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LABOR UPDATE

Third Quarter, 2005

Recent Developments in Labor and Employment Law

WHEN PANDORA COMPLAINS TO THE EEOC.....

A recent decision by the U.S. Court of Appeals in Chicago reinforces the EEOC's broad power to sue employers after its investigation. The case should serve as a cautionary tale to employers who think their potential liability is limited to the initial claims of a complainant. The court's ruling allows for an almost limitless inquiry into all the company's practices and gives the EEOC broad powers regarding the content of the case it wants to pursue.

The matter began when Karon Lambert, a former employee of Caterpillar, Inc., filed a charge with the EEOC. Lambert claimed that she had been fired for rejecting the sexual advances of her supervisor at Caterpillar's Aurora, Illinois plant. The EEOC investigated the charge and determined that Caterpillar had not only discriminated against Lambert individually, but also against "a class of female employees based upon their sex." In other words, what began for Caterpillar as a specific charge by one former employee regarding a single supervisor became a class action lawsuit by the EEOC on behalf of multiple women employed at the Aurora plant.

Caterpillar contested the EEOC's ability to file a complaint so substantially beyond the original charge. In so doing, it invoked the generally well-settled principle that a Title VII plaintiff's judicial complaint can only include claims asserted in or related to her initial EEOC charge.

The federal appellate court ruled that the EEOC, unlike individual plaintiffs, has the power to bring lawsuits regardless of the scope of an original charge. The court wrote: "any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. The charge incites the investigation, but if the investigation turns up additional violations the EEOC can add them to its suit."

The case demonstrates the need for employers to treat every charge with the EEOC with the utmost seriousness. If the scope of the investigation and issues to be decided can be framed early in the investigative process, it will save plenty of headaches and money for the employer. The attorneys of Peters & Lyons are skilled at handling EEOC investigations from the outset and are always available to help. *EEOC v. Caterpillar, Inc.*, 2005 U.S.App.LEXIS 9741 (7th Cir. 2005) (7th Cir. Docket No. 05-8006).

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YOUR E-MAIL CAN BE YOUR BIGGEST LIABILITY

A recent case from New York City has had great repercussions on how one of the world's largest brokerage firms handles its electronic mail. The case should serve as a red flag to employers of any size whose employees communicate via e-mail.

Laura Zubulake worked for UBS Warburg as a securities trader at UBS's Singapore desk. She was a very well-educated and highly compensated employee. She was in line to be promoted when the head of UBS's East Asian trading desk left, but a male received that promotion instead. This new male boss allegedly created a hostile work environment for Zubulake. Thereafter, Zubulake filed a claim with the EEOC, and then, shortly after that, UBS fired her. After the EEOC investigated her claim, Zubulake sued UBS in federal court.

Zubulake's attorneys repeatedly attempted to have UBS produce e-mails sent by Zubulake's superiors and co-workers at the East Asian trading desk over a three-year period. Time and again, UBS failed to produce the e-mails, claiming either that it would be too expensive to retrieve them, or the "back-up tapes" had been deleted. The problem for UBS was, Zubulake had kept her own records of the e-mails and was clearly able to demonstrate that the "back-up tapes" still existed. The district court broke new ground in establishing an employer's duty to preserve and produce e-mails.

In response to UBS's argument that producing the e-mails would be too expensive, the court created an eight-factor test to determine whether Zubulake would have to pay some of the costs of production. Some of the factors include: the specificity of the requests; the likelihood of discovering critical information; the total cost of the production; and the resources of each party to pay for the production. After analyzing the particular systems used by UBS, the judge ruled that UBS bore the whole cost burden of producing the e-mails.

Regarding UBS's argument that the "back-up tapes" were destroyed (to which Zubulake had contrary evidence), the judge was even more stern. The judge again reviewed the technology used by UBS and ruled that any e-mails requested by the plaintiff should have been retrievable at the time of the request. Therefore, the failure to produce the e-mails resulted in the award of fees and costs to the plaintiff. However, even more problematic to UBS was the judge's ruling that the jury would be instructed that it could assume that the emails not produced by UBS were unfavorable to its case.

As a side note regarding the e-mail issues, the judge concluded that employers are under a duty to preserve relevant electronic data when litigation is "reasonably anticipated." Unbelievably, in Zubulake's case, the judge ruled UBS' duty to preserve data began while she was still working for them (and before she filed her EEOC claim).

Armed with these rulings, Zubulake tried her case to a jury in April, 2005. She was awarded more than \$29 million dollars.

This case demonstrates the perilous nature of e-mail communication for employers. Not only can their content be used as evidence, their unexplained absence can be even more problematic. Employers must make sure they have a strong policy concerning not only the employees' use of the company's e-mail systems, but they must ensure that there is a policy concerning the preservation of the data as well. *Zubulake v.*

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FROM THE MOMENT AN APPLICANT WALKS IN, THE ADA APPLIES

Many employers know about the Americans with Disabilities Act. Most know that it is unlawful to discriminate in employment situations against a qualified individual with a disability. What some don't understand is that the ADA applies at all stages of the employment process, including the initial request for a job. Turning a qualified disabled individual away can cause serious consequences for an employer.

Dale Alton is a blind individual who completed training to be a customer service representative at the Colorado Center for the Blind. Mr. Alton was trained with software developed specifically for blind individuals seeking to work in telephone customer service. The software enables the user to perform the routine tasks of a customer service representative at a level at least equal to, and sometimes faster than, a fully sighted individual.

Alton then requested employment as a customer service representative at EchoStar, a satellite TV and cable company. He was told that he should not even bother putting in an application because EchoStar was not equipped to "handle blind people." It was undisputed that EchoStar did not own the software on which Alton had been trained on at the time of his application.

Making the case worse for itself, EchoStar invited Alton back for a "sham interview" when it received his charge of discrimination. Alton was given a Braille test that was substantively more difficult than the standard tests EchoStar gave to sighted people. Moreover, EchoStar made Alton take a computer proficiency test, during which an EchoStar representative stood by and gave Alton directions on how to access screen icons by saying, "move (the mouse) to the left, move down, now click."

In the ensuing lawsuit, much of the testimony revolved around whether EchoStar could have reasonably installed the software in order to accommodate Alton on the date of his first request for a job. The jury obviously thought that EchoStar could, returning a verdict in his favor. The jury awarded Alton \$2,000 in back pay and \$5,000 in compensatory damages. But the real damage came in the award of punitives. The jury "punished" EchoStar to the tune of \$8 million.

Employers are well advised to train their personnel, who interface with those requesting employment, as to the requirements of the disabilities law. When dealing with individuals seeking employment, it is important for employers to determine whether a qualified individual can be accommodated and then take steps to determine whether such an accommodation is reasonable under all of the circumstances. *EEOC v. EchoStar* (EEOC Press Release, May 6, 2005; www.eeoc.gov).

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THIS BUD'S FOR YOU!

Before a unionized employer installs hidden surveillance cameras in areas where employees may be observed, it is best to seek legal advice as to whether advance bargaining with the union on the subject is necessary. In a case decided by the United States Court of Appeals on July 5 of this year, the court affirmed a decision by the National Labor Relations Board that such bargaining was required.

Anheuser-Busch had installed a hidden surveillance camera in a remote elevator motors room in one of its breweries. Review of the tape from that camera revealed several employees coming into the area for legitimate work purposes but sixteen others using that remote area to sit around, sleep, smoke pot and urinate on the floor. The employees engaged in misconduct were fired.

The union grieved the matter, and an arbitrator held a hearing and sustained the discharges. However, the union also brought unfair labor practices before the NLRB, arguing that the employer had violated the National Labor Relations Act by installing the cameras without first bargaining with the union and also by discharging several employees *as a result* of the alleged illegal surveillance.

Following its own precedent, the NLRB ruled that the use of hidden surveillance cameras in the workplace is a *mandatory subject of bargaining* and thus Anheuser-Busch violated the act by not bargaining about that with the union in advance. However, the NLRB refused to find unlawful the discharge of the employees who were caught on the surveillance tape, reasoning that employees who engage in misconduct should not be rewarded by the federal labor law. The Board also relied on a provision of the federal act that, “no order of the Board shall require reinstatement of any individual...or the payment to him of any back pay, if such individual was suspended or discharged for cause.”

Disturbingly, the federal appeals court in Washington, D.C. ruled that the NLRB’s refusal to find the discharges unlawful was not well reasoned and has now sent the case back to the NLRB for further proceedings. The court observed that in previous cases the NLRB had awarded discharged employees back pay and reinstatement where the misconduct of the employees had been discovered as a result of an employer’s illegal implementation of a rule, policy or procedure. The court ordered the NLRB to revisit the matter to either change its ruling as to the remedy for the discharged workers, or to distinguish the case from its other decisions where back pay and reinstatement were granted. *Brewers and Maltsters, Local Union No. 6 v. NLRB*, 2005 U.S. App. LEXIS 13292 (July 5, 2005).

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QUOTABLE

*“Baseball is almost the only orderly thing in an unorderly world.
If you get three strikes, even the best lawyer in the world can’t get you off.”*

-Bill Veeck-

Since 1984, the *LABOR UPDATE* has been produced and 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.

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