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

Volume 4, Number 11 *November 1996*

TO OUR CLIENTS AND FRIENDS:

Texaco, Inc. recently agreed to pay $176 million to settle a race discrimination lawsuit filed March 1994 in which the plaintiffs alleged that Texaco failed to promote a number of black employees because of their race. *Roberts v. Texaco, Inc.* (D.C.S.D. NY). As part of the settlement, each black employee will receive a 10% raise on January 1, 1997. Furthermore, 1,400 former and current black employees will receive an average settlement of $82,000 each. Of course, the case received notoriety recently due to a tape recording of a conversation in which senior executives referred to blacks in racially derogatory terms and discussed plans to destroy damaging evidence.

An obvious question raised by this case is how such behavior could occur in one of the world's largest corporations, with a tremendous amount of resources available to it for management training and monitoring the company's compliance with equal employment opportunity laws. The answer, unfortunately, is that at Texaco (and too many other companies), the training given executives, managers and supervisors on the legal implications of their workplace actions is totally inadequate. Increasingly, plaintiffs in employment lawsuits allege that the employer negligently failed to provide sufficient training. Employers who simply assume that because they have not had employment discrimination problems in the past, they do not need to train managers now, are taking a substantial risk. As the *Roberts* case indicates, taking that risk can prove to be an expensive mistake.

The Texaco settlement is the highest ever in a race discrimination case. Furthermore, Texaco agreed to the monitoring of its employment practices by a task force consisting of three members appointed by the company, three by the plaintiffs, and a chairman. If Texaco refuses to implement a task force recommendation, it must go to court to prove that it cannot implement the recommendation.

A TALE OF TWO EMPLOYEE MANUALS: ONE IS A CONTRACT, ONE IS NOT

At-will employees may be terminated without cause in most states. To get around this legal hurdle to wrongful termination suits, attorneys for fired at-will employees have frequently argued in court that language contained in a company handbook constitutes an employment contract; when successful, this sleight of hand gives the terminated employee a basis for his suit, and exposes the company to unexpected liability. Two recent cases illustrate the need for employers to review their employee handbooks on an annual basis to be sure that the handbook

could not be considered an employment contract with the employee. In one case, *Derrig v. Wal-Mart Stores, Inc.* (D.C. Mass, September 10, 1996), the court ruled that Wal-Mart's employee handbook was a contract with its employees. The court considered the specificity of the language that focused on employee rights and procedures employees should follow at work regarding discipline, termination, evaluations, and pay increases. According to the court, "As a matter of content, the specific information with respect to attire, hours, training, advancement, discipline, and indeed possible grounds for termination, set out what any reasonable

employee would believe to be binding obligations and certain rights." Furthermore, the handbook did not contain adequate disclaimers that it was not binding. However, the court ruled that the employee was terminated properly under the terms of the handbook.

More general language with explicit disclaimers resulted in the conclusion that the handbook was not a contract in the case of *Orback v. Hewlett-Packard Company* (10th Cir., October 8, 1996). Four former employees sued after they were terminated, claiming that the company's statements about doing things "the H-P way" and the company's respect and value for its employees created a contract. The plaintiffs in essence claimed that the corporate philosophy as outlined in the handbook was not followed regarding their terminations and, therefore, the company breached its obligation to employees. The court stated that "the manual's deliberately limited distribution, its clear and conspicuous disclaimer, its lack of any mandatory termination procedures, and the discretion left to individual managers prevent the manual from serving as a basis for any promises Hewlett-Packard should reasonably have expected any of the plaintiffs to consider as a commitment."

The interpretation of whether a handbook is a contract will vary from state to state. Therefore, it is imperative that an employer review its handbook at least once a year to assess whether the handbook could be considered a contract in any state where it is distributed to employees.

UNIONS RECEIVE GOOD NEWS AND BAD NEWS: ITS "UNION SUMMER" PROGRAM WAS SUCCESSFUL, BUT NUMBER OF ELECTIONS AND UNION WIN RATE DECLINE

Recently, there was a combination of "good news, bad news" for organized labor. The good news is that the union summer program, which featured nine-week internships for one thousand college students, was highly successful according to the feedback from the students. The purpose of union summer was to reach out to a new generation of potential unionists. Eighty-one of the one thousand interns have been hired by the AFL-CIO as organizers, and another twenty have participated in a follow-up three-day organizing institute. Recent surveys show that unions are perceived favorably among younger employees, so the AFL-CIO "union summer" initiative is the part of the organization's long-range plan to more effectively reach the younger American worker.

It has been one year since John Sweeney became President of the AFL-CIO, but his immediate and substantial changes to the organization have not improved union successes at the ballot box. According to the National Labor Relations Board, the number of certification elections for the first six months of 1996 decreased to 1,374 from 1,424 in 1995. The number of eligible voters during the first six months of this year was 98,748, slightly down from 99,130 during the same period last year. Furthermore, unions won 47.5% of those elections held during the first six months of 1996, compared to 50.1% of the elections held during the first six months of 1995.

Unions had their greatest successes in service industries, where they won 57.7% of all elections held during the first six months of 1996. They also did quite well in finance, insurance, and health care. Unions won only 44.8% of all elections held in manufacturing, 46.1% in communications, 43.7% in wholesale, and 49% in transportation and communications. Although John Sweeney's efforts to change the image and culture of the AFL-CIO appear to be working in some respects, the organization has yet to translate its new dynamism into success at the ballot box.

EEOC BECOMING A TOLL BOOTH FOR LITIGATION

In an effort to reduce its back log of approximately 86,000 cases, the EEOC is increasing its practice of simply issuing right to sue notices to charging parties or their counsel without an investigation or analysis of the charge and employer's response. The average caseload for each EEOC investigator is 109. On-site investigations are rare. Several employers have commented to us that EEOC representatives do not return calls or respond to correspondence. If the EEOC reaches a decision in a case, odds are in the employer's favor: only five percent of fully processed EEOC charges result in "cause" findings.

The current state of affairs at the EEOC raises strategic questions for employers and policy questions regarding the agency's continued role. Employers should be careful in assessing how much information to send to the EEOC in response to a charge. That information may be obtained by the charging party in the event he or she files suit. Therefore, submitting extensive documents and witness statements in response to a charge may assist the charging party in his or her lawsuit, and provide the EEOC with more information than the Commission needs in order to close the case. The broader policy question is whether the EEOC needs to exist in its present form. The easy access charging parties have to legal counsel has contributed to turning the EEOC into simply a toll booth that one must pass through in order to proceed to court, and diminishes the need for the EEOC to continue with its near impossible task of attempting to investigate and resolve each charge of discrimination.

* * *

EMPLOYER RIGHT TO CONSIDER OFF-DUTY BEHAVIOR AS BASIS FOR TERMINATION

The case of *Johnson v. The New York Hospital* (2d Cir., September 13, 1996) concerned a vacationing registered nurse who arrived at his employer hospital drunk and began fighting with security guards. The hospital terminated him for this behavior. Johnson sued, claiming that the behavior was due to his disability, alcoholism, because the employer considered his off-duty behavior as the terminating event. In rejecting this claim, the court said that "to turn a blind eye toward such conduct is justified neither by logic nor sound policy. Johnson's off-duty actions are relevant to whether his employment may pose a threat to the safety of others, especially patients given his tendency to become belligerent when intoxicated."

Would the employer have been justified in terminating Johnson if his behavior did not occur on hospital premises, such as if he directed it toward a security guard at a shopping mall? An employer has the right to consider an employee's off-duty behavior when deciding whether to discipline or discharge the employee if that behavior may affect the employer's interests. Johnson was in a position of providing care to others. Therefore, there is a strong argument that Johnson's behavior was relevant to the employer's concerns, even if the behavior did not occur while on duty.

DID YOU KNOW...

...that Secretary of Labor Robert Reich announced that he will resign, effective on January 20, 1997? Referred to by the business community as the Secretary of "Organized" Labor, Reich was hailed by AFL-CIO President John Sweeney as "one of the most outstanding Secretarys of Labor in the history of our country."

...that on October 28, 1996, a former president of the Carpenters District Council was indicted for stealing $250,000.00 from the union's operating fund? Where did the money go? According to the Manhattan District Attorney, the official, Frederick Devine, took luxurious trips, rented expensive cars, and ate at the finest restaurants. He also hired his girlfriend as a consultant for $15,000.00 per month.

...that according to a study issued by the Women's Legal Defense Fund, older women are the least likely to prevail in sex and age discrimination claims? The study found that 81% of sex and age discrimination claims were filed by women. Women between ages 45 and 49 and 55 and 59 won at least half of the time. However, women aged 60 or older won only 18% of the time. Note that this report focuses on cases that involve claims of both sex and age discrimination.

...that on October 27, 1996, President Clinton extended the Congressional Accountability Act to Executive Branch employees? Passed in 1995, the Congressional Accountability Act creates protection under eleven federal employment laws for 27,000 Congressional employees. Until the President's action on October 27, the Executive Branch employees did not enjoy similar protection.

...that courts in two different states held that state workers' compensation laws preclude an individual from filing a sexual harassment lawsuit? The courts in *Reed v. Avian Farms, Inc.* (D.C. Maine, October 1, 1996) and *Konstantopoulos v. Westvaco Corporation* (OH S.Ct., October 2, 1996) ruled that the exclusivity principles of workers' compensation coverage apply to injuries resulting from sexual harassment. The scope of what claims are barred due to workers' compensation laws is a question that is decided on a state-by-state basis, according to each state's workers' compensation laws and cases.

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 White	205/323-9278
