

MACMA BULLETIN

July/August 2004

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President: Tim Howard
The News & Record, NC
1st Vice President: Earle Woodward
The Item, Sumter, SC
2nd Vice President: Ray Bruett
Richmond Times-Dispatch, VA
Convention Secretary: Debra Morris
Durham Herald Sun, NC
Secretary/Treasurer: Carol Mosely
The Daily Herald, Roanoke Rapids, NC

-----“TO EXCHANGE IDEAS, ASSIST EACH OTHER, GET BETTER ACQUAINTED”-----

LEGALLY SPEAKING:

*Litigation News From
L. Mike Zinser
MACMA General Counsel*

This month's column reports on a new Supreme Court case holding that the Age Discrimination in Employment Act does not prohibit favoring the old over the young, a decision from the U. S. Court of Appeals for the First Circuit on a new independent contractor case, and a new case from the U. S. Court of Appeals for the Seventh Circuit which clarifies the type of notice an employee must provide the employer in order to qualify for FMLA leave.

1. ADEA permits favoring the old over the young

The Age Discrimination in Employment Act forbids discriminatory preference for the young over the old. On February 24, 2004, the United States Supreme Court ruled that the Act does not prohibit favoring the old over the young.

The employer and union, in a collective bargaining agreement, agreed to eliminate the Company's obligation to provide health benefits to subsequently retired employees except as to current workers at least 50 years old. All the plaintiffs in this case were at least 40, but under 50 years old, and claimed discrimination. They were claiming reverse age discrimination. The EEOC agreed with them. The U. S. Court of Appeals for the 6th Circuit, ignoring precedent in other circuits, ruled in favor of the plaintiffs, holding that if Congress had meant to limit its coverage to protect only the

older workers against the younger, it would have said so.

The Supreme Court thoroughly analyzed the legislative history and previous case decisions. The Court noted that if "Congress had been worrying about protecting the younger against the older, it would not likely have ignored everyone under 40." In addressing previous lower court cases, the Court noted, "All of them show our consistent understanding that the text, structure, and history point to the ADEA as a remedy for unfair preference based on relative youth, leaving complaints of the relatively young outside the statutory concern."

The Court gave no deference to an EEOC regulation that supported the position of plaintiffs. The Supreme Court stated, "We neither defer nor settle any degree of deference because the commission is clearly wrong." The statute is manifestly intended to protect the older from arbitrary favor for the younger.

2. Independent contractor status under Title VII

The U. S. Court of Appeals for the 1st Circuit has held that a Company was entitled to Summary Judgment as a matter of law on an individual's claims of pregnancy and sex discrimination. The court first determined that the common law agency test was a proper test to use for determining independent contractor status. It ruled that no reasonable jury could conclude other than that the individual was an independent contractor.

The Court emphasized the following factors:

- Plaintiff is a television actress and that is a skilled position requiring talent;

- Plaintiff provides or obtains sponsors to provide the costumes, jewelry and other image related supplies and services necessary for her appearance on the TV station;
- WIPR Channel 6 could not assign plaintiff work in addition to filming the particular show;
- The method of payment, by the episode, favors independent contractor status; her compensation is based on completing the filming, not the time consumed;
- WIPR does not provide plaintiff with benefits, such as health insurance, life insurance, or retirement benefits;
- Plaintiff's tax treatment suggested independent contractor status; she does not receive a W-2, but rather, is treated like an independent contractor for tax purposes.

The court specifically rejected the notion that she was an employee merely because she was required to film at the featured sites at the required times and to follow the instructions of the director. To hold that this sort of control determined employee status would defy common sense. The court also said that the fact that she was considered an employee for purposes of unemployment compensation was irrelevant to the analysis because federal law controls the question under Title VII.

Finally, the court rejected the argument that her 16-month relationship with WIPR supported employee status. The court noted that in other cases, it had found independent contractor status where the parties' relationship was as long as 20 years.

3. FMLA employee notice must be real notice

The U. S. Court of Appeals for the 7th Circuit, upholding summary judgment in favor of the employer, ruled that an employee had not provided sufficient notice to his employer under the FMLA to entitle him to family leave. The employee had notified his employer that he wanted family leave to stay home with his pregnant wife. He did not state that his wife had complications and made no mention of any other serious health condition.

The court stated, "wanting to stay home with one's wife until she has the baby ... is not the same thing as wanting to stay home to care for a spouse who has a serious health condition." The court held that the Act's requirement of notice is not satisfied by merely demanding leave. An employee must give his employer a reason to believe that he is entitled to FMLA leave. The court stated, "if you have brain cancer, but just tell your employer that you have a headache, you have not given the notice that the act requires."

The court specifically rejected the notion that Department of Labor regulations that suggest that merely by demanding leave, the employee triggers a duty on the part of the employer to determine whether the requested leave is covered by the FMLA. Significantly, the court stated, "unless the employer already knows that the employee has an FMLA authorized ground for leave ... the employee must communicate the ground to him; he cannot just demand leave."

FROM THE PRESIDENT: Tim Howard

Three months sure have gone by rather quickly. Since our May Conference, we have already had a board meeting and an ABC Seminar. The seminar was attended by 38 Directors and Managers in the MACMA region. Jeff Walsh from ABC provided valuable information and answered questions from the group. I would like to extend my thanks on behalf of MACMA to Ed Rose and the *Durham Herald Sun* for hosting the seminar. Also, I want to thank Debra Morris (Convention Secretary) and Brett Ray (ABC Chairman) for organizing and presiding over the seminar. I would also like to recognize PDI and Wilson Gregory for sponsoring our lunch.



Moving forward, our officers, directors and chair people are in the process of planning our 2005 conference in Harrisonburg, VA. I hope everyone will start planning to attend the conference, which will be held May 1-3. Please keep this in mind during fall budgeting. Total cost is about \$400.00 per person for 3 days and nights. This is an excellent value for the training, networking and development you get in return.

On October 22 we will have our 3rd Party Seminar in either Raleigh or Greensboro. Jennifer Davidson, of the *Winston-Salem Journal*, is the training chairwoman. She will be notifying the membership very soon with an agenda. This will be a new type of seminar for MACMA. It is such an important topic, and more circulation managers and advertising people need to learn how to use the strategies.

Well, that's it for now. I look forward to seeing all of you very soon!

**Next MACMA Board Meeting
Will be October 21 at the
Raleigh News & Observer.
It will run 11:00AM - 2:00PM**

MACMA Transitions and Member News

The *Free Lance-Star*, Fredericksburg Virginia announced a new Circulation Director, Tom Bibs, effective July 1, 2004. Tom comes from Amarillo, Texas, where he worked as Circulation Director for the *Amarillo Globe News*.

“Anxiety is the experience of growth itself... Anxiety that is denied makes us ill; anxiety that is fully confronted and fully lived through converts itself into joy, security, strength, centeredness, and character. The practical formula: Go where the pain is.”

~Peter Koestenbaum
Philosopher

quoted in *FAST COMPANY* magazine

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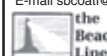


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ABC Seminar Held at Durham Herald Sun

The Audit Bureau of Circulations (ABC) Manager, Publisher Relations Field Auditing, Jeffrey M. Walsh, led the session Friday, August 6, 2004.

His agenda included the basics, day-of-the-week reporting, electronic editions, omitted days, bonus days, conversions, previous Sunday, sales with other services, premiums, combination sales, NIE, hotel sale and third party sales.

There were 38 members in attendance and plenty of questions. Future sessions topics include third party sales (a forum) and customer service. For questions about the session, contact Jennifer Davidson at jdavidson@wsjournal.com.



Recognition from Newspaper Association of America

Hello MACMA members:

Just wanted to provide you all with an update on two awards programs that are currently underway at NAA. We are soliciting nominations for both our 2005 Carrier of the Year program and our Circulation Sales Executive of the Year. We would very much like to partner with you at MACMA and your respective competitions to ensure that we have a robust field of candidates for both programs. A brochure to promote and solicit entries for each is just about to be mailed – one is in route and the other at the mail house. You will also be able to obtain nomination forms on the NAA website. Please encourage members of your sectional to enter the competition. Feel free to contact me with any questions. Deadlines for both are in mid-November.

Thank you for your support.

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