EMPLOYMENT LAW BULLETIN

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

Volume 6, Number 2 ***February 1998***

TO OUR CLIENTS AND FRIENDS:

The Occupational Safety and Health Administration's Cooperative Compliance Program has been put on hold, based upon an order from the United States Court of Appeals for the District of Columbia on February 17, 1998. *Chamber of Commerce of the United States v. U.S. Department of Labor*. The Court, without opinion, enjoined the Department of Labor from proceeding with the program. OSHA had identified employers with the highest accident injury rates for participation in the program. The objective of the program was to allow those employers to work with the agency to identify potential hazards and correct them, rather than OSHA inspecting those employers for compliance. The lawsuit challenged the legality of the Department of Labor's promulgation of this program.

Although the Court's decision does not address the core right of the Department of Labor to implement this program, the Court had to consider in granting the stay whether those challenging the program would likely prevail on their arguments. The Court also had to consider whether the harm caused to employers by permitting the program to be implemented now would outweigh any damage to OSHA and the Department of Labor if implementation were delayed.

The effect of the Court's action is that employers who have not notified OSHA about their decision to participate in the program do not have to do so at this time. According to OSHA, "The Court did not rule on the merits and we are confident that when the Court does look at this award-winning program, it will agree that this proven way of reducing workplace injuries and illnesses is in the interest of both American workers and business."

ARBITRATION CLAUSE IN HANDBOOK DOES NOT BIND EMPLOYEES, RULES COURT

In the case of *Paladino v. Avnet Computer Technologies, Inc.* (11th Cir. February 4, 1998), an employee should be bound by language in the employee handbook consenting to arbitration of any employment dispute. Employee Paladino signed a handbook acknowledgment form. The language in the handbook regarding arbitration stated, "The company and I consent to the settlement by arbitration of any controversy or claim arising out of or relating to my employment or the termination of my employment. . .The arbitrator is authorized to award damages for breach of contract only, and shall have no authority whatsoever to make an award of other damages." Paladino was terminated and filed a Title VII lawsuit. The employer argued that Paladino should be compelled to arbitrate under the handbook. The district court disagreed with the employer, and so did the court of appeals.

What were the problems with the employer's clause? Several, according to the 11th Circuit:

- The clause did not state in plain English that it covers statutory claims, such as those under Title VII.

- The language is confusing. One clause says that it covers any and all claims, but the other clause says that the arbitrator's authority is limited to damages for breach of contract.

- The language excludes damages that are otherwise available under Title VII.

- The language is too legalistic and not easily understood by a non-attorney.

According to the Court, "A clause such as this one that deprives an employee of any hope of meaningful relief, while imposing high costs on the employee, undermines the policies that support Title VII."

Note that mandatory arbitration agreements contained in personnel handbooks may be enforceable. The issue in this case was not that the arbitration agreement was in the handbook and that the employee signed the acknowledgment, but rather the substance of the handbook language.

Employers have the right to establish a mandatory arbitration process as part of the employee handbook. Be sure that the process is in plain English and gives employees a clear understanding of what arbitration means. The language in the handbook should provide the arbitrator with a full range of remedies available under the claims that would be part of the arbitration process.

UNION MEMBERSHIP FALLS; AFL-CIO TARGETS DISCRIMINATION CLAIMS TO APPEAL TO NEW MEMBERS

According to a report from the Bureau of Labor Statistics on January 30, 1998, the number of employees in the United States who belong to unions dropped by 159,000 during 1997. The number of employees who are actually represented by unions, regardless of whether or not they belong to the unions, dropped by 235,000 in 1997 to 17.9 million, from 18.2 million in 1996. The percentage drop is from 16.2 percent to 15.6 percent of the workforce. These statistics include private and public sector membership. Only 9.8 percent of private sector employees belong to unions.

Union membership is highest among men ages 45 to 64 (23 percent of all employed) and women in the same age group (16.5 percent of all employed). Twenty-six percent of employees who work in transportation and utilities belong to unions, compared to 18.6 percent in construction, 16.3 percent in manufacturing, and 13.9 percent in mining. For other industries, the union membership was 5.8 percent or less.

In the series of its continuing efforts to try to increase membership, the AFL-CIO on January 14 announced major efforts to be identified with eliminating workplace discrimination. The AFL-CIO will prepare a guide for union and non-union employees on improving race relations, entitled "Practical Guide to Improving Race Relations, Equality, and Opportunity in the Workplace." This will be published by September 1, 1998. The AFL-CIO will also conduct forums throughout the country on improving race relations issues in the workplace.

One of the reasons why union membership declined over the past several years is because the plaintiff's attorney has replaced the union organizer as the person addressing employee workplace concerns. By becoming identified as a pro-active force attempting to eliminate workplace discrimination, the AFL-CIO hopes that employees will look to unions, rather than the EEOC, for assistance with discrimination issues.

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THIRD PARTY SEXUAL HARASSMENT COSTS EMPLOYER $200,000

An employer's obligation to identify and address sexual harassment includes non-employee behavior toward employees. Occidental International learned this lesson the hard way, to the tune of

$200,000 in the case of *Rodriguez-Hernandez v. Miranda-Velez* (1st Cir. January 6, 1998). In an effort to enhance the relationship with Occidental's primary customer, Occidental's president, Chavez, told the plaintiff to "be nice to him" [the customer] and to "keep him satisfied." She was also told to visit the customer personally whenever she went to the customer's offices. She and other women were told to attend a company party for the customer without an escort, and to make themselves available to dance with the customers' employees.

The case arose when the customer made several sexual comments and advances to Rodriguez-Hernandez. He sent her a sexually explicit card and asked her to visit with him in the evenings. He also told her that he would pick her up and take her to a motel. When Rodriguez-Hernandez complained to her boss, Chavez told her that she should be "a woman" in how she dealt with the customer. Approximately one month later, Rodriguez-Hernandez was suspended because of absenteeism and the use of company property without authorization. Shortly thereafter, she was terminated, when there had been no previous warnings regarding her job performance.

The jury awarded Rodriguez-Hernandez $200,000 against Occidental International even though it concluded that the customer was not liable to Rodriguez-Hernandez. The court also ordered Occidental and Chavez to pay Rodriguez-Hernandez' attorneys $150,000. According to the court, Rodriguez-Hernandez was subjected to unwelcome sexual overtures from a third party, the customer, which Occidental not only failed to deal with but in fact encourages. Furthermore, after Rodriguez-Hernandez complained about the behavior, the employer retaliated against her by suspending and ultimately terminating her.

Remember that an effective harassment policy includes an explanation to employees that the behavior of non-employees is covered under the policy. This would include customers, visitors, or vendors who interact with the employee during the course of his or her work day.

SUPREME COURT'S REFUSAL TO HEAR CASE UPHOLDS NLRB'S DECISION ON EMPLOYEE COMMITTEES STANDS

On February 23, 1998, the United States Supreme Court refused to hear the case of *Webcor Packaging, Inc. v. NLRB*. This means that the 6th Circuit Court of Appeals' decision upholding the NLRB position on employee committees stands.

The company created a workplace plant council. This council not only was a source of communications between employees and management, but it also provided an opportunity for employees to raise concerns about safety, productivity, and plant effeciency. The council also made recommendations regarding the development of a handbook and a grievance procedure. Furthermore, the council made proposals to management regarding wages and hours. The employee representatives were elected by fellow employees. The employees through their elected representatives made specific proposals to the company, which the company would accept or reject. The company disbanded the council once the Teamsters started an organizing campaign, but then resumed with the council after the Teamsters lost the union election.

The NLRB ruled that the employer violated the National Labor Relations Act, because the council was an employer-created and dominated labor organization.

The employer in this case made some fundamental mistakes in the creation of the employee council. First, employees should not be elected to represent anyone. Rather, let employees serve on the council on a voluntary, rotating basis. Second, make clear that the council members are there to speak for themselves and not serve in a representative capacity. Third, seek dialogue with employee

council members, but do not seek proposals that would be accepted or rejected by the company. Rather, seek suggestions, work together on specific ideas and concepts, but do not seek ultimate approval from employee participants.

DID YOU KNOW. . .

. . .that Astra USA, Inc., on February 5 settled a sexual harassment lawsuit with the EEOC for $10 million? *EEOC vs. Astra USA, Inc.* (D.Ct. Mass., February 5, 1998). This settlement covers approximately eighty individuals who were either sexually harassed or were encouraged to cover up harassment. This settlement is eight times greater than any settlement or verdict the EEOC ever received regarding sexual harassment.

. . .that the AFL-CIO's organizing activities now include body piercers, who voted for union representation? The election involved four employees at Gauntlet, Inc., who voted to become part of the United Food and Commercial Workers Union. The issue that sent the body piercers to the union was their employer's request to sign a non-compete agreement. According to the company's president, the body piercers "make $40,000 a year for poking holes in people."

. . .that an employee with clinical depression could not expect an employer to provide a stress-free workplace as a form of reasonable accommodation under the ADA? The case, *Gaul v. Lucent Technologies, Inc.* (3rd Cir., January 22, 1998), arose because the company failed to provide Gaul with a work environment that was not stressful. The court said that the company "could never achieve more than temporary compliance because compliance would depend entirely on Gaul's stress level at any given moment." The court added that such accommodation would cause "extraordinary administrative burdens" on the company.

. . .that pregnant waitresses who were terminated because they were too fat received $750,000 in the case of *EEOC v. W & O, Inc.* (D.Ct. S. Fla., February 4, 1998)? The restaurant's policy required that women notify the company if they become pregnant. Their working hours were changed as they entered the latter months of pregnancy. When employees complained about that, their employer said they were "too big and fat to be waiting tables."

. . .that the number of work stoppages in 1997 was at the lowest level in the fifty-year history that such records have been kept by the Bureau of Labor Statistics? There were twenty-nine major work stoppages during 1997, which covered 4½ million days of lost work and 339,000 employees. The average strike lasted twenty days, and the majority lasted for less than two workweeks.

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

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