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LABOR: ALERT! MARTIANS ARE COMING!

By David "Spaceman" Farkas

We live in a time when nothing can shock us anymore. For better or worse, every day we read of events that would have raised more than the eyebrows of our parents, but just don't seem to affect us. The same is true in the legal world. Practitioners barely give a passing glance at decisions that would have once been unthinkable. Experience gives one a sense of "argued there, litigated that," such that one is rarely surprised at anything he sees in the law. I, too, thought I'd seen everything – until the little green Martians landed on my desk.

It's true. An eye-popping legal update recently came to my attention regarding an arbitration over a union grievance, where an arbitrator ruled that a bus driver deserved the written warning issued to him by his employer, for sharing his theories about aliens with passengers. The case began innocuously enough, with a woman riding a bus. While enjoying her ride, she suddenly received an unusual request from the driver. The driver asked the passenger to visit his website, while at the same time handing her a card with the website's address, and a picture of a rocket ship on it.

The woman dutifully visited the driver's site, where she encountered a photograph the driver had apparently taken during a flight from California to Michigan. The photo contained images which the website claimed were of a fetus, a white dove, a black calf, a "spaceman," a skeleton in a black square, and a religious figure with a horn protruding from his head. The driver theorized, on the website, that the images were created by an

intelligence much higher than Man, and "may be connected to Martian theory."

An investigation revealed that the driver had discussed his theories of alien life with at least two other passengers, who, like the woman discussed above, felt disturbed. The employer issued a written warning to the driver, instructing him to keep out of the passengers' space. (Ed. – get it?) The union grieved, however, contending that the driver was neither rude nor discourteous, and thus did not deserve the warning.

At arbitration, arbitrator Debra M. Brodsky agreed with the employer. She held that making passengers uncomfortable by discussing unnatural phenomena that could have been the result of some higher intelligence is a form of discourtesy. Astutely, she noted that riders could rightfully fear that the driver

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This publication is intended to inform clients and friends about labor and employment matters of current interest. The matters included were not given exhaustive treatments due to space limitations. This abridged information should not be construed as legal advice and is not a substitute for legal counsel. This publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship.



EMPLOYMENT: COURT EASES DEFENSE BURDEN IN DISCRIMINATION CLAIMS

By David “Sweet Sensation” Farkas

Just before going to print, a flurry of case summaries belatedly appeared on our desk, summarizing the recent decisions from the two-week period before. We are glad this summary arrived so late, as we are now able to bring to your attention an important ruling by Judge Celebrezze from the Cuyahoga Court of Appeals, an influential state court.

The case concerns the Cleveland powerhouse, International Steel Group (ISG), formerly known as LTV Steel. An individual was hired in the position of electrical supervisor, a salaried position. He was interviewed and hired by two other supervisors, Dave Rupar and Terry Fedor. During the first few months of his tenure, the appellant reported that he was uncomfortable with certain portions of his job, as his background was in traditional electrical work, not instrument controls or computer assistance. As a result of these conversations, Rupar and Fedor hired a new person for the supervisor position, and demoted the appellant to another, lower-paying job dealing solely with electrical work.

The company then hired a 38-year-old man for the position, but as he voluntarily left that position after only a few weeks, the company then hired a new individual. The appellant subsequently filed an action alleging age discrimination. (As detailed elsewhere in this newsletter, age discrimination claims cover workers 40 and over, and thus hiring someone less than 40 years of age can, under our law, give rise to an inference of discrimination.)

The trial court granted summary judgment to ISG, and the appellate court agreed. The court found it significant that the appellant had both been hired and fired by the same two supervisors, Rupar and Fedor. Federal courts have referred to such a factor as the “same actor” inference, i.e. a lack of discrimination may be inferred where the same individual hired and fired an employee. As the court cogently noted, “The idea that the same actors, Fedor and Rupar, would engage in a practice of hiring persons of a protected class and then demoting them a few months

later because of that protected class, is illogical, uneconomical, and unsupported by the evidence presented to the court in this case.”

This decision is significant because, while federal courts have used the same actor test before, this appears to be the first appellate court in Ohio to adopt the reasoning in a state action. Moreover, there is no reason to limit the holding of the case to age discrimination actions. The logic that a person would not be hired and fired by the same individual for discriminatory reasons should obtain whether the alleged discrimination is based on age, race, sex, or any of the other “protected classes” covered by the law. Thus, an important legal defense has been developed, with the imprimatur of a respected Court and Judge behind it.

Our attorneys regularly review state and federal decisions that might impact your company. Contact our employment law division for more information.

WORKERS' COMPENSATION: SUPREME COURT CLARIFIES DATE OF INJURY ON INSTALLATIONS

By RBS Staff

Imagine a large food-processing company, using massive pieces of machinery as part of its daily operations. At least one of the machines has a rotator coring knife, which is used to de-core vegetables such as cabbage. In 1970, when the machine was installed, no law in Ohio mandated that power knives, such as a rotating coring knife, be fitted with a protective guard. Thirty years later, a specific safety requirement has appeared in the law, requiring all such power knives to be guarded. Today, as you read this article, an employee gets injured on the unguarded coring machine knife. Quickly, now – what date governs the employer’s liability in this case? The date of the machine’s installation? Or the date of injury? The practical difference, of course, is whether an injury on an unguarded machine constitutes a violation of a specific safety requirement (VSSR). Clearly the VSSR will only apply if the date of injury is used, as there was no guard requirement in place when the machine was installed.

The Ohio Supreme Court set out to answer this question in the recent decision of *Arch v.*

Industrial Commission. The facts of the case are substantially similar to the facts outlined above. (The narrative actually begins with the memorable line, “Appellee Herzo Canning Company, Inc. turns cabbage into sauerkraut.”) The case arrived at the High Court by way of an appeal from the Industrial Commission, which denied the VSSR application. In its analysis, the Court noted that a claimant’s workers’ compensation rights are generally governed by the law in effect on the date of the injury. However, the Court also noted that the law provides an exception when the injurious device is an “installation” or “construction.” In such cases, the date of injury is not controlling. Previous courts have reasoned that the exception was motivated by the legislature’s recognition of the practical difficulties of requiring an employer to remove massive pieces of machinery every time the law is amended. The financial outlay and interruption to normal business operations could well be ruinous, as older, yet perfectly functional pieces of machinery would have to be replaced simply to remain in compliance with the changing law.

Using this analysis, the Court noted that such theoretical hardships would not apply in regard to less cumbersome tools, devices and equipment used daily in workshops and factories. Ultimately the Court held that size, relative permanence, and immobility are key components in defining an installation or construction. Thus, the Court concluded that the Industrial Commission had properly exercised its discretion in determining that the coring machine in this case was, in fact, an installation, and thus not subject to the general date of injury principles.

It is important for manufacturers in particular to bear this ruling in mind with regard to their physical plant. While the law does provide exceptions for certain pieces of machinery, others do not enjoy the same degree of latitude. Employers must take the factors described above into consideration when faced with ever-changing safety requirements.

The Workers’ Comp Unit keeps constant vigilance over these changes and more. Our attorneys are standing by to answer any questions you may have.

EMPLOYMENT LAW BREAKFAST BRIEFINGS

*Presented by Lynn Schonberg & David Andrews, in conjunction with
Jane Plank of HR Department Unlimited*

Location: 6000 Freedom Square Drive, Independence
In the Ground Floor Amphitheatre

Time: 8:30 a.m. to 10:30 a.m.

Registration: Please contact Melody at (216) 447-1551 for information, or register online at www.rbslaw.com
(No cost to RBS clients and HRDU Members)

September 22, 2005 – Working with the Disabled Employee

“I need the company to buy an expensive machine to help me do my job.” “I need to work from home three days a week so that I can deal with my disability.” These dreaded requests leave many companies wondering how far they must go to comply with an employee’s accommodation request. This session will cover the entire accommodation process, including which employees must be accommodated, to what extent a request for an accommodation must be granted and the employers’ rights in the accommodation process.

December 1, 2005 – HR Legal Update – What’s Next for Employers?

The only certainty in the laws governing employees is that there will be change. This annual year-end review will bring you up to date on all the employment law related developments of 2005.

RBS SPEAKING ENGAGEMENTS

Lynn Schonberg and David Andrews will be featured speakers at a one-day seminar called “Payroll Basics in Ohio,” presented by Lorman Education Services. The event will take place in Cleveland on July 14, 2005, and is designed for payroll professionals, CPAs, accountants, human resource managers, bookkeepers, controllers and CFOs.

Please call Melody at (216) 447-1551 for more information.

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ABC, NORTHERN OHIO CHAPTER SEMINARS

ABC conducts an ongoing series of safety training for employers, including the popular OSHA 10-Hour and OSHA 30-Hour classes. All training participants must register in advance with Jennifer at (440) 717-0389.

Location: All training will be held at the NOC-ABC Training Center, 9255 Market Place West, Broadview Heights, Ohio.

ABC also offers seminars, apprenticeship, and training for a variety of crafts. Upcoming Cleveland-area courses offered for 2005 include the following:

- 32 Hour medical-gas piping instruction, NITC approved.
- Electrical 10-hour Code (Approved by OCILB for ten hours of Continuing Education credits) generally held between 7:00 a.m. to 5:30 p.m.

Many of these programs and more are offered at a special discounted rate for ABC members. Please call Jennifer for dates and more information.

SAFETY COURSES ARE NOW AVAILABLE ONLINE THROUGH ABC

Employees can take the course from any computer – at work, home, or the library. This can result in significant savings to companies, in both time and travel costs!

DON'T FORGET THE BIG ABC GOLF OUTING ON AUGUST 19!!!

Jennifer has all the information for this annual event – don't miss it!!

EMPLOYMENT: GREEN LIGHT GIVEN FOR “DISPARATE IMPACT” AGE DISCRIMINATION SUITS

by David T. Andrews

On March 30, 2005, the United States Supreme Court decided that employers may be sued under the Age Discrimination and Employment Act (ADEA) for employment decisions that have a disparate impact on older workers, defined as workers 40 years or older. What this means is that plaintiffs can file lawsuits alleging discrimination if an employer takes any action, regardless of intent, that adversely affects older workers. In other words, you can be guilty of discrimination without even knowing it.

On one level, the ruling makes it far easier to bring a lawsuit under the ADEA, as it removes the requirement that an employee actually prove that an employer deliberately discriminated against older workers. In that regard, the new ruling brings the ADEA in line with the Civil Rights Act of 1964, for which the Court has also held that no proof of intent to discriminate is required.

On the other hand, the decision also requires the *employee* to prove the questionable employment decision was not based on “a reasonable fact other than age.” The Civil Rights Law, as currently interpreted, places the burden on the *employer* to prove that the action was based on “business necessity.” Thus, in age discrimination cases, the burden of proof remains on the employee. This is a significant development because, as any practitioner can tell you, the burden of proof is often the most difficult hurdle in proving any case.

The legal community’s response to the Court’s decision has been mixed, predictably enough. Some attorneys have noted that the new decision will likely make it harder to bring ADEA lawsuits, as the burden on the employee is a very hard standard to prove. Other attorneys, by contrast, have stated that the new decision gives plaintiffs’ attorneys a weapon that they did not previously have. Before the decision, many age discrimination cases alleged anecdotal evidence of age bias, such as a manager’s remark about bringing in “new blood” or “getting rid of dead wood.”

Now, employees can file such lawsuits without such “smoking gun” statements, merely by showing evidence, statistical or otherwise, that a particular decision had a disparate impact on older workers.

The Court’s decision also settled a split among the nation’s appellate courts, where some courts had already been allowing ADEA cases to proceed without proof of an intent to discriminate. However, those courts had also been placing the burden of proof on the employer. Thus, the Supreme Court decision affirms those Circuit courts but establishes a harder standard than they were using hitherto.

The Court also clarified that the ADEA allows more latitude for practices that disparately affect older workers than for practices that disparately impact women or minorities, covered by the Civil Rights Law. The Court reasoned that “age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual’s capacity to engage in certain types of employment.”

Regardless of whether the ruling prompts a new rush of age discrimination complaints, company managers and human resource departments will have to be wary of this new decision. The decision is especially problematic for large employers, who generally have rich databases for statisticians to study in search of “proof.” Managers must look at practices such as transfers, promotions, pay increases, and reductions in force, all of which can have an unintended impact on workers 40 and over. It would be advisable for employers to conduct a thorough self-audit of their policies. If a policy does in fact have a disparate impact on older workers, employers would be advised to document the business reasons for the policy.

Employment discrimination claims continue to be the number one source of litigation in the country. Contact David, Lynn Schonberg, or Jerry Cline to learn more about how you can protect your company.

self-insured [corner]

The Workers’ Compensation Resource Network is an association for self-insured employers in Ohio. The purpose of the association is to provide a unique forum, opportunity and resource for the educational benefit of self-insured employers.

The Resource Network dialogues ideas, resources and information with member peers by identifying and addressing issues which self-insured employers face. This includes engaging in dialogue focused on outcomes that enhance self-insured administration. Some topics thus far covered include the development and maintenance of a transitional work program, ergonomics, the importance of written job descriptions, the economic impact of business failures on self-insured employers, and medically managing claims for self-insured employers.

If you are a self-insured company, consider becoming a member of the Workers’ Compensation Resource Network. Members pay no additional cost for two representatives from your company to attend regularly scheduled seminars and meetings.

Call Megan Geist at (216) 447-1551 x165 for additional information and membership details.

WORKERS' COMPENSATION: UPDATE ON WORKERS' COMPENSATION REFORM

by Jennifer Bennett

Ohio Senate Bill 7, which proposes numerous workers' compensation changes outlined in our prior newsletter, has been passed by the Senate. On June 2, it was introduced to the House of Representatives. In the House, the Bill has been assigned to the State Government Committee and hearings will be held to discuss any amendments

to the proposed Bill. As we go to press, the Governor has not indicated whether he will sign the Bill into law or not.

If you should have any questions regarding the status of the Bill, please feel free to contact any of the workers' compensation attorneys at Ross, Brittain & Schonberg.

Alert! Martians are Coming! *continued from page 1*

might perceive "odd formations" while driving the bus, a safety hazard. Moreover, the employer had told the grievant on two separate occasions before formally warning him that it was inappropriate to discuss his theories with his passengers.

Although Martian theory discussion may not be high on the list of employer concerns, this arbitration demonstrates the lengths some unions will go to protest what they feel to be unfair treatment. It is also revealing that the arbitrator based her decision in part on the fact that the employer had issued warnings before. This underscores the need to meticulously document all warnings to employees, even verbal warnings. Employers would do well to consider our little green friends when the need for discipline arises in the future.

The Labor Department of RBS seeks to protect you from harm, extraterrestrial or otherwise. Please contact Alan Ross or David Farkas for more information.

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