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:

What should an employer do if reasonable accommodation that is offered under the Americans with Disabilities Act proves to be inadequate? The case of *Memorial Hospital Association v. Humprey* (9th Cir.; US S.Ct. declined to hear on April 15, 2002) upheld a determination that the hospital violated the ADA by not pursuing other accommodation possibilities. Humprey was employed as a medical transcriptionist. She had an obsessive compulsive disorder resulting in her coverage under the ADA. In order to accommodate her, the employer permitted her to report to work at any time within her scheduled workday, provided she worked eight hours during that day. This accommodation proved to be unsuccessful, as Humprey's compulsive behaviors resulted in her taking several hours to get ready for work each day and unable to work eight hours in a day. She was terminated, although Humprey had requested an alternative accommodation of working at home.

In upholding the ruling that the hospital violated the ADA, the Court of Appeals stated that **"the employer's obligation [under the ADA] to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed."** There are three situations where this "additional accommodation" must be considered. The first, as in this case, is where the initial accommodation proved to be unsuccessful. The second situation is where the initial accommodation is successful, but either the individual's disability or job duties changed, rendering the initial accommodation ineffective. The third circumstance is when the employee moves to a different location or a different job. An employer's duty of reasonable accommodation may be an ongoing "work in process" with certain employees. An employer is required to consider an employee's suggestions for accommodations. However, once the employer determines that accommodation is possible, the employer does not have to present the employee with a "buffet" of accommodation choices. Thus, the employer may insist on an accommodation that may be reasonable, but which the employee thinks is unreasonable.

EMPLOYEE TERMINATED AFTER PREGNANCIES NOT TERMINATED BECAUSE OF PREGNANCY

The case of *Wallace v. Methodist Hospital System*, (5th Cir., May 20, 2002) involved a classic example of the "mixed motive" inquiry into an employer's actions. A jury concluded that Wallace was terminated before she began leave for her third pregnancy because of her pregnancies, and awarded her a total of $507,500 in damages. This decision was overturned by the Fifth Circuit Court of Appeals and the U. S. Supreme Court declined to hear the case.

Wallace was hired in late 1992. Approximately six months later, she took three and one-half months off due to pregnancy. Approximately eleven months after

returning from pregnancy leave, Wallace took another three month pregnancy leave in June 1994. She was terminated in December 1994 before she was scheduled to begin an additional three months of pregnancy leave.

After returning from her second pregnancy, her head nurse told Wallace that she needed to choose between family and work. However, the head nurse was not involved in the decision to terminate Wallace. Wallace was terminated because she changed a patient's tubes without authorization by a physician and she falsified documentation to cover up her actions. The hospital argued that whatever comments the head nurse made about Wallace's pregnancy were not made by anyone involved in the decision to terminate her. Furthermore, Wallace could show no other employee who engaged in similar behavior - - followed a procedure without doctor's orders and falsified records about it - - who was treated differently. Because Wallace could not show a difference in treatment or evidence that decision makers made comments to suggest that termination was pregnancy related, there was not a basis to conclude that she was fired due to her pregnancy.

Timing is everything in several termination cases. That is, was the real reason for an employee's termination the reason the employer offers, or was it due to the employee's protected activity or status (pregnancy) which occurred within the same time frame? **To the EEOC and juries, timing may fail to pass the "smell test." Thus, it is essential for employers to be able to show clearly the business reasons for the termination decision without regard to the protected activity.** In this case, Wallace's conduct was so egregious and was handled in a manner inconsistent with hospital policies such that there could be no basis to conclude that she was discriminated against based upon pregnancy or her sex.

EEO TIPS: CLAIMING AN EXEMPTION UNDER THE ADEA

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Because fringe benefits are usually given gratuitously by an employer to its employees, it would seem logical to conclude that the extent and degree to which such benefits are provided would be wholly within the discretion of the employer. Unfortunately, under the Age Discrimination in Employment Act (ADEA) that is not the case. Section 11 (1) of the Act makes it clear that employee benefits are part of the "compensation, terms, conditions, and privileges of employment" as to which the general prohibition against age discrimination applies.

However, since its inception, the ADEA has allowed certain limited differentials in treatment of some employee benefits based on age. Section 4(f)(2) of the act specifically states that "...it is not unlawful for an employer....to observe the terms of ...any bona fide employee benefit plan such as a retirement, pension or insurance plan which is not a subterfuge to evade the purposes of this Act, ..." In effect this section of the Act permits appropriate age-based adjustments or reductions in employee benefits where such reductions are justifiable because of significant differences in cost to the employer. Thus, most retirement plans, health insurance plans, or pension benefits would qualify for the exceptional treatment under Section 4(f)(2). It would not apply for example to paid vacations or uninsured paid sick leave since the cost for such benefits is essentially the same for all employees in the same job, grade or pay level regardless of age.

If a given retirement plan, health insurance plan or other benefit qualifies under Section 4(f)(2), the benefit levels for older employees may be reduced as necessary to achieve some reasonable equivalency in cost to the employer for both the older and younger workers. According to the Equal Employment Opportunity

Commission (EEOC), a benefit plan qualifies under Section 4(f)(2) if the actual amount of the payment made or the cost incurred on behalf of an older employee is equal to that made or incurred on behalf of a younger employee. This is so even though an older employee may receive a lesser amount of benefits or insurance coverage under the plan than a younger employee. If the plan is challenged by an employee, the EEOC will look to see whether the cost to the employer is essentially the same for all employees. Since Section 4(f)(2) is an exception to the general prohibition against age discrimination, the burden of proof will be on the employer to show that the cost requirements have been met.

To satisfy the requirements of Section 4(f)(2) a benefit plan must have met three basic standards as follows:

First, the plan must be a "Bona Fide Employee Benefit Plan." To be Bona fide:

- All of the terms of the plan must be in writing and accurately describe the benefits to be received as well as the responsibilities of the employee;
- The plan must actually provide the benefits set forth therein so as not to be misleading to employees.
- The employer must notify employees promptly of any changes in the plan which might effect them.

In general, compliance with the disclosure requirements under the Employee Retirement Income Security Act (ERISA) will satisfy the disclosure requirements under the ADEA.

Secondly, the employer "must observe the terms of the plan." This simply means that if in fact the plan provides lower benefits to older employees, those provisions must be clearly set forth in the plan. This presumably gives employees the chance to protest the discriminatory provision if they so chose. The key purpose of this requirement, however, is to ensure that the employer is "observing" the terms of the plan in acting on the age-based discriminatory treatment of older employees, otherwise the exception allowed by Section 4(f)(2) would not apply and the employer's actions would violate the ADEA.

Thirdly, the plan must not be a "subterfuge" to evade the purposes of the Act. The purpose of the Act, of course, is to prohibit discrimination on the basis of age. The plan would not be a subterfuge if the lower level of benefits to older workers is justified by age-related cost considerations. The cost data used in justification of such lower benefits must be valid and reasonable. Under EEOC Regulations an employer may provide cost data on a "Benefit-By-Benefit" basis (where the cost of each benefit is measured separately) or on a "Benefit Package" basis (where the cost of the entire package is measured in the aggregate).

The development of a benefit plan which complies with the strictures of Section 4(f)(2) can be complicated and requires a technical knowledge of both the ADEA and the employer's cost accounting systems. We strongly recommend that employers consult legal counsel before implementing any plan which even potentially provides age-related lower benefits to older employees than those provided to younger employees.

OSHA TIPS: OSHA'S WHISTLEBLOWER PROVISIONS

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. Mr. Hall can be reached at (205) 226-7129.

Section 11(c) of the OSH Act prohibits the discharge or any manner of discrimination against an employee who has exercised a right

afforded by the Act. Any employee who thinks he or she has been terminated or otherwise discriminated against for engaging in such an activity has 30 days in which to file a complaint with the Secretary of Labor. In some cases this 30- day time frame may be extended. This could occur where the employer has concealed or misled the employee regarding a dismissal or adverse action, or where the discrimination is of a continuing nature. However, things like filing with another agency, pending grievance-arbitration proceedings, filing workmen's compensation or ignorance of the 30 day requirement would not justify a tolling of the 30-day period.

Once a discrimination complaint is filed it must be investigated by the Secretary. If the investigation finds that a violation did occur, the Secretary must bring an action in a United States District Court. The courts may order all appropriate relief including rehiring or reinstatement of an employee with back pay.

Some examples of discrimination listed by OSHA are firing, demotion, transfer, layoff, losing opportunity for overtime or promotion, assignment to an undesirable shift, denial of benefits such as sick leave or vacation time, blacklisting with other employers, damaging credit at financial institutions, and reducing pay or hours.

Protected activity under the Act includes, among other things, filing safety and health complaints with OSHA, other agencies, or the employer, requesting information from OSHA, providing information and participating in OSHA inspections.

Four essential elements in establishing a violation of Sec.11c are a showing of protected activity, knowledge, animus, and reprisal.

One of the more common discrimination complaints arises where an employee makes a formal (signed) complaint to OSHA that triggers an onsite inspection. The employee is terminated or senses that the employer is otherwise discriminating and turns to OSHA. While the formal complaint filed with OSHA requires the identity of the complainant and a signature, this is revealed to the employer only if the complainant specifically requests that this be done. In the vast majority of complaints the identity is not disclosed to the employer. Occasionally a complainant allows disclosure with the idea that it is an added protection against reprisal by the employer since it makes it clear that the complaint source is known.

An employee's engagement in a protected activity may not be the only factor leading to termination or other adverse action. Problems with attendance or productivity may have existed prior to the filing of a safety complaint by the employee. However, if the protected activity was a substantial reason for a subsequent adverse action, then a violation of Sec. 11c may be established.

Not infrequently OSHA receives discrimination complaints where employees have been terminated or otherwise sanctioned for refusing to do a job they judged to be unsafe. Generally, an employee does not have the right to walk off the job or refuse to work because of unsafe conditions. It could be a protected right if all of the following conditions are met:

(1) the employer is asked to eliminate the danger and fails to do so
(2) the employee genuinely believes there is an imminent danger and the refusal to work is in good faith
(3) a reasonable person would agree that there is a real danger of death or serious injury
(4) the urgency of the situation doesn't allow the employee time to have OSHA inspect and have the hazard eliminated.

WAGE AND HOUR TIP: NOT INCLUDING REIMBURSEMENTS AS PART OF REGULAR PAY

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The recent case of *Berry v. Excel Group, Inc.*, (5th Cir., April 19, 2002) addressed a potentially confusing issue of whether expense reimbursements must be included in overtime calculations. The case involved an electrician who worked on a job site 100 miles from home. He was paid $17 an hour plus a per diem of $100 per week. He was promoted to a non-exempt position at a rate of $20 an hour, and his per diem increased to $150 a week. The project lasted six weeks and Berry decided that rather than commuting 100 miles from home to work, he would live in a trailer near the construction site. Apparently the raise and per diem increase were not enough for Berry, because upon completing work, he sued, alleging that the per diem $100 and then $150 per week should be included in his base pay for overtime purposes. The district court granted summary and the Court of Appeals affirmed, holding that the per diem amount was a reasonable reimbursable expense.

Under the Fair Labor Standards Act, the definition of "regular rate" specifically excludes "reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursed by the employer." The amount provided to the employee on a per diem or reimbursement basis must be reasonably related to the actual expenses incurred. The court concluded that if Berry had driven to and from work each day, he would have commuted 1,000 miles per week. At a rate of .15 cents per mile, that would have amounted to $150 per week. The fact that Berry chose not to drive to work resulted in expenses that the per diem was reasonable to cover such as rent, utilities and meals. Where an employer's per diem or expense reimbursement is substantially higher than the amounts incurred, the Department of Labor or courts may consider that to be an effort by the employer to maintain a lower employee base wage and, therefore, lower overtime costs as well.

AFL-CIO RAISES TAXES FOR POLITICAL CONTRIBUTIONS

On May 22 the AFL-CIO General Executive Board approved a tax increase for each member belonging to an affiliate union to raise an additional $7 million for political campaign purposes. Currently, the rate is 6.5 cents per month. That will increase to 10.5 cents per month, effective in July 2002.

Two unions voted against the increase, the Teamsters and Machinists. Teamster president James Hoffa wanted more AFL-CIO accountability of political candidates. He also wanted greater union input into the decision regarding which candidates the AFL-CIO would support.

According to AFL-CIO president, John Sweeney, the issue is broader than whether particular candidates are elected. The political contributions will be used to further an agenda to help all working families to creating jobs, retirement income protection and a sound healthcare system.

DID YOU KNOW . . .

. . .that employees forwarding sexually explicit e-mails do not have an expectation of privacy regarding employers reviewing and terminating them for that behavior? *Garrity v. John Hancock Mutual Life Insurance Company*, (D. MA, May 5, 2002). The company had in place an e-mail policy which prohibited receiving or storing sexually explicit messages and information. The court also noted a prior decision which stated that employees who engaged in this behavior inherently had no reasonable expectation of privacy. Wiretap laws were not violated, according

to the court, because this message was not "intercepted" by the employer but rather detected by the employer after it was stored or sent.

. . .that on April 24 the Senate Health, Education, Labor and Pensions Committee approved legislation that would prohibit discrimination based upon sexual orientation? Known as the Employment Non-Discrimination Act (ENDA), the bill will likely be voted on by the Senate prior to the November 2002 elections. The bill will likely be approved by the Senate, but its passage in the House is uncertain.

. . . that rude and harassing behavior is not actionable if it is not based on protected class status? *Shannon v. Advocate Health Centers, Inc.*, (N.D. ILL., 4/8/02). The plaintiff alleged that the doctor swore at her, cut her off at meetings and behaved rudely toward her which amounted to evidence of race based harassment. However, the plaintiff was unable to show that the doctor treated other employees differently. Although the behavior was inappropriate, it was not illegal. Remember that what the law requires is a low threshold for compliance; an employer's standards should be higher, including prohibiting the type of behavior that existed in this case.

. . . that an illegal lockout may cost Kaiser Aluminum $200 million, the largest back pay award ever in NLRB history? *Kaiser Aluminum and Chemical Corp*., (NLRB, May 10, 2002). The lockout arose after the union would not agree to a proposal that the administrative law judge characterized as "vague." Based upon the union's lack of agreement, the company initiated the work stoppage through the lockout. Because the lockout was ruled an illegal one, the employer's risk is backpay for every employee who was lockout.

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