

# PETERS & LYONS, LTD.

ATTORNEYS AT LAW

SUITE 1000

25 EAST WASHINGTON STREET

CHICAGO, ILLINOIS 60602

DONALD F. PETERS JR  
CHRISTOPHER P. LYONS  
PATRICK F. MORAN

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*

### **COURT TO COMPLAINANTS: COOPERATE WITH EEOC OR LOSE YOUR CASE**

A federal court of appeals recently ruled that a plaintiff who filed a charge of age discrimination against his former employer with the Equal Employment Opportunity Commission, but failed to cooperate with the EEOC in its investigation of that charge, could not pursue his discrimination claims in court. This decision may help slow or even deter potential claimants from pursuing monetary damages without first putting forth solid evidence or effort.

Fifty-six year old Davis Shikles began working for Sprint in its billing department. Sprint terminated Shikles five years later as part of a reduction in force.

Shikles filed a charge with the EEOC alleging that Sprint terminated him in violation of the Age Discrimination in Employment Act ("ADEA"). The EEOC assigned an investigator to interview Shikles and evaluate his case. However, over the next three months, Shikles and his attorney cancelled three scheduled telephone interviews, did not return the investigator's calls, and failed to respond to his requests for information. As a result, Shikles never provided the EEOC with any information regarding his claims beyond that set forth in his original charge.

Three months after the charge was filed, the EEOC dismissed Shikles' charge because after "having been given over 30 days in which to respond, [Shikles] failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve [his] charge." Along with notice of this dismissal, the EEOC sent Shikles its standard, 90-day Right to Sue notice, which is required by the statute.

Shikles then sued Sprint for age discrimination in federal court. Sprint promptly moved for judgment in its favor, contending that Shikles' failure to cooperate with the EEOC amounted to a failure to exhaust his administrative remedies (a condition precedent to the pursuit of discrimination claims via lawsuit). The court agreed with Sprint and granted its motion, holding that, "allowing plaintiff to proceed with an ADEA claim after failing to cooperate with the EEOC would thwart the administrative process and turn the EEOC filing requirement into a mere formality."

Shikles appealed, arguing that he sufficiently exhausted his administrative remedies by filing his EEOC charge, as the ADEA requires, and because the EEOC's sixty-day period of jurisdiction over his charge had expired by the time he sued in court. Ironically, the EEOC (who had originally dismissed the charge based on non-cooperation) supported Shikles' appeal, and argued on his behalf that the ADEA does not expressly condition an employee's right to sue an employer upon his or her cooperation with the EEOC!

Although the appeals court acknowledged that the text of the ADEA imposed no cooperation requirement, it nevertheless found such a requirement to be consistent with public policy emphasizing voluntary cooperation in the civil rights law enforcement process. Noting that Congress had selected "cooperation and voluntary compliance" as the preferred means of achieving the goals of such laws, the court affirmed that Shikles was implicitly required to cooperate with the EEOC in order to exhaust his administrative remedies, and that his failure to do so left the courts without jurisdiction over his claims. *Shikles v. Sprint/United Management Co.*, 426 F. 3d 1304 (10<sup>th</sup> Cir. 2005).

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## **THE EQUAL PAY ACT REEXAMINED**

The Equal Pay Act requires that employers pay men and women the same for the same work in the same establishment. The work does not have to be identical, but where men and women perform with substantially equal skill, effort, and responsibility, the pay must be the same. Employers charged with violations of the Equal Pay Act can avoid liability if they can show that their compensation system is based upon seniority, merit, quantity or quality of work, or "any other factor other than sex."

The Illinois Department of Human Services (the "Department") established a system where it would pay its new hires at least the salary that the person had been making at his or her *previous* employer, plus an additional amount according to whether that person's job classification allowed for more pay. Thus, the additional amount would be based upon a pre-determined, company-wide pay scale which provided salary ranges for all the employer's job classifications.

Shortly after this policy was established by the Department, Jenny Wernsing was hired. Her previous job paid less than the "bottom" range of the job classification she was hired into. Therefore, according to the Department's policy, Wernsing was paid her previous salary plus she was given an additional amount which raised her initial salary into the low-end of the Department's established pay range for that classification.

About the same time, the Department hired a man, Charles Bingaman, to work in the same job classification as Wernsing. Bingaman's previous employer had paid him a higher salary than Wernsing was receiving at the Department. According to the Department's policy, Bingaman was then hired at the salary he was making at his former job. The result was that Bingaman was immediately paid more for doing exactly the same work as Wernsing. Jenny Wernsing filed suit claiming the employer had violated the Equal Pay Act.

The federal court of appeals in Chicago ruled that Wernsing had no claim. The court found that because the new employee's prior salary is a "*factor other than sex*," the Department did not violate the Equal Pay Act. The Department's system was established with gender-neutral rules that were applied to all the employer's employees equally. The court observed that while the system had an adverse affect on Wernsing's salary, it was not a violation of the Equal Pay Act.

Additionally in Wernsing's case, the appellate court noted-- but rejected-- a different method that other courts have sometimes used to analyze Equal Pay Act cases. Other federal appeals courts have placed the burden on the employer in these cases to demonstrate that their "factor other than sex" has an "*acceptable business reason*." The *Wernsing* court stated, in rejecting this argument:

"Congress has not authorized federal judges to serve as personnel managers for America's employers... [they] do not sit in a court of industrial relations. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, [the Equal Pay Act] does not interfere."

Employers within the jurisdiction of the Seventh Circuit court of appeals (Illinois, Indiana, and Wisconsin) can, for the present, take comfort in the court's words. However, because of the conflict between the federal courts of appeals on this point, the issue of whether employers must affirmatively be able to establish an "acceptable business reason" in Equal Pay cases is ripe for decision by the United States Supreme Court. *Wernsing v. Dept. of Human Services*, 427 F.3d 466 (7<sup>th</sup> Cir. 2005).

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### **SCARY! FIRED GUARD HAS GHOST OF A CHANCE FOR BENEFITS**

An Iowa judge recently held that a former security officer who was fired after he reported seeing ghosts was entitled to collect unemployment benefits. Officer Wade Gallegos reported to his supervisor that he saw ghosts haunting the neighborhood he patrolled. When his supervisor arrived, Gallegos showed him the ghosts and pointed out where they were standing. The supervisor, not surprisingly, saw nothing. Perhaps more surprisingly, the company also observed no signs that Gallegos was drunk or intoxicated.

The judge agreed with the employer's contention that Gallegos' beliefs rendered him unfit to act as a security guard. Nevertheless, the judge ruled that seeing ghosts is not the sort of "misconduct" sufficient to disqualify a claimant from receiving benefits.

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### **PAYING EMPLOYEES FROM "DON TO DOFF"**

The U.S. Supreme Court recently affirmed that the mandatory "donning" and "doffing" (i.e., the putting on and taking off) of certain *specialized safety gear* is a compensable activity under the Fair Labor Standards Act ("FLSA"). Accordingly, employees must be paid not only for the time they spend donning and doffing such gear,

but also for their time spent walking to and from their workstations after donning (and before doffing), and any time spent waiting to doff.

In issuing this ruling, the Court recognized a distinction between “integral and indispensable” protective gear that is often special, elaborate, and burdensome to put on and take off, and non-unique gear like hard hats, ear plugs, safety glasses, boots, or hairnets that takes relatively minimal time. The Court held that time relating to the donning and doffing of the former is compensable, whereas time spent on the latter is not.

This decision is likely to create additional payroll obligations for employers who require their employees to wear such special equipment. However, it should motivate all employers to review their pay practices to ensure that they are properly paying employees for all compensable time, especially in light of the recent rise in FLSA litigation. *IBP, Inc. v. Alvarez and Tum v. Barber Foods, Inc.*, 546 U.S. \_\_ (2005) (consolidated cases)

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### **BITS & PIECES**

A Gallup poll, released in December, found that one out of six workers believes that they have been subjected to job discrimination within the past year. The highest numbers of those perceiving job discrimination came from the ranks of women (22%), Asians (31%) and African-Americans (26%). Broken down by the kind of perceived discrimination, gender discrimination led the way (26%), followed by race (23%), age (17%), favoritism (12%) and disability (9%). Specifics focused on promotion decision (33%), pay (29%), hiring 13% and harassment (11%).

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A pro hockey player who was injured in a fight on the ice was found by a Virginia appeals court to be covered under that state’s workers’ compensation law. Normally, an employee injured while engaged in willful misconduct isn’t covered, but here the court agreed that since the player was known as the team’s “enforcer” and claimed he had been sent over the boards by his coach with orders to go out and start a fight, his injury came about because he was doing his job. *Norfolk Admirals v. Jones*, 50-05-4, Virginia Court of Appeals, (November 1, 2005).

### **QUOTABLE**

*“A professional is someone who can do his best work when he doesn’t feel like it.”*

-Alistair Cooke

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