ZASHIN&RICH CO.,L.P.A.
cleveland | columbus

EMPLOYMENT LAW QUARTERLY

Volume VII, Issue III
Fall 2005

In this issue:



# WORKERS' COMP:

## Ohio courts consider compensability in cases of automobile injury and limb loss

*By: Steve P. Dlott**

Two recent cases in Ohio courts considered two different aspects of workers' compensation law: when an injury is received "in the course of employment," and when the loss of limb can result in permanent total disability compensation.

In *Cartwright v. Conrad*, an employee traveling as a passenger in her co-worker's vehicle suffered injuries in a car accident. The injured employee had asked her co-worker, a store manager, for a ride to and from a one-day training seminar. After the seminar, the co-worker stopped to obtain payroll packets for her store and another store before driving the employee home. At this stop, the employee actually went inside and obtained the payroll packets. The employee and her co-worker then dropped off the first payroll packet. However, while driving to the second store to drop off the second payroll packet, the co-worker got into an accident.

The employee filed a workers' compensation claim for injuries she suffered as a passenger in the car accident. The Bureau of Workers' Compensation denied her claim, and the employee appealed. The Industrial Commission affirmed the Bureau's decision, and the employee appealed the Industrial Commission's decision to court. The court found in favor of the employer.

The employee appealed, arguing that factual questions existed concerning whether her injury occurred "in the course of" or "arising out of" her employment. By statute, only an employee with an injury "received in the course of, and arising out of, the injured employee's employment" may receive workers' compensation benefits for that injury. The language "in the course of" limits compensation to injuries an employee receives while performing duties that his or her employer requires, while "arising out of" requires a causal connection between the injury and the employment.

The appeals court held that the employee's injury was not received either "in the course" or "arising out of" her employment. First, the court reviewed the accident in light of the "coming-and-going rule":

> As a general rule, an employee with a fixed place of employment, who is injured while traveling to or from his place of

*(continued on page 5)*

## Brain • Food • Breakfast • Law Series

**Breakfast** might the most important meal of the day. Most people skip it.

Keeping pace with **workplace law** is important too, yet many human resource professionals, attorneys, managers and business leaders skip that, too.

**Zashin & Rich Co., L.P.A.** presents you with a valuable opportunity to get the nutrition you need for breakfast and your brain. The Ohio Supreme Court has also approved these seminars for attorney CLE credit. Join Zashin & Rich attorneys for breakfast refreshments as they discuss topics from and take your questions about the ever-evolving world of workplace law:

*(continued on page 4)*

# PRISON LOVE:

## California Puts Sexual Favoritism in the Slammer

*By: Lois A. Gruhin**

The California Supreme Court recently expanded the grounds for employee harassment actions against employers. In *Miller v. Department of Corrections*, the court unanimously held that widespread sexual favoritism in the workplace may create an actionable hostile work environment under the state's anti-harassment law, the Fair Employment and Housing Act ("FEHA").

In Miller, two female former employees of a California prison ("the plaintiffs"), claimed that a supervisor accorded unwarranted favorable treatment to three female co-workers ("the paramours") with whom the supervisor had sexual affairs. The plaintiffs claimed that the supervisor's conduct constituted sexual discrimination and harassment in violation of FEHA. For example, one plaintiff served on an interview panel that evaluated applications for a promotion. Although the panel did not select one of the supervisor's paramours, who had applied for the promotion, the paramour nonetheless received the promotion, allegedly upon the supervisor's orders. When one of the plaintiffs competed for a promotion with a second paramour, the paramour again received the promotion, despite the plaintiff's higher rank, superior education, and greater experience.

The plaintiffs alleged a host of other conduct and unfair treatment they attributed to the supervisor's sexual relationships. The plaintiffs also alleged that their complaints were either ignored or dismissed. Both plaintiffs eventually resigned from their positions. The lower courts awarded the employer summary judgment, finding, as have many other courts, that a supervisor's favoritism toward a workplace-lover does not constitute sexual harassment toward non-favored employees. The California Supreme Court reversed, however, finding that an employee may establish an actionable claim of sexual harassment under FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and to create a hostile work environment.

The court relied heavily on a 1990 Equal Employment Opportunity Commission ("EEOC") policy statement concerning employer liability for sexual favoritism under the Civil Rights Act of 1964 ("Title VII"). In its policy statement, the EEOC observed that:

> although isolated instances of sexual favoritism in the workplace do not violate Title VII, widespread sexual favoritism may create a hostile work environment in violation of Title VII by sending the demeaning message that managers view female employees as 'sexual playthings' or that 'the way for women to get ahead in the workplace is by engaging in sexual conduct.'

The court concluded that this was just such a situation. The evidence suggested to the court that the supervisor "viewed female employees as 'sexual playthings' and that his ensuing conduct conveyed this demeaning message in a manner that had an effect on the workforce as a whole." Moreover, the court found that the supervisor's sexual favoritism blocked plaintiffs' advancement and caused them to suffer harassment at the hands of one of the supervisor's paramours, who the supervisor failed to control. The court therefore concluded that the evidence created at least a triable issue of fact.

So what does this case mean for employers? How much can employers possibly do to control workplace romances? Generally speaking, all employers, not just those doing business in California, should determine how they want to manage workplace relationships. Some companies go so far as to prohibit workplace relationships altogether, while other employers prohibit romantic relationships between supervisors and subordinates. Still others require employees engaged in romantic relationships to report the relationship to management. Some companies require that upon such a report, one employee transfer to another location or even leave the company's employ. Some companies require the employees to sign a "love contract" acknowledging the consensual nature of their relationship.

There may be wisdom in each of these choices. Employers should consider the best method for their size, legal jurisdiction, and corporate culture. All employers must, however, ensure that employees work in a hostility-free work environment even when co-workers have consensual sexual relationships.

Regardless of how your company manages workplace romances, all employers should be familiar with one

*(continued on page 6)*

# LAST CHANCE AGREEMENTS ADA-Okay

*By: Stephen S. Zashin**

Drugs and alcohol adversely affect the lives of so many people on a personal level that sometimes employers overlook the profound impact of substance abuse on the workplace. Employers must manage employee substance abuse while remaining cognizant of federal and state disability laws. Under the Americans with Disabilities Act ("ADA"), drug rehabilitation is considered a disability, although current, illegal use of drugs is not protected. An employer cannot, therefore, discriminate against an individual who no longer engages in drug use and who participates in or who has successfully completed a drug treatment program.

Many employers have utilized "last chance agreements" to work with recovering employees returning to work after treatment. "Last chance" or return-to-work agreements generally require an employee to abide by an employer's rules concerning drug or alcohol use, treatment, and testing in exchange for continued employment.

Although many federal courts have determined that such agreements are valid under the ADA, Ohio courts have not really considered the question. Recently the Cuyahoga County Court of Common Pleas decided that it agrees "with those federal courts that have found that last chance agreements or return to work agreements …do not violate the ADA."

In *Partlow v. Blue Coral-Slick 50*, the employee informed the employer's human resources department that he had a drinking problem. Pursuant to the employer's drug policy, the employer made its employee assistance program ("EAP") available to the employee. The employee saw a counselor through the EAP and divulged during a counseling session that he also had a cocaine addiction and depression. The employee began outpatient counseling and continued working with no incident–until three weeks later, when he relapsed. The employee then entered a treatment facility, and the employer placed him on medical leave.

When the employee received permission to return to work, the employer presented him with a "return to work agreement." The employer conditioned the employee's continued employment on successful participation and completion of a treatment plan and any aftercare counseling and treatment; periodic unannounced drug and alcohol testing; and no drug or alcohol use. The agreement also stated that any failure to abide by all of its terms would be cause for termination and ineligibility for rehire. The employee signed the agreement and returned to work without incident–until about two weeks later when he was arrested for cocaine possession.

After the employee returned to work, the employer contacted his drug treatment therapist, who confirmed that the employee had relapsed into drug use. The employer determined that the employee had violated the terms of his return to work agreement and terminated his employment. The employee sued under the ADA and Ohio state law, arguing that the return to work agreement unlawfully changed the terms and conditions of his employment solely because he sought treatment for his addiction.

The court reviewed federal case law interpreting the ADA and agreed that last chance agreements do not violate state or federal disability laws. The court reviewed a Pennsylvania federal case, for example, that held that an alcoholic's violation of a last chance agreement did not constitute a discharge based solely on disability, but rather a discharge based upon a breach of the agreement. The Pennsylvania court said that to attribute the firing to alcoholism was "defective reasoning that skips the key step of reality, i.e., the prior accommodation to alcoholism."

The employer in *Partlow* helped itself immensely by going by the book: abiding by its own drug policy and referring

*(continued on page 6)*

ZASHIN&RICH CO.,L.P.A.

**cleveland office:**
55 public square, 4th floor
cleveland, ohio 44113
p: 216.696.4441
f: 216.696.1618

**columbus office:**
fifth third center, suite 1900
21 east state street
columbus, ohio 43215
p: 614.224.4411
f: 614.224.4433

www.zrlaw.com



**Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of workplace law.**

# Brain • Food • Breakfast • Law Series

*(continued from page 1)*

Zashin & Rich Co., L.P.A. presents **Overtime Over Your Head?** Fair Labor Standards Act Update. This seminar will take place on November 10, 2005. Attorney Michele Jakubs will discuss a variety of useful FLSA topics, including:

- how to determine whether an employee is exempt from overtime compensation (administrative, executive, professional, and others)
- how to protect exempt status: dos and don'ts
- how to understand what comprises working time, and what to do with waiting time, on-call time, break periods, training and the like
- how to avoid overtime mishaps with hours, bonuses, and determining an employee's "regular rate"
- what to do if your company makes a mistake

In addition, Attorney Christina Janice will discuss FLSA litigation and provide you with a useful understanding of:

- collective actions, class actions, multidistrict litigation, and choice of remedy
- which employers are subject to collective actions
- current trends and recent decisions in class action FLSA litigation
- defensive strategies for employers subject to collective actions

**details for the FLSA seminar:**
**date:** November 10, 2005 **time:** 8:30 a.m.- 10:00 a.m.
**how to register:** call (216) 696-4441 and speak with Gwen Johnston or send an email to gsj@zrlaw.com

Because all seminars are strictly limited to 20 attendees, you must register for this seminar no later than **November 8, 2005**.

You may also register for our next breakfast seminar, **How Does Your Garden Grow?** Cultivating a Union-Free Workplace. In this seminar, attorney Robert Hartman will discuss union organizing and union avoidance following recent developments involving the AFL-CIO. The information in this seminar will include:

- current state of union organizing
- exploring why employees unionize
- proactive steps management can take to prevent union organizing
- methods to win a union election campaign

**details for union organizing seminar:**
**date:** December 8, 2005 **time:** 8:30 a.m.- 10:00 a.m.
**how to register:** call (216) 696-4441 and speak with Gwen Johnston or send an email to gsj@zrlaw.com

**All brain • food • breakfast seminars:**

- take place at our offices, located at 55 Public Square, 4th Floor, Cleveland, 44113. Call (216) 696-4441 for directions or more information.
- begin with registration at 8:30 a.m. and conclude at 10:00 a.m.
- are strictly limited to 20 attendees. You may register in advance by calling (216) 696-4441 (please ask for Gwen Johnston) or sending an email to gsj@zrlaw.com.
- These courses have been approved by the Ohio Supreme Court Commission on Continuing Legal Education for 1.50 total CLE credit hours for each seminar (0.00 of ethics, 0.00 hour(s) of professionalism and 0.00 of substance abuse instruction).
- cost $30.00 per session per attendee
- include breakfast refreshments.
- are led by Zashin & Rich attorneys who practice only workplace law all day, every day.
- include time for your questions.

Join us for **the brain • food • breakfast • law series.** It's just good for you.

# USERRA UPDATE:

## Finalization of New Regs Just Around the Corner

*By: Helena J. Oroz**

You probably know that the Uniformed Services Employment and Reemployment Rights Act of 1994, or USERRA, is a federal law that affects employment, reemployment and retention in employment, when employees serve or have served in the uniformed services. But did you know that new regulations implementing USERRA will go into effect soon?

The regulations clarify employer and employee responsibilities under USERRA in a question-and-answer format that covers USERRA's various provisions. The new regulations are expected to become finalized and effective by the close of 2005. As always, Zashin & Rich will keep you posted concerning these regulations.

*Helena Oroz practices in all areas of employment law and compliance issues. For more information about military leave issues or USERRA, please contact Helena Oroz at (216) 696-4441 or hjo@zrlaw.com*

**Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of workplace law.**

## WORKERS' COMP:

*(continued from page 1)*

> employment, is not entitled to participate in the Workers' Compensation Fund because the requisite casual connection between the injury and the employment does not exist.

The court held that the employee had a fixed place of employment, even though her employer required her to attend the one-day seminar at a different location. Based on the coming-and-going rule, therefore, the employee could not receive benefits for injuries received in the car accident while traveling home from work. The employee argued that an exception applied in her case because she was performing a special errand for her employer at the time of the accident. The court disagreed, explaining that the exception does not exist unless the special errand was a major factor in the travel that produced the injury, not just incidental to the travel. The court held that the co-worker's errand was merely incidental to the employee's journey home. Therefore, the employee's injury did not occur "in the course of" her employment.

The court also reviewed the facts and circumstances surrounding the accident in light of three factors that the Ohio Supreme Court established for finding a causal connection between an employee's employment and injury: proximity of the place of employment to the accident scene; the employer's degree of control over the accident scene; and the benefit to the employer of the employee's presence at the accident scene.

The court found no causal connection between the employee's injury and her employment. First, the accident scene was remote from the employee's place of employment, as well as the hotel where the seminar took place. Second, the employer had no direct control over the accident scene. Finally, and most significantly for the court, the employee's presence at the accident scene provided no real benefit to the employer. The court found that the employee did nothing significant during the trip from the hotel to her home that aided her co-worker's mission on the employer's behalf. Therefore, the court held that the employee's injury was not one "arising out of" her employment.

It was clear from the facts in this case that the three-factor analysis did not point to a causal connection between the employee's injury and her employment. Nevertheless, employers should understand that any off-site employee work activity increases the risk of workers' compensation exposure.

***

The Ohio Supreme Court recently concluded that the loss of a leg is a loss of two limbs–a leg and a foot–for purposes of Ohio's permanent total disability ("PTD") statute. Under Ohio law, an individual may receive an award of PTD for "the loss or loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof."

In *International Paper v. Trucinski*, an employee suffered serious injuries to his leg during a chemical explosion at work. As a result of the injury, the employee underwent an above-the-knee amputation. The employee eventually applied for and received PTD. The employer unsuccessfully challenged the PTD award to an appeals court, and then to the Ohio Supreme Court.

The Ohio Supreme Court, in affirming the appeals court, also affirmed its own previous decision in a similar case. The Court previously held that a hand and an arm are distinct body parts for purposes of the PTD statute. Therefore, an employee's loss of an entire single extremity can equate to the loss of two body parts and an award of PTD under the statute. Based on its reading of the PTD statute and its previous case law, the Supreme Court held that the employee's loss of his leg equated to the loss of two body parts–a leg and a foot–for purposes of a PTD award.

The Supreme Court's decision is somewhat surprising. While the loss of a foot does not necessarily involve the loss of a leg, the converse is always true. One need not have a medical degree to recognize that the loss of a foot cannot survive the loss of a leg. Allowing employees, who unfortunately suffered the loss of a leg, to collect benefits for both the leg and the foot suggests a double recovery. However, the Supreme Court's sympathy for such tragic injuries appears to trump elementary anatomy in lost limb compensation awards.

*Steve Dlott defends employers in all aspects of workers' compensation law. For more information about workers' compensation claims, or preventative claims administration or aggressive claims management, please contact Steve Dlott at (216) 696-4441 or spd@zrlaw.com.*

**Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of workplace law.**

ZASHIN&RICH CO.,L.P.A.
55 public square
4th floor
cleveland, ohio 44113
attorneys at law



www.zrlaw.com

## LAST CHANCE AGREEMENTS

*(continued from page 3)*

the employee to its EAP; using a clear and comprehensive last chance agreement that kept it in the loop concerning the employee's treatment; and confirming information regarding the employee's relapse with his drug counselor. Unfortunately, the employer still ended up in court. However, there is now clear guidance from an Ohio court that last chance agreements in this context are okay.

Keep in mind, however, that last chance agreements should be drafted clearly and carefully to avoid violation of other state or federal laws. For more information about last chance agreements or other ADA-compliance issues, please contact Stephen Zashin at (216) 696-4441 or ssz@zrlaw.com.

*Stephen S. Zashin is an OSBA Certified Specialist in Labor and Employment Law and has extensive experience in defending ADA based litigation. For more information about the Americans with Disabilities Act or state disability laws, please contact Stephen at (216) 696-4441 or ssz@zrlaw.com.*



## PRISON LOVE

*(continued from page 2)*

very important word: discretion. For more information about sexual favoritism in the workplace, please contact Lois Gruhin at (614)224-4411 or lag@zrlaw.com.

**Lois A. Gruhin, a member of the firm's Columbus office, is a former General Counsel for Schottenstein Stores Corporation and has extensive experience in corporate compliance and employment discrimination matters. If you have any questions or need assistance with employee relations issues, sexual harassment claims or other non-discrimination laws, please contact Lois at lag@zrlaw.com or (614) 224-4411.*

**Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of workplace law.**