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:

In response to numerous client requests for electronic communication, **LMPP is pleased to announce that beginning with our April 2002 issue, the *Employment Law Bulletin* will arrive on your desktop each month via email.** We invite you to forward our new electronic version to colleagues, friends and associates whom you feel would benefit from the information.

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This change is in response to suggestions from *Employment Law Bulletin* recipients who prefer to receive the bulletin through email so that it can be widely and promptly distributed throughout their organizations.

DISCRIMINATION COMPLAINTS RISE, ACCORDING TO EEOC

The number of discrimination charges filed in 2001 with the EEOC rose to 80,840, the highest since 1995, when 87,529 charges were filed. Age discrimination charges rose to 21.5% of all charges and disability discrimination charges rose to 20.4% of all charges. Race discrimination charges total nearly 36% of all filed, and sex discrimination charges slightly more than 31%.

These increases attributed to the downturn in the economy. However, even in difficult economic times, employers can still reduce the risk of discrimination charges or lawsuits. For example:

1. Your organization's equal employment opportunity policy should include reporting processes so that employees bring complaints to you, rather than private counsel or a regulatory agency.

2. During new employee orientation, and annually with all employees, go over the steps they should take if they believe the policy has been violated.

3. Be sure that supervisors, managers and anyone involved in the hiring, evaluation, discipline and discharge processes are trained regarding what is both permitted and prohibited under the laws of discrimination.

4. A discharge decision will most likely provoke a discrimination claim. When terminating or disciplining an employee, direct him or her to the appropriate colleague if he or she wishes to express any concerns.

5. The term "layoff" implies recall. If you have laid off employees and do not intend to call those employees back, tell them.

Also, if you provide severance, ask for a release in exchange for the severance.

LYING ON EMPLOYMENT APPLICATION OKAY, RULES COURT

In 1995, the U.S. Supreme Court ruled that an employer may not reject an applicant for being a union "salt," who, working on behalf of a union, seeks employment with a non-union employer for the purpose of attempting to unionize that employer's workforce. On February 6, 2002 in the case of *Hartman Brothers Heating and Air Conditioning, Inc. v. NLRB*, (7th Cir.), the court ruled that since an employer "cannot turn away a job applicant just because he's a salt or other type of union organizer or supporter," supplying false information about employment history and intentions is immaterial.

The applicant in this case lied about why he left his previous job. He said that he was laid off, but actually he had requested a leave of absence for the purpose of becoming a union salt. The employer terminated the individual for, among other reasons, lying on the application. The court ruled that the lie was "immaterial." However, the court upheld the employer's additional reason for termination, which was the applicant's inability to drive company vehicles due to a poor driving record.

False information on an employment application must be handled in a consistent manner. If the employer in this case established that lies about previous employment history resulted in disqualification or termination of others, that would have strengthened the argument that this individual's purpose as a "salt" was not the motivating reason for his termination.

AGE DISCRIMINATION CHARGES GROWING: HOW TO PROTECT YOURSELF

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.

According to recent statistics from the Equal Employment Opportunity Commission, age discrimination charges are rising and now comprise over 21% of all employment discrimination charges filed with the agency. Therefore, it is important for employers to have at least a working knowledge of the various defenses available to them.

Under the Age Discrimination in Employment Act (ADEA), the defenses fall into four basic categories. For example, an employer may assert:

1. That the employment decision or differentiation in question was based on "reasonable factors other than age."

2. That age was a "Bona Fide Occupational Qualification (BFOQ)."

3. That the action taken was in keeping with a "bona fide seniority system" or " bona fide employee benefit plan" such as a retirement, pension or insurance plan, or:

4. That the action taken involved an employee who is subject to one or more of the "Exemptions" under the act.

In the next several issues of the *Employment Law Bulletin*, these defense categories will be detailed. We will begin here with the first and most basic

defense: That the employment transaction in question was based upon "**reasonable factors other than age."**

In order to establish a prima facie case of age discrimination in a hiring situation, for example, the plaintiff would have to show that: (i) he/she was a member of the protected age group (over age 40); (ii) that he/she applied for the job and was qualified; (iii) that he/she was rejected; (iv) and that after the rejection, the employer continued to seek applicants with similar qualifications. A prima facie promotion or discharge case would require basically the same formulation appropriately adjusted, of course, to fit the facts. It is important to note that in establishing a prima facie case, a plaintiff need not show that he/she was replaced by someone outside of the protected age group (below age 40). It is unlawful to discriminate against persons within the protected range, simply because of age.

To apply the reasonable-factors other than-age defense, the employer would simply have to show that the decision not to hire (or promote or discharge) the applicant (or employee) was based on factors other than age such as:

- comparative work history,
- attendance records,
- previous performance evaluations,
- the results of a validated test, or
- a subjective assessment of the applicant's temperament for the job.

Many other factors could also be used as a defense. The key to the use of any or all of them is whether they would be reasonable under the specific circumstances in the case at hand. Generally, such alternative factors will pass the reasonableness test if (1) they can be justified by business necessity, and (2) they were not merely used as a proxy or subterfuge for age discrimination.

Simply stated, the reasonable-factors-other-than age defense requires that the employer provide legitimate, non-discriminatory reasons for its actions. Under existing case law, the Plaintiff would then have to show not only that the factor used was pretextual, but also that the employer harbored discriminatory animus (intentionally discriminated against the employee or applicant because of his/her age) in making the employment decision in question. Normally, this is a very difficult burden of proof to sustain.

Look next month for ways to use the defense that age is a "Bona Fide Occupational Qualification."

AN EMPLOYER'S "GENERAL DUTY" UNDER OSHA

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.

Section 5(a) of the **Occupational Safety and Health Act imposes two duties upon an employer. The first is an obligation to keep the workplace free from recognized hazards for which a feasible means of abatement exists, and which are likely to cause death or serious physical harm to employees. This has come to be known as the "general duty" clause. The second requires employers to comply with specific health and safety standards promulgated by OSHA** after public notice-and-comment rulemaking.

Given the large number of specific standards in OSHA's arsenal, one might question the need for a "catch-all" provision. Keep in mind that OSHA may cite an employer under "general duty" clause only where no specific standard applies to a particular hazard. It is not uncommon for OSHA

to find it necessary to issue such citations. In fact, last year, it was one of the most frequently cited violations. Historically, it has been utilized to address a great variety of job hazards, including ergonomics, workplace violence, assorted material handling and equipment operation exposures, etc.

OSHA cannot indiscriminately apply this regulation to all hazards for which no specific standard applies. Legal precedent and OSHA's Field Inspection Reference Manual describe the 4 elements needed to support a violation of the general duty clause. These are as follows:

(1) The employer failed to keep the workplace free of a hazard to which its own employees were exposed.

(2) The hazard must be recognized. (This may be shown by the employer's own individual knowledge, "common-sense" recognition or general recognition by the employer's industry.)

(3) The hazard was causing, or was likely to cause, death or serious physical harm.

(4) The hazard can be eliminated or materially reduced by a feasible action or method.

When OSHA is not sure that a specific standard applies to a hazard, they may allege a violation of that standard and Section 5(a)(1) in the alternative. They will not normally reference Section 5(a)(1), however, to impose a more stringent requirement than that of a clearly applicable standard.

Often, OSHA will issue a Section 5(a)(1) warning letter. In these cases, the above four elements necessary for a Section 5(a)(1) violation may not all be fully established. This warning letter does not mandate corrective action by the employer but "advises" that the condition be addressed. Since it clearly puts the employer on notice, a future finding on the issue could likely result in a citation and penalty.

Employers should be aware that in addition to all relevant standards, the potential for being cited under the general duty provision of the OSH Act is real. Being diligent in addressing safety and health matters at the workplace can greatly reduce the likelihood of such citations. Some rather obvious but good advice in this regard is to heed manufacturer safety instructions and when recurring accidents reveal a problem, take corrective action.

VERBAL PROMISE NOT BINDING, RULES COURT

As health insurance costs rise, employer efforts to cut those costs may have a profound impact on retirees, particularly those on a limited or fixed income. **Thus, changing the cost or coverage of health benefits for retirees often provokes litigation, such as in the case of *Lie v. Boler Company***, (N.D. Ill, Feb. 8, 2002).

Lie told his employer in 1995 that he was dissatisfied with his salary and benefits. He and the company's president agreed that he would remain employed, but that the company would provide continued medical benefits for Lie once he retired. This agreement was verbal; nothing was put in writing. When Lie resigned and found that the benefits he thought he would receive were not forthcoming, he sued, claiming fraud.

In granting the company's motion for summary judgment, the court agreed with the company's position that ERISA preempts a state law fraud claim on this issue. Under ERISA, verbal variations of benefit plan such as those described in this case are not permitted. Therefore, Lie was out of luck, even if he was lied to.

To avoid these types of claims, your employee handbook should contain in the benefits section a statement such as: "The terms and conditions of eligibility and plan administration are governed by the plan document, only. Any changes to an employee's benefits covered under the plan must be in writing."

INABILITY TO DRIVE NO DISABILITY, RULES COURT

To you and me, driving is a "major life activity." To the U. S. Supreme Court, it is not. February 19, The Supreme Court upheld the Eleventh Circuit's position that driving is not a "major life activity" under the Americans with Disabilities Act. *Chenoweth v. Hillsborough County*, (Feb. 19, 2002).

Chenoweth was responsible for driving to different sites within the county's jurisdiction to examine patient records at county facilities. Due to epilepsy, she was unable to drive for six months. She asked for accommodation, such as working at home, which the county denied. Ultimately, she returned to work and was able to drive. However, she sued for lack of reasonable accommodation during the period she was unable to drive.

The court upheld summary judgment for the employer that driving is not a major life activity under the ADA and, thus, Chenoweth's prohibition of driving did not require accommodation. The Eleventh Circuit stated "we are an automobile society and an automobile economy, so that it is not entirely far fetched to promote driving to a major life activity, but millions of Americans do not drive, millions are passengers to work, and deprivation of being self driven to work cannot be sensibly compared to inability to see or learn."

DID YOU KNOW . . .

. . .**that $25 million was awarded to eight caucasian Atlanta librarians who were demoted and transferred because of race?** *Bogle v. McClure*, (Jan. 16, 2002). Evidence presented to the jury included audiotapes and minutes from board meetings with board members stating that there were too many white managers at the main branch in Atlanta.

. . . that President Bush on January 22 made two interim appointments to the NLRB, such that Republican members now number three out of four NLRB stats? The two new members, Michael Bartlett and William Cowen, are recessed appointees, which means that their term expires in December 2002, as do the terms of current members Wilma Liebman (Democrat) and the Chair of the NLRB, Peter Hurtgen (Republican). Three out of the four members of the Board are Republican appointees.

. . . that a $10 million sexual harassment award was upheld by the Texas Court of Appeals? *Hoffman-LaRoche, Inc. v. Seltwanger*, (TX. Ct. App.). According to the court, the company "allowed the development of a corporate culture that tolerated the telling of vulgar and suggestive jokes in both small and large group settings, thereby tolerating the continued employment of those who persisted in such conduct." Seltwanger complained about this, and subsequently was terminated. She had been previously advised by her supervisor not to "rock the boat" regarding this issue.

. . . that 21% of women surveyed recently indicated they experience sexual harassment at work and 7% of the men surveyed were also subjected to harassment? The survey was based upon a poll of 1,000 American employees. Furthermore, 54% of those surveyed believed they would be subject to retaliation if they rejected romantic advances from their supervisor, yet 66% said that romantic relationships at work are personal to the employees involved and should not be addressed by the employer.

. . . that an employer "taking" an employee's computer to hold for criminal investigation did not violate the employee's constitutional privacy rights? *Muick v. Glenayre Electronics*, (7th Cir. Feb. 6, 2002). The employer was concerned that the employee was involved in possessing and transmitting child pornography. The employer

seized and held the employee's workplace computer until the employer was served with a warrant by law enforcement authorities. In rejecting the employee's argument that this was an unreasonable search and seizure under the Constitution, the court said that the employer, a private sector entity, was not acting as an agent or representative of the government when it held the computer. Therefore, the Constitution does not apply to private sector actions and the employer did not violate the employee's constitutional rights.

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