

Second Quarter, 1996

## **LABOR UPDATE**

*Recent Developments in Labor and Employment Law*

### **THE LESS SAID, THE BETTER**

The courts continue to erode the once prominent employment at-will doctrine by expanding the causes of action employees may bring against employers. One such area is allowing statements made by company representatives to constitute binding employment contracts.

Jerry Taylor was a longtime maintenance employee for Canteen Corporation, a company in the business of providing on-site cafeteria and food vending services. Canteen solicited Taylor to accept a promotion to a maintenance supervisor position. This promotion required Taylor, a union member, to leave a position covered by a collective bargaining agreement.

At the meeting where the company's district manager, Donald Bross, first offered Taylor the promotion, Taylor told Bross that he was hesitant to accept the job since he would lose his union security. According to Taylor, Bross responded, "You have nothing to worry about." At a second meeting, Taylor, questioned Bross regarding issues of job security. In response, Bross allegedly said Taylor could work in the maintenance supervisor position for "as long as he wished." Bross also allegedly said that Taylor could have the job "until he retired or decided he did not want the job anymore." After these assurances, Taylor accepted the promotion.

After holding the maintenance supervisor position for six years without incident, the company eliminated Taylor's position and discharged him. Taylor brought suit alleging breach of an oral contract of employment, among other claims.

The court rejected the company's attempt to have Taylor's breach of oral contract claim dismissed. Initially, the court held that Bross' alleged statements during the two meetings could be reasonably interpreted as a clear and definite offer of employment until Taylor wished to retire. The court found that Bross' supposed comments were more than vague assurances of goodwill or the hope of continued association. Rather, the court held that the alleged comments constitute a definite commitment, especially when viewed within the context of the offer.

The court also found that a jury should decide whether adequate consideration was given to render the oral contract enforceable. The court held that if the company specially bargained with Taylor for the termination of his union position in exchange for the new management position, then sufficient consideration may be found.

With a wary eye toward this and similar court decisions, supervisors and managers should be extremely careful as to what they say during hiring and promotion interviews. Do not oversell the position. Also, taking notes during interviews may prove helpful in establishing a paper trail as to what was really said, as opposed to claimed statements by a disgruntled former employee. *Taylor v. Canteen Corporation*, 69 F.3d 773 (7th Cir. 1995).

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## **COURT HOLDS SUPERVISORS CAN BE PERSONALLY LIABLE UNDER LEAVE ACT**

A federal district court in Chicago has ruled that supervisors can be held individually liable for violations of the Family and Medical Leave Act ("FMLA"). This holding greatly expands the scope of potential targets available to FMLA claimants and could expose large numbers of managers and supervisors to FMLA claims.

The plaintiff's complaint charged several of her supervisors with violating the FMLA by impeding and denying her right to a leave of absence to care for her sick children. Plaintiff, who had a history of attendance problems and was already on probation when her need for leave arose, was suspended and ultimately terminated because of her purported failure to provide a medical release and other documentation of her need for leave. The defendant supervisors either recommended or participated in the decisions to suspend and then discharge the plaintiff.

These supervisors moved for judgment in their favor, contending that they could not be held liable under the FMLA since they were not the plaintiff's employers. In support, the supervisors argued that they did not employ 50 or more employees during the 20 weeks preceding the violation (the threshold for FMLA coverage); they were neither officers nor directors of the employing entity; and they each lacked unilateral authority to hire, fire, or grant leaves. Furthermore, the supervisors cited precedent established under other employment statutes such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, holding that individuals generally can not be personally liable under those laws.

In rejecting the supervisors' arguments, the court distinguished the FMLA from these other employment statutes. It pointed to the FMLA's broader definition of "employer," which includes "any person who acts, directly or indirectly, in any interest of an employer to any of the employees of such employer."

The court noted that although different from that of the aforementioned statutes, the FMLA's definition of "employer" mirrors that set forth in the Fair Labor Standards Act ("FLSA"). Relying upon case law pointing towards individual liability under the FLSA, the court held that the FMLA's reach is not limited to those who have "unilateral" authority regarding leaves. Instead, the Act's reach extends to all persons who control "in whole or in part" an employee's ability to take leaves of absence and return to work thereafter.

This decision should immediately prompt all employers who have not already done so to thoroughly examine their leave policies, in order to ensure their compliance with the FMLA. More importantly, it should personally motivate all managers of such employers to insist on such a review, as they can be held individually liable for FMLA violations along with their firm. *Freemon v. Foley*, 67 EPD ¶ 84,031, 131 LC ¶ 33,315 (N.D. Ill. November 7, 1995).

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## **COURT ALLOWS UNEMPLOYMENT COMPENSATION BENEFITS FOR SEASONAL STUDENT EMPLOYEE**

The Chicago Transit Authority ("CTA") had a summer student program allowing college students to work full-time. Under the program, these students would work on a temporary basis performing the duties of permanent employees who were on vacation. The program specified that each participant be enrolled full-time in college or intend to register as a full-time student for the fall term. The program also provided a specific end date of September 30 for each year.

Tenecia Smith was hired by the CTA in this program. Before September 30, Smith informed the CTA that she decided not to return to school and requested permanent employment. However, when the CTA did not respond to her request by September 30, Smith was obligated to leave her temporary position with the CTA. Shortly thereafter, Smith filed a claim for unemployment compensation benefits with the Illinois Department of Employment Security ("Department").

The CTA protested Smith's claim arguing that she "voluntarily" left her employment, and, thus was disqualified from benefits. The Illinois Appellate Court upheld the Department's finding that Smith did not "voluntarily" leave her job within the meaning of the Illinois Unemployment Insurance Act. Rather, the court held that employees who are hired for a specified period of time are not disqualified from benefits merely because the employment term expires. "The statute does not disqualify all workers who leave their employment voluntarily but only those who do so without good cause attributable to the employer." Here, the court held that the CTA's policy forced Smith to leave on September 30, and that she did not "voluntarily" leave within the meaning of the statute. *Chicago Transit Authority v. Loleta A. Didrickson, et al.*, 276 Ill. App. 3d (1st Dist. 1995).

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## BITS AND PIECES

Health-care costs for the nation's employers rose a slight 2.1 percent in 1995, according to a survey of 2,800 companies conducted by Foster Higgins, a New York-based employee benefits consulting firm. Although this rate was higher than in 1994 when health-care costs actually declined, the 1995 rate is far below the double-digit growth that had become routine through the 1980s and early 1990s. Meanwhile, another survey, by the management consultant Towers Perrin predicts that health-care costs for large employers will increase an average of 3 percent in 1996.

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James O'Connor, age 56, was a regional general manager for the Consolidated Coin Caterers Corp. The company discharged O'Connor after it eliminated his position. O'Connor filed suit against the company under the Age Discrimination in Employment Act ("ADEA") claiming that he was actually replaced by a 40 year old employee. The federal appellate court dismissed O'Connor's claim, using a "bright line" test, holding that he could not establish a prima facie case under the ADEA since he was allegedly replaced by an employee within the protected 40 and over age group.

An unanimous United States Supreme Court reversed ruling that to present a prima facie case of age discrimination an employee is not required to show that he was replaced by someone under the age of 40 years old. Rather, the Supreme Court held that the plaintiff only has to show that he was replaced by someone younger than himself, even if the replacement is age 40 or over. *O'Connor v. Consolidated Coin Caterers Corp.*, (U.S.Sup.Ct., No. 95-354, 4/1/96)

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## QUOTABLES

When choosing between two evils, I always like to try the one I've never tried before.

*Mae West, 1892-1980*

A jury consists of 12 persons chosen to decide who has the better lawyer.

*Robert Frost, 1874-1963*

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