EMPLOYMENT LAW BULLETIN

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TO OUR CLIENTS AND FRIENDS:

Last month we reviewed in detail two recent United States Supreme Court cases that established when employers were liable for sexual harassment by supervisors and what steps employers can take to defend against such claims. In those cases, *Ellerth v. Burlington Industries* and *Faragher v. Boca Raton*, the Supreme Court said that employers were responsible if a supervisor creates a hostile environment, even if the employer lacks notice of the harassment, unless the employer exercised reasonable care to correct and prevent the harassment and the employee failed to utilize processes to report the harassment or otherwise failed to take action to prevent it. The Supreme Court explained that if an employee suffered due to the harassment, such as denial of a promotion opportunity, then there was "strict liability" to the employer for the supervisor's action, which means that there would not be available the defense the steps the employer took to prevent or correct the harassment. On July 10, 1998, in *Booker v. Budget Rent-A-Car Systems* (N.D. Tenn), a federal district court judge ruled that the Supreme Court's analysis also applies to racial harassment cases.

Anthony Booker worked for Budget in Nashville. Throughout his 13-year history, he received several promotions, eventually becoming market manager. He was the only black management employee at the Nashville location throughout his employment with Budget. Eventually, he was promoted to location manager, reporting to a general manager.

Booker kept a diary of the comments and behavior from the general manager that showed racial animus toward Booker. This included verbal abuse, cursing, belittling comments, and demotion. Eventually, the general manager resigned, but, according to Booker, he received similar treatment from the new general manager.

In reviewing the case, the court held that Budget was responsible because of the racial harassment. The court also explained that even if that harassment had not occurred, the employer could not prevail in the case because the employer failed to prove that the anti-harassment policy, which included race, was ever distributed to employees. Furthermore, the employer failed to prove "that management ever received any kind of training with respect to issues of racial harassment." Therefore, according to the court, Budget failed to prove that it exercised reasonable care to prevent racial harassment. The court added that the behavior directed toward Booker "should have given Budget notice that a situation involving potential racial harassment was present, and Budget's failure to take prompt action prevented from asserting an affirmative defense against vicarious liability."

Remember that in order to prevent or defend harassment disputes of any kind, an employer needs to establish that a proper policy was distributed and reviewed with employees and that when the employer became aware of possible harassment, it took prompt action to identify and address the behavior. If your harassment policy is limited to just sexual harassment, or if your policy is not properly distributed, reviewed or acted upon if a complaint arises, then your business could be held liable for the harassment behavior of one of your managers or supervisors.

GM OUTMUSCLES UAW

The once mighty United Autoworkers membership has dropped by approximately one million members during the past fifteen years, contributing to the UAW merger with the Machinists and Steelworkers effective in the year 2000. This decrease was demonstrated in the recent strike against GM. UAW President Stephen Yokich characterized the recent settlement of the strike as one where "nobody really won." If the union president says that no one really won the strike, perhaps one inference is that the UAW lost the strike. Mr. Yokich's subdued behavior stands in stark contrast to Teamster President Ron Carey's crowing over how the Teamsters won the UPS strike last summer. If the Teamster strike indicated renewed muscle for organized labor, the UAW-GM strike was a step back in that progress.

The broad issue leading to the strike concerned GM's refusal to invest in an outdated Flint, Michigan stamping plant unless employees improved their productivity. Additionally, GM would not settle the Flint dispute unless disputes with five other UAW locals were also resolved. The UAW agreed to that proposition. GM agreed that it would not sell plants in Flint, Michigan or Dayton, Ohio until January 2000. It also agreed to reinvest in the Flint stamping plant, but in exchange the union agreed to take steps to improve productivity by 15 percent. The strike cost General Motors $2 billion. However, GM did not agree to alter its plan to eliminate over the next few years 50,000 jobs out of the total 189,000 jobs currently held by UAW members. Instead of the UAW gaining a lift from the outcome of the strike like the Teamsters-UPS, the outcome of this strike furthers UAW's title as the union for the "unemployed autoworker."

IMPROPER SEARCH OF EMPLOYEE'S DESK COSTS EMPLOYER $436,000

In a 17-year case that never seemed to end, the Court of Appeals for the Ninth Circuit upheld a jury award for a psychiatrist whose office desk was searched by hospital officials without his permission. *Ortega v. O'Connor* (June 26, 1998). The problems leading to the lawsuit arose when the hospital heard that Dr. Ortega was soliciting personal contributions from psychiatrists in residence at the hospital in order to assist in buying a computer that Dr. Ortega would use. The hospital's executive director, Dr. Dennis O'Connor, requested the hospital administrator to investigate. Dr. Ortega was requested to take administrative leave, but instead he took a two-week unpaid vacation and was told not to return to the facility during this time. While on vacation, the administrator changed the locks on Ortega's office, took personal items from Ortega, such as letters and poems from Ortega's girlfriend. Shortly thereafter, Ortega was terminated and was told that although he could make copies of the items that were taken from him, he could not have them back.

A jury awarded Ortega compensatory damages of $376,000.00, punitive damages of $35,000.00 against the hospital administrator, and $25,000.00 against O'Connor. Ortega's theory was based upon an invasion of privacy. He argued that he had a reasonable expectation of privacy in his office and desk, which had never been searched before. He

asserted that the hospital did not have a search policy and that his rights were invaded by the hospital searching his office, changing its locks, and confiscating personal items. In upholding the jury award, the court said that "the search was at best, a general and unbounded pursuit of anything that might tend to indicate any sort of malfeasance...asserts that it is almost by definition, unreasonable."

There are several steps employers can take in order to establish their right to conduct a search of an employee's office, desk, or locker. Establish a policy so that employees do not have a reasonable expectation for privacy at work regarding the use of desks, cabinets, or lockers. Describe the circumstances where those items may be searched and where failure of the employee to comply with the employer's search request may result in disciplinary action or termination. The policy should describe the scope of the search as limited only to the extent necessary to investigate the employer's concerns. Furthermore, try to conduct the search in privacy, out of the view of other employees who have no reason to know about the search.

TEAMSTERS FACE SIGNIFICANT RISK IN LIBEL LAWSUIT

During an effort by the Teamsters to organize employees at Overnite Transportation Company, a Teamster organizer, Keith Maddux, circulated memos to employees telling employees that three Overnite managers had been "formally indicted by the United States Government of massive violations of federal labor laws." This "formal indictment" was nothing more than a garden variety unfair labor practice charge filed by the Teamsters. The Teamsters then issued a press release to employees in the community stating that the three managers were indicted. Continuing on this theme, the Teamsters invited employees to an organizing meeting to tell employees about the indictments against the three Overnite managers by the United States Government for "massive violations" of federal labor laws.

The managers sued the Teamsters organizer for libel, stating that their reputations had been damaged. In permitting the case to proceed, the court said that the union organizer "was familiar with the nature of NLRB proceedings, knew that they were civil rather than criminal, and nevertheless used the terms 'indicted' and 'indictment' in the flyers even though he knew they had a criminal meaning." The court added that "a jury could determine by clear and convincing evidence that Maddux...had published the flyers either knowing that the information they contained was false or with a reckless disregard for whether the information the flyers contained was true or false...."

No criminal charges had ever been filed against the managers. The union's overreaching characterization of unfair labor practice charges as criminal indictments is an example of how far a union organizer will test the limits of the law in an effort to persuade employees to sign up with the union.

$2 MILLION AWARDED TO EMPLOYEE WHO COMPLAINS ABOUT RACIAL DISCRIMINATION NOT DIRECTED TOWARD HIM

Motel 6 may cut back on "leaving the light on for you" out of concern for the power bill as it now must pay $2 million for terminating an employee who complained about what he thought were racially discriminatory policies toward motel guests. *Petaccia v. Motel 6 G.P., Inc.* (M.D. Fla., June 18, 1998). The employee, Mario Petaccia, reported to his supervisors concerns that Motel 6 discriminated against black guests and employees. After Motel 6 did not address Petaccia's concerns to his satisfaction, Petaccia then reported his concerns to the United States Justice Department. Shortly thereafter, he was terminated.

Petaccia alleged that he was directed by managers to place black guests in a location of the motel that was referred to as a "ghetto." He also alleged that he was directed to charge black guests the rate for a double room even if black guests traveled alone. He also alleged that managers identified certain rooms to rent to non-whites only, and that at times black guests were told that no rooms were available when in fact there were rooms available.

There was conflicting evidence at trial about whether Motel 6 management ever took the complaints seriously and properly investigated them. There was also inconsistent testimony regarding reasons why Petaccia was fired. Motel 6 will appeal the award.

Remember that retaliation covers not only concerns about whether an employee believes that he or she was discriminated against, but also concerns about whether an employer's behavior toward other employees or its business practices are discriminatory.

COURT INVALIDATES MANDATORY ARBITRATION AGREEMENT CONTAINED IN PERSONNEL MANUAL

Several employers throughout the country have established mandatory arbitration provisions in personnel manuals, which may not necessarily succeed in accomplishing the desired result. The employer's objective is for an employee to agree to submit any potential employment claims to arbitration, rather than filing suit. As the case of *Trumbull v. Century Marketing Corporation* (N.D. Ohio, 7/7/98) illustrates, courts will not enforce arbitration language that is not drafted properly and clearly, and is not identified conspicuously in the manual.

The employer distributed to employees a 60-page handbook. The mandatory arbitration provision according to the court was "buried" in one and a half pages of the handbook. The handbook acknowledgment form did not refer to the arbitration language. Furthermore, the arbitration language was located in the handbook among other provisions that did not affect employee legal rights. The court added that "the language of the arbitration clause says nothing about arbitration of statutory claims as opposed to contractual disputes, or about the significance of the right to a judicial forum. For a waiver to be valid, such language must be present in the agreement." Furthermore, "it cannot be said that the parties agree to submit discrimination claims to arbitration **or the plaintiff knowingly waived her right to have her day in court. To conclude that there was a waiver of such an important right, there must at least be evidence that the plaintiff intended such a waiver."**

In addition to these defects, the arbitration agreement was also invalid because it denied the arbitrator the right to award the types of damages available under Title VII, including punitive and compensatory damages. The court stated that if an arbitration agreement is to be enforced, the employee must have available through arbitration the same remedies that would exist if the employee proceeded to court.

The final reason why the court invalidated the arbitration agreement is because, according to the court, there was no consideration or bargained- for exchange between employee and employer for the employee to agree to arbitration. The provision was unilaterally imposed on the employee and did not result in the employer giving up anything in order for the employee to submit potential claims to arbitration.

The enforceability of arbitration language needs to be evaluated depending upon each state in which an employer seeks to require employees to submit claims to arbitration. Based upon these cases, the following are issues employers need to address in order to enforce an arbitration agreement in a handbook:

- Does the language clearly and conspicuously state that the employee gives up the right to a jury trial in exchange for arbitration?

- Are the remedies available through arbitration the same as those that would be available if the employee took a case to court?

- Has the employer given up something in exchange for the employee's agreeing to arbitration?

- Does the handbook acknowledgment form direct the employee's attention to the arbitration procedure in the handbook, and is the procedure spotlighted in the handbook so that the employee understands it is critical language that the employee should review?

DID YOU KNOW...

. . .that an individual who is HIV-positive without symptoms is considered disabled under the ADA? The Supreme Court held as such in the case of *Bragdon v. Abbott*, decided on June 25, 1998, by a five to four vote. According to the majority opinion, "in light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease, we hold it is an impairment [under the ADA] from the moment of infection." Furthermore, reproduction is a major life activity, and the reproductive system is affected by an individual who is HIV-positive.

. . .that an employer cannot require employees to waive compensation for travel time under the Fair Labor Standards Act? *Baker v. Bernard Construction Company* (10th Cir., June 18, 1998). The case involved welders who repaired oil and gas pipelines. The employer required employees to sign an agreement that the time they spent traveling to the job would not be considered compensable under wage and hour law. The court ruled that such an agreement was invalid, because "travel time was integral and indispensable to the principal activities for which they were hired." The court added that when such activities are part of the employee's job, "no mutual agreement could waive the application of the FLSA minium wage and overtime provisions to that work."

. . .that a court held that it was not sexual harassment to comment to an employee that her clothing was inappropriate for work? *Schmitz v. ING Securities, Futures & Options, Inc.* (N.D. Ill., July 9, 1998). The plaintiff, Laura Schmitz, wore tight skirts, low-cut blouses and, according to the court, clothes that "generally were too sheer and revealing." Schmitz admitted that she dressed and acted provocatively at the office. She was counseled several times by her employer that her dress was inappropriate. After she was terminated, she complained that her supervisor's actions in commenting to her about her dress constituted sexual harassment. The court said that "although Schmitz surely found [her supervisor's] criticisms to be unwelcome, there is no question that they were exactly the opposite of sexual advances, the quest for sexual favors, and other verbal or physical conduct of a sexual nature. If Schmitz did in fact see the workplace environment as 'hostile,' that notion stemmed from her own misperception that she was entitled to make the rules for workplace behavior, without reference to her employer's wishes..."

. . .that the EEOC has agreed not to use federal funds for its "tester" program? The program involved sending equally qualified pairs of applicants of different races and genders to employers to see whether the employer's hiring practices were discriminatory. The House of Representatives had refused to approve EEOC funding increases unless the EEOC did not pay for that program with federal funds. House members claimed that the tester process was a "set up" for

employers, as the testers were not interested in working for that particular employer. The EEOC agreed to accept the House Appropriations Committee position on testers. In exchange, the House Appropriations Committee agreed to approve an increase in the EEOC funding for fiscal year 1999 of $18.5 million, for a total of $260.5 million.

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