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Second Quarter, 2001

LABOR UPDATE

Recent Developments in Labor and Employment Law

TERMINATION OF EMPLOYEE FOR ABANDONING DRUG TREATMENT PROGRAM UPHELD

The Americans with Disabilities Act does not automatically protect employees who drop out of drug treatment programs. Daniel E. Law worked for Garden State Tanning (GST) in Pennsylvania when he failed a drug test. GST's drug policy required Law to attend a drug treatment program. Law's continued employment hinged on completion of the program.

Law attended the program, and when he did not meet the treatment goals, a therapist recommended that Law undergo a psychiatric exam. The psychiatrist who performed the exam diagnosed Law as a paranoid psychotic and prescribed medication. Law did not take the medication properly and did not make progress in the treatment program. He was then recommended to a 14-day inpatient program. Law dropped out of the program after one day, and GST fired him.

Law filed suit, claiming his dismissal violated the ADA and Pennsylvania law. The court ruled for GST because GST did not fire Law for his disability but because he failed to complete the treatment program, a prerequisite to his continued employment. Law v. Garden State Training Centers, United States District Court, Eastern District of Pennsylvania.

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EEOC GETS SUED FOR AGE DISCRIMINATION

Several attorneys in the Equal Employment Opportunity Commission's (EEOC) Atlanta, Georgia office have filed suit against the EEOC claiming the EEOC tried to force two senior trial attorneys into early retirement and demoted the regional attorney in charge of the Atlanta office when he refused an order to terminate the senior attorneys. The attorneys claim that high level EEOC staff in Washington, D.C. stated that "older people lack motivation" and that "replacing them with younger people would improve the office's productivity and serve as a warning to other senior staff members to pick up the pace." The EEOC denies the allegations.

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CORPORATE GIANTS ACCUSED OF GIVING MEANINGLESS TITLES TO AVOID OVERTIME IN CALIFORNIA

California is experiencing an increase in the number of class actions filed that challenge the practice of large corporations handing out titles without substance. According to plaintiffs, the corporate behemoths -- including employers Taco Bell and Wal-Mart -- promote hourly employees to assistant manager slots simply to avoid paying overtime. In the current case of *Mohsin Mynaf v. Taco Bell*, 3,000 workers across California are asking for overtime pay and damages for what they call unfair business practices. Plaintiffs' attorneys estimate employees are owed damages in the millions. In *Orlando Sandoval Jr. v. Wal-Mart*, the plaintiff said he was promoted to assistant manger and given a salary, but still spent the majority of his time doing work that hourly employees were doing. Sandoval said because of his new title he wasn't eligible for overtime even though he worked it.

California Labor Law requirements are different than federal requirements. Under California law, executive employees are exempt from overtime compensation. To qualify, executives must have discretionary authority over employees, regular supervision of at least two workers, and must spend more than 50 percent of their work time devoted to "managerial duties." Fifty percent of the executive work needs to be managerial.

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EFFECTIVE RESPONSES TO PWBA INVESTIGATION

The Pension Welfare and Benefits Administration (PWBA) of the U.S. Department of Labor penalizes companies that fail to timely remit employee elective deferrals to 401(k) plans. If the PWBA finds a violation, administrators should:

- Recommend that the plan sponsor retain qualified ERISA counsel as soon as learning of an investigation if one is not already advising the plan;
- Verify the charge with the employer and the investment provider;
- Justify any late payments when possible;
- Make clear in a response to the PWBA that the employer is not "settling" the matter but rather taking the corrective action voluntarily; and
- Properly analyze the risk of litigation because if the PWBA is unhappy with the voluntary correction, it is free to bring legal action.

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EMPLOYERS PLAN TO SHARE MORE OF THE ESCALATING PRESCRIPTION DRUG COSTS

According to a recent survey, sixty-eight percent of employers believe they will have to share more of the soaring prescription drug costs with benefit plan participants. Melody Carlsen, associate director of research at the International Foundation of Employee Benefit Plans in Brookfield, Wisconsin says that "Increasing the costs to employees has an intent that is twofold. It offsets the increasing costs of prescriptions, but in reality it will still cost less than half of the drug." Although the survey by The International Society of Certified Employee Benefit Specialists found that the vast majority of respondents currently use a co-payment structure of drug cost-sharing, sixty-five percent predicted that a shift from a set co-payment to a percentage-based co-insurance structure may occur soon because of the rising costs. The survey also found that thirty-seven percent of employers are already trying to control their costs by increasing the amount of employee co-payment or co-insurance. Carlsen also notes that employer concerns "haven't really ever changed" when it comes to drug benefits.

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SUPERVISOR'S STATEMENTS OF FACT MAY DEFAME OF AT-WILL EMPLOYEE

Samuel Albert worked in the radiology department at Brooklyn Hospital in New York. On January 30, 1995, he misplaced radioactive materials to be used in a medical test. He then substituted other sources for the materials, pursuant to procedure, and claims to have properly reported the incident to his supervisor, Salmen Loksen. Albert claims that he also told Loksen that he was prepared to complain to hospital and regulatory officials about defective equipment and Loksen's frequent absences. On February 2, Brooklyn Hospital fired Albert. The Termination Report stated that Albert had endangered a patient; endangered the safety of co-workers; failed to follow orders; was dishonest; and neglected procedure.

Albert filed a suit alleging breach of contract, defamation and tortious interference with contractual relations. The district court granted summary judgment to the defendants on all counts. On appeal, the Second Circuit held that there was no breach of contract because Albert was an at-will employee with no contractual right of employment. As for his defamation claim the court found that Albert presented sufficient evidence that Loksen called Albert dishonest and told others that Albert endangered a patient. Moreover, evidence showed that Loksen contributed to Albert's Termination Report. Because Loksen's statements are specific statements of fact rather than statements of opinion, they are not protected as an evaluation of performance and if false may amount to defamation. The statements also qualify as grounds for tortious interference with contractual relations because they can clearly damage Albert's reputation in his professional community. *Albert v. Loksen* , United States Court of Appeals, 2nd Circuit.

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WORKPLACE PRIVACY LITIGATION

Public outcries over privacy issues have a long history in the United States. For example, fears about a perceived erosion of privacy were expressed after journalists first began publishing photographs, when the government began using wiretaps, during Senator Joseph McCarthy's infamous investigations, and following the publication of George Orwell's 1984. Currently, we are in the midst of a backlash against the use of personal information as a commodity. As anyone who has ever suffered from identity theft knows, an individual's identifying data can indeed be very valuable. Just as consumers were outraged to learn that companies were surreptitiously depositing cookies onto their hard drives and tracking their web surfing habits, employees are also sometimes unpleasantly surprised to find information that they consider private used in employment decisions. The use of private information in the employment context has been the topic of numerous recent court cases.

Some of the most attention-grabbing privacy-related court cases have involved anonymous Internet message board postings. In fact, there are currently more than 100 of these so-called "John Doe" anonymity cases in various stages of litigation. These cases stem from the use of websites that allow users to criticize corporations. While many of the sites cater to consumer complaints, others provide a forum for disgruntled employees to bash their employers. Several companies have filed lawsuits against anonymous message board users whose highly critical postings made it evident that the users were employees. The lawsuits allege that the anonymous postings caused harm to the business' reputations, and were disparaging and libelous. As such, the companies filing suits have sought the identities of the anonymous users through subpoenas. Yahoo, which controls message boards involved in several of these cases, has found itself in an awkward intermediary position, and has itself been sued by an individual who was fired from his job after his employer successfully subpoenaed Yahoo for the release of the anonymous poster's name. The fired employee had posted disparaging messages about his employer, AnswerThink Consulting Group, such as, "One (manager) is so dull that a 5-watt bulb gives him a run for his money." Yahoo turned the individual's name over to the employer without first notifying the user. Since this incident, Yahoo has changed its subpoena policy, and now gives users 15 days to respond to subpoena notification.

Numerous other workplace privacy legal actions have been reported in the press recently. For example, during discovery for a lawsuit filed by Northwest Airlines against its flight attendants for allegedly organizing an illegal 1999 holiday-season sickout, the airline confiscated and searched the home computer hard drives of some of the flight attendants for evidence of their involvement. The flight attendants whose computers were searched filed grievances through their union, Teamsters Local 2000, and retained attorneys to represent them. Their grievances were still in mediation when legal actions were dropped after a new collective bargaining agreement was signed.

Another case involving Wal-Mart made headlines when a jury awarded a former employee \$1.65 million because Wal-Mart employees, with the cooperation of local police, raided his home after he was falsely accused of stealing from the store where he worked. Rent-A-Center will have to pay even larger damages; the chain settled a lawsuit in July 2000 for \$2 million. The money will go to job applicants who sued after being required to take a pre-employment psychological test that they found offensive and inappropriately invasive. The applicants involved in the suit objected to the overly-personal nature of a number of questions that asked about such sensitive topics as bodily functions, sexual habits, and religious views.

In addition to a growing number of lawsuits filed over privacy intrusions in the workplace, several workplace privacy suits have also involved employers' failure to adequately protect employee information. One such lawsuit was filed in May 2000 against Burlington Northern Santa Fe Corp., alleging that the railroad company violated employees' privacy by inappropriately disseminating their Social Security numbers and salary information to company managers as part of an effort to crack down on excessive overtime. Another employee privacy case is currently pending against Safeway; it was filed by a payroll clerk whose detailed psychiatric records were revealed to her co-workers. The records were perused and discussed by her peers during an after work happy hour, after the employee's therapist turned the records over to Safeway to process the employee's worker's compensation claim. In another situation that did not result in a lawsuit, but did yield numerous complaints, the court-appointed trustee for Living.com was publicly criticized for posting bankruptcy court documents on the company's Web site that listed employees' salaries, signing bonuses, and stock options. The information was removed after former employees complained.

The public sector has also come under fire for providing information about government employees. A class action suit has been filed on behalf of Department of Veterans Affairs employees, who claim that an internal patient record system gave their fellow workers and some patients access to all employee social security number and dates of birth. The lawsuit seeks \$1,000 for each of the 180,000 VA employees. Also, remember Linda Tripp? The Pentagon's Inspector General determined that a Pentagon spokesman violated the Federal Privacy Act when he released information from Tripp's security file to a magazine reporter who was investigating Tripp's role in the Monica Lewinsky scandal. However, in another recent public sector case, a judge ruled that a Navy fighter pilot whose confidential flight evaluation was leaked to an author does not have the right to sue the federal government for the breach of privacy.

The threat of privacy-related lawsuits is attracting the attention of business insurers; insurance industry experts worry that class-action privacy lawsuits may yield massive verdicts against companies. According to *Business Insurance*, an insurance industry journal, several new Internet specialty policies provide coverage for privacy liability claims. Not all Internet-oriented business insurance policies, however, cover privacy liability, and some policies plan to specifically exclude coverage until the issue evolves further.

There are few clear-cut guidelines or rules in the workplace privacy debate. The cases cited here demonstrate that employers and employees are testing the waters through various legal actions. Moreover, in addition to a growing number of privacy-related lawsuits, privacy advocates are also calling for legislation to address the issue.

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COMPANY LIABLE IN EMPLOYEE'S CRASH

Linda Hunt, who sued her company after she was injured in an accident while driving home drunk, was recently awarded \$200,000 for the accident. A Canadian court found Sutton Group Incentive Realty of Barrie, Ontario, partly responsible for allowing Linda Hunt to drive after an all-afternoon office party in 1994. After leaving the party, Hunt had two more drinks at a bar with friends from work. On the way home, she lost control of her car and sideswiped a pickup truck. Although the judge found Hunt largely responsible for the accident, the judge said the company

deserved 25 percent of the blame because Hunt's employer "ought to have foreseen that by maintaining an open and unsupervised bar, he would be incapable of monitoring the alcohol consumption of his employee, which led Hunt into the danger."

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MICROSOFT SUED FOR \$5 BILLION

Microsoft Corp. has been hit with one of the largest discrimination suits in U.S. history as seven African Americans alleged racism and a "plantation mentality" at their workplace in a suit filed in federal court in Washington, D.C. on January 3, 2001.

A group comprising both current and former employees in the company's Washington, D.C., and Redmond, Wash., offices claims they were repeatedly passed over for promotions, paid less than white employees, and subjected to harassment and retaliation when they complained.

While the amount of damages sought may have no bearing on the actual outcome of the case, several other U.S. companies have recently paid record amounts to settle discrimination suits. In November, 2000, Coca-Cola Co. settled a discrimination case for a record \$192.5 million, while Texaco Inc. paid \$176.1 million in 1997 to settle a discrimination suit brought by its employees.

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WHAT DOES MAKEUP HAVE TO DO WITH MIXING DRINKS?

Cocktail waitresses at Nevada casinos are protesting dress codes and makeup requirements they believe exploit women. Their first target is Harrah's, which fired bartender Darlene Jespersen in August for refusing to wear makeup. Jespersen filed a discrimination complaint with the Nevada Equal Rights commission charging that the requirements single out women.

The women are comparing Harrah's requirements to those of the Moonlite Bunny Ranch, a brothel whose owner calls himself the "pimpmaster general of America." For example, Harrah's requirements include: lip color and makeup applied neatly in complimentary colors; shoes with a minimum 1-inch heel and hair that is teased, curled or styled. The Bunny Ranch only requires clean hair, and makeup is optional.

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JURY UPHOLDS TERMINATION OF EMPLOYEE FOR FAILURE TO FOLLOW COMPANY POLICY

A Nebraska Wal-Mart fired Shirley Gasper for violating store policy. Gasper gave authorities copies of a photo showing a bruised infant crawling in what appeared to be a pile of marijuana, with \$50 and \$100 bills lying around. Authorities placed the child in foster care and Wal-Mart fired Gasper. Gasper violated Wal-Mart policy by not going to management before turning the pictures over to authorities. Gasper sued Wal-Mart for wrongful termination, and despite her argument that Wal-Mart's policy violates state law, the U.S. District Court jury found for Wal-Mart.

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HIGH-TECH COMPANIES OFTEN SACRIFICE CRITICAL EMPLOYMENT POLICIES FOR FAST BUCK

High-tech companies may face more discrimination lawsuits as their fortunes decline. Massive layoffs are one reason. Additionally, many of these companies were started by younger, less experienced entrepreneurs whose efforts to turn a quick profit replaced attempts to develop favorable working conditions and safeguards for workers' rights. Moreover, these executives often enticed employees with stock options instead of higher salaries and overtime pay.

Now that many high-tech companies are suffering from a decline in the stock market, the stock options are no longer valuable compensation. The combination of unhappy employees and questionable working conditions, including what may be even unfair working practices, may lead to more lawsuits against some high-tech employers

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QUOTABLE

From the judicial opinion of Judge Richard Posner, discussing the counting of employee votes in a labor-management dispute:

"[Employer] suggested that either a minister or a lawyer (we are touched at the suggestion of their interchangeability) unseal the envelopes...and count the votes." Vic Koenig Chevrolet, Inc. v. N.L.R.B., 126 F. 3d 947, 951 (7th Cir. 1997).

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