EMPLOYMENT LAW BULLETIN

The Newsletter of **LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.**

Volume 5, Number 1 ***January 1997***

TO OUR CLIENTS AND FRIENDS:

It is our pleasure to announce that David C. Skinner has become associated with the firm. David is a 1994 *summa cum laude* graduate of the University of Alabama School of Law where he was a senior editor of *The Law Review*. He received his undergraduate degree from Tulane University. Prior to attending law school, David was a commissioned officer in the U.S. Army where he received certification as an OSHA hazard communication instructor and hazardous waste manager. Before joining our firm, David was associated with the Birmingham law firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal. We are delighted that David has joined our firm and hope that you have the opportunity to meet and work with David in the near future.

"AIM" FOR LEGISLATIVE UPDATE AT LMP&P BREAKFAST BRIEFING ON FEBRUARY 27, 1997

Our next Breakfast Briefing is scheduled for Thursday, February 27, 1997, from 7:30 a.m. to 9:00 a.m. at the Sheraton Perimeter Park South in Birmingham. Our guest speakers will be **George N. Clark**, President and Chief Lobbyist of the Alabama Industry & Manufacturers Association ("AIM"), and **Barry Mask**, Vice President of AIM. Mr. Clark and Mr. Mask will provide attendees with great insight on state and federal legislation affecting employment law, health and safety, environmental issues, tort reform, and taxation. Mr. Clark is former Executive Vice President and Chief Lobbyist of the Business Council of Alabama, where he was credited by many as the chief architect for business gains during the 1994 state and federal legislative campaigns. Mr. Mask was formerly Vice President for the BCA Political Action Program. In addition to the insights Mr. Clark and Mr. Mask will provide attendees, **David Skinner** will review recent developments and problem avoidance in the area of workers' compensation retaliation litigation, and **Richard Lehr** will review other current labor and employment-related developments. A complimentary continental breakfast will be served beginning at 7:30 a.m., with the program beginning at 8:00 a.m. Those who plan to attend this program should please return the attached registration form.

PRIVATELY-OWNED PUBLIX SUPER MARKETS AGREES TO HIGHLY PUBLICIZED $81.5 MILLION DISCRIMINATION SETTLEMENT

Add Publix Super Markets, Inc., to the list of notorious national discrimination claims, in addition to Texaco and Mitsubishi. On January 24, 1997, Publix agreed to pay $81.5 million to settle a class action sex discrimination lawsuit brought by twelve women and the Equal Employment Opportunity Commission. Starting with twelve plaintiffs, the case developed into a class that included 150,000 (that's correct) women. Those individuals will receive $53.5 million from Publix; their attorneys will receive $18 million.

The case involved allegations of sex discrimination by Publix in promotions, pay, work hours, advancement opportunities, and job assignments. Three million dollars of the total settlement amount

will also be applied toward charging parties who claimed they were discriminated against based upon their race. The case involved individuals employed at Publix stores in Florida, South Carolina, Georgia,
and Alabama.

The settlement extends far beyond simply the payment of money to the class members. For example, Publix agreed that it will implement practices that include the training of managers and supervisors regarding the laws of equal opportunity, Publix will develop an internal complaint system so that those who believe they were discriminated against based upon gender can step forward with the company conducting a thorough and impartial investigation of the claim, and Publix will designate a company official who will monitor compliance with these requirements for the seven-year period the settlement agreement is in effect. This settlement is a good example of "pay now or pay later." For example, had Publix implemented an effective training program for its managers and supervisors and developed an internal complaint procedure regarding equal employment opportunity, perhaps this case, or at least the magnitude of this case, could have been avoided. However, by failing to adopt effective pro-active business practices, Publix is responsible for paying one of the largest amounts ever to resolve a sex discrimination claim and, of course, will receive heightened scrutiny from the EEOC should any charges of discrimination be filed from this point forward.

$1.2 MILLION AWARDED FOR ***DISCRIMINATION BASED UPON SEXUAL ORIENTATION***

Thus far, federal employment law does not forbid employers from discriminating based upon sexual orientation, but such discrimination is prohibited in several states and cities. On December 30, 1996, in the case of *Walsh v. Carney Hospital Corporation*, a Massachusetts jury awarded an individual $1.275 million in response to his claim that he was fired because of sexual orientation, which is prohibited under the laws of the Commonwealth of Massachusetts.

Walsh was employed in a management capacity for the hospital. He disciplined several employees in his department because he believed they made comments which he considered to be racist, sexist, and homophobic. According to Walsh's claims, employees reacted by calling Walsh a homosexual and accusing Walsh of sexual harassment. The hospital conducted an investigation of the matter, which Walsh claimed was insufficient. The investigation also requested a disclosure by Walsh of his sexual orientation, which he refused to do.

The event that precipitated Walsh's termination involved an off-the-premises, off-duty fight between Walsh and two of the employees who accused him of homosexual harassment. The jury concluded that the reason for Walsh's termination was pretextual for several reasons: (1) The notes of the person who conducted the investigation were altered; (2) several managers made anti-homosexual comments and were not counseled for this; (3) the event precipitating Walsh's termination was not properly and fairly investigated; and (4) the hospital did not follow its own policies when it terminated Walsh. According to hospital policy, suspension should have occurred, not termination.

In 1996, legislation to amend Title VII to include sexual orientation failed to pass the United States Senate by one vote. Expect similar legislation to be

considered by Congress in 1997. Several employers in states that do not forbid discrimination based upon sexual orientation have pro-actively included sexual orientation in their fair employment practices statement to employees.

COURT RULES THAT MANDATORY ARBITRATION AGREEMENT IS UNCONSCIONABLE AND, THEREFORE, UNENFORCEABLE

The California Court of Appeals on January 9, 1997, in the case of *Stirlen v. Super Cuts, Inc.*, concluded that a mandatory arbitration agreement between the company and its former executive was unconscionable and therefore unenforceable. The agreement provided that both parties would submit any claim against the other to arbitration, including a claim for a violation of state or federal employment law. The remedy for discrimination was limited to back pay only, and excluded "any other remedy at law or in equity, including, but not limited to, other money damages..." The Court concluded that the agreement was unconscionable for several reasons. First, the employee's remedies, should he prevail, were less under the agreement than under state or federal law. Second, the agreement was too broad regarding the type of employer conduct that would have to be arbitrated. Third, the employee lacked effective negotiation leverage to change the terms of the agreement. The company had argued that the plaintiff was a sophisticated executive who had been paid over $150,000 a year and certainly understood the terms of what he freely negotiated with the company. The Court rejected this analysis, concluding that the arbitration clause "is unconscionably one-sided and unfair in numerous respects and therefore unenforceable in its entirety." Courts have become increasingly concerned about the scope of mandatory agreements to arbitrate employment-related disputes. Employers who use such agreements should generally make available to employees remedies that are consistent with those under the laws covered by the arbitration agreement.

EMPLOYER NOT REQUIRED UNDER ADA TO RETAIN EMPLOYEE WHO POSES RISK OF HARM, RULES COURT

The case of *Turco v. Hoechst Celanese Chemical Group, Inc.* (5th Cir., December 23, 1996), involved an employee who was an insulin-dependent diabetic. The jobs at the employer's plant involved working with hazardous materials and safety-sensitive equipment. Due to Turco's diabetes, his concentration levels at work varied. According to the evidence, there were times that Turco's sugar level was so low that he could not remember his name, and he also had difficulty climbing and walking. The employer analyzed in several respects how it could accommodate Turco, but concluded that there was no job available in the plant that did not involve a risk of harm to Turco or others in the event he should have an accident due to his diabetes. Therefore, the employer terminated Turco. In upholding the employer's decision, the Court concluded that "any diabetic episode or loss of concentration occurring while operating this machinery or chemicals had the potential to harm not only himself, but also others. This would be a walking time bomb and woe unto the employer who places an employee in that position." Employers should note that concluding that the employee poses a risk of harm to himself or others should not be based on a "hunch" or a "common sense" conclusion. Rather, the employer should consult with the employee's medical professionals and the employer's safety specialist to determine whether accommodation is possible such that the employee would not present a risk of harm to himself or others. If accommodation is not possible, then termination may be proper.

CLARIFY WHEN VIDEO *TAPING EMPLOYEES IS ILLEGAL, COURT TELLS NLRB*

One method employers have used successfully to communicate with employees about remaining union free is to show employees a film about the company and union, which features footage of the company's employees during the course of their working day. The NLRB had ruled in the case of *Allegheny Ludlum Corporation v. NLRB* (D.C. Cir., January 17, 1997), however, that the employer's actions in making such a film constituted an illegal poll, because the employer asked employees to let the employer know if they did not want to part of the film. According to the NLRB, by asking employees if they wanted to "opt out" of the film, the employer in essence was polling employees to determine their sentiments for or against the union. The Board reasoned that those who did not want to part of the film were likely to be viewed by the employer as pro-union.

The employer appealed the decision to the Court of Appeals for the District of Columbia. On appeal, the Court considered the NLRB position with the employer's free speech rights under the National Labor Relations Act, and concluded that the Board's position did not make sense and needed to be clarified. According to the Court, the NLRB needs to provide "clear guidelines as to how to proceed in regard to company video taping of employees." The Court set aside the Board's order that concluded that asking employees if they wished to opt out of the video tape was an illegal poll. The Court also directed the Board to develop "a more comprehensive articulation of the relationship between the employer's free speech rights, the request of consent for employee video taping, and the procedures that must be followed by employers in obtaining employee consent to such filming." One outcome of this decision should be guidelines from the NLRB regarding procedures employers should follow when developing video tape during organizing campaigns that include film clips of its employees.

OHSA'S PERSONAL PROTECTIVE EQUIPMENT STANDARD

Does your company require the use of safety glasses or other types of personal protective equipment? If so, your company is impacted by OSHA's PPE regulations.

OSHA's generic personal protective equipment (PPE) regulation contains four major components. Employers are required to: (1) perform a hazard assessment of the workplace, (2) determine the appropriate type of PPE to protect employees from the hazards identified, (3) select PPE that is approved for protection against the type hazard, and (4) train employees on the proper use, fitting, and limitations of the PPE and certify that they understand the training.

PPE categories include eye and face, hand, head, body and foot protection. The hazard assessment and PPE selection must be documented for each occupational classification or department where different types of hazard are present. The workplace hazard assessments and PPE assessments should be performed by a Safety and Health Professional or an employee who is trained to conduct PPE hazard assessments. For more information, please contact Terry Price or Steve Stastny.

DID YOU KNOW...

...that R.R. Donnelley & Sons, a Chicago-based commercial printing company, has been sued for over $500 million in a race discrimination case? The plaintiffs allege that the company wrongfully classified them as temporary workers so that it could fire almost all of them during a plant closing. At the same time these employees were terminated, the company transferred 31% of its four hundred white employees to new jobs, while transferring only 1.2% of the black employees.

...that on the first day of the 105th Congress, January 7, 1997, employment bills were introduced that are characterized as "family friendly"? The bills include the "Working Families Flexibility Act," which would permit employees to take overtime in the form of comp time, and a bill to amend the Family and Medical Leave Act to permit an employee an additional twenty-four hours a year for family needs.

...that the EEOC recently obtained the largest ADA verdict yet, when a Michigan jury awarded an employee $5.5 million? The employee, Thomas Lewis, worked as a truck driver for Complete Auto Transit in Troy, Michigan. He had an epileptic seizure. He asked the company to transfer him to another job, but the company refused and made no effort at reasonable accommodation. The verdict includes $4.3 million in punitive damages. The EEOC Chair, Gilbert Casellas, calls the verdict "historic."

...that according to the United States Department of Labor, FMLA complaints filed between October 1, 1995, through September 30, 1996, totaled 2,394, compared to 2,179 for 1995? The DOL also found that 1,379 of the complaints were meritorious, and the most frequent complaint was that employers considered the FMLA unexcused.

...that failing to meet weight requirements or a fitness test is not discrimination under the ADA? The Court, in the case of *Andrews v. Ohio* (6th Cir., January 13, 1997), concluded that failure to meet weight and physical fitness standards did not constitute an disability as defined under the ADA. The applicants alleged that they were perceived as disabled for failing these standards, but the Court stated that "a mere physical characteristic does not, without more, equal a physiological disorder..." Note that employers still must maintain the job-relatedness of these factors and also analyze reasonable accommodation where an applicant cannot meet these factors due to a disability.

...that 150 physicians in Tucson, Arizona, voted on January 23, 1997, to be represented by the American Federation of State, County and Municipal Employees? The physicians were employed at six different locations by the Thomas-Davis Medical Clinic, which was sold to a health maintenance organization. The physicians claimed that the reason for unionization is because of disagreements with their employer over how they will practice medicine.

...that the Machinists Union has sued Walt Disney Pictures and Television, Inc., for defamation, based upon how the machinists were portrayed in the film *Ransom*? The film featured a scene in which Mel Gibson (as the owner of an airline company) paid a $250,000 bribe to a "machinists union." The actual Machinists Union filed suit in Maryland on December 23, 1996, alleging that this depiction is a false and defamatory statement about the Machinists Union and subjects the union "to ridicule and scorn." The union also claims that its "standing and reputation" have been diminished, and its business and associational prospects have been severely injured and will continue to be injured in the future. The union seeks $200 million in damages.

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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Please reserve a seat at the Breakfast Briefing scheduled for February 27, 1997, at the Sheraton Perimeter Park South, Birmingham.

NAME: _____

COMPANY: _____

Others from my company who wish to attend:

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