EMPLOYMENT LAW BULLETIN

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

Volume 7, Number 10 ***November 1999***

TO OUR CLIENTS AND FRIENDS:

The Occupational Safety and Health Administration on November 22, 1999, released an ergonomics standard totaling approximately 1000 pages that could potentially affect virtually every United States employer. The proposed standard would require employers primarily in manufacturing and businesses that require manual handling to develop ergonomic standards to prevent musculoskeletal injuries. However, the standard would also extend to other employers if only one musculoskeletal injury were reported. According to OSHA, the standard will prevent 300,000 injuries a year and save employers $9.1 billion. OSHA also stated that it will cost employers a minimum of $4.2 billion to comply. Labor Secretary Herman has promised that the standard will become effective before the end of 2000, unless challenges by business groups result in court action that either invalidates the standard or delays its effective date.

The following questions and answers are intended to provide our readers with a practical overview of the standard:

1. Which employers are covered by the standard?

Employers who have manual operations with jobs that require the physical exertion of lifting and lowering, pushing and pulling, or carrying. Also, all supervisory and non-supervisory employees in the manufacturing of durable and non-durable goods. This includes fabrication, processing and assembly. Examples are employees who work on assembly lines, meat and poultry cutting and packing; machine operators; food preparation assembly jobs; warehousing jobs within manufacturing facilities and maintenance personnel.

2. What is required for compliance under the standard?

If a musculoskeletal disorder is reported or the employer has knowledge that a musculoskeletal hazard exists, then a full program is required. The full program includes a job hazard analysis, training of employees and supervisors, a special musculoskeletal disorder management program, and a continuing program of evaluation and recordkeeping. Employers may also implement a "quick fix" program instead of the full ergonomics one, if the employer works with employees to eliminate the musculoskeletal disorder hazard within 90 days, verifies within 30 days that the action taken has worked, keeps a record of the "quick fix" controls and immediately cares for an injured employee. If there is either another reportable musculoskeletal disorder or the "quick fix" does not work within 36 months, then the full program is required.

3. What benefits does the injured employee receive?

If the employee is on temporary light duty while recovering from the injury, the employee's pay must equal 100% of what he or she earned prior to the injury. Set offs for workers' compensation or disability benefits are permitted. If the individual

is not working, the individual must receive 90% of the employee's net compensation and benefits.

4. **What are the proposed effective dates of the standard?**

The medical management would begin whenever a musculoskeletal disorder is reported. The employee participation in hazard identification and information would have to occur within one year after the published date of the rule. Within two years after the published date of the rule, the employer must conclude a job hazard analysis, implement interim controls and have conducted employee training. By the end of three years after the published date, those employers required to provide a full program must have in place permanent controls, a program evaluation and a method to address particular problem jobs where musculoskeletal disorders occur even after the program's implementation.

OSHA proposed this standard without completing an ergonomic study commissioned and funded by Congress. Legislation was proposed in Congress to prohibit OSHA from issuing the standard until the National Academy of Sciences completed the study. However, OSHA proceeded forward prior to Congressional action.

The proposed standard has the potential to affect virtually every employer. In addition to providing OSHA with our comments regarding the standard, we will continue to provide you with timely information regarding this matter.

WRONGFULLY TERMINATED WHISTLE BLOWERS AWARDED $3 MILLION

An increasingly popular cause of action is "whistle blowing," where employees claim they were terminated in retaliation for speaking out about what they believe to be unethical or illegal business practices of their employer. The recent case of *Paracelsus HealthCare Corporation v. Williard* (Miss. S.Ct., November 4, 1999) is a prime example of how the whistle blower theory works.

Employees Williard and Sumner reported that their hospital administrator forged checks. They were long term employees with what the court characterized as "impeccable work records" and positive employee evaluations. The jury concluded that the only reason supporting the termination was the employees' report of the forgery. The jury awarded $10,000.00 in actual damages to one employee and $35,000.00 to the other, and then awarded each employee $1.5 million in punitive damages. The court upheld the punitive damages award, stating that it was reasonable when compared to the fact that the employer's assets were approximately $800 million.

In upholding the award, the court stated that:

> "The deterrent of conduct such as that by Paracelsus provides employees with the ability to report misconduct about their employers or other employees without fear of repercussion. Paracelsus' action of terminating Williard and Sumner, both shown to be exemplary employees, for reporting the misconduct of the administrator was in fact reprehensible, especially in light of the fact that Williard and Sumner were terminated despite favorable evaluations from the administrator herself."

One of the most rapidly expanding areas of employment claims involves allegations of retaliation, either for speaking up about employer illegal actions such as in this case, or retaliation for speaking out about employment discrimination or harassment issues. Employers need to communicate in writing to employees about retaliation, including a definition of the behavior, the employer's prohibition of retaliation, and the reporting processes employees should take if they

believe they have been retaliated against. Treat retaliation with the same level of concern as harassment and discrimination; the principles to identifying or preventing potential problems are similar for all three areas.

OFCCP TAKES OFF ON BOEING REGARDING PAY DISPARITY

The Boeing Company is the country's second largest government contractor, with approximately $11 billion in government business during 1998. A lengthy OFCCP investigation resulted in the Department of Labor concluding that there were substantial pay disparities based upon race and gender at several Boeing facilities. In a 40 page settlement agreement, Boeing agreed to pay $4.5 million to settle the OFCCP claims. The settlement includes a back pay pool of $2.6 million for women and blacks at seven facilities, $1.3 million in prospective salary changes, and a minimum of $500,000.00 for lower and mid-level executives. The locations affected include corporate headquarters at Seattle and facilities in Philadelphia; Huntsville, Alabama; Long Beach, California; Wichita, Kansas; and Tulsa, Oklahoma.

The Department of Labor characterized the $4.5 million settlement as a floor, not a ceiling. Part of the settlement includes a willingness of Boeing to rectify pay disparities "at all of its facilities in whatever amounts are necessary in order to meet their obligations under the agreement and law." Boeing will conduct a salary comparison based upon race and gender according to education and seniority. The agreement also includes several changes in the Boeing applicant tracking and recordkeeping processes. Note that this settlement is a separate matter from a race discrimination class action lawsuit that settled for $14.2 million in September, 1999.

The OFCCP will continue to increase its focus on employer pay disparities based upon race and gender. It is important for employers to conduct attorney supervised "self audits."

NO TIME LIMIT FOR RETURN TO WORK NOT REASONABLE ACCOMMODATION UNDER ADA

The case of *Taylor v. Pepsi-Cola Company* (10th Cir. November 12, 1999) addressed the question of whether an indefinite medical leave of absence is a necessary form of reasonable accommodation under the ADA. The court concluded that it is not reasonable, "particularly when Taylor had already advised Pepsi that he would never be able to return to his former position and could not advise when and under what conditions he could return to work."

Taylor worked as a delivery driver. At the conclusion of a one year leave of absence due to a back injury, Taylor asked the employer for a continued medical leave in order to recover. Taylor did not identify whether he would recover and if so, potentially by when. Pepsi had a rule that those employees who do not perform any work for the company for one year would be terminated. Taylor was unable to perform any other job for Pepsi, with or without accommodation, by the end of the first year of his medical absence. Taylor argued that reasonable accommodation under the ADA meant that unlimited additional medical leave should be granted. In rejecting Taylor's argument, the court said that it is true that granting an additional accommodation past the one year may be required, but only when an employee provides the employer with an anticipated duration of the impairment and leave. Because Taylor failed to provide that, Pepsi was not required to extend its one year policy as a form of reasonable accommodation.

Employers often ask whether it violates the ADA to limit the amount of medical leave an employee may receive. Although policies such as Pepsi's are permissible, employers would be required as a form of accommodation to extend the leave if the employer knew the duration of the extended leave

and provided the extended leave did not create for the employer an undue hardship.

"SUBJECTIVE INTERPRETATIONS OF AMBIGUOUS CONDUCT" INSUFFICIENT TO JUSTIFY HARASSMENT CLAIM

In the case of *Mendoza v. Borden, Inc.* (11th Cir., November 16, 1999), an employee alleged that she was sexually harassed because her supervisor followed her, stared at her and occasionally made sniffing noises around her. The 11th Circuit Court of Appeals panel that initially heard the case concluded that Mendoza presented enough evidence to present her case to the jury. However, upon rehearing, the full 11th Circuit concluded that the allegations, even if true, were not pervasive or severe enough to constitute harassment and, therefore, should not go to the jury.

Mendoza alleged that her supervisor constantly watched her and followed her. She also said that on two occasions, the supervisor "looked me up and down, and stopped at my groin area and made a sniffing motion." She also alleged that there was one other time when her supervisor was near her and made a sniffing sound, but was not looking at her when he did so. She was terminated because of absenteeism, and filed a sexual harassment suit. After the evidence was presented to the jury, the trial judge granted judgment as a matter of law to the employer.

In concluding that Mendoza failed to state a sexual harassment claim, the full 11th Circuit noted that sexual harassment must be severe and pervasive enough to alter the conditions of employment. The recipient must subjectively perceive the behavior to have this effect, and the recipient's subjective perception must be reasonable. The court said that in assessing whether the behavior alters an individual's terms and conditions of employment, the court should consider the frequency of the behavior, its severity, whether it is threatening or humiliating, and whether it is behavior that unreasonably interferes with an employee's job performance.

After reviewing the behavior alleged in this case, the 11th Circuit stated that the behavior "falls well short of the level of either severe or pervasive conduct sufficient to alter Mendoza's terms or conditions of employment." The court added that the "sniffing" sounds are not threatening or humiliating, and that the staring is "a natural and unavoidable occurrence when people work together in close quarters or when a supervisor keeps an eye on employees." As Judge Edmondson said in concurrence, "My thought is not that the supervisor's conduct in this case could not possibly have sexual connotations. My thought is this one: at least when a sexual content of a supervisor's conduct is not obvious, a plaintiff asserting a claim of sexual discrimination in employment must present some evidence that plaintiff's co-workers, not those of plaintiff's sex, were treated differently and better. Otherwise, Title VII's vital element - discrimination - is right out of the statute." Judge Carnes stated that supervisors should be permitted to look at and observe employees, and sometimes follow them, "without being hauled into court whenever the employee views that behavior to be offensive."

DID YOU KNOW...

. . .**that Peter Vosco, Regional Vice-President of the Laborers' International Union of North America, has been ordered to pay back over $80,000.00 he received from the union as a "consultant?"** A hearing officer on October 14, 1999, found Vosco guilty of eleven out of thirteen charges of federal law violations. According to the administrative law judge in a 70-page opinion, "This case is a classic example of the abusive and corrupt practices in union administration...."

. . .that requiring an employee to tape record a voice sample violated the Federal Polygraph Protection Act Veazey v. Communications & Cable of Chicago, Inc. (7th Cir. October 20, 1999)?

The employer argued that requiring a voice recording did not constitute a "lie detector" under the Polygraph Protection Act. The court stated, however, "We are of the opinion that the application of basic logic necessitates that a tape recorder might very well be considered as an adjunct to a 'lie detector' determination under the EPPA because the results of a tape recording can be used to render a diagnostic opinion regarding the honesty or dishonesty of an individual when evaluated by a voice stress analyzer or similar device." Veazey was required to provide a voice sample because of a threatening message that was left on a fellow employee's voice mail. Veazey was terminated for refusing to provide the voice sample.

. . . that on November 19, 1999, William Hamilton, former Governmental Affairs Director of the Teamsters, was convicted of shifting Teamster political contributions into former President Ron Carey's 1996 re-election fund *United States v. Hamilton* (Jury Verdict, November 19, 1999)? Hamilton faces up to 30 years in jail for his convictions for conspiracy, embezzlement, mail and wire fraud, and perjury. Hamilton was alleged to have diverted to Carey's re-election campaign $885,000.00 of Teamster funds that were allocated for the union's political action contributions.

. . .**that a federal judge has permitted a consumer class action to proceed against American Airlines pilots and their union due to their illegal work stoppage earlier this year** *In Re Allied Pilots, Class Action* (N.D. Tx., November 15, 1999)? The pilots' union was fined $45 million for ignoring the court's return to work order. The class action suit seeks to recover from the pilots and the union damages on behalf of the 300,000 passengers who were inconvenienced due to the union's illegal activity. According to attorneys for the passengers, "They knew that their illegal sick out was severely disrupting the lives of thousands of innocent passengers, and they brazenly ignored the orders of a federal district judge."

. . .that an "English only" work rule cost an employer $55,000.00 although no employee was economically harmed by the requirement *EEOC v. Synchro-Start Products* (N.D. Ill. November 10, 1999)? Under a consent decree, the employer will pay four employees a total of $55,000.00. The EEOC argued that such rules are used as a basis of discrimination toward those who do not speak English. After the case was settled, the EEOC stated that "The notion that the speaking of Polish or Spanish or any other language on the job can be similarly outlawed runs against both our traditions and our laws. English only rules bring national origin bias right into the workplace." The court stated that such rules create "an atmosphere of inferiority, isolation and intimidation." The employer stated that the rule was intended to ensure effective communications within a diverse workforce.

* * * * *

This is an excellent time of the year for employers to communicate a message of appreciation to employees for the efforts they have made during the year, and offering employees the best for continued success together and good health in 2000. We at Lehr Middlebrooks Price & Proctor appreciate the opportunity to work with you and your colleagues, and we wish you a holiday season and new year filled with peace, good health and positive employee relations.

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

6430.wpd