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LABOR UPDATE

Recent Developments in Labor and Employment Law

EMPLOYER'S UNEMPLOYMENT APPEAL THWARTED BY UNRULY ALARM CLOCK!

Illinois employers, when contemplating whether to contest unemployment claims of discharged employees, are often confronted with the question of what actions amount to "misconduct" sufficient to deny a claimant benefits under the Illinois Unemployment Insurance Act ("Act"). A recent Illinois Appellate Court decision has dealt a blow to employers in this area.

Phillip Wrobel was a pressman for the Chicago Tribune. After many instances of tardiness, for which Wrobel was given written warnings and then suspended pursuant to the Tribune's attendance policy, Wrobel was fired. Although the Illinois Department of Employment Security denied his unemployment claim, Wrobel appealed.

The Illinois Appellate Court in Chicago ruled that there was no misconduct here. The court held that for an employee to be guilty of "misconduct" under the Act, the employer must show that the worker deliberately and willfully violated a reasonable work rule and that the violation either harmed the employer or such violation has been repeated by the employee, despite a warning or other explicit instructions from the employer.

Wrobel had claimed that on the day he was fired he was late because a power outage had disabled his electric alarm clock and he had forgotten to set his wind up clock that he used as a back up. The court held that Wrobel's act was not conscious or intentional but rather negligent and unconscious. The court found that since there was no finding that Wrobel *chose* to oversleep, his serial oversleeping problem could not be deemed misconduct, because it was not something he had set about to do. The court observed, "[o]ne does not typically forget to do something intentionally; forgetting is a matter of carelessness."

This decision has serious implications for employers seeking to maintain a low level of unemployment insurance tax, which is based upon past claims experience. Clever claimants will seek to portray their repeated acts of malfeasance or nonfeasance for which they are discharged as "mistakes," or "acts of unconsciousness or negligence" to bring their claim within this ruling and collect unemployment benefits. (*Wrobel v. Illinois Department of Employment Security*, 2003 Ill. App Lexis 1361).

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EMPLOYEE VICTIMS OF DOMESTIC OR SEXUAL VIOLENCE GAIN LEAVE OF ABSENCE RIGHTS IN ILLINOIS

A new law in Illinois grants limited leave of absence rights to certain employees who are victims of domestic or sexual violence. The Victims' Economic Security and Safety Act ("VESSA") was enacted help such employees cope with the aftermath of such violence.

The law applies to Illinois employers of more than 50 employees. Limited leave of absence rights are accorded when an employee, or a member of the employee's family or household, has been subjected to domestic or sexual violence and such leave is needed for seeking medical attention for physical or psychological injury, obtaining services from a victim services organization, obtaining psychological counseling, participating in safety planning, relocation or other activities to prevent future harm, or securing legal assistance to ensure the safety of the employee, or family or household member.

Similar to the federal Family Medical Leave Act ("FMLA"), VESSA provides for up to 12 weeks of unpaid leave during any 12 month period. This leave can be taken all at once, intermittently, or on a reduced work basis. Like the FLSA, the employer must maintain the health insurance of an employee on VESSA leave, on the same basis as if the employee was actively employed.

If possible, the employee is required to give at least 48 hours notice to invoke such leave rights. This rule is relaxed in emergency situations. The employer may require certification from the employee that the employee or family or household member has been the victim of such violence and that the leave is needed for one of the purposes set forth above. This can be satisfied by a sworn statement from the employee, a statement from a victim assistance organization, attorney, clergy member or other professionals assisting the employee, or police, judicial or medical reports. VESSA requires the employer to keep all such information in strict confidence.

An employee returning from a "VESSA leave" is entitled to reassignment to his or her former job, or an equivalent position if the former job is not available.

Sometimes, victims of such violence seek to modify their schedules, environment or other aspects of their work to protect against further attacks. VESSA requires employers to reasonably accommodate such requests, unless the employer can demonstrate that such accommodation would be an undue hardship.

VESSA further prohibits an employer from discriminating against an employee who is (or who the employer perceives is) a victim of such violence, as well as prohibiting retaliation by an employer against an employee who seeks to exercise rights under this law.

Employers covered by this law (over 50 employees) are further required to post an Illinois Department of Labor notice, advising employees of their rights under VESSA.

In case of employer violations of the new statute, VESSA provides no private right of action, but rather empowers the Illinois Department of Labor to investigate employee complaints

and bring award back pay with interest, reinstatement, promotion, reasonable accommodation and attorneys fees.

Illinois employers covered by VESSA are well advised to:

- a) Obtain and post the necessary IDOL notice of rights under this law.
- b) Consider revising handbooks and other statements of policy to include reference to procedures to be followed for requesting and processing VESSA leave requests.
- c) Train managers and supervisors as to how to respond to requests by employees for leave under VESSA, including requests for reasonable accommodation.

Please contact Peters & Lyons if we can help you with any element of compliance with Victims' Economic Security and Safety Act

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WAGE AND HOUR SUITS ON THE RISE

Wage and hour suits, under the federal Fair Labor Standards Act (FLSA), claiming overtime pay violations have dramatically increased. In a recent two-year period, the filing of such suits across the country increased 25%. More and more, these suits are being brought as "class actions," which have the potential of dramatically increasing the amount recovered in such litigation, thus being more attractive to plaintiffs and plaintiff's counsel. In the past five years, 450 such class actions have been brought in federal court. Class actions are an employer nightmare as the litigation process necessarily becomes more complex and expensive, and settlement more difficult.

Many of these suits stem from the failure of the employer to observe the rigid standards of the FLSA and the Department of Labor in determining which employees are exempt from overtime and which are not. Employers are well advised to carefully examine those employees, that they have been treating as exempt and immediately make the necessary correction if an employee's duties, method of payment and other requirements to establish and maintain exempt status are not present.

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WAGE SURVEYS 2003-2004

Various employee wage and benefit consultants report that U.S. companies budgeted pay increases have averaged 3.5 per cent in 2003 (down from 4% in 2002) and are expected to be slightly less (3.3%) in 2004. Over the past ten years, pay increases have exceeded the rate of inflation by between 1.1 to 2.6 per cent. However, the net of these pay increases over the inflation rate has been eroded by companies shifting more health care costs to workers. Recent studies have also noted that more and more companies are turning to performance based, merit wage increases and away from across the board pay adjustments.

EMPLOYEE SPAMMER OVERWHELMS INTEL IN COURT

In the Second Quarter, 2002, *Labor Update*, we reported that a California appellate court had allowed a suit, brought by Intel against a former employee, Kourosh Hamidi, to go forward. Hamidi had launched an intense e-mail campaign against his former employer, sending up to 35,000 messages to various Intel employees, castigating the company and urging the employees to quit their jobs. The appellate court found that Intel could proceed on the legal theory of “trespass to chattels,” i.e. that the tort of trespass is committed when one intentionally interferes with the personal property of another (in this case, Intel’s email system). Hamidi then filed another appeal.

Now, the California Supreme Court has reversed that decision, holding that Intel could not show actual damage to its computer system as a result of Hamidi’s over 35,000 incoming emails to Intel employees. Intel’s claim that it was damaged by the loss of productivity caused by employees reading and reacting to these messages or the company’s efforts to block the incoming messages was not enough. The court distinguished this case from other “cybercases” where it has allowed suits to go forward based on the trespass to chattels theory of law. However, in those cases, the court observed the plaintiff had shown that “spammers” had so overburdened its computer system that it caused malfunction or break down. Since Intel could not show this, the case was dismissed. (*Intel v. Hamidi*, 1 Cal. Rptr. 3d 32 (Cal. 2003)).

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TURN ABOUT...FAIR PLAY?

In the midst of an EEOC employment discrimination suit in Miami alleging violations of law against Hispanic workers, the EEOC’s Miami office had to ask for a trial postponement because its only Spanish speaking lawyer had left the agency! That office’s disclosure, that it has no Spanish speaking lawyers, is in stark contrast to the EEOC’s recent press release that women, blacks, Hispanics and Asians have made gains in the legal profession in recent years. EEOC chair Cari Dominguez recently told the American Bar Association that it was important for the nation’s law firms to be open and inclusive to all individuals. Apparently not so in the EEOC’s Miami office.

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QUOTABLE

“May you have a lawsuit in which you know you are in the right.”

Gypsy Proverb

Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of our firm. Written entirely by Peters & Lyons attorneys, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed or as covering all significant developments in labor and employment law. The LABOR UPDATE is not intended to be a substitute for legal advice. The LABOR UPDATE may be quoted or reproduced if credit is given to the source.

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