EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

It was not until 1986 that the United States Supreme Court first recognized that sexual harassment violated Title VII of the Civil Rights Act of 1964. Since that time, courts have struggled with the standards that should be applied in determining when an employer is responsible for a supervisor's improper behavior. A recent decision of the Eleventh Circuit may help clarify that confusion. Faragher v. City of Boca Raton, (11th Cir., April 15, 1997).

In Faragher, two former life guards of the City of Boca Raton claimed that two upper level supervisors touched them in a sexually offensive manner and that they also made offensive comments and gestures to them. Despite their claims, neither employee ever complained to the City's Parks and Recreation Department management neither at the time they were employed or when they resigned. Although both employees spoke with a lower level supervisor about the misconduct, they did not do so on a subordinate to superior basis; rather, they spoke with that supervisor as a friend whom they held in high repute. The lower level supervisor who discussed the matter with the lifeguards did not make any report to any other City official.

After resigning, one of the employees wrote a letter to the City's Director of Personnel complaining that she and other lifeguards had been sexually harassed. The City did not know about the misconduct until receiving that letter. The City investigated the complaint, determined that inappropriate conduct had occurred, and reprimanded and disciplined both individuals involved.

After resigning her position to attend law school, one of the employees filed suit against the City and the individuals claiming, among other things, that she was sexually harassed in violation of Title VII. The trial court found in favor of the employee, but awarded her nominal damages. The court reasoned that the City was directly responsible for the upper level supervisors' conduct based on their supervisory authority and the overall workplace structure.

The City appealed, arguing that it could not be held directly responsible under agency principles for the upper level supervisors' conduct for two reasons. The Eleventh Circuit agreed with the City and reversed the judgment for the employee on her Title VII sexual harassment claim. In ruling for the employer, the Eleventh Circuit recognized that neither supervisor was acting within the scope of his employment when he perpetrated the harassment. Indeed, the court found that the supervisors' conduct was an "archetypical example of employees stepping outside of the scope of their employment and seeking to defer their personal ends."

The court also ruled that the supervisors were not aided in accomplishing their harassment by the existence of their positions. The court recognized that at least in one sense, supervisors are always aided in accomplishing hostile environment sexual harassment by the existence of their positions. This is the case because a supervisor's responsibilities necessarily include close proximity

to and regular contact with the complainant. The court reasoned, however, that the rule concerning liability could not consider the term "aided" to have such a broad definition.
Rather, an employer is only liable if the harassment is accomplished by a instrumentality of the agency or through conduct associated with the agency status. A paradigm example of that would be if the supervisor who repeatedly reminds the victim that he can fire her if she refuses his advances.

Although <u>Faragher</u> is without question a victory for employers, the lesson employers must learn remains the same: to avoid liability for harassment claims, employers must, at a minimum, do the following:

1. The employer must have a well publicized policy on harassment.

2. Employers must properly train employees, and particularly supervisors, about the company's harassment policy and position on harassment.

3. Once harassment complaints are made, the company <u>must</u> perform a proper investigation.

In today's legal climate, avoiding employer liability is becoming increasingly challenging. Nevertheless, rechecking your policies and training your employees is a critical step employers must take.

EEOC ISSUES GUIDANCE REGARDING PSYCHIATRIC DISABILITIES COVERED UNDER THE AMERICANS WITH DISABILITIES ACT

According to the EEOC, approximately 2,000 out of its total of 78,000 discrimination charges filed last year claimed psychiatric disabilities that were protected under the ADA. Last month, the EEOC issued a guidance memorandum regarding psychiatric disabilities. The Commission defines the mental impairment provision of the ADA to include "mental or psychological disorder, such as...emotional or mental illness." Also included are learning disabilities and neurological disorders, including Alzheimer's. The EEOC adds that "a qualified individual with a psychiatric disability is covered by the ADA, even if medication is taken to control the effects of the disability."

One of the more difficult areas with psychological disabilities involves an individual's behavior that creates problems in interacting with fellow employees or customers. According to the EEOC, certain personality traits, such as unfriendliness, are not considered part of a disability and would not be covered under the Act. However, according to the EEOC, an employee would be covered under the Act if that employee's relations "were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary. These limitations must be long-term, as opposed to temporary, to justify a finding of ADA disability."

If an individual due to a psychological disability behaves inappropriately at work, what type of accommodation is required? According to the EEOC, possible approaches include adjusting supervisory methods, providing a "job coach" for the employee, assignment to a different job, and a modified work schedule are examples of possible reasonable accommodations. However, in general, an employer is not required to tolerate the disruptive behavior at work, but rather must make efforts to assist the employee such that the disruption does not occur. If the disruption continues even after accommodation, then the employer may take disciplinary action.

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INITIAL HIPAA INTERIM FINAL REGULATIONS ISSUED; MORE ON THE WAY

On April 1, 1997, it was no joke when the Departments of Labor, Treasury, and Health and Human Services issued approximately 375 pages of interim final regulations regarding the Health Insurance Portability and Accountability Act. The regulations are open to public comment until July 7, 1997, and it is anticipated that they will become final by the fall of 1997, so that employers can comply by HIPAA's January 1, 1998, effective date.

An area of substantial uncertainty from the regulations involves a situation where an individual as a condition of enrollment or continued participation in a plan may not be required to pay a premium greater than the premium for a "similarly situated individual" enrolled in the plan. The problem with such language, however, is that there is no elaboration or definition regarding who is a "similarly situated individual."

Another area of uncertainty concerns the impact of discounts for employees who participate in employee wellness programs. For example, is there a conflict between those employees who engage in a program such as smoking cessation, and receive a discount, with the terms of HIPAA which require nondiscrimination regarding premium benefits?

At our Breakfast Briefing, scheduled for May 29, 1997, from 7:45 to 9:00 a.m., we will review with you the interim regulations regarding HIPAA, with practical suggestions at what your organization can do in order to comply. Please call Susan Dalluege at 205/323-9263 for reservations for the May 29 meeting.

EMPLOYER HAS THE RIGHT TO RAISE NORMAL RETIREMENT AGE FROM 65 TO 67 WITHOUT VIOLATING ERISA, RULES COURT

The 10th Circuit Court of Appeals on April 18, 1997, upheld an employer's decision to raise what was defined as normal retirement age under its retirement plan from 65 to 67. Under ERISA, age 65 is considered the top age for what would be defined as normal retirement for those individuals who have at least five years of participation in the company's retirement plan. *Lindsay v. Thiokol Corporation* (April 18, 1997). The plan in this case provided that if an individual were vested and stopped working on or after his or her 55th birthday, the individual's pension benefits would vary from 43.4% at age 55 to 100% at age 67. Those at age 65 would receive 86.7% of the accrued benefits under the plan. According to the court, Thiokol met the ERISA requirement to preserve retirement benefits for those employees who reach "normal retirement age." Under the new plan, the retiree's benefit is still fully protected, even though now a 65-year old employee is considered two years short of the normal retirement age.

"PERCEPTION OF DISABILITY" CAUSED BY WORK-RELATED STRESS PERMITTED TO GO TO TRIAL

The case of *Lucky Stores, Inc. v. Holihan* (March 31, 1997), involved a grocery store manager who, during a three-month period, behaved in such a manner that on fifty-one separate occasions, store employees complained about him. Lucky did not terminate him for the behavior, but rather offered him the opportunity to take a leave of absence if he enrolled in the company's employee assistance program. He enrolled in EAP, where a psychologist who met with the store manager concluded that he "experienced stress-related problems precipitated by work." The psychologist recommended a three-month leave of absence, which the company granted. At the end of that leave, another leave was requested for three months because, according to the psychologist, Holihan, the store manager, now experienced anxiety and depression. The company refused to extend the leave beyond the initial three months and terminated him. When Holihan offered to return to work several months later, the company said that it had no store manager positions available, but would re-hire Holihan as a clerk. He "checked out" of the store and instead filed his ADA claim.

The federal district court judge who heard the case dismissed it, but the Court of Appeals reversed, stating that the company viewed Holihan as having a mental condition that rose to the level of a disability. According to the court, the company's recommendation that Holihan seek counseling and the company's review of the doctor's reports outlining Holihan's depression and anxiety were factors resulting in a determination that the company could have considered Holihan as disabled. The United States Supreme Court refused to hear the case, which means that the circuit court's decision stands: The case will go to a jury on the question of first, whether there was enough evidence to suggest that the company considered Holihan as disabled for psychological reasons and, if so, whether Holihan was discriminated against because of that impairment.

This case places employers in a situation where the more they try to help an individual who has behavioral problems at work, the greater the likelihood that the employer's actions will be considered covered under the ADA. The irony of this case is that if the employer had not suggested that the store manager seek assistance, but rather terminated the store manager based upon his behavior, it is unlikely that the store manager could have articulated a basis for an ADA violation. Thus, employers need to be aware that when assisting employees with emotional or psychological difficulties, such as in this case, remember the ADA obligations because the ADA will likely apply to the situation.

DID YOU KNOW...

...that Laborers' International Union organizers went on strike against their union for over a week, demanding recognition? Only after the union agreed to recognize the organizers union, known as the Federation of Union Representatives, did the organizers return to work. As an outcome of the dispute, the union's assistant organizing director, Dwayne Stillwell, resigned, stating that the organizers were "an unbelieving, naive group..."

...that a jury concluded that 13,000 Taco Bell employees were not paid overtime because they were told to work off the clock? The case, *Ryder v. Taco Bell Corporation*, was a class action with the jury returning its verdict on April 8, 1997. The case involved employees who alleged that they were required to work prior to and after their scheduled shift time, but they did not get paid more than 40 hours a week. In some situations, if business was slow when employees arrived at work, they were told not to clock in until more customers arrived.

...that the promise of the Steelworkers to hold "the biggest party in Texas" tainted the results of an election which they won, thereby resulting in a second election? In the case of *Trencor v. NLRB* (5th Cir., April 8, 1997), the union the day before the election promised that, if they won, they would hold the biggest party ever in Texas with lots of food and beer for everyone. The union argued that all it was doing was trying to lay the groundwork for a constructive employer—union relationship if it

won the election. However, according to the court, "There is no indication in the record that the offered 'biggest party in the history of Texas' had anything to do with laying the groundwork for a productive employee—union relationship or, indeed, was anything more than an inducement to vote for the union."

...that the United Food and Commercial Workers Union has filed a national class action lawsuit against Albertson's, claiming that the company violated the Fair Labor Standards Act? *Barton v. Albertson's, Inc.* (D. Ct. ID, April 17, 1997). The union seeks $200 million in back pay, claiming that employees were required by store managers to work off the clock. As evidence of this, the plaintiffs claim that a store manager's bonus was reduced if employees worked overtime. Albertson's employs 88,000 individuals in twenty states; so far, approximately 6,000 current and former employees have raised the wage and hour claim.

...that the United States Supreme Court on April 21, 1997, agreed to determine whether an individual who signs a "good-bye forever" release in exchange for money can keep the money and claim that the release is invalid? The case, *Oubre v. Entergy Operations, Inc.* (April 21, 1997), involved an employee who was told that she would either be terminated if she did not improve or that she could resign and accept a severance package that would release the company of any and all claims she had against it. She signed the agreement and took the money but filed suit a year later, claiming that she was rushed into signing the agreement. The agreement did not meet all of the requirements of the Older Workers Benefit Protection Act. However, the court of appeals and district court ruled that even though the release did not comply with the law, because Oubre kept the money, she lost the right to sue about the release. The issue before the United States Supreme Court is whether an otherwise invalid release remains effective if an individual does not return the money.

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