



**HUMAN RESOURCES
POTPOURRI**

• The Seventh Circuit Court of Appeals reinstates the claim of an electrical contractor who sued a union local in federal court under a state antitrust law after he lost a construction contract (*Smart v. Local 702, Int'l Bhd. of Electrical Workers*, 7th Cir. April 7, 2009). The Court held that 29 U.S.C. "section 187(b) completely preempts state-law claims related to secondary boycott activities" such as those aimed at one business to exert pressure on a second business, by providing "an exclusive federal course of action for the redress of such illegal activity" (the union's threat to shut down the construction project unless the owner employed union workers).

• A 15-year veteran nurse fired for alleged sexual harassment a month before she planned to take leave was allowed to proceed with her interference and retaliation claims under the Family & Medical Leave Act (*Staples v. Parkview Hosp. Inc.*, N.D. Ind. March 3, 2009). According to Judge Lee, the plaintiff met the "serious health condition" threshold under the FMLA. "Neither the FMLA nor the relevant portion of (DOL regulations interpreting the act) state that an employee's serious health condition must render them unable to perform their job prior to taking the leave.... Many people may need to have surgery, for example, for a problem that is non-emergent. However, they may still qualify for FMLA leave in order to have that surgery and to spend time recuperating from it."

(See HR Potpourri, page 2.)

Veritas™

A newsletter of Human Resources highlights, helpful hints, suggestions and reminders to assist employers in their daily interactions with employees.

NLRB Issues Guidelines on "Salting"

The office of the NLRB's general counsel, which is responsible for prosecuting certain labor practice cases, recently issued two guideline memoranda to the agency's regional offices regarding the investigation and litigation of salting cases. Salting is an organizing strategy used by unions in which paid or unpaid union supporters (salts) seek employment at a non-union workplace, generally in the construction industry (but not always), with the goal of organizing the employer's non-union workforce. According to management, salting is used by unions to instigate unfair labor practice litigation against non-union employers in an effort to weaken the employer.

The first guideline memo was authored by the NLRB's General Counsel, who addressed the Board's decision in *Toering Elec. Co.* (2007), stating that a salt applying for a job is not entitled to protection against discrimination based on union affiliation or activity unless the salt is "genuinely interested" in the employment relationship with the hiring employer. The general counsel has the burden of showing that the salt made a bona fide application for employment and had a genuine interest in becoming employed by the employer.

In the second memo, authored by the NLRB's Associate General Counsel, the Board's decision in *Oil Capitol Sheet Metal Inc.* was addressed. In this case, the Board held that it will no longer apply a rebuttable presumption that a salt who was not hired because of his or her union activity would have continued to work indefinitely for the employer and is entitled to back pay for the period from the start of the discrimination until the employer makes a valid hiring offer. The Board further held that the General Counsel must prove that the salt, if hired, would have worked for the employer for the period claimed.

The purpose of the Board's memos was to provide guidance to the regional offices in the investigation of salt-related cases to expedite the investigatory process, and to prohibit or limit the relitigation of all relevant issues.

Time will tell whether the holdings of these cases will withstand the scrutiny of a new NLRB under the current administration.


\$15 Million Sexual Harassment Award

A New York City jury awarded a registered nurse \$115 million in damages in a sexual harassment lawsuit against the hospital for its failure to act against a physician's sexual misconduct (*Blanco v. Flushing Hosp. Med. Ctr.*, N.Y. Sup. Ct. Verdict 2/18/09). The jury attributed fault from the sexual harassment evenly between the hospital and the doctor. The award: \$8 million for past emotional distress, \$5.5 million for future emotional distress, and \$1.5 million in punitive damages. The lawsuit was filed under the New York state and city human rights laws, and the state statute has no damages cap. Although the hospital intends to appeal, the case illustrates the things employers and employees should not be doing.

The plaintiff, who began working at the hospital in 1992, alleged that the hospital negligently retained the doctor, even though it knew that the physician had "engaged in pervasive sexual harassment." Plaintiff also alleged that she had been subjected to unwelcome sexual advances and touching by the doctor for "many years." In July, August and September of 2007 the following incidents allegedly occurred.

The doctor repeatedly asked plaintiff to go on dates with him, ran his hands through her hair, and grabbed her shoulders from behind, and tried to forcibly kiss her, all of which she rejected. The hospital's medical director was a witness to the kissing incident, but failed to discipline the doctor. Plaintiff also complained to the charge nurse but nothing was done. Then, in September 2001, while attending a patient, the doctor pursued plaintiff and groped her below the waist. In plaintiff's statement following the verdict, "While the jury's verdict gives me a sense of vindication, it does not alleviate the emotional trauma that this has caused me." "To anyone that is being sexually harassed," make sure to "speak out and complain—you don't have to allow yourself to be a victim." Employers, listen well. In plaintiff's statement directed to the employer she stated, "Just having a sexual harassment policy is insignificant, unless the employer has a true commitment to eliminating unwelcome sexual harassment.... [I]f proper training measures had been in place, this might not have happened to me or countless other people that have had similar experiences." These cases not only severely impact the parties being harassed by creating a "tremendous amount" of emotional horror, they also "emotionally devastate" the party being harassed. As seen by the above, they also have a very high level of jury appeal.

Questions involving employment and training issues related to sexual harassment matters should always be referred to an experienced attorney who practices in this area of the law.



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Things I Have Learned:

- That I cannot expect others to solve my problems.
- That a person's degree of self-confidence greatly determines his success.
- That no matter how thin you slice it, there are always two sides.
- That you should hope and work, but never hope more than you work.
- That worry is often a substitute for action.
- That a person's greatest need is to feel appreciated.
- That anger is an ill wind which blows out the lamp of reason.

HR Potpourri (cont'd)

• Thinking about withdrawing recognition during the (initial) certification year? A word to the wise: DON'T! So says the Ninth Circuit Court of Appeals (*Virginia Mason Med. Ctr. v. NLRB*, 9th Cir. 2/25/09). An employer's refusal to bargain will result in a violation of Section 8(a)(5) of the National Labor Relations Act. The Court stated, "Once a labor union is certified as the exclusive bargaining representative of a unit of employees, the union is entitled to a non-rebuttable presumption of majority status for a reasonable time, typically one year." Further, "a perceived loss of majority status, as demonstrated through a decertification petition or otherwise, does not entitle the employer to withdraw recognition during the year." The Court reminded the employer "there is no de-minimis exception for noncompliance with Board orders." However, the presumption of majority status during the certification year "may be lost if the union causes an inexcusable delay in bargaining," but this affirmative defense remains the employer's burden of proof.

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By the Numbers: Updating the Union Scoreboard

They are out there and coming on strong:

- Unions won 66.8% of representation elections in 2008.
 - Up from 60.4% in 2007.
 - The highest win rate since 1955 when unions won 67.6%.
- Unions have won more than half of all representation elections in each of the past 12 years.
- NLRB conducted elections: 1,579 in 2008; 1,519 in 2007; 3,300 in 1998
- Number of elections won by unions: 1,054 in 2008; 918 in 2007
- Most active unions:
 - International Brotherhood of Teamsters (IBT)
 - United Food and Commercial Workers (UFCW)
 - International Union of Operating Engineers (IUOE)
 - Service Employees International Union (SEIU)
 - International Brotherhood of Electrical Workers (IBEW)
 - International Association of Machinists (IAM)

Is Your Company Safe?

- Unions had the greatest success among very small and very large units.
 - Unions won 69.3% of elections in units of fewer than 50 employees.
 - 64% in units of more than 500 employees.

Bottom line: No non-union employer is safe! Note: These numbers do not tell the whole story. Many unions organize through neutrality and card check recognition agreements and other methods, and these figures are omitted.

BEWARE: The Employee Fair Choice Act is still out there, and it is a dangerous piece of pro-union/anti-employer legislation.

Questions involving labor and employment issues should always be referred to an experienced attorney who regularly practices in this area of the law.

Source: BNA, Daily Labor Report, May 5, 2009

Employer's Honest Belief Validates Firing

An employee fired for violating a company's corporate policy could not show that the company did not hold an honest belief that she broke the rule, so holds the Sixth Circuit Court of Appeals (*Lybrandt v. Home Depot U.S.A. Inc.*, 3/26/09). This is an interesting decision with some formidable language for employers who articulate "a facially legitimate, non-discriminatory reason for terminating" an individual's employment for purportedly violating Home Depot's Code of Conduct.

The Court determined that there was "no material dispute about the acts that ultimately led to" the employee's discharge. The Court's language is notably important to employers. "As long as an employer had an honest belief in its proffered nondiscriminatory reason for discharging the employee, the employee cannot establish that the reason was pretextual simply because it is ultimately shown to be incorrect." According to the Court, "The key inquiry in assessing whether an employer holds such an honest belief is whether the employer made a reasonably informed and considered decision before taking the complained of action."

Employers take notice: When an employer interprets, acts upon and enforces its policies, it must look carefully at the purpose of the policy. Is the policy intended to deter theft and dishonesty, stop sexual harassment or any form of discrimination, or limit other forms of impropriety? Is the policy clear with respect to the penalties associated with a violation? Is the policy consistently enforced and applied fairly to all employees? If so, then it is likely that when an employer acts on an honest belief that the policy has been violated, and its decision after investigating the facts was "informed and considered," the employer is less likely to be found in violation of the law and, in turn, have its decision upheld.

On all matters involving questions of potential violations of labor and employment law, consultation with experienced counsel in these issues is advisable.

Source: BNA, Daily Labor Report, 4/1/09

Quotes of the Month

The reason people find it so hard to be happy is that they always see the past better than it was, the present worse than it is, and the future less resolved than it will be. ~Marcel Pagnol

And whether you're an honest man or whether you're a thief, depends on whose solicitor has given me my brief. ~W. S. Gilbert

There are three kinds of lies: lies, damned lies, and statistics. ~B. Disraeli

This is the punishment of the liar: He is not believed even when he speaks the truth. ~Babylonian Talmud

The great pleasure in life is doing what people say you cannot do. ~Walter Bagehot

Hope sees the invisible, feels the intangible, and achieves the impossible. ~Anonymous

