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LABOR UPDATE

Recent Developments in Labor and Employment Law

BIASED REMARKS COUPLED WITH WEAK REASONING FOR LAYOFF SPELLS LIABILITY COURT HOLDS

The Illinois Appellate Court's decision in *Interstate Material Corporation v. Illinois Human Rights Commission*, 654 N.E.2d 713 (1st Dist. 1995), aptly demonstrates how an employer's seemingly pat rationale for laying off an employee may crumble when placed under the rigors of trial. This decision also illustrates how a tribunal may seize upon biased remarks by a supervisor to tip the scales in favor of finding a discriminatory motive for an adverse employment action.

An African-American employee was laid off due to what the employer claimed was a decrease in work orders, poor job performance and his inability to learn how to drive a truck. The employee contested his lay off arguing that a similarly situated white employee was treated more favorably than he, and that his immediate supervisor, who played an integral part in the lay off decision, used language that reflected racial bias.

Both parties presented their evidence to an administrative law judge of the Illinois Human Rights Commission. The employee offered evidence that he was hired to perform laborer duties and not to drive a truck. Additionally, the employee had several witnesses testify that a similarly situated white employee had worse job performance than he, but, nevertheless, was allowed to remain on while the company laid off the African-American employee. Furthermore, three witnesses testified that the white supervisor was heard referring to African-American employees as "you people" while referring to white employees by name. Also, the supervisor was overheard referring to African-American employees as "niggers," stating "those niggers in the plant don't know nothing. They are dumb. * * * [W]hat I am going to do is I am going to fire all of them and hire me a new crew."

The employer countered by attempting to show that a decrease in work necessitated the lay

off. However, the employer was unable to substantiate this assertion since documentation demonstrated otherwise. Second, the judge concluded that the plaintiff was actually hired to perform laborer duties, thus, his inability to drive a truck was irrelevant. Third, in support of its contention that the plaintiff had poor job performance, the immediate supervisor testified that he caught the plaintiff "leaning on his shovel" a couple of times. Undoubtedly with an eye toward the previous testimony of racial bias, the administrative law judge found little credibility in the supervisor's testimony.

The court upheld the administrative law judge's nearly \$120,000 verdict against the company. Exhibiting great deference to the judge's decision, the court accepted the employee's evidence while finding that the employer's rationale was pretextual. Additionally, over the employer's objection, the court held that the administrative law judge properly took into account the racially biased comments of the supervisor to establish the state of mind and motivation of an individual who admittedly played a crucial role in deciding to lay off the plaintiff.

This decision provides a fitting reminder to human resource managers that they should closely examine the company's rationale for taking an employment action to determine whether it can withstand close scrutiny. Also, this case illustrates the importance of having supervisors avoid slurs or jokes about race, national origin, age and the like in the work environment.

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[Article re: Raintree Health Care v. Human Rights Commission, 211 Ill. Dec. 561 (1st Dist. 9/95) (HIV positive cook proved disability discrimination case)].

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[Article re: Torosyan v. Boehringer Ingelheim Pharm., 622 A.2d 89 (Conn. S. Ct. 1995) (Employer's modification to employee handbook, eliminating "just cause" provision, required additional consideration to employees beyond merely continued work with the company)].

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BITS AND PIECES

Average annual wage changes under major collective bargaining agreements in private industry have been lower than the wage changes that preceded them for the last 12 consecutive quarters, the United States Department of Labor, Bureau of Labor Statistics reported. Wage settlements in the third quarter of 1995 average 3.2 percent over the life of the contract, compared with 3.3 percent in the contracts they replaced.

The Bureau of Labor Statistics also reported that cost of living adjustment clauses (COLA) now cover only about 22 percent of the 5.4 million workers covered by major agreements, compared with about 40 percent in the late 1980s. On the other hand, lump sum payments were included in 45 percent of the major agreements as of September 30, 1995, the highest level since 1987.

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A Swedish teacher, who stripped naked in front of her class of unemployed adults, was awarded 150,000 crowns (\$23,000) for unlawful termination, the Chicago Tribune recently reported. The teacher explained to the court that she undressed to give the unemployed women students more confidence in themselves and to show them that age was not an issue. Although bitter over losing the case, the school may be the beneficiary in the long run by the teacher's revealing tactics. Enrollment in the teacher's class for next semester has been rumored to be tremendous.

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QUOTABLE

Undistinguished and often shabby in appearance, Ulysses S. Grant did not recommend himself to strangers by his looks. He once entered an inn at Galena, Illinois, on a stormy winter's night. A number of lawyers, in town for a court session, were clustered around the fire. One looked up as Grant appeared and said, "Here's a stranger, gentlemen, and by the looks of him he's traveled through hell itself to get here."

"That's right," said Grant cheerfully.

"And how did you find things down there?"

"Just like here," replied Grant, "lawyers all closest to the fire."

Clifton Fadiman, The Little, Brown Book of Anecdotes

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 entirely 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.

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