EMPLOYMENT LAW BULLETIN

THE NEWSLETTER OF LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.

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TO OUR CLIENTS AND FRIENDS:

We are pleased to announce that Lyndel Erwin, formerly District Director for the United States Department of Labor, Wage and Hour Division, has become associated with our firm. Lyndel worked with DOL for 36 years, including service as the District Director of the Department's Fort Lauderdale and Alabama and Mississippi Districts. In this capacity, Lyndel was responsible for DOL enforcement of the Fair Labor Standards Act (wage and hour), child labor, Service Contract Act, Walsh-Healy Act, Davis-Bacon Act and Family and Medical Leave Act.

Lyndel will work with our attorneys in conducting preventative audits for compliance with the above-referenced statutes, and will also assist our attorneys in the defense of investigations by DOL. We are delighted that Lyndel has joined our firm. He will enhance our ability to provide you with the most effective approaches for compliance with the laws enforced by DOL and the defense of DOL investigations.

DO EMPLOYEES HAVE THE RIGHT TO USE EMPLOYER E-MAIL FOR UNION ORGANIZING ACTIVITY?

This question has recently been reviewed by the National Labor Relations Board. The NLRB considered cases where employees used company e-mail to engage in protected, concerted activity, such as criticizing an employer's vacation policy and promoting efforts to unionize. In one case, the NLRB concluded that e-mail was simply a substitute for oral communication. According to the Board, just as employees may talk to each other during the course of the day about unionizing, they may also do so through e-mail.

The employer prohibition of e-mail for union related activities needs to fit within

an employer's overall policy regarding solicitation and distribution. That is, if an employer permits the use of e-mail as an employee "electronic flea market," where e-mail is used for non-business related purposes, then it would violate the National Labor Relations Act for an employer to also forbid the use of e-mail for union related purposes. Where e-mail is restricted to business use, only, an employer has greater authority for prohibiting the use of e-mail for organizing efforts.

In another opinion letter, the NLRB said that even where there is a valid no solicitation, no distribution policy, e-mail is another form of communication which must be permitted if it occurs during non-working hours in non-working places. Our view is that e-mail is company property and if a company forbids e-mail use for non-company business at any time then union solicitation may also be forbidden.

If you want to be sure that there is no e-mail for union organizing purposes, we encourage you to do two things. First, establish that e-mail communications are for business use, only, and are not to be used to send non-work related information, such as jokes or otherwise, to employees. Second, enforce this policy consistently. Only in those situations can an employer be assured of effectively prohibiting the use of e-mail for union organizing efforts. Some employers may decide that the risk of e-mail for union organizing efforts is outweighed by the benefit they consider for employees to use e-mail for personal related reasons. All of these factors need to be evaluated before you make your decision.

EMPLOYEE TERMINATION DURING FMLA ABSENCE DOES NOT VIOLATE LAW

Under the Family and Medical Leave Act, an employee who is on leave is not entitled to any greater job security protection than if the employee had remained at work. This issue was evaluated recently in the case of O'Connor v. PCA Family Health Plan, Inc. (11th Cir. January 19, 2000).

O'Connor was hired in March, 1995 as an account executive. She became pregnant in August that year, and told her employer that she planned to take a leave of absence the following spring. She requested FMLA effective from April 22, 1996 through August 1, 1996. The company changed the dates for the leave to April 18 through July 10. The baby was born on May 2nd.

In June, 1996, the company initiated a reduction in force due to serious financial conditions, resulting in the termination of 190 employees on July 1. All employees who were on leave were excluded from the termination list. O'Connor's name was inadvertently included on the layoff list and she was terminated. After she filed a FMLA suit on July 23rd, the company offered to reinstate her, but she declined.

The court, in rejecting O'Connor's FMLA claim, focused on a Department of Labor FMLA regulation, in which it is stated that **"an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave**...for example, if an employee is laid off during the course of taking FMLA leave, the employer's responsibility to continue FMLA leave, maintain group health plan benefits, and restore the employee cease at the time the employee is laid off..."

Remember that the FMLA does not entitle an employee to greater protection when on leave than if the employee had not been absent at all. However, employers must be consistent when evaluating how to treat an employee who is absent for FMLA reasons compared to other reasons.

EXPLANATION TO EEOC INCONSISTENT WITH POSITION STATEMENT AND LAWSUIT; EMPLOYER IN TROUBLE

It is absolutely essential that the reasons an employer provides for an employee termination or other decision remain consistent throughout the various administrative and judicial review processes. For example, the response to the claim for unemployment compensation needs to be consistent with the response to the EEOC, both of which need to be consistent with an employer's response to a lawsuit. That inconsistency created a problem for the employer in the case of Carlton v. Mystic Transportation, Inc. (2d. Cir. January 28, 2000).

Carlton was a 56 year old marketing manager for Mystic, a heating oil delivery company. Carlton was 49 when he was hired by the company as a salesman. During the next few years, he brought in several new accounts and was promoted to marketing manager. He was terminated, however, in 1995 after a mild winter resulted in significant company losses. After he was terminated, a 38 year old took his place. Carlton alleged that the reason for his termination was due to his age.

In response to the EEOC, the company argued that Carlton was terminated not because of performance, but because of the company's financial circumstances. In applying for summary judgment, the company argued that Carlton was terminated for poor performance and that the company should be entitled to the "same actor inference." Mystic's argument was that because the same person hired and fired Carlton, the inference should be that age was not a factor in either decision. In rejecting that argument, the court stated: "The premise underlying this inference is that if the person who fires an employee is the same person that hired him, one cannot logically impute to that person an invidious attempt to discriminate against that employee. Such an inference is strong

where the time elapsed between the events of hiring and firing is brief. Here, it is not."

The court also raised questions about the company's reasons for Carlton's termination. To the EEOC, the court said that the termination was due to company finances, although Carlton was replaced by a younger person. To the court, the employer argued that the termination was due to poor performance, although the court found that there were no documented performance problems. **According to the court, those inconsistencies "suggest that perhaps some other motive beyond the company's finances motivated Carlton's dismissal." Therefore, the court decided that the case should go to the jury.**

Too often, employers do not scrutinize the theory for terminating an individual until termination reaches the litigation stage. At the outset of the decision, even before an individual files for unemployment benefits, the employer should establish a theme that clearly explains why the termination decision was made. That theme should be consistent throughout all communications to administrative entities and courts, unless information about the individual subsequent to termination is discovered that was not known at the time the decision was made.

TERMINATION TO PRECLUDE AWARD OF HIGHER PENSION BENEFITS VIOLATES ERISA

The case of Pennington v. Western Atlas, Inc. (6th Cir. February 7, 2000) involved the termination of two individuals before they would have received full pension benefits. They were laid off approximately five years before they would have qualified for double the amount of benefits they actually received.

Five years of service does not automatically entitle an employee to an immediate benefit increase. However, these employees won their claim. The company argued that the individuals were terminated for poor performance, but their supervisors testified that their performance was excellent. Additionally, a human resources representative testified that, at the company's request, she asked a systems analyst employee to prepare a spreadsheet of employees by name, date of birth, date of hire, and eligibility date for retirement. Individuals who could cause greater pension expense to the company were identified as "high risk" on the spreadsheet, which of course included the two plaintiffs. One plaintiff was awarded $348,090.00 and the other $135,002.00 as backpay,

benefits and interest for discrimination under ERISA.

In upholding this decision, the Court of Appeals stated that the plaintiffs showed the employer violated Section 510 of ERISA. Under this section, **it is illegal for an employer to terminate an employee because he or she may become eligible for certain benefits.** According to the court, the plaintiffs were able to prove that the company sought "to cut costs associated with benefit payments, that the pattern of terminations was that more people over the age of 50 were terminated than would be expected in a random process."

REASONABLE ACCOMMODATION UNDER THE ADA SUPERCEDES EMPLOYER AAP REQUIREMENTS

Where ADA reasonable accommodation requirements conflict with affirmative action plan obligations, which obligation should the employer follow? According to the Equal Employment Opportunity Commission, reasonable accommodation should prevail. This decision was based upon its January 31, 2000 opinion letter from EEOC Associate Legal Counsel Peggy Mastroianni.

The question assumes that the employer has in place a valid affirmative action plan. A position becomes available in which a qualified disabled candidate as well as an equally qualified minority female can be placed can be placed. There is no other reasonable accommodation available for the ADA candidate.

According to the EEOC, the position must be awarded to the ADA candidate as a form of reasonable accommodation. The EEOC stated that "the existence of a voluntary [affirmative action] plan alone would not constitute an undue hardship within the meaning of the ADA. Therefore, the employer must offer the position to the employee with a disability. This is true regardless of whether the minority female candidate is currently an employee or someone outside of the organization."

The EEOC added that even if the minority female candidate is a better candidate or might be considered better qualified than the ADA candidate, the ADA candidate must receive the position if that individual meets the qualifications for the job. The EEOC was careful to state that this opinion letter is not "official" and does not represent the position of the EEOC. Rather, it was simply intended for guidance in response to this particular issue.

DID YOU KNOW . . .

. . .**that the Department of Labor is working with employers to revise its position that employee stock options must be included for purposes of calculating overtime pay?** The Department of Labor initially viewed wage and hour law as requiring employers to include the value of stock options in overtime compensation formulas. However, due to an outcry from the business community, DOL is reconsidering this position.

. . . that on February 4 OSHA announced that it will target 4200 high hazardous workplaces for random inspections? This will be based upon workplaces with a lost workday illness and injury rate at or above 14 per 100 employees. This action is according to data reported during 1999.

. . .that a male who was prohibited from wearing an earring at work could not claim sex discrimination? Klein Sorge v. Eyeland Corp. (E.D. Pa, January 31, 2000) According to the court, prohibiting a man from wearing an earring was a "minor difference" in grooming policy that did not constitute sex discrimination. The court added that, "an employer has the right to establish and enforce different grooming requirements. Minor differences in personal appearance regulations that reflect customary modes of grooming do not constitute sex discrimination within the meaning of Title VII."

. . .that according to the Bureau of Labor Statistics, 1999 was an all time low for work stoppages? BLS starting keeping work stoppage statistics in 1947. There were only 17 work stoppages during 1999, which covered 73,000 employees and resulted in two million idle workdays. In 1998, there were 34 work stoppages that covered 385,000 employees and resulted in 5.1 million idle days. The previous low for work stoppages was 1997 with 29; the previous high was the early 1950's with over 500.

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