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REPORT FROM COUNSEL

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DO YOU NEED A LAWYER?: PENNSYLVANIA COMMONWEALTH COURT SAYS EMPLOYERS CANNOT BE REPRESENTED BY EMPLOYEES AT UNEMPLOYMENT COMPENSATION HEARINGS

By Nicole L. Mangino, Esquire

The typicality of former employees' claims for unemployment compensation benefits and the minimal amounts at stake when employees contest denials of their unemployment compensation benefits have caused employers to frequently represent themselves in lieu of retaining counsel. The informality of the unemployment compensation hearings before referees (officials who decide contested unemployment compensation claims), which include taking testimony and presenting evidence in a procedurally lax atmosphere, has led to employers sending supervisors, low level management or other employees to appear on behalf of the employer. But, are these employees, supervisors, and/or management personnel capable of fully representing the employer in these unemployment compensation proceedings?

The recent Commonwealth Court of Pennsylvania decision in *Harkness v. Unemployment Compensation Board of Review (Federated Logistics t/a Macy's Department Store)*, No. 150 C.D. 2004, 2005 Pa. Cmmw. Lexis 48 (Pa. Cmmw. February 3, 2005) has said "no" to this customary practice of employers representing themselves in

unemployment compensation proceedings holding, inter alia, that a non-lawyer may not practice unemployment compensation law. In Harkness, Claimant, Lani Harkness, sought review of the Unemployment Compensation Board of Review's decision denying her unemployment compensation benefits based on her former employer, Macy's Department Store, being represented by a non-lawyer representative of an unemployment compensation services company at the hearing before the referee.

Claimant, Lani Harkness was employed in retail sales at Macy's Department Store in the cosmetics department manning a cosmetics counter. After an incident with a dissatisfied customer, Ms. Harkness was discharged from her employment with Macy's for cause. Harkness applied for unemployment compensation benefits and was denied benefits by the Unemployment Compensation Service Center. As common practice, Federated Logistics t/a Macy's Department Store, hired TALX UC EXPRESS ("TALX"), a company providing unemployment compensation services including attendance at hearings to employers. At the hearing before the referee, TALX provided a non-lawyer, William Forrest ("Forrest"), to represent Macy's at the hearing and Forrest participated in the hearing before the Referee by cross-examining Ms. Harkness, entering exhibits into evidence, and offering a closing statement. The referee overruled Claimant's objection to Forrest's representation of employer and denied Claimant's request for unemployment benefits. The Unemployment Compensation Board of Review affirmed the Referee's denial of benefits, from which the Claimant appealed to the Commonwealth Court of Pennsylvania.

The Commonwealth Court held that the non-lawyer representative, like Forrest and TALX, could not represent a third-party employer in an unemployment compensation proceeding and remanded the matter to the Referee. In doing so, the Court upheld the general rule that non-attorneys may not represent parties before Pennsylvania Courts or administrative bodies, noting that "a non-lawyer does not have the right to practice unemployment compensation law in an adversary proceeding before an administrative agency".¹ As a result of this decision, company employees may still appear and testify at the hearings without legal representation, but they are not authorized to practice law by cross-examining witnesses, lodging objections or asserting any legal arguments, which would constitute the unauthorized practice of law.

The Unemployment Compensation Board of Review has recently updated its guidelines pertaining to an employer's representation at unemployment hearings. The Board allows claimants to remain able to represent themselves, or be represented by an attorney or advocate of claimant's choice. The Board, however, allows only sole proprietorships and partnerships to be represented by the respective individual proprietor(s)/owner(s) or general partner(s). Corporations, limited liability companies, government agencies, trusts, and associations may only be represented by an attorney. The Board guidelines provide that if an employer does not have adequate legal representation at the hearing, the employer's witnesses may still testify, but the employer's non-lawyer representatives are prohibited from representing the employer by objecting to evidence, examining any witnesses or giving legal argument.

Despite these guidelines, the Unemployment Compensation Review Board intends to appeal the Commonwealth Court's decision in *Harkness* to the Pennsylvania Supreme Court. The Department of Labor and Industry and Board are pursuing this appeal because they are concerned that this decision will delay the multitude of unemployment compensation claims and complicate the system which was designed to handle claims in an expedited manner. While this appeal is pending, referees have been instructed to grant continuances to employers who appear at hearings without lawyers.

To insulate your company from a referee's refusal to allow you to cross-examine witnesses or present evidence or legal arguments at the hearing and from potentially unfavorable unemployment compensation decisions, employers should be represented by counsel in unemployment compensation proceedings. In the event that your company is already involved in the unemployment compensation administrative process and planning to attend a hearing without counsel, you are able to request a continuance from the referee to obtain legal counsel in light of the Commonwealth Court's recent decision.

Should your company need representation at a future unemployment compensation proceeding or if you have any questions concerning the *Harkness* decision, please contact the author or Sherrard, German & Kelly for advice and representation.

About the Author

Nicole L. Mangino is an associate attorney with the firm and is a member of the firm's Litigation Services Group. Her practice is concentrated in the areas of commercial litigation, employment and civil rights, insurance coverage, and family law. Ms. Mangino is a 1999 graduate of the University of Pennsylvania and a 2002 graduate of the University of Pittsburgh School of Law.

Endnote

¹ The Court's decision is not applied retroactively and will apply only to proceedings filed after the date of the Court's February 5, 2005 decision.

REAL ESTATE ROUNDUP

Final Rules on Capital Gains

The Internal Revenue Service has issued its final rules on the capital gains tax exclusion that is available on the sale of a taxpayer's principal residence. A taxpayer may exclude up to \$250,000 from the sale of a principal residence, and the exclusion doubles to \$500,000 for married taxpayers. However, the taxpayer must have owned and used the property as a principal residence for a total of at least two of the five years before the residence is sold.

The final rules focus on the part of the Internal Revenue Code that allows a taxpayer who fails to meet the above condition to still have an exclusion in a reduced amount. There are three grounds for claiming a reduced exclusion: change in employment, health, and unforeseen circumstances. For each of these grounds, the regulations provide a general definition and one or more "safe harbors"--specific reasons for the sale of the residence. If the safe harbor for a particular ground applies, a sale (or exchange) is deemed to be "by reason of" that ground. If no safe harbor applies, the taxpayer still can claim one of the grounds on the basis of all of the surrounding facts and circumstances.

For example, the safe harbor for claiming a reduced exclusion because of a change in employment applies when the new place of employment is at least 50 miles farther from the residence that was sold than was the former place of employment. As for health, the safe harbor that smooths the way for the reduced exclusion is a physician's recommendation of a change of residence for reasons of health. A sale or exchange of a residence due to unforeseen circumstances refers to the occurrence of an event that the taxpayer could not reasonably have anticipated before purchasing and occupying the residence. Simply wanting to move to a preferred home or moving due to improved financial circumstances does not qualify. The specific events that make up the safe harbor for this ground include, among other things, such circumstances as death, divorce, natural or man-made disasters affecting the house, and even multiple births from a single pregnancy.

Town Cannot Zone Out Synagogues

Two small Jewish congregations leased second-floor space in a bank building in the business district of a small town. Under the town's zoning ordinance, churches and synagogues were allowed in only one of the town's eight zoning districts. Unfortunately for the congregations, their location was not in that district. When the town tried to direct the congregations out of the business district and into the one district where synagogues were allowed, the worshippers objected. They maintained that there was no suitable location in that district and that such a move was not practical or convenient for the many members who had to walk to services.

When the dispute eventually reached federal court, the congregations ultimately prevailed on a claim brought under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). Essentially, that law prohibits a governmental entity from implementing a land-use regulation in a manner that treats a religious assembly or institution less favorably than a nonreligious assembly or institution. The town's ordinance ran afoul of the RLUIPA because it permitted private clubs, social clubs, and lodges in the same business district in which it banned churches and synagogues.

The town argued that it was reasonable to keep houses of worship out of the business district because they eroded the tax base and reduced the vitality of the retail areas. The court agreed with the congregations' response that the places of worship were no more of a drag on business than the clubs and lodges that were allowed in the business district. In fact, there was evidence that members of the congregations regularly stimulated the local

economy as they patronized shops on the way to and from the synagogues. There was no comparable stimulus from members of private clubs, who gathered less often and sometimes during nonbusiness hours. All that was left to explain the town's treatment of the congregations, as compared to the town's treatment of the congregations' secular counterparts, was the religious nature of their activities. It was just such discrimination that Congress meant to prohibit when it enacted the RLUIPA.

Handicapped-Accessible Apartments

In its role as enforcer of the Fair Housing Act (FHA), the U.S. Department of Justice sued the developer of, and architects for, two apartment complexes. The government won an injunction against any further construction and occupancy of the apartment buildings.

Among the detailed requirements in the FHA for accessibility for the disabled is a requirement that "common areas" for multifamily dwellings be readily accessible to and usable by handicapped persons. In the case under consideration, the focus was on the landing area shared by two ground-floor apartments in each complex. The front door for each of the apartments was located there, but it was not handicapped accessible because the landing could only be reached by descending stairs. The apartments also had a rear entrance from the apartments' patios that was handicapped accessible, but it was located farther from the parking lot.

The defendants argued that the FHA only requires that there be at least one accessible route into and out of each apartment, and that the patio entrance for each ground-floor unit met that requirement. The federal court disagreed. All it took to make the landing area a "common area" was that it was shared by at least two units, and that was so in the case before the court. It was beside the point that there was a separate, back-door access for the disabled. The FHA clearly mandates that the common area, which in this case was at the front-door entrance to the apartments, be handicapped accessible.

The court indicated that the public's strong interest in eradicating housing discrimination against the disabled outweighed the developer's plea that the injunction translated into substantial financial losses each month. The government also pointed out that the developer chose to proceed at its own peril with construction and leasing after being warned that the design violated the FHA. This case offers an object lesson in the importance of being in compliance with FHA requirements *before* breaking ground on a construction project.

ARCHITECTS AND ENGINEERS BEWARE-- PENNSYLVANIA SUPREME COURT ALLOWS NEGLIGENT MISREPRESENTATION CLAIM BY CONTRACTOR AGAINST ARCHITECT FOR ECONOMIC DAMAGES

By Holly S. McCann, Esquire

Historically, Pennsylvania courts never permitted a contractor to maintain a claim of negligent misrepresentation against an engineer or architect where there was no contract between the two. Thus, in cases where a contractor reasonably relied on a design professional's plan in submitting its bid and sustained cost overruns because those plans were false or misleading, there was no ability to recover those overruns from the design professional absent a contract.

That rule of law was expressly overturned by the Pennsylvania Supreme Court in its recent ruling of *Bilt-Rite Contractors, Inc. v. Architectural Studio*, __ A.2d __ (Pa. 2005), 2005 WL 120794 (Pa.). Therein, it was determined that a contractor may pursue a negligent misrepresentation claim against a design firm even where there was no contract between the two, affirmatively abandoning the design professional's privity of contract defense that had previously existed to defeat such claim. The court concluded that, in fairness, while such plans may be provided under a contract with the property owner, the designer is well aware that such plans are prepared for the use of the contractor and will be relied on by him in bidding a job. The court reasoned that while the design professional is not directly engaged by the contractor, he still owes a duty of care to the contractor who will rely on his plans.

For design professionals such as architects and engineers, this carries severe ramifications. Specifically, a contractor who completes a project based on plans drafted by a design firm now has a cause of action against such design firm for monetary damages to the contractor that result from any negligent misrepresentations contained in those plans. In light of this decision, we suggest that design firms immediately review their insurance coverage with their insurance professionals. This will ensure that the appropriate coverage exists to provide liability coverage for any such contractor claims. We also recommend that design professionals review their contracts and contracting procedures to address the effects of this case.

If you have any questions about the complete ramifications of this case, please contact us.

About the Author

Holly S. McCann is an associate attorney with the firm and is a member of the firm's Corporate Services Group. Her practice focuses on the area of corporate, partnership and individual business and tax law, especially relating to small and medium sized

businesses. In addition, Ms. McCann's practice concentrates on issues relating to the taxation and regulation of nonprofit corporations. She also has experience dealing with the tax and related issues surrounding the formation of captive insurance companies. Ms. McCann received her undergraduate degree in 1986 from Edinboro University of Pennsylvania and her law degree from O'Duquesne University in 1994.

MORE BUSINESSES ELIGIBLE FOR C-EZ

The Internal Revenue Service introduced Schedule C-EZ, a simplified expense form, for use by small businesses preparing Form 1040. The IRS recently announced that it will expand the number of small businesses eligible to use the form by 15%, or about 500,000 businesses, beginning with tax year 2004.

The greater availability of Schedule C-EZ will be accomplished by doubling the business expense threshold for businesses that can use the form from \$2,500 to \$5,000. This change could save as much as five million hours of paperwork for small business taxpayers.

FDIC INSURANCE FOR REVOCABLE TRUSTS

In 2004, the Federal Deposit Insurance Corporation (FDIC) put in place new rules for insurance coverage of living trust accounts in FDIC-insured institutions. A living trust, sometimes called a family trust, is a formal revocable trust. Its owner specifies who will receive the trust assets when the owner dies. During his or her lifetime, the owner, also known as a grantor or settlor, maintains control of the trust assets and has the power to make changes in the trust.

The owner of a living trust account is insured up to \$100,000 per beneficiary if each of the following three requirements is met:

- (1) The beneficiary must be the owner's spouse, child, grandchild, parent, or sibling. Not every relative qualifies. For example, cousins, nieces, and nephews do not qualify, but stepparents, stepchildren, and adopted children do.
- (2) The beneficiary must become entitled to his or her interest in the trust when the owner dies. FDIC insurance coverage would be based on the beneficiaries who satisfy this requirement as of the time when a bank fails.
- (3) The title of the account at the bank must indicate, with terms such as "living trust" or "family trust," that the account is held by a trust.

While insurance coverage is based on the actual interests of each beneficiary, the FDIC will assume that the beneficiaries have equal interests in the trust account unless the trust states otherwise. By way of a simple example, if a father has a living trust leaving all of the trust assets equally to his three children, the account would be insured up to \$300,000. The total coverage consists of \$100,000 for each of the three qualifying beneficiaries, who would become owners of the trust when their father dies.