EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

The Seventh Circuit Court of Appeals recently expressed its frustration at the ever increasing number of employment cases it is asked to review, particularly several cases which it believes should not have been brought in the first place. In the case of *Skouby v. The Prudential Ins. Co. of America* (Nov. 26, 1997), the Seventh Circuit Court of Appeals stated that the court has turned into "almost a super personnel department, examining the employment history of various workers, and reading about the risque3 jokes they tell one another." Furthermore, the court said, "At some point we must question whether every unique, fact-intensive case should be set out in ponderous detail in the Federal Reporters. For the most part, only a smidgen, at best, of what we say in these cases advances anyone's understanding of the law." Skouby's case involved a claim of sex discrimination and retaliation. The court ruled that her claim was time-barred. Even had it not been time-barred, the court agreed with the lower court's decision that Skouby failed to state a claim that would have been actionable under the law.

The irony of the court's language is that employers are equally frustrated when current or former employees use regulatory agencies and courts as super personnel departments, rather than first making the employer aware of the employee's concerns and providing the company with an opportunity to address those issues. Employers can help courts diminish their concern of becoming personnel specialists by aggressively promoting among employees the importance of stepping forward within the organization if there are concerns or complaints, and reviewing with employees how to express those concerns and to whom. One New Year's resolution employers should consider for 1998 is to establish a process and culture where no employment issue leaves the workplace without the employer first knowing about the issue and having an opportunity to address and resolve it.

SENATOR KENNEDY OFFERS "GOOD NEWS, BAD NEWS" FOR EMPLOYERS

Senator Edward Kennedy on December 11th in his speech to the National Press Club reviewed the legislative agenda he and other Senate and House Democrats intend to push for 1998. The bad news for employers is that this agenda includes raising the minimum wage by $1.50 an hour effective September 1, 2000, to $6.65 an hour, and annual increases thereafter based upon cost of living analysis. He also proposes to extend the Family and Medical Leave Act to all employers with ten or more employees and to double the EEOC's budget during the next five years. Senator Kennedy says Democrats will also propose legislation that will require employers to contribute to health insurance costs for their employees. The good news is that it is unlikely that these proposals will come up for a vote or even pass.

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EMPLOYER HAS THE RIGHT TO BE WRONG WHEN DISCHARGING AN EMPLOYEE FOR DISHONESTY, RULES COURT

What level of proof is necessary for employers to terminate an employee who is engaged in what the employer believes is dishonest behavior? This was reviewed recently in the case of *Kariotis v. Navistar International Transportation Corp.* (7th Cir. Dec. 9, 1997). The case involved an employee, Kathleen Kariotis, who was on disability leave for knee replacement surgery. The company believed that she was faking a disability. The company's investigation included secretly video taping Kariotis. The tape indicated that she was able to perform several of the same routine functions that she did before the surgery. Based upon the tape and an interview with Kariotis, the company concluded that she was lying about her disability claim and therefore terminated her.

Kariotis then sued the company under the ADEA, ADA, the Family and Medical Leave Act, ERISA, COBRA, and alleged violations of state insurance laws. All of her claims were dismissed. According to the court, the company honestly believed that her claim was fraudulent. The company's belief was in good faith and based upon a reasonable investigation. Kariotis' disagreement with the company's conclusion does not mean that the company violated any of the above-referenced laws. Rather, Kariotis had to offer evidence to show why her age, disability or receipt of benefits was a motivating factor in the discharge. This she could not do. According to the court, she "offered no comparative evidence suggesting that the company would have been more careful before firing a younger employee or one not on leave though suspected of fraudulent activity. Instead, her main argument is that the company was careless in not checking its facts before firing her, and while it may be true, there is no evidence that the company approached her case differently than others. ***While the decision arguably was wrong, she has not shown it was based on illegal discrimination."*** (Emphasis added.)

The key to the employer's victory in this case was the consistent manner with which it investigated possible fraudulent disability or workers' compensation claims. The employer had the right to be wrong, provided it was consistent in how it conducted its investigations. The plaintiff in this case tried virtually every law imaginable to support her theory that she was wronged because the employer could have conducted a better investigation. Much of Kariotis' discontent may have arisen not from the nature of the investigation, but rather the company's termination of Kariotis without showing her the tape or explaining to her the reasons why it believed her claim was fraudulent. Had she reviewed the tape or known specifics that formed the basis of the employer's decision, perhaps the lawsuit could have been avoided.

COURT REJECTS CLAIMS BY APPLICANTS WHO FAILED TO FOLLOW INSTRUCTIONS REGARDING COMPLETION OF EMPLOYMENT APPLICATION

The H.B. Zachry Company was concerned that the International Brotherhood of Boilermakers would try to set up the company for unfair labor practice charges by having applicants volunteer on their employment application that they were union organizers. Therefore, the company let all applicants know that any applicant who provided information not requested on the employment application and would not be considered for employment. Specific language on the application was as follows: "Provide only the information requested. Failure to do so will result in disqualification of your application." Eighteen members of the Boilermakers Union applied for

jobs with the company and wrote "union organizer" on the employment application. They were all rejected for employment. They filed unfair labor practice charges, stating that they were rejected because of their union affiliation. The National Labor Relations Board predictably agreed with an administrative law judge's ruling that the employer's conduct was illegal. In rejecting the NLRB decision, the Eleventh Circuit Court of Appeals, in the case of *International Brotherhood of Boilermakers v. NLRB* (Nov. 13, 1997), pointed out that over two hundred other applicants were rejected during the same year for volunteering information not requested. According to the court, "The right which the union and Board ask us to recognize is the right for union applicants to let potential employers know about their union affiliation in direct contravention of the employer's neutral non-discriminatory policy prohibiting extraneous information of any kind. We are not aware of a single court which has recognized such a right." Therefore, the court refused to enforce the Board's decision ordering reinstatement and back pay to these eighteen union organizer applicants.

LABOR FORCE IN THE YEAR 2006: INTERESTING PROJECTIONS FROM THE BUREAU OF LABOR STATISTICS

The Bureau of Labor Statistics recently released a comprehensive review projecting the workforce in the year 2006. According to the report, Hispanics in 2006 will comprise 11.7 percent of the workforce, the second largest racial or ethnic group. That is an increase from 9.5 percent in 1996. White non-Hispanics will account for 72.7 percent of the workforce in 2006, down from 75.3 percent in 1996. Blacks will account for 10.7 percent of the workforce, down from 11 percent in 1996. "Asian or Other" will account for 4.9 percent in 2006, up from 4.1 percent in 1996.

As the baby boomers age, the median age of the workforce will also increase. That age will be 40.6 years in 2006, which will be the highest median age ever. Women will comprise 47 percent of all employees, compared to 46 percent in 1996. During the next ten years, the Bureau of Labor Statistics projects that one out of every two jobs that will be added to the economy will be either in health care, business services, social services, management or engineering. There will be a net increase of 300,000 construction jobs, but manufacturing will lose 350,000 jobs by the year 2006.

AIRLINE HITS TURBULENCE WHEN SHIFTING EMPLOYEES FROM EMPLOYEE TO INDEPENDENT CONTRACTOR STATUS

Edward Gitlitz and Joe Collins worked for a combined total of 57 years for Air France as sales representatives. They were paid on a salary basis. In 1993, Air France eliminated their jobs, but then made them an offer to work on an independent contractor basis as "business development attaches." This was another way of telling the two employees that they would continue to do what they did before, but they would be no longer treated as employees. Of course, as independent contractors, they no longer participated in any company benefit plans. Although these two employees qualified for early retirement benefits, they were forbidden from receiving their benefits while working as independent contractors. *Gitlitz v. Campagnie Nationale Air France* (11th Cir., Nov. 19, 1997).

The Eleventh Circuit Court of Appeals ruled that Gitlitz and Collins properly stated a claim that they were shifted to independent contractors for the purpose of denying them the opportunity to continue to participate in the company's retirement plans. According to the court, "The only business reason for the change which has been

asserted by Air France is that its purpose was to motivate the sales force." The court characterized as unintelligible Air France's explanations for why converting long-term employees to independent contractor status would be a great motivator. In reversing the district court's summary judgment in favor of the airline, the Court of Appeals stated that there is a genuine issue of fact whether the motivating factor for the shift from employee to independent contractor status was to deprive these two individuals of their ERISA benefits.

This case should be viewed in context with the recent Microsoft litigation where it was determined Microsoft owed several millions of dollars in stock benefits to independent contractors who were not true independent contractors and, therefore, should have been treated like employees. The Microsoft case involved the improper classification of individuals as independent contractors. The *Air France* case involves claims where the motivating reason for classifying individuals as an independent contractor was to exclude those individuals from ERISA-covered plans. The two cases point to two key issues employers must consider when classifying individuals as independent contractors: First, are the individuals properly classified as independent contractors and, second, is a motivating reason for the classification to deny the individuals coverage under the company's ERISA plans? If individuals are either improperly classified or properly classified but for the wrong reason, the employer will be flying into "choppy air."

DID YOU KNOW. . .

. . .that OSHA announced on December 15, 1997, that employers are not required to pay for personal protective equipment? This decision arose after a ruling on October 16th by the Occupational Safety and Health Review Commission that employers could not be responsible for paying for personal protective equipment. The basis for the decision was language in OSHA's regulations that required employers to "provide" personal protective equipment. Because the language did not require employers to "pay for" the equipment, OSHA could not require it under that regulation. OSHA says that it will move quickly to amend the standard to require employers to pay for personal protective equipment. Most employers that paid for such equipment will probably continue to do so in order to monitor and maintain the quality and compliance with safety standards.

. . .that effective December 22, 1997, new OFCCP record retention requirements became effective? This new rule requires employers to maintain records related to all phases of the employment process, including advertising, interview notes, hiring records, training, promotion, demotion, transfer and pay records. If an employer has less than 150 employees and a federal contract of less than $150,000, it must maintain these records for one year. Those employers that exceed those minimum thresholds must maintain these records for two years.

. . .that the financially troubled Teamsters Union was ordered to pay the $7.4 million cost for the Justice Department to conduct another election for the Teamster presidency? This decision was issued on December 18, 1997, by the federal judge responsible for enforcing the Justice Department and Teamster consent decree that includes requirements that the government conduct the Teamsters' election for president. According to the judge, "The government has already expended over $17.5 million in the 1996 Teamster election in order to achieve the goals of the Consent Decree. Because additional costs now must be incurred due to the actions taken by persons affiliated with and acting for the Teamsters, it is equitable to require that the Teamsters bear the additional cost caused by its own conduct."

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Just a reminder to reserve your spot for our January 16, 1998, Safety and Health Review at the Sheraton-Perimeter Park South from 8:30 a.m. until 11:30 a.m. In addition to providing you with the most recent information regarding OSHA matters, we will also update you regarding other current developments. Complimentary continental breakfast will be served. Please reserve your spot by calling Susan Dalluege at 205/323-9263.

Our firm feels fortunate for the opportunity to have worked with you during 1997. We hope that in 1998 you and your organization will enjoy a year of peace, prosperity and positive employee relations.

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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