# EMPLOYMENT LAW BULLETIN

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

***Volume 7, Number 9*** ***October 1999***

## *TO OUR CLIENTS AND FRIENDS:*

On October 6, 1999, the National Labor Relations Board issued an opinion narrowing an employer's right to establish employee participation committees, *Polaroid Corporation v. Scivally*. An employee involvement committee violates the National Labor Relations Act when the committee functions as a labor organization and the employer dominates, interferes with or supports the committee. The Act defines a labor organization as an organization "which exists with the purpose...of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions at work."

In 1993, Polaroid invited all employees to apply for membership to its employee-owners' ownership council. The company selected 30 employees to serve on the council out of 150 applicants, provided the meeting facilities, and paid for any committee-related expenses. The meetings were conducted by a company organizational specialist. At the meetings, company representatives presented information regarding several topics. Then, the employee members of the committee discussed the subjects with the company representatives and were polled by a management representative concerning their views on the topics.

The company argued that the committee was limited to brainstorming and information sharing, which is permitted under the law. However, the NLRB concluded that the committee "functioned on an ongoing basis as a bilateral mechanism in which the group of employees effectively made proposals to management, the management responded to these proposals by acceptance or rejection by word or deed." Examples of the subjects discussed and resolved included health benefits, employee stock ownership, a broad family and medical leave plan, and the company's termination processes. In dissent, NLRB member Peter Hurtgen wrote that "If a group is designed to serve the employer's purpose of obtaining information and ideas upon which to make a management decision, I would conclude that the group is not a labor organization." The case will likely proceed to the Court of Appeals for further review.

One of the key factors in the NLRB decision was the committee vote on management ideas, which the NLRB considered to be negotiations. According to the Board, **it does not violate the National Labor Relations Act for employers to seek employee input about policies or programs. However, the problem with Polaroid's approach was that it proposed policies to the committee for acceptance or rejection based upon a vote by a majority of the employee committee members.**

Employers should not be dissuaded from establishing employee committees. The following are some practical suggestions to help employers develop committees in a manner that would likely survive a challenge under the National Labor Relations Act:

- **Employee participation**. Employee participation on committees should be voluntary, and not based upon employee elections. If more employees volunteer than there are spaces on the committee, select participants on an objective basis, such as order of sign up or length of service.

- **Subject matter**. Establish a committee to focus on a specific workplace issue or subject, rather than to function on a continuing, unlimited basis. For example, if the issue is attendance, the committee's purpose should be to focus on attendance issues. Once the committee's work is completed, the committee should dissolve. If the committee is a continuing one, such as for safety issues, rotate employee participants.

- **Management's role**. The management representative should be the person leading discussions, to explain the issue to the committee members and to receive committee suggestions. Management representatives should vary depending upon the subject matter of the committee.

- **Employee's role**. Seek employee suggestions. Gather employee feedback on a consensus basis, rather than through a formalized voting process. Stress to employees that they are to give their own input and are not viewed by the company as representing the views of other employees.

If an employer's in-house committee violates the National Labor Relations Act, the employer will be required to disband the committee. There is no financial risk to the employer, such as for compensatory or punitive damages. Thus, when weighing the risks and benefits of establishing employee committees, our recommendation usually is in favor of involving employees through committees because of the benefit to employee-employer relations.

## EMPLOYER EXERCISES "REASONABLE CARE" TO AVOID HARASSMENT LIABILITY

The case of *Montero v. A.G.C.O. Corp.* (9th Cir. September 28, 1999) is an example of what "reasonable care" must be exercised in the face of a harassment complaint in order to avoid liability. Montero was the only female employee out of eight employees working at the company's warehouse. Two years after she was hired, Montero complained to the company's human resources director that she had been sexually harassed by three of her male co-workers, one of whom was the warehouse manager. Montero also said that the behavior had stopped three months prior to her complaint.

Upon receipt of the complaint, Montero was placed on administrative leave, with pay, for a one week period, during which the company conducted an investigation. The three men admitted to the behavior, stating that they were "joking around." The warehouse manager was terminated and the other two employees were disciplined. Montero, however, said that she would not return to work because she was under psychiatric care. Four months later Montero resigned. In response to Montero's resignation, the company's human resources director informed Montero that a female warehouse manager had been hired and that the warehouse manager and the company were committed to making sure that the behavior did not occur again. The company told Montero that her job was still available and urged her to reconsider her decision.

The lower court granted summary judgment for the employer and the court of appeals upheld that decision. According to the court, "from the time Plaintiff complained, it took A.G.C.O. only eleven days to complete its investigation and take action

to address Plaintiff's complaint in a decisive and meaningful fashion. A.G.C.O. therefore exercised reasonable care to correct promptly sexually harassing behavior..."

The court noted that although the employee took two years before raising the complaint to the company, once the company became aware of the complaint, it took the company only eleven days to resolve the matter. Furthermore, the company had a clear policy prohibiting sexual harassment and Montero knew the policy, having received a copy of the policy when she was hired and on two other occasions during meetings where the policy was reviewed. Therefore, **although the warehouse manager engaged in sexually harassing behavior, the court ruled that the company was not responsible for that behavior. The company took proper steps to make Montero aware of what she should do in the event harassment occurred and acted promptly and aggressively when it became aware of such behavior.** The combination of the employer's action and the employee's inaction in reporting the alleged harassment dictated a finding of no liability on the party of the employer.

Note that the employer conducted the investigation even though the employee admitted that the behavior had stopped three months earlier, and even though the employee had waited to report the behavior. **Employers should conduct an investigation regardless of when the behavior is reported to have occurred. The fact that there was a delay in reporting the behavior may affect what action the employer takes based upon the outcome of the investigation, but it should not affect the decision to investigate.** Furthermore, in this instance, the delay in reporting the behavior was one of the reasons the plaintiff did not prevail in her case. The plaintiff knew at the time the behavior occurred that it was against company policy. She also knew what she should have done about it at that time. Finally, she unreasonably failed to use available steps to report and avoid further harassment.

## OFCCP FOLLOWING THROUGH ON COMPENSATION PAY PRACTICES REVIEW

In an effort to focus on wage disparities between men and women, in April, 2000, the OFCCP will require government contractors to provide compensation information based upon the following groupings: minority males, non-minority males, minority females, non-minority females. The information will be broken into nine broad job classifications and within each job classification the contractor will be required to submit the compensation and the average employee length of service for each subgroup. It is the OFCCP's objective to conduct compensation surveys of approximately 60% of the 100,000 companies that are covered by the OFCCP through service and supply contracts with the federal government. According to the OFCCP, they believe that approximately 7,000 government contractors are not complying with Executive Order 11246.

This initiative by the OFCCP is designed to end gender based wage discrimination. With $14 million in funding for the project, the OFCCP will be able to target more specifically those employers it believes are not complying with equal pay requirements.

## REASONABLENESS OF EMPLOYEE'S COMMUTE NOT A FACTOR FOR COMPENSATION, RULES COURT

If you thought you had a tough commute to work, consider the situation faced by David Kavanagh, a refrigerator and utility mechanic for Grand Union. Kavanagh lived on Long Island, New York. His service region involved Grand Union stores in Connecticut, New York and New Jersey. He was paid $10.00 per hour and regularly worked a 40

hour week. His initial reporting location changed daily, depending upon where his services were needed. Under the Portal-to-Portal Act, an employer is not responsible for compensating an employee for the employee's commute from home to work and work to home. On a daily basis, Kavanagh started his work day at a different location from the day before. Each work day ended at 4:30 p.m., at a different location than the day before. Although Grand Union paid him for travel from location to location during the course of the day, Kavanagh was not paid for travel between home and his work location.

Kavanagh often left home for work at 4:00 a.m. to arrive at his first reporting location by 8:00 a.m., and did not return home until 8:30 p.m. after leaving his last location at 4:30 p.m.. Kavanagh argued that he should have been paid for all of that travel time. The Second Circuit Court of Appeals called the treatment of Kavanagh "inequitable," but ruled that Grand Union's practice was legally permissible, *Kavanagh v. Grand Union* (September 28, 1999). According to the court, **"The regulations as currently written do not permit a construction that would require Grand Union to compensate Kavanagh for his time spent traveling to the first job of the day and from the last job of the day, regardless of the length of that distance or the benefit to Grand Union of having only one employee cover such a large geographic area."** However, if an employee is "called out" from home after his regular workday ends, then the employee is entitled to the compensation for time spent traveling to and from his call out.

This case is an example of a challenge often facing employers. Although the employer's actions may be legal, employees may perceive the practice as unfair. Although, in the instant case, Grand Union may have won the legal battle, in the eyes of Kavanagh and other Grand Union employees, it most likely lost the war on the issue of fairness.

## OSHA WILL NOT "ROUTINELY" REVIEW EMPLOYERS' SELF AUDITS

On October 6, 1999, the Occupational Safety and Health Administration stated that it usually will not review employers' self audits when it conducts worksite inspections. Prior to this determination, OSHA's position of reviewing employer self audits during the course of an OSHA inspection inhibited employers from conducting those audits out of concern that those documents would be used against them by OSHA. Now, OSHA will review only those portions of self audits that apply to the particular safety or health hazzard being investigated. OSHA will no longer use the self audits to focus on hazzards that the employer has identified.

Additionally, OSHA stated that in circumstances where a self audit is used as a basis for an employer to correct violations that OSHA discovered, OSHA will reduce the penalties issued to the employers. Furthermore, OSHA will not use the self audit in an assessment of whether an employer's violation was willful. Although OSHA claims that there was no evidence supporting the contention that employers stop doing self audits out of fear that the audits would be used against them, OSHA stated that it intended to reduce the circumstances in which it would seek to review and use employer self-audits.

## NLRB ORDERED TO CONDUCT HEARING ON UNION MISREPRESENTATION

In a 19-16 vote, employees selected the Steelworkers as their bargaining representative in the case of *NLRB v. Gormack Custom Manufacturing, Inc.* (6th Cir. September 3, 1999). Prior to the vote, the Steelworkers distributed a list of 31 employees that the Steelworkers claimed intended to vote for the union. It turns out that several of those employees not only did not vote for the Steelworkers, but three of them also signed affidavits stating that they did not vote for the

Steelworkers, and did not authorize the Steelworkers to use their name. The employer objected to the election, claiming that it was illegal for the union to give a false impression of such strong support. Although the NLRB initially refused to hold a hearing on the employer's objections to the election, the court of appeals ordered it to conduct the hearing.

According to the court of appeals, **"Evidentiary hearings have been routinely granted to investigate allegations far less serious than those that were made here...we are satisfied in this case that the Board abused its discretion and that it acted unfairly in denying a hearing in this case."** The court noted that the union misrepresented its support and breached the confidences of those employees who signed authorization cards. Because the election was so close, with the swing of two votes changing the outcome, the court determined that the NLRB abused its discretion by refusing to conduct a hearing on the evidence of union misrepresentation and breach of confidentiality.

## DID YOU KNOW...

. . .**that the Sierra Club and Steelworkers have joined forces to combat what they call corporate greed?** In an October 4, 1999 announcement, the Steelworker's announced that the Sierra Club and the Union will work together to educate the public about how environmental and labor relations issues are connected, such as through the impact of pollution on the workforce and community. According to the Steelworkers, strong environmental controls preserve more jobs than they eliminate and enhance the quality of community life.

**. . .that the EEOC may not file suit upon a charge from a charging party who signed a mandatory arbitration agreement?** *EEOC v. Waffle House, Inc.* (4th Cir. October 6, 1999). According to the court of appeals, where a charging party and the employer agree to arbitrate their differences, the EEOC cannot be compelled to arbitrate those differences. However, the EEOC cannot seek relief in court for the charging party who is subject to an arbitration agreement.

**. . . that a Hispanic employee was recently awarded $550,000 based upon national origin harassment?** *Pavon v. Swift Transportation, Inc.* (9th Cir. September 20, 1999). Pavon was called a number of derogatory names based upon his national origin. When he complained about this to management, management refused to investigate and responded by telling him "Do you know who Martin Luther King was? Remember what happened to him?"

. . .**that a transfer from a boss who causes depression may not be a reasonable accommodation required under the ADA?** In *Kennedy v. Dresser Rand Company* (2nd Cir. September 22, 1999), Kennedy's supervisor was responsible for supervising all plant nurses and safety and health personnel. Kennedy, a nurse, asserted that she was diagnosed with depression caused in large part by her supervisor's behavior toward her. Although the court rejected the employer's argument that reassignment from one supervisor to another cannot be a form of reasonable accommodation, the court noted that in this particular case, it was "virtually impossible" for Kennedy to perform her job without having contact with her supervisor.

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.


| | |
|---|---|
| Kimberly K. Boone | 205/323-9267 |
| Stephen A. Brandon | 205/909-4502 |
| Michael Broom | 256/355-9151 (Decatur) |
| Brent L. Crumpton | 205/323-9268 |
| Richard I. Lehr | 205/323-9260 |
| David J. Middlebrooks | 205/323-9262 |
| Terry Price | 205/323-9261 |
| R. David Proctor | 205/323-9264 |
| Marcia Bull Stadeker | 205/323-9278 |
| Steven M. Stastny | 205/323-9275 |
| Tessa M. Thrasher | 205/226-7124 |

Albert L. Vreeland, II 205/323-9266
Sally Broatch Waudby 205/226-7122



*Birmingham Office:*
2021 Third Avenue North, Suite 300
Post Office Box 370463
Birmingham, Alabama 35237
Telephone (205) 326-3002

*Decatur Office:*
303 Cain Street, N.E., Suite E
Post Office Box 1626
Decatur, Alabama 35602
Telephone (256) 308-2767

THE ALABAMA STATE BAR REQUIRES 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."

4858.wpd