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LABOR UPDATE

Recent Developments in Labor and Employment Law

UNFINISHED SYMPHONY - MALE EMPLOYEE SUES FEMALE BOSS FOR HARASSMENT AND SEX DISCRIMINATION

John Wolf worked as the Operations Manager for the Northwest Indiana Symphony Society, reporting to CEO Cheryl Cox. Wolf complained that Ms. Cox made sexist comments to other female employees, denigrating men and stating that men were generally untrustworthy. Wolf alleged that he was assigned menial tasks beyond the boundaries of his job responsibilities. During this time, Wolf also complained that Cheryl Cox was promoting a sexual relationship with him by giving him keys to her home, commenting about her sex life, and calling him up at night to say she was laying in her king sized bed wearing a pink nightgown. Wolf then quit his job and sued the Symphony for sexual harassment and sex discrimination.

After discovery and before the trial, the Symphony obtained an order dismissing the case. The United States Court of Appeals in Chicago affirmed that ruling. The court held that the record showed that the Symphony had a proper anti-sexual harassment policy and further that John Wolf had never made a complaint under that policy at any time. It further noted that in Wolf's resignation letter to Cheryl Cox he wrote of his satisfaction with his job and his respect for Ms. Cox, concluding that his resignation was because he was underpaid. Only later did Wolf first make his allegations of harassment and discrimination against Cox.

The court held that Wolf had not submitted substantial evidence to establish that Cox's actions made his working environment hostile, and therefore the case was properly dismissed without need of a trial. It ruled that because Wolf had quit his job, he had the burden of not only showing that harassment and discrimination had occurred, but that it was of such magnitude that a reasonable person in that situation would have had no other alternative than to quit. Under these facts, the court found that Wolf had fallen short. Additionally, the court found that Wolf's various complaints about Cheryl Cox did not amount to a "hostile environment" because a reasonable person would not have found her actions sufficiently severe or pervasive to interfere with Wolf's work performance.

This ruling is good news for employers. First, it affirms that courts are favorably disposed toward companies having well-drafted and communicated anti-sexual harassment policies. Sometimes, such policies can make the difference between victory or defeat in court. Second, this decision underlines that courts do not see themselves of arbiters of bad taste or vulgarity in the work place. Courts understand the reality that sometimes people in the workplace use vulgar language, make lewd or suggestive statements, etc. Without condoning this (as no employer should) most courts now require a showing that: a) the complainant was significantly affected by the misbehavior; and b) that a reasonable person in that situation would likewise be affected. *Wolf v. Northwest Indiana Symphony Society* (CA 7), May 21, 2001.

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LETTER GUARANTEEING MINIMUM MONTHLY PAY FOR TWO YEARS CREATES ENFORCEABLE EMPLOYMENT CONTRACT

Mark Pokora, an office supply salesman, was recruited by Warehouse Direct to leave Office Depot and join the Warehouse Direct team. Warehouse Direct made several written offers. The final written offer, accepted by Pokora, promised Pokora a commission and guaranteed him a minimum monthly payment of \$5,500 per month for his first two years of employment. It made no mention of any sales quotas.

Warehouse Direct was soon dissatisfied with the volume of Pokora's sales. It decreased Pokora's monthly payment by \$500 and threatened to terminate Pokora's employment if he didn't improve his sales. Pokora requested that Warehouse Direct restore his salary to its original level. Warehouse Direct terminated Pokora's employment a few weeks later.

Pokora sued Warehouse Direct, claiming that his offer letter was an enforceable contract guaranteeing him \$5,500 per month in salary, regardless of how much he sold. Pokora claimed Warehouse Direct breached the contract by reducing his salary and by terminating his employment. Warehouse Direct claimed the offer letter simply outlined Pokora's compensation package and that Pokora was an "at-will" employee who could be fired at any time.

The court ruled for Pokora based on the language of the final offer letter. Generally, a written employment agreement without a fixed duration or term can be terminated at any time by the company or the employee, even if the salary is stated in annual or monthly terms. However, if a written offer of employment guarantees a salary for a specific amount of time, then an employment contract has been created and the employment relationship is not terminable "at will." In Pokora's case, noted the court, he was guaranteed a minimum monthly payment for at least two years without any mention of how much he had to sell. Thus, his employment was not at-will, and Warehouse Direct owed him compensation.

Sometimes letters have more legal significance than an employer might intend, as Warehouse Direct found out. Written employment offers must be carefully drafted so that an employment contract is not created. In the rush to recruit a good prospect, an employer should be careful not to

forfeit the ability to terminate the employment relationship at will, in case things don't work. Peters & Lyons can review written offers for employers to prevent trouble before it starts and to make sure that the terms of the offer mean what the employer wants. *Pokora v. Warehouse Direct, Inc.*, 322 Ill.App.3d 870, 751 N.E.2d 1204, 256 Ill. Dec. 367 (2nd Dist. 2001).

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PROBLEMS WITH EMPLOYEE USE OF E-MAIL AND THE WEB INCREASE

Millions of American workers have access to e-mail communications and interface with the Internet from their work places. The headaches to employers are increasing.

A survey by the American Management Association found that almost 10% of U.S. firms have had to defend sexual harassment or sexual discrimination claims arising out of employees' use of e-mail or the Internet. A like percentage of companies have received subpoenas for employee e-mails in lawsuits where a disgruntled employee or former employee has sued.

More and more, employers are monitoring employee email and Internet usage with surveillance software. Recently, federal appellate judges in San Francisco were surprised to learn that their email and internet use was being monitored. They complained that they had no knowledge of this.

Ninety-three percent of U.S. businesses surveyed have written policies concerning use of e-mail and the Internet. Despite this, Dow Chemical fired or disciplined 250 workers last year for internet misuse and Xerox similarly discharged 40 employees.

The key remains having a carefully worded, comprehensive policy that is communicated to and acknowledged by employees. Besides describing prohibited uses, these policies should also put employees on notice that the employer reserves the right to monitor their e-mail and internet usage. Peters & Lyons can assist you in drafting or reviewing such policies.

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BITS & PIECES

The State of Illinois has passed the Nursing Mothers in the Workplace Act. The Act requires employers with more than 5 employees, excluding family members, to provide "reasonable" unpaid break time each day to mothers who need to collect breast milk for their infants unless it would unduly disrupt the employer's operations. The employer may require employees to use any regularly scheduled breaks to collect breast milk. The law requires employers to use reasonable efforts to provide a private location, other than a restroom, for mothers to collect their milk.

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According to a report in the Wall Street Journal concerning a nine year study of the

results of employment discrimination cases, employees win only 30% of discrimination suits at the trial court or initial level. For those employees who win their cases at trial, the victory is often short-lived. On appeal, 44% of the verdicts for employees are overturned.

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John Blubaugh, a professional bridge player, recently filed a \$3 million suit in federal court in Indianapolis alleging a violation of the Americans With Disabilities Act by the American Contract Bridge League. The League suspended Blubaugh after it says cameras caught him dealing several aces from the bottom of the deck in a bridge tournament. Blubaugh alleges that part of his dealing hand was chewed off by an 800 lb. sow years ago and this disability has caused the League to misunderstand how he shuffles and deals the cards, leading to the deprivation of his income during his 18 month suspension.

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Immunomedics, a New Jersey company, may now determine which of its employees anonymously posted confidential company information on an Internet bulletin board sponsored by Yahoo. The employee, using the name “Jean Doe”, allegedly violated her confidentiality agreement by posting company financial data and a manager’s personal information. The court balanced Doe’s free speech rights versus the company’s rights to protect its confidential information and ruled the company’s rights prevailed. According to the court, the First Amendment does not protect employees who use it to violate confidentiality agreements. The decision allows Immunomedics to determine Jean Doe’s exact identity in order to sue for breach of the confidentiality agreement. *Immunomedics, Inc. v. Jean Doe* (N.J. Sup. Ct. 2001).

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QUOTABLE

“All laws are promulgated for this end: that every man may know his duty; and therefore the plainest and most obvious sense of the words is that which must be put on them.” Sir Thomas Moore, *Utopia* (1516).

Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of our firm. Written entirely by Peters & Lyons attorneys, 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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