

Counselor

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Court Upholds Employer's Rights In "Seinfeld" Case

Do employers have an obligation to volunteer information that might affect employees' plans to stay or look for other work, even when they have not been asked?

A closely divided Wisconsin Court of Appeals decided this question in *Mackenzie v. Miller Brewing Co.*, Case No. 917-3542 (February 22, 2000). Lathrop & Clark represented Wisconsin Manufacturers and Commerce ("WMC"), the statewide

association representing Wisconsin business, in a brief supporting Miller's position on appeal. A majority of the Court sided with Miller and WMC, and relied in part on the position advanced by Lathrop & Clark on WMC's behalf.

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The so-called “Seinfeld” case received national medial coverage and considerable attention in legal circles when, after a three-week trial, a Milwaukee County jury awarded Jerold Mackenzie over \$25,000,000. Mackenzie had alleged that Miller intentionally misrepresented his chances for advancement within the company, causing him to continue his employment at Miller when his prospects would have been better elsewhere. Perhaps the most controversial and newsworthy aspect of the case, however, involved a claim by a female employee (who had been under Mackenzie’s supervision) that Mackenzie had made inappropriate remarks about a risqué episode of the Seinfeld television show. Miller investigated the report and shortly thereafter fired Mackenzie for “poor management judgment.”

In fact, the “Seinfeld” incident represented only one of four claims brought by Mackenzie; a claim that, in fact, was dismissed by the trial court. However, the jury returned a series of verdicts favorable to Mackenzie, finding that: (1) Miller Brewing and an executive (Smith) had intentionally misrepresented Mackenzie’s job status, inducing him to remain in Miller’s employ; (2) the executive had intentionally interfered with Mackenzie’s promotion; and (3) the employee had intentionally interfered with Mackenzie’s contract in reporting the “Seinfeld” incident. The jury awarded over \$6,000,000 in compensatory damages, and over \$19,000,000 in punitive damages.

The Court of Appeals held that Mackenzie could not pursue a claim for intentional misrepresentation based on Miller’s alleged failure to disclose the effects of Miller’s corporate reorganization on his career. But the Court also concluded that, in any event, Mackenzie had failed to prove that Miller had misrepresented or concealed anything it had a duty to disclose; that Miller had intended to deceive him; that he had relied on any alleged misrepresentations; or that he had been

financially damaged as a result of misrepresentations. As a result, the Court reversed the jury verdicts against Miller.

The Court also found that company executives have a legal privilege to comment on whether other employees, like Mackenzie, should be promoted, and that Mackenzie had failed to prove any interference with his contract. Consequently, the judgement against the individual executive was also reversed.

Perhaps the most intriguing and important part of the Court’s decision dealt with Mackenzie’s claim that an employer is obligated to disclose information to employees that might influence their career plans to stay with an employer or, alternatively, to seek employment elsewhere. Mackenzie had claimed that Miller falsely advised him that the company’s internal reorganization did not affect his status, and that Miller failed to inform him that his position had been downgraded.

The Court agreed with Miller and WMC on this critical issue, ruling that Miller and its executive could not be held liable for intentional misrepresentation. According to the Court, Wisconsin law provides that employers and employees should bear the responsibility of defining their duties to each other through the terms of their contracts. The Court agreed with Miller and WMC that employers could not possibly determine all employment-related information that employees might rely upon in deciding whether to continue their current employment and, as a result, the Court concluded that a duty to disclose of this kind was unworkable.

The Court quoted from WMC’s brief, in this regard, observing that such a duty would also have to be a two-way street, requiring employees to disclose to employers whenever they were considering quitting or interviewing for other positions. As an additional example, a management representative who might be required to satisfy such a requirement on

behalf of an employer would have to determine what information might affect the employee's decision to continue working, make disclosure of all conceivably relevant information, and update the information as long as the individual was employed. And if the manager left the company first, he or she would have to record or pass on that information to any successor to make certain that accurate updates continue to be provided.

According to the Court, this would create an impossible burden for the employer. The Court also noted that sensitive information, which might be of the greatest interest to an employer's competitors, might also be information that would be considered material to its employees' decision to remain with the company (e.g., financial reversals).

In the second major portion of the decision, the Court reviewed the claim that Smith's comments about Mackenzie's suitability for promotion constituted interference with his contract. The Court ruled that while improper interference can provide grounds for a lawsuit, providing truthful information is "privileged," i.e., a legally protected communication. The Court again cited WMC's brief with approval, noting that an employee must have the freedom to critique and honestly evaluate the performance of co-employees (particularly when an employer seeks their input), and that the prospect of liability would discourage employees from giving accurate opinions or cooperating with inquiries made by the employer.

Mackenzie should not be seen as a green light for employers to mislead their employees. At the same time, it represents a realistic view of employer-employee relationships. The Court of Appeals' decision should provide some solace to Wisconsin employers who attempt to deal fairly with their employees, but who cannot realistically be expected to provide any and all information that might influence employees' career planning.



Don Heaney and Ken Axe, who authored the brief on behalf of Wisconsin Manufacturers and Commerce, have extensive business litigation experience and were pleased to present the viewpoint of Wisconsin's business community.

New Rules Governing the Landlord/ Tenant Relationship

The residential landlord/tenant relationship in Wisconsin is governed Chapter 704 of the Wisconsin Statutes, and by administrative regulations found in Chapter ATCP 134 of the Administrative Code. On October 12, 1998, several changes to ATCP 134 were adopted. These changes, which took effect on January 1, 1999 are outlined below:

(1). Rental Agreement. The definition of “rental agreement” has been narrowed to mean an oral or written agreement for the rental of a specific dwelling unit. The mere approval of a tenant’s rental application does not create a rental agreement, and a rental agreement does not arise until the parties agree on the specific dwelling unit to be rented.

(2). Misrepresentation. Misrepresentation by a landlord is specifically prohibited. No landlord may, for the purpose of inducing a person to enter into a rental agreement, misrepresent the location, characteristics or equivalency of dwelling units offered by the landlord, the amount of rent to be paid, or any non-rental charges which will increase the total amount payable by the tenant during its tenancy.

(3). Credit Checks. A landlord may require a prospective tenant to pay the actual cost, up to \$20.00 to obtain a consumer credit report on the prospective tenant from a consumer reporting agency. The landlord must notify the prospective tenant of the charge before requesting the consumer credit report, and

must provide the prospective tenant with a copy of the credit report. If the prospective tenant provides the landlord with a consumer credit report that is less than 30 days old, the landlord may not require the tenant to pay for a subsequent credit report, but may obtain a report at the landlord’s expense.

(4). Earnest Money. The landlord must now refund the applicant’s earnest money deposit by the end of the next business day after the landlord rejects the rental application or the applicant withdraws the rental application before the landlord approves it.

(5). Security Deposits. Several substantial changes have been made to the rules regarding security deposits. The new rules clarify that the landlord may collect more than one month’s prepaid rent as a security deposit. However, if the landlord holds any rent prepayment in excess of one month’s prepaid rent when the tenant surrenders the premises, the landlord must treat the excess as a security deposit.

Second, before a landlord accepts a security deposit, or converts an earnest money deposit to a security deposit, the landlord must notify the tenant in writing that the tenant has the opportunity to inspect the dwelling and request a list of physical damages or defects charged to the previous tenant’s security deposit. If a tenant requests a list of damages charged to the previous tenant’s security deposit, the landlord must provide this list within 30 days, or within 7 days after the landlord notifies the previous tenant of the security deposit deductions, whichever occurs later. The landlord need not disclose the previous tenant’s identity, or the amount withheld from the previous tenant’s security deposit.

Third, regarding the return of security deposits, if a landlord returns a security deposit in the form of a check, draft or money order, the landlord shall make the check payable to all tenants who are parties to the rental agreement, unless otherwise authorized by the tenants in writing. The landlord is still required to return security deposits within 21 days of the tenant surrendering the premises.

Finally, the new rule clarifies what is meant for a tenant to “surrender” the premises. The tenant is deemed to surrender the premises on the last day of tenancy specified under the rental agreement, except that surrender occurs sooner if the tenant gives the landlord a written notice that the tenant has vacated

before the last day of tenancy specified in the rental agreement. If a tenant vacates the premises after the last day of tenancy specified in the rental agreement, surrender occurs when the landlord learns that the tenant has vacated.

(6). Habitability. A landlord must now disclose that dwelling unit lacks hot or cold running water, and, for purposes of disclosing if a heating unit is not capable of maintaining a temperature of 67°, the temperature must be measured from the center of the room, midway between the floor and the ceiling. The landlord is also required to disclose if the dwelling unit is not served by plumbing or sewage disposal facilities in good operating condition.

(7). Receipts. A landlord must give a tenant a receipt for any earnest money, security deposit, or rental payment which a tenant pays in cash. The receipt must state the nature and the amount of the payment.

(8). Late Rent Fee. A landlord is specifically prohibited from charging a late rent fee or a late rent penalty, except as specifically provided in a written rental agreement. Before charging a late rent fee, the landlord must apply all rent prepayments received to offset the amount of rent owed by the tenant.

(9). Non-Standard Provisions. The new rules identify certain rental provisions which, because of the potential unfairness to tenants, may not be incorporated as boilerplate language in a standard rental agreement. These provisions include any agreement expanding the landlord's normal right of entry to the tenant's dwelling unit, any agreement expanding the normal reasons for which a landlord may withhold a security deposit, and any lien agreement giving the landlord a lien on the tenant's personal property. Provisions of this type must now be separately negotiated between the landlord and the tenant, and must be made part of the lease by a separate written document entitled "Non-Standard Rental Provisions." The landlord must discuss each of these provisions with the prospective tenant.

Landlords that own residential properties should review their present leases to ensure the lease complies with the new rules set forth in ATCP 134. A failure to comply with the rules of ATCP 134 may subject a landlord to a claim by tenants that the landlord is involved in unfair trade practices. If a tenant is successful in a lawsuit of this type, the tenant, in addition to any monetary damages the court may award, shall also receive double damages, and the tenant's reasonable attorney fees for prosecuting the action.

Landlords are also reminded that if they own a property which was built before 1978, the landlord is required to provide a tenant with Addendum L, which discloses to the tenant that the residence may contain lead based paint. By providing Addendum L, the landlord is disclosing the possible existence of lead based paint because the residence was built prior to 1978; however, a landlord does not have a duty to test the premises, or remove the lead based paint. However, on July 9, 1999, the Wisconsin Supreme Court ruled landlords are required to test certain property for lead paint and can be held responsible for injuries to tenants from such paint. In ruling in favor of a young boy who was diagnosed with lead poisoning after eating paint at a residence in which he and his parents were tenants, the court held that landlords have a duty to test for lead based paint when they know or should know of chipped or peeling paint. Based on this ruling, if a landlord owns a rental property which was built before 1978, the landlord should inspect the premises for chipped or peeling paint, and if such paint is found, take the necessary steps to remediate the problem.



Paul Johnson is a partner with Lathrop & Clark LLP and practices primarily in the firm's Lodi office. His practice concentrates on real estate transactions, family law, estate planning and representation of individuals.

Notes From The Chair

The fundamental mission of any law firm is to serve the needs and interests of its clients. Although this mission is simply stated and easily understood, dealing with the real problems of people can be a difficult task. This is particularly true given the nature of the world in which we live. A dynamic business and social environment, increasing complexity in relationships between and among people and businesses, changing technology, the ongoing development, growth and redirection of law—these factors all complicate the ability of a firm to deliver legal services to clients.

Meeting these challenges requires organization, specialization, concentration and focus. Our approach has included structuring the firm into six teams, separated by areas of practice, each dedicated to the delivery of legal services to the firm's clients in the most efficient and effective manner possible. A brief description of each of our practice groups, its focus and its capabilities, follows:

(1) Business Law. Our firm represents many small and mid-size businesses. Our business law team focuses on the variety of issues affecting our business clients, including the organization of business entities, the financing of business operations, stakeholder and management issues, business transactions, employment, contracts, business combinations and dissolutions.

(2) Real Property, Probate and Trust. Our firm also maintains a significant practice involving the representation of individuals, with special experience and demonstrated capabilities in the areas of family law, real estate (including real estate development) and estate planning, trusts and probate. This team deals with the special issues and problems affecting the needs and interests of individuals.

(3) School, Municipal, Labor and Employment Law. Our firm is a recognized leader in the area of school law, representing many school districts throughout the state. We also represent a number of units of local government within the areas served by our Madison and branch offices. A significant component of our work for school districts involves labor and employment issues. This

team also focuses on the other issues of constitutional, governmental and municipal law affecting units of government. Finally, the team serves as counsel to private employers in a variety of labor and employment law issues.

(4) Patent, Trademark, and Copyright. Our firm also has maintained, over many years, a leading practice in the intellectual property areas of patent law, trademarks, trade names and copyright law. Our clients include individuals and businesses on a local, regional, national and international scale. This team deals with issues involved with this highly specialized area of law.

(5) Litigation. The effective resolution of disputes requires a special understanding of procedures, practices and techniques. The needs of our clients requires us to handle a wide variety of cases at state and federal levels, before administrative agencies, at trial and on appeal. Our litigation team has the special capabilities necessary to provide support to our other practice teams, serving our business, individual and governmental clients and handling patent and other intellectual property law cases, before agencies and courts throughout the state and country.

(6) Tax. Business and personal decisions are often influenced by tax considerations. Further, tax laws tend to be comprehensive and complicated. Our tax department, which includes two certified public accountants, maintains the capabilities necessary to provide a full range of tax service and advice in areas such as the preparation of tax returns for individuals, taxation of estates, tax advice to business (including the tax consequences of business organization, dissolutions and transactions), sales tax issues, tax audits and litigation, tax-exempt organizations, taxation of deferred compensation plans, and tax-planning in litigation.

We are fully aware of how complex and interconnected legal issues and affairs can be, and how important it is that we maintain the ability to respond to the range of interests and needs of our clients. We hope that the Counselor helps to introduce you to our firm, who we are and what we do, our sense of



purpose and professionalism, and the resources we can provide in serving the needs and interests of our clients. Please also visit our web site at www.LathropClark.com to learn more about our firm.

Ventures

Honors & Awards

Jerry McAdow was elected to serve as president of the Dane County Public Affairs Council for 2000. The DCPAC is a group of Madison and area business leaders who gather monthly to discuss topics of business and community interest and to hear presentations from the community. ■ School district personnel in the Madison and Milwaukee areas are registering to attend a comprehensive seminar entitled "School Law Issues in Wisconsin." Attorney **Michael Julka** will present a portion of the agenda in Madison on May 18, 2000. ■ **Heidi Tepp** and **David Rohrer** have once again authored the "School Law" section of the Annual Survey published by the State Bar of Wisconsin in April. ■ **David Rohrer** will be moderating a School Violence seminar on June 8th in Madison. His presentation is entitled "Legal Aspects of the Expulsion Process." In addition to Mr. Rohrer, the seminar includes a wide variety of area professionals including school administrators, Assistant District Attorneys, an Assistant Professor in Education Administration, a licensed psychologist, a clinical social worker and a retired police officer, who now oversees security for the Madison Metropolitan School District. ■

New Faces



Lydie Arthos Hudson joined Lathrop & Clark LLP on January 1, 2000. Lydie joins the Patent, Trademark and Copyright Group. She has a background in copyright and trademark law and has extensive experience with computer software agreements. She advises clients on e-commerce issues generally and, as former in-house counsel at Nicolet Instrument Corporation, she has a wealth of experience with general commercial transactions, including domestic and international distribution relationships. Lydie received her J.D. from the University of Michigan Law School in May 1986. She currently sits on the

Boards of Directors for the University of Wisconsin Children's Hospital and The Pleasant Company Fund for Children. ■ The School, Municipal, Labor and Employment team is pleased to announce that **Diane Parker** has been hired as secretary to Michael Julka and Shannon Day. Diane brings with her 11 years of school district administrative secretary experience through her prior position with the Richland School District. Diane and her husband Greg recently moved to Sun Prairie from Lone Rock along with their four Tennessee Walking Horses that they ride and show in their free time.

Publications & Presentations

Our Director of Library Services, **Carol Schmitt**, was the only Madison librarian to present at "Strategic Use of Internet Search Engines in Wisconsin" on March 30, 2000. The audience included Madison area paralegals, legal secretaries and law clerks. Ms. Schmitt regularly conducts research for our attorneys in a wide range of practice areas. She is a member of the American Association of Law Libraries and the Law Librarians Association of Wisconsin. ■ Several of our attorneys will be involved in a two-day presentation for human resource administrators in the Madison area on June 20-21, 2000. Topics that will be covered by firm attorneys include: Recent Developments Under the Wisconsin Fair Employment Act by **David Rohrer**; Employee Handbooks and Manuals by **Shannon Day**; Employee References and Background Searches by **Kirk Strang**; and Internet/E-Commerce Issues in the Workplace by **Frank Sutherland**. For registration information regarding the "Effective Human Resource Management in Wisconsin" seminar, contact Lorman Education Services at (715) 833-3959. ■ **Shelly Safer**, a co-author of the Wisconsin Attorney's Desk Reference (a publication of the State Bar of Wisconsin) has prepared the 2000 supplement on trademark law. The supplement was published in February of this year. ■

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