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Employee Avoids “At-Will” Disclaimer and Wins \$1,100,000 Verdict



By Keith L. Pryatel

In a case that could serve as the blueprint to how plaintiffs’ attorneys intend to attack, and avoid, written “at-will” employment disclaimers, an automobile dealer General Manager recently was awarded \$1,100,000 by a Franklin County jury (*Miller v. Honda East of Columbus*). The case is significant because it is the first in Ohio to examine, in depth, the efficacy of “at-will” employment disclaimers, and exposes gaps which may allow workers to pitch their employment claims to sympathetic juries.

When Ronald Miller was hired away from a Northeast Ohio Honda dealership to become the General Manager for a Columbus-based dealership, he signed an Acknowledgement of Receipt of Employee Handbook, which

clearly and expressly stated: “It should be noted that your employment is considered an ‘at-will’ arrangement, meaning that you may terminate your employment at any time and the dealership has the same right.” Additionally, the handbook itself, which was distributed to Miller, clearly and specifically stated: “Each employee is free to resign at will, at any time and for any reason. Similarly, the dealership may terminate the employment relationship at will, at any time and for any reason.” However, before Miller actually signed for his employee handbook, and accepted the Columbus dealership’s offer of employment, he claimed to have had a verbal discussion with the dealership’s

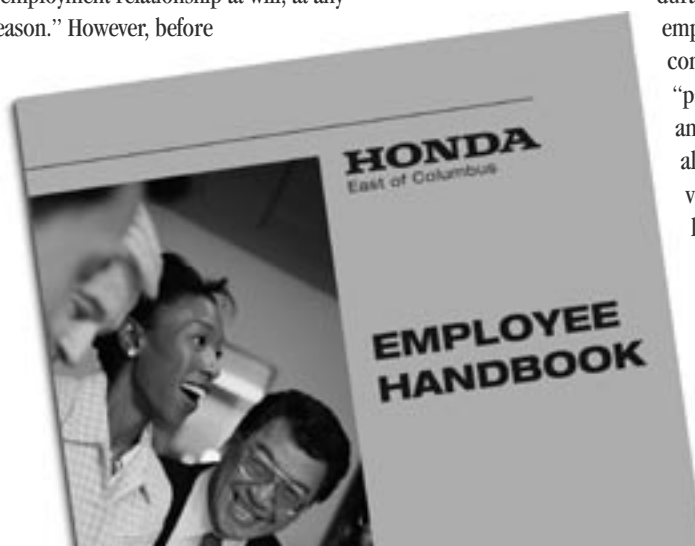
owner, promising full-time employment for no less than 10 years. Just two years after he accepted his position at the Columbus dealership, Miller was fired after engaging in several verbal altercations with the owner’s two sons. Miller then promptly sued, alleging “wrongful discharge,” and a Franklin County jury awarded him \$1,100,000 in economic damages.

Honda East challenged the jury’s verdict on appeal, claiming that both Miller’s handbook acknowledgement, and accompanying handbook proclaiming his “at-will” status, served to legally bar his claim of having 10 years worth of employment security. Normally, a substantive rule of law known as the “parol evidence” rule would prohibit a worker from claiming that their employment relationship was anything other than the terms and

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conditions set forth in a written document. However, in this case, the Court of Appeals ruled that Miller had at least two arguments against the parol evidence rule. First, that rule of law only applies to “fully integrated” documents, not those that are “partially integrated.” Since neither Miller’s Acknowledgement of Receipt of Handbook, nor the handbook itself, set forth any

durational limits to his employment, it was considered to be only “partially integrated,” and thus capable of being altered or modified by verbal promises and the like. Second, the Court of Appeals ruled there was no “consideration” given to Miller because, according to the Court,



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he was not an “at-will employee when . . . presented the acknowledgement . . . for signature.” Instead, said the Court, Miller and Honda East had already verbally agreed to a 10-year employment commitment.

In light of the earth-shattering jury verdict, and the legal blueprint established for avoiding written “at-will” disclaimers, it is now more important than ever for employers to revisit both their employee handbooks and acknowledgement of receipt forms to insure that they are airtight against the types of claims brought by Miller. For example, a simple phrase added to Honda East’s acknowledgement and handbook that: “There are no other oral or written agreements of any kind pertaining to the terms set forth in this handbook, and this handbook is the entire, and only writing or employment understanding

between us” probably would have defeated Miller’s claim that the acknowledgement and handbook were not fully integrated. Second, had Honda East distributed its handbook and acknowledgement of receipt form to Miller with a shiny red penny, that would have satisfied the “consideration” requirement, since courts will only inquire as to whether any consideration was provided to someone entering into a contract, and not examine its adequacy or amount.

Columbus Honda East was stung by a significant employment jury verdict because it did not dot its i’s and cross its t’s, and relied upon a handbook and acknowledgement form that had been drafted years ago. Employers would be prudent to revisit their own acknowledgement forms, handbooks, and employment applications to avoid Honda East’s fate.

2006 Brings Heightened Recordkeeping Requirements



By *Harley M. Kastner*

The last quarter of 2005 brought about several important developments that will significantly affect employers in the coming years. These three changes specifically address an employer’s duty to collect certain information concerning its employees as well as report them to the Department of Labor (“DOL”) or the Equal Employment Opportunity Commission (“EEOC”).

must consider the individual for a particular position; (3) the expression of interest must indicate that he or she possesses the basic qualifications for the position; and (4) the individual must not at any point prior to receiving an offer remove himself or herself from further consideration or otherwise indicate that he or she is no longer interested in employment in the position.

The form and method of the submission are broadly interpreted. OFCCP expressly included email, commercial and internal resume databank services such as Monster.com, and employer website submissions as sources of Internet applications.

Although the final rule appears on its surface to establish an additional cumbersome requirement on employers, there is significant potential to exclude applicants from the “Internet applicants” definition. Applicants can essentially remove themselves from ‘consideration’ by including salary or geographic location restrictions in their application. If these limitations are contrary to the requirements of the position, the applicant is not under consideration for that position and can be excluded from the reporting requirements. An employer can also limit the amount of Internet applicants by establishing basic qualifications that must be met for a position. These qualifications must be non-comparative, objective and business related (such as requiring a Masters in Accounting). However, so long as they do not require a contractor to consider the substance of each application, they can be used to reduce the number of Internet applicants. Contractors also can establish a protocol under which they refrain from considering any expression of interest that is not submitted according to that protocol, such as unsolicited resumes without respect to a particular position.

The OFCCP uses the race and gender data to audit individual employers as related to other local and industry workforces to ensure that hiring decisions are made in compliance with their equal employment opportunity and affirmative action obligations. The OFCCP has begun notifying specific contractors of upcoming compliance reviews.

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Obligation to Solicit Race and Gender Data from “Internet Applicants”

On October 7, 2005, the DOL’s Office of Federal Contract Compliance Programs (“OFCCP”) issued a final rule amending its traditional recordkeeping requirements to make employers responsible for collecting additional information from Internet applicants. The new regulation becomes effective February 6, 2006, and applies to any company that holds a federal contract. The final rule adds to OFCCP’s traditional requirements a provision requiring contractors to obtain, where possible, the same gender, race, and ethnicity information for “Internet Applicants”.

To be considered an “Internet applicant,” an individual must meet four criteria:

- (1) have submitted an expression of interest in employment with the contractor through the Internet or related technology channel;
- (2) the contractor

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DOL Guidance of Expanding Enforcement of Disclosure Requirements

As outlined in the Summer 2005 edition of the kwwlaborlaw.com communicator, the DOL made its intentions known to expand the enforcement of the Labor Management Reporting and Disclosure Act (“LMRDA”). The DOL has subsequently released an updated question and answer (“Q&A”) guidance to better explain the new reporting obligations. The LMRDA requires employers to disclose to the DOL all payments or benefits made either directly or indirectly (including marketing expenses, gifts, meals, lodging, travel, golf outings, tickets to sporting events, and access to educational conferences) to labor organizations, union officials, or union employees on Form LM-10.

The Q&A expands the number of employers that are bound by the LMRDA and imposes compliance on vendors, service providers [including investment advisors, banks, broker-dealers, and other financial institutions that do business with union-affiliated pension plans (generally called “Taft-Hartley” plans)], and non-union employers.

The Q&A also narrows the payments that will be exempt from reporting. The DOL believes that only payments made in the regular course of business, that are arms-length commercial transactions, and are made without regard to the recipient’s status as a union official are exempt from reporting.

The Q&A does increase the dollar amount for the *de minimis* exemption from \$25 to \$250. A payment does not need to be reported if (1) the total value is less than \$250 in any fiscal year and (2) it is unrelated to the recipient’s status as a union official.

The Q&A also outlines that, absent “extraordinary circumstances,” new filers of Form LM-10 will be required to keep records and submit forms for the fiscal year beginning on or after January 1, 2005. Recognizing that many employers have not kept adequate records, where the employer acts diligently and in good faith to reconstruct records and identify reportable records, the DOL has eliminated the requirement that the president and treasurer sign the initial Form LM-10. The relaxed



signature and record standard only applies to the 2005 calendar fiscal year. Employers must establish appropriate policies for documentation and reporting beginning January 1, 2006.

Overall the Q&A increases the number of employers that must file a Form LM-10, while also shrinking the available exempt payments. Although the Q&A does enlarge the *de minimis* exemption, it likely will lead to higher costs associated with tracking expenses. Although the underlying purpose of the LMRDA is to enhance union transparency and keep union officials accountable to their members for their compensation and benefits, the revision and

clarification of the Form LM-10 reporting requirements will impose additional costs on more employers.

Revisions to EEO-1 Report

On November 16, 2005, the Equal Employment Opportunity Commission (“EEOC”) approved revisions to the Employer Information Report (EEO-1) which will be used for the reporting cycle beginning with the survey due by September 30, 2007. The September 2006 survey will use the previous format.

The EEO-1 must be filed by (1) employers with federal government contracts of \$50,000 or more and 50 or more employees and (2) employers who do not have federal government contracts but have 100 or more employees. Qualified employers must provide the federal government with an accounting of their employees by ethnicity, race and gender, divided into job categories.

The race and ethnicity category of the EEO-1 is being revised to add a new category entitled “Two or more Races” as well as rename and reclassify existing categories to their more politically correct alternatives. Most importantly the revision strongly endorses self-identification of race and ethnic categories by employees themselves as opposed to the current system of visual identification by employers.

The job category of the EEO-1 is also being changed to better track the representation of women and minorities at different levels of management.

Military Leaves – New Regulations Employers Share in War on Terrorism



By *Kenneth M. Haneline*

On December 19, 2005, the United States Department of Labor (DOL) issued final regulations for the Uniformed Services Employment and Reemployment Rights Act (USERRA) concerning

the obligations of employers to members of the Armed Services who must take leave from work to comply with military service orders. These new regulations go into effect on January 18, 2006. Some of the most important aspects of the new rules include:

Eligibility Requirements: An employee must meet the following criteria to be eligible for reemployment under USERRA at the end of military service: (1) the employer had advance notice of the employee's service; (2) the employee has five years or less of cumulative service in the uniformed services (with a number of exceptions); (3) the employee timely returns to work or applies for reemployment; and (4) the employee has not been dishonorably discharged.



employees in the same or similar position in determining whether the returning employee is entitled to non-seniority, performance-based "merit pay" increase which might have been earned during the employee's leave of absence. The preamble to the regulations provides the following example: if the employer offers continued life insurance coverage, holiday pay, bonuses, or other non-seniority benefits to its employees on a leave of absence, the employer must also offer the service member similar benefits during the time he or she is absent from work due to military service. According to the preamble, the accrual of vacation is a non-seniority benefit.

Leave Notice: Employees are not required to give written or formal notice of their need for leave, but only such notice as is necessary to reasonably inform the employer.

Prompt Reemployment: Employers are required to reemploy returning employees "promptly," meaning "as soon as practicable under the circumstances." Under normal circumstances, reemployment must occur within two weeks. Where the employee is returning from weekend National Guard duty, "prompt reemployment" is the next regularly scheduled workday. "Prompt reemployment" after several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position.

Job Elimination: An employer need not reemploy a returning employee if the employer conducted a reduction in force during the employee's period of military service and can demonstrate that the reduction would have included the employee.

Health Coverage: If an employee's health coverage lapses during a period of service, it must be reinstated immediately upon the employee's return, regardless of any waiting period that would normally be imposed under the employer's plan. Last year, the COBRA rules were changed to require a continuation period of 24 months, rather than the usual 18 months, for employees on military leave.

Pension Contributions: Pension plans must allow employees to make up all or part of any contributions they missed by virtue of their terms of military service. This duty extends even to service members who are no longer employed by the plan sponsor.

Under the new regulations, employers may now examine the returning employee's own work history, the employee's history of merit increases, and the work and pay history of employees in the same or similar position in determining whether the returning employee is entitled to a non-seniority, performance-based "merit pay" increase.

Escalator Principle: The addition of an "escalator principle" which requires the employee to be reinstated to the position he or she would have obtained with reasonable certainty but for the military absence. The regulations also address how the specific reemployment position is determined and provide that the reemployment position includes the seniority rights, status, and pay that the employee would ordinarily have obtained in that position given his or her job history, including prospects for future earnings and advancement. Notwithstanding the escalator principle, the regulations emphasize that USERRA does not require an employer to reinstate a returning service member in an employment position if the returning service member is not qualified to perform the civilian job, although the employer is obligated to make reasonable efforts to assist the returning employee to become qualified for employment.

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Employer Definition: The definition of employer includes supervisors and managers in certain situations. Thus, there can be individual liability under USERRA. To establish a discrimination claim under USERRA, the individual must show that a status or activity protected by USERRA was “one of the reasons” the employer took action against him or her, not necessarily the sole cause of the employment action.

Protection from Discharge

The regulations clarify a returning service member’s special protections from discharge except for “just cause.” The regulations now provide that although the “just cause” requirement is an exception to at-will employment, the protection from discharge is not absolute. The regulations provide that “the employer bears the burden of proving either that the discharge was based on the employee’s conduct or it was the result of some other legitimate nondiscriminatory reason that would have affected any other employee in the reemployed

service member’s position regardless of his or her protected status or activity.” The regulations list other illustrative examples for discharge to include “elimination of the employee’s position, corporate reorganization or ‘downsizing’ and layoff, provided that those reasons are legitimate, nondiscriminatory, and non-pretexual.”

New USERRA Notice Poster

The Veterans’ Benefits Improvement Act of 2004 (VBIA) requires employers to provide notice to all employees of their rights under USERRA. The DOL has revised the notice poster by stating that USERRA may apply to certain National Disaster Medical System personnel. Because this service is the only USERRA-covered service not contained in USERRA itself and, as a result, may be overlooked, the DOL modified the text of the notice to include this service. This change is separate from the new USERRA regulations. The latest version of the poster is available at the following website: http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf.

Department of Labor Offers Guidance on Employees as Volunteers



By James P. Wilkins

This past fall, the U.S. Department of Labor (“DOL”) issued a series of opinion letters clarifying when a “volunteer” is truly a volunteer and therefore not entitled to compensation under

the Fair Labor Standards Act. The issue generally arises when a non-exempt employee agrees to put in additional time for some civic or charitable effort sponsored by the employer. The DOL has always been somewhat suspicious of “volunteer” arrangements because of their potential use as a means to circumvent the minimum wage and overtime requirements of the FLSA.

Under the FLSA, a non-exempt employee must generally be paid time and one half his/her regular hourly rate for all hours worked in excess of forty in a workweek. However, under certain circumstances, time spent by such employee volunteering for his/her employer will not be counted as hours worked and therefore no additional compensation will be required for such volunteer work.

In its latest releases, the DOL expressly recognized “the generosity and public benefit of volunteering,” and sought to eliminate obstacles to “bona fide volunteer efforts for charitable and public purposes.” Based on the guidance issued by the DOL, volunteer status will most clearly be established when certain criteria are satisfied:

- Designation of “volunteer” status is not done unilaterally by the employer to avoid minimum wage or overtime requirements;
- The volunteer time must be for a civic, charitable, or humanitarian purpose without any promise,

expectation or receipt of compensation by the employee (though a nominal fee may be provided);

- The act of volunteering truly must be voluntary, without any direct or implied coercion from the employer;
- The employee’s volunteer activities must not be similar to the services he/she performs as part of his/her regular employment; and
- The volunteering must be performed outside the employee’s normal work hours.

In its latest releases, the DOL expressly recognized “the generosity and public benefit of volunteering,” and sought to eliminate obstacles to “bona fide volunteer efforts for charitable and public purposes.”

The DOL permits a “nominal” payment to an employee for performing additional volunteer services without destroying the volunteer nature of that service. For example, a non-exempt school custodian can volunteer to coach one of the school’s sports teams without the employer being required to compensate the individual for all hours spent coaching. The school can even pay the volunteer coach a stipend, so long as it is nominal when compared with what would be paid if someone were hired to do the job. Such stipends may not be a substitute for compensation and cannot be tied to productivity or the amount of time devoted to the volunteer activity.

Though not specifically required by the DOL opinion letters, an employer who permits an employee to perform volunteer services is well advised to have a written understanding with the employee to help assure that each of the foregoing criteria are satisfied. For a sample “Acknowledgement of Volunteer Status” form, please contact Jim Wilkins, jwilkins@kwvlaborlaw.com.

Court Finds Employer Duty to Monitor Employee Computer Use



By Dean E. Westman

In a recent decision by the Superior Court of New Jersey, the Court recognized that an employer was under a duty to exercise reasonable care to monitor and stop an employee's use of a workplace computer to view child pornography. The unusual fact pattern in this case involved an accountant who worked at his company's corporate headquarters in Somerset County, New Jersey. Not surprisingly, the employee was provided with a workplace computer to carry out his job functions. He worked in a cubicle that had no doors and opened into a hallway. Other cubicles and the offices of management personnel were also located along the same hallway. Beginning sometime in 1998 or 1999, the company's Internet services manager detected from a review of computer log reports that the employee had been visiting pornographic sites. This was reported to the company's senior network administrator, who told the employee to stop the activity but did not inform any of the other supervisors of these events.

This decision emphasizes the importance of ensuring that the inappropriate use of workplace computers is not tolerated by employers, particularly when there is observed behavior that places an employer on notice that these activities are occurring.

In early 2000, the employee's immediate supervisor also informed the senior network administrator that the employee in question had been visiting inappropriate websites. A limited investigation was done for one or two days to identify the websites being visited by the employee, several of which were pornographic websites. When the results of this investigation were reported to the company's director of network and PC services, the director admonished the senior network administrator that there should be no further access to the employee's computer logs. The matter was not discussed further with the employee because of a company policy communicated by e-mail that prohibited monitoring of or reporting the Internet activities of employees. The policy called for penalties ranging from reprimand to termination in the event of policy violations.

In December of 2000, a female employee in the accounting department told her manager that she had observed the employee in question acting strangely by shielding his computer screen and quickly minimizing it so that others could not see what he was doing. She reported that she saw him acting in this manner two or

three times a day and had discussed this behavior with other employees who had also observed the unusual behavior. Although these events were discussed with the company's manager of financial reporting, no action resulted from their complaints.



In February and March 2001, further reports surfaced that the employee had been visiting pornographic websites. The same female employee who had complained earlier reported that she had seen a picture of a woman in a bikini with very large breasts in a sultry pose on the employee's computer screen as she walked passed his cubicle. At about the same time, the employee's supervisor went into the employee's cubicle during lunch, clicked on the "websites visited" icon on the employee's computer, and discovered that the employee had visited various porn sites. At least one of the pornographic sites involved child pornography. The employee's supervisor printed out the information he discovered and showed it to his supervisor. On March 6, 2001, a meeting was conducted with the employee who was told that there had been reports of inappropriate computer usage. The employee was instructed to stop these activities, and he said he would. This conversation was confirmed in an e-mail message and the employee appeared to stop his activities, but in early June the supervisor noted that the employee had resumed his workplace visits to pornographic websites. The supervisor told no one of these resumed activities.

Following the issuance of a search warrant, the employee's workspace and work computer were examined, and the employee was thereafter arrested on child pornography charges. Unbeknownst to his employer, the employee had been secretly videotaping and photographing his ten year old stepdaughter at their home in nude and semi-nude positions. The employee later admitted that he

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had stored child pornography, including nude pictures of his stepdaughter, in his workplace computer. He also admitted to downloading over 1,000 pornographic images while at work.

As a result of these events, a lawsuit was brought against the employer by the former employee's wife on her own behalf and on behalf of the wife's minor daughter. Although the suit was dismissed initially upon a motion filed by the employer, when appealed to the Superior Court of New Jersey the dismissal was reversed, and the case was remanded to the trial court for further proceedings. The Court of Appeals concluded that the company had the right and the ability to monitor the employee's office computer activities, and that the company was on notice that the employee was viewing pornography on his workplace computer, including child pornography. Because of this, the company was under a duty to investigate further and to exercise reasonable care to stop the employee's activities. As the court concluded, these activities, by their very

nature are deemed by the state and federal lawmakers to constitute a threat to others, the others being the children who are forced to engage in or unwillingly made the subject of pornographic activities.

This decision emphasizes the importance of ensuring that the inappropriate use of workplace computers is not tolerated by employers, particularly when there is observed behavior that places an employer on notice that these activities are occurring. Most Internet use policies permit employers to monitor the Internet activities of their employees, as did the policy involved in this case. The combination of notice of inappropriate website visits and the ability to detect those activities were key factors in the decision reached by the Superior Court of New Jersey. Although this decision might be viewed as inviting "Big Brother" to work, it makes sense that employers should be keenly aware of any type of unlawful conduct occurring in their workplace, and take appropriate steps to bring such conduct to an immediate end.

Supreme Court Gives Guidance on Compensability of Donning and Doffing Time



By Thomas Evan Green

Recently, the U.S. Supreme Court held that the time employees spend walking to a production area after donning, or changing into, required work gear is compensable under the Fair Labor Standards Act.

IBP, Inc. v. Alvarez. The Supreme Court similarly held that time waiting to doff, or remove protective gear, is also compensable. On the other hand, any time an employee spends waiting to don the first piece of gear prior to the start of the work day is not compensable.

In resolving a conflict among two federal appeals Courts, the court indicated that "[d]uring a continuous work day, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity... is covered by the FLSA." The unanimous 9-0 Court ruled that with respect to an employee who is required to wear certain gear, the employee's first principal activity is the donning of work gear, and the last is doffing. The Court applied a Department of Labor regulation that defines the "continuous work day" as

"the period between the commencement and completion on the same work day of an employee's principal activity or activities."

The Court applied a Department of Labor regulation that defines the "continuous work day" as "the period between the commencement and completion on the same work day of an employee's principal activity or activities."

Alvarez was a consolidated case in which the Supreme Court heard appeals from the First and Ninth Circuits. The plaintiffs in both cases sought compensation for time spent walking to the production area after changing into required work clothes. The same employees sought compensation for the time they spent waiting to pick up the required clothes at the beginning of the day, and the time they spent waiting to drop off the protective clothes at the end.

Aside from the meat processing industry, the Court's holding in this case has potential applicability to any industry where an employee must pick up tools, clothes, documents, or any other items necessary for their primary work function, prior to the start of such function. Due to the severity of the penalties under the Fair Labor Standards Act, employers are urged to exercise great caution whenever non-exempt employees are arguably required to perform any work-related task before the start of the compensable work day.



Ohio Supreme Court Rejects “Mental-Mental” WC Claims



By Richard Davies

The Supreme Court of Ohio recently decided a much anticipated case on the issue of whether a so-called “mental-mental” condition which does not arise from a compensable physical injury or occupational disease can be compensable under Ohio’s workers’ compensation statutes. In *McCrone v. Bank One Corp.*, the Supreme Court held such a condition is not compensable, and put to rest, at least for the foreseeable future, the debate over whether such a condition would be found to be compensable. The debate had been raging ever since the case of *Bailey v. Republic Engineered Steels, Inc.*, was decided in 2001.

In the *McCrone* case, Ms. McCrone worked for Bank One. During her three years she worked for the bank, the branch where she was employed twice was robbed. The first time the bank was robbed Ms. McCrone was present in the bank, but she was not the teller actually involved with the robbery. She was able to go back to work without apparently suffering any residual problems. After the second robbery, however, Ms. McCrone was diagnosed with PTSD (posttraumatic stress disorder) and was not able to return to her job with the bank.

McCrone filed an application asking for workers’ compensation benefits for the PTSD, but her application was denied throughout the Industrial Commission’s administrative hearing process on the ground she had not suffered a physical injury and therefore could not seek allowance for a psychological or psychiatric condition. The Industrial Commission relied on the definition of ‘injury’ contained in Ohio Revised Code §4123.01(C)(1). That section specifically excluded purely psychological or psychiatric conditions from the definition of “injury” unless there was also a physical injury.

McCrone then filed an appeal to the Stark County Common Pleas Court seeking the right to receive workers’ compensation benefits for her PTSD, challenging ORC §4123.01(C)(1) on constitutional grounds. Both the Common Pleas Court and thereafter the Stark County Court of Appeals found that section of the statute unconstitutional on equal protection grounds. Since those decisions were contrary to the position taken by every other Ohio appellate court that had addressed a similar case, the Supreme Court of Ohio agreed to review the case.

The Supreme Court in a 5 to 2 decision found the section of the statute being challenged by McCrone to be constitutional. The Court also suggested strongly that its previous ruling in the *Bailey* case remains the high water mark in attempts to expand the definition of “injury” to include purely psychological or psychiatric conditions. The Court in its present makeup would not permit further encroachments on the statutory requirement that there be a physical injury or occupational disease when an injured worker sought the allowance of a psychological or psychiatric condition.

The Court said, however, it was the province of the Ohio General Assembly, and not the courts, to amend and expand the definition of “injury” to include such purely psychological or psychiatric injuries if the General Assembly felt it appropriate.

In *Bailey* the Court previously had permitted a worker to recover workers’ compensation benefits for developing a purely psychological condition where his co-worker had sustained the required physical injury. The co-worker was accidentally killed while Bailey was operating the piece of machinery involved in the accident. In *McCrone*, the Court’s majority said the *Bailey* decision was an “atypical holding” which had created an “aberration.” The Court found there was a legitimate governmental interest in the General Assembly’s definition of “injury” in ORC §4123.01(C)(1), and declined to find the statute violated McCrone’s equal protection rights.

The Court did acknowledge purely psychological or psychiatric injuries *could* come from an individual’s employment and recognized the impact such injuries could have on that individual. The Court said, however, it was the province of the Ohio General Assembly, and not the courts, to amend and expand the definition of “injury” to include such purely psychological or psychiatric injuries if the General Assembly felt it appropriate. Until that time, the Supreme Court said it would abide by the definition of injury as currently set forth in ORC 4123.01(C)(1).

There has been no indication that the presently constituted General Assembly is considering any proposed expansion of the definition of ‘injury’ to include purely psychological or psychiatric conditions. We will of course keep you informed of any developments.

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