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First Quarter, 2003

LABOR UPDATE

PETERS & LYONS, LTD. WISHES YOU A HAPPY, HEALTHY AND PROSPEROUS NEW YEAR

Recent Developments in Labor and Employment Law

EMPLOYEE'S DISCHARGE FOR REFUSAL TO "INCRIMINATE" SELF DURING INTERNAL INVESTIGATION IS NOT RETALIATION

An Illinois Appellate Court recently upheld the dismissal of a claim for retaliatory discharge in which a former employee, Darryl N. Veazey alleged that his employer, LaSalle Telecommunications, Inc. (LaSalle), unlawfully terminated him for refusing to provide a voice recording for the company to use in investigating harassing voice mail messages. Veazey contended that LaSalle discharged him in retaliation for having invoked his constitutional rights against self-incrimination.

This matter arose when LaSalle began investigating a threatening message left on Veazey's supervisor's voice-mail. Several persons who listened to the message believed that it was Veazey's voice on the tape. A month or so later, another message was left on this same supervisor's voice mail, this time by a female caller who threatened the supervisor's wife.

LaSalle questioned Veazey and directed him to read a transcript of the original message so that his voice could be recorded, analyzed, and compared to that of the caller. Veazey refused and was suspended without pay. Several days later, LaSalle again ordered Veazey to make the recording. When he refused a second time, his employment was terminated.

Veazey alleged that his discharge violated public policy, a necessary element of a retaliatory discharge claim. Specifically, he contended that his discharge violated the privilege against self-incrimination set forth in the United States and Illinois Constitutions.

Like the circuit court, the appellate court rejected Veazey's claim, noting that this constitutional privilege only applies to governmental action, not to the activities of private parties. The appellate court further found that, even as it applies to the government, the privilege only protects against self-disclosure of testimonial or communicative evidence, and does not cover statements made solely for identification purposes, like those in a police line-up or, as in Veazey's case, for voice testing.

In affirming the dismissal of Veazey's retaliatory discharge claim, the court concluded that LaSalle's conduct simply was not prohibited by the constitution and, because it was not otherwise restricted by law, did not run afoul of any other public policy. *Veazey v. LaSalle Telecommunications, Inc.*, 779 N.E.2d 364 (1st Dist. 2002).

Although the specific employer conduct complained of in this case was not unlawful, companies should be mindful nevertheless that certain other internal investigative tactics (e.g., polygraph testing, criminal background review, agreeing to forego criminal charges in exchange for cooperation, etc.) are regulated strictly, if not prohibited outright, by law. Employers are advised to consult with legal counsel when conducting an important investigation, particularly before taking any adverse employment action based on its results.

SEX DISCRIMINATION "THE PARAMOUR PREFERENCE"

Most often, "quid pro quo" sexual harassment cases involve an employee who is fired, demoted, or denied a promotion because the employee will not bow to the romantic overtures of his or her supervisor. But what about situations where the subordinate willingly agrees to the boss' advances and, as a result, that employee receives "better" treatment than his or her co-workers? Who, if anyone, is the victim?

In a case recently decided by the United States Court of Appeals for the Seventh Circuit, two male employees, Gerald Schobert and Ronald Werner (Schobert and Werner), brought suit against the Illinois Department of Transportation (IDOT), based on sex discrimination. They claimed that the sole female co-worker in the shop received preferential job assignments and other special treatment because she participated in various risqué frolics at work with her supervisor, such as sitting on his lap and taking her shirt off. Schobert and Werner contended that IDOT discriminated against male workers by permitting the sole female employee to be the "beneficiary" of quid pro quo sexual harassment.

Whether the female employee was herself harassed was not the question. She had not filed a charge. Whether she had consented to the inappropriate activity was not at issue. Rather, the court focused on whether employees who were disadvantaged because of the activities of another employee and her supervisor constituted actionable sexual discrimination.

The court decided that instances of "paramour preference" did not violate the sex discrimination prohibitions found in Title VII of the federal civil rights law. Specifically, the court found no sex discrimination because Schobert and Werner had not shown that their gender

(male) had made them more susceptible to ill treatment. The court noted that had there been other women workers in the shop, they would have been similarly disadvantaged by the playful relationship between the supervisor and the female employee in question. The court observed

that, although intra-office “romances” are obviously bad for morale and should be discouraged by employers, Title VII does not prohibit employers from favoring employees because of personal relationships so long as the special treatment accorded the employee is not based on an impermissible classification. *Schobert v. Illinois Department of Transportation*, 304 F.3d 725 (7th Cir. 2002).

UNION ORGANIZING DRIVES WITHIN YOUR COMPANY’S E-MAIL

Traditionally, union organization campaigns have been conducted by union organizers contacting employees outside of work, or by union sympathizers “talking union” with their fellow workers within the workplace. Over the years, many employers have adopted rules that prohibit solicitation of workers during work time and distribution of pamphlets, union cards and other organizing materials on company property at any time.

The National Labor Relations Board (NLRB), while guarding the rights of employees to organize and support unionization attempts, has endorsed properly worded employer “no-solicitation,” “no distribution” rules. Sometimes, however, employers with the right rules in place have run afoul of the federal labor laws by applying a double standard. For example, violations have been found when employees are allowed to solicit each other to participate in a Super Bowl pool during working time, but not talk union, or when the local Girl Scout troop is allowed to set up a table in the company’s lobby to hand out order forms and solicit sales, but union organizers are banned from the premises.

Company e-mail systems now give unions the *potential* of increased access to employees. While employers may (and should) adopt rules concerning non-business use of their e-mail systems, lax enforcement can cause problems. In a recent case, a NLRB administrative law judge found that a company’s e-mail policy, which banned the use of its system “to solicit or proselytize for commercial venture, religious or political causes, outside organization or other non-job related solicitations” was neither overly broad nor unlawful. However, because the company had allowed United Way and Weight Watchers access to its e-mail system, the administrative law judge found that the company violated federal labor law when it disciplined an employee after he had used the e-mail system to contact his fellow workers to recommend they join a union. *The Guard Publishing Company and Eugene Newspaper Guild*, 2002 WL 336963 (NLRB Div. of Judges).

This case emphasizes an employer’s need to have a well-crafted e-mail policy, which is communicated to its workers, and to enforce the policy to keep the company’s e-mail system private.

**A WORD TO THE WISE:
EMPLOYMENT TAXES TAKE PRIORITY**

The Internal Revenue Service (IRS) can penalize an employer for any willful failure to collect or truthfully account for and pay withheld income and Social Security taxes. Federal employment taxes that are withheld from employees' paychecks – income, Social Security, and Medicare taxes – are considered government property that an employer holds "in trust" until they are paid.

In determining who should be penalized, the IRS may, and often does, purse more than one person. Typically, the IRS targets company owners, directors, officers, employees who are authorized to sign company checks, and those responsible for deciding which bills are paid. However, anyone responsible for collecting or paying a company's employment taxes can be penalized. An employer that does not intend to evade taxes, but taps into the funds may still be penalized. The IRS considers an employer's use of withheld employment tax money to ease other financial pressures to constitute willful behavior.

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BITS & PIECES

Beware the Hair

Angelisa Garret is suing Enterprise Rent-A-Car in St. Louis federal district court for race discrimination, claiming that Enterprise treated her differently than white workers in enforcing its dress and grooming rules. Garret, an African-American woman who had dyed her hair for years, came to work one day sporting what the company claimed was a new hair color, which it characterized as "pink fuschia." Enterprise wanted Garret to return her hair color to its original state, but agreed to let her keep the alleged new shade if she agreed to wear her hair pulled back while at work. When Garret refused, Enterprise fired her. Enterprise claims that it was merely enforcing its neutral grooming code, which calls for a "conservative hairstyle." Garret contends that the company told her that red tint was not of her own ethnic origin, but that it allowed white employees to dye their hair blond.

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QUOTABLE

*"Rewards should not be out of proportion,
punishments should not be arbitrary."* Sun Tzu

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