



HUMAN RESOURCES POTPOURRI


Now We Must Be Mind Readers!

Sexual harassment of a female employee by a male co-worker may be imparted to her employer based on evidence that her supervisor had reason to suspect the harassment but failed to take appropriate remedial action, even though the supervisor was never told of and did not witness any harassment, so says the Second Circuit Court of Appeals (*Duch v. Jakubeh*, 107 FEP Cases 1576, December 4, 2009).

According to the Court, a jury could find that the supervisor had constructive knowledge of the harassment based on his awareness of the co-worker's past sexual misconduct toward other females and the plaintiff's emotional response to the subject of working with him, even though the alleged harassed woman refused to say what was the matter. The Court denied that it was announcing a new rule of liability for employers that receive nonspecific complaints of harassment: "We merely recognize that ... when the employee's complaint causes the specter of sexual harassment, a supervisor's purposeful ignorance of the nature of the problem ... will not shield an employer from liability under Title VII."

Should employers be concerned? Again, we report; you decide. In the meantime, keep that phone number of an experienced employment attorney close at hand.

(Continued on page 2.)



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The ADA – “Regarded as Disabled” is Alive and Well

A bank executive whose employment was terminated after he threatened suicide with a gun and was taken into custody by police was allowed to proceed to trial by a federal court in North Dakota on his claim that he was fired in violation of the Americans with Disabilities Act (ADA) (*Lizotte v. Dacotah Bank*, D.N.D. January 7, 2010). The issue: whether the bank regarded him as disabled under the ADA. The Court determined that the executive was fired unlawfully “on the basis of myth, fear, or stereotype.” The Court said in order to establish a prima facie case under the ADA, plaintiff had to show “(1) he is disabled within the meaning of the ADA; (2) he is qualified to perform the essential functions of his job with or without reasonable accommodation; and (3) he suffered an adverse employment action because of his disability.”

The ADA defines a “disability” as a physical or mental impairment that substantially limits one or more major life activities of an individual, but the statutory definition, 42 U.S.C. §12102(1), also includes “being regarded as having such an impairment.” In this case, plaintiff claimed that the bank mistakenly believed that his mental disorder or impairment, described by his doctor as a “mood disorder,” substantially limited him in the major life activity of working. The Court noted, “If an individual can show that an adverse employment decision was made by the employer because of a perception of a mental impairment—whether based on myth, fear, or stereotype—the ‘regarded as’ prong of being defined as disabled under the ADA is generally satisfied.”

Under the law, when a prima facie case of unlawful discrimination is established, the burden shifts to the defendant to produce a legitimate nondiscriminatory reason for terminating the individual. While legitimate nondiscriminatory reasons may exist for terminating an employee, the courts will generally look beyond those reasons, which in the instant case it did. The Court found that “inferences can be drawn from the evidence that the Defendant bank acted on the basis of myth, fear, or stereotype, and that Plaintiff’s perceived mental impairment was the reason for the termination.”

As noted in previous editions of *Veritas*, under the ADA Amendments Act, which took effect on January 1, 2009, the “regarded as” standard will be an area of increased litigation.

When employment questions of this nature arise in the workplace, consultation with experienced employment counsel is recommended.

Workers’ Compensation Benefits – the Employer Still Pays!

An interesting ruling by the Illinois Supreme Court: an employer’s obligation to pay benefits to an injured employee does not end simply because the employee has been terminated (*Interstate Scaffolding Inc. v. Illinois Workers’ Compensation Comm’n*, Ill. January 2010). The employer’s obligation to pay temporary total disability workers’ compensation benefits (TTD) was allowed even though the individual was terminated for conduct unrelated to the injury. The Court determined that the employer’s obligation to pay benefits continued until the worker’s medical condition has “stabilized” and he has reached “maximum medical improvement” (MMI).

The Court also noted that it did not matter if the discharge was for “cause.” The determinative inquiry for TTD entitlement is whether the claimant’s condition has stabilized. If the employee can show he continued to be temporarily totally disabled as a result of the work-related injury, the employee is entitled to TTD benefits. In these cases, the courts will look at the state statute to determine if there is a provision for the denial, suspension or termination of TTD benefits as a result of an employee’s discharge by the employer. If no such provision exists, benefits will be allowed. Could it happen in Indiana? In the world of workers’ compensation, anything is possible.

When workers’ compensation questions arise in the workplace, a call to experienced counsel in this area of the law is recommended.

Bits of Wisdom

- 🍀 If you lend someone \$20 and never see that person again, it was probably well worth it.
- 🍀 If you tell the truth, you don’t have to remember anything.
- 🍀 A closed mouth gathers no foot.
- 🍀 Some days you are the bug; some days you are the wind screen.
- 🍀 Good judgment comes from bad experience, and most of that comes from bad judgment.

Courtesy of the Optimist Club of Kitchener – Waterloo, Ontario

Things I Have Learned:

- That nothing gives you freedom like a few bucks in the bank.
- That envy is the enemy of happiness.
- That it takes a lot more creativity to find out what's right than what's wrong.
- That you can never have too many smart people in your life.
- That enthusiasm and success just seem to go together.
- That you can inherit wealth but never wisdom.
- That dinner rolls bake a lot faster if the oven is turned on.

HR Potpourri (cont'd)

Union Membership Declines in 2009

Want to know why the Obama administration supports passage of the proposed Employee Free Choice Act? Just keep reading.

Unions lost 771,000 members in 2009, primarily in manufacturing and construction, but workers who belonged to labor unions held steady at 12.3%. The number of union members employed in the private sector fell to 7.4 million workers in 2009, down from 8.3 million in the prior year. However, union membership in government rose from 7.8 to 7.9 million for the first time last year, union membership in government now stands at 52%. Are the unions in trouble? The numbers in the private sector seem to indicate that is the case.

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A Back-Door Approach to EFCA?

An Oregon business group and the U.S. Chamber of Commerce filed suit to block an Oregon law prohibiting employers from disciplining or threatening to discipline employees who decline to attend meetings to communicate the employer's view about religious or political matters, including whether to join a union. The new law prohibits employers from discharging, or taking adverse action or threatening to do so, against any employee who "declines to attend or participate in an employer sponsored meeting ... if the primary purpose of the meeting is to communicate the opinion of the employer about religious or political matters" (*Associated Or. Indus. v. Avakian*, December 22, 2009). The suit, filed on behalf of the association's member employers, seeks a declaratory judgment that the state's Worker's Freedom Act, which took effect on January 1, 2010, violates employers' First Amendment speech rights and is preempted by the National Labor Relations Act. Why all the fuss, you ask? Oregon becomes the first state to pass a law banning mandatory employee meetings, which unions call "captive audience meetings." Since organized labor has not been able to gather the necessary votes or public support to pass that bad federal legislation known as the Employee Free Choice Act (EFCA), they have moved on to "Plan B" in an attempt to muzzle employers during union organizing drives.

Is this the beginning of a trend for a state-by-state assault by organized labor on an employer's federally protected right of free speech? It has been stated that a law such as the one passed in Oregon "tramples employer's free speech rights and gives organized labor an unprecedented advantage in unionizing campaigns." So, should employers be concerned? We think so. The unions' ongoing campaign to make it easier to organize employees, whether through laws such as EFCA, the infamous card-check bill, or the Worker's Freedom Act all have the same result. There is a strong move by unions to trample the employer's fundamental right to freely communicate its views about whether employees should join a labor organization. In our opinion, the Oregon law is a bad law because it improperly creates a restraint on an employer's ability to communicate views about whether employees should join a labor organization. Regulating or prohibiting employer non-coercive speech is not what Congress intended.

When these issues arise in your workplace, it may be time to reach out and call an experienced labor attorney who can help you sort through this complicated process.

(Source: BNA, Daily Labor Report, December 24, 2009)

So, Why a Pro-Union Agenda, You Ask?

It has been stated that Big Labor is broke and desperate, and, as previously noted in *Veritas*, there continues to be a decline in union membership. The *Wall Street Journal* recently reported that the AFL-CIO has more liabilities than assets. Query: Is this a trend, and is union insolvency just around the corner?

In the midst of all this chaos, the number one visitor to the White House has been Andy Stern, the outspoken and sometimes radical president of the Service Employees International Union. Ironically, the SEIU is also in financial trouble with its pension plans and liabilities being about 80% of its assets. Another big union in trouble is the International Brotherhood of Teamsters, which is also facing a potential pension disaster as its Central States Pension Fund borders on financial ruin with an asset-liability ratio of only 43%. So, who will come to the rescue and bail out these financially troubled unions? You guessed it, the union-friendly federal government. Why, you ask? Who was the biggest supporter of the current administration during the last round of elections in 2008? None other than the labor unions, which spent millions and bet their futures on the current administration and Congress to save them. Big Labor desperately needs the rules changed in order to survive, and if that happens, harm may come to employers and workers across the nation in the form of some very bad laws and a more unbalanced playing field.

Quotes of the Month

If you think education is expensive, try ignorance. ~Derek Bok

Today was good. Today was fun. Tomorrow is another one. ~Dr. Seuss

Tact is the knack of making a point without making an enemy. ~Unknown

My reading of history convinces me that bad government results from too much government. ~Thomas Jefferson

If you can accept losing, you can't win. ~Vince Lombardi

If you don't read the newspaper you are uninformed; if you do read the newspaper you are misinformed. ~Mark Twain

