OREGON

CIVIL RIGHTS

NEWSLETTER

Published by the Oregon State Bar Civil Rights Section *March 2011*

And Justice for All: Federal Civil Rights Enforcement in Oregon

"We will not stand by or be aloof. We will move."

Attorney General Robert F. Kennedy, Jr., discussing civil rights enforcement at the U.S. Department of Justice

United States Attorney for the District of Oregon
Dwight C. Holton

Assistant United States Attorney
Adrian L. Brown

Frank Armstrong served in the military in World War II. The war ended, but Frank was not done serving. He still volunteers on a regular basis at the VA hospital here in Portland. It's a long trip from his home on the Oregon coast, but he has made friends on the weekly shuttle ride. So imagine his surprise when a local hotel in Portland turned him away—ushering him out because he did not have a driver's license. He had a state-issued ID card, as well as identification from the VA, but the clerk would not let him register with that—no, the clerk required a driver's license. Well, Frank was not eligible for a driver's license—because he is legally blind. So Frank spent that night on the floor of the volunteer office at the VA hospital, feeding himself from a vending machine.

Never again will Frank have to suffer this humiliation. After the United States Attorney's Office investigated Frank's complaint under the Americans with Disabilities Act (ADA), the case was successfully resolved. Frank was compensated, and the hotel entered into a settlement agreement to change its policies and practices, effectively agreeing to never again engage in disability-based discrimination. You can read the settlement agreement at www.ada.gov.

In Oregon, the U.S. Attorney's Office (USAO) is moving on civil rights enforcement. In the last six months, we have worked cases under the ADA, Fair Housing Act (FHA), and Uniformed Services Employment and Reemployment Rights Act (USERRA). We have increased our attorney time commitment and launched a new civil rights hotline (503-471-5577, toll free at 855-474-5577) and a website with information about federal statutes such as the ADA, along with a complaint form (www.usdoj.gov/usao/or).

We have worked with community civil rights organizations and made countless appearances in public forums seeking help in developing cases and educating people on the requirements of federal civil rights laws. Our current outreach efforts include planning a statewide tour of schools to help prevent today's bullies from becoming tomorrow's civil rights defendants. And we have started work on a new initiative to combat human trafficking, one more step forward in the enforcement of civil rights.

Our Charge of Enforcement: Past and Present

Honoring the commitment of U.S. Attorney General Robert F. Kennedy, Jr.—who took the helm at the United States Department of Justice (USDOJ) just over 50 years ago, leading the charge for federal enforcement of civil rights—we are very much on the move.

Current U.S. Attorney General Eric Holder has renewed Kennedy's charge. When Holder took office two years ago, he made clear that enforcement of our nation's civil and criminal civil rights laws is a top priority for the USDOJ.[1] Holder appointed Tom Perez as assistant attorney general for civil rights to lead the effort. Perez began making good on Attorney General Holder's commitment right away, hiring dozens of additional lawyers to bring the Civil Rights Division back to its earlier greatness, serving as the nation's leading civil rights law firm, and using the U.S. Attorney's Offices around the country as a "force multiplier."

Under Attorney General Holder's leadership, the USDOJ Civil Rights Division now has about 400 lawyers working full-time on civil rights enforcement throughout the nation. Holder and Perez have reinvigorated enforcement under the ADA, FHA, USERRA, and Voting Rights Act. They have also emphasized prosecution under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, which expanded the groups of people protected by federal law against violent hate crimes

CONTINUED ON PAGE 2

✦ In This Issue

to include those targeted due to their sexual orientation, gender identity, or disability.

Brief Overview of the Civil Rights Division and the U.S. Attorney's Offices

The Civil Rights Division, established in 1957, is headquartered in Washington, D.C. Its mission is to uphold the civil and constitutional rights of all Americans, including the most vulnerable members of our society. The U.S. Attorney's Offices, part of the U.S. Department of Justice, are located throughout 93 federal districts and play an essential role in the enforcement of federal antidiscrimination statutes in coordination with the Civil Rights Division.

The 93 United States attorneys serve as the nation's principal litigators, under the direction of the attorney general. In essence, we are one arm of the U.S. Department of Justice. Each U.S. attorney is the chief federal law enforcement officer of the United States within his or her particular jurisdiction. Oregon is one federal district with three offices, located in Portland, Eugene, and Medford.

United States attorneys conduct most of the trial work in which the United States is a party in federal district court, stemming from three statutory responsibilities under Title 28, Section 547, of the United States Code: the prosecution of criminal cases brought by the federal government; the prosecution and defense of civil cases in which the United States is a party; and the collection of debts owed to the federal government that are administratively uncollectible.

Each U. S. attorney exercises wide discretion in the use of his or her resources to further the priorities of the local jurisdictions and the needs of their communities. Our district's dedication to civil rights enforcement is a reflection of community's need to have a local federal resource doing that enforcement.

Federal Dedication to Enforcement

Since January 2009, the Civil Rights Division has prosecuted a record number of criminal cases: the division's criminal section prosecuted a record 125 cases in 2010, which was above the previous record set in 2009 (112 cases), and was almost twice the number of cases prosecuted in 2003 (63). In FY09, the section prosecuted the most hate crimes cases since 2001. Last year, the criminal section prosecuted more law-enforcement misconduct cases (52) and human trafficking cases (52) than in any other fiscal year in its history. Recent human trafficking cases include the largest human trafficking case in history, alleging that the defendants forced over 400 Thai workers to labor on farms across the country.

The division has also trained hundreds of law enforcement officers on the new Shepard-Byrd Hate Crimes Prevention Act and has opened more than 80 investigations under that law.

The Civil Rights Division has launched an aggressive effort to enforce the U.S. Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), which recognized that the unjustified isolation of people with disabilities in institutional settings is a form of discrimination under the ADA. The division joined or initiated litigation to ensure community-based services in over a dozen cases during 2009 and 2010 in the states of Alabama, Arkansas, California, Connecticut, Florida, Georgia, Illinois, New Jersey, New York, North Carolina, Pennsylvania, Texas, and Virginia. This litigation includes cases brought on behalf of people with disabilities who had been flourishing in the community but may have been forced into nursing homes to receive needed services due to state budget cuts. The division is investigating other *Olmstead* matters in five states, including Oregon.

CONTINUED ON PAGE 7

OREGON CIVIL RIGHTS NEWSLETTER

The *Oregon Civil Rights Newsletter* is published by the Civil Rights Section of the Oregon State Bar
P.O. Box 231935
Tigard, Oregon 97281-1935

The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

♻ Recycled/Recyclable

NLRA Survey: Recent Developments in First Amendment Issues

Sally Carter

The National Labor Relations Act (NLRA or Act)[1] affects a complex web of behavior, and as a result, employers and employees alike may make First Amendment claims in labor disputes. This article focuses on First Amendment issues in recent cases decided by or pending at the National Labor Relations Board (NLRB or Board). In addition, this article addresses the status of SB 519, the 2009 Oregon legislation banning various kinds of mandatory meetings for employees.

Employees' Freedom of Speech

In a recent series of ten cases involving unions' use of stationary banners to protest against secondary employers, the NLRB interpreted the Act so as to avoid potential First Amendment concerns.[2] In so doing, the Board found that unions do not violate the NLRA in secondary-boycott situations in which union agents peaceably display banners bearing a message directed to the public if the agents hold the banners stationary on a public sidewalk or right-of-way, do not patrol or carry picket signs, and do not interfere with those seeking to enter or leave any workplace or business.[3]

In the seminal case, *Eliason & Knuth of Arizona, Inc.*, the Board noted it was an issue of first impression whether unions violate Section 8(b)(4)(ii)(B) of the Act through the display of stationary banners at the workplaces of secondary employers. A secondary employer is one with whom a union does not have a direct relationship, that is, the employer has no collective-bargaining relationship with the union and the union is not seeking to organize the employer's employees.[4] In all ten cases, the unions engaged in the banner displays because the secondary employers had economic relationships with employers with whom the unions were engaged in primary labor disputes, and the unions wished to put indirect pressure on the primary employers.[5]

Under Section 8(b)(4)(ii)(B), it is an unfair labor practice for a labor organization or its agents to threaten, coerce, or restrain a person engaged in commerce with the object of forcing or requiring a person to cease doing business with any other person.[6] Picketing and "disruptive or otherwise coercive nonpicketing conduct" directed against secondary employers violates Section 8(b)(4)(ii)(B).[7]

In considering whether the peaceable display of banners at issue in *Eliason* violated Section 8(b)(4)(ii)(B), the Board noted that under Supreme Court jurisprudence, it was impelled, if possible, to avoid construing the Act in a fashion that would create a serious First Amendment question.[8] In the light of this jurisprudence, the Board considered and rejected the argument that the banner displays at issue constituted picketing: picketing "generally involves persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite," and the "element of confrontation" created by the carrying of picket signs and patrolling is central to the Board's conception of picketing.[9] Stating that the peaceable banner displays at issue did not create any confrontations and finding nothing in the language of the NLRA or its legislative history that required the Board to find a violation of Section 8(b)(4)(ii)(B), the Board was able to avoid any potential constitutional problems.[10]

In the next eight banner cases, all involving allegations of violations of Section 8(b)(4)(ii)(B), the Board found that the unions' conduct was, in all relevant respects, the same as that found lawful in *Eliason*.[11] In some cases, the Board noted small factual differences which it nevertheless found did not distinguish the conduct from that found lawful in *Eliason*.[12]

Finally, in the most recent banner case, *New Star General Contractors*, the Board was confronted with allegations of violations of both Section 8(b)(4)(ii)(B) and (i)(B).[13] It disposed of the (ii)(B) allegations in the same manner as in *Eliason*, since the conduct at issue was similar.[14] With respect to the Section 8(b)(4)(i)(B) allegations, the Board noted that unions violate the subsection through "picketing or other activity that induces or encourages the employees of a secondary employer to stop work," if an object of the activity is to compel the secondary employer to cease doing business with the primary employer.[15] Operating under the same duty to avoid raising unnecessary serious constitutional issues as applied to the Section 8(b)(4)(ii)(B) allegations, the Board held that the display of stationary banners did not violate Section (b)(4)(i)(B).[16]

Employers' Freedom of Speech and Oregon Law

In 2009, the Oregon legislature passed Senate Bill 519, which limits the ability of employers to require employees to attend meetings concerning political, religious, or union issues. Codified at ORS 659.780–659.785, the legislation created a private right of action for employees whose employers penalize them for declining to attend a meeting if the meeting's primary purpose is to allow the employer to communicate its opinion on matters involving religion, politics, or "the decision to join, not join, support or not support" a union. The statute has been in effect since January 1, 2010.

Shortly before the statute took effect, the business advocacy group Associated Oregon Industries (AOI) and the Chamber of Commerce of the United States of America filed suit in federal court, arguing that the statute violated employers' First Amendment rights and was preempted by the NLRA.[17] The plaintiffs sought declaratory and injunctive relief against

CONTINUED ON PAGE 4

CONTINUED FROM PAGE 3

defendants Brad Avakian, who is the commissioner of the Oregon Bureau of Labor and Industries, and the Laborers' International Union of North America, Local No. 296.

On May 6, 2010, Judge Michael W. Mosman of the U.S. District Court for the District of Oregon granted summary judgment for the defendants. He did not reach either the First Amendment or the preemption issue. Instead, he found that the plaintiffs' case failed for lack of subject matter jurisdiction. With respect to Commissioner Avakian, who said he had neither the authority nor the intention to enforce ORS 659.785, the court found that the plaintiffs lacked standing.[18] With respect to the union, which did not expressly disavow any intent to encourage lawsuits under the statute, the court found that the plaintiffs' claims lacked ripeness.[19]

Currently, there are two bills pertaining to ORS 659.780–659.785 before the Oregon legislature.[20] House Bill 2771, introduced at the request of AOI, would simply repeal ORS 659.780–659.785. In contrast, House Bill 2446 would modify the damages available and certain definitions and exceptions in the statute. For example, it would change the mandatory award of treble back pay for a prevailing employee to a requirement that the employee receive double back pay as liquidated damages if the court chooses to award back pay. In the definition section, the bill would change the ban on mandatory meetings concerning "the decision to join, not join, support or not support" a union to a ban on mandatory meetings concerning "matters related to" a union.

Employers' Freedom of Religion

In a case in which Catholic Social Services of Southern Illinois (the employer) challenged the NLRB's jurisdiction over St. John Bosco Children's Center, a nonprofit childcare facility, on freedom of religion grounds, the Board held that the Center properly came under its jurisdiction because the facility was providing secular social services and occasional secular education to the children under its care.[21] The employer had requested review of the NLRB regional director's decision asserting jurisdiction over the Center, arguing that jurisdiction was inapplicable because the employer was a religious organization and the Center provided religious instruction.[22]

The Board found that the regional director had correctly applied *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and related cases in finding that the exercise of jurisdiction created no serious First Amendment questions.[23] The Board noted that the Supreme Court's concerns in *Catholic Bishop* were with the Board's asserting jurisdiction over religious schools, because education plays a central role in propagating and sustaining religious faith.[24] In contrast, in *Catholic Social Services*, the Center was not a school, and any tutoring performed there was nonreligious.[25] Rather, the purpose of the Center was "to provide childcare in a residential treatment facility for abused and neglected children who are wards of the State of Illinois."[26]

Employers' Freedom of Press

Currently awaiting a Board decision is an appeal of an administrative law judge's 75-page decision in a case involving freedom of the press, multiple violations of Sections 8(a)(1) and (3) of the NLRA,[27] and Rob Lowe's home address.[28] The decision, *Ampersand Publishing*, details the deterioration of employer-employee relations at the Santa Barbara News-Press and the ensuing efforts of employees to unionize.[29] The efforts included a vociferous public relations campaign by employees, focused on persuading subscribers of the paper to pledge to cancel their subscriptions if the publishers did not agree to recognize the union, negotiate a contract, and, in the words of the employees, "[r]estore journalism ethics" to the paper by implementing a separation between

"To the extent the publisher's choice of writers affects the expressive content of its newspaper, the First Amendment protects that choice."

the business and news-gathering sides of the paper.[30] The paper declined to recognize the union voluntarily, but the union won an NLRB-conducted election on September 27, 2006.[31]

Following the union election, workplace relations continued to deteriorate, and on May 31, 2007, the regional director of the NLRB issued a complaint alleging that the News-Press violated Section 8(a)(3) and/or 8(a)(1) of the NLRA by various actions, including discharging eight employees because they "engaged in union and other protected concerted activities."[32] In his December 26, 2007, decision, the administrative law judge (ALJ) ruled against the News-Press on most points, finding multiple violations of the Act and rejecting the paper's arguments that its actions were protected by the First Amendment freedom of press.[33] Among other remedies, the ALJ ordered the News-Press to rehire the eight employees.[34]

Subsequently, on March 6, 2008, the NLRB regional director filed a Section 10(j) petition in federal court, asking for a temporary injunction to require the News-Press to offer interim reinstatement to the eight employees while the appeal of the News-Press to the Board was in process.[35] On January 26, 2010, the Ninth Circuit Court of Appeals affirmed the district court's denial of the requested injunction.[36] It applied a heightened standard for injunctive relief and explained that it did so because of the risk that the injunction would compromise the News-Press's First Amendment right to exercise editorial control.[37]

CONTINUED ON PAGE 5

CONTINUED FROM PAGE 4

The court stated that the facts of the unionization campaign persuaded it that the campaign "aspired in large part to compel" the publisher "to relinquish to the newsroom staff editorial control over the reporting of the news, which lies at the core of a newspaper's First Amendment rights."[38] The court said that of particular concern was that requiring the paper to rehire the discharged employees would affect the stories the News-Press published.[39] "To the extent the publisher's choice of writers affects the expressive content of its newspaper, the First Amendment protects that choice."[40]

In dissent, one judge disagreed with the focus of the majority's First Amendment concerns, stating that if the injunction were granted, the News-Press would still be "perfectly free to insist on total editorial control in labor negotiations, leaving it able to lockout [sic] employees who do not agree to such terms."[41]

Employers' Freedom of Petition

In a recent decision, the Board indicated it would issue a future decision on whether an employer's summoning police during a union demonstration was an action protected by the First Amendment freedom of petition.[42] The case originated in a March 1, 1999, union demonstration on a disputed region of sidewalk in front of the Venetian Casino Resort in Las Vegas (the employer).[43] During the demonstration, the employer, arguing that its property rights over the sidewalk sufficed to make the demonstrators' entry trespass, played a recorded trespass message at the demonstrators, attempted to make a citizen's arrest of a union agent, and summoned police to ask them to issue criminal citations to the demonstrators and block them from the sidewalk.[44] Subsequent to the demonstration, in non-Board litigation, the Ninth Circuit Court of Appeals found that the sidewalk constituted a public forum subject to First Amendment protections.[45]

In the Board's original decision in the case *(Venetian I)*, relying on the Ninth Circuit's finding that the sidewalk was a public forum, the Board held that the employer had violated Section 8(a)(1) of the Act through its March 1, 1999, efforts to interfere with the union demonstration.[46] On appeal, in response to the employer's First Amendment arguments under the *Noerr-Pennington* doctrine, the District of Columbia Circuit affirmed the Board's decision with respect to the playing of the trespass message and the attempted citizen's arrest but remanded for Board consideration of the issue of the summoning of police.[47] Originating in antitrust law, the *Noerr-Pennington* doctrine provides that otherwise illegal conduct is sometimes protected by the First Amendment when the conduct "is part of a direct petition to government or 'incidental' to a direct petition."[48]

In its decision, the District of Columbia Circuit held that the employer's trespass message and citizen's arrest were not protected under the "incidental" category because those activities were in no sense prerequisites to the employer's litigation.[49] However, the court found that the Board had not addressed whether the summoning of the police was protected as a direct effort to influence the government.[50]

In a two-member decision in 2009 *(Venetian II)*, the Board decided to withdraw its finding of a Section 8(a)(1) violation with respect to the employer's action of summoning the police, finding that it would be more efficient to leave the issue unresolved and enforce the rest of the order in the case.[51] However, in the wake of the Supreme Court's opinion in *New Process Steel, L.P. v NLRB*, which invalidated that kind of two-member decision, the Board decided *(Venetian III)* to set aside its 2009 decision and order, sever the remanded finding, reissue the order for enforcement, and consider and take appropriate action on the remanded finding.[52] ✦

Sally Carter is a Portland attorney with a background in labor and employment law and criminal prosecution. She is the current chair of the Civil Rights Section.

Endnotes

1. 29 USC §§ 151–169.

2. *E.g., Carpenters Local No. 1506 (Eliason & Knuth of Arizona, Inc.)*, 353 NLRB No. 159 (August 27, 2010), slip op. at 1.

3. *E.g., id.*

4. *See, e.g., id.* at 2.

5. *See, e.g., id.*

6. *Id.* at 3.

7. *Id.* at 1.

8. *Id.* at 1, 3.

9. *Id.* at 5–6.

10. *Id.*

11. *E.g., Southwest Regional Council of Carpenters (Carignan Construction)*, 355 NLRB No. 216 (September 30, 2010); *Carpenters Locals 184 and 1498 (Grayhawk Development, Inc.)*, 355 NLRB No. 188 (September 21, 2010).

12. *Mid-Atlantic Regional Council of Carpenters (Goodell, Devries, Leach & Dann, LLP)*, 356 NLRB No. 16 (November 2, 2010) (banner display preceded at secondary location by area-standards picketing); *Southwest Regional Council of Carpenters (Held Properties, Inc.)*, 356 NLRB No. 16 (October 29, 2010) (same); *Southwest Regional Council of Carpenters (Held Properties, Inc.)*, 356 NLRB No. 11 (October 27, 2010) (same); *Southwest Regional Council of Carpenters (Richie's Installations)*, 355 NLRB No. 227 (October 7, 2010) (banners moved in de minimis fashion); *Carpenters Local 506 (Marriott Warner Center Woodland Hills)*, 355 NLRB No. 219 (September 30, 2010) (banners displayed very close to premises of secondary employers); and *Carpenters Local 1506 (AGC San Diego Chapter)*, 355 NLRB No. 191 (September 22, 2010) (banners oriented slightly differently than in *Eliason*).

13. *Southwest Regional Council of Carpenters (New Star General Contractors)*, 356 NLRB No. 88 (February 3, 2011), slip op. at 2.

14. *Id.*

15. *Id.* at 3.

16. *Id.* at 6.

17. *Associated Oregon Industries and Chamber of Commerce of the U.S.A. v. Brad Avakian and Laborers' International Union of North America, Local No. 296*, No. CV 09-1494-MO (D. Or. May 6, 2010), slip op. at 2 (Summary Judgment Opinion and Order).

18. *Id.*

19. *Id.*

20. My thanks to Barbara Bloom and David Thompson at Bullard Smith Jernstedt Wilson for alerting me to these bills.

CONTINUED ON PAGE 9

Supreme Court Update

***NASA v. Nelson*,**
09-530 (Jan. 19, 2011)

The United States Supreme Court reversed the Ninth Circuit Court of Appeals in this 8–0 decision and held that background checks for government contract employees did not violate a constitutional right to informational privacy. Contract employees with long-term access to federal facilities were required to complete a standard background check, starting with a questionnaire that inquired into the contract employee's treatment or counseling for drug use; his or her references were asked open-ended questions about the contract employee's honesty. Employees who did not complete the background check process would face termination.

Plaintiffs brought suit, claiming that the process violated a constitutional right to informational privacy. The district court declined to issue a preliminary injunction. The Ninth Circuit reversed, holding that the plaintiffs' informational-privacy rights were likely violated because questions relating to treatment or counseling for drug use furthered no legitimate interest, and that open-ended questions were not narrowly tailored to meet the government's interests in verifying contractors' identities. The Supreme Court reversed, holding that the questions were reasonable in light of the government interests at stake.

***Snyder v . Phelps*,**
09-751 (March 2, 2011)

The Supreme Court affirmed the Fourth Circuit Court of Appeals in an 8–1 decision and held that the First Amendment shields from tort liability those who peacefully protest on a matter of public concern near the funeral of a military service member. For the past 20 years, the congregation of the Westboro Baptist Church (WBC) has picketed military funerals to communicate its belief that God hates the United States for its tolerance of homosexuality, particularly in America's military.

Elizabeth Bonucci
Fisher & Phillips LLP

Kyle Busse
Busse & Hunt

Fred Phelps, who founded the church, and six WBC parishioners traveled to Maryland to picket the funeral of a Marine who was killed in Iraq in the line of duty. The picketing took place on public land approximately 1,000 feet from the church where the funeral was held, in accordance with guidance from local law enforcement officers. The picketers peacefully displayed their signs for about 30 minutes before the funeral began. The plaintiff sued Phelps and the church, alleging, among other things, intentional infliction of emotional distress.

A jury found for the plaintiff and awarded millions in compensatory and punitive damages. The trial court reduced the punitive damages but left the verdict otherwise intact. The Fourth Circuit reversed, holding that the defendants' statements were entitled to First Amendment protection.

The Supreme Court affirmed, noting that although the defendants' conduct inflicted great pain on the plaintiff, the WBC "addressed matters of public concern, in a peaceful manner, in full compliance with the guidance of local officials." The Court further noted that, as a nation, we have chosen "to protect even hurtful speech on public issues to ensure that we do not stifle public debate."

***Staub v . Proctor Hospital*,**
09-400 (March 1, 2011)

In this unanimous decision, the Supreme Court reversed the Seventh Circuit and held that under the Uniformed Services Employment and Reemployment Rights Act (USERRA), if a supervisor performs an act motivated by antimilitary animus that is intended to cause an adverse employment action, and if that act is the proximate cause of an adverse employment action, the employer is liable. In *Staub*, the plaintiff, a member of the U.S. Army Reserve, was given a disciplinary warning by supervisors who were hostile to his military obligations. After receiving a report that the plaintiff had violated the terms of the warning, and reviewing his personnel file, the employer terminated the plaintiff.

The plaintiff brought suit, alleging violations of USERRA. The Seventh Circuit reversed a jury verdict in favor of the plaintiff and held that the defendant was entitled to judgment as a matter of law because the decision-maker relied on more than just the hostile supervisors' advice in making her decision. The Supreme Court reversed, holding that since there was evidence that the hostile supervisors' acts were causal factors in the plaintiff's termination, judgment as a matter of law was inappropriate.

***Thompson v. North American Stainless*, No. 09-291 (Jan. 24, 2011)**

In this unanimous decision, the Supreme Court reversed the Sixth Circuit Court of Appeals and held that an employee who does not directly engage in protected activity can still assert a claim for retaliation under Title VII of the 1964 Civil Rights Act as a victim who falls within the "zone of interests" of protection afforded by the statute. The plaintiff alleged that he was terminated in retaliation for his then-fiancé's filing of a gender-based discrimination complaint against their mutual employer. The Supreme Court held that the plaintiff himself was a person aggrieved within the meaning of Title VII and that the nature of the antiretaliation provision included a broad range of employer conduct that might dissuade a reasonable worker, such as a close family member or fiancé, from making or supporting a charge of discrimination. ✦

Elizabeth Bonucci, an associate of Fisher & Phillips LLP, represents employers in labor and employment law. Kyle Busse, an associate of Busse & Hunt, represents employees.

Back to page 1

 CONTINUED FROM PAGE 2

The division has also intervened in the case of *Disability Advocates, Inc. v. Paterson*, 10-235-CV (2d Cir. 2010), filing a brief in support of the district court decision ordering the state of New York to place 4,000 people over the course of several years from adult foster homes to community-supported housing.

Focus on Employment Discrimination, Including Veterans

Under Attorney General Holder, the Civil Rights Division has revived its long-dormant pattern-or-practice enforcement to systematically combat employment discrimination. The division has initiated 16 new pattern-or-practice investigations of state or local employers since President Obama was sworn into office. The Civil Rights Division is making full use of all tools in our enforcement arsenal, including disparate impact theory. The division obtained a significant victory for applicants to be New York City firefighters when a court found that the city's use of two written examinations resulted in an unlawful disparate impact on African Americans and Latinos. The court has ordered priority hiring relief for 293 rejected applicants and mandated the implementation of new, lawful hiring practices.

A recently filed suit in Massachusetts challenges the use of a physical fitness test in screening applicants for correctional officer jobs. The division alleges that the test has a significant disparate impact on women and is not job related. In New Jersey, a new suit challenges a state's written exam for promotion to police sergeant, asserting that it has had an unlawful disparate impact based on race and national origin.

The Civil Rights Division has also worked to protect the employment rights of our men and women in uniform. The division has aggressively enforced USERRA, ensuring that service members returning from active duty are not penalized by their civilian employers. For example, the division secured back pay and injunctive relief against the Alabama Department of Mental Health for its failure to promptly reemploy an employee upon his return from active duty in Iraq.

In the last two years, the Civil Rights Division has also built up efforts to help businesses and public institutions achieve compliance without the need for costly (and time-consuming) litigation. Civil Rights Division lawyers provide training and consultation on civil rights compliance around the nation, and have posted an easy-to-use website with extensive information on how to stay in compliance—whether you're a small business, a multinational, or a local government or public institution. As Attorney General Holder and Perez make clear, we'd rather prevent than litigate—but when enforcement is necessary, we won't shy away from the job.

Holder and Perez have also sought to leverage the resources of the Civil Rights Division and put local talent to use by teaming up with the U.S. Attorney's Offices nationwide.[2]

Our Commitment to Both Civil and Criminal Enforcement of Civil Rights in Oregon

The civil statutes most commonly enforced by the U.S. attorney in the District of Oregon include the ADA, FHA, and USERRA. We also work collaboratively with the Civil Rights Division regarding enforcement of the Civil Rights of Institutionalized Persons Act, the Equal Educational Opportunities Act, and the Voting Rights Act. These statutes reflect some of the United States' highest ideals and aspirations: equal treatment and equal justice under law.

These statutes are commonly investigated by a federal administrative agency before the U.S. Department of Justice gets involved. We may investigate and seek to remedy alleged discriminatory conduct only when and in the manner specifically authorized by the applicable statute. Accordingly, our authority to investigate and seek to remedy patterns and practices of certain unlawful discriminatory conduct does not generally extend to representing individuals in their pursuit of private civil rights claims.

Usually the USAO handles individual civil rights cases only after they have been investigated and referred to us by another federal agency, such as the Equal Employment Opportunity Commission (www.eeoc.gov/); United States Department of Housing and Urban Development (http://portal.hud.gov/); United States Department of Education, Office of Civil Rights (www.ed.gov/about/offices/list/ocr/docs/hq5269.html); United States Department of Labor (www.dol.gov/vets/); and Office of Special Counsel (www.usdoj.gov/crt/osc/). By contrast, Title II and Title III of the ADA are investigated and enforced directly by the Department of Justice, including the U.S. Attorney's Offices.

The Federal Bureau of Investigation (FBI) investigates allegations of criminal civil rights violations, working closely with the U.S. Attorney's Office and the Civil Rights Division to ensure that appropriate cases are prosecuted as crimes. The USAO and the Civil Rights Division coordinate the enforcement of federal criminal civil rights statutes, such as hate crimes statutes prohibiting discrimination on the basis of race, sex, disability, religion, national origin, sexual orientation, and gender identity.

Recent Civil Rights Cases Prosecuted by the U.S. Attorney for the District of Oregon

The U.S. Attorney's Offices in Oregon have four assistant U.S. attorneys who handle civil rights cases—three in the Portland office, two of whom handle criminal cases, and one who works on civil enforcement—and one in the Eugene office, who handles criminal cases. In conjunction with attorneys from the Civil Rights Division in Washington, D.C., they prosecute a variety of cases.

CONTINUED ON PAGE 8

CONTINUED FROM PAGE 7

Civil enforcement started picking up in 2009, with a case involving the Fair Housing Act, enforced against a landlord in Columbia County who refused to allow a mentally disabled woman to have a service animal in her apartment. In that case, we worked closely with the Department of Housing and Urban Development, which investigated the case, and Legal Aid Services of Oregon, which represented the complainant.

In 2010, we enforced the FHA in a case involving a landlord in Klamath Falls who refused to allow families with children to live in her rental properties. That case stemmed from testing performed by the Fair Housing Council of Oregon (FHCO), and ended with damages of $30,000 being paid by the landlord's estate to the FHCO.

Also last year, we sought justice for a Korean War veteran and retiree of Portland General Electric. The veteran had been denied credit for his pension for time spent serving in Korea—in violation of USERRA. PGE ultimately agreed to provide the veteran credit for time served and for the time he worked with PGE prior to his service, resulting in a payment of $20,000 in past damages to the veteran, along with an upward adjustment to his monthly pension check for the additional time he was credited.

The U.S. Attorney's Office has also assisted on the Civil Rights Division's investigation into the conditions and treatment of patients at the Oregon State Hospital under the Civil Rights of Institutionalized Persons Act. We continue to work closely with attorneys from the special litigation section in D.C., who recently expanded their investigation to include the state's duties to provide community-based mental health services as required by the 1999 U.S. Supreme Court decision *Olmstead v. L.C., supra*.

As mentioned above, allegations of criminal civil rights violations are investigated by the FBI, which works closely with the U.S. Attorney's Office and the Civil Rights Division to ensure that appropriate cases are federally prosecuted in Oregon. Recent criminal civil rights cases prosecuted by the U.S. attorney include hate crimes against African American and Jewish members of our community. In Medford, Gary Moss and Devan Klauseggar pled guilty to setting a fire in the shape of a cross and the letters "KKK" on the lawn of an African American family. Both pled guilty to the crime of conspiring to violate civil rights and admitted that their actions were intended to scare the family into moving solely because of their race, which is a criminal violation of the federal Fair Housing Act.

In Eugene, the U.S. Attorney's Office prosecuted and convicted five separate individuals (Jacob Laskey, Gabriel Doyle Laskey, Gerald Anthony Poundstone, Jesse Lee Baker, and Jereomy Allan Baker) for conspiring to violate civil rights and/or damaging religious property when the group threw swastika-etched rocks at the Temple Beth Israel, breaking its stained glass windows, while 80 people were inside attending a Jewish religious service. The recent Mosque arson in Corvallis, allegations of verbal and physical intimidation against a Muslim woman in Gresham, and an assault against a Muslim inmate at the Multnomah County Jail are some pending investigations that the FBI and U.S. Attorney's Office are handling that involve allegations of hate crimes.

There is also a pending criminal case in the Portland office against a former federal probation officer from Eugene, Mark John Walker. A federal grand jury charged Walker for allegedly sexually abusing offenders he supervised as a probation officer, and then later allegedly obstructing justice during an investigation of the reported misconduct. The indictment provides that as a probation officer, Walker's duties included supervising female offenders under terms imposed by a federal judge, including those with vulnerable backgrounds involving sexual abuse, mental illness, and drug addiction. Abuse of duties as a federal officer is commonly known as a "color of law" violation against an individual's civil rights. The U.S. Attorney's Office and the FBI also investigate color-of-law violations involving police misconduct and excessive force (including the shooting death of the Aaron Campbell by the Portland Police Bureau).

Resources for Citizen Complaints

In some cases, citizens might not know where or how to file a complaint with the most appropriate agency. The U.S. Attorney's Office has published a civil rights complaint form (available in both English and Spanish) to provide the citizens of Oregon with a local resource that may be used to file a civil rights complaint of any kind. The U.S. Attorney's website has also been updated to provide the public with web links to the most appropriate law enforcement or administrative agency for specific complaints. The form and the links can be accessed at www.usdoj.gov/usao/or/.

Our civil rights hotline provides another way for the public to voice concerns about civil rights issues in our community. As mentioned above, that line can be reached by calling 503-471-5577 or (toll-free) 855-474-5577. Or send an email message to usaor.civilrights@usdoj.gov.

The U.S. Attorney's Office welcomes information from the public that brings to our attention possible violations of our nation's civil rights laws. While the scope of our civil rights practice is broad, the authority of the U.S. Department of Justice to investigate and seek relief for individual complaining parties for alleged civil rights violations is limited. The U.S. Attorney's Office reviews all information received from citizens and determines whether a potential civil rights violation has occurred, and if so, what

CONTINUED ON PAGE 9

NLRA CONTINUED FROM PAGE 5

21. *Catholic Social Services*, 355 NLRB No. 167 (2010), slip op. at 1.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 2.

27. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" employees in the exercise of their rights to engage in union and other protected concerted activities. Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

28. *Ampersand Publishing, LLC d/b/a/ Santa Barbara News-Press*, No. 31-CA-027950 (December 26, 2007) (ALJ Decision and Order). Available at http://www.nlrb.gov/case/31-CA-027950. Other highlights of the decision include pejorative language about otters, an employee named "Starshine," and shenanigans with duct tape. Even for those who never deal with labor issues, the decision is worth reading for its entertainment value alone.

29. In one key event in the deterioration of relations, Rob Lowe's home address was included in a land-use story and, as a consequence, Mr. Lowe cancelled his subscription. The staff members who wrote and edited the story were subsequently given written reprimands, despite their protests that publishing addresses under such circumstances was common practice at the paper. *Id.* at 7–10.

30. *Id.* at 13.

31. *Id.* at 16–17.

32. *Ampersand Publishing* at 1–2.

33. *Id.* at 23–25.

34. *Id.* at 73.

35. *McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 956 (9th Cir. 2010). Section 10(j) of the NLRA allows the NLRB to petition the federal courts for an appropriate temporary restraining order or relief pending the NLRB's resolution of an unfair labor practice charge. *Id.* at 957.

36. *Id.* at 953.

37. *Id.* at 958.

38. *Id.* at 961.

39. *Id.* at 962.

40. *Id.*

41. *Id.* at 967.

42. *Venetian Casino Resort, LLC*, 355 NLRB No. 165 (August 27, 2010), slip op. at 1–2 (*Venetian III*).

43. *Venetian Casino Resort, LLC, v. NLRB*, 484 F.3d 603, 604 (D.C. Cir. 2007) (*Venetian v. NLRB*).

44. *Id.* at 604–605.

45. *Venetian Casino Resort, LLC*, 345 NLRB 1061, 1061 (September 30, 2005) (*Venetian I*).

46. *Id.*

47. *Venetian v. NLRB*, 484 F.3d at 614.

48. *Id.* at 611.

49. *Id.* at 614.

50. *Id.*

51. *Venetian Casino Resort, LLC*, 354 NLRB No. 9 (April 29, 2009), slip op. at 1 (*Venetian II*).

52. *Venetian III*, slip op. at 1–2.

Oregon State Bar
Civil Rights Section
P.O. Box 231935
Tigard, OR 97281-1935

FEDERAL CIVIL RIGHTS CONTINUED FROM PAGE 8

law enforcement or administrative agency would be best suited to handle the concern raised in the complaint. The U.S. Attorney's Office is primarily a litigating office, not an investigative office, and it may refer inquiries to the most appropriate agency.

In short, we are on the move in enforcing civil rights at the U.S. Attorney's Office—and we welcome your help and support. ✦

Dwight C. Holton is the United States attorney for the District of Oregon. Adrian L. Brown is an assistant U.S. attorney in the Portland office.

Endnotes

1. Charlie Savage, "Justice Department to Recharge Civil Rights Enforcement," *The New York Times*, August 31, 2009.

2. Carrie Johnson, "Justice Department Focuses on Civil Rights," www.npr.org, February 7, 2011, and reported on NPR's *Weekend Edition*. See testimony of AAG Perez on Tuesday, April 20, 2010, before the Senate Judiciary Committee, and on Thursday, April 29, 2010, before the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties, www.justice.gov/opa/pr/2010/April/.

Back to page 1