

# PETERS & LYONS, LTD.

ATTORNEYS AT LAW

SUITE 1000

25 EAST WASHINGTON STREET

CHICAGO, ILLINOIS 60602

DONALD F. PETERS JR  
CHRISTOPHER P. LYONS  
KATHLEEN V. CROWE

TELEPHONE (312) 346-7300  
FACSIMILE (312) 782-6690  
E-MAIL laborlaw@peterslyons.com

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## **LABOR UPDATE**

*Recent Developments in Labor and Employment Law*

### **MANY CHANGES IN ILLINOIS LAW AFFECT EMPLOYERS IN 2004**

The new "Illinois Whistleblower's Act" provides a specific, statutory right for an employee to sue his employer where the employee can show that he was fired in retaliation for providing information to the government concerning the employer's possible violation of law. Even if the information the employee provides is erroneous, the statute provides protection if the employee reasonably believes that it is true (740 ILCS 174).

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The newly amended Illinois Employment of Strikebreakers Act provides that day and temporary labor services may not send any temporary laborer to any company where a strike or lockout exists (820 ILCS 30).

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Effective January 1, 2004, the Illinois minimum wage law provides for pay (for those employees of at least 18 years of age) of no less than \$5.50 per hour (as contrasted with the federal minimum wage of \$5.15). Effective January, 2005, the Illinois minimum hourly wage increases to \$6.50 (820 ILCS 105).

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Another new Illinois law effective in January prohibits "English Only" policies of employers that restrict an employee from speaking in a foreign language where such communication is unrelated to the employee's duties. Where an employer seeks to have an "English Only" policy, the burden is on the employer to establish the necessity for same and for the employer to communicate this to its employees (775 ILCS 5/2-102).

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As was discussed in detail in the First Quarter 2004 *Labor Update*, the new VESSA law provides that employers with more than 50 employees must provide up to twelve weeks of unpaid leave per year for an employee who is a victim of domestic or sexual violence or who has a family or household member who is a victim of such an act (820 ILCS 180).

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**SUPREME COURT ACTIVE  
IN THE AGE DISCRIMINATION LAW ARENA**

In February, the United States Supreme Court, in a 6-3 ruling, decided that the Age Discrimination in Employment Act protects older workers from preference being given to younger workers, but not the reverse.

Like many other U.S. corporations in recent years, General Dynamics Corp. had a need to downsize its workforce. It offered workers who were close to retirement age special incentives to leave the company. Workers who were within the law's "protected age group" (i.e., over 40) filed suit, claiming that the older workers were being given preferential treatment in violation of the federal age discrimination law. The Court disagreed. (*General Dynamics Land Systems, Inc. v. Cline*, No. 02-1080).

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Last week, the Supreme Court decided to hear arguments as to whether the Age Discrimination Act permits suits where the employer's action has a *disproportional impact* on older workers. In Title VII suits for discrimination based on race, gender, religion etc., employees have long been able to sue under either the theory that they were intentionally mistreated or that the employer's action, while unintentionally discriminatory, had a disproportionate effect upon a certain protected group of workers. However, in age discrimination cases, most federal courts have only recognized the intentional mistreatment theory of liability. Next fall the Supreme Court will hear arguments and decide whether the disparate impact concept will be the law of the land in age discrimination cases. Seventy million American workers are in the (over 40) protected age group. (*Smith v. City of Jackson, Miss.* No. 03-1160).

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**SUPREME COURT TO CLARIFY SEX HARASSMENT LAW**

On March 30, the United States Supreme Court heard arguments to decide whether certain victims of sexual harassment, who quit their job in the face of such treatment will be able to sue their employer for sexual harassment.

In many employment litigation contexts, the doctrine of "constructive discharge" is available as a theory of liability when an employee quits after being subjected to treatment such that a reasonable person in that situation would feel they had no other alternative other than to quit. However, special rules for sexual harassment occurring between co-workers that is not known to management require that the employer take some negative "tangible employment action" affecting the employee in order for the employer to be liable. The Court will now decide whether an employee quitting under duress under such circumstances will amount to a negative tangible employment action and allow the employee to sue for sexual harassment.

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## **COURT DECLINES TO EXPAND TORT OF RETALIATORY DISCHARGE**

Darrell Hancock worked for Chicago Commons Association (CCA). Discovering that it had overpaid wages to Hancock, CCA asked for repayment. When Hancock declined, CCA filed a suit against him, for unjust enrichment and the wrongful withholding of an overpayment of wages. Hancock filed an appearance with the court and shortly thereafter was fired by CCA.

Hancock then filed a counterclaim against CCA alleging the tort of retaliatory discharge, i.e., that he had been fired in retaliation for defending his employer's lawsuit against him, in violation of the public policy of the State of Illinois. In February, the Illinois Appellate Court disagreed, and dismissed Hancock's claim. It held that the tort of retaliatory discharge is only recognized where an employee is discharged in retaliation for his activities and the discharge violates a clearly mandated "public policy." Citing Illinois Supreme Court precedent, the appellate court observed that:

"[P]ublic policy concerns what is right and just and what affects the citizens of the State collectively," and

"Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal...a matter must strike at the heart of a citizen's social rights, duties and responsibilities before the tort will be allowed."

The court went on to discuss that retaliatory discharge claims in Illinois have been allowed in circumstances of discharge for the filing of workers compensation claims or in "whistleblowing" contexts, i.e. where an employee reports alleged illegal conduct of his employer. The court declined to expand retaliatory discharge further. It found that the dispute between CCA and Hancock involved their private, economic claims and not something integral to Hancock's social rights, duties and responsibilities.

This decision is consistent with the attitude of Illinois courts to strictly limit the tort of retaliatory discharge and to generally rebuff the attempts of creative former employees to expand it. (*Chicago Commons Association v. Hancock*, No. 1-03-0741, February 10, 2004).

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## **NEW TWIST ON EQUAL PAY**

Sixteen violinists of *Beethovenorchester*, a renowned German symphony orchestra, have filed suit seeking extra pay. The string section has calculated that they play more notes than the brass, woodwinds and percussion musicians and thus they should receive the equivalent of an extra \$121 for each performance. The case will be heard in a German court in May.

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## **BITS & PIECES**

The New Jersey Supreme court ruled that a construction worker injured while riding a “go cart” could collect under the state’s workers’ compensation law. The court reasoned that since the foreman on the job site had encouraged the hijinx, the worker’s broken ankle from the go cart accident was compensable.

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Investigators have reported that in the past four years a number of employers, particularly fast food restaurants, have been sued by employers whose managers were tricked into conducting strip searches of employees! Perpetrating a hoax, an outsider, posing as a policeman, made phone calls to the managers, identifying a particular employee as a suspect in a theft or drug investigation, and instructing the managers to make body searches of the “suspect.” Incredibly, some of the managers complied and the businesses are now defending suits brought by the employee victims of the hoax.

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## **A MILESTONE FOR THE LABOR UPDATE**

This year marks the 20th year of publication for *The Labor Update*. Over that period of time, approximately 80 quarterly editions have been written by lawyers of the firm as a service and source of information for our friends. We continue to receive many positive comments from recipients of this publication and hope that our newsletter will continue to be of value to you.

The *Labor Update* can also be sent in email form as well. If you would like to receive an electronic version, please contact our administrative assistant Kathena Anderson (312.456.0193). You can also make arrangements with Kathena to add to our list any business associates, clients or friends who may be interested in receiving *The Labor Update*.

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## **QUOTABLE**

*“If you think that you can think about a thing, inextricably attached to something else, without thinking of the thing it is attached to, then you have a legal mind.”*

Henry C. Blinn

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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.

