



**HUMAN RESOURCES  
POTPOURRI:**

**Discharge for Wage Claim  
Not Protected in Indiana**

In a case based on an alleged retaliation claim for his employer's failure to pay him overtime and deposit withheld payroll taxes, the Indiana Supreme Court held that the former employee had no claim for wrongful discharge in violation of the public policy exception of the "at will" employment doctrine (Meyers v. Meyers, 861 N.E.2d 704, 154 Lab.Cas. 60, 355, 25 IER Cases 1296 (Ind. 2007)). The Court stated, quite simply, that Indiana public policy does not extend to retaliation for asserting a claim for unpaid wages under state statutes and is not an exception to the "at will" doctrine.

**No Retaliation If Performance  
Issues Pre-date Discrimination  
Claims**

The Eighth Circuit ruled that a black former city employee failed to establish a causal connection between his complaint of discrimination and his subsequent discipline and discharge (Carrington v. City of Des Moines, 100 FEP Cases 513, April 2007).

The Court reasoned that, although the employee did engage in numerous protected activities, he did not do so until after his supervisors began to investigate his job performance. The fact that an employee has made complaints of discrimination does not insulate him from discipline for violating rules or disrupting the workplace.

**Employers Beware!**

An Oakland, California automotive dealer was properly ordered to bargain with a union after illegally providing unilateral pay increases. The infamous Ninth Circuit held that the payment of those monies tainted an employee petition resulting in the employer's withdrawal of union recognition. In the words of the Court, "Both logic and precedent dictate that unilateral action with respect to wages is likely to have a long-lasting effect on employee support for a union because each paycheck reminds them of the likely irrelevance of the union." Wow!

**New Family Act  
Legislation Proposed**

We are watching the Sen. Kennedy-Rep. DeLauro supported paid sick leave legislation entitled "The Healthy Families Act," recently introduced in both houses, March 2007. This bill would guarantee seven paid sick days a year for workers to care for their own or a family member's medical condition. The Act would apply to companies of at least 15 employees. The Act would also allow paid sick leave for doctor appointments or preventive diagnostic treatment.

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# Veritas™

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

## DOMESTIC VIOLENCE SPILLS INTO THE WORKPLACE

Witnesses testifying before the Senate subcommittee on Employment and Workplace Safety told the members what we have been telling our clients and audiences for the past few years in our workplace violence programs—that incidents of domestic violence often affect not only the victims of abuse and violence themselves but also their employers and co-workers. An even bigger concern is why have they not been listening? Unfortunately, it takes incidents like those that occurred at Virginia Tech and in our schools and workplaces to get the public's attention.

Here are some of the more noteworthy statements from those who testified before the Senate subcommittee:

- Domestic violence "doesn't stay at home." Violence follows victims into their workplaces and poses safety, legal and financial problems for victims, employers and co-workers.
- Domestic violence results in an estimated eight million missed days of work each year—but only 4% of employers provide training on the subject.
- One in four women in the U.S. could expect to be the victim of domestic violence, but only 4% of employers have adopted policies on the subject of domestic violence and abuse.
- Most perpetrators of domestic violence are themselves employed and they often use company resources, including cars and telephones, to stalk and harm their victims.
- Employees responsible for violence against others often have difficulty concentrating on their own jobs or are involved in a large number of workplace accidents.

While many employers are compassionate about those involved in domestic violence, sadly, only a little evidence exists that those employers are willing to take the time necessary to help the victims. The problem is real and everyone must become proactive in taking steps to help fix the problem. Doing nothing is never the answer.

(SOURCE: BNA, Inc., Labor Relations Reporter, April 23, 2007)

## HANDBOOK ILLEGALLY DETERS UNION ACTIVITIES

The U.S. Court of Appeals, D.C. Circuit, ruled that a company's handbook rules prohibiting security guards from complaining to client representatives, from soliciting and distributing literature while off-duty if wearing their uniforms, and from fraternizing with co-workers all violate federal labor laws. (Guardsmark LLC v. NLRB, 181 LRRM 2289, D.C. Cir., Feb. 2007)

In affirming the NLRB, the appeals court held that the complaint and solicitation/distribution rules discourage protected labor activity in violation of the National Labor Relations Act. However, the Court reversed the Board's ruling on the fraternization rule. The Court reasoned that dictionaries define fraternize to include engaging in social and intimate relationships, and the primary definition is to engage in fraternal relationships, which would include participating in union activities. Employees could therefore reasonably interpret the rule as prohibiting them from discussing terms and conditions of employment.

Employers are urged to review the language of their employee handbooks and to consult with experienced legal counsel, if necessary.

## TRUCK DRIVER WITH NERVE CONDITION NOT SEEN AS DISABLED

In an interesting decision, the Seventh Circuit ruled that a truck driver who was discharged after being diagnosed with a nerve condition, neurocardiogenic syncope, was not regarded as disabled under the Americans with Disabilities Act (ADA) (EEOC v. Schneider National, Inc., March 2007).

The Court rejected the employee's argument that he was regarded as disabled because of his medical condition. The Court reasoned that, based on the company's policy and despite the fact that the employee's condition was treatable with medication and he was subsequently hired by another company, there was a risk to the employer in retaining the employee. The company's potential liability in the event of an accident because the employee may forget to take his medication would be "calamitous" in view of the prospect of substantial punitive damages. The Court held the company was free to determine the degree of risk it was willing to assume without implicating the ADA. Reasoning further, the Court stated that the employee's inability to drive for that particular company did not constitute a substantial limitation on a major life activity. Additionally, the fact that the employee was also asked to apply for a non-driving position and did not thereby negate the view that he was "substantially limited in his abilities."

Title VII issues can be complicated by their unusual fact situations and how the law will be interpreted and applied. Consulting with experienced legal counsel is always recommended.

(SOURCE: BNA, Inc. Labor Relations Reporter, April 16, 2007.)

## Things I Have Learned:

- That one sincere apology is worth more than all the roses money can buy.
- That learning to laugh at yourself is the surest sign of maturity.
- That the easiest way to find happiness is to quit complaining.
- That you should be grateful for all you have, even if it isn't enough.
- That the copy machine can tell when I'm in a hurry.
- That the best way to succeed is to do small things well.
- That I've never regretted the nice things I've said about people.

## ULP Charge Did Not Taint Employee Petition

The NLRB ruled, in a 3-to-1 decision, that a decertification petition filed after alleged unlawful conduct by an employer, but before the employer and union entered into a new collective-bargaining agreement settling the ULP charge, should not be dismissed. The majority opinion stated that an employer's agreement to settle outstanding unfair-labor-practice allegations will not be "treated as an admission of wrongdoing unless it expressly so provides, and will not require dismissal of a decertification petition . . . filed after the alleged unlawful conduct but prior to settlement."

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## COURT FINDS DISABILITY DID NOT "SUBSTANTIALLY LIMIT"

In upholding an employee's termination for job abandonment and dismissal of her disparate treatment, retaliation, and failure to accommodate claims, the Seventh Circuit held that the employee did not establish that she was disabled under the Americans with Disabilities Act. (*Kampmier v. Emeritus Corp.*, 18 AD Cases 1607, 7th Cir., Jan. 2007)

The case involved a nurse who had suffered from endometriosis since she was a teenager, resulting in numerous surgeries and complicated pregnancies. The Court ruled that the nurse failed to show that she was substantially limited in a major life activity. The Court based its finding on the fact that the plaintiff cleaned her own home, cooked on a regular basis, played with her children and had no difficulty brushing her teeth, bathing, combing her hair, and dressing herself.

Most noteworthy was the Court's rejection of an opinion by the late Chief Justice of the Supreme Court, William H. Rehnquist, in which he stated that "there are numerous disorders of the reproductive system, such as . . . endometriosis, which are so painful that they limit a woman's ability to engage in major life activities such as walking and working" (*Bragdon v. Abbott* (1998)). In rejecting the above opinion as "dicta," the Seventh Circuit held that disability determinations must be made on an individualized case-by-case basis.

It does not get any easier! Consulting with experienced employment counsel is always recommended.

(SOURCE: BNA, Inc., Labor Relations Reporter, Feb. 19, 2007)

## DOCUMENTATION: THE KEY TO DEFENDING RETALIATION CLAIMS

Written documentation of any disciplinary actions against an employee may make it easier for an employer to rebut a claim of retaliation. The Title VII protected categories, including those found in the ADA and ADEA, prohibit retaliation against employees who exercise their rights under these laws. However, an employer may lawfully discipline or discharge an employee who has filed a claim as long as the disciplinary action/termination is based on misconduct unrelated to the claim and is not retaliatory in nature. Remember, it pays to keep it in writing!

The above-noted issues require a party to demonstrate a causal connection between the exercise of his/her legal rights and the employer's adverse action. A relevant consideration will be the amount of time between an employee's assertion of a claim and the action taken by the employer. An employer who has followed and documented its disciplinary steps and who has not singled out a particular individual or group (disparate impact) will be in a better position to defend itself against an employee's future claims.

Consistency in applying the rules and providing notice of those rules in the employee handbook or policy manual may provide the employer with its best defense. As it relates to those written policies, the employer is advised to keep them current, including the use of anti-retaliatory language as part of the policy. Guidance from the organization's HR department or experienced employment counsel is highly recommended.

(SOURCE: Americans with Disabilities Act Manual, BNA, March 15, 2007)

## QUOTES OF THE MONTH

"It's not a very big step from contentment to complacency." – Simone De Beauvoir

"Just because you're smart doesn't mean the other guy is stupid." – Unknown

"When you are content to be simply yourself and don't compare or compete, everybody will respect you." – Lao-Tzu

"You don't stop laughing because you grow old. You grow old because you stop laughing." – Michael Pritchard

"When I was born I was so surprised I didn't talk for a year and a half." – Gracie Allen

"I am careful not to confuse excellence with perfection. Excellence, I can reach for; perfection is God's business." – Michael J. Fox

"Work joyfully and peacefully, knowing that right thoughts and right efforts inevitably bring about right results." – James Allen

