EMPLOYMENT LAW BULLETIN

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

Volume 7, Number 5 ***May 1999***

TO OUR CLIENTS AND FRIENDS:

We are offering our half day program for supervisors and managers on Workplace Harassment and Violence, scheduled for July 15 (Birmingham), July 16 (Huntsville) and July 22, 1999 (Montgomery). An agenda and registration form are enclosed. The program will be practical, such that supervisors and managers have a clear understanding of recognizing the behavior that may signal potential harassment and violence, and what they should do about it. Our objective is for attendees to gain a full understanding of the potential sources and behaviors that indicate harassment or violence, and steps they should take to help the organization be sure that these issues never leave the workplace without the company first having a chance to investigate and resolve them. The program will combine lecture, group discussions and problem solving, film and case studies. Each attendee will receive a comprehensive reference guide.

The cost for the program is $100.00 each for up to two attendees and $75.00 each for three or more attendees. We also conduct this program "in-house." If you have further questions about this program, please contact either Richard Lehr (205/323-9260), Brent Crumpton (205/323-9268) or Kimberly Boone (205/323-9267).

FAMILIES OF WORKPLACE VIOLENCE VICTIMS AWARDED $7.9 MILLION

On May 4th, a North Carolina jury awarded the families of two victims of workplace violence $7.9 million in the case of *Allman v. Dormer Tools, Inc.* This case is a good example of how a company that tries to handle workplace violence effectively, but not aggressively, can be held responsible for the worst case scenario.

The case involved an employee, James Floyd Davis, who had four fights with employees during his four year history. This immediately should place our readers on the alert as to why Davis was retained after the first fight or at least the second. After Davis' third fight with employees (again, why is he still employed?), the company referred Davis to its EAP Program. The company received reports from the EAP psychologist that Davis did not pose a threat to other employees. Davis was suspended for fighting with employees a fourth time, which occured on May 12, 1995. He was terminated on May 15. The EAP psychologist told the company that Davis accepted the termination well, did not present a threat of harm and was looking for other work. Two days after he was terminated, Davis returned to the workplace where he killed three employees and wounded a fourth with an M-1 carbine that he had bought that morning at a pawn shop.

The company argued at trial that it was assured by the EAP psychologist that Davis did not present a threat of harm to other employees. Additionally, an expert testified on behalf of the company that there was no way to predict that Davis would have engaged in such behavior. Ironically, under North Carolina contributory negligence law, two of the victims did not receive any award because their behavior toward Davis was contributory negligence, which meant that they could recover nothing.

When workplace violence is caused by an employee or a domestic altercation, just about every time there are prior signals that a potential tragedy could happen. However, **just as we did not expect threats from teenagers to result in school violence, employers often do not think that fighting or other threatening behavior at work can lead to violence**. There are signals in advance of potential employee violence toward other employees, or domestic violence toward an employee at the workplace. The issue employers face is what steps to take based upon those signals. The following are suggestions that should have occurred in this case and employers should keep in mind in general:

- If an employee is engaged in threatening or physically aggressive behavior toward other employees, and the employee is given another chance, require counseling as part of the disciplinary process. Tell the employee that any subsequent similar behavior with or without that counseling will result in termination. The employer in the instant case should not have permitted four separate incidents of fighting by Davis before taking action.

- Remove the employee from the premises immediately, but do not feel compelled to terminate immediately. Rather, coordinate the termination process with involvement from the employee's counselor. This may take several days after the incident, but it is a helpful approach to reduce the risk of violence.

- Be sure the proper security arrangements are made in the event the employee during suspension or upon termination attempts to reenter the premises.

- Consider whether it is necessary to provide security away from work from employees threatened by another employee.

EMPLOYER RIGHTS AND RESPONSIBILITIES UNDER THE UNIFORMED SERVICES EMPLOYMENT AND RE-EMPLOYMENT RIGHTS ACT (USERRA)

The recent call up of several reserve units for the conflict in Kosovo prompted a number of questions from employers about their responsibilities under USERRA, which was passed in 1994 and overhauled the Veterans Re-employment Rights Act. The following are key points to remember to comply with USERRA:

- The law covers all private and public sector employers.

- The law covers all employees, including in some situations temporary or probationary employees, unless the employer can show that their employment was for a specific period of time.

- The employee has the right to a leave of absence if called into service or enlists for service.

- Employers are not required to pay an employee when on military leave, but check the states in which your employees work because some states require payment for a fixed period of time.

- Employees cannot be required to reschedule a military obligation.

- An employee may take leave for up to five years and still retain re-employment rights. The time period for the employee to exercise those rights depends on how long the employee served. For example, if an employee is absent for less than 31 days, the employee must report to work at the next scheduled workday, after an appropriate amount of time for travel. An employee who is absent for more than 30 days and less than 180 must report within 14 days, and those employee who are absent for more than 180 days must report within 90 days.

- An employee returns to the same seniority, responsibilities, pay and benefits he or she would have had but for the absence.

- An employee is entitled to COBRA benefits during leave. If pension credits are based upon years of service rather than actual hours worked, then pension benefits must also accrue during the leave of absence.

- Overall, an employer may not discriminate against an individual for exercising rights under USERRA.

Please contact us if there are specific questions or concerns regarding military leave.

SUBJECTIVE INTERVIEWS NOT PROHIBITED BY FAIR EMPLOYMENT PRACTICE LAWS, RULES COURT

Employers may be disinclined to use subjective factors during the hiring or promotion process, out of concern that subjective factors make an employer more vulnerable to discrimination claims. The recent case of *Scott v. Parkview Memorial Hospital* (7th Cir. April 23, 1999) illustrates the importance of subjective interviews for certain promotions or job classifications and why subjective factors are permissible.

The case involved a series of interviews the hospital conducted to reduce the number of social workers on its staff from nine to six. One individual, Rodney Scott, made the first cut but ultimately was among those who were terminated. Two of the six jobs were filled by women who had not worked for the hospital. Scott claimed that the subjective factors considered in the reduction process discriminated against him because he was a man.

The court stated that Scott presented no evidence showing that gender played a role in the employment decisions, even if six out of the seven interviewees were women and those who were retained were women. The court rejected Scott's claim that the female interviewers subjectively discriminated against him because he was a man. According to the court, the laws prohibiting discrimination in employment do not prohibit subjective interviews. The court stated that to rule otherwise would require "private employers to behave as if they were running paper heavy bureaucracies, and to prefer paper heavy evaluations over contextual assessments by knowledgeable reviewers. **Unless the evidence demonstrates that an open-ended process was used to evade statutory anti-discrimination rules, subjectivity cannot be condemned."** Subjectivity has limits, however. The more remote the subjective assessment is from the job duties and requirements, the greater the risk that an individual may prove that the subjective factors were used for an improper purpose.

WORKPLACES ON WHEELS: CELL PHONE ACCIDENT LEADS TO $500,000.00 SETTLEMENT

It seems that people cannot go anywhere without answering or making cell phone calls, such as at movie theaters, restaurants, sporting events and of course in the automobile. Several of our readers may recall incidents when they have been driving and passed a driver deeply absorbed in a cell phone conversation or slightly swerving as the driver attempted to make a cell phone call. The risk for employers is that if such calls are made by employees during the course of their workday, the car phone calls become a safe driving risk and subject the employer to potential liability in the event there is an accident. Such was the situation in the recent case of *Roberts v. Smith Barney* (E.D. Pa. February 12, 1999).

James Tarone, a broker for Smith Barney, was involved in an automobile accident while driving to a restaurant on a Saturday evening. He was not driving from the office, nor was his dinner engagement business related. Tarone said that while attempting to call a client from his car, the phone dropped on the floor and he bent down to retrieve it. He then ran through a red light and killed a motorcyclist who was the father of two young girls. Tarone said that he was encouraged by Smith Barney to call his clients at any time of the day and Smith Barney encouraged its brokers to use cell phones when driving. Smith Barney paid $500,000.00 to settle the case.

There is a practical lesson for employers from this case. If an employer encourages employees to use cell phones for business purposes, reimburses employees for cell phone use or provides employees with cell phones, the employer should state specifically that such phones are not to be used on company business when driving or in any other circumstance that could impair the safety of the employee or others.

OSHA PLACES ALABAMA COMPANIES ON HIT LIST

In late April, the Occupational Safety and Health Administration (OSHA) notified 472 Alabama employers that their workplaces rank among the nation's riskiest for employee health and safety. Birmingham had 52 workplaces on the OSHA list, Montgomery had 22, Mobile 30, Huntsville 14, Anniston and Tuscaloosa 13 each, Decatur and Gadsden 12 each, Dothan and Fort Payne 11 each, and Bessemer 10.

The letters, authored by Assistant Secretary of Labor for Occupational Safety and Health, Charles N. Jeffress, enclosed injury and illness data for the establishment and a list of the most frequently violated OSHA standards for the target company's particular industry. In the letter, Jeffress urged that the targeted companies consider hiring an outside safety and health consultant to evaluate injuries, risks and their causes. For smaller employers, Jeffress suggested using the OSHA funded state consultation services. Alabama's consultative service is Safe State in Tuscaloosa.

OSHA officials stated that the riskiest workplaces in the country, those with more than 16 injuries or illnesses per 100 workers, will likely receive unannounced OSHA inspections. In this regard, the individual rates were not released so that employers would not be "tipped off."

Of the 472 workplaces in Alabama, nursing homes were the most prevalent with 52 skilled care facilities and 7 regular nursing homes targeted. Other industries targeted were wood products manufacturing 38 companies; trucking and moving companies, 33; steel, 15; poultry processing, 14; building materials, 10; and warehousing, 9.

Companies should be aware that should they hire an outside consultant, or opt for Safe State consultation, the findings of the consultant or Safe State would be discoverable in litigation and in

OSHA administrative proceedings. Essentially, the notice of a hazard could form a basis of a wilful OSHA violation or form the basis of notice for negligence or tort-like causes of action. In order to eliminate this concern, many employees hire safety consultants through attorneys in order to protect the findings of the consultant under the attorney-client and/or work-product privileges. For more information regarding OSHA targeting and consultation services, please contact Steve Stastny, a shareholder of the firm who practices in the area of occupational safety and health.

DID YOU KNOW...

. . . **that according to a recent Federal Trade Commission opinion, outside firms conducting investigations of possible harassment are required to comply with the Fair Credit Reporting and Disclosure Act?** This means, for example, that certain aspects of the investigation cannot occur without the employee's permission and that the employee must receive a notice and waiting period before any adverse action is taken. The impact of this opinion could limit the thoroughness with which an employer could investigate harassment claims, if outside investigations are conducted.

. . .that a union sued a hospital chain claiming that the hospital's fees for opposing union activity violated Medicare and Medicaid reimbursement parameters? *Congress of California Seniors v. Catholic Healthcare West* (Cal. Sup. Ct. May 20, 1999). The Service Employees International Union sued the hospital chain, claiming that federal and state laws were violated by using reimbursement money to fund the employer's response to the SEIU organizing campaign. According to the union, the hospital failed to report those costs as non-reimbursable ones and also failed to delete those from costs to be reimbursed by Medicare and Medicaid.

. . . that in the latest "do you believe this" ADA claim, an individual claimed that the employer's failure to provide her with a special area for her to use a breast pump at work violated the Disabilities Act? *Martinez v. NBC, Inc.* (S.D. NY, May 18, 1999). The employee claimed that failure to provide her with a clean, safe and comfortable area for breast pumping violated the Disabilities Act. According to the court, pregnancy and medical conditions that are routinely associated with pregnancy are not disabilities under the ADA. The court also added that failure to provide for this process did not violate Title VII because to allow such a claim would create "protected status" for breast pumping.

. . . that a court permitted a racial discrimination class action to proceed against the Laborers International Union of North America? *Alexander v. Local 496, Laborers' International Union of North America* (6th Cir. April 30, 1999) According to the plaintiffs, the Local and International specifically denied them membership and referrals to jobs because of their race. According to the judge, LIUNA has a "despicable and egregious" record of denying membership and referral opportunities based upon race.

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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THE FOLLOWING DISCLOSURE:

"No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."