

# OHPELRA Update

THE OHIO PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION NEWSLETTER, SUMMER 2008

## OHPELRA's President's Letter

LET ME TAKE THIS OPPORTUNITY to announce that as of June 01, 2008, I have retired from the Board of Greene County Commissioners. Greene County's motto is "A great place to live, work, and play", and I have done the first two for the past 42 years, so I am certainly looking forward to experiencing the "play" part of my life.

I have so enjoyed working along side of all of you as we experienced the good times and bad. I can say it was never dull or boring, and was always a great and interesting challenge. I am honored to have served both county and statewide in our labor relations and employee relations needs. I hope I have contributed in a positive way to the betterment of the County and State.

I wish all of you the best. I will continue to be around, as I am not stepping down as President of OHPELRA until later this year or next. After that, I will remain on the Board as immediate past president until the Board composition says otherwise. In addition, I will be back to join you in the years to come at various seminars and conferences just to see all of you.

Now, I'm going to go play with my husband!

Thanks so much,

*Marsha*

Marsha Jordan-Smart



## OHPELRA's Summer Program You Be the Arbitrator and Religious Discrimination

ON JULY 11, 2008, DON'T MISS OHPELRA's summer program. For the morning topic, Mike Esposito, Clemans-Nelson and Associates, will team up with Rob Stein, Arbitrator, to present *You Be the Arbitrator*. They will present the facts of arbitration cases, but will withhold the arbitrators' decisions to allow us the opportunity to play the neutral. Will our logic be the same as the arbitrators? You'll have to attend and play to find out.

The afternoon will be the up-and-coming topic of **Religious Discrimination** cases and the wave of litigation that may be coming upon us. Lori Torriero, Downes Hurst and Fishel, and Don Collins, City of Toledo Law Department, will provide us with what is here and what will be coming. You can't miss this one.

The summer program will be held at the City of Columbus Police Academy and will be free to OHPELRA members. Non-member cost will be \$150. **Non-members who join OHPELRA at the time of registration are eligible to attend this program for free**, and will enjoy all other benefits of OHPELRA and NPELRA membership. **Combined dues are only \$185.00 per year. If you attend this program and our Fall Seminar or Annual Conference, you will save more than the cost of membership.**

Watch your mail or go to the OHPELRA website, [www.ohpelra.org](http://www.ohpelra.org), to register.

## OHPELRA ... "Going Green" and "Getting Refreshed"

AS YOU CAN SEE, OHPELRA HAS OFFICIALLY ENTERED THE 21ST CENTURY by "going green" with its newsletter. We hope the move to an electronic version continues to provide you with the information you need regarding OHPELRA and also keeps your desk a little more tidy.

After you read the newsletter, make sure you peruse the "new look" website ([www.ohpelra.org](http://www.ohpelra.org)) We've added some great features to assist our membership and the public sector labor relations and human resources professional get the resources they need at one site.

The site features all the information we provided before, but also includes enhancements such as a homepage link list to all our most frequent research resources and agency sites, as well as federal and state forms. You don't have to search the web for the right place to look up federal regulations, Ohio Ethics Commission advisory opinions, or the Declaration of Material Assistance (DMA) form any longer. It's all right on the front page of the website. Other new features include replacing the Discussion Board with a web blog and allowing members to download the OHPELRA/NPELRA membership list from our site. You can even get your local forecast and search the web using Google right from our front page.

*Continues on next page.*

“OHPELRA Going Green” from page 1

We hope that once you see the site and the toolbox it provides, it will be your site for research and information. If you have any other links or ideas to enhance the site, please e-mail Kevin Williams at [kgwilliams@columbus.gov](mailto:kgwilliams@columbus.gov). Make sure you visit the site, and who knows, once you've seen it, maybe you'll make it a featured bookmark, or better yet, your homepage. [www.ohpelra.org](http://www.ohpelra.org)

**If you are a member and forgotten the user name and password for the member-only portions of the website, please e-mail Maurice Evans at [maurice.evans@cityofdayton.org](mailto:maurice.evans@cityofdayton.org)**

## 2008 OHPELRA Annual Training Conference – Always the Best!!!

IT IS JUST ONE OF THOSE EVENTS that you look forward to all year, and after the holidays have ended, it's the next “great” event that comes around. This, of course, must be the Superbowl, right? Well, in part. No, I'm talking about the OHPELRA Annual Training Conference, and the 2008 edition was, again, a great success with over 200 members attending again this year.

Why do we look forward to it so much? It is the one place and time that we, as human resources and labor relations professionals, come and can “let our hair down.” We are truly amongst friends, colleagues, and brethren at this event. We can share our successes, our hardships, and our day-to-day irritations with people who know what the heck we are talking about. Thank you to the membership and the sponsors for making this our “oasis”, even for just a few days a year.

Beyond the kinship, the ATC also offers the best darn public sector employment and labor relations practice training you will ever get. This year's ATC was no different in that way. Sunday kicked off the ATC fast with NPELRA's elective academy, “Costing a Labor Contract,” followed by Mike Esposito of Clemans, Nelson & Associates wowing us with “You Be the Arbitrator.”

After working all day, we then had one of the best Superbowl parties we've had where we were able to reacquaint ourselves with old friends and introduce ourselves to some new ones. The event looked to be enjoyed by all who attended.

On Monday, Marsha Jordan-Smart, OHPELRA President, Denyce Holsey, NPELRA President, and Mike Kolb, NPELRA Executive Director, opened the conference with a warm welcome and an overview on the local issues affecting our association. From there, the conference took on its usual magnificence in providing the most up-to-date information and advice that can be provided with sessions including, Alternative Bargaining Models (Steve Loeffler, State of Ohio Office of Collective Bargaining), Death, Taxes, and Performance Appraisals: Three Miserable But Unavoidable Facts of Life in Human Resources (Felicia Bernardini, Bernardini Consulting Group), Effective Witness Interviews (Don Crain, Frost Brown Todd, and Ron Linville, Baker Hostetler). And, if you missed Deb Adams', Frost Brown Todd, presentation of Tattoos and Tank Tops and Piercings – Oh My! or the closing session of Brighten the Corner Where You Are presented by Dr. Stephen Douglas, you missed some of the best and most humorous presentations of our reality as human resources and labor relations professionals.

At the business meeting OHPELRA honored two of its very special sponsors and long-time members. Marc Fishel, Downes Hurst and Fishel, received the Pacesetter Award for his work defend-



**Marc Fishel, of Downes Hurst & Fishel, received the OHPELRA Pacesetter Award. He is pictured with OHPELRA President, Marsha Jordan-Smart.**

ing Butler County in the Allen v. Butler County federal litigation regarding FMLA, and Felicia Bernardini, Bernardini Consulting,

was rewarded for her several years of contributions to OHPELRA and the betterment of human resources and labor relations with the Award of Excellence.

The ATC is the pinnacle event for OHPELRA and we encourage our membership to continue to attend and bring their war stories and their current struggles to share amongst friends. You, the membership and sponsors make it the best.



**Felicia Bernardini, Bernardini Consulting, receiving the OHPELRA Award of Excellence.**



OHPELRA members enjoy the Pat Webster Memorial Eucre Tournament on Monday evening of the OHPELRA ATC.



Marsha Jordan-Smart, OHPELRA President, with her reward for being the high bidder at the NPELRA Foundation auction held during the NPELRA ATC.

## OHPELRA Member, Brenda Lovell, Brings Home the Gold (or Glass in this case)

BRENDA LOVELL HR ASSISTANT in the Village of Groveport and OHPELRA member, was recognized at the NPELRA Annual Training Conference in Clearwater Beach, Florida with the NPELRA Pacesetter Award. Brenda recognized the difficulty of the HR role in a small city with limited staff. Because of this, she initiated the first central Ohio HR Group meeting. It started with 15 individuals representing 10 municipalities and villages. By the end of 2007, she had grown the organization to over 35 individuals representing 24 entities.

The group started meeting monthly but then changed to quarterly as the group grew in size. The group meetings include roundtable table discussions and speaker presentations that have greatly enhanced the networking and available HR resources in the area.

*Congratulations and Great Job to Brenda for all of her hard work in establishing and growing this organization and making OHPELRA proud!*



Brenda Lovell being presented with the NPELRA Pacesetter Award from Sherrie Le.



One of the two paintings by Erik Wahl. The other painting was of Bono from the rock group U2. Mr. Wahl painted both portraits in minutes to music while presenting the keynote presentation at the NPELRA ATC. Mr. Wahl donated both paintings to NPELRA and they were auctioned with proceeds going to the NPELRA Foundation.



# Don't Be Caught Up Creek Without a Paddle –

## Navigating the Current Wave of Proposed Changes in Employment Law

WITH THE CURRENT PRESIDENTIAL PRIMARIES focusing on “bringing change” to America, businesses should take this time to reflect upon what changes are already being contemplated in Federal employment law. Obviously, the 2008 presidential elections will have a profound impact on American workplaces as a Democratic President and Congress will mean a big change in priorities from the current Bush administration. However, even a cursory review of the current wave of pending, proposed, and recent employment law changes should have businesses ready to raise their anchors and prepare for a wave of change beginning in 2008. This article will serve as your guide through some of the hottest new and proposed Federal employment law changes currently facing American businesses.

### FMLA

President Bush recently signed into law the National Defense Authorization Act (“NDAA”) which amended the Family and Medical Leave Act (“FMLA”) as it relates to military family leave. The NDAA permits the use of up to 26 weeks of FMLA leave during a twelve month period to care for a service member with a “serious illness” who was injured in the line of duty. It also provides the FMLA’s standard 12 weeks of leave during a twelve month period for a “qualifying exigency” related to a service member’s call to active duty. The NDAA charged the Department of Labor (“DOL”) with defining “qualifying exigency” through the DOL’s power to regulate under the FMLA.

On February 11, 2008, the DOL responded to the NDAA by publishing proposed new FMLA regulations. However, not all of the proposed new regulations relate to the new military family leave. Some of the important non-military family leave regulatory changes proposed by the DOL include the following:

A. Employers will have to provide employees a much more substantive notice whenever leave is designated FMLA. Employers must provide the notice to employees within five (5) days of having sufficient information to make the determination. The current regulations require the designation notice to be provided within two (2) days, which can be difficult to comply with. However, having more time to designate the leave comes with a price – employers will now be required to inform employees of the precise number of hours, days, or weeks that will be designated FMLA within the body of the notice. The more substantive calculations may prove difficult for unforeseeable and intermittent leave requests. The DOL will also require employers to inform intermittent employees every 30 days that their leave is designated and protected under FMLA and advise the employees as to the amount of FMLA taken during the 30-day period.

B. Employers will be able to directly contact an employee’s medical provider in order to obtain clarification or authentication of FMLA documentation. Current regulations prohibit employ-

ers from personally contacting an employee’s medical provider. Instead, employers are limited to communicating with the employee’s medical provider solely through the employer’s own retained medical provider. Even then, the employee must first consent. The DOL is clear, however, that even though employers will now be permitted to contact an employee’s medical provider personally, the employer must still comply with HIPAA’s privacy rules. Therefore, employers will need to have employees complete a HIPAA Release prior to contacting the employee’s medical provider. This requirement seems reasonable and serves as a layer of protection for employee privacy.

C. Employees will have to comply with an employer’s usual paid leave call-in procedures before taking unscheduled, intermittent leave under the FMLA except in cases of emergency. The new regulations will make it clear that an employee covered under FMLA is not entitled to any paid benefits that they would not normally be entitled under the employer’s paid leave policy. Therefore, an employer will be permitted to deny paid benefits and seek any appropriate, non-retaliatory disciplinary procedures against employees who fail to follow company policy for paid leave. Current FMLA regulations state that an employer cannot enforce FMLA notice provisions that are stricter than the FMLA. This regulatory change is very welcome and will help remove employee perception that FMLA-covered employees are treated more favorably than non-FMLA covered employees who seek the same level of paid leave benefits.

D. The proposed regulations clarify that employers may not place limits on employees who request FMLA protection in order to care for family members with a serious illness. Some employers have taken the position that employees only qualify for FMLA leave in these situations if the employee is the only individual or family member available to provide care. The new regulations will prohibit this practice and its continued use will unlawfully interfere with employee FMLA rights.

E. The new regulations will permit public employers to run compensatory time concurrently with FMLA leave. This is not currently permitted in the regulations and will serve to treat compensatory time off the same as other paid leave benefits.

F. Employers will be prohibited from counting an employee’s time worked during a temporary light-duty assignment (typically pursuant to a workers compensation injury) against the employee’s twelve-week FMLA allotment. The new proposed regulations specify that time worked in a light-duty assignment does not count toward an employee’s FMLA leave.

G. Finally, the proposed regulations will clarify the confusion in the courts as well as among practitioners as to the validity of an employee’s waiver of FMLA rights in a severance or settlement agreement. The DOL’s proposed regulations take the majority view that employers and employees can enter into enforceable agreements that waive an employee’s right to institute litigation regarding past FMLA claims. However, future FMLA claims that may arise after the date of the agreement may not be waived.

Again, these are proposed regulations at this time and are currently open for public comments through midnight, April 11, 2008. The indication from the DOL is that the agency wants to

*Continues on next page*

have the final rules in place before the current Bush administration leaves office. If you want to offer comment or your opinion to the DOL about the proposed regulations, please contact the DOL prior to the deadline for public comments. Go to [www.dol.gov](http://www.dol.gov) for directions on how to submit your comments.

### **ENDA**

The Employment Non-Discrimination Act (ENDA) is a proposed Federal law that would prohibit discrimination against employees on the basis of sexual orientation. It would have the same damages as Title VII of the Civil Rights Act. The Act exempts religious organizations and the U.S. armed forces from compliance. There are two pending versions of this bill (H.R. 2015 and H.R. 3685). The main difference between them is that HR 3685 does not include the term "gender identity" within its coverage. The main argument advanced for excluding gender identity (which is essentially taking on the characteristics, appearance, or mannerisms of the opposite sex) is that Courts have already extended Title VII of the Civil Rights Act's protections against sex discrimination to gender identity. On November 7, 2007, HR 3685 overwhelmingly passed the House of Representatives and is currently pending in the Senate.

If either of these bills pass, which is rather likely at this time, businesses will be highly encouraged to revise their handbooks, policies, and recruiting materials to add the new protected category of "sexual orientation" to their anti-discrimination policy statements. Additionally, management and employee training and awareness will be a must.

### **ADA Restoration Act**

The ADA Restoration Act is pending before the House of Representatives and would drastically expand the definition of disability under the American with Disabilities Act ("ADA") to cover, and require employers to accommodate, individuals with any "mental or physical impairment." This proposed new definition expands disability to cover minor or temporary impairments such as near-sightedness, headaches, and even runners knee.

Currently, an employee must have a physical or mental impairment which renders the employee substantially limited in an everyday life activity in order to qualify as disabled under the ADA. Minor or temporary impairments do not currently meet this definition. The Restoration Act also would remove the current judicial interpretation that employee impairments must be considered in their mitigated state. Therefore, under the Restoration Act, an employee who is near-sighted but has 20/20 vision with corrective contact lenses would now be considered disabled since the person is near-sighted without the mitigation of contact lenses.

The Restoration Act would have far reaching implications for employers. Since the ADA requires employers to provide reasonable accommodations to qualified disabled individuals, if the Restoration Act's new definition of disability is enacted, employers will be faced with a substantial increase in accommodation requests that they must consider and provide to employees with allergies, headaches, and plausibly sinus infections since they will be disabled under the Restoration Act's language. Further, these newly disabled employees will be protected from discrimination and retaliation under the ADA.

### **Civil Rights Act of 2008**

Pending before both the House and Senate are two related bills (HR 2159 and S.B. 2554, respectively) that would radically modify employment law in a manner that would be detrimental for American businesses. S.B. 2554 is co-sponsored by both Senator Hilary Clinton and Senator Barack Obama. Both Acts would do the following:

A. Eliminate the current damage caps under Title VII and the ADA, thereby increasing litigation costs for employment claims.

B. Add compensatory and punitive damages to the FLSA and the Equal Pay Act ("EPA")

C. Amend the Federal Arbitration Act ("FAA") to prohibit clauses in employment agreements (except collective bargaining agreements) that require arbitration of federal constitutional or statutory claims unless the parties consent AFTER the dispute arises. Therefore, pre-employment arbitration agreements will be invalid as to federal claims.

D. Provide the National Labor Relations Board ("NLRB") with the ability to award back pay to undocumented workers. Currently, undocumented workers are not eligible for back pay as they are not legally entitled to wages under the FLSA.

E. Condition a State's receipt of federal funds on the State's waiver of sovereign immunity against individual claims for monetary damages under the Age Discrimination in Employment Act ("ADEA"), the FLSA, and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Currently, States cannot be sued for these claims base upon their sovereign immunity. However, in practice, state law will typically be applied against the States in place of federal law.

Both bills are relatively new and have not come to a vote before either the House or Senate. Either bill, however, appears to have dire consequences for all American employers as they substantially increase both damages and exposure to liability.

### **FLSA**

Let's not forget the Fair Labor Standards Act. Under the Federal minimum wage increases signed into law in May of 2007, the Federal Minimum Wage will jump to \$6.55 on July 24, 2008 and to \$7.25 on July 24, 2009. For most Ohio employers, the State minimum wage is higher than the Federal rate at this time. However, in 2009, that may change. Besides ensuring that both Federal and State minimum wage requirements are met, businesses are encouraged to inspect their current FLSA employment law posters to ensure that they reflect the new Federal rates. If they are out of compliance, a penalty may be imposed.

### **CONCLUSION**

All radar indicates that this year is going to be the beginning of an interesting period for employment lawyers and human resources professional alike. In order to legally navigate through the proposed and coming waves of change, businesses should keep a continuous look-out over the port-side to ensure that they are not caught up the creek without a paddle.

Article By: Brad E. Bennett, Esq. *Downes, Hurst & Fishel*

# High Court Holds “Me Too” Evidence May Be Admissible

ON FEBRUARY 26, 2008, THE U.S. SUPREME COURT answered an important evidentiary question that will affect both public and private employers alike: Can a plaintiff claiming discrimination introduce evidence that other employees were discriminated against by a different decision-maker? The answer is “sometimes.” In *Sprint/United Management v. Mendelsohn*, the Supreme Court held that employment discrimination plaintiffs may introduce testimony of non-party coworkers who allegedly experienced similar discrimination by different supervisors, **if** the relevancy of such evidence outweighs the prejudice to the employer. The Court’s ruling on the admissibility of “me too” evidence resolves a long-time split among the circuit courts and confirms that the relevancy-versus-prejudice balancing test trumps any blanket rule.

In *Sprint / United Management v. Mendelsohn*, a 51-year-old woman sued for age discrimination after Sprint terminated her in a corporate layoff. At trial, Mendelsohn sought to introduce testimony from five other former employees over the age of 40 who also allegedly experienced age discrimination during the Sprint layoff. These former employees were not parties to the litigation, and they did not have the same supervisor as Mendelsohn. The district court excluded this “me too” evidence, concluding that the former employees were not “similarly situated” with Mendelsohn because they were not laid off at the same time by the same supervisor. Because the district court found that the only relevant question was whether Mendelsohn’s supervisor acted with discriminatory animus, evidence of the actions of other supervisors toward other employees was irrelevant and unduly prejudicial to Sprint. Unfortunately for the appeals process, the basis for the district

court’s decision was less than clear.

The Tenth Circuit reversed the district court’s minute order, assuming that the district court made a blanket ruling that “me too” evidence was *per se* inadmissible. The Tenth Circuit clarified that its “similarly situated” rule only applies in discriminatory discipline cases—not in cases where a plaintiff alleges company-wide systemic discrimination. Although recognizing that “me too” evidence may not conclusively prove that Mendelsohn’s supervisor discriminated against her, the Tenth Circuit found it relevant to at least “raise an eyebrow.” The Tenth Circuit therefore remanded the case to the district court for a new trial, ordering that Mendelsohn’s proffered “me too” evidence be admitted as relevant and not unduly prejudicial.

On appeal, the United States Supreme Court ultimately ruled that “me too” evidence is “neither *per se* admissible nor *per se* inadmissible.” The Supreme Court further held that, if the district court had indeed applied a *per se* rule to exclude “me too” evidence, the Tenth Circuit would have been correct in its reversal. However, the Supreme Court vacated the Tenth Circuit’s decision because it was based on a faulty premise that the district court made a blanket ruling. The Supreme Court agreed that the district court’s minute order lacked a basis but found that the proper remedy was to remand the case to the district court for clarification of its ruling, not to reverse the district court based an assumption about what it intended.

Employers hoping that the Supreme Court had accepted the case to issue a blanket prohibition on “me too” evidence are surely disappointed. While some of the substantive evidentiary importance of *Mendelsohn* may be lost due to the procedural focus of the Supreme Court’s opinion, one rule of law is clear: The admissibility of “me too” evidence is left squarely within the discretion of a trial court, which must apply the traditional relevancy-versus-prejudice balancing test in the first instance.

Article by:  
Jennifer R. Fuller, Esq.,  
Thompson Hine LLP

## Help Us Serve You – Update Your Information Today

OHPELRA AND NPELRA ARE COMMITTED TO PROVIDING YOU the most up-to-date training and information as possible. In order to continue to provide these services, we ask that you visit the OHPELRA website at [www.ohpelra.org](http://www.ohpelra.org) and check your membership information. If your information is current – great!!! We can continue to provide you timely information. If your information is not up-to-date, please update it on-line at the website. **And, please, if your e-mail address is not included, please enter it in.** From time-to-time we provide time-sensitive information to our members using the Internet and we do not want to leave you out.



## OHPELRA Welcomes New Members

SINCE THE LAST ISSUE OF *OHPELRA UPDATE*, the following new members have joined OHPELRA and NPELRA. Welcome to our organization, and we hope to see you at our next event!

**John Allard**, Staff Lieutenant, Ohio State Highway Patrol

**Kelly Babcock**, Senior Consultant, Clemans Nelson & Associates

**Brian Butcher**, Senior Consultant, Clemans Nelson & Associates

**Carrie Copfer**, Director of Finance, City of North Olmsted

**John Dean**, Human Resources Assistant Manager, Industrial Commission of Ohio

**Wendy Dillingham**, Benefits Specialist, CEBCO

**Scott Dressler**, Director of Administration, Summit County Engineer

**David Fulmer**, Chief, Miami Township Division of Fire/EMS

**Samantha Genders**, Labor Relations Officer, Ohio Department of Public Safety

**Donald Gibson**, Employee and Labor Relations Consultant, The Ohio State University

**Nadine Glaub**, Assistant Director for Personnel Administration, Miami University

**Roseanne Graham**, Human Resources Administrator, City of Mentor

**Patrick Herron**, County Administrator, Wayne County

**Teresa Jones**, Partner, Thompson Hine LLP

**Megan Kish**, Director of Human Resources, City of Reynoldsburg

**Charles Linek**, Lieutenant, Ohio Department of Public Safety

**Delphine Mays**, Labor Relations Officer, Ohio Department of Insurance

**Scott Messer**, Human Resources Generalist, City of Columbus

**Kevin Miller**, Sergeant, Ohio Department of Public Safety

**Warrenette Parthemore**, Director of Administrative Services, City of Sandusky

**Beryl Piccolantonio**, Human Resources Assistant Manager, Industrial Commission of Ohio

**Craig Predieri**, Assistant Chief, Ohio Department of Insurance

**Karen Shroyer**, Administrative Assistant, Sugarcreek Township

**Don Simpson**, Police Chief, City of Montgomery

**Christine Thompson**, Assistant to the Mayor, City of Sharonville

**Laura Wilson**, Attorney, Coolidge, Wall, Co. LPA

**Laurie Worcester**, Human Resources Manager, Industrial Commission of Ohio

## OHPELRA Thanks Its 2007 Contributing Sponsors

SEE THE LINKS ON OUR WEB SITE at OHPELRA.org for more information on these sponsors. Please continue to consider our sponsors when seeking professional services, and remember to thank them for supporting OHPELRA!



Bernardini Consulting  
Services

CareWorks

Pepple & Waggner, Ltd  
Attorneys at Law



baker & hostetler

