New Jersey Law Journal

VOL. CLV – NO. 8 – INDEX 817 FEBRUARY 22, 1999 ESTABLISHED 1878

An Ex Parte Rule a Corporation Can Love

A lawyer suing Goodyear is disqualified for failing to find out in advance whether a manager he phoned was represented

By Henry Gottlieb

When he called a Goodyear Tire & Rubber Co. supervisor at home last Labor Day, Glenn Bergenfield was a plaintiffs' lawyer in search of a killer witness.

The Princeton solo practitioner had heard that the manager, Lawrence Guffey, was willing to share personal experiences that would support a federal court suit portraying the tire company's North Brunswick warehouse as a cauldron of racial discrimination.

When the conversation was over, the exultant lawyer reckoned that Guffey would indeed be a good source of ammunition to wound Goodyear.

As it turned out, the casualty was Bergenfield.

In a ruling that is sure to bother lawyers who seek evidence of wrongdoing by big corporations, U.S. Magistrate Judge Ronald Hedges disqualified Bergenfield in the Goodyear case on Tuesday for violating ethics rules. *Andrews v. Goodyear*, Civ. No. 98-2895.

Hedges ruled that the lawyer didn't make a diligent effort *before* making the call to Guffey to determine whether the manager was represented by counsel, or was part of Goodyear's litigation control group. As the state Supreme Court made clear in 1996 when it reformed the rules on this issue, such people have always been off limits to ex parte contacts.

Never mind that Guffey didn't hear from Goodyear's lawyers until after Bergenfield phoned, which would indicate he was an unrepresented party at the time of the call. And never mind that even Goodyear has never claimed that Guffey was in the litigation control group. The rules required Bergenfield to find all this out first, before placing the call, Hedges decided.

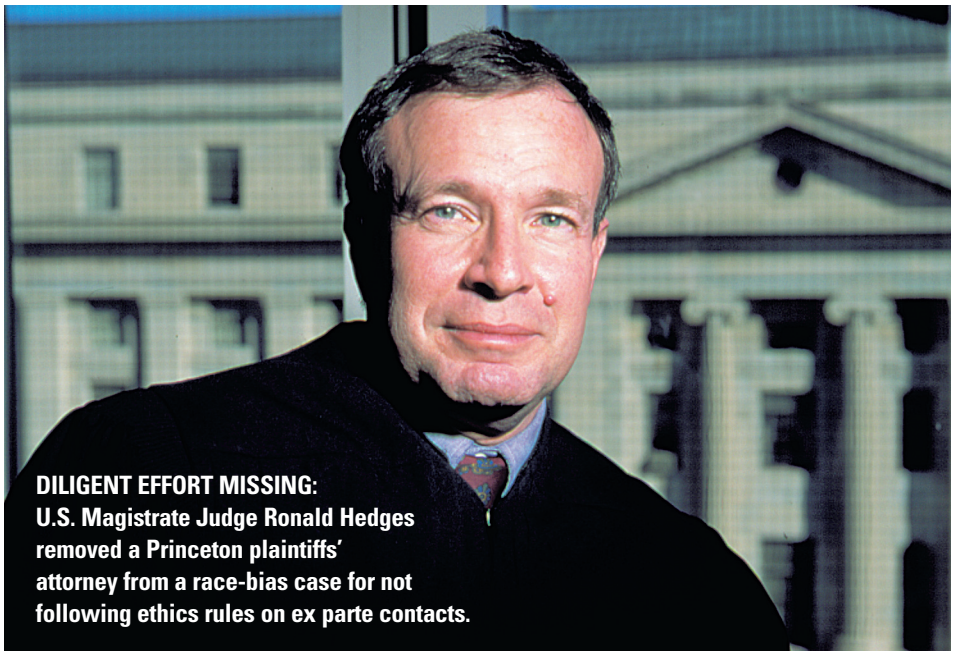
On a broad level, Hedges' ruling is important because it is among the most pro-corporate interpretations of Rules of Professional Conduct 4.2 and 4.3 since the state Supreme Court's Sept. 1, 1996, rewrite of the strictures.

No case requiring an interpretation of the new rules has come to the state's highcourt, but there have been some rulings on the issue by federal jurists in New Jersey. Of these, Bergenfield says, Hedges' appears to be the first to create a bright-line rule that contacts are unethical if the lawyer doesn't make sure, before the call, that the party isn't represented.

It's not just tough, it's wrong, Bergenfield said on Friday. He says he will appeal to U.S. District Judge Nicholas Politan to reinstate him.

In practice, Bergenfield says, the ruling requires plaintiffs' lawyers or prosecutors to query a defendant corporation's lawyers to find out whether a contact is permissible. Any plaintiffs' lawyer who did that, Bergenfield says, would get this quick response from the company: "He's in our litigation control group now; he's represented by us. Next question."

The rule requires diligence in determining whether an employee is out of bounds, not litigation suicide, Bergenfield suggests.



DILIGENT EFFORT MISSING: U.S. Magistrate Judge Ronald Hedges removed a Princeton plaintiffs' attorney from a race-bias case for not following ethics rules on ex parte contacts.

PHOTO BY CARMEN NATALE

Big Win for Goodyear

As far as the particular case is concerned, the decision is a significant victory for Goodyear because it requires a group of black workers suing the company to replace the lawyer who has been championing their cause, vigorously, in various forums, for more than three years.

It also means that the information

obtained as a result of his contact with Guffey is likely to be precluded because it was obtained unethically.

The suit was a state case until it was removed to federal court less than a year ago, but the allegations against the tire maker have been around since 1984. That year, black warehousemen, including two of the 12 current plaintiffs, filed a discrimination claim in the state Division on Civil Rights.

PHOTO BY CARMEN NATALE

OFF THE CASE: Glenn Bergenfield, above, was removed from representing a group of black workers who allege Goodyear Tire & Rubber Co. engaged in racial discrimination.

The claim was dismissed 10 years later on the principle of laches because the division took too long to investigate. But a hostile work environment and discrimination in promotions and job assignments continued, the plaintiffs allege, and they are seeking more than $100 million in damages.

Goodyear, whose executives have said they have extensive programs to make the company discrimination-free, has denied the charges and has fought back.

Its counsel, Marilyn Sneirson, a partner in the Newark office of Pittsburgh's Reed Smith Shaw & McClay, filed a counterclaim accusing Bergenfield and the workers of defaming the company during television interviews.

The counterclaim says the plaintiffs lied when they accused managers of using racial epithets and that the false accusations had damaged the company's name and made people reluctant to do business with Goodyear.

Sneirson says the company won't comment on the underlying case, or the ethics dispute. "We don't believe that it's appropriate to litigate the issue in the media," she says. "We prefer to have the court render its opinion and litigate in the courtroom."

But the company's position, and what Bergenfield did, are detailed in pleadings filed with the court, including a certification by Bergenfield.

He certified that he learned from Robert Whyler, an Ohioan and former Goodyear employee who had sued the company in another case, that Guffey, a North Brunswick manager from 1989 to 1993, was eager to talk about conditions in the New Jersey warehouse, a major distribution center for the tire company.

Bergenfield wrote that he had a copy of RPC 4.3 at his fingertips when he called Guffey, now living in Canton, Ohio, and still working for Goodyear.

He certified that he told Guffey that he was counsel to black plaintiffs and asked whether Guffey was represented. The answer was no, and that he hadn't had contact with Goodyear's lawyers, either, Bergenfield wrote.

Then they talked, and Guffey made a number of critical comments detailing bias by Goodyear supervisors, including one of the named individual defendants in the litigation, Bergenfield wrote. Guffey also told Bergenfield he had written a memo about what he knew about racially motivated actions at the warehouse.

Bergenfield memorialized Guffey's comments and sent them to the potential witness in the form of a draft certification that Guffey was invited to review, amend if he thought necessary, and sign.

Change of Heart

A few days later, however, Guffey wasn't so friendly. He told Bergenfield that the information in the draft certification was not accurate. And on Sept. 15, 1998, Guffey told Bergenfield that although he was sending him his memo, he also was sending it to James Conlin, Goodyear's general counsel.

Alerted by Goodyear's lawyers to the possibility of an illegal ex parte contact, Hedges ordered Guffey's deposition, hoping to shed light on whether Sneirson was right that Bergenfield should be disqualified.

During his deposition on Nov. 17, Guffey told Sneirson that Bergenfield never asked him whether he was represented or part of a litigation control group, or whether he knew he was entitled to legal representation by Goodyear lawyers or any other attorney. Nor did Bergenfield say he had a right not to talk, Guffey testified.

When it was Bergenfield's turn to ask questions, Guffey said that his first conversations with any Goodyear lawyers were after Bergenfield's calls. Nor was he ever advised by the company that he was part of any Goodyear litigation control group.

In his opinion, Hedges found that nothing in Guffey's deposition indicates that Bergenfield asked the questions required of him to meet his obligation under RPC 4.2. The rule forbids an attorney from communicating with people without exercising reasonable diligence to find out whether they are represented by other counsel.

The rule states: "Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel."

The rule also says a contact can be made for the sole purpose of ascertaining whether the person is in fact, represented by counsel.

In a ruling relied on by Hedges, *Michaels v. Woodland*, 988 F. Supp. 468 (D.N.J. 1997), U.S. Magistrate Judge Joel Rosen said employees cannot be considered represented parties or members of a litigation control group just because the corporation offers to represent them.

It's a pro-plaintiffs ruling, but Hedges pointed to Rosen's comments in *Michaels* that "plaintiff is permitted to conduct ex parte interviews since *it has already been determined* that they are not part of the litigation control group" (Hedges' italics).

An Attorney's Obligation

Hedges concluded: "*Michaels* implies that an attorney has some obligation to determine whether an individual is either represented by counsel or is part of a litigation control group before initiating contact with the individual. There is no indication Bergenfield made such inquiries before his discussion with Guffey."

He also found that Bergenfield violated RPC 4.3, which bars lawyers from implying they are disinterested when speaking on behalf of clients and requires them to use diligence to find out whether a person in an organization is represented by the organization's attorney, or is entitled to such representation.

Here again, Bergenfield went astray. "There is no indication that Bergenfield sought this information or that he used 'reasonable diligence' to secure the information before contacting Guffey," Hedges found.

The judge conceded that disqualification was a drastic punishment, but said Bergenfield's knowledge of the information gained unethically would give him an unfair advantage and prejudice Goodyear's case, even if the information was precluded.

No decision on preclusion was in the opinion, though Hedges ordered a status conference for April 15, and said he expected the plaintiffs to secure new counsel by then.

In her successful brief, Sneirson cited precedents that said lawyers conduct ex parte interviews like Bergenfield's at their own peril if they don't ask permission of courts or alert defendants.

The peril can be avoided if, as it says in *In re Environmental Insurance Declaratory Judgment Actions*, 252 N.J. Super. 510 (Law Div. 1991), investigators and attorneys follow a script when conducting ex parte interviews, Sneirson wrote. "Mr. Bergenfield did not follow the script," Sneirson said in her brief.

Bergenfield says the ruling is wrong because the rule itself says that one of the ways to determine whether someone is in a control group is to ask that person. Thus, it shouldn't be necessary to go to court or ask the corporation for permission.

He says he's also upset that the judge didn't make a ruling on the issue of why — if Guffey is part of Goodyear's defense — Goodyear never gave him Guffey's memo in discovery or identified him as someone who should be deposed.

"If the ruling stands, corporations can continue to not identify people and hold them back as fact witnesses who contradict the party line of corporations," Bergenfield says. ■