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**OHIO DRUG TESTING LAW COVERING WORKPLACE INJURIES RULED UNCONSTITUTIONAL**

By Jennifer Bennett and Jonathan Stender

In what could be a short-lived victory for the union, recently the Ohio Supreme Court ruled that suspicionless random drug testing of injured workers violates the workers' right to privacy under the United States and Ohio Constitutions. *Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*

The Ohio Supreme Court struck down a law that allowed employers the right to deny workers' compensation benefits to any injured worker whose injuries were caused by drugs or alcohol. Under the provision rejected by the Court, an injury to a worker was presumed to have been caused by drugs or alcohol if either the worker tested positive for drugs or alcohol or refused to be tested.

In effect, this provision forced every employee injured on the job to be tested for drugs and alcohol regardless of whether the employer had any suspicion that the injury was caused by the employee's use of drugs or alcohol. Further, if the employee refused to be tested, a rebuttable presumption was created that the employee was in fact under the influence at the time of injury.

The Court found that the testing violated workers' privacy rights. In the past,

suspicionless drug testing has been allowed only when the targeted individual had a history of abuse, held a unique position, or had a potential for causing a catastrophe if working in a mind-altered state. In these cases, the situations were unique and the targeted groups were discrete.

The law that the Ohio Supreme Court found unconstitutional did not involve unique situations or target specific groups. Rather, it covered all Ohio workers involved in workplace accidents. The

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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.

By Alan Ross\*

After a long period marked by vacancies and turmoil, there is finally a confirmed republican majority on the National Labor Relations Board (Board). This should come as welcome news for employers, who saw fiscal year 2002 end with just three of the five Board members confirmed, resulting in low productivity and fewer cases decided than had been in the past.

The backlog began in December 2001, when democratic member Dennis Walsh's most recent appointment ended. (The Board is traditionally comprised of two democrats, two republicans and a third member of the sitting President's party, all of whom are confirmed for five-year terms.) Upon the loss of Walsh, the Board was left with only two members, Wilma Liebman and Peter Hurtgen.

Without the quorum of three, which is necessary to issue rulings, the Board was powerless to decide cases. That changed, at least for the short term, when two republicans, Michael Bartlett and William Cohen, were given recess appointments. The Board was again left with a bare quorum when Hurtgen later stepped down to head the Federal Mediation and Conciliation Service.

As a result of these vacancies and resulting turmoil, the Board only decided 489 cases in fiscal year 2002 – 287 unfair labor practice cases and 202 representation cases. For purposes of comparison, in fiscal year 2001, the

Board was able to decide 735 cases, consisting of 536 unfair labor practice cases and 199 involving representation. Fortunately, the Senate recently confirmed all five of the Board's members at once, an unprecedented occurrence in the 65-year history of the Board. The new Board now consists of Democrats Wilma Liebman and Dennis Walsh and Republicans Robert Battista (Chairman), Peter Shaumber and Rene Acosta.

A full Board bodes well for General Counsel Arthur Rosenfeld. Rosenfeld is widely considered to be even-handed and cooperative with both management and labor. At a recent convention of labor attorneys, he related several goals that he wanted to accomplish in the coming years. For example, he indicated that he wanted to see more efficient case management, an effort to ensure compliance and effective remedies, and the promotion of better relationships with practicing attorneys.

It is certainly a step in the right direction to have all five members of the Board in place. Moreover, a reconstituted five-member Board has an opportunity to restore balance in federal labor law which was sorely missed during the Clinton years. We will keep you informed.

*\*Special thanks to our law clerk, David Farkas, who assisted in the preparation of this article. David will be sitting for the Ohio State Bar Examination in February 2003.*

## NEW HUMAN RESOURCES FIRM UNVEILED

Ross, Brittain & Schonberg has formed a relationship with HR Department Unlimited (HRDU), a human resources consulting firm that provides small businesses with the resources and knowledge needed to create and support the best workforce possible.

HR Department Unlimited is a membership-based organization created to maximize efficiency and effectiveness and minimize cost for small businesses. HRDU provides employers with high quality, affordable human resource solutions, including human resource audits, monthly employee training, a fax-back service, a newsletter and various discount programs. Consulting services, which span the human resource spectrum, are available, including consulting on policies and procedures, job descriptions and evaluations, HR audits and compliance, HR Generalist services and issues related to a Drug-Free Workplace.

To register for presentations sponsored by HR Department Unlimited or to learn more about HRDU, contact Jane Plank, Executive Director, at 330-990-4738 or [jjplank@hrdepartmentunlimited.com](mailto:jjplank@hrdepartmentunlimited.com).

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### ***Fighting Discrimination With – More Discrimination?*** ***continued from page 5***

wholesale promotion or hiring of minorities or the absolute ban against hiring such individuals. Such policies, in addition to being morally deficient, can leave an employer open to the charges of discrimination, reverse or otherwise.

*\*Special thanks to our law clerk, David Farkas, who assisted in the preparation of this article. David will be sitting for the Ohio State Bar Examination in February 2003.*

## STATE CONSTRUCTION PROJECTS WILL REQUIRE DRUG-FREE WORKPLACE POLICIES BEGINNING JANUARY 2003

By Lynn Schonberg

The Bureau of Workers' Compensation (BWC) has had in place for a number of years a discount program called the Drug-Free Workplace Program (DFWP). A company that meets the initial eligibility requirements may be eligible for a premium discount of 10%, 15% or 20%, depending upon the program level requested and approved by the BWC. Generally speaking, the DFWP requires mandatory drug and alcohol testing, training of your workforce and a commitment to rehabilitation.

On September 20, 2002, Governor Taft signed an executive order that requires contractors and subcontractors who wish to be eligible for state construction projects to enroll in the DFWP, or a comparable program approved by the BWC. The new policy will be phased in to allow contractors time to prepare programs.

Specifically, beginning January 1, 2003, contractors may submit bids to the state without being enrolled in the DFWP. However, they must enroll in the DFWP or a similar drug program within 10 days of the bid opening. Beginning July 1, 2003, all contractors submitting bids must be enrolled in the DFWP or a similar program.

Currently, the DFWP provides for only two application dates each year — June 30 and December 31. In light of Governor Taft's executive order, we highly recommend that contractors who wish to be enrolled in the DFWP submit an application to the BWC as soon as possible. The DFWP provides for a 90-day period to prepare and publicize your new drug and alcohol program.

If you are interested in participating in the DFWP or obtaining further information, please contact Lynn Schonberg.

## CONSTRUCTION INDUSTRY EMPLOYERS PAYROLL REPORTING LIMITATION CHANGE

The Ohio Bureau of Employment Services has performed its annual evaluation and revision of the statewide average weekly wage. As a result, the Bureau of Workers' Compensation (BWC) has adjusted the construction industry reporting limitation to **\$965 per week** for reportable payroll to a construction industry classification.

When an employee's actual reportable payroll exceeds \$965, any amount over \$965 is not reportable to the Ohio BWC. However, if an employee earns under

\$965 in a week, actual wages need to be reported to the BWC. The **corporate officer maximum is still \$800 per week** (or \$20,800 every six months). This applies to officers that are reportable under a construction industry manual classification. The payroll of clerical employees of a construction industry employer is fully reportable, even if the weekly wages exceed \$965.

If you have any questions regarding reporting requirements or industry classifications, please contact our office.

## self-insured [corner]

### Workers' Compensation Resource Network

Thursday, March 13, 2003

12:00 - 4:00 p.m. (starting with lunch)

Holiday Inn Independence  
6001 Rockside Road  
Independence, OH 44131

### speaker:

Troy Ames, Director of the Self-Insured Department of the Ohio BWC.

For more information or reservations, contact:

Rick Walters 216-447-1551

### *Ohio Drug Testing Law Covering Workplace Injuries Ruled Unconstitutional continued from page 1*

Court observed that ordinary people working ordinary jobs do not have the expectation that they are subject to searches, in the form of drug and alcohol testing, without reason.

Whether Reconsideration of this decision will be sought is unknown. The Court's vote was close, 4-3. Former Lt. Governor Maureen O'Connor, considered a conservative Republican, replaced Justice Douglas, a more moderate Republican, in January. Douglas voted for the majority, but O'Connor likely would not in the event Reconsideration is sought.

Nonetheless, this decision is yet another example of judicial meddling in legislative business. For more information, call Jennifer Bennett or Jonathan Stender at (216) 447-1551.

## EMPLOYMENT LAW BREAKFAST BRIEFINGS

### **All Workshops:**

**Time:** 8:30 a.m. – 10:00 a.m.

**Location:** 6000 Freedom Square Dr.  
Ground Floor Amphitheatre • Independence, Ohio  
Call (216) 447-1551  
(No cost to RBS Clients and HRDU Members)

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### ***Employee Handbook Helpers***

**Date:** March 13, 2003

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### ***Best Practices in Selection and Placement***

**Date:** June 12, 2003

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### ***Performance Management: Getting the Most Out of Your Employees***

**Date:** September 11, 2003

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### ***HR and Legal Alerts and Updates for Employers***

**Date:** December 11, 2003

## ABC, NORTHERN OHIO CHAPTER SEMINARS

All seminars are held at the ABC Training Center  
9255 Market Place West • Broadview Hts., Ohio 44147  
For additional information and registration, call Marissa at (440) 717-0389

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Topics in February 2003

- ***Competent Person in: Scaffolding Trenching Fall Protection***
- ***OSHA 10-hour classes***
- ***Supervisor/Project Manager training***

## OHIO BWC SPONSORED SEMINARS

### ***Ohio Safety Congress & Expo***

More than 6,000 people from businesses throughout Ohio will attend the three-day event to hear dynamic keynote speakers, visit educational sessions and see exhibits of occupational safety products and services. The Ohio Safety Congress & Expo is scheduled April 1-3 in Columbus.

Registration is simple and free! Register in advance (until March 10) to receive a name badge in the mail approximately two weeks prior to the event. Registration is also available each day of the event.

### **For more information or to register by phone:**

Phone: 1-800-OHIOBWC, press 22, then 3 • Fax: (614) 728-3260  
Mail: Ohio Safety Congress & Expo, 13430 Yarmouth Drive, Pickerington, OH 43147  
Email: SafetyCongress@ohiobwc.com

## FIGHTING DISCRIMINATION WITH — MORE DISCRIMINATION?

By Lynn Schonberg\*

As a firm that practices exclusively in the field of labor and employment law, there is hardly a day that goes by without a discrimination case, of some sort, being brought to our immediate attention. At present, the employment environment is quite litigious. Consequently, the cost of doing business is high, and getting even higher. Specialized legal counsel, even for the most basic of employment decisions, is becoming the norm rather than the exception. This is especially true given a rapidly developing area of employment law — “reverse discrimination.”

The anti-discrimination laws were originally created in the early 1960s to provide for the equal (not preferential) treatment of women and minorities in the workplace. These laws make it unlawful to base an employment decision on a person’s race, color, sex, religion, or national origin.

Affirmative action was introduced in 1965 by President Johnson as a way to overcome the effects of past societal discrimination by allocating jobs and resources to members of specific groups, such as minorities and women. Over the years, it has been both praised and pilloried as an answer to racial inequality. In essence, affirmative action legally permits an employer to make an employment decision on the basis of a qualified individual’s gender or race where there exists a demonstrated history of sex or race discrimination by that employer.

In the late 70s, fueled by “angry white men,” a backlash against affirmative action began to mount. The term “reverse discrimination” was coined to describe the phenomenon. In the contest of employment law, litigation became the weapon of choice. Typically, cases were brought by white men who were denied

some sort of employment opportunity. To prevail, the party (a white man for example) would have to show that there was no basis for that particular affirmative action policy, that is, no documented history of discrimination with that employer. In some instances, these cases would be successful, while in others they would not.

More recently, reverse discrimination cases have been filed in non-affirmative action situations. A good example of this occurred only a few months ago in Missouri. In *Gagnon v. Sprint Corp.*, a white male manager at a large company claimed reverse race discrimination because his supervisor allegedly said, “he’s just a white guy,” in reference to the manager’s proposal for a raise. The court allowed the case to proceed to trial, which is expected to occur in the next year or so.

Another similar claim was settled in March between Ford Motor Co. and a white male human resources manager. In this case, the manager alleged that Ford’s former CEO, Jacques Nasser, had at one time stated, “We have too many middle-age, white Anglo-Saxon males and that needs to change.”

While the EEOC has stated that reverse discrimination claims account for only a small portion of claims, these claims are generally taken pretty seriously by the Commission. “They certainly don’t get laughed at by the courts,” said the EEOC’s David Grinberg. “They can be as successful as any lawsuit.”

How is an employer to function in this politically charged, politically correct environment where diversity trumps all? The goals and requirements of the anti-discrimination laws must always be complied with — all employment

decisions must only be based on job-related qualifications, and one’s race, gender, color, age, national origin and disability must be ignored (unless somehow negatively affecting the ability to perform the position in question).

Furthermore, companies should avoid giving the impression that complaint or grievance procedures already in place are meant for certain protected parties only. This is true not only for complaints regarding discrimination, but even for complaints alleging sexual harassment. Many men have successfully sued companies due to not having their complaints of harassment from a woman taken seriously or investigated.

In addition, the United States Supreme Court in 1998 opened the doors for same-sex sexual harassment cases. A policy manual encouraging women to file complaints, but not men, would be just the “smoking gun” a court can use to find evidence of discrimination against the majority. Moreover, failing to seriously investigate complaints lodged by a man against a woman, or a woman against a woman, or a man against a man, could also result in a large verdict against the company.

Some larger companies may also have standing committees in place already, committed to the idea of diversity. For such companies, it is important to include members of the majority on the committee. In addition to serving as a good defense against possible charges of reverse discrimination, such a policy does much to dispel the notion that only one segment of society can have something of value to say about a particular issue or policy. In short, discrimination lawsuits cannot be adequately defended simply by

*continued on page 2*