EMPLOYMENT LAW BULLETIN

The Newsletter of

LEHR MIDDLEBROOKS PRICE & 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 4 *April 1996*

TO OUR CLIENTS AND FRIENDS:

It is our pleasure to introduce you to Terry Price, our new partner, who joins the firm after several years as a partner with an Atlanta labor firm and, prior to that, as a trial attorney for the United States Department of Labor. Terry is originally from Fairfield, Alabama, and graduated from Columbia University and the University of California at Davis Law School, where he was a member of the Law Review. Terry's practice is focused primarily on litigation defense and employee benefits issues. We welcome Terry, his wife, Valerie and their son, Terry Jr. to the firm and back to Birmingham.

Terry will be the featured speaker at our next complimentary Client Breakfast Briefing, scheduled for June 7, 1996, at the Sheraton-Perimeter Park South in Birmingham. Terry will focus on hot issues in employee benefits, with particular attention to disputes over benefits claims. The briefing will begin at 7:30 a.m. and conclude at 9:00 a.m. Please confirm your plans to attend the briefing by returning the reservation form attached to this newsletter.

HOW DO JURIES EXPECT EMPLOYERS TO TREAT EMPLOYEES?

This subject was reviewed with attorneys recently by Dan Gallipeau of Dispute Dynamics, Inc. According to a survey Gallipeau conducted of potential jurors:

- < 74% believe that employers should give employees at least one warning before termination, be sure the employee understands the problem, and work with the employee to try to improve.
- < 57% of those surveyed stated that an employee's performance evaluation was the best evidence of an individual's job performance.
- < 90% of all potential jurors believe that a company is negligent if it does not document unsatisfactory job performance.
- < 74% of potential jurors believe that companies are less ethical today than they were twenty years ago.
- < 88% of all potential jurors agree that companies should be able to fire poorly performing employees.

According to a recent survey, approximately one out of six working Americans has been touched in some manner by corporate downsizing. Some of these individuals may be jurors in your case, and will bring with them to trial impressions, values and attitudes based upon their personal experiences. They will expect you to have treated the plaintiff fairly; in practical terms, they will expect a performance appraisal that accurately describes perfor-mance and is not inconsistent with the reasons for termination, some warning that the employee's job was in jeopardy and that provided the employee an opportunity to improve, and documentation of your actions.

STATE COURT RULES THAT WORKERS' COMPENSATION IS EXCLUSIVE REMEDY FOR AN EMPLOYEE'S SEXUAL HARASSMENT CLAIM

A general principle in workers' compensation law is that workers' compensation is the exclusive remedy for an employee who has suffered a job-related injury. Does that apply if the "injury" is emotional in nature due to harassment? Yes, ruled the Wisconsin Court of Appeals on March 5, 1996, in the case of Byers v. Labor and Industry Review Commission.

Byers became involved in a consensual sexual relationship with a fellow employee. She terminated the relationship after her husband became aware of it. Her companion, distraught at the end of the relationship, reacted by following her, rubbing up against her and writing notes to her. Even a restraining order did not stop the rejected lover's overtures.

Byers eventually sought psychological counseling and filed harassment and workers' compensation claims against the

company. An Administrative Law Judge dismissed the harassment claim, ruling that the workers' compensation law provided the exclusive remedy for her workplace injury. According to the appeals court, the injury claims were identical. Wisconsin workers' compensation law includes compensation for mental or emotional injury suffered at work. Therefore, ruled the court, the injuries inflicted on Byers by a fellow employee were covered exclusively under the Workers' Compensation Act. If the injuries were caused by an agent of the employer, such as the supervisor, then, according to the court, the workers' compensation exclusivity principle would not apply.

IMPROPER NOTICE MAY VIOLATE FMLA, RULES COURT

Employees are entitled to take up to 12 weeks of leave under the Family and Medical Leave Act. Reinstatement rights under the FMLA terminate after 12 weeks. According to a federal court in Pennsylvania, however, a generous employer providing for leave beyond the FMLA may violate the FMLA if it does not advise the employee that reinstatement rights terminate after 12 weeks. In Fry v. First Fidelity Bancorporation (E.D.Pa., Jan. 30, 1996), an employee was not reinstated to her former job upon completion of her 16-week medical leave of absence. The employer's policy provided that the first 12 weeks of that 16-week absence were treated as FMLA covered. However, the employer did not notify the employee that at the end of 16 weeks the employee was not entitled to reinstatement to the same or equivalent position. The employer offered the employee a lower-paying job. The employee claimed that the employer had a duty to notify her that her reinstatement rights terminated at the end of the FMLA part of the 16-week leave. The court ruled that an employer is obligated to notify an employee of the impact of the employer's leave policy on the employee's FMLA rights. Otherwise, employees may unknowingly forfeit protection under the FMLA, such as reinstatement after 12 weeks. In this case, the employee assumed that full reinstatement rights would occur after 16 weeks.

EMPLOYER NOT RESPONSIBLE FOR ACCIDENT CAUSED BY INTOXICATED EMPLOYEE WHO WAS SENT HOME

An employee arrives at your premises unfit for work, impaired due to the use of drugs or alcohol. Based upon your observation of the employee, you send the employee home. The employee gets back into his/her vehicle, and on the way home is involved in an accident in which the passenger of another vehicle is seriously hurt. Is your organization responsible in any manner for the consequences of that employee's actions? No, ruled the court in Riddle v. Arizona Oncology Services, Inc. (AZ.Ct.App., March 8, 1996). In holding that the employer was not responsible for damages caused by this accident, the court stated that the employee's intoxication was not "caused, contributed to or condoned" by the employer. Although the risk of an accident was foreseeable, the court declined to rule that the employer should have taken action to prevent the employee from driving.

This case is distinguished from circumstances where an employee may become impaired because of too much alcohol consumed at an employer function. In that situation, an employer may have legal duty to prevent the employee from driving.

ERISA DOES NOT SHIELD EMPLOYER FROM FRAUD LITIGATION, RULES U.S. SUPREME COURT

The case of Varity Corp. v. Howe (Mar. 19, 1996) involved former employees who sued their employer for fraud over issues concerning health insurance and other employee benefits. The employer, Massey-Ferguson, merged with Varity Corporation to form a new company, Massey Combines Corporation. Plan participants of Massey-Ferguson were encouraged by Varity to transfer to the new subsidiary. The subsidiary failed. Prior to the transfer, employees were shown videos and provided with other information that touted the prospects of Massey Combines Corporation. Retiree health care benefits were cut off due to the bankruptcy of the Massey Combines Corporation. Varity argued that its communication to employees and retirees about the new company was not in its role as a fiduciary, but rather as an employer and, therefore, the retirees' exclusive remedy was against the plan administrator, which of course was the bankrupt company. The jury awarded the retirees $46 million in damages. According to the Supreme Court, an employer cannot "participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense." Therefore, the beneficiaries were entitled to bring a claim of fraudulent misrepresentation, and the employer was not protected by ERISA against such a claim.

AFL-CIO SUMMIT REVIEWS UNION ORGANIZING STRATEGY

Several union leaders and consultants met from March 31st through April 2nd to discuss ways to invigorate union organizing. AFL-CIO member unions need to add 300,000 new members a year just to stay even with the previous year's membership number, because of the losses each year in total membership. A one million member increase will increase overall union membership by only one percent. According to AFL-CIO President John Sweeney, unions have to break the patterns of how they have organized during the past twenty years. The following were the key points upon

which unions reached a consensus to increase their organizing successes:

- < Unions need to spend more money on researching employee attitudes toward unions by race, gender, age and region.

- < Unions should make a stronger connection between negotiations and organizing. For multi-location employers, unions should negotiate a "neutrality" provision by which the company agrees not to campaign against the union at non-union locations.

- < Unions should focus on major employers, rather than trying to organize smaller bargaining units. Unions should take a long-term view toward organizing a company's employees.

- < Unions should establish a presence in the community before organizing. Rent space near the organizing target; conduct open houses for community leaders; become involved in community affairs.

- < Unions should release information to the community about the company they are organizing, covering such matters as environmental, safety and equal employment opportunity concerns. Place the company on the defensive in the community.

REASONABLE ACCOMMODATION DOES NOT INCLUDE ACCEPTING VIOLENT BEHAVIOR, RULES COURT

The case of Williams v. Widnall (10th Cir., Mar. 26, 1996) involved the termination of an alcoholic who threatened his supervisor and co-employees. Because alcoholism is a disability under the law, the employee argued that the employer was required to tolerate his behavior. Rejecting that, the court stated that "you cannot adopt an interpretation of the statute which would require an employer to accept egregious behavior by an alcoholic employee when that same behavior, exhibited by a non-disabled employee, would require termination." The court concluded that the existence of a disability does not protect employees from the consequences of their inappropriate behavior.

DID YOU KNOW . . .

. . . the FMLA does not cover an employee's absence if a family member dies, ruled the court in Brown v. J.C. Penney Corporation, (D.Ct.S.Fla., Mar. 5, 1996)? An employee was on FMLA leave to care for his terminally ill father. He did not return to work until one month after his father died. He was assigned to a different job, which he refused to accept, and then was terminated. The court ruled that the FMLA applies to taking care of the living, and does not cover time off after a family member has died.

. . . the Senate Labor and Human Resources Committee on April 17, 1996, approved the TEAM Act (S. 295) by a 9-7 vote? This Bill would amend the National Labor Relations Act to provide employers greater protection in establishing employee committees. Senator Kennedy, who voted against approving the Act, attempted to thwart the approval by proposing broad amendments to the National Labor Relations Act that would increase the opportunities for unions to organize.

. . . that an employer has the right to be wrong in terminating an employee for making death threats, ruled the court in Roche v. John Hancock Mutual Insurance Co. (1st Cir., Apr. 16, 1996)? The company terminated an employee after it became convinced that the employee was responsible for making death threats toward a senior executive. The employer saved the voice mail message which contained the threats. Other employees, after listening to the message, identified a particular employee as the one who made it. The employee was arrested and subsequently acquitted of criminal activity. After his acquittal, he sued his employer, claiming false arrest, false imprisonment, wrongful discharge and malicious prosecution. The court found that the company conducted a thorough investigation prior to taking its action, and that the employer's decision was reasonable based upon what it knew, even if the employee was subsequently acquitted.

. . . a jury ordered a law firm to pay $2.5 million for discrimination against an associate attorney? The case of Mungin v. Katten Muchin & Zavis (D.Ct.DC., Mar. 22, 1996) involved a black associate attorney who claimed that he was discriminated against because of his race. He was able to show that the firm excluded him from department meetings, treated him less favorably than similarly situated white associates, and was not forthright about problems with his performance. A jury awarded $1 million in compensatory damages and $1.5 million in punitive damages. The firm said that it did not meet with the associate to review his performance because he "slipped through the cracks."

. . . EEOC litigation activity is down? During fiscal year 1995, the EEOC filed 322 lawsuits, compared to 373 lawsuits during fiscal year 1994 and 398 during fiscal year 1993. The EEOC recovered $18 million from lawsuits filed during 1995, compared to $29.2 million for 1994 and $34.4 million for 1993. Considering that the EEOC has an inventory of over 100,000 discrimination charges, these statistics indicate that employers with charges of discrimination pending have about a one-third of one percent risk that the EEOC will file suit based upon that charge.

v HEALTH LAW SUPPLEMENT v

EMPLOYER DOES NOT VIOLATE NATIONAL LABOR RELATIONS ACT BY TERMINATING EMPLOYEES WHO COMPLAINED TO PATIENTS

Employees at the Aroostook County Regional Ophthalmology Center complained about their work schedules in a manner that patients clearly heard. The employer had a written policy that provided "all grievances are to be discussed in private with the office manager or physicians. It is totally unacceptable for an employee to discuss any grievance within earshot of patients." The day after the same employees voiced dissatisfaction regarding a change in their schedule, the employer terminated them. The employees complained that the employer violated the National Labor Relations Act, because the employees talked about working conditions and did so in a corrective manner. In rejecting the NLRB decision that there was such a violation, the court of appeals stated that "such grousing in the presence of patients is plainly inconsistent with the reasonable demands of caretaking, and, therefore, it cannot constitute protected activity [under the National Labor Relations Act]." Aroostook County Regional Ophthalmology Center v. NLRB (D.C.Cir., Apr. 12, 1996).

v PUBLIC SECTOR SUPPLEMENT v

MANDATORY RETIREMENT OF POLICE OFFICERS VIOLATES AGE ACT, RULES COURT

The case of EEOC v. State of New York and New York State Police (D.C.N.N.Y., March 25, 1996) involved 48 police officers who were required under state law to retire at age 55 if they were troopers and 62 if they worked as detectives. The state of New York agreed to settle this case for $1.2 million. Mandatory retirement for law enforcement officers could be permitted under the ADEA, provided the employer substantiates that the retirement age is a bona fide occupational qualification. In such a situation, the employer has the burden of proving that employees above a certain age group would not be able to perform the job requirements. In this case, the retirement ages that were adopted by the State of New York were arbitrary and not supported by medical evidence. There is a proposal currently pending in Congress to amend the ADEA to give states latitude to set mandatory retirement ages for law enforcement employees. However, until legislation is passed, actions such as those of the state of New York are illegal.

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
Terry Price	205/323-9261
R. David Proctor	205/323-9264
Steven M. Stastny	205/323-9275
Albert L. Vreeland, II	205/323-9266

E E E E E E E E E E E E E E E

---------- (Detach and Return) ----------

To: Allison Swift
LEHR MIDDLEBROOKS PRICE & PROCTOR
2021 Third Avenue North, Suite 300
Birmingham, AL 35203

Or Fax to: 326-3008

Please reserve me a seat at the Client Breakfast Briefing scheduled for June 7, 1996, at the Sheraton-Perimeter Park South.

_____NAME

_____COMPANY

Others from my company who wish to attend:

_____

_____