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

MAILING ADDRESS: POST OFFICE BOX 370463, BIRMINGHAM, ALABAMA 35237

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

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TO OUR CLIENTS AND FRIENDS:

It is our pleasure to announce that attorneys Sally Broatch Waudby and Debra C. White have joined our firm. Ms. Waudby received her J.D. Degree from Washington and Lee University in 1993 and graduated *magna cum laude* in 1988 from the University of St. Andrews in St. Andrews, Scotland. She served as law clerk to the Honorable Janie L. Shores of the Supreme Court of Alabama, and practiced in the area of litigation defense before joining our firm.

Deb White joins the firm as of counsel. She received her J.D., with distinction, in 1991 from Emory University. Ms. White graduated in 1982 from the University of Nebraska, *magna cum laude*. Ms. White practiced in the area of litigation and employment law prior to joining our firm.

We are delighted that Sally Waudby and Deb White have joined the firm and hope that you will have the opportunity to meet and work with them.

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EEOC ISSUES ENFORCEMENT GUIDANCE ON WORKERS' COMPENSATION AND ADA

On September 3, 1996, the EEOC issued enforcement guidance in a user-friendly question and answer format concerning the interplay of workers' compensation and the ADA. The following are some of the key points the EEOC makes to clarify what it viewed as areas of misunderstanding:

- An employer has the right to ask an employee disability-related questions or require a medical examination if there is either a job-related injury or the employee seeks to return to work after that injury. The questions or exam must relate only to the injury and job.

- The employer may require substantiation of a disability if it is due to a job-related injury and the employee requests reasonable accommodation.

- The ADA requirement that an employee's medical information should be maintained in a file separate from the personnel file also applies to information regarding the employee's job-related injury. Furthermore, the EEOC stresses that "an employer must keep medical information confidential even if someone is no longer an applicant or an employee."

- An employer may not refuse to hire someone who has a disability where the employer believes that the individual creates a greater risk of a job-related injury or may add to workers' compensation costs. An exception to this is if the employer can show that employing that individual would create a direct threat to either that employee or others at work. According to the EEOC, "direct threat means a significant risk of substantial harm to health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that a direct threat exists must be the result of a fact-based, individualized inquiry that takes into account the specific circumstances of the individual with a disability."

- An employer may not require a release for "full duty" before an individual with a job-related injury that is also a disability is permitted to return to work. This is because full duty "may include marginal as well as essential job functions" or performing essential job functions with reasonable accommodation.

- The EEOC states that an employer cannot refuse to return to work an employee who has been considered permanently or totally disabled under state workers' compensation laws. Note that some courts have held that an individual claiming permanent or total disability for workers' compensation or social security is inherently inconsistent with the concept of returning to work. However, the EEOC will consider it a violation of the ADA for an employer to refuse to attempt to return to work an individual who has been identified as permanently or totally disabled under workers' compensation law.

- Reasonable accommodation for a job-related injury is not required where that injury is not a disability as defined under the ADA.

- Defining light duty as "positions created specifically for the purpose of providing work for employees who are unable to perform some or all of their normal duties," the EEOC states that creating a light duty position is not required as a form of reasonable accommodation even where it is provided for those with job-related injuries. However, if certain jobs are identified as light duty jobs and are not created on a case-by-case basis, then the employer may be required to consider transfer of an individual with a disability to one of those light duty positions.

This enforcement guidance became effective upon its issuance on September 3, 1996.

COURT UPHOLDS EMPLOYEE'S RIGHT TO SUE BECAUSE OF A VERBALLY ABUSIVE SUPERVISOR

Although the law does not yet require that supervisors speak kindly to employees, there are legal consequences to companies when supervisors are verbally abusive to employees. For several years, the concern about verbal abuse has related to whether it is viewed as harassment based upon a protected status, such as sex or race. Now, claims are brought for intentional infliction of emotional distress where the behavior may be abusive, but not because of an individual's gender or race. A recent example of this is the case of *Subbe-Hirt v. Baccigalupi* (3rd Cir. August 28, 1996).

The supervisor, Baccigalupi, was determined to force Subbe-Hirt to quit her employment with their company, Prudential Insurance. He subjected her to intense sessions of ridicule, which he had told others was the office equivalent of a "root canal." One manager testified that Baccigalupi explained to them that an office root canal would "intimidate and basically destroy these people to the point of submission or just getting the hell out of the business." The court characterized this office root canal from the supervisor as a "pain-producing, anxiety-producing procedure [in which] you would keep going deeper and deeper until you struck a nerve, which would either end up in the agent submitting, or reaching the point of anxiety where they just couldn't stand any job any longer." The supervisor also referred to the subordinate with "blatantly sexist" vulgar language and metaphors. Subbe-Hirt's psychiatrist said that she was "totally disabled with post-traumatic stress disorder triggered by Baccigalupi's badgering and intimidation."

In reversing the lower court's granting summary judgment, the Court of Appeals ruled that Subbe-Hirt provided sufficient evidence to show that her

supervisor intended to harm her emotionally and acted out his intentions. This case is a good illustration of why employers should broaden harassment policies to include any abusive or intimidating behavior toward an employee, and why complaints about such behavior should be investigated with the same diligence as a sexual harassment complaint.

SECRETARY OF LABOR SEES INCREASED UNIONIZATION EFFORTS

In his state of the work force address on Labor Day, Labor Secretary Robert Reich contrasted the current status of unions with the first Labor Day during his appointment in 1993. According to Reich, four years ago he hardly heard of any interest from employees about unions. "Now," Reich said, "I hear it all the time."

Why is there an increased interest in unions? According to Reich, employees are concerned about the future of their jobs and the lack of power in dealing with their employer regarding their own future and job security. Furthermore, Reich said that employees pay more for their health insurance, receive lower employer contributions to their 401(k) plans, and that whatever raises they receive do not make up for the increased costs that are now their responsibility.

EEOC GENERAL COUNSEL OUTLINES LITIGATION STRATEGY

On September 12, 1996, the EEOC General Counsel, C. Gregory Stuart, outlined the Commission's litigation strategy. He believes the EEOC should pursue cases that tend to be different from the ones that private plaintiffs' attorneys initiate. Therefore, although the Commission will maintain its primary responsibility of attempting to resolve individual charges, those individual charges will not become the primary focus of EEOC litigation efforts. Rather, whether the EEOC initiates a lawsuit will depend upon the following factors:

- Does the outcome of the case create a potential benefit to several employees, rather than just an individual charging party? An example is the difference between an individual who claims an illegal discharge, which is a case the EEOC would prefer that private attorneys handle, compared to a claim of discrimination in promotion practices, which is a case the EEOC believes benefits more individuals than just the charging party.

- Is there a serious and widespread pattern of discrimination within the organization?

- Does the case raise an important legal issue to the EEOC, even if it involves an individual claim, or does the case raise an important question regarding the EEOC's authority?

The EEOC will maintain a litigation load of approximately three hundred cases. An example of the type of case the EEOC believes furthers its responsibilities to the work force is the EEOC class action against Mitsubishi over harassment of women at its factory in Normal, Illinois. According to Stuart, "By bringing this lawsuit, the Commission is telling the public that it is not enough simply to have an anti-discrimination policy in place as Mitsubishi did...when management fails to take appropriate action to see that the policy realistically protects its employees, Title VII has been violated." Which claims will most likely cause the EEOC to litigate? Hiring and promotions.

U.S. SENATE FALLS ONE VOTE SHORT OF FORBIDDING EMPLOYMENT DISCRIMINATION BASED UPON SEXUAL ORIENTATION

On September 10, 1996, the United States Senate, by a vote of 50 to 49, rejected legislation that proposed to forbid employment discrimination based upon sexual orientation. The bill, known as the Employment Nondiscrimination Act, was introduced by Senators Kennedy (D- MA), Lieberman (D-CN), and Jeffords (R-VT). Those who opposed the bill characterized sexual orientation as a lifestyle that would be elevated to the same protection as race, sex, age, and disability under Title VII, Age Discrimination in Employment Act and Americans with Disabilities Act. Furthermore, the same legal theories regarding other forms of discrimination

could apply to sexual orientation, such as claiming that an employment practice has a discriminatory impact based upon sexual orientation. Several states and cities forbid discrimination based upon sexual orientation. Senator Kennedy stated that re-introducing this bill in January 1997 will be one of the first acts of the new Congress.

HEALTH CARE SUPPLEMENT

HOSPITAL REQUIRED TO PROVIDE UNION WITH INFORMATION REGARDING MERGER; INTERNS AND RESIDENTS UNIONIZE

The case of *Providence Hospital and Mercy Hospital v. NLRB* (1st Cir. August 28, 1996) concerned two hospitals that unsuccessfully pursued a merger. After the decision to merge was announced, the nurses' union requested documents arising out of the merger, such as plans for a consolidation, work force reductions, and changes. The hospitals refused to provide the information due to its confidential nature. However, an Administrative Law Judge ruled that the union had the right to this information in order to fulfill its collective bargaining responsibilities. The NLRB upheld the ALJ decision because the union needed to receive the information in order to assess the potential impact of the merger on its collective bargaining agreement. Subsequently, the merger fell apart.

According to the court, "As long as a pending merger is sufficiently advanced, a union is entitled to request information shown by the totality of the circumstances to be relevant in order to prepare for effects bargaining." Furthermore, although the merger fell through, the hospitals were confident that the merger would occur as they had handed out information to the work force about employee relocations.

* * *

Although public employees are not covered by the National Labor Relations Act, 1,000 interns and residents were permitted under Florida law to determine whether or not they wanted to form a bargaining unit. *Committee of Interns and Residents v. Public Health Trust of Metropolitan Dade County* (Fl. Public Employees Relations Commission, September 4, 1996). The issues creating the organizing effort are hours and pay. According to the Director of the Committee of Interns and Residents, "The house staff are among the hardest working employees in any situation. It's only fair that people who work this hard have the same rights as other employees."

DID YOU KNOW . . .

...that President Clinton's executive order to bar government contractors from hiring permanent replacements during strikes is dead? The Justice Department on September 9, 1996, announced that it would not appeal the decision of the Court of Appeals for the District of Columbia holding that the President's executive order was unconstitutional.

...that claims of hostile environment are also permitted under the Americans with Disabilities Act? The case of *Gray v. Ameritech Corporation* (D.Ct. Ill., August 27, 1996) concerned an employee with psoriasis, who claimed that she was subjected to a hostile work environment because of her disability. Although the employee's claim was unsuccessful, the court ruled that the ADA permits a hostile environment theory.

...that the San Diego Office of the EEOC concluded that non-religious, strongly held ethical beliefs are protected under Title VII? The case of *Anderson v. Orange County Transit Authority*, Case No. 345-96-0598, August 20, 1996, involved a vegetarian bus driver who, because of his strong vegetarian beliefs, refused to hand out free hamburger coupons to passengers. In issuing a cause finding, the EEOC San Diego Office concluded that if an individual has ethical or moral beliefs of an intensity analogous to religious convictions, he should receive the same type of protection from discrimination that exists for those with religious beliefs or convictions.

...that an applicant who falsified answers on the employment application allegedly because of his

disability was not protected under the ADA? The case of *Holmes v. Perry* (6th Cir. August 27, 1996) concerns an applicant who answered "No" regarding questions of criminal convictions, when he was convicted for driving while intoxicated, disorderly conduct, shoplifting, and disturbing the peace. He said that the reason why he falsified his answers was due to his disability, alcoholism. The court rejected this claim, concluding that the employer was unaware of the disability and therefore, even assuming that the disability was the reason for the falsification of the answers, the employer's lack of knowledge or perception of the disability precluded the claim for discrimination based upon disability.

...that the Clinton administration may push for legislation before January 1, 1997, to amend the Fair Labor Standards Act and FMLA? The FLSA amendment would permit private employees to award comp time instead of overtime. The FMLA amendment would permit employees to take 24 hours off in a year for a child's school activities, elder care and family members in addition to a parent, child or spouse.

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
Terry Price	205/323-9261
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
Sally Broatch Waudby	205/226-7122
Debra C. White	205/323-9278
