Fourth Quarter, 1996

LABOR UPDATE

Recent Developments in Labor and Employment Law

"HE SAID--SHE SAID"
The E-mail Tells The Tale

Susan Cerwinski filed a sexual harassment charge against a fellow manager, Richard Fernandez, claiming that she was fired after their romantic relationship ended. She claimed that Fernandez continued to pursue her, sending her suggestive photos, cards and e-mail messages.

Ms. Cerwinski complained to the company human resources department about Fernandez' conduct. Fernandez, in turn, said that it was Cerwinski who was harassing him! Concluding that *both* parties were acting inappropriately at work as a result of their failed personal relationship, the company cautioned them both to keep their personal matters out of the office in all respects. However, Susan Cerwinski continued her attack, e-mailing several company vice presidents, accusing Fernandez of various job performance deficiencies which were unfounded.. The company concluded that Cerwinski was still harassing Fernandez and she was fired.

The federal court agreed that the company's action was justified. Although both parties were initially at fault, Richard Fernandez had mended his ways while Susan Fernandez did not. The court found that she was not treated differently from Fernandez. Her continued e-mail attack on Fernandez exposed her to discharge. The court ruled that she was not fired as a result of her initial complaint of sexual harassment against Fernandez, but rather for her own, inappropriate conduct.

This case points up a common problem in the investigation of sexual harassment cases, where the alleged victim and the alleged harasser are telling diametrically opposed stories. Often, it is the other corroborating evidence--here, the records of Cerwinski's e-mail attack--which allows the employer to make a good faith, legitimate business decision as to how to handle the matter. Such decisions, based upon a demonstrable fact, are often sufficient for an employer to carry the day in court. (*Cerwinski v. Insurance Services Office,* DCSNY, No. 95 Civ. 1766 (1996)).

NATIONAL LABOR RELATIONS BOARD'S ATTACK ON CORPORATE AMERICA

Since President Clinton's appointment of William Gould as Chairman of the National Labor Relations Board ("NLRB"), management has feared that Chairman Gould, known for his pro-labor views, would seek to expand employee and union rights at the expense of corporate America. While these concerns may have been initially exaggerated, recent decisions and comments from the NLRB and Chairman Gould indicate that this fear may yet be realized.

One such area of greater expansion of employee and union rights may lie in the NLRB's future handling of temporary workers. Currently, the NLRB views temporary workers as being the employee of both the temporary agency and the company where they are assigned to perform work. This "joint employer" designation requires both the temporary agency and the company to agree before temps may join a bargaining unit of permanent union employees; a feat rarely obtained.

Two current cases before the NLRB, however, challenge the NLRB's "joint employer" rationale. In both cases, unions are seeking to represent temporary workers and have them added to existing company bargaining units containing permanent employees. A recent Wall Street Journal article quoted Chairman Gould as stating that existing NLRB rules are outmoded in light of the recent growth in the temporary-employment industry. Statistics from the Department of Labor show that 2.2 million people worked as temporary employees in 1995, up from just 417,000 in 1982. Chairman Gould asserted that current NLRB rules are based on a "flimsy premise" that makes it "virtually impossible" for temps to join unions.

Chairman Gould's comments signal that the NLRB may be poised to change the "joint employer" rationale increasing the likelihood that temps will more readily be able to join the ranks of regular union employees. The issuance of these NLRB's decisions will be watched closely.

In other developments, the NLRB issued a decision expanding an employer's obligation to turnover financial information to a union during contract negotiations. In past cases, the NLRB only required an employer to turnover financial information to a requesting union if the employer claimed it was presently financially unable to meet the union's wage and/or benefit demands. In *ConAgra, Inc.*, 1997-98 CCH NLRB ¶16,120 (August 20, 1996), however, the NLRB signaled that employers will be obligated to turnover its financial books in a broader range of cases. The NLRB stated, "[R]egardless of the words used, if an employer's claims can be interpreted either as a present inability to pay or a prospective inability to pay during the contract term, it is obligated to provide the union with data supporting its assertions."

This decision signals that employers must choose their words at the bargaining table even more carefully than before or risk having to open their financial books to a requesting union.

COMPANY WINS REASONABLE ACCOMMODATION ARGUMENT ONLY TO LOSE RETALIATION CLAIM

A federal judge in Chicago dismissed charges that Abbott Laboratories violated the Americans with Disabilities Act ("ADA") when it rejected an employee's request for a split keyboard and a voice-activated computer to cope with pain caused by typing. Nonetheless, the court agreed with the employee that a question still existed whether Abbott Laboratories retaliated against the employee by discharging her when she requested the accommodations.

Elizabeth T. Garza was hired in 1991 and rose to the post of customer service administrator. This position required her to speak to customers with a telephone headset and operate a computerized order processing system to record customer information or to locate information for the customer. The job required some 7.5 hours of keyboarding each day.

Garza began experiencing pain in her right hand that was later diagnosed as interosseous nerve syndrome. After two wrist operations, Garza was medically limited to typing only 1.5 minutes consecutively. The company physician recommended that Garza attempt to use a split keyboard, a voice-activated computer software system or transfer to a new position.

In reviewing the company physician recommendations, Abbott, first, pointed out that existing research failed to show that a split keyboard would be helpful to a person who could not type repetitively in the first place. Abbott also chose not to purchase a voice-activated computer software program after determining that the system was extremely expensive and the software had poor word recognition and accuracy.

Abbott eventually discharged Garza for allegedly violating its absence control program. Garza claimed, however, that Abbott speeded up the calculation of her absences - counting half day absences - in violation of its own policy. Also, Garza claimed that Abbott steered her to jobs outside the company, as opposed to its internal placement service.

The court agreed with Abbott's assessment that the possible accommodations to Garza were not "reasonable" within the meaning of the ADA. Reviewing the split keyboard accommodation, the court said the burden is on the plaintiff to show that the accommodation would be effective in allowing her to perform the job. Garza merely argued that she should have been given a chance to try the new keyboard. The court rejected this argument stating that Garza must show that the accommodation was reasonable and effective, and not merely offer speculation. Likewise, the court found that the voice activation software's cost - Abbott estimated that the cost would be $1.4 million - greatly outweighed any benefit making it an unreasonable accommodation.

The court, however, allowed Garza to proceed to a jury on her retaliation claim. It found that a question existed as to whether Abbott counted Garza's absences similarly to other employees who were not disabled.

This case demonstrates that when a company carefully reviews accommodations presented by a disabled employee, it may legitimately reject these accommodations if they are too expensive or have not been shown to be effective. However, care must be taken when dealing with a disabled employee not to treat him or her any differently than other employees. (*Garza v. Abbott Laboratories*, DC Ill., No. 95 C 3560. September 12, 1996)).

BITS AND PIECES

A recent Wall Street Journal article reported that over 20 million workers now have their computer files, voice mail or e-mail searched by their bosses, quoting from a new workplace privacy study. Additionally, nearly one-third of newly hired employees undergo drug testing. One company, however, may have gone too far in its attempt to ferret out employee wrongdoing. Degussa Corporation, a precious-metals processor in South Plainfield, New Jersey, requires employees to pass through metal detectors before leaving work. If the detector beeps, employees are required to remove articles of clothing that contain metal. Three women, who wear underwire bras, have sued the company for invasion of privacy. The company attorney justified the clothing removal requirement saying that all women were given a $100 allowance to buy new bras, hopefully, not containing metal.

* * * * *

Teamster President Ron Carey was re-elected by a slim 52 to 48 per cent margin over challenger James P. Hoffa Jr. The rancorous election fight ended with a majority of Chicago Teamster locals backing Hoffa, but not by as a wide a margin as expected, the Chicago Tribune reported.

* * * * *

A Kmart Corporation employee was awarded $1.5 million after being fired for allegedly eating a bag of chips from the store, the Wall Street Journal reported. Patricia Rue sued her former employer for defamation of character when she learned that her boss told her co-workers she had stolen the chips. The judge agreed with the jury's award saying the jury saw "the defendant's conduct as mean-spirited" and the plaintiff's treatment as "outrageous." Hoping not to be caught with the empty bag, Kmart appealed.

* * * * *

QUOTABLE

Great moments in science: Einstein discovers that time is actually money.

Gary Larson, cartoon caption