

# **PETERS & LYONS, LTD.**

**ATTORNEYS AT LAW**

7035 VETERANS BLVD.  
BURR RIDGE, IL 60527

**DONALD F. PETERS JR**  
**CHRISTOPHER P. LYONS**

**TELEPHONE (630) 887-6900**  
**FACSIMILE (630) 8876910**  
**WWW.PETERSLYONS.COM**

## **LABOR UPDATE — THIRD QUARTER 2008**

*RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW*

\* \* \* \* \*

### **NOW THAT'S JUST WEIRD! EMPLOYEE'S BIZARRE BEHAVIOR BEGETS FMLA LEAVE?**

Although she was a satisfactory employee with no history of misconduct or health problems at Hyre Electric Company, Beverly Stevenson was no animal lover. On the morning of February 9, 2004, a stray dog jumped through a window in the warehouse where she worked and approached her. The mere sight of the pooch apparently caused Stevenson to immediately suffer symptoms of physical distress, including a headache, a rush of blood to her head, and a tightening of her neck and back.

A few minutes later, a company supervisor discovered an agitated Stevenson screaming, cursing, and frantically spraying air freshener. Two hours after that, Stevenson left work claiming to be ill.

Stevenson called off sick from work the next day. Upon returning to Hyre on the morning of February 11th, she aggressively charged into the office of the company's president and screamed profanely at him for several minutes about the dog. After exiting his office, Stevenson told her supervisor she "could not work" and once again left the premises.

Later that day, Stevenson filed a complaint with OSHA about stray animals in her workplace. She also went to the emergency room, complaining of a three-day headache, insomnia, anxiety, and a loss of appetite due to an "emotionally stressful incident at work." Stevenson was diagnosed with "anxiety and stress" and given a prescription.

The next day, February 12th, Stevenson left a message for her supervisor that she was sick and would miss work. She also called off the next day, a Friday, as well as the following Monday, but gave no details about her condition.

Stevenson returned to work on Tuesday, February 17th, and found that the contents of her desk had been boxed up and moved to another room; actions the company explained as an effort to accommodate her fear of stray animals. Claiming to still feel sick, she stayed at work only a few hours. Before leaving, she called the police to complain about "harassment" and left a copy of her emergency report on a company manager's desk.

After Stevenson departed, Hyre sent her a letter via overnight mail stating that because she had exhausted all of her sick leave and vacation time, any additional time off would need to be governed by the Family and Medical Leave Act of 1993. According to the letter, Stevenson needed to submit a medical certification demonstrating FMLA eligibility by February 24th or face termination.

Stevenson was out sick from February 18th through February 23rd. During this time, she obtained a doctor's note that excused her work until February 20th, but did not mention the FMLA. Stevenson attempted to return to work on February 24th, but discovered the company's locks had been changed. She knocked on the door until the president answered and handed her a box filled with her personal belongings. He refused to accept the note from Stevenson's doctor. On March 9, Hyre sent Stevenson a letter advising that she had been terminated effective February 25th.

Stevenson sued Hyre claiming that the company interfered with her FMLA rights. A district court judge rejected her claim, finding that she had failed to notify Hyre of the existence of any serious health condition justifying FMLA leave.

The U.S. Court of Appeals in Chicago reversed the judgment in favor of Hyre. The question of whether Stevenson had given her employer adequate "constructive" notice of her alleged need for FMLA leave was an issue to be decided at trial. Although the Court acknowledged that Stevenson had failed to give Hyre direct notice of any serious health condition, the appeals court decided that Stevenson's recent behavior was so "undeniably unusual" that, in light of her previously unblemished employment history, it could have alerted the company to the existence of a serious mental health condition necessitating FMLA leave.

In light of this decision, employers should be cautious when dealing with unusual or extraordinary employee conduct, especially when exhibited by persons with otherwise solid records. Instead of being cause for discipline or discharge, bizarre behavior can actually give rise to federally protected rights. *Stevenson v. Hyre Electric Co.*, 505 F.3d 720 (7th Cir. 2007).

\* \* \* \* \*

### **LEGAL "AFFAIRS" CAN LEAD TO LIABILITY**

It happens all too often. Otherwise smart, prudent employers find themselves embroiled in messy employment disputes because of decisions prompted by emotion rather than reason. Even experienced employment lawyers can fall victim to this trap.

In 1996, the law firm of Bellows & Bellows (the partners are husband and wife) hired Evelyn Benders as a legal secretary. The law firm promoted Benders, an African American in her 40's, to office manager the following year.

Shortly after she started at the firm, Benders began a five-year romantic relationship with Mr. Bellows. Benders remained employed with the firm after the relationship stopped.

In May 2003, about two years after the relationship ended, Mr. Bellows privately told Benders that his wife and another partner were trying to force Benders out of the firm, and therefore she should start looking for another job. A few weeks after that, the firm hired a white woman, 10 years younger than Benders, who began taking over Benders' responsibilities. Benders status was then reclassified from employee to independent contractor.

Benders filed charges of age and race discrimination against the firm in February 2004. Thereafter, she claimed that Mr. Bellows became increasingly hostile and made her working conditions unpleasant.

According to Benders, in April 2004, three days after the firm submitted its response to her discrimination charge, Mr. Bellows complained to her about her "awful EEOC charge." Five days after that, the law firm dismissed her. At that time, Benders had not yet found another job. Benders quickly amended her charge to add a claim for retaliation.

The law firm successfully disposed of Benders' retaliation claim by arguing that it had decided to dismiss Benders and had informed her of that fact back in May 2003, months before she ever filed her charge. However, this judgment in favor of the firm was reversed on appeal, and Benders' claim was reinstated.

The appeals court ruled that questions of timing, both with respect to the long period that had passed between May 2003 and Benders' actual last day of work, and the short amount of time between Bellows' negative comments and her final day, suggested a causal connection between Benders' charge and her termination. This timing gave rise to an inference of retaliation warranting a jury trial.

There can be little question that Benders' filing of her charge made an already awkward office environment worse, and that the law firm, especially Mrs. Bellows, was anxious to be rid of an employee that had not only carried on an affair with a partner, but had formally charged it with unlawful conduct. However, the firm's judgment in discharging Benders in such close proximity to her charge was almost certainly clouded by resentment and emotion. The firm likely should have heeded advice that it doubtless gave to many of its clients; when making employment decisions do so coolly, calmly, and with the advice of independent employment counsel. *Benders v. Bellows & Bellows*, 515 F.3d 757 (7th Cir. 2008).

\* \* \* \* \*

### **FORMER EMPLOYEE PLAYS "GOTCHA" WITH OLD EMPLOYEE HANDBOOK**

Gary Ross worked for the venerable Marshall Field's and Company in Chicago for nearly 40 years. Ross was discharged after it was discovered he drew stick figure pictures of a coworker being electrocuted, boiled, guillotined and run over by a train. Ross sued, claiming that his discharge was a breach of contract, referencing a provision of Field's 1968 employee handbook, which, Ross contended, implied that *all* discipline must be progressive, thus entitling him to a warning before being discharged.

The 1968 handbook did not contain the now standard clause disclaiming that the handbook was a contract, but subsequent handbooks issued by Field's over the next 30 years did include such disclaimers. Field's pointed this out to a Cook County judge who dismissed Ross' case. However, the case was reversed on appeal.

The Illinois appellate court found that the 1968 handbook constituted a contract of employment which had not been modified by subsequent events. Field's argued that the subsequent handbooks (which included disclaimers) superseded any provisions of the 1968 handbook. However, the appellate court said that there had to be "consideration" in order for the 1968 contract to be modified. "Consideration" (generally, the giving or forbearance of something of value) is an essential element to the formation of a contract, or the modification of an existing contract.

The court observed that the employee's mere decision to continue employment after new handbooks issued over the years was not sufficient consideration. Field's argued that "consideration" was supplied over ensuing decades of Ross' employment by increases in pay and benefits. The court disagreed, finding those things were offered to *all* Field's employees, and did not provide the "bargained for exchange" with Ross necessary to modify an existing contract. The court was also unimpressed with Field's argument that it would be a logistical nightmare for employers to individually bargain with employees under such circumstances. The court basically found that Field's stubbed its toe in 1968, and therefore individual agreements with individual employees would be necessary to correct that miscue.

As a practical matter, Field's (now Macy's) exposure to other claims is very limited, since there are undoubtedly few remaining employees who received the problematic handbook forty years ago. However, the case does again raise two points. First, employers should have clear and well communicated disclaimers in their employee handbooks. Second, to the extent that a company may have an ancient handbook out there which some long term employee could point to as an unmodified contract, steps should be taken to effect a proper written modification, supported by the required consideration. *Ross v. May Co.*, 377 Ill. App.3d 387 (1<sup>st</sup> Dist. 2007).

\* \* \* \* \*

### **BITS & PIECES**

A female college tennis coach, after enjoying an undefeated season, was terminated for claimed verbal abuse to her players. The coach sued, pointing to two male coaches who were also verbally abusive to their players and who were not discharged. A federal court in Indianapolis ruled that this, coupled with the lack of a prior warning, was enough for the female coach to proceed to trial for a jury to decide whether there was sex discrimination involved in her firing. *Peirick v. Indiana University-Purdue University Indianapolis Athletics Dept.* (S.D. Ind. 2007).

\* \* \*

Thirteen states have proposed legislation that would make it illegal for a boss to bully an employee in the course of employment. These laws are meant to expand the prohibition against harassment for specific reasons, such as sexual, race or religion based harassment. The proponents of such legislation have established a website at [www.workplacebullyinglaw.org](http://www.workplacebullyinglaw.org).

\* \* \*

Take that, judge! Washington, D.C. administrative law judge Roy Pearson filed suit against his dry cleaner for \$67 million who allegedly lost a pair of his pants. At trial, Pearson argued that the sign in the cleaner's shop, "Satisfaction Guaranteed," meant that Pearson was entitled to whatever it took to satisfy him! Pearson's case was dismissed. Later, Pearson lost his job and he's now suing his former employer, the District of Columbia, in federal court under laws that protect "whistleblowers" from retaliation. Pearson claims that his employer was so upset by the media's vilification of him in connection with the "Great American Pants Suit" that it illegally fired him. A federal court will now have to iron that out.

\* \* \*

### **QUOTABLE**

If you call a tail a leg, how many legs has a dog?  
Four, because calling a tail a leg doesn't make it a leg.

*Riddle attributed to Abraham Lincoln*

---

Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of our firm. Written entirely by Peters & Lyons attorneys, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed or as covering all significant developments in labor and employment law. The LABOR UPDATE is not intended to be a substitute for legal advice. The LABOR UPDATE may be quoted or reproduced if credit is given to Peters & Lyons, Ltd. as the source.