EMPLOYMENT LAW BULLETIN

The Newsletter of

LEHR, MIDDLEBROOKS & PROCTOR

A PROFESSIONAL CORPORATION

ATTORNEYS AND COUNSELORS

2021 THIRD AVENUE NORTH, SUITE 300, BIRMINGHAM, ALABAMA 35203

PHONE: 205 326-3002 FACSIMILE: 205 326-3008

Volume 4 , Number 3 *March 1996*

TO OUR CLIENTS AND FRIENDS:

We are pleased to announce that Christopher S. Enloe has become associated with the firm. Prior to joining the firm, Mr. Enloe served as law clerk to the Honorable Charles R. Butler, Jr., United States Federal District Court Judge for the Southern District of Alabama. Mr. Enloe received his undergraduate degree from the University of Virginia and his law degree from Washington Lee University. Mr. Enloe's addition to our firm enables us to continue to provide you with prompt legal services of the highest caliber.

OSHA ISSUES GUIDELINES TO AVOID WORKPLACE VIOLENCE

On March 14, 1996, the Occupational Safety and Health Administration released voluntary guidelines for employers to follow to reduce the risk of workplace violence. Because employees in health care and social services face a higher risk of violence than any other industries, the generally target those industries. However, OSHA has several useful suggestions for all employers to consider:

1. Businesses should establish a written program that has a zero tolerance for harassment, intimidation or threatening behavior toward employees.

2. Employers should analyze each work site to determine whether there are existing or potential threats to employees.

3. Identify particular high risk factors, such as the nature of the job, job location (is there proper lighting?), and access to emergency communication devices, such as phones or emergency switches.

4. Establish security precautions at all entrances and exits to the property, including coding to enter the building during off hours, closed circuit video or metal detectors for high risk areas, where necessary.

5. Establish a liaison with local law enforcement authorities.

6. Establish training and education for employees to understand the organization's violence identification and prevention policy, how to diffuse potential violence issues, and how to recognize a potentially violent situation.

AFTER THE FACT PERCEPTION OF SEXUAL HARASSMENT INVALID, RULES COURT

Employers are well advised to investigate any claim of harassment, including those raised by an individual no longer employed with the company. However, in the recent case of Faragher v. Boca Raton, Florida (11th Cir., Feb. 8, 1996), the Court of Appeals ruled that there can be no claim of hostile environment sexual harassment when an individual raised the issue after her employment relationship was severed. The plaintiffs were two women who worked as lifeguards for the City of Boca Raton. They alleged that their supervisors made sexual gestures to them and touched them in an inappropriate manner. According to the court, a plaintiff in a sexual harassment case must believe that the behavior was harassing at the time it

occurred. In this situation, neither plaintiff thought the behavior was important at the time it occurred. After they quit their jobs, one plaintiff actually sought reemployment on a part-time basis, and the other plaintiff did not discourage her sister from seeking a lifeguard job with the city.

In a hostile environment sexual harassment situation, an employer may be responsible for the behavior if it knew or should have known of the behavior and failed to take prompt, remedial action, or if those involved in the harassment were agents of the employer. In this case, the court ruled that the city did not know of the behavior, as the recipients failed to report it. The court also ruled that the supervisors were not considered agents of the employer when they engaged in this behavior. According to the court, for a supervisor's harassing behavior to be imputed to the employer, there must be a connection between the harassment and the employee's job performance. The court said, "If, for example, [supervisors] had constructed something offensive and intimidating to women under the guise of trying to improve lifeguard performance, then their supervisory and disciplinary authority would support a finding that they acted as the city's agent." The court, however, upheld an award of damages for the plaintiffs on claims of battery against their supervisors because of the unwelcome touching.

AFL-CIO CREATES WORKING WOMEN'S DEPARTMENT FOR ORGANIZING PURPOSES

On February 22nd, the AFL-CIO announced the creation of a department to focus on the interests of women at work. Chairing the department is Karen Nussbaum, who co-founded the National Association of Working Women in 1973 and Service Employees International District 9-2-5. It is Nussbaum's desire for her department to provide a "strong activist voice for working women." Regarding efforts to organize, Nussbaum said that "good organizing depends on knowing who you are organizing, knowing what they care about, and speaking in a language that matters to them and having leadership that they can identify with." Therefore, Nussbaum said that you must face realities of "the way women view the world [and] the special responsibilities that women have for their families as well as their work." Nussbaum also said that "people are best organized by people just like them." According to Nussbaum, the issues she will focus on are pay, benefits, the balance of work and family responsibilities, and promotion opportunities for women.

MINOR FLAWS IN PERFORMANCE RATHER THAN AGE JUSTIFIED TERMINATION DURING CUTBACK, RULES COURT

One of the most delicate decisions an employer makes is deciding in the course of a cutback which employees should be terminated. This is particularly true if a terminated employee is older than an employee retained. In the case of Wolf v. Buss America, Inc., (7th Cir., Feb. 20, 1996), the employer terminated Henry Wolf, age 53, rather than a 34 year old in the same job classification. Wolf's performance would not have been an independent basis for termination had there not been the reduction in force. Examples of the issues that resulted in Wolf's selection for termination included his lateness in filing reports, "excessive talking," occasional arrogance toward customers, and failure to check in often enough with his superiors regarding his progress. A younger, less experienced engineer was retained. According to the court, "the picture that emerges here is of an employee who was, overall, competent and diligent. Unfortunately, Wolf also possessed -- in Buss America's view -- a few, minor flaws. These flaws were not serious enough to call for Wolf's immediate dismissal, but when Buss America was faced with an undisputed economic slowdown these flaws naturally figured into Buss America's decision regarding which service engineer to let go. The facts which accompany age discrimination cases are never heartwarming. The ADEA, however, is not a form of job insurance for older employees."

EMPLOYEE MUST FOLLOW GRIEVANCE PROCEDURE BEFORE INITIATING LAWSUIT, RULES COURT

"The rule of the Supreme Court in this Circuit is that an employee must follow the grievance procedure established by the collective bargaining agreement prior to filing suit in federal court," wrote the Fourth Circuit Court of Appeals in the case of Austin v. Owens-Brockway Glass Container, Inc., (March 12, 1996). The employee sued her employer, alleging that after her injury, the employer did not accommodate her by providing light duty. She claims this was sex discrimination, because the employer had made similar accommodations for men. She also claimed the employer violated the Americans With Disabilities Act. The lower court agreed with the employer that the claims were subject to mandatory arbitration. According to the court, "Ms. Austin is a party to a voluntary agreement to submit statutory claims to arbitration. The collective bargaining agreement specifically listed gender and disability discrimination as claims that are subject to arbitration. . . . Finding that Congress did not intend

to preclude arbitration of claims under Title VII and the Disabilities Act, we hold that the arbitration provision in this collective bargaining agreement is enforceable."

The employer and union in this case agreed to a contract that specifically provided for the arbitration of discrimination claims. In addition to stating that the company and union would comply with all laws prohibiting discrimination in employment, the article addressing equal opportunity stated that "any disputes under this Article as with all other Articles of this Contract shall be subject to the grievance procedure." The grievance procedure provided for arbitration that was binding on both parties.

CONGRESSIONAL EMPLOYEE COVERAGE UNDER WAGE AND HOUR LAW PROMPTS SENATE CONSIDERATION OF AMENDMENTS TO ACT

There is nothing like a taste of your own medicine to influence your behavior, as the United States Senate has determined in complying with the Fair Labor Standards Act. The Congressional Accountability Act, which became effective in 1995, resulted in coverage of congressional employees under the Fair Labor Standards Act. On February 27th, the Senate Labor and Human Resources Committee began hearings on FLSA amendments regarding overtime and exemptions. One of the frustrations that the Senate has experienced with the law concerns the requirement of overtime for time over 40 hours worked in a week. As an example, Congressional employees missed several days of work due to snowstorms. If they made up the time they missed, Congress, as any other employer, would have to pay them overtime. Several Senators were unwilling to schedule overtime because of the cost involved, so the employees were unable to make up the lost time and pay. There also are concerns among Senators that the exemptions as currently defined under the Act are not easily applicable to jobs in today's work environment.

Senator John Ashcroft (R-MO) has proposed legislation that would permit employers to schedule employees for 160 hours over a four-week period in any manner, provided the total hours do not exceed 160. Thus, a fifty-hour work week followed by a thirty-hour work week would not result in overtime. We will continue to follow the Senate hearings and proposed legislation and report of any new developments.

JUST CHARGE IT, AFL-CIO TELLS ITS MEMBERS

The AFL-CIO has committed to contribute $35 million to Democratic candidates for Congress during the 1996 elections. One way the AFL-CIO will fund this is to charge each member 15 cents a month. Ironically, although the AFL-CIO is committed to supporting Democratic candidates only and has endorsed President Clinton for reelection, approximately 40 percent of AFL-CIO members voted Republican in the 1994 off-year elections.

The AFL-CIO will be able to substantially increase its funding of political and organizing campaigns because of a recent credit card deal it reached with Household International. According to the AFL-CIO, this credit card plan will result in the AFL-CIO receiving $375 million over a five-year period. The new member credit card program becomes effective on February 28, 1997. AFL-CIO president John Sweeney said, "It's a better deal for our members, and it sends a good portion of what are now the bank's profits back into our movement so we can help build a more secure future for working Americans." The AFL-CIO will receive a $50 million signing bonus from Household and will receive guaranteed royalties over the first five years of the contract that could reach as high as $450 million. Four different credit cards will be offered, including a credit card for AFL-CIO members with no established credit. The rate charged will be prime plus five percent.

JUSTICE DEPARTMENT ISSUES GUIDELINES TO COMPLY WITH SUPREME COURT AFFIRMATIVE ACTION DECISION

In the case of Adarand Constructors, Inc. v. Pena (1995), the United States Supreme Court ruled that it was unconstitutional for race to be a controlling factor in the failure to award a government contract to the low bidder, a white-owned company. On March 1, the Justice Department issued an advice memorandum to federal agencies regarding how they should comply with the Adarand decision. According to the memo, "federal programs that use race or ethnicity as a basis for decision making must be strictly scrutinized to ensure that they promote compelling governmental interests, and that they are narrowly tailored to serve those interests." The memo states that although federal agencies may consider race or ethnicity to promote diversity in the award of government contracts, "the use of racial and ethnic criteria should not be the only means by which the agency obtains diversity . . ." The memo stated that numerical goals for minority participation in the

award of government contracts would not conflict with Adarand if the decision making to achieve diversity is not based on race.

DID YOU KNOW . . .

. . . that in an effort to broaden its appeal to women, the International Brotherhood of Teamsters is considering changing its name? Concerned that the name implies that it is a union for men, only, the Teamsters is considering changing its name to the International Teamsters Union or the International Brotherhood and Sisterhood of Teamsters.

. . . that six former employees of the Seattle Supersonics professional basketball team were awarded over $13 million in punitive damages for overtime pay violations? The case, Lambert v. Ackerley (Feb. 29, 1996), was brought pursuant to Washington state law. Employees complained that not only did the employer refuse to pay them overtime, the employer also told the employees that it "doesn't care what the laws are." After employees continued to raise the issue, all six were terminated and asked to sign a release. The amount of damages for back pay was doubled because of the willfulness of the employer's behavior. The employees also prevailed in a claim of outrage and fraudulent misrepresentation.

. . . that several Democratic Senators have proposed to increase the minimum wage to $5.15 per hour? The proposal is tagged as amendments to other pending legislation. One of the supporters, Senator Edward Kennedy, stated that "fewer than a third of minimum wage workers are teenagers. Sixty-nine percent are adults." According to Kennedy, there are five to seven million adults currently working at the current minimum wage of $4.25 per hour.

. . . that a court ruled that even though a disabled employee violated the company's absenteeism policy, the employer may have violated the ADA if it improperly considered the employee's disability in the application of the attendance policy? Fritz v. Mascotech Automotive Systems Group, Inc., (D.Ct.Mich., Feb. 13, 1996). The employee had a history of diabetes, which he disclosed during his initial hiring interview. The employee stated that he would be able to work 56 hours a week. Due to his disability, he was late 14 times during his first month of employment. His supervisor fired him, but the personnel department reinstated him and requested medical confirmation of his need for time off. His absences continued, and he was told that lateness or tardiness due to disabilities would not be counted against his attendance record. At the time of his termination, he was totally absent for 13% of all working days and partially absent for over 30% of all working days. The employee was told he was terminated due to a reduction in force and not because of his absenteeism. In denying the employer's motion for summary judgment, the court stated that the employee may be able to show that the employer could have accommodated his disability by a flexible schedule, such as permitting the employee to arrive to work late and remain at work late, as the employee proposed.

v HEALTH LAW SUPPLEMENT v

THE UFCW CONTINUES ORGANIZING FOCUS ON BEVERLY ENTERPRISES NURSING HOMES

Seventy-two hundred (7,200) employees of Beverly Enterprises' nursing homes are represented by the United Food and Commercial Workers and Service Employees International unions. Several contracts at Beverly facilities throughout the country are subject to renewal in 1996. The unions have made national patient care concerns a primary focus at the bargaining table. According to the unions, proposals to improve the quality of patient care will be presented at every negotiation. These proposals will include increasing the staffing levels, providing for a patient care committee that includes employees, providing for greater employee training on rendering care, health regulations and disability regulations, and the establishment at every Beverly facility of a safety and health committee involving employees. The unions stated that patient care proposals are "strike issues" during 1996.

According to the UFCW, Beverly's nursing homes in Alabama were cited 416 times during a three-year period for failing to meet patient care standards. The unions also state that "for the care givers the quality of care is the number one issue in collective bargaining." Furthermore, "the appalling pattern of violations that exist in Beverly homes nationwide raise questions for residents and their families about

Beverly Enterprises' ability to provide even basic care; and for taxpayers, who provide nearly 80 percent of its revenues, as to whether they are getting what they paid for."

v PUBLIC SECTOR SUPPLEMENT v

IS IT CONSTITUTIONAL TO TERMINATE SUBCONTRACTORS WHO SUPPORT AN ELECTED OFFICIAL'S OPPONENT?

In the case of O'Hare Truck Services, Inc. v. City of Northway, the Supreme Court on March 28th heard oral argument on whether it was constitutional to terminate a subcontractor who refused to contribute to the mayor's reelection campaign. O'Hare Truck Services provided towing services for the city's police department. In 1976, the United States Supreme Court ruled that political beliefs cannot be a basis for terminating a non-policy-making, nonconfidential governmental employee. However, this case involves a contractor, not an employee. Arguing in favor of the mayor's decision, the city claims that the mayor should have the right to limit contracts to only those who support the mayor's administration. Stating that political patronage has been a privilege of government for well over 200 years, the city also argued an elected official should be able to reward his or her supporters without violating the First Amendment.

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.

Robert L. Beeman, II	205/323-9269
Brent L. Crumpton	205/323-9268
Christopher S. Enloe	205/323-9267
Richard I. Lehr	205/323-9260
David J. Middlebrooks	205/323-9262
R. David Proctor	205/323-9264
Steven M. Stastny	205/323-9275
Albert L. Vreeland, II	205/323-9266