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## **LABOR UPDATE – SECOND QUARTER 2007**

*RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW*

### **“STRICT” EMPLOYER SAFETY POLICIES AND THE ADA: A COURT UPHOLDS AN EMPLOYER’S ABILITY TO MANAGE RISK WITHOUT DISCRIMINATION**

The EEOC recently took the nation’s largest trucking company to court, claiming that the company’s policies regarding certain medical conditions violated the Americans with Disabilities Act. The EEOC claimed the employer’s policy resulted in the company “perceiving” employees as disabled (thus giving the employees protection under the ADA). The federal appeals court in Chicago told the EEOC that its interpretation of the ADA was too broad—and that employers can, under the right circumstances, take action relating to employees’ medical conditions.

The case involved truck driver, Jerome Hoefner, who was a valuable long-term employee for Schneider National, Inc. In 2002, Hoefner received an award from Schneider for successfully driving a million miles without an accident. Shortly after receiving the award, Hoefner had a fainting spell and was diagnosed with a condition known as “neurocardiogenic syncope.” The symptoms of the condition include sudden drops in blood pressure and potential fainting. The condition is treatable, however, and the symptoms can be controlled with prescribed medicine. While on medication, Hoefner could satisfy the federal safety standards required for truck drivers.

Schneider took a more rigid position concerning neurocardiogenic syncope. In 2000, another Schneider truck driver who had been diagnosed with the disease tragically “fell asleep” at the wheel of a Schneider truck and was killed. Although it was not conclusively proven that this prior accident was the direct result of the driver’s neurocardiogenic syncope, Schneider wanted to avoid a potentially similar tragedy. Schneider immediately established a company policy not to employ truck drivers who suffered from neurocardiogenic syncope. By doing this, Schneider adopted a “higher” or “stricter” safety standard than the one mandated by the federal government. When Hoefner was diagnosed with neurocardiogenic syncope in 2002, his employment was terminated.

The EEOC took up Hoefner's case and requested that the court find Schneider's policy, and the firing of Hoefner pursuant to that policy, to be in violation of the Americans with Disabilities Act. Arguing that Schneider acted impermissibly with respect to Hoefner's disability, the EEOC noted that Hoefner's condition was treatable, that he met federal safety standards, and that after Schneider discharged him he found work driving with a competing trucking company. The trial court denied the EEOC's request, and the federal appeals court in Chicago agreed on March 21, 2007.

The appellate court made two important points in denying the EEOC's case. First, although the ADA prohibits discrimination based upon an employee's disability (or when an employer mistakenly "perceives" that an employee is disabled), simply showing that the employer took action because of the employee's medical characteristics is not enough. In order for an ADA violation to be found, the employer's challenged action must stem from its belief that the employee is impaired with respect to engaging in a "major life activity." In this case, the evidence showed Hoefner was able to get another job driving a truck, so his neurocardiogenic syncope did not disable him from the alleged major life activity of "working."

Second, and importantly for employers who are attempting to craft company policy relating to employee health and well being, the court affirmed the legitimate need of an employer to protect against risks. Per the court, when an employer sets a legitimate health and safety standard that is stricter than the standards imposed by law, but which has an adverse effect on an alleged disabled employee, the employer does not automatically violate the ADA. Accordingly, Schneider's policy of not employing any drivers diagnosed with neurocardiogenic syncope, even though "higher" than the safety requirements set by federal law, did not violate the ADA. Schneider had a legitimate purpose in implementing the policy (the previous tragic accident), and the courts will not second guess such legitimate company policy decisions. *EEOC v. Schneider National, Inc.*, 2007 U.S.App. LEXIS 6454 (7<sup>th</sup> Cir. March 21, 2007).

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## **PROTECTING YOUR WORKPLACE FROM CUPID'S ARROWS OF LOVE**

Employers often have to deal with employees who date, fall in love, and occasionally break up. A recent poll by Spherion, a workplace recruiter, shows that nearly 40% of U.S. workers have dated an office colleague. Disturbingly, the same survey showed that 84% of U.S. workers said their employers lacked a policy concerning office romance (or they were not sure if such a policy existed.)

The effects of not having a company policy dealing with office romances can be far reaching for employers. Claims of preferential treatment and conflict of interest can emerge. When supervisors are involved in the romance, potential harassment and retaliation claims can loom. Even relationships that begin as entirely consensual can foster claims if they eventually turn sour.

Questions as to what constitutes prohibited employee “dating” or “fraternization.” can be especially difficult. Additional problems can arise when employers only hear about employee behavior indirectly or “around the water cooler.” Does mere rumor or gossip trigger a duty to investigate or act?

In circumstances of alleged harassment between rank and file employees, courts have held that employers can be liable for such harassment when they know (or should know) about the harassing misconduct and fail to take reasonable measures to stop it. However, when the alleged harasser is a supervisor, employers are almost always held responsible for the supervisor’s misconduct.

In order to avoid liability, employers should anticipate problems and consider implementing written rules, guidelines and programs. Employers should ensure that employees are given adequate notice of the company policy, made aware of the consequences of violating the policy, and uniformly held to the policy’s standards. Some forms of company policies can include:

- Written rules of conduct or anti-harassment policies contained in the employee handbook that acknowledge the existence of employee dating, but prohibit it if the employees are in the same department, or if one employee has supervisory or management responsibilities over the other.
- “Consensual Relationship Agreements”. If an employer learns of a workplace romance, it can require that the employees sign a statement wherein they acknowledge that the relationship is consensual and agree to comport themselves in accordance with company policy.
- Preventative training programs. Such programs are aimed at increasing awareness of the danger office romances and providing employees the skills and motivation needed to address issues of sexual harassment in the workplace.
- Anti-fraternization policies that restrict or limit workplace romances altogether. All restrictions and limitations must accord with applicable federal, state and local laws. For instance, many states have laws that prohibit discrimination on the basis of marital status, so any policies must not inadvertently result in disparate treatment of co-workers who are married.

There is no simple answer to what policies employers should implement in order to prevent or diminish the potential risks of workplace romances. Every work environment is different, as is every potential company policy. The key is employer recognition of risks involved in office romances. Only then can an employer decide what actions to take, and then work with legal assistance to design, if necessary, and enforce a policy that is right for the company. The attorneys of Peters & Lyons, Ltd. are skilled at developing and tailoring employment policies that suit individual employer needs.

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## **BITS & PIECES**

The United States House of Representatives approved the Employee Free Choice Act of 2007 on March 1, 2007. The new Democratic majority introduced the proposed legislation on behalf of national labor unions. Under current procedure, employees wishing to form a union must obtain written authorizations from 30% of all the proposed bargaining unit members. If the 30% threshold is met, the NLRB can hold a secret ballot election to determine whether the proposed union should be certified. The new law calls for the union's certification, without a secret ballot election, after a showing of a simple majority of employee authorization cards. This process would make it much easier for unions to organize and make more demands upon employers. The Senate will debate the measure later this year.

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The outplacement firm of Challenger, Gray & Christmas estimates that loss of productivity due to "March Madness" (the NCAA Basketball Tournament) this year will approach \$1.2 billion. The figure is four times the estimate of two years ago, which the researchers attribute to employees having more internet access at work.

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Employers of employees utilizing Blackberry and similar "PDA" devices that synch with company computers are well advised to broaden their computer use policy to cover these devices, including describing what company information may (and may not) be loaded on the PDA, how it should and should not be used (including a statement that it should not be used while driving), required security configurations for the device, that it be subject to employer inspection and specific procedures to follow should it be lost or stolen.

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## **QUOTABLE**

*The nearest most people come to perfection is when  
filling out an employment application*  
-Unknown-

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