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## LABOR UPDATE – FIRST QUARTER 2007

RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

### RETALIATION UPDATE: EMPLOYERS VICTORIOUS IN KEY CLAIMS

Last summer, the *Labor Update* reported that a ruling by the U.S. Supreme Court had broadened the anti-retaliation provisions of one of the nation's chief civil rights laws, potentially opening the door to an array of new retaliation claims. That case, *Burlington Northern & Santa Fe Railway Co. v. White*, announced that any "materially adverse" action that might "dissuade a reasonable worker from making or supporting a charge of discrimination" would be deemed unlawful.

In a case recently decided by a federal court in Chicago, an employee-plaintiff who no doubt was encouraged by the Supreme Court's decision, ultimately wound up disappointed. A lower court's rejection of her attempt to base a retaliation claim on alleged post-employment "blackballing" by her former boss was affirmed on appeal.

Evelyn Szymanski, a former nurse at Cook County Hospital, claimed that after she successfully pursued a discrimination lawsuit against the county, her former supervisor retaliated against her by giving unfavorable references to potential new employers. However, Szymanski could not muster sufficient evidence to prove that her failure to obtain new employment was due to "adverse" action by the hospital. Indeed, because her former boss had rated her performance as "good," Szymanski could not even establish adverse action in the first place.

Although Szymanski contended that she should have been rated more favorably, the court, noting that there was no evidence to suggest that this rating was false, refused to rule in the abstract that rating someone as "good" could be deemed unlawful "adverse action." Because Szymanski had no evidence of any other alleged adverse action by the hospital, the court concluded that it was impossible to conclude that her failure to be hired for a new job had anything to do with unlawful retaliation. *Szymanski v. County of Cook*, \_\_\_ F.3d \_\_\_, 2006 U.S. App. LEXIS 28672 (7<sup>th</sup> Cir. 2006).

In a related development, another employee-plaintiff recently saw his state-law claim for retaliation likewise defeated. Michael Webber, a corporate CFO, claimed that he was unlawfully retaliated against and discharged because he objected to his

employer's accounting practices, which he believed were illegal and improper. His employer countered that Webber had been "on the bubble" of termination for years, and was ultimately fired for communication problems and poor quality of work. Webber's case was tried to a jury, which rejected his retaliation claim and returned a verdict for his employer that was affirmed on appeal.

Webber's claim was undone in part by key pieces of evidence introduced by his employer. Several witnesses testified to ongoing problems with Webber's personality and performance. Most significantly, form letters that Webber had signed for his employer's auditors in which he attested to the integrity of the company's accounting practices went a long way to undermine his charge that this accounting was improper. Webber's efforts to have these letters thrown out on appeal were rejected by the court. *Webber v. Wight & Company*, No. 1-04-1622 (1<sup>st</sup> Dist., November 9, 2006).

Although retaliation claims have become relatively easier for employees to bring of late, these developments indicate that with careful action and planning, employers still can defeat them. Employers should, however, continue to proceed with caution when dealing with employee-complainants and remain mindful that any adverse employment action taken in the wake of an employee's "whistleblowing" (whether done inside or outside the company) can give rise to a legal presumption of retaliation. Therefore, employers should make certain that adverse action taken against such a complainant is appropriate under the circumstances, can be justified and supported with ample and adequate evidence, and, if practicable, does not follow a complaint so closely as to suggest an unlawful connection.

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### **POTPOURRI OF TRENDS IN EMPLOYMENT**

Traditionally the first quarter edition of the *Labor Update* includes wage and benefit data that may be helpful to your 2007 business planning. Some highlights include:

- Chicago employers reported in a recent study that their pay hikes will average 3.7% in 2007. Annual wage increases have not touched 4% since 2001. Declining pay increase numbers in recent years have been spurred by galloping increases in health care costs.
- Heading into 2007, the Consumer Price Index continues at approximately 2.5% annually.
- Nationally, the United States Department of Labor ("USDOL") reported that near the end of 2006, union wage increases averaged 2.2% (2.8% total wages and benefits) as contrasted with 3.2% wage increases in the non-union sector (3.1% total wages and benefits).

- Unions represent 16.9% of the Illinois workforce, holding steady from the previous year. The USDOL figures show a decline of unionized workers nationally from 21.2% of the workforce in 1995 to 12.5% in 2005.
- On December 19, 2006, Illinois Governor Rod Blagojevich signed into law a bill that increases the minimum wage rate in Illinois from \$6.50 to \$7.50 on July 1, 2007, and \$.25 each year for three years thereafter, to a total of \$8.25 by 2010.
- At mid-year 2006, the USDOL reported that private employer compensation costs averaged \$25.16 per hour. Of that, wages and salaries averaged \$17.77 (71%) and benefits \$7.39 (29%).
- Group health insurance premiums increased 7.7% in 2006, slower than the 9.2% hike in 2005 and the total rise of 68% since 2001, according to the Kaiser Foundation's annual study. Over 75% of covered workers with single coverage and over 90% of covered workers with family coverage make contributions toward insurance premium costs. On average, employees nationally contribute 16% toward the premium cost for single coverage and 27% for family coverage. In addition, increasing deductibles and adjustments to drug plans and other benefit features have added to employee costs.

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**AS THE BALL BOUNCES...**  
**LABOR LAW IMPLICATIONS OF NBA'S NEW BALL AND TATTOO RULES**

This season the National Basketball Association changed to a new synthetic ball, eschewing the venerable leather ball used since Dr. Naismith hung up that peach basket in the Springfield, Massachusetts YMCA in 1891. U.S. Patent #1,718,305 was granted to the design of the "basketball" in 1929.

Many NBA players didn't like the new basketball and their frustration led them to file unfair labor practice charges with the National Labor Relations Board in December, 2006. The charges were based on the principle that in a unionized setting, an employer cannot make modifications to wages, hours and other conditions of employment without first bargaining with the union to an agreement or to an impasse on the subject. Here, the players alleged that the composition of the ball was a "condition of employment" that had to be respected under this rule. While the NBA had a public relations nightmare on its hands, it also had significant arguments to oppose the players' unfair labor practice charge. After all, would anyone seriously argue that a unionized business owner has to first negotiate with the union when it decides to retool and utilize what it hopes to be better machines to produce its product? Would an employer have to bargain before it acquired new machines to produce new products? Disappointing some basketball fans and legal theorists alike, the league recently let the air out of this entire issue by agreeing to re-implement the "old" leather ball on January 1, 2007.

Another hotbed of controversy for the NBA players is body tattoos. With bare upper arms and shoulders prominent in a basketball uniform, some players may be tempted to display tattoos (whether of the permanent or temporary variety) as part of company endorsement contracts. The issue raises questions of the NBA's "brand." Notably, the issue involves questions of competition and infringement between commercial images displayed on a player's shoulder and other images a company has paid the NBA or the team to display in the arena or on television. Whether or not the regulation of tattoo content is a matter that "vitally affects" the terms and conditions of the employment relationship between the bargaining unit (the players) and the league as a matter of labor law remains to be decided.

In the meantime, enjoy the game.

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### **BITS & PIECES**

Employers concerned about filing accurate W-2 Wage and Tax Statements can verify their employees' social security numbers online. Through the website of the Social Security Administration ([www.ssa.gov](http://www.ssa.gov)), an employer can instantly verify whether the social security number for an individual employee matches the number on file with the federal government. This process can save employers quite a bit of time and worry if the Social Security Administration has questions later on.

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In what will be a closely watched case, a former employee of Scotts Miracle-Gro sued the company after he was discharged for smoking. The company had put in place a policy last year that prohibited smoking in order to promote healthier lifestyles and keep insurance costs down. The company refused to hire smokers and required employees to undergo tests for nicotine. After he tested positive for nicotine, the discharged employee stated he chewed nicotine gum on the way to the testing, and that he never once smoked while on company time.

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### **QUOTABLE**

*I will meet the corrupt, the greedy, the arrogant, the deceitful, the envious and the boastful. Therefore, I shall not be unreasonably disturbed by it all, no more than I am disturbed by changes in the weather.*

-Roman Emperor Marcus Aurelius-

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