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LABOR UPDATE – FOURTH QUARTER 2007

RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

UNFAIRNESS ≠ UNLAWFUL DISCRIMINATION

Workers involuntarily separated from employment often feel they have been treated unfairly. However, garden-variety unfairness does not necessarily equal unlawful discrimination. The employment discrimination laws require more.

While Vickie Hossack worked as an office manager at a flooring store in Joliet, Illinois, she had a lengthy affair with store manager Nick Cladis. "World War III" erupted when Hossack's husband learned of the affair and Hossack told the store's owners about the relationship. Understandably upset, Hossack's husband let it be known that he would cause trouble for Cladis.

After a series of discussions between Hossack and the store owners about whether she wanted to keep working with Cladis, resign, or transfer to another store, the company told Hossack that it was accepting her resignation. Hossack refused to sign a resignation document, pointing out that Cladis had not been fired or otherwise disciplined for being party to the affair. She later filed a sex discrimination charge and ultimately a lawsuit in the federal court in Chicago.

The case was heard by a jury, who had little trouble finding that Ms. Hossack's "resignation" was really a discharge. The jury found the company liable for sex discrimination and awarded Hossack $250,000 in damages. However, the federal district judge stepped in and reversed the jury's verdict. The federal court of appeals in Chicago this summer agreed with the dismissal of the case.

The company had argued at trial that it feared the threats Hossack's husband made, and worried about the risks of workplace disruption he might cause. The company also argued that Cladis wasn't discharged because he was the top earning salesman in the store and therefore more important to the organization than Hossack. It was additionally established at trial that the employer had known of twelve other past or present employees in that store who had romantic relationships with other employees, but none had ever before been disciplined and there was no rule prohibiting such relationships.

Although there seemed to be plenty of support for a conclusion that Hossack was treated *unfairly* in the matter, the appeals court nevertheless agreed with the lower court judge that her case should be dismissed because Hossack could not establish that her separation was *because of* her sex. That is, Hossack failed to come forth with any evidence to show that the company's explanations (i.e., its fears of the angry husband and Cladis' top sales production) were pretexts unworthy of belief. Thus, the appeals court concluded that Hossack had failed in her burden to introduce evidence of *intentional discrimination because of her sex.*

Although this case points out how a seemingly unfair discharge may not result in liability where the employee cannot establish the crucial causal link between the firing and the employee's legally protected status (here, her gender), prudent employers work hard to avoid discharges, demotions or other adverse actions which, in the first instance, have the sense, smell or stench of unfairness. *Hossack v. Floor Covering Associates of Joliet, IL.*, 2007 U.S.App.LEXIS 15949 (7th Cir. 2007).

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"JUST WIN, BABY?" CONSIDER THE OTHER SIDE'S ATTORNEY'S FEES

Many times when employers are sued by a former employee, the first reaction is to fight the allegations until the end. Sometimes, that strategy is a wise one and should be pursued. However, the "just win" strategy sometimes should be tempered based upon considerations outside the merits of the lawsuit itself. The potential of paying the opposing party's attorney's fees should always be taken into account before proceeding with litigation.

Consider a recent case involving the employer Rent-A-Center. Rent-A-Center ("RAC") had a policy and practice of administering a test to its employees (known as the APT Management Test). The test included a personality test, which RAC utilized in awarding promotions. If an employee deviated in a pre-determined number of ways on the personality test from what RAC deemed acceptable, the employee was ineligible for promotion.

Several RAC employees filed a class action lawsuit against RAC in 2002 alleging that the personality test violated the Americans with Disabilities Act's prohibition against medical examinations. Amongst other things, the employees requested that RAC stop using the personality test and disregard the results when making promotions. The initial court hearing the matter granted judgment to RAC. The employees then appealed the judgment and won at the appellate level. The appellate court directed the trial court to enter judgment for the employees on their ADA claim.

The employees' attorneys then moved the trial court for the payment of their fees, which then totaled in excess of $250,000. The trial court denied the request, ruling that the employees were not a “prevailing party” and thus not entitled to fees. Because the plaintiffs did not recover any money from the judgment (not even a nominal sum), the trial court did not award them fees.

The employees then appealed the decision not to award their attorney’s fees. In July 2007, the federal appellate court in Chicago ruled that the trial court’s order that called a halt to the use of personality tests by RAC changed the legal relationship between the parties and resulted in a benefit to the plaintiffs. Therefore, the plaintiffs were “prevailing parties” and an award of attorneys’ fees was appropriate.

Thus, after five years of litigation, RAC’s employees won only the right to have the test results removed from their personnel files and RAC was ordered not to consider the test results. RAC was never ordered to pay its employees a dime. However, RAC was ordered to pay the opposing party’s attorney’s fees, which will be well in excess of $250,000. Therefore, it is important for employers to consider factors such as the potential of paying the other side’s attorneys before deciding to fight until the end. *Karraker v. Rent-A-Center, Inc.,* 2007 U.S.App. LEXIS 16184 (7th Cir. 2007).

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<u>ILLINOIS EMPLOYEES: PUT THAT CIGARETTE DOWN!</u>

Beginning January 1, 2008, Illinois workplaces must be smoke free. The “Smoke Free Illinois Act” mandates that places of employment and other public places (even though privately owned) must take steps to ensure a smoke free environment.

Citing medical studies that have concluded that secondhand smoke causes at least 65,000 deaths per year from heart disease and lung cancer, Illinois now joins a growing number of states that have banned smoking in all public places.

For employers, the requirements of complying with the Act include ensuring all parts of their buildings are smoke free, including private offices not visited by the public. Employers must also post “No Smoking” signs and remove any existing ashtrays in their buildings. If employers choose to designate a smoking area outside of their facility, such an area must be at least fifteen feet from any entrance or open window. Failure to comply with the requirements of the new law could result in fines for employers which escalate with repeated offenses.

For assistance in ensuring compliance with the new Smoke Free Illinois Act, please contact the attorneys of Peters & Lyons, Ltd.

BITS & PIECES

Although employment litigation is generally directed just at the corporate employer, there have recently been an increasing number of cases brought against company managers and supervisors as well. Many statutes flatly prohibit such individual attacks, but some state and federal laws explicitly or implicitly permit it. More and more plaintiff's attorneys are joining company owners, executives, managers or supervisors as individual defendants. It appears that this is sometimes done to "get the attention" of the employer, by making the case "more personal," and in some instances done to drive a wedge between the company and the individually sued manager.

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The next time one of your employees announces her pregnancy, say something appropriate! Ms. Asmo announced in a meeting that she was pregnant with twins and everyone present immediately expressed their congratulations -- except her manager, who remained silent. Shortly thereafter, Ms. Asmo was one of a number of employees affected by a reduction in force. Claiming unlawful discrimination because of her pregnancy, Asmo filed suit. In ruling that the case could proceed to a jury trial, the federal court of appeals said that the manager's silence at the time of Ms Asmo's announcement was suspect and became more so when the manager never again mentioned her pregnancy from then until she was terminated. The court found that this was something a jury was entitled to consider at a trial. *Asmo v. Keane, Inc.,* 471 F.3d 588 (6^{th} Cir. 2006).

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Union workers' wage and benefit gains continue to lag behind those of non-union workers. The U.S. Department of Labor Bureau of Labor Statistics Employment Cost Index released July 31, 2007, showed a one year increase in wages of 2.5% for union workers (as compared to 3.4% for non-union) and an increase in benefit costs of 1.4% for union workers (2.8% for non-union). Overall weighted compensation costs were increased 2.1% for union and 3.3% for non-union.

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QUOTABLE

Laws are like sausages.
It's better not to see them being made.
Otto Von Bismarck