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Time and material home remodeling requires written contract

by Gary R. Gehlbach

A recent decision of the Illinois Appellate Court raises a serious concern about whether contractors completing home repairs or remodeling on a time and material basis can avoid the requirements of the Home Repair and Remodeling Act.

Under the Act, which became effective Jan. 1, 2000, a person engaged in the business of home repair or remodeling must, among other things, provide the owner with "a written contract or work order that states the total cost, including parts and materials listed with reasonable particularity and any charge for an estimate" if the cost of the work is expected to exceed $1,000.

In the recent appellate court decision, a contractor sought to foreclose a mechanic's lien for $14,000 for electrical work performed during extensive remodeling of the defendant's home over a one-

year period. In this case, the work was done on a time and material basis, with the owner directing the electricians on a "day by day, room by room and fixture by fixture" manner as the work progressed. The contractor testified it was impossible to have provided an estimate of the total cost or extent of the work at the beginning and therefore impossible to have strictly complied with the Act.

The owner disagreed, asserting the contractor's failure to comply with the Act rendered the contract unenforceable and the mechanic's lien invalid.

The trial court agreed with the contractor, essentially finding that the nature of the work was such that it would have been impracticable for the contractor to have given the owner a detailed estimate at the beginning of the job.

The appellate court, however, reversed the trial court in a 2-1 decision, finding that there is "no exception under the Act for work billed on a time and material basis, or projects that become unpredictable in scope and nature." The contractor, the court said, could have provided an updated estimate or work order as the circumstances changed, which appeared to be day by day. Contractors thus should be on notice that courts appear inclined to require strict compliance with the Act.

Inside

Employers must accommodate duties of some volunteer firefighters

by Dana M. Considine

Companies that employ volunteer firefighters should be aware of legislation that protects some firefighters' jobs.

The Volunteer Firefighter Job Protection Act prohibits employers from terminating employees who fail to report to work or who report late to work because they were responding to an emergency as a volunteer firefighter. The Act, however, applies only to departments of municipalities with a population of 3,500 or less. The Act also applies only to those firefighters who truly are volunteers and who do not receive any monetary compensation for their services (excluding monetary incentives awarded by the board of trustees of the fire protection district).

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New law clarifies disposition of deceased's remains

by David W. Badger

For most families, the death of a loved one is a time when the family seeks to resolve conflicts out of respect for the deceased. Recognizing that from time to time disputes arise as to the disposition of the deceased's remains, however, the Illinois legislature recently passed the Disposition of Remains Act

The Act, which became effective Jan. 1, 2006, sets forth who has the right to control the disposition, including cremation, of a decedent's remains. Under the Act, an individual may designate by a written instrument, signed by the individual and properly notarized, the person who can control the disposition of the remains. In the absence of a written designation, the law sets forth the following order of those who will possess the authority:

- First, the person serving as executor of the decedent's estate, if any;
- second, the decedent's surviving spouse, if any;
- third, the decedent's adult children, if any;
- fourth, the decedent's parents, if then living; and
- fifth, the decedent's next of kin.

Companies should be wary of 'payment in full' checks

by Megan G. Heeg

When can payment of $1,696.47 for a $26,453.31 bill be deemed payment in full? As one unhappy Illinois company recently learned, this can occur when the recipient of the payment does not have a system in place to avoid an inadvertent "accord and satisfaction."

An accord and satisfaction is a legal theory under which parties are deemed to have entered into a new agreement that replaces an old one. This new agreement, however, need not be in writing or even verbalized. Rather, the new agreement can be inferred from the parties' actions, including the depositing of a check for a lesser amount.

In a recent Illinois Appellate Court case, one company's attorney sent a demand letter to the other company, demanding the past-due amount of $26,453.31. In response, the other company sent a check for $1,696.47 directly to the company, along with a cover letter.

The language in the cover letter, along with the words "FINAL PAYM" on the check stub, persuaded the appellate court to hold that, once the company cashed the check for $1,696.47, a new agreement between the companies existed. The shared mutual intent to compromise, the court said, could be inferred from the recipient company's knowing acceptance and negotiation of the check.

The recipient company argued that the employee who processed and deposited the check had no authority to bind the company to an accord and satisfaction. The court disagreed, saying "An organization's practice of authorizing its employee to endorse checks and deposit them into an account on its behalf cannot serve as a means of isolating the organization or its principals from the legal consequences that flow from the employee's actions in the scope of his or her duties." Therefore, the court said, "An employee whose authority includes depositing a check upon which restrictive language appeared will be presumed to have acted on behalf of the organization, and his or her acts will be imputed to the organization as a matter of law."

Although the result of this case might be troubling, other businesses can avoid this result by properly training their employees to flag all suspicious checks for a supervisor's review.

Firefighters. . .

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In order to protect employers, the Act allows employers to charge against the employee's regular pay any time lost from employment because of the employee's response to an emergency situation. Employers wishing to verify an employee's response to an emergency can request a written statement from the supervisor of the fire department detailing the time and date of the emergency and confirming the employee's attendance. In addition, when an employee is aware that he or she will be late or absent because of an emergency, he or she must make a reasonable effort to inform the employer.

The consequences for violating the Act are significant. Not only is the employee authorized to file a civil action against the employer, the employer might be responsible for reinstatement and back pay.

Recent decisions test employers' knowledge of key laws

by Douglas E. Lee

Court decisions frequently can be helpful in understanding the legislation that controls the employer-employee relationship. Unfortunately, those decisions often are long and boring. The following summaries of recent decisions are designed to eliminate those problems and to test an employer's knowledge and ability to predict judicial outcomes.

■ A route supervisor, whose duties included driving routes and making deliveries when drivers were unavailable, became afflicted with an eye disease that rendered him legally blind and unable to qualify for a driver's license. The affliction would not improve or worsen with time. The employee and supervisors discussed accommodating the employee's disability by having another employee drive or by transferring the employee to warehouse positions that involved driving a forklift. The company's human resources supervisor refused both suggestions, saying that use of another driver would require creation of a new position and that a transfer to a forklift position would create a safety risk. The employee sued. The court said:

A. Employer wins. The vision impairment rendered the employee unable to perform essential functions of the position, and transferring a vision-impaired employee to a position that required driving a forklift was not a reasonable accommodation.

B. Employer wins. Even if the vision impairment could have been reasonably accommodated, the discussion between the employee and his supervisors was sufficiently interactive to protect the employer from liability.

C. Employee wins. The human resources supervisor was wrong to assume a visually impaired employee could not operate a forklift.

D. Employee wins. Because the affliction would not worsen with time, the employer was under a higher duty to attempt reasonable accommodations.

Answer: C. The court said the evidence was insufficient to establish that the employee could not safely operate a forklift and that more information was needed for the employer to properly determine the reasonableness of the requested accommodation. The court also said the "interactive process" required by the Americans with Disabilities Act is not interactive unless the representative of the employer involved in the discussion has the power to implement the accommodation. *(Canny v. Dr. Pepper/Seven-Up Bottling Group,* No. 05-1491 (8th Cir. 2006)).

■ A long-time female bartender at a casino sports bar refused to comply with the employer's grooming policy, which, among other things, required women to wear makeup but prohibited men from doing so. The employee had been employed for 20 years before the employer started enforcing the policy. The female employee sued, alleging gender-based discrimination. The court said:

A. Employer wins. Grooming standards that differentiate between genders are not illegally discriminatory.

B. Employer wins. A makeup policy does not create any unequal burden for women.

C. Employee wins. Different requirements on grooming policies based on gender are *per se* illegal discrimination unless supported by a *bona fide* occupational qualification.

D. Employee wins. A makeup policy tends to stereotype women as sex objects and thus constitutes sexual harassment.

Answer: B. Grooming standards that differentiate between genders are permitted as long as they do not unduly burden women. The court held the female employee had not offered sufficient evidence to allow it to find that applying makeup was any more than a minor inconvenience. *(Jespersen v. Harrah's Operating Co.,* No. 03-15045 (9th Cir. 2006)).

■ During an office remodeling, a male supervisor constructed a peephole and installed a two-way mirror that he used to observe women in the bathroom. Evidence also existed that the supervisor placed poison ivy or other materials on the toilet seat, which caused female employees to suffer rashes. After the supervisor's conduct was discovered, the supervisor was terminated. Female employees sued, alleging sex discrimination and hostile work environment. The court said:

A. Employer wins. No adverse employment action was taken against the female employees.

B. Employer wins. The employees were not aware of the peeping, and placement of materials on the toilet seat was not pervasive enough to establish harassment.

C. Employee wins. The supervisor's conduct was more than enough to create a hostile work environment.

D. Employee wins. Even if unknown, an invasion of privacy is sufficient to create liability under Title VII.

Answer: B. Sexual harassment cannot occur if the harassing conduct is unknown to the alleged victims. An invasion of privacy, by itself, is not actionable under Title VII. *(Cottrill v. MFA, Inc.,* No. 05-1748 (8th Cir. 2006)).

Legislation eases cancellation of home Internet services

by Dana M. Considine

Consumers desiring to cancel Internet services should be aware of provisions in the Illinois Consumer Fraud and Deceptive Business Practices Act.

The Act now protects consumers who utilize Internet services for home and personal use under a one-year contract with an automatic renewal provision. Under the Act, the Internet service provider must offer Illinois residents a secure method (with instructions) at the ISP's website for canceling the service and may not require a telephone call or written mail to complete the cancellation.

The Automatic Contract Renewal Act offers another protection to consumers. When a consumer enters into a contract containing automatic renewal language, the renewal provision must be clearly and conspicuously disclosed and contain cancellation procedures. The business also must provide the consumer written notice between 30 and 60 days before the cancellation deadline so that the consumer can cancel the service before it automatically renews.

An ISP or other business that violates these amendments will be deemed to have committed a deceptive practice, which can subject the business to a wide range of fines and penalties.

In Print and At the Podium

Mr. Lee in April was a featured speaker in a symposium on the reporter's privilege sponsored by the William H. Bowen School of Law at the University of Arkansas-Little Rock. **Mr. Lee** spoke about the legal aspects of a reporter's right in judicial proceedings to refuse to reveal the identity of a confidential source. Approximately 150 lawyers, law students and journalists attended the day-long event. As part of the symposium, **Mr. Lee** has written an article about the reporter's privilege that will be published in the Arkansas Law Review . . . **Mr. Gehlbach** was recently reappointed to the Real Estate Law Section Council of the Illinois State Bar Association. For the past 20 years he has edited the *Real Property* newsletter of the State Bar . . . **Mr. Gehlbach** also has accepted reappointment to the Editorial Board of the *Illinois Bar Journal*, which is responsible for all publications of the Illinois State Bar Association . . . *The Lautum News*, the newsletter of the Illinois Association of Mutual Insurance Companies, published an article by **Mrs. Heeg** in which she analyzed a recent judicial decision applying the Fair Credit Reporting Act to the underwriting of insurance . . . **Mrs. Considine** was the featured speaker at Northern Illinois Clerk's Association meeting hosted by the City of Amboy . . . . In his most recent commentary for the web site of the First Amendment Center, www.firstamendmentcenter.org, **Mr. Lee** discussed an Illinois federal court's assertion of jurisdiction over an Arizona web site operator . . . **Mr. Gehlbach** was a speaker at a recent Regional Meeting of the Illinois Association of Mutual Insurance Companies, presenting an update on how to find and retain competent directors . . . In May, **Mrs. Heeg**, a member of the Board of Directors of Forreston Mutual Insurance Company, joined with other farm mutual company representatives who traveled to Washington, D.C., to brief Illinois legislators on issues affecting the state property/casualty insurance industry.

Deals and Decisions

Mr. Lee obtained a favorable verdict for a client in a mechanic's lien case. After a two-day trial, the judge ruled not only that neither lien claimant could recover from the client under its lien but that one of them owed the client more than $1,000 as a result of poor workmanship . . . **Mr. Gehlbach** continues to work on a number of real estate development projects, from Naperville, to Rockford, to Rochelle and around Dixon, and is currently involved in several annexation matters in the Dixon area . . . **Mrs. Considine** recently was appointed the attorney for the Village of Sublette . . . **Mrs. Heeg** assisted a corporation in filing bankruptcy in order that it could efficiently and orderly deal with its creditors as part of its dissolution . . . **Mrs. Considine** worked with the City of Amboy's Plan Commission to complete the City's first subdivision ordinance . . . **Mrs. Heeg** successfully represented an employee who suffered permanent injuries at work, obtaining for the client a significant settlement along with a Medicare-approved fund to cover the client's future medical needs . . . In April, **Mrs. Heeg** was reappointed to the panel of private trustees maintained by the Office of the United States Trustee for Region II. As a trustee, **Mrs. Heeg** administers chapter 7 bankruptcy cases in Lee and Whiteside Counties . . . With the federal and Illinois estate tax being inapplicable to most estate planning clients, **Messrs. Gehlbach** and **Badger** are focusing more on family planning issues with their estate planning clients.