EMPLOYMENT LAW BULLETIN

The Newsletter of

LEHR MIDDLEBROOKS PRICE & PROCTOR

A PROFESSIONAL CORPORATION

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TO OUR CLIENTS AND FRIENDS:

How long must an employer keep a job open for an injured employee, once that employee's FMLA expires? This question was addressed by the Court of Appeals for the Sixth Circuit in the case of Monette v. Electronic Data Systems Corporation on July 30, 1996. In considering this case under the Americans with Disabilities Act, the court held that the employer does not have to keep a position open indefinitely for the injured employee to return to work.

The employee was injured on February 17, 1993, when equipment on a cart that he was pushing fell and bruised his back and shoulder. The employee was absent for the next seven months due to injury, but received full pay and benefits throughout that period of time. In August 1993, the employee sought long-term disability benefits, which were denied. The full pay and benefits to the employee, still on medical leave, terminated as of September 15, 1993. The company informed him that there would be no assurances that he would be re-hired when he was ready and able to return to work.

Monette interviewed for placement elsewhere in the company in October 1993, but did not receive an offer because those who interviewed him felt that he did not have the skills for the jobs and showed a total lack of enthusiasm during the interview. After his termination in November 1993, Monette sued under the Americans with Disabilities Act.

According to the court, it is an undue hardship for an employer to keep a job open indefinitely for an employee to return to work. In this case, the employee on leave told the employer that he was unable to perform his job under any circumstances. Therefore, the employer was justified in filling the position. According to the court:

> Employers simply are not required to keep an employee on staff indefinitely in the hope that some position may become available sometime in the future. Moreover, employers are not required to create new positions for disabled employees in order to reasonably accommodate the disabled individual. Accordingly, Monette has failed to establish that his proposed accommodation [indefinite leave] is a 'reasonable one' under the statute.

The court added that since Monette expressed no desire to return to work and filed for long-term disability benefits, the employer reasonably concluded that the employee did not intend to return to his job.

Note that in several jurisdictions, an employee such as Monette could have pursued a worker's compensation retaliatory discharge claim. That is a factor still to consider, even if the employee has exhausted rights under the FMLA and if under the ADA it is unnecessary to place the employee on indefinite leave. Furthermore, in this case Monette was the only employee in his job class. His absence quickly placed a significant burden on the employer. Although an indefinite leave is not a form of

accommodation generally required under the ADA, employers still need to assess the circumstances on a case-by-case basis because if Monette worked at a job that several others also performed, perhaps that factor would have influenced the court to rule that an indefinite leave was a reasonable accommodation.

"OH BOSS, WON'T YOU BUY ME, A MERCEDES-BENZ...MY FRIENDS ALL DRIVE PORSCHES, I MUST MAKE AMENDS..."

Practical jokes at the workplace can be expensive, as Nationwide Mutual Insurance Company found out on August 2, 1996, when it was ordered to pay a former employee $60,000.00 for that employee to buy two Mercedes-Benz automobiles. The case, Mears v. Nationwide Mutual Insurance Company (8th Cir.), began when the company offered employees prizes in a contest to name the slogan that the company should use at its annual employee convention. One prize was a pair of his and her Mercedes-Benz, and another prize was a trip around the world. After great thought, employee David Mears submitted the slogan, "At the Top and Still Climbing." It was Mears' lucky day, as the company selected his slogan for the 1994 Nationwide convention. The slogan appeared on coffee mugs, name tags, and banners throughout the convention. Eagerly awaiting his opportunity to drive the luxurious Mercedes, Mears became despondent when the company told him that the contest was a joke and gave him a gift certificate instead of the automobiles. Mears sued, claiming that the contest and prizes the company offered to employees was a contract. Therefore, two Mercedes automobiles cost $60,000.00 and that is what the company owed him. A jury agreed with Mears, and so did the Eighth Circuit Court of Appeals.

According to the court, there was sufficient evidence for a jury to conclude that a contract was established to reward the winner of the contest with the two Mercedes-Benz automobiles. The company took no action prior to announcing the winner to suggest that the contest was a joke. When last heard from, Mears was driving his Mercedes, "At the Top and Still Climbing."

EMPLOYEE TAPE RECORDING OF CONVERSATION WITH SUPERVISOR ADMITTED INTO EVIDENCE, EVEN THOUGH SUPERVISOR WAS UNAWARE OF THE RECORDING

Unless prohibited under state law, employees and employers have the right to tape record conversations with each other without the other participant to the conversation knowing or giving permission to the recording. The case of Stringel v. The Methodist Hospital of Indiana, Inc. (7th Cir. July 12, 1996) involved an employee who secretly taped a conversation with his supervisor. However, the tape was no help to the employee, who ended up losing the case on summary judgment and was ordered to pay the employer its costs of defending the employee's appeal.

The plaintiff, Dr. Gustavo Stringel, sued his former employer, claiming that he was terminated in retaliation for filing a charge with the EEOC of race and national origin discrimination. Stringel was hired in 1990 under the terms of a five-year contract that gave either Stringel or the hospital the right to terminate the contract with "good cause." Shortly after Stringel was hired, he claimed that he was harassed by fellow employees because of his heritage and accent. The hospital received complaints about Stringel from hospital employees. They claimed that he was rude, loud and angry toward them, refused to assist other physicians and, in one instance, would not meet with a patient's family members. Stringel taped a conversation with his supervisor which he thought supported his claim that the hospital retaliated against him for filing his EEOC charge. The court concluded that the tape showed Stringel's hostility and combative behavior, and the district court properly ruled that the employer did not retaliate against Stringel for filing his EEOC charge.

In several states, an employee and employer have the right to tape record the other, without the person's knowledge. In other states, such taping is illegal without the consent of the other party. Taping without a person's knowledge may undermine trust in an employment relationship and could be viewed by a jury as a dishonest action. Employers may as a

matter of policy prohibit the tape recording of conversations in general, or require those who tape a conversation to receive the consent of those who are recorded and provide them with a copy of the tape recording. Those employers who prefer a tape recording of a meeting with an employee to substantiate what occurred are usually better served by requesting someone else to be present at the meeting. Although we usually suggest that tape recording without disclosure is inappropriate (and a potential invasion of privacy), there also could be circumstances where such action is appropriate or even necessary. Employers need to consider it carefully before starting to record.

EMPLOYEE DOES NOT HAVE TO SACRIFICE SENIORITY RIGHTS TO ACCOMMODATE ANOTHER EMPLOYEE'S DISABILITY

The general principle under the Americans with Disabilities Act is that reasonable accommodation is an enhancement to the individual with a disability, but accommodation does not require another employee to sacrifice a right or a privilege extended by company policy or a collective bargaining agreement. This point was made by the Seventh Circuit Court of Appeals in the case of Eckles v. Consolidated Rail Corporation (August 14, 1996). Eckles, an epileptic, worked for the company for a four-year period, at various shifts. Occasionally he worked the "grave yard" shift, from 11:00 p.m. to 7:00 a.m. Shortly after he was hired, Eckles had a seizure and was diagnosed with epilepsy. His physician stated that Eckles should be assigned to a day position, only, because working the various shifts and grave yard shift disrupted his sleep patterns and contributed to seizures.

The employer had a collective bargaining agreement with the United Transportation Union. Under that agreement, positions were filled on various shifts according to seniority. Initially, the union honored Eckles' request and placed him on a day shift, which resulted in Eckles jumping ahead of thirty people on the seniority list. The union then withdrew that offer. Ultimately, Eckles was placed in a position consistent with the seniority requirements, but also which resulted in minimum grave yard shift responsibilities. Eckles sued anyway, claiming that he could still be bumped from his new position by a more senior employee.

The federal judge that heard the case and the court of appeals both agreed that the Americans with Disabilities Act does not require that a collectively bargained seniority system be compromised to reasonably accommodate a disabled employee. The appeals court said that the issue was really not one of the disabled employee's rights compared to the employer or union's rights, but rather the rights of the disabled employee compared to the other employees. The court rejected the position taken in the case by the EEOC that the employer and union are required to negotiate a variance from the collective bargaining agreement seniority provisions as a form of accommodation. According to the court, such a position "lacks any foundation in the text, background, or legislative history of the ADA." This case involved a collectively bargained seniority system; however, the principles of this case could also apply to an employer that established policies addressing seniority when filling vacancies, honoring transfer requests, or laying off employees.

FEDERAL MINIMUM WAGE INCREASES BY FIFTY CENTS ON OCTOBER 1, 1996, AND AN ADDITIONAL FORTY CENTS ON SEPTEMBER 1, 1997

President Clinton on August 20, 1996, signed compromise legislation that increases the minimum wage by ninety cents during the next year. The bill also includes an important amendment to the Portal to Portal Act of 1947. Under the amendment, employees who drive company vehicles from work to home and home to work will not have to be compensated for that travel time. Previously, the Wage and Hour Division of the Department of Labor took the position that the employee drove the vehicle home for the employer's benefit, so the employer would not have to be concerned about the security of leaving a vehicle parked at the facility overnight. Because it was for the employer's benefit, the employer owed the employee for the time spent commuting round trip. The bill also permits employers to establish a training wage of $4.25 per hour for the first ninety days of employment for those employees who are younger than twenty years of age; however, an employer may not terminate an older employee to hire a $4.25 per hour under twenty year old. The new law exempts from overtime computer professionals who are paid the hourly equivalent of at least $27.63.

The bill also includes an important provision regarding the taxability of compensatory damages in employment discrimination cases not involving physical injury. Prior to the enactment of this legislation, the Tax Code permitted an individual to

exclude from gross income settlement amounts for personal injuries or sickness. Often, language of a settlement agreement in an employment claim was broad enough to be considered non-taxable. With this legislation becoming law, the term "physical injury" or "sickness" is narrowly construed, and does not include emotional distress. Thus, most damages in an employment discrimination case will be considered taxable.

The last key element of the August 20 bill is the establishment of some tax benefits to small businesses.

* PUBLIC SECTOR SUPPLEMENT *

Employee rights not violated when employer searches computer messages

Two police department employees in the case of Bohach v. City of Reno (D. Ct., NV July 23, 1996) complained that their constitutional rights were violated when the police department searched messages that were stored on a computer network. Employees were told in advance that every message under the network was logged. They were also told that it was forbidden for them to send messages on the computer network that would either criticize the department or were discriminatory in nature. In upholding the employer's right to search these messages, the court concluded that the employees did not have a reasonable expectation of privacy in the message. Furthermore, federal wiretap restrictions on the interception of electronic messages do not apply to messages that are in electronic storage. Therefore, messages in this case were not intercepted. According to the court, "No computer or phone lines have been tapped, no conversations [were] picked up by hidden microphones." Therefore, there was neither a constitutional expectation of privacy that is protected nor was there an interception of these messages that would be prohibited under federal wiretap law.

* HEALTH CARE SUPPLEMENT *

Court dismisses union's effort to seek arbitration over accretion of nurses to the bargaining unit

The case of Hawaii Nurses' Association v. Kapiolani Health Care System (D.Ct., July 5, 1996) is an example of another approach a union took to try to expand the scope of employees covered under its bargaining agreement with the hospital. The nurses' association represented separate units of LPNs and RNs at the medical center for several years. The union then requested that the contract should extend to the nurses at another, non-union facility. The hospital refused this request. The union then filed a grievance, claiming that under the bargaining agreement those nurses should be included in the bargaining unit. The hospital refused to hear the grievance, because it concerned non-bargaining unit employees. Both parties then filed petitions with the National Labor Relations Board to clarify whether or not the non-union nurses belong in the bargaining unit.

The union was not satisfied with waiting for the NLRB decision. It immediately sued the hospital, to compel the hospital to arbitrate this issue. The court concluded that arbitration was improper, because "if the NLRB finds that the accretion is improper, then there is no issue left to arbitrate." The NLRB ruled that the non-represented hospital existed at the time the union and hospital agreed to the contract, and that if the parties intended to include those non-union nurses in the contract, they could have done so at the bargaining table. Furthermore, the Board stated that the bargaining agreement was clear in describing the unit of employees covered, and it did not include those non-union nurses.

This case is another example of how unions today are attempting to use existing collective bargaining agreements to add non-union employees at the employer's other locations to the scope of employees covered by the bargaining agreement.

DID YOU KNOW. . .

. . .that a recent survey conducted by the AFL-CIO concluded that sixty-seven percent of its members supported the organization's political efforts in 1996? Widely criticized for requiring that all members pay a tax to raise $35 million to unseat one hundred Republicans in the House, the AFL-CIO cited the survey as an example to show that its members overwhelming approve of its actions. The AFL-CIO has approximately three hundred fifty to five hundred volunteers in every congressional district to help get out the vote on November 5, 1996.

. . .that a court of appeals on August 13, 1996, upheld awarding an employee twenty-five years of front pay (that is not a typo) in an age discrimination case, the longest front pay award we ever heard of? Padilla v. Metro-North Commuter Railroad (2d Cir. August 13, 1996). The employee is forty-two years old; the front pay award will last until the employee retires at age sixty-seven. The court concluded that because the employee had very specialized skills and earned $65,000.00 a year, it was not possible for the employee to find a comparable position. Furthermore, the court ruled that due to the hostility between Padilla and the employer, which will now continue for twenty-five years, it was impossible to reinstate Padilla.

. . .that on August 7, 1996, a court ruled that an employee's spouse may not sue for a retaliatory employment action directed toward the employee? Holt v. JTM Industries, Inc. (5th Cir. August 7, 1996). According to the court, the Age Discrimination in Employment Act forbids retaliation against the employee. The Act does not extend a claim of retaliation to an employee's spouse, even if the spouse is employed by the same company. According to the court, "There is no evidence that Frank helped Linda prepare her charge or that he assisted in any way in its filing. At best, Frank was a passive observer of Linda's protected activities." However, if Frank had protested the company's treatment of Linda, or assisted Linda in the filing of a charge, then he would have a claim for retaliation concerning his treatment by the employer.

. . .that two federal courts in the near future will decide whether a worker's compensation claim bars an individual from pursuing a Title VII lawsuit involving the same actions? Dici v. Commonwealth of Pennsylvania (July 31, 1996); Johnson v. Strick Corp. (August 2, 1996). Both cases arose in Pennsylvania and involve allegations of sexual and racial harassment. The individuals initially filed worker's compensation claims regarding the same behavior. In one case, the state worker's compensation referee concluded that no injury occurred, in another case damages were awarded for the injury. The courts will now decide whether the worker's compensation actions bar the Title VII claims from proceeding.

. . .that on July 30, 1996, the House approved the Working Families Flexibility Act which would permit employees who are non-exempt under the Fair Labor Standards Act to take time off instead of receiving overtime pay? President Clinton on June 24, 1996, announced his support for what he characterized as a "family friendly" flex-time approach to paying overtime. However, since then the President has stated his opposition to the bill.

. . .that on July 30, 1996, President Clinton vetoed the Teamwork for Employees and Managers Act? The bill proposed to provide employers with greater protection for establishing employee committees without violating the National Labor Relations Act. Thirty thousand employers have such committees or employee work groups. The Senate passed an identical bill in July, but as with the House bill, the margin for passing the bill was not large enough to override the President's veto.

LMP&P BREAKFAST BRIEFING SCHEDULED FOR SEPTEMBER 12, 1996

Our next firm Breakfast Briefing is scheduled for Thursday morning, September 12, from 7:30 a.m. to 9:00 a.m. at the Sheraton Perimeter Park South in Birmingham. Our guest speaker will be Wilton Murphy, Managing Director of W.W. Murphy & Associates, of Louisville, Kentucky. Wilton Murphy is an industrial and organizational psychologist who has worked with companies throughout the country to help them operate in a manner that removes their vulnerability to unionization. Many of these programs developed by Wilton also had a measurable and positive impact on other important performance measures, including customers' rating of quality of service, productivity and dysfunctional behavior. Breakfast will be available beginning at 7:30 a.m.; at the conclusion of Wilton's talk at 8:45 a.m. a member of our firm will review recent labor and employment relations developments. Please return the attached

registration form if you and/or other members of your organization plan to attend.

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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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"No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

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Please reserve me a seat at the Breakfast Briefing scheduled for September 12, 1996, at the Sheraton Perimeter Park South, Birmingham.

NAME: _____

COMPANY: _____

Others from my company who wish to attend:

_____

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