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## Recent Developments In Employment Law

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### Michigan Supreme Court Rejects Different Standards of Proof for Reverse Discrimination Claims

The Michigan Supreme Court in *Lind v. Battle Creek* (June 11, 2004) ruled that evidentiary standards applicable to race discrimination claims were not different for whites and blacks. In this case, a white police officer claimed race discrimination in the city's promotion of a black police officer instead of him. The court of appeals decided that in a "reverse discrimination" case, in addition to the proofs required in a discrimination case, a plaintiff must show "background circumstances supporting the suspicion that defendant is that unusual employer who discriminates against the majority . . ." The Supreme Court reversed this ruling, eliminated this extra requirement, and decided that the same evidentiary standards applied equally to discrimination and reverse discrimination claims.

### Michigan Court of Appeals Approves Individual Liability for Retaliation Claims Under MCRA

In *Rymal v. Baergen* (June 8, 2004), the Michigan Court of Appeals decided that individuals, in addition to employers, can be held liable for retaliation under the Michigan Civil Rights Act (MCRA), formerly known as the Elliott-Larsen Civil Rights Act (ELCRA). The court also determined that when reporting a claim of harassment to a supervisor, one need not specifically state the sexual nature of the harassment for that complaint to be protected from retaliation under the MCRA.

The MCRA prohibits employers from engaging in or permitting discrimination in the workplace on the basis of sex. Further, the MCRA prohibits an employer from retaliating against an employee who complains of sexual harassment.

In this case a female employee claimed that her supervisor sexually harassed her by proposing to rekindle an old relationship. She further stated that because she refused his request he began to abuse her verbally at work and effectively demoted her by removing certain job responsibilities. She complained to the employer's vice president, who was also general counsel and human resources director. She did not specifically complain of sexual harassment but rather of abusive treatment in general, which would not be prohibited by MCRA.

The Court of Appeals, in denying the supervisor's motion for summary judgment, ruled that an individual can be liable under the retaliation provision of the MCRA. The court distinguished a prior decision which held that only employers could be held liable for sexual harassment under MCRA, noting that the harassment provision of MCRA is applicable

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*When a female employee complains of abuse by a male boss, HR managers should be alert to the "spectre" of a sexual harassment claim which must be handled as an MCRA complaint.*

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to all "employers," while the retaliation provision is applicable to all "persons."

The court also decided that an employee need not explicitly claim harassment of a sexual nature to have that complaint protected from retaliation under MCRA. Distinguishing holdings to the contrary, the court stated that "if an employer's decision to terminate or otherwise adversely effect [sic] an employee is a result of that employee raising the spectre of a discrimination complaint, retaliation prohibited by the act occurs." Critical to the court's decision was that the supervisor to whom the employee complained was a lawyer who, the court

decided, should have inferred the underlying complaint as one of sexual harassment.

When a female employee complains of abuse by a male boss, HR managers should be alert to the "spectre" of a sexual harassment claim which must be handled as an MCRA complaint.

### **EBSA Issues Final COBRA Notice Regulations**

The Employee Benefits Security Administration of the Department of Labor has issued the final COBRA notice regulations effective for plan years beginning after November 25, 2004, although plan administrators may rely on the final regulations immediately if they desire.

The final regulations provide models for the "general notice" which an employee must receive within 90 days after first becoming a participant in an employer's group health plan and the "election notice" which employee participants and beneficiaries must receive within 14 days of the plan administrator being notified of a qualifying event. The final model notices are different from the models in the proposed regulations. They are available in PDF format on the Bodman LLP web site.

The final regulations vary only slightly from the proposed regulations. The most significant difference is that if a participant has a qualifying event before receiving the general notice within 90 days of first participating in the plan and is entitled to an election notice within the 90 day period, then only the election notice need be given.

The primary risk for employers entailed in the COBRA notice regulations, which is not new to the final regulations, lies in the provisions concerning the notices which employees and beneficiaries are required to give to plan

administrators of (i) divorce or legal separation, (ii) a child's ceasing to be a dependant, (iii) a second qualifying event and (iv) Social Security determination of disability. The regulations require employers to establish procedures and time limits for giving these notices, and there are cues for placing these procedures in the model general notice. An employer's procedure may require that these notices be given within 60 days after the event, be given to a specified person and be given on a specified form. All of these features are desirable in order to establish an objective cut-off for giving these notices.

What is not obvious in the model general notice is that participants must be notified of these procedures in the summary plan description, even though the general notice may be distributed as a stand-alone document. We strongly recommend that employers opt for placing the entire general notice in the plan's summary plan description for this reason.

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*If you have not already done so, we urge you to give special attention to your health plan's procedures for participant notices of qualifying events and disability determinations.*

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If an employer does not establish a procedure for participant notices or if participants are not notified of the procedure, the regulations provide that participants may give effective oral notice to any individual or unit which customarily handles the employer's employee benefit matters. If such a notice is not acted upon by sending a COBRA election form, the participant retains the ability to elect COBRA coverage throughout the continuation period. Group health plan insurers may be unwilling to grant retroactive coverage in such cases, and the employer may become directly liable for actual medical expenses.

If you have not already done so, we urge you to give special attention to your health plan's procedures for participant notices of qualifying events and disability determinations. If you need help to develop the procedures, notify participants of them or draft the forms please call Jim Buschmann of our Ann Arbor office at (734) 930-2499.

### **Court of Appeals Clarifies Standards for Arbitration of Civil Rights Claims**

In *Rembert v Ryan's Steak Houses, Inc.*, 235 Mich App 118 (1999) (in which Bodman represented the successful employer), the Michigan Court of Appeals held that an employer and an employee could agree to binding arbitration of claims arising under the Michigan Civil Rights Act as long as the arbitration process met standards of procedural fairness. In recent unpublished decisions, the Court of Appeals provided further guidance as to the appropriate form of such a binding agreement and the circumstances under which an arbitration decision can later be challenged in court.

In two consolidated cases decided on June 8, 2004, the court determined that an agreement to arbitrate contained in an application for employment was a binding arbitration agreement, even though the employment application incorporated by reference the arbitration procedures contained in the employer's employment manual and the application became null and void after six months.

Employees had argued that because the employer had the unilateral ability to modify the employment manual, and because the employment application expired in six months, the arbitration agreement should not be regarded as binding. The court, however, held that it was the application, and not the manual, which constituted the agreement,

and that the application became void only if the employee had not been hired within the six-month period.

In a case involving a municipal employer, decided on June 17, 2004, the court of appeals considered the extent of the “public policy” exception to the general rule restricting attacks on arbitration decisions. Normally a losing party may challenge an arbitration decision in court only on grounds of fraud, bias, or an arbitrator exceeding his or her authority. An arbitrator had reduced a police officer’s discipline for violation of departmental policy regarding enforcement of traffic regulations from demotion to a one-day suspension. The employer argued that the arbitration decision violated a public policy in favor of vigilant enforcement of traffic rules. The court ruled that for an arbitration award to violate public policy, it must have the effect of mandating illegal activity or causing the employee to act unlawfully, which the court found not to have occurred in this case.

### **Executive Briefing Helps Employers Prepare for New FLSA Regulations**

As we go to press, the Department of Labor’s new regulations governing “white collar” exemptions from overtime pay are still scheduled to take effect on August 23, 2004. Employers who have not already done so should audit their employees immediately to make sure they are in compliance with the new rules. A summary of the new rules is contained in the Spring 2004 edition of *Recent Developments in Employment Law*, which is available on Bodman’s web site.

On July 15 and July 19, Bodman employment law specialists presented an in-depth analysis of the new regulations to dozens of Firm clients and friends at our latest Executive Briefing, “New Rules for White Collar Exemptions: Changes to Who is Now Entitled

to Overtime Pay.” Seminar guests also received detailed guides to the new regulations to keep for future reference.

Thanks to the many participants who enhanced the discussion with their insightful questions. We also appreciate those who took the time to provide detailed evaluations, which we consider carefully when planning new programs. We look forward to seeing you at our next program.

### **David B. Walters Joins Bodman LLP**

We are pleased to welcome David B. Walters to Bodman and to the Labor and Employment Practice Group. David joined us on July 26, bringing his nearly 20 years of experience counseling employers on all aspects of employee benefit plan formation, administration and taxation to the Firm. He will be based in our Troy office.

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