Journal of the National Association of Administrative Law Judiciary

Volume 27 | Issue 2 Article 9

10-15-2007

Legal Summaries

Leslie Polizzotto

Pepperdine University School of Law
Legal Summaries*

Table of Cases

---

* Prepared by Leslie Polizzotto, the Legal Summaries Editor of the Journal of the National Association of Administrative Law Judiciary at Pepperdine University School of Law. The Legal Summaries are selected case briefs of recent court decisions on issues involving administrative law.

Table of Cases (cont.)

UNITED STATES SUPREME COURT

Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc., 127 S. Ct. 1513 (2007).

LAW: Failure of a carrier to pay an operator compensation for phone calls as directed by 47 U.S.C. §276(b)(1)(A) is an unreasonable practice under 47 U.S.C. §201(b). A cause of action for damages may be brought under 47 U.S.C. §207.

FACTS: In 1990, Congress enacted special legislation that required payphone operators to allow payphone users to obtain free access to the long-distance carrier of their choice, even without depositing coins. In recognizing that the call would impose costs upon the payphone operator, Congress authorized the Federal Communications Commission ("FCC") to promulgate regulations to provide compensation to these operators. The FCC, using traditional rate-making methods, promulgated a specific amount to be reimbursed, unless the operator and the carrier agreed to different amounts. The FCC also determined that a carrier's refusal to reimburse an operator was an "unreasonable practice" and unlawful under 47 U.S.C. §201(b). This section had a link to 47 U.S.C. §207 which authorized a payphone operator to bring a federal-court lawsuit against the carrier.

In 2003, respondent Metrophones Telecommunications, Inc. ("Metrophones"), brought suit in federal court against Global Crossing Telecommunications, Inc. ("Global Crossing") for compensation owed under the act. The District Court agreed with the FCC's determination that Global Crossing's refusal to pay amounted to a §201(b) violation and permitted Metrophones to sue in federal court under §207. The Ninth Circuit affirmed the District Court's determination. Global Crossing appealed this decision.

ANALYSIS: The Court notes that the history of these sections makes clear that the purpose of §207 is to allow persons injured by §201(b) violations to bring federal-court actions. Additionally, history also shows that the FCC has long implemented §201(b) through the issuance of rules and regulations. The Court acknowledged that the issue isn't whether §207 covers actions for violations of §201(b), because it plainly does. Instead, the Court must decide whether the particular FCC regulation lawfully implements §201(b)s unreasonable practice prohibition.

The Court, citing *Chevron*, stated that the FCC's unreasonable practice determination is reasonable and therefore lawful because it easily fits within the statutory phrase. Moreover, when Congress revised the telecommunications laws in 1996 to enhance competition, it left §201(b) in place. In the absence of Congressional prohibition, and the similarities with traditional regulatory action, the Court found the FCC's determination reasonable.

The Court rejected various arguments by Global Crossing, including the argument that §207 authorizes only actions seeking damages for statutory violations and not for violations of regulations promulgated to carry out statutory objectives. The Court reasoned that even though this lawsuit does seek damages for a statutory violation of §201(b)s prohibition of unreasonable practice, prohibitions have long been thought to extend to rates that come from FCC prescriptions.

HOLDING: The Ninth Circuit's judgment that the FCC's application of §201(b) is lawful and §207 allows the operator to sue the carrier was affirmed.

IMPACT: Operators have a cause of action in federal court when carriers do not allocate and pay compensation to operators from long-distance calls made without coins from phone booths.

Beck v. PACE International Union et al., 127 S. Ct. 2310 (2007).

LAW: Under 29 U.S.C. §1341 (b)(3)(A)(i), merger with a multi-employer plan is not a permissible method for terminating a single-employer defined-benefit pension plan, and the therefore the employer does not have a fiduciary obligation under ERISA to consider that method for terminating the plan.

FACTS: PACE International Union (PACE) represented employees covered by a single-employer defined-benefit pension plan which was sponsored and administered by Crown Paper and its parent company Crown Vantage, Inc. (hereinafter referred to in singular as "Crown"). After filing for bankruptcy, Crown considered a standard termination though the purchase of annuities, which is a statutorily specified method plan termination under §1341 (b)(3)(A)(i) of the Employee Retirement Income Security Act of 1974 ("ERISA"). Additionally, the Pension Benefit Guaranty Corporation ("PBGC"), which administers an insurance program to protect plan benefits, agreed to withdraw the proofs of claim it had filed against Crown if this termination method was used.

PACE interrupted Crown's plan termination discussions and proposed that Crown instead merge plans with PACE's own multi-employer plan. Crown's termination method would allow Crown to retain an estimated $5 million of over funding to use for creditors. PACE's termination method would allow PACE's own multi-employer plan to retain the $5 million in over funding.

Crown moved forward with its preferred termination method of the annuity purchase which prompted PACE to file an adversary action against Crown in Bankruptcy Court. The court sided with PACE because it found that the termination method decision was a fiduciary decision and Crown had not given sufficient consideration of the proposal. The District Court affirmed in relevant part. The Court of Appeals for the

Ninth Circuit did as well, but acknowledged that the termination decision was a business decision not subject to ERISA's fiduciary obligations, but also reasoned that the implementation of a decision to terminate is fiduciary in nature. It determined that the merger method was a permissible means of plan termination and therefore Crown had a fiduciary obligation to consider that method seriously. Crown appealed this decision.

ANALYSIS: The Court starts off by stating that ERISA sets forth exclusive procedures for standard termination of single-employer pension plans in §1341(b)(3)(A). Subsection (i) expressly permits termination through purchase of annuities, which is the most common termination method. Subsection (ii), which is a residual clause, is potentially more embracing of alternative methods of plan termination. It is this clause that PACE argues would allow the merger method of plan termination. The Court rejects PACE's argument because PBGC disagrees that merger is a permissible method and the Court traditionally defers to PBGC when interpreting ERISA.

PACE failed to convince the Court that PBGC's interpretation is unreasonable. One reason is because Congress nowhere expressly provided for merger as a permissible means of termination. The court notes three additional reasons why PACE's interpretation that mergers are permissible under subsection (ii) lacks clarity. First, termination through purchasing annuities formally severs ERISA's applicability to plan assets, whereas termination through merger results in the former plan's assets remaining within ERISA's purview. Second, ERISA expressly allows the employer to recoup surplus funds, as Crown sought to do here and the merger method would preclude receipt of such funds. Third, merger is nowhere mentioned in §1341, but instead is dealt with in an entirely different set of statutory sections with different rules and procedures.

HOLDING: The Ninth Circuit's holding that a merger was a permissible means of plan termination and therefore Crown

had failed in its fiduciary obligation to consider this proposal for termination seriously was reversed and remanded.

IMPACT: This holding narrows the potential alternative methods to be used in defined-benefit pension plans under §1341(b)(3)(A)(ii). This is another example of the Court giving deference to an agency's, or in this case a government corporation's, interpretation when Congress has not expressly spoken on the issue.

Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007).

LAW: The Fair Labor Standards Act 29 U.S.C. §213(a)(15) exemption from minimum wage and maximum hours rules for companionship workers employed in domestic service employment includes those workers employed by third party agencies.

FACTS: Respondent, a domestic worker who provided companionship services to elderly and infirm men and women sued her employer, Long Island Care at Home, Ltd. (Long Island Care) for failure to pay her minimum wages and overtime wages. The Fair Labor Standards Act ("FSLA") §213(a)(15) exempts workers who provide companionship services employed in domestic services. The Department of Labor (DOL) promulgated a regulation that states the exemption includes those companionship workers who are employed by an employer, agency other than the family, or household using their services. The District Court found the DOL's third party regulation valid and controlling and consequently dismissed Respondent's lawsuit. The Second Circuit found the DOL's third party regulation unenforceable and set aside the District Court's judgment. Long Island Care sought certiorari and the petition was granted.

ANALYSIS: The Court stated that the FSLA explicitly left gaps as to the scope and definition of its domestic service and companionship services terms, and Congress empowered the

DOL with authority to fill those gaps. Respondent argued that domestic service employment is treated differently in the DOL's General Regulations and the regulation in question. The Court stated that although the literal language of the third party regulation and the General Regulation conflict, it nonetheless agreed with the DOL's position for four reasons. First, a decision that the General Regulation controlled would create serious problems as to the coverage of particular domestic service workers by the statutory exemption and by the FSLA as a whole. Second, the General Regulation's purpose is to describe the kind of work that must be performed to qualify as domestic service and the third party regulation is for the sole purpose of explaining how the exemption applies to third party domestic service workers. Therefore the third party regulation is more specific to the question at issue and therefore governs. Third, the DOL reached the interpretation after going through a notice and comment rulemaking procedure making surprises unlikely. Fourth, this Court has accepted such interpretations where the agency's course of action indicates that its interpretation reflects the agency's views and not post hoc rationalization.

The Court also rejected Respondent's argument that the third party regulation is not meant to fill a statutory gap, but is a description the DOL's view of what the FSLA means and therefore is not entitled to *Chevron* deference. It reasoned that the DOL did not have to comply with notice and comment for an interpretation, but did so because it treated the regulation as a binding exercise of its rulemaking authority. Finally, the Court also rejected Respondent's argument that the notice and comment proceedings were defective because the final rule was a logical outgrowth of the rule proposed by the DOL.

HOLDING: The Second Circuit's judgment that the DOL third party regulation was unenforceable was reversed and remanded.

IMPACT: Domestic service employees who perform companionship services, including those employed by third party agencies, are exempt from FLSA minimum wage and

maximum hour requirements. This holding confirms the DOL's expansion of the FSLA exemption for domestic service workers who are employed for companionship services.

UNITED STATES COURT OF APPEALS – FEDERAL CIRCUIT

Groff v. United States, 493 F.3d 1343 (Fed. Cir. 2007).

LAW: *Chevron* deference applies to agency interpretations made in informal adjudications.

FACTS: Two cases, *Groff* and *LaBare* were consolidated on appeal from the Court of Federal Claims which involved challenges to Bureau of Justice Assistance ("BJA") determinations that denied benefits to the relatives of pilots who were employed by private contractors and died rendering fire suppression services to public agencies. The benefits were denied because the BJA ruled that neither of the pilots were a "public safety officer" within the meaning of the Public Safety Officers' Benefits Act ("PSOBA") because both parties were employees of private companies and therefore were not serving a public agency in an official capacity.

Both claimants appealed the BJA decisions to the Court of Federal Claims, which rendered different holdings for each case. The court held in one case that the BJA's denial of benefits was erroneous and awarded benefits, while a different judge for the same court affirmed the BJA's decision to deny benefits in the other case.

ANALYSIS: The court stated that in determining whether *Chevron* deference is warranted in the agencies interpretation of "public safety officer" is whether Congress meant to delegate to the agency the authority to make determinations having the force of law. The court noted that a very good indicator of congressional intent can be found in express language giving authorization to engage in the process of rulemaking or adjudications which produces regulations or rulings for which deference is claimed. In the PSOBA,

Congress expressly authorized the BJA to establish rules, regulations, and procedures to carry out the purposes of the act. Specifically, Congress expressly authorized the BJA to determine regulations regarding if a public safety officer has died as the direct and proximate results of an injury sustained in the line of duty. The court cited two cases holding that the BJA's interpretations of statutory terms should receive *Chevron* deference. The court rejected the claimants attempt to distinguish a case because it involved and interpretation of a regulation promulgated through traditional notice and comment rulemaking and the other case because it was decided before the Supreme Court interpreted *Chevron* restrictively. The Court reasoned that the Supreme Court in later cases has made clear that *Chevron* deference is not limited to formally promulgated regulations. Additionally, the court stated that it was reasonable to conclude that Congress contemplated the BJA would use the process of adjudicating claims to make legal determinations necessary to fill in gaps of the statutory standards. Finally, the court noted that legislative history confirms, at a minimum, that the BJA's interpretation of "public safety officer" is a plausible interpretation of the statute and therefore is reasonable.

HOLDING: The court reversed the *Groff* holding awarding benefits, and affirmed the *LaBare* holding denying benefits.

IMPACT: Agency interpretations of a statute made through informal adjudication deserve *Chevron* deference. This decision expands the application of *Cheron* deference given to agencies.

UNITED STATES COURT OF APPEALS – NINTH CIRCUIT

Aageson Grain & Cattle v. USDA, 500 F.3d 1038 (9th Cir. 2007)

LAW: Proceedings of the National Appeals Division ("NAD") qualify under §554 of the Administrative Procedure

Act ("APA"), therefore the Equal Access to Justice Act ("EAJA") applies to those proceedings.

FACTS: After winning an appeal for denial of assistance under the 2003 Noninsured Crop Disaster Assistance Program ("NAP"), three farms applied for an award of attorney's fees and expenses under EAJA totaling $17, 943.84. NAD refused to consider the application, because it was the United States Department of Agriculture's ("USDA") position that the EAJA was inapplicable to NAD proceedings. The farmers filed for judicial review and cross-motions were filed by both the farmers and the USDA. The district court granted the farmers' motion for summary judgment, concluding that the NAD proceedings were an "adversary adjudication" under 5 U.S.C. §504(a)(1) (2000). After entering judgment, the district court ordered the case remanded to NAD for a determination of the proper attorney's fee and costs awards under EAJA. The USDA appealed the district court's order.

ANALYSIS: The court rejected the USDA's argument that the denial of benefits under the Disaster Assistance Program under the NAD was not an "adversary adjudication" because it was not "under" APA §554. The court looked to the legislative history of the EAJA, which states that if an agency takes a position at some point in the adjudication, the adjudication would then become adversarial. The court acknowledged that in the NAD hearing, the United States had a formal position. The court also looked to an 11th Circuit case which concluded that in the case of a challenge to the denial of benefits under a disaster assistance program, a proceeding before the NAD was 'adversarial' in nature.

After determining that NAD proceedings are adversarial adjudications within the meaning of APA §504, the court had to determine whether the proceedings are "under" APA §554. This section applies in every case of adjudication required by statute to be determined on the record and have the opportunity for an agency hearing. This requirement has three components including that the adjudication must be required by statute, it must be on the record, and there must be an

opportunity for an agency hearing. The USDA challenged whether application of APA §554 to NAD hearings is mandatory. The court looked to the plain meaning of the statutory language of U.S.C. §6996(a) which compels NAD adjudications. It states that participants shall have the right to appeal an adverse decision by the division. Therefore, the statute creating the NAD satisfies the requirements for the application of the APA §554.

HOLDING: The District Court's judgment that EAJA applies to NAD proceedings is affirmed.

IMPACT: Private litigants who prevail against the federal government in administrative adjudication under the USDA NAD process are entitled to recover attorney's fees under EAJA. This holding expands the applicability of EAJA fee awards to administrative appeal proceedings, not just court proceedings, and makes it less costly for private parties who litigate with the government in administrative proceedings because of they win, they can recover reasonable attorney's fees from the government.

UNITED STATES COURT OF APPEALS – SEVENTH CIRCUIT

Walsh v. Heilmann, 472 F.3d 504 (7th Cir. 2006).

LAW: Hearing officers cannot be removed from their appointed position because of political reasons.

FACTS: After being elected, a mayor appointed a new administrative hearing officer. The replaced officer argued that he was replaced because he backed the other losing candidate in the mayoral election. He claimed the new mayor wanted his own supporters in plum positions which violated the first amendment as applied to political patronage. The District Court dismissed the complaint after concluding that hearing officers are the sort of position for which politics is a permissible consideration.

ANALYSIS: The Court of Appeals agreed with the District Court's reasoning that because all non-vehicular subjects were under the discretion of the hearing officer to determine fines ranging from zero to $50,000, this was a position that made policy and therefore views about wise public administration were appropriate. Ordinance issues and violations such as failure to trim hedges, shoveling snow from sidewalks, and raking leaves are decided by the hearing officer, but can affect a mayor's success in office. This makes it appropriate for a mayor to appoint officers who share his or her views about enforcement priorities. The court cited its own prior holding in *Kurowski v. Krajewski* which held that politics is a permissible consideration for judicial positions, even those held for just a short time.

The court rejected the appellant's argument that *Kurowski* should be limited to appointed part-time judges when the full-time position is elected. It discussed how federal administrative appeals judges at federal agencies serve at the pleasure of the cabinet officials so that the policies of the executive branch are carried out. Since the hearing officer has such discretion in enforcement of ordinances, it is important that the officer be held by someone who holds the elected official's confidence.

HOLDING: The District Court's holding that politics was a permissible consideration for hearing officers who possessed discretion over which laws received how much enforcement was affirmed.

IMPACT: Appointed administrative hearing officer positions are subject to political considerations because of their enforcement discretion and the impact that discretion has on an elected official's success in office.

UNITED STATES COURT OF APPEALS – FIFTH CIRCUIT

Chao v. Occupational Safety & Health Review Comm'n., 480 F.3d 320 (5th Cir. 2007).

LAW: The authority to assess penalties under Title 29 U.S.C. §666(j) does not authorize an ALJ to group separately charged and proven willful offenses for the purposes of assessing penalties. This section establishes a mandatory penalty range for each willful violation charged and proven.

FACTS: Two related companies ("Respondents") sharing space were assessed a total of 141 willful recordkeeping violations by failing to record certain work-related accidents and illnesses. In the Secretary's enforcement capacity through the Occupational Safety and Health Administration ("OSHA") investigated, cited, and proposed penalties for the violations. The Secretary chose not to group the violations, rather cited and sought penalty for each violation. The Administrative Law Judge ("ALJ") treated the companies as if each had committed one willful violation and assessed a penalty of $70,000 for each company. The Secretary appealed the ALJ's penalty assessment to the Commission. The two commissioners who heard the appeal did not reach an agreement on the propriety of the ALJ's grouping decision. An official action of the commission requires an affirmative vote of two members. Since that did not occur, the commissioners vacated the direction for review and the case came to the Court of Appeals for the Fifth Circuit.

ANAYSIS: Initially, the court noted that even though the violations may stem from a single company policy, each failure to record may represent a separate and distinct violation. The court referenced the language of the act under §666(a) which states that penalties may be assessed not less than $5,000 and not more than $70,000 for each willful violation.

The court rejected the Respondent's argument that the Commission's authority to assess penalties allows grouping

because the act allows the Commission to give due consideration to the appropriateness of the penalty by considering factors such as size of business, gravity of the violation, good faith of the employer, and history of previous violations. The court stated that the due consideration is to be given to the amount of penalty for each violation but does not allow for manipulation of the number of violations so that the penalty fits his appropriateness determination.

The court noted that the Respondent's argument that the Commission is not bound to the Secretary's penalty proposals is correct, but the penalty proposal is the amount the Secretary is seeking, not the number of violations. Therefore, the Commission does not have the authority to change the number of violations.

HOLDING: The court vacated the ALJ's penalty assessment and remanded for proceedings not inconsistent with the opinion.

IMPACT: Although the Commission has discretion in determining the amount of penalty to be assessed, it does not have the discretion to group violations in order to meet that amount.

UNITED STATES COURT OF APPEALS – FIRST CIRCUIT

Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12 (1st Cir. 2006).

LAW: The hearing requirement in 33 U.S.C. §§ 1326(a), 1342(a) only requires an informal hearing.

FACTS: In 1998, Dominion Energy Brayton Point, LLC (Dominion), an electrical generating facility, applied for renewal of its National Pollution Discharge Elimination System ("NPDES") permit and thermal variance authorization. The Environmental Protection Agency ("EPA") issued a proposed final permit in October, 2003 which rejected the requested thermal variance. Dominion sought review before

the Environmental Appeals Board ("Board") asking for an evidentiary hearing. The Board accepted the petition for review, but declined to convene an evidentiary hearing. In August, 2004, Dominion notified the EPA of its intent to file a citizen's suit under the Clean Water Act ("CWA") to compel the Board to hold an evidentiary hearing. After receiving no reply, Dominion filed complaint in the United States District Court for the District of Massachusetts. The district court granted the EPA's motion to dismiss on jurisdictional grounds because the citizen suit was a direct challenge to the EPA's hearing rule and thus came under the exclusive jurisdiction of the circuit court under 33 U.S.C. §1369(1)(E). Dominion appealed.

ANALYSIS: The interpretation of "opportunity for a public hearing" has led to much confusion. In the past, the EPA followed the interpretation of "public hearing" that was established in *Seacoast Anti-Pollution League v. Costle*, which established a rebuttable presumption that in the context of adjudication, an organic statute that calls for a "public hearing" means that it must comply with the formal adjudication procedures in the APA. The EPA promulgated regulations that memorialized the use of formal hearings. This changed in 1984 when the Supreme Court held in *Chevron v. NRDC*, that when a court reviews an agency's construction of the statute, it must first ask whether Congress has directly spoken to the precise question and if not, then the agency's interpretation must be given deference if reasonable. The EPA then revised its interpretation to allow for informal hearings to satisfy the hearing requirement.

The court rejected Dominion's attempt to rely on the *Seacoast,* holding because as to the CWA's public hearing language, the *Chevron* doctrine trumps the potential application of stare decisis principles. The Court also discussed a precedent case, *Brand X,* which demands the pre-*Chevron* precedents be re-examined through a *Chevron* lens. The court in *Seacoast* based their interpretation of "public hearing" not on clear intent from Congress, rather it settled upon a "best reading" of the language. This makes the stare decisis effect yield to

contrary, but plausible, interpretations because of the *Chevron* Doctrine. Since Congress has not spoken directly to the precise question at issue, the Court must defer to the EPA's interpretation as long as it is reasonable. The Court also rejected Dominion's argument that refusing to follow *Seacoast* offends the "law of the circuit rule" because that rule is subject to exceptions. For instance, when a controlling authority undermines the decision, like the Supreme Court did with its holding in *Chevron.*

HOLDING: The Court affirmed the District Court's dismissal of Dominion's claim.

IMPACT: The authority provided in the *Chevron* Doctrine allows an agency to re-examine interpretations of statutory language when those interpretations were based on a "best reading" of the statute and not on express Congressional intent.

CALIFORNIA STATE COURT

Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board, 40 Cal. 4th 1 (2006).

LAW: Section 11430.70 (a) of the California APA prohibits all ex parte contacts in a unitary agency, prior to the rendering of a final decision, in all non-ratemaking proceedings.

FACTS: The Department of Alcoholic Beverage Control ("Department") filed accusations of violations of the terms of licenses against three licensees. The Department followed the two-stage adjudication process: (1) a department staff attorney acting as prosecutor and the licensee present their respective cases to an Administrative Law Judge ("ALJ"). The ALJ makes factual findings, prepares a proposed decision, and then submits it to the Department; (2) the submission is considered by the Department's Director, who can elect to adopt, modify or reject the proposal.

After the close of each hearing and before the final decision rendered, the prosecutor prepared a report of the hearing which included a recommended solution, and sent it to the Department's Chief Counsel, but not to any of the licensees. In each case, the Department rejected the ALJ's proposed decision to dismiss suspending the licenses and substituted its own decision to suspend the licenses. The licensees appealed the Department's decision to suspend liquor licenses to the Alcoholic Beverage Control Appeals Board ("Board").

ANALYSIS: The Court rejected the Department's argument that revised California APA §11430.70(a) ex parte contact limitations extend only to the trial stage and not the decision stage. The Court reasoned that a review of legislative history makes clear that §11430.70(a) was intended to apply more broadly to limit ex parte contacts in all non-ratemaking proceedings that employ an evidentiary hearing in the course of adjudication. Review of the official comments to the section further defined limits on contacts with agency heads and other decision makers in both trial and decision stages.

Additionally, the Court rejected the Department's argument that §11517 gives wide latitude to the Department to structure its adjudicative proceedings. The Court acknowledged that latitude, but stressed that it still must comply with the California APA and constitutional minimums. Nothing in §11517 authorizes procedures to run afoul of proscriptions spelled out elsewhere in the Government Code.

Finally, the court also rejected the Department's argument that the records contain no proof that the prosecutor's reports on the hearings were actually considered by the ultimate decision maker, because under the California APA, the mere submission of ex parte substantive comments is illegal.

HOLDING: The Court of Appeal's holding that the practice of having the agency prosecutor prepare a report of hearing, including a recommended outcome, and forwarding it to the Department's Chief Counsel while a final Department decision

was pending, violated the licensee's due process rights was affirmed.

IMPACT: Due to the California APA and due process violations, the agency's order was reversed. Real party interests who receive adverse decisions from unitary agencies may scrutinize that agency's adjudication process to find APA and due process violations in order to get decisions reversed.

Carter v. Cal. Dep't of Veterans Affairs, 38 Cal. 4th 914 (2006).

LAW: The Fair Employment and Housing Act (FEHA) [Gov. Code] Section 12940 (j) (l), includes sexual harassment committed by non-employees.

FACTS: A nurse brought suit against her employer, the California Department of Veteran's Affairs, because she was sexual harassed by a resident of the veteran's home where she worked. The complaint alleged that the employer had failed to take effective steps to stop the harassment. The trial court ruled that the employer could be held liable for third party sexual harassment under Gov. Code §12490 (j)(1) as amended, but the court of appeal reversed because it concluded that the code did not impose liability on an employer when its customers or clients sexually harassed its employees.

ANALYSIS: Since §12490 (j)(1) was amended subsequent to the sexual harassment, the court had to determine whether the amendment changed or clarified the previous language of the code. The Veterans Affairs ("VA") argued that the amendment to §12490 (j)(1), which now had language imposing liability for acts of non-employees, changed the statute and therefore could not be retroactively applied to this case.

The court reviewed legislative history which expressly stated the Legislature's intent to "clarify" §12490 (j)(1). The court recognized that a declaration to clarify existing law cannot be given an obvious unintended effect. The court also stated that

when an amendment to clarify is adopted soon after a controversy, it is logical to regard the amendment as an interpretation of the original act. Here, the amendment to §12490 (j)(1) was enacted soon after FEHA did not impose liability on an employer for a passenger's conduct in *Salazar v. Diversified Paratransit, Inc.* Because of the timing of the amendment and the stated intent to clarify existing law by the legislature, the court rejected the VA's argument. Additionally, since the amendment clarified and did not change the act, the court did not have to address whether retroactive application would be appropriate and whether that would implicate due process concerns.

HOLDING: The Court of Appeal's holding that the FEHA did not impose liability on an employer when its customers or clients sexually harassed its employees was reversed.

IMPACT: Since the statute in this case had clarified existing law and did not change law, the court did not address the issue of retroactivity and possible due process concerns. This leaves the door for that issue open for future cases.

PENNSYLVANIA STATE COURT

Harkness v. Unemployment Comp. Bd. of Review, 591 Pa. 543 (2007).

LAW: An employer may be represented at an unemployment compensation hearing before the Unemployment Compensation Board referee by an individual who is not an attorney.

FACTS: After a lewd, verbal confrontation with a customer, a Macy's Department Store ("Macy's") employee ("claimant") was subsequently terminated because of her remarks to the customer. The claimant filed for unemployment compensation benefits and was denied. Employee appealed and a hearing was held and was attended by the claimant, her counsel, and a representative for Macy's who was not an attorney. The

claimant objected to Macy's being represented by a non-attorney, but the objection was overruled.

The decision from the hearing was that claimant had violated Macy's customer service policy and this rose to willful misconduct and therefore benefits were properly denied. Claimant appealed this decision to the Unemployment Compensation Board of Review ("Board"), who also concluded that benefits were properly denied and that the referee did not err in allowing the employer to be represented by a non-attorney. Claimant thereafter appealed to the Commonwealth Court which concluded it was an error for the referee to allow non-attorney representation because it was unauthorized practice of law and the Board's order was vacated. Macy's and the Board both filed petitions for allowance of appeal from this decision.

ANALYSIS: The court rejected the lower court's conclusion that the non-lawyer representative was practicing law. It reasoned that the activities performed by an employer representative are largely routine and primarily focus on creating a factual basis for the referee's decision. Additionally, the court recognized that providers of services such as payroll, tax, and benefits often attend these proceedings to provide documents and records to aid referee in decisions. These types of individuals are more akin to facilitators and do not engage in legal analysis. Also, these proceedings are informal in nature and are meant to be efficient. Requiring employers to be represented by counsel would undermine the informal, speedy, and low cost nature of the proceedings. Based upon these considerations, the non-attorney representing an employer before a referee was not practicing law.

The court had to next determine whether unemployment compensation law permits non-lawyer representation of the employer. The court rejected the lower court's reliance on §702, which applies to limitation of fees and only allows for the claimant to be represented by a lawyer. Instead, the court referenced §502 which addresses decisions of a referee and the

appeals process. Specifically, the section's language references "parties" and their attorneys or "other representatives of record." The statute's language does not differentiate between claimant and employer; rather it refers to all parties. Additionally, the language also refers to other representatives at the referee's hearing. Therefore, non-lawyers can be representatives of employers in hearings.

HOLDING: The order of the Commonwealth Court that the non-attorney was practicing law, which allowed for the Board's decision to be vacated, was reversed and remanded for proceedings consistent with the opinion.

IMPACT: Non-lawyers may represent an employer in unemployment compensation hearings. This holding supports the informal, low cost, and efficient intent of unemployment proceedings by allowing for employers to utilize non-lawyers to convey facts on behalf of the employer necessary for the decision.

IOWA STATE COURT

Doe v. Iowa Bd. of Med. Exam'rs, 733 N.W. 2d 705 (2007).

LAW: Iowa Code §272C.6(4) permits disclosure of complaints pending investigation to other states' medical licensing authorities.

FACTS: A doctor ("Doe") licensed by the Iowa Board of Medical Examiners ("Board") applied for a license to practice medicine in Massachusetts prior to relocating to the state. The Massachusetts Board of Registration in Medicine ("Massachusetts Board") denied application based on three complaints pending investigation that the Board had disclosed to the Massachusetts Board upon request.

Doe filed a complaint with the Iowa State Appeal Board alleging the Board unlawfully disclosed confidential information. The State Appeal Board denied Doe's claim. Doe then filed a petition for judicial review alleging his

substantial rights had been prejudiced by the disclosure of confidential information. After the hearing, the district court affirmed the State Appeal Board's denial of Doe's claim concluding that §272C.6(4) permits the disclosure of complaints pending investigation to other states' medical licensing authorities. Doe appealed this decision.

ANALYSIS: The court first determined the standard of review of the Board's interpretation of §272C.6(4) was for correction or errors and not the more deferential standard because the legislature did not give the Board discretion to determine what information is, and is not, confidential. To determine legislative intent of §272C.6(4), the court analyzed the history of the section, starting with when first enacted and then subsequent amendments.

An amendment made in 1982 included a disclosure exception that authorized the release of investigative information, which "relates to licensee discipline", to other states' licensing authorities. The court rejected Doe's argument that the exception only allowed disclosure to other states' licensing authorities after formal disciplinary proceedings had been initiated. The court discussed that the phrase "relates to licensee discipline" is used twice in the section; first to describe the information that must be kept confidential, and second to describe the information that may be disclosed to other states' licensing boards. The court concluded that since §272C.6(4) was intended to ensure broad confidentiality of all complaint and investigative information pertaining to licensee discipline, by using this same language to describe information to be disclosed, the legislature also intended to ensure broad disclosure to these boards. Since a complaint is the first step in imposing licensee discipline, it clearly "relates to licensee discipline."

HOLDING: The district court's ruling that §272C.6(4) permits disclosure of complaints pending investigation to other states' medical licensing authorities was affirmed.

IMPACT: All confidential information in complaint files and investigative data relate to licensee discipline and therefore may be disclosed to other states' licensing authorities.

IDAHO STATE COURT

Ater v. Idaho Bureau of Occupational Licenses, 160 P.3d 438 (2007).

LAW: An agency cannot reject fact findings of a hearing officer, and rely on unexplained agency knowledge and experience, when the fact findings are supported by substantial evidence.

FACTS: The Board of Professional Counselors and Marriage and Family Therapists ("Board"), a licensing board within the Idaho Bureau of Occupational Licenses, filed a complaint against a therapist after an altercation with a patient. The Board alleged that the therapist had violated certain provisions of the American Counseling Association Code of Ethics ("ACA Code"). After an evidentiary hearing was conducted, the officer issued factual findings, legal conclusions, and a recommendation which concluded that the therapists had not violated the ACA Code.

The Board adopted the officer's factual findings and legal conclusions, except for the conclusion that there were no violations of the ACA Code. The Board based this rejection upon its members' specialized knowledge and experience. The Board suspended the therapist's license for one year, but provided for suspension to be stayed if the therapist agreed to practice under the supervision of a Board-approved counselor, pay a fine, costs, and attorney fees. The therapist appealed the Board's decision.

The District Court set aside the Board's order concluding that the Board had violated the therapist's due process rights because 1) the Board didn't use its specialized knowledge and experience to evaluate the evidence, but instead substituted

that knowledge for the evidence presented; 2) it failed to articulate the standard the therapist violated; and 3) the record did not disclose the knowledge and experience upon which the Board based its decision. The District Court also found that the Board acted arbitrarily and capriciously because it disregarded evidence presented and failed to articulate standards. Attorney fees were awarded to the therapist. The Board appealed this decision.

ANALYSIS: The court stated that it would overturn an agency's disciplinary decision on appeal only when it violates a substantial right of the party and where its decision 1) violates statutory or constitutional provisions; 2) exceeds agency authority; 3) are made upon unlawful procedure; 4) are not supported by substantial evidence in the record; or 5) are arbitrary, capricious, or an abuse of discretion. Also, when a hearing officer's recommendations are not accepted, the court will review with greater scrutiny. Here, the Board went against the hearing officer's determination of credibility in favor of the therapist, and instead determined that its witness was more credible than the testimony of the therapist.

The hearing officer made a factual finding that the therapist's method for handling the patient was credible, was in the best interest of the patient, and therefore was not a violation of the ACA Code. This factual finding was ignored by the Board, and instead reached an opposite conclusion relying on its own knowledge and experience. No where in the record does the Board explain its knowledge and experience that would compel a change from the hearing officer's determination.
Because the holder of a professional license has valuable property right, the Board infringed upon the therapist's substantial right to practice and therefore setting aside the Board's order was proper.

HOLDING: District Court's holding to set aside the Board's action in whole and award attorney fees was affirmed.

IMPACT: When a hearing officer's fact findings are rejected, the reviewing court uses strict scrutiny and requires articulated reasons and standards for the rejection.