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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 alleged 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. Richard Fernandez retorted that it was Susan 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 to keep their personal matters out of the office in all respects. However, Susan Cerwinski continued her attack, sending e-mails to several company vice presidents, which accused Fernandez of various, unfounded job performance deficiencies.

The company concluded that Cerwinski was still harassing Fernandez and fired her. Cerwinski filed a federal civil rights claim against the company, claiming that not only had she been sexually harassed by Fernandez, but the company had unlawfully retaliated against her by firing her for complaining of harassment. A large part of her case rested on the fact that she was fired, but Fernandez was not.

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 Cerwinski had not. The court found that she was not treated differently than Fernandez and that evidence confirming her continued e-mail attack on Fernandez exposed her to the justifiable penalty of discharge. The court ruled that Cerwinski 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 tell diametrically opposed stories. Often, it is the other corroborating evidence--here, the records of Cerwinski's e-mail attack on Fernandez--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, 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 exaggerated initially, recent decisions and comments from the NLRB and 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" obtained from day labor services. Currently, the NLRB views temporary workers as being the employees 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. Obviously, this consent is rarely obtained and unions have been effectively blocked from organizing these temporary workers.

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. Chairman Gould stated 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.

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 decisions will be watched closely.

In other developments, the NLRB issued a decision expanding an employer's obligation to turn over financial information to a union during contract negotiations. In past cases, the NLRB only required an employer to turn over financial information to a requesting union if the employer claimed it was presently financially unable to meet the union's wage and benefit

demands. In *ConAgra, Inc.*, 1997-98 CCH NLRB ¶16,120 (1996), however, the NLRB signaled that employers will be obligated to turn over 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, the company is obligated to provide the union, upon request, with data supporting its assertions."

This decision guides employers to choose their words at the bargaining table even more carefully than before--or risk having to open their financial books and records to the union.

COMPANY WINS REASONABLE ACCOMMODATION ARGUMENT ONLY TO FACE 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 she could nevertheless proceed to a jury trial on the issue of whether Abbott Laboratories retaliated by discharging her when she requested these accommodations.

Elizabeth T. Garza worked as a customer service administrator, which required her to speak to customers with a telephone headset and type into a computerized order processing system. The job required 7.5 hours of keyboarding each day.

Garza began experiencing pain in her right hand that was later diagnosed as a serious 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 estimated cost of over \$1 million for the voice activation equipment and software greatly outweighed any benefit, thus making it an *un*reasonable accommodation!

The court, however, ruled that Garza could proceed to try her case before a jury on her retaliation claim. It found that a question of fact 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 administering absenteeism or other disciplinary rules not to treat a disabled employee differently from other, non-disabled employees. (*Garza v. Abbott Laboratories*, DC Ill., No. 95 C 3560 (1996)).

BITS AND PIECES

Rightly or wrongly, employers are becoming more aggressive with regard to monitoring their employees. Over 20 million workers now have their computer files, voice mail or e-mail searched by their bosses, according to 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.

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A Kmart Corporation employee was awarded \$1.5 million after being fired for allegedly eating a bag of chips from the store. 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 holding the bag, Kmart has appealed.

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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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