// EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

Retiree health benefits continue to be a prime concern for employers. Overall, employee retirement funds grew substantially in value during the past several years, notwithstanding the recent stock market plunges. Today, many individuals are retiring at earlier ages. They are healthy and look forward to several years of a more leisurely lifestyle. A strong component of an employee's retirement strategy is the availability of health benefits. **Employers who do not promptly amend and communicate health plan changes for retirees may find themselves stuck with fulfilling a commitment they cannot change, such as lifetime health benefits**, as in the case of *Deboard v. Sunshine Mining and Refining Co.* (10 Cir. April 5, 2000).

Woods Petroleum Company merged with Sunshine Mining and Refining Company in 1985. As part of the merger agreement, Sunshine agreed that it would not terminate or change any of the welfare benefit plans covering Woods' employees for at least 10 years. Shortly after the merger, Woods, which became a wholly owned subsidiary of Sunshine, offered employees an early retirement program and stated that as part of that program, the company's health insurance would be "fully paid for at Woods Petroleum Corporation's expense until the time of your death." Ten years later, in 1995, Sunshine wrote to the retirees who accepted the Woods offer and told them that it would no longer pay for the retiree medical and dental coverage, but the retirees could continue coverage on their own at a monthly cost of $500.00. Retirees sued, claiming that Sunshine's action violated their ERISA rights.

In ruling that the Woods' lifetime benefit plan commitment could not be changed by Sunshine, the court stated that the Woods retirement program "created a new ERISA plan, separate from the employee welfare plan already in existence at Woods." Furthermore, "the language of the letters [offering the benefit] clearly indicates an attempt on the part of Woods to provide plaintiffs with lifetime health insurance benefits." The summary plan description covering the health benefits in 1995 did not include any comments regarding lifetime benefits for retirees. When Sunshine stopped paying for the benefits, it relied on the 10 year window under the merger agreement, not the summary plan description. The court ruled that because the commitment to pay and provide for lifetime health benefits was an ERISA plan, the terms of that plan were controlling, not the merger agreement or summary plan description for overall benefits that was silent on the issue of retiree benefits.

Based upon projected life expectancy of approximately 80 years, providing paid health insurance benefits for life can be an expensive proposition. Be sure your plan documents thoroughly and properly address the issue of retiree health benefits.

OFCCP TO ISSUE NEW AFFIRMATIVE ACTION REGULATIONS

The Labor Department announced on April 7, 2000 that in May it will issue new regulations intended to "get to the heart of affirmative action," according to Shirley Wilcher, Chair of the DOL office of Federal Contract Compliance Programs. The new regulations will ease paperwork burdens, such as streamlining the workforce analysis, which requires employers to list all employees on a departmental basis based upon race and gender, and ranked according to salary. Wilcher also said that rather than using the eight factor analysis currently required to compare the employer's racial and gender workforce composition to its geographical area, OFCCP will simplify it to use only two factors.

Wilcher also commented on the equal opportunity survey, which follows letters that OFCCP sent to 7,000 contractors last month. The survey is mandatory, and requires contractors to provide race, gender and salary information with every job category. The first 7,000 employers to receive the survey have been identified by OFCCP as those that potentially are not complying with affirmative action requirements.

EMPLOYEE PROPERLY TERMINATED FOR FAILURE TO RETURN FMLA CERTIFICATION WITHIN 15 DAYS

The Family and Medical Leave Act requires an employee to provide certification of a serious health condition within 15 days if requested by the employer. According to the case of *Rager v. Dade Behring, Inc.* (7^{th} Cir., April 10, 2000), an employee who fails to provide certification within the 15 days may be terminated.

Rager told her supervisor on December 15, 1997 that she was scheduled to have surgery a week later. Three days after notifying the supervisor, Rager talked again to the supervisor and to a representative of the human resources department. They reviewed with Rager company policies regarding sick leave and short term disability. They gave her two forms, one to complete for short term disability and the other for a family and medical leave absence. She was not given a form specifically identified as a Certification of Serious Health Condition. She was told that she needed to provide supporting medical documentation with either form that she completed.

Rager submitted the completed Family and Medical Leave request form on December 20th, but with no medical substantiation. She had the surgery on December 22nd and was told to spend four weeks thereafter convalescing. On December 23rd, the company sent Rager a certified letter informing her that she had to provide medical substantiation in support of her Family and Medical Leave Act request by January 12, 1998, or her absences up to that date would be unexcused and she would be terminated. The company sent a form to Rager on December 29, 1997 for Certification of a Serious Health Condition, and then on December 31, 1997 the company explained in writing once again to Rager that if she did not provide medical substantiation by January 12, 1998 she would be fired. She did not provide a substantiation and was terminated.

Rager argued that the 15 day period for providing medical substantiation of her serious health condition should have begun on December 31st, when the employer provided her with the Serious Health Condition Medical Certification form. The company argued that the time period began on December 19th, when Rager first requested a medical leave of absence that would be covered under the Family and Medical Leave Act. The court ruled that neither date applied, but rather that the effective date was December 23rd, when the company communicated in writing to Rager all of the information she needed for her absence to be protected under the Family and Medical Leave Act. The court also stated: **"Remember that the Act does not require the employer to request medical documentation on a particular form. All that is required is that the employee be informed in writing that he or she has 15 days in which to submit proof of a serious health condition, and of the consequences if it is not submitted within the deadline."** Because Rager gave "no reason why she could not have submitted the required medical documentation by January 12th, or for that matter on the day of her surgery, December 22nd, when the surgeon told her she couldn't return to work for four weeks," the employer properly terminated her for failing to comply with its request.

ARRIVING TO WORK ON TIME AN ESSENTIAL JOB FUNCTION; ADA DOES NOT PROTECT TARDY EMPLOYEE FROM TERMINATION

One would think that arriving to work is an essential job function and that the failure to do so would justify termination. The law does not always follow logic, but fortunately it did in the case of *Earl v. Mervyns, Inc.* (11th Cir. March 30, 2000). Mervyns is a multi-state retailer. It hired Earl as an area coordinator for one of its stores in Florida. In this position, Earl was responsible for making sure that her department was fully prepared and ready for business at the time the store opened. According to the court, Earl's tasks "by their very nature must be performed daily at a specific time."

Earl was warned by Mervyns about her tardiness. She provided medical substantiation that her tardiness was due to an obsessive-compulsive disorder. She was tardy 33 times between January and May 1995. She was warned that continued tardiness could result in further discipline including termination. In September, she was placed on final warning. Mervyns offered to accommodate Earl by permitting her to clock in 15 minutes earlier than scheduled, offering to pay her overtime. Earl rejected that, and instead requested that Mervyns permit her to clock in

whenever she got to work, and make up the amount of time that she was tardy at the end of her shift. Mervyns denied that request, and offered to place her in a different position on a different shift, which she declined. She continued to be late and was terminated. She filed her ADA and FMLA lawsuit in a timely fashion, but was the prompt recipient of the court's granting the employer's summary judgment request.

In rejecting Earl's claim for accommodation by permitting her to clock in whenever she arrived at work, the court said that "An individual is qualified [under the ADA] if she, with or without reasonable accommodation, can perform the essential functions and job requirements of the position the individual holds. An accommodation is reasonable, and thus required under the ADA, only if it allows the employee to perform the essential functions of the job." The court observed that if Earl reported to work late, her department would not be ready for business when Mervyns opened. Therefore, the court stated that punctuality was an essential job function. The court also noted that "the burden of identifying an accommodation that would allow a qualified employee to perform the essential functions of her job rests with that employee," not the employer.

BOSS WHO TERMINATES LOVER CREATES EMOTIONAL HURT BUT NO LEGAL HARM

Although the law does not forbid a boss from becoming romantically involved with a subordinate, an employer should prohibit such conduct to avoid the potential for the situation that arose in the case of *Kahn v. Objective Solutions International* (D. Ct. S. D. NY, March 13, 2000).

Kahn was an outstanding employee who received stellar performance reviews. She became involved in a consensual sexual relationship with the president of the company, and fell in love with him. Stating that his family "disapproved of the affair," the president told Kahn he was terminating his relationship with her and also terminating her employment. He told Kahn that the only one who could change this decision was his wife, and he suggested that if she wanted to keep her job she should call his wife at his wife's therapist's office. Kahn called the wife, who stunned Kahn by telling Kahn that she would not get her job back. Kahn then sued, claiming sexual harassment and sex discrimination.

The court found that Kahn's sexual relationship with the president of the company was consensual. Accordingly, "participation in a consensual office affair does not constitute actionable gender discrimination when the termination of the affair results in discharge." The court also concluded that Kahn was not coerced, nor was she the recipient of unwelcomed sexual harassment. Thus, the termination of her employment and the termination of her affair, "no matter how unpleasant," was neither sexual harassment nor sex discrimination. The court also added that the suggestion that Kahn call the president's wife to ask for her job back may have been degrading and humiliating, but it was not legally actionable.

The president of the company in this case used up more than the nine lives he may have been allotted. He had the affair, terminated the affair, terminated the employee, kept his wife, and won the lawsuit. Of course, he also kept his job since it was his company. Employers have the right to forbid officers, directors, managers or supervisors from becoming involved with subordinates, and to terminate them if they do.

DID YOU KNOW . . .

. . .that the Equal Employment Opportunity Commission will focus litigation efforts on ADA violations among the contingent workforce? According to a statement issued by the EEOC on April 14, 2000, "We're now at a point where Manpower has more employees than General Motors. This reality is the workforce of the future." The EEOC is in the process of developing guidelines concerning litigation issues on behalf of contingent employees, particularly regarding their rights under the ADA.

. . . that the Teamsters on April 17th filed a $9 million suit against former President Ron Carey and other union officials? The suit alleges a violation of the Racketeer Influenced and Corrupt Organizations Act, claiming that Carey and others defrauded the Teamsters by making Teamster political contributions in exchange for similar contributions to Carey's reelection campaign. The Teamsters allege that $885,000 was stolen by Carey and others, and that it cost the Teamsters $2.2 million to conduct a rerun election for president due to Carey's actions. Under RICO, damages may be tripled, which is why the Teamsters seek $9 million. Carey's assets will be skin and bones by the time the Teamsters get to him; in our view the Teamster litigation is simply an effort to show during organizing campaigns that the Teamsters respond aggressively to union corruption.

. . .that according to a survey released on April 5, 2000, less than half of all American employees feel a sense of loyalty to their employer? The survey was conducted by the Hudson Institute and involved 3,000 employees representing several sectors of the American economy. According to the survey, one out of three employees plans to leave the employer within the next three years and four out of ten would like to leave their employer but believe they have no place to go. According to the survey, the smaller the employer, the greater the employee attachment. The survey also found that union represented employees feel less loyal to their employers than non-union employees. The survey also included questions about integrity. Less than half of all employees believe that their company's leaders have high integrity.

. . .that it is not a violation of the ADA for benefit plans to provide lesser coverage for mental and emotional disabilities compared to physical disabilities? In *EEOC v. Staten Island Savings Bank* (2d. Cir. March 23, 2000) the court said, "The ADA, unclear on its face, does not specifically condemn the historic and nearly universal practice inherent in the insurance industry of providing different benefits for different disabilities." Several other circuit courts have reached the same conclusion. In this case, disabilities for mental or emotional conditions resulted in payments for up to two years, compared to payments for physical disabilities until the employee was eligible to receive Social Security.

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