

**LABOR AND THE LAW:  
NEWS AND CURRENT EVENTS FROM THE LERA SECTION ON LABOR AND EMPLOYMENT LAW  
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**February 2006**

**LABOR AND EMPLOYMENT LAW NEWS**

**Contracting for Just Cause Employment**

Indiana state law states that police chiefs are at-will employees. The Indiana Court of Appeals has held that a town council therefore had no power to contract out of that law by agreeing that it would only terminate its police chief for good cause. As a result, the contract was void and unenforceable. *Taylor v. New Chicago*, Case No.45A05-0503-CV-156 (Ind. Ct. App. Dec. 19, 2005).

**Seventh Circuit Overturns NLRB Ruling**

In December, the 7<sup>th</sup> Circuit Court of Appeals overturned a split NLRB decision and directed the NLRB to reinstate the Administrative Law Judge's factual and legal findings that the employer had violated the NLRA. *Slusher v. NLRB*, Case No.04-3793 (7th Cir. Dec. 23, 2005).

The court said that the majority had given no reason for rejecting the ALJ's reasoning. The court said that an ALJ's decision "is as much a part of the record as the evidence put before the ALJ, and we must consider the ALJ's views in deciding whether the Board's order is supported by substantial evidence." The court told the NLRB that it could not just ignore ALJ findings.

The court added that it had "special concerns raised by the Board's rejection of an ALJ's factual findings," and it therefore articulated guidelines for the court's review of a Board decision. The court stated:

1. In all cases, the standard of review is the "substantial evidence" standard.
2. Because the ALJ's report is a part of the record with independent significance, a factual determination of the Board that departs from the findings of the ALJ stands on weaker ground than one that does not.
3. Because only the ALJ can view the demeanor of the witnesses, any of the ALJ's findings that turn on express or implied credibility determinations take on particular significance on review.

**Employer must Give Union Information on its Use of Subcontractors**

Employers are required to provide unions with information that is useful and relevant to the union's obligations to the employees it represents. In a recent case, a two-member NLRB ordered an employer to provide the union with more information about how much work it is subcontracting. However, the NLRB overruled the ALJ and held that the employer did not have to disclose the subcontractors' identities nor the nature and location of the subcontracting. *Wisconsin Bell Inc.*, 346 NLRB No.8 (Dec.16, 2005).

**Michigan Company Cannot Eliminate Health Benefits for Retirees**

On December 22, a Michigan federal district judge preliminarily enjoined ArvinMeritor

from eliminating health benefits for retirees, their eligible dependents, and surviving spouses age 65 and over and ordered it to reinstate benefits that were cut. The court held that in prior years the employer had unlawfully reduced and cancelled some health benefits for retirees. The judge found that the plaintiffs are likely to succeed on the merits of their claims that the employer had breached its promises of lifetime retiree health benefits under the Labor Management Relations Act and the Employee Retirement Income Security Act. *Cole v. ArvinMeritor*, Case No.2:03-cv-73872 (E.D. Mich. Dec. 2 ,2005).

The employer has appealed the injunction to the 6<sup>th</sup> Circuit Court of Appeals.

### **Paralegals Not Exempt Employees Under FLSA**

The Department of Labor 's Wage and Hour Division recently released an opinion letter stating that paralegals and legal assistants normally are not exempt employees under Fair Labor Standards Act, because they lack the sort of specialized education that correlates to specialized job responsibilities. College degrees, including at the masters level, alone do not satisfy the requirements for an exemption. The determining factors include an advanced specialized degree and work that requires applying that advanced knowledge and the exercise of discretion and independent judgment in the performance of the jobs's primary duties. Wage & Hour Opinion Letter, FLSA No.2005-54 (Dec.16, 2005).

### **WEB LINKS**

Center for Immigration Studies, The Bottom of the Pay Scale - Wages for H-1B Computer Programmers <http://www.cis.org/articles/2005/back1305.pdf>.

### **RECENT LABOR AND EMPLOYMENT LAW ARTICLES**

Meera Adya & Brian Bornstein, Genetic Information and Discrimination in Employment: A Psycho-Legal Perspective, 32 Wm. Mitchell L. Rev. 263 (2005)

Fran Ansley & Cathy Cochran, Going On-line with Justice Pedagogy: Four Ways of Looking at a Website, 50 Vill. L. Rev. 875 (2005)

Sarah Benjes, Comment: A Pretext of Victory for Employees, 83 Denv. U. L. Rev. 231 (2005)

Sarah Borak, Comment: The Legacy of "Deep Throat": The Disclosure Process of the Whistleblower Protection Act Amendments of 1994 and the No Fear Act of 2002, 59 U. Miami L. Rev. 617 (2005)

Deborah Brake, Retaliation, 90 Minn. L. Rev. 18 (2005)

Frank Cavico & Nancy Cavico, Employment-at-will, Public Policy, and the Nursing Profession, 8 Quinnipiac Health L.J. 161 (2005)

Hope Chau, Comment: Challenges and Solutions for Public Employers: Maintaining Work

Environments Free of Harassment and Discrimination by Non-Employees, 93 Cal. L. Rev. 1455 (2005)

Sherman Clark, Law as Communitarian Virtue Ethics, 53 Buff. L. Rev. 757 (2005)

Christopher, Coleman, Laurence Nee & Leonard Rubinowitz, Social Movements and Social-change Litigation: Synergy in the Montgomery Bus Protest, 30 Law & Soc. Inquiry 663 (2005)

Robin Collin, Community Organizing and Direct Activism, 50 Vill. L. Rev. 793 (2005)

Hugh Collins, Social Inclusion: A Better Approach to Equality Issues? 14 Transnat'l L. & Contemp. Probs. 897 (2005)

Roberto Corrada, Toward an Ethic of Teaching: Class, Race and the Promise of Community Engagement, 50 Vill. L. Rev. 837 (2005)

Frank Cross, Law and Trust, 93 Geo. L.J. 1457 -1545 (2005)

Darin Dalmat, Note: Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws under Home Rule, 39 Colum. J.L. & Soc. Probs. 93 (2005)

Ellen Dannin & Gangaram Singh, Creating a Law Reform Laboratory: Empirical Research and Labor Law Reform, 51 Wayne L. Rev. 1 (2005)

Jeffrey Dudas, In the Name of Equal Rights: "Special" Rights and the Politics of Resentment in Post-Civil Rights America, 39 Law & Soc'y Rev. 723 (2005)

Aric Elsenheimer, Comment: Agency and Liability in Sexual Harassment Law: Toward a Broader Definition of Tangible Employment Actions, 54 Am. U. L. Rev. 1635 (2005)

Susanna Eneteg, Note: EC Labor Law: Do Men Become Fathers? 11 Colum. J. Eur. L. 413 (2005)

Debra Greenberger, Note: Toward Increased Notice of FMLA and Ada Protections, 80 N.Y.U. L. Rev. 1797 (2005)

Kelly Grez, Comment: Stepping onto the Reservation: The National Labor Relations Board's New Approach to Asserting Jurisdiction over Indian Tribes, 57 Admin. L. Rev. 1153 (2005)

Matthew Hampton, Note: The Fourth "R": Sustaining the ADA's Private "Right" of Action Against States for Disability Discrimination in Public Education, 83 Wash. U. L.q. 631 (2005)

Grant Hayden, Refocusing on Race, 73 Geo. Wash. L. Rev. 1254 (2005)

Jarrett Haskovec, Note: A Beast of Burden? The New EU Burden-of-Proof Arrangement in Cases of Employment Discrimination Compared to Existing U.s. Law, 14 *Transnat'l L. & Contemp. Probs.* 1069 (2005)

Elisabeth Holzleithner, Maintstreaming Equality: Dis/entangling Grounds of Discrimination, 14 *Transnat'l L. & Contemp. Probs.* 927 (2005)

Matthias Jestaedt, Protection Against Discrimination and Private Autonomy, 14 *Transnat'l L. & Contemp. Probs.* 1027 (2005)

Robert Kearney, The Coming Rise of Disparate Impact Theory, 110 *Penn St. L. Rev.* 69 (2005)

Thomas Kohler, The Notion of Solidarity and the Secret History of American Labor Law, 53 *Buff. L. Rev.* 883 (2005)

Orly Lobel, Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety, 57 *Admin. L. Rev.* 1071 (2005)

Alison Lothes, Comment: Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives, 154 *U. Pa. L. Rev.* 433 (2005)

Kenneth Mack, Rethinking Civil Rights Lawyering and Politics in the Era Before Brown, 115 *Yale L.J.* 256 (2005)

Matthias Mahlmann, Prospects of German Antidiscrimination Law, 14 *Transnat'l L. & Contemp. Probs.* 1045 (2005)

Bruce Miller & ADA Verloren, Discovery at the NLRB – Why Not? 51 *Wayne L. Rev.* 107 (2005)

Michael Murphy, The ESOP at Thirty: A Democratic Perspective, 41 *Willamette L. Rev.* 655 (2005)

Christine O'brien, The NLRB Waffling on Weingarten Rights, 37 *Loy. U. Chi. L.J.* 111 (2005)

Jason Pirruccello, Note: Contingent Worker Protection from Client Company Discrimination: Statutory Coverage, Gaps, and the Role of the Common Law, 84 *Tex. L. Rev.* 191 (2005)

Yasmine Rassam, International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach, 23 *Penn St. Int'l L. Rev.* 809 (2005)

Jason Schatz, Note: Imposing Mandatory Mediation of Public Employment Disputes in New Jersey to Ameliorate an Impending Fiscal Crisis, 57 *Rutgers L. Rev.* 1111 (2005)

Alexander Somek, *Concordantia Catholica: Exploring the Context of European*

Antidiscrimination Law and Policy, 14 *Transnat'l L. & Contemp. Probs.* 959 (2005)

Symposium: Therapeutic Jurisprudence, 7 *Fla. Coastal L.J.* 91 (2005)

Cass Sunstein, Why Does the American Constitution Lack Social and Economic Guarantees? 56 *Syracuse L. Rev.* 1 (2005)

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Lea Vandervelde, Substituting Social Inclusion for Equal Treatment: A Comparison of Means to Achieve Just Outcomes in Antidiscrimination Efforts – A Response to Professor Hugh Collins, 14 *Transnat'l L. & Contemp. Probs.* 919 (2005)

Paul Verkuil, Privatizing Due Process, 57 *Admin. L. Rev.* 963 (2005)

Louis Virelli, Don't Ask, Don't Tell, Don't Work: The Discriminatory Effect of Veterans' Preferences on Homosexuals, 38 *J. Marshall L. Rev.* 1083 (2005)

Richard Wiley, The First Annual Distinguished Lecture on Administrative Law and Regulatory Practice. The "Ins and Outs" of Rulemaking: Lessons from Government and K Street, 57 *Admin. L. Rev.* 951 (2005)

Viktor Winkler, Dubious Heritage: The German Debate on the Antidiscrimination Law, 14 *Transnat'l L. & Contemp. Probs.* 1007 (2005)

Rebecca Zietlow, To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act, 57 *Rutgers L. Rev.* 945 (2005)

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