# EMPLOYMENT LAW BULLETIN

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

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## *TO OUR CLIENTS AND FRIENDS:*

### SAME-SEX HARASSMENT VIOLATES TITLE VII, UNANIMOUS SUPREME COURT RULES

On March 4, 1998, in the case of *Oncale v. Sundowner Offshore Services*, the United States Supreme Court held that Title VII prohibits same-sex sexual harassment. "In the interest of both brevity and dignity," Justice Scalia, writing for a unanimous Court, gave only a brief description of the facts. Oncale worked as a roustabout on an eight-person crew, including two supervisors, on an off-shore oil rig. One of his supervisors threatened to rape Oncale, and both supervisors subjected him to humiliating sexual comments in front of other crew members. Oncale complained about this to the company, but no action was taken. In fact, the safety compliance clerk that Oncale talked to about the harassment told Oncale that he was also the victim of that type of harassment and suggested to Oncale that Oncale was gay. Oncale quit, stating that he was doing so because of the sexually harassing environment.

Oncale filed a lawsuit, complaining that he was discriminated against under Title VII because of his sex. The district court granted summary judgment for the employer, stating that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers." The Fifth Circuit Court of Appeals agreed with the district court.

The Supreme Court unanimously reversed. The Court said that the prohibition of discrimination based upon sex under Title VII includes terms and conditions of employment, explaining that "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." The Supreme Court added that the prohibition of discrimination based upon sex covers men as well as women. Regarding same-sex harassment claims, the Supreme Court said, "We see no justification in the statutory language or our precedence for a categorical rule excluding same-sex harassment claims from coverage under Title VII." The Court explained that although same-sex harassment was not what Congress had in mind when it passed the Civil Rights Act in 1964, "Statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Because sexual harassment interferes with a term and condition of employment affected by Title VII, the Court concluded that there was no basis to exclude same-sex harassment from Title VII's protection.

The Court expressed what it felt were logical boundaries to prevent Title VII from becoming a "general civility code." The Court explained, "The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." The conduct must be severe or pervasive enough such that a reasonable person would find that it has altered the conditions of the

work environment. The Supreme Court believes that such a requirement under Title VII is "sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace such as male-on-male horseplay or intersexual flirtation for discriminatory "conditions of employment." The Court concluded by saying that "common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."

This case was not a close call regarding whether the behavior was "roughhousing" or "horseplay" among men at work. The challenge for employers will arise where an employee considers behavior to be offensive or hostile, but from the employer's perspective, a reasonable person would consider it flirtation or male-on-male roughhousing.

## ASSAULT FROM FELLOW EMPLOYEE LEADS TO NEGLIGENT HIRING CLAIM

Plaintiff Holly Anne Oakley worked as a night clerk at a K-Mart store in Kentucky. A company called Flor-Shin was hired to clean the floors at K-Mart. William Bayes, Flor-Shin's area supervisor, sexually assaulted Oakley at the K-Mart store while both were working alone, late at night, with the doors locked. Bayes pleaded guilty to sexual abuse, sexual misconduct, and false imprisonment. He received a five-year suspended sentence. Believing that justice was not completely served, Oakley then sued Flor-Shin, claiming that it was negligent in hiring Bayes because a reasonable review of Bayes' past would have indicated the risk Bayes posed to Oakley and other women. *Oakley v. Flor-Shin, Inc.* (Ky. Ct. App., March 1998). Prior to his employment with Flor-Shin, Bayes had been arrested for attempted rape and carrying a gun, and had been convicted for burglarly, theft, and bail jumping. Oakley argued that Flor-Shin should have known about Bayes' background because it was foreseeable that Bayes could present a risk of harm to an individual such as Oakley. Because Flor-Shin failed to make even a cursory inquiry regarding Bayes' background, it was negligent and, therefore, should be held responsible for damages suffered by Oakley. In permitting the case to go to trial, the court said that "every person owes a duty to every other person to exercise ordinary care in his activities to prevent any foreseeable injury from occurring to such other persons."

Remember that when an individual is hired in a position that could place others at risk, such as in this case, employers should exercise every legal right to find out as much as possible regarding the applicant's background. This includes not only checking into an individual's criminal history, but also inquiring of former employers whether the individual had ever been counseled regarding inappropriate behavior toward fellow employees, violations of company safety procedures, or behavior that put others at risk.

## TRAINING IS CONSIDERED WORKING TIME, RULES COURT, BUT COMMUTING TO TRAINING IS NOT

The case of *Imada v. City of Hercules* (9th Cir., March 17, 1998) addressed two conflicting principles under wage and hour law. The first principle is that employers are not required to pay for the time spent during an employee's commute to and from work. The second principle is that if an employee is required to travel at the employer's request on a special one-day assignment that is farther than the employee's regular commute, then the employee is required to be paid for the travel time that exceeds the usual commuting time. In the *Imada* case, police officers were required to attend three consecutive days of mandatory training. The travel time for most officers to and from the training sessions was longer than their usual commute. When the City refused to pay

overtime for this excess travel time, the officers traveled to the United States Fedeal District Court to file their wage and hour lawsuit. In rejecting the officers' claim, Judge Mary Schroder wrote that the travel time for the training was not so exceptional as to justify overtime. Rather, the training "is a normal, contemplated, and indeed mandated incident of their employment..." Therefore, the special assignment exception requiring payment for commuting time did not apply. Remember that if the time spent in the training program is for the employer's benefit or at the employer's request, then the excess travel time is compensable.

## REASSIGNMENT TO A NEW JOB NOT REQUIRED UNDER ADA, RULES COURT

The case of *Smith v. Midland Brake, Inc.* (10th Cir., March 13, 1998) is a good example of how the ADA permits individuals easy access to the court system, but makes it difficult for them to stay in court. The plaintiff, Robert Smith, worked for the company for seven years until he was terminated. Smith had "chronic dermatitis" on his hands. Smith was on a leave of absence for 1992 and part of 1993, until he was finally terminated. Smith claimed that he should have been transferred to another position, but the employer refused to reassign Smith because Smith's doctor would not give the employer a written release.

In upholding the district court's decision for the employer, the Court of Appeals stated that "reassignment can be used as a means of accommodating a disabled employee when accommodating him in his current position is possible, but difficult for the employer. It follows that when it is not at all possible to accommodate an employee in his current position, there is no obligation to reassign." The dissenting judge argued that the court's opinion contradicted the EEOC's interpretive guidelines of the ADA. According to the dissent, "The EEOC interprets the ADA as requiring an employer to consider reassignment when the employee cannot perform his job at all or can only perform it with accommodation that poses undue hardship to the employer."

Our recommendation is that employers first attempt to accommodate the employee in the job that the individual currently holds. If accommodation is not possible, employers should see if there are any other jobs available for which the individual is qualified, with or without accommodation. If that job pays less than the individual's current job, the employer is not required to keep the individual at the current level of pay. Furthermore, the employer is not required to transfer the employee to a vacant job if doing so would violate employer policy. Our view of this decision is that although it extends greater rights and flexibility to employers, it conflicts with the EEOC interpretive guidelines of the ADA. Until case law becomes more definitive on this point, we encourage employers to consider reassignment if reasonable accommodation in the current job is not possible.

## FMLA COMPLAINTS INCREASE ONLY MARGINALLY, REPORTS DEPARTMENT OF LABOR

The Wage and Hour Division of the Department of Labor received 2,670 FMLA complaints during fiscal year 1997, which was only 136 more than the previous year. Of that number of complaints, violations were found in 1,187, resulting in $2.8 million in damages, compared to $2.1 million the year before.

The significant change from 1996 to 1997 involved the type of FMLA cases filed. In 1996, the major claims involved employers refusing to permit employees to take leave. In 1997, the claims involved employers who permitted employees to take leave, but did not reinstate employees to the same or an equivalent position. The Department of Labor administratively resolves 90 percent of

FMLA claims and has filed 25 lawsuit claiming FMLA violations. Unlike laws prohibiting discrimination in employment, there is no prerequisite that an employee file an FMLA charge or claim with the Department of Labor; the employee has the right to proceed to court without an administrative review. Therefore, the DOL statistics do not represent the total number of FMLA lawsuits filed.

## DID YOU KNOW. . .

**. . .that employers should pay attention to the proliferation of Monica Lewinsky jokes at the workplace?** Although forbidding any humor regarding this matter is not realistic or necessary, employers should beware of the more graphic comments or pictures in the context of the company's harassment policies.

**. . .that Congress is willing to support an increase in funding for the EEOC if the EEOC cancels its testers program and makes other changes?** The Clinton Administration has requested that for fiscal year 1999, the EEOC budget increase from $242 million to $279 million. This request has been referred to the House Education and Workforce Subcommittee on Employer-Employee Relations. House Republicans have stated that they will support an increase if the EEOC cancels its program of sending testers out to challenge employer hiring practices and also if the EEOC reduces its backlog of discrimination charges, improves its investigation processes, does not pursue cases to create new law, and expands its use of alternative dispute resolution procedures.

**. . .that an employer was ordered to pay its employee $280,000 for prohibiting her from breast-feeding her baby, even though she worked out of her home?** *Monheimer v. Nobel Biocare, USA* (D. Ct. Ore., March 10, 1998). The plaintiff sold dental products. The jury believed her allegation that the employer deliberately restricted her travel and sales activities in order to interfere with her breast-feeding her baby. The employer argued that it "bent over backwards" to work with the employee, but that she showed no flexibility.

**. . .that a condition must be evaluated without medicine to determine whether it is a disbility, according to the First Circuit Court of Appeals?** Glen Arnold is an insulin-dependent diabetic. His employer, United Parcel Service, refused to employ him as a truck driver because he could not obtain a commercial driver's license. The lower court ruled that Arnold was not disabled under the ADA, because his diabetes was controlled by insulin. In disagreeing with the lower court, the court of appeals stated that Congress when passing the ADA "intended the analysis of an 'impairment' and the question of whether it 'substantially limits a major life activity' should be made on the basis of the underlying condition, without consideration of the ameliorative effects of medications, prostheses, or other mitigating measures."

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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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| 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 |