meritless prong of the analysis has been established.

In *BE&K Construction*, however, the Supreme Court decided that simply because a lawsuit is dismissed, withdrawn or unsuccessful, does not necessarily mean it was meritless for purposes of the *Bill Johnson's* analysis. Rather, the Court held that in order to establish the meritless prong, the NLRB must establish that a concluded lawsuit was objectively baseless or, in other words, a "sham." The Court noted that reasonably-based but unsuccessful cases intended to interfere with employee protected rights cannot be held to violate the NLRA without impairing the employer's sacrosanct right to petition the courts, guaranteed by the First Amendment. The Court simply rejected as dicta its language from the *Bill Johnson's* case itself that seemed to allow the NLRB to do what the Court now prohibits.

Supreme Court Won't Review Case Extending Weingarten Rights to Non-Unionized Workplaces

The Supreme Court declined to review a D.C. Circuit decision that enforced an NLRB order allowing employees in non-unionized workplaces to assert their "Weingarten" right to have an employee representative present in disciplinary meetings with the employer. *Epilepsy Foundation v. NLRB*, 2002 U.S. LEXIS 4231 (June 10, 2002).

D.C. Circuit Reverses Lower Court and Upholds President Bush's Executive Order Regarding Project Labor Agreements

In *Building and Construction Trades Dept. v. Allbaugh*, 2002 U.S. App. Lexis 14020 (July 12, 2002), the D.C. Circuit reversed a district court decision that invalidated President Bush's Executive Order on project labor agreements. Executive Order 13202 provides that no federal agency or entity receiving federal assistance for a construction project may require or prohibit bidders or contractors to enter into project labor agreements.

Project labor agreements are generally multi-trade collective bargaining agreements ensuring labor stability and qualified manpower for a specific construction project. Essentially, the Bush Administration opposed project labor agreements because such agreements use unionized labor by nature.

The District Court determined the executive order delved impermissibly into private ordering of labor management relations, conflicting with the NLRA. The District Court determined that the NLRA preempted

the executive order and issued a permanent injunction against the E.O.'s use.

The D.C. Circuit, however, reversed. The Circuit determined that the executive order pertains to situations when the government is acting "proprietary" or as contractor, as opposed to in a regulatory or governmental capacity, and as such, the executive order is permissible. The Court noted: "the principles of NLRA preemption come into play only when the Government is 'regulating within a protected zone,' and not when it is acting as a proprietor, 'interacting with private participants in the marketplace.'"

Curiously, President Clinton issued a similar executive order prohibiting executive agencies from contracting for services with companies that had permanently replaced strikers, and this Court invalidated that as being regulatory in nature and interfering impermissibly with private ordering of labor relations. See *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

D.C. Circuit Rejects Claim That Package Delivery Drivers Are Independent Contractors

In *Corporate Express Delivery Systems v. NLRB*, 2002 U.S. App. Lexis 11139 (D.C. Cir. June 11, 2002), the D.C. Circuit upheld an NLRB decision that certain owner-operator package delivery drivers were not independent contractors. Rather, the owner-operators were determined to be employees. The Court approved the NLRB's primary reliance on the fact that because putative independent contractors had no significant entrepreneurial opportunity for gain or loss, they were employees. The focus of the analysis was not one of "control" over the specific tasks but whether individuals possessed a real entrepreneurial opportunity regarding the tasks.

The Court noted that the "right to control" test is not always reliable, noting that a "full time cook is regarded as a servant (rather than an independent contractor) although it is understood that the employer will exercise no control over the cooking." Shifting to an emphasis on "entrepreneurialism" is a more reliable analysis and takes into account issues such as whether the individual can hire subordinates and work for more than one party.

NLRB Decision Set Aside; Employees Potentially Coercing Other Employees Prior to NLRB Election

In *NLRB v. Kentucky Tennessee Clay Company*, 2002 U.S. App. Lexis 14010 (4th Cir. July 12, 2002), the Fourth Circuit allowed an employer to refuse to bargain with a union that had won an

NLRB election because certain employees tainted the election process.

Because certain employees stated to other employees that they might be "squeezed" out of a job if they didn't support the union, the Court found that the union's election victory was tainted by coercion. The Court rejected the NLRB's conclusion that such statements between employees did not taint the election because the employees did not have the means or authority to carry out such "threats." The Court concluded that the employees who made such remarks were "apparent agents" of the union largely because they were the leading vocal proponents of the union. Hmmm.

Ninth Circuit Finds Local Joint Metal Trades Council Covered by LMRDA's Election Rules

In *Chao v. Bremerton Metal Trades Council*, 2002 U.S. App. Lexis 12415 (9th Cir. June 25, 2002), the Ninth Circuit reversed a lower court's decision, determining that a local joint council of metal trades locals constituted a "labor organization" for purposes of election provisions of the LMRDA. Although the joint council in the case did not itself directly represent any private sector employees and represented directly only a unit of federal government employees, the Ninth Circuit noted the AFL-CIO's metal trades council, with which the local joint council was affiliated, is comprised of unions representing employees in the private sector. The Ninth Circuit determined that the joint council, due to its affiliations, was a labor organization subject to the LMRDA.

Refusal of Enforcement?

In the wake of *Circuit City v. Adams*, a number of federal courts are refusing to enforce arbitration agreements which contain advance waivers of employees' right to sue in court for discrimination or other statutory violations. For example, a Pennsylvania court recently refused to enforce a "last chance agreement" which precluded a discharged employee from filing suit over his claims that he was fired in retaliation for filing charges with the EEOC, holding that the limitation "emasculated" his statutory claims. *Underwood v. Chef Francisco/Heinz*, 88 FEP Cases 1315 (E. D. Pa. 2002).



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Wal-Mart, an employer and plan sponsor that had paid in excess of \$100,000 in medical expenses for a seriously-injured participant, contended it had an equitable lien that it could enforce in her bankruptcy case.

After participant filed for bankruptcy she recovered \$125,000 in a settlement with the individual who caused her injuries, which she asserted was exempt from creditors, including the plan, under federal Bankruptcy Code and a Virginia statute that exempts proceeds of personal injury settlements.

The Fourth Circuit agreed with the lower courts that security interest was an equitable lien and that nothing impeded the plan's right to foreclose on that interest, ordering that she pay proceeds to Wal-Mart.

ERISA:

Supreme Court Finds ERISA Doesn't Preempt State HMO Law Requiring Independent Medical Review of Plan's Medical Necessity Determination

In *Rush Prudential HMO, Inc. v. Moran*, 2002 U.S. Lexis 4644 (June 20, 2002), the Supreme Court determined that ERISA did not preempt an Illinois statute requiring an HMO to honor an independent medical review determination after the HMO denies coverage on lack of medical necessity grounds.

The case arose when an individual sought certain shoulder surgery and was denied by her HMO due to HMO determination that the surgery (which was to be performed by an unaffiliated physician) was not medically necessary. The individual requested that the HMO abide by Illinois law and permit independent medical review of the issue. The HMO refused. Even so, the individual had the surgery at her own expense. An independent medical review determined the surgery was in fact medically necessary. The HMO continued to refuse reimbursement for the surgery, arguing that ERISA preempted the state law that had permitted the independent medical review. The Supreme Court determined that the independent medical review requirement was akin to a state law "insurance" regulation, and thus saved from ERISA's otherwise broad preemption provisions.

Justice Thomas filed a dissenting opinion in which Justices Scalia, Kennedy and Chief Justice Rehnquist joined.

First Circuit Reinstates Discharged Employee's Claim Employer Violated ERISA Section 510 by Terminating Her To Deprive Her of Benefits

In *Benham v. Lenox Savings Bank*, 292 F.3d 46 (2002), the First Circuit reversed and remanded for a new trial a discharged plaintiff's claim under the anti-discrimination provision of ERISA, Section 510, that her employer fired her to avoid paying her employee benefits.

The Court found that the long term employee, who had risen from teller to senior vice-president of the bank, had introduced evidence to substantiate her claim under Section 510 including: (1) because of her long tenure with the bank, her benefits far exceeded those of all other employees; (2) the bonus paid to the bank president who abruptly fired her was directly proportional to profits, a situation which gave him incentive to reduce payment of employee benefits; and (3) the president had reduced several of the bank's employee benefit plans.

In response to her claim of unlawful discrimination, the bank asserted she was discharged because of loans she made that were in violation of its code of conduct. As the appellate Court noted, the trial judge did not credit either of the employer's proffered reasons, but found that the bank president

fired the plaintiff to make an example of her and demonstrate his power. The appellate Court found this finding clearly erroneous because it had absolutely no support in the record.

Seventh Circuit Reverses Award of Attorney Fees as "Unjust"

The U. S. Supreme Court left undisturbed the Seventh Circuit's recent ruling in *Central States, S.E. & S.W. Areas Pension Fund v. Hunt Truck Lines*, 272 F.3d 1000 (7th Cir. 2001), cert. denied, *Hunt Truck Lines, Inc. v. Central States*, 122 S. Ct. 2357 (June 10, 2002). Significantly, the appellate court had reversed an award of attorney fees to an employer that had won on the merits before the trial court.

In the initial decision, the district court held that the fund exceeded its powers when it filed suit for interim payments of withdrawal liability before the withdrawal actually occurred. Defendant's participation in the fund ceased when it sold covered operations in a Section 4204 transaction that precluded an assessment of withdrawal liability. Two years later, the purchaser withdrew from the fund and defaulted on its liability. The fund sought to collect withdrawal liability from the defendant, but the courts determined it moved too swiftly. After the Seventh Circuit affirmed the district court's ruling on the merits, 204 F.3d 736 (7th Cir. 2000), defendant returned to district court and obtained an award of \$100,000 in attorney fees.

The Circuit agreed with the fund that its position in the litigation was substantially justified and that special circumstances existed in the case that made the lower court's award of fees unjust. It noted that in agreeing that the fund was barred from collecting the withdrawal liability based on the premature notice, the Court had emphasized that the fund would certainly be entitled to receive the full amount assessed once it issued a revised demand notice, and had warned the defendant that it should comply with the fund's demand. Nevertheless, Hunt failed to pay withdrawal liability after receiving revised notice and sought award of fees, which the district court granted based on recognition that there is a modest presumption in favor of a fee award to a prevailing party in an ERISA case.

Based on its own precedent, the Court faulted the lower court for making the award without taking into account the broader context of the litigation, noting that granting fees to the recalcitrant employer encouraged the avoidance of interim payment liability the statute was designed to prevent, constituting "special circumstances" that made the award "unjust." The Court emphasized that while the employer had won that round, it continued to refuse to pay its liability and its financial stability had arguably deteriorated while it avoided making the interim payments Congress determined were required.

Further, the Court found that while it had lost below, the fund's position was "substantially justified," such that denial of the fee request was appropriate, since Hunt had never even alleged that the fund's demand threatened irreparable harm, the standard the Court's earlier cases had set, and found that the fund reasonably relied on those cases. It also found that the fund had a "significant good-faith reason" for taking the position it did because it must meet its obligation to its beneficiaries but, as its frequent recourse to the Court showed, employers who withdraw often resist paying their liability.

Further, because of the importance of timely collection, the Court recognized that the fund had a substantial interest in arguing for a rule that would not penalize it for a miscalculation of a withdrawal date, which is not always clear. The Court concluded that the lower court's view that a fee award was necessary to deter similar conduct was unjust and an abuse of discretion. In making a fee award, a court must evaluate the request based upon all circumstances in the case.

Post-Knudson, Fourth Circuit Concludes Employer-plan Sponsor Had Equitable Lien in Seriously-injured Participant's Bankruptcy Case

In *Carpenter v. Wal-Mart Stores, Inc.*, 2002 U.S. App. LEXIS 10615 (June 3, 2002), a divided panel of the Fourth Circuit affirmed judgment of the bankruptcy and district courts for the Eastern District of Virginia that Wal-Mart, an employer and plan sponsor that had paid in excess of \$100,000 in medical expenses for a seriously-injured participant, had an equitable lien that it could enforce in her bankruptcy case. The lower courts concluded that the plan had a reimbursement provision that participant had acknowledged prior to payment being made for the medical expenses such that the plan had an equitable lien enforceable as a security interest. After participant filed for bankruptcy she recovered \$125,000 in a settlement with the individual who caused her injuries, which she asserted was exempt from creditors, including the plan, under federal Bankruptcy Code and a Virginia statute that exempts proceeds of personal injury settlements. The Fourth Circuit agreed with the lower courts that security interest was an equitable lien and that nothing impeded the plan's right to foreclose on that interest, ordering that she pay proceeds to Wal-Mart.

The appellate court held the participant's appeal in abeyance pending the Supreme Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). Following issuance of the Knudson opinion earlier this year, the court concluded that the Supreme Court's reasoning supports the lower court's ruling here, where the plan sponsor was seeking to enforce an equitable lien, and not a legal claim sounding in contract.

INDIVIDUAL EMPLOYMENT RIGHTS:

Supreme Court Allows Employer to Decide Whether an Employee May Assume A Health Risk

In *Chevron, Inc. v. Echazabal*, 2002 U.S. Lexis 4202 (June 10, 2002), the Supreme Court determined that an individual who worked at an oil refinery could not maintain a disabilities case against a refinery employer. The Company prohibited the employee from working once it determined that his working at the refinery exposed him to chemicals that could exacerbate a preexisting liver condition.

Specifically, Mario Echazabal worked for various contractors at one of Chevron's oil refineries. Chevron refused to hire him directly because of a liver condition which its doctors said would be exacerbated by exposure to chemicals at the refinery. Chevron instructed the contractor to remove him from any jobs that exposed Mr. Echazabal to the chemicals. The contractor eventually laid off Mr. Echazabal.

Mr. Echazabal filed a lawsuit claiming, among other things, Chevron violated the Americans with Disabilities Act (ADA) by refusing him work because of his liver condition. Chevron cited an EEOC regulation that allows a defense where an employee's disability would pose a direct threat to his own health.

The trial court ruled in favor of Chevron. On appeal, however, the Ninth Circuit reversed and held that the EEOC rule exceeded the scope of permissible rulemaking because the ADA statute itself only addressed threats to co-workers and not threats to one's self.

The Supreme Court in turn reversed. The Court noted that the language in the statute did not foreclose the EEOC's rule and the EEOC rule was not unreasonable.

Supreme Court Makes It Tougher for Statute of Limitations Defenses in "Pattern and Practice" Discrimination Cases

In *National Railroad Passenger Corporation v. Morgan*, 2002 U.S. Lexis 4214 (June 10, 2002), the Supreme Court made it easier for victims to complain about continuing and long-term job discrimination or harassment. The Court ruled that statutes of limitation do not always apply when illegal treatment extended over months or years.

An unusual lineup of justices voted to allow leeway for workers who claim a "pattern and practice" of unfair treatment under the 1964 Civil Rights Act. Justice Thomas, writing for the majority, noted that such suits can come outside the usual 180 day (or 300 day, depending on circumstances) statute of limitations so long as suit is filed within the limitations period for at least one of the alleged rights violations. Otherwise, events at start of the



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pattern would be excluded from court review, leaving only most recent incidents.

“Given . . . that the incidents comprising a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim,” Thomas wrote for himself and four justices in the Court’s moderate-to-liberal wing. This alignment is noteworthy because Thomas ordinarily sides with the conservative wing of the Court.

Supreme Court To Review FMLA’s Applicability to State Government Employers

In closing days of the term, the Supreme Court agreed to hear a case concerning whether the Family and Medical Leave Act applies to states and state governmental agencies when they act as employers.

The Court will decide the matter after it reconvenes in October. Watch *Nevada Dept. of Human Resources v. Hibbs*, 2002 U.S. Lexis 4692 (June 24, 2002).

Back (Pay) Pain

Back pay awards from the Merit Systems Protection Board are limited to losses directly flowing from an adverse action, and may not include pay for periods when an employee was placed on administrative leave or reassigned to other work, but was paid at his regular rate. The Federal Circuit has affirmed the Board’s decision, although it reversed an earlier ruling by the Board allowing broader relief in such cases. *Mattern v. Dept. of the Treasury*, No. 01-3253 (Fed. Cir. May 30, 2002).



We’re on the Web:

The WorkSheet is available in electronic format as well. To receive a printable eMail version, please contact Tatyana Schum by phone at 202.328.7222, ext. 116 or email tschum@bakfirm.com

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Let us know his/her name, mailing address and/or email address and we’ll include him/her in subsequent issues. Know more than one? We’ll include them all.

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