

# Labor Law

Labor and employment law trends of interest to our clients and other friends.

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## EMPLOYMENT CASES DOMINATE SUPREME COURT DOCKET

The U.S. Supreme Court began its 2001-2002 term with an unusually high number of employment cases on its docket, and it is likely that more will be added during the term. Fourteen cases have been accepted for review, including:

**FMLA.** *Ragsdale v. Wolverine Worldwide, Inc.* is the first FMLA case to reach the high court. It involves the issue of whether an employee not told that her time off would count as FMLA leave is entitled to additional leave. Ragsdale was given seven months' medical leave for

cancer treatment but not told by her employer that the leave would count toward her 12-week FMLA entitlement. After her leave expired, she requested FMLA leave. Her employer told her that she had used all FMLA

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leave. Ragsdale sued under a DOL regulation providing that leave does not count against an employee's FMLA entitlement if the time off is not designated by the employer as FMLA time. The lower court invalidated the regulation because it gives an employee more time than the statute requires. On appeal the Eighth Circuit affirmed, siding with the Eleventh Circuit, which had earlier reached the same result. Other courts have upheld the regulation, causing a split of authority that the Supreme Court will resolve.

**NLRA.** In *Hoffman Plastic Compound, Inc. v. NLRB*, the NLRB reinstated an employee fired for engaging in pro-union activity. During a compliance hearing over the computation of back pay, the employee disclosed that he was an undocumented alien. The Board dropped reinstatement as a remedy but ordered that back pay be paid to the date the parties learned the employee was undocumented. The DC Circuit Court of Appeals enforced the Board's order in a 5-4 decision. The court rejected the employer's argument that an individual must be considered unavailable for work (and therefore not entitled to back pay) during any period when he is not lawfully present and employed in the United States.

**ADA.** *Williams v. Toyota Motor Mfg., Kentucky, Inc.*, raises the question of how restrictive a disability must be on an employee's ability to work to render the employee "disabled" under the ADA. The Sixth Circuit found that an employee was disabled because her limb, shoulder and neck impairments substantially limited her ability to perform the range of tasks associated with her assembly-line job.

**ERISA.** In *Moran v. Rush Prudential HMO, Inc.*, a medical benefit plan participant sued Rush under the Illinois HMO Act after it had denied her claim for surgery reimbursement because the procedure was not deemed medically necessary. Rush argued that Moran's state law action was a claim for benefits preempted by ERISA. The trial court agreed and granted summary judgment to Rush because it had not abused its discretion or acted arbitrarily in denying the claim. The Seventh Circuit reversed on the ground that the state law fell within a savings clause in ERISA excepting from preemption laws that regulate insurance.

**EEOC.** *EEOC v. Waffle House, Inc.*, involves the extent to which the Equal Employment Opportunity Commission, in bringing a suit in its own name, is bound by a private arbitration agreement between the charging party and his employer. The EEOC action was brought under the ADA seeking relief on behalf of an employee who had signed an employment application with a provision requiring him to submit to binding arbitration any claim concerning his employment. The Fourth Circuit concluded that although the EEOC could not be compelled to arbitrate its claims, it could seek injunctive relief against the employer.

The Supreme Court's decisions in these cases and others will be discussed in subsequent issues of this newsletter. In the meantime, if you have any questions about any of the issues raised by these pending Supreme Court cases, call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

## **ENOUGH IS ENOUGH: REGULAR ATTENDANCE IS AN ESSENTIAL FUNCTION OF A JOB UNDER THE ADA**

The United States Court of Appeals for the Seventh Circuit recently held that an employee's request for unlimited sick days was not a reasonable accommodation under the Americans With Disabilities Act ("ADA"). *EEOC v. Yellow Freight Systems, Inc.*, 253 F.3d 943 (7th Cir. 2001), involved a trucking company dockworker who suffered from AIDS and Kaposi's sacoma, a cancer related to AIDS. The plaintiff had a history of poor attendance and was ultimately terminated for excessive absenteeism. Specifically, in 1991 he left early twice and called in sick 37 times; in 1992 he left work early once and took 15 days off; in 1993 he left early 4 times and was out 126 days; in 1994 he left work early 3 times and took 47 days off; and in 1995 he left work early 3 times and called in sick 50 times.

In 1995, plaintiff contacted his supervisor and requested time off for a medical condition. The supervisor explained to plaintiff that he was not eligible for FMLA leave, but offered him a 90-day unpaid leave of absence as an alternative. Instead, plaintiff chose to simply call in sick

for the next two weeks. In December 1995, plaintiff was diagnosed as HIV positive and, in January 1996, was diagnosed with Kaposi's sarcoma. On January 12, 1996, plaintiff sent a letter to his supervisor apprising him of his medical problems.

Plaintiff's attendance worsened. He called in sick every day in January, February, and March 1996. At that time Yellow Freight decided to treat plaintiff under its five-step progressive disciplinary policy. Under the policy, the company had a step 1 "coaching session" with him, and shortly thereafter sent him a step 2 letter. Plaintiff responded by reminding the company of his illness. When the absences continued, the company sent a step 3 letter and plaintiff wrote back again, reminding the company of his medical condition.

Yellow Freight responded by sending an ADA accommodation form. Plaintiff returned a letter stating he was "requesting no particular considerations at this time other than the reasonable accommodation necessary to monitor and maintain my health status...[I want] sick days as needed without being penalized."

Plaintiff missed the next 10 of 19 working days, resulting in a disciplinary suspension. He was terminated for excessive absences a few months later. Plaintiff filed a charge with the EEOC, alleging that the company disciplined him on account of his disability and denied his request for reasonable accommodation. The EEOC brought suit against Yellow Freight, and the plaintiff intervened.

The lower court granted summary judgment for the employer on the employee's claims.

On appeal, the Seventh Circuit affirmed the lower court's decision. The critical question on appeal was whether an essential function of plaintiff's full-time position was regular attendance, and if so, whether he met the requirement for "essential function."

The court reasoned that this circuit, and every other circuit that has addressed this issue, has held that in most instances the "ADA does not protect persons who have

erratic, unexplained absences, even when those absences are a result of a disability...in most cases, attendance at the jobsite is a basic requirement of most jobs." Further, the court stated that it is not the existence of the absences themselves, but the "excessive frequency of an employee's absences in relation to that employee's job responsibilities that may lead to a finding that an employee is unable to perform the duties of his job."

On the claim that Yellow Freight failed to accommodate plaintiff, the court determined that plaintiff's request for "unlimited sick days, if needed, without being penalized" was not a reasonable request as a matter of law because "businesses are not obligated to tolerate erratic, unreliable attendance or to provide an accommodation which would impose an undue hardship on the business."

Moreover, an employer is not required to provide an employee the specific accommodation requested. Yellow Freight met its burden to interact with plaintiff regarding a reasonable accommodation, offered him the option of 90 days' medical leave, and sent him an accommodation review form. Plaintiff rebuffed the company's efforts.

### ***Other ADA Highlights in the Seventh Circuit***

Shortly after the *Yellow Freight* decision, the Seventh Circuit ruled in another case involving the issue of the "essential function of the job." In *Winfrey v. City of Chicago*, 259 F.3d 610 (7th Cir. 2001), the court determined that the essential functions of the position of city ward clerk were those listed on the official job description,

and the fact that the city offered to accommodate the employee by modifying the position did not mean that the

duties included in the modified position were the only essential functions of the job. The court found the plaintiff could not demonstrate that he could perform the essential functions of the city ward position.

On several occasions the Seventh Circuit dealt with the issue of reassigning a disabled employee from a job he

*The critical question on appeal was whether an essential function of plaintiff's full-time position was regular attendance, and if so, whether he met the requirement for "essential function."*

cannot perform to one he can. In *EEOC v. Humiston – Keeling*, 227 F.3d 1024 (7th Cir. 2000), the court held that an employer is not required to reassign a disabled employee to a vacant position if another, more qualified candidate has applied “provided that it is the employer’s consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant.”

In *Ozlowski v. Henderson*, 237 F.3d 837 (7th Cir. 2001), the court placed a strict burden on the disabled employee to show there is a vacant position for which he was qualified. The plaintiff in *Ozlowski* argued that there were several open positions into which the employer could have transferred him. However, the court stated that the plaintiff was not qualified for any of the positions, and that several positions were not actually vacant. Specifically, the company had placed an “informal hold” on one of the positions while a new computer system was installed which would likely change the job requirements. The court stated “we do not believe that an employer is required to fill a position which, based on a reason wholly independent of the employee’s disability, it had chosen not to fill. Such a position is not vacant.”

Finally, in *Williams v. United Insurance Co.*, 253 F.3d 280 (7th Cir. 2001), the court held that an employer is not required to provide special training to qualify a disabled employee for an open job. The court reasoned that the ADA does not require an employer to offer special training to a disabled employee that is not offered to nondisabled employees.

If you have any questions about *Yellow Freight*, or any other questions involving the ADA, please call Angela Pavlatos (312/609-7541), Barry Hartstein (312/609-7745) or any other Vedder Price attorney with whom you have worked.

## **SEXUAL HARASSMENT NOT THAT EASY TO SHOW**

Employers face anxiety and risk whenever they face a sexual harassment claim. But, several recent decisions from the Seventh Circuit Court of Appeals (covering

Illinois, Indiana and Wisconsin) make it more difficult for a harassment plaintiff to prevail when there is no tangible employment action.

The court’s decisions have established two general hurdles to prove claims of environmental harassment. The first is proof that the conduct has “the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive work environment.” *Wolf v. Northwest Indiana Symphony Society*, 250 F.3d 1136, 1143 (7th Cir. 2001). The second requires proof of conduct that is sufficiently *severe or pervasive* that a reasonable person would find it hostile and that the victim considers it as abusive. *Murray v. Chicago Transit Authority*, 252 F.3d 880, 889 (7th Cir. 2001).

In assessing severity and pervasiveness of the alleged conduct, courts look at “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Smith v. Sheahan*, 189 F.3d 529, 533-34 (7th Cir. 1999). Recent Seventh Circuit decisions provide some help in applying the standard.

The Seventh Circuit recognizes that Title VII “do[es] not mandate admirable behavior from employers.” *Russell v. Board of Trustees of University of Illinois*, 243 F.3d 336, 343 (7th Cir. 2001). Thus, “‘simple teasing,’ offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’” *Adusumilli v. City of Chicago*, 164 F.3d 353, 361 (7th Cir. 1998). Rarely will mere offensive comments, particularly when they are few and far between, constitute a sexually hostile environment when they are not physically intimidating, threatening or sexually suggestive. For example, in *Russell* the Seventh Circuit found no claim when a supervisor referred to a female employee as “Grandma,” commented to her that all intelligent women were unattractive, and made inappropriate comments referring to another female employee as a “bitch,” “sleazy” and saying that she dressed “like a whore.” A district court in the Seventh Circuit rejected a harassment claim when a supervisor, over a nine-month period, told several “blonde jokes” or

made inappropriate comments about blondes to his female staff. *Harris v. Moorman's Inc.*, Case No. IP00-140-C-H/G, 2001 WL 1168174 (S.D. Ind., Aug. 14, 2001). Employers prevailed on summary judgment in these cases as well:

- A supervisor who, on two occasions, told a female employee that he would like to have sexual intercourse with her 15-year old daughter. *Rizzo v. Sheahan*, Case No. 00C2494, 2001 WL 1117435 (7th Cir., Sept. 20, 2001).
- Over a six-month period, a law firm partner requested that his secretary show him pictures of herself wearing lingerie, commented to her about her undergarments and questioned whether she bought items at a risqué lingerie store. *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976 (7th Cir., May 11, 2000).
- A co-worker once brushed up against another male employee while standing in front of a urinal. *Stewart v. General Motors Corp.*, Case No. 99C0628, 2001 WL 710106 (N.D. Ill., June 22, 2001).

What, then, does constitute sexual harassment? Generally, the conduct must involve unwanted, forcible contact or threat of contact, inappropriate touching, and/or lewd propositions for sex. *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 807-08 (7th Cir. 2000). Nevertheless, each case stands on its own facts. The longer the conduct continues and the more offensive it becomes, the more likely a judge will let a jury decide the issue. And, in that event, a jury may be much more inclined to hold an employer accountable after hearing and seeing the plaintiff testify in court.

If you have any questions about this issue, please call Rachel Barner (312/609-7836), Barry Hartstein (312/609-7745) or any other Vedder Price attorney with whom you have worked.

## THE BUSH LABOR BOARD: WHO'S ON FIRST?

The President has the opportunity to greatly influence the labor laws of our country through appointments to the National Labor Relations Board, which is responsible for enforcing the National Labor Relations Act. The President also designates the Chairman of the Board. The Board is responsible for resolving unfair labor practices and determining which labor organization, if any, should represent employees in bargaining. The Board, essentially a judicial body, consists of five members appointed by the President (with the advice and consent of the Senate) for staggered five-year terms, although an individual chosen to fill a vacancy fills only the unexpired term of the prior member.

Although the law does not require any particular political mix, tradition has dictated since 1947 that the political party holding the White House gets three seats and the other party two. However, the President must wait for vacancies to shift the balance to his liking, since Board members can be involuntarily removed only for good cause. When the Senate is not in session, the President can make "recess appointments" to the Board, which are good for a maximum of one year.

The President also appoints the General Counsel of the NLRB (again with advice and consent of the Senate) for a four-year term. The General Counsel investigates and decides whether unfair labor practice charges should go to complaint, and, if so, the General Counsel prosecutes the Complaint. The General Counsel also represents the Board in court proceedings to enforce or review Board decisions.

Currently, there are three vacancies on the Board. The following are the statutory five-year terms by expiration dates and the status of each:

December 16, 2002

Filled by Democrat Wilma B. Liebman, a Clinton appointee. Liebman previously served as Deputy Director of the Federal Mediation Conciliation Service and other positions in that agency. Prior to that, she was counsel for the Bricklayers,

counsel to the Teamsters, and a staff attorney with the NLRB.

#### August 27, 2003

Vacant, but R. Alex Acosta was nominated by President Bush on October 4, 2001, and is awaiting Senate confirmation. Acosta is currently the Deputy Attorney General in the Office of Civil Rights at the U.S. Department of Justice.

#### December 16, 2004

Currently held by Democrat Dennis P. Walsh under a recess appointment by President Clinton, who nominated Walsh to a full term shortly before he left office. Bush withdrew Walsh's nomination, and his recess appointment will expire when the Senate adjourns its 2002 session. However, the word now in Washington is that Bush will nominate Walsh for a full statutory term that will run until December of 2004.

#### August 27, 2005

Currently vacant.

#### August 27, 2006

Vacant, but currently being filled by the Bush recess appointment of Peter Hurtgen, a Republican appointed by Clinton to a statutory term that expired on August 27, 2001. Hurtgen, whom President Bush designated as NLRB Chairman, can serve until the end of the current session of Congress in 2002, or until the Senate confirms a nominee, whichever occurs first. Hurtgen previously was a partner in a management side law firm.

The General Counsel's situation is not as confusing. In May, Bush nominated Arthur Rosenfeld for the post, and he was unanimously confirmed by the Senate on May 26, 2001. Prior to becoming General Counsel, Rosenfeld served as Senior Labor Counsel of the Senate Committee on Health, Education, Labor and Pensions and as a Senior Advisor to Senator James Jeffords on matters concerning labor and employment law.

Thus, President Bush theoretically has the opportunity to appoint a majority of members with conservative judicial and labor philosophies like his own and shape the law accordingly; including, perhaps, revisiting some of the decisions of the liberal Clinton Board. However, it is not clear how quickly Bush will act in this area or how successful he will be, not only because of the all-consuming war against terrorism, but because of the loss of the Senate majority and its potential negative impact on the confirmation process.

If you have any questions about the composition of the NLRB, please call Deric Bomar (312/609-7726), George Blake (312/609-7520) or any other Vedder Price attorney with whom you have worked.

### **EMPLOYEE COMMITTEES THAT PERFORM MANAGERIAL FUNCTIONS ARE NOT “LABOR ORGANIZATIONS”**

Ruling on the controversial subject of “employee committees,” the National Labor Relations Board unanimously held that employee committees created to perform managerial functions were not “labor organizations” within the meaning of the NLRA.

In *Crown Cork & Seal Co.*, 334 NLRB No. 92 (2001), the employer operated an aluminum manufacturing plant where, since the plant’s opening, authority was delegated to employees to operate the plant through participation on various committees. All seven of the committees at issue made decisions by a process of discussion and consensus. Although managers served on the committees, management members held no greater authority than other committee members.

Under the committee system, four of the seven committees were designated as “production teams,” and every employee in the plant participated on one of them. The production teams were empowered to take action with respect to production, quality issues, training, attendance, safety and discipline short of suspension or discharge. The production teams had authority to decide which members were given formal and informal training, could counsel employees and recommend suspension or discharge and administered the plant’s absentee program

by deciding requests for time off and whether an absence was excused or unexcused.

Three other committees – the organizational review board, the advancement certification board and the safety committee – operated at one administrative level above the production teams. Each of these three committees consisted of employees and management. Many of the higher-level committee decisions were reviewed by a team that consisted solely of plant managers. The organizational review board was responsible for reviewing production team recommendations of suspension or discipline. The advancement certification board certified employee skill levels and recommended pay increases to the plant manager. The safety committee reviewed production team accident reports and considered the best methods to ensure a safe workplace.

The employer was charged with violating Section 8(a)(2) of the Act by dominating or supporting a “labor organization.” In considering whether the seven committees constituted “labor organizations” within the meaning of the Act, the Board stated that under Section 2(5) a labor organization must exist for the purpose, in whole or in part, of “dealing with” the employer regarding terms and conditions of employment. The Board noted that the term “dealing with” contemplates a bilateral mechanism under which the employer and the employee committees submit to one another’s proposals concerning the terms and conditions of employment and engage in negotiations.

In this case the Board affirmed the Administrative Law Judge’s (“ALJ”) dismissal of the complaint and found that the committees do not “deal with” an employer if their purpose is to perform essentially managerial functions. The Board held that because the committees exercised authority that was unquestionably managerial, they were not “labor organizations” within the meaning of the Act. The Board reasoned, in part:

“\* \* \* what is occurring in the Respondent’s facility is the familiar process of a managerial recommendation making its way up the chain of command. Higher-management review of a recommendation made by lower management cannot be equated to the ‘dealing’ between an employer and a representative of its employee contemplated

by the statute. Indeed, it is the fact that the interaction is occurring between two management bodies that distinguishes this case from cases such as \* \* \* [citations omitted] and persuades us that the statutory element of dealing is absent.”

*Crown Cork* establishes that employers will not violate Section 8(a)(2) by maintaining employee committees that possess real authority akin to management. If this authority is established, the fact that the decisions of the committees are subject to review by other managerial employees does not convert them to “labor organizations.”

If you have any questions about this issue, please call Deric Bomar (312/609-7726), Larry Casazza (312/609-7770) or any other Vedder Price attorney with whom you have worked.

## **PLEADING POVERTY DURING BARGAINING MAY REQUIRE PRODUCTION OF SUPPORTING INFORMATION**

The Board recently outlined its position with respect to the duty of an employer to produce financial information, upon union request, when the employer claims during bargaining negotiations that it is not able to meet union demands for wage increases.

In *Lakeland Bus Lines, Inc.*, 335 NLRB No. 29 (August 27, 1999), the president of the company sent a letter to employees when the employer and union were not able to reach agreement on a compensation package. The letter stated, in relevant part:

We are trying to bring the bottom line back into the black . . . We are asking for help from our LAKELAND FAMILY so we may retain your jobs and get back in the black in the short term . . . I ask you to give the enclosed Final Offer your serious consideration and vote YES to ratify it. The future of Lakeland depends on it.

The union then requested that the employer allow its accountant to review the employer’s books and records. The employer refused, stating it did not claim its financial

position precluded agreement to the union proposals. The General Counsel alleged that the employer violated Sections 8(a)(5) and (1) of the Act by refusing to provide the union with access to the requested financial information. However, the ALJ found no violation because the employer was not claiming inability to pay.

In a 3-to-1 decision, Board Members Liebman, Truesdale, and Walsh reversed the ALJ decision. The Board relied substantially on its prior decision in *Shell Co.*, 313 NLRB 133 (1993), where it held that an employer's duty to disclose relevant financial information is triggered by claims that its present circumstances were "bad" and a "matter of survival," that it was "losing business," and "faced serious regulatory and cost problems." The Board concluded in *Lakeland Bus* that the message contained in the employer's letter to employees was not distinguishable from that found to trigger the employer's obligation to disclose financial information in *Shell Co.* Specifically, the Board reasoned that the employer's letter conveyed a sense of immediacy that it could not afford to pay more than its final offer, that it was not profitable, that its loss of revenue was permanent and that its proposals were premised on its immediate need to make up for the permanent loss.

This case highlights the needs for employer caution when making fiscal objections to union contract proposals. Employers should be careful to avoid inferring inability to meet union wage demands based on a weak financial position at risk of having to produce financial records to the union.

If you have any questions about this issue, please call Deric Bomar (312/609-7726), George Blake (312/609-7520) or any other Vedder Price attorney with whom you have worked.

## **WARN ACT LIABILITY MAY BE GREATER THAN YOU THINK**

In today's uncertain economy, many employers are restructuring operations, laying off workers and closing facilities. Employers with 100 or more employees may be required to provide 60 days' advance notice of a "mass

layoff" or "plant closing" under the Workers Adjustment Retraining Notification Act ("WARN"). An Employer deciding when to make an announcement regarding a mass layoff or plant closing must, in addition to considering the possible reactions by investors, merger partners, the public, the government, and its own employees, comply with obligations at risk of penalties under WARN. Employers who fail to provide timely notice of an impending mass layoff or plant closing may be liable to their employees for up to 60 days of back pay.

As part of the decision-making process, an employer must determine the expense it would incur if it has to pay back pay to its employees for the number of days it is in violation of the notice requirement. WARN provides that the back pay must be paid at "the average regular rate received by such employee during the last 3 years of the employee's employment" or "the final regular rate received by such employee," whichever is higher. While it appears that it should be simple to determine the potential liability for a WARN violation, the statute never clearly defines the term "back pay." Consequently, if an action is brought against an employer for unpaid WARN damages, the courts have the discretion to define back pay in a way that an employer may not have considered. Some court decisions show that an employer's back pay liability may be greater than expected.

First, while the majority of courts hold that an employer's liability under WARN should be the number of days the employees would have worked during the violation period, a few jurisdictions, most notably the Third Circuit Court of Appeals (with jurisdiction over Pennsylvania, New Jersey and Delaware), have held that the liability is for the number of *calendar* days during the violation period. In *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993), the Third Circuit concluded that back pay damages under WARN were intended to be a form of liquidated damages. According to the court, the use of the term "back pay" was meant to establish a measure of daily damages to be multiplied by the number of days during the period of violation and not intended to represent the actual wages an employee would have earned during that period.

In a recent case, *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands*

Inc., 244 F.3d 1152 (9th Cir. 2001), the Court of Appeals for the Ninth Circuit considered the definition of back pay under WARN. The employer, Sands, violated WARN by giving its employees only 45 days' notice that the casino would be closing. Facing a WARN violation for not providing the full 60 days' notice, Sands agreed to pay the workers an additional 15 days of back

pay. However, Sands did not include tips the employees might have earned during that 15-day period or the extra pay for those employees who would have worked on the July 4<sup>th</sup> holiday. Sands also deducted the amounts of severance payments it had made to the employees in exchange for staying on the job until the casino closed.

The employees' union sued Sands, seeking the tips and holiday pay and objecting to the severance pay set-off. The lower court agreed that tips and holiday pay should be included in the back pay award and severance pay should not be deducted. The Ninth Circuit Court of Appeals affirmed.

The court of appeals reasoned that back pay under WARN is intended to provide laid-off employees with a sum equal to what they would have received had the notice violation not occurred. The court also noted that back pay awards under other federal statutes (e.g., the National Labor Relations Act and Title VII of the Civil Rights Act of 1964) include forms of compensation such as holiday pay, overtime pay, shift differentials, interest, sick days, vacation pay and tips. Then, the court rejected the employer set-off for severance pay, stating that under WARN an employer may reduce its back pay liability only by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C. § 2104(a)(2)(B). Because Sands was obligated to make the severance payments to the employees under a legally enforceable agreement, its WARN liability could not be reduced by those amounts.

The United States Supreme Court denied the employer's request for further review.

*If an action is brought against an employer for unpaid WARN damages, the courts have the discretion to define back pay in a way that an employer may not have considered. Some court decisions show that an employer's back pay liability may be greater than expected.*

These cases show that employers must take care to make correct calculations of WARN liability based on the law in their jurisdiction. Employers should ensure that they are including the correct types of compensation and correct number of days and do not deduct payments made under a separate legal commitment. If calculations are made incorrectly, the additional costs can include not only the extra back pay but interest, legal fees, and possibly the plaintiffs' attorneys' fees.

If you need assistance in analyzing your particular situation, or have any other questions regarding WARN, please call Ron Weisenberg in New York (212/407-7709), Tom Wilde in Chicago (312/609-7821) or any other Vedder Price attorney with whom you have worked.

## EMPLOYERS MUST BARGAIN OVER HIDDEN SURVEILLANCE CAMERAS THAT MONITOR EMPLOYEES

Reaffirming a prior ruling, a recent decision by the National Labor Relations Board makes clear that an employer must bargain with its union prior to installing hidden surveillance cameras in the workplace. In a 2-1 decision the Board reaffirmed that employer use of hidden surveillance cameras is a mandatory subject of bargaining. The Board also held that an employer has an obligation to respond to an information request from a union concerning use of hidden surveillance cameras. *National Steel Corp.*, 335 NLRB No. 60 (August 27, 2001).

In *National Steel*, the employer periodically used hidden cameras to investigate specific cases of suspected theft or other instances of wrongdoing. The union asked the employer for information regarding its use of hidden cameras and stated that the employer needed to talk to the union before it installed additional cameras. In a follow-up letter to the employer, the union stated that "the use of hidden surveillance cameras has been deemed by the

National Labor Relations Board as a mandatory subject of bargaining and the Union has not waived its right to bargain over the subject.” In addition, the letter requested “all information concerning any existing hidden surveillance cameras that our members are subjected to that exist in any and all areas.”

The employer responded by letter, stating that “disclosing the location of this equipment would defeat its purpose,” and that “the Company does not believe that the Union is entitled to this information.” After receipt of this letter, the union filed an unfair labor practice charge and an Administrative Law Judge held that the employer violated Sections 8(a)(5) and (1) by refusing to bargain with the union over the hidden cameras and by failing to seek an accommodation with the union over its confidentiality concerns.

Affirming the ALJ decision, the Board cited its decision in *Colgate-Palmolive Co.*, 323 NLRB 515 (1997), where it held that employer use of hidden surveillance cameras to investigate workplace theft and employee misconduct was a mandatory subject of bargaining because the “installation of surveillance cameras is both germane to the working environment and outside the scope of managerial decisions lying at the core of entrepreneurial control.” The employer in *National Steel* unsuccessfully attempted to distinguish *Colgate-Palmolive* by arguing that it did not utilize hidden surveillance cameras in areas such as restrooms.

The Board also affirmed the ALJ holding that the employer violated the Act by (1) refusing to provide the union with information pertaining to existing hidden surveillance cameras and (2) refusing to bargain for an accommodation to the union’s information request pertaining to the location of the cameras. The Board stated that the employer had an obligation to come forward with an offer of an accommodation to the union if it had confidentiality concerns about the location and use of the cameras. Unless *National Steel* is reversed or limited, employers considering the use of surveillance cameras in the workplace must treat it as a mandatory subject of bargaining.

If you have any questions about this issue, please call Deric Bomar (312/609-7726), George Blake (312/

609-7520) or any other Vedder Price attorney with whom you have worked.

## **FIRST AMENDMENT RETALIATION CLAIM: “FREE SPEECH” DOESN’T MEAN “FREE SPEECH” FOR PUBLIC SECTOR EMPLOYEES**

A public sector employee cannot simply claim “free speech” when allegedly terminated in retaliation for whistle-blowing. In order to prevail on a First Amendment retaliation claim, a plaintiff’s speech must be constitutionally protected and have been a motivating factor in the employer’s actions. Speech by a public employee is “protected” if: (1) it addresses an issue of public concern and (2) the employee’s interest in speaking outweighs the interest of the state in efficiently providing services. To determine whether the speech implicates a public concern, courts examine content, form, context, and motivation – with content being the most important.

The United States Court of Appeals for the Seventh Circuit recently applied this analysis in *Wallscetti v. Fox, Lagges et al.*, 258 F.3d 662 (7th Cir. 2001). Plaintiff Stephanie Wallscetti worked for the Cook County Department of Environmental Control. After noticing that two of her supervisors were sometimes absent from their offices in the afternoons, she hired a private investigator to tail one of them. She concluded that the two supervisors often stayed on the clock while engaging in personal business away from the office and informed the Cook County Comptroller of her suspicions. She thereafter complained to the County’s EEO officer that the same two supervisors were harassing her for her whistle-blowing.

Shortly after Wallscetti reported her complaints to the Comptroller, the Director of her Department met with Wallscetti about her failing to follow the chain of command. At the meeting Wallscetti refused to reveal to whom she made her reports and would not provide documentation to substantiate her allegations.

Wallscetti later participated in a predisciplinary hearing to address charges that she: (1) had harassed one of the two supervisors at issue; (2) was insubordinate; (3) failed to properly perform her duties; (4) lied to supervisors; and

(5) submitted false documents in her work. After the hearing, Wallscetti was terminated.

Wallscetti filed suit against the two supervisors and the Department Director in their individual and official capacities, alleging retaliation in the form of harassment, false reprimands and her eventual termination because she exercised her First Amendment rights. The U.S. District Court found that the only protected speech was the information about her supervisors' failure to work. Wallscetti unsuccessfully argued that *all* of her speech was protected, including her complaints of harassment.

On appeal, the Seventh Circuit found that Wallscetti's allegations of harassment were more in the nature of a private personnel dispute than a matter of public interest. The content of her complaints involved personal matters, rather than issues involving her department as a whole. The Court noted that, "[g]enerally, speech relating to only the effect an employer's action had on the speaker is not shielded by the First Amendment, since it rarely involves a matter of public concern." Further, the fact that Wallscetti contacted internal superiors rather than bringing the alleged harassment into view of those outside the County supported the finding that her complaints were not a matter of public concern and therefore not protected.

This case reassures public employers that employee use of the First Amendment as a defense to pending discipline is not automatic—when the speech at issue is not one of public concern. But, public employers must be aware of employee speech that does involve a public concern. For example, in *Meyers v. Hasara*, 226 F.3d 821 (7th Cir. 2000), a city health inspector brought an action against the city's mayor and health director, alleging that the issuance of a 5-day suspension for her comments about an unlawfully operating food market violated her First Amendment rights. The Seventh Circuit found a legitimate claim, observing that the city turned a "blind eye" to a known permit violation that posed a potential health risk, and that the employee's comments involved a matter of public concern. Moreover, the mayor and director were not entitled to qualified immunity in this case,

because they could not "claim not to have known that disciplining Myers under these circumstances would not implicate her right to free speech."

If you have any questions about this issue, please call Katie Colvin (312/609-7872), Jim Spizzo (312/609-7705) or any other Vedder Price attorney with whom you have worked.

## UNION VIDEOTAPING OF REPLACEMENT WORKERS DURING A STRIKE VIOLATES THE NLRA

In a ruling that may reduce intimidation against replacement workers crossing picket lines, the National Labor Relations Board recently held that a union violated the Act where picketers videotaped replacement workers entering and exiting the employer's facilities, recorded their license plate numbers and directed abusive remarks toward them.

In *General Teamsters, Warehousemen and Helpers Union (Basic Vegetable Products, L.P.)*, 335 NLRB No. 55 (August 27, 2001), the union struck after the contract expired and the employer hired replacements who were eventually converted to permanent replacements. The union instructed its picket line captains and picketers

to have a video camera available at all times, allegedly to record any violence or violations of the law on the part of the employer and to record

events on the picket line in the event of any allegations of misconduct on the part of picketers. However, the union picketers used the cameras to videotape vehicles entering and exiting the facility. The cameras were aimed at license plates and the occupants of the vehicles. In one incident, while a picketer was using a camera, another union supporter used a bullhorn to call out the license number of each vehicle entering the facility. Picketers simultaneously sometimes shouted obscenities at the replacements.

*...public employers must be aware of employee speech that does involve a public concern.*

The Administrative Law Judge held that the Union violated Section 8(b)(1)(A) by videotaping the replacement employees, their vehicles and license plates. A Board majority affirmed the finding that, although videotaping employees is not by itself a violation of the Act, when picketers combined the videotaping with other action that indicates that the union may react negatively to employees who fail to honor a picket line, such conduct violates the Act.

From now on, union videotaping of replacement workers or other people attempting to cross picket lines may be unlawful when it is combined with abusive remarks or other conduct that has a reasonable tendency to instill fear of retribution in the minds of replacement or crossover employees.

If you have any questions about this decision or about picket line conduct generally, please call Deric Bomar (312/609-7726), Larry Casazza (312/609-7770) or any other Vedder Price attorney with whom you have worked.

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