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## **LABOR UPDATE – THIRD QUARTER 2007**

*RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW*

### **PREGNANCY DISCRIMINATION – AGAINST A MALE?**

On June 6, the federal appeals court in Chicago decided a case brought jointly by two discharged employees—one female, the other male-- under the federal pregnancy discrimination law.

Charles Griffin was the Farm Manager for the Sisters of St. Francis, an order of Catholic nuns. He oversaw an intern program that included Julia Yarden, who became pregnant with Griffin's child during their employment. The nuns were aware of Yarden's pregnancy and Griffin's paternity.

Things had been going badly in the intern program and Griffin was fired as manager. Later, Yarden was also terminated when the farm eliminated its corporate marketing function, in which Yarden was the sole employee. Yarden and Griffin both sued for pregnancy discrimination under the Pregnancy Discrimination Act (PDA), Griffin claiming that he was the victim of the same unlawful bias visited upon Ms. Yarden.

The appeals court found that a male cannot state a claim under the PDA, which was enacted for the protection of women. However, the court speculated that if Griffin had sued under a sex (i.e. gender) discrimination theory, such a claim might be valid if there was evidence that he was fired because of his sex.

Turning to Ms. Yarden's claim, the court found that the Sisters of St. Francis had stated a legitimate business reason for the termination action—the elimination of its corporate marketing function (that Yarden occupied alone)—and that Yarden had failed to meet her burden of proving that such reason was a pretext. In observing that it is not the court's function to sit in judgment of business decisions, it stated, "the question is never whether the employer was mistaken, cruel, unethical, out of his head or down right irrational in taking the action for the stated reason, but simply whether the stated reason was its reason." Thus, whether Yarden's termination was "...smart or advisable has no

bearing on the pretext inquiry.” Since Yarden had no evidence to show that the reason for her termination was pretextual, the case was dismissed. *Griffin v. Sisters of St. Francis, Inc.* (Case No. 06-3312; Slip op. June 6, 2007)

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**RISKY BUSINESS:**  
**FAILURE TO INVESTIGATE**  
**HARASSMENT CLAIMS**

Karen Bombaci worked as a pressroom jogger in a printing facility in Hartland, Wisconsin. She claimed that shortly after her hire, two male co-workers began sexually harassing her by touching her offensively, pulling down her shirt, making sexual gestures in her presence and making crude remarks to her about sex acts.

Ms. Bombaci alleged that she had complained to another co-worker, Sarah Stoll, after two years of this continued misconduct. Although Stoll wasn't a supervisor, Bombaci said that she thought Stoll was. Bombaci further said that Stoll got back to her, telling her that she (Stoll) had passed along the complaint to the facility manager who allegedly said that he would pass Bombaci's complaint along to the company vice president. Stoll and the manager both denied that Bombaci had ever complained to them and thus also denied saying anything about passing the complaint up to the front office.

Two years after this alleged exchange of communications, there was another incident of alleged harassment in the shop. Bombaci then complained to the new human resources person at the company about ongoing harassment by the same two males. After an investigation, the company fired the two male workers. Thereafter, Ms. Bombaci felt that her co-workers ostracized her and she resigned.

Bombaci sued the company for sexual harassment, complaining that the company knew of the harassment but had done nothing to stop it for two years after she had initially reported it to Sarah Stoll. However, the federal trial court rejected her claim. That court felt that although there was no question that the harassment was severe and pervasive, there was no evidence that the company had acted negligently in discovering the harassment. The court found that Bombaci's initial claimed report to Stoll didn't put the company on notice of the harassment because Bombaci couldn't have reasonably believed Stoll to be in a position to respond to such complaints. Furthermore, Bombaci hadn't accessed the company's formal harassment complaint procedures.

The federal appeals court in Chicago recently disagreed and reinstated Bombaci's case, sending it back for trial. The court held that a jury should consider Stoll's alleged statement that a manager would pass along the complaint to the front office and, if it believed the statement, decide whether the company was negligent for failing to investigate the complaint.

This case emphasizes the need for an employer to establish a policy and provide training and other information to employees regarding not only the reporting of harassment, but also the action to be taken upon receiving such a report. Supervisors and managers should understand that they have a legal responsibility to immediately follow through on investigating any such complaints, whether the complaint is a formal or informal, an oral statement by the claimed victim of harassment, or as here, the passed along complaint of an intermediary. *Bombaci v. Journal Community Publishing Group, Inc.* 482 F.3d 979 (7<sup>th</sup> Cir. 2007).

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### **PAID SICK LEAVE MADE MANDATORY**

California, the state known for setting fashions and trends in both culture and law, is at it again. The City of San Francisco's recently enacted Paid Sick Leave Ordinance appears to have inspired a rash of similar bills across the nation.

Under San Francisco's ordinance, employers in that city must provide full-time, part-time, and even temporary employees with paid sick leave, to accrue at the rate of one hour for every 30 hours worked. For new hires, sick leave begins to accrue after 90 days of employment. Employees working for small employers (fewer than 10 employees) are allowed to accrue up to 40 hours of paid sick leave. Employees of larger employers can accrue up to 72 hours.

Accrued, unused paid leave carries over from year to year up to the maximum leave limits. However, the ordinance does not require employers to pay out accrued, unused benefits to terminating employees.

The ordinance permits employees to take paid sick leave for their own illness or to care for sick children, parents, siblings, grandparents, grandchildren, spouses, domestic partners, and a "designated person" of the employee's choice. Employers can require employees to give "reasonable notification" of an absence for which paid sick leave is or will be used. However, employers cannot require employees to find a replacement worker to cover the hours while an employee is on paid sick leave.

Legislatures in at least seven states are expected to consider mandatory sick leave bills this year. Federal legislation, dubbed the "Healthy Families Act" has also been introduced in both houses of Congress. It remains to be seen how many other jurisdictions will follow San Francisco's lead, but at this point, the trend towards establishing paid sick leave as a workplace "right" certainly seems to be gathering momentum.

## ILLINOIS MINIMUM WAGE ON THE RISE

The cost of labor in Illinois is on the rise again. Beginning July 1, 2007, Illinois' minimum wage will increase by \$1.00 per hour, to \$7.50. In each of the following four years, the minimum wage will again increase by \$.25 per year, culminating in a minimum wage of \$8.25 beginning July 1, 2010. However, the minimum wage law does give employers some breaks. For the first ninety days of employment, the wage can be \$.50 less than the mandatory minimum.

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## **BITS & PIECES**

A federal appellate court recently decided that a female employee who was fired after she inappropriately grabbed her male boss and passed him suggestive notes had no sex discrimination claim against him or the company. The court reasoned that the plaintiff, Maelynn Tenge, was not fired by her boss Scott Phillips because of her sex, but rather because of his "desire to allay his wife's concerns over Tenge's admitted sexual behavior with him." Tenge's biggest problem in proving her case was Scott Phillips' wife Lori was involved in the operation of the business, and it was Lori's suggestion to fire Tenge. The lesson, as always, is that the wife is usually right.

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The launch of the "iPhone" from Apple in July 2007 is scaring employers who have incurred considerable expenses in enabling other mobile software for their employees, such as installing BlackBerry software. Currently, the "iPhone" will not deliver corporate email over the BlackBerry system. Many employers are greatly concerned that tech-saavy employees could find a way to get their corporate email delivered to the "iPhone," weakening the company's IT system in the process. Because the "iPhone" is expected to sell in vast numbers, this issue is likely to arise with great frequency. The attorneys of Peters & Lyons, Ltd. can help craft employer policies which effectively deal with these problems.

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## **QUOTABLE**

*Lawyers: persons who write a then thousand  
word document and call it a brief*

**Franz Kafka**

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