EMPLOYMENT LAW BULLETIN

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TO OUR CLIENTS AND FRIENDS:

We are pleased to report that the United States Supreme Court on June 22, 1999 issued decisions that we believe ultimately will reduce the number of Americans with Disabilities Act claims and lawsuits. **The Supreme Court concluded in *Sutton v. United Airlines, Inc.* and *Murphy v. United Parcel Service, Inc.* that mitigating measures must be considered in determining whether an individual has a disability as defined under the ADA. The Court also ruled that an employer may consider medical conditions that are not real or imagined impairments without violating the ADA provision prohibiting discrimination against an individual who is "regarded as" disabled.** Both decisions were by a seven to two margin, with Justice O'Connor writing both majority opinions.

The plaintiffs in Sutton were twin sister airline pilots who were severely nearsighted, but had 20/20 vision when they wore eyeglasses. The plaintiffs worked as commercial pilots for a regional commuter airline. However, when they applied for employment with United, they were rejected because their uncorrected vision was worse than 20/100 which was United's minimum requirement for employment. The plaintiffs alleged that under EEOC interpretations of the definition of disability, United had to evaluate whether they were disabled without regard to their vision when wearing glasses. They argued that if without glasses they would be substantially impaired in the major life activity of seeing, then they should be considered disabled under the ADA. Their position was rejected by both the federal district court and the court of appeals.

In the United Parcel Service case, Murphy was hired to work as a mechanic. His blood pressure without medication was 250/160. Even when he took his medication, his blood pressure was higher than normal for an individual of his age, height and weight. UPS required its truck mechanics to maintain a commercial driver's license. In order to obtain a commercial driver's license, the applicant's blood pressure must not exceed specific thresholds. Murphy was mistakenly issued a commercial driver's license. After he was hired by UPS, the company became aware that Murphy's blood pressure exceeded the standards for obtaining the license. The company then terminated him. The district court and the court of appeals both rejected Murphy's ADA claim, stating that although with medication Murphy's blood pressure was still higher than usual, he was not impaired in major life activities in his medicated state.

The United States Supreme Court upheld the lower court decisions in *Sutton* and *Murphy* for three reasons, according to Justice O'Connor:

- Congress, when it passed the Americans with Disabilities Act, defined the term "disability" and did not entitle the EEOC to broaden that definition through the regulatory process. Considering the hypothetical question of what someone's medical condition would be without medication or corrective lenses is inconsistent with the case by case analysis

required in order to determine whether an individual is disabled. According to Justice O'Connor: "looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures, both positive and negative, must be taken into account when judging whether the person is "substantially limited" in a major life activity and thus "disabled" under the Act."

Justice O'Connor noted the congressional findings that there were 43 million Americans with disabilities. According to Justice O'Connor, that number is inconsistent with the EEOC's position that one with a condition that is corrected by medication or otherwise is also disabled. Some studies have suggested that if the Supreme Court adopted the EEOC's definition of disabled, four out of five American adults would qualify for ADA protection. According to Justice O'Connor, Congress did not intend for the ADA to apply to so many.

The Supreme Court also stated that the decisions not to hire Sutton and Hinton and to terminate Murphy do not mean that the employers "regarded them as disabled." According to Justice O'Connor, an employer violates the "regarded as" definition of a disability if the employer makes a decision based upon a "real or imagined" impairment that would be regarded as substantially limiting a major life activity. Justice O'Connor added **"an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment - such as one's height, build, or singing voice - are preferable to others, just as it is free to decide that limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job."** Sutton and Hinton were not treated as impaired in the major life activity of working because they were still able to work as pilots. Murphy was not regarded as substantially limited in the major life activity of working, because he spent 22 years working as a mechanic where he was not required to drive.

The Supreme Court on June 22nd also decided another ADA case, *Albertsons v. Kirkingburg*, which involved an employer that refused to hire an individual who received a waiver of the vision standards for obtaining a commercial driver's license. The waiver of the federal requirement did not preclude Albertsons from adhering to its own vision standards.

For several years, we have advised our clients that although the EEOC guidelines and case handling process made it relatively easy for individuals to allege ADA violations and proceed to court, the courts overall took a more restrictive view of ADA coverage, making it difficult for ADA plaintiffs to remain in court. In these cases, the Supreme Court has stated that it was "impermissible" for the EEOC to hold through regulation that an individual qualifies as disabled without regard to considering the effects of medication or other devices or mechanisms for assistance.

"EGREGIOUS" BEHAVIOR NOT REQUIRED FOR PUNITIVE DAMAGES TO BE ASSESSED AGAINST EMPLOYER, RULES SUPREME COURT

On June 22, 1999 in the case of *Kolstad v. American Dental Association*, the United States Supreme Court clarified what standards must be met for a punitive damages award under the Civil Rights Act of 1991. The CRA standard applies to Title VII and the Americans with Disabilities Act.

Kolstad claimed that she was not promoted because of her gender and that a supervisory employee made sexually derogatory comments about women during staff meetings. Kolstad was awarded back pay for the amount she would have received had she been promoted, but the court refused to permit the jury to consider an award of punitive damages. A panel of judges from the District of Columbia Circuit Court of Appeals ruled that the trial judge should have permitted the jury to determine whether punitive damages were appropriate, but the full Court of Appeals overturned its decision by a six to five vote, ruling that it was only appropriate to consider punitive damages where a plaintiff presents evidence that the employer's conduct was egregious.

In a seven to two decision reversing the Court of Appeals, Justice O'Connor wrote that the 1991 Civil Rights Act permits punitive damages when evidence is shown that the employer acted "with malice or reckless indifference to the federally protected rights of an aggrieved individual." Justice O'Connor added that "the terms 'malice' and 'reckless' ultimately focus on the employer's state of mind. While egregious conduct is evidence of the requisite mental state, the Civil

Rights Act of 1991 does not limit plaintiffs to this form of evidence, and does not require a showing of egregious or outrageous discrimination independent of the requisite showing regarding the employer's state of mind. The Court stated that "malice" or "reckless indifference" relate to whether the employer was aware that its actions may violate federal law.

Justice O'Connor also addressed the issue of the propriety of punitive damages when an employer is unaware of the inappropriate actions of its supervisors or managers. According to Justice O'Connor, even if the employer takes all reasonable steps to try to comply with the anti-discrimination laws, it still could be held responsible for the acts of its managers. However, Justice O'Connor added that **"holding employers liable for punitive damages when they engage in good faith efforts to comply with Title VII is in some tension with the very principles underlying common law limitations and vicarious liability for punitive damages."** To rule otherwise, according to Justice O'Connor, would discourage employers from becoming pro-active to try to prevent discrimination from occurring in the workplace. Justice O'Connor stated that "recognizing Title VII as an effort to promote prevention as well as remediation, and observing the very principles underlying the limits on vicarious liability for punitive damages, we agree that in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'" The Supreme Court remanded the case for the lower court for it to determine whether Kolstad could show that her employer acted maliciously or with reckless indifference to Title VII, and whether the employer made efforts to comply with Title VII and develop and enforce an effective anti-discrimination policy at work.

EEOC ISSUES GUIDANCE FOR EMPLOYER LIABILITY DUE TO SUPERVISORS' HARASSMENT

On June 18, 1999, four days before the Supreme Court told the EEOC that its guidance on the ADA went too far, the Commission issued guidance regarding employer liability for harassment and other unlawful

behavior by supervisors. The guidance follows the Supreme Court's 1998 sexual harassment decisions in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*. In those cases, the Supreme Court determined that there were circumstances where an

employer would not be liable for sexual harassment committed by a supervisor.

According to the EEOC, an employer will not be responsible for a supervisor's harassment if the employer "proves that it exercised reasonable care in preventing and correcting the harassment **and** the employee unreasonably failed to avoid all of the harm." This is the same language the Supreme Court used in the *Burlington Industries* and *Faragher* cases. The effective components of "reasonable care" in preventing the harm and correcting the harassment include the following, according to the EEOC:

- A harassment policy that clearly describes the behavior that is prohibited.
- A statement in the policy protecting employees from retaliation for providing information related to a harassment complaint.
- A "plain English" complaint process that has multiple methods for employees to express their concerns.
- A statement in the policy assuring that employers will protect employee confidentiality when possible.
- An investigation that is thorough and prompt, and conducted by a well trained investigator.
- A statement in the policy that the employer will take corrective measures if it determines that the policy has been violated.

We also encourage employers to include in the policy a provision that employees should notify the employer of a policy violation even if the violation is not directed toward the employee, a statement that the policy covers behavior of non-employees toward employees, and an outlet for reporting a policy violation that may be through a non-employee. Furthermore, those employers with published codes of conduct and a list of potential disciplinary actions that could be taken based upon certain violations should be sure that a violation of the company's policies on harassment and equal employment opportunity are listed among the type of conduct that could result in discipline or discharge.

GOOD TIMES FOR ORGANIZED LABOR: HIGHER ELECTION WIN RATES, MERCEDES NEUTRALITY, AND STRONG ADMINISTRATION SUPPORT

For several years, unions have been referred to as "disorganized labor." The times have changed. For example, according to the most recent information provided by the National Labor Relations Board, unions won 51.2% of all representation elections held for the calendar year 1998. Although this is down from 54.3% in 1997, there were 3,229 representation elections held in 1998, an increase from 3,160 elections held in 1997. The following is a summary of the total number of elections in the last few years and the percentage won by unions:

Year	No. of Elections	Union Win Rate
1994	3,052	49.2%
1995	2,716	48.2%
1996	2,817	47.7%
1997	3,160	50.3%
1998	3,229	51.2%

Unions won 50% of all elections in units of 500 or more employees, a substantial increase from 32% in 1997. Unions have the highest victory rate in units of fewer than 50 employees, a winning percentage rate of 55.9%. Interestingly, the number of large unit elections increased in 1998, to 541 from 482 in 1997.

In addition to its increasing victory rate, labor is also encouraged by the neutrality position taken toward the United Auto Workers by DaimlerChrysler. Prior to the merger of Mercedes and Chrysler, Mercedes was committed to remaining union free at its Vance, Alabama plant and at its Freightliner truck plants in North Carolina. Since the merger, however, the merged company has adopted a position of "neutrality." According to Thomas Stallkamp, a member of the DaimlerChrysler Board, the company's position to UAW organizing is "corporate neutrality."

Stallkamp added that "We want the efforts to go on in a completely open basis. We'll let the union and the employees decide." The UAW Chrysler contract expires at midnight on September 14th and covers 69,000 employees. Negotiations for a new contract with DaimlerChrysler and the UAW began on June 15, 1999.

Neutrality at the Freightliner and Vance, Alabama facilities will no doubt be a major discussion point during negotiations. Neutrality takes many forms. One form is neutrality is not only "hands off," but actually providing the union with access to employees on company premises in order to promote the union's interests. Furthermore, neutrality may also mean that the company will recognize the union through an authorization card check, rather than insisting on a secret ballot election conducted by the National Labor Relations Board. This action by Mercedes will have a significant impact on employers in Alabama and North Carolina, in particular, and throughout the Southeast in general. It increases the vulnerability to union pressure directed toward suppliers of Mercedes and those companies that make the raw materials for the suppliers.

A final note of good news for organized labor is the likely decision of the Clinton administration to consider compliance with federal labor laws as a factor when awarding contracts on government projects. Although not complying with fair employment practice laws can result in debarment of a government contractor, the proposal the Clinton administration is considering would include the right to deny a contract to a company with "substantial non-compliance with labor and employment laws." What does substantial non-compliance mean? Does it mean opposing union organizing and defending objections to an election or to unfair labor practice charges arising out of a campaign? The impact of this proposal is to pressure government contractor employers to tread lightly when opposing union organizing efforts.

We will shortly be mailing to our clients a notification about a briefing we will be conducting in the fall for supervisors and managers on the newest issues concerning union avoidance. We will conduct the briefing at times convenient for individuals on all three shifts to attend. **Organized labor is closing this decade in the strongest position it has been in since**

the 1970s. Unless employers take a pro-active position to enhance their union free status, they may face a revitalized, rejuvenated, creative and aggressive union organizing adversary.

DID YOU KNOW...

. . .that President Clinton proposed on May 24, 1999 to permit employees on Family Medical Leave to qualify for unemployment compensation benefits? The President's comments were made at a time when the Commonwealth of Massachusetts was considering comparable legislation. The Massachusetts unemployment compensation system pays out $700 million a year. To add family and medical leave absences would cost an additional $200 million dollars. The outcome would be an increase in employer unemployment compensation taxes.

. . .that on June 17th legislation was introduced to permit "comp time" for private sector employees? The bill is entitled the Family Friendly Workplace Act, and was introduced by Senator Ashcroft (R-MO). The bill would permit an employer and employee to schedule 80 hours over a two week period on a flexible basis to meet an employee's personal needs without triggering overtime requirements. The employer would have to pay time and a half at the end of the year for each hour of comp time that was not taken. Furthermore, during that two week eighty hour period, an employee could not work more than 50 hours in a week.

. . .that according to the Bureau of Labor Statistics, only 19.2% of all married couples are considered to model the "traditional" family where the husband works and the wife does not? 64% of married couples with children under age 18 work, compared to 62.6% in 1994. According to Labor Secretary Alexis Herman, "The report shows that more parents are working and, as a result, need more help balancing their work and family life. To help meet these challenges, President Clinton recently announced new steps to promote time off for working parents with children."

. . .that the International Brotherhood of Teamsters Union won an Equal Pay Act lawsuit filed against it

by a female organizer? *Hutchins v. International Brotherhood of Teamsters* (8th Cir. June 17, 1999). The plaintiff, Melanie Hutchins, started at a salary of $35,000.00 a year. She was told that she would receive a $5,000.00 raise every six months until she was paid $55,000.00. Eight men were hired as organizers at $35,000.00, and thirteen were hired as organizers at salaries between $40,000.00 and $55,000.00. Additionally, five other women organizers were hired at starting salaries of $45,000.00 to $55,000.00. The court stated that the Teamsters showed that the differences in pay between Hutchins and the male organizers were unrelated to gender. In particular, the men had more experience and better qualifications.

. . .that the teamsters violated the National Labor Relations Act by fining a member $500 for reporting that two fellow employees took an unauthorized break? *NLRB v. Teamsters Local 439* (9th Cir. May 26, 1999). The reporting employee was a leadman who did his job when he told his supervisor about his fellow employees taking unauthorized breaks. The Teamsters' fine was illegal because the leadman was required under the Teamsters' negotiated bargaining agreement to report the employee misconduct.

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