

kwwlaborlaw. communicator

3480 West Market Street • Suite 300 • Akron, Ohio 44333 • Phone: (330) 867-9998 • FAX: (330) 867-3786 • E-mail: kww@kwwlaborlaw.com

Ohio Voters Approve Broad Anti-Smoking Law



By James P. Wilkins

On November 7, 2006, voters in Ohio approved a broad no smoking ban for virtually all places of employment. State laws are normally passed by the Ohio General Assembly, but in this instance, a public referendum – Issue 5 – has resulted in the enactment of Ohio Revised Code Chapter 3794. Effective December 7, 2006, the law imposes new obligations on most private and public employers in Ohio.

An Ohio employer has always had the latitude to prohibit smoking anywhere in its facilities or on its property. However, even those employers who previously have adopted policies that broadly prohibit smoking undoubtedly will be required to take further affirmative steps to assure that the no-smoking restrictions imposed by the new statute are fully enforced.

The new law applies to virtually every employer in Ohio. One narrow exception is “family-owned and operated places of employment in which all employees are related to the owner,” but only if the place of employment is not open to the public and is in a building occupied solely by that employer. There are also limited exceptions for hotels, nursing homes, and retail tobacco stores.

The law prohibits smoking in any enclosed area at a place of employment, including offices, meeting rooms, sales, production and storage areas, restrooms, stairways, hallways, warehouses, garages, and vehicles. An “enclosed area” is defined as an “area with a roof or other overhead covering of any kind and walls or side coverings of any kind, regardless of the presence of openings for ingress and egress, on all sides or on all sides but one.”

An employer also must prohibit smoking in any areas directly or indirectly under its control that are “immediately adjacent” to locations of ingress or egress to the place of employment. The statute does not define what constitutes “immediately adjacent,” so employers may have to await regulations that provide more guidance on the scope of the no-smoking zone that must be enforced outside of doorways. Such regulations are due to be

issued by June 7, 2007. An employer also must assure that smoke does not drift into the workplace through entrances, windows, ventilation systems, or other means.

All of the foregoing restrictions would seem to prohibit smoking in several areas that have commonly fallen through the cracks up until now, including areas just outside of doorways, on loading docks, in company-owned vehicles, and even in a smoking shack that is separated from the main place of employment. Though an employer may not be *required* to prohibit smoking in parking lots and other outside areas away from doorways, an employer remains free to do so.

“No smoking” signs or the international “No Smoking” symbol must be “conspicuously posted” in every place of employment where smoking is prohibited, including at each entrance to the place of employment. All signs must contain a telephone number for reporting violations. Employers also are required to remove ashtrays and receptacles for disposing of smoking materials from any area where smoking is prohibited by the statute. Since smoking is prohibited in entranceways under the employer’s control, the statute would seem to require the displacement of smoking urns, ashtrays or receptacles that are typically placed outside of doorways. Such receptacles can no longer be “immediately adjacent” to the doorway.

“No smoking” signs or the international “No Smoking” symbol must be “conspicuously posted” in every place of employment where smoking is prohibited, including at each entrance to the place of employment.

The new statute has several enforcement mechanisms. The state Department of Health is charged with enforcement of the new law. It will establish systems for reporting violations, including a dedicated toll free telephone number. Following a written warning for the first violation, employers are subject to progressive fines ranging from \$100 to \$2,500. An individual who refuses to immediately discontinue smoking in a prohibited area when requested to do so is subject to a fine of up to \$100 per violation.

Unionized employers may have legal and contractual obligations that impact how they go about the task of complying with the new law. Therefore, they should consult with labor counsel before implementing any changes in policies or work rules. If you would like more information on this new law or assistance in implementing its provisions, please contact any KWW professional.

Contents	Page
Ohio Voters Approve Broad Anti-Smoking Law	1
The New Ohio Minimum Wage Amendment	2
National Labor Relations Board Defines Supervisory Status	3
OSHA Update	4
Why You Should Think About Electronic Discovery	5
Workers’ Compensation Leave Still a Mystery in Ohio	6
Obesity Without Physiological Cause is Not a Disability	7
Employer Pays Top Dollar to Settle Wage & Hour Claims	8

The New Ohio Minimum Wage Amendment



By James W. Ellis

On November 7, 2006, Ohio voters not only passed the anti-smoking law, but also approved an amendment to the Ohio Constitution that impacts most employers in Ohio. The new Article II, Section 34a of the Ohio Constitution increases Ohio's minimum wage from \$5.15 to \$6.85 effective January 1, 2007. The new Constitutional amendment also contains a provision that automatically increases Ohio's minimum wage every January beginning in 2008 based on the rate of inflation determined by the federal government's Consumer Price Index.

The new Constitutional amendment applies to all employers covered by the federal Fair Labor Standards Act. However, employers with gross receipts less than or equal to \$250,000 for the previous calendar year are specifically excluded from coverage of the new law. An exception also has been carved out for employees under the age of sixteen. However, it is important to note that the federal minimum wage – currently \$5.15 – still applies in these situations.



Article II, Section 34a of the Ohio Constitution increases Ohio's minimum wage from \$5.15 to \$6.85 effective January 1, 2007...and also contains a provision that automatically increases Ohio's minimum wage every January beginning in 2008 based on the rate of inflation determined by the federal government's Consumer Price Index.

The new amendment also allows employers to pay less than minimum wage to family members working in a family owned business and to individuals with mental or physical disabilities if the employer is licensed by the state to do so. Tipped employees must be paid not less than half the minimum wage so long as the employer can show that the paid wage and paid tips equal at least the minimum wage.

In addition to the increased minimum wage, the amendment imposes strict recordkeeping requirements on all Ohio employers. It provides that employers must maintain a record for each employee containing the employee's name, address, occupation, pay rate, hours

worked for each work day, and the amount paid to the employee. This record must be retained by an employer for three years after the date of the employee's separation.

Additionally, the amendment mandates that the foregoing information "shall be provided without charge to an employee or person acting on behalf of an employee upon request." Though the language of the amendment seems to indicate that an employee (or his representative) can only request his own records, some opponents of the Constitutional amendment argued this requirement could make all of an employer's payroll records an "open book." The new amendment does not define who may act on an employee's behalf nor does it state what form

an authorization should take. These and other uncertainties about the scope of an employer's duty to provide access to its payroll records will need to be resolved through legislation, regulations, or litigation.

The amendment requires that employees be given the employer's name, address, telephone number and other "contact information" upon hire and requires that employers update this information whenever necessary to keep the information current. The constitutional amendment also appears to create some harsh and perhaps unintended consequences. For example, existing federal and state laws provide that minimum wage requirements do not apply to certain broad categories of employees. Examples would include: salaried employees who work in an executive, administrative, or professional capacity; outside salesmen; certain agricultural employees; and employees who work at camps or recreational areas for children. Under the new constitutional amendment, all of these categories of workers fall within the definition of "employee," and thus would now be subject to the amendment's new \$6.85 minimum wage requirement.

Furthermore, the requirement to keep a record of all hours worked each day applies to **all** employees, with no distinction being drawn between salaried and hourly employees. Under current state and federal law, Ohio employers never have been required to keep a record of actual hours worked for salaried employees who were exempt from the minimum wage and overtime requirements of federal law.

The full implications of this constitutional amendment remain to be seen and will undoubtedly be resolved in Ohio's courts. In the meantime, employers who have questions about the impact of this new development on their operations may contact our office.

National Labor Relations Board Defines Supervisory Status



By James P. Wilkins

In what may prove to be a landmark case that impacts employers for years to come, the National Labor Relations Board recently clarified the types of duties and responsibilities that make an employee a supervisor under the Act. *Oakwood Healthcare, Inc.* Under the National Labor Relations Act, a supervisory employee is not permitted to join a labor union, cannot engage in union activity, and is not otherwise protected by the Act. Therefore, the determination of who is or is not a “supervisor” is crucial during a union organizing effort. In a 3-2 decision, a majority of the Board criticized past Board decisions for being “result-oriented.” In the majority’s view, the Board in the past too often has decided cases with one eye on whether its decision would result in too many workers being deemed supervisors, thereby falling outside the protection of the Act. Instead, the Board majority in *Oakwood* sought to apply the statutory definition by giving key words and phrases their ordinary meaning. The result is a much broader definition that is likely to result in more employees being excluded from the protections of the Act.

Section 2(11) of the Act defines “supervisor” as an employee who has “authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action,” provided the exercise of such authority “is not of a merely routine or clerical nature, but requires the use of independent judgment.”

In its decision, the Board grappled with what it means to “assign” employees and “responsibly to direct them.” According to the Board, to “assign” an employee means the act of designating an employee to a place (*e.g.*, a location or department), appointing an employee to a shift, or giving significant overall duties to an employee. The majority rejected the contention that to “assign” necessarily entails determining an employee’s actual job classification.

The Board also determined that the phrase “responsibly to direct” means the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees being directed. For example, if an employee is subject to discipline if work is not adequately performed by those working under his or her direction, then the employee is likely to be deemed a supervisor. The alleged supervisor also must have authority to take corrective action if necessary.

The mere exercise of the functions referenced in the statutory definition of “supervisor” – to assign, discipline, promote, etc. – is not sufficient to make an employee a supervisor unless the employee uses “independent judgment” in exercising those functions. For instance, if a decision to assign or transfer an employee is dictated or controlled by detailed instructions, such as company policies or rules, by the verbal instructions of a higher authority, or by the terms of a collective bargaining agreement, then such a decision is not made with independent judgment. On the other hand, if an employee is making decisions to assign or transfer and such decisions are free of the control of others and require forming an opinion or making an evaluation, then it is more probable that the employee will be regarded as a supervisor.

The mere exercise of the functions referenced in the statutory definition of “supervisor” – to assign, discipline, promote, etc. – is not sufficient to make an employee a supervisor unless the employee uses “independent judgment” in exercising those functions.

Even an employee who functions as a “supervisor” only on a part-time basis can be regarded as a supervisor. To be a supervisor, an employee only needs to perform supervisory functions on a patterned or scheduled basis for at least 10 to 15 percent of his or her total work time.

The determination of which employees are “supervisors” under the Act can have profound consequences if a union is attempting to organize an employer’s workforce. A true “supervisor,” as determined by the Board, is not eligible to vote in a union election and will not be part of the bargaining unit if the union wins the election. Many employers have found that inclusion of supervisory employees in a bargaining unit impairs an employer’s ability to manage the workforce.

Employers that are interested in assuring the supervisory status of selected employees should consider taking several proactive steps to set the stage for future evaluation of employee supervisory status. Job descriptions should explicitly state that supervisors have the type and degree of discretion and authority to meet the statutory definition of “supervisor.” Obviously, it is equally important to be able to demonstrate that the employee *actually* exercises such authority. Employers also should create and preserve documentation that reflects the supervisory actions and judgments of its supervisors, such as documents showing supervisory decisions to transfer, assign, and discipline subordinate employees.

OSHA Update



By Keith L. Pryatel

OSHA Loses Bid to Argue Supervisory Liability

In a decision that is seen by many as fundamentally altering the legal landscape surrounding the federal Occupational Safety and Health Administration (“OSHA”), a federal appeals court recently ruled that OSHA cannot demonstrate the requisite “knowledge” of a violative safety condition simply by pointing to a supervisor’s knowledge. *Yates & Sons Co. v. Occupational Safety and Health Review Commission*. The decision is viewed as a significant setback for OSHA, which traditionally relies upon nothing more than a foreman’s “knowledge” of an alleged violative condition in order to hold the employer responsible for a health or safety citation.

The decision is viewed as a significant setback for OSHA, which traditionally relies upon nothing more than a foreman’s “knowledge” of an alleged violative condition in order to hold the employer responsible for a health or safety citation.

In *Yates & Sons*, a construction crew foreman was observed by two OSHA officers working on a 65-foot sloped embankment without wearing any fall protective gear. There was no question in the case that the failure of the foreman to don the gear violated applicable OSHA safety standards and rules. Noting that Congress never intended to impose “strict liability” for alleged OSHA violations, the U.S. Court of Appeals for the Fifth Circuit held that OSHA had not carried its burden of proving that Yates & Sons Construction Company possessed the requisite “knowledge” in order to establish an OSHA violation. The Court expressly rejected OSHA’s theory that because a foreman (i.e., supervisory employee) knew of the violative condition, that that “knowledge” should necessarily be imputed to his employer. The Court stated that “imputing to the employer the knowledge of a supervisor of his own violative condition without any further inquiry would amount to the imposition of a strict liability standard, which the Act neither authorized nor intends.” The Fifth Circuit therefore held that “a supervisor’s knowledge of his own

malfeasance is not imputable to the employer where the employer’s safety policy, training, and discipline are sufficient to make the supervisor’s conduct in violation of the policy unforeseeable.” OSHA has vowed to appeal this adverse federal ruling, and also has asked that the full judicial panel of the Fifth Circuit review the decision that was issued by a three-judge panel. If the decision is left to stand, the need for employers to train their workers in all safety aspects, and to have in place comprehensive health and safety policies and procedures becomes all the more important because if in place, OSHA cannot properly issue safety citations and fines where a supervisor or foreman acts in contravention of his or her employer’s written policies.

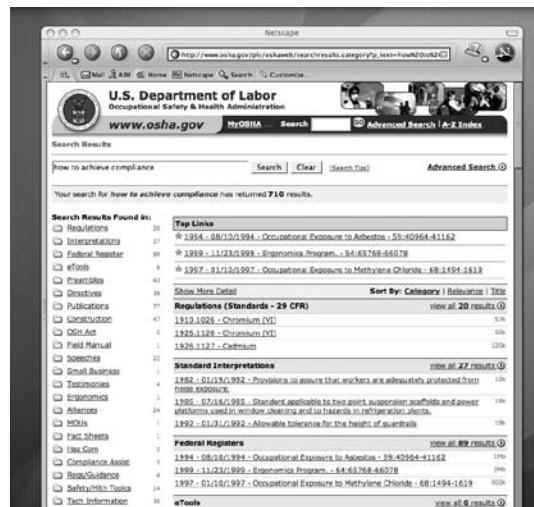
Importance of OSHA Interpretive Letters Placed in Doubt

A recent decision by the Occupational Safety and Health Review Commission places in doubt the continued credibility of private interpretation letters that are often issued by the Occupational Safety and Health Administration (*Secretary of Labor v. Beverly Healthcare-Hillview*).

Many of OSHA’s regulations are what are known as performance-oriented standards. These types of regulations spell out prohibited conduct, but do not detail how compliance under the regulation is to be achieved. Frequently, OSHA fills in the “how to achieve compliance” gap by issuing private letter rulings that are archived on its website. In *Beverly Healthcare*, the issue was whether OSHA’s blood-borne pathogen standard required employers to pay for time spent and travel costs incurred by employees obtaining medical treatment after needle-stick injuries. Although the regulation itself did not address the issue, several OSHA interpretive letters expressly stated that employers must cover the cost of travel and lost time.

In a split decision, the Occupational Safety and Health Review Commission concluded that the regulation itself was vague, and that employers did not receive “fair notice” that OSHA required reimbursement of costs simply by virtue of the private letter rulings that appeared on its website. The Review Commission’s decision is significant because it

questions whether OSHA’s interpretation letters can ever satisfy the requisite proper notice under a vague, non-detailed safety regulation. OSHA may have to invent a more formal mechanism to communicate and warn employers about its unique interpretation of admittedly vague regulations.



Why You Should Think About Electronic Discovery



By Lisa A. Kainec

Effective December 1, 2006, we as lawyers have to concern ourselves with changes to the Federal Rules of Civil Procedure (“FRCP”). Boring, right? Glad you didn’t go to law school, right? Probably

on both counts you are smiling right about now.

Well, these most recent changes to the FRCP have been in the works for the past six years and bring to the forefront the issue of what you and your organization must do in connection with any federal litigation and your electronic information. Did you know that “deleted” information really is not deleted from your system? That many programs automatically create duplicate copies of documents or store web pages in memory? That your back-up systems and archived data is a depository that can be requested, reproduced and rifled by attorneys who are suing your organization?

We’ve all read about the horror stories of thousands

of employee e-mails being reviewed and disgruntled employees stealing electronic information. But every server, work station, laptop, PDA, cellular telephone, and off-site storage unit at your business (as well as those home work stations) also potentially contain enormous amounts of information that must be properly managed. Electronic documents also can contain what is known as metadata, which can reveal even more about when and how that document was prepared, modified, accessed and stored.

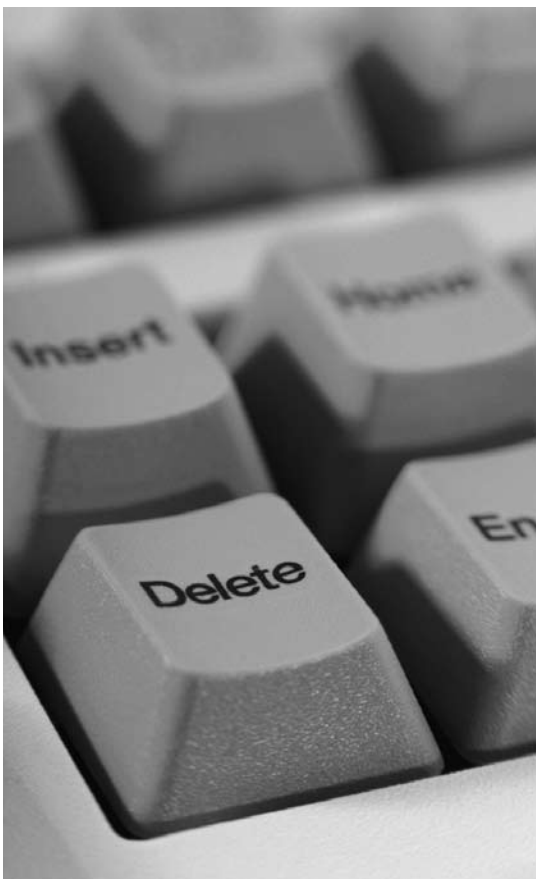
With this vast amount of data and electronic information potentially accessible, every organization should develop and maintain an up to date document retention policy. Such a policy must address what information exists, what is kept, the format in which it is kept, how long it is kept, and what happens when time is up. For example, many state and federal statutes have specific mandates about the length of time specific types of employment records must

be maintained. The new Ohio minimum wage law is a fresh example of such a requirement.

Document destruction policies are just as important as document retention policies. Once an organization has notice of pending or threatened litigation, it must not destroy any relevant documents. However, documents can be properly destroyed in connection with a lawful document retention and destruction policy where no such pending or threatened litigation exists. However, those document destruction policies must strictly

comply with statutory retention requirements and also establish your organization’s legitimate business reasons for destroying any records. Also, schedules for document destruction should be closely followed in order to avoid the inference that inconsistent destruction patterns suggest illegitimate motivations.

Now, back to those FRCP changes. Starting December 1, 2006, every organization that is involved in federal court litigation will be required at the initial court conference to address the issues of how electronic information will be handled. Each organization must know what is available, how it



Every server, work station, laptop, PDA, cellular telephone, and off-site storage unit at your business (as well as those home work stations) also potentially contain enormous amounts of information that must be properly managed.

can be accessed, and be prepared to present arguments for or against access to particular aspects of its electronic information and systems. Addressing these issues now and adopting a thorough document retention and destruction system may save you countless hours of arguments with an opposing attorney about what should be made available in a lawsuit and the cost of producing volumes of electronic data that otherwise could have and should have been properly destroyed.

kwlablaw.com
Communicator

Workers' Compensation Leave Still a Mystery in Ohio



By James W. Ellis

Ohio employers continue to struggle with the *Coolidge v. Riverdale Local School District* decision issued by the Supreme Court of Ohio in the fall of 2003.

Employers know that they cannot terminate an employee who is receiving temporary total disability (TTD) benefits solely due to absenteeism when the absence is due to a work-related injury. *Coolidge* left unanswered many questions about how an employer should treat other forms of available leave and benefit continuation during such leave.

Until the Supreme Court of Ohio further outlines the parameters of workers' compensation leave requirements, employers should carefully examine how they administer workers' compensation leave and seek legal counsel before terminating an employee from leave status.

The cases that have addressed leave issues since *Coolidge* have come from state and federal courts. A recent federal court decision is important for its particular interpretation of *Coolidge*. *Woody v. Sears, Roebuck & Co.* In *Woody*, the employee was injured on January 4, 2002 while working as a service technician. Due to a neck injury, the employee received temporary total disability benefits for approximately six months, returned to work for three months, and then went back on TTD benefits for another three months. The TTD benefits ultimately were terminated on January 27, 2003, but the employee was unable to return to work at that time.

On March 18, 2003, the employer informed the employee that his employment would be terminated on April 19, 2003, pursuant to its Workers' Compensation Leave of Absence Policy, due to his inability to return to work and exhaustion of all available leave. The employee sued, alleging that his termination was in violation of Ohio public policy under *Coolidge*.

The employer asserted that it had not violated *Coolidge*, because the employee was not receiving TTD benefits at the time

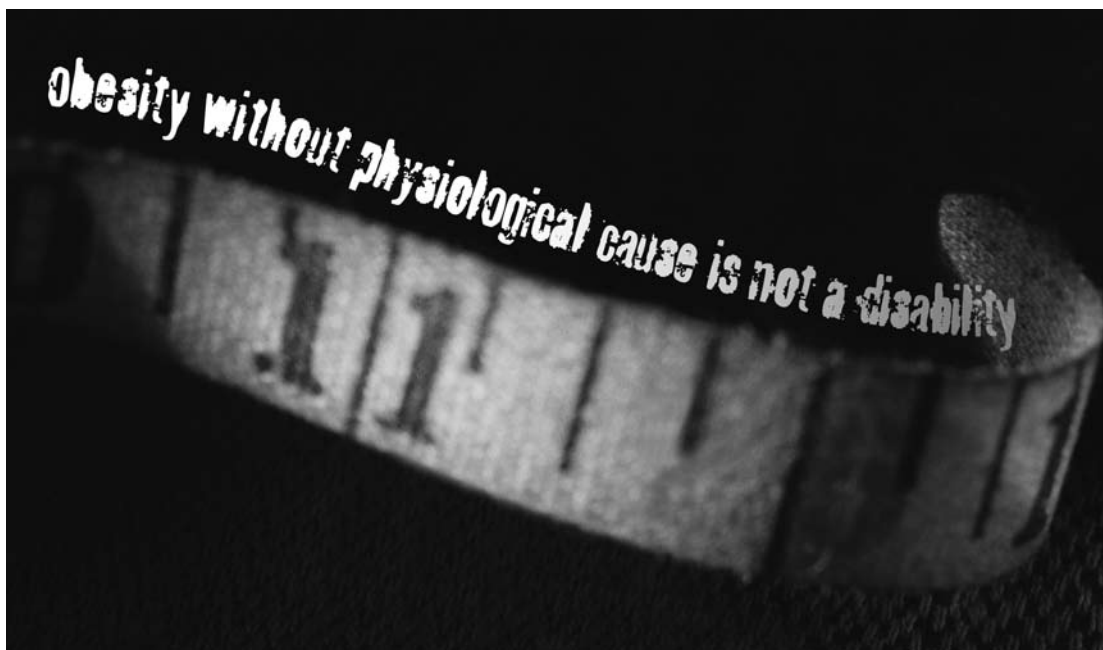
he was discharged. Moreover, the employer cited an Ohio appellate court case that specifically held that an employee claiming a violation of *Coolidge* must be receiving TTD benefits at the time of his or her termination. However, the federal court disagreed with the employer's arguments, finding that the employer had violated the Ohio public policy defined in *Coolidge*.

In its holding, the federal court criticizing the Ohio appellate court case, stating that it was an inaccurate interpretation of *Coolidge*. Instead, the federal court held that *Coolidge* prohibits employees from being "penalized" for a work related injury. "Penalized" was not defined, but the court specifically held that plaintiff's termination operated as a penalty against the employee for taking nine months of TTD benefits.

This decision clearly calls into question the validity of otherwise facially neutral workers' compensation leave of absence policies. Moreover, it suggests that periods of TTD may not be counted against other available leave without being deemed to have penalized the employee receiving TTD.

The only real consistency in this area has been inconsistency. Courts, both state and federal, have seldom agreed on what public policy has been established by *Coolidge* or how that policy should be applied. Until the Supreme Court of Ohio revisits the issue and further outlines the parameters of workers' compensation leave requirements, employers should carefully examine how they administer workers' compensation leave and seek legal counsel before terminating an employee from leave status.





Obesity Without Physiological Cause is Not a Disability



By Dean E. Westman

A recent decision by the U.S. Court of Appeals for the Sixth Circuit confirms that obesity, even morbid obesity, is not an impairment giving rise to Americans With Disabilities Act of 1990 (“ADA”)

protections unless it is the result of a “physiological condition.” Ruling against the Equal Employment Opportunity Commission (“EEOC”), the Court upheld dismissal of the EEOC’s suit against Watkins Motor Lines.

The remarkably long history of the case began with the termination of a driver/dock worker by the name of Stephen Grindle. Grindle was hired by Watkins Motor Lines in August 1990. About 65 percent of his job duties consisted of dock work, such as loading, unloading, and arranging freight. This required him to climb, kneel, bend, stoop, balance, reach and engage in repeated heavy lifting. At the time he was hired, Grindle weighed 345 pounds. Over the ensuing five years, Grindle’s weight fluctuated between 340 and 450 pounds. There was no evidence of a physiological or psychological cause for Grindle’s excessive weight.

After sustaining a work-related injury (Grindle was climbing on a ladder at the loading dock when a rung on the ladder broke and he injured his knee), Grindle remained off work on an injury leave of absence. The leave began in January of 1996. Grindle never returned to work from the injury leave. His doctor failed to provide a valid release to return to work, and another doctor who examined him concluded that he could not safely perform the requirements of his job. Watkins had a policy at that

time that any employee who remained on leave for more than 180 days would be terminated. In accordance with that policy, Watkins terminated Grindle when he failed to return to work within 180 days.

Claiming that he had been fired because of his weight, Grindle filed an EEOC charge on September 30, 1998. The EEOC did not file suit against Watkins until October 30, 2002, more than four years later. The suit alleged that Grindle’s termination was in violation of the ADA. In February of 2004, Watkins filed a motion for summary judgment. The District Court granted that motion, concluding that non-physiologically caused obesity is not an “impairment” under the ADA. Testing the District Court’s determination, the EEOC appealed, contending that morbid obesity, i.e., a body weight more than 100% over the norm, was a protected disability, regardless of the cause.

A recent decision by the U.S. Court of Appeals for the Sixth Circuit confirms that obesity, even morbid obesity, is not an impairment giving rise to Americans With Disabilities Act of 1990 (“ADA”) protections unless it is the result of a “physiological condition.”

The Sixth Circuit held that a physical characteristic must relate to a physiological disorder in order to qualify as an ADA impairment. Agreeing with the District Court’s dismissal of the EEOC’s suit, the Court noted that there was no showing that Grindle’s obesity had a physiological cause. Although noting that its decision need not be consistent with Social Security regulations, the Court also pointed out that a 1999 amendment to the Social Security Administration regulations deleted “obesity” from the listing of stand-alone impairments.

Employer Pays Top Dollar to Settle Wage & Hour Claims



By Thomas Evan Green

A federal court in New Jersey recently approved a \$15 million settlement of class action wage and hour claims involving a prominent nationwide retailer, offering a painful reminder to employers as to the impact

of improperly compensating employees. *Lenaban v. Sears, Roebuck & Company*.

Lenaban resolved four different lawsuits involving a nationwide class of 16,000 Sears, Roebuck service technicians who alleged that Sears had not properly compensated them for commuting time between their homes and the first service call of the day and also had not properly paid overtime. As a general rule, of course, employers are not required to compensate employees for commuting from home to work. However, if a hourly non-exempt employee's work day begins at home, such employees likely is entitled to compensation for the time

spent traveling from home to his or her initial work site of the day.

In *Lenaban*, the employees alleged that Sears required them to log on to their home computers each morning and download information regarding that day's service call assignments. Therefore, the employees argued that their work day began when they logged on and that they were entitled to be compensated continuously from that point through the rest of their work day. To avoid similar claims for uncompensated work and failure to pay overtime, employees must be paid from the time they start working until they stop, regardless of whether their work day begins in the office, on the road, or as in this case, at home.

To avoid claims for uncompensated work and failure to pay overtime, employees must be paid from the time they start working until they stop, regardless of whether their work day begins in the office, on the road, or as in this case, at home.



The *kwwlaborlaw.communicator* is published by the law firm of Kastner Westman & Wilkins, LLC as a service to its clients. The information contained in the newsletter is neither designed nor intended to be relied upon as specific legal advice to any individual or organization and is not a solicitation to provide legal services. Past issues of the newsletter are archived at the law firm's website www.kwwlaborlaw.com. Under the CAN-SPAM Act of 2003, this newsletter could be considered an advertisement. You may elect to not receive future newsletters by sending a letter in writing to Kastner Westman & Wilkins, LLC attention Lisa Kainec or send an email to lkainec@kwwlaborlaw.com. Readers always should consult with an attorney about specific legal matters. Copyright 2005 by Kastner Westman & Wilkins, LLC, 3480 West Market Street, Suite 300, Akron, Ohio, 44333.