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CRANFILL SUMNER & HARTZOG LLP

October 2008

Litigation

forum

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► Employment Law

PINK SLIP BLUES: GUIDELINES FOR CONDUCTING LAYOFFS

Tough times can call for tough measures, but tough measures can lead to even tougher times if not implemented carefully.

By Frank J. Albetta (WILM), Employment Practices Group

Economic survival during a business downturn may require a hard look at what is usually a business's major item of overhead, the payroll. Elimination or consolidation of positions can reduce costs quickly, and cutting inessential positions protects employees in essential jobs.

If conducted without regard to legally sound standards and procedures, however, a reduction in force ("RIF") may also create a wave of litigation that can leave an employer longing for a mere recession. The key to obtaining a streamlined workforce while minimizing the risks is planning and the development of clear standards and procedures.

Terminations of individual employees as part of a layoff are subject to challenge on the basis of federal and state employment discrimination laws, and, for public employers, on the basis of claims of First Amendment retaliation, and Due Process and Equal Protection violations. The employer must be prepared to identify and document the legitimate, non-discriminatory reasons for the terminations and the procedural adequacy of the means by which they were carried out.

A. Preliminary Issues

Although the principal legal risks raised by a RIF come from potential claims under the various federal and state employment discrimination laws, some other threshold issues should be noted.

First, if an employer is unionized, it may already be bound to particular criteria, standards, and procedures for layoffs pursuant to a collective bargaining agreement ("CBA"). A CBA will usually require that layoffs of employees proceed from those with the least seniority to those with more seniority. Of course, that standard may be counterproductive from the employer's standpoint -- for example, when newer employees have come to the organization with more current education and training. A seniority based RIF may also reverse gains the employer has made in recruitment and advancement of minorities and women.

Second, the federal Worker Adjustment and Retraining Notification Act (WARN Act) requires employers with 100 or more employees to provide at least 60 days advance notice of certain covered plant closings and covered mass layoffs, regardless of other procedures and considerations. As a WARN-covered employer and lay-off must be planned further in advance due to the notice requirements, the employer will have less discretion in choosing the optimal timing for the RIF.

Third, the employer must be aware of any specific contractual obligations it is under with respect to specific employees or groups of employees. Although employees under term contracts may be subject to layoffs along with at-will employees, the term contracts may provide specific standards for what will constitute good cause for termination.

B. Preliminary Assessment

Before undertaking a RIF, exhaust other measures first. A company defending an employment claim in the wake of a RIF should be able to show that the RIF was a last resort. Identify, pursue, and document other cost-reduction measures prior to the RIF, or be prepared to show that such measures were considered, but would have been ineffective.

If a RIF is necessary, the scope of the RIF may affect the approach to be adopted. Termination of a small number of individuals, including those within the protection of the Age Discrimination in Employment Act (ADEA), can sometimes be accomplished through negotiation of individual severance/settlement agreements and waivers of claims in compliance with the Older Workers' Retirement Benefits Protection Act. Under the circumstances of a wider RIF, however, it is usually impossible to negotiate individual cases.

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Employment Law

C. Planning

Careful planning is essential to successful layoffs. Although small and medium sized employers may not have a regular RIF policy, the development of a written plan specific to the RIF will help document the employers purposes and methods for a jury in the event of litigation. The RIF plan should include the following elements:

1. Be clear in advance *why* the RIF is necessary.

Every plaintiff who sues following termination under a RIF will claim that the entire RIF was a pretext for getting rid of him or her personally—even though 500 other employees were also laid off. The RIF plan should thus articulate the factors that make the RIF necessary. In addition to business-cycle downturns, issues such as a loss of market share or of key customers or clients, a more competitive industry environment, a merger or acquisition, outsourcing, technological innovations, or a shift in mission, direction, products, or services provide sound bases for layoffs.

2. Document the business and financial reasons for the RIF in advance.

In conjunction with the identification of the reasons for the RIF, the RIF plan should reference or incorporate data that both illustrates and supports such reasons, and identifies the cost savings, operational improvements, increased efficiencies, and other advantages that will allow the employer to overcome the problems that led to the RIF.

3. Identify RIF criteria.

In all instances, the key is to identify and apply neutral and legitimate business-related criteria in the process of identifying positions for the RIF, and to document the process of doing so. How elaborate the process need be will vary depending on the size of the organization, the size of the projected RIF, and the extent to which the employer foresees legal claims arising from the action.

In instances in which a particular sector or operation of the organization is to be eliminated, the RIF criterion is simply one that encompasses the positions in or supporting that sector or operation. If the goal is to downsize or streamline the organization generally, however, specification of the RIF criteria will warrant more detail and effort. Seniority as the RIF criterion, offers the benefit of neutrality and legitimacy, but, as noted, it is often a blunt instrument that can leave the employer with a workforce, the training and skills of which are dated. Moreover, seniority selects for layoff on the basis of employees, rather than positions, which is usually a mistake.

When a RIF is warranted for economic, financial, or competitive purposes, RIF criteria should focus upon eliminating positions rather than upon terminating particular employees. That focus may be counterintuitive in light of the desirability of retaining better-performing employees. But, by starting with an analysis of what positions can be eliminated, the employer will be better able to maintain a functionally sound organization while increasing efficiency and reducing costs.

Accordingly, a primary criterion should be whether a position's functions can be redistributed among, and performed by, incumbents in other positions in the particular work unit, department, division, etc., such that the unit will be able to continue to perform its functions. Notably, that approach also reduces the significance of direct employee-to-employee comparisons in the first instance, which can contribute to claims of discrimination. Considerations of performance and even seniority can be incorporated into the selection process through the use of a point system for employees, which can also be particularly useful for comparing a large number of potential RIF candidates.

Although the details of the process will vary from firm to firm, sequentially, the first step is to have line supervisors make initial recommendations concerning how positions and functions can be consolidated, redistributed, or eliminated, subject to review by management. Upon the completion of that process, the employees to be laid off may be obvious on the basis of the skills and performance history of the incumbents. If not, that restructuring of functions can be succeeded by a separate but overlapping process of assigning points to employees on the basis of what management considers important criteria for retention, such as skill/training level, adaptability to different functions, performance history, and



seniority. A rating sheet for each employee can be filled out by work group supervisors, who assign points in each category for each employee. A simple "3" (high), "2" (medium), "1" (low) system will suffice.

It is important that the point scores for each employee be based upon verifiable data. The performance rating for each employee, for example, should be based upon the written, annual performance evaluations in each employee's personnel file rather than upon an *ad hoc* rating for purposes of the RIF. That, of course, requires that such evaluations are regularly completed and are current. Likewise, skill/training levels should be clear from application, training, and performance records. When the multi-year performance and training histories of two different employees show clear differences, it is much harder for an employee to claim that he or she was downgraded in anticipation of the RIF.

The foregoing is one illustration of a process that maintains the focus upon objective circumstances and criteria, and that limits subjective comparisons of employees, which can engender discrimination claims.

4. Identify and train the supervisors and managers who will be responsible for identifying RIF candidates in the use and application of the RIF criteria.

It is important to the purposes of the RIF as well as to the avoidance of legal claims, that RIF criteria be applied on a consistent and uniform basis throughout the organization. Accordingly, the supervisors and managers who will be recommending and reviewing RIF candidates be trained to do so. Ensure that the RIF criteria are uniformly understood and interpreted. Make clear that any deviations require approval of specific managers.

5. Create a RIF plan in the form of a management directive for limited distribution to those members of management who will be responsible for carrying out the RIF.

The management directive should outline the plan for the RIF, and should:

- Identify those managers who will be responsible for initial recommendations of employees for RIF;
- Specify the criteria for identification of surplus functions and the system for identifying employee candidates for RIF recommendations, such as a point-based system;
- Create specific documentation requirements for the managers at each level who will be identifying employees for possible RIF, or reviewing or approving such recommendations (development of a form for use at each level is a good way of ensuring uniformity in application of criteria);
- Describe the levels of review of the initial identifications of employees for RIF, e.g., the department head's initial recommendations will be reviewed by the division director, the group vice president, and legal counsel;
- Require, in its documentation requirements, that recommending, reviewing, and approving managers articulate the specific bases for their recommendations or approvals;
- Note that employees on family and medical leave or military leave might require special consideration; and
- Provide for the maintenance of confidentiality regarding the RIF process.

The RIF plan should *not* be published to employees generally, but limited to those management employees at and above the management level that will be making RIF recommendations, conducting reviews, and making final decisions. Publication of the RIF plan to employees generally could give rise to the claim that such publication created a contractual entitlement on the part of such employees. If such contractual entitlement were recognized by a court, minor deviations from the plan, oversights or variations in carrying it out, and other glitches could create "breach of contract" problems.

6. To the extent possible, avoid final identification of employees for RIF on the basis of performance rankings.

Rankings will be based on evaluations, and evaluations--even if they are done well, which is not usually the case--will invariably include some subjective elements. Plaintiffs will concentrate their attack on such elements to show that they were unfairly "targeted" or "set up" for selection for RIF. It is not usually possible to completely avoid performance comparisons, particularly when numbers of employees will be RIFed. But by avoiding final decision-making on the basis of performance-based comparisons, you may avoid such issues.

As noted, one solution is to include performance as one element in the RIF criteria, particularly in selection criteria that employ point systems. The performance factor will thereby be rendered non-dispositive, leaving expendability of functions as the effectively determinative criterion. If performance evaluations as a criterion must be used, make sure that those of employees who may be considered for RIF are up to date and complete.

7. Conduct a RIF impact assessment before finalizing RIF selections.

Particularly if the employer is a government contractor, it should determine whether older (over age 40) employees, women, minorities, or disabled employees would be disproportionately impacted by the RIF selections as preliminarily posed. If such disproportions appear, the bases for selection should be reviewed carefully or, if the employer has an approved affirmative action plan, adjusted based upon the goals of such plan.

8. Provide transfer opportunities and outside placement services for employees selected for RIF.

In a litigation context, these types of services can help show the employer's good faith and good will in the eyes of a jury. The closer question is whether to permit "bumping" -- displacement of a less senior employee by a more senior one. If the principal litigation threat is in regard to age discrimination claims, bumping can relieve the impact of the RIF on older employees. As noted, however, if an employer has made efforts to diversify during the years leading up to the RIF, bumping on the basis of seniority may reverse gains made in that regard.

9. Consider obtaining waivers of claims in appropriate cases.

As noted above, waivers can frequently be negotiated when a relatively small number of employees will be laid off. Even in wider RIF situations, however, consideration should be given to whether a waiver/severance pay arrangement would be feasible and cost effective in certain high risk cases.

Note that, regardless of the context in which the waiver is sought, the specific requirements of the waiver under the Older Workers' Retirement Benefit Protection Act may very well alert

the employee to the possibility of making a claim, when he or she may not otherwise have thought to do so. Therefore, before seeking such a waiver, make sure the employee in question is either very likely to make such a claim, or very unlikely to be able to establish a valid claim. If it appears the employee would be able to establish a valid claim, reconsider the termination.

10. Consult before you act.

Involvement of employment counsel *before* any final decisions can help avoid costly mistakes, and can also provide risk assessments in the strategic planning of the termination or RIF that will allow the employer to balance disparate factors, recognize and weigh risks, and make better-informed decisions. ■

► One Year Post the United States' *Twombly* Decision and How the Aftermath is Affecting Title VII Claims Within the U.S. District Courts Of North Carolina.

By Allison Serafin (RAL), Employment Practices Group

With little or no warning, on May 21, 2007, the Supreme Court abrogated the familiar *Conley* standard which, for the past 60 years, has defined the concept of "notice pleading" pursuant to Rule 8 of the Federal Rules of Civil Procedure. The words Justice Souter¹ wrote, "dismissal for failure to state a claim upon which relief may be granted *does not* require appearance, beyond a doubt, that plaintiff can prove *no set of facts* in support of a claim that would entitle him to relief..." set a new standard for the sufficiency of complaints. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 167 L. Ed. 2d, 929 (2007) (emphasis added), *abrogating Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

In *Twombly*, the Court explained that a complaint must "contain enough factual matter (taken as true) to suggest that an agreement was made." 127 S. Ct. at 1965. "[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 1966. In conclusion, Justice Souter noted, "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is *plausible* on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.* at 1974 (emphasis added).

Twombly's General Effect in North Carolina

Prior to the *Twombly* decision in 2007, the Supreme Court decided *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) which some circuits read as eliminating the fact pleading requirement in a complaint. At the time of the *Swierkiewicz* decision in 2002, federal circuits splintered as they struggled to identify the level of factual assertion necessary to withstand dismissal.

¹ Justice Souter wrote the opinion in which Justices Roberts, C.J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ., joined (except as to part IV).

The Fourth Circuit, however, remained clear during this unsettled time that Rule 8 of the Federal Rules of Civil Procedure required a "plaintiff to allege facts sufficient to state all the elements of her claim." See, *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003), *cert. denied*, 540 U.S. 940 (2003). In *Bass*, Judge Luttg wrote,

Our circuit has not, however, interpreted *Swierkiewicz* as removing the burden of a plaintiff to allege facts sufficient to state all the elements of her claim. See *Dickson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir. 2002) "[T]he Supreme Court's holding in *Swierkiewicz v. Sorema* did not alter the basic pleading requirement that a plaintiff set forth facts sufficient to allege each element of his claim." (internal citations omitted). These cases reject Plaintiff's contention. While a plaintiff is not charged with pleading facts sufficient to prove her case, as an evidentiary matter, in her complaint, a plaintiff *is* required to allege facts that support a claim for relief. The words "hostile work environment" are not talismanic, for they are but a legal conclusion; it is the alleged facts supporting those words, construed liberally, which are the proper focus at the motion to dismiss stage.

Bass v. E.I. Dupont de Nemours & Co. 324 F.3d 761, 764 -765 (4th Cir. 2003).

While *Twombly* does not explicitly overrule *Swierkiewicz*², it has affirmed the Fourth Circuit's previous interpretation of *Swierkiewicz* that a plaintiff must state facts sufficient to support the elements of his/her claims. See generally *Bass*, 324 F.3d 761, 765 (noting that a plaintiff *is* required to allege facts that support a claim for relief).

Consistent with *Bass*, *Twombly* now also requires a plaintiff to plead facts that state a claim to relief that is *plausible* on its face. See also *Iqbal v. Hasty*, 490 F.3d 143, 157 -158 (2nd Cir., 2007) ([W]e believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible "plausibility standard," which obliges a pleader to amplify a claim

with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*).

Employment Discrimination Claims

The *Twombly* standard has been specifically applied to employment discrimination cases in our district courts. Recently Judge Horn III applied *Twombly* as the standard of review in *Nixon v. Majors*, 2007 WL 4592277, *4 (W.D.N.C., December 28, 2007) (Slip Copy) to a hostile work environment claim brought under Title VII and again in *Rathbone v. Haywood County* 2008 WL 2789770 (W.D.N.C., July 17, 2008) to a claim for retaliation under Title VII. Similarly, Judge Conrad, Jr. applied *Twombly* in an employment discrimination case and dismissed Plaintiff's negligent infliction of emotional distress claim. *Zampogna v. Gaston County Schools Bd. of Educ.*, 2007 WL 4570869, *2 (W.D.N.C., December 26, 2007) (Slip Copy).

² At least one Court has interpreted *Twombly* to implicitly overrule *Swierkiewicz*. See *Aztec Energy Partners, Inc. v. Sensor Switch, Inc.* 531 F. Supp. 2d 226, 228-9 (D. Conn., October 2, 2007) *Swierkiewicz*; See also *Bell Atlantic Corp. v. Twombly*, --- U.S. ---, 127 S. Ct. 1955, 1960, 1964-65 (2007).

Even more recently, Judge Britt applied the Twombly standard to a claim of hostile work environment. See Mangum v. Town of Holly Springs, 551 F. Supp. 2d 439, 444 (E.D.N.C. March 17, 2008). Relying on Twombly as the articulated standard for dismissal, Judge Britt stated:

Because plaintiff has not alleged facts that, if true, would establish the third element of her claim under any plausible reading of her complaint, the court need not address the other elements. The facts plaintiff has alleged simply do not rise to the level of unlawful gender discrimination based on hostile work environment in violation of Title VII, and defendant's motion to dismiss with respect to this claim will be granted. Mangum at 444.

The application, therefore, of Twombly as a standard for review in Title VII cases, is being applied throughout our district courts. And the "plausibility" standard has developed the appropriate teeth necessary to render a claim which is not plausible, subject to dismissal.

Pro Se Caveat

Two weeks after the Twombly decision was released, the Supreme Court cited Twombly in a motion to dismiss a *pro se* litigant's claim, Erickson v. Pardus³, --- U.S. ---, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007). Although the Court reiterated that "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." The Court also noted that the plaintiff "ha[d] been proceeding, from the litigation's outset, without counsel." Id. A document filed *pro se* is 'to be liberally construed,' and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.' Id. In conclusion, the Court held that the case cannot "be dismissed on the ground that petitioner's allegations of harm were too conclusory..." Erickson at 2200.

A number of lower courts also recognize a "deference" provided to *pro se* litigants. See, e.g., Alvarez v. Hill, 518 F.3d 1152 (9th Cir. 2008) (noting that prisoner had made factual allegations establishing a "plausible" entitlement to relief while also noting that conclusion was "bolstered by the 'less stringent standards' used to assess whether a *pro se* inmate's complaint places the defendants on notice); accord, Dudnikov v. Chalk & Vermillion Fine Arts, Inc., 514 F.3d 1063 (10th Cir. 2008); Johnson v. Lappin, 264 Fed. Appx. 520 (7th Cir., February 14, 2008); Curto v. Bender, 231 Fed. Appx. 93 (2nd Cir. 2007) (unpublished).

In North Carolina, the results appear to be mixed. See Ervin v. Hammond 2008 WL 901185, 5 (W.D.N.C. March 31, 2008) (Slip Copy) Stating, "To the extent that the 'no set of facts' language has been pronounced outdated, the deference provided to Ervin's complaint as a *pro se* litigant and the other statements of proper standards render the objection moot and the lower court's application of the Twombly standard correct." Ervin at *5 relying upon Erickson, 127 S. Ct. at 2200 (emphasis added). In Salami v. Monroe, 2008 WL 2981553, 5 (M.D.N.C., August 1, 2008), the Middle District Court noted that since the plaintiff was proceed-

³ Erickson, a prisoner, brought a *pro se* § 1983 suit against prison medical officials, alleging deliberate indifference to his serious medical needs, in violation of his Eighth Amendment rights. The United States District Court for the District of Colorado, 2006 WL 650131, dismissed, and the prisoner appealed. The United States Court of Appeals for the Tenth Circuit, 198 Fed. Appx. 694, 2006 WL 2640394, affirmed the lower court's opinion. Prisoner filed petition for Writ of Certiorari. The Supreme Court reversed and, citing Twombly, held that prisoner properly alleged that he suffered substantial harm.

ing *pro se* the Court is required to construe Plaintiff's pleading liberally and hold it to a less stringent standard than those drafted by attorneys to allow for the development of a potentially meritorious claim. Id. Citing Boag v. MacDougall, 454 U.S. 364, 365 (1982); Gordon v. Leeke, 574 F. 2d 1147, 1151 (4th Cir.1978). However, the Salami Court also dismissed multiple claims by Plaintiff and stated, [n]evertheless, "[t]he requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court." Salami 2008 WL 2981553, 5 citing Oehlson v. Powers, No. 8:06-1060, 2006 WL 2077005, *2 (D.S.C. 2006) and Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990)).

Conclusion

While North Carolina district courts have not held that Twombly explicitly overrules Swierkiewicz, they have consistently applied the Fourth Circuit's previous interpretation of Bass -- that a plaintiff must state facts sufficient to support the elements of their claims. Accordingly, pursuant to the recent Twombly opinion, our courts now also require a plaintiff to plead facts that state a claim to relief that is *plausible* on its face.

This "plausibility" standard, however, has yet to be extended entirely to cases in which a *pro se* litigant is faced with a motion to dismiss. In fact, as of the date of this publication, there have been no Title VII complaints brought by *pro se* litigants which have been challenged as not meeting the new "plausibility" standard. Consequently, the deference accorded the general *pro se* litigant continues notwithstanding the holding in Twombly and remains a delicate area to consider when encountering this particular type of litigation. ■

Can an Employer Deny Workers' Compensation Benefits if an Employee Lied on His Job Application?

By Meghan Knight (RAL), Employment Practices Group

On March 4, 2008, in Freeman v. J.L. Rothrock, 657 S.E.2d 389, the North Carolina Court of Appeals ruled that where an employee misrepresented his prior medical history on a job application, or during a post-hiring, pre-placement physical examination, that employee was barred from recovering workers compensation benefits. This case has the potential to be a great opportunity for employers.

In Freeman, the employee completed a medical history questionnaire after receiving a conditional job offer. Despite two prior back injuries and permanent lifting restrictions, the employee stated he had never suffered from prior back conditions, there were no health reasons that would keep him from performing the job, he had no disabilities that would have affected his job performance, and he had never filed a workers' compensation claim. Furthermore, during his pre-placement medical examination, the employee also failed to reveal to the examining doctor that he had previously injured his back.

The Court of Appeals adopted the three-part "Larson test" for determining whether an employee's misrepresentation bars recovery of workers compensation benefits:

- (1) The employee must have knowingly and willfully made a

false representation as to his/her physical condition at the time he/she was hired;

(2) The employer must have relied upon the false representation, which must have been a substantial factor in the decision to hire the employee; and

(3) The false representation must have in some way led to the workers compensation injury for which the employee is seeking compensation.

It appears the employer can raise the false representation issue at any point, as this case was decided even after the employer accepted the claim and began paying benefits; however, once raised, employers have the burden of proving all three parts of this test. The first part may be most difficult to prove, as evidence as to whether Plaintiff knowingly and willfully made a false representation may be difficult to prove unless the employee admits doing so. Testimony from the employer that it probably would not have hired the employee had it known of the employee's prior injury may be sufficient for the second part of the test (though if other employees are working with the same type of injury, that testimony may not be believed). Medical testimony that the employee's false representation placed the employee in a position of increased risk for the injury the employee sustained will likely be necessary to satisfy the third part of the test.

While Freeman is a good decision for employers, employers should interpret and apply this opinion with caution. First, the Freeman decision is inconsistent with at least one prior decision of the North Carolina Court of Appeals. Interestingly, the Freeman court specifically declined to follow a prior decision of the Court of Appeals that *rejected* the Larson test. Hooker v. Stokes-Reynolds Hosp., 161 N.C. App. 111, 587 S.E.2d 440 (2003), *disc. rev. denied*, 358 N.C. 234, 594 S.E.2d 192 (2004). On April 10, 2008, the plaintiff in Freeman filed a Notice of Appeal to the North Carolina Supreme Court. Significantly, the Hooker decision was written by Judge Hudson, who now sits on the North Carolina Supreme Court.

Second, the opinion fails to directly address restrictions on pre-employment medical inquiries under the Americans with Disabilities Act of 1990 ("ADA"). Specifically, the opinion does not discuss whether an employer could deny workers compensation benefits if the false information was given by the employee in response to questions or medical examinations prohibited by the ADA or other anti-discrimination statutes. Employers may be tempted to treat the Freeman decision as a green light to ask potential employees for detailed information about past injuries with the hope that intentional misrepresentations on applications and elsewhere may ultimately allow employers to avoid paying benefits. However, asking for such information before making a conditional offer of employment would expose the employer to potential discrimination suits under the ADA and the North Carolina Persons with Disabilities Protection Act.

Among other things, these statutes seek to prevent discrimination against people with disabilities in the job application process. For example, under the ADA:

- It is illegal to ask a job applicant if he/she has a disability or about the nature or severity of any disability if the applicant has *not* been given a conditional offer of employment.
- It is illegal to ask or require a job applicant to take a medical examination if he/she has *not* been given a conditional offer of employment.

- In order for an employer to require medical examinations *after* an employee has been given a conditional offer of employment, the employer, among other things, must require the examination of all entering employees in the same job category.
- While job offers may be conditioned on these medical examinations, the ADA places restrictions on whether and how information gained during a post-offer medical exam may be used in making hiring decisions. In particular, if an applicant is not hired because the exam reveals a disability, the employer must be able to show that the reason the employee was not hired is job related and a business necessity, and that no reasonable accommodation would have made it possible for the applicant to perform the essential functions of the job.
- It is illegal to inquire into applicants' workers compensation histories before making a conditional offer of employment. After conditional job offers are made, an employer may ask about workers compensation histories as part of the medical examinations discussed above, but may not base employment decisions on speculation that an applicant may cause increased workers compensation costs in the future.

In summary, Freeman potentially gives employers a significant opportunity to limit workers compensation benefits where employees falsify employment applications. However, as there are many legal requirements regarding what may and may not be asked of potential employees during the application process, and when such questions may be asked, employers will be well-served to consult with legal counsel regarding their application and hiring practices and policies, rather than relying exclusively on the test set out in Freeman. ■

► Land Condemnation

NCDOT v. Fernwood Hill Townhome HOA, Et al.

The Land Condemnation Section recently handled an eminent domain case that was the first of its kind in the country and one of the three most important appellate cases in the state according to *Lawyer's Weekly*. The NCDOT condemned a portion of a townhome community for the construction of a highway bypass around Henderson, NC. Prior to the NCDOT project, the small, upscale townhomes were nestled in a wooded area. As a result of the construction, the right of way for the elevated superhighway was just six feet from one of the townhomes and a twenty foot concrete sound wall was constructed through the common area which served as the homes' backyard. The NCDOT claimed that it owed the homeowners' association just \$5,400 for the taking of the common area. It did not include the homeowners in the lawsuit, or offer to pay them anything for the diminution in value of their homes. The homeowners hired Cranfill Sumner & Hartzog LLP to intervene and file an inverse condemnation suit, which would require the NCDOT to add the homeowners as parties, pay for the damage to their homes, and pay the owners' costs and attorneys' fees. After the owners won the suit in the Trial Court and the Court of Appeals, the Supreme Court denied the NCDOT's petition for discretionary review. After remand, the NCDOT agreed to pay the owners more than fifty times the original offer.

The case has led to a number of similar suits throughout the country. CSH's Land Condemnation Section has been involved in half a dozen similar suits for planned communities and condominiums since the Fernwood decision.

NCDOT v. Whitfield

Another favorable settlement occurred in a Brunswick County case, wherein NCDOT initially offered our client \$319,000 for the taking of one acre of land (and a drainage easement) from a four and one-half acre tract. The taking was for a new road which will split the property in two pieces. After weeks of negotiating following the mediation, NCDOT agreed to pay \$1,309,000 to settle the claim, with NCDOT being granted one of the remaining "damaged" parcels.

NCDOT v. Smith

In Iredell County, CSH represented a property owner who had four properties being affected by the widening of a busy road running between Mooresville and Lake Norman. NCDOT's first offers on all four properties totaled \$1,073,000. Two days before trial, NCDOT agreed to pay \$2,250,000 to settle the four claims.

City of Raleigh v. Jack Parker Properties

The Land Condemnation Section's largest settlement occurred in an acquisition by the City of Raleigh. The City needed approximately 39 acres of our client's property to consolidate its maintenance and parks and recreation services. After an initial offer of \$8,622,702 to our client, CSH was able to negotiate a settlement of \$11,900,000 at mediation. This amount represents the third largest settlement of any type of case in the state during 2007. ■

Civic / Professional Notes

DAN HARTZOG (RAL) was selected by *Business Leader* magazine as a Triangle Impact Law Leader for 2008. Criteria for the awards were based upon community involvement, key accomplishments, business achievements, career milestones and future goals. **MR. HARTZOG** was also recognized as one of the Triangle's "Top Lawyers" in the field of Trial/Litigation.

DAN HARTZOG (RAL) was recognized by *Business North Carolina* magazine as a member of the publication's 2008 Legal Elite in the field of Litigation.

PATRICIA HOLLAND (RAL) was elected as a member of the Firm's Management Committee in June, 2008, and also serves as the Chair of the Firm's Employment Practices Group.

The 2008 edition of *Chambers, USA: America's Leading Lawyers for Business* recognized Partner **PATRICIA HOLLAND (RAL)** as a "Notable Practitioner" in the field of Labor & Employment Law. The Chambers ratings are based on extensive interviews of the law firm's clients, colleagues and competitors, and inclusion is determined through a rigorous vetting process whereby Chambers researchers evaluate attorneys on a number of factors.

PATRICIA HOLLAND (RAL) was selected by *Business Leader* magazine as a Triangle Impact Human Resources and Staffing Leader for 2008. To be considered as a Triangle Impact HR/Staffing Leader, candidates must demonstrate significant business accomplishments and leadership in the category for which they are nominated. Candidates must be active members of a business located in the community as well as active participants in civic or philanthropic groups in the community.

PATRICIA HOLLAND (RAL) was recognized by *Business North Carolina* magazine as a member of the publication's 2008 Legal Elite Hall of Fame in the field of Employment Law.

CRANFILL SUMNER & HARTZOG LLP sponsored an evening reception for the North Carolina Association of Municipal Attorneys Summer Conference held at the Blockade Runner Hotel at Wrightsville Beach, North Carolina in August, 2008.

PATRICIA HOLLAND (RAL) and **NORWOOD BLANCHARD (WILM)** presented a program entitled "Hot Topics in Employment Law" for the North Carolina Association of Municipal Attorneys Annual Summer Conference held at Wrightsville Beach, North Carolina in August, 2008.

PATRICIA HOLLAND (RAL) attended a week-long course at Harvard University in June, 2008 taught by the Harvard Negotiation Project entitled "Advanced Negotiation: Making Difficult Conversations Productive."

MEGHAN KNIGHT, PAUL HOLSCHER, KATIE WEAVER HARTZOG, DAN HARTZOG, JR., PATRICIA HOLLAND and **ANN ESTRIDGE (RAL)** authored the Employment Law chapter of the manuscript for the "Twenty-Eighth Annual Review, North Carolina 2008" Continuing Legal Education program presented by the Wake Forest University School of Law.

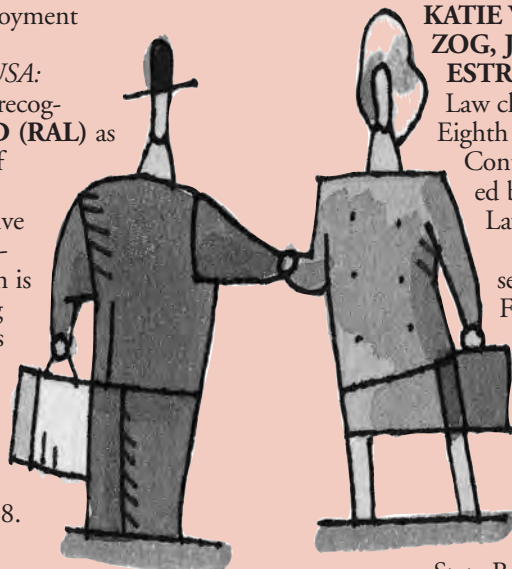
PATRICIA HOLLAND (RAL) was selected to participate as a member of the Faculty of the Wake Forest University School of Law's "Twenty-Eighth Annual Review, North Carolina 2008," and **MS. HOLLAND** and **MEGHAN KNIGHT (RAL)** participated as speakers at the program's Raleigh seminar in September, 2008, on the topic of recent noteworthy employment law cases.

In April 2008, the North Carolina State Bar Council reappointed **DONNA RASCOE (RAL)** to a three-year term on the Disciplinary Hearing Commission (DHC). The DHC acts as the North Carolina State Bar's trial court. It is composed of 12 lawyers and 8 public members, who sit in panels of three to hear complaints of lawyer misconduct referred to it by the Grievance Committee.

JOHN BOWEN "BO" WALKER (RAL) is now licensed to practice law in the state of South Carolina.

In August 2008, **DONNA RASCOE (RAL)** spoke on "Liability for Educators" at the Law Institute for Teachers sponsored by the NC Bar Association.

ASHLEY K. BRATHWAITE (RAL) recently completed all the requirements and obtained an unrestricted license to practice law in South Carolina.



Earlier this year, **JOHN BOWEN “BO” WALKER (RAL)** became a member of the Steering Committee for the Young Leaders Society. This group was formed by the United Way to encourage service and philanthropy for members of the triangle area under the age of 40.

During 2008, **JOHN BOWEN “BO” WALKER (RAL)** served on the Service Juris Day Steering Committee Member. Service Juris Day is a day set aside by the legal community in the triangle for community service. Committee members planned the event and signed up sponsors.

ALLISON SERAFIN (RAL) published "One Year Later: How the Aftermath of the Twombly Decision is affecting Title VII claims in the U.S. District Court of North Carolina" in the latest issue of *The Defender* published by the North Carolina Association of Defense Attorneys. See *Bell Atlantic Corp. v. Twombly*, __U.S. __, 127 S. Ct. 1955, 167 L.Ed. 2d. 929, (2007). Her article tracks the influence the Twombly opinion has had in Federal District Court decisions in Title VII cases over the last year and considers a certain "pro se" caveat.

ROB GRIFFIN (RAL) was a speaker at the Harmonie Group Transportation Committee Trucking Industry Seminar in Chicago. **MR. GRIFFIN** gave a presentation on the topic of "Mediation and Alternative Dispute Resolution in Trucking Cases." The chair of the Firm's Trucking and Commercial Transportation Section, **MR. GRIFFIN** was also recently selected to membership in the Transportation Law Association and the North Carolina Trucking Association.

Earlier this year, nine Cranfill Sumner & Hartzog LLP attorneys were named to the 2008 *North Carolina Super Lawyers®* list. They are:

- **David H. Batten** - Personal Injury Defense: Medical Malpractice
- **Richard T. Boyette** - Alternative Dispute Resolution
- **Buxton S. Copeland** - Workers' Compensation
- **Dan M. Hartzog** - Civil Litigation Defense
- **Patricia L. Holland** - Employment & Labor
- **C. D. Taylor Pace** - Workers' Compensation
- **Robert W. Sumner** - Personal Injury Defense: General
- **Emerson M. Thompson, III** - Civil Litigation Defense
- **David D. Ward** - Personal Injury Defense: Medical Malpractice

In addition, **PATRICIA HOLLAND** was also named to the list of Top 100 North Carolina Super Lawyers, the Top 50 Female North Carolina Super Lawyers and was honored as one of the Top 10 attorneys in the State of North Carolina.

In September, 2008, eighteen attorneys from Cranfill Sumner & Hartzog LLP were selected by their peers for inclusion in *The Best Lawyers in America®* 2009 edition. They are:

Alternative Dispute Resolution
Richard T. Boyette (RAL)
Patricia L. Holland (RAL)

Commercial Litigation
David H. Batten (RAL)
Dan M. Hartzog (RAL)

Education Law
Donna R. Rascoe (RAL)

Eminent Domain and Condemnation Law
George B. Autry, Jr. (RAL)
Stephanie H. Autry (RAL)

Insurance Law
Susan K. Burkhart (RAL)

Labor and Employment Law
Patricia L. Holland (RAL)

Medical Malpractice Law
David H. Batten (RAL)
John D. Martin (WILM)
David D. Ward (RAL)

Personal Injury Litigation
David H. Batten (RAL)
Dan M. Hartzog (RAL)
John D. Martin (WILM)
Robert W. Sumner (RAL)
David D. Ward (RAL)

Product Liability Litigation
Robert W. Sumner (RAL)

Workers' Compensation Law
M. Andrew Avram (CHAR)
P. Collins Barwick III (RAL)
Paul L. Cranfill (RAL)
W. Scott Fuller (RAL)
Kirk D. Kuhns (RAL)
C. D. Taylor Pace (RAL)
Robin H. Terry (RAL)

Since last fall's issue of *LITIGATION FORUM*, the following attorneys have joined Cranfill Sumner & Hartzog LLP:

Frank J. Albetta (WILM)
Charles (Trey) Collier, III (RAL)
Angela Ward DiNoto (WILM)
Danny F. Fulmer, II (RAL)
Matthew K. Lilly (CHAR)
M. Janelle Lyons (CHAR)
Mica L. Nguyen (CHAR)
Donna E. Tanner (RAL)
Ashley B. White (RAL)
Stephanie B. Woods (WILM)

Recent Case Results

BOB SUMNER (RAL), LEE POOLE (CHAR) and **JAYE BINGHAM (RAL)** obtained a defense verdict of no negligence in favor of an international antiques and collectibles show producer, following a two week jury trial. The plaintiff, a vendor, sought over \$1 million in damages, after he claimed some of his merchandise was stolen from a show. The defense argued that the security and procedures at the show were in place and operational, and there was no negligence on the part of the defendants.

DAN HARTZOG (RAL) and **KARI JOHNSON (RAL)** obtained a favorable opinion from the North Carolina Court of Appeals in a case involving claims against a municipality and its police officers for a death that occurred during a vehicular police pursuit. In the case, the decedent's estate alleged that the officer's conduct during the pursuit amounted to gross negligence. The Court of Appeals disagreed and affirmed Summary Judgment in the defendants' favor.

KARI JOHNSON (RAL), with assistance from **DAN HARTZOG, JR. (RAL)** obtained a favorable ruling from the Fourth Circuit in a case where Plaintiff claimed that his constitutional rights were violated when he was charged by the defendant officer with various charges stemming from three separate incidents of sexual assault. The Fourth Circuit affirmed Summary Judgment in favor of the defendant police officer based on qualified immunity.

LEE POOLE (CHAR) and **JANELLE LYONS (CHAR)** tried a week-long nursing home case in Mecklenburg County in which Plaintiff alleged negligent care resulted in Stage IV decubitus ulcers and sepsis. The jury returned a verdict of no negligence.

KARI JOHNSON (RAL) obtained Summary Judgment on behalf of the defendants, a Sheriff and various deputies, in a case pending in the Eastern District of North Carolina wherein Plaintiff claimed that she was arrested without probable cause and was the victim of racial profiling.

ROBIN DAVIS (RAL) and **PAUL HOLSCHER (RAL)** successfully defended a claim for unemployment brought by a municipal employee. The employee was denied unemployment benefits. The employee's appeal was denied by the Appeals Referee and was dismissed by the Employment Security Commission.

ROBIN DAVIS (RAL) and **PAUL HOLSCHER (RAL)** obtained dismissal of a charge of discrimination filed with the Equal Employment Opportunity Commission (EEOC). The employee claimed she had been discriminated against by her employer because of her race and gender.

ROBIN DAVIS (RAL) and **PAUL HOLSCHER (RAL)** obtained another dismissal of a charge of discrimination file with the Equal Employment Opportunity Commission (EEOC). The employee claimed she had been discriminated against by her employer because of her race.

RACHEL ESPOSITO (RAL) and **PAUL HOLSCHER (RAL)** recently obtained dismissal of negligence claims against a teacher and school board arising out of an alleged injury suffered by a middle school student. Plaintiff contended that the injuries were caused by the defendant teacher's failure to properly supervise his class and the defendant school board's failure to maintain the grounds of its middle school. After more than a year of litigation, Plaintiff voluntarily dismissed both claims.

RACHEL ESPOSITO (RAL) and **PAUL HOLSCHER (RAL)** recently obtained dismissal of claims of discrimination, hostile work environment and negligent supervision asserted against a housing authority, as well as its executive director and deputy executive director. The claims arose out of Plaintiff's change in position at the housing authority. Defendants filed a Motion for Judgment on the Pleadings which was heard in Pitt County Superior Court. Defendants' motion was granted and all of Plaintiff's claims were dismissed with prejudice. Plaintiff then appealed the dismissal to the N.C. Court of Appeals which was later withdrawn.

RACHEL ESPOSITO (RAL) obtained a dismissal from the Equal Employment Opportunity Commission (EEOC), without any formal investigation, of a Charge alleging age discrimination and retaliation under the Age Discrimination in Employment Act. The complainant/former employee believed that the termination of her employment was because of her age and not because of the employer's cited reasons, including her poor work performance and insubordination. Around the same time that the employee had been placed on an improvement plan, she filed an internal grievance alleging age discrimination which later formed the basis for her so-called retaliation claim in that she believed her termination was also in retaliation for her previously filed internal grievance. After rounds of discussions with the EEOC Investigator, where it became abundantly clear that the employee's poor work performance and attitude were the true basis for the termination, the EEOC ultimately terminated its investigation of the case and there was no need for the defense to draft or submit any Position Statement. The EEOC issued a right-to-sue letter; however, the former employee did not file suit and her statute of limitations has now expired.

RACHEL ESPOSITO (RAL) and **PAUL HOLSCHER (RAL)** persuaded a plaintiff with claims alleging breach of contract, fraud, and unfair and deceptive trade practices to dismiss his case on the eve of the Court hearing on the defense's Motion for Judgment on the Pleadings. Plaintiff alleged that our client breached a lawn maintenance contract and engaged in fraudulent activity by not awarding him a new contract (despite his admitted substandard performance on prior contracts). Plaintiff was hinging his case on anticipated testimony from a former disgruntled employee of our client who had been the Contract Administrator during Plaintiff's work and contract bids. At the final hour, this Contract Administrator had "second thoughts" about testifying for Plaintiff, and Plaintiff took a dismissal.

DANIEL KATZENBACH (RAL) and **ANDREW HATHAWAY (RAL)** successfully obtained Summary Judgment on behalf of their client, an architectural firm, in Federal Court in the Middle District of North Carolina. The architectural firm had been sued for professional malpractice on a commercial project with alleged damages of over \$1 million. **MR. KATZENBACH** and **MR. HATHAWAY** successfully argued that Plaintiff had failed to forecast sufficient evidence of any breach of the applicable standard of care by the architectural firm, and the Court granted Summary Judgment in favor of the firm.

TODD KING (CHAR) obtained a defense verdict in a trial involving breach of warranty and lemon law claims against a national car manufacturer. Plaintiff alleged that the car had a vibration at speeds of 70-75 m.p.h. The defense admitted that the vibration existed, but disagreed with Plaintiff's description

of its severity. The defense also alleged that the vibration was an inherent characteristic of the car and, therefore, no defect existed.

MELODY CANADY (CHAR) obtained a voluntary dismissal with prejudice of a premises liability action against a municipality in which Plaintiff sought damages for injuries suffered when he slipped on ice allegedly created by Defendant's failure to maintain a fire hydrant. Plaintiff's attorney voluntarily dismissed the action with prejudice after **MS. CANADY** filed a Motion for Summary Judgment and supporting memorandum, arguing that the City did not owe Plaintiff a duty because it was not the fire hydrant that created the dangerous condition and also arguing that Plaintiff was contributorily negligent in failing to take precautions to ensure his own safety.

NORWOOD BLANCHARD (WILM) recently secured a defense verdict on behalf of a municipal client in a jury trial of a premises liability case. The case arose out of an incident in which a twelve year-old minor was injured when she collided with a volleyball pole at a city park and struck an exposed bolt. Plaintiff alleged that the City's Parks & Recreation Department was negligent because the applicable safety guidelines required the bolt to be trimmed flush. The jury returned a contributory negligence verdict. This was a significant win because under North Carolina law there is a presumption against contributory negligence when the injured party is a minor under the age of fourteen.

ANN ESTRIDGE (RAL) and **ALLISON SERAFIN (RAL)** successfully moved to dismiss a claim of Hostile Work Environment in a lawsuit brought under Title VII based on the recently established Twombly standard. The court held that Plaintiff could "not establish the third element of her claim under any plausible reading of her complaint" and further, the court need not address the other elements. Mangum v. Town of Holly Springs, 551F. Supp. 2d. 439 (E.D.N.C. March 17, 2008). "The facts Plaintiff has alleged simply do not rise to the level of unlawful gender discrimination based on a hostile work environment in violation of Title VII and defendant's motion to dismiss with respect to this claim will be granted." (Mangum referencing Bell Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S. Ct. 1955, 167 L.Ed. 2d. 929, (2007)).

PATRICIA HOLLAND (RAL) and **ALLISON SERAFIN (RAL)** successfully accomplished the dismissal of a lengthy lawsuit alleging "constructive discharge" in N.C. State Court based on the recently affirmed case Clark v. United Emergency Services, Inc., COA 07-592 (N.C. Ct. of App. April 15, 2008) (N. C. Court of Appeals upheld lower court's Order granting Defendant's Motion to Dismiss Plaintiff's claim of wrongful termination in violation of public policy).

PATRICIA HOLLAND (RAL) and **ALLISON SERAFIN (RAL)** successfully accomplished a full dismissal with prejudice of a lawsuit alleging multiple claims including violations of the Equal Credit Opportunity Act and the North Carolina Consumer Finance Act as well as claims of sexual harassment / discrimination, negligence, misrepresentation, breach of contract, and unfair and deceptive trade practices.

ANN ESTRIDGE (RAL) and **ALLISON SERAFIN (RAL)** received a favorable ruling from the North Carolina Court of Appeals which affirmed the dismissal of a lawsuit on the basis of governmental immunity. As alleged in the complaints, an eight year old student lost control of his bicycle and fell into the path of a school bus and was critically injured.

Two of the student's siblings witnessed the accident. The two brothers brought a lawsuit seeking emotional distress damages. The Court of Appeals affirmed the dismissal of the lawsuit finding that the North Carolina Industrial Commission had exclusive jurisdiction to hear this claim. The Court also held that exclusions in the Board of Education's coverage agreement applied. Because there were exclusions from coverage, the Court determined that the Board of Education had not waived its sovereign immunity. Because the Board of Education had not waived its sovereign immunity, the case was properly dismissed.

ANN ESTRIDGE (RAL) and **MEREDITH BERARD (RAL)** received a favorable ruling from the North Carolina Court of Appeals which affirmed the trial court's grant of the defendant school teacher's Motion for Summary Judgment. A student, through his legal representative, sued a former teacher alleging that he was injured as a result of a fall in a bathroom. The student was physically and mentally disabled and alleged that the fall occurred because he was allegedly not being supervised properly while in the bathroom. The trial court rejected Plaintiff's negligence claims and granted the school teacher's Motion for Summary Judgment which was affirmed on appeal.

ANN ESTRIDGE (RAL) obtained a favorable ruling from the full Commission of the Employment Security Commission. A former employee sought unemployment benefits from the Town. The former employee alleged that she was being sexually harassed and that she resigned because of the harassment. The full Commission found that the former employee was properly denied benefits. The Commission adopted the findings of the Appeals Referee which found the employee's testimony "incredible." Further, the Commission issued a new finding of fact which explicitly found that the employee had not been sexually harassed.

MEGHAN KNIGHT (RAL) obtained a favorable ruling from North Carolina Department of Labor regarding a Wage and Hour Act complaint filed by a former employee who, upon her resignation, claimed she was entitled to an extraordinary amount of pay for unused vacation.

MEGHAN KNIGHT (RAL) obtained Default Judgment, including an order for an execution sale, in a statutory lien matter.

MEGHAN KNIGHT (RAL) obtained a favorable settlement in a motor vehicle negligence case where the defendant driver admitted driving while impaired.

MEGHAN KNIGHT (RAL) assisted a mental health care provider in reporting compliance after numerous HIPAA violations by former employee.

JONATHAN ANDERS (RAL) recently obtained favorable decisions from the North Carolina Industrial Commission in two cases involving alleged pulmonary occupational diseases. The cases are Ray v. Mountaire Corp. and McNeill v. Mountaire Corp. In both cases, live haul drivers contended that their exposure to chicken proteins, feathers, and droppings caused them to develop the condition of hypersensitivity pneumonitis, a condition that can result in inflammation of lung passageways, permanent scarring and permanent reduction in breathing capacity. In Ray, the Commission ruled in Mountaire's favor in part due to the fact that a pulmonary function testing revealed no abnormality within a month after Ray was terminated from Mountaire for falsifying his job application. In McNeill, the Commission ruled in Mountaire's favor in part due to the fact that Plaintiff suffered from

Coccidiyodomicosis that resulted in his hospitalization and disability. Cocci is a fungal infection that can be contracted only in the Southwestern US, which is where Plaintiff drove trucks before going to work at Mountaire. The Commission also found in both Ray and McNeill that neither Plaintiff proved that their job duties significantly contributed to their contraction of their alleged conditions.

PAT FLANAGAN (CHAR), RYAN BOLICK (CHAR), and MELODY CANADY (CHAR) successfully defended an appeal by Plaintiffs to the North Carolina Court of Appeals of the entry of Summary Judgment in favor of a municipality. Summary Judgment was granted in favor of the municipality in the Superior Court case in which two subcontractors died while working on a water line project owned by the municipality. The estates of these subcontractors filed claims for wrongful death alleging that the municipality was negligent in failing to follow appropriate safety procedures and standards, and that the municipality was strictly liable under Chapter 143 of the North Carolina General Statutes due to its alleged failure to discover underground storage tanks near the site of the subcontractors' deaths. Plaintiffs' counsel sought damages in this suit in excess of \$10 million. The Court of Appeals affirmed the Superior Court's entry of Summary Judgment in favor of Defendant.

RYAN BOLICK (CHAR) successfully defended an appeal by Plaintiff to the North Carolina Court of Appeals of entry of Summary Judgment in favor of a corporate defendant and its employee. Summary Judgment was granted in favor of Defendants in the Superior Court case in which Defendants complained to Plaintiff and her employer regarding her poor work performance over a period of approximately six months. As a result of these complaints, Plaintiff was removed from her position. Plaintiff sued Defendants for defamation *per se*, tortious interference with contract, punitive damages and unfair and deceptive trade practices. In dismissing the action, the judge found that the complaints were not made with malice and that Defendants were privileged to make such statements as they were made to protect a business interest. The Court of Appeals affirmed the Superior Court's entry of Summary Judgment in favor of Defendants.

PATRICK FLANAGAN (CHAR) and BRAD KLINE (CHAR) obtained Summary Judgment on behalf of a municipality and police officer in the Western District of North Carolina Federal Court. The plaintiff alleged that he was subjected to an unreasonable search and seizure and was deprived of his substantive and procedural due process rights, all in violation of the Fourteenth Amendment of the United States Constitution. The complaint arose out of a traffic stop of a vehicle owned by the plaintiff and the subsequent search of the vehicle and arrest of the plaintiff for possession of a controlled substance. The case was dismissed with prejudice after the defense successfully argued that probable cause existed for the arrest and that the plaintiff failed to meet the standard for federal constitutional claims against municipalities set by Monell v. Department of Social Servs., 436 U.S. 658 (1978).

ROBB RUBIN (CHAR) and BRAD KLINE (CHAR) obtained Summary Judgment on behalf of two individually named members of a corporation that owned and operated various sandwich shops. Plaintiff alleged that she contracted *Salmonella javiana* food poisoning from a sandwich she ate at one of the restaurants owned and operated by the corporation.

However, Plaintiff filed her complaint against the individual members of the corporation and did not name the corporation as a defendant in her complaint. The case was dismissed after the defense successfully argued that Plaintiff's complaint failed to name the proper party defendant; that any Motion to Amend the complaint would not "relate back" to the original complaint; and, that any Motion to Amend would therefore be futile due to the running of the statute of limitations.

ERIN TAYLOR (RAL):

Kenneth Baker v. CCCC

Plaintiff sustained a compensable back injury in 2000. Defendants accepted liability and paid medical and indemnity benefits. Plaintiff returned to work for the Insured and Defendants made several attempts to pay Plaintiff for the rating. Plaintiff refused to enter into a Form 21 agreement or clincher. Defendants requested a Hearing to determine what permanent partial disability benefits were due. Just weeks prior to the Hearing, Plaintiff informed Defendants that he had received additional treatment, including surgery, and would be asking the Commission to approve this unauthorized treatment. Deputy Commissioner Gillen found Defendants rebutted the Parsons/Perez presumption and denied Plaintiff's claim for medical compensation; Plaintiff's recovery was limited to the rating.

Carl Kingston v. Lyon Constr.

Plaintiff alleged he contracted mesothelioma as a result of exposure to asbestos during his employment. Two different carriers provided coverage for Lyon Construction during Plaintiff's employment period, PMA Group and Penn National. While Penn National was the last carrier on the risk for Lyon Construction, Deputy Commissioner Glenn found that Plaintiff was last injuriously exposed to asbestos during PMA Group's coverage period.

Douglas Cooke v. First Choice Paints

Plaintiff, a painter, fell off a roof on September 21, 2005. Defendants accepted liability for Plaintiff's injury to his right hip and provided medical and indemnity compensation. In May 2007, Plaintiff alleged that he also injured his low back in the fall and sought medical treatment which was denied by Defendants. Deputy Commissioner Glenn found Plaintiff presented insufficient evidence to establish the original work incident caused his low back condition.

Harold Hayes v. Weldon Steel

Defendants accepted liability for Plaintiff's neck strain on October 3, 2005 and provided medical treatment and indemnity compensation. Plaintiff returned to work for the Insured and alleged a second injury on March 2, 2006. Plaintiff then went to work for another Employer and alleged a third injury on January 17, 2007. Defendants denied Plaintiff's claims for the March 2006 and January 2007 incidents. Deputy Commissioner Griffin found Plaintiff failed to prove that he sustained a compensable injury on March 2, 2006 or January 17, 2007; Plaintiff's recovery was limited to a 5% rating issued after the October 2005 incident.

Belinda Harrison, Administrator of the Estate of J.C. Taylor, deceased, Employee v. HBD Industries

Plaintiff alleged deceased employee contracted asbestosis and lung cancer as a result of exposure to asbestos during his employment. Deputy Commissioner Glenn found that deceased employee was not injuriously exposed to asbestos, that

he did not contract any asbestos-related disease and that his death was not caused by occupational exposure to asbestos. Plaintiff appealed to the Full Commission. Commissioners Sellers, Mavretic and McDonald affirmed the denial of benefits.

Furnell Peaks v. Duke University

Plaintiff sustained a compensable injury to his right knee on May 12, 1998. Defendant accepted liability for this claim and provided indemnity and medical compensation. On February 9, 2006, Plaintiff fell at home injuring his right wrist. Plaintiff alleged that his fall was caused by his right knee giving out and therefore was a compensable consequence of the original work injury. Defendants denied liability for the wrist injury. Deputy Commissioner Baddour found Plaintiff failed to prove that his fall on February 9, 2006 was caused by or was a direct and natural result of the original compensable injury on May 12, 1998.

ROB GRIFFIN (RAL) and **MARSHALL WALL (RAL)** obtained a successful jury verdict in Forsyth County Superior Court. The defendant was a national propane gas company whose vehicle ran a red light, was T-boned by another vehicle and was knocked into a crowded bus stop in Winston-Salem. The plaintiff, who was standing at the bus stop, was pinned against a rock retaining wall, and her leg was traumatically amputated by the collision. The defendants admitted liability and were willing to offer up to \$1 million to settle the case, but the plaintiff's pretrial demand was \$5 million, and the lowest demand at trial was \$3.5 million. After a one week trial, the jury awarded the plaintiff \$1.1 million.

ROB GRIFFIN (RAL) and **JENNIFER WELCH (RAL)** successfully moved to set aside an entry of default against an alleged underinsured motorist carrier in Johnston County Superior Court. After obtaining the order setting aside the default entry, **MR. GRIFFIN** and **MS. WELCH** then successfully obtained a dismissal of the entire case against the carrier on the grounds that there was no UIM coverage available under the policy.

ROB GRIFFIN (RAL) and **CHIP CAMPBELL (RAL)** recently obtained a Rule 12(b)(6) dismissal of a punitive damages claim in a wrongful death suit in Alamance County Superior Court. The estate of the decedent sought punitive damages from the defendant corporation's driver, who was legally intoxicated and was also killed in the accident. The dismissal of the punitive damages claim against the defendant estate assisted **MR. GRIFFIN** and **MR. CAMPBELL** in obtaining favorable settlements in the wrongful death claim and a companion suit in Guilford County involving a catastrophic injury to the passenger of the other vehicle in the same accident.

PATRICIA HOLLAND (RAL) and **KATIE WEAVER HARTZOG (RAL)** recently obtained a Rule 12(b)(6) dismissal on behalf of an employer who terminated a former employee who had been accused of sexual harassment. The former employee was a member of a local labor union and could only be terminated for "just cause" pursuant to the terms of the collective bargaining agreement between the union and the employer. The collective bargaining agreement required that employees submit claims involving unjust terminations to a grievance process and then to arbitration, if necessary, for resolution. **MS. HOLLAND** and **MS. HARTZOG** successfully argued that this case should be dismissed because plaintiff's claims were preempted by the Labor Management Relations

Act and because plaintiff failed to exhaust the remedies provided in the collective bargaining agreement prior to filing suit.

ROBIN DAVIS (RAL) and **KATIE WEAVER HARTZOG (RAL)** obtained summary judgment on behalf of a homeowners' association and country club in a case filed by homeowners in a development who sought to prevent the residential development of a piece of property which was formerly used as a driving range. The case was dismissed after **MS. DAVIS** and **MS. HARTZOG** successfully argued that use of the property in question was not governed by restrictive covenants and that the owner of the property could develop it for residential use.

MEREDITH BERARD (RAL), **KATHY MILES (RAL)** and **DAVID BATTEN (RAL)** obtained a dismissal of Plaintiff's appeal and upheld the trial court's granting of Summary Judgment in a medical malpractice case. Plaintiff's counsel subsequently filed a Petition for Writ of Certiorari with the Court of Appeals, which was denied by the Court.

KATHY MILES (RAL) and **MEREDITH BERARD (RAL)** obtained a dismissal in a medical malpractice case when Plaintiff's Rule 9(j) expert failed to qualify under the NC Rules of Civil Procedure.

In another case, a Motion to Dismiss a medical negligence claim by **KATHY MILES (RAL)** was granted on the grounds that Plaintiff failed to comply with Rule 9(j) of the NC Rules of Civil Procedure.

DAVID BATTEN (RAL), **LEE POOLE (RAL)** and **LEIGH ANN SMITH (RAL)** successfully defended a Maternal Fetal Medicine Specialist at trial in Mecklenburg County. In this case, the minor plaintiff was born prematurely at a very early gestation and, as a result, was born with Cerebral Palsy and Blindness. The plaintiff had a 23 million dollar life care plan as well as an emotional "day in the life" video. After seven weeks of trial, the jury decided in favor of the defendant doctor.

VAN BARNETTE (RAL) successfully argued a motion for summary judgment in Sampson County Superior Court. Plaintiff claimed that he sustained significant knee injuries after he slipped and fell in a restaurant. In his complaint, Plaintiff alleged that he fell due to moisture which was present on a hard tile floor. He also alleged that there were no signs warning him of this "hidden danger." During discovery, Defendant produced a video tape showing Plaintiff's fall, which clearly illustrated that a restaurant employee had placed a "wet floor" sign at the area in question. **MR. BARNETTE** utilized the video during his summary judgment argument and argued that, as a matter of law, the restaurant was not negligent and that Plaintiff's own contributory negligence caused the fall. The presiding judge viewed the tape in its entirety four times, read the briefs and ultimately granted Defendant's Motion for Summary Judgment.