

# LABOR LAW DEVELOPMENTS

REID, PEDERSEN, MCCARTHY & BALLEW, L.L.P.

WINTER 2007

---

**REID,  
PEDERSEN,  
MCCARTHY  
& BALLEW,  
L.L.P.**

---

**ATTORNEYS  
AT LAW**

---

101 Elliot Ave. West  
Suite 550  
Seattle, WA 98119

(206) 285-3610  
or  
(800) 221-6215

For further information  
regarding this newsletter  
please email

Todd A. Lyon at:  
Todd@rpmb.com

## IN THIS ISSUE:

**NLRB OVERHAULS SUPERVISOR DEFINITION**

**WASHINGTON SUPREME COURT LIMITS DISABLED WORKERS' RIGHTS**

**UNION WINS OVERTIME CASE, TIME AND AGAIN**

**ARBITRATOR'S INTERPRETATION OF ISSUE IS ENTITLED TO SUBSTANTIAL DEFERENCE**

**AN EMPLOYEE'S FAILURE TO MITIGATE DAMAGES RESULTS IN A REDUCED AWARD**

**RERUN ELECTION ORDERED BECAUSE UNION PHOTOGRAPHED EMPLOYEES**

**NLRB'S GENERAL COUNSEL FOCUSES ON FIRST CONTRACTS**

**UNIONS MUST BE TRUTHFUL IN CORPORATE CAMPAIGNS—  
OR PAY A HEAVY PRICE**

**EMPLOYER THROWS EMPLOYEE OUT IN THE COLD FOR EATING  
"STOLEN" FROZEN FOOD**

**DOL ISSUES REPORTING RULE ON UNION CONTRIBUTIONS TO TRUSTS**

**BECK/AGENCY FEE UPDATE**

Since its founding in 1963, the law firm of Reid, Pedersen, McCarthy & Ballew, L.L.P. has devoted its practice to the representation of labor unions. In addition, the firm represents trust funds which provide pension, training, and health and welfare benefits to represented employees.

This newsletter summarizes current developments which may be useful in representing unions and union members. The summaries and recommendations herein are general in nature and should not be relied or acted upon without further legal consultation.

**NLRB OVERHAULS  
SUPERVISOR DEFINITION**

On October 3, 2006, the NLRB issued its landmark decision revising the definition of supervisor. In *Oakwood Healthcare Inc.*, 348 NLRB No. 37 (2006), the NLRB defined the statutory function, “assign,” as designating an employee to a place, time, or overall duties. In addition, the NLRB defined “direct” as deciding what task to be performed and who must perform the task. Finally, the NLRB made clear that an employee will be considered a supervisor only if he or she exercised these forms of authority for a ‘regular and substantial’ part of the time. *Oakwood Healthcare Inc.*, 348 NLRB No. 37 (2006); *Croft Metals Inc.*, 348 NLRB No. 38 (2006); *Beverly Enterprises-Minn. Inc.*, 348 NLRB No. 39 (2006).

---

**WASHINGTON SUPREME  
COURT LIMITS DISABLED  
WORKERS’ RIGHTS**

On July 6, 2006, the Washington State Supreme Court adopted the Americans with Disabilities Act’s definition of “disabled” for the Washington Law Against Discrimination. The new definition limits who is considered disabled and, as a consequence, significantly narrows the rights available to disabled and injured workers in Washington. *McClarty v. Totem Electric*, 157 Wn.2d 214 (July 6, 2006).

---

**UNION WINS OVERTIME  
CASE, TIME AND AGAIN**

Teamsters Local 760 arbitrated sixteen (16) grievances alleging that employees were entitled to overtime based upon the plain language of the contract. In ordering Tree Top to pay additional overtime, the arbitrator rejected the Employer’s bargaining history as unreliable and past practice as unproven in sustaining all sixteen grievances. When Tree Top asked the arbitrator to overturn his decision, the arbitrator denied the request relying upon the doctrine of *functus officio*, which prohibits arbitrators from changing or modifying their decisions. *Tree Top, Inc.*, (Krebs, 2006). Tom Leahy of Reid, Pedersen, McCarthy & Ballew, L.L.P. represented IBT Local 760 in this case.

---

**ARBITRATOR’S  
INTERPRETATION OF  
ISSUE IS ENTITLED TO  
SUBSTANTIAL DEFERENCE**

Teamsters Local 174 prevailed in arbitration against United Parcel Service over the Company’s refusal to follow the plain language of the collective bargaining agreement concerning coverage for absent full-time combination employees. UPS brought an action in Federal Court to overturn the Award, complaining that the Arbitrator did not address the issue that was presented to him. In dismissing the Company’s claim, the Court confirmed that an Arbitrator’s interpretation of the issue submitted is entitled to substantial deference. In addition, the District Court found that the Arbitrator’s Award was in direct response to the issue submitted. *United Parcel Service, Inc. v. IBT Local 174*, 2006 WL 2137146, (W.D.Wash., 2006). David Ballew of Reid, Pedersen, McCarthy & Ballew, L.L.P. represented IBT Local 174 in this case.

---

**AN EMPLOYEE’S FAILURE  
TO MITIGATE DAMAGES  
RESULTS IN A REDUCED  
AWARD**

Despite the fact that the Union successfully secured reinstatement of an employee, the arbitrator only ordered 75% of the make-whole remedy because the employee failed to make a good faith effort to look for work after termination. *Albertson’s Inc.*, 122 LA 1043 (Guttshall, 2006).

---

**RERUN ELECTION  
ORDERED BECAUSE  
UNION PHOTOGRAPHED  
EMPLOYEES**

During a successful Union organizing drive, the Sheet Metal Workers Union photographed employees receiving campaign literature. The National Labor Relations Board, however, overturned the election because “in the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a Union or an employer.” *Randell Warehouse of Arizona, Inc.*, 347 NLRB No. 56 (July 26, 2006).

---

**NLRB'S GENERAL  
COUNSEL FOCUSES  
ON FIRST CONTRACTS**

When Unions are negotiating a first contract, the National Labor Relations Board will pay close attention to illegal Employer conduct and bargaining tactics to determine if a temporary injunction is necessary to remedy them. In addition, the NLRB will consider special remedies like extension of the certification year, notice reading and publication, and Union access to bulletin boards. *General Counsel Memorandum*, No. 06-05 (April 19, 2006).

---

**UNIONS MUST BE  
TRUTHFUL IN CORPORATE  
CAMPAIGNS—  
OR PAY A HEAVY PRICE**

In a recent corporate campaign, UNITE HERE mailed postcards to past, present, and prospective patients telling them not to use Sutter hospitals because their bed linens were not free of “blood, feces, and harmful pathogens.” Sutter hospitals filed a libel suit in California and a jury, in July 2006, awarded Sutter hospitals \$17.3 million in damages against the Union.

Similarly, in September 2006, an Illinois jury awarded J. Maki Construction \$2.3 million in damages against the Chicago Regional Council of Carpenters for defaming the homebuilder during an area standards campaign. The trial focused upon handbills suggesting the homes were constructed of poor quality.

---

**EMPLOYER THROWS  
EMPLOYEE OUT IN THE  
COLD FOR EATING  
“STOLEN” FROZEN FOOD**

A Kroger grocery store clerk selected a dinner from the frozen food aisle, ate it during her break, and worked the rest of her shift. According to the clerk, she intended to pay for the item the next day when the store reopened. The Employer terminated her for dishonesty and theft. The arbitrator found there was just cause for the termination because there was no evidence of a past practice allowing employees to pay for merchandise at the end of the shift. *Kroger Limited Partnership*, 122 LA 413 (Nicholas, Jr. 2006).

---

**DOL ISSUES REPORTING  
RULE ON UNION  
CONTRIBUTIONS  
TO TRUSTS**

Putting a new spin on a forty-seven year old law, the Department of Labor issued a rule on September 29, 2006 requiring Unions that have annual receipts greater than \$250,000 to annually file a Form T-1 for each trust in which it is “interested.” For purposes of reporting, a Union is “interested” in a trust if the Union alone, or with other Unions, appoints the majority of the trust’s governing board or contributes more than 50% of the trust’s revenue during a one-year reporting period. The new rule provides for limited exceptions, including a political action committee fund and for an employee benefits plan which files its own reports under ERISA. 71 Fed. Reg. 57,716. Reporting obligations begin 90 days after the conclusion of the Union’s fiscal year that begins on or after January 1, 2007. On November 27, 2006, the AFL-CIO filed a complaint seeking to set aside the final rule because the rule was issued without proper notice/comment and it is arbitrary and capricious. *AFL-CIO v. CHAO*, Case No. 1:06CV02009 (D. D.C., November 27, 2006).

**BECK/AGENCY  
FEE UPDATE**

During the October 2003 UFCW strike at Safeway stores in Southern California, many Teamsters Local 952 truck drivers crossed the picket lines. After Local 952 initiated disciplinary action, the drivers filed unfair labor practice charges against Local 952 for failing to advise them of their agency fee rights. The NLRB Administrative Law Judge agreed with the employees and found the Union had failed to provide the employees with their rights under *NLRB v. General Motors*, 373 U.S. 734 (1963) and *Communication Workers v. Beck*, 487 U.S. 735 (1988). As a result, the ALJ ordered the Union to rescind the discipline and reimburse, with interest, dues and fees for the nonrepresentational activities. *Teamsters Local 952*, NLRB ALJ, No. 21-CB-13609 (May 31, 2006).

More locally, Teamsters Joint Council 28's Objector Policy was approved of again, this time by Arbitrator Philip Kienast, in a recent attack by an Objector challenging the appropriateness of the Union's calculation of representational activities. According to Arbitrator Kienast, "The Union presented clear and convincing evidence that it properly determined the fee payable by non-members." *Teamsters Local 763 and Highline School District*, AAA 75-063-00399-05 (September 29, 2006). Todd Lyon of Reid, Pedersen, McCarthy & Ballew, L.L.P. represented IBT Local 763. Joint Council 28 covers Teamsters locals in Washington State.

The U.S. Supreme Court will review the constitutionality of a Washington State law which requires a Union to obtain individual affirmative authorization from non-members to use any part of their agency fee for political purposes. *Davenport v. Washington Educ. Ass'n* 2006 WL 1646515 and *Washington v. Washington Educ. Ass'n* 2006 WL 1785339, (2006). In March 2006 the Washington State Supreme Court ruled that the "opt-in" aspect of the law violated the First Amendment rights of the Union and its members. *State ex rel. Washington State Public Disclosure Com'n v. Washington Educ. Ass'n* 156 Wn.2d 543 (2006).

---

---

REID, PEDERSEN, MCCARTHY & BALLEW, L.L.P.

ATTORNEYS AT LAW

101 ELLIOT AVE. WEST • SUITE 550

SEATTLE, WA 98119