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Virginia Ready-Mixed Concrete Association Newsletter — November 2008

VRMCA Sponsors Green Concrete Programs In Architecture Exchange East

By J. Keith Beazley,
Director of Industry Services

Architecture Exchange East, the Virginia State AIA Convention, was held in the Richmond Convention Center on November 12-14, 2008. The annual convention features over 70 educational sessions and workshops and more than 150 vendors. The convention provides architects and design professionals with an opportunity to explore industry best practices and new technologies, techniques and materials.

In addition to sponsoring the convention, the Virginia Ready Mixed Concrete Association presented two educational programs "Insulating Concrete Forms for High Performance Schools" and "Green and Sustainable

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VA Tech Career Fair

By Bob Nablo,
Director of Industry Services

In late October the Virginia Tech Building Construction Department held their second annual Fall Career Fair. VRMCA Advisory Council Chairman Larry Bullock, of Boxley Materials Co., Robert Marek of Roanoke Cement Co., and Boxley Human Resources Director Joyce Kessinger attended the event. While Larry and Robert manned the VRMCA booth and distributed literature, Joyce spent several hours meeting and interviewing potential interns. All agreed that this was a very well organized and highly successful event.

Building Construction Department Head Dr. Yvan Beliveau says more than 200 students attended the fair, with some looking for jobs after graduation this spring and others either hoping for summer internships or just practicing their interviewing skills. The Fair is a very popular event with employers, and 93 booths were filled with companies eager to talk with qualified candidates.

The Building Construction curriculum has grown to almost 500 students and now fills it's new academic building–Bishop Favrao Hall–although the various labs in the building are not yet complete. ❖

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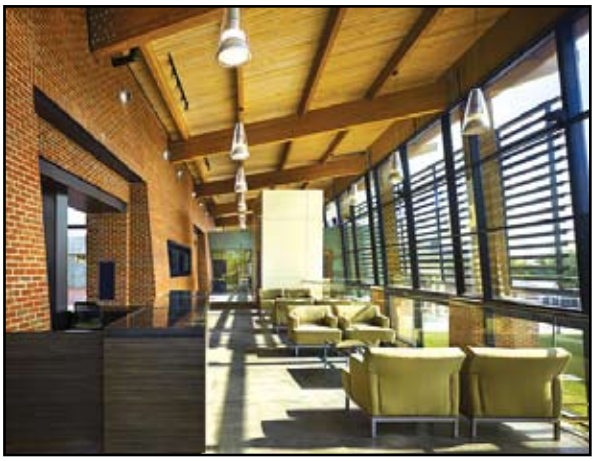
Charlottesville Wins Green Building Leadership Award

By Bob Nablo,
Director of Industry Services

The James River Green Building Council has named the City of Charlottesville winner of the 2008 Government Leadership Award. Charlottesville has been committed to environmental stewardship and green building for over ten years. The city is a signatory to many environmental protection agreements, including the U.S. Mayors Climate Protection Agreement, and is implementing its sustainability action plan to meet the Kyoto Protocol by 2012.

Charlottesville completed the LEED Gold-certified Downtown Transit station in 2007–still the only municipally owned LEED Gold building in the Commonwealth–and will break ground this fall on the Charlottesville Transit Services Operations Center, anticipating a LEED Gold Certification. VRMCA and Allied Concrete participated in the construction of the Downtown Transit station.



The city has also recently entered into an energy performance category that will save 2.7 million pounds of carbon in the first year. In addition, Charlottesville provides financial incentives to its citizens for water efficient toilets, energy efficient thermostats and water heaters, and offers real estate tax abatements for energy efficient buildings. ❖

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NVCAC 2008 Concrete Construction Round Table Forum

By Hessam Nabavi, VRMCA &
Marc Granahan, Lehigh Cement Co.

On October 23, Lafarge North America and the education committee of the Northern Virginia Concrete Advisory Council under the leadership of the chairman Art Nettle hosted another successful Round Table event at the Holiday Inn Washington Dulles. This Forum was designed to touch on the following topics:

- ✓ State of the Economy into 2009 (suggestions for the success in the down market)
- ✓ Concrete vs. Asphalt (Construction, Durability, Pavement Life)
- ✓ Testing Concrete on the Jobsite and in the Laboratory
- ✓ Appropriate Handling, Curing, Breaking and Reporting of Concrete Cylinders
- ✓ Placing, Finishing and Curing (Why is ACI Flatwork Finishers Certification required)
- ✓ Pervious Concrete (Questions typically asked by builders and owners)
- ✓ Communication between Suppliers, Contractors and Testing Companies

Ed Wiles, Regional Sales Manager with Roanoke Cement Company, led the discussion by starting with a presentation titled "Cement & Construction Outlook," Ed briefly talked about the present state of the economy, housing market, cement consumption, gas prices, etc. He talked about five factors that contribute to the economic adversity: sub-prime lending, energy, financial crises, inflation and labor market.

Following are some of the comments and suggestions made by the audience about the economy and other topics of discussion.

Working Together In Down Economy

Need to locate/recommend new ways to better serve customers to help out the industry. Understanding Green and LEED. Talking about Concrete vs. Asphalt, Fiber vs. Steel, Pervious Concrete vs. Pervious Asphalt, Tilt-up, etc.

Need to be inclusive of others in the building industry (associations, businesses) in determining strategies to help the industry.

Lines of communication are getting better but need to improve between testing agents, contractors and ready-mix producers.

Need to work just as hard during the booming economy as during a down economy to build relations and continually generate new business opportunities.

Accountability

Who currently gets the testing results vs. who should get the results before they become problematic?

Can we get free trade of information about the standard operating procedures between testing labs, contractors, ready-mix producers and owners?

All concerns and requests need to be addressed before the job and adhered to throughout the job–it is vital that all parties be included in pre-construction meeting and throughout.

Codes need to be handled uniformly across the region to prevent the abuse of the system.

Ready-mix producers asking for better prepared and equipped field representatives for better testing procedures, while testing representatives are asking for more accountability from contractors for curing.

Testing labs put in awkward position at times because of poor curing facilities and use of unapproved mix designs. These policies were discussed during the pre-construction meetings.

There is a need for uniformity in coordinating with all parties to make sure proper procedures are followed; if not, testing should be stopped and appropriate parties notified to ensure quick resolution. The key question is "Who is responsible for the curing?"

Proper curing operations result in less issues. We need to make sure contractors provide an ideal curing facility and environment at all times.

Resolutions

Testing labs and ready-mix producers need to work with contractors on how to produce better curing samples. It Save Time & Money!

There is a need for all parties to cooperate with each other and communicate with an open-mind. This is one team and we are all in this together.

Rules and procedures should be enforced. This determines quality control issues and concerns.

Communication with all the parties involved will resolve the issues before they become severe.

Report improper procedures to the proper people. This is a correct thing to do.

Paperwork (test results, mix designs, pre-construction notes) need to be sent to all parties involved. The goal is to resolve the problem.

Spend time with the people who are involved with the project to understand their operations and responsibilities in the building industry.

This gathering offered a great opportunity to allow the industry participants to share their experience and knowledge with each other, and Ed as a presenter and a moderator was instrumental to help them to put things in perspective. Many thanks to Ed from NVCAC for his patronage and dedication to RM Industry. ❖

When Is Activity Protected Under The Employment Discrimination Laws?

By John G. Kruchko and Kathleen A. Talty*

The employment discrimination laws extend protections on a number of different classifications and provide that employment decisions must be based on neutral factors. Those laws also generally contain anti-retaliation provisions that are designed to ensure that persons who invoke the protections of the employment discrimination laws are not treated in an adverse manner as a result of their actions. Central to a retaliation claim is establishing that the employee engaged in a "protected activity."

Under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C § 2000e - *et seq.*, protected activities fall into distinct categories: participation or opposition. The "participation clause" provides that an employer may not retaliate against an employee "because the employee has. . . participated in any manner in an investigation, proceeding or hearing under" Title VII. 42 U.S.C. § 2000e-3(a). The "opposition clause" provides that an employer may not retaliate against an employee because he/she has opposed any unlawful employment practice. *Id.* at § 2000e-3(a). In some recent federal court cases, the question of what activity constitutes "protected activity" has been considered by the courts.

In one case, an employee who worked in a health-care setting filed a discrimination charge with the EEOC, alleging race discrimination by her current employer. During the EEOC's investigation of the charge and while still employed, the employee submitted to the EEOC unredacted medical records that contained confidential information on patients. When the employer discovered the employee's actions, the employee was terminated for violation of the employer's confidentiality policy. The employee then amended her discrimination charge and subsequently filed a lawsuit against the employer, asserting retaliatory discharge. In support of her claim, the employee argued that her submission of the documents to the EEOC was a protected activity because it was part of her participation in the EEOC's investigation.

The employee was not successful at the trial court level with her argument because the trial court found that the employee's dishonesty or disloyal conduct while participating in a Title VII proceeding was presumptively unreasonable and, thus, unprotected activity. The appellate court, however, viewed the matter differently. The appellate court noted that the "participation clause" provision is intended to be read broadly because "activities under the participation clause are essential to the machinery set up by Title VII." The court also stated that the language of the participation clause is broad in its scope and encompasses, by its definition, participation "in any manner" in a Title VII proceeding.

Therefore, the appellate court concluded that the submission of unredacted medical records, even though a clear violation of the employer's confidentiality rules, was a "protected activity." The employee could then maintain her retaliatory discharge claim. However, the court went on to state that while the "participation clause may be nearly absolute in theory, it may seldom be absolute in fact." Accordingly, the court ruled that, while the employee may have engaged in protected activity, the employer's decision to terminate the employee because her action violated the employer's policies and procedures regarding confidentiality represented a legitimate, non-discriminatory reason. As a result, the employee's claim was dismissed.

In another federal court case, the court considered an action which frequently forms the basis for "protected activity" and that activity is the filing of a discrimination charge with the EEOC. An employee, Charlotte Vigil, filed a discrimination charge in December, 2002, alleging constructive discharge. The matter was later resolved with the entry of a no-fault settlement agreement that included the employee's reinstatement in June, 2003. Approximately three months after her reinstatement, Ms. Vigil and two other employees were laid-off. Although Ms. Vigil was the most senior of the three laid-off employees, she was the last of the three employees to be recalled.

In November, 2003, Ms. Vigil wrote a letter to the employer, complaining about the retaliatory work environment and the lack of training opportunities, which had been a matter that the parties had agreed to in the settlement agreement. Then in February, 2004, Ms. Vigil was initially suspended and then terminated because of an alleged failure to verify an increase in the prescription strength of a medication. Ms. Vigil grieved the termination action. However, the employer denied the grievance even though the employer discovered that Ms. Vigil's actions were not in violation of the company policy.

After the termination, Ms. Vigil filed a second EEOC charge and in the later charge she alleged retaliatory discharge. She eventually filed a lawsuit and asserted retaliatory discharge. The gist of Ms. Vigil's argument was that the termination in February, 2004 was in retaliation for her filing the discrimination charge in December, 2002.

In defending the action, the employer argued that there was no causal connection between the filing of the 2002 EEOC charge and the discharge in 2004. In other words, the employer contended that too much time had elapsed–more than 12 months–between the two events for the employee to rely upon the 2002 charge as evidence of protected activity. The court, however, found otherwise and, in large part, it was due to the pattern of what the court regarded as retaliatory conduct that took place between the two events. The pattern of retaliatory conduct that the court identified included: 1) Ms. Vigil's lay-off in August, 2003 and the fact that she was last to be recalled even though she was the most senior of the laid-off employees; 2) her November, 2003 letter in which she complained about retaliation and the employer's non-compliance with the settlement agreement; and 3) Ms. Vigil's termination for reasons that were found to be unjustified. Therefore, the court concluded the 2002 EEOC charge represented "protected activity" on which Ms. Vigil could base her retaliatory discharge claim.

These cases illustrate the types of activity that can constitute "protected activity," as well as the courts' consideration of such claims. All employers need to carefully evaluate the possible "protected" nature of employee conduct before taking disciplinary or other actions. ❖

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VRMCA Sponsors Green Concrete Programs

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Homes." The Concrete Schools program was presented by Vera Novak, Director of Marketing and Technical Services for the Insulated Concrete Form Association. Novak was the first LEED accredited professional in the ICF industry and is a well-known speaker on matters of sustainability and construction.

Vera Novak, co-presenter

The program featured the LEED Gold certified Clearview Elementary School in Hanover, Pennsylvania. The school, built with concrete, is designed to consume one-third less energy than a conventional structure while providing substantial cost savings. The design of insulating concrete forms in the project has saved the Hanover School System an estimated $34,000 annually on energy costs with the monies saved on utilities going towards other educational purposes in the school.

Don Thompson, co-presenter

The program on Concrete Schools was well received and earned high marks by architects attending the program. The Commonwealth of Kentucky School System has built 12 schools in the state using ICF forms and plans are in place to build more this coming year; similar cost-saving construction could be duplicated in Virginia.

The Green and Sustainable Concrete Homes program was presented by Don Thompson, AIA and LEED AP of the Portland Cement Association. Don is the Residential Technology Manager of the PCA and represents the cement manufacturers nationwide. The program provided an overview of green building features of various concrete homebuilding technologies and the latest residential green building programs with the LEED and NHBA Green Building standards. Attendees learned the benefits of concrete walls, floors and roofs, pervious pavements, decorative stamped and colored floor finishes and exterior options like concrete roof tiles and fiber cement siding.

The VRMCA was represented by Keith Beazley, Bob Nablo, and Hessam Nabavi and member companies Ed Wiles, Roanoke Cement, and Allison Carrigan, Lafarge Cement.

The Green programs of this year's event were very effective in presenting the benefits of the usage of concrete in building and structures for green and sustainable environmentally performing construction. ❖

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Is There A Wage And Hour Lawsuit In Your Future?

By John G. Kruchko and Jay R. Fries

In recent years, employers have witnessed a dramatic rise in the number of lawsuits filed by employees claiming thaat their employer has failed to pay overtime required under the federal Fair Labor Standards Act ("FLSA") or under state wage and hour law. The plaintiffs' attorneys bringing these cases seek large damage recoveries for multiple employees under a "class action" theory and seeking double damages under the FLSA for "willful" violations. Many employers become intimidated by these lawsuits and opt for an early settlement resulting in a tidy windfall for plaintiffs' legal counsel. Needless to say this only encourages the attorneys to seek other similar targets with their lawsuits. Some firms have recently been running television commercials soliciting these "overtime" cases, and our Firm was recently made aware of a letter from an out-of-state law firm soliciting such claims from employees in Maryland.

Most of these overtime lawsuits raise allegations that specific job classifications in the employer's workforce have been misclassified as "exempt" in the overtime requirements of federal and state law. Under the FLSA and most state wage and hour laws, employers are required to pay overtime at a rate of one and one-half times the employee's regular rate of pay for each hour worked over forty in a workweek. A workweek consists of seven consecutive twenty-four hour periods beginning and ending on a day and time selected by the employer.

Federal and state wage and hour laws contain certain specific exemptions from the overtime requirement. The most common are for professional, administrative, or executive employees. Additional exemptions apply to outside salesmen and to certain highly-skilled computer professionals. However, in order to qualify for these exemptions, the job duties of the employees must meet the specific tests set forth in the wage and hour regulations promulgated by the Department of Labor. In claiming an exemption, the burden is on the employer to prove that the job in question meets the test set forth in the regulations. If there is any question as to the applicability of the exemption, or if the job falls into a "gray area", the employee most likely will be found to be non-exempt, and thus entitled to overtime payments.

Many employers believe that if they pay an employee on a salary basis, the employee is exempt from overtime. As noted above, in order to be exempt from overtime under the FLSA, the employee must meet all of the tests for one of the exemptions set forth in the regulations. Although payment on a salary basis is one part of the test for many of the exemptions, it does not in and of itself create an exemption from overtime.

Overtime issues often arise under the administrative exemption to the FLSA. To qualify for this exemption, the employee must be compensated on a salary basis at a rate of at least $455 per week and the employee's primary duty must be (1) the performance of office or non-manual work that is directly related to the management or general business operations of the employer or the employer's customers, and (2) this work must require the exercise of discretion and independent judgment with respect to matters of significance. Generally, the employee's work must be directly related to assisting with the management of the business as distinguished from the performance of actual manufacturing, service, or sales work. Administrative employees generally are "staff" employees who assist with budgeting, accounting, finance, auditing, purchasing, procurement advertising, marketing, personnel management, human resources, employee benefits, etc., as opposed to "line employees" who actually manufacture product, service clients or sell in a retail business. In addition, the employee must use "discretion and independent judgment" which implies that the employee has the authority to make independent choice that is free from immediate supervision regarding matters of significance.

A classic example of a job raising issues regarding the application of the administrative exemption is the "administrative assistant". In some cases, an administrative assistant may operate independently making decisions regarding matters of significance which affect the employer's business operation or may commit the employer to matters that have significant financial impact. In other cases, an administrative assistant position is a glorified clerical position exercising little or no discretion or independent judgment and being closely supervised from above. This example points out that the job title of the em ployee is not controlling in determining whether an exemption applies. Rather, the key inquiry is the actual job duties and responsibilities performed by the employee in question.

Overtime issues can arise when an employer has not properly included all hours worked in the computation of overtime. Issues may arise regarding the treatment of travel time, time spent in seminars or training, "on call" time, and even time spent sleeping on the employer's premises. As with the overtime exemptions, answering these issues requires a thorough review of the facts as well as a knowledge of the complex administrative regulations and opinions.

Overtime liabilities may also arise when a state wage and hour law differs in a material respect from the federal statute. Unlike most federal laws, the federal Fair Labor Standards Act does not preempt state wage and hour laws. The states are free to enact their own wage and hour legislation and whichever law is most favorable to the employee will apply. Employers operating in multiple states need to be aware of state wage and hour laws which may be more stringent than the federal law. For example, California wage and hour law requires overtime for work over eight hours in a day in addition to the requirement of overtime for over forty hours in a workweek. Many of the recent class action wage and hour lawsuits raise state law claims in addition to federal law overtime claims.

The area of wage and hour law is one of the most complex areas in the Labor and Employment arena. Issues of whether a particular job is exempt are often complex and fact-intensive. Nonetheless, employers need to make sure that they have properly classified their exempt employees and that they are properly counting all hours worked as required by federal and state law. Employers can successfully defend these wage and hour lawsuits if they have properly prepared in advance. Employers should contact experienced labor counsel before litigation arises if they have questions regarding the proper classification of employee or the method of calculating overtime hours. ❖

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