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## LABOR UPDATE

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

#### **MANAGERS' IGNORANCE OF AGE DISCRIMINATION ACT CALLED "RECKLESS INDIFFERENCE TO THE LAW"**

Anthony Mathias was a 59 year old with 24 years experience selling cars. In 1996, Mathias responded to a newspaper ad seeking sales staff placed by Phillips Chevrolet. Mathias completed a written application and took it to Phillips. No one from Phillips was available to interview him when he delivered his application, so he left it with the cashier. A few weeks passed without Mathias receiving any response from Phillips, so Mathias dropped off another written application with the cashier. Each application contained a statement that the Age Discrimination in Employment Act (ADEA) "prohibits discrimination on the basis of age with respect to individuals who are at least 40 years of age."

The only hint on the application concerning Mathias' age came from the date he listed that he was discharged from the military - May, 1959. Mathias was never interviewed for a job. Later, Mathias learned that Phillips had hired seven salespeople, all much younger than himself. Mathias filed suit against Phillips claiming he had been denied a job because of his age in violation of the ADEA.

Although Phillips claimed it never received any applications from Mathias, the jury credited Mathias' testimony that he had submitted two applications. Additional evidence showed that Phillips' managers made several crucial missteps in the hiring process. For instance, manager Jamie Pascarella who had the ultimate authority at Phillips to hire salespeople, often noted the ages of prospective employees on their applications. Pascarella also testified that he was not aware that it was illegal to consider a person's age when making a hiring decision. Furthermore, another manager at Phillips testified that he sought applicants that were "bright, young, and aggressive."

The jury ruled that Mathias had been discriminated against because of his age by Phillips and awarded him \$50,000 in compensation. The jury also found that Phillips' violation of the age discrimination law was *willful*. A violation of the ADEA is considered "willful" if the employer: 1) either knows its hiring practices violate the ADEA, or 2) shows reckless disregard regarding

whether its employment practices violate the ADEA. As a result of the "willfulness" finding, Mathias was awarded an additional \$50,000 as "liquidated damages." Liquidated damages are additional damages designed to penalize companies who violate the age discrimination law.

Phillips appealed several aspects of the jury's verdict, including the finding that Phillips' conduct had been willful. Phillips stated that Pascarella's ignorance of the law should negate a finding of willfulness. Phillips also argued that the ADEA statement on its applications showed that Phillips made a good-faith effort to comply with the ADEA's requirements. The ADEA statement on Phillips' applications, noted the Court, may have indicated to the jury that although Phillips knew that discrimination on the basis of age was illegal, it did not take any steps to make sure that its managers understood the law's requirements. Thus, the Court ruled that Phillips failed to show that its actions were permissible or excusable. Many employers may believe that simply having anti-discrimination policies is sufficient protection from claims of employment discrimination. However, as the *Mathis* case shows, managers who have input into employment decisions must be properly trained on workplace discrimination laws to make sure that the policies adopted by the employer are actually put into effect. *Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771 (7th Cir. 2001).

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### **MAY A "TRANSGENDER" FEMALE LAWFULLY BE DENIED USE OF THE LADIES' ROOM?**

Justin Goins was designated a male at birth. Confused about his sexual identity, Goins took some female hormones and began dressing and grooming himself as a woman. Goins did not have sex change surgery. Goins refers to himself as a "transgender" person. A Texas Court granted Goins' petition for a name change, to "Juliennne," and for a designation of Goins' gender, "from genetic male to *reassigned* female." Goins then sued a Minnesota employer, for sexual orientation discrimination, when denied used of the ladies' restroom, after some female employees objected.

Minnesota state law prohibits discrimination based upon sexual orientation. However, the Minnesota Supreme Court dismissed Goins' case. The court ruled that it was permissible for an employer to follow the traditional and accepted practice of providing restroom facilities that reflect cultural preferences based upon *biological* gender. Thus, the court rejected Goins' argument that an employee should be able to exercise his/her *self image* of gender in choosing which restroom to use. The court observed that if Goins' position were sustained, then biological male employee who perceived themselves as females, could also insist on using a workplace shower and locker room facilities. The court therefore found that the Minnesota legislature's prohibition against sexual orientation discrimination did not extend to Goins' use of the ladies' room.

Sexual orientation discrimination in employment is not prohibited by federal law, although that may soon change. However, many states (but not yet including Illinois) do have such prohibitions and many local jurisdictions (e.g. City of Chicago and Cook County) also prohibit sexual orientation discrimination. With gay and lesbian issues, as well as cross-dressing, transsexual and transgender issues emerging at the work place more and more, employers are well advised to

determine applicable rules in their jurisdiction and then tread carefully when such delicate issues arise. *Goins v. West Group*, Case No.: CX-00-706, Minnesota Supreme Court, November 29, 2001.

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### **COURT UPHOLDS DISCHARGE OF DIABETIC CHLORINE PROCESSING WORKER WHO WAS A “DIRECT THREAT” TO OTHERS**

Norman Hutton, a diabetic, worked as a chlorine processor for Elf Atochem. Elf knew of Hutton’s diabetes when it hired him. As a processor, Hutton oversaw the transformation of gaseous chlorine into liquid chlorine. The work is dangerous and requires great attention to detail. A chlorine spill or leak can have catastrophic consequences.

Hutton had about seven diabetic episodes from 1989 to 1998. These episodes ranged from mild, when Hutton would feel dizzy and have problems speaking, to a single very severe episode where Hutton lost consciousness. Elf was concerned that Hutton’s diabetic episodes might cause a major accident. Extensive discussions ensued between Hutton’s union, Elf, and their respective medical advisors regarding the severity of Hutton’s condition and the risk that it posed to the safety of Elf’s personnel and operations. A doctor chosen by Hutton’s doctor and Elf’s doctor to opine on Hutton’s condition stated that while the risk of a diabetic episode were small if Hutton managed his condition correctly, there remained the potential for a major catastrophe in the event that a diabetic episode prevented Hutton from safely performing his job. In the opinion of the third doctor, whether Hutton should continue working as a chlorine processor depended on whether Elf believed the risk of an accident was acceptable.

Elf concluded that Hutton needed to be transferred to another position in light of his medical condition and the accommodations that had been suggested by the various doctors. No alternative position was available and Elf terminated Hutton’s employment. Hutton sued Elf claiming it had violated the Americans with Disabilities Act. The risks posed to others and himself were slight, according to Hutton, and he was able to perform the essential functions of his position with or without an accommodation. The trial court ruled for Elf, and Hutton appealed.

Disabled workers may not be protected by the ADA if they “pose a direct threat to the health or safety of other individuals in the workplace.” Courts will examine and weigh four factors to determine whether an employee poses a direct threat: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the probability that the potential harm will occur; and 4) the imminence of the potential harm. In Hutton’s case, the Court weighed each factor and concluded that Hutton’s condition posed a direct threat to his co-workers. The Court noted that “a significant physical or mental lapse by Hutton as a result of a diabetic episode could result in substantial harm to his co-workers and others.” Thus, the judgment for Elf was upheld.

When it seems that a worker’s medical or health condition may pose a direct threat to others the Hutton case demonstrates that medical and legal advice may be necessary in order to help the employer make decisions which are medically justifiable and legally defensible. *Hutton v. Elf Atochem N. America, Inc.*, 2001 WL 1504411 (9<sup>th</sup> Cir. 2001).

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## DEFAMATION CLAIM OVER WORKPLACE DEATH THREAT DEFENDED

In a decision welcomed by many in these uncertain times, an Illinois Appellate Court recently held that an employee's claim for employment-related defamation had been properly rejected at trial. The claim arose when the employee was discharged after he allegedly threatened to kill some of his fellow workers.

The employee, Mr. Marvie Achanzar, denied making such threats and charged that he was defamed by his employer, Ravenswood Hospital, when it disclosed his alleged threats within the workplace. At trial, Achanzar swore that he was a non-violent, church-going man, and several of his co-workers testified that they found him to be a peaceable, gentle person.

Nevertheless, in upholding the trial court's verdict against the employee, the Court ruled that the Hospital maintained a narrow "qualified privilege" to disclose and investigate the alleged threat, which had been reported to it by a concerned co-worker. The Court noted that given the existence of this "privilege," an employee can prevail in a defamation action only if he proves that his employer abused it.

The Court concluded that because the threat was disclosed only to human resources personnel in charge of investigating incidents relating to workplace safety, it "was properly limited in scope and purpose and was revealed only to proper parties." Thus, the Hospital was found not to have abused its "qualified privilege," and the verdict for the Hospital was upheld.

This case suggests a willingness on the part of Illinois courts to protect employers confronted with reports of employee wrongdoing or menacing behavior, so long as the employers' responsive actions and statements are made in good faith and are limited to the appropriate chain of command. However, employers facing the difficult task of preserving the security of their employees while also protecting against their own potential defamation liability should remain cautious when balancing these goals, and obtain professional assistance prior to investigating and responding to threats of violence whenever possible. *Marvie Achanzar v. Ravenswood Hosp.* Case No.: 1-00-2586, Illinois 1<sup>st</sup> District Court of Appeals, December 11, 2001.

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## QUOTABLE

"Law must be stable, and yet it cannot stand still." Roscoe Pound,  
*Introduction to the Philosophy of Law*, 1922

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