EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

If an individual files for Social Security benefits, claiming that he or she is totally disabled, is that individual therefore precluded from coverage under the Americans with Disabilities Act? Not necessarily, according to the EEOC in its 39-page guidance memorandum issued on February 12, 1997. The EEOC explains that the term "disability" is not one with a universal meaning. For example, under the Social Security Act, "reasonable accommodation" is not factored into the assessment of whether the individual is entitled to receive Social Security benefits. Furthermore, under the Social Security Act, the question of "disability" for work relates to all job tasks that the individual would perform, nonessential and essential. Thus, an individual who is unable to perform nonessential functions may be entitled to receive Social Security benefits, but under the ADA, an individual's inability to perform nonessential functions due to a disability is not a basis for denying the individual an employment opportunity or continued employment. Finally, the EEOC states that the ADA analysis is job-specific, compared to a more general analysis under the Social Security Act.

The EEOC guidance was prompted by conflicts among the courts over whether an individual who claims to be disabled under one law is precluded from claiming that he or she is a qualified individual with a disability under the ADA. The EEOC does not state that a claim for Social Security benefits is irrelevant to a determination of whether an individual is covered under the ADA. According to the EEOC, "It is necessary to look at the context and timing of the representations [regarding disability]." Therefore, the EEOC instructs its investigators on a case-by-case to consider the following:

1. Does the disability application under the non-ADA statute involve specific positions or work in general? Does it include a reasonable accommodation analysis?

2. Were the disability representations to Social Security, for example, made in the charging party's own words, or by counsel, or someone else who assisted the charging party in seeking those benefits?

3. Did the representation for benefits include a statement that the individual was able to work, although with restrictions? Has the individual's mental or physical condition changed since the time the individual applied for disability benefits?

4. Did the employer suggest that the individual apply for disability benefits?

5. Did the individual work in any manner during the time frame when the individual claims to have been totally disabled?

The EEOC also says that its investigators should consider other factors, "such as advances in technology or changes in the employer's operations that may have occurred since representations were made..."

The EEOC investigators will use the guidance memorandum to determine whether an individual who has claimed total disability under one law is considered a qualified applicant or employee with a disability under the ADA. Employers should review the EEOC guidance before taking the position that
an individual who has filed for total disability under Social Security or another law is precluded from ADA coverage.

NEGATIVE AND TRUTHFUL REFERENCE BASIS FOR RETALIATION CLAIM

The case of *EEOC v. Avery Dennison Corporation* (6th Cir. January 17, 1997) raises the question of whether providing a reference that refers to a settlement can be viewed as retaliation under Title VII. The case involved an employee named Ronald Willis, who filed a race discrimination charge against his employer, Avery Dennison Corporation. He filed another charge, while still employed, claiming that he was suspended from work in retaliation for filing the initial charge. He then filed suit. The case was settled, whereby Willis agreed to resign from Avery Dennison Corporation. In exchange for his resignation, he received money and a good reference.

Approximately one year later, Willis was close to receiving a job offer from another employer. That employer checked with Avery Dennison Corporation for a reference regarding Willis. The potential employer was told that Willis had problems meeting the company's attendance policies and resigned from the company in exchange for a cash settlement. Based upon that reference, Willis was not hired by the potential employer and filed a charge of discrimination against Avery Dennison Corporation, claiming retaliation.

The case went to trial, and the district court ruled in favor of Avery Dennison Corporation. The district court said that the EEOC failed to prove that Avery Dennison connected the negative reference to Willis' protected activities under Title VII. The district court ruled that the EEOC failed to state a *prima facie* case on Willis' behalf, because it failed to show a connection between Willis' behavior and the reference given about Willis. The court of appeals concluded that Willis stated a *prima facie* case and that the district court needs to decide whether Willis satisfied his ultimate burden of showing that

he was retaliated against for filing the initial discrimination charges. The court distinguished stating a *prima facie* case from a case necessary to win: "To win a judgment, the plaintiff is required to overcome the additional obstacle of the defendant's rebuttal and convincingly demonstrate the existence of discrimination. All that is required of plaintiff at the *prima facie* case is to demonstrate that he has a case, that the evidence is on his side."

Note one theory that would have been available to Willis in this case is negligent maintenance of personnel records. That is, once the parties agree on the type of reference that will be provided, the employer is potentially negligent if it provides a reference inconsistent with that which was agreed upon. This case is a good example of the principle that not only is it important for employers to let a former employee know the type of reference that will be provided, but also be consistent in providing that type of reference. Too often, employers assume they cannot tell the truth about a former employee. Problems with references arise not because the employer told the truth, but because the former employee was unaware of the type of reference the former employer would provide.

DISCIPLINARY DOCKING OF EXEMPT EMPLOYEE'S PAY INVALIDATES EXEMPTION, RULES U.S. SUPREME COURT

On February 19, 1997, in the case of *Auer v. Robbins,* the United States Supreme Court upheld the Department of Labor's determination that docking pay from an exempt employee nullifies that individual's exempt status. The consequence is that the individual is entitled to overtime pay.

The case arose in the public sector, but its principle applies to private as well as public employers. The case involved police sergeants in the city of St. Louis, Missouri. According to the St. Louis Metropolitan Police Department Manual, exempt employees' salaries could be docked for disciplinary reasons, including unsatisfactory quality or quantity of work. The Department of Labor, on behalf of the police sergeants, determined that such a pay docking policy from an exempt employee nullified the individual's exempt status. The United States Supreme Court unanimously upheld the Department of Labor's regulations concerning pay docking of exempt employees. The regulations specifically provide that an individual must receive a salary in order to qualify as an exempt administrative, professional or executive employee, and that person's salary cannot be "subject to reduction because of variations in the quality or quantity of the work performed." The United States Supreme Court ruled that the Secretary of Labor is entitled to great deference by the Court and is not "plainly erroneous."

Note, however, that if an exempt employee is suspended for a week for disciplinary reasons, the individual does not have to receive pay at all for that week. If an employer's deductions from an exempt employee's pay are inadvertent, the regulations provide that "the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." However, where deductions occur as a matter of policy or repeatedly in response to questions regarding work quantity or quality, then the courts will uphold the Secretary of Labor's interpretation that the employer never intended for the person to be exempt and, therefore, the individual must be paid overtime.

REASONABLE ACCOMMODATION DOES NOT DIMINISH THE RIGHTS OF OTHERS, RULES COURT

A question arises under the ADA to what extent must an employer reasonably accommodate an individual with a disability if to do so would diminish the rights or privileges extended to other employees. This was considered most recently in the case of *Daigre v. Jefferson Parish School Board* (D. Ct. La, January 16, 1997). A teacher was shot by a student and developed post-traumatic stress syndrome. This occurred after the teacher was employed for only three months. Her doctors suggested that she should be placed in a different school, in order to assist her in overcoming her trauma disorder. Transfers to schools were governed by the terms of the collective bargaining agreement between the school board and teachers union. Daigre bid for a transfer to a school, which was denied under the transfer terms of the bargaining agreement. She was temporarily assigned to other schools to replace teachers who were on sabbatical. However, she claimed she should be permanently assigned to a position at a school with a reputation for non-violence, even if to do so would violate the terms of the bargaining agreement. The court granted the employer's motion for summary judgment, explaining that the collective bargaining agreement contained a bona fide seniority system and that the employer was not required to bump a more senior employee from a position or opportunity in order to accommodate a less senior employee. The court also concluded that the employer reasonably accommodated the teacher by placing her temporarily in different teaching situations at nonviolent schools, and that she continued to have the opportunity to bid for a transfer to other schools as her seniority

accumulated. Those employers that, as a matter of policy, provide for a transfer or shift preference based upon seniority are not required to diminish the seniority rights of other employees in order to reasonably accommodate an employee with a disability. However, employers should be careful to see whether they have made exceptions to such policies in the past and, if so, what their business reason would be for not making such an exception as a form of reasonable accommodation.

COURT UPHOLDS EMPLOYER REFUSAL TO COMPLY WITH OSHA SURVEY REQUEST

In 1996, OSHA sent 80,000 employers a survey entitled "Occupational Injury and Illness Report, 1995," which stated that participation was "mandatory" and that failure to file the report might result in citations and penalties under the OSH Act, stating that all employers receiving the form "must complete and return it within 30 days...."

The American Trucking Association ("ATA") and Federal Express Corporation sued OSHA on the grounds that OSHA did not have the authority to force employers to respond to a survey without first issuing a regulation. The U.S. District Judge Thomas Penfield Jackson in Washington, D.C. ruled that the survey constituted "final agency action" and held that the agency could only compel compliance with the survey if it first issued a regulation commanding employers to file reports. In essence, because the agency did not comply with the Administrative Procedures Act's rulemaking requirements, which, among other things, requires lengthy proposed rulemaking and public comment periods, the Court held that OSHA's edicts relative to the survey were baseless. Ironically, OSHA itself admitted that neither the OSH Act nor OSHA's record keeping regulations rendered the survey mandatory. Further proceedings will be held to determine damages in favor of ATA and Federal Express. It is uncertain at this time as to whether OSHA will pursue an appeal of the ruling.

DID YOU KNOW...

...that while on the subject of retaliation, a court ruled that copying confidential documents was not considered protected activity under Title VII in the case of *Laughlin v. Metropolitan Washington Airport Authority*? (D. Ct. Va, January 9, 1997). The employee, a secretary, copied personnel records of another employee. She claimed that she was retaliated against because she had filed a discrimination charge. However, the court ruled that there was no connection between her discrimination charge and copying the documents; the actions that resulted in her resignation were not protected under Title VII because they did not involve the protest or concern of employment discrimination.

...that legislation was introduced on February 11, 1997, to raise the minimum wage to $6.50 per hour by 2000? According to the proponent of the bill, Representative John Olver (D—Mass.), "How do we expect to get people off welfare and into jobs if it is more profitable for them to stay on welfare?"

...that an employee was convicted for falsifying an e-mail message in order to extort a $100,000 sexual harassment settlement from her employer? The case involved *People v. Lee* (Cal. Super.Ct., January 30, 1997). The company paid $100,000 to settle a sexual harassment complaint brought by former employee, Adelyn Lee against the company and her former boyfriend. Lee alleged that she was terminated by a company vice

president after she refused to have sex with her former boyfriend, who was an Oracle employee. An e-mail message was sent from the vice president to the former boyfriend, telling him that "I have terminated Adelyn per your request." It turns out that the e-mail was totally fabricated. The vice president who was alleged to have sent the e-mail did not have access to the system at the time the e-mail was sent. Ultimately, the company was able to show through its computer logs an electronic trail that pointed to Lee as the one who sent the message.

...that according to a January 30, 1997, report from SmithKline Beecham, positive drug tests of employees for 1996 continued to decline from previous years? According to the report, only 5.8% of those current employees who were tested for drugs tested positive, compared to 6.7% in 1995. These reports have been issued by SmithKline Beecham since 1987. Overall positive drug tests have declined by approximately 70% since that time. Of all samples tested in 1996, marijuana was found in more than half of all positive samples and cocaine was found in nearly 25% of all positive samples.

...that legislation was introduced on February 13, 1997, to prohibit unions from placing organizers on the payroll of targeted companies? Known as the "Truth in Employment Act," the bill's sponsors state that the legislation would "reassure employers that they are not obligated to hire persons whose intent is to wreak havoc on their businesses."

...that the proposal to cap financial contributions to candidates also includes regulating political contributions made by organized labor? Unions spent over $35 million to defeat Republican lawmakers in 1996. Legislation that was introduced by Senate Majority Whip Don Nichols (R—Oklahoma) would require that before unions could spend money on political activities, unions would need written permission from individual union members and would be entitled to a refund if the unions spent their dues on political campaigns.

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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