EMPLOYMENT LAW BULLETIN

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TO OUR CLIENTS AND FRIENDS:

The Violence Against Women Act ("VAWA"), passed in 1993, is used on an increasing basis to prosecute claims of workplace sexual harassment. Unlike Title VII and other sources of protection against workplace harassment, the VAWA does not limit the amount of damages that may be awarded to a plaintiff.

According to congressional findings in support of passing VAWA, "Violence is the leading cause of injury to women ages 15 to 44, more common than automobile accidents, muggings, and cancer deaths combined." Furthermore, "three out of four American women will be victims of violent crimes sometime during their life." The statute does not cover random violent behavior unrelated to gender. Rather, the Act requires that first, a crime of violence must be committed and second, .the motivation for that crime must be gender. The most prevalent use of VAWA regarding sexual harassment is in the context of unwelcomed touching.

The recent case of Wells v. Lobb & Company, Inc. (D. Colo. December 1, 1999) is a good example of how the Act works in the employment context. The case was brought by three women who formerly worked at a Hooter's restaurant in Denver. They were awarded by the court a total of $700,000.00 in damages based upon what the court concluded were gender-based crimes of violence. In particular, the court found the following:

* The women were continually subjected to inappropriate sexual behavior, including unwelcome sexual touching by the company president and the manager of the restaurant where they worked.

* Hooter's did not have an appropriate sexual harassment policy.

* Hooter's failed to remedy the harassment once it became known.

* The fact that the president of the company engaged in the behavior made it even more egregious.

According to the court, "Under the circumstances of this case, I find that substantial punitive damages should be imposed" and provide a message to others that such behavior in the workplace will not be tolerated.

Although VAWA was not motivated primarily by workplace violence toward women, the statute has become a source of additional claims to bring against individuals and companies who engage in the most egregious form of sexual harassment. In order to bring a VAWA claim, the plaintiff does not have to file a criminal action, even though the nature of the behavior alleged under VAWA would be criminal in nature.

EMPLOYEE WHO REFUSES TO TAKE MEDICINE NOT DISABLED UNDER ADA, RULES COURT

The case of Tangires v. The Johns Hopkins Hospital (D.Md. January 10, 2000) said "no" to the following question: "If an individual has a disabling condition which could be corrected with medication which the individual refuses to take, is the individual protected under the ADA?" Plaintiff Dimitra Tangires worked for the hospital as an interior designer. She was severely asthmatic and often was sick and felt cold at work. Several times she complained about the hospital's air system, which the hospital attempted to adjust for her benefit without inconveniencing others. She continued to miss a substantial amount of work and was told by the hospital that she would be given a medical layoff if her attendance did not improve. Medical layoffs were given to those employees whose request for a leave of absence could not be granted. Tangires sued, claiming that the refusal to grant a leave of absence was in essence a failure to accommodate her under the ADA.

The hospital argued that Tangires' debilitating condition could have been corrected with medication, which she refused to take. Therefore, asserted the hospital, she should not be considered protected under the ADA. The doctor who treated Tangires testified that medicine would completely control her asthma, but that she refused to follow his instructions and to take the medication. She refused to take the medication because she thought the medication would cause other adverse medical conditions. Her doctors disagreed with this assertion.

In concluding that she was not protected under the ADA, the court stated that **"Plaintiff's asthma was treatable and that during her employment she intentionally failed to follow her physician's recommendations that she take steroid medication...a Plaintiff who does not avail herself of proper**

treatment is not a 'qualified individual' under the ADA."

This case is an extension of the United States Supreme Court's June, 1999 ADA decisions, in which the court ruled that contrary to the EEOC interpretative guidelines, an individual who takes medication which eliminates the effect of a condition that would qualify as a disability is not disabled under the ADA. In this case, the court moved the Supreme Court's decision one step further. The impact of this decision is that not only will the effects of medication determine whether an individual is disabled, but an individual who refuses to take medication that would correct a disabling condition is not considered protected under the ADA. Note, however, that this case is a district court decision which is not binding on other jurisdictions. However, it is still a significant development for employers.

EMPLOYER RESPONSIBLE FOR ITS EMPLOYEES' RACIAL HARASSMENT OF INDEPENDENT CONTRACTOR

Section 1981 of the 1866 Civil Rights Act provides that without regard to race, "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts...and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens..." Part (b) of Section 1981 defines the "make and enforce contract provision" as "the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Section 1981 race discrimination claims do not have a cap on the amount of punitive damages that may be awarded, in contrast to the $300,000.00 cap for punitive damages under Title VII. Thus, often plaintiff attorneys file lawsuits alleging violations of Title VII and Section 1981.

The recent case of Wal-Mart Stores, Inc. v. Danco, Inc., (January 10, 2000) involved the issue of whether Section 1981 applied to an independent contractor. Danco was owned by Benjamin Guiliani, a Mexican American. His company had a contractual relationship with Wal-Mart in Augusta, Maine to clean and maintain the store's parking lot. The contract was agreed to in September, 1994. Guiliani alleged that in October and November of 1994 he was subjected to racial harassment. He said that the words "white supremacy" were spray painted on the parking lot where he unloaded his equipment and not cleaned up for over a month. He alleged that a Wal-Mart employee said that "I don't like your kind" and that I would "rip your head off," and that the same employee drove by Guiliani as he worked in the parking lot and yelled a racial slur at him. Guiliani complained to Wal-Mart, which told Guiliani that it investigated the allegations and could not substantiate them.

In March, 1995 Guiliani's contract was terminated, because Wal-Mart claimed that it was not satisfied with his work. Guiliani sued, claiming that the racial harassment violated his contractual rights under Section 1981. The jury agreed with Guiliani and awarded him $300,000.00, which was upheld by the First Circuit Court of Appeals. The United States Supreme Court on January 10th declined to review the case, which means that the First Circuit's decision stands.

Wal-Mart argued that Section 1981 applies only to an employment relationship, thus a company is not responsible under Section 1981 for the behavior of its employees toward independent contractors. In rejecting Wal-Mart's argument, the First Circuit stated that Section 1981(b) "only speaks in terms of the benefits, privileges, terms, and conditions of the contractual relationship, nowhere mentioning the employment context. In fact, the words 'employment,' 'employer,' or 'employee,' are completely absent from Section 1981."

The lesson of this decision extends beyond hiring an independent business, such as Guiliani's, to perform services. It also extends to "contractor" employees working on the employer's premises, even though those employees are on another employer's payroll. **Employers should adopt as a business practice providing independent contractors and contract employees a copy of the organization's policies and protocols regarding harassment.** Be sure that your organization takes prompt remedial action, where appropriate, to address reported claims of harassment by contractors. When such a claim is reported, consult with the contracting entity regarding how the matter will be investigated and ultimately resolved.

RESOLVING ADA CONFIDENTIALITY WITH NLRA PROTECTED, CONCERTED ACTIVITY

The case of Lockheed Martin Astronautics (NLRB, January 6, 2000) involved the intersection of the National Labor Relations Act right of employees to engage in protected, concerted activity with the ADA responsibility for employers to respect confidentiality of employee medical matters. A case arose when a security guard, Conn, told a fellow security guard, Romano, that she had medical restrictions that prevented her from performing certain key aspects of her job. Romano discussed her medical restrictions with another security guard. Then Romano consulted with his union steward about filing a grievance, because of his concern that Conn would not be able to assist other guards in emergency situations.

When Conn learned that the other guards discussed her medical restrictions, she alleged that their continuing discussion of her restrictions was a form of workplace harassment. Romano responded by telling her that the guests were contemplating filing a grievance. Ultimately, Romano tried to apologize to Conn. However, he and Conn got into an argument. Romano received a written reprimand for discussing repeatedly Conn's medical condition.

Romano filed an unfair labor practice charge, stating that he was reprimanded in violation of his Section VII rights under the National Labor Relations Act. Section VII protects employees who act in concert for mutual aid or protection regarding wages, hours and conditions of employment. Romano argued that his discussion of Conn's injury involved protected, concerted activities. Lockheed Martin stated that under the Americans with Disabilities Act, it was required to intervene when it believed that disability based harassment occurred and, furthermore, it had a duty to help maintain the confidentiality of employee medical information. The administrative law judge who heard the case and the National Labor Relations Board ruled otherwise.

According to the Board, "We recognize that Lockheed Martin has obligations under other statutes, including the ADA, that may in some circumstances justify the prohibition of certain kinds of speech and conduct. However, any such prohibitions must be narrowly tailored in order to avoid unnecessarily depriving employees of their Section VII rights." Furthermore, the Board said that when the company took action, it did not tell the employees that its decision was necessary for ADA compliance.

DILLARD DEMOTION COST $2.5 MILLION IN DAMAGES

Delores Beckwith at the time of her demotion was 64 years old and had worked for Dillard Department Stores for approximately 25 years, the last 19 of which were as an area sales manager. She injured her back at work when she attempted to move a heavy table. Two different doctors selected by Dillard certified that Beckwith was temporarily disabled; she was unable to stand up straight or walk without assistance due to the injury. Her manager pressured Beckwith to return to work before the doctors released her.

Only one month after her injury, Beckwith returned to work in a light duty capacity. It turned out that this light duty job was an entry level job that resulted in a 40% cut in her pay and benefits. Beckwith was told that if she did not accept that job, she could resign. However, because of the humiliation she felt from this demotion, she became depressed, received psychiatric treatment and ultimately resigned. She sued Dillard for intentional infliction of emotional distress and "constructive" discharge. A Nevada jury helped Beckwith "beat the house" with a $2.5 million award in damages and $518,000.00 on top of that in attorney fees. Dillard Department Stores v. Beckwith (Nev. December 13, 1999).

The Nevada Supreme Court upheld the award. First, the Supreme Court said that Dillard violated public policy by requiring Beckwith to return to work before she was released by either of two doctors who were selected by Dillard in the first place. And when Beckwith returned to work only one month after the injury, the Supreme Court said that the company retaliated against her by demoting her and substantially cutting her pay and benefits. The court said that "The public policy of this state

favors economic security for employees injured while in the course of their employment. We conclude that...Dillard's improper request that Beckwith return to work against doctor's orders was a direct violation of that public policy."

DID YOU KNOW . . .

. . .**that by refusing to hear the case of Microsoft Corporation v. Vizcaino (January 10, 2000), the United States Supreme Court let stand a ruling that contractor employees may be eligible to receive Microsoft stock?** The appeal to the Supreme Court arose after the Ninth Circuit ruled that individuals who were classified as independent contractors may actually have met the test for an employment relationship and, therefore, would be entitled to past benefits from Microsoft, including stock options. The outcome of the case is that each contract employee from Microsoft who can meet the common law definition of "employee" will be entitled to pursue a claim for these past benefits. Individuals classified as contract employees who are perform work side by side with regular company employees, under the same direction and supervision, are likely to be considered as a regular employee, rather than a contractor.

. . . that OSHA has issued a $500,000.00 fine against the contractors of Miller Park, the new baseball stadium in Milwaukee, due to three fatalities that occurred on July 19, 1999? The OSHA penalties were issued on January 12th. Three ironworkers were standing in a basket on a crane when the crane lost stability and collapsed. Though OSHA was never able to pinpoint the exact cause of the accident, high winds that day were a significant contributing factor.

. . .that violating the ADA during the interview process cost an employer $157,500.00? EEOC v. Wal-Mart Stores (10th Cir. December 21, 1999) An applicant lost his right arm just below the elbow due to an accident, but had full range of movement with that arm due to a prosthetics. During the interview process, however, the Wal-Mart interviewer asked medical questions before it extended a conditional offer, in violation of the ADA. The interviewer used a prepared set of questions. The question that caused the greatest problem under the ADA was "What current or past medical problems might limit your ability to do a job?" According to the court, "The law is clear that an employer is prohibited from making inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability. The law is equally clear that an employer may only make inquiries into the ability of an applicant to perform job-related functions." The employer never explained to the applicant the nature of the duties and never phrased the question in the context of performing those duties.

. . .that Labor Secretary Herman withdrew within 24 hours a proposal for OSHA to extend safety compliance requirements to employees who commute and work at home? On January 4, Labor Secretary Herman

proposed that OSHA would include employer requirements for the safe working conditions of those individuals who work at home. Twenty-four hours later, after an outcry from the business community and home workers, Secretary Herman withdrew the letter based upon "widespread confusion" over its intent. The impact of Secretary Herman's initial letter would have required that home workers become familiar with the thousands of pages of regulations and requirements to comply with OSHA, and employers to follow up to be sure that the home workers have complied with OSHA.

LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.

Kimberly K. Boone	205/323-9267
Stephen A. Brandon	205/909-4502
Michael Broom	256/355-9151 (Decatur)
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