EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

Three employees recently were awarded a total of $52 million (that's not a typo) as part of medical supplier SmithKline Beecham's agreement to pay a record $325 million to settle claims that it overbilled Medicare and Medicaid for lab tests. The case was filed under the False Claims Act, which has become the primary weapon used by federal government enforcement authorities, as well as current and former employees, to combat fraud in virtually every federally-funded program. If your organization receives federal funding, you need to consider whether you are complying with the False Claims Act. The Act prohibits a person or corporation from making a false or fraudulent demand to the federal government for payment of funds. Any entity that receives, spends or uses federal money is subject to liability under the Act. A section of the Act known as "qui tam" allows a citizen, referred to as a "relator," to blow the whistle on suspected fraud by initiating a lawsuit on behalf of the government. Typically, the whistle-blower is a disgruntled current or former employee. In return for performing this task, the whistle-blower is entitled to up to 30 percent of any money recovered for the government, depending upon the amount of assistance the whistle-blower provides. In the SmithKline case, the government argued that the whistle-blowers did only a minimal amount of work and that the $52 million award was outrageous.

During the last ten years, the number of whistle-blower lawsuits has increased by 1,500 percent. A total of 2,013 were filed during the past twelve months alone. During that ten years, the government has recovered more than $1.8 billion from non-complying employers. Most recently, the government's unprecedented crackdown on healthcare fraud has brought increased focus to the possible False Claims Act gold mine for whistle-blowers. As you would expect, lawyers know about this incentive too, and advertise seeking whistle-blower clients.

As a service to our clients who may be covered under the False Claims Act, we will conduct a series of complimentary briefings in July entitled "False Claims Act And Qui Tam: What Every Employer Needs To Know." The briefings will be held in Huntsville, Birmingham, Montgomery and Dothan. More specific information regarding agenda, dates and times will be mailed to you shortly. This is one law you do not want to learn the hard way!

UNION ELECTIONS AND VICTORY RATE THE HIGHEST IN FIVE YEARS

According to the most recent information released by the National Labor Relations Board, unions won over 50.3 percent of all representation elections held in 1997, the highest percentage during the past five years. Also, there were 3,160 representation elections held last year, the highest in the past five years. The following chart shows total elections, total elections involving AFL-CIO unions without the Teamsters, and total number of Teamster elections:

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REPRESENTATION ELECTIONS 1993-1997

NUMBER OF ELECTIONS

	HELD	WON BY UNION	NO UNION CHOSEN	PERCENT: ELECTIONS WON BY UNION
TOTAL ELECTIONS				
1993	3,038	1,479	1,559	48.7%
1994	3,052	1,501	1,551	49.2
1995	2,716	1,309	1,407	48.2
1996	2,817	1,345	1,472	47.7
1997	3,160	1,591	1,569	50.3
AFL-CIO (NON-TEAMSTERS)				
	1,804	849	955	47.1%
1993	1,895	924	981	48.8
1994	1,701	816	898	48.0
1995	1,754	882	898	50.3
1996	2,026	1,039	1,005	51.3
1997				
TEAMSTERS				
1993	1,043	475	568	45.5%
1994	959	395	564	41.2
1995	828	339	489	40.9
1996	888	334	555	37.6
1997	949	394	557	41.5

The number of decertification elections in 1997 declined to 408, the lowest it has been during the past five years. In fact, since 1994 there have been fewer decertification elections held each year. Additionally, unions won 31.9 percent of all decertification elections in 1997, its highest victory rate during the past five years:

DECERTIFICATION ELECTIONS 1993-1997

NUMBER OF ELECTIONS

	HELD	WON BY UNION	NO UNION CHOSEN	PERCENT: ELECTIONS WON BY UNION
TOTAL ELECTIONS				
1993	484	154	330	31.8%
1994	488	151	337	30.9
1995	458	136	322	29.7
1996	443	138	305	31.1
1997	408	130	278	31.9

The following are the key points we see all unions pushing during organizing campaigns:

- **Job insurance.** Unions tell employees that dues are a form of job insurance. Employees have homeowners insurance, car insurance and health insurance, but no job insurance. Employers tell employees they are terminable at will and the handbook is not a contract, so for monthly dues, the employees can get a contract and job protection.

- **Employee voice.** Unions tell employees they provide employees with a voice. Employees feel that their supervisors and managers are less accessible than ever before, and when employees seek assistance or answers to questions, they are communicated with through 800 numbers or e-mail messages rather than person-to-person service with a company representative.

- Lack of respect and poor communication. Unions by the very nature of the socialization they provide communicate to employees that employees have value, that their lives mean something, and that they belong to an organization that cares about the employee and the employee's family.

- Pay and benefits. How does an employee increase his or her value to the company? What does the employee need to do to be worth more? Are the employer's benefits understood by the employee, "user-friendly," and effectively communicated to the employees?

Several employers have supervisors and employees with no understanding or experience regarding unions. For younger generations of employees, the air traffic controller strike in 1981 is their reference point regarding union ineffectiveness. Since then, those employees look at the UPS-Teamster strike and conclude that perhaps unions have something to offer. Employers need to train supervisors effectively regarding their role in an employer remaining union free, and need to orient new employees about why remaining union free is important to the employer competitively and, therefore, to the employee's job security.

COURT REJECTS 2-FOR-1 HIRING AS FORM OF REASONABLE ACCOMMODATION

In the case of *Webster v. Methodist Occupational Health Centers* (7th Cir., April 23, 1998), a nurse who suffered a stroke asked the employer to provide her with a full-time nurse escort to help her perform her job duties. The employer explained that this would double its costs and, therefore, would not be a form of reasonable accommodation. However, the employer offered the nurse a non-nursing job, which she refused. She was fired and sued, claiming that someone should have been assigned to work with her as a form of reasonable accommodation.

The Seventh Circuit rejected the nurse's ADA claim. An essential function of her job was for the nurse to work alone. As a nurse, she was required to assist patients in several situations where help from an aide or other nurse would not be necessary. Ironically, after she initiated her lawsuit, the nurse proposed other forms of reasonable accommodation. However, the court said that the time for her to have suggested other forms of accommodation was during the interactive process with the employer, when the employer offered to transfer her to a non-nursing job.

CALLING ALL ON-CALL COMPENSATION PRACTICES

Two recent cases considered the question of whether an employee who is required to be "on call" must be paid for that time. In the first case, *Ingram v. County of Bucks* (3rd Cir., May 12, 1998), deputy sheriffs were required to be on call between their shifts and on weekends. They were required to wear a pager and report to work within 45 minutes, if called. The deputies claimed that they should be compensated for the amount of time that they were on call. According to the court, the deputies failed to meet four critical elements for on-call time to be compensable. First, they were able to leave home and take their pagers with them. Second, the frequency of the times that they were called did not interfere with their non-work activities. Third, they were free to switch on-call schedules with other employees. Fourth, they were also free to pursue virtually all of their usual recreational activities. When considering all four factors, the court concluded that the deputies' freedom was not so restricted that on-call time was required to be compensable.

A different result was reached in the case of *Hoffman v. St. Joseph's Hospital of Atlanta, Inc.* (N.D. Ga., April 14, 1998). Respiratory therapists received a half hour unpaid break per shift. They were required to wear pagers during their break in the event they needed to be contacted during an emergency. If they were paged during their break and did not respond immediately, they were subject to discipline. If their break were disrupted because of a page, they could take another half-hour break during their shift. According to the court, the frequency of the times when the therapists were paged and the disciplinary consequences of not responding to the page so greatly restricted the employees' freedom that their on-call time during their meal break must be compensable.

On-call employees who respond to the call must be paid from the moment they respond to the call until they return free and clear of their job duties. This includes compensation for travel time. Whether an employee must be paid for on-call time depends upon whether the employee must carry a pager, the frequency and nature of the calls, flexibility in swapping on-call schedules, and whether the time for responding to the call is such that the employee is unreasonably limited in pursuing personal interests.

MANAGER AWARDED $60,000.00 FOR WORKPLACE HARASSMENT NOT DIRECTED TOWARD HER

The case of *Leibovitz v. New York City Transit Authority* (E.D. NY, May 5, 1998) resulted in an employee receiving an award based upon the sexual harassment directed toward employees. The plaintiff was a deputy superintendent in the Transit Authority's car-cleaning department. She became aware that a female car cleaner complained that a male supervisor sexually harassed her. She was also told that another female employee complained of sexual harassment by the same male supervisor. Leibovitz confronted the supervisor about this behavior and spoke to the Transit Authority's labor relations manager. The Transit Authority investigated the harassment and cleared it up. Apparently, one Transit official told Leibovitz that her career could suffer if she pursued these complaints. Leibovitz sued, claiming that the harassment violated her Title VII rights. The Transit Authority argued that she was not an aggrieved person under Title VII, because she was not the recipient of the alleged harassment. In permitting the case to go to the jury and upholding a $60,000.00 award, the judge stated that "The general principle regarding a responsible person's distress at observing other's suffering [applies]." The court distinguished this case from others that ruled that a white employee could not bring a claim based upon the harassment directed toward a black employee. In this case, because Leibovitz was in the same protected class as those who were harassed, the court stated that she could suffer "psychological trauma" due to "having to witness the abuse" directed toward another employee. The award was based upon the emotional damages Leibovitz felt she suffered. This included anxiety, depression, loss of sleep, and weight gain. A psychiatrist testified on her behalf regarding these damages.

DID YOU KNOW...

. . .that the Securities and Exchange Commission on May 20 adopted a rule that does away with the Cracker Barrel exclusion and permits shareholders to include proposals for employment-related issues? Since 1992, publicly traded companies could exclude shareholder resolutions regarding employment-related matters that addressed social policy issues. This "Cracker Barrel" exclusion, which the SEC has now abolished, first arose because of a challenge to Cracker Barrel's policy of discriminating based upon sexual orientation.

. . .that ten officers of the Hotel Employees and Restaurant Employees International Union resigned based upon allegations of involvement with organized crime? The resignation includes International president, Edward Hanley. The allegations are that the officers, including Hanley, used union funds for their own personal benefit and were involved with organized crime as a way to filter union funds for personal use. Hanley allegedly set up a fake local union at a location in Wisconsin where he had a vacation home. The fake local was simply a method to funnel money to Hanley in order to cover his vacation expenses, including the use of the union's jet to get to his vacation home.

. . .that an employer bargained in bad faith by scheduling only 19 bargaining sessions over a 15-month period, which converted an economic strike to an unfair labor practice one? *Calex Corporation v. NLRB* (6th Cir., May 11, 1998). The effect of this decision requires the employer to pay back pay to all strikers. The reason for the employer conducting so few sessions and canceling several sessions was allegedly due to the unavailability of its chief negotiator, because of other responsibilities. The court concluded that the company had a legal obligation to meet at reasonable times and places, and refused to do so. According to the court, "An employer's chosen negotiator is its agent for the purposes of collective bargaining, and if that negotiator causes delays in the negotiating process, the employer must bear the consequences."

. . .that the Eleventh Circuit Court of Appeals agrees with several other circuits that it does not violate Title VII for employers to establish grooming policies that require men to cut their hair? *Harper v. Blockbuster Entertainment Corporation* (April 29, 1998). The employer established a grooming policy that permitted women but forbade men from having long hair. The men were terminated, and they sued, claiming sex discrimination. According to the court, grooming policies are not gender equity issues. If an employer established a grooming policy for only men or women, but not both, then it would violate Title VII.

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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.

Robert L. Beeman, II	205/323-9269
Kimberly K. Boone	205/323-9267
Michael Broom	256/355-9151 (Decatur)
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
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

Birmingham Office:
2021 Third Avenue North, Suite 300
Post Office Box 370463
Birmingham, Alabama 35237
Telephone (205) 326-3002

Decatur Office:
303 Cain Street, N.E., Suite E
Post Office Box 1626
Decatur, Alabama 35602
Telephone (256) 308-2767