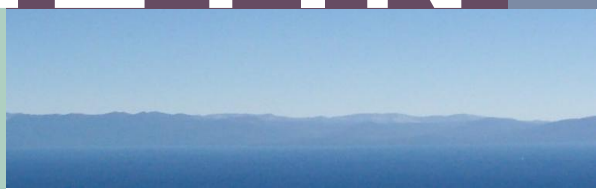
VOLUME 1
ISSUE 2
OCT. 2005

NEVADA LAW BULLETIN

A REVIEW OF LEGAL NEWS AND DEVELOPMENTS AFFECTING THE NEVADA LAW FIRM AND OUR CLIENTS



FMLA EMPLOYEES: PROCEED WITH CAUTION

It happens all too often: an employee goes out on leave, whether it be FMLA, vacation or otherwise, and the employee's temporary replacement discovers performance problems or improprieties warranting termination. Thus, the employer is put in the position of having to decide whether to terminate an employee who has obviously not been properly performing his or her job. The fear, of course, is a lawsuit by the employee for retaliation for participating in a protected activity: *e.g.* FMLA leave.

To prevail on a retaliation claim, an employee must prove she was engaged in a protected activity (*e.g.,* FMLA leave); she suffered an adverse employment action, such as firing or demotion; and there is a causal connection between the two.

If an employee was terminated for any reason other than engaging in a protected activity, however, the employer may escape further litigation by filing a Motion for Summary Judgment, thus avoiding the possibility of trial.

However, such was not the case in a recent Oregon federal court. *Bond v. State Farm*, 2005 WL 97067 (D. Or., Jan. 11, 2005). The employer, State Farm, failed on the Motion for Summary Judgment and was forced to go to trial. The long-term employee had a history of acceptable performance evaluations until she transferred to another office. Then a steady decline in performance began. Eventually she was granted FMLA leave for depression and several files were reassigned. In the course of the reassignment, Bond's supervisor discovered many of the files were out of compliance. After an unsuccessful suicide attempt, Bond stated she could not return to work. A few weeks later she was terminated for the compliance problems.

The court denied State Farm's Motion for Summary Judgment stating there was an issue of fact as to State Farm's motivation for the termination, that is, whether they terminated her because she was not properly doing her job, or because she exercised her FMLA rights.

The FMLA does not force an employer to retain an employee on FMLA leave when the employee would not have been retained otherwise. An FMLA employee may be dismissed, but *only* if the dismissal would have occurred regardless of the FMLA leave.

(*See FMLA Leave, cont., p. 4*)

ERICKSON, THORPE & SWAINSTON, LTD.

99 West Arroyo Street
Reno, Nevada 89509

IN THIS ISSUE:

ETS Attorneys in the News

William Cobb, senior partner of Erickson, Thorpe, was included in the 2006 edition of *Best Lawyers in America*, "the definitive guide to legal excellence in the United States." Bill is a past president of the Association of Defense Counsel of Northern Nevada and the Bruce Thompson Chapter of the American Inns of Court. He is also a member of the American Board of Trial Advocates and the International Association of Defense counsel. In addition to his trial practice, Bill serves as a mediator and a Nevada Supreme Court Settlement Judge.

Bill Cobb

Thomas Beko, embarking on his 20th year with the firm, was elected to the American Board of Trial Advocates. Membership in ABOTA is restricted to civil trial lawyers who have tried a significant number of jury trials and who display exemplary skill, civility and integrity to help younger lawyers achieve a higher level of trial advocacy and to preserve the right to trial by jury guaranteed by the Constitution. Tom, an honors graduate of the McGeorge School of Law, is licensed to practice in Nevada and California and is also admitted to practice before the US Supreme Court.

Rebecca Bruch recently became a partner at Erickson, Thorpe. She is currently serving as President of the Association of Defense Counsel of Northern Nevada and is a former president of Northern Nevada Women's Lawyers. Becky practices primarily in the employment law field, including the development and review of employment handbooks, sexual harassment training, in-house investigations and the defense of civil employment litigation. She is a member of the Defense Research Institute's (DRI) Employment Law Committee and the Northern Nevada Human Resources Association.

Becky Bruch

Nevada Legal Roundup:

A review of recent decisions shaping Nevada law

Langon v. Matamoros

As many of Erickson, Thorpe & Swainston's clients and friends are aware, NRS 41.133 has long provided that conviction of a crime is conclusive evidence of the facts necessary to impose civil liability for injury caused by that crime. This statute is often used by injured victims to recover in tort after the perpetrator is convicted in parallel criminal proceedings. *See, Desert Cab Inc. v. Marino*, 108 Nev. 323, 823 P.2d 898 (1992).

The Nevada Supreme Court recently ruled that NRS 41.133 should not be used to impose civil liability on motorists convicted of misdemeanor traffic offenses. *Langon v. Matamoros*, 121 Nev. ___, 111 P.3d 1077 (May 26, 2005). In *Langon*, the Court ruled that application of NRS 41.133 to misdemeanor traffic offenses would lead to absurd results, and would be inherently irreconcilable with Nevada's system of comparative fault, which insulates a defendant from liability in cases in which a plaintiff's comparative negligence exceeds that of the parties to the action against whom recovery is sought.

If NRS 41.133 applied to every traffic citation, the Court explained, "discretionary police decisions to issue traffic citations, regardless of potential evidence of comparative negligence, would serve to conclusively override the basic statutory construct governing the law of negligence. Such an approach would render the comparative negligence scheme of NRS 41.141 meaningless in this context." *Langon*, 111 P.3d at 1079.

In spite of the Court's recent decision, misdemeanor traffic offenses may still be used by alleged victims in their attempts to prove liability for statutory negligence; however, the Court has made clear that the mere fact of conviction in regard to a misdemeanor traffic offense is no longer the sum and substance of a winning plaintiff's case-in-chief. Such a thought may serve as potent fodder for early discussions of liability with counsel for plaintiffs seeking to recover for personal injuries sustained in accident cases.

Bass-Davis v. Davis

The Nevada Supreme Court recently set a new standard for "negligent" spoliation of evidence, now requiring the jury to determine whether a defendant has a "satisfactory explanation" for the loss of evidence occurring "after the party knew or should have known of the existence of the claim." *Bass-Davis v. Davis*, 121 Nev. Ad. Op. 44 (August 11, 2005).

In *Bass-Davis*, Plaintiff contacted Defendants' 7-11 store a week after a slip and fall accident to request copies of the store's incident report as well as the surveillance videotape capturing the incident. Though Plaintiff was referred to an employee of the corporate franchiser, she never received the evidence and later learned it had been lost or destroyed.

This evidence was not personally lost by Defendants. Instead, it was lost after being forwarded to a third party: Defendants' insurer. According to testimony from Defendants, it appears that both the videotape and incident report were, according to corporate policy, mailed to and received by the franchiser. From

there, the videotape was forwarded to the franchiser's insurance company, where it was apparently lost. Despite Plaintiff's request, the trial court refused to offer any instruction allowing the jury to draw an inference against Defendants based on the missing evidence.

In granting Plaintiff a new trial, the Nevada Supreme Court proffered the following instruction, directing that it be given in all future cases when evidence that should have been preserved for trial is lost or destroyed without evidence of willful suppression:

"You [the jury] may infer that lost or destroyed evidence is unfavorable to the party who could have produced it and did not, if the evidence was (a) under the party's control and reasonably available to it and not reasonably available to the adverse party, and (b) lost or destroyed without satisfactory explanation after the party knew or should have known of the existence of this claim."

The reasoning behind this instruction, the Court explained, is that "once a party has notice of a potential claim, that party has a duty to exercise reasonable care to preserve information relevant to that claim. . . . To hold otherwise would encourage potential defendants to forward damaging evidence to their insurers who could 'lose' the evidence without any negative effect on the potential defendants."

The lesson to be gleaned from the *Bass-Davis* decision's ruling on "negligent" spoliation of evidence is that Defendants and their insurers must have a tight grasp on potentially discoverable evidence once they are put on notice of a claim. Such diligence will be extremely helpful to, and appreciated by, the attorneys responsible for defending such litigation, and may just be the feather that tips the scales in a favorable direction should your case proceed to trial.

California Report: Snowney v. Harrah's, Inc.

Under the United States Constitution, it has long been held that the Courts of one state may exercise jurisdiction over out-of-state residents – including businesses as well as people – only so long as "the [nonresident] defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The California Supreme Court has now held that a Nevada company may be subjected to liability in the California courts where a website's interactive nature evidences the "purposeful targeting" of California residents. *Snowney v. Harrah's Ent. Co.*, 29 Cal.Rptr.3d 33 (June 6, 2005).

The website, according to the Court, was interactive in that it allowed visitors to receive quotes for room rates and to reserve rooms within Defendant's hotels. Furthermore, "[b]y touting the proximity of their hotels to California and providing driving directions from California to their hotels," the Court ruled, "defendants' site specifically targeted residents of California." The Court explained that, since these activities were successful in persuading California customers to spend money, "defendants have purposefully derived a benefit from their Internet activities in California, and have established a substantial connection with California through their Web site."

Based thereon, the Court held that sufficient "minimum contacts" had been established such that it was fair and reasonable to force Defendant to answer suit in a California court. As business websites become cheaper, more available and more elaborate (*i.e.* more "interactive"), *Snowney* is an important decision for large and small business alike. With increasingly interactive websites, courts will find it easier to hale nonresident Defendants into court to answer for suits appearing trivial.

ERICKSON, THORPE & SWAINSTON, LTD.
99 West Arroyo Street
Reno, Nevada 89509

CONSTRUCTION DEFECT LAW: NEVADA

THE NEVADA SUPREME COURT RECENTLY DECIDED TWO CONSTRUCTION DEFECT CASES MAKING IMPORTANT CHANGES TO NEVADA CONSTRUCTION DEFECT LAW.

DESERT FIREPLACES PLUS, INC., 121 NEV. ___ (2004)

A general contractor's claim against a third-party subcontractor accrued when a homeowner's association provided notice of the defect claims to the general contractor and until 30 days after the mediation between the homeowner's association and the general contractor was concluded.

BEAZER HOMES NEVADA, 121 NEV. ___ (2004)

NRS 78.585, the statute requiring claims against dissolved corporations to be filed within two years after dissolution, does not apply to claims arising after the corporation's dissolution. Further, the Court held that the homeowner's claims did not arise until the alleged defects were, or should have been, discovered.

(FMLA LEAVE, CONT. FROM P.1)

There is a glimmer of hope. The FMLA does not provide leave for leave's sake, but instead, provides leave with the expectation an employee will return to work after the leave ends. Thus, if an employer were authorized to discharge an employee if the employee were not on FMLA leave, the FMLA does not shield an employee on FMLA leave from the same lawful discharge.

Despite this important rule, and despite at-will employment, a decision to terminate an employee can never be taken lightly. Any such decision must be substantiated by more than innuendo or inference. Documentation is crucial. Nevertheless, an employer properly counseled by a qualified employment law attorney may be able to retain control of its business and not be strictly prohibited from making important business decisions about substandard employees.

EMPLOYMENT LAW SEMINAR: *OCTOBER 20, 2005*

You are cordially invited to an afternoon seminar addressing the latest issues in employment law. We will be presenting an overview of the most recent court cases and hot topics facing Nevada's employers, including responses to administrative complaints; employer exposure in hiring and firing; employee handbooks; privacy issues and electronic equipment, email and the internet; and arbitration and other forms of alternative dispute resolution. The seminar will be held at the ***Siena Resort & Spa****, in Reno, from 1:30 to 4:30 p.m., with a wine and hors d'oeurves reception to follow. Please direct inquiries to ldelpiero@etsreno.com.*