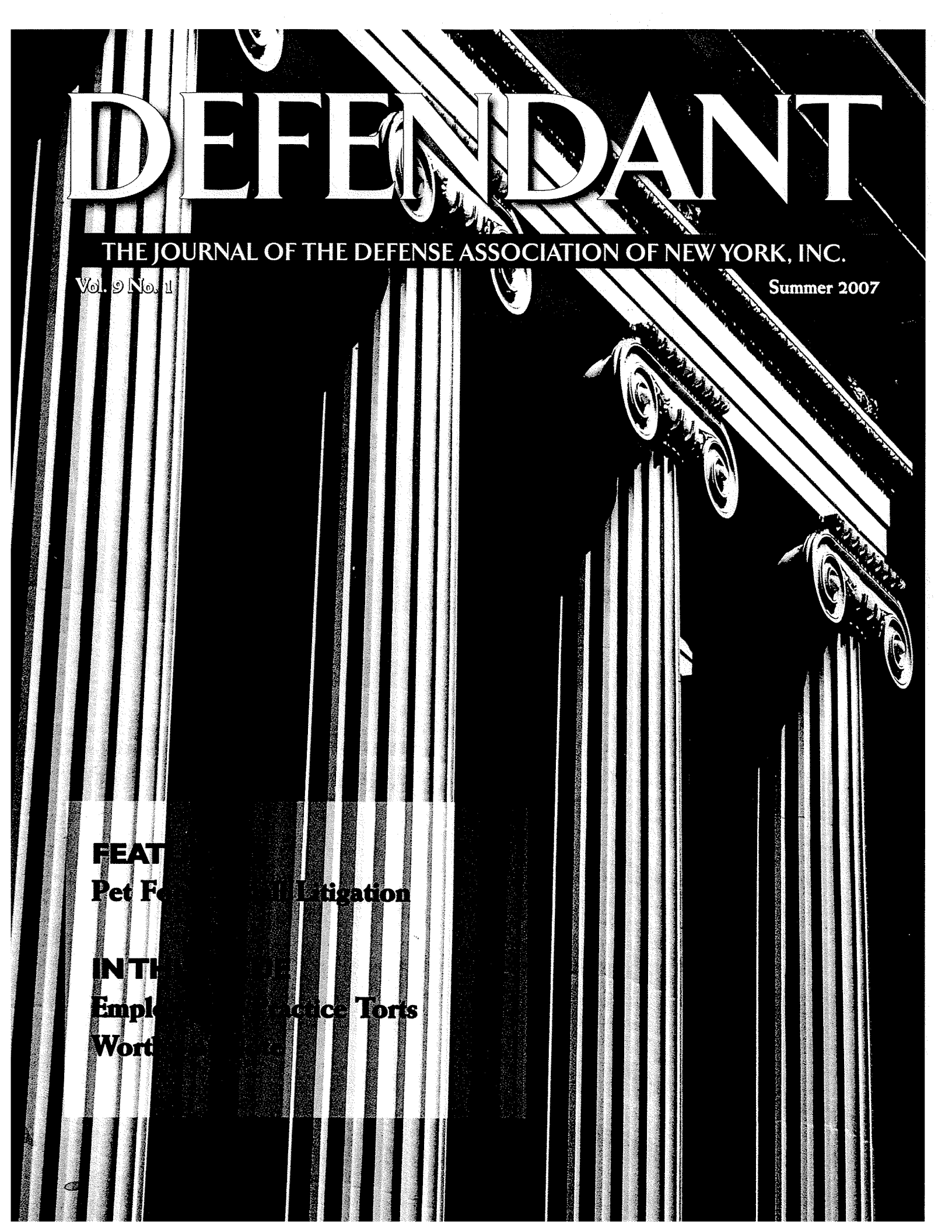

DEFENDANT

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Summer 2007

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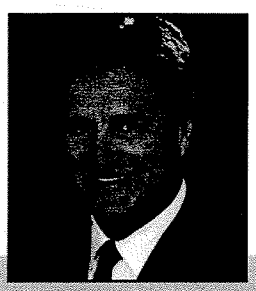
The Pet Food Recall Litigation



JOHN J. MCDONOUGH, ESQ.*

It has been reported that on or about September 27, 2006, Xuzhou Anying Biologic Technology Development Company, based in China, exported tainted wheat gluten to Las Vegas, Nevada-based Chem Nutra, Inc. a distributor of wheat gluten and other products. It is believed that Menu Foods began using the tainted wheat gluten at its plants around November of 2006. Between December 2006 and March 2007 Menu Foods manufactured and distributed a variety of wet pet foods containing the contaminated wheat gluten under many different labels.

On March 16, 2007 Menu Foods recalled more than 60 million containers of wet pet food. The Food and Drug Administration found melamine, a slow-release fertilizer also used to make plastics, in wheat gluten that may have gotten into the recalled food.

The FDA said there were 16 confirmed pet deaths from contaminated food, including nine from a routine company taste test, but officials also said the number was likely to be much higher. In April, Menu Foods expanded its recall by adding 34 varieties of cat food.

Hundreds of claims have now been interposed in over 100 class-action lawsuits around the country. Pursuant to an order of the Multi-District Litigation panel in Nevada, these have now been consolidated for pretrial discovery and other purposes in the United States District court in Camden, New Jersey before Judge Noel Hillman.

Millions of dollars have been spent by retailers and others on the costs associated with the recall, the storage of the product (to avoid spoliation problems) and consumer confidence in otherwise sterling household names in pet nutrition has been shaken. All of which begs the question, what are these cases worth?

Generally pets are treated as personal property. The majority rule is that damages for the death of a pet are fixed at the pet's fair market value. New York is in accord with the general rule. *Melton v. South Shore U-Drive, Inc.* 32 A.D. 2nd 950 (2nd Dept. 1969).

Recovery for loss of companionship has been expressly prohibited in New York. *Gluckman v. American Airlines, Inc.* 844 F. Supp 151 (S.D.N.Y. 1994).

In *Rimband v. Beiermeister,* 168 A.D. 596 (3rd Dept. 1915) the court allowed a claim for punitive damages for the death of a pet, assuming the owner can otherwise meet New York's heavy burden of proof in regard to the type of conduct required for such a cause of action.

The aspect of damages most in dispute in the pet food litigation is the extent to which an owner may recover for emotional distress. While a number of states allow recovery for the owner's mental distress, New York has expressly prohibited recovery for such damages. *Jason v. Parks,* 224 A.D.2nd 494 (2nd Dept. 1996).

While there is clearly an issue with privity, a number of complaints set forth claims for relief alleging breaches of implied and express warranties under the Uniform Commercial Code ("UCC"). As a general rule, the measure of damages for breach of warranty under the UCC is the difference between the value of food as purchased and the value it would have had if it was not tainted. See UCC 2-714(2). This would essentially allow for recovery of the food's purchase price. However, in addition, UCC Article 2-715 allows recovery for consequential damages including "injury to person or property proximately resulting from any breach of warranty."

Continued on page 2

* *Mr. McDonough is the Editor of The Defendant and is a Partner at Cozen O'Connor where he serves as the Vice-Chairman of the firm's General Litigation Department and Chairman of the firm's Food Liability Group. Cozen O'Connor represents one of the defendants in the Pet Food Recall Litigation.*

The Pet Food Recall Litigation

Continued from page 1

Consequential damages are defined as "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise, an injury to personal property proximately resulting from any breach of warranty." UCC § 2-715(2). That portion of § 2-715 permitting the recovery of consequential damages incorporates the rule that a person breaking a contract is liable for those consequences that naturally flow from his breach or which, because of the circumstances known to both of the parties at the time of contracting, were within the contemplation of the parties as a foreseeable consequence of the breach. 91 A.L.R. 3d 299.

At this time, it appears that all states allow recovery for foreseeable consequential damages resulting from a breach of warranty. See 91 A.L.R.3d 299. It appears that injury to a pet from ingesting tainted food would be considered foreseeable in most if not all jurisdictions. See e.g., *Pine Grove Poultry Farm v. Newton By-Products Mfg.*, 248 N.Y. 293 (1928) (seeking damages for loss of ducks resulting from their consumption of food imbedded with steel wire). Therefore, veterinary bills and all other reasonable expenses incurred stemming from the pet's injury may be recoverable.

While it is too early in the pet food litigation to know what damages will ultimately be available to claimants, the issue certainly warrants further monitoring in light of what appears to be an escalation of problems with products imported from China.

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John J. McDonough
EDITOR IN CHIEF

STAFF
Anthony Celentano
Denise LaGrua
Alexandra M. McDonough

Ed Kennelly, Vincent P. Pozzuto
and Richard L. Steer

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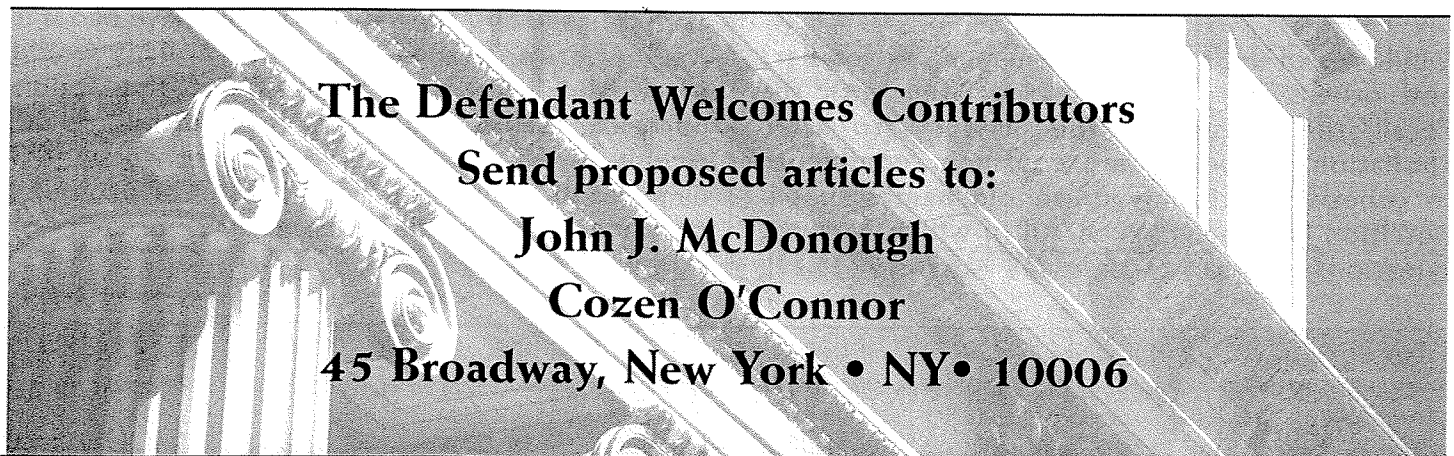

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EMPLOYMENT PRACTICE TORTS

ED KENNELLY, ESQ. CPCU* AND RICHARD L. STEER, ESQ.**

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Suits alleging negligence resulting in bodily injury or property damage are not the only cases resulting in assignments by insurers to defense counsel. As insurers respond to meet the evolving exposures of our society, counsel are increasingly called upon by insurers to respond and defend against claims asserting new causes of action. This article will discuss the emergence of employment practice torts and highlight some emerging issues concerning the defense of wrongful termination, discrimination and harassment suits.

EMERGENCE OF EMPLOYMENT PRACTICE TORTS

In 1991 Thurgood Marshall retired from the United States Supreme Court. The first President Bush nominated Clarence Thomas to be his successor. Many groups mobilized against his appointment. As we know, Clarence Thomas was and is a conservative. It was feared that he would not help protect and advance the rights of people if he were placed on the Court.[1]

The nation was glued to the television set watching the confirmation hearing. Members of the Senate Judiciary Committee questioned witness after witness. The major focal point of the hearings became the interaction and relationship between Clarence Thomas and Anita Hill. Minute details of their relationship were put under a microscope and analyzed by the senators and by the public. Ultimately, the process resulted in Clarence Thomas filling the vacancy on the bench created by Justice Thurgood Marshall's retirement. Another result of the Clarence Thomas hearing was that the nation developed a heightened awareness of sexual harassment in the workplace and of Affirmative Action policies. In that same year, The Civil Rights Act of 1991 amended Title VII to dramatically expand the potential for recovery available to individuals who can prove employment discrimination. Thus, an expanded litigation frontier was opened up.

Before 1991, in the vast ocean of litigation, there were a few scattered waves of discrimination, sexual harassment and wrongful termination claims. After the Thomas hearings that year, tidal waves of litigation surfaced and are still forming. Enforcement of remedies under existing laws were sought and new laws were created. For example, from 1980 to 1989, there were 19,434 harassment charges filed with the EEOC. From 1990 to 1999, there were 109,472 charges filed with the EEOC.[2]

In addition to the frequency of employment-related claims being filed, the severity of awards also increased. One particularly large settlement was a gender discrimination action involving the Voice of America. That claim settled for $508,000,000 in March of 2000 in Federal Court, Washington, DC. Interstate Brands, the maker of Wonder Bread, took a verdict for $132,000,000 for discrimination against 21 African-American workers in August 2000, in State Court, California. That amount was subsequently reduced. Overall, median awards for employment practices cases from 1994 to 2000 were $519,116.[3]

In the early 1990s, as the wave of these suits hit businesses, the waves also splashed over to insurers. Businesses tendered these discrimination, harassment

Continued on next page

* *Ed Kennelly, Esq. CPCU, Division Counsel, P & C Severity, AIG Domestic Claims, Inc.*

** *Richard L. Steer, Esq. Partner Labor & Employment Practice Group Tarter Krinsky & Drogin LLP Adjunct Professor of Law Pace University School of Law*

and wrongful termination suits to their commercial carriers. Generally, there was no coverage for these claim under the Commercial General Liability policies. The complaint did not set forth an "occurrence" or "bodily injury" as defined by the policy and was otherwise excluded.

As the wave of lawsuits continued, a need emerged for businesses and individuals to be protected. Clearly there was not sufficient protection under existing policies for these claims. There was not a policy in existence that specifically responded to and was geared for responding to employment practice liability claims. The insurance industry responded to this emerging exposure and developed a new product. Employment practice liability insurance would shift the risk to an insurer and allow businesses to continue their operations and, hopefully, not to be forced out of business.

New York defense attorneys certainly know the general rule of thumb that negligently caused bodily injury is covered, but intentionally caused bodily injury may not be covered. Yet, it would be incorrect to conclude that certain torts with the component of intentional conduct, such as malicious prosecution, wrongful eviction or false arrest would be uninsurable. In fact, these torts are specifically enumerated personal injury offenses set forth in the Personal Injury coverage grant of the CGL policy. Like the personal injury offenses, sexual harassment, discrimination and wrongful termination, while having a component of intentional conduct, are generally insurable.

By 1997, the Insurance Services Office ("ISO") had published employment-related practices liability coverage form EP00010498. ISO has also put out employment-related practice liability coverage (separate limits for defense and indemnity) - form EP0002. There are many variations of employment-related practice coverage put out by many different carriers. These stand-alone policies generally replaced employment endorsements that were not so neatly added on to general liability policies.

Some employment practice policy forms cover termination of employment based only on discrimination. Other policies have much broader coverage. These include claims for wrongful failure to employ, wrongful failure to promote, negligent evaluation or discipline, wrongful deprivation of career opportunity, failure to grant tenure, and negligent supervision. Some policies provide for defense only coverage. Most pay for settlements and judgments which include back-pay and front-pay, statutory attorney fees and compensatory damages. Mo policies will exclude civil and criminal fines. Son policies may specifically exclude punitive damage and others that may cover such damages could b barred from indemnifying these under applicable sta law. Also, certain equitable relief or non-monetai relief would not be covered under virtually all of th employment practice policies. Currently, many carrie offer coverage for third-party discrimination claims a well. Third-party discrimination claims are brought b non-employees. For instance, patrons in a restaurai who believe that they have been discriminated again may sue the restaurant. Coverage for such third-par discrimination claims can be purchased to prote against this exposure.

Defense attorneys in New York are increasing receiving assignments from carriers to represei defendants involved in employment related suits. Th area of tort law has many aspects that differ fro traditional negligence claims resulting in bodily inju or property damage. Some of the elements of th employment torts and the defenses to these clain are discussed below in the context of recent Supren Court decisions.

EMERGING ISSUES CONCERNING THE DEFENSE OF EMPLOYMENT PRACTICE TORTS

There have been a number of recent United Stat Supreme Court decisions that will have, or ha already had, implications for claims potentially covere by employment practice policies. The range of cas addressed by the Supreme Court is illustrative of th types of cases encountered by defense counsel in th employment area.

One type of case that is frequently seen in th employment law context is sexual harassment. In tw recent cases decided by the Supreme Court, the issu of sexual harassment was raised in two very differei contexts.

In *Burlington Northern v. White,* decided on Apr 17, 2006, the Court questioned whether the ant retaliation provision of Title VII of the Civil Righ Act of 1964 is confined to retaliation that only affec the terms and conditions of employment, or if it h a broader scope.[4] In addition, the Court considere to what extent an adverse action has to be harmf before it can be considered illegal retaliation.

In this case, Shelia White brought a complai against her employer, Burlington Northern & San

Continued on page

Employment Practice Torts

Continued from page 5

Fe Railway Company, for alleged sexual harassment, gender-based discrimination and retaliation for having made complaints about her immediate supervisor. White asserted that her reassignment from her duties as a forklift operator to track laborer was effectively a demotion and was made in retaliation because she complained that her supervisor had made inappropriate and insulting sexual remarks to her.

White also brought a retaliation charge after she was suspended for 37 days without pay for insubordination. Although Burlington eventually concluded that White had not been insubordinate, and she was reinstated and awarded backpay, White maintained the additional retaliation charge.

In its defense, Burlington argued that there was no basis to conclude that it had retaliated against White because her transfer did not affect the terms and conditions of her employment. The Supreme Court disagreed, saying that "the scope of the anti-retaliation provisions extends beyond workplace-related or employment-related retaliatory acts and harm."[5] In determining whether White's transfer could be viewed as a retaliatory act, the Court said that while the "reassignment of job duties is not automatically actionable, whether a particular reassignment is materially adverse" depends on whether a reasonable person in a similar position and circumstances would find the actions to be materially adverse.[6] Thus, the Court determined that there was sufficient evidence for the jury to have concluded that a reasonable person would have found White's reassignment and 37-day suspension without pay to have been materially adverse.

To be an employer covered by Title VII of the Civil Rights Act of 1964, an employer must have fifteen or more employees.[7] In *Arbaugh v. Y & H Corp.*, another sexual harassment case, decided on January 11, 2006, Jenifer Arbaugh claimed that her employer had sexually harassed her while she worked as a bartender and waitress at the Moonlight Café in New Orleans.[8] The defendant, Y & H, did not assert that they employed less than fifteen people, which would have excluded it from the definition of "employer" under Title VII, until two weeks after the jury found in Arbaugh's favor. Without the required fifteen employees, the District Court would arguably have lacked jurisdiction under Title VII.

The Court considered whether the numerical qualification included in Title VII's definition of "employer" affects federal-court subject matter jurisdiction, and therefore is an issue that can be raised at any time during the proceeding, or whether it is a substantive component of the Title VII claim for relief, and is an issue that must be raised in the early stages of litigation. The Court determined that in this instance, the question of numerical qualifications is not a jurisdictional issue, but is instead an element of the plaintiff's claim. Therefore, the Court said that Y & H had failed to make a timely argument against the federal court proceeding with the case.

In another retaliation case of note, *Jackson v. Birmingham*, decided March 29, 2005, Petitioner Roderick Jackson brought suit against the Birmingham Board of Education alleging that the Board had engaged in retaliation against him. Jackson, the girls' high school basketball coach, complained to the school board that the girls' team was not receiving equal funding and equal access to equipment and facilities as required by Title IX of the Education Amendments of 1972.[9] The question for the Supreme Court was whether Title IX's private right of action encompasses claims of retaliation.

The Supreme Court determined that the private right of action under Title IX does indeed encompass retaliation claims "where the funding recipient retaliates against an individual because he has complained about sex discrimination."[10] The Court determined that retaliation against a person who has complained about sexual discrimination is a form of intentional discrimination, and declared that the District Court erred when it granted the school board's motion to dismiss Jackson's claim. The Court firmly added that even though Jackson was an "indirect victim" of sex discrimination, the statute is broadly worded and "does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint."[11] According to the Court, the ability to enforce Title IX would be hindered if retaliation against witnesses and third parties who reported discrimination went unpunished because "[w]ithout protection from retaliation, individuals who witness discrimination would likely not report it . . . and the underlying discrimination would go unremedied."[12]

Another issue that the Supreme Court has addressed in its past two terms is the question of employee rights to freedom of speech under the First Amendment – that is, to what extent may an employer discipline a public sector employee for something that the

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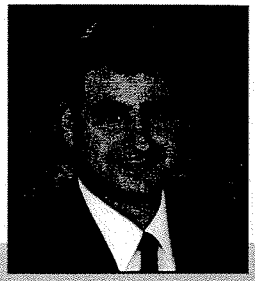
Worthy Of Note



VINCENT P. POZZUTO*

1. PROCEDURE

Plaintiff Failed to Comply with Statutory Requirement Regarding Notice of Claim.

Klait v. NYCTA, 831 N.Y.S.2d 526 (2nd Dept. 2007)

Plaintiff's initial notice of claim stated that the claim arose on December 30, 2002, and did not specify a time. During the 50-h hearing, plaintiff testified that the accident occurred on December 28, 2002, at 1:30 a.m. Plaintiff then served an amended complaint reflecting the correct date of the accident. The Court held that defendants were prejudiced and that the Supreme Court improvidently exercised its discretion in denying the defendants' motion to dismiss the amended complaint.

2. PRODUCTS LIABILITY

Court Properly Denied Manufacturer of Treadmills Motion for a Directed Verdict.

Wheeler v. Sears Roebuck & Co., 831 N.Y.S.2d 427 (2nd Dept. 2007)

The 26 month old infant plaintiff was injured when his hand was caught in the rear of a treadmill upon which his ten year old sister was walking. The trial court denied the defendant's motion for a directed verdict. On appeal, the Second Department held that the 26 month old infant-plaintiff was presumed to have been legally incapable of understanding danger and averting his injuries. In addition the Court noted that the manufacturer's witness testified that the treadmill's rear end cap created an "in-running nip point hazard" and that other models were manufactured in an "open back" style which eliminated the nip point hazard.

3. LEAD PAINT

Defendant's Expert Affirmation Established Owner's Prima Facie Entitlement to Summary Judgment in Lead Paint Case.

Veloz v. Refika Realty Co., 831 N.Y.S.2d 399 (1st Dept. 2007).

In a lead paint case, the Court held that defendant's expert affirmation established its entitlement to summary judgment on the ground that the infant-plaintiff did not suffer any physical or cognitive impairments stemming from the alleged lead poisoning. The Court further held that plaintiff's expert affirmation failed to create an issue of fact. Plaintiff's expert stated that impairments similar to those he saw in the infant-plaintiff "have been described as sequelae of early childhood exposure to lead." The Court held that the expert did not cite to any particular scientific literature, did not identify the impairment so described, who so described them, the similarity of those so described to those he saw in the plaintiff and at what lead levels such impairments have been observed.

4. LABOR LAW

Labor Law 240 Cause of Action Dismissed.

Meng Sing Chang v. Homewell Owners Corp., 831 N.Y.S.2d 547 (2nd Dept. 2007).

Plaintiff was standing on the second step of a ladder attaching a cable to the wall of a building. The metal grating upon which the ladder was resting collapsed. The building's superintendent testified that after the accident, he observed the plaintiff and the metal grating at the bottom of an elevator shaft, while the ladder was still standing against the wall. The Court held that defendants demonstrated that the fall resulted from a "separate hazard wholly unrelated to the danger that brought about the need for the ladder in the first instance." The Court also dismissed the 241 (6) and 200 claims as plaintiff failed to cite any applicable Industrial Code provisions and there was no evidence of supervision and control or notice.

5. LEAD PAINT

Presumption of Lead Based Paint Does Not Apply in Absence of Chipping or Peeling Paint.

Concepcion v. Walsh, 831 N.Y.S.2d 402 (1st Dept. 2007)

Continued on page 8

* *Vincent P. Pozzuto is a member in the Manhattan office of Cozen O'Connor.*

Continued from page 7

In a lead paint case, the Court held that the presumption of the existence of a lead hazard contained in the Administrative Code of the City of New York does not arise in the absence of peeling or chipping paint in the subject apartment. The Court further held that because the plaintiff's mother testified that she did not know if there was chipping or peeling paint, her affidavit to the contrary lacked evidentiary value. The Court further rejected plaintiff's argument that evidence of lead in another apartment in the building constitutes evidence of lead paint in the subject apartment.

6. MEDICAL MALPRACTICE

Plaintiff Failed to Prove Circumstantially Which Defendant Caused her Burn After Orthopedic Surgery

Boling v. Stegemann, 831 N.Y.S.2d 622 (4th Dept. 2007).

Plaintiff commenced an action against doctor and county hospital after suffering burn during orthopedic surgery. At trial, each defendant offered expert testimony attributing the burn to the other. Plaintiff argued that the fact that she suffered a burn established negligence and it was for the jury to decide who caused it. The first two questions on the verdict sheet were whether each defendant was negligent. The jury answered both questions in the negative. On a post-trial motion, the lower Court held that there was no rational basis to find neither defendant liable. On appeal, the Court held that the doctrine of resipsa loquitur, while it permits an inference of negligence, does not require a jury to infer negligence against a defendant.

7. INSURANCE

Insured's Failure to Give Notice For Over One Year Was Unreasonable.

RMD Produce Corp. v. Hartford Cas. Ins. Co., 831 N.Y.S.2d 135 (1st Dept. 2007)

Plaintiff RMD had a Commercial General Liability policy issued by Hartford that was in effect at the time in question. The underlying action arose out of an incident which occurred on May 13, 2003, in which a New York City Fire Inspector, Ward, claims he was assaulted by Freeman, an employee of RMD, as Ward was attempting to conduct a fire inspection of a premises, occupied by RMD. RMD did not give notice to Hartford until April 2004, when the underlying suit was commenced. RMD argued that because justification was available as a defense to the assault claim, its duty to notify Hartford was not triggered. The Court held that in view of the circumstances, including the injuries sustained by Freeman, the fact he was arrested and the fact that Ward was a New York City Official, there was no way to conclude that the failure to give notice was reasonable.

8. NEGLIGENCE

Evidence was Sufficient to Establish that Defendant Neither Created Condition Nor had Actual or Constructive Notice.

Yutes v. City of New York, 831 N.Y.S.2d 186 (2nd Dept. 2007)

Plaintiff's decedent suffered fatal injuries when he was struck by a falling lamppost. At the time, the decedent was working for a third party contractor removing and replacing sidewalk adjacent to the lamppost. The Court held that defendant established its prima facie entitlement to judgment as a matter of law. The Court further held that evidence of a subsequent design modification with respect to newly installed lampposts is inadmissible to demonstrate that the original design was defective.

9. LABOR LAW

Carpentry Contractor was Neither a General Contractor nor a Statutory Agent of the Owner.

Aversano v. J.W.H. Contracting LLC, 831 N.Y.S.2d 222 (2nd Dept. 2007).

Plaintiff was employed by an electrical contractor, Elite Electrical. The site owner hired a number of contractors to perform renovation work at the site, including defendant J.W.H. Contracting. J.W.H. was hired to perform carpentry work. Plaintiff fell from an attic joist after hopping up onto the joist from a ladder owned by his employer, Elite. The Court held that J.W.H. was not a statutory agent of the owner, and thus was not subject to liability under Labor Law § 240 (1). The Court noted that the owner selected the other contractors, including Elite, and paid them directly. The Court also noted that J.W.H. and Elite had separate contracts with the owner, and J.W.H.'s contract did not give it the authority to insist that proper safety practices be followed by other contactors.

Continued on next page

Worthy Of Note

10. INSURANCE

Insured's Misrepresentations Breached Cooperation Clause

Sirius American Ins. Co. v. TGC Const. Corp., 830 N.Y.S.2d 773 (2nd Dept. 2007)

On March 8, 2002, Robert Matthius sustained personal injuries while employed by a subcontractor at a construction site. In October, 2002, Matthius brought an action to recover against TGC Construction Corp. TGC sent a copy of the complaint to its carrier on October 29, 2002. During a November 5, 2002 meeting, TGC's sole shareholder, John Culotta, stated that TGC was not involved with the site. During a further inquiry, on April 29, 2003, Culotta signed a statement confirming that TGC was not involved with the project. On July 22, 2004, Culotta was deposed and testified that TGC had a verbal agreement with the developer of the site to act as project manager, and to hire and supervise the general contractor and subcontractors. The Court held that these misrepresentations violated the cooperation clause, and that Sirius was not obligated to defend or indemnify TGC.

11. PRODUCTS LIABILITY

Defense Verdict for Steam Table Manufacturer Was Not Against the Weight of the Credible Evidence. *Lucks v. Lakeside Mfg. Inc.*, 830 N.Y.S.2d 747 (2nd Dept. 2007)

Plaintiff, a food service worker, placed a pan of hot soup on a shelf that was part of a steam service table. The shelf collapsed causing the soup to spill on him. During trial, plaintiff contended that the shelf fell due to a defective support pin. The jury returned a verdict in favor of the defendant. On appeal, the Court held that the verdict was supported by a valid line of reasoning. By the time plaintiff's expert examined the steam table, only one of the four support mechanisms contained a support pin. Plaintiff's expert was not certain that the remaining pin was of original manufacture. The Court held that the jury could have reasonably concluded that the pin examined by plaintiff's expert was not one of the original pins, or that it was not defective when it left defendant's possession.

12. DAMAGES

One Million Dollars for Conscious Pain & Suffering was Not Excessive.

Twersky v. Basche, 830 N.Y.S.2d 725 (2nd Dept. 2007)

Plaintiff's decedent, who was struck by a van in a crosswalk, suffered a broken femur, collar bone, ribs, collapsed lungs and extensive internal bleeding. The trial proof established that she remained conscious for two and a half hours until she underwent anesthesia and surgery. The Court reinstated the award for $1 million in conscious pain and suffering, holding that it did not deviate materially from what would be reasonable compensation.

13. PREMISES

Liability Wheelchair User's Attempt to Traverse Height Differential Superseded Any Negligence on Part of Building Owner

Sealey v. West End Garden Development Company, Inc., 830 N.Y.S.2d 730 (2nd Dept. 2007)

Plaintiff, a wheelchair bound quadriplegic, summoned the elevator to the fourth floor of his apartment building. When it arrived, the floor of the elevator was approximately five to six inches higher than the hallway floor. Plaintiff attempted to ride his electric-powered wheelchair into the elevator twice. On the second attempt, the wheelchair flipped over backwards ejecting plaintiff. The Court held that plaintiff's attempt to enter the elevator superceded any negligence on the part of the defendants. The Court also noted that the wheelchair's operating manual warned users not to drive over curbs or obstacles space since doing so could cause the wheelchair to turn over.

14. DISCOVERY

Defendant is Entitled to Vocational Rehabilitation Examination when Plaintiff Claims Inability to Perform Overtime

Allen v. New York City Transit Authority, 828 N.Y.S.2d 301 (1st Dept. 2006)

Plaintiff asserted in his Bill of Particulars that he would continue to lose earnings until he returned to work, "if ever." Plaintiff did in fact return to work, albeit limited to light duty, and claimed that he could not perform overtime. The Court held that defendant was entitled to a vocational

Continued on page 12

2007 Charles C. Pinckney Award Recipient

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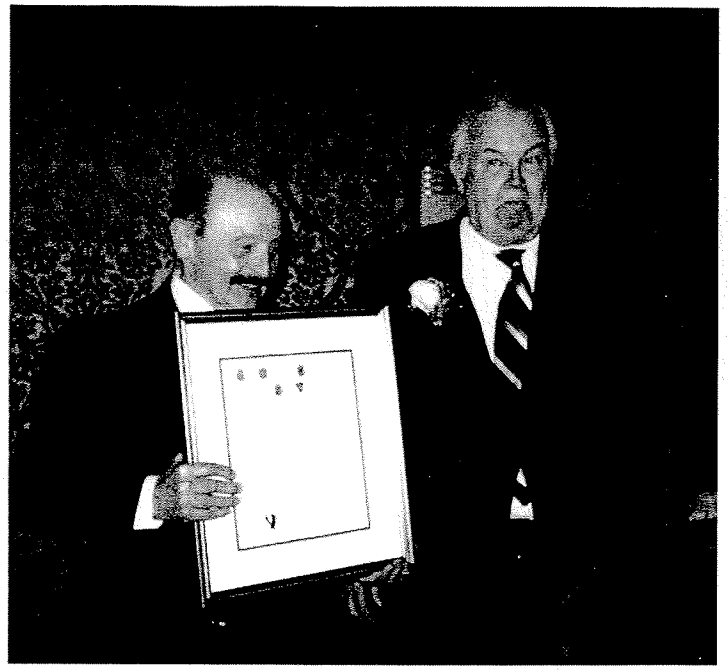

Anthony Celentano Honored for his dedication and service to the Defense Association of New York

Roger P, McTiernan with Honorable Justice Angela Mazzarelli (Appellate Division, First Department)

Continued from page 9

rehabilitation examination, regardless of whether plaintiff had noticed a vocational rehabilitation expert of his own.

15. LABOR/LAW DAMAGES

Recalcitrant Worker Defense not supported by Evidence; Future Pain & Suffering Award Reduced.

Miraglia v. H & L Holding Corp., 888 N.Y.S.2d 329 (1st Dept. 2007)

Plaintiff construction worker was impaled by a steel bar after falling into a trench. He was rendered a paraplegic. The Court held that the evidence did not support the recalcitrant worker defense as plaintiff's employers testified that workers were permitted to walk on planks across the trench provided that they doubled these planks. The Court held that this testimony negated the defense that plaintiff was a recalcitrant worker for walking on a plank rather than using a ladder to cross the trench. In addition, the court noted that plaintiff offered unchallenged expert testimony that even doubled-up planking did not provide adequate protection. The Court reduced the future pain and suffering award from $10,000,000 to $5,000,000.

16. INSURANCE

Negligent Hiring Cause of Action Falls Within Scope of Policy's Auto Exclusion.

Utica First Ins. v. Star-Brite Painting, 828 N.Y.S.2d 488 (2nd Dept. 2007).

Plaintiff insurer brought a declaratory judgment action seeking a declaration injury that it was not obligated to defend or indemnify Star-Brite painting and its President, sole owner and sole employee, Kenneth Doerler, in an underlying personal injury action arising out of Doerler's operation of a motor vehicle. The second cause of action in the Complaint alleged negligent hiring. The Court held that the inclusion of a negligent hiring cause of action does not alter the fact that the operative act giving rise to any recovery was the alleged negligent operation of a motor vehicle. The Court thus held that the auto exclusion applied.

17. DUTY

Tour Operator Owed No Duty to Plaintiff.

Marcia v. Church of Our Lady of Mount Carmel, 828 N.Y.S.2d (2nd Dept 2007).

The Court held that a Tour Operator has no duty to warn group members of possible hazards on property it neither owns or occupies. In addition, the Court held that the third-party defendant Tour Operator did not assume a duty to plaintiff in the absence of any evidence that the Tour Operator directed plaintiff to proceed in a particular manner.

18. LABOR LAW

Rebar is an Integral Part of the Work Being Performed.

Tucker v. Tishman Construction Corp. of New York, 828 N.Y.S.2d 311 (1st Dept 2007).

The Court held that the rebar steel over which plaintiff tripped was an integral part of the work being performed, not debris, scattered tools, or a sharp projection. The Court further held that the rebar was not obstructing a passageway. Finally, the court held that §§ 23 1.30 of the Labor Law did not apply as the record was insufficient to create an inference that the amount of the lighting fell below the specific statutory standard.

19. INSURANCE

Fact Issue as to Whether Insured's Conduct was Intentional or Expected Precluded Summary Judgment

New York Cent. Mut. Fire Ins. Co. v. Wood, 827 N.Y.S.2d 760 (3rd Dept. 2007)

Defendant Amber Wood was camping with friends in a state park. Defendant Charles Young, at approximately 6:15 a.m., drove his vehicle over her tent causing her serious injury. Young pled guilty to attempted reckless assault and was sentenced to 11 years in prison. Wood commenced a personal injury action against Young's motor vehicle insurance carrier, Progressive. Progressive denied coverage under the intentional act exclusion. Wood then commenced arbitration with New York Central, her own motor vehicle insurance carrier, pursuant to her own policy's uninsured/under insured's motorist provision. Plaintiff New York Central Mutual obtained a stay of the arbitration in order to commence a declaratory action against Progressive. Both plaintiff and defendant moved for summary judgment. The lower court granted summary judgment for plaintiff New York Central Mutual and denied Progressive's motion for summary judgment. The appellate court affirmed, holding that the dispositive inquiry to determine whether the intentional act exclusion applies is whether there was any possible factual or legal basis upon which to find that the bodily

injuries inflicted upon Wood were not expected or intended by Young. The Court noted that Young stated in both his statement to police and in his plea colloquy, that he did not know that Wood, or anyone else, was in the tent. The Court held that this could provide a sufficient basis for a finding that his conduct was reckless, not intentional.

20. DRAM SHOP

Plaintiff's Complaint was Sufficient to Put Defendant on Notice of Claim Under General Obligations Law Section 11-101

Johnson Ex. Rel. Fredo v. Verona Oil, Inc., 827 N.Y.S.2d 747 (3rd Dept. 2007)

Defendant Andrew Cobb fell asleep at the wheel after drinking beer at a party. He was 19 years old. His passenger, plaintiff Elyssa Johnson was severely injured. Plaintiff brought suit against Cobb and defendant Verona Oil, Inc. alleging that Verona unlawfully sold beer to Cobb. The lower Court denied defendant's motion to dismiss and permitted plaintiffs to amend the complaint to relabel their Alcoholic Beverage Control Law §65 Cause of Action as a Claim under General Obligations Law §11-101. The Appellate Court affirmed, holding that where the allegations in a complaint are sufficient to provide notice of a plaintiff's claim and state the material elements of the cause of action it is enough that the pleader states the facts making out the cause of action, and it does not matter whether the pleader gives the cause of action a name or even gives it a wrong name. The Court further affirmed the denial of Verona's motion for summary judgment holding that plaintiff presented evidence that the store clerk did not compare the identification presented by Cobb long enough to know whether it was his identification card and evidence that witnesses saw Cobb leave defendant's store with a case of beer. Witnesses also described Cobb's inability to keep his balance, erratic driving, glassy eyes and rambling speech. The Court held that this evidence created an issue of fact.

21. INSURANCE

50 Day Delay in Issuing Disclaimer was Unreasonable as a Matter of Law

Gotham Const. Co. v. United Nat. Ins. Co., 829 N..S.2d 5 (1st Dept. 2006)

Plaintiffs, the construction manager and owner of a residential building under construction, sought a declaration of entitlement to defense and indemnification from their insurer, United National, in an underlying personal injury suit brought by an employee of a subcontractor. United National disclaimed under a Residential Projects Exclusion. The Court held that the 50-day delay in disclaiming was unreasonable as a matter of law. The Court further held that United National had no need to conduct additional investigation before disclaiming.

22. PROCEDURE

Evidence that Witness's Relocation Presented Difficulties in Securing Affidavit Supported Motion to Renew

DeCiccio v. Longendyke, 829 N.Y.S.2d 284 (3rd Dept. 2007)

Plaintiff brought a personal injury action alleging that his injuries were caused by defendant's failure to adequately light the premises. Defendant was granted summary judgment. Upon the submission by plaintiff of an affidavit from a non-party witness, the Supreme Court granted plaintiff's motion to renew and reversed its award of summary judgment. The Appellate Court held that plaintiff had exercised due diligence in attempting to obtain a sworn affidavit from the witness prior to the Court's original decision. There was evidence that the witness's relocation presented difficulties in securing the affidavit.

23. LABOR LAW

Plaintiff's Decision not to Request a New Ladder was Sole Proximate Cause of his Accident.

Miro v. Plaza Construction Corp., 2007 WL 925474 (1st Dept. 2007)

Plaintiff alleged that he slipped and fell as he climbed down a six foot wooden ladder that was partially covered with sprayed-on fireproofing material. Plaintiff testified that his employer was "pretty good" about sending replacement ladders to the job site on request, and that his employer had "a lot of ladders" available for use on its projects. Plaintiff observed the fireproofing on the ladder before starting work on the day of the accident, and "didn't call" his employer to request another ladder. The Court held that these facts established that plaintiff's actions were the sole proximate cause of the accident. The Court further held that a ladder does not need to be immediately at hand, either spatially or temporally, to be deemed available for purposes of Labor Law §240.

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employee said, did or wrote during the course of his employment or in relation to his employment?

In City of San Diego v. Roe, decided December 6, 2004, the Court granted certiorari to determine whether a police officer's dismissal from the San Diego Police Department ("SDPD") violated his right to freedom of speech under the First Amendment.[13] Respondent John Doe was dismissed from the police force for posting various items for auction on eBay. His eBay auctions allegedly included police equipment, San Diego Police Department official uniforms, and sexually explicit videos of himself. He was dressed as a police officer in a video that he allegedly had made, his eBay user name was associated with police radio terminology, and his user profile identified himself as employed in the field of law enforcement. The SDPD ordered Roe to stop selling and displaying sexually explicit materials. When Roe failed to adequately comply with the orders, he was dismissed.

The central question for the Supreme Court was whether Roe's actions qualified as expression relating to a matter of "public concern" under the 1983 decision Connick v. Myers.[14] The Court of Appeals for the Ninth Circuit held that "Roe's conduct fell within the protected category of citizen commentary on matters of public concern" because his expression was unrelated to the workplace.[15] The Supreme Court disagreed. The Court stated that when it comes to government employment, the "government employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public."[16] The Court applied the balancing test used in Pickering v. Board of Education,[17] which requires a court to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[18]

The Court cited prior case law to determine that in order for a subject to be a matter of public concern, it must be "something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."[19] Applying these determinations to Roe's case, the Court held that Roe's expression did not meet the threshold requirement of being a matter of public concern. The Court said he had not acted in an attempt to inform the public about the function of the SDPD, but instead was attempting to exploit his employer's image.

In Garcetti v. Ceballos, decided on May 30, 2006, the Court questioned whether an employee's First Amendment rights had been violated when he was disciplined for speech he made pursuant to his official duties.[20] Respondent Ceballos, a deputy district attorney for the Los Angeles County District Attorney's Office, allegedly was reassigned after he wrote a memorandum that recommended dismissal of a pending case because he felt that there were serious inaccuracies with the affidavit used to obtain a critical search warrant. Ceballos' supervisors allegedly criticized his memorandum, and proceeded with the case despite his recommendation. Ceballos was eventually transferred to another position in a different court, which he claims was retaliatory and in violation of his right to freedom of speech.

Because Ceballos was a government employee, the Court revisited the question of whether his speech was a matter of public concern discussed in San Diego v. Roe.[21] Here, the Court determined that the dispositive factor was that Ceballos had written his memorandum pursuant to his duties as a calendar deputy. The Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[22] In other words, because Ceballos was not acting as a citizen when he wrote the memorandum, but only as a paid employee performing the obligations of his position, his supervisors were not restricted from acting in their own discretion to control speech made by their employee. The Court concluded that while the First Amendment ensures government employees the right and ability to participate in public debate, it does not allow them "a right to perform their jobs however they see fit."[23]

The Supreme Court frequently grants certiorari to cases dealing with other forms of employment discrimination. In Ash v. Tyson Foods, decided February 21, 2006, the Supreme Court reversed and remanded the case based on two errors made by the Eleventh Circuit.[24] Petitioners Anthony Ash and John Hithon, both African-Americans, were superintendents at a poultry plant owned and operated by respondent Tyson Foods. Petitioners sought promotions to the position of shift manager, but the positions were eventually offered to two White males. Petitioners alleged that Tyson discriminated against them on the basis of race. At trial, Tyson moved for judgment

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as a matter of law at the close of plaintiff's case. The District Court denied the motion, and the jury found for the petitioners, awarding compensatory and punitive damages. Tyson renewed its motion for judgment. This time, the court granted the motion, and ordered a new trial for both petitioners.

On appeal, the Eleventh Circuit affirmed in part and reversed in part. For Ash, the appeals court determined that the trial evidence was insufficient to show pretext (and thus unlawful discrimination) under the burden shifting framework set forth in McDonnell Douglas Corp. v. Green.[25] With regard to Hithon, the appeals court reversed the motion for judgment under Rule 50(b), but affirmed the remedy of granting a new trial holding that the evidence did not support the award of punitive damages, or the compensatory damages amount.

The United States Supreme Court reversed, stating that the Circuit Court of Appeals had made two errors. First, the appellate court erred in addressing the petitioners' argument that the use of the term "boy" by their employer was evidence of a discriminatory animus. The appellate court had held that use of the word "boy" is evidence of discriminatory intent only when it is modified by racial classifications such as "black" or "white," but, that "the use of 'boy' alone is not evidence of discrimination."[26] The Supreme Court held that even though the word may not always be evidence of a racial animus, the use of the word "boy" does not need to be preceded by a modifier in order to show evidence of bias. The contextual factors surrounding the use of the word may be enough to show a racial animus even when it is used by itself.

The second error made by the Court of Appeals, according to the Supreme Court, was that it improperly articulated the standard for determining whether the asserted nondiscriminatory reasons for Tyson's hiring decisions were pretextual. The Court of Appeals stated that "[p]retext can be established through comparing qualifications only when 'the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.'"[27] The Supreme Court was dissatisfied with the vagueness of the term "slap you in the face," calling it "unhelpful and imprecise."[28] While the Court declined the opportunity to definitively state the standard that should govern pretext claims, it suggested that the Court of Appeals use a different test to ensure that trial courts reach consistent results. Thus, the Supreme Court granted certiorari, the judgment of the Court of Appeals was vacated and the case remanded.

In another employment discrimination case, Smith v. City of Jackson, decided March 30, 2005, petitioners, who were police and public safety officers employed by the city of Jackson, claimed that salary increases they received violated the Age Discrimination in Employment Act of 1967.[29] The City had enacted a pay plan that granted raises to all City employees. The plan was largely motivated by an effort to bring starting salaries of police officers up to the regional average. The result of the raises was that officers who had less than five years tenure received raises that were proportionately greater than officers who had more seniority.

The petitioners were a group of older officers who raised a claim of disparate-treatment (intentional discrimination) alleging that the City deliberately discriminated against them because of their age, and a claim of disparate-impact (non-intentional discrimination) because they were "adversely affected" by the plan because of their age. The Supreme Court's decision focused on the question of whether the "disparate-impact" theory of recovery used in the 1971 case Griggs v. Duke Power is cognizable under the ADEA.[30] The Supreme Court determined that Griggs, which held that section 703(a)(2) of Title VII does not require a showing of discriminatory intent, only a showing of discriminatory consequences, "strongly suggests that a disparate-impact theory should be cognizable under the ADEA."[31]

However, in analyzing the disparate-impact claim of the petitioners, the Court determined that they had failed to meet their burden of "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."[32] Furthermore, the Supreme Court concluded that the City's plan was based on "reasonable factors other than age" because the explanation for the differential raises was the City's desire to raise the salaries of junior officers to compete with similar positions in the market.[33] In light of its goals to bring officers' salaries in line with surrounding police departments, the City acted reasonably when it made the decision to grant raises based on seniority and position. The Supreme Court concluded that "even though there may have been more reasonable ways for the City to achieve its goals, the one selected was not unreasonable."[34]

For the 2007 term, the Supreme Court has granted certiorari with regard to number of employment related cases that will continue to change and shape employer's responsibilities and employee rights. In

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Ledbetter v. Goodyear, a case on appeal from the Eleventh Circuit, the Court will look at whether a plaintiff asserting a disparate pay claim under Title VII may challenge payment decisions that were made prior to the last decision immediately preceding the start of the statute of limitations period.[35]

The above cases represent just a small sample of the types of issues that confront defense counsel in employment practice litigation. As insurers write more employment practice policies, the insurance defense bar is being called upon to respond and defend insureds against these claims. While traditional bodily injury and property damage claims will continue to be a large part of the focus of the insurance defense bar, employment practice claims are here to stay.

(Footnotes)

1 Http://chnm.gmu.edu/courses/122/hill/hilloutline2:btm

2 Employment Practices Liability, 2001, JVR

3 www.eeoc.gov

4 126 S.Ct. 2405 (2006).

5 Id. at 2414.

6 Id. at 2417.

7 42 U.S.C. § 2000e(b).

8 126 S.Ct. 1235 (2006).

9 544 U.S. 167 (2005).

10 Id. at 171.

11 Id. at 179.

12 Id. at 180-81.

13 543 U.S. 77 (2004).

14 461 U.S. 138 (1983).

15 City of San Diego, 543 U.S. at 79.

16 Id. at 80.

17 391 U.S. 563 (1968).

18 City of San Diego, 543 U.S. at 82 (citing Pickering, 391 U.S. at 568).

19 City of San Diego, 543 U.S. at 83-84.

20 126 S.Ct. 1951 (2006).

21 543 U.S. 77.

22 Garcetti, 126 S.Ct. at 1960 (emphasis in original).

23 Id.

24 126 S.Ct. 1195 (2006).

25 411 U.S. 792 (1973).

26 Ash, 126 S.Ct. at 1197 (citing Ash v. Tyson Foods, 129 Fed.Appx. 529, 833 (11th Cir. 2005)).

27 Ash, 126 S.Ct. at 1197 (citing Ash, 129 Fed.Appx. at 533).

28 Ash, 126 S.Ct. at 1197.

29 544 U.S. 228 (2005).

30 401 U.S. 424 (1971).

31 Smith, 544 U.S. at 236.

32 Id. at 241 (emphasis in original) (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 91989)).

33 Smith, 544 U.S. at 241.

34 Id. at 243.

35 421 F.3d 1169 (11th Cir. 2005), certiorari granted, 127 S.Ct. 617, 166 L.Ed.2d 426, 75 USLW 3262.

TARTER KRINSKY & DROGIN LLP
ATTORNEYS AT LAW

Richard L. Steer | Partner
Tarter Krinsky & Drogin LLP
470 Park Avenue So. | New York, NY 10016
T 212.481.8585 | Fax 212.481.9062
rsteer@tarterkrinsky.com | www.tarterkrinsky.com

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