# EMPLOYMENT LAW BULLETIN

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

***Volume 6, Number 9*** ***September 1998***

## *TO OUR CLIENTS AND FRIENDS:*

If the effects of a disability are minimal due to medication, is the individual still considered disabled under the ADA? This is a decision that several courts have had to address, including most recently the Fifth Circuit Court of Appeal in the case of *Washington v. HCA Health Services of Texas, Inc.* (September 3, 1998). According to the Fifth Circuit, "Only serious impairments and ailments that are analogous to those mentioned in the EEOC guidelines and the legislative history — diabetes, epilepsy, and hearing impairments — will be considered in their unmitigated state." Thus, persons suffering from other disabilities where the mitigating measures either permanently correct or ameliorate the disability, such as an organ transplant or artificial joint, may not be considered "disabled" under the Act.

The case arose after Kelvin Washington, an accountant with HCA, was terminated. Washington suffered from a degenerative rheumatoid condition, which, in its unmedicated state, rendered him unable to work and bedridden. With medication, the pain of the condition was minimal and he was able to maintain a heavy workload, often sixty to eighty hours a week. However, after a series of these lengthy workweeks, Washington collapsed at work and his doctor instructed him to work no more than fifty hours a week because of his medical condition. Shortly thereafter, there was a workforce reduction which affected Washington. He sued under the ADA. His employer argued that he was not considered disabled under the ADA because his illness did not substantially limit a major life activity when medicated.

The Fifth Circuit Court of Appeals looked carefully at the legislative history of the ADA and the EEOC guidelines regarding the ADA. According to the court, there is nothing in the law that says that determining whether one is disabled should not include the consideration of mitigating or ameliorative medication or devices. The EEOC guidelines, however, specifically state that an individual's disability should be assessed without regard to the impact of medication or other assistance. The guidelines identified specific medical conditions as examples, including Washington's condition. The Fifth Circuit said that although generally medication or ameliorative actions may be considered when assessing whether one is disabled, if an individual has an ailment that is analogous to those mentioned in the EEOC guidelines, such as diabetes, epilepsy, and hearing impairments, then it will be considered without regard to the ameliorative steps. The court added that, "If the mitigating measures amount to permanent corrections or ameliorations, then they must be taken into consideration." The court gave as an example a situation where an individual has a hip joint replaced. If the individual had not had the hip joint replaced, the individual would have been disabled according to the ADA. Does that mean that because the hip joint was replaced and the person is not disabled under the ADA, that he should still be covered by the ADA? The court held that such an interpretation makes no sense under the ADA. Therefore, except for limited circumstances, whether an individual is disabled

under the ADA should include consideration of "permanent corrections or ameliorations."

## NLRB UPHOLDS NON-UNION EMPLOYEE'S RIGHT TO EXPRESS CONCERNS ABOUT EMPLOYER JOB ASSIGNMENTS

Employers usually view the National Labor Relations Board as an agency that becomes involved when dealing with labor organizations. However, because Section 7 of the National Labor Relations Act provides employees with the right to act in concert regarding concerns about wages, hours, and conditions of employment without regard to unionization, the NLRB's jurisdiction also extends to an employee whose Section 7 rights were violated, even when no union is involved. The recent case of *Youville Healthcare Center, Inc. and Barry Adams* (August 27, 1998) illustrates this point.

The employer had a policy that prohibited employees from discussing working conditions with each other. Barry Adams was a nurse who raised several questions about staffing assignments and decisions. Mr. Adams sent a memo to management claiming that recent patient falls and improper medication were due to insufficient staffing numbers and urging other nurses not to work overtime so that the employer would be forced to hire additional staff. After Adams was terminated for writing this memo, other nurses were disciplined pursuant to the employer's no complaints policy. An administrative law judge concluded that Adams was terminated "to silence him and retaliate against him." The NLRB upheld this decision. According to the Massachusetts Nurses Association, this decision is a key victory for non-union employees. Those employees, stated Julie Pinkham of the Nurses Association, "often find themselves without a job if they speak up about unsafe conditions. Even nurses who do have union protection are reluctant to speak up because complaints are taken harshly by their managers." We expect that individuals who believe they are retaliated against for speaking up about working conditions will begin to use the National Labor Relations Board as a forum to address their concerns.

An employer should establish as its objective that no employment issue leaves the workplace without the employer knowing about it first. In this particular instance, the employer knew about the issue, and retaliated against an employee for speaking out. However, if an employee's protected activity is disruptive, it may lose its protection. Thus, employers should encourage employees to speak up, but if employees engage in disruptive behavior, such as interfering with those who are working or who are supposed to be working, then the National Labor Relations Act will not protect the individual.

## 13,000 EMPLOYEES TO RECEIVE BACK PAY FOR TIME SPENT IN NEW EMPLOYEE ORIENTATION SESSIONS

The Boeing Company encountered turbulence when its policy of requiring newly hired employees to attend a two-hour to full day long pre-employment orientation without compensation was challenged. Boeing extended offer letters to employees, which included an invitation to attend the pre-employment orientation session. These sessions involved the completion of the usual pre-employment paperwork, photographs for identification badges, distribution of information about benefits and policies, and a discussion about company values and culture. In a class action lawsuit, *Seattle Professional Engineering Employees Association v. Boeing Company* (Washington Ct. App., August 31, 1998), the Court of Appeals for the State of Washington concluded that the time spent in orientation was working time and employees should be paid for it at the proposed pay rate rather than at minimum wage. The total amount owed to the employees will be over $400,000.00.

Boeing is also responsible for paying the plaintiffs' attorney fees, which are over $700,000.00.

When an employee is required to attend a meeting or briefing that is in part for the employer's benefit, such as this pre-employment orientation, it is considered working time. This orientation is different from meetings where individuals are recruited and invited to apply for employment or where individuals are taking a variety of tests or assessments in order to be considered for employment. Those considerations are not working time and, therefore, not compensable under wage and hour law.

## DEMOTION OR TERMINATION FOR FAILURE TO KEEP UP WITH TECHNOLOGY NOT AGE DISCRIMINATION, COURTS RULE

One of the more difficult demotion or lay-off decision to make occurs when long-term, age-protected employees with overall good work records have failed to keep up with technological changes. Two recent cases, *Shorette v. Rite-Aid of Maine, Inc.* (1st Cir., September 15, 1998) and *Watkins v. Sverdrup Technology, Inc.* (11th Cir., September 11, 1998), addressed this type of situation.

Peter Shorette was sixty years old when he resigned from Rite-Aid, rather than accepting a demotion. He had worked as a manager of a drug store for over thirty years. His company was then bought by Rite-Aid. He and all of his prior company's drug store managers were told by Rite-Aid that they would be retained as managers, but had to learn the Rite-Aid computer system. Shorette was given three months to learn the system, including up to twenty hours per week of one-on-one training. Because he could not learn the computer, he was offered a demotion from his $31,000.00 a year job to a job as a cashier. He resigned and claimed age discrimination. Although he was the oldest drug store manager, there is no evidence to suggest that the reason offered by Rite-Aid for his demotion, Shorette's failure to learn the computer system, was based on age.

Employees Watkins and Mallory were hired by Sverdrop in 1988 and assigned to work on infra red and laser radar weapons. After the Gulf War, the company shifted its emphasis from infra red guided weapons to satellite guided weapons. The plaintiffs' expertise was in the infra red area, but the company's needs were for engineers who were more familiar with the new technology. The two plaintiffs worked for the company for only four years. The company documented that they had some of the highest rates of hours charged to administration rather than to project work, and that they did not know the new technology for which the company was hiring. The plaintiffs were fifty-eight and sixty-one years old. The company hired ten engineers between twenty-four and thirty-five years old to work in the new technology area. In rejecting the age claim, the court said that the new engineers "were critically skilled in areas that Watkins and Mallory were not." The company substantiated that it needed engineers with new and distinct skills, which these plaintiffs did not possess.

To reduce the risk of age discrimination litigation in these types of circumstances, employers would be wise to make clear to individuals what skills are necessary in order for them to remain employed and consider whether providing training for long-term employees to gain these skills is possible. For example, in the Rite-Aid case, the company made a significant effort to train the individual to learn the company's computer system. The company was not obligated to retain that individual as a store manager where he could not operate the company's system. In the Sverdrup case, neither plaintiff was even close to possessing the expertise necessary for the company's new direction. Because the company was consistent in applying that standard to its current and potential engineering workforce, there was no evidence to indicate that the company's actions were based on age.

## DID YOU KNOW...

**. . .that according to the Labor Department, thirty-two states in August reported jobless rates of below the national average of 4.5 percent?** The states with the lowest unemployment are in the Midwest and Southeast. Those states with 5 percent or higher unemployment are Oregon, California, Montana, New Mexico, Texas, Alaska, Louisiana, Mississippi, West Virginia, and New York. Thirty-nine states during the past year have reported a drop in unemployment rates, with the highest drops in Alaska (2 percent) and Alabama and Connecticut (1.4 percent each).

**. . .that a federal judge ruled that "employment testers" are not employees and may not serve as the basis for a discrimination complaint?** *Kyles v. J.K. Guardian Security Services, Inc.* (N.D. Ill., September 18, 1998). The plaintiffs were African-Americans who were employed as testers for a legal advocacy group. They applied for employment as a receptionist, and were rejected in favor of two white applicants who were also testers. In rejecting the claim that the testers were discriminated against, the court said that since the individuals never intended to work in the position, they were not harmed by the employer's actions. Since they did not seek employment, they were not wronged by the employer's actions and there is no legal remedy available on their behalf. The judge held that, "Thus, this suit offers no redressability potential and is therefore improper in federal court."

**. . .that the United Auto Workers owes $75,000.00 in damages for failing to stop racial and sexual harassment?** *EEOC v. United Auto Workers Local 25* (E.D. Mo., July 20, 1998). The case involved a white union official who racially and sexually harassed women and black company supervisors. The union failed to take prompt remedial action when it became aware of this behavior. It thus ended up paying those individuals $75,000.00 to settle the case.

**. . .that when union officials steal, they are not modest about the amounts they take?** For example, on September 3, two former officials with the Oil, Chemical and Atomic Workers Union began serving time in jail for stealing over $100,000.00 in union funds. Upon completion of their jail sentence, they will have to pay fines, reimburse the union for the money they took, and perform "community service."

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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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