EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

"LAYOFFS HIT JOBS AS UPS RETURNS; TEAMSTER PRESIDENT'S ELECTION IS THROWN OUT"

. . .and the public believes the Teamsters "won" the strike with UPS and organized labor is back on track? No doubt that at the time the strike was settled, the public perceived that UPS caved in to the Teamsters. The subsequent headlines showed why Ron Carey, president of the Teamsters, spent as much time with public relations as he did negotiations. He expected that his election victory over James Hoffa, Jr., would be overturned and that he would have to run again. Those who think the union won the strike should consider the price striking employees paid, which for full-time drivers amounts to approximately $2,000.00 of lost pay and for approximately 15,000 union members, layoff notices.

The major strike issue where UPS caved in concerned the company's proposal to create its own pension plan and withdraw from the thirty-one multiple employer regional Teamster plans. Although UPS employees would have been better off with a UPS plan, Ron Carey clearly could not politically agree to that proposal. The wage proposal agreed to for full-time and part-time employees varied only marginally from what UPS offered prior to the strike. The top paid, full-time drivers will receive a 2.8 percent annual increase for the five-year duration of the contract.

There were two winners in the UPS—Teamster strike. First, UPS' competitors won. Second, Ron Carey won. His excellent use of the media during the strike in essence provided free publicity for his election campaign. UPS did not aggressively make its position known to the public, and chose not to engage in a public relations battle with the Teamsters. There were two business reasons why UPS made this decision. First, they did not want to further alienate the workforce. Second, UPS did not want to engage in rhetoric that would have placed them at odds with the President of the United States and Secretary of Labor, both of whom exerted pressure on UPS to back off of its key pension proposal.

The public perception of a Teamster victory will no doubt help the Teamsters and Ron Carey, but our view is that this perception will not translate into an increased success among unions in their efforts to recruit new members.

EMPLOYERS TRY TO UNDERSTAND ISSUES RELATED TO UNDERSTANDING EMPLOYEE SPEECH

Recent cases have raised questions concerning employer actions because an employee either cannot speak English or cannot speak English well. For example, in *EEOC v. Norrell Services, Inc.* (E.D. Pa, 8/1/97), a Nigerian telemarketer with a heavy accent was terminated because according to the employer, he had "a communication problem." The EEOC filed suit on behalf of the telemarketer,

claiming that the telemarketer's personnel file did not indicate any problems with his job performance, and in fact showed that his performance was comparable to other employees even if he spoke with a heavy accent. According to the EEOC, the reason for termination was based upon the individual's national origin.

In another case, the EEOC filed a charge against the Houston Astrodome on behalf of twenty-five cleaning department employees. All of the employees were female, first-generation Hispanic immigrants who could not speak or understand English. The charge alleges that the women were grabbed, pushed and subjected to repeated sexual overtures from their supervisor. The EEOC claimed that the Astrodome's failure to communicate its sexual harassment policy in Spanish created such a barrier that these women could not complain about the behavior. This case was settled by the Astrodome on June 12, 1997, as it agreed to pay each woman between $13,000.00 and $30,000.00, and also to communicate about sexual harassment in Spanish.

If an employer has employees who cannot read or understand English, the employer is responsible for communicating to them in a manner they can understand about the employer's policies regarding harassment and anti-discrimination, and what steps those employees should take if they believe those policies have been violated. Although most states do not require that employers communicate to its workforce in a multi-lingual manner, employers that fail to do so lose the defense in cases that "the employee failed to complain about the behavior" because the employer did not take the necessary steps for the employee to know how to complain. Furthermore, employers may also be planting the seeds for a potential national origin discrimination claim.

If an employee's job performance is deficient and the employer believes it is due to not speaking clearly or well enough, an employer should focus on as many objective facts regarding performance as possible. For example, a telemarketer can be measured by number of calls and successful solicitations. If an individual is unsuccessful in performing the job, then the employer should focus on the outcome of performance that was expected, rather than assuming that the outcome was because of the language issue. If an employee performs a job where it is difficult for others to understand, and that has created communication problems for the employer, then the employer should become pro-active in discussing this with the employee, explain the communication level required, and discuss the steps the employee can take from a self-help prospective to meet the employer's expectations. Assisting the employee with finding a self-help program may not only enhance that individual's effectiveness, but it will also help the employer avoid or win a dispute suggesting that the employee's termination is due to national origin.

TEN CANS OF BEER EACH EVENING DOES NOT IMPAIR MAJOR LIFE ACTIVITIES, RULES COURT

The case of *Burch v. Coca-Cola Company* (5th Cir., 7/30/97), involved an employee who claimed that he was terminated because he was a recovering alcoholic. A Texas jury agreed with the employee, and awarded him $700,000.00 in front pay, $300,000.00 for pain and suffering, $109,000.00 in back pay, and $6 million in punitive damages. The trial judge reduced the front pay award to $295,000.00, granted his attorneys a fee of $208,000.00, and threw out the punitive damages award. The Fifth Circuit Court of Appeals threw out the remainder of the award.

According to the court, Burch worked for Coke for about three and a half years as an area service manager and received high performance reviews. A year and a half before he was terminated, he entered the company's EAP. He was then referred to mental health professionals who concluded that he suffered from depression and "probable" alcohol

abuse. Burch never drank at work, but he said that he often drank ten beers each night and showed up for work the next day unfit for work because of his heavy drinking. He claimed that the company culture contributed to his alcoholism, because the culture said that alcohol went better with Coke. During the time that Burch received assistance due to his drinking, he attended a managers meeting where after a few drinks, Burch spoke to fellow managers in an angry, violent and threatening tone. Two months later when Burch told the company that he was ready to return to work after his alcohol treatment, the company told Burch he was terminated. The court of appeals concluded that although Burch was frequently drunk and drank heavily, his drinking was not a substantial impairment of a major life activity and, therefore, he was not covered under the ADA. Burch also claimed that the company failed to reasonably accommodate him. The court said that even if Burch were covered under the ADA, his reasonable accommodation claim fails because according to the court "Burch has contended consistently that he required no job concessions, that he was in every way fit to return to precisely the same position, the same responsibilities, the same schedule, the same supervisor, and even the same office that he had prior to his treatment. . ."

This decision is an encouraging one for employers, because once again it shows how courts are somewhat narrowly interpreting the definition of what impairs a major life activity for coverage under the ADA.

A THIRTY-MINUTE WAGE AND HOUR VIOLATION MAY COST AN EMPLOYER $15 MILLION

Under the Fair Labor Standards Act, an employer is not required to give employees a lunch break. However, if the employer gives the employee a lunch break and it is more than twenty minutes, the employer may treat that lunch period as unpaid only if the employee is free and clear of job duties throughout that time. Occasionally, an employee may perform an incidental task during the lunch break, but that action does not usually require that the break become a paid one. However, in the case of *Reich v. Southern New England Telecommunications Corporation* (2d Cir., 7/31/97), employees during their lunch breaks were required to remain at the work site for security reasons. The lunch break was thirty minutes. The employer's security concern was to be sure that there was no vandalism to the employer's work or equipment. The court agreed with the employer that it was "easy" for an employee to look around the workplace while eating lunch. However, the court said that because the employee's freedom to leave the workplace during that lunch break was restricted for the employer's benefit, that lunch break must be treated as working time. This pay practice involved 1,500 telephone technicians over 156 weeks. The damages are in the range of $15 million.

Employers should be sure their wage and hour practices do not result in inappropriate meal deductions. One frequent example is when employees eat at their work stations. Often, the Wage and Hour Division of the Department of Labor will assume that an employee performs incidental tasks for the employer during such a break and, therefore, the break is not one where the employee is free and clear of job responsibilities.

SIGN A NON-COMPETE AGREEMENT OR YOU'RE FIRED

One question that often arises is whether an employer may terminate an employee who refuses to sign a non-competition agreement. In the case of *O'Regan v. Arbitration Forums, Inc.* (7th Cir., 7/31/97), the court ruled that the employer had the right to terminate an employee who refused to sign a non-competition agreement. The employee was given ten days to review the agreement and

decide whether she wanted to sign it. She refused to do so, knowing she would be terminated. The employee claimed that the employer's "sign or else" approach violated the public policy of the state where she was employed, Illinois. The court of appeals upheld the employer's actions.

Note that in several states, an employer may communicate to an employee that the employee must sign a non-compete agreement or else face termination. In other states, courts have ruled that such a contract is one that is entered into under duress and, therefore, not enforceable. We suggest that if employers would not permit employees to drive up to the facility and take product away at will, why should the employer permit the employee to leave with any ideas or information in the employee's head that can be used if the employee becomes a competitor or works for a competitor. The only way the employer can potentially limit that is if the employee signs a non-compete agreement. The only way to be sure that you can tell an employee to "sign, or else" is to know if it is permitted in the state where the employee is located.

DID YOU KNOW...

. . .that a federal judge presiding over the settlement of the class action race discrimination suit against Texaco approved an attorney's fee award of over $19 million ($19,154,115.00)? (DLR 150, A-8). The plaintiff attorneys didn't even have to prepare the case for trial.

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. . .that Labor Department statistics released August 7, 1997, show that work-related fatalities in 1996 were at a five-year low? Six thousand one hundred twelve workers were killed as the result of workplace accidents in 1996. This represented a two percent reduction from the 1995 figures.

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. . .that Rep. David Bonior (DSMichigan) has introduced a bill to raise the federal minimum wage by five annual increments culminating in an hourly wage of $7.25 by the year 2002?

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. . .that an employer owes nearly $400,000.00 in back pay for requiring exempt employees to use accrued vacation to pay for partial day absences? In the case of *Graziano v. Society of New York Hospital* (D.Ct.S NY, 7/16/97), exempt nurses claimed that the requirement to use vacation pay for partial day absences violated wage and hour law.

The court agreed with them, holding that from the court's viewpoint, there is no difference in requiring employees to use an accrued benefit or just reducing the employee's weekly salary for the amount of the absence. There is a difference of opinion on this issue within the Wage and Hour Division of the Department of Labor. Certain wage and hour districts take the same approach as in this case, and other districts conclude that requiring an exempt employee to use vacation for partial day absences is not considered docking that person's salary.

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. . .that the case of *Paula Jones v. President Clinton* is set for trial in May 1998? Ms. Jones accuses President Clinton of "*quid pro quo*" sexual harassment, a claim he vehemently denies. The judge is a former law student of President Clinton. It would not surprise us if the case is settled.

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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