EMPLOYMENT LAW BULLETIN

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

Volume 5, Number 10 ***October 1997***

TO OUR CLIENTS AND FRIENDS:

The number of claims alleging "retaliation" for engaging in protected activities continues to rise. A recent decision by the United States Supreme Court not to review an employer**S**favorable opinion about retaliation provides employers with some guidance regarding the perameters of what actions are considered retaliatory. The case, *Mattern v. Eastman**S**Kodak Co.* (U.S. S.Ct., October 20, 1997), involved an apprentice mechanic who filed a discrimination charge alleging that she was subjected to a sexually hostile work environment. She then claimed that after she filed the charge, her supervisor threatened to terminate her. She also said that her performance reviews became more negative after she filed the charge, which resulted in no pay raise. She was also told by her supervisor that she was on final notice that if her performance did not improve, she would be terminated. She quit shortly thereafter and filed her retaliation claim. A jury concluded that although she had been sexually harassed, Kodak took prompt, remedial action. However, the jury also concluded that Mattern was retaliated against _____ charge of discrimination, and it awarded Mattern $50,000.00. The Fifth Circuit Court of Appeals reversed that decision, holding that the alleged retaliation did not result in "ultimate employment decisions."

The Fifth Circuit said that "hostility from fellow employees, having tools stolen, and resulting anxiety without _____ did not consitute the required adverse employment actions" for retaliation. In concluding that none of the alleged retaliation was actionable, the Court of Appeals said that a retaliation claim must involve an "ultimate employment decision." This includes hiring, termination, promotion, or compensation, rather than an intermediate decision that has some effect on an ultimate decision. For example, the Court of Appeals indicated that the performance review and discipline were not ultimate decisions, but only tangental to those decisions.

The United States Supreme Court refused to review the Fifth Circuit's decision. Several employee rights advocates screamed about this result, declaring that it is "open season on employees who complain to the EEOC or otherwise oppose discrimination." For employers, the Supreme Court's decision is a welcome one, because it increases the burden and narrows the scope of actions employees may claim as retaliatory under employment discrimination laws.

FITNESS FOR DUTY EXAM CONSISTENT WITH ADA AND FMLA, RULES COURT

Some employers have been confused regarding what rights an employer has to require an injured or ill employee to take a fitness for duty exam before returning to work. The court in *Porter v. United States Alumoweod Co., Inc.* (4th Cir., September 15, 1997), clarified employer rights in such a situation.

The plaintiff began employment as a machine operator in September 1991. Shortly thereafter, on two separate occasions, he injured his back at work. After the second injury during the time

Porter was recovering from that injury, the company sent Porter a letter telling him that if he wants to return to active status, he will have to provide a doctor's or a therapist's statement that he is able to perform the functions of the job. Three months later, on April 7, 1994, Porter underwent surgery for his back. One month later, on May 9, his doctor wrote a note that he was able "to return to work safely without any limitation." However, the company stated that it needed an evaluation of Porter's functional capacity to perform the job duties with or without accommodation. It also told Porter that he would have to pay for the cost of such an appointment and related tests. Porter refused to comply with the company's request and was terminated. Porter's lawsuit alleged violations of the ADA and FMLA.

In reviewing the EEOC regulations regarding the ADA, the court stated that the ADA permits such an exam as required in this case when the request is "job-related and consistent with business necessity." Because the job required continuing lifting and pulling, the employer was within its rights under the ADA to require the functional capacity exam. The court added that Porter's refusal to take the exam resulted in his inability to prove that he was at all disabled, since his physician authorized him to return to work without limitation.

Regarding Porter's FMLA claim, Porter relied on the FMLA regulation that upon return to work, an employee only needs to provide "a simple statement of an employee's ability to return to work." In rejecting this, the court explained that if the employer's exam is job-related, the employer has the right under the FMLA and the ADA to require a fitness for duty exam before returning to work.

UNIONS LEAD CAMPAIGN FINANCE CASH FLOW

According to a report issued on September 9, last year organized labor spent $119 million on federal political activity. Sixty-six million dollars of that total was spent on direct contributions to candidates, while the remainder was spent on lobbying and other political activity. The report was issued by a nonpartisan organization known as the Center for Responsive Politics, and is entitled "Political Union: The Marriage of Labor and Spending." According to the report, unions outspent the business community during the 1996 elections by a ratio of seven to one. The leading contributors were the American Federation of State, County and Municipal Employees ($3.1 million), the Teamsters, National Education Association, and Laborers International ($2.8 million each). The Auto Workers and Food and Commercial Workers each contributed $2.7 million. Those candidates who received the greatest political contributions from unions were Senators Feinstein of California ($655,000.00), Harkin of Iowa ($620,000.00), Conrad of North Dakota ($474,000.00), Glenn of Ohio ($456,000.00), Wellstone of Minnesota ($407,000.00), and Torricelli of New Jersey ($406,000.00). Out of the total amount of political contributions to candidates, only $4 million from organized labor was contributed to Republican candidates. The UAW spent the most of any union on lobbying, a total of $2.9 million. A copy of the report can be obtained by calling the Center at 202/857-0044.

* * *

WHEN DOES RELIGIOUS PROSELYTIZING BECOME HARASSMENT?

This issue was considered recently by the 7th Circuit Court of Appeals in the *Venters v. City of Delphi* (August 19, 1997). The essence of the lawsuit was an employee complaining that her supervisor placed her in a situation of either

conforming to his religious beliefs or losing her job. Using an analogy to sexual harassment claims, the court said that the religious remarks to the employee "were uninvited, were intrusive, touched upon the most private aspects of her life, were delivered in an intimidating manner, in some cases were on their face scandalous, and were unrelenting."

Venters worked for the city as a police dispatcher, and reported to the Chief of Police, Ives. According to the court, Ives made it clear to Venters that he was a born-again Christian, that he thought that his decisions as chief should be based upon his religious faith, and that he had "been sent by God to [the employer] to save as many people from damnation as he could." The police chief spoke to Venters often about the Bible, and her own salvation. His comments to her about her salvation made her believe that he thought she was immoral. He referred to the police station as "God's house" and told Venters that she should play by "God's rules." He also told her that she needed to be "saved" in order to be considered a good employee.

As you could predict, Venters and the chief started to have work-related disagreements. The chief suggested that one way to resolve those disagreements would be for Venters to seek spiritual counseling and attend church services with him. On one occasion after telling the chief that she did not go to church, the chief told Venters that "she had a choice to follow God's way or Satan's way, and that she would not continue working for Ives if she chose the latter." Ives also told Venters that she lived a "sinful life," that he thought she had sexual relations with family members, and that he believed that she was sacrificing animals. He also told her that he thought suicide was a better alternative than her lifestyle.

The lower court dismissed Venters' claim in part because the court concluded that as a prerequisite for alleging religious harassment, an individual must show that he or she sought an accommodation of their own religious beliefs or practices. According to the appeals court, requesting religious accommodation is not at all necessary in order for an individual to claim religious harassment. Using the principles of sexual harassment case analysis, the court said that this case raises a question of whether there is a "*quid pro quo*" form of religious harassment, something to the effect of "adopt my beliefs or you are fired."

This case is instructive to employers in several respects. First, analyzing whether behavior is a form of religious harassment follows the sexual harassment model. That is, is there pressure from the employee's supervisor to adopt that individual's religious beliefs or practices, or else face job harm? Such a claim would be of the "*quid pro quo*" form of harassment. Second, an employee may be subjected to a hostile environment regarding religious beliefs. For example, unwelcome comments to or about an employee's religious beliefs could be a form of hostile environment religious harassment. What if a supervisor is involved in conducting or approving employee prayer meetings at work? Is that illegal? No, but that could be potential evidence in an employee's hostile environment or *quid pro quo* claim. Employers are wise to ensure that their harassment policies are broad enough to include forms of harassment other than just sexual, providing employees with the opportunity to express concerns about any form of harassment, including religious.

EMPLOYER PROHIBITION OF PRESCRIPTION DRUG USE VIOLATES AMERICANS WITH DISABILITIES ACT

The price of a room just went up at the Cheyenne Mountain Conference Resort in Colorado Springs, Colorado. The problem for the resort was its drug policy, which stated that "prescribed drugs may be used only to the extent that they have been reported and approved by an employee's supervisor." The policy was distributed to all five

hundred employees, who were told that if they refused to sign the policy, they would be terminated. Employee "Jane Roe" refused to sign, she was terminated, and sued claiming among other things a violation of the Americans with Disabilities Act. The district court agreed with Roe, but refused to enjoin the company from enforcing the policy. The court of appeals determined that an injunction should have been issued because the policy was still in effect. In fact, the court of appeals stated that the resort showed "defiant hostility" by refusing to rescind its policy after the district court ruled that it was illegal.

According to the court, the ADA issue is a straightforward one. Under the ADA, an employer is prohibited from making inquiries of an employee to see whether that employee has a disability, or requiring the employee to make disclosures to the employer about the employee's medical condition. There are exceptions to this principle, such as an employer's observation of employee behavior or other job-related reasons for doing so. In this case, however, an across-the-board policy compelling employees to disclose this information to supervisors clearly violated the ADA. How could the employer have revised its policy to comply with the ADA? The employer could provide that an employee must make such a disclosure if the effects of the medication may create the risk of a job-related accident or interfere with the employee's job performance.

GENERAL ACCOUNTING OFFICE ISSUES ANALYSIS OF WORKER PROTECTION PROGRAMS

The General Accounting Office conducted an analysis of employer ergonomic programs and their impact on work-related injuries and workers' compensation costs. The companies surveyed covered all aspects of American industry. Based upon the survey, GAO concludes that the companies with the lowest workers' compensation claims, job-related injuries, and musculoskeletal problems have the following six factors in common:

- Jobs are studied and identified as to which present the greatest risk of harm to an employee.
- Controls are identified to use for the problem jobs.
- A strong and continuing emphasis is placed on safety training and education for all employees.
- The safety programs include significant employee involvement.
- The program includes effective medical management, where the health care professionals know the jobs and the workplace.
- The success of the program starts at the top: There is a strong commitment from upper level management to the program such that it becomes ingrained as part of the company's culture.

One of the most critical issues for employers is not addressed in the study, which is the cost of such programs. A copy of the report may be obtained for free by writing to U.S. General Accounting Office, P.O. Box 37050, Washington, D.C. 20013, and ask for the GAO Report "Worker Protection: Private Sector Ergonomics Programs Yield Positive Results."

FAMILY-RELATED ABSENCES NOT CONSIDERED FMLA OR OTHERWISE PROTECTED, RULE COURTS

Two recent cases raise sensitive issues concerning family-related absences that do not fall within the protection of the Family and Medical Leave Act or any other federal or state law. The first case, *Upton v. JW Businessland, Inc.* (Mass. Sup. J. Ct., August 18, 1997), involved a single mother who refused to work overtime. She claimed that when she was hired, she was told that her work hours would be

from 8:15 a.m. until 5:30 p.m., except for two late evenings a month. Based upon those representations, she made the necessary childcare arrangements. It turns out that she had to work late several evenings each week, sometimes until 9:00 or 10:00 p.m. After telling her employer that she would no longer be able to work those hours due to her childcare responsibilities, the employer terminated her. The employee claimed that her termination violated public policy, because an employer should not be able to terminate an employee who cannot work overtime due to family responsibilities. In rejecting that argument, the court stated that the plaintiff requested that the general termination at will rule should be converted into a "just cause to terminate an at-will employee" rule, which the court declined to do. Therefore, although the employee had compelling family responsibilities, the employer had the right to terminate the employee due to her inability to work overtime.

The second case, *Dillon v. Carleton* (D.Ct. M. Fla., August 14, 1997), involved an employee who requested leave under FMLA to care for her child who had a hyperactivity disorder. The employee had attendance problems throughout her employment. Three years after she was hired, and in the midst of her attendance problems, it turns out that the employee's son was diagnosed as having attention deficit hyperactivity disorder. She requested a modified work schedule in order to make appointments for her son and to assist him at school. The employer accommodated this request for a reduced work week. Several months later, however, the employee asked to work additional hours because of her financial needs. The employer granted this request. Unfortunately, the employee's child began acting up at school and the employee requested an accommodation to her former schedule. However, the healthcare professional treating the employee's son refused to certify that his behavior was due to a serious health condition. Therefore, the employer refused the employee's request for accommodation. The employee was told that if she did not report to work when she was scheduled and remain until the end of her scheduled work day, she would be terminated. The employee continued to be absent because of her son's behavioral problems at school, and she was terminated. The employee claimed that the employer violated the FMLA in part because the employer did not request a second medical opinion. The court pointed out, however, that the employer was not required to ask for a second medical opinion; it had the right to rely on the medical opinion provided by the employee. Because the employee was unable to substantiate that her absences were due to a serious health condition for her son, the court ruled that the employee's absences were not protected by the FMLA and the employer had the right to terminate her.

Both cases illustrate that at times employers may be faced with a situation where an employee's family-related absence is not protected by the FMLA or any other law, however compelling or legitimate the reason for the absence. The outcome in both cases was the same, although under one circumstance the employer made great efforts to accommodate the employee. Employers can help minimize potential claims such as those described in these cases if their attendance expectations to employees are clear from the outset of the employment relationship, and clearly communicated when they change. Be flexible, when possible, but also be confident when you can draw the line and conclude that the employee's absences, however compelling, can no longer be accommodated.

DID YOU KNOW...

. . .that by a vote of 92 to 8, the U.S. Senate on September 11 approved a bill that would require the Teamsters to repay the federal government the cost of monitoring the rerun election involving Ron Carey and other top Teamsters officials? The federal monitoring of the Teamsters arose out of a 1989 consent decree due to a racketeering lawsuit that was filed against

the union. It cost the federal government $22 million to conduct last year's election.

. . .that same sex vulgarity is not a form of same sex sexual harassment, ruled the 7th Circuit in the case of *Johnson v. Coca-Cola Bottling Company of Wisconsin* (August 28, 1997)? According to the court, "More often than not, when these expressions are used (particularly when uttered by men speaking to other men), their use has no connection whatsoever with the sexual acts to which they make reference. . .even when they are accompanied, as they sometimes were here, with [gestures]." The court characterized these comments as "simply expressions of animosity or juvenile provocation."

. . .that an employee who quit her job because of a disability is not entitled to reinstatement as a form of reasonable accommodation? *Brundage v. County of Los Angeles* (Cal. Ct. App., August 21, 1997). At the time the employee quit, the employer was unaware of any disability. The employer is not required to undo the employee's separation because now the employee claims that her actions resulting in the separation were due to her disability.

. . .that the AFL-CIO on September 4 announced that it was targeting working women for its legislative and organizing efforts? The AFL-CIO has created a "working women working together network" in order to assist in organizing. Furthermore, the organization will seek the passage of the Fair Pay Act and the Pay Check Fairness Act. According to a study from the AFL-CIO Working Women's Department, 73% of the women surveyed who are not represented by a union believe that unions can be helpful to address women's workplace issues.

* * *

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.

Robert L. Beeman, II	205/323-9269
Kimberly K. Boone	205/323-9267
Brent L. Crumpton	205/323-9268
Richard I. Lehr	205/323-9260
David J. Middlebrooks	205/323-9262
Terry Price	205/323-9261
R. David Proctor	205/323-9264
David C. Skinner	205/226-7124
Steven M. Stastny	205/323-9275
Albert L. Vreeland, II	205/323-9266
Sally Broatch Waudby	205/226-7122
Cinda R. York	205/323-9278