EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

Those employees at the Mercedes Benz facility in Vance, Alabama who seek to remain union-free are receiving help from Jay Cole, a consultant who meets with employees to be sure they know what a union could mean for them. At our next breakfast briefing, scheduled for Wednesday, October 19th from 7:45 a.m. until 9:00 a.m. at the Sheraton-Perimeter Hotel, Mr. Cole will review the union activity at the Vance facility and the efforts of employees to keep the facility non-union. In addition to Mr. Cole's comments, a member of our firm will review the most recent legislative, regulatory and judicial developments affecting employers. Each attendee will receive a comprehensive handout.

The breakfast briefing is complementary, but please reserve your spot by either returning the attached registration form or calling Peggy McCorkle at (205)323-9263. You are welcome to bring additional representatives from your organization and guests.

WINNING THE BATTLE BUT LOSING THE WAR: RIF DECISION NOT AGE DISCRIMINATION, BUT REFUSAL TO REHIRE COSTS EMPLOYER $160,500

Long term employees who are RIFd often are willing to take a lower level, lower paying position in order to remain employed. The recent case of *Beaver v. Rayonier, Inc.*, (11th Cir. September 13, 1999) illustrates the problem an employer faces when the employer does not offer an employee subject to the RIF an opportunity to remain employed by transferring to an available, lower level, lower paying position.

Rayonier manufactures dissolving cellulose and fluff pulp. In 1996, due to a substantial decline in sales, the company initiated an early retirement program which was accepted by twenty-four employees. However, that number was insufficient to meet the company's cost cutting objectives. Therefore, it chose to terminate ten more individuals, including J.A. Beaver, a twenty-two year employee and maintenance supervisor.
Beaver was told that he was terminated because his position was eliminated and consolidated with another supervisory position. At the time Beaver was terminated, however, there were seven supervisory positions that were vacant. When he was notified of his termination, Beaver told the employer that he would take any job that was available, at any pay level. The employer declined Beaver's offer and filled six out of the seven vacant positions with employees who were younger than Beaver.

The court concluded that the elimination of Beaver's position was not due to age, but the company's failure to place him in one of the available supervisory positions was age based. According to the court, "The employer is free to choose whatever means it wants, so long as it is not discriminatory, in responding to bad economic conditions. It is not our role to second guess

Rayonier's decision to respond to a loss in sales at the mill by cutting its workforce."

The problem for Rayonier was not its decision to cut Beaver, but rather to not offer Beaver a vacant job that paid less. According to the court, "The ADEA does not require employers to establish inter-departmental transfer programs during a RIF or to transfer or rehire laid off workers in the protected age group as a matter of course. However, a discharged employee who applies for a job for which he is qualified and which is available at the time of his termination **must** be considered for that job along with all other candidates, and cannot be denied the position based upon age." The court upheld the jury award of $80,242 in backpay and benefits, which was doubled by the court because the jury concluded that Rayonier intentionally violated the ADEA.

FORD COMMITS $18 MILLION TO SETTLE SEXUAL HARASSMENT CLAIMS

Never assume that companies among the largest in the world have their act together concerning proper workplace policies and training in fair employment practices and harassment. On September 7th, Ford Motor Company announced the settlement of discrimination charges brought by the EEOC based upon workplace sexual and racial harassment and race discrimination at two plants in Chicago. The case arose out of nineteen separate discrimination charges alleging that women were being sexually harassed by male managers and hourly employees. The allegations included incidents of sexually explicit graffiti and pornographic materials in the plant. The EEOC also determined that women received less favorable job assignments and were denied supervisory opportunities based upon gender. Furthermore, the EEOC concluded that a racially hostile work environment existed based upon graffiti and slurs directed toward minority women and the denial of favorable job assignments or promotion opportunities to black employees.

As part of the settlement, Ford agreed to pay nearly $8 million to a class of approximately 900 female and minority female current and former employees, and committed $10 million to training, policy revisions and other actions necessary to the implementation of a zero tolerance policy.

What Ford has committed to do is instructive for employers willing to learn from the mistakes of others without having to make their own:

1. A panel of three monitors will be appointed to oversee Ford's efforts to implement proper policies and procedures. One monitor will be appointed by Ford, the other by the EEOC and the third by both monitors.

2. Ford will revise its fair employment and harassment policies and procedures and submit them to the monitors for their approval.

3. Ford will provide training on workplace harassment and employment discrimination for all hourly and salaried employees at the two Ford plants in Chicago from which the case arose and at eleven other Ford facilities.

4. Ford will train its human resources staff at the plant level and personnel specialists at Ford headquarters on how to conduct a proper investigation of Title VII complaints.

5. Ford will revise its performance appraisal system for supervisors and managers, to provide that compliance and responsiveness to Ford policies on harassment and discrimination will be a key component on which employees may receive bonuses and promotion opportunities.

6. Ford will target to fill thirty percent of the entry level supervisory vacancies at the two

Chicago plants with women during the next three years.

FAILURE TO DISCLOSE PROPOSED PLAN CHANGES TO RETIREES COSTS IBM $15.5 MILLION

345 Former IBM employees will divide a $15.5 million settlement arising out of a change in the IBM retirement plan that was implemented one month after the individuals retired. *McAuley v. International Business Machines Corp.* (E.D. KY, September 13, 1999).

The individuals in the case were employed at the IBM plant in Lexington, Kentucky. They chose to accept IBM's offer of early retirement, provided they retired on or before December 31, 1990. Their benefits were calculated based upon the retirement plan in effect at that time. As it turns out, one month later, IBM implemented an even better retirement plan, which it began considering in 1989. Had the retirees known about the possibility of the new plan, they could have chosen to take a leave of absence to extend their length of service so that they would have been eligible for the greater benefits that became available to those employees who retired on or after January 31, 1991.

The employees claimed that IBM had a duty to tell them that they could have used the leave of absence provision to extend their service to January 31, 1991, the date for eligibility under the enhanced plan. The Sixth Circuit Court of Appeals agreed with the retirees, and IBM chose to settle the case and withdraw its request for the Supreme Court to hear the case.

According to the appeals court, although no final changes to the retirement plan were adopted prior to December 31, 1990, IBM had a fiduciary duty to disclose to the retirees the possibility of the enhanced retirement benefit and their option to use the leave of absence provision. The retirees will receive lump sums ranging from $2,000 to $150,000. The impact of the case for employers is that when an employer is contemplating changes to a retirement plan which would affect the timing of an employee's decision to retire, the employer may have a duty to disclose that to employees who are seeking to retire at a date prior to the potential implementation of the enhanced benefit plan.

AFL-CIO CONSTITUENCIES UNITE TO FURTHER ORGANIZING OBJECTIVES

Six special AFL-CIO constituencies announced their efforts to combine forces to raise issues that are paramount to their members. The constituencies include the Coalition of Labor Union Women, the Coalition of Black Trade Unionists, the Asian Pacific American Labor Alliance, the A. Phillip Randolph Institute, the Labor Council for Latin American Advancement, and Pride at Work (which pursues rights for gay employees). Specifically, the constituencies will unite for the following purposes:

- To assist unions in organizing. They will help recruit and train new organizers, and direct their constituencies to specific unions.
- To push to intensify the fight against employment discrimination. According to their press release, “We will defend affirmative action, support civil rights enforcement, seek rules to protect workers from discrimination based on sexual orientation and gender identity, fight for pay equity and further advance the rights of persons with disabilities.”
- To initiate political action to be sure that women and minorities are accurately counted in the 2000 census.
- To address the needs of first generation immigrants, including “family safety net” benefits, social services and education.

! To focus on retirement security issues to be sure that changes to the Social Security system do not harm minority and women employees.

DID YOU KNOW...

. . .**that on September 14, 1999, OSHA announced it was delaying until January, 2001 the implementation of its new injury and illness record keeping requirements?** The final revisions for the rule should be available by the end of 1999. The reason for the one year delay is to provide employers with a sufficient amount of time to understand and comply with the new rule. Changes will more clearly define what an employer should consider as an illness or injury that is work-related. Additionally, the rules are intended to simplify current record keeping requirements.

. . .that according to a recent report issued by the Employee Benefit Research Institute, fewer workers today are eligible for insurance coverage than ten years ago? Only 75% of all employees today are eligible, compared to 82% in 1988. Approximately 40% of those without insurance do not need it because a spouse had coverage, while the remainder went without health insurance coverage.

. . . that union stewards are considered union employees for Title VII compliance purposes? *Daggitt v. United Food and Commercial Workers Local 304*A (D. Sd. August 20, 1999). The issue arose when steward Patricia Daggitt alleged that she was terminated from two union positions, including that of union steward, based upon gender. The union argued that a steward is not an employee, and therefore that the Local fell below the jurisdictional requirement to be considered an employer under Title VII. The court concluded that although stewards were elected by members and not selected by the union, the union's reimbursement of stewards for their expenses and the direction over the stewards' activities established the requisite employment relationship.

. . .**that on August 26, 1999, the Florida Supreme Court upheld a $31 million punitive damage award to an employee who died from asbestos exposure?** *Owens-Corning Fiberglass Corp. v. Ballard* (August 26, 1999). Although the award was seventeen times larger than the compensatory award, the Florida Supreme Court refused to reduce the award due to the serious nature of the company's behavior. According to the court, for thirty years the company concealed the dangers of asbestos, intentionally and knowingly misrepresented to employees the dangers of asbestos and intentionally contaminated a new asbestos-free product with asbestos.

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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