EMPLOYMENT LAW BULLETIN

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TO OUR CLIENTS AND FRIENDS:

There are important legal distinctions for employers to remember when conducting video surveillance as compared to listening to or tape recording employee telephonic communications. The general principle is that video surveillance of employees may be conducted when they are in a situation that does not create an expectation of privacy. Federal and most state laws do not require that employees know of or approve in advance of video surveillance. Recording an employee telephone conversations, however, is governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and provides than an employee's personal telephone conversations may not be listened to or taped without the employee's approval in advance. The recent case of *Desiletes v. Wal-Mart Stores, Inc.*, (1st Cir. March 29, 1999) illustrates the problems for employers who engage in taping.

This case involved the Wal-Mart store in Claremont, New Hampshire. Store managers used voice activated tape recorders to record employee phone conversations on several occasions during August, 1995 without the employee's permission. Under Title III, a claim can be brought by an individual "whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" without the employee's permission or the benefit of several exceptions. In addition to statutory damages, the offending party is required to pay the plaintiff's attorney fees.

Employers should not videotape employees or intercept or record employee telephonic or electronic communications without first thoroughly understanding their legal rights and responsibilities under Title III of the Omnibus Crime Control and Safe Streets Act and state law. Failure to follow the law will subject the employer to a risk of significant damages and loss of trust among those employees who are not the subject of the recording, interception, or surveillance.

EMPLOYER'S "NO MOONLIGHTING" RULE JUSTIFIES NOT HIRING UNION "SALT"

A union salt is a paid union employee who applies for work with an employer for the sole purpose of attempting to unionize those employer's employees. The salt typically identifies his or her union affiliation on the employment application, and if the employer refuses to hire the salt, the salt then files an unfair labor practice charge with the National Labor Relations Board, claiming that they were denied employment because of their union affiliation.

One approach to avoid this situation is for an employer to state on the application that any information disclosed on the application which is not requested will result in the employer refusing to consider the applicant for employment. Thus, those salts who disclose their union membership on the application would not be considered, just as any other applicant who volunteered information that was not requested. Another approach that was recently upheld by the National Labor Relations Board involved an employer that established a "no moonlighting" policy. *Little Rock*

Electrical Contractors and IBEW Local 480 (March 22, 1999).

The Little Rock Group is an association of non-union employers. When they advertised that they were hiring electricians, the IBEW sent several of their "salts" to apply for work. The employer announced that applicants must agree not to work for any other employer as a condition of employment. On this basis, the employer refused to hire those salts who were paid union organizers. The administrative law judge and NLRB upheld the employer's decision. In upholding the employer's actions, the Board, in a two to one decision, stated that "there is no allegation that the rule is unlawful. The record shows that [the applicants] were full time employees of the union when they applied. The general counsel does not contend that they intended to give up their union employment upon being hired by [the contractors]. Thus, the employment of these two applicants would have violated [the contractors] rule."

HOSPITAL FACES RISK OF LIABILITY FOR A PHYSICIAN WHO TAKES TURN FOR THE NURSE

In the case of *Quiroz v. Hartgrove Hospital* (N.D. Ill. March 24, 1999), LPN Eva Quiroz claimed that during the six month period she was sexually harassed by Dr. Bernardo Livas, who was never assigned to be her supervisor, although his patients were frequently in her unit. In holding that the hospital could be responsible for the physician's behavior, the court said that "although Livas was not plaintiff's immediate supervisor, there is sufficient evidence to find that Livas had significant authority over her and possessed the power to alter her working conditions." The evidence showed the hospital honored Livas' request to transfer nurses to other shifts or not to place his patients on units covered by certain nurses. The effect of this, according to the court, could be a reduction in the work hours available to the nurses. Thus, "formal control" over an employee's wages, hours and conditions of employment is not required for there to be a conclusion that a physician acts as a supervisor on behalf of the hospital and, therefore, the hospital may be held responsible for that physician's sexual harassment.

SKIMPY ARBITRATION PROCESS LEAVES HOOTER'S EXPOSED

Courts continue to scrutinize arbitration procedures to be sure that the process is a fair one, when considering that the employee gives up the right to a jury trial. In the case of *Hooters of America, Inc. v. Phillips* (4th Cir. April 8, 1999), the court held that employee does not have to arbitrate a claim because the Hooters arbitration process was "utterly lacking in the rudiments of even-handedness." The employee alleged that a company official sexually harassed her and when she complained to her restaurant manager, no action was taken. She alleges that she was forced to quit due to the work environment. When she initiated a Title VII sexual harassment claim, Hooters argued that the Court should require her to arbitrate the claim.

The company rolled out the arbitration process in 1994. Its employees were not eligible for raises, transfers or promotions unless they signed the arbitration agreement. The agreement also stated that the company "from time to time" would issue rules concerning the arbitration process that were available to employees upon their written request. Employees were not given a copy of the rules at the time they were asked to sign the arbitration agreement.

The court ruled that "although the employee signed the arbitration agreement, that Hooters rules when taken as a whole, however, are so one-sided that their only possible purpose is to undermine the neutrality of the proceeding." On that basis, the court concluded that Hooters failed to fulfill its obligation to establish a neutral

arbitration process and, therefore, the employee was not required to arbitrate her claim.

The following are examples of Hooters' one-sided rules:

- The employee must provide a specific statement in writing of the complaint, but the company does not have to respond in writing and does not have to give the employee its defenses to the claim.
- The employee must give the company a list of all potential fact witnesses and a description of what those witnesses would say; the company was not required to provide similar information to the employee.
- The employee would select an arbitrator, the company would select an arbitrator and then the two arbitrators would chose a third arbitrator for the arbitration panel. However, the list of arbitrators from which the employee and company chose was determined by the company.
- Hooters could expand the arbitration to include matters that were not specifically raised by the employee, but the employee could not expand the arbitration to cover matters that were not submitted in writing to the company.
- The company could move for summary judgment at the end of the hearing, but the employee could not.
- The company could sue in court if an arbitration decision were not supported by a preponderance of the evidence, but the employee could not appeal to the courts.
- The company could modify the arbitration process at any time, including during an actual arbitration hearing.

The court characterized the Hooters arbitration process as "a sham system unworthy even of the name of arbitration."

DID YOU KNOW...

. . . that on April 9, 1999 United Food and Commercial Workers organizers advised other union organizers to raise racial issues up-front with employees during campaigns? It is illegal for either a union or an employer to appeal to race during the course of an organizing campaign. However, the way the Food and Commercial Workers described it, organizers at the beginning of the campaign should talk about racial issues and racial prejudice to make employees "aware" of their rights and the union's concerns on this issue. Sounds to us as if this is simply another way that unions can try to appeal to race, which the law forbids.

. . . that the Allied Pilots Association and two officers were ordered to pay $45.5 million to American Airlines because of an illegal sick out? *American Airlines v. Allied Pilots Association* (N.D. Tex. April 15, 1999). This award was based upon losses the company suffered during what the court characterized as an
illegal sickout. The judge concluded that the union and its officers were in contempt for violating his temporary restraining order that required the pilots to end this sickout and return to work. The court stated that although he cannot order pilots to fly a plane, he can "make people pay for what they break."

. . . that in an absurd ADA claim, an individual alleged that the requirement that he wear a condom constituted disability under the ADA? *Qualls v. Lacks Stores, Inc.* (N.D. Tex. March 31, 1999). An employee alleged that he was terminated because he had hepatitis. He alleged

that in order to minimize transmitting the disease, he was required to wear a condom during intercourse. He claimed that he was required to wear a condom because he had hepatitis C, and it was necessary to take that precaution in order to prevent transmitting the disease. According to the court, "sexual intercourse is not a major life activity under the ADA." Furthermore, the court added that "the use of a condom during intercourse, at least without more, does not constitute a substantial limitation on one's sex life."

. . . that the house subcommittee on workplace protections on April 13th considered excluding bonus payments from overtime calculations under the Fair Labor Standards Act? Forty representatives testified that production bonuses are difficult and costly due to wage and hour requirements that those bonuses must be calculated when determining how much overtime an employee receives. Opponents to the bill responded by stating that "corporate profits are at unprecedented levels and those in the top twenty percent income bracket are making more money than ever before. At the same time, more and more workers are working longer and longer hours to make ends meet."

. . . that President Clinton has proposed amending Title VII to prohibit discrimination against parents? Although as of the date of this newsletter such legislation has not yet been introduced, the President believes that employers discriminate against parents by not accommodating parents who need time off of work for family related matters. According to the President, employers are less inclined to hire parents because of concerns about family responsibilities and do not accommodate parental needs.

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