



FEDERALLY SPEAKING



Number 19

by Barry J. Lipson

The Western Pennsylvania Chapter of the Federal Bar Association (FBA), in cooperation with the Allegheny County Bar Association (ACBA), brings you the editorial column Federally Speaking. The views expressed are those of the author or the persons they are attributed to and are not necessarily the views of the FBA or ACBA.

IF YOU MISSED THE WHISKEY REBELLION LAST YEAR

MARK YOUR CALENDAR! Again this year, on Wednesday, November 6, 2002, the FBA West Penn Chapter is keeping alive the “**Whiskey Rebellion**” tradition with whiskey-related CLE followed by a Whiskey Rebellion Reception in the grand old style of the Engineers Society Ballroom, all presided over by our own **Judge Judy**. This not-to-be-missed “Blast from the Past,” is annual once again! With properly attired **Federal Troops** of the Original George W., Honest Western Pennsylvanian Rebel Farmers, Unabashed Revenuers, Corn Whiskey Punch (included), Bourbon Meat Tastees and other Revolutionary Vitals, and with Kolonial Karaoke, Sing-A-Longs and Surprises as part of the planned entertainment, how could you be elsewhere? All true “Sons and Daughters of the Bar” (and Bench) are welcome at the cost of a mere \$12.00 each; except that the cost for each “Unabashed Revenuer” is \$52.00, plus a round of drinks at the cash bar. A one hour/credit CLE on the “Legal Aspects of the Whiskey Rebellion,” will immediately precede the “Blast,” at the meager stipend of \$27.00 (including Blast). CLE starts at 3:45 pm, followed by the reception at 5 pm. In addition, Legal Eagles who join the FBA between now and the arrival of **George Washington’s Federal Troops**, will be the guests of the Chapter at the CLE and receive free admission to the Blast. However, *reservations* are a *must* and may be made by contacting Fran DiSalle, RSH&D, 900 Oliver Building, Pittsburgh, PA 15222 (412/434-8596).

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INSUBORDINATE OR TERMINALLY BLACK? Did Amtrak back Abner Morgan’s caboose permanently into the terminal for not following management's orders, or for being terminally black? At trial, Mr. Morgan painted the blacker picture of his termination. He claimed that before he was fired he had suffered racial discrimination for nearly the entire five years he was with Amtrak, testifying that while he had been hired as an electrician, he was referred to as an “electrician’s helper;” that his managers used the “N” word; and that he had been reprimanded for not coming to work when his daughter was ill; among other things. Justice Clarence Thomas, the former chief of the **Equal Employment Opportunity Commission** under two Republican presidents, wrote the majority opinion for an otherwise equally divided (5-4) **U.S. Supreme Court**. Abandoning the conservative wing of the **Court**, Justice Thomas give Abner Morgan his day in court by holding that the normal 180-day or 300-day window for commencing litigation under the **Civil Rights Act of 1964** does not close where the employee claims a pattern of unfair treatment. He

explained that given “the incidents comprising a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim,” which may occur “over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own” for such “claims are based on the cumulative effect of individual acts.” *National Railroad Passenger Corp. v. Morgan*, No. 00-1614 (Sup. Ct., June 10, 2002). This term Justice Thomas also departed company from Chief Justice Rehnquist, the sole dissenter, in *Watchtower Bible and Tract Society Of New York, Inc., v. Village Of Stratton*, No. 00-1737 (Sup. Ct. June 17, 2002), where an ordinance making it a misdemeanor to engage in door-to-door solicitation without first registering with the mayor and receiving a permit, was stroke down by an 8-1 majority as being a violation of **free speech** under the **First Amendment** (see **Federally Speaking** for August 2002). What **other** issues will bring out the “Earl Warren” in Justice Thomas?

NON-CLASS ACTORS MAY APPEAL. Justice Sandra Day O’Connor, Honorary FBA West Penn Advisory Council Member, writing for the 6-3 majority of the **U.S. Supreme Court**, determined that you need not be acting as a named class member to appeal. In *Devlin v. Scardelletti*, No. 01-417 (June 10, 2002), the **High Court** found that as non-named “class members are parties to the [Class Action] proceedings in the sense of being bound by the settlement,” it is required that such “class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing. To hold otherwise would deprive non-named class members of the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court.” Here petitioner is a retiree who participates in a defined benefits pension plan (the Plan) that was amended in 1991 to add a cost of living increase (COLA). Because its trustees subsequently determined that the Plan could not support the large benefits increases caused by the COLA’s, in 1997 its trustees eliminated the COLA and filed a class action in the **U.S. District Court for the District of Maryland**, seeking a **Declaratory Judgment** that the 1997 amendment was binding on all Plan members or, in the alternative, that the 1991 COLA provision was void. The **Sixth Circuit’s** affirmance (265 F.3d 195) of the District Court’s denial of this right to appeal was reversed. Justice O’Connor appears to have based her reasoning, in part, on “the fact that petitioner had no ability to opt out of the settlement” as it was for a **Declaratory Judgment** (see **Fed. Rule Civ. Proc. 23(b)(1)**). The question, therefore, remains, would the same be true in Class Action proceedings, say for monetary damages, where the non-named class member could have opted out?

WHATEVER HAPPENED TO CHARLIE TUNA? Charlie Tuna’s first TV Commercial went “in the can” in 1961, without him. He debuted as a slightly deranged, debonair Tuna, wanting his day in the can. But, alas, he was never to be so “star-kissed” by StarKist®. In his attempts to be chosen, Charlie advocated his personal “*good taste*” in his conduct and endeavors (Charlie never had any mercury under his gills), but to choose him StarKist insisted he must “meet StarKist’s *high-quality standards* for ... tuna that *tastes good*” (emphasis added). However, according to one consumer communication with the **Food and Drug Administration (FDA)**, basically complaining about “mushy” tasting tuna, the quality of canned tuna generally appears to have greatly deteriorated since Charlie debut: “In bygone years there seemed to have been three grades of canned Tuna: Grated [Flake]; Chunk; and Solid Pack. The Grated appeared to be mainly a Tuna puree; the Chunk mainly varying size ‘chunks’ of Tuna; and the Solid mainly one or two solid appearing pieces. Today, Grated [Flake] by that name appears to have disappeared; Chunk appears mainly to be the old Grated [or Flake]; and Solid Pack to be mainly the old Chunk. Please advise if, from a regulatory point of view, these observations are correct.” Unlike the **FTC**, the **FDA** responded to this communication, and by phone, in just about a month, referring the consumer to **21 CFR Ch. 1, §161.190 (Canned Tuna)**, and advising that this regulation has been in effect “forever” (though the 2001 Edition she referred to had been adopted in 1977 and amended in 1982, 1984, 1989, 1990, 1991, 1993, 1996 and 1998). These “regs” currently define “solid pack” as tuna “cut in lengths suitable for packing in one layer” where “free flakes broken from loins in the canning operations shall not exceed 18 percent;” they define “chunk” as “pieces of tuna in which the original muscle structure is retained” and in which “not less than 50 percent

... is retained on a ½-inch-mesh screen;” and they define “grated” and “flake” as being uniform particles or mixed pieces of tuna which “pass through a ½-inch-mesh screen.” But “*sorry Charlie,*” if these observations are correct, not only is the tuna packing industry, even under current “regs,” way “out of spec,” but it fails to comply with Charlie’s personal standards of “good taste” and with general product standards of quality and “tastes good.” (Incidentally, the **FDA** does regulate actual “taste,” permitting only the use of salt, monosodium glutamate, hydrolyzed protein, spices, garlic, vegetable broth and lemon flavoring, and apparently not wine or vinegar.) And we consumers thought that all we had to worry about were Charlie’s successful competitors being refugees from some ill-fated episodes at “*Mercury Theater.*” While **Mr. FDA**, we do not want another “*War of the World’s,*” it would be appreciated if you would strengthen your enforcement of your canned tuna standards. Down with over-priced, mushy tasting, tiny tuna tidbits!

IN-HOUSE COUNSEL: THE UNSUNG HERO! Harken all you counselors of the inner realms, hidden away from out-house glamour, buffeted by the woes of your counterparts at Enron and Andersen (see the June and August, 2002 **Federally Speaking** columns), your day has come! Your ilk, with silken grace, “harkened” to the call of our future **Commander-in-Chief** and saved his nether-area. So says the **Security and Exchange Commission (SEC) Division of Enforcement**, which we have only now learned of through the **Freedom of Information Act** efforts of the **Center for Public Integrity**. In a March 18, 1992 “Action Memorandum,” or more precisely a “No-Action Memorandum,” the **Enforcement Division**, after noting that “Bush and Harken waived the attorney-client privilege to allow the staff to question Harken’s in-house counsel,” reported that in a telephone interview “with Harken’s in-house counsel, Larry Cummings, ... Cummings told the staff that, during the second week of June [1990], Bush contacted Cummings and requested his advice as to whether Bush could sell his Harken stock. According to Cummings, he and Bush discussed the issues surrounding a potential sale, including whether Bush was an insider with knowledge of any information prohibiting a sale.” After this meeting “Cummings contacted Harken’s outside counsel, Haynes and Boone” and, at Bush’s request, “Harken’s President and Chairman [Michael Faulkner], as well as Alan Quasha, another director.” Thereafter, outside counsel advised Cummings “the attorneys at the firm that performed work for Harken ... saw no reason why Bush could not sell his stock.” Likewise, Faulkner, and Quasha through Faulkner, told Cummings that they knew of no “inside information that would prevent Bush from selling his stock and neither of them objected to Bush’s proposed sale.” Cummings further advised “he conveyed the results of his conversations with Haynes and Boone and Faulkner to Bush and told Bush he was free to sell his stock. Cummings said that Bush told him that he would have Smith [Buyer’s broker] contact Cummings to work out the mechanics of the transaction,” which is what happened next. Based thereon, the **SEC Enforcement Division** concluded that: “In light of the facts uncovered, it would be difficult to establish that, even assuming Bush possessed material nonpublic information, he acted with scienter or intent to defraud,” and concluded that “the staff does not believe that an enforcement action is appropriate in this matter.” By letter of October 18, 1993, the **Division** advised Bush’s personal attorney, Robert W. Jordan, that “no enforcement action is contemplated,” though, of course, the **SEC** letter included the normal caveat that this “must in no way be construed as indicating that the party has been exonerated.” Good work, Larry! And thanks George; it’s nice to know we have a president who knows enough to seek legal counsel. Too many executive do not.

PASS THE POPCORN, WARDEN. Be nice just once, and look what happens! While Jere Krakoff, an attorney with the **Pennsylvania Institutional Law Project**, who represents the inmates at **McKean Federal Correctional Institution**, acknowledges that the warden was really being nice, as his **class action** suit “doesn’t say prisoners have a right to see movies in the first place,” he asserts, that “since a movie-screening program exists, the government has to show why certain movies should be banned.” He has, therefore, attacked “a prison policy that provides that ‘[n]o movies rated R, X, or NC-17 may be shown to inmates.’” In *Wolf v. Ashcroft* (3rd Cir, July 24, 2002, No. 01-1869), the **Third Circuit** agreed with Jere and reversed U.S District Judge Sean J. McLaughlin’s dismissal of this **class action** (WDPA, Civil No. 97-

cv-00408E). According to the **Appellate Court**, only “the ban on movies rated R and NC-17 represented a recent change in policy; X-rated movies have long been banned. See **28 C.F.R.S 544.33**. The policy was designed to implement the **Zimmer Amendment**, which prevents the expenditure of funds for the viewing of movies rated R, X, or NC-17 in prison. See Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, S 611, 110 Stat. 3009 (1996).” Here, the reviewing court concluded, “the **District Court** did not conduct a proper, thorough analysis under *Turner* [*Turner v. Safley*, 482 U.S. 78, 89 (1987)] in that it did not articulate the relevant penological interest or the prohibition’s relationship to it.” This appeal was argued before U.S. Circuit Judges Mansmann, Rendell And Fuentes on January 7, 2002. “The Honorable Carol Los Mansmann participated in the oral argument and conference in this case, but died before she could join or concur in this Opinion.” Apparently Jere is concerned over the inmates being "relegated to watching what children watch." He has publicly expressed no concern over the availability or quality of the popcorn!

TO EAT “ORR” NOT TO EAT? – THAT IS THE QUESTION! Stephen C. Orr ran a single-pharmacist pharmacy for the Chadron, Nebraska Wall-Mart. He was fired for not eating while working. The story as recounted by the Eighth Circuit in *Orr v. Wall-Mart Stores, Inc.*, (8th Cir, July 22, 2002; No. 01-2959), goes something like this. Wall-Mart wanted Orr to work **and** eat. He was to keep the pharmacy open at all times, grabbing bites in the pharmacy’s back room only between the times customers’ were seeking service. Orr, presumably being a knowledgeable medical professional, and being a diabetic on a strict eating schedule that he claimed was necessary for his proper diabetes management, wanted to eat **or** work. Accordingly, each day he closed the pharmacy for a half hour and ate. By a 2 to 1 vote the **Eighth Circuit** upheld his firing under the **Americans With Disabilities Act (ADA)** – Nebraska-style (finding the Nebraska Act was interpreted applying Federal law). In essence the reviewing court found that either eating was not “a major life activity” or that Orr had not asserted in a timely or proper fashion that the major life activity of “eating” was substantially impairment (apparently asserting instead that the “questionable” so-called major life activity of “working” was so impaired). Senior Circuit Judge Donald P. Lay, dissenting, accuses the majority of splitting “hares,” reasoning that the “majority faults Orr for not raising the issue of ‘eating’ as a limitation on one of his life’s major activities before the **district court**. In all due respect, this is a myopic treatment of the record before the **district court**. Orr’s entire case turned on the refusal of his employer to allow Orr to follow a dietary regimen. Orr’s argument focused on eating but eating is inextricably related to ‘working.’ As the **district court** acknowledged, plaintiff claimed that he was substantially limited in his ability to work. This claim, however, was obviously based upon Orr’s ability to control his regulated diet and insulin injections. Thus, eating at defined times is directly related to his ability to work. Orr’s whole complaint as well as the evidentiary record relates to Wal-Mart’s refusal to allow Orr to eat during a lunch break. To suggest eating was not raised in the **district court** slights the entire evidentiary record.” Some commentators read this case as extending the **U.S. Supreme Court** decision in *Sutton v. United Air Lines Inc.*, 527 U.S. 471, 483 (1999) to exclude diabetics from ADA protect (in *Sutton* potential pilots who wore glasses, and who were refused training because of this, were found not to be "disabled" under the ADA, even though their defective eye sight was the cause for this refusal). The better reading would appear to be that this is a case with only one oar in the water and stands for nothing. Incidentally, Judge Lay further advises that there “is additional proof that Wal-Mart has now changed its policy and allows an uninterrupted lunch break at its single-pharmacist store in Chadron.”

THE FEDERAL CORKBOARD™

Call Susan Santiago for information and reservations on all FBA programs (412/281-4900).

CITIZEN’S DAY NATURALIZATION CEREMONIES. At 10 AM on September 17, 2002, at the Federal Courthouse, eighth floor, the West Penn Chapter of the Federal Bar Association is sponsoring the Citizen's

Day naturalization of approximately 100 new citizens. Chief Judge D. Brooks Smith (newly appointed to the U.S court of Appeal for the Third Circuit) will be presiding. **All are welcome to attend the ceremonies.** A light reception will follow.

FBA LEARNABOUT™ LUNCHEON SERIES CONTINUES. At Noon on Thursday, September 19, 2002 Margaret Picking from the U.S. Attorney's office and Penn Hackney of the Federal Public Defender's office will present a one-hour CLE on "The Nature Of Recent Trends In U.S. Supreme Court Criminal Decisions."

WHISKEY REBELLION. Wednesday, November 6, 2002, 3:45 PM CLE; 5 PM "Blast from the Past" Reception (see lead story for more details or call as noted above).

LUNCH WITH A FEDERAL JUDGE SERIES, for FBA members, continues.

The purpose of Federally Speaking is to keep you abreast of what is happening on the Federal scene. All Western Pennsylvania CLE providers who have a program or programs that relate to Federal practice are invited to advise us as early as possible, in order to include mention of them in the Federal CLE Corkboard™. Please send Federal CLE information, any comments and suggestions you may have, and/or requests for information on the Federal Bar Association to: Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266. (412/566-2520; FAX 412/566-1088; E-Mail blipson@wgbglaw.com). Federally Speaking thanks LexisNexis for aiding in research.

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