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ILLINOIS STATE BAR ASSOCIATION

Labor & Employment Law

The newsletter of the Illinois State Bar Association's Section on Labor & Employment Law

Court tags asset purchaser with seller's FLSA liability

By Michael R. Lied, Howard & Howard Attorneys PLLC, Peoria

Employees sued JT Packard & Associates, their employer, and Packard's parent, S.R. Bray Corp. for liability under the Fair Labor Standards Act.

The district court allowed the plaintiffs to substitute Thomas & Betts Power Solutions, LLC, for the original defendants, after its parent, Thomas & Betts Corporation, bought Packard's assets and placed them in a wholly owned subsidiary,

Thomas & Betts objected to being substituted, but its position was rejected by the district court.

On appeal, the court was called upon to decide whether Thomas & Betts was liable for damages owed the plaintiffs as a result of Packard's alleged violations.

When a company is sold in an asset sale, the buyer acquires the company's assets but not necessarily its liabilities. In fact, most states limit such liability.

When liability is based on a violation of a federal statute relating to labor relations or employment, however, a federal standard of successor liability is typically applied.

The federal standard requires consideration of the following factors:

(1) Whether the successor had notice of the pending lawsuit;
(2) Whether the predecessor would have been able to provide the relief sought in the lawsuit before the sale;
(3) Whether the predecessor could have provided relief after the sale;

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Employee's quit not attributable to employer; No unemployment benefits

By Michael R. Lied, Howard & Howard Attorneys PLLC, Peoria

Dorota Lojek worked for ABM Janitorial Services ("ABM"). Roosevelt University was one of ABM's customers.

A Roosevelt employee complained that Lojek and two other employees were seen smoking and drinking in the dean's office. Mariola Scarlech, Lojek's supervisor, discharged Lojek from her supervisory position at Roosevelt. To avoid Lojeck's losing her job entirely, ABM transferred Lojek to a different work site.

After working at the new location for one day however, Lojek told her union representative that she did not intend to return to ABM and asked her representative to find her a new job. Lojek did not file any grievances, nor did she inform anyone at ABM of her alleged problems at the new location.

Lojek filed for unemployment benefits. The claims adjudicator concluded that Lojek was ineligible for benefits and Lojek filed a notice of appeal to a hearing referee.

The hearing referee denied Lojek unemployment benefits. He found that ABM discharged Lojek from the Roosevelt location for misconduct connected with her work. He also found that Lojek left her position at the new location for reasons that were purely personal and not attributable to ABM.

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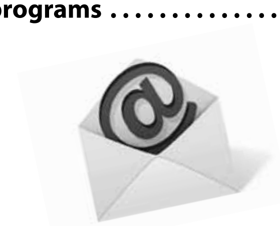

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Court tags asset purchaser with seller's FLSA liability

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(4) Whether the successor can provide the relief sought in the suit; and
(5) Whether there is continuity between the operations and work force of the predecessor and the successor.

The reason for a different standard applicable to federal labor and employment statutes is that these statutes are intended either to encourage labor peace, or to protect employees' rights. In either case, imposition of successor liability may be necessary to achieve the statutory goals

The appeals court found no reason to reject successor liability. Had Packard been sold before Bray got into trouble, imposition of successor liability would have been "unexceptionable"; Bray could have found a buyer for Packard willing to pay a good price even if the buyer had to assume the company's FLSA liabilities.

Packard presented no good reason why its having been sold afterward ought to change the outcome. The district court's imposition of successor liability was affirmed.

Teed v. Thomas & Betts Power Solutions, L.L.C. 2013 WL 1197861 (7th Cir. 2013). ■

Employee's quit not attributable to employer; No unemployment benefits

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The Board of Appeals affirmed the hearing referee's decision, and Lojek filed a complaint for administrative review.

The circuit court reversed the Board's decision and the Illinois Department of Employment Security took an appeal.

The issue on appeal was whether the Board's decision finding that Lojek voluntarily left her employment without good cause was clearly erroneous.

The question of whether an employee has left work without good cause attributable to her employer involves a mixed question of fact and law. The Board's decision will be found clearly erroneous only where the reviewing court, considering the entire record, is left with the definite and firm conviction that a mistake has been committed.

The court of appeals observed that the Unemployment Act was enacted to benefit persons who become unemployed through no fault of their own.

The Act states that "[a]n individual shall be ineligible for benefits for the week in which he or she has left work voluntarily without good cause attributable to the employing unit."

Good cause for voluntarily leaving one's employment results from circumstances which produce pressure to terminate employment that is both real and substantial, and which would compel a reasonable person under the circumstances to act in the same manner.

Nevertheless, an employee's unhappiness with her hours or wages normally does not constitute good cause to quit.

A voluntary leaving is not attributable to the employer unless the employee's cause for leaving is within the employer's control. Even in this situation, the employee must make a reasonable effort to resolve the problem when possible.

Changes in pay, duties, and regulations alone do not constitute good cause attributable to the employer. The employee must prove that the change in her working conditions was unilateral and substantial.

Scarlech testified that Lojek requested to be transferred and demoted to keep her job. Lojek did not contradict this testimony. Changes in Lojek's working conditions were not unilateral because Lojek bargained for them in exchange for her continued employment.

The record indicated that Lojek did not request an accommodation from ABM to remedy the conditions that allegedly caused her to leave her employment.

Lojek had argued before the hearing referee and the Board that she had to leave her employment with ABM for medical reasons. To demonstrate that a health concern is a justifiable reason for terminating employment, a plaintiff must: (1) offer competent testimony that adequate health reasons existed to justify her leaving work on the date she terminated her employment; (2) have informed the employer of the health problem; and (3) be available, where reasonable accommodation is made by the employer, for work which is not inimical to her health."

Here, Lojek failed to offer competent testimony that adequate health reasons existed to justify her leaving work. Lojek's testimony before the hearing referee did not address the specifics of her disorder and she did not provide evidence from a physician to corroborate her alleged health problems.

The court of appeals reversed the order of the trial court and affirmed denial of Lojek's unemployment benefit.

Lojek v. Department of Employment Sec., 2013 IL App (1st) 120679. ■

Illinois recognizes privacy rights in case involving investigation of former employee

By Michael R. Lied, Howard & Howard Attorneys PLLC, Peoria

Kathleen Lawlor worked for North American Corporation of Illinois as a salesperson. She was to generate business, but management of the accounts was handled by other employees. In August 2005, after quitting, Lawlor began working for Shamrock Companies, Inc., a competitor of North American.

When Lawlor left North American, the company started an investigation to determine if she had violated her noncompetition agreement. North American asked its corporate attorney, Lewis Greenblatt, to conduct the investigation. Its vice president of operations, Patrick Dolan, was to serve as the company contact person. Greenblatt hired Probe, an investigation firm. Dolan provided Greenblatt and Albert DiLuigi, from Probe, Lawlor's date of birth, her address, her home and cellular telephone numbers, and her social security number. Probe used this information when it asked another investigative company, Discover, to obtain Lawlor's personal phone records.

John Miller, North American's chief executive officer and president, made the decision to investigate Lawlor. He knew Greenblatt hired Probe to conduct the investigation. Miller later testified that Dolan had the authority to provide Lawlor's personal information to obtain her phone records.

The information Discover uncovered was sent to Probe, which sent it on to North American. North American's employees tried to determine if any of the numbers belonged to any of its customers.

DiLuigi testified that Dolan wanted him to obtain Lawlor's phone records. Significantly, in a pretrial motion, North American agreed that Probe and Discover were agents of Greenblatt.

Roosevelt Boykins, a manager with AT&T, testified that AT&T would not release information on a telephone account without first confirming the customer's identity. Traci Hart, a subpoena specialist with U.S. Cellular, testified that U.S. Cellular would not release such information if the caller did not provide sufficient information to confirm his or her identity.

Lawlor later filed suit against North American seeking unpaid commissions and a declaration that her noncompetition agreement was unenforceable. When she learned of North American's investigation, Lawlor amended her complaint to allege an "intrusion upon seclusion" tort based upon a "pretexting scheme" in which someone pretended to be her to obtain her phone records. In a counterclaim, North American alleged that Lawlor breached her fiduciary duty of loyalty by attempting to direct business to a competitor while working for North American and by communicating confidential sales information to a competitor.

The jury gave Lawlor $65,000 in compensatory damages and $1.75 million in punitive damages. North American was awarded $78,781 in compensatory damages and $551,467 in punitive damages. The trial court reduced the jury's punitive damages award to $650,000. The appellate court affirmed the jury's verdict for Lawlor, reinstated the punitive damages award, and reversed the trial court's judgment on North American's breach of fiduciary duty claim. The Illinois Supreme Court reduced Lawlor's punitive damages award to $65,000.

A first issue for the Illinois Supreme Court was whether to recognize the tort of intrusion upon seclusion.

Section 652B of the Restatement (Second) of Torts provides: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." The Illinois Supreme Court had never addressed whether the tort of intrusion upon seclusion is a claim which is recognized in Illinois.

North American argued that there was no evidence that it personally obtained any of Lawlor's phone logs or that there was an agency relationship between North American and Probe or Discover.

A person who is injured must normally seek his remedy from the person who caused the injury. A principal, however, may be held liable for the acts of an agent which cause injury, even if the principal does not engage in

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any conduct in relation to the plaintiff. Moreover, an agent may also appoint subagents to perform the tasks or functions the agent has undertaken to perform for the principal.

In this case, the jury could reasonably infer that North American knew that Lawlor's phone records were not publicly available, and that by requesting such records from Probe, North American recognized that investigators would pose as Lawlor to obtain the records.

The jury could also reasonably conclude that North American exercised control over its agent by directing it to obtain specific information and providing it with the necessary tools to accomplish the task.

The Illinois Supreme Court also evaluated the award of punitive damages. Here there was no evidence that North American had an intentional, premeditated scheme to harm Lawlor.

Lawlor's phone records were obtained as part of a legitimate investigation of a violation of a noncompetition agreement. There was no animus toward Lawlor, and the investigation concerned a private dispute which did not implicate any general public policy.

Lawlor's phone records were only reviewed by a few of North American's employees. Her records were not distributed outside of the company, nor were they used for any purpose other than to determine if Lawlor had contact with one of North American's customers.

The jury's verdict on compensatory damages showed limited harm to Lawlor.

The evidence showed that she never sought medical or psychological treatment and there was no evidence of any alteration in her normal daily activities or that she missed work.

Based on these facts, the jury's punitive damage award of $650,000 was not warranted, particularly when the trial court specifically found that the conduct at issue was "*de minimus*."

Further supporting the determination to reduce the punitive damages, the jury awarded the damages in a case of vicarious liability. The justification for punitive damages is sharply diminished in such a case. The highest award the evidence supported was punitive damages equal to the award of compensatory damages of $65,000.

Lawlor v. North American Corporation of Illinois, 2012 IL 112530. ■

Employee's misconduct results in both termination and loss of nearly $2M contingent payment

By Michael R. Lied, Howard & Howard Attorneys PLLC, Peoria

This case has received some attention because it involves an employee "mooning" two superiors. However, it is interesting in that it is one of the rare state court cases that determines what actions by an employee may be "cause" for termination, relying on the Illinois Unemployment Insurance Act.

Jason Selch was hired by Wanger Asset Management, L.P. ("WAM") as an investment analyst. WAM was eventually bought out and Selch obtained the right to a percentage of the proceeds from the sale of WAM to Liberty Financial Companies, Inc. (in this discussion, we skip discussing a number of corporate transactions, for simplicity).

A partnership created a non-qualified profit sharing plan ("Plan") to provide contingent payments to Selch and others in his position. The participants in the Plan could lose their rights to the contingent payments if they were terminated for "cause" or for "good reason."

Liberty also provided Selch an employment agreement. The agreement stated that employees could be terminated for "cause" or "good reason" and that if this occurred they would sacrifice their severance packages. The agreement defined "cause" for termination as a:

> "conviction of a felony, engaging in misconduct that injures the Company, performing your duties with gross negligence or any material breach of your fiduciary duties as an employee of the Company."

The agreement defined "good reason" for termination as:

> "(i) a reduction in your base compensation, (ii) a material change in your level of work responsibilities which has not been remedied within 30 days after you have given written notice of such claimed event or (iii) a requirement that you be based at a location more than 50 miles outside the Chicago metropolitan area."

In April, 2005, Selch learned that a friend and colleague, Chris O'Dea, had been terminated. Roger Sayler and Charles McQuaid, Selch's direct boss, had fired O'Dea earlier that day.

Selch was upset. He entered a conference where Sayler and McQuaid were sitting and asked if he had a noncompete agreement. Sayler and McQuaid said "no." Selch unbuckled his pants, and "mooned" Sayler and McQuaid. Selch also said he hoped Sayler would not return to the Chicago office. Selch left.

Chris Hamilton, a human resources manager, and McQuaid issued a letter constituting a Formal Warning. In the letter, McQuaid and Hamilton said that they hoped that further disciplinary actions would not be necessary and that Selch would continue to be a productive staff member of Columbia Wanger. However, CEO Keith Banks later decided to terminate Selch. As a result of his termination, Selch forfeited his contingent payments, which were worth nearly $2 million.

Selch sued, but the circuit court ruled against him. On appeal, Selch contended that the circuit court erred in granting summary judgment in favor of defendants because a genuine issue of material fact existed as to whether Selch was terminated for "cause," as set forth in the Plan.

As noted above, in the agreement, "cause" for termination was defined as: "conviction of a felony, engaging in misconduct that injures the Company, performing your duties with gross negligence or any material breach of your fiduciary duties as an employee of the Company."

According to the court of appeals, in Illinois, employers have a right to expect a certain standard of conduct from their employees in matters that concern their employment. The legislature, in the Unemployment Insurance Act, defined a violation of this standard of conduct, or "misconduct," as "the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees." 820 ILCS 405/602. An employer need not present direct evidence of the existence of a reasonable rule or policy; instead, a court can simply determine that such a policy exists through a common-sense realization that some behavior intentionally and substantially disregards the employer's interest. Using such a commonsense interpretation, Selch's behavior in "mooning" Sayler and McQuaid, injured the company.

Under the agreement, Selch's duties included observing "all rules and regulations which the Company may establish governing the conduct of its business and that of its affiliates." The employee handbook stated that "insubordination" and "conduct unbecoming an associate" were prohibited and that:

> "Disruptive, unruly or abusive behavior by associates in the workplace***is not tolerated. Inappropriate conduct includes verbal or physical threats, fights and obscene or intimidating behavior, as well as any other abusive conduct. *** Associates who violate any provision of this policy are subject to disciplinary action up to and including immediate termination of employment."

In the view of the court of appeals, Selch violated the rules and regulations in the handbook by behaving in a disruptive, unruly, and abusive manner — "mooning" Sayler and McQuaid and also by telling Sayler that he was not welcome in that office and that Selch hoped he would never return to the Chicago office.

Selch's behavior also injured the company because it diminished McQuaid's authority and because Selch disregarded company policies. Selch's misconduct justified his termination for cause.

Selch argued that a question of material fact remained as to whether defendants breached a contractual agreement when they terminated him for cause after issuing him the Formal Warning.

Selch maintained that the Formal Warning was a contract, which provided that he would retain his employment with the company, so long as he did not commit any further violations of the company's standards.

Defendants, however, protested that the Formal Warning did not contain any specific promises of future employment. The Formal Warning did not have specific and mandatory language constituting an offer. Nor did the Formal Warning outline a specific course of action for dealing with potential future misconduct. It only said that if there was any future violation of the company's standards in any aspect of plaintiff's job, he would be subject to further disciplinary action, up to and including termination.

The appeals court noted that the Formal Warning contained only a "hope"—that no further disciplinary action would be required. Also, there was no legal consideration related to the Formal Warning; Selch simply signed the letter, attesting to the fact that he had read and understood the contents of the warning.

Selch took the position that since he and McQuaid both signed the Formal Warning, it must have been a contract. This argument was for naught. Under *Rudd v. Danville Metal Stamping Co.,* 193 Ill. App. 3d 1009, 1010-12 (1990), requiring an employee to sign a document, in order to acknowledge his receipt, does not transform the document into a contract.

Selch v. Columbia Management, 2012 IL App (1st) 111434 (2012). ■

Employer may lawfully change schedule to limit overtime

By Michael R. Lied, Howard & Howard Attorneys PLLC, Peoria

Redland Energy Services LLC drills and services natural gas wells in Arkansas. Several employees worked as operators of Redland's drilling rigs. Each crew of operators worked twelve-hour shifts for seven consecutive days, followed by seven days off. Redland used a Tuesday-to-Monday workweek to calculate overtime owed to drill rig employees.

In May 2009, Redland reduced the size of drill rig crews from five operators to four and changed the designation of their workweek from Tuesday-to-Monday to a Sunday-to-Saturday workweek used for other employees.

Five employees later filed a lawsuit on behalf of themselves and similarly situated employees. They alleged that, after this change, they were only paid twenty hours overtime within the same work week, even though they actually worked eighty-four or more hours in each work week.

The employees argued to the district court that the Fair Labor Standards Act ("FLSA") prohibits an employer from changing an existing workweek for the purpose of reducing employee overtime. The district court ruled in favor of Redland and the employees appealed.

The FLSA does not define the term workweek, but the Department of Labor's regulations have long provided that it means:

> . . . a fixed and regularly recurring period of 168 hours – seven consecutive 24-hour periods. It need not coincide with the calendar week but *may begin on any day and at any hour of the day*. . . . Once the beginning time of an employee's workweek is established, it remains fixed *regardless of the schedule of hours worked by him.*

Courts have concluded that an employer does not violate the FLSA merely because, under a consistently-designated workweek, its employees earn fewer hours of overtime than they would if the workweek was more favorably aligned with their work schedules.

The issue on appeal was whether the FLSA limits an employer's freedom to *change* an existing workweek designation.

The appeals court noted that the Department of Labor's regulations directly address the issue: The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. 29 C.F.R. § 778.105.

The plaintiffs argued that Redland changed the workweek for the purpose of reducing the number of overtime hours in their normal work schedules and therefore the change was designed to evade the overtime requirements of the Act.

The appeals court recognized that the same issue had been presented in a case applying the Illinois Minimum Wage Law. *Kerbes v. Raceway Assocs., LLC*, 961 N.E.2d 865, 870 (Ill. App. 2011).

There, the Illinois appellate court found the employer's modification of its workweek did not violate the overtime requirements of the FLSA. The FLSA does not require a workweek schedule that maximizes an employee's accumulation of overtime pay. Thus, a schedule whereby an employee's actual work schedule is split between two workweeks does not violate the federal legislation. If such a schedule does not itself violate the FLSA, the Illinois court could not see how a change to such a schedule could be viewed as having been designed to evade the overtime requirements of this Act.

The court of appeals pointed out that an employer's effort to reduce its payroll expense is also not contrary to the FLSA's purpose.

The court of appeals rejected the employees' contention that an employer's permanent change in the designated workweek violates § 207(a)(1) of the Act unless it is justified by a legitimate business purpose. To the contrary, so long as the change is intended to be permanent, and it is implemented in accordance with the FLSA, the employer's reasons for adopting the change are irrelevant. The judgment of the district court was affirmed.

Abshire v. Redland Energy Services, LLC, ____ F.3d ____, 2012 WL 4795897 (8th Cir. 2012). ■

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