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Nonprofit Alert®

Alerting nonprofit leaders to key legal developments and responsive risk management steps.

Inside This Issue:

YMCA Cleared of Liability in Shooting Incident

The YMCA in Fargo, ND, is not responsible for the permanent disabilities an attorney suffered in a shooting incident that occurred on its premises in 1996, the North Dakota Supreme Court has decided. The ruling also upholds a lower court decision relieving the YMCA of liability. (See *NPA*, Aug. 00, for a summary of that ruling).

Security Precautions

The attorney was shot five times while exercising early one morning in the YMCA weight room. The gunman, who was also a member of the YMCA, had threatened the attorney on numerous prior occasions. The gunman was later sentenced to life in prison for attempted murder.

The attorney then sued the YMCA, claiming its lack of security led to his injuries. He argued the YMCA should have terminated the gunman's membership and instituted greater precautions against his violent behavior. But a lower court decided the YMCA and its director had acted responsibly in handling both individuals.

Reasonable Response

Although the director knew of animosities between the men, he testified that no other members or employees ever encountered problems with them. At one point, the director had called a YMCA in South Dakota where the gunman had once been a member but found the man had actually been a volunteer and never caused any problems. This, the court concluded, was all the YMCA could reasonably be expected to do under the circumstances. *Rodenburg v. Fargo Moore-head YMCA*, 2001 N.D. 139.

Determining Factors

Proactively addressing problems and documenting results are key steps to providing adequate security. Here, the director's private foundations because it allowed donors to instruct Fund trustees on how to invest and donate their contributions. A district court agreed, forcing the Fund to alter its operating policies so that donor control was more limited.

Here, the director's determination that the member had no known history of violent behavior was significant in avoiding liability for the YMCA.

Volunteer Abortion Doctor Reinstated to Adjunct Position

The University of Nebraska Medical Center has agreed to reinstate Dr. LeRoy Carhart, a controversial abortion provider, to a volunteer adjunct position in the department of pathology and microbiology, in settlement of a federal lawsuit that Carhart filed earlier this year. (See *NPA*, Feb. 01).

The announcement came after months of legal wrangling over Carhart's First Amendment rights. He claimed he was terminated from a volunteer position in retaliation for his involvement in an abortion rights case. The term-ination, he claimed, harmed his professional reputation and violated his free speech rights.

University officials say his termination was the result of reorganizing. His name will be reinstated on the faculty roster, but he will not perform any services, officials say.

The case presented ground-breaking issues in volunteer/ employee law, but the settlement now means court action must await a future case.

→→→ *IRS Releases Interesting Stats* ←←←

More than one million §501(c) organizations were registered with the IRS as of Sept. 30, 1999, according to recently released IRS statistics. Of that number, 773,934 were listed as §501(c)(3) organizations, but the actual number of §501(c)(3)'s is probably much higher since churches, integrated auxiliaries, and conventions or associations of churches are not required to register with the IRS. This figure represents a 5.5% increase in the number of §501(c)(3)'s since 1998.

Liability & Risk Management

Association Members Lack Standing to Sue Manager

Members of a homeowner's association cannot sue the association's manager for breach of fiduciary duty, an Ohio appeals court has ruled, because only the association has standing to bring such a claim against the manager. Two members accused the manager of dishonesty and fraudulent misappropriation of funds, then sought a court order forcing his removal. The court noted that the members did not bring the case as a derivative suit in the name of the association. Instead, they claimed the manager owed them a direct fiduciary duty, but the court disagreed. No fiduciary duty exists in Ohio law between an employee and shareholders (or in this case, association members) that would allow the members to bring an individual suit against the manager, the court said. *Sayyah v. O'Farrell*, No. 200006-017 (12thApp.Dist. OH 2001).

The concept of "standing" basically limits the filing of law suits to injured parties. If the homeowners' injury here had been separate and distinct from an injury to the corporation, they could've sued. But under these circumstances, any claims of fraud perpetrated by the manager against the association must be asserted by the association itself, not its members in their individual capacities. Memo, *Governing Responsibly by Nonprofit Board Members.* See back page to order.

Pastor Pays Over $100,000 in Taxes; Ends IRS Battle

Rev. Gregory J. Dixon, pastor of the Indianapolis Baptist Temple, has been ordered to pay $136,610 in back taxes and penalties arising from his refusal to pay income taxes during 1983–1986. A U.S. district judge issued the order last month, ending a long-running battle between Dixon, his church and the IRS. Earlier this year, federal marshals seized church property to satisfy $5.9 million that the church owed for failure to withhold employment taxes between 1987–1993. (See *NPA*, Dec. 01). The church argued it was not subject to taxation because it operated only under God's law, not U.S. tax law. Dixon's judgment was separate from the church case.

Baptist Home Didn't Discriminate in Firing Lesbian

A federal district judge has ruled the Kentucky Baptist Homes for Children, a foster home in Louisville, did not discriminate or violate civil rights laws when it fired a homosexual employee. The suit stemmed from Alicia Pedreira's dismissal in 1998. She claimed the foster home discriminated against her for religious reasons. Her complaint reasoned that "sexual orientation discrimination" (which is not forbidden by federal law or Kentucky law) constitutes "religious discrimination" when objections to sexual orientation are based on religion. The judge disagreed, however. He said the foster home did not violate any constitutional guarantees because it based Pedreira's dismissal on its "behavioral code," which coincided with its religious beliefs. None of Pedreira's religious beliefs were ever violated, he said. *Pedreira v. Kentucky Baptist Homes for Children, Inc.* (W.Dist. KY, 7/23/01).

The bottom line: early federal trademark registration is always preferable and may be critical to your "brand" identity. Understand the basics with Nonprofit Alert® Memo, *Trademark Law for Nonprofits.* See back page to order.

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Employees & Volunteers

Carpal Tunnel Not Always An Automatic Disability

An employee who lands a higher paying position after leaving her prior job because she suffered from carpal tunnel syndrome (CTS) is not considered "disabled" under the Americans With Disabilities Act (ADA), the First Circuit has ruled. Although CTS can qualify as a disability under the ADA, the court said the employee in this case was not substantially limited in any major life activity since she found another job at substantially higher pay and continued to work. The court went on to say that not every employee who suffers from CTS will automatically be considered "disabled." Instead, the court said an "individualized inquiry" must be made in every case with consideration given to a number of factors, including the individual's work ability, education, skills and expertise. *Gelabert-Ladenheim v. American Airlines, Inc.*, 252 F.3d 54 (1st Cir. 2001).

Consumer inquiries about questionable charity practices rose by 40% following the September 11 terrorist attacks, according to reports from The Better Business Bureau. If you suspect a charity scam, contact the FTC at 1-877-FTC-HELP or report the offender to your state charity officials listed at www.nasconet.org.

Get It in Writing: Court Upholds Unsigned Contract

A prominent Tennessee restaurant offered a position to an experienced chef. The parties held two meetings and produced the first draft of a three-year employment contract for the chef, to which he orally agreed but never signed. The chef began work immediately, and the restaurant paid him the agreed salary with benefits. Four months later, the restaurant reduced his salary then eventually fired him, claiming his culinary skills were inconsistent, and his leadership skills were lacking. The chef then sued the restaurant for breach of contract. A lower court

sided with the restaurant, ruling that the unsigned contract was unenforceable under the Statute of Frauds, which requires employment contracts longer than one year to be singed and in writing. On appeal, the chef argued that an exception to the Statute of Frauds, called the "partial performance doctrine" applied in his case. That doctrine allows an otherwise unenforceable contract to be upheld if one or both parties have already performed certain acts in satisfaction of the contract terms. The appeals court accepted this argument because it found that the chef had devoted 100 percent of his time to the business and the restaurant had initially paid him the agreed salary and benefits. Both parties had partially performed under the agreement. *Schnider v. Carlisle Corp.*, No. W2000-01695-COA- R3-CV (Tenn.Ct.App., 4/19/01).

Employer contracts should normally specify at-will employment status (and only rarely a term of years), current salary and benefits, and conciliation or other alternative dispute resolution provisions. Learn more with Nonprofit Alert® Memo, *Hiring & Supervision.* See back page to order.

Tax-Exempt Issues

IRS Okays Fragmentation Rule for UBIT Activities

The IRS recently applied the "fragmentation rule" of §513(c) to permit a tax-exempt organization to collect both UBIT and non-UBIT revenue from one event without endangering its exempt status.

The case involved an annual golf tournament and charity ball that an organization sponsored to raise money. All funds raised from the events were distributed to a §501(c)(4) organization, which then disbursed various amounts to other charities. A souvenir program, which included advertising, was also produced in conjunction with the golf tournament, but the organization handled all the advertising solicitation in-house during the months preceding the tournament every year. The IRS said the tournament and charity ball were unrelated to the organization's exempt purpose, but because they were not regularly carried on, the revenues didn't constitute UBIT. However, the organization conducted ad solicitations throughout the year preceding every tournament. This activity was more like a regularly conducted business, separate and distinct from the tournament itself. Therefore, the IRS concluded revenues generated from the advertising were subject to UBIT. IRS LTR 200128059.

The IRS relied on a previous court ruling, which fragmented advertising revenues from a basketball tournament, and found that activities conducted on a regular or lengthy basis cannot be considered "intermittent." To prudently plan your next fundraiser and minimize UBIT, order Nonprofit Alert® Memo, *UBIT Primer for Nonprofits.*

Nonprofit Partners with LLC to Build Public Library

A private foundation will not endanger its exempt status by granting funds to a community trust for the construction of apublic library, in which a limited liability company (LLC) will be involved, the IRS has ruled. The funds were to be used for the

NPA Highlight of the Month

A New Wave of Drug Testing: Reduce Costs, Lock In Results

Technology to detect drug use by analyzing a single lock of hair may dramatically alter the way nonprofits hire and supervise employees. The process is more reliable and less intrusive than urinalysis or blood testing, claim its developers, and is able to detect drug use over a much longer period—up to 90 days in some cases.

It works by detecting and measuring drug molecules that become permanently entrapped in hair following ingestion into the body. Drugs are absorbed into the bloodstream, which then nourishes the hair. The chemical footprint is indelible, scientists claim. The test begins with the collection of a small lock of hair, usually about an inch, cut close to the scalp where new growth has occurred. An initial screen is performed to determine if any drug residues are present. If that screen comes back positive, then an additional hair sample is taken for a separate test involving much more sophisticated procedures, including a cleansing process that takes up to four hours to make sure no environmental factors have triggered a false positive.

A standard hair test costs between $40-$50. Although the technology to perform such tests has existed for many years, the reliability of the tests has only recently improved, and the cost has became affordable on a wide scale. Nonprofit organizations aren't typically among those entities administering routine drug tests to employees, but the hair test could change all that, especially for those organizations whose employees occupy high risk positions. Many nonprofits must also comply with federal laws that require testing certain employees.

The Omnibus Transportation Employee Testing Act of 1992 imposed significant burdens on employers, including nonprofits, for testing employees who operate commercial motor vehicles or are required to hold commercial drivers licenses. Commercial motor vehicles are those that are designed to transport 16 or more passengers, regardless of whether fewer than 16 passengers are actually transported at any given time. Because of this requirement, hundreds of nonprofit employers have been affected, from day care centers that run buses, to church groups that operate large vans or buses on field trips.

For a detailed summary of the drug testing requirements nonprofit employers face, refer to Nonprofit Alert® Memo, *Substance Abuse Prevention in the Nonprofit Workplace*. For more information about drug testing using hair samples, visit the web site maintained by Psychemedics, a leading drug test laboratory: http://www.drugtestwithhair.com.

acquisition and renovation of a building into which a public library planned to relocate. The LLC also planned to purchase an adjoining parcel of land to construct a parking garage. The foundation elected to work with the LLC because of certain historic rehabilitation tax credits that were available to the LLC's members, who included one or more for-profit corporations. This raised questions of self-dealing. In addition, two corporations that were disqualified persons in the foundation owned other properties in the neighborhood where the library was planned. The IRS said the disqualified persons stood to benefit from this transaction, which would trigger the self-dealing prohibitions. But the IRS concluded any benefit they would receive was "only incidental or tenuous" if compared to the community benefits the library would provide, and thus allowed the project to proceed. IRS LTR 200129041.

State Rules & Regs

Alaska Exempts Gift Annuities from Insurance Regs

Gov. Tony Knowles (D) has signed into law a measure passed by the state legislature exempting "qualified charitable gift annuities" from the definition of insurance and removing them from oversight by the state's insurance regulators. To be a "qualified annuity," the charity must inform potential donors that the agreement does not constitute an insurance policy, is not regulated by state insurance laws, and is not endorsed by the state. But charities that issue gift annuities must provide notice to state insurance regulators and certify their charitable status. Failure to comply with the notice requirements can result in penalties up to $1,000 per incident. The measure becomes effective Oct. 1. H.B. 121; AK §21.03.070.

Alaska becomes the most recent of approximately 20 states to exempt gift annuities from state insurance regulations. For a detailed multi-state analysis order Nonprofit Alert® Memo, *Guidelines for CGAs.*

Vermont Won't Appeal Lobby Tax; Refunds Pending

Last month, **Nonprofit Alert®** reported the Vermont Supreme Court had struck down a state law that imposed a 5% tax on annual lobbying expenditures exceeding $2,500 because the provision had the effect of chilling political speech in violation of the First Amendment. Now, Vermont's Secretary of State has decided not to appeal the ruling in that case, according to a report by the American Society of Association Executives. This means all those who paid taxes under the law since it was originally enacted in January 1998 will be entitled to a refund, plus interest. The state's announcement effectively ends a three-year battle between Vermont and seven plaintiffs who fought to repeal the tax. *Vermont Society of Association Executives v. Milne*, No. 2000-32 (VT Sup.Ct. 2001).

Although Vermont isn't a hotbed of nonprofit lobbying, this case is important because it signals the regulatory limits that other states should consider when debating lobbying taxes. Since Vermont's lobbying tax was unconstitutional, other states will likely think twice before pursuing similar measures.

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