EMPLOYER'S EDGE

A Newsletter for Employers and Claims Professionals from Heyl Royster *June 2013*

A WORD FROM THE PRACTICE GROUP CHAIR

I am pleased to present our June 2013 edition of the Employer's Edge Newsletter which is designed to help you avoid and hopefully minimize workplace litigation.

This edition of the Employer's Edge includes some very helpful "Did You Know" bullet points touching on the Illinois Equal Pay Act and the Illinois Drug Free Workplace Act among others. The legislative update addresses a proposed work comp initiative and amendments to the Illinois Human Rights Act which could impact your workplace.

The recent developments in the courts section include very interesting retaliation cases and the *May v. Chrysler Group* case regarding an employer's responsibility to adequately respond to harassment claims.

Our Statute in the Spotlight section addresses the Illinois Family Military Leave Act and its impact on Illinois employers.

Please feel free to contact any of our attorneys for your employment questions. Attached to the Employer's Edge is a list of our attorneys, their location, as well as contact information.

Bradford B. Ingram
Chair, Employment Law Practice Group
bingram@heylroyster.com

THIS MONTH'S AUTHORS:

Brad Ingram has spent his entire legal career with Heyl Royster, beginning in 1980 in the Peoria office. His defense practice has included a wide variety of civil litigation matters. He is the partner in charge of the firm's Employment Law Practice Group. He also manages the defense of workers' compensation cases and civil rights and municipal claims in the Peoria office.

Kevin Luther has spent his entire legal career at Heyl Royster, beginning in 1984 in the Peoria office. He has practiced in the Rockford office since it opened in 1985. He supervises the workers' compensation, employment law, and employer liability practice groups in the firm's Rockford and Chicago offices. He is the immediate past chair of the firm's statewide workers' compensation practice group. Kevin concentrates his practice in the areas of workers' compensation, employment law, and employer liability.

Brian Smith joined Heyl Royster's Urbana office in 2007. His practice focuses on civil rights, employment, professional liability, and commercial litigation.

IN THIS ISSUE

DID YOU KNOW…

- Officers and agents of an employer cannot willfully and knowingly permit an employer to evade a final judgment awarded under the Illinois Equal Pay Act of 2003. 820 ILCS 112/27.
- Whenever Illinois' unemployment rate exceeds 5%, employers must employ at least 90% Illinois laborers in the construction or building of any public works. 30 ILCS 570/3.
- If any employee is unable to earn sufficient wages to pay an amount normally deducted from a pay check for participation in a medical service plan, the employer must accept cash in the amount necessary to continue participation in the plan for up to 6 months. 820 ILCS 150/1.
- The Illinois Drug Free Workplace Act states that employers with 25 or more employees and contracts or grants of $5,000 or more with the State of Illinois must establish a drug-free workplace policy; it does not require employers to perform drug or alcohol tests on its employees. 30 ILCS 580/1.
- All commissions due at the time of termination of a contract between a sales representative and principle shall be paid within 13 days of termination; commissions that become due after termination shall be paid within 13 days of coming due. 820 ILCS 120/2.

LEGISLATIVE UPDATE

Proposed Workers' Compensation Initiative – SB 1429

On February 6, 2013, Senator Kyle McCarter introduced the Illinois Chamber's workers' compensation initiative (SB 1429). It has been assigned to the Senate Labor & Commerce Committee. The legislation addresses four important areas needing improvement: establishing a higher causation standard, capping body as a whole awards benefits at 500 weeks, providing credits for prior injuries and reversing the recent Will County Forest Preserve decision which designated shoulder injuries as body as a whole benefits. The legislation also clarifies the definition of injured workers' average weekly wages.

Proposed Amendment to Illinois Human Rights Act Would Extend Obligations – HB 1030

On January 30, 2013, Rep. Mary Flowers introduced HB 1030 which amends the Illinois Human Rights Act to provide that it is a civil rights violation for an employer to refuse to provide reasonable accommodations for an employee for conditions relating to pregnancy, childbirth and related medical conditions.

RECENT DEVELOPMENTS IN THE COURTS

Employer Did Not Properly and Adequately Respond to Harassment

May v. Chrysler Group, LLC, Nos. 11-3000 & 11-3109, 2013 WL 1955682 (C.A. 7th, May 14, 2013): The Seventh Circuit reviewed the May case in order to determine whether Chrysler responded in a manner reasonably likely to end harassment. The plaintiff, Otto May, Jr. was required to prove that he was subject to unwelcome harassment based on his race, religion or national origin and that it was sufficiently severe or pervasive to create a hostile or abusive work environment for there to be liability for his employer. The defendant, Chrysler, could avoid liability for the hostile work environment claim if it promptly and adequately responded to employee harassment. The Seventh Circuit reviewed the facts in the May case in order to determine whether Chrysler responded in a manner reasonably likely to end harassment.

The facts in the May case are extensive. More than 50 times between 2002 and 2005, Otto May, Jr. a pipefitter at Chrysler's Belvedere Assembly Plant was the target of racist, xenophobic, homophobic, and anti-Semitic graffiti that appeared in and around the plant's paint department.

The court went into significant detail as to the disturbingly violent, aggressive messages that he was subjected to while employed.

A jury concluded that May carried his burden of proof and awarded him $709,000 in compensatory damages and $3,500,000 in punitive damages. The compensatory award was remitted to $300,000 and the punitive damage award was vacated. The Seventh Circuit Court of Appeals reaffirmed its ruling on liability and evaluated the actions taken by Chrysler to remedy the harassment. The court held that the jury was presented with ample evidence to conclude that Chrysler did not promptly and adequately respond to the harassment.

The court reviewed the actions taken by Chrysler during the first year of written threats and harassments. Chrysler held a meeting and interviewed Otto May. One year into the investigation they hired a handwriting expert to review the written threats. The Seventh Circuit described Chrysler's efforts as follows:

> As it has it, the company was like a duck on a river, looking unperturbed but paddling like crazy beneath the surface.

Chrysler provided testimony that they were all but consumed with the May case and human resources had never worked as much on any other HR matter.

The jury did not believe the efforts at documentation were adequate or even if the efforts were adequate, they did not start promptly enough for Chrysler to avoid liability.

The jury also heard what Chrysler did not do. They did not interview anyone on a list provided by May. The employee had been subjected to repeated threats over the course of many months and had a list of names. The employer's investigator should have talked to at least some of those people. The court notes that while an employer's response need not be perfect or textbook to avoid liability for a hostile work environment, the investigation needs to be at least reasonably likely to be effective. What the jury heard was that Chrysler documented the incidents and used the gate to narrow the field of suspects. However, the jury did not believe that this action was sufficient. Chrysler did not install a single surveillance camera to observe the threatening conduct.

The Seventh Circuit Court of Appeals confirmed that it does not sit as a super personnel department. However, in deciding the appeal, they were required to assess the response of the actual personnel department. They affirmed the jury's finding of liability and its determination that the employer did not take action that promptly, and adequately and effectively remedied the harassment. This case is instructive for employers and their HR personnel departments with regard to the nature and extent of the actions that must be taken to effectively remedy harassment.

Employer Good Faith Belief Beats Retaliation Claim

Vaughn v. Vilsack, No. 11-3673, 2013 WL 856515 (C.A. 7, March 8, 2013): The Seventh Circuit affirmed a district court grant of summary judgment. Plaintiff claims he suffered retaliation for engaging in protected activity under the act. Plaintiff worked for the United States Forest Service in Golconda, Illinois at the Job Corps training center. He filed a series of EEOC complaints between 1997 and 2006. Those claims were settled in 2007. Two days after that settlement his job changed. His work schedules changed. He also believed he was passed over for certain available positions and lost overtime.

During the same period of time (2005) a co-worker filed harassment charges against Vaughn after they ended a five year relationship. An order of protection was obtained by the employee against Vaughn. He was placed on administrative leave and returned in September of 2005. He was reassigned to avoid the other employee and in an effort to comply with the order of protection. In 2006 he returned to his former job. The co-worker filed a charge in 2007 that was eventually resolved. In 2009 Vaughn filed a lawsuit claiming retaliation for his prior EEO activity and for changing his work schedule denying him overtime and denying him rotation into certain positions.

The court analyzed plaintiff's prior activity and determined that management believed in good faith that its decision with respect to Vaughn's terms and conditions

of employment were appropriate to remedy the behavior, which based on the information available, could be described as harassing.

The Seventh Circuit determined that plaintiff could not use his prior EEO activity as a shield against the consequences of his inappropriate workplace conduct. His harassment of a co-worker (inappropriate workplace activity) is not legitimized by the earlier filing of a complaint of discrimination. His harassing conduct in the workplace supported the employer's action which was to comply with the order to protect its employee and maintain the effectiveness of the office.

This case focused on the employer's good faith belief that the actions it took did remedy the inappropriate and harassing behavior of the plaintiff. The plaintiff could not use his prior EEO activity as a shield for his subsequent bad acts.

Plaintiff Must First Prove She Is a Qualified Individual with a Disability To Prevail

Majors v. General Electric Company, No. 12-2893, 2013 WL 1592072 (C.A. 7, April 16, 2013): Plaintiff Majors filed a lawsuit alleging GE violated the Americans with Disabilities Act when it denied her temporary and permanent positions which she was otherwise entitled under the seniority based-bidding procedure at the plant used to fill vacant positions.

Summary judgment was granted to the employer. Plaintiff suffered a work-related injury to her right shoulder that left her with a permanent 20 pound lifting restriction that precluded her from above shoulder level work with the right arm. She was the senior eligible bidder in 2009 for a temporary purchase material auditor position. This position required intermittent movement of heavy objects. This requirement was the focus of this dispute.

The Seventh Circuit Court of Appeals held that the lifting requirement of more than 20 pounds was an essential function of that position and she was not medically qualified for the position. She suggested that a material handler could do that lifting. GE decided she could not perform the essential function of the position because of her permanent lifting restriction. The Seventh Circuit determined that plaintiff was not a qualified individual with a disability. GE was entitled to summary judgment on the ADA claim. She argued on appeal that she was a qualified individual because she could lift objects weighing more than 20 pounds with reasonable accommodation, however, GE failed to accommodate her restriction.

In order to determine whether a job function is essential, the court looked to the employer's judgment, written job description, the amount of time spent on the function, and the experience of those who previously or currently hold the position. The court found that the job description required the intermittent movement of heavy objects and an employee who held the purchase material auditor position and the manager of the others holding the position confirmed that lifting parts and materials over 20 pounds was an essential part of the job.

Plaintiff was unable to perform the essential functions of the job without accommodation. Plaintiff had the burden of establishing that she could perform those functions. The only accommodation she proposed was to have a material handler lift the objects for her. The court held that to have another employee perform a position's essential function and to a certain extent perform the job for the employee is not a reasonable accommodation and not required under the ADA. She also argued that GE was required to propose accommodation and did not interact with her in that regard. The court confirmed that she must first establish that she is a qualified individual with a disability. Thereafter the defendant would have the burden to prove that the accommodation would create an undue hardship on the business. The court noted the plaintiff must first show that the accommodation she seeks is reasonable on its face. It was not deemed reasonable on

its face and as a result, GE was not required to show the accommodation would create an undue hardship.

The significant holdings in this case include the following:

1. To prove that the defendant failed to provide such a reasonable accommodation, the plaintiff has the burden of establishing that she is a qualified individual with a disability.
2. An interactive process between employer and employee is meant to determine the appropriate accommodation for a qualified individual with a disability.

This record would not allow a finding that Majors was a qualified individual, so whether the discussion between GE and Majors was sufficiently interactive is immaterial.

This case demonstrates the importance of good job descriptions and the value of determining initially whether the plaintiff is a qualified individual with a disability.

But for Causation Standard Possible for Title VII Retaliation Claims

University of Texas Southwestern Medical Center v. Nassar, No. 12-484 (oral argument heard Apr. 24, 2013): The Supreme Court heard oral argument on April 24, 2013 that could make proving retaliation claims more difficult for employees. It may result in a change in the application of the mixed motive theory to Title VII retaliation claims. The employer argued that based upon the plain language of Title VII, the court should apply a more rigorous "but for" causation standard to Title VII retaliation claims similar to the standard applied to age discrimination cases under the ADEA.

The mixed motive theory provides that if an employer fired an employee for multiple and separate reasons and one of those reasons was that the employee engaged in a legally protected activity, such as complaining about harassment, the employee could prevail in a Title VII retaliation case, even if the employee could not prove that he or she would have been terminated but for engaging in the legally protected conduct.

If the Supreme Court agrees with the employer in this case, employees bringing such claims would have to show that their protected activity was the sole, motivating factor rather than one of many for the materially adverse employment action.

STATUTE IN THE SPOTLIGHT

In each issue, Heyl Royster attorneys will summarize a statute that imposes requirements on an employer with respect to its employees. These summaries can be printed and compiled in a notebook for easy access and quick answers to your questions.

The Family Military Leave Act – 820 ILCS 151/1 *et seq.*

Who: An employee working for an employer that employs at least 15 employees.

What: An employer shall provide unpaid Family Military Leave, which is defined as leave requested by an employee who is a spouse, parent, child or grandparent of a person called to military service lasting longer than 30 days with the State or United States pursuant to the orders of the Governor or the President of the United States, to an employee during the time federal or state deployment orders are in effect.

An employee who takes Family Military Leave must be restored to the position he or she held before starting leave, or a position with equivalent seniority status, benefits, pay, and other terms and conditions of employment.

An employee on Family Military Leave shall not lose any employee benefit accrued before the date on which the leave commenced.

While an employee is on Family Military Leave, the employer shall make it possible for the employee to continue their benefits, at the employee's expense.

Collective bargaining agreements cannot diminish an employee's rights under the Family Military Leave Act; if a collective bargaining agreement or employee benefit plan provides greater leave rights to an employee than the Family Military Leave Act, the Act does not affect an employer's obligation to comply with that which was agreed upon.

How: Employee must provide at least 14 days notice of the intention to take leave, if the leave will consist of 5 or more consecutive work days. An employee taking military family leave for less than 5 consecutive days must provide advance notice as is practicable.

Employer may require certification to verify the employee's eligibility.

Limits: An employee working for an employer that employs between 15 and 50 employees is entitled to up to 15 days of unpaid Family Military Leave during the time federal or state deployment orders are in effect.

An employee working for an employer that employs more than 50 employees shall provide up to 30 days of unpaid Family Military Leave to an employee during the time federal or state deployment orders are in effect. For employers with more than 50 employees, when an employee seeks leave because the employee's spouse or child is called to military service, the number of days of leave provided to an employee shall be reduced by the number of days of leave provided to the employee under the Family and Medical Leave Act of 1993.

An employee shall not take Family Military Leave unless he or she has exhausted all agreed vacation leave, personal leave, compensatory leave, or any other leave (except sick leave and disability leave).

Prohibited Acts: An employer cannot interfere with an employee's rights under the Act.

An employer cannot discharge or discriminate against an individual because he or she has exercised any right under the Act.

An employer cannot discharge, fine, suspend, expel, discipline or discriminate against any employee for opposing any practice made unlawful by the Act.

Enforcement: Civil action may be brought by an employee to enforce the Family Medical Leave Act. The court may enjoin an employer from taking any action or practice that violates or may violate the Act

The statutes and other materials presented here are in summary form. To be certain of their applicability and use for specific situations, we recommend an attorney be consulted. This newsletter is compliments of Heyl Royster and is for advertisement purposes.

Employment & Labor Contact Attorneys

Heyl, Royster, Voelker & Allen

Peoria

Attorneys:
Shari L. Berry - *sberry@heylroyster.com*
Mitchell P. Hedrick - *mhedrick@heylroyster.com*
Bradford B. Ingram - *bingram@heylroyster.com*
Debra L. Stegall - *dstegall@heylroyster.com*

Springfield

Attorney:
Theresa M. Powell - *tpowell@heylroyster.com*

Urbana

Attorneys:
Keith E. Fruehling - *kfruehling@heylroyster.com*
Tamara K. Hackmann - *thackmann@heylroyster.com*
Brian M. Smith - *bsmith@heylroyster.com*

Rockford & Chicago

Attorneys:
Jana L. Brady - *jbrady@heylroyster.com*
Kevin J. Luther - *kluther@heylroyster.com*

Edwardsville

Attorney:
Douglas R. Heise - *dheise@heylroyster.com*

Chicago

Attorney:
Daniel J. Cheely - *dcheely@heylroyster.com*

Appellate:

Craig L. Unrath - *cunrath@heylroyster.com*

Peoria
Suite 600,
Chase Building
124 S.W. Adams Street
Peoria, IL 61602
309.676.0400

Springfield
3731 Wabash Ave.
PO Box 9678
Springfield, IL 62791
217.522.8822

Urbana
Suite 300
102 E. Main Street
PO Box 129
Urbana, IL 61803
217.344.0060

Rockford
2nd Floor,
PNC Bank Building
120 West State St.
PO Box 1288
Rockford, IL 61105
815.963.4454

Edwardsville
Suite 100
Mark Twain Plaza III
105 West Vandalia Street
PO Box 467
Edwardsville, IL 62025
618.656.4646

Chicago
Suite 1203
19 S. LaSalle Street
Chicago, IL 60603
312.853.8700

HEYL ROYSTER

Below is a sampling of our practice groups highlighting a partner who practices in that area – For more information, please visit our website
www.heylroyster.com

Appellate Advocacy
Craig Unrath
cunrath@heylroyster.com

Business and Commercial Litigation
Tim Bertschy
tbertschy@heylroyster.com

Business and Corporate Organizations
Deb Stegall
dstegall@heylroyster.com

Civil Rights Litigation/Section 1983
Theresa Powell
tpowell@heylroyster.com

Class Actions/Mass Tort
Patrick Cloud
pcloud@heylroyster.com

Construction
Mark McClenathan
mmcclenathan@heylroyster.com

Employment & Labor
Tamara Hackmann
thackmann@heylroyster.com

Insurance Coverage
Jana Brady
jbrady@heylroyster.com

Liquor Liability/Dramshop
Nick Bertschy
nbertschy@heylroyster.com

Long Term Care/Nursing Homes
Matt Booker
mbooker@heylroyster.com

Mediation Services/Alternative Dispute Resolution
Brad Ingram
bingram@heylroyster.com

Product Liability
Rex Linder
rlinder@heylroyster.com

Professional Liability
Renee Monfort
rmonfort@heylroyster.com

Property
Dave Perkins
dperkins@heylroyster.com

Railroad Litigation
Steve Heine
sheine@heylroyster.com

Tort Litigation
Gary Nelson
gnelson@heylroyster.com

Toxic Torts & Asbestos
Lisa LaConte
llaconte@heylroyster.com

Truck/Motor Carrier Litigation
Matt Hefflefinger
mhefflefinger@heylroyster.com

Workers' Compensation
Craig Young
cyoung@heylroyster.com

Scan this QR Code for more information about our practice groups and attorneys

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Peoria
Suite 600,
Chase Building
124 S.W. Adams Street
Peoria, IL 61602
309.676.0400

Springfield
3731 Wabash Ave.
PO Box 9678
Springfield, IL 62791
217.522.8822

Urbana
Suite 300
102 E. Main Street
PO Box 129
Urbana, IL 61803
217.344.0060

Rockford
2nd Floor,
PNC Bank Building
120 West State St.
PO Box 1288
Rockford, IL 61105
815.963.4454

Edwardsville
Suite 100
Mark Twain Plaza III
105 West Vandalia Street
PO Box 467
Edwardsville, IL 62025
618.656.4646

Chicago
Suite 1203
19 S. LaSalle Street
Chicago, IL 60603
312.853.8700