EMPLOYMENT LAW BULLETIN

The Newsletter of **LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.**
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TO OUR CLIENTS AND FRIENDS:

Wage and Hour violations can cost employers several hundreds of thousands of dollars because often one Wage and Hour violation covers several employees. Back pay can be recovered for up to two years, three in the event of a willful violation, and it may be doubled. In an effort to assist our clients to avoid Wage and Hour disputes, we have invited Lyndel Erwin, former District Director of the United States Department of Labor, Wage and Hour Division, to be a guest speaker at our Breakfast Briefing scheduled for Friday, May 15, 1998, at the Sheraton-Perimeter Park South, Birmingham, from 8:00 to 9:15 a.m. Mr. Erwin recently retired as District Director after thirty-six years of service. If you and other representatives from your organization plan to attend, please return the enclosed registration form. A complimentary continental breakfast will be served.

"OVERQUALIFIED" CANDIDATE QUALIFIES FOR AGE DISCRIMINATION CLAIM

Donald Hamm was 49 years old when he applied for a job as an entry-level auditor in the New York City Office of the Comptroller. At the time he applied, Hamm was in college, pursuing another undergraduate degree. Prior to that time, he worked as a consultant in the financial industry for several years and also as a futures trader. Hamm was interviewed twice for the job but was rejected because he was "overqualified and would be bored." Hamm filed an age discrimination charge and lawsuit. *Hamm v. New York City Office of the Comptroller* (D. Ct. NY, March 4, 1998). In deciding that the case should go forward to trial, the court explained the term "'overqualified' may often be simply a code word for too old." Furthermore, the interview notes of the two supervisors who met with Hamm conflicted regarding their evaluation of him. One interviewer considered Hamm's communication skills as above average, while the other interviewer stated that Hamm "possessed neither the substantive experience and understanding nor the interpersonal skills necessary to perform the job."

Although "overqualified" may be a buzz word for age, an employer should not refrain from asking questions to identify whether the overqualified applicant may be looking for a short-term job or not truly interested. If the applicant's answers reveal that the applicant does not appear to be sincerely motivated for the job, then that is the basis for rejection, not because the applicant is "overqualified."

MANDATORY ARBITRATION CLAUSE IN HANDBOOK NOT BINDING ON EMPLOYEES, RULES COURT

Melton Nelson was fired by the Cyprus Bagdad Copper Company in 1994, after nineteen years of service. Nelson was employed as a senior maintenance technician at the time of his termination. Prior to his termination, there was a

significant corporate reorganization. After first being told that his position would remain as is, Nelson was then asked to sign a voluntary severance agreement, which he refused. Then Nelson was shifted to 12-hour days and a different shift, which he claims caused medical problems. After what Nelson claims was a half-hearted attempt to accommodate him, he was terminated.

Nelson then found his way to the Equal Employment Opportunity Commission and federal court to claim disability discrimination. The employer argued that the case should be dismissed because the handbook contained language that described an arbitration procedure as

> "the sole and exclusive procedures for the processing and resolution of any problem, controversy, complaint, misunderstanding or dispute that may arise concerning any aspect of your employment or termination of employment, including any dispute arising out of or based upon any state or federal statute or law applicable to your employment."

According to the federal district court, that mandatory arbitration language in the handbook barred Nelson from pursuing his disability discrimination claim. The court stated that because Nelson acknowledged receiving a handbook and signed a statement that he agreed to comply with the terms of the handbook, he could not now claim that the arbitration provision was unenforceable. The Ninth Circuit Court of Appeals reversed the district court and, on April 20, 1998, the Supreme Court refused to hear the Ninth Circuit's decision. *Nelson v. Cyprus Bagdad Copper Corp.* (9th Cir. 1997). According to the Ninth Circuit, "Any bargain to waive the right to a judicial forum for civil rights claims, including those covered by the ADA, in exchange for employment or continued employment must at the least be express: The choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question. That did not occur in the case before us."

The court did not say that mandatory arbitration provisions contained in a handbook are unenforceable. Rather, the manner in which the arbitration provision was communicated in this case rendered it unenforceable. Those employers that have included mandatory arbitration language in personnel handbooks should review the language and the manner in which it was communicated to employees to be sure employees clearly understood what they waived by agreeing to it. One cautionary comment to employers is that if the handbook contains language that says it is not a contract and does not bind the employer or employee, be prepared for a claim where the employee can argue that the employee should not be bound by the arbitration procedure because it is contained in a document that neither the employer nor employee is required to follow.

RETALIATION BY A SUPERVISOR CREATES STRICT LIABILITY FOR EMPLOYER

Approximately one out of five discrimination charges alleges that an employee was retaliated against for exercising a protected right. The case of *Cross v. Coeaver* (8th Cir., April 10, 1998) concluded that retaliation is such reprehensible behavior that an employer is strictly liable for the retaliatory actions of its managers or supervisors. "Strict liability" means that the employer will be responsible for the actions even if the employer did not know or should not have known that the behavior occurred.

Vicki Cross was a police officer for the Kansas City, Missouri police department. She dated a fellow police officer, but when the relationship deteriorated, Cross asked her supervisor to tell her former boyfriend to leave her alone. She was told

that she could file a sexual harassment complaint, which she did. The chief of police happened to be a good friend of her former boyfriend. Upon receiving the complaint, the chief responded that he would "get the bitch." True to his word, he accused her several times of criminal misconduct, and each time she was cleared. She was suspended without pay for four months but was reinstated after she won at trial. She was also awarded $270,000.00 against the police department for a claim of retaliation and $30,000.00 against the police chief.

In applying this strict liability standard, the court concluded that "employment actions that are sufficiently adverse to sustain a retaliation claim are also often actions in which the retaliator wields the employer's authority, either actually or apparently, to effect the retaliation, which must take the form of a material employment disadvantage. . . . It would follow that the employer liability would also be imputed for such retaliatory acts, because in such circumstances, the retaliator is, by definition, acting as the employer."

Employers have continued to improve the quality of their training regarding employee, supervisor and manager compliance with fair employment practices and anti-harassment principles. A critical component of that training should include the concept of retaliation. Employer policies on harassment and fair employment practices need to include an anti-retaliation statement, a process for employees to report retaliation, and an explanation regarding what actions may occur if the employer concludes that retaliation has occurred.

DOES WARNING AN APPLICANT THAT A VULGAR AND SEXUALLY HOSTILE WORK ENVIRONMENT EXISTS SHIELD AN EMPLOYER FROM HARASSMENT COMPLAINTS?

In a variation of the "You should have known better" defense, the employer in the case of *Williams v. Snyder Roofing and Sheetmetal, Inc.* (D. Ct. Ore., March 11, 1998), argued that an applicant who was told the type of language and behavior she would be exposed to cannot then complain that she suffered harassment on the job. Lahonda Williams applied to work as a receptionist for the company. During the interview, she was told that some of the employees behaved in a sexist manner based upon sex and language. She said that she felt that she could work in that environment, and she got the job.

Apparently, the employer was not quite specific enough regarding what Williams would be exposed to. For example, during her brief four months of employment, one co-worker brought a large styrofoam penis to her desk. There was also a calendar in the warehouse with pictures of nude women. Other employees wiggled their tongues, made sexual comments, and made loud, moaning sounds with sexual comments. After complaining about the behavior, she was ostracized and ultimately quit.

In rejecting the employer's argument that she agreed to work in this environment, the court said, "No facts were stated which would put Williams on notice that she was agreeing to waive her statutory right to work in an environment free from discriminatory intimidation, ridicule and insult." The court explained that there is nothing to show that Williams knowingly waived any statutory protection regarding the behavior she was exposed to.

BANK ON IT: CORESTATES GOES TO THE VAULT FOR $1.5 MILLION IN OFCCP PAY EQUITY INVESTIGATION

The Department of Labor announced on April 17, 1998, that CoreStates Bank would pay $1.5 million in back pay to 142 women and minorities for pay discrimination compared to similarly situated white male employees. According to

OFCCP, this is the largest pay disparity settlement in the agency's history. The women and minorities performed the same work, were in the same or higher grades, and had similar or higher seniority and performance reviews. Part of the settlement includes a commitment from CoreStates to analyze its overall salary grade structure and to correct any disparities that exist between women, minorities and non-minorities. According to Secretary of Labor Alexis Herman, this agreement will also apply after CoreStates merges with First Union. These pay disparities were uncovered during an OFCCP glass ceiling audit of the bank. According to Secretary Herman, OFCCP averages 3,500 audits and 40 glass ceiling reviews per year.

DID YOU KNOW...

. . .that Shoney's managers and assistant managers may now proceed with a class action claim that they were not paid properly under wage and hour law? *Edelen v. Shoney's, Inc.* (M.D. Tenn., March 26, 1998). The managers argued that they were not exempt from overtime because their salaries were reduced when the restaurant suffered losses or cash shortages. The plaintiffs argued that such salary reductions destroyed the salary status required to maintain the executive exemption under the Fair Labor Standards Act.

. . .that the EEOC budget may increase by 15 percent from $242 million to $297 million for fiscal year 1999? Republican members of the House Education and Workforce Subcommittee on Employer-Employee Relations are open to this increase provided the EEOC revises its intake process, reduces its backlog, uses more alternative dispute resolution, does not use "employment testers" to establish hiring claims regarding discriminatory hiring, and revises its litigation strategy.

. . .that the House by June may consider the Worker Paycheck Fairness Act (HR 1625)? This bill would require full disclosure by unions to its members regarding how much money is spent for political purposes and require the unions to obtain permission from each member annually in order for that member's dues to be used for such purposes. Furthermore, if unions violated this law, they would be subjected to punitive damages claims by their members.

. . .that it took a federal court of appeals to rule that missing teeth is not a disability? *Talanda v. KFC National Management Company, Inc.* (7th Cir., April 7, 1998). The case arose when a Kentucky Fried Chicken manager was fired after he refused to transfer a virtually toothless employee from the customer counter to the back of the restaurant. The company wanted the employee transferred because it thought that a person working at the counter dealing with customers should have most of her teeth because a smiling, outgoing counterperson was an asset to the employer. According to the court, the employee's "missing teeth did not limit her in the performance of a major life activity" and, therefore, the employee was not disabled.

. . .that the number of positive drug tests for current employees has declined to less than 5 percent? This is based upon the annual SmithKline Beecham Drug Testing Index, published on April 7, 1998. In 1997, slightly less than 5 percent of all current employees who were tested for drugs tested positive, compared to 5.8 percent in 1996. The 1997 levels are the lowest since SmithKline Beecham began reporting this information in 1987. Incredibly, in 1987, 18.1 percent tested positive.

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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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Please reserve a seat at the complimentary Breakfast Briefing scheduled for May 15, 1998, 8:00 S 9:15 a.m., at the SheratonSPerimeter Park South, Birmingham.

NAME: _____

COMPANY: _____

TELEPHONE: _____

OTHERS FROM COMPANY WHO MAY WISH TO ATTEND:

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