EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

It is our pleasure to announce that Marcia Bull Stadeker has become associated with the firm as of January 1, 1999. Marcia received her undergraduate and law degrees from Harvard University. Prior to joining the firm, Marcia was a staff attorney for the Southern Poverty Law Center in Montgomery, Alabama. In this capacity, she specialized in prosecuting hate crimes cases against the Ku Klux Klan. We are proud that Marcia has joined the firm and look forward to introducing her to you.

DISABILITY OR NOT A DISABILITY: THE U.S. SUPREME COURT WILL DECIDE

On January 8, 1999, the United States Supreme Court announced that it would decide three cases concerning whether individuals should be considered in their unmedicated or unassisted condition when deciding whether they have a disability under the ADA. In 1995, the EEOC issued guidance regarding the ADA that states that the determination of "whether an individual is substantially limited in a major life activity must be made on a case-by-case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."

The first case the Supreme Court will address, *Sutton v. United Airlines, Inc.*, concerned two applicants for pilot positions who were not hired because they were nearsighted. According to the court of appeals that heard the case, nearsightedness is a physical impairment. However, the court said that because the plaintiffs wore corrective lenses or eyeglasses, they no longer had a substantial impairment and therefore were not disabled. The court rejected the EEOC guidance, stating that it conflicts with the ADA. The court added that United's determination that the plaintiffs could not serve as pilots did not mean that United "treated them as disabled," which is also a definition disability.

The second case, *Murphy v. United Parcel Service, Inc.,* concerned a driver who, without medication, had blood pressure of 250/160. With medication, his blood pressure was 186/124. UPS required its drivers and mechanics to meet Department of Transportation requirements, including a requirement that blood pressure be no higher than 160/90. After reviewing Murphy's file, the company realized that his blood pressure did not meet DOT requirements and he was terminated. At Murphy's trial, a doctor testified that when Murphy takes his medication, he is not restricted from performing normal functions or usual daily activities. On that basis, the court concluded that Murphy was not disabled under the ADA. It explained that UPS terminated Murphy not because UPS feared that Murphy would suffer a stroke or heart attack on the job, but rather because Murphy's blood pressure did not fall below the DOT requirement.

The third case, *Albertson's, Inc. v. Kirkingburg,* concerned a plaintiff who was virtually blind in one

eye. He was required to meet Department of Transportation vision tests in order to work as a driver for Albertson's. He obtained a waiver of the DOT vision requirements by showing that he had an overall good driving record, stable vision in his good eye, and correctable vision in his good eye. However, Albertson's had a policy of not accepting DOT waivers; drivers either had to meet the DOT requirements or they were not hired. The court of appeals ruled against Albertson's, holding that an employer may not reject a DOT waiver when the effect of doing so is to discriminate against drivers with disabilities.

The courts of appeals in the United States are split over the question of whether an individual is "disabled" under the ADA when, due to medication or other assistance, the disabling condition does not limit any major life activity. The Supreme Court's decisions in these cases will be important for employers. We will monitor these cases and report the outcomes to you.

OUTRAGE CLAIMS PROCEED AGAINST EMPLOYER REQUIRING EMPLOYEE TO CONTINUE APPOINTMENTS WITH SEXUALLY HARASSING COUNSELOR

In 1992, Georgia-Pacific contracted with a consulting firm to provide training and business-related counseling sessions for employees. The consulting firm hired Dr. Charles Ted Deble to provide one-on-one counseling to participating employees. Deble was never told that the counseling should be limited to business-related matters, only.

Robin Henry was a Georgia-Pacific employee who was instructed by her plant manager to attend one-on-one sessions with Dr. Deble. Henry thought the purpose of these sessions was to improve her attitude. During the course of her sessions with Dr. Deble, Henry asked him about quitting smoking and his hypnosis technique to assist her in doing that. During the course of his meetings with Ms. Henry, Dr. Deble asked her about her sex life, gave her suggestions about sexual behavior with her husband, and asked that she remove her blouse. As luck would have it, Henry tape-recorded the session where Dr. Deble made that request and played the tape for her supervisor.

Ms. Henry told her supervisor that she did not want to continue with the sessions with Dr. Deble for what should have been obvious reasons. However, she was instructed to continue the counseling sessions until Deble stopped the one-on-one counseling sessions with all Georgia-Pacific employees. Approximately one year later, after the sessions stopped, Henry told a friend at company headquarters about the experience. As a result, Deble was removed from the company's employee assistance and training programs.

Henry then sued her individual supervisors and the company, claiming that their requiring her to continue in the sessions with Dr. Deble was outrageous behavior. The lower court dismissed her case, but the Alabama Supreme Court reinstated it. *Henry v. Georgia-Pacific Corporation* (December 18, 1998). According to the Alabama Supreme Court, Henry could continue with her claim because the supervisors were "told exactly what had occurred during the sessions; that Georgia-Pacific, with prior knowledge, required Henry to continue counseling sessions at which improper sexual conduct was occurring; and that they made Mrs. Henry's job dependent upon her attending those sessions." Although this case was based on a tort of outrage, it really is a variation of the "*quid pro quo*" form of harassment. That is, put up with the harassment, or else.

What steps could employers take to be sure that they are not placed in this type of situation? Here are some suggestions:

< Be sure that your harassment policy is broad enough to include the behavior of non-employees and provide for multiple

outlets for employees to report such behavior.

< Conduct a background and reference check regarding those counselors who are made available to your employees through an employee assistance program or other similar program.

< Stress to supervisors and all employees the importance of reporting any information they have received about improper behavior toward employees. Do not let the fact that the employee may not have followed the specific reporting procedures be a reason for not reporting knowledge of a potential policy violation.

HOW EMPLOYERS CAN TALK TO EMPLOYEES ABOUT RETIREMENT WITHOUT CREATING AGE DISCRIMINATION EVIDENCE

The case of *Cox v. Dubuque Bank & Trust Company* (8th Cir. December 22, 1998), considered whether an employer's inquiries into an employee's retirement plans could constitute evidence of age discrimination. The plaintiff lost her job at age 51 when the bank closed the branch where she worked. She sued, claiming age and sex discrimination. The case went to a jury which awarded Cox $150,000.00. The jury heard evidence that Cox was asked on several occasions when she planned to retire and that the bank expected her to retire soon. The trial court refused to issue an instruction to the jury that would state, "Neither the state nor the federal law prohibits an employer from asking the retirement plans of an employee if reasonable under the circumstances." A court of appeals reversed this verdict, holding that the employer's requested jury instruction should have been given to the jury.

According to the appeals court, when requests about an individual's retirement plans are reasonable, "a plaintiff should not be able to rely on those inquiries to prove intentional discrimination." Furthermore, the court recognized that, "Sometimes retirement inquiries are so unnecessary and excessive, that is, unreasonable, as to constitute evidence of [discrimination]." The employer who is concerned about an employee's retirement plans merely to assist both the employer and employee in planning for that event should not have to be concerned about those inquiries being used as evidence against the employer in an age discrimination claim. The following are suggestions employers should consider in order to reduce the risk of such inquiries being used against them:

< Offer retirement planning assistance that employees may receive on a voluntary basis.

< Engage employees in retirement counseling at a consistent time related to the employee's age and/or length of service. For example, if your company's retirement plan includes an option to retire at age 55, perhaps consider inquiring about an employee's retirement plan and objectives at age 52.

< If a retirement-eligible employee is laid off or terminated, do not push that employee to seek retirement. Rather, review the business decision and then arrange for an appointment where the employee's retirement options are reviewed.

< The review should be "reasonable." That is, it should be conducted in a structured, planned manner as part of the employer's overall benefits program.

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EMPLOYER'S FAILURE TO TERMINATE CONTRACT PROPERLY RESULTS IN PENALTIES, ATTORNEY FEES AND BENEFITS LIABILITY

It is an expensive mistake not to "cross the T's and dot the I's" when it involves terminating a collective bargaining agreement. That was an unfortunate lesson learned by Fantin Enterprises, Inc., a company that installs tile and ceramics. Fantin became signatory to a collective bargaining agreement as a member of the Detroit Ceramic Tile Contractors Association with the Tile Layers and Tile Finishers Local 32. The agreement contained an "evergreen clause," which provided for an annual automatic renewal unless a company specifically canceled the agreement sixty days prior to its expiration. The original agreement was entered into on September 27, 1991. The Association entered into a new agreement on November 10, 1992, which was effective through May 31, 1995. Although Fantin did not sign the new agreement, it did not notify the union until November 15, 1993, that it did not want to be covered under this new agreement. According to the court, the company's notification was not proper under the terms of the contract. Only on June 29, 1994, did Fantin properly terminate the contract.

Due to Fantin's improper termination, the trustees of the union's insurance funds sued Fantin for past due contributions. The lower court ruled for the trustees, as did the court of appeals. *Trustees of the B.A.C. Local 32 Insurance Fund v. Fantin Enterprises, Inc.* (6th Cir. December 30, 1998). According to the court, "The collective bargaining agreement was limited to the language contained in its four corners." Because the cancellation clause in the contract was clear, "no language suggested a later contract could act as notice of termination for the earlier contract." Therefore, the court stated that Fantin owed benefits contributions from September 27, 1991, through May 27, 1995. In addition to the past due contributions, Fantin was required to pay liquidated damages (double the past due contributions), the union's trustees' attorney fees, and penalties for its ERISA violations. Unfortunately for Fantin, the reason why it sought to terminate the contract is because its business suffered a substantial downturn such that at the time the litigation ensued, there were only two employees left in the company, Ralph E. Fantin and his son, Ralph B. Fantin.

EMPLOYER COMMITTEES ARE ILLEGAL, RULES NLRB

The case of *Efco Corporation and United Brotherhood of Carpenters & Joiners* (327 NLRB No. 71, December 31, 1998) concerns the NLRB's most recent determination of the legality of employer-created committees. The company created three committees. One committee considered employee benefits, another considered employment policies, and another addressed safety issues. In ruling that these committees were illegal, the Board said that although the company's "stated aim of involving employees in decision-making may be commendable, we find with regard to these three committees that the particular means chosen by the company to achieve that end were unlawful." The committees operated as follows:

1. The company selected ten employees to participate on the committees from a total number of employees who volunteered. The committee members then elected an employee member to be a liaison between the committee and the company's central management committee, which is comprised of company executives.

2. The committees, through their elected spokesman, made recommendations to the central management committee regarding changes in benefit plans, some of which were rejected.

3. The committee that addressed company policies was asked by the company president to represent all employees to review policies and recommend new ones.

After the committees were formed, the union notified the company that it was attempting to organize the company's employees. It filed unfair labor practice charges due to the creation of these committees.

According to the NLRB, these committees functioned in a manner that met the definition of "labor organization" under the National Labor Relations Act. Under the National Labor Relations Act, an employee committee will be considered a labor organization where it deals with the employer concerning "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." There was one other committee that did not act in a representative capacity and, therefore, was not illegal according to the Board. However, because the aim of these three committees was to represent employees, the Board concluded that they were illegal employer-dominated labor organizations. According to the Board, these committees formulated proposals and recommended changes to management on behalf of all employees.

It is difficult for employers to create committees that do not function in the "recommendation" manner as those committees in this case. Perhaps the key factor contributing to the outcome in this case was the employer's stated message to the employees that they represented all employees in the plant. Where committees are created, employers should be sure to stress to committee members that they are participating not as a representative of others, but rather as a volunteer to use their own judgment based upon what they think is the most appropriate or fair manner to address a situation. Encouraging committee members to take polls or report back to employees about committee progress creates a risk for the employer. Instead, employers should prepare committee minutes that are posted or otherwise communicated by company representatives to employees.

DID YOU KNOW...

. . .that an employee who refuses to provide information to an employer about the employee's medical condition cannot claim that the employer refused to accommodate under the ADA? *Templeton v. Neodata Service, Inc.* (10th Cir. December 10, 1998). Templeton was on disability leave and was requested by her employer to provide an update regarding her medical status. She refused to do so and was terminated. According to the court, "Neodata needed the requested information in order to determine appropriate reasonable accommodation for Mrs. Templeton in the event she was able to return to work at all." Her ADA claim failed because of her failure to cooperate with the employer.

. . .that an employer has the right to revoke a "good-bye forever" severance offer before it is accepted? *Ellison v. Premier Salons International, Inc.* (8th Cir. January 6, 1999). Waiver of age claims require a 21-day waiting period in order to comply with the Older Workers Benefit Protection Act. In this case, the employer revoked an early retirement offer before it could be accepted within the 21-day period. In upholding the employer's right to revoke the offer, the court said, "The language does not forbid such offers from being rejected or revoked for 21 days nor does it state that the common law contract principles are preempted. Contrary to Ellison's contention, the language of the OWBPA does not create an irrevocable power of acceptance."

. . .that the Justice Department will continue monitoring the Laborers International Union of North America for another year to try to rid the union of corruption? The Department of Justice and the Union announced on January 7, 1999, that it will extend its Department of Justice

Oversight Agreement to January 31, 2000. The Agreement has been in effect for four years. According to the Justice Department, "While progress continues to be made, this extension recognizes that additional time is needed to complete efforts to eliminate corruption from the union."

. . .that requiring emergency medical technicians to remain "on call" did not count as compensable time under wage and hour law? *Dinges v. Sacred Heart Saint Mary's Hospitals, Inc.* (7th Cir. January 7, 1999). This case was brought by medical technicians who were required to work on standby crews that had to report to the hospital within seven minutes of the call out. Usually, such a restriction would require treatment of the on-call time as compensable. However, in this case, the court said that if the employees are able to "effectively" use on-call time for personal pursuits, it need not be compensable. In this case, the court determined that employees were able to continue with their normal activities even with the seven-minute reporting requirement. The court noted that these employees worked at a rural hospital, and many of their personal activities were within a seven-minute range of the hospital. This seven-minute on-call response time is the shortest amount of time we have seen a court treat as non-compensable.

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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