EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

In response to the increased organizing activity and success of organized labor, we have scheduled a series of programs in Birmingham, Huntsville and Decatur to meet with your managers and supervisors to review what they can and should do about union activity. The programs are scheduled as follows: September 15, 1999 - Huntsville (Marriott Space Center), September 16, 1999 - Decatur (Holiday Inn), and September 22, 1999 - Birmingham(Sheraton Perimeter Park). Two sessions covering the same materials are scheduled each day, so that supervisors and managers from all three shifts will be able to attend. The times are from 8:30 a.m. until noon and 4:00 p.m. until 7:30 p.m. Enclosed is a registration form; please identify the location and session you are interested in having your supervisors and managers attend. The cost is $100.00 per person for up to nine employees from the same company and $85.00 per person for ten or more employees.

COURT INVALIDATES DOL NOTICE REQUIREMENT FOR EMPLOYEES ON FMLA

Alicia Cox was employed as a manager for AutoZone, Inc. and was absent from work for fifteen consecutive weeks in connection with the birth of her child and for post-childbirth care. The first thirteen weeks of her absence were covered under the company's short term disability plan. However, instead of returning to work at the end of the thirteenth week, Cox remained absent for two additional weeks, assuming that she could return to her position as manager because she thought those two weeks were covered under the Family Medical Leave Act. Upon her return, Cox was not placed in her old job, but rather was demoted to an assistant manager position. She claimed that the demotion was a “constructive discharge,” and that she was entitled to her old job under the FMLA.

Cox argued that, under the Department of Labor regulations, AutoZone was required to notify her in advance that her thirteen weeks of disability leave would be counted against and run concurrently with her available FMLA leave. Because the employer did not give her notice of this fact, as required under the regulations, Cox claimed that she was entitled to twelve weeks of FMLA leave *in addition* to the thirteen weeks leave she had already taken. Cox's argument was based upon Department of Labor Regulation 825.208, which states that leave that is already taken does not count toward the twelve weeks of available FMLA leave if the employer did not notify the employee in advance that her absences would be counted toward the twelve week FMLA maximum.

The United States District Court for the Middle District of Alabama granted summary judgment for AutoZone, stating that the FMLA required that the employee receive up to twelve weeks, which Cox received, and that the Department of Labor's notice requirement was invalid. This decision was upheld by the Eleventh Circuit Court of Appeals on July 14, 1999. The Court of Appeals said that

although agency regulations are entitled to great deference, such deference will not be given when the regulations are clearly contrary to the statute. According to the court, "The statute does not impose any specific requirements for the type of notification an employer must provide or when that notification must occur." The court also said that Regulation 825.208 conflicts with the presumption in Regulation 805.207(d)(1) that leave for childbirth counts as FMLA leave. Regulation 805.207(d)(1) provides that "Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the twelve weeks of leave permitted under FMLA." According to the court, the statute provides for twelve weeks of FMLA and if Congress wanted to include a notice provision with strict consequences for not complying, it would have stated so in the statute. The court said that "The regulations not only add requirements and grant entitlements beyond those of the statute but they also are inconsistent with the stated purpose of the statute to balance employees' workplace and family demands with employers' legitimate interests. Where an employer exceeds the baseline twelve weeks by providing not only more leave than FMLA but also paid leave, the employer should not find itself sued for violating FMLA."

Although some may claim that the court's decision is limited to situations involving pregnancy, only, the overriding message is that if the employee receives the required FMLA benefit, the lack of notice to the employee at the beginning that the absence was covered under FMLA does not prohibit an employer from counting the absence toward the total number of weeks available to the employee under the FMLA. Nevertheless, we encourage employers to continue to give employees notice, as soon as possible, that an absence is covered under FMLA and what that means. Under the FMLA, the employee is entitled to return to the same or equivalent position. This is not required when an absence extends beyond the twelve weeks FMLA leave, such as under a company's disability benefit plan. Therefore, employers will want to notify employees at the earliest point that their jobs will only be held for FMLA leave which is limited to twelve weeks.

U.S. SUPREME COURT TO EMPLOYERS: LIMIT PUNITIVE DAMAGES RISK THROUGH PROPER POLICY IMPLEMENTATION, COMMUNICATION AND EDUCATION

Last month's Employment Law Bulletin reviewed the June 22, 1999 Supreme Court decision in *Kolstad v. American Dental Association* (Volume 7, Number 5, page 2), in which the Supreme Court held that egregious behavior is not the standard by which to judge whether punitive damages may be awarded for a Title VII violation. We also included an excerpt from Justice O'Connor's opinion in which she said that "In the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents when those decisions are contrary to the employer's good faith efforts to comply with Title VII." Just as one year ago the Supreme Court outlined steps an employer should take to avoid liability for the harassing behavior by supervisors, now the Supreme Court has issued a similar message concerning ways to avoid liability for punitive damages for discrimination. We encourage employers to take the following steps to avoid liability for punitive damages under the Supreme Court's standard:

1. EEO Policy Development

   - Identify all protected classes.
   - Identify the decisions upon which considering those protected classes would violate the policy (hiring, promotion, training, job assignments, compensation,

discipline, discharge and terms and conditions of employment).

- C State that employees should report actions which they believe may violate the policy, even if the actions were not directed toward the reporting employee.

  - C Provide two to three alternative sources to whom the employee may report a policy violation. Do not limit it to the "chain of command."

  - C Describe actions the company will take based upon a possible policy violation (investigation and discipline or discharge, where appropriate).

  - C Include a description of and prohibition against "retaliation" and state what actions employees should take if they believe retaliation has occurred.

  - C Describe limited confidentiality.

2. Include on the employment application acknowledgment section a statement such as the following: "I understand and agree that if employed by the company, I am responsible for reporting any behavior which I believe may violate the company's policies on equal employment opportunity or harassment."

3. During new employee orientation, specifically review these policies and obtain the employee's dated acknowledgment that these policies were reviewed with him or her.

4. Review these policies annually with all employees. Distribute the policies as part of that review, explain paragraph by paragraph the terms and meaning of the policies, and invite questions. Provide examples of actions that may be considered potential discrimination, and what an employee should do about them. Have employees sign-in at that meeting, date the sign-in sheet and attach to it a copy of the policy.

5. Post the policy at a conspicuous location; do not rely only on the postings that are required by statute.

   - C Do not "bury" the policy in the handbook; make it prominent and include references to it in the introduction.

6. Review with supervisors their responsibility for policy compliance and reporting possible violations.

REASSIGNMENT TO A VACANT JOB AS REASONABLE ACCOMMODATION

The recent case of *Smith v. Midland Brake, Inc.* (10th Cir. June 14, 1999) reviewed the circumstances where assigning an employee who cannot be accommodated in his or her current job to a vacant job may be required. The employee in this case was terminated due to an allergic reaction he suffered

to chemicals at work. Because of his reaction, he was unable to perform his job duties. The company was unable to find Smith another position within his existing department that would have reduced his exposure to workplace chemicals to which he was allergic. Smith complained that there had been other circumstances where the company had transferred employees to vacant positions in other departments, but that the company failed to do so for him. The company argued that ADA reassignment rights should apply only to applicants and not current employees.

According to the Court of Appeals, reassignment of an employee as a form of accommodation has to be analyzed on the basis of a reasonableness standard. For example, it is unreasonable to reassign an employee if to do so would displace someone already in that other position. However, "reassignment of an employee to a vacant position in a company is one of the range of reasonable accommodations which must be considered and, if appropriate, offered if the employee is unable to perform his or her existing job." A qualified individual with a disability must be able to perform his or her job with or without reasonable accommodation. The employer argued that it met its obligations by "considering" Smith for reassignment. In rejecting this argument, the court stated that to rule otherwise would mean that "The employer could merely go through the meaningless process of consideration of a disabled employee's application for reassignment and refuse it in every instance." However, if the job to which the employee is reassigned pays less than the employee's current rate, the employer may pay the employee the lower rate and still be considered to have "reasonably accommodated" the individual under the ADA.

GOVERNMENT CONTRACTORS BEWARE: LEGAL COMPLIANCE LINKED TO CONTRACT AWARDS

President Clinton on July 9, 1999 issued a proposal that would link the award of federal contracts to contractor compliance with several federal laws, primarily employment related. The proposal is an amendment to the Federal Acquisition Regulation. Under the proposal, contract officers would consider a "prospective contractor's lack of compliance with tax laws, or substantial non-compliance with labor laws, employment laws, environmental laws, anti-trust laws or consumer protection laws." The proposal would not even require the contract officer to be limited to considering final adjudications of employer non-compliance. Rather, a contract officer can determine that an employer's business practices and integrity were unacceptable based upon "persuasive evidence of substantial non-compliance with the law or regulation." This "persuasive evidence" need not be an adjudication. Does this mean, for example, that a case pending before the National Labor Relations Board is "persuasive evidence," even if it has not yet gone to trial or been appealed to the NLRB? Is a "cause" finding by the EEOC "persuasive evidence?"

In addition to considering employer compliance as a factor in awarding contracts, the proposal would also prohibit employers from including in contract costs "activities related to influencing employee's decisions regarding unionization." No doubt the impetus for this regulation is to help organized labor sign up new members. Currently, the proposal is in the stage where comments have been invited for ninety days. Ultimately, we expect the proposal to become final and its legality will be challenged.

DID YOU KNOW...

. . . **that the Equal Employment Opportunity Commission sued an employer for allegedly retaliating against employees who refused to attend the employer's prayer sessions?** *EEOC v. L.J. Home Health Services, Inc.* (D. Minn. May 26, 1999). The EEOC seeks compensatory and punitive damages for what are alleged to be retaliatory actions against those employees who chose not to participate in such prayer sessions. Remember that although an employer may permit employees to engage in prayer meetings on company premises, employers should be sensitive to the rights and interests of those who would not be interested in participating. We generally suggest that supervisors should not be coordinating or directly involved in leading such sessions.

. . .that Senator Christopher J. Dodd (D - Conn.) proposed legislation to provide pay for FMLA absences? The bill, called the Family Income to Respond to Significant Transitions (FIRST) Act, was introduced on July 13. The bill would provide that states could use unemployment insurance benefits for FMLA absences. The bill would also provide $400 million to states with which to experiment with different approaches to supplement an employee's otherwise unpaid FMLA leave.

. . . that an employee received $1.7 million after being terminated for protesting an employer's business practices? *Murcott v. Best Western International, Inc.* (AZ Sup. Ct., May 12, 1999). The employee alleged that he was required to review market information which he presented to Best Western and which it reviewed in deciding which hotels to include in its chain. He claimed that the Best Western participating hotels "would combine, conspire and/or agree with voting Best Western Board members to preclude, or boycott, otherwise qualified applications from acceptance for anti-competitive commercial reasons, such as if an existing member did not want new competition in his or her particular area." We often think of retaliation applying to an employee's questioning employment practices. This case is an example of retaliation where an employee questioned business practices.

. . . that the United States Senate has rejected the EEOC's funding request for fiscal year 2000? The EEOC is currently operating under a budget of $279 million. Last year, it received every dollar of the increase it requested. However, for fiscal year 2000, the EEOC's requested increase of $33 million was rejected by the Senate Appropriations Committee. Instead of the proposed 11.8% increase, the Senate will likely only increase the EEOC's budget by 4.5%. The reason for the 11.8% proposal, according to the Clinton administration, was to provide the EEOC with additional resources to combat sex based wage discrimination.

. . .that former temporary and contractor employees of Atlantic Richfield Company have sued, claiming they are entitled to the same benefits available to employees? *Casey v. Atlantic Richfield Company,* (C.D. Cal. June 24, 1999). Some of the employees allege that they have been classified as temporary for up to ten years. They also allege that periodically, ARCO would require the temporary service to terminate the employees, and then ARCO would re-hire them through another temporary service. Employers need to reexamine their use of temporary and contractor employees. As more of those employees realize the benefits they are missing, we see more claims filed where temporary or contract employees claim that the employer violated ERISA by failing to include them within the company's benefits plans.

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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