EMPLOYMENT LAW BULLETIN

THE NEWSLETTER OF LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.
"YOUR WORKPLACE IS OUR WORK"

Volume 10, Number 10 ***October 2002***

TO OUR CLIENTS AND FRIENDS:

Is an employer responsible when an employee is involved in an automobile accident leaving work after working consecutive eight hour shifts? No, according to the Alabama Supreme Court in the case of *Ex parte Shelby County Health Care Authority* (Aug. 30, 2002). Britt worked as a respiratory technician at the Shelby Medical Center. She worked double shifts on Saturday and Sunday, sixteen hours on each day. On her way home after completing her Sunday shift, she fell asleep while driving and was seriously injured in an automobile accident. She filed a claim for workers' compensation benefits and filed a lawsuit against her employer, alleging that it wantonly failed to provide her with a safe workplace.

The Alabama Supreme Court stated that Britt's claim is not covered by workers' compensation, because it did not arise out of or within the course of her employment. However, the Court said that there may be circumstances when an employee driving to or from work could be compensated under workers' compensation laws. Examples include where the employer provides transportation, reimburses the employee for transportation, if the accident is on the employer's premises, or if the employee is engaging in work on behalf of the employer, such as transporting tools, equipment or materials.

Because Britt's accident was not work related and she was precluded from receiving workers' compensation benefits, the "exclusivity" provision of workers' compensation did not preclude her from filing her lawsuit against the hospital.

The Court ruled that the hospital was entitled to summary judgment on Britt's tort claims. According to the Court, an employer's duty to ensure the safety of employees does not include scheduling work hours such that the employee can commute safely to and from work. The accident did not occur on the employer's premises, thus the employer did not breach a duty to provide Britt with a safe workplace.

COURT ENFORCES APPLICANT'S AGREEMENT TO LIMIT TIME FOR FILING SUIT

The following language on the employment application was the basis for this case:

> In consideration of Chrysler's review of my application, I agree that any claim or lawsuit arising out of my employment with, or my application for employment with Chrysler Corporation or any of its subsidiaries must be filed no later than six months after the date of the employment action that is the subject of the claim or lawsuit. While I understand that the statute of limitations for claims arising out of an employment action may be longer than six months, I agree to be bound by the six month period of limitation set forth herein, and I waive any statute of limitations to the contrary.

Such a limitation is enforceable, ruled the court in the case of *Wright v. Daimler-Chrysler Corporation* (E.D. Mich., Sept. 30, 2002). The plaintiff argued that the restricted

period reduced her rights under state fair employment practice laws. According to the court, "a shortened limitations period encourages immediate access to the court. The policy supporting any limitation is to encourage the prompt bringing of claims to prevent unfairness to the defendant, loss of evidence, and the fading of witnesses' memories."

Wright alleged that she was sexually harassed by her supervisor and terminated for refusing to agree to his requests. She was subsequently reinstated and transferred to another facility. She says that a supervisor at that facility also sexually harassed her. She was subsequently terminated and again reinstated, and then sued based upon the alleged sexual harassment approximately two years earlier. In upholding summary judgment for the employer and enforcing the six month statute of limitations, the court stated that the limitation to shorten the time period for filing lawsuits was a reasonable one. According to the court, the plaintiff had enough time to investigate the matter to determine whether she should sue in order to vindicate her rights.

EEO TIP: NAVIGATING THE "SPEAK ENGLISH-ONLY" CHANNEL ON THE IMMIGRATION EMPLOYMENT STREAM

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.

Last month in this column we discussed some of the basic guidelines for employers to follow in order to avoid national origin discrimination charges based upon an applicant's or an employee's accent. In substance, 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 true 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.

Obviously, if an employer is severely limited in making employment decisions based upon an employee's foreign accent, wouldn't an employer be even more limited in establishing an English-only rule for its workplace? The answer to that question is a matter of timing. It could be yes or no depending on whether the English-Only Rule applies at all times or only at specified times. According to the EEOC an English-Only Rule that applies at all times, including breaks and lunch time, presumptively violates Title VII, because it has an adverse impact on one's national origin, and rarely can be justified by business necessity. On the other hand, an English-Only Rule that applies only at certain, specified times, or under certain circumstances such as during the actual performance of one's job duties may be lawful, but, according to the EEOC, must still be justified by business necessity.

The rationale for the EEOC's presumption of illegality is that the prohibition of employees from speaking their primary language or the language they are most comfortable with inherently disadvantages an individual's job opportunities and also tends to create an "intimidating, hostile work environment."

The law on this point is unsettled in many jurisdictions. While the EEOC presumes that an English-Only Rule has an adverse impact, the Ninth Circuit and some other Courts have held that adverse impact must be proven before an employer is required to justify the rule by showing business necessity. The common thread, though, for both approaches is that the employer at some point must be able to justify the rule by proving business necessity.

Fortunately, as with the accent issue, there are some basic guidelines for employers to follow in deciding whether or not to establish an English-Only Rule. Such rules are likely to be upheld under the following circumstances:

< Where communications among co-workers require close coordination. For example, where a

communication failure might result in injury or severe loss of material or other damages to equipment or property such as: in performing surgery, drilling an oil well, working with dangerous substances or equipment, working in a laboratory, refinery, mine or on a construction site.

- Where speaking in English is essential to communicate with customers or clients.
- Where speaking in English is essential for proper communication between employees and supervisors. That is, where the need to give clear, precise instructions or directions to subordinates both individually and as a group may be essential to the completion of a given project or regularly scheduled work.

Theoretically, an employer may be able to justify an English-Only Rule that applies at all times. However, the circumstances for such a justification are rare, and probably will be carefully scrutinized if a charge is filed with the EEOC. As a practical matter, we suggest that employers make sure that any such rule applies only at those times where necessary to accomplish a legitimate business purpose. We further suggest that the rule be narrowly drawn to accomplish that specific business purpose. Given the EEOC's presumption of a violation as to any English-Only Rule, we suggest that you consult legal counsel before attempting to implement such a policy.

OSHA TIP
BUT IS IT IN WRITING?

A number of OSHA standards require that written programs be developed and maintained, certification records be available or other documentation be on file. It is most likely that, to the extent they apply at your worksite, the OSHA representative will request to review this material. Failure to have the required items or to have them up to date and properly constructed will invite citations and penalties. It could also result in a more rigorous inspection and the prospect of a greater number of cited deficiencies with corresponding penalties.

While not all-inclusive, the following briefly summarizes a number of the more frequently cited OSHA standards.

Hazard Communication Program One of the most frequently cited standards, 1910.1200(e)(1), requires a written program describing how hazardous chemicals will be labeled, material safety data sheets will be made available, and employees will be provided information and training on this topic.

Control of Hazardous Energy (Lockout/Tagout) OSHA standard 1910.147(c) requires documented procedures to protect employees from unexpected machine start up or releases of stored energy during maintenance or service work.

Permit-required Confined Spaces When employees are required or allowed to enter confined spaces, i.e., tanks, pits, bins, that pose a potential for hazardous atmospheres, engulfment, entrapment, or other hazards, the employer must have a written permit program. The applicable standard, 1910.146(c)(4), also states that the written program must be available for inspection by employees.

Bloodborne Pathogens Where employees have duties that expose them to blood or other potentially infectious materials, such as saliva and other human body fluids, the employer is required to establish a written Exposure Control Plan in accordance with 1910.1030(c)(1).

Emergency Action and Fire Prevention Plans OSHA standards 1910.38(a) and (b) set out the requirements for a written emergency action plan and a fire prevention plan where these are required by a particular OSHA standard.

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.

For instance, compliance with portable fire extinguisher standards in 1910.157 may trigger a need for these plans. The referenced plans do not have to be in writing for employers with 10 or fewer employees. (The agency recently issued a compliance directive, CPL 2-1.037, to clarify their enforcement policy with respect to these standards.)

Personal Protective Equipment An employer is required to conduct a hazard assessment of the worksite to identify hazards that necessitate the use of any type of protective equipment such as, gloves, glasses, shoes, etc., that would reduce or eliminate an exposure. This assessment needs to be documented in a written certification. It should identify the site evaluated, the person certifying the assessment and the date it was done. This requirement is found in 1910.132(d) of the OSHA standards.

It is important, and in some cases mandatory, that these and similar areas of your safety program be periodically (annually or more often) reviewed and updated.

WAGE AND HOUR TIP: THE MOTOR CARRIER EXEMPTION

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.

One of the broadest exemptions in the Fair Labor Standards Act is provided for certain employees that fall under the Motor Carrier Act of 1935. Although most employers don't consider that their operations come under the Motor Carrier Act, if the employer operates motor vehicles hauling goods and/or materials some of his employees most likely come under the Act.

The overtime provisions of the Fair Labor Standards Act do not apply with respect to any employee to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of The Motor Carrier Act of 1935. This exemption can apply to any **driver, driver's helper, loader or mechanic** employed by a carrier whose duties affect the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce.

Requirements

The exemption applies to those employees for whom the Department of Transportation (DOT) claims jurisdiction and if the employer is:

(1) A private carrier who hauls property or;
(2) a common or contract carrier and hauls property or passengers and if;
(3) any of the employee's duties affect the safety of operation of a motor vehicle and;
(4) the employee's travel is in interstate commerce; or
(5) the employee transports goods to an intrastate terminal that are on an interstate journey.

For example, an employee taking parts from the company warehouse to the local bus station for shipment out of state meets these requirements and can qualify for the exemption even though the employee never travels out of state.

The exemption can also apply to those employees called upon to perform, either regularly or from time to time, safety-affecting activities. In the case of an employer who has several truck drivers, some of whom regularly haul goods in interstate commerce, although a driver may not have gone out of state, he could still come within the exemption.

Additionally, a driver in the group would fall within the exemption in all workweeks when he is employed in such work.

Where safety-affecting employees have not made an actual interstate trip, they may still be subject to DOT's jurisdiction if:

- the employer is shown to have an involvement in interstate commerce and;
- if the employee could have been reasonably expected to make an interstate journey or could have worked on the motor vehicle in such a way to affect the safety of its operation.

Where an employee meets the above criteria, the DOT will assert jurisdiction over that employee for a four (4) month period beginning with the date he could have been called upon to engage in the carrier's interstate activities. Thus, such employees would be exempt for the four-month period.

This exemption also applies to drivers' helpers who assist the driver in the safe operation of the vehicle, loaders who oversee the loading of the vehicle to ensure that the materials are safely placed on the vehicle and mechanics who maintain the vehicles that are used to transport the goods in commerce.

The exemption does not apply to employees of non-carriers such as commercial garages, firms engaged in the business of maintaining and repairing motor vehicles owned and operated by carriers, or firms engaged in the leasing and renting of motor vehicles to carriers.

This exemption can give employers a method of controlling payroll costs for some employees who may need to work extra hours to get shipments delivered timely or to get materials to the employer when needed. Employers who operate motor vehicles may want to take a closer look to see if this exemption is available to them for some of their employees. However, employers should remember the burden of proof is on the employer when claiming an exemption.

DID YOU KNOW . . .

. . . that an individual who cannot work at high altitudes because of seizures was not disabled under the ADA? *Whitson v. Union Boiler Company*, (6th Cir. October 2, 2002). Whitson was a pipe fitter who due to a seizure disorder could not work at high altitudes. He was assigned to work at a job fourteen storys above the ground. He was told that he had to work at that elevation or else he would be fired. In ruling that he was not disabled, the court stated that "evidence that Whitson was unable to do a single particular job is not sufficient evidence of disability for purposes of the ADA. Whitson did not produce evidence that he was significantly restricted in his ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."

. . .that California on September 23, 2002 enacted a law permitting employees to have paid Family Medical Leave? The statute becomes effective in 2004 and provides that employees can take up to six weeks of paid leave according to the pay provisions under California workers' compensation law. Employees are paid up to 55% of their wages over the previous twelve month period, with a maximum of $728 a week in 2004 and $840 a week in 2005. Employer groups called the law a "job killer."

. . . that sexual bantering that was offensive to both sexes was not sexual harassment? *Ocheltree v. Scallion Productions, Inc.*, (4th Cir., October 10, 2002). According to the court, "with respect to the vast majority of offensive conduct upon which Ocheltree relies, the uncontested evidence demonstrates conclusively that Ocheltree would have been exposed to the same atmosphere had she been male. Regardless of how repulsive we find the behavior to have been during and before Ocheltree's employment Scallion Productions, we are compelled to conclude that the conduct does not give rise to an actionable claim of sexual harassment under Title VII." The court found there were two incidents where Ocheltree was singled out for sexual behavior because she was a woman, but according to the court, those incidents were "isolated" and "scattered." Furthermore, the court said that "we repeatedly have held that the conduct was not sufficiently severe or pervasive enough as a matter of law." The two incidents that were considered based on sex occurred over an eighteen month period.

. . . that requiring an individual to pay half of arbitration costs may violate ERISA? *Bond v. Twin Cities Carpenters Pension Fund*, (8th Cir., October 8, 2002). According to the court, "the threat of having to pay the arbitrator's expenses no doubt discourages the pursuit

of many legitimate claims by those who cannot afford such costs. A claims system such as this is unduly burdensome, and not permitted by ERISA." The pension fund required arbitration as the only recourse for disputes regarding its administration. It also provided that the arbitrator's costs must be split equally. In ruling that such a request violates ERISA, the court referred to DOL regulation stating that "a provision or practice that requires payment of a fee or cost as a condition of making a claim or to appealing an adverse benefit determination would be considered to unduly inhibit the initiation and processing of claims for benefits [under ERISA]."

. . . that a soldier returning from military leave does not have to show a discriminatory motive in the employer's failure to rehire him or her? *Jordan v. Air Products and Chemicals, Inc.*, (C.D. Cal., September 24, 2002). According to the court, The Uniformed Services Employment and Re-employment Rights Act creates an absolute right to re-employment, with limited exceptions. It is not the soldier's burden to prove that the employer's motive for not re-hiring was due to the soldier's military leave. Rather, if the soldier gives proper notice for re-employment, he or she is entitled to re-employment. According to the court, the only defenses the employer may raise to deny re-employment are that it was unreasonable, impossible or creates an undue hardship.

LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.

R. Brett Adair	**205/323-9265**
Stephen A. Brandon	**205/909-4502**
Donna Eich Brooks	**205/226-7120**
Michael Broom	**256/355-9151 (Decatur)**
Barry V. Frederick	**205/323-9269**
Richard I. Lehr	**205/323-9260**
David J. Middlebrooks	**205/323-9262**
Terry Price	**205/323-9261**
R. David Proctor	**205/323-9264**
Christopher N. Smith	**205/323-8217**
Matthew W. Stiles	**205/323-9275**
Michael L. Thompson	**205/323-9278**
Albert L. Vreeland, II	**205/323-9266**
Sally Broatch Waudby	**205/226-7122**
Lyndel L. Erwin **Wage and Hour and Government Contracts Consultant**	**205/323-9272**
Jerome C. Rose **EEO Consultant**	**205/323-9267**
John E. Hall **OSHA Consultant**	**205/226-7129**

Birmingham Office:
2021 Third Avenue North, Suite 300
Post Office Box 370463
Birmingham, Alabama 35237
Telephone (205) 326-3002

Decatur Office:
303 Cain Street, N.E., Suite E
Post Office Box 1626
Decatur, Alabama 35602
Telephone (256) 308-2767

For more information about Lehr Middlebrooks Price & Proctor, P.C., please visit our website at www.LMPP.com.