EMPLOYMENT LAW BULLETIN

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

?Your Workplace Is Our Work"

Volume 9, Number 12 ***December 2001***

To Our Clients And Friends:

Our best wishes to you and your loved ones for the holiday season and a healthy, peaceful and prosperous New Year. Events that occurred in 2001 reminded us at Lehr Middlebrooks Price & Proctor how fortunate we are in so many ways. The opportunity to work with you is one of those blessings. We thank you, and wish you all the best.

EEOC BACKLOG DROPS, SO DOES AMOUNT RECOVERED

The EEOC recently issued its data reviewing Fiscal Year 2001, which ended September 30. The EEOC overall recovered $277 million for charging parties in 2001, down from $285 million in 2000. The amount of time it took the EEOC to process charges dropped from 216 days in 2000 to 182 in 2001. Just five years ago, it took the EEOC an average of 379 days to process a charge. The following information is also of interest:

- 22% of all charges resolved in 2001 resulted in "cause" findings (90,100 total charges), the same rate from a year earlier when 93,700 charges were resolved.
- 80,800 discrimination charges were filed during FY 2001, compared to 79,900 in FY 2000.
- Race discrimination was alleged in 35.8% of all charges compared to 36.2% in FY 2000.
- Sex discrimination was alleged in 31.1% of all charges, the same as FY 2000.
- Disability discrimination was alleged in 20% of all charges, the same as FY 2000.
- Age discrimination was alleged in 20% of all charges, the same as FY 2000.
- National Origin discrimination was alleged in approximately 10% of all charges, a steady increase each year from 8.3% in FY 1997.
- 25% of all charges include allegations of retaliation.

(Note: Charges often include multiple allegations).

Of these statistics, the one that stands out the most to us that **25% of all discrimination charges alleged retaliation** (it was slightly higher for Fiscal Year 2000). **Too often, employer written policies that address discrimination in the workplace do not address retaliation**. If an employer claims that it was unaware of retaliatory behavior, such a claim means little unless the

employer has a written policy and training program that address retaliation.

EEO TIP: UNDUE HARDSHIP AND RELIGIOUS ACCOMMODATION

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.

This is the third in a series pertaining to religious discrimination. In the two previous articles on this subject in the *Employment Law Bulletin*, it was stated that Title VII makes it unlawful for an employer to discriminate against an employee on the basis of religion. The term "religion" includes" all aspects of religious observance and practice, as well as belief." [42.U.S.C. 2000e-2(a)(1), (2)] **The definition imposes on employers a duty to provide a reasonable accommodation for an employee's religious beliefs and observances unless the employer can show that it is unable to do so without "undue hardship" on the conduct of its business.** Subsequent case law has established that "an undue hardship exists as a matter of law, when an employer incurs anything more than a de minimis cost" to provide the reasonable accommodation.

At first glance, it would seem that an employer's duty to provide a reasonable accommodation is quite simple. However, it is much more complex because neither the underlying statute nor subsequent case law have clearly defined what constitutes a reasonable accommodation under all circumstances. Thus, it must be determined on a case by case basis. For example, according to the EEOC's Technical Assistance Program guidance, the de minimis cost "must be more than just administrative or marginal costs" before it becomes an undue hardship. The EEOC will attempt to measure the hardship to the employer by considering the cost of the accommodation in relation to the size and operating costs of the employer, as well as the number of individuals who may require such an accommodation.

On the other hand, various courts in individual cases have concluded that de minimis costs:

1. May include not only monetary costs but also the employer's burden in conducting business. (A somewhat nebulous concept).

2. Need not be quantified precisely in economic terms, if the employer, otherwise, acted reasonably, and that

3. A proposed accommodation can be evaluated as to cost and impact even though it has not actually been implemented. (A somewhat speculative concept).

Generally, the matters that help define reasonable accommodation and what would constitute undue hardship must be decided on a case-by-case basis. Following are some tips that should assist you in making that determination.

U As a threshold matter, the extent of undue hardship on the employer's business becomes an issue only when the employer believes that it is unable to offer any reasonable accommodation without such hardship.

U The mere possibility of an adverse impact on co-workers to accommodate an employee's religious beliefs may be sufficient to constitute undue hardship. The employer can evaluate the cost and impact without waiting for them to be actually implemented.

- Any reasonable accommodation by an employer is sufficient to meet its accommodation obligation. The employer need not accept a particular alternative posed by the employee, nor does it need to show that each alternative proposal would result in undue hardship. An employer need only establish that it offered a reasonable accommodation, even if the employee would have preferred some alternative accommodation.

- Where safety and health risks are concerned, Title VII does not require that safety and health considerations be subordinated to the religious beliefs of an employee. (For example, where the employer has a "pants only" dress code for safety purposes.) Or as one court put it: "Title VII does not require the accommodation of personal preferences, even if wrapped in religious garb."

- An employer cannot give preference to an employee because of his or her religion any more than it can discriminate against the employee for the same reason. Hence any accommodation that would require another employee to forego seniority or collective bargaining contractual rights would probably be unreasonable and result in undue hardship.

- Finally, an employee has a duty to cooperate in achieving an accommodation and be flexible in achieving that end. An offer of another position which pays less does not necessarily make the accommodation unreasonable.

Whether a given accommodation is reasonable will depend on the facts. If you have questions, please contact us.

WAGE AND HOUR TIP: HOURS WORKED UNDER THE FAIR LABOR STANDARDS ACT

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.

Although most employers are generally aware of the requirements of the FLSA, not everyone understands what constitutes "hours worked" for which the employee must be compensated. Certain issues can, if not properly addressed, cause employers significant problems. For instance:

Employ - includes "to suffer or permit to work." Work not requested but allowed to be performed is time that must be paid for by the employer. For example, an employee may voluntarily continue to work at the end of the shift to finish an assigned task or to correct errors. The reason is immaterial. The hours are work time and are compensable.

Workweek –An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees. The workweek may not be changed for the purpose of evading the overtime requirements of the FLSA.

Waiting Time: Whether waiting time is time worked under the Act depends on the particular

circumstances. Generally, the facts may show that the employee was engaged to wait (work time) or the facts may show that the employee was waiting to be engaged (not work time). For example, a secretary who reads a book while waiting for dictation or a fire fighter who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait" and the time spent in these activities must be counted when determining hours worked by the employee.

On-Call Time: An employee who is required to remain on call on the employer's premises is working. An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, carries a pager or a phone in most cases is not working while on call. However, if the restrictions placed on the employee are so severe that he or she may not use the time for his or her own benefit, such time could be construed to be hours worked.

Rest and Meal Periods: Rest periods of short duration, usually 20 minutes or less, are common and must be counted as hours worked. Bona fide meal periods (typically 30 minutes or more) generally need not be considered as work time. The employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating. Although not required, it is good practice for employees to leave their work area while taking a meal break.

Sleeping Time and Certain Other Activities: An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. An employee required to be on duty for 24 hours or more may agree with the employer to exclude bona fide regularly scheduled sleeping periods of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy uninterrupted sleep. No reduction is permitted unless at least 5 hours of sleep are taken.

Lectures, Meetings and Training Programs: Attendance at lectures, meetings, training programs and similar activities must be counted as working time unless four criteria are met; it is outside normal hours, it is voluntary, not job related, and no other work is concurrently performed.

Next month's edition of *Employment Law Bulletin* will address travel time.

Employers should remember that the failure to correctly pay for hours worked by an employee can create a substantial liability. Not only may an employee recover unpaid wages, he or she can also bring suit for liquidated damages (an amount equal to the unpaid wages) plus attorney fees. In addition, the Department of Labor can assess a penalty of up to $1,100 per employee for repeated or willful violations of the Act.

CALLING IN "SICK" INSUFFICIENT FMLA NOTICE

If an employee calls in sick but is not specific about the nature of the illness, is the absence protected under the FMLA? Is the employer required to ask the employee about the nature of the illness? The answer to both questions, is "No." The recent case of *Collins v. NTN-Bower Corp.*, (7th Cir., Dec. 5, 2001) involved an employee who called in sick and was absent for several days for what turned out to be depression. She did not tell her employer the nature of her illness. In evaluating her absences, the employer concluded that the most recent absences due to sickness exceeded the limit under the company attendance policy and, therefore, resulted in her termination. Collins sued, alleging that her absence was due to a serious health

condition under the FMLA. The employer was unaware that she was absent due to depression until she sued them.

The court said that **by not telling the employer the medical reason for the absence until after filing the lawsuit, the employee "did not suggest to the employer that the medical condition might be serious or that the FMLA otherwise would be applicable."** The court noted that the FMLA regulations provide that the employee may delay giving notice about the specific reasons for the absence for a day or two in the event of emergencies, "but Collins took much longer to let her employer know why she did not show up. **Employers are entitled to the sort of notice that will inform not only that the FMLA may apply but also when a given employee will return to work."**

The FMLA is the only federal employment law that requires an employer to have a written policy. If an employer has a proper FMLA policy and complies with the FMLA posting requirement, then an employee who simply calls in "sick" without more specific information will not be protected if the employer counts those absences against the employee for disciplinary reasons.

SLOW ECONOMY CUTS INTO AFL-CIO AND MEMBER UNIONS; MEMBER LOSSES AND REVENUE SHORTFALLS

The AFL-CIO, at its recent convention, (ironically in Las Vegas) announced a rather dismal financial projection for years 2002 and 2003. The organization projects it will lose 400,000 members next year due to the economy and as a result, there will be a revenue shortfall of $5 million in 2002 and an estimated $7 million in 2003.

In an effort to cut expenses, the AFL-CIO will lay off staff members, take other steps to reduce administrative expenses and try to consolidate programs. They are also advising all member unions to tighten their belts and not to engage in "unnecessary activities."

We expect the financial challenges faced by individual unions and the AFL-CIO will inhibit the organization's aggressive funding of union organizing. In addition, individual unions could become more selective when targeting employers to organize. Additionally, individual unions will become more selective in determining whether a particular grievance should be brought to arbitration, in order to save on arbitrator fees.

Approximately 95% of the time, union organizing begins because employees seek out a union, rather than the union contacting employees. Unions will now be more careful in scrutinizing potential targets when such overtures are made. **Whether your company continues to remain union-free will continue to depend on your actions, rather than the actions of a financially struggling union.**

DID YOU KNOW . . .

. . . that an employee who was told to sign a non-compete agreement or face termination was awarded $1.26 million after she was fired? *Walia v. Aetna, Inc.*, (Cal. Ct. App., Nov. 21, 2001). The employer violated California law prohibiting non-compete agreements that preclude an individual from working in his or her chosen profession. In upholding the verdict, the court said that the company's behavior in pursuing this goal could "quite reasonably have been seen by the jury as despicable." Be careful when requiring employees to sign non-competition or arbitration agreements or face termination. Although such actions are permitted in some states, they are not

uniformily permitted throughout the United States.

. . . that the Department of Labor has increased penalties for Fair Labor Standards Act violations effective January 1, 2002? The increase was announced December 7, 2001. The penalties were raised by 10%, so willful minimum wage and overtime violations will result in penalty of up to $1,100 per employee. Violation of child labor violations will result in a penalty of up to $11,000 per employee.

. . . that an employee is not disabled under the ADA because of a limitation on the employee's ability to lift? *Conant v. Hibbing* (8th Cir. Nov. 26, 2001). The employee, a laborer, was unable to lift more than 30 pounds and was told to avoid repeated squatting or bending. In holding that he was not protected under the ADA, the court said that "a substantial limitation on the major life activity of working means that an individual must be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." According to the court, a lifting limitation does not significantly impair the individual from engaging in a major life activity of working.

. . . that an employer could raise as a defense in a sexual harassment claim the employee's delay in reporting the alleged harassment? *Jackson v. Arkansas Department of Education*, (8th Cir., Dec. 4, 2001). Jackson alleged that she was harassed by her supervisor nine months after the alleged harassment occurred. The employer investigated the matter immediately and took remedial action. The court agreed that the employee acted unreasonably by not promptly notifying the employer that the alleged harassment had occurred.

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