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## **LABOR UPDATE**

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*Recent Developments in Labor and Employment Law*

### **THE SUPREME COURT DECIDES A LANDMARK CASE IN FAVOR OF OLDER WORKERS**

The Supreme Court of the United States ruled on March 30, 2005 that intent to harm need not always be established as an element of age discrimination claims under federal law. The Court allowed older workers to establish their cases by showing a "disparate impact." This is a significant change in the law of age discrimination.

The case before the Supreme Court involved a group of over-forty year old policemen in Jackson, Mississippi. The city of Jackson gave a raise to all city employees in order to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and to ensure equitable compensation to all employees regardless of age, sex, race and/or disability." In the police department, the raises were given according to rank and seniority. Because the pay scale was "top-heavy," the police chief (and higher-ranking officers) received a lower percentage raise than the regular beat officers.

The policy had the practical effect of statistically giving younger employees higher-percentage raises than those of older employees. Therefore, the age forty and over officers went to court claiming that they were adversely affected by the action. The lower courts ruled against the officers, deciding that such claims (where there was no proof of intent to discriminate) were categorically unavailable under the Age Discrimination in Employment Act (ADEA). The officers appealed to the United States Supreme Court.

In deciding the case, the Supreme Court reviewed its prior ruling in 1971 that established the so-called "disparate impact" theory. In that case, an employer required either a high school diploma or the successful passing of a company-administered test in order for transfer or promotion. There was no question that the company there had acted in good faith in instituting the policy. However, the result of the policy was that a significant number of African-Americans were not promoted or transferred. Thus, the "disparate impact" theory was recognized by the Court in civil rights cases as a viable theory for proving unlawful discrimination. No longer did plaintiffs have to show that there was discriminatory intent to prove a violation of Title VII. However, until now, the disparate impact theory was not available to age discrimination claimants, who had to prove that their employer or former employer intended to treat them differently because of their age.

In last week's *Smith v. City of Jackson* decision, the Supreme Court decided that age discrimination claimants may now also avail themselves of the disparate impact theory of liability and thus need not show their employer acted with discriminatory intent in situations where the

outcome of employment decisions negatively impacts older workers more than younger workers. However, the Court made it clear that even where there is a disparate impact, an employer may escape liability if it can show that its decision was based upon “reasonable factors other than age.” In the *Smith* case, the city was successful in demonstrating that its pay restructuring decision was based upon a reasonable need to be more competitive in the pay of junior officers and thus the employer ultimately won the case.

The Supreme Court has now opened the door for a variety of claims by workers over forty who claim that a particular company policy has a “disparate impact” on them. The court adhered to the rule, however, that as long as a particular policy is based upon reasonable factors other than age, the claim will be defeated.

Employers should be both cognizant and wary of the Supreme Court’s decision to broaden the scope of the ADEA. In implementing policy changes, employers should always make clear the reasonable factors they are relying on for the decision. Otherwise, if the change has a statistical adverse affect on workers over forty, employers will be fighting their decisions in a courtroom rather than a boardroom. *Smith v. City of Jackson*, 03-1160 (decided March 30, 2005).

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### **EMPLOYER DUTY TO RESPOND WHEN CO-WORKERS HARASS EACH OTHER**

When non-supervisory co-workers are involved in sexual comments and touching, when does their employer become liable under sexual harassment laws? In January, 2005, the federal appeals court in Chicago wrestled with the question in a case involving the Lou Malnati’s Pizzeria chain.

Kathleen Loughman began working for Malnati’s in 2000, and shortly thereafter was the subject of whistling and inappropriate comments by some kitchen workers. Loughman complained to manager Jim Solis, who said that he’d talk to the kitchen workers. Several months later, another kitchen worker put his arm around Loughman’s waist, pushed her into a side room and tried to kiss her, blocking her exit from the room for several minutes. Loughman reported the incident to Solis who met with the kitchen worker and warned him that he would be fired if he ever touched Loughman again. A year later, two other co-workers grabbed Loughman, pinned her against a wall and grabbed her chest. One of them, Hernandez, tried to put his hands in her pants. Loughman was able to run away. This incident was also reported to Solis and another manager who allegedly made a culturally disparaging remark to the effect that “this is how Mexican workers act” and said that Loughman should “be a bitch to them.” After the second incident, Loughman said that these workers continued to make inappropriate comments, but no disciplinary action was immediately taken.

A final encounter happened a year later, when a pizza driver walked up behind Loughman, touched her hair, ran his hand up the back of her shirt and wiggled his fingers on her stomach before he ran away. Loughman reported the incident. Immediately, Malnati managers apologized to her, transferred her to another Malnati’s store, and began investigating the entire history of Loughman’s problems, which resulted in Hernandez being fired.

Eventually, Loughman filed suit against Malnati’s. The lower federal court in Chicago decided that even assuming all Loughman’s claims were true, the case should be dismissed since Malnati’s had a sexual harassment policy in place which it administered effectively when it learned of problems.

After Loughman appealed the decision, the appellate court disagreed and sent the case back to the trial court for a jury to decide. The court restated the general rule that when there are

problems between non-supervisory co-workers, the employer may generally escape liability if it exercised reasonable care to prevent and promptly correct such behavior and if it took reasonable steps to discover or remedy the harassment.

However, the court found that, based upon these facts, a jury could reasonably conclude that Malnati's failed to apply its sexual harassment policy effectively. Insofar as the company knew that Loughman had been subjected to a consistent stream of harassment, the court found an issue as to whether the company could have done more than merely "talking to" the offending workers. Further, the court observed that the alleged comment by the manager that this was "the culture" of the Hispanic workers could certainly be seen by a jury as management's view that any efforts to prevent harassment would be fruitless.

This case again points up the need for employers to have up to date anti-harassment policies distributed to all employees and vigorously enforced by management. Supervisors should be trained to look for signs of harassing behavior between co-workers and how to promptly and effectively respond to such indications or to any indirect or direct information that harassing behavior is occurring.

The attorneys at Peters & Lyons, Ltd. can be of assistance in drafting or reviewing appropriate anti-harassment policies and procedures, providing training to managers and supervisors or helping in the investigation and evaluation of instances that may arise.

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## **REASONABLE ACCOMMODATIONS FOR THE DRIVE TO WORK?**

An Illinois court has answered the question of whether an employer is required to provide any reasonable accommodation to a handicapped individual who experiences difficulty on the commute to work. The answer is no.

Marla Owens worked as a clerk for AT&T since 1978. She worked in one of AT&T's Chicago offices and was at all times capable of doing her job. In April, 2001, because of a work imbalance within AT&T, Owens was transferred to a facility in Rolling Meadows. Owens kept the same title, same pay, and same job responsibilities.

Almost immediately after the transfer, Owens requested she be allowed to return to Chicago. Her daily commute was over fifty miles each direction. Moreover, she began to suffer a variety of medical ailments which forced her to take a medical leave of absence. Owens obtained a note from her physician that stated she could not "safely drive" the fifty miles to-and-from Rolling Meadows daily. This medical opinion was based upon Owens' hypertension and congestive heart disease. According to the doctor, the medical conditions would make Owens tired, thereby creating a danger to herself and others if she was required to drive long distances. Eventually, however, her own doctors approved her health and set a return date for Owens to go back to work. When she did not show up at AT&T's Rolling Meadows facility after being medically cleared for work, AT&T terminated the employment relationship.

Owens claimed that AT&T violated the Illinois Human Rights Act when it fired her. She alleged that her medical conditions rendered her handicapped and that AT&T had a duty to provide her a reasonable accommodation. She argued that the reasonable accommodation should have been allowing her to work closer to home. AT&T countered with the argument that since Marla's handicap solely related to her ability to get to-and-from work (as opposed to relating to her ability to perform her daily tasks), there was no duty to accommodate her at all.

The Illinois court agreed with AT&T. While the court affirmed the principle that an employer has the burden of providing a reasonable accommodation to handicapped employees

(provided that the proposed accommodation would not be prohibitively expensive or unduly disruptive, of course), the court ruled that the employer has no duty to its handicapped employees *outside* the workplace. The Human Rights Act does not cover commuting problems. In reaching its decision, the court was clear to differentiate Owens' case from a situation where daily schedules could be adjusted so that the handicapped employee could get to work on time (or leave early, as the case may be). In such an instance, if there is an employer practice of adjusting work schedules that does not unduly disrupt the business, it would be a violation of the Human Rights Act to deny the handicapped employee a modified schedule. However, in Owens' case, there was no violation for merely demanding the handicapped employee work at a certain location at a certain time like every other employee.

This was the first Illinois case where a court has positively decided that employers have no duty to accommodate handicapped individuals outside of the workplace. Employers should take heart that Illinois courts will ensure that "reasonable accommodations" still will be "reasonable."

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### **BITS & PIECES**

Oklahoma Supreme Court Justice Marian Opala sued his fellow justices in federal court in January for age discrimination. Opala, 83, claims that he was in line for promotion to the post of Chief Justice of the court, but that his fellow justices changed the rules so that the younger, current Chief Justice could serve a few more years.

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Two fired female caregivers have sued the Gorilla Foundation in Woodside, California alleging sexual discrimination. The Foundation owns Koko, the world famous sign language ape who has a vocabulary of over 1,000 signs. The discharged workers allege that they were ordered to bare their breasts to the 300 pound simian in order to help him "bond" with them. The caregivers' supervisor, also a female, routinely flashed the gorilla and allegedly told the workers that Koko needed new objects of interest!

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### **QUOTABLE**

*"I don't want to achieve immortality through my work; I want to achieve it through not dying."*  
Woody Allen

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