

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

LABOR UPDATE – THIRD QUARTER 2006

RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

SUPREME COURT BROADENS RETALIATION PROHIBITIONS

The U.S. Supreme Court recently expanded the scope of the nation's chief civil rights law by deciding that an employer's actions constitute unlawful retaliation if they deter employee complaints, even if such actions are unrelated to employment or occur outside of the workplace. This ruling could foster a host of new retaliation claims.

This decision came after Sheila White sued the Burlington Northern Santa Fe railroad (BNSF) for several actions that followed her complaints of harassment. The first was a reassignment to different job duties that, although still within White's existing job description, were more demanding than those she had previously performed. Next, after White complained about this reassignment, she was suspended for 37 days without pay for alleged insubordination. Eventually, however, the company rescinded this suspension and reimbursed her with back pay for the 37 days.

White claimed that both the reassignment and suspension violated the anti-retaliation provision of Title VII of the Civil Rights Act, which prohibits an employer from discriminating against any employee or applicant because that person has complained of or opposed a practice forbidden by Title VII. After two lower courts supported White's claim, BNSF appealed.

The railroad contended that a mere reshuffling of White's existing duties, accompanied by no reduction in pay, was insufficiently punitive to amount to actionable retaliation. Essentially arguing "no harm, no foul," BNSF likewise submitted that because it had erased White's suspension and reimbursed her with back pay, White did not suffer any real punishment for which it could be liable.

The Supreme Court rejected BNSF's arguments and held that White had established valid claims for retaliation for both of these challenged actions. The Court found sufficient evidence to conclude that White's job assignments after her complaint

were “more arduous and dirtier” than those she had before. As to the rescission of White’s suspension and her receipt of back pay, the Court noted that despite these gestures, White and her family still had to live for 37 days without income, not knowing whether or when White could return to work.

In deciding that these specific harms were sufficient to constitute actionable retaliation against White, the Court set forth a new, seemingly low standard for determining what “retaliation” is. Under this standard, any “materially adverse” action that might “dissuad[e] a reasonable worker from making or supporting a charge of discrimination” will be deemed unlawful. Furthermore, noting that a law that prohibited only employment-related actions would not deter many forms of retaliation, the Court emphasized that Title VII’s anti-retaliation provision also applies to actions that occur outside the workplace, as well as those that do not directly affect terms and conditions of employment (e.g., false complaints about an employee to police).

Although the Court did mention that “trivial harms,” “petty slights,” and “minor annoyances” would generally not deter reasonable persons from pursuing their Title VII rights, it acknowledged that the significance of any given act of alleged retaliation would ultimately depend upon particular circumstances. In light of this decision, employers should be more cautious than ever when dealing with employees who have aired discrimination concerns. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. ____ (2006).

SOME RECENT CHANGES IN THE LAW AFFECTING ILLINOIS EMPLOYERS

The Illinois General Assembly has enacted a flurry of new laws affecting Illinois employers, many of which are friendly to employees and unions:

- ✓ Sexual orientation discrimination is now prohibited under the Illinois Human Rights Act. 775 ILCS 5/1-102A.
- ✓ “English only” edicts in the workplace are now prohibited unless the employer can show business necessity. 775 ILCS 5/1-101.1
- ✓ The underpayment of the State of Illinois minimum wage (currently \$6.50 per hour) now carries the penalty of punitive damages (2% per month of the unpaid amount). 820 ILCS 105/12
- ✓ Communications from employees to union representatives are now considered as “privileged” and thus not subject to disclosure, similar to attorney-client or doctor-patient communications. 735 ILCS 5/8-803.5

- ✓ Employees are entitled up to two paid hours to vote in general or special elections. The employee must give advance notice and the employer can, within limits, specify the hours in which the employee may leave to vote. 10 ILCS 5/17-15.
- ✓ Employers of at least 25 workers must grant (unpaid) leave for employees who provide 20 days notice that they will be serving as an election judge. 10 ILCS 5/13-2.5; 10 ILCS 5/14-4.5
- ✓ A state “whistleblower” law has been enacted, prohibiting firing or other adverse action against an employee who provides information to state or federal officials regarding matters that the employee reasonably believes to be unlawful employer conduct. 740 ILCS 174
- ✓ The Victim’s Economic Security and Safety Act (“VESSA”) prohibits employers of at least 50 employees from discriminating against victims of domestic violence who need leave time for medical or psychological care, to seek legal assistance, to obtain assistance from victim services organizations or to engage in relocation activities. 820 ILCS 180/1
- ✓ The Illinois Military Leave Act provides limited leave time for family members of persons in active military service. 820 ILCS 151/1.
- ✓ The Employee Blood Donation Leave Act requires employers of 51 or more employees to provide up to one hour’s paid leave every 56 days for employees who wish to be excused from work to donate blood. 820 ILCS 149/1
- ✓ The Illinois Right to Breastfeed Act provides that mothers may breastfeed their babies in any location (public or private) where the mother is otherwise authorized to be, and it is unlawful for an employer to deny a mother this right. Further, unless unduly disruptive, an employer must provide reasonable unpaid break time for an employee needing to express breast milk, as well as a private place for the mother to do so. 740 ILCS 137/1
- ✓ Illinois has enacted its own Equal Pay Act, essentially mirroring the federal law. Employers of 4 or more employees are prohibited from paying different wages to men and women for doing the same or substantially similar work or for jobs requiring equal skill, effort and responsibility, and for work that is performed under similar working conditions. Besides the remedy of making up the pay difference, this law provides for civil penalties and attorneys fees. P.A. 93-0006
- ✓ Illinois now has its own Worker Adjustment and Retraining Notification Act, similar to the federal “WARN” law. Whereas the federal law applies to employers of 100 or more employees, the Illinois version applies to employers of 75 or more employees. Sixty days’ notice must be given to the affected employees, various public entities and a union, if applicable, before a mass layoff, relocation or employment loss. P.A. 93-915

- ✓ The Illinois Personal Information Protection Act, requires employers (and other entities which collect data) to notify employees when there has been a breach of computer security and personal data may have been acquired. 815 ILCS 530/1

Please note that the above highlights are by no means an exhaustive treatment of these laws, which should be read fully to understand their full breadth, exceptions and specific requirements. The attorneys at Peters & Lyons, Ltd. are available to discuss the applicability of these recent Illinois laws to your specific needs.

BE THE BALL!

On May 2, a federal court in New York awarded \$34,000 to a caddie on a sexual harassment claim.

The Tallgrass Golf Club held a series of golf matches among its employees. Caddie Eugene Palumbo was defeated in one of these games by a female employee. Poking fun at Palumbo, the club manager circulated a newsletter that announced the results of the matches and referred to Palumbo as a “ball-less wonder,” and suggested that perhaps he might enjoy vacationing at a nearby resort town that had a reputation as being frequented by gay people.

Palumbo didn’t think it was very funny and nor did the EEOC, which filed suit on his behalf in federal court. The case points up the need for managers to curb their enthusiasm as comedians. Poking fun at someone, even if meant as “good fun,” can poke the employer in the pocketbook.

“CYBERSLACKING” EATING AWAY AT COMPANY PROFITS

In a recent study conducted by America Online and Salary.com, it was found that office workers cited personal internet use as their principal work distraction. The study estimated that \$750 billion annually was wasted by employees surfing the net.

Besides being a timewaster, cyberslacking increases a company’s computer system to viruses and being a repository for inappropriate or even illegal subject matter.

Employers should seriously consider implementing internet use policies for both security and productivity reasons. The attorneys at Peters & Lyons, Ltd. can help you craft a policy for your business needs, advise you as to effective ways to communicate that policy to your employees, and craft appropriate methods to monitor compliance.

Since 1984, the LABOR UPDATE has been 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. The LABOR UPDATE may be quoted or reproduced if credit is given to Peters & Lyons, Ltd. as the source.

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