

LEGAL UPDATE

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**HOEPPNER
WAGNER &
EVANS LLP**
ATTORNEYS AT LAW

WHO IS A SUPERVISOR FOR PURPOSES OF UNION REPRESENTATION?



Robert L. Clark

One issue which both union and non-union employers deal with is the status of “supervisors,” and whether these employees are exempt or non-exempt from various federal and state laws. In the arena of traditional labor law, the defined status of a supervisory employee was clarified in the Fall of 2006, and remains a

hot topic for both employers and unions as both sides deal with this important employee classification. On September 29, 2006, the National Labor Relations Board issued the lead decision in what has been termed the “*Kentucky River*” cases which redefined who is included as a Section 2(11) Supervisor under the National Labor Relations Act (“NLRA” or “the Act.”). The *Kentucky River* case held that permanent charge nurses employed by a hospital exercised supervisory authority in assigning nursing personnel to specific patients for care on each shift. The Board found that such assignments, which consisted of giving “significant overall duties” to an employee, met the statutory definition of “assign” as used in the Act. The charge nurses were therefore 2(11) supervisors and were deemed not part of the union.

The importance and impact of the Board’s ruling has caused employers in various industries to re-examine their employees’ duties and classifications in order to determine who can properly be classified as a Supervisor - based upon the employee’s exercise of “independent judgment” and the right to “assign” and “responsibly direct” other employees. An employee who qualifies as a “supervisor” under 2(11) of the Act is not eligible to vote in an election to determine whether a

company will recognize a new union, and will ultimately not belong to the union.

Following the publication of the *Kentucky River* decision, the AFL-CIO President has expressed his belief that the ruling in *Kentucky River* invites employers to strip millions of workers of their right to have a union by reclassifying them as supervisors in name only, and other union spokespersons have opined that the employer can give the employee token supervisory responsibility and the employee then loses his/her right to have a voice at work.

Employers need to be cautious, however, when designating or classifying employees as 2(11) supervisors, and when granting the type of “assign and direct” authority to its employees, because any anti-union comments or statements made by a supervisory employee can be attributable to the employer and can result in the filing of a charge with the National Labor Relations Board by an hourly or non-exempt employee. Anti-union or adverse actions or statements made by a supervisor are generally attributable to the company, and can lead to the filing of a charge before the Board and ultimately, liability on the part of the company. ■

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BYSTANDER'S EMOTIONAL DISTRESS IS A SEPARATE INJURY FOR INSURANCE PURPOSES



Richard M. Davis

In *Elliott v. Allstate Ins. Co.*, 859 N.E.2d 696 (Ind. App. 2007) a driver, insured by Allstate, with her sister and daughter in her car, got into an accident with an uninsured motorist in which she sustained very serious injuries. The sister also sustained an injury but the claim at issue was that she suffered emotional distress with physical manifestations. The daughter did not suffer any physical injury (she was a 3 year old, and, presumably, well protected by the car seat), but also experienced emotional distress, only without any physical manifestations.

The insurance policy in question stated that the "each person" limit applied to injuries sustained by an insured and any injuries resulting from or arising out of those injuries. The policy in question had a \$25,000 limit for "each person." Allstate contended that based upon the language of its policy, that limit applied not only to the driver in this case, but also to the emotional distress claimed by the passengers as a result of witnessing the driver's severe injuries. Allstate paid the driver its limit of \$25,000 and so the limits for "each person" were exhausted in Allstate's view, and there was no

insurance available for the emotional distress claims of the passengers. The United States Court of Appeals for the 7th Circuit had previously found that Allstate was correct in this regard. The Trial Court, in this case agreed.

The Court of Appeals, however, found in a 2-1 opinion that the 7th Circuit Court of Appeals view was NOT the better one. Rather, the Indiana Court of Appeals found that a passenger's emotional distress resulting from witnessing severe injuries to the driver, was a separate "bodily injury," under the policy of insurance, and did not "result from" the injury to the driver. Therefore, the emotional distress experienced by the passengers, in this case, was compensable even though the "each person" limit had already been paid to the driver. The Indiana Court of Appeals held that this was true whether the passengers had physical manifestations of their emotional distress or not. The majority noted that the viability of this tort was restricted to claimants who were in close proximity to the injured person on the family tree. That is to say, a second cousin passenger might not be able to make this claim, and certainly a casual acquaintance would not. The majority had no compunction about this extension of the ability of bystanders to make "bodily injury" claims as a result of emotional distress, because the court required that there be a showing that the emotional distress

was susceptible to medical diagnosis and could be proven through medical evidence. The Indiana Court of Appeals found that the daughter had demonstrated a medical diagnosis and the existence of medical evidence in support of her claim and so, as a matter of law, had a valid claim under the policy. Apparently, the record was devoid of medical evidence concerning a medical diagnosis and medical evidence concerning the alleged emotional distress of the 3 year old daughter. As such, the Indiana Court of Appeals held that the daughter had a "viable claim." In other words, if medical evidence were produced in support of the claim of emotional distress, then it would certainly be payable. By implication, if there was no medical evidence in support of the emotional distress claim, (remember physical manifestation is not required, but a medical diagnosis or medical evidence of emotional distress is) then the claim would not be payable, under the holding in this case.

The dissent felt that the United States Court of Appeals for the 7th Circuit had the better view. In the eyes of the dissent, the claims of the passengers in this case were derivative of the claim for bodily injury brought by the driver. Therefore, payment of the policy limits to the driver exhausted the insurance limits and there was nothing left to be paid to the passengers. ■

DUTY OF LANDOWNERS TO CLEAR ICE AND SNOW ON ADJACENT PUBLIC SIDEWALKS LIMITED



Kevin G. Kerr

In a recent decision, the Indiana Court of Appeals explored the duty of a property owner to remove accumulations of ice and snow from adjacent public sidewalks. *Denison Parking, Inc. v. Davis*, 861 N.E.2d 1276 (Ind. Ct. App. 2007) involved claims by a pedestrian who slipped and fell outside Market Square Arena in Indianapolis.

The pedestrian, Barbara Davis,

crossed a wheelchair ramp and, as she stepped back onto the level sidewalk, stepped on a patch of ice, slipped and fell. Denison Parking performed snow removal and its employee was responsible for checking the area where Davis fell, and for cleaning, plowing or clearing snow from the sidewalks as warranted. Denison Parking's employee manual noted that initial snow removal would be performed by a vendor. However, the facility was responsible for monitoring and keeping abreast of further snow removal services.

The manual read that: "In the event of a long response time from a

contractor, it becomes the manager's responsibility to ensure that the facility's sidewalks are cleared and salted or sanded...". The manager might need to remove snow and apply salt until the contractor could be contacted and was responsible for keeping adequate snow removal supplies on hand. Denison had also agreed, with a third party, to remove "snow and ice build up that may restrict the safety of pedestrian traffic."

The Trial Court denied Denison's motion for summary judgment on

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DOCUMENT RETENTION POLICIES BECOMING CRITICAL TO SUCCESSFUL LITIGATION



Sean E. Kenyon

The increase in cases involving harsh sanctions for deleted electronic data, combined with newspaper headlines touting “smoking gun” e-mails, as in the Arthur Anderson/Enron debacle, make clear the increasing importance of electronic documents in litigation. Indeed, the potential for explosive information being unearthed in e-mail or other electronically stored documents has brought the era of overlooking electronic data, during the discovery phase of litigation, to a screeching halt. Recently, the federal courts began operating under revised rules to address electronic document discovery. These changes in the litigation environment bring an increased need for companies to assure that they are prepared to comply with discovery obligations if involved in litigation.

And to properly prepare, a company must begin document organization and preservation efforts well before litigation ensues. First and foremost, a company must devise a records retention policy, which accounts for statutory and regulatory obligations unique to its business or industry. Judge Shira Scheindlin, of the United States District Court, for the Southern District of New York, authored a seminal opinion on electronic data discovery, which has been cited repeatedly by other judges. See *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004). When interviewed on the topic of records retention, Judge Scheindlin noted the import of placing someone in charge of records retention. The company’s general counsel must know the person charged with records retention. As different individuals within a company generally have varied focuses, she further recommended that a records retention committee be established and meet regularly. Corporate counsel, a senior executive, the head of the Information and Technology Department, and the company’s records retention manager are key people to include on a company’s records retention committee.

At a minimum, the committee members must know what records the company creates, the choices for storing electronic records, the accessibility of electronically-stored records, and the cost of retrieving documents from particular storage devices. Also, the records retention committee should meet regularly to review the company’s retention policy, assure compliance with the policy, and consider ways to improve the policy. The committee must assure that all employees receive, understand, and comply with the records retention policy. In addition,

...to properly prepare, a company must begin document organization and preservation efforts well before litigation ensues.

once on notice that litigation is likely, if not before, legal counsel should be obtained regarding a company’s retention policy, particularly as to the appropriate document preservation protocol or response to anticipated or actual litigation.

Moreover, once litigation does, in fact, appear likely, Judge Scheindlin recommended forming a response team to address the document retention needs specific to that litigation. The appropriate point-person must be identified to assist litigation counsel in coordinating, collecting, and managing relevant electronic data. Under the revised federal rules, the type of information stored electronically, the location of those records, the software needed to retrieve and read those records, and the protocol for preserving electronic data must be exchanged by counsel early in a case. Thus, litigation counsel can better represent and advise a company if equipped with a thorough understanding of a company’s document creation and storage systems. Time spent with counsel to prepare will help guard against stiff sanctions, which may be imposed if documents relevant to the litigation are destroyed or altered.

You cannot save yourself from electronic discovery issues by keeping a hard copy of each document that your company generates. Even if a paper

copy exists, the electronic version of the document must still be protected from destruction. In fact, the electronic version may be more useful in litigation, because it contains information known as “metadata” or “embedded data,” not apparent in a printout, which may include the date the document was created or edited, who created the document, the identity of any later editors, or who the document was distributed to or among. See *James P. Flynn and Sheldon M. Finkelstein, “A Primer on ‘E-vid-n.c.e.’,”* 28 LITIGATION 34, 36-7 (Winter 2002).

And a company need not be named in a case to be subject to the duty to preserve evidence. The duty also arises when a subpoena is served. Indeed, a subpoena and request to provide information relevant to a case may issue to an entity that is not a party to that case. If this happens, the requested data must be protected. Moreover, as it may be expensive to retrieve the information requested, obtain advice of counsel before attempting to respond to a subpoena. Recently, a court ordered that a non-party, which had undertaken some efforts to retrieve e-mails, continue with its efforts and assume all document retrieval costs. If responding to a subpoena may prove expensive, do not attempt a half-hearted response and then claim it too expensive to generate all requested information. The better course requires bringing the problem to the court’s attention before instituting steps to retrieve and produce documents. Once steps have been initiated, the courts are less inclined to find that you lack the ability to proceed and are less likely to shift the costs of retrieval to the person or entity that requested the records. An attorney can assist in forming and bringing the issues involved with document production to the court’s attention early in the process.

As this is a developing area in the law, there are few hard and fast rules. But diligence in preparing a records retention policy, knowing the obligations to preserve data, and raising limitations that your company may have with regard to document production early in a lawsuit will serve you well. ■

SEIZURE OF PUBLIC SCHOOL STUDENT AND CONFISCATION OF DRUGS, BASED UPON ANONYMOUS TIP, DEEMED CONSTITUTIONAL



Robert J. Dignam

The Fourth Amendment to the United States Constitution, part of the Bill of Rights, became effective December 15, 1791, to protect Colonists from intrusions by the British government. The amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

On November 1, 1851, Indiana's Electorate adopted Article I, Section 11 of the Indiana Constitution, which is virtually indistinguishable from its federal counterpart. Surely, the framers of each document did not contemplate application of those constitutional provisions to the seizure of cannabis from the pocket of a teenage student's pants.

In *T.S. v. State of Indiana*, 863 N.E. 2d 362 (Ind. Ct. App. 2007), however, the Court of Appeals of Indiana addressed whether those constitutional protections, as well as the Due Process rights contained in the Fifth and Fourteenth Amendments to the United States Constitution, were violated when an Indiana Public School's police officer confronted a high school student and seized a quantity of marijuana, which led to the student's adjudication as a juvenile delinquent.

The case began with an anonymous tip from a classmate of the student (T.S.) alleging that T.S. had marijuana in the right front pocket of his pants. The officer removed T.S. from gym class, escorted him to his locker, instructed him to change into his street clothes, and asked T.S. if "he had anything he should not have." In response, T.S. took a bag of marijuana from his pants pocket and gave it to the officer. The officer then removed another bag of marijuana from the same pocket. T.S. related a different story. T.S. said once they reached the locker, the officer told him about the tip, placed his hand on his chest, and said that he must have some marijuana because his heart was beating fast. He then took T.S.'s pants from the locker and found two bags of marijuana.

At the outset, the appellate court noted that the Fourth Amendment does apply to a search and seizure on school property, in a modified manner. Borrowing from an opinion issued by the United States Supreme Court, the Indiana tribunal explained:

The accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. *Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.* 863 N.E. 2d at 367, quoting *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985)(emphasis added).

The determination of "reasonableness" involves a two-part test. Initially, the action must be justifiable at its inception, meaning that there must be reasonable grounds for suspecting that the search and seizure will uncover evidence of a violation of a law or school rule. If the first test is met, the search and seizure must be reasonably related in scope to the circumstances which justified the search in the first place.

To evaluate the officer's conduct, the appellate court then enumerated three questions: (1) whether the officer initiated an encounter with

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LABOR & EMPLOYMENT LAW UPDATE:

CONTROLLING INCREASES IN YOUR BUSINESS'S UNEMPLOYMENT TAX RATE

by Tina M. Bengs



Whether a business has three employees or three hundred employees, the financial impact from an increase in a business's unemployment tax rate can be significant. So how can a business control its unemployment tax costs?

First, a business must understand how unemployment benefits are paid. The benefits for an unemployment claim will be paid from either the State's Account or the Business's Account. The State Account is funded by contributions from all employers. If unemployment benefits are paid out of the State Account, then a business's unemployment tax rate is generally unaffected. On the other hand, if unemployment benefits are paid out of the Business's Account, the business's tax rate can increase. Since the unemployment tax rate is multiplied by the wages paid by the business, even an increase of the tax rate by a few percentage points will make a significant difference in the business's tax obligation.

For example, if a business had 30 employees, each earning \$15,000, and the unemployment tax rate was 1.1%, then the business would only pay \$4,950 in unemployment tax. However, if the employer's tax rate was increased by two percentage points (to 3.1%) as a result of claims being paid out of the Business's Account, the business would now owe \$13,950 in unemployment tax. Bottom line, an increase of just a few percentage points could almost triple the business's tax obligation.

Second, a business must understand when unemployment claims should be paid out of the State's Account instead of the Business's Account. If an employee is terminated "for just cause," the employee will generally still be entitled to a portion

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UNHAPPY WITH THE DIRECTION TAKEN BY YOUR HOMEOWNERS ASSOCIATION? *CHANGE COURSE AND REPLACE THE DIRECTORS*



Thomas L. Chrzanowski

of Directors may be the answer.

Indiana Code § 23-17-12-8 provides that a director, or even the entire board, may be removed with or without cause, unless the articles of incorporation provides otherwise. In *Heritage Lake Property Owners Association, Inc. v. Kevin York*, 859 N.E.2d 763 (Ind. Ct. App. 2007), in accordance with the articles of incorporation, the Heritage Lake Property Owners Association (“Association”) was charged with maintaining the common property of the subdivision, enforcing the restrictive covenants, and promoting the pleasure, recreation, and welfare of the Heritage Lake Community. The Board of Directors of the Association was made up of nine directors, a majority of which was required for a quorum. The bylaws of the Association provided that, “a director may be removed for “just cause” by a three-fourths vote of the Board of Directors.” The term “just

cause” includes self-dealing, conflict of interest, repeated absences from meetings, and negligence.

Mr. York, a member of the Association as a result of being a resident of Heritage Lake Subdivision, represented an ad hoc group of the Association’s members who had become dissatisfied with the management and affairs of the Association. Mr. York sent notice to the Association requesting permission to inspect various corporate records, including the bylaws, resolutions, minutes of all meetings for the past three years, written communications to the corporate members within the past three years, a list of names and addresses of current directors, the number of votes each member was entitled to cast, and a list of names and addresses of all members that the Association considered to be “not in good standing” and the reason such members were so considered.

The Association denied Mr. York’s request, forcing him to file a petition with the court for the right to view the records and obtain the information. Mr. York also demanded that the Association call for a special vote of the members so as to have the Board of Directors removed from office and replaced. After an expedited hearing, the trial court ordered the Association to provide Mr. York with the information

he requested, and in its order, stated that “a member has a right to call for a removal of directors by state statute and by the Heritage Lake POA’s (Property Owner’s Association) articles of incorporation.”

The Association filed an appeal, arguing that because the corporate bylaws provided for the removal of directors for a “just cause” by a three-fourths vote of the Board of Directors, there is no provision for the removal of a director through any other procedure. The Indiana Court of Appeals disagreed with the Association. The Association is governed by the Indiana Nonprofit Corporations Act of 1991, which requires every nonprofit corporation to adopt bylaws. Bylaws may contain any provision for regulating the affairs of the corporation that is not inconsistent with any laws or the articles of incorporation. In accordance with the Act, “members may remove a director elected by the members with or without cause, unless the articles of incorporation provides otherwise.”

If you find yourself unsatisfied with the direction being taken by the Board of Directors of your homeowners association, take a page out of Mr. York’s play book and have the directors replaced. ■

Seizure of Public School Student and Confiscation of Drugs, Based Upon Anonymous Tip, Deemed Constitutional (continued from page 4)

T.S. without involving other school officials; (2) whether the encounter between the officer and T.S. constituted a seizure, and if so; (3), what standard of suspicion applies to a seizure occurring in school. *T.S. v. State*, 863 N.E. 2d at 368.

Concerning the question of the officer’s status, other jurisdictions have divided school searches into three categories, utilizing the following standards:

- (1) where school officials initiate the search or police involvement is minimal, the reasonableness standard is applied; (2) where the search is conducted by the school resource officer on his or her own initiative to further educationally related goals, the reasonableness standard is applied; and (3) where “outside” police officers initiate the search of a student for investigative purposes, the probable cause and warrant requirements are applied. *Id.*

Embracing these standards, the appellate court concluded that the officer was not an “outside” police officer, so the higher degree of suspicion of “probable cause” was not required to justify a search or seizure of T.S. Rather, since the

officer was a resource employee acting to further educational goals, the reasonableness standard applied.

The court of appeals next addressed whether the officer’s actions amounted to a search or seizure of T.S., and concluded that because T.S. reportedly handed over the first bag of marijuana, there was no search, but there was a seizure. The appellate court stated:

[N]o credible argument can be made that a reasonable student would feel free to disregard an armed officer’s demand to leave class. We conclude that the encounter between Sergeant Driskell and T.S. constituted a seizure, and therefore implicated the Fourth Amendment.

Since there was a seizure, the final issue became whether it was reasonable for the officer to act in response to the anonymous tip. Normally, in the context of non-school searches, an anonymous tipster must possess details not easily obtainable by the general public, to verify the tipster’s credibility, and must also demonstrate an “intimate familiarity with the affairs of the accused and be able to predict future behavior.” *Id.* at 376. The (continued on page 7)

Davis' claims and an interlocutory appeal was taken. The critical issue on review was whether there was a duty owed by Denison to Davis. This question, the existence of a duty, was a pure legal question suitable for resolution by the court.

Davis asserted that Denison owed her a common law duty to maintain sidewalks surrounding its commercial premises free of ice and snow for the safety of pedestrians such as herself. The Court of Appeals dismissed this argument by noting that "It is well settled in Indiana that an owner or occupant of property abutting a public street or sidewalk has no duty to clear those streets and sidewalks of ice and snow."

A similar principle defeated Davis' reliance on a municipal ordinance requiring property owner's to keep adjacent sidewalks clear of ice and snow. This duty was imposed, by common law, on the municipality. Although the ordinance imposed obligations on Denison regarding snow removal, these duties were for the benefit of the municipality, not individuals using the streets.

A somewhat stronger argument was that Denison had assumed a duty. However, such duties, in the context of a duty to a pedestrian on a public sidewalk existed only when the act of the adjacent property owner created an artificial condition which proximately caused injury to the pedestrian. Assuming that Denison assumed by contract or conduct, a duty to remove ice and snow from the public sidewalk, no artificial condition had been created. Artificial conditions included features like a trench on a public alley or sand left on a sidewalk where the sand was used to enhance an adjacent building's appearance. Here, the evidence showed only some snow and ice removal. Previous decisions of the Court had refused to extend the definition of artificial condition to include removal of ice and snow.

The Court concluded that removal of ice and snow accumulations was not an artificially created condition that increased risk to the pedestrian. Efforts to remove ice and snow would generally *reduce* the risk to pedestrians. The Court of Appeals noted the public policy conundrum of imposing this duty through assumption or by common law. Refusing to impose liability arising from defects in the removal of ice and snow would tend to encourage adjacent property owners to remove the accumulation. ■

of his unemployment benefits, but those benefits should be paid from the State's Account, not the Business's Account.

Third, a business must understand what evidence must be produced to Workforce Development to prove that an employee was terminated "for just cause" so that the benefits are properly paid out of the State's Account, instead of the Business's Account. In Indiana, the unemployment statute does not provide one specific definition of what termination "for just cause" means. Instead, the statute provides several examples of termination "for just cause," including: 1) termination for falsifying an employment application to obtain employment; 2) termination for the knowing violation of a reasonable and uniformly enforced rule of an employer; 3) termination for unsatisfactory attendance, if the individual cannot show good cause for absences or tardiness; 4) termination for damaging the employer's property through willful negligence; 5) termination for refusing to obey instructions; 6) termination for reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer's premises during working hours; 7) termination for conduct endangering the safety of self or co-workers; 8) termination for incarceration in jail following conviction of misdemeanor or felony by a court or breach of duty in connection with work which is reasonably owed an employer by an employee.

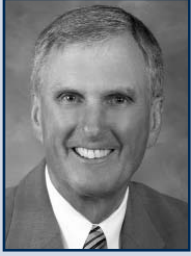
To successfully establish that an employee was terminated "for just cause," the business must produce evidence that establishes one of the above examples. For example, Bob filed for unemployment benefits after having argued with his supervisor, was instructed to stop arguing with the supervisor, started arguing with the supervisor again, and then was terminated. In response to Bob's unemployment claim, ABC Company submitted a description of the misconduct and explained the repeated instructions to Bob to stop arguing. The busi-

ness characterized the reason for termination of Bob as his refusal to obey the instructions to stop arguing with his supervisor. Did ABC Company successfully defend the unemployment claim so that Bob's benefits are paid from the State's Account? Probably yes, because ABC Company proved Bob was terminated for his refusal to obey instructions which constitutes "just cause."

Sometimes the facts support finding that the employee was terminated "for just cause," but the business fails to submit sufficient evidence to prove the basis for finding the employee was terminated "for just cause." For example, Business ABC had an employment policy that prohibited personal use of a company computer. Fred was found using the company computer for personal reasons - - looking up pornographic materials. Fred was written up and terminated. In response to the unemployment claim, Business ABC sent in a description of what occurred, a copy of the employment policy prohibiting use of the company computer, and a copy of the write up regarding termination. Did Business ABC prove Fred was terminated "for just cause?" Probably not, because Business ABC failed to submit evidence that established Fred knew about the rule (such as a copy of the acknowledgment page that Fred signed to confirm he had received and read the company policies) and it failed to submit evidence that the rule/policy is uniformly enforced (such as a supervisor's statement indicating others have been disciplined for similar violations).

If a business understands how unemployment benefits are paid, when the benefits are payable from the State's Account instead of the Business's Account, and what evidence must be provided to defend an unemployment claim, a business can maintain a low unemployment tax rate (or even reduce its current rate) which can result in a significant savings to the business by reducing its tax obligation. ■

MANAGING PARTNER'S CORNER



William F. Satterlee, III
Managing Partner

Congratulations **John E. Hughes** and **Ronald P. Kuker** on being chosen as two of the "BEST" lawyers in America!

Each year, *Best Lawyers* conducts an exhaustive peer-review, surveying thousands of leading lawyers who confidentially evaluate their professional peers. In the U.S., the results are published in an annual referral guide, *The Best Lawyers in America*, which includes 29,575 attorneys in 78 specialties, covering all 50 states and the District of Columbia.

In Chicago, on May 10-11, **F. Joseph Jaskowiak** and **Robert L. Clark** attended NELI's (National Employment Law Institute) *12th Annual Advanced Level Human Resources Conference*.

Morris A. Sunkel attended a PESI seminar entitled, *Indiana Medicaid, Special Needs and Charitable Planning* on April 26 in Merrillville.

On April 19, **Sean E. Kenyon** attended a CLE presentation by Judge Robert J. Miller in South Bend entitled, *Federal Evidence*.

The Lake County Bar Association held a *Bench and Bar Conference* on April 13 where **John E. Hughes**, **Richard M. Davis** and **F. Joseph Jaskowiak** were in attendance.

On April 20, **Ronald P. Kuker** served as a panel member at the Indiana Spring Judicial College in Indianapolis. Ron's topic was "Mediation for Judicial Officers: How To Improve Your Case Management."

In Merrillville, on March 21, **James L. Jorgensen** presented at the Annual SHRM (Society for Human Resource Management) Conference. **Ruth A. Cramer, Esq.**, **Lois J. Evans**, Firm Administrator and **Karen D. Hammersmith**, Accounting Supervisor were in attendance.

J. Brian Hittinger attended NADCO's (National Association of Development Companies) *504 Loan Closing Update Course* on March 18 in Arlington, Virginia.

On March 8, **James L. Jorgensen** and **Tina M. Bengs** presented their annual "Employment Law Update" at the Valparaiso Chamber of Commerce - Percolator Club monthly membership luncheon where **Todd A. Leeth** was in attendance.

Case Highlights

Jack A. Kramer was awarded a defense verdict on May 22, 2007, in which the Indiana Supreme Court ruled that our client did not act in bad faith when it denied a claim for medical payment benefits. We were able to eliminate the bad faith and punitive damage judgments of \$850,000 against our client. Great job, Jack!

Jack also received a defense verdict for *Schmidtke Hoepfner Consultants in a case involving a life insurance claim on a missing person. We obtained a summary judgment dismissing the bad faith and punitive damage claims against our client. Congratulations, Jack!

**Hoepfner Wagner & Evans also maintains a subsidiary that conducts business as Schmidtke Hoepfner Consultants, a law firm that concentrates its practice in the areas of pension, life, health, disability and other employee benefit-related areas. Schmidtke Hoepfner Consultants has represented clients in litigation matters pending in state and federal courts in over 45 states and U.S. Territories. Schmidtke Hoepfner Consultants also provides consulting and plan document preparation services, primarily in the area of employee welfare benefits. Schmidtke Hoepfner Consultants maintains the top average client rating in the Select List published by Res Gestae, a national registry of law firms that represent life, health, and disability insurance carriers.*

Seizure Of Public School Student And Confiscation Of Drugs, Based Upon Anonymous Tip, Deemed Constitutional (continued from page 5)

student who provided the tip about T.S. provided no such information, other than where he attended school.

In resolving the constitutionality of the in-school seizure of the student, the Court of Appeals of Indiana eloquently concluded:

Turning to the Indiana Constitution, the Court of Appeals of Indiana explained that it will consider the "totality of the circumstances," which involves a consideration of "both the degree of intrusion into the subject's ordinary activities and the basis upon which the officer selected the subject of the search or seizure." *Id.* at 378. In determining whether a search or seizure was reasonable, Indiana courts will consider and balance three factors: "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs." *Id.* The appellate court, in *T.S. v. State*, found that, under the totality of the circumstances, the school police officer did not violate the student's state constitutional rights. 362 N.E. 2d at 379.

Given our societal focus on eradicating drugs and violence in schools, it appears that our Indiana judiciary, while mindful of each individual's constitutional freedoms, has empowered school officials to exercise sound judgment and conduct lawful searches and seizures for the protection of our most valued resource - our children.■

HOEPPNER WAGNER & EVANS LLP

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