EMPLOYMENT LAW BULLETIN

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

Volume 6, Number 10 ***October 1998***

TO OUR CLIENTS AND FRIENDS:

Cynthia Pierre has been appointed as the new District Director for the Birmingham Office of the Equal Employment Opportunity Commission. The Birmingham Office is responsible for all charges filed in Alabama and Mississippi. Ms. Pierre will be the featured speaker at our next Breakfast Briefing, scheduled for December 3, 1998, from 8:00 a.m. to 9:00 a.m. at the Sheraton Perimeter Park South in Birmingham. Ms. Pierre will discuss recent developments regarding EEOC case handling and enforcement in Alabama and Mississippi, and the EEOC's national focus. Ms. Pierre joined the Commission in 1982, and has held appointments at EEOC offices in Houston, Washington, D.C., San Francisco, and most recently, Chicago. In addition to Ms. Pierre's presentation, a member of our firm will update attendees regarding the most current labor, legislative, and regulatory developments. The briefing is complimentary; a continental breakfast will be served beginning at 7:30 a.m. We hope to see you on December 3. Enclosed with this month's newsletter is a registration form.

COURT RULES THAT "SIGN IT, OR ELSE," ARBITRATION AGREEMENT IS ILLEGAL

Beth Akerman accepted an offer to work as a mortgage funder/closer for The Money Store in Clark, New Jersey. In doing so, she rejected an offer from a competitor. Ms. Akerman began her employment with The Money Store on June 30, 1997. On July 8, 1997, she was issued her new hire packet of information. Included in the new hire packet was an arbitration agreement that required Akerman and The Money Store to submit all employment and discrimination claims to arbitration, except for unemployment and workers' compensation issues. The agreement provided that The Money Store and Akerman waived their rights to pursue an action against each other in state or federal court. Akerman did not sign the agreement and received a memo on August 20 directing her to do so. After Akerman's further refusal to sign the agreement, The Money Store "cashed out" its relationship with Akerman by terminating her employment on August 29. Subsequently, Akerman returned the arbitration agreement with the following language: "I, Beth L. Akerman, have signed this form under protest due to the threat of termination by The Money Store if I do not sign." The Money Store did not rescind Akerman's termination. Akerman then sued, claiming that she was wrongfully terminated under state law, and accused the company of fraud. *Ackerman v. The Money Store*, N.J. Super. Ct. (October 15, 1998).

The court agreed with Akerman, stating that requiring an employee to sign an agreement to waive rights under the anti-discrimination laws or else face termination is not voluntary and, therefore, violates public policy. It also ruled that The Money Store was precluded from insisting that Akerman sign the agreement or be terminated because Akerman was not informed at the time she was offered the job that her employment would be conditioned upon signing such an agreement. The court ordered a hearing to determine Akerman's

damages and enjoined The Money Store from requiring other employees to sign the agreement or face termination.

Where did The Money Store "go broke" in this case? The court held that by failing to notify Akerman that her employment was conditioned upon signing the agreement, The Money Store intentionally misled Akerman. Akerman rejected another job offer to accept a position with The Money Store while under this misconception. **Employers should notify an individual at the time an offer of employment is made that the offer is conditioned upon the individual agreeing to an arbitration provision.** Had the timing in this case been different, Akerman would not have prevailed. Bear in mind that courts often will seek a reason to void an arbitration agreement presented to an employee under the "sign, or you're fired" fact situation that existed in this case.

WHEN IS AN EMPLOYEE PROTECTED FROM "RETALIATION" BY PARTICIPATING IN AN INTERNAL INVESTIGATION OF A POSSIBLE TITLE VII VIOLATION?

This was the issue before the Eleventh Circuit Court of Appeals in the case of *Clover v. Total Systems Services, Inc.* (October 6, 1998). Title VII prohibits retaliation against an employee who either opposes an employment practice the employee believes violates Title VII or who has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing" under Title VII. According to the court, this protection does not extend to an employee's participation in a company's own internal investigation, but rather is limited to an investigation conducted by the Equal Employment Opportunity Commission.

The case arose when Lisa Clover was late to a meeting that involved an internal investigation about a sexual harassment complaint by another employee. Upon her late arrival, Clover was asked why she was late. Clover apparently gave one explanation at this meeting and another to her superior. The employer terminated Clover's employment because it said that she gave inconsistent explanations for her tardiness. Clover sued, claiming that the real reason for her termination was her participation in the company's investigation. A jury agreed with her, awarding her a total of $185,000.00 in damages.

In reversing the jury, the Eleventh Circuit Court of Appeals ruled that Clover was not protected by the provision prohibiting retaliation for opposing an unlawful employment practice under Title VII. The court explained that her belief that sexual harassment had occurred at the workplace was not "objectively reasonable." None of the incidents she reported came even close to rising to the level of sexual harassment. Therefore, the court said that she did not oppose an employment practice covered by Title VII. The court also explained that participation in an investigation conducted by the employer is not a protected activity under Title VII. Only participation in an investigation conducted by the EEOC or its designate gives rise to a Title VII retaliation claim. According to the court, "The complete absence of any mention of in-house or internal investigations indicates that only EEOC investigations are [covered under Title VII]."

An employee is protected from retaliation if an employee opposes an employment practice that reasonably appears to indicate a potential Title VII violation. This does not mean that every time an employee claims discrimination there is protection from retaliation; there must be some reasonable basis for the employee's concern. Furthermore, the Title VII protection against retaliation does not cover internal investigations conducted by the employer. **Nevertheless, we still recommend that employers' equal opportunity policies include not only a statement that the employer will not tolerate retaliation based upon a complaint about a**

possible policy violation, but also a statement that the employer will not tolerate retaliation against employees for participating in the employer's investigation of possible policy violations.

EMPLOYER MAY BE REQUIRED TO INCLUDE LEASED EMPLOYEES IN BENEFITS PLAN

Pacific Gas & Electric Company informed thirteen employees that their employment with PG&E was terminated. PG&E informed them, however, that they could become employed with an employment agency that would provide their services to PG&E. The employees were thereafter leased to PG&E for approximately five years. The leased employees notified PG&E that they considered themselves PG&E employees and wanted copies of health plan documents. PG&E denied their request. The employees sued, and lost based upon the court's conclusion that as leased employees they were properly excluded from the company's benefit plans. *Burrey v. Pacific Gas & Electric* (October 20, 1998).

In reversing the district court, the Ninth Ciurcuit Court of Appeals explained that an employee's classification does not determine whether the employee is eligible for benefits. Rather, the issue is whether the employees, as a practical matter on a day-to-day basis, are directed and controlled by PG&E rather than the leasing company. For example, are the employees performing work that is usually done by PG&E employees, under the supervision of PG&E staff and management. According to the court, one's status as a leased temporary employee does not answer the question of whether the employee is eligible to participate in the health plan. Rather, the courts must determine whether under the facts of the case, the leased employees are actually controlled, directed, and performing as actual employees of the employer rather than the leasing company.

COURT LIFTS MANDATE THAT PERMANENT LIFTING LIMITATION IS A DISABILITY

An employee with a permanent lifting limitation is not disabled, ruled the Eighth Circuit in the case of *Gutridge v. Clure* (August 26, 1998). The case involved a computer service technician who, due to a job-related injury, was permanently restricted in the amount he could lift. In ruling that the lifting restriction did not constitute a disability, the court stated that Gutridge "is still able to function as a computer repair technician for other employers who either do not require lifting as part of their job duties or can provide assistance. Indeed, Gutridge has found such employment." Gutridge argued that the activity of "lifting" is a major life activity and the restriction thereof constituted a disability. However, the court stated that, "A general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability within the meaning of the ADA." **Employers should not assume a lifting restriction is a disability. If the lifting restriction does not limit the individual from performing a wide range of jobs in the employee's field, then the restriction will not be viewed as a disability.**

The court also addressed the issue of whether an individual who is hospitalized can be covered under the ADA definition of disability because of a "record of an impairment." Gutridge argued that because he was hospitalized, he should be considered as having a record of an impairment. The court concluded that hospitalization does not per se establish a record of impairment creating ADA protection.

INCOMPLETE NOTICE FAILS TO CREATE FMLA PROTECTION

The case of *Satterfield v. Wal-Mart Stores, Inc.* (October 5, 1998), provides guidance for employers as to when an employee's notice of a medical

absence is incomplete for purposes of triggering FMLA coverage. Satterfield had a history of unexcused absences with Wal-Mart. On June 16, Satterfield woke up with a great deal of pain. Her mother, a Wal-Mart employee, brought a note to Wal-Mart stating that Satterfield was off due to pain and asking if she could make up the day. Satterfield did not report to work during the next three days, nor did she provide any additional notice to Wal-Mart regarding the reasons for her absences. Based upon her prior absences and the three days without notice, Wal-Mart terminated Satterfield's employment. Satterfield contacted Wal-Mart on June 28, twelve days after she woke up with pain in her side, to try to schedule surgery. At that time, she realized she had been fired. The Supreme Court refused to hear an appeal from the Fifth Circuit Court of Appeals' decision that Satterfield failed to give Wal-Mart proper notice to trigger the protections of the FMLA.

According to the Fifth Circuit Court of Appeals, the information that Satterfield ultimately provided Wal-Mart "was either too little, or too late, or both." The court explained that an employer is not required to investigate each employee absence to determine if it is FMLA-related. **Simply telling the employer that an employee is sick or has pain is insufficient to trigger FMLA coverage. It would be unreasonable and unduly burdensome for employers to be on such inquiry notice.** Although the FMLA requires up to thirty days notice when leave is foreseeable, it does not specify a number of days when leave is unforeseeable, such as in Satterfield's case. The Department of Labor regulations state that such notice should be provided "as soon as practicable under the facts and circumstances of the particular case, which usually should be within two working days." In Satterfield's situation, her mother provided Wal-Mart with an excuse on the first day Satterfield missed work and, as a Wal-Mart employee, would have been in a position to provide Wal-Mart with greater information in order to put Wal-Mart on notice that Satterfield's absence was FMLA-protected. It was not Wal-Mart's obligation, ruled the court, to seek out Satterfield to request additional information after the initial date when she was reported absent due to pain.

Remember that it is the employee's responsibility to provide the employer with enough information for the employer to know that the absence may raise an FMLA obligation. Furthermore, the notice must be timely. In Satterfield's situation, ultimately the notice she gave the employer would have triggered FMLA protection, but because the notice came twelve days after her initial absence it was too late, and Wal-Mart's decision to terminate her for unexcused absences was justified.

WHAT'S THE DEAL WITH BACK BELTS?

All one has to do is go to a home supply or warehouse club to see the prevalence back belt use in the workplace. Indeed, a great many employers require that their employees in warehouse and material handling positions wear back belts in performing their jobs. After years of experience with back belts, government agencies and experts have weighed in with respect to the effectiveness of back belts as personal protective equipment.

The National Institute for Occupational Safety and Health (NIOSH) publication, *Back belts: Do they prevent injuries*, concludes that "Although back belts are being sold under the premise that they reduce the risk of back injury, there is insufficient scientific evidence that they actually deliver what is promised." The potential benefits of back belts in the context of medical treatment of specific conditions is generally recognized in the medical community. However, with respect to use of back belts as personal protective equipment, the evidence is in conflict and the controversy is ongoing. Studies indicate that the potential benefits of using back belts as personal protective equipment may be balanced or even overshadowed

by the potential adverse effects. What studies have shown is that (1) there is either no difference or an increase in back compressive force when using back belts; and (2) back belts have no effect on static strength, isoconnectic strength, maximum acceptable weight or dynamic lifting capacity.

The general consensus of most ergonomic medical studies is that the preferred and effective method of back injury prevention is the proper design of jobs, equipment, products, work places and practices. At best, the studies indicate that back belts serve as "postural reminders" in that they increase intra-abdominal pressure by eight to twenty percent in maximal conditions. However, their use results in back compressive forces that may be one hundred to one hundred and fifty percent beyond the considered safe limit. Thus, the use of back belts as the only control or protective device can leave employees with a false sense of protection and expose them to greater risk.

For a copy of the NIOSH publication, please contact Steven M. Stastny, a shareholder in the firm, who practices in the area of Occupational Safety and Health.

DID YOU KNOW...

. . .that the AFL-CIO Industrial Union Department has been disbanded? The IUD was one of the AFL-CIO's nine foundation departments, responsible for coordinating organizing efforts. The IUD will now become a committee within the AFL-CIO, in addition to an already established AFL-CIO organizing committee. The downfall of the IUD began in 1996 when the UAW refused to pay a per capita tax to sustain the IUD services.

. . .that employees do not understand company strategy direction, according to a study issued on October 7? This report was based upon a survey conducted by a conference board of 155 executives throughout the United States. According to the survey, only 5 percent of employees understand their company's business strategy and direction. Thirty-seven percent of those who responded said most employees understood their company's strategy and direction, 36 percent said only some employees understood it, and 22 percent said that very few employees understood it. Interestingly, the same survey indicated that only 62 percent of all managers understand their company's strategy.

. . .that Ida Castro on October 21, 1998, was confirmed by the Senate as the new chair of the EEOC? Prior to this appointment, Castro was the Director of the Women's Bureau at the Labor Department and Senior Legal Counsel for the New York City Health and Hospital Corporation.

. . .that President Clinton on October 22, 1998, appointed Fred Feinstein as the General Counsel of the National Labor Relations Board? Feinstein received a recess appointment, which means that a Senate confirmation is unnecessary and Feinstein will retain his position until Congress concludes its 1999 session. Several union leaders applauded Feinstein's appointment. Representatives of the business community are angered by the Feinstein appointment, and believe that he has conducted his duties with the NLRB in a manner showing bias toward organized labor.

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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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GUEST SPEAKER:

CYNTHIA PIERRE, District Director
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Please reserve a seat at the complimentary Breakfast Briefing scheduled for December 3, 1998, 8:00 **S** 9:00 a.m., at the Sheraton**S**Perimeter Park South, Birmingham.

NAME: _____

COMPANY: _____

TELEPHONE: _____

OTHERS FROM COMPANY WHO MAY WISH TO ATTEND:

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