

Labor and Employment Law

JULY 2004

VOLUME XI, ISSUE 4

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Employment Discrimination

Court Finds Release Agreement May Not Be Enforceable

Melinda Meyers worked for TruGreen as a sales associate. She allegedly experienced severe sexual harassment on multiple occasions from two separate managers. After she rebuffed the advances of these two managers, she said that she began receiving threatening e-mail messages from them. Meyers believed that her job was in jeopardy as a result of these threats. She reported the harassment and threats to the company's human resources manager, who shortly thereafter presented Meyers with a release agreement. Meyers, who claims to have been frightened and intimidated at the time due to the alleged harassment and threats by the managers, signed the agreement the next day in exchange for \$3,000.

Meyers returned to work, but told the HR manager that she felt too upset to perform her job. The HR manager told her that she should resign from the company and sign another release agreement, and in exchange, the company would pay her \$10,000. According to Meyers, the HR manager also said that if she decided to stay on with the company, she would be fired and would end up with no job and no money. She further claimed that the HR manager told her that she needed to sign the release "right away." Meyers did so the next day without speaking with a lawyer.

Despite accepting this \$13,000 and signing a full release, Meyers later brought suit for sexual harassment and intentional infliction of emotional distress. The company moved for summary judgment, claiming that the two release agreements signed by Meyers precluded her claims. The federal court in Chicago, however, found that a jury must decide whether or not Meyers executed the

release agreements knowingly and without duress. The court examined the facts surrounding Meyers' signing of the agreements and concluded that the alleged harassment and threats could have altered Meyers' emotional state to such a degree that she did not knowingly sign the agreements. The court also found that the termination threat allegedly made by the HR manager could amount to duress that would invalidate the second agreement. *Meyers v. TruGreen, Inc.*, Case No. 03 C 7570.

Release agreements have become commonplace in an era of increasing employment litigation. But employers must be aware of what is required

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for such agreements to be valid. An employee should be given adequate time to consider a release, should be given the opportunity to consult an attorney before signing the agreement, and should not be

threatened regarding the consequences of not signing the release. The release itself must be written in clear language and not legalese. Furthermore, to release a federal age discrimination claim the employer must also comply with the specific requirements of the Older Worker Benefit Protection Act (e.g., at least 21 days to consider the release, told to consult with a lawyer, at least seven days to rescind, etc.). As this case shows, courts will refuse to enforce release agreements where circumstances indicate that the employee did not "knowingly and voluntarily" agree to the release.

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Court Finds That Employee Properly Engaged In ADA Interactive Process

The Americans With Disabilities Act (ADA) requires that an employer and a disabled employee engage in a dialogue whenever there is a question as to whether the employer can accommodate the employee's need for a disability-related accommodation. This dialogue is the so-called "interactive process." Recently, the Seventh Circuit Court of Appeals found this interactive process does *not* include a requirement that the employer meet with the employee's attorney or rehabilitation counselor. *Ammons v. ARAMARK Uniform Services, Inc.*, No. 03-1036.

The plaintiff in the case, Clyde Ammons, worked for ARAMARK at a large uniform cleaning facility in Chicago. Ammons' job involved maintenance and repair of everything in the facility, including washers, dryers, ironers, boilers, and presses. This maintenance job required significant physical exertion and agility—frequent climbing, standing, walking, kneeling, and lifting.

In 1997, Ammons took a leave of absence due to an injury to his right knee. After a knee operation, a course of treatment, and a functional capacity evaluation, his doctor concluded that he had reached the point of maximum medical improvement. Ammons' doctor further determined that he could not return to his normal job duties at ARAMARK and that he was limited to a light-medium level of work with severe limits on his ability to kneel, stand, walk, and lift.

Eventually, Ammons requested to return to work with modified job duties. The company scheduled a meeting with

Ammons to discuss whether his physical restrictions could be accommodated. Ammons requested that the company allow his attorney (who was representing Ammons in a workers' compensation case against the company) and his vocational rehabilitation counselor (who was also assisting Ammons in his workers' compensation case) to attend the meeting. The company refused to allow the attorney or counselor to attend the meet-

An employer that fails to discuss accommodations with a disabled employee risks an ADA lawsuit...

ing but it did allow him to bring his union representative to the meeting.

At two meetings with company officials, Ammons indicated that he could perform very little of his maintenance job. Ammons wanted the company to create a new position for him that would encompass only those tasks that he was able to perform (e.g., to be a "troubleshooter" who could advise other mechanics). The company concluded that Ammons' request was not a reasonable accommodation, and, because Ammons could not perform the essential functions of his maintenance job, he was terminated when his leave of absence expired.

Ammons sued under the ADA. He argued that if the company had allowed his attorney and vocational rehabilitation counselor to attend the interactive meetings, some sort of reasonable accommo-

dation could have been reached. The district court rejected Ammons' argument, granting summary judgment to ARAMARK. On appeal the Seventh Circuit agreed that "[t]he duty to engage in an interactive process does not mandate a meeting with an employee's attorney and vocational counselor." Since there was no accommodation that would allow Ammons to perform the essential functions of his maintenance job, and since employers have no duty to create a new position for a disabled employee, the Seventh Circuit agreed with the lower court that the company was entitled to terminate Ammons' employment.

This case also highlights the importance of communication with disabled employees regarding workplace accommodation issues. An employer that fails to discuss accommodations with a disabled employee risks an ADA lawsuit based on a claim that a reasonable accommodation could have been reached if the employer had only taken the time to discuss the issue. Although employers will generally be allowed to meet only with the disabled employee, that does not mean the employer can ignore input that it does receive from third parties. Also, the meeting must allow for a thorough exploration of all of the possibilities regarding workplace accommodations.

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NLRA

NLRB Voids Weingarten Rights For Non-Union Employees

On June 9, 2004, the National Labor Relations Board (NLRB), in a 3-2 decision favoring IBM Corporation, overruled its four-year-old news-making decision in *Epilepsy Foundation of Northeast Ohio*. In that case, an NLRB majority held that an employer violated the National Labor Relations Act (NLRA) by denying a non-union employee's request for the presence of a co-worker in

an investigatory interview that the employee reasonably believed might result in discipline. The now-overruled *Epilepsy Foundation* decision had extended to non-union employees the right to the presence of a union representative in such investigatory interviews (which was established for union-represented employees in the U.S. Supreme Court's 1975 *Weingarten* decision).

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Showing Video Depicting Union Violence Invalidated Election

In November 2000, there was an election at Gold Kist Inc.'s processing plant in Douglas, Georgia, to determine whether or not the United Food and Commercial Workers Union (UFCW) would represent the plant employees. During the course of the campaign leading up to the election, the company showed a video and slide show depicting violence that had occurred during a UFCW strike at the company's plant in Alabama about 11 years earlier. Part of the video was a "dramatic reenactment" of that violence. The company also put up posters with pictures and descriptions of the violence. The company never claimed that the violence would also occur at the Georgia plant, but instead had a slide that said: "UFCW strike, will it happen here? Make sure it does not happen to you. Vote no union, vote no union strikes!"

The company won the election by a vote of 523 to 345. The UFCW filed objections to the election, claiming that the company had engaged in unfair election tactics, including the video, slides, and posters regarding the previous strike at Gold Kist's Alabama plant.

Less than a year later, in October 2001, an Administrative

Law Judge found that the campaign tactic was in violation of the NLRA and ordered a new election. Now, more than two and a half years later, a three member panel of the National Labor Relations Board has issued a decision agreeing with the Administrative Law Judge. *Gold Kist Inc.*, 341 NLRB No. 135.

According to the NLRB, the company "clearly created a reasonable impression in the minds of its employees that if they elected to be represented by the union a strike was inevitable and it was likely to be a violent one." In the NLRB's view, the mere fact that the company used a question mark in referencing the strike—i.e., "will it happen here?"—was overridden by the amount of attention that the company gave to the issue. However, an employer is ordinarily allowed to state the facts in an election campaign—and the violent strike 10 years earlier was a fact. Thus, this appears to be yet another example that conduct which has been upheld by the NLRB as lawful in some situations, can be found unlawful when a different set of NLRB members addresses it.

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Conceding that the NLRA could properly be interpreted either way (i.e., to guarantee *Weingarten* rights to non-union employees or not to), NLRB Chairman Battista and NLRB Member Meisburg, with Member Schaumber concurring, held that, based on policy considerations and post-*Weingarten* changes in the American workplace, the better interpretation of the Act was to provide *Weingarten* rights only to union employees. *IBM Corporation*, 341 NLRB No. 148. Not surprisingly, the more "liberal" members of the NLRB, Members Liebman and Walsh, wrote a strong (some may say vitriolic) dissent.

The Board majority described the significant changes in the American workplace as follows:

The years after the issuance of *Weingarten* have seen a rise in the need for investigatory interviews, both in response to new statutes governing the workplace and as a response to new security concerns raised by terrorist attacks on our country. Employers face ever-increasing requirements to conduct workplace investigations pursuant to federal, state, and local laws, particularly laws addressing workplace discrimination and sexual harassment. We are especially cognizant of the rise in the number of instances of workplace violence, as well as the increase in the number of incidents of corporate abuse and fiduciary lapses. Further, because of the events of September 11, 2001 and their aftermath, we must now take into account the presence of both real and threatened terrorist attacks.

The NLRB majority then compared the attendance of co-workers at an investigatory interview in a non-union workplace with the attendance of a union representative at an investigatory interview in a union workplace. The majority stated four princi-

pal reasons for their distinguishing between union and non-union workplaces:

- ◆ Co-workers do not represent the interests of the entire work force;
- ◆ Co-workers cannot redress the imbalance of power between employers and employees.
- ◆ Co-workers do not have the same skills as union representatives; and
- ◆ The presence of a co-worker may compromise the confidentiality of information.

The majority wrapped up its balancing analysis as follows: Our examination and analysis of all these factors lead us to conclude that, on balance, the right of an employee to a co-worker's presence in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough, and confidential workplace investigations. It is our opinion that limiting this right to employees in unionized workplaces strikes the proper balance between the competing interests of the employer and employees.

Employers should be aware that *Weingarten* rights for union employees remain unimpaired. Employers should also be aware that, while an employer is now free to refuse the request of a non-union employee for the presence of a co-worker in an investigatory interview, the employer may not punish the employee for making the request. Furthermore, it should never be forgotten that the "final" decision resolving this issue may not last past the terms of the three members who formed the majority. In fact, the dissent ended: "[The majority] have overruled a sound decision not because they must, and not because they should, but because they can. As a result, *today's decision is unlikely to have an enduring place in American labor law.*"

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SEIU

Unions Vow Increased Organizing

At the recent convention of the 1.7 million member Service Employees International Union (SEIU), its President, Andrew Stern, made an impassioned plea for all unions to unite to increase their organizing efforts. He called on the AFL-CIO to reform itself so that unions will start working together to build the strength of the union movement.

These are not just “words” from SEIU President Stern. He is already at the forefront of initiating changes to strengthen the union movement. For example, he was instrumental in forming an organization called New Unity Partnership (NUP). Also involved in NUP are Unite, HERE, the Laborers Union and the Carpenters Union. Significantly, Unite and HERE recently voted to merge into one union called “Unite HERE.” Those of our readers who live in the Chicago area probably saw numerous news reports showing Unite HERE delegates and members marching together, sometimes in defiance of orders from Mayor Daly and the Chicago police department as

to which streets they could use. The merger of these two unions into one union with over 400,000 members may be the start of a movement to fewer unions with more members, wielding more power.

The SEIU not only intends to grow the union movement through more aggressive organizing tactics, but also through political activity. At its convention, the SEIU announced plans to spend

...the SEIU announced plans to spend about 77 million dollars in an effort to elect a “pro-worker” President of the United States.

about 77 million dollars in an effort to elect a “pro-worker” President of the United States. In addition to financial support, the SEIU claimed to have 50,000 volunteers ready to work 10 hours each during the campaign. That kind of money and manpower simply can't be overlooked.

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ESA

Illinois Strikebreaker Law Struck Down

In 1975, Illinois passed an Employment of Strikebreakers Act (ESA) prohibiting Illinois employers from knowingly employing professional strikebreakers during the course of a strike or lockout. In 2003, the Employment of Strikebreakers Act was expanded to also prohibit day-labor and temporary staffing agencies from being used during a strike. Caterpillar Inc. then filed suit alleging that the ESA was preempted by the federal National Labor Relation Act. The company also argued that the ESA violated its 14th Amendment right to equal protection. Judge McDade of the U.S. District Court of the Central District of Illinois agrees.

According to Judge McDade, the NLRA preserves an employer's right to bring economic pressure against unions, as long as it does so within the

requirements of the NLRA. In his view, the ESA shifts the balance of power in favor of labor by depriving employers of an economic weapon of self help—the hiring of professional strikebreakers or the use of temporary help agencies. He therefore found that the ESA is “an intrusion into the substantive process of collective bargaining. . . .” *Caterpillar Inc. v. Lyons*, No. 03-1245.

Not surprisingly, an appeal has been filed with the Seventh Circuit Court of Appeals.

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NEW FLSA REGULATIONS ON EXEMPTIONS FROM OVERTIME PAY

The Department of Labor issued new regulations governing the overtime exemptions under the Fair Labor Standards Act (the Act). The regulations become effective on August 23, 2004. In the May issue of this newsletter, we discussed the new duties tests for the four primary exemptions under the Act—the executive, administrative, professional, and outside sales exemptions. In this issue, we will outline the new salary level tests, explain revisions to the salary basis test, and discuss state law compliance issues.

SALARY LEVEL TESTS

The old regulations provided for a “long test” and a “short test” for overtime exemptions. The long test was used if the employee earned less than \$8,060 per year. Since that amount was less than the current minimum wage, the long tests were out-of-date and were almost never used. The new regulations: eliminate the long test/short test distinction; establish a minimum salary level for exempt status; and establish a new test for exempt status for highly compensated employees.

MINIMUM EXEMPT SALARY

The minimum salary to qualify for the executive, administrative and professional exemptions will be \$455 per week, or \$23,660 per year (\$380 per week in American Samoa). Employees who make less than this amount are not exempt even if they perform exempt duties (*e.g.* a store manager).

There are a number of exceptions to the minimum salary requirement. They include the following:

- ◆ There is no minimum salary for the outside sales exemption.
- ◆ There is no minimum salary level for teachers, lawyers, doctors or medical interns, and they can qualify for the professional exemption even if they earn less than \$455 per week.
- ◆ The minimum pay to be exempt as a “computer professional” (which is specifically defined by the statute) is \$27.63 per hour.
- ◆ Academic administrators who receive the same salary as entry level teachers can be eligible for the administrative exemption even if they earn less than \$455 per week.

NEW TEST FOR HIGHLY COMPENSATED EMPLOYEES

Employees who earn at least \$100,000 will be exempt from overtime pay if they customarily and regularly perform any *one* or more duties of the executive, administrative or professional exemptions. As a practical matter, this will mean that almost every white collar employee who earns more than \$100,000 will be exempt. (But keep in mind that even the most highly paid blue collar workers (*e.g.*, skilled tradesman) are not exempt from overtime.)

Salary, non-discretionary bonuses and other non-discretionary compensation are counted as part of salary for purposes of determining whether the \$100,000 threshold has been reached, but discretionary bonuses, board, lodging, insurance, and fringe benefits are not included in these calculations.

END OF YEAR CORRECTION ALLOWED

The Department of Labor recognizes that it may be difficult to predict whether an employee will earn \$100,000 in a given year, so the regulations state that an employer can make a year-end payment to achieve the \$100,000 level within one month after the year ends. For this purpose, the employer can use any 52-week period. If no period is identified in advance by the employer, the calendar year will be used. Partial years of employment can be pro-rated.

SALARY OR FEE BASIS REQUIRED FOR MOST EXEMPTIONS

In order to be exempt from overtime under the executive, administrative or professional exemptions, an employee must (1) perform exempt duties; and (2), in most cases, be paid on a fee basis or a “salary basis.”

FEE BASIS TEST

Employees who come within the administrative and professional exemptions may be paid on a “fee basis,” pursuant to which they receive an agreed sum for a single job regardless of time of completion. Where the fee basis is used, the amount paid must be at least \$455 per week if the employee had worked 40 hours. As a practical matter, the fee basis method of payment is rarely used for employees.

SALARY BASIS TEST

Employees who perform the duties of the executive, administrative and professional exemptions may be paid on a “salary basis.” To accomplish this, the employee must receive a predetermined amount constituting all or part of his or her compensation each pay period on a weekly or less frequent basis. The employee’s salary cannot be subject to reduction because of variations in *quantity* or *quality* of work, and, in general, “pay docking” is not allowed. Under the new regulations, however, an employee’s salary can be docked without destroying the salary basis for the following reasons:

- ◆ Absence for one or more full days due to personal reasons other than sickness or disability.
- ◆ Absence of one or more full days for sickness or disability in accordance with a bona fide sick pay or disability pay plan.
- ◆ Penalties imposed in good faith for infractions of safety rules of major significance.
- ◆ NEW: Unpaid disciplinary suspensions of *one or more full days* imposed in good faith for infractions of workplace conduct rules *pursuant to a written policy applicable to all employees* (e.g., sexual harassment or workplace violence policy).
- ◆ Partial week if it is first or last week of employment.
- ◆ Unpaid time taken under the Family and Medical Leave Act (but this does not necessarily cover time taken off under state leave laws such as the Illinois Victims Economic Security and Safety Act).

EFFECT OF IMPROPER DEDUCTIONS FROM SALARY

Under the old regulations, an employer risked losing the exemption for large groups of employees if it had a policy that allowed pay docking (even if it did not dock pay), or if amounts were erroneously deducted from one employee’s pay. The new regulations provide that the employer will lose the exemption only if it has an *actual practice* of improper deductions. The loss of the exemption will be limited to: (1) the same time period in which the docking occurred; (2) for employees in the same job classification; (3) who are working for the same manager.

SALARY BASIS SAFE HARBOR

The new regulations also provide a “safe harbor” for salary basis errors if an employer has a policy that meets certain requirements. The employer must:

- ◆ Adopt a policy which prohibits improper pay deductions and includes a complaint mechanism;
- ◆ Reimburse employees for any improper deductions; and
- ◆ Make a good faith commitment to comply in the future.

If all of these requirements are met, the employer will not lose the exemption as a result of the “pay docking” error.

The entire text of the new regulations, Fact Sheets and explanations of the new regulations can be found at the Department of Labor’s website at www.dol.gov/fairpay.

STATE LAW ISSUES

Many states have wage and hour laws, and in some cases, those laws are different than the new federal regulations. Illinois has enacted legislation preserving the old federal regulations defining the executive, administrative and professional exemptions, so in many cases Illinois employers will not receive the benefits of the changes in the new regulations. Other states, including California, have their own overtime schemes. Employers must pay overtime to an employee if it would be required by federal law or by state law, so the analysis of an employee’s exempt status must include a review of applicable state law.