EMPLOYMENT LAW BULLETIN

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"YOUR WORKPLACE IS OUR WORK"

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SEXUAL AND RACIAL HARASSMENT CASES COST EMPLOYERS $31.5 MILLION; DO NOTHING AND PAY THE PRICE

Two recent cases illustrate the risks when employers fail to establish harassment policies broader beyond sexual harassment and when they fail to quickly act on complaints of harassment.

In the case of *Lee v. Consolidated Freightways Corp.*, (W.D.Mo., 3/28/02), a jury awarded a black employee $1.5 million for repeated racial harassment of which he had complained but had not been addressed by the employer. The testimony revealed that white employees regularly made racist comments to Lee and to others about Lee. Furthermore, racist comments were made to white employees who were friends of Lee, as well as to other black employees. **Lee complained about harassment in writing to the company but nothing was done to communicate with the individuals who engaged in the behavior, nor company-wide to raise awareness regarding acceptable and unacceptable behavior.**

In the next case, on April 5, 2002, California-based Ralph's Grocery Company was ordered to pay $30.6 million to six women who were subjected to continual verbal and physical sexual harassment by a Ralph's store director. *Gober v. Ralph's Grocery Co.*, (Cal. Super. Ct., 4/5/02). The case arose after more than 80 complaints were filed between 1985 and 1998 charging unwelcome verbal and physical behavior from the director who oversaw operations at four Ralph's locations. The director was never disciplined, however, because profits at his four stores had improved. Because the company was making money, management decided to "bag the profits" and look the other way.

Following are some important principles from these cases to keep in mind:

- Your company's harassment policy should not be limited to sexual harassment. Cover all protected classes, and any behavior the employee considers demeaning, threatening, insulting or intimidating, even if not based on protected class status.

- Remember that life would be simpler if the marginal or nonperforming employees were also the harassers. If your organization views workplace harassment as an unacceptable working condition regardless of who is the harasser, then do not let a harasser's good job performance overcome your need to act.

- In both cases, instances of harassment were reported but not properly acted upon by the employers. The employees fulfilled their

responsibilities by providing their employers an opportunity to address the matter first. **When you receive any notice of harassment, investigate immediately and take prompt, corrective action. Furthermore, once you have taken such action, follow-up with the individuals who raised the concern to determine whether the behavior has continued.**

- Remember that the higher the level of responsibility, the less forgiving an employer should be toward that individual who engages in behavior that violates an employer's harassment policies.

CHANGING SENIORITY SYSTEM NOT REQUIRED (USUALLY) FOR REASONABLE ACCOMMODATION, RULES SUPREME COURT

On Monday, April 29, 2002 in the case of *U.S. Airways, Inc. v. Barnett*, the U.S. Supreme Court in a 5 - 4 decision addressed the issue of whether reasonable accommodation included making an exception to an established seniority system. Barnett worked as a cargo handler until he hurt his back. He then was transferred to the mail room, which did not involve heavy lifting. However, the new position was subject to bidding under the company's seniority system. U.S. Airways declined to create an exception to the seniority system to reasonably accommodate Barnett, claiming that to do so would be unreasonable. Based on the bidding process, a more senior employee took the job to which Barnett had been assigned and Barnett was terminated. Barnett sued, alleging that under the ADA, a form of reasonable accommodation required the employer to make an exception to the seniority system and permit him to continue in the mail room.

The district court granted U.S. Airways' motion for summary judgment, but the Ninth Circuit reversed. The Ninth Circuit said that a seniority system was only one factor to consider in whether providing reasonable accommodation would cause undue hardship to the employer.

The Supreme Court said that neither Barnett nor U.S. Airways was entirely correct. **If an employer can show that creating an exception to an established seniority rule would be required, the employer may not provide the accommodation because to do so would be an undue hardship.** The Supreme Court did not distinguish seniority systems at unionized locations compared to non-union locations.

However, the fact of a seniority system does not end the inquiry, according to the Court. **The employee could show that although there existed an established seniority system, the employer's prior actions regarding that seniority system meant that the employer could create an exception for reasonable accommodation.** For example, did the employer provide other exceptions to the seniority system? If so, then the employer would have to show why it could not provide reasonable accommodation. **Furthermore, does the seniority system itself provide for exceptions? If so, then the question is whether an additional exception in the form of reasonable accommodation would be unreasonable.**

What does this case mean for employers? Here are some things to remember:

- An employer with a seniority system that operates without exceptions is not required to create an exception as a form of reasonable accommodation.

- If an employer with a system that does not have exceptions has created exceptions in the past, then the inquiry will be why the employer was unable to create an exception for reasonable accommodation.

- C If the seniority system is structured with exceptions, then the inquiry is why the employer was unable to make an additional exception for reasonable accommodation.

- C These principles apply whether the seniority system is developed through negotiations with a union or implemented unilaterally by a non-union employer.

The Supreme Court remanded the case for the parties to seek summary judgment consistent with the principles outlined in its opinion.

EEO TIPS: CLAIMING AN EXEMPTION UNDER THE ADEA

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.

Although the clear intent of Congress in framing the ADEA was to "promote the employment of older persons based upon their ability rather than age..," it recognized that one's age at some point could become a critical factor in the successful performance of certain specialized jobs or positions. Thus, notwithstanding the general prohibition of discrimination against persons over the age of forty (40), almost without exception, the ADEA does allow an employer to consider an employee's age, where:

(1) Age is "... a bona fide occupational qualification." (BFOQ) which was discussed in our previous issue, and
(2) where the employer's otherwise discriminatory actions involved an employee who is subject to one or more "Exemptions" under the act.

In effect, an exemption permits an employer to limit the age at which an employee can be hired, or to compel retirement at age 65 (or earlier) depending upon the position held by the employee. It is the latter category of exceptions that will be addressed in this article.

At the outset, a clear distinction should be made between the concept of a BFOQ defense and the concept of an Exemption. A BFOQ must be based upon objective, empirical findings of a relationship between an employee's age and his/her ability to satisfactorily perform the requirements of the job or position in question. An exemption, on the other hand, is a direct grant of immunity from the ADEA's anti-discrimination provisions notwithstanding that the employer's actions would otherwise be discriminatory on the basis of age. Thus to establish a **BFOQ,** an employer must show that age is related to performance. To claim an **exemption,** an employer need only show that the action taken involved an exempt position.

Not surprisingly, there are very limited exempt:

- C Elected state or local government officials on the policy-making level,
- C Firefighters and Law Enforcement officers,
- C Bona Fide Executives or High-Level Policy making officials for retirement purposes, and
- C Tenured faculty at higher educational institutions on a limited basis if certain conditions are met.

Since the first two categories basically involve local or state government positions, and the fourth category provides exemption on only a limited basis, the focus of our attention in this article will be on the Bona Fide Executives and High-Level Policy making positions in the private sector.

You may note that "Apprenticeship Program Positions" were omitted from the above listing. That is because the federal regulations pertaining to Apprenticeship Programs (29 C.F.R.1625) were amended in April, 1996 to cancel the exemption.

The Bona Fide Executive or High Policy Maker Exemption covers mandatory retirement at age 65; it does not affect other employment decisions, such as demotion. An employer must show that the individual in question:

- held a bona fide executive or high-level policy making position for at least a two- year period prior to retirement; and
- was entitled to an immediate non-forfeitable annual retirement benefit totaling at least $44,000 per year.

If the employee in question held two or more positions during the two-year period, the employer still may claim the exemption if both positions were executive or high policy making in nature. However, if one of the positions held by the employee during the two-year period was not an executive or high policy making position, the employee could not be compelled to retire at age 65.

In order to prove that an employee was a Bona Fide Executive or High Policy Maker, employers must be prepared to prove that the employee:

- Managed the organization or major department of the organization;
- Directed the work of at least two other employees;
- Had final authority to hire and/or fire employees under his/her supervision and that personnel decisions were given great weight;
- Customarily exercised discretionary authority on behalf of the organization; and,
- Generally devoted approximately 80% or more of his/her time to the management responsibilities indicated above.

The term "High Policy-making position" includes top-level employees who may not be bona fide executives, but who play a significant role in developing and implementing corporate policy such as a chief economist, corporate general counsel, or research scientist.

The claiming of an exemption under the ADEA requires careful planning well in advance of the retirement action contemplated. Legal counsel should be sought when in doubt regarding whether the position in question would qualify for the exemption.

WAGE AND HOUR TIPS: "WHITE COLLAR" EXEMPTIONS REVISITED

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 U. S. 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.

From time to time over the past two years I have discussed the requirements for the Executive, Administrative and Professional exemptions. I've done so because misapplications of these exemptions cause employers more problems than all of the remaining exemptions in the Fair Labor Standards Act (FLSA).

Many employers still believe that by paying an employee a salary they are not required to pay overtime when that employee works more than 40 hours in a workweek. Consequently, the employer does not maintain a record of hours worked by the salaried employee nor does the employer attempt to limit the number of hours worked by the employee. These errors can become very costly if an employee (or group of employees) files a complaint with Wage Hour or brings a private action against the company for the failure to pay proper overtime.

The FLSA provides that an employee may bring an action against his employer to collect unpaid wages, an

equal amount of liquidated damages and attorney fees. In addition, the act does not require the employee to file a complaint with Wage Hour prior to bring the suit. Thus, the first knowledge an employer may have of a potential problem is when he or she is served with the complaint that has been filed in court.

Each of these exemptions has a minimum salary test requirement that is presently $250 per week. This salary test was set in 1975 through an administrative hearing process when the minimum wage was $2.30 per hour. There have been numerous attempts to revise this test since then but none have been successful. In the late 1980s President Carter issued new regulations that would have increased the salary requirements to $345 per week but in January 1981 President Reagan withdrew the regulations for further study. They are still being studied today. Based on the present minimum wage of $5.15 per hour, this salary requirement would be approximately $600 per week.

Because the salary test is no longer a realistic test for exemption, in recent years both the Department of Labor and the courts have been looking very closely at the duties being performed by employees to ensure that the employee actually meets all of the requirements for one of the exemptions. Recently there have been several cases resulting in large judgments against employers where employees had been considered as exempt but the courts determined the employees did not meet the duty tests for exemption and should have received overtime compensation. For example, an insurance company was ordered to pay $90 million (approximately $37,500 per employee) to employees who worked as claims adjusters and a large financial organization is being required to pay overtime to its loan ordinators. Also, in recent years the Courts have become more willing to allow class actions by groups of employees which makes the employer more susceptible to large judgments.

Two large nationwide retailers in the food service industry are defending suits filed by some 4,500 managers, assistant mangers and trainees alleging they did not meet the duty test for any of the exemptions and therefore should have been paid overtime.

Not only are employers subject to back wage liabilities for a two- or three-year period, when employees are improperly classified, they can also be required to pay substantial legal fees for the employee's representatives.

In a recent case, five plaintiffs were found to be due back wages in the amount of $13,000 where the Court awarded attorney's fees in the amount of $97,000. Recently, I became aware of another situation where Wage Hour came to audit an employer because one hourly employee alleged he had been allowed to work overtime without being paid time and one-half. During its investigation, Wage Hour discovered that the employer had failed to pay overtime to trainee managers. This resulted in the employer being ordered to pay more than $50,000 in back wages for overtime hours worked while the managers were in training.

The Department of Labor recently stated that it is studying these regulations with an eye on revising them later in 2002. However, I will be surprised if they actually get a revised regulation formulated and in place this year. Thus, employers should still look very closely at the duties performed to make sure the employee meets all of the requirements for the exemption(s). Otherwise the employer may face a very substantial liability, either from a private action or a Wage Hour investigation.

OSHA TIPS: OSHA ANNOUNCES LATEST INSPECTION TARGETS

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 the firm, 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.

The Occupational Safety and Health Administration has just released its plan for inspecting about 3,000 work sites within the next year. Employers inspected under this plan will have had high injury and illness rates as reflected by their records for the year 2000. The agency directive implementing the plan is titled Site-Specific Targeting 2002 (SST-02) and is effective April 15, 2002.

Site-specific targeting was first used in 1999 and is OSHA's attempt to ensure that its limited inspection resources are well-spent. For years its discretionary inspections were directed at industries with high injury/illness rates. Employers within an industry were targeted randomly without available data to select those having the highest rates. OSHA established the Data Initiative Collection System in 1995, which solicited specific site information from about 80,000 employers in high-hazard industries. The injury/illness data provided by these employers now allows OSHA to identify those sites at which its inspection efforts should be directed. To verify the accuracy and provide for quality control of employer-provided data, OSHA conducts annual on-site audits of a sampling of employers and about 250 audits will be conducted for the year 2000 submissions.

Is your work site on OSHA's current list for inspection? It is likely if your response to the agency's request for 2000 data reflected a high injury/illness rate. In February of this year about 13,000 employers received letters from OSHA advising them that their rates were higher than average. Those receiving such letters had shown eight or more injuries or illnesses that resulted in lost workdays or restricted activity during the year. The national average for the year was only three per 100 workers. OSHA encouraged employers with these high rates to take action to address their safety and health problems. They were encouraged to utilize the agency-supported state consultation services, insurance carriers or outside consultants for assistance.

The current inspection plan will target for inspection those employers who reported 14 or more recordable injuries or illnesses for every 100 employees during 2000. Employers reporting at least eight but fewer than 14 per 100 workers will be placed on a secondary list for possible inspection.

Under the SST plan, an OSHA office is directed to generate a list (cycle) of employers based on the office's available resources, geographic range, etc. Any cycle begun is to be completed before any new cycle is created. Therefore, some offices may be continuing to work from sites selected under the previous directive, Notice 01-01 (CPL 2) Site-Specific Targeting 2001, for some time beyond the effective date of this new plan.

No nursing or personal-care facilities (SIC Codes 8051, 8052, 8059) will be inspected under this new plan. OSHA has announced plans to inspect about 1,000 of these sites under a new National Emphasis Program (NEP) that will focus on hazards causing the majority of the injuries and illnesses at such sites. These generally involve ergonomics, bloodborne pathogens/TB, and slips, trips, and falls.

As was the case with the three previous inspection targeting plans, this new version does not include the construction industry. Inspections in the construction industry are scheduled under a separate administrative plan.

A new feature of this latest inspection plan is the inclusion for inspection of a few employers with rates less than the targeted level (eight cases per 100 workers). About 200 employers who reported rates between zero and eight will be randomly selected for inclusion on the primary inspection list. These employers will be drawn from the top 25 highest-rate industries.

Establishments on the list which have received a comprehensive safety and health inspection after January 1, 2000, will be deleted from the current cycle.

FAILURE TO APPLY FMLA TO DOMESTIC VIOLENCE COST CITY $628,000

The case of *Gregg v. Anchorage* (Alaska Super. Ct., 3/15/02) involved a former police officer who exhausted sick leave but not FMLA, yet was terminated while absent for dealing with the psychological impact of suffering domestic abuse. Without exposing the sordid details, the basis is that Gregg was ordered back to work after her sick leave expired. Her employer knew that she needed to be absent for an additional period of time to deal with personal and family matters arising out of her abusive marriage to her now former husband. Rather than permit this to be covered under FMLA, she was terminated. Furthermore, she was not rehired after she applied on four separate occasions; her overall work record was excellent.

The employer argued that the FMLA did not apply in part because she failed to request FMLA when notifying her employer of the need for the absence. In rejecting that argument, the court stated:

> It is true that (Gregg) did not mention FMLA when she made her request for leave without pay. **However, there is no requirement that an employee expressly assert rights under the FMLA or even mention FMLA to provide the employer adequate notice.** What the defendants failed to recognize and acknowledge is the significant mental stress (Gregg) was undergoing, as a result of her victimization by domestic violence, her ongoing pain from injuries, her pregnancy, and being forced to make difficult personal choices.

How should you, as the employer, handle an absence if you are not certain whether it is covered under FMLA? This case is an example of "bad guessing." If an individual is undergoing counseling due to an abusive domestic relationship, the employer needs to determine whether it qualifies as a serious health condition within the FMLA regulations. If you are unsure, then ask whether the benefit of the doubt for coverage should be given to the employee. After all, if the employer is wrong in the assessment regarding appropriate application of FMLA, it can be an expensive mistake.

DID YOU KNOW . . .

. . .**that requiring a doctor's diagnosis for each sick absence violates the ADA?** *Fountain v. New York State Corrections Services Department*, (N.D.N.Y., 3/11/02). The Department required that an employee who returns to work from absences due to sickness may be asked to provide a medical certificate containing a diagnosis that the employee was unable to work due to that condition, plus a prognosis. The doctor must also state that the employee is fit to resume his or her normal job duties. The court stated that for such a medical inquiry to be protected under the ADA, it "must be based upon a reasonable expectation that the inquiry into the protected information would reveal that the employee was unable to perform work related functions or was a danger to the health and safety of the workplace." Thus, the employer could require information if the employer had reason to believe that the employee's ability to perform the job effectively or safely would be impaired, but under the ADA an employer may not otherwise compel an employee to disclose medical information.

. . . that an employee caught stealing must pay the employer not only for what he or she stole, but also for the cost of the surveillance? *Alcaraz v. Wyoming*, (Wyo. Ct., 4/12/02). The employer spent over $5,600 in surveillance equipment to detect Alcaraz stealing $1,000. In addition to ordering Alcaraz to pay back the money, the court stated that "the store owner could recover special damages that

include the cost of surveillance" for the employer to recover what was stolen.

. . . that two Labors International officials are on their way to jail for receiving kickbacks in exchange for depositing union funds with banks and developers? Two executives of the Labors Central States Joint Board Pension and Health and Welfare Fund covering 20,000 union members placed deposits with eight different banks in exchange for banks providing the union leaders unusually favorable terms on loans totaling $5 million. The leaders also received over $300,000 in construction industry kickbacks.

. . . that the AFL-CIO will conduct a series of "town hall" meetings across the country to address retirement issues in the wake of the Enron debacle? Announced on April 3, the program entitled "No More Business As Usual" attempts to assist employees in protecting their retirement funds. According to AFL-CIO president John Sweeney, "our goal is to help workers protect their retirement security, their basic rights, and to prevent them from becoming 'Enron-ed'."

. . . that according to a recent Liberty Mutual survey, the cost of workplace related injuries increased for employers from 1998 to 1999 by 3.8%, totaling $40.1 billion? Approximately one-fourth of that amount was due to injuries involving lifting, pushing, pulling carrying and/or holding. Falls accounted for $4.6 billion and repetitive motion injuries were $2.7 billion. According to Liberty Mutual, employers "may be inadvertently focusing the resources on certain causes of workplace injuries, and may need to realign their workplace safety priorities."

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