

## U.S. Supreme Court decisions point to need for sharpened employer policies

BY ADRIAN P. KENDALL

On the last day of its term, the U.S. Supreme Court issued two decisions in sexual harassment cases. Those decisions, *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, should finally provide some uniformity in the rules the courts use to determine whether employers can be held liable for sexual harassment perpetrated by supervisory employees.

In *Burlington Industries*, the Supreme Court held that employers are subject to the same standard of vicarious liability under Title VII of the 1964 Civil Rights Act, whether the alleged harassment is of the quid pro quo or hostile environment variety. The employee does not need to show that the employer was negligent or otherwise at fault for the supervisor's actions. Moreover, the employee does not need to prove any adverse, tangible job consequences from refusing to submit to the supervisor's advances. In *Faragher*, the Supreme Court restated these holdings, applying them to a sexually hostile environment created by supervisors.

The decision in *Burlington Industries* essentially does away with the so-called "quid pro quo" and "hostile work environment" approaches which have been used by the courts in analyzing the issue of vicarious liability of employers for their employees' activities.

Under the *Burlington Industries* standard, the determination of employer liability for a supervisor's conduct focuses on determining vicarious liability.

However, the employer may raise an affirmative defense when the employer has taken no tangible employment action against the employee. To be eligible for the defense, the employer must be able to show, by a preponderance of the evidence, (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, AND (2) that the plaintiff employee unreasonably failed to take advantage of any corrective or preventive opportuni-

ties the employer provided or to avoid harm otherwise.

Future case law promises a full and microscopic dissection of this affirmative defense. However, the Supreme Court has provided some preliminary guidance in its application. Specifically, proof that an employer has an anti-harassment policy, which includes a complaint procedure, is considered in determining whether the first prong of the affirmative defense test has been met.

Similarly, the Supreme Court determined that the second prong of the test would "normally" be satisfied when it could be shown that the employee unreasonably failed to use the complaint procedure the employer established.

The affirmative defense is not available, and the employer is therefore strictly liable, when the supervisor's harassment results in tangible employment action. A "tangible employment action" occurs when the employer makes a significant change in the employee's status, such as firing, failing to promote, reassigning with significantly different responsibilities, or making a decision that causes a significant change in benefits.

The same standards were restated in *Faragher v. City of Boca Raton*.

So, what do these decisions mean for the employer? In real world terms, an employer should take these steps:

1. Make sure the company has a comprehensive sexual harassment policy which includes a clear and practical complaint procedure. Form policies are widely

### INSIDE

*U.S. Supreme Court decisions point to need for sharpened employer policies* 1

*New federal law gives credit unions continued membership access* 2

*ADA: study points to employers prevailing in court* 3

*New Maine law makes insurance fraud a crime* 4

*NH&D now on the Internet* 4

*Briefs/Kudos* 5

*Four significant Law Court decisions* 6

*When does absolute pollution exclusion apply in personal injury suits?* 7

*NH&D contributes to prosecution of Bosnian war atrocities* 8

*First Circuit: job applicants may sue for damages under FMLA* 9

*Workers' compensation - Law Court decisions* 10



ADRIAN P. KENDALL

available from a variety of sources, but take care to adapt “boilerplate” language to fit the circumstances of your operations. Above all, be sure to follow your written procedures in responding to a complaint.

2. Don’t just adopt a policy and bury it in the employment manual. Present the policy to the employees. Make sure they understand what is expected of them, as well as the procedure for dealing with a sexual harassment claim. Remember – the affirmative defense is not available if you don’t take reasonable care both to *prevent and promptly correct* the wrongful behavior.

3. Choose carefully the people in your organization to receive complaints. These people should be approachable and considered unbiased by the employees. While a supervisor may be suitable to receive complaints from an employee about a fellow worker, that will not be the case when the complaint concerns a supervisor, or even a supervisor’s superior. Designate a credible alternative route for the complaint filing procedure.

If the employee can provide a reasonable explanation as to why the company’s complaint procedure was not followed, the employer loses its affirmative defense.

4. Structure your company’s organization to prevent harassers from having the power to take “tangible employ-

ment action.” If practicable, do not give supervisors the lone authority to hire, fire, adjust pay scales or otherwise take action against an employee without first getting a superior’s approval. A supervisor should always give written reasons as to why a negative action regarding an employee is recommended. It will not always be possible to tell when such action is retaliation in a harassment situation, but requiring a reason can help. If possible, develop a form the supervisor must fill out about the employee and note the action taken.

As soon as tangible employment action is taken against an employee, the employer’s affirmative defense is entirely lost.

The Supreme Court’s decisions in the *Burlington Industries* and *Faragher* cases do mean that employers can be held responsible for an employee-supervisor’s conduct without that employer ever learning about the conduct. However, the employer can take prudent steps to significantly lessen exposure to liability.

For more information about sexual harassment laws in Maine and insurance coverage-related issues, see the Fall, 1996 and Fall, 1997 issues of the NH&D Newsletter. These and all issues published since 1990 are now available online at [www.nhdlaw.com](http://www.nhdlaw.com). □

---

NORMAN, HANSON & DETROY, LLC

## newsletter

is published quarterly to inform you of recent developments in the law, particularly Maine law, and to address current topics of discussion in your daily business. These articles should not be construed as legal advice for a specific case. If you wish a copy of a court decision or statute mentioned in this issue, please write or telephone us.

Stephen W. Moriarty, Editor  
Rachael Finne, Managing Editor  
Charlotte Tebbenhoff, Copy Editor  
Norman, Hanson & DeTroy, LLC  
P.O. Box 4600, Portland 04112  
Telephone (207) 774-7000  
FAX (207) 775-0806  
E-mail address: [lstinitiallastname@nhdlaw.com](mailto:lstinitiallastname@nhdlaw.com)  
Website: [www.nhdlaw.com](http://www.nhdlaw.com)  
Copyright 1998 by Norman, Hanson & DeTroy, LLC

## *New Federal law gives credit unions continued membership access*

President Clinton signed into law the Credit Union Membership Access Act on August 9, 1998. The successful enactment of this legislation brings to a close a tempestuous chapter in the history of credit unions across the country.

Both the House and Senate delivered gratifying support to credit unions this year, and the new law clarifies and strengthens a financial service that was founded in the last century to aid low-income individuals and families. Federally insured credit unions in Maine number 88, with over two billion dollars in assets.

Title I of the Act speaks to credit union membership. Federal credit unions continue to be authorized to have multiple group charters with new criteria and procedures. The National Credit Union Administration will implement rules and directives, one of which will come in the form of a new Chartering and Field of Membership Manual. New definitions affecting membership, the definition of communities and the like will be carried out.

Title II fixes new requirements on credit unions regarding financial statements and audits. Federally insured credit unions with assets of \$500 million or more must obtain an annual independent audit by a certified public accountant, all credit unions with assets of \$10 million or more must follow accepted accounting principles for all “reports or statements,” and third, any federal credit union with assets exceeding \$10 million that uses an independent auditor must obtain audits which comply with state laws and regulations, including licensing requirements. Also affected in Title II are member business loans. New aggregate limits on a

credit union's outstanding member business loans must be the lesser of 1.75 times the CU's net worth, or 12.25% of the CU's total assets. This section provides certain exemptions from these limits for some credit unions.

Title III deals with new capitalization requirements for all federally insured credit unions. These provisions do not take effect until August 7, 2000, and in-

volve a new net worth standard of 7% of assets together with risk-based capital standards for certain credit unions. The NCUA states that they will issue implementing rules in advance of compliance dates.

Several Maine credit unions with multiple group charters have breathed a considerable sigh of relief over passage of the Credit Union Membership Access Act. The credit union movement in Maine

has expressed its collective thanks to Congressmen Baldacci and Allen for their support in the House, and to Senators Snowe and Collins for their strong show of support in the Senate, especially in response to proposed amendments to this legislation which would have been detrimental to the interests of Maine's credit unions. □

*Roderick R. Rovzar*

---

## Americans with Disabilities Act: impact study points to employers prevailing in court

BY ADRIAN P. KENDALL

---

According to a summary of an American Bar Association report, the vast majority of cases brought under the Americans with Disabilities Act of 1990 (ADA) are resolved in favor of employers. The survey included a review of 1,200 case decisions and covered "virtually every reported and most unreported court decisions" since 1992 – the date when the first case was decided under the ADA.

Of the 1,200 cases reviewed, 760 resulted in a final decision. Of those cases, employers prevailed a full 92% of the time. While employers met with overwhelming success across the nation, there was some geographical disparity. Employers were most successful in the Fifth Circuit, which covers Louisiana, Mississippi and Texas, while employees were most successful (16.7% of the time) in the Ninth Circuit - comprised of most of the western states, Hawaii and the Pacific Territories.

A review of ADA charges resolved by the EEOC essentially mirrored the results from the courts. Of the 83,000 plus administrative decisions rendered by the EEOC between 1992 and 1997,

86% were resolved in the employer's favor.

The ABA report reasoned that this statistical pro-employer advantage was due to two inherent "Catch-22's" in the ADA. The report identifies the first "catch" as being that, on the one hand, the law requires the disability be substantially limiting, while on the other, the law requires the employee to be otherwise qualified to perform essential job functions. The other "Catch-22" identified in the study is the application of a legal doctrine known as "judicial estoppel." Courts have used that doctrine to prevent some plaintiffs from recovering under the ADA in instances where those same plaintiffs have previously asserted that they are 100% disabled when applying for either Social Security or workers' compensation benefits. Some plaintiffs, though claiming to be 100% disabled for the purposes of obtaining these benefits, have also claimed that they are qualified to perform essential job functions.

The tone of the report strongly suggests that the survey was approached from the pro-employee perspective. For instance, not addressed is to what extent

the high employer success rate may be due to meritorious claims being recognized and settled by employers after the case is filed without adjudication. The survey also claims that the term "disability" is being restrictively defined, yet does not appear to focus on the fact that an essential issue in many ADA cases is whether the disability can be or was *reasonably accommodated* by the employer. Finally, the number of employer victories attributable to procedural pitfalls rather than consideration of the facts is not presented.

According to its author, John Parry, director of the ABA Commission on Mental and Physical Disability Law, the survey undercuts the widely held belief that the ADA favors plaintiffs and unduly burdens employers. However, once additional factors are taken into account, it may be that the ADA has realized its goal – protecting disabled workers, while striking a balance on the degree of accommodation required from the employer of the disabled employee or applicant for employment. □

# New Maine law makes insurance fraud a crime

BY ANNE H. JORDAN

Insurance deception just became a separate criminal act in Maine under a new law that went into effect July 9, 1998. Under 17-A MRSA Section 354-A, a person may be found guilty of theft if s/he purposely writes false statements or misrepresents to a person in the insurance industry any facts that affect the application or renewal of a policy, the rating of a policy, payment made in accordance with a policy, a claim for payment or benefit under a policy, or premiums paid on a policy.

Punishment for individuals convicted of insurance deception will depend on the value of the property lost. If the value is less than \$1,000, it is a Class E crime, with penalties of up to six months in jail and up to a \$2,000 fine. Property valued between \$1,000 and \$2,000 is a Class D crime, with penalties of up to 364 days in jail and up to a \$2,000 fine. Property valued between \$2,000 to \$10,000 would cost the perpetrator up to five years in jail and up to a \$5,000 fine. Over \$10,000 in property loss is a Class B crime, and will cost up to ten years jail time and up to a \$20,000 fine.

Regardless of the crime's classification, the court may also impose a fine of up to twice the amount of the defendant's monetary gain. Restitution for the amount of the loss may also be ordered.



ANNE H. JORDAN

In suspected insurance fraud, close cooperation is needed between law enforcement officials and claims adjusters, because it is most often the insurer who develops facts necessary for criminal prosecution.

## Second new law addresses deceptive insurance practices

On the flip side, the Maine Legislature has also passed a new law relating to deceptive insurance practices in the industry, 17-A MRSA Section 901-A.

Generally, a person is guilty of deceptive insurance practices if s/he *purposely makes a false statement* in the course of conducting insurance business

that materially alters any of three kinds of documents:

A. a document filed with the Superintendent of Insurance or insurance official or agency of another jurisdiction regarding an insured's financial condition, issuance of written evidence of insurance, or reinstatement of a policy;

B. a document submitted by an insured, claimant or applicant to an insurer, insurance producer or other person; or

C. a document or report filed with a law enforcement agency.

An insurer's employee may also be guilty of deceptive insurance practices if in the course of business s/he intentionally:

A. transacts the business of insurance in Maine without proper license, certification or authorization; or

B. destroys, conceals, removes or otherwise impairs the truth or availability of an insurer's records with intent to deceive, or solicits or accepts a new or renewal insurance risk when they know or should have known that the insurer or other person responsible for the risk is insolvent.

All deceptive insurance practices crimes are a Class D offense.

If you have questions concerning the new law, please feel free to call me at 774-7000 or to e-mail me at [ajordan@nhdlaw.com](mailto:ajordan@nhdlaw.com). □

## Extensive new NH&D website now available

Norman, Hanson & DeTroy, LLC is now on the Internet at [www.nhdlaw.com](http://www.nhdlaw.com). Our extensive new website offers information about the firm and its specialized practice areas, together with a description of each attorney's practice and a direct e-mail connection to each individual.

All issues of NH&D's quarterly

Newsletter from 1990 to the present, and NH&D Law Alerts, will be on the Internet. Articles can be searched by attorney name, keywords, or article title.

We are also providing Internet links to Maine resources: newspapers, organizations, legal resources, state government, and libraries. Links to federal resources

such as the U.S. Supreme Court, federal courts, and federal agencies are also provided.

Our Internet website represents a further commitment to our clients by offering a wide-ranging service we believe will keep you informed and make us more accessible. □

## Briefs/Kudos

EMILY BLOCH attended the first National Conference of the Women's Bar Association in Toronto this summer, as representative of the Maine State Bar Association, Women's Law Section. The Maine Women's Law Section last year received the Conference's Annual Public Service Award for its Breast Cancer Awareness Project. Emily reports that the 1998 Toronto Conference provided a splendid opportunity to meet women attorneys from across the U.S. and Canada.

TOM MARJERISON recently presented a seminar at the American Bar Association headquarters on the evaluation and analysis of war crimes prosecutions in the former Yugoslavia under the 1996 Rome Agreement.

Insurance companies will particularly appreciate a unique workshop held in September in Bangor, the Second Annual Juvenile Firesetters Interviewing and Intervention seminar. Attorney ANNE H. JORDAN was a featured speaker; Anne is a member of the State of Maine Fire Safety for Children Task Force, a workshop sponsor.

On September 2, two new justices were sworn in and seated on the Maine Supreme Judicial Court: Superior Court Justices Susan W. Calkins and Donald G. Alexander. Three new judicial appointees to the Superior Court include Jeffrey L. Hjelm and Thomas E. Humphrey, both previously serving on the District Court, and Thomas E. Warren from the Attorney General's office.

District Court Chief Justice Michael N. Westcott has appointed Christine Foster to the post of Deputy Chief Judge, and recent District Court appointees are Judges Keith A. Powers and Kevin Stitham.

DAVID HERZER and his fiancée, Angela Matheson, were married July 18, 1998 at Grey Havens Inn in Georgetown,

Maine. The new couple flew across the continent to Whistler Cove, British Columbia for a two-week honeymoon, and are now making their home in Portland.

BOB BOWER serves on the Board of Trustees of Kieve Affective Education, Inc., a non-traditional limited purpose school in Nobleboro serving youth and families statewide. Kieve's Leadership Decisions Institute program typically brings 7th or 8th graders from a school district to the camp on Damariscotta Lake for a week, where the children participate in team building, refusal skill reinforcement, ropes course initiatives, and drug, alcohol, and tobacco use prevention. Other programs include a girls' science camp and a boys' summer camp. In 1997, Kieve served over 10,000 people, both residentially and in outreach programs.

The Kieve Advisory Board's October benefit dinner featured Dora Mills, M.D., Director of the Bureau of Health, as speaker.

Bill LaCasse's right hand in workers' compensation solutions, KIM LEAVITT, was married October 10 to Russell Van Der Meiren at People's United Methodist Church. They live in South Portland.



Inveterate golfer JON BROGAN recently won the championship at Purpoodock Club in Cape Elizabeth for the third time. Jon also was elected President of the Purpoodock Club.

Administrators in manufacturing will be pleased to learn that the Regulatory Director of OSHA, Marcia Kent, has won the Anti-Gobbledygook Award for 1998. Ms. Kent's brilliance shone in rewriting and making crystal clear the safety directions, regulations, and other print information from OSHA.

Almost one-third of all employees in the United States are involved to some extent in caring for an aging parent or relative. The Family and Medical Leave Act gives workers up to 12 weeks of unpaid time off to care for an ill parent - if possible, with 30 days' notice. Employees should be aware that leave may be taken in small increments: a day, or even a half-day, if the employer approves.

RUSS PIERCE and his wife Lisa welcomed a newborn daughter to the family on September 3rd: Josie Ruth Pierce. Josie Ruth will soon be entertaining her little brother Ethan.

This summer Maine tackled its disproportionately high auto accident and death rate for drivers 15 to 24 years old by making requirements for novice drivers tougher. It's working. In September 50% of young drivers failed the more challenging road tests. Secretary of State Dan Gwadosky believes the failure rate will lessen once applicants get the benefit of new laws strengthening driver training. Drivers under age 21 must now have provisional licenses for two years.

At the early fall seminars sponsored by the Maine Trial Lawyers Association on The Valuable, Versatile Paralegal, NH&D's JOLENE JACQUES and MARK LAVOIE were featured as an exemplary paralegal/attorney litigation team. □

# Four significant Law Court decisions

BY DAVID P. VERY

## Jury instruction for inexperienced drivers

Does inexperience constitute negligence? That was the question a jury posed to a trial court in *Michaud v. Wood*, 1998 ME 156 (June 18, 1998). The driver in the case was 16 years old and had a Maine driver's license for less than a year. The Law Court stated that the answer to the jury's question could have included an explanation that inexperience alone does not constitute negligence, but that a deviation from the standard of ordinary care caused by inexperience does constitute negligence.

The Law Court went on to state, "While inexperience may lead a driver to take actions that an ordinary, careful driver would not take, it conversely may lead a driver to act with more caution than an ordinary, careful driver." This decision will obviously result in plaintiffs requesting that the jury be instructed that an inexperienced driver has the duty to act with more caution than an ordinary, careful driver. Such a possibility should be considered in handling cases in which the insured has held a driver's license for less than a year.

## A new tort: negligent selection of a contractor

As a general rule, an employer has no vicarious liability for the negligence of an independent contractor. But in *Dexter v. Town of Norway*, 198 ME 1995 (July 31, 1998), the Law Court adopted two exceptions to that general rule. First, the Court adopted the tort of negligent selection of a contractor. Under this new tort, an employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor to do work that will involve a risk of physical harm unless it is skillfully and carefully done, or to perform any duty which the employer owes to third per-

sons. Thus, an insured may be held liable if it retains an independent contractor who is not competent to do the work and if the insured fails to inquire about the contractor's experience in areas of expertise.

The Law Court then held that, with the appropriate factual development, an employer may be held vicariously liable for the contractor's negligence if the work created a "peculiar risk" of doing physical harm. Unfortunately, the Law Court did not provide any clear guidance as to the elements of this cause of action. Indeed, the Court stated, "We are far less certain whether and under what circumstances we would recognize this doctrine." This issue will need to be addressed by the Court again in the future. In the meantime, the Court has opened the door for actions against an employer who hires a contractor to do work which is likely to create a peculiar, unreasonable risk, or a special danger to others which the employer knows or has reason to know about and fails to exercise precautions.

## Negligent transmission of a sexually transmitted disease

A question addressed in Maine for the first time is whether a negligence action may be based on infection of a partner by a sexually transmitted disease. In *McPherson v. McPherson*, 1998 ME 141 (June 5, 1998), Nancy McPherson filed a complaint against her ex-husband, Steven McPherson, claiming that he had infected her with a sexually transmitted disease, Human Papilloma Virus (HPV).

Nancy alleged that Steven acquired HPV through a clandestine, extramarital affair, and that Steven transmitted the disease to her prior to their divorce. Nancy asserted a negligence action claiming that there is a duty to be sexually faithful in marriage and that breach of

that duty is actionable where the breach leads to physical harm to the marital partner. The trial court found that this duty does not exist under Maine law. Nancy further alleged assault and battery, and the trial court concluded that no assault and battery occurred because the intercourse was consensual.

On appeal, the Law Court did recognize a cause of action for negligent transmission of a sexually transmitted disease. The central issue before the Court was whether Steven owed Nancy a duty to protect her from infection with a sexually transmitted disease. The Law Court specifically rejected Nancy's argument that there is a duty to be sexually faithful in marriage and breach of that duty is actionable where it leads to a partner's physical harm. Instead, the Law Court held that one who knows or should know that he or she is infected with a sexually transmitted disease is under a duty to protect sexual partners from infection. Since the trial court had found that Steven did not know or have reason to know that he had HPV, the Law Court held that Steven did not breach any legal duty to Nancy.

With regard to the assault and battery claim, Nancy argued that her consent to have sexual intercourse was vitiated by the fact that Steven had failed to inform her of his extramarital affair. The Law Court agreed that consent may be invalidated by misrepresentation. For example, the Court specifically held that if Steven knew he had a venereal disease, and knew that Nancy was ignorant of that fact, Steven would be subject to liability for battery. However, the Court determined that Steven could not be liable for assault and battery by misleading Nancy concerning his fidelity. Since Steven was not aware that he was infected with a sexually transmitted disease, the Law Court held that he may not be held liable for assault and battery.

## Insurer that breaches duty to defend not stopped from denying coverage on indemnification

In *Elliott v. Hanover Insurance Company*, 1998 ME 138 (June 4, 1998), Warren Elliott was injured on property insured by Hanover. The carrier notified its insured that his homeowner's policy did not provide coverage for the injury. Elliott then sued Hanover's insured for negligence, and Hanover's insured assigned his rights under the policy to Elliott in return for an agreement not to execute on a judgment. The Superior Court awarded Elliott a default judgment in the amount of \$326,340 against Hanover's insured.

Elliott then filed a reach and apply action against Hanover for its failure to defend its insured. The Superior Court granted Elliott summary judgment, con-

cluding that Hanover had breached its duty to defend, and that it was bound by the default judgment and estopped from asserting noncoverage as a defense.

On Hanover's appeal, the Law Court first confirmed that a determination whether there exists a duty to defend is resolved by comparing the complaint with the terms of the insurance contract. The Court specifically rejected an exception to the "pleading comparison test" for situations in which undisputed facts show that the injury in question was not covered by the policy.

Hanover then argued that regardless of whether it had a duty to defend, it did not forfeit any right it may have had to argue the issue of indemnification. The Law Court agreed, and held that an in-

surer that breaches its duty to defend is not estopped from asserting noncoverage as a defense in a subsequent action brought by the insured or the insured's assignee. The Court noted that it is the insurer's burden to prove that the claim was not within the policy's coverage when it wrongfully declines to defend a claim, and that an insurer is also bound by the default judgment as to any factual issues that might have been litigated in the underlying negligence action. Thus, where an insurer unjustifiably refuses to defend, it may be responsible for normal contract damages as a result of that refusal, but it will not be responsible to indemnify its insured if no coverage exists.

Jim Poliquin represented the Hanover in this suit. □

## When does the absolute pollution exclusion apply in personal injury suits?

BY JAMES D. POLIQUIN

**T**he question of how the pollution exclusion in a commercial liability insurance policy should be interpreted in personal injury actions has been answered differently by courts around the country.

The term "pollutant" is defined in exclusion (f) in Form CG 00 01 to mean any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals, and waste. In short, any substance that can be an irritant or contaminant would meet this definition. In a lawsuit brought because of injuries caused by a substance, it is not a tremendous leap to conclude the substance was an irritant or contaminant. Courts in several jurisdictions have decided however that this definition should not be applied literally, and the exclusion should be limited to traditional pollution of the environment.

A recent decision in the U.S. Federal District Court in Maine, *Nautilus Insurance Co. v. Jabar* (Docket No. 97-

84-P-H), addressed the issue of insurance coverage in an incident involving an injury allegedly caused by fumes from roofing products. The application of the "total pollution exclusion" was at issue, which has not been addressed by the Maine Law Court.

*Nautilus* argued in the underlying complaint that Lisa Varano was injured as a result of inhaling "hazardous and toxic air pollutants and fumes emitted and discharged" by a roofing product used by Jabar. Her claims, the insurer maintained, were excluded from coverage by the pollution exclusion because the substances were pollutants within the meaning of the language in the exclusion. The substance cited in the complaint as the cause, toluene disocyanate, is identified by the U.S. Environmental Protection Agency as a hazardous air pollutant subject to regulation, and must therefore be considered a pollutant

within the meaning of exclusion (f).

The Court extensively reviewed decisions in other jurisdictions and concluded that an exclusionary clause in an insurance policy can be ambiguous in one context and not in another. In *Nautilus*, the Federal Court found the pollution exclusion was ambiguous because "an individual engaged in a business not known to present the risk of causing environmental pollution would not understand that the insurance policy excludes coverage for injuries arising from the use of products associated with that business for the purpose for which those products are intended."

The Court concluded that the pollution exclusion is intended to apply only to environmental pollution and not injuries arising out of the normal use of products, though those products may be hazardous because of their chemical composition if used negligently. □

# Maine law firm contributes to prosecution of Bosnian War atrocities

*First war crimes prosecutions since World War II continue in The Netherlands*

In May, 1998, Norman Hanson & DeTroy lent attorney Tom Marjerison to the International Criminal Tribunal for the former Yugoslavia in The Hague, The Netherlands. Tom is a member of Norman Hanson & DeTroy's litigation group, where he concentrates on insurance defense and white-collar criminal defense matters. He spent six weeks assisting the Prosecutor of the International Criminal Tribunal, and here Tom shares some of his observations about the first international effort to bring to justice war criminals since the Nuremberg trials after World War II.

The conflict in the former Yugoslavia from 1992 until 1995 presented the world with a war focused on "ethnic cleansing." In Bosnia, Serbian forces sought to exterminate and displace Muslims from Serb-controlled regions, and eradicate any evidence of Muslim culture in Bosnia. In most cases, ethnic cleansing was accomplished by mass killings and a policy of encouraging soldiers and paramilitaries to rape and terrorize Muslim civilians to force them to flee the region.

The war in Bosnia also confronted the world with television images of abused prisoners detained in concentration camps based on their ethnic background. The most notorious camps were set up by Serbian paramilitary groups in which thousands of Muslim civilians were slowly starved and subjected to horrific treatment. In addition to summary executions, concentration camp guards routinely tortured prisoners, and even forced prisoners to perform mutilations and kill one another.

In Sarajevo, the capital of Bosnia, the Serbs pursued the policy of ethnic cleansing by engaging in random artillery and sniper attacks against women and children in an attempt to force Sarajevans in Muslim areas to flee the city. Children were targeted in these attacks since a wounded child would often bring rescuers into the sights of the snipers.

After news of the Serbian concentration camps and atrocities reached the outside world, the United Nations Security Council created the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) to prosecute individuals accused of serious violations of international humanitarian law in the former Yugoslavia. The creation of the ICTY in 1993 marked the first time that an international body has prosecuted war crimes since the Nuremberg and Tokyo war crimes trials following World War II.

Under the 1996 Rome Agreement, the ICTY also assumed responsibility for approving the detention of all persons charged with war crimes in the national courts of Bosnia. Because of the large number of atrocities committed in Bosnia, the ICTY was quickly overwhelmed by the number of cases submitted by the Bosnian Government. To support the prosecution of these war crimes, the U.S. Government provided funds to send American lawyers to assist the ICTY in its prosecutions.

In April 1998, the Coalition for International Justice requested that I join a team of attorneys to be sent to the International Criminal Tribunal in The Hague, The Netherlands to help in the

review and evaluation of national war crimes prosecutions. The request for assistance was quickly granted by managing partner Bob Hanson and litigation department head Mark Lavoie. After briefings in Washington, D.C., I was assigned to the Rome Agreement project in The Hague. NH&D's contribution of legal resources reflects the firm's commitment to the ideals of the practice of law, and the value placed on *pro bono* contributions to worthwhile causes.

From a legal perspective, the opportunity to work on major international war crimes prosecutions was a once in a lifetime opportunity. From a human perspective, however, reviewing countless cases of killings and rapes, and watching videotapes of the exhumation of mass graves left me with an intimate sense of the personal horrors that many Bosnians suffered during four years of ethnic cleansing.

The ICTY's unwavering prosecution of the persons responsible for these atrocities reflects the United Nations' commitment to the rule of law as a means to combat genocide, crimes against humanity, and grave breaches of the Geneva Conventions. I was deeply gratified that Norman, Hanson & DeTroy was able to contribute to that process. □



# First Circuit: Job applicants can sue for damages under the Family Medical Leave Act

BY ANNE M. CARNEY

The First Circuit Court of Appeals has issued an opinion which expands the class of individuals who can bring a civil action to recover damages under the federal Family Medical Leave Act. The FMLA creates a private right of action for “employees” whose exercise or attempt to exercise rights under the FMLA have been interfered with. 29 U.S.C. § 2617(a)(2). The FMLA creates a separate remedy, an administrative complaint filed with the Department of Labor, for “aggrieved individuals.” 29 U.S.C. § 2617(b)(1). In *Duckworth v. Pratt & Whitney, Inc.*, decided July 14, 1998, the First Circuit held that an applicant for employment is an “employee” and thus may file a civil action seeking damages rather than filing an administrative complaint.

Mark Duckworth was a 14-year employee of Pratt & Whitney when he suffered serious injuries which caused him to be absent from work. Duckworth was qualified for and received medical leave under FMLA during the summer of 1994. The leave totaled 52 days, and ended in September, 1994. Duckworth volunteered for a lay-off in December, 1994. At the time he left Pratt & Whitney’s employment, one of his supervisors completed an Employment Termination Record which indicated that Duckworth’s attendance was “poor.”

Approximately two years later, Duckworth re-applied for a position at Pratt & Whitney. He was not hired. Duckworth’s civil action alleges that Pratt & Whitney refused to re-hire him because of the statement on his termination record that his attendance was poor. The civil action further alleges that the “poor” rating was based upon the 52 days of leave to which he was entitled under FMLA.

Pratt & Whitney argued that FMLA grants a right to file a civil action only to

employees who are eligible for leave at the time the employer is alleged to have interfered with the exercise of rights under FMLA. All other aggrieved individuals are limited to the administrative complaint procedure. The distinction between a private civil action and the administrative complaint procedure is significant because the remedies available in a civil action greatly exceed those available through the Department of Labor.

The First Circuit held that a refusal to hire, if based upon an applicant’s past exercise of rights under FMLA, constitutes a violation of the Act which can be remedied through a civil action for damages. The Court focused almost exclusively on the meaning of the word “employee” in the FMLA provision that creates a private right of action. If the term “employee” included only current employees or employees eligible for leave under FMLA, then no civil action could be brought by applicants like Duckworth, or even by employees who were terminated when the employer became aware of a future need for medical leave.

The First Circuit observed that, under the employer’s interpretation, “an expectant mother who had worked for her employer for 11 months could be fired from her job if she notified her employer of her need for leave several months later, at a time when she would be an ‘eligible’ employee under the FMLA.” Finding that this interpretation conflicted with the basic purpose of FMLA, which is to provide job security to eligible employees requiring medical leave, the First Circuit adopted a broad definition of the term “employee.” The Court held that the statutory reference to “employee” encompasses prospective employees, current employees, and former employees. This is consistent with judicial inter-

pretation of the term “employee” in other federal employment statutes and with the definition of “employee” adopted by Department of Labor regulations. The Court also viewed the expansive definition of “employee” as more consistent with other provisions of FMLA.

The *Duckworth* decision has practical consequences for Maine employers. First, employers must educate management regarding the expansive application of FMLA. Leave authorized by FMLA must not be viewed as absenteeism when management is conducting a performance review or evaluating an employee for re-hire or promotion.

Second, employers must train management personnel who complete termination documents and conduct exit interviews to document carefully performance issues such as absenteeism. Although Duckworth avoided dismissal of his action for failure to state a claim, he still has to prove that he was not re-hired because of his use of FMLA-protected leave in the past, rather than for other attendance problems. It is entirely possible that an employee could have a history of excessive absenteeism justifying termination, refusal to re-hire, or refusal to promote, even though that same employee also took authorized medical leave. In the re-hire situation, personnel records must contain enough information to enable someone reading the file years later to distinguish between absenteeism and FMLA-protected leave.

Finally, employers must develop procedures for recording requests for FMLA-protected leave, the granting of FMLA leave, and the end of a period of protected leave. Under the Department of Labor regulations, ambiguity about whether time away from work is FMLA-protected leave or absenteeism will be construed against the employer. □

# Workers' compensation - Law Court decisions

BY STEPHEN W. MORIARTY

## Apportionment

In *Lamonica v. Holmes*, 1998 ME 190 (July 28, 1998), the employee had suffered an original injury in 1977 while employed by Ladd Holmes, and had sustained a second occupational injury in 1995 while employed by the Town of Skowhegan. However, the employee failed to give timely notice to the town of his 1995 injury, and filed a Petition for Restoration against Holmes, the 1977 employer. The Board concluded that because no notice had been given of the 1995 injury, the latter injury must be considered as a subsequent nonwork-related injury within the meaning of §201(5). The Board then concluded that the two injuries were causally related to each other, and found the 1977 employer to be fully responsible for all of the employee's current disability.

On appeal, the employer Holmes argued that it should not be responsible for that portion of the disability attributable to the 1995 injury, as that injury was clearly occupational in nature, notwithstanding the employee's failure to have given notice. The Law Court reviewed the language of §201(1) and §301 and in a 4-2 decision, the majority held that "an injury is not 'work-related' if the employee does not provide notice of the injury." According to the majority, therefore, the 1995 injury became a subsequent nonwork-related injury within the meaning of §201(5), and ruled that the Board had correctly applied the provisions of that section.

Technically, the employer was not seeking an apportionment pursuant to §354, as that section is limited to situations in which there is more than one responsible insurer or employer, which was not the case in *Lamonica*. Instead, Holmes argued that as a matter of policy, it should not be assessed full responsibility for the employee's disability where there had been a failure to notify a second employer of a subsequent and otherwise clear-cut occupational injury. The majority dis-



STEPHEN W. MORIARTY

missed the employer's policy arguments and suggested that the issue was better left in the hands of the Legislature. As the majority held:

The determination of whether an injury is "work-related" is ultimately a legislative decision, and we decline to enter into the thicket of deciding on a case-by-case basis whether otherwise non-compensable injuries should be regarded as "work-related" for purposes of apportionment.

The majority affirmed the decision of the Board, finding the 1977 employer to be solely responsible for payment of all benefits.

Justices Saufley and Dana vigorously dissented, and argued that the Court had erroneously equated the concept of a compensable injury with that of a work-related injury. The dissenting Justices concluded that because the 1995 injury was unquestionably work-related, it made no difference whether the injury was non-compensable for lack of notice, and that the employee's recovery should have been limited to that portion of the disability attributable to the 1977 injury. The dissenting Justices sharply questioned the public policy established by the majority opinion. They observed that an employee

through inaction could protect a current employer from responsibility for an injury, and yet receive full entitlement from a prior responsible employer. Such a result, according to the dissenting Justices, "is neither consistent with statutory language and intent nor sound public policy."

The majority openly invited the Legislature to further define and distinguish compensable injuries from work-related injuries which may not be compensable due to lack of notice. It remains to be seen whether the Legislature will revise the statute to limit an earlier employer's liability to its proportionate responsibility for incapacity where an employee fails to give notice of a subsequent occupational injury in multi-injury cases.

## Partial incapacity

The employee sustained a bilateral carpal tunnel injury in September 1990 while employed as an office manager for Internal Medicine Associates (IMA), but ultimately returned to work for the same employer and earned as much per week as before the injury. In 1994 she left her employer for reasons unrelated to the injury, and took a position paying somewhat less with Mechanical Engineering Systems one week later. Eventually the employee left that job and finally began accepting temporary assignments through a personnel agency.

She filed a Petition for Award for the 1990 injury, and the Board determined that although the employee had attained her pre-injury level of earnings while still employed by the pre-injury employer, her actual earning capacity was reflected by her reduced earnings at Mechanical Engineering Systems. As a result, the employee was awarded ongoing partial based on a differential between her 1990 average weekly wage and the lesser sum she was able to earn at Mechanical Engineering Systems.

IMA appealed and in *Dufour v. Internal Medicine Assoc.*, 1998 ME 169 (July 7, 1998), the Law Court affirmed the decision of the Board. IMA argued that any loss of earnings experienced by the employee was due to her decision to quit as opposed to lingering effects from the injury, but the Court side-stepped the issue and simply upheld the Board's factual determination that the employee's capacity to earn was best reflected by her weekly earnings at Mechanical Engineering Systems.

Citing *Severy v. S.D. Warren Co.*, 402 A.2d 53 (Me. 1979), the Court held that the fact the employee had actually been able to earn the same amount of money post-injury would not in the future preclude a claim for partial incapacity benefits. The Court found that the Act did not compel the Board to determine that the employee's wage earning capacity was established as of the time she left IMA. The Court also rejected IMA's argument that awarding benefits for partial would frustrate an underlying goal of the Act: to encourage employers to accommodate injured workers by returning them to work in a position in which they could earn at pre-injury level.

*Dufour* is a discouraging decision from an employer's point of view, as it allows an employee who has been accommodated to leave a position and seek ongoing benefits for partial, even though the pre-injury level of earnings had been regained. However, the case was governed by former §55-B, and it is possible a different result would have been reached if §214(1) had applied. In that event, the Board would have had to consider whether the employee had left IMA for good and reasonable cause, and a lack of reasonable cause would have resulted in a forfeiture of benefits.

### Action for fraud

In a recent decision the Law Court unequivocally held that the Workers' Compensation Board has exclusive jurisdiction over all matters relating to alleged fraud for claims arising under the Act, and that the Superior Court has no subject

matter jurisdiction in fraud cases. In *Lavoie v. Gervais*, 1998 ME 158 (June 30, 1998), the employee had originally been injured in October 1989, and at the time of injury, the identity of his employer was uncertain. Ultimately it was determined that he had been the employee of a single individual in that individual's personal capacity, but the employer was not required to provide workers' compensation coverage under §401(1)(C) because he employed 6 or fewer agricultural workers.

Lavoie brought a civil action for negligence against his employer, and while that matter was pending, he filed a multi-count complaint against his employer, the compensation insurer, the insurance agency and several attorneys alleging fraud in the nature of collusion to obscure the identity of the claimant's actual employer. Although a number of separate causes of action were alleged against the various defendants, the Law Court observed that all counts depended upon a finding that the defendants had engaged in fraud in the workers' compensation process. The central issue was whether the Superior Court had subject matter jurisdiction to hear claims of fraud arising from workers' compensation proceedings.

The Law Court noted that §321 of the Act sets forth a procedure in which any party may petition the Board to reopen any case in which fraud on the part of the opposing party is alleged. The Court held that "the Superior Court simply has no role in reviewing claims of fraud in the context of workers' compensation proceedings," and determined that all claims of fraud must be initially presented before a Hearing Officer pursuant to §321. The Court therefore held that this was the exclusive remedy for an employee alleging fraud, and that under the Act, the

Superior Court had no jurisdiction to entertain or act upon complaints of fraud. The matter was remanded to the Superior Court with instructions to dismiss the complaint in its entirety.

### Effect of employee fault

Ever since the adoption of the Workers' Compensation Act of 1992, claimants and employers have wrestled with the concept of employee fault and its significance regarding entitlement to benefits under the subparagraphs of §214. In *Bureau v. Network Staffing*, 678 A.2d 583 (Me. 1996), the Law Court held that termination for cause was not equivalent to a refusal of an offer of suitable employment pursuant to §214(1)(A), and therefore a termination did not result in a forfeiture of entitlement to compensation under that section.

The Court recently had an opportunity to consider the impact of fault on entitlement to benefits under §214(1)(E), but in *Webber v. Cyro, Inc.*, 1998 ME 149 (June 17, 1998) the Court divided equally on the issue, thereby affirming the underlying decision of the Board. The Court disposed of the matter in a single sentence; therefore case facts have been obtained from briefs the parties submitted.

The claimant had sustained an occupational injury to her hands, wrists, and elbows on February 1, 1993, but continued to work for her pre-injury employer on a full-time basis with accommodations. Ultimately, she was discharged on December 9, 1994 for violation of employer policies. The presiding Hearing Officer found as a fact that the employee had lost her job through her own fault, but noted that she had significant restrictions and had been unable to find new employment despite having performed a reasonably diligent search for work. The Hearing Officer concluded that the employee's fault did not prevent her from receiving benefits, and awarded ongoing partial compensation at a 100% rate from the date of termination ongoing.

The Law Court granted the employer's Petition for Appellate Review, and the employer was joined by four of



Maine's largest self-insured employers as friends of the Court. On appeal, the employers argued that §214(1)(E) applied, as the employee remained employed for less than 100 weeks between the date of injury and the date of termination. Section 214(1)(E) provides in full as follows:

If the employee, after having been employed at any job following the injury for less than 100 weeks, loses the job through no fault of the employee, the employee is entitled to receive compensation based upon the employee's wage at the original date of injury.

Because the Hearing Officer had found that the employee had lost her job

through fault of her own, the appellants argued that the clear language of §214(1)(E) prevented the Board from awarding any incapacity benefits at all.

In response, the employee argued that the case was controlled by *Bureau, v. Network Staffing*, and by earlier decisions of the Court which rejected fault as a consideration under the predecessor statute. The employee also argued that the language of §214(1)(E) was too ambiguous to allow a termination of benefits for fault where employment has continued for less than 100 weeks following an injury.

As noted, the six members of the Law Court who heard the appeal divided equally on the issue, resulting in an automatic affirmation of the decision of the Hearing Officer. Notwithstanding this disappointing result, the effect of fault upon a claimant's right to receive compensation is clearly an issue that will not go away. In the four months since *Webber* was decided, one Justice has retired, another has taken a seat on the First Circuit Court of Appeals, and two new Justices were seated in September. When this same issue inevitably reaches the appellate stage again, the make-up of the Court will have changed substantially, and it is hoped a majority opinion on this critical matter can be obtained. □

Norman, Hanson & DeTroy, LLC

415 Congress Street

P.O. Box 4600

Portland, Maine 04112

Return service requested

*Fall 1998*