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## LABOR UPDATE

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

#### **EMPLOYEE BRANDED AS “RELIGIOUS FANATIC” PROCEEDS WITH DISCRIMINATION SUIT**

Victoria Leyva, an Evangelical Christian Baptist, worked for the University of Chicago Hospital. Leyva, a recruiter in the employment department, consistently received high marks on her evaluations. Leyva’s troubles began after a new supervisor, JoAnn Shaw, arrived in the department.

Shaw immediately noticed a calendar and clock, bearing the name of Leyva’s church, on her desk. Shaw directed Leyva to remove the items and placed a note in Leyva’s file, “Baptist church referrals off desk.” Escalating the tension, Shaw directed Leyva and others to no longer recruit at churches or church sponsored job fairs.

Shaw confided to other employees that she believed Leyva to be a “religious fanatic” and wanted Leyva fired. This got back to Leyva, along with information that a reimbursement check was being held back because Leyva was a “Bible thumper” and the supervisor was making her “sweat.”

While on vacation, Leyva heard from a fellow employee that it looked like she was going to be fired. Leyva returned from vacation with a resignation letter, and arrived to see her desk packed up and her office used for storing boxes. Leyva handed in her resignation letter.

Leyva complained to the EEOC, who took up her case and filed suit against the hospital, alleging that Leyva had illegally been discharged based upon her religion. The hospital claimed that the case should be dismissed because Leyva had resigned. The United States Court of Appeals in Chicago ruled in January that the case could proceed to a trial by jury.

The court found that under the circumstances, a jury could conclude that Leyva had been “constructively discharged.” That is, the employer’s acts were so intolerable that a reasonable person would have no alternative other than to quit. The court found that based upon the facts before it, Leyva did not have to wait around to be fired, but rather could reasonably infer that the

hospital was going to discharge her from the various actions and words of the supervisor. The hospital argued that the packed up office shouldn't be considered, because Leyva admitted that she had brought her resignation letter with her the morning she saw her belongings put in boxes. The court brushed that contention aside on the basis that the letter, although written, had not yet been submitted when Leyva arrived that day.

This case is noteworthy for two reasons. First, it illustrates how an employer's efforts in pushing an employee to resign can backfire. In serious enough circumstances, the employer's actions can amount to a "constructive discharge," and thus the employer will have to defend the case as if it had discharged the employee. Second, it demonstrates how a supervisor, acting on his/her irrational intolerance of an employee's personal expression (in this case, of religious beliefs) can lead to employer liability. *Equal Employment Opportunity Commission v. University of Chicago Hospitals*, 276 F.3d 326 (7<sup>th</sup> Cir. 2002).

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### **EMPLOYER STRIKES BACK AGAINST E-MAIL ATTACK BY DISGRUNTLED FORMER EMPLOYEE**

Fired Intel employee Kourosh Hamidi obtained the company e-mail list and launched a protest campaign. On six occasions, he sent electronic mail messages to between 8,000 and 35,000 Intel employees. After Hamidi ignored the company's formal requests to stop this activity, Intel filed suit, seeking an injunction and damages.

The California appellate court found for Intel, reaching back to the ancient common law principle of "trespass to chattels" to support its decision. That is, the court held that any intentional interference with the enjoyment by another of his personal property is a trespass. Here, Hamidi's extensive e-mail activities were viewed by the court as a clear attempt to intentionally interfere with Intel's business.

The court brushed aside Hamidi's arguments that "cyberspace" is necessarily free and open and that free speech rights protected his activity. It pointed out that Hamidi's unwanted e-mail was distracting thousands of Intel employees from their work. It also discounted Hamidi's position that e-mail is no different than first-class mail, the sending of which is largely protected by the Constitution. The court said that it would likewise prohibit a person from sending thousands of unwanted letters to a company or making thousands of unwelcome telephone calls.

This case illustrates that employers are not helpless when a former employee taps into the company's e-mail system to advance his complaints or make mischief. *Intel Corp. v. Hamidi*, Case No.: C003076 (Cal. Ct. App. 3<sup>rd</sup> Dist. Dec. 10, 2001).

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## **EMPLOYER NOT LIABLE FOR HARASSMENT OF FEMALE CO-WORKER DESPITE LACK OF FORMAL COMPLAINT POLICY**

In the January, 2001, edition of the *Labor Update*, we reviewed a case where Peters & Lyons, Ltd. convinced the federal district court to reject the harassment, discrimination, and retaliation claims of a female factory worker who had been discharged for serious acts of sexual misbehavior. Recently, the federal court of appeals in Chicago handed the employee a second defeat.

The machine operator employee notified her human resources manager that a male co-worker had, for a long time, sexually harassed her by touching her inappropriately and making offensive remarks. The human resources manager immediately began an inquiry, and the male co-worker was suspended, pending the outcome of the investigation. Almost immediately, the male co-worker brought counter-charges of sexual harassment, claiming that the female machine operator had engaged in offensive behavior as well. The company's thorough investigation, in which many employees were interviewed, confirmed that both workers had engaged in outrageous behavior creating a sexually hostile environment, and both were discharged.

The discharged female employee filed suit in federal court, claiming the company had failed to protect her from sexual harassment, and had discharged her in retaliation for the complaint she made against her male co-worker. The district court ruled for the company on all the employee's claims and she appealed.

The employee argued on appeal that the company should be liable for her co-worker's harassment because the company did not have a formal, written harassment policy. The appeals court rejected this contention, finding that although it is highly advisable for employers to have formal, written harassment policies, such policies are not strictly required. Rather, the court observed that the law requires only that employers have an effective procedure in place to discover and resolve complaints of harassment. The court noted that the female employee, several years before, had made a sexual harassment complaint against another co-worker at the company. Therefore, the fact that the employee knew how to register a complaint showed that the company had an effective procedure in place, despite the absence of any formal, written policy.

Finally, the court rejected the employee's claim that the company had retaliated against her by discharging her for her complaint against the male employee. The employee claimed that the company's reason for her discharge, that she herself had committed sexual harassment, was false. In support of her claim that this reason was pretextual, the employee pointed to the fact that the company's human resources manager shredded his investigation notes, which, she alleged, would have cleared her. However, this argument also failed. No evidence existed showing any hostility between the human resources manager and the employee prior to her termination. The human resources manager had, in fact, investigated two prior complaints of harassment brought by the employee and had initiated the discharge of both of the harassers. The court said that employers are not required to keep every scrap of paper regarding an employment decision. Rather, it is sufficient if the employer keeps the final document that memorializes the employment decision.

This case underscores several points. Employers are well advised to have in place anti-harassment policies that are communicated to employees. Employers should thoroughly investigate harassment claims, carefully documenting the facts found. Finally, even though an employee has filed a discrimination claim, this does not mean that the employee cannot be disciplined if he or she is found to have engaged in misconduct.

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### **BITS & PIECES**

According to a recent report in the Wall Street Journal, in 2001, only 9% of workers for non-public employers were union members (down from 17% twenty years ago.) Three unions that have been on the organizing trail, HERE (representing hotel and restaurant workers) UNITE (representing garment workers and now expanding into offices and industry) and SEIU (representing janitors, security guards and a variety of other service workers) have largely turned away from the traditional organizing route of a government-supervised National Labor Relations Board election. Instead, these unions have developed campaigns to pressure employers to recognize and bargain with them using publicity, picketing, political pressure, boycotts, and sometimes strikes.

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The Equal Employment Opportunity Commission reports that claims of job discrimination reached a six year high in 2001. Although race and gender claims comprised the majority of the complaints filed, age and disability charges had the greatest rates of increase. Despite the increase in the number of charges, approximately two out of three of the claims “closed” by the EEOC were found to lack evidence that discrimination had occurred. The EEOC attributes the greater number of charges to the recent economic slowdown and the “graying” of the workforce. Additionally, “baby boomers” are viewed as more willing to file charges against employers in contrast to earlier generations.

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### **QUOTABLE**

“People are getting smarter nowadays; they are letting lawyers, instead of their conscience, be their guide.”

-Will Rogers

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