

LABOR & EMPLOYMENT INSIGHTS

SUMMER 2009

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New Administration Keeps Employers Busy

WHOA, NELLIE! Robin Shea

Since President Barack Obama took office in January 2009, he has kept employers' heads spinning with appointments, enactment of new laws and regulations, and withdrawal of some employer-friendly regulations issued in the late hours of the Bush Administration. It may be too early to engage in an in-depth analysis of the changes, but it is safe to say that employers will face a tougher world. The following is a summary of what we consider the most significant legal and political developments.

Political News

From Souter to Sotomayor. President Obama has nominated Sonia Sotomayor, currently a judge for the U.S. Court of Appeals for the Second Circuit (Connecticut, New York, Vermont), to replace the retiring Justice David Souter. Judge Sotomayor was initially appointed to the federal bench by former President George H.W. Bush (the elder) and then appointed to the Second Circuit by President William Jefferson Clinton. Although Republicans and conservatives have been critical of her stance on diversity issues, her employment decisions appear to be relatively even-handed, with no strong bias for or against employers. Her most noteworthy case of late is *Ricci v. DiStefano*, a reverse discrimination case in which she joined the panel that granted summary judgment to the city of New Haven, Connecticut. In *Ricci*, which is on appeal to the U.S. Supreme Court, the plaintiffs alleged that the city unlawfully scrapped a promotion test for firefighters after most minority candidates failed to score above the minimum acceptable level.

More politically significant is Sen. Arlen Specter's announcement that he is switching from the Republican Party to the Democratic Party. Assuming that former Saturday Night Live comedian, talk radio host and writer Al Franken is declared the victor in the contested Minnesota senatorial race, Specter's defection will give the Democrats a 60-40, filibuster-proof, majority.

Before he changed party affiliations, Specter was responsible for the defeat of the Employee Free Choice Act (at least, in its original form). It will be interesting to see what role he plays in the enactment of some form of the EFCA as a Democrat.

Hot Appointment News

In addition to the appointments of Judge Sotomayor, pro-union Hilda Solis as Secretary of Labor, and Wilma Liebman as Chair of the National Labor Relations Board, the following are some appointments of interest:

Retail employers beware! President Obama has nominated M. Patricia Smith, currently Commissioner of Labor for the state of New York, to be Solicitor of Labor. Smith is known for working aggressively with labor advocacy groups and has focused on labor violations by restaurants, supermarkets, car washes, and race tracks. President Obama has nominated Smith's protégé, Lorelei Boylan, to be Wage and Hour Administrator. Boylan is relatively young, having graduated from law school in 2004, but she has made a name for herself as director of strategic enforcement of the Labor Standards Division of the New York Department of Labor. Assuming both women are confirmed, we can expect to see aggressive enforcement of the wage and hour, and labor laws, against all employers, but particularly against those in the retail and apparel industries.

Clinton's OSH Review Commission chair is back. President Obama has nominated Thomasina Rogers to head the Occupational Safety and Health Review Commission. Ms. Rogers served in the same capacity under President Clinton, and she has also been legal counsel to the EEOC and the Department of Justice. Ms. Rogers was named as acting chair of OSHRC in February 2009.

Obama names professor with strong labor ties to labor policy post. Obama has tapped William E. Spriggs, a Howard University economist, to

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from the
**EDITOR'S
DESK**

**FIVE BEST PRACTICES
IN UNDERTAKING A RIF**

We'd love to hear
your feedback.
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comments or
suggestions, please
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Skyrocketing deficits. Bankruptcies. Unemployment. Swine flu. These are not good times, even though things certainly could be (and may get) worse.

The following rules aren't particularly original, but they do serve as a good reminder to employers who are reducing their work forces:

Rule 1: Avoid having a RIF if you can help it, but be careful that the alternatives don't cause you more problems. If you are in a position to question, do give every proposed RIF a hard look and consider how necessary it is and whether there aren't other ways to save money. You should also be careful about pitfalls related to the alternatives. For example, if you simply reduce work hours, the way you handle pay could affect your employees' status as FLSA-exempt.

Rule 2: Communicate properly. If your company is having difficulties, you should share that information with your employees as well as the possibility that cutbacks may be necessary. If the employees are mentally prepared, the announcement of a RIF will be less traumatic when it comes.

Rule 3: Have a selection process that is fair. Employers should decide beforehand what the criteria will be and how the employees will be measured against that criteria. The employer should do its best to be consistent. If any exceptions have to be made, the exceptions and their rationale should be justified and thoroughly documented.

In cases where clear-cut criteria (for example, reverse seniority or the shutdown of a business unit) are not going to be used, a "fairness review" of the RIF selections by Human Resources and counsel is strongly recommended.

Another good idea for ensuring fairness is to keep "before and after" statistics on the races, sexes, national origins and ages of the individuals in the "decisional unit," especially if the selection

criteria involve some subjectivity. If you do gather such information, it is important to protect that through attorney-client privilege or work product so that you don't have to disclose it in the event of a lawsuit.

Rule 4: Be honest. One of the biggest mistakes that employers make during RIFs is to lump "problem" employees into the affected group even though they may not fit the criteria and even though their problems have not been sufficiently documented to support a termination for cause. If such an employee decides to file a charge or sue, then he may have a strong case because – according to the employer's criteria – he shouldn't have lost his job. On the other hand, it hardly seems fair to terminate good employees in a RIF situation and keep the bad ones. The solution? Be honest. Put the "problem" employee into the pool, but explain to him and to any governmental agencies that become involved that he was included because of problems that had not yet reached "termination" level, and that it just was not fair to terminate good employees in his stead.

Rule 5: Be sure you have your act together on severance. First, if you are giving only a small amount of severance, don't ask for a release. On the other hand, if you are giving a relatively generous amount, always ask for a release. For employees 40 and older, make sure that your release complies with the Older Workers' Benefit Protection Act. Courts are closely scrutinizing disclosures now to make sure that they comply with the requirements of the Act. Finally, your severance agreement overall should be written in a manner that is calculated to be understood by the average employee in the group being terminated. Too much "legalese" in the agreement can result in a finding that your agreement is void as to any age discrimination claims.

Here's to better times.

Robin Shea, Editor

WHOA, NELLIE! (continued from page 1)

be Assistant Secretary for Labor Policy at the U.S. Department of Labor. Professor Spriggs has recently served on the “National Commission of Immigration and Customs Enforcement Misconduct and Violations of Fourth Amendment Rights” chaired by Joe Hansen, president of the United Food and Commercial Workers union. Professor Spriggs also currently holds leadership roles in commissions dealing with health and retirement benefits for members of the United Auto Workers union who are or were employed at General Motors or Ford Motor Company. Under President Clinton from 1994 to 1997, Professor Spriggs was a senior economist for the Democrats’ Joint Economic Committee for Congress, and among other things, worked for an increase in the minimum wage.

Two pro-union attorneys nominated to NLRB. Finally, as Constangy has previously reported, President Obama has nominated Craig Becker, currently Associate General Counsel to the Service Employees International Union and the AFL-CIO, and Mark Pearce, a labor and employment lawyer from Buffalo, New York, who represents unions.

Legal News

Lilly Ledbetter Fair Pay Act. As most employers know, the first bill signed into law by President Obama was the Lilly Ledbetter Fair Pay Act, which extends the charge-filing period for discriminatory employment decisions that have an effect on an employee’s compensation, including benefits as well as pay. As long as the employee continues to receive a paycheck or benefits reflecting a past discriminatory decision, the charge-filing period will continue to run. The Ledbetter Act will apply to claims brought under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973. The Ledbetter Act will dramatically increase the number of “timely” discrimination charges, and thus will have a dramatic effect on employers’ recordkeeping obligations as well.

Here we go! A federal judge in Mississippi refused to dismiss a college faculty member’s pay discrimination claim because of the Ledbetter Act. The plaintiff in *Gentry v. Jackson State University* contended that in 2004 she was discriminatorily denied tenure because of her sex. Then she alleged that, in 2006, she was discriminatorily refused a salary adjustment.

Although the court dismissed her state law claim and a claim brought under 42 U.S.C. §1981, her Title VII claim survived. The plaintiff’s attorney was quoted as saying, “[W]e were overjoyed when we learned that President Barack Obama had signed the Lilly Ledbetter Act.”

EEOC issues caregiver “best practices” that go beyond employers’ legal obligations.

The U.S. Equal Employment Opportunity Commission issued a set of employer “best practices” for dealing with employees who have caregiver responsibilities. The EEOC under the Bush Administration issued similar guidance in 2007, but the Bush guidance focused primarily on ways that employer treatment of caregiver employees could result in violations of laws such as Title VII, the Americans with Disabilities Act, or the Family and Medical Leave Act. The Obama guidance takes it a step further and sets forth what employers “ought” to do, regardless of whether the law requires it. Most of the “suggestions” will not be news to employers who already have family-friendly policies and practices: for example, the Obama guidance encourages employers to allow flexible schedules and telecommuting, and to give sufficient notice of mandatory overtime. However, it also suggests offering part-time employees pay and benefits that are “proportionate” to those offered full-time employees.

Revocation of Bush rules. The Obama Administration has proposed the revocation of three employment-related rules issued by the Bush Administration: (1) a rule that would have imposed a greater obligation on unions to report financial information about the sale of investments and compensation paid to union officers and employees; (2) a rule that streamlined the process by which agricultural employers hired foreign guestworkers under the so-called “H-2A” program; and (3) a rule that allowed employees of health care employers and clinical students to “conscientiously object” to certain medical procedures, such as abortion, on religious grounds. (It should be noted that many employers in the health care industry opposed the conscientious objection rule.)

Robin Shea (Winston-Salem, NC) practices in the areas of litigation prevention and defense, including defense of class and collective actions under the Fair Labor Standards Act and the anti-discrimination laws, and affirmative action compliance.

The plaintiff’s attorney was quoted as saying, “[W]e were overjoyed when we learned that President Barack Obama had signed the Lilly Ledbetter Act.”

GETTING TO KNOW US



LISA BAIOCCHI (*Milwaukee, WI, employment litigation prevention and defense, and labor relations*) received her bachelor's degree in Human Resources from the University of Wisconsin-Milwaukee and her law degree from Marquette University, where she was president of the Labor

and Employment Law Society. Before attending law school, Lisa worked in almost every aspect of Human Resources, from payroll, and health and welfare issues, to 401(k) plan and benefit design. She has a Qualified 401(k) Administrator Certification from the American Society of Pension Actuaries. In her spare time, Lisa enjoys swimming, reading, and long walks with her two dogs.



GLEN FAGAN (*Atlanta, GA, employment litigation prevention and defense*) has a bachelor's degree in communications from Florida Southern College and a master of divinity from Emory University. After serving as a minister in the United Methodist Church, Glen earned his

law degree from Georgia State University, and clerked for the Honorable C. Christopher Hagy, a U.S. Magistrate Judge. Glen is a member of the steering committee of the Georgia Bar's Diversity Program, and enjoys playing tennis, snow skiing, hiking, and long road trips. Glen has two sons.



HEATHER OWEN (*Jacksonville, FL, employment litigation prevention and defense, and labor relations*) received both her bachelor's degree in psychology and her law degree from the University of Florida. Heather is certified by the Florida Bar in Labor and Employment Law, and has been

named one of the "Legal Elite in Employment Law" by *Florida Trend*. She is also Master of the Chester Bedell Inns of Court and serves on a number of community organizations, including

Family Foundations, where she is Board chair; and the Child Guidance Center, where she is a Board member and chair of the personnel committee. Heather and her husband, John, have six-year-old twins, and Heather enjoys working with roses, hunting for fossils, and spending time with her family.



DAVE PEARSON (*Tampa, FL, employee benefits, ERISA*) has a law degree from Harvard Law School and an LL.M. in Taxation from New York University. He received his bachelor's degree *magna cum laude* in meteorology from the University of Washington. Between college and law school, Dave worked as a weather

forecaster, computer programmer, and satellite tracker with the U.S. Air Force. Among other things, he planned top-secret flight paths, including Henry Kissinger's trip to the People's Republic of China in 1971, which paved the way for President Richard Nixon's historic trip there in 1972. Dave enjoys foreign languages, astronomy, playing chess and working with animals at the local animal shelter. He and his wife, Tara, have two grown daughters.



LEIGH TYSON (*Atlanta, GA, labor relations*) received her bachelor's degree *cum laude* in English Literature from Vanderbilt University and her law degree from the University of Georgia. While in law school, Leigh was managing editor of the *Georgia Journal of International and Comparative Law*, and was secretary

of the Moot Court Board. Leigh has been named twice as a "Rising Star Super Lawyer" by *Atlanta* magazine. She enjoys painting, and even supported herself while in law school by selling her work. Now, she often donates mixed media paintings to various charities for silent auctions. When she is not working or painting, Leigh can be found reading, cooking, traveling and spending time with friends.

WHEN YOUR EMPLOYEES COME MARCHING HOME: REEMPLOYMENT OBLIGATIONS UNDER USERRA Steven G. Hopkins

With the new administration, employers need to be aware of their reemployment obligations to employees who have taken leave under the Uniformed Services Employment and Reemployment Rights Act. This article assumes that the employer has granted leave to an employee under USERRA and discusses employers' obligations with regard to reemployment of such individuals.

Application for Reemployment

After the completion of military service, the returning employee must notify the employer of his intent to return by either reporting to work or submitting an application for reemployment, depending upon the length of the military service. Returning employees with a period of service of less than 31 days (or any length of time for a military fitness examination) must report back to the employer no later than the first full regularly-scheduled work period on the first full calendar day after the completion of the service. At a minimum, such employees cannot be required to report earlier than eight hours after arriving home. If the employee has more than 30 days of service but less than 181 days, the employee must submit an application for reemployment within 14 days of completing service; returning employees with a period of service of more than 180 days must submit an application for reemployment within 90 days of the completion of service. For those returning employees who are hospitalized or convalescing from an illness or injury incurred or aggravated by the military service, the time period for reporting or applying is extended for a maximum of two years.

The application for reemployment can be either written or verbal and is not required to be in any particular format. Although the application should indicate that the employee is returning from service in the uniformed services and is seeking reemployment, the returning employee is not required to identify a particular position for which she is seeking reemployment. The application for reemployment can be provided to any agent of the employer, including the human resources department, a supervisor, or the like. Moreover, a returning employee who fails to

timely report or apply for reemployment does not automatically forfeit her right to reemployment; instead, she would be subject to the employer's general conduct rules, policies, and practices regarding absences from work. Finally, because USERRA's regulations are replete with exceptions when the failure to report or apply are not the fault of the returning employee, employers are well advised to give the returning employee the "benefit of the doubt" as opposed to rigidly applying conduct rules.

Documentation

An employer may request documentation from the returning employee if the period of service exceeded 30 days to establish that 1) the reemployment application is timely; 2) the returning employee has not exceeded the five-year cumulative limit on the duration of service; and 3) the returning employee's dismissal from service was not disqualifying. Generally, acceptable documents include those issued by the military service detailing the returning employee's period and character of service, such as discharge forms, duty orders, letters from commanding officers, certificates of completion, etc. Servicemembers who have been discharged under less than honorable conditions as established by the military services (for example, dishonorable or bad conduct discharge, dismissal by court martial, removal from service rolls because of desertion) are not eligible for reemployment under USERRA. However, the employer should not delay or deny requested reemployment because of administrative delays in issuance of military documentation; instead, the employer should conditionally reemploy the individual until proper documentation is received. At that time, if it is determined that the returning employee is not entitled to reemployment, the employer may terminate the employment.

Reemployment Position

Absent unusual circumstances, the employer must reemploy the returning employee within two weeks of the application for reemployment. Moreover, under USERRA, the returning employee is entitled to the position that he

(continued on page 7)



QUARTERLY QUIZ

In 1995, Sheila was denied a promotion, and her male co-worker, Eddie, got it and became her boss. Sheila and Eddie continued to work together until the present, and the pay gap between them has widened every year because they both get percentage increases based on their salaries, and Eddie's salary has been higher ever since the promotion. Sheila has always believed that she was more qualified than Eddie and that his selection was discriminatory. On July 1, 2009, Sheila files a discrimination charge against her employer based on the 1995 promotion decision. (1) Is her claim timely? and (2) If she prevails, how far back can she recover the pay differential?

(answer on page 6)



ANSWER

(from Quarterly Quiz, page 5)

(1) Under the Lilly Ledbetter Fair Pay Act, each paycheck that Sheila receives that reflects the discriminatory decision would be a new “unlawful employment practice” for charge-filing purposes, which means that her challenge to her pay would be timely. (2) Because a claim based on the actual promotion decision would be untimely, the Ledbetter Act appears to provide that she can recover back pay from only two years before the date that she files her charge. Thus, she would be entitled to back pay only to July 1, 2007, not all the way back to 1995.

Employers should note the importance of retaining employment records in light of the Ledbetter Act. One very important defense to Sheila's charge would be that the promotion decision was not discriminatory and therefore the pay differential based on the fact that Sheila and Eddie held two different positions was also not discriminatory. If the company has already destroyed its 1995 records, that might be difficult to establish.

The Golden State

CHANGES TO ADA, FMLA ARE OLD HAT FOR CALIFORNIA EMPLOYERS, BUT WATCH OUT FOR MEALS AND MILEAGE

Michael S. Lavenant

EDITOR'S NOTE: “The Golden State” is a new feature that will cover developments in California.

In most of the United States, the enactment of the Americans with Disabilities Act Amendments Act and the promulgation of the new Family and Medical Leave Act regulations will have a major impact on employers.

In California, it's just business as usual.

The groundwork for California's aggressive disability discrimination rules was first laid in 1974 – almost 20 years before the “old” ADA was signed into law. Since then, California has been at the forefront of guaranteeing that persons with disabilities have equal access to employment. The expansive nature of the California Fair Employment and Housing Act was recognized in 2000, when legislation clarified that the FEHA has always been intended to be much broader than the ADA. In A.B. 2222, the state Legislature clarified that the definitions of physical and mental disability require only a “limitation” upon a major life activity, not a “substantial limitation” as required by the old ADA. They further stated that when determining whether an employee's condition is a “limitation,” mitigating measures should not be considered, unless the mitigation itself limits a major life activity. Accordingly, the elimination of the term “substantial” and of consideration of helpful mitigating measures in the ADA Amendments Act is old hat for California employers, or should be.

Nor is the federal Family and Medical Leave Act a major concern for California employers because in 1991, two years before the enactment of the FMLA, California passed the Moore-Brown-Roberti Rights Act of 1991 (also known as the “CFRA”). The recent amendments to the FMLA are not expected to have a significant impact on California employers, but while everyone is getting used to the new FMLA regulations, and particularly the new “military” FMLA leave, it's a

good idea for California employers facing family or medical leave situations to consult with their employment counsel.

What California employers (and those out-of-state companies conducting business in California) should be concerned with is the continual enforcement of the burdensome wage and hour rules. In particular, meal and rest periods continue to be a headache for managers. The two favorable state rulings on flexibility of lunch periods have been appealed, so we are continuing to advise employers to micromanage their nonexempt employees by forcing the employees to take a meal period of at least 30 minutes no later than the end of the fifth hour of work. Proper documentation of the length of the lunch and when it was taken is mandatory.

Another important area of concern for California employers is the requirement to reimburse employees for all expenses incurred as a result of the discharge of their duties. (Labor Code, Section 2802.) This includes reimbursement for each mile an employee drives in his or her personal vehicle for business purposes. The “presumed” accurate rate is the IRS mileage reimbursement rate. Failure to reimburse mileage or to reimburse at the proper rate could expose the employer to a class action lawsuit. Prevailing plaintiffs in meal break and reimbursement litigation are entitled to attorneys' fees, which makes these cases attractive for plaintiffs' attorneys.

In a state where you may have to pay an employee to commute to work (San Francisco Commuter Benefits Ordinance), California business owners and Human Resources professionals should not be horrified about anything that occurs in the other 49 states.

Michael Lavenant is head of Constangy's Ventura County, California, office and practices in all areas of labor and employment law.

REEMPLOYMENT (continued from page 5)

would have attained with reasonable certainty if not for the absence due to the military service. This position is referred to as the “escalator position.” Employees returning from military service of less than 91 days must be reemployed in the escalator position; for those employees returning from military service of greater than 90 days, the employer has the option of placing the employee in the escalator position or “a position of like seniority, status, and pay.” The Act also requires employers to make reasonable efforts to help returning employees become qualified to perform the duties of the position. Further, a returning employee is entitled to the seniority, status, and rate of pay that he would have attained in the position if continuously employed. Specifically, “status” in the reemployment position includes equivalent opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.

By the same token, if it is reasonably certain that the employee would have been demoted, transferred, or even laid off had she not been on leave under USERRA, the employer is only required to place the returning employee in the position she would have held absent the military service. Thus, an employer is not required to reemploy the returning employee when circumstances have changed so as to make reemployment impossible or unreasonable, such as when the returning employee would have been terminated during a reduction in force. Moreover, even if the returning employee is otherwise eligible for reemployment, the employer is not required to assist her in becoming qualified for the reemployment position if doing so would pose an undue hardship on the employer. Finally, the employer is not required to reemploy an individual who held a position before the military service that was only for “a brief, nonrecurrent period” and there was no reasonable expectation that the employment would continue indefinitely or for a significant period (that is, a temporary employee). Keep in mind that the employer bears the burden of establishing these defenses to a returning employee’s right to reemployment.

As employees begin to return from military service in larger numbers over the coming months and years, employers must follow USERRA’s requirements for reemployment. Courts have expressed a willingness to interpret the Act’s provisions liberally so as to provide returning employees with the maximum benefits allowed. If you have questions regarding employers’ rights and obligations under USERRA, please contact the Constangy attorney of your choice.

Steve Hopkins (Atlanta office) practices in the area of litigation prevention and defense.

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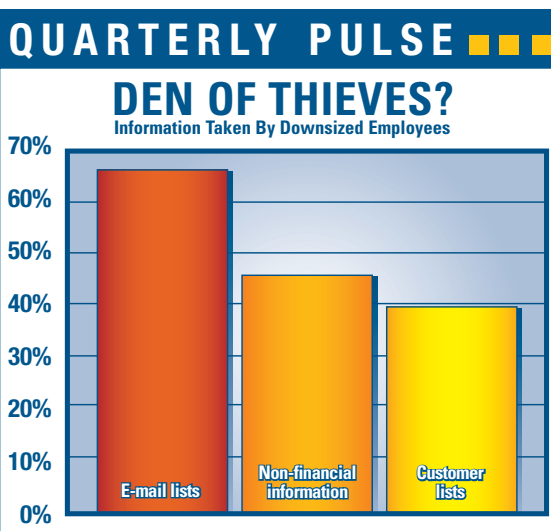
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SOURCE: From “Data Loss Risks During Downsizing: As Employees Exit, So Does Corporate Data” by Ponemon Institute, Traverse City, MI.

REASON PREVAILS...

She got served. A Home Depot manager in Tennessee was terminated for violating the company's no-self-service policy, a measure intended to control theft. The policy, common among retailers, requires that employees who make purchases and other personal transactions be waited on by co-workers rather than handling the transactions themselves. This prevents employees from "purchasing" goods and then "returning" them for a refund while keeping both the goods and the refund money. Home Depot's policy provided that violations resulted in termination on first offense. The manager did both, and was terminated. Then she sued Home Depot for sex discrimination. Thankfully, a federal district court granted summary judgment to Home Depot, and the U.S. Court of Appeals for the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) affirmed.

The Joy of SOX. A newbie employee doesn't like the way his supervisor does things. He accuses her of dishonesty, and the company conducts an investigation, clearing the supervisor and her department of accounting irregularities. "Newb" believes his company isn't taking the complaint seriously enough, so he continues to raise Cain, and is eventually terminated after only three months on the job. He files Sarbanes-Oxley and wrongful termination claims against his employer. Both a federal court in Massachusetts and the U.S. Court of Appeals for the First Circuit (Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island) agree that the employee has failed to create an issue for a jury. Even if the supervisor were guilty of sloppy recordkeeping and accounting practices, the First Circuit said, this would not be enough for a viable SOX claim. The plaintiff would have to show that the inaccuracies were material to shareholders, meaning that a reasonable investor would consider the information to have "significantly altered" the "total mix of information" relevant to the investment decision.

AND REASON FLAILS...

Aaaarrrrrgh, matey! Weren't the pirates to blame? The inspiring story of the Captain Richard Phillips of the Maersk Alabama – who offered himself to be kidnapped by Somali pirates so that his crew members could be saved – sank like a stone after a crew member on the freighter sued Maersk and another company for putting him in danger. The suit, filed by chief cook Richard Hicks, requests that the defendants impose a number of safety measures, some of which may be reasonable, but it also (of course) seeks damages in excess of \$75,000 for Mr. Hicks himself. In a related story, a Tennessee woman who offered a McDonald's cheeseburger to a homeless man who ungratefully beat her up is suing... McDonald's! (But at least she's suing her attacker, too.)

Woman with a lot on her plate can't be denied promotion for . . . having a lot on her plate. A federal district court in Maine granted summary judgment to an employer who denied a promotion to a woman who had six-year-old triplets and one other child, and who was attending night school. Among other things, the court found no discrimination because the successful candidate was also a mom, and it found that there was no evidence that the employer was motivated by "anti-mom" animus. The plaintiff appealed, and the U.S. Court of Appeals for the First Circuit (Maine, Massachusetts, New Hampshire, and Puerto Rico) reversed, giving her the right to take her case to trial. The plaintiff was told that she did not get the promotion because she had "the kids" and was going to school – and "you just have a lot on your plate right now." Moreover, although the successful candidate was a mother, she had only two children, ages 9 and 14.

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