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EMPLOYMENT: Virtual Harassment in the Digital Workplace

by Ryan T. Neumeyer

Employers in the digital age need to understand and appreciate that communications through the internet, e-mail, instant messaging and text messaging can constitute actionable harassment in the work place. This may even hold true when an employee makes harassing comments while on his own time.

In addition to e-mail and the internet, which employers have had to keep an eye on for some time, social media websites, such as Facebook and Twitter, have only made things more complicated for employers.

Facebook is a website that allows a user to post pictures, messages, links and other similar content to a page dedicated solely to that user. Typically, a user's posted content can only be viewed by other individuals who the user has accepted as a virtual "friend." Once this "virtual friendship" has been established, the two users are free to view and comment upon each other's posted content. Similarly, Twitter is a website that allows a user to post "tweets" (a brief written message) or other content to a page, again dedicated solely to that user. "Followers" of the user may view the content and choose to reply with posted messages or other content.

A message posted on an employee's Facebook page or "tweeted" by an employee has the potential to create a harassment claim. Employers should treat all conduct similarly, whether it be person to person or through some digital medium, by applying a uniform anti-harassment policy.

Also keep in mind that conduct does not have to be sexually explicit to constitute sexual harassment. For example, a female employee has a male co-worker, who, after overhearing a previous comment she had made to a female co-worker about buying a new dress, sent her a message on her Facebook page. The male co-worker tells the female employee that he cannot wait to see her in the dress and he is sure she "will look amazing in it." Although the female employee feels uncomfortable with this remark, she does not report the conduct, but tells the male co-worker that she thought the comment was inappropriate.

The male co-worker continues to send Facebook messages that the female employee feels are inappropriate, but are not sexually explicit on their face. The female employee finally "de-friends" the male co-worker on Facebook (ends their virtual friendship) and reports his conduct to human resources. All of the messages were sent by the male co-worker outside of work hours.

At this point, human resources must conduct a full investigation under its anti-harassment policy. Although the conduct took place outside of work and through a social media website, the employer still has an obligation to determine whether or not harassment occurred. If the employer determines after the investigation that harassment occurred, it must discipline the male co-worker, or it may face liability for failing to do so.

Continued on Page 2...

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 relationship.

EMPLOYMENT: Virtual Harassment in the Digital Workplace (CONTINUED)

In order to prevent a situation like the above, employers should consider adopting a social media policy, and if they have not done so already, an internet and e-mail usage policy. The social media policy should express the employer's view, which respects employees' right to express personal opinions when using personal social media websites and does not retaliate or discriminate against employees who use social media for lawful purposes, but rather discourages

employees from posting messages that are detrimental to the employer and violate general professional conduct. Furthermore, the social media policy should directly state that employees must not use social media to harass, threaten, defame, libel, embarrass, disrespect, or offend co-workers, customers and the like.

While an employer cannot control what an employee chooses to post on their own social media site, an

employer can discipline an employee for posting inappropriate messages that are harassing or otherwise casting the employer in a poor light. If you would like to discuss the issues surrounding the proliferation of social media and/or develop a social media policy, please do not hesitate to contact Ryan Neumeyer or Lynn Schonberg for more information.

WORKERS' COMPENSATION: The Anatomy of a Workers' Compensation Trial

by Scott W. Gedeon

On occasion, a workers' compensation case will make its way to trial in a court of common pleas. The most common form of trial is a jury trial, where the jury will determine if the injured worker, known as the plaintiff, has the right to participate in the workers' compensation fund for the specific medical and/or psychological conditions sought by the plaintiff.

The right to a jury trial is enjoyed by both injured workers and employers.

However, a party may waive their right to a jury trial and proceed to a bench trial. In a bench trial, there is no jury, and the judge decides whether the plaintiff has established the right to participate in the workers' compensation fund.

A jury trial begins with jury selection. The goal of jury selection is to assure that an impartial jury of eight citizens is selected to comprise the jury. Both the judge and counsel for the parties may question the prospective jurors to identify their backgrounds, any bias, and to determine their suitability for service as a juror.

After the jury is selected and sworn in by the judge, each party will present its opening argument. As the plaintiff has

the burden of proof at trial, the plaintiff will give its opening argument first. The purpose of opening argument is to give the jurors a preview of the evidence they are expected to see and hear during trial. Good trial attorneys will use both jury selection and opening argument as a way to begin relating their theory or theme of the case to the jurors.

After opening arguments are completed,



the plaintiff will begin by presenting its case in chief by calling the witnesses that the plaintiff wishes to have testify. Witnesses may include the plaintiff, the plaintiff's doctors, co-employees, supervisors, or other individuals whose testimony will be helpful in establishing the plaintiff's case. After each witness testifies on direct examination, the employer may cross-examine the witness in order to tell the employer's side of the story or to cast doubt on the credibility of the witness.

After the plaintiff has presented its case in chief, the employer will then have the opportunity to call its own witnesses. Again, these may be medical doctors or the plaintiff's supervisor or coworkers.

After the employer completes the presentation of its case, the exhibits used

during trial (medical records and other relevant documents) will be admitted into evidence for the jury's review during their deliberations.

The parties will then move to closing argument. At this point, each side, beginning with the plaintiff, will have the opportunity to argue the significance and meaning of the evidence heard at trial.

After closing arguments are concluded, the jury will receive the instructions of law which are prepared by the judge. The jury will be told what the law is on each issue presented to them and how to conduct their deliberations. The jury will then retire to the jury room where it will deliberate and reach a determination as to whether the plaintiff has established the right to participate in the workers' compensation fund. If six of the eight jurors agree that the plaintiff has established that right, by the preponderance of the evidence, then a verdict will be rendered for the plaintiff, giving the plaintiff the right to receive workers' compensation benefits for the conditions sought at trial. If six jurors cannot agree that the plaintiff has established the right to participate by the preponderance of the evidence, then a verdict will be rendered in favor of the employer.

If your company has questions regarding a specific court appeal or workers' compensation litigation in general, please do not hesitate to contact Scott Gedeon or any of the workers' compensation attorneys at RBS.

WORKERS' COMPENSATION: Attorney Representation at Hearings before the Industrial Commission of Ohio

by Meredith L. Ullman

As a reminder to all Ohio employers, there is a significant difference between attorney representation and representation by a third party administrator (TPA) at hearings before the Industrial Commission of Ohio.

In December 2006, the Supreme Court of Ohio held that a TPA could participate in the defense of workers' compensation claims before the Industrial Commission of Ohio, but only in a very limited capacity.

The Supreme Court held that a TPA may communicate an employer's area of concern to the hearing officer at hearing and present a list of facts or a summary prepared by the employer. However, a TPA cannot examine or cross-examine the injured worker, the employer or any witnesses, which is often an integral part of defending a contested claim. A TPA may not freely comment upon

opinions with respect to the evidence at hearing and the credibility of witnesses. Most importantly, a TPA is completely precluded from making any type of legal argument at hearing and may not cite to or interpret administrative rulings or court decisions. A TPA is not permitted to provide legal advice to employers.

The Supreme Court's decision in 2006 effectively curtailed the role of a TPA in defending contested claims in hearings before the Industrial Commission of Ohio. Over the past four years, the practical application of the Supreme Court's decision has become clear. In order to be properly represented and have your company's full rights asserted, you need to be represented by attorneys in hearings before the Industrial Commission of Ohio.

While a TPA offers extremely valuable administrative services to employers,

hearings before the Industrial Commission should always, without exception, be handled by attorneys. Due to the restrictions imposed on a TPA by the Supreme Court, an attorney's presence at hearings is more important now than it has ever been.

Representation by Ross, Brittain & Schonberg guarantees that an attorney will protect your company's interests at hearings before the Industrial Commission of Ohio. Do not hesitate to contact Meredith Ullman or any of the workers' compensation attorneys at RBS for assistance in defending a problematic workers' compensation claim.

FIRM NEWS: Ross, Brittain & Schonberg is Pleased to Welcome Michael J. Reidy to the Firm



Mike Reidy is a 1978 graduate of Case Western Reserve School of Law. He began his workers' compensation practice as an in-house administrator for one of Cleveland's Fortune 500 companies. He entered private practice in 1990 and joined Ross, Brittain & Schonberg in 2010. His practice is 100% workers' compensation defense, representing employers before the Industrial Commission of Ohio and in all Ohio courts.

He is a member of the workers' compensation sections of the Ohio and Cleveland Bar Associations. Including workers' compensation claims for state-funded and self-insured employers, Mike has tried upwards of 60 cases to jury verdict. At the request of other practitioners, Mike has conducted several private mediations in workers' compensation matters and is a past member of the Board of Mediation for the Diocese of Cleveland.

In addition to representing employers, for 15 years he was a state-funded employer himself owning a separate business with 50 full and part-time employees. He has a high degree of expertise defending employers before juries and litigating violations of specific safety requirements. He has been a frequent speaker on workers' compensation issues and has participated in numerous seminars on the topic. Mike is married with three children.

- * Practice Areas: Workers' Compensation
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WORKERS' COMPENSATION: The Industrial Commission of Ohio Initiates Video Hearings

by Anthony A. Baucço

"Roads? Where we're going, we don't need roads." - Dr. Emmett Brown, *Back to the Future*

As any fan of the 80's classic *Back to the Future* knows, beloved scientist and inventor Doc Brown is alluding to the fact that we all have flying cars in 2015, and roads are no longer a necessity. Unfortunately, I did not travel to the local Industrial Commission office today in my flying DeLorean. That technology seems to be at least five years away (by *Back to the Future* standards, of course). Therefore, I still need those outdated roads to get to my hearings. Hearing officers for the Industrial Commission of Ohio, on the other hand, have recently been given the opportunity to forgo roads and preside over hearings via video conferencing technology. Doc Brown would be proud.

In an effort to increase efficiency and save hundreds of thousands of dollars annually in Ohio workers' compensation premiums, the Industrial Commission of Ohio recently initiated video hearings in June. The first video hearing was held at the Portsmouth office of the Industrial Commission on June 24, when a hearing officer in Columbus presided over a hearing in Portsmouth. Of course, the parties in Portsmouth attended in person. Video hearings are now being held three days a week at the Portsmouth office. In July, video equipment was installed in the Logan, Cambridge and Cincinnati offices and video hearings began in those offices as well. It appears that the Mansfield and Lima offices will be the next offices to have video equipment installed and have video hearings conducted.

So what, exactly, is a video hearing? As per the Industrial Commission of Ohio, a video hearing is the same as a regular Industrial Commission hearing, with one exception. Instead of a hearing officer physically sitting at a desk in the hearing room, there is a video monitor in his place. The hearing officer is visible on the video

monitor to all parties in the hearing room. The hearing officer is able to see and hear everything that takes place in the hearing room and is able to easily communicate with all parties.

The Industrial Commission of Ohio has estimated that the use of video hearings, in place of hearing officers traveling those roads we talked about, will save the Industrial Commission more than \$2 million dollars in travel expenses over the next ten years.

Clearly, there are many other benefits to these video hearings, most of which are realized by the hearing officers. Hearing

attorneys view the video hearings as being awkward or impersonal in nature, noting that it is difficult to effectively communicate your position to a hearing officer who is not there in person. Some attorneys also question the amount of "control" a hearing officer has over a video hearing, in the event that parties become disruptive or other problems arise. Additionally, attorneys must now be sure to arrive extra early to video hearings, as the sign-in sheet must be sent to the hearing officer conducting the hearing. New evidence or reference packets brought to the video hearing by an attorney must likewise be sent to the hearing officer prior to the video hearing being conducted.

These concerns, of course, are fairly understandable reactions to new technology. As time goes by, these video hearings will hopefully become more comfortable for attorneys, our clients and hearing officers alike.

Last, but certainly not least, due to occasional glitches in this new technology, some hourly dockets have been running behind. Worse yet, whole hourly dockets have been cancelled due to problems with the equipment and/or the office itself. Again, with time and experience, these

"technical difficulties" will most likely become a thing of the past.

In short, we know one thing for sure – video hearings are here to stay. At the end of the day, it is our job, as your attorneys, to adjust and adapt to this new technology and continue to offer you, our clients, the excellent legal representation that you have come to expect from us.

Questions or concerns about the new video hearings? Please do not hesitate to contact Anthony Baucço or any of the workers' compensation attorneys at RBS to discuss this new technology or any other workers' compensation matter that's on your mind.



officers in one office can now easily handle hearings for another office, and even handle the dockets for multiple locations in one workday. As per the Industrial Commission of Ohio, this will spread the workload evenly and allow for quick docket reassignments due to hearing officer illnesses or emergencies. Productivity should also increase, as hearings may be held during the time that hearing officers would have spent traveling across Ohio. Additionally, hearing cancellations due to our notoriously bad winter weather in Ohio should decrease, as hearing officers will no longer have to travel to other offices.

Reaction to these video hearings by Ohio attorneys has been mixed, at best. Some

LABOR: Ohio Supreme Court Allows Bid Costs as Damages for Wrongfully Rejected Bidders on Public Projects

by Nick A. Nykulak

On July 21, the Supreme Court of Ohio issued a decision finding that bidders on public improvement projects can recover their bid costs as damages if they prove that they were wrongfully denied a public construction contract in violation of state competitive bidding laws. However, before bid costs are available as damages, bidders must first promptly seek injunctive relief from a court. In other words, bidders must first petition a court to stop the award of the public construction contract or stop the construction itself. If injunctive relief is then denied by a court, bid cost damages are available to the complaining bidder if that bidder later proves that it was wrongfully denied the contract or that the contract was awarded to another bidder in violation of competitive bidding laws. Bid cost damages can include all labor, materials and other expenses incurred by the bidder in submitting its bid to obtain the public contract.

Injunctive relief is very difficult to obtain for bidders in public construction cases due to policy concerns regarding the adverse affects imposed on the taxpaying public in general, such as increased construction costs caused by the delays in construction that result from the time it takes to complete injunctive relief proceedings. Often times, injunctive relief requests are denied on this public policy basis.

Several years ago, the Supreme Court of Ohio held that wrongfully rejected bidders on public projects could not recover lost profits as damages when contracts were awarded to other bidders in contravention of competitive bidding laws. The



Supreme Court held that punishing government entities by allowing bidders to recover lost profits in effect punishes the very people competitive bidding laws were intended to protect – Ohio taxpayers. In allowing bid costs as damages, the Court has struck a fine balance between providing a remedy to construction contractors against public officials acting in dereliction of public bidding laws, while still protecting the interests of Ohio taxpayers.

The Supreme Court correctly recognized that without a meaningful remedy, bidders

who believe public contracts will not be awarded fairly simply will not bid, reducing the overall size of the bidding pool, thereby increasing construction costs to Ohio taxpayers. Simply put, without some sort of penalty, there is little deterrent for a public entity to comply with competitive bidding laws.

More so, by allowing bid costs as damages, the Supreme Court has also guaranteed that bidders who are wrongfully denied public contracts get “their day in court.” Many times, public officials escape liability and exposure from wrongful acts by arguing in public construction cases that the case was “mooted” by the start of construction or by an award of the contract to another bidder. Typically, a case is “moot” and will be dismissed when a court can award “no effectual relief whatsoever” to the plaintiff. By allowing bid costs as damages, the Supreme Court has guaranteed that the merits of these construction cases will be heard, exposing any and all wrongful acts committed by public officials.

If you have any questions or concerns about this article, or if you need additional information regarding competitive bidding laws or the requirements for awarding public construction contracts, please feel free to contact Nick Nykulak or Alan Ross.

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WORKERS' COMPENSATION: Beware of Employee Misclassification When Using Independent Contractors

by Michael J. Reidy

Although many employers may currently be experiencing an uptick in their businesses, the uncertainty surrounding the direction of our country's economy remains. On top of the already-recognized economic uncertainty, a new incentive to stay "downsized" is the passage of health care reform. The ever-increasing cost of health care has always been a major consideration for employers; however, it is heightened by new penalties to be imposed when employees opt out of company-sponsored programs or when employers fail to provide affordable health insurance to employees. These penalties may run as high as \$3,000 per employee.

An increasing number of employers, especially manufacturers, are turning to temporary staffing agencies to meet their manpower needs and avoid the cost and uncertainty of a permanent hire. Other businesses have addressed the issue by exploring or expanding independent contractor relationships. Workers' compensation premium, unemployment tax, health insurance, Medicare, and Social Security can all be avoided. It is therefore not surprising that Washington expressed its displeasure with the most recent unemployment numbers throughout the country, while continuing to pump federal dollars into the economy.

Pending legislation, including the Employee Misclassification Prevention Act and the Taxpayer Responsibility, Accountability and Consistency Act, present landmines for companies who use temporary staff and independent contractors by imposing even more penalties upon companies who misclassify their employees, including the forfeiture of favorable tax treatment. Additionally, the misclassification of employees is being scrutinized by the Plaintiffs' Bar.

Twenty-thousand FedEx drivers have filed 63 consolidated class action lawsuits alleging they have been misclassified as independent contractors. Should they be successful, the damages could be monumental.

If you use independent contractors, beware; an understanding between the company and the worker and the label of "independent contractor" is not enough. When the independent contractor issue is raised as a defense by an employer (for example, in a workers' compensation claim), the dispositive question is whether



the employer has retained the right to control the manner and means of the work. If the parties believe they have established the relationship but the right to control the manner and means of the work is left with the person for whom the service is performed, an employer/employee relationship continues to exist. Accordingly, the issue is decided by examination of the evidence of control or a lack thereof. Relevant factors to be considered include the following:

1. Is there a written agreement between the parties agreeing to an independent contractor relationship?
2. Who sets the hours/days worked?

3. Who selects/provides the materials/tools?
4. For traveling employees, who selects the routes?
5. Who selects the length of employment?
6. Who selects the method of payment? Hourly? Commission? By the job?
7. Is the work being performed in any way different from that being done by the regular employees?

Companies desiring to establish true independent contractor relationships which will withstand a misclassification charge should begin with a written agreement enumerating the respective rights and obligations of the parties, which agreement should take into account the above-listed considerations. Additionally, care should be exercised during the performance of the work that company supervisors acknowledge the independent contractor

relationship and not treat that worker in the same manner as a company employee; the exercise of direction and control is dispositive. Lastly, it is highly recommended that employers utilizing independent contractors require a certificate of workers' compensation coverage prior to the commencement of work.

Please feel free to contact Mike Reidy or any of the workers' compensation attorneys at RBS with questions as to what constitutes a true independent contractor relationship or for assistance in drafting a written agreement between your company and a potential independent contractor.

WORKERS' COMPENSATION: Frequently Asked Questions Regarding Workers' Compensation Claims and Hearings

by Carol D. Strassman

FAQs

Q: We know the injured worker should complete an incident report as soon as possible, but when do we need to obtain witness statements?

A: Obtaining an incident report from the injured worker as soon as possible after the alleged incident is imperative. Obtaining witness statements is equally important. The incident report itself should ask the question as to whether or not there were any witnesses to the alleged incident. The witnesses who are named on the incident report should then be given forms to complete to obtain their statement as to what occurred. Obtaining witness statements should be done as soon as possible after the incident itself, as that is when the recollection of the witnesses is at its best. If a named witness tells you that he didn't see anything and knows nothing about the incident, you must get a specific statement indicating this. During your investigation of the incident, all other potential witnesses should complete statements, even if they are not named by the injured worker on the incident report.

Q: When do we need to obtain an independent medical examination (IME)?

A: This is an issue which is truly decided on a case-by-case basis and after careful analysis. In addition, self-insured employers will obtain IME's on a more frequent basis than state fund employers. This is because the BWC will very often obtain an IME of its own in state fund claims. An IME should be considered in the following situations:

- When the initial allowance is being contested, including extent of the injury sustained and extent of disability (time off work)
- Issues of additional allowances, particularly when the additional allowance may result in additional compensation
- When the issue of maximum medical improvement (MMI) is appropriate. This is when a claimant has been off work and receiving temporary total disability for a period of time and there is an indication the claimant should have returned to work or that the claimant's condition is no longer improving
- When an application for permanent total disability (PTD) is filed
- When an application for permanent partial disability (C-92) is filed

Whether or not to obtain an IME is claim specific, as no two situations are exactly alike. The above-captioned situations are where an IME should be considered, at the very least.



Q: When is it necessary for the employer to attend a hearing?

A: The employer should be present at hearings in two crucial situations:

1. When there is a factual dispute, particularly concerning the mechanism of injury or whether the injury in fact occurred
2. When an injured worker's termination from employment is crucial to the issue being determined at hearing (typically a question of entitlement to temporary total disability compensation)

Employer attendance at hearings other than the above two situations requires a claim-by-claim analysis. In addition, employer attendance at a hearing can demonstrate to the hearing officer the employer's interest in the outcome of the claim. Further, having the employer sitting across the table from the injured worker may keep the injured worker "under control" and prevent the injured worker from exaggerating the events of the injury or being untruthful.

No hard and fast rules apply to all claims as to obtaining an IME or having the employer present at a hearing. The purpose of this article is to point out those situations where these issues should certainly be considered. Do not hesitate to contact Carol Strassman or any of the workers' compensation attorneys at RBS with any questions or concerns regarding claim management.