EMPLOYMENT LAW BULLETIN

The Newsletter of

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TO OUR CLIENTS AND FRIENDS:

The recent case of Payton v. New Jersey Turnpike Authority, (NJ Sup. Ct. June 28, 1996) raises an important issue about a plaintiff obtaining copies of an employer's investigation file on a sexual harassment complaint. Payton was employed as a maintenance clerk. She filed a sexual harassment complaint alleging that the two highest ranking administrators in her department engaged in various forms of hostile environment sexual harassment. She sued, and during the course of the litigation, her attorneys requested documents relating to the employer's investigation of her complaints. The employer refused to provide those documents, claiming that they were protected by the attorney-client privilege and the self-critical analysis privilege. The lower court agreed with the employer. The appeals court, however, reversed the lower court and required the employer to produce the documents.

According to the appeals court, in a sexual harassment claim, an employer's internal response to the investigation is critical to the question of whether the employer took prompt, remedial action. In addressing concerns about the privacy interests of those witnesses who were interviewed, the court of appeals stated that their privacy interests should be protected, provided that such protection does not interfere with the plaintiff's ability to prosecute her lawsuit. The court also summarily rejected the employer's self-critical analysis argument, which is a claim that an internal review of procedures or a process regarding an employer's compliance with legal standards should not be discovered by the other side. The policy reason behind the doctrine is that if those internal documents were discovered, employers would be less inclined to conduct compliance reviews. In this case, however, the information involved the results of an investigation, not a self-critical analysis. Finally, the court said that the attorney-client privilege should not be presumed to preclude the release of the results of the investigation to the plaintiff. The appeals court ordered the lower court to review the documents to determine which, if any, involved the attorney in his professional capacity.

Do not assume that because an investigation is labeled confidential or if the investigation is conducted with the advice or even involvement of counsel that the investigation necessarily cannot be discovered by the other side. Furthermore, often there are circumstances where the employer wants to use the documented investigation to substantiate its position that the employer took prompt, remedial action. If the employer refuses to provide that report to the plaintiff, the court may likely preclude the employer from presenting evidence of its prompt, remedial action.

EMPLOYER STUCK WITH $192,000 MEDICAL BILL FOR DROPPING EMPLOYEE FROM INSURANCE PLAN

Marvin Stephens was employed at the Panhandle 76 Truck Stop in Berkley County, Virginia. Diagnosed with a severe liver ailment, Stephens was notified by the University of Virginia Medical Center in December 1990, that a liver transplant was available for him immediately. Stephens left work and checked into the hospital that day. The employer on the same day noted in Stephens' personnel file "quit-disability". Stephens had requested a medical leave of absence, to which the employer did not respond. Stephens never received notification from the employer that he was terminated.

In March 1991, the company terminated its group health plan for another plan and Stephens' coverage ceased. He was never notified of this cessation in coverage, and presumed that he was still covered under his employer's health insurance plan. One month later, Stephens returned to work on a part-time basis for a few months, was terminated, and then was rehired for another six months before he was again terminated due to illness. His health insurance coverage was never restored, even when he returned to work.

The court ruled that under ERISA, the law is violated when a fiduciary, such as the employer in this case, either prevents or interferes with an employee's receipt of health insurance benefits. Because the employer failed to notify Stephens that his benefits were terminated, and did not include Stephens on the company's new insurance program, the court held that the company was responsible for paying all of Stephens' medical bills during the time he lacked insurance, which totaled approximately $123,000. The court also ordered the employer to pay a $4,000 penalty and $28,000 in attorney fees. <u>Shade v. Panhandle Motor Service Corporation</u>, (4th Cir. July 11, 1996).

The court said that the employer twice erred in its treatment of Stephens, first in noting that he had been terminated in December 1990 and then failing in March 1991 to notify him of the change in insurance plans and to include him on the new plan. The employer claimed that the error was "inadvertent." It may have been, but this case is a good example of how costly to an employer an inadvertent error can be when dealing with employee health insurance.

NLRB DECISIONS ENHANCE UNION ORGANIZING EFFORTS

Organized labor has been unsuccessful in influencing Congress to change the National Labor Relations Act to provide for greater opportunities to unionize employers. Whatever despair labor feels toward Congress is matched by labor rejoicing as the NLRB continues to decide cases in a manner that enhances labor's organizing opportunities. The first case, <u>52nd Street Hotel Associates d/b/a/ Novotel New York</u>, (July 8, 1996) involved a situation where shortly before employees voted in a union election, the union filed a wage and hour lawsuit on the employees' behalf, told the employees that the legal services were for free, and that each employee could gain up to $30,000 in back pay if the union won the lawsuit. The union received seventy votes on election day, the employer received fifty votes and ten ballots were challenged. The employer argued that this union campaign tactic led employees to believe that if they vote for the union, they have a chance to win $30,000. Since paying employees for their votes is illegal, the employer argued that there was no difference in using the courts to accomplish the same result. According to the Board, the union has the right under the First Amendment of access to the court and the same right under the National Labor Relations Act.

The NLRB reversed a thirty year employer campaign method in the case of <u>Kalin Construction Company</u>, (July 8, 1996). On election day, as employees walked to the polls, their supervisors gave employees an envelope with two checks and a flyer. One check showed the employees what their paychecks could become in the future if the union won, which was a check for less than what the employees usually received. The second check represented the value of employer paid benefits. The literature distributed with the checks told employees that those benefits could be lost if the union won. The Board ruled that issuing two checks on the day of the election under these circumstances was an unlawful threat to employees that they would lose benefits if the union won. Additionally, the Board adopted a uniform rule that now applies to all campaigns. According to the Board, there may be no changes in an employee's paycheck where the change to the check is intended to influence an employee's vote, if the change is communicated to the employee within the twenty-four hour period before the election polls open and until the election polls close. Thus, an employer still may distribute separate pay checks as in the <u>Kalin Construction Company</u> case, but not within twenty-four hours of the election.

COURT RULES THAT EMPLOYER "REGARDED" EMPLOYEE MEDICAL CONDITION AS A DISABILITY, WHICH INVOKED ADA COVERAGE

A recent case addressed a somewhat perplexing issue for employers, which is at what point does their knowledge of an employee's medical status create protection for the employee under the ADA because the employee is now "regarded" as having a disability? Under the ADA, an individual who is not disabled but is "regarded" by the employer as disabled becomes protected from discrimination under the Act. The case of <u>Holihan v. Lucky Stores, Inc.</u>, (9th Cir. June 26, 1996) involved a store manager, Richard Holihan, who had a stellar work record until several employees complained about his hostile behavior and verbal and physical abusiveness toward them. Holihan's superiors met with him and asked him if he had any problems, and offered to him the company's employee assistance program. Holihan said he was not having any problems, but the company transferred him to another store to try to give everyone a fresh start.

During Holihan's first three months at his new store, thirteen employees filed fifty-one complaints with the company about his abusive behavior. Holihan then sought a psychologist through the company's employee assistance program. The psychologist recommended a three month leave of absence, stating that Holihan's behavior was due to "stress related problems precipitated by work." Holihan filed a workers' compensation claim. A doctor on his behalf stated that he suffered from "organic mental syndrome" that left him "partially psychiatrically disabled from his job." There was no evidence that either his original psychologist or his worker's compensation doctor communicated their reports to the company.

The company granted Holihan his leave of absence, but terminated him after he asked for an extended leave of absence. Under the company's policy, he had exhausted the six month leave of absence available. During his leave of absence he worked several hours each week as a real estate agent. When he applied for re-employment and was not hired as a manager (he was offered a position as a cashier), he sued.

The court of appeals stated that Holihan did not have a disability, in that it was not apparent that his illness impaired any major life activity. However, the court of appeals ruled that the trial court was incorrect in granting summary judgment to Lucky Stores, because more evidence should be available to consider whether the company "regarded" Holihan as disabled. The court emphasized the company's asking Holihan if he were having "problems" and advising Holihan to seek assistance with the company's employee assistance program. According to the court of appeals, those inquiries and recommendations to Holihan were enough to at least raise an issue of whether or not the company "regarded" Holihan as disabled.

This case raises a dilemma for employers. The implication of this case is that raising permissible questions to an employee about an employee's physical or emotional well being creates a risk that by doing so, the employer has created protection for the employee under the ADA. It is our assessment that if there is no other evidence to support Holihan's claim that the employer treated him as disabled, then merely asking him how he is feeling and advising that he go to the employee assistance program will be insufficient to create protection under the ADA's "regarded as disabled" definition.

ARBITRATION MAY NOT BE A PANACEA, BUT IT SURE HELPS

The employer in the case of Rojas v. T.K. Communications, Inc., (5th Cir. July 11, 1996) is relieved that it required employees to execute agreements to arbitrate any disputes that the employer and employee may have with each other. The employee was a disc jockey in San Antonio, Texas. She signed an employment agreement that included a requirement to submit disputes with her employer to arbitration under the American Arbitration Association. She alleged that she was sexually harassed, and the employer failed to take prompt remedial action. She also claimed that she was retaliated against by her supervisor for raising harassment complaints. Due to this work environment, she felt compelled to resign and sue. The court of appeals upheld the district court's decision that her claim must be arbitrated, rather than litigated. According to the court, her agreement to submit "any other disputes" with her employer to arbitration is broad enough to include her Title VII claim. In responding to the employee's claim that she really did not have negotiating leverage and the contract was forced upon her, the court held that those are claims that must also be addressed in arbitration.

DID YOU KNOW . . .

. . . that according to the Bureau of National Affairs, wage increases negotiated during the first six months of 1996 averaged 3%? For three year contracts, the increases also averaged 3% in each of the next two years. 56% of those contracts negotiated in 1996 resulted in first year wage increases ranging from 2% to 4%, 13% of contracts provide first year wage increases of up to 2%, and 13% resulted in wage freezes. Only 1% resulted in wage decreases. The remaining 17% involved wage increases in excess of 4%. The region with the highest increases for the first year was New England (3.9%), the Middle Atlantic Region offered the lowest increases (2%). The Southeast and Southwest averaged 2.5% in first year increases.

. . . that on July 18, 1996, the Court of Appeals for the Eighth Circuit overturned the award of $20 million to BE&K Construction Company for illegal union boycott activity? After evidence was heard, the jury concluded that the United Brotherhood of Carpenters and the United Paper Workers conspired to have BE&K removed from a major construction project. However, the appeals court concluded that there was insufficient evidence to support the jury's finding.

. . . that the AFL-CIO has received favorable publicity regarding its "union summer" program and $35 million effort to unseat one hundred Republican members of Congress this November? National newspapers and news magazines featured complimentary stories addressing the AFL-CIO resurgence under John Sweeney, pointing to the political campaign and union summer as examples of a revitalized labor union movement.

. . . that a local union president's bubble burst when he lied about dropping a water balloon on a fellow employee and was terminated? The National Labor Relations Board in the case of <u>Asarco, Inc. v. NLRB</u>, (5th Cir. July 10, 1996) ruled that the employee was terminated because of his role as the local union president. In refusing to enforce the board's decision (which would have required reinstatement and back pay) the court of appeals upheld the employer's decision to terminate the president after he lied about dropping a water balloon on a fellow employee. To rule otherwise, according to the court, "would give to the union president a license to disregard his employer's rules and would leave the employer with no legal recourse to correct an inexcusable wrong."

. . . that on July 23, 1996 a judge in North Carolina enjoined the National Labor Relations Board from conducting any further representation elections involving Perdue Farms, Inc.? <u>Perdue Farms, Inc. v. NLRB</u>, (D.Ct. Enc. July 23, 1996). According to the court, the board is assisting the United Food and Commercial Workers Union in trapping Perdue into a series of elections with the hope that eventually the union will win one of them. The board pushed for elections even after the company raised questions that hundreds of authorization cards were forged at the request of the local union president. According to the court, "the only possible explanation for the board's behavior is the one proposed by the employer: that the NLRB is manipulating its election rules capriciously in order to foster the interests of the United Food & Commercial Workers Union." Therefore, the court ordered that there could be no further elections involving Perdue until the NLRB conducted a proper investigation into the company's charges that authorization card signatures were forged.

. . . that Congress is considering boosting the EEOC's fiscal 1997 budget by $7 million due to its case load? Originally, the House voted to allocate $233 million to the EEOC for fiscal year 1997, the same amount it received this year. However, Congress concluded that the EEOC simply needs more money in order to hire more staff to address its back log. According to the EEOC, fifteen years ago it had 3,390 staff members, compared to 2,813 employees today. Of course, fifteen years ago there was no Americans with Disabilities Act, which at some EEOC offices is as much as one-third of the office's entire case load.

v HEALTH LAW SUPPLEMENT v

<u>COURT RULES THAT NLRB HOSPITAL BARGAINING UNIT RULES DO NOT APPLY TO MERGERS</u>

The NLRB in April 1989 adopted a rule identifying eight classifications of acute care hospital employees for bargaining unit purposes. This rule was upheld by the United States Supreme Court in 1991. The rule presumes that these bargaining units are appropriate, although there are circumstances where the eight classifications approach could be challenged. The case of <u>Presbyterian University Hospital v. National Labor Relations Board</u>, (3rd Cir. July 10, 1996) involved a merger of five hospitals in Pittsburgh. Skilled maintenance employees at one hospital comprised a bargaining unit, while unskilled maintenance employees at the other hospitals comprised separate bargaining units. The hospitals argued that the NLRB violated its own eight classification rule by not creating one bargaining unit. In rejecting the hospitals' argument, the court of appeals stated that the classification of employees in eight different units relates to union organizing initiatives, and does not restrict the board to follow those eight classifications in a merger situation. When there is a merger, the NLRB may still revert to its traditional "community of interests" test to determine which bargaining units are appropriate. According to the court, the fact that the rule does not address mergers "does not prevent the NLRB from considering the actual make-up of various health care entities in order to determine the appropriate number of an employer's facilities to which it must apply the eight bargaining unit categories. Instead, it simply indicates that the rule does not address the issue."

v PUBLIC SECTOR SUPPLEMENT v

$500,000 RETALIATION AWARDED IS EXCESSIVE, RULES COURT

The case of Hetzel v. Prince William County Virginia, (4th Cir. July 11, 1996) concerns a former member of the Prince William County Police Department. She claimed that she was retaliated against after she asserted that she was not promoted because of her gender and national origin. After an eight day trial, the jury concluded that her failure to receive a promotion was not discriminatory. However, the jury concluded that the Police Chief retaliated against her and, therefore, awarded her $750,000 in damages, which the trial court reduced to $500,000. She was also awarded her attorney fees and costs, which totaled $180,000. According to the court of appeals, her retaliation evidence "consisted almost exclusively of Hetzel's own, brief conclusory statement. . . . Indeed, although Hetzel insists that she was devastated and humiliated by Appellants' actions, she has never once seen a doctor, therapist or other professional, or even sought the counsel of a friend . . ." The appeals court said that her damages should be "minimal" for what she claims to be her injuries. The court also concluded that the award of attorneys fees was too substantial compared to the results achieved. The court sent the case back to district court to refigure the damages and attorney fees. According to the court of appeals, "the award of $500,000 was grossly excessive, when compared to the limited evidence presented at trial and would result in a serious miscarriage of justice if upheld."

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