Wrongful termination in violation of public policy

Is the jeopardy element in jeopardy?

The right of this court to recognize a common-law cause of action and remedy for the wrongful discharge of an at-will employee cannot be seriously questioned. After all, who presides over the common law but the courts?\(^1\)

In *Greeley v. Miami Valley Maint. Contractors, Inc.*, the Supreme Court of Ohio recognized an exception to at-will employment, allowing aggrieved employees to sue an employer who violates a public policy found in a statute.\(^2\) Four years later, the Court extended this exception to include public policies found not only in statutes, but also in the Ohio and U.S. Constitutions, administrative rules and regulations, and the common law.\(^3\)

In determining whether a cause of action can be maintained under this newly expanded exception to employment at-will, in *Painter v. Graley* the Court laid out the following elements for a wrongful employment action based on a public policy violation:

- A clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (clarity element);
- Dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the jeopardy element);
- The plaintiff’s dismissal was motivated by conduct related to the public policy (the causation element); and
- The employer lacked an overriding legitimate business justification for the dismissal (the overriding justification element) (the *Painter* elements).\(^4\)

While the overriding justification element and causation element are questions of fact, the clarity and jeopardy elements are questions of law.\(^5\) Since the recognition of these elements, the Supreme Court, and indeed the lower courts throughout Ohio, has struggled with interpreting the jeopardy element. Recently, the Court attempted to set forth a standard for addressing this element.\(^6\) However, it appears that the jeopardy element remains just as open to interpretation as ever.

The Court’s first struggle with the jeopardy element appeared shortly after the *Painter* elements were adopted.\(^7\) *Collins v. Rizkana* involved the issue of wrongful discharge in violation of public policy based on sexual harassment/discrimination. The Court analyzed the jeopardy issue in terms of whether the statute expressing the public policy provides adequate remedies to protect the public interest.\(^8\)

While the Court found that the *Collins* employee could maintain a claim under the public policy exception to wrongful termination, the remedies available under R.C. 4112 did not apply to this particular employee’s claim. The employer never employed enough employees to provide the protections provided under R.C. 4112. Because the legislature seemingly only intended to exempt small business from R.C. 4112 burdens and not

Continued on page 4
NLRB news

There is a Chinese curse that translates, roughly, “may you live in interesting times.” When an election looms around the corner, and particularly when there will be a change in the national administration regardless of who wins, for federal agencies—including the National Labor Relations Board (NLRB)—these almost certainly will be interesting times.

As most of you know, the NLRB is composed of five board members who, along with the general counsel, sit in Washington, D.C. During the past year, Senate Democrats blocked Bush appointments to the board and now that body is reduced to two members, Republican Peter Schaumber and Democrat Wilma Liebman. Usually a board quorum is three members who comprise a panel and can issue a decision as long as two of the three agree on the result. Prior to the board being reduced to two members, the board delegated its authority to act as a panel to only two members who can issue a decision as long as they agree on a result. Thus Schaumber and Liebman, who often do not agree on policy matters, can still issue decisions in unfair labor practice cases as long as neither dissents. As a practical matter, this means that rather run-of-the-mill cases can and will issue. On the other hand, it is highly unlikely that more controversial cases are going anywhere for the next year or so—in other words, after the election and when the board is back to its normal complement of members.

The board being reduced to two members has happened only a handful of times in recent history and then only for a fairly brief time. One issue that came up when this last happened—at the end of the Carter administration—was a court challenge to the board’s authority to issue two member decisions. For whatever reason, there was not a definitive judicial ruling. This time around, however, since a fair number of decisions have and likely will issue with only two members signing, one might expect that a number of legal challenges to the delegation will be mounted by opposing parties. One federal district court recently upheld the delegation, and it appears that in four or five other cases around the country similar challenges will be made.

The general counsel, Ron Meisburg, is also a Republican, but because the general counsel fills a fixed term that starts with Senate confirmation—even if there is a Democratic administration next January—Meisburg will continue to serve as general counsel until his term expires in approximately 18 months. Region 9 in Cincinnati reported that a party attacked the board’s delegation to the general counsel of its authority to apply for injunctive relief under Section 10(j) of the NLRA. Region 9 reported that the district court upheld that delegation.

Several decisions issued by the board, before it was effectively shut down as a policy-making body, have wide impact for labor law practitioners in Ohio, and nationwide, and deserve at least brief mention. In Dana Corp., the Board decided that there would no longer be a bar to an election following a voluntary recognition unless the affected employees received adequate notice of the recognition of the union by their employer. Dana allows for the filing of a petition within 45 days of notice. In short, the board decided that the parties—the employer and the union—involved in a voluntary recognition risk a challenge to that recognition unless the employees are notified, through an official notice from the NLRB, that they have the right to seek an election. The official notice must be posted for 45 days in the plant. At the end of the posting period, the employer and the union can proceed in the knowledge that any petition challenging the recognition will not be processed by the regional office.

Of the eight voluntary recognition (VR) cases processed thus far this fiscal year in Region 8, five have involved the VR of the Teamsters as representative of units of mechanics employed by United Parcel Service at various locations in Northern Ohio. All of these VR cases have been processed without the filing of any petitions within the 45-day timeframe mandated by Dana.

In another recent decision, Truserve Corp., the board found that a decertification petition (RD) filed after alleged unfair labor practices by the employer and prior to settlement of those charges, should not be dismissed (as was the practice before this decision) where there has been no finding or admission that the employer had actually engaged in the allegedly unlawful conduct. The case overruled several long-established cases from 1995, 1998 and 2000, and requires an actual finding by the regional director that the employer was actively involved in the filing of the RD petition to result in its dismissal.

In Truserve an incumbent union filed unfair labor practice charges against the company alleging unilateral changes. Shortly thereafter an RD was filed, but the petition was blocked by the pending unfair labor practice charges. The employer and the union then entered into a nonboard settlement with the employer agreeing to bargain and the union agreeing to withdraw the unfair labor practice
charge. The decertification petitioner was not a party to the settlement and did not agree to withdraw the petition. The region approved the union request to withdraw the unfair labor practice charge and, following precedent, also dismissed the RD petition.

The board reversed the regional director’s dismissal, finding that “there was no basis for dismissing a petition based on a settlement of alleged but unproven unfair labor practices.” Further, the board noted that this result would be the same regardless of whether the settlement contained a nonadmissions clause. The board did note that an RD may not be processed if the execution of the settlement of the unfair labor practice charge precedes the filing of the petition; the regional director finds that the petition was instigated by the employer or that the employees’ showing of interest in support of the petition was solicited by the employer; or the settlement of the unfair labor practice charge includes an agreement by the decertification petitioner to withdraw the petition.

Another representation matter worth mentioning involves an effort by the Service Employees International Union (SEIU) to organize Catholic Healthcare Partners (CHP), the largest hospital system in Ohio. The SEIU started its organizing effort in 1999 in Lorain, where, after a very hotly contested campaign, they won an election to represent nearly 500 nurses. Even after winning the election it took the SEIU more than a year to get a first contract.

No doubt spurred on by this experience, the SEIU started a corporate campaign to pressure CHP to agree to official neutrality in election campaigns. The culmination of this effort was an election slated to take place in mid-March at nine of the system’s 21 Ohio hospitals, with the possibility that approximately 8,300 workers would unionize in the span of a week. The union’s public pressure had produced an agreement with CHP for a vote “free from coercion.” The employees were to be informed of the election two weeks in advance in a letter co-signed by CHP and SEIU, a jointly written fact sheet and a broadside from each party arguing, in fairly neutral language, for and against the union. Each side set up a toll-free number for questions and neither side would say another word to unit employees until after election day.

Had the election gone the way the SEIU expected, it would no doubt have served as a model for future agreements.

But that was not to be. Members of the California Nurses Association arrived in Ohio armed with anti-SEIU propaganda, that undermined what the nurses union had come to see as SEIU’s corporate-friendly unionism. The fliers asked, “Democracy or Dictatorship?” and charged that the election amounted to a “back room deal” aimed at legitimizing a sweetheart arrangement.

In this context, and because of the neutrality deal, SEIU concluded it could neither respond nor fairly compete. Accordingly, the election was cancelled.

Before the California nurses arrived on the scene, Region 8 in Cleveland did run one election under a neutrality agreement for a hospital in northeast Ohio run by Community Healthcare Partners. The employer filed RM petitions based on an SEIU demand for recognition in five units. The parties entered into consent agreements. All post-election issues were to be handled by the regional director for Region 9 in Cincinnati (although the hospital location was within Region 8’s jurisdiction). The deal was to run the elections within two weeks of filing, provided the parties agreed to unit descriptions and election arrangements. The RM petitions were filed Nov. 28, 2007, and approved Nov. 30, and the elections were held Dec. 13.

Interestingly enough, even a neutrality agreement does not guarantee an election victory.

The SEIU was certified only in the nonprofessional employee unit and the skilled maintenance unit. It lost in the professional employee unit, the technical unit and the business office clerical unit.

One last case worth commenting on is Grosvenor Orlando Associates. In Grosvenor, the board found “that reasonably diligent discriminatees should at least have begun searching for interim work at some time within the initial 2-week period….”

Thus, a discriminatee will lose backpay if there is more than a two-week period after his or her termination, layoff or refused hire in which he or she does not engage in a search for work. However, even if the discriminatee fails to search for work during this two-week period, the backpay period does not stop. If a discriminatee unreasonably delays an initial search, the board will toll backpay until a reasonably diligent search begins.

As a result of this decision, it is important to remember that if backpay and/or other reimbursement is
Wrongful termination in violation of public policy, continued from p. 1

from policies against discrimination, the employee could bring her suit.\footnote{9}

While Collins provided guidance by focusing on whether the statute expressing the public policy provides adequate remedies to protect the public interest, the opinion created more questions than answers. What does “adequate” entail? Does “public interest” include the specific interest of the individual employee? Later, in analyzing the state whistleblower statute, the Court revisited the at-will employment exception in Kulch v. Structural Fibers, Inc.\footnote{10} In Kulch, the Court reiterated that Greeley was not intended to only apply where a statute provides no civil remedies. Rather, Greeley and its progeny are intended to bolster the public policy of this state and to advance the rights of employees who are discharged or disciplined in contravention of clear public policy.\footnote{11}

The Court concluded that the whistleblower statute does not provide the exclusive remedy for discharged at-will employees. The remedies available under this particular statute did not provide complete relief because it did not provide for certain compensatory damages and did not specifically authorize punitive damages. Furthermore, the statute permitted the court to fashion an award deemed most appropriate.\footnote{12}

Because complete relief is not available, a public policy wrongful termination claim can be brought under the state whistleblower statute. This opinion, which has been criticized since it was published, suggested that “adequate” meant “complete” relief, including compensatory and punitive damages. This high time for employees lasted several years. Under Kulch, employees were able to bring a wrongful discrimination claim under a wide range of statutes and regulations. An unenlightening, one sentence decision in Livingston v. Hillside Rehab. Hosp. led some courts to also believe that public policy claims based on the age discrimination statutes were permitted.\footnote{13} However, the Court has since narrowed its interpretation of the jeopardy element.

In 2002, the Court published a plurality opinion in Wiles v. Medina Auto Parts, which prohibited an employee policy embodied in the FMLA would not be jeopardized. Thus, a wrongful termination claim based on the public policy underlying the FMLA is not permitted.\footnote{16}

The employee in Wiles argued that complete relief was not available under the FMLA because punitive damages and compensatory damages for anxiety and emotional distress are not permitted. Nonetheless, the Court backtracked on its Kulch decision, which suggested complete relief was required to preclude a claim. The Court said that Kulch was not controlling authority because its analysis only garnered the votes of three justices (which, coincidentally, the Wiles opinion did as well).\footnote{17} The Court bolstered its argument by stating that punitive damages are irrelevant to the analysis because they are not designed to compensate the plaintiff, but rather, are intended to punish the defendant and deter future wrongdoing. Furthermore, FMLA’s exclusion of recovery for emotional distress is not enough to outweigh the broad remedies that are allowed.\footnote{18}

Thus, after Wiles, the employment community understood that complete relief is not necessary to preclude a wrongful termination based on public policy. A combination of compensatory and equitable remedies may be sufficient. However, courts were still left wondering exactly how much relief an employee must be given under the law.

Five years later, the Court again acknowledged confusion over the jeopardy element.\footnote{19} Leininger v. Pioneer Natl. Latex holds that statutory remedies for age discrimination provide sufficient relief to preclude a wrongful termination claim based

The Supreme Court has struggled with interpreting the jeopardy element.

The Court concluded that the whistleblower statute does not provide the exclusive remedy for discharged at-will employees. The remedies available under this particular statute did not provide complete relief because it did not provide for certain compensatory damages and did not specifically authorize punitive damages. Furthermore, the statute permitted the court to fashion an award deemed most appropriate.\footnote{12}

Because complete relief is not available, a public policy wrongful termination claim can be brought under the state whistleblower statute. This opinion, which has been criticized since it was published, suggested that “adequate” meant “complete” relief, including compensatory and punitive damages. This high time for employees lasted several years. Under Kulch, employees were able to bring a wrongful discrimination claim under a wide range of statutes and regulations. An unenlightening, one sentence decision in Livingston v. Hillside Rehab. Hosp. led some courts to also believe that public policy claims based on the age discrimination statutes were permitted.\footnote{13} However, the Court has since narrowed its interpretation of the jeopardy element.

In 2002, the Court published a plurality opinion in Wiles v. Medina Auto Parts, which prohibited an employee policy embodied in the FMLA would not be jeopardized. Thus, a wrongful termination claim based on the public policy underlying the FMLA is not permitted.\footnote{16}

The employee in Wiles argued that complete relief was not available under the FMLA because punitive damages and compensatory damages for anxiety and emotional distress are not permitted. Nonetheless, the Court backtracked on its Kulch decision, which suggested complete relief was required to preclude a claim. The Court said that Kulch was not controlling authority because its analysis only garnered the votes of three justices (which, coincidentally, the Wiles opinion did as well).\footnote{17} The Court bolstered its argument by stating that punitive damages are irrelevant to the analysis because they are not designed to compensate the plaintiff, but rather, are intended to punish the defendant and deter future wrongdoing. Furthermore, FMLA’s exclusion of recovery for emotional distress is not enough to outweigh the broad remedies that are allowed.\footnote{18}

Thus, after Wiles, the employment community understood that complete relief is not necessary to preclude a wrongful termination based on public policy. A combination of compensatory and equitable remedies may be sufficient. However, courts were still left wondering exactly how much relief an employee must be given under the law.

Five years later, the Court again acknowledged confusion over the jeopardy element.\footnote{19} Leininger v. Pioneer Natl. Latex holds that statutory remedies for age discrimination provide sufficient relief to preclude a wrongful termination claim based
on public policy. \((\text{Livingston's effect was distinguished by noting that the case arose under a different, old statutory scheme.})\) The Court concludes that.

It is unnecessary to recognize a common-law claim when remedies provisions are an essential part of the statutes upon which the plaintiff depends for the public policy claim and when those remedies adequately protect society’s interest by discouraging the wrongful conduct.\(^{20}\)

Thus, the analysis of the jeopardy element now seems to be three-fold:

- The statute must have remedy provisions that are essential to the statute;
- Those remedies must adequately protect society’s interest; and
- Those remedies must discourage wrongful conduct. This language attempts to shift the focus from how a statute compensates an aggrieved employee to how a statute punishes an employer, by requiring society’s interest to be protected by discouraging wrongful conduct. However, the Court’s analysis of the age discrimination statutes does not logically flow from this three-part test.

The Court determined that the broad relief available pursuant to R.C. 4112 is sufficient to preclude a wrongful termination based on public policy claim. Ohio Revised Code 4112.99 subjects violators of R.C. 4112 to a civil action for damages. Damages includes “the panoply of legally recognized pecuniary relief,” including punitive damages.\(^{21}\) The final statement by the Court specifically holds that a wrongful discharge claim based on age discrimination is not permitted because “R.C. 4112 provides complete relief for a statutory claim for age discrimination.” (Emphasis added.)\(^{22}\)

This complete relief language is reminiscent of Kulch, which allowed a claim based on a state whistle-blower statute because the statute did not provide “complete” relief. However, this may not necessarily mean that the Kulch standard is back. The Court did not specifically find that complete relief was the minimum requirement. What can be inferred, based on the lengthy discussion on the specific age discrimination remedies, is that the first element of the three-part Leininger test is satisfied.

Turning to the second and third elements of the Leininger test, the Court holds that:

- Chapter 4112 adequately protects the state’s policy against age discrimination in employment through the remedies it offers to aggrieved employees.\(^{23}\)

This statement seems to conclude that society’s interest is adequately protected by the remedies, but does not discuss what “adequate” entails. The opinion also does not address how the remedies discourage wrongful conduct. Punitive damages are mentioned within the “panoply of relief” available, but no connection is made between punitive damages and discouraging wrongful conduct.

Leininger arguably provides parties more language to manipulate in future litigation.\(^{24}\) However it does not give much direction in applying these principles to the present. Rather, it begs the question: Is the jeopardy element in jeopardy? \(^{\star}\)

\textit{By Stacy V. Pollock, an attorney with Means, Bichimer, Burkholder & Baker, Co., in Columbus.}

\textbf{Endnotes}


\(^{2}\)\textit{Greeley v. Miami Valley Maint. Contractors, Inc.} (1990), 49 Ohio St.3d 228, 233-34.


\(^{4}\)Id. at 384.


\(^{7}\)\textit{Collins}, 73 Ohio St.3d 65.

\(^{8}\)Id. at 73.

\(^{9}\)Id. at 74.

\(^{10}\)\textit{Kulch}, 78 Ohio St.3d 134.

\(^{11}\)Id. at 155.

\(^{12}\)Id. at 157.

\(^{13}\)\textit{Livingston} (1997), 79 Ohio St.3d 249.

\(^{14}\)\textit{Wiles} (2002), 96 Ohio St.3d 240.

\(^{15}\)Id. at 244.

\(^{16}\)Id. at 244-46.

\(^{17}\)Id. at 247.

\(^{18}\)Id. at 248.

\(^{19}\)\textit{Leininger}, 115 Ohio St.3d 311.

\(^{20}\)Id. at 317.

\(^{21}\)Id. at 318.

\(^{22}\)Id. at 319.

\(^{23}\)Id.

\(^{24}\)Without the benefit of further analysis in \textit{Leininger}, the 10th District recently opined that statutes that provide regulatory oversight, civil penalties and criminal sanctions against the employer are sufficient to protect the public’s interest. \textit{Ripley v. Montgomery} (10th Dist. 2007), 2007 Ohio 7151 (analyzing R.C. 2913.02 (theft by deception) and R.C. 3517.092 (improper solicitation of campaign contributions). This analysis focused on the penalties against employers that protect the public’s interest. The 10th District thus addressed the deterrence factor set forth in \textit{Leininger}. A common-law tort action for wrongful termination based on statutes with these oversights and penalties is therefore unnecessary.
FMLA and military injuries

Assume the following scenario. Employer is a covered employer under the Family and Medical Leave Act of 1993 (FMLA) and has no employees in military service. One day, an employee goes to the human resources director and says,

I just received notification that my cousin, who was injured while on duty as an Ohio National Guardsman in Iraq and was treated at Walter Reed Hospital, is soon to be released for outpatient therapy and medical care and will be staying with me. My cousin is not married, and I am his closest next of kin. We’re more like brothers than cousins. And, by the way, I am requesting a leave of absence for 24 weeks to care for him.

The human resources director replies,

I’m sorry to hear of your cousin’s injuries and you have our sympathy, but you are not eligible for leave under FMLA as your cousin is not a person who qualifies you to be granted leave and, secondly, your request for 24 weeks is in excess of the 12-week period allowed under FMLA.

Is the employer in violation of FMLA? If your answer is no, refer to Section 585 of the National Defense Authorization Act for Fiscal Year 2008. The purpose of this article is to alert the reader to some significant changes that have been made by Congress to FMLA dealing with military injuries.

The 2008 amendment added a number of definitional terms to 29 U.S.C. §2611. For example, a covered service member is any member of the Armed Forces, National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness. A ‘serious injury or illness’ is defined as an injury or illness that may render the service member ‘medically unfit to perform the duties of the member’s office, grade, rank, or rating.’

The second important aspect of the amendment is set forth in 29 U.S.C. §2612(a)(3), which provides that,

Subject to §103, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the service member.

Under the previous version of FMLA, generally, for one to be eligible to use leave provisions, the employee had to care for his or her spouse, son, daughter or parent. The military provision expands that definition to provide that “next of kin” are eligible for FMLA and, rather than the customary 12-week limitation, may be entitled to a total of 26 weeks. The term “next of kin” refers to the “nearest blood relative of that individual.” Thus, for injured service members, the caretaker definition is more expansive.

As with FMLA generally, an employee may request and an employer may require the employee to substitute any accrued paid vacation leave, personal leave, family leave, or medical or sick leave for any part of the 26-week period, except that nothing in this title requires an employer to provide sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave.

Under the 2008 amendment to 29 U.S.C. §2613, the employer may require that the request for leave to care for a service member be supported by appropriate certification. The U.S. Department of Labor has issued preliminary commentary regarding the 2008 military amendments to FMLA with the anticipation that final regulations will be issued quickly. The present commentary on FMLA is set forth by the Department of Labor in Federal Register Vol. 73, page 7876 and, more particularly, as related to the 2008 military amendments at pp. 7925–7937.

With increasing numbers of service members suffering traumatic and/or psychological injuries, the need for those service members requiring outpatient medical services will no doubt increase and put resulting pressures on family members to provide caretaker support. As this situation grows, employers, who otherwise have no connection with the military, are going to see greater demands placed on them as employees request FMLA leave and for periods of time in excess of the accustomed maximum of 12 weeks. How severe this will be for civilian employers remains to be seen, but every employer needs to be aware of and attuned to this expanded provision of FMLA as
Recent labor and employment decisions

Following are several recent 6th Circuit labor and employment decisions. For a more detailed list of these, along with state court cases, go to www.ohiobar.org/pubs/newsletters/?type=laborandemployment and click on “Recent labor and employment decisions” or type http://tinyurl.com/5lnsp4 in your browser.

**Abdulnour v. Campbell Soup Supply Co., LLC, 101 FEP Cases (BNA) 897 (6th Cir. 2007, Judge Marbley):** Plaintiff failed to offer evidence to defeat the legitimate nondiscriminatory reason as pretextual.


**Bryson v. Regis Corp., 19 ADA Cases (BNA) 1067, 12 Wage & Hour Cases 2d (BNA) 1409 (6th Cir. 2007, Judge Cole):** Knee injury qualifies for FMLA, but not as a disability.

**In Re Rodriguez, 487 F.3d 1001 (6th Cir. 2007, Judge Moore):** Manager’s derogatory comments regarding plaintiff’s foreign accent was direct evidence of discrimination.

**Michael v. Caterpillar Fin. Servs. Corp., 496 F.3d 584 (6th Cir. 2007, Judge Gilman):** EEOC found that a racially hostile work environment existed but 6th Circuit disagreed.

**Renfro v. Indiana Michigan Power Co., 12 Wage and Hour Cases 2d (BNA) 1281 (6th Cir. 2007, Judge Cook):** 6th Circuit reversed summary judgment for plaintiffs in a FLSA class action.

**Thomas v. Miller, et al., 489 F.3d 293 (6th Cir. 2007, Judge Boggs):** Numerical threshold is an element of COBRA claim, and not a jurisdictional requirement.

**Walker v. Hoppe, 2007, Fed Appx. 0662N (6th Cir. 2007, Per Curiam):** Time to file a charge of discrimination triggered when plaintiff received notice of her impending termination, not on the actual date of her termination.

**Coburn v. Rockwell Automation Inc., et al., 100 FEP Cases (BNA) 721 (6th Cir. 2007, Judge Griffin):** Close call regarding plaintiff’s showing of pretext in reduction in force case means that a “jury could reasonably conclude” or hold for the plaintiff.

**Wysong v. Dow Chemical Co., Case No. 05-4197 (6th Cir. 2007, Judge Moore):** FMLA retaliation and perceived disability claims are both restored by court.

Case summaries courtesy of the Ohio Employment Lawyers Association, attorneys who dedicate 70 percent or more of their employment practices to representing employees, not management. For more information on membership, visit www.ohioemploymentlawyersassociation.org or call chair Andrew Margolius at (216) 621-6214.

---

**ABOUT Labor and Employment News**

Labor and Employment News is produced by the Ohio State Bar Association Labor and Employment Section. The OSBA publishes 10 committee and section newsletters.

For more information about Labor and Employment News, contact editor Wanda Carter at Moots, Carter and Hogan, 3600 Olentangy River Rd., Columbus, Ohio 43214, (614) 459-4140 or wcarter@mchlaw.us, or editor Amy S. Glesius, 1360 W. 9th St., Ste. 310, Cleveland, Ohio 44113, (216) 241-6882 or info@glesiuslaw.com.

Articles published in this newsletter reflect the views and opinions of the writers and are not necessarily the views or opinions of the OSBA Labor and Employment Section. Publication in Labor and Employment News should not be construed as an endorsement by the section or the OSBA.

For information about other OSBA committee and section newsletters, contact Beth Kuypers, OSBA publications coordinator, at P.O. Box 16562, 1700 Lake Shore Drive, Columbus, Ohio 43216-6562, (800) 282-6556 or (614) 487-4415, or e-mail at bkuypers@ohiobar.org.

© Copyright 2008 Ohio State Bar Association.
due as part of the remedy for the unfair labor practice, for instance, an unlawful discharge or refusal to hire, the board requires discriminatees to mitigate (offset) the backpay by promptly looking for another job in the same or similar line of work. If a discriminatee is unable to establish that he or she actively sought to mitigate damages, he or she may face the risk of having whatever money is owed reduced.

Accordingly, discriminatees must keep careful records of when and where they sought employment, or risk the diminution of their backpay. ✦

By Fred Calatrello of the National Labor Relations Board in Cleveland.

Endnotes
1 351 NLRB No. 23.
2 349 NLRB No. 23.
3 350 NLRB No. 86.

NLRB news, continued from p. 3

FMLA and military injuries, continued from p. 6

well as those employees who have a spouse, son, daughter, parent, or a next of kin who is a service member. ✦

By Donald N. Jaffe, of counsel at Weston Hurd in Cleveland.

Endnotes