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First Quarter, 2001

LABOR UPDATE

Some recent results obtained for our clients:

EMPLOYEE'S INSUBORDINATION DEFEATS HIS CLAIM OF UNLAWFUL RETALIATION

Peters & Lyons, Ltd. successfully defended a claim of unlawful retaliation on an appeal to the United States Court of Appeals for the Seventh Circuit.

In that case, an employee filed a charge of national origin discrimination against his employer. While the charge was pending at the United States Equal Employment Opportunity Commission (EEOC), the employment relationship continued uneventfully for a year, until the employee was then terminated for a profanity ridden tirade against his supervisor, who had reprimanded him for not wearing his uniform.

The employee then filed a second charge of discrimination with the EEOC, alleging that the company fired him in *retaliation* for filing his first charge one year earlier.

The federal court of appeals affirmed the trial court's previous ruling dismissing the charge on the grounds that the employee failed to establish a connection between his initial complaint of discrimination and his discharge a year later. The court observed that the employee could cite no incidents in the intervening year suggesting that the company was upset with him. Also, the supervisor who terminated the employee had nothing to do with the initial discrimination charge. Thus, the court found that the employee's claim of retaliation was too remote from his original charge, which was dismissed for other reasons.

Often employers are faced with the dilemma of dealing with an employee who previously filed a charge of discrimination and later violates a work rule for which discipline would ordinarily be appropriate. Although these cases carry the risk of a retaliation claim, the employer is not powerless. Despite an earlier claim or charge, the employer still has the right to discipline or discharge an employee for misconduct where such action would normally be taken. Obviously, the

employer is well advised in such instances to be careful that the facts establishing the employee's misconduct are well documented. Likewise, the discipline administered to the former complainant should be consistent with that meted out to other employees who engaged in similar misconduct.

SEXUAL HARASSMENT "VICTIM" FOUND BY COURT TO BE VICTIMIZER

In another retaliation case successfully defended by Peters & Lyons, Ltd. in the past quarter, a federal district court judge in Chicago dismissed the retaliation claim of a female employee under very unusual circumstances.

A female factory worker came forward with a complaint that a male co-worker had been making inappropriate sexual comments over a long period of time, which culminated with his pulling back her sleeveless blouse to look at her breast and commenting to his fellow employees about what he saw. The employer immediately suspended the male employee, pending investigation, and the very upset female was invited to take the rest of the day off, with pay, to calm herself.

In conducting an immediate and thorough investigation, the company not only confirmed the male employee's inappropriate conduct, but was surprised to learn from witnesses that the female employee had often entered into significant sexual banter, teasing and horseplay with the male employee. This included one incident where she approached him from behind, reached through a hole in his jeans and grabbed his crotch. Finding that both employees had engaged in serious misconduct that created a sexually hostile environment on the factory floor, the company discharged both the male and female employees.

The female employee filed suit against the company, alleging that she had been illegally discharged in retaliation for complaining about the acts of her co-worker and seeking to hold the company liable for her co-worker's harassment of her.

In granting summary judgment for the company, the court found that the retaliation claim failed because the plaintiff could not show that the employer's investigation was improper or that its decision to terminate her, based upon the facts found in the investigation, was anything other than a legitimate, good faith business decision. In dismissing her sexual harassment claim, the court observed that the male co-worker was her peer, and not a supervisor, and that the female worker had never before complained to the company of his misconduct. Therefore, the company could not be found liable for the sexually harassing acts of the non-supervisory male co-worker of which the company had no knowledge.

This case illustrates how things are not always as they seem and how a professional and thorough employer investigation of the facts can get to the bottom of things and enable the company to arrive at a just, and legally defensible, determination.

COURT ADDRESSES DUTY TO ACCOMMODATE DISABLED EMPLOYEES VIA TRANSFER

In a recent case in which Peters & Lyons, Ltd. was involved as local counsel, the U.S. Court of Appeals rejected the EEOC's assertions that employers must reasonably accommodate disabled employees by reassigning them to vacant positions ahead of better applicants. The court noted that because the employer had a *bona fide*, consistently implemented policy of giving a vacant job to the best applicant, the Americans with Disabilities Act ("ADA") did not require the employer to deviate from this policy to, in effect, give "preference" to the disabled applicant.

The employer in this case made several attempts to accommodate this employee, and there was no evidence suggesting that it was biased against her or disabled persons in general. After these accommodation attempts were rejected or exhausted, the employee, a warehouse worker, asked to be transferred one of several, open clerical jobs. She was then invited to apply for these positions, in accordance with company procedure for filling vacant jobs.

The employee met at least the minimum qualifications for all the vacancies. Furthermore, her disability had nothing to do with the office positions she applied for. Nevertheless, she was passed over for each of these jobs in favor of other applicants who the EEOC conceded were likely to be more productive. As a result, she was eventually let go by the company.

Because the ADA's definition of "reasonable accommodation" specifically includes "reassignment to a vacant position" as an example of action that may be required of an employer of the disabled, the EEOC, suing on the employee's behalf, charged the employer with violating the ADA by failing to provide a reasonable accommodation. The EEOC essentially argued that unless an employer would face "undue hardship," the ADA's reassignment provision required an employer to advance a disabled ahead of more qualified, non-disabled person, even if the employee's disability put her at no disadvantage in competing for the job.

The court rejected this argument. It held that although an employer must at least consider reassigning a disabled employee to another job in which her disability will not impede full performance, such reassignment is mandatory only when the transfer is feasible and does not require the rejection of a superior applicant.

Interestingly, this decision runs contrary to the holding of another federal court of appeals. Key facts which no doubt influenced the favorable decision here were the employer's well-established practice of hiring based on merit alone and its willingness to implement or at least consider several different accommodations options. Employers would be wise to implement both of these prudent practices.

COURT CLARIFIES CONCEPTS FOR FMLA COUNTING

In a case with novel issues arising under the Family and Medical Leave Act (FMLA), Peters & Lyons, Ltd. successfully argued that the labor-law doctrine of “integrated enterprise” may not be used to combine the employees of separate, yet related corporations when counting towards the FMLA’s threshold definition of “employer.” Generally, the FMLA only covers employers having 50 or more employees for 20 or more weeks in the current or proceeding year.

Under this doctrine, legally distinct, but affiliated corporations can be deemed one “integrated enterprise” if the companies have interrelated operations and share common ownership, management, and control of labor relations. In this case, the plaintiff, who worked for an entity with less than 50 employees, sought to invoke this doctrine and count the employees of an affiliated corporation run by common shareholders towards the 50-employee threshold for FMLA coverage.

Although FMLA regulations seem to sanction this approach, Peters & Lyons, Ltd. convinced the court that this concept would override Congress’ intent to exempt small employers from FMLA coverage. Employers should remain mindful, however, that this doctrine can be employed under other labor statutes, and ensure that affiliated corporations are organized and operated separately.

QUOTABLE

"The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration."

-Sir William Blackstone

“If the law is upheld only by government officials then all law is at an end.”

-Herbert Hoover

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