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First Quarter, 2005

LABOR UPDATE

Recent Developments in Labor and Employment Law

CONTEMPLATING LOWERING RETIREE BENEFITS? BE CAREFUL WHAT YOU SAY!

The United States Supreme Court recently declined to hear an appeal of retired employees of a Chicago company that had cut the retiree health care allowance which was promised for a “lifetime.” The federal appellate court had found that “lifetime” doesn’t always mean what it sounds like.

Continental Insurance Company offered an early retirement plan that guaranteed a “lifetime benefit,” including a guaranteed retiree health insurance allowance. Later, Continental was acquired by CNA who continued the plan for several years and then terminated it. The retirees sued CNA seeking to recover the health insurance allowance.

The employees first argued that under ERISA, the designation of the health care allowance as a “lifetime” benefit made the allowance vested (and therefore irrevocable) upon the employee’s acceptance of early retirement. The appeals court rejected the argument, noting that “lifetime” under prior ERISA decisions actually means “for life, *unless* revoked or modified.” The employees also argued that since they were never told the plan was revocable, the employer breached its fiduciary ERISA duty of loyalty, which encompasses the duty to tell the truth. The employees alleged that the company’s failure to inform them at the time of their retirement of the possibility of revocation of the plan was unlawful.

However, the federal appeals court in Chicago ruled that the only basis for such lawsuit would be if the employer *actually* lied in order to induce employees to retire. Absent a showing that the employer intentionally misled the employees (as opposed to an innocent mistake, or a failure to fully explain the policies), the court held there was no breach of fiduciary duty. *Vallone v. CNA Financial Corp.*, 375 F.3d 623 (7th Cir. 2004).

**AS EASY AS IT IS TO SUE,
A CHICAGO FEDERAL COURT REAFFIRMS THAT
DISCRIMINATION AND RETALIATION CLAIMS ARE HARD TO PROVE**

The Seventh Circuit Court of Appeals in Chicago recently reaffirmed that claims of discrimination and retaliation must actually be proven, and not just assumed.

Momicilo Filipovich, a native of the former Yugoslavia, worked since 1982 on the dock for K&R Express Systems. In 1993, he filed a discrimination charge with the United States Equal Employment Opportunity Commission (EEOC) and later a complaint in federal court alleging that K&R failed to promote him based upon his ethnicity. He lost this case in 1997, but a mere fifteen days later filed a new charge with the EEOC claiming that he had been bypassed for another promotion because of his age. He also claimed that K&R had retaliated against him for filing his EEOC charge in 1993. The basis for the new retaliation claim was a series of disciplinary actions taken by K&R against Filipovich for poor performance. The new charge became the basis for a complaint in federal district court and proceeded to trial.

At trial, Filipovich failed to produce any evidence that K&R's failure to promote him had to do with his age. Key to this was his failure to show that similarly situated younger people had been treated more favorably. Although the jury sided with Filipovich, the trial judge threw out the jury's age discrimination finding. The federal court of appeals in Chicago agreed with this decision, stating: "although we do not overturn a jury verdict lightly, that does not mean that all jury verdicts must be affirmed." The court found that there was no evidence of age discrimination upon which a reasonable jury could have returned a verdict.

The jury also found in favor of Filipovich on his retaliation claim. Unlike the age discrimination claim, the trial judge let the jury verdict stand and allowed the assessment of punitive damages and attorneys fees against K&R. The Seventh Circuit Court of Appeals reversed that decision outright. The appellate court based its decision on the lack of proof presented by Filipovich that the disciplinary actions taken against him were not warranted. During the trial, Filipovich denied every instance of poor performance for which he was disciplined. Moreover, he implied that K&R had manufactured the proof of his poor performance in retaliation against him. In rebuking the jury's verdict based upon such a dearth of evidence, the seventh circuit reaffirmed the rule that the plaintiff must, in a retaliation case, actually show that the retaliation is tied to some protected activity. In his case, Filipovich failed to show that the disciplinary actions were in any way connected with his filing of an EEOC charge. Moreover, the court reaffirmed the general principle that in discrimination and retaliation cases, a plaintiff cannot sit back and simply deny everything the employer offers to the jury. The jury is not present in these cases just to decide which side is telling the truth. The jury is there to decide whether the plaintiff has met the burden of proving his or her case.

For employers, discrimination and retaliation cases often seem like they are too simple to both file and prove. The good news is that at least one court is making sure plaintiffs are required to do what the law mandates they do. *Filipovich v. K&R Express Systems*, (No. 03-2038 7th Cir. December 7, 2004)

ANOTHER COURT EXPANDS WHO CAN BE "RETALIATED" AGAINST

Since 1978, discharged employees in Illinois have been able to sue their former employers if they alleged that the firing was in retaliation for certain types of activities. These claims had their genesis with employees who were fired for filing workers compensation claims. Over the years, Illinois courts have expanded the types of employee activities that are “protected.”

One of these activities is when an employee allegedly reports illegal or improper conduct that has occurred within the company and gets fired for it. This type of claim is called a “citizen crime-fighter” claim. The theory behind these claims is that reporting a crime is an activity to be encouraged and the person reporting it is worth protecting. Whether the fired employee has such laudable goals when they bring suit is always another question.

In a recent decision by an Illinois appellate court sitting in Chicago, the outer limits of the “citizen crime-fighter” theory were tested. Shawn Mackie, an employee of a not-for-profit company, suspected that one of the company’s directors was using the company mailing list for a for-profit business the director owned on the side. Mackie reported his suspicion to the president of the not-for-profit company, and was allegedly told that he should “play ball.” After this conversation with the president, Mackie’s progress reviews allegedly became unjustifiably low and his work was subjected to heightened scrutiny. Mackie was fired a few months later.

The trial court dismissed Mackie’s claim. It was unwilling to expand the “citizen crime-fighter” theory anymore than Illinois courts already had. On appeal, however, the claim was reinstated. The appellate court reasoned that the crucial issue was Mackie’s reasonable belief that a theft had been committed. Since Mackie had such a reasonable belief when he reported his suspicions, his conduct should be “protected” from firing.

The problem with the decision is twofold for employers. One, it is hard to understand how Mackie can be considered a “citizen crime-fighter” if all he did was report his suspicions to the president of the company. Crime fighters should be protected for reporting crime to the police, not just intra-office suspicions. Two, the purported “theft” was committed by a director of the not-for-profit corporation. All the director allegedly did was download a copy of the not-for-profit’s mailing list. While such actions, if true, may be improper (and even a breach of a fiduciary duty), labeling them as “theft” is quite a stretch.

If Illinois courts continue to expand the myriad of “protected” activities for which an employee can be retaliated against, the concept of at-will employment will become endangered. Before terminating employees, employers should take note of any complaints or “whistleblowing” activities of the person in question. If present, employers need to have confidence that they can establish that the reason for the firing has nothing to do with any alleged “protected” activity. *Mackie v. Vaughan Chapter- Paralyzed Veterans of America*, (Ill.App.Ct. 1st Dist. December 7, 2004).

**ILLINOIS VERSION OF THE WARN ACT
TAKES EFFECT JANUARY 1, 2005**

Since 1989, employers of more than 100 full time employees have been required to observe the federal WARN act in certain cases of plant closings and mass layoffs. Now, Illinois has instituted its own law, the Illinois Worker Adjustment and Retraining Act, which imposes additional and stricter obligations on Illinois employers.

The new Illinois law, which is effective January 1, 2005, applies to employers of 75 full time employees and is triggered when 25 or more full time employees lose their jobs because of a mass layoff or plant closing, if that group constitutes a third or more of the employer's full time employees. In such instances, an Illinois employer is required to give 60 days written notice to the employees, certain state and local officials and, if applicable, the union that represents the workers. Significantly, the Illinois WARN act applies in cases of plant relocation, where the federal law does not.

As under the federal WARN law, the failure of an Illinois employer to give required notice subjects the employer to liability for the payment of back pay and benefits to the affected employees as well as civil penalties. Also, similar to the federal statute, the Illinois WARN law provides some narrow exceptions when abrupt closings or layoffs are beyond the employer's control.

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BITS & PIECES

Sports Illustrated reports that the employee participation in "fantasy football" activities at work this year has cost American business \$2.7 billion in lost productivity.

The U.S. Department of Labor reported that worker's complaints about overtime pay are at their highest level in four years. This number is likely to increase even further in 2005, when the impact of the recent sweeping changes to the federal overtime regulations are more fully realized.

QUOTABLE

It is also forbidden that any employee shall be slain or hanged for any fault, but let his eyes be put out and his goats divided among middle management.

[Is your employee handbook up to date???)

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