EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

The increased enforcement activity by the Occupational Safety and Health Administration raises questions regarding what steps employers are taking to enhance workplace safety and to deal with OSHA effectively. We have scheduled a special briefing for our clients to cover all aspects of safety–related matters, for Friday, January 16, 1998, from 8:30 a.m. until 11:30 a.m., at the Sheraton**S**Perimeter Park South in Birmingham. The program will be conducted by Terry Price, who was responsible for prosecuting cases on behalf of OSHA when he was an attorney with the Solicitor's Office of the United States Department of Labor, and Steve Stastny, who has conducted audits regarding employer compliance with OSHA and defended employers in responding to dangerous OSHA investigations and claims. The briefing is complimentary for our clients; we hope to see you on January 16.

"CAN'T ANYBODY AROUND HERE PLAY THIS GAME?" — TEAMSTER PRESIDENT DISQUALIFIED FROM RUNNING FOR REELECTION

The quote mentioned above was attributed to Casey Stengel when describing his 1962 New York Mets, who won 40 games and lost 120. In the fine tradition of James Hoffa, Sr., Jackie Presser, and Frank Fitzgibbons, Teamster president, Ron Carey, was disqualified on November 17, 1997, from seeking reelection. Carey narrowly defeated James Hoffa, Jr., last year for reelection, but it turned out that Carey's victory was financed illegally by the Teamsters. According to appeals master, Kenneth Conbly, who wrote a 74**S**page decision to cover the matter, Carey was responsible for illegally taking $735,000.00 of Teamster money and funneling it into his election campaign against Hoffa. Part of the funds were contributed to a political advocacy group which, in turn, used the money to help Carey raise funds for his reelection. Mr. Conbly also directed an investigation of Mr. Hoffa's campaign financing, because his finance records indicate that over 20,000 unidentified individuals each contributed up to $100.00. Meanwhile, the U.S. Attorney for the Southern District of New York is conducting a criminal investigation regarding the Teamsters election.

CONGRESS AND THE WHITE HOUSE PUT FINANCIAL SQUEEZE ON EEOC

The Clinton Administration has requested that the EEOC $242 million budget remain the same for physical year 1998. Outgoing EEOC Chair, Gilbert Casellas, on November 18, 1997, called the Administration's request and possible Congressional cuts at the EEOC "discouraging." Because approximately 75 percent of the EEOC budget is spent on its staff, the Commission expects to reduce its workforce, cut training, and close or consolidate district offices.

MATERNITY LEAVE DOES NOT INSULATE EMPLOYEE FROM LAYOFF, RULES COURT

The case of *Ratt v. Carnegie Center Associates* (3 Cir., October 31, 1997), involved an employer who laid off a pregnant employee due to her absences caused by the pregnancy. The company did not have any type of formal medical or pregnancy leave policy. Deborah Ratt was hired in April 1989 and received a salary raise in January 1990. In June 1990, she told her supervisor that she was pregnant. In December 1990, she sent her supervisor a memo stating that she planned to be out on maternity leave from December 21, 1990, to approximately April 15, 1991. During the time Ratt was on maternity leave, the company's financial situation worsened, ultimately leading to bankruptcy. Several employees were terminated, including Ratt, and the male manager she reported to. Because Ratt was absent, she was one of the individuals terminated. In rejecting her pregnancy discrimination claim, the court stated that "the PDA is a shield against discrimination, not a sword in the hands of a pregnany employee." The court explained that an employer under the Pregnancy Discrimination Act is required to ignore the employee's pregnancy, but the employer is not required to ignore her absences due to the pregnancy. The only exception to that would be if absences of nonpregnant employees were not treated consistently with Ratt's absences. Because Ratt could not show that she received disparate treatment compared to other employees, the court concluded that the Pregnancy Discrimination Act was not violated.

The employer was lucky on this one, because with no established policies or practices regarding medical leaves of absence, there was increased risk that Ratt's treatment would be inconsistent with how nonpregnant employees who were absent for medical reasons were treated. A pregnant employee is entitled to the same treatment as employees who are absent or need accommodation for other medical reasons, but the PDA does not create a preference for pregnancy compared to other medical conditions.

DISABILITY DOES NOT PROTECT EMPLOYEE FROM LAYOFF DUE TO DISABILITYSRELATED DECLINE IN PRODUCTION

Assume you have a management employee who suffers a heart attack in July and does not return to work until the following January. Upon returning to work, he can only work part time. Prior to his heart attack, the manager's performance was evaluated based upon quantity and quality of work. The same standards applied to the manager when he returned from his heart attack. Due to the manager missing about a half year of work for medical reasons, the performance appraisal was poor in the quantity of work area. Shortly thereafter, the low performance appraisal is a basis for laying off the employee, with others, due to an overall workforce reduction. Does that violate the ADA? Not at all, ruled the court in *Matthews v. Commonwealth Edison Company* (7th Cir., November 17, 1997).

Matthews argued that if he did not have his heart condition, which was a disability, he would not have been laid off. In rejecting Matthews' argument, the court said that "the company had painful choices to make in rewarding the people who had done or were doing the most work may have been a sensible criterion from the standpoint of maintaining good relations with, or motivating, its remaining employees. But foolish or not, it was not based on disability, although it was correlated with it." The court concluded that Matthews' disability was not the reason for his layoff, but rather the consequences of the disability. According to the court, Matthews "had contributed little in 1991 and was working only part time in 1992." Remember that the ADA does not require an employer as a form of reasonable accommodation to accept a lower level or quality of

performance from an individual with a disability when compared to others. In this instance, even if the disability was the reason for the employee's lower production, that did not excuse the employer from laying off the employee due to that low production.

UNION ORGANIZING MAY BE EASY: USE OF COMPANY'S E-MAIL

Recently, employees at several stores of Borders Books and Music used the internet to communicate messages to each other about their union organizing activities. The organizers established a Borders union website which enabled union supporters to pass along information anonymously. According to one union organizer, "there is no other way to talk to each other so inexpensively." The company set up its own website in response to the union organizing efforts, but did not establish a policy for employees regarding internet and e-mail use during working time that would be limited to working purposes, only. Thus, the activity of exchanging information through the internet and e-mail was the electronic version of solicitation and distribution. If employers permit employees to use e-mail as an electronic flea market, then employers will run afoul of the National Labor Relations Act if they prohibit its use for union organizing purposes. Our recommendation to employers is to establish an e-mail policy that limits the use of e-mail policy and access to the internet only to those matters that are work**S**related at any time when employees are using company technology.

DID YOU KNOW...

. . . that 775,000 citizens in California are attempting to place on the June 1998 ballot a referendum that would require employers and unions every 12 months to receive employee permission before any deductions or dues could be used for political purposes? An organization funded by labor, known as Californians to Protect Employee Rights, filed suit on November 13, 1997, challenging whether the petition's signatures were proper. *Trujillo v. Jones* (Cal.Sup.Ct., November 13, 1997).

. . . that on November 6, 1997, the court ruled that the beneficial effects of medication may result in a disabled person not qualifying under the ADA? *Wilking v. County of Ramsun* (D.Ct. MN, November 6, 1997). An employee suffered from clinical depression, which is a disability. The EEOC interpretive guidelines state that determining whether one is disabled must be considered "without regard to mitigating measures such as medication." In rejecting the EEOC guidelines, the court stated that "the EEOC's interpretation is in direct conflict with the language of the statute requiring plaintiffs in ADA cases to show that an impairment substantially limits a major life activity." If the use of medication means that an employee does not have a substantial limitation of a major life activity, then the individual does not qualify as "disabled" under the ADA.

. . . that first year wage increases of labor contracts negotiated thus far in 1997 average 3 percent, which is the same percentage as 1996? According to the Bureau of National Affairs, manufacturing and nonmanufacturing both averaged 3 percent increases, compared to 3.6 percent in construction.

. . . that a federal judge on October 23, 1997, approved a class action against Sbarro Restaurant because of alleged wage and hour violations? *Hoffman v. Sbarro* (D.Ct.S. NY). Store managers were treated as exempt from minimum wage in overtime, yet they were required to pay back the company for cash shortages. Approximately 1,000 managers for Sbarro were covered under this policy. The Labor Department regulations state that an exempt individual's salary

may not be reduced due to fluctuations in quality or quantity of work. Requiring a manager to pay back a cash shortage is a reduction due to quality of work and, therefore, nullifies the exempt status.

. . . that on November 6, 1997, Laborers International president, Arthur Coia, was accused of violating his union's own ethical code? According to the allegations, Coia "knowingly permitted organized crime members to influence the affairs of Laborers International Union, breached his constitutional and fiduciary duties to the union, and improperly accepted benefits from the Laborers International Union service provider."

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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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