COUNTERPOINT

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WHY IS THE EFFECT OF INCOME TAXES NOT PART OF AN EARNINGS CAPACITY ANALYSIS?

By J. Michael Flanagan, Esquire, Flanagan and DiBernardo, LLP, Lancaster, PA

"The only things certain in life are death and taxes." That quote is attributed to Pennsylvania's own, Benjamin Franklin. As our nation wrestles with the question of how to pay for staggering public debt, the quote remains as true now as it was in Franklin's time. It is not whether we will pay income taxes, but the amount to be deducted from income by federal, state and local governments.

As we enter the year 2013, we prepare to celebrate the 100th anniversary of the 16th Amendment which authorized Congress to levy income taxes. Perhaps it is time to ask the question, why is the effect of income taxes not part of a personal injury, earnings/earnings capacity analysis in the Commonwealth of Pennsylvania?

The logical answer would be that awards for earnings or earnings capacity in personal injury and wrongful death claims are subject to taxation as income. Yet, we all know that is not the case. Almost as quickly as the 16th Amendment was ratified on February 3, 1913, the Congress exempted "amounts received . . . as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness" from the definition of gross income (Revenue Act of 1918, § 213(b)(6), 40 Stat. 1057, 1066)[1]. Likewise, awards and settlements for personal injury damages are exempt from income taxation in the Commonwealth of Pennsylvania.[2]

There is certainly a logic inherent in the decision not to tax awards for pain and suffering. Such awards are compensation for loss of one's health and well being; had a plaintiff not been injured, his or her health and well being would not be taxed.

By contrast, had the plaintiff not been injured and continued to work, the plaintiff's earnings would have been

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On The Inside

MISPLACED PRIVACY

By Kevin L. Connors, Esquire, Connors Law, LLP, Exton, PA

"No matter where you go, there you are!"

If the above quotation, mouthed by the character of Buckaroo Banzai, played without lips by Peter Weller, later infamous as the RoboCop character, when Buckaroo, playing with his rock band, the Hong Kong Cavaliers, tried to talk Penny Pretty, played by Ellen Barkin, out of committing suicide, as the band was playing at a bar in Grover's Mill, New Jersey, also infamous as the Martian landing site in Orson Wells' radio broadcast in 1937, in the classic, and yes, it should be watched at least once a year, movie, The Adventures of Buckaroo Banzai Across the 8th Dimension.

If that "no matter…" sounds vaguely familiar, it is and will always remain, incisively existential in perhaps an all too obvious paradoxical universe of Berkleyan idealism, posited by the English philosopher, George Berkley, credited with the development of the philosophy of subjective idealism, also sometimes referred to as empirical idealism, which point will soon prove all too true for you the reader, as Berkley asked "if a tree falls in the forest, and no one is there, does it make a sound"?

Now, if you were Dirty Harry, you would ask "Well, did it feel lucky"?

So what, if anything, do the above ramblings have to do with litigation, a question perhaps best answered by Jack Sparrow's character in Pirates of the Caribbean, who quixotically confessed "It's nice to be here, it's nice to be anywhere".

And, of course, it might well depend upon the presidential precedent of "it depends upon what the meaning of the word 'is,' is?"

Yes, there is a point.

At what point is anything private, or can legally be expected to support a claim of privacy, when posting stuff about yourself, in whatever medium or format, on the internet, seemingly the most public medium in the history of human

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Why is the Effect

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subject to taxation. As citizens of this state and nation, we do not have the opportunity to elect out of the income taxation mandates of our legislatures. "The inequities between personal injury victims and other taxpayers produced by Section 104(a)(2) have been tolerated if not condoned by Congress."[3]

Accordingly, in a personal injury/ wrongful death claim, the amount of any earnings/earnings capacity award which, if actually earned, would have been paid in taxes essentially constitutes a windfall. The windfall seems to go beyond the historical purpose of tort law, which is "to afford *compensation* for injuries sustained by one person as the result of the conduct of another".[4] In a judicial system designed to provide "compensation" for actual loss where is the logic for this windfall?

A search for the logic to the windfall naturally starts with a review of decisions of our appellate courts. A walk back through such appellate decisions begins with *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.,* 510 Pa. 1, 507 A.2d 1 (1986) app. on other grounds after retrial 580 A.2d 1341. In this wrongful death and survival action, the defendant sought to reduce an earnings capacity claim by the amount of taxes that would have been paid had the decedent actually earned the income. The court summarily dismissed the reduction stating, "in addition, we see no need to re-evaluate our case law which holds that income tax consequences are not considered in fixing damages for the determination of decedent's earnings capacity". *Id.* at 12. At around the same time, the Commonwealth Court in *Commonwealth Pennsylvania Department of Transportation v. Phillips,* 87 Pa. Cmwlth. 504, 488 A.2d 77 (1985), superseded on other grounds by *Mascaro v. Youth Study Center*, 514 Pa. 351, 523 A.2d 1118 (1987), rejected a similar reduction sought by PennDOT:

> DOT contends that the trial court erred because it failed to allow income taxes as a cost of Phillips' personal maintenance. This question has already been resolved in *Gradel v. Inouye*, 491 Pa. 534, 421 A.2d 674 (1980) which held that income taxes are not a legitimate item of personal maintenance. 488 A.2d at 89

Gradel v. Inouye, supra. decided some five years earlier, involved a claim for personal injury resulting from medical malpractice. The court rejected any offset of taxes against earnings. The "analysis" offered by the court in *Gradel* was, "the law of Pennsylvania plainly is that tax consequences should not be considered by the jury". *Gradel, supra.,* at 680, citing *Girard Trust Corn Exchange Bank v. Phila Transp. Co.,* 410 Pa. 530, 190 A.2d 293 (1963).

The search for the genesis of the Commonwealth's law governing the treatment of income taxes in earnings and earnings capacity claims is finally reached in the 1963 *Girard Trust* decision. *Girard Trust, supra.,* involved a wrongful death and survival action arising out of a motor vehicle accident. The *Girard Trust* court was hearing an appeal from a trial court instruction that, in fixing damages income taxes should be deducted from the gross earnings of the decedent. The court acknowledged the issue as one of first impression in Pennsylvania, holding that:

> The majority rule in the United States is that in fixing damages for the determination of decedent's earnings capacity, the income tax consequences of the matter should not be taken into consideration. See, "Propriety of taking income tax into consideration in fixing damages in personal injury or death action" 63 A.L.R. 2d 1393. [See also, Income Taxes as a Factor in Assessing Damages in Personal Injury Cases (H.B. Levin) Vol. XXXIV, Pennsylvania Bar Association Quarterly p. 538 (March 1963)] ... This, in our opinion, is based upon sound legal reasoning and is now announced as the rule to be followed in Pennsylvania. Any other rule would lead to incongruous results. at 190 A.2d 293.

That is it, the legal DNA trail for guidance, support and enlightenment on the reason for this important damage rule ends with this one brief paragraph in *Girard Trust*. No real explanation; no concrete analysis.

So we turn to the cited March 1963 article by Harvey B. Levin, which offers some arguments for this rule. However, most of those arguments are archaic and no longer supportable.

Levin argues that it is the government which has withheld its taxing power on the plaintiff's recovery, and that the government may at any time change the rules and make earnings awards taxable. However, it has been 50 years since the Levin article was written and the federal government has not changed the rule. The chances of repeal of an exemption embedded in the tax code for almost a century, which surely will be defended vigorously by special interest groups, is slim to none. In fact, since Levin's essay the tax code has actually expanded the exemption to include "periodic payments" (structured settlements).[5]

Levin's second argument is that the absence of taxation on a personal injury award constitutes a collateral source, which benefit the tortfeasor should not enjoy. However, the absence of income taxes on personal injury earnings awards is not a benefit for which plaintiff has paid to protect himself. Such an argument has some, albeit superficial, merit for life insurance policy benefits for which a plaintiff has paid a premium. But the benevolence of the tax code was not in any way earned, purchased or subject to subrogation.

In addition, in recent years there has been an increasing recognition that windfalls and double dipping are inconsistent with the goal of compensatory damages. Examples of this can be seen in the Motor Vehicle Financial Responsibility Law, 42 Pa.C.S. § 1722 *et seq*. (benefits paid through first party coverage not recoverable), the Mcare Act, 40 P.S. § 1303.508 (generally past medical expenses and past lost earnings covered by non-governmental third party benefits not recoverable), and the Political Subdivision Tort Claims Act, 42 Pa. C.S.A. §§ 8545, 8549, 8553 (insurance benefits which paid for expenses not recoverable). *See* also *Tannenbaum v. Nationwide Ins. Co.,* 605 Pa. 590, 992 A.2d 859 (2010) (damages for lost earnings in MVA are to be net of disability insurance). Further, the windfall is not subject to subrogation by any source.

Levin argues that since earning capacity is to be reduced to present value, the plaintiff is already having his award reduced and thus should not be subject to further reduction. However, that argument has not had any foundation since the Pennsylvania Supreme Court's 1980 decision of *Kaczkowski v. Bolubasz,* 491 Pa. 561, 421 A.2d 1027 (1980), which completely abrogated any reduction to present value.

Finally, Levin postulates that tax rates may change or a plaintiff's tax status (single or married) may also change. Thus, he continues, the amount of taxation would be conjecture. However, the Commonwealth already permits far more speculative assumptions in computing earnings capacity which enhance a plaintiff's recovery. For example, fringe benefits which vary considerably from industry to industry, job to job and employer to employer are routinely part of an earnings capacity analysis. Even more speculative is the notion of productivity increases being added to an earnings capacity assessment. *Gillingham v. Consol Energy, Inc.* 518 A.3d 841 (Pa. Super. 2012). The assumption that an employee will enjoy the benefits of increases in productivity, as opposed to the employer, is not consistent with reality. PBX switching equipment increased productivity, but did not increase switchboard operator wages, it put them out of work. Toll booth operators have not enjoyed higher salaries due to the productivity advent of the EZ-Pass.

The purpose of awarding damages is compensation for the loss sustained. If reasonable certainty is the cornerstone of such awards, then the recognition of the reality of taxes as a certainty should be part of the equation. Taxes are more certain today than they were when Benjamin Franklin made his famous remark. In order to achieve awards that are truly "compensation" for earnings loss, damage awards should equate to "take-home pay". *DeWeese v. United States,* 419 F.Supp. 170, 171 (D. Colo. 1976), aff'd 576 F.2d 802 (10th Cir. 1978).

Clearly the effect of income taxes on past earnings can be calculated with certainty. Hindsight offers complete clarity on tax rates since the date of injury. The computation on expected taxes on future earnings would be far less speculative than the current inclusions of productivity and fringe benefits.

Preserving this issue for appeal can take many forms. Certainly, if the defense intends to offer a vocational or economic expert, the expert's report can include an analysis of the effect of income taxes. This offer of proof is the most certain way to preserve the issue. Less costly but probably effective would be an offer of cross examination of plaintiff's vocational or economic witness on the effect of income (and for that mater, payroll) taxes on earnings calculations. An additional offer of a point for charge directing that income taxes should be deducted in the jury's findings might also preserve the issue.

The dissent of Justice Saylor in *Helpin v. Trustees of the University of Pennsylvania,* 608 Pa. 45, 10 A.3d 267 (2010) suggests that there may be some open minds on the Supreme Court willing to thoughtfully reconsider the impact of income taxes on earnings and earnings capacity claims. Perhaps, a change is not too far off?

"Death and Taxes" . . . nothing is more certain. Except that still, today, in 2013 the effect of income taxes will not be part of an earnings or earning capacity analysis; that is unless we start asking the question; why not?

ENDNOTES

[1]The current version of the exemption for damages received "on account of personal physical injuries or physical sickness" appears at 26 U.S.C.A. § 104(a)(2).

[2]Pennsylvania uses similar language to exempt personal injury awards and agreements from taxation by defining such funds out of the definition of "Gross income" in computing Pennsylvania income tax as was used in the Revenue Act 1918. 72 P.S. § 3402-303B.(5).

[3]Lawrence A. Frolik, "The Convergence of I.R.C. § 104(A)(2), *Norfolk & Western Railway Co. v. Liepelt* and Structured Tort Settlements: Tax Policy 'Derailed'," 51 Fordham L. Rev. 565, 566 (1983).

[4]W.L. Prosser, *Torts 4th Ed*., p. 6

[5]See; Frolick, *supra*, at 566.

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civilization, where you have no control over what happens to whatever you post after it is posted, to include what others who have been exposed to your posting might do with it, with or without your permission?

And, if you think that whomever or whatever you have shared this personal information or data with, should stop to consider what they should or should not do with it, after they have been exposed, then you are, quite simply, both clueless and naive. One might precede the other, although the more relevant thought might be, what were you thinking if at all, when you posted that thought you thought so brilliant?

And yes, we are finally at our point of departure, which is the always fascinating battle, in the context of discovery, motions and arguments, over what is, or is not, discoverable, with the flashpoints being relevance and expectations of privacy. Into that conundrum we go, with those against whom social media and discovery requests are made, claiming "expectations of privacy", and with those seeking social media discovery, contending that there can be no "expectation of privacy" in a medium so universally visible and accessible.

Having previously reported on several Facebookian court rulings in the past, the newest rulings, by courts in Pennsylvania, and in other jurisdictions, continue to cement the requirements both for seeking and disclosing social media discovery.

Recent Pennsylvania Rulings

Two recent Pennsylvania rulings are of interest. The rulings are *Mazzarella v. Mount Airy Casino Resort,* a case decided in the Monroe County Court of Common Pleas, and *Simms v. Lewis,* decided in the Indiana County Court of Common Pleas.

Mazzarella v. Mount Airy Casino Resort

Mazzarella is a ruling issued on November 7, 2012. It involved a premises liability slip and fall case, with the trial court judge deciding, correctly we think, that the plaintiff's expectation of privacy in her social media activity was "misplaced." The Honorable David Williamson, ruled that "those who elect to use social media, and place things on the Internet for viewing, sharing and use with others, waive an expectation of privacy". So ruling, Judge Williamson held that the defendant's social media discovery request was not a violation of privacy, with the plaintiff being ordered to answer the defendant's discovery request.

The discovery request in question sought disclosure of the plaintiff's social media user name and password, without a time limitation imposed upon the defendant for access. Prior court rulings on this issue in other jurisdictions, have imposed time limitations on the requesting parties' access to the disclosing parties' social media.

Simms v. Lewis

Simms is a ruling decided by the Honorable Thomas Bianco in the Indiana Court of Common Pleas. *Simms* involved the plaintiff's personal injury lawsuit, following a motor vehicle accident, with the plaintiff claiming that her injuries were both serious and permanent.

After determining that the plaintiff had a social media account with Facebook, My Yearbook, and MySpace, and that each of the accounts had been active after the plaintiff was injured in the motor vehicle accident, the defendant sought access to the plaintiff's social media accounts, filing a motion to compel when the plaintiff refused to allow access. In the motion, the defendant indicated that the front page of the plaintiff's MyYearbook account contained the plaintiff stating "chillin with my girl tonight. We're going to do some Zumba fitness:) so excited!!! HTC:p,".

Not surprisingly, the defendant sought the plaintiff's user names and passwords for her social media accounts with Facebook, MyYearbook, and MySpace. Access to the accounts was sought in order to view private portions and pages on the site, with the plaintiff impolitely declining to provide that information.

The *Simms* court began with the premise "as a general rule, discovery is liberally allowed with respect to any matter, not privileged, which is relevant to the cause being tried." *George v. Schirra,* 814 A. 2.d 202 (PA.Supr. 2002). It also reflected on Pennsylvania Rule of Civil Procedure No. 4003.1. However, the court indicated that there were no Pennsylvania appellate court cases that addressed the issue of discovery requests for information concerning an individual's social networking account.

While there were no appellate rulings on that issue, there were a number of trial court rulings, with the *Simms* court citing the *Zimmerman v. Weiss Markets* decision from Northumberland County in May of 2011. There, the plaintiff had been ordered to provide login information for the plaintiff's Facebook account. However, the trial court in *Zimmerman* specifically limited access to a threshold determination obtainable from access to the plaintiff's public page, requiring that the public pages indicate that private postings might contain relevant information.

Adopting the *Zimmerman* threshold, the *Simms* court ruled that the defendant must first show that access to the plaintiff's social media account would lead to the discovery of relevant information. The defendants were able to meet this threshold in *Simms,* but only as to the plaintiff's MyYearbook account. The *Simms* court denied the defendant's request for disclosure of the plaintiff's social media account user name and password for the plaintiff's Facebook and MySpace accounts, as the court indicated that the defendant "has failed to articulate the factual predicate necessary to meet his burden" with regard to those accounts.

So, while an expectation of privacy might be "misplaced," the right to seek disclosure of social media user information is not absolute. It may well require a requesting party to meet a threshold pre-requisite, proving that public postings implicate the potential relevance of private postings.

New York, New York

Hot off the presses, is the ruling of the United States District Court for Eastern District of New York in the case of

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Karissa Reid v. Ingerman Smith LLP, which involved the plaintiff suing the defendant for economic and non-economic damages arising from the plaintiff's alleged sexual harassment by an employee of the defendant.

In the course of discovery, the defendant sought information relating to the plaintiff's social media accounts. The federal district court judge granted that motion in part, and denied the Motion in part.

Recognizing that the law regarding the scope of discovery of electronically stored information (ESI) remained unsettled, the court also indicated that there was no dispute that social media information may be a source of relevant information that is discoverable. This is particularly true in cases involving claims of personal injury, where social media information may reflect a "plaintiff's emotional or mental state, their physical condition, activity level, employment, this litigation, and the injuries and damages claimed."

The court cited to *Sourdiff v. Texas Roadhouse Holdings, LLC,* a case decided by the United States District Court for the Northern District of New York, in 2011. As an example, the court indicated that plaintiffs who had placed their emotional well-being at issue, in the course of asserting claims of sexual harassment or discrimination, had been subject to some courts finding that "Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the contents' posting." *Bass v. Miss Porter's School,* 2009 WL 3724968 (D. Conn. 2009).

Conversely, other courts have observed "the relevance of the content of a plaintiff's Facebook usage… is more in the eye of the beholder than subject to strict legal demarcations." *Bass.* Tripping the light fandango, whether electronically-stored and disseminated on the Internet or not, "anything that a person says or does might in some theoretical sense be reflective of their emotional state." *Rozell v. Ross-Holst,* 2006 WL 163143 (S.D.N.Y. 2006).

In *Reid,* the defendant claimed that the plaintiff's Facebook postings were relevant, as those postings contradicted the plaintiff's claims of mental anguish, allegedly resulting from her alleged sexual harassments, and subsequent termination of employment. Not surprisingly, the plaintiff argued that she should not be subject to broad discovery, to include the entirety of her social media accounts, potentially resulting in disclosure of private information.

Considering both arguments, for disclosure and in opposition to disclosure, the court held in *Reid* that photographs and comments that the plaintiff had posted on her publicly available Facebook pages provided probative evidence of her mental and emotional state, and the same could reveal the extent of activities in which she was engaged. The court also found that her private postings might likewise contain relevant information similarly reflective of her emotional state.

More germane, maybe to the point of this discourse, the court further ruled that "even had the plaintiff used privacy settings that allowed only her 'friends' on Facebook to see her postings, she had no justifiable expectations that her friends would keep her profile private", citing to *U.S. v. Meregildo,* 2012 WL 3264501 (S.D.N.Y. 2012). Moreover, the court found that the wider the plaintiff's circle of friends might be, the more likely that her post would be viewed by a stranger.

Although the court declined to require full disclosure of all materials in the plaintiff's social media accounts, holding that not all postings might be relevant to her claims, the court did order the plaintiff to provide access to postings on her social media accounts that dealt with her social activities, where relevant to her claims of emotional distress and loss of enjoyment of life. The court also indicated that those postings might also provide information regarding potential witnesses with knowledge as to the plaintiff's social activity, as well as to the plaintiff's claims of emotional distress and loss of enjoyment of life.

So, in conclusion, it really does depend on what the meaning of the word "is," is. No matter what you post, it might become relevant in discovery.

All three of the social media decisions reflected upon herein, clearly established a requesting parties' right, to access social media. Access may be dependent upon two predicates. First, the threshold factual predicate that the parties subject to disclosure, and their public postings, suggests the availability of relevant information entitling the requesting party to seek disclosure of private postings. Second, that the information being sought is "relevant" to the claims being asserted by the party posting to social media accounts, as well as, obviously, relevant to the party seeking disclosure.

Pennsylvania Employment Law Update

By Lee C. Durivage, Esquire, Marshall Dennehey Warner Coleman & Goggin, Philadelphia, PA

Pennsylvania Supreme Court holds that a labor arbitration award pursuant to the Public Employee Relations Act reinstating an employee who was terminated for acts of sexual harassment violated well-defined public policy and should be vacated.
The Philadelphia Hous. Auth. v. Am. Fed'n of State, County & Mun. Employees, Dist. Council 33, Local 934, 2012 Pa. LEXIS 1891 (Pa. Aug. 31, 2012)

In *The Philadelphia Housing Authority* case, the employee was found to have engaged in "lewd, lascivious and extraordinarily perverse" sexual harassment—which included verbal comments and inappropriate touching—toward another employee and was terminated in accordance with the employer's policy prohibiting sexual harassment. Following the employee's termination, his union grieved the termination and, following the exhaustion of the grievance procedures provided for in the collective bargaining agreement, an arbitration was held to determine "whether [the employer] had just cause to terminate [the employee's] employment and, if not, what would be the appropriate remedy." Following the arbitration, the arbitrator specifically found that the employee had been adequately informed about the employer's policy prohibiting sexual harassment, the employee was not credible, the victim of the sexual harassment testified credibly regarding the sexual harassment, and the harassment was "unacceptable." Nonetheless, the arbitrator concluded that the employer did not have "just cause" to terminate the employee's employment because a supervisor previously provided him with a verbal warning concerning his conduct prior to the formal investigation. As a result, the arbitrator ordered that the employer reinstate the employee and pay him back wages.

On appeal, the Pennsylvania Supreme Court vacated the arbitrator's ruling and held that the award to reinstate the employee to his position with full back pay violated "a well-defined and dominant public policy against sexual harassment in the workplace"; namely, the policies set forth in Title VII and the Pennsylvania Human Relations Act. In so holding, the Pennsylvania Supreme Court reasoned that the arbitrator's award prevents the employer from taking appropriate corrective action following its sexual harassment investigation. In fact, the court expressly noted that "[t]o allow an arbitration award which finds that an employee engaged in 'extraordinarily perverse' physical sexual harassment of a co-worker, yet then simply dismisses the conduct as unworthy of an employer response beyond initial 'counseling,' and reinstatement with back pay, would eviscerate the ability of employers to enforce dominant public policy."

Fair Labor Standards Act settlements must be approved by a court or by the Secretary of Labor in order to be deemed effective.
Deitz v. Budget Innovations & Roofing, Inc., 2012 U.S. Dist. LEXIS 177878 (M.D. Pa. Dec. 13, 2012)

The plaintiffs filed a collective action pursuant to the Fair Labor Standards Act, alleging the employer failed to pay him and other hourly workers overtime compensation and alleging that he was not paid for hours actually worked. After the lawsuit was filed, plaintiff's counsel sought to withdraw from the case in light of the fact that the plaintiffs purportedly resolved the matter with the employer without the involvement of their attorney. Plaintiff's counsel also argued that Fair Labor Standards Act settlements must be approved by the court in the absence of direct supervision by the Secretary of Labor. In reviewing the situation, the court noted that the Third Circuit has not addressed whether FLSA lawsuits claiming unpaid wages may be settled privately without court approval…but that "[s]everal cases from the District of New Jersey and the Eastern District of Pennsylvania have cited to [an Eleventh Circuit decision] and assumed that judicial approval is necessary." As a result, the court expressly concurred "that bona fide disputes of FLSA claims may only be settled or compromised through payments made under the supervision of the Secretary of the Department of Labor or by judicial approval of a proposed settlement in a FLSA lawsuit." In so holding, the court reasoned that it was "impossible to ensure that an agreement settles a bona fide factual dispute over the number of hours worked or the regular rate of employment in the absence of judicial review of the proposed settlement agreement." Accordingly, the court required that the proposed settlement agreements be submitted to the court to determine whether the matter can be resolved.

Employers must be aware that they cannot resolve potential claims for unpaid wages pursuant to the FLSA without obtaining direct approval by the Department of Labor or a court. As these issues largely arise when employers are negotiating separation agreements with employees, it is recommended that employers contact an employment attorney to guide them through these potential issues in order to determine whether the agreement would require court approval. Failure to do so may result in the employee filing a subsequent lawsuit, alleging the employer failed to pay him (and, perhaps, other employees) wages owed to him.

An employee's gender discrimination and retaliation claims failed when he was terminated in connection with an harassment complaint issued by a co-worker.
Lucchesi v. Day & Zimmerman Group, Inc., 2012 U.S. Dist. LEXIS 163917 (E.D. Pa. Nov. 16, 2012)

The plaintiff alleged gender discrimination and retaliation in connection with his termination from employment. Specifically, the plaintiff and another co-worker dated for a brief period of time, and they would infrequently socialize outside of work. However, several

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months later, the plaintiff began sending his co-worker 20 to 50 emails a month and later showed up to her house, requesting to be let in and then sending her several text messages and emails throughout the night. As a result, his co-worker made a complaint to human resources regarding the plaintiff. Following the complaint, an investigation was conducted, and the plaintiff's supervisor suggested to the human resources manager that two people should be present when interviewing the plaintiff in light of prior outbursts in the workplace.

Following the investigation, the plaintiff was informed that he was being given a written warning. During this meeting, the plaintiff asserted that the treatment of him was "unfair" and that his co-worker "gets off so easily." In addition, the plaintiff would not state that he would stop contacting his co-worker, and the human resources manager reported that the plaintiff acted "irrational" during the meeting and that the conversation was "scary." As a result, the employer made the decision to terminate the plaintiff's employment, which prompted the plaintiff's lawsuit.

In dismissing the plaintiff's gender discrimination claim, the court expressly rejected his claims that he and his co-worker were similarly situated. In particular, the court expressly noted that, "To call her similarly situated or characterize her as a mere interviewee rather than a complainant would create a dangerous precedent—for many reasons, a victim of harassment in the workplace may not always be the first person to bring the harassment to an employer's attention." Moreover, the court dismissed the plaintiff's retaliation claim, noting that he admitted during his deposition that he never told his employer that he felt he was being discriminated against based on his gender, but that he was merely "being treated differently" than his co-worker. In rejecting this claim, the court reasoned that the Third Circuit "[h] as made clear that general complaints of unfair treatment cannot support a retaliation claim—the complaint must include some mention of a protected class or conduct to serve as the basis for such a claim."

As can be seen from this case, it is imperative that employers consider every complaint of harassment serious, including those that are prompted from "out of the office" conduct. Prompt actions must be taken to investigate the complaint and remedy the situation, if warranted. Moreover, the employer should take every action to document its investigation in order to protect itself from lawsuits such as the one above.

An employee's disability discrimination claim failed where she merely alleged that a co-worker "regarded her" as disabled.
Del Tinto v. Clubcom, LLC, 2012 U.S. Dist. LEXIS 163523 (W.D. Pa. Nov. 15, 2012)

The plaintiff filed a lawsuit alleging that her co-worker's one-time use of a pejorative term with respect to her supported a "regarded as" disability discrimination claim. Specifically, the plaintiff—who is not disabled—alleged that her co-worker commented that she is "freaking retarded" in connection with a sales contract she was working on. The plaintiff, who has two relatives with learning disabilities, was offended by the comment, complained to management and later resigned. In dismissing the claim, the court expressly noted that the plaintiff is required to prove "[t]hat her employer believed she was disabled or limited in her ability to work" but that the plaintiff's only evidence was that a co-worker made one comment regarding her. Moreover, the court further rejected the plaintiff's hostile work environment claim because she was required to demonstrate that she was actually disabled in order to sustain such a claim.

An employee's failure to provide evidence that the decision maker was aware of his disability mandates dismissal of his claim.
Wengert v. Phoebe Ministries, 2012 U.S. Dist. LEXIS 151236 (E.D. Pa. Oct. 22, 2012)

The plaintiff and another employee were terminated following an incident where a resident fell and was injured and the subsequent investigation by the employer revealed that proper procedures were not utilized by the employees. Following the plaintiff's termination, he filed a lawsuit, alleging that his termination was due to the fact that he is HIV-positive. In particular, the plaintiff asserted that there was a prior incident in which a patient bit him, which required a co-worker to take blood to determine if he contracted HIV. The plaintiff, however, informed the co-worker that he was already HIV-positive. The plaintiff's co-worker later took a statement from a witness in connection with the incident that resulted in the plaintiff's termination. In rejecting the plaintiff's claim, the court expressly noted that a plaintiff must demonstrate that the employer was aware of his disability in order to sustain a disability discrimination claim and that, in this case, the decision maker testified she was not aware of the plaintiff's HIV-status.

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WORKERS' COMPENSATION UPDATE

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Employer's suspension of benefits upheld because claimant voluntarily accepted retirement package in which he agreed he was not under duress, able to work and not disabled.
Krushauskas v. Worker's Compensation Appeal Board (General Motors), No. 446 C.D. 2011 (Pa. Commonwealth Court, October 11, 2012), filed by Judge Leadbetter

The claimant sustained an acknowledged work injury on September 7, 2005. In May 2006, as a member of the union, the claimant attended a meeting addressing the employers' plan for attrition of the workforce. After the meeting, he accepted a voluntary retirement from the employer in exchange for a lump sum payment of $35,000 and a vested pension, with 45 days to change his mind. The documentation he signed stated he was not under duress or disabled and not entitled to receive disability pay or benefits. The employer then suspended the claimant's workers' compensation benefits based on his voluntary retirement from the workforce.

The claimant filed a penalty petition alleging a violation of the Act for unilaterally suspending his benefits without an agreement or order. The judge granted the petition, but he made no award since he found that the claimant voluntarily retired from work when he accepted the Special Attrition Plan. Based on the voluntary retirement, the judge ordered the suspension of benefits as of the date of the employer's unilateral suspension. The Appeal Board affirmed the judge's decision based on their finding that the claimant had voluntarily retired from the workforce.

In a 5-2 decision, the Commonwealth Court affirmed the judge's decision. The court rejected the claimant's argument that benefits cannot be suspended without an agreement or order, noting that in situations where a claimant is clearly on notice of the employer's actions and is afforded a chance to defend against it, a judge may act accordingly. In this case, the employer had ceased paying benefits based on the voluntary retirement plan and asserted its right to continued suspension in defense of the penalty petition. The employer's actions, according to the court, clearly put the claimant on notice of the request for suspension.

In a dissent, President Judge Pellegrini took the position that the majority's ruling allows an employer to obtain any relief from a judge without first filing a petition.

The Supreme Court holds that grace period payments made to the claimant are considered compensation the employer is entitled to reimbursement of them from the Supersedeas Fund.
Department of Labor and Industry, Bureau of Workers' Compensation v. WCAB (Excelsior Insurance); 46 MAP 2011; Decided November 21, 2012; By Justice Baer

The employer filed a petition to modify a claimant's workers' compensation benefits, which it later amended to a suspension petition. In connection with the petition, the employer requested supersedeas. The employer's request was denied by a WCJ. After the supersedeas denial, the claimant settled a related third-party case and entered into a third party settlement agreement with the employer. As part of that agreement, the parties calculated the weekly pro-rata share of the expenses of recovery and determined that the employer would pay the claimant $164.42 per week during a grace period.

A few months after the third party settlement agreement, the judge granted the employer's petition suspending the claimant's benefits. The employer then filed an application for supersedeas fund reimbursement for the amounts paid to the claimant from the date the petition was filed through the date of the judge's decision, including the grace period payments. The Bureau challenged the application, arguing the payments made by the employer were not considered compensation under the Act but, rather, were payments of counsel fees.

A judge granted the employer's application. The Appeal Board affirmed, as did the Commonwealth Court. The Bureau appealed to the Supreme Court of Pennsylvania.

The Supreme Court affirmed the decisions below, holding that the payments made by the employer to the claimant were considered compensation under the Act. In fact, the court pointed out that the language of §319 is consistent with viewing grace period payments as compensation since it instructs that those payments "shall be treated as an advance payment by the employer on account of any future installments of compensation." According to the court, the employer paid the funds as compensation to the claimant to satisfy the employer's obligation to the claimant pending the judge's final decision on its petition. The court held that the employer should be reimbursed for the full amount of compensation it paid as a result of the denial of supersedeas relief.

In a physical/mental injury claim, claimant need not prove that physical disability caused mental disability or show that a physical injury continues during the life of the psychic disability.
New Enterprise Stone and Lime Co., Inc. v. WCAB (Kalmanowicz); 1492 C.D. 2012; Filed December 6, 2012; By Judge Covey

The claimant was employed by the employer as an equipment operator and was involved in a work-related accident while operating a tractor trailer. The tractor trailer collided head on with another vehicle, and the claimant observed the driver of the oncoming vehicle looking directly at him at the time of impact. The driver of the other vehicle died as a result of the accident. The collision forced the claimant's truck down an embankment. The claimant was eventually taken to the emergency room

of a local hospital and diagnosed with injuries to the left chest, right wrist and left shoulder.

The claimant continued to work for the employer. Initially, the claimant did not drive, since his trailer was destroyed. Ultimately, the claimant resumed his pre-accident duties, but within a few months, the claimant began receiving treatment for post-traumatic stress disorder. After missing some time from work, the claimant returned to the employer as a laborer at a lower weekly wage.

The claimant filed a claim petition, alleging he sustained PTSD as a result of the motor vehicle accident. The WCJ granted the petition, concluding that the claimant had met his burden of proving a physical/mental injury that resulted from a "triggering physical event." The Board affirmed.

On appeal to the Commonwealth Court, the employer argued that the Board erred by applying the standard for a physical/mental injury as opposed to a mental/mental injury. The Commonwealth Court, however, rejected the employer's argument and affirmed the decisions below. The court held that the claimant did meet his burden of proving a physical/mental injury and concluded that the physical/mental analysis was properly applied by the judge and was supported by substantial evidence. The court further concluded that the mental/mental standard was inapplicable because, in other mental/mental cases, physical stimulus was not the cause of psychological injury.

Absent a showing by the claimant that the employer deliberately subverted a third party suit brought by the employee, the employer's right to subrogation under §319 of the Act is virtually absolute.
Jason P. Glass v. WCAB (City of Philadelphia); 1274 C.D. 2012; filed 1/10/13; by Judge Cohn Jubelirer

The claimant sustained injuries in the course and scope of his employment as a police officer when he lost control of a motorcycle he was on while training and it fell on top of him. The claimant's injuries were acknowledged by the employer as work-related, and the claimant received benefits. The claimant then filed a third party tort action against the employer alleging that improper maintenance of the motorcycle caused him to lose control, resulting in his injuries. Ultimately, the claimant obtained an arbitration award in the amount of $490,000. The employer filed a petition seeking to recover its workers' compensation lien, which totaled $219,755.63. The claimant challenged the petition, alleging the employer acted in bad faith by allowing for the spoliation of evidence which affected the claimant's third party recovery. The claimant cited the case of *Thompson v. WCAB (USF&G)*, 566 Pa. 420, 781 A.2d 1146 (2001) in support of his position.

According to the evidence presented by the claimant, very shortly after the incident occurred, the employer was notified by claimant's counsel that he intended to perform an inspection of the motorcycle. The employer was asked to refrain from altering the motorcycle, particularly the clutch mechanism. Counsel for the employer responded by saying that inspection would not be permitted because the claimant did not comply with a directive requiring him to notify the police department of the law suit. Counsel further said that, once the claimant complied with this, access to the motorcycle would be given. Claimant's counsel then satisfied the employer's notice requirements. Counsel for the employer contacted officials from the police department to advise them that the motorcycle should be made available for inspection and to ensure that it had not been or would not be altered. Later, counsel for the employer learned that in September of 2006, a repair order for the motorcycle was issued, which indicated that the motorcycle's clutch lever had been replaced.

After considering the evidence, the WCJ granted the employer's petition. The judge found that the claimant did not establish that the employer undertook in deliberate bad faith to subvert the third party suit brought by the claimant so as to extinguish the employer's right to subrogation. The Board affirmed on appeal, and the Commonwealth Court did as well. According to the court, it was reasonable for the judge to conclude that there was not deliberate bad faith on the part of the employer, but rather, a series of miscommunications.

A claimant seeking reinstatement after previously refusing a light-duty job in bad faith must show that the work injury has worsened as well as an inability to do the light-duty job. The claimant is not relieved of his burden simply because the prior job was a funded position.
Alfred Napierski v. WCAB (Scobell Co., Inc. & Cincinnati Insurance Co.); 330 C.D. 2012; filed 1/10/13; by Judge Leavitt

Following the claimant's work injury, the employer referred the claimant to an employer for a funded employment position. The position was a sedentary job that paid less than the claimant's pre-injury wage and was approved by the claimant's physician. The claimant began working the job but abruptly quit after the company moved him to a third office, concluding that the employer was "playing games" with him. The employer then filed a modification petition, which the judge granted, finding that the claimant refused in bad faith to work the funded employment job. After losing appeals at the Board and Commonwealth Court level, the claimant asked the employer to fund the job for him again so that he could return to work. The employer refused, and the claimant petitioned for reinstatement.

The judge denied the claimant's petition since he did not prove his medical condition had worsened to the point that he could no longer do the funded duty position. The Board affirmed. On appeal to the Commonwealth Court, the claimant argued that he should be excused from showing that his condition worsened since the job he left was a funded employment job. The Commonwealth Court rejected this argument. According to the court, once the claimant has refused an available job in bad faith, his employer's obligation to show job availability ends. There is no exception in the law for leaving a funded employment position. The claimant who seeks a reinstatement of benefits after

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Workers' Compensation Update *continued from page 11*

refusing a light-duty job in bad faith, whether a funded employment job or not, must show a worsening of his condition and an inability to do the previous light-duty job.

In a petition to suspend the benefits of an unauthorized worker, the employer must show that the claimant is unauthorized and that the claimant is no longer totally disabled.
Eleazar Ortiz v. WCAB (Raoul Rodriguez & Uninsured Employers Guaranty Fund); 446 C.D. 2012; filed 1/15/13; by Judge Leavitt

The claimant suffered an injury while working for the employer and brought a claim against the Pennsylvania Uninsured Guaranty Fund (Guaranty Fund). The WCJ granted the claim brought against the Guaranty Fund, awarding the claimant total disability benefits from the date of injury through November of 2007. By that time, the claimant was working on a part-time basis, and the judge awarded the claimant partial disability benefits. The claimant presented no evidence that he was authorized to work in the United States, and the employer did not appeal. Later, the employer filed a suspension petition, alleging the claimant was not authorized to work in the United States and that the claimant had returned to work.

The judge dismissed the employer's petition, concluding that the employer did not prove a change in the claimant's medical condition. But, at the judge level, there was evidence that the claimant had been working since November of 2007 at approximately 18 to 20 hours per week, with his doctor's permission. The Board reversed the judge's decision on appeal, concluding that the employer showed a change in the claimant's medical condition by virtue of the work the claimant was performing since November of 2007. The Board held that this established that the claimant was no longer totally disabled. The claimant appealed to the Commonwealth Court, arguing that benefits cannot be suspended solely on the basis that he is not authorized to work in the United States and that there must be proof of a change in condition.

The Commonwealth Court affirmed the Board's decision. In the court's view, the employer proved that the claimant's loss of earning power was caused by his immigration status once his medical condition improved enough to allow him to work part-time, which happened in November of 2007. The court concluded that in the case of an unauthorized worker, an employer need only demonstrate that a claimant's medical condition has improved enough to work at some job, even one with restrictions.

A claimant who settles his claim by final and binding Compromise & Release Agreement cannot later petition to expand the nature of the work injury and argue that the employer is precluded from denying causation by voluntarily making a medical bill payment.
Michael DePue v. WCAB (N. Paone Construction, Inc.); 1113 C.D. 2012; filed 1/30/13; Judge Leadbetter

The claimant settled his indemnity claim by compromise and release agreement (C&R). The C&R that was approved by the WCJ described the injuries as "[a]ny and all injuries . . . including but not limited to the accepted injuries of a severe closed head injury with seizure disorder and short term memory loss." The C&R also stated that the employer would pay for all reasonable and related medical bills. After a decision was issued by the judge approving the settlement, the claimant filed a penalty petition, alleging the employer refused to pay for medical bills related to the work injury. The claimant additionally filed a petition to review, alleging the description of his work injury was incorrect. The claimant was seeking to add a left shoulder component to his work injuries.

The judge denied the claimant's petitions. She concluded that the review petition was barred by *res judicata* since the claimant was aware of the left shoulder injury at the time of the settlement and agreed not to include it in the approved C&R. The Appeal Board affirmed.

On appeal to the Commonwealth Court, the claimant argued that the C&R should be corrected to add the left shoulder injury. He claimed the left shoulder injury was erroneously omitted in the final draft of the agreement and that, because the employer paid medical bills for the left shoulder injury, they were aware it was causally related to the work incident. The claimant further argued that under the doctrines of promissory and equitable estoppel, the employer should be precluded from refusing to pay the medical bills for the left shoulder.

The Commonwealth Court rejected the claimant's arguments and dismissed the appeal. The court pointed out that before the C&R was signed, employer's counsel rejected a proposed addendum to the agreement prepared by claimant's counsel which included a left shoulder fracture as part of the work injury. The final version of the C&R omitted the injuries that the claimant sought to include in the proposed addendum to the C&R. The court further noted that the claimant did not expressly reserve his right to add a new injury in the C&R. The court additionally held that the doctrines of promissory equitable estoppel did not apply simply because the employer made a voluntary payment of medical bills for treatment of the left shoulder. The employer's payments did not constitute an admission of liability for an injury.

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