// EMPLOYMENT LAW BULLETIN

The Newsletter of

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TO OUR CLIENTS AND FRIENDS:

In several states, an employer and an employee may tape record conversations with each other without the other's permission. This does not mean, however, that in all states an employer is without recourse if an employee taped a conversation with his or her supervisor or manager without that individual's permission. This point was illustrated in the recent case of *Bodoi v. North Arundel Hospital* (D. Ct. MD, November 20, 1996). Bodoi worked for several years in the maintenance department of the employer hospital. He received several warnings and verbal reprimands regarding job performance. However, the event that resulted in Bodoi's termination was his surreptitious taping of a conversation with his supervisor. Bodoi filed a discrimination charge, claiming he was terminated because of retaliation for filing several complaints with the EEOC. However, Maryland is a "two party" consent state, meaning that in a non-criminal situation, it is illegal to tape record a conversation without the other party knowing and consenting to the recording. Therefore, the court concluded that the employer properly terminated Bodoi for illegally tape recording a conversation with a supervisor.

Unfortunately, more instances are arising where employees are tape recording conversations with employer representatives. Even if such tape recordings are not illegal, an employer still may prohibit those recordings as a matter of policy.

INCONSISTENT APPLICATION OF DRUG POLICY COSTS AIRLINE $380,000

A jury in Minneapolis ordered Northwest Airlines to pay a black former employee $380,000 for damages arising out of his termination for testing positive for marijuana. The employee, Robert Landen, worked as a baggage handler. Under company policy, an employee is subject to drug testing when there is reasonable suspicion, such as a job-related accident, and will be terminated if the test is positive. Landen was involved in a workplace accident which caused damage to an airplane, triggering a drug test, which was positive for marijuana. According to the company, termination was required under its policy.

Landen showed there was a discriminatory application of the otherwise proper drug testing policy. He provided several examples of more serious accidents than the one he was involved with where those employees were not tested for drugs or alcohol. Furthermore, he also provided several examples of where employees who tested positive for the first time, such as Landen, were given a second chance to remain employed. The jury concluded that Landen was discriminated against because of his race, and awarded him $250,000 in punitive damages, $105,000 in back pay, and $25,000 for emotional distress due to Northwest Airlines' violation of Title VII. Northwest is also responsible for paying Landen's attorney fees. Employers should learn from Northwest that they can quickly lose altitude if they do not consistently apply an otherwise proper alcohol and drug policy.

A DISABILITY CONTROLLED BY DRUGS IS NOT A DISABILITY, RULES COURT

The case of *Murphy v. United Parcel Service* (Kansas, October 22, 1996) raised the question of what impact medication has on an individual's protected status under the Americans with Disabilities Act. The plaintiff, who had high blood pressure, worked as a mechanic for UPS. Mechanics are required to drive vehicles in order to repair UPS vehicles that break down on the road. Murphy was fired because he could not receive a Department of Transportation health card required for his driving responsibilities due to his high blood pressure. Murphy argued that he was unable to control his hypertension with medication because of the medication's side effects. Therefore, he argued, he should be considered disabled due to his hypertension without medication.

The court concluded that a disability which is controlled with medication is not a disability that is protected under the Americans with Disabilities Act. The court relied on other decisions which have held that other physical handicaps that can be alleviated with corrective measures (such as nearsightedness) are not disabilities. The court rejected the EEOC interpretative guidance of the ADA that coverage under the ADA should exist "without regard to mitigating measures such as medicines, or assistive or prosthetic devices."

The court also stated that UPS' reliance on Department of Transportation regulations, which barred Murphy from driving, were a complete defense to his ADA charge. The court found that UPS was consistent in its application of the DOT standards and, therefore, did not use those standards as a pretext for firing Murphy.

EMPLOYEE'S OFFENSIVE RELIGIOUS LETTERS SENT TO FELLOW EMPLOYEES NOT PROTECTED UNDER TITLE VII

A sensitive issue frequently arising in today's workplace is to what extent must an employer accommodate or tolerate religious practices at work by employees. The case of *Chalmers v. Tullin Company of Richmond* (4th Cir., December 4, 1996) involved a situation in which an employee sent religious letters to other employees at their homes. The employee had worked for the company since 1988 and shortly thereafter was promoted to a supervisory position. According to the court, Chalmers was an evangelical Christian who wanted to share the gospel whenever there was an opportunity to do so. She and her immediate supervisor at times talked about religion. She felt that her supervisor was not honest with customers, and wrote to the supervisor that "you are doing some things in your life that God is not pleased with and He wants you to stop." The problem was that the supervisor's wife opened the letter and assumed that the letter related to an affair her husband had, rather than lying to a customer. The wife then called the supervisor at work and disrupted a business meeting in order to talk to him about the letter. The supervisor then told the company that Chalmers' letter caused considerable difficulty to his marriage and he could no longer work with her.

The company also learned that Chalmers wrote a letter to a subordinate at home after the unwed subordinate gave birth to a baby. Chalmers told her subordinate that "you probably do not want to hear this at this time, but you need the Lord Jesus in your life right now. One thing about God, He doesn't like when people commit adultery. You know what you did is wrong." Chalmers added in this letter that when people sin, "God can put a sickness on you."

The company concluded that Chalmers' letters made her working relationships with employees too tense and difficult for her to continue with the company. Chalmers sued under Title VII,
claiming that the company failed to accommodate her religious views. The court rejected her argument, stating that she did not prove that her religious principles "required her to send personal, disturbing letters to her co-workers." Therefore, according to the court, Chalmers "did not allow the company any sort of opportunity to attempt reasonable accommodation of her beliefs." According to the court, had Chalmers put the employer on notice regarding her religious beliefs, the employer then could have considered ways to accommodate her. However, the employer did not fail to accommodate Chalmers when it responded to disturbing letters that she sent to fellow employees, including a subordinate.

g HEALTH CARE SUPPLEMENT g

HEALTH CARE EMPLOYERS BEWARE: THE DEPARTMENT OF LABOR WILL LOOK AT YOU DURING 1997

On December 3, 1996, the head of the Department of Labor Wage and Hour Division, Maria Echaveste, stated that her Division will continue its focus on health care employers for wage and hour violations. In particular, the Division is reviewing low paid employees and low wage health care industries in its investigation, because the Wage and Hour Division found that sixty percent of the health care employers it investigated last year violated the Fair Labor Standards Act. Because the health care industry remains one of the fastest growing industries in the country, Echaveste said that it is an industry the Wage and Hour Division will continue to monitor during the next several years.

Note that for fiscal year 1997, the Wage and Hour Division received a nineteen percent increase in funding from 1996, resulting in two hundred new investigators. Echaveste said that these investigators will focus primarily on those states with a high number of first generation immigrants, such as New York, California, and Texas. Echaveste believes that several employers of immigrants in those states are not compensating the immigrants properly under the Fair Labor Standards Act.

g LMP&P INITIATES OSHA COMPLIANCE SERVICES g

In response to client requests for guidance on how to comply with OSHA and to assist employers in preventing safety-related disputes from arising, Lehr Middlebrooks Price & Proctor is pleased to offer our clients an array of services that deal with OSHA compliance. The OSHA-related services include wall-to-wall simulated OSHA audits, customized OSHA-required training programs, and OSHA record keeping audits. Additionally, in conjunction with a nationally recognized consultant, the firm is offering safety and health services, including industrial hygiene, medical monitoring, hearing conservation, respiratory protection, indoor air quality, and occupational medicine. Additionally, the firm will provide compliance and programmatic services regarding OSHA topics that are enforced under either specific OSHA standards or the "General Duty" clause of OSHA, including ergonomics, workplace violence (for hospital and social service environments), personal protective equipment, fire protection, lock out/tag out, blood-borne pathogens, confined spaces, hazard communication (Hazcom), machine guarding, and record keeping. For more information regarding these services, please contact either Terry Price (205/323-9261) or Steve Stastny (205/323-9275).

Furthermore, the *Employment Law Bulletin* will include more information regarding occupational safety and health and OSHA topics. Therefore, you may want to add the person or people in your organization responsible for occupational safety and health and/or OSHA compliance to the *ELB* mailing list. For your convenience, a subscription form is included on the last sheet of this newsletter.

g OSHA TOPICS g

REVIEW RESPIRATORY POLICIES AND PRACTICES IN PREPARATION FOR 1997 UPDATED REGULATION FROM OSHA

In 1997, OSHA will issue an updated respirator regulation to prevent employee overexposure to toxic agents in the workplace when engineering controls are not feasible to reduce exposure, or during emergency response. Companies which require their employees to wear respirators for protection against atmospheric hazards must comply with OSHA's respirator regulations which apply to general industry. There are separate regulations for the construction industry. Those companies affected must develop procedures which describe how they

address the OSHA respirator regulation. The procedures must include the following, at a minimum:

- Establish respirator selection and use criteria;
- Provide employee training;
- Determine if employees are medically capable of wearing respirators;
- Ensure proper cleaning, inspection, and storage of respirators;
- Conduct workplace surveillance such as periodic air monitoring;
- Periodically evaluate the effectiveness of the respirator program;
- Limit the use to only National Institute for Occupational Safety and Health (NIOSH) or NIOSH-approved respirators.

Remember that OSHA has published several contaminate-specific regulations, such as lead, asbestos, and arsenic, which contain additional respirator use requirements.

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g DID YOU KNOW... g

...that on December 16, 1996, the AFL-CIO Executive Committee announced its legislative agenda for 1997? The agenda includes amending the labor laws to create a "right to organize" law, greater health care protection for employees, and also greater protection of employee pension rights. The union initially opposed President Clinton's nomination of Alexis Herman on December 19, 1996, as Secretary of Labor, but then said that she would make a splendid Secretary and that the labor movement is looking forward to working with her.

...that OFCCP has determined it will "refashion" how it inspects employers for compliance in light of Texaco? Shirley J. Wilcher, head of OFCCP, said on December 12, 1996, that "where there are problems corporate-wide, as there appear to be in Texaco, I want to begin to look at the entire corporation." This means a change in how OFCCP conducts compliance reviews, which have been done on a location-by-location basis. Furthermore, Wilcher said that OFCCP will target major employers that have not been audited before.

...that the Second Circuit Court of Appeals on November 25, 1996, upheld a union's right to insist on maintaining a check off from an employee who resigned from the union? According to the court in *Williams v. NLRB*, "When an employee who is subjected to a union security clause agrees to have membership dues deducted from his paycheck, he agrees that the employer will deduct whatever membership dues he owes under the union security clause." The court rejected the employee's claim that the union security and check off clauses were only effective if the employee remained a member of the union.

...that Ron Carey, President of the Teamsters, who is committed to "cleaning up" the union, narrowly won re-election to another five-year term? His opponent, James P. Hoffa, is the son of the union's best known president, Jimmy Hoffa. Carey campaigned on a platform of cleaning up the union, such as eliminating the triple salary certain union business agents received. Hoffa charged that Carey's efforts to clean up the union also resulted in a weaker union at the bargaining table and that Carey failed to bring dynamism to the union's organizing efforts.

...that according to the Organization for Economic Cooperation and Development, only six percent of all graduates of United States colleges remain unemployed one year after graduating from college, compared to a twenty-nine percent rate for those one year after they graduate from high school? Furthermore, in a report entitled "Education at a Glance," approximately half of all high school graduates who do not proceed to higher education score "below acceptable" on standardized literacy tests to determine employability. The reason for this wide disparity, according to the individual responsible for compiling this statistical information, is that "secondary education is geared toward those people who are going on to higher education, and not doing very well at all for those left behind."

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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