ERICKSON, THORPE & SWAINSTON, LTD.

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NLRB Continues Its Interest On A Variety Of Topics. This Time It's Union Representation.

By Rebecca Bruch, Esq

The NLRB continues to take a keen interest in activities of both public and private employers, and has recently issued a decision related to employee representatives during the course of an investigation. In a decision related to Ralph's Grocery Company, the NLRB affirmed the Administrative Law Judge's ("ALJ") ruling reinstating an employee in the produce department who was fired after he refused to submit to a drug and alcohol test.

Vittorio Razi was displaying unusual behavior, slurring his words, could not remember his computer log-in information, had difficulty kneeling to tie his shoes, and seemed nervous and agitated. Based on those observations, Mr. Razi was ordered by the store director to submit to a drug and alcohol test. Mr. Razi requested a union representative. The director told Mr. Razi he did not have the right to union representation, but allowed him to try to reach a union official anyway. Mr. Razi could not reach a representative, and refused to submit to the test. The director warned Mr. Razi that the refusal would result in his termination. He was, in fact, suspended immediately, and terminated the next day.

Ralph's argued that it did not have to delay its investigation indefinitely simply because Mr. Razi could not contact a union representative. That position is consistent with case law as well as previous NLRB decisions. An employer has a legitimate interest in proceeding in an investigation without delay. It is easy to see in a situation like this, where obtaining Mr. Razi's blood-alcohol level was pivotal to a decision about how to proceed. Ralph's also argued that Mr. Razi was insubordinate, and relied on its written policy that refusal to submit to a drug test constituted an automatic positive result.

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Under Weingarten, union employees have a right to request their union representative be present at investigatory interviews and meetings if discipline is a possibility. The arbitrator found that Mr. Razi's investigatory rights did not apply to the testing directive, since it was not "investigatory," and because Ralph's had already made a decision to send Mr. Razi for a drug test.

The arbitrator's decision was overturned by the ALJ and the Board. They found that directive for the drug test triggered Mr. Razi's Weingarten rights. More importantly, the ALJ and the Board found that Ralph's based its termination solely on Mr. Razi's refusal to take the test until his union representative arrived, and therefore, rejected the argument that the refusal translated to insubordination or an assumed positive test. Instead, the Board concluded that Ralph's punished Mr. Razi for refusing to waive his right to representation under Weingarten.

As a practice pointer, be sensitive to employees' requests for union representation prior to investigatory events, or any situation that could lead to discipline. An even broader best practice may be to allow union representation in any meeting with any employee. It may also be advisable to allow someone to accompany any employee that is being questioned in any capacity regarding issues of concern to the employer, whether these are union employees or not. On the other hand, depending on the circumstances, an action as taken by Ralph's very well could be considered appropriate, depending on the urgency of the situation. If you believe a situation could risk the safety of the employee or others, to insist that medical attention or drug testing occur immediately could be appropriate. As in the Ralph's situation, obviously, any drug test done on Mr. Razi the next day, or even several hours later, would likely be useless. This illustrates the conundrum many employers find themselves in when trying to make quick decisions.

As in many workplace situations, they require a case-by-case analysis to determine the best approach.

That decision-making process is best made with the advice of legal counsel.

ETS News

Congratulations to Andrea Pressler who was named one of Nevada's Top Attorneys by Legal Elite. This annual list highlights Nevada's top attorneys as chosen by their peers.

Congratulations to Rebecca Bruch who was recently elected to Master of the American Inns of Court, Bruce R. Thompson Chapter.

A Devastating New Defense Strategy

By Thomas P. Beko, Esq.

For years defendants and their counsel have been exasperated by plaintiffs who commit obvious perjury in support of their case, yet face little consequence. In the past, about all defense counsel could do was use the counter evidence during cross examination as a means of impeaching the credibility of the plaintiff. Alternatively, defense counsel could use the evidence as part of settlement negotiations to try and drive down the value of the claim. While these tactics have proven to be very effective defense tactics, they nonetheless failed to make the plaintiff fully accountable for his misconduct. Moreover, with regard to the use for impeachment purposes, they required the defendant to force the case all the way through trial before the evidence could be utilized.

In recent years, Erickson, Thorpe & Swainston, Ltd. began to explore a means by which to get the courts more involved in this abusive process by dishonest plaintiffs. Legal research began to reveal a few cases where courts employed an inherent power of the court to protect the integrity of the process by imposing sanctions, up to and including dismissal, against plaintiffs who engaged in such deceptive conduct. In several cases where it could be clearly shown that the plaintiff gave false testimony, or swore to false discovery responses, motions to dismiss were filed. In most cases, the actions were either dismissed by the plaintiff, or settled for a very insignificant sum. Recently, however, one of these motions went through the entire briefing process.

In a case filed in the federal district court for the State of Nevada, Erickson Thorpe & Swainston attorney Tom Beko filed a Motion to Dismiss seeking dismissal of a federal civil rights action which was brought by an individual who claimed that he was seriously injured following an altercation with a police officer. In the motion, Attorney Beko asked for the sanction of dismissal because the plaintiff's perjured testimony and discovery responses falsely denied the existence of a preexisting medical condition related to his shoulder.

The Court agreed that the plaintiff had offered perjured testimony and false and misleading discovery responses, and thereafter employed its inherent power to levy sanctions for the plaintiff's abuse of the litigation process. After a review of the evidence, the Court determined that the actions of the plaintiff to thwart the discovery of evidence that would undermine his claims weighed in favor of dismissal of the entire action. In this regard, the Court found the conduct of plaintiff to be a quintessential case in which a litigant's abusive litigation practices threatened the orderly administration of justice. Furthermore, there was no indication that, if given a second chance, the plaintiff would do anything differently. As a result, the Court found the dismissal sanction to be appropriate in order to deter such future conduct and protect the judicial process.

This decision will prove to be an extremely valuable tool for many future cases.

Erickson, Thorpe & Swainston was founded in 1969. Since that time, the Firm has efficiently and successfully represented its clients in state and federal courts in Nevada and Northern California. As experienced trial and appellate attorneys, we vigorously advocate our clients' interests while remaining committed to the principles of the highest legal ethics.

Erickson, Thorpe & Swainston offers committed support in all phases of commercial and civil litigation, including labor and employment law and associated preventative employment services. We provide the experience necessary to meet our clients' expectations for an effective, efficient and timely resolution of their conflicts and issues. Our continued success in this highly competitive market demonstrates our widely recognized ability to deliver satisfaction and positive outcome to those who give us their trust – our clients.

$6M Jury Verdict Reversed in Palms Casino Premises Liability Case

by Brent L. Ryman, Esq.

The Nevada Supreme Court recently issued an order in a negligence case against the Palms Casino that friends and clients of ETS may find especially interesting. *See, FCH1 v. Rodriguez*, 130 Nev. Adv. Op. No. 46 (June 5, 2014). Plaintiff in that case Enrique Rodriguez, sued the Palms Casino Resort to recover damages for a knee injury he suffered while sitting in the Palms Sportsbook Bar watching Monday Night Football on television. The injury occurred when another patron dove for a souvenir tossed into the crowd by Brandy Beavers, an aspiring actress paid by the Palms to dress as a cheerleader for the Monday Night Football event. Following a bench trial, the District Court found in Plaintiff's favor and – surprisingly to this reader, at least – awarded in excess of $6,000,000.00 in damages.

In determining that the case should be remanded (and specifically granting Defendant's request to have the case reassigned to another District Court Judge) the Nevada Supreme Court first examined its prior decision in *Turner v. Mandalay Sports Ent.,* 124 Nev. 213, 220-21, 180 P.3d 1172, 117 (2008). In the *Turner* case, as regular ETS Newsletter readers may recall, the Nevada Supreme Court clarified Nevada law regarding assumption of the risk and adopted the limited-duty doctrine in holding that a spectator struck by a baseball could not recover from the Las Vegas 51's minor-league squad. Applying that law to the facts before it, the Nevada Supreme Court ruled the Palms would not be protected by the limited duty doctrine since the tossing of souvenirs is not fundamental to the activity of watching televised football at a bar. The Supreme Court further held that a landowner such as the Palms may be held liable under a theory of premises liability where the landowner has acted to increase the risk posed to entrants.

The Supreme Court still found that reversal was appropriate, however, based upon the Trial Judge's error in excluding the Palm's security expert because the expert failed to talismanically state that his testimony was given to a "reasonable degree of professional probability." *See, Hallmark v. Eldridge,* 124 Nev. 492, 504, 189 P.3d 646, 654 (2008) (holding evidence was improperly admitted where a medical expert failed to testify to a "reasonable degree of medical certainty"). The Supreme Court reiterated that *Hallmark's* refrain is functional, not talismanic, because the "standard for admissibility varies depending upon the expert opinion's nature and purpose." *Morsicato v. Sav-On DrugStores, Inc.*, 121 Nev. 153, 157, 111 P.3d 1112, 1115 (2005). The Court clarified that, rather than listening for specific words, a Trial Court should consider the purpose of the expert testimony and its certainty in light of its context.

Finally, the Court also clarified that while a treating physician is generally exempt from NRCP 26's written report requirement, the exemption only extends to "opinions formed during the course of treatment." When testimony goes beyond that point, as the Supreme Court determined to have occurred in the underlying matter, it is error for a court to admit such testimony at trial without formal disclosure and a written report.

SAVE THE DATE

ETS Employment Law Seminar

October 9, 2014,
9:00 a.m. to 4:00 p.m.

The ETS Employment Law Seminar will be held Thursday, October 9, 2014, at The Grove in south Reno. The agenda will include the most current news on mental illness and the ADA, investigating harassment claims, pregnancy discrimination, and the always-popular mock trial. The seminar has been pre-approved for 6.0 general HRCI credits and 6.0 Nevada CLE credits. Contact Jennifer Hall to register at **jhall@etsreno.com** or 775-786-3930.