EMPLOYMENT LAW BULLETIN

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

Volume 5, Number 7 ***July 1997***

TO OUR CLIENTS AND FRIENDS:

Because we were unable to accommodate all of those who had requested to attend "The Effective Supervisor" program which Richard Lehr and Brent Crumpton conducted on April 22, 1997, we have scheduled another program for Friday, October 10, 1997, at the Sheraton—Perimeter Park South in Birmingham. Enclosed is a registration form.

The program will again be conducted by Richard Lehr and Brent Crumpton. The following is an outline for the program:

1. **A supervisor's guide to legal rights and responsibilities in today's workplace.**

2. **The supervisor's role in preventing, identifying, and responding to workplace harassment or possible violence.**

3. **Dealing with and documenting problem employees and employee problems.**

4. **How to create and conduct an effective employee performance appraisal.**

5. **Discharging an employee.**

If you have any questions regarding the program, please call either Richard (205/323-9260) or Brent (205/323-9268).

PROACTIVE EMPLOYERS DEFEAT CLAIMS OF SEXUAL HARASSMENT

Three recent cases illustrate how proactive employers are more likely to avoid claims of sexual harassment or win those cases should they arise.

In the first case, *Reynolds v. CSX Transportation, Inc.* (11th Cir. June 20, 1997), the court of appeals overturned a $300,000.00 jury award for sexual harassment. Reynolds, a temporary employee working at CSX in Jacksonville, Florida, was subjected to vulgar and vile comments from her CSX manager, including a suggestion that Reynolds work at a nude club so the manager could watch her. The company had an anti-harassment policy posted on all of its bulletin boards. Furthermore, after the company became aware of Reynolds' complaints, it promptly investigated, offered Reynolds her job back, issued a written reprimand to the manager, cut the manager's pay by five percent for six months, and transferred the manager to a different floor. The court concluded that when CSX became aware of the behavior, it took prompt, remedial action and, therefore, should not be liable for sexual harassment.

In a case decided ten days later by the 11th Circuit, *Farley v. American Cast Iron Pipe Co.* (June 30, 1997), the court ruled that "once a company has developed and promulgated an effective and comprehensive anti-sexual harassment policy, aggressively and thoroughly disseminated the information and procedures contained in the policy to its staff, and demonstrated a commitment to adhering to this policy, it has fulfilled its obligation to make reasonably diligent efforts to

'know what is going on' within the company." When this is the case, the employee cannot attribute liability to the employer without making his or her concerns known through appropriate channels.

In another recent case, an employer escaped liability for a sexual harassment claim not because of the employee's failure to report the misconduct but because the employee requested confidentiality. Specifically, Jenice Torres' manager allegedly ridiculed her when she was pregnant, made crude sexual comments to her and used racial slurs. Although Torres never complained about her manager's behavior, when another member of management learned of her situation, he encouraged her to file a formal complaint. She repeatedly maintained that she could take care of the matter and any reports of it should remain confidential. Ultimately, she presented her concerns to upper management which arranged to have her transferred with an increase in pay. A year later, she filed suit claiming that her employer's less than rapid response was unacceptable. The court found that she could not recover because her employer's failure to swiftly respond to her allegations of workplace misconduct was a direct result of her request for complete confidentiality. *Torres v. Pisano* (2nd Cir. June 3, 1997).

We suggest that even if an employee requests confidentiality, the employer should still process the reported harassment. Do not let the employee determine whether or not the claim proceeds.

In order for an employer to be responsible for a hostile environment, the employer had to have known or should have known about the behavior and failed to take prompt, remedial action. We suggest that after such action is taken, report back to the individual who made the complaint to let that person know what has been done. A proper policy, posted and communicated, and a thorough investigation will be an effective problem avoidance approach.

A REPORT ON NEW HIRING REPORTING

The federal new hire reporting system becomes effective on October 1, 1997. This new hire reporting requirement arises out of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 which was signed into law by President Clinton on August 21, 1996. The Act requires all 50 states to create new hire reporting systems to collect and submit to the federal government information to create a unified database through which individuals entitled to child support and similar obligations can locate delinquent debtors. Virtually all states have enacted laws to comply with the Act. As an example, Alabama law provides:

> Section 5. (a) An employer shall report to the Department [of Industrial Relations], within 7 days of hiring, each new hire, recall, or rehire. The information to be reported shall include the name, address, social security number, and date of hire of each newly hired, recalled, or rehired individual, and the name, address, and state and federal identification numbers of the employer. The information shall be reported on forms supplied by the Department or by such other method as approved by the director. Notwithstanding the forgoing, employers may transmit reports to the Department magnetically or electronically, twice a month, not less than 12 days nor more than 16 days apart, when required.

State laws also include penalties for noncompliance. In Alabama, the penalty is a $25.00 fine per violation.

Unfortunately, the federal Act fails to address the issue of how employers with employees in multiple

states will report their new hires. For example, if an employer has its headquarters and human resources department in South Carolina but hires a new employee in Florida, does the employer have to report the new hire to South Carolina, Florida, or both? Although this remains unresolved, the Health and Human Services Department has suggested that employers report all hires in the state of employment or report all hires for the entire company in a single state of its (the company's) choosing. The states, in essence, collect this information and report it to the federal government for action. Therefore, we suggest that multi-state employers may report all hires in a single state. Employers should begin planning now to comply with this new hire reporting system.

"REGARDED AS DISABLED" BECOMES CATCHSALL FOR ADA PLAINTIFFS

In order for an individual to be covered under the Americans with Disabilities Act, the individual must show that he or she has a physical or mental condition that impairs a major life function. A disability also includes an individual who has a condition that does not impair a major life function, but the employer treats the individual as if he or she is disabled. We are seeing an increase in the number of ADA cases in which individuals who are not considered disabled under the traditional definition of disability are claiming that the employer perceived that they were disabled and, therefore, discriminated against them. Two recent cases illustrate this point.

The first case revolved around Richard Bryant's activities while working for an auto parts warehouse company. Bryant, who is 6 feet tall and weighs over 350 pounds, was hired by a store manager without having met the company's owners. Bryant was initially permitted to drive the company's Ford Fiesta and GEO Metro delivery vehicles. However, after the company's owners learned of Bryant's size, he was restricted to driving the company truck. Bryant ultimately quit and filed a claim based on constructive discharge. Bryant conceded during pretrial proceedings that although he met the medical definition of "morbid obesity," the theory of his case was not that he was in fact a disabled individual within the meaning of the ADA. Rather, Bryant contended that he was "regarded" as having a disability and therefore entitled to protection by the Act. The court agreed that a factual issue existed as to whether or not Bryant's employer perceived him as being disabled regardless of whether he in fact was. Consequently, the judge ruled that the case should proceed to trial. *Bryant v. Troy Auto Parts Warehouse, Inc. (* D.Ct.S. Ind., April 25, 1997).

The second case involves Evelyn A. Mundo. Shortly after being promoted into a new job with increased responsibilities, Ms. Mundo was forced to take medical leave to undergo an appendectomy. In her absence, her employer discovered that she had a backlog of work. Her employer concluded that she was "stressed out" by the demands of her new position and that she did not exhibit the personality traits necessary to serve in a supervisory capacity. Ms. Mundo's employer terminated her based on this evaluation of her performance and capabilities. Mundo filed suit under the ADA contending that she was "regarded" as a disabled individual because she could not handle stress. The court disagreed and dismissed her case. *Mundo v. Sanus Health Plan of Greater New York (* D.Ct. N.Y., June 24, 1997*)*.

Unfortunately, even a well-intended employer can create evidence that can be fodder for a "regarded as disabled" claim. For example, assume that an employer is not sure whether an employee's condition is covered under the ADA. However, in an effort to be sure that the employer does not violate the ADA, the employer provides the individual with reasonable accommodation. If the reasonable accommodation is not sufficient and no alternatives are available, or the reasonable accommodation works but the employee is

otherwise terminated, the employee can then use the employer's accommodation as evidence to suggest that the employer considered the employee as disabled. Even with this example of "no good deed goes unpunished," we still encourage employers to try to accommodate employee medical conditions, if possible, particularly if the employer is not sure whether the employee is covered under the ADA.

LABOR'S ORGANIZING EFFORTS FAIL TO GAIN NEW MEMBERS

The National Labor Relations Board has released its annual report on union activity, covering 1996. The figures generally show that although organizing activity rose slightly, union victories declined. Check out the scores below:

Almost 3,000 representation elections were held in the United States in 1996 representing a 3.7% increase from 1995. Although there was an increase in the number of elections, union successes continue to wane with 1996 marking the second year of decline. Specifically, unions won 49.2% of elections in 1994, 48.2% in 1995, and only 47.7% in 1996. ***Management 1, Labor 0***.

From the standpoint of unit size, unions have better than a 50-50 success rate in representation elections with units of 50 workers or less. However, with units of over 500 employees the success rate drops to only 37%. ***Management 2, Labor 0***.

Unions only have about a 1 in 3 chance of surviving a decertification election. Specifically, unions prevailed in only 31.1% of the 1996 decertification elections. Although less than a 1/3 success rate, it does represent an increase from the 29.7% figure attained by unions in 1995. ***Management 3, Labor 0***.

Unions were most likely to be decertified in units of 50 or less (only a success rate of 23.2%) and most likely to retain representation in units of 100 to 499 employees with a success rate of 55.5%. ***Management 3, Labor 1***.

On July 14, 1997, an NLRB general counsel, Fred Feinstein, told the Legislative Conference of the United Steelworkers that the NLRB has seen "little change" in its overall case load during the past year compared to previous years. Based upon the NLRB results for 1996 and Mr. Feinstein's comments about the NLRB workload during 1997, it appears that organized labor's organizing efforts have not resulted in an increased amount of activity.

WHEN A MEDIATED SETTLEMENT DOES NOT SETTLE THE MATTER

Under the Older Workers Benefit Protection Act, an individual has twenty-one days to decide whether or not to sign the agreement and seven days to revoke his acceptance. However, what if the individual signs an agreement as an outcome of a mediation, where the individual is represented by counsel? According to the court in *Jacobs v. New York Financial Center Hotel* (D.Ct. NY, June 5, 1997), the twenty-one and seven-day periods still apply.

As an outcome of a mediation held with the employer, Jacobs accepted and signed off on a settlement agreement of $65,000.00 to waive his age discrimination complaint. Some days later, Jacobs told the company that he wanted more money. After those negotiations failed, Jacobs sued. The employer attempted to dismiss the case, seeking enforcement of the settlement agreement reached through mediation. The court ruled that there is no language in the Older Workers Benefit Protection Act suggesting that the twenty-one and seven-day periods do not apply to a mediation process. Furthermore, according to the court, Jacobs "had only a few hours to consider the settlement agreement. He also claims to have been under pressure because the mediator told him that

defendants' offer was open only during the mediation session. The short, intense time was insufficient to allow full consideration of the terms of the agreement. Indeed, once plaintiff had an opportunity to think it over, he rejected the settlement agreement." The circumstances in this case, according to the court, fully support the basis for the OWBPA and the twenty-one and seven-day periods. Therefore, the release was not binding and the plaintiff was permitted to proceed with his lawsuit.

DID YOU KNOW...

. . .that the National Labor Relations Board ordered Colgate-Palmolive Company to bargain with the International Chemical Workers Union regarding workplace surveillance? Specifically, Colgate was planning the installation of hidden workplace cameras in a plant located in Indiana. The Board held that hidden cameras were comparable to physical exams, drug testing and polygraph tests and, therefore, subject to mandatory bargaining.

. . . that the United States Supreme Court will decide whether Title VII prohibits "same sex" harassment? The Fifth Circuit Court of Appeals has ruled that Title VII does not govern such cases. However, the balance of the federal circuit courts of appeals which have reviewed the issue, have found at least some degree of protection under Title VII for "same sex" harassment in the workplace. Consequently, the time has come for the high court to review the issue and settle the law. The case which the Court has agreed to review involves an individual who claims he quit his job on an off-shore drilling rig because of repeated threats from his male co-workers that they were planning to rape him. *Oncale v. Sundowner Off-Shore Services, Inc.* (June 9, 1997).

. . .that a jury awarded $26,000,000 (that's $26 million) to a former employee of Miller Brewing who was fired in response to allegations of sexual harassment? The "harasser" had shown a co-worker a page from a dictionary containing the definition of a item of female anatomy which was the topic of a portion of a recent episode of Seinfeld. Although the case has been fodder for the press, it also has legal significance. Specifically, the jury apparently found that the company's treatment of the alleged harasser was heavy-handed and unacceptable. It is important for employers to never forget that both the harasser and the harassee are potential litigants with workplace rights. Consequently, the cure for a sexual harassment complaint is a proper investigation and a reasonable response to the allegations based on the results of the investigation.

. . . that on July 11, in the case of *NLRB v. Web Core Packaging*, the Sixth Circuit Court of Appeals ruled that the company violated the National Labor Relations Act by creating a plant council employee involvement group? Participation in the council was by election. The purpose of the council was to address work rules, wages and benefits. Two months later, the Teamsters lost an election to represent the company's employees. The court upheld the NLRB determination that the employer created an illegal company union.

. . .that the EEOC, on July 17, 1997, announced that it will take several actions to oppose mandatory arbitration agreements? According to the EEOC, such agreements diminish individual employee rights and are entered into under distress, because if the applicant does not sign on, the applicant does not get the job, and if the employee does not accept the agreement, the employee may be terminated.

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The Employment Law Bulletin is prepared and edited by Richard I. Lehr and David C. Skinner. Please contact Mr. Lehr, Mr. Skinner, or another member of the firm if you have questions or suggestions regarding the Bulletin.

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THE ALABAMA STATE BAR REQUIRES
THE FOLLOWING DISCLOSURE:

"No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

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Please reserve a seat at "The Effective Supervisor" training seminar scheduled for October 10, 1997, at the Sheraton Perimeter Park South, Birmingham.

NAME: _____

COMPANY: _____

Others from my company who wish to attend:

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