EMPLOYMENT LAW BULLETIN

The Newsletter of

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TO OUR CLIENTS AND FRIENDS:

The United States Supreme Court in the case of BMW of North America v. Gore, on May 20, 1996 ruled unconstitutional an award of punitive damages that was 500 times greater than the actual damages. The case involved a doctor who purchased a new BMW from a Birmingham, Alabama dealer. Unknown to the doctor, the paint job to the new BMW had been retouched at some point due to minor damage while in transit from Germany. It was BMW's policy not to disclose damage that was less than 3% of a car's value. The amount of damage to Dr. Gore's car was $601.34, less than 3% of its value and thus BMW did not disclose the repainting to Gore. He claimed that the car was worth $4,000 less because of the retouching. An Alabama jury awarded him $4 million in punitive damages, which they calculated based upon $4,000 per car, multiplied by one thousand cars in the United States that had been retouched since 1983. The Alabama Supreme Court reduced the amount of punitive damages to $2 million.

Writing for a 5 to 4 court, Justice John Paul Stephens ruled that the $2 million award was "grossly excessive", and therefore violated the due process clause of the Fourteenth Amendment. According to Justice Stephens, BMW's actions were not reprehensible, the ratio of punitive to actual damages was too severe, and there was no fair warning of the penalty that was imposed. In a separate opinion, agreeing with the majority, Justice Breyer wrote that "the standards Alabama courts applied here are vague and open ended to the point where they yield arbitrary results."

Although this case involved a consumer transaction and not an employment issue, we anticipate that certain due process issues in the BMW of North America case can be applicable to employment issues. Hopefully, employers will continue to implement and adhere to those employment practices and philosophies which will help them to avoid facing a situation where they must raise an argument that damages awarded against them are excessive.

EMPLOYER VIOLATES ADA BY RELYING ON SUPERFICIAL MEDICAL OPINION

The case of EEOC v. Texas Bus Lines, (D.Ct.S.TX, April 23, 1996) involved an obese applicant for a position as a van driver. The applicant, Arezella Manual, interviewed satisfactorily, provided references that checked out and successfully passed a driving test. She then received a conditional offer of employment, which depended upon the company's satisfaction with the results of a physical examination required by the Federal Motor Carrier Safety Regulations.

The examining physician spent approximately five minutes with Manual. He marked her "normal" in each category on the medical evaluation form. He conducted no mobility or agility tests. After observing Manual walking to the examination room, the doctor failed to give her a medical examiner's certificate required under the DOT guidelines. Therefore, Texas Bus Lines withdrew its conditional offer of employment to her, relying on the physician's opinion. The court agreed with the EEOC's position that under the ADA the employer was required to follow-up the doctor's results with inquiries to determine whether a thorough examination was conducted. According to the court, "The ADA would have little meaning if employers could blindly accept a doctor's opinion, no matter how baseless or contrary to law it is." The court added that "if an employer's relationship with the physician who conducts a medical examination results in a discriminatory rejection of applicants protected by the

ADA, the employer is liable for a violation of the statute despite the involvement of the third party, the doctor, with whom the employer had a professional arrangement."

Employers should remember that obtaining a medical opinion, whether as part of a conditional offer or when conducting a reasonable accommodation analysis, does not alone shelter an employer from ADA risks. The employer must be sure that the medical inquiry or reasonable accommodation analysis is thorough.

"UNION SUMMER" NOW PLAYING AT A CITY NEAR YOU

The AFL-CIO announced a "union summer" internship program for 1,000 students to assist in union organizing efforts. According to AFL-CIO President John Sweeney, "We intend to harness the energy of young Americans of conscience for the cause of working people. At the same time they are advancing workers' rights, they will be learning firsthand that the labor movement is at the heart of the struggle for social justice in America."

The "union summer" program is intended to model itself after the Freedom Summer of 1964 coordinated through the civil rights movement. The "union summer" internships will last for three weeks and will occur in June through August in Akron, Atlanta, Boston, Charleston, South Carolina, Chicago, Denver, Detroit, Washington, D.C., Miami, New Orleans, Seattle and St. Louis. Additionally, particular emphasis will be placed on California cities, with plans for "union summer" interns to be placed in Los Angeles, Oakland, Sacramento, San Diego, San Jose and Watsonville. The interns will receive a stipend of $210 per week plus free housing and training. In addition to assisting with organizing drives, the interns will spend time in the South assisting with voter registration. According to the AFL-CIO, "union summer" "is an investment in the next generation of Americans who are committed to workplace justice."

EEOC ISSUES GUIDELINES ON MAY 24 TO ADDRESS USE OF "TESTERS"

Testers are individuals who apply for jobs they have no intention of accepting. The testers represent both genders and different races and age groups, to see how one tester is treated by an employer in comparison to other testers. If there is discriminatory treatment of the testers, whom the employer believes are bona fide applicants, the tester then files a charge of discrimination with the EEOC.

The EEOC on May 24, 1996 issued enforcement guidelines regarding the use of testers. According to the EEOC, a tester who is subjected to discrimination may seek financial and injunctive relief, and punitive damages. They would not be entitled to reinstatement or back pay, since they had no intention of working anyway. Furthermore, the Commission said that it may use the information obtained by the testers as a basis for pursuing a potential class action claim against the employer.

"SIGN A MANDATORY ARBITRATION AGREEMENT OR YOU ARE FIRED": UNFAIR LABOR PRACTICE, ACCORDING TO THE NLRB

The case of Bentleys Luggage Corp., (May 16, 1996) involved an employee, Robert Letwin, who was terminated for refusing to sign an agreement that would require him and the company to submit any disputes regarding each other to mandatory arbitration. Letwin filed a civil suit against the employer and also an unfair labor practice under the National Labor Relations Act. The National Labor Relations Board issued a complaint against the employer, stating that such a mandatory arbitration agreement would require the individual to forego his right to bring an unfair labor practice charge to the NLRB. According to the Board, insisting that an individual sign an agreement to forego bringing a complaint to the NLRB is inherently an unfair labor practice.

The company and NLRB settled the charge, where the company did not admit a violation of the National Labor Relations Act. However, the company agreed to notify its employees that they would no longer be required to arbitrate as a condition to exercising their rights under the National Labor Relations Act.

This case is an example of a theory an individual may pursue if terminated for refusing to sign a mandatory arbitration agreement. The outcome in this case does little to affect the momentum employers have gained in requiring employees to sign such agreements. However, it is indicative that those who are terminated for refusing to sign such agreements will develop "fight back" theories.

LABOR DEPARTMENT PROPOSES TO CHANGE AFFIRMATIVE ACTION RECORD KEEPING AND INSPECTION PROCESSES

According to a proposal released by the Labor Department on May 21, 1996, OFCCP plans to change employer record keeping requirements and also the manner in which OFCCP conducts audits. Currently, rules do not specify how long an employer must keep records about affirmative action plans. Under the proposed rules, there would be a two year time limit. Furthermore, OFCCP would be entitled to access to a contractor's premises for reasons other than just compliance reviews, such as investigations of specific complaints and also compliance evaluations.

The term "compliance evaluation" would not be limited to a complete compliance review. In addition to the compliance review, it could include an off-site review of records, a "compliance check" to see if the contractor has properly maintained records, or a "focused review" on a particular aspect of the contractor's organization or employment practice. Contract debarment could range from a minimum of six months to indefinite, with the debarment ending when there is a determination that the employer is complying with all affirmative action requirements. No action will be taken on the proposed rule for sixty days, during which time the Department of Labor will receive comments about the rule.

DID YOU KNOW . . .

. . . that according to Bureau of National Affairs, median wage increases for the first five months of 1996 averaged 2.8%, compared to 3% last year? Manufacturing increases were 2.6%, which was the same a year ago, construction increases were 3%, which was also the same last year. The non-manufacturing, non-construction median increase was 3.5%.

. . . that a poll released on May 15 by Yankelovich Partners stated that three out of four of those surveyed believed a company should consider its responsibilities to the community before profits? Over half of all those surveyed believed that a company owes its first obligation to its employees and its next obligation to stockholders. According to those who conducted the survey, "the public believes that companies should run their business in a way that factors in the needs and concerns of the workers, as well as their local communities."

. . . that the District of Columbia Court of Appeals on May 10, 1996 refused to reconsider its decision nullifying President Clinton's Order to bar government agencies from using contractors that hire replacement strikers? Chamber of Commerce v. Reich. On February 2nd, a three judge panel of the District of Columbia Court of Appeals overturned the executive order, concluding that it was preempted by federal law. The full Court of Appeals refused to reconsider that decision, characterizing certain Clinton administration arguments as "far fetched."

. . . that 62% of union members oppose organized labor using their dues for political purposes? This is according to a study released on April 30th by Americans for a Balanced Budget. The AFL-CIO announced that it was raising $35 million to attempt to unseat seventy-five Republican Congressmen in the November, 1996 elections. In order to pay for this, the AFL-CIO has asked its seventy-nine unions to pay 15¢ per month, per member for a twelve month period. According to the poll, 62% of union members oppose the use of their money for political purposes. If the presidential election were held today, the poll showed that 50% of those surveyed would vote for President Clinton, 20% for Robert Dole, 11% for Ross Perot and 19% were undecided.

. . . that according to the Bureau of Labor Statistics, there were 1,544 mass layoffs during the last three months of 1995, causing a job loss of 270,598 workers? Manufacturing accounted for 64% of the job loss. The largest layoffs occurred in California, Ohio, Illinois and Pennsylvania.

. . . that the EEOC on May 16, 1996 was ordered to pay $450,000 to a white male EEOC attorney who claimed he was discriminated against because of race and gender? Terry v. EEOC, (D.Ct.W.TN). The employee, a long term EEOC attorney, complained that he was passed over for promotion ten times between 1984 and 1992 because of his race and gender. Terry alleged that "the EEOC discriminates against white males generally, that he has been a victim of such discrimination and the victim of retaliation for bringing EEOC complaints" against the Commission. Although Terry was highly rated by the EEOC, he was passed over for several promotions to management positions.

v HEALTH LAW SUPPLEMENT v

HOSPITAL SETTLES DISCRIMINATORY PREGNANCY LEAVE POLICY CLAIMS

The case of EEOC v. St. Elizabeth Hospital of Chicago, Inc. (D.Ct.N.ILL, May 7, 1996) involved a lawsuit claiming that the hospital leave policies violated the Pregnancy Discrimination Act. The hospital policy prohibited first year employees from receiving any type of sick leave. This included individuals who were pregnant or had pregnancy related conditions. According to the lawsuit, this policy had a discriminatory impact on pregnant employees based upon gender. The hospital settled the case for $30,000 without an admission of liability, but also revised its policy to permit child care and pregnancy related leave for first year employees who work more than twenty hours a week. According to the EEOC, "we hope that these cases provided sufficient incentive to other employers who have similar sick leave policies to bring them into compliance with Title VII."

On the legislative front, several unionists rallied on May 10, 1996 in Washington, D.C. in support of the Patient and Health Care Professional Protection Act. This bill would propose to set staffing levels for health care facilities, provide a hot line for patients to address complaints against the health care providers and provide whistle-blower protection for health care employees who identify health care problems at the work place.

v PUBLIC SECTOR SUPPLEMENT v

EMPLOYER REQUIRES HIGHER HEALTH CARE PREMIUMS FROM SMOKERS

Effective July 1, employees for the State of South Dakota who smoke will be required to pay more in health care premiums than non-smokers. Each smoker will pay a $25 per month surcharge. Approximately 4,500 of the state's 23,000 employees smoke. The surcharge will also apply to employee spouses who smoke.

According to the state, it costs approximately $500 to $1,000 per year in additional medical costs per smoker. Therefore, each smoker is paying only an additional $300 for those costs. If the costs increase, the state plans to increase the surcharge. Although state law forbids discrimination based upon off-the-premises use of tobacco products, the law does not prohibit employers from charging a higher premium to smokers compared to non-smokers. The state is self-insured. The State Employees Association has not taken a position on the issue, because those of its members who do not smoke believe that smokers have received a free ride, and those who smoke believe that they have been unfairly singled out.

Note that this action would not conflict with the American's with Disabilities Act. However, because several states have enacted legislation prohibiting discrimination against employees who smoke or use other tobacco products, employers should carefully review the implications of the law in their state before requiring such a surcharge.

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

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