

Ross, Brittain & Schonberg has just moved.

Phone numbers, fax number and
e-mail addresses remain the same.

Our new address is:
6480 Rockside Woods Blvd. South, Suite 350
Cleveland, Ohio 44131

practice limited to representation of management in all aspects of: labor law ▲ employment relations ▲ workers' compensation

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Attorneys

Alan G. Ross
Brian K. Brittain*
Evelyn P. Schonberg**
Anthony A. Baucio
Scott Coghlan
Christopher R. Debski
Tricia L. Hurst
Ryan T. Neumeyer
Nick A. Nykulak
Carol D. Strassman*
Meredith L. Ullman

Paralegals

Renee Mezera
Lorraine J. Geiger
Arlene M. Gollas
Megan E. Kelley
Carla E. Kihorany
Elizabeth A. Krusinski
Lori A. Williamson

Firm Administrator

Mary Ann Kuilder

*OSBA Certified Specialist Workers' Compensation

**OSBA Certified Specialist Labor & Employment

6480 Rockside Woods Blvd. South, Suite 350
Cleveland, Ohio 44131

Phone: [216] 447-1551 Fax: [216] 447-1554
www.rbslaw.com

WORKERS' COMPENSATION: EXPANSION OF VOLUNTARY ABANDONMENT SHORT-LIVED

By Meredith L. Ullman

To the detriment of employers throughout Ohio, the Supreme Court of Ohio has reversed its earlier holding expanding the doctrine of voluntary abandonment. As you may recall, in the recent *Gross I* decision, the Supreme Court found that terminable conduct resulting in an industrial injury could also be used as a bar for temporary total disability benefits under the voluntary abandonment doctrine.

The Supreme Court was noticeably silent in *Gross I* on the issue of whether the holding changed the no-fault policy of the workers' compensation system. The Court merely stated that the facts of the case were not conducive to further discussion of a no-fault policy. The Court noted that the claimant willfully ignored repeated warnings not to improperly clean the pressure cooker, yet wished to ascribe his behavior to simple negligence or inadvertence, which was not accurate.

Following this decision, the claimant requested a reconsideration which was granted and heard by the Supreme Court. The Supreme Court in *Gross II* then reversed their prior holdings and the claimant was found not to have voluntarily abandoned his position of employment. The Supreme Court opined that *Gross I* was not intended to expand the voluntary-abandonment doctrine. The Supreme Court noted that until the present case, the voluntary-abandonment doctrine has only been applied in post-injury circumstances in which the claimant, by his own volition, severed the causal connection between the injury and loss of earnings that justified his entitlement to temporary total disability benefits. The

Supreme Court thus held that the doctrine has never been applied to pre-injury conduct or conduct contemporaneous with the injury and that *Gross I* did not intend to create such an exception.

The Supreme Court's rationale revolved around the issue of whether or not the injury, regardless of the claimant's negligent status, was in fact the cause of the disability. The focus was therefore on the question of whether the claimant's injury (or his termination because of a rule violation) was the cause of his loss of earnings. The Supreme Court found that it was the claimant's injury, and not his termination, which was causally related to his loss of earnings. Therefore, the claimant's departure from work was not deemed voluntary in nature.

Based on the Supreme Court's new holding, the status of voluntary abandonment has reverted to the pre-*Gross I* status. That is, temporary total disability benefits can only be barred by a voluntary abandonment due to termination, when the termination acts as a break in the causal chain between the injury and loss of earnings. If the injury and terminable conduct are one-and-the-same, the terminable conduct will not preclude temporary total disability.

Still wondering whether or not an employee of yours "voluntarily abandoned" his position of employment? Feel free to contact Meredith or any of the workers' compensation attorneys at RBS to discuss this defense or any workers' compensation matter that has you confused! ■

LABOR: NEW PREVAILING WAGE REQUIREMENTS IN OHIO

By Nick A. Nykulak

On September 28, 2007, the Ohio Department of Commerce, Bureau of Wage and Hour issued a press release imposing new restrictions on Merit Shop Contractors who perform public work subject to the requirements of Ohio's Prevailing Wage Law. This decision adversely affects contractors who have prevailing wage pension plans which only require pension contributions for public projects.

Ohio's Prevailing Wage Law, among other requirements, requires non-union contractors to pay the equivalent of "union wages" when performing work on construction projects receiving public funding. Employers who provide bona-fide fringe benefits to employees may take an hourly credit to reduce the amount to the total wage package owed for each hour worked by the employee on the public project.

The Department of Commerce's new requirements are effective January 1, 2008, and substantially affect the way some contractors take an hourly fringe benefit credit by making irrevocable employer contributions to employee pension plans while performing prevailing wage work.

The Department of Commerce will now take into consideration all hours worked by the employee throughout the year on both public and private projects in order to calculate the allowable fringe benefit credit a contractor is entitled to take for employer pension contributions to prevailing wage-only pension plans. "Annualizing" contributions made by the employer over all hours worked will substantially reduce the hourly credit an employer will be allowed to take on the prevailing wage project. The divisor for the amounts contributed to these pension plans will be the employee's actual hours worked throughout the year on all projects, if properly documented, or 2,080 hours.

The decision by the Ohio Department of Commerce will put merit shop contractors at a competitive disadvantage when bidding future public work subject to Ohio's Prevailing Wage Law. Unless the contractor is willing to contribute the same amounts to the employer-sponsored pension plans on both public and private work, the contractor will have to make up the remaining prevailing wage package in cash, significantly increasing the cost of workers' compensation insurance, federal and state payroll taxes, and unemployment

insurance. While union contractors will only have to pay taxes on the base rate of pay listed in the prevailing wage rate schedule, non-union contractors will have to pay taxes on the base rate of pay as well as on the additional cash fringe. Under the Federal Davis-Bacon prevailing wage law, contributions to prevailing wage-only pension plans are allowed so long as the contributions are made to individual employee accounts, are 100% vested, and have no restrictions to impede the employees' access to his funds. The Department of Commerce's position regarding prevailing wage pension plans is a departure for this well established precedent.

After January 1, 2008, the Department of Commerce will assess underpayments and penalties for employer pension contributions to prevailing wage pension plans that are not calculated as described above.

Contractors with prevailing wage pension plans are encouraged to contact Alan Ross or Nick Nykulak at RBS with all questions and concerns arising from these new requirements. ■

EMPLOYMENT: OHIO CIVIL RIGHTS COMMISSION ISSUES PROPOSED AMENDMENT TO MATERNITY LEAVE REGULATIONS

By Ryan T. Neumeier

In January 2007, the Ohio Civil Rights Commission proposed a change to a section of the Ohio Administrative Code dealing with maternity regulations. The proposed amendment states that "where an adverse employment action taken against an employee who is temporarily limited, in part or in whole, in her ability to work due to pregnancy, childbirth or related medical condition is based upon a policy or practice under which less than twelve weeks of leave is available, such policy shall be presumed to have a disparate impact on women and constitutes unlawful sex discrimination unless justified by business necessity."

Thus, the proposed amendment requires employers to provide at least twelve weeks of leave to any employee who is temporarily limited in her ability to work due to her pregnancy, when an employer employs four or more employees, regardless of the length of time the employee has worked for the employer.

Tony Fiore, director of labor and human resources policy for the Ohio Chamber of Commerce, was quoted as stating that "requiring small businesses to hold open positions would be a hardship as would the immediate eligibility for new workers at large corporations."

Fortunately, as of November 2007, the Administrative Code has not yet been amended.

The attorneys at RBS will keep you updated as to if and when the requirements for maternity leaves in Ohio change. In the meantime, please do not hesitate to contact Lynn Schonberg or Ryan Neumeier with any questions or for additional information regarding maternity leaves. ■

GUEST COLUMN: RECOGNIZING AND HANDLING THE PASSIVE-AGGRESSIVE EMPLOYEE

By Nicholas Phillips of HR Department Unlimited

On the surface, the workplace is an environment of tasks and transactions; of projects and processes; of grind and goings-on. But deep beneath the surface lurks a silent enemy — one who does not discriminate and who strikes over time, with its victim unaware until it's too late. We're not referring to a great white shark, Freddy Krueger, or the tax man. We're talking about the passive-aggressive employee, whose poker face and quiet torment can take a real toll on organizational productivity, interpersonal perception, and workforce equilibrium.

Individuals who exhibit passive-aggressive behavior tend to express hostile and antagonistic feelings in non-aggressive ways. In the workplace, the passive-aggressive employee subtly exhibits behaviors that appear on the surface to be passive, but in reality are directed and purposeful, and intended to control, injure, or assign negative third-party perception, while avoiding real responsibility. Passive-aggressive behavior can cause problems in the workplace, on both a personal and organizational level. The passive-aggressive employee does not necessarily have a specific "look;" rather, he is identified through the actions or behaviors that are employed in the course of daily interpersonal communication and work. In that vein, these employees can be categorized into various types:

The Backstage Bellyache

This person can't seem to get through the day without complaining or commenting on the boss' deficiencies... to everyone except the boss. To the boss, the individual displays signs of agreeable compliance, but a passive undertone of contempt exists.

The Perplexed Pretender

When asked to assume responsibility for the completion of a job, this person feigns misunderstanding in an attempt to both perform less and provoke more.

The Counter Compliant

In being asked to perform a duty, complete a function, or even do a favor, this person purposefully falls just short of compliance, but only to a point that complaining about it would seem trivial.

The Intentional Inefficient

Knowing that ultimate responsibility for productivity, volume, and efficiency falls squarely upon the shoulders of another, this person takes passive steps to diminish the ends.

The Convenient Contributor

As soon as the boss is unavailable, this person dreams up a task that needs accomplishing. This task of course requires approval, and since the boss is conveniently not available it is necessary to go over his head to the next-line of management for action or approval.

The Well-Timed White Knight

Waiting for the right time to step in and save the day, this person creates a crisis when the boss is unavailable, and then steps in.

The Prolonged Performer

No task is too big or too small, and ultimate completion of a task is not an issue; however, this person takes so long to reach completion that the task-giver is sorry he ever gave the assignment in the first place.

The Nodding Nuisance

Though miniature problems may arise and comments in private may be made, this person keeps silent in public and operates in a state of agreeable dormancy, not making waves and not voicing complaint or disdain where others may hear.

So how does one handle the passive-aggressive employee?

The first step to take in dealing with any issue with an employee's performance or attitude problem is to identify what you are dealing with. By first identifying the type of passive-aggressive employee, you

can proactively determine what can be done to counter the undesired behavior. Once you know who you are dealing with, the second step is to consider past behavior and anticipate what strategies can be employed to prevent future repeated passive-aggression from having a negative effect. Finally, consider levels of emotional intelligence and subsequent triggers. Often, there is a root cause, or emotional catalyst, that is igniting passive-aggressive actions. Formal, ongoing training and coaching for those with direct reports is the key to working through workforce and organizational challenges.

Though often silently pervasive, employees who exhibit passive-aggressive behavior can cause real problems in the workplace. While not always easy to identify, and often doubly difficult to curb, dealing with such passive negative expressions is possible through a deliberate and planned approach... and with a little patience.

Would you like more information on dealing with passive-aggressive employees? Please contact Nicholas Phillips at HR Department Unlimited at (216) 520-1010. You can also obtain additional information at www.HRDUonline.com. ■

WORKERS' COMPENSATION: ONE "BAD" WORKERS' COMPENSATION CLAIM: WHAT STATE-FUND EMPLOYERS CAN DO

By Christopher R. Debski

The bottom line in the world of workers' compensation is that higher claim costs result in higher premiums. Furthermore, it is no secret that significantly higher premiums can be financially devastating for small to medium-sized businesses. Yet, no matter how aggressive an employer is in managing their workers' compensation costs, most employers inevitably face at least one "bad" claim at one time or another. A bad claim is usually the result of a serious accident which involves extensive medical treatment and/or long-term disability for the injured worker. Unfortunately, all it takes is one really bad claim to do significant damage to a state-fund employer's risk rating and knock them out of a group, costing the employer thousands of dollars.

Thankfully, the Bureau of Workers' Compensation offers the "One Claim

Program" as a potential source of relief for affected employers. This program is open to private, state-fund employers enrolled in a group-rating plan. Per the Bureau, qualifying employers will receive a 40 percent discount off of their base rate for up to four years while the one bad claim remains in their experience. To qualify, the claim must be entering the employer's claim experience and must have caused the employer's removal from a group-rating program. Furthermore, the employer must not have more than three medical-only claims in addition to the one bad claim during the past five years. The losses for these medical-only claims must not exceed their expected losses. Finally, to remain eligible for this program, the Bureau requires that employers be current on their premiums, not have any major lapses in

workers' compensation coverage, and attend Bureau-approved training courses.

Most employers know by the end of February or early March whether or not a bad claim has knocked them out of a group. The yearly application deadline for the One Claim Program is March 31.

If you are an employer who typically has minimal claims but runs into one bad claim, you should definitely keep this program in mind. Please contact Chris or any of the workers' compensation attorneys at RBS to discuss the One Claim Program or other ways to minimize your company's workers' compensation costs. ■

ROSS,
BRITTAIN
&
SCHONBERG
CO., L.P.A.

6480 Rockside Woods Blvd. South
Suite 350
Cleveland, Ohio 44131

upcoming

[events]

BREAKFAST BRIEFINGS

“2007 AND BEYOND: ANNUAL LEGAL UPDATE”

This annual year-end session will review what happened in 2007 and what to look forward to in 2008 and beyond.
Presented by the attorneys of Ross, Brittain & Schonberg.

Date: December 6

All breakfast briefings are held from 8:30 AM to 10:30 AM at 6000 Freedom Square Drive, Independence, in the ground floor amphitheatre.

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)

RBS ATTORNEY SPEAKING ENGAGEMENTS

December 7 – Carol Strassman will be the Chair of the Cleveland Bar Association Annual Advanced Workers’ Compensation Medical-Legal Seminar in Cleveland for the Cleveland Bar Association.

December 12 – Alan Ross and Nick Nykulak will be speaking on the topics of “Ohio Prevailing Wage” and “What are PLA’s?” at a seminar for Associated Builders & Contractors.

December 13 – Lynn Schonberg will be speaking on the topic of “Payroll Fundamentals: Basic Principles to Help You Manage the Payroll Process” at a seminar in Akron for Lorman Education Services.

January 15 – Lynn Schonberg will be speaking on the topic of “Coping with Leave Laws” at a seminar in Cleveland for Sterling Education Services.

February 13 – Lynn Schonberg will be presenting a Human Resources Legal Update at a seminar in Cleveland for the National Business Institute.

March 12 – Lynn Schonberg will be presenting an update on the Americans with Disability Act at a seminar in Cleveland for the National Business Institute.

For more information, please contact Melody at [216] 447-1551.

ASSOCIATED BUILDERS & CONTRACTORS, INC., NORTHERN OHIO CHAPTER

Tow Motor Safety and Certification

Review safety and OSHA standards for forklifts and tow motors.

Hands-on obstacle course and written test.

If written test is passed, students will receive an Operator Certificate, valid for three years.

November 28

8:00 AM to 3:00 PM

Cost is \$75 per person for ABC members.

Volume discount of \$50 per person for four or more people.

OSHA 10-Hour Safety Course

Students will review and receive the “OSHA Standards for the Construction Industry” book.

Students will receive an OSHA 10-Hour card upon completion of this one-day course.

November 30

7:30 AM to 5:00 PM

Cost is \$85 per person for ABC members.

Cost includes lunch!

Basic Training for Foremen and Supervisors

A one-day course presented by Doug Butler, covering communication, motivation, leadership, negotiating commitment and goal setting.

December 4

7:30 AM to 4:00 PM

Cost is \$250 per person for ABC members.

Volume discount of \$225 per person for four or more people.

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CONT'D FROM FRONT

ASSOCIATED BUILDERS & CONTRACTORS, INC., NORTHERN OHIO CHAPTER

Drug-Free Work Place Training

December 12
7:30 AM to 9:30 AM

Cost is \$70 per person for ABC members.

Seminars hosted by Ross, Brittain & Schonberg Co., LPA

The first seminar will focus on the topic of "Ohio Prevailing Wage" and the second seminar will tackle the question, "What are PLAs?"

December 12
1:00 PM to 4:30 PM

Cost is \$25 per person for ABC members.

Contact Jennifer at ABC (440-717-0389) for more details on any of the above events!

Location:

All Cleveland training will be held at the NOC-ABC Training Center, 9255 Market Place West, Broadview Heights, Ohio 44147.
For Perrysburg locations, call for details.

You can also visit www.nocabc.com for updates on events and new course offerings.

SAFETY COURSES ARE AVAILABLE ONLINE THROUGH ABC!

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

Last but not least, don't forget about the...

Annual ABC Planning Conference

Help ABC plan for 2008!

December 14
12:00 PM to 5:00 PM

Open to all ABC members.
Please RSVP to Rick Lorenzen.

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 Brian Brittain at (216) 447-1551 for additional information and membership details.