EMPLOYMENT LAW BULLETIN

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TO OUR CLIENTS AND FRIENDS:

The most recent decision concerning employer-employee committees ruled that because the committees involved collective bargaining, the committees had to be disbanded. *E.F.C.O. Corp. v. NLRB* (4th Cir., May 17, 2000).

The company established four committees to involve employees in daily operations and decision making. The committees were the Employee Safety Committee, the Employee Benefits Committee, the Employee Policy Review Committee and the Employee Suggestion Screening Committee. The Carpenters and Joiners Union of America filed an unfair labor practice charge, claiming that the committees were unlawful employer created labor organizations. The administrative law judge agreed, and ordered all but the Suggestion Committee to disband.

The National Labor Relations Act defines a labor organization as any "organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose . . . of dealing with employers concerning . . . wages, rates of pay, hours of employment, or conditions of work." The evidence in *E.F.C.O.* indicated that the employee committee members presented proposals to the company and that the company responded with counter proposals. The manner in which the company was "dealing with" the employee representatives of the committee was characterized as a form of labor negotiations and, therefore, violated the Act. The court also ruled that the employer violated the Act because the committee functioned as a "labor organization that is the creation of the employer, whose structure and function are essentially determined by the employer and whose continued existence depends on the fiat of the employer . . ."

Note that the remedy for the violation required that the company dissolve the

committees. Employer committees actually create a dilemma for unions, because if the committees are successful and a determination is made that the committees are employer dominated, and/or functioning as a labor organization, then the employees may blame the union if the committees are disbanded due to the efforts of the union.

Employee involvement is an important ingredient to an effective employee relations strategy. The following are suggestions for developing committees which we believe will reduce the risk that such committees could be found to violate the National Labor Relations Act:

1. Employee participants should be on a voluntary basis, not selected by their peers.

2. Use focus groups to address single issues, such as reducing scrap, and once the focus group has completed its work, disband the group.

3. With the use of focus groups, is it necessary to have permanent standing committees other than for safety and quality? If so, limit the committee function to the subject area; do not permit the committee meetings to stray into areas that could include wages and benefits.

4. Treat employee input as suggestions, which are refined through the committee's discussion work. Once the dialogue has exhausted the subject matter, then the company should make a decision and communicate it to the committee and work force.

5. Communicate to the workforce the results of each committee meeting; do not expect communication to the workforce to be the responsibility of the employee committee members.

U. S. SUPREME COURT CLARIFIES STANDARD NECESSARY TO PROVE AGE DISCRIMINATION

The question before the United Supreme Court in the case of *Reeves v. Sanderson Plumbing Products, Inc.*, (June 12, 2000) was whether discriminatory intent can be inferred when there is no direct proof. In discharge cases, proof of an employer's intent to discriminate based upon age is fundamental to the claim. The question the Supreme Court considered is what facts are sufficient to prove that an employer intended to discriminate.

The case arose when Reeves was fired at age 57 after 40 years of service with the company. His replacement was in his 30s. The company asserted that it terminated Reeves because he maintained inaccurate employee time records and failed to discipline employees.

Reeves established a prima facie case of age discrimination. That is, he showed that he was in the protected age group, he suffered an adverse employment action and he was replaced by someone younger. The employer fulfilled its burden by articulating a non-age based reason for the discharge: Reeves' failure to keep accurate records and discipline employees. Reeves was then able to prove that the reasons the employer stated for his termination were false. The question the Court decided was whether the fact that an employer's offered reason is untrue is enough evidence to conclude that the employer intentionally discriminated against Reeves because of his age or whether a plaintiff is required to offer additional evidence that age was the reason he was terminated. In ruling for Reeves, Justice Sandra Day O'Connor stated that "when a plaintiff presents a prima facie case of age discrimination and can prove that the employer's business reason is untrue, that may permit the trier of fact [jury] to conclude that the employer unlawfully discriminated." Justice O'Connor added if the employer's business reason is untrue, that does not mean that it will automatically prove age discrimination. Rather, other factors to evaluate "include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case . . ."

An important lesson to employers from this case is to be sure that a theme or reason articulated early for an individual's discharge is one that the employer can maintain if the matter results in litigation and trial. **Thus, consistent employer communications about a termination in response to a claim for unemployment compensation, to the EEOC, internally or otherwise may become critical to prove whether the employer was truthful regarding its reasons for the discharge.** Should the evidence show that the employer's business reason is untrue, then a jury may infer that the employer's real reason was the illegal one.

FAIR LABOR STANDARDS ACT TIPS
Who are employees?

The Fair Labor Standards Act defines employ as "suffer or permit to work" and the courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept. **Mere knowledge, by an employer, of work done for him by another is sufficient to create the employment relationship under the FLSA**. Many employers attempt to treat all persons other than full time employees as independent contractors. However, to do so, can be very costly in many instances.

While the U.S. Supreme Court has indicated there is no single rule or test for determining whether the individual is an independent contractor or an employee it has listed several factors that must be considered. No one factor is seen as controlling but one must consider all of the circumstances.

- The extent to which the services rendered is an integral part of the principal's business.
- The amount of the alleged contractor's investment in facilities and equipment.
- The alleged contractor's opportunities for profit and loss.
- The nature and degree of control by the principal.
- The amount of initiative, judgment or foresight in open market competition with others.
- The permanency of the relationship.

Further the Court has said that the time or mode of pay does not control the employees' status.

There are several areas that cause employers problems:

- The use of so-called independent contractors in the construction industry.
- Franchise arrangements, depending on the level of control the franchisor has over the franchisee.
- Volunteers - A person may not volunteer his/her services to the employer to perform the same type of service performed by an employee of the firm.
- Trainees or students.
- People who perform work at their home.

In order to limit his liability an employer should look very closely at individuals that he/she considers to be independent contractors to make sure that he/she is not creating a potential liability for the firm.

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ADA GOOD NEWS/BAD NEWS FOR EMPLOYERS: WIN RATE UP; COURT REJECTS "DIRECT THREAT" DEFENSE

According to the American Bar Association, the employer win rate in ADA cases filed in federal court was 95.7% in 1999. The employee success rate has declined each year for the past three years, from 8.4% in 1997 to 5.6% in 1998 to 4.3% in 1999. In ADA charges filed with the Equal Employment Opportunity Commission, ADA charging parties prevailed less than 15% of the time in 1998 and 1999; between 1992 and 1997 they prevailed only 14% of the time.

The ADA survey is based upon reported decisions at the Federal District Court level. Throughout the United States during 1999, out of 434 federal ADA cases, the employer won 291 either at trial or by summary judgment, employees won 13 and there was no resolution in 130 cases, where the merits of the case have yet to be decided. The survey does not cover all ADA cases, such as those that were filed in state court. However, it is a telling overall survey of employer/employee success rate.

Interestingly, out of 291 employer wins, only 34 were actually based on the merits of the case. According to the ABA, "this suggest that the procedural and technical requirements contained in the ADA, as interpreted by the courts, create difficult obstacles for plaintiffs to overcome. These include satisfying the requirements that the plaintiff meet the ADA's restrictive definition of disability -- a physical or mental impairment that substantially limits a major life activity -- and still be qualified to meet essential job functions with or without reasonable accommodation."

Less encouraging news for employers was delivered by the Ninth Circuit Court of Appeals in the case of *Echazabal v. Chevron USA, Inc.*, (May 23, 2000). **The court ruled that an employer may not take adverse action against an employee whose disability poses a direct threat to that employee's own safety or health.** The case involved a refinery worker with Hepatitis C. Echazabal applied for a job with Chevron to work in a coker unit where he had been working as an employee of a maintenance contractor. A medical examination indicated that Echazabal's liver might be damaged due to his exposure to the chemicals in the coker area. On that basis, Chevron refused to hire him. None of the doctors told Echazabal that he should not work in that area, but the company still refused to hire him and in fact told the contractor to remove him from that unit.

Under the ADA, an employer may screen out an otherwise qualified applicant or employee if that individual poses "a direct threat to the health or safety of other individuals in the workplace." In concluding that an individual cannot be disqualified because of the risks to himself, the court stated that "on its face, the provision does not include direct threats to the health or safety of the disabled individual himself." The court explained that the term "direct threat" under the ADA is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." Ironically, the EEOC in its interpretive guidelines of the ADA concludes that "a direct threat" includes an individual who may present a risk of harm to himself. The court ordered the district court, which had granted summary judgment for Chevron, to reconsider the claims.

UNION WIN RATES DOWN IN 1999

A recent Bureau of National Affairs study of NLR-conducted elections for 1999 shows a decline in union successes in several areas:

- The number of elections in 1999 declined by 7.8% from 1998 (2,976 from 3,229).
- The number of eligible voters in 1999 dropped by 3.3%, (237,325 in 1998 to 229,482 in 1999).
- The number of employees and bargaining units that voted for union representation declined by 9.8% from 105,624 in 1998 to 95,238 in 1999.
- Although there were more elections in units of fewer than 50 employees in 1999 than 1998 (2,120 compared to 2,076), the union win rate in 1999 dropped to 49.4% from 55.9%.

The overall union win rate in 1999 was virtually the same as 1998, 51.3% compared to 51.2%. In elections involving units of 500 or more employees, unions won half in 1998 (32 of 64), but only approximately 36% in 1999 (24 of 62). Unions in 1999 won 39.3% of all elections held in units of 100 to 499 employees, compared to 39.6% in 1998. The Teamsters had the single largest number of elections, 857, and won 40.6% of those. In 1998, the Teamsters won 43.8% of 970 elections.

The industries where unions had their lowest success rates were manufacturing and wholesale; the highest success rates were in health care services, communications, construction, retail and transportation.

DID YOU KNOW . . .

. . . that an employer owed over $446,000 in a sexual harassment case because it failed to follow its own proper procedures? *Ogden v. Wax Works, Inc.* (8th Cir. June 6, 2000). Ogden was a store manager who often complained to the company that her supervisors asked her for dates and sexual favors. The company conducted an investigation, but it focused on the store manager and not those she alleged behaved inappropriately toward her. According to the court in upholding the jury verdict, 'There is substantial evidence indicating that Wax Works neither conducted the "thorough investigation' nor took the 'appropriate action' promised by its sexual harassment policy, belying its claim to have exercised reasonable care to 'prevent and correct promptly sexually harassing behavior.'"

. . . that the Teamsters have recommended that union charges be brought against a Michigan union official who was a mentor to current Teamster president James P. Hoffa? According to the Teamster report on June 19, 2000, Local 337 president Larry Brennan and fellow officers increased their pay and gave themselves Christmas bonuses to help fund their re-election campaign. This local played a critical role in discovering the embezzlement of funds by former Teamster president Ron Carey, which of course resulted in Carey's downfall and cleared the way for James P. Hoffa to become elected as president of the Teamsters.

. . . that an employer improperly terminated an employee who left work to observe his Sabbath? *Franks v. National Line and Stone Company* (Ohio Ct. App. June 14, 2000). Franks was a Seventh Day Adventist who worked as an equipment operator for the employer. He walked off the job before his Friday evening shift ended, because his Sabbath was about to begin. The company terminated Franks for allegedly violating the company's tardiness policy. Franks was able to show that the company had not enforced this policy until he left the job to observe his Sabbath. The court also determined that the company made no effort to reasonably accommodate Frank's observance of his Sabbath. Frank's was a probationary employee who could have been moved to another shift were there also probationary employees, and that move would have allowed Franks to observe his Sabbath.

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