

Fourth Quarter, 1997

## **LABOR UPDATE**

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

#### **I OWE, I OWE, ITS OFF TO WORK I GO...**

More employers have been running credit checks on prospective employees than ever before, typically without informing unsuspecting applicants. This became a dangerous practice on October 1, 1997, when a new federal law went into effect requiring employers who run credit checks to inform applicants. In addition, employers must give applicants a summary of their rights under the new credit law, including the right to dispute inaccurate information in the credit report.

The changes are amendments to the Fair Credit Reporting Act of 1971 and represent the political fallout from a rash of newspaper articles about inaccurate credit reports and their devastating effects. Under the old law, employers were required to notify applicants if a credit report played a significant role in their rejection for a position. However, few companies, particularly small businesses, even knew of this requirement, much less complied. Moreover, aggrieved applicants were unlikely to file a lawsuit which could alienate other potential employers.

Under the new amendments, employers seeking credit information on existing or prospective employees must obtain the employee's written permission before even requesting a credit history. In addition, the disclosure requirements apply to employees being considered for promotion or demotion.

The new law does not leave employers powerless. For instance, employers have the right to insist upon written consent to obtain a credit report before an individual will even be considered for a position. The amendments do not curtail the employer's right to refuse to hire or promote individuals based on their credit history.

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**SUPREME COURT TO DECIDE WHETHER SAME-SEX  
HARASSMENT IS ACTIONABLE**

The Supreme Court has agreed to decide whether same-sex sexual harassment is actionable under Title VII of the Civil Rights Act of 1991, the same law which prohibits harassment or discrimination based on race, sex, or national origin. The high court agreed to hear the case after an appellate court in Pennsylvania ruled that a man who had been sexually harassed by his male supervisor and two male employees had no remedy under Title VII because the law did not prohibit same-sex harassment. *Oncale v. Sundowner Offshore Services, Inc.*, (5th Cir. 1996).

The Pennsylvania court's decision is at odds with a recent decision by the federal appellate court in Chicago. In a case very similar to *Oncale*, a male employee of Coca-Cola Bottling Co. sued his employer after he was allegedly sexually harassed by a male co-worker. The suit claimed that Coca-Cola was aware of the situation, yet did nothing to prevent further incidents. *Johnson v. Hondo, Inc.*, (7th Cir. 1997)

The Chicago court held that Title VII does protect employees from same-sex harassment. The court stated, "Sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not be actionable in appropriate cases."

This new twist in the law is important to employers in Illinois, Wisconsin and Indiana. Although the Supreme Court may ultimately rule that same-sex harassment is not actionable under Title VII, the current law in these states prohibits such conduct. Employers must now be particularly vigilant to recognize and prevent this emerging form of harassment.

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**COURT CONTINUES TO EXPAND SCOPE OF  
AMERICANS WITH DISABILITIES ACT**

Ever since the ADA became effective in 1990, the courts, the Equal Employment Opportunity Commission, and civil rights attorneys and professors have struggled to determine what constitutes a "disability" under the Act. The ADA itself defines a disability as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

However, exactly what constitutes such a "physical or mental impairment" has been the subject of

scores of lawsuits and is, quite possibly, the most litigated issue under the ADA. Plaintiffs ranging from diabetics to paraplegics, alcoholics to transvestites, have all claimed that their maladies fall within the definition of a "disability". Two recent decisions from the federal appellate court in Chicago have attempted to explain, just a bit more, who is protected by the ADA.

Margaret Christian was fired by St. Anthony's Medical Center after she was diagnosed with hypercholesterolemia, an excessive amount of cholesterol in her blood. Christian claimed that her termination was based on the Medical Center's apprehension that she would need to undergo a disabling treatment known as pheresis, where the patient's blood is drained from her body, cleansed of cholesterol, and put back in the patient. Christian contended that such a treatment would result in numerous absences from work and that this was the basis of her termination, in violation of the ADA's requirement that employers reasonably accommodate disabled employees.

The Medical Center countered, stating that Christian was not protected by the ADA because her affliction, hypercholesterolemia, was not itself disabling. The only reason that Christian would miss work was because she was voluntarily undergoing a disabling treatment. The lower court accepted this argument and dismissed the case.

However, the appellate court disagreed. In the first decision of its kind, the court found that if a disability is the result of mandatory but disabling treatment of a non-disabling affliction, the individual is protected under the ADA. The court likened the situation to that of a cancer victim. Although cancer, at least in its early stages, is not disabling, aggressive and disabling chemotherapy treatment is often indicated. It is axiomatic that this individual would be considered disabled. If Christian's condition required disabling treatment, she was entitled to the protections of the ADA. The Plaintiff ultimately lost her case, however, because the court determined that the disabling treatment was not necessary to control her condition. *Christian v. St. Anthony Medical Center*, (7th Cir. 1997)

The second case dealt with the non-disabling "trigger" of a disabling affliction. Marquita Palmer worked for the Circuit Court of Cook County. She had never had any performance or interpersonal problems at work until she was assigned to work under a new supervisor. A serious personality conflict soon developed between the two and quickly escalated. Diagnosed with major depression and paranoia, Palmer was terminated after making death threats to her supervisor and other co-workers.

Palmer sued alleging that her termination violated the ADA. However, her case was dismissed after the district court found that the plaintiff was not disabled. The judge reasoned that, since the plaintiff had never had problems at work before, Palmer's symptoms merely constituted a "personality conflict" with her new supervisor and not a "disability" under the ADA. However, the appellate court disagreed. While noting that a "personality conflict" with a single individual will never qualify as a "disability" under the ADA, the conflict was merely a trigger for a serious mental illness. Regardless of its source, the court ruled, Palmer's mental condition was clearly a "disability". *Palmer v. Circuit Court of Cook County*, (7th Cir. 1997)

## **BITS AND PIECES**

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A female supervisor's policy of giving each of her female employees a hug, a bag of chocolate hearts, and a note signed "Love, Steph" when they picked up their paychecks did not create a sexually hostile work environment according to a federal district court judge in New Hampshire. According to the judge, two uninvited hugs over a three week period were not severe or pervasive enough to create a hostile work environment. The company has, however, discontinued the policy. *Drew v. First Savings of New Hampshire* (D.NH, 1997)

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Both houses of Congress have introduced bills that would prohibit employment in the private and public sectors on the basis of sexual orientation. House Bill 1858 and Senate Bill 869 define "sexual orientation" as homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived. Neither bill applies to the provision of employee benefits to an individual's partner. Similar legislation was introduced in the 104th Congress last year, but was never passed. However, some experts claim that with the increasing mainstream acceptance of homosexuality, passage of such a bill is expected.

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In the first case of its kind, a Connecticut District Court ruled that the Age Discrimination in Employment Act (ADEA) does not bar discrimination against the young in favor of the old. The case involved a plant closing agreement which offered employees over the age of 50 a generous retirement package. Employees between 40 and 50 sued alleging that the favorable treatment of older workers violated the ADEA. However the Court disagreed, finding that the ADEA was enacted to protect older workers from being denied employment based on inaccurate stereotypes about their abilities. The legislature was not concerned with protecting younger workers merely because they are too young. *Dittman v. General Motors Corp.* (DC, 1997)

## QUOTABLE

Among attorneys in Tennessee the saying is: When you have the facts on your side, argue the facts. When you have the law on your side, argue the law. When you have neither, holler.

*Vice President Al Gore*

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