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LABOR UPDATE – SECOND QUARTER 2006

RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

RATHER ARBITRATE THAN LITIGATE? THE ILLINOIS SUPREME COURT HANDS A VICTORY TO EMPLOYERS

The time and cost associated with prolonged litigation can be a drain on the resources of any employer. Add expenses, combined with the inherent unpredictability faced whenever a disgruntled employee can present a case to a jury, and it's enough to keep employers awake at night. Thankfully, a recent decision by the Illinois Supreme Court may help employers sleep a little better.

The case involved Joann Melena, a non-union employee of Anheuser-Busch in Mt. Vernon, Illinois. Sometime after her hire, Anheuser-Busch mailed a letter to all of its Mt. Vernon employees announcing the implementation of a "Dispute Resolution Program." The program adopted arbitration for resolving issues between Anheuser-Busch and its employees. The letter stated that the employees, "by continuing or accepting an offer of employment," accepted the terms of the new dispute resolution program. Melena later signed an acknowledgement that she had received the policy and that she was responsible for reading and understanding its terms.

In 2002, Melena injured herself at work and filed a claim for workers' compensation with the Illinois Industrial Commission. In 2003, while Melena was receiving workers' compensation disability payments, Anheuser-Busch terminated her employment. Melena sued in Illinois state court claiming retaliatory discharge, a claim that is typically tried before a jury. Anheuser-Busch moved to dismiss Melena's court case and submit her claim to arbitration instead, as provided for in the program. Both the trial and appellate courts rejected these efforts. The initial two courts allowed Melena to pursue her claim before a jury. Then, the Illinois Supreme Court decided to hear the case and agreed with Anheuser-Busch, sending the case to arbitration.

The Court disregarded Melena's principal contention: that her acceptance of the program needed to be "knowing and voluntary," which she claimed it was not. Relying on basic principles of contract law, the Court held that a party to a signed contract is charged with knowledge of its terms. The Court concluded that there was no special exemption from this rule for arbitration agreements, and there was no heightened requirement that an employee understand that an arbitration policy could deprive her of the right to a jury trial in certain circumstances. Melena acknowledged and accepted the employer's offer by her continued employment, and that was sufficient to bind her to the terms of the arbitration policy. The Court went on to add that the "take it or leave it" nature of the policy was not a bar to enforcement.

Although Melena has promised an appeal to the United States Supreme Court, this decision by the Illinois Supreme Court is an important one for employers, as it eliminates a key defense by employees in challenging the validity of arbitration agreements. The attorneys at Peters & Lyons, Ltd. are available to consult with employers to determine whether such agreements can be used to your advantage. *Melena v. Anheuser-Busch, Inc.*, 2006 Ill. LEXIS 329 (Docket No. 99421, Decided March 23, 2006).

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**EYES FRONT!
EMPLOYEE'S FIRING AFTER COMPLAINING OF
A CO-WORKER'S GIVING HIM "THE EYE" WAS NEITHER
HARASSMENT NOR RETALIATION**

Todd Bernier was a researcher for the financial institution Morningstar. A co-worker, Christopher Davis, is a gay man who has a "lazy eye," a condition where one eye can appear to be gazing in one direction while the other eye is looking in another direction.

Bernier believed that Davis would sometimes pass by his work place and stare at him. Once, while standing alongside each other in the men's room, Bernier thought that he saw Davis look up and down, as if trying to see Bernier's genitals. Rather than complain to management, Bernier decided to deal with the situation by sending Davis an anonymous instant message from his work computer to which said: "Stop staring! The guys on the floor don't like it."

When Davis received the instant message, he complained to the company, perceiving it to be an anti-gay message. An investigation by Morningstar's IT department quickly determined that the message came from Bernier's work computer. When questioned about the matter, Bernier denied sending any such message and he was then fired for lying about it. Bernier later admitted sending the message.

Bernier then brought an action in federal court in Chicago, complaining of sexual harassment (i.e., that Davis had stared at him in the men's room) and retaliation (for firing him for complaining about Davis' alleged conduct).

The court dismissed the matter, on summary judgment, before trial. As to Bernier's harassment claim, the court found that in instances of alleged harassment between co-workers, where an employer has in place a proper anti-harassment policy, and where the employer neither knew nor reasonably should have known of the harassing situation, there is ordinarily no employer liability. The court found that Morningstar had a strong anti-harassment policy. Significantly, it noted that Bernier never brought up the men's room matter until *after* he had been told he was fired for lying about his email communication to Davis. The court also dismissed the retaliation claim because the company was not even aware of Bernier's issues with Davis until after Bernier was discharged.

The case underscores the need for employers to have up-to-date, well communicated, and effectively administered anti-harassment policies in place as a defense to charges by incumbent or former employees. Further, the training of supervisors and managers as to harassment awareness and dealing with allegations of harassment can further strengthen the defense of such cases. The attorneys of Peters & Lyons, Ltd. are available to assist you in documenting your anti-harassment policies and providing such training. *Bernier v. Morningstar*, 2006 U.S. Dist. LEXIS 3958 (2006).

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**EMPLOYEES ON THE ROAD?
HAVE A POLICY REGARDING CELL PHONE USE!**

Many employers require their employees to be away from the office for some portion, or occasionally all, of the workday. No matter what the employee's job title and position description, the employer can still be liable for the conduct of that employee when out of the office. One of the most common bases of liability for employers in recent years has been employee involvement in vehicle accidents that occur while the employee is using a cell phone.

In just a sampling of recent cases:

- An attorney talking with a client on her cell phone was swerving and driving in a reckless manner, which resulted in a fatal collision when the attorney struck a teenager on the side of the road. The attorney's law firm was sued in conjunction with the attorney, simply on the theory that the business she was conducting at the direction of the employer was a cause of the fatality. The employer settled for a confidential amount, while the attorney was ordered to pay \$2 million.
- A stockbroker, driving on a Saturday night, dropped his personal cell phone while driving. The broker attempted to search for the phone on the car's floor, but ran a red light, killing a motorcyclist. The estate of the motorcyclist sued the

brokerage firm the driver worked for. The estate obtained testimony from other employees at the brokerage firm that the firm encouraged business calls to clients during non-work hours. The firm ultimately paid \$500,000.00 to the motorcyclist's estate to avoid going to a jury trial.

The key to these cases for the injured plaintiff to recover from the other driver's employer is establishing the legal theory of *respondeat superior*. To do so, the plaintiff must establish that the employee was acting at the employer's direction or control in some minimal fashion. As indicated in the above examples, the employee's making a business call when an accident occurs can be enough to make the employer liable.

A strong and well communicated employer policy prohibiting the use of cell phones (and personal data assistant "PDA" devices) while driving on employer business or making business calls while driving at any time will be helpful in defending these cases. Employers cannot control their employees' movements at every instant, but they can plan for the unfortunate events that may occur. Having a policy that is known to all the employees will limit the possibility that the employer will have to pay for all the employee's mistakes.

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BITS & PIECES

The Kaiser Family Foundation reports only 59% of small companies (fewer than 200 employees) offer *any* employee health insurance coverage, with that percentage declining about 5% each of the past few years. Some businesses that choose not to offer traditional health insurance plans are turning to Health Reimbursement Accounts (HRA), which are individual accounts, funded by the employer, which employees can apply toward their health care expenditures. The money accumulated in an employee's account stays with the employer if the employee leaves or if the plan is terminated.

QUOTABLE

"A lean agreement is better than a fat lawsuit"

-German Proverb-

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