EMPLOYMENT LAW BULLETIN

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"YOUR WORKPLACE IS OUR WORK"

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TO OUR CLIENTS AND FRIENDS:

Does an "at-will" employee have the right to claim that his employer was negligent in how it conducted an investigation of the employee's conduct? No, ruled the Texas Supreme Court on August 30, 2002 in the case of *Farm Bureau Mutual Insurance Company v. Sears*. According to the Court, "By definition, the employment at-will doctrine does not require an employer to be reasonable, or even careful, in making its termination decisions."

The case arose after an anonymous complaint was filed alleging that insurance agent Sears, an insurance adjuster and a contractor were involved in a kickback although an investigation could not conclusively prove Sears's involvement. The company concluded that Sears was suspected of such involvement and, therefore, terminated his employment. Sears sued, alleging intentional infliction of emotional distress and negligent investigation. A Texas jury awarded Sears $574,000 in compensatory damages, $750,000 in punitive damages and $943,000 in pre judgment interest.

In rejecting Sears's emotional distress claim, the Supreme Court stated that Farm Bureau's investigation of Sears "did not rise to the level of extreme and outrageous conduct sufficient to sustain a claim for intentional infliction of emotional distress." Regarding Sears's claim of negligent investigation, the court stated that **"an employer has no duty to investigate at all before terminating an at-will employee, because either party may end the relationship at any time with or without reason or justification."** Therefore, because there is no duty to investigate an at-will employee's alleged misconduct there cannot be a claim alleging that an employer was negligent if it conducts such an investigation.

This case is further affirmation of the "at-will" employment doctrine. However, when conducting investigations, remember the following principles:

1. Train the investigator to conduct a proper investigation.

2. Remember due process: Be sure the investigated employee is told what he/she is alleged to have done wrong and provide the opportunity for the employee to respond.

3. "Beyond a reasonable doubt" does not have to be the standard that determines what action an employer may take. If the employer concludes that the employee engaged in inappropriate behavior, that is sufficient for the employer to take action against the employee.

4. If the decision is to terminate but the company cannot prove that the employee "did it," then an appropriate reason for termination is that based upon the investigation the employer no longer has confidence in retaining the employee.

AFL-CIO POLL RESULTS: MORE WORKERS WOULD VOTE "UNION YES" IF GIVEN THE OPPORTUNITY

The AFL-CIO for the past eighteen years has conducted polls regarding the public's perception and support for labor unions. According to results released on August 29, 2002, 50% of those who were surveyed in 2002 said they would vote for a union if given an opportunity, compared to only 42% last year. This is the highest percentage in eighteen years of support for unions.

According to the poll, 74% of minorities say they would vote for unions, 62% of manufacturing, industrial and construction employees would support unions, and 58% of those younger than age 35 would also "vote yes."

The poll also included a survey of public attitudes toward large corporations. Last year, 42% of those surveyed viewed large corporations in a positive light; 25% negative and 23% no opinion. Most recently, 39% of those surveyed viewed large corporations in a negative light, 30% positive and 31% no opinion. The negative rating for corporations is the highest it has been during the past eight years.

Although the total number of union representation elections continues to decline, the union win rate continues to increase. Non-union employers cannot become complacent regarding employee attitudes toward unions. Be sure your employees know why remaining union free is important to your organization's continued vitality.

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.

According to the U. S. Census Bureau, Asian Pacific and Hispanic immigration is growing at an increasing rate. The Census Bureau estimates that by the year 2010, Asians and Hispanics combined will make up almost twenty percent (20%) of the U. S. population. The demographics of Alabama likewise is rapidly changing. For example the Hispanic population in Alabama increased over three hundred percent (300%) from 24,629 in 1990 to 75,380 in 2000.

While this boon has had many positive effects upon the U. S. economy including an increased supply of labor and, in many instances, a restoration of the viability of inner cities (or at least a stabilization of inner cities in terms of the past massive flight to the suburbs) it has presented a host of other problems for employers. In addition to the difficult problem of complying with all of the immigration laws, there is the basic problem of communication within the workplace. Employers in service industries in particular have been greatly affected because of the premium placed on interpersonal relationships with customers and with fellow workers. **Thus, many well-intentioned employers find themselves in a quandary over how to utilize this new wave of foreign-born employees, many of whom have heavy foreign accents, without discriminating on the basis of national origin.** And

yes, it is clear that an employer's refusal to hire, promote, advance or transfer an employee because of the employee's distinct foreign accent could be a violation of Title VII based upon his/her national origin. This is so because a foreign accent is a trait which has been held to be so closely related to one's national origin that it is almost as "immutable" as one's race or color. Hence, employers should beware of making any hasty decisions based upon an employee's accent.

Fortunately there are some basic guidelines for employers to follow in deciding what to do about an applicant or employee who has such a heavy foreign accent that it makes him or her difficult to understand.

First, employers should make sure that the requirement to speak clearly in English is an essential element of the job in question. The job description, itself, should indicate:

- That the ability to communicate clearly in English materially relates to one's ability to perform the duties of the position.
- The audience to whom the communications will be directed; for example, to the general public, customers, co-workers or any combination of these persons.

Care should be taken to ensure that the job elements in the job description are the same as those in actual practice. If the job description indicates that communication is a material part of the job duties, then such communications should constitute more than a small fraction of the employee's job duties on a daily basis. For example, **the ability to communicate in English has been found to be essential in the following types of jobs:**

- Jobs requiring extensive contacts with the general public or clients, such as hotel desk clerks, telephone operator or receptionists.
- Managerial jobs requiring clear communication of job requirements or standards to subordinates, such as technical project engineers and construction foremen.
- Jobs requiring frequent or rapid response to emergency situations in which quick, succinct communication is necessary , such as hospital emergency room staff, police or fire dispatchers, emergency response dispatchers for other agencies.

Secondly, as a guideline employers should make an honest determination as to whether the accent of the applicant or employee in question does in fact interfere with the required ability to clearly communicate in English. This is a more subjective judgment, but if done fairly and honestly, it will provide the employer with the needed answer. To be fair an employer might hire or promote an individual with a heavy accent on a trial or provisional basis to see if he or she can master the communications requirement. At least this could be claimed as a good faith effort to utilize the employee in question.

The main defense to an employer's denial of a promotion or refusal to hire will be whether the requirement to communicate clearly in English can be justified by business necessity. By following the above guidelines the employer will have taken the necessary steps to establish a viable defense.

Next month in this column the matter of implementing a "Speak-English-Only" rule will be discussed. It , too, is closely related to National Origin discrimination and should be approached with care.

OSHA TIP
OSHA VIOLATIONS: AGENCY PROOF AND EMPLOYER DEFENSES

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.

To establish a safety and health violation OSHA must show exposure of an employee to a hazard for which the requirements of an applicable standard are unmet.

The employee may be the employer's own or that of another employer. (Except for alleged violations of Section 5(a)(1) of the Act/General Duty Clause, where the employee must be employed by the cited employer). This element may not be established where a non-employee such as member of the general public is the exposed party.

A violation may occur when an exposure was observed during the course of the OSHA inspection or shown to have occurred in the past. Potential exposure may be shown, for example, where a defective or unguarded power tool is left in the work area without precautions to prevent its use. Where a past exposure is established by an accident or through interviews, it must have occurred within the past 6 months of the date OSHA learned or could have learned of the violation.

Section 5(a)(1) of the OSH Act states that employers have a responsibility to comply with safety and health standards promulgated under the Act. These specific standards are found in Title 29 Code of Federal Regulations (CFR) 1900 series. A referenced standard that charges a violation must be mandatory, i.e., contains "shall" rather than "should" language. Further, where OSHA has adopted specific standards for a particular industry, these must be cited to address alleged violations rather than universal standards that might otherwise apply.

Weaknesses in any of the above basic elements might make a citation item vulnerable to an employer's challenge. Additionally, there are a number of affirmative defenses that may excuse an employer for noncompliance with a standard.

One such defense is a showing that the alleged violation is the result of an isolated event or due to unpreventable employee misconduct. Generally, to successfully claim this defense, an employer would need to show an absence of knowledge and the existence of an effectively communicated and enforced work rule regarding the item in question.

Another defense is an impossibility to comply with a standard. To support this claim the employer would need to establish that there are no alternative methods that would afford the required protection.

Finally, a defense that is similar to the previous one could be made that shows that to comply with the particular standard would create a greater hazard. In this case, the employer would again need to show the lack of a safe alternative and/or to explain why an agency "variance" would be inappropriate. A variance is the mechanism whereby OSHA may be petitioned to sanction an alternative method or safeguard as being equally or more protective than that required by a specified standard.

WAGE AND HOUR UPDATE

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.

There are a couple of provisions in the Fair Labor Standards Act that are not generally known but can cause an employer problems if he fails to follow the requirements of those sections of the Act. First is the "hot goods" provision and second is the prohibition against retaliation toward an employee who has taken an action under the FLSA.

Section 15(a)1 of the Act states "it shall be unlawful for any person to transport, ... sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7..." The effect of this section of the Act is to make it illegal for any person to ship goods in commerce that have been produced by employees, within the previous 90 days, who were not paid at least the minimum wage and/or overtime as required by the FLSA.

Where it is determined that employees have not been paid in compliance the federal courts may issue an injunction against shipment of the goods until the employees are paid the wages they are legally due under the Act. The DOL does not normally invoke this process unless there are a number of employees who have been improperly paid. Typically this happens when an employer fails to make a payroll to its employees. For example, recently a Memphis-based paper mill failed, as determined by a DOL investigation, to pay some $165,000 to 95 employees and an injunction was issued to prevent shipment of these goods until the wages were paid. Earlier this year DOL also took a similar action against a West Virginia employer who had failed to make payrolls. There have been other instances where the goods have already been shipped from the manufacturer to another firm and DOL obtained an injunction against further shipment until the wages are paid. Although DOL doesn't have the direct authority to require the payment of the wages through the use of the "hot goods" provisions it can, frequently, effect the payment of the wages that are due the employees.

The other section that can affect employers is section 15(a)3 which makes it unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint ... related to this Act, or has testified or is about to testify..." Recently a New York firm fired an employee who had cooperated in a DOL investigation. A federal judge ordered the employee's reinstatement and payment of back wages. The following day the employee was taunted and threatened by other employees plus the employer refused to put the employee back to work. DOL filed a contempt motion requesting the employer(s) be fined $10,000 per day and that a Special Master be appointed to monitor the defendant's compliance with the Act. The judge issued an order regarding reinstatement and back wages. Further, he required that 40 employees be brought to the courtroom where they were read the order to ensure they understood the required actions.

Although not related to the above sections of the FLSA, **you should be aware that there are currently several Fair Labor Standards Act lawsuits that have recently been filed in throughout the southeastern states**. Presently, over 30 school systems have been sued for alleged violations of the FLSA by a Mississippi firm. This firm had previously sued over 100 school systems in Mississippi that resulted in the school systems paying back wages of over $5 million. They have also recently sued school systems in Arkansas and Alabama.

A few months ago the plaintiff's firm began running both print and radio advertisements regarding the FLSA. As a result, in one Alabama school system they represent over 100 employees who allege they have been improperly paid. With this type of litigation going on throughout the region we expect suits to be brought against other employers alleging violations of the FLSA. In previous years most of these suits were for individual employees but now the courts are more receptive to certifying class actions. Therefore, employers should look very closely at their pay practices toward ensuring they are complying with all of the provisions of the Fair Labor Standards Act.

EMPLOYEE'S FAILURE TO BE SPECIFIC PRECLUDES FMLA PROTECTION

A recurring issue is how much information an employee needs to provide to the employer for protection under the FMLA. This issue was recently addressed in the case of *Hauge v. Equistar Chemical Company*, (M.D. IL, August 26, 2002). Hauge told his supervisor that he needed to go to the doctor because he had a "pain in his tail bone." Apparently, Hauge for several weeks had received treatment for a fracture in his lower tail bone. On the day in question, he made an appointment with his doctor and told his supervisor that he needed to go to the doctor because of pain. The supervisor said that he could not go to the doctor until he finished all of his work. Hague left for the doctor's appointment without completing the work. Accordingly, when his overall work record was evaluated, he was terminated.

In granting summary judgment for the employer, the court stated that under the FMLA, "employers are entitled to adequate notice that informs them the employee's FMLA rights are applicable." In this case, "Hague did not convey the severity of the condition or the nature of his medical problem. Hague did not identify his pain as an emergency medical condition or inform Equistar he could not continue working that day."

FMLA issues can be frustrating for employers, but employers have more rights under this law than they think they do. For example, as in this case, the employee is required to provide the employer with enough detailed information about the need for the absence for the employer to know that the FMLA may apply. Simply stating that an employee is going to the doctor because he or she is sick or in pain is insufficient for FMLA. It is also insufficient for an employee to return to work with a generic doctor's statement that does not describe the condition with enough specificity for the employer to realize that the FMLA may apply knowing your rights under FMLA will result in a more efficient and less frustrating administration of that statute.

DID YOU KNOW . . .

. . . that claims of a violation of the Fair Labor Standards Act may be subjected to a mandatory arbitration agreement? *Adkins v. Labor Ready, Inc.*, (4th Cir. August 30, 2002). According the court, the statutory and remedial scheme under the Fair Labor Standards Act is similar to the Age Discrimination in Employment Act, which the U.S. Supreme Court held is subject to mandatory arbitration. Therefore, when considering the "pro arbitration" purpose of the Federal Arbitration Act, requiring that contractual arbitration includes wage and hour disputes is appropriate.

. . .that questions are being asked regarding workplace discrimination against parents? According to a study conducted by two law school university professors, there has been an increase in workplace discrimination due to family responsibilities. According to the professors, "our report documents an illegal trend -- mothers and fathers are challenging unfair discrimination on the job." A copy of the report, "The New Glass Ceiling: Mothers and Fathers Sue for Discrimination," can be reviewed at http:\\www.wcl.american.edu\gender\workfamily.

. . . that a class action has been certified against Wal-Mart challenging its health insurance plan exclusion of contraceptive coverage? *Mauldin v. Wal-Mart Stores, Inc.*, (N.D. GA, August 30, 2002). The class involves all female employees nationwide who use prescription contraceptives and were covered under Wal-Mart's insurance plan after March 8, 2001. Most of Wal-Mart's one million employees are women. The claim alleges that Wal-Mart was "singling out female employees

for disadvantageous treatment by excluding prescription contraceptives and related services from its employee benefit plans." Wal-Mart asserts that prescription contraceptives are part of a class of preventative benefits that are not covered under the plan, and are not limited to gender. Wal-Mart asserts that its plan covers catastrophic incidents, but not preventative care, such as prescription contraceptives.

. . . that an employee may still bring a sexual harassment claim even though she did not report it according to company policy? *Wallace v. Valentino's of Lincoln*, (D. Neb, August 22, 2002). The employer had a specific reporting procedure for harassment claims that was outlined in its handbook. Instead of following that procedure, Wallace notified her immediate supervisor and general manager. The harassment did not stop and in fact she overheard the general manager telling the alleged harasser not to worry about it. The company argued that it should not be held to have known about the harassment since it was not reported according to the policy. In refusing to grant summary judgment for the employer, the court stated that it is an open question whether the employer was still on notice of the alleged harassment, even though the employee did not follow the employer's policy in how to report the behavior. Remember: Investigate promptly any reported incidents of harassment, even if it is reported in a manner that is not consistent with the company's policy.

If you have not yet done so, be sure to register for our Firm's *The Effective Supervisor* programs throughout Alabama in 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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