

"Permatemps" Partners Push the Envelope

By Patricia S. Rose

How many lawyers can make the claim that they were responsible for a new word being introduced into the dictionary? The partners of Bendich, Stobaugh and Strong can. That word is "permatemps" and those who were around Seattle in the 1990s are probably familiar with the oxymoronic term.

"Permatemps" are workers in the class now referred to as the "contingent workforce" or "contract workers." Many of them toil for years on location at many employers, both public and private, without the same benefits as their so-called "regular" peers. Perhaps most known for their litigation against software giant Microsoft, Judy Bendich, David Stobaugh and Steve Strong have been almost single-handedly responsible for recovery of more than \$185 million in cash and benefits for these and other workers.

Bendich and Stobaugh met in a constitutional law seminar in their third year of law school. Stobaugh and Strong already were well acquainted. Together, they shared a common vision of practicing law independently after graduation. While they initially envisioned a general practice and took on a variety of matters, this all changed. Their early practices included family law for Bendich and business lending for Stobaugh. Indeed, the latter area provided a stable source of income when they began taking on the City of Seattle, Microsoft, King County and others whose employment practices wrongfully classified employees as "temporary" or "intermittent," effectively depriving them of the employment benefits offered members of their work force.

In 1978, Strong and Stobaugh took on their first employee benefits case representing 17 so-called "intermittent" Seattle city employees. Despite their status, which would suggest an "on-call" or occasional shift assignment, these individuals had career attachments to the City workforce. Indeed, some of the individual clients, in what came to be known as *Scannell v. City of Seattle*, actually worked full time and had done so for many years. Yet, the City's system denied them vacation, sick leave, retirement and other benefits associated with "regular" employment.

Tackling what seemed the most clear-cut violation first, Stobaugh and Strong took on the vacation issue for John Scannell — today a member of the bar, but then a laborer for Seattle Center — and his co-workers. Even though the city charter provided for 12 days of paid vacation for all employees, they lost on summary judgment. That decision was affirmed at the Court of Appeals, but was reversed by a unanimous Washington Supreme Court, which held that "shall" did not, in fact, mean "may." See *Scannell v. City of Seattle*, 97 Wn.2d 701 (1982). After the Supreme Court victory, a class was certified and the litigation dragged on. Eventually, in 1989, after 11 years of litigation, the case settled.

Based on the publicity of that case, some Microsoft "temporary" workers found their way to the firm. After pursuing administrative remedies under ERISA, the suit began in earnest against Microsoft in 1992. Unlike the "intermittents" of the City, Microsoft labeled some of its employees as "independent contractors" and later chose to engage in the practice that Bendich, Stobaugh and Strong refer to as "payrolling," i.e., placing the workforce on the payroll of a third-party agency or staffing firm. Strong spent many hours exhaustively reading Treasury regulations regarding employee



David Stobaugh

Steve Strong

Judy Bendich

The triumphant triumvirate's efforts have garnered local and national recognition.

stock purchase plans and cases concerning common-law employees.

In 1996, a year after oral argument, a Ninth Circuit panel ruled 2-1 in the plaintiffs' favor in the Microsoft case. The Court stated in part:

Large corporations have increasingly adopted the practice of hiring temporary employees or independent contractors as a means of avoiding payment of employee benefits, and thereby increasing their profits. This practice, has understandably led to a number of problems, legal and otherwise.

Vizcaino v. Microsoft, 97 F.3d 1187 (9th Cir. 1996). This decision was covered by The New York Times, The Wall Street Journal and many other newspapers and national broadcast media. After another long and tortured litigation history, as of this writing the class claimants are finally about to be paid. (See page 1.)

While the Microsoft case was pending, the firm filed yet another large employee class action in 1993 against King County. That case, *Logan v. King County*, involved individuals who were classified as "part-time" because they did not have an official position in the budget. The Superior Court narrowed that class in 1996, leading to yet another case, *Knox v. King County*, to address those excluded as "temporaries."

Another action was filed in 1995, *Clark v. King County*, on behalf of "contract workers," who supposedly were working for "payroll agencies" used by the County and Metro. Some of these plaintiffs, like their "temporary" County counterparts, had been onsite at Metro continuously for between three to 17 years without civil service protection and other benefits of employment. The King County cases ultimately settled for about \$24 million in back pay and \$16 million in prospective benefits in October 1997.

Since these cases, the firm has litigated class actions that increased benefits for part-time community college faculty in Washington in *Mader v. Health Care Authority* and *Mader v. State of Washington*. Still pending are cases involving faculty merit pay at the University of Washington, which recently received class certification in King County Superior Court, and another City of Seattle "temporary" employee case.

Not only has Bendich, Stobaugh and Strong achieved tremendous results in the litigation of these claims, but the partners have been instrumental in lobbying for legislative initiatives to address the systemic payroll industry practices they uncovered. Stobaugh and Strong helped draft and promote passage of the Public

Employee Misclassification Act in Washington, now codified at RCW §§ 49.44.160-.170. In July 1998, the firm retained a Washington, D.C. business lobbying firm and Stobaugh spent months shuttling between the two Washingtons attempting to shut down proposed federal legislation sponsored by the "temp" agencies as the "Staffing Firm Worker Benefits Act of 1997." The bill eventually died.

All these efforts have not gone without recognition. Lawyers' Weekly USA recognized the firm as "Lawyers of the Year" in 1997. In 2000, the Washington State Trial Lawyers awarded the firm its Public Justice Award. The firm's efforts also have resulted in creation of a national non-profit organization, The Center for the Changing Workforce, whose research and policy analysis on contingent work and health insurance has provided an excellent counterpoint to the firm's litigation and lobbying efforts.

Most recently, the firm also hired a lobbyist to assist the National Employment Lawyers Association (NELA) to pass legislation signed by President Bush in October 2004 that permits clients who obtain settlements or verdicts in employment litigation to take a full, above-the-line federal income tax deduction for the attorneys' fees and costs incurred in obtaining that result. This legislation, popularly known as the Civil Rights Tax Relief Act, effectively ended what had been the unfortunate practice of double taxation of the same recovery, i.e., treatment of those receipts as income to the attorney and to the client.

This led NELA to recognize the firm for its "extraordinary contributions" at its national convention this past June. As NELA President Janet Hill stated, "The CRTRA is one of the most significant pieces of civil rights legislation in almost a decade." Similar kudos were bestowed on the firm when the Washington State Bar Association presented its "Local Hero" award to Bendich, Stobaugh and Strong for its pro-bono efforts and contributions in passage of this legislation.

It is remarkable that these results have been achieved in a firm with only five attorneys; most of the time, three. Strong stressed that this was possible because the firm selected employment class actions for their common legal issues rather than factual questions, although this has led to an extraordinary amount of briefing.

In a recent interview, the partners all indicated that they were looking forward to continuing employment class actions outside the "permatemp" arena. Despite the earlier lean years where their work led to seven-day work weeks with no end in sight, they remain remarkably satisfied with the changes they have made in the world of work and the choices they have made along the way. Now with 30 years of practicing together, they are all armed with the good sense of humor and commitment that has united them as friends and colleagues. ■

Patricia S. Rose has maintained a solo practice in Pioneer Square since 1991 where she represents individuals involved in employment, labor and civil rights disputes in state and federal courts and administrative enforcement agencies. Ms. Rose is also an active member of the Planning Committee of the Pacific Coast Labor and Employment Law Conference, the Legal Committee of the Northwest Women's Law Center and the Amicus Committee of the Washington Employment Lawyers Association. She can be reached at 206-622-8964, prose83897@aol.com or www.giget.com/roselaw.