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LABOR UPDATE

Recent Developments in Labor and Employment Law

CREATION OF PERMANENT, LIGHT-DUTY POSITION NOT REQUIRED AS ADA ACCOMMODATION

The U.S. Circuit Court of Appeals in Chicago recently ruled that an employer was not obliged to indefinitely assign an injured employee to a new, light-duty position as a reasonable accommodation under the Americans with Disabilities Act (ADA). The court declared that it was not “reasonable” to require an employer to create a new job specifically tailored to an employee’s individual abilities.

In July 1997, plaintiff Tamara Watson began working on her employer’s assembly lines. Ten months later, she suffered a shoulder injury that inhibited her ability to perform repetitive, assembly-line tasks. Her employer then temporarily assigned her to series of other jobs that she could perform.

Watson’s doctor later informed the company that Watson was permanently unable to resume any tasks requiring the repetitive movement of her upper right arm. With no manual jobs available for someone with Watson’s limitations, her employer then let her go.

Watson sued under the ADA, claiming that her employer should have accommodated her “disability” by permanently assigning her to the type of light-duty jobs she had previously been given. Her claim was rejected by the trial court, which held that her employer did not have to create any new position custom-tailored to Watson. The court of appeals affirmed, declaring that even if an employer regularly allowed its injured employees to work light-duty positions while recovering—a practice encouraged by the ADA and many workers compensation insurers--the ADA does not require the employer to make such work available indefinitely to employees whose rehabilitation has concluded unsuccessfully.

Because Watson could no longer perform any of her employer's assembly-line jobs, her request for accommodation essentially sought a new and different job, rather than an accommodation in the performance of her regular one. As such, this request was not reasonable, and therefore not required by the ADA. *Watson v. Lithonia Lighting*, 304 F. 3d 740 (7th Cir. September 20, 2002).

Although many employers would be wise to continue their practice of accommodating injured workers by temporarily assigning them to available light-duty work, this case clarifies that employers are not required to "make work" or offer light duty assignments on a permanent or indefinite basis. Employers should consult legal counsel for help in determining when to offer and end such temporary assignments.

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WEB SHOPPING AT WORK TIME WASTER OR EMPLOYEE BENEFIT?

With the increasing availability of workplace computers with high speed internet access for employees to carry out their employer's work, the issue of personal use for web shopping and E-bay auction activities has grown.

Many employees see such access as a convenience provided by their employer, which can be utilized before or after working hours, at lunch time or perhaps when "there is nothing to do." Many employers see such activity during working time as a time waster and drain on productivity, especially in an economy when employers are trying to make do with smaller work forces.

A national research firm recently studied employee internet shopping activities and reported some interesting results. Internet users prefer shopping on line at the office over home 2 to 1. Internet shopping's peaks are from 10:00 a.m. to noon and 3:00 p.m. to 5:00 p.m., with a lull between noon and 1:00 p.m.! Devotees of auction sites spend almost twice as much time on the internet than more traditional on line shoppers.

Employers are responding in a number of ways. Some have elected to do nothing. Some are issuing strict edicts against any personal use of company computers at any time. Others are restricting (appropriate) personal use of company internet connections to meal periods, breaks or other defined non-working times. Still others are simply raising the issue and asking their employees to be prudent, reasonable and not abuse the opportunity to use company computers for such legitimate personal purposes.

Once having made some sort of policy on the subject, the question arises as to how can or should the company ensure compliance with the policy? More and more, employers are utilizing monitoring software, such as is available at Vericept.com to determine compliance with its internet policy. In a more open, less "Big Brotherish" approach, some companies have installed software, such as "FastTracker" (fatline.com) which allows each employee to use a pop-up menu on their own screen to view the time he or she has spent during a given period on business vs. non-business internet use.

Before considering any monitoring activities, it is important for an employer to publish and distribute a carefully drafted policy on internet usage, which includes language notifying employees that their use of business computers and the company

computer network is subject to monitoring. This step puts the employee on notice that his or her personal emails to a friend sent from or received at the office computer are not private and thus lessen the company's exposure to a claim for invasion of the employee's privacy rights. Please contact Peters & Lyons, Ltd., if we can be of assistance in crafting or reviewing your internet policy.

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RETALIATORY DISCHARGE TORT EXPANDING IN ILLINOIS?

In 1981, the Illinois Supreme Court, in *Palmateer v. International Harvester*, held that an employer's firing of a "whistleblower," - someone who as complained or threatened to complain the alleged unlawful activities of company officials - was an actionable civil wrong, for which the discharged worker could bring before a jury to receive money damages, including punitive damages.

Since then, a number of Illinois decisions have further shaped this tort, strictly limiting it to where an employee's report concerns clear and important public policies. Thus, employees discharged after complaining about their company's improper dumping of wastes or securities irregularities have been allowed to proceed, since these subjects are close to the public interest. In other cases, employees fired after threatening to go the IRS to report their employer's tax fraud or reports to banking regulators, the courts have not extended retaliatory discharge protection.

In all of the appellate court decisions thus far, the cases have dealt with alleged activities of company officials which have a *connection* with the company's business, and not the purely personal (mis)conduct of company owners, executives or supervisors. However, the Illinois Supreme Court is now considering the latter scenario.

In that case, employee Vorpapel was fired after reporting his boss, Maloney to the police. Vorpapel had overheard Maloney make statements about abusing his (Maloney's) own daughter. Maloney was subsequently arrested and plead guilty to charges as a result of Vorpapel's police report.

After the circuit judge dismissed Vorpapel's case, on the ground that the tort of retaliatory discharge does not cover employees who report non-work related incidents, an Illinois Appellate Court for the First District reversed, holding that the Supreme Court's ruling in *Palmateer* did not necessarily exclude such employees or make a distinction between work and non-work related reports.

The Illinois Supreme Court will now weigh this important case. If the appellate court's decision is sustained, it could result in a significant expansion of the tort of retaliatory discharge, providing an avenue for former employees to sue their former employers for firings related to threats to expose the personal, non-work related activities of company officials or supervisors.

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BITS AND PIECES

The EEOC reported that it won 60 percent of the discrimination suits which it brought, as contrasted with the 27 percent success rate for suits brought by private plaintiffs.

The EEOC filed 1,963 suits over the past five years (570 on behalf of classes and 1,212 on behalf of individuals). Thirty percent of these were for sex discrimination, twenty-two percent for retaliation, thirteen percent for race discrimination, thirteen percent for disability discrimination and eight percent for age discrimination.

A finding of “substantial evidence” by the EEOC at the conclusion of its investigation is not an indication that the EEOC will necessarily bring suit on behalf of the charging party. In most cases, the EEOC simply lacks the resources or interest to bring suit, and instead merely issues a “right to sue” letter to the charging party, advising of the individual’s right to institute suit in federal court (within 90 days after such letter), assuming they can find a lawyer willing to advance their case, or file as a pro bono plaintiff.

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QUOTABLES

*The lamb and the lion will lie down together
when the lamb hasn’t anything the lion wants.*

Anonymous

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If the law supposes that, said Mr. Bumble, the law is an ass, an idiot.

Dickens

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Labor disgraces no man; unfortunately you occasionally find men disgrace labor.

Ulysses S. Grant

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