

A newsletter digest and commentary on recent, selected Federal cases and Legislation relating to the Federal Rules of Evidence and selected, related state cases.

FEDERAL RULES OF EVIDENCE *News*

- Volume 23
- Number 6
- June 1998
- Page 98-81

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HIGHLIGHTS

Subscribers to, and readers of, the June NEWS, will find the following opinions valuable in their civil practice. The Second Circuit rules on the propriety of judicially noticing the record of a prior case tried by the judge to establish industry practice as to trademark searches. See ARTICLE II. In the First Circuit, the Court examines the relevance, in an age discrimination suit, of the company's disciplinary guidelines plus evidence of failure to follow them. See RULE 403. During a proceeding to assess costs against a vexatious attorney, the Seventh Circuit rules on the admissibility of the attorney's use of similar sharp tactics in prior litigation. See RULE 404(b). The Eighth Circuit determines, in a diving accident case, whether plaintiffs' expert qualified under *Daubert* standards since he mainly relied upon his own swimming experiences. See RULE 702.

These opinions should be helpful to prosecutors and defense counsel. In reviewing bank robbery convictions, the Ninth Circuit decides defendant's claim of error in keeping out a twelve-year-old incident that implied a government witness' bias against African-Americans. See RULE 403. The Eleventh Circuit evaluates the admissibility of detailed background evidence on neighborhood drug operations on the theory that these facts were "inextricably intertwined" with crack conspiracy charges against its leader. See RULE 404(b). In the Tenth Circuit, the Court analyzes the constitutionality of new RULE 414 that admits, in child molestation trials, evidence of prior similar acts to show propensity towards such behavior. During a proceeding to allow the limited release of John W. Hinckley, Jr., the District of Columbia Circuit reviews the denial of Hinckley's request for access to the internal discussions of his hospital board based on the deliberative process privilege. See ARTICLE V.

This issue also presents enlightening opinions from the U. S. Court of Appeals for the Armed Forces [see RULE 404(b)] and the Supreme Courts of Colorado [see RULE 801(d)(2)(A)] and Nebraska [see RULE 401].

Along with the June NEWS, you will receive the Cumulative Quarterly Table of Cases covering the first six issues of 1998. Be sure to check it for parallel citations and later case histories.



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ARTICLE II: JUDICIAL NOTICE OF ADJUDICATIVE FACTS

International Star Class Yacht Racing Association (ISCYRA) is a non-profit corporation. Its purpose is to control and promote the sport racing of a type of so-called “Star Class” yachts whose design rights it owns. These vessels have to display a solid five-point star on their mainsails. In return for royalties, ISCYRA licenses the use of the term “Star Class” and the star on promotional materials such as clothing. ISCYRA, however, has never registered “Star Class” for federal trademark protection.

Based on limited information from Tommy Hilfiger, a well-known designer of men’s clothing, its attorneys had carried out a trademark search on “Star Class.” After looking into federal trademarks mostly in the clothing area, they reported back a failure to find a prior trademark on “Star Class.” Despite the lawyers’ disclaimers, however, Hilfiger did not execute a full search of *all* previous commercial uses until sued by ISCYRA.

In 1994, ISCYRA found out that Hilfiger was making and marketing clothes bearing the words “Star Class” plus the star. The promo depicted the clothing as having authentic details and patterns from competitive yacht-racing sails. Most of the garments also bore the Hilfiger name and logo.

ISCYRA’s April 1994 suit against Hilfiger invoked the Lanham Act [15 U.S.C.A. § 1125(a)], the common law and New York state law. One year later, the federal court awarded ISCYRA a permanent injunction against Hilfiger’s use of the mark “Star Class.” It did not, however, award damages: (1) because ISCYRA had not suffered any damages; and (2) because Hilfiger had not acted in bad faith. An appeal followed.

On remand after resort to the appellate court, the district court addressed the search issue. To show industry custom, however, the judge took judicial notice of testimony and evidence from an antitrust case the judge had tried in 1991. This persuaded the judge that, except when the client was seriously planning to register a trademark, sophisticated searches were seldom undertaken. Since Hilfiger asserted that he was using the term “Star Class” only as decoration rather than as a stand-alone trademark, there was no occasion to order an exhaustive search. Thus, the court found, Hilfiger acted consistently with his attorneys’ recommendations.

Both sides appealed. The U. S. Court of Appeals for the Second Circuit vacates in part and affirms in part in a valuable opinion by Senior Circuit Judge James L. Oakes. **International Star Class Yacht Racing Ass’n v. Tommy Hilfiger U.S.A., Inc., 1998 WL 272634 (CA 2nd, 1998).**

Judge Oakes first cautions against over broad use of judicial notice under RULE 201. It allows the court to bring in facts from outside the record and takes from the opponent the chance to rebut or otherwise challenge the noticed fact before the jury. While courts often properly notice the filing of official court documents or their contents, the lower court went far beyond the accepted use of RULE 201 as to judicial materials:

“In this case, the district court relied on statements of fact contained in its 1992 . . . opinion to establish prevailing trademark search practices in 1993. This was error. . . . Facts adjudicated in a prior case do not meet either test of indisputability contained in Rule 201(b): they are not usually common knowledge, nor are they derived from an unimpeachable source. . . . Moreover, prevailing trademark search practices may well

have changed or developed in the intervening years between the [1991] trial and the events at issue in this case.” [* 3-4]

Another remand is necessary, in Judge Oakes’ view, for an independent evaluation of evidence on current industry practice. The nature of the practice is not beyond reasonable dispute, thus precluding the application of RULE 201.

ARTICLE IV: RELEVANCY AND ITS LIMITS

RULE 401: Definition of Relevant Evidence

On an unspecified date, Hillis F. Mathes (an Omaha police officer) and his wife were driving in their pickup truck when a Suburban vehicle driven by Thomas Taylor cut them off. Taylor made an “unfriendly gesture” toward Mathes and started a series of speeding up and slowing down maneuvers in front of Mathes’ moving truck.

At one point, the two vehicles were proceeding next to one another along a two-lane road. When Mathes had his wife lower her window to ask Taylor to let him back in lane, however, Taylor claimed that Mathes shot out his window.

Police found Mathes’ 9-mm police handgun under his car seat but it was not clear whether or not Mathes had fired it. Neither Taylor nor another witness actually saw Mathes shoot but the Suburban turned out to have two holes on its door and a broken driver’s-side window. After administrative proceedings took place, Omaha dismissed Mathes from the police department.

At the hearing before the Personnel Board, Richard Circo, a polygraph examiner for the Omaha police, testified that he found “deception on all of the relevant questions” that Circo had asked Mathes about the alleged shooting incident.

An FBI forensic examiner testified that the slug found in the Suburban’s door was consistent with the weight of a shell fired from Mathes’ gun after penetrating a window. Mathes and his wife, on the other hand, denied the firing of a shot. Mathes also put on an expert who opined that the slug was not from the same kind of ammunition that Omaha police issued to their officers.

Mathes then filed suit to challenge the dismissal as based on inadmissible polygraph test results. The trial court, however, upheld the administrative tribunal. In an opinion by Justice D. Nick Caporale, the Nebraska Supreme Court affirms. **Mathes v. City of Omaha, 254 Neb 269, 576 NW2d 181 (1998).**

Justice Caporale first points out that Omaha and many other states have held that the results of polygraph tests are not admissible in criminal trials. Several states have ruled them out of administrative hearings.

After noting that the city failed to lay a proper foundation of general acceptance in the relevant scientific community under the *Frye v. United States* test [293 F 1013 (CA DC 1923)], Justice Caporale declares:

“[w]e discern no reason for making admissible in administrative hearings the results of polygraph examinations which are not admissible in criminal cases and therefore hold that the results of such examinations are inadmissible for the purpose of attempting to show deception in a proceeding before an administrative agency of a municipal government. The board therefore erred in receiving the polygraph examiner’s testimony. However, the board made no reference to the polygraph testimony in its findings of fact, and the question becomes whether there exists other competent evidence sustaining the board’s findings and decision.” [274]

The Justice examines the record and finds enough admissible evidence to support the Board's findings:

"There is substantial competent evidence exclusive of the polygraph testimony that Mathes fired a shot at the Taylor vehicle. The most convincing evidence, as detailed in the board's order, is that relating to the lead in the slug found in Taylor's passenger-side door, which matched the lead found in two of the bullets in Mathes' possession. The record demonstrates that it is very likely that all three bullets came from the same 70-pound billet of lead. Additionally, the gun carried by Mathes had room for one more shell." [274-75]

RULE 403: Exclusion of Relevant Evidence on Grounds of Unfair Prejudice or Waste of Time

In age discrimination suit, First Circuit upholds plaintiff's introduction of company's disciplinary guidelines to show company's failure to comply with them

John Michael Kelley joined Airborne Freight Corporation (Airborne) in 1974. Fifteen years later, the company promoted Kelley to Regional Services Manager (RFSM) for the Northeast Region.

Kelley worked under William Simpson, an Area Vice President whereas Richard Goodwin ran Airborne's human resources division. Between 1988 and 1991, Kelley won high company awards four times. Simpson also rated Kelley as "superior" to "outstanding" in all major performance categories.

Kelley went to a mid-1992 meeting with his superiors to discuss a planned reduction in force (RIF). He recalled that Goodwin told the group that the RIF would provide a good chance "to get rid of some of the older mediocre managers" in the northeast.

In October 1992, Simpson praised Kelley's region as performing well. The following March, however, Simpson gave Kelley, who was then 46, a termination letter. It recited five alleged failings on Kelley's part going back some time.

At the trial of his age discrimination suit, Kelley argued that these grounds were pretextual. Over Airborne's RULE 403 objection, the trial judge admitted its Employee Relations Guidelines for Disciplinary Action (Guidelines). Kelley hoped to show that Airborne had failed to comply with its own internal procedures in dealing with him, thus suggesting that his alleged incompetence was not the real reason for the discharge.

Airborne, on the other hand, argued that the company often did not follow the Guidelines and that they did not apply to cases like Kelley's. The judge also limited Goodwin's testimony on this topic.

The jury came in for Kelley. After applying a multiplier to several elements of damages, the judge entered judgment in the amount of over \$4,300,000. Airborne then appealed. In an opinion by Judge Norman H. Stahl, the U. S. Court of Appeals for the First Circuit affirms. **Kelley v. Airborne Freight Corp., 140 F3d 335 (CA 1st, 1998).**

Judge Stahl detects no abuse of discretion in letting in the Guidelines. For one thing, the trial judge told the jury to pay no attention to the Guidelines if the defense persuaded them that they did not apply to Kelley. For another, Kelley's theory of relevance was plausible.

Airborne also complained that the trial judge had erred in limiting Goodwin's testimony about the Guidelines as cumulative. Judge Stahl, however, finds it impracticable to review the issue:

"On the present record . . . we cannot determine whether Airborne suffered