



THE READY-MIXER



**NRMCA
VISION**

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Virginia Ready-Mixed Concrete Association Newsletter

March 2011

Virginia Chapter ACI 2010 Excellence in Concrete Awards

By Hank Keiper, PE, SEFA Group

The Virginia Chapter ACI formally recognized the four winning projects teams in front of a record audience of over 300 at the Virginia Concrete Conference on March 3, 2011. The *Excellence in Concrete Awards* program is designed to recognize creative, innovative, aesthetic or simply important uses of concrete in Virginia construction.

The awards criteria are simple: A project must be essentially or substantially completed in 2010. Concrete, of course, must be a substantial part of the project. The project must be located in the Commonwealth except for the four counties or Arlington, Fairfax, Loudon, and Prince William. They are serviced by the National Capitol Chapter. Awards are given to projects in four categories: Residential, Commercial, Innovation, and Infrastructure. The Chapter board selects a winner in each category, and the best overall project of the four category winners is awarded the Commonwealth Award. So here are the 2010 award-winning projects.



Morgan Nelson and Bob Swope with their 2010 Awards.



Ren Angle, Allied; Jay McNeely, Allied; Mike Waylett, St. Anne's; Cliff Harrison, C.L. Harrison Consulting

Residential:

THE SWOPE RESIDENCE

You may recognize the name, because this home is owned by our friend Bob Swope of R.L. Swope and Associates. Bob's home is located near the James River in Charles City. The project includes a parking area, sidewalk, and porch. Fifty-six yards of colored and stamped concrete are artfully woven into the landscape. Each yard also includes 3 pounds of PSI Max 10 Fibers and one-half pound of PSI Micro Fibers. The color is Prairie Tan 3% and it was integrally mixed into each truck using Solomon's four color Liquid Concrete Ready Mix System. Bob represents many of these companies, and he can honestly say now he used them at his own house. The project team consists of Bob Swope, the homeowner; the concrete contractor, River City Concrete; and the concrete supplier, S.B. Cox Ready Mix.

Commercial:

ST. ANNE'S-BELFIELD SCHOOL LEARNING VILLAGE

Saint Anne's Belfield School is a private school in Charlottesville, and the new, 105,000 square foot Learning Village is the centerpiece of the campus. The envelope of this LEED Gold Project is made mostly of insulating concrete forms or ICF; and it is the first school in Virginia to use them as the primary wall system. ICF was chosen for its excellent energy efficiency, indoor air quality, and safety for the students and staff. Twelve hundred cubic yards of concrete were placed in the ICF system. Pervious concrete was chosen for the new parking area to reduce storm

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Virginia Ready-Mixed Concrete Association

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VRMCA
Spring Convention
TWO THOUSAND AND ELEVEN

MAY 15TH-17TH
THE GREENBRIER RESORT
WHITE SULPHUR SPRINGS, WEST VIRGINIA

Awards *continued from page 1*

water runoff, for high solar reflectance that reduces urban heat island effect, and to generate irrigation water. Water collected by the pervious concrete is captured in a 75,000 gallon cistern and then used for irrigating the athletic fields greatly reducing peak demands on the municipal water system. As a hands-on sustainable construction laboratory, the school and their partners created an online kiosk available to the public where energy savings can be tracked in real time. Also on the school website are links to professionally-made videos about the school construction and their commitment to the environment.

The project team consists of the owner, St. Anne's-Belfield School; the owner's consultant, C.L. Harrison Consulting; Bowie Gridley Architects; Lineage Architects; Draper Aden Associates; English Construction; and Allied Concrete.

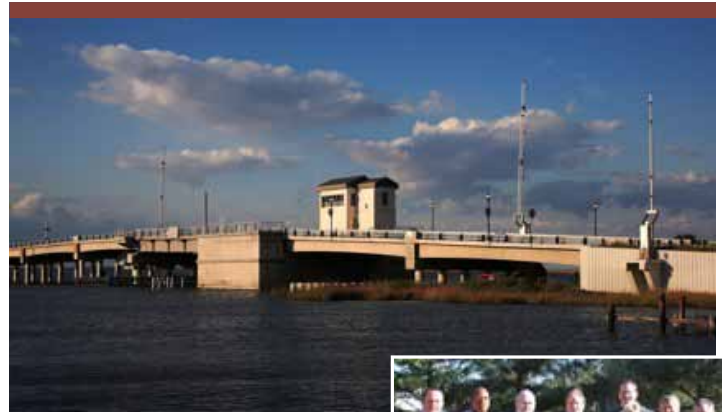


Duane Laughlin, Essroc; Coy Holt, Ozark Concrete; Todd Shenk, Essroc

Innovation:
KERNSTOWN COMMONS 7-11 PARKING CONVERSION

Located in the Kernstown Commons shopping center in Kernstown, this convenience store's parking lot was originally designed with bituminous asphalt pavement. The staff from Essroc Ready Mix demonstrated to the owner, Orange Partners, LLC the life cycle cost benefits of using portland cement concrete instead. They used a computer program from the National Ready Mix Concrete Association called Concrete Pavement Analysis or CPA to calculate the construction costs, maintenance, lighting, and repair costs for both concrete and asphalt. The program then converts the projected costs to present value for a real apples to apples comparison.

In this particular project, the CPA software projected a savings with the concrete option not only in life-cycle costs, but initial construct costs as well. In addition to the financial benefits, the owner recognized the better nighttime visibility provided by concrete's lighter color and high reflectance; as well as the overall sustainable and green rewards of using concrete instead of asphalt. Twelve hundred cubic yards of Essroc's branded mix "DuraDrive Plus" went into the 55,000 square feet of concrete paving. The project's team includes the Owner, Orange Partners, LLC; the general contractor, KEE Construction Services; concrete contractor Ozark Concrete, and concrete supplier Essroc Ready Mix.



Scott Hubbard, Branscome; Mike Johnson, Branscome; David Nester, Jacobs; Bud Morgan, VDOT, J.P. Binard, Bayshore; Nina Shaw, Branscome; Jack Kowalski, Branscome; Mark Bundy, Branscome; Ray Hagen, American Bridge



Infrastructure and Commonwealth Award:
CHINCOTEAGUE BRIDGE REPLACEMENT

The name of the project is somewhat misleading, because this was not simply a bridge replacement. The old Route 175 bridge landed on Marsh Island first, and then crossed a swing bridge built in 1939 directly into downtown Chincoteague. The new main bridge is 4035 feet long and includes a new bascule drawbridge over Lewis Creek Channel. The new, longer bridge cuts around the north of Marsh Island and aligns with Maddox Avenue on Chincoteague Island.

The old swing bridge was eliminated and replaced with a second, 729-foot fixed bridge called the Marsh Island Connector. The two bridges meet at a "T" intersection over the water.

The mainline bridge has 49 spans consisting of 80-foot prestressed bulb-T beams supported by cast in place pile caps over 36" prestressed concrete piles. The superstructures and substructures of the bridges required 2.1 million pounds of epoxy-coated rebar and 16,000 cubic yard of ready mix concrete. Much of the fresh concrete was delivered using 4 cubic yard buckets transported on special, shallow draft barges and tug boats. This project was also tasked as a pilot project for VDOT's End Result concrete specification. The mainline bridge opened on April First, and the landscape of Chincoteague Island changed drastically for the better. Because of the complexity, working conditions, challenges, and the great impact on the daily lives of residents and visitors, the Virginia Chapter ACI is very honored to present the Infrastructure Award and bestow the Commonwealth Award to the project team for the Chincoteague bridge replacement project.

The project team includes the owner, VDOT; the contract administrator, Jacobs Engineering Group; MMM Design Group; structural engineers Hardesty & Hanover LLP; the prime contractor American Bridge; precast supplier Bayshore Concrete; and ready mix supplier Branscome Concrete.

All of us at the Virginia Chapter ACI congratulate the winners and we thank all those who submitted excellent projects this year. January 2012 is not that far off, so start thinking about your 2011 submittals! 🚚

news|briefs

**Concrete Walls for a Healthier Home**

– Yet another reason why concrete should be considered a first choice in home building. Homes built using concrete can feel more friendly to people with indoor allergies. Concrete masonry resists mold growth. In many areas, concrete masonry walls do not require insulation, which can attract cough- and sneeze-causing dust. Even for people without allergies, concrete masonry can mean a healthier home. Home owners don't need to paint concrete masonry walls. Avoiding paint helps avoid the harmful chemicals they can contain. Concrete masonry walls also block sound, creating serene environments in even the most hectic urban environments. To read the article, visit the Coal Geology website at <http://coalgeology.com/concrete-walls-for-a-healthier-home/15698/>. 🚚

HRCAC Spring Golf Tournament To Be Held at Kiln Creek



The Hampton Roads Concrete Advisory Council has announced the Spring Golf Tournament will be held at Kiln Creek Golf Club and Resort in Newport News on Tuesday, May 3rd. The annual event funds the Lane Malbon Memorial Scholarship presented each year in Cox High School in Virginia Beach. The Scholarship is given each to a student with a major in Civil Engineering or Architecture attending a Virginia College or University. The Virginia Beach School Administration recognizes the scholarship as one that is very beneficial to Cox High School and is one that is presented the students in the top of each year's graduation class.

The Golf Tournament is well managed and will include features very enjoyable for the participants such as range balls, box lunch and dinner, prizes for 1st, 2nd, and 3rd. Cash awards for closest to the pin and longest drive.

The Annual Chairman is Charles Malbon and close attention is given to make sure everyone has an enjoyable experience. Contact Charlie at Schwerman Trucking, tanklines@aol.com, or 757/630-6902 for reservations and information for the tournament.

The Spring Golf Tournament is very popular with members and guests and early reservations are encouraged. 🚚

Residential Concrete Construction Seminar Held in Richmond

A special seminar was held in the Central Virginia Concrete Advisory Council meeting for members and guests in March. The seminar based on the VRMCA Technician Bulletin "Quick Reference Guide for Residential Concrete Construction" was presented by Bob Neal, Technical Services Engineer, Lehigh Cement. The guide is based on technical information in publications of the International Residential Code, International Building Code, American Concrete Institute and the Portland Cement Association. Bob Neal developed the guide for the VRMCA and the VRMCA Technical Committee and the information is VRMCA Technical Bulletin #6.



The information is very helpful and useful in determining the proper design strength for applications such as base-

ment walls and foundations, basement slabs and interior slabs on grade, driveways, walkways and concrete exposed to weather. The guide will be distributed to the Richmond Homebuilders Association as part of the educational program the Advisory Council has with the Homebuilders. The correct strength and mix design is very important in residential construction and meeting the requirements of the local building officials and the building code. Concrete producers are also encouraged to educate sales personal on the requirements of the code for proper shipping of strengths and mix designs to the residential projects.

Bob Neal has been consulted on projects for recommendations for proper usage and strengths and also has been an expert witness in court cases concerning this proper usage. The bulletin should be a part of the homebuilders and concrete producers information for the concrete usage for the proper strengths, slump, jointing, placing and finishing and curing are part of each homebuilder's project. 🚚

Collaborative High Performance Schools “CHPS” Standards Coming to Virginia

By Hessam Nabavi,
Director of Industry Services

CHPS is leading a national movement to improve student performance and the entire educational experience by building the best possible schools. More and more states and school districts are recognizing CHPS standards.

CHPS was created as the result of a meeting in November 1999, when the California Energy Commission called together Pacific Gas and Electric Company, Sempra Energy, and Southern California Edison to discuss how to improve the energy performance of California's schools. CHPS addresses not only energy efficiency, but additional considerations that foster healthy and environmentally responsible school buildings. The CHPS criteria, published in 2002, established the nation's first building rating program specifically intended to assist schools in designing sound, environmentally responsible learning spaces. CHPS is a national, non-profit organization with two high performance building rating and recognition programs: CHPS Designed and CHPS Verified.

The Mission of CHPS is to facilitate and inspire change in the design, construction and operation of high performance schools: Environments that are not only Energy and Resource Efficient, but are also Healthy, Comfortable, Well Lit, Easy to Maintain and Operate, offer Environmentally Responsive Sites, are Safe and Secure, Community Resources, Stimulating Architecture, Adaptable to Changing Needs and Containing the Amenities for a Quality Education. The result will be a finished school that is an enduring asset to its community: one that enhances teaching and learning, reduces operating costs, and protects the environment.

CHPS Core Criteria is a newly developed tool which is designed to ensure a high performance common denominator while offering local flexibility for future geographic adaptations of the CHPS Criteria school rating system, the CHPS Core Criteria framework was first used



for the 2009 update MA-CHPS Criteria and was completed in February 2010.

In Virginia, the first of four pilots of the full Core Criteria process is currently led by an advisory committee sponsored by Fairfax County Public Schools, joined by Loudoun and Stafford County Public School Districts as the nucleus for the development of a Virginia (VA-) CHPS Criteria. Virginia CHPS Criteria (VA-CHPS), creates a benchmark for the design and construction of Virginia high performance school buildings that are efficient, comfortable, environmentally responsible and healthy spaces to learn.

It is anticipated that VA-CHPS will be ready for use by March 2011.

This new tool will also help Virginia to invest wisely in schools that are better for kids and better for the environment. The Virginia CHPS Criteria is a

state-specific high performance school standard that responds to the priorities and local conditions of Virginia's schools. Development of the Virginia CHPS resource represents the first time a state has used the new CHPS "Core Criteria" to design a high performance building rating system. CHPS has identified the three priorities of improving health and student performance, reducing operating costs and mitigating environmental impacts, which are reflected in the Core Criteria. States then use the Core Criteria to build in state priorities, local climate, code issues and other regional variations that make each state's rating system unique.

VA-CHPS applies not only to the design and construction of new schools, but also to major modernizations and additions to existing school campuses. 🚧

SW Virginia Council Hosts Seminar for General Contractors

By Bob Nablo,
Director of Industry Services

For some time, Southwest Virginia Council members have been hearing that a few General Contractors have been self-performing small amounts of concrete work – mostly footings, but occasionally flatwork. We assumed this was not only to keep their crews busy, but possibly also to save money. It was proposed that the Council host a breakfast seminar to help them understand more about the concrete design and placement process, and the result was a seminar titled “What Contractors Should Know About Concrete”.

The seminar featured a panel of SW VA Council members arranged to answer questions about all facets of ready-mixed concrete and a moderator to lead and guide the discussions. Council Chairman Robert O’Brian (Lynchburg Ready Mix) welcomed about fifty attendees and moderated the Q&A session. Panelists were Larry Necessary (Roanoke Cement) for the cement industry, Tom Wahl (The SEFA Group) handling Supplementary Cementitious Materials, Sam Woolwine (Boxley Materials) for aggregates, Will



Members and guests enjoy breakfast before the seminar.

Rafferty (Swope & Assoc.) talking about admixtures, George Kuhn (Chandler Concrete) representing the ready-mixed producers, Michael Moon (ECS, Ltd.) for testing laboratories and Gary Pasquarell (F & R) handling mix design and ordering questions. Each panelist was given a few minutes to discuss new or important issues pertinent to his industry and then the floor was opened to questions and

discussion. Other Council members were encouraged to add information or give opinions from the floor. A good cross-section of attendees was on hand, with General Contractors, municipal officials, design engineers, construction management firms and finishing contractors all represented. The questions were interesting (Grades of cement? Lightweight concrete production? Curing issues? Placement problems? Importance of admixtures?) and the answers were informative and lively. Council members agreed that this was easily one of the best local seminars ever presented, and suggest that we try holding similar meetings in other cities within the SW VA Council region. 🚚

Pervious Concrete Construction, Testing and Measurements Program Presented in Hampton Roads

A March seminar on Pervious Concrete Construction, Testing and Measurement was presented by special guest speaker William Rafferty, Swope and Associates. The seminar presented to the Hampton Roads Advisory Council and Guests included Mix and Design and Materials, Engineering Properties, Construction, Maintenance, and Testing and Quality Control.

Will stated that Pervious Concrete uses the same materials as conventional concrete with the exceptions that the fine aggregate typically is eliminated entirely and the size distribution of the coarse aggregate is kept narrow. The mix design requires different considerations in mixing, placing, compaction, and curing. Rafferty covered the engineering properties of Pervious with fresh properties and hardened properties of the concrete, permeability, compressive and flexural strength, durability, and freeze thaw properties.



John Cox, Bob Swope and Will Rafferty-Swope and Associates.

The program also included construction practices of subgrade base and preparation, batching and mixing, placement and consolidation, finishing, curing and protection, inspection and testing. Post-construction inspections with core samples taken after seven days and maintenance requirements for Pervious Concrete were given as practices for construction practices. A special section on the new testing procedures and practices were covered and the ACI new guidelines for testing equipment and

methods. Pervious concrete should be considered as a system of storm water management and each situation is different in the application of the base and concrete thickness. The program was attended by Hampton Roads Testing Laboratories and discussion held of the new methods. Pervious Concrete is involving as a product for consideration for storm water management by the Federal and State agencies stated Will Rafferty. 🚚

“Concrete Solutions for Sustainability” Presented in Hampton Roads, Richmond



**By J. Keith Beazley,
Director of Industry Services**

A special seminar was presented to concrete design professionals in Hampton Roads and Richmond in February. The speaker was Kelly McGinnis, Coordinator of Sustainable Development, Portland Cement Association. Kelly McGinnis stated “The Sustainability Movement is a reality. Architects, engineers, specifiers, and contractors are faced with the challenge of how to produce functional buildings that are expected to be more environmentally friendly, socially acceptable, and economically beneficial.” McGinnis demonstrated concrete’s characteristics in achieving a sustainable design and construction practices. She also presented information on carbon footprint, thermal transmission and thermal mass and storage, longevity, service life, and

storm water management. Kelly has a degree in Environmental Science and Ecology for Evergreen State College, Olympia, Washington.

The Hampton Roads and Central Virginia Concrete Advisory Councils sponsored the program in a joint effort to reduce the expense of the seminar. A Sustainable Textbook “The Sustainable Concrete Guide” that was developed by the U. S. Green Concrete Council was presented to each attendee. The seminar is part of the Winter Educational Concrete Seminars held each year by the Councils.

Roanoke Cement Company developed a special presentation for the seminar with a special display and demonstration for Pervious Concrete and the Thermal Property Comparison of Asphalt and Concrete. The demonstration and seminar was well received by attendees of the seminar. 🚚



For coverage in future issues, send press releases and photos to marci.malinowski@easterassociates.com or mail to:

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Submissions may be edited for length. Inclusion is not guaranteed and may be excluded due to space.

On the Horizon Calendar of Upcoming Events

APRIL 5-7, 2011

ACI Concrete Field Testing Seminar and Examination*

Chandler Concrete
614 Norfolk Avenue, SW
Roanoke, VA

*PRE-REGISTRATION REQUIRED

APRIL 12, 2011

HRCAC Business Meeting

11:30 AM-1:00 PM
Holiday Inn Executive Center
5655 Greenwich Road
Virginia Beach, VA

NVCAC Business Meeting

7:30 AM-10:00 AM
Manassas, VA

APRIL 19, 2011

CVCAC Business Meeting

11:00 AM-1:00 PM
Meadowbrook Country Club
3700 Cogbill Road
Richmond, VA

APRIL 19-21, 2011

ACI Concrete Field Testing Seminar and Examination*

Crown Plaza Hampton Marina Hotel
700 Settlers Landing Road
Hampton, VA

*PRE-REGISTRATION REQUIRED

APRIL 20, 2011

SWCAC Business Meeting

8:00 AM-9:30 AM
The Roanoker Restaurant
2522 Colonial Avenue Southwest
Roanoke, VA

APRIL 29, 2011

Yvan Beliveau Retirement Reception

5:30 PM-8:30 PM
Virginia Tech
Blacksburg, VA

CALL BOB NABLO FOR MORE INFO AT 540/460-0181

**Please visit the online calendar
for an up-to-date list of events.**

www.VRMCA.com/calendar

Economic Study Details Cumulative Impact of Regulations

The U.S. cement industry – already one of the most heavily regulated in the country – is currently facing no fewer than seven different existing or proposed EPA regulatory standards that, cumulatively, will severely hamper the industry and the economy for minimal environmental benefit.

A study, released in March by the Portland Cement Association (PCA), examines the cumulative impact of these regulations on the U.S. cement, concrete and construction industries – particularly their potential impact on employment, construction costs and the environment.

“We are not shying away from environmental regulations. We take our environmental stewardship seriously and have a long history of investing in continuous improvements that are win-win for both environment and economy,” Aris Papadopoulos, CEO of Titan America and chair of PCA, said. “However, federal regulators have issued a barrage of standards that are completely disconnected from both tangible environmental benefits and economic realities.”

The study found one regulation alone - the National Emission Standards for Hazardous Pollutants - will force the industry to shut down 18 plants and source cement from other countries, thereby exporting cement jobs and importing cement from countries with lower emissions standards. As many as 4,000 direct cement industry jobs could be lost.

“EPA is now imposing emission levels 5-12 times stricter than Europe. Such excessive regulation will shift production, investment and jobs offshore to countries like China. Already the world’s largest cement producer, China’s standards have a long way to go before they catch-up to what the U.S. has, even before these recent EPA regulations. In the end, we don’t even improve air quality in the United States, as their emissions will eventually reach us,” added Papadopoulos.

According to Brian McCarthy, PCA president and CEO, the plant closures



“ ... federal regulators have issued a barrage of standards that are completely disconnected from both tangible environmental benefits and economic realities.”

will hit areas that can least afford an economic downturn. “Cement plants are often located in rural areas where the plant is the tax base of the community. Not only does the community lose jobs, but also a strong contributor of tax revenue and supporter of local schools, charities and activities is abolished when a cement plant closes.”

Cost increases in the manufacture of cement and concrete due to EPA compliance is likely to displace some construction activity. The PCA study estimates a potential direct job loss in the construction sector at 12,000 to 19,000. With up- and downstream indirect impacts considered, more than 80,000 construction jobs are potentially lost due to EPA regulations. Many of these job losses would be concentrated in areas near the plant shutdowns, magnifying the potential distress in these communities.

The country’s largest consumer of cement/concrete is the public sector for infrastructure. PCA calculates that EPA compliance costs could add as much as

\$1.2 to \$2 billion annually to state and local governments’ expenditures just to maintain existing roadways and bridges.

“Think for a moment what structures are traditionally made with concrete. Our bridges, roads, dams, schools and hospitals will be hit the hardest by construction cost increases at a time when the nation’s deteriorating infrastructure is at unsafe levels,” McCarthy said.

The study also examined the economic impact of these regulations in view of the expected increase in demand for cement. Expected plant shutdowns are likely to lead to a reliance on imports. By 2025, the nation would be importing 56 percent of its cement needs. In 2010, it imported less than 10 percent.

“Dependence on foreign cement follows the road of dependence on foreign energy,” Papadopoulos said. “And with cement more cumbersome to import than oil, shortages and price volatility will become more common. This could hurt the entire construction economy, with impacts on infrastructure, housing, commerce and jobs.” 🚧

2011 Annual Virginia Concrete Conference Record Attendance and Success

By J. Keith Beazley,
Director of Industry Services

The opening statement of the 2011 Virginia Concrete Conference by the VDOT Commissioner Gregory A. Whirley was, "I Love Concrete." This statement set the stage of the very successful annual meeting held each year in Richmond. The passage and overwhelming support of Governor McDonnell's Transportation Bill this year also bought a new awareness and realization of the benefits of the utilization of concrete in transportation products and the opportunities of the concrete industry. Sean Connaughton, VDOT, Secretary of Transportation, and Irene Rico, FHWA, Virginia Division, also held opening supportive remarks for the start of the first day of the conference.

The conference was held on March 3-4 in the Sheraton Park Hotel and this year's attendance set a record of 335 participants. The conference first day is a session with topics of general interest in all participants. The second day the conference is divided into two sessions; the Bridge Breakout Session and the Pavement Breakout Session.

The VRMCA marketing directive for the year "Local Streets and Roads" was supported by several programs in the pavement and Bridge sessions. Phil Kresge, NRMCA, explained the new program developed by the NRMCA to market and promote local streets and roads and the benefits of the usage of concrete.

A program from VDOT explained the specifications in place for using concrete on local streets and roads. Quiet Concrete Pavements, Life Cycle Analysis, Full-Dept Reclamation, Concrete Pavements for Public-Private Projects, and Advanced Concrete Technology were subjects in the Pavement Session. The Bridge Session also featured a number of topics on advanced technology for concrete on the bridge construction.

The VRMCA, an annual sponsor of the event, developed a booth and Roanoke Cement held demonstrations with

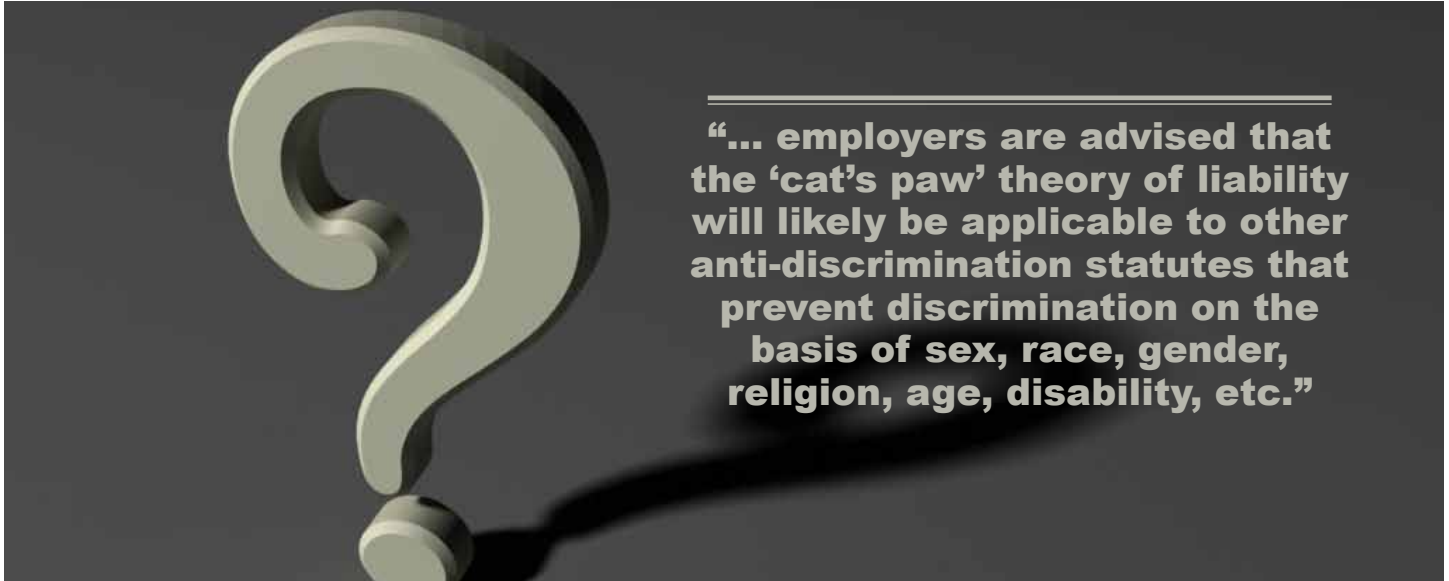


Top: Larry Necessary, Roanoke Cement Technical Resources Manager and Don Ingerson, Roanoke Cement VP Sales and Marketing. Lower left: Heat Island Demonstration. Lower right: Pervious Concrete Demonstration.

Pervious Concrete and a Heat-Island Demonstration with thermal properties of concrete vs. asphalt. The demonstration was well attended and received by the participants of the conference. Streets and Roads brochures also were distributed showing Cost and Performance, Sustainability Considerations, and Life-cycle Costs of Concrete Streets and Roads. Roanoke Cement also had professional photographs of roads projects for viewing in the booth.

The Conference was closed by Charles "Andy" Babish, Materials Engineer for the Commonwealth. Andy talked of the very successful conference and the record number of attendees of this year's event. The Virginia Conference is a major opportunity to showcase concrete products and to educate VDOT, the local cities and counties, and our concrete industry, of new and exciting products and methods for our concrete industry. 🚚

What Do a Cat's Paw, a Felon and an Exempt Employee All Have in Common?



**By John G. Kruchko
and Kevin B. McCoy**

It will come as no surprise to those employers that have been following labor and employment law trends that the Obama administration wants to grant employees more substantive rights and increased access to the court system. Surprisingly though, many significant changes have gone largely unnoticed because the Administration has tapped several agencies with the responsibility of instituting new policies or rules designed to further the Administration's goals. Adding insult to injury, the U.S. Supreme Court (a usually conservative bunch) recently joined the federal agencies in granting employees increased rights to sue their employers.

What is a “Cat’s Paw,” and Why Should You Care?

For several years federal courts around the country have been split on whether employees may use the so-called “cat’s paw” theory of liability to successfully sue their employers for unlawful discrimination or retaliation. What is the cat’s paw? Typically, employees suing for discrimination must prove that their employer unlawfully discriminated against them with regard to some aspect of their employment. Usually, the

employer’s “decision maker” is alleged to have had a discriminatory motive for the challenged decision. If that is proven true, the employee usually prevails; if not, the employer prevails.

The “cat’s paw” theory introduces a third party into that equation. Under this theory, a lower-level manager or supervisor holds an unlawful discriminatory motive, but does not possess the authority to affect any change to the employee’s terms or conditions of employment. However, the manager or supervisor influences or “dupes” the employer’s ultimate “decision maker” (i.e., a higher level manager) into taking action against the employee by feeding him false, misleading, or inaccurate information about the employee.

On March 1, 2011, the U.S. Supreme Court resolved the circuit split by approving the “cat’s paw” theory of liability (*Staub v. Proctor Hospital*). In that case, Vincent Staub, a hospital employee was also a member of the Army Reserves. He was therefore obligated to attend training on the weekends and serve two full weeks during each year. The employee’s immediate “supervisor,” who was in charge of scheduling shifts, along with the head of Staub’s department, Michael Korenchuk, did not like Staub’s military commitment, and they began scheduling

him to work weekends, which created conflicts with his Army obligations.

Not long after, Staub received an order from the Army to report to “soldier readiness processing,” a preparatory session leading potentially to active deployment. He was promptly issued a written warning for disregarding his job duties (which Staub disputed), and was instructed to report to Korenchuk whenever he had finished an assignment.

A few months later, Staub had completed a job around noon and went to report to Korenchuk, but he was not in his office. Staub then left Korenchuk a voice-mail as to his whereabouts and went to lunch. When Staub returned, Korenchuk confronted him and demanded to know where he had been. When Staub told him he had gone to lunch, Korenchuk went directly to the Vice President of Human Resources, told her that Staub had been previously warned but had today failed to report his whereabouts, as he had been previously instructed. As such, the VP of HR terminated Staub’s employment – completely unaware of the hostility his immediate supervisors harbored toward his military service.

The U.S. Supreme Court found that the hospital had unlawfully discriminated against Staub in violation of the Uniformed Services Employment

and Reemployment Rights Act of 1994 ("USERRA"). In reaching its decision, the Court cautioned that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." In short, if a lower level manager who holds a discriminatory motive can persuade an unsuspecting executive to take action against an employee (even if that executive has no discriminatory motive), then the employer will be liable.

While the Staub decision was limited to the context of USERRA, employers are advised that the "cat's paw" theory of liability will likely be applicable to other anti-discrimination statutes that prevent discrimination on the basis of sex, race, gender, religion, age, disability, etc. Thus, going forward, employers should use great care in automatically crediting the recommendation of an employee's immediate supervisors and take extra precautions to make sure the rationale underlying an employment decision is legitimate and not based on unlawful discriminatory motives.

Don't Be Too Quick to Weed Out the Felons

To many employers it seems axiomatic that if you have a job applicant who has committed a serious felony, he should not be hired. This makes some intuitive sense, because applicants with no criminal history are probably less likely to cause problems than those applicants who have past felony convictions. Employers have also long been bolstered by the fact that our federal anti-discrimination laws do not expressly prohibit discrimination based on conviction records.

However, the Equal Employment Opportunity Commission ("EEOC") recently issued some informal guidance

strongly cautioning employers that it is illegal to use a prospective employee's past conviction records, even for serious felonies, as an "absolute measure" as to whether the applicant should be hired. The EEOC's position, while a bit controversial, is not all that surprising when you look at the underlying rationale. Federal law does not prohibit discrimination against felons, but it does prohibit employment discrimination based on race. In this country, African Americans and Hispanics make up a disproportionate percentage of felons. A practice of excluding felons would have the unintended consequence of routinely denying employment to those two racial groups. The EEOC has therefore taken the view that denying employment to felons (solely because of their convictions) would amount to race discrimination – which is unlawful under Title VII of the Civil Rights Act of 1964, and many state and local laws.


The EEOC guidance does not, however, prevent convictions from being considered at all; it simply prevents employers from using conviction records as a bright line, litmus test for excluding applicants. Thus, employers are still free to weigh conviction records against such things as (1) the nature of the job, (2) the nature and seriousness of the offense, and (3) the length of time since the conviction(s).

However, employers should also take care to understand the state laws where they do business. Many states limit the use of arrest and/or conviction records that may be used in the hiring process. And the federal Fair Credit Reporting Act ("FCRA") imposes several obligations on employers who wish to conduct an applicant's criminal background or credit history, including disclosing the information to the applicant before taking any adverse action based on the contents of the records.

A Written Job Analysis May Soon Be Required for Your Exempt Employees

It is no secret that the U.S. Department of Labor has recently begun to crack down on employers' misclassifying their employees as "exempt," when they are really "non-exempt." The reason for the crackdown is, in short, overtime pay. Exempt employees are not entitled to overtime pay, while non-exempt employees must receive overtime pay for hours worked in excess of 40 per week (under the federal Fair Labor Standards Act). Misclassifying non-exempt employees as exempt employees results in those employees being denied overtime pay they were otherwise entitled to receive.

To assist with its wage and hour crackdown, the DOL recently proposed a rule that would require employers to conduct a written classification analysis for each exempt employee in its organization. The employer would have to provide this written analysis to the employee and keep a copy in its corporate files in the event of a DOL audit or investigation. The same analysis would also have to be conducted for individuals whom employers classified as independent contractors as opposed to employees.

While the proposed rule may not become final for some time, employers are strongly encouraged to begin the internal audit process now. Reviewing exempt employee job duties and preparing the necessary analysis for each employee will take a significant amount of time and effort, which should not be put off until the rule becomes final. If your organization is not familiar with how to conduct a proper internal wage and hour audit or how to properly classify employees as exempt or non-exempt, you should seek the assistance of experienced labor and employment counsel. 

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