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 overwhelming national focus on the behavior of some executives at large publically-held companies, and the decline in the stock market, may have profound workplace implications on all employers. For example:

1. **Will employees trust information they hear from their organization's leaders about the organization's finances?** This is particularly true where organizations have bonus or other gain-sharing programs. If the organization tells employees that the bonus or gain share is down for a variety of financial reasons, it will be a "tougher sale" regarding credibility.

2. **How will juries react to testimony by corporate officers and high level managers?** If a national stereotype is that corporate officials will lie about numbers in order to increase their compensation and the stock price, will juries assume that corporate officials will also lie to protect themselves and their company at trial?

3. **Many individuals who plan to retire with certain financial assumptions have had those assumptions shattered,** and face the reality of working longer than anticipated. If terminated, whether due to a workforce reduction or job performance, their financial dispair so late in their working career is more likely to provoke litigation.

4. **If individuals are postponing retirement and seeking to remain in the workforce, what happens to the job opportunities for those who are entering the workforce or attempting to move up within the organization?** If they are caught in traffic, so to speak, and can not move in or up, is litigation over failure to hire or promote a potential outcome?

Addressing these issues is neither easy nor can it be done quickly. However, one step employers can take immediately is to provide employees with facts about business conditions and how they are affecting the organization. One way to prove the validity of the facts is to ensure that corporate behavior at all levels supports the conclusion that the facts are true. For example, if business conditions are such that raises for the workforce are not appropriate, does corporate leadership still receive raises and bonuses? Several years ago, the former president of Southwest Airlines, Herb Kelleher, asked the airline's pilots for a three-year wage freeze. Before asking them for the wage freeze, he froze his own pay for three years. **This shared sacrifice means that before an employer asks those who can least afford the sacrifice to begin to sacrifice, the employer should substantiate that request by ensuring that the organization's leadership was the first to make sacrifices.**

Our view is that residual impact of issues regarding corporate behavior and the trauma of the stock market will be long term, just as the Watergate scandal contributed to several years of a general mistrust of authority that filtered into the workplace.

POSSIBLE SENIORITY VIOLATION NO BASIS FOR REFUSING ACCOMMODATION

On June 10, 2002, in the case of *U.S. Airways, Inc. v. Barnett*, the U.S. Supreme Court ruled that an employer is not required to violate the terms of a seniority system as a form of reasonable accommodation, provided other exceptions to the seniority system are not made. The case of *Dilley v. SuperValue, Inc.*, (10th Cir. July 15, 2002) took the Supreme Court's decision one step further — what if accommodation would potentially violate the seniority system? Is that a basis for denying accommodation? The plaintiff was a truck driver with eighteen years of service. Due to a lower back problem, his physician advised the employer that he could not lift items more than 60 pounds, which would have resulted in shifting him to routes that did not require heavy lifting. The company refused the transfer, because under the company's seniority system, if Dilley were transferred and a more senior employee desired the position, Dilley would be displaced. Thus, the company never even placed him in that position. A jury found that the company violated the ADA and awarded $115,268 in backpay and $25,001 in compensatory damages.

In upholding the jury award, the court of appeals said that it was totally "speculative" whether a more senior employee would have attempted to bump Dilley from that position. The company had offered Dilley two other lower paying jobs. However, the court said that **"in reasonably accommodating an employee under the ADA, the employer should first consider lateral moves to positions that are regarded as equivalent and may only consider lesser jobs that constitute a demotion if there are no such equivalent position."** Dilley was ranked number five in seniority out of a total of 42 employees. The court of appeals stated that it was completely speculative that Dilley would have been bumped out of that position by somebody with greater seniority. In essence, the employer should have placed Dilley in that position which would not have violated the seniority system. If a more senior employee then sought the position and the employer bumped Dilley, that would be consistent with the seniority system and also the ADA.

Remember the following rules as they relate to the application of a seniority system in a union or non- union environment:

1. If there are no exceptions made to the seniority system, none need be made under the ADA.

2. If exceptions are made to the seniority system, then the inquiry is whether it is possible to do so as a form of reasonable accommodation and if not, why not.

3. If the terms of the seniority system provide for exceptions, is it possible to also include reasonable accommodation and if not why not.

EEO TIPS: NATIONAL ORIGIN DISCRIMINATION CHARGES, A GROWING PROBLEM FOR EMPLOYERS

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. Mr. Rose can be reached at (205) 323-9267.

Even before the events of September 11, 2001, the number of charges filed with the EEOC alleging national origin discrimination was on the rise. According to EEOC statistics the

number of National Origin charges increased by 20% between 1995 and 2001. While it was a common mis-perception that the increase in such charges was largely attributable to the proliferation of illegal aliens and undocumented migrant farm workers, the increase was also fueled in fact by several other factors including:

- a marked increase in legal emigration from Europe, southeast Asia, the mid-east, and the Carribean;
- a marked increase in the number of foreign companies which have built plants and are doing business in the United States (e.g. car manufacturers); and
- a significant increase in the number of foreign students or workers on temporary visas who are in the process of applying for U. S. citizenship.

Unfortunately, many employers are not well-informed as to either their own rights or the rights of their employees with respect to national origin issues. For example how would your Human Resource Manager answer the following questions:

1. Are illegal aliens and/or non-citizens protected by Title VII?

2. Must undocumented workers be given the same employment rights as regular workers?

3. Does the Immigration Reform and Control Act [IRCA] relieve employers of all responsibility under Title VII to undocumented workers?

4. Can an employer lawfully refuse to hire or deny a promotion to an applicant or employee because of his/her accent?

5. Can an employer lawfully establish a Speak-English-Only Policy for all communications at work?

6. Does a foreign corporation have to abide by U.S. anti-discrimination laws?

7. What effect, if any, does a Friendship, Commerce, Navigation (F.C.N.) Treaty have on the employment rights of a foreign corporation doing business in the U.S. as compared to a domestic corporate employer? What effect, if any, does it have on employees?

During the next several issues of the *Employment Law Bulletin* an attempt will be made to provide at least an abbreviated answer to all of the foregoing questions. However, as a threshold matter, it might be good to understand exactly how the EEOC defines the term "national origin discrimination." The Commission's Procedural Regulations found at 29 C. F. R. 1606, et seq. state as follows:

The Commission defines national origin discrimination broadly as including but not limited to, the denial of equal employment opportunity because of an individual's, or his ancestors, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.(emphasis added)

Incidentally, the Commission includes within that broad definition discrimination against an individual because of his\her association with persons from a "national origin group." **Title VII of the Civil Rights Act of 1964, the underlying federal statute, also specifically protects individuals against employment discrimination on the basis of race, color, religion, sex or national origin. It should be noted that both the underlying statute and the regulations indicate that the law protects "individuals," with no mention of citizenship or work eligibility.**

Thus, in answer to the question of whether aliens and undocumented workers are protected by Title VII, the answer would be "yes." In the case of *Espinoza v. Farah Mfg. Co.* (Sup. Ct. 1973) the U.S. Supreme Court clearly declared that non-citizen, undocumented

workers were included within the protections of Title VII. Accordingly, in general, undocumented workers, aliens and non-citizens, notwithstanding their status, are generally covered by Title VII.

There are exceptions, however, and an employer may deny employment to a non-citizen for reasons of national security or where citizenship is a business necessity qualification. Even under those circumstances, the Commission may investigate to determine whether the purpose or effect of requiring U. S. citizenship is actually to discriminate on the basis of national origin.

The foregoing barely touches upon the many national origin problems that an employer may face. In subsequent issues of the *Employment Law Bulletin* answers to the remaining questions indicated above will be provided together with a discussion of the Immigration Reform and Control Act of 1986 and the impact of Friendship, Commercial and Navigation Treaties upon federal anti-discrimination statutes.

OSHA TIPS: SELF-AUDITS FOR OSHA COMPLIANCE: A SHIELD OR SELF INFLICTED WOUND?

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.

Despite an agency policy to the contrary, some employers have concerns that voluntary safety audits might be used against them in OSHA enforcement actions. Specifically, they fear that such reports will identify safety or health problems that could result in willful violations with large monetary penalties. Internal documents, including safety inspection and audit reports, have been used by the agency to demonstrate an employer's knowledge of a hazardous condition or possible violation. Such information can be used to show an employer's conscious decision not to comply with a standard or regulation and thus support an allegation of willfulness. (In fact the agency's Field Inspection Reference Manual discusses the use of such documents to support willful violations.)

OSHA has consistently expressed support for and acknowledged the value of employer audits in achieving and maintaining a safe workplace. Many specific OSHA standards mandate that periodic audits be conducted to ensure continuing compliance within the area to which they apply. These limited, mandatory audits generally have not been an issue. However, some employers have voiced a reluctance to conduct voluntary audits with the prospect of having to release the findings to an OSHA inspector. While an OSHA survey found that 85% of employers were conducting voluntary safety audits, the agency acted to further promote this activity.

Faced with the possibility of discouraging such audits and the need to encourage employers to find hazards and fix them, OSHA enunciated a self-audit policy that was published in the Federal Register on July 27, 2000.

Key provisions of OSHA's policy regarding the treatment of voluntary self-audits (which includes audits by competent employees, management officials or a third-party source) by employers are as follows:

(1) The agency will not routinely request voluntary self-audit reports at the initiation of an inspection and such reports will not be used to identify hazards for inspection. (However, if OSHA has an independent basis to believe that a specific safety or health hazard exists, it may exercise its authority to obtain relevant portions of an employer's self-audit report.)

(2) OSHA will not issue a citation for a violation that an employer discovered as a result of a voluntary self-audit, provided it is corrected and measures are taken to prevent a recurrence prior to an OSHA inspection or

any event that may have triggered the inspection, such as an accident.

(3) If an employer has responded in good faith to a violation discovered during a voluntary self-audit, OSHA will not consider that portion of the audit report to be evidence of willfulness during any subsequent enforcement action.

(4) Finally, an employer's prompt response and corrective measures taken as a result of a voluntary self-audit may be considered evidence of good faith that would justify a substantial penalty reduction.

WAGE AND HOUR TIPS: AN EMPLOYER'S RIGHT TO REQUIRE REPAYMENT OF TRAINING COSTS

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.

It's absolutely frustrating for employers to invest in employee training, only to have that employee leave the employer before the employer gets a return on its investment. **One approach the employer can take to protect its investment is to require repayment for training costs depending upon when an employee leaves employment, whether voluntarily or involuntarily.** The recent case of *Hender v. Two Rivers* (7th Cir. July 10, 2002) discussed this type of situation.

Two Rivers is a community located in Wisconsin. Concluding that it was desirable for its firefighters to become certified as paramedics, the city agreed to compensate firefighters for time spent in training to become certified. However, if a firefighter was no longer employed by the city within three years after the training began, the firefighter was responsible for reimbursing the city for its training costs.

The lower court ruled that the reimbursement requirement was invalid, characterizing it as an unreasonable covenant not to compete. The court of appeals reversed the lower court on this point, and ruled that the firefighter must reimburse the city $1,400 for the costs of books and tuition, stating that "competition has nothing to do with the matter." The lower court had also ruled that because the firefighter left after two and one-half years of training, the firefighter should only be responsible for paying the remaining 1/6 increment of the training costs. The court of appeals reversed this conclusion, as well, stating that "we do not think that the Supreme Court of Wisconsin is apt to require employers and employees to amortize training costs with precision, to factor the time value of money . . . or to craft an individual schedule based upon the number of years each employee is expected to remain able to work."

The court also upheld the reimbursement plan covering those individuals who retired, were disabled or left for any reason other than simply voluntarily quitting. This case overall exemplifies employer rights to offer training with conditions attached to it; if the employee leaves for any reason, the employer may require the employee as a condition of receiving the training to reimburse the employer for the training costs.

DID YOU KNOW . . .

. . . that on June 28 legislation was introduced to provide greater pension benefits to a surviving or a divorced spouse? Known as the Women's Protection Act, introduced by Senators Kennedy and Snowe, legislation would require an option in defined benefit plans to pay 75% of the eligible benefit to the participant's surviving spouse and also enhance the rights of benefits available to a divorced spouse. According to Senators Kennedy and Snowe, "Simple improvements in our pension system [would] ensure that retirement

savings programs better respond to the realities of women's working lives."

. . .that on July 15 OSHA announced a program that will result in focusing on hazards existing for employees who work in nursing homes? According to OSHA, its inspection efforts will focus on "nursing and personal care facilities that have fourteen or more injuries or illnesses resulting in lost working days or restricted activity for every 100 full-time workers." OSHA in February notified 2,500 nursing homes that their illness and injury rates were higher than the industry average. The number one reason for nursing home and assistant care injuries relates to handling residents and slipping and falling.

. . . that an employer properly terminated an employee who was seen at the county fair while out on FMLA leave? *Connel v. Hallmark Cards, Inc.* (D. Kn. June 19, 2002). Connel was terminated when she was seen at the county fair while she was out from work on FMLA leave. The evidence revealed that Connel had lied to her employer about being at the fair. Additionally, the employer asked Connel's doctor whether -- considering she was well enough to go to the Fair -- she was well enough to work. The doctor said yes. Accordingly, the employer terminated Connel for lying about the need for an FMLA absence. The court concluded that "there was evidence presented at trial that the plaintiff had been dishonest, that dishonesty was against company policy, and that defendant terminated plaintiff's employment because of her dishonesty," not because of her use of FMLA leave.

If you have not yet done so, be sure to register for our Firm's *The Effective Supervisor* programs throughout Alabama in September and October. For additional information about the programs or conducting an "in-house" for your organization, please contact Ms. Sherry Morton at 205/323-9263.

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