The WorkSheet

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BAKGG On The Job

- The **International Brotherhood of Teamsters** presented its "Distinguished Service Award" to **Hugh Beins** at the Teamsters' Lawyers Conference in California. The award, presented amidst hundreds of Teamster lawyers from across the country, recognizes Hugh's exemplary career representing Teamsters and his overall dedication to the labor movement and working people. Hugh is the third attorney ever to receive this award.

- **David Kelly** and **Beth Slavet** aided **Jon Axelrod** in his presentation of "Bargaining Issues: Post 9/11 Workplace Security," concerning workplace privacy and security issues, to the **International Conference of Teamsters Lawyers** on October 22, 2003. Read the text of the presentation at *http://www.bakgg.com/publications_index.htm*

- **Jon Axelrod, the Virginia UPS Employees** and the **Teamsters' Virginia Health and Welfare and Pension Plans** win big against UPS. The arbitrator ruled that the Company must continue paying into the funds on behalf of bargaining unit employees who were on vacation. Relying on a skewed interpretation of a provision in the collective bargaining agreement, UPS argued that its 38-year history of contributing for vacation weeks had been a "mistake." UPS will pay approximately $12 million in vacation-week contributions over the remainder of the contract.

- **Hugh Beins** wins decision for **Teamsters Local Union No. 326** – some of its members initially went on strike and were later locked out. The case is significant because it narrows the "labor dispute" excuse employers can use to deny unemployment compensation to employees who are out of work because of a strike or lockout.

- **Rich Gibson** litigated a UPS case that has national implications for the Teamsters. The victory requires UPS to permit drivers who become medically unfit to drive to work in non-driving positions indefinitely. The arbitrator rejected UPS's argument that such non-driving work need only be provided to employees with finite temporary medical conditions.

- **Ed Gleason** and **Rich Gibson** are teaching the Spring term "Advanced Labor Law" course at **Georgetown University Law Center**.

- **Barbara Kraft** spoke on "What Plaintiffs' Lawyers Need To Know About 401(k) Plans" at the **Metropolitan Washington Employment Lawyers Association (MWELA)** monthly brown-bag lunch on January 15, 2004.

- **Barbara Kraft** is co-chair of the Plan Design & Qualification Subcommittee of the Employee Benefits Committee, ABA Labor & Employment Law Section. Along with a number of other ERISA practitioners, she has prepared a report for the Committee's February 2004 meeting and is working on the next Supplement to the ABA's Employee Benefits Law, 2nd. Edition (BNA).

- **The Legal Environmental Assistance Foundation ("LEAF")** elected **Regina Markey** to its Board of Directors. LEAF is an environmental advocacy organization with a longstanding commitment to preserve environmental integrity through community, legal and legislative strategies. The Tallahassee-based group is headed by **Robert Martin**, the former Ombudsman of the **Environmental Protection Agency**, whose principled fight for accountability of environmental polluters nationwide is highlighted in the current bestseller "Bushwhacked," by Molly Ivins and Lou Dubose.

Legislative Watch: Your Lawmakers At Work

Rule Change Allows Truck Drivers to Drive Longer Days

The Department of Transportation issued new rules that allow truck drivers to stay on the road for up to 11 continuous hours. The previous rule allowed drivers to stay on the road for a maximum of 10 hours. The new rule, however, requires drivers to take at least 10 hours off before they can resume driving. Previously, drivers were required to rest eight hours before resuming driving. With a cyclone-like media spin, the Bush Administration and trucking companies hail the new rules as promoting safety because drivers will now be required to rest for a longer period of time. However, The Teamsters Union, as well as highway safety groups,

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.

In the midst of an impasse on funding relief for defined benefit plans hit by low investment returns and high lump sum payout obligations, Congress is considering a proposal by UPS to shift billions in pension promises to the federal government

point to research showing that driver fatigue increases markedly after 8 to 10 hours of driving, suggesting that the new rules allowing 11 hours of driving actually raise the likelihood of driver fatigue and crashes.

DOL Likely To Proceed With Revised Overtime Rules

Congressional conferees dropped specific amendments to spending legislation that was designed to thwart the Bush Administration's effort to overhaul overtime requirements. As a result, the Department of Labor is forging ahead with its effort to implement new rules in the next few months. As reported in previous editions of THE WORKSHEET, the business-friendly Bush Administration has promoted the revisions to the rules. The original overtime rules tended to promote the creation of more jobs (*i.e.* create more straight time jobs instead of paying time and one half rates for overtime to existing workers). The new rules, however, simply provide a gift to employers by eliminating overtime pay for millions of workers. More work for less pay!

As THE WORKSHEET was going to press, Senate Democrats had at least delayed implementation of the new rules by requiring further discussion of the spending bill. Unfortunately, on January 22, the Democrats yielded and Congress will permit the new regulations to take effect.

DOL Required to Delay Implementation of New Union Reporting Rules

On December 31, 2003, the United States District Court for the District of Columbia issued a preliminary injunction preventing the U.S. Department of Labor from implementing its new LM-2/T-1 reporting rules for at least one year. Specifically, the Court concluded that the new rules, issued in October, provided unions with insufficient time to comply with the new reporting requirements, which were to take effect on January 1, 2004. In this regard, the Court stated:

> *The Department of Labor has allowed unions covered by the statute less than two months to make the extensive and sophisticated accounting, computer, and employee training changes that are necessary in order to bring them into compliance with the Rule. A one-year postponement of the effective date of the new rule will cause no harm to the Department of Labor. Given the fact that the present regulations, which have been in effect for more than 40 years will continue in effect, there will be no discernable harm to the public interest.*

NOTE: As THE WORKSHEET was going to press, the Judge granted the DOL's request for reconsideration, declined to invalidate the new rules, and stated that the new rules may go into effect on July 1, 2004 or 90 days after the DOL makes its software available, whichever is later.

Congress Considering Business Friendly Pension Relief

In the midst of an impasse on funding relief for defined benefit plans hit by low investment returns and high lump sum payout obligations, Congress is considering a proposal by UPS to shift billions in pension promises to the federal government. UPS's proposal would limit its withdrawal liability under Title IV of ERISA and leave other responsible employers in multiemployer plans holding the bag. Meanwhile, Senators Gregg, Grassley, Baucus and Kennedy have negotiated short term funding relief for multiemployer plans that would extend certain amortization periods, limit benefit increases and require information notices to participants in plans experiencing funding problems. These measures are being considered as THE WORKSHEET goes to press.

DOL Weighs in on Enron/Worldcom Cases

The DOL Solicitor's website, http://www.dol.gov/sol, reprints the Secretary of Labor's amicus brief opposing WorldCom's motion to dismiss a fiduciary lawsuit brought by participants in its 401(k) plan. The Secretary's brief, filed January 21, 2004, argues that ERISA imposes a duty on fiduciaries who appoint other fiduciaries to monitor those they appoint, and that the court should not impose a heightened pleading standard on employees' fiduciary breach claims. *In Re WorldCom, Inc., ERISA Litigation*, Case No. 02 Civ. 4816 (DLC) (S.D.N.Y.). DOL also takes this position in the Enron litigation. The DOL's WorldCom brief cites to DOL regulations, 29 C.F.R. 2509.75-8, requiring appointing fiduciaries periodically to review the performance of those they appoint, and stating that the review procedures will vary according to the facts and circumstances and the type of plan. At the same time, the brief attempts to make clear that the duty to monitor is not a duty to second-guess the appointee's decision. The yardsticks the brief uses are the duties of prudence and loyalty, the duty to refrain from prohibited transactions, and the duty to refrain from participating in or contributing to co-fiduciary breaches.

Recent Cases in the Workplace: You Be The Judge

LABOR:

Sixth Circuit Finds "Partial Strike" Unprotected

Refusing to enforce an NLRB order, the Sixth Circuit recently held that employees who engage in a "partial strike" are not protected by the Act. *Vencare Ancillary Services, Inc. v. NLRB*, 2003 U.S. App. Lexis 24883 (6th Cir. 2003). Upset by Vencare's announcement of wage cuts, employees responded by refusing to see patients, but remaining at work to handle backlogged paper work and filing, until management met with them to address their complaints. The next day, they were terminated. The NLRB found that the employees were protected because their completion of the old paperwork was "incidental windup work done in preparation for their work stoppage regarding new patients" and was not the selective performance of work.

In contrast, the Sixth Circuit reasoned that employees cannot refuse to work under terms lawfully established by their employer while remaining on their jobs. Because the employees did "some work" after requesting a meeting with management, they were attempting to work and strike at the same time. The Court found "legally irrelevant" the NLRB's conclusion that the employees had behaved responsibly by performing the backlogged paperwork. [Reaching this conclusion, the Court did not address the employer's argument that the strike was unlawful under Section 8(g) because the employees had not given the required 10 days' notice of a strike.]

The Court's explanation was wrong: The employees' responsible behavior was both relevant and determinative.

In the Court's view, it transformed arguably protected activity into unprotected activity. The moral of the story: Extremism is lawful; moderation is no virtue.

Damages for Secondary Boycott Include Speculative Lost Profits

Although the NLRA does not prohibit picketing which has substantial or foreseeable secondary effects, the NLRA does prohibit picketing which is intended to involve a secondary employer in the dispute. A federal district court considered the question of intent and damages when a union picketed the employer's various work sites after losing an NLRB representation election. *Engineering Consulting Services, Ltd. v. Operating Engineers Local 150*, 2003 U.S. Dist. LEXIS 193348 (N.D. Ill. 2003). The court denied the union's motion for summary judgment, ruling that the plaintiff had presented sufficient evident of secondary intent to proceed to trial. The court found the following indicia of secondary intent: (1) the union's business agent admitted that the union hoped neutral employees would honor the picket lines; (2) the union picketed only sites where neutral employers were present and did not picket the primary employer's offices; (3) the union asked truck drivers and representatives of other unions to honor the picket lines even when the primary employer was off the site; (4) the union videotaped people who crossed the picket lines; (5) the union told neutral employers that picketing would continue until the neutrals ceased doing business with the primary employer; and (6) the union picketed when no primary employer was present, picketed at neutral gates, and did not identify the primary employer in its handbills.

The court also rejected the union's attempt to limit the plaintiff's damages. At least in the Seventh Circuit, lost profits on future contracts are recoverable if they can be estimated with reasonable certainty because defendants cannot benefit from their illegal conduct.

D.C. Circuit Rejects NLRB's "Inability to Pay" Determination

In *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955 (D.C. Cir. 2003), the D.C. Circuit rejected an NLRB determination that an employer's letter to employees stating that it "was trying to bring the bottom line back into the black" and asking for help so "we may retain your jobs" and urging the employees to accept its last offer to the union was sufficient to trigger the employer's obligation to provide the union with requested financial information to verify its claims. The NLRB viewed the letter as raising an "inability to pay" issue which the employer failed to sufficiently disavow, thereby requiring the employer to open its books in order to justify its position. The D.C. Circuit, however, reversed the NLRB and stated that in context, the letter did not constitute an inability to pay claim on the part of the employer and that the employer effectively clarified its position on the matter. The Court's decision is troubling in that it effectively fails to give any deference to the NLRB's fact finding in order to arrive at a decision that allows an employer to refuse to justify its claimed dire financial situation by placing form over substance.

Third Circuit Requires Evidentiary Hearing in Union Election Win

In *Trimm Associates v. NLRB*, 2003 U.S. App. Lexis 24468 (3d Cir. 2003), the Third Circuit refused to enforce an NLRB decision ordering an employer to bargain with a union that had recently won an election among the employer's employees. The employer argued that the election was tainted because two former employees engaged in electioneering near the polling place. The two employees were allowed to vote because the legitimacy of their termination was being litigated. The Employer asserted that the employees engaging in such activity were agents of the Union. In support of its "agency" argument the employer pointed to an NLRB unfair labor practice charge filed by the Union asserting that the two individuals were "lead organizers." The Union, however, claimed that the individuals were not agents of the Union and were speaking only as employees and that as a result their conduct was not attributable to the union. The NLRB rejected the employer's assertion of agency. On review, however, the Third Circuit rejected the NLRB's conclusion and ordered that the NLRB was required to conduct an evidentiary hearing on the issue.

LMRDA Prohibits Interested Employer From Funding Membership Suit Against Union, But not Membership Counterclaim Against Union

In a decision of questionable logic, a divided Second Circuit panel recently held that Section 101(a)(4) of the Landrum-Griffin Act, which expressly prohibits an interested employer from financing a member's "institution" of litigation against his union, does not prohibit the same interested employer from financing a member's counter-claim against a union which has sued the employee. *Sheet Metal Workers Local 38 v. Perella*, 350 F.3d 73 (2nd Cir. 2003). The union had sued to collect an internally-imposed fine; the member counter-claimed for breach of contract and violations of his due process rights. The Second Circuit explained that a counter-claim is not the institution of litigation, but is a response to litigation. Further, the Court majority explained, the statutory purpose of prohibiting employer-financed litigation against unions would not be served by prohibiting the financing of counter-claims; the Congressional bar of employer-financed harassment of unions has less force when the union has sued the member. Dissenting Judge Straub suggested that the majority's parsing of the word "institute" would permit a union to discipline a member who filed a counter-claim, because Section 101(a)(4) protects only the right to "institute" an action against the union. [However, as television advertisements warn, do not try this at home.]

Employer Who Unlawfullly Solicited Anti-Union Statements May Nevertheless Rely on "Untainted" Statements to Withdraw Recognition of the Union

The Fourth Circuit's recent refusal to enforce part of an NLRB order is further evidence that a little misconduct pays, for employers. *NLRB v. Transpersonnel, Inc.*, 349 F.3d 175 (4th Cir. 2003). Rejecting the NLRB's conclusion that the employer unlawfully solicited nine employees to sign anti-union statements, the court found that the employer had coerced only two employees. Based on the "uncoerced" seven statements and five other statements, the court found, the employer could lawfully withdraw recognition from the union. The court stated that an employer's good faith belief that a majority of employees oppose the union could be based on the statement of anti-union employees as to the opinions of their co-workers unless the NLRB General Counsel can

The Fourth Circuit's recent refusal to enforce part of an NLRB order is further evidence that a little misconduct pays, for employers, *NLRB v. Transpersonnel, Inc.*, 349 F.3d 175 (4th Cir. 2003).

In a blow to Wal-Mart, the Fifth Circuit struck down under Texas law a Corporate-Owned Life Insurance Policy (COLI) on the life of a Wal-Mart associate. *Mayo v. Hartford Life Ins. Co.*, 2004 U.S. App. LEXIS 160 (5th Cir. 2004). Wal-Mart received a tax deduction on premiums for COLIs on associates (*i.e.*, rank-and-file employees) and named itself the beneficiary in order to fund employee benefits

prove that the employee "lied or lacked a basis for his information." Furthermore, the court permitted the employer to use the co-worker's statement - hearsay - as proof that the union had, in fact, lost majority support. Dissenting Judge Wilkinson would have adopted the NLRB's conclusion that the employer had coerced all nine and that the union continued to have the support of a majority of the employees.

Sympathy Strike not Prohibited by Broad No-Strike Clause

In *Standard Concrete Products v. General Truck Drivers Union Local No. 952*, 2003 U.S. App. Lexis 25619 (9th Cir. 2003), the Ninth Circuit reversed a lower court decision which had held that a general "no-strike" clause in a collective bargaining agreement prohibited employees from honoring picket lines at other workplaces. The Ninth Circuit determined that the general no-strike clause was not sufficiently specific to waive a union member's right to respect a picket line. In order to waive the right to honor picket lines, the Court continued, the clause must expressly state that sympathy strikes are included within the no-strike prohibition. As a result, the Court vacated an $800,000 damage award the lower court had imposed against the union.

Second Circuit Reverses NLRB Concerning Facial Legality of "Picket Line" Clause

In *NLRB v. Local 32B-32J*, 2003 U.S. App. Lexis 26408 (2nd Cir. 2003), the Second Circuit refused to enforce an NLRB decision which had determined that a contract clause providing that no employees covered by the agreement would be required to cross picket lines of any affiliated local union in an "authorized strike" was facially illegal. The Second Circuit determined that the clause was not unlawful on its face because the word "authorized" could be construed to mean "lawful." Therefore, because the clause could be interpreted in a lawful manner, the NLRB erred in concluding that the clause was illegal on its face.

Benefits:

COBRA Notice Must be Timely Sent

In *Brown v. Aventis Pharmaceuticals, Inc.*, 341 F.3d 822 (8th Cir. 2003), the court ruled that a plaintiff who requested COBRA notification and "notice of termination of any of her other benefits," two months following her termination of employment, was entitled to statutory damages for the failure of her employer to supply COBRA notification and a Summary Plan Description. This ruling affirms that statutory penalties for violations of COBRA notification rules and Employee Retirement Income Security Act of 1974 ("ERISA") would still be incurred even for what the defendant deemed administrative errors. The court deemed the plaintiff's request specific enough to require the employer to send an SPD.

Wal-Mart's Corporate-Owned Life Insurance Program Struck Down

In a blow to Wal-Mart, the Fifth Circuit struck down under Texas law a Corporate-Owned Life Insurance Policy (COLI) on the life of a Wal-Mart associate. *Mayo v. Hartford Life Ins. Co.*, 2004 U.S. App. LEXIS 160 (5th Cir. 2004). Wal-Mart received a tax deduction on premiums for COLIs on associates (*i.e.*, rank-and-file employees) and named itself the beneficiary in order to fund employee benefits. The program was ended in 2000. A COLI typically insures only corporate executives and officers. The court found that Wal-Mart violated Texas law because Wal-Mart did not have an adequate insurable interest in the life of its rank-and-file employees.

NOTE that former Texas Republican Senator Gramm has suggested that the State of Texas fund its pension plans by insuring the lives of retired teachers, with the pension fund as the beneficiary. And the Republican Governor of Texas is reportedly interested in the idea.

Once an ERISA Plan — Always an ERISA Plan

A Federal district judge looked at a long-term disability plan an employer wished to exempt from ERISA regulation, claiming it was only an administrative conduit, and concluded that, "once ERISA, always ERISA" — that is, the plan was an ERISA plan even after the employer's board of directors determined that the employees, and no longer the company, would pay premiums. *Stern v. Provident Life & Acc. Ins. Co.*, 2003 U.S. Dist. LEXIS 23183 (M.D. Fla. 2003).

ERISA Preemption Argument Trumped by Spousal Waiver

A common situation: A life insurance policy issued through an ERISA plan named the participant's spouse as beneficiary. On the couple's divorce, the judgment, consented to by the participant and her husband, provided that the proceeds of the policy would be payable to the participant's estate or to a beneficiary she designated after the divorce. The participant died without designating a new beneficiary. The insurance company paid the former husband. He argued his waiver was preempted by ERISA, relying on the Supreme Court's decision in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), where the Court said that ERISA preempted a state law automatically revoking a spousal beneficiary designation on divorce. The Michigan Court of Appeals held, in *Estate of Rowley v. MacInnes*, 2004 Mich. App. LEXIS 31 (2004), that, while ERISA would preempt a state law that purported to mandate the beneficiary of an ERISA plan, the husband's explicit waiver trumped his ERISA preemption argument in this case.

Participant Can Not Be Compelled to Arbitrate Certain Fiduciary Claims With Plan Investment Advisor

Relying on the Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), a federal judge in California has held that a plan participant cannot be compelled to arbitrate his ERISA fiduciary claims as a result of a mandatory arbitration provision in an investment agreement between a plan sponsor and an investment advisor. The district judge reasoned that the participant had not signed the agreement, was not a third party beneficiary of the agreement, and had a right under ERISA independent of the plan's rightto sue the advisor for breach of fiduciary duty. *Comer v. Micor, Inc.*, 278 F.Supp.2d 1030 (N.D.Ca. 2003).

Rolled Over IRA Not Exempt From Bankruptcy Estate

The Eighth Circuit has held that assets in a married couple's IRAs that had been rolled over from their employer-sponsored retirement plans were not exempt from the couple's bankruptcy estate. Section 522(d)(1)(E) of the Bankruptcy Code exempts pension and annuity payments if they are made on account of illness, death, disability, age or

length of service, and if they are reasonably necessary for the debtor's support. The assets in the IRAs here, the court reasoned, were not "pension" assets, were not made on account of illness, death, disability, age or service, and were not necessary for the couple's support. *Rousey v. Jacoway*, 2003 U.S.App. LEXIS 21191 (8th Cir. 2003).

Supreme Court to Hear Case Concerning Retroactive Prohibitions on Post-Retirement Work

On December 1, 2003, the Supreme Court granted certiorari to review the Seventh Circuit's decision in *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802 (7th Cir. 2002). The Seventh Circuit decided that a multiemployer plan amendment that broadened the definition of prohibited post-retirement work that would result in a suspension of benefits violated ERISA's anti-cutback rule. Prior to the amendment, a retiree's benefit was suspended if he worked in bargaining unit position for which contributions were required. As a result of the amendment, a retiree's benefit was suspended if he worked as a construction supervisor. The Seventh Circuit's decision is at odds with the Fifth Circuit's view in *Spacek v. Maritime Association*, 134 F.3d 283 (5th Cir. 1998). In *Spacek*, the Fifth Circuit held that a suspension was not a "cutback" or reduction in benefits.

A federal district judge in Illinois, noting *Heinz* and the possibility that the Supreme Court might overrule it, has ruled that employees who retired before the effective date of a plan amendment expanding the definition of prohibited post-retirement employment did not have standing to challenge the amendment. *Herman v. Central States, Southeast and Southwest Areas Pension Fund*, 2003 U.S.Dist. LEXIS 18732 (N.D. Ill. Oct. 20, 2003). In contrast, an active employee who declined employment that fell within the expanded definition could seek damages, the court held, but not injunctive or declaratory relief, provided he has first exhausted his remedies under the plan. The active employees as a whole lacked standing to pursue equitable relief because their injuries were speculative, and because their claim was moot in light of the Trustees' recission of the amendment after the Seventh Circuits decision in *Heinz*. The District court in *Herman* also rejected the claim that the trustees breached their fiduciary duty by adopting an amendment authorizing the plan to obtain reimbursement for benefits paid during prohibited reemployment periods from future benefits. The court relied in part on the DOL regulation authorizing a pension fund to offset monthly benefit payments to recoup an overpayment. *See* 29 CFR Sec. 2530.203-3(b).

Unilateral Change in Retiree Benefits Permitted Because of Clause in SPD

A company's unilateral change to retirees' postretirement health and life insurance benefits during the term of its contract with the union does not violate ERISA or the NLRA, according to the Seventh Circuit in *UAW v. Rockford Powertrain, Inc.*, 2003 U.S. App. LEXIS 24296 (7th Cir. 2003). The summary plan description ("SPD") describing the retirees' benefit was incorporated in the collective bargaining agreement, but contained a clause reserving the company's right to terminate the benefits. The court observed that, while the SPD entitled retirees to benefits for life, the terms of the plan were also subject to change at the will of the employer. While expressly rejecting the retirees' and the union's argument that these benefits were vested by virtue of the lifetime promise, the court's decision also implicitly holds that the company was not required to maintain these benefits for the duration of the contract.

Individual Rights Cases:

ADA Does Not Protect Disabled Employees (Terminated for Violating Workplace Rules)

The Supreme Court recently held that the Americans with Disabilities Act does not prohibit an employer from refusing to rehire an employee lawfully terminated for drug abuse. *Raytheon Company v. Hernandez*, 2003 U.S. LEXIS 8965 (2003). The Company had a policy of never rehiring a discharged employee. The Ninth Circuit found the policy unlawful as applied to employees lawfully forced to resign for illegal drug use but who have since been rehabilitated, reasoning that the "no-rehire" disparately treated former drug users. The Supreme Court held that a neutral, no-rehire policy is, by definition, legitimate and non-discriminatory. The only remaining issue was whether the policy was a pretext for rejecting the employee. Because the Ninth Circuit had not reached that question, the Supreme Court remanded the case.

Pattern of Non-Actionable Workplace Indignities Can Accumulate Into Actionable Items

In denying a motion to dismiss, the United States District Court for the District of Columbia determined that a series of workplace indignities, which might not be actionable in and of themselves, could be aggregated into an actionable adverse employment action under discrimination laws. Specifically, the Court noted that it would be contrary to the purpose of Title VII to deny "relief to a plaintiff who complains of [a discriminatory] course of conduct merely because she points to instances of discriminatory behavior that, in themselves, would not permit her relief. The Court determined that whether such accumulated conduct constituted an adverse employment action was a matter for the jury to decide. *Higby v. Billington*, 2003 U.S. Dist Lexis 19363 (D.D.C. 2003).

D.C. Circuit Overturns Dismissal of Hostile Environment Claim

In *Singletary v. District of Columbia*, 2003 U.S. App. LEXIS 25373 (D.C. Cir. 2003), the U. S. Court of Appeals for the District of Columbia Circuit set out its first application of *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), in which the Supreme Court held that events outside the limitations period could be used to establish hostile work environment even if those events did not rise to the level of discrete acts of discrimination. In *Singletary*, the court held that the trial court had erroneously failed to consider acts outside Title VII's limitations period together with more recent employer conduct within the period that was sufficient to state a hostile work environment claim. The Court of Appeals also rejected the trial court's analysis of the employee's retaliation claim, which failed to consider protected conduct close in time to adverse employment actions taken by the employer shortly before the employee filed his EEOC charge. Finally, the court found that the trial court erred in its application of the 3-year limitations period to the employee's claim against two District officials under 42 U.S.C. Section 1983. Barbara Kraft litigated this case on behalf of plaintiff Singletary, whom she has represented since 1992.

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Changes for Our Community

- **Lindsey Maxwell** and the **Sports and Entertainment Law** practice group continues its team-building efforts with the signing of several new player clients. For specific information on the practice group, contact Lindsey at 202.328.7222 or *lmaxwell@bakgg.com*

- We are regular guest speakers and offer customized training in labor issues, collective bargaining, and employee and retiree benefits, to name just a few. Ask any of our attorneys how we can help you and your organization learn more about any of our practice areas. Let's make 2004 successful for the community and all our friends and clients.

We Want Your Ideas

Have an idea for a news item or topic for discussion? Send suggestions for consideration to *tschum@bakgg.com* or give us a call at 202.328.7222

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Know Someone Who Would Like to Receive The WorkSheet?

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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