EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

Employees who complain (in a lawsuit) of a hostile environment form of sexual harassment, but have not taken advantage of their employer's policies and procedures for reporting and correcting the behavior, may not prevail in a hostile environment sexual harassment lawsuit, ruled the Eleventh Circuit Court of Appeals in the case of *Coates v. Sundor Brands, Inc.* (November 13, 1998). Coates worked in the storeroom with Emmett Long, a non-supervisory employee. Coates told a fellow employee that Long called her at home and left sexual messages on her recording machine, offered to give her money in exchange for sex, and told her that he would kidnap her. The fellow employee reported it to the company's human resources manager, who told the employee to encourage Long to cease his harassing behavior. The employee also urged Coates to speak with the human resources manager that day, which she did. She told the human resources manager that the situation was "fine." It turned out that the harassment continued, but the human resources manager did not know this because neither Coates nor the other employee reported it. Approximately a year later, Coates told a consultant who was visiting the company's premises about Long's continued harassment. The company investigated and Long resigned. Coates thereafter began medical leave, then resigned, claiming a hostile work environment, and sued.

The court held that, in a hostile environment claim where the behavior is from a peer rather than a supervisor, the employer can win the case by showing that it took proper steps to prevent and correct the problem, and that the employee failed to take advantage of the employer's corrective opportunities or otherwise avoid the harm. In this case, the court said that the employer had a "user friendly" harassment policy, properly distributed it to all employees, informing employees of their responsibilities to report the behavior. Further, the employer reviewed with managers the steps to take when harassment occurs. Coates lost the case because she failed to report to the company the continued harassing behavior. According to the court, **"When an employer has taken steps, such as promulgating a considered sexual harassment policy, to prevent sexual harassment in the workplace, an employee must provide adequate notice that the employer's directives have been breached so that the employer has the opportunity to address the problem."**

NO PREGNANCY DISCRIMINATION WHERE LIGHT-DUTY POLICY COVERS JOB-RELATED INJURIES, ONLY

Employers often face the situation where a pregnant employee requests some form of accommodation due to the pregnancy. **Where an employer has jobs that are classified as "light duty" and those jobs are limited to employees with job-related injuries, refusing to transfer a pregnant employee to that job does not violate the Pregnancy Discrimination Act,** ruled the Fifth Circuit Court of Appeals in a decision the Supreme Court refused to hear. *Urbano v. Continental Airlines, Inc.* (November 16, 1998). Urbano worked at the airport check-in counter,

which required her to lift heavy luggage. During her pregnancy, Urbano experienced lower back pain and was told by her doctor that she could not lift anything heavier than twenty pounds. She asked Continental to transfer her to a light-duty job as an accommodation. Continental explained to Urbano that light-duty jobs were available only to employees with job-related injuries. However, Continental told Urbano that she could bid for a different job which would not require her to lift over twenty pounds, but transfers were awarded based upon seniority. Urbano sued, claiming that Continental's refusal to include her pregnancy as part of its light-duty job assignments violated the Pregnancy Discrimination Act of 1978.

In rejecting Urbano's claim, the court ruled that the Pregnancy Discrimination Act does not require an affirmative obligation on the part of employers to give preferential treatment to pregnant employees compared to other medical conditions. Rather, the PDA prohibits employers from treating pregnancy less favorably than other medical matters. Because Urbano's back pain was due to pregnancy and not a work-related injury, Continental treated her no differently from any other employee, male or female, who requested a transfer to a light-duty job, but was not given one because the medical condition was not work-related. To rule otherwise, according to the court, would require employers to give preferential treatment to pregnancy, which is not required under the PDA. In reviewing the evidence in this case, the court noted that every employee who held a light-duty job in the time frame requested by Urbano had a job-related injury; there were no exceptions to the policy.

This case does not prohibit employers from assigning employees with non-job-related medical limitations to light-duty jobs. Rather, it states that employers are not required to do so for pregnancy when they do not do so for other non-job-related injuries or illnesses.

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WHEN ARE PUNITIVE DAMAGES APPROPRIATE UNDER TITLE VII?

The answer will be determined by the United States Supreme Court in the case of *Kolstad v. American Dental Association* (November 2, 1998). In agreeing to hear the case, the Supreme Court will address a conflict among the courts of appeals regarding what proof is required in order to justify the award of punitive damages under Title VII. There are basically two legal theories available to pursue a claim of discrimination. The disparate impact theory does not require proof of an intent to discriminate. Proof of an employment practice that has a disproportionate negative effect on a protected class which is not justified by a neutral business reason is sufficient to establish such a claim. Disparate impact cases most often arise in the hiring or promotion context. Disparate treatment is the predominate theory relied upon by plaintiffs. However, a claim under the disparate treatment theory requires proof that the employer intended to discriminate against the plaintiff. **The conflict the Supreme Court will consider is whether the same intent needed to prove basic Title VII liability will be sufficient to justify the imposition of punitive damages. If the Supreme Court says "yes," the same proof required to establish liability will be sufficient to justify punitive damages.**

The Civil Rights Act of 1991 amended Title VII to provide for jury trials and the right to award punitive damages of up to $300,000.00, depending on the employer's number of employees. The standard for punitive damages outlined in the Civil Rights Act requires proof that the employer engaged in discriminatory conduct "with malice or reckless indifference" to the plaintiff's statutory rights. This standard requires a higher standard of proof of an employer's intent than a basic finding of discriminatory intent. Other courts of appeals have held that the standards are the same, so the Supreme Court will attempt to clean up the confusion and attempt to define the measure of

proof for the imposition of punitive damages in employment discrimination cases.

OFCCP ISSUES NEW GUIDELINES FOR VETERANS AND DISABLED VETERANS

The OFCCP on November 4, 1998, adopted more stringent requirements for hiring and promoting disabled and Vietnam-era veterans. According to the new OFCCP requirements, disabled veterans should not be asked to "self-identify" until after they have received a conditional offer of employment, unless the applicant is specifically notified that the request for self-identification is necessary for affirmative action compliance purposes. Furthermore, the employer may satisfy the requirement for listing all available job openings by listing as part of the Labor Department's national job bank.

Government contractors should note that the OFCCP will issue additional changes regarding Vietnam-era and disabled veteran affirmative action requirements based upon the Veterans Employment Opportunities Act of 1998. This law, which became effective on October 31, 1998, raises the threshold for coverage from $10,000.00 to $25,000.00, but also broadens the scope of coverage to include "veterans who served on active duty during the war or in a campaign or expedition for which a campaign badge has been authorized."

MISCLASSIFICATION OF TEMPORARY EMPLOYEES BECOMES POTENTIAL PERMANENT PROBLEM

On November 17, 1998, another class action against Microsoft was filed by temporary employees who claimed that they were entitled to company benefits. *Hughes v. Microsoft Corporation* (W.D. Wash.). The lawsuit alleges that the plaintiffs "have been full-time, long-term employees of Microsoft and were hired by Microsoft to work at Microsoft, but they are, or were, misclassified as nonemployees." This includes employees who were classified as independent contractors and temporary employees. The class represents several thousand individuals who were classified as "permatemps." These individuals seek health benefits, participation in the 401(k) plan, and an opportunity to participate in the company's stock purchase plan.

Microsoft is not alone in facing major litigation over employee classifications. The Department of Labor on October 26, 1998, sued Time-Warner, Inc., alleging that employees were misclassified as temporary or independent contractors, resulting in the denial of health insurance, pensions and stock. The Department of Labor alleges that not only did Time-Warner fail to classify employees properly according to legal standards, it also failed to follow its own internal classification structure as described in its management manuals. The Department of Labor is seeking the appointment of an independent audit to review Time-Warner records and employee classifications and a court order awarding benefits retroactive to the date the misclassified employees first should have become eligible. Time-Warner asserts that not only were employees properly classified, but the Department of Labor does not have jurisdiction to bring a lawsuit alleging misclassification.

Year end is a good time to review employer classifications to be sure that those who are identified as independent contractors and temporaries truly meet the legal standards for such classifications. The Microsoft and Time-Warner cases are examples where temporaries or independent contractors may look in retrospect at what they have missed, such as pension, health benefits and 401(k) participation, and decide to sue in order to obtain those benefits retroactively. This is also a good time of the year for employers to review whether employees are properly classified as exempt from overtime compensation. Employers may reduce the risk of disruption when changing

employee classifications by implementing those changes at the beginning of a new year.

OSHA REQUIREMENTS: FOUR MINUTES UNTIL CITATION WITH RESPECT TO THOSE WHO ADMINISTER FIRST AID

OSHA will cite an employer if the employer cannot or does not provide first aid within three to four minutes of an accident. This requirement gives rise to issues with respect to the training of first aid responders and first aid kits and their contents.

Employers should not rely upon ambulance or paramedic crews responding within three to four minutes of an accident. In fact, employers have been cited during post-accident OSHA inspections because ambulance crews or paramedics did not respond within the three to four-minute interval. In one instance, the paramedics were stationed next door to the facility. Generally, during the time of need, the ambulance or paramedic crews were on another call, or not available for some other reason, and backup crews needed to be called from outside the vicinity of the workplace.

It is generally accepted that the baseline amount of training for a first aid responder is the eight-hour multi-media Red Cross first aid course, or the equivalent. Employers should ensure that enough employees, usually supervisors, managers and human resources staff, are trained to administer first aid so that there can be ample coverage on each shift. Even though an employer may employ an industrial health nurse, an emergency medical technician, or other professional, there should be enough trained employees to cover for that person in the event of their absence or a multiple injury catastrophe. Once the first aid responders are selected and trained, the employees in the workplace need to be informed of who the first aid responders are and the procedure for contacting them. This can be done in departmental meetings, and should be followed up by a posting, including telephone extensions of the first aid responders and a paging system. Of course, if an employer already has employees who are trained, including those who may be paramedics, firemen, or emergency medical technicians ("EMT's"), those employees can volunteer to be first aid responders. This arrangement generally provides for a higher level of response and expertise.

It follows that those employees who are trained to be first aid responders should have proper and adequate supplies, first aid kits, and equipment with which to perform their duties. First aid kits, supplies and equipment should not be of a nature and type beyond the training of those who are expected to use it. In this regard, OSHA requires that a "local physician" approve the contents of each first aid kit. Although some employers use a first aid kit stocking and supply company which provides a letter from a physician (usually out of state) approving the first aid kit, this approval will not suffice for OSHA purposes. Most employers usually obtain such an approval by providing a written inventory of the first aid kit and gaining approval from their workers' compensation physician. After the approval is obtained, a copy of the letter should be in or near the first aid kit or supplies and kept on file. When selecting first aid kits or any other safety materials, please keep in mind that despite manufacturer assertions, OSHA does not approve <u>any</u> product.

As a final note, because first aid responders may be exposed to human blood or other bodily fluids, they must be trained and the employer must comply with OSHA's blood-borne pathogen standard. The standard provides for education, training and precautionary controls for those who may be exposed to human blood and bodily fluids in the workplace.

DID YOU KNOW...

. . .that economists are predicting job cuts among the Big Three auto manufacturers, which will have an impact on the overall jobless rate nationally? According to a University of Michigan report, the Big Three will need to make substantial workforce cuts in order to remain competitive and respond to slowing car sales. In 1978, GM employed 452,000; today it employs 202,000 and is projected during the next ten years to reduce its workforce to 134,700. Ford and Chrysler are also expected to cut their workforces as the sales level of new automobiles is projected to remain flat.

. . .that requiring employees to "smile and greet" customers provokes sexual harassment, according to a discrimination charge filed by Safeway employees on October 28, 1998? The company requires its employees to make eye contact with customers, smile at them, greet them, and offer to assist them. The discrimination charge alleges that this policy has resulted in some customers making unwanted sexual advances toward women employees. According to the company, "The purpose is to provide good service. It covers aspects that customers appreciate when shopping at our stores and it's made a difference in our sales."

. . .that on October 27, 1998, President Clinton proposed amending the Family and Medical Leave Act to count the leave time for pension-vesting purposes? According to the President, "The hard fact remains that too many retired women, after providing for their families, are having trouble providing for themselves. Sometimes a few months spent at home with a child can be the difference between a pension benefit and no pension benefit. That is precisely the wrong message to send to people who are trying to balance work and a family." The President also proposed a joint survivor annuity plan such that the surviving spouse would receive at least 75 percent of the retirement benefit that was available when both spouses were alive.

. . .that an individual who receives Social Security disability payments was precluded from seeking reinstatement pursuant to an age discrimination lawsuit? *King v. Thomas Memorial Hospital* (4th Cir. October 30, 1998) King was a dietary employee for 25 years before her termination at age 58. She filed for and received Social Security benefits, which were based upon a determination that she was unable to perform her previous job. She then sued her employer under Virginia state law, claiming she was discriminated against based upon her age. In rejecting her claim, the court said that, "To allow King to obtain benefits from two sources based on two incompatible positions. . .would reduce truth to a mere financial convenience and would undermine the integrity of the judicial process."

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