

LAW OFFICES  
**DONALD F. PETERS JR.**

SUITE 1000  
25 EAST WASHINGTON STREET  
CHICAGO, ILLINOIS 60602

DONALD F. PETERS JR.  
CHRISTOPHER P. LYONS  
JAMES G. CIESIL

TELEPHONE (312) 346-7300  
FACSIMILE (312) 782-6690

February, 1995

## **LABOR UPDATE**

### *Recent Developments in Labor and Employment Law*

#### **EVIDENCE OF EMPLOYEE MISCONDUCT ACQUIRED AFTER DISCHARGE DOES NOT BAR DISCRIMINATION SUIT**

The United States Supreme Court ruled in January that evidence of wrongdoing acquired by an employer after an employee's discharge does not bar a job discrimination suit, but may somewhat limit the company's liability if the employee proves unlawful discrimination.

Christine McKennon, 62, was fired after thirty years service with a publisher. After her age discrimination suit was filed, the company took her pre-trial deposition and learned that while employed she had copied and taken home sensitive company documents--an act that would have resulted in her termination had the company known at the time. The company argued that even if McKennon could show unlawful age discrimination in her firing, this "after-acquired" evidence of her misconduct should result in the dismissal of her suit.

The Supreme Court disagreed. It held that since the purposes of the anti-discrimination laws are both to compensate victims and to deter future discrimination, the use of such after acquired evidence should not bar the suit. However, the Court further held that in such instances like McKennon's, the employee should not be entitled to the remedy of reinstatement, since it would not be fair for a court to order the reemployment of someone the employer would have terminated anyway. For the same reason, the Court said that backpay should be limited to the period from the unlawful discharge to when the employer discovered the evidence of serious misconduct which it was unaware of during the employee's employment. Thus, in employment discrimination litigation, employers will be motivated to lessen a successful plaintiff's entitlement by engaging in vigorous pre-trial discovery in an attempt to unearth misconduct severe enough to establish that it would have resulted in the employee's discharge.

The Court's decision, however, does not lessen the impact on employers of the payment of plaintiff's attorneys fees and punitive damages in employment discrimination cases, which are often more significant than the potential backpay liability. *McKennon v. Nashville Banner Publishing Co.* (January 23, 1995).

## COURT STRIKES DOWN NO-SPOUSE RULE

An Illinois court of appeals recently held that a no-spouse rule created unlawful marital status discrimination against the wife of a school principal. This decision casts doubt on the legality of many no-spouse and anti-nepotism employer policies.

In *River Bend Community Unit School District No. 2 v. The Illinois Human Rights Commission*, a long time school teacher, Virginia Ray, sued the school district over a policy it had adopted prohibiting employee transfers to positions where one spouse would be directly supervise the other. Virginia requested a transfer to a school located in the district. However, Ben Ray, Virginia's husband, was the principal of that school. The administration denied the request for transfer based on its no-spouse rule.

Virginia sued, contending that the no-spouse rule constituted illegal marital status discrimination. The court agreed, upholding a decision issued by the Illinois Human Rights Commission. The court held that the phrase "marital status" in the Illinois Human Rights Act not only protects employees based on whether they are single, married, divorced, or separated, but also prohibits discrimination based upon the identity of the employee's spouse. Thus, the court held, Virginia's status as the spouse of Ben Ray was sufficient to trigger the protection of the Act's "marital status" definition.

The court also rejected the district's attempt to establish that the no-spouse rule was essential for the efficient operation of the school. The school district presented expert testimony that spouses working together can sometimes lead to disciplinary problems, low morale and conflicts of interests. Nevertheless, the court concluded that the school district's no-spouse policy was overly broad, since there was no specific showing that all or substantially all spouses could not effectively supervise one another in a school setting. The court pointed to the fact that Virginia Ray had shown that she had spent four years under the supervision of her husband some years before with no work related problems having arisen.

In light of the *River Bend* decision, employers should re-examine their no-spouse or anti-nepotism policies. To pass the high standards set forth in the *River Bend* decision, an employer must demonstrate that these policies are reasonably related to the essential operation of the job. Also, there must be a factual basis that all or substantially all spouses can not perform the job based on security or other vital concerns of the company. (*River Bend Community Unit School District No. 2 v. The Illinois Human Rights Commission*, 232 Ill. App. 3d 838, 597 N.E.2d 842 (3d Dist. 1992), *cert. denied*, 147 Ill. 2d 637, 606 N.E.2d 1235 (1992)).

As a result of a recent conflicting decision by another Illinois court of appeals the Illinois Supreme Court has recently agreed to hear arguments on this issue. That decision, when rendered, will be reported in the *Labor Update*.

\* \* \* \* \*

## LOOSE TALK AND WANDERING HANDS DO NOT CONSTITUTE INVITATION FOR SEXUAL HARASSMENT

Vulgar, "unladylike" behavior by a female tinsmith, who was the target of a campaign of sexual harassment by her coworkers, did not bar her sexual harassment suit, according to the federal appeals court in Chicago. This decision will make it more difficult for employers to use the "welcomeness" defense to defeat such claims.

The plaintiff was the first woman to work in the tinsmith shop at the company. The men in the shop made derogatory comments of a sexual nature on a daily basis and subjected her to offensive signs, pictures and graffiti. She was also the target of various gender related pranks, such as painting her toolbox pink and cutting out the seat of her overalls. Also, the men would change in and out of their work clothes in front of her, and twice a coworker deliberately exposed himself.

However, the plaintiff was no angel either. A female welder, who worked near the tinsmith shop, testified that the plaintiff was a "tramp," because she used the "F word" and told dirty jokes. The welder also testified the plaintiff once placed her hand on the thigh of a young male coworker.

Overruling a lower court's finding that the plaintiff's conduct constituted "welcomeness," the appeals court ruled that the plaintiff's words and conduct could not be compared to those of the male tanners. The plaintiff was one woman among many men the court noted, and her use of vulgar language could not be deeply threatening. Likewise, the court held, plaintiff's placing her hand on the thigh of one of her male coworkers could not be considered intimidating or an invitation to the sexual harassment she endured.

The court also found the company's response to the plaintiff's complaints of the sexual harassment woefully inadequate. It held that the employer was "unprepared to deal with problems of sexual harassment, even when those problems were rubbed in its face." Although the woman had made a number of complaints, little was done by the company to improve the situation, the court noted. Meetings were held, but no disciplinary action was taken. At one such meeting, management agreed to show a videotape on sexual harassment, but it was never shown. Remarkably, the personnel director acknowledged that he was uncertain as to the handling of the company's sexual harassment policy and had never read it!

This decision emphasizes the responsibility of employers to establish and actively enforce an effective sexual harassment policy. With courts becoming more reluctant to deem conduct by plaintiffs as indicating welcomeness, the response by employers to sexual harassment complaints becomes vital to defending such claims. Prompt, thorough investigation and appropriate remedial action are both required. (*Carr v. General Motors Corp.*, 65 EPD ¶43,211 (7th Cir. 1994)).

\* \* \* \* \*

## **BITS AND PIECES**

The Equal Employment Opportunity Commission recently reported that a total of 34,877 charges have been filed alleging violations of the American with Disabilities Act from 1992, when the law went into effect, through the end of September 1994. Approximately thirty million dollars have been paid to workers under ADA, according to EEOC statistics. Illinois ranked fourth highest in the number of disability discrimination charges filed at 1,790. The most common disabilities cited were back impairment, neurological impairments followed by emotion/psychiatric disabilities. Charges based on HIV infection made up 2% of all charges filed. The EEOC predicts that disability discrimination charges will make up an even higher percentage of all discrimination charges filed in the years to come.

\* \* \* \* \*

Employment costs grew by a modest 3.5% in 1994, the United States Department of Labor reported. This year, the government reports that workers' wages, salaries and benefits are projected to increase by just 3.2%. The Labor Department further reported that wage increases, alone, averaged 2.4% annually in 1994 in its study of major collective bargaining agreements covering an estimated 627,000 workers.

\* \* \* \* \*

## **QUOTABLE**

"A witness cannot give evidence of his age unless he can remember being born." Judge Blagden

"There are three kinds of lies--lies, damned lies and statistics." Mark Twain

"Apart from cheese and tulips, the main product of this country (Holland), is advocaat, a drink made from lawyers." Alan Coren

---

Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of the Law Offices of Donald F. Peters Jr. Written by this office, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed nor as covering all significant developments in labor and employment law. The LABOR UPDATE is not intended to be a substitute for legal advice.

---

The LABOR UPDATE may be quoted or reproduced if credit is given to the source.