The College of Labor & Employment Lawyers

Spring 2002 Newsletter
Vol. 4 No.2

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ARNOLD WEBER SPEAKS AT FOURTH ANNUAL LECTURE

The fourth Annual Lecture was a great success. Arnold Weber, President Emeritus of Northwestern University delivered his remarks at the Chicago Sheraton on April 25. He follows the Honorable Abner Mikva, Judge Richard Posner and Professor Ted St. Antoine as distinguished lecturers for the College. Mr. Weber was introduced by Fellow and Board of Governors' member Elliot Bredhoff, a longtime friend of the speaker dating back before the Nixon Pay Board in the early 1970's when Mr. Weber was a Public Member of the Pay Board and Mr. Bredhoff was legal advisor to the Board's Union Members and an alternate Union Member.

The 2002 Lecture was entitled "Issues and Trends in Labor Relations: A View from the Board of Directors." Mr. Weber drew his talk from observations gleaned during his 28-year experience serving on the boards of ten major corporations. Commenting that he was now gradually giving up board of directors work, he shared some conclusions he has drawn from that experience about broad shifts in the role of labor relations in large industrial firms. One indication of this shift, Mr. Weber noted, is the very name of our organization, The College of Labor and Employment Lawyers.

Commenting that more board of directors' time and attention is spent today on EEO and OSHA issues than on traditional labor relations, Mr. Weber said that corporate directors tend now to view labor relations as an aspect of corporate life that is more to be managed than to be fought about. For example, a railroad board on which he serves rarely talks about labor relations issues any more, focusing instead on issues like railroad network mergers and access to Mexico under NAFTA. A corollary to this observation is that strikes and lockouts have become rare. None of the corporations on whose boards he has served had a serious lockout or strike during the 1990's.

His second observation was that the field of labor relations today has very little ideological content. In recent years he has heard little class-conscious rhetoric in discussions about labor relations issues.

Further he observed that there is less and less innovation coming out of the labor relations side of the corporation. With the exception of a few agreements to put union officials on corporate Boards and some joint safety efforts, the kind of innovation of the 1960's and 1970's was not repeating itself in the 1990's. He noted, for example, the passage of pattern bargaining in the automobile industry – a practice that was often a spur to innovation, as well as a defense for labor relations people in agreeing to contracts. The disappearance of pattern bargaining, he suggested, has made the issue of wages less important than medical coverage and pensions.

Finally, Mr. Weber remarked on the ascent of the human resources component in the corporate hierarchy. He attributed this added importance to a general weakening of union strength, an increase in protective labor legislation such as OSHA and EEOC, and the growing significance of executive compensation. "The people talking at Board meetings today are the Vice President for Human Relations and the lawyers," said Mr. Weber.

Weber summarized his view from the board room on the state of labor relations: labor relations don't enjoy the central position it once held; labor relations have moved beyond a class conflict mentality-corporations manage labor relations, they don't fight it; and labor relations are now part of a comprehensive workforce program – a victory, in a sense, for the American industrial relations system, since the vital workplace protections of due process and fairness that are so accepted today, have their roots in the labor relations system.

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BOARD ELECTS FELLOWS FOR CLASS OF 2002

At a meeting of the Board of Governors on May 22nd, the following distinguished lawyers were elected Fellows of the College. The induction ceremony, scheduled to take place in Washington, DC, will be held Sunday, August 11th. Mark your calendars now for what should be an exciting evening.

Rosemary Alito, Newark, NJ
Joseph W. Ambash, Boston, MA
Luis F. Antonetti, San Juan, PR
James Baird, Chicago, IL
Howard L. Bernstein, Chicago, IL
Allen S. Blair, Memphis, TN
Stephen E. Brown, Birmingham, AL
David B. Calzone, Bingham Farms, MI
Roxanne Barton Conlin, Des Moines, IA
Craig M. Cornish, Colorado Springs, CO
Gardner G. Courson, Atlanta, GA
Yvonne T. Dixon, Washington, DC
John J. Franco, Jr., San Antonio, TX
Avrum M. Goldberg, Washington, DC
Robert M. Goldich, Philadelphia, PA
N. Victor Goodman, Columbus, OH
Stephen D. Goodwin, Memphis, TN
Michael C. Hallerud, San Francisco, CA
Douglas A. Hedin, Minneapolis, MN
John M. Husband, Denver, CO
Paul M. Igasaki, Washington, DC
Charles C. Jackson, Chicago, IL
Tom A. Jerman, Washington, DC
Edward M. Kaplan, Concord, NH
James H. Kaster, Minneapolis, MN
James J. Kelley, Washington, DC
Katharine Wolf Kores, Memphis, TN
Stewart S. Manela, Washington, DC
Ellen M. Martin, New York, NY
Thomas M. Melo, Houston, TX
Armin J. Moeller, Jr., Jackson, MS
Ralph J. Moore, Jr., Washington, DC
Joseph W. Moreland, Kansas City, KS
Dennis J. Morikawa, Philadelphia, PA
Anne K. Morrill, Natick, MA
Nancy Morrison O'Connor, Washington, DC
Randall M. Odza, Buffalo, NY
Theodore R. Opperwall, Birmingham, MI
Michael J. Ossip, Philadelphia, PA
William N. Ozier, Nashville, TN
David H. Perez, Falls Church, VA
S. Mason Pratt, Jr., Portland, ME
Joseph L. Randazzo, Alden, NY
James A. Reiter, Farmington Hills, MI
Theodore O. Rogers, Jr., New York, NY
Arthur F. Rosenfeld, Washington, DC
Harold A. Ross, Cleveland, OH
Patrick W. Shea, Stamford, CT
Arthur F. Silbergeld, Los Angeles, CA
Stephen D. Wakefield, Memphis, TN
Jay W. Waks, New York, NY
John T. Wells, San Antonio, TX
Carolyn B. Witherspoon, Little Rock, AR
Michael S. Wolly, Washington, DC
M. Baker Wyche, III, Greenville, SC
Sandra P. Zemm, Chicago, IL

THE STURGIS CASE – THE MAKING OF A QUAGMIRE

By Edward A. Lenz

Mr. Lenz, Senior Vice President for Public Affairs and General Counsel of the American Staffing Association in Alexandria, VA, was inducted as a Fellow in the College in 2001.

Involving multiple staffing suppliers, the case illustrates two of the most contentious issues that are likely to be recurrent themes.

Almost two years have passed since the National Labor Relations Board issued its long-awaited decision in the *M.B. Sturgis* case dealing with how temporary workers can be organized[1] — enough time to begin taking a serious look at the implications of the course that decision has set us on.

The central holding in *Sturgis* was that temporary workers, supplied by staffing firms, can be included in a single bargaining unit with the regular employees of a user firm if all the workers in the unit are employed either solely or jointly by the user firm, and the workers share a "community of interest." Overruling prior Board precedent, the ruling held that such a combination is not a "multi-employer" unit requiring the consent of all the employers.

Initial reviews of the decision were mixed. The media described it as a victory for labor. But labor advocates, while hailing the ruling in principle, foresaw no dramatic impact on union organizing.[2] I worried publicly about the chilling effect the ruling might have on the overall use of temporary workers employed in the United States.[3]

It now seems apparent that only a small percentage of temporary workers are likely ever to be affected by the *Sturgis* decision. While no study has been conducted to determine how many temporary employees employed by staffing firms actually belong to a union, the number is probably small. So is the pool of temporary employees who would even potentially be eligible for union membership. Anecdotal evidence suggests that as little as five percent of temporary employees employed by staffing firms work at union worksites—most of them on very short assignments.

Nonetheless, the impact on those temporary workers who are affected, and on the bargaining obligations of the multiple employers involved in such cases, is likely to be substantial—and adverse.

In his dissent in *Sturgis*, former Board Member Brame called the decision "both bad law and bad policy." Criticizing the majority's "abrupt departure from the longstanding requirement of consent to multi-employer bargaining," he predicted that the result would be "controversy and confusion as the employers strive to protect their differing interests."[4] Private commentators voiced similar concerns.[5]

Subsequent Board decisions suggest that these concerns were not unfounded.[6] The Board's most recent decision in the *"Tree of Life"* case aptly illustrates the complex problems that lie ahead.[7] Involving multiple staffing suppliers, the case illustrates two of the most contentious issues that are likely to be recurrent themes.

One is the "community of interest" standard that should be applied in determining whether different groups of temporary workers can be combined into a single unit. The other is how to sort out the diverse bargaining interests and obligations of the parties involved in staffing arrangements, especially when there are multiple staffing suppliers—which is more often than not the case.

How much of a "community of interest" must exist between diverse groups of workers before they can be combined into a common bargaining unit depends on when the issue arises. If it arises in the context of an initial representation proceeding, in which all of the employees the union seeks to include in the unit have the opportunity to vote, an ordinary community of interest standard applies. But if the union seeks to "accrete" a previously excluded class of employees into an existing unit without a vote, an "overwhelming" community of interest must be shown.[8]

In *Tree of Life*, the Board promptly split on which standard to apply. Members Truesdale and Liebman asserted that the temporary workers were placed in positions that plainly fit the unit description (drivers and warehousemen) set forth in the union bargaining contract. Hence, in their view, the ordinary community of interest standard applied and the workers could be included. Chairman Hurtgen dissented, arguing that since temporary employees historically were not part of the bargaining unit, and since the workers in question never voted in a representation proceeding, they could not be included absent an overwhelming community of interest. That higher standard was not met, he said, because the " 'bread-and-butter' " conditions [of their employment] are set by different sets of employers, and these conditions are different."[9]

Indeed, in determining joint employer status, all three Board members accepted the general finding of the administrative law judge that the staffing firms controlled the workers' pay and other economic conditions and that

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Thus, in its fourth year of administrative litigation, Board review, remands, more fact-finding, and likely court appeals—the end of the case is nowhere in sight.

Sturgis *(cont'd. from pg. 3)*

Tree of Life controlled non-economic conditions, such as work assignments, hours of work, and work schedules. But there was anything but clarity as to the employers' respective obligations to apply the terms of the union contract to the temporary employees.

Chairman Hurtgen, of course, found it unnecessary to decide whether *Tree of Life* had an obligation to apply the union contract to the temporary workers since, in his view, they were not properly included in the bargaining unit. Member Truesdale, having decided that they were properly included, said *Tree of Life* would only be obligated to apply the provisions of the contract to the temporary workers "as to the working conditions it controlled." Member Liebman, in dissent, argued not only that the temporary employees should be included in the unit, but that *Tree of Life* should be required to apply all of the terms of the contract to them.

The view that *Tree of Life*, at most, had an obligation to apply only those provisions of the union contract dealing with matters it controlled—coupled with the law judge's finding that the staffing firms controlled the temporary employee's pay—appeared to relieve *Tree of Life* of any duty to apply the contract's wage terms to them. But the Board held that since the issues of control had been litigated "only in general terms," it remanded the case for further proceedings to determine *Tree of Life's* control over "specific working conditions governed by particular contract provisions." [10]

Four months later, with no additional fact-finding, an NLRB compliance officer notified *Tree of Life* that, "inasmuch as Respondent has ultimate control over all of their terms and conditions of employment," it would be required to apply all of the terms of the union contract to the temporary employees. But the Regional Director subsequently recommended to the General Counsel of the Board that any enforcement proceedings be withdrawn "until such time as a thorough compliance investigation can be completed." Hence, at this writing, it appears that there will be further fact-finding to determine the issues of control. In the meantime, *Tree of Life* may ask the Board to reconsider and/or clarify its decision and has filed a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit.

Thus, in its fourth year of administrative litigation, Board review, remands, more fact-finding, and likely court appeals—the end of the case is nowhere in sight.

Tree of Life, along with the other cases decided to date, clearly illustrates the confusion the *Sturgis* decision has created for suppliers and users of temporary help. Unless the Board reconsiders its decision in *Sturgis*, or the courts overturn it, employers, unions, and temporary workers alike will likely find themselves in an ever-deepening legal quagmire.

1 *M.B. Sturgis, et al* and *Jeffboat et al*, 331 NLRB 173 (Aug. 25, 2000)

2 *The Wall Street Journal* quoted Judith Scott, general counsel for the Service Employees International Union as saying that the ruling "closes an artificial distinction between workers. Will it open the floodgates to organizing? No. Is it an important development in some workplaces? Absolutely." See, Nicholas Kulish and Carlos Tejada, "Labor Board Allows Organizing of Temps," Aug. 31, 2000 p. A2.

3 *Id*.

4 Note 1, *supra*, slip op.at 12

5 Former NLRB general counsel, John Irving, warned that bargaining in situations involving temporary employees supplied by a staffing firm would become "a real nightmare." BNA Daily Labor Report, Sep. 6, 2000, p. AA-1.

6 *Professional Facilities Management, Inc.*, 332 NLRB 40 (Sept. 26, 2000); *J. E. Higgins Lumber Company*, 332 NLRB 109 (Oct. 31, 2000); *Lodgian Inc.*, 332 NLRB 128 (Nov. 14, 2000); *Interstate Warehousing of Ohio*, 333 NLRB 83 (Mar. 27, 2001); *Outokumpu Copper Franklin, Inc.*, 334 NLRB 39 (Jun. 6, 2001) *Engineered Storage Products Co.*, 334 NLRB 138 (Aug. 10, 2001).

7 *Tree of Life, Inc. d/b/a Gourmet Award Foods, Northeast*, 336 NLRB 77 (Oct. 1, 2001).

8 The two tests were discussed by member Hurtgen in *J. E. Higgins Lumber Company*. See, note 5, *supra*, slip op. at 2. While seeing "no necessary impediment" to the basic premise in Sturgis, he cautioned that temporary employees should not be forced into combined units without having had the chance to vote.

9 *See* note 7 *supra*, slip op. at 6.

10 *Id*. at 4.

THE INJURY PRONE WORKER: WHAT'S A MOTHER TO DO?

The Supreme Court Considers Echazabal v. Chevron USA, Inc.

By Paul D. Myrick

A management lawyer, Mr. Myrick is a partner in the law firm of Adams & Reese LLP in Mobile, Alabama. He was inducted as a Fellow of the College in 2000. He wishes to acknowledge the assistance of R. Scott Hetrick, an associate at Adams & Reese, in preparing this article

Despite the risk to his health, Echazabal persisted and, when Chevron still refused to hire him for the job, he sued for disability discrimination under the ADA.

The Americans With Disabilities Act prohibits employers from "using qualification standards… that screen out or tend to screen out an individual with a disability… unless the standard… position in question and is consistent with business necessity." Such qualification standards "may include a requirement that the individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. §§12112(b)(6), 12113(a), (b).

But what if a particular job threatens the health or safety of the disabled individual, not "other individuals"? Does the ADA allow an employer to screen out a disabled individual who is at risk of serious injury or illness, even if the individual chooses to ignore the risk?

The EEOC says "yes." 29 C.F.R. §1630.15(b)(2) ("The term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace."); 29 C.F.R. §1630.2(r). Several years ago, the Eleventh Circuit agreed. *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996) (Employer lawfully discharged epileptic employee who risked serious injury or death performing jobs that involved "fast-moving press rollers," "a conveyer belt with in-running pinch-points," and "machinery that reached temperatures of 350 degrees."), cert. denied, 519 U.S. 1118 (1997).

In September 2000, however, the Ninth Circuit disagreed in *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063 (9th Cir. 2000). Mario Echazabal has hepatitis C, an incurable, chronic liver disease that kills eight to ten thousand Americans every year. He discovered his illness after Chevron twice refused to hire him for a "coker unit" job at its El Segundo, California oil refinery. Each time he applied, Chevron's doctors conducted a medical evaluation and concluded that exposure to the solvents and chemicals in the coker unit could further damage Echazabal's liver and potentially kill him. Despite the risk to his health, Echazabal persisted and, when Chevron still refused to hire him for the job, he sued for disability discrimination under the *ADA*. Citing the EEOC's regulation, the district court agreed with Chevron that the job posed a direct threat to Echazabal's health, and granted summary judgment for Chevron. 226 F.3d at 1065, 1073.

On appeal, the Ninth Circuit reversed. According to the majority, the EEOC regulation ignores the "plain meaning" of the ADA's statutory text, which expressly applies only to "a direct threat to the health or safety of other individuals in the workplace," not to "threats to oneself." The majority favorably cited the ADA's legislative history, including ADA cosponsor Ted Kennedy's statement that "employers may not deny a person employment based on paternalistic concerns regarding the person's health", as well the Supreme Court's previous decision in *Autoworkers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), which rejected "paternalistic employment policies" that excluded many women from particular jobs. 226 F.3d at 1066-68.

In dissent, Judge Trott sharply criticized the majority's rationale:

> Our law books, both state and federal, overflow with statutes and rules… to protect workers from harm…"Paternalism" here is just an abstract out-of-place label of no analytical help. …In effect, we repeal these [safety] laws with respect to [Echazabal], and to other workers in similar situations. So much for OSHA. *Now, our laws give less protection to workers known to be in danger than they afford to those who are not. That seems upside down and backwards.* Precisely the workers who need protection can sue because they receive what they need.
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> [T]he majority's holding leads to absurd results: a steelworker who develops vertigo can keep his job constructing high rise buildings; a power saw operator with narcolepsy or epilepsy must be allowed to operate his saw; and a person allergic to bees is entitled to be hired as a beekeeper.
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> Did Congress really intend to nullify state and federal workplace safety laws and render them impotent to protect workers in

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Injury Prone Worker *(cont'd. from pg. 5)*

> identifiable harms' way? I doubt it. Does anti-paternalism trump basic safety concerns? This entire construct makes a house of cards look secure.

Echazabal, 226 F.3d at 1074, 1075 (Trott, J., dissenting).

The United States Supreme Court agreed to review the case, and in February 2002, the Court heard oral arguments. During oral arguments, several Supreme Court justices echoed Judge Trott's disagreement. Thus, Justice Kennedy asked Echazabal's attorney:

> Why not in this society is it wrong to say that an employer can care about employees? … Your position forces an employer to take a position that's completely barbarous.

Justice Scalia observed that, since federal and state legislatures have long engaged in "paternalism" regarding workplace safety:

> I don't see why Congress would be adamant about [avoiding] paternalism for the handicapped, but not everyone else.

Justice Scalia also observed that, under the Ninth Circuit's rationale, a disabled individual could force the employer to place him in a job that might prove lethal, but the same employer remains free to (and often is legally obligated to) prevent a non-disabled person from taking a similarly dangerous job. See, e.g., OSHA 29 U.S.C. §654(a)(1) (employer must maintain workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to… employees").

The justices also questioned the Ninth Circuit's reliance on *Autoworkers v. Johnson Controls*. In that case, the Court held that an across-the-board policy barring all fertile women (but not men) from jobs involving exposure to lead because of the potential risk to the fetus if the women became pregnant violated *Title VII*'s prohibition against sex discrimination. When Echazabal's counsel argued that Echazabal's case was similar to *Johnson Controls*, Justice O'Connor disagreed. She noted that *Johnson Controls* involved a *per se* bar of all women from a job that may have posed a risk to only a few, whereas Chevron excluded only Echazabal based upon an individualized medical assessment of the health risk posed by the specific job Echazabal sought.

Overall, several justices appeared to agree that an employer's obligations under workplace safety laws is a sufficient "business justification" for excluding an at-risk disabled individual from a particular job, if the decision is based on an individualized medical assessment of the risk involved performing that job, rather than stereotyped, across-the-board generalizations. Echazabal's case typifies the dilemma often confronted by employers in considering an injury or illness prone worker with a disability for a particular job. While oral argument may be an imprecise predictor, the Supreme Court seemingly agrees with Judge Trott's observation that the Ninth Circuit majority's view is an "upside down and backwards" approach to resolving this dilemma. The ADA states that permissible qualification standards "*may* include" a requirement that the individual "shall not pose a direct threat to others." 29 U.S.C. §12113(b). Nothing in this language conflicts with the EEOC regulation, which allows employers to implement similar qualification standards designed to protect the individual, as long as the standards are job-related and consistent with business necessity. The EEOC's regulations do not condone the arbitrary "paternalism" condemned in *Johnson Controls*. Instead, the EEOC would require a case by case analysis:

> The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job… based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

29 C.F.R. §1630.2(r).

Clearly, employers should be entitled to rely on a specific job analysis and an "individual assessment" of this kind, as opposed to generalized perceptions (or misconceptions) about the potential risk of illness or injury, or the possibility of increased workers' compensation costs. Quite simply, the *ADA* should not force an employer to knowingly put a worker in harm's way.

Echazabal's case typifies the dilemma often confronted by employers in considering an injury or illness prone worker with a disability for a particular job.

On June 10, 2002, the Supreme Court issued a unanimous opinion in the Echazabal case, reversing the judgment of the Court of Appeals and remanding the case for further proceedings consisitent with the Court's opinion. (Chevron USA Inc. v. Echazabal, 536 U.S. __ (2002))

IS *RAGSDALE* THE TIP OF THE ICEBERG?

By Deborah Crandall Saxe

Ms. Saxe chairs the labor and employment practice in the Los Angeles office of Heller Ehrman White & McAuliffe LLP. She was inducted as a Fellow of the College in 2000.

The penalty regulation at issue in Ragsdale is unlikely to be the only FMLA regulation struck down by the Supreme Court.

In *Ragsdale v. Wolverine Worldwide, Inc.*, 122 S. Ct. 1155 (2002), the United States Supreme Court reviewed for the first time one of the regulations adopted by the Department of Labor ("DOL") during President Clinton's administration to implement the Family and Medical Leave Act of 1993 ("FMLA"). The Court found the regulation to be invalid because it exceeded the DOL's authority. The DOL should review and revise the regulations it adopted during the Clinton years. If it does not, the decision in *Ragsdale* may be the first of many in which the Supreme Court invalidates an FMLA regulation.

The plaintiff in *Ragsdale* had worked at Wolverine for less than a year when she was diagnosed with cancer. The prescribed treatment involved surgery and months of radiation therapy. Under Wolverine's policies, she was entitled to, and received, seven full months of leave. The Company held her job open for the entire seven months and continued her health insurance (at its expense) during the first six months. When she asked for an eighth month of leave, the Company said she had exhausted her entitlement under the Company's plan and then terminated her employment when she failed to return to work.

Ragsdale filed suit under the FMLA, claiming that she had not yet taken any FMLA leave since Wolverine had never notified her that her absences were being counted against her 12-week FMLA leave allotment. This claim was supported by a FMLA regulation, 29 CFR § 825.700(a), which provides that if an employee takes medical leave "and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." Another FMLA regulation, 29 CFR § 825.208(c), makes it the employer's responsibility to give written notice to an employee on leave that it is counting the leave against the employee's FMLA leave entitlement.

Noting that the penalty regulation (29 CFR § 825.700(a)) punished an employer's failure to provide timely notice of the FMLA designation by denying it any credit for leave granted before the notice, even if the lack of notice caused no prejudice to the employee, the Court held it invalid because it altered the FMLA's cause of action in a fundamental way. An employee can prevail on a FMLA claim only if he or she can prove, as a threshold matter, that the employer violated 29 U.S.C. § 2615 by interfering with, restraining, or denying his or her exercise of FMLA rights. Even then, the employee is entitled to no relief unless he or she was prejudiced by the violation. The DOL therefore had no authority to adopt the penalty regulation, which attempted to alter this scheme by awarding an additional 12 weeks of leave to every employee whose medical leave was not designated as FMLA leave, thereby relieving the employee of the burden of proving any real impairment of FMLA rights and resulting prejudice.

The penalty regulation at issue in *Ragsdale* is unlikely to be the only FMLA regulation struck down by the Supreme Court. Another likely candidate is 29 CFR § 825.110(d), which provides, among other things, that an employer cannot deny leave to an employee who does not meet the eligibility requirements of 12 months of service and at least 1,250-hours of work in the past 12 months if, having received notice of the employee's need for leave, the employer failed to give timely (i.e. two business days, absent extenuating circumstances) notice to the employee that he or she was not entitled to FMLA leave. This regulation is particularly dangerous because the DOL also has taken the position that an employee can provide "notice of the need for leave" without mentioning the FMLA. If an employer is put on "inquiry notice" that an employee is potentially eligible for FMLA leave, it is the employer's obligation to inquire further to determine eligibility. At least one court already has held that an employer is put on inquiry notice by an employee reporting that he or she has to stay home because a child is "sick." See, e.g., *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995). If the employer renders an otherwise ineligible employee eligible by failing to give notice of ineligibility within two business days of being put on inquiry notice, large numbers of otherwise ineligible employees may be found eligible for FMLA leave.

In addition, many employers have chosen not to attempt to count FMLA-qualifying leaves of short duration, for instance, leaves of less than three working days, accepting the consequences of such failure (e.g., not being able to count the absences against the employee

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The court in Dormeyer noted that the regulation attempted to change the law, not interpret it.

***Ragsdale** (cont'd. from pg. 7)*

for disciplinary purposes and not deducting the time from the 12-week FMLA leave allotment) as justified by avoiding the administrative burden of trying to designate extremely short FMLA leaves. Because of this regulation, an employer that applies such a policy to ineligible employees runs the risk of changing their status from ineligible to eligible in many circumstances.

This regulation was held invalid by the Seventh Circuit in *Dormeyer v. Comerica Bank – Illinois*, 223 F.3d 579 (7th Cir. 2000). The court in Dormeyer noted that the regulation attempted to change the law, not interpret it. Because the employee did not work 1,250 hours in the 12 months preceding the leaves, she was not entitled to FMLA protections. Other courts have agreed with Dormeyer that the regulations invalid. *See, e.g., Brungart v. Bell South Telecomms., Inc.*, 231 F.3d 791, 796-97 (11th Cir. 2000), cert. denied, 532 U.S. 1037 (2001); *Wolke v. Dreadnought Marine, Inc.*, 954 F. Supp. 1133, 1135 (E.D. Va. 1997); *McQuain v. Ebner Furnaces, Inc.*, 55 F. Supp. 2d 763, 765 (N.D. Ohio 1999) (Congress clearly spoke to eligibility rules; regulation impermissibly contradicts clear Congressional intent). *But see Miller v. Defiance Metal Prods., Inc.*, 989 F. Supp. 945 (N.D. Ohio 1997) (expressly finding 29 CFR § 825.110(d) to be a reasonable interpretation of the FMLA).

Another part of the same regulation (29 CFR § 825.110(d)) provides that an employer that mistakenly approves an ineligible employee's request for FMLA leave can never challenge the employee's eligibility. It says: "If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility."

29 CFR § 825.110(d). This part of the regulation was held invalid in *Woodford v. Community Action of Greene County, Inc.*, 268 F.3d 51 (2d Cir. 2001). The plaintiff in Woodford was the director of the organization's Head Start Program. The employer approved her request for FMLA leave even though she had worked only 816.5 hours during the 12 months preceding her request for FMLA leave. It advised her of her "key employee" status when it approved the leave and later gave the required notice of its intent not to reinstate her. She filed suit challenging the employer's refusal to reinstate her and, citing the "no-challenge" regulation, argued that the employer was precluded from asserting she was not entitled to the leave. The court in *Woodford* found the regulation invalid because it made eligible under the FMLA employees who did not meet the statutory eligibility requirements.

A study presented at an April 11, 2002, Congressional hearing reported that no less than 11 FMLA regulations have been challenged in federal courts in 58 cases. Most of the lawsuits challenging the rules have been filed in the last three years and employers are winning the majority of them. The DOL should revise its interpretations of the FMLA to reflect Congressional intent.

The Newsletter Committee continues to strongly encourage all Fellows to submit for publication any honors, accomplishments or other notable information.

SPOTLIGHT ON FELLOWS

Fellow and Past President Vicki Lafer Abrahamson was recently named one of Chicago's thirty tough lawyers. The March 2002 edition of *Chicago* magazine describes Ms. Abrahamson as having "built a national reputation for pressing her clients' claims through mediation and negotiations, or, if necessary, by going to trial." The article classified the collection of attorneys as "an all-star team of the fiercest legal talent in town." A past president of the College and current member of the Board of Governors, Ms. Abrahamson practices employment law for plaintiffs and is a name partner at Abrahamson Vorachek & Mikva.

Fellow Emeritus Bernard F. Ashe received the Nat Weinberg Memorial Award from Wayne State University, "for his unfailing work, service and dedication to the labor movement and social justice." Mr. Ashe, a Fellow Emeritus elected to the inaugural class of the College, served for years as General Counsel to the New York State United Teachers Union.

Fellow and Board of Governor's Member Elliot Bredhoff, Fellow Emeritus Jerome "Buddy" Cooper and Fellow Judith Vladeck were honored at a special session of the AFL-CIO Union Lawyers Conference held April 28th in Chicago, Illinois. The session was followed by a reception honoring all veteran members of the AFL-CIO Lawyers Coordinating Committee.

Fellow Emeritus H. Stephan Gordon passed away May 8th at his home in Hartford, Connecticut. Mr. Gordon served as Associate General Counsel, Division of Operations, at the National Labor Relations Board from 1961 to 1971. After leaving the Board, Mr. Gordon served as Chief Administrative Law Judge at the US Department of Labor, first General Counsel of the Federal Labor Relations Board and General Counsel of the National Federation of Federal Employees. He was inducted into the College as a Fellow Emeritus in 1997.

Congratulations to ***Fellow and Founding Governor A. John Harper, II*** of Fulbright & Jaworski on his son, A. John Harper, III, practicing labor and employment law at Haynes and Booth in Dallas, Texas.

Fellow Leonard Page, former General Counsel of the National Labor Relations Board, former Associate General Counsel of the UAW and grandfather writes to advise he has now retired to build a log home on Twin Lakes in northern Michigan. We anxiously await the next chapter.

COLLEGE MEMBERSHIP AND DIVERSITY

By Stephen P. Pepe, President

The College, now in its seventh year, has grown to over five hundred members of whom 317 are management lawyers, 96 union lawyers, 45 plaintiffs lawyers and 52 neutrals. Of this number, based on a review of the names of Fellows approximately 447 are men and 63 are women. The College does not collect statistics for people of color. The comparative percentages of the College Fellows are slightly better than the comparative percentages for the ABA's Labor and Employment Law section. As one would expect with a requirement of twenty years of practice, the age of Fellows is quite senior, with approximately forty percent reaching the seventy-year Emeritus status within the next ten years.

At its May 22, 2002 meeting, the Board of Governors had an extensive discussion of our membership and its diversity. While we believe we have done a satisfactory job to date, there is room for improvement. The Board of Governors discussed and approved a number of initiatives to address our concerns about this issue. However, it can not be done by the Board of Governors alone and we solicit and encourage the Fellows to nominate for the Class of 2003 qualified women and people of color to be Fellows. With your cooperation we are confident that we can improve our efforts. While our percentage of plaintiff, union and neutral Fellows compares favorably with the Section, we also want to encourage Fellows to nominate in 2003 their colleagues and friends from these areas as well. Finally, the Board approved an alternate fee structure which would set the annual dues at fifty percent of the yearly amount to encourage those Fellows who retire from the practice of law to remain active in the College. Fellows who are not otherwise gainfully employed and are retired from the practice of law but not yet of the age to qualify for Emeritus status will be eligible for this status. Please contact Susan Wan in the College's office if you would like further information or have any questions.

The Board looks forward to the Fellows' cooperation and assistance in this membership endeavor and we are confident that together we can improve our efforts in this area.

Weber Lecture *(cont'd. from pg. 1)*

After a lively exchange of questions and answers, those in attendance adjourned to a pleasant reception. The College thanks the members of the Chicago Host Committee, Max G. Brittain, Jr., Christine Godsil Cooper, Anthony J. Crement, Joel A. D'Alba, James C. Franczek, William J. Holloway, Martin H. Malin, Ralph A. Morris, L. Steven Platt, Joseph H. Yastrow, for their efforts in this very successful Fourth Annual Lecture.






Newsletter Staff

Donald P. MacDonald, Editor

Edward A. Lenz, Contributor
Paul D. Myrick, Contributor
Deborah Crandall Saxe, Contributor

Susan Wan, Executive Director

The College of Labor & Employment Lawyers
1050 Connecticut Ave., NW
Suite 900
Washington, D.C. 20036
(202) 955-8225 Telephone
(202) 467-0539 Facsimile
www.laborandemploymentcollege.org