EMPLOYMENT LAW BULLETIN

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TO OUR CLIENTS AND FRIENDS:

The United States Supreme Court on April 16 announced that it would hear arguments in two cases involving Americans with Disabilities Act issues. The first case, *U.S. Airways, Inc. v. Barnett*, raised the issue of whether as a form of reasonable accommodation an employer is required to transfer the ADA-protected employee to a job which otherwise would be awarded to a more senior employee. The Supreme Court will also address whether the inability to perform certain tasks due to carpal tunnel syndrome and tendonitis qualifies the individual as disabled according to the ADA. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.

Barnett was employed as a cargo handler for U.S. Airways when he injured his back. After returning from a disability leave, he was limited from engaging in jobs that involved heavy lifting and excessive twisting, pulling, pushing and bending as well as standing or sitting for extended periods of time. He transferred to a job in the mail room. He then learned that more senior employees who also desired that mail room job would bump him out of that job, and there were no other jobs available within his restrictions. Barnett asked to remain in the mail room but the company denied that request. The Ninth Circuit Court of Appeals ruled in Barnett's favor, stating that a seniority system does not "per se" bar reassignment of Barnett, and that it is the employer's burden to show that a reassignment that violated a seniority based policy was an undue hardship to the company. The Ninth Circuit's decision conflicts with the Fourth Circuit, which stated that it was per se unreasonable to require an employer, as a form of reasonable accommodation, to assign a less senior employee to a job that under the employer's seniority system, should be awarded to a more senior employee.

In the *Williams* case, the Sixth Circuit Court of Appeals ruled that although she was disabled under the ADA, she was completely restricted from working and thus was not a qualified person with a disability. **The issue the Supreme Court will consider is whether a limitation on performing manual tasks means that an individual is overall disabled under the ADA.** Toyota argues that Williams has a partial limitation, because she is able to perform many manual tasks, both personal and work related, but simply cannot perform the specific manual tasks of her job.

Both cases are important for employers in the area of defining a disability and the employer's extent of the duty to reasonably accommodate. We will monitor the progress of these cases and inform you of their outcome and implications for employers.

TIPS ON HOW TO RESPOND TO THE EEOC'S REQUEST FOR A POSITION STATEMENT

A careful but comprehensive response to the EEOC's request for a position statement provides an employer with its first opportunity to undermine the allegations of the charging party as set forth in the charge. It is also a prime opportunity to establish the employer's credibility with respect to how it treats it employees and carries out its personnel policies and procedures. For all of the foregoing reasons that opportunity should not be squandered.

Some Things To Do With Respect To Position Statements

1. **If necessary, request an extension of time in which to respond**. In most instances an employer will need some additional time to interview witnesses, gather factual data concerning the allegations and consult with legal counsel. It is always prudent to request an additional 15 to 20 "working days" to gather this necessary information. The Commission will usually grant a reasonable extension of time.

2. **Carefully analyze the charge to determine its validity.** The charge should contain a clear statement of the alleged violation including relevant dates on which the violation occurred. The alleged violation must be within 180 days (six months) of the date the charge was filed. Depending on the validity of the charge, your statement of position may be that the Commission does not have jurisdiction and that the charge should be dismissed. For example, a charging party may allege an ADA violation, yet not identify a disability.

3. **Provide sufficient information to defeat the charge.** Provide a comprehensive response to each allegation. Include as many objective facts as possible. If the information is not presently available, indicate that your response will supplemented with the additional information when it becomes available or within a specific period of time. For example, if the information in question must be obtained from the "Home Office" in another city, indicate that it will be sent to the EEOC within the next 30 days. The position statement gives the employer its first opportunity to undermine the charging party's allegations. This opportunity should not be wasted.

4. **When possible, frame the response in keeping with the burden of proof for the issue in question.** For example, in a typical hiring case the elements of proof would generally be that: (a) the charging party is a member of a protected class -- minority or female; (b) the charging party was qualified, (c) notwithstanding the charging party's qualifications, the employer continued to look for other applicants, and (d) the employer hired an applicant outside of the protected class. In response, the employer should include objective facts proving that while the charging party was a member of a protected class, he or she was unqualified, or that the applicant who was hired was in fact more qualified for the position at issue. Legal counsel may be needed to frame the response in the same format as the elements of proof depending on the issue in question.

5. **Include supporting documentary evidence whenever possible.** Although some of the same information may be needed to respond to a Request For Information, the assertions made in the Position Statement should be supported by documentary evidence whenever possible. This enhances the comprehensiveness of the response and improves the possibility that no further

information will be needed by the Commission. Moreover, it presents the employer's case in a strong light and shifts the burden of going forward to the Charging Party.

Some Things To Avoid In Drafting A Position Statement

1. **Don't neglect to send in a Position Statement.** While the language in Section 1601.15(a) of the Commission's Procedural Regulations suggests that the provision of a "statement of position" is optional, it would be a serious mistake to take the Commission's request as such. The Commission, under its "**Priority Charge Handling Procedures,"** will categorize the charge largely on the basis of a Respondent's Position Statement. **A failure to cooperate by sending a response sends the wrong signal to the EEOC and will likely result in a burdensome Request For Information, or force the Commission to make an adverse inference based upon the only evidence available.**

2. **Do not make a general denial without supplying supporting evidence.** Unless it is supported by some admissible evidence, a general denial will be looked upon as merely a self-serving statement.

3. **Do not try to evade or cover up questionable but non-discriminatory actions by managers or supervisors**. In the absence of any discriminatory animus, subjective decisions by an employer or his/her agents are not tantamount to unlawful discrimination under Title VII. Likewise, an employer's mistake in judgment is not necessarily a violation if there was no discriminatory intent. **Hence, a forthright admission of a subjective decision or mistake in judgment is not an admission that any federal employment law was violated.** Commission investigators usually take a dim view of the employer's credibility if an attempt is made to ignore or cover up the mistakes of a manager or supervisor.

Because of limitations in space, our discussion in this newsletter has focused on the do's and don't's of providing a "Position Statement." The matter of responding to the EEOC's "Request for Information" will be discussed in a later issue.

This article was prepared by Jerome C. Rose, EEO consultant for the law firm of Lehr Middlebrooks Price & Proctor, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the EEOC. As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the states of Alabama and Mississippi.

WAGE AND HOUR TIP: SUMMER EMPLOYMENT OF MINORS?

As we approach the summer, many employers will be asked by a current employee to hire his or her child or to hire other minors. To do so will often help employee morale. However, employers must make sure the hiring of a minor does not run afoul of either state or federal Child Labor Laws. Illegal employment of minors can result in the U. S. Department of Labor assessing penalties of up to $10,000 per minor.

The child labor laws are designed to protect minors by restricting the types of jobs and the number of hours they may work. To make it easier on employers, several states have amended their laws

to conform very closely to the federal statute.

Prohibited jobs

There are 17 non-farm occupations determined by the Secretary of Labor to be hazardous to below the age of 18. Generally, they may not work at jobs that involve:

* Manufacturing or storing explosives
* Driving a motor vehicle and being an outside helper on a motor vehicle
* Coal mining
* Logging and saw milling
* Power-driven wood-working machines
* Exposure to radioactive substances and to ionizing radiation(s)
* Power-driven hoisting equipment
* Power-driven metal-forming, punching, and shearing machines
* Mining, other than coal mining
* Meat packing or processing (including power-driven meat slicing machines)
* Power-driven bakery machines
* Power-driven paper-products machines
* Manufacturing brick, tile, and related products
* Power-driven circular saws, band saws, and guillotine shears
* Wrecking, demolition, and ship-breaking operations
* Roofing operations
* Excavation operations

Hours limitations

There are no limitations on the hours, under federal law, for youths aged 16 and 17. However, states often limit the hours. For example, the state of Alabama prohibits minors under 18 from working past 10:00 p.m. on a night before a school day.

Youths aged 14 and 15 may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs (basically limited to retail establishment and office work) up to

* 3 hours on a school day
* 18 hours in a school week
* 8 hours on a non-school day
* 40 hours on a non-school week

Also, the work must be performed between the hours of 7:00 a.m. and 7:00 p.m., except from June 1 through Labor Day, when the employee may work until 9:00 p.m.

In addition, most state statutes require the employer to have a work permit on file for each employee under the age of 18. Although the federal law does not require a work permit, it does require the employer to have proof of the date of birth of all employees under the age of 19. A state issued work permit will meet the requirements of the federal law. Work permits can be obtained through the school system attended by the minor.|

The federal child labor laws are administered by the Wage Hour Division of the U. S. Department of Labor, while the state labor department usually administers the state statute. Employers should be aware that all reports of injury to minors filed under Workers Compensation are forwarded to both agencies. Consequently, if you employ a minor who is injured, you will likely be contacted by one or both agencies. If the U. S. Wage and Hour Division of DOL finds the minor to have been employed contrary to the child labor law, they will assess a substantial penalty. Thus, it is very important that the employer complies with all child labor laws.

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Price & Proctor, P.C. Prior to working with Lehr

Middlebrooks Price & Proctor, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the United States Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.

SOON TO BE COVERED EMPLOYEE PROTECTED BY FMLA

Katherine Meyer was one or two days shy from completing her first year of employment when she requested time off for Family and Medical Leave Act reasons which would begin a week after her one year employment anniversary. However, she was terminated the day after she made her Family and Medical Leave Act request. The question for the court was whether she still had the right to bring an action for retaliation under the FMLA even though at the time she made the request she was not covered under the Act. The court ruled that she could pursue her claim. *Meyer v. Imperial Trading Company*, (E.D. LA March 28, 2001).

The employer argued that the case should be dismissed because at the time of her FMLA request and termination she was not yet eligible to take under the FMLA. **The court stated that "the federal regulations anticipate precisely the scenario in which Meyer found herself: Seeking leave under Act before the date she became eligible, but to commence after she was eligible."** The court rejected the employer's argument that because she was not covered under the Act she could not pursue her claim. The court noted that the regulations require the employer to respond to the employee's request for FMLA when the FMLA would begin after she became eligible. Therefore, because she was terminated the day after she made her request for leave that would begin after she was eligible, she could pursue her claim of retaliatory discharge under the FMLA.

The recent case of *Rowe v. Laidlaw Transit, Inc.*, (9th Cir. April 4, 2001) is a good reminder of an employer's rights when an employee exempt under the Fair Labor Standards Act takes intermittent FMLA leave. Rowe argued that because the employer paid Rowe on an hourly basis during weeks of intermittent leave, Rowe was entitled to several years of overtime compensation because an exempt employee may not be paid hourly. However, the court noted that under the FMLA regulations, an employer may pay an exempt employee less the regular salary if the employee is absent due to intermittent leave.

STEAKHOUSE'S ARBITRATION AGREEMENT NOT WELL DONE, RULES COURT

In the case of *Geiger v. Ryan's Family Steakhouse's, Inc.*, (S.D. Ind., March 21, 2001) the court refused to enforce the employer's mandatory agreement to arbitrate employment disputes. The reasons the court gave are instructive for employers who are contemplating requiring employees to sign such agreements:

1. Ryan's employed a third party, EDSI, to handle all of the arbitrations. The court concluded that because EDSI had a financial interest in continuing to be retained by Ryan's, it could not be objective nor fair to employees

in the arbitration.

2. The employees were required to pay for half of the arbitration costs, including a $200 fee to start the arbitration process. The court ruled that paying for half of the cost was too high.

3. The agreement was entirely too complex. The court articulated a useful standard in asking whether the agreement can be understood: **"we have major doubts that a typical high school graduate would be able to read the multiple documents provided to her at her interview, comprehend the arbitration agreement and EDSI rules well enough to formulate questions as to their substance, and ask those questions during that interview."**

4. The applicants were not advised of the rights and obligations that Ryan's had based upon the arbitration process, thus they could not fully understand and appreciate the significance of the signing the document.

DID YOU KNOW . . .

. . . that President Bush on April 3 put on hold the "Contract Responsibility Rule? This rule, implemented by the Clinton administration, would require government contractors to provide certification that they are in compliance with labor and employment laws. There are several problems with the rule, including the possibility that mere charges of discrimination could be sufficient to deny certification. It is likely that rule will be rescinded altogether.

. . . that one of the largest AFL-CIO member unions has withdrawn? The United Brotherhood of Carpenters on March 29 severed its relationship with the AFL-CIO. The 500,000 member union disagreed with AFL-CIO organizing priorities and the ways in which the organization was spending money. According to the Carpenters, "the AFL-CIO continues to operate under the rules and procedures of an era that passed years ago, while the industries that employ our members change from day to day."

. . . that union stewards are considered union employees for purposes of Title VII coverage? A union steward was awarded $85,000 for sexual harassment and discrimination against the union, which the union tried to overturn by claiming that a steward is not a union employee. *Daggitt v. United Food and Commercial Workers International Union Local 304A*, (8th Cir. April 4, 2001). The court concluded that stewards should count toward the local union's total number of employees for determining coverage under Title VII. The court ruled that financial benefits received by the steward from the local were a form of compensation for the steward's services. These financial benefits included reimbursement for union dues, payment for time lost from work due to union responsibilities and a contribution on the employee's behalf into the employee's 401(k) plan. According to the Court of Appeals, "we agree that ordinary definitions of employer and employee, as well as ordinary principals of agency, establish the existence of an employer/employee relationship between the union and its stewards sufficient to require that the stewards be counted toward Title VII's 15 employee jurisdictional requirements."

. . . that OSHA will delay enforcement of new needle stick rules? The Needle Stick Safety and Prevention Act of 2000 resulted in revising OSHA's blood borne pathogen standard as of April 18, 2001. However,

OSHA has announced that the revised rule will not be enforced for 90 days so they can emphasize education and outreach. Under the rule, employers are required to log injuries from contaminated sharp instruments. The rule also provides for employees to be involved in the selection of protective devices for their benefit.

. . . that incidental time putting on and taking off protective gear is not compensable under the Fair Labor Standards Act? *Anderson v. Pilgrim's Pride Corp.*, (E.D. Tx, April 4, 2001). The employees worked at a chicken processing plant and were required several times each day to put on and remove protective clothing, which took about 10 ten minutes. In refusing to rule that this time should be compensable, the court said that the time was minimal and it did not involve "physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." The court added that it only takes seconds to put on or remove the clothing and in fact employees often do so as they are walking to or from their work stations. Note, however, that where protective clothing is heavy, cumbersome and extensive, the time involved to put that on or take it off may be compensable, as it was for employees at a meat packing plant in the case of *Reich v. Monfort, Inc.*, (10th Cir. 1999).

LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.

R. Brett Adair	**205/323-9268**
Stephen A. Brandon	**205/909-4502**
Michael Broom (Decatur)	**256/355-9151**
Richard I. Lehr	**205/323-9260**
David J. Middlebrooks	**205/323-9262**
Terry Price	**205/323-9261**
R. David Proctor	**205/323-9264**
Steven M. Stastny	**205/323-9275**
Michael L. Thompson	**205/323-9278**
Tessa M. Thrasher	**205/226-7124**
Albert L. Vreeland, II	**205/323-9266**
Sally Broatch Waudby	**205/226-7122**
Lyndel L. Erwin Wage and Hour and Government Contracts Consultant	**205/323-9272**
Jerome C. Rose EEO Consultant	**205/323-9267**

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

29233.wpd