www.laboremploymentlaw.org.

the Checkoff

The Florida Bar
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The Labor & Employment Law Section

INSIDE:

Eleventh Circuit Holds That Employers Must Accommodate Workers Who Are "Regarded As" Disabled

by Jack R. Wallace

On a case of first impression in the Eleventh Circuit Court of Appeals, the court in *D'Angelo v. ConAgra Foods, Inc.*, 2005 WL 2072131 (11th Cir. 2005), held that the duty to provide reasonable accommodations to disabled employees under the ADA extends to employees who are "regarded as" disabled, even if such employees are not actually disabled under the Act.

Background

The plaintiff, Cris D'Angelo, was diagnosed with vertigo shortly before being hired by ConAgra Foods, Inc., in October 1998 as a "spreader" at one of its seafood processing plants. As a "spreader," D'Angelo would stand at a moving conveyor belt and separate shrimp that were stuck together on the belt. D'Angelo did not mention her vertigo condition when she was hired. However, during her employment, there were instances in which she would experience episodes of vertigo, causing her to feel sick and dizzy. In June 2000, D'Angelo told a supervisor that she could do anything in the plant other than work as a spreader because she would feel sick and dizzy after staring

See "Accommodate" page 4

Chair's Message

Although you will not read this message until after the holidays, on behalf of the entire Executive Council, I want to wish you a happy holiday season and a prosperous new year. I am now halfway through my term as Section Chair and am pleased to report that our Section continues to make forward strides. As many of you know, we have already held two high quality CLE programs this Fall under the overall direction of CLE Chair, Alan Forst, and Legal Education Chair, Steve Meck, and we look forward to even more top notch CLE programs in 2006.

The Section is also in the process of completely overhauling its website to provide greater information and services in a more user-friendly format. This effort has been spearheaded by our Website Subcommittee Chair, Marcus Snow. As many of you know, the Section's website has languished, virtually unattended to, for several years. Although part of the blame for our past website woes can be laid at the Executive Council's feet, Marc and his Subcommittee, in coordination with the Publication Subcommittee, have developed a practical strategy for categorizing and updating the website's content so that users will find both useful and timely information easily. The revamping and maintaining of our website

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CHAIR'S MESSAGE
from page 1

will be no simple task; however, the Section has teamed up with a capable website designer and host, Elyk Innovations, Inc., and I am truly excited to see the new website in the near future.

I am also pleased to report that the Section's Special Projects Subcommittee, under the direction of Michael Spellman, has been quite busy. In the wake of the successive deaths of several pioneers in the field of labor and employment law, the Executive Council, at its October 27, 2005 Meeting, approved a motion to establish a memorial contribution in the amount of $250 for deceased individuals whom the Executive Council determines have made significant contributions to the practice area. This memorial contribution will be made to an approved charitable institution of the surviving family's choice, or to the law school of the decedent. The Subcommittee is also in the process of exploring ways to recruit private sponsors for CLE programs and Section events, so that the Section's coffers will not be drained by the impact of the Board of Governors' ("BOG") new Budget Amendments, and so that Section dues (which are being raised to $40 per year in 2006) hopefully will not need to be raised again within the near future.

While the foregoing developments are positive, I regret to report that not all of the news I have is favorable. Many of you will recall that in my last Chair's Message, I informed you about the BOG's new Budget Amendment concerning profits and losses for CLE programs. Currently, the BOG bears all of the risk of loss for an unsuccessful Section CLE program and is supposed to share 12.5% of the profits of a successful CLE program with the Section offering it. Effective in June of 2006, however, the BOG is imposing a new rule concerning the profits and losses of Section CLE programs. Although phased in over a three (3) year period, under this rule, the Sections will ultimately be responsible for 80% of the cost of unsuccessful CLE programs and will reap 80% of the profits derived from successful programs. While this will be highly lucrative for our Section if our CLE programs make money, the cost of even a few unsuccessful programs may be devastating.

As some of you may be aware, in the past couple of years, the Bar has been selling the various Sections' CLE programs on-line, in addition to selling those programs on audio and/or videotape. In September, we discovered that for some heretofore unexplained reason, the Bar has not been giving the various Sections their 12.5% of the revenue derived from its sales of those on-line CLE programs. According to the Bar, it has earned a total of $86,000 from the sales of on-line Section CLE programs prior to January 1, 2005. Of this $86,000 in revenue, the Sections collectively should have received $10,650. However, no amount of money has ever been distributed by the Bar to the Sections as a result of its sales of these on-line CLE programs. To make matters worse, the Bar has ignored our Section's repeated requests to be provided with a precise accounting of how many of its CLE programs were sold on-line and what portion of the $10,650 in profits it should have rightfully received. Although we have been given assurances that the Sections will receive their fair share of all on-line CLE program profits from January 1, 2005, going forward, I and others are concerned about how the Bar will treat the Sections in future years — when even more Section CLE program revenue will be at stake as a result of the new profit and loss structure — if it presently will not disclose, much less pay, the Sections what it owes them.

Of an even greater concern to our Section, however, is the encroachment by the Young Lawyers Division ("YLD") into our practice area by conducting substantive "basic skills" level CLE programs entirely devoted to labor and employment law. According to Rule 6-12.3 of The Rules Regulating The Florida Bar, the YLD is mandated by the Florida Supreme Court to conduct three substantive basic skills requirement courses per year. In the past, the YLD fulfilled its mandate by conducting multi-disciplinary substantive programs (such as the "Bridge the Gap" CLE Program) which were not devoted to one particular area of the law. However, in recent years, the YLD has conducted a number of "practice area" based substantive Basic Skills Course Requirement ("BSCR") CLE programs that compete directly with the Sections for CLE program revenue.

Although the clear intention of Rule 6-12.3 is to ensure that young lawyers (i.e., newly licensed attorneys under the age of 35 and/or who have been practicing less than five years) satisfy their basic skills requirements, attendance at the YLD's basic skills substantive CLE programs is not limited to merely young lawyers seeking to satisfy their basic skills requirements. As a result, these YLD basic skills substantive CLE programs operate in competition with those offered by the Sections. To make matters worse, although the YLD is only required to offer three such programs a year, in 2005, it offered four basic skills substantive CLE programs at multiple locations throughout the state in the areas of Guardianship and Probate Law, Commercial Litigation, and Construction Law, in addition to Labor and Employment Law. This fact indicates to me that a driving force be-

The CHECKOFF

The Checkoff is prepared and published by the Labor and Employment Law Section of The Florida Bar.

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hind the YLD's practice area based basic skills CLE programs may be the generation of CLE revenue.

This year, for the third straight year, the YLD offered a basic skills substantive CLE program on labor and employment law. This program was offered at locations in eleven different cities on several different dates, either live, or via videotape. The two live presentations of this program were offered on October 27 and 28, 2005, in Miami and Tampa, Florida, respectively. Those dates are the same dates our Section offered its Public Employees Labor Relations CLE Program in Orlando, Florida; however, our Section did not even learn of the YLD's competing basic skills labor and employment law program until it was announced in the October 1, 2005, Florida Bar News. Because under The Rules Regulating The Florida Bar the YLD does not have to, it did not coordinate with us to put on this basic skills substantive CLE program (in order to select topics and speakers), nor did it communicate with us to avoid selecting a date that would conflict with our Section's CLE programs. From registration figures obtained on October 19, 2005, we know that at least sixteen Section members attended the YLD programs in Tampa and Miami, as opposed to our Section's PELR Program. It is presently unknown how many Section members attended this YLD program in the other nine locations. Nevertheless, it is clear to me that as a result of the YLD's actions, our Section and others are now directly competing for CLE limited revenue in their own practice areas. This prospect is especially disturbing, given the Bar's new 80% profit and loss rule pertaining to Section CLE programs.

It is my view that the Sections should play a role in, if not be solely in charge of, all substantive CLE programs in their respective practice areas, including the basic skills courses. Consequently, I believe that The Rules Regulating The Florida Bar relating to the YLD and its mandate to conduct these basic skills courses need to be changed. Although we have been working with our Board Liaison, Grier Wells, to affect these changes, no significant movement has occurred to date. As the abovementioned CLE issues are of concern to all of the Sections, not just our own, we have brought them to the attention of the Council of Sections. We are also endeavoring to get our concerns about the YLD's basic skills programs heard by the Bar's Program Evaluation Committee, but this too has been difficult.

Hopefully, by the next Chair's Message, I will have some additional news to report. In the meantime, if you have any thoughts or comments on these issues, please send me an e-mail. My e-mail address is dkitchen@constangy.com. Your thoughts and comments are important to the Section and will be shared with our Board Liaison. I hope to hear from you. As I stated in my last Chair's Message, this Section belongs to you.

at the conveyor belt for an extended period of time.

After working as a spreader, D'Angelo was eventually promoted to other positions in the plant, eventually filling the position of "product transporter." As product transporter, she would pull and stack product, weigh product, work in an area called "the triangle" to ensure that fish traveling down a chute did not clog the machines, and occasionally worked on a "box-former machine" and a saw. Product transporters were also occasionally asked to help out with other duties, including the spreader function.

In September 2001, a new supervisor at the plant asked D'Angelo to monitor a conveyor belt known as the "box-former belt." This job involved monitoring the belt to make sure that boxes were being formed properly and were not mangled. D'Angelo had never performed this job before, and after working it, complained to the supervisor that monitoring the box-former belt was making her sick. D'Angelo requested that she be given another assignment not involving work at a conveyor belt. In response, the supervisor requested documentation of D'Angelo's condition. D'Angelo provided the company with a copy of the prescription for her vertigo medication, as well as a doctor's note which stated:

> This patient should not work more than 5 nights a week because of her medical condition. Also, she has a vertigo condition. This affects her when her eyes have to look at moving objects such as belts. She should avoid this situation since it could cause her to fall and sustain injury.

ConAgra interpreted the doctor's note as meaning that D'Angelo could not work around moving conveyors or other equipment, whether it meant working directly at a conveyor belt, or working near a conveyor belt. Based on the restrictions in the doctor's note, the employer determined that D'Angelo could not perform any of the jobs in the plant and therefore would be terminated. Four months following her termination, in January 2002, D'Angelo provided ConAgra with a second doctor's note which clarified the earlier one, stating: "[p]atient is able to work around mechanized equipment, but is unable to work at a conveyor belt for a long period of time due to vertigo . . . ."

After her termination, D'Angelo brought suit against ConAgra under the ADA, claiming that her termination constituted a unlawful failure to reasonably accommodate her disability. Specifically, D'Angelo claimed that she was either disabled under the ADA, or regarded by her employer as disabled, and that the employer should have accommodated her request to perform her job without having to work at a conveyor belt.

The district court held that D'Angelo was not "actually disabled" under the ADA, but that there was a genuine issue of material fact regarding whether D'Angelo was "regarded as" having a disability by ConAgra. Nonetheless, the district court held that summary judgment for ConAgra was appropriate because: (1) individuals who are only "regarded as" disabled, versus actually disabled, are not entitled to a reasonable accommodation under the ADA; and (2) even if D'Angelo was entitled to a reasonable accommodation, she was not "qualified" because she could not perform the essential functions of the position even with an accommodation.

The Decision

The Eleventh Circuit, in an opinion written by Judge Marcus and joined by Judge Black, affirmed the district court's decision in part, and reversed in part. The court affirmed the district court's conclusion that D'Angelo was not actually disabled, and also agreed that there was a genuine issue of material fact regarding whether D'Angelo was "regarded as" disabled by the employer. On this latter point, ConAgra considered D'Angelo to be unable to perform any job that would place her in the vicinity of moving equipment. Thus, the court held that such a "far-reaching impairment" would disqualify D'Angelo from an entire class of factory jobs and other similar jobs, making her substantially limited in the major life activity of working.

The Eleventh Circuit reversed the district court's holding that individuals "regarded as" disabled are not entitled to reasonable accommodation under the ADA, and further held that a genuine issue of material fact existed regarding whether D'Angelo was "qualified" to perform her position.

Reasonable Accommodations for "Regarded As" Disabled Employees

The court's holding that an employer must provide reasonable accommodations to "regarded as disabled" employees contributes to the split among other federal appeals courts regarding the issue. The Third Circuit has held that reasonable accommodations are required, while the Fifth, Sixth, Eighth and Ninth Circuits have held otherwise. The Eleventh Circuit's holding rested on two points. First, the court held that the plain language of the ADA required an employer to provide a reasonable accommodation in such an instance. Second, the court held that its decision was mandated by the Supreme Court's holding in *School Board of Nassau County v. Arline*, a case decided under the Rehabilitation Act.

"Plain Language"

Regarding the text of the ADA, the court reasoned that the Act's prohibition on discrimination, when read together with the Act's definition of "disability," produces the inescapable conclusion that employees who are "regarded as" disabled are entitled to a reasonable accommodation. The ADA states that an employer is prohibited from discriminating against a "qualified individual with a disability." The term "discriminate" is defined under the Act to include "not making reasonable accommodations" to a "qualified individual with a disability." The term "disability" is defined to include individuals who are actually disabled, are regarded as disabled, or have a record of a disability. Therefore, the court reasoned, it is necessarily unlawful for an employer to "not make reasonable accommodations" to an individual who is disabled, regarded as disabled, or who has a record of a disability. In the court's words, "[t]he text of this statute simply offers no basis for differentiating among the three types of disabilities in determining which are

entitled to a reasonable accommodation and which are not."

While recognizing the principle that the language of a statute should not be construed to produce absurd results, the Eleventh Circuit rejected the idea that this principle required a different result. The court acknowledged that its interpretation might create an arbitrary disparity in treatment among impaired (but not actually disabled) employees, with some entitled to accommodation based on employer misperceptions and some not. However, the court declined to "rewrite" the ADA to improve the efficacy of the statute. Furthermore, according to the court, impaired but not actually disabled employees who are regarded as disabled by their employers are especially entitled to the protection of the ADA because these employees are "subject to the stigma of the disabling and discriminatory attitudes of others."

School Board of Nassau County v. Arline

The court also reasoned that requiring reasonable accommodations for employees regarded as disabled was consistent with the Supreme Court's decision in *Arline*, a case decided under the Rehabilitation Act, the predecessor statute to the ADA. In *Arline*, the Supreme Court held that a teacher with contagious tuberculosis was "regarded as" handicapped by a county school board under the Rehabilitation Act. Although the precise issue of whether "regarded as" handicapped employees are entitled to reasonable accommodation was not before the Court, it did remand the case to determine "whether the school board could have reasonably accommodated her." Based on the result in *Arline*, and because the ADA is modeled after and incorporates many of the standards in the Rehabilitation Act, the court determined that it was bound to follow *Arline* as imposing a duty of reasonable accommodation on individuals who are regarded as disabled under the ADA.

Was D'Angelo "Qualified?"

In addition to holding that employees "regarded as" disabled are entitled to a reasonable accommodation, the Eleventh Circuit reversed the district court and concluded that a genuine issue of material fact existed regarding whether D'Angelo was "qualified" under the ADA. To be a "qualified individual with a disability," D'Angelo must have been able to perform the essential functions of the product transporter position with or without a reasonable accommodation. D'Angelo had requested that she work in the product transporter position with the accommodation of not having to perform duties involving working directly on a conveyor belt.

In determining whether D'Angelo could perform the essential functions of her position, the court framed the issue in terms of D'Angelo's requested accommodation, i.e., wheth-er working directly on a conveyor belt was an essential function of the product transporter position. After a lengthy analysis, the court concluded that it was not. The Eleventh Circuit noted that the employer's written job descriptions were mostly devoid of any reference to conveyor belt work. In addition, deposition testimony by members of management did not specifically mention conveyor belt work as being a duty of the product transporter position, including one supervisor who flatly stated that as a product transporter, D'Angelo "wouldn't work on a conveyor belt." The court also found that although product transporters were expected to assist in other functions in the plant (such as spreader work on the conveyor belt), the record evidence showed only one occasion when Plaintiff was asked to work on a conveyor belt, and that other employees could perform this function instead of D'Angelo with no detrimental impact on the employer.

Interestingly, the Eleventh Circuit did not discuss the portion of the initial doctor's note which stated that D'Angelo could not work more than five nights a week, other than to say that D'Angelo testified in her deposition that this limitation was unrelated to the vertigo condition. One of ConAgra's additional reasons for termination was that this limitation conflicted with D'Angelo's ability to work overtime, an "integral" job duty. Therefore, it appears that even if ConAgra unlawfully failed to reasonably accommodate D'Angelo regarding her vertigo condition, she would have been terminated anyway for not being able to work overtime. This type of "mixed motive" argument was either not raised by the employer or disregarded by the court.

In a dissent, Judge Fay characterized the parties' dispute as "a simple case of an employer deciding that it had to terminate an employee because of a medical condition that made it dangerous for her to work in the plant." According to Judge Fay, ConAgra made a "sound business decision" by relying upon the initial doctor's note in making its determination that D'Angelo could not safely work at the plant.

Employer Impact

Arguably, the *D'Angelo* decision will confuse, rather than clarify, an employer's obligations under the ADA. The decision does not address the ramifications of its decision on non-impaired employees who are either regarded as disabled or who have a record of disability under the statute. Employees who can success-

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WANTED: ARTICLES

The Section needs articles for the *Checkoff* and The Florida Bar *Journal*. If you are interested in submitting an article for the Checkoff, contact either Scott Fisher (813/228-7411) (*sfisher@fowlerwhite.com*) or Ray Poole (904/356-8900) (*rpoole@constangy.com*). If you are interested in submitting an article for The Florida Bar *Journal,* contact Frank Brown (813/273-4381) (*feb@macfar.com*) to confirm that your topic is available.

REWARD: $150*

[*For each published article, a $150 scholarship to any section CLE will be awarded.]

Article deadline for next *Checkoff* is March 15, 2006.

ACCOMMODATE
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fully fool their employers into believing they have a disability will be legally entitled to a reasonable accommodation. An employer's refusal to provide a "reasonable accommodation" (for example, a requested job modification) by non-impaired employees may now be unlawful in some circumstances, even though in reality there is nothing to accommodate.

Furthermore, employers attempting to discern whether an employee is disabled, and thus entitled to a reasonable accommodation, will now have to utilize mental gymnastics to determine whether it is "regarding" an employee as actually disabled even though it may have just determined, based on the facts at hand, that an employee is *not* actually disabled.

Perhaps more troubling to employers is that the court analyzed whether D'Angelo could perform the essential functions of her position according to what D'Angelo stated as her limitation (i.e., that she could not perform work directly on a conveyor belt), *not* the broader limitation described in the initial doctor's note, which stated that D'Angelo could not work in situations where "her eyes have to look at moving objects such as belts."

The Eleventh Circuit discounted ConAgra's reliance on the doctor's note for three reasons: (1) D'Angelo testified in her deposition that her limitation was only regarding conveyor belt work; (2) the second doctor's note, provided four months after D'Angelo's termination, clarified that she "is able to work around mechanized equipment;" and (3) D'Angelo was "able to perform her job satisfactorily" during her three years of employment. The first two reasons could not have been considered by the employer at the time of termination. The third reason suggests that an employer may disregard a doctor's note regarding an employee's safety in the workplace if that employee has been fortunate enough to avoid injury during his or her employment up to that point in time. Of course, it could be argued that the employer misread the doctor's note, interpreting it as containing a broader limitation than what it states. Regardless, the court's decision serves as a caution to employers to carefully review doctor's notes regarding physical or mental limitations of employees, perhaps construe them narrowly, and seek clarifying information if possible prior to making a termination decision.

Jack R. Wallace *is an attorney with Constangy, Brooks & Smith, LLC, and represents management in labor and employment law matters.*

Section Bulletin Board

Mark Your Calendars for These Important Section Meeting & CLE Dates:

For more information, contact Angela Froelich:
850-561-5633 / afroelic@flabar.org

FEBRUARY 23, 2006

Labor & Employment Law Section Executive Council Meeting & Reception
(All Members Welcome)
5:00 p.m. Council Meeting /
6:00 p.m. Reception
Rosen Plaza Hotel, Orlando, FL

FEBRUARY 23 & 24, 2006

"6th Annual Labor & Employment Law Certification Review" CLE
(Course No.0298)
Hotel Reservations: 407/996-9700
Group Rate: $112 / Group Rate Expires: January 27, 2006
Rosen Plaza Hotel, Orlando, FL

MAY 5, 2006

Labor & Employment Law Section Executive Council Meeting & Reception / Dinner
(All Members Welcome)
5:00 p.m. Council Meeting /
6:00 p.m. Reception /
7:00 p.m. Dinner
Sawgrass Marriott Resort & Spa,
Ponte Vedra Beach, FL

MAY 5 & 6, 2006

"Advanced Labor Topics" CLE
(Course No.0299)
Hotel Reservations: 904/285-7777
Group Rate: $195 /
Group Rate Expires: April 4, 2006
Sawgrass Marriott Resort & Spa,
Ponte Vedra Beach, FL

JUNE 22, 2006

Labor & Employment Law Section Executive Council ANNUAL Meeting & Reception
(All Members Welcome)
Boca Raton Resort & Club,
Boca Raton, FL

The Florida Bar Continuing Legal Education Committee and the Labor & Employment Law Section present

6th Annual Labor & Employment Law Certification Review

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: February 23 - 24, 2006
The Rosen Plaza Hotel • 9700 International Drive • Orlando, Florida • 407/996-9700

Course No. 0298R

This course is intended to provide a comprehensive review of the subject matter, and it may help candidates prepare for a certification examination. Those who have developed the program, however, have no information regarding the examination content other than the information contained in the exam specifications which are also provided to each examinee. Candidates for certification who take this course should not assume that the course material will cover all topics on the examination or that the examination will cover all topics in the course material. Any questions regarding the exam may be directed to Michelle Francis at 850/561-5737. Any questions regarding the course may be directed to Angela Froelich at 850/561-5633.

Thursday, February 23, 2006

8:00 a.m. – 8:30 a.m.
Late Registration

8:30 a.m. – 8:45 a.m.
Opening Remarks
Karen M. Buesing, Tampa
Alan M. Gerlach, Jr., Winter Park

8:45 a.m. – 9:45 a.m.
NLRA and Collective Bargaining
Vasilis C. Katsafanas, Orlando

9:45 a.m. – 10:00 a.m.
Break

10:00 a.m. – 11:00 a.m.
OSHA
Gordon D. Rogers, Ft. Lauderdale

11:00 a.m. – 12:00 noon
FMLA
David E. Block, Miami

12:00 noon – 1:00 p.m.
Lunch (included in registration)

1:00 p.m. – 2:00 p.m.
PERA
Deborah C. Brown, Gulfport

2:00 p.m. – 2:30 p.m.
WARN
Kevin D. Johnson, Tampa

2:30 p.m. – 2:45 p.m.
Break

2:45 p.m. – 3:45 p.m.
Public Employee Claims – §1985, §1993, First Amendment
William R. Radford, Miami

3:45 p.m. – 4:15 p.m.
Drug Testing Statutes
Paul A. Donnelly, Gainesville

4:15 p.m. – 5:00 p.m.
Whistleblower Acts and Workers' Compensation Retaliation
Robert J. Sniffen, Tallahassee

5:00 p.m. – 6:00 p.m.
Labor & Employment Law Section Executive Council Meeting (all invited)

6:00 p.m. – 7:30 p.m.
Reception (included in registration)

Friday, February 24, 2006

8:15 a.m. – 8:30 a.m.
Opening Remarks
Karen M. Buesing, Tampa
Alan M. Gerlach, Jr., Winter Park

8:30 a.m. – 9:30 a.m.
FLSA and Florida Statutory Claims for Wages
David H. Spalter, Weston

9:30 a.m. – 10:00 a.m.
Polygraph / Fair Credit
Donald J. Spero, Palm Beach Gardens

10:00 a.m. – 10:15 a.m.
Break

10:15 a.m. – 11:15 a.m.
Common Law Claims
Carlos J. Burruezo, Orlando

11:15 a.m. – 12:15 p.m.
Statutory and Common Law Protection of Business Interests
Jill S. Schwartz, Winter Park

12:15 p.m. – 1:15 p.m.
Lunch (included in registration)

1:15 p.m. – 2:00 p.m.
ERISA/COBRA
Marcus A. Castillo, Clearwater

2:00 p.m. – 2:50 p.m.
Discrimination Claims – Claims and Defenses
Peter F. Helwig, Lakeland

2:50 p.m. – 3:00 p.m.
Break

3:00 p.m. – 4:00 p.m.
Discrimination Claims – Administrative Procedures
F. Damon Kitchen, Jacksonville

CLE CREDITS

CLER PROGRAM
(Max. Credit: 15.5 hours)

General: 15.5 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 15.5 hours)

Labor & Employment Law: 15.5 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News) you will be sent a Reporting Affidavit or a Notice of Compliance. The Reporting Affidavit must be returned by your CLER reporting date. The Notice of Compliance confirms your completion of the requirement according to Bar records and therefore does not need to be returned. You are encouraged to maintain records of your CLE hours.

How to register:	ON-LINE: www.FLORIDABAR.org * NEW * SECURE * FASTER *	MAIL: Completed form w/check.	FAX: 850/561-5816 Form with credit card information.

REFUND POLICY: Requests for refund or credit toward the purchase of the course book/tapes of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $25 service fee applies to refund requests. Registrants who do not notify The Florida Bar by 5:00 p.m., 02/17/06 that they will be unable to attend the seminar, will have an additional $120 retained. Persons attending under the policy of fee waivers will be required to pay $120.

HOTEL RESERVATIONS: A block of rooms has been reserved at the Rosen Plaza Hotel, at the rate of $112 single/double occupancy. To make reservations, call the Rosen Plaza directly at (407) 996-9700. Reservations must be made by 01/27/06 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

Register me for the "6th Annual Labor & Employment Law Certification Review."

ONE LOCATION: (259) ROSEN PLAZA HOTEL, ORLANDO FLORIDA (FEBRUARY 23 - 24, 2006)

TO REGISTER OR ORDER COURSE BOOK/TAPES, BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON SITE REGISTRATION, ADD $15.00. **On-site registration is by check only.**

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

ABF: Course No. 0298R

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Labor & Employment Law Section: $390
- ❑ Non-section member: $415
- ❑ Full-time law college faculty or full-time law student: $267.50
- ❑ Persons attending under the policy of fee waivers: $120
  Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.)

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.) ☐ MASTERCARD ☐ VISA

Signature: _____ Exp. Date: _____/_____ (MO./YR.)

Name on Card: _____ Card No. _____

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

COURSE BOOK – AUDIOTAPES – PUBLICATIONS

Private taping of this program is not permitted. **Delivery time is 4 to 6 weeks after 3/10/06. TO ORDER AUDIOTAPES OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price of tapes or books. Tax exempt entities must pay the non-section member price.**

_____ COURSE BOOK ONLY: Cost $40 plus tax TOTAL $ _____

_____ AUDIOTAPES (includes course book)
Cost: $390 plus tax (section member), $415 plus tax (non-section member) TOTAL $ _____

Related Florida Bar Publications can be found at http://bookstore.lexis.com/bookstore/catalog.
Click on "Jurisdictions," then "Florida" for titles.

Certification/CLER credit is not awarded for the purchase of the course book only.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course book/tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

IBP V. Alvarez:
A Change for Employers in Compensation Practices

by Heather Jarrell

On November 8, 2005, the Supreme Court issued a unanimous decision that further defines what constitutes compensable time under the Fair Labor Standards Act ("FLSA").[1] In *IBP v. Alvarez*, the Court resolved a split between the First and Ninth Circuits regarding the donning and doffing of protective gear.[2] The Supreme Court's decision in this case impacts employers nationwide. Employers must reevaluate their compensation practices and determine whether their timekeeping methods sufficiently reflect hours worked for time spent donning, doffing, and traveling between different places where principal activities occur.

In *IBP*, the Ninth Circuit held that the FLSA required an employer to compensate its production workers for certain pre-production and post-production activities, such as time spent donning and doffing and walking between changing areas and the production floor.[3]

In *Tum v. Barber Foods, Inc.*, the First Circuit addressed a similar issue.[4] The First Circuit agreed that the FLSA obligates employers to compensate for the pre-production donning and post-production doffing of required protective gear.[5] The court found that such activities were "integral and indispensable" to the principal activities of the job.[6] However, contrary to the Ninth Circuit's decision in *IBP*, the First Circuit held that the FLSA does not require an employer to compensate employees for walking time associated with the donning and doffing of required protective gear.[7] The First Circuit also decided that employers are not required to compensate employees for time spent waiting in line for necessary protective equipment.[8]

The Supreme Court consolidated these actions and specifically considered the following two issues: (1) whether the FLSA mandates that employers compensate for the time employees spend waiting to don protective gear; and (2) whether the FLSA requires employers to compensate for the time employees spend walking between the changing area and the production area.[9] When examining these issues, the Court considered the portal-to-portal provisions of the FLSA.[10] The Portal-to-Portal Act specifically excludes two activities from coverage under the FLSA: walking time "to and from the actual place of performance" of the employee's principal job activity, and activities that are "preliminary" or "postliminary" to an employee's principal job duty.[11]

Citing its decision in *Steiner v. Mitchell*,[12] the Court reaffirmed its holding that the term "principal activity" includes activities that are an "integral and indispensable part" of an employee's principal job duty; such activities do not fall within the Portal-to-Portal Act's preliminary or postliminary exclusion.[13] Therefore, the Supreme Court agreed with the First and Ninth Circuit's decisions that employers must compensate employees for the donning and doffing of required protective gear because such activities are an "integral and indispensable part" of the principal job activity.[14]

When deciding whether to compensate employees for time spent walking from the changing area to the production floor, the Court considered the Department of Labor's "continuous workday" rule.[15] The "continuous workday" rule defines the workday as "the period between the commencement and completion of the same workday of an employee's principal activity or activities."[16] Therefore, because the donning and doffing of required protective gear is tantamount to a "principal activity," the Court held that the workday begins and ends in the changing area.[17] Accordingly, the donning and doffing of required protective gear delineates the "outer limits" of the workday.[18]

The Supreme Court explained that the portal-to-portal provisions of the FLSA require employers to compensate for time spent traveling from "the place of performance of one principal activity to that of another."[19] This means that employers must compensate employees for time spent walking between the changing area and the production floor.[20] Additionally, the Court stated that the FLSA requires employers to compensate for "any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity."[21] However, pursuant to this rationale, employers should not compensate for time spent walking to the changing area before donning because this time clearly falls within the exclusions of the Portal-to-Portal Act.[22]

Unlike walking from the changing area to the production floor, the Court held that the time employees spend waiting to don protective gear is not compensable under the FLSA.[23] Instead, the Court found that waiting to don constitutes a preliminary activity under the Portal-to-Portal Act.[24] The Court explained that, in contrast to walking time, waiting time is "too far removed" from the "productive activity."[25]

Employers should expect that some courts may read this opinion expansively and apply it in other contexts. Questions remain, such as, does this opinion mean that contractors should compensate their employees for time spent gathering necessary tools before arriving at worksites? Without careful attention from employers, this decision may also expand liability under the FLSA. Congress adopted the Portal-to-Portal Act to curtail the potentially expansive nature of an employer's liability under the FLSA.[26] However, this expansive interpretation of law could ultimately contradict Congress' intent when it enacted the Portal-to-Portal Act.

Moreover, the Court's interpretation of the "continuous workday" rule may limit an employer's ability to assert the *de minimus* exception. Previously, courts recognized that employers need not compensate employees for time spent donning, doffing, and traveling between places of

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principal activity, if such time was *de minimus*. In *Anderson v. Mt. Clemens Pottery*, the Supreme Court stated that otherwise compensable work became *de minimus* if it consisted of "insubstantial and insignificant periods of time spent in preliminary activities."[27]

However, courts differed as to the amount of time employees could spend on an activity before employers would lose the ability to argue that such activity was *de minimus*. Some courts defined the amount of time as "split-second absurdities," whereas other courts set forth a ten-minute threshold.[28] Regardless, the Supreme Court's decision in *IBP* will make it more difficult for an employer to assert the *de minimus* exception. According to this opinion, carving out specific amounts of time as "non-compensable" after the principal activity begins is inconsistent with the "continuous workday" rule.

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Endnotes:

1 29 U.S.C. § 201 *et seq*.
2 *IBP v. Alvarez*, 2005 WL 2978311 (Nov. 8, 2005).
3 *IBP v. Alvarez*, 339 F.3d 894 (9th Cir. 2003).
4 *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004).
5 *Id.* at 279.
6 *Id.*
7 *Id.* at 281.
8 *Id.* at 282.
9 *IBP*, 2005 WL 2978311 at * 2.
10 *Id.* at *4-*6.
11 *Id.* at *3.
12 *Steiner v. Mitchell*, 350 U.S. 247 (1956).
13 *IBP*, 2005 WL 2978311 at * 4.
14 *Id.*
15 *Id.* at *6-*7.
16 29 C.F.R. § 790.6.
17 *IBP*, 2005 WL 2978311 at *6-*7.
18 *Id.* at *6.
19 *Id.*
20 *Id.* at *6-*7.
21 *Id.* at *7.
22 *Id.* at *6.
23 *Id.* at *8.
24 *Id.*
25 *Id.* at *9.
26 *Id.* at *3.
27 *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 693 (1946).
28 *See Anderson*, 328 U.S. at 692; *Lindow v. U.S.*, 738 F.2d 1057, 1062 (9th Cir. 1984).

LABOR & EMPLOYMENT LAW SECTION
STATEMENT OF OPERATION

Revenue	2004-05 Approved Budget	Year End June 2005 Actuals	2005-06 Approved Budget
Dues	55,000	52,875	55,000
Affiliate Dues	210	150	210
Less Retained by TFB	(27,640)	(26,641)	(27,640)
Total Dues	**27,570**	**26,384**	**27,570**
Course Income	10,000	10,038	10,000
Videotape Sales	1,000	0	0
Audiotape Sales	10,000	7,715	10,000
Book/Material Sales	1,000	202	500
Bd. or Council Meeting	3,500	0	3,500
LRP Dinner	350	390	0
Members Service Program	10,500	0	10,500
Trial Skills	300	0	300
Sponsorship	1,500	0	1,500
Investment Income	4,527	3,353	7,417
Miscellaneous	500	0	500
Credit Card Fees	0	(10)	0
Total Revenues	**70,747**	**48,072**	**71,787**
Expenses			
Staff Travel	4,071	2,958	3,717
Postage	1,500	1,173	1,500
Printing	2,000	78	2,000
Officer/Council Office Expense	50	0	0
Newsletter	6,500	3,047	7,500
Membership	500	0	500
Supplies	150	0	150
Photocopying	500	109	500
Officer Travel Expense	1,500	0	1,500
Meeting Travel Expense	22,500	20,024	22,500
Out of State Travel	2,500	0	2,500
CLE Speaker Expense	2,500	0	2,500
Committee Expense	1,500	1,641	1,500
Board or Council Meeting	3,550	3,550	2,500
Bar Annual Meeting	6,096	6,096	5,000
Midyear Meeting	2,070	2,070	0
Gov't. Lawyer Directory	1,000	0	1,000
Section Service Program	1,000	654	2,500
Cert. Cmte. Expenses	3,000	2,004	6,000
FL Labor Management	0	0	500
Section Membership Directory	9,500	0	9,500
Awards	6,000	302	6,000
Scholarships	10,000	4,500	10,000
Trial Skills	11,000	1,678	0
SMU Speakers Expense	1,000	0	1,000
Stetson Reception	1,500	600	1,500
Website	6,400	7,738	6,400
Chair's Convention	400	0	400
Council of Sections	300	300	300
Miscellaneous	1,000	500	1,000
CLER Credit Fee	150	0	150
SMU Conference	3,000	0	3,000
Operating Reserve	6,086	0	10,312
Total Expenses	**118,823**	**59,022**	**113,429**
Beginning Fund Balance	**95,961**	**97,331**	**105,964**
Net Operations	**(48,076)**	**(10,950)**	**(41,642)**
Ending Fund Balance	**47,885**	**86,381**	**64,322**

SECTION REIMBURSEMENT POLICIES: General: All travel and office expense payments in accordance with Standing Board Policy 5.61. Travel expenses for other than Bar staff may be made if in accordance with SBP 5.61(e)(5)(a)-(i) and 5.61 (e)(6) which is available from Bar headquarters upon request.

Record Keeping Requirements for Job Applications From the Internet

by Jaimi Kerr and Shane Munoz

Federal contractors subject to Executive Order 11246 have long been required to maintain race, ethnicity, and gender information about job applicants. In recent years, with the explosion of Internet-based recruitment and applications, there has been substantial uncertainty concerning how to apply the Order's requirements.

Definition of "Internet Applicant"

Central to the confusion has been the essential question, "Who is an applicant?" Effective February 6, 2006, final regulations issued by the Office of Federal Contract Compliance Programs ("OFCCP") provide an answer to that question. As of that date, contractors subject to the Order will be required to maintain race, ethnicity and gender information for all individuals who fall within the definition of "Internet Applicants." According to the new regulations, which amend 41 C.F.R. §60-1.3 and 60-1.12, "Internet Applicant" is an individual who meets four criteria:

1. The individual submits an expression of interest in employment through the Internet or related technologies;
2. The contractor considers the individual for the position;
3. The individual's expression of interest indicates that he or she possesses the basic qualifications for the position; and
4. The individual at no point in the selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in employment in the position.[1]

When all four criteria are met, the contractor has an obligation to solicit and retain race, ethnicity and gender information for the individual in question.

What Do The Criteria Mean?

An individual is "considered for the position" whenever the contractor assesses the substantive information provided in the expression of interest – in other words, whenever the contractor reviews the resume, profile, or other electronic document submitted by the individual.[2] Contractors are expressly permitted by the regulation to establish protocols declining to consider expressions of interest that are not submitted in accordance with a standard procedure; for example, a contractor may decline to consider all unsolicited resumes.[3] However, in order to maintain compliance, employers should take care to ensure that such protocols, if adopted, are uniformly enforced by managers, human resources officers, and others who may screen applicants. Note also that, when a company accepts both Internet applications and traditional applications for a particular position, all of the "expressions of interest" of either type are considered to fall within this definition and EEO information must be requested and retained for individuals who meet the other three criteria.[4]

The "basic qualifications" for the position are defined by either the content of the advertisement for the position at issue or, if no advertisement is used, a record of qualifications for the position that was created prior to considering any expressions of interest.[5] The qualifications also must meet three conditions.[6] First, they must be non-comparative (i.e., "Three years of experience required" as compared to "Must have one of the top five number of years' experience in the field of applicants"). Second, they must be objective ("B.A. in Accounting" as compared to "a technical degree from a good school"). Third, they must be relevant to the performance of the position at issue. If the basic qualifications meet all of these conditions, then an individual whose expression of interest fails to demonstrate the qualifications are met is not an "Internet Applicant" and EEO information need not be solicited from that individual.

Finally, the new regulation provides that a company may conclude that an individual has removed himself or herself from consideration, and thus is not an "Internet Applicant" from whom EEO information must be solicited, in the following situations: 1) the individual expressly states he or she is no longer interested; 2) the individual shows "passive disinterest" through "repeated non-responsiveness to inquiries from the contractor;" or 3) the individual's expression of interest provides information, such as salary requirements or preference for type of work or location of work, that shows he or she lacks interest in the position.[7] When a company makes a determination based on information provided in the expression of interest, however, it must be pursuant to uniform and consistent procedures; for example, the determination that every applicant who indicates a salary preference in excess of $50,000 will be considered to have removed himself or herself from consideration. Finally, where an excessively large number of expressions of interest are received, a company may use non-substantive data management techniques like random sampling or absolute numerical limits to narrow the pool appropriately.[8]

Additional Recordkeeping Obligations

As discussed above, employers subject to E.O. 11246 are only obligated to request and maintain EEO information for individuals who meet the criteria. However, the OFCCP explained in the commentary to its final regulations that it also needs to maintain the ability to "verify the contractor's compliance with the 'Internet Applicant' definition" through access to "the records of individuals whom the contractor contends did not meet that definition."[9]

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Accordingly, although EEO information need not be sought for individuals who do not meet the "Internet Applicant" definition, the regulation requires that covered employers retain "any and all expressions of interest through the Internet or related data technologies as to which the contractor considered the individual for a particular position."[10]

Towards that end, when a covered employer uses internal resume databases maintained by the employer (e.g., internal databases containing resumes sent via application on a company website) for hiring purposes, records must be kept of 1) each resume added to the database; 2) the date each resume was added to the database; 3) the position for which each search of the database was made; and 4) for each search, the date of search and substantive criteria of the search. Additionally, there are recordkeeping requirements for employer searches of third-party databases (e.g., the resume search at Monster.com). With respect to such searches, the regulation requires retention of 1) all resumes of individuals who met the basic qualifications for the position that was the subject of the search; 2) identification of all individuals contacted regarding their interest in a particular position; and 3) records of the position for which each search was made, the date of the search, and the substantive search criteria used.[11]

"Internet Applicant" Going Forward

In March 2004, the EEOC, in conjunction with the OFCCP, the Department of Labor, the Department of Justice, and the Office of Personnel Management, promulgated a document discussing guidance on the topic of Internet-based job applicants.[12] That joint guidance on the topic has not yet been finalized. In conjunction with its passage of the final regulation defining "Internet Applicant," the OFCCP has stated that it intends to continue to work with the other agencies on the joint guidance to ensure that contractors do not face inconsistent requirements.[13]

In light of the final regulation, contractors' obligations with respect to the tracking of Internet applicant flow are more defined. However, with that greater definition comes an increased obligation, as employers subject to E.O. 11246 are now subject to detailed recordkeeping requirements that govern their Internet recruiting practices. Effective February 6, 2006, all such employers must carefully monitor their practices and establish procedures to ensure compliance with the new requirements.

Endnotes:

1 41 C.F.R. §60-1.3(1).
2 41 C.F.R. §60-1.3(3)
3 *Id*.
4 41 C.F.R. §60-1.3(2)(i)-(iii).
5 41 C.F.R. §60-1.3(4)(i).
6 41 C.F.R. §60-1.3(4)(ii).
7 41 C.F.R. §60-1.3(5)
8 *Id*.
9 70 FR 58959.
10 41 C.F.R. 60-1.12(a).
11 *Id*.
12 69 FR 10152.
13 70 FR 58947.

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