EMPLOYMENT LAW BULLETIN

The Newsletter of

LEHR, MIDDLEBROOKS & PROCTOR

A PROFESSIONAL CORPORATION

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TO OUR CLIENTS AND FRIENDS:

AFL-CIO President John Sweeney on January 24, 1996, announced substantial changes to invigorate the ailing labor movement. These recommendations evolved from work groups appointed by Sweeney after he became President in October 1995, and include the following:

- Organizing is the organization's top priority.
- Southern and sunbelt states are the prime locations.
- Hospitality and other service-related industries are the prime targets.
- Employees who work at unskilled or semi-skilled jobs, receive lower wages and who may not have insurance are the prime target groups. Sweeney has committed $20 million over the next two years to organizing. He appointed Richard Bensinger to lead the organization's newly-created organizing department. Bensinger also heads the AFL-CIO's Organizing Institute, which is the training ground for new organizers. Bensinger's department will go beyond training organizers, to include coordination among unions in the selection of organizing targets and providing fellow unionists with assistance in their organizing efforts. **According to Sweeney, the AFL-CIO will spend one-third of the organization's entire budget on union organizing by the year 1998**.
- In an effort to change the political composition of Congress, 100 union activists will be named in each Congressional district, with the purpose of serving as the political watchdogs of the AFL-CIO, promoting the importance of voting among its membership, and making a strong effort to change the composition of the U.S. Congress. The AFL-CIO will spend approximately $35 million on political issues.
- There will also be more emphasis on strategic campaigns directed toward employers. This includes doing a better job of identifying which employers are targets for organizing, and developing a campaign to pressure employers to agree to a first contract after the union is certified as the bargaining agent. The AFL-CIO is creating a Center for Strategic Campaigns which will be international in scope.
- Sweeney has reorganized the AFL-CIO's public affairs department into four separate divisions that include publications, electronic media, media outreach, and speech writing. The AFL-CIO will attempt to communicate a more contemporary message in its radio and television advertising.
- There will also be a division responsible for political education, which is an approach to train unionists to become leaders in furthering the organization's mission politically and at the organizing level.

At the same time the AFL-CIO is gearing up for a strong two-year organizing battle, the NLRB is contemplating a procedural change that would assist unions in organizing efforts. Specifically, NLRB Chair William Gould is proposing that the NLRB adopt a "single facility" bargaining unit rule. The rule would provide that if a proposed bargaining unit is comprised of at least 15 employees and one supervisor and located at least a mile away from another company facility, the employees working at the facility will be considered an appropriate

bargaining unit unless more than 10 percent of those employees have spent at least 10 percent of their time working at another company facility. Why would this make union organizing easier? The smaller the bargaining unit, the greater the statistical likelihood of a union victory. If employees at one location sought union representation, but there was another company facility within the same geographical area that included common supervision, policies and procedures, the employer could argue that employees from all related facilities should be grouped together for bargaining unit purposes. The effect could mean that the union would not have enough strength to win the election, compared to an election limited to the facility where the union activity began. **Thus, if the NLRB proposed "single facility" bargaining unit rule becomes effective, it will boost John Sweeney's efforts to increase organized labor's membership**.

VILE, DISGUSTING, VULGAR COMMENTS REGARDING SEX ARE NOT SEXUAL HARASSMENT, RULES FOURTH CIRCUIT

Remember that not all disgusting or inappropriate behavior is illegal, though we have yet to hear of an employer that believes such behavior furthers its business interests. The case of McWilliams v. Fairfax County Board of Supervisors (4th Cir., Jan. 9, 1996) addressed the issue of whether such behavior could be considered sexual harassment. This case involves employees who worked for a school district's transportation division. One employee, McWilliams, worked as a mechanic. On a recurring basis, McWilliams was subjected to vulgar, vile and as the court said "shameful" sexual behavior by some fellow employees, who were referred to as "lube boys." The behavior was not directed toward McWilliams because of his sex or sexual orientation. However, the behavior continued, McWilliams objected, and ultimately quit complaining of emotional distress.

In rejecting McWilliams' claim that such behavior was sexual harassment under Title VII, the court said the behavior directed toward McWilliams was not "because of" his sex. If the behavior had been based upon McWilliams' sexual orientation, then he could have pursued a hostile environment sexual harassment claim under Title VII. However, although the lube boys' behavior was based upon their "vulgarity and insensitivity and meanness of spirit," it was not "specifically because of the victim's sex," and therefore non-actionable under Title VII.

This case is a good example of how a narrowly drafted sexual harassment policy can present problems for employers. A properly-drafted policy should cover behavior broader than that which is within the legal definition of sexual harassment, to include abusive, offensive, threatening or intimi-dating behavior. One possibility that could have arisen out of the McWilliams' case is that instead of pursuing an action under Title VII, McWilliams could claim that he suffered a job-related injury, is protected for absences covered by the Family and Medical Leave Act, and may even be disabled because of this behavior.

EMPLOYEE RECEIVES $180,000 FOR SPEAKING UP ON BEHALF OF FELLOW EMPLOYEE

The case of Probst v. Reno (D.Ct.Ill. Dec. 22, 1995) is a good example of how retaliating against an employee can become expensive for the employer. Peter Probst was a DEA agent. He worked as a team with a black agent on a lengthy cocaine investigation. During the course of the investigation, Probst's partner was subjected to racial slurs from other white DEA agents. Probst complained about this to his supervisors. As a result of bringing this to his supervisors' attention, the matter was investigated and Probst was suspended for ten days because he used "insulting, abusive and obscene language to and about others." In concluding that the DEA retaliated against Probst in violation of Title VII, the court found that the investigation of Probst's allegations was biased. Apparently, no one Probst named as a witness was interviewed by the investigators. Furthermore, Probst's overall employment record was excellent, as evidenced by outstanding performance appraisals. In addition to awarding Probst $180,000 and $2,229 back pay for the ten days of work he missed, the court also ordered that all negative references about Probst based upon this incident should be expunged from his record.

EMPLOYEE RECEIVES $295,000 FOR DEMOTION AFTER OUTSTANDING PERFORMANCE REVIEWS

In the case of Kemp v. Monge (D.Ct.Fla., Dec. 18, 1995), a detective with a hearing impairment received nearly $300,000 after he was demoted, allegedly because he could no longer do the job. It took the jury less than 30 minutes to reach a decision regarding liability and the amount that Kemp should receive in damages. Kemp had worked as a detective until he was demoted to a desk job because the employer complained that Kemp's hearing impairment diminished his ability to work effectively as a detective. However, there was no effort made to reasonably accommodate Kemp, there was testimony from fellow detectives that Kemp's work was excellent,

and Kemp's recent performance evaluations rated him highly. Furthermore, the timing of the demotion could not have been worse. It was implemented while Kemp was away on Christmas vacation. According to Kemp's attorney, "his performance reviews were our best evidence. [His superiors] said he couldn't perform with his hearing problems, but everything that was documented by the sheriff's office was that he was performing at an above average level. Every single member of his squad was a witness in his favor."

DID YOU KNOW . . .

. . . that the Congressional Accountability Act, signed by President Clinton on January 23, 1995, became effective on January 23, 1996? This Act requires that Congress comply with the following employment laws: Title VII, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Americans With Disabilities Act, the Fair Labor Standards Act, the Employee Polygraph Protection Act, the Worker Adjustment and Retraining Notification Act, the Uniform Services Employment and Reemployment Rights Act of 1994, the Federal Service Labor-Management Relations Statute, and the Occupational Safety and Health Act. In order to adhere to these laws, Congress established an Office of Compliance. We welcome Congress as an employer participant of the legislative and regulatory world it created.

. . . that EEOC litigation will focus on cases of systemic discrimination, which means more class actions filed by the Commission? According to EEOC General Counsel Clifford Gregory Stewart, "The litigation docket should reflect a more appropriate mix of individual and systemic cases." In order to facilitate bringing those cases, Stewart has asked local commission offices to gather more information about employment patterns of the major employers in each region where the EEOC has an office.

. . . that an employer must accept the benefit of its bargain and arbitrate claims with a former executive? In Asplundh Tree Expert Co. v. Bates (6th Cir., Dec. 14, 1995), the court ordered the company to arbitrate its claims with its former executive, Bates. Asplundh bought Bates' business, and as part of that transaction, Bates signed an agreement to arbitrate any and all claims with Asplundh arising out of that transaction. After discovering that Bates defrauded Asplundh, Asplundh terminated Bates, who then sought to arbitrate the dispute. Asplundh refused to do so. The court ordered Asplundh to fulfill what it bargained for, which was arbitration as an alternative dispute resolution forum.

. . . that an employee who lied on his employment application 21 years ago may lose his eligibility under the employer's loss of control plan? The case of Moos v. The Square D Co., (6th Cir., Dec. 22, 1995) concerns an employee who claimed that he had a degree in accounting when he applied for work with the company as an accountant 21 years ago. The company found out about the lie when it asked all employees with college degrees to provide a copy of their transcripts. The employer developed a control separation plan for high level employees in the event the company was sold. Exceptions to the plan included if an employee engaged in behavior that is "materially and demonstrably injurious to the company." In upholding the right of the Plan Administrator to deny covered to Moos, the court accepted the company's explanation that "when a person of his standing in the company engages in any form of dishonesty, it is materially injurious to the company."

. . . that the NLRB ruled that an employer's "no moonlighting" policy violated the National Labor Relations Act? Tualation Electric, Inc. (Dec. 18, 1995). According to the Board, the policy was motivated by the employer's bitterness toward union organizing. The company used the policy as a basis to refuse to hire four individuals who were "salts," which means they were on the union's payroll for the purpose of trying to become employed with the company in order to unionize it. Such applicants are entitled to protection under the National Labor Relations Act. The employer may not establish a "no moonlighting" policy to circumvent the right of employees on the union payroll from applying for employment for the purpose of trying to unionize the employer.

. . . that escorting terminated employee off the premises is not defamation, ruled the court in the case of Bolton v. Department of Human Services, State of Minnesota (Mn.S.Ct., Dec. 15, 1995)? The case arose when a terminated employee was escorted to his office, and then off of the premises. The employee complained that the employer's escorting him to his office and off of the premises amounted to defamatory conduct. A lower court ruled that such action could be defamatory, but the Minnesota Supreme Court stated that "where there is no word spoken or conduct other than a simple escorting of the plaintiff to the exit door upon his termination," there could be no defamation. To hold otherwise, ruled the Court, would create problems because "job performance evaluations are part of the everyday work environment, where a supervisor must occasionally take disciplinary action against a subordinate who it perceived to have fallen short in job performance."

v HEALTH LAW SUPPLEMENT v

COURT PERMITS PHYSICIAN CHALLENGE TO BOARD CERTIFICATION

The case of Morrison v. American Board of Psychiatry and Neurology, Inc. (D.Ct.Ill. Jan. 4, 1996) involved a psychiatrist who claimed that she was denied certification by the Board because of her race. She worked at two medical facilities in Louisiana. Because the Board did not certify her, she claims that she is earning less than those who are certified and also that her opportunities are limited. The examination requires an oral exam where the candidate's actions with live patients are observed, and it also requires a written test. Morrison failed the oral part, though she passed the written part. She took the oral test again, but did not pass the live patient test. She claims that by requiring a photograph of her when she submitted her application to the Board, the Board deliberately gave her a harder oral test than other candidates because of her race. The Board argued that it is not an employer under Title VII and therefore should not be subjected to the suit. The Court acknowledged that the case is an unusual one, but held that because the Board plays a critical role in a candidate's employment opportunities, the case should not be dismissed.

v PUBLIC SECTOR SUPPLEMENT v

TOO MUCH FREE SPEECH RESULTS IN TERMINATION

The case of Sheppard v. Beerman (D.Ct.NY, Dec. 20, 1995) involves a judicial law clerk who was terminated after accusing the judge of impropriety and corruption. What brought the employment relationship to an end was when Sheppard claimed that the judge asked him to draft an order which Sheppard felt was improper. The conversation then became heated with the judge, and Sheppard called the judge "corrupt" and a "son of a bitch." The judge terminated Sheppard the next day. Shortly thereafter, Sheppard sued, claiming that his free speech rights were violated by the judge's decision. In ruling that First Amendment rights were not protected, the court concluded that Sheppard's comments to the judge did not touch and concern the public. Furthermore, even if it touched and concerned the public, the disruptive nature of the speech outweighed any value to protecting the speech. For example, the judge reasonably concluded that Sheppard could not be trusted to complete his work as requested, which would be disruptive to the judge's responsibilities under the judicial system.

The Employment Law Bulletin is prepared and edited by Richard I. Lehr and Brent L. Crumpton. Please contact Mr. Lehr, Mr. Crumpton, or another member of the firm if you have questions or suggestions regarding the Bulletin.

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