EMPLOYMENT LAW BULLETIN

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

Volume 6, Number 8 ***August 1998***

TO OUR CLIENTS AND FRIENDS:

Enclosed with this month's newsletter is information regarding our **Effective Supervisor Training Program** which is scheduled for October 9th in Birmingham and October 23rd in Huntsville. We appreciate the feedback we received regarding the quality of this program and are pleased to offer it again. Please review the enclosed information and call us if you have any questions.

Also, mark your calendars for September 11, 1998, for our quarterly **Breakfast Briefing**. George Clark, President of the Alabama Industry & Manufacturers Association, and Barry Mask, AIM Executive Vice President, will review election developments affecting employers. They will address both state and congressional races. In its brief history, AIM has established an excellent reputation for representing employer interests in Alabama. A complimentary continental breakfast will be served from 7:30 a.m. until 8:00 a.m. If you or other members of your organization plan to attend, please return the enclosed registration form.

VIOLENCE — WHEN WILL IT END?

On a daily basis, the news is filled with horrific reports of how violent our society has become. Whether it involves the schools, playgrounds, or the workplace, Americans cannot take their safety for granted.

Workplace homicide is the number one cause of death at work. A number of causes of workplace homicide are domestic violence occurring at work, violence arising based upon the employment relationship, or violence from strangers usually involving robbery. According to a survey that was conducted for Liz Claiborne, Inc., approximately four million women each year are victims of domestic violence. Of those four million, 70 percent work.

What steps can you take to reduce the risk of workplace violence? We recommend that employers consider the following:

1. Act on signals from employees that may indicate potential violence. Such signals may include agitated or angry outbursts, depression, threatening or intimidating comments, inappropriate visits to the workplace during non-working hours, paranoia, confrontational conversation or hate mail, or excessive threats of litigation.

2. Know what is happening with employees in their personal lives. Are employees having financial or domestic troubles? Early intervention with an offer of assistance or a referral to counseling may be of help.

3. Meet with local police to assess the overall security of your premises.

4. Take any threat of violence seriously.

5. When disruptive changes are unavoidable, carefully consider how to deliver bad news to avoid angry reactions. Always treat employees with respect and compassion. Also, consider providing additional, low profile security to help ease a potentially volatile situation.

STEELWORKERS COMMIT TO TRIPLING FUNDS FOR UNION ORGANIZING

On August 12, at their 29th Annual Meeting (in Las Vegas), the Steelworkers voted in a secret session to take measures to add 100,000 new members during the next four years. In 1981, the Steelworkers had over one million members; by 1989, membership had dropped to less than 600,000. The Steelworkers now have 670,000 members. That number is largely due to mergers with other unions. The union adds, on average, about 13,000 new members per year through organizing. It loses slightly less than that amount through plant closings, downsizing, and decertification. Unless the union increases its organizing efforts, it projects that by the year 2002, total membership will be less than 600,000.

In an effort to increase organizing successes, the Steelworkers plan to do the following:

1. Increase the amount of money from the Steelworker budget committed to organizing from $13 million to $40 million annually.

2. Fund the increased organizing budget through dues increases.

3. Require each district director (there are twelve) to submit an organizing plan to the International each year.

4. Focus on training thousands of Steelworker members to become union organizers.

5. Develop more strategic alliances at the local level with other unions for organizing purposes.

6. Create industry conferences to identify specific organizing targets based upon industry, location, and potential unit size.

Interestingly, the Steelworker Executive Board cut off debate on the dues increase so that those who were opposed to the increases were prohibited from speaking.

Too often, employers only conduct internal union vulnerability assessments when facing a union campaign. We recommend that employers conduct their own internal audit now because the Steelworkers, like several other unions, are becoming more aggressive due to their desperate need to increase their membership or risk becoming irrelevant.

EEOC BACKLOG AND TOTAL CHARGES DECLINE

During the past three years, the EEOC has reduced its backlog of charges from approximately 115,000 to 58,000 current cases. Possibly helping reduce the backlog is a slight downward trend in the number of charges filed. In fiscal year 1997, 87,680 charges of discrimination were filed, a slight increase from 1996, but a significant decrease from 1994's high of 91,189 charges filed. In 1997, 36.2 percent of all charges alleged race discrimination; 30.7 percent charged sex discrimination; 8.3 percent, national origin discrimination; 2.1 percent, religious discrimination; 22.5 percent alleged retaliation; 19.6 percent alleged age discrimination; 22.4 percent, disability discrimination; and 1.4 percent alleged Equal Pay Act violations. Claims of retaliation have shown the most dramatic increase during the last few years, increasing from 17.5 percent in 1995 to 22.5 percent in 1997.

The following is a summary of charges by number, category, and year since 1991:

CATEGORY	1991	1992	1993	1994	1995	1996	1997	1998*
TOTAL CHARGES	63,898	72,302	87,942	91,189	87,529	77,529	77,990	59,226
RACE	27,981 43.8%	29,548 40.9%	31,695 36.0%	31,656 34.8%	29,986 34.3%	26,287 33.8%	29,199 36.2%	21,443 36.2%
SEX	17,672 27.7%	21,796 30.1%	23,919 27.2%	25,860 28.4%	26,181 29.9%	23,813 30.6%	24,728 30.7%	18,262 30.8%
NATIONAL ORIGIN	6,692 10.5%	7,434 10.3%	7,454 8.5%	7,414 8.1%	7,035 8.0%	6,687 8.6%	6,712 8.3%	5,079 8.6%
RELIGION	1,192 1.9%	1,388 1.9%	1,449 1.6%	1,546 1.7%	1,581 1.8%	1,564 2.0%	1,709 2.1%	1,385 2.3%
RETALIATION	7,906 12.4%	10,932 15.1%	12,644 14.4%	14,415 15.8%	15,342 17.5%	14,412 18.5%	18,113 22.5%	12,759 21.5%
AGE	17,550 27.5%	19,573 27.1%	19,809 22.5%	19,618 21.5%	17,416 19.9%	15,719 20.2%	15,785 19.6%	11,217 18.9%
DISABILITY**	NA	1,048 1.4%	15,274 17.4%	18,859 20.7%	19,798 22.6%	18,046 23.1%	18,108 22.4%	13,278 22.4%
EQUAL PAY ACT	1,187 1.9%	1,294 1.8%	1,328 1.5%	1,381 1.5%	1,275 1.5%	969 1.2%	1,134 1.4%	853 1.4%

* NOTE: 1998, first seven months only. Preliminary data.

** EEOC began enforcing the Americans with Disabilities Act on July 26, 1992.

According to the EEOC, during fiscal year 1997, 106,312 charges were resolved. Of that number, only 3.8 percent (4,041) resulted in "reasonable cause" findings, meaning that the EEOC found reasonable cause to determine discrimination occurred. The percentage of charges that have resulted in "reasonable cause" determinations have been 2.7%, 2.3%, 2.7%, 2.7%, 2.3%, 2.2%, and 3.8% for the years 1991 through 1997, respectively. In 1997, over 60 percent of all charges were resolved with "no cause" findings, compared to 61.1 percent in 1996 and 50.9 percent in 1995.

IMPROPER WAIVER OF RIGHTS DOES NOT PREVENT AGE DISCRIMINATION CLAIM, RULES COURT

The case of *Tung v. Texaco, Inc.* (2d Cir. July 22, 1998), involved a technical failure by Texaco to fully comply with the Older Workers Benefit Protection Act. The effect of this failure was that a 56-year-old employee who signed a release was allowed to proceed with a discrimination lawsuit.

Tung was told that the termination of his employment by Texaco was part of a company-wide reduction in force. Under the Older Workers Benefit Protection Act, the information that must be provided to a terminated employee and the timetable for providing it are different depending on whether the individual is laid off or individually discharged. In a layoff context, an individual must receive at least 45 days to consider whether or not to waive rights. Additionally, the employer is required to provide extensive information about "comparables," including the ages of all employees who were eligible and selected for the layoff. The information must be given to the employee at the beginning of the 45-day period. In Tung's situation, Texaco gave him more than 45 days to consider the release, but failed to provide him with information about the comparables until after he signed the release. After receiving this information, Tung filed an EEOC charge and, subsequently, a lawsuit alleging race, national origin, and age discrimination. According to the court, Texaco's failure to comply with each detail of the Older Workers Benefit Protection Act nullified the release and afforded Tung the right to proceed with his lawsuit. In this case, Tung was not provided with the information from which he could properly evaluate whether he had a viable discrimination claim until <u>after</u> he had waived his rights to bring such a claim.

SUPERVISOR'S FAILURE TO STOP DISTRIBUTION OF RACIALLY OFFENSIVE MATERIAL CONTRIBUTES TO RACE DISCRIMINATION CLAIM

It is not enough for supervisors simply to obey your company's fair employment practices and harassment policies. Supervisors should also be required as part of their jobs to enforce these policies. A supervisor's failure to enforce these policies has contributed to a significant problem for the U.S. Postal Service (once again) in the case of *Robinson v. Runyon* (6th Cir., July 22, 1998).

Employee Aleia Robinson was terminated after she was involved in an automobile accident on the job which, according to the police report, was due to her excessive speed. However, it turned out that the police report was wrong. Robinson contested the termination and through arbitration was reinstated with back pay. Robinson also filed suit under Title VII. In her Title VII case, the jury returned a verdict for the Postal Service. Robinson appealed, claiming that the trial judge improperly excluded as evidence of race discrimination a fake employment application that had been circulated in the workplace which was titled a "nigger employment application." The court also excluded from evidence a picture of a white hangman putting a noose around a black person's neck, which had also been circulated at work. The trial judge felt that both documents were inflammatory and were not probative regarding Robinson's claim of race discrimination.

In reversing the trial court, the Court of Appeals reasoned that, "The racist application form, which was circulated and allegedly known to upper level management, yet not immediately condemned, plainly makes the existence of racially motivated actions by management more probable..." The Court added that discrimination cases generally involve largely circumstantial evidence and, "The absence of even one piece of highly relevant evidence may have made the difference in the

jurors' minds and its exclusion was therefore far from harmless." Although the Postal Service admitted that at least one supervisor knew about the employment application (and did nothing to stop it), there was no evidence suggesting that any supervisor knew about the hangman and noose picture. In ordering a new trial, the Court stated that, "Shocking messages, offensive though they may be to the court and to the jury, comprise the signature element of a discrimination case."

In order to effectively enforce fair employment practices and anti-harassment policies, employers need to stress to supervisors and employees that any potential policy violation must be reported. Moreover, supervisors should be reminded that an employer is justified in holding them to higher standards of conduct than non-supervisory personnel.

DID YOU KNOW...

. . .that an employer requiring an employee to "opt out" of an arbitration agreement was not allowed to enforce the agreement because the employer gave the employee nothing of value? *Michalski v. Circuit City Stores, Inc.* (W.D. Wis., July 22, 1998). Michalski claimed that she was terminated because of her pregnancy. The company argued that her case should have been dismissed because she failed to follow the company's "Issue Resolution Program." The company required employees to either sign a form stating they wished to "opt out" of the company's dispute resolution procedure, or, by their failure to opt out, the employee would be considered to have agreed to submit all potential employment claims to arbitration. The court refused to enforce this policy, holding that it was "very dubious of enforcing what amounts to a contract of adhesion." The court added that, "To create a legal mirage of a bargained, knowing, and voluntary waiver of [Title VII] protections by the at-will employee of a large and sophisticated corporation is both dangerous and disingenuous."

. . .that on August 14, 1998, a former business manager for IBEW Local 45 was indicted for embezzling over $63,000.00 of union funds over three years? *U.S. v. Jackson* (C.D. Cal.). Jackson allegedly used union funds for unauthorized automobile expenses and his adult child's health insurance. Also, two days earlier, Manuel Lujan, Secretary/Treasurer of the International Brotherhood of Boilermakers, was indicted for stealing $25,000.00 from the union by using union credit cards for personal business and making unauthorized withdrawals from the union's bank account.

. . .that on August 5, which was the five-year anniversary of the effective date of the Family and Medical Leave Act, the U.S. Department of Labor called the FMLA a success, although it "needs some adjustment." According to the Department of Labor, approximately 88 million workers are covered under the FMLA. Of that number, between 12 and 20 million have exercised their rights under the FMLA. Labor Secretary Alexis Herman called the FMLA "one of the easiest laws to administer of all the laws administered by the Department of Labor."

. . .that a successor employer is not necessarily responsible for the predecessor's unfair labor practices, ruled the court in *Peters v. NLRB*? (6th Cir., 8/10/98). According to the court, "Forcing this new employer to remedy its predecessor's labor violations might require it to comply with the terms of an old bargaining agreement, or might impede it from instituting the desired changes to other terms and conditions of employment. Without the successor's efforts in this case, the employees might very well have been out of a job." This case involved a company that went into receivership. The purchaser specifically refused to assume any responsibility for its predecessor's collective bargaining agreement and unfair labor practices.

The Employment Law Bulletin is prepared and edited by Richard I. Lehr and Sally Broatch Waudby. Please contact Mr. Lehr, Ms. Waudby, or

another member of the firm if you have questions or suggestions regarding the Bulletin.

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"No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

BREAKFAST BRIEFING
SEPTEMBER 11, 1998

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----------(Detach and Return)----------

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Please reserve a seat at the complimentary Breakfast Briefing scheduled for September 11, 1998, 7:30S9:30 a.m., at the Sheraton — Perimeter Park South, Birmingham.

NAME: _____

COMPANY: _____

TELEPHONE: _____

OTHERS FROM COMPANY WHO MAY WISH TO ATTEND:

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