Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue

Testing

Examiners win damages in case of videotaped test

Issue: Prosecution of copyright violations of licensing exams

A candidate who was acting in a suspicious manner during the eight-hour professional engineering Civil Examination denied she was illicitly copying the exam when she was confronted—but as she was talking, an electronic device slid out of her jacket sleeve.

The October 2006 incident in Puerto Rico led to criminal charges against the test taker, Bethzaida Cameron-Ortiz. The test developer, the National Council of Examiners for Engineering and Surveying (NCEES), subsequently filed a civil action against Cameron-Ortiz for willful copyright infringement based on her videotaping of the exam items.

In a June 16 ruling, the U.S. District Court for the District of Puerto Rico ordered Cameron-Ortiz to pay actual damages of $1,021,630 for infringing NCEES's copyrights and compensatory damages of $1,021,630 for breach of contract (*National Council of Examiners for Engineering and Surveying v. Bethzaida Cameron-Ortiz*).

Cameron-Ortiz was accused of copying the two required exams for professional engineers: the PE (Principles and Practice of Engineering) Exam and the FE (Fundamentals of Engineering) Exam.

A total of 240 multiple-choice items could have been compromised by the alleged copying. Some of the previously used questions serve as "equators" to measure the level of performance of candidates from one form of the exam to another.

To protect the confidentiality of its exams, NCEES registers them for copyright protection under "secure test" regulations. A "secure test" is defined as a non-marketed test administered under supervision at specified sites on specific dates, all copies of which are accounted for and either destroyed or returned to locked storage after each administration.

The secure test regulations suspend the requirement to deposit copies of the work, and require instead that registrants of secure tests only deposit a portion or a description of the test sufficient to identify it.

At the October 27, 2006 PE Civil Examination administration at the University of Puerto Rico in Mayaguez, Cameron-Ortiz took the morning exam, then returned after the lunch break. It was during the afternoon session that an exam proctor and the Chief Examiner observed Cameron-Ortiz's "unusual behavior" and suspected she was copying exam contents.

Cameron-Ortiz was found to be concealing in her clothing: (1) a wireless audio/video transmitter module with a built-in microphone, (2) a mini video camera, (3) a receiver, (4) a pocket video recorder, (5) a cradle used to connect to a TV or computer with audio/video input, and (6) two battery packs to power the equipment she had.

When confronted, Cameron-Ortiz denied that she had any copying or recording devices, but an electronic device was discovered in her jacket sleeve. When she was taken to a private room and her jacket and bag were searched, various devices were found sewn into the pockets.

The court calculated the actual damages to NCEES based on the loss in fair market value of the copyright. "Due to defendant's actions, NCEESW retired one copyrighted exam form, and a portion of another copyrighted exam form. Based upon the cost of replacing the test questions on each of those forms, NCEES suffered damages of $562,046 for the professional exam, and $433,891 for the engineering fundamentals exam."

The expenses NCEES incurred to identify the scope of the infringements and to address the effects of infringements upon future administration of the exams in question added up to $25,693, the court said. In addition, "all relevant factors justify awarding attorney's fees to NCEES."

Cash for "shortened" licensing exam qualifies as bribery, federal court says

Issue: Corrupt exam practices

There was sufficient evidence to support the bribery conviction of the owner of a truck driving school who gave "short tests" to candidates for commercial driver's licenses who made cash payments, the U.S. Court of Appeals for the Eighth Circuit ruled June 22 *(United States of America v. Mustafa Redzic*).

The defendant, Mustafa Redzic, owner of Bosna Truck Driving School, was charged with mail fraud, wire fraud, bribery and conspiracy to commit each of these offenses in connection with a scheme to obtain Missouri commercial driver licenses for his students.

Students who completed their training at Bosna and wished to obtain a commercial driver license were required to be tested at either a state-run facility or a private company licensed by the state of Missouri. The test consisted of a written exam and a three-part driving component, including a pre-trip inspection, a skills test, and a road test.

One of the licensed testers, Commercial Drivers Training Academy, had a testing program overseen by Troy Parr, a codefendant of Redzic's. To generate more business and process more CDL applicants, Parr developed a system of "short testing" in which CDTA would omit entire portions of the driving exam or administer it in only a fraction of the time needed for a proper evaluation.

For payments of $150, often with $50 to $200 in extra cash, Parr regularly gave short tests to Redzic's students and submitted paperwork to the state falsely indicating they had successfully met the full requirements for their CDLs.

"These short tests did not meet the minimum requirements set by the state for CDL testing," the court said. In addition, for two students Redzic asked Parr to

submit paperwork even when they never appeared at the testing company, and Parr agreed to do so.

A government wiretap revealed Redzic promising the husband of a potential customer that he could "guarantee" his wife would pass the driving test, despite her inability to operate a manual transmission.

A jury convicted Redzic and Parr, and the district court ordered he forfeit $25,277 in cash, seven trucks, and three trailers.

In his appeal, Redzic argued that the indictment, the government's argument at trial, and the jury instructions all proceeded on the theory that he and Parr had defrauded the state of Missouri of property in the form of commercial driver's licenses (CDLs). He maintained that as a matter of law, "state and municipal licenses in general do not rank as 'property,' in the hands of the licensor."

The court rejected this reasoning, holding that Redzic intentionally devised a fraudulent scheme whereby the state of Missouri was deprived of its right to Parr's honest services, and the government produced sufficient evidence for a reasonable jury to convict Redzic for bribery.

Court rejects candidate's claims of discrimination on licensing exam

Issue: Alleged discrimination in exam scoring

A candidate who failed the medical licensing exams several times did not show that the National Board of Medical Examiners and the Federation of State Medical Boards scored his exams in a discriminatory manner, the U.S. District Court for the Northern District of New York ruled May 22 *(C. Earl Grant v. National Board of Medical Examiners, et al.*)

The candidate, C. Earl Grant, took Step 1 of the three-part US Medical Licensing Exam a total of six times starting in 1994, passing on the sixth attempt. Along with another medical student, he sued the NBME for alleged failure to provide them with reasonable testing accommodations in violation of the Americans with Disabilities Act. While the lawsuit was pending, Grant took and failed Step 2 of the USMLE twice.

Grant reached a settlement agreement with the NBME providing for certain accommodations for him, setting some requirements for his requests for any score re-checks, and providing that NBME would not retaliate against him in its scoring of any future examination.

Between 2003 and 2006, he took Step 3 of the USMLE five times without passing, and the NBME rejected several of his requests for score re-checks as untimely. The FSMB received some re-check requests eight months and up to three years after Grant's scores were released.

"The crux of Plaintiff's claims revolve around a perceived bias towards him," the court said. "Plaintiff claims that Defendants subjectively graded his examinations in an unfair manner."

Grant claimed that because only one of the re-graded exams had written markings on it showing partial hand scoring, and the other re-graded exams didn't, NBME had lied about having re-scored the other exams. But the court found that NBME had made available Grant's examination answer sheets when requested, agreed to timely re-scoring requests, and otherwise complied with the settlement agreement.

That agreement "does not guarantee Plaintiff the right to have his Step 2 exam re-scored by hand," the court said, noting that rechecking of some scores is done using computer systems applicable to all candidates.

Grant did not provide sufficient evidence that NBME or FSMB had discriminated against him on the ground of race, color, religion, or national origin to show a violation of Title II of the Civil Rights Law of 1964, the court said in dismissing his claims. "Mere speculation or conjecture" that he was discriminated against is insufficient.

Was failure of exam within licensee's "power to control"?

Issue: Certification exam passage as job requirement

The case of a teacher who failed the PRAXIS II, a certification exam, and was terminated from her job, then sought unemployment benefits, must be determined by whether her failure to procure the full license was "within her power to control, guard against, or prevent," the Court of Appeals of North Carolina ruled May 19 (*Scotland County Schools v. Donna F. Locklear and Employment Security Commission of North Carolina*).

The teacher, Donna Locklear, was hired by Scotland County Schools provisionally, but to retain her position was required to pass a state licensing exam.

Locklear was fired because she failed to pass the exam, and the Employment Security Commission of North Carolina found that she "was discharged because she failed to meet the requirements to maintain her position"—and she was "not disqualified" to receive unemployment benefits.

On appeal, a trial court found that Locklear was disqualified for benefits. The appellate court then ruled that because the termination did not implicate misconduct or substantial fault, a different statutory provision applied to her.

It has now sent the case back, ordering the trial court and the commission to decide on the status of the provisional license and its relationship to a full license, and "whether Locklear's failure to procure the full license required for continued employment was within her power to control."

While the state statute involved here is "not a paragon of clarity," the court noted, the public policy maintained by North Carolina is that state unemployment reserves "should be used for the benefit of persons unemployed through no fault of their own."

The legislative history shows the general assembly sought to prevent payment of benefits to individuals who lost a license or certificate required for the job by reasons that they could have prevented—for example, the legislature noted, a truck driver who loses his driver's license because of speeding convictions or DWI.

Court blasts both test maker and candidate in cross-jurisdictional case

Issue: Confidentiality of examination items

The Court of Appeals of Indiana partly agreed with an applicant who sought access to exam materials on the national osteopathic medical exam after he failed it seven times. In a June 26 ruling (*(Massood Jallali v. National Board of Osteopathic Medical Examiners*), the court said the applicant was right about some jurisdictional issues. But it found that the National Board of Osteopathic

Medical Examiners' provisions on its web-based exam regarding the confidentiality and non-accessibility of the testing materials were enforceable.

In the case, applicant Massood Jallali took and failed to pass the board's Level I exam five times before finally passing in October 2004. He proceeded to take the Level II exam three times and failed each time.

During the last two attempts, which were taken electronically through the NBOME website, Jallali agreed at the website to comply with security and confidentiality provisions requiring that any legal claim must be brought under a court in Indiana.

A key finding of the case related to enforceability of Internet "clickwrap" agreements—where an "Accept" dialog box must be clicked, indicating that the user consents to any terms and conditions in order to proceed with the Internet transaction. The court found it would have been impossible for Jallali to take either of the two electronic examinations without first establishing an NBOME account and clicking "Accept" under a dialogue box that contained an "acknowledgement and agreement"—confirming that he accepted the confidentiality and non-accessibility of the testing materials.

In 2007, Jallali sued NBOME in Florida seeking to access NBOME's exams, the answer keys, and the methodology of scoring. A Florida court initially refused to dismiss Jallali's lawsuit, but later did dismiss it.

Meanwhile, NBOME filed a complaint against Jallali in Indiana, and a trial court concluded that Jallali could not access any of the testing materials for any of the examinations he took.

Jallali appealed and the Court of Appeals said the trial court should have deferred to the Florida litigation which was pending at the time, in the interest of comity.

The appeals court expressed frustration that it did not learn the Florida suit had been dismissed until months after it happened. "We are baffled, confused, and puzzled why NBOME did not advise us of that fact in its first brief. Clearly, this dismissal is vitally important to our consideration of the issues raised here, and renders our original opinion factually and legally incorrect. There can be no comity discussion about a case that no longer exists."

Jallali "does not escape unscathed," however, the court said. "He trumpeted the Florida court's April 28, 2007 denial of NBOME's motion to dismiss without disclosing the September 16 dismissal of the case."

The factual context of the case makes it "extraordinarily rare," the court said. It agreed with NBOME that Jallali had accepted the confidentiality provisions on the electronic exam, but refused to find the same for the written exams. On that issue, it sent the case back to the trial court.

Licensing

Title act overturned

State's ban on use of broad, generic professional title "too extensive," says federal court

Issue: Constitutionality of laws protecting use of title

A Connecticut law limiting use of the title of "interior designer" was "more extensive than necessary to further any interest properly advanced by the state," and is unconstitutional, the U.S. District Court for the District of Connecticut held June 30 (*Susan Roberts, et al. v. Jerry Farrell Jr., in his capacity as Commissioner of the Connecticut Department of Consumer Protection*).

The case was brought by three women who own businesses including a Decorating Den franchise, an antique furniture and interior design company called the "Idea Factory," and "Ideal Interiors." They sought an injunction against enforcement of a Connecticut law that they claimed censors their truthful commercial speech by forbidding them from calling themselves "interior designers."

Although 19 states regulate interior design related titles, only Connecticut regulates the specific term "interior designer."

In attempting to address the complaint early in 2009, the state attorney general requested that the case be stayed until the state legislature considered a proposed bill to change the regulated title from "interior designer" to "registered interior designer."

> "The term 'interior designer' is not a term of art and it is not inherently misleading. It merely describes a person's trade or business," the court said. "At oral argument, counsel had difficulty explaining to the court the difference between the services rendered by an 'interior decorator' or a 'designer' (Plaintiffs may use either term to describe their work) and an 'interior designer' (a term Plaintiffs may not use)."

However, the legislature did not complete action on the bill, so the court said it would turn to the merits of the complaint. A year after they first filed the action, "plaintiffs deserve a ruling on their claim so they may move forward with their livelihoods," the court said.

State law requires that any person using the title "interior designer" either be a licensed architect, or obtain a certificate of registration as an interior designer.

Jerry Farrell, Commissioner of the state Department of Consumer Protection, argued that the plaintiffs' would-be use of the term "interior designer" merits no First Amendment protection because it is misleading.

The court ruled, however, that that argument involved circular reasoning and was "untenable." Adopting the commissioner's position would eviscerate the First Amendment's protection of commercial speech by making the determination of what is 'misleading' dependent upon the parameters of the challenged restriction," the court said.

During the trial, this case was compared to other key decisions affecting title acts. In defending Connecticut's title act for interior designers, the Commissioner cited a 2004 California case, *American Academy of Pain Management v. Joseph*, in which the Ninth Circuit Court of Appeals upheld the state medical board's prohibition against physicians' use of the term 'board certified 'unless the certifying organization met certain requirements.

The Connecticut court, however, said this case was different. "'Board certified' is a term with an established meaning connoting a high level of specialized skill and proficiency…There has been no showing that the term 'interior designer' is a well-established term of art in the design industry that connotes specialized skills or proficiency."

Rule restricting veterinarian practice exceeded board's authority

Issue: Limitations of administrative rulemaking

A rule relating to veterinarians' scope of practice that was adopted by the Tennessee veterinary board was invalid because it was overbroad and inconsistent with the veterinary medicine practice act, the Court of Appeals of Tennessee at Nashville ruled August 27 (*Bonnie Cady v. Tennessee Board of Veterinary Medical Examiners*). The decision upheld an earlier ruling by the Chancery Court for Davidson County.

The case was brought by a breeder and trainer of horses, Bonnie Cady, who owned and operated a business named The Horse Hub. She provided services

including the breeding of mares, taking care of mares from foaling to re-breeding, collecting semen from stud horses for shipment and use off-site, training horses, and boarding horses.

The state health department notified Cady in 2004 that she had engaged in the unlicensed practice of veterinary medicine by artificially inseminating mares, flushing mares, performing ultrasound exams on mares, infusing horses with antibiotics, and administering other drugs to horses, in violation of a board rule.

The Board of Veterinary Medical Examiners later convened a hearing and issued an order assessing $17,000 in civil penalties to Cady for allegedly engaging in unlicensed practice.

The Chancery Court held, and the Court of Appeals agreed, that the board's rule, providing that the scope of veterinary practice includes any action to "treat, correct, change, relieve" an animal's "injury or other physical or mental conditions" is substantially broader and more encompassing than the legislature's definition of the practice of veterinary medicine.

While the legislature did include manual procedures for diagnosis or treatment of sterility or infertility, and transplantation or removal of embryos, it did not include "artificial insemination" or "testing for pregnancy within the statutory definition."

By unlawfully expanding the definition of the practice of veterinary medicine in its rule, the board "blanketly bars persons who are not licensed veterinarians from engaging in livestock management practices" which the legislature did not authorize.

Therefore the board exceeded its authority, the court said. It overturned the assessment of civil penalties and assessed the costs of appeal against the veterinary board.

Appeals court reverses ruling that licensing act is protectionist and anti-competitive

Issue: Constitutionality of corporate ownership ban

The state morticians and funeral directing act does not violate the dormant Commerce Clause of the U.S. Constitution and is not unconstitutional, the U.S. Court of Appeals for the Fourth Circuit held March 27.

In the case, *Charles Brown et al. v. David Hovatter et al.,* the appeals court partially reversed the judgment of a federal district court, which had held that while the Morticians Act did not violate the Equal Protection Clause or the Due Process Clause, it did violate the dormant commerce clause.

The plaintiffs were four residents of Maryland who describe themselves as "funeral and cemetery entrepreneurs." They contended that the act, which prohibits corporate ownership of morticians' licenses and funeral establishments (except for 58 corporations grandfathered into the act in 1945) effectively shields the Maryland funeral industry from most out-of state-competition.

The industry members "profit handsomely from the most blatantly anti-competitive funeral regulation in the nation, adding nearly $800 to the cost of a funeral in Maryland," they said.

Led by Charles Brown, the plaintiffs wished to own and operate funeral establishments in Maryland through the corporate form without being individually licensed.

The lower court did find that the plaintiffs' challenge of the morticians' act had merit on one score: it violated the dormant Commerce Clause because it was a "protectionist piece of legislation that is clearly anti-competitive."

That court said that even if one of the 58 licenses does become available, a prospective out-of-state purchaser must pay an inflated price for it, creating intolerable burdens that are "clearly excessive."

However, the appeals court ruled that the dormant Commerce Clause may only remedy economic harms or anticompetitive choices that unjustifiably burden interstate commerce—and that does not apply here. "The Morticians Act does not treat real persons from out of state any differently than persons in state," the court noted.

The law "purports to regulate an industry that is inherently local, not interstate, in nature… The only restrictions that are imposed by the Morticians Act relate to professional education, experience, and accountability. Thus, entry into the Maryland funeral services market is limited only by the choices of the individual as to how best to allocate his or her time and resources."

The court noted that Maryland made a "rational legislative judgment" that "limiting funeral home licenses to licensed individuals will foster a greater degree of accountability to regulators." The limit also protects the public welfare by encouraging the familiarity of the owner of a funeral business with the day to day workings of that business, in place of the continued licensing of corporations, "which are inherently designed to limit the personal responsibility of owners."

Academic studies do not qualify as "practice" for alternate pathway licensing

Issue: Entry requirements for alternate pathways

An applicant for a dental license under Hawaii's alternate pathway program for dental specialists did not have experience that met the requirements of the program, the Intermediate Court of Appeals of Hawaii ruled May 21 *(K. Amanda Wilson v. Board of Dental Examiners*).

Affirming the state Board of Dental Examiners' denial of the application of K. Amanda Wilson, the court rejected Wilson's argument that her graduate orthodontics studies should qualify as "lawful engagement in the practice of dentistry."

Wilson originally applied for Hawaii licensure in 2004 but did not receive a passing score on her dental exam. The following year, however, applicants had limited access to licensure by examination because the board was in the process of adopting a new exam.

To ensure adequate numbers of dentists were being licensed in the interim period, the legislature enacted Act 121, providing several alternate pathways to licensure.

Wilson was one of the proponents of Act 121 and actively lobbied for the bill, which was set to be repealed on the day that the dental board approves the American Board of Dental Examiners' examination.

In June 2005, she applied for a dental license under a provision that allowed a dental specialist such as an orthodontist to bypass the traditional exam and receive a Hawaii license by virtue of his or her credentials.

The board denied her application, reasoning that her three-year graduate orthodontics studies in Connecticut, which concluded in 2004, did not count toward the law's requirement of "having been lawfully engaged in the practice of dentistry for at least three years preceding the date of the application."

The board concluded that the provision required an applicant to be licensed, practicing independently and outside of the academic arena, bearing primary responsibility for the patient's safety.

The temporary alternate pathway was repealed in October 2005, four months after it was passed. The court found that the board's order denying Wilson a license did not contravene the purpose of the law, which "was not enacted to guarantee Wilson's Hawaii licensure."

"Although Wilson may have actively lobbied for Act 121, her personal comments have no persuasive authority," the court added. And there was no evidence to suggest that the board denied her license application in retaliation for her involvement in the passage of the law providing for licensure by credential.

Discipline

In "duel of experts," appeals court sides with board's discipline of appraiser

Issue: Expert witness credibility

The Arkansas appraiser board was neither wrong nor arbitrary in disciplining an appraiser for substandard work, the Court of Appeals of Arkansas, Division One, ruled June 24 (*Arkansas Appraiser Licensing & Certification Board v. Peter Emig*).

Reversing a circuit court that had ordered the discipline of Peter Emig to be reversed, the appeals court said there was substantial evidence to support the board's finding that the appraiser's work was deficient.

The board found Emig's appraisal deficient because, among other things, it (1) failed to use appropriate comparables, (2) failed to show conspicuously that the property was located in a flood zone, (3) improperly assumed that financing would be unavailable post-contamination, (4) cited an incorrect date of contamination, (5) relied on improper records for the size of the property, (6) made deficient and conflicting determinations about the property's highest and best use, and (7) improperly included another appraiser who had not sufficiently contributed to the report.

Peter Emig was hired to do a "before and after" appraisal of real property in Camden damaged by leaky gasoline storage tanks. An appraiser hired by the board to evaluate Emig's work testified to several deficiencies—including errors, omissions, and unexplained assumptions—that violated the board's professional standards. The report was "incomplete and did not follow correct methodology," the board's expert testified.

Emig petitioned for judicial review, noting that the project was very very difficult, and that his report contained several mistakes he would correct in hindsight.

Both of Emig's experts agreed that Emig's bottom line was "in the ballpark" and did not mislead anyone as an infringement of professional standards. and the circuit court found the board's discipline order to be inconsistent in one respect and arbitrary in several.

The board appealed to the Court of Appeals. After reviewing the case, the court said the record "presents a duel of experts on a specialized matter—the standards and required practices for real estate appraisals."

The board, said the court in affirming its discipline, was not making inconsistent conclusions, because the professional standards for appraisers "stack" several requirements of professional competence and integrity, and the

board was merely concluding that Emig's work, however deficient, did not render his behavior unethical.

Claims of investigator abuse "too vague," court says

Issue: Alleged misconduct in investigation of complaints

A licensee's claims that a state investigator was abusive in his investigation of misconduct charges against her were too vague, ruled the US District Court for the Western District of Wisconsin June 11 (*Charlene Kavanagh v. Wisconsin Psychology Examining Board, its Staff and Investigators, and Jack R. Zwieg*).

The plaintiff, a psychologist named Charlene Kavanagh, filed a federal claim that Wisconsin investigator Jack Zwieg used "abusive, coercive, arbitrary and capricious techniques" while investigating allegations of misconduct against her, thus violating the Fourth and Fourteenth Amendments. The court granted the state board's motion for summary judgment and dismissed Kavanagh's claims.

Kavanagh failed to respond to the board's arguments on the merits of her claims, the court noted. For instance, the board argued that she could not identify a privacy right related to the alleged government seizure barred by the Fourth Amendment.

When the board argued that it had qualified immunity, Kavanagh's sole response was that "full and complete discovery into the investigations that form the basis of these claims is needed" and "there exist substantial issues of material fact." Those were left unidentified, however.

The court said Kavanagh also failed to put forth any proposed findings of fact. "The upshot of plaintiff's failure to propose facts is that her version of the story must be disregarded. This is not as harsh as it might seem because the only useful 'facts' plaintiff attempted to propose were vague references" about Zwieg's abusiveness.

By failing to respond to the board's arguments, Kavanagh conceded she could not establish grounds for alleged constitutional violations, and even if she could, the board and other defendants are entitled to qualified immunity, the court concluded.

Physician unprofessional and negligent, not incompetent, court finds

Issue: Sufficient evidence to justify finding of incompetence

A physician's discipline for unprofessional conduct and negligence was properly imposed, but an administrative hearing commission incorrectly found the physician subject to discipline for incompetency, the Supreme Court of Missouri found June 30 in *Faisal Albanna v. State Board of Registration for the Healing Arts*.

The state medical board imposed five years of probation on Faisal Albanna, a neurosurgeon who had practiced in Missouri since 1987, based on two patients it found were injured as a result of Albanna's actions.

The board found that in one case Albanna had performed an inappropriate operation, and in another had violated the standard of care in several respects, causing corrective surgery to have to be performed. As discipline, Albanna was

required to obtain extensive informed consent from his surgical patients and to refer them for second opinions prior to performing surgery.

When Albanna appealed, however, a circuit court reversed the decision that found grounds for discipline. The board then appealed to an appeals court which transferred the case to the Missouri Supreme Court.

"In an earlier time, physicians were disciplined for what the statute simply called unprofessional conduct, with the idea that a licensed professional should know what that phrase means," the court said. "In recent years the statute has been made more explicit, giving the profession, the board and the courts a clearer understanding of the conduct, practices, professional failings for which a licensee can be disciplined."

The court said that even though none of the experts who testified indicated whether they viewed Albanna's conduct as unprofessional, the hearing commission properly drew its own conclusion based upon the testimony and opinions as to the care.

As to "repeated negligence" charges, Albanna argued that an incorrect legal standard was applied, and that the hearing commission should have employed the medical judgment rule, under which a physician who uses his own best judgment cannot be convicted of negligence as long as there is room for an honest difference of opinion among competent physicians.

But as to the incompetency charge, the court sided with Albanna. Albanna argues the evidence of his long and successful career is inconsistent with a finding of a general lack of professional ability. The court stated that "incompetency" refers to a state of being, something different from negligence.

In this case none of the experts testified that Albanna was incompetent. Albanna cited his lengthy record of successful surgeries as evidence that he is not, in fact, incompetent.

"As Albanna argues, an evaluation of 'incompetency' necessitates a broader-scale analysis, one taking into account the physician's capabilities and successes," the court said. There was insufficient evidence in this case to support the finding of incompetency. The court remanded the case to the trial court to send back to the board to reconsider the discipline to be imposed.

Licensee can't circumvent time-limit rules in appeal of revocation

Issue: Venue and timeliness requirements in filing appeals

A physician's switch of his license suspension appeal from the Superior Court of the Virgin Islands to a federal court and back did not stop the clock on the time limit governing appeals of a medical board decision, the Superior Court of the Virgin Islands held June 10 (*Wilbert Williams v. Government of the Virgin Islands, Board of Medical Examiners*).

The case stemmed from an April 15, 2005 incident in the Virginia Islands office of the physician, Wilbert Williams. A patient became unresponsive during treatment and was transported to a hospital where she died several days later. The Virgin Islands Board of Medical Examiners held a hearing in June 2005 and issued a one-year suspension of Williams' license.

Williams filed a complaint challenging the decision, but filed a notice of dismissal before the Superior Court could rule. He then filed in the U.S. District Court of the Virgin Islands, which agreed to a temporary restraining order. However, after a new hearings the board voted to revoke Williams' license for life.

The federal court dismissed Williams' case, declining to exercise its jurisdiction because the matter was before the Superior Court. Although Williams

argued that the doctrine of "equitable tolling" —which preserves the protections that statutes of limitations are intended to afford—applied to his case, the Superior Court ruled that Williams' petition for review was not timely filed.

"Williams chose a course of action to voluntarily dismiss his Superior Court case and instead pursue his claims in District Court. The decision to do so was solely his choice. Now, more than two years later after receiving the District Court's opinion, Williams cannot circumvent the procedural rules that govern this Court because he is dissatisfied with the outcome in the District Court and is trying to avail himself of another form of relief," the court said.

Revocation for making hateful calls too harsh a sanction

Issue: Severity of sanction

The Pennsylvania accountancy board abused its discretion by imposing the most drastic available sanction on an accountant who had been convicted of criminal harassment in Illinois, the Commonwealth Court of Pennsylvania ruled May 20 (*Kevin Allen Ake v. Bureau of Professional and Occupational Affairs, State Board of Accountancy*). It reversed the revocation order and sent the case back to the board for reconsideration.

The accountant, Kevin Ake, identified the 2002 harassment conviction on his application for reinstatement of his Pennsylvania CPA credentials in 2007, and the board re-licensed Ake. But a few months later it initiated an enforcement action against him based on the conviction.

At a hearing, Ake explained that he was evicted from a Cook County YMCA where he lived at the time, and following the eviction he left a series of telephone messages to the executive director of the YMCA, who he knew to be a lesbian, in which he expressed his feelings that homosexuality was an unnatural lifestyle, against the teachings of the Bible.

Ake was arrested and convicted of the felony offense of hate crime under state law. By 2005 he had completed all the terms of his sentence including probation, fines, and 14 days in jail, and 200 hours of community service.

In his testimony to the board, Ake said he did not know anything about the hate crime law and, although he maintained his convictions about homosexuality, he understood he was guilty. "'And I apologize if I've done something wrong…And I just come before you as a simple accountant, requesting that I'll still keep my CPA status."

Expressing doubt that Ake was fully rehabilitated based upon his testimony at the hearing, the board revoked Ake's CPA credentials on May 16, 2008.

In his appeal, Ake argued that the board abused its discretion in imposing the maximum penalty, that the evidence did not support its conclusion that he was not rehabilitated, and that the board failed to consider that his harassing conduct would not have constituted a felony in Pennsylvania, and that the conduct for which he was convicted was unrelated to his ability to perform the responsibilities of a public accountant.

The court noted that Pennsylvania case law teaches that "the nature of the offending crime and its remoteness in time must be considered where an agency seeks to revoke a professional license on the basis of a conviction." In this case, "Ake's harassing conduct in Illinois was certainly deplorable. However, it does not relate to any of the character qualities the legislature has identified as central to holding a CPA certificate, i.e., honesty, integrity, and being able to practice accounting in a non-negligent manner."

In addition, the board's analysis lacked any objective standard for what constitutes "rehabilitation" in this context. "It is not for the board or this court to decide whether Ake's beliefs are objectionable. The Board is not vested with authority to look into the hearts of those licensees who appear before them. The board members may not assume the role of the proverbial thought police and require Ake or any other accountant to change his beliefs to conform with those of the board's members."

The board did have grounds to impose a sanction upon Ake, the court said, but not the most drastic sanction. "Complete revocation of a CPA's credentials should be a sanction reserved for the worst offenders," the court said, citing as an example the Pennsylvania accountant whose misconduct consisted of helping to prepare an audit report that falsely inflated a company's net earnings by $75 million.

Birth of full-term baby sufficient evidence that teacher had sex with student

Issue: Sufficient evidence justifying misconduct findings

The fact that a former high school student's baby by a high school teacher was not premature, and was born less than six months after the student graduated, was sufficient evidence to permanently revoke the teacher's license for having sex with a student, the Court of Appeals of Kentucky decided May 22 (*James Tracy Carroll v. Kentucky Education Professional Standards Board*).

The case involved an elementary school physical education teacher, James Carroll, and a high school student who was assigned to assist him as part of a community service learning program, Laura Hughes. Hughes graduated from high school May 24, 2003, married Carroll in July, and gave birth to a 7 lbs 12 oz baby on November 13, 2003.

A license revocation proceeding against Carroll was begun and a hearing was held in August 2006, at which Carroll argued that the only proof in support of the claim that he had sexual relations with Hughes while she was a student was the fact that their child was born on November 13, 2003.

The hearing officer concluded that the birth certificate created a presumption of a gestational period of approximately 36 weeks, and that Carroll failed to rebut this presumption with any evidence. The recommendation of the hearing officer was that Carroll's license be revoked until June 30, 2009; the Kentucky Education Professional Standards Board adopted the findings but opted to permanently revoke the license.

In his appeal, Carroll contended that the board merely proved he had sexual relations with Hughes, which he admitted, but not when such relations occurred. He sought an order reversing the trial court and the reinstatement of his teaching certificate.

The court held this argument was refuted by the record. Under state rules of evidence, a judicially noticed fact must be one that is "not subject to reasonable dispute in that it is either: (1) Generally known within the county from which the jurors are drawn, or in a non-jury matter, the county in which the venue of the action is fixed; or (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

In this case, "The board and the Franklin Circuit Court properly relied on the entirety of the record to conclude that an infant weighting 7 lbs and 12 oz at the time of birth could not have been born in excess of three months premature as Carroll implicitly maintains."

Once reasonable evidence was entered into the record that Brennan Carroll was born at a normal or large birth weight for a full-term baby, the burden shifted to Carroll to offer evidence in support of his implied argument that Brennan was conceived about 5 and one half months before his birth, the court said.

Take Note

Mississippi licensing board not an "employer" under Title VII

Issue: Independent boards and applicability of civil rights laws

The U.S. Supreme Court refused May 18 to review a decision by the U.S. Court of Appeals for the Fifth Circuit, which had held in November 2008 that the Mississippi pharmacy board did not qualify as an employer under US Title VII, a law that prohibits an employer from discriminating on the basis of sex and race (*Bertha M. Garrett-Woodberry v. Mississippi Board of Pharmacy*).

The case was filed by Bertha M. Garrett-Woodberry, who began a nine-year period of employment with the state Board of Pharmacy in 1999 as an administrative assistant and was promoted to enforcement agent in 2004.

In September 2006, the board issued a directive assigning her to the licensing division of the board, and she filed suit under Title VII against the board, alleging race discrimination and sex discrimination as well as state whistleblower law violations.

Under Title VII, an employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year."

The board lacks a sufficient number of employees to constitute a statutory "employer," so Garrett-Woodberry contended the court should aggregate the board's employees with other state agencies.

The appeals court disagreed, citing case law holding that aggregation of employees for purposes of Title VII could be done for private employers, but not with regard to employees of a town, state and county. The board makes autonomous decisions concerning its employees, including hiring, transfers, promotions, discipline, and discharges, the court found.

"Woodberry seeks to aggregate all of the state agencies of the State of Mississippi as one single employer, but put forth no evidence that the state made any decision or took any action regarding her employment," or that the state and the board shared centralized control of labor relations," the decision stated.

Actual malice not present in newspaper's erroneous report of revocation

Issue: Liability of media for inaccurate report of discipline

The *New York Post*, which inaccurately reported that singer Ozzy Osbourne's physician had had his license revoked by the California medical board, did not do so with actual malice, the New York Court of Appeals decided April 30 *(David Kipper MD, et al. v. NYP Holdings Co., Ltd.*).

Upholding the Appellate Division's grant of summary judgment to *the New York Post*, the court said there was not clear and convincing evidence that the newspaper had maliciously libeled the physician, David Kipper.

Under pertinent case law, a public figure is barred from recovering damages in a libel action unless clear and convincing evidence proves that a false and defamatory statement was published with knowledge that it was false or with reckless disregard of whether it was false or not.

The eight-paragraph article, a rewrite of a longer article on *the Los Angeles Times*'s wire service, appeared in the paper on December 7, 2003. The *Times* article had reported that Osbourne alleged Kipper had over-prescribed various medications to him and that the California medical board "moved to revoke" his license due to gross negligence in the treatment of other patients.

The *Post* article, however, appeared under the headline, "Ozzy's Rx doc's license pulled," and reported that the board had revoked Kipper's license.

In affidavits submitted to the court, neither the reporter nor the editor could recall how the non-factual revocation appeared in the story, but the editor said that a reporter performing a rewrite like this one may typically make "minor editorial changes" including "more interesting word selection," before publication in the *Post*.

The reporter said his job essentially entailed shortening wire service stories, changing the lead paragraph to make it "less boring than the *Los Angeles Times*" or a "better read."

The court found that there was no evidence the newspaper had deliberately fabricated the report of revocation, and noted that it had issued a full retraction when requested.

Investigator's lawsuit against board may proceed, court decides

Issue: Alleged wrongful termination of investigative employee

A federal district court in Oklahoma refused to dismiss the lawsuit of a former investigative assistant who sued the Oklahoma veterinary board for wrongful termination.

In the May 26 decision in *Rajeanna Dixon v. Oklahoma Board of Veterinary Medical Examiners*, the court said the former employee of the veterinary board, Rajeanna Dixon, had raised substantive charges that could not be summarily dismissed.

Dixon was employed by the board from June 2000 to July 2004 when she was terminated. She alleged that she was fired in retaliation for reporting wrongdoing at the board including improper expenditure of public funds and inappropriate and illegal behavior by employees, such as speeding and driving state-owned vehicles in an unsafe manner.

She asserted four cases of action: a civil rights claim for violation of her constitutional right to speak on matters of public concern, wrongful termination in violation of Oklahoma public policy for exposing wrongdoing and exercising her legal rights, violation of the Fair Labor Standards Act for the board's failure to pay her overtime, and breach of contract.

The veterinary board sought summary judgment on Dixon's second cause of action, wrongful termination.

The court rejected Dixon's tort claim regarding wrongful termination based upon the Whistleblower Act because, it said, there is a remedy in the statute itself to redress a violation.

But the Oklahoma constitution's free speech clause "sweeps more broadly than the First Amendment" of the U.S. Constitution, the court stated. At this stage of the litigation, it said, the board has not made a valid case that Dixon was not protected by the free speech clause.

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