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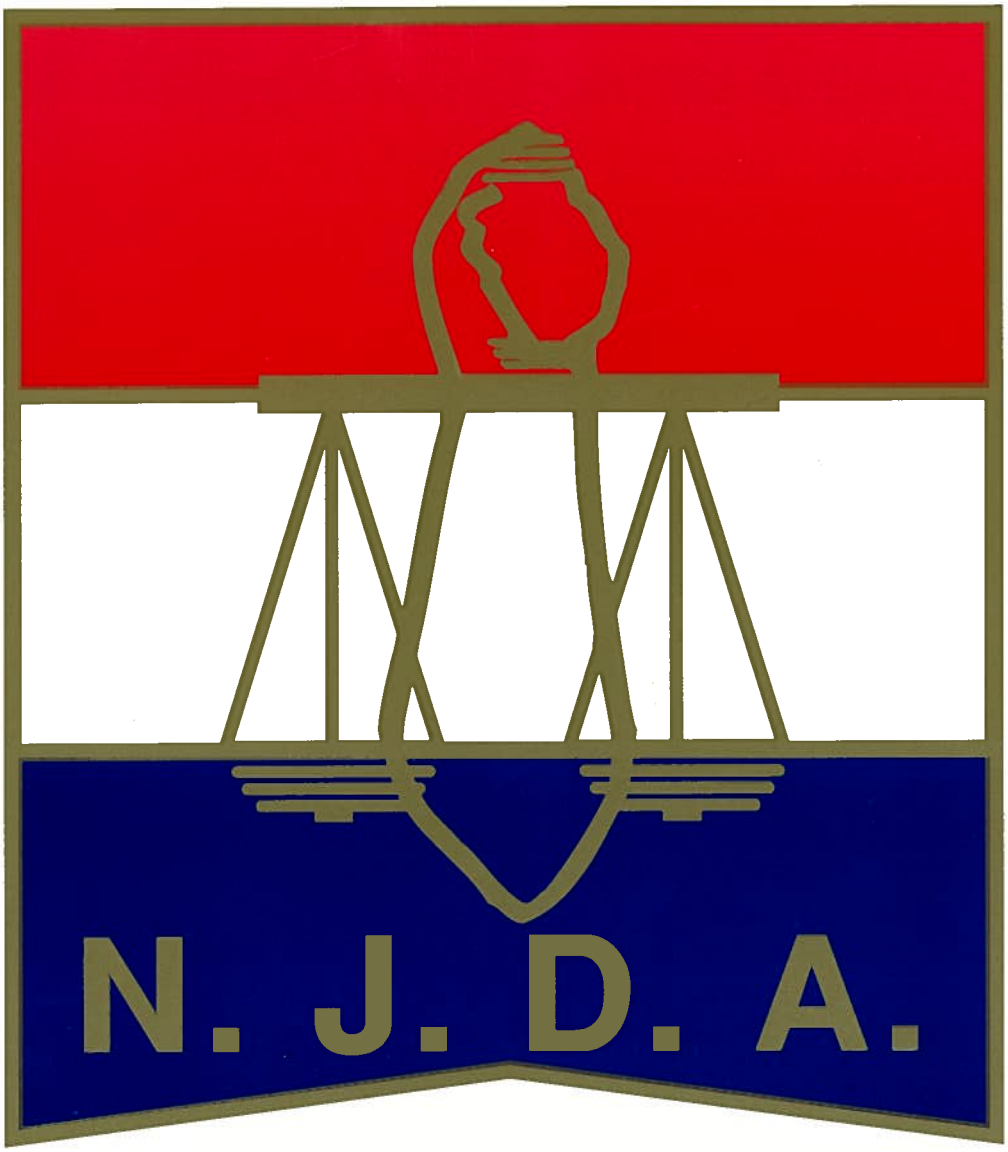
New Jersey Defense

~~ A Publication of The New Jersey Defense Association ~~



inside...

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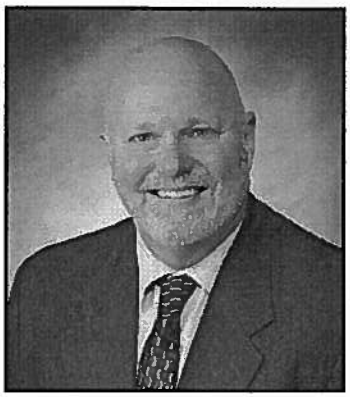

PRESIDENT'S MESSAGE

Arthur F. Leyden, III, Esq.

I am honored to be President of the New Jersey Defense Association. I am mindful of its roots and traditions as we move forward and respond and adapt to today's challenges to our profession and practices. There is always tension between continuity and change, but that is the dynamic from which growth occurs. My goals as President are simple. I plan to continue to build on the foundations we have and to strengthen the collaborative efforts that have been initiated with the Insurance Counsel of New Jersey, New Jersey Corporate Counsel Association, Delaware Valley Corporate Counsel Association, Minorities in the Profession (MIPS) Section of the Bar Association. We will also be reaching out to those defense lawyers practicing as staff counsel, those doing medical malpractice and public entity defense work. I will also be working with the seminar committee to make sure that the seminars continue to be timely and relevant and successful. Education is one of our core values.

I want to thank all who attended and contributed to the success of our 2006 NJDA Convention in Amelia Island. In particular, I would like to thank our program speakers Natalie Watson, Mark Saloman, Eric Probst, Dave Uitti, Steve Foley, Keith Jones and Joe Aronds. Their presentations were topnotch and first rate. Thanks also to our golf committee members Mario Delano and Kevin Decoursey, and our tennis committee member Mark Saloman. As always, our Executive Director Maryanne Steedle was there behind the scenes taking care of the details and making sure everything went smoothly. Thank you Maryanne. The topics presented by the speakers are listed below:

Just How Intentional is Intentional? An Examination of the Intersection between New Jersey Case Law that (Re)Defines "Substantial Certainty" and Workers' Compensation Laws – Presented by Natalie S. Watson, Esq. of McCarter & English, LLP

New Jersey Employment Law – Update 2005-2006 – Presented by Mark A. Saloman, Esq. of Proskauer Rose LLP

Is that Settlement Final? Guarding Against and Being Prepared for Public and Private Third-Party Payor Claims Co-Presented by Eric L. Probst, Esq. of Porzio Bromberg & Newman, P.C., and David C. Uitti, Esq. of Dechert LLP

Annual Case Law Review: Key Updates and Their Impact on The Defense Trial Lawyer Presented by: Stephen J. Foley, Jr., Esq. of Campbell, Foley, Lee, Murphy & Cernigliaro; Keith P. Jones, Esq. of Hill Wallack and Joseph M. Aronds, Assistant General Counsel and Assistant Vice President of Hartz Mountain Industries, Inc.

I want to extend a special thanks to our convention Chairperson, Linda Pissott Reig who is our immediate past President and now Chairperson of the Board. Linda was an outstanding President. She worked tirelessly to move the NJDA forward in several areas, including the start of the Diversity Initiative and the collaborative efforts with the New Jersey Corporate Counsel Association (NJCCA) and the Delaware Valley Corporate Counsel Association (DELVACCA). Linda also strengthened and expanded our substantive committees, our seminars and contributions to the NJDA Newsletter. I want to wish her all the

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PRESIDENT'S MESSAGE

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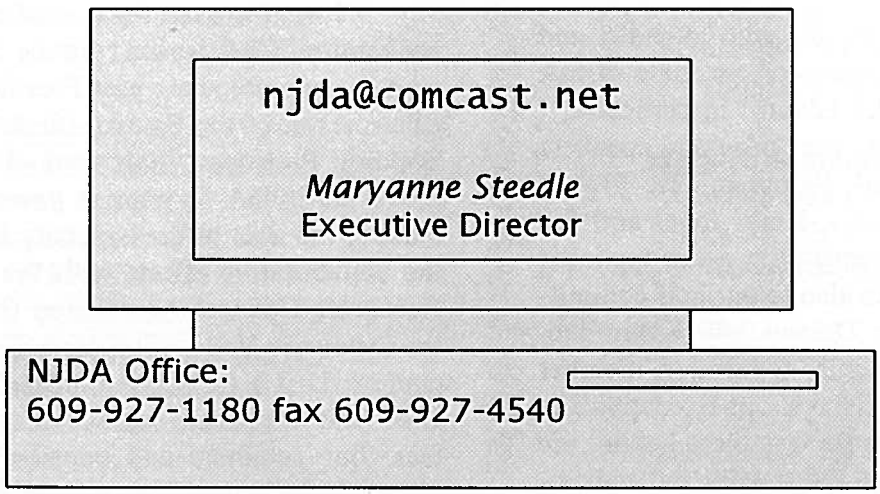
best in her new role as mother and wish Linda could have been at the convention to personally accept our sincerest deep felt gratitude for a job well done. I know that President-Elect Mike Leegan and myself will continue to promote and carry on Linda's initiatives.

On a personal note, I want to thank Bruce Helies for the work he has done with the Newsletter to date to give us a firm foundation on which to build. Bruce is a go-to guy and someone you can always count on to come through and he did that as editor of the Newsletter. Due to time commitments he has stepped down from the editor position. Steve Foley has agreed to be the managing editor and there will be an editorial board assisting him. The Newsletter's tradition for scholarship and excellence will continue and will be extended. As editor of this edition of the Newsletter, I don't know how Bruce did it but he did and did so exceptionally well. Also, thanks to Chuck Hopkins and Roger Steedle who reached out and got me involved in the NJDA. Finally, a special thank you to my wife Pam and to my law partners Paul Capotorto and Dawn Ritter for their continuing support.

With your help (I'll be calling), we'll have another successful year and the NJDA will continue to grow. I appreciate and welcome any and all input/suggestions to make the NJDA a better organization. Just call me at 732-349-2443 or e-mail me at aleyden@lawlcr.com.

Art Leyden



ENVIRONMENTAL LAW

INDIVIDUAL FACTS DICTATE CONTAMINATION COVERAGE

The application of the Owned Property Exclusion depends on the situation. *

Joanne Vos, Esq.

It is clear that insurance coverage may be properly disclaimed based upon an applicable Owned Property Exclusion. If groundwater is not contaminated by a leaking tank on the property and groundwater samples reveal no concentration of any contaminant beyond acceptable levels the groundwater exception to the Owned Property Exclusion will not apply.

Does the Owned Property Exclusion apply to environmental contamination? You will not be surprised to learn that the short answer is: it depends. Of course, we must always defer to the specific language of the applicable policy. However, the garden variety property exclusion may very well apply to environmental contamination caused by an on-site source if groundwater or third-party property is not impacted.

For example, a home currently owned by the Smith family discovers a leak from the Underground Storage Tank located on their property. Upon excavation, odor and sheen confirm that the surrounding soil is contaminated. The soil is ultimately classified and removed. In the interim, the New Jersey Department of Environmental Protection is notified of the discharge and a groundwater investigation is commenced to determine the extent of the contamination. Upon completion of the groundwater sampling, it is determined that contaminants in the groundwater do not exceed acceptable levels. It is further determined that no off-site properties have been affected by the leaking tank. Accordingly, a No Further Action letter is issued by the DEP, but only after $50,000 in remediation costs are incurred by the family's insurer, ABC Insurance. Needless to say, ABC wants to recoup these monies, if possible.

To begin the reimbursement process, ABC will endeavor to age-date the leak by testing the soils or having the tank itself examined for corrosion. An expert on behalf of ABC opines that the leak occurred 10 to 15 years before the discovery. Based upon this information and per the pro-rata formula provided by the New Jersey Supreme Court in *Carter-Wallace, Inc. v. Admiral Insurance Company*, 154 N.J. 312 (1998), ABC will attempt to subrogate against any "potentially responsible party" or prior homeowners who owned the property within the period of time the initial leak may have occurred [15 years prior to the discovery] and their carriers, pursuant to the New Jersey Spill Compensation and Control Act (hereinafter referred to as The Spill Act). N.J.S.A. 58:10-23.11g(c)(1) reads, in pertinent part, as follows:

> Any person who has discharged a hazardous substance, or is any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup costs incurred by the Department or local unit pursuant to Subsection (b) of Section 7 PL 1976, c. 141 (C) 58:10-23.11f.

The Spill Act is liberally construed and permits a strict liability claim to be brought against any person who has discharged a hazardous substance or is in any way responsible for the discharge of a hazardous substance. Under the

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wide breadth of the Spill Act, both homeowners and insurers can be deemed "potentially responsible parties" because neither fault nor knowledge of the discharge is required.

A carrier for a prior homeowner would undoubtedly invoke an Owned Property Exclusion contained within its policy in the Smith family example. Simply stated, such an assertion would likely be based upon the fact that only property owned by the Smiths was affected by the leak or otherwise deemed contaminated, i.e., the Underground Storage Tank and the actual soil itself. These items would likely be deemed to be first party property and, therefore, outside the scope of their previous coverage.

"Proving that groundwater was affected may be one way of getting around the Owned Property Exclusion"

Proving that groundwater was affected may be one way of getting around the Owned Property Exclusion in such a situation. This is due to the natural ability that contaminated groundwater has to contaminate third party or off-site property. Generally speaking, where soil has been contaminated by an Underground Storage Tank, a groundwater investigation follows suit as it is often required by the DEP. However, even if groundwater is required to be tested by the DEP due to the threat of additional contamination, the Owned Property Exclusion will be upheld if: (1) the groundwater is not contaminated or (2) the groundwater does not contain any contaminant beyond state accepted levels.

The Appellate Division considered the exact issue presented by the Owned Property Exclusion, also against the backdrop of the Spill Act, in *The Muralo Company, Inc. v. Employers Insurance of Wausau*, 334 N.J. Super. 282 (App. Div. 2000). In relevant part, the Court considered whether a "potentially responsible party," or a carrier on the risk during an environmental loss, should be held responsible for costs in connection with soil remediation, where groundwater remediation was unnecessary, in the face of the applicable policy's Owned Property Exclusion. The court held that it should not be held responsible under those circumstances. Specifically, the *Muralo* court found:

> The issue, of course, is whether they also came within the now well-settled exception to that exclusion, namely liability of the owner based on contamination of the groundwater beneath the owned property...If DEP determines that the level of contamination is so low that there is no need for water remediation, we are persuaded, absent contrary evidence, that no damage to groundwater within the coverage has taken place. To be sure, the extent of the soil contamination on the owned parcels posed a threat of future contamination to the groundwater if not remediated. But the Supreme Court has made it clear that at least in respect of environmental risk insurance, the threat of harm, however imminent, does not constitute harm within coverage...If DEP finds that no groundwater remediation is required as a matter of environmental protection, then the insured has necessarily failed to prove that he comes within the groundwater exception to the exclusion. We are aware that removal of contaminated soil may be a step in the process of groundwater remediation, but removal of contaminated soil only as a remediation of soil contamination does not constitute groundwater remediation *even if that soil removal will eliminate a threat of groundwater contamination*. See *Muralo*, 334 N.J. Super at 353, citing *Universal-Rundle*, 319 N.J. Super. at 240 (emphasis added).

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It is clear that coverage may be properly disclaimed based upon an applicable Owned Property Exclusion. If groundwater is not contaminated by a leaking tank on the property and groundwater samples reveal no concentration of any contaminant beyond acceptable levels the groundwater exception to the Owned Property Exclusion will not apply. Such is the case even if the DEP requires groundwater investigation; and the same holds true even if the removal of soil is necessary to prevent future contamination of groundwater.

Joanne Vos is an associate in the Environmental Department of Hoagland, Longo, Moran, Dunst & Doukas in New Brunswick, New Jersey

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"JUST SOME THOUGHTS"

Brian R. O'Toole, Esq.

"Roll out those lazy, hazy, crazy days of summer." Let's go back in time to when the practice of law was gentler and kinder to those warriors who occupied the trial trenches, litigators to the white glove law firms. When I started to practice, the courts were closed for the last four weeks of the summer preceding Labor Day. The arrangement served the purpose of giving trial lawyers the opportunity to take a vacation without interfering with their trial calendar. The majority of Superior Court Judges were also on vacation, so one hand clearly did wash the other. Unfortunately, this practice was abandoned in favor of our current schedule of keeping the courts open all year long. Some counties suspend jury trials for the last couple weeks before Labor Day, but this is the only vestige that remains of our beloved old system.

The rationale was that the courts should be open to litigants all year long and that judges, attorneys and court staff should be allowed to take vacations anytime during the year, just like the rest of the work-a-day world. The latter portion of this argument is erroneous, for while judges, attorneys and court staff were encouraged to vacation during the court hiatus, certainly it was not required. With appropriate preplanning, vacations could be scheduled at any time during the year. Exceptions also were called for in emergent situations involving criminal, juvenile and family matters.

So why not go back to the old system. For those of us who work in the court system, we know that August is one of the most difficult months to accomplish anything since so many litigants, witnesses and experts are unavailable due to planned vacations. Juror availability suffers from the same problem. In the old days, high school kids started fall practice on the first day of September. As anyone who has a child between the ages of 14 and 21 can tell you, all of this now occurs during the month of August, further diverting the public's attention from that upcoming trial date.

Much has been made about overtime in the sheriff's department, but what better way to eliminate this than by allowing "comp time" for officers in August. Judges' law clerks would also be free to start their new jobs in August, rather than having to wait until after Labor Day. This would result in saving August's salaries and avoiding the embarrassment of having clerks sitting around with nothing to do while their Judge is on vacation. Quite honestly, it will also be beneficial for the public in that exposure to our court system is extremely stressful to the average layperson. Adding ninety degree temperatures to this mix makes it even more intolerable.

So let's go back to the old days when we were singing the Nat King Cole song and drinking ice cold Miller High Life during the month of August. Who knows, we trial lawyers might even get to live year or two longer!

* * *

It seems to me that we are the only profession that tolerates the self flagellation that is forced upon us by the Court Rules. A case in point is the 30 day rule for filing a trial de novo. For a simple mistake such as failing to diary something, our Draconian rules virtually dictate that an attorney call his malpractice carrier. Why is this necessary in a society which considers itself fortunate to wait less than an hour in their doctors' waiting room for a scheduled appointment? Regardless of the reason, none of the violations involve circumstances that substantially prejudice the opposing party. So why not fashion the punishment to fit the crime, rather than invoking a death sentence for the proverbial parking ticket. All of us on the defense side know that trying to get an insurance company, or even more so a self-insured, to make a quick decision is virtually impossible. Plaintiff attorneys also know that trying to compromise medical liens so that they may advise

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"JUST SOME THOUGHTS"

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their clients about actual bottom lines takes time.

So who not amend the Rule to allow a late filing of up to ninety days for good cause and with no real prejudice to the opposing party with an appropriate late filing fee. Isn't the real purpose of our Rules to facilitate justice? Wouldn't such an amendment be in the interest of justice while at the same time removing the loaded gun from the head of the trial bar? So seriously, when has your doctor ever said "There's no fee because I was late." Get the message.

* * *

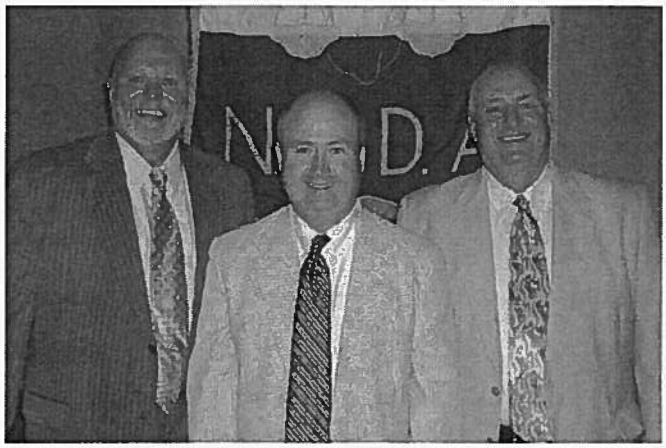
Let me leave you with this upbeat message, no profession contributes more to society than the legal profession. Almost 20% of all legal man hours involves pro bono work When is the last time you heard of engineering, accounting or dental pro bono work. Cars and highways are safer because of lawyers. Doctors are more cautious because of lawyers. Pharmaceutical companies are more diligent because of lawyers and on an on. The bogus argument that lawsuits increase costs, begs the question of why we should be paying for unsafe products or incompetent professionals in the first place. We should be proud of the fact that many lawyers are well paid. All workers at the top of their respective profession are well paid. So instead of being apologetic, be proud of your professional and keep up our outstanding record of providing pro bono services to those in need without the means to address those needs.

* * *

Just some thoughts. Enjoy the rest of the summer.

NJDA CONVENTION PHOTOS

Phil Lezenby presenting gavel to
President Art Leyden



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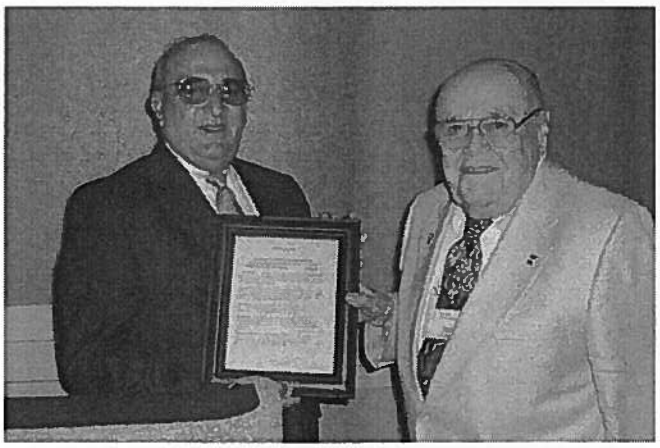
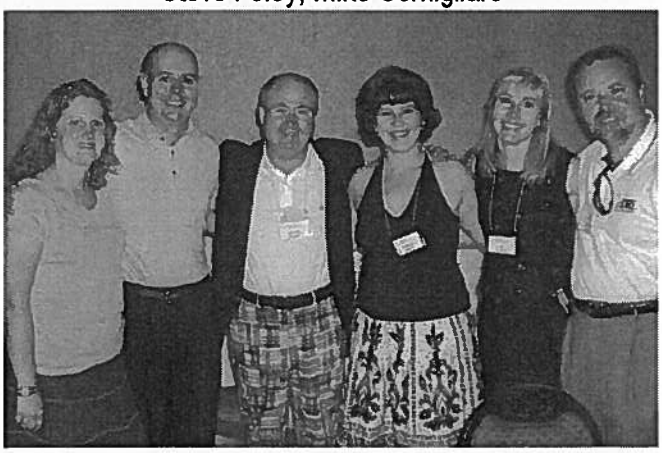


Mike Cernigliaro presenting NJDA Resolution to Fred W. Jung, Jr.

Past Presidents Brian O'Toole, Chuck Hopkins, Fred Jung, Roger Steedle, Phil Lezenby, Steve Foley, Mike Cernigliaro

Mike Cernigliaro, Marge Jung, Brian O'Toole, Fred Jung, Roger Steedle



Elisa Probst, Eric Probst, Mike Leegan, Kim Leegan, Liz Hopkins, Chuck Hopkins

YLC Speakers Natalie Watson, Eric Probst, Dave Uitti, Mark Saloman

Case Law Update Speakers Joe Aronds, Steve Foley, Keith Jones

WORKERS' COMPENSATION:
IS A TERMINATED EMPLOYEE, WHO FILED A SUBSEQUENT CLAIM FOR WORK INJURY, STILL DUE THE SAME BENEFITS?

Michele G. Haas, Esq. and Stephen Banks, Esq.

The Appellate Division has recently considered an issue, which is faced by many employers on a daily basis. It deals with payment of Workers' Compensation temporary total disability benefits to an employee, who no longer works for an employer and the disability period manifests itself after the employment. In Cunningham v. Atlantic States Cast Iron Pipe Co., A-6772-04T1 (App.Div. 2006), the Appellate Division held that in order to receive temporary disability benefits, the former employee must establish that "but for" the work-related disability, he or she would have been employed.

By way of brief background, New Jersey requires the payment of temporary disability benefits to an injured worker, who is unable to work, by Statute. Generally, temporary disability benefits are payable from the day the employee is first unable to work due to the work-related injury "until the employee is able to resume work and continue permanently thereafter," N.J.S.A. 34:15-38, and are not to exceed 400 weeks, N.J.S.A. 34:15-12(a). However, the Workers' Compensation Act, NJ.S.A. 34:15-1 *et. seq.*, only address when benefits should begin, while the issue of when they "clearly" end, before 400 weeks, has been left to the State Courts to define.

Important decisions to date are found in prior cases addressing how long benefits should be paid, whether benefits stop with light duty and whether benefits are limited for a seasonal employee. Monaco v. Albert Maund Inc., 17 N.J. Super. 425, 86 A.2d 279 (App. Div. 1952) dealt with an employee, who suffered injuries to the head and back and continued under treatment with some new employment. The Court addressed the language of the Statute and held that temporary disability continues until an employee is able to resume work and continue permanently thereafter, or until one is as far restored as permanent character of injuries will permit, whichever happens first. Harbatuk v. SS Furniture, 211 N.J. Super. 614, 512 A.2d 537 (App. Div. 1986), referred to a construction worker, who suffered a hernia, while lifting a dolly in the course of employment. While out of work, he was denied temporary disability benefits because he continued his hobby repairing bicycles, that would have made him eligible to do light duty. The Court allowed benefits holding that temporary disability benefits are not automatically terminated merely because a claimant obtains some employment, if maximum recovery has not been achieved. Outland v. Monmouth-Ocean Education Service Commission 154 N.J.531, 713 A.2d 460 (S.C. 1998), regarded a teacher, who was injured in an attack by a student. She was denied temporary disability benefits during the summer months, when she would not have been teaching. The Court denied her claim if she could not prove, that she planned to relax over the summer because her employment had a set ending date, and an employee could not make a claim, when they were not absent from work.

However, until now, no decision has clearly defined the issue of whether an injured worker, who had previously been terminated because of their own actions, is still due temporary disability benefits.

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The petitioner in Cunningham was employed as a machine operator for Atlantic States Cast Iron Pipe Co. (hereinafter referred to as "Atlantic States") and suffered a compensable injury to his knee. Medical treatment was provided by the employer. Following surgery, Cunningham was advised to return to work full duty without restrictions. However, in the interim, Cunningham had missed three consecutive days from work due to incarceration, which violated an Atlantic States policy. He was terminated due to the absences but was eventually reinstated to his position. A condition of his reinstatement was that he could have no unauthorized absences for an entire year. He completed this one year probationary period without any absences while working without restrictions. Cunningham then encountered additional trouble and was incarcerated again. He contacted Atlantic States and was informed that he would be terminated if he did not return to work within three days pursuant to the policy. He did present for work on the third day but was several hours late for his shift, and his tardiness was found to have violated the policy and he was terminated accordingly. A new agreement was again reached reinstating Cunningham with the one year condition. Cunningham reported for work, however, he later advised his employer that he had to leave temporarily due to childcare issues. Cunningham advanced the argument that Atlantic States advised him that if he left the premises, he would be terminated. Cunningham left and then was terminated. Approximately eight days after his termination, Cunningham presented to the employer's doctor for an unauthorized visit and the doctor issued Cunningham a note indicating that he could not work due to his knee injury for approximately four months. Cunningham filed a Motion for medical and temporary disability benefits. Atlantic States disputed Cunningham's assertion that he was entitled to temporary total disability benefits and argued that Cunningham essentially voluntarily abandoned his employment, that he was unemployed, and therefore was not losing any wages. The compensation judge found in favor of Cunningham, opining that the obligation to pay temporary disability benefits continued after an employee leaves employment, whether voluntary or involuntary. Atlantic States appealed.

The Appellate Division reviewed the statutory provisions and prior case law dealing with the payment of temporary disability benefits to an injured employee. The Court also took notice of the remedial purpose of temporary disability benefits, quoting Ort v. Taylor-Wharton Co., 47 N.J. 198, 208 (1966), and noted that such are benefits are to provide an injured employee who suffers a work related injury with a "partial substitute for loss of current wages." The Court then reviewed the circumstances of Cunningham's separation from employment. The Court previously held in Electronic Associates, Inc. v. Heisinger, 111 N.J.Super. 15, 20 (App.Div.), *certif. denied*, 57 N.J. 139 (1970), that an employee who retired from employment due to her pregnancy was not entitled to payment of temporary disability benefits for an injury that occurred during her employment but did not manifest itself until after her retirement. Atlantic States contended that Cunningham's termination from employment was voluntary since he was aware that if he left work without authorization, he would be terminated. Cunningham argued that he was fired, which was not voluntary. The Court also took note of how other jurisdictions deal with the issue of the payment of temporary disability to an employee whose conduct causes his separation from employment. After reviewing the law of several other states on this issue, the Court held that there is "no material difference between termination for cause, with prior knowledge by the employee that violation of a work rule would result in termination, and voluntary departure."

The Court stated that the fact that Cunningham was terminated was not sufficient to entitle him to temporary disability benefits. The Court further stated that the "claimant has the

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WORKERS' COMPENSATION

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burden of proving not only that he was available and willing to work, but that he would have been working if not for the disability." The Court reasoned to find otherwise would improperly compensate the former employee. Thus, the Court remanded the case to allow Cunningham to establish that he suffered from actual wage loss. The Court also alluded that expert occupational testimony could be presented to address how long it would have taken an individual to procure employment had he not been disabled.

Thus, rather than benefits being automatically paid by a former employer, the analysis now centers upon whether the employee, who no longer works for the employer, is actually suffering a wage loss as a result of being placed out of work.

Michelle Haas, Esq. is with the firm of Hoagland, Longo, Moran, Dunst & Doukas.

Stephen Banks, Esq. is with the Law Offices of Charles P. Hopkins, II.

YOUNG LAWYERS COMMITTEE

Chairperson: Natalie S. Watson
Vice Chair: Michelle Hou

Upcoming Events: ***Week of September 11, 2006***
Law School Tour — Introduction to the NJDA

November 30, 2006
YLC Holiday Party

March 29, 2007
YLC Happy Hour

Summer Events: ***June 2007***
NJDA Convention

July 2007
Summer Associate Luncheon

YLC is seeking nominations for the committee. Please contact Ms. Watson or Ms. Hou if you are interested.

RETALIATORY HARASSMENT: ACTIONABLE?

Patricia S. Robinson, Esq.
assisted by David J. Treibman, Esq.

In *Jensen v. Potter*, 435 F.3d 444 (3d Cir. 2006), the Third Circuit finally answered in the affirmative the question whether retaliatory harassment by a co-worker is actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. That the opinion was written by now-Associate Justice Samuel Alito may surprise some, given the heated debates regarding his judicial philosophy during the confirmation hearings. Personalities and politics notwithstanding, the decision is unremarkable, the court taking the safe predictable route and joining the majority of the Circuits (First, Second, Fourth, Seventh, Ninth, Tenth and Eleventh) in holding that Title VII prohibits severe or pervasive retaliatory harassment.

Facts

Plaintiff Anna Jensen, a letter carrier with the United States Post Office at its Kingston, Pennsylvania branch, brought the action, asserting claims of hostile work environment retaliatory and sexual harassment under Title VII. Both claims arose from the same set of operative facts, which began with an unwelcome sexual proposition, conveyed via telephone by Carl Waters, then Jensen's immediate supervisor. Jensen immediately reported the incident to the male Kingston branch manager, Chris Moss, and within several days Waters was transferred to another branch. An investigation followed, resulting in Waters' termination some five months later. *Id.* at 446-47.

Within two weeks of the incident, Jensen's new male supervisor, Rick Honeychurch, moved her workstation out of the branch manager's office, to a stand-up desk in an area known as Unit 1. Moss articulated legitimate reasons for the move: Jensen had used the office while nursing an injured leg, which had now healed and Moss had confidentiality concerns regarding the pending Waters investigation. Jensen, however, heard rumors that after her complaint Moss was afraid to be alone with her. Whatever the reason, Jensen's workspace in Unit 1 was, ironically, Waters' former one. The reception Jensen received from her co-workers in Unit 1 was less than friendly.

Immediately after the move, one of the male letter carriers, Joe Sickler, began to bombard Jensen with verbal insults. Within earshot of Jensen, Sickler referred to her as "the [obscenity] who got [Waters] in trouble." He was also overheard discussing a petition to return Waters to the branch and opining that Waters should not have to apologize for his conduct. The insults escalated to a physical prank – Sickler crept up behind Jensen and clapped two objects together, which frightened her. Jensen immediately reported Sickler's conduct to Moss and asked to be removed from Unit 1. Moss said he would talk to Sickler, but he refused to move Jensen, despite the availability of another workstation. Sickler's offensive comments continued at the pace of two to three times week. When asked at his deposition why he did not move Jensen, Moss answered, "Because I didn't." *Id.*

In the meantime, another male letter carrier, Ed Jones, who had previously been friendly with Jensen before she reported Waters, now physically threatened her, driving "U-Carts" toward her at a rapid pace. He also told Jensen he disagreed with the decision to terminate Waters. Finally, about a year after the Waters incident, Jensen's car was vandalized while it was parked in the Post Office parking lot – twice scratched with a key, spit on, and splattered with coffee -- something which had never occurred before. Despite Jensen's repeated complaints to Honeychurch and Moss about her co-workers' behav-

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RETALIATORY HARASSMENT

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ior, it continued unabated for 19 months after her initial complaint. At that point Jensen complained to her new female supervisor, who raised the issue with Moss. The latter, with union officials, confronted Sickler. Remarkably, Jensen's troubles quickly disappeared.

"Under the prevailing case law, an employer is strictly liable if a supervisor creates a hostile work environment, absent the availability of an affirmative defense."

Health Manifestations

During the 19 months of harassment, Jensen suffered panic attacks, stress-related illness causing her to use sick time, and repeated trips to the emergency room because of her asthma. Jensen attributed these problems to the working conditions at the Post Office. Based on these events, Jensen brought a claim for sex discrimination under 42 U.S.C. §2000e-2(a) and retaliation under 42 U.S.C. §2000e-3(a). The district court granted the Post Office's motion for summary judgment as to both claims and Jensen appealed.

In reversing and remanding, the Third Circuit first had to decide whether a retaliation claim predicated upon a hostile work environment, in the absence of a tangible employment action, is cognizable under §2000e-(3)a. In *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997) (Alito, J.), the court had held that "[r]etaliatory conduct other than discharge or refusal to hire" violates Title VII when it "alters the employee's 'compensation, terms, conditions, or privilege of employment,' deprives him or her of 'employment opportunities,' or 'adversely affect [s] his [or her] status as a employee.'" *Jensen*, 435 F.3d at 448 (quoting *Robinson*, 120 F.3d at 1300 (quoting 42 U.S.C. §2000e-2(a))). Extending the logic of its *Robinson* decision, the court held that §2000e-3(a), the retaliation provision, which makes it unlawful to "discriminate" against an employee "because [the employee] had made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]," prohibits "a quantum of discrimination coterminous with that prohibited by §2000e-2(a)." *Jensen*, 435 F.3d at 448-49.

Completing the analysis, the court reaffirmed in the retaliation context the well-established principle that a claim of discrimination can be predicated on a hostile work environment, *id.* (citing *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (sex); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (same); *Caver v. City of Trenton*, 420 F. 2d 243, 262 (3d Cir. 2005) (race); *Cardenas v. Massey*, 269 F. 3d 251, 260 (3d Cir. 2001) (national origin); *Abramson v. William Paterson Coll.*, 260 F.3d 265, 276-77 n.5 (3d Cir. 2001) (religion)), reasoning that if harassment can alter the terms and conditions of employment under §2000e-2, then by logical extension, the same must be true for §2000e-3. *Id.* at 449.

Proofs Required

The court then addressed the analytical framework for analyzing retaliatory harassment claims. Because of the consistency that it had now concluded existed between §2000e-2 and §2000e-3, the court applied the "usual" hostile work environment framework to Jenson's retaliatory harassment claim. Thus, Jensen had to prove that:

(1) she suffered intentional discrimination because of her protected activity;

(2) the discrimination was severe or pervasive;

(3) the discrimination detrimentally affected her;

(4) it would have affected a reasonable person in like circumstances; and

(5) a basis for employer liability is present.

Jensen, 435 F.3d at 449.

Since Title VII is not "a general civility code for the American workplace," *id.* (quoting *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80-81(1998)), to satisfy the first element a plaintiff cannot simply identify harassing conduct, but must also show that the conduct had a

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motivation proscribed by Title VII – here, retaliation for engaging in activity Title VII protects. *Id.* at 449. To determine whether the conduct had the proscribed retaliatory motive, a court must focus on two factors: (1) the "temporal proximity" between the protected activity and the alleged discrimination; and (2) the existence of "a pattern of antagonism in the intervening period." *Id.* at 450 (citing *Abramson*, 260 F.3d at 288).

Once a plaintiff has identified conduct that a reasonable jury could find to be retaliatory, she must then prove that the harassment was severe or pervasive enough to "alter the conditions of [her] employment and create a hostile and abusive working environment." *Id.* at 451 (quoting *Meritor*, 477 U.S. at 67). This inquiry has both a subjective and objective component, which are embodied in the third and fourth prongs of the analysis, respectively. While the severe or pervasive standard applies to both §2000e-2 and §2000e-3, it is especially crucial to retaliatory harassment claims. Careful distinction must be made between the inevitable strains on workplace relationships on the one hand, and actionable harassment on the other. "Sides will be chosen, lines drawn," and friendships lost. *Id.* at 452. But that is not harassment. Neither is ostracism, the "silent treatment" (of which Jensen complained), or expressions of support for the alleged harasser. Employers cannot force employees to socialize and while expressions of support may evidence a retaliatory motive for actionable behavior, standing alone they cannot meet the "severe or pervasive" prong of the test. "Title VII prohibits retaliation against accusers, not support for the accused." *Id.*

Proofs and Jensen's Facts

Though this is an exacting standard, the court found sufficient evidence in the record to support a finding of severe or pervasive retaliatory conduct. The court cited Sickler's 19 months of several-times-per week insults; Jones' physically threatening behavior; and the four instances of property damage to Jensen's vehicle as raising a material question of fact as to whether retaliatory harassment "permeated" the workplace and changed the terms or conditions of Jensen's employment.

Lastly, the court addressed the issue of employer liability. Under the prevailing case law, an employer is strictly liable if a supervisor creates a hostile work environment, absent the availability of an affirmative defense. *Id.* (citing *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998)). However, when the perpetrators are co-workers, a plaintiff must prove employer liability using traditional agency principles. *Id.* In other words, the plaintiff must show that the employer knew or should have known about the harassment but "failed to take prompt and adequate remedial action." *Id.* at 453 (citing *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d. Cir. 1990)).

Jensen framed her case as one of co-worker harassment. However, the court noted in dictum that the record might support an inference that in moving Jensen's desk out of Moss's office to Waters' former workspace, her supervisor, Honeychurch, deliberately placed her in a vulnerable position where co-workers supportive of Waters could retaliate against her. *Id.* at n.4 This raised two difficult questions – though academic here because of the way Jensen had litigated her claim: First, Which liability standard applies when a supervisor intentionally facilitates co-worker harassment? and second, Who is a "supervisor" for the purpose of establishing employer strict for unlawful harassment? *Id.* at 435 n.4.

Subsequent Harassment

Finally, the Third Circuit also reversed summary judgment for the employer on Jensen's *sexual* harassment claim, which was based on Waters' original sexual proposition, plus the conduct on which Jensen based her retaliatory harassment claim. Both parties agreed that Waters' proposition raised the necessary inference of in-

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tentional sex discrimination. The parties' dispute was over whether the subsequent harassment could be found sexually discriminatory. The court's answer was so subtle as to guarantee a wealth of future litigation, which will include more trials than ever:

> As an abstract matter, retaliation against a person based on the person's complaint about sexual harassment is not necessarily discrimination based on the person's sex. If the individuals carrying out the harassment would have carried out a similar campaign regardless of the sex of the person making the complaint, the harassment, while actionable as illegal retaliation, would not also be actionable as discrimination based on sex. In reality, however, when a woman who complains about sexual harassment is thereafter subjected to harassment based on that complaint, a claim that the harassment constituted sex discrimination (because a man who made such a complaint would not have been subjected to similar harassment) will almost always present a question that must be presented to the trier of fact. In such a situation, the evidence will almost always be sufficient to give rise to a reasonable inference that the harassment would not have occurred if the person making the complaint were a man. The difficult task of determining whether to draw such an inference in a particular case is best left to trial.

Id. at 454.

What the court giveth, it also taketh away. The simple "yes" that *Jensen* offers to the question of whether Title VII prohibits retaliatory harassment is perhaps more than offset by the difficult questions it raises as to who is a supervisor, when supervisor conduct short of actual harassment leads to *Ellerth/Faragher* strict employer liability, and whether trial can ever be avoided when a retaliatory harassment claim has its origin in a sexual harassment complaint.

Ms. Robinson and Mr. Treibman are with
the law firm of Fisher & Phillips, LLP
in Somerset, New Jersey

Calendar of Events

Friday, September 29, 2006
Joint Seminar NJDA and ICNJ
"Recent Developments in Auto Liability
and Workers' Compensation Law"
9:00 a.m. — 12:30 p.m.
Woodbridge Hilton, Iselin, New Jersey

Tuesday, November 21, 2006
9:00 a.m. — 12:30 p.m.
Woodbridge Hilton, Iselin, New Jersey
topic to be announced

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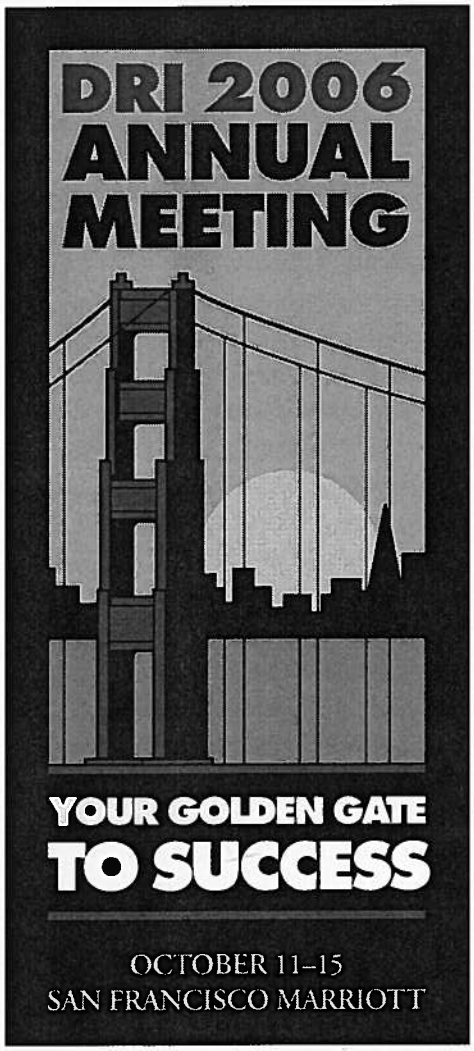


CHECK OUT THESE PROGRAM HIGHLIGHTS!

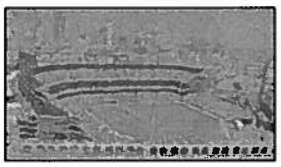
- Political insider and journalist, **Pat Buchanan**, kicks off the meeting on Thursday

- **Donna Brazile**, author and political strategist, is the Awards Luncheon speaker

- Renowned trial practice expert **Larry Pozner** speaks Saturday on Cross Examination Techniques

- Wednesday's Welcome Reception features the richly ethnic **neighborhoods of San Francisco**

- Experience the excitement of America's favorite pastime at **AT&T Park San Francisco** on Thursday



- The Meeting wraps up with **An Evening in the Wine Country** at the **President's Gala** on Saturday evening!

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First Row: Justice James Coleman, Joanne Vos, Preston Fulford
2nd Row: Thomas J. O'Grady, Keith Wingold, Timothy Bloh, David Kane, Matthew Marrone

Justice James Coleman, Thomas J. O'Grady, Keith Weingold, Joanne Vos, Preston Fulford

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