
MASUD, PATTERSON, SCHUTTER & PETERS, P.C.

ATTORNEYS AND COUNSELORS
SPECIALIZING IN LABOR AND EMPLOYMENT LAW

NEWSLETTER

December 2007

Volume XI, Issue 3

NLRB Adopts New Evidentiary Standard for Determining Back Pay Period for Union Salts

“Salting” is organized labor’s practice of sending trained union agents into non-union companies under the pretext of seeking employment but ultimately for the purpose of advancing the union’s organizing efforts. Under the law, if the employer discharges or refuses to hire the “salt” because of his or her union affiliation or activity, the employer’s conduct constitutes an unlawful unfair labor practice, which usually results in substantial back pay liability. The National Labor Relations Board (“NLRB”) has recently decided a case which provides some relief to employers in this regard.

In Oil Capitol Sheet Metal, Inc., the NLRB found unanimously that the employer, Oil Capitol Sheet Metal, Inc., violated Section 8(a)(3) and (1) of the National Labor Relations Act (“NLRA”) by refusing to hire a salt. The Board split, however, on the remedy to be ordered. In a 3-2 decision, the NLRB ruled that it will no longer apply to union organizer salts the usual “rebuttable presumption” that, if hired, the salt would have worked indefinitely for the employer. The three member Board majority held that this presumption was inconsistent with the reality of salting because salts, “unlike other applicants for employment, . . . often do not seek employment for an indefinite duration; rather, experience demonstrates that many salts remain or intend to remain with the targeted employer only until the union’s defined objectives are achieved or abandoned.” The Board also noted that “much of the uncertainty as to the duration of

the back pay period is attributable to the union and salt/discriminate rather than to the wrongdoing employer, and [the union is] in the best position to prove the reasonableness of the claimed back pay period by presenting, through the General Counsel, evidence readily available to them.” Such evidence would include “the salt/discriminatee’s personal circumstances, contemporaneous union policies and practices with respect to salting campaigns, specific plans for the targeted employer, instructions or agreements between the salt/discriminatee and union concerning the anticipated duration of the assignment, and historical data regarding the duration of employment of the salt/discriminatee and other salts in similar salting campaigns.”

This is an extremely favorable decision for merit shop contractors and small businesses as it relieves the burden of proof from employers when calculating back pay awarded in cases involving union salts. Please note, however, that the Board’s decision in this case does not affect the burden of proof in non-salting cases.

Important Reminder: New I-9 Form Issued

As published in the Federal Register on November 26, 2007, United States Citizenship and Immigration Services (USCIS) introduced a newly revised Form I-9 for verifying the identity and employment authorization of newly hired employees. The significant revision to the Form I-9 is the removal of five “List A” documents which previously could be used for proof of both identity and employment eligibility. After December 26,

“Making Labor and Employment Law
Work for Employers”

2007, employers who fail to use the newly amended Form I-9 may be subject to applicable civil penalties. Please note, employers do not need to complete the newly amended form for current employees with a properly completed Form I-9 on file. The revised form is available online at: www.uscis.gov/files/form/I-9.pdf.

Important Reminder: OSHA Issues a New Rule Requiring Employers to Pay for Personal Protective Equipment

On November 15, 2007, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) published a final rule clarifying employer/employee responsibilities for payment of personal protective equipment (PPE). This final rule does not create any new requirements regarding what specific PPE employers must provide or when it must be provided. Instead, it provides that employers must pay for almost all PPE required under existing OSHA general industry, construction and maritime standards. The final rule contains exceptions for certain ordinary protective equipment such as safety-toe footwear, prescription safety eyewear, everyday clothing, and weather-related gear. The final rule also clarifies OSHA's intent regarding employee-owned PPE and replacement PPE. For example, if employees choose to use PPE they own, employers will not need to reimburse the employees for the PPE. The standard also makes clear that employers cannot require employees to provide their own PPE and an employee's use of PPE he or she already owns must be completely voluntary. When an employee provides his or her own PPE, the employer must ensure that the equipment is adequate to protect the employee from hazards at the workplace. In addition, the final rule requires the employer to pay for all replacement PPE used to comply with OSHA standards. However, should an employee lose or intentionally damage his or her PPE issued and paid for by the employer, the employer is not required to pay for its replacement under the rule. While this rule takes effect February 13, 2008, employers have until May 15, 2008, to fully implement the PPE pay requirements. Lastly, and significantly, this final rule supersedes collective bargaining agreements that set forth responsibility for providing certain PPE.

Employers Can Shorten the Statute of Limitations Period for Employment-Related Lawsuits

Under the Elliott-Larsen Civil Rights Act ("ELCRA"), an individual generally has three years from the date of the act giving rise to the claim. Employers, however, have the right to contract with employees for a shorter statute of limitations for employee lawsuits. In Dedivanaj v. Daimler Chrysler, the Michigan Court of Appeals affirmed the dismissal of an employee's sexual harassment and race association discrimination claims because the employee's claim was time barred by a provision in the employee's employment application. This application provision stated that all claims or lawsuits had to be filed within six months of the employment action that was the subject of the claim or lawsuit.

According to the Court of Appeals, because the language in the application was unambiguous, and was not contrary to law or public policy, and was not otherwise unenforceable under traditional contract defenses, like duress, waiver, estoppel, fraud, or unconscionability, the contract provision was valid and enforceable. This case provides an extremely important reminder for all employers that they can substantially limit the period of time in which they can be sued for employment related lawsuits by including a simple provision in their employment application.

Misconduct Caused by a Disability is Not Protected

In Macy v. Hopkins County School Board, a former physical education teacher challenged her termination on the grounds the School Board had discriminated against her based on her disability. In 1987, the employee sustained a severe head injury in a non-school related accident but returned to teaching. A 1995 automobile accident inflamed her injuries and the school provided accommodations in compliance with the Americans with Disabilities Act ("ADA"). In 2000, the employee told nine middle school students that she would kill them if she heard them making fun of girls. She repeated the threat, stating that she "meant it." She was

terminated from her employment based on this and for commenting on the marital status of their parents and their sexual activities. The Sixth Circuit Court of Appeals, in upholding the termination, held that even though this misconduct may have been caused by the teacher's disability, her termination was not barred by the ADA because an employer may legitimately fire an employee for conduct if that conduct disqualifies the employee from his or her job. The lesson employers should take from this decision is that even if conduct occurs as a result of a disability, if that conduct (such as threatening to kill or injure a co-worker) disqualifies the employee from his or her job, an employer may terminate the employee without violating the ADA.

**LAW FIRM UPDATES
AND
CLIENT SUCCESSES**

MIOSHA Challenge a Success

With Elizabeth Peters' guidance, a mid-Michigan construction company has successfully challenged a MIOSHA citation and penalty. The MIOSHA citation and penalty stemmed from a demolition contractor's negligent exposure of asbestos on a project where the construction company was the Project Manager. MIOSHA cited the construction company as the General Contractor and argued that a Project Manager and General Contractor are one and the same. Appealing the imposed citation and penalty, Elizabeth argued that the construction company as the Project Manager *was not* the General Contractor, nor was the construction company responsible in any way for the demolition contractor's asbestos exposure. Elizabeth investigated the facts and discovered that the construction company's on-site Project Manager had informed the demolition contractor of the location of the asbestos prior to the demolition contractor starting the work. Elizabeth also discovered that the construction company's on-site Project Manager was not present when the

demolition contractor exposed the asbestos, but when he was informed of the exposure, he had the work stopped and the area cleared until the asbestos could be abated. Elizabeth submitted to MIOSHA a copy of relevant provisions from the construction company's Project Manager contract that outlined the role of the Project Manager and placed on the contractors the direct responsibility for their employees' safety and, in particular, for any hazardous materials exposure. Elizabeth also submitted a detailed witness statement from the on-site Project Manager that evidenced the appropriate measures that the construction company took to warn the demolition contractor of the asbestos, and to stop the work when the exposure came to the construction company's attention. Although MIOSHA stated that Project Managers and General Contractors both have a responsibility for safety, MIOSHA could not dispute that the construction company's on-site Project Manager was not present when the asbestos was exposed, thus, MIOSHA dismissed the citation and penalty.

Kraig Schutter Elected Board Member to the Saginaw Valley Manufacturers' Association

Kraig Schutter has recently been elected to a 2-year term as a board member to the Saginaw Valley Manufacturers' Association (SVMA). The SVMA consists of business leaders from a broad spectrum of companies working to support and promote manufacturing in the mid-Michigan area.

Thank You to Our Clients

In keeping with the spirit of giving that accompanies the end-of-year holidays, Masud, Patterson, Schutter & Peters, P.C., made a contribution to the Mid-Michigan Children's Museum as an expression of appreciation on behalf of you, *our clients*. Thank you for choosing our firm as your labor and employment counsel and we hope you have a happy, healthy and prosperous 2008.