EMPLOYMENT LAW BULLETIN

The Newsletter of

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TO OUR CLIENTS AND FRIENDS:

When is interception of an employee's e-mail messages permissible? Apparently, if the employer intercepts messages that are offensive, unprofessional or inappropriate, ruled the court in the case of Smyth v. Pillsbury Company (D.Ct.Pa., Jan. 18, 1996). The plaintiff worked as a regional operations manager. The company intercepted e-mail messages the employee left for his supervisor, stating that a company party would become "the Jim Jones Affair" and stating that he would "kill the back-stabbing bastards." The company had a policy that provided all e-mail messages would remain confidential and privileged. Once the company became aware of Smyth's messages, the company terminated him.

Smyth claimed that he had an expectation of privacy because of the company's policy that e-mail communications would remain confidential. The court rejected Smyth's privacy claim, stating in essence that it is unreasonable for an employee to expect that offensive or unprofessional e-mail messages would remain private and that the interception of those messages would be highly offensive to a reasonable person. The court also stated that "once plaintiff communicated the alleged unprofessional comments to a second person over an e-mail system which was apparently utilized by the entire company, any reasonable expectation of privacy was lost." The court also noted that the company did not compel Smyth to disclose any information about himself. Rather, the company acted on information which he voluntarily communicated through e-mail.

Whether an employee's expectation of privacy is reasonable regarding e-mail or voice mail messages often depends on what policy an employer has adopted regarding those systems. If an employer has no policy regarding the use of e-mail and voice mail, then an employee's expectation of privacy is enhanced, even if the messages are personal and non-business related in nature. The most effective approach an employer can take is to establish a written policy regarding the use of e-mail and voice mail, and to include the correct spot check of those systems to be sure there are no offensive or inappropriate communications.

EEOC REPORTS DROP IN NUMBER OF CHARGES FILED

The EEOC recently issued statistics comparing charges filed for fiscal year 1995 (ending October 31, 1995) to 1994, which showed 87,500 charges filed during FY 1995, compared to 91,000 charges during FY 1994. According to the EEOC, this is the first drop in the number of charges filed in seven years. The following chart summarizes the total percentage of ADA, age and Title VII charges filed during fiscal year 1994 and fiscal year 1995:

(Chart includes multiple claims in one charge)

CHARGES	FISCAL YEAR 1995	FISCAL YEAR 1994
ADA	22.6%	20.7%
Age Discrimination	16.7%	18.7%
Title VII (all charges)	59.3%	59.3%
Equal Pay Act	1.3%	1.3%

The EEOC also reports that 46.9% of all charges during 1995 involved discharge cases. Sexual harassment charges declined at the EEOC from 13% during 1994 to 10.4% during 1995; however,

harassment based upon factors other than sex increased from 12.5% in 1994 to 14.8% in 1995. Remember that the sexual and non-sexual harassment charges do not represent all cases brought under these theories, as plaintiffs may file claims under state law theories without first proceeding through the EEOC.

The EEOC is also optimistic that it will be able to reduce the backlog of cases, which is now approximately 96,000 charges. We have noticed the EEOC processing charges at a much faster rate compared to 1995 and 1994. Employers who provide information to the EEOC promptly enhance their opportunity to receive a favorable determination from the Commission before the Charging Party requests a Right to Sue Notice.

JURY TO DECIDE WHETHER EMPLOYER DEFRAUDED EMPLOYEE DURING THE RECRUITING AND HIRING PROCESS

The recent case of Lazar v. Superior Court (Cal., Jan. 26, 1996) concerns a situation in which an employee accepted an offer, relocated, and then found out after arriving that the job was not all it was represented to be during the recruiting and hiring process. The plaintiff in this case was president of a restaurant company in New York. He accepted an offer to relocate to California to become general manager for another restaurant company. The California company told the employee, Lazar, that he would receive significant pay raises and his job would be a secure one. Sensing a better employment opportunity and preferring the Pacific over the Atlantic, Lazar accepted the offer. He performed his job in a stellar fashion and was rewarded with not receiving the bonus he was promised and being terminated shortly thereafter due to management restructuring.

In permitting the case to go to the jury, the court ruled that the employer is not helped by termination-at-will principles, since Lazar claims the employer intentionally misled him regarding the company's financial condition. When Lazar asked for a written employment contract, the company refused, telling him that there were no written employment contracts and that the company's bond was its word.

Simply telling applicants that they are terminable-at-will does not avoid a potential fraud claim. One way to reduce the risk of a fraud claim is to extend a written offer of employment outlining the entire terms and conditions of the offer and including a statement that the offer supersedes all previous discussions the company and applicant have had regarding the employment relationship.

COURT OF APPEALS DISPLACES PRESIDENT CLINTON'S STRIKER REPLACEMENT ORDER

The Court of Appeals for the District of Columbia Circuit on February 2, 1996, set aside President Clinton's Executive Order that barred government contractors from hiring permanent replacements during a strike. Chamber of Commerce v. Reich. The President has asked the Justice Department to appeal the decision. According to the Court of Appeals, the National Labor Relations Act gives employers the right to hire replacements during a strike. That is a statutory right which may not be altered by an Executive Order. According to the court, "no state or federal official or government entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be." The court added that clearly "the NLRA reserves to employers the right to permanently replace economic strikers as an offset to the employees' right to strike."

The opinion was issued by a panel of the Court of Appeals. The next step for the President is to appeal the decision to the full Court of Appeals and then to ask the Supreme Court to review the decision if the President loses before the full Circuit.

EMPLOYEE'S FAILURE TO DISCUSS REASONABLE ACCOMMODATION RELIEVES EMPLOYER LIABILITY

Lorraine Beck worked as a secretary at the University of Wisconsin. She was hospitalized due to osteoarthritis and depression. Upon leaving the hospital, her physician provided a note to the University which stated that she could return to work but might require reasonable accommodation. The University then asked Ms. Beck to sign a release permitting the University to review the medical information from her doctors, so the University could assess the accommodation issue. She refused to sign the release. She also refused to meet with the employer to discuss accommodations.

Beck took another leave of absence for medical reasons. Upon return from leave, her physician stated that helping Beck with her workload could improve her medical situation. The University again contacted Beck, telling her that it did not understand what specifically was necessary for accommodation and why. The University said that until it received more information about Beck's condition and the

need for accommodation, she would be transferred temporarily to another position. She suffered further illnesses and absences, but remained employed. She filed a charge of disability discrimination.

In upholding summary judgment in favor of the employer, the Court of Appeals stated that the plaintiff's behavior was a barrier to the University's efforts to reasonably accommodate and, therefore, the University did not violate the ADA. Beck v. University of Wisconsin Board of Regents (7th Cir., Jan. 26, 1996).

Noting that the EEOC regulations refer to an "interactive process" between the employer and employee to achieve accommodation, the court stated that Beck failed to make the process an interactive one. The University took steps to try to accommodate her, but "at no point did Beck tell the University exactly what she needed." Furthermore, it was only Beck, and not the University, who had access to the information that the University could consider to best accommodate her. By obstructing the employer's access to that information, Beck cannot claim that the employer failed to reasonably accommodate her disabilities.

DID YOU KNOW . . .

. . . that the court invalidated a provision of a severance agreement which precluded the former employee from testifying in other cases against the employer? Wendt v. Walden University, Inc., (D.C.Minn., Jan. 26, 1996). Two terminated employees signed agreements that included a provision that forbade them from making disparaging comments about their former employer. The employer sought to enforce this provision when those two employees were asked to give depositions in an unrelated case. Although the court noted that the parties have the freedom to enter into a contract of their choice, enforcing such confidentiality language is against public policy because "the evidence is often not just relevant but indispensable," and justice would not be served by an employer paying for employee silence.

. . . that a supervisor's preference for his girlfriend is not sex discrimination, ruled the court in Proskel v. Gattis, (Cal., Jan. 26, 1996)? As luck would have it, Richard Gattis was an attorney who hired Karen Proskel to work as his secretary. About a year after she was hired, Proskel became aware of Gattis having an affair with another employee at work. Proskel took whistle blowing to a higher level, reporting this incident to Gattis' wife. Gattis responded by terminating Proskel, promoting his girlfriend and giving her a raise. According to the court, the nature of this relationship did not create a hostile work environment, and "where there is no conduct other than favoritism toward a paramour, the overwhelming weight of authority holds that no claim of sexual harassment or discrimination exists."

. . . that the EEOC adopted a plan on February 8th for determining which cases will have litigation priority at the Commission? According to the plan, cases receiving litigation priority include those that involve an individual case of discrimination but could have an impact reaching far beyond that particular case, those involving developing a new area of the law, and those which relate to the EEOC investigation and conciliation process. The EEOC will also focus on certain unresolved legal issues that have developed, such as the enforceability of arbitration agreements, issues regarding reasonable accommodation, and issues involving accommodation of an employee's religious practices or beliefs.

. . . that a court will review whether the EEOC has the authority to issue a right to sue letter before the 180 days for investigating the charge expires? Pearce v. Barry Sable Diamonds, (D.Ct.Pa., Jan. 5, 1995). Title VII provides that the EEOC may take up to 180 days to investigate a charge before issuing a right to sue letter. In 1978, the Commission determined that if it could not conclude the investigation within 180 days, it would issue the right to sue letter earlier, if requested by the Charging Party. The question before the court is whether this regulation improperly amended Title VII. According to the court, "If we were writing on a blank slate, we would find that the EEOC exceeded its authority when it determined that a right to sue could be issued prior to 180 days."

. . . a court recently issued a decision making it virtually impossible for unions to enter an employer's private property to solicit support from the employer's customers? United Food & Commercial Workers v. NLRB, (Ct.App.D.C., Jan. 26, 1996). The United Food & Commercial Workers and Teamsters attempted to distribute literature on an employer's private property to the employer's customers about a labor dispute the unions had with the employer. In noting the limited circumstances which a union may enter an employer's private property to communicate to employees, the court said that "It would make no

sense to hold that non-employees have a greater right of access when attempting to communicate with an employer's customers than when attempting to communicate with an employer's employees."

v HEALTH LAW SUPPLEMENT v

CHARGE NURSES ARE NOT SUPERVISORS, RULES NLRB

The case of Providence Hospital, (Jan. 3, 1996) involved questions of whether charge nurses qualified as exempt supervisors under the National Labor Relations Act. The Board concluded they do not. According to the Board, although a charge nurse assigns other employees to perform tasks, it is not the kind of authority that requires the use of discretion and independent judgment necessary to qualify as a supervisory employee. According to the Board, job assignments are routine clerical tasks that do not involve active supervision. Charge nurses in this case work more as team leaders, rather than actual supervisors. In response to the NLRB decision, American Nurses Association General Counsel Barbara Satin stated that the decision should "open the organizing gates for nurses." She also added that although the core of a nurse's job involves the use of professional judgment, a charge nurse is not exempt from the National Labor Relations Act as a supervisor.

v PUBLIC SECTOR SUPPLEMENT v

BEWARE OF DISPARATE IMPACT IMPLICATIONS OF TESTING DEVICES

The case of Fickling v. New York State Department of Civil Service in Westchester County, (D.Ct.N.Y., Dec. 22, 1995), involves a test that the court found had a discriminatory impact on applicants based upon race. The case involved jobs that analyze whether individuals are eligible for welfare. In order to be eligible for consideration for employment, an applicant had to score at least 70 percent on the pre-employment exam. The test consisted of 30 questions regarding welfare eligibility rules and 30 questions regarding interviewing techniques. According to the employer, only 13 of the 49 key components to the job were addressed on the test. In concluding that the test was not competently constructed, the court found that there was not an appropriate job analysis conducted by those who prepared the test, not all of the test involved job-related factors, and the employer could not substantiate the propriety of a 70 percent score as the cut-off point for the test, when approximately 75 percent of the job tasks were not tested. According to the court, "the test seized upon relatively minor aspects of the eligibility examiner job, such as reading comprehension and arithmetic and ignored others."

The Employment Law Bulletin is prepared and edited by Richard I. Lehr and Brent L. Crumpton. Please contact Mr. Lehr, Mr. Crumpton, or another member of the firm if you have questions or suggestions regarding the Bulletin.

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