EMPLOYMENT LAW BULLETIN

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

Volume 7, Number 2 ***February 1999***

TO OUR CLIENTS AND FRIENDS:

How should an employer handle and communicate with employees who are experiencing either mental illness or emotional difficulties? This subject will be discussed by Dr. Richard Craig, Executive Director of the Jefferson-Blount-St. Clair Mental Health Authority at our next Breakfast Briefing scheduled for Friday, March 19, from 7:45 to 9:15 a.m. at the Sheraton—Perimeter Park Hotel in Birmingham. Dr. Craig has been a clinical psychologist for over twenty years. The Jefferson-Blount-St. Clair Mental Health Authority oversees programs that provide mental health services to 22,000 people a year in Jefferson, Blount, and St. Clair Counties. Dr. Craig will discuss how an employer can recognize the signals of emotional difficulties or mental illness, effective approaches for raising concerns with the employee, and how to discuss with the employee when and where to seek assistance. In addition to Dr. Craig's presentation, a member of our firm will review the most recent developments regarding legislative, judicial, and regulatory action concerning employment and labor relations issues. The briefing will include a complimentary continental breakfast. You are welcome to bring guests; please complete the attached registration form to reserve your spot(s) for what promises to be an enlightening meeting on March 19.

* * *

NO FMLA VIOLATION WHERE EMPLOYEE FAILS TO COMPLY WITH EMPLOYER NOTICE REQUIREMENTS

If an employee is absent for a sickness that is not an emergency and fails to comply with the employer's call-in requirements, does terminating the employee violate the FMLA? No, ruled the court in *Holmes v. Boeing Company* (10th Cir., January 12, 1999). Under the FMLA, an employee is required to notify and provide the employer with information for the employer to determine whether the absence is covered under the FMLA. According to Regulation 825.303(a), the employee must give the employer notice "as soon as practicable under the facts and circumstances of the particular case. It is expected that the employee will give notice within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances . . ."

Holmes missed five consecutive weeks of work, but did not provide his employer with sufficient notice for the employer to designate the leave as FMLA-protected. Rather than treat the leave as an unexcused absence, the employer treated the leave as FMLA leave retroactively, once the employer became aware of the reasons for the leave. There was no dispute that the absence qualified as an FMLA absence. Rather, Holmes had failed to give the employer sufficient notice. When Holmes returned to work, he was told that if there were further medical absences, he needed to notify either

his supervisor or personnel representative on the day of the absence, otherwise the absence would be unexcused.

Shortly thereafter, Holmes was absent for a few days and complied with the company's request. The company determined that the absences were covered under the FMLA and, therefore, excused them. However, Holmes was later absent for twelve consecutive days and did not notify either his supervisor or personnel representative. Although he informed his union steward, he did not provide the company with an explanation regarding his absences until the day he returned to work. The reason for the absences qualified as a serious health condition under the FMLA. However, the employer terminated Holmes for failing to comply with the company's call-in procedures. Holmes argued that the termination violated the FMLA. First, he argued that notice to a union steward was sufficient. Second, he argued that the company's requirement that he contact the personnel representative or supervisor violated the FMLA. In upholding summary judgment for the company, the court of appeals stated that, **"The FMLA does not prohibit an employer from requiring its employees to give notice to specific company supervisors on the day they are going to be absent in a non-emergency situation, as in this case. Holmes has not alleged that his physical condition was such that he could not comply with the company's reasonable notice requirements."**

The following are our practical suggestions to employers:

- Establish notice requirements for absences, whether due to sickness or other reasons. Maintain a log where those absences are noted.

- If an employee does not comply with the notice provisions and the absence is due to a condition that arguably is covered under the FMLA, determine why the employee was unable to comply with the notice requirements.

- If the failure to comply is due to unusual circumstances or an emergency, such as due to the severity of the employee's condition, then do not discipline the employee for failure to follow the notification procedures. You also may designated the absence as FMLA-covered from the first date of the absence.

- If the failure to notify the employer is not due to an emergency or other circumstance that made it impractical to give notice, the employee may be disciplined for failure to notify the company and the absences may be considered unexcused.

COURT CALLS EMPLOYER "HEARTLESS"; OTHERS MAY CALL THE EMPLOYER CARELESS AND STUPID

Enforcing policies in a mechanical fashion without considering common sense can be expensive, as the employer learned in the case of *Slane v. Mariah Boats, Inc.* (7th Cir., January 11, 1999). A jury returned an award of $225,000.00 against the employer who terminated an employee for refusing to take a drug test the day he was hospitalized.

Slane worked in the upholstery department for Mariah Boats for approximately two years. The company had an alcohol and drug-free workplace policy, which included testing. One day at work, two employees reported to management that they saw Slane in the men's room with white powder under his nose. Eight days later, the company decided to drug test Slane. He agreed to the drug test, but that same day was hospitalized due to either heat exhaustion at work (it was 80 degrees) or a diabetic attack.

The company asked Slane to take a drug test despite his being hospitalized, but he (and his doctor) said that he was too sick to do so. Slane took a drug test the next day, and passed it. However, the company by that time had made a decision to terminate Slane for refusing to take the drug test on the date he was hospitalized. Slane sued, claiming retaliation under state workers' comp law, a violation of the ADA, and a violation of ERISA because the company wanted to avoid increased costs to its health insurance plan due to his hospitalization.

The court dismissed the ADA and ERISA claims, holding that there was no evidence to show that the employer's motive for the termination was either due to diabetes or to preclude Slane from receiving benefits under the plan. However, the court concluded that the jury's verdict on the retaliation claim was proper because the evidence showed that the human resources director "deliberately refrained from investigating whether Slane had refused to take the drug test" and that the human resources director knew that Slane suffered symptoms at work that may have been due to heat exhaustion, but proceeded to terminate him anyway without an investigation.

According to the court, **"The evidence, viewed favorably in support of the verdict, showed that Mariah's conduct was heartless — it fired an employee while he was lying in the hospital and refused to reconsider that decision even after a doctor explained that Slane was physically unable to take the requested drug test."** Remember one of the basic principles in employee relations: Do not proceed under the basis of "ready, fire, aim." The company's failure to follow its own investigation procedures in Slane's case, its failure to promptly drug-test Slane, and its failure to even consider Slane's doctor's explanation why Slane could not take the drug test on the date requested, all inspired the jury to teach the company a six-figure lesson in how policies should be applied and employees should be treated.

UPDATE REGARDING OSHA ERGONOMICS RULE

The Occupational Safety and Health Administration's draft ergonomics rule would apply to employees who work in manufacturing or jobs requiring manual tasks. It would not apply to construction and agricultural industries. OHSA's objective for the rule is to reduce job-related musculoskeletal disorders from developing. The rule proposes that employers would have to identify potential hazards, analyze those hazards, train employees to identify and avoid hazards, and develop an overall ergonomics program for the entire workplace. Furthermore, an employee report of a musculoskeletal disorder will trigger the application of the OSHA standard even if the employer otherwise is not covered.

The rule proposes to cover musculoskeletal disorders that are required to be reported on OSHA 200 logs, that have occurred at a job where the individual is currently employed, in a work environment that is "reasonably likely to cause or contribute to the type of musculoskeletal disorders reported," and where the employee has been exposed on a continuing basis to the hazardous condition.

Under the rule, if an employee reports a musculoskeletal disorder, the employer would be required to assess whether work restrictions are appropriate and provide the employee with access to a healthcare provider. The employer would have two weeks to develop the training program, conduct a job analysis, and implement temporary controls to try to minimize the risk of these disorders from arising. We will continue to provide you with the most current information regarding the development of this rule.

CANDY AND SNACKS COST EMPLOYER $20 MILLION

Four Wal-Mart employees were terminated after company video surveillance caught them eating candy and snacks from previously damaged and opened packages on company property. On January 19, 1999, a jury awarded each employee $5 million in damages, including both punitive and compensatory damages, because of the company's surveillance, termination, and communication to other employees about these four individuals.

Prior to termination, the company showed the employees the video surveillance. The employees readily admitted to engaging in the behavior shown on the film, which was eating candy and snacks from open or damaged packages. The employees said they understood that they were permitted to eat these products and asserted that other employees in the store did so. The employees said that there was an unwritten store practice that these packages were left in the break room for employees and that they did nothing wrong. Wal-Mart terminated their employment anyway. At trial, testimony showed that 90 percent of Wal-Mart employees at this particular store engaged in the same behavior without termination. Furthermore, Wal-Mart had audio taped the employees' interviews without the employees' permission, in violation of state law, and the interviews with the employees were handled in an accusatory, confrontational manner. The employees were terminated on the spot and escorted through the entire store in front of other employees. In addition, the video tape of their behavior was later shown to other employees as part of the company's in-house training procedure regarding employee theft.

The trial took only three days. The obvious question is what outraged the jury to the extent that they sent a $20 million message to Wal-Mart? Several things. First, Wal-Mart's inconsistent application of its policy. Second, the accusatory, threatening manner in which the investigatory interviews were handled. Third, the illegal audio taping of the interviews with the employees. Fourth, exposing the employees to ridicule by the manner in which the termination was handled and showing the video tape to others which caused public embarrassment and humiliation. **This case is another example of an employer that tried to do too much at one time, without considering some fundamental employment relations questions, such as: Have others engaged in a similar behavior in the past, and how were those cases handled? Have we investigated the employees' explanation of what occurred? Are we within our legal rights to use surveillance and audio taping without the employees' permission? Are we handling the termination in a manner that maintains the level of respect for employee dignity interests?**

EMPLOYEE WHO INSISTS ON "HER WAY" "HITS THE HIGHWAY"

The ADA contemplates an "interactive process" with the employer and employee to determine reasonable accommodation. Of course, an important component of this interactive process may include the employer requesting medical information from the employee to substantiate the disability and assist in accommodation. If an employee fails to cooperate with an employer's reasonable request, then the employee will fail in a claim that the employer did not reasonably accommodate. This was the situation in the case of *Templeton v. Neodata Service, Inc.* (10th Cir., December 10, 1998).

The employee in this case was involved in an automobile accident that caused severe head and neck injuries. The employee's physician notified the company's insurance carrier that the employee could not return to work for approximately sixteen months, and even that date was uncertain. The

doctor also said that he did not have a detailed job description, so he did not know what duties the employee would be able to perform. Fourteen months after the accident, the employer asked the employee's physician to complete a medical certification form for the employer's insurance carrier to process Templeton's disability payments and to assess the potential for reasonable accommodation. Templeton refused to authorize her physician to provide this information, and she was terminated. She said the reason why she refused to provide the information was because she thought the employer would force her to stay on medical leave, rather than trying to accommodate her.

In rejecting Templeton's claim, the court said that, "Neodata needed the requested information in order to determine appropriate reasonable accommodation for Mrs. Templeton in the event she was unable to return to work at all." Templeton's concern that she would be required to stay on leave rather than be reasonably accommodated is not a basis for refusing to provide the information. Rather, if Templeton provided the information and the employer placed her on leave rather than accommodating her, then Templeton would have a viable ADA claim. However, Templeton's refusal to comply with the employer's request denied the employer the opportunity to assess the feasibility of reasonable accommodation and, therefore, doomed Templeton's claim.

DID YOU KNOW...

. . .that legislation was introduced on January 20, 1999, to further protect women who are victims of domestic or workplace violence? The bill, entitled "Violence Against Women Act of 1999," would provide assistance to employers and unions to develop workplace programs to protect women from violence. The legislation also provides that employers who implement these programs would be eligible for tax credits.

. . .that President Clinton on February 11, 1999, nominated a union attorney to be the general counsel of the "impartial" National Labor Relations Board? The nominee, Leonard Page, is associate general counsel of the United Auto Workers and has been a member of their legal staff since 1970. The President's prior nominee, Laurence Cohen, withdrew his name from consideration once he realized that he would not be confirmed by the Senate. Cohen is in private practice representing unions, including the International Brotherhood of Electrical Workers, and the AFL-CIO Building and Construction Trades Department. The only difference we can ascertain between Mr. Page and Mr. Cohen is which unions they represent.

. . .that an employer's failure to pay for employee's costs in arbitration doomed the arbitration process? *Shankle v. B-G Maintenance Management of Colorado, Inc.* (10th Cir. 1999). A mandatory arbitration agreement at issue required the employer and employee to split the costs of arbitration on a fifty-fifty basis. Shankle was hired as a janitor and later promoted to a shift manager. He signed a mandatory arbitration agreement that made him liable for one-half of the arbitration costs. When he was terminated, he filed a charge claiming that race, age, and disability were the motivating factors for his termination. The employer sued to compel arbitration. According to the court, requiring an employee to pay between $1,875.00 and $5,000.00 for arbitration put the employee in between a rock and a hard place. According to the court, "If the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights," then the agreement cannot be enforceable. In this case, the court ruled that the cost of arbitration effectively precluded the employee from participating in the process.

. . .that President Clinton on January 30, 1999, urged Congress to pass the Paycheck Fairness Act of 1999? This Act would strengthen the remedies available for gender-based wage discrimination. The bill would amend the Equal Pay Act of 1963, which does not provide for compensatory and punitive damages. Under this Act, a sex-based wage discrimination claim under Title VII would provide for compensatory and punitive damages. According to the President, the average woman loses $420,000.00 in pay during the course of her working career due to gender discrimination.

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

To: Susan S. Dalluege
LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.
Post Office Box 370463
Birmingham, Alabama 35237
Fax: (205) 326-3008

Please reserve a seat at the complimentary Breakfast Briefing scheduled for March 19, 1999, from 7:45 to 9:15 a.m., at the SheratonSPerimeter Park South, Birmingham.

NAME: _____

COMPANY: _____

TELEPHONE: _____

OTHERS FROM COMPANY WHO MAY WISH TO ATTEND:

_____

_____

_____

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.

Kimberly K. Boone	205/323-9267
Michael Broom	256/355-9151 (Decatur)
Brent L. Crumpton	205/323-9268
Richard I. Lehr	205/323-9260
David J. Middlebrooks	205/323-9262
Terry Price	205/323-9261
R. David Proctor	205/323-9264
Marcia Bull Stadeker	205/323-9278
Steven M. Stastny	205/323-9275
Albert L. Vreeland, II	205/323-9266
Sally Broatch Waudby	205/226-7122

Birmingham Office:
2021 Third Avenue North, Suite 300
Post Office Box 370463
Birmingham, Alabama 35237
Telephone (205) 326-3002

Decatur Office:
303 Cain Street, N.E., Suite E
Post Office Box 1626
Decatur, Alabama 35602
Telephone (256) 308-2767