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LABOR NOTES

THREE UNIONS BOLT FROM AFL-CIO; OTHER NEWS FROM AFL-CIO CONVENTION

Three of the nation's largest unions voted to quit the AFL-CIO, the labor confederation that has coordinated union activities for 50 years. Just as the AFL-CIO began its annual convention in Chicago, the Brotherhood of Teamsters, with 1.4 million members, and the Service Employees International Union, with 1.8 million, announced they would withdraw and spend on organizing campaigns the dues they used to send to the Washington, D.C.-based confederation. They plan to send some of their former dues to a new group, called the "Change to Win Coalition." On July 29, the United Food and Commercial Workers (UFCW) with 1.4 million members announced that it was pulling out.

The division was sparked by some union leaders' concerns that the AFL-CIO's strategies were not halting the steady decline of union membership, which has fallen from a high of 35 percent to just 12 percent of the workforce today. But AFL-CIO President John Sweeney, who is running unopposed for re-election this year, tried to persuade the dissidents to remain, arguing that a rift would weaken the labor movement at a time when it is under assault from business-friendly lawmakers. Outsiders, however, were divided over whether the division would help or hurt the movement. Ken Margolies, a former organizer who now runs a labor education program for Cornell University, said that if the division leads to unions raiding each other for members, workers won't benefit much. But, he argued, "this could stimulate some changes that would be good for the labor movement, such as more aggressive organizing. This could lead to a revival, or a collapse," he said. "Either way, it is historic."

In order to deal with the disaffiliation of the unions, the AFL-CIO convention delegates unanimously approved a 4-cent increase in the monthly per capita tax dues paid by each union to the AFL-CIO. Prior to the increase, the per capita dues were 61 cents per member per month. The 4 cent increase will be placed in a special fund to address the financial distress that some state federations will face since the disaffiliated unions will no longer be members of these entities, possible raids on AFL-CIO by the disaffiliated unions and any adverse impact on the AFL-CIO's trade and industrial departments caused by the disaffiliation.

During the convention, the AFL-CIO also approved changes to its governing body. The

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number of vice presidents was reduced from 51 to 43, with the executive counsel having the authority to create up to eight additional vice presidencies in the event of an affiliation or reaffiliation of a union. In addition, delegates also set aside 15 vice president seats for women and people of color in order to promote diversity. The delegates approved the appointment of a new executive committee which will be composed of vice presidents from each of the 10 largest affiliated unions and nine additional unions.

The AFL-CIO also announced its plans to ramp up its organizing efforts among professional employees in sectors where union membership is low, i.e., information technology, financial services, and biotechnology. The AFL-CIO announced that organizing the millions of professional and technical employees is "essential to the survival" of the labor movement.

Finally, in other convention action, delegates called for the Bush administration to bring the troops home from Iraq rapidly.

DISCIPLINE APPROPRIATE FOR DISCUSSION OF "MARTIAN THEORY"

A labor arbitrator found that a bus driver's discussion of his "Martian Theory" with passengers was inappropriate and amounted to "discourtesy." In the case, a bus driver gave a business card to a passenger and asked the passenger to go to his personal web site listed on the card. When the passenger viewed the website she was disturbed to find that it contained a discussion of the bus driver's personal theory regarding Martians as well as photographs he had taken to support his theory. The aerial photographs on the website depicted what the driver claimed to be "a fetus or embryo, a religious figure with a horn protruding from its head, a white dove, a black calf, a spaceman and skeletons in a black square." The bus driver claimed that these images were created by a higher intelligence and may be connected to the "Martian Theory."

The arbitrator found that the bus driver's actions by promoting his web site and discussing his "Martian Theory" made passengers uncomfortable. The arbitrator believed that the passengers could have a legitimate fear that the driver would perceive these strange sights while driving the bus. The arbitrator held the promotion of the personal web site that discussed the driver's personal theories with photographs was a "form of discourtesy." Additionally, the arbitrator found the driver had been warned not to discuss his "Martian Theory" with passengers on two prior occasions and he continued to do so. The arbitrator upheld the employer's issuance of a written warning to the employee. Interurban Transit Partnership, 120 LA 1235 (Arb. 2004)

DISCRIMINATION

EEOC CLARIFIES QUESTIONS EMPLOYERS MAY ASK IN HIRING PROCESS

An Equal Employment Opportunity

Commission informal guidance letter issued in May 2005, advised that religious organizations and religiously affiliated schools can make inquiries regarding religious practices on an employment application; however, the EEOC noted that such questions could be used as possible evidence in a complaint of religious bias if the applicant was not hired. In other words, inquiries regarding religious practices made by religious organizations as part of their hiring practices are not illegal under Title VII.

The EEOC created the exemption for religious organizations, which it defined based on: 1) whether or not their articles of incorporation stated a religious purpose; 2) whether or not its day to day operations are religious, and; 3) whether or not it operated for profit. The letter also created an exemption for religiously affiliated schools defined as those, "owned, supported, controlled or managed, in whole or in part, by a particular religious group," or if the curriculum director towards promotion of a particular religion. The exemption only applied to religious discrimination and not other forms of discrimination.

The EEOC also advised that any questions regarding an applicant's disability or medical history cannot be made prior to offering the applicant employment. The employer can ask disability and medical questions, and even require a medical examination, once they have made a job offer to the applicant. The job offer can be made contingent on the results of the post offer questions and the medical examination; however, the job offer may be withdrawn on basis of disability or medical reasons only when the medical information shows that the applicant cannot perform the essential functions of the job, even with reasonable accommodation, without being a direct threat to safety.

The EEOC letter also stated that questions regarding an employee's height and weight may be asked since they are not related to any disability issues. The EEOC letter stated that height and weight questions "may sometimes reveal that an applicant has a condition such as dwarfism or morbid obesity, which may be disabilities, they will usually reveal no more than normal deviations in height or weight, which are not disabilities." EEOC Guidance Letter May 5, 2005.

SAME-SEX SEXUAL HARASSMENT BECOMES HARDER TO PROVE

On June 28, 2005 the Tenth Circuit Court of Appeals ruled that a heterosexual female employee could not prove she experienced sexual harassment for not behaving like a stereotypical lesbian. In her complaint, the plaintiff argued that her failure to comply with gender stereotypes in her workplace caused her harassment. The plaintiff did not argue she failed to dress or behave like a stereotypical woman; instead, she argued she did not behave like a lesbian, which she argued was the stereotypical woman who worked in her office.

The court cited Oncale v. Sundowner Offshore Services, Inc., stating there were three ways to prove same-sex sexual

harassment. First, the plaintiff must show that the harassment was due to a sexual desire. Second, the plaintiff can show that the harasser was motivated by hostility to the plaintiff's sex. Finally, the plaintiff can show that the harasser treated men and women differently. However, the Medina Court added that the Oncale methods are not exclusive and that noncompliance with gender stereotypes can also be a motivation for Title VII harassment.

Ultimately, the Tenth Circuit held that Title VII protections do not extend to claims of harassment due to a person's sexuality, since they do not have anything to do with gender stereotypes. The court noted that Congress has repeatedly refused to enact legislation that would protect employees from discrimination based upon their sexual orientation. Medina v. Income Support Division, State of New Mexico, No. 04-2166 (10th Cir. 2005)

RETALIATION

LION HANDLER TOLD TO HUSH DEATH OF ANIMAL CAN TAKE CLAIM TO TRIAL

A lion handler who was fired from Ringling Brother's and Barnum & Bailey Circus after he complained about the death of a lion can take his wrongful discharge claim to trial according to a Virginia federal court. The court found that there was a strong public policy interest in California the prevention of cruel treatment of animals. The court found that the circus was on notice that it was expected to comply with the federal Animal Welfare Act (AWA) before the animal died. The court found the AWA provided a "fundamental, substantial, and well-established policy" that can form the basis of a wrongful discharge claim.

A lion handler complained to the train master that the train must stop to provide fresh water for the lions because of the excessive heat traveling through the Mojave Desert from Phoenix, Arizona to Fresno, California. The train master refused to stop to get fresh water because the train was behind schedule. The train stopped six hours after the lion handler had made the request and Clyde, a 2 year old lion, was found unresponsive in a fetal position with his tongue hanging out and his eyes rolled back. Clyde subsequently died and the handler was told to clean out the train car and move the dead lion into the meat truck and not tell anyone of the death. When the train arrived in California, the handler was told to remove the evidence of the lion from the meat truck before the inspectors from the U.S. Department of Agriculture arrived and then was told by circus's legal counsel not to talk to anyone about the lion's death. The employee continued to talk about Clyde's death and he was subsequently terminated while the circus was still in California and was left without transportation back to Virginia.

The court found, contrary to the employer's assertions, that the Labor-Management Relations Act (LMRA) did not preempt a wrongful discharge claim because their

resolution did not require an interpretation of the collective bargaining agreement. The employer's obligation to refrain from discharging the employee came from a duty imposed by California law to implement a fundamental public policy embodied in statutes, constitutions, and regulations. The court did reject the Plaintiff's intentional infliction of emotional distress claim that was based upon the distress from dealing with the dead lion. The court found that this claim arose out of the normal employment of taking care of the lions and was not actionable. Hagan v. Feld Entertainment d/b/a Ringling Bros. & Barnum& Bailey Circus, 04-663 (E.D. VA 2005)

FLSA

"LEARNED PROFESSIONAL" NOT ENTITLED TO OVERTIME PAY UNDER FLSA

The U.S. District Court for the District of Delaware ruled that an embryologist was a "learned professional" and as such was not entitled to overtime pay under the Fair Labor Standards Act. The court listed the following factors in determining who was qualified as a "learned professional" under the FLSA: 1) receipt of a higher than average salary; 2) performance of work that required advanced knowledge in a field of science or learning; and, 3) acquiring such knowledge through a prolonged course of specialized intellectual instruction.

In its ruling, the court found that according to the Department of Labor regulations, receipt of pay of at least $455 a week was sufficient to qualify as higher than average salary. Additionally, the court looked at the requirements to perform specific job functions and found that those job functions required specialized scientific training acquired over several years of instruction. Sansoucie v. Reproduction Assoc. of Del. P.A., No. 04-861 (D. Del. 2005).

DOCKING AND TIMEKEEPING FOR EXEMPT EMPLOYEES OK'D BY U.S. DEPARTMENT OF LABOR

In an April 11, 2005 opinion letter, the U.S. Department of Labor addressed the docking of partial days pay from FLSA overtime-exempt workers and the requirement of timesheets from exempt workers. The opinion letter stated that employees who are exempt under FLSA Section 13(a)(1) as bona fide executive, administrative, and professional employees, including attorneys, do not lose their exempt status when they are required by their employer to track their time on an hourly basis. Furthermore, the opinion stated that the FLSA overtime exemption for salaried exempt employees, including attorneys, is not lost by requiring a partial docking of their salary when they have exhausted their paid leave and are not absent for a purpose that qualifies under the Family Medical Leave Act (FMLA).

The letter also addressed inclusion of absences from work as a factor in evaluating performance of a bona fide executive, administrative, and professional employee, including attorneys. The Department of

Labor found that there was no provision in the FLSA that prohibits an employer from using non-FMLA absence from work as a factor in employee performance evaluations. However, employers may not discriminate against an employee who has used FMLA leave by using the paid or unpaid FMLA leave as a negative factor in any employment action such as hiring, promotions, or disciplinary actions. U.S. Department of Labor Opinion Letter, April 11, 2005.

JOINT EMPLOYMENT UNDER FLSA

In an April 11, 2005 opinion letter the U.S. Department of Labor set forth guidelines for the application of joint employment under the Fair Labor Standards Act (FLSA). The opinion letter was issued regarding a healthcare system that owned two hospitals, a nursing home, and a long-term hospital/nursing home. The question presented to the Department of Labor was whether or not an employee of one of the healthcare system's hospitals had to be paid overtime when working weekends at one of the nursing homes owned by the healthcare system.

A determination of joint employment is based upon all the facts in a particular case. If the facts established that two or more employers are not completely disassociated with respect to the employment of a particular employee then there is joint employment. The letter stated that one must look to see if the employers share control of the employee, either directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer to determine if joint employment exists.

Factors that the DOL considered in this case to determine that joint employment did exist were: 1) Some of the facilities shared a common president and board of directors; 2) One facility's Human Resources Department provided administrative assistance to another facility's Human Resources Department; 3) Vice President of Human Resources and some senior executives and senior managers had responsibility for more than one facility within the system; 4) Some of the facilities' personnel policies were the same, including those involving the Family Medical Leave Act, nepotism, and workplace harassment; 5) Non-union employees shared a common healthcare plan, and; 6) Job vacancies at facilities within the system were posted within the other facilities owned by the system before they are advertised publicly. The DOL Labor used the aforementioned factors to determine that the employer was a joint employer and thus the hours of any employee who worked at one facility must added to the number of hours they worked at any other facility within the system within the same pay period to determine whether or not they were entitled to overtime pay. Department of Labor Opinion Letter, April 11, 2005.

ADA

FIRED EMPLOYEE LOSES APPEAL, MUST PAY EMPLOYER'S ATTORNEY'S FEES

The Fifth Circuit Court of Appeals issued a ruling on April 29, 2005, ordering a terminated employee to pay $32,000 of her employer's attorney's fees for filing frivolous claims. The Fifth Circuit affirmed the lower court ruling that granted summary judgment and $22,000 in attorney's fees to the employer, Tulane University Hospital, and tacked on an additional $10,000 for the employer's cost of the appeal.

The plaintiff was a supervisor in billing and collections who took a two month FMLA leave for surgery. During Plaintiff's leave, Tulane hired an independent collections firm who discovered over a half million dollars worth of accounts had not been processed. Tulane notified the plaintiff of the violations and she denied them. Tulane gave the plaintiff approximately three months to correct the errors and when they discovered she had not taken any action to process the accounts she was terminated. Dutton filed a claim against Tulane University Hospital under the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA).

The courts found no evidence of illegal retaliation under either FMLA or ADA and the plaintiff failed to dismiss the ADA claim after Tulane pointed out that it had no merit. Additionally, the plaintiff failed to produce any evidence, other than her own self-serving statements, to rebut Tulane's assertion that they had a legitimate business reason for termination. Dutton v. University Healthcare Systems, No. 04-30554 (5th Cir. 2005).

PREVIOUSLY DISABLED COP DISCRIMINATED AGAINST IN BEING DENIED REINSTATEMENT

The Metropolitan Nashville Police Department was found to have discriminated against an injured police officer when they denied his reinstatement after his physician approved his return to work after being out injured for 25 years. The Sixth Circuit upheld a jury verdict that found it was a discriminatory practice not to rehire a disability pensioner and the police department had an unofficial policy of not rehiring these pensioners in contravention to the Americans with Disabilities Act (ADA). The jury awarded the employee $150,000 in compensatory damages and the district court judge added $27,500 in back pay and ordered reinstatement, which was upheld by the Sixth Circuit.

The officer was injured in an on duty accident in 1975. The officer was on a disability status for some time and worked intermittently for the police department until 1999 when his doctor cleared him to return to work. In April 2000, the police department's benefit board recommended rehiring the officer, but he was not rehired. The police department contended the officer was not allowed to return because he failed to provide the proper medical documentation prior to beginning the department's training course and he was subsequently terminated because he refused to take the course. The officer contended that he was told on the first day of the course that he had not received medical clearance, that the department had never rehired a person who had been on a

disability pension, and that his rehiring was conditioned upon his successful completion of the course, which he perceived as a threat.

The Sixth Circuit found that an employer who granted employees a disability pension considered the individuals disabled for purposes of the ADA. Numerous witnesses were produced to prove the police department had an unofficial policy of not rehiring disability pensioners who were cleared to return to work without restrictions. The Sixth Circuit found there was sufficient evidence to uphold the jury verdict. Knight v. Metropolitan Gov't of Nashville and Davidson County, 03-6520 (6th Cir. 2005).

PERFUME ALLERGY PROVES COSTLY FOR RADIO STATION

A Detroit federal jury awarded a radio disc jockey approximately $10.6 million in compensatory and punitive damages on a claim that the station failed to accommodate her perfume allergy, paid her less than the male disc jockeys and fired her when she complained about the sexual discrimination.

Plaintiff was a female country music disc jockey who alleged that she was not paid as much as her male counterparts at the station, despite having higher ratings and raising more advertising revenue for the station. Additionally, while working at the radio station Plaintiff was exposed to some hazardous chemicals that caused her to develop sensitivity to perfumes and other odors. Plaintiff provided her employer with medical documentation of her perfume allergy and informed them she could not work with her co-host who wore perfume that Plaintiff was sensitive to. Instead of accommodating Plaintiff, the station sent her to another medical examination with their physician who concurred with Plaintiff's initial medical diagnosis. During this time Plaintiff was forced to take medical leave due to her allergies. Instead of accommodating Plaintiff by placing her on another shift, the station terminated her employment after she took a medical leave due to her allergy.

The jury found that the radio station discriminated against Plaintiff for her disability, retaliated against her because she filed an EEOC charge, and violated her equal pay rights. The jury also found that the ADA and Title VII violations were committed with malice or reckless indifference leading to the high award. Weber v. Infinity Broadcasting, No. 02-74602 (E.D. Mich. 2005).

FUNCTIONAL CAPACITY TEST USED ONLY TO DETERMINE ESSENTIAL JOB FUNCTIONS

The U.S. District Court for the Eastern District of Louisiana held that DuPont discriminated against a lab employee under the Americans with Disabilities Act when they terminated her after determining her difficulty in walking would impede her ability to evacuate the building in an emergency.

The employee even offered to purchase her own wheelchair, or use a golf cart or bicycle to get around the plant and was prohibited from doing so by the employer. According to

the court, DuPont's use of a functional capacity test to determine that the employee's walking impairment was a direct threat to herself and others was incorrect. DuPont argued that being able to evacuate on one's own by walking was an essential function of the lab clerk's job. The court disagreed with DuPont by defining "essential functions" as "the fundamental duties of a position." Additionally, the court held that an element is considered essential when one of the reasons a position exists is to perform a certain function, or only a limited number of employees can perform the job. Consequently, the court found that the ability to evacuate a building was not an essential duty. EEOC v. E.I duPont de Nemours, 03-1605 (E.D. La. 2005).

LABOR ORGANIZATIONS

STATE LABOR NEUTRALITY LAWS PREEMPTED BY NATIONAL LABOR RELATIONS ACT

The U.S. District Court for the Northern District of New York ruled that a state law prohibiting the use of state money by employers to encourage or discourage union organizing or participation in union organizing drives, including hiring attorneys or consultants or hiring employees to engage in such activities, was preempted under the National Labor Relations Act (NLRA). The court found that Section 7 of the NLRA protected employees' rights to join or refuse to join a union. The court based their ruling on International Ass'n of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976) in holding that under the supremacy clause of the Constitution federal laws are given priority when they come into conflict with state laws.

The court first used a two part Fifth Circuit test developed in Cardinal Towing and Repair v. Bedford, 180 F.3d 686 (5th Cir. 1999) to determine whether or not the State of New York was a market participant or private contractor and thus exempt from the preemption of the NLRA. The first part of the test requires the court to consider whether the challenged action reflects the state's own interest in the efficient procurement of goods and services. In the second part of the test, the court must decide whether or not the state law is narrowly focused to address a specific proprietary problem.

The court applied the second part of the test and found that the section was not sufficiently narrow to overcome the inference that the primary goal of the law was to encourage a general policy rather than address a specific problem. The court found that since the New York law was drafted as to apply to all state contracts regardless of the amount, it failed this portion of the test and was therefore not a market participant. The court found that the law allowed unions to actively participate in union organization campaigns, but hindered the ability of employers to oppose union organization. Thus, the court concluded that the state was not a market participant.

The court also determined that the law was contrary to the ruling in International Ass'n of Machinists, in that it directly interfered with the NLRA system for promoting or deterring union organizing by hindering employers' ability to disseminate information opposing unionization. Healthcare Ass'n of N.Y. State Inc. v. Petaki, 1:03cv413 (N.D.N.Y. 2005).

HOUSE AND SENATE SPONSOR IDENTICAL "ANTI-SALTING" BILLS

The U.S. House and Senate have sponsored two separate bills aimed at stopping the union practice known as "salting." "Salting" is the practice by union members and organizers to seek jobs with non-union employers and then try to organize the workers. This practice has been called unfair by many business owners, but is seen as "empowerment" by pro-union forces because it is seen as a method of educating non-union employees about their rights under federal labor law and the benefits of union membership.

H.R. 1816, proposed by Rep. Steve King (R-Iowa) and Rep. Marilyn Musgrave (R-Colo.) is known as the Truth in Employment Act. S.B. 983 is the identical Senate bill introduced by Senator Jim DeMint (R-S.C). The authors maintain that the practice of "salting" is a dishonest, deceptive and unfair union practice that frequently harms employers who seek to provide jobs for members of the communities where they operate. Legislation opponent Rep. Dan Lipiniski (D-Ill.) believes that the Truth in Employment Act would undermine the NLRA's "purpose of protecting the right of workers to form and join unions." However, Mark Mix, the president of the National Right to Work Committee, observed that "salting" often hurts small businesses that are either forced to knuckle under to union pressure or become inundated with so many unfair labor practice charges that can bankrupt the business with legal fees.

HIGHEST PAID JOBS OF 2004 IN HEALTH CARE

According to the Labor Department's Bureau of Labor Statistics 2004 figures, thirteen (13) of the fifteen (15) highest paid occupations were in the health care industry. Surgeons and obstetricians/gynecologist led the pack averaging annual salaries of $181,610 and $176,207 respectfully. The two non-health care related occupations that were in the top fifteen were corporate chief executives who averaged $139,920 and airline pilots who averaged $129,620.

The industry that garnered the lowest wages was in the food preparation industry where the average annual earnings were $15,610. The food preparation industry was followed closely by the farming, fishing, forestry, maintenance and personal care and service industries as low wage paying occupations. The Bureau of Labor Statistics found that at least 40 percent of all workers in the low wage occupations made less than $8.50 per hour.

HUMAN RESOURCES

NEW BANKRUPTCY LAW WILL AFFECT HR & BENEFITS DEPARTMENTS

On April 20, 2005, President George W. Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCA). The new law creates rules designed to curb what many saw as abuses of bankruptcy laws.

When it takes effect on October 20, 2005, 180 days from the date it was signed, BAPCA will apply a means test to people filing for bankruptcy protection. Debtors who earn more than the median income in his or her state will be required to declare bankruptcy under Chapter 13 instead of Chapter 7.

Chapter 13 requires debtors to work out a plan to repay their debts. The means test will not apply to disabled military personnel, as long as their debts occurred when they were on active duty.

While BAPCA is a hot topic now for bankruptcy attorneys and credit card companies, there are some provisions of the new law that will affect Human Resources and Benefits departments.

When notified that an employee has filed for bankruptcy, keep these things in mind:

- Retirement funds continue to be protected from creditors in the event of a bankruptcy. This applies to funds qualified under Section 401 and 403 of the Internal Revenue Code, as well as IRC Sections 408, 408A, 414, 457, 501(a), 529, and 530.

- Retirement funds held in an Individual Retirement Account are also protected, up to $1,000,000. This is in addition to amounts rolled over from a plan qualified under 401 or 403(a) or (b)

- Plan loans are not dischargeable in bankruptcy, as Plan loans are not dischargeable in bankruptcy as long as the loan meets the requirements of ERISA or IRS Section 72(p). In the past, when a bankruptcy trustee notified a plan administrator to cease loan repayments from salary, that action put the loan into default. The loan then became a taxable distribution to the participant, adding to the participant's financial worries. Under BAPCA, the plan administrator can continue to make salary deductions from the participant for loan repayments.

The ERISA-qualified status of your plan will have an enormous impact on the protection of participant accounts. If the plan loses its qualification, the plan accounts could be subject to collection.

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