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LABOR UPDATE

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Recent Developments in Labor and Employment Law

CHICAGO FEDERAL COURT DISMISSES BIAS CLAIM OF CONNIVING PLAINTIFF

Angelita Greviskes brought a national origin discrimination claim against her former employer, Fermilab, in the federal district court in Chicago. During the discovery phase of the case, Greviskes sought various personnel records of Erickson, another Fermilab employee, in an attempt to bolster her case.

Apparently not satisfied with the documents turned over by the employer, Greviskes schemed to send faxed communications to Fermilab's payroll department purportedly signed Erickson, bearing Erickson's social security number and asking for copies of "my" time sheets. A return fax number was provided for a reply.

An alert payroll clerk uncovered the ruse and the court was informed. Looking into the matter further, the court found that the fax in question was sent from a second telephone line in Greviskes' home, the requested number for the return fax was to the (law) office of Ms. Greviskes' husband, and the purported signature of Erickson on the fax was a forgery. Adding to this, the court observed that when confronted by these facts and a request for an explanation, Greviskes' lawyer merely angrily denied that he had anything to do with the allegations and demanded an apology.

Fermilab filed a motion to dismiss the case. In granting the motion, the court observed that it has the inherent power to protect its integrity and punish a litigant for gross misconduct. The court found, "Apparently, plaintiff believes that the processes of this court exist to serve her selfish interests rather than to serve the cause of justice. Plaintiff is wrong, and must be sanctioned in the only manner that will deprive her of the very process she sought to pervert." Judge Gettleman dismissed the complaint, with prejudice, meaning Greviskes may not refile the case, and ordered her to pay Fermilab's legal fees in connection with the motion to dismiss the case. *Greviskes v. Universities Research Association*, 03C257 (N.D. IL June 16, 2004)

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**A HOLE IN THE SHIELD:
PROTECTIVE LAW FAILS TO SAVE EMPLOYER
FROM LIABILITY FOR JOB REFERENCE**

A Wisconsin court of appeals recently upheld a jury's award of \$33,000 in compensatory damages and \$250,000 in punitive damages against an employer that gave a former employee a negative job reference. The employer argued that it was immune from liability in the case, pursuant to a Wisconsin law designed to promote and encourage job references. However, because the court found that the employer acted maliciously in giving the reference, it held that the statute's protections did not apply.

James Gibson worked for Overnite Transportation Company as a dock hand and truck driver for less than six months. He normally worked out of Overnite's non-union facility in Kaukauna, WI. However, during a strike at Overnite's unionized Milwaukee facility, Gibson was temporarily assigned to pick up freight there. While doing so, he was harassed by Teamster supporters. He then promptly quit Overnite, telling his terminal manager, Tim Behling, that he was resigning to help tend to his sick grandfather's business.

In reality, Gibson went to work for another transportation company, USF Holland, the next day. Gibson testified that he lied to Behling about his separation because he feared that Behling would retaliate against him for avoiding confrontations with the Teamsters in Milwaukee and for going to work for a union company.

Gibson's concerns about Behling proved to be well founded. During his probationary period at USF Holland, representatives of that company contacted Behling while performing a background check on Gibson. Among other things, Behling told them that Gibson: was "way below average;" "needed to improve his work ethic and attitude;" "was late most of [the] time;" and "missed anywhere from two to three days a week." Behling characterized Gibson's paperwork as "fair" and "need[ing] help like you wouldn't believe." He also said that Gibson's trustworthiness was "borderline," and that he would "never" rehire Gibson. However, there were no records in Gibson's personnel file to support these performance deficiencies.

Overnite was the only one of Gibson's former employers to give him a negative reference. Nevertheless, USF Holland terminated Gibson based on Behling's report. Behling went on to give references to several other potential employers with whom Gibson sought work. Perhaps not surprisingly, Gibson was unable to find another job for over a year and a half.

Gibson later sued Overnite for defamation. However, Wisconsin law, like that of several other states (including Illinois), grants employers immunity from defamation and other civil claims relating to job references, so long they provide such references in good faith. Indeed, under the Wisconsin law at issue and similar statutes in other states, employers enjoy a legal presumption that references have been made in good faith. Accordingly, Gibson was required to overcome this presumption with clear and convincing contrary evidence in order to successfully sue Overnite.

Here, Gibson was able to overcome this presumption by showing that Overnite acted maliciously in providing his reference. What was significant about this case, however, was that Gibson was able to deprive Overnite of its statutory immunity and

establish his claim for defamation absent specific proof of Overnite's "actual" malice (i.e., proof that Behling's statements were either knowingly false, or made with reckless disregard for their truth). Instead, the court held that it was sufficient for Gibson merely to demonstrate the company's "express" malice. Unlike "actual" malice, this lesser form of malice only requires a showing of ill will, hatred, envy, spite, or other bad motives against the person allegedly defamed. The court held that Gibson had presented ample evidence that Behling had spoken about him out of spite or ill will, thus establishing his claim of defamation.

This case illustrates that notwithstanding the existence of purportedly protective legislation, employers should always remain cautious when giving employment references, especially negative ones. *Gibson v. Overnite Transportation Co.*, 267 Wis. 2d 429, 671 N.W.2d 388 (2003).

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FOLLOW YOUR OWN RULES FIRST!

Lawana Porter worked as a correctional officer in the California Department of Corrections. She was propositioned on numerous occasions by her boss, Sgt. Pete DeSantis, and consistently turned him down. Porter complained about this, and the situation was remedied by transferring Porter to another section.

After some years passed, Officer Porter sought another transfer. Her immediate supervisor, Lieutenant John Anglea, initially approved the transfer. However, the old supervisor (Sgt. DeSantis) was now working in the personnel division and all transfers had to be approved by him. DeSantis denied the request, stating that the department Ms. Porter wanted to transfer into was overstaffed already. There was nothing improper about the reason he gave in denying the request. The department actually was overstaffed. However, Porter brought suit alleging that DeSantis, her former boss, was retaliating against her for complaining of his conduct years earlier.

The employer defended the suit, saying that the personnel supervisor's actions were done for a non-discriminatory, legitimate business purpose. Ultimately, the federal Ninth Circuit Court of Appeals ruled against the Department and allowed Officer Porter to proceed to trial on her retaliation claim.

The key fact for the court was that Porter's direct supervisor, Lt. Anglea, (who initially approved the transfer), testified that it was outside of normal department procedures for Sgt. DeSantis to deny a transfer in the manner that happened here. Anglea testified that Sgt. DeSantis improperly and unilaterally overloaded the section Porter wanted to transfer into just before denying her request. The court found that the testimony that DeSantis acted unilaterally (and outside the normal company procedure) raised an inference that the employer's defense was not legitimate.

The lesson to be learned is that evidence of deviation from normal procedures can be used to show that a company's "legitimate business purpose" defense doesn't hold water and is a cover-up for discriminatory action. The company's own procedures establish what is *supposed* to happen in a given circumstance. As in the Porter case, plaintiffs can point to deviations from those procedures as establishing *improper motive* which can be the basis for a discrimination finding. *Porter v. California Dept. of Corrections*, (9th Cir. Sept. 10, 2004)

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BITS AND PIECES

Maytag Corp. has been sued by the EEOC for age discrimination. The suit alleges that a large number of workers over 50 years old lost their jobs in a corporate restructuring. The EEOC claims that Maytag *stereotyped* these older workers as not being able to manage new sales procedures, which were heavily computer based.

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Health insurance premiums continue to climb. In a nationwide study, premiums rose at a double-digit rate for the fourth consecutive year and had increased 60% since 2001. To partially meet these rising costs, employees have increasingly been required by employers to contribute from their pay. The average annual single contribution increased 75% over the past five years (from \$318 to \$558) while the average annual family of four contribution increased by 73% (from \$1,543 to \$2,661) over the same period. On average, the employer's share to insure a family of four is \$7,289 annually.

Some employers are removing health insurance as a benefit. Today, five million fewer American jobs come without any health insurance offering than in 2001. At smaller companies (less than 200 employees), only 63% offer health insurance, down from 68% in 2001.

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A New York appellate court in October upheld a finding that the estate of a worker, whose suicide was attributed to employment related stress, was entitled to workers' compensation benefits. The deceased worker had become depressed after being promoted to a management position and then transferred back to his truck driving position. He then killed himself at home. The court found that the depressive illness stemmed from work stress and awarded benefits. *Potter v. Curtis Lumber Co., Inc.*

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QUOTABLE

He who builds a better mousetrap these days runs into material shortages, patent-infringement suits, work stoppages, collusive bidding, discount discrimination—and taxes.

H. E. Martz

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