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## PRIVACY IN THE WORKPLACE

A Management-side Labor Attorney's Perspective  
On Employer's Workplace Theft Investigations.

Mark G. Flaherty <sup>1/</sup>

### I. Introduction to Employer's Investigations Of Employee Theft and Related Litigation

The technology and effectiveness of employer's efforts to minimize employee theft has improved dramatically over the past ten years. Ironically, employee theft has skyrocketed over this same period; it is estimated, by the National Business Crime Information Network to exceed 200 Billion for calendar year 1987. Employers' efforts to reduce this staggering number include significantly improved efforts at loss prevention; i.e., improved lighting, fencing, alarms, procedures audits, etc., all of which are aimed at preventing, or at least discouraging, employee theft.

Employers' efforts to identify and discipline their employees who engage in employee theft remains, however, a significant aspect of most employers' loss prevention efforts. More and more often, employers are utilizing trained loss prevention professionals to plan and direct these efforts.

These professionals routinely use an investigative format that involves first, the use of trained "undercover" employee(s) who, while posing as regular employee(s) for generally at least six months, attempt to observe, and even befriend, those employees engaged in theft, or the use of unlawful drugs. Second, the loss prevention professionals dissect the "undercover's" notes and reports, organizing the notes by suspected employee. Third, additional information such as criminal records, information from previous employers, work history, and comments made by other employees about the suspect are added to

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<sup>1/</sup> Of Husch, Eppenberger, Donohue, Cornfeld & Jenkins, Esqs., 500 City Center Square, 12th & Baltimore, Kansas City, Missouri 4105. This article first appeared in Privacy in the Workplace, materials presented by the Section of Litigation of the American Bar association to the Annual Meeting held on August 9, 1988. It is reprinted here by permission.

the undercover's observations. Next, a team of trained interviewers, adequate to interview all suspected employees in a single day, is assembled in a facility away from the suspected employees' regular place of work. The suspected employees, generally being told they will be attending a loss prevention meeting, are then assembled and transported en masse to the waiting interviewers.

The interviewers are generally assigned one suspected employee at a time, whom they take to an individual office. The suspected employee then learns, for the first time, the true purpose of the meeting. When confronted with the undercover's specific information, the overwhelming majority of the suspects confess their wrongdoing. Sworn written statements confirming their own wrongdoing and that of other employees is then obtained. The employee is then requested to confirm the extent of his or her theft by taking a polygraph examination. The employees implicated by the original suspects are then assembled and interviewed until no new implications are obtained. Often, after admitting their wrongdoing, the employees are directed to return, or permit the investigators to recover, the stolen property still in their possession. This investigative format has been fully described by one of its pioneers, J. Kirk Barefoot, in two of his books on the subject, Employee Theft Investigations, Security World Publishing Co., Inc., 1979 and Undercover Investigations, Butterworth Publishers, 1983.

Finally, all employees who admitted wrongdoing are terminated and their written admissions are often turned over to local law enforcement authorities. Additionally, planned press releases are frequently made at this point to minimize the risk of libel and slander claims arising out of a careless statement by a company official.

This investigative format is highly effective in identifying and eliminating employees who steal from their employer, but it has also spawned a large volume of litigation around the United States. This paper will outline the course that this privacy in the workplace litigation has followed, from the perspective of one of the management side attorneys who has been defending some of that litigation and, necessarily, employers' rights to conduct such investigations. My comments emphasize the legal developments from those investigations where some or all of the employees were represented by a labor organization and were working under the terms of a collective bargaining agreement between that labor organization and their employer. I place this emphasis since most of this litigation has arisen out of this setting.

## II. The First Half -- Immediate Post- Investigation Claims and Charges

Due to the time limits that accompany most collective bargaining agreement grievance procedures, employee responses to their treatment and terminations commence immediately. The employer considering a large-scale investigation should plan this post-investigation phase as carefully as the investigation stage since significant strategic and tactical advantage can be won or lost here.

The early battles come in three arenas: 1) union grievances; 2) unemployment compensation claims; and 3) unfair labor practice charges. Although all of these types of claims are routinely and effectively handled by the employer's nonlegal staff, that routine handling is generally inadequate in this setting. This is caused primarily because of the use of outside professionals to conduct both the undercover and interview phases of the investigation. Accordingly, few, if any, of the employer's staff who routinely handle these claims have any knowledge of the events, the evidence obtained, or the location of the interviewers.

Further, I offer the following observations concerning each type of claim. First, the hearings on the unemployment claims are dangerous. Most state unemployment commissions are, and should be, predisposed to grant benefits. However, due to the collateral effect of facts found by unemployment commissions in virtually all states, these hearings must, to the extent possible, be handled as if they are trials on the merits of punitive damage claims.

Second, with respect to union grievances, it is my universal experience that labor organizations are as interested as employers in eliminating thieves from the workplace. Accordingly, I recommend informing the employees' union officials of the undercover investigation and planned interviews early during the undercover phase of the investigation. The union is then able to focus its attention on the representation of individual employee suspects, instead of puzzling over the employer's tactics in obtaining a mass of highly incriminating evidence. This early union involvement also facilitates the prompt resolution of most of the inevitable grievances that are filed over the terminations.

The third kind of claims that are frequently filed are unfair labor practice charges with the N.L.R.B. Since the employers' right to investigate theft and the method thereof is always a subject of collective bargaining, and thus a basis for grievances, not unfair labor practice charges, the N.L.R.B. charges that are filed fall into only two categories: 1) employer violations of Section 8(a)(1) for alleged interference with an employee's right to union representation during the interviews (Weingarten); or 2) union violations of

Section 8(b) for failure to adequately represent the employees during the interviews. With respect to these alleged violations, I make two observations; first, both can be relatively easily avoided or won by inviting the union's early involvement, as described above; and second, any Weingarten charges can be resolved on a non-admission basis with the mere posting of a N.L.R.B. notice.

Employer victories in union grievances, unemployment claims, and unfair labor practice charges are critical to the next phase, full-blown litigation.

### III. The Second Half -- I'll See You At The Courthouse

The causes of action pled by plaintiffs' attorneys are myriad. They include: breach of contract, wrongful discharge, breach of an implied covenant of good faith and fair dealing, defamation, false light portrayal, invasion of privacy, tortuous interference with contract, fraudulent misrepresentation, conversion, intentional infliction of mental and emotional distress, violations of Section 301 of the Labor Management and Relations Act, and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO).

Since virtually all of these claims may be, and are, brought in both state and federal courts by individual employees and groups of employees, the first problem to reckon with is consolidating related cases before a single judge, if at all possible. Removal to federal court in these matters is always possible, if done in a timely manner, since any cause of action, no matter how pled, arising out of an employee's (who worked under a collective bargaining agreement) termination, states a federal claim. <sup>2/</sup> If the cases are not consolidated before a single judge, or at least a single federal court, discovery is a nightmare. Deposition discovery of all plaintiffs should begin, seriatim, as soon after the case is filed as possible.

As stated above, the employee terminated after an employer's theft investigation has a multitude of potential claims. The defense of these lawsuits raises several important questions. Is an employer liable for RICO violations where it conducts a company investigation of employee wrongdoing? Can an employer require an employee suspected of wrongdoing to submit to a polygraph examination? Under what circumstances can an employee's conduct outside the workplace influence employee discipline?

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<sup>2/</sup> Brooks v. Solomon Company, 542 F. Supp. 1229 (N.D. Ala. 1982).

Perhaps the most important tool in defending these suits is the doctrine of federal labor preemption. The long established doctrine of preemption was announced by the Supreme Court in its Garmon decision.<sup>3/</sup> In Garmon, the court held that where it is clear, or may be assumed, that the activities which the state purports to regulate (by statute or common law action) are protected by Section 7 of the National Labor Relations Act or constitute an unfair labor practice under Section 8 of the NLRA, the state jurisdiction must yield to that of the National Labor Relations Board. This aspect of federal labor preemption is premised on Congress's desire to avoid conflicting rules of substantive law and remedy, thereby insuring a consistent national labor policy.<sup>4/</sup> Under Garmon, states may only regulate labor-related disputes where the conduct sought to be regulated is of only "peripheral concern" of federal labor laws or where the conduct touches "interests so deeply rooted in local feeling and responsibility" that it would be unreasonable to infer, in the absence of compelling congressional direction,<sup>5/</sup> that Congress had deprived the state of the power to act.

Only limited exceptions to the Garmon preemption doctrine have been recognized. In Farmer v. United Brotherhood of Carpenters,<sup>6/</sup> the Supreme Court held that the plaintiff's state law claim against the union for intentional infliction of mental and emotional distress was not preempted. At the same time, the court emphasized the limited application of this exception. The court noted that to void preemption it was "essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself".<sup>7/</sup> Further, the court noted that the employees' claims were brought not against the employer, but against the union

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3/ San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 Ct. 773, 3 L.Ed.2d 775 (1959).

4/ Id., 359 U.S. at 242.

5/ Id. at 243-244.

6/ 430 U.S. 290, 97 S. Ct. 1056, 51 L.Ed.2d 338 (1977).

7/ Id., 430 U.S. at 304.

and the focus of the NLRA, the court reasoned, was on the relationship between the employee and the employer. <sup>8/</sup>

The Farmer exception is a very limited one, and it has been held that Farmer does not create a per se exception to federal preemption in all cases involving claims for intentional infliction of mental and emotional distress. The 9th and 10th Circuits have held that claims for intentional infliction of mental and emotional distress will routinely be held not to fall within the Farmer exception where the claims are, in essence, wrongful discharge claims based upon facts that are intertwined with the grievance machinery of the collective bargaining agreement. <sup>9/</sup>

The principles announced in Garmon have been reaffirmed by the Supreme Court in two recent decisions. In Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc., <sup>10/</sup> a state statute which provided remedies for conduct prohibited by the NLRA, was held preempted by federal labor law because "a conflict is imminent whenever "two remedies are brought to bear on the same activity". <sup>11/</sup> The Wisconsin statute prohibited state employees from contracting for state contracts with companies who had violated the NLRA three times within a five-year period. The opposite result was reached in Baker v. General Motors Corporation, <sup>12/</sup> where the court held that a Michigan statute which denied unemployment compensation to employees who had financed the labor dispute that resulted in their unemployment by means other than payment of their regular union dues, was not preempted. The court reasoned that the Social Security Act had intended that the states have freedom to design their own worker's compensation scheme and, therefore, that Congress had intended to tolerate the conflict between the NLRA and state worker's compensation laws.

While Garmon preemption focuses on potential conflicts between state and federal labor law, the equally strong preemption

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<sup>8/</sup> See, United Steelworkers v. Warrior and Gulf Navigation Company, 63 U.S. 574, 80 S. Ct. 1347, 4 L.Ed.2d 1409 (1960).

<sup>9/</sup> Viestenz v. Fleming Companies, Inc., 681 F.2d 699 (10th Cir. 1982); Magnuson v. Burlington Northern, Inc., 577 F.2d 1367 (9th Cir. 1978).

<sup>10/</sup> 475 U.S. 282, 106 S. Ct. 1057, 89 L.Ed.2d 223 (1986).

<sup>11/</sup> Id., 106 S. Ct. at 1061.

<sup>12/</sup> \_\_\_\_ U.S. \_\_\_\_, 106 S. Ct. 3129, 92 L.Ed.2d 504 (1986).

rulings on the supremacy of arbitration have recently been reaffirmed by the Supreme Court in Allis-Chalmers Corporation v. Lueck, <sup>13/</sup> Under Allis-Chalmers preemption, an employee plaintiff simply cannot substitute state law remedies for his remedies under a collective bargaining agreement. Allis-Chalmers held that courts (state or federal) have no jurisdiction over state law claims brought by an employee against his employer which are related to the terms of a collective bargaining agreement. The court held that "when resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a Section 301 claim, . . . or dismissed as preempted by federal labor-contract law". <sup>14/</sup>

The Chalmers preemption principles have been applied specifically in the context of disputes arising out of an employer's investigation of suspected employee wrongdoing. The 5th Circuit in Strachan v. Union Oil Company, <sup>15/</sup> held that "employees may not resort to state tort or contract claims in substitution for their rights under the grievance procedure in a collective bargaining agreement". <sup>16/</sup> In Strachan, two employees claimed their employer had committed state law torts in connection with its investigation. The employees had been required to undergo medical examinations, searches of their persons, lockers and automobiles. Because the employees were subject to the terms of a collective bargaining agreement, the court held their sole remedy was under the terms of that agreement. The Tenth Circuit's holding in Viestenz v. Fleming <sup>17/</sup> fully discusses the same investigative format described above and clearly holds all state law claims related thereto to be preempted.

Allis-Chalmers has also been held to require preemption of state law invasion of privacy claims. In Kirby v. Allegheny Beverage Corporation, <sup>18/</sup> the employee was suspected of drug use by his employer. The employee was required to undergo a body search and a search of his automobile. While he voluntarily submitted to the search of his

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<sup>13/</sup> \_\_\_\_ U.S. \_\_\_\_, 105 S. Ct. 1904, 85 L.Ed.2d 206 (1985).

<sup>14/</sup> Id., 105 S. Ct. at 1916.

<sup>15/</sup> 768 F.2d 703 (5th Cir. 1985).

<sup>16/</sup> Id. at 704.

<sup>17/</sup> Viestenz, supra, nt. 8.

<sup>18/</sup> 811 F.2d 253 (4th Cir. 1987).



person, he would not consent to a search of his automobile and was discharged. The court held that the employee's claims required reference to the collective bargaining agreement to determine whether the body search was reasonable under the terms of the agreement. Having made this determination, the court held that plaintiff's state law claims were preempted.

Where the employee is a member of the bargaining unit, the preemption defense under Garmon, prohibits the dissatisfied employee from bringing state law claims where the activities which the state law purports to regulate are protected by Section 7 of the NLRA, constitute an unfair labor practice under Section 8 of the NLRA, or where Congress intended the activities to be unregulated by the states. State law claims are also subject to preemption under Allis-Chalmers where resolution of the state law claim is "substantially dependent" upon an interpretation of a collective bargaining agreement.

With this excellent arsenal of legal defenses, it is relatively easy to eliminate all state law torts from these cases, leaving only Section 301 claims. Summary judgment on those claims is also relatively easy to obtain if the union has fulfilled its duty of fair representation at all during the grievance process.

#### IV. RICO and Labor and Employment Law

Although arguably preempted as well, employers who conduct company investigations may still face allegations of "racketeering". Civil claims under the Racketeer Influenced and Corrupt Organizations Act <sup>19/</sup> (RICO) have become commonplace in the employment setting. The provision most commonly used is Section 1962(c) which provides that no person employed by or associated with an enterprise may conduct or participate in the enterprise's affairs through a pattern of racketeering.

The threshold question is whether the employer has engaged in a "pattern of racketeering activity". <sup>20/</sup> To meet this showing, the plaintiff must allege "at least two" <sup>21/</sup> predicate acts which relate to each other as part of a common plan. <sup>21/</sup> The Supreme Court has held that to establish a RICO pattern, the plaintiff must demonstrate

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<sup>19/</sup> 18 U.S.C. Sections 161-168 (1984).

<sup>20/</sup> 18 U.S.C. Section 1962(a)-(d).

<sup>21/</sup> 18 U.S.C. Section 1961.

"continuity", that is, the threat of ongoing illegal conduct. <sup>22/</sup> The lower courts have concluded that a scheme to achieve a single objective does not suffice to show "continuity" even where the objective is pursued by multiple alleged illegal acts. <sup>23/</sup> Thus, where a company conducts an investigation with one objective in mind -- to combat employee theft or illegal drug and alcohol use on company premises -- the RICO "continuity" requirement has no been met and the claim must fail.

RICO claims by bargaining unit employees are also subject to attack on grounds of preemption. The Supreme Court's recent decision in Shearson/American Express, Inc. v. McMahon, <sup>24/</sup> invites the argument that where employees are covered by a collective bargaining agreement that has a mandatory and binding arbitration clause, as almost all do, the employee must arbitrate his claim rather than litigating it. In a unanimous decision, the court held that: (1) RICO claims were not too complex for arbitration; (2) the alleged "overlap" between RICO's civil and criminal provisions did not render such claims nonarbitrable; and (3) the public interest in the enforcement of the RICO Act does not preclude arbitration.

In Shearson, the arbitration provision appeared in a customer agreement and was enforceable under the Federal Arbitration Act. <sup>25/</sup> Admittedly, the RICO claim in Shearson, was not brought in a labor law context, but courts have uniformly held that the Federal Arbitration Act is applicable to collective bargaining agreements. <sup>26/</sup> While not yet addressed by the Supreme Court, seemingly, the presumption of

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<sup>22/</sup> Sedima, S.P.R.L. v. Imrex Company, 473 U.S. 479, 105 S. Ct. 3275, 87 L.Ed.2d 346 (1985).

<sup>23/</sup> Torwest DBC, Inc. v. Dick, 810 F.2d 925 (10th Cir. 1987); Garbade v. Great Divide Mining and Milling Corporation, 831 F.2d 579 (10th Cir. 1987); Condict v. Condict, 815 F.2d 579 (10th Cir. 1987).

<sup>24/</sup> \_\_\_\_ U.S. \_\_\_\_, 58 L.W. 4757 (June 8, 1987).

<sup>25/</sup> 9 U.S.C. Section 1, et seq.

<sup>26/</sup> Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972); Signal-Stat Corporation v. Local 475, United Electrical Radio and Machine Workers, 235 F.2d 298 (2d Cir. 1956), cert. denied, 54 U.S. 911, rehearing denied 355 U.S. 852 (1957); Dickstein v. Dupont, 443 F.2d 783 (1st Cir. 1971); Tenney Engineering, Inc. v. Union Electrical Radio and Machine Workers, Local 437, 207 F.2d 450 (3d Cir. 1953).

arbitrability in the labor context, would require the same result as that in Shearson and require that RICO claims be subject to arbitration.

I also note that any causes of action related to mental or physical injury in the investigative process are almost always preempted by state workmen's compensation laws.

V. A Brief Glimpse at State  
and Federal Polygraph Law

With the appearance of RICO in the labor setting and the broadening of the preemption doctrine under Allis-Chalmers, labor and employment litigation is increasingly becoming the exclusive province of the federal courts. A proposed federal law regulating the use of polygraph examinations may further expand federal jurisdiction over certain employment and labor disputes. In November, 1987, the House passed a bill banning<sup>27/</sup> the use of polygraph examinations by most private employers. In March, 1988, the Senate passed its own version of the polygraph bill which would prevent most private employers from<sup>28/</sup> using polygraph examinations to screen job applicants. On May 17, 1988, a Joint House and Senate Conference reached compromise on a bill which would prohibit the use of polygraph tests for pre-employment screening.

The House Bill (HR 1212), would have prohibited most private employers from administering polygraph examinations for any purpose. The bill specifically exempted private security firms and drug companies from this ban under certain circumstances. The exception for drug companies would have permitted testing of employees who had access to controlled substances. Employers whose primary business is providing security services, would have been allowed to administer polygraph examinations to security guards who dealt with the shipment or storage of radioactive or toxic waste, currency, negotiable securities, precious commodities, or proprietary information. The exception for private security firms also would have allowed the testing of guards whose jobs had a significant impact on health, safety or national security. Further, the House bill exempted federal, state and local government employers from the ban.

The Senate version (S 1904), commonly known as the Polygraph Protection Act of 1988, differed significantly from the House bill.

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<sup>27/</sup> H.R. 1212.

<sup>28/</sup> S. 1904.

While the Senate version of the Act would have prohibited most private employers from using polygraph examinations for pre-employment screening, it did permit employers to administer polygraph examinations to employees during an "ongoing investigation" of theft or any other incident causing "economic loss or injury" to the employer, so long as the employer had "reasonable suspicion" that the employee was involved in the incident. Exceptions for some private industries were also provided in the Senate version. The bill would have exempted private security firms, nuclear power plants and private consultants under contract to a federal agency. Like the House bill, federal, state and local government employers would have also been exempt. The Senate version, however, also exempted the Department of Defense, the Department of Energy, the National Security Agency, the CIA and the FBI. These agencies would have been allowed to test private contractors, experts and consultants working for the agency.

The compromise version is most similar to the Senate bill. It retains the Senate provision allowing employers to test employees who are reasonably suspected of being involved in theft or other activities causing economic injury to the employer. Most of the compromise between the House and Senate versions concerns which private industries will be exempted. (The compromise retains the exemption for federal, state and local governments and a national security exemption.) Private drug companies continue to be exempt as provided in the House bill and the exemption for private security firms is retained. However, the Senate bill's exemption for nuclear power plants is eliminated. Each of the employers qualifying under one of the above exemptions is subject to certain limitations on polygraph testing. The person tested must be provided with the questions in advance, must be allowed to terminate the examination at any time and must be advised of his legal rights and remedies before testing. Further, questions related to the employee's race, religion, political beliefs, sexual behavior or beliefs regarding labor organizations may not be asked. This paper being submitted on June 1, 1988, but will not be presented until August 8, 1988, by which time the author predicts that a bill close to the Senate version will become law.

While it appears that both the Senate and House bills will preempt yet another area of state law, the Senate bill specifically provides that the bill would not preempt any collective bargaining agreement or any state law that is more restrictive than the provisions of the federal law. State law, then, will continue to govern in some situations. Several states have wholly outlawed the use of polygraph

examinations in the employment context, while others prohibit the use of polygraph examinations as a condition of employment. <sup>29/</sup>

In those states where no such ban exists, the new law would clearly restrict an employer's ability to administer polygraph examinations to its employees. Typically, lawsuits arising out of the employer's requirement that an employee submit to a polygraph examination, include claims for invasion of privacy, intentional infliction of mental and emotional distress and wrongful discharge based upon admissions obtained through the polygraph examination. Currently, state law gives the employer great latitude in administering polygraph examinations during an ongoing company investigation. The enforcement provisions of the Polygraph Protection Act, which include injunctive and penalty (\$10,000.00 per violation) actions by the Secretary of Labor, plus private actions for legal and equitable relief promise mountains of new litigation.

In Food Fair, Inc. v. Anderson, <sup>30/</sup> a Florida case which is being followed throughout the country, an employee sued his employer for intentional infliction of mental and emotional distress. Anderson, a nonunion cashier of defendant, was requested by Food Fair's security officer to report to a motel room in order to take a polygraph examination in connection with a theft investigation. Once there, the security officer told her that company policy dictated that she take a polygraph examination or that she would be discharged. She signed a form consenting to the polygraph examination. The security officer advised her that company policy dictated that she admit to prior thefts and if she refused to do so, she would be terminated as untrustworthy. The security officer assured her that a confession of prior thefts would not be used against her. He suggested to her that other employees who had engaged in company thefts had been retained by signing statements admitting the theft and making restitution to the store.

Following this explanation, Anderson, while tearfully claiming her innocence, signed a statement, dictated by the security officer, admitting theft of \$150.00. A polygraph test was administered by the security officer. The security officer told Anderson, "it didn't clear". Anderson then requested a second polygraph test and was advised to return the following day. The next day, Anderson met

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<sup>29/</sup> Delaware, Connecticut, District of Columbia, Alaska, Iowa, Hawaii, Massachusetts, Maryland, Michigan, Minnesota, Montana, New York, Oregon, Rhode Island, Utah, Vermont and Washington.

<sup>30/</sup> 382 So.2d 150 (Fla. App. 1980).

again with the security officer. He told her she would have to admit to an amount greater than \$150.00 and dictated a new statement using the figure \$500.00. After signing the second statement admitting thefts of \$500.00, Anderson submitted to a second polygraph examination. The security officer told Anderson she still "didn't clear". Anderson was then advised that she was suspended pending the outcome of the investigation. She was later terminated based upon her admissions of misappropriation of company cash. The Food Fair court concluded, as a matter of law, that the security guard's actions were not sufficiently outrageous to support Anderson's claim for outrage.

Even where a state statute limits or prohibits the use of polygraph examinations, courts have been hesitant to award excessive damages. In Freeman v. Q. Petroleum Corp., <sup>31</sup> the plaintiff, a former employee of defendant, sued for violations of Minnesota's statute prohibiting polygraph examinations as a pre-condition of employment. The employee alleged, after having been discharged, that he had been coerced into taking a polygraph examination. The court held that the statute provided for non-penalty type liability and allowed recovery only by persons actually injured by a violation and then, the employee could recover only provable damages.

The threshold inquiry in nearly all cases alleging claims arising from polygraph testing is whether the employer's conduct is reasonable. Even where such conduct is prohibited by statute, the plaintiff must make some showing of unreasonable behavior to justify an award of damages for a violation. To this extent, the compromise version of the Polygraph Protection Act is similar to most state law in that it allows testing of employees during an investigation so long as the employer has "reasonable suspicion" that the employee was involved in the conduct giving rise to the investigation.

In the context of company investigations of employee misconduct, conduct outside the workplace normally plays a role in discipline or discharge only where that conduct influences job performance. In any of the investigation cases, some employees were suspected of using drugs and alcohol before work or during their breaks. Other employees were implicated in theft schemes that involved sales of stolen merchandise to local flea markets which resold the merchandise. Some employees were questioned during their interviews concerning sexual relations with other employees. Many of the employees who were accused of these activities during their interviews, later brought claims for defamation, invasion of privacy, false light portrayal and intentional infliction of mental and emotional distress. As discussed

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<sup>31</sup>/ 676 F.2d 503 (11th Cir. 1982).

above, for all employees working under collective bargaining agreements, the federal courts have been routinely holding all of these claims preempted by the federal labor laws, with the employees' sole remedy being under the collectively bargained grievance process.

Resolution of these claims involves balancing the employee's privacy rights against the employer's legitimate business concerns. Where the employer can show an obvious connection between the off-duty behavior and the employee's job performance, the employer's actions are usually protected so long as his conduct is reasonable. For example, an arbitrator upheld the discharge of two truck drivers who, while intoxicated, assaulted two other drivers from the same company during a layover. The arbitrator found good cause for the discharge because the incident interrupted the company's delivery schedule.<sup>32/</sup> Similarly, where a resort hotel fired a bellhop after he pled guilty to selling a stolen handgun to an undercover agent, the arbitrator concluded that the employee had been fired with just cause because the employer had a legitimate concern over potential liability for property damage or injury to its guests.<sup>33/</sup>

Absent this link between the off-duty conduct and job performance, the employer takes significant risk in disciplining or discharging an employee for off-the-job conduct. The Weyerhaeuser Company discharged an employee after he admitted smoking marijuana away from company premises. Unable to show that the employee's work would be impaired by this off-duty conduct, the employee was reinstated through the grievance arbitration procedure.<sup>34/</sup> An arbitrator revoked the suspension of two IRS agents who had been suspended after "mooning" a group of women in a parking garage. The arbitrator noted that the employer may not "exaggerate unduly what the public may think of incidents having no bearing on their job".<sup>35/</sup>

The employer can protect itself by forbidding particular conduct in company policies or work rules. But where company rules do not prohibit the off-duty activity or where the fact finder determines that the plaintiff has not violated the company policy or rule, employees have prevailed on their claims. The most newsworthy case is that of Virginia Rulon-Miller, an IBM sales manager, who was demoted

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32/ Lucky Stores, Inc., 83 L.A. 760 (1984).

33/ Hilton Hawaiian Village, 76 L.A. 347 (1981).

34/ Weyerhaeuser Company, 86 L.A. 182 (1985).

35/ United States Internal Revenue Service, 77 L.A. 19 (1981).

for dating an employee of a competitive company. <sup>36/</sup> IBM had a written policy governing conflicts of interest upon which the plaintiff's demotion was based. Plaintiff sued IBM for intentional infliction of mental and emotional distress and wrongful discharge. The court concluded that plaintiff did not violate the conflict of interest policy by dating the competitor's employee. The court recognized that plaintiff had a constitutional right of privacy under California law and that where the prohibited off-duty conduct does not impact on the employer's legitimate business concerns, an employee cannot be discharged or disciplined for that conduct.

If the conduct away from the workplace can be shown to influence job performance, or where the off-duty conduct is specifically prohibited by company policy or work rules, the employer can discharge or discipline on the basis of that conduct without the fear of claims by dissatisfied employees.

#### VI. The Federal Labor Preemption Fortress Remains Strong

In conclusion, the legal protections for those employers willing to fight the dramatically increasing problem of workplace theft, particularly among unionized employees, remain virtually insurmountable. This bastion must not be breached if the menace of workplace theft is to be controlled. The Polygraph Protection Act leaves employers with one of their strongest weapons in the fight against workplace theft, the use of polygraph testing in employee theft investigations.

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<sup>36/</sup> Rulon-Miller v. IBM, 1 IER Cases 405 (1984).



## ABOUT NAALJ

For those who have recently joined NAALJ, or who may be thinking of joining, we include this brief description of our association.

The National Association of Administrative Law Judges, formerly known as the National Association of Administrative Hearing Officers (NAAHO), is a non-profit, professional organization dedicated to the improvement of the administrative hearing process. It is comprised of state, federal, county and municipal administrative law judges, hearing officers, referees, trial examiners and commissioners, and members of higher appellate authorities, exercising a wide variety of subject matter jurisdiction.

NAALJ was established in 1974; it now has members in every state, Canada, the Virgin Islands and Puerto Rico. The New York State Administrative Law Judges Association, the California Administrative Law Judges Association and the Illinois Association of Administrative Law Judges are among its largest affiliated local chapters.

NAALJ strives to enhance the quality of administrative justice, and to improve the process of dispute resolution. It serves as a forum for the exchange of ideas and information, conducts periodic seminars and training conferences, publishes a journal, and confers with officials of the state and federal governments on methods of improving administrative adjudication. The National Administrative Law Foundation, incorporated by NAALJ in 1980, is expressly devoted to the public interest.

Membership in NAALJ is open to persons gainfully employed by government agencies who are empowered to preside over statutory factfinding hearings or appellate proceedings arising within, among or before public agencies, or who are empowered to prepare decisions for a higher tribunal. Other persons may be eligible for associate membership.

National dues for the fiscal year ending September 30, 1988 are \$35 for all members. Many states have local chapters.

To apply for membership in NAALJ, complete the within Membership Application and mail it to NAALJ % National Center for the State Courts, 300 Newport Avenue, Williamsburg, VA 23187-8798.

**NATIONAL ASSOCIATION OF  
ADMINISTRATIVE LAW JUDGES**  
%National Center for the State Courts  
300 Newport Avenue, Williamsburg, VA 23187-8798

**MEMBERSHIP APPLICATION AND QUESTIONNAIRE**

Please answer all questions fully. Type or print.

- 1) NAME: \_\_\_\_\_  
(last) (first) (M.I.)
- 2) HOME ADDRESS: \_\_\_\_\_  
(street) (apt.)  
\_\_\_\_\_  
(city) (state) (zip)
- 3) HOME TEL. #: ( ) \_\_\_\_\_ BUS. TEL. #: ( ) \_\_\_\_\_
- 4) TITLE (ALJ, HEARING OFFICER, etc.): \_\_\_\_\_
- 5) NAME OF AGENCY (in full): \_\_\_\_\_  
\_\_\_\_\_
- 6) BUSINESS ADDRESS: \_\_\_\_\_  
(street)  
\_\_\_\_\_  
(city) (zip)
- 7) PLEASE SEND MY MAIL TO: \_\_\_\_Home \_\_\_\_Business Address
- 8) DATE OF BIRTH: \_\_\_\_\_ SOC. SEC. #: \_\_\_\_\_
- 9) ARE YOU AN ATTORNEY AT LAW? \_\_\_\_yes \_\_\_\_no
- 10) MY PRESENT POSITION IS: \_\_\_\_elected \_\_\_\_appointed for fixed term  
\_\_\_\_appointed for indefinite term \_\_\_\_competitive civil service  
\_\_\_\_other (explain): \_\_\_\_\_
- 11) MY POSITION IS: \_\_\_\_full time \_\_\_\_part time \_\_\_\_per diem
- 12) YEAR SERVICE BEGAN: \_\_\_\_\_

13) BRIEF DESCRIPTION OF JOB DUTIES: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

14) ACADEMIC DEGREES & YEARS AWARDED: \_\_\_\_\_

\_\_\_\_\_

15) AWARDS, HONORS, ETC.; OTHER AFFILIATIONS (OPTIONAL): \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

=====

16) OPTIONAL & CONFIDENTIAL: FOR USE BY THE COMMITTEE ON COMPENSATION OF ADMINISTRATIVE LAW JUDGES & HEARING OFFICERS.

Salary (or salary range) for your present position:  
\$ \_\_\_\_\_ per \_\_\_\_\_. Salary fixed by:  
\_\_\_\_ statute \_\_\_\_ civil service board \_\_\_\_ appointing authority  
\_\_\_\_ collective bargaining \_\_\_\_ other (please explain):  
\_\_\_\_\_

=====

17) \_\_\_\_ I AM NOW A MEMBER OF THIS ASSOCIATION. (I previously joined NAALJ or its predecessor, NAAHO.)

18) SIGNATURE: \_\_\_\_\_ Date: \_\_\_\_\_

NEW ORLEANS IS THE SITE OF 1989 NAALJ  
ANNUAL CONVENTION AND SEMINAR

New Orleans has been called "The Big Easy" and "The City That Care Forgot". It is only natural that a city which can play host to two million people each year for Mardi Gras and is the city of choice for visitors to the Super Bowl and other sporting events could show visitors how to "Laissez le bon temps rouler" or "let the good times roll".

More than six million visitors travel to New Orleans every year. Please be one of them at the 15th annual NAALJ convention and seminar, October 12-14, 1989. The convention committee is planning an exciting and informative program which will provide continuing judicial education to administrative law judges in all specialties. There will be a series of lectures and discussions. Topics will focus on constitutional issues, the role of public policy, ethics, and evidence, and we are applying for continuing legal education credits for participants.

Founded by French settlers in 1699, and ruled by Spain during part of the 1700's, the city of New Orleans was part of the Louisiana Purchase of 1803. Louisiana became part of the Union of States in 1812. The new Americans were not welcome in the French Quarter, or Vieux Carre, and built their fine homes on the other side of what is now Canal Street.

The Riverwalk, located a block from our hotel, is a unique collection of stores which offer shopping, dining, and entertainment seven days a week. The Riverwalk overlooks the Mississippi River, which gives the Crescent City its shape. Jackson Brewery, a similar development on the site of the old Jax Beer brewery in the French Quarter, is another example of the New Orleans riverfront renaissance.

Although the "Streetcar Named Desire" is currently only on display, you can ride a streetcar from downtown Canal Street, through the Garden District of stately mansions, near unique above-ground cemeteries and along the campuses of Tulane and Loyola Universities. A one and one-half hour round trip is a bargain at \$1.20. There is also a new riverfront streetcar line which travels from Esplanade Avenue on the far edge of the French Quarter to Julia Street which is within walking distance of the hotel.

There are many family attractions in and around the city. The Audubon Zoo is a world class zoo which is home to more than 1,000 exotic and wild animals. It is located on 58 acres in uptown New Orleans. The reptile exhibit features the world's only white alligator exhibit. The award winning Louisiana Swamp Exhibit portrays life and wildlife of the Louisiana swamps. You can ride the sternwheeler Cotton Blossom from the Riverwalk to the zoo.

Paddleboats offer harbor tours, plantation tours, swamp tours and moonlight boat rides. Guided tours of the Superdome are scheduled daily. Walking tours of the French Quarter are available, or you may tour the Quarter in horse drawn carriages.

New Orleans is the place where jazz was born and where jazz is at! It's the foot-tapping turf of the incomparable Pete Fountain, the versatile Neville Brothers, Allen ("Southern Nights") Toussaint, and the indomitable Fats Domino. This is also home of the talented Marsalis family - father Ellis and his sons, Delfayo and two-time Grammy winner Wynton. The Ambassador of Jazz, Louis "Satchmo" Armstrong, was born here on July 4, 1900. A jazzy city? You bet.

Home of some of the world's best restaurants, New Orleans offers a variety of foods to tempt every palate. Paul Prudhomme, owner and celebrity chef of K-Paul's Louisiana Kitchen, says that Creole and Cajun cooking have blended over the past several years into a new kind of cooking that's called "Louisiana food." "Nowhere else have all the ethnic groups merged to combine all these different tastes," says Prudhomme, "and the only way you'll know the difference, honey, is to live 'em!"

Hundreds of flights are scheduled daily to and from New Orleans' Moissant Airport. You can ride the airport limousine from the airport to our hotel for \$7. Taxi fares from the airport to the hotel average between \$14 - \$16. Amtrak and the Greyhound Bus Line serve the city from their terminal in the Central Business District.

The host hotel is the Radisson Suite Hotel at 315 Julia Street, New Orleans, Louisiana 70130. It is located in the Central Business District, near the French Quarter and two blocks from the Mississippi River. It is an all-suite hotel, with 253 full-sized one, two, and three bedroom suites. All suites have a living area, televisions, wet bar, refrigerator, and spacious bedrooms. A comparable room in the area rents for \$110 - \$150 per night. For this convention, we have arranged special low rates of \$55 for single and \$65 for double rooms. These rates can only be guaranteed through September 1, 1989.

For an additional \$10 per suite, all occupants of the suite are entitled to a full buffet breakfast in the hotel and complimentary cocktails from 5:00 to 7:00 p.m.

Reservations should be made directly with The Radisson Suite Hotel, 315 Julia Street, New Orleans, Louisiana 70130, (504) 525-1993 or (800) 333-3333.

To register for this event, complete the form at the end of this article. For more information on any of these events, you may contact Hon. Tom Halko (504) 361-6662 or Hon. Dennis Dykes (504) 342-2810.

NATIONAL ASSOCIATION OF  
ADMINISTRATIVE LAW JUDGES

REGISTRATION FORM  
15TH ANNUAL CONFERENCE AND SEMINAR  
OCTOBER 12-14, 1989

NAME \_\_\_\_\_ DATE \_\_\_\_\_

OFFICIAL TITLE \_\_\_\_\_ AGENCY \_\_\_\_\_

OFFICE MAILING ADDRESS \_\_\_\_\_

\_\_\_\_\_ PHONE ( ) \_\_\_\_\_

HOME MAILING ADDRESS \_\_\_\_\_

\_\_\_\_\_ PHONE ( ) \_\_\_\_\_

Types of cases (i.e. Worker's Comp., U.I., Utility rate making) \_\_\_\_\_

\_\_\_\_\_

Are you a member of NAALJ? Yes \_\_\_\_\_ No \_\_\_\_\_

Please register me for the following: Enclosed is my check to the order of "NAALJ" to pay for the items checked below.

\_\_\_\_\_ General Conference Fee \$ 160.00

\_\_\_\_\_ Are You interested in a family program?

\_\_\_\_\_ Annual Banquet for \_\_\_\_\_ persons  
@ \$40.00 per person \$ \_\_\_\_\_

Total Enclosed \$ \_\_\_\_\_

Hotel reservations must be made separately with the Radisson Suite Hotel of New Orleans, 315 Julia Street, New Orleans, Louisiana 70130, (504) 525-1993; or toll free (800) 333-3333

Please send form and your check to:

Hon. Tom G. Halko  
Appeals Tribunal  
16 Westbank Expressway  
Suite 207  
Gretna, Louisiana 70053



Jackson Square, originally called the Place d'Armes, served as the public square and parade field in New Orleans early days.

Credit: Joseph A. Arrigo