EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

Employers seeking to enforce non-competition agreements need to be sure those agreements are valid under state law, or the employer seeking to enforce the agreement can end up owing the former employee backpay and other damages. This situation occurred in the recent case of *Hogan Management Services, P.C. v. Martino* (Ga. Ct. App. March 3, 2000).

Martino began working for Hogan in 1994 and signed an agreement that included a non-competition/non-solicitation provision within ten miles of any Hogan practice area for a period of 18 months. Martino agreed not to solicit any of Hogan's patients or employees during that same time period. Less than a year after Martino was terminated, he established a practice within the 10-mile radius, in the same county as Hogan. Hogan immediately went to court seeking a temporary restraining order (TRO) to enforce the non-compete agreement. A TRO can be issued without notice to the other party if the party seeking the TRO can show that without the TRO, even minimal, immediate and irreparable injury will occur.

Although a TRO was issued against Martino, at trial the judge concluded that the non-compete agreement was unenforceable. The court said the non-compete language was ambiguous and the no solicitation language was invalid because there was no geographical or time limit.

The court concluded that because the agreement was invalid, Martino was entitled to damages from Hogan resulting from the issuance of the TRO which wrongfully restrained Martino from earning a living.

The enforceability of a non-competition agreement varies from state-to-state. Courts will consider not only the subject matter of the non-compete agreement, but also time and

geographical limits. For example, is it so broad that the individual in essence is excluded from working in the industry? Will its geographic scope preclude the individual from working within a reasonable distance from home? Is it so long that the effect of it is to deprive the individual of the opportunity to earn a living? Although non-competition agreements are not necessarily favored by courts, courts will still enforce non-competition agreements that have been drafted properly and reasonably. In this case, the court refused to enforce an improperly drafted non-competition agreement and required the employer that sought to enforce it to pay backpay to the employee it wrongfully restrained under the agreement. If your organization has or seeks to implement non-competition agreements, those agreements should not "overreach" and should be reviewed to assure that they are in compliance with state law.

LIFTING LIMITATION AND INABILITY TO WORK OVERTIME NOT PROTECTED UNDER ADA, RULE COURTS

Once again, the courts have addressed the issue of whether an inability to lift on a repetitive basis and work overtime qualifies an individual as "disabled" under the ADA. In both cases, the courts said "no."

Sharkey v. Federal Express Corp. (E.D. Pa., February 29, 2000) concerned a courier/driver who was required to lift items that weighed as much as 75 pounds and rearrange or move items weighing up to 150 pounds. Sharkey experienced chest pains at work and applied for disability benefits after his release from the hospital. His physician argued that he could return to work but should not be required to lift anything heavier than 50 pounds. The company told Sharkey that he had 90 days to find another job within the company that was within his lifting limitation. He attempted to qualify for several of those jobs, but for a variety of reasons was unable to do so and was terminated.

The court rejected Sharkey's argument that the lifting restriction was a substantial limitation on the major life activity of working, and, therefore, that he was disabled under the ADA. According to the court, an individual is not restricted if he cannot perform a particular job, such as the job or jobs that involve lifting. Rather, "to be substantially limited in the major life activity of working, one must be precluded from more than one type of job, a specialized job, or a particular job of choice." One would have to be excluded from performing "either a class of jobs or a broad range of jobs in various classes." In this instance, the court said that although Sharkey became comfortable and accustomed to his job as a courier/driver,

"Sharkey's training, knowledge, skills and abilities, despite his physical limitations, qualify him for a broad range of jobs at Federal Express. Therefore, it cannot be said that his ability to work has been substantially limited under the ADA."

In the second case, an employee asked to be excused from overtime because of periodic back problems *(Davis v. Florida Power and Light Co.,* 11th Cir. March 10, 2000). The company argued that the overtime requirement was an essential function of the job. The EEOC, in support of Davis, claimed that overtime could never be considered an essential job function. The court found that, in this industry, overtime "is the tool that gets the work done the same day." The court also said that overtime in this situation was the same as requiring somebody to be at work, which courts have ruled is an essential job function (we are not kidding; there is actually a court case addressing whether attendance is an essential job function).

As a follow-up to a back injury that occurred at work, Davis's physician recommended that he work no more than eight hours a day. The company said that it could accommodate this for a 60 day period, but that overtime was essential to the job and he would be required to work overtime thereafter. The company's assignment of overtime was based on seniority and dictated by the terms of a collective bargaining agreement. The company also offered Davis the opportunity to transfer to another job. He refused the transfer, refused overtime and was terminated. In upholding the employer's action, the court said that overtime was necessary due to the employer's commitment to provide same day service for power outages. The court also held that violating the seniority rights of other employees under a collective bargaining agreement relating to the assignment of overtime was not a reasonable accommodation. The court also emphasized that the employer made it clear to all employees on the employment application that working overtime for the connect and disconnect position Davis held was a job requirement and a condition of employment.

FEDERAL COURT EEO CASE FILINGS REMAIN HIGH

The 1991 Civil Rights Act triggered a substantial increase in federal case filings under fair employment practice laws, an increase to a level that has remained fairly stable. According to the Administrative Office of the United States Courts, prior to the effective date of the 1991 Act, the annual total of equal employment discrimination cases filed in federal courts ranged between 8,000 and 9,000. However, by 1997, the case total reached 24,000. In 1998, it was 23,300 and in 1999, it was 22,400. Also, although the overall number of

employment discrimination cases has declined slightly, the overall percentage of federal civil court filings has increased by 3.3%.

In 1999, there were 261,651 civil cases filed. Employment discrimination cases amounted to 8.6% of all filings. One out of every 11.7 cases filed nationally in federal court is an employment discrimination case.

The circuit courts of appeal are particularly interested in employment discrimination cases compared to others, according to the percentage of appeals cases that result in oral argument before the appellate courts. For example, during 1999, the courts of appeal held oral argument in 6.2% of all civil cases. In comparison, oral argument was held in 26.6% of all EEO cases. There were 2,499 employment discrimination cases pending in U.S. courts of appeal by the end of 1999, compared to 2,603 at the end of 1998.

Note that these figures do not include employment discrimination cases filed under state laws in state courts. Because virtually every state has state laws prohibiting employment discrimination, a number of plaintiffs prefer to file suit in state court where there may be a longer statute of limitations period and no limit on damages.

COURT OVERTURNS $500,000 MALICIOUS PROSECUTION AWARD

Malicious prosecution lawsuits are a problem that can arise when an employer seeks to prosecute employees for theft. In a malicious prosecution case, to be successful, the employee must prove each of the following factors:

- The employer initiated the criminal action toward the employee.
- The outcome of the criminal action is in the employee's favor.
- The employer initiated the action without probable cause and with malice.
- The employee suffered damages as a result of the employer's action.

The case of *Negron-Rivera v. Rivera Claudio* (1st Cir. February 25, 2000) was spurred by an audit where the company believed that employee Negron stole approximately $50,000.00. Negron had initialed several invoices during a 10-month period but the company discovered that the cash deposits during

that period were approximately $50,000.00 short of the invoice total. The company notified the police and asked for an investigation. The company did not tell the police Negron was suspected.

During the course of the investigation, the company responded to questions about Negron's cash and invoice end balance. A criminal complaint was filed accusing Negron of 116 separate instances of theft; a judge heard the complaint and determined that there was enough probable cause to arrest Negron. The charges were later dropped, and Negron followed with the malicious prosecution suit.

In overturning the jury award of $500,000.00 to Negron, the Court of Appeals ruled that Negron could not even establish that the criminal action toward her was initiated by the company. Rather, the evidence showed that the police were responsible for the charges against Negron. Furthermore, the company's role, according to the court, "appears from the record to have been limited to reporting the illegal appropriation to the police, cooperating with the ensuing investigation, and providing testimony."

When an employer believes that an employee or employees may have stolen from the company and believes criminal prosecution may be in order, we recommend that employers report the theft to law enforcement authorities, provide them with all pertinent information, and let the results of the investigation determine the outcome. If an employee is suspended without pay pending the results of the investigation, do not accuse the employee at that time of theft, unless you can clearly prove it, but rather state that the employee is part of a broader investigation that law enforcement authorities are conducting regarding the missing money or material.

DID YOU KNOW . . .

. . .**that the former Government Affairs Director of the Teamsters was sentenced last March 14 to three years in jail for his illegal activity in trying to help former President Ron Carey win reelection in 1996?** *United States v. Hamilton* (S.D. NY, March 14, 2000). Hamilton was convicted of trying to arrange for $885,000.00 to be contributed to Carey's campaign by using the AFL-CIO and political action committees as conduits for the contribution. Hamilton also attempted to use members of the Clinton/Gore 1996 reelection committee to help find contributors to Carey's campaign on a promise that the Teamsters would commit $235,000.00 to the Clinton/Gore campaign.

. . . that hearings began on March 13th concerning the proposed OSHA standard regarding ergonomics? The proposed standard would cover 27 million employees at approximately 1.9 million industry sites. OSHA received over 6,000 comments regarding its proposed standard. During the hearings, OSHA testified that "We've spent ten years studying this issue, talking with stakeholders, analyzing evidence, reviewing data and sifting ideas and options..."

. . .that on March 22nd the United States government agreed to pay $508 million in backpay to 1,100 women discriminated against by the Voice of America and U.S. Information Agency? (*Hartman v. Albright*). This is the highest dollar amount ever paid under a Title VII claim, according to the plaintiff's attorneys. The case arose in 1977 when a woman was told by her male supervisor that she would not be hired for a management position because she was not a man. According to the plaintiff's attorney, "The evidence suggests a 'good old boy' network with deep roots." Class members will receive approximately $450,000.00 each. The plaintiff's attorney fees, which will be paid by the government, will total approximately $12 million.

. . .that on March 24, 2000, a former business agent for Local S25 of the International Association of Machinists was charged with accepting over $30,000.00 in illegal payments from an employer who entered into a bargaining agreement with the union? *United States v. Frizzi* (D. Mass.). Frizzi is alleged to have concealed the payments by using his son's Social Security number. If convicted, Frizzi could face up to five years in jail and a fine of $250,000.00.

. . .that the Wage and Hour Division of the Department of Labor is considering an alternative approach to requiring that employers include the value of stock options and overtime compensation payments? The Wage and Hour Administrator told a House Panel on March 2nd that it would like to participate in a legislative solution "confined to addressing this particular issue." The stock option issue was based upon a DOL opinion letter stating that stock option programs needed to be calculated into an employee's base rate for overtime compensation. The Wage and Hour Administrator told the House that the opinion letter "did not make a general statement on whether all stock option programs do or should affect the regular rate, nor was it intended to do so." The current rule in effect does not require all stock option programs to be calculated as part of the regular rate; rather, it is a case specific analysis depending upon the nature of the stock program and the employee's participation.

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