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Second Quarter, 2003

## LABOR UPDATE

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

#### **EMPLOYER COUNTERCLAIMS IN DISCRIMINATION CASES— ---SWORD, SHIELD OR BOOMERANG?**

Employers defending groundless discrimination claims often feel helpless, facing the prospect of paying legal fees to defend themselves in a case they should win. Sometimes, the employer reaction is to “push back,” on the theory that “the best defense is a good offense.” The tactic can be successful, or compound trouble, depending on the circumstances, as illustrated in two recent cases.

The first case involved the suit of a 25 year employee, Hernandez, against his former employer for age and national origin discrimination. The company took the offensive, filing a counterclaim alleging that Hernandez had been involved in theft, and therefore owed the company money, as damages. However, the counterclaim was dismissed on the basis that the company’s evidence was weak and any alleged misconduct had occurred many years before.

Hernandez counter-punched and alleged that the company’s filing of the counterclaim was itself an unlawful, retaliatory act, in violation of the federal civil rights act.

At trial, the jury was not impressed with Hernandez’ original claims of age and national origin discrimination. However, the jury seized upon the company’s failed counterclaim and found illegal retaliation, awarding Hernandez \$75,000 in compensatory and punitive damages. *Hernandez v. Crawford Building Material Co.*, 321 F. 3d 528 (5<sup>th</sup> Cir. 2003).

In another federal court case, the company counterclaim strategy fared better. Elaine McLaughlin was employed as a manager by the Chicago Transit Authority (“CTA”). After her separation, McLaughlin filed a discrimination suit against the CTA. During the pre-trial discovery phase of the case, McLaughlin revealed that while still employed, she had secretly accessed and removed certain confidential CTA files that she

believed would later bolster her discrimination claims. Reacting, the CTA filed a counterclaim against McLaughlin for “breach of fiduciary duty,” seeking the return of \$150,000 in salary which CTA had paid her since the date she secretly obtained the documents.

In ruling against the employee’s motion to dismiss the counterclaim, a federal judge in Chicago ruled that the case could proceed to be heard by the jury because the CTA’s counterclaim had properly alleged all of the elements of a breach of fiduciary duty, namely, 1) as a manager, McLaughlin was a fiduciary of CTA, 2) she deliberately violated company rules by copying and removing confidential files and 3) CTA was damaged by continuing to pay her salary, not knowing of her improper actions. *McLaughlin v. Chicago Transit Authority*, 2003 WL 253161 (N.D. Ill.2003).

These cases illustrate the potential benefits and pitfalls of an employer counterclaim in defending suits brought by employees. Before utilizing this tactic, the employer is well served to be sure there is a sound basis for the claim, to avoid the boomerang effect of a claim of retaliation if the counterclaim is unsuccessful.

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## **SUPREME COURT OFFERS SOME RELIEF FOR EMPLOYERS IN PUNITIVE DAMAGE BATTLEGROUND**

In employment cases, as well as other litigation, corporate defendants are often concerned with scenario where the actual, compensatory damages of the plaintiff are rather low, but the jury awards huge punitive damages against the company. Although judges retain the right to modify an out of bounds jury award, guidance from our highest courts has not been extensive. On April 7, the United States Supreme Court issued an opinion discussing the issue and setting out three “guideposts” in determining whether a punitive damage award should be set aside as excessive:

1. The *degree* of a defendant’s wrongdoing toward the plaintiff. The Court commented that the matter should not turn into a trial of the company in general or its actions toward others, but rather focus on its actions with respect to the plaintiff and the degree of seriousness of the company’s action.
2. The *ratio* between the actual harm caused the plaintiff and the punitive damage award. Although the Court did not set a precise standard, it signaled that a ratio of more than 10 to 1 (punitive to compensatory damages) should be disfavored.
3. The difference between the jury’s punitive damage award and civil penalties imposed in comparable cases.

Although this case is generally good news for defendant employers, it may signal a shift in plaintiff’s strategies to focus more on compensatory, pain and suffering damages, to attempt to increase the total award. *State Farm Mutual Insurance Co. v. Campbell*, No. 01-1289 (April 7, 2003).

**NOT SO FAST!  
EMPLOYER PROMOTION OF WOMAN  
USED BY FEMALE DISCRIMINATION PLAINTIFF  
AS EVIDENCE OF ILLEGAL RETALIATION!**

Lori David worked as a security guard for Caterpillar in East Peoria, Illinois. On several occasions, she unsuccessfully sought advancement to a supervisory security position within the company. She made a formal complaint of sex discrimination, alleging that no woman had ever been awarded a security supervisory post, that her superiors had stated that no woman would ever be promoted and that Caterpillar had given her incorrect and conflicting information as to what standards were required for such a promotion.

While Lori David's complaint was pending, a vacancy arose for a security supervisor at the plant. However, management neither posted the job nor advised Lori David that the position was open. Instead, the company approached *another female* security guard, Joni Lusher, told her of the opening and asked her if she'd like the job. Ms. Lusher said "yes," and she was promoted to the vacancy.

Ms. David then amended her discrimination claims to add a claim of unlawful retaliation and a jury agreed, awarding her substantial compensatory and punitive damages. Affirming the jury award, the United States Court of Appeals for the Seventh Circuit held that Lori David had proven enough to substantiate her retaliation claim. Evidence had been presented of statements of upper management that the vacancy in question had to be filled by "a woman," because of the existence of a pending suit by "a woman in Peoria." The appeals court found that the jury could reasonably have inferred that this reference was to Lori David's pending suit, and that the granting the position to another female, Joni Lusher, was to punish or retaliate against Lori David. *David v. Caterpillar, Incorporated*, 2003 WL 1401242 (7<sup>th</sup> Cir. March 17, 2003).

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**THE JUDGE COMES TO THE RESCUE  
FOR THE "QUEEN OF MEAN"**

A Manhattan jury found that notorious hotel magnate Leona Helmsley had fired Charles Bell, the manager of the Park Lane Hotel, because he was gay. The jury originally awarded \$11.2 million in damages to Bell, but the judge cut the award to \$500,000. The judge noted that the jury went beyond the facts because, "the spectre of the 'Queen of Mean' [was] alive in the courtroom," and the jury couldn't see past her abrasive personality. The judge felt that the evidence of Leona pulling on Bell's goatee and lightly slapping him was "sporadic" and didn't justify the large award.

The judge noted that punitive damages in these sorts of cases need to be curtailed. Judge Tolub observed that punitive damages, "...are not a game of Lotto and...Mrs. Helmsley is not a 4 billion dollar piñata for every John, Patrick or Charlie to poke a stick at in the hopes of hitting the jackpot."

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## BITS & PIECES

On April 21, the United States Supreme Court agreed to hear arguments and decide whether employees at the lower end of the protected age group (40+) under the federal age discrimination law can establish a claim for “reverse discrimination” when workers in the protected age group nearing “normal retirement age” are offered early retirement buy-out packages. The United States Court of Appeals for the Sixth Circuit in Cincinnati recently ruled that such a case may proceed and the Supreme Court will be called upon to decide this issue, which will be closely watched by employers who have or intend to utilize “buy-out” offers for older workers.

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The United States Department of Labor is proposing the first overhaul in twenty-eight years of the Wage & Hour regulations, relating to which employees are or are not exempt. Under the proposals now under review and subject to further debate, any employee earning less than \$22,100 would automatically qualify for overtime pay, regardless of the employee’s authority and duties. This will have an impact in many retail and hospitality settings, where assistant managers sometimes earn less than that amount, but currently have the requisite managerial authority to qualify for an overtime exemption. The proposed regulations seek to clarify the outmoded “tests” for the “executive” and “administrative” exemptions. Final regulations will soon be issued by the U.S. Department of Labor.

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Small employers welcomed the United States Supreme Court’s April 23<sup>rd</sup> decision, holding that in determining the number of employees of a company, for purposes of coverage under the Americans with Disabilities Act (where 15 employees are required for the Act to apply), company owners, who may also be employees, should not be counted. *Clackamas Gastroenterology Associates v. Wells*. 01-1435.

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## QUOTABLE

*‘The horror of that moment,’ the King went on, ‘I shall never, never forget!’  
‘You will, though,’ the Queen said, ‘if you don’t make a memorandum of it!’*

Lewis Carroll

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