EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

Never forget about the rights of the "accused" during the course of an investigation. Coors Brewing Company learned this lesson the hard way with a $1.38 million verdict against it and the accuser in the case of *James v. Coors Brewing Company* (D. Colo., August 4, 1999).

Homer James sued Coors claiming defamation and breach of contract. James was terminated based upon allegations of sexual harassment made against him by Yvonne Mannon. Mannon alleged that she and other women experienced graphic, vulgar and repetitive sexual harassment from James and several other men in the same department. Mannon alleged that after she complained to the company, male employees made death threats against her and her daughter, and they poisoned her dogs.

James and seven other men were terminated as a result of an investigation into Mannon's claims. The company spent $600,000.00 on the investigation and an additional $300,000.00 to install a security system at Mannon's home and provide her with twenty-four hour protection. Additionally, the company urged law enforcement authorities to press criminal charges against James. James alleged and proved to the jury's satisfaction that Mannon repeated untrue statements about James both internally within Coors and externally, such as to law enforcement authorities.

Coors felt that it was caught between a rock and a hard place no matter what action it took. Although Coors spent a lot of money to try to get to the bottom of the harassment allegations, it failed to adequately protect James's rights in the manner in which it handled Mannon's allegations. The following suggestions will hopefully prevent employers from repeating Coors's mistakes:

1. Be careful not to "rush to judgment" against an individual who is accused of harassment. Treat each individual accused as if that individual were the only one charged.

2. Provide the accused with specific information regarding the allegations made against him or her and allow the accused an opportunity to respond.

3. Follow the company's internal investigation protocols. In James's case, Coors's failure to adhere to its own protocols was used as evidence in support of James's breach of contract claim.

4. Only communicate information about the investigation and its outcome to those who have a need to know. Do not use the possibility of a referral of the matter to law enforcement authorities as a threat or for leverage with the accused. Whether the matter is one to be turned over to law enforcement authorities should be assessed based on the results of the investigation.

IMPROPER EXEMPTIONS MAY COST WAL-MART $150 MILLION IN BACKPAY DAMAGES

On August 2, 1999 in the case of *In Re Wal-Mart Stores, Inc.*, a Colorado district court judge ruled that Wal-Mart violated the Fair Labor Standards Act by failing to pay overtime to approximately 1,000 pharmacists. Furthermore, the judge said that the failure to pay overtime was not "inadvertent," which means that the damages may be doubled as a willful violation.

One of the "white collar" overtime exemptions under wage and hour law applies to professional employees. Pharmacists may qualify as professional employees. However, exempt professional employees must be paid on a salary basis. This is defined under wage and hour regulations as when the employee "regularly receives each pay period...a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." Wal-Mart failed to satisfy the "predetermined" salary aspect of the exemption. Wal-Mart set the pharmacists' salary before the beginning of each pay period, but the pharmacists did not receive the same recurring salary for each pay period. The pharmacists often worked 50 to 60 hours a week, but when their scheduled hours were reduced, so was their pay for that particular week. According to the court, "businesses cannot cut hours for their own convenience and still maintain that the employees are salaried."

The court denied Wal-Mart the opportunity to raise the defense of "corrective action." This defense arises where an employer who has violated wage and hour laws corrects matters by voluntarily paying the employees the amount they should have received to begin with. According to the court, this defense is only applicable to inadvertent violations. The court viewed Wal-Mart's violations as intentional.

While most overtime exemption cases focus on an employee's job duties, this case illustrates the often overlooked aspect of overtime exemptions: proper compensation. If an exempt employee is not paid properly, or if inappropriate deductions are made from that individual's pay, the employee's exempt status will be lost. Remember that salaries may not be reduced for disciplinary purposes (unless the employee is suspended for a full week), nor may the salary be prorated based upon a change in circumstances beyond the employee's control (such as work level or business conditions of the employer). Further, no deductions may be made for any absence of less than a full day, unless the absence is due to a situation covered by the Family and Medical Leave Act. An exempt employee's salary may be prorated only during the employee's first or last weeks of employment.

ARBITRATION AGREEMENT "UNCONSCIONABLE" RULES COURT AS IT DENIES ENFORCEMENT

"We perceive a significant trend in the law, both in this jurisdiction and elsewhere, toward a heightened awareness of the potential for unfairness in pre-dispute arbitration clauses. We applaud this trend. In the final analysis, no dispute resolution method, whether in court or out, will be accepted by litigants unless it is (and is perceived to be) fair, prompt and economical." With that language, a California appellate court declined to enforce an arbitration agreement in the case of *Maciejewski v. Alpha Systems Lab, Inc.* on August 5, 1999. Maciejewski was terminated from his position as the company's Director of Software Development. He sued, claiming that he was terminated so that the company could hire younger and Asian employees. In the employment agreement which he signed at the time he was hired, Maciejewski agreed to submit any

employment dispute to arbitration, according to rules promulgated by the American Arbitration Association. The company's arbitration protocol provided that the company and employee would each select an arbitrator, and then the two arbitrators would select a third arbitrator. Under this protocol, the company and employee would pay for the expense of the arbitrator they select, their attorneys, and split the cost for the third arbitrator.

When Maciejewski sued, the company filed a Motion to Compel Arbitration. Maciejewski argued that it would cost up to $7,000.00 for him to arbitrate, and that the company's arbitration process required him to give up statutory remedies and forego the right to discovery in order to prove his claim. The lower court refused to enforce arbitration, and the appellate court agreed.

According to the court, the requirement that Maciejewski pay his own fees and costs was an "exorbitant and unjustified expense." The court also thought the agreement was harsh, one sided, and that the arbitration rules under the company's protocol were those that applied to commercial disputes rather than employment issues. The commercial arbitration rules provide for much more limited discovery than employment arbitration rules. The court stated that Maciejewski was placed in a position where he had given up statutory rights and remedies and was faced with an arbitration procedure he could not afford. Accordingly, the court declined to enforce arbitration.

The issue of affordability has become increasingly important to a court's assessment of the fairness and enforceability of arbitration agreements. To overcome this issue, some companies provide within their arbitration process a budget for the employee to use in order to secure representation during the arbitration procedure. Remember that because it costs an employee only a nominal fee to file a lawsuit, and even that fee can be waived by the court if the employee cannot afford it, courts will be protective of employees who may be entirely precluded from pursuing a remedy because of the cost of arbitration.

REJECTION OF APPLICANTS SUSCEPTIBLE TO NERVE CONDITIONS DOES NOT VIOLATE ADA, RULES COURT

In its preemployment process, Rockwell International tested applicants for nerve conditions, including whether applicants were susceptible to carpal tunnel syndrome. If the tests showed that an applicant was susceptible to such a condition, then the applicant was rejected from consideration for certain jobs that require repetitive motions or the constant use of tools that vibrated. The EEOC sued Rockwell, claiming that Rockwell's actions violated the Americans with Disabilities Act. According to the EEOC, Rockwell's actions showed that it considered the applicants to be substantially limited in the major life activity of working. *EEOC v. Rockwell International Corporation* (N.D. Ill., August 13, 1999). The judge dismissed the case, and ruled as unreliable the expert opinion on behalf of the EEOC that the company's actions
resulted in a reduction of each applicant's access to the labor market. The court stated that "evidence of an inability to perform a particular job for a particular employer is not sufficient to establish a substantial limitation on the ability to work." The court concluded that there simply was not enough evidence presented by the EEOC to substantiate the argument that excluding individuals from the repetitive motion or vibration-tool jobs at Rockwell effectively meant that they were excluded from a substantial number of jobs in the relevant market area.

DID YOU KNOW...

. . . **that a Texas employer has agreed to pay $137,000.00 in penalties for violating OSHA blood borne pathogen exposure prevention program?** The violations included failure to use universal precautions, failure to provide training,

failure to provide a hepatitis B vaccine, failure to provide proper waste containers, failure to provide proper labeling, and failure to provide proper documentation regarding training. The investigation was triggered by a complaint from the Communications Workers of America, which represents the laboratory's employees.

. . .that on August 3rd, the AFL-CIO established "strategic organizing" campaigns for its affiliates? Under this system, an AFL-CIO member union may register for protection from competition from another union when it is organizing employees in a particular industry, occupation, or location. This development arose out of concern that, historically, a particular union might spend a great deal of effort to try to organize employees at a location, only to have a competitor union reap the benefit of that effort. The AFL-CIO will now protect the campaign investment of a particular union by requiring other unions must refrain from organizing the same groups or industries within that geographical area.

. . . that a construction employer who improperly operated "double-breasted" companies owes a union trust fund $1.8 million in past due benefits? *Local 159 v. Nor-Cal Plumbing, Inc.* (9th Cir. July 27, 1999). "Double-breasted" is a term describing the situation where a union contractor establishes a non-union company to bid for jobs in the same industry. In this case, the jury found that the two companies were operated essentially as one, and that the employer gradually syphoned off funds and jobs from the union company to the non-union company. The court also ruled that, because there was substantial evidence to justify piercing the corporate veil of protection, personal liability for the owner and his wife was appropriate.

. . . that a delay in retirees receiving benefits does not entitle them to past due interest under the company's retirement plan? *Clair v. Harris Trust and Savings Bank, Inc.* (7th Cir. August 10, 1999). The plan at issue provides that payments will begin within a "reasonable time" which would not exceed 60 days. Former employees of Harris Trust claimed that the delay in receiving payments was unreasonable and that all plan participants should receive past due interest. According to the court, "It is apparent that what the authors of the plan meant was that the plan reserved the right to wait the full 60 days allowed by the IRS to make the payment." The court stated that the lawsuit "boarded on the frivolous."

There is still space available for our program on how supervisors and managers can help their companies remain union-free, scheduled for Huntsville (Marriott) on September 15, Decatur (Holiday Inn) on September 16 and Birmingham (Sheraton Perimeter) on September 22nd. If you have not received information regarding the subject matter of the program and registration, please contact Peggy McCorkle at (205)323-9263.

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"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."

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