EMPLOYMENT LAW BULLETIN

THE NEWSLETTER OF LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.
"YOUR WORKPLACE IS OUR WORK"

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TO OUR CLIENTS AND FRIENDS:

The United States Supreme Court recently issued two significant decisions impacting employer rights.

The first on January 8, 2002 involved *Williams v. Toyota Motor Manufacturing of Kentucky, Inc.*

Emma Williams worked for Toyota on its assembly line using pneumatic tools, which caused her to develop carpal tunnel syndrome and tendonitis in her hands and arms. To accommodate Williams under the ADA, Toyota transferred her to a different assembly line, where she inspected cars for defective paint and manually wiped down each newly painted car as it passed her on a conveyor. Her responsibilities were expanded to include another job in the paint inspection section which required her to grip a block of wood with a sponge attached to the end and wipe down the cars with a highlight oil at the rate of approximately one car per minute. In addition to gripping the block of wood, Williams' new tasks required her to keep her hands and arms at shoulder height repetitively over the course of several hours. Her ligament and muscle problems reappeared in a more severe form as a result of the new job, with tendonitis now in her shoulders and neck as well. As a result, Williams asked Toyota to re-assign her to her former job within the paint inspection section. Toyota refused Williams' request.

The key issues considered by the U.S. Supreme Court in this case were:

- Did Williams' physical difficulties — i.e., her ergonomic injuries to her hands, arms, and shoulders, — constitute a disability under the ADA?

- Did Toyota have an obligation to accommodate Williams?

The answers to these questions were unclear because the ADA defines "disability" to include "a physical or mental impairment that substantially limits one or more of the major life activities." Does this mean that ergonomics injuries which interfere with a person's inability to work — but may not otherwise interfere with "major life activities" — are covered by the ADA?

The Supreme Court held that the "central inquiry" must be whether Williams is unable to perform the variety of tasks "central to most people's daily lives," and *not* whether she is unable to perform the tasks associated with her specific job. In other words, since Williams' injuries did not interfere with the performance of the majority of her "major life activities," she was not disabled per the ADA simply because she could not perform some of the functions of her *job*.

The *Williams* case does not mean that anyone with carpal tunnel syndrome or other partial disabilities is automatically excluded from coverage under the ADA. But it does mean that such claims may be harder to prove, since the

Court has made it clear that the disability must affect a broad range of manual tasks or duties.

On January 15, 2002, the Supreme Court ruled that a private arbitration agreement does not preclude enforcement actions by the Equal Employment Opportunity Commission. This involves a very low percentage of all discrimination charges filed or lawsuits initiated by the Commission. The Supreme Court ruled that because the EEOC was not a party to the arbitration agreement, it could move forward on initiating its own action against the employer. *EEOC v. Waffle House, Inc.* However, the *Waffle House* decision still leaves in place the effectiveness of an arbitration agreement such that an employee could not file a lawsuit even if he or she filed a discrimination charge. Only the EEOC, in initiating the litigation, would not be bound by the arbitration agreement; the individual signing it would still be precluded from filing a suit.

EEO TIPS: DOWNSIZING? HOW TO AVOID ADEA PROBLEMS

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.

Given the downturn in the U.S. economy during the latter half of 2001, it is understandable that many organizations have found it necessary to downsize or curtail some of their operations. Typically, this involves layoffs or involuntary terminations of certain employees. It is not surprising that in the process of implementing cost-cutting strategies, employers frequently start by looking at employees who often are the oldest, age-wise.

Although the downsizing plan may be neutral on its face, older employees because of their age or years of service may be adversely affected. That is precisely what happened recently in a number of instances prompting the EEOC to file several notable class action lawsuits under the Age Discrimination in Employment Act (ADEA) of 1967.

The outcomes of such lawsuits are questionable because the Circuit Courts of Appeal are divided as to whether class action lawsuits can be brought under the ADEA. Nonetheless, given the attention that age discrimination seems to have engendered, especially in the eyes of the EEOC, it is wise to review some of the basic provisions of the ADEA with a keen eye on avoiding age-based charges.

ADEA Basics

Ë The ADEA protects individuals (including applicants and employees) age 40 and over, with no upper limit restrictions. Thus, applicants and employees at or above normal retirement age are protected. However, some exemptions apply and those will be discussed in subsequent articles.

Ë Under the ADEA, it is important to remember that it is unlawful to discriminate between individuals within the protected group, that is 40 years of age and older, solely because of age. Thus, showing a preference for an individual who is 42 over one who is 52 may be a violation if that is the only criterion upon which an employment decision is being based.

Ë The ADEA covers employers with 20 or more employees, employment agencies, and labor

organizations, as well as the agents of such entities.

Ë In general, the ADEA prohibits an employer or the other entities from discriminating against any individual with respect to hiring, promotions, discharge, compensation, terms, conditions, or privileges of employment because of his or her age. Additionally covered entities are prohibited from retaliating against an individual because he or she has opposed unlawful age discrimination or has exercised his or her rights under the Act including the filing of a charge, testifying, or participating in an ADEA investigation or proceeding.

Ë Age discrimination charges must be filed within 180 days after the alleged discrimination occurred, the same as under Title VII. Likewise, ADEA lawsuits by an individual must be filed within 90 days after the individual receives notice that the EEOC has terminated its investigation and/or proceedings pertaining to the charge.

Ë As compensation for a violation, the charging party may be entitled to back pay, front pay and liquidated damages if the finding is "a willful violation." Liquidated damages represent an assessment against the employer equal to the amount due for back pay.

The foregoing summarizes some of the main provisions of the ADEA. It by no means covers the many technical aspects of the Act which differ greatly from Title VII. For example, employers should be aware that under the ADEA, the EEOC may launch an investigation on its own volition without having received a charge. These and other technical aspects of the ADEA including exemptions, waivers of rights and claims, and the impact of the Older Worker's Benefit Protection Act on the ADEA will be discussed in future articles.

WAGE AND HOUR TIP: WHEN IS TRAVEL TIME COMPENSABLE?

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Price & Proctor, P.C. Mr. Erwin can be reached at (205) 323-9272. 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.

The principles that apply in determining whether time spent in travel is compensable time depend on the nature of the travel.

C Home To Work Travel: An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

C Home to Work on a Special One Day Assignment in Another City: An employee who regularly works at a fixed location in one city is given a special one-day assignment in another city and returns home the same day. The time spent in traveling to and from the other city is work time. However, except that the employer may deduct the amount of time the employee would normally spend commuting to the regular work site.

C Travel that is All in the Day's Work: Time spent by an employee in travel as

part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

- Travel Away from Home Community: Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly working time when it cuts across the employee's workday. The time is not only work time on regular working days during normal working hours, but also during corresponding hours on non-work days. The Department of Labor does not consider as work time the time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

- Driving Time: Time that an employee spends driving an employer's vehicle is work time. If an employee is directed by the employer to drive the employee's vehicle to transport tools, supplies, equipment or other employees, the time is also considered as hours worked.

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.

OSHA's Chemical Hazard Communication Standard

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks Price & Proctor, P.C. Prior to working with Lehr Middlebrooks Price & Proctor, P.C., Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities.

Often referred to as the "right -to-know" law or by the acronym HAZCOM, OSHA's Hazard Communication Standard (29 CFR 1910.1200) is among its most frequently cited violations. In fiscal year 2000, federal OSHA cited it around 7,500 times.

The Hazard Communication Standard (HCS) is based on the premise that employees are entitled to understand the chemicals with which they work, the hazards posed and the precautions they should take. While that seems simple enough, the rule has enough complexity to have prompted around 300 interpretations.

The standard covers physical hazards, such as flammability or explosive potential, as well as those that could potentially have acute or chronic effects. Since hazardous chemicals are defined very broadly, it is a rare employer who would not utilize some such chemicals. Included are seemingly innocuous products used in households. However, OSHA does not cite for employee use of home consumer products unless workplace use greatly exceeds normal home use. Covered employers are required by the standard to do the following:

(1) Develop a written program that details how the various requirements are carried out at the work site.
(2) Ensure that chemicals are labeled.
(3) Maintain Material Safety Data Sheets (MSDS).
(4) Provide information and training to employees regarding chemical hazards.

The HCS requires that all chemicals imported, produced, or used in U.S. workplaces be evaluated regarding their hazards. This information must be passed along via appropriate labeling of all containers and MSDS. The employer is responsible to develop and implement such a program as referenced above.

Employers should ensure that every container of hazardous chemical received is labeled, tagged, or marked with the required information. It should also be verified that an appropriate material safety data sheet containing detailed information about the product is received with the shipment.

OSHA Directive CPL 2-2.38D sets out enforcement procedures for the HCS. Should your written program be reviewed in an OSHA inspection, following are some of the key elements that should be addressed:

(1) Labels and Warnings

*Designate a key employee to be the responsible party for labeling in-plant containers.

*A description of the labeling system used in the plant should be readily available.

*Clearly define procedures for the review and updating of label information.

(2) Material Safety Data Sheets

*Designate a key employee to be the responsible party for maintaining material safety data sheets for the site.

*Provide ready access to information regarding how the data sheets are maintained at the site and how employees may gain access to them. (An employee, upon request, must be provided an MSDS with the work shift.)

(3) Training

*Designate a key employee to be the responsible party for hazard communication training of employees at the site.

*Clearly define the format and elements of the required training.

*Implement procedures describing how new employees will be trained and how all affected employees will be trained when a new hazard is introduced into the work area. No specific documentation of training is required here but may be a wise practice.

The written HCS program should include a list of all the hazardous chemicals being used and handled at the work site. Copies of the written program should also be made available to employees upon request. Sample or generic hazard communication programs are available, including one in CPL 2-2.38D referenced above. Employers should ensure that these are tailored to meet the circumstances and needs at their own work site.

DID YOU KNOW . . .

. . .**that on January 11, 2002, President Bush nominated Donald Prophete as General Counsel of the EEOC?** Mr. Prophete has been director for the labor and employment law department of Sprint since 1997.

. . . that according to the Bureau of Labor Statistics, unions won a higher percentage of elections during the first half of 2001 compared to the year before, yet the number of elections continued to decline? During the first half of 2001, there were 1,210 elections compared to 1,559 one year earlier. Unions won 660 of those elections, compared to 829 from a year ago. The union's victory rate was 54.5% up from 53.2% in 2000. The number of eligible

voters also declined in 2001, to 91,116 from 117,175 a year earlier. Unions won over 50% of all elections in services, mining, healthcare, communications, wholesale, finance and transportation, communications and utilities. Unions won less than half of all elections in manufacturing (33.9%) and construction (48%).

. . . that on January 2, 2002, a federal judge struck down President Bush's executive order requiring government contractors to post *Beck* notices? *UAW - Labor Employment and Training Corp. v. Chao*, (D.DC). The judge ruled that the National Labor Relations Act preempts the executive order. The executive order required that workers who are covered by a union security clause who do not join the union can be required to pay agency fees that apply only for collective bargaining, contract administration and grievance administration. The notice required contractors to also tell employees that they cannot be required to support nonrepresentational activities of unions, such as political efforts. This means that although contractors are not required to post such notice, they may continue to post them.

. . . that reducing an engineer's work hours as a form of "reasonable accommodation" was an undue hardship for the employer? *David v. Microsoft Corp.* (Wash.Ct.App., January 7, 2002). Engineers work 60 to 80 hours a week. Davis, an engineer, was diagnosed with Hepatitis C and became unable to work the overtime hours. He received a $2.3 million jury verdict award, which the court of appeals overturned. According to the court of appeals, Microsoft demonstrated that the job required 60 to 80 hours a week and it would be an undue hardship to accommodate an engineer to work less than 40 hours per week. The case was remanded for further trial, because the judge concluded that Microsoft did not attempt to work with Davis to find him another job for which he was qualified that would have involved fewer hours of work. Note that the duty of reasonable accommodation includes not only an evaluation of the employee in the particular job which he or she holds, but also requires the employer to consider transferring the employee to another job, even if it pays less.

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