EMPLOYMENT LAW BULLETIN

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TO OUR CLIENTS AND FRIENDS:

What is the chance of a plaintiff prevailing in an Americans with Disabilities Act discrimination lawsuit? Only 8 percent, according to a recent survey released by the American Bar Association. The results of the survey were released on June 17, 1998, and involved the study of 1,200 ADA employment discrimination cases since 1992. The highest percentage of employer victories (98.1 percent) was in Louisiana, Mississippi and Texas, with the highest percent of employee victories (16.7 percent) covering the far western states and Hawaii.

The survey also included an analysis of charges filed with the EEOC. Out of 83,000 ADA charges resolved by the Commission between 1992 and 1997, 86.4 percent were resolved in favor of the employer and 13.6 percent in favor of the employee.

According to John Parry, Director of the American Bar Association Commission on Mental and Physical Disability Law, the problem for employees under the ADA is that the law "requires a disability to be substantially limiting, while requiring employees with such a disability to be otherwise qualified to carry out essential job functions. In other words, employees have to have a severe disability, but it cannot be so severe that they are unable to do their job completely." He added that a majority of the cases employers won were based upon summary judgment because the ADA "was much more restrictive than those who drafted and supported the ADA had thought it would be." Parry's comments overlook what we consider an obvious reason for employer success: Employers are well aware of their rights and responsibilities under the ADA and are able to prove at the EEOC or in court that there was no discrimination.

ASSISTANT MANAGERS QUALIFY FOR OVERTIME EXEMPTION, RULES FOURTH CIRCUIT

A nagging question for employers who employ assistant managers is whether those managers are exempt from overtime under wage and hour law. In a recent case involving Food Lion, Inc., decided on June 4, 1998, the Fourth Circuit ruled that salaried assistant mangers at Food Lion stores met the exemption for executive employees under the Fair Labor Standards Act.

The case involved eleven separate cases that were consolidated into one. The company submitted the assistant manager job description from the store manual and excerpts from depositions of assistant store managers that showed that when the store manager was absent, the assistant managers were regularly in charge of full store operations. This included supervising and disciplining employees, handling customer complaints, and dealing with vendors. Even if less than 50 percent of the assistant managers' time involved exempt duties, the court said they were

still exempt. The non-exempt tasks they performed included stocking shelves, rotating products and operating the cash register.

In order to qualify as an exempt executive employee, the individual must customarily and regularly supervise the equivalent of two full-time employees and have as the primary function operating or managing an enterprise, department, or division of the employer. In the Food Lion case, there was minimal overlap in the hours the assistant manager worked compared to the store manager. Furthermore, the written job description for assistant store managers described their primary tasks as exempt in nature, and the testimony of assistant managers confirmed this.

Assistant managers without specific managerial authority will not qualify for the overtime exemption. Furthermore, management trainees are non-exempt employees unless the trainee tasks they perform are exempt work. We urge employers to conduct their own internal exempt/non-exempt analysis in order to identify potential areas of concern and resolve them before an wage and hour investigation or lawsuit occurs.

UNIONS SPEND MILLIONS OF DOLLARS IN CAMPAIGN TO DEFEAT PROPOSED RESTRICTION OF UNION EXPENDITURES ON POLITICAL CAMPAIGNS

California citizens recently voted on two well-known referendums, Proposition 227, which abolished bi-lingual education, and Proposition 226, which required annual approval of union members in order for unions to spend dues on political campaign contributions. Although statistically approximately 40 percent of union members vote Republican, nearly 90 percent of AFL-CIO political contributions are made to Democratic candidates. The California initiative would have had the practical effect of reducing the amount of money organized labor could contribute to political campaigns.

In the spring, the polls indicated that California citizens favored Proposition 226 by a three-to-one margin, but on election day on June 2, Proposition 226 failed by 7 percent. Apparently, the primary reason why the proposition failed is because organized labor pumped millions of dollars into the campaign and distorted what the proposition would cover. For example, labor said that the effect of the proposition would require employee approval for employers to make charitable contributions. Organized labor was concerned that if they lost this proposition in California, "copy cat" propositions would be raised and passed elsewhere in the United States. Proposition proponents stated they will return to the voters for another vote in the year 2000.

EMPLOYER NOT REQUIRED TO VIOLATE SENIORITY POLICIES TO ACCOMMODATE APPLICANT'S RELIGION

The term "reasonable accommodation" is most often identified with the Americans with Disabilities Act. However, there is also a reasonable accommodation obligation regarding religious discrimination under Title VII.

Under Title VII, an individual may not be discriminated against based upon that individual's religion. Furthermore, the employer is required to "reasonably accommodate" an applicant's or employee's religious beliefs or practices, unless the accommodation would impose an undue hardship on the company. Note that the term "undue hardship" is also used to describe an inability to accommodate under the ADA.

The case of *Balint v. Carson City* (9th Cir., May 26, 1998) involved an individual who applied for a position with the Carson City, Nevada Sheriff's Department. She told the Sheriff's Department

that she would be unable to work weekend shifts, because her Sabbath was from sunset Friday to sunset Saturday and she did no work during that 24-hour period. The employer told her that it could not accommodate her religious practices. The department established a policy where shift assignments were based upon seniority and bidding. Requiring accommodation would mean that a more senior employee would lose seniority rights. According to the court, "because the department had in place a non-discriminatory seniority-based system for assigning shifts, it had no duty to accommodate Balint, even if such accommodation would have no more than a de minimis impact."

A similar result occurs under the ADA. An employer is not required as a form of accommodation to give priority to an employee's religious practices or disability needs if to do so would diminish the rights or benefits of other employees.

EEOC ISSUES GUIDANCE TO EMPLOYERS ON WHAT ACTIONS CONSTITUTE RETALIATION

The number of retaliation charges filed under the statutes administered by the EEOC increased from approximately 8,000 during 1991 to 18,100 during 1997. In an effort to help employers avoid retaliatory behavior, on May 26, the EEOC issued guidance to explain what behavior could constitute retaliation.

The EEOC first described the "opposition" and "participation" form of retaliation. The opposition clause protects employee action that opposes an employer practice which the employee believes may violate the statute. This includes speaking out about an employer action, complaining about it, requesting reasonable accommodation, or refusing to engage in an action. The participation clause includes involvement in an EEOC investigation or otherwise testifying in a discrimination proceeding or lawsuit. The EEOC said that not every opposition voiced by an employee is protected. However, without being specific, the EEOC said that opposition will be protected if it is "based on a reasonable and good faith belief that the opposed practices were unlawful."

Which employer practices would be considered retaliatory? The EEOC listed the following:

- An "unjustified negative job reference"
- Refusal to provide a job reference
- Disclosing to a potential employer an individual's protected activities
- Other actions that affect terms or conditions of employment

If an employer's reference disclosure is consistent with its overall reference policy, then such action would not be viewed as retaliatory.

We encourage employers to include in their equal employment opportunity statements a definition of retaliation and what steps an employee should take if the employee believes that retaliation has occurred. Establish a process whereby employees know to whom they should report what they believe to be retaliatory actions, describe how the company will investigate those actions, and explain the consequences if the employer concludes that retaliation occurred.

DID YOU KNOW...

. . .that on June 11, 1998, the EEOC and Mitsubishi Motor Manufacturing of America, Inc., settled a sexual harassment claim for $34 million? Approximately 350 women will be covered by the settlement, some of whom will receive up to $300,000.00. The EEOC will administer the settlement fund.

. . .that on June 11, 1998, in the case of *Lewis v. Aetna Life Insurance Company and K-Mart Corporation* (D. Ct., Va.), the court ruled that K-Mart violated the ADA by providing lower long-term benefits for mental illness compared to other health conditions? Under the K-Mart plan, disability coverage for any impairment other than a physical one terminated after two years. Physical impairments were covered until the individual reached age 65. According to the court, "K-Mart cannot convincingly argue that prohibiting discrimination against the mentally disabled in their disability insurance plan raises dire economic consequences." K-Mart was ordered to pay approximately $655,000.00 for past due and future disability expenses to a store manager who has not worked due to severe depression. The amount the employee was awarded in this case is enough to last until age 65, unless the individual is no longer disabled.

. . .that Richard Bensinger has been replaced after less than two years as the Chief Organizer for the AFL-CIO? This decision was announced on June 10, 1998, by AFL-CIO President, John Sweeney. Kirk Adams, the Southern Regional Organizing Director for the AFL-CIO, replaces Bensinger.

. . .that an employer was not required to accommodate an individual's 18-month absence from work under the ADA? *Nowak v. St. Rita High School* (7th Cir., April 24, 1998). According to the court, regular attendance was an essential function of the job and the employer was not required to accept an 18-month leave of absence as a form of reasonable accommodation.

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