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## **LABOR UPDATE – FIRST QUARTER 2008**

*RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW*

### **WHEN DOES THE HARASSMENT VICTIM HAVE A DUTY TO COMPLAIN?**

A Milwaukee Burger King outlet hired Samekia Merriweather, a high school student, to work at the restaurant. Merriweather had just turned 16 and this was her first job. Tony Wilkins, the Burger King's 35 year old manager, was having sexual relations with several of the restaurant's female employees and he turned his attention to Ms. Merriweather shortly after her hire. Wilkins began by making suggestive comments that soon escalated to rubbing up against Merriweather and inviting her to have sex with him. Merriweather rebuffed him, and Wilkins turned hostile and fired her.

Later, Wilkins rehired Merriweather and the harassment continued. Merriweather's mother came to the restaurant and complained to another supervisor about Wilkins's harassment of her daughter. When Wilkins heard about this, he fired Merriweather for involving her mother in the matter.

Merriweather filed sexual harassment and retaliation charges with the EEOC and a lawsuit followed. In November, the federal appeals court in Chicago reviewed whether the case should be submitted to a jury trial, wrestling with two questions.

First, the court examined whether Merriweather's failure to utilize the company's written grievance procedure should affect her claim. Although the court acknowledged that a harassment victim's failure to report harassment via a well written and communicated complaint mechanism can affect entitlement to certain damages, it recognized that the effectiveness of such a mechanism depends upon the circumstances. For example, a complaint mechanism written in English would not be effective for employees who cannot understand English. Here, the court held that because Burger King employs many employees of high school age, its complaint mechanism should have been written so that it could be understood by the average teenager. Parsing the Burger King employee complaint mechanism, the appeals court found that it was not only confusing to teenagers, but adult employees as well! The most serious shortcoming, the court said, was that the mechanism did not contain assurances that a harassing supervisor

could be bypassed in the complaint process. In the end, the court observed that the burden of proving the effectiveness of a complaint mechanism in these cases falls upon the employer, and Burger King had not met its burden.

Second, the court examined the question of whether Merriweather could proceed with her claim of retaliatory discharge, even though a third-party (her mother) had complained of the harassment on her behalf. The court noted that in several previous cases, “third-party” complaints were insufficient to trigger retaliation claims. However, in this case, the court found that the mother of a minor held a special position as the minor’s legal representative. The court likened this relationship to the attorney-client relationship, in which a complaint by an attorney to an employer can be treated as if made by the employee herself. The court observed that since a minor can only act through a parent or guardian with regard to many legal acts (e.g. filing a lawsuit), the mother should be regarded as the legal representative of the child for purposes of making a harassment complaint.

Undaunted, Burger King then argued that if the mother was viewed as Merriweather’s representative, then the mother should have pursued the harassment complaint through the procedures of the complaint mechanism. However, the court stated that this would have required the daughter to have shown the company handbook to her mother, who then would still have had to understand how to complain to her daughter’s supervisor. Rejecting this argument, the court ruled that the mother could not have been expected to do more than what she did.

This case points up the need for employers to have well constructed employee complaint mechanisms that are effectively communicated to employees. In some instances, this can serve to avoid liability or to lessen the impact of an adverse result. The attorneys at Peters & Lyons, Ltd. are available to review your policies and procedures in this regard.

*E.E.O.C. v. V&J Foods, Inc.*, 2007 U.S.App.LEXIS 25856 (7<sup>th</sup> Cir. November 7, 2007)

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### **SEX VERSUS SEXUAL ORIENTATION: TITLE VII COVERS ONLY ONE**

Interesting claims of discrimination and harassment are frequently brought against employers under Title VII of the Civil Rights Act of 1964. Recently, Christopher Vickers brought one of the more intriguing claims against his employer, Fairfield Medical Center. Vickers worked as a private security officer at Fairfield, and was “perceived” by his supervisors and co-workers as homosexual. After a long period of enduring discrimination and harassment by his co-workers and supervisors based upon their perception, Vickers sued Fairfield.

Title VII of the Civil Rights Act of 1964 prohibits discrimination and harassment of employees based upon a number of factors, but “sexual orientation” is not one of them. Although many state and local discrimination laws forbid discrimination and harassment

based upon sexual orientation, the federal government has not yet added sexual orientation to the “protected classes” under Title VII. Therefore, Vickers could not allege a valid claim based upon his co-workers and supervisors actions, because all the actions were only targeting Vickers’ perceived homosexuality.

Vickers argued to the court, however, that the discrimination and harassment he suffered were actionable because of a prior line of cases decided by the United States Supreme Court that ruled that “sex stereotyping” is a valid basis for bringing a claim under Title VII. The Supreme Court has ruled that if an employee is discriminated against or harassed because they do not conform to stereotypes about gender, they can validly state a claim. For instance, if a woman alleges she is perceived as “too mannish” and is discriminated against on that basis, she can validly bring a claim under Title VII. The Supreme Court decided that this type of discrimination falls under the rubric of “sex” discrimination (which is covered by Title VII) instead of “sexual orientation” discrimination (which is not).

Vickers, however, lost his argument that he was a victim of “sex stereotyping” because the kinds of discrimination and harassment that he suffered had nothing to do with his behavior in the workplace. Vickers admitted that he rarely talked about his personal life at Fairfield, and that the only cause of the alleged discrimination and harassment by his co-workers and supervisors was Vickers’ friendship with a homosexual doctor also employed by Fairfield. Because Vickers only alleged that the Fairfield supervisors and employees acted on their perception that Vickers was a homosexual, and not because they perceived him “too feminine,” he could not state a claim under Title VII.

The court’s ruling acknowledges that times are changing. It wrote: “While the harassment alleged by Vickers reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility, Vickers claim does not fit within the prohibitions of the law.” Congress has noticed cases like Vickers’ (and the actions of many state and local governments) and recently passed in the House of Representatives the *Employment Non-Discrimination Act*, which would amend Title VII to prohibit discrimination and harassment based upon sexual orientation.  
*Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6<sup>th</sup> Cir. 2006)

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## **NEW YEAR BRINGS CHANGES TO CHARGES**

On January 1, 2008, changes to Illinois law will take effect that significantly alter the way charges of discrimination are handled at the state level. The Illinois Human Rights Act currently provides that employees may file a complaint for discrimination only with Illinois Human Rights Commission after first allowing the Illinois Department of Human Rights to investigate the claim.

The changes to the Human Rights Act now allow complainants to file a complaint in state circuit court once the Illinois Department of Human Rights either makes a finding

on the complainant's charge or after 365 days of filing. Importantly, the new changes allow complainants to bring their case to a jury, which can award them compensatory damages expected to be far greater than those historically awarded by the Human Rights Commission. While punitive damages are still unavailable for cases alleging discrimination and harassment, these changes to the law may significantly change the way Illinois employers handle such cases in the future.

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### **BITS & PIECES**

In 2008, employers are once again facing increased employment costs. Recent surveys have projected a 3.9% increase in exempt employee salaries for the upcoming year. Non-exempt employees and union employees are projected to earn an additional 3.7% and 3.3%, respectively. Couple this data with projections that the average health cost per person for major companies will rise from \$7,982 in 2007 to \$8,676 in 2008, and employers are looking at another expensive year.

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The Tylenol made her do it. A certified nursing assistant recently was discharged after she fell asleep on the job. The nursing assistant claimed that she should nevertheless be entitled to unemployment compensation, claiming that her actions were not "deliberate." The nursing assistant argued that she had taken an extra-strength Tylenol for a toothache, and that she therefore had not "deliberately" fallen asleep on the job. Thankfully, the agency in charge forced her to admit, as a nursing assistant, that she knew that drowsiness was a side effect of extra-strength Tylenol. The agency then denied her benefits.

### **QUOTABLE**

*You can tell the size of a man  
by the size of the thing that makes him mad.*

Adlai E. Stevenson

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