



Labor & Employment Law Section

June 2008 **Newsletter**

Section Co-Chairs' Corner

From the Editors:

As we wrap up our year, the editors are delighted to announce a new feature, created by Nina Kimball and Beth Hennessy of Kimball Brousseau LLP – the Labor & Employment Section's first ever Crossword Puzzle. We welcome feedback and entries into our new puzzle category. Looking ahead, please Save the Date for the Section's kick off event, the Open House, which will take place on Wednesday, September 17, at 5:00 at the BBA. Finally, the new Steering Committee List is included at the end of the Newsletter.

Have a great summer, and see you all in the Fall.

-- Newsletter editors Nina Kimball and Chris Powell

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Special BBA Events

BBA Orchestra Concert

Wednesday, July 16, 2008 - 7:30pm - 9:00pm

Faneuil Hall MarketPlace Great Hall (2nd floor) - Boston, MA

For more information please contact **Dorothy Linsner** at (508) 656-1900 x273, or dlinsner@irgfocus.com

Save the Date: Annual Meeting

Thursday, September 11, 2008 - 11:00am - 2:00pm

Seaport Hotel - Boston, MA

Judicial Update

Christopher Powell and Robin Horton
Ropes & Gray LLP

Supreme Court Decisions:

CBOCS West, Inc. v. Humphries, No. 06-1431 (May 27, 2008).

The Supreme Court affirmed the Seventh Circuit's ruling that 42 U.S.C. § 1981 encompasses claims of retaliation. Humphries, a black former assistant restaurant manager, alleged that his employer dismissed him because of racial discrimination and because he complained that another assistant manager had dismissed another black employee based on racial discrimination. The Seventh Circuit upheld the District Court's rejection of Humphries's additional Title VII, 42 U.S.C. § 2000e discrimination claim and remanded for trial the § 1981 retaliation claim. Defendant employer CBOCS sought certiorari on the question of whether §1981 encompassed a claim of retaliation.

The Supreme Court held that considerations of stare decisis strongly supported adherence to the many precedents where the Court interpreted §§1981 and 1982 similarly and held that § 1981 covered retaliation against Humphries that resulted from his complaint about racial discrimination against another employee, even though the statutory language does not expressly cover retaliation that results from helping another individual facing discrimination. The Court found that § 1981 and § 1982 are "sister statutes," that the Civil Rights Act of 1991 defined § 1981 with knowledge of the Supreme Court's holding that § 1982 covers retaliation for protesting discrimination against another person, and that § 1981 expressly covers post-contract-formation conduct, which has been interpreted by other courts to cover claims of retaliation.

Gomez-Perez v. Potter, No. 06-1321 (May 27, 2008).

Overruling the First Circuit decision, the Supreme Court found that the federal sector provision of the Age Discrimination in Employment Act, 29 U.S.C. § 633a(a), prohibits retaliation against a federal employee who is a victim of retaliation as a result of filing a complaint of age discrimination, upholding a U.S. Postal Service employee's claim that she faced retaliation from a supervisor for filing her administrative age discrimination complaint.

The Court found that the statutory language of the federal sector provision includes retaliation based on the filing of an administrative age discrimination

complaint. The fact that the ADEA includes an express provision prohibiting such retaliation against private sector employees (§ 623(d)), but no similar provision for federal employees, is not dispositive because the provisions were not enacted simultaneously and the federal sector provision was modeled after the federal sector discrimination ban of the Civil Rights Act of 1964 (42 U.S.C. § 2000e), not after the ADEA's private sector provision. Further, the Court held that it is reasonable to interpret Congress's prohibition of age discrimination similarly to its prohibition of sex discrimination in Title IX (20 U.S.C. § 1681(a)), enacted two years earlier. In relevant comparison, Title VII of the Civil Rights Act federal sector provision incorporates private sector provisions but omits a provision prohibiting retaliation in the private sector.

Enquist v. Oregon Department of Agriculture, No. 07-474 (June 9, 2008).

In a 6-3 decision, the Supreme Court affirmed the 9th Circuit's decision that a public-sector employee cannot bring a "class of one" equal protection claim to challenge her layoff as unconstitutional on the basis that it was arbitrary and capricious. The plaintiff, an employee of the Oregon Department of Agriculture, brought a claim under the Equal Protection Clause of the Fourteenth Amendment claiming that her layoff was a violation of equal protection, not because she was a member of a protected class (such as race, sex or national origin), but on the grounds that it was made for "arbitrary, vindictive, and malicious reasons." Recognizing that there is a crucial constitutional difference when the government acts as employer rather than as a regulator, and that the government as employer has far broader powers than the government as sovereign, the Court held that the class-of-one theory of equal protection did not apply in the public employment context. The Court also noted that public sector employees have other protections against arbitrary employment actions.

Federal Express Corp. v. Holowecki, 128 S. Ct. 1147 (Feb. 27, 2008).

In a 7-2 decision, raising the question of what constitutes a "charge" as the ADEA uses that term for the purposes of filing a charge with the EEOC, the Supreme Court agreed with the EEOC's position in the case, ruling that "[i]n addition to the information required by the regulations, i.e., an allegation and the name of the charged party, if a filing is to be deemed a

charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee." The Court rejected the employer's position that to constitute a charge, the EEOC must also have acted on the charging party's request, as the Court refused to adopt such a condition precedent to the filing of a lawsuit.

Nina Kimball contributed to the Supreme Court write up.

1st Circuit Decisions:

Torrech-Hernandez v. GE, 519 F.3d 41 (1st Cir. Mar. 7, 2008).

The First Circuit affirmed the District Court's award of summary judgment to the employer on an employee's ADEA claim. Plaintiff plant manager Hernandez alleged that his employer violated the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., by firing or, alternatively, constructively discharging him from his position because of his age in an effort to replace older workers. The District Court (D.P.R.) granted defendant employer GE's motion for summary judgment on the ADEA claim. (Hernandez also made state law claims which were dismissed without prejudice.)

The First Circuit affirmed the grant of summary judgment to GE on the grounds that Hernandez had clearly and voluntarily resigned, that no jury could reasonably find that he was discharged, and that there was no evidence that GE intended to replace older workers. The court noted that Hernandez submitted an affidavit which contradicted his testimony and that his statements were conclusory and self-serving.

DeCaire v. Mukasey, No. 07-1539 (1st Cir. Mar. 11, 2008).

The First Circuit vacated and remanded an award of summary judgment against a Deputy U.S. Marshall in suit for gender discrimination and retaliation. Plaintiff DeCaire, a Deputy U.S. Marshall, sued the U.S. Marshal for the District of Massachusetts for gender discrimination and retaliation under 42 U.S.C. § 2000e-16 and § 2000e-3. DeCaire alleged that the defendant discriminated against her by effectively demoting and transferring her and by denying her certain positions and assignments and that the defendant retaliated against her for filing a complaint at the Equal Employment Opportunity office by transferring her to a lesser position, denying her a promotion, and denying her certain assignments.

At bench trial, the District Court (D. Mass.) found that DeCaire established that the defendant did discriminate against her and treat her adversely after she complained of discrimination. However, the court held that the discrimination was based on a perception of disloyalty, not gender bias or retaliation. The court found that the defendant had produced sufficient defenses to rebut the presumption of gender discrimination and held for the defendant on both the gender discrimination and retaliation claims.

The First Circuit vacated the District Court's decision and remanded the case. The court noted that the District Court had raised a mixed motive analysis *sua sponte* and held that if the employer in a gender discrimination suit has mixed motives, it only restricts the plaintiff's remedies. The court further found that there was sufficient evidence to support a gender discrimination claim and that the District Court's conclusion that there was no retaliation was based on errors of law: it was not necessary that the employer be motivated by gender bias in engaging in retaliation, only that the employer was acting in response to the plaintiff's filing of an EEO complaint.

Five Star Transp., Inc. v. NLRB, 522 F.3d 46 (1st Cir. Mar. 31, 2008).

The First Circuit affirmed the National Labor Relations Board's decision that unionized bus drivers who wrote letters intended to dissuade a district to avoid awarding a contract to another bus company engaged in conducted protected by the National Labor Relations Act.

Encouraged by their union's vice-president, school bus drivers working for a private bus company under contract with the Belchertown School District wrote fifteen letters to the district with the goal of dissuading it from awarding a successor contract to another bus company, Five Star Transportation, Inc., because of its safety reputation and what they saw as an unreasonably low bid which could affect its ability to maintain wages and benefits of its drivers. Shortly after receiving the letters, the district awarded the contract to Five Star, which subsequently hired six of the seventeen drivers from the prior company. Five Star later admitted that the remaining eleven drivers were not considered for hire because they had written letters to the district that were critical of Five Star.

The union filed a Board charge, alleging that Five Star had discriminated against the bus drivers' protected activity in violation of 29 U.S.C.S. § 158(a)(1) (the National Labor Relations Act). Five Star defended the suit on the grounds that the bus drivers' letters

included “criticism, disparagement, [and] disloyalty,” and therefore precluded protection under the NLRA for being abusive. The Administrative Law Judge found that Five Star had violated the NLRA with respect to nine of the drivers; two drivers’ letters were not protected. Both parties filed exceptions, and a panel of the Board found that Five Star had violated the NLRA with respect only to drivers whose letters raised employment-related concerns and ordered that those drivers be reinstated; letters that failed to raise employment-related concerns or that primarily disparaged Five Star were not protected. Five Star challenged the NLRB decision on the grounds that no employer-employee relationship existed, that the letters did not constitute concerted activity, and that, even if the letters did constitute concerted activity, they precluded protection under the NLRA because they were abusive and not part of an ongoing labor dispute.

The First Circuit affirmed the decision of the NLRB panel, finding that the NLRA did not restrict the meaning of “employee” to employees of a particular employer, that “concerted activity” concerns not whether employees acted individually, but rather whether their actions were in furtherance of a group concern, and that a “labor dispute” may include any controversy, regardless of whether a proximate employer-employee relationship exists. The court held that the bus drivers were “employees,” that their actions constituted “concerted activity” for purposes of the NLRA, that the drivers were engaged in an ongoing labor dispute, and that their letters were reasonably necessary to safeguard the drivers’ employment conditions and not excessively disloyal. Therefore, the drivers engaged in activity protected under the NLRA and Five Star’s discrimination against the bus drivers could be considered unfair labor practice.

Livick v. Gillette Co., 524 F.3d 24 (1st Cir. Apr. 17, 2008).

The First Circuit affirmed the District Court’s decision to deny an employee’s claims that he was entitled to erroneously estimated benefits. Plaintiff Livick sued his employer, Gillette, over a dispute about the amount of pension benefits to which he was entitled. Livick, employed by the Parker Pen Company since 1976, began to work for Gillette in 1993 when it bought the Parker Pen Company. The companies’ pension plans were merged in 1995. Livick later received letters from Gillette giving an estimate of Livick’s accrued pension benefits from the time he worked for Parker Pen Company. In 2000, Livick’s position at Gillette was eliminated, at which time a Gillette human resources representative provided Livick with an erroneous estimate of his pension benefits based

on a start date in 1976 instead of 1993. On several occasions Livick also used Gillette’s online benefits estimator which generated an even higher estimate. The online estimator required a user to acknowledge an explicit disclaimer that the terms of the Gillette plans would control in case of any discrepancy about benefit amounts. A correction was later made that provided Livick with pension benefits substantially lower than the amount erroneously estimated by the human resources representative. Livick sued Gillette in the District of Massachusetts, claiming that Gillette breached a fiduciary duty in misrepresenting his pension benefits, and demanded equitable relief under ERISA § 502(a)(3). The District Court granted Gillette’s motion for summary judgment.

The First Circuit agreed with the District Court, holding that neither providing benefits estimates nor hiring someone to estimate benefits is a fiduciary function and noting that in cases alleging breach of ERISA fiduciary duties “the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary’s interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.” The court held that Gillette’s human resources representative was merely providing ministerial functions and was not a fiduciary in providing estimates of ERISA benefits, and that Gillette did not breach any fiduciary duty in failing to train the human resources representative to estimate ERISA benefits. The court further found that, even if estoppel were available, Livick did not reasonably rely on the benefits estimates provided by the human resources representative because he conceded that he understood the distinct benefits policies of Gillette and Parker Pen Company.

UMass Memorial Medical Center, Inc. v. United Food & Commercial Workers Union, Nos. 07-2527, 07-2528 (1st Cir. May 15, 2008).

The First Circuit upheld the District Court’s affirmation of an arbitration decision that a hospital was required to make differential payments to all eligible employees for holidays not worked.

Pursuant to the parties’ collective bargaining agreement, United Food and Commercial Workers union submitted a grievance to the UMass Memorial Medical Center on behalf of phlebotomist employees alleging that the hospital failed to provide differential pay for holidays not worked. Upon arbitration, the hospital was required to make the demanded payments. A year after the submission of the first grievance, the union filed another grievance on behalf

of all union employees based on the same complaint because the hospital had failed to compensate all of the employees entitled to differential pay. The hospital challenged the grievance as untimely because it had already been arbitrated and the union had not made the original complaint on behalf of all employees. The second complaint was also submitted to arbitration; the arbitrator found that the union's grievance was timely even though it was filed outside of the requisite seven-day filing period since the allegation constituted a continuing violation of the collective bargaining agreement.

On appeal by the hospital, the District Court upheld the arbitration award and denied the hospital attorneys fees, even though it found that the arbitration award could be read to suggest either that a grievance must be filed within seven days of a holiday or else any day following a holiday that an employer fails to provide differential pay.

The First Circuit affirmed, finding that the hospital should have been aware that the union intended to obtain differential pay for all affected employees. The court held that there was insufficient evidence that the arbitration award was unreasonable and that the arbitrator did not abuse its discretion in denying attorneys fees to the hospital.

U.S. District Court For The District Of Massachusetts Decisions:

Jorstad v. State Street Corp., 534 F.Supp.2d 214 (D. Mass. Feb. 21, 2008).

The District Court denied a shareholder's claims that several of his Employee Retirement Income Security Act ("ERISA") rights were violated. Plaintiff brought an action against State Street Corporation and its officers alleging that they violated his rights under ERISA in forcibly ejecting him from an annual shareholders meeting and that the defendants tried to coerce him to exit a savings program.

The District Court held that the rights alleged by Jorstad were not protected by ERISA—specifically, that ERISA does not protect a shareholder's right to participate in an annual shareholders meeting and that an unsuccessful attempt to persuade someone to sell his stock does not constitute breach of a fiduciary duty under ERISA. The court declined to exercise supplemental jurisdiction over Jorstad's state law claims and granted the defendants' motion to dismiss.

DeCaro v. Hasbro, Inc., 542 F.Supp.2d 141 (D. Mass. Mar. 31, 2008).

In a suit brought by a long-time press operator employee diagnosed with multiple sclerosis, the District Court allowed defendant Hasbro's motion for summary judgment on a count of breach of contract but denied a motion for summary judgment on a claim alleging violation of Mass. Gen. Laws ch. 151B, § 4(16), the state antidiscrimination statute.

Plaintiff DeCaro began working for Hasbro in 1985. In 2000, DeCaro was diagnosed with multiple sclerosis. He continued working at Hasbro until taking voluntary medical leave in May 2005. Several months before taking leave, DeCaro received a written disciplinary warning for a flawed printing job. DeCaro alleged that others responsible for more substantial errors did not receive similar disciplinary warnings. DeCaro was temporarily relieved of his duties and subsequently resumed work with the aid of a golf cart. Evidence of DeCaro's physical condition during his medical leave was limited and conflicting. Beginning in November 2005, DeCaro made four attempts to return to work, supported by notes from a doctor, as required by Hasbro policy, but was rejected upon evaluation by Hasbro's nurse based on concerns about DeCaro's safety.

DeCaro alleged that Hasbro violated the state antidiscrimination statute by (1) refusing to allow him to return to work on four occasions, (2) refusing to provide him with reasonable accommodations related to his medical condition, and (3) discriminating against him in the terms and conditions of his employment. The parties disputed the list of essential tasks that DeCaro was required to perform as a press operator; DeCaro argued that many of the more physical tasks could be delegated to other employees and that the position was not as physically demanding as Hasbro alleged.

DeCaro further alleged that Hasbro breached its contract with him by failing to adhere to provisions of its Employee Handbook and/or personnel policies and guidelines when it required him to produce a return-to-work note from a doctor other than the one who issued his out-of-work notes. The parties disputed whether the Hasbro nurse informed DeCaro that he would need a return-to-work note from a neurologist in addition to the notes provided by another physician. The parties agreed that DeCaro was employed under a collective bargaining agreement that was silent about the process of returning from medical leave. DeCaro alleged that his return-to-work notes were valid under an existing oral contract with Hasbro.

The District Court allowed Hasbro's motion for summary judgment on the breach of contract claim on the grounds that DeCaro failed to establish a prima facie case, finding that there was insufficient evidence that Hasbro mutually assented to treat the alleged policies as a contract. The court denied the motion on the discrimination claim because issues of material fact existed as to whether Hasbro properly refused to allow DeCaro to return to work, offered him reasonable accommodation, or discriminated against him based on his disability.

Massachusetts State Court Decisions:

City of Somerville v. Somerville Municipal Employees Assoc., 451 Mass. 493 (May 22, 2008).

The Supreme Judicial Court reversed and vacated an arbitrator's award requiring the mayor of Somerville to appoint a union member as director of veterans' services for the city. A military veteran and member of the Somerville Municipal Employees Association union had challenged the appointment. The arbitrator found that the appointment violated the city's collective bargaining agreement with its employees and ordered the mayor to appoint the plaintiff to the position. The city appealed the award to the Superior Court, which found for the union; the decision was affirmed by the Appeals Court.

The SJC reversed and vacated the award, finding that the clear mandate of Mass. Gen. Laws ch. 115, § 10, which directs city mayors to establish and maintain a local department of veterans' services and to appoint a veteran as director of the department, provided that the plaintiff's claim was not a proper subject for collective bargaining or arbitration. The court acknowledged a strong public policy favoring collective bargaining in public employment codified in Mass. Gen. Laws ch. 150E, §§ 6, 7(d), but held that the statutory language of Mass. Gen. Laws ch. 155, § 10 unambiguously prevailed over the city's collective bargaining agreement with its employees.

King v. City of Boston, 883 N.E.2d 316 (Mass. App. Ct. March 28, 2008).

The Appeals Court vacated and remanded for trial the Superior Court's summary judgment award on gender discrimination and retaliation claims brought by three female command-level officers relating to separate treatment in the provision of locker room facilities. Plaintiffs, acting on behalf of all members of the Boston Police Superior Officers Federation, alleged that the City of Boston had engaged in gender discrimination by failing to provide them rank-specific locker rooms separate from locker rooms used by

lower-rank parole officers, as were provided to male officers of similar rank. The plaintiffs further alleged that the city retaliated against them by eliminating all rank-specific locker rooms after both male and female officers complained of the discriminatory treatment towards the female officers. The Superior Court found that the city's failure to provide rank-specific locker rooms for female officers did not constitute an adverse employment action, granted the city's motion for summary judgment and entered a declaratory judgment authorizing the city to eliminate all rank-specific locker rooms.

The Appeals Court vacated and remanded, determining that a jury could reasonably find that the failure to provide rank-specific locker rooms to the female officers constituted an adverse employment action and that the male officers had faced retaliation in response to their support for the plaintiffs' internal grievance. The Appeals Court held that genuine issues of material fact existed as to whether (1) rank-specific locker rooms were a material privilege or a condition of employment; and (2) whether the city police department's plan to eliminate all rank-specific locker rooms was an adverse employment action conducted in retaliation against male superior officers for supporting the plaintiffs' complaints, which precluded summary judgment on both claims.

Windross v. Village Automotive Group, Inc., No. 07-P-494 (Mass. App. Ct. June 2, 2008).

The Appeals Court affirmed a jury verdict that defendant Village Automotive Group, doing business as Charles River Saab (CRS), was liable for subjecting a former employee to a racially discriminatory hostile work environment rejecting defendant's argument that the claim should have been barred because it was not specifically pleaded in his original complaint to the Massachusetts Commission Against Discrimination (MCAD).

Windross, a black Jamaican, was allegedly terminated from his position as salesperson at CRS for poor performance. Windross subsequently filed a complaint with the MCAD, alleging that CRS and two managers had subjected him to employment discrimination based on his race, color, and national origin. After timely removal to Superior Court, a jury found for Windross on his hostile work environment claim but for CRS on a wrongful termination claim and for the managers on discrimination claims. CRS appealed, arguing that, because Windross did not specifically make a distinct hostile work environment claim in his MCAD complaint, the cause of action should have been barred for failure to exhaust administrative remedies.

The Appeals Court disagreed with the defendant, citing several Massachusetts and First Circuit cases in finding that a claim not explicitly stated in the administrative complaint may still be asserted in a subsequent Superior Court action if it is based on the discriminatory acts that the MCAD investigation could reasonably be expected to cover. The court held that there was no reason to avoid the hostile work environment claim because the core factual allegations underlying it were set forth in the administrative complaint. The court further found that there was sufficient evidence in the record on which the jury could reasonably rely in concluding that Windross had been subjected to substantial harassment that unreasonably interfered with his work performance.

Legislation Update

Christine Wichers, Choate, Hall & Stewart, LLP and Sharen Litwin, Kotin Crabtree & Strong, LLP

Massachusetts Wage Act Amended to Make Treble Damages Mandatory

On April 14, 2008, the state Legislature amended the Wage Payment Act, M.G.L. c. 149, § 148, to make treble damages mandatory. These damages are in addition to the remedies that are already mandatory for a violation of the Wage Act: the employee's unpaid wages, 12% interest, and attorney's fees. The amendment will go into effect on July 12, 2008.

Previously when a court determined that an employer had violated the Wage Act, it was permitted to award treble damages only if it determined that the employer had acted with "reckless indifference" or "evil motive." Now treble damages will be mandatory even if the employer acted in good faith or violated the law inadvertently. As before the amendment, an employee's consent to a reduced or late payment is no defense to a Wage Act violation.

Federal Ledbetter Fair Pay Act Fails to Pass

In May of last year, the Supreme Court ruled in *Ledbetter v. Goodyear Tire & Rubber Co.* that Lily Ledbetter's claim of pay discrimination on the basis of her gender was untimely except as to those pay decisions made within 180 days before she filed her EEOC charge. The effect of the ruling was to prohibit Ms. Ledbetter from challenging any of the paychecks she had received over her nineteen-year career at Goodyear except those she had received in the last six months.

The decision caused a public uproar, resulting in the filing of the Lily Ledbetter Fair Pay Act of 2007. The bill would have overturned the high court's decision by amending Title VII, the ADEA, and the ADA to clarify that an unlawful act occurs each time compensation is paid pursuant to a discriminatory decision or practice. The House of Representatives passed the bill in July 2007. However, in April the bill failed to pass the Senate. Senator McCain, who did not vote because he was out of town campaigning for President, was roundly criticized for failing to appear.

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Federal Law Against Genetic Information Discrimination Passes

On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act of 2008, also referred to as GINA. The bill had passed the Senate unanimously and the House by a vote of 414 to 1. The new law prohibits employers and health insurers from discriminating on the basis of genetic information. The part of the law affecting employers will take effect in November 2009. The law will not change the obligations of Massachusetts employers, who are already prohibited by state law from discriminating on the basis of genetic information.

Agency Update

Christopher Powell and Douglas Brayley, Ropes & Gray LLP

EEOC Guide: Veterans with Service-Connected Disabilities and the Americans with Disabilities Act.

The EEOC has issued a new question-and-answer guide concerning military veterans with service-connected disabilities in the workplace. The guide, available in versions for both employers and veterans with service-connected disabilities, offers an overview of the relevant federal law and illustrates the effect of the Americans with Disabilities Act (“ADA”) on the recruitment, hiring, and accommodation of veterans with service-connected disabilities.

As the guide observes, between October 2001 and February 2008, more than 30,000 veterans returned home with service-connected disabilities. As these veterans are integrated into the workforce, lawyers representing employers and employees will likely find this EEOC guide useful in understanding the extent of the protections afforded veterans with disabilities.

The guide begins with a comparison of the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), which is enforced by the U.S. Department of Labor, and Title I of the ADA, which is enforced by the EEOC. The EEOC observes that USERRA applies to the reemployment of veterans with and without service-connected disabilities and that its definitions of “reasonable accommodation” and “disability” differ somewhat from the ADA’s definitions. In some cases, USERRA definitions may require more of employers than ADA definitions. USERRA also applies to all employers, regardless of size.

The guide then describes with more particularity how the ADA applies to the recruitment, hiring, and accommodation of veterans with service-related disabilities. Among the topics the guide explores are:

- The difference between “individual with a disability” under the ADA and “disabled veteran.” Veterans who meet one definition may or may not meet the other definition.
- Questions employers may lawfully ask applicants with service-related disabilities. Although employers generally may not ask for medical information from applicants prior to making a job offer, they may do so for affirmative action purposes.
- What disclosures veterans with disabilities are and are not required to make in their applications. Veterans are not required to identify a disability at the time of application unless they need a reasonable accommodation in the application process.
- How employers may lawfully communicate job requirements and any preferences for veterans and applicants with disabilities. Employers may specifically recruit veterans with service-connected disabilities, and they must make sure that there is nothing in a job announcement or on an application that would discourage anyone with a disability from applying.
- Specific steps employers may take to recruit and hire veterans with service-connected disabilities and specific examples of reasonable accommodations such veterans may need.

Finally, the guide lists where to find more information on USERRA and the ADA; public and private organizations that can assist employers who want to recruit and hire veterans or can help veterans who are seeking employment; and organizations and agencies that can help identify specific reasonable accommodations for veterans with service-related disabilities. This useful EEOC guide is available on the internet at: <http://www.eeoc.gov/facts/veterans-disabilities-employers.html> (employer guide); and <http://www.eeoc.gov/facts/veterans-disabilities.html> (veteran guide).

NLRB Issues Unfair Labor Practice Checklists

On May 15, 2008, the Office of the NLRB General Counsel made several checklist memoranda on unfair labor practices publicly available. These checklists are intended for use by Board officials in identifying key issues for an unfair labor practice affidavit and provide useful insight into the Board’s analysis of claims of unfair labor practices.

The General Counsel issued four checklists, covering 8(a)(1), 8(a)(3), 8(a)(5), and 8(b)(1)(A) allegations. Lawyers litigating any of these issues before the NLRB will likely gain from examining these checklists closely. They are available on the internet at: http://www.nlrb.gov/research/memos/general_counsel_memos.aspx.

Massachusetts Attorney General's Office Issues Final Advisory on the Independent Contractor Law

After conducting a public comment period, the Massachusetts Attorney General's Office ("AGO") has released a final advisory on the Massachusetts Independent Contractor Law (M.G.L. c. 149, s. 148B). This guidance supersedes the advisory issued by the AGO in 2004. The final advisory is available on the internet at:

http://www.mass.gov/Cago/docs/Workplace/independent_contractor_advisory.pdf.

The final advisory differs in one important respect from the proposed advisory that was described in the March 2008 Labor & Employment Law Section Newsletter. In the final advisory, the AGO no longer lists "Independent contractors performing similar or identical services as employees of the same entity" as a factor that strongly suggests employee misclassification. This factor had been drawn from prong two of the Independent Contractor Law, which provides that the service the individual performs must be "outside the usual course of business of the employer" in order for the individual to not be classified as an employee. M.G.L. c. 149, s. 148B(a)(2).

Instead, in the final advisory, the AGO recognizes that prong two of the Independent Contractor Law presents a complex question about the definition of "usual course of business" that Massachusetts courts have yet to resolve. To avoid an interpretation of prong two that overwhelms the other prongs of the Independent Contractor Law, the AGO will consider whether the service an individual performs is "necessary to the business of the employer or merely incidental." The AGO has indicated that, if it finds that an individual performs services necessary to the business, the individual should be classified as an employee, not an independent contractor.

Department of Labor Proposes Changes to Labor Organization Financial Disclosure Rules

A proposed rule, published in the May 12 Federal Register (73 Fed. Reg. 27,345), would make several changes to the LM-2 financial disclosure form filed by large labor unions and establish procedures for revoking a small union's privilege of filing simpler LM-3 financial disclosure forms. The proposed rulemaking comes from the Office of Labor Management Standards (OLMS) and would require large unions to disclose more detailed information on sales and purchases of investments and fixed assets and disbursements to

officers and employees. This proposed change will be of particular interest to lawyers who advise unions on regulatory compliance.

The proposed rule is available online at: <http://www.dol.gov/esa/regs/compliance/olms/E8-10151.pdf>. The OLMS will accept comments until June 26, 2008, and plans to issue a final rule by November 2008.

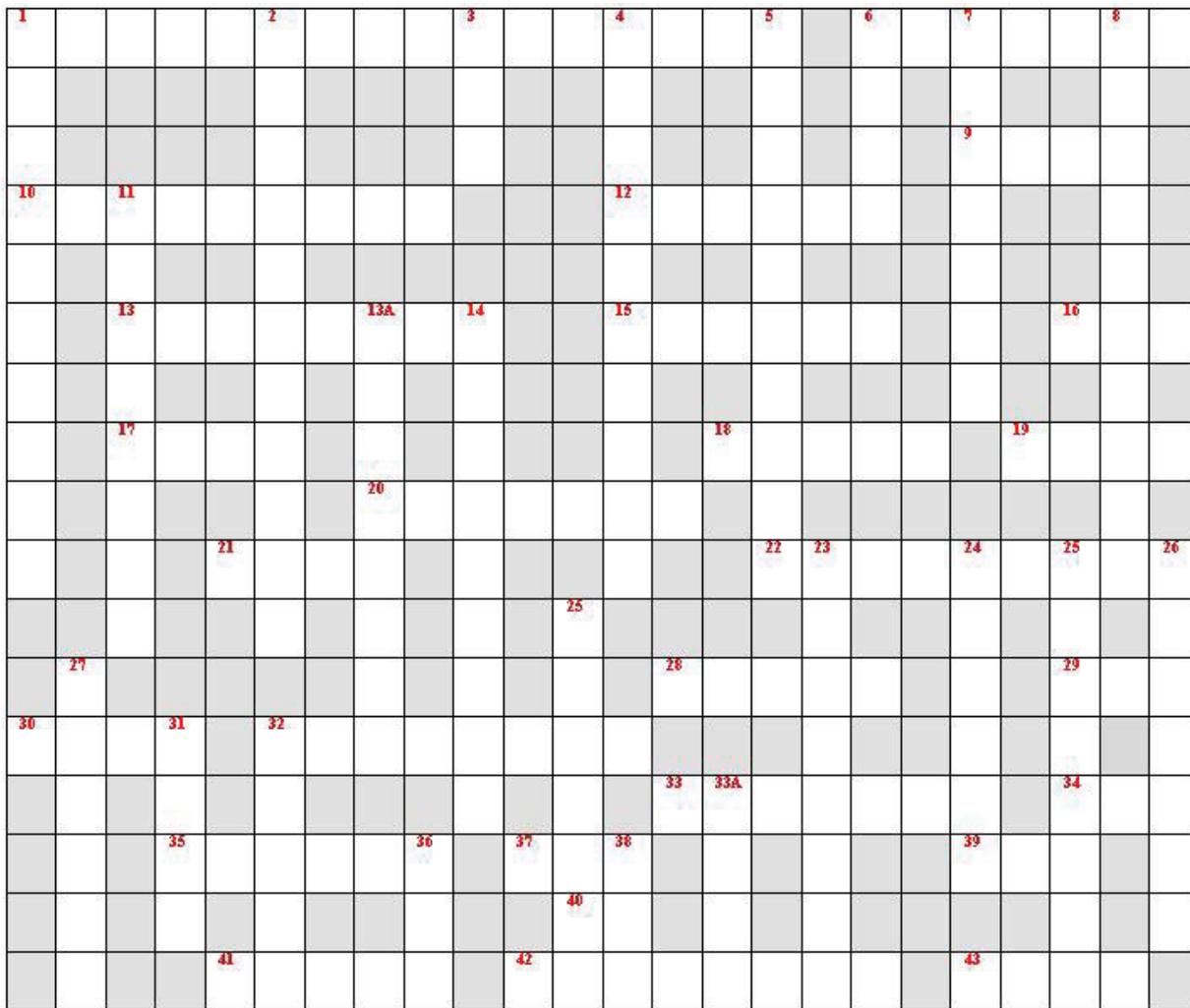


Brown Bag Lunch Update

The Brown Bag Lunch Committee, co-chaired by **Justine Brousseau** of Kimball Brousseau LLP and **Suzanne Suppa** of Littler Mendelson, P.C., finished off a busy year with their last program on June 10, 2008, with new MCAD Commissioner Suni Thomas-George. Before a full house, Commissioner Thomas-George gave a very informative discussion of new developments at the MCAD, including new procedures for investigations, interviewing of a General Counsel and Chief of Enforcement, testing, some new programs, and requesting support for the MCAD's budget.

L&E Crossword Puzzle - June 2008

By Nina Kimball and Beth Hennessy of Kimball Brousseau LLP



ACROSS

- | | | |
|---|--|---|
| 1. Goodridge author. | 21. Academic or dead. | 34. "____ ipsa loquitur" |
| 6. A remedy. | 22. "... Congress may from time to time ordain and ____." | 35. ____ in chief. |
| 9. Denied bail to shoe bomber. | 28. Claim in 1735 Peter Zenger trial. | 37. Number of NBA Championships Celtics won in last 20 years. |
| 10. Among other things (Lat.). | 29. Benefits agency. | 39. Payment for services. |
| 12. Employment status. | 30. The Wagner Act | 40. Judge Judy's medium. |
| 13. Fair. | 32. Exemplary. | 41. "Common Sense" author. |
| 15. Vernal. | 33. "No state shall make or enforce any law which shall ____ the privileges or immunities of citizens ..." | 42. Decision applying McDonnell-Douglas to Massachusetts. |
| 16. First federal sex discrimination statute. | | 43. Refer to. |
| 17. Subj. of Const. | | (clues con't on following page) |
| 18. Proximate _____. | | |
| 19. Null. | | |
| 20. Former Sox hurler. | | |

DOWN

1. Needed to award back pay.
 2. 704(a); 4(4); 4(4A).
 3. Subject of Sutton trilogy.
 4. College-Town claim.
 5. Not unlawful.
 6. He said, "Before anything else, preparation is the key to success."
 7. SJC continuing violation decision.
 8. What famous plaintiff was told to "walk more femininely, talk more femininely, dress more femininely, wear make up. . ."
 11. Justice who authored first Supreme Court decision recognizing sexual harassment claim.
 - 13A. Punishment.
 14. EEO goal.
 23. Definite.
 24. "Live your _____s and you can turn the world around."
- [Henry David Thoreau]
25. Circumstantial.
 26. Inadmissible, e.g.
 27. Claim.
 31. Aid and ____.
 32. ____ facie case.
 - 33A. "For Whom the ____ Tolls"
 36. Norma McCorvey, a/k/a Jane ____.
 38. "All About ____."



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L&E Crossword Puzzle Answers

1	M	A	R	G	A	2	R	E	T	3	M	A	R	S	4	H	A	L	L	5		6	B	A	7	C	K	P	8	A	Y							
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